

## **International Trade**

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This Article outlines the most important developments in international trade law during 2017. It summarizes developments in international trade negotiations and World Trade Organization (“WTO”) dispute settlement activities. It also summarizes developments in U.S. trade cases at the Department of Commerce (“Commerce”), the International Trade Commission (“ITC”), the U.S. Court of International Trade (“CIT”), and the Court of Appeals for the Federal Circuit (“CAFC”).

### **I. Negotiation Developments**

#### **A. WTO NEGOTIATIONS/MULTILATERAL UPDATE**

This update discusses the negotiations leading up to the December 2017 11th WTO Ministerial Conference (“MC11”) and the status of major negotiations initiated under the Obama Administration.

*11th Ministerial Conference.* Throughout the year, WTO Members have negotiated at various fora on agriculture, fisheries subsidies, domestic services regulations, and e-commerce. On November 28, 2017, two weeks prior to MC11, WTO Director-General Roberto Azevêdo, however, stated that he did not think the multilateral engagement in Geneva will lead to agreed negotiated outcomes. Some of the major topics in connection with the negotiations are provided below:

*Agriculture.* The negotiations have focused on domestic support, transparency in export restrictions, market access, public stockholding for

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food security purposes, and special agricultural safeguard provisions. Regarding domestic support, the multilateral negotiations have reportedly long been at an impasse because the US and China are unable to agree on proposals to limit domestic subsidy levels. Regarding public stockholding for food security purposes, in prior WTO Ministerials, WTO Members agreed to reach a permanent solution at MC11. Members, however, remain divided on the scope and transparency obligations of public stockholding programs.

*Fisheries subsidies.* The negotiations have focused on bans on subsidies related to illegal, unreported, and unregulated fishing and prohibitions on overfishing. One of the critical outstanding issues between the United States and the European Union (“EU”), India, and Indonesia relates to proposals advanced by the latter providing for various exclusions from the subsidy ban.

*Domestic Services Regulations.* Twenty-two WTO Members, including the EU and Australia, have put forward a proposal on domestic regulation of services – specifically, the administration, transparency, and development of regulations. The US has criticized the proposal on the basis that it provides Members who have weak market access commitments with “far greater rights to challenge the regulatory practices of [M]embers who have scheduled strong market access commitments.”<sup>1</sup>

*E-Commerce.* A group of WTO Members, including Australia and the EU, proposed that trade ministers agree to form an e-commerce working group and to extend the WTO’s e-commerce moratorium on duties on electronically delivered goods.

While WTO Members have made progress in connection with multilateral negotiations in 2017, major multilateral negotiations on the Trade in Services Agreement and the Environmental Goods Agreement initiated under the Obama Administration have remained on hold and negotiated outcomes for the 2017 negotiation areas are not likely to come to fruition by the year-end.

## B. REGIONAL NEGOTIATIONS

In January 2017, President Trump signed a memorandum formally withdrawing the U.S. from the Trans-Pacific Partnership (“TPP”).<sup>2</sup> While the U.S. has nevertheless signaled its commitment to engage with TPP countries bilaterally,<sup>3</sup> the remaining members of the TPP have endeavored

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1. “Members struggle over proposals to consider at upcoming WTO ministerial,” WORLD TRADE ONLINE, (Nov. 17, 2017), <https://insidetrade.com/inside-us-trade/members-struggle-over-proposals-consider-upcoming-wto-ministerial>.

2. Press Release, The White House, The White House Memorandum for the USTR: Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 23, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>.

3. See “2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program,” Office of the United States Trade Representative,

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to sustain the trade deal without the United States. During the November APEC summit, ministers of the TPP-11 reached an agreement on the “core elements” of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”).<sup>4</sup>

On the re-negotiation of the North America Free Trade Agreement (“NAFTA”), the rapid-paced negotiation rounds came after the Office of the United States Trade Representative (“USTR”) notified Congress of its intent to engage negotiations with Canada and Mexico regarding a modernization of the twenty-four-year-old agreement.<sup>5</sup> By the end of 2017, the United States, Canada, and Mexico concluded the fifth round of NAFTA renegotiation. In its press release, USTR, Robert Lighthizer, expressed concerns over the lack of headway in achieving the U.S. NAFTA renegotiation objectives, specifically in the areas of auto rules of origin and dispute settlement.<sup>6</sup>

## II. WTO DISPUTE SETTLEMENT ACTIVITY

This year witnessed the continued heavy use of the dispute settlement process by many WTO Members. In 2017, Members filed fourteen disputes with the WTO Dispute Settlement Body (DSB).<sup>7</sup> Noteworthy challenges include: (1) United States against Canada “concerning measures maintained by the Canadian province of British Columbia governing the sale of wine in grocery stores”;<sup>8</sup> (2) Brazil against Canada “with respect to measures concerning trade in commercial aircraft”;<sup>9</sup> and (3) a trio of disputes filed by Qatar against the United Arab Emirates, the Kingdom of Bahrain, and the Kingdom of Saudi Arabia “with respect to measures relating to trade in

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Mar. 2017, files/files/reports/2017/AnnualReport/AnnualReport2017.pdf (“2017 Trade Policy Agenda”).

4. See Trans-Pacific Partnership Ministerial Statement, Nov. 11, 2017, [http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/statement-declaration.aspx?lang=eng&\\_ga=2.239857219.1923031733.1510435660-1966312929.1510435660](http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/statement-declaration.aspx?lang=eng&_ga=2.239857219.1923031733.1510435660-1966312929.1510435660).

5. See Letters from the United States Trade Representative, May 18, 2017, available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/may/ustr-trump-administration-announces>.

6. Press Release, USTR, USTR Lighthizer Statement on the Conclusion of the 5th Round of NAFTA Renegotiations, (Nov. 21, 2017), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/november/ustr-lighthizer-statement-0>.

7. See *Chronological List of Dispute Cases*, WORLD TRADE ORGANIZATION (Nov. 15, 2017), [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm).

8. DS520: *Canada—Measures Governing the Sale of Wine in Grocery Stores*, WORLD TRADE ORGANIZATION (Nov. 15, 2017), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds520\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds520_e.htm); DS531: *Canada—Measures Governing the Sale of Wine in Grocery Stores (Second Complaint)*, WORLD TRADE ORGANIZATION (Nov. 15, 2017), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds531\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds531_e.htm).

9. DS522: *Canada—Measures Concerning Trade in Commercial Aircraft*, WORLD TRADE ORGANIZATION (Nov. 15, 2017), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds522\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds522_e.htm).

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goods, trade in services and trade-related aspects of intellectual property rights from Qatar.”<sup>10</sup>

Also relevant is a dispute initiated in late 2016 by China against the United States “concerning certain provisions of US law pertaining to the determination of normal value for ‘non-market economy’ countries in anti-dumping proceedings involving products from China.”<sup>11</sup> China alleged that the United States failed to confer market economy status on China for antidumping duty purposes, as required by China’s WTO Accession Protocol.<sup>12</sup> This dispute likely will take center stage in 2018, and its resolution will produce lasting political, economic, and legal consequences.

Apart from these disputes awaiting resolution, the DSB issued several notable reports in 2017. For example, in September 2017, the Appellate Body issued a report concerning the latest chapter in a long-running dispute between the EU and the United States over certain subsidies related to the development, manufacture, and sale of large civil aircraft.<sup>13</sup> In October 2017, the Panel issued the most-recent compliance report in the ongoing dispute between Mexico and the United States over labels for dolphin-safe tuna products.<sup>14</sup> Finally, in November 2017, the Panel issued a report on numerous procedural issues and antidumping duty methodologies in a dispute between the Republic of Korea and the United States stemming from an investigation of oil country tubular goods.<sup>15</sup>

In addition to these decisions, the DSB issued three significant reports whose findings and conclusions are highlighted below.

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10. *DS526: United Arab Emirates—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORGANIZATION (Dec. 6, 2017), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds526\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds526_e.htm); *DS527: Bahrain—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORGANIZATION (Aug. 4, 2017), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds527\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds527_e.htm); *DS528: Saudi Arabia—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORGANIZATION (Aug. 4, 2017), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds528\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds528_e.htm).

11. *DS515: United States—Measures Related to Price Comparison Methodologies*, WORLD TRADE ORGANIZATION (Nov. 15, 2017), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds515\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm).

12. *See id.*

13. Appellate Body Report, *United States—Conditional Tax Incentives for Large Civil Aircraft*, WTO Doc. WT/DS487/AB/R (Sept. 4, 2017).

14. Panel Reports, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 of the DSU by the United States) and United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Second Recourse to Article 21.5 of the DSU by Mexico)*, WTO Docs. WT/DS381/RW/USA, WT/DS381/RW/2 (Oct. 26, 2017).

15. Panel Report, *United States—Anti-dumping Measures on Certain Oil Country Tubular Goods from Korea*, WTO Doc. WT/DS488/R (Nov. 14, 2017).

A. INDONESIA—IRON OR STEEL PRODUCTS (CHINESE TAIPEI)

In this dispute, Chinese Taipei challenged Indonesia's imposition of a purported safeguard on imports of certain flat-rolled iron and steel products.<sup>16</sup> Notwithstanding Indonesia's description of the measure as a safeguard, the Panel concluded that Indonesia's imposition of a specific duty on galvalume was not a safeguard measure, which, by definition, suspends an existing WTO obligation, while Indonesia had no binding tariff obligation in its WTO Schedule of Concessions as to galvalume.<sup>17</sup> Based on this fact, the Panel concluded that Indonesia was precluded from affording special and differential ("S&D") treatment to qualifying developing country Members because the S&D treatment obligation in Article 9.1 of the Safeguard Agreement attaches only when a Member derogates from an actual WTO obligation, which was missing here.<sup>18</sup> Therefore, Indonesia violated its Most Favored Nation ("MFN") obligation under Article I of the General Agreement on Tariffs and Trade ("GATT") 1994 because the MFN obligation encompasses both tariff bound and unbound goods.<sup>19</sup>

Had Indonesia, instead, imposed quota restrictions, thereby suspending its obligations under Article XI, it could have legitimately afforded the S&D treatment to the developing countries.<sup>20</sup>

Indonesia and Chinese Taipei have appealed the Panel's decision to the Appellate Body.

B. UNITED STATES—ANTI-DUMPING METHODOLOGIES (CHINA)

Here, China contested in part the United States' use of the "*Nails* test" to address so-called targeted dumping.<sup>21</sup> The Appellate Body rejected China's two "as applied" claims related to the *Nails* test, concluding that the United States properly identified a pattern of export prices that differed significantly.<sup>22</sup> The Appellate Body also concluded that Article 2.4.2 of the Anti-Dumping Agreement did not require an investigating authority to determine the causes for the differences in export prices or to tie those

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16. Panel Report, *Indonesia—Safeguard on Certain Iron or Steel Products*, WTO Docs. WT/DS490/R, WT/DS496/R (Aug. 18, 2017).

17. *Id.* ¶¶ 7.12–41.

18. Safeguard Panel Report; *see also* Agreement on Safeguards art. 9.1, Apr. 15, 1994, [https://www.wto.org/english/docs\\_e/legal\\_e/25-safeg.pdf](https://www.wto.org/english/docs_e/legal_e/25-safeg.pdf).

19. *Indonesia—Iron or Steel Products (Chinese Taipei)*, *supra* note 16, ¶ 7.29.

20. *Id.* ¶ 7.41.

21. Appellate Body Report, *United States—Certain Methodologies and Their Application to Anti-dumping Proceedings Involving China*, WTO Doc. WT/DS471/AB/R, ¶ 4.1 (May 11, 2017). (China also contested various adverse facts available determinations, which we do not discuss here); Panel Report, *Indonesia—Safeguard on Certain Iron or Steel Products*, WTO Docs. WT/DS490/R, WT/DS496/R, ¶ 4.2 (Aug. 18, 2017).

22. *Id.* ¶¶ 5.2–5.45.

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differences to targeted pricing behavior.<sup>23</sup> Finally, the Appellate Body concluded that Article 2.4.2 of the Anti-Dumping Agreement restricts the application of the weighted average-to-transaction (“A-T”) comparison methodology to only those sale transactions that constitute the identified pattern. It thus upheld the practice of double zeroing, *viz.* zeroing the negative dumping margins for transactions subjected to the average-to-average comparison method when combining their results with the positive margins for targeted sales based on A-T methodology.<sup>24</sup> Notably, the Appellate Body’s findings and conclusions on targeted dumping in this dispute follow its precedent established in *United States—Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*.<sup>25</sup>

C. BRAZIL—TAXATION

Here, the EU and Japan challenged numerous Brazilian federal tax measures as being inconsistent with various articles of the GATT 1994, the SCM Agreement, and the TRIMs Agreement.<sup>26</sup> To a large degree, the Panel agreed with the EU and Japan that the subject measures are WTO-inconsistent because some of the measures favored domestic products and production over imported products,<sup>27</sup> whereas other measures constituted WTO-inconsistent subsidies contingent upon export.<sup>28</sup>

Of significant note here, the Panel rejected two defenses advanced by Brazil. First, Brazil argued in part that certain measures fell outside of the scope of the relevant agreements because they regulated production and not products.<sup>29</sup> The Panel rejected that defense, citing “a long line of jurisprudence” that ran counter to Brazil’s claim.<sup>30</sup> The Panel concluded that the articles of the relevant agreements applied to measures that impact products in the market, regardless of whether those measures were directed at production (rather than at the products themselves).<sup>31</sup> Second, in response to claims that the measures offended its National Treatment obligations in Article III of GATT 1994, Brazil invoked exceptions under Article XX of GATT 1994 related to the protection of public morals, public health, and natural resources. For example, Brazil defended one of the

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23. *Id.* ¶¶ 5.60–.61; *see* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.4.2, Apr. 15, 1994, [https://www.wto.org/english/docs\\_e/legal\\_e/19-adp.pdf](https://www.wto.org/english/docs_e/legal_e/19-adp.pdf).

24. United States—Anti-dumping Methodologies (China), *supra* note 21, ¶¶ 5.102–.108.

25. Appellate Body Report, *United States—Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*, WTO Doc. WT/DS464/AB/R (Sept. 7, 2017).

26. Panel Report, *Brazil—Certain Measures Concerning Taxation and Charges*, WTO Docs. WT/DS472/R, WT/DS497/R, ¶¶ 3.1–3.2 (Aug. 30, 2017); *see id.* ¶¶ 2.1–2.176 (providing an overview of the measures in dispute) [hereinafter Taxation and Charges Panel Report].

27. *Id.* ¶¶ 8.1–8.22.

28. *Id.* ¶ 7.1238.

29. *Id.* ¶¶ 7.57–7.60.

30. *Id.* ¶ 7.64.

31. *Id.* ¶ 7.70.

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measures by claiming that the measure “ensure[s the] supply of digital television equipment in accordance with the Brazilian digital television standard,”<sup>32</sup> and that such equipment is necessary to “bridg[e] the digital divide” among its citizens and “promot[e] social inclusion.”<sup>33</sup> Although the Panel agreed with Brazil that these objectives promoted public morals worthy of protection,<sup>34</sup> it concluded in part that Brazil had not demonstrated that the measure was necessary to achieve those objectives, “particularly in light of reasonably available alternatives.”<sup>35</sup> The Panel reached a similar conclusion with respect to Brazil’s defense of another measure based on the protection of public health and natural resources.<sup>36</sup> Brazil, the EU, and Japan have appealed the dispute to the Appellate Body.

### III. U.S. Trade Remedies

#### A. RULEMAKING

Although there were no notable amendments to the trade remedy statute or regulations during 2017, the year was nonetheless notable on account of the resurrection of certain obscure and idle statutory tools by Commerce. Normally, AD/CVD investigations are initiated in response to petitions filed by a domestic industry alleging that dumped or unfairly subsidized goods are being exported into the U.S. market. Conversely, the Department can unilaterally initiate an investigation if the Secretary of Commerce determines that a formal investigation is warranted. The Department last self-initiated a CVD investigation in 1991 on softwood lumber from Canada and an AD investigation in 1985 on semiconductors from Japan.

#### B. SIGNIFICANT DEPARTMENT OF COMMERCE CASES

2017 was an exceptionally active year for AD/CVD litigation at the U.S. Department of Commerce. Commerce initiated over seventy AD and CVD investigations, involving at least thirty-five different countries and products ranging from steel and pipe products, to carbon steel and stainless steel flanges, to citric acid and citrate salts.<sup>37</sup> Notably, on November 28, 2017, Commerce—for the first time in over twenty-five years—self-initiated antidumping and countervailing duty investigations on Chinese imports of common alloy aluminum sheet (“common alloy sheet”) pursuant to sections

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32. *Id.* ¶ 7.552.

33. *Id.* ¶ 7.560.

34. *Id.* ¶ 7.565.

35. *Id.* ¶ 7.622.

36. *Id.* ¶¶ 7.849–1011.

37. See ACCESS, International Trade Administration, U.S. Department of Commerce, <https://access.trade.gov/login.aspx>.

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702(a) and 732(a)(1) of the Tariff Act of 1930.<sup>38</sup> A selection of Commerce proceedings are discussed below.

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

The proceedings on *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from China* (“Solar I”) continued this year, with ongoing administrative reviews. The final results of the *Solar I* third AD/CVD administrative reviews were issued in summer 2017, resulting in margins between 22.96–31.23 percent, with a 238.95 percent margin for the China-wide entity.<sup>39</sup> Preliminary results are expected in the *Solar I* fourth administrative reviews in December 2017 and January 2018. Notably, Commerce’s determination that so-called “hybrid” solar cells, which contain both a crystalline silicon component and thin film component, are covered by the scope of the *Solar I* orders was upheld by the U.S. Court of International Trade. That decision is currently on appeal before the U.S. Court of Appeals for the Federal Circuit.

The final results of the *Solar II* first AD/CVD administrative reviews were issued in July and September 2017. The combined duty margins for China are 23.54 percent, with a 165.04 percent margin for the China-wide entity.<sup>40</sup> The AD margins for Taiwan range between 3.56–4.20 percent.<sup>41</sup> Commerce rescinded the second reviews of *Solar II* China, and the preliminary results of the second review of *Solar II* Taiwan are expected in December 2017.

2. *Corrosion-Resistant Steel Products and Cold-Rolled Steel Flat Products from China*

U.S. producers have previously filed 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, in circumvention of the AD/CVD orders on Chinese CORE and cold-

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38. U.S. DEPARTMENT OF COMMERCE, *supra* note 36; *see also* Fact Sheet of Commerce (November 28, 2017), available at [https://www.commerce.gov/sites/commerce.gov/files/fact\\_sheet\\_commerce\\_self-initiates\\_antidumping\\_duty\\_and\\_countervailing\\_duty\\_investigations\\_of\\_imports\\_of\\_common\\_alloy\\_aluminum\\_sheet\\_from\\_the\\_peoples\\_republic\\_of\\_china.pdf](https://www.commerce.gov/sites/commerce.gov/files/fact_sheet_commerce_self-initiates_antidumping_duty_and_countervailing_duty_investigations_of_imports_of_common_alloy_aluminum_sheet_from_the_peoples_republic_of_china.pdf).

39. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China*, 82 Fed. Reg. 32,678 (July 17, 2017), *as amended*, 82 Fed. Reg. 46,760 (Oct. 6, 2017); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China*, 82 Fed. Reg. 29,033 (June 27, 2017), *as amended*, 82 Fed. Reg. 40,560 (Aug. 25, 2017).

40. *Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China*, 82 Fed. Reg. 32,170 (July 12, 2017); *Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China*, 82 Fed. Reg. 42,792 (Sept. 12, 2017).

41. *Certain Crystalline Silicon Photovoltaic Products from Taiwan*, 82 Fed. Reg. 31,555 (July 7, 2017).



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rolled.<sup>42</sup> In response to these petitions, in November 2016, Commerce initiated circumvention proceedings on (“CORE”) and cold-rolled steel flat products. After the imposition of the orders, while U.S. imports of Chinese CORE and cold-rolled declined, imports of Vietnamese CORE and cold-rolled skyrocketed, and imports of Chinese steel inputs into Vietnam increased. Commerce has extended the deadlines for the proceedings and has yet to make a preliminary determination in either case. As of early December 2017, the final determination for both proceedings is scheduled for February 15, 2018.

### 3. OIL COUNTRY TUBULAR GOODS FROM KOREA

In April 2017, Commerce issued its final results in the first administrative review on oil country tubular goods from Korea.<sup>43</sup> For the first time, Commerce applied its “Particular Market Situation” methodology, which was introduced in the 2015 Trade Preferences Extension Act, and Commerce adjusted the price of hot-rolled coil paid by Korean OCTG producers by the amount of subsidies found in a countervailing duty investigation of Korean hot-rolled steel.<sup>44</sup> This review resulted in AD rates for Korean OCTG exporters ranging from 2.76 percent to 24.92 percent for mandatory respondents, and 13.84 percent for all other companies.<sup>45</sup> The Particular Market Situation methodology is likely to be applied going forward in other cases where Commerce finds that the cost of materials or fabrication in a particular situation does not accurately reflect the cost of production in the ordinary course of trade.<sup>46</sup>

## C. SIGNIFICANT INTERNATIONAL TRADE COMMISSION CASES

### 1. *Certain Aluminum Extrusions from China (Sunset Review)*

The ITC conducted the first five-year review of the AD/CVD orders on Chinese aluminum extrusions, releasing its final publication in March 2017.<sup>47</sup> The ITC conducted a full review, as three Commissioners found that circumstances, such as the need to examine further the issue of domestic like product, warranted full review.<sup>48</sup> The ITC ultimately found that

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42. *Certain Cold-Rolled Steel Flat Products from the People’s Republic of China*, 81 Fed. Reg. 81,057 (Nov. 17, 2016); *Certain Corrosion-Resistant Steel Products from the People’s Republic of China*, 81 Fed. Reg. 79,454 (Nov. 14, 2016).

43. *See Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014–2015*, 82 Fed. Reg. 18,105 (Apr. 17, 2017) (“OCTG from Korea”).

44. *See generally* Issues and Decision Memorandum accompanying *OCTG from Korea* at Comment 3.

45. *OCTG from Korea*, 82 Fed. Reg. at 18,106.

46. *See generally* 19 U.S.C. Section 773(e).

47. *Certain Aluminum Extrusions from China*, Inv. Nos. 701-TA-475 and 731-TA-1177 (Review), USITC Pub. 4677 (March 2017) (“USITC Pub. 4677”).

48. USITC Pub. 4677, *supra* note 47, at 4 n. 6, 6.

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revocation would be likely to lead to the continuation or recurrence of material injury to the domestic industry and voted to continue the orders.<sup>49</sup> While arguments for separate domestic like products were raised pertaining to certain kitchen appliance components, fin evaporator coil systems, and fittings for engine cooling systems, the ITC defined a single domestic like product corresponding to the scope of the orders.<sup>50</sup>

Cut-to-Length (“CTL”) Carbon Steel Plate from Brazil, South Africa, Turkey, China, Austria, Belgium, France, Germany, Italy, Japan, Korea, and Taiwan

Continuing its series of historic affirmative determinations from 2016 on flat-rolled steel that address the global steel trade crisis, the ITC in 2017 issued several major determinations on imports of carbon and alloy steel cut-to-length plate from twelve countries – Brazil, South Africa, Turkey, China, Austria, Belgium, France, Germany, Italy, Japan, Korea, and Taiwan.<sup>51</sup> Although the investigations for these twelve countries were filed simultaneously, their schedules were staggered into three stages. First, in January 2017, the ITC found that the domestic industry is materially injured by imports from Brazil, South Africa, and Turkey.<sup>52</sup> Second, in March, the ITC issued a final determination against China,<sup>53</sup> finding that subsidized and dumped plate imports from China caused material injury to the U.S. steel industry. Last, in May, the ITC concluded its final stage of these investigations with a determination of material injury on imports from the remaining eight countries.<sup>54</sup>

### 3. *Rebar from Japan, Taiwan, and Turkey*

In September 2016 the ITC began investigations of steel concrete reinforcing bar (“rebar”) from Japan, Turkey, and Taiwan when Petitioner, the Rebar Trade Action Coalition and its individual members, filed a petition with the ITC and Commerce.<sup>55</sup> Following affirmative preliminary determinations from both agencies, these investigations entered their final stages over the course of the spring and summer of 2017. In June 2017, the

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49. *Id.* at 1.

50. *Id.* at 10-11.

51. See *Carbon & Alloy Steel Cut-to-Length Plate from Brazil, S. Africa, & Turkey*, Inv. Nos. 731-TA-1319, 1326, and 1328, USITC Pub. 4664 (Jan. 2017) (Final) (“USITC Pub. 4664”); *Carbon & Alloy Steel Cut-to-Length Plate from China*, Inv. Nos. 701-TA-560 and 731-TA-1320, USITC Pub. 4675 (March 2017) (Final) (“USITC Pub. 4675”); *Carbon & Alloy Steel Cut-to-Length Plate from Austria, Belgium, France, Germany, Italy, Japan, Korea, & Taiwan*, Investigation Nos. 701-TA-561 and 731-TA-1317-1318, 1321-1325, and 1327, USITC Pub. 4691 (May 2017) (Final) (“USITC Pub. 4691”).

52. *Carbon & Alloy Steel Cut-to-Length Plate from Brazil, S. Africa, & Turkey*, USITC Inv. No. 731-TA-1319 (2017).

53. *Carbon & Alloy Steel Cut-to-Length Plate from China*, USITC Inv. No. 701-TA-560 (Mar. 1, 2017).

54. *Carbon & Alloy Steel Cut-to-Length Plate from Austria, Belgium, France, Germany, Italy, Japan, Korea, & Taiwan*, USITC Inv. No. 701-TA-561 (May 1, 2017).

55. See *id.* at I-1.

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ITC found that the U.S. rebar industry was materially injured by dumped and subsidized imports from Japan and Turkey.<sup>56</sup> In September 2017, the ITC found that the U.S. rebar industry was materially injured by dumped imports of rebar from Taiwan.<sup>57</sup>

4. *Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Japan and Romania (Third Sunset Review)*

In October of this year, the ITC voted to keep in place the antidumping duty orders on carbon and alloy seamless standard, line, and pressure pipe from Japan and Romania.<sup>58</sup> Three out of four Commissioners voted in the affirmative on both countries, and one Commissioner voted in the affirmative only with respect to Japan, voting in the negative with regard to Romania.<sup>59</sup> This was the third five-year review on orders that were originally issued in 2000.<sup>60</sup>

D. SECTION 232 INVESTIGATIONS

In 2017, the Trump Administration self-initiated separate but concurrent investigations under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, to determine the effects of imports of steel and aluminum on U.S. national security.<sup>61</sup> The outcome of these investigations remains unclear as of the end of 2017. The Administration's invocation of Section 232, a long-dormant provision of U.S. trade law, represents a new direction in U.S. trade policy.

Section 232 provides authority for the U.S. government to investigate the effect of imports on national security. If Commerce finds that imports threaten to impair the national security, the President has 90 days to determine whether to "adjust imports." Section 232 has not seen regular use in nearly 30 years, and it has rarely resulted in import restrictions. In fourteen Section 232 investigations conducted in the 1980s and 1990s, the U.S. government chose not to impose any quotas, fees, or tariffs on imports, with the sole exception of crude oil imports from Libya in 1982.<sup>62</sup>

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56. *Steel Concrete Reinforcing Bar from Japan and Turkey*, Inv. Nos. 701-TA-564, 731-TA-1338 and 1340, USITC Pub. 4705 (July 2017) (Final) ("USITC Pub. 4705").

57. *Steel Concrete Reinforcing Bar from Taiwan*, Inv. Nos. 731-TA-1339, USITC Pub. 4648 (Sept. 2017) (Final) ("USITC Pub. 4648").

58. *See Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Japan and Romania*, Inv. Nos. 731-TA-847 and 849, USITC Pub. 4731 (Oct. 2017) (Third Review) at 1.

59. *Id.*

60. *Id.*

61. *See* Department of Commerce, Bureau of Industry and Security, *Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19205 (April 26, 2017); Department of Commerce, Bureau of Industry and Security, *Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum*, 82 Fed. Reg. 21509 (May 9, 2017).

62. *See* U.S. Department of Commerce, Bureau of Industry and Security, *Fact Sheet: Section 232 Investigations: The Effect of Imports on the National Security* (Apr. 20, 2017).

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In the new investigations, the Administration will confront the question of whether, and to what extent, the concepts of “national security” and “national economic interest” overlap. The U.S. Supreme Court, in its only decision addressing Section 232, adopted a relatively narrow interpretation of “national security.”<sup>63</sup> The Court noted that Congress, in passing and renewing Section 232, specifically rejected an amendment that would have allowed the president to increase the duty on any article “when he finds it in the national interest.”

The consequences of United States action against steel and aluminum imports also raises concerns under GATT. Article XXI of GATT 1994 provides a “national security” exception, but the contours of that exception are vague and untested.<sup>64</sup> Notably, the “national security” exception in Article XXI, as written, is self-designating, which means that the U.S. government could unilaterally claim that it applies in circumstances of its own determination. But even assuming the Administration could successfully defend measures as consistent with WTO obligations under Article XXI, it potentially faces the unwelcome prospect of other WTO members also expanding their use of Article XXI to justify import restrictions based on “national security” considerations.

E. SECTION 201 UPDATE

Following up on what might be the most notable of the trade-related promises he made on the campaign trail, President Trump announced a new focus on ways to combat import competition. For U.S. industries seeking import relief under the new Administration, a promising but rarely used tool is the global safeguard remedy of Section 201 of the Trade Act of 1974 (19 U.S.C. § 2251), which permits import barriers on goods from all countries when a domestic industry is seriously injured by sharply increasing imports.

Section 201 requires a showing that surging imports are a “substantial cause of serious injury, or threat thereof” to the U.S. industry.<sup>65</sup> Notably, the statute does not require unfair trade practices (*e.g.*, unfair pricing or foreign government subsidization as required in AD/CVD investigations). If the ITC finds serious injury, it recommends remedial action to the President, who ultimately has authority to impose any remedy that “will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.”<sup>66</sup>

Section 201 has not been invoked since 2001, but in 2017, the Administration launched two new Section 201 investigations on crystalline silicon photovoltaic (“CSPV”) products and large residential washers

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63. *Federal Energy Admin. v. Algonquin SNG Inc.*, 426 U.S. 548 (1976).

64. GATT 1994 art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 187 U.N.T.S. 154, 33 I.L.M. 1153 (1994) (“GATT 199”).

65. 19 U.S.C. § 2251(a).

66. *Id.*

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(“LRWs”). The cases have key similarities. Certain imports of both products already were subject to AD/CVD orders.<sup>67</sup> In both cases, the petitioning U.S. industries cited duty avoidance by foreign competitors as undermining the effectiveness of those orders, thus justifying broader and more restrictive import barriers under section 201.

Petitioners in the two investigations have thus far obtained favorable results. In each case, the ITC unanimously found that imports were a substantial cause of serious injury to U.S. producers.<sup>68</sup> As permitted by statute, certain U.S. free trade agreement (“FTA”) partners are excluded from the determinations. Both cases are now before the President for decision on the remedy, if any, to be imposed. The ITC’s remedy proposals are mixed: in the case of CSPV products, it recommended a range of quotas, tariffs, tariff-rate quotas and fees; in the case of LRWs, it recommended tariff-rate quotas but disagreed on tariff levels.

Imposition of remedies has been highly contested, particularly in the CSPV products case. As of this writing, more than 3,800 written comments on remedy have been filed with the USTR,<sup>69</sup> with whom the President must consult. The President’s decisions in both cases are due in early 2018. Whether the President approves aggressive remedies, or offers more limited relief, may in turn determine whether other U.S. industries view Section 201 as a viable tool. Aggressive U.S. action under Section 201 may also prompt trading partners to pursue promised challenges in the WTO or perhaps unilateral retaliation.

#### F. SECTION 337 INVESTIGATIONS

Several significant Section 337 developments in 2017 included several pertinent U.S. Supreme Court cases and a number of seminal determinations by the ITC.

The U.S. Supreme Court issued two important decisions that may have profound effects on future Section 337 cases. In the first decision, *Lexmark International*, the Court held that an authorized sale of an item outside of the U.S., like one within the U.S., terminates all patent rights to the item. This holding expanded the exhaustion doctrine, by placing limits on the ability of patent owners to use patent law to impose post-sale restrictions on their

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67. See, e.g., *Large Residential Washers From Mexico and the Republic of Korea*, 78 Fed. Reg. 11,148 (Feb. 15, 2013); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from The People’s Republic of China*, 77 Fed. Reg. 73017 (Dec. 7, 2012).

68. Press Release U.S. International Trade Commission, *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products)* (Sept. 22, 2017), [https://www.usitc.gov/press\\_room/news\\_release/2017/er092211832.htm](https://www.usitc.gov/press_room/news_release/2017/er092211832.htm); Press Release U.S. International Trade Commission, *Increased Imports of Large Residential Washers Injure U.S. Industry, USITC Determines* (Sept. 22, 2017), [https://www.usitc.gov/press\\_room/news\\_release/2017/er100511841.htm](https://www.usitc.gov/press_room/news_release/2017/er100511841.htm).

69. U.S. Trade Representative, *Administration’s Action Following a Determination of Import Injury with Regard to Certain Crystalline Silicon Photovoltaic Cells*, Docket USTR-2017-0020, <https://www.regulations.gov/docket?D=USTR-2017-0020>.

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products. The restrictions could adversely affect their ability to bring Section 337 cases in certain circumstances.<sup>70</sup>

Conversely, in a decision that could result in an expansion of patent-related cases brought before the ITC under Section 337 rather than before federal district courts under the Patent Act, the Court ruled in *TC Heartland* that the patent venue statute (28 U.S.C. § 1400(b)) is the exclusive provision controlling venue in patent cases, and that, under that statute, a domestic corporation “resides” only in its state of incorporation. This ruling will significantly limit the number of federal districts in which defendants may be sued under the Patent Act.<sup>71</sup>

Significantly, in January 2017, the Court also denied a petition for a writ of certiorari in the *Sino Legend* case.<sup>72</sup> In its cert petition, Sino Legend asserted that the CAFC failed to apply the Court’s extra-territoriality test when it affirmed the ITC’s decision in the *Rubber Resins* case (Inv. No. 337-TA-849) and that Section 337 cannot be used in connection with trade secret misappropriation occurring outside of the U.S. In denying cert, the Court effectively stated that it is possible for the ITC to find Section 337 violations for trade secret misappropriation occurring outside of the U.S.

The ITC also promulgated several significant domestic industry-related decisions in 2017. In *Certain Electric Skin Care Devices* (Inv. No. 337-TA-959), the Commission ruled that research and development investments in plant and equipment or labor and capital count towards satisfying Subsections (A) and (B) of the domestic industry requirement. In *Certain Air Mattress Systems* (Inv. No. 337-TA-971), the Commission held that investments can count towards multiple patents. By contrast, in *Certain Pumping Bras* (Inv. No. 337-TA-1015), the Commission ruled that patent and trademark prosecution and maintenance expenses do not count for purposes of satisfying the domestic industry requirement. Finally, in *Certain Digital Video Receivers* (Inv. No. 337-TA-1001), the Commission ruled that that complainants must show a nexus between Subsection (C) claimed activities and the asserted IP.

#### G. COURT APPEALS

The U.S. Court of Appeals for the Federal Circuit addressed several significant aspects of the U.S. Department of Commerce’s administration of the antidumping duty trade remedy laws in 2017. Three of these cases, discussed below, related to important aspects of the Department’s treatment

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70. *Impression Prods. Inc. v. Lexmark Int’l Inc.*, 137 S. Ct. 1523 (May 30, 2017). Significantly, the Court’s ruling abrogated the CAFC’s decision in *Jazz Photo Corp. v. Int’l Trade Comm’n*, 264 F.3d 1094 (Fed. Cir. 2001), in which the CAFC had held that a sale outside the United States did not terminate the patent holder’s right to bring an infringement action against a person who imported the product into the United States.

71. *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (May 22, 2017).

72. *Sino Legend (Zhangjiagang) Chem. Co. v. Int’l Trade Comm’n*, No. 16-428, 2017 WL 69209 (U.S. Jan. 9, 2017).

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of countries it deems to be non-market economies for purposes of the antidumping laws.

1. Changzhou Hawd Flooring Co., Ltd. v. United States<sup>73</sup>

In its antidumping duty proceedings, the Department typically examines only a handful of all foreign producers or exporters of the merchandise subject to the proceeding.<sup>74</sup> Where the Department examines imports from countries deemed to have non-market economies, such as China, the Department typically applies the rates derived from all individually examined respondents to calculate a rate for all non-selected respondents capable of demonstrating independence from the Chinese government (so-called “separate rate” companies).<sup>75</sup> Companies incapable of demonstrating independence from the Chinese government are assigned a single “all-China” antidumping duty rate, based on the presumption that all government-controlled firms form part of a single “China-wide” entity.<sup>76</sup> The Department normally finds that the fictional “China-wide” entity fails to cooperate in its investigation, and, accordingly, the all-China rate is typically much higher than the separate rate.

In the administrative proceedings underlying *Changzhou Hawd*, the Department calculated *de minimis* rates for all individually investigated respondents.<sup>77</sup> In this situation, the antidumping statute permits the Department to resort to “any reasonable method” to calculate the rate for companies found to be independent from the Chinese government.<sup>78</sup> Pointing to the statute’s legislative history, however, Federal Circuit precedent has established that the “expected method” in these circumstances consists of weight-averaging all zero and *de minimis* margins in assigning the separate rate.<sup>79</sup> Under this framework, the Department may deviate from the “expected method” only when it has provided sufficient justification for doing so.<sup>80</sup>

In *Changzhou Hawd*, the court addressed the extent of the Department’s discretion to deviate from the expected method. In the underlying proceedings, the Department calculated the separate rate by averaging the adverse “all-China” rate with the *de minimis* rates calculated for all individually examined respondents.<sup>81</sup> The court held the Department’s calculation of the separate rate to be unlawful because the Department failed to demonstrate that a rate derived partially from the adverse all-China rate

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73. *Changzhou Hawd Flooring Co., Ltd. v. United States*, 848 F.3d 1006 (Fed. Cir. 2017).

74. For the statutory framework governing the Department’s authority to use certain producers/exporters as a proxy for all other known producer/exporters, see 19 U.S.C. § 1677f-1.

75. See *Changzhou Hawd*, 848 F.3d at 1009-11.

76. See *id.*

77. See *id.*

78. See *id.* at 1012 (citing 19 U.S.C. § 1673d(c)(5)(B)).

79. See *Albemarle Corp. v. United States*, 821 F.3d 1345, 1348 (Fed. Cir. 2016).

80. See *Changzhou Hawd*, 848 F.3d at 1009-10.

81. See *id.*

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was more representative than a rate derived solely from the *de minimis* rates assigned to the individually examined respondents.<sup>82</sup> Accordingly, the court remanded the case to the Department with instructions for the agency to reconsider its separate rate determination.<sup>83</sup>

2. *Suntec Industries Co., Ltd. v. United States*<sup>84</sup>

Upon an interested party's request, the Department will review, on an annual basis, the antidumping duty rate assigned to a particular respondent.<sup>85</sup> When a member of the domestic industry requests an annual review of a foreign producer or exporter, the domestic party is required by regulation to serve the foreign exporter/producer with the review request.<sup>86</sup> The Department subsequently publishes a notice in the *Federal Register* indicating which foreign firms subject to the antidumping duty order will be subject to the annual administrative review process.<sup>87</sup>

In *Suntec*, the Federal Circuit was faced with a situation where a domestic interested party requested a review for Suntec but the domestic party violated the Department's regulations by not properly serving Suntec of the review request.<sup>88</sup> The Department, however, subsequently published notice in the *Federal Register* indicating that Suntec would be subject to the annual review.<sup>89</sup> Suntec, a Chinese entity, did not monitor the *Federal Register* and was unaware that a review had been initiated for it.<sup>90</sup> Accordingly, Suntec was included in the China-wide entity and assessed a margin of 118.04 percent because it submitted no information on the proceeding establishing its eligibility for a separate rate.<sup>91</sup>

The primary question that the court addressed in *Suntec* was whether the domestic producer's failure to serve its request for review to the appellant rendered the Department's initiation and conduct of an annual review for that respondent contrary to law.<sup>92</sup> The panel majority held that the domestic party's failure to serve the review request on appellant constituted harmless error because the Department's subsequent publication of the notice of initiation constituted constructive notice and the foreign producer or exporter was required to participate in the proceeding to avoid being subject to the all-China rate.<sup>93</sup>

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82. *See id.*

83. *See id.* at 1013.

84. *Suntec Indus. Co., Ltd. v. United States*, 857 F.3d 1363 (Fed. Cir. 2017).

85. *See generally* 19 U.S.C. § 1675.

86. *See* 19 C.F.R. § 351.303(f)(3)(ii).

87. *See, e.g., Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 76 Fed. Reg. (Oct. 3, 2011) (Initiation of proceedings subject to review in *Suntec*).

88. *See Suntec*, 857 F.3d at 1364.

89. *See id.*

90. *See id.*

91. *See id.* at 1365. In the immediately prior review, Suntec had established eligibility for the separate rate and was assessed a dumping rate of 21.24 percent.

92. *See id.* at 1368-69.

93. *See id.*



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The dissenting member of the panel found that constructive notice was inadequate in this context.<sup>94</sup> The dissent observed the fact that the respondent was a Chinese entity and that it did not have counsel.<sup>95</sup> Regarding the majority's position on the Federal Register notice, the dissent also noted that the notice should not negate the regulation's requirement that a requesting party properly serve a party with actual notice.<sup>96</sup> Finally, in pointing to what it viewed to be an unfair result in this case, the dissent noted that "Foreign manufacturers are entitled to rely on the regulations that Commerce has promulgated."<sup>97</sup>

3. *Diamond Sawblades Manufacturing Coalition v. United States*<sup>98</sup>

In the Department's antidumping proceedings, a failure to cooperate, or other actions that impede the Department's proceeding, may result in assessment of an antidumping duty rate based on adverse facts available ("AFA").<sup>99</sup> As discussed above, the Department typically calculates the "all-China" rate derived from AFA premised on the legal fiction that the "China-wide" entity is uncooperative.

In *Diamond Sawblades*, the Chinese respondent Advanced Technology & Materials ("ATM") cooperated in the Department's administrative review, but nonetheless, was assessed the AFA-based China-wide rate because it was unable to demonstrate independence from the Chinese government to the Department's satisfaction.<sup>100</sup> ATM appealed, arguing that it was unreasonable for the Department to assess an AFA-derived rate to a respondent that the agency specifically had found to be fully cooperative based on the legal fiction that the larger "China-wide entity" was uncooperative.<sup>101</sup> The Federal Circuit found ATM's argument to be unpersuasive and held that, in the non-market economy context, if a respondent, "despite its cooperation, fails to rebut the presumption of government control, the party remains party of the country-wide entity and therefore receives the country-wide entity rate," notwithstanding the fact that the country-wide rate was calculated on the premise of non-cooperation.<sup>102</sup>

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94. *See id.* at 1373 (Newman, J. dissenting).

95. *See id.* The domestic industry initially had served the review request on the respondent's former counsel, with whom Suntec no longer had a relationship.

96. *See id.*

97. *See id.* (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) ("It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their Government.")).

98. *Diamond Sawblades Mfrs. Coal. v. United States*, 866 F.3d 1304 (Fed. Cir. 2017).

99. *See* 19 U.S.C. § 1677e(b).

100. *See Diamond Sawblades*, 866 F.3d at 1308.

101. *See id.*

102. *Id.* at 1315.

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