

UNITED STATES

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I OVERVIEW OF TRADE REMEDIES

For the better part of the last century, the United States has been among the least restrictive markets for imports of foreign products. US normal customs duties are quite low compared with other nations around the world, and customs procedures generally permit the free, fast and reliable flow of goods to consuming industries and retail businesses. Combined with the country's culture of consumerism, the US market is a magnet for foreign goods. Yet, despite the generally free flow of goods across US borders, anyone doing business with the United States must be aware of the risks associated with various US laws that can impose additional and sometimes prohibitive special duties on US imports.

Anti-dumping (AD) and countervailing duty (CVD) cases have long been a tool used by US industries to combat alleged unfair competition from imports and are the most common trade remedy practice under US law. The United States is by far the largest user of AD and CVD remedies, and the scale of recent cases is notable. For example, investigations of common alloy aluminium sheet involved imports from a record 18 countries.² The investigation of passenger vehicle and light truck tyres from South Korea, Thailand, Taiwan and Vietnam involved almost US\$4.5 billion in imports in a US market of US\$20 billion.³ These kinds of cases are affecting a greater volume of US trade.

The prevalence of international trade remedy proceedings has steadily increased in recent years, with approximately 460 AD orders and 164 CVD orders in place against a myriad of products from 62 countries.⁴ The US government has also imposed Section 201 safeguard measures on washers and solar products; conducted an unprecedented number of Section 232 investigations; and implemented Section 301 actions against the majority of products imported from China. This chapter discusses noteworthy developments in the US imposition of import restrictions in recent years and provides prospects for the future.

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2 Common Alloy Aluminum Sheet From Bahrain, Brazil, Croatia, Egypt, Germany, Greece, India, Indonesia, Italy, Korea, Oman, Romania, Serbia, Slovenia, South Africa, Spain, Taiwan, and Turkey; Institution of Anti-Dumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations, 85 Fed. Reg. 14,702 (Mar. 13, 2020).

3 News Release, 'Passenger Vehicle and Light Truck Tires from Korea, Taiwan, and Thailand, and Subsidized Passenger Vehicle And Light Truck Tires From Vietnam, Injure US Industry, Says USITC' (June 23, 2021) (https://www.usitc.gov/press_room/news_release/2021/er0623111785.htm).

4 See US Antidumping and Countervailing Duty Orders in Place As of October 19, 2020, https://www.usitc.gov/trade_remedy/documents/orders.xls.

II LEGAL FRAMEWORK

i Anti-dumping and countervailing duty proceedings

Title VII, Subtitle B of the Tariff Act of 1930, as amended (the Tariff Act) sets forth the applicable standards governing determinations by the US Department of Commerce (Commerce) and the US International Trade Commission (the Commission).⁵ These agencies are tasked with administering AD and CVD proceedings to provide protection against unfair trade practices, including injurious dumping and injurious subsidisation of products.

At its most basic level, dumping occurs when a foreign firm sells merchandise in the United States at a price lower than what the firm charges for a comparable product in its home market, other primary markets or below a cost-based constructed value.⁶ For a subsidy to be actionable under CVD law, there must be a financial contribution provided by an ‘authority’⁷ that benefits the recipient and is limited (or ‘specific’) in nature.⁸ Examples of countervailable subsidies are tax benefits related to export activities or government-provided low-cost loans targeted to specific companies or industries. However, as explained below, dumping and subsidisation are only remediable if the Commission also concludes that the subject imports are a cause of material injury to the domestic industry.

Most AD and CVD proceedings are commenced by the filing of a petition by an interested party on behalf of a domestic industry.⁹ If Commerce initiates an investigation following a petition, the process takes approximately one year and proceeds in four separate, but interrelated and sometimes overlapping, phases.¹⁰

Commerce conducts its investigations through use of questionnaires that seek information to calculate each company’s dumping margin or subsidisation rate. Commerce also requests information from the foreign government in CVD investigations about relevant government programmes. When many companies ship to the United States, only the margins or rates of ‘mandatory respondents’ are calculated, which are then applied to imports from other firms (with additional processes required for respondents in non-market economies, including China and Vietnam).

If Commerce initiates parallel AD and CVD investigations for the same product and country or countries of origin, the Commission will conduct a single investigation of all subject imports to determine whether a domestic industry is materially injured, or threatened with imminent material injury, by reason of subject imports.¹¹ The statute directs the Commission to analyse the effect of subject imports on volume and prices in the US market and the impact on the performance of the domestic industry in terms of production,

5 19 USC. §§ 1673b, 1673d.

6 19 USC. §§ 1677(34), 1677(35).

7 The term ‘authority’ means the government of a country or any public entity within the territory of the country. 19 USC. § 1677(5)(B).

8 19 USC. § 1677(5)(B), (D) (financial contribution), (5)(E) (benefit), (5A) (specificity).

9 19 C.F.R. § 351.202.

10 19 USC. §§ 1671b(a)(2), 1673b(a)(2) (the Commission’s preliminary injury determination); 19 USC. §§ 1671b(b)(1), 1673b(a)(2), 1673b(b)(1) (Commerce’s preliminary AD and/or CVD determination); 19 USC. §§ 1671d(a)(1), 1673d(a)(1) (Commerce’s final AD and/or CVD determination); 19 USC. §§ 1671d(b)(2), 1673d(b)(2) (Commission’s final injury determination).

11 Material retardation (i.e., when development of a nascent industry is inhibited by unfair trade) is a third basis for an affirmative injury determination, but it is rarely invoked. The most recent case was in 2019. *Refillable Stainless Steel Kegs From China and Germany*, 84 Fed. Reg. 68,191 (Dec. 13, 2019).

shipments, employment, financial performance and other relevant factors.¹² The Commission issues questionnaires to US producers, US importers, foreign producers from the subject countries and US purchasers. The Commission holds public hearings to hear testimony and ask questions of industry participants and parties submit briefs. The Commission makes its determination based on a majority vote of the commissioners.

If both agencies issue affirmative determinations, Commerce will publish AD or CVD orders (or both), but the proceedings are not over. The United States uses a ‘retrospective system’ in assessing duties on imports of subject merchandise.¹³ Rates established during an investigation establish the amount of cash deposits for AD or CVD duties at the time of entry. Commerce determines final duty liability during an administrative review of the order. Interested parties can request a review of particular foreign exporters or producers covered by AD or CVD orders.¹⁴ ‘New shippers’ of subject merchandise, who are exporters or producers that did not export subject merchandise to the United States during the original period of investigation, can also request a separate individual AD margin or CVD rate on an expedited basis.¹⁵

Additionally, the US regulatory system allows for a ‘scope inquiry’ process, through which Commerce considers whether a particular product is included within the scope of an order.¹⁶ Petitioners can also request an ‘anti-circumvention inquiry’ if they believe that foreign producers or importers are circumventing an order. Circumvention may occur by completing or assembling merchandise in the United States, completing or assembling merchandise in foreign countries not subject to the order, making minor alterations to merchandise that technically removes a product from the scope of an investigation or selling later-developed merchandise with the same general characteristics as the subject merchandise.¹⁷

The Tariff Act follows the general framework of the World Trade Organization (WTO) Anti-Dumping Agreement and the WTO Agreement on Subsidies and Countervailing Measures. Differences between the agreements and US law sometimes create questions as to whether the United States is in compliance with WTO law, but the US trade remedy statutes themselves have rarely been found to be inconsistent with WTO law. On the other hand, the application of US AD and CVD laws in particular cases has often been challenged at the WTO, and in most instances the US government has agreed to adjust its determinations to comply with adverse decisions issued by a panel or the Appellate Body. Section 129 of the Uruguay Round Agreements Act allows Commerce or the Commission to amend, rescind or modify a determination found to be inconsistent with US international obligations, but changes are prospective in nature, applying only to unliquidated entries.

ii Other trade remedies

The US government conducts numerous other inquiries focused on imports. In the past, these tools have been used far less often than the AD and CVD laws, but their expanded use during the Trump years may be a harbinger of things to come.

12 19 USC. § 1677(7).

13 19 C.F.R. § 351.212(a).

14 19 C.F.R. § 351.213(b).

15 19 C.F.R. § 351.214(b).

16 19 C.F.R. § 351.225(c).

17 19 USC. §§ 1677j(a), 1677j(b), 1677j(c), 1677j(d).

It is useful to start with a primer on the structure of the US government and where these tools fit within that framework. The US Constitution establishes a tripartite form of government consisting of the legislative branch (Congress), the executive branch (the President and the subordinate agencies) and the judicial branch (the Supreme Court and lower tribunals).¹⁸ The Constitution confers authority on Congress to ‘lay and collect Taxes, Duties, Imposts and Excises’ and to ‘regulate Commerce with foreign Nations’.¹⁹

Congress has delegated a portion of these authorities to agencies within the executive branch to address imports that harm or threaten the United States and its commerce. In recent years, despite rarely invoking them for decades, the executive branch has increasingly relied on three tools to address such imports: Section 201 of the Trade Act of 1974;²⁰ Section 232 of the Trade Expansion Act of 1962;²¹ and Section 301 of the Trade Act of 1974.²²

Section 201 of the Trade Act of 1974: Safeguard

Consistent with the WTO Agreement on Safeguards, Section 201 of the Trade Act of 1974 authorises the executive branch to address imports of ‘an article [that] is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article’.²³ Unlike AD and CVD cases, safeguard proceedings cover imports into the United States regardless of country of origin and there is no allegation or investigation of unfair trade practices. If the Commission makes an affirmative injury determination, it will offer recommendations to the President on what remedy should be imposed, such as tariffs or quotas.²⁴ An inter-agency committee reviews the Commission’s remedy recommendations and gathers additional input from stakeholders.²⁵ However, only the President decides whether to impose a remedy and, if so, what form the remedy may take.²⁶ The President may decide that no remedy is warranted.

Tariffs, tariff-rate quotas or quotas that are effective for more than one year must be phased down at regular intervals.²⁷ A safeguard measure is temporary, generally effective for four years,²⁸ but in rare circumstances may be extended to no more than eight years.²⁹ If the initial safeguard measure exceeds three years, the Commission must conduct what is known as a ‘mid-term’ review to determine what changes, if any, should be made to the measure.³⁰ Although no statute requires the President to grant exclusion from a safeguard measure, the President may direct the US Trade Representative (USTR) to provide such an exclusion if appropriate.³¹

18 *INS v. Chadha*, 462 US 919, 951 (1983).

19 US Const. art. I, § 8, cls. 1, 3.

20 19 USC. § 2252 et seq.

21 19 USC. § 1862 et seq.

22 19 USC. § 2411 et seq.

23 19 USC. § 2252(b)(1)(A).

24 19 USC. § 2252(e).

25 19 USC. § 2253(a)(1)(C); see 19 USC. § 1872(a).

26 19 USC. §§ 2253(a)(1), (a)(3).

27 19 USC. § 2253(e)(5).

28 19 USC. § 2253(e)(1)(A).

29 19 USC. § 2253(e)(1)(B).

30 19 USC. § 2254(a)(2).

31 See, e.g., Proclamation No. 9693, 83 Fed. Reg. 3541, 3543-44 (Jan. 23, 2018).

Section 232 of the Trade Expansion Act of 1962: National Security

Section 232 addresses imports that raise national security concerns. Initially promulgated in the 1950s, Section 232 in its current form authorises the President to take measures against imports that threaten to impair the national security of the United States.³² Commerce has 270 days to conduct an investigation to determine whether a threat exists.³³ It considers a range of factors, including some that tie directly to the health of the US economy.³⁴ If Commerce makes an affirmative threat determination, and the President concurs with that finding within 90 days, the President may impose a remedy on imports.³⁵ Alternatively, the President may attempt to reach a negotiated solution, but the President retains the authority to impose such a measure if negotiations (or the negotiated solution) fails.³⁶

Section 301 of the Trade Act of 1974: Unfair Acts, Policies, and Practices

Section 301 bestows on the executive branch broad authority to investigate and respond to the unfair acts, policies and practices undertaken by foreign governments. Within the executive branch, the USTR conducts the investigation and takes action when appropriate.³⁷ Section 301 requires the USTR to take action when there is a violation of a trade agreement by a foreign government or when that government's act, policy or practice is 'unjustifiable' and 'burdens or restricts' US commerce.³⁸ The USTR has the discretion to take action when the foreign government's act, policy or practice 'is unreasonable or discriminatory', 'burdens or restricts United States commerce' and action by the USTR 'is appropriate'.³⁹ If the USTR finds that the foreign nation has engaged in actionable conduct, it may impose a remedy, which may include a tariff, a quota or other forms of relief.⁴⁰ If the investigated act, policy or practice is subject to a rule established in a free trade agreement or in a multilateral agreement administered by the WTO, the USTR must first seek dispute settlement before imposing a remedy, a process that can take years; however, if no such agreement covers the investigated act, policy or practice, the USTR is free to retaliate immediately.⁴¹ As such, Section 301 is not traditionally considered as a statute aimed at remedying an action associated with imports, but the imposition of duties on US imports has been used as a cudgel to convince foreign countries to open their markets to US goods or otherwise reduce limitations placed on US commercial interests.

32 19 USC. § 1862(b)(3)(A), (c).

33 19 USC. § 1862(b)(3).

34 19 USC. § 1862(d).

35 19 USC. § 1862(c)(1). See Fed. *Energy Admin. v. Algonquin*, 426 US 548, 571 (1976).

36 19 USC. § 1862(c)(3).

37 See generally 19 USC. § 2411.

38 19 USC. § 2411(a).

39 19 USC. § 2411(b)(1)-(2).

40 19 USC. § 2411(c).

41 19 USC. § 2413(a).

III TREATY FRAMEWORK

The United States–Mexico–Canada Agreement (USMCA) is a trilateral agreement signed in November 2018, covering various aspects of cross-border trade. Concerning trade remedies in particular, Article 10.12 of the USMCA affords parties the opportunity to appeal final AD and CVD determinations to a binational panel as an alternative to domestic judicial review, but does not change the substantive rules or procedures of such cases.

A number of free trade agreements with the United States include provisions related to safeguard proceedings.⁴² For example, under Article 10.2.1 of the USMCA, parties to the agreement must exclude imports of goods from other USMCA countries from a safeguard action unless: (1) imports from a USMCA country, considered individually, account for a ‘substantial share of total imports’; and (2) imports from a USMCA country, considered individually, ‘contribute importantly’ to the serious injury caused by imports. Both criteria must be satisfied to impose a safeguard measure on imports from a USMCA country. In contrast, under Article 8.6.2 of the Peru–United States Trade Promotion Agreement, the United States may (but is not required to) exclude imports from Peru if the investigating authority finds that the ‘imports are not a substantial cause of the material injury or threat thereof’. These are separate requirements in addition to the provisions of the US safeguard statute.

IV RECENT CHANGES TO THE REGIME

There have been no recent legislative changes to the US trade remedies regime. The most recent amendment to the Tariff Act was in 2015, discussed further in Section V.ii. Instead, any changes in law or practice have evolved during administrative proceedings before Commerce or the Commission, or in the course of appellate review.

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i Currency undervaluation as countervailable subsidy

In May 2021, Commerce issued its first affirmative determination of currency undervaluation in the CVD investigation of passenger vehicle and light truck tyres from Vietnam.⁴³ For Commerce to find a countervailable subsidy resulting from currency undervaluation, two conditions must met: a benefit must be conferred from the exchange of US dollars for the currency of the country under review; and there must be government action on the exchange rate that contributes to the undervaluation of the currency.⁴⁴

Commerce found that two mandatory respondents received currency undervaluation subsidies at rates of 1.16 and 1.69 per cent.⁴⁵ In defending its currency undervaluation

42 The United States has agreements with the following countries, which reference safeguards: Australia, Bahrain, Canada, Chile, Colombia, Dominican Republic-Central America, Jordan, Mexico, Morocco, Oman, Panama, Peru, Singapore and South Korea. 19 USC. § 2252, notes.

43 See *Passenger Vehicle and Light Truck Tyres From the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 86 Fed. Reg. 28,566 (May 27, 2021) (*PVLT Tyres from Vietnam*), accompanying Issues and Decision Memorandum at 4.

44 Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings, 85 Fed. Reg. 6,031 (Feb. 4, 2020) (‘Final Rule’).

45 *PVLT Tyres from Vietnam*, Issues and Decision Memorandum at 4.

methodology from various challenges raised by the government of Vietnam and interested parties, Commerce made some key findings. It found that neither US law nor the Articles of Agreement of the International Monetary Fund (IMF) prohibit a member of the IMF from analysing whether an exchange involving an undervalued currency constitutes a countervailable subsidy.⁴⁶ Commerce also disagreed with the government of Vietnam that because the exchange of currency is reciprocal in nature, it cannot constitute a financial contribution, involving a direct transfer of funds.⁴⁷ Finally, Commerce found that the exchange of US dollars for Vietnamese dong met the specificity requirement under the statute because the traded goods sector – the predominant user of the subsidy – accounted for a large percentage of US dollar inflows into Vietnam.⁴⁸

ii Particular market situation in anti-dumping proceedings

Commerce has continued to meet resistance from the US Court of International Trade (CIT) for invoking its ‘particular market situation’ authority under the Trade Preferences Extension Act of 2015 (TPEA), which amended the Tariff Act.⁴⁹ Finding a particular market situation allows Commerce to use something other than the respondent’s own sales or cost data to calculate the dumping margin.⁵⁰ In several recent opinions, the CIT has found that Commerce’s practice of making adjustments to a respondent’s cost of production, for the purposes of the sales-below-cost test, does not give effect to the expressed intent of Congress under the TPEA, and, therefore, is contrary to law.⁵¹ The domestic industry has appealed the CIT’s particular market situation findings before the US Court of Appeals for the Federal Circuit (the Federal Circuit).⁵²

46 id. at 8.

47 id. at 13-14; see also 19 USC. § 1677(5)(D)(i).

48 *PVLT Tires from Vietnam*, Issues and Decision Memorandum at 18-20; see also 19 USC. § 1677(5A)(D)(iii)(II).

49 Section 504 of the TPEA added the ‘particular market situation’ authority to the definition of the term ‘ordinary course of trade’ in 19 USC. § 1677(15) and for purposes of constructed value under 19 USC. § 1677b(e). 19 USC. § 1677b(e) states that ‘if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the COP in the ordinary course of trade, {Commerce} may use another calculation methodology under this subtitle or any other calculation methodology’.

50 The statute does not define a ‘particular market situation’, but the Statement of Administrative Action explains that such a situation may exist ‘where there is government control over pricing to such an extent that home market prices cannot be considered competitively set’. See SAA, H.R. Doc. 103-316, vol. 1 (1994) at 822. Commerce has also found a particular market situation that distorted the domestic costs of major inputs used in the production of subject merchandise. See, e.g., *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*; 2014-2015, 82 Fed. Reg. 18,105 (April 17, 2017), accompanying Issues and Decision Memorandum at 40-41.

51 See *Saha Thai Steel Pipe Pub. Co. v. United States*, 476 F. Supp. 3d 1378, 1383, 1386 (Ct. Int’l Trade 2020); *Dong-A Steel Co. v. United States*, 475 F. Supp. 3d 1317, 1337–41 (Ct. Int’l Trade 2020); *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 426 F. Supp. 3d 1395, 1411–12 (Ct. Int’l Trade 2020); *Husteel Co. v. United States*, 426 F. Supp. 3d 1376, 1383–89 (Ct. Int’l Trade 2020); *Saha Thai Steel Pipe Pub. Co. v. United States*, 422 F. Supp. 3d 1363, 1368–71 (Ct. Int’l Trade 2019); *Borusan Mannesmann Boru Sanayi ve Ticaret A.Ş. v. United States*, 494 F. Supp. 3d 1365, 1371 (Ct. Int’l Trade 2021).

52 *Husteel Co., Ltd. v. United States*, Fed Cir. Docket No. 2021-1748.

iii New commissioners

The Commission is led by a panel of six commissioners, who are nominated by the President and confirmed by the Senate for staggered, nine-year terms. No more than three Commissioners may be of any one political party. Currently, there are three Democrats and two Republicans. President Trump nominated three of these commissioners, including the chair and vice chair. The two newest commissioners were sworn into office in August 2019.

The presence of two new Commissioners (and three Trump appointees) has not significantly impacted outcomes before the Commission. President Trump was known for his protectionist trade policies, but historically most injury determinations are affirmative regardless of the current political climate. Since August 2019, only seven of 34 new AD and CVD investigations resulted in negative determinations by the Commission, a figure that is consistent with historical averages.⁵³

iv Covid-19 pandemic

The covid-19 pandemic has played a role in injury investigations over the past year. Although the Commission primarily focuses its investigation on trends in subject import volumes, domestic industry market share and price effects caused by subject imports, other relevant economic factors also play a role in its causation analysis. Under the Tariff Act, the Commission must prove causation by determining whether material injury, or threat of material injury, is 'by reason of' subject imports.⁵⁴ In recent months, the Commission has evaluated the effect of the global covid-19 pandemic, which affects supply and demand. The pandemic is unrelated to import competition, so when the Commission examines covid-19 and its impact, questions arise as to whether injury to the domestic industry was indeed caused by subject imports.

VI TRADE DISPUTES

i Anti-dumping and countervailing duties

Final AD and CVD determinations by Commerce and the Commission may be challenged in federal court before the CIT and subsequently the Federal Circuit. Pursuant to the USMCA, when the proceeding involves Canada or Mexico, the determination may be challenged before a binational panel instead of sitting CIT judges. Parties may obtain an injunction from the CIT, enjoining Commerce and US Customs and Border Protection from liquidating entries. Because injunctions survive throughout the appeals process, it can be years before entries are liquidated.

Decisions may also be challenged before the WTO. In that forum, a foreign government will challenge the final decision made by Commerce or the Commission, and a panel will render a decision following multiple rounds of briefing and oral argument spread over the course of several months. For example, following extensive briefing and oral presentation, a WTO panel issued a report in August 2020 concluding that Commerce made numerous

53 US International Trade Commission, 'Import Injury Investigations' (https://www.usitc.gov/investigations/import_injury).

54 19 USC. §§ 1671d(b), 1673d(b).

findings that were inconsistent with the WTO in the countervailing duty investigation of certain softwood lumber products from Canada.⁵⁵ Panel rulings may be appealed to the Appellate Body, though that entity currently lacks the requisite quorum to resolve appeals.

ii Safeguard actions

As a result of investigations conducted from 2017 to 2018, the President imposed safeguard measures on certain washers and solar products.⁵⁶ The fallout from the solar safeguard measure resulted in litigation raising many issues of first impression.

In *Invenergy Renewables LLC v. United States*, which is ongoing, the CIT is tasked with resolving whether the USTR properly withdrew an exclusion from the solar safeguard measure for bifacial modules and panels. In a series of groundbreaking decisions, the CIT confirmed that the USTR's actions are subject to the Administrative Procedures Act (APA),⁵⁷ and that the USTR likely failed to comport with what the APA demanded in twice attempting to withdraw the exclusion.⁵⁸ A final decision on the merits of USTR's attempted withdrawals remains pending before the CIT, though a decision is expected in autumn 2021.

In a separate appeal, various plaintiffs have contested President Trump's October 2020 proclamation that reinstated duties on bifacial panels and increased the duty rate in the fourth year of the safeguard from 15 to 18 per cent.⁵⁹ President Trump purportedly based his modifications on the results of the Commission's mid-term review,⁶⁰ but the plaintiffs allege that he failed to satisfy several statutory predicates in issuing the proclamation.⁶¹ The CIT is expected to rule on the merits of the challenge later this year.

One other development warrants discussion. In 2020, the US government conducted a series of hearings regarding the US market for perishable agricultural produce. The resulting report recommended initiation of safeguard investigations of imported blueberries, strawberries and bell peppers due to increased quantities of such imports. As a result, the USTR requested an investigation of fresh and frozen blueberries.⁶² After intense involvement of a coalition in opposition to any safeguard measure, including importers, shippers, foreign producers from around the world and even domestic blueberry growers, the Commission found that such imports did not constitute a substantial cause of serious injury to the domestic industry, a conclusion that brought the investigation to a close.⁶³ The USTR also did not request safeguard investigations of strawberries or bell peppers, but instead limited

55 Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R (Aug. 24, 2020).

56 See Proclamation No. 9693, 83 Fed. Reg. 3541 (Jan. 23, 2018) (safeguard measure on solar products); Proclamation 9694, 83 Fed. Reg. 3553 (Jan. 25, 2018) (safeguard on washing machines).

57 See *Invenergy I*, 422 F. Supp. 3d at 1282-83.

58 See generally *Invenergy I*, 422 F. Supp. 3d 1255; see also *Invenergy Renewables LLC v. United States*, 476 F. Supp. 3d 1323 (Ct. Int'l Trade 2020).

59 See *Solar Energy Industries Association et al. v. United States*, Court No. 20-3941 (Ct. Int'l Trade); see also Proclamation 10101, 85 Fed. Reg. 65,639 (Oct. 16, 2020).

60 Proclamation 10101, 85 Fed. Reg. at 65,640.

61 See *Solar Energy Industries Association et al.*, Court No. 20-3941, ECF No. 2 at ¶¶ 54-71 (Ct. Int'l Trade Dec. 29, 2020).

62 *Fresh, Chilled, or Frozen Blueberries; Institution of Investigation, Scheduling of Public Hearings, and Determination That the Investigation is Extraordinarily Complicated*, 85 Fed. Reg. 64,162 (Oct. 9, 2020).

63 See generally *Fresh, Chilled, or Frozen Blueberries*, Inv. No. TA-201-77, USITC Pub. 5164 (March 2021).

the US government's oversight to monitoring the status of the domestic industry and the level of imports. The blueberry case serves as an important reminder that not every claim for safeguard relief is successful or deserves a remedy.

iii National security tariffs

The Trump administration brought about an explosion in Section 232 proceedings, initiating eight investigations, which accounted for nearly a quarter of all Section 232 investigations since the Trade Expansion Act was enacted in 1962.⁶⁴ Products subject to investigation included steel, aluminium, uranium, titanium sponge, automobiles and automotive parts, electrical steel, vanadium and mobile cranes.⁶⁵ President Trump affirmatively imposed Section 232 measures – in the form of tariffs and quotas – on imports of aluminium and steel. In moves that generated significant controversy, President Trump also modified his Section 232 measure on steel to double the tariff rate on imports from Turkey (ostensibly due to the devaluation of the Turkish lira),⁶⁶ as well as to cover derivatives of steel products, such as nails.⁶⁷

President Trump's Section 232 measure on steel imports engendered significant litigation. In *Transpacific Steel LLC v. United States*, plaintiffs challenged President Trump's decision to double the Section 232 tariff rate applicable to Turkish steel imports.⁶⁸ In two separate opinions, the CIT confirmed that the President's action offended the equal protection guarantees in the Fifth Amendment because it singled out Turkish steel imports for a higher tariff rate.⁶⁹ The CIT also concluded that the President unlawfully failed to follow the procedures set forth in Section 232.⁷⁰ However, in July 2021, the Federal Circuit reversed the CIT and concluded that Section 232 authorises the President to take 'a continuing course of action', such as through modifications, to address imports found to threaten the national security.⁷¹ The Federal Circuit also concluded that President Trump's actions did not violate equal protection principles.⁷² It seems likely that further appeals will follow, either to the Federal Circuit again or to the US Supreme Court.

Dozens of plaintiffs also challenged President Trump's decision to modify the Section 232 measure on steel to cover derivative articles. In the lead appeal, *PrimeSource Building Products, Inc. v. United States*, the CIT held that the President failed follow the procedures set forth in the statute before imposing tariffs on steel derivatives nearly two years after subjecting steel imports to Section 232 duties.⁷³ The government appealed *PrimeSource* to the Federal Circuit. The resolution of *PrimeSource* likely will hinge on whether the Federal Circuit believes that its recent decision in *Transpacific* controls the outcome, given that the appeals raise similar legal claims.

64 Rachel F. Fefer et al., Cong. Research Serv., R45249, 'Section 232 Investigations: Overview and Issues for Congress' 60-63 (2021).

65 id.

66 Proclamation No. 9772, 83 Fed. Reg. 40,429 (Aug. 15, 2018).

67 Proclamation No. 9980, 85 Fed. Reg. 5281 (Jan. 29, 2020).

68 See *Transpacific Steel LLC v. United States*, Court No. 19-009 (Ct. Int'l Trade).

69 See *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267 (Ct. Int'l Trade 2019) (*Transpacific I*); *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246 (Ct. Int'l Trade 2020) (*Transpacific II*).

70 See *Transpacific I*, 415 F. Supp. 3d at 1271-76; *Transpacific II*, 466 F. Supp. 3d at 1251-1260.

71 *Transpacific Steel LLC v. United States*, No. 2020-2157, 2021 WL 2932512, at *9-*21 (July 13, 2021).

72 id. at *21-*24.

73 *PrimeSource Bld. Prods., Inc. v. United States*, 497 F. Supp. 3d 1333 (Ct. Int'l Trade 2021).

iv Section 301 tariffs

Similar to its actions under Section 201 and Section 232, the Trump administration administered Section 301 unlike any prior administration. In particular, the USTR investigated various intellectual property practices of China.⁷⁴ As a result, it promulgated four ‘lists’ that imposed tariffs on nearly every article imported from China.⁷⁵ The final two lists – ‘List 3’ and ‘List 4A’ – are subject to unprecedented litigation that involves thousands of plaintiffs across a broad range of industries.⁷⁶ Plaintiffs allege that the USTR unlawfully promulgated List 3 and List 4A and, in so doing, violated various aspects of the APA.⁷⁷ The CIT is expected to rule on the merits during the first quarter of 2022. China also lodged – and prevailed – in an appeal before the WTO’s Dispute Settlement Body concerning the Section 301 duties imposed by the United States,⁷⁸ but without an active Appellate Body, China’s panel victory is unlikely to motivate a change in US policy.

Over the past year, the USTR has also conducted a number of other investigations pursuant to Section 301, including digital services taxes proposed or administered by Austria, Brazil, the Czech Republic, the European Union, France, India, Indonesia, Italy, Spain, Turkey and the United Kingdom.⁷⁹ The USTR found that a number of these taxes were actionable and proposed to impose tariffs on imports from these countries, but it ultimately suspended the application of such tariffs for 180 days.⁸⁰ The USTR also investigated Vietnam’s currency practices and determined that those practices were actionable under Section 301, but ultimately decided to take no action, at least at that time.⁸¹ It has also initiated an investigation into Vietnam’s practices related to the import and use of timber that is illegally harvested, but has not yet issued any findings.⁸²

74 Addressing China’s Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 82 Fed. Reg. 39,007 (Aug. 17, 2017).

75 Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28,710 (June 20, 2018) (List 1); Notice of Action Pursuant to Section 301: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40,823, 40,823–24 (Aug. 16, 2018) (List 2); Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47,974 (Sept. 21, 2018) (List 3); Notice of Modification of Section 301 Action: China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43,304 (Aug. 20, 2019) (List 4A).

76 See *In Re Section Cases*, Court No. 21-052 (Ct. Int’l Trade).

77 See, e.g., *HMTX Indus. LLC et al. v. United States*, Court No. 20-177, ECF No. 12 at ¶¶ 63-75 (Sept. 21, 2020).

78 Panel Report, *United States – Tariff Measures on Certain Goods from China*, WT/DS543/R (Sept. 15, 2020).

79 See Initiation of Section 301 Investigations of Digital Services Taxes, 85 Fed. Reg. 34,709 (June 5, 2020); see also Initiation of Section 301 Investigation of France’s Digital Services Tax, 84 Fed. Reg. 34,042 (July 16, 2019).

80 See, e.g., Notice of Action in the Section 301 Investigation of Austria’s Digital Services Tax, 86 Fed. Reg. 30,361 (June 7, 2021).

81 See Notice of Determination Pursuant to Section 301: Vietnam’s Acts, Policies, and Practices Related to Currency Valuation, 86 Fed. Reg. 6732 (Jan. 22, 2021).

82 See Initiation of Section 301 Investigation: Vietnam’s Acts, Policies, and Practices Related to the Import and Use of Illegal Timber, 85 Fed. Reg. 63,639 (Oct. 8, 2020).

VII OUTLOOK

The number of AD and CVD proceedings before Commerce and the Commission is likely to increase as governments take measures to restore economies following the covid-19 pandemic. Several key issues involving safeguard investigations, Section 232 investigations and Section 301 measures pending before the CIT and the Federal Circuit will structure the availability of trade remedies outside the more traditional and common AD and CVD laws. Ultimately, the future of international trade law will be shaped in large part by the trade policy of the Biden administration, including the enforcement actions that it pursues against articles imported in the United States and the unfair acts, policies and practices implemented by foreign governments.