

Trade Year in Review for 2021

Elizabeth Drake and Deanna Okun, Co-Chairs, CITBA International Trade Committee

The year began with a lot of anticipation and speculation regarding the direction that the new Administration would take on international trade matters. Throughout 2021, the agencies and the courts have continued to grapple with trade disputes left over from the prior Administration, as well as issuing new decisions and launching novel initiatives. This overview highlights some of the key developments in international trade law in 2021.

Section 232 and 301 remain, in some form: Rather than revoking the Trump Administration's tariffs on steel and aluminum under Section 232 and the tariffs on Chinese imports under Section 301, the new Administration has been taking its time to determine what adjustments, if any, are needed to the two programs. After reaching an agreement to replace tariffs on steel and aluminum from the EU with a quota system, other countries are lining up in hopes of reaching similar deals. Section 301 duties on imports from China remain in place, and it is yet to be seen what actions may be taken with regard to the "phase one" deal with China or, possibly, new Section 301 actions regarding Chinese policies and practices.

Tools for bolstering critical supply chains: After the Biden Administration completed a 100-day review of certain critical supply chains, it appears that trade measures will play a key part in efforts to shore up domestic capacity in certain technologies. In June, the Administration established a "trade strike force" to recommend trade actions to address unfair foreign trade practices that have eroded critical supply chains. In September, the Department of Commerce announced a Section 232 investigation on neodymium magnets, a key component of motors, electric vehicles, and wind turbines. In November, the U.S. International Trade Commission voted unanimously to recommend extending safeguard relief on solar cells and modules for another four years, a recommendation the Administration must decide on before the relief expires in February of 2022.

The courts weigh in: The U.S. Court of International Trade and U.S. Court of Appeals for the Federal Circuit have also been very active on trade in 2021.

- In June, the CIT ruled that Commerce is permitted to treat Section 232 duties as import duties and deduct them from export price in antidumping calculations. The *Borusan* decision is currently on appeal at the Federal Circuit.
- In July, the Federal Circuit reversed the CIT's determination in *Transpacific* and held that the Administration was permitted to temporarily increase Section 232 duties on imports of steel from Turkey. A petition for *certiorari* in the case is pending as of this writing.
- In July, the Federal Circuit remanded certain technical aspects of Commerce's differential pricing methodology in *Stupp* – just the latest development in the long history of Commerce's targeted dumping practice.
- Following a string of CIT decisions striking down Commerce's determinations regarding a "particular market situation" affecting the costs of production in antidumping proceedings, the Federal Circuit affirmed the CIT on one statutory interpretation issue common to many of the cases in December. The *Hyundai* decision is not yet final, and

the Federal Circuit has yet to weigh in on a separate substantial evidence issue regarding some of the particular market situation determinations.

- Another set of cases that drew great attention and interest were challenges to the prior Administration’s attempts to withdraw the exclusion from safeguard relief for bifacial solar panels. With two major decisions issued by the CIT in November reinstating the bifacial exclusion, the litigation remains pending.

There has been no final decision this year from the CIT three-judge panel presiding over the thousands upon thousands of challenges to Section 301 “List 3” and “List 4” duties, though in a July ruling on a preliminary injunction, the panel found that the cases raise “a serious, substantial, and difficult question.”

Commerce’s New Rules: In September of 2021, Commerce issued the most wide-ranging revisions to its antidumping and countervailing duty regulations in decades. The rule-making effort lasted more than a year and resulted in an 85-page long *Federal Register* notice addressing the wide array of comments received from the bar. The new regulations revamp the agency’s procedures in scope inquiries, anti-circumvention proceedings, and new shipper reviews, and contain a number of other refinements to Commerce procedures.

Adapting to the “New Normal”: Throughout the year, the agencies and the Courts have made great efforts to implement revised filing and hearing procedures to allow the trade bar to continue to represent our clients’ interests safely and effectively in the era of COVID. In 2021, CITBA filed petitions with both Commerce and the ITC asking that the expanded reliance on electronic filing and service be kept in place even after the pandemic. In 2022, we are hopeful that conditions will eventually allow us to have more in-person hearings, meetings, and events before our Courts and agencies, as well with all of our colleagues in the bar.