

# TRADE LAW UPDATE



December 2019

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## PRESIDENTIAL ACTIONS

### [USTR Requesting Comments on Extending March 2019 Section 301 list 1 Product Exclusions](#)

The Office of the U.S. Trade Representative (“USTR”) [announced](#) that it is seeking comments from interested parties on whether or not to extend previously granted Section 301 [exclusions](#) for another year. The List 1 exclusions, which were originally granted on March 25, 2019, are set to expire on March 25, 2020, but USTR is considering extending those exclusions for another year. USTR will accept comments on the possible extension of exclusions beginning January 15, 2020 and until February 15, 2020.

### [U.S.-Mexico-Canada Agreement \(USMCA\) Passes House, Setting Stage for Vote in the Senate in 2020](#)

The U.S.-Mexico-Canada Agreement (“the USMCA”) passed the U.S. House of Representatives on December 19, 2019, by a vote of 385 to 41. In order to be fully ratified by the United States, the USMCA must now be approved by the U.S. Senate, which has a total of up to 30 session days after the House vote to conduct a full vote on the bill. While some Senators have expressed disapproval over the deal, as Senator Patrick Toomey of Pennsylvania [opined](#) in the *Wall Street Journal*, it is expected to pass the Senate as well. Once approved by the Senate, the USMCA will be signed into public law by the

President and implemented by presidential proclamation. Given that Congress has recessed for the holidays, it is unlikely that a vote in the Senate on the USMCA will take place before the New Year, in which case the legislation will not take effect until sometime in 2020. To read the full post, click [here](#).

### [U.S. and China Reach “Phase One” Agreement to Resolve Trade War](#)

After a long period of negotiation, Vice Minister Wang Shouwen of China’s Commerce Ministry [announced](#) on December 13, 2019 that the U.S. and China have agreed to “phase one” of an agreement to bring an end to the trade war that has disrupted global supply chains since 2018. China’s confirmation came after President Trump approved a limited deal and had suggested that an official agreement was close. To read the full post, click [here](#).

### [USTR to Expand List of EU Imports Subject to Tariffs Awarded in WTO Aircraft Dispute](#)

On December 12, 2019, the Office of the United States Trade Representative (“USTR”) announced in a *Federal Register* [notice](#) that they are reviewing the action taken as a result of the Large Civil Aircraft dispute with the European Union. USTR is requesting comments on whether any products currently subject to additional duties should have those duties removed or whether the duties on any of those products should be increased up to a level of 100 percent. USTR is also seeking comments on whether any other products listed in the April and July 2019 *Federal Register* notices should become subject to additional duties. USTR has invited interested parties to submit comments by January 13, 2020.

## [USTR Announces New Section 301 Product Exclusions](#)

On December 12, 2019, the United States Trade Representative (“USTR”) issued another round of product exclusions pertaining to the 25% Section 301 List 3 Tariffs. The new list of exclusions includes 35 specifically crafted product descriptions that cover 75 separate exclusion requests. To view the full list of excluded products, click [here](#). According to the USTR, the product exclusions apply retroactively to entries going back to September 24, 2018 and remain in effect until August 7, 2020. The products affected include fruits, calculators, towers of aluminum, and chairs, among other products. To read the full post, click [here](#).

## [Trump Administration and House Democrats Reach Agreement to Move USMCA Forward](#)

On December 10, 2019, House Speaker Nancy Pelosi stated in a press conference that Democrats had [reached an agreement](#) with the Trump Administration on the new U.S.-Mexico-Canada Agreement (“USMCA”) intended as a NAFTA update, clearing the way for Congress to vote on the trade agreement. Speaker Pelosi called the agreement “a victory for America’s workers” and “infinitely better” than the USMCA agreement previously negotiated. To read the full post, click [here](#).

## **U.S. DEPARTMENT OF COMMERCE DECISIONS**

### **Investigations**

- Carbon and Alloy Steel Threaded Rod from Taiwan: On December 9, 2019, Commerce released its final [determination](#) in the Antidumping Duty Investigation.
- Dried Tart Cherries from the Republic of Turkey: On December 10, 2019, Commerce released its final determination in the [Antidumping](#) and [Countervailing](#) Duty Investigations.
- Certain Cold-Rolled Steel Flat Products from the Republic of Korea: On December 26, 2019, Commerce released its final affirmative [determination](#) of circumvention of the antidumping and countervailing duty orders.
- Certain Corrosion-Resistant Steel Products from Taiwan: On December 26, 2019, Commerce released its final affirmative [determination](#) of circumvention of the antidumping duty order.
- Certain Corrosion-Resistant Steel Products from the Republic of Korea: On December 26, 2019, Commerce released its final affirmative [determination](#) of circumvention of the antidumping and countervailing duty orders.
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### **Administrative Reviews**

- Chlorinated Isocyanurates from Spain: On December 3, 2019, Commerce released the final [results](#) of the Antidumping Duty Administrative Review (2017-2018).
- Certain Steel Threaded Rod from the People’s Republic of China: On December 4, 2019, Commerce released a notice of final amended [results](#) of the Antidumping Duty Administrative Review (2013-2014).
- 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People’s Republic of China: On December 12, 2019, Commerce released the final [results](#) of the Antidumping Administrative Review (2016-2018).
- Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: On December 13, 2019, Commerce released the final [results](#) of the Countervailing Duty Administrative Review (2016).
- Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria: On December 13, 2019, Commerce released the final [results](#) of the Antidumping Duty Administrative Review (2016-2018).
- Oil Country Tubular Goods (OCTG) from the Republic of Turkey: On December 13, 2019, Commerce released the final [results](#) of the Countervailing Duty Administrative Review (2017).

- Certain Activated Carbon from the People’s Republic of China: On December 17, 2019, Commerce released the final [results](#) of the Antidumping Administrative Review (2017-2018).
- Silicon Metal from the People’s Republic of China: On December 18, 2019, Commerce released the final [results](#) of the Antidumping Duty Administrative Review (2017-2018).
- Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: On December 23, 2019 Commerce released the final [results](#) of the Countervailing Duty Administrative Review (2017).
- Carbon and Alloy Cut-to-Length Plate from the Republic of Korea: On December 26, 2019, Commerce released the final [results](#) of the Antidumping Duty Administrative Review (2016-2018) and final determination of no shipments.
- Certain Steel Nails from the Sultanate of Oman: On December 27, 2019, Commerce released the final [results](#) of the Antidumping Duty Administrative Review (2017-2018).
- High Pressure Steel Cylinders from the People’s Republic of China: On December 27, 2019, Commerce released the final [results](#) of the Countervailing Duty Administrative Review (2017).
- Certain Uncoated Paper from Portugal: On December 27, 2019, Commerce released the final [results](#) of the Antidumping Duty Administrative Review (2017-2018).

### Changed Circumstances Reviews

- There have been no final results of Changed Circumstances Reviews by Commerce during the month of December.

### Sunset Reviews

- Refined Brown Aluminum Oxide from the People’s Republic of China: On December 31, 2019, Commerce released the final [results](#) of the expedited third five-year sunset review of the antidumping order.

## U.S. INTERNATIONAL TRADE COMMISSION

### Section 701/731 Proceedings

#### Investigations

- Vertical Metal File Cabinets from China: On December 6, 2019, the ITC released its final [determination](#) in the Antidumping and Countervailing Duty Investigations.
- Carbon and Alloy Steel Threaded Rod from Thailand: On December 10, 2019, the ITC released its final [determination](#) in the Antidumping Duty Investigation.
- Acetone from Singapore and Spain: On December 10, 2019, the ITC released its final [determination](#) in the Antidumping Duty Investigation.
- Polyester Textured Yarn from China and India: On December 12, 2019, the ITC [determined](#) that a U.S. industry is materially injured by imports of the subject merchandise. A final report has not yet been released.
- Mattresses from China: On December 12, 2019, the ITC released its final [determination](#) in the Antidumping Duty Investigation.
- Fresh Tomatoes from Mexico: On December 12, 2019, the ITC released its final [determination](#) in the Antidumping Duty Investigation.



- Refillable Stainless Steel Kegs from China and Germany: On December 13, 2019, the ITC released its final [determination](#) in the Antidumping and Countervailing Duty Investigations.

## Sunset Review Decisions

- There have been no Sunset Review Decisions by the ITC during the month of December.

## Section 337 Proceedings

- Certain Strontium-Rubidium Radioisotope Infusion Systems and Components Thereof, Including Generators: On December 6, 2019, the ITC announced its final [determination](#) of no violation of Section 337.
- Certain Microfluidic Devices: On December 26, 2019, the ITC announced its final [determination](#) of violation of Section 337.

## U.S. CUSTOMS & BORDER PROTECTION

- On December 9, 2019, Customs [announced](#) that the U.S. and Vietnam signed a Customs Mutual Assistance Agreement to facilitate increasing volumes of trade between the two countries.
- On December 17, 2019, Customs announced that the Craft Beverage Modernization Act (CBMA) will remain in effect through 2020 instead of expiring at the end of 2019.
- On December 19, 2019, Customs added the ability in ACE for importers to file entries with recently excluded goods in the third tranche of Section 301 tariffs.

## COURT OF INTERNATIONAL TRADE

### Summary of Decisions

#### [19-151](#)

On December 2, 2019, the CIT sustained Commerce's final remand redetermination in the antidumping duty administrative review (2014-2015) of cased pencils from China. Plaintiff Rongxin argued that it adequately established independence from governmental control which is required to qualify for a separate antidumping duty rate, while Commerce determined that the Government of China still maintained de facto control over Rongxin. The CIT found that Commerce had adequately justified its determination of continued de facto government control over Rongxin, as the company lacked independence to choose its management. Rongxin contended that it was entitled to a separate rate because it became a privately-owned company during the final month of the period of review, but Commerce was unable to calculate a separate rate since Rongxin made no sales during that month.

#### [19-152](#)

On December 3, 2019, the CIT sustained in part and remanded in part Commerce's remand redetermination in the third antidumping duty administrative review of crystalline silicone photovoltaic cells, whether or not assembled into modules, from China. On remand, Commerce valued the respondents' module glass inputs using the Bulgaria HTS subheading instead of the Thailand HTS subheading and further explained that AFA was warranted to value factor of production because that information was not provided by certain unaffiliated suppliers. Commerce also reopened the record and issued Qixin a supplemental questionnaire, but later found Qixin ineligible for a separate rate due to Qixin's failure to demonstrate that it had made a shipment of the subject merchandise during the POR. The CIT sustained Commerce's use of Bulgarian HTS subheadings to value the inputs of module glass and its rejection of Qixin's separate rate application, but remanded Commerce's use of AFA in calculating Canadian Solar's dumping rate for further explanation or reconsideration.

### [19-153](#)

On December 5, 2019, the CIT granted the Plaintiff's motion for a preliminary injunction ("PI") regarding the safeguard duties on monofacial and bifacial solar panels that was imposed by Presidential Proclamation 9693 of January 23, 2018 and implemented by USTR. USTR excluded bifacial solar panels from the duties and then, four months later, reversed the decision. The Plaintiffs challenged the process because there was only 19 days' notice to the public without an opportunity for public comment, and without a public record as a basis for the decision. The Plaintiff's argument for PI alleged that the U.S. Government violated the Administrative Procedure Act ("APA"), Section 201 of the Trade Act of 1974, and constitutional due process under the Fifth Amendment by failing to follow procedure in withdrawing a previously-granted exclusion to safeguard duties on solar products. The CIT found that the Government did not follow its own laws governing notice-and-comment rulemaking in withdrawing the exclusion without adequate process and granted the Plaintiffs' motion to issue a PI enjoining the Government from implementing the withdrawal, without reaching the Section 201 or constitutional claims.

### [19-154](#)

On December 6, 2019, the CIT sustained the ITC's final affirmative material injury determination in the antidumping and countervailing duty investigations into imported cold-drawn mechanical tubing from various countries, including China, India, Germany, Italy, Korea, and Switzerland. Respondent, Autoliv, argued that the ITC's decision not to define airbag tubing as a separate domestic like-product was unlawful because the Commission must define domestic like product with respect to subject imports. The Plaintiffs argued that domestic like product must be defined without reference to whether domestic production of a proposed like product exists. The court agreed with the Commission that the statute is clear and unambiguous that a domestic like product must be a product that is produced domestically. The Plaintiff's interpretation of "domestic like product" improperly relied on in-scope imports to define a non-existent domestic like product, and the Respondents ignored the requirement that the domestic like product must be a *domestic* product. The CIT agreed with the ITC's interpretation of the applicable statutes and sustained its determination.

### [19-155](#)

On December 10, 2019, the CIT remanded Commerce's final remand redetermination for further analysis of the Export Buyer's Credit Program (EBCP) in the countervailing

duty investigation of off-the-road tires from China. On the first remand, Commerce reviewed its determination on the EBCP and provided additional support for its findings. Commerce also provided further support for its argument that distortions existed in the synthetic rubber market based on a 33.36 percent increase in imports from 2014 to 2015. The Plaintiffs claimed that Commerce was using the law of small numbers to manipulate the distortion findings and failed to explain how the distortion functioned. The court sustained Commerce's finding on the distortion because of the explanation that the synthetic rubber market in China went through a significant change from increased imports. But the court was still unsatisfied by the remand results related to the EBCP, as evidence did not support the use of AFA, because Commerce did not show a gap in the record. The court ordered Commerce on remand to pursue verification of the alleged non-use of EBCP before Commerce could use AFA.

### [19-156](#)

On December 10, 2019, the CIT sustained Commerce's remand results in the antidumping duty investigation of 1-Hydroxyethylidene-1, 1-Diphosphonic Acid ("HEDP") from China. After the Plaintiffs challenged aspects of Commerce's initial final determination, the Defendants filed a remand request seeking an opportunity to reconsider the surrogate value determinations disputed by the Plaintiffs. Specifically, Plaintiffs challenged Commerce's use of the financial statements from one of the Mexican companies that Commerce used to calculate surrogate data, CYDSA, and alleged that Commerce double-counted ocean freight fees. On remand, Commerce continued to use CYDSA's financial statements to calculate the surrogate financial ratios for factory overhead, selling expenses, general and administrative expenses, and profit. Commerce also found on remand that it was possible for double-counting of ocean freight fees to have occurred and revised its calculation, resulting in a lower U.S. price and, consequently, a higher antidumping rate for Plaintiff Nanjing. Dissatisfied with the results, the Plaintiffs argued that the dumping determination was not based upon substantial evidence because Commerce failed to use the "best available information" as required by the statute to calculate surrogate financial ratios and a surrogate value for ocean freight. The CIT determined that any complained-of flaws in Commerce's use of CYDSA's financial statement were insignificant and that any claimed differences between the Plaintiffs' and that CYDSA's marketing activities did not render Commerce's use of CYDSA's financial statement unreasonable. Furthermore, the CIT concluded that Commerce's revised calculation of the surrogate value for ocean freight was supported by substantial evidence and in accordance with the law.

### [19-157](#)

On December 16, 2019, the CIT sustained Commerce’s remand redetermination in the sixth antidumping administrative review of diamond sawblades and parts thereof from China. The CIT had remanded for further explanation Commerce’s conclusion that Bosun Tools had not acted to the best of its ability in responding to Commerce’s requests for information. Bosun challenged Commerce’s remand redetermination as arbitrary and capricious and unsupported by substantial evidence because no “necessary information” regarding Bosun’s U.S. sales was missing from the record. But the court agreed with Commerce’s decision to rely on AFA. Bosun did not provide Commerce the requested direct country of origin information, which is “among the most basic data necessary” for accurate dumping margin calculation. Because Bosun did not submit direct country of origin information, it did not meet the “best of its ability” standard, supporting Commerce’s use of AFA.

### [19-158](#)

On December 16, 2019, the CIT concluded after a bench trial that Ziploc brand reclosable sandwich bags are classified as articles for the conveyance or packing of goods under HTS heading 3923, rather than as plastic household articles under HTS heading 3924 as Plaintiff S.C. Johnson had argued. Though Ziploc bags could be classifiable under both headings, the CIT determined that heading 3923 is the more specific and correct tariff provision under General Rule of Interpretation 3(a). While heading 3923 offers a slightly lower duty rate of 3% as opposed to 3.4% for heading 3924, heading 3924 has greater eligibility for Generalized System of Preferences benefits.

### [19-159](#)

On December 17, 2019, the CIT sustained Commerce’s third remand results in the seventh antidumping administrative review of certain activated carbon from China. On Commerce’s second remand redetermination, the CIT remanded Commerce’s selection of Thailand as the primary surrogate country, holding that substantial evidence did not support Commerce’s determination that Thailand was a significant producer of comparable merchandise. On its third remand redetermination, Commerce changed its primary surrogate country from Thailand to Indonesia. While no party challenged Commerce’s selection of Indonesia as the primary surrogate country, the Plaintiffs challenged Commerce’s selection of Indonesian Global Trade Atlas (GTA) data from HTS heading 2701.11 as the surrogate value for anthracite coal. The parties’ arguments focused on the specificity of

the surrogate value to the actual material used in the production process and the Court found that Commerce had supported its decision based upon the facts of the review.

### [19-160](#)

On December 17, 2019, the CIT sustained in part and remanded in part Commerce’s third remand results in the eighth antidumping administrative review of certain activated carbon from China. On its third remand redetermination at issue, Commerce determined that the Philippines and Malaysia were potential primary surrogate countries for valuing Plaintiff Jacobi’s factors of production, after the CIT had previously remanded Commerce’s selection of Thailand as the primary surrogate country. Commerce selected Malaysia as the primary surrogate country—using Malaysian data to value the factors of production—and used Philippine data for financial ratios and carbonized material surrogate values. Defendant-Intervenors Calgon Carbon opposed the selection of Philippine data as the surrogate value for carbonized material, while the Plaintiffs opposed Commerce’s selection of Malaysian data as surrogate values for coal tar as aberrational and bituminous coal as commercially insignificant. The CIT sustained Commerce’s determination with respect to the Malaysian data as surrogate values for coal tar and bituminous coal but remanded for further explanation Commerce’s decision to use Philippine data for the valuation of carbonized material. Specifically, Commerce’s third remand redetermination, according to CIT, featured ostensibly contradictory and inconsistent language, such as describing Malaysia and Philippines as “equally viable” surrogates but later stating that the Malaysian data was not commercially significant.

### [19-164](#)

On December 18, 2019, the court sustained Commerce’s final remand redetermination that reformulated liquidation instructions to Customs and Border Protection (CBP) in the anticircumvention investigation of aluminum extrusions from China. In previous proceedings, the court had affirmed Commerce’s initial anti-circumvention investigation and scope interpretation on aluminum extrusions but remanded the liquidation instructions based on lack of notice to two plaintiffs Tai-Ao Aluminum and Regal Ideas Inc. Tai-Ao requested that the court sustain the remand results, and Regal requested another remand to address Regal’s date of liability. AEFTC requested that the court sustain the Remand Results for Regal and sustain Commerce’s Final Determination based on sufficient notice to Tai-Ao and Regal. The Government requested that the court sustain the Remand Results.

Regal contended that Commerce should have prepared draft instructions to CBP in order to provide sufficient notice. According to the remand, Commerce was required to reformulate the liquidation instructions. But Regal did not have any entries during the pre-notice period, and for that reason, the instructions did not need to be reformulated for nonexistent entries. The remand liquidation instructions complied with the remand order because Commerce's failure to prepare draft instructions had no legal impact on the liquidation of entries and Regal's two pending cases. AEFTC contended that Commerce could not reformulate its liquidation instructions under protest because it was in error and not supported by substantial evidence or in accordance with law. But the court held that Commerce has a right to file a remand under protest.

#### 19-165

On December 18, 2019, the CIT remanded Commerce's final results in the 2016-2017 antidumping administrative review of circular welded carbon steel pipes and tubes from Thailand. The court found that Commerce had misapplied its particular market situation adjustment when it calculated normal value for the purpose of the home-market-sales-below-cost-test. Under 19 U.S.C. Section § 1677b(e), Commerce's authority to apply a particular market situation adjustment is limited to the calculation of costs of materials and fabrication, meaning that constructed value must be the basis of normal value, not home-market sales. Commerce applied Section 504 in finding a particular market situation when it increased the Plaintiff's cost of production for purposes of the home-market-sales-below-cost test, after having compared the Plaintiff's U.S. sales to home-market sales.

The CIT concluded that Commerce conflated the sales-based provisions with the cost-based provisions and that Commerce's particular market situation was therefore not in accordance with the law. The court did not reach a conclusion as to the issues of Commerce's fairness and impartiality during the review or whether substantial evidence supported the duty drawback adjustment.

#### 19-166

On December 18, 2019, the CIT sustained in part and remanded in part Commerce's second remand determination in the administrative review of welded carbon steel standard pipe and tube products from Turkey. In the second remand, Commerce readdressed Plaintiff Toscelik's request for a duty drawback adjustment for the Turkish IPR program. Commerce explained that since Toscelik never recorded any duty costs associated with Turkey's IPR exemption program, an off the books liability

was generated. As a result, Commerce made a per-unit adjustment to the U.S. price in the full amount of the per-unit duty drawback as claimed by Toscelik. Toscelik did not contest Commerce's duty drawback adjustment.

Commerce also made a circumstance of sale (COS) adjustment on remand in order to add the same per-unit duty amount to the home market price and constructed value that was granted to Toscelik under the IPR exemption program.

Commerce claimed that the COS adjustment supported a fair comparison between U.S. price and constructed value. Plaintiff Toscelik argued that the law does not require a duty-neutral outcome and that a COS adjustment is only available in the context of direct selling expenses. The Defendant argued that the COS adjustment eliminated the perception of double counting, is an appropriate comparison between export price and normal value, and is further appropriate because Turkey's duty drawback scheme transforms import duties into direct selling expenses. The court found no such transformation as the adjustment concerns the imposition of a duty and not a circumstance of sale.

The perception of double counting, according to the court, lacks merit. Additionally, the COS adjustment does not remedy the duplicity because it negates the duty drawback adjustment. Therefore, the court found the COS adjustment to be unlawful and remanded the matter back to Commerce.

#### 19-167

On December 18, 2019, the CIT sustained Commerce's remand determination in the antidumping duty administrative review of tapered roller bearings from China. On remand, Commerce granted Plaintiff Zhaofeng a separate rate. Because Commerce determined that Zhaofeng satisfied the *de jure* and *de facto* control criteria to obtain a separate rate, the CIT sustained Commerce's remand results as to Zhaofeng's separate rate status. Plaintiff Zhaofeng also challenged Commerce's use of AFA, arguing that Zhaofeng appropriately complied with Commerce's requests for information. The CIT found the Plaintiff's argument to be unpersuasive, as Commerce identified inconsistencies in the record at verification and could reasonably conclude that Zhaofeng's sales database was unreliable, thereby warranting the use of AFA. CIT sustained the remand results as to Commerce's use of AFA.

#### 19-168

On December 18, 2019, the CIT sustained Commerce's second remand results in an antidumping investigation of certain corrosion-resistant steel products from India. On

remand, Commerce granted the full duty drawback that Plaintiff had claimed and made three additional circumstance of sale adjustments. The court upheld “a per-unit adjustment to U.S. price in the full amount of the per-unit duty drawback granted on export.” But the Court found the other adjustments to be suspect. After its analysis, the Court concluded that because the adjustments made by Commerce dealt with the imposition of a duty and not a circumstance of sale, the court opined that it was concerned that Commerce was using circumstance of sale adjustments to effectively negate and to write a separate adjustment section out of the statute. However, due to the fact the Plaintiff did not contest the legality of these additional adjustments, the court sustained the second remand results in full.

#### [19-169](#)

On December 19, 2019, the CIT sustained in part and remanded in part Commerce’s final results of the first antidumping administrative review of certain steel nails from Taiwan.

Commerce based its decision on adverse facts available (“AFA”) because Plaintiff PT/Pro-Team’s initial quantity and value response was seven-days late. The court found that Commerce did not consider whether the Schedule was so incomplete that it could not provide a reliable source of information or whether it could be sued without undue difficulties. Thus, the court found that the decision to use AFA was an abuse of discretion and was not based upon substantial evidence and remanded the matter to Commerce for further consideration.

Consolidated Plaintiff Unicatch also challenged Commerce’s use of total AFA to determine its dumping margin for similar reasons: that Unicatch did not cooperate to the best of its ability and that missing information from the record required the use of AFA. The CIT sustained Commerce’s decision to use total facts otherwise available to determine Unicatch’s margin, but remanded Commerce’s use of an adverse inference as it lacked substantial evidence.

#### [19-170](#)

On December 20, 2019, the CIT remanded Commerce’s final results in the changed circumstances review of the antidumping order on stainless steel bar from India. Plaintiff Venus challenged Commerce’s determination that Venus was not the producer of subject merchandise made using inputs that are covered by the scope of the antidumping duty order and the corresponding determination that the producers are the unaffiliated suppliers of the inputs. Venus also contested Commerce’s

decision to use total AFA to determine Venus’s dumping rate.

Regarding Commerce’s determination that Venus was not the producer of subject merchandise exported to the U.S., Venus contended that Commerce unlawfully departed from agency practice without justification. Venus also argued that prior scope determinations which found that a “substantial transformation” occurred when stainless steel wire rod was converted into stainless steel bar were relevant and improperly dismissed by Commerce. Venus further argued that Commerce’s NWR analysis ignored crucial facts. The CIT did not find Venus’s argument regarding agency practice convincing, but remanded Commerce’s use of NWR analysis for further explanation. The court deferred decision on Venus’s direct challenges to the NWR test, pending Commerce’s decision on remand.

#### [19-171](#)

On December 26, 2019, after a second remand of Commerce’s final determination on its countervailing duty investigation of off-the-road tires from China, the CIT upheld Commerce’s remand results that the respondents did not use EBCP during the period of review. Commerce did not apply AFA in evaluating EBCP and complied with the court’s ruling that the EBCP program was not used by the respondents. The court viewed Commerce’s use of AFA as a result of Commerce’s dissatisfaction with the respondent’s responses about EBCP to be unpersuasive. The court found Commerce’s actions to be inappropriate because Commerce can only find gaps that occur after Commerce “actually attempts verification and adequately confronts these (purportedly) insurmountable challenges.”

#### [19-173](#)

On December 30, 2019, the CIT remanded Commerce’s final determination in the countervailing duty administrative review of narrow woven ribbons with woven selvedge from China. At issue was Commerce’s decision to include the Export Buyer’s Credit (EBCP) program in determining Plaintiff Yama’s overall subsidy rate. Commerce inferred Yama’s participation in EBCP based upon fact otherwise available because Yama did not cooperate to the best of its ability and that the record did not allow for Commerce to determine that Yama did not benefit from EBCP. The court found that Commerce did not provide a meaningful opportunity for Yama to show it did not benefit from EBCP. Further, the court found that the record contained evidence that Yama did not benefit from the program, that Commerce improperly inferred Yama’s participation based on the Government of China’s responses, and that Commerce did not request the additional information it claimed it needed.

## COURT OF APPEALS FOR THE FEDERAL CIRCUIT

### 2018-2191

On December 12, 2019, Appellants Techtronic Industries Co., Ltd. and Techtronic Industries North America Inc. (“TTI”), One World Technologies Inc. and OWT Industries Inc. (“One World”), and ET Technology (Wuxi) Co. Ltd. appealed from a final determination of the U.S. ITC under Section 337 of the Tariff Act of 1930. The ITC determined that each of the Appellants violated Section 337 through the importation of garage door opener products that infringed claims 1-4, 7-12, 15 and 16 of U.S. Patent 7,161,319. Following its determination, the ITC entered limited exclusion orders against each of the Appellants and cease and desist orders against TTI and One World. The CAFC concluded that the ITC erred in its construction of “wall console,” a term in each of the patent claims, and reversed its final determination of infringement in addition to vacating the orders against the Appellants.

## EXPORT CONTROLS AND SANCTIONS

### Commerce Department Extends Comment Period for Foreign Adversary ICTS Rule

As we discussed in a recent client alert, the U.S. Department of Commerce recently issued a proposed rule (the “Proposed Rule”) which intends to give the U.S. Secretary of Commerce the authority to block, unwind or modify information and communications technology or services (“ICTS”) transactions involving “foreign adversaries” if the Commerce Secretary determines that such transactions threaten U.S. critical infrastructure, the U.S. digital economy or U.S. national security. There were many aspects of the Proposed Rule which were unclear, but the U.S. Department of Commerce indicated its willingness to consider comments from the public which were received on or before Friday, December 27, 2019. To view the full post on this issue, click [here](#).