US & Multilateral Trade and Policy Developments

Japan External Trade Organization

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Contents

US General Trade Policy

New Changes to U.S. Trade Remedy Laws Take Effect

On August 6, 2015, several changes to the U.S. antidumping (AD) and countervailing duty (CVD) laws took effect, approximately five weeks after being signed into law by President Obama as part of the *Trade Preferences Extension Act of 2015* ("the Act").[1] The Act provided new instructions, and in some instances, expanded discretion, to the two federal agencies responsible for conducting U.S. trade remedy investigations: the Department of Commerce (DOC) and the International Trade Commission (ITC) (collectively "the Agencies").

The changes made by the Act pertain to (i) the definition of material injury; (ii) DOC's selection and corroboration of facts otherwise available and the use of adverse inferences; (iii) the definition of ''ordinary course of trade'' and DOC's treatment of a ''particular market situation'' in AD proceedings; (iv) DOC's treatment of allegedly distorted prices or costs in AD proceedings; and (v) DOC's discretion to limit the number of voluntary respondents in a proceeding. In an August 6 *Federal Register* notice, DOC announced that it would apply the new provisions to determinations made on or after August 6, 2015, with the exception of item (i) in the list above, which applies only to the ITC.[2] The ITC has yet to provide guidance on when it will apply the revised definition of material injury set forth in the Act.

We provide an analysis of the changes made by the Act below. In addition, the attached Annex contains a side-by-side comparison of each amended provision, showing both the original text and the current text as amended by the Act. According to both the text of the Act and statements made by congressional proponents of the legislation, the amendments are intended (i) to expand DOC's discretion to assign higher dumping margins and subsidy rates to foreign producer/exporters; and (ii) to increase the likelihood that the ITC will make affirmative injury determinations. However, many of the additions and amendments simply codify DOC's current and well-established practice, rather than expanding significantly DOC's discretion and authority.

Section 502 – Selection and Corroboration of Facts Otherwise Available

Section 502 of the Act amended 19 U.S.C. 1677e to revise certain provisions covering the Agencies' discretion when selecting and corroborating information that may be used as "facts otherwise available" with an adverse inference. Prior to the enactment of the Act, the Agencies already possessed the authority under 19 U.S.C. 1677e to (i) make determinations on the basis of facts otherwise available if a foreign respondent did not cooperate with a request for information in a proceeding; and (ii) to use an inference that was adverse to the interests of that foreign respondent when selecting among the facts otherwise available. Section 502 of the Act made the following revisions to 19 U.S.C. 1677e:

No requirement to make certain assumptions. Section 502 added a new general provision, 19 U.S.C. 1677e(b)(1)(B), which states that when an interested party fails to cooperate with a request for information, the Agencies are not required to "determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information."

[1] Public Law 114-27. The trade remedy law changes are contained in Title V of P.L. 114-27, and were collectively titled the *American Trade Enforcement Effectiveness Act*.

[2] 80 Fed. Reg 46793. Available at **https://www.federalregister.gov/articles/2015/08/06/2015-19353/dates-of-application-of-amendments-to-the-antidumping-and-countervailing-duty-laws-made-by-the-trade**.

Significance of change: This change provides DOC with the statutory grounds for making an adverse inference that is wholly unrelated to the respondent's business practices or production experience, which is consistent with DOC's well-established practice of applying adverse facts available in response to a respondent's failure to cooperate in an investigation or review.

Exception from corroboration requirement. Section 502 revised 19 U.S.C. 1677e(c) – which previously required the Agencies to corroborate any "secondary information" used when making determinations on the basis of facts otherwise available – by adding an exception for dumping margins and subsidy rates that have already been applied during an earlier segment of the same proceeding. Secondary information refers to information other than that obtained during the course of a particular investigation or review, and may include information derived from the petition that gave rise to that investigation or review, a previous final determination concerning the merchandise subject to the investigation, or any previous administrative review concerning the merchandise subject to the investigation. Prior to the enactment of the Act, each time that the Agencies relied on secondary information, they were required to corroborate the information to the extent practicable through independent sources. However, the exception added by Section 502 provides that the Agencies "shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding." Thus, under the new law, once DOC has applied a dumping margin or subsidy rate to an uncooperative respondent in an investigation or administrative review, it will be able to apply the same rate in a subsequent review without corroborating the information.

Significance of change: This change will make it easier for DOC to apply an adverse dumping margin or subsidy rate without having to go through the extra step of justifying or demonstrating the reasonableness of the adverse rate.

Use of previously-applied dumping margins and subsidy rates. Section 502 added a new provision, 19 U.S.C. 1677e(d), which addresses DOC's discretion to use previously-applied dumping margins and subsidy rates when using an adverse inference. In these circumstances, the new provision provides that DOC may:

- Use a subsidy rate applied for "the same or similar" subsidy program in any other CVD proceeding involving the same country; or, if no such program exists, a subsidy rate for another program that DOC "considers reasonable to use";
- Use any dumping margin from any segment of the proceeding under the applicable antidumping order; and
- Use any of the subsidy rates or dumping margins specified above, "including the highest such rate or margin."

19 U.S.C. 1677e(d) also clarifies that DOC is not required to (i) estimate what the countervailable subsidy rate or dumping margin would have been if the interested party had cooperated; or (ii) demonstrate that the countervailable subsidy rate or dumping margin used reflects an "alleged commercial reality" of the interested party.

Significance of changes: These changes could lead to a situation in which a highly punitive rate from a prior segment of a proceeding is applied with little explanation or justification in a separate segment of the same proceeding for a fact pattern that might not justify the application of such a highly punitive rate.

Section 503 – Material Injury and Captive Production

Section 503 of the Act amended 19 U.S.C. 1677(7) to revise the definition of ''material injury'' in AD and CVD proceedings. The revisions made by Section 503 are as follows:

Relevant Economic Factors. Section 503 expanded the list of factors that the ITC must evaluate when considering the state of the U.S. industry, adding two new factors – "return on assets" and "ability to service debt" – while replacing "profits" with more specific terms: "gross profits, operating profits, and net profits." The revised list of relevant economic factors is shown in the table below (new additions are underlined).

Previous Text of 19 U.S.C. 1677(7)(C)(iii)(I)	New Text of 19 U.S.C. 1677(7)(C)(iii)(I)
(iii) Impact on affected domestic industry In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to- (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,	**(iii) Impact on affected domestic industry** In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to- (I) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity,

Significance of change: The previous law already required the ITC to evaluate "all relevant economic factors" which affect the condition of the domestic industry. Because the ITC already considers the domestic industry's profitability, return on investment, and other financial performance indicators, the change to expand the number of specifically enumerated economic factors to consider would not substantively change current ITC practice.

Captive Production Test. Captive production refers to production of the domestic like product that is not sold in the "merchant market," but instead is processed into a higher-valued downstream article by the same producer. By contrast, selling in the merchant market refers to sales of the domestic like product to unrelated customers. In some instances, a domestic producer of the like product may have engaged in both captive production and production for sale on the merchant market during the period under review. In these instances, the ITC may apply the captive production test, pursuant to 19 U.S.C. 1677(7)(C)(iv), to determine whether its injury analysis should be based on the total production of the domestic like product, or only on that portion produced for sale on the merchant market. If the conditions of the captive production test are satisfied, the ITC will limit its focus to the merchant market, potentially making it easier for the domestic industry to demonstrate injury because the allegedly dumped or subsidized imports would then account for a larger share of total consumption. As shown in the table below, Section 503 eliminated the third condition of the captive production test, which required the ITC to find that the production of the domestic like product sold in the merchant market "is not generally used" in the production of the relevant downstream article.

Previous Text of 19 U.S.C. 1677(7)(C)(iv)	New Text of 19 U.S.C. 1677(7)(C)(iv)
(iv) Captive production If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that- (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product, (II) the domestic like product is the predominant material input in the production of that downstream article, and (III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article, Then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.	**(iv) Captive production** If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that- (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product, and (II) the domestic like product is the predominant material input in the production of that downstream article, Then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.

Significance of change: The captive production provision has been considered in few cases. However, several of those cases involved steel products, and the ITC's treatment of captive production contributed to negative injury

determinations in those cases. The elimination of one of the three previous factors will make it easier for the ITC to focus primarily on the merchant market for the domestic like product, instead of captive production that often is more profitable for the domestic industry because they are shielded from market competition.

Effect of Profitability. Section 503 added a new provision, 19 U.S.C. 1677(7)(J), which clarifies that the ITC "may not determine that there is no material injury or threat of material injury to an industry in the United States merely because that industry is profitable or because the performance of that industry has recently improved."

Significance of change: The ITC under the previous law already focused on declines in profitability, and in a number of cases the ITC found material injury even though the domestic industry was quite profitable. The changes reflect the ITC's current practice and should not substantively change the ITC's injury analysis.

Section 504 – Normal Value, Ordinary Course of Trade and Particular Market Situation

Section 504 of the Act amended 19 U.S.C. 1677(15) and 19 U.S.C. 1677b to revise the definition of ''ordinary course of trade'' and the provisions governing the treatment of a ''particular market situation'' in AD proceedings, respectively. Prior to the enactment of the Act, DOC already possessed the authority,[3] when determining the normal value of the subject merchandise, to exclude sales of the foreign like product that were made outside of the ordinary course of trade. The definition of "ordinary course of trade" is set forth in 19 U.S.C. 1677(15), which, prior to the enactment of the Act, specifically directed DOC to exclude below-cost sales and sales made to affiliated persons. As shown in the table below, Section 504 revised this definition, thereby permitting DOC to exclude domestic sales of the foreign like product from the calculation of normal value in "situations in which [DOC] determines that the particular market situation prevents a proper comparison with the export price or the constructed export price."

Previous Text of 19 U.S.C. 1677(15)	New Text of 19 U.S.C. 1677(15)
(15) Ordinary course of trade The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade: (A) Sales disregarded under section 1677b(b)(1) of this title. (B) Transactions disregarded under section 1677b(f)(2) of this title.	**(15) Ordinary course of trade** The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade: (A) Sales disregarded under section 1677b(b)(1) of this title. (B) Transactions disregarded under section 1677b(f)(2) of this title. (C) Situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price.

Significance of change: Article 2.2 of the WTO Anti-Dumping Agreement permits investigating authorities like DOC to reject home-market sales as the basis for calculating normal value in the case of a "particular market situation," but U.S. law previously permitted DOC to use only third-country sales instead. This change will permit DOC to use either constructed value or third-country sales when DOC has found a "particular market situation" in the exporting country.

Section 504 also grants DOC additional discretion in circumstances where it does not possess sufficient information about a foreign respondent's home market and third-country sales to determine normal value, and instead has to rely on the "constructed value" approach. When calculating constructed value, DOC is required by 19 U.S.C. 1677b(e)(1) to include "the cost of materials and fabrication or other processing of any kind" employed in producing the merchandise. As shown in the table below, Section 504 provides an exception to this requirement, permitting DOC to

[3] 19 U.S.C. 1677b(a)(1)(B)(i) and 19 U.S.C. 1677b(b)(1)

use an alternative calculation methodology of its choosing to arrive at constructed value 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 cost of production in the ordinary course of trade."

Previous text of 19 U.S.C. 1677b(e)	New text of 19 U.S.C. 1677b(e)
(e) Constructed value For purposes of this subtitle, the constructed value of imported merchandise shall be an amount equal to the sum of- (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business; (2)(A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (B) if actual data are not available with respect to the amounts described in subparagraph (A), then- (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise, (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise; and (3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States. For purposes of paragraph (1), the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition which are remitted or refunded upon exportation of the subject merchandise produced from such materials.	**(e) Constructed value** For purposes of this subtitle, the constructed value of imported merchandise shall be an amount equal to the sum of- (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of <u>trade</u>; (2)(A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (B) if actual data are not available with respect to the amounts described in subparagraph (A), then- (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise, (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (iii) the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise; and (3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States. <u>For purposes of paragraph (1), 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 cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this part or any other calculation methodology</u>. For purposes of paragraph (1), the cost of materials shall be determined without regard to any

Previous text of 19 U.S.C. 1677b(e)	New text of 19 U.S.C. 1677b(e)
	internal tax in the exporting country imposed on such materials or their disposition that is remitted or refunded upon exportation of the subject merchandise produced from such materials.

Significance of change: This provision leaves open the possibility that DOC, following a finding that a company's material costs and other cost variables are distorted by a "particular market situation" in the exporting country, could apply a constructed value calculation methodology much like the non-market economy (NME) calculation methodology currently applied to China and Vietnam.

Section 505 – Distortion of Prices or Costs

Section 505 of the Act amended 19 U.S.C. 1677b(b), which covers DOC's treatment of allegedly distorted prices or costs when determining normal value in AD proceedings. Prior to the enactment of the Act, DOC already possessed the authority under 19 U.S.C. 1677b(b)(1) to disregard certain sales when determining normal value if it had "reasonable grounds to believe or suspect" that such sales were made at less than the cost of production. As shown in the table below, Section 505 modified the definition of "reasonable grounds to believe or suspect" set forth in 19 U.S.C. 1677b(b)(2), adding a new requirement that DOC must now request that interested parties provide the information necessary to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made below cost. Under the prior version of the provision, the burden for providing such information was placed on the petitioners. In its August 6 *Federal Register* notice, DOC explained that it would only apply this new requirement to determinations in which the complete initial questionnaire had not been issued as of August 6, 2015.

Previous text of 19 USC 1677b(b)(2)(A)	New text of 19 USC 1677b(b)(2)(A)
(A) Reasonable grounds to believe or suspect There are reasonable grounds to believe or suspect that sales of the foreign like product were made at prices that are less than the cost of production of the product, if—	**(A) Reasonable grounds to believe or suspect** [no other introductory language]
(i) in an investigation initiated under section 1673a of this title or a review conducted under section 1675 of this title, an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677 (9) of this title provides information, based upon observed prices or constructed prices or costs, that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of the product; or	**(ii) Requests for information** In an investigation initiated under section 732 or a review conducted under section 751, the administering authority shall request information necessary to calculate the constructed value and cost of production under subsections (e) and (f) to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the cost of production of the product.
(ii) in a review conducted under section 1675 of this title involving a specific exporter, the administering authority disregarded some or all of the exporter's sales pursuant to paragraph (1) in the investigation or if a review has been completed, in the most recently completed review.	**(i) Review** In a review conducted under section 751 involving a specific exporter, there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that are less than the cost of production of the product if the administering authority disregarded some or all of the exporter's sales pursuant to paragraph (1) in the investigation or, if a review has been completed, in the most recently completed review.

Significance of change: As the previous introductory text has just been moved into subparagraph (i), this change should not lead to significant changes in DOC practice. However, the other change – shifting the burden for

gathering information on below-cost sales from "interested parties" to DOC – should increase DOC's workload while decreasing the workload of interested parties, most notably petitioners.

Section 505 also modified 19 U.S.C. 1677b(c), which covers DOC's calculation of constructed value for merchandise originating from non-market economy (NME) countries, by providing DOC with discretion to disregard certain prices or costs when valuing the factors of production. The new provision shown below, 19 U.S.C. 1677b(c)(5), provides that when DOC values the factors of production in these circumstances, it may "disregard price or cost values without further investigation if [DOC] has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order."

No original provision	New provision: 19 U.S.C. 1677b(c)(5)
	(5) Discretion to disregard certain price or cost values In valuing the factors of production under paragraph (1) for the subject merchandise, the administering authority may disregard price or cost values without further investigation if the administering authority has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order.

Significance of change: This change is consistent with DOC's well-established practice of disregarding surrogate values (*i.e.*, country-specific import values) used in non-market economy dumping calculations that originate from a country with broadly available export subsidies or involving merchandise subject to an AD order.

Section 506 – Number of Voluntary Respondents

Section 506 of the Act amends 19 U.S.C. 1677m(a) to enumerate the specific factors that DOC may consider when determining whether to accept voluntary responses (*i.e.*, requests from foreign producer/exporters for an individualized dumping margin or subsidy rate). Prior to the enactment of the Act, DOC already possessed the authority under this provision to reject a foreign producer/exporter's request for an individualized margin or rate, if the number of producer/exporters *submitting the necessary information* was large enough that individual examinations would be "unduly burdensome." As shown in the table below, Section 506 revised this requirement, permitting DOC to reject requests for individual examinations if the number of producer/exporters *subject to the investigation or review* is large enough that individual examinations would be unduly burdensome. Section 506 also added a new provision enumerating the specific factors that DOC may consider when determining whether individual examinations would be unduly burdensome.

Previous text of 19 U.S.C. 1677m(a)	New text of 19 U.S.C. 1677m(a)
(a) Treatment of voluntary responses in countervailing or antidumping duty investigations and reviews In any investigation under part I or II of this subtitle or a review under section 1675(a) of this title in which the administering authority has, under section 1677f–1(c)(2) of this title or section 1677f–1(e)(2)(A) of this title (whichever is applicable), limited the number of exporters or producers examined, or determined a single country-wide rate, the administering authority shall establish an individual countervailable subsidy rate or an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such sections who submits to the administering authority the information requested from exporters or producers selected for examination, if-	**(a) Treatment of voluntary responses in countervailing or antidumping duty investigations and reviews** **(1) In general** In any investigation under part I or II of this subtitle or a review under section 1675(a) of this title in which the administering authority has, under section 1677f–1(c)(2) of this title or section 1677f–1(e)(2)(A) of this title (whichever is applicable), limited the number of exporters or producers examined, or determined a single country-wide rate, the administering authority shall establish an individual countervailable subsidy rate or an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such sections who submits to the administering authority the information requested from exporters or producers selected

Previous text of 19 U.S.C. 1677m(a)	New text of 19 U.S.C. 1677m(a)
(1) such information is so submitted by the date specified- (A) for exporters and producers that were initially selected for examination, or (B) for the foreign government, in a countervailing duty case where the administering authority has determined a single country-wide rate; and (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.	for examination, if- (A) such information is so submitted by the date specified- (i) for exporters and producers that were initially selected for examination, or (ii) for the foreign government, in a countervailing duty case where the administering authority has determined a single country-wide rate; and (B) the number of exporters or producers subject to the investigation or review is not so large that any additional individual examination of such exporters or producers would be unduly burdensome to the administering authority and inhibit the timely completion of the investigation or review. **(2) Determination of unduly burdensome** In determining if an individual examination under paragraph (1)(B) would be unduly burdensome, the administering authority may consider the following: (A) The complexity of the issues or information presented in the proceeding, including questionnaires and any responses thereto. (B) Any prior experience of the administering authority in the same or similar proceeding. (C) The total number of investigations under part I or II and reviews under section 1675 of this title being conducted by the administering authority as of the date of the determination. (D) Such other factors relating to the timely completion of each such investigation and review as the administering authority considers appropriate.

Significance of change: DOC in recent years has been unwilling to accept voluntary responses and calculate individual dumping margins for any companies other than those selected as mandatory respondents. The changes made under Section 506 simply codify the factors that DOC has already relied upon to disregard a company's voluntary responses and to justify not calculating individual dumping margins for companies not selected as mandatory respondents.

Conclusion

While many of the amendments described above merely codified existing agency practices, some expanded the Agencies' discretion in a manner that could be advantageous to domestic petitioners and disadvantageous to foreign respondents. In particular, the new provisions could make it easier in certain circumstances for DOC to assign highly punitive dumping margins and subsidy rates to uncooperative respondents, and to calculate constructed value using surrogate country or adjusted domestic cost data if a foreign respondent's material costs are found to be distorted due to a "particular market situation." However, it is uncertain whether the Agencies' interpretation and application of the new provisions will ultimately have such effects or result in significant departures from existing practice.

Although the extent to which the Agencies will use their new discretion is unclear, the US industries that routinely seek protection under the trade remedy laws have advocated strongly for the changes contained in the Act, suggesting that they expect the expanded agency discretion to have a tangible impact in favor of petitioners. For example, the US steel industry advocated for many of the changes contained in the Act during the recent congressional debate over Trade Promotion Authority, including in testimony before the Congressional Steel Caucus. By contrast, the US retail industry actively opposed the changes, most likely due to concerns that the provisions will ultimately lead to increased duties on imported retail goods. Notably, the same US steel producers that advocated

for the changes to US law filed two new, major AD/CVD investigations concerning hot- and cold-rolled steel flat products shortly after the law was enacted.[4] These new investigations will be among the first to occur under the amended U.S. law. Given the US steel industry's vocal support of the changes, these two new investigations should provide insights into how the DOC and ITC will interpret and apply the new provisions.

US General Trade Policy Highlights

US Business Groups Urge President Obama to Address China's ICT Policies at Summit With Chinese President Xi Jinping

On August 11, 2015, a coalition of 19 US trade associations sent a letter to President Obama expressing concerns over China's recent pursuit of policies affecting the information and communications technology (ICT) sector. In the letter, the coalition cites several existing and proposed Chinese measures pertaining to national security, cybersecurity, and foreign investment, asserting that certain aspects of these measures will limit the ability of US ICT firms to conduct business in China. The coalition letter requests that President Obama raise these issues during an upcoming bilateral summit with Chinese President Xi Jinping in November 2015.

The Chinese measures cited in the letter include regulations promulgated in December 2014 by the China Banking Regulatory Commission, titled *Guidelines on Promoting the Application of Secure and Controllable Information Technology in the Banking Industry 2014-2015* ("Guidelines"), implementation of which was suspended in April 2015 in the face of opposition from the United States, among others. Other Chinese measures cited in the letter include (i) China's recently-adopted national security law; (ii) new alleged restrictions on cross-border data flows; (iii) draft laws on counter-terrorism, cybersecurity, and foreign investment; and (iv) a new program to "acquire or indigenize" US semiconductor technology. The Office of the United States Trade Representative has stated that the draft counter-terrorism law in particular could raise questions with respect to China's obligations under the WTO Agreement on Technical Barriers to Trade, citing the law's domestic data storage and security testing requirements as well as provisions requiring the installation of encryption "back doors" in certain IT systems.

Making reference to China's existing international obligations, the coalition letter urges President Obama to reaffirm with President Xi that any national security measures affecting the ICT sector should be: (i) necessary to advance a legitimate security objective; (ii) narrowly-tailored to achieve that objective; and (iii) the least restrictive of open trade and competition as possible. The letter also emphasizes the importance of maintaining an ongoing US-China high-level consultation mechanism dedicated to minimizing any disruption of global ICT trade.

Several of the issues raised in the letter were reportedly discussed by senior US and Chinese officials during the US-China Strategic and Economic Dialogue in June 2015, but no major breakthroughs or commitments were made. Despite criticism of the above measures by the US ICT sector and senior US officials, China has continued to assert that it has the right to implement such measures in the interest of protecting national security and the integrity of its financial system. The sensitive nature of national security issues in particular will likely complicate efforts to resolve the US industry's concerns.

Click **here** for a copy of the letter.

US Court of Appeals Rejects SEC Appeal to Restore Conflict Minerals Disclosure Rule

On August 18, 2015, the US Court of Appeals for the District of Columbia Circuit (DC Circuit) panel dismissed by a 2-1 majority the US Securities and Exchange Commission's (SEC) appeal in National Association of Manufacturers v. Securities and Exchange Commission, upholding an earlier ruling by the court issued in April 2014[5] that abolished the

[4] See *Cold-Rolled Steel Flat Products From Brazil, China, India, Japan, Korea, Netherlands, Russia, and the United Kingdom*, 80 Fed. Reg. 46047 (August 3, 2015)(Notice of Institution) and *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom* (petition filed on August 11, 2015; notice of institution pending).

[5] *National Association of Manufacturers v. Securities and Exchange Commission, No. 13-5252 (2014),* opinion dated April 14, 2014 (available **here**)

SEC's rule requiring public companies to disclose whether their products contain so-called "conflict minerals" sourced from the Democratic Republic of the Congo (DRC) ("SEC rule"). In its opinion, the panel upheld its previous conclusion that the SEC's conflict minerals disclosure requirement violates public companies' First Amendment rights, as the SEC did not demonstrate that the rule was narrowly tailored to achieve a substantial government interest.

The panel rejected the SEC's appeal, which was based on the panel's reasoning in American Meat Institute v. United States Department of Agriculture,[6] because the SEC rule is not related to advertising or point–of–sale disclosures. The panel therefore concluded that there was no commonality between the two cases and that the reasoning in American Meat Institute was not relevant for consideration of the SEC rule. Additionally, the panel found the SEC rule to be unconstitutional, concluding that the speculative benefits of the rule are far outweighed by the cost of compliance. The SEC rule is predicated on an assumption that the forced disclosure of conflict minerals will deprive armed groups in the DRC of funding and diminish their operations; however the panel concluded that it could not rely on speculation in a First Amendment case involving commercial speech.[7] Moreover, the panel noted that the estimated cost of compliance with the SEC rule is approximately USD 3-4 billion, and that the SEC rule might cause boycotts of suppliers with DRC connections.[8]

The SEC is currently reviewing the panel's opinion, and has stated that until it issues guidance in response to the opinion, public companies can choose to comply with the SEC rule on a voluntary basis. The SEC issued the conflict minerals disclosure rule on August 22, 2012 under Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (PL 111-203 or "Dodd-Frank Act"). The rule, aimed at ending conflict in the DRC, requires public companies to make specialized disclosures regarding their use of conflict minerals, defined as gold, tin, tungsten, and tantalum exploited and traded to finance the conflict in the eastern region of the DRC.

Click **here** for copy of the panel's opinion.

US-Uruguay Customs Mutual Assistance Agreement Enters into Force

On August 18, 2015, the US-Uruguay Customs Mutual Assistance Agreement (CMAA) entered into force. The CMAA was signed on May 14, 2014 by US Customs and Border Protection (CBP), US Immigration and Customs Enforcement (ICE), and the Uruguayan Ministry of Foreign Affairs, and was ratified by Uruguay on July 10 under Law No. 19328.

The CMAA provides a legal framework for the two customs administrations to exchange information and evidence, thereby assisting one another in the enforcement of customs laws. The information exchanged pursuant to the CMAA will support efforts to enforce laws related to duty evasion, trafficking, proliferation, money laundering, and counterterrorism. US CMAAs are based on the World Customs Organization's (WCO) model bilateral convention on mutual administrative assistance, and can also lead to subsequent information sharing arrangements, including mutual recognition arrangements (MRAs) for authorized economic operator (AEO) programs.

According to CBP, the United States has signed 75 CMAAs with customs administrations from around the world, including 14 Latin American nations and all five Mercosur member states. Other bilateral agreements between Uruguay and the United States include a Bilateral Investment Treaty (BIT), which entered into force in 2006, and a Trade and Investment Framework Agreement (TIFA), which was signed in 2007.

[6] *American Meat Institute v. United States Department of Agriculture, No. 13-5281 (2014).*

[7] According to the ruling in *Edenfield v. Fane, 507 U.S. 761, 770 (1993),* "*under the First Amendment, in commercial speech cases the government cannot rest on 'speculation or conjecture*.'"

[8] According to the SEC: "*the high cost of compliance … [with the SEC rule]… provides an incentive for issuers to choose only suppliers that obtain their minerals exclusively from outside the Covered Countries*." See 77 Fed. Reg. 56273.

China Begins Drafting Revised Regulations on "Secure and Controllable" ICT for the Banking Industry

The China Banking Regulatory Commission (CBRC) has reportedly begun drafting a revised version of its Guidelines on Promoting the Application of Secure and Controllable Information Technology in the Banking Industry ("Guidelines"), and has met with several US technology firms in recent weeks to solicit input on potential changes to the original Guidelines issued in December 2014. The original Guidelines took effect in March 2015, but the CBRC suspended their implementation in April 2015 in response to opposition from the United States and other foreign governments.

The United States has expressed concerns that the Guidelines appear to place local content requirements on information and communications technology (ICT) equipment used by the banking sector. In particular, the Office of the United States Trade Representative (USTR) has stated that the Guidelines appear to require that: (i) suppliers disclose the source code for certain ICT products to Chinese authorities; (ii) the intellectual property rights (IPR) attached to such products be "indigenous" (i.e., owned or controlled by a Chinese citizen or entity); (iii) suppliers source such products from "controllable" supply chains, potentially leading to greater localization of vendors; and (iv) suppliers of such products establish their own service centers in China and conduct relevant research and development activities in China. According to USTR, the products, services, and technologies that may be subject to the Guidelines include routers, Wi-Fi equipment, computers, anti-virus equipment, virtual private networks (VPNs), operating systems, and ATM machines.

The CBRC has reportedly informed US technology firms that it is consulting with China's Ministry of Commerce (MOFCOM) to ensure that the revised Guidelines will be consistent with China's WTO obligations. USTR has previously raised concerns about the consistency of the original Guidelines with the WTO Agreements on Technical Barriers to Trade and Trade-Related Investment Measures, and has also suggested that China did not provide adequate opportunity for public comment on a draft version of the original Guidelines.

At this time, it remains unclear when the CBRC will issue a formal notice seeking public comments for its revision of the Guidelines. We will continue to monitor this issue and will provide further details when they become available.

Free Trade Agreement Highlights

Outcome of TPP Ministerial in Hawaii Reduces Likelihood of U.S. Ratification Before 2016 Presidential Elections

Trade Ministers negotiating the Trans-Pacific Partnership (TPP) failed to reach agreement on politically-sensitive market access and rules issues at the July 27-31 TPP Ministerial in Hawaii, reducing the likelihood that the U.S. Congress will vote on the potential agreement before the 2016 U.S. Presidential elections. The Obama administration sought to conclude the TPP negotiations in Hawaii to maximize prospects for a successful vote in late 2015 or early 2016; however, the Ministers failed to resolve differences on market access for dairy products and sugar, rules of origin for automobiles, and data exclusivity for biologic drugs, among other issues. We summarize the main outstanding issues in the negotiations and the likely next steps for the TPP below.

Rule of Origin for Automobiles

The United States, Mexico, Canada, and Japan failed to resolve an unexpected disagreement over the regional value content (RVC) threshold for automobiles (i.e., the minimum percentage of an automobile's value that will have to originate from TPP countries in order for the automobile to receive preferential tariff treatment). Mexico and Canada reportedly did not learn until arriving at the Ministerial that the United States and Japan had already reached a bilateral understanding on the RVC threshold. The precise figure agreed to by the United States and Japan is unknown, but is believed to be a compromise between the initial U.S. proposal of 55 percent and the initial Japanese proposal of 40 percent. Japan has reportedly sought a low RVC threshold that would benefit Japanese auto manufacturers who source components from non-TPP countries, such as Thailand.

Upon learning of the U.S.-Japan compromise, Mexico and Canada were dissatisfied, both with its substance and with the fact that they allegedly were not consulted on the compromise in advance of the Ministerial. In particular, Mexico deemed the proposed RVC threshold to be too low, as it is seeking a rule of origin equivalent to the one included in the North American Free Trade Agreement (NAFTA), which requires automobiles to contain at least 62.5 percent RVC to receive preferential tariff treatment. Canada was reportedly more concerned that the RVC formula proposed by the United States and Japan included exemptions for certain non-originating auto parts. Japan was reportedly unaware that its agreement with the United States had not yet been vetted with the other NAFTA countries. New Zealand Trade Minister Tim Groser and Australian Trade Minister Andrew Robb have suggested that this disagreement among the auto-producing countries left little time for substantive negotiations on agricultural market access.

Market Access for Dairy and Sugar

Canada submitted an initial market access offer for dairy at the Ministerial, but the offer, which reportedly would establish a single tariff-rate quota (TRQ) for all dairy products based on their liquid milk equivalent, was deemed insufficient by the United States, Australia, and New Zealand, the world's largest dairy exporter. New Zealand is also dissatisfied with the level of market access it is being offered by the United States and Japan, who are not expected to make further concessions to New Zealand unless they receive more ambitious offers from Canada. However, Canada's Conservative Party government is facing political pressure to limit concessions on dairy in the TPP, and this pressure has intensified in recent months due to Canada's upcoming federal elections on October 19. A more ambitious Canadian offer is seen as essential to conclude the negotiations, but it is uncertain whether Canada will be willing to offer significant liberalization of its sensitive dairy sector ahead of a closely-contested election.

EGA Update: US Trade Representative Requests ITC Analysis of Potential Tariff Cuts on Environmental Goods

US Trade Representative (USTR) Michael Froman recently asked the US International Trade Commission (ITC) to conduct investigations into the economic effects of tariff cuts on goods resulting from both the 2012 Asia Pacific Economic Cooperation (APEC) agreement on trade in environmental goods, as well as those proposed by other WTO Members in the course of negotiations for the Environmental Goods Agreement (EGA). The requests indicate that EGA negotiations are advancing and shed light on US approaches to the negotiations. The steps are also in line with the reviews that other participants in these negotiations are now carrying out with respect to the list of 650 products proposed for EGA coverage. Settling on an agreed list is the last major challenge that must be met before the EGA can be finalized.

In 2012, APEC Members agreed to cut import duties on a list of 54 designated environmental goods to 5 percent or less. This list served as a basis for the commencement of EGA negotiations in 2014. Ambassador Froman asked the ITC via letter on August 5, to "provide advice on the probable economic effects of the modifications of tariffs for the products reflected in the enclosed proposal on industries producing like or directly competitive articles, and on consumers." On August 20, a second letter made an identical request for a more expansive list of products, based on proposals submitted by WTO Members during the EGA negotiations.

The requests reveal some details of the EGA negotiation process, particularly the US position. Product coverage is the linchpin to a successful EGA, and Members have not yet reached consensus on such a list. Earlier this month, Australia (the EGA chair) divided a list of over 600 goods into two – one containing products that have found overall support for inclusion by the negotiating Members (approximately 450 products) and one containing more controversial products. The list contained in USTR Froman's August 20 letter includes approximately 400 tariff lines; some have observed that the list is broader in scope than current proposals and includes goods that have not been nominated. Nevertheless, we understand that the "vast majority" of products on this list are those that have been proposed by other negotiating Members.

Although a USTR official has been quoted as saying that the inclusion of any product on the list "is in no way indicative of our support for it[,]" the fact that USTR has asked for analyses of both the narrower APEC list as well as

a broader list based on the EGA negotiations suggests that it will likely use the ITC analysis to refine its approach to negotiations and enhance its negotiating leverage. The United States has been one of the most enthusiastic participants in the EGA negotiations, and this development could help push others toward a more ambitious final agreement than they might otherwise have been prepared to join.

The two requests also suggest that the Obama administration might seek to implement the EGA by Presidential proclamation, rather than by submitting EGA-implementing legislation to Congress for approval. USTR Froman made both requests pursuant to Section 131 of the *Trade Act of 1974*, which states that the President, in connection with any proposed trade agreement under Section 103(a) of the Trade Promotion Authority (TPA) law, "shall from time to time publish and furnish [the ITC]" with lists of articles that may be considered for duty modification in order to obtain the ITC's advice on the impact of the potential changes. Section 103(a) of TPA, which covers "agreements regarding tariff barriers" such as the EGA, authorizes the President to modify duty rates on certain products by proclamation in order implement such agreements. USTR Froman's August 5 request specifically cites the President's authority under Section 103(a) to proclaim changes to duty rates, suggesting the possibility that President Obama will rely on this authority to implement the EGA. Doing so could speed the EGA's conclusion, but also could be met with resistance by members of Congress or trade skeptics in the United States who oppose the proclamation on political, procedural or protectionist grounds.

Upcoming EGA negotiating rounds are scheduled for September 16–22, October 29–November 4, and November 30–December 4. Product coverage will be the primary focus of those negotiations. The European Union has made a strong pitch to include language in the EGA that commits participants to extend the exercise in the next stage to environmental services and non-tariff barriers affecting environmental goods, so this will also be a subject for negotiation over the next few months. However, there is not a great deal of enthusiasm among other participants for moving in the direction that the European Union is seeking.

The ITC has released the schedule for the investigation of the APEC environmental goods, and intends to deliver its report to USTR no later than November 4. Although the ITC has not yet released a schedule for its investigation into the broader list of environmental goods based on the EGA negotiations, USTR Froman requested "that the Commission provide its report… as soon as possible, but no later than December 4, 2015." This date is significant insofar as it coincides with the last day of the latest-scheduled EGA round, as well as the run-up to the WTO Ministerial in Nairobi, and the United Nations Framework Convention on Climate Change meeting in Paris, at which countries aim to announce a new agreement on climate change. It therefore reinforces the view that USTR intends to use the ITC analysis to inform or bolster its negotiating position.

Copies of the August 5 and August 20 requests are attached for reference, and include the respective product lists.

Multilateral Policy Highlights

50 WTO Members Formally Agree to Expand Information Technology Agreement

Fifty WTO Members have formally agreed to expand the Information Technology Agreement (ITA II) to cover an additional 201 products, and have issued a Declaration setting out the schedule for finalizing the Agreement in time for the WTO's 10th Ministerial Conference in Nairobi in December. The Declaration is open for acceptance by all WTO Members.

Following agreement last week on the product coverage of ITA II, the Declaration was issued as soon as Thailand and Taiwan indicated that they accepted the product list and were prepared to ratify the Agreement. This provided assurance that the Parties to ITA II would represent a critical mass of over 90 percent of world trade in the products covered and that the Agreement could therefore be applied by the Parties on the Most-Favored Nation (MFN) basis to all WTO Members without concern that there would be large global producers who could free-ride on the Agreement.

The Declaration provides full details of the "staging" of the tariff reductions that will take place pursuant to the Agreement. Tariffs on the covered products will be reduced in four equal annual installments to zero, beginning on July 1, 2016 and concluding on July 1, 2019. Extended staging of reductions for some sensitive products may be acceptable in limited circumstances. Each Party is asked to submit its draft schedule of tariff reductions by October 30, for the approval of other Parties no later than December 4. Once a Party's schedule is approved, it must submit it to the WTO as a modification to its Schedule of Concessions, in accordance with the Decision of March 26, 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (BISD 27S/25). The Agreement takes effect once Parties accounting for approximately 90 percent of world trade in the covered goods have their draft schedules approved. This threshold is expected to be reached in time for the 10th Ministerial Conference in December.

The Parties have also agreed to meet no later than January 2018 to review the product coverage of ITA II and consider whether the coverage should be updated to incorporate additional products through further negotiations. In addition, they have agreed to intensify their discussions concerning the removal of non-tariff barriers in the information technology sector.

A copy of the Declaration is attached.

Annex I

Side-by-Side Comparison of Trade Remedy Law Provisions Amended by P.L. 114-27

Section 502 – Selection and Corroboration of Facts Otherwise Available

Previous text of 19 U.S.C. 1677e(b)	New text of 19 U.S.C. 1677e(b)
(b) Adverse inferences If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from- (1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or (4) any other information placed on the record.	**(b) Adverse inferences** **(1) In general** If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle- (A) may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available; and <u>(B) is not required to determine, or make any adjustments to, a countervailable subsidy rate or weighted average dumping margin based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.</u> **(2) Potential sources of information for adverse inferences** An adverse inference under paragraph (1)(A) may include reliance on information derived from- (A) the petition, (B) a final determination in the investigation under this subtitle, (C) any previous review under section 1675 of this title or determination under section 1675b of this title, or (D) any other information placed on the record.
Previous text of 19 U.S.C. 1677e(c)	**New text of 19 U.S.C. 1677e(c)**
(c) Corroboration of secondary information When the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.	**(c) Corroboration of secondary information** **(1) In general** Except as provided in paragraph (2), when the administering authority or the Commission relies on secondary information rather than on information obtained in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal. **<u>(2) Exception</u>** <u>The administrative authority and the Commission shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding.</u>

No original provision	New provision: 19 U.S.C. 1677e(d)
	(d) Subsidy rates and dumping margins in adverse inference determinations **(1) In general** If the administering authority uses an inference that is adverse to the interests of a party under subsection (b)(1)(A) in selecting among the facts otherwise available, the administering authority may- (A) in the case of a countervailing duty proceeding- (i) use a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country; or (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the administering authority considers reasonable to use; and (B) in the case of an antidumping duty proceeding, use any dumping margin from any segment of the proceeding under the applicable antidumping order. **(2) Discretion to apply highest rate** In carrying out paragraph (1), the administering authority may apply any of the countervailable subsidy rates or dumping margins specified under that paragraph, including the highest such rate or margin, based on the evaluation by the administering authority of the situation that resulted in the administering authority using an adverse inference in selecting among the facts otherwise available. **(3) No obligation to make certain estimates or address certain claims** If the administering authority uses an adverse inference under subsection (b)(1)(A) in selecting among the facts otherwise available, the administering authority is not required, for purposes of subsection (c) or for any other purpose- (A) to estimate what the countervailable subsidy rate or dumping margin would have been if the interested party found to have failed to cooperate under subsection (b)(1) had cooperated; or (B) to demonstrate that the countervailable subsidy rate or dumping margin used by the administering authority reflects an alleged commercial reality of the interested party.

Section 503 – Material Injury and Captive Production

Previous text of 19 U.S.C. 1677(7)(C)(iii)	New text of 19 U.S.C. 1677(7)(C)(iii)
(iii) Impact on affected domestic industry In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United	**(iii) Impact on affected domestic industry** In examining the impact required to be considered under subparagraph (B)(i)(III), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States,

States, including, but not limited to- (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity, (II) factors affecting domestic prices, (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping. The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.	including, but not limited to- (I) actual and potential decline in output, sales, market share, gross profits, operating profits, net profits, ability to service debt, productivity, return on investments, return on assets, and utilization of capacity, (II) factors affecting domestic prices, (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and (V) in a proceeding under part II of this subtitle, the magnitude of the margin of dumping. The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.
Previous text of 19 U.S.C. 1677(7)(C)(iv)	**New text of 19 U.S.C. 1677(7)(C)(iv)**
(iv) Captive production If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that- (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product, (II) the domestic like product is the predominant material input in the production of that downstream article, and (III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article, Then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.	**(iv) Captive production** If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that- (I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product, and (II) the domestic like product is the predominant material input in the production of that downstream article, Then the Commission, in determining market share and the factors affecting financial performance set forth in clause (iii), shall focus primarily on the merchant market for the domestic like product.
No original provision	**New provision: 19 U.S.C. 1677(7)(J)**
	(J) Effect of profitability The Commission may not determine that there is no material injury or threat of material injury to an industry in the United States merely because that industry is profitable or because the performance of that industry has recently improved.

Section 504 – Normal Value, Ordinary Course of Trade, and Particular Market Situation

Previous text of 19 U.S.C. 1677(15)	New text of 19 U.S.C. 1677(15)
(15) Ordinary course of trade The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade: (A) Sales disregarded under section 1677b(b)(1) of this title. (B) Transactions disregarded under section 1677b(f)(2) of this title.	**(15) Ordinary course of trade** The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade: (A) Sales disregarded under section 1677b(b)(1) of this title. (B) Transactions disregarded under section 1677b(f)(2) of this title. (C) Situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price.
Previous text of 19 U.S.C. 1677b(e)	**New text of 19 U.S.C. 1677b(e)**
(e) Constructed value For purposes of this subtitle, the constructed value of imported merchandise shall be an amount equal to the sum of- (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business; (2)(A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (B) if actual data are not available with respect to the amounts described in subparagraph (A), then- (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise, (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (iii) the amounts incurred and realized for selling,	**(e) Constructed value** For purposes of this subtitle, the constructed value of imported merchandise shall be an amount equal to the sum of- (1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade; (2)(A) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (B) if actual data are not available with respect to the amounts described in subparagraph (A), then- (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise, (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (iii) the amounts incurred and realized for selling,

general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise; and (3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States. For purposes of paragraph (1), the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition which are remitted or refunded upon exportation of the subject merchandise produced from such materials.	general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise; and (3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the subject merchandise in condition packed ready for shipment to the United States. For purposes of paragraph (1), 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 cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this part or any other calculation methodology. For purposes of paragraph (1), the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition that is remitted or refunded upon exportation of the subject merchandise produced from such materials.

Section 505 – Distortion of Prices or Costs

Previous text of 19 USC 1677b(b)(2)(A)	New text of 19 USC 1677b(b)(2)(A)
(A) Reasonable grounds to believe or suspect There are reasonable grounds to believe or suspect that sales of the foreign like product were made at prices that are less than the cost of production of the product, if—	**(A) Reasonable grounds to believe or suspect** [no other introductory language]
(i) in an investigation initiated under section 1673a of this title or a review conducted under section 1675 of this title, an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677 (9) of this title provides information, based upon observed prices or constructed prices or costs, that sales of the foreign like product under consideration for the determination of normal value have been made at prices which represent less than the cost of production of the product; or	**(ii) Requests for information** In an investigation initiated under section 732 or a review conducted under section 751, the administering authority shall request information necessary to calculate the constructed value and cost of production under subsections (e) and (f) to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the cost of production of the product.
(ii) in a review conducted under section 1675 of this title involving a specific exporter, the administering authority disregarded some or all of the exporter's sales pursuant to paragraph (1) in the investigation or if a review has been completed, in the most recently completed review.	**(i) Review** In a review conducted under section 751 involving a specific exporter, there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that are less than the cost of production of the product if the administering authority disregarded some or all of the exporter's sales pursuant to paragraph (1) in the investigation or, if a review has been completed, in the most recently completed review.
No original provision	**New provision: 19 U.S.C. 1677b(c)(5)**
	(5) Discretion to disregard certain price or cost

	values In valuing the factors of production under paragraph (1) for the subject merchandise, the administering authority may disregard price or cost values without further investigation if the administering authority has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order.

Section 506 – Number of Voluntary Respondents

Previous text of 19 U.S.C. 1677m(a)	New text of 19 U.S.C. 1677m(a)
(a) Treatment of voluntary responses in countervailing or antidumping duty investigations and reviews In any investigation under part I or II of this subtitle or a review under section 1675(a) of this title in which the administering authority has, under section 1677f–1(c)(2) of this title or section 1677f–1(e)(2)(A) of this title (whichever is applicable), limited the number of exporters or producers examined, or determined a single country-wide rate, the administering authority shall establish an individual countervailable subsidy rate or an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such sections who submits to the administering authority the information requested from exporters or producers selected for examination, if- (1) such information is so submitted by the date specified- (A) for exporters and producers that were initially selected for examination, or (B) for the foreign government, in a countervailing duty case where the administering authority has determined a single country-wide rate; and (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.	**(a) Treatment of voluntary responses in countervailing or antidumping duty investigations and reviews** **(1) In general** In any investigation under part I or II of this subtitle or a review under section 1675(a) of this title in which the administering authority has, under section 1677f–1(c)(2) of this title or section 1677f–1(e)(2)(A) of this title (whichever is applicable), limited the number of exporters or producers examined, or determined a single country-wide rate, the administering authority shall establish an individual countervailable subsidy rate or an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such sections who submits to the administering authority the information requested from exporters or producers selected for examination, if- (A) such information is so submitted by the date specified- (i) for exporters and producers that were initially selected for examination, or (ii) for the foreign government, in a countervailing duty case where the administering authority has determined a single country-wide rate; and (B) the number of exporters or producers <u>subject to the investigation or review</u> is not so large that any additional individual examination of such exporters or producers would be unduly burdensome to the administering authority and inhibit the timely completion of the investigation <u>or review</u>. **<u>(2) Determination of unduly burdensome</u>** <u>In determining if an individual examination under paragraph (1)(B) would be unduly burdensome, the administering authority may consider the following:</u> <u>(A) The complexity of the issues or information presented in the proceeding, including questionnaires and any responses thereto</u>. <u>(B) Any prior experience of the administering authority in the same or similar proceeding</u>. <u>(C) The total number of investigations under part I or II and reviews under section 1675 of this title being conducted by the administering authority as of the date of the determination</u>. <u>(D) Such other factors relating to the timely completion of each such investigation and review as</u>

Previous text of 19 U.S.C. 1677m(a)	New text of 19 U.S.C. 1677m(a)
	the administering authority considers appropriate.

Contact us

Washington

White & Case LLP
701 Thirteenth Street NW
Washington
DC 20005-3807

Scott Lincicome, Esq
Counsel

T +1 202 626 3592
E slincicome@whitecase.com ?subject=Test

Singapore

White & Case Pte. Ltd.
8 Marina View #27-01
Asia Square Tower 1
Singapore 018960

Samuel Scoles
Regional Director Asia, International Trade Advisory Services

T +65 6347 1527
E sscoles@whitecase.com

WHITE & CASE

whitecase.com