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This BNA Insights article by Eric Emerson and Henry Cao of Steptoe & Johnson LLP examines the Trade Preferences Extension Act of 2015 that President Obama recently signed into law and which included the most significant amendment to U.S. antidumping and countervailing duty law since the passage of the Uruguay Round Agreements Act in 1994, according to the authors.

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Impact of the Amendments to U.S. Antidumping and Countervailing Duty Law in the Trade Preferences Extension Act of 2015

BY ERIC EMERSON AND HENRY CAO

On June 29, 2015, President Barack Obama signed into law H.R. 1295, the Trade Preferences Extension Act (TPEA) of 2015. This bill was designed principally to extend the Generalized System of Preferences and the African Growth and Opportunity Act, but it also reauthorized Trade Adjustment Assistance (TAA), a program that provides financial assistance to U.S. workers displaced as a result of import competition. Reauthorization of TAA was a key prerequisite for the subsequent congressional passage of Trade Promotion Authority, under which the President is permitted to negotiate trade agreements subject only to an up-or-down vote in Congress.

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In addition to these reauthorization provisions, the TPEA also included the most significant amendment to U.S. antidumping and countervailing duty law since the passage of the Uruguay Round Agreements Act (URAA) in 1994. These changes were originally included as part of a Customs enforcement bill that is still making its way through Congress, but they were added to TPEA as well as part of a political compromise designed to increase the likelihood that TAA in particular would pass.

While these amendments are not as significant as those resulting from the implementation of U.S. WTO commitments through the URAA, the TPEA neverthe-

less results in several changes that substantially increase agency discretion, and that increase the likelihood that foreign producers/exporters caught up in such cases—including cases currently underway—will face greater uncertainty and potential duty liability.

1. Analysis of the TPEA Amendments to the AD/CVD Law. The TPEA amended AD/CVD law in six key areas. In several instances, these amendments were designed to overturn decisions from the Court of International Trade and/or the U.S. Court of Appeals for the Federal Circuit that limited the relevant agencies' discretion in applying this law.

a. Calculation of Constructed Value. The TPEA grants the U.S. Department of Commerce (DOC) significant new authority in its approach to calculating a foreign producer's constructed value where it believes that the producer's costs are not reasonable—an amendment that is aimed directly at China's eventual transition to ''market economy'' status under U.S. AD law.

In order to calculate a dumping margin for imports from market economy countries, the price at which merchandise is sold in the U.S. is compared to a ''normal value.'' Under Section 773 of the Tariff Act of 1930, ''normal value'' is, in order of preference, (i) the price at which the merchandise is sold in the foreign producer/exporter's home market, (ii) the price at which the merchandise is sold by the foreign producer/exporter in its largest non-U.S. export market, or (iii) the ''constructed value'' of the U.S. merchandise—that is, its fully allocated cost of production plus an amount for profit.

However, if the DOC finds that a ''particular market situation'' exists in a home or third country market that prevents a ''proper comparison'' with U.S. prices, the DOC has disregarded that market as the basis for calculating normal value and has instead resorted to ''constructed value.'' The phrase ''particular market situation'' is not defined in the Act and has been seldom used by the DOC to disqualify a market from consideration.

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The TPEA contains certain amendments intended to strengthen the DOC's existing authority to reject a market found to exhibit a ''particular market situation,'' and to move directly to constructed value as a basis for normal value. But the more significant change is that the DOC now has a much freer hand in how constructed value will be calculated where such situation exists. As a result of the TPEA amendments, the constructed value provision of the Act now reads as follows:

> For purposes of [calculating 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, the {DOC} may use another calculation methodology under this subtitle or any other calculation methodology.

It is difficult to interpret these amendments as anything other than an effort to revise U.S. AD law in anticipation of China's eventual transition from a nonmarket economy (NME) status to a market economy status. In the case of companies operating in NMEs, normal value is calculated using a methodology similar to constructed value described above, but with the cost of materials taken from so-called ''surrogate countries'' rather than from the NME producer's own cost data in order to eliminate distortions in these state-controlled economies. As a result of its Protocol of Accession to the WTO, China expects to transition to a market economy status for AD purposes in late 2016.

''It seems highly likely that upon China's graduation to market economy status—whenever that may be—U.S. petitioners will argue that China's home market presents a ''particular market situation'' such that its prices cannot be used as the basis for normal value.''

It seems highly likely that upon China's graduation to market economy status–whenever that may be–U.S. petitioners will argue that China's home market presents a ''particular market situation'' such that its prices cannot be used as the basis for normal value. These parties could then be expected to argue that in calculating constructed value, this same ''particular market situation'' means that Chinese producers' costs do not ''accurately reflect the cost of production in the ordinary course of trade,'' clearing the way for the DOC to use a modified constructed value methodology of its own creation. And since the amendment authorizes the use of ''another calculation methodology under this subtitle,'' the DOC could go back to using the NME methodology, or something similar to it, to calculate margins for Chinese companies even after China graduates to market economy status.

While this provision might have been written with China in mind, its language is broad enough to apply in other contexts as well. For example, when the DOC ''graduated'' Russia to market economy status in 2002, the DOC stated that it retained the discretion to adjust certain cost elements—in particular, energy inputs—that did not reflect market costs. While the DOC has not made those adjustments to date, this amendment could embolden the DOC to find that a ''particular market situation'' exists in Russia such that a constructed value could be calculated that used adjusted natural gas costs.

The DOC could also conclude that this provision is applicable even to countries that have always been market economies, but where allegations of cost distortions have nevertheless been made by petitioning U.S. industries. We expect to see substantially increased litigation over this term now that the DOC has been given this additional authority.

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b. Standard for Initiating 'Sales Below Cost' Investigations. Where home market or third country sales are made ''outside the ordinary course of trade,'' the Act permits the DOC to disregard such sales in the calculation of normal value. In most cases, sales ''outside the ordinary course of trade'' are those which are made below their cost of production in substantial quantities. To identify these sales, the DOC normally conducts a ''sales below cost'' investigation in which production costs are requested from the respondent companies, which costs are then compared with their associated sales values.

In order to initiate such an investigation, the DOC must have ''reasonable grounds to believe or suspect'' that the relevant comparison market sales were made outside the ordinary course of trade. Prior to the TPEA, ''reasonable grounds'' in an initial AD investigation were based on evidence and allegations submitted by petitioners regarding the foreign producer's likely production costs relative to its comparison market sales prices. The DOC would determine if these allegations were sufficient, and if so, would then initiate a ''sales below cost'' investigation. The situation in an administrative review was similar, except that the DOC could also rely on evidence of sales below cost in prior proceedings (i.e., either the initial investigation or prior reviews) as ''reasonable grounds to believe or suspect.''

As a result of the TPEA, the DOC is now directed to request the respondent's cost of production data in every AD investigation and review in order to determine whether there are ''reasonable grounds to believe or suspect'' that sales were made at below cost prices. In other words, now, the request for the submission of cost information comes before the Department decides whether ''reasonable grounds'' exist, and no allegation needs to be made by petitioner before such data are requested. This amendment thus brings U.S. law into line with the AD laws of other major jurisdictions, such as the EU and China, which also require respondents to submit cost of production data with their initial questionnaire responses.

''The real benefit of this amendment accrues to petitioners, as they are now relieved of the burden of making a 'sales below cost' allegation in every case.''

While on its face, this amendment might seem to result in a significant increase in the burden on respondents, in fact, this change is likely to have little practical impact on them. ''Sales below cost'' allegations are made in nearly every case, and in almost all cases in which they are made, the DOC decides to initiate a ''sales below cost'' investigation. The real benefit of this amendment accrues to petitioners, as they are now relieved of the burden of making a ''sales below cost'' allegation in every case.

Moreover, this amendment even eliminates the slight possibility that such an allegation could be rejected, ensuring that cost data will be submitted in every single AD investigation and review.

c. Selection of Surrogate Values in Non-Market Economy Cases. As noted above, in calculating normal value for foreign companies located in NMEs, the DOC uses ''surrogate values'' taken from market economy countries in order to calculate a hypothetical market-based cost of production for the foreign producer. These surrogate values typically represent the value of imports into a selected surrogate market economy country. For example, the DOC might use the value of imports into Thailand during the period of investigation as the basis for valuing a Chinese producer's inputs.

A limited exception exists where an NME producer buys a sufficiently large quantity of an input from a market economy source; in such case, the DOC will use the producer's actual purchase price to value the consumption of that input. For example, in an AD investigation of wooden furniture from China, a Chinese furniture producer might purchase all of its requirements for a particular type of wood from Canada. In such case, rather than using a surrogate value based on imports into the country being used to derive surrogate values (say, imports into Thailand), the DOC will instead use the Chinese producer's actual purchase price for that wood from Canada.

In calculating these surrogate values, though, the DOC disregards values derived from countries which maintain ''broadly available export subsidies.'' In practice, this has led the DOC to disregard imports into surrogate countries from countries such as India, Indonesia and South Korea, which are believed to maintain such subsidies. Because for whatever reason imports from these countries tend to be lower in price, the exclusion of imports from these countries generally tends to increase the surrogate value used. Similarly, where a producer in an NME country buys an input from such a country, the DOC has also disregarded those market economy purchases in favor of a surrogate value.

So in the example above, if the Chinese furniture producer purchased all of its requirements for a particular type of wood from Indonesia, those purchase prices will likely be rejected in favor of a surrogate value, just as if the Chinese producer bought the input from a Chinese source. These surrogate values are often higher than actual purchase prices and are at the very least highly unpredictable.

In recent cases, though, the DOC's decisions to reject values from these countries have been challenged before the CIT. These cases have held that before rejecting values form these countries, the DOC must demonstrate that (1) subsidies of the industry in question existed in the supplier countries during the period of investigation; (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier to not have taken advantage of such subsidies. See *Fuyao Glass Industry Grp. Co. v. United States*, 29 Ct. Int'l Trade 109 (2005).

While a ''formal investigation'' of such subsidies is not required, it nevertheless still held that DOC's ''presentation of substantial, specific evidence and an adequate elucidation of reasons for its determinations are essential.'' See *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334 (CIT 2003), aff'd 104 Fed. Appx. 183 (Fed. Cir. 2004).

Through the TPEA, the DOC has now been granted a much freer hand in rejecting values from such coun-

tries. The relevant section of the Act now reads as follows:

> In valuing the factors of production . . ., the [Department] may disregard price or cost values *without further investigation* if the [Department] 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 (emphasis added).

This clause suggests that if the DOC can demonstrate that export subsidies exist, the DOC may now exclude those values without having to demonstrate that the producers in the surrogate country in fact received those subsidies, or even that it was likely that they did so. Instead, if the DOC finds that such export subsidies exist, those values can now be disregarded ''without further investigation,'' meaning without any positive evidence to demonstrate that the producers in question actually benefited from that subsidy.

d. Limitation on the Selection of Voluntary Respondents. Over the past several years, in virtually every AD/CVD investigation or review involving three or more foreign producer/exporters, the DOC has limited the number of respondents it selects for individual investigation or review. In those cases, the DOC selects a limited number of respondents (typically two or three) to serve as so-called ''mandatory respondents.'' Generally speaking, the company-specific margins for these mandatory respondents are then weight-averaged, and this average is applied to the remaining foreign producer/exporters that were not individually selected.

In some cases, foreign producer/exporters who believe that their own data will yield a lower AD/CVD margin will volunteer to participate in the investigation by submitting their own sales and cost data. The DOC must then decide whether to allow these additional ''voluntary respondents'' to participate fully in the proceeding.

In most cases, the DOC denies companies the right to participate as a voluntary respondent on the grounds that the ''additional individual examination of such exporters or producers would be unduly burdensome to the administering authority and inhibit the timely completion of the investigation.'' (19 U.S.C. § 1677m(a)). In these cases, the DOC often cites to the pending cases assigned to the relevant office as a basis for denying voluntary respondent treatment. But in several recent cases, the CIT has held that the DOC's normal workload is not itself a sufficient basis to refuse to accept additional voluntary respondents.

The TPEA amends the Act to provide a list of the factors the DOC may consider in deciding whether the acceptance of additional respondents would be ''unduly burdensome.'' Since most of these are factors the DOC already relies upon to make its determination, their inclusion in the Act was perhaps only intended by Congress to be a sign that these factors are a sufficient basis for the DOC to decline to accept additional voluntary respondents. In particular, the TPEA amendments state that the DOC may consider ''[s]uch other factors relating to the timely completion of each such investigation and review as the administering authority considers appropriate'' in refusing to accept voluntary respondents. This catch-all clause appears to offer the DOC a broad, flexible statutory basis to justify a decision to refuse to accept voluntary respondents.

e. Use of Adverse 'Facts Available.' The TPEA significantly increases the Department's discretion in selecting ''facts available,'' and in particular adverse ''facts available'' where parties are uncooperative. Foreign producers should be aware that the DOC now has even greater authority to impose extremely high margins on companies that decline to participate in AD/CVD proceedings.

When the DOC resorts to ''facts available'' by assigning a high margin to a non-cooperative party, the DOC is required by statute to ''corroborate'' that information ''to the extent practical.'' Long-standing precedent from the Court of Appeals for the Federal Circuit has interpreted the corroboration requirement to mean that an adverse ''facts available'' margin applied to an uncooperative respondent ''should be reasonable and have some basis in reality,'' and should be ''a reasonably accurate estimate of the respondent's actual rate.'' See *F.lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027 (Fed. Cir. 2000). While this case dates from 2000, it is often cited in decisions challenging the DOC's use of adverse ''facts available'' rates, and has resulted in several judicial remands for the DOC to justify or modify the adverse ''facts available'' rates selected.

The TPEA effectively overturns this decision. Now, the DOC is no longer required to adjust or modify the adverse AD/CVD rate selected ''based on any assumptions about information the interested party would have provided if the interested party had complied with the request for information.''

Similarly, the TPEA also limits the corroboration requirement to clarify that the DOC ''shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding.'' This means that any rate from any prior proceeding under the same AD/CVD order is now fair game for use as an adverse ''facts available'' margin, with no further support required.

Second, in selecting which adverse ''facts available'' AD/CVD margin to use, the DOC has been given even greater latitude. To determine the subsidy rates for individual programs in a CVD proceeding, the TPEA permits the DOC to use the subsidy rate found for a same or similar program from the same country, or in the absence of such rate, the DOC may use a subsidy rate from any other program it deems ''reasonable.''

In AD proceedings, the DOC may use any dumping margin from any segment under the same AD order. These provisions generally reflect the DOC's current practice, but their inclusion in the statute now gives the DOC greater support if its decision is challenged.

''Taken together, the changes to this section give the DOC almost unfettered discretion to impose extremely high AD/CVD margins on companies that do not fully participate in the DOC's proceedings.''

Importantly, though, in selecting these AD or CVD rates, the TPEA specifically grants the DOC the discretion to select the highest rate to use as an adverse infer-

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ence. In so doing, the DOC is not required to estimate what the dumping or subsidy rates would have been if the respondent had participated, nor is it required to determine if the rate used ''reflects an alleged commercial reality of the interested party.'' Taken together, the changes to this section give the DOC almost unfettered discretion to impose extremely high AD/CVD margins on companies that do not fully participate in the DOC's proceedings.

f. Determining Material Injury to a Domestic Industry. The TPEA makes changes to the determination of injury in two areas, both of which have the effect of making it easier for the U.S. International Trade Commission (ITC) to reach an affirmative determination in its injury investigations.

First, the TPEA addresses how the ITC should consider a U.S. industry's profitability in its injury analysis. One of the amendments provides that ''[t]he Commission may not determine that there is no ''material injury'' or ''threat of material injury'' to an industry in the U.S. ''merely because that industry is profitable or because the performance of that industry has recently improved.'' At the same time, the ITC may now consider not just ''profits,'' but gross profits, operating profits and net profits (along with the ability to service debt and return on assets) as measurements of injury.

The implication of these changes is that the ITC will be able to find material injury even for industries that appear to be healthy. The ITC likely could have taken all of these factors into account even prior to the TPEA, given the broad discretion it has in making its injury determination, but as with other revisions in the TPEA, this amendment is designed to give the ITC's decision even greater insulation from future judicial challenge.

Second, the TPEA amends a provision of Section 771(7) related to the treatment of so-called ''captive production.'' In certain industries, a domestic like product is both produced as an end product sold in a merchant market, but is also used or consumed internally as an input in the production of downstream nonsubject products by the sane U.S. companies who produce the domestic like product. (A good example is cold-rolled steel, which is both sold on the merchant market but is also used internally by steel producers to produce other coated steel products.) Previously the Act directed the ITC to focus primarily on three conditions to determine whether this captive production exception was met:

(i) the domestic like product used to produce the downstream article does not enter the merchant market,

(ii) the domestic like product is the ''predominant material input'' in the production of a the downstream product, and

(iii) the domestic like product sold in the merchant market is not generally used in the production of that downstream product.

''As a general matter, a focus on the merchant market is favorable to U.S. industries bringing an AD/CVD case, as it tends to shrink the size of the U.S. market being considered, which thus increases the apparent presence of imports in the market.''

The TPEA eliminates the third factor from this test, meaning that even if the domestic like product sold in the merchant market is generally used to produce the same downstream product as is the internally consumed domestic like product, the ITC can still focus primarily on the merchant market in making its injury determination. As a general matter, a focus on the merchant market is favorable to U.S. industries bringing an AD/CVD case, as it tends to shrink the size of the U.S. market being considered, which thus increases the apparent presence of imports in the market.

2. Effective Date for the TPEA Amendments. While the TPEA contains a number of effective dates for its various reauthorization provisions, it fails to contain a specific effective date for its amendment to the AD/CVD law. In the absence of any specific Congressional directive, the determination of the effective date of the TPEA amendments is left to the agencies applying them.

On August 6, 2015, the DOC published a Federal Register notice regarding the effective dates for the provisions of the TPEA it is responsible for administering (80 Fed. Reg. 46,793). Pursuant to this notice, the amendments discussed above under 1(a), 1(c), 1(d) and 1(e) will be applied to all determinations made after Aug. 6, 2015. Since the amendment described under 1(b) affects the information collected in a proceeding, the DOC has announced that it will only be applied in determinations where the ''complete initial questionnaire'' has not been issued by Aug. 6, 2015, in order to give the DOC and the parties sufficient time to submit the cost of production information the amendment requires. As a result of this notice, parties currently involved in proceedings before the DOC should carefully consider how their case strategies and liabilities may be affected by these amendments.

The ITC has not yet issued a notice regarding the effective date for the change to the material injury standard described in 1(f).