The International Trade Law Review

Second Edition

Editors
Folkert Graafsma and Joris Cornelis

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CONTENTS

EDITORS' PREFACE

Ancient wisdom has it that 'anything can happen' in this year of the 'Fire Monkey'.[1] And indeed, while some of this year's events could have been foreseen, such as the impending expiry of part of China's Protocol of Accession, other remarkable incidents such as the Brexit vote have confirmed ancient wisdom. Such events – and the issues and challenges they present – have helped to further propel international trade law from a niche area of interest to a select few onto a stage with a larger and more captive audience.

Brexit has illustrated that a domestic decision can have unexpected and far-reaching international ramifications. And while the world is still struggling to fully comprehend its economic and trade impact, the trading relationship of a number of economies with China continues to attract attention. Notably, it remains to be seen how certain WTO members will respond to the impending expiry of part of China's Protocol of Accession. The relevant part of Section 15 of the Protocol has thus far permitted investigating authorities to derogate from regular calculation methods to determine domestic prices and costs for Chinese products. This impending expiry, set for 11 December 2016, has already stirred up debates ranging from diverse places such as the European Parliament to the *Global Trade and Customs Journal*.

Moreover, the recent findings of the Panel in *Argentina – Biodiesel*, prohibiting investigating authorities from deviating from actual cost records of an exporter in regular market-economy anti-dumping proceedings, has further raised the stakes of the impending expiry of part of the Protocol. Although this Panel Report is currently still under appeal, the additional consequence of this Report is that, while on 11 December part of the Protocol will expire, the previously used alternative cost calculation methods for 'regular' market economies will likewise no longer be permitted towards China after that date. As a result of

1 The Chinese calendar contains horoscope signs based on a yearly categorisation. According to this horoscope, the first day of the Red (Fire) Monkey started on 4 February 2016. The year 2016 is counted per the Gregorian calendar, and (more or less) equals the 4,713th year counted per the Chinese calendar. As a trivial fact it can be noted that famous 'monkeys' include Justin Timberlake and Leonardo Da Vinci.

these combined constrictions, certain jurisdictions have felt compelled to initiate a flurry of anti-dumping proceedings right now, as currently they can still deviate from local Chinese costs and prices without controversy.

We are therefore deeply grateful for the continued participation and support from the following authors who were willing to share their profound knowledge and expertise in this field: Phillipe De Baere from Van Bael & Bellis for the WTO chapter, Alfredo A Bisero Paratz at Wiener Soto Caparros for the Argentine chapter, Mauro Berenholc at Pinheiro Neto Advogados for the Brazilian chapter, our friend and colleague Elena Kumashova for the Eurasian Economic Union Chapter, Shiraz Patodia at Dua Associates for the Indian chapter, Adrian Vázquez at Vázquez Tercero y Zepeda Abogados for the Mexican chapter, Bulent Hacioglu at Trade Resources Company for the Turkish chapter, and the undersigned for the European Union chapter.

And we are even more pleased and honoured to welcome onboard new and acclaimed contributors. Thanks to their in-depth know-how and contributions, this book brings together an even broader set of rich experiences: Ignacio Garcia at Porzio, Rios, Garcia & Asociados Abogados for the Chilean chapter, Erry Bundjamin at Bundjamin & Partners for the Indonesian chapter, Yuko Nihonmatsu and Fumiko Oikawa at Atsmui & Sakai for the Japanese chapter, Lim Koon Huan at Skrine for the Malaysian chapter and, last but not least, Alex Schaefer and Jeff Snyder at Crowell & Moring LLP for the US chapter.

We are indebted to all these outstanding practitioners, who in spite of their demanding schedules, have taken the time to preserve and pass on their insights, gained as the result of years of practice in the field of international trade. We hope and trust therefore that readers find their chapters both useful and insightful.

Folkert Graafsma and Joris Cornelis
Vermulst Verhaeghe Graafsma & Bronckers (V V G B)
Brussels
September 2016

Chapter 13

UNITED STATES

Alexander H Schaefer, Charles De Jager and Benjamin Blase Caryl[1]

I OVERVIEW OF TRADE REMEDIES

The following is a brief introduction to the various areas of US trade remedies law, including the anti-dumping (AD) and countervailing duty (CVD) laws as well as other statutes designed to address different types of trade violations.

i Anti-dumping/countervailing duty

The AD and CVD laws are the best-known and most frequently used trade remedies laws in the United States. The AD laws are designed to provide a remedy (in the form of an import duty) for domestic industries that have been injured or threatened with injury by imports of unfairly priced ('dumped') merchandise, whereas the CVD laws are designed to provide a remedy (also in the form of an import duty) for domestic industries that have been injured or threatened with injury by imports of merchandise produced or exported by companies benefiting from impermissible subsidies. Thus, each type of case features two components: an injury evaluation,[2] conducted by the US International Trade Commission (ITC), and an analysis of the alleged wrongdoing – namely dumping (in AD cases) or subsidisation (in CVD cases) – conducted by the US Department of Commerce (the Department, or Commerce). Only if the agencies find both injury and dumping does an AD order issue, and likewise only if the agencies find both injury and unlawful subsidisation does a CVD order issue.

1 Alexander H Schaefer is a partner, Charles De Jager is a counsel and Benjamin Blase Caryl is an associate at Crowell & Moring LLP.

2 Technically, in addition to material injury and the threat of material injury, ITC may also evaluate whether the establishment of an industry in the US has been 'materially retarded'. In practice, however, this allegation is rarely made, and affirmative findings of material retardation of a US industry are exceedingly unusual.

Dumping and subsidisation

Under US AD law, 'dumping' means selling a class or kind of merchandise at 'less than fair value.'[3] To evaluate whether an exporter to the US is dumping, Commerce first calculates the fair or 'normal' value – typically, the price at which the producer sells the same merchandise in the home market.[4] It then compares that value to the US price (as adjusted for differences in freight, selling expenses, etc.). If the export sale is to an unrelated party, then the export price serves as the US price; if the export sale is to a related party, then the US price is based on the first sale in the US to an unrelated party. Thus, where a foreign exporter sells to its US affiliate, the US price is based on that affiliate's sale to its unrelated customer(s). Note, however, that because the US AD law treats China and Vietnam as 'non-market economies', it presumes that pricing in those markets is distorted and cannot serve as a reasonable basis for comparison to US prices. So, in cases involving those countries Commerce uses a complex and somewhat unpredictable 'surrogate value' methodology, whereby it takes the various inputs and cost elements required to produce the merchandise and then values them based on their market prices in a 'surrogate country'.[5] A surrogate country must be a producer of the merchandise at issue and must also be at a level of economic development similar to that of Vietnam or China, depending on the case.[6] The extent to which the 'normal value' exceeds the US price is known as the 'margin of dumping',[7] and ultimately translates into the AD duty that must be deposited at the time of entry.

Subsidisation, as noted above, does not involve unfair pricing but rather the provision of unlawful subsidies. Such subsidies can take a variety of forms (e.g., tax holidays, export credits, debt forgiveness, etc.) provided that they confer a financial benefit on the recipient(s) and that they are 'specific,' meaning that they are provided to particular companies or industries either as a matter of law or as a matter of fact.[8] The 'margin' of subsidisation is calculated by spreading some portion of the subsidy benefit amount over the exporter's production or export sales value.[9]

If Commerce calculates a margin of dumping or subsidisation above the *de miminis* level (typically 2 per cent in AD investigations and 1 per cent in CVD determinations), then it issues an affirmative determination.[10]

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3 19 U.S.C. §§ 1673(a) and 1677(34).

4 If the quantum of home market sales are too small relative to US sales, Commerce may consider other bases for 'normal value,' including sales to third countries or, failing that, cost of production plus a reasonable profit.

5 19 U.S.C. § 1677b(c).

6 There are several surrogate countries that Commerce typically identifies; of late the most frequently used are Thailand and Indonesia.

7 19 U.S.C. §§ 1677(35) and 1677b.

8 19 U.S.C. §§ 1677(5) and 1677(5A).

9 This 'spreading' process is dependent on the nature of the subsidy; for example, if the subsidy comes in the form of an export credit paid only on export sales, then the subsidy value will be spread across only those sales. But if the subsidy is, say, a tax benefit that is not tethered to export sales, then it will be spread over all sales of that merchandise.

10 19 U.S.C. §§ 1671d(a) and 1673d(a).

Injury

ITC's injury analysis focuses on a three-year snapshot of the performance of the domestic (US) industry and includes a variety of factors such as profitability, capacity utilisation, capital investment and R&D.[11] It also evaluates pricing trends for the domestically produced and imported merchandise over time to examine the relationship between imports and the domestic industry's performance.[12] If ITC finds a causal connection between imports and material injury (or threat of injury) to the domestic industry, it issues an affirmative determination.[13]

Investigation and review procedures

AD and CVD investigations are typically commenced by the filing of a petition by the domestic industry.[14] Following that filing, Commerce must confirm that the petitioners and supporters represent a sufficiently large proportion of the industry to have standing;[15] if so, then the case moves to ITC for a preliminary determination as to whether there is a 'reasonable indication' of injury or threat.[16] If ITC makes a negative determination at this juncture then the case is dismissed, but in practice the 'reasonable indication' standard is a low one and it is quite rare for an AD and/or CVD case to conclude at this stage.

If ITC makes an affirmative determination that there is a reasonable likelihood of injury (or threat thereof), then the case moves to Commerce, which analyses whether and to what extent there is dumping or subsidisation, or both. Commerce issues comprehensive questionnaires to the largest two or three exporters of the subject merchandise seeking sales and production data, and it typically conducts an on-site audit of those data known as a 'verification.' If respondents provide incomplete or inaccurate data, or otherwise fail to cooperate, they may be subject to adverse findings that can result in extremely high margins and duties; recent cases have seen combined AD and CVD margins in excess of 500 per cent. Commerce makes a preliminary determination (typically about seven months after the investigation begins) as to whether there has been dumping or subsidisation;[17] at that point, importers must begin paying duties at the rates that Commerce has provisionally calculated.[18] After that, both Commerce and ITC begin their final investigatory phases, in which interested parties may submit briefs and provide testimony. To the extent that Commerce makes a final affirmative determination that there is dumping and ITC makes a final affirmative determination of injury or threat, Commerce issues an AD or CVD order, or both, and importers must continue making duty deposits at the final rates Commerce calculates.[19] If either agency issues a negative determination, then the case ends and the US Customs and Border Protection (CBP) refunds any duties remitted between Commerce's preliminary and final determinations.

11 19 U.S.C. § 1677(7)

12 Id.

13 19 U.S.C. §§ 1671d(b) and 1673d(b).

14 19 U.S.C. §§ 1671a(b) and 1673a(b).

15 19 U.S.C. §§ 1671a(c)(4) and 1673a(c)(4).

16 19 U.S.C. §§ 1671b(a)(1) and 1673b(a)(1).

17 19 U.S.C. §§ 1671b and 1673b.

18 19 U.S.C. §§ 1671b(d) and 1673b(d).

19 19 U.S.C. §§ 1671d(c)(2)–(c)(4) and 1673d(c)(2)–(c)(4).

The initial rate at which importers deposit duties thus is based on past sales data.[20] As such, AD and CVD deposit rates are subject to change via annual 'administrative reviews' that may be requested by any US producer, foreign producer or exporter, or US importer of the subject merchandise.[21] If a producer's margin of dumping for a particular annual period is lower than the deposit rate, then the US importers of that producer's merchandise receive a refund of the difference (plus interest).[22] If the margin is higher than the deposit rate, then the importers are invoiced for the difference (again plus interest).[23] In addition, the rates calculated in these administrative reviews become the new deposit rates for importers going forward. But given that the reviews themselves frequently take in excess of a year to be completed, it may be several years after an import entry is made before the final assessment rate for that entry is established.

In addition to annual administrative reviews at Commerce, AD and CVD orders are subject to five-year 'sunset reviews'. Conceptually, AD and CVD orders are designed to be temporary measures; as such, the sunset review procedures are designed to verify that the industry still needs the orders. As a result, every five years ITC conducts a review to evaluate whether revocation of the order(s) would lead to the recurrence of injury, and Commerce conducts a review to consider whether revocation of the order(s) would lead to the recurrence of dumping or subsidisation, or both.[24] If either agency concludes that an order is no longer necessary, then the order is 'sunset' (revoked).[25] Revocations in the first five-year sunset review are rare; with results becoming more mixed in subsequent reviews.

Appeals

Interested parties that participated in the agency proceedings may appeal AD and CVD determinations in reviews and investigations (including determinations as to the 'scope' of AD/CVD orders and what products do and do not fall within it) go to the US Court of International Trade (CIT), an Article III court that sits in Manhattan. The CIT has exclusive jurisdiction over AD/CVD matters as well as certain types of customs issues. The CIT acts in many respects like an appellate court – its judges may not re-weigh the evidence or substitute their own judgment for that of the agencies; instead, the role of the judge assigned to a case is limited to evaluating whether the agency decisions at issue were supported by 'substantial evidence on the record'. If so, then the judge must affirm those decisions (whether or not he or she would have reached the same ultimate conclusion); if not, the judge must remand the matter to the agency for further consideration. Appeals from CIT decisions go to the US Court of Appeals for the Federal Circuit (CAFC) in Washington, DC. Interestingly, that court has interpreted the AD/CVD statute as allowing the CAFC to conduct *de novo* review,[26] which has been the cause of some consternation in the US trade bar since the CIT is a specialised trade court whereas the CAFC hears primarily patent matters, appeals of Veteran's

20 See 19 U.S.C. §§ 1671d(c)(1)(B)(ii) and 1673d(c)(1)(B)(ii).

21 19 U.S.C. § 1675(a)(1).

22 19 U.S.C. § 1677g.

23 Id.

24 19 U.S.C. §§ 1675(c) and 1675a.

25 19 U.S.C. § 1675(d).

26 See *NSK Corp. v. U.S. Int'l Trade Comm'n*, 542 F. App'x 950 (CAFC 2013).

Administration determinations and other non-trade issues. Interested parties aggrieved by CAFC decisions may file a petition for *certiorari* with the US Supreme Court, but such petitions are rarely granted, and grants typically must involve a constitutional question.[27]

In cases involving Mexico or Canada, interested parties may opt to invoke NAFTA's dispute resolution provisions and conduct their appeal before a binational panel in lieu of filing in the CIT. The panel will include five panelists from a roster that the importing and exporting countries maintain, but it will apply the law of the importing country; so, in appeals of US AD/CVD determinations involving Canada or Mexico, the panel will apply US law.

ii Other trade remedies

There are several other types of US trade remedies proceedings that merit mention. The first is a so-called 'safeguard' action, commonly known as a '201' action in reference to its statutory underpinning at Section 201 of the Trade Act of 1974.[28] Section 201 cases are designed to address a situation where imports of a particular class or kind of merchandise are increasing to the point of being a 'substantial' cause of 'serious injury' to the US industry.[29] These cases differ from AD/CVD proceedings in several important ways: first, the domestic industry need not allege any wrongdoing by the exporting countries. Second, the standard for making the 'serious injury' showing is substantially higher than the standard for 'material injury' applied in AD/CVD cases (which is the primary reason why 201 proceedings are comparatively rare). Third, even if petitioners successfully satisfy that standard, the President has the discretion to grant or deny relief. If relief is granted, it can take the form of duties or quotas, and it may not last longer than four years (though it can be extended for up to an additional four years).

The US also provides a remedy for US holders of intellectual property (IP) rights that are alleged to be infringed by imports. These proceedings, known as '337' cases because of their statutory underpinning in Section 337 of the Trade Act of 1974,[30] are heard by administrative law judges and ultimately the ITC. Although ITC cannot award monetary damages the way that a federal district court can, it has the power to exclude merchandise from being imported – as a result, 337 cases are often brought in parallel to infringement cases in federal court to increase the complainant's leverage and scope of relief. In addition to IP violations, Section 337 also covers imported products manufactured via the use of other unfair trade practices (e.g., child labour). That provision of the statute has rarely been invoked, but in 2016 the steel industry did so in an attempt to lock out Chinese steel – a further discussion of that proceeding follows in Section V.iii, *infra*.

II LEGAL FRAMEWORK

US AD and CVD proceedings are subject to both US law and agency regulation: the law is set out in 19 U.S.C. §§ 1671 and 1673 (for AD and CVD investigations, respectively), and

27 In the past decade, only one trade case has reached the Supreme Court. See *United States v. Eurodif S.A., et. al.*, 555 U.S. 305 (2009).

28 See 19 U.S.C. § 2252 et. seq.

29 Id.

30 See 19 U.S.C. § 1337.

the regulations appear in 19 C.F.R. § 351 et seq. and 19 C.F.R. § 207 et seq. (for Commerce's and ITC's regulations, respectively). Importantly, both agencies' regulations provide for the creation of 'administrative protective orders' or 'APOs', which ensure that the sensitive data that parties are obliged to provide in AD/CVD proceedings remain confidential to foreclose any possibility of the cases being used opportunistically to troll for competitive information.

World Trade Organization (WTO) Member States that conclude that a Commerce or ITC determination violates the United States' obligations under the WTO may invoke the WTO's dispute resolution provisions. However, as a matter of US law the WTO's decisions are not legally binding on the US[31] – following an adverse decision, the US may either opt to bring its practices into conformity on a prospective basis (in general no retroactive correction is required), or it may ignore the WTO's findings altogether (subject to the right of the aggrieved WTO member to retaliate within the bounds of what the WTO agreements allow).

III TREATY FRAMEWORK

Although the WTO generally favours free trade, the WTO nevertheless allows Member States to maintain trade remedies laws and regulations, subject to the WTO's parameters on methodology, transparency and fairness. This 'carve-out' for trade remedies proceedings reflects the desire of the US and its colleague Member States to be able to maintain trade remedies regimes notwithstanding the general movement towards free trade. That being so, the free trade agreements (FTAs) into which the US has entered tend not to address AD/CVD and safeguard actions other than to reaffirm the legitimacy of such actions. As noted in Section I, *infra*, NAFTA allows aggrieved party Member States in trade remedies proceedings brought by another Member State to appeal to a binational panel rather than to the CIT, but NAFTA is unique in this regard. On occasion, as a part of the FTA negotiatory process, the US will insist on certain trade remedies provisions; for example, during the negotiation of the Korea–US FTA, the parties agreed upon a provision creating a special 'safeguard' mechanism for shipments of automobiles.[32] But aside from these sorts of sectorally targeted initiatives, the United States' treaty arrangements have little impact on US trade remedies law other than to legitimise its continued application to imports from FTA partners.

IV RECENT CHANGES TO THE REGIME

i CBP AD/CVD duty evasion investigation protocols

There has been relatively little legislative action on the US trade remedies front since 2015, when Congress passed several laws modifying the AD/CVD laws, but the prospects for new regulatory measures in the short term merit keeping a close watch. Both the Trade Preferences Extension Act of 2015 and the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA)[33] included a variety of provisions designed to tip the scale further in

31 See 19 U.S.C. § 3512(a)(1).

32 See Correspondence between US Trade Representative Ron Kirk and Korean Trade Minister Kim Jong-Hoon (10 February 2011), available at https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/korus/2011_02_10_Kirk-Kim%20Letter.pdf.

33 Public Law 114-376 114-125, 130 Stat. 122 (2016).

favour of domestic industries in AD and CVD investigations and periodic reviews.[34] The latter of these sought to overhaul and modify CBP procedures, and in particular to increase that agency's focus on importer evasion of AD/CVD duties.[35] The statute was passed in response to widespread complaints that CBP was not fully engaged in the investigation of evasion allegations, even where those allegations were accompanied by *prima facie* evidence demonstrating likely evasion. The TFTEA outlines a structure in which CBP (subject to multiple layers of administrative and court appeal) is obliged to investigate allegations of evasion of AD/CVD duties filed by other federal agencies or interested parties – US importers, producers or wholesellers; foreign producers or exporters; or union and trade associations thereof.[36] On 22 August 2016, CBP issued interim regulations for the evasion investigation system and solicited comments thereon.[37]

A number of domestic producers of goods subject to AD/CVD orders have signalled their intent to submit allegations under this new framework as soon as it has been implemented. In addition, a number of importers of such goods who claim to be at a disadvantage because they are properly depositing AD/CVD duties while certain nefarious competitors are not have likewise indicated interest in submitting allegations (or at least participating in the proceedings). But there are a number of uncertainties associated with the new process, not least the practical threshold standard for what constitutes a properly supported evasion allegation. That being so, practitioners are closely watching for developments in this regard to get an early read on how CBP will effectuate the statute and the extent to which this framework will yield a significant new commercial weapon for interested parties to wield against one another.

ii Maturation of the 'differential framework': zeroing reincarnated

For many years, Commerce applied a 'zeroing' methodology to calculate dumping margins, whereby the agency included only positive dumping margins in its calculations of a weighted-average dumping margin.[38] Under this methodology, sales of subject merchandise made at a price less than the benchmark fair value were not completely offset by sales made at a price above fair value. Foreign exporters and US importers viewed zeroing as a calculation methodology that overstates dumping margins, whereas domestic producers viewed the zeroing methodology as necessary to fully address dumping, including foreclosing exporters from offsetting 'dumped' sales to certain customers or in certain regions or time periods with opportunistic sales above fair value to other customers or in other regions or time periods (a practice known as 'masked' or 'targeted' dumping).

34 See the United States chapter of the first edition of *The International Trade Law Review* for a detailed summary of those provisions.

35 19 U.S.C. § 4371.

36 19 U.S.C. § 1517.

37 Investigation of Claims of Evasion of Antidumping and Countervailing Duties, 81 Fed. Reg. 56,477 (22 August 2016).

38 I.e., the Department does not offset positive margins with negative margins because it assigns a value of zero to negative margins. For a detailed explanation of the Department's zeroing practice and its history, see *Union Steel v. United States*, 823 F. Supp. 2d 1346, 1348–1351 (Ct. Int'l Trade 2012), aff'd 713 F.3d 1101 (Fed. Cir. 2013).

Due to the United States' implementation of several adverse WTO decisions, zeroing is no longer the Department's default methodology for dumping calculations.[39] But from the outset of those changes, the Department indicated that while its default methodology would no longer apply zeroing, it would determine 'on a case-by-case basis' whether it might be appropriate to diverge from the default and apply a quasi-zeroing approach.[40] In that regard, the US trade remedies laws include a provision that may allow for such an approach where the Department finds 'targeted dumping' (i.e., where it finds a 'pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions or periods of time' that cannot be fully addressed by the default calculation methodology).[41]

Since 2008, the Department has toggled among several different methodologies for identifying and addressing targeted dumping. In 2013, the Department rolled out what has become known as the 'differential pricing' analysis,[42] which it now applies in all AD proceedings to determine (1) whether an exporter's sales data suggest that it has engaged (knowingly or unknowingly) in targeted dumping; (2) the extent of any such targeted dumping; and (3) whether the use of zeroing in the dumping margin calculation is an appropriate methodology to address the targeted dumping (if any). Although the CIT has been hearing challenges to the Department's various targeted dumping methodologies for several years, challenges to the Department's new differential pricing analysis have only recently reached the CIT (in late 2015 and 2016), and there now are multiple appeals pending in the US Court of Appeals for the Federal Circuit.

The status and legality of the differential pricing analysis that Commerce conducts is of critical importance to trade practitioners for the simple reason that AD margins calculated via the use of a zeroing-like methodology tend to be substantially higher than those calculated with the current non-zeroing default methodology. As a result, petitioners in AD cases have a powerful incentive to support the continued application of that methodology, whereas respondents argue that is simply zeroing via the 'back door' and should be discontinued in favour of the Department's default methodology. What follows is a more detailed discussion of the mechanics of the differential pricing framework.

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39 See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation: Final Modification, 71 Fed. Reg. 77,722 (27 December 2006); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification, 77 Fed. Reg. 8,101 (14 February 2012) (Zeroing Final Modification).

40 Zeroing Final Modification, 77 Fed. Reg. at 8,102, 8,104, and 8,106-7; see also 19 C.F.R. § 351.414(c)(1) ('in an investigation or review, the Secretary will use the average-to-average method unless the Secretary determines another method is appropriate in a particular case.').

41 19 U.S.C. § 1677f-1(d)(B). The Department has also used this statutory provision as guidance in deciding when to apply the average-to-transaction method, with zeroing, instead of the default average-to-average method in administrative reviews, which has been affirmed by the courts. *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013); *JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015); *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 608 Fed. Appx. 948 (Fed. Cir. 2015).

42 Xanthan Gum from China: Final Determination of Sales at Less Than Fair Value, 78 Fed. Reg. 33,351 (4 June 2013).

Tests for pattern of significant differences in prices

The first step in the Department's differential pricing analysis involves testing each respondent's sales database to determine whether there has been 'targeting' – that is, whether there is a pattern of prices for comparable merchandise that differs among purchasers, regions or time periods. To make that determination, the Department applies a statistical measure known as the 'Cohen's *d*' test.[43] The Department then quantifies the extent of these differences, if any, by one of three fixed thresholds defined by the Cohen's *d* test: small (0.2), medium (0.5) or large (0.8).[44] If the calculated Cohen's *d* coefficient is equal to or exceeds the large (0.8) threshold, then the Department considers the price differences to be meaningful and the sales database to have 'passed' the Cohen's *d* test (meaning that the respondent engaged in targeted dumping).[45] The Department then applies the 'ratio test' to all sales that passed the Cohen's *d* test (based on purchaser, region or time period). In essence, if the value of 'targeted' sales represents more than 33 per cent of the respondent's total sales, that respondent passes the ratio test.[46]

Meaningful difference test

Where the company's sales pass the Cohen's *d* test and ratio test (i.e., where more than 33 per cent of the company's sales, by value, have Cohen's *d* coefficients of 0.8 or more for at least one of the three patterns (purchaser, region or time period)) then the Department examines whether using only the default calculation method 'can appropriately account' for the pattern(s) of prices that differ significantly.[47] The Department tests this by looking for a 'meaningful difference' between the weighted-average dumping margin using only the default method (without zeroing) and the weighted-average dumping margin using the alternative method (with zeroing). If more than 66 per cent of the value of the company's total sales passes the Cohen's *d* test, the alternative method is to employ zeroing for all sales; if more than 33 per cent but less than 66 per cent of the total sales passes the Cohen's *d* test, the alternative method is to employ zeroing for all sales passing the Cohen's *d* test but apply the default method to the other (non-targeted) sales. The Department finds a meaningful difference between the two methods if:

43 According to the Department, the 'Cohen's *d* coefficient is a generally recognised statistical measure of the extent of the difference between the mean (i.e., weighted-average price) of a test group and the mean (i.e., weighted-average price) of a comparison group' that is then compared to the pooled standard deviation. See, e.g., Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation (29 February 2016), referenced in 81 Fed. Reg. 12,072 (8 March 2016) (*Russian Cold-Rolled IDM*) at 21. 'A pooled standard deviation is a composite value representing the variance between multiple data sets, which in this case are the sales prices of the test group and the comparison group.' *Apex Frozen Foods Private Ltd. v. United States*, 114 F. Supp. 3d 1308, 1325 n.17 (Ct. Int'l Trade 2016).

44 See *Russian Cold-Rolled IDM* at 21.

45 See id.

46 See id. at 21–22.

47 See id.

a there is a 25 per cent relative change in the weighted-average dumping margins if both rates are above the *de minimis* threshold;[48] or

b the resulting weighted-average dumping margin of the default method is *de minimis* and the weighted-average dumping margin of the alternative method is above *de minimis*.[49]

If the Department finds such a meaningful difference exists, it concludes that its default method cannot appropriately account for the price patterns and application of the alternative method (with zeroing) is required.[50] The below table summarises the Department's current differential pricing analysis for targeted dumping:

Statutory factor	*Test*	*Measures*	*Needed to pass*
Pattern of significant difference in prices	Cohen's *d* test	Significance of difference in prices	Coefficient of 0.8
	Ratio test	Whether extent of significance constitutes a pattern	More than 33 per cent of total sales pass Cohen's *d* test
That cannot be taken into account with default method	Meaningful difference test	Compare dumping margin from default method to alternative method (mixed or all zeroing)	If alternative method increases dumping margin by 25 per cent or moves margin across the *de minimis* threshold

The Department is continuing to develop its approach to its differential pricing analysis based on its growing experience and comments received in AD proceedings,[51] but many aspects of the differential pricing analysis have already been challenged before the courts, including the following:

Is 'intent to target' relevant?

The Department's differential pricing analysis does not consider 'intent' or consider alternative explanations of why price patterns exist. The Federal Circuit has held in two separate cases that the targeted dumping statute does not require the Department to conduct an investigation into why the respondent demonstrated a pattern of significant differences of prices.[52] In doing

48 For original investigations, the *de minimis* threshold is 2 per cent; for administrative reviews, the *de minimis* threshold is 0.5 per cent. See 19 C.F.R. § 351.106.

49 See, e.g., *Russian Cold-Rolled IDM* at 22.

50 The CIT has pressed the Department for satisfactory explanations of why the A-A method could not take into account the differences in prices under 19 U.S.C. § 1677f-1(d)(1)(B)(ii). See *Beijing Tianhai Indus. Co. Ltd. v. United States*, 7 F. Supp 3d 1318 (Ct Int'l Trade 2014) and Slip Op. 15-114 (14 October 2015) at 13–15; but see *Apex Frozen Foods, Private Ltd. v. United States*, 37 F. Supp. 3d 1286, 1299 (Ct. Int'l Trade 2014) and *The Timken Co. v. United States*, 2016 Ct. Intl. Trade LEXIS 45, Slip Op. 2016-47 (2016), at *36–37.

51 See, e.g., *Russian Cold-Rolled IDM* at 20.

52 *JBF RAK LLC v. United States*, 790 F.3d 1358, 1368 (Fed. Cir. 2015) (rejecting the argument that the Department improperly refused to consider whether the respondent's pricing pattern was due to market conditions and valid business purposes because the respondent's sales

so, the Federal Circuit has agreed with the CIT that requiring the Department to determine the intent of a respondent would create a 'tremendous' burden on the Department that is not required or suggested by the statute.[53] Following the Federal Circuit's decisions in *JBF RAK* and *Borusan*, the CIT issued several additional decisions upholding the Department's refusal to consider alternate explanations for patterns of significant price differences other than targeted dumping, including pricing strategies such as rebates and holiday discounts,[54] contractually set prices tracking spot prices on the London Metals Exchange,[55] shifting currency exchange rates[56] or volatility in the prices raw material inputs.[57] Most recently, however, CIT Judge Restani offered dicta that the Federal Circuit's decisions did not cover the situation where a respondent affirmatively demonstrates that the price differences are the result of something other than targeting, and her opinion went on to suggest that in such an instance the Department may be obliged to consider such information.[58] A discussion of the WTO's take on this same point follows in Section VI, *infra*.

Higher and lower prices are considered 'targeted'

One of the biggest differences between the Department's prior tests and analyses for targeted dumping and its new differential pricing analysis is that the former considered only significantly lower prices, while the latter captures both significantly higher and lower prices. The CIT has upheld the Department's new policy of including higher-priced sales in determining whether the respondent's sales prices differ significantly, accepting as reasonable the Department's rationale that the function of the Cohen's *d* test is to determine whether a respondent's prices differ significantly, not to identify dumped sales.[59]

How much targeting is required to constitute a 'pattern'?

The Department calculates a Cohen's *d* coefficient when the test and comparison groups of data for a particular purchaser, region or time period each have at least two observations, and when the sales quantity for the comparison group accounts for at least 5 per cent of the total

practice prevented targeting); *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 608 Fed. Appx. 948, 949 (Fed. Cir. 2015) (rejecting the challenge to the Department's failure to consider whether increases in raw material costs, not an intentional targeting scheme, explained the respondent's price pattern).

53 *JBF RAK*, 790 F.3d at 1368 (internal citation omitted).

54 *Samsung Electronics v. United States*, 72 F.Supp. 3d 1359, 1368 (Ct. Int'l Trade 2015).

55 *Golden Dragon Precise Copper Tube Group v. United States*, 2015 Ct. Intl. Trade LEXIS 89, Slip Op. 2015-89 (2015), at *18–20.

56 *The Timken Co. v. United States*, 2016 Ct. Intl. Trade LEXIS 45, Slip Op. 2016-47 (2016) at *21.

57 *Nan Ya Plastics Corp. v. United States*, 128 F.Supp. 3d 1345, 1352–1358 (Ct. Int'l Trade 2015).

58 *The Timken Co. v. United States*, 2016 Ct. Intl. Trade LEXIS 45, Slip Op. 2016-47 (2016) at *21–23, n.12.

59 *Tri Union Frozen Products, Inc. v. United States*, 2016 Ct. Intl. Trade LEXIS 37, Slip Op. 16-33 (2016), at *126. Just as the Cohen's *d* test captures both significantly higher and lower prices, the Department includes both higher and lower priced sales that pass the Cohen's *d* test in its ratio or sufficiency test for whether the extent of significant differences in prices constitute a pattern, which the CIT has upheld as reasonable. Apex Frozen Foods, 114 F. Supp. 3d at 1329-30.

sales quantity of the comparable merchandise.[60] Recently, however, the CIT remanded a case in which the court found the Department had failed to explain why the application of these thresholds that excluded a significant percentage of respondents' total sales values from the Cohen's *d* test was reasonable.[61]

The use of average prices to identify a significant price difference

Thus far, the CIT has upheld the Department's use of weighted-average sales prices for the test and comparison groups in performing the Cohen's *d* test, including the Department's use of annual weighted-average prices for evaluating sales to purchasers and regions and quarterly weighted-average prices for evaluating sales in certain periods of time.[62] Recently, however, the CIT left open the possibility of a future successful challenge against the Department's use of weighted-average prices in determining whether significant differences in prices exist under the Cohen's *d* test.[63]

V SIGNIFICANT LEGAL AND PRACTICAL DEVELOPMENTS

i Increased use of US trade remedies: the return of big steel and more

Beginning in the summer of 2015, the US steel industry went on the offensive and began filing AD and CVD petitions against imports of steel from virtually all major foreign sources. Those cases have included:

a *Certain corrosion-resistant steel products from China, India, Italy, Korea, and Taiwan*;
b *Cold-rolled steel flat products from Brazil, India, Japan, Korea, the Netherlands, Russia, and the United Kingdom*;
c *Hot-rolled steel flat products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey, and the United Kingdom*;
d *Circular welded carbon-quality steel pipe from Oman, Pakistan, the Philippines, United Arab Emirates, and Vietnam*;
e *Heavy walled rectangular welded carbon steel pipes and tubes from Korea, Mexico, and Turkey*;
f *Welded stainless pressure pipe from India*;
g *Stainless steel sheet and strip from China*;
h *Carbon and alloy steel cut-to-length plate from Austria, Belgium, Brazil, China, France, Germany, Italy, Japan, Korea, South Africa, Taiwan, and Turkey*; and
i *Finished carbon steel flanges from India, Italy, and Spain*.

60 See, e.g., *Russian Cold-Rolled IDM* at 21.

61 *U.S. Steel Corp. v. United States*, 2016 Ct. Intl. Trade LEXIS 50, Slip Op. 16-44 (2016), at *21–22.

62 *Apex Frozen Foods Private Ltd. v. United States*, 114 F. Supp. 3d 1308, 1326-28 (Ct. Int'l Trade 2016); *Tri Union Frozen Products, Inc. v. United States*, 2016 Ct. Intl. Trade LEXIS 37, Slip Op. 16-33 (2016), at *121.

63 *Apex Frozen Foods Private Ltd. v. United States*, 114 F. Supp. 3d 1308, 1326 (Ct. Int'l Trade 2016); see also *Tri Union Frozen Products*, 2016 Ct. Intl. Trade LEXIS 37, Slip Op. 16-33, at *122. This decision is currently on appeal before the Federal Circuit. *Apex Frozen Foods Private Ltd. v. United States*, Appeal Number 15-2085 (Fed. Cir.).

This increase in new US trade remedies proceedings has not been limited to steel products. This year has also seen petitions filed on imports of multiple alloys, chemicals, glossy and printing paper, iron pulleys, sheaves and flywheels, plastics, large residential washing machines, phosphor copper, rubber, amorphous silica fabric and biaxial integral geogrid products. Overall, in 2015 there were petitions on 14 products covering 21 countries, a significant increase from the eight petitions covering 10 countries filed in 2014. Thus far, 2016 has continued the pace from 2015, with petitions on 13 products covering 17 countries already filed at the time of writing. Though recent petitions have covered frequent US targets like China, Korea and India, they also have covered countries not typically in the trade remedies spotlight, like Austria, Oman, Pakistan, Portugal, Sri Lanka and the United Arab Emirates.

ITC voted in the affirmative (i.e., finding injury or the threat of injury to the domestic industry and triggering AD or CVD orders) in 88 per cent of the investigations completed in 2015, a significant increase in the affirmative rate from recent years (65 per cent in 2014, 53 per cent in 2013 and 47 per cent in 2012).[64] The 2016 affirmative rate (as of 4 August) is 94 per cent. It is unclear whether this high rate of success is a function of the application of 2015's legislative changes or other factors, but in any event it is the case that petitioners are experiencing a success rate at ITC not seen in the past several years. This high petition success rate is particularly impactful given that the scopes of the new cases and orders (i.e., the technical descriptions of what products are covered by the investigations or orders) have become increasingly vague and expansive, leading to widespread confusion among industry, the trading community and US government agencies (including CBP) as to what products are covered or not covered by these cases.

Historically, it was relatively unusual for any AD or CVD order to be the subject of more than a handful of scope proceedings – subject products tended to be particularised commodities, and as such there was little confusion about what was and was not covered by a trade remedies case.[65] But after expressing concern that foreign producers may be undertaking low-level processing and fabrication to avoid the application of AD or CVD orders, petitioners have shown a recent tendency to draft scope language broadly, including the commodity at issue and arguably also including a number of downstream articles manufactured from that commodity. The result has been a dramatic increase in scope proceedings relating to such downstream articles. The AD and CVD orders on aluminum extrusions from China are the best example of this phenomenon – at the time of writing, those orders (which have been in place for roughly six years) have been the subject of over 150 scope or circumvention proceedings at Commerce, dozens of ongoing appeals before

64 If both AD and CVD petitions were simultaneously filed against the same product-country combination, it was treated as one product-country combination for this chapter, because ITC cumulatively assesses the volume and effects of the dumping and subsidisation of such imports on the domestic industry. 19 U.S.C. § 1677(7)(G)(iii). Because multiple-country petitions can and do result in different determinations, however, the affirmative rate is based on product-country combinations.

65 One notable exception to this general trend was the order covering petroleum wax candles, which included a variety of exclusions and was the subject of dozens of scope proceedings. The order on antifriction bearings likewise featured a number of scope proceedings, though this was in part a function of the fact that it was in place for more than 25 years.

US courts, and endless confusion among importers, many of whom did not participate in the original investigations and were unaware of how broadly the orders ultimately would be interpreted and applied.[66]

Finally, owing to a variety of factors including the 2015 changes to US trade remedy law, Commerce's use of its differential pricing analysis to resume its zeroing methodology, and the general anti-trade political climate, many of the duty rates calculated on newly covered products have been astronomically high. For example, cold-rolled steel imports from China now face AD and countervailing duties of over 500 per cent *ad valorem*.[67]

ii Section 201 Petition Against Imports of Primary Unwrought Aluminum

On 18 April 2016, the United Steelworkers (USW) filed a petition under Section 201 of the Trade Act of 1974[68] requesting the imposition of trade remedies on imports of primary unwrought aluminum pursuant to a global safeguard investigation. In accordance with Section 201, ITC must determine whether the product concerned is imported into the United States in such increased quantities as to be a substantial (i.e., important and not less than any other) cause of serious injury, or the threat thereof, to the domestic industry. Given a positive determination, Section 201 relief applies *erga omnes* to all imports into the United States.

While imports of primary unwrought aluminum into the United States originate in Canada, the Middle East, Russia and Venezuela, the USW's petition focused on excess capacity in China as being a key factor in depressing global primary aluminum prices. Given those prices, the USW alleged that the threat to the domestic industry was so great and imminent that it requested ITC make a finding of critical circumstances, which could have resulted in the imposition of provisional duties during the course of the investigation. The USW also sought relief in the form of safeguard duties to be imposed for four years, with the duty rates beginning at 50 per cent in the first year and decreasing to 35 per cent in the final year.

The USW's petition was notable because requests for the initiation of global safeguard investigations are relatively rare in the US trade remedies context. Even more surprising, however, was the USW's sudden suspension of its petition on 22 April in the face of opposition from a number of other interests in the US domestic industry. This development reflects the willingness of certain domestic interests to avail themselves of nearly all possible means of addressing primarily Chinese excess capacity in their industry as well as the impediments these interests are likely to face even domestically in trying to obtain import relief.

66 Commerce has created a website dedicated solely to scope rulings for the aluminum extrusions orders at http://enforcement.trade.gov/download/prc-ae/scope/prc-ae-scope-index.html.

67 Certain Cold-Rolled Steel Flat Products From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances, 81 Fed. Reg. 32,725, 32,726 (24 May 2016) (265.79 per cent); Certain Cold-Rolled Steel Flat Products From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Partial Affirmative Critical Circumstances Determination, 81 Fed. Reg. 32,729, 32,731 (24 May 2016) (256.44 per cent).

68 19 U.S.C. § 2251.

iii Section 337 proceeding against imports of certain steel products from China

On 26 April 2016, US Steel Corporation filed a petition under Section 337 of the Tariff Act of 1930[69] requesting a total import ban on all carbon and alloy steel products from China. As discussed in Section I, *infra*, Section 337 typically is deployed where a US intellectual property right holder alleges that certain imports are infringing that right.[70] On its face, the statute also prohibits other forms of 'unfair' competition in import trade, such as misappropriation of trade secrets and antitrust violations, but as a practical matter it is rarely if ever used outside of the patent infringement context. It is thus quite novel for US Steel to supplement multiple ongoing AD and CVD proceedings conducted by ITC and Commerce against imports of steel from China with a Section 337 complaint, since the complaint did not include any allegations of patent or trademark violations (though as discussed below it did include an allegation of trade secret theft).

US Steel alleged that numerous Chinese steel producers, distributors and affiliates have (1) conspired to fix prices by controlling output and export volumes in violation of US antitrust rules, (2) misappropriated and used US Steel's trade secrets, and (3) falsified origin designations for Chinese steel imports to circumvent US AD and CVD orders already in force. Pursuant to these allegations, ITC voted to institute a Section 337 investigation of the relevant steel products on 2 June 2016.[71] In accordance with Section 337, an ITC administrative law judge (ALJ) was designated to conduct a trial and render an opinion regarding any violations and proposed remedies.

On 6 July 2016, the presiding ALJ issued an initial determination that suspended the investigation, citing two justifications. First, the matter at hand appeared to the ALJ to fall partly within the purview of the AD and CVD laws, requiring the ITC to notify Commerce. Second, the scope of certain pending proceedings before Commerce could potentially overlap with the scope of the Section 337 investigation. However, US Steel filed a petition for review of the ALJ's initial determination, and on 5 August 2016 ITC reversed the ALJ's initial determination and ruled that the investigation should continue.[72] As a result, the investigation has been remanded to the ALJ for further proceedings.

This development highlights the lengths to which domestic steel producers may now go to seek import relief, especially from China, and the difficulties investigating authorities will encounter in trying to balance the competing legal and political implications of these novel approaches.

VI TRADE DISPUTES

In *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*,[73] Korea challenged certain aspects of Commerce's methodologies in determining dumping and imposing definitive duties against imports of such washers from Korea. Specifically, Korea challenged certain aspects of the methodologies used by Commerce

69 19 U.S.C. § 1337.

70 See Section I.ii, *infra*.

71 81 Fed. Reg. 35381 (2 June 2016).

72 See www.usitc.gov/secretary/fed_reg_notices/337/337_1002_notice08052016sgl.pdf.

73 *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, DS464.

to determine whether the conditions for the application of the alternative comparison methodology under the second sentence of Article 2.4.2 of the WTO Antidumping Agreement (ADA) were met.[74] Korea also challenged Commerce's use of zeroing in the context of the comparison methodology. The Panel in this case upheld Korea's claims regarding both application of the relevant comparison methodology and the use of zeroing.[75]

With respect to the comparison methodology, Korea argued that Commerce resorted to the use of the alternative methodology without explaining why the price differences it found could not appropriately be accounted for under the default methodologies. Korea further argued that no aspect of Commerce's differential pricing methodology (DPM) sought to identify a 'pattern' of export prices, as required under the second sentence of ADA Article 2.4.2. The Panel agreed, faulting Commerce for relying on the alternative methodology and the DPM and thereby failing to consider whether the price differences may have been explained by factual circumstances other than targeted dumping.

With respect to zeroing, the Panel found that each pattern transaction must be duly considered regardless of whether the export price is above or below normal value because the second sentence of ADA Article 2.4.2 refers to the prices of individual export transactions. As a result, the Panel also found that Commerce's use of zeroing when applying the alternative methodology was inconsistent with ADA Article 2.4.2.

VII OUTLOOK

Trade remedies proceedings in the US are active – this is partly a function of the number of new cases that have been filed in recent months, and partly because of the ambiguity of the 'scope' of some of those cases. It is difficult to say whether the rate of filing of new cases will continue – in general, that rate is counter-cyclical (meaning that cases tend to be filed when the economy slows), although that is not always true. But whether or not new cases are filed, it appears likely that disputes over the scope of existing cases – and litigation about that scope – will continue. Moreover, the new US regulations obliging CBP to investigate allegations of duty evasion are sure to be tested by parties with a commercial interest in the ultimate result. In short, as has been said in many past years, rumours of the death of US trade remedies have been – at least for the moment – greatly exaggerated.

74 The second sentence of ADA Article 2.4.2 allows for deviation from weighted average-to-weighted average (W-W) or transaction-to-transaction (T-T) comparisons of normal value and export price if an investigating authority finds a pattern of targeted dumping. In such cases, a weighted average-to-transaction (W-T) comparison is permissible. The W-W methodology (without zeroing) is Commerce's current default methodology, whereas the W-T methodology (with zeroing) is its alternative methodology, as set out in Section IV.ii, *infra*.

75 WT/DS464/R.

Appendix 1

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