CHANGE IS COMING: WHAT TO EXPECT FROM THE RECENT AMENDMENTS TO THE TRADE REMEDY LAWS

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ABSTRACT

President Obama recently signed a bill that amends several sections of U.S. domestic trade remedy laws. This Article examines the nature and significance of these amendments through the lens of the Court of International Trade’s 2014 case law—the last full year in which the prior statute was in effect. As discussed below, the amendments are a significant departure from existing rules in a few key areas. These new standards are likely to be a source of contentious litigation in the years ahead.

I. INTRODUCTION .......................................................... 161

II. DISPUTES ABOUT WHICH DATA COMMERCE SHOULD USE IN PROCEEDINGS INVOLVING NON-MARKET ECONOMY COUNTRIES . . 164
   A. Overview of the CIT’s 2014 Jurisprudence on Surrogate Values ...................................................... 166
   B. Changes Made by the 2015 Act ................................. 172

III. COMMERCE’S TREATMENT OF PARTIES THAT FAIL TO COOPERATE IN ITS PROCEEDINGS ........................................ 175
   A. Overview of the CIT’s Jurisprudence on AFA ............... 176
   B. Changes Made by the 2015 Act ................................. 180

IV. WHAT LIES AHEAD ...................................................... 183

I. INTRODUCTION

Last spring—while Congressional Democrats were battling the President’s efforts to complete the ambitious, and highly contentious, twelve-nation trade agreement known as the Trans-Pacific Partnership (TPP)¹—a bill called the “Trade Preferences Extension Act of 2015”

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¹ The TPP is being negotiated between the United States and eleven Pacific Rim nations, including Japan, Malaysia, Vietnam, Australia, and Peru. See generally IAN FERGUSON ET AL., CONG. RESEARCH SERV., R42694, THE TRANS-PACIFIC PARTNERSHIP (TPP) NEGOTIATIONS AND ISSUES FOR
(the “Act”) was quietly introduced into Congress.² With most pundits and officials focused on the TPP, this bill received relatively little attention.³ An eclectic amalgam of amendments to existing statutes, the Act quickly cleared both chambers without much debate, and was signed into law shortly thereafter.⁴ And just like that, Congress had made one of the biggest changes to our domestic trade remedy laws in over twenty years.

In broad terms, U.S. domestic trade remedy laws⁵ require the U.S. Department of Commerce (“Commerce”) to calculate and impose duties on imported merchandise that is either sold in the United States below fair value (a practice known as “dumping”)⁶ or that benefits from unfair foreign government subsidies (also known as “countervailable subsidies”).⁷ The governing trade statute, 19 U.S.C. §§ 1671-77, provides various guidelines for how Commerce is to make such calcula-


³. Indeed, with TPP occupying the press’ attention, the Trade Preferences Extension Act received barely any coverage. See generally supra note 1.

⁴. See H.R. 1295.


⁶. Specifically, the antidumping statute provides for remedial duties on imported merchandise sold, or likely to be sold, in the United States “at less than fair value” when the domestic industry is injured. 19 U.S.C. § 1673(e) (2012); see also Union Steel v. United States, 713 F.3d 1101, 1103 (Fed. Cir. 2013). Sales are found to be made “at less than fair value” when the “normal value” (the price at which the product is sold in the home market or the price constructed from the cost of the various factors of production) exceeds the product’s price in the United States, §1677b(a)(1)(A), (B) (2012). The difference between the normal value of the goods and the U.S. price is the “dumping margin.” See 19 U.S.C. § 1677(35)(A) (2012).

⁷. The countervailing duty statute states that if “the government of a country or any public entity within the territory of a country” is providing a countervailable subsidy with respect to the production or exportation of specific merchandise, “then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net countervailable subsidy.” Fine Furniture (Shanghai) Ltd. v. United States, 748 F.3d 1365, 1368 (Fed. Cir. 2014) (quoting 19 U.S.C. § 1671(a) (2012)).
RECENT AMENDMENTS TO THE TRADE REMEDY LAWS

tions. The Trade Preferences Extension Act changes a number of these guidelines. Most significantly, Title V of the Act, titled “Improvements to Antidumping and Countervailing Duty Laws” (1) adds a new provision that permits Commerce to disregard certain data when calculating dumping margins for producers of merchandise from non-market economy countries and (2) changes how Commerce may calculate rates for parties that fail to cooperate with its proceedings. What is the scope of these changes? How significant are they likely to be in practice? Perhaps the best way to answer these questions is to consider the constraints that Commerce previously faced in these areas—and, in particular, to consider how the Court of International Trade (CIT), which has exclusive jurisdiction to review Commerce’s antidumping and countervailing duty determinations, has analyzed Commerce’s determinations on these issues under the old statute. This Article will focus on the CIT’s jurisprudence in 2014—the last full year that Commerce operated under the “old” regime.

As detailed below, the portion of the Act that permits Commerce to disregard certain types of data when calculating margins for non-market economy producers is a significant change. Although the terms of the new provision are narrow, the provision comes in one of the most hotly contested areas of Commerce’s practice: the fact-specific disputes about which data provide the best approximation of the producers’ experience. And the Act’s change to Commerce’s treat-

10. Id. § 502. The Act also streamlines and clarifies some other provisions of the statute that apply to Commerce. For example, one provision of the Act clarifies the standards for how many individual margins Commerce is required to calculate in an investigation or review. See id. § 506. Another provision clarifies that it is the burden of parties to provide certain information in proceedings involving companies from market-economy countries. See id. § 505(a). These changes do not appear to be significant because they both largely codify Commerce’s existing practice. See, e.g., Ad Hoc Shrimp Trade Action Committee v. United States, No. 12-00290, slip op. 14-57 at 4–18 (Ct. Int’l Trade May 27, 2014) (discussing Commerce’s practice for deciding how many individual margins it will calculate). I will therefore not discuss them further. Additionally, the Act changes some provisions that govern how the International Trade Commission (ITC) determines whether the domestic industry has been injured by any unfair trade practice (a finding that is required for Commerce to impose any antidumping or countervailing duty order). See Trade Preferences Extension Act of 2015, H.R. 1295, 114th Cong. § 503 (2015). However, any discussion the ITC’s practice is beyond the scope of this article. I leave it to people who are more knowledgeable about the ITC than I to analyze those changes.
12. See H.R. 1295, § 505; see also infra Section II.
ment of non-cooperating parties is nothing less than dramatic. The terms of the new Act repudiate a number of court-established standards and promise to significantly limit the types of challenges that parties can successfully bring in this realm.

II. Disputes about Which Data Commerce Should Use in Proceedings Involving Non-Market Economy Countries

Plaintiffs in CIT cases frequently complain about the data Commerce used to calculate dumping margins for producers that operate in non-market economy countries. Indeed, these types of challenges form a significant portion of the CIT’s docket. This fact is not surprising. Commerce imposes antidumping duties on nearly one hundred different types of goods from China, which is considered a non-market economy. No market-economy country even comes close. Just as importantly, however, Commerce’s non-market economy proceedings are inherently complicated, and therefore prone to court challenge.

When it deals with a market economy, Commerce can often compute a producer’s dumping margin by simply comparing the price that the producer charges for its goods in the United States with the price it charges in its home country (or, when such price is unavailable, with how much the producer reports spending to produce the goods). However, that method usually does not work with respondents from non-market economies. In those economies, there is often a “concern that the factors of production used to produce the goods at issue are under state control, [meaning that] home market sales may not be reliable indicators of” fair value. To eliminate these types of distortions, the statute directs Commerce to reconstruct the producer’s business experience. In particular, the statute provides that Commerce shall determine the fair value “of the subject merchandise on

13. H.R. 1295, § 502; see infra Section III.
15. See id. Indeed, when it comes to how many antidumping or countervailing duty orders apply to goods from any single country, China leads by a full order of magnitude. See id.
17. Id. at 1233 (citing 19 U.S.C.§ 1677(18)(A) (2012)).
the basis of the value of the factors of production”19—that is, how much it would generally cost to make the product in question. These factors of production can include things like “hours of labor required,” “quantities of raw materials employed,” “amounts of energy and other utilities consumed,” and “representative capital cost, including depreciation.”20 The statute directs Commerce to value these factors of production “based on the best available information regarding the values of such factors” in a market economy country that can serve as an appropriate surrogate for the non-market economy at issue.21

Naturally, parties frequently disagree about what constitutes the “best available” surrogate value information. Domestic petitioners often want Commerce to use values that increase the calculated cost of production—thereby raising the foreign respondents’ dumping or countervailing duty margins.22 For their part, the respondents want Commerce to use surrogate values that have the opposite effect (i.e., that decrease the calculated cost of production). Given that a typical proceeding can require Commerce to establish more than a dozen surrogate values,23 it is rare that all parties are satisfied with Commerce’s calculations. More often than not, parties bring their disputes to the CIT.24

21. 19 U.S.C. § 1677b(c)(1) (2012); see also U.S.C. § 1677b(c)(4) (2012) (requiring that Commerce “utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.”); Shakeproof Assemb. Components v. United States, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (discussing these requirements).
24. See infra Section II.A.
A. **Overview of The CIT’s 2014 Jurisprudence on Surrogate Values**

In 2014, the CIT issued a total of eighty-two decisions analyzing the Department of Commerce’s antidumping and countervailing duty determinations; more than a quarter of these involved at least one surrogate value issue (and many involved more). Although each case has unique facts, there are overarching trends. As a general matter, the CIT deferred to Commerce’s selection of overall methodologies to establish surrogate values. However, the Court was much more skeptical of Commerce’s factual determinations and how Commerce weighed competing evidence on the record—and frequently reversed Commerce on those grounds.\(^{25}\)

For example, in one case, *Jiaxing Brother Fastener Co. v. United States*, a Chinese producer of steel-threaded rod challenged the methodology that Commerce used to select Thailand as the surrogate country.\(^{26}\) The producer claimed that Commerce did not give proper meaning to the statute’s requirements that a surrogate country’s “level of economic development” be comparable to that of China, and that the surrogate country be a “significant producer of comparable merchandise.”\(^{27}\) The Court rejected this challenge. As the Court explained, the statute does not define how Commerce should measure the two criteria.\(^{28}\) To fill the gap, Commerce published a policy bulletin, which stated that Commerce would follow a sequential analysis: first, Commerce would identify a list of potential surrogate countries that had a reported per-capita gross national income (GNI, a measure derived from a country’s gross domestic product), similar to that of the non-market economy country; then, Commerce would determine whether any of those countries were significant producers of comparable merchan-

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25. This trend seems to reflect the difficulty that courts often have parsing the line between scrutinizing the agency’s action and not substituting their judgment about the evidence for that of the agency. As courts have frequently explained, “It is not for [the courts] to reweigh the evidence before the [agency].” *Henry v. Dep’t of the Navy*, 902 F.2d 949, 951 (Fed. Cir. 1990). Yet, at the same time, courts are expected to ensure that the agency’s determination is supported “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008). Not infrequently, a court’s opinion about what a reasonable mind would perceive is different from that of the agency—and differences of opinion about what a reasonable mind would perceive often look a great deal like a re-weighing of the evidence on the record.


This methodology, the Court explained, was a reasonable way for Commerce to fill a gap in the statute and therefore deserved deference under the established two-step framework laid out by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*

Because India’s GNI was not close to China’s, the Court explained that Commerce was right to eliminate it from further consideration; Commerce was not required to consider whether factors other than GNI made India economically similar to China, and Commerce was not required to consider whether India was a more significant producer of subject merchandise than Thailand.

The Court rejected a similar set of challenges to Commerce’s general methodology for selecting a surrogate country in *Clearon Corp. v. United States.* As the Court explained in that case, Commerce had discretion to consider GNI as reflective of economic comparability. Likewise, the Court held, Commerce had discretion to consider the statutory factors sequentially and treat economic comparability as a threshold criterion that could eliminate a country from further consideration.

Commerce had similar success in defending its general methodology for valuing labor rates. For example, in two cases involving shrimp from Vietnam, the plaintiff claimed that Commerce erred by valuing labor “in the same way that [it] value[d] all other surrogate” factors of production—that is, by “relying on data from a single surrogate coun-


31. 467 U.S. 837, 842-45 (1984). Under this well-established framework, a court first examines “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842–43. If it has, the clear intent of Congress governs. *Id.* But if “the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. In such cases, “[a]ny reasonable construction of the statute is a permissible” one, *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (citation and quotation marks omitted), and the agency’s “interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.” *United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (citation omitted).


34. *Id.* at *30-37.

35. *Id.* at *38-46.
In both cases, the plaintiffs claimed that Commerce did not appropriately explain why it departed from its prior method of constructing a “regression-based” model that approximated the wage rate of Vietnam based on the data from multiple market economies. In rejecting both of these challenges, the Court observed that Commerce was merely relying on its newly established labor methodology (which it developed after its regression-based methodology was found inconsistent with the statute in 2010). That methodology, the Court explained, had previously been found “reasonable on its face” based on the terms of the statute and Commerce’s explanation that the modicum of accuracy that could be gained from a complex regression analysis did not outweigh the administrative costs.

By contrast, the Court was generally much more skeptical of how Commerce analyzed purely factual matters—including how it applied its established methodologies to the actual facts in the record. Thus, even while it sustained Commerce’s general sequential approach for identifying surrogate countries, the CIT frequently directed Commerce to provide further explanation or analysis about why, on the record presented, the country it actually selected satisfied the established criteria. For example, in the *Jiaxing Brother* case discussed above, the Court directed Commerce to explain why Thailand was a better surrogate country than the Philippines, given evidence suggesting that Philippine financial statements could be a better match for the respondent’s production experience and that data for some other inputs was closer to global averages. Similarly, in *Clearon*, the Court held that the record did not support Commerce’s decision to select the GNI range.


that it did—and directed Commerce to further explain its decision.\footnote{Clearon Corp. v. United States, 2014 Ct. Intl. Trade LEXIS 88 at *48-53 (Ct. Intl’l Trade July 24, 2014).}

Indeed, the Court frequently remanded Commerce’s surrogate country determinations for further explanation or analysis.\footnote{Compare, e.g., Dupont Teijin Films, Mitsubishi Polyester Film, Inc., Skc, Inc. v. United States, No. 12-00088, slip op. 14-86 (Ct. Intl’l Trade July 22, 2014), and Ad Hoc Shrimp, slip op. 14-59, with Clearon, 2014 Ct. Intl. Trade LEXIS 88, and Catfish Farmers of Am. v. United States, No. 12-00087, slip op. 14-146 (Ct. Intl’l Trade Dec. 18, 2014).}

The CIT’s examination of other factual-intensive surrogate value determinations followed a similar pattern. For example, in a case involving the final results on the antidumping investigation of wind towers from Vietnam, \textit{CS Wind Vietnam Co. v. United States}, plaintiffs challenged how Commerce valued a number of different production factors, including: steel plate, carbon dioxide, financial expenses, as well as a number of other factors.\footnote{CS Wind Vietnam Co. v. United States, 971 F. Supp. 2d 1271, 1276 (Ct. Intl’l Trade 2014).} As part of their challenge, plaintiffs claimed that they had presented Commerce “six different data sets for valuing the steel plate, and pointed to at least ten other data sets that purportedly corroborated these prices,” which they insisted Commerce had disregarded.\footnote{Id. at 1277-78.} One by one, the Court analyzed thirteen different data sets on the record and concluded that Commerce should have considered them in more detail in its determination.\footnote{Id. at 1283-84.} Meanwhile, the Court explained that data that Commerce did consider was not sufficiently specific to the product in question, and therefore was not the best available information.\footnote{See id. at 1295-96.} In the end, the Court remanded Commerce’s determination on four out of five contested surrogate value issues.\footnote{CS Wind Vietnam Co. v. United States, No. 13-00102, slip op. 14-128 at 2 (Ct. Intl’l Trade Nov. 3, 2014).}

Another example: in a case involving a review of the antidumping duty order on oil country tubular goods,\footnote{Oil country tubular goods are defined as “Pipe and tube products used in petroleum industry, such as drill pipe, pipe casings, oil pipes.” \textit{Oil country tubular goods (OCTG), BUSINESSDICTI-ONARY}, http://www.businessdictionary.com/definition/oil-country-tubular-goods-OCTG.html (last visited Oct. 16, 2015).} plaintiffs challenged how
Commerce valued five different inputs.\(^50\) One of these was steel billet—essentially, blocks of steel. Among other things, plaintiffs claimed that Commerce “incorrectly concluded that [the respondent] used alloy steel billets—not carbon steel billets—to produce most” of its merchandise.\(^51\) Commerce had made this determination after reviewing the respondent’s answers to a series of extensive questionnaires about the chemical makeup of its inputs, as well as quality certificates.\(^52\) In support of its determination, “Commerce also cited billet consumption statement[s], inventory slips, and website data to prove that the preponderance of [the respondent’s] billet was alloy steel.”\(^53\) The Court cited detailed tables summarizing the data.\(^54\) In the end, however, it concluded (1) that the data on which Commerce relied was flawed because it was not sufficiently specific, (2) that Commerce improperly inferred facts about un-sampled products, and (3) that Commerce ignored one document submitted by plaintiff.\(^55\) Accordingly, the Court remanded the issue for further consideration.\(^56\)

This kind of searching scrutiny is not unusual. The CIT frequently analyzed competing surrogate-value evidence in this manner. As a result, Commerce frequently lost on value issues—sometimes through multiple remands.\(^57\)

The Court has been especially exacting in analyzing Commerce’s decisions to disregard certain data when calculating the factors of production. For example, in an antidumping investigation into coated paper from China, Commerce disregarded the prices a respondent reported paying for certain raw materials that it purchased from market economy countries, Thailand and South Korea.\(^58\) Pursuant to its regulation, Commerce is “normally” required to use those prices in

\(^{51}\) Id. at 5.
\(^{52}\) Id. at 5-8.
\(^{53}\) Id. at 9.
\(^{54}\) Id. at 10.
\(^{55}\) Id. at 12-13.
\(^{56}\) Id. at 13-14.
calculating the factors of production.\textsuperscript{59} However, in this proceeding, Commerce took the position that it was not required to use those prices because there was “reason to believe or suspect” that the reported prices were distorted by subsidies.\textsuperscript{60} In reviewing this determination, the Court agreed that Commerce can disregard prices when it has “reason to believe or suspect” that prices are distorted; however, it held that Commerce did not properly analyze whether the record before it established the necessary reason to believe or suspect that such distortion occurred.\textsuperscript{61}

In reaching this determination, the Court relied on a standard articulated almost a decade before in \textit{Fuyao Glass Industry Group Co. v. United States}.\textsuperscript{62} Under the standards articulated in \textit{Fuyao Glass}, Commerce was required to justify its decision to disregard certain prices by pointing to “specific and objective evidence that:” (1) subsidies were in effect “in the supplier countries during the period of investigation;” (2) that the supplier from whom the respondent made purchases was “a member of the subsidized industry or otherwise could have taken advantage of any available subsidies;” and (3) that “it would have been unnatural for a supplier to not have taken advantage of such subsidies.”\textsuperscript{63} Finding that the evidence on which Commerce relied—namely, findings of broadly-available export subsidies in Korea and Thailand a number of years before the date of the investigation—did not rise to the requisite level of specificity, the Court remanded the issue to Commerce for further examination.\textsuperscript{64} When, on remand, Commerce reversed its determination under protest, but without conducting a detailed analysis of the existence of suspected subsidies, the Court again remanded the issue, directing Commerce to make findings based on concrete and contemporaneous evidence, as required by \textit{Fuyao Glass}.\textsuperscript{65}

This set of decisions was not unusual. Even in cases where the Court sustained Commerce’s decision to disregard prices believed to be

\textsuperscript{59} 19 C.F.R. § 351.408(c)(1) (2015).
\textsuperscript{60} See Peer Bearing Co.-Changshan v. United States, 298 F. Supp. 2d 1328, 1334-35 (2003) (citing legislative history, and holding that “when Commerce has reason to believe or suspect that a market-economy supplier’s prices are subsidized, Commerce may reject market prices paid to the supplier in favor of surrogate prices for its calculation of [normal value]”).
\textsuperscript{61} \textit{Gold E. Paper (Jiangsu) Co.}, 918 F. Supp. 2d at 1324.
\textsuperscript{63} \textit{Id.} at 114.
\textsuperscript{64} \textit{Gold E. Paper (Jiangsu) Co.}, 918 F. Supp. 2d at 1324.
distorted—as in the CS Wind Vietnam case, discussed above—the Court still applied the exacting standard articulated in Fuyao Glass, emphasizing the need for Commerce to support its decision with detailed factual evidence.\textsuperscript{66} Taken together, the decisions reflect the CIT’s concern that Commerce was not properly accounting for the evidence before it.

**B. CHANGES MADE BY THE 2015 ACT**

Against this backdrop, the Act grants Commerce significant new discretion to disregard certain prices. Specifically, section 505(b) of the Act amends the portion of the statute that establishes the factors-of-production methodology by adding a provision titled, “Discretion To Disregard Certain Price Or Cost Values.” This new provision states that,

\begin{quote}
[i]n valuing the factors of production . . . 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.\textsuperscript{67}
\end{quote}

On its face, this provision repudiates the standard articulated in Fuyao Glass in at least two important ways.

First, unlike Fuyao Glass, the Act does not impose any requirement that Commerce only rely on recent findings of subsidies or dumping to disregard prices. To the contrary, the provision merely states that Commerce may disregard prices if it “has determined” that subsidies (or dumping) “existed” at some point, without specifying a timeframe. On the face of this provision, Commerce may disregard prices even if subsidies were identified years (or even decades) ago—something the CIT has not readily accepted previously.\textsuperscript{68} Second, unlike Fuyao Glass, the Act explicitly permits Commerce to disregard prices not only based on a finding that a specific industry was subsidized, but also based on a more general finding of “broadly available export subsidies.”\textsuperscript{69} In other words, Commerce no longer needs to connect a subsidy to the

\textsuperscript{68.} See, e.g., Gold E. Paper (jiangsu) Co., 991 F. Supp. 2d at 1364-65.
\textsuperscript{69.} H.R. 1295, § 505(b).
particular industry that produces a respondent’s input to disregard the input’s reported price.

In practical terms, both of these changes expand the number of situations where Commerce can substitute surrogate values for a respondent’s actual reported costs. Over the years, Commerce has found countervailable subsidies in many countries.\(^\text{70}\) It has found dumping from even more.\(^\text{71}\) If Commerce is no longer required to disregard a number of these prior subsidy findings—either because they are too old or because the subsidies identified were too general—it is going to have an easier time establishing a reason to believe or suspect that a country’s prices may have been distorted and should be disregarded. And if Commerce can use a prior finding of dumping for a particular producer or industry to reach the same conclusion—something the statute now explicitly permits—that expands its options to disregard prices even further. As a general matter, disregarding reported prices and using surrogate values tends to increase the calculated normal value of a respondent’s merchandise and leads to higher calculated rates.\(^\text{72}\) By giving Commerce more options to use such surrogate values, the statutory change greatly favors the domestic industry.

All of this is especially true given that the terms of the new provision are broad and do not provide specific guidance. Like other sections in the trade statute, such as the portions governing calculation of normal value,\(^\text{73}\) the Act’s new provision provides an overall standard but does not indicate how Commerce should ensure that the standard is met. Commerce is therefore likely to develop its own methodologies to fill the gap in the statute. As explained previously,\(^\text{74}\) such methodologies are generally given deference and upheld by the court under the *Chevron* framework. As a result, plaintiffs are likely to face an uphill battle in seeking to overturn Commerce’s decision to disregard a particular price.

Beyond these immediate practicalities, Congress’ explicit repudiation of *Fuyao Glass* sends a strong—and unusual—signal. Congress does not often pass legislation to undo the effect of a court decision,

\(^{70}\) See generally Antidumping and Countervailing Duty Investigation Initiated After January 1, 2000, supra note 14.

\(^{71}\) See id.

\(^{72}\) See, e.g., Gold E. Paper (Jiangsu) Co., 991 F. Supp. 2d 1357 (remand decision where abandoning surrogate value for a particular market-economy input dropped the overall calculated dumping margin).


\(^{74}\) See supra Section II(A), pp. 6-8.
especially not in technical areas like trade. And when Congress has passed such legislation, there have been extraordinary circumstances.

For example, in 2012 Congress passed a law that explicitly overturned a non-final Federal Circuit decision. But that decision was drastic: in it, the Federal Circuit held that Commerce was, as a legal matter, precluded from collecting countervailing duties from producers in non-market economy countries. That type of categorical holding—rendered by a court whose decisions are binding authority on Commerce and the CIT—raised the specter of Commerce having to immediately terminate countervailing duty orders worth billions of dollars. It is understandable that Congress stepped in to correct course.

By contrast, *Fuyao Glass* is just one decision from the CIT. It is not binding on future Commerce determinations—nor is it binding on the CIT itself. Indeed, there is mixed law on whether *Fuyao Glass* is good precedent that should be followed. Further, and just as importantly, the case does not categorically preclude Commerce from doing anything; at most, it merely requires Commerce to support its determinations with more evidence. As a result, it cannot be said to significantly impact Commerce’s practice.

That Congress nevertheless saw the need to pass legislation on this issue could suggest that Congress viewed the CIT as imposing too high a burden on Commerce and engaging in inappropriate scrutiny of Commerce’s decisions. Without a clear legislative history we will never know for sure. But we do know that Congress is looking over the CIT’s shoulder—and is at least partially displeased with what it finds.

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76. See GPX Int’l Tire Corp., 666 F.3d at 745.


78. See, e.g., Algoma Steel Corp. v. United States, 865 F.2d 240, 243 (Fed. Cir. 1989) (noting that the CIT is not bound by its prior decisions). But see Krupp Stahl A.G. v. United States, 15 C.I.T. 169, 172-73 (Ct. Int’l Trade 1991) (noting that, although prior decisions are not binding, “it would appear to be better practice for judges of this court to follow the prior opinions of the court”).

79. See, e.g., Zhejiang Mach. Imp. & Exp. Corp. v. United States, 473 F. Supp. 2d 1365, 1372 n.10 (Ct. Int’l Trade 2007) (“It is . . . noteworthy that the [Fuyao Glass] test has generated some controversy, which has yet to be resolved.”).

III. Commerce’s Treatment of Parties that Fail to Cooperate in Its Proceedings

If the Act’s repudiation of Fuyao Glass is significant, then the Act’s other change—which alters how Commerce may treat uncooperative parties—is downright dramatic.

In conducting its antidumping and countervailing duty proceedings, Commerce generally depends on parties to supply the necessary factual information. Commerce gives parties time to place the necessary information on the record, and it solicits additional information through questionnaires and other types of requests. Ultimately, however, Commerce has no means to compel a party to produce information; it cannot, for example, issue a subpoena requiring a party to provide documents. As a result, when a party refuses to cooperate, Commerce can be left with significant gaps in the record.

Fortunately, the statute gives Commerce a way to mitigate this problem. Section 1677e permits Commerce to fill gaps that result from parties failing to submit the requested information with “facts otherwise available.” Further, if Commerce “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,” it is permitted to make “an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” Making such an inference is known as applying adverse facts available (or, simply, AFA).

These adverse facts can be drawn from the petition, a prior segment of a proceeding (meaning either the original investigation or successive annual reviews), or any other information in the record; however, the statute requires that when Commerce “relies on secondary

81. Id. § 505.
82. See, e.g., Fine Furniture (Shanghai) Ltd. v. United States, 748 F.3d 1365, 1369-70 (Fed. Cir. 2014); see also Foshan Shunde Yongjian Housewares & Hardware Co. v. United States, 33 I.T.R.D. (BNA) 2123, *2-3 (Ct. Int’l Trade 2011) (“[Commerce] generally makes its antidumping determinations based on the information it solicits and receives from interested parties concerning the normal value and export price of the subject merchandise.”).
83. See, e.g., Essar Steel Ltd. v. United States, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (noting that “Commerce lacks subpoena power”).
84. See, e.g., Fine Furniture (Shanghai) Ltd. v. United States, 748 F.3d 1365, 1368 (Fed. Cir. 2014) (explaining that the government of China’s failure to cooperate left Commerce without information about the size of a subsidy that various companies were receiving).
86. 19 U.S.C. § 1677e(b) (2012); see also Nippon Steel Corp. v. United States, 337 F.3d 1373, 1381-82 (Fed. Cir. 2003) (clarifying the standard for cooperation).
information rather than on information obtained in the course of an investigation or review, [Commerce] shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal.” The Federal Circuit has further circumscribed Commerce’s discretion to use AFA by holding that the AFA rate may not be “unreasonably high.” As the court recently explained in Gallant Ocean (Thail.) Co. v. United States, the “purpose of the AFA rate is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.” Accordingly, the court has required that Commerce’s “AFA rate[s] be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.”

Needless to say, these various standards are somewhat nebulous and confusing. Many times, they are difficult to administer in practice. As a result, the CIT’s docket is full of cases challenging Commerce’s use of AFA.

A. OVERVIEW OF THE CIT’S 2014 JURISPRUDENCE ON AFA

The CIT’s recent AFA jurisprudence is fairly well represented by its 2014 decisions. The court’s decisions examined both whether Commerce’s use of AFA was justified, and whether Commerce properly corroborated the AFA rate it used—that is, whether Commerce appropriately connected the AFA rate to the respondent’s economic reality. Commerce’s success in defending these cases was mixed.

Commerce had the most success defending its use of AFA where a party’s failure to cooperate was flagrant and demonstrable. For example, in Papierfabrik August Koehler S.E. v. United States, a German respondent concealed certain sales it made to its home market. Specifically, it made sales intended for German consumers to intermediaries in other countries and did not report those sales to Commerce. Once the petitioner alerted Commerce to the scheme, Commerce determined that the respondent had failed to cooperate, and applied “total AFA”—that is, Commerce disregarded all of the respon-

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89. Gallant Ocean (Thail.) Co. v. United States, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (internal quotes omitted) (citations omitted).
90. Id. (internal quotes omitted) (citations omitted).
91. Id. (emphasis in original).
93. Id.
dent’s reported sales and calculated the margin based on the rate contained in the petition.94 The respondent challenged this determination, claiming that it did not intend to defraud Commerce, that it provided its correct home-market data to Commerce after the transshipment scheme was identified, and that Commerce therefore had no basis to apply AFA.95 As an alternative, the respondent claimed that (1) Commerce should have only used AFA to substitute for sales that were concealed, not all reported sales, and (2) that the AFA rate Commerce used was not properly corroborated.96 The Court rejected all of these challenges.

As the Court explained in that case, the respondent’s trans-shipment scheme was a material failure to provide truthful information; Commerce was reasonable to find that failure undermined the respondent’s credibility and cast doubt on all the data it submitted.97 As a result, Commerce was justified in not using any of the respondent’s sales data.98 Nor did the statute require Commerce to mitigate its use of AFA in light of the remedial efforts that the respondent took after its improper actions were discovered.99 Finally, the Court held, Commerce properly corroborated the AFA rate—a rate derived from the original petition—because, among other reasons, that rate was significantly lower than the margin for one individual sale calculated during the previous year’s review.100 The Court specifically noted that using an AFA rate below the highest margin was a proper form of corroboration.101

Commerce’s success was more mixed when it applied AFA because a respondent simply submitted the requested information after the established deadline. In Dongtai Peak Honey Industry Co., Ltd. v. United States, for example, the Court sustained Commerce’s decision to reject a filing for which a plaintiff requested an extension two days after the elapsed deadline.102 In doing so, the Court agreed with Commerce that the respondent had not established good cause for why it could not

94. Id. at 1309.
95. Id. at 1310-13.
96. Id. at 1313-15.
97. Id. at 1310-15.
98. Id.
99. Id. at 1311-13.
100. Id. at 1316-17.
101. Id. at 1317.
submit the extension request before the deadline.103 Because the information was central to establishing whether the respondent was entitled to its own rate, the Court also sustained Commerce’s decision not to use any of the respondent’s data in assigning that respondent a rate.104 On the other hand, in Artisan Manufacturing Corp. v. United States, the Court rejected Commerce’s application of AFA based on an unexcused delay of one day in submitting the requested data.105 The Court reasoned that the party’s delay in submitting the data appeared insignificant and non-prejudicial to Commerce or the other parties, and therefore should have been excused.106

The area where Commerce had by far the most difficulty was corroboration. Consistent with the Federal Circuit’s precedent, Commerce has generally tried to corroborate AFA rates by showing that they fall within the rage of the respondent’s own sales practices—for example, that the rate is lower than the margin for individual sales that a respondent has previously made.107 However, that type of analysis did not always prove sufficient. For example, in a case involving an antidumping duty order on wooden bedroom furniture from China, Dongguan Sunrise Furniture Co., et. al. v. United States, the Court rejected four different attempts that Commerce made at corroborating an AFA rate for sales that respondent did not report to Commerce.108

In the first of these attempts, Commerce had determined the AFA rate by selecting the rate calculated for a different party in a prior review.109 Commerce explained that this rate was relevant to the respondent because it was still lower than the rate for a percentage of individual sales that the respondent made.110 The Court was not
persuaded. Finding that “Commerce ha[d] not explained why a small percentage of [the respondent’s reported] sales can be considered relevant and reliable for [the respondent’s] unreported sales,” the Court ordered a remand.\footnote{111}

On remand, Commerce “grouped the [respondent’s] unreported sales into four categories based on general product type: armoires, chests, nightstands, and dressers.”\footnote{112} Commerce then determined an AFA margin for each category by selecting “the single highest” margin for each unique product type that was below the respondent’s overall highest single-transaction margin.\footnote{113} The Court also remanded this determination, explaining that Commerce “had failed to demonstrate a rational relationship between the AFA rates chosen and a reasonably accurate estimate of [the respondent’s] actual rate, because the AFA rates were based on minuscule percentages of [the respondent’s] actual sales,” and because the rate calculated for the reported transactions “was much lower than the selected AFA rates.”\footnote{114}

Commerce tried for a third time. It again grouped sales by general types, but this time selected “the single-highest” margin (below the highest single-transaction rate overall) for each particular product type “where at least 0.04% of the total reported sales in that product category were dumped at or above [that] selected margin.”\footnote{115} This too was insufficient; the Court remanded, finding that the number of sales considered was still too small.\footnote{116}

In its fourth attempt, Commerce based the AFA rate “on the weighted-average dumping margins of the 15% of reported sales with the highest dumping margins within each of the four general product categories.”\footnote{117} However, this attempt was no more successful. The Court observed that the actual AFA rate calculated using this revised method was not meaningfully different than the rate calculated using other methods.\footnote{118} According to the Court, this rate was simply too high; although Commerce had now identified a sizable percentage of indi-
vidual sales with higher margins, the overall AFA rate was still much higher than the average rate calculated for the respondent’s reported sales. In the Court’s view, this type of discrepancy suggested that the AFA rate did not correspond to the respondent’s commercial reality. Accordingly, the Court again remanded the matter for Commerce to try for a fifth time to calculate a corroborated AFA rate.

Commerce’s corroboration attempts in other cases were less tortured. Nevertheless, in every case where Commerce applied AFA, corroboration was a thorny issue that was heavily contested.

B. **Changes Made By the 2015 Act**

The new Act makes three big changes to the statute—collectively, these changes grant Commerce significantly greater discretion about which data sources to use, and dramatically ease the corroboration requirement.

First, section 502(1) of the Act amends the subsection of the statute that authorized Commerce to use adverse inferences—that is, section 1677e(b)—by adding a new sub-paragraph. This sub-paragraph states that Commerce “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.”

Second, the Act amends the corroboration requirement—found in section 1677e(c) of the statute—by expressly providing that Commerce “shall not be required to corroborate any dumping margin or countervailing duty applied in a separate segment of the same proceeding.”

Third, the Act adds a whole new subsection to section 1677e of the statute. This new subsection—which now becomes subsection

119. Id. at 1336.
120. Id.
121. Id. at 1337-38.
123. See, e.g., Papierfabrik August Koehler S.E., 7 F. Supp. 3d at 1315-16.
125. Id.
126. Id. § 502(2).
1677e(d)—is titled “[s]ubsidy rates and dumping margins in adverse inference determinations.” It also contains three subparts, which state, in turn:

(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.\(^\text{128}\)

On its face, the provisions of this last subsection appear to largely overlap and echo the other changes. Taken together, the amended provisions largely repudiate the standard articulated by the Federal Circuit’s decision in *Gallant Ocean* and related cases.

Specifically, the new provisions explicitly eliminate *Gallant Ocean’s* requirement that the AFA rate bear a relationship to the respondent’s “commercial reality.”\(^\text{129}\) Indeed, the amendment to the statute now explicitly provides that Commerce is “not required . . . to demonstrate that the” AFA rate “reflects an alleged commercial reality of the interested party.”\(^\text{130}\) Likewise, the provisions remove any restrictions the courts, following *Gallant Ocean*’s reasoning, placed on Commerce using the highest calculated rate for a single transaction as the AFA margin.\(^\text{131}\) To the contrary, the new Act grants Commerce discretion to select the highest calculated rate, even if that rate was calculated for only a single transaction. Finally, the Act entirely removes the requirement that Commerce corroborate any rate that was “applied in a separate segment of the same proceeding”—that is, a preceding review of the particular dumping or countervailing duty order at issue, or the underlying investigation.\(^\text{132}\)

In practical terms, these changes eliminate a large portion of the challenges that parties can make to Commerce’s AFA determinations. Take the *Dongguan Sunrise Furniture* case discussed previously as an example.\(^\text{133}\) In its original determination, Commerce determined the respondent’s AFA rate based on the rate assigned to another company in a prior review.\(^\text{134}\) Under the revised section 1677e(c), corroboration of this rate would not even be required because that rate was the “dumping margin . . . applied in a separate segment of the same proceeding.”\(^\text{135}\) Even if corroboration were required, the amended statute

\(^{128}\) Id.

\(^{129}\) *Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010).

\(^{130}\) H.R. 1295, § 502(2).


\(^{132}\) H.R. 1295, § 502(2).

\(^{133}\) See supra Section III(A), pp. 20-21.

\(^{134}\) *Dongguan Sunrise Furniture*, 865 F. Supp. 2d at 1233.

\(^{135}\) H.R. 1295, § 502(2).
gives Commerce the discretion to use the highest transaction margin calculated for the respondent without connecting that margin to the respondent’s overall economic reality. As a result, Commerce would win the corroboration issue almost by default.

Indeed, it is not clear what corroboration now means following these changes. It obviously does not mean connecting the AFA rate to a respondent’s overall business experience, as courts have been assuming. The Act explicitly repudiates that requirement. Instead, corroboration now appears to mean something much more mundane. For example, Commerce may still not be able to use an unsupported allegation from the petition—but if it can substantiate the rate alleged in the petition with at least one margin calculated at some point, for some company, that could be enough.

Needless to say, these amendments give Commerce and the parties a whole new way to think about AFA. What used to be a powerful, but restrained, tool in Commerce’s arsenal has now been made bigger and more untethered. With fewer conditions to limit high AFA rates, Commerce will, very likely, assign much bigger margins to non-cooperative respondents than it has in the past few years. As it does so, litigants and the court will have to chart an entirely new path about what standards should constrain Commerce’s discretion and what types of challenges can successfully be brought to the use of AFA.

IV. What Lies Ahead

The changes made by the Act represent a dramatic departure from the current jurisprudence. It will likely take Commerce and the courts years to resolve the full scope of the changes and to establish the new limits on Commerce’s authority. Before that happens, however, there are going to be disputes about whether the law can even apply as a threshold matter—can it, for example, apply to active cases at Commerce or the CIT?

The law itself contains no clear effective date provision. One its face then, it would seem possible to apply the law immediately to all pending proceedings: that is, to review, Commerce’s completed determinations under the new standard. In fact, petitioners have already advocated doing so in some cases. But applying the law to all pending cases is likely to elicit the objection that courts are attaching

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136. See id.
137. See generally id., §§ 363, 501–507.
new legal consequences to a respondent’s previous failure to cooperate (or some other behavior) in a way that is generally disfavored. Such an objection has some merit. As the Supreme Court has frequently noted, courts should avoid applying new laws to past conduct unless Congress has clearly expressed its intent that the law reach such prior actions. Following the Supreme Court’s guidance, courts engage in a fact-specific analysis to determine whether a new law goes too far in upsetting settled expectations in a way that could be said to materially affect liability for past conduct. However, there are few categorical rules: courts are essentially left to their own “intuition” to determine whether a rule crosses the line. In terms of the Act, there is an argument to be made that, because the law changes Commerce’s procedural rules, it does not impermissibly upset settled expectations. Moreover, the notion of settled expectations is inapposite in an area like trade, where importers can have no reliance interest in receiving a particular rate of duty.

Notably, however, the Federal Circuit has seemingly foreclosed such an aggressive application of the new legislation. In a decision called Ad Hoc Shrimp Trade Action Comm. v. United States—issued on October 5, 2015—the court asked the parties whether the new standards for Commerce’s use of AFA, codified in section 502 of the Act, could be applied for the first time on appeal. After analyzing the issue, the Court concluded “that Congress intended section 502 of the Act to apply only to Commerce determinations made on or after the date of enactment.” As the Court explained, Congress provided retroactive effective dates in other parts of the Act; that Congress chose not to provide any effective date in section 502 therefore indicated that Congress did not intend the section to be applied retroactively. This decision seemingly forecloses applying the new Act when analyzing administrative determinations that Commerce completed under the

139. See Landgraf v. USI Film Products, 511 U.S. 244 (1994).
141. Compare Celtronix Telemetry, Inc. v. FCC, 272 F.3d 585, 588 (D.C. Cir. 2010), with Nat’l Mining Ass’n v. Dep’t of Labor, 292 F.3d 849, 860 (D.C. Cir. 2002).
142. See generally GPX Int’l Tire Corp. v. United States, 780 F.3d 1136, 1143-44 (Fed. Cir. 2015).
144. Id. at *24-25.
145. See id. at *24-26 (“The juxtaposition of section 502 of the Act with the legislation’s other provisions implies that, had Congress wanted section 502 of the Act to have retroactive effect or to apply to pending appeals, it would have said so.”).
old standards. Nevertheless, the Federal Circuit’s decision leaves open the possibility of applying the new law to pending cases where the courts issue a remand—and thereby force Commerce to re-open a previously final administrative determination. This approach accords with at least one decision of the D.C. Circuit, *Potomac Electric Power Co. v. United States*. In that case, an agency rendered a decision under an existing law and then Congress modified the law and the applicable standards for the agency’s decision. The Court examined the agency’s action under the old standard but finding that the decision did not satisfy that standard, a explained that, on remand, the new law should be applied. Notably, the court declined to address “whether the change in law in itself would necessitate a remand,” but cited to a case suggesting that remand on that ground would not be appropriate.

Of course, the practical effect of this alternative approach would not be much different than applying the new law to previously closed determinations. If the CIT finds that Commerce did not properly apply the old standard—for example, if the Court concludes that Commerce did not correctly corroborate an AFA rate—the CIT would remand the matter back to Commerce. That remand would, in turn, re-open Commerce’s administrative decision-making process and make it appropriate for Commerce to apply the new law. Under the new law, Commerce would either not have to corroborate the AFA rate, or would be able to easily do so under the new relaxed standards. A remand therefore would essentially result in a default win for the agency.

Whether Commerce will adopt this second approach is not yet clear. Whatever approach Commerce takes, however, it is likely that the Federal Circuit will have to ultimately resolve the issue. Meanwhile, courts will undoubtedly also be asked to examine the methodologies that Commerce develops under the new standards—and, in particular, whether those methodologies satisfy the revised statute. If history offers any guidance, the examination of those questions will fill the pages of law journals in the years to come.

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146. Notably, this decision is consistent with Commerce’s position that it will apply the standards set out in the new Act prospectively—that is, that it will not re-open prior determinations to apply the new standards. *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46,793 (Aug. 6, 2015).


148. *Id.*

149. *Id.*