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Trade Remedies: "New Shipper" Reviews

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Summary

Some U.S. producers of the kinds of merchandise subject to antidumping (AD) or countervailing (CV) duties have complained that U.S. Customs and Border Protection (CBP) has not been able to successfully collect the full amount of duties owed on targeted imports. One of the "loopholes" often cited was a U.S. law that allowed importers receiving goods from new exporters of the targeted merchandise to post bonds instead of cash deposits while the International Trade Administration (ITA) conducted a review of the "new shipper."

Legislation was approved in the 109th Congress to suspend the new shipper bonding privilege from April 1, 2006, to June 30, 2009 (sec. 1632 of P.L.109-280). Other bills, including H.R. 3283 (English, passed House July 27, 2005) and S. 695 (Cochran, passed Senate by unanimous consent, November 17, 2005) sought to suspend the privilege. H.R. 3306 (Rangel) proposed to strike it entirely.

Background

U.S. antidumping (AD) laws (19 U.S.C. 1673 *et seq.*) authorize the imposition of remedial duties if (1) the International Trade Administration (ITA) of the Department of Commerce determines that foreign merchandise is being, or likely to be sold in the United States at less than fair value, and (2) the U.S. International Trade Commission (ITC) determines that an industry in the United States is materially injured or threatened with material injury, or that the establishment of an industry is materially retarded, due to imports of that merchandise. A similar statute (19 U.S.C. 1671 *et seq.*) authorizes the imposition of countervailing duties (CVD) if the ITA finds that the government or any public entity of a foreign country has provided a subsidy on the manufacture, production, or export of the merchandise, and the ITC determines injury. These laws are part of a larger body of statutes also known as *trade remedies*. In the United States, AD and CVD actions represent the vast majority of activity under the trade remedy laws.

Duty collections resulting from AD and CVD actions are currently distributed pursuant to the Continued Dumping and Subsidy Offset Act (CDSOA), more commonly known as the "Byrd Amendment." This law provided for the distribution of import duties collected as a result of AD or CV duty orders to petitioners and other interested parties who supported the investigations that resulted in the orders. CDSOA disbursements amounted to $284 million in FY2004, $226.1 million in FY2005, and $380.0 million in FY2006. Although the CDSOA was actually repealed in the Deficit Reduction Act of 2005 (P.L. 109-171), the repeal language specified that disbursement of duties will continue, as if the law had not been repealed, for all entries of goods prior to October 1, 2007.[1]

"New Shipper" Reviews

In the course of an AD or CVD investigation by the ITA, the agency generally determines a separate weighted average dumping margin or subsidy rate for each exporter or producer of subject merchandise that was investigated individually during the period of investigation (POI), and an estimated (generally higher) "all-others rate" for all those not individually investigated.[2] These are the duty rates assessed if the investigation results in final affirmative determinations by the ITA and ITC, and an AD or CV duty order is subsequently issued.

Since many exporters who are individually investigated are likely to receive significantly lower rates than the "all-others rate," it is often in the interest of an exporter to request an investigation in order to receive the separate rate. After the conclusion of an AD or CVD proceeding, if the ITA receives requests from an exporter or producer who (1) did not export the subject merchandise during the initial POI; and (2) is not affiliated with any producer or exporter who exported the merchandise, it must conduct a review to establish an individual AD or CV duty rate for the exporter.[3] This type of review, commonly known as a "new shipper review," may take from 270 to 450 days to complete, depending on complexity.[4]

A firm from a non-market economy (NME) country, such as China, must also demonstrate the absence of *de jure* and *de facto* government control over its export activities in order to be assigned a separate rate in AD investigation; similar restrictions apply to new shippers from NME countries.[5]

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[1] 19 U.S.C. 1675c, repealed by section 7601 of P.L. 109-171. See CRS Report RL33045, *The Continued Dumping and Subsidy Offset ("Byrd Amendment"),* by Jeanne J. Grimmett and Vivian C. Jones.

[2] 19 U.S.C. 1673d(c)(1)(B); 19 U.S.C. 1671d(c)(1)(B). The ITA can also determine instead a single estimated country-wide subsidy rate if it determines that it is not practicable to determine individual rates. See 19 U.S.C. 1671d(c)(1)(B)(i)(II); 19 U.S.C. 1677f-1(e)(2)(B).

[3] 19 U.S.C. 1675(a)(2)(B).

[4] 19 U.S.C. 1675(a)(2)(B)(iv).

[5] China was first designated an NME country for purposes of AD investigations in *Preliminary Determination of Sales at Less than Fair Value, Greige Polyester Cotton Print Cloth from China* (48 F.R. 9897 (1983)). Any such determination remains in effect until revoked by the ITA (19 U.S.C.1677(18)(C)(i)). See 19 C.F.R. 351.214(b)(2)(iii)(B) relating to new shipper reviews.

Prior to the suspension of the new shipper bonding privilege, any importer purchasing from the new shipper undergoing investigation received the right, at its option, to post a bond or security (in lieu of a cash deposit) to cover the additional AD or CV duties to be assessed at the completion of the review.[6] When the final results of the new shipper review were published and the exporter was assigned an individual duty rate, the ITA instructed U.S. Customs and Border Protection (CBP) to terminate the bonding privilege and to collect cash deposits of the estimated AD/CV duties on all future entries of the targeted merchandise at the shipper-specific rate determined (or the "all others" rate, if applicable) during the review. In addition, the CBP was instructed to liquidate all subject merchandise reviewed during the investigation at the final assessment rate, and to determine and collect the final duties to be assessed on any other subject merchandise that entered while the review was ongoing.[7]

Duty Collection Issues

CBP has reportedly had considerable difficulty collecting the actual amount of AD and CV duties owed on subject merchandise. This problem received special attention beginning in 2001, the first year in which U.S. industries were eligible to receive disbursements under the CDSOA. According to CBP records, these uncollected duties amounted to about $260 million in FY2004, $93.4 million in FY2005, and $146.4 million in FY2006. For example, Louisiana crawfish producers estimated, and CBP's annual disbursement reports later confirmed, that between 2002 and 2004, CBP collected only $25.5 million of about $195.5 million in AD duties owed on crawfish, with about 90 percent of these duties owed on merchandise imported from China.[8]

Any shortfall in collections of AD or CV duties affects U.S. producers of the subject merchandise in two ways: (1) the protection afforded by the AD or CV action, intended to assist the domestic industry to compete against unfairly traded, lower-priced goods, is diminished; and (2) domestic producers are not able to collect all of the duties available to them under the CDSOA.

Alleged Abuse of New Shipper Rules

Many U.S. producers of goods subject to AD or CVD orders cited the new shipper bonding privilege as one of the ways that importers circumvented duty orders. Several methods are reportedly used. One method, for example, reportedly involved exporters subject to high AD duty rates setting up "shell" companies in the source country to act as new shippers. Other shell companies were set up in the United States to act as the

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[6] 19 U.S.C. 1675(a)(2)(B)(iii).

[7] Department of Commerce. International Trade Administration. Import Administration Policy Bulletin. *Application of the Interest Provision in Section 778(a) of the Tariff Act to Entries Made Pursuant to a Subsequently Rescinded New Shipper Bonding Privilege*. Policy Bulletin No. 03.3, August 26, 2003. [http://www.ita.doc.gov].

[8] Prior to FY2001, all AD and CV duties were deposited in the general fund of the U.S. Treasury. CBP has included a listing of all uncollected duty amounts by case number in its CDSOA annual report since FY2003. See [http://www.customs.gov/].

importer of record, or arrangements could have been made with other collusive importers. These "new shippers" then sent a few shipments of the goods to the importer at a "fair" price and subsequently requested that the ITA undertake a new shipper review of its export sales price.[9] While the new shipper review was underway, the importer posted a bond — generally for much less than the AD duty amount that was assessed at the end of the investigation.[10]

Administrative authorities sometimes discovered this or other types of fraudulent arrangements in the course of the new shipper review. If not discovered, however, the "new entity" could receive a very low dumping margin and continue to supply the market with the original shipper's merchandise at a much lower AD/CV duty rate than previously assigned. Even if the arrangement was discovered, the receiving company could have succeeded in importing unlimited quantities of the subject merchandise for many months.[11] In addition, since the time between the entry and final liquidation of the subject merchandise is often more than a year, the shipper under investigation, the importer, or both, could have gone out of business or declared bankruptcy by the time that the final rate of duty was established. Therefore, in many cases, the higher duties owed remained uncollected.

ITA and CBP Efforts

The ITA and CBP have both made significant policy changes in an effort to restrict abuses of the new shipper bonding privilege and other forms of duty circumvention. In procedures implemented in October 2002, the ITA began requiring additional certifications and qualifying paperwork from all exporters requesting new shipper reviews in order to (1) ensure that these exporters actually meet all regulatory requirements and (2) limit the application of the bonding privilege so that the new shipper under review could not become a conduit for exports from producers not involved in the review.[12]

In response to complaints on the part of some interested parties that the bond amounts established were not sufficient to cover the AD duties likely to be owed, CBP amended its guidelines in July 2004.[13] Specifically, CBP now requires that continuous bond amounts for all importers of certain "special categories" of merchandise subject to

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[9] U.S. Congress. House. Committee on Ways and Means. Hearing. "United States-China Relations and China's Role in the Global Economy." October 30-31, 2003. Statement of the Customs Bond Committee of the American Surety Association (ASA).

[10] WTO, Negotiating Group on Rules, United States. "New Shipper Reviews (ADA Article 9.5)," July 14, 2004. No. TN/RL/GEN/11.

[11] Ibid., p. 2.

[12] The ITA began requiring these additional certifications in *Preserved Mushrooms from Indonesia: Initiation of New Shipper Antidumping Duty Review*, 67 FR 62437. For further clarification, see U.S. Department of Commerce, International Trade Administration, Import Administration Policy Bulletin No. 03.2 of March 4, 2003, *Combination Rates in New Shipper Reviews*. [http://www.ita.doc.gov].

[13] U.S. Customs and Border Protection. Amended Customs Directive 99-3510-004, July 9, 2004. The minimum bond amount was previously 10% of the duties, taxes, and fees paid by the importer during the previous year.

AD or CV duty orders (currently only frozen warmwater shrimp), be increased to the ITA rate established on the final AD or CV order (new shippers are assessed at the "all others" rate), multiplied by the value of the importer's entries of the subject merchandise in the previous 12-month period. For example, if an importer has imported subject merchandise with a value of $1 million during the previous 12 months, and the ITA rate is 40 percent, the importer's continuous bond amount will be increased by $400,000.[14] Continuous bonds must be posted *in addition to* any regular duties, single-entry bonds, or cash deposits required to cover each entry of the merchandise. Bond amounts will also be periodically reviewed to monitor whether the bonds are sufficient, and rates may be adjusted as circumstances warrant.[15]

On April 24, 2006, Thailand requested dispute settlement consultations with the United States in the World Trade Organization (WTO) relating to certain AD procedures, including CBP's continuous bond requirement, on warmwater shrimp.[16] India, Japan, Brazil, and China requested to join the consultations in early May 2006. In early June 2006, India also requested consultations on the continuous bond requirement.[17] Meanwhile, the office of the U.S. Trade Representative (USTR) has reportedly been putting pressure on CBP to change the policy due to concerns that a WTO challenge might be successful.[18]

Legislation

Domestic interested parties called on Congress to deal with the "new shippers" duty collection issue, and several bills were introduced in the 109th Congress to address the "loophole." Section 4 of H.R. 3283, the United States Trade Rights Enforcement Act (English, introduced July 14, 2005, passed House July 27, 2005) and its companion bill S. 1421 (Collins, introduced July 19, 2005) sought to suspend the new shipper bonding privilege for three years. The legislation also would have required administration officials to make recommendations to Congress regarding the extension of the suspension, and to report on the effectiveness of previous administrative measures in addressing the difficulties that led to the suspension of the privilege. S. 695 (Cochran,

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[14] Ibid. See also U.S. Customs and Border Protection, "Amendment to Bond Directive Clarification of July 9, 2004 Amended Monetary Guidelines for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases," issued August 10, 2005. Bonds for exporters with no prior history of imports (e.g., new shippers) will be assessed on the basis of the ITA deposit rate in effect on the date of entry, multiplied by the estimated annual import value of the subject goods.

[15] Customs Directive 99-3510-004.

[16] World Trade Organization. *United States — Antidumping Measures on Shrimp from Thailand*. April 27, 2006, WT/DS343/1. See 71 F.R. 33495 for a summary of the major issues raised by Thailand.

[17] World Trade Organization. United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, June 6, 2006, WT/DS345/1. See 71 F.R. 44723 for a summary of the major issues raised by India.

[18] "USTR Steps Up Fight Against CBP Bonding Rules Under Threat of WTO Case," *Inside U.S. Trade*, June 16, 2006.

passed the Senate by unanimous consent on November 17, 2005) and its companion bill H.R. 1039 (Pickering, introduced March 11, 2005) sought to suspend the privilege for a similar time period. S. 2467 (Grassley, introduced March 28, 2006), among other things, also sought to suspend the privilege. Section 7 of H.R. 3306, the Fair Trade with China Act of 2005 (Rangel, introduced July 14, 2005), sought to strike the new shipper bonding privilege entirely.

On July 28, 2006, several trade provisions, including a measure suspending the new shipper bonding privilege, were inserted into pension legislation before the House. H.R. 4 (Boehner), the Pension Protection Act of 2006, passed the House on the same date by a vote of 279-131. The bill was subsequently received in the Senate, and passed on August 3 by a vote of 93-5. On August 17, the President signed the bill (which became P.L. 109-280).

The "new shipper" measure included in P.L. 109-280 suspended the availability of bonds to importers from new shippers retroactively from April 1, 2006, to June 30, 2009, thus requiring them to submit a cash deposit to cover the entire estimated AD/CV duties for the targeted merchandise.[19] The measure was implemented by CBP on August 16, 2006.[20] The law further required the Secretary of the Treasury, in consultation with the Secretary of Commerce, the U.S. Trade Representative, and the Secretary of Homeland Security to report to Congress on the effectiveness and trade-related impact of the suspension and to make recommendations on its extension no later than December 31, 2008. The same officials are also required to report on previous duty collection issues during the "4 most recent fiscal years for which data are available; including any fraudulent activity intended to avoid payment of duties" within 180 days of enactment.[21]

Conclusion

Suspension of the new shipper bonding privilege may improve the effectiveness of AD and CV duty collections by reducing fraudulent activity. However, it could also cause imports of the targeted merchandise to be less attractive, thus leading to the collection of lower duty amounts in any case. Therefore, if domestic manufacturers are interested in more effective collection of duties so that they will receive higher CDSOA disbursements, suspension of the new shipper bonding privilege may frustrate that purpose. However, if producers and other interested parties seek the optimal protection afforded by AD and CVD actions (e.g., the ability to compete with the imported subject merchandise due to fair pricing of the imports), requiring cash deposits may be an effective approach.

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[19] The suspension does not apply to Mexico or Canada because the North American Free Trade Agreement (NAFTA) specifies that any amendments to AD or CVD laws apply to NAFTA countries only "to the extent specified in the amendment." See 19 U.S.C. 3438.

[20] U.S. Customs and Border Protection. *Suspension of New Shipper Review Provision*. Memorandum, August 16, 2006.

[21] P.L. 109-280, sec. 1632(b) and (c).