Congressional Research Service

Report RS22290

Trade Remedies: "New Shipper" Reviews

Vivian C. Jones, Foreign Affairs, Defense, and Trade Division

May 12, 2008

Abstract. Some U.S. producers of merchandise subject to antidumping (AD) duties or countervailing duties (CVD) complain that U.S. Customs and Border Protection (CBP) have not collected the full amount of duties owed on targeted imports. One of the "loopholes" often cited is a law that allows importers that receive goods from new exporters of targeted merchandise to post bonds instead of cash deposits while an investigation of the "new shipper" is conducted to assess an appropriate AD or CVD duty amount based on the exporter's previous sales. Congress suspended the new shipper bonding privilege from April 1, 2006 to June 30, 2009 (sec. 1632(a) of P.L. 109-280). A May 2008 report by the U.S. Government Accountability Office (GAO) estimated that abuse of the new shipper bonding privilege was responsible for about 40% of the uncollected duties from fiscal years 2001 to 2007.

Order Code RS22290
Updated May 12, 2008

CRS Report for Congress

Trade Remedies: "New Shipper" Reviews

Vivian C. Jones
Specialist in International Trade and Finance
Foreign Affairs, Defense, and Trade Division

Summary

Some U.S. producers of merchandise subject to antidumping (AD) duties or countervailing duties (CVD) complain that U.S. Customs and Border Protection (CBP) have not collected the full amount of duties owed on targeted imports. One of the "loopholes" often cited is a law that allows importers that receive goods from new exporters of targeted merchandise to post bonds instead of cash deposits while an investigation of the "new shipper" is conducted to assess an appropriate AD or CVD duty amount based on the exporter's previous sales.

Congress suspended the new shipper bonding privilege from April 1, 2006 to June 30, 2009 (sec. 1632(a) of P.L. 109-280). A May 2008 report by the U.S. Government Accountability Office (GAO) estimated that abuse of the new shipper bonding privilege was responsible for about 40% of the uncollected duties from fiscal years 2001 to 2007. This report will be updated as events warrant.

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 sold, or is 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 prohibited 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.

From FY2001 to FY2007, duties assessed on entries of goods subject to AD and CVD orders[1] were distributed to the petitioners and other parties in support of successful AD and CVD cases pursuant to the Continued Dumping and Subsidy Offset Act (CDSOA), more commonly known as the "Byrd Amendment." Although the CDSOA was actually repealed as of October 1, 2005, in sec. 7601of the Deficit Reduction Act of 2005 (P.L. 109-171), the repeal language provided for continued disbursement of AD/CV duties assessed on entries of goods until October 1, 2007. CDSOA disbursements amounted to $284 million in FY2004, $226.1 million in FY2005, and $380.0 million in FY2006, and $264.4 million in FY2007.[2]

Duty Collection Issues

U.S. Customs and Border Protection (CBP) reportedly has had considerable difficulty collecting the actual amount of AD and CV duties owed on subject merchandise. This problem received special attention beginning in FY2001, the first year in which U.S. industries were eligible to receive disbursements under the CDSOA. According to CBP records, uncollected duties from FY2001 through FY2007 amounted to more than $613 million.[3] For example, Louisiana crawfish producers estimated, and CBP's annual disbursement reports later confirmed, that between FY2002 and FY2004, CBP collected only $25.5 million of about $195.5 million in AD duties owed on crawfish.[4] A recent report by the Government Accountability Office (GAO) estimated that the ability of "new shippers" to temporarily post bonds (in lieu of cash deposits) while the ITA conducts an investigation of their sales in the U.S. market accounted for about 40% of these uncollected duties.[5]

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.[6] In addition, with the repeal of CDSOA, duties that would

---

[1] After the ITA and ITC reach final affirmative determinations of dumping or subsidy, ITA instructs CBP in an AD or CVD "order" to assess these duties on the targeted merchandise.

[2] 19 U.S.C. 1675c, repealed by section 7601 of P.L. 109-171. The repeal means that, for all entries of goods after October 1, 2007, AD/CVD duties are, as they were prior to the CDSOA enactment, deposited in the general account of the U.S. Treasury.

[3] Government Accountability Office (GAO). *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*. GAO-08-381, March 2008, p. 13. (Hereinafter, GAO report).

[4] 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 reports since FY2003. See [http://www.cbp.gov/]. The requirement that CBP report the amount of AD/CVD duties collected (and uncollected duties) was, in effect, repealed with the CDSOA..

[5] GAO report, p. 24.

[6] Because the United States uses a retrospective system of AD/CVD collection, some industries are still receiving disbursements for goods that entered the United States prior to October 2007.

normally be directed to the U.S. Treasury (i.e., on targeted merchandise entering after October 2007), are foregone.

"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 much higher) "all-others rate" for all those not individually investigated.[7] 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 most 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 so that it can be assigned a separate rate. After the conclusion of an AD or CVD proceeding, if the ITA receives a request 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, the ITA must conduct a review to establish an individual AD or CV duty rate for the exporter.[8] This type of review, commonly known as a "new shipper review," may take from 270 to 450 days to complete, depending on complexity.[9]

Prior to April 2006, any importer purchasing from the new shipper undergoing investigation received the right, at his or her 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.[10] Congress suspended this "new shipper bonding privilege" until June 30, 2009 (sec. 1632(a) of P.L . 109-280). As a result, all importers must now post a cash deposit to cover the estimated AD or CV duties. In terms of collecting the duties owed, this eliminates the risk of delinquency provided that the final duty rate assessed is equal to (or less than) the cash deposit rate. However, if the ultimate duty rate is higher than the cash deposit posted, a risk that the difference is uncollected remains.[11]

---

[7] 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).

[8] 19 U.S.C. 1675(a)(2)(B). 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 (19 U.S.C. 1675(a)(2)(B)(iv)).

[9] 19 U.S.C. 1675(a)(2)(B)(iv).

[10] 19 U.S.C. 1675(a)(2)(B)(iii). The bond amount set by CBP was generally significantly lower than the amount of duties likely to be assessed.

[11] GAO Report p. 25.

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 the duties owed. One method that was reported involved exporters subject to high AD duty rates setting up "shell" companies in the source country to act as new shippers. Other such companies were set up in the United States to act as the importer of record, or arrangements were made with other collusive importers. These "new shippers" exported a minimal amount of the goods at a "fair" price and subsequently requested that the ITA undertake a new shipper review of its export sales price.[12] While the new shipper review was underway, the importer posted a bond — generally for a substantially lesser amount than the AD/CV duty amount that was assessed at the end of the investigation.[13]

Administrative authorities sometimes discover this or other types of fraudulent arrangements in the course of the new shipper review. If not discovered, however, the "new entity" can 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 can succeed in importing unlimited quantities of the subject merchandise for many months.[14]

Second, since the United States uses a retrospective system of assessing AD/CVD tariffs, the time between the actual entry of the merchandise and receipt of the final bill assessing the duties is 3.3 years on average, which can add to the risk that duties are uncollected, especially when dealing with illegitimate importers.[15] During the elapsed time, the shipper, the importer, or both, may have gone out of business or have declared bankruptcy. Therefore, in many cases, the higher duties owed remain 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.[16]

---

[12] 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).

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

[14] Ibid., p. 2.

[15] GAO Report, p. 23.

[16] 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 (continued...)

In July 2004, CBP required that continuous bond amounts for all importers of certain "special categories" of merchandise subject to AD or CV duty orders (currently only frozen warmwater shrimp[17]) 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.[18] 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.[19]

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.[20] 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.[21] A February 2008 WTO dispute settlement panel report found that application of the revised policy with respect to products from India and Thailand was inconsistent with U.S. WTO obligations.[22] In addition, the U.S. Court of International Trade has issued a court injunction on implementation of the policy against some importers.[23]

Legislation

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

[16] (...continued)
Administration Policy Bulletin No. 03.2 of March 4, 2003, *Combination Rates in New Shipper Reviews*. [http://www.ita.doc.gov].

[17] GAO estimated that 87% of the uncollected duties were owed on agriculture/aquaculture products (see GAO Report, p. 15).

[18] Ibid.

[19] Customs Directive 99-3510-004.

[20] 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.

[21] World Trade Organization. United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, WT/DS345/R (See 71 F.R. 44723 for a summary of the major issues raised by India); United States —Measures Relating to Shrimp from Thailand, WT/DS343/R.

[22] Ibid.

[23] *National Fisheries Institute, Inc.* v. *United States Customs and Border Protection* . 465 F.Supp. 2d at 1337. The injunction applies to 27 members of the above trade association.

for entries of the targeted merchandise.[24] The measure was implemented by CBP on August 16, 2006.[25] The law further requires 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 were 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.[26]

Conclusion

Suspension of the new shipper bonding privilege may partially improve the effectiveness of AD and CV duty collections because, until July 2009, importers must post cash deposits roughly equivalent to the amount of duties assessed at the time of entry into the United States, provided the final amount of duties assessed is equal to or lesser than the deposit rate. Supplemental duties that may be accrued due to possible rate increases (either during the final ITA determination as a result of annual reviews) are not protected, however.[27] Furthermore, Congress faces the issue, some time in 2009, of evaluating its effectiveness and determining whether to allow it to lapse, extend the suspension, or require cash deposits for new shippers permanently.

Congress could also revise the level (or number) of shipments necessary for exporters to apply for "new shipper" status.[28] According to ITA officials, abusers of the privilege typically exported one shipment of the goods subject to AD or CV duties at a relatively high price, resulting in a relatively low cash (or no) deposit being required. If subsequent shipments were found to be dumped or subsidized, CBP had to issue retrospective bills for the duty amounts assessed which were likely to be uncollected.[29] Therefore, Congress could choose to increase the dollar amount or number of shipments required prior to application for a new shipper review, or to provide ITA with the discretion to do so. On the other hand, this approach could unfairly burden legitimate new shippers by requiring them to export a much larger amount at a relatively high rate of duty prior to receiving an individual (presumably lower) rate.

Finally, the requirement that CBP report all uncollected AD/CV duties was repealed along with the CDSOA. Congress may also want to consider reinstating the reporting requirement.

[24] 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.

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

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

[27] GAO Report, p. 25.

[28] GAO Report, p. 42.

[29] Ibid.