"SHOW ME THE MONEY": A PRACTITIONER'S GUIDE TO THE INTERSECTION OF CUSTOMS AND AD/CVD LAW

VALERIE A. SLATER* & JARROD M. GOLDFEDER**

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* Valerie A. Slater heads the International Trade Practice at Akin Gump Strauss Hauer & Feld LLP, Washington D.C. Ms. Slater has extensive experience with the trade regulatory matters before the U.S. Department of Commerce and the U.S. International Trade Commission, as well as trade litigation before the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit.

** Jarrod M. Goldfeder is an associate in the International Trade Practice at Akin Gump Strauss Hauer & Feld LLP, Washington D.C., where he focuses primarily on international trade proceedings before U.S. federal agencies. Mr. Goldfeder formerly served as a senior import compliance specialist at the Import Administration, International Trade Administration, U.S. Department of Commerce, which is responsible for conducting antidumping and countervailing duty proceedings.

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1. INTRODUCTION

When the Trade Agreements Act of 1979 transferred the administration of the antidumping ("AD") and countervailing duty ("CVD") laws from the U.S. Department of the Treasury to the U.S. Department of Commerce ("Commerce"),[1] the Treasury Department, through its U.S. Customs Service ("Customs"), retained responsibility for collecting and assessing AD/CVD duties based on instructions received from Commerce.[2] In 2002, Customs was renamed U.S. Customs and Border Protection ("CBP") and became part of the newly created Department of Homeland Security, but its responsibilities in the AD/CVD realm remained the same.[3]

Much of AD/CVD practice focuses on Commerce's methodology for calculating the applicable duty rates for each investigated foreign producer or exporter. However, CBP is ultimately responsible for implementing Commerce's determinations and, consequently, it is equally important for all involved interested parties to understand the intricacies of CBP's processes. For exporters and importers in particular, the Customs side of the trade remedies process is critical for financial planning because it determines when they will be responsible for the actual payment of duties. In recent years, however, domestic parties have become particularly focused on Customs issues because of the Continued Dumping and Subsidy Offset Act ("CDSOA"), also known as the "Byrd Amendment," which entitles certain domestic producers to the duties that CBP collects pursuant to AD/CVD orders.

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[1] Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended throughout Title 19 of the U.S. Code).

[2] For simplicity, this Article uses the shorthand description "AD/CVD" to refer to antidumping ("AD") or countervailing duty ("CVD") where the discussion applies to both types of proceedings.

[3] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. §§ 101-557 (2006)).

This paper provides a detailed overview of the timing of CBP's collection and assessment of AD/CVD duties. It also discusses various issues that highlight the interplay between Commerce and CBP in the enforcement of the AD/CVD laws.

2. TIMING OF COMMERCE INSTRUCTIONS TO CBP

The Tariff Act of 1930,[4] as amended by the Uruguay Round Agreements Act, establishes a two-part procedure for the collection of AD/CVD duties. First, CBP collects cash deposits or bonds as a security to ensure the eventual payment of any AD/CVD duties that will be owed at the completion of Commerce's administrative review process.[5] These securities represent only estimates of the potential liability for duties that may be owed on each entry. In other words, at the time of importation, the amount of actual duties owed on the entered shipment is not known.

Second, in an administrative review, Commerce determines the actual amount of AD/CVD duties that each importer owes on its entries made during the period being examined.[6] Reviews are completed and final duties are assessed long after the merchandise has been imported and entered into U.S. commerce, and an importer could owe more or less than the estimated security that it had posted through cash deposits or bonds. Thus, importers undertake inherent and significant risks when they import merchandise subject to AD/CVD duties.

Before discussing some of the major Customs issues that practitioners may encounter, it is important first to consider the timing of the major events that occur during the course of an AD/CVD proceeding. The timeline on the following page summarizes the major events discussed in this section.

2.1. Publication of Commerce's Preliminary Determination

The first major event resulting in the collection of AD/CVD duties is Commerce's preliminary determination during the original investigation.[7] Commerce normally calculates preliminary duty

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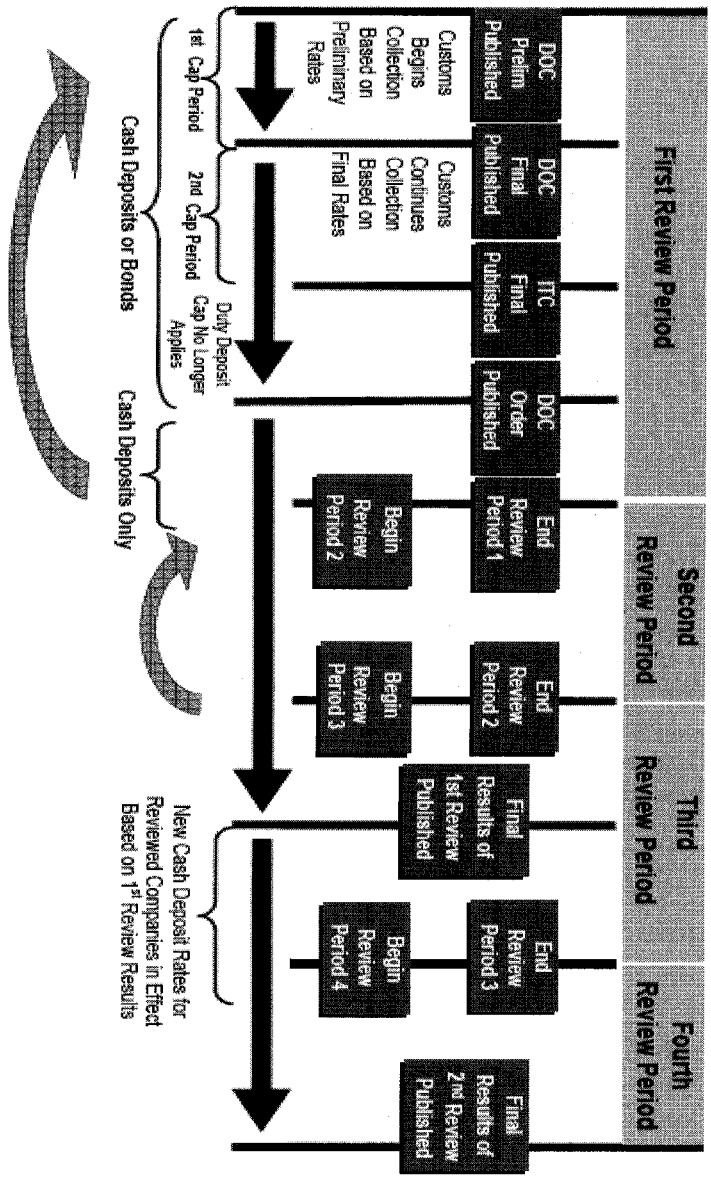
[4] Tariff Act of 1930, 19 U.S.C. §§ 1202, 1671–1677n (2000).

[5] *See id.* §§ 1671b(d)(1)(B), 1671d(c)(1)(B)(ii), 1673b(d)(1)(B), 1673d(c)(1)(B)(ii) (stating that Commerce shall order the posting of a cash deposit or bond for each entry of subject merchandise as security for AD/CVD duties).

[6] *Id.* § 1675(a)(1).

[7] Although the International Trade Commission ("ITC") issues its preliminary determination prior to the U.S. Department of Commerce's ("Commerce")

Chart 1: Timeline of Major Events in an AD/CDV Proceeding



preliminary determination, no actions are taken by the U.S. Customs and Border Protection ("CBP") at that time. That is, the ITC's preliminary determination does not affect the treatment given to subject merchandise at the border. However, if the ITC issues a negative preliminary determination, then the investigation terminates.

margins based on information submitted by respondents in their extensive questionnaire responses.[8] It also calculates a weighted-average AD/CVD rate that applies to all companies not individually investigated based on the rates calculated for the investigated companies.[9] Effective the date of publication of its preliminary determination in the *Federal Register*, Commerce instructs CBP to suspend liquidation on each entry of subject merchandise and to require importers to pay cash deposits or post bonds as security for eventual duty liability at the preliminarily calculated rates.[10] These deposits will remain with CBP until Commerce issues a final determination and instructs CBP to effect final liquidation of the entries after Commerce's administrative review process.[11] Of course,

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[8] Commerce normally calculates individual rates for each producer or exporter that participates in its proceedings. However, the CVD law permits Commerce to conduct its proceedings on an aggregate basis. *See* 19 U.S.C. § 1677f-1(e)(2)(B) (stating that, if determining individual rates is impracticable, Commerce may determine a single, country-wide subsidy rate that applies to all exporters and producers). For simplicity, this paper discusses the imposition of CVD duties on an individual producer basis.

[9] *Id.* §§ 1671b(d)(1)(A), 1673b(d)(1)(A)(ii). In calculating these country-wide rates (also referred to as "all others" rates for cases involving merchandise from market economy countries), Commerce excludes any zero or de minimis margins, margins calculated entirely on the basis of "facts otherwise available," and margins calculated for voluntary respondents. *Id.* §§ 1671d(c)(5), 1673d(c)(5); *see also* 19 C.F.R. § 351.204(d)(3) (2006) (discussing the treatment of voluntary respondents in the calculation of the all others rate).

[10] 19 U.S.C. §§ 1671b(d)(1)(B), 1673b(d)(1)(B); 19 C.F.R. § 351.205(d). If Commerce finds that "critical circumstances" exist, it instructs CBP to suspend liquidation retroactively, and require cash deposits or bonds, on imports that entered 90 days prior to the publication date of Commerce's preliminary determination. 19 U.S.C. §§ 1671b(e), 1671d(a)(2), 1673b(e), 1673d(a)(3); 19 C.F.R. § 351.206. Under Commerce's rules, critical circumstances exist when: (1) there have been "massive imports" in subject imports in a relatively short time period; (2) in an AD proceeding, there is a history of dumping the subject merchandise, or importers know or should have known that imports were being dumped; and (3) in a CVD proceeding, the alleged countervailable subsidy is inconsistent with the WTO Subsidies Agreement. 19 U.S.C. §§ 1671b(e)(1), 1673b(e)(1). If Commerce makes an affirmative finding, the ITC conducts a separate evaluation of whether imports subject to the finding are likely to undermine the remedial effect of the order.

[11] If Commerce makes a "significant" ministerial error in its preliminary determination, then it must issue a corrected *Federal Register* notice and revised instructions to CBP at the amended preliminary cash deposit rates. 19 C.F.R. § 351.224(e). Commerce's regulations define a "ministerial error" as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error . . . ." *Id.* § 351.224(f). A "significant" ministerial error is any error that "[w]ould result in a change of at least five absolute percentage points in, but not less than 25 percent of, the weighted-average dumping margin or the coun-

if Commerce issues a negative preliminary determination because all exporters receive de minimis margins—i.e., less than two percent in an AD investigation[12] or less than one percent in a CVD investigation[13]—then liquidation is not suspended. Unlike the ("ITC"), however, Commerce still proceeds to the final phase of its investigation even if it issues a negative preliminary determination.

As noted above, cash deposits or bonds that importers post at the time of each entry into the United States are set at levels that constitute *estimates* of the actual liability that may be owed on that entry, and CBP retains those deposits or bonds until Commerce determines the actual amount of duty liability in the administrative review some one to three years after entry.[14] At the time of importation, CBP calculates the estimated security amount for each entry by multiplying the applicable dumping rate by the Customs value of the merchandise. The "customs value" is the commercial value declared by the importer on the entry summary forms (CBP 7501). For example, if Commerce calculates a preliminary AD margin of 10% and an importer enters subject merchandise valued at $100,000, then that importer must post either a cash deposit or bond of $10,000 in estimated AD duties (i.e., $100,000 x 10%).

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tervailable subsidy rate" or "[w]ould result in a difference between a weighted-average dumping margin or countervailable subsidy rate (whichever is applicable) of zero (or de minimis) and a weighted-average dumping margin or countervailable subsidy rate of greater than de minimis, or vice versa." *Id.* § 351.224(g).

12 19 U.S.C. § 1673b(b)(3).

13 *Id.* § 1671b(b)(4)(A).

14 The cash deposits or bonds required for entries between the publication of Commerce's preliminary determination and the publication of the AD/CVD order are referred to as "provisional measures." Provisional AD duty measures may not remain in effect for more than four months unless respondents request in writing that Commerce extend the period to not more than six months. 19 U.S.C. § 1673b(d). Moreover, Commerce will not extend the deadline for its final AD determination unless respondents who "account for a significant proportion of exports of subject merchandise" agree to this extension. 19 C.F.R. § 351.210(e)(2). Thus, if an AD order is published more than six months after the publication of Commerce's preliminary determination, a slight gap period may result during which CBP does not require cash deposits or bonds. In contrast, provisional CVD duties may not be extended beyond the four month period. *See* 19 U.S.C. § 1671b(d) ("The instructions of the administering authority . . . may not remain in effect for more than 4 [sic] months.").

2.2. Publication of Commerce's Final Determination

After conducting on-site verifications of the respondents' books and records and then considering comments submitted by interested parties through case and rebuttal briefs, Commerce issues its final determination. As part of its final determination, Commerce recalculates the AD/CVD margins for each investigated respondent as well as the country-wide rate applicable to all other non-investigated exporters.[15] If the final determination is affirmative—that is, if at least one respondent receives an AD/CVD duty margin that is above de minimis—Commerce then instructs CBP to continue suspending liquidation on each entry of subject merchandise.[16] It also instructs CBP to collect cash deposits or require the posting of a bond equal to the revised rates established in the final determination, effective the date of publication of the final determination in the *Federal Register*.[17]

On the other hand, if Commerce's final determination is negative, the investigation terminates. Commerce then instructs CBP to terminate suspension of liquidation and refund all previously paid cash deposits or release any posted bonds.[18] In such instances, importers are *not* entitled to interest on any refunded cash deposits.[19]

Finally, if Commerce's final determination is affirmative but certain exporters receive de minimis margins, Commerce will instruct CBP to terminate the suspension of liquidation as to those specific exporters and refund any cash deposits, or release any

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[15] Although the country-wide rates normally do not change following the investigation phase of an AD/CVD proceeding, non-investigated exporters can receive company-specific cash deposit rates if they participate in an administrative review. Likewise, companies that participate in an investigation can receive revised company-specific cash deposit rates if they subsequently participate in a review.

[16] *See* 19 U.S.C. §§ 1671d(c)(1) (explaining the effect of an affirmative final CVD determination), 1673d(c)(1) (explaining the effect of an affirmative final AD determination); *see also* 19 C.F.R. § 351.210(d) (explaining what actions are taken by CBP once an AD/CVD determination is final). If Commerce makes any ministerial errors in its final determination, then it must issue a corrected *Federal Register* notice and revised instructions to CBP at the amended final cash deposit rates. *See* 19 C.F.R. § 351.224(e) (explaining what actions are taken once a ministerial error or is found with a final determination).

[17] 19 U.S.C. §§ 1671d(c)(1)(B), 1673d(c)(1).

[18] *Id.* §§ 1671d(c)(2), 1673d(c)(2).

[19] *See Id.* § 1677g(a)(1) ("Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after the date of publication of a countervailing or antidumping duty order . . . .").

bonds, that were posted on entries of their merchandise since the date of publication of the preliminary determination. Thus, even though an AD/CVD order may go into effect, entries from those particular producers or exporters are exempted from duties throughout the life of the order.

2.3. Publication of the ITC's Final Determination

The publication of the ITC's final determination does not directly result in action at CBP, but it is nevertheless extremely relevant for importers. Entries of subject merchandise that occur between the publication date of Commerce's preliminary determination and the publication date of the ITC's final determination are subject to a "cap" on duty liability.[20] Ultimate liability for duties on such entries cannot exceed the amounts deposited during this period.[21]

Within this "cap" period, there are actually two caps. The first cap applies during the period between the date of publication of Commerce's preliminary determination and the date of publication of its final determination. The second cap applies during the period between the date of publication of Commerce's final determination and the day before the publication of the ITC's final determination. The relevance of the cap is illustrated with the following example. Assume that Commerce issues a preliminary AD margin of 10% and a final AD margin of 15%, and the final liability for AD duties (determined in the final results of the first administrative review) is 20%. In this scenario, the importer's final liability for AD duties is capped at 10% for entries made between Commerce's preliminary and final determinations and at 15% for all entries made between Commerce's final determination and the ITC's final determination. For all entries on or after the publication date of the ITC's final determination and through the end of the first adminis-

[20] *See* 19 C.F.R. § 351.212(d) ("If the amount of duties that would be assessed by applying the rates included in [Commerce's] affirmative preliminary or affirmative final antidumping or countervailing duty determination ('provisional duties') is different from the amount of duties that would be assessed by applying the assessment rate . . . , [Commerce] will instruct the Customs Service to disregard the difference to the extent that the provisional duties are less than the final duties, and to assess antidumping or countervailing duties at the assessment rate if the provisional duties exceed the final duties.").

[21] *See* 19 U.S.C. §§ 1671f(a)(1), 1673f(a)(1) (explaining circumstances under which differences between the estimated amount and actual amount of AD/CVD duties are disregarded).

trative review period, the importer would be liable for the full 20%, including the amounts in excess of the estimated duties deposited at the 15% duty rate (i.e., the importer would owe an additional 5%).

Thus, the publication date of the ITC's final determination is important because, beginning on that date, an importer becomes potentially liable for payment of duties in excess of the estimated duties deposited with CBP upon entry.

2.4. Publication of the AD/CVD Order

Commerce publishes an AD/CVD order after receiving official notice of the ITC's final determination.[22] The publication date of the order is significant for two reasons. First, effective on that publication date, Commerce instructs CBP to require *only* cash deposits at the final calculated rates.[23] Thus, bonds may no longer be provided as security for AD/CVD duty liability. Second, the publication date establishes the anniversary month during which administrative reviews can be requested in each subsequent year of the order's life.

2.5. Anniversary Month of the AD/CVD Order

An administrative review is a separate procedural stage during which Commerce determines the amount of AD/CVD duties, if any, that an importer owes on merchandise that it imported during a prior period.[24] Commerce does not automatically conduct administrative reviews of foreign producers or exporters. Rather, each year during the "anniversary month" of the publication of an order, a review of a particular producer or exporter can be requested by: (1) the foreign producer or exporter itself; (2) importers of subject merchandise from the particular producer or exporter from which they purchase; (3) domestic producers (normally, peti-

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[22] *See id.* §§ 1671(a) (explaining the general rule for imposing CVD duties), 1673 (explaining the general rule for imposing AD duties); *see also* 19 C.F.R. § 351.211(b) ("Not later than seven days after receipt of notice of an affirmative final injury determination by the Commission . . . [Commerce] will publish in the FEDERAL REGISTER an 'Antidumping Order' or 'Countervailing Duty Order' . . . .").

[23] *See id.* § 351.211(a) ("Generally, upon the issuance of an order, importers no longer may post bonds as security for antidumping or countervailing duties, but instead must make a cash deposit of estimated duties.").

[24] Unlike Commerce, the ITC does not conduct annual reviews of its injury determination.

tioners); or (4) foreign governments.[25] Commerce then initiates reviews on all companies for which reviews are requested. This process continues every year in the anniversary month of the order to permit review of all U.S. entries or sales of subject merchandise that occurred during the time in which the order is in effect.

If Commerce does not receive any requests for review of particular foreign producers or exporters during the anniversary month, it normally instructs CBP shortly after it initiates the administrative review to: (a) assess final liability for AD/CVD duties on each entry during the period being reviewed at the rates at which the importers posted cash deposits or bonds; and (b) continue collecting cash deposits at the existing deposit rates.[26] In other words, for each exporter that is not subject to an administrative review, the importers of that exporter's goods will be liable for duties equal to the amounts that they posted in the form of cash deposits or bonds.[27]

2.6. *Publication of the Final Results of Commerce's Administrative Review*

In an administrative review, Commerce determines the final liability for AD/CVD duties owed on each covered entry during the prior year.[28] The final liability may differ from the amount depos-

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[25] 19 C.F.R. § 351.213(b).

[26] *See id.* § 351.212(c) (providing that Commerce will instruct CBP to "automatically assess" AD/CVD duties if no review is requested). If reviews are requested for some, but not all, exporters, Commerce normally instructs CBP to assess AD/CVD duties on entries from only those exporters for which reviews were not requested.

[27] Commerce's practice is not to issue automatic assessment instructions for exporters from non-market economy countries that do not have their own company-specific rates (referred to as "separate rates").

[28] *See* 19 U.S.C. § 1675(a)(2)(C) ("The determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties."); 19 C.F.R. § 351.221(b)(6) ("If the type of review in question involves a determination as to the amount of duties to be assessed, promptly after publication of the notice of final results instruct the Customs Service to assess antidumping duties or countervailing duties (whichever is applicable) on the subject merchandise covered by the review . . . ."). In each annual AD administrative review, Commerce normally examines U.S. entries or sales during the 12-month period immediately preceding the anniversary month. *See* 19 C.F.R. § 351.213(e)(1)(i) ("[A]n administrative review under this section normally will cover, as appropriate, entries, exports, or sales of the subject merchandise during the 12 months immediately preceding the most recent anniversary month."). For the first AD administrative review, however, Commerce examines a slightly

ited only if: (a) the exporter participates in the administrative review based on its own request or a request from domestic parties, its foreign government, or its importers; or (b) a review is requested for an exporter, but it declines to participate. If an exporter participates in a review, its importers have an opportunity to receive a whole or partial refund of the estimated duties deposited. Otherwise if a particular exporter is not subject to a review, its importers' final liability equals the amounts deposited. However, if an exporter is subject to review but refuses to participate or does not cooperate with Commerce, its U.S. importers typically receive a punitive duty rate on the basis of "adverse facts available."[29]

For those exporters that participate in a review, Commerce calculates the total amount of duties that are owed on entries during the period reviewed (i.e., the "assessment rate") based on information provided in the exporter's questionnaire responses.[30] If the actual amount of duties owed is less than the amount of cash deposited, then the importer will receive a refund of the difference, plus

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longer period beginning with the first date on which Commerce suspended liquidation—normally, the publication date of its preliminary determination, unless critical circumstances were found—through the last day of the month immediately preceding the first anniversary month of the AD order. *Id.* § 351.213(e)(1)(ii).

For each annual CVD administrative review, Commerce normally examines entries or exports during the most recently completed calendar or fiscal year. *Id.* § 351.213(e)(2)(i). For the first administrative review of a CVD order, however, Commerce examines the period beginning with the first date on which it suspended liquidation through the end of the most recently completed calendar or fiscal year. *Id.* 351.213(e)(1)(ii).

[29] *See* 19 U.S.C. § 1677e(b) ("If the administering authority . . . 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 from the administering authority . . . , the administering authority . . . in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party . . . . Such adverse inference may include reliance on information derived from: (1) the petition, (2) a final determination in the investigation under this subtitle, (3) any previous review . . . or determination . . . or (4) any other information placed on the record.").

[30] *See* 19 C.F.R. § 351.212(b) (explaining how AD/CVD duties are assessed). As in investigations, Commerce publishes both preliminary and final determinations in administrative reviews. However, when Commerce publishes the preliminary results of its administrative review, it does not direct CBP to take any actions with respect to cash deposit or assessment rates. Accordingly, if Commerce makes a significant ministerial error in the preliminary results of review, it does not to issue a corrected *Federal Register* notice or send revised instructions to CBP. 19 C.F.R. § 351.224(c)(1).

accrued interest.[31] For example, if the importer posted cash deposits at an antidumping duty rate of 20%, but Commerce finds in its administrative review that the imports were sold at prices only 5% below fair value, the importer is entitled to a refund of the excess duties deposited (i.e., 15%, plus interest) because the amounts deposited exceeded the actual level of dumping.

However, if Commerce instead determines that the actual amount of dumping exceeded the original cash deposit amount, then the importer must pay the difference, plus accrued interest. For example, if an importer deposits estimated antidumping duties at a rate of 20% on its entries from a particular exporter, but Commerce determines that the actual level of dumping on those entries was 30%, then the importer must pay an additional 10%, plus interest. If the total value of the importer's entries from that particular exporter was $1 million, it would have deposited only $200,000 ($1 million x 20%), but it would be liable for $300,000 ($1 million x 30%). The importer would subsequently receive a bill from CBP to pay the $100,000 difference, plus interest. Thus, while the administrative review process is potentially beneficial to an importer, it can also result in significantly increased duty liability.[32]

Following the publication in the *Federal Register* of the final results of an administrative review, Commerce directs CBP to liquidate all shipments entered or withdrawn from warehouses during the period of review and make the final duty assessment at the rates calculated in that review. Commerce normally issues assessment instructions to CBP within fifteen days from the date on which it publishes the final results in the *Federal Register*.

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[31] Interest is paid on overpayments and charged on underpayments, as appropriate, except on entries prior to the publication date of the AD/CVD order. *See* 19 U.S.C. § 1677g(a)(1) (explaining the general rule of interest payment on AD/CVD duty deposits). The rules governing the determination of the applicable interest rates are found at Section 6621 of the Internal Revenue Code. *See* I.R.C. § 6621 (2000) (providing the rules for determining interest rates). CBP publishes these interest rates on a quarterly basis in the *Federal Register*.

[32] In AD administrative reviews, Commerce calculates assessment rates on an importer-specific basis, which means that some importers may receive refunds while other importers may owe additional duties. *See* 19 C.F.R. § 351.212(b)(1) (stating that Commerce usually assesses antidumping duties individually for each importer). In administrative reviews, however, Commerce calculates a single assessment rate that applies to all entries from the exporter being reviewed (or, in an aggregate case, all entries from the exporting country). *Id.* § 351.212(b)(2).

In addition, Commerce calculates a new cash deposit rate for each exporter reviewed.[33] Effective on the date of publication of the final results of the administrative review, Commerce directs CBP to continue suspension of liquidation on future entries from each exporter covered by the review, but at the newly calculated cash deposit rates. The cash deposit rates calculated in the review then remain in effect for all future entries until the publication of the final results of the next administrative review in which that exporter participates.[34]

Finally, in an administrative review, the standard for a de minimis margin is less than 0.5%.[35] If Commerce calculates a de minimis margin for a respondent exporter or producer in an administrative review, importers of that company's subject merchandise are not required to pay cash deposits on future entries unless and until Commerce determines an above de minimis margin in a subsequent review. Furthermore, if an importer's assessment rate is de minimis, it will receive a full refund of its deposits on its entries from that exporter.[36] However, that exporter remains covered by the order and can be covered by subsequent administrative re-

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[33] *See id.* § 351.221(b)(7) (discussing the applicability of revised cash deposit rates).

[34] For exporters not covered by the review, Commerce instructs CBP to continue suspension of liquidation at either: (a) that exporter's previously calculated cash deposit rate (if it has its own); (b) the manufacturer's previously calculated cash deposit rate (if the exporter does not have its own rate but the manufacturer does); or (c) the "all others" rate (if neither the exporter nor the manufacturer currently has its own rate or the manufacturer is unknown). Thus, the cash deposit rates for all non-reviewed companies remain the same if they do not participate in an administrative review. *See, e.g.*, Import Admin., Int'l Trade Admin., U.S. Dep't of Commerce, Boilerplate Email Instructions to U.S. Customs and Border Protection, Cash Deposit Instructions, *available at* http://ia.ita.doc.gov/download/custboil.htm#25 (identifying the appropriate cash deposit rates on entries of subject merchandise exported by companies other than the producer).

[35] *See id.* § 351.106(c)(1) (discussing the *de minimis* standard for administrative reviews).

[36] *See id.* § 351.106(c)(2):

> [Commerce] will instruct the Customs Service to liquidate without regard to antidumping duties all entries of subject merchandise during the relevant period of review made by any person for which . . . [Commerce] calculates an assessment rate under § 351.212(b)(1) that is less than 0.5 percent *ad valorem*, or the equivalent specific rate.

Because the calculation methodologies for the cash deposit rates and the assessment rates differ, it is theoretically possible to calculate a de minimis weighted-average dumping margin, yet still calculate an importer-specific AD assessment rate that exceeds the 0.5% de minimis threshold.

views unless the AD/CVD order is revoked in whole or solely with respect to that individual exporter.[37]

2.7. Injunctions Against Liquidation of AD/CVD Duties

If the final results of an administrative review are appealed to the U.S. Court of International Trade, then interested parties may request that CBP be enjoined from liquidating the affected entries pending the outcome of the litigation.[38] If the Court issues an injunction, Commerce will instruct CBP to continue suspension of liquidation on the entries at issue until instructed by Commerce to liquidate the entries subsequent to a final court decision.[39]

3. DEEMED LIQUIDATION

When Commerce instructs CBP to liquidate entries and assess AD/CVD duties based on the final results of an administrative review, the statute directs CBP to make such liquidations "promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued."[40] Under the "deemed liquidation" rule, where the liquidation of an entry has been suspended, CBP may not wait more than six months to liquidate that entry once it has received notice from Commerce to terminate the suspension of liquidation as a result of Commerce's completion of an administrative review or the removal of a court-ordered injunction:

> Except as provided in [19 U.S.C. § 1675(a)(3)], when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry . . . within 6

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[37] *See* 19 U.S.C. §§ 1675(c)-(d) (discussing the rules governing the revocation of orders); *see also* 19 C.F.R. § 351.222 (discussing the procedures for revoking AD/CVD orders).

[38] For a thorough discussion of the statutory requirements and standards for issuing injunctions against the liquidation of entries subject to AD/CVD duties, see Stuart M. Rosen et al., *Preliminary Injunctions: A Respondent's Perspective*, 39 J. MARSHALL L. REV. 29 (2005), and Jeffrey M. Telep, *Injunctions Against Liquidation in Trade Remedy Cases: A Petitioners' [sic] View*, 39 J. MARSHALL L. REV. 45 (2005).

[39] Although the Court of International Trade routinely enjoins liquidation of entries pending judicial review, there is well-established precedent indicating that it will not enjoin CBP from adjusting the cash deposit rate based on the final results of a review because no irreparable harm results from the collection of cash deposits and the U.S. Government has an interest in ensuring that importers do not default in paying the actual duty liability. *See, e.g.*, Shandong Huarong Gen. Group Corp. v. United States, 122 F. Supp. 2d 143 (Ct. Int'l Trade 2000).

[40] 19 U.S.C. § 1675(a)(3)(B).

> months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record . . . .[41]

Thus, if CBP does not liquidate entries within six months from the date it receives notice from Commerce of the removal of suspension of liquidation, it is precluded by operation of law from liquidating the entries using any entered value and cash deposit rate other than that which applied at the time of entry. That is, the entries are "deemed liquidated" at the entered deposit rate, and CBP may not collect additional amounts beyond those already collected.

The deemed liquidation rule has significant potential implications for all parties involved in AD/CVD proceedings. For example, if an importer provides cash deposits at a rate of 20% at the time of entry, but Commerce subsequently determines in an administrative review that the importer's actual liability is 5%, the importer would lose substantial refunds if the entries were deemed liquidated subsequent to the end of the six-month period. Conversely, if that importer posted cash deposits of 10% but its actual liability was 30%, CBP would ultimately collect less than the full amount of duties owed on the entries if it failed to liquidate the entries within the six-month period. This, in turn, means that smaller amounts would be available for distribution to domestic producers under the CDSOA and, perhaps more significantly, the trade remedy laws would have been ineffective in offsetting unfair trade. In either case, the work performed by Commerce during the course of an administrative review would be nullified if CBP fails to liquidate the affected entries within the six-month period. Consequently, affected parties have a significant interest in ensuring that CBP makes proper and timely liquidations.

Given the significance of "deemed liquidation," the statutory provision has been the subject of several legal challenges in recent years. In particular, the courts have addressed the question of what constitutes "adequate notice" to CBP that suspension of liquidation has been lifted for purposes of starting the six-month

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[41] *Id.* § 1504(d).

deemed liquidation period. In *International Trading Co. v. United States,* the U.S. Court of Appeals for the Federal Circuit held that entries of AD/CVD merchandise are considered to be "deemed liquidated" six months from the date on which Commerce publishes the final results of its administrative review in the *Federal Register*.[42] The court has also reasoned that publication of the final results of a review represents "unambiguous and public" notice to CBP that suspension of liquidation has been lifted on the entries covered by that review.[43]

As discussed above, if Commerce's final results are appealed and liquidation is enjoined, the injunction causes suspension of liquidation to continue on the affected entries until CBP receives notice of a final decision by the courts, at which point the six-month period begins. By statute, Commerce is required to publish notice of adverse court decisions "within ten days from the date of the issuance of the court decision."[44] One issue that the courts have addressed is what constitutes the start of the six-month deemed liquidation period when Commerce fails to publish such a *Federal Register* notice in a timely manner. For example, in *Fujitsu General America, Inc. v. United States,* the Federal Circuit examined a situation in which Commerce did not publish notice of the court's decision until more than one year after the litigation had ended.[45] The Federal Circuit held that "[d]eemed liquidation under section 1504(d) can occur only if Customs fails to liquidate entries within six months of having received notice of the removal of a suspension of liquidation."[46] Thus, while it was "frustrating" that Commerce had delayed publication by more than one year after the court had issued its decision, the Federal Circuit concluded that the six-month deemed liquidation period began with Commerce's publication of notice of the court decision and corresponding lifting of suspension of liquidation in the *Federal Register* because it constituted CBP's receipt of "unambiguous and public" notice.[47]

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[42] *See* Int'l Trading Co. v. United States, 412 F.3d 1303, 1313 (Fed. Cir. 2005) ("[T]he period for deemed liquidation . . . was triggered when the final results of the . . . administrative review covering the entry were published in the *Federal Register* . . . .").

[43] Int'l Trading Co. v. United States, 281 F.3d 1268, 1275 (Fed. Cir. 2002).

[44] 19 U.S.C. § 1516a(e).

[45] Fujitsu Gen. Am., Inc. v. United States, 283 F.3d 1364, 1368–69 (Fed. Cir. 2002).

[46] *Id.* at 1382.

[47] *Id.* at 1382–83; *see also* Peer Chain Co. v. United States, 316 F. Supp. 2d 1357,

Another noteworthy case is *Cemex v. United States*, in which Commerce instructed CBP to liquidate certain entries at a rate that was significantly higher than the deposit rate as a result of the final remand results of a court appeal.[48] One of CBP's ports failed to liquidate as instructed within the six-month period, and the entries were deemed liquidated at the much lower entered rate. Domestic parties challenged these deemed liquidations, but the Federal Circuit held that, unlike importers, domestic interested parties have no right to protest any improper liquidations made by CBP.[49] Rather, in accordance with 19 U.S.C. § 1516, domestic interested parties may make only "*prospective* challenges to the rate and classifications of [AD/CVD] . . . duty decisions, as provided in 19 U.S.C. § 1516."[50] Thus, domestic parties have no avenue for relief if they discover that an importer's entries were deemed liquidated at the entered AD/CVD rate, but the importer received a higher assessment rate as a result of Commerce's administrative review or a court decision.

In contrast, the Court of International Trade held in *Koyo Corp. v. United States* that the deemed liquidation rules do not apply when the assessment rate determined in an administrative review or by a subsequent court decision is less than the cash deposit rate in effect at the time of the original entry.[51] In that case, the final AD rates from an administrative review were significantly lowered by the court, and Commerce instructed CBP to liquidate the affected entries at the lower rates. CBP failed to liquidate the entries within six months after having received notice from Commerce, and the entries were deemed liquidated at the substantially higher entered rates. On appeal, the Court of International Trade held that CBP could not disregard the decisions of Commerce or the

1364–65 (Ct. Int'l. Trade 2004) (explaining that, despite any delay by Commerce in providing notice to CBP of the removal of suspension of liquidation, entries are not considered "deemed liquidated" so long as CBP acts within six months of receiving notice from Commerce).

48 Cemex S.A. v. United States, 384 F.3d 1314, 1316–17 (Fed. Cir. 2004).

49 *See Id.* at 1322 ("[D]omestic parties have no specific avenue of relief for improper liquidation.").

50 *Id.* (emphasis in original).

51 Koyo Corp. of U.S.A. v. United States, 403 F. Supp. 2d 1305, 1311 (Ct. Int'l Trade 2005), *appeal docketed*, No. 2006-1226 (Fed. Cir. 2006). As of the writing of this paper, the appeal at the Federal Circuit is still pending.

courts in this manner:[52]

> In sum, the court cannot accept an interpretation of 19 U.S.C. § 1504(d) which encourages Customs simply to forget or refuse to liquidate and to ignore a court victory favoring an importer as to antidumping duties. The incentive would be perverse and the opposite of what Congress intended. Congress wished to spur on Customs to liquidate timely. This distinguishes this matter from all other cases in which § 1504 may produce difficult results, such as *Cemex*. The court is not substituting its notions of good policy for those of Congress. It is interpreting the statute to do what Congress intended, not the opposite. Congress intended to encourage *prompt* liquidation, not delayed liquidation. Congress did not intend to urge Customs to sit back, not obey its directions, Commerce's directions, and the courts' directions, and thereby retain funds to which it no longer had valid claim.[53]

The implication of these decisions is that, when the six-month period expires, CBP may apply its deemed liquidation rules if the final assessment rate is higher than the entered deposit rate, but it may not do so if the importer is entitled to a whole or partial refund of the amounts deposited.

4. REIMBURSEMENT OF DUTIES

4.1. Commerce's Rules and Practice

Importers of record have the obligation to post a security for *estimated* AD/CVD duties when merchandise subject to an order enters the United States.[54] They are also required to pay any actual AD/CVD duties that result from the administrative review process.[55] However, Commerce's regulations provide that foreign pro-

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[52] *See id.* at 1310 ("Customs cannot ignore Federal Register notices or . . . wait for six months to elapse from the time of public notice of new rates . . . .").

[53] *Id.* at 1311 (emphasis in original).

[54] *See supra* Section 2.1 (explaining that CBP collects securities based on estimated liabilities for AD/CVD duties).

[55] *See* 19 C.F.R. § 351.212(b) (explaining that Commerce will normally instruct CBP to assess AD/CVD duties based on the results of each administrative review).

ducers or exporters will be penalized if they pay AD/CVD duties directly on behalf of their importers or "reimburse" their importers for duties.[56] Specifically, if Commerce finds evidence of actual reimbursement or an agreement to reimburse during an AD administrative review, it will deduct from the U.S. price (i.e., the "export price" or "constructed export price") the amount of reimbursed duties.[57] In calculating the U.S. price, Commerce normally deducts the amount of reimbursed duties only once, which usually has the effect of doubling the amount of duties owed on each entry.[58]

Commerce explained that "[t]he objective of the reimbursement regulation is to ensure that the remedial purpose of the antidumping law is not compromised by the payment or reimbursement of antidumping duties by the foreign producer and exporter that would in effect relieve the importer of the financial consequences of dumping."[59] Thus, it will presume that a producer or exporter has reimbursed AD/CVD duties unless, prior to final liquidation of the subject merchandise, the importer files a certificate with CBP stating that it has not been reimbursed by or entered into any re-

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[56] *See id.* § 351.402(f)(1)(i) (providing that Commerce will deduct from the export price the amount of AD/CVD duties that are paid directly on behalf of, or reimbursed to, the importer).

[57] The regulations provide one limited exception to this general rule: if, before the initiation of the antidumping investigation, the exporter (or producer) and importer entered into an agreement in which the exporter/producer granted the importer a "warranty of nonapplicability of antidumping duties" on subject merchandise that was (a) sold before publication of the AD order in question, and (b) exported before the publication of Commerce's final determination in the investigation, Commerce will not deduct the amount of AD/CVD duties paid or reimbursed. *Id.* § 351.402(f)(1)(ii).

[58] *See id.* § 351.402(f)(1)(iii) ("Ordinarily, under [§ 351.402(f)(1)(i)], . . . [Commerce] will deduct the amount reimbursed only once in the calculation of the export price . . . ."). Commerce has also found it appropriate to take into account findings of reimbursement when assigning AD margins to non-cooperative exporters on the basis of "adverse facts available." *See, e.g.*, Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 71 Fed. Reg. 14170 (Mar. 21, 2006), accompanying Issues and Decision Memorandum at cmt. 2 ("We agree . . . that the reimbursement verification findings should be applied to CATACO for cash deposit and assessment purposes."); Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 70 Fed. Reg. 39735, 39739–40 (July 11, 2005) (prelim. admin. review) (evaluating significance of reimbursement findings before deciding to apply the reimbursement provision as part of its adverse facts available determination), *aff'd*, 70 Fed. Reg. 73727 (Dec. 13, 2005) (final admin. review).

[59] Certain Welded Carbon Steel Pipes and Tubes from Thailand, 66 Fed. Reg. 53388 (Oct. 22, 2001), accompanying Issues and Decision Memorandum at cmt. 1 (quoting Hoogovens Staal BV v. United States, 86 F. Supp. 2d 1317, 1320–21 (Ct. Int'l Trade 2000)).

imbursement agreements with the producer or exporter.[60] The certificate must contain the following language:

> I hereby certify that I (have) (have not) entered into any agreement or understanding for the payment or for the refunding to me, by the manufacturer, producer, seller, or exporter, of all or any part of the antidumping duties or countervailing duties assessed upon the following importations of (commodity) from (country): (List entry numbers) which have been purchased on or after (date of publication of antidumping notice suspending liquidation in the Federal Register) or purchased before (same date) but exported on or after (date of final determination of sales at less than fair value).[61]

Exporter-importer arrangements must be properly structured so that the exporter does not directly pay or reimburse the importer for any duties that may be imposed, as their relationship determines whether the reimbursement prohibition applies.

Specifically, Commerce will invoke its reimbursement prohibition (i.e., double the duty) if the exporter and importer are separate corporate entities, even if they are related, for example, if the exporter uses a separate U.S. subsidiary (whether wholly- or partially-owned) to import the subject merchandise.[62] In this type of situation, the parent exporter may not reimburse its U.S. importer subsidiary for AD/CVD duties paid. Similarly, it may not undertake indirect means of paying the duties by, for example, lowering the amount it invoices to the importer in order to compensate it for having to pay the duties.[63]

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[60] *See* 19 C.F.R. §§ 351.402(f)(2)-(3) ("[Commerce] may presume from an importer's failure to file the certificate . . . that the exporter or producer paid or reimbursed the antidumping duties or countervailing duties."); *see also* Certain Pasta from Italy, 69 Fed. Reg. 6255 (Feb. 10, 2004), accompanying Issues and Decision Memorandum at cmt. 14 (explaining that the presumption of reimbursement arises only if a certificate of non-reimbursement has not been filed by the time of liquidation).

[61] 19 C.F.R. § 351.402(f)(2).

[62] *See* Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27295, 27355 (May 19, 1997); *see also* Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 65 Fed. Reg. 81827 (Dec. 27, 2000), accompanying Issues and Decision Memorandum at cmt 1 (citing Hoogovens Staal BV v. United States, 4 F. Supp. 2d 1213, 1217-18 (Ct. Int'l Trade 1998), *aff'd*, Hoogovens Staal BV v. United States, 93 F. Supp. 2d. 1303, 1306-7 (Ct. Int'l Trade 2000)).

[63] *But see* Antifriction Bearings (Other Than Tapered Roller Bearings) and

In contrast, the reimbursement prohibition does not apply when the importer and exporter are the same legal entity.[64] In other words, if the exporter itself becomes the importer, Commerce will not find that reimbursement of duties has occurred because no payment is made to or on behalf of the importer within the meaning of the regulation. However, if the exporter sets up a related but legally distinct company in the United States to act as the importer, the reimbursement regulation applies.[65]

Furthermore, Commerce has found that an agreement to reimburse a related importer raises a rebuttable presumption that reimbursement has occurred, which applies regardless of whether the agreement is made directly by the exporter or through a third party acting on the exporter's behalf.[66] For example, Commerce has determined that reimbursement occurred when the parent company of both the exporter and importer provided funds to the importer for the payment due on entries of subject merchandise produced by the exporter.[67] Likewise, Commerce found a reim-

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Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom, 62 Fed. Reg. 54043, 54077 (Oct. 17, 1997) (providing that below-cost transfers between an exporter and related importer are not "tantamount to an indirect transfer of funds for reimbursement of antidumping duties . . . .").

64 *See, e.g.*, Certain Polyester Staple Fiber from the Republic of Korea, 70 Fed. Reg. 73435 (Dec. 12, 2005), accompanying Issues and Decision Memorandum at cmt. 2 ("[T]he reimbursement rule does not apply when the importer and foreign producer are the same entity."); Structural Steel Beams from the Republic of Korea, 68 Fed. Reg. 2499 (Jan. 17, 2003), accompanying Issues and Decision Memorandum at cmt. 2 ("The Department has stated in several cases that when the importer and exporter are the same entity, the reimbursement rule does not apply."); Certain Preserved Mushrooms from India, 67 Fed. Reg. 46172 (July 12, 2002) ("In numerous cases, the Department has held that reimbursement within the meaning of the regulation does not occur when the importer and exporter are the same legal entity.").

65 *See, e.g.*, Circular Welded Non-Alloy Steel Pipe and Tube from Mexico, 63 Fed. Reg. 33041, 33044 (June 17, 1998) (final admin. review) (explaining that "two separate corporate entities must exist to invoke the reimbursement regulation").

66 *See, e.g.*, Certain Cased Pencils from the People's Republic of China, 69 Fed. Reg. 29266 (May 21, 2004), accompanying Issues and Decision Memorandum at cmt. 5 (asserting that reimbursement agreements trigger the application of 19 C.F.R. § 351.402(f)(1)); Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, *supra* note 59 (presuming actual reimbursement by a third party "affiliated sales agent"); Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands, 61 Fed. Reg. 48465, 48470 (Sept. 13, 1996) (final admin. review) (explaining that the existence of an agreement to reimburse duties "is sufficient to trigger the [reimbursement] regulation").

67 *See, e.g.*, Porcelain-on-Steel Cookware from Mexico, 64 Fed. Reg. 26934, 26937 (May 18, 1999) (explaining that Commerce interprets its reimbursement

bursement agreement between a third party that was related to the exporter and the importer because the third party acted on the exporter's behalf.[68] In these situations, because the exporters could not rebut the presumption of reimbursement, Commerce deducted the "reimbursed" duties from U.S. price.

4.2. Reimbursement Certificates: The Customs Issue

Commerce's regulations provide that an "importer" is required to file certificates of non-reimbursement with CBP prior to liquidation.[69] One issue that arises is whether the "importer" that files these certificates must be the "importer of record," which the Customs statute defines as "the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a person holding a valid [customs broker's] license . . . ."[70] In other words, the importer of record for Customs purposes can be a customs broker who is, of course, only an agent of an owner, purchaser, or consignee (i.e., the actual party-in-interest), but does not have a financial or legal interest in the merchandise and does not otherwise cause the importation of the merchandise.

However, Commerce's regulations define an "importer" as "the person by whom, or for whose account, subject merchandise is imported."[71] Thus, Commerce requires the filing of a non-reimbursement certificate by a party that actually arranges for the introduction of the imported merchandise into U.S. commerce (i.e., the party "by whom" the merchandise is imported) or otherwise has a financial or legal interest in the imported merchandise (i.e., the party "for whose account" the merchandise is imported).

This raises an interesting legal issue of whether the term "importer," as defined by Commerce's regulations, is synonymous with an "importer of record" as defined by Customs law. Recent policy guidelines issued by CBP regarding certificates of non-

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regulation to consider "situations in which reimbursement occurs indirectly, i.e., through someone acting on behalf of the exporter, because such an interpretation more effectively accomplishes the purposes of the regulation.").

[68] Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, *supra* note 59, at 39738.

[69] *See* 19 C.F.R. § 351.402(f)(2) ("The importer must file prior to liquidation a certificate . . . with the appropriate District Director of Customs . . . .").

[70] 19 U.S.C. § 1484(a)(2)(B) (2000).

[71] 19 C.F.R. § 351.102(b).

reimbursement suggest that the two terms are not interchangeable. These guidelines specifically state that, "[Commerce] does not interpret its regulations to allow a customhouse broker to sign the reimbursement certificate."[72] Indeed, the boilerplate non-reimbursement certificates issued by CBP contain a disclaimer that, "An officer of the importing company must sign this certificate. It may not be signed by a customhouse broker on behalf of the client."[73]

The clear implication is that Commerce does not want customs brokers to sign non-reimbursement certificates, even where that broker acts as the importer of record. Otherwise, an importer that entered into a reimbursement agreement with the exporter could avoid the consequences of the reimbursement regulation by simply designating its customs broker as the importer of record and requiring that broker to sign and file a certificate with CBP indicating that it—the broker—had not been reimbursed.

5. SINGLE AND CONTINUOUS ENTRY BONDS

5.1. Use of Bonds During the Investigation Phase

As noted in Section 2, during the period between the date of publication of Commerce's preliminary determination and the publication of the AD/CVD order, importers are permitted to post bonds in lieu of providing cash deposits.[74] This option is highly desirable because bonds are typically less costly and do not tie up cash resources to the extent that cash deposits do. Bonds can be obtained from certified surety companies, which guarantee the importer's payment of the duty liability.[75]

There are two principal types of customs bonds, single entry bonds and continuous entry bonds. As their names indicate, single entry bonds cover only a single entry or transaction, while con-

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[72] Memorandum from the Executive Dir., Trade Enforcement and Facilitation, to Office of Field Operations, U.S. Bureau of Customs and Border Prot. to Dirs., Field Operations (Nov. 18, 2005), *available at* http://www.cbp.gov/xp/cgov/import/add_cvd/program_guidelines/.

[73] *Id.*

[74] *See* 19 U.S.C. §§ 1671b(d)(1)(B), 1671d(c)(1)(B)(ii), 1673b(d)(1)(B), and 1673d(c)(1)(B)(ii) (permitting the use of bonds in lieu of cash deposits during the provisional measures period).

[75] *See* U.S. Dep't of Treasury, Financial Management Service, Surety Bonds, http://www.fms.treas.gov/c570/c570.htm#certified (providing a list of certified surety companies).

tinuous bonds cover bonds cover a large number of entries and remain valid until terminated. Single entry bonds must be equal to at least "the total entered value [of the shipment] plus all duties, taxes, and fees which apply."[76] In contrast, the minimum amount for a continuous entry bond is the greater of $50,000 or 10% of the importer's total customs duties, taxes, and fees paid during the preceding twelve-month period.[77] In accordance with a 1985 Treasury Department decision, when an importer has the option of posting a bond in lieu of providing a cash deposit, it may use either a single entry bond or continuous entry bond if the applicable duty rate is less than five percent.[78] Otherwise, if the rate is five percent or greater, the importer may only use a single entry bond for each entry.

5.2. Revised Continuous Entry Bond Guidelines

Importers typically have valid continuous entry bonds in place in order to ensure that all customs duties, fees, and other charges assessed by CBP will be paid, regardless of whether the merchandise is subject to AD/CVD duties. As discussed, the bond amount must equal the greater of $50,000 or 10% of the importer's total duties, taxes, and fees paid during the prior year. However, in July 2004, CBP changed the minimum continuous bond amount requirements for importers that import agricultural or aquaculture merchandise subject to AD/CVD duties in order to counteract persistent difficulties it had experienced with collection problems.[79] CBP explained that the policy revision resulted from difficulties it

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[76] U.S. Customs Service, Directive 099-3510-004 (July 23, 1991) *available at* http://cbp.gov/linkhandler/cgov/toolbox/legal/directives/3510-004.ctt/3510-004.txt.

[77] *See id.* (providing the guidelines for setting bond amounts).

[78] *See* T.D. 85-145, Antidumping or Countervailing Duties; Acceptance of Cash Deposits; Bonds, or Other Security to Obtain Release of Merchandise; Revision of T.D. 82-56, (Sept. 5, 1985, rev. Oct. 2001), *available at* http://www.cbp.gov/xp/cgov/import/add_cvdcargo_summary/bonds/07082004.xml (follow the "T.D. 85-145" hyperlink) (last visited Feb. 23, 2007) (specifying the forms of security that CBP will accept for the release of merchandise for consumption within the United States).

[79] *See* U.S. Customs and Border Protection, Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases (July 9, 2004), *available at* http://www.roanoketrade.com/pdf/ADDCUD/Directive%2099-3510-004%20dated%207-9-04.pdf (last visited Feb. 23, 2007) (articulating the new guidelines for determining bond requirements for importers of agricultural or aquaculture merchandise subject to AD/CVD duties).

had experienced with the collection of AD/CVD duties, particularly with imported agricultural and seafood products from China, and that the existing continuous bonds could not "ensure the revenue is adequately protected."[80]

Under these new guidelines, CBP may require an importer to increase the amount of its continuous entry bond by an amount equal to the total AD/CVD duties that it would have paid in the prior year at the applicable deposit rates. This has the potential effect of dramatically increasing the amount of continuous entry bonds that importers would be required to maintain. For example, if an importer has an existing continuous entry bond for $50,000 (based on its normal duties and taxes from the preceding year), it entered $5 million of an agricultural product subject to an AD order during the prior year, and the applicable final AD margin for its entries from a foreign exporter is 10%, then CBP will require the importer to obtain a new continuous entry bond with coverage of $600,000 (i.e., $50,000 + ($5 million x 10%), rounded to the next $100,000).[81] Thus, importers would have to post "double" security for the same eventual AD/CVD duty liability: (1) cash deposits on each entry that arrives in U.S. customs territory based on the rates applicable to the particular exporter; and (2) the increased continuous bond amount. Many surety companies have insisted that importers provide letters of credit or full cash collateral to secure these new bonds in order to protect themselves against importer default on payment. In case of default, the terms of the bond require the surety to assume the liability. As a result, importers subject to these guidelines have to undertake an even greater burden when importing because it severely impairs their cash flow and working capital.

CBP began its implementation of these guidelines in February 2005 after the publication of AD orders on frozen warmwater shrimp from six countries. At that time, it was generally understood that these new bond requirements would be applied to all agricultural and aquaculture products subject to AD/CVD duties once the shrimp pilot program had been completed and reviewed. However, in August 2005, CBP issued revised guidelines clarifying that "agriculture/aquaculture" is the only "special category" of

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[80] *Id.*

[81] *See* U.S. Customs Service, Directive 099-3510-004, *supra* note 77 (explaining that CBP fixes bond limit liability in multiples of $100,000 if the total duties and taxes paid during the preceding year exceeded $100,000).

products subject to the new requirements and, within that designated special category; shrimp is currently the only "covered case."[82] It also adopted a procedure through which domestic parties could request that other products become subject to these guidelines, although it did not provide any indication as to whether or when it intended to add any products. In fact, it has been reported that CBP has failed to extend its requirements to imports of various agricultural and seafood products from China, despite requests from domestic interested parties.[83] This includes products such as crawfish and garlic from China, which CBP had specifically identified as products that brought about the revision to its continuous bond guidelines.

CBP's new continuous bond guidelines are currently being challenged in the U.S. Court of International Trade separately by the National Fisheries Institute and by the Seafood Exporters Association of India. Challenges have also been made to the World Trade Organization ("WTO") by the Governments of India and Thailand. Furthermore, presumably in response to the criticism and ensuing litigation, CBP requested public comments concerning proposed changes to its continuous bond guidelines.[84] As of the writing of this paper, the cases are still pending, and CBP is still considering the public comments received on the bond guidelines.[85]

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[82] U.S. Customs and Border Protection, Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases (Aug. 10, 2005), *available at* http://www.cbp.gov/linkhandler/cgov/import/cargo_summary/bonds/bond-clarification.ctt/bond_clarification.doc (last visited Feb. 23, 2007).

[83] *See USTR Steps Up Fight Against CBP Bonding Rules Under Threat Of WTO Case*, INSIDE U.S. TRADE, June 16, 2006 (citing "CBP's inability to collect millions of dollars in antidumping duties on a handful of imports, primarily from China").

[84] *See* Monetary Guidelines for Setting Bond Amounts for Importations Subject to Enhanced Bonding Requirements, 71 Fed. Reg. 62276, 62276 (Oct. 24, 2006) ("Public comments will assist CBP in identifying factors that may further improve the process to ensure the bond amounts protect the revenue and facilitate trade.").

[85] In the appeal filed by the National Fisheries Institute, the Court of International Trade granted partial preliminary injunctive relief by enjoining CBP from applying its revised bond guidelines to several of the plaintiff importers during the pendency of the litigation. *See* Nat'l Fisheries Inst., Inc. v. U.S. Bureau of Customs and Border Protection, slip op. 06-166 at 77 (Ct. Int'l Trade Nov. 13, 2006) (granting "preliminary injunctive relief that imposes restraints and obligations on Customs, but only to the extent required to prevent irreparable harm during the pendency of this proceeding").

5.3. Bonding Privilege for New Shippers

Under U.S. law, "new shippers," i.e., producers or exporters that did not export subject merchandise to the United States during the original period of investigation and were not affiliated with any producers or exporters that exported subject merchandise during that period, may request an expedited review during the anniversary month or semiannual anniversary month of an AD/CVD order.[86] Traditionally, new exporters have sought these reviews instead of normal administrative reviews because of a special provision in the statute that permitted their importers to post bonds in lieu of cash deposits for each entry of subject merchandise while the new shipper review was being conducted.[87] With bonds, their importers would incur only a fraction of the cost associated with importing merchandise subject to AD/CVD duties.

In recent years, Commerce has discovered abuses of the new shipper review process. For example, existing companies have fraudulently requested new shipper reviews under new names in order to receive the benefit of posting the less-expensive bonds instead of the full cash deposits.[88] In response to these attempts to evade duties, Congress recently enacted a law, the Pension Protection Act of 2006, which contained a provision suspending the bonding privilege for new shippers.[89] President Bush signed this bill into law on August 17, 2006.

The relevant provision states that the bonding privilege will not be in effect during the period April 1, 2006 through June 30, 2009, which means that importers may no longer post bonds in lieu of cash deposits as a security for estimated duties while new shipper reviews are being conducted.[90] The bill also requires the Ad-

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[86] *See* 19 C.F.R. § 351.214 (setting forth the requirements for new shipper reviews).

[87] *See* 19 U.S.C. § 1675(a)(2)(B)(iii) (2000) ("The administering authority shall, at the time a [new shipper] review under this subparagraph is initiated, direct the Customs Service to allow, at the option of the importer, the posting, until the completion of the [new shipper] review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.").

[88] *See, e.g., House Pension Bill Includes Half of Miscellaneous Tariff Bill*, INSIDE U.S. TRADE, Aug. 4, 2006 (explaining that CBP had been unable to collect millions of dollars in AD duties on imports of crawfish, mushrooms, garlic, and honey from China because of abuses of the bonding privilege for new shippers).

[89] *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 1632, 120 Stat. 780, 1165-66 (2006).

[90] *Id.* § 1632(a). In August 18, 2006 instructions to CBP, Commerce clarified that, in accordance with 19 U.S.C. § 3438, the suspension of the bonding privilege

ministration to prepare a report to Congress addressing whether the suspension of the bonding privilege is effective in curtailing abuses and whether the suspension should be extended beyond June 30, 2009.[91] However, the incentive to request new shipper reviews has effectively been diminished by this change inasmuch as the only remaining benefit is the potentially (but typically not) expedited timetable.

6. CONTINUED DUMPING AND SUBSIDY OFFSET ACT

Before 2000, AD/CVD duties were deposited into the U.S. Treasury after being collected by CBP following the completion of each administrative review. This changed with the passage of the CDSOA,[92] which is better known as the "Byrd Amendment." This law did not change any of Commerce's procedures or practices. Rather, it redirected the assessed AD/CVD duties from the U.S. Treasury to certain "affected domestic producers" in order to compensate them for "qualifying expenditures" incurred after the issuance of an order and which relate to their production operations of merchandise covered by the order. The need for the CDSOA has been explained as follows:

> The [CDSOA] ensures that the U.S. companies and their workers can compete against unfair imports from foreign companies who dump their products in the U.S. If a foreign company continues to dump its products in the U.S. after having been found guilty of that practice, the [CDSOA] allows that future penalty tariff payments be made to the companies who are being injured. We would all prefer that companies halt their illegal dumping, but if a foreign competitor chooses to continue the predatory practices, then the tariffs assist the U.S. workers and industry to remain competitive . . . . The money assists the impacted

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does not apply to new shipper reviews of exporters from Canada and Mexico because the amendment did not expressly state that it applied to goods from NAFTA countries. *See* Import Admin, Int'l Trade Admin, U.S. Dep't Of Commerce, SUSPENSION OF ANTIDUMPING AND COUNTERVAILING DUTY BONDING PRIVILEGE FOR NEW SHIPPERS FROM 04/01/2006 *to* 06/30/2009, *available at* http://ia.ita.doc.gov/download/customs/suspension-of-bonding-privilege-for-new-shippers.pdf.

[91] Pub. L. No. 109-280 §§ 1632(b)-(c).

[92] 19 U.S.C. § 1675c.

companies to help them remain competitive, invest in new technologies and keep jobs in the U.S.[93]

The CDSOA provides that, each year, CBP will distribute the duties that it has collected in the preceding fiscal year on a pro rata basis among the domestic producers that meet the specified regulatory requirements to receive distributions. An "affected domestic producer," as defined by the statute and CBP's regulations, is entitled to apply for and receive the AD/CVD duties under the CDSOA if, among other requirements, it brought or supported the underlying petition, it remained in operation during the fiscal year that is the subject of the disbursement, and it meets the certification requirements for qualifying expenditures.[94] Thus, a company that opposed or did not state any position on a petition would *not* be eligible for CDSOA refunds.

Although it had strong support in the U.S. Congress, the CDSOA was strongly condemned by the United States' trading partners as constituting a subsidy to U.S. industries. The WTO subsequently determined that it violated U.S. international obligations, and several countries were permitted to retaliate for the U.S. failure to repeal the law.[95] In his 2004 through 2006 budget proposals, President Bush included a provision for the repeal of the CDSOA, but until recently, Congress had rejected this request.

This changed in February 2006, when President Bush signed into law the Deficit Reduction Act of 2005, which contained a provision repealing the CDSOA.[96] As a result, affected domestic producers remain eligible to receive duties assessed on all entries of merchandise through September 30, 2007.[97] Duties assessed on

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[93] *WTO Decision and the CDO Act*, 149 CONG. REC. S1064 (daily ed. Jan. 16, 2003) (statement of Sen. Hollings).

[94] *See* 19 U.S.C. § 1675c(a) ("Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers . . . ."); *see also* 19 C.F.R. § 159.61(a) (regulating the distribution of duties under the CDSOA).

[95] *See* Appellate Body Report, *United States - Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (concluding that the CDSOA is a non-permissible specific action against dumping and subsidies, and that the United States failed to comply with Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the Agreement on Subsidies and Countervailing Measures).

[96] *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154-55 (2006) (repealing the CDSOA, 19 U.S.C. § 1675c).

[97] *Id.* § 7601(b).

merchandise that enters the United States through September 30, 2007 will still be distributed to the U.S. industry after the administrative reviews of those entries have been completed. However, this change to the law will have no impact on the orders themselves, which will remain in effect. That is, Commerce will continue to review and ultimately assess duties on entries beginning on October 1, 2007. The only difference is that the duties assessed on entries after the repeal date will once again be retained by the U.S. Treasury after collection by CBP.

6.1. Clearing and Special Accounts

As discussed above, when subject merchandise enters the United States, importers must post cash deposits for estimated AD/CVD duties. After each entry, CBP places the cash deposits into a "Clearing Account" pending the completion of an administrative review.[98] After CBP liquidates the entries, whether by instruction from Commerce at the conclusion of an administrative review or by operation of law pursuant to the "deemed liquidation" provisions, CBP transfers the relevant amount of assessed duties from the "Clearing Account" into a "Special Account."[99] Each fiscal year, CBP distributes the amount of AD/CVD duties that it has collected in that year to affected domestic producers from this Special Account.[100]

CBP periodically makes information regarding the CDSOA distributions available on its website.[101] Each year, CBP publishes the preliminary amounts available in the Special Account, normally as of April 30, which allows potential applicants to determine if there will likely be CDSOA funds available by the end of the fiscal year (September 30). Once all of the applications have been filed, CBP publishes a listing of all certifications received for each AD/CVD order in effect. Then, after the distributions have been made after the end of the fiscal year, CBP publishes an annual report that de-

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[98] *See* 19 C.F.R. § 159.64(a)(2) (explaining that the Clearing Account is designed to hold "all estimated antidumping and countervailing duties received pursuant to an antidumping or countervailing order or finding in effect on January 1, 1999, or thereafter").

[99] *Id.* § 159.64(b)(1)(i).

[100] *Id.* § 159.64(b)(1)(ii).

[101] *See* U.S. CUSTOMS AND BORDER PROTECTION, CONTINUED DUMPING AND SUBSIDY OFFSET ACT (CDSOA) OF 2000, http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/.

tails, for each AD/CVD order, the amount of certified qualifying expenditures claimed by each applicant and the total amount of CDSOA funds disbursed to each.

At the same time, CBP makes available two other important reports. First, CBP identifies the total amount of uncollected AD/CVD duties for each order as of the end of the fiscal year. Obviously, CBP can only disburse what it has actually been able to collect on entries that it has liquidated. For example, if an importer paid cash deposits of $100,000 on its entries, but the actual liability for AD duties was $300,000, and the importer declares bankruptcy before CBP can collect the difference, then CBP may only be able to transfer the $100,000 previously received into the Special Account. Uncollected duties have posed a major problem for CBP in recent years. In FY 2005, for example, CBP reported that it had been unable to collect approximately $93 million in duties by the end of that fiscal year, which, while an improvement from FY 2003 ($130 million uncollected) and FY 2004 ($260 million uncollected), was still very substantial.[102]

Second, CBP also publishes the Clearing Account balances as of the beginning of the new fiscal year, October 1st. As discussed, these amounts represent the amounts deposited with the entries made under each order. The final amounts transferred to the Special Accounts may be higher or lower depending on the assessment rates determined at the conclusion of the administrative reviews and what CBP is actually able to collect from importers at the time of liquidation. Nonetheless, this report provides insight into the amount of CDSOA funds potentially available to affected domestic producers in the future.

6.2. Eligibility for Receiving CDSOA Distributions

In order for a U.S. company to receive a distribution under the CDSOA, it must qualify as an "affected domestic producer," which the statute defines as "any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons)" that satisfies two criteria: (1) it was a petitioner or an interested party that expressed support for the petition that resulted in the order; and (2) remains in operation and continues to produce the merchandise subject to the AD or CVD order.[103] Thus, a com-

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[102] *See id.* (providing reports for fiscal years 2001 through 2006).

[103] *See* 19 U.S.C. § 1675c(b)(1); *see also* 19 C.F.R. § 159.61(b).

pany that did not produce the merchandise subject to an order during the applicable fiscal year is not eligible for refunds. However, the statute and regulations clarify that "successor" companies are eligible for refunds unless a petitioning or supporting company is acquired by another company that was affiliated with a company that opposed the AD/CVD petition.[104]

Each year in June, CBP publishes a *Federal Register* notice indicating that affected domestic producers under each AD/CVD order may submit an application for distribution of funds collected in that fiscal year.[105] The notice identifies potentially eligible parties (i.e., petitioners and supporters) based on information that CBP obtains from ITC.[106] These parties must submit applications within 60 days from publication of that notice, i.e., sometime around late July or early August.[107] When a company submits an application, it must report its "qualifying expenditures" relating to its production of the subject merchandise since publication of the relevant order. The application must also state the total amount of distributions previously made by CBP under that order, which is then deducted from the total qualifying expenditures.[108] Based on these applications, CBP will distribute relevant funds from the "Special Account" to eligible parties within 60 days after the beginning of

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[104] *See* 19 U.S.C. § 1675c(b)(1) (explaining that the term "affected domestic producer" excludes companies "who have been acquired by a company or business that is related to a company that opposed the investigation . . . ."); *see also* 19 C.F.R. § 159.61(b)(1)(i)("[T]he successor company may file a certification to claim an offset as an affected domestic producer on behalf of the predecessor company.").

[105] *See* 19 U.S.C. § 1675c(d)(2) (requiring CBP to publish in the *Federal Register*, at least 30 days before a CDSOA distribution, a notice of intention to distribute the offset and the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the ITC); *see also* 19 C.F.R. § 159.62 (requiring CBP to publish a notice of intent to distribute CDSOA funds at least 90 days before the end of the fiscal year).

[106] *See* 19 U.S.C. § 1675c(d)(1) (requiring the ITC to forward to CBP within 60 days after the date an AD/CVD order is issued, a list of petitioners and persons with respect to each order); *see also* 19 C.F.R. § 159.61(b)(1) ("It is the responsibility of the U.S. International Trade Commission (USITC) to ascertain and timely forward to Customs a list of the domestic producers potentially considered 'affected domestic producers' eligible to receive a distribution in connection with each order. . . .").

[107] 19 C.F.R. § 159.63(c) (providing that the period for filing an application for a CDSOA distribution is 60 days after the date of publication of the notice in the *Federal Register*).

[108] *Id.* at § 159.63(b)(2) (listing the qualifying expenditures that should be enumerated in the certification).

the following fiscal year (i.e., sometime in late November). If the claimed qualifying expenditures made by all domestic producers exceed the amounts available, CBP will distribute the funds on a "pro rata" basis among the qualified affected domestic producers who apply to receive distributions.[109] Thus, if many companies apply for refunds, each company may receive less than its total amount claimed.

The most difficult portion of the application is the identification of the amount of "qualifying expenditures." Qualifying expenditures must be "incurred after the issuance of the antidumping duty finding or order or countervailing duty order" and "must be related to the production of the same product" that are covered by the order.[110] They consist of expenditures that are for:

> (A) Manufacturing facilities; (B) Equipment; (C) Research and development; (D) Personnel training; (F) Acquisition of technology; (G) Health care benefits for employees paid for by the employer; (H) Pension benefits for employees paid for by the employer; (I) Environmental equipment, training, or technology; (J) Acquisition of raw materials and other inputs; and (K) Working capital or other funds needed to maintain production.[111]

These categories are broadly defined, and CBP has not issued guidelines detailing the types of expenditures that should be included in each category. Thus, each applicant must exercise discretion when preparing its application, bearing in mind that the reported expenditures may only apply to the production of merchandise covered by an order since the issuance of that order. Obviously, the more domestic production activity for subject merchandise in which a company engages, the more qualifying expenditures it can report and, in turn, the more CDSOA refunds it will potentially receive.

Finally, applicants do not need to submit underlying documentation with their certification of eligibility, but they must attest to the accuracy of the submitted data. However, CBP may audit each

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[109] 19 U.S.C. § 1675c(d)(3); see also 19 C.F.R. § 159.64(c)(2) (discussing when funds will be distributed to eligible domestic producers on a pro rata basis).

[110] 19 U.S.C. § 1675c(b)(4); *see also* 19 C.F.R. § 159.61(c) (defining the term "qualifying expenditure").

[111] 19 U.S.C. § 1675c(b)(4) (reciting the same list of qualifying expenditures); *see also* 19 C.F.R. § 159.61(c).

application to verify its contents and ensure that the reported figures tie to the company's normal business records. Moreover, CBP requires applicants to retain supporting documentation for five years after filing each application.[112]

6.3. Court Cases Interpreting the CDSOA

Since its passage, the CDSOA has been the subject of numerous legal challenges. The most significant challenge, and perhaps the one that contributed most significantly to the law's ultimate repeal, was the dispute brought to the World Trade Organization by several of the United States' major trading partners: Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico, and Thailand.[113] The Appellate Body ultimately concluded that the CDSOA constituted "a non-permissible specific action against dumping or a subsidy" because the WTO agreements did not permit this type of remedy.[114] Thus, it found that the CDSOA was inconsistent with the United States' obligations under Article 18.1 of the WTO Antidumping Agreement and Article 32.1 of the WTO Agreement on Subsidies and Countervailing Measures, and it recommended that the United States bring its law into conformity with the WTO agreements.[115]

Within the context of U.S. jurisprudence, several recent court decisions have had significant implications for distributions that will be made under the CDSOA for the time it remains in effect. Among these, the most important decisions resulted from constitutional challenges to the CDSOA's definition of an "affected domestic producer" as limited to only those companies that were part of the petitioning group or otherwise expressed support for the peti-

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112 *See* 19 C.F.R. § 159.63(d) ("Parties . . . are required to maintain the accounting records used in developing their claims, for a period of five years after the filing of the certification.").

113 *See* Dispute Settlement Body, *Minutes of Meeting*, WT/DSB/M/109, at 4-5 (Oct. 3, 2001) (requesting that the WTO establish a panel to examine the CDSOA).

114 *See United States - Continued Dumping and Subsidy Offset Act of 2000*, *supra* note 96, paras. 273-74 ("[W]e conclude that . . . the CSDOA is inconsistent with Article 32.1 . . . [and] [a]ccordingly, we uphold . . . the finding of the Panel that the CSDOA is a non-permissible specific action against dumping or a subsidy . . . .").

115 *See id.* paras. 318-19 ("[T]he CSDOA is inconsistent with certain provisions of the [WTO] Antidumping Agreement and [Article 32.1 of the WTO Agreement on Subsidies and Countervailing Measures] . . . . The Appellate Body *recommends* that the [Dispute Settlement Body] request the United States bring the CDSOA into conformity with its obligations under [these agreements].") (emphasis added).

tion. In *PS Chez Sidney v. U.S. Int'l Trade Comm.*, the Court of International Trade found that the CDSOA's support requirement violated the First Amendment's protection against compelled speech.[116] Specifically, when responding to the ITC's questionnaire, domestic producers must indicate whether they support, oppose, or take no position on the petition. Only companies that indicated support are entitled to CDSOA distributions.[117] The Court reasoned that the CDSOA violated the First Amendment because, inasmuch as it was intended to remedy injury to domestic producers, the statute could not reasonably condition eligibility for receipt of the government benefit to the particular opinion expressed on the petition:

> In the case of the CDSOA, the underlying motive articulated by Congress, assistance to members of domestic industry injured by foreign dumping and subsidies, could be achieved by a narrower inquiry; was the questionnaire respondent *injured* by the imports at issue? Where, as here, the respondent is required by law to provide an honest answer regarding support or nonsupport for the petition, and the Government is required to seek it; where the response is burdened for opposing, or not supporting the "correct" side of a public policy question, and where a narrower and more accurate alternative exists, the strict scrutiny test is simply not met.[118]

Then, in *SKF USA v. United States*, the Court of International Trade found that the same provision violated the Equal Protection Clause of the Fifth Amendment because it treated "similarly situated entities" differently.[119] The Court reasoned that an ITC injury

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116 PS Chez Sidney v. U.S. Int'l Trade Comm., 442 F. Supp. 2d 1329, 1358–59 (Ct. Int'l Trade 2006) ("[T]he support requirement of the CDSOA must fail the strict scrutiny required by the First Amendment."). In *PS Chez Sidney*, the government filed a motion for rehearing, arguing that the Court of International Trade must rule on the issues of severability and remedies before the Federal Circuit can hear the appeal. *See* Defendant's Rule 59 Motion for Rehearing, PS Chez Sidney v. U.S. Int'l Trade Comm., 442 F. Supp. 2d 1329, No. 02-00635 (Ct. Int'l Trade 2006). As of the writing of this paper, the motion is still under consideration by the Court.

117 *See* 19 U.S.C. § 1675c(b)(1)(A) (stating that the term "affected domestic producer" means that the party "was a petitioner or interested party *in support of the petition*.") (emphasis added).

118 *PS Chez Sidney*, 442 F. Supp. 2d at 1356. (emphasis in original).

119 SKF USA Inc. v. United States, 451 F. Supp. 2d 1355, 1360 (Ct. Int'l Trade

determination applies to an industry as a whole and that the CDSOA distributions are intended to offset the injurious effects of dumping, but that the CDSOA discriminates against those domestic producers that did not support the underlying petition:

> The plain language of the CDSOA fails to rationally indicate why entities who supported a petition are worthy of greater assistance than entities who took no position or opposed the petition when all the domestic entities are members of the injured domestic industry. Even if, however, in passing the CDSOA Congress intended to help entities that suffered more injury than others, the Court cannot find a connection between that purpose and then to identify the gravely injured as only the ones who supported an antidumping petition.[120]

The Court then found that "the offending portion of the statute is easily severable from the rest of the CDSOA and will not render the statute useless."[121] In doing so, the court suggested that the definition of an "affected domestic producer" should be revised to eliminate the support requirement, thereby including "*all* domestic producers as eligible entities to receive CDSOA funds so long as they participated in an antidumping [or countervailing duty] investigation resulting in an order."[122]

Thus, in the court's opinion, the plaintiff (SKF) should have been included on the list of eligible domestic producers and should have received a CDSOA distribution, provided that it had satisfied all of the other statutory and regulatory requirements. Accordingly, the court remanded the matter to CBP and the ITC to review the decisions to deny plaintiff the distribution of CDSOA funds.[123] As of the writing of this paper, the Court is now reviewing the remand determinations filed by these agencies in which they implemented the court's opinion, pending the exhaustion of all opportunities for appeal.

Both *PS Chez Sidney* and *SKF U.S.A.* will likely be appealed to the Federal Circuit. However, if this change is ultimately applied

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2006) ("As the CDSOA is applied here, similarly situated entities . . . are treated differently and thus, do not stand equal before the law.").

120 *Id.* at 1361–62.

121 *Id.* at 1365.

122 *Id.* (emphasis added).

123 *Id.* at 1367.

to all orders, it may mean that an additional class of companies would now be eligible to share in CDSOA distributions, thereby potentially reducing the distribution that each producer receives.

Another case that addressed the CDSOA and diluted its impact was *Canadian Lumber Trade Alliance v. United States*.[124] In that case, the Court of International Trade found that the application of the CDSOA to imports from Canada and Mexico violated section 408 of the NAFTA, which provides that any amendment to the AD/CVD laws enacted after the NAFTA entered into force "shall apply to goods from a NAFTA country only to the extent specified in the amendment."[125] Because the CDSOA did not expressly state that it applied to NAFTA countries, the Court of International Trade enjoined the distribution of AD/CVD duties assessed on imports of merchandise from Canada or Mexico.[126] Subsequently, CBP published a notice stating its intent to withhold CDSOA distributions of AD/CVD duties deriving from Canadian and Mexican imports pending a final resolution of the appeals.[127] This decision, if upheld, means that domestic industries that had won major AD/CVD suits against NAFTA countries, most notably, the softwood lumber industry, would not be eligible to receive distributions.

Other cases have focused on whether certain domestic producers are eligible for CDSOA distributions when they filed their applications beyond the established deadline. For example, in *Cathedral Candle Co. v. U.S. Int'l Trade Comm.*, CBP did not include the claimants' names on the published list of eligible domestic producers because they had requested confidential treatment of their support for the petition during the underlying investigation.[128] When the claimants realized that they had missed CBP's established deadline, they filed applications that CBP subsequently rejected as

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[124] Can. Lumber Trade Alliance v. United States, 441 F. Supp. 2d 1259 (Ct. Int'l Trade 2006), *appeals docketed*, Nos. 2006-1622, 2006-1625, 2006-1626, 2006-1627, 2006-1636, and 2006-1648 (Fed. Cir. 2006).

[125] 19 U.S.C. § 3438 (2000).

[126] *Can. Lumber Trade Alliance*, 441 F. Supp. 2d at 1268 ("[E]quity would not be served by ordering Customs to disgorge money distributed after recipients were placed on notice of this action.").

[127] Notice of Withholding of Certain Distributions on Continued Dumping and Subsidy Offset to Affected Domestic Producers, 71 Fed. Reg. 57000 (Sept. 28, 2006).

[128] Cathedral Candle Co. v. U.S. Int'l Trade Comm., 285 F. Supp. 2d 1371, 1373 (Ct. Int'l Trade 2003), *aff'd*, 400 F.3d 1352 (Fed. Cir. 2005).

untimely. The claimants then challenged this decision, alleging that the applications should have been accepted in light of the exclusion of their names from the published list. However, the Court of International Trade and the Federal Circuit upheld CBP's decision, finding that the claimants chose to request confidentiality for their positions and were thus on constructive notice that they would not be included on the published list.[129] The courts found that the claimants could have petitioned the ITC to have their names included, but did not do so in a timely manner.[130]

The Court of International Trade reached a different result in *Dixon Ticonderoga*.[131] In that case, CBP failed to publish its notice of intent to distribute CDSOA funds in the *Federal Register* within ninety days before the end of the fiscal year, as required by its regulations.[132] Subsequently, the plaintiff filed its application beyond the sixty-day deadline set forth by Customs regulations and *Federal Register* notice,[133] and CBP rejected the application. On appeal, the Court of International Trade held that the plaintiff had been substantially prejudiced by CBP's own failure to timely publish its notice of intent to distribute CDSOA funds:

> Dixon's interest in receiving its share of the anti-dumping duties assessed against Chinese pencil manufacturers was clearly injured by Customs' failure to give timely notice of its intent to distribute—the only notice that Customs' regulations direct domestic producers to expect. Such failure harms those who assume agency compliance with section 159.62(a) and are prejudiced by non-compliance, particu-

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[129] *Id.* at 1378 (stating that the *Federal Register* notice described the list's availability to interested parties).

[130] *Id.* at 1379–80; *see also* Candle Artisans, Inc. v. U.S. Int'l Trade Comm., 362 F. Supp. 2d 1352, 1357 (Ct. Int'l Trade 2005) (finding that CBP was not required to undertake a notice and comment period in order to reconcile (1) the statutory provisions that permit domestic producers to keep their support for a petition confidential with (2) the requirement under the CDSOA that CBP publish the names of domestic producers that supported a petition).

[131] Dixon Ticonderoga Co. v. U.S. Customs and Border Protection, 366 F. Supp. 2d 1352 (Ct. Int'l Trade 2005), *reh'g denied*, No. 05-98, slip op. (Ct. Int'l Trade Aug. 18, 2005).

[132] *See* 19 C.F.R. § 159.62 (2006) ("At least 90 days before the end of a fiscal year, Customs will publish in the Federal Register a notice of intention to distribute assessed duties . . . .").

[133] *See id.* § 159.63(c) ("A certification that is submitted in response to a notice of distribution and received within 60 days after the date of publication of notice in the Federal Register may be reviewed before acceptance . . . .").

larly because domestic producers receive no other indication of Customs' intent to distribute an offset or the deadline within which to file for a share of the offset.[134]

Consequently, the court concluded that the plaintiff was entitled to a pro rata distribution even though it had filed its application late.[135]

7. CONCLUSION

CBP has acknowledged that, by law, it has a "ministerial role" in the assessment of AD/CVD duties pursuant to instructions that it receives from Commerce.[136] It is essential that practitioners representing foreign producers and exporters (or their U.S. importers) and domestic producers understand the numerous complex issues related to CBP's performance of this ministerial role. A thorough understanding of these issues is essential if clients are to take full advantage of and avoid the pitfalls associated with the trade remedy laws and to ensure that Commerce's determinations are accurately implemented.

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134 *Dixon Ticonderoga*, 366 F. Supp. 2d at 1358.

135 *See id.* (stating that Dixon is "precisely one of the contemplated beneficiaries of the CDSOA" and thus should receive its share of benefits).

136 *See* Mitsubishi Elecs. Am., Inc. v. United States, 44 F.3d 973, 977 (Fed. Cir. 1994) ("Customs has a merely ministerial role in liquidating antidumping duties under 19 U.S.C. § 1514(a)(5).").