

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

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I. 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, 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 respondent. 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 and CVD orders.

¹ See Trade Agreements Act of 1979, Pub. L. 96-39, 93 Stat. 144 (1979).

² For simplicity, this paper uses the shorthand description “AD/CVD” to refer to AD or CVD where the discussion applies to both types of proceedings.

³ See Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002).

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.

II. TIMING OF COMMERCE INSTRUCTIONS TO CBP

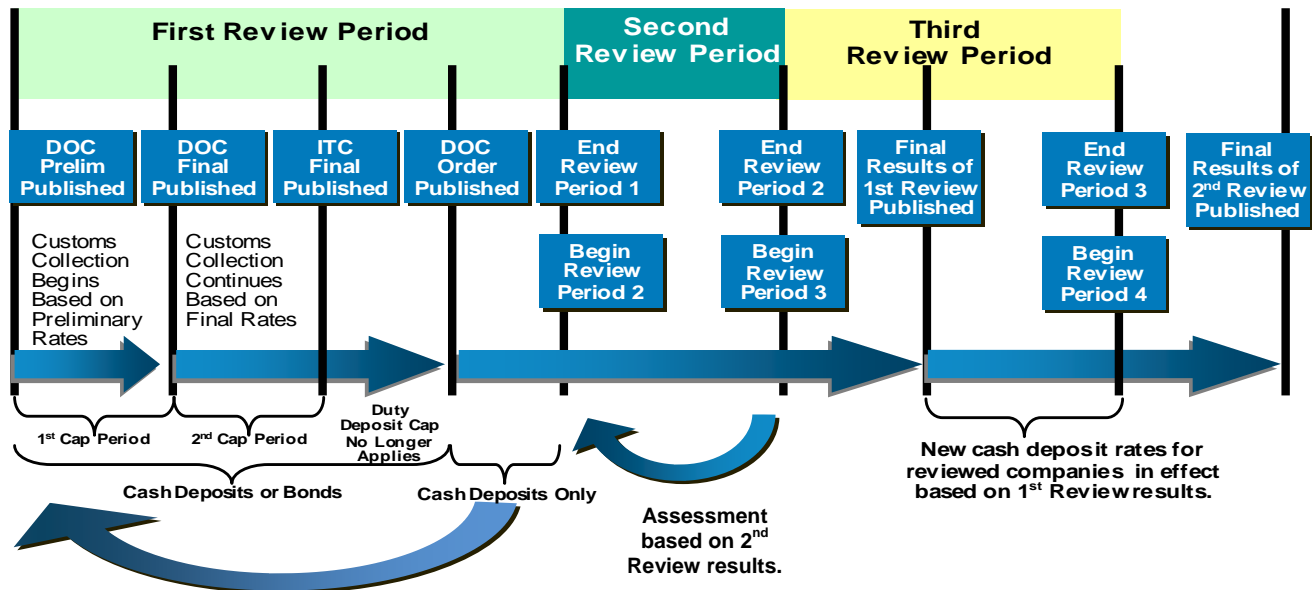
The Tariff Act of 1930, as amended by the Uruguay Round Agreements Act, establishes a two-part procedure for the collection of AD/CVD duties. First, CBP collects cash deposits or bonds as a security to ensure the eventual payment of any AD/CVD duties that will be owed at the completion of Commerce's administrative review process.⁴ 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 examined by Commerce.⁵ 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 in the form of a cash deposit or bond. Thus, there is an inherent and significant risk associated with the importation of merchandise subject to AD/CVD duties.

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

⁴ See 19 U.S.C. §§ 1671b(d)(1)(B), 1671d(c)(1)(B)(ii), 1673b(d)(1)(B), and 1673d(c)(1)(B)(ii).

⁵ See *id.* § 1675.



Assessment based on 1st Review results.

A. 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.⁶ Commerce normally calculates preliminary duty margins based on information submitted by respondents in their extensive questionnaire responses.⁷ 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.⁸ Effective the date of publication of its preliminary determination in the Federal

⁶ Although the International Trade Commission (“ITC”) issues its preliminary determination prior to Commerce’s preliminary determination, no actions are taken by 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 is terminated.

⁷ 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). For simplicity, this paper discusses the imposition of CVD cash deposit and assessment rates on an individual producer basis.

⁸ See 19 U.S.C. §§ 1671b(d)(1)(A) and 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. See id. §§ 1671d(c)(5) and 1673d(c)(5); see also 19 C.F.R. § 351.204(d)(3).

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.⁹ 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. Of course, if Commerce issues a negative preliminary determination because all exporters receive de minimis margins – i.e., less than two percent in an AD investigation¹⁰ or less than one percent in a CVD investigation¹¹ – then liquidation is not suspended.¹² 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 the importer posts 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

⁹ See 19 U.S.C. §§ 1671b(d)(1)(B) and 1673b(d)(1)(B); see also 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. See 19 U.S.C. §§ 1671b(e), 1671d(a)(2), 1673b(e), and 1673d(a)(3); see also 19 C.F.R. § 351.206. Under Commerce’s rules, critical circumstances exist when: (1) there has been a “massive surge” 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. See 19 U.S.C. §§ 1671b(e)(1) and 1673b(e)(1). If Commerce makes an affirmative finding, the ITC conducts a separate analysis of whether imports subject to the finding are likely to undermine the remedial effect of the order.

¹⁰ See 19 U.S.C. § 1673b(b)(3).

¹¹ See *id.* § 1671b(b)(4)(A).

¹² 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. See 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 countervailable 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).

actual amount of duty liability in the administrative review some one to three years after entry.¹³

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%).

B. 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.¹⁴ 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.¹⁵ It instructs CBP to collect cash deposits or require the posting of a bond equal to

¹³ 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 Commerce to extend the period to six months. See 19 U.S.C. § 1673b(d). Moreover, Commerce will not extend the deadline for its final AD determination unless the respondents “account[ing] for a significant proportion of exports of subject merchandise” agree to this extension. See 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 for which CBP does not require cash deposits or bonds may result.

¹⁴ 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.

¹⁵ See 19 U.S.C. §§ 1671d(c)(1) and 1673d(c)(1); see also 19 C.F.R. § 351.210(d). If Commerce makes 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).

the revised rates established in the final determination effective the date of publication of the final determination in the Federal Register.¹⁶

On the other hand, if Commerce's final determination is negative, the investigation is terminated. Commerce then instructs CBP to terminate suspension of liquidation and refund all previously paid cash deposits or release any posted bonds.¹⁷ In such instances, importers are not entitled to interest on any refunded cash deposits.¹⁸

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 exporters and refund any cash deposits, or release any bonds, that were posted on their entries 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.

C. 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.¹⁹ Ultimate liability for duties on such entries cannot exceed the amounts deposited during this period.²⁰

¹⁶ See 19 U.S.C. §§ 1671d(c)(1)(B) and 1673d(c)(1)(B).

¹⁷ See 19 U.S.C. §§ 1671d(c)(2) and 1673d(c)(2).

¹⁸ 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").

¹⁹ See 19 C.F.R. § 351.212(d).

²⁰ See 19 U.S.C. §§ 1671f(a)(1) and 1673f(a)(1).

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 during the period 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 administrative review period, the importer would be liable for the full 20%, including the amounts in excess of the estimated duties deposited (i.e., 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.

D. Publication of the AD/CVD Order

Commerce publishes an AD/CVD order after receiving official notice of the ITC’s final determination.²¹ The publication date of the order is significant for two reasons. First, effective on that publication date, Commerce instructs CBP to require cash deposits at the final calculated rates.²² Thus, bonds may no longer be provided as security for AD/CVD duty liability on future

²¹ See id. §§ 1671(a) and 1673; see also 19 C.F.R. § 351.211.

²² See 19 C.F.R. § 351.211(a).

entries. Second, the publication date establishes the anniversary month during which administrative reviews can be requested in each subsequent year of the order's life.

E. Anniversary Month of the AD/CVD Order

An administrative review is the 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.²³ 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, petitioners); or (4) foreign governments.²⁴ 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, in any anniversary month, Commerce does not receive any requests for review of particular foreign producers or exporters, 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.²⁵ In other words, for each exporter

²³ Unlike Commerce, the ITC does not conduct annual reviews of its injury determination.

²⁴ See 19 C.F.R. § 351.213(b).

²⁵ See id. § 351.212(c), which provides 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.

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.²⁶

F. 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.²⁷ The final liability may differ from the amount deposited 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, as discussed supra, if a particular exporter is not subject to a review, its importers' final liability equals the amounts deposited. However, if a foreign exporter is subject to review but refuses to participate or does not cooperate with Commerce, its U.S. importers will likely receive a punitive duty rate on the basis of "adverse facts available."²⁸

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

²⁶ 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").

²⁷ See 19 U.S.C. § 1675(a)(2)(C); see also 19 C.F.R. § 351.221(b)(6). 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). For the first AD administrative review, however, Commerce examines a slightly 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. See 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. See id. § 351.213(e)(1)(ii).

²⁸ See 19 U.S.C. § 1677e.

information provided in the exporter's questionnaire responses.²⁹ 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 accrued interest.³⁰ For example, if the importer posted cash deposits at a 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 accrued 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. Thus, while the administrative review process is potentially beneficial to an importer, it can also result in significantly increased duty liability.³¹ For example, if an importer deposits estimated AD duties at a rate of 10% 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 20%, plus interest. If the total value of the importer's entries from that particular exporter was \$1 million, it would have deposited only \$100,000 (\$1 million x 10%), but it would be liable for \$300,000 (\$1 million x 30%). The importer would subsequently receive a bill from CBP to pay the \$200,000 difference, plus interest.

²⁹ See id. § 351.212(b). 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 have to issue a corrected Federal Register notice or send revised instructions to CBP. See id. § 351.224(c)(1).

³⁰ 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. The rules governing the determination of the applicable interest rates are found at Section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621. CBP publishes these interest rates on a quarterly basis in the Federal Register.

³¹ 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). In CVD 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). See id. § 351.212(b)(2).

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 warehouse 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 15 days from the date on which it publishes the final results in the Federal Register.

In addition, Commerce calculates a new cash deposit rate for each exporter reviewed.³² 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 will 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.³³

Finally, in an administrative review, the standard for a de minimis margin is less than 0.5 percent.³⁴ 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 an above de minimis margin is determined 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.³⁵ However, that exporter remains

³² See 19 C.F.R. § 351.221(b)(7).

³³ 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.

³⁴ See 19 C.F.R. § 351.106(c)(1).

³⁵ See id. § 351.106(c)(2) ("The Secretary 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 the Secretary 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

covered by the order and can be covered by subsequent administrative reviews unless the AD/CVD order is revoked in whole or with respect to that individual exporter.³⁶

G. 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.³⁷ 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 following a final court decision.³⁸

III. 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.”³⁹ 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:

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 percent threshold.

³⁶ See 19 U.S.C. §§ 1675(c) and (d); see also 19 C.F.R. § 351.222.

³⁷ 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 (Fall 2005); and Jeffrey M. Telep, Injunctions Against Liquidation in Trade Remedy Cases: A Petitioner’s View, 39 J. MARSHALL L. REV. 45 (Fall 2005).

³⁸ 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 there is no irreparable harm resulting 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).

³⁹ 19 U.S.C. § 1675(a)(3)(B).

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 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 at the time of entry by the importer of record⁴⁰

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 AD duties owed on the entries if it failed to liquidate the entries within the six-month period. This, in turn, means that there would be smaller amounts available for distribution to domestic producers under the CDSOA and, perhaps more significantly, the trade remedy laws would have been ineffective in offsetting dumping. In either case, the work performed by Commerce during the course of an administrative review would be nullified if

⁴⁰ 19 U.S.C. § 1504(d).

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 been faced with the question of what constitutes “adequate notice” to CBP that suspension of liquidation has been lifted for purposes of starting the six-month deemed liquidation period. In International Trading Co. v. United States, 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.⁴¹ The court 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.⁴²

As discussed supra, 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.”⁴³ 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 courts 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.⁴⁴ The Federal

⁴¹ Int’l Trading Co. v. United States, 412 F.3d 1303, 1313 (Fed. Cir. 2005).

⁴² Id. at 1308 (citing Int’l Trading Co. v. United States, 281 F.3d 1268, 1275 (Fed. Cir. 2002)).

⁴³ 19 U.S.C. § 1516a(e).

⁴⁴ Fujitsu General America, Inc. v. United States, 283 F.3d 1364, 1368-69 (Fed. Cir. 2002).

Circuit held that, “Deemed 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.”⁴⁵ Thus, while it was “frustrating” that Commerce had delayed publication by more than one year after the court issued its decision, the court concluded that the six-month deemed liquidation period began with Commerce’s publication of notice of the court decision and lifting of suspension of liquidation in the Federal Register, which constituted CBP’s receipt of “unambiguous and public” notice.⁴⁶

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.⁴⁷ 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.⁴⁸ 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.”⁴⁹ 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.

⁴⁵ Id. at 1382.

⁴⁶ Id. at 1382-83; see also Peer Chain Co. v. United States, 316 F. Supp. 2d 1357, 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).

⁴⁷ Cemex S.A. v. United States, 384 F.3d 1314, 1316-17 (Fed. Cir. 2004).

⁴⁸ Id. at 1322.

⁴⁹ Id.

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.⁵⁰ In that case, the final AD rates from an administrative review were significantly lowered as a result of a court appeal, 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 subsequently 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 courts in this manner:⁵¹

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.⁵²

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 (Cemex), but may not do so if the importer is entitled to a whole or partial refund of the amounts deposited (Koyo).

⁵⁰ Koyo Corp. of U.S.A. v. United States, 403 F. Supp. 2d 1305, 1311 (Ct. Int'l Trade 2005).

⁵¹ Id. at 1310.

⁵² Id. at 1311.

IV. REIMBURSEMENT OF DUTIES

A. 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.⁵³ They are also required to pay any actual AD/CVD duties that result from the administrative review process.⁵⁴ However, Commerce's regulations provide that foreign producers or exporters will be penalized if they pay AD/CVD duties directly on behalf of their importers or "reimburse" their importers for duties.⁵⁵ 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 AD/CVD duties.⁵⁶ 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.⁵⁷

Commerce has explained that, "The 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

⁵³ See supra Part II.

⁵⁴ See 19 C.F.R. § 351.212(b).

⁵⁵ See id. § 351.402(f)(1)(i).

⁵⁶ The regulations provide one limited exception to this general rule: if, before the initiation of the antidumping investigation of the merchandise under consideration, the exporter/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 antidumping duty order in question; and (b) exported before the publication of Commerce's final antidumping duty determination, Commerce will not deduct the amount of paid or reimbursed AD/CVD duties. Id. § 351.402(f)(1)(ii).

⁵⁷ See id. § 351.402(f)(1)(iii). 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), and accompanying Issues and Decision Memorandum at Comment 2; Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 70 Fed. Reg. 39735 (Jul. 11, 2005) (prelim. admin. rev.), aff'd, 70 Fed. Reg. 73727 (Dec. 13, 2005).

relieve the importer of the financial consequences of dumping.”⁵⁸ 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 reimbursement agreements with, the exporter/producer.⁵⁹ 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).⁶⁰

Therefore, exporter-importer arrangements must ensure that the exporter does not directly pay, or reimburse the importer for, any duties that may be imposed because 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.⁶¹ 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

⁵⁸ Certain Welded Carbon Steel Pipes and Tubes from Thailand, 66 Fed. Reg. 53388 (Oct. 22, 2001), accompanying Issues and Decision Memorandum at Comment 1 (quoting Hoogovens Staal BV v. United States, 86 F. Supp. 2d 1317, 1320-21 (Ct. Int’l Trade 2000)).

⁵⁹ See 19 C.F.R. §§ 351.402(f)(2) and (3); see also Certain Pasta from Italy, 69 Fed. Reg. 6255 (Feb. 10, 2004), and accompanying Issues and Decision Memorandum at Comment 14 (explaining that the presumption of reimbursement arises only if a certificate of non-reimbursement has not been filed by the time of liquidation).

⁶⁰ 19 C.F.R. § 351.402(f)(2).

⁶¹ 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 Comment 1 (citing Hoogovens Staal BV v. United States, 4 F. Supp.2d 1213, 1217 (Ct. Int’l Trade 1998), aff’d following remand, Hoogovens Staal BV v. United States, 93 F. Supp. 2d. 1303, 1307 (Ct. Int’l Trade 2000)).

paying the duties, for example, by lowering the amount it invoices to the importer in order to compensate it for having to pay the duties.⁶²

In contrast, the reimbursement prohibition does not apply when the importer and exporter are the same legal entity.⁶³ 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.⁶⁴

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.⁶⁵ 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

⁶² But see Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom, 62 Fed. Reg. 54043 (Oct. 17, 1997) (below-cost transfers between an exporter and related importer are not “tantamount to an indirect transfer of funds for reimbursement of antidumping duties”).

⁶³ See, e.g., Certain Polyester Staple Fiber from the Republic of Korea, 70 Fed. Reg. 73435 (Dec. 12, 2005), and accompanying Issues and Decision Memorandum at Comment 2; Structural Steel Beams from the Republic of Korea, 68 Fed. Reg. 2499 (Jan. 17, 2003), and accompanying Issues and Decision Memorandum at Comment 2; Certain Preserved Mushrooms from India, 67 Fed. Reg. 46172 (Jul. 12, 2002).

⁶⁴ See, e.g., Circular Welded Non-Alloy Steel Pipe and Tube from Mexico, 63 Fed. Reg. 33041, 33044 (Jun. 17, 1998) (final admin. rev.) (explaining that “two separate corporate entities must exist to invoke the reimbursement regulation”).

⁶⁵ See, e.g., Certain Cased Pencils from the People's Republic of China, 69 Fed. Reg. 29266 (May 21, 2004), and accompanying Issues and Decision Memorandum at Comment 5; Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, *supra*; Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands, 61 Fed. Reg. 48465, 48471 (Sep. 13, 1996) (final admin. rev.) (Commerce explained that the existence of an agreement to reimburse duties “is sufficient to trigger the [reimbursement] regulation”).

payment due on entries of subject merchandise produced by the exporter.⁶⁶ Likewise, Commerce has found a reimbursement agreement between a third party that was related to the exporter and the importer because the third party acted on the exporter's behalf.⁶⁷ In these situations, because the exporters could not rebut the presumption of reimbursement, Commerce deducted the "reimbursed" duties from U.S. price.

B. 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.⁶⁸ 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"⁶⁹ 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."⁷⁰ Thus, Commerce requires the filing of a non-reimbursement certificate by a party that actually arranges for the introduction into U.S. commerce of the imported merchandise (i.e., the party "by whom" the merchandise is imported)

⁶⁶ See, e.g., Porcelain-on-Steel Cookware from Mexico, 64 Fed. Reg. 26934, 26936-37 (May 18, 1999) (explaining that Commerce interprets its reimbursement 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.")

⁶⁷ See Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, *supra*.

⁶⁸ See 19 C.F.R. § 351.402(f)(2).

⁶⁹ 19 U.S.C. § 1484(a)(2)(B).

⁷⁰ 19 C.F.R. § 351.102.

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-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.”⁷¹ 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.”⁷²

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.

V. SINGLE AND CONTINUOUS ENTRY BONDS

A. Use of Bonds during the Investigation Phase

As noted in Section II, 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

⁷¹ See U.S. Bureau of Customs and Border Protection, Memorandum for Directors, Field Operations from Executive Director, Trade Enforcement and Facilitation, Office of Field Operations, “Guidance for Certificates of Reimbursement,” Nov. 18, 2005, available at http://www.customs.gov/xp/cgov/import/add_cvd/program_guidelines/.

⁷² Id.

post bonds in lieu of providing cash deposits.⁷³ 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.⁷⁴

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 continuous 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 applicable duties, taxes, and fees.⁷⁵ 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 12-month period.⁷⁶ 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 cash deposit rate is less than five percent.⁷⁷ Otherwise, if the rate is five percent or greater, the importer may only use a single entry bond for each entry.

B. 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

⁷³ See 19 U.S.C. §§ 1671b(d)(1)(B), 1671d(c)(1)(B)(ii), 1673b(d)(1)(B), and 1673d(c)(1)(B)(ii).

⁷⁴ See U.S. Department of Treasury, Financial Management Service, Surety Bonds, at <http://www.fms.treas.gov/c570/index.html> (providing a list of certified surety companies).

⁷⁵ See U.S. Customs Service, Directive 099-3510-004 (Jul. 23, 1991).

⁷⁶ See *id.*

⁷⁷ 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, and accompanying Memorandum of Agreement between the U.S. Department of Commerce and the U.S. Customs Service Concerning Acceptable Security for Release of Merchandise Subject to Antidumping and Countervailing Duty Proceedings (Sep. 5, 1985, rev. Oct. 2001).

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.⁷⁸ CBP explained that the policy revision resulted from difficulties it 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 adequately "protect the revenue."⁷⁹

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 potentially has the 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).⁸⁰ 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

⁷⁸ See U.S. Customs and Border Protection, Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases (Jul. 9, 2004), available at http://www.cbp.gov/xp/cgov/import/add_cvd/bonds/.

⁷⁹ Id.

⁸⁰ CBP fixes bond limit liability in multiples of \$100,000 if the total duties and taxes paid during the preceding year exceeded \$100,000.

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 as 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 shrimp was the only “covered case” subject to these new requirements.⁸¹ 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.⁸² Furthermore, CBP’s new continuous bond guidelines are currently being challenged in the U.S. Court of International Trade by an association of Indian seafood exporters and at the World Trade Organization (“WTO”) by the Governments of India and Thailand. As of the writing of this paper, the cases are still pending.

⁸¹ See 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, available at http://www.cbp.gov/xp/cgov/import/add_cvd/bonds/.

⁸² See Inside U.S. Trade, USTR Steps Up Fight Against CBP Bonding Rules Under Threat Of WTO Case, Jun. 16, 2006.

C. Bonding Privilege for New Shippers

Under U.S. law, “new shippers,” i.e., producers or exporters that did not export subject merchandise to the U.S. 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.⁸³ 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.⁸⁴ 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, such as existing companies fraudulently requesting new shipper reviews under new names in order to receive the benefit of posting the less-expensive bonds instead of the full cash deposits.⁸⁵ 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.⁸⁶ 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

⁸³ See 19 C.F.R. § 351.214.

⁸⁴ See 19 U.S.C. § 1675(a)(2)(B)(iii) (“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.”)

⁸⁵ See generally Inside U.S. Trade, House Pension Bill Includes Half of Miscellaneous Tariff Bill, 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).

⁸⁶ See Pension Protection Act of 2006, Pub. L. 109-280, § 1632, 120 Stat. 780, 1165-66 (2006).

bonds in lieu of cash deposits as a security for estimated duties while the new shipper reviews are being conducted.⁸⁷ The bill also requires the Administration to prepare a report to Congress on whether the suspension of the bonding privilege is effective in curtailing abuses and whether the suspension should be extended beyond June 30, 2009.⁸⁸ 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.

VI. 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, which is better known as the “Byrd Amendment.”⁸⁹ This law did not change any of Commerce’s procedures or practices, but rather, 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 that they showed related 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

⁸⁷ 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 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 Department of Commerce, International Trade Administration, Import Administration, “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-SHIPPIERS.PDF>.

⁸⁸ See Pub. L. 109-280 at §§ 1632(b)-(c).

⁸⁹ See 19 U.S.C. § 1675c.

continue the predatory practices, then the tariffs assist the U.S. workers and industry to remain competitive. . . . The money assists the impacted companies to help them remain competitive, invest in new technologies and keep jobs in the U.S.⁹⁰

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.⁹¹ 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 United States’ failure to repeal the law.⁹² 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 that repealed the CDSOA.⁹³ As a result, affected domestic producers remain eligible to receive duties assessed on all entries of merchandise through September 30,

⁹⁰ WTO Decision and the CDO Act, 108th Cong., 149 CONG. REC. S 1064 (statement of Sen. Hollings).

⁹¹ See 19 U.S.C. § 1675c(a); see also 19 C.F.R. § 159.61(a).

⁹² See United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

⁹³ See Deficit Reduction Act of 2005, Pub. L. 109-171, § 7601, 120 Stat. 4, 154-55 (2006).

2007.⁹⁴ Thus, duties assessed on 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.

A. Clearing and Special Accounts

As discussed supra, 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 completion of an administrative review.⁹⁵ After Commerce 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.”⁹⁶ 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.⁹⁷

CBP periodically makes information regarding the CDSOA distributions available on its website at http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/. Each year, CBP publishes the preliminary amounts available in the Special Account, normally as of April 30th, which allows potential applicants to determine if there will likely be CDSOA funds available by the end

⁹⁴ Id. § 7601(b).

⁹⁵ 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 duty order or finding in effect on January 1, 1999, or thereafter”).

⁹⁶ See id. § 159.64(b)(1)(i).

⁹⁷ See id. § 159.64(b)(1)(ii).

of the fiscal year (September 30th). 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 details, 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 was an improvement from FY 2003 (\$130 million) and FY 2004 (\$260 million), but still very substantial.⁹⁸

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 for each order.

⁹⁸ See U.S. Customs and Border Protection, Continued Dumping and Subsidy Offset Act (CDSOA) of 2002, at http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/.

B. 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 any association 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.⁹⁹ Thus, a company 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.¹⁰⁰

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.¹⁰¹ The notice will identify potentially eligible parties (i.e., petitioners and supporters) based on information that CBP obtains from ITC,¹⁰² which must submit applications within 60 days from publication of that notice, i.e., sometime around late July or early August.¹⁰³ 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 paid

⁹⁹ See 19 U.S.C. § 1675c(b)(1); see also 19 C.F.R. § 159.61(b).

¹⁰⁰ See 19 U.S.C. § 1675c(b)(1); see also 19 C.F.R. § 159.61(b)(1)(i).

¹⁰¹ See 19 U.S.C. § 1675c(d)(2); 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).

¹⁰² See 19 U.S.C. § 1675c(d)(1); see also 19 C.F.R. § 159.61(b)(1).

¹⁰³ See 19 C.F.R. § 159.63(c).

by CBP under that order, which is then deducted from the total qualifying expenditures.¹⁰⁴ Based on these applications, CBP will distribute relevant funds from the “Special Account” to eligible parties within 60 days after the beginning of 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.¹⁰⁵ 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.¹⁰⁶ They consist of expenditures that are for: (1) manufacturing facilities; (2) equipment; (3) research and development; (4) personnel training; (5) acquisition of technology; (6) health care benefits for employees paid for by the employer; (7) pension benefits for employees paid for by the employer; (8) environmental equipment, training, or technology; (9) acquisition of raw materials and other inputs; and (10) working capital or other funds needed to maintain production.¹⁰⁷

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

¹⁰⁴ See *id.* § 159.63(b)(2).

¹⁰⁵ See 19 U.S.C. § 1675c(d)(3); see also 19 C.F.R. § 159.64(c)(2).

¹⁰⁶ 19 U.S.C. § 1675c(b)(4); 19 C.F.R. § 159.61(c).

¹⁰⁷ 19 U.S.C. § 1675c(b)(4); 19 C.F.R. § 159.61(c).

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 application to verify its contents to 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 of the application.¹⁰⁸

C. 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.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

¹⁰⁸ See 19 C.F.R. §§ 159.63(c)-(d).

¹⁰⁹ See WTO Dispute Settlement Body, Minutes of Meeting, Oct. 3, 2001, WT/DSB/M/109, at 4-5.

¹¹⁰ See United States – Continued Dumping and Subsidy Offset Act of 2000, *supra*, at paras. 273-74.

¹¹¹ See *id.* at paras. 318-19.

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 petition. 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.¹¹² 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.¹¹³ 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.¹¹⁴

¹¹² PS Chez Sidney v. U.S. Int'l Trade Comm., Slip Op. 06-103 (Ct. Int'l Trade Jul. 13, 2006). In PS Chez Sidney, the Government has 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, Aug. 14, 2006, PS Chez Sidney v. U.S. Int'l Trade Comm. (No. 02-00635). As of the writing of this paper, the motion is still under consideration by the Court.

¹¹³ See 19 U.S.C. § 1675c(a).

¹¹⁴ Id. at *45-46.

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.¹¹⁵ The Court reasoned that an ITC injury 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.¹¹⁶

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.”¹¹⁷ 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.”¹¹⁸

Both PS Chez Sidney and SKF U.S.A. will likely be appealed to the U.S. Court of Appeals for the Federal Circuit. However, if this change is ultimately applied to all orders, it may mean that an additional class of companies would now be eligible to share in CDSOA distributions, thereby reducing the distribution that each producer would receive.

¹¹⁵ SKF USA Inc. v. United States, Slip Op. 06-139 (Ct. Int’l Trade Sep. 12, 2006).

¹¹⁶ Id. at *15-16.

¹¹⁷ Id. at *24.

¹¹⁸ Id. at *24-25 (emphasis added).

Another case that addressed the CDSOA and “diluted” its impact was Canadian Lumber Trade Alliance v. United States.¹¹⁹ 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 North American Free Trade Agreement (“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.”¹²⁰ 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.¹²¹ 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.¹²² 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.¹²³ When the claimants realized that they had missed CBP’s established deadline, they filed applications that

¹¹⁹ Canadian Lumber Trade Alliance v. United States et al., 425 F. Supp. 2d 1321 (Ct. Int’l Trade 2006), appeals docketed, Nos. 2006-1622, 2006-1625, 2006-1626, 2006-1627, 2006-1636, and 2006-1648 (Fed. Cir. 2006).

¹²⁰ 19 U.S.C. § 3438.

¹²¹ Canadian Lumber Trade Alliance v. United States et al., Slip Op. 2006-103 (Jul. 14, 2006).

¹²² See Notice of Withholding of Certain Distributions on Continued Dumping and Subsidy Offset to Affected Domestic Producers, 71 Fed. Reg. 57000 (Sep. 28, 2006).

¹²³ Cathedral Candle Co. et al. v. U.S. Int’l Trade Comm. et al., 285 F. Supp. 2d 1371 (Ct. Int’l Trade 2003), aff’d, 400 F.3d 1352 (Fed. Cir. 2005).

CBP subsequently rejected as 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.¹²⁴ 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.¹²⁵

The Court of International Trade reached a different result in Dixon Ticonderoga.¹²⁶ In that case, CBP failed to publish its notice of intent to distribute CDSOA funds in the Federal Register within 90 days before the end of the fiscal year, as required by its regulations.¹²⁷ Subsequently, the plaintiff filed its application beyond the 60-day deadline set forth by Customs regulations and Federal Register notice,¹²⁸ 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, particularly because domestic producers receive no other indication of Customs'

¹²⁴ Cathedral Candle, 285 F. Supp. 2d at 1378.

¹²⁵ Id. at 1379-80; see also Candle Artisans, Inc. v. U.S. Int'l Trade Comm., 362 F. Supp. 1352 (Ct. Int'l Trade 2005) (finding that CBP was not required to undertake a notice and comment period in order to reconcile the statutory provisions permitting domestic producers to treat their support for a petition as confidential with the requirement under the CDSOA that CBP publish the names of domestic producers that supported a petition).

¹²⁶ Dixon Ticonderoga Co. v. U.S. Customs and Border Protection, 366 F. Supp. 2d 1352 (Ct. Int'l Trade 2005), rehearing den'd, Slip Op. 2005-98 (Ct. Int'l Trade Aug. 15, 2005).

¹²⁷ See 19 C.F.R. § 159.62.

¹²⁸ See id. § 159.63(c).

intent to distribute an offset or the deadline within which to file for a share of the offset.¹²⁹

Consequently, the Court concluded that the plaintiff was entitled to a pro rata distribution even though it had filed its application late.¹³⁰

VII. 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.¹³¹ It is essential that practitioners representing foreign respondents (or their U.S. importers) and domestic producers understand the numerous complex issues related to CBP’s performance of this ministerial role in order 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.

¹²⁹ Dixon Ticonderoga, 366 F. Supp. 2d at 1358.

¹³⁰ See id.

¹³¹ Mitsubishi Electronics America, Inc. v. United States, 44 F.3d 973, 977 (Fed. Cir. 1994).