# For Agriculture And Aquaculture Imports, U.S. Antidumping Laws Are Now More Onerous Than Ever

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America's awful antidumping ("AD") law has just gotten worse. A controversial new AD bonding requirement issued by the U.S. Bureau of Customs and Border Protection ("CBP") makes the law more onerous for agriculture and aquaculture imports. For even a single entry of these products, in addition to making full AD cash deposits, an importer now must also post a bond equal to estimated duties on a full year's worth of imports – and sureties are requiring full collateralization of these bonds.

Managing the retrospective nature of the U.S. AD law is critical but it can be difficult to understand. Under this system, an importer cannot know the final acquisition cost for a product until long after it has been purchased and imported. It is easy to imagine the chilling effect this uncertain risk has on trade. In the rest of the world, AD laws are prospective, meaning that AD duties paid upon importation generally are the final amounts due. Certainty is gained because adjustments to AD rates and liabilities are prospective only. Under the U.S. system, however, an importation is subject only to an estimated "duty deposit" rate. Importers must put up cash at this estimated rate upon importation, but then must wait until the U.S. Department of Commerce ("DOC") updates its dumping calculations to determine if the importer actually owes more or less than the cash deposited. This update occurs in an annual "administrative review," which often is not completed until two or three years after the product enters U.S. customs territory.

In the end, the retrospective system can benefit an importer when its final AD liability is less than the cash deposited. In this instance, refunds are paid with interest. But importers have little control over the outcome of an administrative review and can end up owing much more than the AD duties deposited, with interest owed on any shortfall. Rather than take this risk, importers sometimes simply cease importing. The U.S. retrospective AD system has been in place since 1921 in one form or another. It is what makes the U.S. AD law such a potent trade weapon, even when AD deposit rates are low.

To make matters worse, last year CBP announced a new policy that significantly increases the burdens on importers of products subject to AD duties. (CBP Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases, effective July 9, 2004). The new policy concerns the "continuous bond" that all importers must carry to cover uncollected customs expenses that CBP might later determine are due. For most companies, to cover all imports on an ongoing basis, this is a single relatively modest bond (usually about $50,000) that can be obtained from a surety company for a reasonable fee. CBP has determined, however, that these bonds must be increased for imports of agriculture and aquaculture products subject to AD orders (and countervailing duty or "CVD" orders). This is due to concerns that some importers might not pay in instances where their final liability exceeds the initial cash deposit estimates.

While implementation has been uneven, imports subject to current AD duties and, putatively, the new CBP bonding policy include the following: canned pineapple fruit (from Thailand); crawfish tail meat (China); fresh and chilled Atlantic salmon (Norway); fresh garlic (China); frozen fish fillets (Vietnam); frozen shrimp (Brazil, China, Ecuador, India, Thailand, and Vietnam); hard red spring wheat (Canada); honey (Argentina, China); IQF red raspberries (Chile); non-frozen apple juice concentrate (China); pasta (Italy, Turkey); preserved mushrooms (China, India, and Indonesia); raw in-shell and roasted pistachios (Iran); and sugar (EU). This list represents multiple billions of dollars in annual U.S. trade – and CPB has warned that it might expand the new rule's scope to other products in the future.

CBP's new requirement is that an importer of such product (a) multiply the value of its past year's imports by the current AD duty deposit rate, (b) add $50,000, and (c) round up, to obtain the new bond amount. So, if last year a company imported $80 million of a product with a current five percent AD deposit rate, the new bond amount would be $4.1 million, instead of $50,000 under the old system. The cost of the new bond is significant as the surety's exposure is substantially increased. As a result, sureties are requiring importers to provide letters of credit to back at least the face amount of the bonds (for which importers' banks are requiring full collateralization by the importer), plus pay an annual premium. The cost of trading in products subject to AD orders has increased greatly as a result.

The reader might ask: If the retrospective AD duty system has been in effect for over 80 years, and hence the risk of importers ultimately owing more in AD duties than the cash deposited, why is CBP now suddenly increasing the continuous bond requirements? And, why is CBP applying this new policy only to agriculture and aquaculture products? Here, as elsewhere, the answers are found by following the money.

Pressure has increased for CBP to ensure collection of AD duties since the 2000 enactment of the Continued Dumping and Subsidy Offset Act ("CDSOA"), known as the "Byrd Amendment" after Senator Robert Byrd (D-WV), who steered it through Congress without debate as a conference committee rider to a "must-pass" appropriations bill. This is the law requiring that final AD duties be paid as subsidies to domestic companies protected by the tariffs, rather than the federal treasury. These protected industries have quickly come to view Byrd money as an entitlement, even though the Byrd Amendment has been found illegal by the Appellate Body of the World Trade Organization ("WTO"), retaliation has been authorized against U.S. exports in response, and both President Clinton and President George W. Bush have called for the law's repeal.

Congressional hearings where companies eligible for Byrd Amendment duties clamored for increased AD enforcement involving some importers of certain agricultural and aquaculture imports from China are what led to the new CBP directive. The CBP directive admits as much, referencing the Byrd Amendment as its primary motivation. CBP also reports what appears to be a year-on-year increase in uncollected AD duties, most all on Chinese agriculture and aquaculture products. In its CDSOA FY 2004 Annual Report, CBP reports a total of $260 million in uncollected AD duties, 82 percent of which involves imports from China (crawfish - $170 million; garlic - $25 million; and mushrooms - $18 million), and the CBP directive specifically references only AD orders against products from China (crawfish and garlic) in explaining its motivation. There is little doubt that CBP's primary target is certain importers from China. Normally, CBP would police such bad actors on a case-by-case basis.

CBP, however, instead chose an overbroad course of action and, as a result, appears to have run afoul of both the U.S. statute and U.S. WTO obligations. While CBP apparently viewed the problem as involving certain imports from China, the U.S. government is prevented by WTO non-discrimination rules (also known as most favored nation or MFN treatment) from singling out China. Consequently, CBP fashioned the policy directive to encompass all agriculture and aquaculture products subject to AD/CVD orders from all countries.

The new policy has been unevenly applied by CBP and actually does little to address the uncollected duties issue. Its main effect has been to penalize importers that are not responsible for any part of the problem. As far as we have been able to determine, CBP has required very few importers of crawfish from China to increase their bonds under the new policy. The same is true for garlic and mushrooms. Instead, CBP appears to be spending its resources imposing the policy on importers of shrimp from six countries subject to new AD orders, for which there is no evidence of any AD collection issues.

Furthermore, CBP's policy does nothing to remedy the root of the problem, which is abuse by certain importers of the AD law provision (19 U.S.C. §1675(a)(2)(B)(iii)) that permits importers from "new shippers" to cover AD duty deposits with single entry bonds instead of cash deposits, a loophole that a few importers apparently have exploited and that CBP has policed poorly. If companies have avoided paying additional duties by abusing the new shipper provision, it is unclear how CBP's new policy will prevent this.

Setting aside policy reservations, the CBP's increased bond requirement appears to violate both U.S. law and the WTO AD Agreement. Under the statute (19 U.S.C. §1623(a)), CBP may impose a continuous bond only where a "bond or other security is not specifically required by law . . . ." Since security for AD liability already is required in the form of cash deposits, CBP's policy directive runs directly counter to the plain meaning of the statute. The expected challenge in the U.S. Court of International Trade to CBP's policy directive will essentially be a case of first impression, although there is analogous precedent on point. *Lagerloef Trading Co. (Inc.) v. United States,* 63 Treas. Dec. 582, T.D. 46288 (1933) (Customs Court finding that Customs could not require additional bonds from an importer of merchandise subject to an antidumping duty order because the importer had already provided another form of security for that import.) CBP's claim that the recently decided case *Carolina Tobacco Co. v. Bureau of Customs and Border Protection,* No. 04-1269 (Fed. Cir. Apr. 4, 2005) affords it broad discretion to set bonding requirements to protect the revenue is unavailing, since the case did not involve imports subject to AD duties and, therefore, did not involve AD cash deposits that trigger the proscription of section 1623(a).

With respect to the WTO AD Agreement, the new CBP policy appears to suffer the same deficiencies as the Byrd Amendment itself. As a "specific action against dumping," the policy conflicts with Article 18.1 of the Anti-Dumping Agreement (and, as to CVD duties, Article 32.1 of the Subsidies and Countervailing Measures Agreement). Because it is not one of the tightly defined allowable actions against dumping, the CBP's policy directive conflicts with U.S. WTO obligations, as does the Byrd Amendment. The CBP policy is, fundmentally, no more than the fruit of the Byrd Amendment's poisonous tree.

The new CBP directive is a classic case of protectionist trade politics making bad national trade policy. CBP has plenty of authority to set bond amounts based on fact-specific risk assessments of individual importers, whether or not involving imports subject to AD orders and of whatever products from whatever country. CBP's legal authority to implement the new continuous bond policy is in serious doubt and sure to be challenged in the courts soon. What is certain is that it is a bad, overbroad policy stifling U.S. trade with many countries involving many products for no legitimate reason.

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