WHITE & CASE

June 2008

Japan External Trade Organization WTO and Regional Trade Agreements Monthly Report

IN THIS ISSUE

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Summary of Reports

United States

GAO Testimony: Export Controls - State and Commerce Have Not Taken Basic Steps to Better Ensure US Interests Are Protected

On April 24, 2008, a representative from the United States Government Accountability Office (GAO) provided testimony before the Senate Subcommittee on Government Management, the Federal Workforce and the District of Columbia in which they concluded that the Departments of State and Commerce have not addressed known vulnerabilities in the US export control system. Past GAO reports have indicated that both agencies have not managed the export control system to better ensure its overall effectiveness in protecting US interests. Whereas both agencies undertook recent actions to address some vulnerabilities, others vulnerabilities - such as an inefficient licensing system and the lack of interagency coordination - have still not been addressed. While there have been no direct responses to this report by either State or Commerce or other governmental agencies, the White House has issued a directive and US legislators have introduced pending legislation related to export control reform. We review herein several highlights of the GAO testimony on "Export Controls: State and Commerce Have Not Taken Basic Steps to Better Ensure US Interests Are Protected." The full testimony is available at: http://www.gao.gov/new.items/d08710t.pdf.

GAO Issues Report on US Trade Preference Programs; Calls for Integrated Approach

On June 12, 2008, the United States Government Accountability Office (GAO) released a report[1] on existing US trade preference programs. GAO reports that imports from trading partners that are beneficiaries of US preference programs have risen substantially since preferences began in 1976, totaling USD 92 billion in 2006. According to GAO, however, the lack of an integrated administration and review process across these programs limits the ability of the US government to balance three principal policy concerns. The GAO report reviews these policy areas, presents the disparate approaches to US trade preference programs, and recommends several improvements. We review herein the report's findings.

[1] "The United States Needs an Integrated Approach to Trade Preference Programs," GAO-08-907T.

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Special Report: A Comparison of Support Amounts Included in the 2002 Farm Bill and the 2008 Farm Bill

This report describes the main provisions of the Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill") and compares it to the Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill") to evaluate whether the US government has increased or reduced financial assistance for US agricultural producers. A comparison of several of the major titles of the 2008 Farm Bill with key titles of the 2002 Farm Bill reveals that assistance levels for agricultural producers have essentially remained the same between both bills. The 2008 assistance provisions for agricultural producers growing sugar, dairy products, peanuts and other commodities are identical when compared to the 2002 provisions, and in some cases assistance is expected to increase for the crop years 2009-2012. In a few limited cases, assistance will be reduced in the crop years 2009-2012. The implications of a 2008 Farm Bill that is similar to a 2002 Farm Bill include the potential for US trading partners to bring World Trade Organization (WTO) disputes against the United States for what they allege may be WTO-inconsistent levels of agriculture support for US farmers.

United States Highlights

We would like to alert you to the following United States highlights:

- Following Presidential Veto and Congressional Veto Override, Farm Bill Becomes Law

Free Trade Agreements

Free Trade Agreements Highlights

- Trade Officials Convene Sixth US-Sri Lanka TIFA Council Meeting

Customs

GAO Report Concludes Congress, Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection

On March 26, 2008, the Government Accountability Office (GAO) released a report on shortfalls in the US system of antidumping (AD) and countervailing (CVD) duties collection. GAO studied fiscal data from 2001-2007 to identify factors that contribute to duty-collection problems. In its report, GAO also suggested options for improving collection of AD/CVD duties and issued recommendations for how

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Congress and the Executive Branch should implement these improvements. We highlight here major elements of the GAO report and reaction to it.

Multilateral

Report of the Appellate Body in United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil

Decision: The WTO Appellate Body has affirmed that US cotton subsidies continue to violate the obligations of the United States under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on Agriculture. It upheld the rulings of a WTO "compliance" Panel that the United States had failed to implement the original (2005) WTO rulings on cotton.

WTO Panel Report: India – Additional and Extra-Additional Duties on Imports from the United States (DS360)

Decision: A World Trade Organization (WTO) Panel has dismissed US claims against additional duties imposed by India on imported alcoholic products. The United States argued that such additional duties were not provided for in India's tariff schedule, and therefore breached India's tariff commitments. However, the Panel agreed with India that these duties were permitted under a provision of the GATT that authorizes the imposition of charges "equivalent to an internal tax" – in this case taxes imposed by the Indian States on locally-produced alcohol.

Cato Event: Global Trade Facilitation Promising, but Little Consensus on WTO Trade Facilitation Agreement

On June 26, 2008, the Cato Institute hosted a discussion featuring panelists Stephen Creskoff, Senior Partner at Creskoff and Doram LLP, J. Michael Finger, Trade Policy Consultant and Former Lead Economist at the World Bank, William C. Lane, Washington Director for Caterpillar, Inc., and World Bank Lead Economist John Wilson. Speakers offered their views on trade facilitation as a promising alternative to expand international trade, boost economic growth, and advance the World Trade Organization (WTO) Doha Round negotiations. We review herein their discussion on trade facilitation.

Multilateral Highlights

- US Requests Consultations with EU Regarding Tariffs on Certain Technology Products

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Reports in Detail

United States

GAO Testimony: Export Controls - State and Commerce Have Not Taken Basic Steps to Better Ensure US Interests Are Protected

Summary

On April 24, 2008, a representative from the United States Government Accountability Office (GAO) provided testimony before the Senate Subcommittee on Government Management, the Federal Workforce and the District of Columbia in which they concluded that the Departments of State and Commerce have not addressed known vulnerabilities in the US export control system. Past GAO reports have indicated that both agencies have not managed the export control system to better ensure its overall effectiveness in protecting US interests. Whereas both agencies undertook recent actions to address some vulnerabilities, others vulnerabilities - such as an inefficient licensing system and the lack of interagency coordination - have still not been addressed. While there have been no direct responses to this report by either State or Commerce or other governmental agencies, the White House has issued a directive and US legislators have introduced pending legislation related to export control reform. We review herein several highlights of the GAO testimony on "Export Controls: State and Commerce Have Not Taken Basic Steps to Better Ensure US Interests Are Protected." The full testimony is available at: http://www.gao.gov/new.items/d08710t.pdf.

Analysis

I. Background

The US export control system for defense-related items was designed to balance legitimate defense trade with the need to protect critical technologies. The current US export control system is divided among two regulatory bodies: the Department of State ("State") oversees issues related to arms exports and the Department of Commerce ("Commerce") oversees issues related to dual-use[2] exports. Other federal agencies are involved with export controls process but maintain a more peripheral role. Please refer to

[2] Dual-use refers to items that have both commercial and military or proliferation applications.

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Appendix A for a table describing the roles and responsibilities of State, Commerce and other federal agencies.

Both State and Commerce have regulations that identify the items and related technologies each department controls, and the requirements for exporting those items. However, exporters are responsible for determining which department controls the item they seek to export and are responsible for verifying the requirements needed for export.

In most cases, dual-use items under Commerce are less restrictive than State's control over arms. The State-regulated exports require licenses for most destinations while Commerce controlled exports generally do not. However, there are license requirement exceptions in both departments.[3]

II. April 24, 2008 GAO Testimony

The GAO has reviewed different aspects of the US export control system over the last decade prior to this current testimony. Through the different assessments, the GAO has mainly concluded that State and Commerce have not managed their export licensing processes efficiently enough to ensure an effective operation. In addition, these previous reports have indicated that poor coordination among State, Commerce and other departments has weakened the export control system. State and Commerce have not implemented most of the prior recommendations made by the GAO to address specific vulnerabilities in the system.

The April 2008 testimony focused on three main reasons that explain the export control system's ineffectiveness: (i) inefficiencies in the export licensing processes; (ii) poor interagency coordination; and (iii) limits in State's and Commerce's ability to identify problems and provide a sound basis for making changes to the system.

A. Inefficiencies in the Export Licensing Processes

According to the GAO, State and Commerce have not managed their respective licensing processes to ensure efficient and consistent operation. While reviews of license applications require time to deliberate and ensure that decisions are appropriate, they should not be unnecessarily delayed due to inefficiencies within the system.

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[3] US GEN ACCOUNTING OFFICE, EXPORT CONTROLS: STATE AND COMMERCE HAVE NOT TAKEN BASIC STEPS TO BETTER ENSURE US INTERESTS ARE PROTECTED, GAO-08-710T, 4-5 (April 24, 2008).

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- ***State Department License System***

State's processing times for license applications began increasing in 2003 and have nearly doubled from 14 days to 26 days by 2006. State's workload has increased, and the department has been unable to keep up with the increased demand for licenses. At its peak, State maintained a backlog of over 10,000 cases. At the time of a GAO review in 2007, State had not analyzed licensing data to identify inefficiencies or developed sustainable solutions to manage its review processes. The GAO concluded that State's increased inefficient licensing process was due to several factors, including procedural weaknesses, problems with its new electronic processing system, and human capital challenges, all of which have gone unnoticed and unaddressed by State.

- *Procedural Weaknesses*: State lacked procedures to identify cases that required interagency review or cases required to be expedited by law. These types of cases would languish for weeks awaiting initial review before the case could be referred to another agency or placed on expedited track.
- *Electronic Processing Problems*: State has implemented D-Trade, a new automated system for processing cases. But D-Trade has limited capabilities and experiences performance problems. There was no significant difference in processing times for D-Trade system cases when compared to the traditional paper based system cases.
- *Human Capital Challenges*: The number of licensing officers has not increased despite a significant increase in workload. Further, State acknowledged that more work was falling onto fewer experienced staff.

- ***Commerce Licensing System***

Most concerns about export licensing processes have been focused on State because Commerce deals with very few licenses for dual-use exports.[4] While dual-use export licenses are few, the number of licenses processed in recent years has been increasing by over 50 percent from 1998 through 2005. The processing time has remained stable during this seven year period, but overall efficiency of Commerce's licensing process is not known. Commerce does not track efficiency-related measures that can provide insight into opportunities for improvement and only measures performance in terms of how long it takes to refer an application to another agency for review.

[4] For example, in 2005, 98.5 percent of dual-use exports were not licensed. This amount reflects only the export of items specifically identified on Commerce's control list.

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B. Poor Interagency Coordination

Due to multiple agencies each playing a role in the export control system, coordination between State and Commerce is particularly important. The GAO testimony noted that there are three main inter-agency coordination problems: (i) jurisdiction conflicts; (ii) license exceptions; and (iii) criminal enforcement actions.

- *Jurisdiction Conflicts:* To date, State and Commerce still have disagreements over which department has jurisdiction over certain items.[5] Despite past GAO recommendations, the two departments have not yet resolved jurisdictional disputes or developed new processes to improve coordination. Until these coordination issues are resolved, exporters, not the respective agencies, determine which department's restrictions apply and what type of governmental review will occur.
- *License Exceptions:* Even when there are no jurisdictional issues, there is not always agreement among the departments on when an export license is required or exempted. For example, the Defense Department may confirm an exemption for a State-controlled item that is for the support of Defense activities. However, GAO revealed that State and Defense have different interpretations of the exemptions and lacked comprehensive data that can oversee the use of these exemptions. State and Defense have established a working group on this issue and recently reached agreement to resolve these issues.
- *Criminal Enforcement Actions:* When an exporter applies for a license, both State and Commerce need to consider whether the parties to the proposed export are eligible to sell or receive these export controlled items. Companies or individuals indicted or convicted of violating certain laws may be denied from receiving such exports. State and Commerce have only recently begun receiving information about these criminal enforcement actions.

C. Absence of Assessment

GAO reports that State and Commerce have not conducted updated assessments to determine if their control processes are sufficient to protect US interests. On January 22, 2008, President Bush signed directives intended to ensure that the export control system focused on meeting security and economic

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[5] In some cases, both departments have claimed jurisdiction over the same items, i.e. certain missile-related technologies. US GEN ACCOUNTING OFFICE, EXPORT CONTROLS: PROCESSES FOR DETERMINING PROPER CONTROL OF DEFENSE-RELATED ITEMS NEED IMPROVEMENT, GAO-02-996 (Sept. 20, 2002).

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challenges, and legislation to improve the export control system has been introduced.[6] However, these initiatives do not outline key details or plans for implementation. Based on past initiatives, improvement legislation that is not grounded in targeted analysis of solving specific problems has not resulted in favorable solutions.[7]

D. Conclusions

According to GAO, the State and Commerce export control system must address known vulnerabilities and adapt to a changing global environment if the system is to adequately protect US national security, foreign policy and economic interests. Implementation of GAO recommendations would be a good first step toward this goal, but the departments must also individually engage in continuous evaluation and coordination with each other. The GAO concluded that addressing known vulnerabilities as well as engaging in continuous assessments over time is the only way to ensure the export control system is efficient and can better serve the interest of the United States.

E. Departmental Responses

To date, neither State nor Commerce has directly responded to the most current GAO report. However, both State and Commerce have issued press releases relating to each department's respective licensing structure just prior to when the current GAO report was issued. Relevant points for each department are listed below.

- ***State Department***

The State Department issued a fact sheet on January 4, 2008 in response to a GAO Report on "Inefficiencies and Challenges in the Arms Export Process."[8] State noted that the GAO study used data available through April 2007, and that the report therefore did not reflect the many steps that State has taken to improve processes since that time. Although the press release was aimed at responding to the November 2007 GAO report, the current GAO testimony reflected no updates in response to the January 2008 State Department press release. Therefore the following points highlighted by the January 2008 press release would also address some of the concerns listed by the April 2008 GAO report:

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[6] Details for the White House directives and the export control legislation are described in more detail in the Outlook section below.

[7] D-Trade was one of the initiatives, and as discussed earlier, its' anticipated initiatives have not been realized.

[8] US GEN ACCOUNTING OFFICE, DEFENSE TRADE: STATE DEPARTMENT NEEDS TO CONDUCT ASSESSMENTS TO IDENTIFY AND ADDRESS INEFFICIENCIES AND CHALLENGES IN THE ARMS EXPORT PROCESS, GAO-08-89, (Nov. 2007).

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- *Processing Times*: State indicated that processing times for licenses and agreements have been in decline since June 2007, when many internal changes were implemented.
- *Procedural Weaknesses:* The Directorate of Defense Trade Controls has implemented a procedure where any case over 60 days old must be reviewed by a Deputy Assistant Secretary (DAS). Cases are not allowed to languish – there must be a justification for cases that require more time.

Despite the decrease in processing time and the efforts made toward procedural challenges, State has not addressed the main concerns found by the GAO testimony. In terms of procedural weaknesses, State has not created procedures to identify the specific cases that required interagency review or cases that were required to be expedited by law.

- ***Commerce Department***

On April 23, 2008, one day before the GAO Export Controls testimony, Commerce issued a press release announcing updates to its Commerce Control List (CCL) and sought public feedback from those updates.[9] The CCL helps determine what US goods and services require a Commerce export license to be shipped overseas. Commerce is seeking to narrow the categories available on the CCL in an effort to streamline the licensing process.

On May 19, 2008, Commerce issued a second press release requesting comments on whether the scope of technologies on the Commerce Control List that are subject to deemed export licensing requirements should be narrowed.[10] Commerce hopes to narrow the scope of technologies on the CCL to concentrate on those technologies having the greatest national security concerns. Those technologies having little national security concerns should be eliminated from the CCL.

If completed, the shorter CCL list may help with the number of license requests that Commerce will receive, but it still will not address GAO's concern about performance assessment. Commerce has still not indicated any desire to start tracking efficiency-related measures within the *entire* licensing process.

Outlook

To date, there has been little to no response from other agencies. However, aside from the GAO testimony, there have been strong pushes for reforms to the US export control system. Most notably are

[9] The CCL changes were published in a Federal Register Notice. Department of Commerce, 73 Fed. Reg. 21035 - 21041 (proposed April 18, 2008).

[10] The CCL changes were published in a Federal Register Notice. Department of Commerce, 73 Fed. Reg. 28795 – 28797 (proposed May 19, 2008).

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the White House directives and an export control bill that the House of Representatives recently passed, described below. Early this year, the President signed a package of directives to reform the export control system to better facilitate the "United States' continued international economic and technological leadership." In addition, the House just passed legislation to reform the State Department arms export licensing process. Relevant provisions are listed below:

A. White House Directives

On January 22, 2008 the President signed a package of directives to "advance a more efficient and transparent export licensing process and enhance dispute resolution mechanisms."[11] The directives are intended to clarify and strengthen the ability of the US Government to monitor and deny US controlled goods, services or technologies to a potential enemy. These directives affect Commerce and State and emphasize different points for the State and Commerce departments.

- ***State:*** The directives will emphasize a focus on more effective export licensing process, a more efficient dispute resolution mechanism, and enhanced enforcement of export enforcement investigations.
- ***Commerce:*** The directives will focus on facilitating trade to reliable foreign customers and ensuring that the most sensitive items are controlled to sustain US economic competitiveness and innovation.

B. Legislative Reforms

On May 15, 2008, the House passed the Security Assistance and Arms Export Control Reform Act[12] to reform the administration of the US Arms Export Control Act.[13] The bill would require State to improve the review and processing of export licenses for defense articles, and would authorize the appropriation

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[11] Statement on US Export Control Reform Directives, (introduced Jan. 22, 2008), *available at* http://www.whitehouse.gov/news/releases/2008/01/20080122-4.html.

[12] Security Assistance and Arms Export Control Reform Act of 2008: H.R. 5916, (introduced April 29, 2008), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h5916.

[13] If enacted, H.R. 5916 would make a number of significant changes to arms export control procedures. For example, Subtitle A of Title I of the bill, referred to as the Defense Trade Controls Performance Improvement Act of 2008, would require the Department of State's Directorate of Defense Trade Controls (DDTC) to institute specified performance goals to improve the review and processing of applications for export licenses (particularly for major allies such as Israel, South Korea, Japan, Australia, New Zealand, and members of NATO).

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of such sums as may be necessary in 2009 and future years for that purpose. The bill is currently awaiting approval from the Senate.[14]

C. Impact

What impact these directives and proposed legislation may have on the export control system is unclear at the moment. Whereas the GAO report does not seem to be eliciting responses from the different governmental agencies, it is likely that other forms of export control reform will need to be assessed to determine the changes that may occur within the export control system in the upcoming months.

[14] The last action was on May 15, 2008 when the House voted for the bill. The bill was introduced in the Senate on May 19, 2008.

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Appendix A

Table: Roles and Responsibilities in the Arms and Dual-Use Export Control Systems

Principal Regulatory Agency	Mission	Statutory Authority	Implementing Regulations
Commerce Department's Bureau of Industry and Security	Regulates export of dual-use items by weighing economic, national security, and foreign policy interests	Export Administration Act of 1979[b]	Export Administration Regulations
State Department's Directorate of Defense Trade Controls	Regulates export of arms by giving primacy to national security and foreign policy concerns	Arms Export Control Act of 1976[a]	International Traffic in Arms Regulations
Other Federal Agencies			
Department of Defense		Provides input on which items should be controlled by either State or Commerce and conducts technical and national security reviews of export license applications submitted by exporters to either State or Commerce	
Department of Homeland Security		Enforces arms and dual-use export control laws and regulations through border inspections and investigations[c]	
Department of Justice		Investigates any criminal violations in certain counterintelligence areas, including potential export control violations, and prosecutes suspected violators of arms and dual-use export control laws	
Department of Energy		Enhancing United States national security through the military application of nuclear energy	
Department of Treasury		Administering and enforcing economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction	

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Source: Cited laws and regulations.

[a]22 U.S.C.. 2751 et seq.

[b]50 U.S.C.. App. 2401 et seq. Authority granted by the act terminated on August 20, 2001. Executive Order 13222, Continuation of Export Control Regulations, issued August 2001, continues the export controls established under the Act and the implementing Export Administration Regulations. Executive Order 13222 requires an annual extension and was recently renewed by Presidential Notice on August 15, 2007.

[c]Homeland Security, Justice, and Commerce investigate potential dual-use export control violations. Homeland Security and Justice investigate potential arms export control violations.

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Special Report: A Comparison of Support Amounts Included in the 2002 Farm Bill and the 2008 Farm Bill

Summary

This report describes the main provisions of the Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill") and compares it to the Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill") to evaluate whether the US government has increased or reduced financial assistance for US agricultural producers. A comparison of several of the major titles of the 2008 Farm Bill with key titles of the 2002 Farm Bill reveals that assistance levels for agricultural producers have essentially remained the same between both bills. The 2008 assistance provisions for agricultural producers growing sugar, dairy products, peanuts and other commodities are identical when compared to the 2002 provisions, and in some cases assistance is expected to increase for the crop years 2009-2012. In a few limited cases, assistance will be reduced in the crop years 2009-2012. The implications of a 2008 Farm Bill that is similar to a 2002 Farm Bill include the potential for US trading partners to bring World Trade Organization (WTO) disputes against the United States for what they allege may be WTO-inconsistent levels of agriculture support for US farmers.

Analysis

I. Background

On May 21, 2008, President Bush vetoed the conference report of the 2008 Farm Bill sent to him by Congress (H.R. 2419). Legislators had begun debating the latest version of the Farm Bill in mid-2007 but were only able to reach agreement on final provisions to the Farm Bill and approve H.R. 2419 in mid-May. On May 21, 2008, the House of Representatives voted to override President Bush's veto by a vote of 316 to 108, more than the necessary two-thirds majority vote required to override a veto (i.e., 283 votes). On May 22, 2008, the Senate voted 82 to 13 to override the veto, also more than the necessary two-thirds majority vote required to override a veto (i.e., 64 votes).

The discovery of a clerical error in the version of H.R. 2419 sent to President Bush, however, required both chambers of Congress to re-do their votes. Specifically, the version of H.R. 2419 sent to the President (that he vetoed) did not contain the full 15 titles that the House and Senate had agreed upon in their conference report. The missing title – Title 3 on trade – had been omitted from the version sent to President Bush due to a printing error by the Office of the House Clerk (i.e., only 14 of the 15 titles in the completed Farm Bill were sent to the President). White House officials failed to catch the omitted title because they referred to the conference report of H.R. 2419 online rather than look at the printed Farm

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Bill conference report sent to the President (which omitted the trade title). The President vetoed and signed the printed conference report with the omitted title, and legislators only discovered the error hours before the scheduled veto override votes. The House and Senate overrode the veto, which put into law 14 of the bill's 15 titles (Pub. L. No. 110-234). Both chambers quickly decided, however, to re-do the voting procedures for the full Farm Bill. Specifically, several Republicans complained that Congress was inviting legal action by voting on a Farm Bill that suffered from a serious technical error (i.e., the missing trade title), and Democratic leaders agreed.

On May 22, 2008, the House voted to pass a newly-numbered Farm Bill (H.R. 6124) that contained all 15 titles, including the missing trade title. The House passed H.R. 6124 by a vote of 306 to 110. H.R. 6124 contains the exact same provisions as H.R. 2419 and was brought up for consideration under suspension of rules, a procedure that barred amendments to the Farm Bill. On June 5, 2008, the Senate passed H.R. 6124 by a vote of 77-15. Congress then sent H.R. 6124 to the President for his consideration.

On June 18, 2008, President Bush (for the second time) vetoed the Farm Bill (H.R. 6124). In vetoing the bill, President Bush stated that "at a time of high food prices and record farm income, this bill lacks program reform and fiscal discipline [and] it continues subsidies for the wealthy and increases farm bill spending by more than USD 20 billion, while using budget gimmicks to hide much of the increase."

The same day as the President's veto, the House of Representatives decided to override the veto by a vote of 317-109, more than the two-thirds majority vote required to override a Presidential veto. Hours later, the Senate also decided to override the veto by a vote of 80-14, a margin also exceeding the two-thirds majority needed to override a veto.

Following Congress' decision to override President Bush's veto, H.R. 6124 replaced the incomplete Farm Bill and became law, having been assigned a new public law number (Pub. L. 110-246).

II. 2008 Farm Bill Titles

The 2008 Farm Bill contains the following 15 titles: (i) Commodity Programs; (ii) Conservation; (iii) Trade; (iv) Nutrition; (v) Credit; (vi) Rural Development; (vii) Research and Related Matters; (viii) Forestry; (ix) Energy; (x) Horticulture and Organic Agriculture; (xi) Livestock; (xii) Crop Insurance and Disaster Assistance Programs; (xiii) Commodity Futures; (xiv) Miscellaneous; and (xv) Trade and Tax Provisions. We highlight below the provisions included under several of these titles.

A. Commodity Provisions

The following provisions are included under the Commodity Title of the Farm Bill:

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- ***Direct Payments.*** The bill states that for each of the 2008 through 2012 crop years of each covered commodity, the Secretary of Agriculture will make direct payments to producers on farms for which base acres and payment yields are established.
- ***Countercyclical Payments.*** The bill states that for each of the 2008 through 2012 crop years for each covered commodity, the Secretary of Agriculture will make countercyclical payments to producers for which payment yields and base acres are established if the Secretary determines that the effective price for the covered commodity is less than the target price for the covered commodity.
- ***Crop Revenue Election Acre Program.*** According to the bill, producers will have the option, beginning with the 2009 crop year, to participate in a state-level revenue protection system. Participants agree to a 20 percent reduction in direct payments and a 30 percent reduction in loan rates in exchange for eligibility for a state-based revenue guarantee on acres planted.
- ***Target Prices and Loan Rates.*** The bill adjusts loan rates and target prices of existing commodities beginning with the 2010 crop year and provides additional program coverage for certain pulse crops beginning with the 2009 crop year.
- ***Peanut Support.*** Under the bill, the peanut program is continued under a separate subtitle with program features similar to those for covered commodities. The direct payment rate is USD 36 per ton; the target price is set at USD 495 per ton, and the marketing loan rate is USD 355 per ton. The bill requires USDA to cover storage, handling and associated costs for forfeited peanuts.
- ***Sugar Support.*** The bill sets the cane sugar loan rate at 18 cents per pound for the 2008 crop year, 18.25 cents for 2009, 18.50 cents for 2010, and 18.75 cents for 2011 and 2012. The beet sugar loan rate is set at 22.9 cents per pound for the 2008 crop year and a rate that is equal to 128.5 percent of the applicable loan rate per pound of raw cane sugar for the 2009 – 2012 crop years. The sugar marketing allotments are amended and extended through the 2012 crop. The overall allotment quantity for a crop year is not less than 85 percent of the estimated quantity of sugar needed for domestic human consumption for the crop year.
- ***Dairy Support.*** The bill replaces the current milk price support of USD 9.90 per hundredweight with separate support prices for cheddar cheese, butter and nonfat dry milk. If the price for one of these dairy commodities is lower than the support price, then the US Department of Agriculture (USDA) will purchase the product at the support level. Under the bill, the Milk Income Loss Contract (MILC) program is restored to cover 45 percent of the shortfall between USD 16.94 per hundredweight and the Boston Class I milk price.

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B. Conservation Provisions

The following provisions are included under the Conservation Title of the Farm Bill:

- ***Conservation Stewardship Program.*** The bill revamps the Conservation Stewardship Program (CSP), a program focused on incentivizing new conservation while simultaneously rewarding producers for achieving high levels of stewardship and addressing priority resource concerns in their area.
- ***Other Conservation Initiatives.*** Other provisions of the bill secure conservation benefits on working lands, the preservation of wetland acres, the restoration of the Chesapeake Bay, the protection of US grasslands, and the conservation of habitat on agricultural, forest and tribal land.

C. Trade Provisions

The following provisions are included under the Trade Title of the Farm Bill:

- ***Food Aid.*** The bill addresses US international food aid programs and problems associated with them, such as lack of attention to food aid quality and inadequate assessment of development in recipient countries. The bill also increases the ability of the US government to pre-position US commodities in overseas warehouses, thus allowing expedited food donations to countries facing emergencies.
- ***Specialty Crops.*** The bill increases funding for a program that provides financial assistance to producers and exporters of specialty crops in addressing technical and sanitary and phyto-sanitary barriers against their products in overseas markets.
- ***Export Programs.*** The bill modifies export credit guarantee programs to make them consistent with the ruling in the World Trade Organization (WTO) cotton dispute and reauthorizes the Market Access Program, Foreign Market Development Program, and the Emerging Markets and Facilities Loan Guarantee program.

D. Nutrition Provisions

The following provisions are included under the Nutrition Title of the Farm Bill:

- ***Food Stamp Program and Assistance.*** The bill provides additional funding for the Food Stamp Program. The bill also increases assistance to families with high child care expenses by allowing full deduction for child care expenses in calculating family income/ benefit levels.
- ***Fresh Fruits and Vegetables Program.*** The bill expands the Fresh Fruit and Vegetable Program, which provides free fresh fruits and vegetables to low-income children in schools.

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E. Agricultural Research and Extension Provisions

The following provisions are included under the Agricultural Research Title of the Farm Bill:

- ***Specialty Crop Research.*** The bill provides funds for the Specialty Crop Research Initiative, a new grants program for producers of specialty crops involving mechanization, plant breeding, genetics, genomics, pests and diseases and food safety.

F. Forestry Provisions

The following provisions are included under the Forestry Title of the Farm Bill:

- ***Forest Conservation.*** The bill's forestry title establishes national priorities for private forest conservation including: (i) conserving and maintaining working forest landscapes for multiple uses; (ii) protecting forests from threats to forest health; and (iii) enhancing public benefits from private forests.
- ***Illegal Logging.*** The bill amends current law to provide additional tools for the US government to prevent trade in illegal timber.

G. Energy Provisions

The following provisions are included under the Energy Title of the Farm Bill:

- ***Biofuels.*** The bill creates and fully funds a program to encourage farmers to establish and grow biomass crops in areas around biomass facilities such as biorefineries. The bill also provides matching payments to producers for harvest, transport and storage of biomass delivered to such a facility, as well as USD 320 million in mandatory funding for loan guarantees for commercial scale biorefineries for advanced biofuels. The bill provides funding to provide grants and loan guarantees for renewable energy and energy efficiency systems for farmers, ranchers and rural small businesses. The bill also provides funding for payments to support the production of advanced biofuels, including biodiesel and cellulosic biofuels.

H. Livestock Provisions

The following provisions are included under the Livestock Title of the Farm Bill:

- ***Origin Labeling.*** The bill requires retailers to label the country of origin of meat, (such as beef, lamb, pork, chicken and goat meat), fish, fruits and vegetables, ginseng, peanuts, pecans and macadamia nuts by September 30, 2008.
- ***Producer Protections and Contracting Fairness.*** The bill ensures producers are not forced into mandatory arbitration in livestock or poultry contracts, and also enables a swine or poultry producer to

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litigate a contract dispute where the principal part of their production occurs, instead of where the company headquarters is located.

I. Crop Insurance and Disaster Assistance Programs

The following crop insurance and disaster assistance provisions are included in the Farm Bill:

- ***Farm Commodity/Disaster Program Benefit Eligibility.*** The bill sets new standards for farm commodity and disaster program benefit eligibility. To receive farm program benefits, an individual's non-farm income may not exceed USD 500,000. If farm income exceeds USD 50,000, an individual will no longer be eligible to receive direct payments.
- ***Disaster Assistance.*** The bill includes a disaster assistance program to assist farmers who lose their crops, livestock or trees or suffer from shallow losses due to disasters such as floods or drought. The program complements the existing crop insurance program and provides additional assistance to farmers based on loss of crop revenue for their whole farm operation. The additional payments are based on their level of losses compared to a benchmark proportional to their level of crop insurance coverage purchased at the beginning of the crop year. As noted, Senate Finance Committee Chairman Baucus fought hard for inclusion of this program in the Farm Bill.

J. Trade and Tax Provisions

The following additional trade and tax provisions are included in the Farm Bill:

- ***Cellulosic Biofuels.*** The bill includes a new tax incentive for developing cellulosic biofuels that will be offset by a gradual reduction of the current ethanol tax credit. The bill also includes a new production tax credit for cellulosic biofuels.
- ***Ethanol Credit.*** The bill reduces the current ethanol credit of 51 cents per gallon by 6 cents, after annual production reaches 7.5 billion gallons.
- ***Caribbean Trade Partnership Act (CBTPA).*** The bill extends the CBTPA for two additional years. The CBTPA is scheduled to expire on September 30, 2008.
- ***Haitian Hemispheric Opportunity Through Partnership Encouragement Act (HOPE).*** The bill expands the HOPE Act by including six stand-alone rules for apparel and some textile products to qualify for duty-free treatment. The bill also authorizes provisions aimed at promoting compliance with core labor standards and improving textile and apparel sector working conditions.

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III. Comparison and Analysis of Commodity Support in 2002 and 2008 Farm Bills

A. Estimated Total Farm Bill Expenditure Differs Between Both Bills

The Congressional Budget Office (CBO) estimated in a May 2008 report that the 2008 Farm Bill would result in a USD 307 billion expenditure for the time period 2008-2012.[15] Specifically, the CBO report highlighted that USD 209 billion would be spent on nutrition programs, USD 35 billion on agricultural commodity programs, and USD 25 billon on conservation programs.[16] In 2002, the CBO estimated that the 2002 Farm Bill would result in a total expenditure of USD 470.5 billion for the 2002-2007 period, and USD 869.3 billion in total for the 2002-2012 period.[17] Furthermore, the report estimated that food assistance programs would account for USD 326.6 billion for the 2002-2007 period, and USD 626.8 billion for the 2002-2012 period.[18] Thus, although the CBO estimated in 2002 that USD 398.8 billion would be spent between period 2008-2012, they have re-calculated this figure as of May 2008 to be only USD 307 billion, a reduction from their initial estimate. As it has done in the past, however, CBO will likely alter and increase their estimated figures over the next several years.

B. Payment Limitations for Agricultural Producers Remain Constant

The payment limitations per person or entity (*i.e.*, per agricultural producer) remain the same in the 2002 and 2008 Farm Bills. Both the 2002 and 2008 Farm Bills state that the total amount of **direct payments** received by an agricultural producer for any crop year may not exceed USD 40,000 if that agricultural producer does not participate in the average crop revenue election program. In both the 2002 and 2008 Farm Bills, in the case of an agricultural producer that does not participate in the average crop revenue election program, the total amount of **counter-cyclical payments** received by that agricultural producer may not exceed USD 65,000. The 2002 and 2008 Farm Bills also set the same payment limitations (although they separate them from other limitations) for peanut growers.

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[15] H.R. 2419, Food Conservation, and Energy Act of 2008: Direct Spending and Revenue Effects of the Conference Agreement, May 13, 2008, http://www.cbo.gov/ftpdocs/34xx/doc3468/hr2646omb.pdf (last visited June 26, 2008).

[16] *Id.*

[17] Congressional Budget Office, Pay-As-You-Go-Estimate, May 22, 2002, http://www.cbo.gov/ftpdocs/92xx/doc9230/hr2419conf.pdf (last visited June. 26, 2008).

[18] *Id.*

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Type of Payment	2002 Farm Bill (payment limitation per person/entity)	2008 Farm Bill (payment limitation per person/entity)
Direct payments	USD 40,000	USD 40,000
Counter-cyclical payments	USD 65,000	USD 65,000

C. 2002 and 2008 Direct Payment Rates and Counter-Cyclical Payments Are Essentially the Same

Section 1103 of the 2002 Farm Bill and the 2008 Farm Bill (under the Commodity Title) provide that the Secretary of Agriculture shall make "direct payments" to farm producers for which the following rates are established:

Commodity	2002 Farm Bill	2008 Farm Bill
Wheat	USD 0.52 per bushel	USD 0.52 per bushel
Corn	USD 0.28 per bushel	USD 0.28 per bushel
Grain Sorghum	USD 0.35 per bushel	USD 0.35 per bushel
Barley	USD 0.24 per bushel	USD 0.24 per bushel
Oats	USD 0.024 per bushel	USD 0.024 per bushel
Upland Cotton	USD 0.0667 per hundredweight	USD 0.0667 per hundredweight
Rice (includes Long Grain Rice and Medium Grain Rice)	USD 2.35 per hundredweight	USD 2.35 per hundredweight
Soybeans	USD 0.44 per bushel	USD 0.44 per bushel
Other Oilseeds	USD 0.80 per hundredweight	USD 0.0080 per pound

A survey of Section 1104 of the 2002 Farm Bill and the 2008 Farm Bill (under the Commodity Title) also reveals that the counter-cyclical payments ("target price") have remained the same except for the upland

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cotton allocations which have been reduced by USD 0.0115 per pound. However, significant increases have been allocated for the years 2010 through 2012 for six crops including wheat, grain sorghum, barley, oats, soybeans, and other oilseeds:

Commodity	2002 Farm Bill	2008 Farm Bill
Wheat	USD 3.92 per bushel	USD 3.92 per bushel[19]
Corn	USD 2.63 per bushel	USD 2.63 per bushel
Grain Sorghum	USD 2.57 per bushel	USD 2.57 per bushel[20]
Barley	USD 2.24 per bushel	USD 2.24 per bushel[21]
Oats	USD 1.44 per bushel	USD 1.44 per bushel[22]
Upland Cotton	USD 0.7240 per pound	USD 0.7125 per pound
Rice	USD 10.50 per hundredweight	USD 10.50 per hundredweight
Soybeans	USD 5.80 per bushel	USD 5.80 per bushel[23]
Other oilseeds	USD 0.1010 per pound	USD 0.1010 per pound[24]

D. Loan Rates for Non-Recourse Marketing Assistance Loans Have Remained Constant

A comparison of Section 1202 of the 2002 Farm Bill and the 2008 Farm Bill (under the Commodity Title) reveals that the loan rates for marketing assistance have remained unchanged. However, the rates for wheat, barley, oats, and "other oilseeds" are projected to increase from 2009 onwards, whereas the rates for dry peas and lentils are expected to decrease from 2009 through the 2012 crop year:

[19] Projected to increase to USD 4.17 per bushel for the 2010 through 2012 crop years.

[20] Projected to increase to USD 2.63 per bushel for the 2010 through 2012 crop years.

[21] Projected to increase to USD 2.63 per bushel for the 2010 through 2012 crop years.

[22] Projected to increase to USD 1.79 per bushel for the 2010 through 2012 crop years.

[23] Projected to increase to USD 6.00 per bushel for the 2010 through 2012 crop years.

[24] Projected to increase to USD 12.00 per hundredweight for the 2010 through 2012 crop years.

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Commodity	2002 Farm Bill	2008 Farm Bill
Wheat	USD 2.75 per bushel	USD 2.75 per bushel[25]
Corn	USD 1.95 per bushel	USD 1.95 per bushel
Grain Sorghum	USD 1.95 per bushel	USD 1.95 per bushel
Barley	USD 1.85 per bushel	USD 1.85 per bushel[26]
Oats	USD 1.33 per bushel	USD 1.33 per bushel[27]
Upland Cotton	USD 0.52 per pound	USD 0.52 per pound
Extra Long Staple Cotton	USD 0.7977 per pound	USD 0.7977 per pound
Rice	USD 6.50 per hundredweight	USD 6.50 per hundredweight
Soybeans	USD 5.00 per bushel	USD 5.00 per bushel
Other Oilseeds	USD 0.0930 per pound	USD 0.0930 per pound[28], [29]
Graded Wool	USD 1.00 per pound	USD 1.00 per pound
Non-graded Wool	USD 0.40 per pound	USD 0.40 per pound
Mohair	USD 4.20 per pound	USD 4.20 per pound
Honey	USD 0.60 per pound	USD 0.60 per pound
Dry Peas	USD 6.22 per hundredweight	USD 6.22 per hundredweight[30]

25 Projected to increase to USD 2.94 per bushel for the 2010 through 2012 crop years.

26 Projected to increase to USD 1.95 per bushel for the 2010 through 2012 crop years.

27 Projected to increase to USD 1.39 per bushel for the 2010 through 2012 crop years.

28 The following seeds are listed: (A) Sunflower seed, (B) Rapeseed, (C) Canola, (D) Safflower, (E) Flaxseed, (F) Mustard Seed, (G) Crambe, (H) Sesame Seed, and (I) Other oilseeds designated by the Secretary.

29 Projected to increase to USD 10.09 per hundredweight for the 2010 through 2012 crop years.

30 Projected to decrease to USD 5.40 per hundredweight for the 2009 through 2012 crop years.

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Commodity	2002 Farm Bill	2008 Farm Bill
Lentils	USD 11.72 per hundredweight	USD 11.78 per hundredweight[31]
Small Chickpeas	USD 7.43 per hundredweight	USD 7.43 per hundredweight

E. Assistance for Cotton Growers has Reduced Marginally; Assistance For Peanut and Sugar Growers are Identical in the 2002 and 2008 Bills; Assistance to Dairy Producers and Administrative Limitations Are Couched in New Language

1. Cotton (Subtitle A)

The assistance to cotton growers has been reduced in the 2008 Farm Bill, although most key assistance-related provisions remain in their language verbatim to the language in the 2002 Farm Bill. In the 2002 Farm Bill, the Secretary of Agriculture was authorized to provide marketing certificates or cash payments to domestic users of cotton or exporters of cotton for using the lowest-priced domestic cotton whose "Friday through Thursday average price quotation…exceeds the Northern Europe price by more than 1.25 cents per pound."[32] Additionally, 1207(b) mandated a special import quota program whenever the Secretary determined "that for any consecutive four-week period, the Friday through Thursday average price quotation for the lowest priced United States growth…exceeds the Northern Europe prce by more than 1.25 cents per pound." The 2008 Farm Bill retains the special import quota in the exact same language but the Marketing Certificate provisions has been eliminated. Other 2002 Farm Bill provisions that enable assistance for cotton growers including "Special Competitive Provisions for Extra Long Staple Cotton" (Sec. 1208) and "Availability of Recourse Loans for High Moisture Feed Grains and Seed Cotton" (Section 1209) remain unchanged in the 2008 Farm Bill.

[31] Projected to decrease to USD 11.28 per hundredweight for the 2009 through 2012 crop years.

[32] The Bill stipulates that the price band must have existed for a continuous four week period. Additionally, Sec. 1207 (B) requires that "the prevailing world market price for upland cotton does not exceed 134 percent of the loan rate for upland cotton established under section 1202."

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2. Peanuts (Subtitle C)

Type of Assistance	2002 Farm Bill	2008 Farm Bill
Payment Rate for Direct Payments	USD 36 per ton	USD 36 per ton
Target Price for Peanuts for counter-cyclical payments	USD 495 per ton	USD 495 per ton
Loan Rate for Marketing Assistance	USD 355 per ton	USD 355 per ton

3. Sugar (Subtitle D)

Type of Assistance	2002 Farm Bill	2008 Farm Bill
Loan Rate for Sugarcane	18 cents per pound	18 cents per pound[33]
Loan Rate for Sugar Beet	22.9 cents per pound	22.9 cents per pound
Storage Rate for Refined Sugar Per Month[34]	N/A	15 cents per hundredweight
Storage Rate for Raw Sugar Per Month[35]	N/A	10 cents per hundredweight

4. Dairy (Subtitle E)

The US government continues to provide assistance for dairy farmers in the 2008 Farm Bill (under the Commodity Title). However, the language in which this assistance is specified is different from the 2002

[33] Projected to increase to USD 18.25 for the 2009 crop year, USD 18.50 per pound for the 2010 crop year, and USD 18.75 per pound for the 2011 and 2012 crop years.

[34] This provision has been inserted into the 2008 Farm Bill by amending Subtitle E of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 7281 et seq.)

[35] *Id.*

Farm Bill. For instance, Section 1501(a) of the 2002 Farm Bill, titled as the "Milk Price Support Program," stipulates that the Secretary of Agriculture shall "support the price of milk produced in the 48 contiguous States through the purchase of cheese, butter, and nonfat dry milk from the milk." Sec. 1502(b) then specifies a rate "equal to 9.90 per hundredweight for milk containing 3.67 butterfat."

The 2008 Farm Bill provides support for dairy producers, albeit in a slightly different manner. The relevant provisions (Sec. 1501(b), 1501(c)) state that the Secretary shall purchase the following dairy products at:

Cheddar Cheese in blocks at not less than	USD 1.13 per pound.
Cheddar Cheese in barrels at not less than	USD 1.10 per pound.
Butter at not less than	USD 1.05 per pound.
Nonfat Dry milk at not less than	USD 0.80 per pound.

5. Administration (Subtitle F)

As noted above, both the 2002 Farm Bill and the 2008 Farm Bill stipulate that the total amount of direct payments made to a person during any crop year under subtitle A of title I may not exceed USD 40,000. For counter-cyclical payments, the limit is set at USD 65,000 in both the 2002 and 2008 bills. However, the bills diverge greatly on the issue of limitation. The 2002 Farm Bill states that an individual or entity with an adjusted gross income (AGI) of greater than USD 2,500,000 is ineligible for assistance, "unless not less than 75 percent of (that income)…is derived from farming, ranching, or forestry operations." However, the 2008 Farm Bill states that a person or a legal entity will be ineligible to receive payments if his non-farm AGI exceeds USD 500,000 or if his farm-related income exceeds USD 750,000.

F. 2008 Farm Bill Establishes New Softwood Lumber Program

The 2008 Farm Bill specifically includes provisions for softwood lumber certification under Title III (Trade), Subtitle D, Section 3301. This language amends the Tariff Act of 1930 as follows:

- Section 803 of the Act establishes a softwood lumber importer declaration program, applicable to importers of both softwood lumber and specified softwood lumber products.

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- Importers of relevant products are required to provide and declare in electronic record format the following information at the time the product enters the United States: (i) the export price for each shipment of softwood lumber or specified product; and (ii) the estimated export charge applicable to the shipment, if any.
- Importers are required to declare that subsequent to an appropriate inquiry and to the best of the importer's knowledge the export price of the softwood lumber or softwood lumber product has been calculated in a manner consistent with the export permit granted by the country of export. e The importer must also declare that all export charges have been paid or are committed to be paid, "in accordance with the volume, export price, and export charge rate or rates, if any, as calculated under an international agreement entered into by the country of export and the United States."
- Under the amended Act, the Under Secretary for International Trade of the Department of Commerce is to determine on a monthly basis any ad valorem export charges to be collected by a country of export from exporters of softwood lumber or softwood lumber products, so as to ensure compliance with any international agreement between that country and the United States. These determinations are to be published immediately, primarily on the US Department of Commerce International Trade Administration website.
- The US Secretary of Treasury is to conduct reconciliations to ensure the proper implementation and operation of international agreements with countries trading softwood lumber and relevant products. The Secretary is to reconcile the export price declared by a US importer and the export price reported by the exporting country, or the revised export price reported by the exporting country if appropriate.
- The Secretary of Treasury is to periodically verify the declarations of US importers, determining whether: (i) the export price declared by a US importer equals the price listed on the export permit issued by the country of export; and (ii) the estimated export charge declared by the US importer is consistent with the determination published by the Under Secretary for International Trade.
- Penalties are established for knowing violations of the title, including a USD 10,000 per-violation fine.
- The President is to deliver semi-annual reports to the Senate Finance Committee and the House Ways and Means Committee, describing reconciliations and verifications undertaken, penalties imposed, patterns of noncompliance, and any problems or obstacles encountered in implementing or enforcing the Act.

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- The Secretary of Commerce is to provide to the Senate Finance Committee and the House Ways and Means Committee semi-annual reports on any subsidies of softwood lumber or relevant products provided by countries of export.
- The Government Accountability Office is to submit within 18 months to the Senate Finance Committee and the House Ways and Means Committee a report on the effectiveness of reconciliations and verifications undertaken under the Act, as well as a report on whether exporting countries are in compliance with their international agreements with the United States within 12 months.

G. 2008 Farm Bill Increases Farm Ownership Loans

Although the 2002 Farm Bill does not address limitations on amount of farm ownership loans, the 2008 Farm Bill addresses the topic by amending Section 305(a)(2) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1925(a)(2))) by increasing the amount from USD 200,000 to USD 300,000.

Outlook

The debate over the Farm Bill – which began in mid-2007 – has resulted in agricultural support amounts that seem to mirror support amounts included in the 2002 Farm Bill. Although there are some alterations, the majority of the provisions in the 2008 Farm Bill remain unchanged from the provisions of the 2002 Farm Bill. For example, the payment structure in the following areas has remained the same:

- Payment limitations for agricultural producers (both direct payments and counter-cyclical payments);
- Direct payment rates and counter-cyclical payments for Title I commodities, the only exception being a slight reduction in the counter-cyclical payment for upland cotton;
- Loan rates for non-recourse marketing assistance for Title I commodities; and
- Assistance for peanut growers and sugar growers.

There were some changes in support amount provisions included in the 2008 Farm Bill. Some variations between the 2008 Farm Bill and the 2002 Farm Bill include:

- The introduction of a new Softwood Lumber Program which places greater regulatory burdens on importers of softwood lumber or specified softwood lumber products;
- Assistance continues to flow to dairy farmers in the 2008 Farm Bill, although the program is designed in a different manner from the 2002 Farm Bill; and

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- Assistance for cotton growers has been reduced marginally with the elimination of the “Marketing Certificate or Cash Payment” program.

However, these changes seem minor and do not reflect substantial, underlying changes to the main provisions and support amounts of the 2008 Farm Bill. Thus, the general conclusion can be drawn that support amounts in the 2008 Farm Bill mirror the support amounts included in the 2002 Farm Bill.

These similar support amounts between the two Farm Bills could have international implications for the United States. On the international front, US trading partners have been relatively quiet on the Farm Bill, to date. Trading partners’ reaction to the latest Farm Bill, however, is likely to be negative. Several US trading partners – such as Brazil and Canada – have already challenged the WTO-consistency of certain provisions of the 2002 Farm Bill. As noted, the latest Farm Bill generally maintains the levels of support for different commodities and programs relative to the provisions of the 2002 Farm Bill. Throughout the Farm Bill debate, the Administration had consistently warned Congress that the Farm Bill should not provoke trading partners to challenge the United States at the WTO, an issue that Congress seems to have swept aside in passing and overriding the President’s veto on the latest Farm Bill. Thus, the United States may witness more criticism – and potential WTO dispute action – from other WTO Members for its most recent Farm Bill.

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United States Highlights

Following Presidential Veto and Congressional Veto Override, Farm Bill Becomes Law

On June 18, 2008, President Bush vetoed the latest version of the Farm Bill (H.R. 6124). The President's veto was quickly followed by votes in the House of Representatives and the Senate to override the veto. With Congress' decision to override President Bush's veto of the Farm Bill, H.R. 6124 became law on June 18, 2008.

I. Background

On May 21, 2008, President Bush vetoed the conference report of the Farm Bill sent to him by Congress (H.R. 2419). Legislators had begun debating the latest version of the Farm Bill in mid-2007 but were only able to reach agreement on final provisions to the Farm Bill and approve H.R. 2419 in mid-May. On May 21, 2008, the House of Representatives voted to override President Bush's veto by a vote of 316 to 108, more than the necessary two-thirds majority vote required to override a veto (*i.e.*, 283 votes). On May 22, 2008, the Senate voted 82 to 13 to override the veto, also more than the necessary two-thirds majority vote required to override a veto (*i.e.*, 64 votes).

The discovery of a clerical error in the version of H.R. 2419 sent to President Bush, however, required both chambers of Congress to re-do their votes. Specifically, the version of H.R. 2419 sent to the President (that he vetoed) did not contain the full 15 titles that the House and Senate had agreed upon in their conference report. The missing title – Title 3 on trade – had been omitted from the version sent to President Bush due to a printing error by the Office of the House Clerk (*i.e.*, only 14 of the 15 titles in the completed Farm Bill were sent to the President). White House officials failed to catch the omitted title because they referred to the conference report of H.R. 2419 online rather than look at the printed Farm Bill conference report sent to the President (which omitted the trade title). The President vetoed and signed the printed conference report with the omitted title, and legislators only discovered the error hours before the scheduled veto override votes. The House and Senate overrode the veto, which put into law 14 of the bill's 15 titles (Pub. L. No. 110-234). Both chambers quickly decided, however, to re-do the voting procedures for the full Farm Bill. Specifically, several Republicans complained that Congress was inviting legal action by voting on a Farm Bill that suffered from a serious technical error (*i.e.*, the missing trade title), and Democratic leaders agreed.

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II. Do-Over Procedures

On May 22, 2008, the House voted to pass a newly-numbered Farm Bill (H.R. 6124) that contained all 15 titles, including the missing trade title. The House passed H.R. 6124 by a vote of 306 to 110. H.R. 6124 contains the exact same provisions as H.R. 2419 and was brought up for consideration under suspension of rules, a procedure that barred amendments to the Farm Bill. On June 5, 2008, the Senate passed H.R. 6124 by a vote of 77-15. Congress then sent H.R. 6124 to the President for his consideration.

On June 18, 2008, President Bush (for the second time) vetoed the Farm Bill (H.R. 6124). In vetoing the bill, President Bush stated that "at a time of high food prices and record farm income, this bill lacks program reform and fiscal discipline [and] it continues subsidies for the wealthy and increases farm bill spending by more than USD 20 billion, while using budget gimmicks to hide much of the increase."

The same day as the President's veto, the House of Representatives decided to override the veto by a vote of 317-109, more than the two-thirds majority vote required to override a Presidential veto. Hours later, the Senate also decided to override the veto by a vote of 80-14, a margin also exceeding the two-thirds majority needed to override a veto.

Following Congress' decision to override President Bush's veto, H.R. 6124 replaced the incomplete law (Pub. L. No. 110-234, based off the incomplete version of H.R. 2419). With the full Farm Bill put into law, US trade and international food assistance programs – which had been affected by the missing trade title in the first incomplete version of the Farm Bill – have been restored.

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Free Trade Agreements

Free Trade Agreements Highlights

Trade Officials Convene Sixth US-Sri Lanka TIFA Council Meeting

On May 29, 2008, US and Sri Lankan trade officials met in Washington, DC under the sixth meeting of the US-Sri Lanka Trade and Investment Framework Agreement (TIFA) Council. Deputy United States Trade Representative (USTR) John Veroneau led the US delegation, and Minister for Export Development and International Trade Gamini Lakshman Peiris led the Sri Lankan delegation. Officials from both sides reviewed progress in addressing bilateral trade and investment issues identified at the last TIFA Council meeting in November 2006, and discussed expanding trade and cooperation ties in addition to the status of the World Trade Organization (WTO) Doha Development Round negotiations, Sri Lanka's participation in the US Generalized System of Preferences (GSP) program, and US trade capacity building assistance to Sri Lanka. Officials also discussed issues affecting US exports, including import tariffs, intellectual property rights (IPR) and government procurement.

US TIFAs are limited trade agreements that establish joint councils of trade and economic officials to discuss trade issues. Specifically, the United States and its TIFA partner(s) agree to establish a joint ministerial-level council as the overall mechanism for consultation with the possibility of establishing issue-oriented working groups. The United States and Sri Lanka signed their TIFA on July 2, 2002. According to USTR, "the TIFA provides a forum for both countries to examine ways to expand bilateral trade and investment" and the TIFA Council continually meets in an effort to increase commercial and investment opportunities by identifying and working to remove impediments to trade and investment flows between the United States and Sri Lanka. Under US trade policy, TIFAs are usually the first step towards the initiation of formal bilateral or regional Free Trade Agreement (FTA) negotiations. The next step in the process would be for the countries to enter into a Bilateral Investment Treaty (BIT), which protects the rights of foreign subsidiaries and investors in the countries' home markets.

US officials have not stated that they are exploring a BIT or a future FTA with Sri Lanka, although they have pointed out that they are proactively working with Sri Lanka to address any possible impediments to US-Sri Lankan trade flows, a sign that in the long-term, the United States may consider Sri Lanka a viable BIT and FTA partner. For now, however, USTR may be looking to expand market access in Sri Lanka. In 2007, total two-way trade between Sri Lanka and the United States totaled USD 2.3 billion. US imports of Sri Lankan goods in 2007 totaled USD 2.2 billion and consisted primarily of apparel, rubber, precious

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stones and machinery. US exports to Sri Lanka in 2007 totaled of USD 227 million and consisted primarily of cereals, electrical machinery, optical and medical instruments, and plastics.

USTR's continued TIFA meetings over the past month (in late April-early May, US officials met with their foreign counterparts under separate meetings of the US-Mauritius, US-Uruguay, and US-Indonesia TIFA Councils) – the latest being with Sri Lanka – indicate that the Bush Administration is still interested in deepening trade ties and linkages with US trading partners, in light of the uncertainty surrounding US Congressional consideration of the three pending Free Trade Agreements (FTAs) with Colombia, Korea and Panama. Prospects for Congressional consideration of these three bilateral agreements by the end of 2008 have diminished, in light of the House of Representatives' vote to suspend the Trade Promotion Authority (TPA)-driven timeline that dictated consideration of the Colombia agreement. Observers are uncertain if and when Congress will consider any of these agreements, and although USTR and the Bush Administration have launched aggressive campaigns to obtain support for these FTAs, their ultimate passage by the end of 2008 and by the time the 110th Congress adjourns is not guaranteed. Consequently, the Bush Administration is looking to other venues through which it can strengthen its trade partnerships, including TIFAs. USTR can pursue any number of TIFAs in an effort to reach out to more trading partners without the constraints associated with TPA-driven FTAs, and though TIFAs are not as binding as FTAs, they do afford the United States to discuss trade issues of interest with a particular partner in an open forum. Thus, the recent US meeting with Sri Lanka – coupled with the earlier meetings with Mauritius, Uruguay and Indonesia – indicate that USTR still views US TIFAs as another viable route through which they can increase US global market access and enhance trade relations with various partners.

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Customs

GAO Report Concludes Congress, Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection

Summary

On March 26, 2008, the Government Accountability Office (GAO) released a report on shortfalls in the US system of antidumping (AD) and countervailing (CVD) duties collection. GAO studied fiscal data from 2001-2007 to identify factors that contribute to duty-collection problems. In its report, GAO also suggested options for improving collection of AD/CVD duties and issued recommendations for how Congress and the Executive Branch should implement these improvements. We highlight here major elements of the GAO report and reaction to it.

The full GAO report on "Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection" (GAO-08-391) is available at: http://gao.gov/.

Analysis

I. Background

A. GAO Report Background

According to the report, over USD 613 million in AD/CVD remain uncollected by Customs and Border Patrol (CBP), a sub-agency of the Department of Homeland Security (Homeland Security).[36] Consequently, according to GAO, the US government has lost substantial revenue and is unable to fully remedy the unfair trade practices targeted by AD/CVD duties. GAO investigated the reasons that duties go uncollected and what the US government has done to address this problem. GAO identified options for improving the current AD/CVD duty system and issued re ccommendations for future progress. In forming its conclusions, GAO examined the following issues:

- The nature and extent of uncollected AD/CVD duties;

[36] The time frame varies for each outstanding bill. Whereas importers technically have eight months to pay the bills before CBP begins sanctions, this USD 613 million total represents unpaid bills in all stages of the collection process, including bills that were recently issued, bills issued more than one year ago which have thus been reported to the Office of Chief Legal Counsel to deal with or to write off, and bills that are being protested (USD 265 million).

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- The factors contributing to uncollected AD/CVD duties and the steps that US government agencies have taken to address these issues;
- The interagency communications that affect AD/CVD duty processing; and
- The options for improving duty collection.

B. AD/CVD Process

According to GAO, US importers must pay all duties, taxes, and fees on products they bring into the United States. Importers must also acquire a general bond to secure payment of these duties, taxes and fees. CBP collects the duties, taxes, and fees and sets the formula to determine the required bond amounts.

US law authorizes AD/CVD duties to be levied to remedy other countries' and foreign companies' alleged unfair trade practices, particularly dumping (*i.e.*, sales at less than normal value) and subsidies by foreign governments. According to GAO, these duties are a substantial source of revenue for the US government.

Three agencies are involved in investigating, calculating and assessing AD/CVD duties. The Department of Commerce ("Commerce") determines whether imports are dumped or subsidized and calculates the appropxriate duty rate (equal to the amount of dumping or subsidy). The International Trade Commission (ITC) then determines whether a US industry is injured by the imports. Next, Commerce issues an AD/CVD duty order specifying which products are subject to AD/CVD duties and the applicable rates. This order also instructs CBP to collect cash deposits equal to the estimated AD/CVD duties when the specified products are imported. In fiscal years 2003-2006, CBP collected USD 8 billion in AD/CVD cash deposits (seven percent of the total import duties collected during that time period).

Commerce may also perform an administrative review on products within 12 months after issuing an AD/CVD duty order. In this process, Commerce analyzes previous imports to determine the actual level of dumping or subsidization. At the end of the review, generally 18 months after it begins, the liquidation rate (*i.e.*, the final duty rate) is established. Commerce conveys this final duty rate to CBP through liquidation instructions, and CBP then instructs port of entry staff to levy the final duties on the imported goods. CBP will either refund money to the importer if the cash deposit rate is higher than the liquidation rate or issue an additional bill if the liquidation rate is higher than the cash deposit rate. If the cash deposit rate is equal to the liquidation rate, the entry is liquidated "as entered" and CBP does not issue a refund or bill. Under 19 U.S.C. §1504(d), Commerce and CBP are required to complete this process within six months.

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CBP sends monthly bills to importers that owe additional AD/CVD duties. Importers have six months from the liquidation date to protest the duty amount. If an importer has not paid the bill after the protest period ends, CBP then requests payment from the surety (*i.e.*, insurance) company that underwrote the importer's general bond when the products entered the United States. During fiscal years 2003-2006, the Department of Treasury ("Treasury") estimates the collection rate for all AD/CVD duties was 96 percent, but the collection rate for duties owed as a result of an administrative review was less than 50 percent.

CBP sanctions importers if bills are not paid in full within eight months after the first bill is sent. Merchandise belonging to sanctioned importers cannot leave the port of entry until CBP receives payment of all estimated duties, taxes and fees. But, merchandise belonging to importers that are not yet sanctioned is generally released from the port of entry if the importer commits to paying all duties, taxes and fees within 15 days. If CBP does not receive payment within one year of issuing the first bill, its Revenue Division refers the case to CBP's Office of Chief Counsel to determine the next course of action or if the bill should be written off under 31 U.S.C. §3711.

AD/CVD duties are also subject to judicial review which has no time limitations. According to GAO, importers and surety companies often obtain legal injunctions and file protests regarding AD/CVD duties. When cases are litigated, the process may take years.

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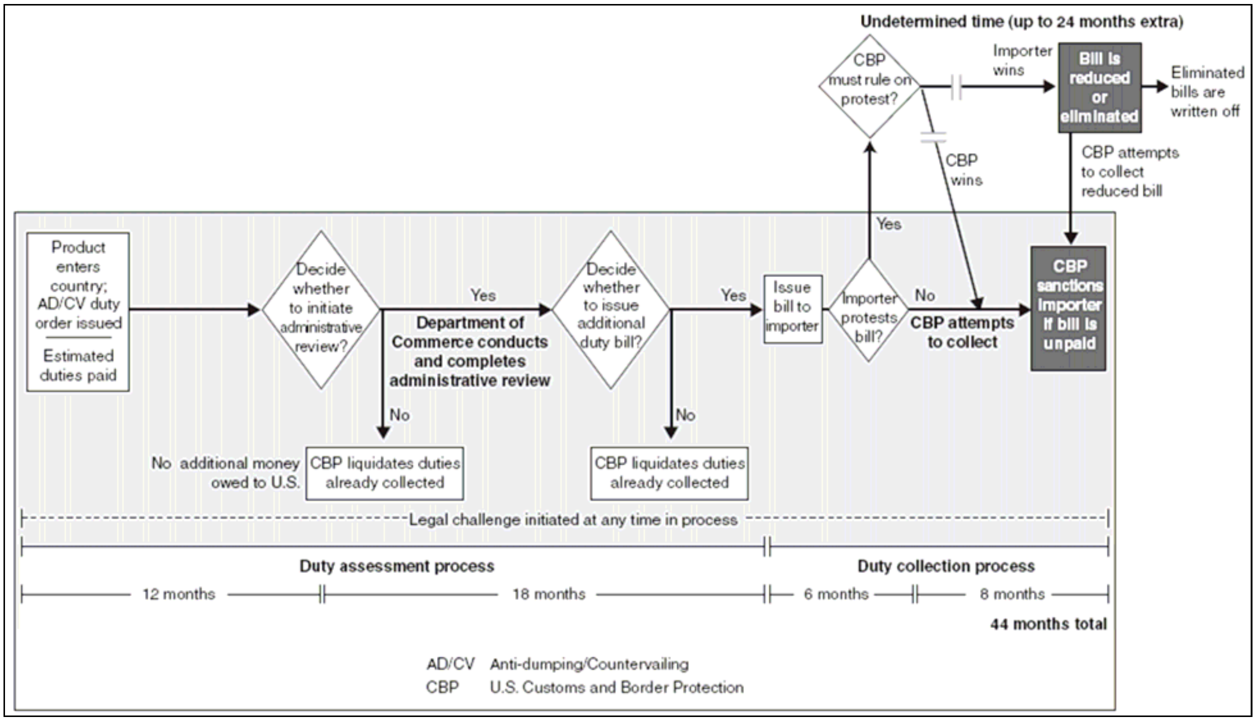
Figure 1: Illustration of the Process and Maximum Time Frames for Collecting AD/CVD Duties



Source: GAO-08-391

Note: This figure depicts the maximum lengths of time allowed by law, regulation, or agency practice for specific steps in the AD/CVD duty process.

II. Methodology

GAO used the following methodologies in conducting its study:

- To determine the nature and extent of uncollected AD/CVD duties, GAO analyzed all open, unpaid AD/CVD bills for fiscal years 2001-2007 (ending September 30, 2007). These bills included the principal amount owed, but not accrued interest, and included duties involved in ongoing protests. The total data consisted of 120 AD/CVD duty orders and more than 23,000 individual bills.
- To identify key factors contributing to uncollected AD/CVD bills, GAO reviewed CBP, Commerce, and Treasury reports and documents related to collection of AD/CVD duties as well as Congressional Research Service reports and legal journals. GAO also interviewed Homeland Security, Treasury, Commerce and Department of Justice (Justice) officials. For private sector views, GAO interviewed officials in domestic trade industries as well as importer and surety associations.

- To establish the steps the US government has taken to improve AD/CVD duty collection, GAO examined CBP duty collection policies and procedures and interviewed CBP, Commerce, and Treasury officials. GAO also analyzed Treasury's July 2007 report on major duty collection problems. Moreover, GAO interviewed domestic industry and importer representatives affected by AD/CVD duties, trade lawyers and academics with AD/CVD duty expertise. Finally, GAO reviewed government-wide guidance on debt collection and its own prior report on CBP's revised continuous bonding policy.
- To develop options to improve AD/CVD duty collection, GAO obtained information about the AD/CVD duty systems in Australia, Canada and the European Union. GAO also interviewed agency officials from CBP, Commerce's Trade Remedy Compliance Staff, and private sector representatives for both domestic producers and importers in a variety of industries.

III. GAO Findings

A. Nature and Extent of Uncollected AD/CVD Duties

According to GAO, since 2001, more than USD 613 million AD/CVD duties have not been collected. Almost all are AD duties (less than 0.1 percent, only USD 280,000, are CVD duties). (See **Figure 2** below for the amount of uncollected AD/CVD duties owed for entries liquidated during several fiscal years)

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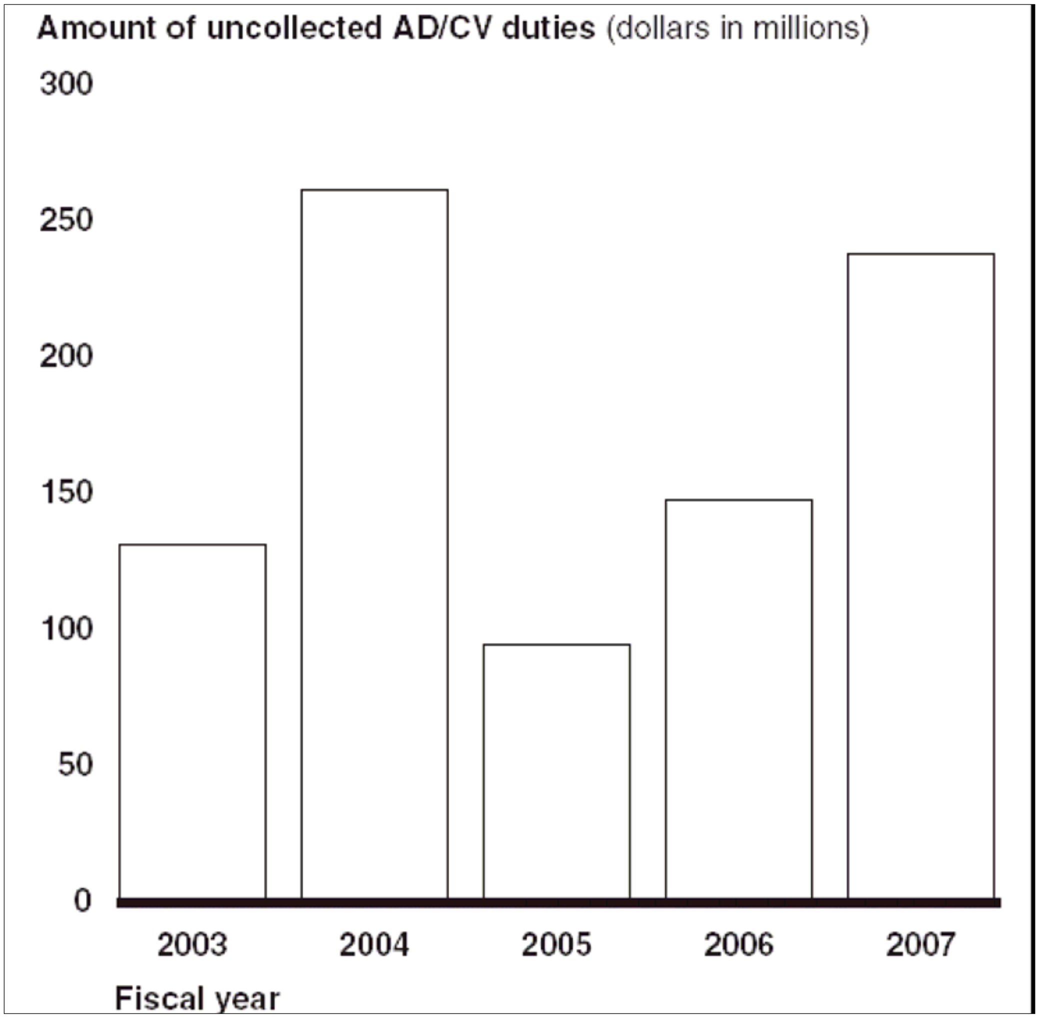
Figure 2: Amount of Uncollected AD/CVD Duties Owed for the Fiscal Year, as of September 30, by Fiscal Year



Source: GAO-08-391

Note: The sum of these data exceeds the total amount of uncollected AD/CVD duties as of the end of fiscal year 2007 because these data represent a snapshot of the amount of uncollected AD/CVD duties at the end of each fiscal year. As noted above, the amounts shown in this figure could decrease based on additional collections in subsequent years.

The total uncollected AD/CVD duties consist of approximately 23,000 unpaid bills. Half of these bills are less than USD 309, but a relatively small number of very large bills (*i.e.,* over USD 1 million) means the average outstanding duty bill is more than USD 26,000.

i. **Concentration of Uncollected AD/CVD Duties.** Uncollected AD/CVD duties are highly concentrated in the following ways:

- **Industry.** The agriculture/aquaculture industry makes up 87 percent of unpaid AD/CVD duties while the steel industry accounts for 7 percent.
- **Product.** Four products, all from China, make up 84 percent of the total uncollected AD/CVD duties: crawfish tail meat, garlic, honey, and mushrooms.
- **Country of Origin.** Importers purchasing products from China make up 90 percent of the total uncollected duties while importers purchasing products from Argentina and Vietnam each make up 2 percent.
- **Exporter's New Shipping Status.** Importers purchasing goods from companies undergoing "new shipper" reviews account for approximately 40 percent of the uncollected duties.
- **Importer.** Less than 2 percent of importers subject to AD/CVD duties since the 2001 fiscal year had unpaid AD/CVD duty bills as of September 2007 (520 importers out of approximately 27,000 total). Moreover, more than one-third of the total uncollected duties are attributable to only four companies and 20 companies account for 63 percent of the total. GAO reported that none of these top 20 companies were active importers as of January 2008.

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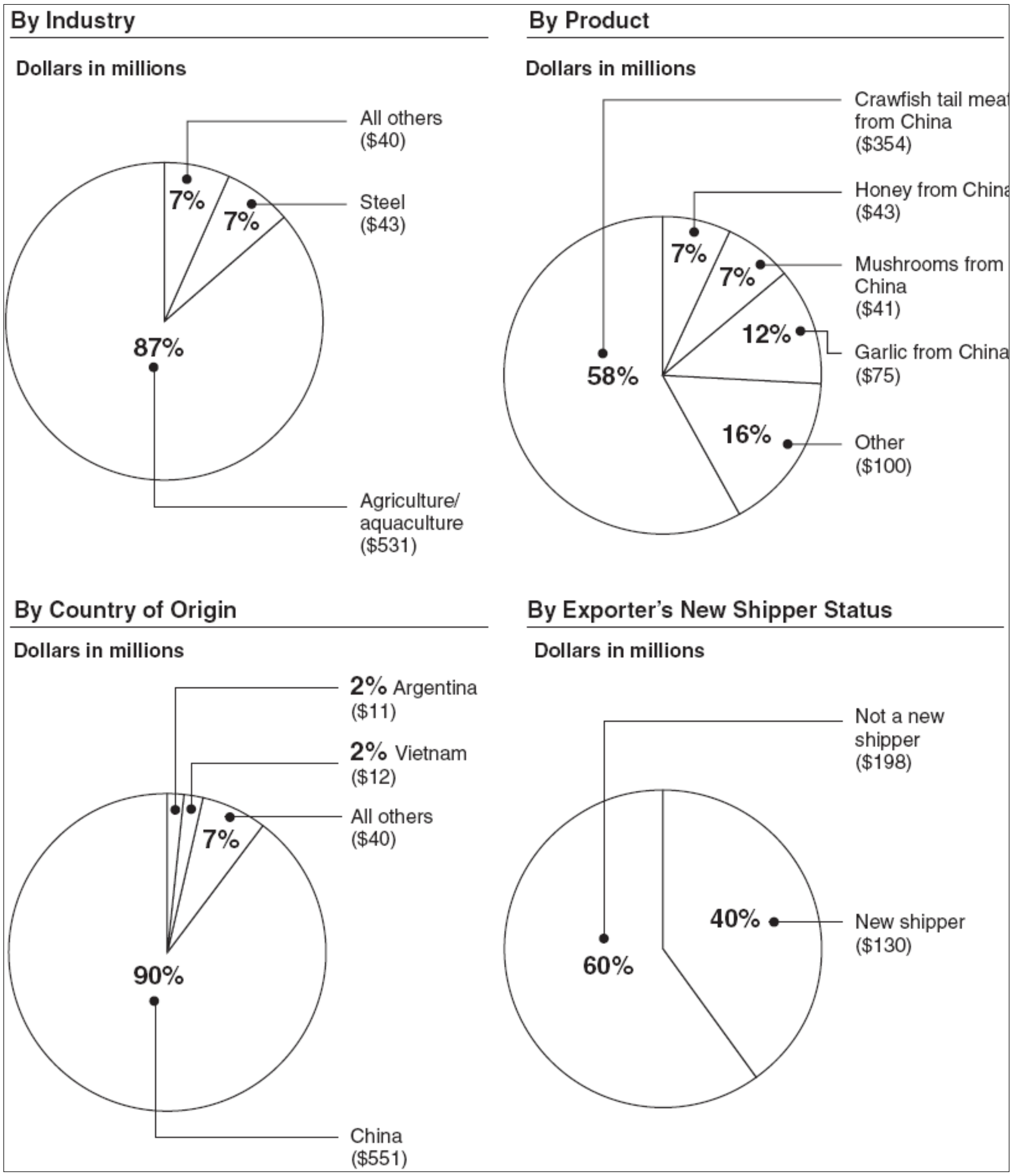
Figure 3: Uncollected AD/CVD Duties, by Industry, Country of Origin and Exporter's New Shipper Status, as of September 2007



Source: GAO-08-391

Note: The analyses by industry, product, and country of origin are based on a total of USD 613 million in uncollected AD/CVD duties. The analyses by exporter's new shipper status is based on USD 328 million of uncollected AD/CVD duties for which GAO could determine the exporter's new shipper status.

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ii. **Protests Hinder Collection of AD/CVD Duties.** Unresolved protests substantially affect collection of AD/CVD duties. As of September 2007, 43 percent (approximately USD 265 million) of the total amount of uncollected AD/CVD duties was under protest. When a bill is protested, CBP suspends any collection actions until the protest is decided. This delayed collection ultimately impairs CBP's ability to collect the full amount of duties owed. Additionally, if an importer or surety company's protest is successful, the final bill will be reduced or eliminated.

iii. **Office of the Chief Counsel.** Out of the approximately USD 350 million AD/CVD duties currently in the collection process, nearly USD 290 million has been reported to CBP's Office of Chief Counsel. The Office of Chief Counsel may send formal payment demands to importers or surety companies or refer the case to the Justice for litigation. Cases are generally referred to Justice if at least one viable party can be located and the collection cost is expected to be less than the duty.

The Office of Chief Counsel may also write off unpaid duties if it deems collection to be impossible or more expensive than the duty that would be recovered in litigation. The Office of Chief Counsel expects to write off most of the nearly USD 290 that is currently referred to its office. From fiscal years 2001-2007, CBP wrote off approximately USD 34 million in AD/CVD duties (28 percent of this was in 2006 and 2007). CBP writes off outstanding AD/CVD duty bills for many reasons such as the inability to locate debtors, importers who have no assets, debts that were discharged in bankruptcy and the cost of collection is higher than the amount recoverable.

iv. **Reporting Uncollected Duties.** Public reporting of uncollected AD/CVD duties helps ensure protection of US industries injured by unfair trade practices. In the past, congressional and public oversight of CBP's efforts to collect these duties has depended heavily on CBP reporting on uncollected bills under CDSOA (*i.e.*, the Byrd Amendment). CDSOA, enacted in 2001, provided for distribution of AD/CVD duties to the injured domestic industries rather than to the Treasury. However, following the World Trade Organization's (WTO) decision that this law violated WTO rules, it was repealed in 2006 and AD/CVD duties will be paid to the Treasury once again.

B. Factors Contributing to Uncollected AD/CVD Duties and Steps Taken to Address These Factors

GAO identified the following factors that contribute to CBP's failure to collect AD/CVD duties:

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i. **Current US AD/CVD Retrospective Duty Assessment System Creates Two Collection Risks.** First, according to GAO, importers currently pay estimated AD/CVD duties when they import products and the final duty amount is determined later. After Commerce conducts an administrative review, the final AD/CVD duty rate may be more than the importer paid earlier. AD duty rates do not increase often, but when they do, the rise can be significant (half of the increases resulted in only a 4 percent increase although a few increases exceeded 200 percent). Because of these occasional increases, importers may be unable to pay the additional amount. In addition, illegitimate importers can take advantage of this system by planning to avoid the final duty obligation, knowing that the final rate will be greater than their cash deposit. Second, the current system creates a long time period between when goods enter the country and when final duties are assessed. Indeed, it takes 3.3 years to complete the process on average. This time lag lowers the likelihood that CBP will be able to collect additional duties as importers may disappear, cease business operations or declare bankruptcy during this time gap. In addition, the time lapse presents importers with an opportunity to avoid paying additional AD/CVD duties because they can bring a large volume of goods into the US during the processing period and subsequently fail to pay any additional duties assessed.

ii. **New Shippers Pose Two Types of Risks.** First, according to GAO, importers purchasing from new shippers (companies that did not previously export products subject to AD/CVD duties) may post bonds rather than cash deposits before a final duty rate is established. New shippers may request a new shipper review from Commerce to establish their individual duty rate. Once this review is initiated, importers purchasing from these shippers may use bonds to satisfy the estimated AD/CVD duties rather than cash. Importers that provided bonds in this way account for 40 percent of the total amount of uncollected AD/CVD duties. See **Figure 3** *infra*. To address this problem, Congress temporarily suspended the new shipper bond system in August 2006 and now requires importers purchasing from shippers undergoing new shipper reviews to pay estimated AD/CVD duties in cash. This policy extends until July 2009 and solves the risk not collecting AD/CVD duties when the final duty amounts are equal to or less than the cash deposit. However, when duty rates increase, collection of supplemental bills is still not protected. Second, US law does not specify a minimum amount of exports or transactions required to begin a new shipper review. Thus, new shippers may obtain a

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new shipper review based on very low levels of merchandise, sometimes one shipment. When this occurs, there are ample opportunities for abuse. For example, a new shipper may price the first shipment very high and receive zero or little AD/CVD duties. This shipper may then price subsequent shipments below the first while still receiving the low AD/CVD duty rate based on the first shipment.

iii. **Inadequate Revenue Protection with Bonds.** Separate from the new shipper bond system, all importers are required to purchase bonds equal to 10 percent of the amount of duties, taxes and fees they owed in the prior year (or USD 50,000, whichever is greater). However, CBP generally sets bond requirements too low so the formula used to determine the amount of the required bond does not always protect AD/CVD duties. For example, if an importer fails to pay supplemental AD/CVD duties, CBP can collect the duties up to the amount of the bond, but this process is lengthy and is often protested by bond agents. Plus, any duties above the coverage provided by the bond are not protected and frequently uncollected. To address this problem, CBP revised its bonding formula for products subject to AD/CVD duties. The new policy requires importers to purchase bonds worth 100 percent of the estimated AD/CVD duties for merchandise imported in the previous year. CBP now receives both a cash deposit and a bond in the same amount when goods are imported. But, this system has only been applied to one test case: imports of shrimp from six countries. The revised policy increased the amount of protected duty revenue by 85 percent but imposed substantial costs on shrimp importers. Moreover, the policy is currently under protest. The US Court of International Trade (CIT) issued a preliminary injunction against applying the policy to eight shrimp importers[37], and the WTO dispute settlement panel stated that the policy, as applied to imports of shrimp from India and Thailand, is inconsistent with WTO rules.[38] Because of these protests, the policy is currently applied to most shrimp importers but not importers of other products.

iv. **Limited Information about Shippers.** CBP faces challenges in locating importers and collecting duties because it requires only minimal information about importers and does

[37] Nat'l Fisheries Inst., Inc. v. United States, 465 F. Supp. 2d 1300, 1337 (2006).

[38] United States - Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, WT/DS345/R; United States - Measures Relating to Shrimp from Thailand, WT/DS343/R.

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not do background or financial checks. Aside from basic information such as name and mailing address, CBP requires only one unique identifying number from importers, such as a Taxpayer Identification Number or a Social Security Number. Importers may also request that CBP assign them a number. According to the report, with such little information, these numbers are an ineffective enforcement tool. Moreover, CBP's ability to collect duties from foreign companies and individuals that are US importers is limited and the cost of collecting such duties often exceeds the amount collected.

C. Interagency Communications Affecting AD/CVD Duty Processing

Commerce and CBP are required to go through several steps before liquidating an entry. After an administrative review, Commerce must first publicize the final results in the Federal Registrar (FR) and, within 15 days, send instructions to CBP to liquidate the entries at the determined rate. Second, CBP reviews the instructions and forwards them to each port of entry. Third, CBP port staff either refund the difference between the final duty and the cash deposit, issue an additional bill to an importer, or close the entry if the final duty is equal to the cash deposit. This process must be completed within six months after an administrative review or after an injunction is lifted in the case of a protest (19 U.S.C. §1504(d)). According to GAO, this deadline is often not met for two reasons: (i) Commerce fails to send liquidation instructions within its 15 day deadline or (ii) Commerce's liquidation instructions are unclear and CBP must ask for clarification.

If CBP fails to complete the liquidation process within the six month limit, the duties are "deemed liquidated." Here, the entry is liquidated at the estimated rate used when merchandise entered the US. Thus, according to GAO, CBP keeps the cash deposit but cannot collect any supplemental duties and does not refund any money owed to importers. GAO determined the potential revenue lost or gained from this process is minimal although it identified a fair amount of refunds owed to importers that were not issued as a result of this policy.

GAO also reports that weak communications between CBP and Commerce hinder CBP's ability to meet the six month requirement. That said, the GAO report states that CBP and Commerce have made some improvements. For example, Commerce established a Customs Unit within the Import Administration to provide information to both government and private sector actors with interests in AD/CVD duties. Commerce has also improved its template for liquidation instructions. In addition, officials from Commerce, CBP, Immigrant and Customs Enforcement (ICE), and sometimes Justice and the US Attorney's Office meet monthly to discuss duty collection as well as potential and on-going cases. Commerce also increased its protest processing staff from one to five, and CBP enhanced its tracking

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system for monitoring protests. Moreover, CBP is currently improving its instructions on procedures for handling AD/CVD duty protests for port staff and is working it improve its data processing system (although the new system is not expected to be complete until 2011). Despite these improvements, however, GAO reports that communication weaknesses continue to impede CBP's ability to effectively process AD/CVD duties.

According to GAO, under-staffing in Commerce also contributes to CBP's failure to process duties within the six month limit. Commerce cited a hiring freeze, in place since January 2006, that prohibited it from filling the 46 International Trade Compliance Analyst positions it lost over time. Despite these human resource losses, Commerce's workload has remained constant, thus putting a larger burden on each current staff member. As a result, Commerce had less than half of the International Trade Compliance Analysts (103 of 211) for which it was authorized in January 2008. In an attempt to remedy this problem, Commerce had hired nine new International Trade Compliance Analysts by September 2007 and has requested additional funding to form an office focused on CVD duty investigations relating to nonmarket economies. Despite these efforts, GAO reported that Commerce has not conducted a comprehensive analysis on its human capital shortages and has no formal plan to address its challenges.

D. Options for Improving Duty Collection

GAO identified the following two options for improving collection of AD/CVD duties:

i. **Adjust the Existing System.** GAO suggested the following possible revisions to the current system. Each of the first three possibilities would increase costs for both legitimate and illegitimate companies. The final possibility would reduce the amount of foregone revenue, but it could make duty collection even more difficult.

- **Revise the process and standards for assigning AD/CVD duty rates to new shippers.** Congress could do this by permanently extending the suspension of the new shipper bonding privilege or require a certain level of exports before "new shipper" status is granted. Revising new shipper requirements could make it more difficult for exporters to manipulate new shipper reviews and to avoid paying duties. However, requiring more exports may unfairly burden some new shippers by requiring them to export more than they otherwise would to initiate a new shipper review.
- **Heighten requirements for becoming a US importer.** According to GAO, requiring financial or background checks would provide only a limited measurement of an importer's ability to pay future duties because their financial situations can change quickly. In addition, a financial check does not reflect a company's actual willingness to pay duties. Conducting and overseeing these checks would

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also create a significant administrative burden for CBP. This information would have to be updated periodically, thus creating an even larger burden for CBP. Since these requirements would be applied to all importers even though the majority complies with customs laws, this option is not likely to be the most cost-effective method for improving collection of AD/CVD duties.

- **Revise CBP's bonding requirements to better protect AD/CVD duty revenue.** GAO suggested that CBP could expand its revised bond policy to all imports subject to AD/CVD duties. As discussed above, this policy has only been applied to shrimp imports from a few countries, has significantly increased costs for importers, and is being challenged both in US domestic courts and internationally. GAO's alternative to this policy would be for CBP to set bond requirements based on its assessment of an importer's ability to pay duties, thus requiring higher bond amounts from importers judged to have a lower ability to pay. According to GAO, this would allow CBP to target risky companies by creating a set of criteria on which to judge importer's abilities to pay AD/CVD duties. But, individual analysis for each importer, like background and financial checks, would substantially increase the administrative burden for CBP. CBP could also require an additional bond for each entry that is subject to AD/CVD duties in addition to the already required continuous bond. Thus, according to GAO, this would protect more revenue while creating a smaller burden for CBP.
- **Lengthen time allotted for CBP to liquidate entries subject to AD/CVD duties.** According to GAO, this option could reduce the amount of entries that are "deemed liquidated" thus decreasing foregone revenue from any additional duties. However, a longer time lag before final duty amounts are established may delay refunds to some importers and could increase the likelihood that duties go uncollected.

ii. Eliminate Retrospective Duty Assessment System. The GAO report states that this option would require a revision of US law by changing the current retrospective system to a prospective one where final duties are assessed when the product arrives in the United States. In the current retrospective system, the final duty amount is based upon the actual amount of dumping or subsidization in a year while under a prospective system, the amount of duties may not match the actual amount of dumping or subsidization. In a prospective system, AD/CVD duty rate changes apply only to future imports and do not affect the duties owed for previous imports. Consequently, countries that use prospective systems report few problems in AD/CVD duty collection. Several major US trading partners use prospective systems including Canada, Australia and the EU. See the

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chart below for examples of how each of these countries' prospective systems compare with the current US retrospective system.

- **Canada.** Canada uses a prospective normal value AD duty system. Under this system, officials determine whether imports are being dumped or subsidized and if they are causing injury to Canadian industry. If dumping is found, the government calculates a "normal value" for the product. If the normal value of the good is greater than the export price, AD duties equal to the difference are imposed. The Canadian government generally reviews these normal prices annually and changes are used only for future imports.
- **Australia.** Australia uses a prospective normal value AD duty system with both a fixed component and a variable one. The fixed amount is the difference between the normal value (determined by the government) and the export price during an AD duty investigation. The variable component is additional duties that are assessed if an exporter lowers its price for an individual transaction below its price during the investigation. Australia also reviews its normal values periodically.
- **European Union.** The EU uses a prospective system with the duty amounts based on the amount of dumping or subsidization applied on an ad valorem (percentage) basis. EU officials investigate whether merchandise is being dumped or subsidized and whether the imports are causing injury to EU businesses. If so, a normal value for the product is established and compared to the export price. The percentage difference is the AD/CVD duty rate and is applied to all future imports. The EU periodically reviews these duties as well.

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Figure 4: Examples of the Calculation of AD/CVD Duties in the United States, Australia, Canada, and the European Union

Assumptions: Normal value calculated during investigation = $110; average import price calculated during investigation = $100

		United States	Canada	Australia	European Union
Method for calculating AD/CV duties		At entry: Percentage difference between the normal value and average import price during the investigation (10%) At liquidation: Percentage difference between the normal value and the current import price	Amount difference between the normal value and the current import price	Sum of two components: (1) Difference between the normal value and the average import price during the investigation [$10] PLUS (2) If the current import price decreases, the difference between the current import price and the average import price during the investigation	Percentage difference between the normal value and average import price during the investigation **(10%)**
Amount of duties owed[a]	*Scenario 1: Exporter raises price by $15*	At entry: $115 x 10% = **$11.50** At liquidation: **$0** owed because import price exceeded the normal value[c]	**$0** owed because the current import price exceeded the normal value	($110 - $100) + $0 because the current import price did not decrease = **$10**[b]	$115 x 10% = **$11.50**
	Scenario 2: Price is unchanged	At entry: $100 x 10% = **$10** At liquidation: $100 x 10% = **$10**	$110 - $100 = **$10**	($110 - $100) + $0 because the current import price did not decrease = **$10**	$100 x 10% = **$10**
	Scenario 3: Exporter lowers price by $15	At entry: $85 x 10% = **$8.50** At liquidation: $85 x 29% = **$25**	$110 - $85 = **$25**	($110 - $100) + ($100 - $85) = $10 + $15 = **$25**	$85 x 10% = **$8.50**
Total price (Import price + duties)	*Scenario 1: Exporter raises price by $15*	At entry: $115 + $11.50 = **$126.50** At liquidation: $115 + 0 = **$115**	$115 + 0 = **$115**	$115 + $10 = $**125**	$115 + $11.50 = **$126.50**
	Scenario 2: Price is unchanged	At entry: $100 + $10 = **$110** At liquidation: $100 + $10 = **$110**	$100 + $10 = **$110**	$100 + $10 = **$110**	$100 + $10 = **$110**
	Scenario 3: Exporter lowers price by $15	At entry: $85 + $8.50 = **$93.50** At liquidation: $85 + $25 = **$110**	$85 + $25 = **$110**	$85 + $25 = **$110**	$85 + $8.50 = **$93.50**

a. *This reflects the amount of duties assessed under each system. As discussed above, in the United States, there can be a substantial difference between the amount of duties assessed and the amount paid. If the importer in this scenario made a duty assessment application, all other things being equal, it would be entitled to a* USD *10 refund as the export price of* USD *115 is above the normal value calculated during the investigation. The United States would have refunded* USD *11.50 to the importer.*

Source: GAO-08-391

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E. Advantages and Disadvantages to Retrospective and Prospective AD/CVD Duty Systems.

In its report, GAO also assesses the advantages and the disadvantages to the implementation of retrospective and prospective AD/CVD duty systems:

i. **Timing for Collection of Final Duties.** Under a prospective system, importers pay duties only when merchandise enters the importing country. Thus, there is no risk of being unable to collect the duties later. A prospective system gives certainty to importers and allows them to plan business operations. This system can also give exporters an incentive to eliminate or reduce dumping by raising prices up to the normal value to eliminate AD/CVD duties.

Conversely, final duties are not determined in a retrospective system until long after the time of importation (more than three years on average for the US system). Under this system, companies may be deterred from dumping by the threat of administrative review and increased final duties. However, the long time lag creates substantial collection challenges for the US government and may encourage importers to intentionally avoid paying duties as they will not face collection until a long time after importation.

ii. **Accuracy of AD/CVD Duties.** In a prospective system, the duties paid may not match the actual dumping or subsidization because duties assessed are based on dumping and subsidization during a previous period. However, a prospective system enhances collection because the government collects the full duty amount when goods are imported. On the contrary, a retrospective system assesses duties based on the actual amount of dumping or subsidization but the time delay in determining the final duty rate creates substantial collection problems. Failure to collect duties assessed means that unfair trade practices are not fully remedied by AD/CVD duties in a retrospective system. Retrospective systems also raise equity concerns because importers who successfully avoid paying AD/CVD duties gain a competitive advantage over importers who do comply with the duties.

iii. **Administrative Simplicity.** A prospective system is far simpler for customs officials to implement because the full and final duty amount is imposed at the time of importation while a retrospective system can create a large administrative burden for customs officials and drain government resources. Issues related to identifying, tracking and processing entries as well as locating importers and collecting duties from insolvent

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importers increases the customs officials' workload and can divert focus from other important trade issues.

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Figure 5: Comparison of Prospective and Retrospective AD/CVD Duty Systems

	Prospective AD/CVD Duty System	**Retrospective AD/CVD Duty System**
Timing of Final Duty Collection	Importers pay duties only when merchandise enters the importing country so there is no risk of being unable to collect the duties later. Importers have certainty and can plan business operations. Importers may have an incentive to eliminate or reduce dumping by raising prices up to the normal value to eliminate AD/CVD duties.	Final duties are not determined until long after importation (more than three years on average for the US system). The long time lag creates substantial collection challenges and may encourage importers to intentionally avoid paying duties because they will not face collection until long after goods are imported. Companies may be deterred from dumping by the threat of administrative review and increased final duties.
Accuracy of AD/CVD Duties	Duties paid may not match actual dumping or subsidization because duties assessed are based on dumping and subsidization during a previous period. Collection is enhanced because the government collects the full duty amount when goods are imported.	While duties are based on the actual amount of dumping or subsidization, the time delay in determining the final duty rate creates substantial collection problems. Unfair trade practices are not fully remedied by AD/CVD duties because duties often go uncollected. Importers who successfully avoid paying AD/CVD duties gain a competitive advantage over importers who do comply with the duties.
Administrative	Implementation is far simpler for customs officials because the full	Customs officials and government resources face a large administrative

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	Prospective AD/CVD Duty System	Retrospective AD/CVD Duty System
Simplicity	and final duty amount is imposed at the time of importation	burden. Issues related to identifying, tracking and processing entries as well as locating importers and collecting duties from insolvent importers increases the customs officials' workload and can divert focus from other important trade issues.

IV. GAO Recommendations

A. For Congress

GAO recommends Congress take the following actions:

i. Require Secretaries of Commerce, Homeland Security and Treasury to analyze and report on the advantages and disadvantages of prospective and retrospective AD/CVD duty systems. This report would examine which type of AD/CVD duty system would best remedy injurious dumping or subsidization of exports, minimize uncollected duties, reduce evasion of AD/CVD duties, target high-risk importers and create the least administrative burden.

ii. Require CBP to publically report all uncollected AD/CVD duties annually.

iii. Provide Commerce with authority to establish a minimum amount or value of exports before initiating "new shipper" review for new companies.

B. For the Executive Branch

GAO recommends the following Executive Branch actions:

i. The Secretaries of Homeland Security and other relevant agencies should reexamine current bond-setting formulas to increase the amount of AD/CVD duty revenue protected by general bonds.

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ii. The Secretary of Commerce and Secretary of Homeland Security should identify methods for improving clarity of Commerce's liquidation instructions to improve the overall liquidation process.

iii. The Secretary of Commerce should establish a strategic human capital plan, including its AD/CVD duty operational offices, to ensure sufficient staffing for the Import Administration to issue timely and clear liquidation instructions to CBP.

V. Reactions to GAO Report

Commerce, Homeland Security and Treasury provided formal comments that are included within GAO's report. Each Department generally agreed with GAO's assessment of the problems associated with AD/CVD duty-collection and each is willing to address the problems identified in the report.

A. Department of Commerce Reaction

Commerce contended that GAO overstated the AD/CVD duty collection problem. According to Commerce, since the total uncollected duties are concentrated in only a few industries, products, importers, and primarily one country, Commerce asserted that the systemic under-collection of duties is not as widespread as the GAO report seems to indicate. Commerce maintained that only two of the four factors identified by GAO actually contribute to under-collection: (i) insufficient general bonds and (ii) minimal background information about importers.

Commerce is willing to conduct a study on the advantages and disadvantages of retrospective and prospective AD/CVD duty systems but believes that GAO's recommendations for the study exceed the scope of the under-collection problem. Thus, Commerce would like to work with congressional oversight committees to better focus the scope of the suggested study.

Commerce also pointed out that it is currently developing a strategic human capital plan for Import Administration's AD/CVD Operations offices. The agency felt that similar plans would be useful in other agencies involved in the collection of AD/CVD duties as well.

B. Department of Homeland Security Reaction

Homeland Security claimed that GAO's options for adjusting the current retrospective system would worsen the current problems by increasing the burden on CBP, not identifying or addressing schemes that circumvent payment of AD/CVD duties, and increasing costs for all importers and shippers. Even though a retrospective system is more accurate, Homeland Security believes a prospective system would better use CBP's resources to identify and address importers who circumvent AD/CVD duties.

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Homeland Security also noted that tens of millions of dollars of duties are uncollected in areas other than the main industries and products and from countries other than China. Homeland Security warns against viewing the uncollected duties problem too narrowly because the risky countries, industries, products, and importers may change in the future.

Homeland Security states that it will continue to report all uncollected AD/CVD duties annually on its website and supports increasing new shipper requirements. It will consider reevaluating the bonding process but cautions that any action must take the outcomes of the current legal challenges into account.

C. Department of Treasury Reaction

Treasury asserted that if the current retrospective system is eliminated, the rate of AD/CVD duty collection will be similar to the collection rate of other forms of duties (near 100 percent).

Treasury considered allowing new shippers to post bonds rather than cash deposits to pose only minimal risks for duty collection but maintained that the possibility for new shippers to abuse the current system by obtaining individual duty rates based on only one shipment is a much greater risk.

Treasury noted that expanding the bond policy for new shippers may not be possible because of the legal challenges against the policy. Moreover, Treasury stressed that bonds are an inherently uncertain method for protecting revenue because retrospective duty increases are not limited. Thus, bond amounts cannot be guaranteed to cover a final AD/CVD duty determination.

Finally, Treasury insisted that credit checks should not be required for general importers even if they are imposed for new shippers.

Outlook

GAO's report indicates that switching to a prospective AD/CVD duty system would solve the current collection problems as well as significantly reduce the administrative burden on CBP. However, such a change would entail major revisions current US law. The differing views of GAO's report and the scope of the collection problem from Commerce, Homeland Security, and Treasury indicate that eliminating the retrospective system in favor of a prospective system would certainly meet resistance. Because all three agencies are in favor of continued study of the AD/CVD duty collection issues and further exploration of possible solutions, they will likely move forward with the additional investigation recommended by GAO. Commerce and CBP will also likely continue to alter existing policies and practices to make the AD/CVD duty collection process more efficient such as improving staffing and refining liquidation instructions.

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Consequently, a full-scale reversal of the current AD/CVD duty system in the short-term (or long-term, for that matter) is highly unlikely.

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Multilateral

Report of the Appellate Body in United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil

Summary

Decision: The WTO Appellate Body has affirmed that US cotton subsidies continue to violate the obligations of the United States under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Agreement on Agriculture. It upheld the rulings of a WTO "compliance" Panel that the United States had failed to implement the original (2005) WTO rulings on cotton.

Significance of Decision / Commentary: Few WTO disputes have been as difficult – or as politicized - as the fight over US cotton subsidies. While Brazil is the complainant in this case, US subsidies have impacted cotton producers around the world, including in sub-Saharan Africa (the subsidies paid by the United States to its 25,000 cotton farmers exceed the entire gross national income of virtually every cotton-exporting country in West and Central Africa). Despite several rounds of litigation and Ministerial-level negotiations, this issue remains unresolved.

The Appellate Body was widely expected to find that the United States had not implemented the original rulings of the WTO Dispute Settlement Body (DSB) on cotton. The decision also clarified the obligation of WTO Members to "remove the adverse effects" of subsidies found to prejudice the interests of other Members.

The "actionable subsidies" disciplines of the SCM Agreement provide that WTO Member governments cannot, through subsidies, cause "adverse effects" to the interests of other Members, including "serious prejudice." A Member that has been found to have breached these rules can either withdraw the subsidy or "remove the adverse effects" caused by it. This vague formulation can give rise to numerous interpretive problems. Moreover, there is relatively little case law on actionable subsidies, unlike the prohibited subsidies provisions, which have been heavily litigated.

In the present case, the original panel had found that payments under two US subsidy programs had caused serious prejudice to Brazil. The implementation period expired in September 2005. During the current compliance panel proceedings, the United States did not contest that: (a) it continues to make payments to its cotton farmers under both programs; and (b) it has not changed the legislative or regulatory provisions governing either one. However, it argued that the original DSB rulings on cotton related to an earlier period (1999-2002), and so any payments made after the expiration of the

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compliance period could not be considered to be "measures taken to comply" with those rulings. (Compliance panels established under Article 21.5 of the Dispute Settlement Understanding (DSU) have a mandate to rule on the WTO-consistency of "measures taken to comply with the recommendations and rulings" of the DSB.) The United States argued that Brazil's compliance claims against the more recent payments were therefore outside the Panel's terms of reference.

The Appellate Body rebuffed the United States on this point, saying that accepting the US position would have "serious implications for a complaining Member's ability to obtain relief against adverse effects of actionable subsidies" and was "difficult to reconcile with the objectives of the DSU."

The Appellate Body rightly rejected the US position on this issue. As the Appellate Body noted, under the US approach a complainant could obtain relief "only with respect to any lingering effects of the subsidies provided during the period examined by the panel" and it would be required to initiate new dispute settlement proceedings for all subsidies provided after that. Such a formalistic approach could have denied a complainant any final, effective remedy, and would be incompatible with the obligation of Members not to "maintain" subsidies that cause adverse effects. Although the Appellate Body's ruling on this issue was made as part of a threshold procedural determination on the Panel's terms of reference, its reasoning will have important substantive ramifications in future disputes over implementation in subsidies cases. The ruling effectively strengthens the remedies provisions of the Agreement.

In 2005, Brazil sought DSB authorization to retaliate against the United States in the amount of approximately USD 4 billion per year for its failure to comply with the DSB rulings. Two arbitral panels were established on the retaliation, although both were suspended pending the compliance panel proceedings. Now that the compliance process is over, Brazil can reactivate the retaliation process. It may not do so immediately, pending its assessment of the US reaction to this latest ruling.

Analysis

Scope of compliance proceedings: US position would have "serious implications for a complaining Member's ability to obtain relief"

Article 5 of the SCM Agreement provides that no Member should cause, through the use of a subsidy, "adverse effects" to the interests of other Members, including "serious prejudice to the interests of another Member." Article 6.3(c) sets out when serious prejudice may arise, including where there is "significant price suppression, price depression or lost sales in the same market."

Article 7 of the Agreement deals with remedies available in actionable subsidies cases. Article 7.8 provides that: "Where a panel report or an Appellate Body report is adopted in which it is determined that

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any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy."

The original Panel had found, among other things, the effect of certain mandatory price-contingent US subsidies, including marketing loan and counter-cyclical program payments, constituted serious prejudice to Brazil. The implementation period for the United States expired on September 21, 2005.

During the current compliance proceedings, the United States did not contest that it continues to provide marketing loan and counter-cyclical payments to US cotton producers, and that the legislative and regulatory provisions governing those payments remained unchanged. However, the United States argued that the serious prejudice findings of the original panel related to payments made during an earlier period (the 1999-2002 marketing years), and did not extend to the subsidy programs themselves. In the US view, payments made after September 21, 2005 were not "measures taken to comply" for the purposes of a compliance panel proceeding under DSU Article 21.5, and were therefore outside the Panel's terms of reference.

The Appellate Body rejected the US position. It stated that "we do not see the obligation in Article 7.8 as being limited to subsidies granted in the past." It stressed that in the case of recurring annual payments, "the obligation in Article 7.8 would extend to payments 'maintained' by the respondent Member beyond the time period examined by the panel for purposes of determining the existence of serious prejudice, as long as those payments continue to have adverse effects." Otherwise, it reasoned, "the adverse effects of subsequent payments would simply replace the adverse effects that the implementing Member was under an obligation to remove."

The Appellate Body expressed concern that:

> [T]he approach advocated by the United States would have serious implications for a complaining Member's ability to obtain relief against adverse effects of actionable subsidies. Under such an approach, a complaining Member that has demonstrated that subsidies provided by another Member have resulted in adverse effects would obtain relief only with respect to any lingering effects of the subsidies provided during the period examined by the panel…The complaining Member would have to initiate another dispute to obtain relief with respect to payments made after the period examined by the panel, even if those subsidies are recurring payments or otherwise of the same nature as those found to have resulted in adverse effects. Even if the complaining Member were to succeed in its claims a second time, the subsidizing Member could

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provide further subsidies after the second panel's ruling, and the complaining Member would have to initiate yet another dispute, and this cycle could continue.

The Appellate Body stressed that "[t]he approach advocated by the United States would not only compromise the effectiveness of the provisions on actionable subsidies in the SCM Agreement, it is also difficult to reconcile with the objectives of the DSU."

It therefore concluded that Brazil's claims against US marketing loan and counter-cyclical payments made by the United States after the expiration of the compliance period were "properly within the scope of these Article 21.5 proceedings."

Export credit guarantees: premiums "inadequate to cover…long-term operating costs and losses" of US program

The SCM Agreement includes an "Illustrative List" of prohibited export subsidies. Item (j) of the list refers to the "provision by governments…of export credit guarantee or insurance programmes…at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes."

The Appellate Body reversed the Panel's intermediate finding that the US export credit guarantees were provided for premiums that were inadequate to cover the long-term operating costs and losses of the program. The Appellate Body noted that the Panel had found during the original proceedings that certain estimates provided a "strong indication" that the program was expected to run at a loss. However, during the compliance proceedings, the panel minimized the importance of the revised data submitted by the United States on the grounds that they were only estimates. The Appellate Body considered that the Panel's reasoning was "internally incoherent" and that its "treatment of the evidence submitted by the parties lacked even-handedness." It therefore ruled that the Panel breached its obligation under DSU Article 11 to "make an objective assessment of the matter before it."

However, while the Appellate Body reversed this intermediate finding, it upheld the Panel's ultimate ruling that the program was "not designed to cover its long term operating costs and losses." It said that the Panel had a sufficient evidentiary basis for the conclusion that "it is more likely than not that the revised…programme operates at a loss." It therefore upheld the Panel's findings that the US export credit guarantees were export subsidies within the meaning of the SCM Agreement and the Agreement on Agriculture, and that the United States had therefore failed to comply with the original DSB recommendations and rulings on this issue.

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Serious prejudice: US subsidies cause "significant" price suppression in the world market

As noted above, the definition of "serious prejudice" under the SCM Agreement includes "significant price suppression…in the same market." The compliance Panel endorsed its finding in the original proceeding that the term "same market" encompassed the world market. It also upheld Brazil's claims that the US marketing loan and counter-cyclical payments caused "present" serious prejudice to Brazil.

On appeal, the United States made a number of unsuccessful claims against the Panel findings on this issue, including the alleged failure of the Panel to determine the degree of price suppression it found to be significant, and the Panel's causation analysis. The Appellate Body dismissed all of these arguments and affirmed the Panel's finding that the marketing loan and counter-cyclical payments provided to US cotton producers constituted "significant" price suppression in the world market, causing "present" serious prejudice to Brazil.

Consequently, the Appellate Body affirmed the compliance Panel's ruling that the United States failed to comply with its obligation under Article 7.8 of the SCM Agreement to "to take appropriate steps to remove the adverse effects or…withdraw the subsidy."

The report of the Appellate Body in United States – Subsidies on Upland Cotton: *Recourse to Article 21.5 of the DSU by Brazil* was released on June 2, 2008.

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WTO Panel Report: India – Additional and Extra-Additional Duties on Imports from the United States (DS360)

Summary

Decision: A World Trade Organization (WTO) Panel has dismissed US claims against additional duties imposed by India on imported alcoholic products. The United States argued that such additional duties were not provided for in India's tariff schedule, and therefore breached India's tariff commitments. However, the Panel agreed with India that these duties were permitted under a provision of the GATT that authorizes the imposition of charges "equivalent to an internal tax" – in this case taxes imposed by the Indian States on locally-produced alcohol.

Significance of Decision / Commentary: The rules on tariffs, set out in Article II of the GATT 1947, establish bedrock principles for trade in goods. Tariff reductions have been negotiated in a series of trade rounds that have taken place since the end of the Second World War. The results of these tariff reduction agreements are memorialized in the tariff schedule of each country, which are considered as "integral parts" of the GATT. Each participating country agrees to schedule (or "bind") its tariffs at agreed maximum levels for each product. Any tariffs applied above the "bound" rate will violate a country's GATT obligations. The GATT similarly prohibits "other duties or charges of any kind" above the bound rate.

Nonetheless, these rules are not absolute. GATT Article II:2 permits certain types of charges to be applied "at any time", including a "charge equivalent to an internal tax" imposed consistently with the national treatment obligations of a Member under GATT Article III:2. Article III:2 provides that imported products cannot be subject to internal taxes "in excess of those applied, directly or indirectly, to like domestic products."

In other words, despite the tariff bindings granted by each country, the GATT permits imports to be subject to charges that are "equivalent" to internal taxes, provided they do not exceed those applied to domestic goods. The rule is designed to ensure that domestic goods do not have to bear a disproportionate tax burden in comparison with imports.

As a practical matter, the outcome of any dispute under these provisions will hinge on how a Panel characterizes a particular charge. The United States argued that the additional Indian duties on imported alcohol should be considered as ordinary customs duties or, in the alternative, "other duties or charges" under Article II:1(b). However, the Panel agreed with India that the charges should be considered as equivalent to internal State taxes. The Panel ruled that the tariff disciplines of Article II:1(b) therefore did not apply to the Indian measures.

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As the complainant, the United States had the burden of establishing that the additional duties were not "equivalent" to State taxes on like domestic products. In this context, it is worth noting that the Panel appeared to have incomplete factual information about the application of the State internal taxes. The Panel stressed that "neither the United States nor India has supplied specific information about excise duties actually levied by different States on alcoholic liquor." Indeed, a footnote indicates that "the Panel, in a written question, requested India to identify relevant State excise duties and any differences in terms of the form of taxation, applicable duty rates, etc. India did not respond to the Panel's question." Although the Panel found this to be "[r]egrettable", it indicated that it was "able to dispose of the US claim under Article II:1(b) without the information in question." In its conclusions, the Panel was careful to indicate that the evidence on the record was "not inconsistent" with India's position on equivalent State-level taxes and that there was "no evidence on the record" demonstrating that there were States that did not levy internal excise duties. Thus, the burden of proof had an important impact on the outcome of this dispute. Ultimately, the Panel concluded that the United States had "failed to establish" any violation by India.

Report

Applicable law: GATT provisions on tariff bindings

Article II of the GATT 1947 sets out the rules applicable to duties and other charges that may be imposed on imported goods. Article II:1(b) states in part that imported products of other Members are "exempt from ordinary customs duties in excess of those set forth" in the importing country's tariff schedule. It adds that such products are similarly "exempt from all other duties or charges of any kind imposed on or in connection with the importation…."

However, Article II:2 provides that nothing in Article II prevents any WTO Members from "imposing at any time" on the importation of any product certain categories of charges: (a) a "charge equivalent to an internal tax" imposed consistently with GATT Article III:2 in respect of the like domestic product; (b) anti-dumping or countervailing duties; and (c) charges for services rendered. At issue in the present case was the first category, i.e., charges equivalent to internal taxes on alcohol.

Panel's approach to tariff disciplines: determining which charges "inherently discriminate against, or disadvantage, imports"

The Panel mapped out its interpretive framework for the types of charges contemplated under Articles II:1(b) and II:2. It began by describing the types of duties contemplated under Article II:1(b):

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> Ordinary customs duties are typically applied so as to afford protection to domestic production. This is because, by their nature, they discriminate against imports of the products subject to the duty. Or to put it another way, they inherently disadvantage imports of the subject products vis-à-vis domestic products. Indeed, this is precisely why exporting Members seek tariff concessions….The first sentence of Article II:1(b) could not effectively serve its purpose of preserving the value of tariff concessions if Members were not subject to any legal constraint when imposing ODCs [“other duties or charges”] that are of the same kind as ordinary customs duties, that is to say, ODCs that inherently discriminate against, or disadvantage, imports of the products subject to bound ordinary customs duties. Of course, the provisions of the second sentence of Article II:1(b) do introduce a relevant constraint, by requiring that ODCs imposed on, or in connection with, the importation of products subject to bound ordinary customs duties may not exceed a defined level.

Thus, in the view of the Panel, there was a “readily apparent rationale – anti-circumvention – for subjecting ‘other duties or charges’ that are of the same kind as ordinary customs duties to disciplines that parallel those contemplated by the first sentence of Article II:1(b).”

The Panel took a different view of charges under Article II:2:

> …Article II:2 charges differ from ordinary customs duties (and ‘other duties or charges’ that are of the same kind as ordinary customs duties) in that they do not inherently discriminate against, or disadvantage, imports. The imposition of such charges on the importation of products subject to a tariff binding does not inherently lessen the value of the relevant tariff concessions, which, to repeat, are concessions relating to discriminatory charges on imports.

Thus, the Panel concluded that “the category of ‘other duties or charges’ imposed on the importation of a product should be considered as encompassing only such duties or charges as are of the same kind as ordinary customs duties, i.e., charges which inherently discriminate against, or disadvantage, imports.” Consequently, it found that “the category of ‘other duties or charges’ imposed on the importation of a product in our view does not comprise the three categories of charges identified in Article II:2, notwithstanding the fact that the latter charges are also imposed on the importation of a product and may be applied in respect of a product subject to a tariff binding.”

As noted above, Article II:2(a) permits the imposition of a “charge equivalent to an internal tax” imposed consistently with GATT Article III:2. The Panel observed that “the text of Article II:2(a) appears to adopt an ‘outside-in’ perspective, in the sense that it seems to take the border charge as a given and the

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internal tax as something to be adjusted to it." It also stressed that the concepts of "equivalence" and "consistency with Article III:2" were "separate and distinct concepts."

Indian measures upheld as charges equivalent to state-level internal taxes

Applying these principles to the facts of this case, the Panel considered the additional duties applied by India on imported alcoholic products. As noted above, the United States argued that these duties breached Article II:1(b). India argued that its measure was neither an "ordinary customs duty" nor an "other duty or charge" within the meaning of Article II:1(b), but rather a "charge equivalent to State-level internal taxes" within the meaning of Article II:2(a).

The Panel accepted India's position on this issue. It stated that the evidence, including "the general legal framework of India's customs duty and tax system as it existed at the time of establishment of this Panel", was "not inconsistent" with India's view that the additional duties were equivalent to State excise duties imposed in respect of "like alcoholic liquor produced or manufactured in the State imposing the duty." It also stated that there was "no evidence on the record to demonstrate that, on the date of establishment of the Panel, there were States permitting the sale of alcoholic liquor that did not levy an excise duty" on alcoholic liquor subject to the additional duties.

The Panel therefore found that the United States failed to meet its burden of establishing that the additional duties were not "equivalent", within the meaning of Article II:2(a), to State excise duties imposed in respect of like alcoholic liquor produced or manufactured in the States.

The Panel concluded that the United States failed to establish that the additional duties constituted ordinary customs duties or an "other duty or charge" within the meaning of Article II:1(b). Consequently, it had "not been demonstrated that the obligations contained in Article II:1(b) were applicable" to India's additional duties on alcoholic liquor.

The Panel also examined another category of duties, which were imposed to counterbalance the sales tax, value added tax, local tax or other charges leviable on domestic products in India, and reached the same conclusions.

The Panel thus ruled that the United States failed to establish that either class of duties was inconsistent with GATT Article II:1(b).

It also dismissed the consequential claim of the United States that the duties were also a violation of Article II:1(a), which provides that each WTO Member shall "accord to the commerce of the other contracting parties treatment no less favourable" than that provided for in its tariff schedule. It stated that

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as no inconsistency with Article II:1(b) had been established, the United States consequently failed to establish that the Indian measures were inconsistent with Article II:1(a).

Therefore, the Panel dismissed the US claims in their entirety.

The report of the Panel in *India – Additional and Extra-Additional Duties on Imports from the United States* (DS360) was released on June 9, 2008.

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Cato Event: Global Trade Facilitation Promising, but Little Consensus on WTO Trade Facilitation Agreement

Summary

On June 26, 2008, the Cato Institute hosted a discussion featuring panelists Stephen Creskoff, Senior Partner at Creskoff and Doram LLP, J. Michael Finger, Trade Policy Consultant and Former Lead Economist at the World Bank, William C. Lane, Washington Director for Caterpillar, Inc., and World Bank Lead Economist John Wilson. Speakers offered their views on trade facilitation as a promising alternative to expand international trade, boost economic growth, and advance the World Trade Organization (WTO) Doha Round negotiations. We review herein their discussion on trade facilitation.

Analysis

The Cato Institute hosted a discussion on trade facilitation and the challenges countries face in this area. Panelists also discussed the chances for trade facilitation to become a plausible alternative to traditional trade liberalization mechanisms, such as bilateral free trade agreements (FTAs) or preferential trade arrangements. Panelists focused their remarks on a WTO agreement on trade facilitation and possible tensions between trade facilitation and WTO Members' economic development goals.

- **Stephen Creskoff, Senior Partner at Creskoff and Doram LLP,** emphasized the dual nature of trade facilitation, which seeks both to shorten shipment times and reduce freight costs. Creskoff noted that trade facilitation efforts must balance security concerns and revenue collection needs, the latter of which is particularly important to developing countries. Creskoff criticized a proposed WTO agreement on trade facilitation as being overly focused on procedures and not focused enough on the principles of trade facilitation. Creskoff, however, stated that such an agreement could eventually be "a good thing" for WTO Members.

- **J. Michael Finger, Trade Policy Consultant and Former Lead Economist at the World Bank**, was skeptical regarding a proposed WTO agreement on trade facilitation. Finger asserted that the draft agreement that WTO Members are considering has merits but leaders must step forward to remove flaws within the draft and restore momentum to broader trade liberalization. Finger criticized WTO Director General Pascal Lamy for allowing the inclusion of "bound obligations for assistance" from developed to developing countries, which "are unrealistic" in light of significant budget constraints. He suggested that the WTO has improperly sought to "usurp" the World Bank's mandate by focusing on development over trade liberalization. According to Finger, necessary trade facilitation

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efforts are already underway in developing countries thanks to local business financing, thus implying that the contribution of the WTO may not be needed.

- **William C. Lane, Washington Director for Caterpillar, Inc.,** stated that trade facilitation is a useful tool for economic development, and he suggested three "legs" needed to expand international trade: (i) the reduction of tariffs and elimination of quotas; (ii) the construction of infrastructure; and (iii) the reduction of transport times from producer to consumer. Lane cited the examples of Cambodia and Bangladesh to illustrate how high import tariffs and low quota levels undermine generous US financial assistance. Lane highlighted the importance of roads, airports, and telecommunications networks to global commerce and stated that more than 60 percent of all funds invested by the development-oriented Millennium Challenge Corporation (MCC) in developing countries are directed to infrastructure projects.
- **John Wilson, Lead Economist at the World Bank,** provided positive economic growth projections for developing countries (as a whole) and increasing numbers for trade as a share of economic growth. Wilson stated that predictability and simplicity are the main advantages to traders. In contrast to Finger, Wilson stated his support for a WTO trade facilitation agreement. However, according to Wilson, a potential trade facilitation agreement in the context of Doha should focus on the shared rights and responsibilities of all WTO Members rather than those of developed countries alone. Wilson briefly proposed an enhanced trade policy review (TPR) mechanism as one means to distinguish between developing and developed states and provide a degree of preferential treatment to less developed trading partners. Wilson stated that a trade facilitation agreement within Doha would be "helpful," but that domestic reforms and initiatives derived from private capital and global savings are "fundamental."

Outlook

Panelists agreed that trade facilitation can bring added benefits to all WTO Members, in addition to becoming a useful tool to spur growth and investment. Some panelists, however, were skeptical regarding the conclusion of negotiations on a WTO agreement on trade facilitation given the divergent needs and priorities of Members, in particular of developing and least-developed Members. WTO Members formally agreed to commence negotiations on trade facilitation in July 2004, on the basis of modalities contained in Annex D of the so-called "July package" adopted by the WTO General Council on August 1, 2004. Under this mandate, Members agreed to clarify and improve General Agreement on Tariffs and Trade (GATT) Article V ("Freedom of Transit"), Article VIII ("Fees and Formalities Connected with Importation and Exportation"), and Article X ("Publication and Administration of Trade Regulations").

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Members also agreed to discuss issues regarding technical assistance and capacity-building in trade facilitation, and strengthen effective cooperation between customs and other authorities on customs compliance issues. Although WTO negotiations on trade facilitation are ongoing, WTO Members have focused their attention on other priority negotiating areas (*e.g.,* Agriculture and Non-Agricultural Market Access-NAMA). The majority of WTO Members believe that the successful conclusion of negotiations in these two sectors will unblock the impasse between Members in the Doha Round negotiations. This focus on Agriculture and NAMA has led some Members to opine that other negotiating sectors – such as trade facilitation, services, and rules – have remained in a limbo state, and that Members will only move on these other areas after achieving consensus in Agriculture and NAMA. Thus, it does not seem likely that WTO Members will move towards securing a trade facilitation agreement in the short-term. If and when WTO Members do pick up their activity in trade facilitation negotiations, it is likely that they will address the same contentious issues that the panelists raised during the Cato discussion, especially on the issues of achieving a working balance between security and revenue collection needs and the suggested "bound obligations for assistance" from developed to developing countries.

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Multilateral Highlights

US Requests Consultations with EU Regarding Tariffs on Certain Technology Products

On May 28, 2008, United States Trade Representative (USTR) Susan Schwab announced that the United States has requested World Trade Organization (WTO) dispute settlement consultations with the EU regarding the EU's imposition of tariffs of up to 14 percent on imports of certain information technology products in violation of the WTO Information Technology Agreement (ITA). In announcing the request for consultations, USTR Schwab stated that "it is critical that the European Union live up to its ITA obligations instead of imposing new taxes and duties on innovative technologies . . . [and] the EU should be working with the United States to promote new technologies, not finding protectionist gimmicks to apply new duties to these products." Both sides will now formally consult on the matter. If consultations fail to resolve the dispute within 60 days (*i.e.*, by July 27, 2008), the United States may request that the WTO Dispute Settlement Body (DSB) establish a panel to determine whether the EU is acting consistently with its WTO obligations.

The ITA is a plurilateral agreement negotiated under the auspices of the WTO. Under the ITA, signatories (including the United States and the EU) have eliminated all import duties on a wide range of information technology (IT) products. The six main categories of goods receiving duty-free status are computers, telecommunications equipment, semiconductors, semiconductor manufacturing equipment, software, and scientific equipment. WTO Members signed the ITA at a WTO Ministerial Conference in Singapore on December 13, 1996, and the ITA went into effect on March 13, 1997.

According to USTR, the EU in the past several years has adopted a series of measures that resulted in new duties on imports of specific high-tech products. These products include cable and satellite boxes that can access the internet, flat panel computer monitors, and certain computer printers that can also scan, fax and/or copy. According to USTR, the EU claims that it can "charge duties on these products simply because they incorporate newer technologies or additional features." According to USTR's press release, the EU's imposition of tariffs on these IT products is equivalent to "taxing innovation – a move that could impair continued technological development in the information technology industry and raise prices for millions of businesses and consumers." USTR noted that it has repeatedly raised the issue of the tariffs with the EU in prior meetings, including several rounds of informal discussions held under the WTO ITA Committee in Geneva.

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According to various reports, the US consultation request accused the EU of violating: (i) Article II of the General Agreement on Tariffs and Trade (GATT), which prohibits contracting parties from imposing duties or charges other than those included in their schedules; and (ii) Article X of the GATT, which obligates WTO Members to publish regulations promptly. Specific to its second charge, the United States argued that the EU failed to promptly publish a measure amending the "Explanatory Notes" to its Combined Nomenclature (CN). The measure stated that set-top boxes would be subject to a 13.9 percent tariff if they use an Ethernet connection or contain a hard drive. Flat-panel graphic displays would also be subject to the same 13.9 percent tariff. The United States argued that the EU enforced this measure before it was officially published on May 7, 2008 in the EU Official Journal.

According to WTO sources, the EU has argued that it can impose duties on these specific products without violating the ITA because the changes in the technology of these products make them objectively different products falling outside of the original product categories covered by the ITA when WTO Members concluded the agreement in 1996. In a May 28, 2008 press statement, the European Commission noted that the EU has respected its ITA obligations and has indicated its willingness to reassess the current ITA product coverage to reflect new technology in a negotiation with all ITA signatories. According to the European Commission, the United States has refused to enter into such a negotiation. Further, the European Commission argued that "where changes in technology have given a product multiple functions . . . then these products in many cases are objectively different products falling outside of the original product categories covered by the ITA and are classified as such by the EU and others." According to the European Commission, although the United States claims this is a violation of the ITA, "both the spirit and explicit provisions in the ITA make it clear that extension to new products to reflect technological change would not be automatic, but based on periodic review by signatories." In response to the EU's press statement, USTR Schwab opined that "very few products would be eligible for duty-free treatment under the ITA today if the agreement's signatories only provided such treatment to products incorporating technology that existed at the time that the ITA was concluded."

Reaction in the United States to the consultation request was positive. House Ways and Means Committee Chairman Charles Rangel (D-NY) and Ways and Means Trade Subcommittee Chairman Sander Levin (D-MI) lauded USTR's request for consultations and used the opportunity to criticize the Bush Administration for failing to protect US rights under trade agreements and trade laws. In their joint statement, the two legislators noted that they and other Members of Congress have repeatedly urged action on this specific issue. They noted that under President Clinton, USTR filed an average of 11 WTO cases each year whereas under President Bush, USTR has filed an average of just three cases per year.

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According to Reps. Rangel and Levin, "the result has been fewer opportunities for US exporters to sell their goods and services in foreign markets – and dwindling support for new trade agreements to open new markets for US exporters." The US IT private sector also reacted positively to the news. The Information Technology Industry Council (ITI) stated that although litigation was a second-best option, "this case is about the EU's systematic failure to live up to its international obligations; . . . the ITA's integrity needs to be maintained." The National Association of Manufacturers (NAM) and the Computer and Communications Industry Association (CCIA) echoed ITI's statements.

On May 28, 2008, Japan also announced that it had requested dispute settlement consultations with the EU on the same matter.

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