Duty Collection Problems
FY 2003-2006

Department of the Treasury
July 2007

Legislative Requirement

Section 1632 of Public Law 109-280 requires the Secretary of the Treasury, in consultation with the Secretary of Homeland Security and the Secretary of Commerce, to:

(1) Report on any major problems in the collection of duties during the four most recent fiscal years,

(2) Estimate the total amount of duties that were uncollected during the most recent fiscal year and why they went uncollected, and

(3) Recommend additional actions to address problems related to the collection of duties, and analyze their potential effect on collections and international commerce.

Executive Summary

The Department of Homeland Security's Bureau of Customs and Border Protection (CBP) collects about $25 billion in duties yearly, with a collection rate of over 99 percent. Of the uncollected duties in fiscal years 2003-2006 ($589 million), 87 percent ($512.9 million) were antidumping or countervailing (AD/CV) duties that were "retrospectively" billed to importers after entry. Of the $939.3 million in antidumping and countervailing duties that were retrospectively assessed in fiscal years 2003-2006, 55 percent ($512.9 million) remains uncollected. The reason CBP is less successful collecting duties billed after entry is that they are not fully secured by bonds or cash deposits.

Under the current AD/CV system, the options to improve collection are limited, would have significant side effects, and would not fully secure all AD/CV duties. CBP could require significantly higher bond amounts to guarantee payments of antidumping or countervailing duties, but this approach has been challenged under both domestic and international law. The higher premiums that accompany higher bond amounts could also adversely affect importers. CBP might also require a separate bond for AD/CV duties, in order to align more directly costs and risks associated with AD/CV shipments. CBP and the Department of Commerce (DOC) could also explore further steps to ensure that the results of DOC Administrative Reviews are reflected in the assessed duty rate.

Duty Collection Problems FY 2003-2006

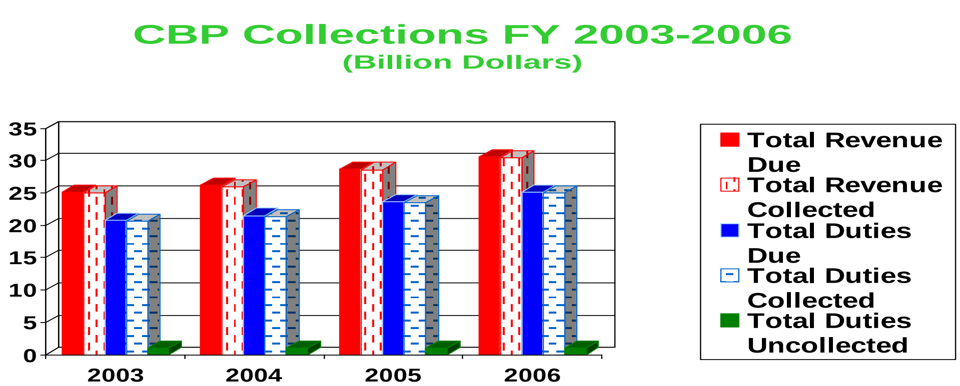
Customs and Border Protection is responsible for collecting duties that currently amount to approximately $25 billion annually. From FY 2003 through FY 2006, $589 million in duties have gone uncollected, resulting in an overall collection rate of 99.35 percent.

While antidumping and countervailing duties accounted for only 14.9 percent of all duties that should have been collected, *uncollected* antidumping and countervailing duties represent 87 percent ($512.9 million) of *all uncollected* duties from FY 2003 through FY 2006. There were no major collection problems with other types of duties during that period. Consequently, this report addresses problems in collecting antidumping and countervailing (AD/CV) duties.

TABLE 1:
CBP COLLECTIONS FY03-FY06 (BILLION DOLLARS)

Fiscal Year	All Revenue Due (Duties, Taxes, Fees)	Revenue Collected	All Duties Due	All Duties Collected	All Duties Uncollected	Percent of All Duties Uncollected	Net AD/CV Duties Due*	AD/CV Duties Uncollected	Percent of AD/CV Duties Uncollected
2003	$25.14	$25.0	$20.74	$20.6	$0.137	.66%	$2.8166	$.0934	3.32%
2004	$26.21	$26.0	$21.51	$21.3	$0.212	.99%	$4.1331	$.2254	5.45%
2005	$28.70	$28.6	$23.60	$23.5	$0.099	.42%	$5.6148	$.0749	1.33%
2006	$30.54	$30.4	$25.14	$25.0	$0.142	.56%	$1.0390	$.1191	11.46%
Total	*$110.59*	*$110.0*	*$90.99*	*$90.4*	*$0.589*	*.65%*	*$13.6034*	*$.5129*	*3.77%*

**Net AD/CV Duties Due includes (at time of liquidation) the sum of cash deposits plus retrospective AD/CV billings made after entry as a result of the Administrative Review process, less refunds. Refunds occur when DOC's final assessment rate is lower than the order rate (cash deposit rate).



Background on AD/CV Collections

Antidumping duties are additional duties used to offset the effects of dumping (selling a product in the United States at a price below the producer's sales price in the country of origin (home market), or at a price that is lower than the cost of production). Countervailing duties are additional duties assessed to counter foreign subsidies on goods that are exported to the United States. The Department of Commerce (DOC), determines the rates for antidumping or countervailing duties based on information received from producers or exporters, which it reports to Customs and Border Protection (CBP), who collects the appropriate amount from the importer (not the foreign producer).

The process for collecting antidumping or countervailing (AD/CV) duties is best understood if split into two periods: 1) the period before the Department of Commerce (DOC) order is issued, and 2) the period after the DOC order is issued.

The first period[1] begins when DOC makes an affirmative preliminary AD/CV determination during its initial investigation, thereby establishing a preliminary AD/CV rate. CBP then requires the posting of a security (typically a "single-entry bond[2]") equivalent to the amount determined by the preliminary AD/CV rate on imported products subject to the preliminary determination. For goods imported prior to the order, the applicable AD/CV duties are almost always not increased "retrospectively" (increased at the entry).[3][4] Thus, the obligation to the government is secured by bond, and most antidumping duties on goods entered prior to the order are collected (although as described below, collections on entries made during this period can be slow and involve burdensome administrative problems for CBP).

The second period begins when DOC issues an "order." The order establishes an AD/CV rate superseding the preliminary rate. After the order is issued by DOC, CBP collects a cash deposit determined by the AD/CV rate on all imported merchandise subject to the order. The merchandise entered after the order can

[1] The period after the preliminary determination and before the DOC order typically lasts 75 days but can be extended to 135 days. However, the period in which goods are subject to AD/CV prior to the DOC order can last 225 days in the case of determination of "critical circumstances" (see note 6 below).

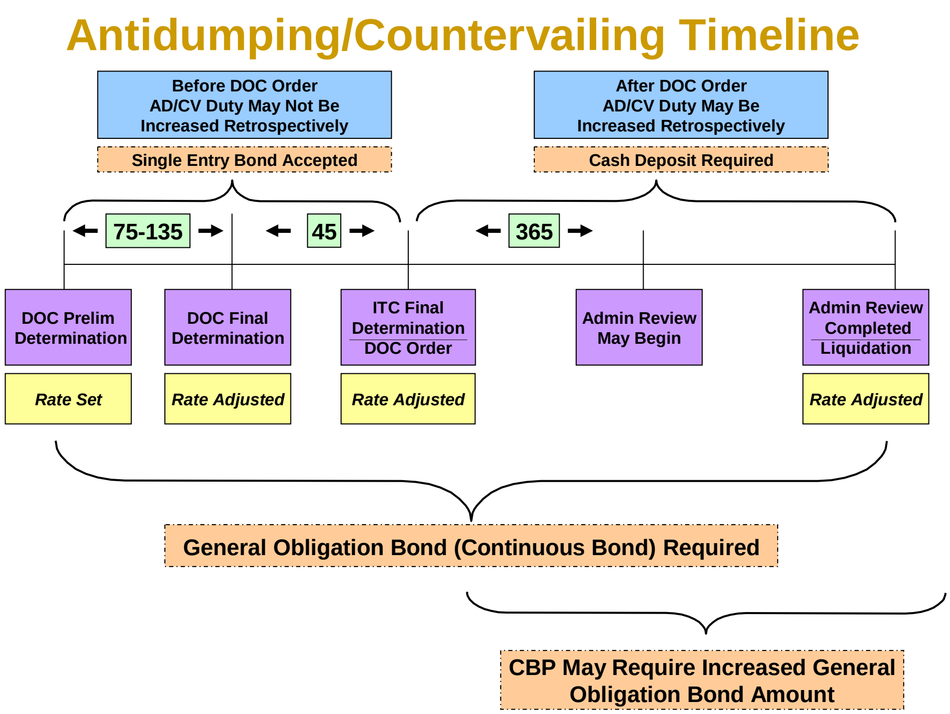
[2] Bonds serve as an insurance policy for the government. If importers default on their obligations, CBP can collect the secured amount from the surety that issued the bond. To ensure payment of unforeseen obligations to the government, importers are required to post a security, usually a general obligation bond, equal to 10 percent of what that importer paid in duties, taxes, and fees, over the preceding year (or $50,000, whichever is greater). In the AD/CV context, single-entry bonds posted in addition to general obligation bonds guarantee payment of antidumping or countervailing duties prior to issuance of the DOC order. For entries prior to order, if the AD/CV duty is less than 5 percent, CBP does not require a single-entry bond, but secures the obligation through the general obligation bond.

[3] When the Department of Commerce and the International Trade Commission find "critical circumstances," antidumping or countervailing duties can be increased retroactively for entries that occurred during the 90 days prior to Commerce's preliminary determination.

[4] In this context and throughout this report, retroactive application of duties means that the duty rate applied at liquidation (final assessment) is higher than the duty rate that existed at the time of entry.

also be subject to a DOC Administrative Review, which determines the amount of duty that ultimately must be paid (assessment rate). If the final assessment rate is higher than the cash deposit rate, CBP issues a bill in the amount of the difference between the cash deposit and the assessment rate. In these circumstances, where the duty amount is "retrospectively" increased, an unsecured duty obligation to the government may be created. The increase can be significant (increases of over 300 percent can occur). It is for entries during the period after the order is issued that the most significant collection problems occur.

When the final assessment exceeds the cash deposit, CBP bills the importers for the difference. If the importer does not pay, CBP looks to the importer's general obligation bond to guarantee payment of the antidumping duties. If the amount of the general obligation bond is less than the difference between the cash deposit and the final assessment, the portion of the duty equal to the difference as a practical matter is usually not collected.



Antidumping and Countervailing Duties Not Collected

Retroactively Assessed AD/CV Duties

Even though AD/CV duties account for the majority of uncollected duties, CBP's overall collection rate for AD/CV duties over the past four fiscal years is still over 96 percent (only 3.77 percent of AD/CV duties were uncollected in FY 2003-2006, see Table 1). However, for those additional AD/CV duties that were billed to importers "retrospectively" (after entry as a result of the DOC Administrative Review), the collection rate for FY 2003-2006 is below 50 percent.

Time Lag in Issuance of Liquidation Instructions

For importations that do not involve AD/CV duties, liquidation[5] normally occurs slightly less than one year after entry. However, for importations involving AD/CV duties, CBP does not liquidate until it receives instructions from Commerce on the final assessment rate, in which case liquidation typically occurs several years after entry. This time lag, which occurs as the result of the time needed to complete an Administrative Review, increases the risk of the importer or surety defaulting, if only because extending this period increases the time during which the importer or surety could suffer financial reverses that leave them unable to pay.

Timely Processing of Liquidation Instructions

CBP is required by law to liquidate AD/CV entries within 6 months of publication of the Commerce Department notice in the Federal Register providing the final assessment rate. If CBP does not issue liquidation orders by this deadline, AD/CV entries are liquidated by operation of law[6] at the cash-deposit rate regardless of whether Commerce's Administrative Review determined that AD/CV duties should be reduced or increased. CBP has not always been able to liquidate within that time frame. Differences between the amount that would be due at the rate determined by the Commerce Administrative Review and the amount that results from liquidation by operation of law are not strictly considered to be uncollected duties, but liquidation by operation of law can result in collection of amounts that are higher, or lower, than the amounts determined by the Department of Commerce. For example, in FY 2006, approximately $18 million in antidumping duties retrospectively billed after entry went uncollected because of incorrect instructions to CBP about the deadline for liquidation.

[5] Liquidation means the final computation or ascertainment of the duties accruing on an entry.
[6] Absent an affirmative action by CBP, the entry is deemed by law to be liquidated at the cash deposit rate, i.e., the rate determined by the DOC order.

Standard Bond Inadequate for Antidumping or Countervailing Duty Coverage

To ensure payment of unforeseen obligations to the government, importers are required to post a security, usually a general obligation bond, usually equal to 10 percent of the amount that importer paid in duties, taxes, and fees, over the preceding year (or $50,000, whichever is greater). When AD/CV duties owed are retrospectively increased through the Administrative Review process, the bond amounts set under CBP's standard bond policy are often insufficient to cover the importer's new obligation (the difference between the cash deposit and the final assessment). If an importer defaults and the amount of the bond is insufficient to cover the importer's obligations, then even though the full bond amount is collected, duties due in excess of the bond coverage remain uncollected. When the ultimate amount of AD/CV duty owed is higher than the estimated rate deposited at entry, the result can often be that bonds issued under the standard policy can be inadequate to insure completely against default by the importer.

Default by Importers

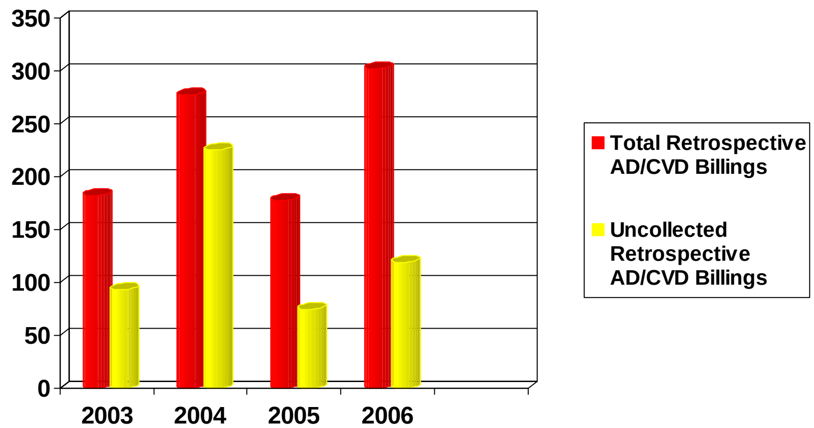
AD/CV duties can be increased "retrospectively" after entry through the Administrative Review process above the amount estimated (and deposited with CBP) at the time of entry. When the amount of AD/CV duties owed is increased (typically several years after importation), the obligation to the government increases, but that obligation may not be fully secured. (Outside of the AD/CV context, goods are typically not released by CBP until the expected duty bill is secured with a cash deposit or bond.) When importers are billed for this additional amount, some importers are unable to pay because the amount exceeds their available assets. In other cases, importers may be unwilling or unavailable to pay. In either case, the duty revenue is at risk because retrospective increases of the duty create an unsecured duty obligation.

TABLE 2:
AD/CV DUTIES, BILLINGS, AND COLLECTIONS (MILLION DOLLARS)

AD/CV BILLINGS AND COLLECTIONS					
Fiscal Year	Net AD/CV Duties Due*	Retrospective AD/CV Billings	Uncollected Retrospective AD/CV Billings	Percent of Retrospective AD/CV Billings Uncollected	Percent of All AD/CV Duties Uncollected
2003	$2,816.6	$182.2	$93.4	51%	3.32%
2004	$4,133.1	$277.3	$225.4	81%	5.45%
2005	$5,614.8	$177.6	$74.9	42%	1.33%
2006	$1,039.0	$302.2	$119.1	39%	11.46%
Total	*$13,603.4*	*$939.3*	*$512.9*	*55%*	*3.77%*

**Net AD/CV Duties Due includes (at time of liquidation) the sum of cash deposits plus retrospective AD/CV billings made after entry as a result of the Administrative Review process, less refunds. Refunds occur when DOC's final assessment rate is lower than the order rate (cash deposit rate).

AD/CV Duties Billed Retrospectively After Entry
FY 2003-2006
(Million Dollars)



<u>Some Importers May Be Bankrupted, But Others "Game" the System</u>

In some cases, importers are unable to pay the final duty bill because the bill exceeds their assets. In other cases, it appears that some importers expect that their final assessment will exceed their cash deposit, and that these importers plan to be "unavailable" to pay their duty obligations. Some importers establish shell companies that they intend to close if CBP attempts to collect any duties that are determined retrospectively. In some cases, importers do not have sufficient attachable assets available for the government to pursue. In all these cases, the increase of the duty creates an unsecured obligation to the government. When the duty is not increased retrospectively, the cash deposited at entry covers the final assessment.

In 2006, Congress suspended the provision of the dumping law that allowed "new shippers" to post a bond rather than a cash deposit (19 U.S.C. 1675(a)(2)(B)(iii)). This provision has been mentioned as a reason for the government's failure to collect antidumping duties. This provision allowed "new shippers" (exporters/producers who hadn't previously exported the merchandise subject to a particular antidumping order) to post a bond instead of a cash deposit while Commerce was determining the appropriate amount of the antidumping duty for merchandise of that exporter or producer. The intent of the provision was to mitigate the impact on importers of the application of what was typically a higher AD/CV rate while awaiting DOC's determination of the specific rate for the new shipper. One intent of the suspension may have been to reduce duty collection problems. But unless the surety defaulted, the provision that allowed "new shippers" to post a bond instead of making a cash deposit created no added collection risk, because the obligation had been secured, although by a bond rather than a cash deposit. There has been one instance of a surety failing that resulted in AD/CV obligations not being collected because the new shipper provision allowed posting of bonds in lieu of cash deposits.

When CBP collects duties from sureties, the process can be lengthy and may initially appear in statistics as uncollected duties. This may have caused some to overestimate the effect of the “new shipper” provision on duty collections.

Differing Collection Rates for Differing Products

There have been substantial differences in the collection rates for retrospectively assessed duties from case to case and product by product. Although a particular imported product may be associated with a high default rate (for example, crawfish imports), the most likely explanation for the varied default rates lies with the type of firms that are importing the product. If importers of a particular product are typically lightly capitalized firms or parties with minimal assets in the United States, one might expect a lower collection rate.

For example, when CBP reviewed its duty collection program, CBP determined that defaults on antidumping duty supplemental bills (bills issued to collect retroactively assessed duties) had increased substantially from previous years.

CBP also determined that the principal entities responsible for uncollected duties were importers of agriculture/aquaculture merchandise subject to antidumping duties. Based on CBP’s analysis, the collection problem with respect to this merchandise appeared to be attributable to the fact that importers of agriculture/aquaculture merchandise tended to be undercapitalized, and that by the time final liability was assessed (typically one or more years after the goods had entered), many of the companies were no longer in operation. Because the antidumping duties finally assessed often significantly exceeded both the cash deposit and the bond amount, CBP was left unable to collect the unsecured (retrospectively assessed) portion of the duties assessed.

Steps Already Taken to Improve Collection

Increasing Bond Amounts

To mitigate the problem of insufficient bond amounts, CBP implemented a new policy with regard to general obligation bonds that requires higher bond amounts for selected imports subject to AD/CV duties where there is an elevated risk of default. To date, this policy has only been applied to imports involved in selected antidumping cases. Moreover, in order to mitigate the impact on compliant traders of the efforts to collect AD/CV duties, the new bond policy provided for an increase in the bond amount equal to the AD/CV rate multiplied by the value of the importer's shipments in the previous 12 months. This approach, intended to limit the higher bond amounts to imports associated with a higher risk of default, has been challenged in domestic courts and in the WTO. (The government is vigorously defending the challenges to this approach.) While this approach attempts to strike a balance between securing obligations payable to the government, it nevertheless does not address the risk of retrospective duty increases on imports not subject to higher bond amounts, nor does it insure against retrospective increases that would exceed 100 percent of the value of the importer's shipments in the previous 12 months multiplied by the AD/CV rate (referred to as the 100 percent cap). Because there is no limit on the possible retrospective increase, no finite bond amount can be guaranteed to cover the final assessment.

Monitoring Sureties

Although not a reason for uncollected duties in fiscal years 2003 through 2006, some prior failures to collect duties were the result of the earlier failure of a surety. Although the ultimate failure of this surety was not due to obligations arising from customs bonds, CBP, nevertheless, has taken extra steps to minimize the risk of default by sureties. CBP monitors each surety's overall exposure for customs obligations, including AD/CV exposure, each surety's total single-entry bond obligations, and the collection risk associated with each surety's portfolio.

CBP has also provided these data to the Treasury Department to examine whether the data may be useful in evaluating a surety's potential solvency. Treasury examined this information in the context of a solvency evaluation in order to mitigate the risk of surety bankruptcy. Treasury conducts quarterly solvency evaluations of sureties and provides approval of the sureties to write CBP bonds. In addition, Treasury provides information to CBP concerning solvency risks of the sureties.

Timely Liquidation of Entries

One reason CBP had not always been able to liquidate within 6 months after DOC publishes notice that it has completed an Administrative Review was inadequate coordination between CBP and Commerce. CBP did not always receive timely instructions from Commerce, or CBP did not liquidate in accordance with timely instructions, or the instructions were not clearly understood. CBP and Commerce have worked together to identify and address instances in which assessment instructions are not prompt, or clearly understood and acted upon. Commerce has committed to issue instructions to CBP shortly after 15 days from the date of the publication of its final results of review in the Federal Register, providing parties time to allege clerical errors or request the court to issue an injunction. Commerce and CBP are also working more closely together to prevent further misunderstandings over Commerce instructions.

Another reason for delays in liquidation is the limited capability of CBP's entry processing system, the Automated Commercial System (ACS), to process AD/CV duties. Processing of AD/CV entries often requires import specialists to liquidate each entry individually, which means that available staff may not be able to process liquidation instructions in time to meet the statutory deadline.

CBP is working closely with Commerce, through the International Trade Data System initiative, to address limitations of the AD/CV system and improve the proper applications of AD/CV duty rates under the Automated Commercial Environment (ACE), the successor to ACS.

Entries in the Period Prior to DOC Issuance of an AD/CV Order

Currently, CBP requires a security, typically a single-entry bond (SEB), for entries made after the DOC preliminary determination and prior to DOC issuance of an order whenever the AD/CV duty rate is 5 percent or greater and the importer opts not to provide a cash deposit.[7] In some cases, SEBs accepted by CBP had been improperly executed by sureties or their agents, which ultimately prevented CBP from collecting on these bonds. CBP has subsequently trained staff to recognize and be on the alert for improperly executed SEBs.

In the past, CBP did not adequately monitor enforcement of the requirement for a SEB in all cases where the AD/CV duty rate was 5 percent or greater. CBP now uses its automated trade processing system to annotate all entries subject to SEBs to facilitate monitoring compliance with SEB requirements.

Also in the past, CBP did not always adequately monitor whether amounts of general obligation bonds were sufficient to secure an importer's obligations. For example, an importer entering goods prior to order and subject to AD/CV duty

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[7] In cases where the rate is below 5 percent, or, in fact, in any case, CBP may look to the importer's general obligation bond to guarantee payment of the antidumping duties.

rates below 5 percent is not currently required by CBP to obtain single-entry bonds to guarantee the AD/CV duties. If the value of imports from that importer increased significantly, that importer might not have been required to increase the amount of his or her general obligation bond to a level sufficient to secure completely AD/CV and other obligations. Over the past several years, CBP has taken steps to address this problem. Now, bond amounts are reviewed at least quarterly and often more frequently to determine if they are adequate based upon the value of imports.

Recommendations to Improve Collections of Antidumping and Countervailing Duties

The following recommendations could mitigate duty collection problems that have been associated with antidumping and countervailing duties.

1. CBP could require higher bond amounts (up to a cap of 100 percent of the value of the importer's shipments over the previous 12 months multiplied by the AD/CV rate) whenever an importer of goods subject to antidumping or countervailing duties has a history of noncompliance with customs laws and regulations or is unable to demonstrate that he or she has the ability to pay duties finally owed, unless CBP can determine there is minimal risk that the final assessments will exceed cash deposits. This would, however, likely raise costs for importers and would be an additional administrative burden for CBP.

Analysis: Increasing bond amounts would lead to improvements in collection rates. CBP estimates that it would, on average, insure the government against default by importers in cases where antidumping or countervailing duty rates are retroactively increased by 85 percent of the cash deposit rate. Increased bond amounts would, however, increase costs for importers. Limiting the higher bond amounts to importers who have a history of noncompliance with customs laws and regulations or are unable to demonstrate the ability to pay duties finally owed would require that CBP conduct an importer-specific financial analysis to see which companies qualified for a lower bond amount. This kind of analysis could require significant additional resources from CBP. The higher bond premium that would accompany higher bond amounts would likely raise costs for importers. And as noted earlier, the limited instances in which CBP has previously increased bond amounts have been challenged in both the WTO and domestic courts.

1a. CBP should examine the suggestions of several national surety associations to require separate continuous bonds to secure antidumping and countervailing duties. These associations recommend reinstituting a continuous bond (in addition to the general obligation bond) to insure all antidumping or countervailing duty obligations to the government. This additional bond would be required of all importers of merchandise subject to antidumping duties. The chief argument of the surety associations has been that the requirement for a separate bond would clearly indicate to CBP and the surety that the underlying transaction involves antidumping or countervailing duties.

Analysis: It may be that sureties or their agents have been issuing general obligation bonds without realizing that the underlying transaction involves antidumping or countervailing duties and that as a result sureties have suffered underwriting losses and reduced profits. There have, however, been no sureties who have failed because of payouts for antidumping or countervailing duties. On the other hand, increased underwriting losses may drive up the price of bonds guaranteeing antidumping or countervailing duty obligations. Any benefits that might stem from requiring a separate antidumping/countervailing duty bond must be weighed against the transaction costs for importers and for CBP associated with a separate bond. Certainly the government has an interest in sureties being well informed: the success of their underwriting secures obligations to the government.

A separate bond for AD/CV duties would also facilitate sureties releasing any collateral they might require for bonding AD/CV duties as soon as those duties are liquidated. Importers who have been subject to CBP's requirement for higher bond amounts for imports subject to specified AD/CV cases have complained that sureties do not release collateral posted by the importer when the AD/CV duty is liquidated (because of other potential liability under the general obligation bond). A separate AD/CV bond could eliminate that concern.

2. Commerce and CBP should continue to work closely together to ensure that instructions are sent and acted upon to prevent entries from liquidating by operation of law at the rate asserted at the time of entry.

Analysis: Commerce issues its instructions as soon as possible after 15 days from the date of the publication of the final results to provide parties sufficient time to allege ministerial errors or seek an injunction. CBP and Commerce should explore additional options, including potential modifications to the existing practice and policy to prevent entries from liquidating by operation of law.