

New Directions in the Perennial Struggle to Detect and Fight the Evasion of Antidumping and Countervailing Duties

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Evasion of antidumping and countervailing (AD/CV) duties by unscrupulous importers is an enduring challenge for the U.S. government. Recent examination by government and private sector entities shows that AD/CV duty evasion may also be an intensifying problem, involving transshipment via third countries, misclassification under the tariff schedule, and other forms of fraud. AD/CV duty evasion deprives the U.S. Treasury of untold millions of dollars of revenue annually and undermines the relief afforded by U.S. trade remedy law to U.S. industries. Evasion should also, however, be of concern to law-abiding U.S. importers whose commercial position may be eroded by cheating importers. A number of bills pending in Congress would buttress the ability of U.S. government entities to combat AD/CV evasion through new powers and procedures. The authors argue that these bills represent a good start, but that meaningful progress in the fight against duty evasion can only come with intensified U.S. government pressure on its trading partners in established international fora and through cooperative mechanisms to fight evasion.

I INTRODUCTION

Barry Goldwater famously quipped that “[t]he income tax created more criminals than any other single act of government.” Practitioners of international trade law are familiar with a variant of Goldwater’s observation—the wide-spread circumvention or evasion of antidumping and countervailing (AD/CV) duties by unscrupulous foreign exporters and U.S. importers of goods subject to U.S. AD/CV duty orders. No readily available data source permits a reliable estimate of the full magnitude of this problem. However, with the declared value of U.S. imports subject to AD/CV duty orders exceeding USD 5 billion during U.S. fiscal year 2010,¹ and AD/CV duty rates often in the double or even triple digits,² the incentive to cheat is strong. By many accounts, AD/CV duty evasion is a very serious, enduring, and costly problem. Allegations of circumvention are rife across many AD/CV duty proceedings, including with respect to the recently imposed orders on solar cells from China—one of the

larger cases by value of trade in the history of U.S. trade remedy law.³

The AD/CV duty evasion is, for obvious reasons, of great concern to U.S. industries seeking relief from alleged unfair competition through the imposition of AD/CV duties. Because the purpose of AD/CV duties is to restore fair pricing to the U.S. market by offsetting alleged dumping and/or foreign subsidization, duty evasion can deprive U.S. industries of the full remedy permitted by U.S. law. The AD/CV duty evasion is also a challenge for the U.S. government entities entrusted with administering U.S. trade remedy law, and deprives the U.S. Treasury of a significant stream of revenue. While not directly affected by AD/CV duty evasion, law-abiding U.S. importers of products subject to AD/CV duty evasion should also be concerned about evasion by other importers because of the competitive distortions that may result from evasion. That is, importers able to successfully evade AD/CV duties may be in a position to offer goods in the

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¹ U.S. Customs and Border Protection, Antidumping and Countervailing Duty Enforcement Actions and Compliance Initiatives: Fiscal Year 2010 (May 24, 2011), at 2. Fiscal year 2010 is the most recent year for which the above-cited estimate is publicly available.

² See footnote 30, *infra*.

³ During 2011, imports of Chinese-origin merchandise subject to these AD/CVD cases were valued at more than USD 3 billion. See http://ia.ita.doc.gov/download/factsheets/factsheet_prc-solar-cells-ad-cvd-finals-20121010.pdf.

U.S. market for prices lower than those that law-abiding importers must seek from their customers. For this reason, the authors submit that AD/CV duty evasion should be a concern for all U.S. companies impacted by AD/CV orders. All have an interest in strong action against circumvention and evasion.

This article first examines the events that have triggered a renewed focus on evasion of AD/CV duties. The article then examines the respective roles of the U.S. Department of Commerce (DOC) and U.S. Customs and Border Protection (CBP) in administering and enforcing AD/CV duty orders. Finally, this article reviews the legislative proposals currently before Congress to supplement and sharpen these agencies' existing tools for combating AD/CV duty evasion. The authors argue that, while a good start, these legislative proposals only offer an incremental improvement in CBP's ability to detect and deter evasion. An effective strategy to combat evasion will ultimately require meaningful engagement by the administration with its trading partners, particularly in Asia, through trade negotiations and bilateral consultation mechanisms such as the U.S.-China Strategic and Economic Dialogue (S&ED).

2 SHINING A NEW SPOTLIGHT ON THE PROBLEM OF DUTY EVASION

While evasion of AD/CV duties likely has a history as long as the existence of trade remedy law, recent years have witnessed a sharp increase in high-profile cases and the public visibility of the issue. Industry efforts to publicize the issue and request intensified action by the U.S. government have played a major role in this mounting awareness. In 2009, citing frustration with CBP's and DOC's enforcement efforts "in the face of rampant cheating," a coalition of U.S. industries that had obtained AD/CV duty orders formed the Coalition to Enforce AD/CVD.⁴ According to the Coalition, this cheating commonly takes a number of forms, including the trans-shipment of Chinese-made goods through neighboring

Asian countries and Mexico and fraudulent schemes such as misclassification of goods or their undervaluation on U.S. customs entry documents.⁵ According to the Coalition, ongoing AD/CV duty evasion deprives the U.S. Treasury of more than USD 100 million annually, while also permitting the continuation of injury to the U.S. industries seeking relief under the U.S. AD/CV duty laws.⁶

In 2010, at the request of Senator Ron Wyden (D-OR), Senate staff launched a project to determine the ease with which U.S. importers could identify foreign suppliers willing to participate in AD/CV duty evasion schemes. To do so, Senate staff established a fictitious trading company called AvisOne Traders, Inc., and registered the company on China's largest business-to-business e-commerce website, Alibaba.com.⁷ Senate staff reported "alarming" results indicative of wide-spread evasion.⁸ According to their report, one staff person contacted 120 companies through Alibaba.com and received 47 responses. Of these 47 responses, 10 included written confirmation of a willingness to evade duties on five products subject to AD/CV duty orders.⁹ For example, one Chinese supplier of steel nails subject to an AD order offered to trans-ship the merchandise through Malaysia and repackage it in order to conceal Chinese origin.¹⁰ The report presents a compilation of email offers to avoid AD/CV duties through a number of mechanisms, including trans-shipment through third countries, fraudulent country-of-origin documentation, improper commodity descriptions resulting in misclassification, and under-valuation.¹¹ The report also catalogs foreign firms identified by Senate staff as willing to evade U.S. AD/CV duties as well as companies advertising trans-shipment services to facilitate duty evasion.¹²

At the request of Senator Wyden, in 2011–2012, the U.S. Government Accountability Office (GAO) undertook a study to evaluate CBP's efforts to combat AD/CV duty evasion.¹³ The GAO first evaluated the process employed by CBP for detecting possible evasion, which includes quantitative analysis of import trends and the evaluation

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⁴ See <http://www.adcvenforce.com/about.asp>. The Coalition to Enforce AD/CVD comprises U.S. producers and industry associations in the following industries: steel wire garment hangers, steel threaded rod, honey, uncovered innerspring units, steel nails, shrimp, prestressed concrete steel wire strand, tissue paper, circular welded carbon quality steel line pipe, and glycine.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Staff Report: Duty Evasion: Harming U.S. Industry and American Workers (November 8, 2010), at 5. "AvisOne" is an anagram for "evasion." *Ibid.*, at 5.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*, at 16–17.

¹¹ *Ibid.*, at Part I.

¹² *Ibid.*, at Parts II and III.

¹³ GAO, Antidumping and Countervailing Duties; Management Enhancements Needed to Improve Efforts to Detect and Deter Duty Evasion (May 2012).

of allegations received through CBP's confidential e-Allegations mechanism.¹⁴ The GAO found that, once CBP detects possible AD/CV duty evasion, it generally attempts to verify whether evasion is actually occurring through a combination of information requests to importers, importer audits, and the physical inspection of merchandise at ports of entry.¹⁵ Once able to verify evasion, GAO found that CBP's options for enforcement action include: (1) pursuing the collection of evaded duties; (2) imposing civil penalties; (3) conducting seizures; and (4) referring cases to U.S. Immigration and Customs enforcement (ICE) for criminal investigation.¹⁶

The GAO further concluded that two general factors negatively impact CBP's efforts to detect and deter AD/CV duty evasion. The first is a combination of external challenges that include the inherent difficulty in identifying clandestine means of evasion, lack of access to corroborating evidence located in foreign countries, the complex nature of many goods subject to AD/CV determinations (e.g., certain steel products the AD/CV coverage of which is determined by metallurgical characteristics), and the ability of some importers to exploit the ease of becoming an importer of record. The second complicating factor, according to GAO, is insufficient information from DOC to enable CBP to optimize its planning and workload management with respect to the processing of AD/CV duties.¹⁷

The GAO also criticized CBP for failing to systematically track and report on key metrics involving its efforts to deter and penalize AD/CV duty evasion. For example, GAO found that CBP could not confirm the total number of cases of evasion it had found, thereby complicating CBP's ability to manage these cases. The GAO also faulted CBP for failing to track and report on the outcomes of allegations of evasion received from third parties. These deficiencies in CBP's efforts, according to GAO, diminished the ability of CBP to effectively fight evasion, of Congress to oversee CBP's efforts in this regard,

and of industry stakeholders to evaluate the impact of their allegations.¹⁸

Reinforcing the intensified focus on AD/CV duty evasion, the Congress is currently considering bills that would provide additional powers to CBP to fight evasion, as discussed in section 5 below.

3 DOC'S ROLE IN COMBATING DUTY EVASION

DOC is entrusted with administering U.S. trade remedy law, and carries out investigations and reviews to determine the extent of alleged dumping and subsidies conferred by foreign governments.¹⁹ A critical part of any U.S. trade remedy proceeding and a key aspect of DOC's role is the establishment of scope—i.e., the description of the merchandise covered by the proceeding and therefore subject to AD/CV duties. While the scope definition provided by the petitioning U.S. industry is always the starting point, DOC possesses inherent authority to clarify proposed and existing scope language to ensure that it is readily administrable, enforceable, and less amenable to circumvention.²⁰

U.S. law provides DOC with explicit authority to address alleged circumvention of AD/CV orders in a number of scenarios. In each scenario, DOC is authorized to clarify or interpret the scope so as to include goods that may not fall within the literal parameters of the scope. Specifically, under the statute, DOC may clarify scope language to include: (1) merchandise completed or assembled in the United States;²¹ (2) merchandise completed or assembled in other foreign countries;²² (3) merchandise that has been altered in minor respects to avoid falling within the literal scope of an order;²³ and (4) merchandise developed subsequent to an AD/CV duty investigation.²⁴ DOC's regulations provide detailed guidance on the conduct of anti-circumvention proceedings, including for each of the circumvention

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¹⁴ *Ibid.*, at 7–8.

¹⁵ *Ibid.*, at 9.

¹⁶ *Ibid.*, at 10–13.

¹⁷ *Ibid.*, at 13–22.

¹⁸ *Ibid.*, at 25–30.

¹⁹ U.S. law divides the main responsibilities in administering trade remedy law between DOC and the U.S. International Trade Commission (ITC). DOC's role is to determine the extent of alleged dumping and subsidization by foreign governments, and the ITC's role is to evaluate whether U.S. industries are materially injured (or threatened with injury) by the imports at issue. See 19 U.S.C. § 1671 et seq.

²⁰ See, e.g., *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995) (DOC “enjoys substantial freedom to interpret and clarify its antidumping duty orders”); *Mitsubishi Heavy Indus. Ltd., v. United States*, 986 F. Supp. 1428, 1433 (1997) (“Commerce retains broad discretion to define and clarify the scope of an antidumping investigation in a manner which reflects the intent of the petitioner”).

²¹ 19 U.S.C. § 1677j(a).

²² 19 U.S.C. § 1677j(b).

²³ 19 U.S.C. § 1677j(c).

²⁴ 19 U.S.C. § 1677j(d).

scenarios set forth in the statute.²⁵ DOC's authorizing statute also authorizes the provision of information obtained during AD/CV duty investigations or reviews to CBP to assist with investigations "into fraud and evasion."²⁶

DOC publishes quarterly lists of its scope and anti-circumvention determinations. To cite two of the most recent instances of DOC's invocation of its above-referenced authority, DOC recently concluded that: (1) certain tissue paper products produced in India from Chinese-origin jumbo rolls and/or cut sheets of tissue paper are circumventing the AD order on China as merchandise developed in a third country;²⁷ and (2) certain blends of honey and rice syrup constitute later-developed merchandise within the scope of the AD order on China.²⁸ The sheer number of recent and ongoing anti-circumvention proceedings—eight are identified in the quarterly notices posted so far this year—would seem to suggest either that creative evasion of AD/CV duty orders is indeed wide-spread, or that the scope language of many AD/CV duty orders is ambiguous and in need of clarification.

One of the principal current circumvention allegations facing DOC relates to its recently imposed AD/CV duty orders on photovoltaic (PV) cells from China, whether or not assembled into modules. Under the scope of these orders, coverage tracks the country of origin of the cells.²⁹ Thus, cells produced in Taiwan, but assembled into modules in China, do not fall within the scope of the orders. Conversely, cells produced in China, but assembled into modules in Taiwan, are within the scope of the orders. Based on an analysis of confidential import data provided by CBP, DOC preliminarily determined that "some importers may either be improperly declaring merchandise as not subject to the AD/CVD orders, or may be

understating the value of the imported merchandise declared as subject to the relevant orders."³⁰ DOC's proceeding is ongoing, but recent press reports indicate that DOC is reviewing allegations that solar cell producers are engaging in minor processing or labeling of Chinese-made cells in third countries in order to improperly claim non-Chinese origin for U.S. shipments.³¹ The AD/CV duty orders on PV cells highlight the creative lengths to which some commercial actors may reach in order to avoid AD/CV duties, and underscore the challenge for the U.S. government in attempting to rein in duty evasion.

Under its anti-circumvention authority, DOC may clarify or interpret scope language in order to limit creative avoidance of AD/CV duties. DOC's authority to clarify scope language is, however, less useful in combating willful evasion of AD/CV duties through misrepresentation by U.S. importers of country of origin or merchandise characteristics or HTSUS classification. In circumstances involving fraudulent representations to CBP—the nub of the problem at issue in this article—DOC's power to interpret and clarify scope language is of limited utility.

To be sure, DOC can and does play an important role in combating AD/CV duty evasion through the provision of data it collects from foreign exporters and U.S. importers, and related analysis, to CBP and ICE. As a senior DOC official stressed in recent testimony before the U.S. Senate, DOC has in recent years ramped up its coordination with CBP and ICE in seeking criminal convictions of numerous entities evading AD/CV duty orders.³² In one of the higher profile criminal proceedings, DOC provided data contributing to the indictment of a major German food distributor, Alfred L. Wolff GmbH, ten of its executives, and Gong Jie Chen, a Chinese national and sales manager of QHD Sanhai Honey Co., Ltd. In this case, the

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²⁵ See 19 C.F.R. § 351.225.

²⁶ 19 U.S.C. § 1677f(b)(1)(a)(ii).

²⁷ Notice of Scope Rulings; 78 Fed. Reg. 42,934 (July 18, 2013). See Memorandum from Paul Piquado, Assistant Secretary for Import Administration to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations re Preliminary Determination Decision Memorandum for the Anti-Circumvention Inquiry on Certain Tissue Paper Products from the People's Republic of China Involving AR Printing & Packaging India Pvt. Ltd. (February 27, 2013).

²⁸ Notice of Scope Rulings; 78 Fed. Reg. 9,370 (February 8, 2013).

²⁹ Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order, 77 Fed. Reg. 73018 (December 7, 2012); Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Countervailing Duty Order, 77 Fed. Reg. 73,017 (December 7, 2012). The relevant scope of each order provides: "Modules, laminates, and panels produced in a third-country from cells produced in the PRC are covered by this order; however, modules, laminates, and panels produced in the PRC from cells produced in a third-country are not covered by this order." Under these orders, AD rates range from 18.32% to the PRC-wide rate of 249.96%, and CVD rates range from 14.78% to 15.97%. *Ibid.*

³⁰ Memorandum from Abdelali Elouardia, Antidumping and Countervailing Duty Operations, DOC, to The File, re: Referral of Potential Evasion Concerns to the Department of Homeland Security (April 9, 2013).

³¹ Inside U.S. Trade, Chinese Solar Firms Under Commerce Scrutiny For Alleged Duty Evasion (August 1, 2013).

³² Testimony of Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Testimony before the Committee on Finance, Subcommittee on International Trade, Customs and Global Competitiveness (May 5, 2011).

defendants allegedly conspired to import honey valued at USD 40 million, illegally concealing Chinese origin in order to avoid AD duties of USD 80 million.³³

4 CBP'S ROLE IN COMBATING DUTY EVASION

CBP is on the front lines of international trade and is responsible for identifying import shipments that are likely subject to AD/CV duty orders. In performing this mission, CBP faces a formidable foe in importers who wish to evade U.S. trade remedy laws because identifying and investigating likely evasion often involves finding a needle in the haystack of incoming shipments. In 2012, CBP processed over USD 2.3 trillion worth of imported merchandise at its 329 ports of entry, including the processing of over 24 million cargo containers (which averages to more than 65,000 containers a day).³⁴ Thus, CBP must use a variety of sophisticated measures to identify importers who are trying to evade U.S. trade remedy laws.

CBP employs a three-step process to identify potential evasion of AD/CV duty orders.³⁵ The first step involves targeting shipments of cargo where evasion is likely occurring.³⁶ CBP's National Targeting and Analysis Group (NTAG) for AD/CV duty enforcement is headquartered in Plantation, Florida.³⁷ The NTAG analyzes data from a variety of sources, including U.S. import data and information that CBP receives from the public via its e-Allegations website³⁸ to identify and target shipments and importers who are likely evading U.S. trade remedy orders.³⁹ CBP explained to GAO that it looks for anomalies in import data like entries using the same HTSUS tariff code as a product that is subject to an AD/CV duty order but the entry is not entered as a type 03 entry (i.e., subject to an AD/CV duty order), or where the country of origin is a known trans-shipment point or does not have the production capabilities to produce the imported product, or where the entered value is significantly lower than other shipments of that product.⁴⁰

After the NTAG identifies potential shipments from the millions that CBP processes on an annual basis, it can use a variety of different measures to determine whether the shipment contains products that are subject to an order and whether the importer is trying to evade a particular AD/CV duty order.⁴¹ CBP outlined five different methods it has used to verify whether AD/CV duty evasion is occurring.⁴² The methods include targeting shipments from the same importer of record; issuing Requests for Information (CF28s) asking the importer of record to provide additional documents to support their import filings; referring matters to ICE to initiate criminal investigations and gather evidence from foreign countries; physically examining shipments at ports of entry; collecting samples for additional analysis; and auditing importers.⁴³

Some of the methods that CBP employs are very useful in quickly identifying certain types of evasion methods identified in Senator Wyden's report. For example, CBP's physical examination and collection of samples identifies evasion techniques employing misclassification and in some instances incorrect country of origin declarations. CBP can, for example, quickly determine that supposed wooden garment hangers are actually steel garment hangers that are subject to AD/CV duties. Similarly, CBP can use laboratory analysis to determine that various types of agricultural products are likely from countries that are subject to AD/CV duty orders.

Unfortunately, however, in instances where importers have falsified various import documents like commercial invoices or, for other products, where CBP does not have the requisite information to develop a particular laboratory analysis, the investigation may take more time and require the use of additional resources to determine whether evasion is occurring. In these instances, CBP may have to engage ICE to conduct an investigation to verify the accuracy of the importer's statements. For example, if an importer is using a double-invoicing scheme to illegally under-value its merchandise, CBP and ICE will have to do a more extensive audit and investigation of the importer to

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³³ *Ibid.*, at 4–5.

³⁴ http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/02012013_3.xml.

³⁵ GAO, Antidumping and Countervailing Duties; Management Enhancements Needed to Improve Efforts to Detect and Deter Duty Evasion (May 2012).

³⁶ *Ibid.*, at 7.

³⁷ *Ibid.*

³⁸ <https://apps.cbp.gov/eallegations/>.

³⁹ GAO at 8.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

determine whether evasion is occurring. Thus, in many instances, CBP and ICE are required to expend a large amount of time and resources to identify potential evasion.

Once CBP is able to identify evasion, CBP can compel the importer to pay the AD/CV duties owed, initiate civil penalty proceedings, seize evading merchandise, or refer the matter to ICE for potential criminal prosecution. CBP has vigorously pursued all of these methods over the past few years and was able to collect USD 208 million in penalties against 237 importers of record who were found to be evading AD/CV duties between 2007 and 2011.⁴⁴ Similarly, CBP made 33 seizures of evading merchandise worth about USD 4 million during the same period.⁴⁵ Thus, CBP has been somewhat successful in cracking down on AD/CV duty evasion. However, as Senator Wyden's report demonstrates, CBP needs to do more as various foreign businesses openly discuss ways to evade AD/CV duties with complete strangers showing little to no fear of repercussions.

Recognizing the challenges that it faces, CBP in 2012 announced the creation of its Re-Engineering Dumping (RED) Teams that are partnerships with ICE and various CBP offices to assist in the enforcement of AD/CV duty orders.⁴⁶ The RED Teams are currently reviewing the entire import process to identify new methods to help counter ever advancing evasion of AD/CV duties. Some of their activities thus far include a study of the various scenarios where ports should require the use of single entry bonds for importers suspected of evasion.⁴⁷ It is also working with DOC to increase the lines of communication with that agency, including the potential of sharing enforcement information with DOC as part of DOC's confidential case records under Administrative Protective Orders.⁴⁸ As outlined below, the authors submit that the development of the RED Teams is helpful, but that intensified administration action is needed to ensure that CBP has the resources and backing it needs to properly enforce AD/CV duty orders.

5 CURRENT LEGISLATIVE PROPOSALS

In response to Senator Wyden's report, the GAO report, and domestic party feedback, a number of bills have been

introduced in Congress to combat the apparently growing problem of AD/CV duty evasion. In particular, Senators Max Baucus and Orrin Hatch (the Chairman and Ranking Member of the Senate Finance Committee) included a title in their draft Customs Reauthorization bill "Trade Facilitation and Trade Enforcement Reauthorization Act of 2013" (S. 662 introduced on March 22, 2013), to address AD/CV duty evasion. Similarly, Congressman Kevin Brady, Chairman of the Ways and Means Trade Subcommittee, also included language to address AD/CV duty evasion in his draft Customs Reauthorization bill, the "Customs Trade Facilitation and Enforcement Act of 2012" (H.R. 6642, introduced on December 7, 2012). Lastly, Congressmen Levin, the Ranking Member of the Committee on Ways and Means and McDermott included provisions that are similar to the two other bills in their bill entitled "Customs Enhanced Enforcement and Trade Facilitation Act of 2012" (H.R. 6656 introduced on December 13, 2012). A description of each of the three bills is provided below.

5.1 The Trade Facilitation and Trade Enforcement Reauthorization Act of 2013 (Section 662)

The Senate bill would provide to domestic producers a clearly designed administrative path for pursuing allegations of evasion with CBP. Upon the receipt of allegations, CBP would be required to initiate an investigation within ten business days, and to reach a determination within 270 calendar days from the date of initiation.⁴⁹ Furthermore, the bill would require CBP to initiate an investigation upon receipt of referrals from other federal agencies claiming that a person is evading AD/CV duty orders.⁵⁰ Under the bill, CBP would be authorized to find that a person has evaded an AD/CV duty order when the person has entered merchandise that is subject to an AD/CV duty order through the use of material and false information provided to CBP or the omission of material information.⁵¹ Evasion, however, does not include clerical errors, including clerical errors made by an electronic system.⁵²

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⁴⁴ *Ibid.*, at 11.

⁴⁵ *Ibid.*

⁴⁶ http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/add_cvd/adcvd_outreach/enforcement_overview.ctt/enforcement_overview.pdf.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ S. 662 pg. 142 and 145.

⁵⁰ *Ibid.*, at 143.

⁵¹ *Ibid.*, at 141.

⁵² *Ibid.*, at 141–142.

During the course of an investigation, CBP may issue questionnaires to the domestic party bringing the allegation, the person that has allegedly evaded the AD/CV duty order, foreign manufacturers or producers of the imported merchandise, and the government of the exporting country.⁵³ CBP is allowed to make adverse inferences in the event that it does not receive responses from either the party bringing the allegation, the importer, or the foreign manufacturer or producer.⁵⁴ Finally, within 90 days after the initiation of an investigation, CBP may suspend the liquidation of entries filed on or after the initiation of the investigation, extend the liquidation of entries filed before the initiation of the investigation and take any other action necessary to protect U.S. revenue.⁵⁵

If CBP makes a finding of evasion under the bill, it may continue to suspend the liquidation of entries filed on or after the date of initiation of the investigation.⁵⁶ CBP must also notify DOC that it has determined that an importer evaded an AD/CV duty order and request that DOC identify the applicable duty rate for the entries whose liquidation has been suspended or extended.⁵⁷ Finally, if CBP finds that evasion has occurred under the bill, CBP must require the posting of cash deposits on all entries whose liquidation have been suspended or extended, and CBP would be authorized to take additional action to issue administrative penalties pursuant to 19 U.S.C. § 1592.⁵⁸

The bill provides an additional layer of administrative review where the CBP Commissioner may review de novo the agency's findings.⁵⁹ The Commissioner must make a determination within 60 days after the filing of an appeal.⁶⁰ The Commissioner's decision would be reviewable by the Court of International Trade using an "arbitrary or capricious" standard of review.⁶¹

Lastly, the bill would require CBP to provide an annual report to the Senate Finance Committee and the Committee on Ways and Means summarizing its AD/CV enforcement activities, including the number of

investigations initiated, the amount of additional duties collected, and the countries of origin of products that were determined to be evading U.S. trade remedy laws.⁶² CBP would also be required to provide a public version summarizing some of the relevant information.⁶³

5.2 The Customs Trade Facilitation and Enforcement Act of 2012 (H.R. 6642)

Using a different approach, the House bill continues to treat AD/CV duty evasion as a matter subject to sensitive and confidential law enforcement investigations. The bill does not impose timelines on CBP, and it does not create a new cause of action for domestic producers or importers at the Court of International Trade. Instead, the bill would establish a Trade Law Remedy Enforcement Division within CBP's Office of International Trade that would be responsible for investigating potential evasion and for coordinating with other federal entities to stop AD/CV duty evasion.⁶⁴ Furthermore, the bill would also mandate that CBP assist small businesses in the preparation of allegations of AD/CV duty evasion, and would require CBP to report to Congress annually on its anti-evasion policies and activities.⁶⁵

The bill would require CBP to enter into agreements with foreign countries to increase cooperation in detecting and fighting evasion, and to facilitate overseas investigations of evasion.⁶⁶ Finally, the bill would also attempt to advance international cooperation on anti-evasion efforts by establishing a corresponding negotiating objective for future trade agreements.⁶⁷

5.3 Customs Enhanced Enforcement and Trade Facilitation Act of 2012 (H.R. 6656)

The House Democrats bill combines the strategies of the House Republican bill with the Senate bill. Specifically,

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⁵³ *Ibid.*, at 145–146.

⁵⁴ *Ibid.*, at 146.

⁵⁵ *Ibid.*, at 151.

⁵⁶ *Ibid.*, at 147.

⁵⁷ *Ibid.*, at 148–149.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, 152–153.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*, at 153.

⁶² *Ibid.*, at 155–159.

⁶³ *Ibid.*, at 159–160.

⁶⁴ H.R. 6642 at 106–107.

⁶⁵ *Ibid.*, at 109.

⁶⁶ *Ibid.*, at 114–115.

⁶⁷ *Ibid.*, at 116–117.

the bill includes a framework, with a set timeline, that CBP must follow when determining that evasion is occurring, albeit with slightly shorter timelines and authority to extend the timeline as needed.⁶⁸ The effect of the determination is the same as the Senate bill, mainly giving CBP the authority to suspend or extend liquidation on entries found to evade AD/CV duties.⁶⁹ Furthermore, like the other House bill, it includes provisions creating a Trade Law Remedy Enforcement Division within the Office of International Trade.⁷⁰

5.4 A Good Starting Point, But More Is Needed

The authors agree that many of the new tools and procedures that would be established by the above-described bills would advance CBP's ability to combat AD/CV duty evasion. The authors question whether the detailed procedural mechanism set forth in the Senate bill would unnecessarily reduce CBP's flexibility in responding to different AD/CV duty evasion scenarios it may encounter. The authors also note that the bills in their current form do not expressly acknowledge or endorse CBP's recently introduced RED Teams strategy, which is already advancing the Congressional objectives reflected in the bills. As Congress considers the bills and works toward a reconciliation of the Senate and House versions, it should ensure that its prescriptions do not upset the newly launched RED Teams strategy.

To materially boost the success of CBP's anti-evasion efforts, however, the administration must engage directly with its key trading partners that are home to commercial actors involved in AD/CV duty evasion, regardless of whether the evading activity is known to those governments. As the GAO report made clear, CBP's current efforts to combat evasion are stifled by a lack of cooperation from foreign governments that possess—or are home to companies that possess—directly relevant evidence (e.g., supposed production facilities listed on dubious customs invoices). The GAO report also explained that, while CBP routinely seeks to enter into information-sharing agreements with its foreign counter-parts, cooperation is limited—particularly with respect to China. It is one thing for Congress to dictate that CBP should seek to enhance its cooperation with China and other countries home to entities involved in evasion of U.S. AD/CV duties. It is quite another for the administration to press its trading partners directly in existing international negotiations and fora to enter into cooperation agreements.

Two opportunities for such pressure, which the administration appears to be under-utilizing, exist right now. One is the Trans-Pacific Partnership (TPP) negotiations, which are rapidly moving toward an advanced stage. It does not appear that the United States is actively seeking concessions from any of the TPP countries that would enhance CBP's ability to detect and deter AD/CV duty evasion. However, the chapter on trade facilitation is a logical existing platform for the United States to seek enhanced customs cooperation, including with respect to duty evasion efforts. At a minimum, with TPP negotiations still underway, the United States should seek to establish mechanisms for customs cooperation and dialogue broad enough to accommodate coordinated, multi-jurisdiction action against duty evaders.

Another opportunity for such dialogue is the S&ED, which the United States also does not appear to be utilizing to seek enhanced customs cooperation from China on matters relevant to evasion. The S&ED, however, provides a suitable forum for such discussion—especially given the focus of recent sessions on “creating a level playing field for U.S. firms and workers.”⁷¹ The U.S.-China Joint Commission on Commerce and Trade (JCCT) provides another currently under-utilized China-specific vehicle for the United States to seek enhanced customs cooperation from China.

Finally, the existing network of U.S. Trade and Investment Framework Agreements (TIFAs) could serve as mechanisms for the United States to press trading partners to take action against duty evasion. For example, most TIFAs, including the TIFA with ASEAN, expressly permit the establishment of ad hoc working groups. The United States could take advantage of this existing authority to seek the establishment of working groups specifically focused on duty evasion.

As noted above, the Brady bill would introduce a negotiating objective on AD/CV evasion. The objective of this provision is appropriate, but requires greater specificity. As we have shown, existing bilateral and multilateral mechanisms, combined with ongoing negotiations, provide a number of opportunities to add focus and specificity to the broadly worded negotiating objective contained in the House bill.

Finally, the Levin/McDermott includes language requiring the implementation of regulations to ensure that CBP along with the DOC and ICE work together to strongly enforce AD/CV duty evasion. The authors believe that this provision is a promising starting point for inter-agency cooperation to enforce U.S. trade remedy laws. The

Notes

⁶⁸ H.R. 6656 at 110–128.

⁶⁹ *Ibid.*, at 124–128.

⁷⁰ *Ibid.*, at 105–109.

⁷¹ U.S. Fact Sheet – Economic Track of the Fourth Meeting of the U.S.-China Strategic and Economic Dialogue (S&ED).

authors suggest that additional inter-agency cooperation is necessary to ensure that all three agencies are kept abreast of ever changing trade flows and methods of evasion. The information sharing should give the agencies the ability to use their limited resources to target likely spots of evasion. Likewise, it should reduce the likelihood that law-abiding importers are not unwittingly caught in over expansive dragnets.

6 CONCLUSION

AD/CV duty evasion is an enduring and possibly intensifying challenge to the U.S. government's ability to protect the integrity of its trade remedy system and associated revenue to the U.S. Treasury. The U.S.

industries seeking the relief of AD/CV duty orders should applaud the energy with which Congress is now seeking to provide CBP and other involved federal entities with the tools needed for a more effective approach to detect and respond to evasion. Law-abiding importers also have a stake in an effective anti-evasion regime. They will be stuck with unfair competitive pressures if less scrupulous importers of the same products are able to circumvent AD/CV duties intended to level the playing field. As we argue in this article, the bills now before Congress represent a good start in redressing the imbalance caused by evasion. What is ultimately needed, however, is intensified action by the administration to seek international customs cooperation, specifically targeted to evasion and the information required to identify and isolate it.