UNPAID "NEW SHIPPER" CUSTOMS BONDS HIGHLIGHT MAJOR PROBLEMS IN CUSTOMS' MANAGEMENT OF SINGLE ENTRY BONDS

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"An honest man's word is as good as his bond." [1]

I. SUMMARY AND CONCLUSIONS

The saga of the "new shipper" customs bonds is a depressing, cautionary tale, for it highlights the serious problems that plague U.S. Customs and Border Protection's ("Customs") multi-billion dollar use of single-entry customs bonds ("SEBs"). These bonds often are the agency's sole leverage for ensuring that foreign-made goods comply with U.S. law, including its provisions for achieving food and product safety. The new shipper bond saga also demonstrates the lengths to which some sureties will go to avoid having to pay Customs under an SEB upon the bonded importer's default.

Customs to date has assessed – but failed to collect – $1 billion in antidumping ("AD") duties[2] on imports of four agricultural products from China – fresh garlic, crawfish tail meat, canned mushrooms and honey – that were entered during the nine-year period from 1998 through 2007.[3] Significant evidence, including Customs' public records, shows that the payment of $400 to $500 million of the unpaid duties is secured by 2,500 to 3,000 specialized SEBs – so-called "new shipper" bonds – that were issued during this period by several major U.S. insurance companies in their capacity as bond "sureties." The sureties typically issued the bonds on behalf of no-asset, fly-by-night importers, which posted the bonds with Customs as collateral against the risk that the importers would fail to pay the amount of AD duties Customs ultimately assessed on the secured imports two or more years after entry.

The face value of each bond is two to four times the value of the secured imports, and ranges from about $50,000 to $1 million. Under standard dumping procedures of which the importers and sureties were or should have been aware, each bond's face value specified the amount of AD duties Customs would ultimately assess on the bonded imports *unless* the Chinese

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[1] Miguel de Cervantes Saavedra, Don Quixote de la Mancha (Part II, Book IV, Ch. 34).

[2] General references herein to the AD law, AD orders, and AD duties are intended to include the same terms under the U.S. countervailing duty ("CVD") law, the companion import trade remedy law to the AD law.

[3] See Attachment 1 (Chart listing certain aggregated data from Customs' annual reports for FYs 2001-2012 under the Continued Dumping and Subsidy Offset Act of 2000, available at http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/ cont_dump/).

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exporter that had shipped them convinced the U.S. Commerce Department ("Commerce") that the imports had been dumped at a lower rate, or had not been dumped at all.

But this rarely happened, because the exporters typically were *also* no-asset shell companies whose common goal with the importers was to use the bonds to enter as many low-priced imports as possible while the sureties were still offering the bonds to any importer willing to pay the relatively small bond premium (typically 1 percent of the bond's value), *without determining whether the importer was creditworthy, or requiring that it post collateral with the surety equal to the bond's value, in case the surety was required by the importer's default to perform under the bond*. Had the sureties instead followed established underwriting practices, none of the new shipper bonds would have been issued, and none of the dumped imports entered under the bonds would have been shipped, for the importers could not have posted the very large cash deposits that would have been required in the absence of the bonds.

The bogus exporters and importers used the bonds to enter hundreds of thousands of metric tons of imports into the U.S. market at steeply dumped prices, as if the AD orders on the four types of agricultural imports from China (the "Four Orders") didn't exist. This eight-year flood of imports had a devastating impact on the competing domestic producers. Further, the huge duty bills Customs started issuing ten years ago on the bonded imports were ignored, first by the importers, which had vanished according to plan; and next by the sureties, which figured that, for many reasons, Customs would fail to sue them for payment before the running of the six-year statute of limitations.

In fact, Customs filed no collections lawsuit against a new shipper bond until after the domestic producers filed their own suit in the U.S. Court of International Trade ("CIT") in April 2009. That lawsuit sought to force the sureties to perform under the bonds, and Customs to aggressively pursue recovery from the sureties. In two decisions over 18 months, the CIT dismissed all claims against the sureties and Customs, and that dismissal was affirmed on appeal last year. In the intervening three years, however, the U.S. Department of Justice ("DOJ") finally filed two dozen lawsuits on behalf of Customs against eight sureties seeking the recovery of $52 million on 729 new shipper bonds that secure entries subject to the Four Orders.

That those bonds cover just a small part of the uncollected duties secured by the new shipper bonds is demonstrated by the strategies three of the sureties have adopted to minimize their liability under the bonds. Hartford Fire Insurance Company ("Hartford Fire") has filed 278 lawsuits at the CIT over the last few years to avoid payment under an estimated 1,800 new shipper bonds that surety issued.[4] Indeed, *one in every four cases filed at the CIT in 2011 and 2012 was a bond-avoidance lawsuit filed by Hartford Fire*.

Lincoln General Insurance Company ("Lincoln General") has sued several of its independent sales agents in federal district court for indemnification under $90 million in new shipper bonds the surety claims those agents negligently issued without following Lincoln General's standard underwriting requirements. In the meantime, the surety to date has only paid

[4] The number of Hartford Fire's bond-avoidance lawsuits is based on a review of the CIT's electronic docket, at https://ecf.cit.uscourts.gov/cgi-bin/iquery.pl?61928352248465-L_1_1-0-33772-pty.

the government a fraction – less than $3 million – of the $90 million the surety claims Customs has demanded.[5] In 2004, Great American Insurance Company similarly sued its independent agents for negligently issuing in its name $10 million in new shipper bonds – five years before Justice finally filed a collection lawsuit against the surety, and long before the surety paid a penny under the bonds.[6]

As parties to these lawsuits, the sureties have made clear they will fight Justice and Customs on a bond-by-bond basis – a tactic designed to discourage the government from engaging in the prolonged and costly litigation such fighting would take, and to encourage Customs to let the sureties off the hook. This strategy, though lawful, belies a curiously cynical attitude toward *the sureties' favored role as among the few insurance companies that can issue bonds in transactions involving the federal government*. This is particularly so, considering the sureties' astonishing negligence in issuing the bonds, the millions of dollars in premiums they earned in doing so, and the devastation these bonds wrought on the domestic producers over many years.

Yet Customs must share the blame for this fiasco, because the agency's serious errors in managing the new shipper bonds have significantly contributed to the duty-collections failures under the Four Orders. These include:

- Customs' failure to obtain bonds on many entries for which bonds were required;
- its loss or misplacement of some or many of the bonds it did obtain;
- its acceptance of bonds with facial defects or errors that made them unenforceable; and
- its failure to file collections lawsuits under some bonds before the running of the six-year limitations period.[7]

The new shipper bond saga conveys a lesson beyond the tremendous injury the domestic producers suffered as a result of the bonds' issuance, the sureties' failure to pay as promised, and Customs' failure to vigorously pursue bond collections. As noted above, SEBs are the best – and often the only – leverage Customs holds to ensure that imports comply with U.S. laws intended

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[5] See *Lincoln Gen. Ins. Co. v. Kingsway Am. Agency, Inc*., 1:11-CV-1195, 2012 WL 1598120 (M.D. Pa. May 7, 2012), and *Lincoln Gen. Ins. Co. v. Kingsway Am. Agency, Inc.*, 1:11-CV-1195, 2013 WL 214634 (M.D. Pa. Jan. 18, 2013), in which the court has twice rejected Lincoln General's request for a declaratory judgment of defendant's liability to Lincoln General for the $87 million it claimed Customs had demanded payment under new shipper bonds, but which the surety had not yet paid. Id. at 3-4, 9-10.

[6] See discussion *infra* at note 54.

[7] Customs' management of SEBs has also been criticized in several government reports over the last ten years. The most recent report, "Efficacy of Customs and Border Protection's Bonding Process," was issued by the U.S. Department of Homeland Security's Office of the Inspector General in June 2011, and is available at: http://www.oig.dhs.gov/index.php?option=com_content&view=article&id=26&Itemid=37. That report concluded (p. 1) that two-thirds of $12 billion in SEBs Customs accepted during 2009 "contain errors that may result in noncollection."

to ensure they are safe for consumption and use here. The new shipper bond saga demonstrates, however, that Customs is not able – or lacks the institutional will – to effectively pursue sureties that attempt to avoid their obligations under SEBs. This means that an SEB's implied assurance – that the imports it covers comply with U.S. law – is illusory, and that Americans are at a higher risk of being physically or economically injured by imports secured by SEBs than is generally appreciated.

II. THE CRUCIAL ROLE OF CUSTOMS BONDS[8]

Congress has charged Customs with ensuring that each commercial entry of foreign-made merchandise into this country complies with the extremely broad range of statues, regulations and rules that constitutes U.S. law. To do this, Customs requires each U.S. importer to promise that each of its entries fully complies with U.S. law before the agency will release the goods to the importer. This generally includes the importer's promise that it has reported the imports' correct tariff classification, quantity and value, and country-of-origin; that the importer will pay the full amount of duties, taxes and fees Customs ultimately determines are owed on the importer's entries; and that the imports will not harm humans or the environment when they are used or consumed in this country.

What if an importer's promise turns out to be false? We now know that there are many dishonest exporters and importers that will tell Customs virtually any falsehood to get products that violate U.S. law into this country. We also know that Customs has little leverage over importers to keep them honest. In most cases, Customs' only leverage is a customs bond.

A. The Elements of a Customs Bond

A customs bond is a three-party contract that is issued by an established U.S. insurance company, referred to in this context as the bond's "surety," that has been approved by the U.S. Treasury Department ("Treasury") to issue surety bonds, including customs bonds, for use in transactions involving the U.S. Government.[9] The bond is issued on behalf of an importer, referred to as the bond "principal," and which pays the surety a premium for issuing the bond. Customs is the bond's identified "beneficiary."

Through the bond, the surety promises that if the importer fails to keep its specified obligations on specified entries, the surety will pay Customs a sum of money up to the bond's face value. If and when the surety pays Customs under the bond, it is immediately subrogated to Customs' former right to seek payment from the importer, including the filing of a collections lawsuit against the importer.

Thus, a customs bond is intended to transfer the risk that an importer will not fulfill its obligations to Customs on a specific entry *from* Customs *to* the surety.

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[8] See generally "Questions and Answers on Customs Bonds" (U.S. Customs Pub. No. 0000-0590, revised Nov. 2006), available at: http://www.cbp.gov/xp/cgov/trade/trade_programs/bonds/.

[9] See 31 U.S.C. §§ 9301-09; 31 C.F.R. § 223.11; 19 C.F.R. § 113.37.

B. Continuous and Single-Entry Bonds

There are two types of customs bonds. A *continuous bond* is a relatively low-value bond that typically covers all of the entries made by the importer that is the bond's principal for a one year period. Customs generally requires every commercial importer to maintain a continuous bond with a face value equal to the higher of $50,000 or 10 percent of the total amount of taxes, fees and duties the importer paid Customs during the most recent year. Should the an importer become insolvent during the bond's pendency, Customs can demand payment from the surety, and apply its proceeds to any amount owed Customs by the importer, up to the bond's value. While proceeds from a continuous bond can be used to pay assessed but uncollected AD duties, Customs typically can recover just a fraction of an insolvent importer's unpaid AD duties under a continuous bond, given the bond's relatively low value and relatively high amount of AD duties typically involved when an importer defaults on paying them.

The second type of customs bond is the *single-entry bond* ("SEB"). For entries where the risk of an importer's default in keeping its promises to Customs is high, the importer often will be required by the applicable laws and regulations to post, in addition to its standard continuous bond, an SEB with a high enough value to cover the heightened risk. For example, for many food related imports, Customs, in conjunction with the U.S. Food and Drug Administration, requires an importer to post an SEB of up to three times the entry's value.

III. THE ILL-FATED "NEW SHIPPER" BONDS

A. Basic Procedures For Assessing and Collecting AD Duties

To understand how the new shipper bonds wrought so much havoc, one must appreciate the basic procedures under which AD duties are assessed and collected.

Final AD duties are not billed and collected at the time imports subject to an AD order are entered. Rather, over the two or more years following entry, Commerce will determine the rate at which the imports were dumped, which is referred to as the "assessment" rate, and typically is expressed as a percentage of the imported goods' declared value.[10] Commerce will then instruct Customs to (1) determine, in the course of liquidating the entry, the amount of final AD duties owed by multiplying the entry's value by the assessment rate; and (2) bill the importer for those duties.[11]

Upon entering imports that are subject to an AD order, an importer must post with Customs a specific amount of collateral – typically in cash – against the importer's potential failure to pay the final AD duties billed by Customs upon the entry's liquidation.[12] The amount of this "cash deposit" is determined by multiplying the declared value of the merchandise times

[10] 19 U.S.C. §§ 1675(a)(1)(B), (a)(2)(A); 19 C.F.R. §§ 351.213(a), (b)(2).

[11] 19 U.S.C. §§ 1675(a)(1)(B), (2)(A), (2)(C).

[12] See 19 U.S.C. §§ 1673e(a)(3), 1673g(a)(collateral required on entry); 19 U.S.C. § 1505(a); 19 C.F.R. §§ 351.211(a), (b)(2)(collateral typically must be in cash form).

the relevant exporter's "deposit rate," which is the rate (also expressed as a percent) at which Commerce has most recently determined the exporter dumped earlier imports into this country.[13]

B. "China-Wide" Duty Deposit Rates

New entries from an exporter in a non-market economy country like China that has not been reviewed by Commerce, and thus has not yet been assigned its own deposit rate, will be subject to the so-called "country-" or "China-wide" deposit rate, which typically is substantially higher than the deposit rates assigned to exporters that have successfully been reviewed by Commerce. Entries from exporters that have not previously shipped to the U.S. market – so-called "new shippers" – are subject to the China-wide deposit rate.

C. The 1995 Addition of "New Shipper" Administrative Reviews, and the New Shipper Bonding Option, to the AD Law

In 1995 the AD law was amended to allow new shipper exporters to obtain their own deposit rates by participating in a "new shipper" administrative review of the relevant AD order, based on Commerce's analysis of the exporter's U.S. shipments made over the most recent six- to twelve-month period.[14] During the year or more it takes Commerce to complete a new shipper review, new entries from the participating exporters continue to be subject to the China-wide deposit rate. The amended law, however, allows an importer to satisfy the duty deposit requirement on such entries by posting an SEB with a face value equal to the amount of the cash deposit that otherwise would be required.[15] Such bonds are known as "new shipper bonds," and the importers' ability to use such bonds is known as the "new shipper bonding option."

For an entry covered by a new shipper bond, if the importer on whose behalf the bond was issued fails to pay the amount of final AD duties assessed and billed by Customs, the surety that issued the bond is required to pay the duties up to the bond's face value. Once it does so, the surety becomes subrogated to Customs' right to sue the importer for repayment.

D. The Sureties' Failure to Follow Established Underwriting Rules Allowed Bogus Traders to Exploit the New Shipper Bonding Option

A relatively small group of Chinese and U.S. traders soon discovered that many sureties were willing to issue new shipper bonds on behalf of importers entering merchandise from exporters that were undergoing new shipper reviews under the AD orders on four agricultural imports from China – fresh garlic, crawfish tail meat, canned mushrooms and honey ("Four Orders"); and that these sureties would do this without following the standard bond underwriting

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[13] 19 U.S.C. §§ 1673e(a)(3), 1675(a)(1).

[14] See Pub. Law 103-465 of Dec. 8, 1994, Title II, Subtitle A, § 220(a), Subtitle B, Part 4, § 283(c), 198 Stat. 4857, 4930 (codified as amended at 19 U.S.C. § 1675(a)(2)(B)).

[15] 19 U.S.C. § 1675(a)(2)(B)(iii). Under a 1985 memorandum of understanding between Customs and Commerce, Customs is required to obtain an SEB on any entry subject to an AD Order, and for which a bond can be used in lieu of cash to meet the duty deposit requirement, if the applicable AD duty deposit rate is five percent *ad valorem* or higher. See T.D. 85-145, published at 19 Cust. B. & Dec. 331 (the "Commerce/Customs MOU"), http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/revenue/bonds/accept_cash.ctt/accept_cash.doc.

procedures of (1) determining whether the importers were creditworthy; and (2) requiring the importers to deposit collateral with the sureties equal to the high face value of the bonds, which was about two to four times the value of the secured imports.[16] The sureties only required that the importers pay them a relatively small premium for issuing the bonds (i.e., about 1 percent of the bond's value). These traders realized that their ability to obtain new shipper bonds just by paying small bond premiums would allow them to enter huge volumes of these goods into the United States, and to sell them here at steeply dumped prices, as if the Four Orders did not exist.

From 1998 to 2006, the sureties collectively issued an estimated 2,500 to 3,000 new shipper bonds, with an estimated combined face value of $400 to $500 million, on behalf of newly-created importers with no assets, which used the bonds to enter hundreds of millions of pounds of fresh garlic, crawfish tail meat, canned mushrooms and honey from China from the 107 similarly brand-new, no-asset Chinese exporters that requested and participated in new shipper reviews under the Four Orders. These imports had an ongoing devastating impact on the domestic producers that were supposed to be protected from such imports by the Four Orders. Had the importers been required to post cash deposits instead of bonds, none of these imports would have been entered, and all of the injury caused by the imports would not have occurred. For the importers would have been required to post cash deposits equal to the value of the new shipper bonds, which the importers, being shell companies with no significant assets, could not have done.

E. Enactment of the Byrd Amendment Gave Domestic Producers a New Form of Remedial Relief: Receipt of Collected AD Duties

As enacted 90 years ago, the AD law was intended by Congress to protect domestic producers from continuing to be injured by ongoing imports that are sold here at dumped prices.[17] For eight bleak years, the sureties' issuance of the new shipper bonds to fly-by-night, no-asset importers allowed massive amounts of imports subject to the Four Orders to be sold here at steeply-dumped prices, and thereby denied the domestic producers the original remedial protection Congress intended in enacting the AD law.

Nevertheless, Congress' enactment in 2000 of the so-called "Byrd Amendment"[18] added a new form of remedial relief to the AD law. That amendment requires Customs to distribute at the end of each fiscal year – beginning with FY 2001 – all AD duties collected during that year on imports subject to AD orders, to qualifying domestic producers under the relevant orders, on a

[16] During this period, the China-wide deposit rates under the Four Orders ranged from 183.80 percent (for the China honey AD order) to 376.67 percent (for the China fresh garlic AD order).

[17] See, e.g., *United States v. Eurodif S.A.*, 129 S. Ct. 878, 884 (2009); *Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1575 (Fed. Cir. 1995) ("To protect domestic industries from unfair competition by imported products, United States law imposes a duty on dumped goods . . . ."); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983) (a domestic producer covered by an AD order "has a strong, continuing, commercial-competitive stake in assuring that its competing importers will not escape the monetary sanctions deliberately imposed by Congress" through the AD Statute).

[18] The Byrd Amendment's formal name is the Continued Dumping and Subsidy Offset Act of 2000, which was enacted as part of Public Law 106-387.

specified pro-rata basis.[19] The courts have recognized that Congress clearly intended through the Byrd Amendment to enhance and supplement the original remedial relief provided AD/CVD laws, by providing domestic producers, through the distribution of collected duties, with compensation for the injury they suffered from covered imports that continued to be sold in the U.S. market at unfairly low prices.[20]

In 2006, the Byrd Amendment was limited to apply only to duties collected on imports that were entered before the end of FY 2007 (i.e., September 30, 2007).[21] Because the last entries secured by new shipper bonds were made in August 2006 (when Congress suspended the new shipper bonding option), Customs must distribute to the qualifying domestic producers under the Four Orders all AD duties collected on all entries secured by these bonds at the end of the fiscal year in which the duties are collected.

Thus, while the sureties' issuance of the new shipper bonds had denied for eight years the domestic producers under the Four Orders the traditional relief intended by Congress through the AD law – protection from ongoing injury caused by continuing dumping – the domestic producers could still be relieved to a degree from that injury through receipt of the duties secured by the new shipper bonds – but only if and when Customs actually collects the duties from the importers or the sureties that have bonded them.

F. The Substantial AD Duties Customs Billed on the Bonded Entries Were Ignored by the Importers and the Sureties

Starting in 2000, Commerce began determining that virtually all of the imports that were secured by new shipper bonds had been dumped here at the high China-wide deposit rates used to determine the face value of the bonds, and Customs subsequently assessed hundreds of millions of dollars in AD duties on these imports. Three things happened. First, the bogus importers disappeared as planned, and never paid Customs' bills. Second, the sureties ignored Customs' subsequent demands to pay the duties as promised under the new shipper bonds. Third (and as detailed in Part IV.B. below), through April 2009 Customs failed to file a single collections lawsuit against any surety under a new shipper bond at the CIT, which has exclusive jurisdiction over such lawsuits.[22] The combined behavior of the importers, sureties, and Customs -- year after year -- denied the domestic producers under the Four Orders of the new remedial relief Congress intended through the Byrd Amendment: the receipt of their share of the AD duties collected on the bonded imports.

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[19] 19 U.S.C. § 1675c(a) (repealed); 19 C.F.R. § 159.61(a).

[20] See, *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1352 n.23 (Fed. Cir. 2009), *cert. denied*, 130 S. Ct. 3273 (2010) (the Byrd Amendment's "primary purpose" is to compensate domestic producers injured by dumping); *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369, 1380 (Fed. Cir. 2003) (the Byrd Amendment "actually enhances [the AD Statute's] remedial nature").

[21] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 7601, 120 Stat. 4, 154-155 (Feb. 8, 2006).

[22] 28 U.S.C. § 1582(2).

IV. THE DOMESTIC PRODUCERS' FIVE-YEAR EFFORT TO STOP THE CONTINUED ISSUANCE OF NEW SHIPPER BONDS

A. Early Efforts to Warn the Sureties and Congress to the Danger of New Shipper Bonds

Over the eight years the new shipper bonds were issued, the entry and sale of huge volumes of steeply-dumped imports devastated the four domestic industries that were supposed to be protected from ongoing dumping by the Four Orders. At first, the domestic producers took little action, thinking the sureties would soon discover they were courting an enormous risk by issuing bonds worth two to three times the value of the secured imports on behalf of no-asset, fly-by-night importers. But the wave of dumped imports allowed by the bonds continued to grow.

On September 26, 2002, the domestic producers sent a nine-page memorandum to one of the two national surety trade associations – the Surety Association of America – that detailed the huge risk the new shipper bonds posed to the sureties, and the immense damage they were inflicting on the domestic producers.[23] The association and its members ignored that warning.

In the spring of 2003, the domestic producers initiated a campaign to convince Congress to stop the huge damage being wrought by the new shipper bonding option by quickly repealing it, but the campaign was stymied by the reasonable disbelief of key Members and their staffs that the sureties could actually be issuing such risky bonds on behalf of brand new importers with neither assets nor established credit history, contrary to what had to be established underwriting guidelines and simple common sense.

B. In 2003, Several Sureties Told Congress They Faced Substantial Liability for New Shipper Bonds

By the fall of 2003, several sureties had become aware that Customs was assessing huge amounts of AD duties on imports secured by new shipper bonds they had issued, as is evidenced by testimony given on behalf of a second national surety trade association, the American Surety Association ("ASA"), at an October 30, 2003 hearing held by the House Ways & Means Committee.[24] The ASA therein reported that several major sureties had issued many new shipper bonds to fly-by-night, no-asset importers, and faced substantial current liability for unpaid AD duties that Customs had already billed on entries secured by their bonds, and substantial future liability for the duties that would be billed on as yet unliquidated entries. That potential future liability was confirmed by Customs' report in early 2004 that, as of Oct. 1, 2003, it was holding *$236 million* in new shipper bonds on unliquidated entries under the Four Orders.[25]

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[23] See Attachment 2.

[24] See Attachment 3.

[25] See Attachment 1.

C. Some Predicted the Sureties Wouldn't Pay Under the Bonds, and Customs Wouldn't Sue for Payment

Contacts through 2004 between representatives of the domestic producers under the Four Orders and certain sureties indicated that:

- While several sureties faced significant liability under new shipper bonds they had issued, most of them already had that liability covered by the significant interest-bearing cash reserves each surety was required by law to maintain.

- Nevertheless, none of the sureties would readily comply with Customs' demands that the sureties pay as promised under the new shipper bonds.

- The sureties would instead make Customs file collections lawsuits against them, and trust that the agency would fail to do so before the running of the six year statute of limitations, after which such lawsuits would be blocked, which would remove all risk of liability for the sureties.

- The sureties were confident that Customs and Justice, which would have to prosecute such lawsuits at the CIT – would not file collections lawsuits, because:

    (1) Such lawsuits, which must be brought on a bond-by-bond basis, would require much time, and substantial government resources.

    (2) Any amounts Customs recovered under the bonds could not be retained by the government, but would have to be distributed to the relevant domestic producers under the Byrd Amendment.

    (3) Customs' aggressive pursuit of payment under the new shipper bonds would financially strain some important sureties, which could discourage them from continuing to issue customs bonds, which are an essential component to all import transactions.

D. A Likely $350 Million in New Shipper Bonds Were Issued Between October 2003 and August 2006

As noted, several major sureties claimed that they had stopped issuing new shipper bonds by the fall of 2003, and that only one surety – Hartford Fire – continued to issue the bonds for the next three years, until August 2006, when Congress finally suspended the new shipper bonding option. If this is true, it is likely that Hartford Fire issued in the range of $350 million in new shipper bonds during that period.

According to Customs' 2007 "Rollup Report" for unliquidated entries subject to AD/CVD orders, the agency was holding, as of the first day of FY 2008 (i.e., Oct. 1, 2007, more than a year after Congress suspended the new shipper bonding option), *$349 million* in new

shipper bonds on unliquidated entries under the Four Orders.[26] As noted above, Customs had earlier reported that as of Oct. 1 2003, it was holding $236 million in new shipper bonds on unliquidated entries under the Four Orders.[27] Because most entries subject to AD orders are liquidated two to four years after entry, it is likely that most, if not all, of the unliquidated entries secured by new shipper bonds at the start of FY 2004 were liquidated by the start of FY 2008, four years later.

If this happened, all of the $349 million in new shipper bonds held by Customs on unliquidated entries under the Four Orders would have been issued between Oct. 1, 2003 and August 2006, when Hartford Fire was allegedly the only surety still issuing new shipper bonds. This would mean that the upper range of new shipper bonds Customs received under the Four Orders is about $585 million.

E. In 2004, Customs Withdrew Its Support for Repealing the New Shipper Bonding Option, and Favored Enhanced Continuous Bonds, But Not For Imports Subject to the Four Orders

In the spring of 2004, Congress started taking the new shipper bonding problem seriously when Customs admitted that it had failed to collect $90 million in AD duties assessed under the Four Orders during FY 2003.[28] The domestic producers appealed for Customs' help in convincing Congress to repeal the new shipper bonding option, and Customs Commissioner Robert Bonner initially expressed his support for repeal.[29] But in July 2004, Customs suddenly withdrew its support, and announced it had developed – without seeking any public comment or input – an alternative "fix" to its AD duty collections problems. Citing the substantial duty collection problems the agency had experienced under two of the Four Orders (fresh garlic and crawfish tail meat), Customs said that henceforth, it would require the importers of any agricultural or aquacultural goods subject to an AD order to post a continuous bond with a face value substantially greater than the relatively small-value continuous bond currently required.[30]

Customs' announcement of its "enhanced" – or "super-sized" – continuous bond requirement doomed for two years the domestic producers' congressional campaign for repeal of the new shipper bonding option, for the Members and staff that had been leading this effort had been told, or reasonably assumed, that Customs would first apply the enhanced continuous bond requirement to imports subject to the Four Orders. But this never happened.

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[26] Relevant pages of Customs' 2007 Rollup Report for Unliquidated Entries Subject to AD/CVD Orders are attached as Attachment 4.

[27] See Attachment 1.

[28] Id.

[29] See May 28, 2004 Letter from Comm'r Robert C. Bonner to Senator Robert Byrd, at 3; see also *Inside U.S.-China Trade*, Customs Says Cash Deposits Would Solve China AD Duty Collection Problem, June 3, 2004.

[30] For the history of Customs enhanced continuous bond requirement, see *National Fisheries Institute, Inc. v. U.S. Bureau of Customs & Border Protection*, 33 CIT __, __, 637 F. Supp. 2d 1270, 1274-78 (2009) ("*National Fisheries Institute*").

In fact, Customs did nothing for next eight months. Then in early 2005, Customs announced – again without first seeking public comment – that it would apply its new enhanced continuous bond requirement not to imports subject to the Four Orders, but to imports subject to Commerce's brand new AD orders on frozen shrimp imports from six countries.[31]

The domestic producers under the Four Orders were shocked by their exclusion from Customs' new program, because the agency's entire rationale for that program was its ongoing duty collections problems under the fresh garlic and crawfish tail meat orders. Now, in addition to diverting Congress from directly addressing the new shipper bond problem by repealing the new shipper bonding option, Customs closed the program for "fixing" its duty collection problem to the domestic producers that needed it most, and ensured that the flood of imports from new shippers under the Four Orders would continue.

Ironically, Customs' "fix" turned out to be a major failure. Two of the six countries whose frozen shrimp exports were now subject to both the new AD orders and Customs' continuous bond requirement immediately challenged that "fix" at the World Trade Organization ("WTO"), claiming it constituted an illegal antidumping "remedy" beyond those agreed to in the WTO's Agreement on Antidumping Remedies. A WTO dispute resolution panel and the organization's Appellate Body ultimately agreed with the challenge, which forced Customs to scuttle the program in early 2009.[32]

At the same time, many U.S. frozen shrimp importers that had been saddled with the enhanced continuous bond requirement challenged Customs' authority to implement it at the CIT, which eventually ruled that Customs had acted arbitrarily and capriciously in imposing enhanced bonding on the shrimp importers. The court critically observed that while Customs claimed that the substantial non-collection of duties under the AD orders on crawfish tail meat and fresh garlic imports from China demonstrated the need for the enhanced bonding for the new frozen shrimp AD orders, Customs had not applied such bonding to importers under the fresh garlic and crawfish tail meat orders, and had not explained how the failure of importers to pay duties under those orders indicated that the different importers of frozen shrimp would do likewise.[33]

F. Kept Free From Customs' Enhanced Continuous Bond Requirements, Imports Secured By New Shipper Bonds Continued to Flood the U.S. Market

In the meantime, the amount of AD duties assessed but not collected under the Four Orders continued to mount, totaling $369 million for FYs 2004-06, versus just $18 million in

[31] *National Fisheries Institute*, 637 F. Supp. 2d at 1275-75.

[32] See *Enhanced Bonding Requirement for Certain Shrimp Importers*, 74 Fed. Reg. 1224 (Jan. 12, 2009), in which Customs announced its intention to end its designation of shrimp subject to AD orders as subject to the agency's enhanced bonding requirement, in light of the recent WTO Appellate Body Report that found Customs' application of this requirement to shrimp from India and Thailand is inconsistent with the United States' WTO obligations. See also *National Fisheries Institute*, 637 F. Supp. 2d at 1280-81.

[33] *National Fisheries Institute*, 637 F. Supp. 2d at 1297-98.

collected duties, meaning that Customs had collected just five cents for every dollar of duties it assessed during this period.[34]

The campaign for repeal of the new shipper bonding option regained some traction in early 2005 when Customs announced it had failed to collect $213 million – or 96 percent – of the AD duties it assessed in FY 2004 under the Four Orders.[35] But the effort continued to be dogged by rumors that unidentified sureties were opposed to such repeal. When it appeared in early 2006 that Congress would soon act to limit the bonds, the number of Chinese exporters that requested new shipper reviews under the Four Orders spiked to 27, and volume of imports being entered from exporters while participating in these reviews similarly soared.

V. CONGRESS FINALLY SUSPENDED THE NEW SHIPPER BONDING OPTION IN 2006

In August 2006 Congress at last passed legislation that addressed the new shipper bond problem in three ways:

- Instead of repealing the bonding option, Congress *suspended* it for a three-year period that would expire on June 30, 2009.
- Congress made the suspension retroactive to April 1, 2006, and directed Customs to require all importers that had posted new shipper bonds on entries made on or after that date to replace the bonds with cash deposits.
- Congress instructed Customs, Commerce, Treasury and the Office of the U.S. Trade Representative ("USTR") to collaboratively submit to it two reports on whether the new shipper bonding option should be repealed at the end of its three-year suspension.[36]

The new law immediately stopped the issuance of new shipper bonds, which in turn stopped all new imports from the 27 Chinese exporters that were then undergoing new shipper reviews. Almost overnight, Congress' suspension of the new shipper bonding option restored the Four Orders' ability to protect the domestic producers from ongoing injurious dumping.

According to the GAO, importers had posted $96 million in new shipper bonds on new entries from April 1, 2006 to the bonding option's suspension in August – an amount that would equal $256 million on an annualized basis.[37] In response to Customs' demand that these

[34] See Attachment 1.

[35] Id.

[36] See Pub. L. No. 109-280, § 1632(a).

[37] See Antidumping and Countervailing Duties: Congress and the Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection, GAO Rept. No. 08-391 (March 2008) at 25, n.52.

importers replace these bonds with cash deposits, the agency received less than $100,000 – or 0.10 percent of the $96 million in bonds.[38]

VI. 2006-09 EVENTS LEADING TO THE DOMESTIC PRODUCERS' LAWSUIT AGAINST THE SURETIES AND CUSTOMS

A. As the Sureties Refused to Perform Under New Shipper Bonds, Uncollected Duties Under the Four Orders Continued to Mount

Following Congress' suspension of the new shipper bonding option in August 2006, domestic producers continued to wait in vain for an indication that Customs was vigorously pursuing the sureties for payment of the hundreds of millions of dollars they owed Customs under new shipper bonds. In its annual Byrd Amendment report for FY 2003, Customs for the first time listed for each AD order the amount of duties it had assessed but not collected during the relevant year, in addition to the amount it had collected. These reports show that during the six years from FY 2003 through FY 2008, Customs under the Four Orders:

- had assessed $773 million in AD duties;
- had collected only $50 million (or 7 percent) of that amount; and
- had failed to collect the remaining $723 million.[39]

The facts available at that time indicated that virtually all of the seven cents Customs had collected for each dollar of duties it assessed under the Four Orders had come from the relatively small amount of cash deposits that had been posted on entries that were not secured by new shipper bonds. The prediction made five years earlier in 2004 – that the sureties would refuse to pay under the bonds unless dragged into court by Customs – was coming true, as was the prediction that Customs ultimately would elect to not sue the sureties.

B. As Customs Failed to File Any Collections Lawsuits Against the Sureties, the Six-Year Limitations Period Began to Run on the Early New Shipper Bonds

According to the CIT's electronic docket from 2001 through 2008, Justice on behalf of Customs had filed only 26 lawsuits to recover under any type of customs bond, and none of those lawsuits involved a new shipper bond.[40] By early 2009, the domestic producers under the Four Orders became concerned that, with the passage of time without Customs having filed any collections lawsuits against new shipper bonds, the number of such bonds for which Customs was becoming time-barred from filing a collections lawsuit was growing. The domestic producers reasoned as follows:

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[38] Id.

[39] See Attachment 1.

[40] The reported information is based on a review of the CIT's electronic docket, at https://ecf.cit.uscourts.gov/cgi-bin/iquery.pl?61928352248465-L_1_1-0-33772-pty, of the lawsuits Justice filed against sureties from 2001 through 2008 under 28 U.S.C. § 1582(2).

- Because the first new shipper review under the Four Orders was initiated in May 1998, the entries under those orders secured by new shipper bonds would have begun then or shortly thereafter.

- Because imports subject to AD orders are typically liquidated two or more years after being entered, the liquidation of entries secured by new shipper bonds would have begun as early as May 2000.

- Because the six-year period within which Customs must file a collections lawsuit against a customs bond begins to run 30 days after the secured entry is liquidated, and continues without being tolled unless the relevant surety consents,[41] that period would have run in May 2006 for new shipper bonds that secured entries that were liquidated in May 2000.

Viewed from early 2009, these facts showed Customs was likely letting the statute of limitations run on a growing number of new shipper bonds.

C. By April 2009, Hartford Fire Had Filed 36 Lawsuits Claiming that the Byrd Amendment Had Voided Its Liability Under Its New Shipper and Other Bonds

Further, at the end of 2006, Hartford Fire filed the first of what has ballooned over the intervening five years into 278 lawsuits against Customs seeking relief from having to pay under an estimated 2,000 SEBs that secure the payment of AD/CVD duties. Of the 278 lawsuits, 201 (72 percent) challenge an estimated 1,800 new shipper bonds issued under the Four Orders (i.e., about 90 percent of all SEBs being challenged).[42]

Through the first quarter of 2009, Hartford had filed 36 lawsuits,[43] and asserted in each what came to be known as the "Hartford defense" against the surety's liability to perform under the customs bonds at issue. Through this defense, Hartford claimed:

- It had issued the bonds with the understanding that their sole beneficiary was Customs, which Hartford would have to pay if the bonds' principals failed to pay the duties secured by the bonds.

- By enacting the Byrd Amendment in 2000, Congress had made the domestic producers protected by the AD/CVD orders to which the entries secured by the Hartford's customs bonds were subject intended third-party beneficiaries of those bonds, without Hartford's knowledge or consent.

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[41] See *United States v. Ataka America, Inc.*, 826 F. Supp. 495 (CIT 1993), 28 USC 2415(a).

[42] The reported information is based on a review of the CIT's electronic docket, at https://ecf.cit.uscourts.gov/cgi-bin/iquery.pl?61928352248465-L_1_1-0-33772-pty, of the lawsuits Hartford Fire has filed against the United States contesting its liability under new shipper and other customs bonds, through the end of 2012.

[43] See Attachment 5.

- By making the relevant domestic producers intended third-party beneficiaries of the bonds, Congress substantially increased Hartford's risk of having to perform under the bonds, which voided the bonds, and thereby relieved Hartford of its obligation to pay thereunder.

In asserting the Hartford Defense, Hartford Fire's obvious strategy was to avoid all liability under its new shipper bonds, which constituted the vast bulk of its potential liability in these cases.

VII. THE DOMESTIC PRODUCERS' NEW SHIPPER BOND LAWSUIT AGAINST THE SURETIES AND CUSTOMS

Thus, by early 2009, the domestic producers under the Four Orders had become extremely alarmed by these circumstances:

(1) The ballooning amount of uncollected AD duties under the Four Orders (i.e., $773 million).

(2) The sureties' ongoing refusal to pay under the new shipper bonds that secured a substantial part of those duties.

(3) Customs' failure to have filed a single collections lawsuit against a new shipper bond despite the passage of eight years since the first entries secured by the bonds were liquidated.

(4) Hartford Fire's claim in its 36 lawsuits against Customs that the Byrd Amendment had voided their obligation to pay under their bonds.

The domestic producers appreciated both that they were the only parties that had a substantial interest in having the sureties forced to perform under the new shipper bonds, and that they lacked any leverage with Customs or the sureties to achieve that result. They accordingly decided to turn to the courts for assistance in correcting what to them was an obvious and enormous injustice.

On April 7, 2009, domestic producers filed a 15-count complaint with the CIT against Hartford Fire and five of its affiliates, and 11 other sureties, as well as Customs and Commerce. Referencing Hartford Fire's admission in its 36 lawsuits that the domestic producers were intended third party beneficiaries of the customs bonds it had issued, the complaint asked the court to recognize the plaintiffs as such, and to require the sureties to perform as promised under the new shipper bonds they had issued. The complaint also claimed that Customs and, to a lesser extent, Commerce, had failed to take a number of ministerial actions that were required to enable Customs to assess and collect AD duties under the Four Orders from importers and their sureties, and that Customs had taken several unlawful actions that prevented the agency from collecting such duties or distributing them under the Byrd Amendment.

In March 2010, almost a year after the complaint was filed, the CIT granted the defendants' motions to dismiss all of the claims against the sureties;[44] and in August 2010, the court granted the government's motion to dismiss all of the claims against Customs and Commerce.[45] A year and a half later, the Federal Circuit, in ruling on the plaintiffs' appeal of most of the dismissed claims, largely agreed with the CIT's analysis, and affirmed that court's dismissal of the claims.[46] Finally, in September of last year, the Supreme Court denied the plaintiffs' petition for certiorari for several of their claims against the government.[47]

VIII. FOLLOWING THE FILING OF THE NEW SHIPPER BOND LAWSUIT, JUSTICE FILED 24 LAWSUITS SEEKING PAYMENT UNDER 729 NEW SHIPPER BONDS

A. Justice's New Shipper Bond Lawsuits Against Eight Sureties

A month after the new shipper lawsuit was filed, Justice on behalf of Customs filed the first lawsuit to collect under the new shipper bonds, *United States v. Great American Ins. Co.* ("*Great American*").[48] Since then, Justice has filed an additional 23 collections lawsuits seeking recovery under new shipper bonds that secure entries subject to the Four Orders. These 24 lawsuits collectively are against eight sureties, and seek recovery under 729 new shipper bonds, with a combined face value of about $52 million.[49] As is discussed below, assuming the government succeeds in showing the sureties are liable under these bonds, the total amount of prejudgment interest at stake in these cases is substantial, likely in the range of $15 to $30 million dollars.

Thus, while the CIT's dismissal of the domestic producers' new shipper bond lawsuit was ultimately affirmed on appeal, the filing of that case – and its pendency for three and a half years – appears to have encouraged the government to much more aggressively press Customs' claims against the sureties.

B. Analysis of *United States v. Great American*

At this point, *Great American* is the only government collections lawsuit seeking recovery under new shipper bonds that has gone to final judgment. In that case, the government sought the surety's performance under eight SEBs, with a combined value of $8 million, to pay

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[44] *Sioux Honey Association v. Hartford Fire Insurance Company*, 700 F. Supp. 2d 1330 (Ct. Int'l Trade 2010).

[45] *Sioux Honey Association v. United States*, 722 F. Supp. 2d 1342 (Ct. Int'l Trade 2010).

[46] *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041 (Fed. Cir. 2012).

[47] *Sioux Honey Ass'n v. United States*, 133 S. Ct. 126 (Oct. 1, 2012). MICK's note: Or if you are putting before the previous opinion: cert. denied, 133 S. Ct. 126 (Oct. 1, 2012).

[48] See *United States v. Great American Ins. Co.*, 791 F. Supp. 2d 1337, 1343-45 (CIT 2011) ("*Great American I*").

[49] The number of the United States collections lawsuits to recover under new shipper bonds is based on a review of the CIT's electronic docket, at https://ecf.cit.uscourts.gov/cgi-bin/iquery.pl?61928352248465-L_1_1-0-33772-pty.]

an equivalent amount of duties assessed on entries form two exporters that were then undergoing new shipper reviews under the AD order on crawfish tail meat from China.[50]

Beyond being the first collections lawsuit for recovery against new shipper bonds, *Great American* is noteworthy for four reasons.

First, the eight entries at issue were made two to three years after the first entries from exporters undergoing a new shipper review under the crawfish tail meat order were made. Yet, *Great American* is the first collections lawsuit Justice filed against new shipper bonds securing entries under that order. What happened to the bonds that secure the many entries under that order that were made during the previous two years? Did Customs perhaps fail to obtain bonds for these entries? Or, did Customs perhaps fail to file collections lawsuits on these bonds before the running of the six-year limitations period? Because the potential amount that could be recovered on those earlier entries is substantial, these are serious questions that need to be answered.

Second, the CIT found in favor of Customs for five of the eight bonds at issue, whose total value was about $6 million.[51] The court, however, agreed with Great American that recovery under the other three bonds, with a total value of about $2 million, was barred by the running of the limitations period, because Commerce had failed to issue timely liquidation instructions to Customs for these entries. The entries became legally – or "deemed" – liquidated in February 2003, so that the six year limitations period ended in February 2009, or three months before the government filed its complaint. This relieved Great American of having to pay Customs $2 million.

The CIT's finding that Justice filed its lawsuit too late for $2 million in new shipper bonds validates the domestic producers' general concern that the government risks having to forego substantial recoveries under the new shipper bonds – both in bond principal and in accrued post-liquidation, pre-judgment interest on that principal – due to Customs' (and Commerce's) mismanagement of crucial ministerial actions related to duty assessment and collection.

Third, shortly after the CIT issued judgment in this case, and after Great American had filed its notice of appeal to the Federal Circuit, Justice asked the court to issue an amended judgment that would grant the government pre-judgment interest on the $6 million in bond principal the court had awarded Customs.[52] While the public version of the parties' filings on this motion do not reveal the amount of interest sought by the government, it is likely in the range of $1.5 to $3 million, for it would be calculated at the statutory rate of 6 percent per year, for the eight or so years from Customs' demand for payment under the bonds through the CIT's issuance of judgment in September 2011. The CIT, however, denied the government's motion

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[50] *Great American I*, 791 F. Supp. 2d at 1343-45.

[51] *Great American I*, 791 F. Supp. 2d at 1361-68.

[52] See *United States v. Great American Ins. Co.*, Slip Op. 12-49, 2012 Ct. Intl. Trade LEXIS 50 (Apr. 11, 2012) ("*Great American II*").

on the ground that it had failed to adequately request pre-judgment interest in its complaint, or pursue such an award during the two years prior to the court's issuance of judgment.[53]

This demonstrates the flaw in the reasoning that Customs understandably will be disinclined to vigorously pursue recovery under the new shipper bonds, for it is *only* the domestic producers under the Four Orders that would benefit from such recovery. To state the obvious: Even if the domestic producers were the only potential beneficiaries of new shipper bond recoveries, Customs is required by law and its own rules and regulations to vigorously enforce the AD law, and make vigorous efforts to recover all debt it is owed – both of which require Customs to make every effort to recover under the new shipper bonds.

But Customs' collection under these bonds would likely result in the government receiving and retaining much needed funds. First, the amount of uncollected duties under the China crawfish tail meat AD order far exceeds the amount the eligible domestic producers may receive under the Byrd Amendment; anything above that amount would be retained by the government.

Second, given Customs' general position that any interest that accrues on collected duties before they are distributed under the Byrd Amendment belongs to the government, the government likely would take the view that all post-liquidation, prejudgment and other interest it may recover from the sureties under the new shipper bonds also belongs the government. If the government is correct (and without conceding that it is), the government stands to recover an enormous amount of such interest, *but only if it recovers the bond principal*.

All entries that could have been secured by the new shipper bonds were made between May 1998 and August 2006, which means that most of these entries were likely liquidated between May 2000 and August 2008. This suggests that the period during which a surety would have been obliged to pay under each bond before being forced to pay -- and during which interest would accrued on the amount owed -- is two to ten years. Assuming (as is reasonable) the sureties issued in the range of $400-$500 million in new shipper bonds, an enormous amount of accrued interest would be due on the bonds. This being the case, Justice and Customs would appear to have every reason to vigorously pursue recovery under each and every new shipper bond. By not doing so, the government is foregoing huge amounts of much needed funds.

Fourth, and last, public documents filed early in the *Great American* case show that in 2004 – five years before the government filed its collections lawsuit against Great American, and seven years before the CIT issued judgment against the surety – Great American had filed a lawsuit in federal district court in Louisiana in which it essentially demanded that its independent agents that on the surety's behalf arranged for and executed the new shipper bonds at issue in the *Great American* case be forced to indemnify Great American for the $10 million Customs had demanded that the surety pay it under the bonds, but which it obviously had not yet paid, as shown by the collections lawsuit the government finally filed against the surety five years later.[54]

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[53] *Great American II* at 5-8.

[54] See *Great American Insurance Company of New York v. The CIMA Companies, Inc., et al.*, Case No. 2:04-cv-01363 (E.D. La.) ("*CIMA*"). On August 8, 2008, while several dispositive motions were pending in that case, an order was entered providing that the case was "closed for administrative purposes with all rights of the parties being (continued)

Would that Customs were to show equal zeal in defending its financial position with regard to the new shipper bonds.

Curiously, Great American's 2004 lawsuit involved two new shipper bonds, worth a combined $2 million, that were not included in the government's 2009 collections lawsuit against that surety. While the public record is not clear on this point, it appears that the government recognized it was barred by the statute of limitations from recovering under those two bonds, and accordingly left them out of its collections lawsuit.

* * *

January 30, 2013

reserved," and that the case "may be reopened upon the motion of any party." See *CIMA*, Order, Aug. 8, 2008 (Doc. No. 443). It seems likely that the parties realized that, with the six year limitations period for Customs' potential claims under the bonds due to run in several months, which would moot the Louisiana lawsuit, it was prudent to temporarily suspend that proceeding.

ATTACHMENT 1

Continued Dumping and Subsidy Offset Act of 2000
Distributions, Amounts Withheld Pending Litigation, and Uncollected Duties
FYs 2001-2012

Garlic from China (A-570-831)
Crawfish from China (A-570-848)
CPMs from China (A-570-851)
Honey from China (A-570-863)

	Total Amount Disbursed for Four Orders	Total Amount Disbursed for All AD/CVD Orders	Percentage of Four Orders for all Disbursed and all AD/CVD Orders	Uncollected Duties for Four Orders	Uncollected Duties for All AD/CVD Orders	Percentage of Four Orders for all Uncollected Duties Under all AD/CVD Orders Uncollected	Customs Bonds Held as of 10/1/03 for All AD/CVD Orders	Customs Bonds Held as of 10/1/03 for Four Orders	Percentage of Four Orders Customs Bonds Held as of 10/1/03
FY '01	$25,251.96	$231,201,890.83	0.01%	*	*	*	*	*	*
FY '02	$8,024,472.52	$329,871,463.94	2.43%	*	*	*	*	*	*
FY '03	$10,146,844.74	$242,215,502.00	4.19%	$90,271,110.65	$130,402,706.74	69.22%	$287,139,719.27	$236,266,793.39	82.28%
FY '04	$9,249,269.15	$284,124,932.54	3.26%	$213,337,942.98	$260,071,679.11	82.03%	*	*	*
FY '05	$3,895,308.47	$226,351,319.20	1.72%	$61,912,839.39	$93,254,022.26	66.39%	*	*	*
FY '06	$5,430,830.91	$380,085,799.14	1.43%	$94,275,833.33	$146,391,239.89	64.40%	*	*	*
FY '07	$7,321,823.58	$262,199,980.45	2.79%	$183,188,454.36	$236,948,202.74	77.31%	*	*	*
FY '08	$14,204,393.64	$226,045,891.22	6.28%	$79,745,945.05	$180,511,208.65	44.18%	*	*	*
FY '09	$10,905,292.66	$323,659,080.39	3.37%	$174,655,522.88	$294,654,329.16	59.27%	*	*	*
FY '10	$3,525,983.81	$40,448,263.49	8.72%	$74,369,667.26	$150,569,442.77	49.39%	*	*	*
FY '11	$17,586,202.79	$85,035,875.48	20.68%	$15,858,207.54	$103,939,925.65	15.26%	*	*	*
FY '12	$52,825,984.85	$118,669,570.55	44.52%	$20,512,129.73	$28,046,858.17	73.14%	*	*	*
Total FYs '01-'08	$58,298,194.97	$2,182,096,779.32	2.67%	$722,732,125.76	$1,047,579,059.39	68.99%	*	*	*
Total FYs '01-'12	$143,141,659.08	$2,749,909,569.23	5.21%	$1,008,127,653.17	$1,624,789,615.14	62.05%	*	*	*
Total FYs '03-'08	$50,248,470.49	$1,621,023,424.55	3.10%	$722,732,125.76	$1,047,579,059.39	68.99%	*	*	*
Total FYs '03-'12	$135,091,934.60	$2,188,836,214.46	6.17%	$1,008,127,653.17	$1,624,789,615.14	62.05%	*	*	*

*Not published.

Source: U.S. Customs and Border Protection website at: http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/

ATTACHMENT 2

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CONFIDENTIAL

MEMORANDUM

September 26, 2002

TO: **MR. SETH MONES, VICE PRESIDENT OF PUBLIC AFFAIRS AND GOVERNMENT RELATIONS**
THE SURETY ASSOCIATION OF AMERICA

FROM: **MICHAEL J. COURSEY, ESQ.**

RE: **HIGH RISK POSED FOR SURETY COMPANIES OF ISSUING BONDS TO THE U.S. IMPORTERS OF "NEW SHIPPERS" UNDER U.S. ANTIDUMPING ORDERS**

This memorandum is a follow-up to the telephone discussion we had on September 19, 2002, concerning the important role bonds play in a specific aspect of the administration of the U.S. antidumping and countervailing duty laws (collectively referred to herein as the "AD law"). The Association's members may not be aware of the high risk involved in issuing bonds in the context of what are called "new shipper" administrative reviews of final AD orders on imports from certain developing countries, especially the People's Republic of China ("China"). As is discussed in detail below, surety companies run a substantial risk of ultimately being held liable for many millions of dollars in unpaid duties stemming from these new shipper reviews.

As I mentioned, I am a partner with the Washington, D.C. law firm of Collier Shannon Scott PLLC. I work with about 25 other firm attorneys in our International Trade Section. A major part of our practice is representing domestic industries as petitioners in AD investigations conducted by Commerce. Our clients thus typically have interests adverse to the foreign exporters and U.S. importers that ship and handle products covered by final AD orders.

I. ANTIDUMPING LAW BACKGROUND

A. Definition of Dumping

To understand the problem that concerns us, a little knowledge is needed on how the AD law operates.

"Dumping" involves the sale of a foreign-made product in this country at prices that are lower than (1) the prices charged for the same good in the foreign producer's home market or largest third-country market, or (2) the good's cost of production. If a specific foreign-made

good is being dumped in the United States, and that dumping is causing or threatening to cause material injury to the competing U.S. producers, the United States Department of Commerce ("Commerce") will issue a final AD order. Commerce determines whether an import is being dumped by examining all importations of the relevant product during the year preceding its receipt of the domestic industry's petition requesting the conduct of a dumping investigation. In other words, Commerce's determination of dumping is based on its investigation of past importations of the relevant imports, which are referred to as the "subject merchandise."

B. The Effect of Final AD Orders

A final dumping order instructs the U.S. Customs Service ("Customs") to require all U.S. importers who import subject merchandise after the order is issued to post with Customs a cash deposit equal to the amount, in percentage terms, of dumping identified in the order times the subject merchandise's declared customs value. Thus, if Commerce issued a final order stating that widgets from Country A are being dumped at a rate of 30% *ad valorem*, and the declared "customs value"[1] of a new shipment of widgets from this country is $10/lb., the importer must post with Customs a cash deposit equal to $3/lb.

The 30% *ad valorem* rate used in this example is referred to as the "duty deposit rate," and the amount calculated by multiplying an import's customs value by the duty deposit rate is referred to as the "duty deposit." This duty deposit would remain with Customs in an interest bearing escrow account until, as is discussed immediately below, Commerce informs Customs at some later point of the exact amount of dumping duties owed on each shipment. The cash duty deposit is collected by Customs at the time of importation as security against the importer's being unable to pay any actual dumping duties that are subsequently determined by Commerce.

C. Annual Administrative Reviews of AD Orders

Every year, during the month in which an AD order was issued, a foreign producer or foreign exporter of imports covered by the order that were entered into the United States during the previous year may ask Commerce to determine the exact amount by which the imports in each shipment (also referred to as an "entry") were dumped. Members of the competing U.S. industry may also ask Commerce to do this for specific foreign producers or exporters. Commerce makes such determinations of the actual amount of dumping during the course of conducting an "annual administrative review" of the order.

If no one requests an administrative review for a specific foreign producer or exporter, Commerce immediately instructs Customs to assess final dumping duties on that exporter's shipments during the one-year period of review ("POR") at the duty deposit rate. Commerce also instructs Customs to collect the duties by transferring the amount of cash duty deposits

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[1] Customs value is typically the price the importer paid for the product on an FOB port-of-export basis.

made for the exporter's entries into the federal treasury. Commerce also instructs Customs to continue to collect duty deposits in cash on new entries at the current duty deposit rate.

D. Customs Execution of Commerce's Instructions at the Conclusion of Administrative Reviews

At the end of an administrative review (which can last a year or more), Commerce will inform Customs of the exact amount by which the imports in each entry during the POR were dumped. Commerce will also order Customs to "assess" final dumping duties against each entry at the amounts calculated by Commerce, and collect the duties.

Following the example started above, assume that in the first administrative review of the AD order on widgets from Country A, only one Country A exporter and one shipment during the POR is involved. If Commerce determined that the relevant entry of widgets was dumped at 30% *ad valorem*, Customs would simply inform the importer that the importer's obligation to pay the duties would be satisfied by the amount of cash duty deposits the importer had posted with Customs at the time of importation.

If Commerce determined that the amount of dumping was 40% *ad valorem*, Customs would inform the importer of the amount of dumping duties owed the government (plus interest) beyond the total cash duty deposits that were posted at the time of importation. If Commerce determined that the amount of dumping was 20% *ad valorem*, Commerce would refund (with interest) to the importer one third of the amount that had been posted as a cash duty deposits.

II. "NEW SHIPPER" ADMINISTRATIVE REVIEWS OF FINAL AD ORDERS

In 1995, the AD law was amended to require Commerce to conduct a special type of administrative review for foreign producers and exporters that are covered by an AD order, but which (1) did not ship the relevant product to the United States during the period examined by Commerce in the original AD investigation; and (2) are not affiliated with any foreign producer and exporter that exported the relevant product to the United States during that period. This procedure is referred to as a "new shipper" administrative review ("NS review").

A. Principal Benefit of NS Reviews: Ability to Import Subject Merchandise Without Posting Cash to Satisfy the Duty Deposit Requirement

There are two benefits provided to "new shippers" through a NS review. First, Commerce is supposed to conduct NS reviews within a relatively shorter period than regular administrative reviews (although this rarely happens in practice). Second, for the time during which Commerce is conducting a NS review, the U.S. importers of the new shipper are allowed to post as security against their potential AD duty liability a bond instead of cash. This typically results in significant savings for the importer on its import-related costs, because the cost of a bond is typically lower than the cost of not having use of the cash which otherwise would be posted by the importer as security. The size of the savings depends on the duty deposit rate to which the new shipper's exports otherwise would be subject upon importation into the United

States. The higher the duty deposit rate, the more valuable the benefit of being able to post a bond instead of cash.

B. All-Others and Country-Wide Duty Deposit Rates

Imports from any foreign exporter that was not individually examined during the original dumping investigation are subject to what is called the "all others" cash deposit rate, which is the weighted average of the dumping rates (also referred to as "dumping margins") of all exporters that were investigated. In the case of a dumping order on imports from a non-market economy ("NME") market like China, the duty deposit rate for exporters that did not participate in the original investigation is called the "country-wide" duty deposit rate, which typically is the rate of dumping demonstrated in the petition that originally requested the initiation of a dumping investigation

For example, the country-wide duty deposit rate under the AD order on fresh garlic from China is 376.67% *ad valorem*. In other words, a U.S. importer of Chinese garlic from a Chinese producer or exporter that was not examined in the original dumping investigation of fresh garlic from China would have to post a cash deposit of about $3.77 for every $1 in fresh garlic it imported. Such a high cash deposit rate, of course, typically would foreclose the relevant imports from the U.S. market.

C. Why Relatively High Duty Deposit Rates Discourage Imports

As mentioned above, regular administrative reviews can be requested only once a year, during the relevant AD order's anniversary month. These reviews take at least one year to complete. Thus, even where a Chinese exporter whose imports are subject to the China-wide rate can demonstrate during an administrative review that its own garlic shipments were not dumped, the U.S. importer of such an exporter typically must wait two or more years before it can recover the substantial cash deposits it would have to post for imports from that exporter. For an exporter whose duty deposit rate is relatively high, the cost to the U.S. importer in terms of the loss of the use of the cash it must post to meet the duty deposit requirement would typically result in the importer avoiding imports from that exporter.

D. Substituting a Bond for Cash Encourages Imports

In a NS review, however, an importer may satisfy the duty deposit requirement by posting a bond, as opposed to cash. While importers incur some costs in procuring bonds for this purpose, that cost typically is a fraction of the cost of having to satisfy the duty deposit requirement with cash. This benefit, in essence, enables an importer to handle imports from a new shipper during the pendency of the NS review, even if the new shipper has a substantial duty deposit rate.

1. Continuous Entry Bonds

Where the duty deposit rate is lower than 5% *ad valorem*, an importer of product from an exporter that is undergoing a NS review may use a continuous entry bond to satisfy the duty deposit requirement. Continuous entry bonds typically have a relatively small maximum face value of $50,000 or $100,000, which typically is sufficient to cover the risk of potential non-payment of final dumping duties where the duty deposit rate that is below 5% *ad valorem*.

2. Single Entry Bonds

Where the duty deposit rate is 5% *ad valorem* or higher, an importer must use a single entry bond with a face amount equal to the potential AD duty liability for every entry from the new shipper. The cost of using single entry bonds is much higher relative to the costs of using a continuous entry bond, but the single-entry-bond costs are still a fraction of the cost the importer would incur if it had to satisfy the duty deposit requirement by posting cash.

III. NS REVIEWS INVOLVING PROCESSED AGRICULTURAL PRODUCTS FROM DEVELOPING COUNTRIES LIKE CHINA POSE SUBSTANTIAL RISK FOR BONDING COMPANIES

As is mentioned above, in AD matters my law firm generally works for domestic industries whose interests are generally adverse to the foreign exporters of products covered by final AD orders, and the U.S. importers who handle these imports. We are currently representing the U.S. petitioners in a number of NS reviews under several AD orders on processed agricultural products from China. Our experience in representing petitioners in these NS reviews has led us to speculate that surety companies who issue single entry bonds on behalf of the U.S. importers of Chinese new shippers may not appreciate the substantial risk this activity poses for them. This risk is that the U.S. importers that are obligated to pay assessed dumping duties will not be able to do so when Customs attempts to collect them. When this happens, Customs will expect the surety companies that issued the bonds on behalf of the importers to pay these duties.

A. Case Study: The NS Review of Clipper Manufacturing Limited Under the AD Order on Fresh Garlic from China

Based on public information related to these matters, the amount of dumping duties that Customs is now or will soon be attempting to collect from the U.S. importers of certain Chinese new shippers is staggering. Recent NS reviews under the final AD order on fresh garlic imports from China, which has been in place since November 1994, presents an excellent example. That order currently imposes a single China-wide duty deposit rate of 376.67 percent *ad valorem* on all U.S. imports of fresh Chinese garlic.

In November 2000, an obscure Hong Kong exporter called Clipper Manufacturing Limited ("Clipper") requested the first NS review under the Chinese garlic AD order. Clipper's request was based on a single sale to the United States in October 2000 of several thousand

pounds of fresh garlic. (Fresh garlic is typically sold internationally in increments of 40,000 to 45,000 pounds -- the amount an ocean-going container holds.)

Commerce initiated the Clipper NS review in late December 2000, and completed it 15 months later, in March 2002. The review ended badly for Clipper: Commerce determined that Clipper's single sale that was subject to its NS review was not a *bona fide* commercial transaction[2] Commerce accordingly rescinded Clipper's new shipper review, and instructed Customs to assess final dumping duties on the single sale at the China wide rate of 376.67% *ad valorem,* and to immediately revoke from Clipper's importers the right to satisfy the duty deposit requirement for new importations from Clipper by posting a bond instead of cash. Of course, Clipper's shipments of fresh Chinese garlic to the United States ceased immediately following Commerce's issuance of this decision in March 2002. Clipper did not appeal this decision.

B. The Face Value of the Single Entry Bonds on Clipper's Exports During the NS Review is More Than $17 Million

During the 15-month pendency of its NS review, Clipper shipped a very substantial amount of fresh Chinese garlic to the United States, all of which was entered under single entry bonds. Public ship manifests show that Clipper began shipping fresh Chinese garlic to the United States by container load in March 2001, and ultimately shipped almost 8 million pounds of garlic to the United States by the end of that year.

This information is corroborated by official U.S. import statistics from Commerce's Census Bureau, which show that 7.93 million pounds of fresh garlic, with an FOB value of $4.63 million, were imported from China in 2001. Because Clipper was the only Chinese exporter in 2001 that could export fresh garlic to the United States without its importers having to post duty deposits in cash at the China-wide rate of 376.67% *ad valorem*, all or virtually all of these imports were likely shipped by Clipper.

Assuming Customs required Clippers' U.S. importer or importers to post single entry bonds at the China wide duty deposit rate on each entry from Clipper, the total face value of those bonds would be $17.44 million (i.e., $4.63 million x 376.67%). This does not include the value of the bonds that were issued to cover Clipper's shipments from January-March 2002 -- the last three months before Commerce's rescission of Clipper's NS review.

Public ship manifests also show that Clipper's major, and perhaps exclusive, U.S. importer in 2001 was a company called Panjee Co., Ltd., of City of Industry, CA ("Panjee"). Based on the public information we have obtained about Panjee, it is very unlikely that Panjee

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[2] Commerce based this finding on the fact that the price of the single sale was substantially higher than both the average price of fresh garlic exports from China to all countries during the POR, and the average price of fresh garlic from the United States and third countries sold in the U.S. market during the POR. Commerce concluded that, given the aberrational price of the sale, it could not be used as the basis for calculating a separate duty deposit rate for Clipper.

would be able to pay even a fraction of the potential AD duty liability for Clipper's shipments during the pendency of its NS review.

For example, Panjee's home office address is a single room in a small industrial park with no identification of the company that occupies the space. While Panjee is incorporated under California law, it has not registered with the dozen or so states in which, according to the public manifests, it maintains offices for purposes of receiving and distributing fresh garlic imports. Further, Panjee has not registered with the Department of Agriculture under the Perishable Agricultural Commodities Act ("PACA"), which requires that any company involved in handling fresh produce register under PACA or face substantial penalties. Finally, Panjee is not listed in the so-called "Blue Book," which lists all known U.S. fresh produce handlers (a term that includes produce importers).

None of this is indicative of a company with significant U.S. assets that could be used to satisfy the huge dumping duty assessment that is almost certain to be issued against Panjee in the near future, as is discussed immediately below.

C. Commerce Will Likely Order Customs to Collect Final Dumping Duties on Clippers 2001 Shipments at the 376.67 % *Ad Valorem* Duty Deposit Rate

In November 2001, while Clipper's NS review was still pending, Clipper formally asked Commerce to conduct a regular annual administrative review of its shipments made during the seventh POR (i.e., November 2000 through October 2001) of the Chinese garlic AD order. Clipper's intent was to show Commerce that its sales during the POR were not dumped, which would release its U.S. importer (and the surety company that issued the single entry bonds to cover the importer's potential dumping duty liability) from having to pay any AD duties for that POR. Had Clipper not asked to be reviewed for the seventh POR, Commerce would have immediately instructed Commerce to assess and collect AD duties on all of Clipper's shipments at the China-wide rate of 376% *ad valorem.*

U.S. import statistics show that about 4.87 million pounds of fresh Chinese garlic were imported during the seventh POR, at an FOB port-of-export value of about $2.83 million. As noted above, all or virtually all of these imports were likely shipped by Clipper, because Clipper was the only exporter during this period able to ship fresh Chinese garlic to the United States without its importers having to post cash to meet the China-wide AD duty deposit requirement. Were Commerce to determine that the China-wide rate should be applied to all of Clipper's seventh POR shipments, the AD duty liability for Clipper's importer would be about $10.66 million dollars ($2.83 million x 376.67%).

It appears that this will, in fact, happen. On August 9, 2002, Commerce issued its preliminary results of the seventh administrative review. *See* 67 Fed. Reg. 51,822 (Dep't Com.). In this decision, Commerce announced its intention (1) to rescind the seventh review as it applies to Clipper, and (2) to instruct Customs to assess final dumping duties against Clipper's seventh POR shipments at the China wide rate of 376.67% *ad valorem.* Commerce based this decision

on its finding that the Chinese companies that supplied Clipper with the product Clipper shipped to the United States during the POR, and not Clipper, were the appropriate "exporters" under the dumping law, and that their prices (to Clipper) should be used to determine whether the garlic in Clipper's shipments were sold at a dumped price.

Commerce's final results of the seventh administrative review are due Monday, December 2, 2002. It is extremely unlikely that Commerce will change any aspect of its preliminary results for Clipper, because Commerce's analysis consists of a reasonable reading of the record facts, and a straightforward application of an uncontroversial aspect of the dumping law.

If, as we expect, Commerce's final results for Clipper are a repeat of the preliminary results, Commerce will instruct Customs within 30 days to assess final dumping duties on Clipper's seventh POR shipments at the China-wide rate, and to immediately collect the duties from Clipper's U.S. importers. If the importers are unable to pay, Customs will foreclose on the single entry bonds that were issued as security against such a failure.

Clipper may attempt to stave off the "day of reckoning by appealing Commerce's decision to the U.S. Court of International Trade ("CIT"), which would stay Customs' hand until the appeal is resolved. The appeal would likely take a year or so, but Clipper's chances of having the CIT reverse Commerce would be quite slim. Clipper could then appeal to the U.S. Court of Appeals for the Federal Circuit, which would likely dispose of the appeal within a matter of months by upholding the underlying decisions of both Commerce and the CIT.

D. The Surety Company That Issued the Bonds Related to Clipper's Seventh POR Shipments Will Likely be Forced to Pay the Dumping Duties Owed by Clipper's U.S. Importer

In short, it is just a matter of time before Clipper's U.S. importer will be confronted with a massive bill for dumping duties stemming from Clipper's shipments.

As noted above, Clipper's major, if not sole, U.S. importer for these sales probably lacks the resources to pay even a fraction of the estimated $10.66 million dumping duty bill it will receive from Customs for the seventh POR. It thus appears that the surety company or companies that issued the single entry bonds for the Clipper sales ultimately will be held responsible by Customs for this daunting payment.

E. Further Risk Posed By Three New NS Reviews Under the Fresh Chinese Garlic AD Order

The risk of an importer's failure to pay substantial dumping duties in connection with a "new shipper" Chinese export goes far beyond the Clipper/Panjee shipments. In November 2001 -- a year after Clipper requested its NS review -- three Chinese exporters requested NS reviews under the fresh Chinese garlic dumping order. Each request was based on a single relatively small-volume sale each exporter made in October 2001. As Clipper used its new

shipper status to ship millions of pounds of Chinese garlic to the United States during pendency of its NS review in 2001, these three "new shippers" shipped 11.25 million pounds of fresh Chinese garlic, with a customs value of $5.40 million, to the United States during the first half of 2002.

If Commerce ultimately determines that the dumping duty owned on these shipments is the China-wide duty deposit rate, the amount of dumping duties owed would be $20.34 million. As with Clipper's U.S. importer, it appears that none of the three importers involved in these three new NS reviews would be able to pay even a fraction of these dumping duties. Instead, Customs would look for payment to the surety company that issued the bonds related to these shipments.

These NS reviews are going badly for at least one of the three exporters, for Commerce announced in August 2002 its intention to rescind that exporter's NS review.

F. Surety Companies Are Exposed to Substantial Risk in Other NS Reviews Being Conducted Under Many Other AD Orders on Agricultural and Manufactured Imports From China

Obscure, undercapitalized U.S. importers are creating similar massive liabilities for surety companies in NS reviews under many other AD orders beside the one on Chinese garlic. We represent the domestic industry with respect to two other AD orders on processed agricultural imports from China: honey and canned mushrooms. Other orders on Chinese agricultural products with which we are not involved include orders on frozen concentrated apple juice and crayfish. Further, there are dozens of other AD orders on manufactured goods from China, all of which involve a growing number of NS reviews.

In virtually all of these NS reviews, the relevant exporters and U.S. importers are first and foremost attempting to exploit the bonding privilege by entering as much of the relevant import as possible during the pendency of the NS review. That the U.S. importers involved in these reviews are typically unknown and very thinly capitalized entities indicates that they have no intention of paying should Customs present them with substantial bills for assessed duties. Those surety companies that have issued bonds for the importers will be held responsible for the duty payment.

* * *

We and our clients question why surety companies would expose themselves to the very substantial risk of issuing single entry bonds on behalf of the U.S. importers of products from China and other developing countries that are involved in NS reviews. It must be that this risk is not yet appreciated by surety companies. Given the newness of the NS review procedure, no such company has yet been presented with a demand by Customs for payment under bonds by the surety company following a massive default by a U.S. importer of the sort we believe will

occur in the context of the Clipper NS review. As is noted above, surety companies will likely be presented with such demands related to a number of NS reviews in the near future.

We would be happy to discuss the issues addressed in this memorandum with you and your colleagues after you have had a chance to review it. In the meantime, please don't hesitate to call me directly with any questions you may have.

Finally, I would appreciate your limiting circulation of this memorandum to the Association's staff, and, if you see fit, to certain Association members. I ask that you instruct any Association member to whom you distribute this memorandum not to distribute it outside of the company, and to hold its contents as confidential.

cc: John Herrmann, Esq. (Collier Shannon Scott, PLLC)

ATTACHMENT 3

House Committee on Ways and Means

Statement of the Customs Bond Committee of the American Surety Association

The Customs Bond Committee of the American Surety Association ("ASA") appreciates the opportunity to submit this testimony for the record in connection with the Ways and Means Committee Hearing on United States – China Economic Relations and China's Role in the Global Economy.

The American Surety Association is a trade association comprised of insurance companies, and their agents, authorized by the Department of Treasury to guarantee US government obligations. A standing committee of ASA is the Customs Bond Committee. Members of the committee represent surety companies that underwrite over 70% of all surety bonds currently on file with the Bureau of Customs and Border Protection ("Customs"). Members maintain offices throughout the country, principally in major port cities. Through the customs bonds they underwrite, ASA members ensure that importers -- including importers of Chinese products -- honor their legal responsibilities.

The issue we would like to raise with the Committee has to do with fraudulent Chinese imports into the United States, and how various illegal schemes are employed to avoid antidumping duties that are in place on agricultural products. These schemes undermine the effectiveness of antidumping laws to protect injured US domestic industries targeted by the fraudulent imports, and coincidentally, jeopardize the availability of surety bonds for legitimate Chinese trade, and perhaps for a broader spectrum of United States trade.

Antidumping duties are a statutory mechanism to increase the cost of selling a foreign product in the US marketplace that was originally sold for export to the US at a price less than the product is sold in the domestic market of the exporting country (*i.e.*, at a price less than the "fair market value" or "normal value" in a non-market economy). If foreign sales for export at less than "fair" or "normal" value result in economic injury to a US industry, then antidumping duties are assessed to "level the playing field."

For more than two centuries the US government has required importers to post security in one form or another to facilitate the import process while providing sound assurances of compliance with all import laws, and especially, to assure the collection of proper duties, taxes and fees when the final assessment is made by Customs. In lieu of depositing cash with Customs and restricting valuable working capital, importers in virtually all cases use corporate surety bonds ("customs bonds") to meet their statutory security requirements. Because of the security provided by the bonds, imports are released to the importer by Customs soon after arrival and avoid unnecessary port congestion and delay. Importers file the necessary paperwork and pay estimated duties within 10 business days after the merchandise is released from Customs.

Surety bonds are a unique form of security. A surety bond is a contract between three parties: the principal, who is the party that undertakes an obligation, the surety, who guarantees the principal will perform the obligation, and the obligee, who obtains the benefit of the bond. In the case of customs bonds, the importer is the principal, and the obligee is the United States. In the event a bonded importer fails to perform its obligations to Customs, Customs will seek performance from the surety. The surety will seek indemnification from the importer for any expense it incurs in performing its obligations under its bond. Surety companies do not willingly provide bonds to importers who they believe will not perform all their bonded obligations, unless they takes steps to protect their exposure in advance, generally by holding collateral, such as a bank letter of credit or taking a deposit of cash.

For the added creditworthiness and qualification a surety provides to the principal and to the benefit of the obligee, the surety collects a nominal premium from the principal. Because the overwhelming majority of customs bonds are not backed by collateral, importers find customs bonds to be an attractive means of fulfilling statutory requirements with minimal impact on the their limited working capital. The historically low loss activity has resulted in this combination of favorable and non-restrictive pricing and underwriting standards that importers find favorable. What we will present to you in our testimony could lead to situations that greatly restrict the surety industry's capacity to provide customs bonds to the importing public at low cost or for all types of importations.

Because of increased export activity and the non-market nature of China, Chinese exports to the US are the subject of numerous investigations into unfair trade practices; most notable are the antidumping investigations. Many products subject to antidumping investigations have antidumping duty rates that greatly exceed the actual entered value of the product (*i.e.*, in excess of 100% of entered value). When the antidumping duty cash deposit requirement approaches or exceeds the entered value, Chinese shippers and importers are more likely to develop schemes to avoid the requirement of making these substantial cash payments.

Within the last year, ASA members have uncovered two fraudulent import schemes used to avoid the requirement to make a cash deposit of antidumping duties on certain Chinese agricultural products: abuse of the "new shipper" rules and forging documents to falsely identify the shipper or manufacturer. Following the discovery of this fraud, many if not all of the major US surety companies have chosen not to knowingly underwrite antidumping duties for garlic, crawfish, mushrooms, or honey from China. This discovery forebodes crippling losses for the US surety industry, continued unfair competition to the US industries sought to be protected by the antidumping laws, and the closure of markets to Chinese agricultural industry *vis a vis* the refusal of the US surety industry to underwrite customs bonds for Chinese agricultural products. All parties will continue to lose greatly unless the US surety industry, Customs, the International Trade Administration of the Department of Commerce ("ITA") and Congress, work together to close the loopholes in the antidumping laws that allow the fraud to continue.

(1) Abuse of the "New Shipper" rules. The first scheme involves a Chinese shipper (exporter) subject to a high antidumping duty deposit rate. Such an exporter may set up a "new" shell company in China to act as a new shipper, and in some cases, also a shell company in the US to act as the importer. This "new" shipper seeks a "New Shipper" status from the ITA. He ships a few orders to the US market as a "New Shipper" and requests the ITA to undertake a "New Shipper Review" of his export sales price.

The undertaking of a "New Shipper Review" qualifies the importer for the privilege of posting a bond in lieu of making a cash deposit of the high antidumping duty rate. This bonding privilege continues while the detailed investigation proceeds. In the interim, this "new" shipper then ships a large volume of product. At the same time, other shippers may attempt to "counterfeit" the "new shippers" identity by submitting counterfeit invoices in order to take advantage of the bonding privileges. While ITA investigates, the customs bonds secure the estimated antidumping duties on the shipments.

Under this process, shippers or importers can operate for about 9-12 months and avoid the requirement of posting a high cash antidumping duty deposit at the "PRC-Wide Rate" (376.67% for garlic; 223.01% for crawfish; 198.63% for mushrooms; and 183.80% for honey). When the ITA finishes its investigation, it publishes its Final Results of the New Shipper Review. These results are formed after the ITA reviews the sales for export and import activity over the period. If the "New Shipper" cannot substantiate that it qualifies for a lower antidumping duty adjustment ("rate") than the "PRC-Wide" rate, ITA will assess and instruct Customs to collect the "PRC-Wide" rate" on all the previous entry transactions from this new shipper. Subsequently, the shipper or importer, or both, "disappear" never having had any intention of paying the antidumping duty increases. Many times there is a revenue

shortfall inadequately secured by surety bonds and cash deposits. In such cases, the government must write off uncollectible debt. All parties lose. The US industry that sought to be protected, the US surety industry, the law-abiding Chinese shippers and the legitimate importers of Chinese products, all continue to be injured by these fraudulent trade practices. All the while, the illegal shippers and importers obviously benefit.

(2) Forging Documents. The second scheme, referenced in brief above, involves the misappropriation of the name and identity of a legitimate Chinese exporter, which has a low/zero antidumping duty margin. This can be easily accomplished with today's desktop publishing capabilities, which allow for the preparation of "counterfeit" invoices. This scheme is carried out until either the counterfeit transactions are caught by the legitimate exporter (as a result of a loss of sales in the US) or by the ITA and "Customs" when it becomes apparent that the transactions reported by the legitimate exporter to the ITA pale in comparison to the evidence of sales/imports available to Customs.

ASA members have attempted on several occasions to gain the cooperation of Customs and the ITA to target and eliminate these fraudulent schemes. Generally, the agencies have rejected our requests. For example, both of the above schemes have been utilized against exporter Huaiyang Hongda (Hongda) in the antidumping case on Chinese garlic. The impact of these illegal schemes could be minimized and curtailed in the future through the administration of the antidumping review of the Chinese garlic for the current period under review (2001-2002). By reviewing the sales and shipments of the Chinese exporter Hongda, the ITA stands to learn more about the schemes and how to develop effective techniques to counter them. However, the ITA has rescinded its review of Hongda in the current Administrative Review. ASA recommends that the ITA reconsider its decision to rescind the Administrative Review and undertake a thorough review of this problem. Hongda's review presents the most immediate and clear "test case" for the ITA to resurrect confidence in its antidumping procedures with respect to China. In light of the schemes, overriding public interest dictates that the ITA take advantage of this opportunity and conduct a review of Hongda and other shippers of Chinese agricultural products who are, or can be identified by the surety community as, participating in or being victimized by the aforementioned schemes. A failure to fully address these issues head on by the ITA will result in the continued injury both to the domestic industry seeking protection, as well as to the US surety industry.

ASA also recommends that the United States government encourage the Chinese government to take an active involvement in monitoring the sale and export of commodities subject to US imposed antidumping duties. Such involvement may require the implementation of a visa program for verification of producer shipments. ASA members stress their willingness to arrange and/or participate in the development of independent verification programs on the United States side among the sureties, the legitimate Chinese shippers and Customs. If appropriate measures are not taken to curtail the schemes used to circumvent antidumping duties, surety companies will face staggering losses and/or will be forced to severely restrict access to customs bonds for these commodities in this trade lane, and domestic interests will continue to suffer unchecked unfair competition. This, in turn, will severely impact United States/China trade relations as law-abiding Chinese exporters will exit the market because their import customers will cease buying in the face of the crippling levels of liquid working capital which they would unnecessarily be required to pledge to continue importing.

Thank you again for the opportunity to submit comments on this very important issue. I look forward to working with you and your staff to address these critical matters.

ATTACHMENT 4

19USC1675C ADCVD UNLIQUIDATED ENTRIES ROLLUP

Case Number	ADD Pay Duty	ADD Bonded Duty	CVD Pay Duty	CVD Bonded Duty
A100108	20,481.45	0.00	0.00	0.00
A122006	1,882.11	0.00	0.00	0.00
A122047	433.29	0.00	0.00	0.00
A122057	15.06	0.00	0.00	0.00
A122085	0.00	0.00	0.00	0.00
A122212	577.85	0.00	0.00	0.00
A122217	4,184.19	0.00	0.00	0.00
A122401	8.10	0.00	0.00	0.00
A122503	102,723.04	0.00	0.00	0.00
A122506	294.13	0.00	0.00	0.00
A122601	32,272.78	0.00	0.00	0.00
A122605	245,809.18	0.00	0.00	0.00
A122804	16,999.72	0.00	0.00	0.00
A122813	195.90	0.00	0.00	0.00
A122814	0.00	0.00	0.00	0.00
A122820	296.14	211.61	0.00	0.00
A122822	5,724,936.90	0.00	0.00	0.00
A122823	287.47	0.00	0.00	0.00
A122826	729.59	1,139.43	0.00	0.00
A122830	779.73	0.00	0.00	0.00
A122837	0.00	530.15	0.00	0.00
A122840	22,436,394.65	0.00	0.00	0.00
A122847	38,496.86	0.00	0.00	0.00
A201108	40.97	0.00	0.00	0.00
A201212	33.48	0.00	0.00	0.00
A201215	351,454.03	0.00	0.00	0.00
A201216	145,327.51	0.00	0.00	0.00
A201601	404.19	0.00	0.00	0.00
A201802	6,392,622.60	0.00	0.00	0.00
A201805	213,323.97	4,526.28	0.00	0.00
A201809	708.71	0.00	0.00	0.00
A201817	160,127.77	0.00	0.00	0.00
A201820	233.90	0.00	0.00	0.00
A201822	23,614,190.82	0.00	0.00	0.00
A201827	4,002.83	0.00	0.00	0.00
A201830	874,399.35	0.00	0.00	0.00
A201831	120.54	0.00	0.00	0.00
A201832	9,845.32	0.00	0.00	0.00
A201834	1,683,926.62	0.00	0.00	0.00
A201835	0.00	234,565.05	0.00	0.00
A274804	15,345,098.49	0.00	0.00	0.00
A301602	100.00	0.00	0.00	0.00
A307701	600.00	0.00	0.00	0.00
A307807	26,473.10	0.00	0.00	0.00
A331602	5.59	0.00	0.00	0.00
A331802	17,378,033.74	34,140.06	0.00	0.00
A337602	152.41	0.00	0.00	0.00
A337803	40,949.53	557.11	0.00	0.00
A337806	1,104,308.96	0.00	0.00	0.00

	Case Number	ADD Pay Duty	Add Bonded Duty	CVD Pay Duty	CVD Bonded Duty
	A560820	1,642.47	0.00	0.00	0.00
	A560834	3,949.54	0.00	0.00	0.00
	A565801	260,443.04	0.00	0.00	0.00
	A570001	24,548.79	0.00	0.00	0.00
	A570003	4,623.80	0.00	0.00	0.00
	A570007	26,167.54	0.00	0.00	0.00
	A570201	2,260,365.52	0.00	0.00	0.00
	A570202	2,928,900.40	0.00	0.00	0.00
	A570203	492,068.91	0.00	0.00	0.00
	A570204	4,262,023.96	0.00	0.00	0.00
	A570212	100.01	0.00	0.00	0.00
	A570213	29,477.02	0.00	0.00	0.00
	A570501	179,169.55	0.00	0.00	0.00
	A570502	106,680.90	0.00	0.00	0.00
	A570504	42,617,370.70	0.00	0.00	0.00
	A570506	781,201.17	0.00	0.00	0.00
	A570601	2,095,404.40	0.00	0.00	0.00
	A570804	511,473.94	0.00	0.00	0.00
	A570805	61,997.40	0.00	0.00	0.00
	A570806	1,184,210.89	0.00	0.00	0.00
	A570808	3,444.55	0.00	0.00	0.00
	A570814	37,221.07	0.00	0.00	0.00
	A570815	21,995.88	0.00	0.00	0.00
	A570822	856,410.65	0.00	0.00	0.00
	A570825	179,507.29	0.00	0.00	0.00
	A570826	190,785.76	0.00	0.00	0.00
	A570827	16,857,440.88	0.00	0.00	0.00
Fresh Garlic	A570831	19,635,560.80	204,985,693.40	0.00	0.00
	A570832	58,941.07	0.00	0.00	0.00
	A570836	795,776.54	0.00	0.00	0.00
	A570844	38,726.42	0.00	0.00	0.00
	A570845	0.00	12,373.87	0.00	0.00
	A570846	8,305,165.15	104,403.08	0.00	0.00
	A570847	36,096.91	0.00	0.00	0.00
Crawfish Tail Meat	A570848	36,869,644.95	46,020,205.36	0.00	0.00
	A570849	31,439.51	0.00	0.00	0.00
	A570850	29,365.68	0.00	0.00	0.00
Preserved Mushrooms	A570851	4,284,518.98	19,758,369.25	0.00	0.00
	A570852	4,414.27	0.00	0.00	0.00
	A570853	23,721.63	2,708.13	0.00	0.00
	A570855	433,299.90	15,105.43	0.00	0.00
	A570856	12,911.40	0.00	0.00	0.00
	A570860	2,507.46	0.00	0.00	0.00
Honey	A570863	14,999,431.67	77,801,815.85	0.00	0.00
	A570864	780,064.60	0.00	0.00	0.00
	A570865	86,790.31	0.00	0.00	0.00
	A570866	294,785.62	0.00	0.00	0.00
	A570867	10,020,945.07	41,240.25	0.00	0.00
	A570868	6,464,610.00	0.00	0.00	0.00
	A570873	9,669.61	0.00	0.00	0.00
	A570874	25,516.20	0.00	0.00	0.00

Case Number	ADD Pay Duty	ADD Bonded Duty	CVD Pay Duty	CVD Bonded Duty
C533222	0.00	0.00	0.00	0.00
C533807	0.00	0.00	0.00	4,371.00
C533821	0.00	0.00	1,835,944.62	0.00
C533825	0.00	0.00	4,120,362.49	288,585.51
C533839	0.00	0.00	103,111.98	0.00
C533844	0.00	0.00	717,870.86	0.00
C535001	0.00	0.00	120,434.48	0.00
C542401	0.00	0.00	100.00	0.00
C549222	0.00	0.00	48,808.69	0.00
C549401	0.00	0.00	3,798.84	0.00
C549701	0.00	0.00	11,219.10	0.00
C549802	0.00	0.00	11.02	0.00
C549803	0.00	0.00	4,502.31	0.00
C549806	0.00	0.00	1,634.56	0.00
C549818	0.00	0.00	4,621,430.19	0.00
C557222	0.00	0.00	252,788.06	27.54
C557806	0.00	0.00	77,228.60	0.00
C559201	0.00	0.00	2,811.35	0.00
C559204	0.00	0.00	97.04	0.00
C559222	0.00	0.00	291,461.13	17,964.60
C560222	0.00	0.00	43.60	0.00
C560806	0.00	0.00	72.80	0.00
C560813	0.00	0.00	15.52	0.00
C560819	0.00	0.00	13,665.11	33.31
C560821	0.00	0.00	0.00	11,550.31
C565222	0.00	0.00	22,585.24	0.00
C570222	0.00	0.00	517,571.98	22,732.13
C570816	0.00	0.00	0.00	0.00
C570817	0.00	0.00	0.00	0.00
C570907	0.00	0.00	563,219.68	2,876,544.59
C580207	0.00	0.00	300,065.64	0.00
C580208	0.00	0.00	4,705,939.81	61,171.40
C580602	0.00	0.00	7,482.32	0.00
C580835	0.00	0.00	789,419.97	0.00
C580837	0.00	0.00	1,933,906.55	6,091.71
C580842	0.00	0.00	735.92	0.00
C580849	0.00	0.00	0.00	0.00
C580851	0.00	0.00	14,368,272.77	20,129.99
C580857	0.00	0.00	7,801.10	0.00
C582222	0.00	0.00	15,178.45	0.00
C583222	0.00	0.00	297,561.69	22,495.87
C588109	0.00	0.00	587.66	0.00
C588222	0.00	0.00	236,937.90	223.55
C791806	0.00	0.00	39,089.63	0.00
C791810	0.00	0.00	111,449.51	0.00
C903222	0.00	0.00	45,845.56	0.00
Total	**1,315,215,480.67**	**380,350,734.14**	**96,832,198.78**	**4,072,245.54**

ATTACHMENT 5

EXHIBIT 1

HARTFORD FIRE INSURANCE CO. &
INTERNATIONAL FIDELITY INSURANCE CO.
CDSOA BOND VOIDANCE SUITS

I. Hartford Lawsuit Dismissed Under CIT Rule 12(b)(1)

1. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00101 (3/21/07), aff'd Hartford Fire Ins. Co. v. United States, 544 F.3d 1289 (Fed. Cir. 2008)

II. Hartford Lawsuits Voluntarily Dismissed Under CIT Rule 41(a)

1. Hartford Fire Insurance Company v. United States, CIT Consol. Ct. No. 06-00451 (complaint filed 12/21/06) (dismissed 2/2/2009) (Crawfish Order)*
2. Hartford Fire Insurance Company v. United States, CIT Ct. No. 06-00453 (complaint filed 12/21/06) (dismissed 2/2/2009) (consolidated with CIT Ct. No. 06-451) (Mushroom Order)*
3. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00167 (complaint filed 5/16/07) (dismissed 2/2/2009)
4. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00181 (complaint filed 6/1/07) (dismissed 2/2/2009)
5. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00290 (complaint filed 8/7/07) (dismissed 2/2/2009)
6. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00410 (complaint filed 11/1/07) (dismissed 2/2/2009) (Garlic Order)*
7. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00081 (complaint filed 2/28/08) (dismissed 2/2/2009)
8. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00210 (complaint filed 7/2/08) (dismissed 2/2/2009)
9. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00272 (complaint filed 8/27/08) (dismissed 2/2/2009)

* The complaints filed in these appeals pertain to Customs' demands for performance under customs bonds that include new shipper bonds issued on imports subject to the identified AD orders.

III. Pending Hartford Lawsuit That Includes Only § 1581(i) Claims

1. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00067 (complaint filed 2/26/07) (amended 2/13/09) (Crawfish Order)*

IV. Pending Hartford Lawsuits That Include Only § 1581(a) Claims

1. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00324 (complaint filed 9/4/2007) (amended 2/25/09)

2. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00325 (complaint filed 9/4/07) (amended 2/25/09)

3. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00326 (complaint filed 9/4/07) (amended 2/25/09)

4. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00327 (complaint filed 9/4/07) (amended 2/25/09)

5. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00328 (complaint filed 9/4/07) (amended 2/25/09)

6. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00402 (complaint filed 10/26/07) (amended 2/27/09) (Honey Order)*

7. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00411 (complaint filed 11/1/07) (amended 2/25/09)

8. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00465 (complaint filed 12/4/07) (amended 2/25/09)

9. Hartford Fire Insurance Company v. United States, CIT Ct. No. 07-00466 (complaint filed 12/4/07) (amended 2/25/09)

10. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00069 (complaint filed 2/19/08) (amended 2/26/09) (Honey Order)*

11. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00106 (complaint filed 4/2/08) (amended 2/25/09)

12. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00163 (complaint filed 5/6/08) (amended 2/25/09)

13. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00232 (complaint filed 7/29/08) (amended 2/26/09) (Honey Order)*

14. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00333 (complaint filed 9/30/08) (amended 2/26/09) (Honey Order)*

15. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00334 (complaint filed 9/29/08) (amended 2/25/09)

16. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00335 (complaint filed 9/29/08) (amended 2/26/09)

17. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00376 (complaint filed 10/24/08) (amended 2/26/09) (Mushroom Order)*

18. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00414 (complaint filed 11/25/08) (amended 2/25/09)

19. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00436 (complaint filed 12/24/08) (amended 2/25/09)

20. Hartford Fire Insurance Company v. United States, CIT Ct. No. 08-00443 (complaint filed 12/29/08) (amended 2/25/09)

21. Hartford Fire Insurance Company v. United States, CIT Ct. No. 09-00054 (complaint filed 2/6/2009) (amended 2/26/09) (Mushroom Order)*

22. Hartford Fire Insurance Company v. United States, CIT Ct. No. 09-00058 (complaint filed 2/10/2009) (Mushroom Order)*

23. Hartford Fire Insurance Company v. United States, CIT Ct. No. 09-00122 (complaint filed 3/13/2009) (Mushroom Order)*

24. Hartford Fire Insurance Company v. United States, CIT Ct. No. 09-00133 (complaint filed 4/2/2009) (Mushroom Order)*

25. Hartford Fire Insurance Company v. United States, CIT Ct. No. 09-00138 (complaint filed 4/3/2009)

V. Pending Customs Collection Action against Hartford

1. United States v. World Commodities Equipment Corporation et al, CIT Ct. No. 07-00263 (complaint filed 7/16/07)

VI. Pending International Fidelity Insurance Co. (IFIC) Lawsuits

1. International Fidelity Insurance, Co., v. United States, CIT Ct. No. 05-00447 (complaint filed 7/30/07, amended 7/30/07)

2. International Fidelity Insurance, Co., v. United States, CIT Ct. No. 06-00238 (complaint filed 1/30/08)

3. International Fidelity Insurance Corporation, v. United States, CIT Ct. No. 08-00305 (summons filed 09/12/08)

4. International Fidelity Insurance Corporation, v. United States, CIT Ct. No. 08-00424 (summons filed 12/09/08)

5. International Fidelity Insurance Corporation, v. United States, CIT Ct. No. 08-00431 (summons filed 12/18/08)