

Trade & Customs - USA

Department of Commerce may rethink retrospective import duty system

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Background

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[Implications](#)

The United States is the only major economy that employs a retrospective system for assessing and collecting anti-dumping and countervailing duties on imports. At the direction of Congress, the Department of Commerce's International Trade Administration has sought public comment on the relative merits of the existing retrospective system versus a prospective system. The initiative suggests significant potential change to the US duty assessment system.

Background

In March 2008 the US Government Accountability Office (GAO) issued a report⁽¹⁾ exposing a \$600 million shortfall in the collection of anti-dumping and countervailing duties assessed against imports of a number of products. Although GAO acknowledged several factors contributing to the government's inability to collect the full amount of outstanding duties, GAO highlighted the retrospective nature of the US anti-dumping and countervailing duty system as the chief impediment.

Under the current system, importers must pay cash deposits equal to the estimated anti-dumping and countervailing duties (if any) applicable to goods that enter the United States at the time of importation. However, the final amount of duties owed may not be determined until much later, after the International Trade Administration has examined the details regarding the imports subject to such duties, and after any judicial challenges of the results of that examination have been exhausted. On average, this process can take over three years and can result in the calculation of a final duty amount that exceeds the amount of cash deposited. By the time the final duty amount is established, the importers may be financially unable to pay the duties, and unscrupulous importers may have disappeared in order to evade their financial obligations. As a result, the US government is often unable to collect the anti-dumping and countervailing duties owed by importers.

The retrospective system also has a significant impact on US importers which are responsible for paying the duties. Although they pay cash deposits to cover the estimated amount of duties at the time of importation of the goods, they must carry a contingent liability on their books for an extended period of time, pending final determination of the amount of duties owed. This is particularly problematic for importers of consumer goods, due to the uncertainty that it creates for the pricing of fast-moving goods in the retail market.

In contrast, under a prospective duty system, duty rates are calculated based on data regarding historical levels of dumping and subsidies, and those rates are applied to future entries of goods at the time of importation. Under this system, it may be possible for importers to obtain a refund of duties previously paid, and foreign exporters may seek a recalculation of the duty rate going forward if they can demonstrate the occurrence of changed circumstances. Generally, however, in prospective systems the duty rates that were initially determined remain in effect throughout the life of an anti-dumping or countervailing duty order, with the final duty assessments calculated on the basis of those rates.

Among the suggested measures for improving the government's collection of duties, GAO recommended that Congress require the secretaries of commerce, homeland security and the Treasury to conduct an analysis and report to Congress on the relative advantages and disadvantages of retrospective and prospective duty systems. GAO reiterated this recommendation in a second report published in July 2008.⁽²⁾

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Congress acted on GAO's recommendation in December 2009. The conference report accompanying the 2010 Consolidated Appropriations Act (Public Law 111-117) required submission of a report by the Departments of Commerce, Homeland Security and the Treasury on the relative merits of retrospective and prospective anti-dumping and countervailing duty systems within 180 days of enactment of the act (ie, by June 14 2010).

Request for comments and hearing participation

To assist its preparation of the report required by Congress, the International Trade Administration published a notice⁽³⁾ on March 31 2010 inviting the public to submit written comments about, and participate in a hearing on, the retrospective and prospective anti-dumping and countervailing duty systems. Specifically, the International Trade Administration requested input on the extent to which each type of system would likely achieve the goals of:

- remedying injurious dumping or subsidized imports into the United States;
- minimizing uncollected duties;
- reducing incentives and opportunities for importers to evade anti-dumping and countervailing duties;
- effectively targeting high-risk importers;
- addressing the impact of retrospective rate increases on US importers and their employees; and
- creating minimal administrative burdens.

Comments were due to be submitted to the International Trade Administration by April 20 2010 and requests to participate in the hearing on the issue were required by April 13 2010. The hearing itself was scheduled for April 27.

Implications

The report to be developed on the basis of the public comments and testimony requested by the International Trade Administration could lead to fundamental changes in the way in which duties are assessed on imports into the United States. On the one hand, adoption of a prospective system would better align US assessment practices with those of other countries, and the greater consistency could benefit global companies that export to the United States and other markets. In addition, it could significantly reduce the shortfall in the collection of anti-dumping and countervailing duties, thereby providing more effective relief for the domestic industries on whose behalf such duties are imposed. On the other hand, replacement of the retrospective system would entail a significant change in the way in which duty liability has been determined in the United States since anti-dumping law was first enacted in 1921, which could engender uncertainty and confusion during a transition period.

In short, the ramifications of a departure from the retrospective US anti-dumping and countervailing duty system must be considered carefully. Because of the fundamental nature of this proposed change in the duty system, companies involved in importation or facing import competition should carefully evaluate where their interests lie.

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Endnotes

(1) www.sidley.com/files/News/ac2b58ca-3193-4872-9ab7-b13dd335c861/Presentation/NewsAttachment/e77e210a-2e57-485d-ad34-b28b48d6f

(2) www.sidley.com/files/News/ac2b58ca-3193-4872-9ab7-b13dd335c861/Presentation/NewsAttachment/4ff0e8a6-022d-41c1-bf61-b5d50d6fb2c

(3) www.sidley.com/files/News/ac2b58ca-3193-4872-9ab7-b13dd335c861/Presentation/NewsAttachment/520bdaea-3778-40c1-b36f-bdb0c1f7d8

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