



INTERNATIONAL  
**TRADE**  
ADMINISTRATION

# **Relative Advantages and Disadvantages of Retrospective and Prospective Antidumping and Countervailing Duty Collection Systems**

**Report to Congress  
November 2010**

**International Trade Administration  
Department of Commerce**

## Introduction

The Department of Commerce is pleased to submit the following report to Congress on the relative advantages and disadvantages of retrospective and prospective antidumping (AD) and countervailing duty (CVD) collection systems. This report has been prepared in response to the conference report accompanying the 2010 Consolidated Appropriations Act, which directed the Secretary of Commerce to work with the Departments of Homeland Security (DHS) and the Treasury to conduct such an analysis and report to the House and Senate Committees on Appropriations. The conferees requested that the report address the extent to which each type of system would: 1) likely achieve the goals of remedying injurious dumped or subsidized exports; 2) minimize uncollected duties; 3) reduce incentives and opportunities for importers to evade AD and CVD duties; 4) effectively target high-risk importers; 5) address the impact of retrospective rate increases on U.S. importers and their employees; and 6) create a minimal administrative burden.

As discussed in the report, the United States is the only major user of AD/CVD trade remedies that implements a retrospective system of duty assessment. Under such a system, final duties are not assessed at the time that the subject merchandise is imported into the United States. Rather, after importation, interested parties may request an administrative review to determine the exact amount of duties to collect based on the level of dumping or subsidization that occurred during the review period. If no review is requested, affected entries are “liquidated” based on the AD or CVD deposit rate applicable at the time of importation. If a review is requested, affected entries are liquidated based on the results of the retrospective review. Conversely, under a prospective system, duties are collected at the time of entry based on previously calculated AD margins and CVD rates, or in some countries, previously determined normal values (reference prices) or subsidy amounts.<sup>1</sup>

The conferees’ report request mirrors one of the considerations for Congressional actions set forth in a March 2008 report on U.S. AD/CVD collection released by the Government Accountability Office (GAO).<sup>2</sup> The report, Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection (GAO Report), found that a substantial amount of AD/CVD duties were uncollected and concluded that the U.S. Government had two options for resolving the problem: 1) Congress could fundamentally change the U.S. AD/CVD system from a retrospective to a prospective duty collection system, or 2) Congress and the relevant agencies could alter specific aspects of the current retrospective system.

---

<sup>1</sup> Unlike the retrospective system, there is no single prospective AD/CVD duty collection system used by other WTO Members. As discussed later in the report, prospective AD systems tend to fall within three general categories – prospective *ad valorem* systems, prospective per unit systems and prospective normal value systems – though some may incorporate a mixture of systems. Prospective normal value systems only apply to AD duty collections. Prospective CVD systems are generally limited to prospective *ad valorem* or per unit systems.

<sup>2</sup> Government Accountability Office, Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection (GAO Report), p. 47.

To aid in our analysis, the Department of Commerce issued a *Federal Register* notice seeking public comments and held a hearing on April 27, 2010. We received 40 sets of comments from a wide range of interested parties. In addition, 19 parties testified at the public hearing which was chaired by Deputy Assistant Secretary for Import Administration, Ronald K. Lorentzen, and included representatives from Treasury and DHS.

Those submitting comments in favor of each type of system ranged from large manufacturers to small family-owned businesses as well as unions, retailers, trade associations and members of the trade bar. Three foreign trade associations also submitted comments. The Department of Commerce appreciates the thought and considerable effort that went into the comments submitted as well as the presentations at the hearing. As can be seen from the report, this input was essential to understanding and evaluating this complex issue. Lists of those providing public comments as well as participants at the hearing are attached in Appendix III of this report. Copies of all comments and a transcript of the hearing are available at: <http://ia.ita.doc.gov/download/rvp/cmts-20100420/rvp-cmt-20100420-index.html>. In addition, we received considerable input from DHS and Treasury.

While the report discusses certain advantages and disadvantages associated with the retrospective and prospective AD/CVD systems, the analysis is limited to some extent by the fact that a wide variety of prospective systems are in existence today. As one group of multinational manufacturers noted, “[t]he Companies respectfully submit that an abstract or theoretical comparison of two duty systems is unlikely to yield useful insight because the relative advantages or disadvantages of any duty system are dictated by the specific features of the system, which can vary widely.”<sup>3</sup>

The report is divided into ten sections which fall into three general categories. The first two sections provide general background information on the retrospective and prospective AD/CVD systems. The next six sections discuss the advantages and disadvantages of retrospective and prospective systems with respect to each of the specific areas of interest identified by the conferees. The final two sections discuss alternative means of addressing the problem of uncollected duties and steps that Commerce and DHS are taking to increase duty collection.<sup>4</sup>

## **Overview of U.S. Retrospective System**

Under the U.S. retrospective system, an AD/CVD order establishes an estimated AD/CVD rate (based on the dumping margin or subsidy rate found in the original investigation) that is applied

---

<sup>3</sup> The companies further noted, “although there are many features of a prospective system, particularly certainty as to the amount of liability, that would recommend that system as a preferred model, it is impossible in the abstract for the Companies to advocate for one model over the other absent clarity about the specific features of a proposed prospective system. The U.S. retrospective system, for example, is far more open and transparent than at least some prospective systems, and it would be inappropriate to sacrifice those qualities of the U.S. system should the United States decide to adopt a prospective approach.” JTEKT and Other Bearing Companies, *Public Comments*, p. 2.

<sup>4</sup> Import Administration within Commerce and Customs and Border Protection within DHS are the two primary agencies involved in administration of AD/CVD orders and the calculation, collection and assessment of AD/CVD duties. Hereinafter, the two agencies are referred to as Commerce and DHS, respectively, throughout the document. Immigration and Customs Enforcement (ICE) is the investigative arm of DHS and conducts criminal investigations involving AD/CVD duty collection.

to subject merchandise as it is imported. This duty rate is for deposit purposes only. Final duties are not assessed at the time the subject merchandise is imported into the United States. Rather, beginning one year after the imposition of the AD/CVD order, interested parties (*e.g.*, domestic producers, importers, or foreign exporters) may request an administrative review to determine the actual amount of duties to be collected based on the level of dumping or subsidization that occurred during the review period. The results of the retrospective review form the basis of the final assessment rate for the imports covered by the review as well as establish the new deposit rate for future importations.<sup>5</sup> If no review is requested, affected entries are “liquidated” by DHS based on the AD or CVD deposit rate in effect at the time of importation.<sup>6</sup>

Below is a more detailed discussion of the U.S. retrospective system.

### Investigation

An investigation usually begins when a domestic industry files a petition with the appropriate agencies, Commerce and the International Trade Commission (ITC), alleging that it is being injured by dumped imports or subsidized imports.<sup>7</sup> If the petition meets all statutory requirements, an investigation will be initiated by Commerce.<sup>8</sup> Commerce determines whether the imports at issue are being dumped (*i.e.*, sold at less than fair value) or subsidized (*i.e.*, benefit from countervailable subsidies). The ITC determines whether an industry in the United States is being materially injured, or threatened with material injury, by the imports at issue.<sup>9</sup> Both agencies make preliminary determinations and, after analyzing the information and comments of the parties, the authorities will make final determinations as to whether dumping or countervailable subsidization and injury exist. If the final determinations by Commerce and the ITC are affirmative, Commerce will issue an AD or CVD order. Investigated companies receive their own company-specific AD and CVD rates; non-investigated companies receive an “all others” rate.<sup>10</sup> Otherwise, the proceeding terminates.<sup>11</sup> In general, the investigation process would be the same under a retrospective or prospective system.

---

<sup>5</sup> In cases where a large number of companies have been requested to be reviewed, Commerce may sample or review only those companies accounting for the largest volume of exports to the United States. The non-selected companies receive an average rate of the selected companies.

<sup>6</sup> Liquidation is the final computation and assessment by DHS of the actual duties owed on the entered merchandise using rates provided by Commerce.

<sup>7</sup> AD/CVD investigations are generally initiated in response to petitions filed by an affected U.S. industry, although under rare circumstances Commerce may self-initiate a case.

<sup>8</sup> The period covered by an AD investigation is generally one year (*i.e.*, the four most recently completed quarters up to the month preceding the receipt of the petition or, in an investigation involving merchandise imported from a non-market economy country, the two most recently completed fiscal quarters). A CVD investigation generally covers the recently completed fiscal year for the government and exporters or producers in question. In investigations where there are a large number of companies, Commerce may sample or select only those companies accounting for the largest volume of exports to the United States for investigation.

<sup>9</sup> The ITC may also in rare cases determine whether material retardation of the establishment of a domestic industry exists by allegedly dumped or subsidized imports.

<sup>10</sup> The all others rate is based on an average of the calculated AD or CVD rates for investigated companies. *De minimis* rates and rates based on facts available information are not included in the all others rate. In non-market economy AD cases, there is no all others rate. In such cases, a country-wide rate is established.

<sup>11</sup> Pursuant to the WTO Antidumping Agreement (Antidumping Agreement) and the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement), if the level of dumping or subsidization is found to be *de minimis* (in AD investigations, less than two percent; in CVD investigations, normally less than one percent unless the

The collection of estimated duties begins during the investigation phase when Commerce publishes an affirmative preliminary determination. At this stage, Commerce instructs DHS to commence suspension of liquidation and require the importer of record to pay a cash deposit<sup>12</sup> or post a bond in lieu of paying cash for each applicable entry.

Following an affirmative final determination by Commerce, DHS will continue to suspend liquidation and collect deposits at the final rate, as directed by Commerce. If the ITC final determination is also affirmative, Commerce will issue an AD/CVD order and instruct DHS to continue the suspension of liquidation and require the importer to pay a cash deposit. These collected cash deposits still represent an estimate of potential AD and CVD duties. Duty collection, as opposed to duty assessment,<sup>13</sup> is prospective in nature and only affects subject merchandise that enters into the U.S. customs territory from the effective date forward.<sup>14</sup> The effective date of the duty deposit requirement is the date that the affirmative preliminary or final determination in the investigation, or final results of the administrative review, is published in the *Federal Register*.

The amount of the duty deposit is based on the difference between U.S. price and normal value<sup>15</sup> of the subject merchandise for AD purposes.<sup>16</sup> For CVD purposes, the cash deposit reflects the amount of countervailable subsidies received by the company.<sup>17</sup> DHS applies the rate calculated by Commerce to the reported entered value of the subject merchandise to determine the deposit amount required.<sup>18</sup> The amount of final duty liability depends on whether Commerce conducts a review covering any prior entries.

### Administrative Reviews

Under the U.S. retrospective system, administrative reviews serve as the procedural mechanism for determining the actual amount of AD/CVD duties to assess on prior imports. Where administrative reviews are conducted, the final duties importers are assessed based on

---

companies investigated are in developing countries, in which case the *de minimis* level is less than two percent), or if no injury is found by the ITC, the investigation will be terminated. Otherwise, this duty becomes the *ad valorem* deposit rate applicable to future imports of subject merchandise entering the United States.

<sup>12</sup> Cash deposits are a temporary payment of estimated AD/CVD duties.

<sup>13</sup> Duty assessments are the actual amount of AD/CVD duties due on a given entry of subject merchandise.

<sup>14</sup> In an AD or CVD investigation, petitioners can allege “critical circumstances,” *i.e.*, massive imports of subject merchandise over a relatively short period combined with history or knowledge of dumping or WTO-inconsistent subsidies. If Commerce and the ITC make a final affirmative finding of critical circumstances, duties are applied retroactively to the later of 90 days prior to the suspension of liquidation or the date of publication of Commerce’s initiation notice in the *Federal Register*.

<sup>15</sup> Generally, normal value is the price the foreign firm charges for a comparable product sold in its home market. Under certain circumstances, normal value may also be the price the foreign firm charges in other export markets or the firm’s cost of producing the merchandise, taking into account the firm’s selling, general, and administrative expenses, and profit. If the producer is located in a non-market economy country, normal value is based on the producer’s factors of production using values in a “surrogate” market economy country. Commerce compares the normal value to the export price or constructed export price to determine the margin of dumping, if any.

<sup>16</sup> For producers and exporters that are not examined, the deposit rate is the all others rate or, in the case of non-market economies, the country-wide rate.

<sup>17</sup> For producers and exporters that are not examined, the deposit rate is the all others rate.

<sup>18</sup> In some cases, rates are calculated on a per unit basis instead of an *ad valorem* basis.

information about the actual amount of dumping or subsidization that has taken place during the period being reviewed rather than the AD duty deposit rate that was calculated using sales information that may be one year to 18 months old, or older depending upon the date of the last administrative review. Once a year, starting one year after the order goes into effect, interested parties (*e.g.*, domestic producers, importers, or foreign producers or exporters) have an opportunity to request an administrative review of the prior year's entries of subject merchandise. The domestic industry will typically request a review if it believes that the level of dumping or subsidization has increased and the duty deposit is not sufficient to remedy the amount of dumping/subsidization that may have taken place over the most recent year. Conversely, exporters, importers or foreign manufacturers will typically request a review if they believe that dumping/subsidization has been reduced or eliminated; they would like importers to receive refunds on past entries and the deposit rate for future entries to be reduced. If both parties are satisfied that the existing rate accurately reflects the level of dumping or subsidization over the previous year or if they are not interested in an administrative review for other reasons, no review is requested or conducted.<sup>19</sup> The period covered by the first administrative review is generally 16 to 18 months, covering the time between the preliminary determination in the original investigation (when suspension of liquidation is most often imposed) and the one-year anniversary of the order. Subsequent administrative reviews normally cover a twelve-month period.

During the administrative review, Commerce determines the final amount of duties to be assessed on entries during the period of review. Duty assessment rates, which are typically calculated on an importer/customer-specific basis, are treated as proprietary in nature because they involve the use of company sales information. Duty assessment rates are retrospective and serve as the actual rate due on entries of subject merchandise that have already entered into the United States during the specified period of review.<sup>20</sup> The final duties to be assessed are based on the actual amount of dumping found on sales of the imported merchandise to the first customer not affiliated with the seller or the actual amount of subsidies received by the foreign manufacturer or exporter.<sup>21</sup> The result of this exercise is that, if an importer's entries of subject

---

<sup>19</sup> If no administrative review is requested, the estimated AD/CVD duties importers paid when the merchandise entered the United States becomes the final amount of duties assessed and DHS liquidates the entry.

<sup>20</sup> The March 2008 GAO report mentioned above provides the following summary of the results of administrative reviews: "In analyzing more than 6 years of CBP data covering over 900,000 entries subject to AD duties, we found that duty rates went up 16 percent of the time, went down 24 percent of the time, and remained the same 60 percent of the time. In instances when rates increased, the median increase was less than 4 percentage points, meaning that half of the time the rate increased less than 4 percentage points. However, because of some large increases, the average rate increase was 62 percentage points, and some exceeded 200 percentage points. When there was a rate decrease, the median decline was 7 percentage points, meaning that half of the time the rate decreases were less than 7 percentage points. However, some larger decreases caused the average rate decrease to be 21 percentage points." The report also notes that, on average, the time period between initial entry of the product and the final assessment of duties is 3.3 years. [GAO Report](#), pp. 21-23.

<sup>21</sup> All AD calculations are based on sales to the first unaffiliated customer. This can occur after importation of the product into the United States. If an affiliated customer incorporates the subject merchandise into a downstream product further manufactured in the United States which is then sold to an unaffiliated customer, adjustments are made to the price of that sale to reflect the further manufacturing when calculating the AD margin for that sale. U.S. law considers transfer prices between affiliated parties to be suspect for use in determining AD duties. Switching to a prospective system would require changes to the statute to allow the use of transfer prices between affiliated parties as the final sale to an unaffiliated customer in the United States would not have occurred at the time of importation in many instances.

merchandise are not dumped or subsidized, the importer will receive a full refund of the deposits it made over the past year, with interest accrued.<sup>22</sup> The interest rates are based on the Federal short-term rate and determined by the Internal Revenue Service on behalf of the Secretary of the Treasury on a quarterly basis.

If Commerce determines that an importer's entries of subject merchandise were dumped or subsidized above a *de minimis* level, *i.e.*, 0.50 percent or greater, it instructs DHS to assess final duties equal to the amount of dumping or subsidization found in the review and any difference from the deposit amount will be charged/refunded, with interest accrued. In principle, the ability to collect an amount of duties equal to the actual amount of dumping or subsidization is an aspect of the system that is intended to discourage continued dumping or unfair subsidization and remedy it when it does occur. The results of the administrative review, where conducted, can help to keep deposit rates more current. The overall duty rate found for the manufacturer or exporter in the review will become the new deposit rate for future imports of the manufacturer's or exporter's merchandise. If dumping/countervailable subsidization is found to have increased, the deposit rate will increase for future shipments to ensure there is an adequate deposit of estimated duties on subsequent entries. If dumping/countervailable subsidization is found to have decreased, the manufacturer or exporter and importers will receive the benefit of a reduced deposit rate for future shipments as well.

Commerce sends cash deposit and liquidation (*i.e.*, assessment) instructions to DHS. These instructions are communicated electronically through DHS's Automated Commercial Environment (ACE). The liquidation instructions are then transmitted to DHS port officials who identify and liquidate all entries covered by Commerce's liquidation instructions. Any entry not liquidated by DHS within six months of receiving notice either through publication of results in the *Federal Register* or through receipt of the instruction itself (*e.g.*, pursuant to litigation that does not require publication of amended results in the *Federal Register*) is "deemed liquidated" by operation of law at the AD/CVD rate asserted at the time of entry. If the importer disagrees with the duties assessed at liquidation, the importer may file a protest with DHS within 180 days of liquidation. DHS forwards many AD/CVD-related protests to Commerce for review and recommendation. Once DHS receives Commerce's recommendation, DHS then either approves or denies the protest. If the importer disagrees with DHS's decision, the importer can challenge it before the U.S. Court of International Trade.

### New Shipper Reviews

New shipper reviews are available to companies that did not export and are not affiliated with any exporter or producer that did export to the United States during the original investigation.

---

<sup>22</sup> All liquidation instructions sent to DHS contain an interest paragraph. In general, interest accrues from the date the importer is required to deposit estimated duties. Interest is not applicable to entries made while the investigation is underway. It is only applicable to entries made once the AD/CVD order is in place. If the calculated assessment rate is higher than the cash deposit rate at the time of entry of the subject merchandise, the importer must remit, in addition to the duty itself, an additional sum reflecting the interest that accrued during the period between entry and assessment. If the assessment rate is lower than the cash deposit rate, the U.S. government must refund to the importer the accrued interest in addition to the difference in duties originally deposited.

An exporter or producer may request a new shipper review within one year of the date on which subject merchandise was first entered, or withdrawn from warehouse, for consumption or, if the exporter or producer cannot establish the date of the first entry, then the date on which it first shipped the merchandise for export to the United States. The new shipper review is available only to exporters or producers; there is no provision for importers or the domestic industry to request a new shipper review.

Commerce initiates a new shipper review by issuing a *Federal Register* notice. The request for review and initiation notice must specify both the exporter and the producer, as the results of the review will apply only to that producer/exporter combination.<sup>23</sup> As with administrative reviews, Commerce issues liquidation instructions to DHS upon completion of the new shipper review for assessment of final duties on entries during the review period. In addition, Commerce issues cash deposit instructions to DHS upon completion of the review, notifying DHS of the new cash deposit rate for the exporter/producer combination which is effective as of the publication date of the final results in the *Federal Register*.<sup>24</sup> For new shipper reviews, this new cash deposit rate only applies to subsequent entries of merchandise produced and exported by the specific producer/exporter combination that Commerce examined in the new shipper review. Also, in the case of new shipper reviews, these instructions notify DHS to discontinue the bonding privilege for imports from that exporter/producer combination. For entries of subject merchandise exported by the exporter of a specific combination for which the producer is different, there is no change to the deposit rate; that is, for non-market economy (NME) cases, the cash deposit remains the “NME-wide” rate and, for the most part, for market economy cases, the “all others” rate.

### Judicial Review

Commerce and ITC decisions are subject to judicial review. Any interested party (*e.g.*, domestic producer, importer, or foreign producers or exporters) may challenge an affirmative or negative determination by either agency in the investigation or the final results of an administrative review by Commerce. There are potentially three levels of judicial review in U.S. courts: the U.S. Court of International Trade (CIT), the U.S. Court of Appeals for the Federal Circuit (CAFC), and (by writ of *certiorari*) the U.S. Supreme Court. In cases involving imports from Mexico or Canada, parties may elect to refer challenges to Commerce or ITC determinations to binational panels pursuant to Chapter 19 of the NAFTA Agreement. In such cases, the United States or government of the foreign country involved may seek review of the panel decision by an Extraordinary Challenge Committee.

In cases involving imports from another WTO member country, the government of that country may also challenge whether the Commerce or ITC determination is consistent with U.S.

---

<sup>23</sup> Under U.S. law, importers of subject merchandise from the producer/exporter combination are not required to pay cash deposits on such imports between the date of publication of Commerce’s notice of initiation and final result of the new shipper review. They may post a bond for estimated AD/CVD duties instead. In August 2006, Congress suspended the new shipper bonding privilege for three years, requiring new shippers to pay cash deposits while Commerce conducts the new shipper review period. This suspension has since ended.

<sup>24</sup> As discussed in more detail later in the report, this new rate, which is often based on limited high-priced sales, can be low or even 0.00 percent in many cases. Unscrupulous importers can take advantage of this low rate to bring in significant volumes of dumped merchandise and then abscond without paying when the bill comes due years later.

obligations under the relevant WTO Agreements. Such challenges would be considered by a WTO dispute settlement panel and would be subject to appeal to the WTO Appellate Body. Such WTO challenge may occur in addition to any domestic or NAFTA case on the same determination.

The court may enjoin the liquidation of some or all entries covered by certain types of determinations that are subject to litigation before the court (*e.g.*, CIT or the CAFC).<sup>25</sup> Absent an injunction, however, present law requires that entries must be liquidated within prescribed time limits regardless of whether a lawsuit has been filed with a court. There are no set time frames for judicial review. Completion of the litigation process can take several years. In some cases, more than a decade has lapsed between the original entry and the final disposition of the court case(s). In such cases, if an injunction was issued by the court, liquidation will not occur until after final disposition, regardless of the amount of time that has passed.<sup>26</sup>

As discussed earlier, importers may also protest DHS's assessment of AD/CVD duties. After liquidation or deemed liquidation, an importer may make a claim for an adjustment or refund by filing a protest with the port within 180 days of liquidation. If the port intends to deny the protest and the importer has submitted a valid application for further review, then the port's ruling will be reviewed at DHS Headquarters prior to issuance. After DHS issues its administrative decision through the protest procedure, the protestant may challenge the determination at the CIT.

### Suspension Agreements

U.S. law at Section 734 of the Tariff Act of 1930, as amended, establishes Commerce's authority to enter into agreements to suspend AD investigations. In CVD investigations, Section 704 provides the same authority. Suspension agreements do not result in the collection of duties but certain agreements may exhibit some features of a prospective system.

Commerce enters into negotiations toward suspending an investigation only when the circumstances of the case warrant this unusual step and only after careful consideration of the policy and administrative implications. In addition, the support of the petitioner in the investigation (*i.e.*, the U.S. industry or workers that filed the petition) is critical to the successful conclusion of any suspension agreement negotiation.<sup>27</sup> As a result of these considerations, a decision by Commerce to enter into a suspension agreement is a relatively rare occurrence, in comparison to the number of AD/CVD orders in place. Commerce currently has only the following eight suspension agreements in effect: Certain Cut-to-Length Carbon Steel Plate from Ukraine; Certain Cut-to-Length Carbon Steel Plate from the Russian Federation; Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation; Uranium from the

---

<sup>25</sup> In NAFTA proceedings, there is a special procedure by which the parties to the case may request an administrative continuation of the suspension of liquidation during the pendency of the NAFTA proceeding. See 19 U.S.C. § 1516a(g)(5).

<sup>26</sup> This uncertainty during any judicial review process would apply equally to any retrospective or prospective system adopted by the United States.

<sup>27</sup> U.S. law requires that a suspension agreement must be in the public interest. The petitioner, having filed the petition in the original investigation, may launch a court challenge if it does not support Commerce's suspending the investigation and entering into a suspension agreement.

Russian Federation; Ammonium Nitrate from the Russian Federation; Fresh Tomatoes from Mexico; Lemon Juice from Mexico; and Lemon Juice from Argentina.

Suspension agreements allow Commerce and respondent parties (foreign producers/exporters) in AD investigations involving market economies, or foreign governments in the case of CVD investigations and AD investigations involving non-market economy countries, to suspend AD or CVD investigations in favor of agreements that provide for the elimination of the unfair pricing or subsidies or elimination of the injury caused by the imports under investigation.

In market economy AD cases, the law permits suspension agreements that eliminate, through price revisions, any amount by which the “normal value” of the merchandise exceeds the U.S. price. The law also permits AD suspension agreements that eliminate injury by means of establishing reference prices at or above which the signatories may sell the subject merchandise. The law requires that signatories to these market economy agreements account for at least 85 percent of the imports of the subject merchandise into the United States. In the case of a non-market economy country, Commerce enters into an AD suspension agreement with the foreign government and reference prices and/or export limits may apply.

In CVD cases, the government providing the alleged subsidy, or exporters which account for substantially all (*i.e.*, at least 85 percent) of the imports of subject merchandise, may agree to eliminate the countervailable subsidy, to completely offset the net countervailable subsidy, or to restrict exports of the merchandise to the United States through export limits.

## **Overview of Prospective Systems**

Among active users of trade remedies, all WTO Members, except the United States, employ some type of “prospective” method for assessing AD/CVD duties. In a purely prospective AD/CVD duty system, it is generally understood that once the investigation is complete and the measure is imposed, the duties are assessed at the time of entry, and the administering authority does not perform an analysis of additional information after entry to determine whether a refund should be made or additional duties should be collected. For example, assume that on January 1, 2010, the relevant authority completed an AD investigation in which it examined pricing practices during the calendar year 2008 and found a “dumping margin” for imports made during 2008 of 10 percent. On January 1, 2010, the authority would issue an AD measure and start imposing a 10 percent AD duty. Under a purely prospective AD duty system this 10 percent duty would remain in effect unless it is changed following a “changed circumstances” or “interim” review.

There is a great deal of variation in the manner in which the AD/CVD duties are assessed under different prospective systems. In some systems, AD and CVD duties are assessed on an *ad valorem* basis (*e.g.*, 10 percent of the entered customs value). We refer to this method of assessment as a prospective *ad valorem* system. In other systems, AD and CVD duties may be assessed prospectively based on an amount per unit (*e.g.*, \$10 per metric ton). We refer to this method of assessment as a prospective *per unit* system. There is also the prospective “normal value” system, which only applies to AD duty assessment, where a normal value is established for each of the different types or models of merchandise subject to an order and, as merchandise

is imported, the normal value is compared to the merchandise's export price (or constructed export price).<sup>28</sup> If the normal value is greater than the export price, an antidumping duty is assessed in the amount of the difference (*e.g.*, if the normal value is \$10 and the export price is \$6, an AD duty of \$4 would be assessed). Another form of prospective system takes a two-part approach to assessment that consists of, first, assessing the dumping margin determined in the original investigation and, second, to the extent that the transaction-specific export price is less than a floor price based on the ascertained export price found in the original investigation, assessing the difference.

The approach to duty assessment can vary within a particular prospective system to accommodate specific concerns. For example, a country that uses the normal value system may employ *ad valorem* rates in large cases, while a country that uses the *ad valorem* system may employ per unit rates for some products. In addition, normal values only apply to the assessment of AD duties. CVD duties would typically be assessed on an *ad valorem* or per unit basis in countries employing a prospective normal value system for AD purposes.

The WTO Antidumping Agreement requires Members operating prospective assessment systems to maintain a refund procedure that allows parties subject to the measure to obtain refunds of duties paid in excess of the actual margin of dumping.<sup>29</sup> This requires Members to provide a prompt refund if the importer of the product subject to the AD duty can demonstrate that the amount assessed at the time of entry exceeded the margin of dumping.<sup>30</sup> These refund procedures involve retrospective elements in that they look back at the export price or constructed export price of imports and the AD duties paid to determine whether a refund is owed to the importer. Generally, no additional duties will be collected if, in the course of the refund review, dumping was found to have increased over the level of AD duties paid. Refund reviews in prospective systems do not generally revise the amount of duty required for future entries. Typically, to obtain a new rate for future entries, a party must request what is known as an interim or changed circumstances review.

Under a prospective system, AD rates can be updated prospectively through a review pursuant to Article 11.2 of the Antidumping Agreement. The requirements to request such a review vary widely among users of AD and CVD remedies. Under Article 11.2, the information being evaluated goes beyond the pricing information examined in refund reviews; under certain systems, these reviews may also examine evidence related to injury. There is no specific threshold outlined in the WTO Agreements and our research indicates that Members follow their own domestic law and practice with regard to conducting interim reviews.

In recent years the USG has collected information on a number of the prospective AD/CVD systems that are administered by other WTO Members. Although all Members provide for refund reviews, only some conduct them. The following factors reportedly could affect the ability and/or desire of parties to request refund reviews and be responsible in part for the apparently limited number of reviews conducted: 1) in most circumstances only importers (not foreign exporters or members of the domestic industry) may request refund reviews;

---

<sup>28</sup> The normal value would be calculated the same way as under the retrospective system.

<sup>29</sup> Article 9.3.2 of the Antidumping Agreement.

<sup>30</sup> There is no parallel CVD refund provision in the WTO Subsidies Agreement.

2) applications for refund reviews may require a significant amount of information from the importer and/or relevant exporters; or 3) regulatory procedures and practices for such reviews may be unclear or not exist, thereby making the outcome of such a review uncertain. The extent to which these are systemic features of prospective systems or could be addressed in implementing a new prospective system is unknowable in the abstract as is the impact any of these potential changes would have on the specific items that Congress asked us to examine (*e.g.*, administrative burden).

Appendix IV contains short descriptions of prospective AD/CVD assessment systems in place in Australia, Brazil, Canada and the European Union (EU).<sup>31</sup>

## **Remedying Injurious Dumping or Subsidized Exports**

With regard to remedying injurious dumping or subsidized exports, commenters focused largely on the extent to which the relative accuracy of the retrospective system or the predictability of the prospective system affected the remedial effects and fairness of adopting either system.<sup>32</sup>

Proponents of the retrospective system found that when administrative reviews are conducted the accuracy of determining dumping margins and subsidy rates retrospectively based on prices, costs, levels of subsidization and other data that are contemporaneous to the importation of the merchandise upon which duties are being assessed provides for a fuller and fairer remedy for injurious dumping and subsidization for all parties. These commenters observed that a retrospective system permits AD duties to be assessed on imported merchandise at a level equal to the amount of dumping found with respect to sales of that merchandise including when the amount of dumping is found to have increased from prior examined periods. In contrast, these commenters found that because current prospective systems only permit refunds of duties and not increases in the amount of assessed duty after importation, assessed duties on imported merchandise accurately reflect the amount by which that merchandise was dumped or subsidized only when the level of dumping or subsidization remained constant or declined from prior periods.<sup>33</sup>

Prospective system proponents find that this was not necessarily the case. They maintain that adjusting the *ad valorem* rate or prospective normal value either on a frequent basis or as needed to respond to changes in dumping or subsidization can readily address increased dumping or

---

<sup>31</sup> Information on the Australian, Brazilian, Canadian and EU systems was gathered from publicly available materials provided by the authorities, previously issued U.S. government reports on the subject, the laws and regulations of these countries, and official reports and notifications filed at the WTO. These systems have been selected to demonstrate the variety of prospective systems used by active users of AD/CVD remedies and are not meant to be a comprehensive survey of assessment methodologies currently in use. It is also important to recognize that AD/CVD assessment practices of administering authorities evolve over time and are not always clearly defined in national law, implementing regulations, or the relevant WTO Agreements.

<sup>32</sup> As discussed below, proponents of the two systems disagree about the relative accuracy of the systems, at least with respect to how the current retrospective system of the United States operates.

<sup>33</sup> Potential under- or over-assessment of duties can occur in either system. A remedy for potential overcollection caused by decreased levels of dumping or subsidization exists under either system. Importers can seek a refund review in a prospective system or an administrative review under the U.S. retrospective system. However, only under a retrospective system is there a remedy for potential under-assessment of duties caused by increased dumping or subsidization.

subsidization through increased duties on future imports of the merchandise. They argue that this type of adjustment could be accomplished in a process similar to the administrative reviews of the retrospective system, but on a more timely basis.<sup>34</sup> A more timely adjustment of the rate in response to changed market circumstances would also provide domestic producers with more immediate injury protection when dumping rates increase.

Some proponents of retrospective systems posited that if the United States were to adopt a prospective system, in order to be fair to domestic petitioners, some adjustment would need to be made to address the one-sidedness of such systems where only importers are able to benefit from retrospective measures, *i.e.*, refund reviews. They suggested that this could be done either by: 1) allowing collected duties to be modified upward in changed circumstances reviews, which in the end would not be much different from the existing retrospective system; or 2) collecting duties based, not on the weighted-average rate, but on the highest rate calculated and rely on importers to request refund reviews if they thought the rate was too high.

Some proponents of prospective systems stated that retrospective systems can achieve greater accuracy than prospective systems only to the extent that reviews are requested and there are resources available to examine individual companies retrospectively. They note that Commerce has not had sufficient resources in recent years to examine more than a few companies in each administrative review even where reviews of many more companies have been requested.<sup>35</sup>

Other commenters questioned the accuracy of Commerce's retrospective determinations particularly in cases that require Commerce to rely on the "best available" surrogate value information which they argue cannot produce truly accurate results. Many commenters argued that the expense of participating in Commerce's proceedings, protracted litigation and uncertain outcomes, lead many companies to conclude that they cannot financially justify the expense of participation, leading Commerce to rely on facts available and adverse inferences given the absence of actual contemporaneous company-specific data.<sup>36</sup>

According to proponents of prospective systems, retrospective duty assessment rates determined long after importation and/or sale of the merchandise in question had little, if any, remedial effect, because the duty assessment rates are not known and cannot be predicted at the time pricing and purchasing decisions are made. These commenters point out that a prospectively

---

<sup>34</sup> The process for establishing ad valorem or per unit AD/CVD rates is the same under a retrospective or a prospective system. If Commerce were to establish new prospective AD/CVD rates more frequently than it does now, this would impose a significant burden on Commerce. Frequent updating of normal values under a prospective normal value system would impose similar burdens on Commerce given the large number of company-specific, model-specific normal values covered by AD orders and the sales and cost data that would need to be gathered, reviewed and analyzed to update each one.

<sup>35</sup> Of course, whether resources are available to examine more or fewer companies is an issue that arises regardless of whether the company-specific examination will determine retrospective or prospective rates of duty. This is separate from the question of whether an examined company's retrospectively determined rate of duty more accurately reflects the amount of dumping or subsidization in connection with the merchandise to which the rate is applied than a prospectively determined rate of duty.

<sup>36</sup> These concerns are unrelated to the question of whether duty rates should be determined retrospectively or prospectively. The expense of participation and protracted litigation is unlikely to change and Commerce's methodology and the circumstances in which the statute provides for the application of facts available and adverse inferences are not a function of, or determined by, the nature of the duty assessment system.

determined duty is known at the time critical pricing and purchasing decisions are made and, as a result, those making these decisions may be more responsive to the certainty of a prospective duty than to the uncertainty of the retrospective duty. In addition, prospective system proponents note that, under a prospective system, the remedy is immediate – if dumping exists, final duties are assessed at the time the goods enter, not two to three years later. Under a prospective normal value system, if prices fall and dumping increases, additional duties are automatically collected.

Retrospective system proponents responded that a prospective *ad valorem* system actually creates an incentive to decrease prices and increase dumping because duty liability is reduced when the *ad valorem* duty rate is applied to a lower entered value.<sup>37</sup> In addition, as previously discussed, they argued that WTO rules require prospective systems to afford a retrospectively determined refund if the duty rate exceeds the margin of dumping or the level of countervailable subsidization. Accordingly, they argue that such systems are only more certain in the sense that the duty will not increase after importation. These commenters noted that while the certainty that a duty will not increase could influence pricing and purchasing decisions, it is not clear that removal of the risk of an increased duty while retaining the possibility of a lower duty would influence pricing and purchasing decisions in a way that would diminish the occurrence of dumping and subsidization.

Proponents of the prospective normal value system emphasized that a prospective normal value system permits exporters and importers to decide to charge prices above normal value, thereby avoiding dumping duties altogether while eliminating dumping.<sup>38</sup> In this respect, a prospective normal value system determines assessed duties based on current pricing and normal value from a recent past period whereas a retrospective system waits to determine final assessment on past entries based on pricing and a contemporaneous normal value from the recent past period.

---

<sup>37</sup> Such action could be remedied through an administrative review under a retrospective system, but may only be addressed for future shipments under a prospective *ad valorem* system if an interim or changed circumstance review were conducted.

<sup>38</sup> The degree of importer knowledge and certainty of duty liability at the time of importation differs, not only between retrospective and prospective systems, but also between the various types of prospective systems. In a prospective normal value system, normal values are generally considered business confidential information. Unless the relevant exporter or producer provides the importer with such information either by agreement or through affiliation, the importer is unaware of, and has no advance access to, the normal value used to assess the duty. Exporters may or may not find it in their interest to share such information and some exporters (e.g., trading companies) may not have access to the proprietary normal values associated with the shipped merchandise. However, the extent to which this would occur is unknown. Further, the overall company-specific AD/CVD rates are likely to provide little guidance to a transaction-specific assessment as these rates constitute an average of all transaction-specific dumping margins during the period reviewed. As individual transaction-specific margins can range from zero percent to percentages in the three, or sometimes even four, digit range, importers without access to the normal values are subject to a game of “duty roulette” each time they import a specific item from a foreign exporter for the first time unless they have been provided with the normal value by the relevant party. Uncertainty is eventually eliminated when importers face an immediate pleasant or unpleasant surprise each time they import for the first time as opposed to waiting for the outcome of an administrative review. However, under a prospective normal value system, importers would have the option of reexporting the goods before the entry was completed and not have to pay the duty. Sometimes limited information is available to the importer. In the Canadian prospective normal value system, for example, Canadian Customs may, upon written request by the importer supported with a copy of a price quotation from the exporter, indicate whether the quoted price will result in potential duty liability (the possibility, not the amount, of duty liability is all that is shared). Of course, such inquiries result in additional administrative burden to the agency responsible for duty collection.

Retrospective system proponents responded that, while a prospective normal value system does not create the same incentive to decrease prices found in the prospective *ad valorem* system, prospectively determined normal values are difficult to administer and can become outdated quickly when input costs or market conditions change rapidly. This can result in no antidumping duty assessed, even when retrospective examination of the normal value would reveal that the export prices were less than the contemporaneous normal value.<sup>39</sup>

Proponents of prospective systems argued that the United States is the only country administering a retrospective system and other major users of these trade remedies are able to afford an effective remedy to their domestic producers using prospective systems. They argue that the United States should be able to do the same while providing the economic benefits of greater certainty and less risk to importers and domestic manufacturers whose businesses rely on imported merchandise. They argue that the extended uncertainty about the final level of duty liability is particularly burdensome for small and medium-sized enterprises. These commenters also noted that the current U.S. system incorporates prospective elements in the establishment of an estimated duty rate which becomes the final assessment rate of an importer's entries if no request for review of their supplier is made. In this respect, they assert that the current U.S. system is retrospective only to the extent that interested parties submit requests for review.

Some commenters noted that one facet of the current retrospective system is that it creates the ability and an incentive for petitioners and exporters to negotiate private agreements whereby the petitioner can offer to withdraw a request for an administrative review in exchange for a negotiated payment from the exporter. Leverage to obtain a settlement exists either when exporters expect a review to lead to an increased dumping margin, or when exporters simply prefer the certainty of a settlement to the uncertainty of a review and to the cost of participating in a review process. They also noted that since these agreements are not public and their frequency is not known, it is not possible to assess their impact on pricing behavior, competition or the markets. However, to the extent that settlement between the parties prevented dumping that occurred from being addressed in the context of the withdrawn administrative review, the effect would be a reduction in potential collected duties.

## **Minimizing Uncollected Duties**

In March 2008, the Government Accountability Office (GAO) released a report on U.S. AD/CVD duty collection. The report, [Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection \(GAO Report\)](#), found that over \$613 million in AD/CVD duties from fiscal years 2001 through 2007 were uncollected as of the end of September 2007.<sup>40</sup>

---

<sup>39</sup> Of course, under a prospective system, if a petitioner files for a review of the original dumping determination and succeeds in showing an increased dumping margin, then a higher duty would be assessed from that point forward.

<sup>40</sup> [GAO Report](#), p. 3. DHS uses a formal debt collection process on amounts legally due from principal debtors and sureties. DHS is actively pursuing collection of the balance of the money against delinquent importers and sureties. Active collection steps include sending delinquency notices to principal debtors, formal demands on respective sureties for payment of delinquent amounts due and litigation against delinquent debtors.

The retrospective nature of the U.S. AD/CVD assessment system was among four key factors identified by the GAO that contributed to the problem of uncollected duties.<sup>41</sup> Among other things, the GAO noted that the long lag time between cash deposit and duty assessment, on average 3.3 years but in many cases much longer, made it difficult for DHS to collect increased duties resulting from an administrative review. The longer the lag time and the larger the amount of the duty owed, the greater the likelihood that DHS would be unable to collect the duties. Depending on the results of the administrative review, importers could find themselves unable to pay the increased duty and associated interest. In some cases, importers end up in bankruptcy; in other cases, they simply disappear before retrospective duty increases are billed by DHS.<sup>42</sup> The GAO concluded that these practices contributed to an increasing shortfall in AD/CVD duty collections. Citing to a Treasury analysis of uncollected duties from fiscal years 2003 through 2006, the GAO noted that, although the overall AD/CVD collection rate was roughly 96 percent, the collection rate for additional retrospective duties owed following the results of an administrative review was less than 50 percent.<sup>43</sup>

In their comments for this report, proponents of prospective systems argued that the timeliness, predictability and efficiency of a prospective system would largely eliminate the problem of uncollected duties. There would be no significant lag time between importation of the goods and final duty assessment. Importers would immediately know their final duty liability and duties would be collected on or near importation of the goods. DHS would not be put in the position of trying to collect significant amounts of additional duties years after the goods were imported and the U.S. Government would not be in the position of having to write-off considerable amounts of unpaid duties. Prospective system proponents argued that the problem of uncollected duties largely disappears under a prospective system as all duties are assessed on entry. Further, these commenters argued that prospective systems based on normal values or which include a floor price, can actually increase collections by responding immediately to decreases in export prices.

In submitted comments to the GAO which were included in the GAO Report, DHS stated that its preferred option would be “for Congress to fundamentally alter the United States system by eliminating its retrospective component and making it prospective. This approach would . . . [a]lleviate the collection issues faced by DHS due to substantial rate increases since the amount of duty assessed at entry would be the final amount owed.” In its comments to the same report, Treasury agreed “with the GAO conclusion that ‘the retrospective component of the U.S. AD/CVD duty system creates the risk of uncollected duties.’ If there were no retrospective component to the U.S. AD/CVD duty law, we would expect the duty collection rate to be similar to that for other duties, over 99 percent.”

Proponents of the current retrospective system disagreed that switching to a prospective system would minimize the undercollection of AD/CVD duties. Instead, the switch would create a different type of duty undercollection. Those parties noted that, because prospective systems

---

<sup>41</sup> The other factors were risks associated with new shippers, inadequate bonding requirements for imports subject to AD/CVD orders, and the minimal checks and requirements imposed on importers.

<sup>42</sup> The GAO reported that, according to DHS and Treasury officials, some importers take advantage of these long lag times to bring in large volumes of imports subject to AD/CVD orders before final duties are assessed. This is often the case with respect to certain new shippers. GAO Report, pp. 24-26.

<sup>43</sup> GAO Report, p. 8.

have no or limited ability to remedy increases in dumping that may occur after the establishment of duty rates or normal values, the amount of “undercollected” duties will actually increase. Duties that could be imposed under a retrospective system as the result of increased dumping will not merely be undercollected, they will not be collected at all. Switching to a prospective system does not solve the problem of uncollected duties, it simply defines it away. The problem of duty undercollection, these commenters maintained, is an enforcement problem, not a systemic problem with the retrospective system.<sup>44</sup> Rather than blame the system, these commenters argued that the solution is to hold importers accountable for the duties they owe.

In comments to the GAO, which were included in a follow-up report on strengthening international agreements to improve AD/CVD duty collection, Commerce stated that the main difference between the two types of systems is that “prospective systems will never collect additional duties when dumping, pursuant to a review, is found to increase.”<sup>45</sup> Further, Commerce stated that it “believe[d] strongly that the under-collections at issue have unique factors that contributed to the problem, and that such factors could exist under either a prospective or retrospective system.”<sup>46</sup> For example, the lengthy lag time between entry and duty collection cited by proponents of the prospective system as a key cause of the uncollected duty problem can also be due to pending litigation.<sup>47</sup> Without significant changes in due process and the ability to challenge Commerce or ITC decisions, such lag times, and the duty collection problems associated with them, are likely to remain, regardless of whether the system employed is a prospective or retrospective one.

### Revenue Forgone

In their comments submitted for this report, proponents of prospective systems argued that the problem of uncollected duties largely disappears under a prospective system. Beyond the initial collection of duties at importation (equivalent to the cash deposits collected under a retrospective system), there are no additional duties billed and no additional duties to collect. Therefore, there are no uncollected duties.

The GAO Report noted that the existence of substantial uncollected AD/CVD duties not only undermines the effectiveness of the government’s effort to address unfair trade, it also reduces the amount of revenue available to the U.S. Government.<sup>48</sup> However, certain prospective systems, for example, those of an *ad valorem* nature, could result in considerable additional loss

---

<sup>44</sup> “[T]he problem regarding collection difficulties is not that cash deposits are not being posted by importers at the time that imports enter the U.S. The problem is that in some cases, the foreign producers and U.S. importers significantly increase the amount of dumping (or level of subsidization from the government) during a review period but then go out of business or otherwise disappear before DHS is able to collect additional duties owed. The only security posted (besides the lower cash deposit amount) is a continuous entry bond which is typically quite small compared to the additional liability that has been incurred.” AFL-CIO, Public Comments, p. 3.

<sup>45</sup> GAO, Agencies Believe Strengthening International Agreements to Improve Collection of Antidumping and Countervailing Duties Would Be Difficult and Ineffective (GAO Follow-up Report), p. 14.

<sup>46</sup> GAO Follow-up Report, p. 14.

<sup>47</sup> As discussed previously, there are no established timelines for litigation. As a result, the lengthiest lag times between entry and duty collection are likely associated with entries subject to outstanding litigation.

<sup>48</sup> GAO Report, p. 46. In line with this concern, Commerce examined not only uncollected retrospective duties as described in the GAO Report, but in the discussion that follows, also the potential total amount of duties that would be collected under the differing systems.

of revenue to the U.S. Government.<sup>49</sup> The potential for this can be drawn from the chart below prepared by Treasury for its July 2007 report on duty collection problems.<sup>50</sup>

**AD/CVD DUTIES, BILLINGS, AND COLLECTIONS (MILLION DOLLARS)**

AD/CVD BILLINGS AND COLLECTIONS					
Fiscal Year	Net AD/CVD Duties Due*	Retrospective AD/CVD Billings	Uncollected Retrospective AD/CVD Billings	Percent of Retrospective AD/CVD Billings Uncollected	Percent of All AD/CVD Duties Uncollected
2003	\$2816.6	\$182.2	\$93.4	51%	3.32%
2004	\$4,133.1	\$277.3	\$225.4	81%	5.45%
2005	\$5614.8	\$177.6	\$74.9	42%	1.33%
2006	\$1039.0	\$302.2	\$119.1	39%	11.46%
<i>Total</i>	\$13,603.4	\$939.3	\$512.9	55%	3.77%

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

In a retrospective system, the forgone revenue is essentially equal to the uncollected retrospective AD/CVD billings – \$512.9 million for the four-year period.<sup>51</sup> In a prospective *ad valorem* system, the forgone revenue is essentially equal to that which was never billed to begin with – \$939.3 million in retrospective billings for the four-year period. Assuming that the level of dumping activity, petitioner behavior, and refunds based on reviews of dumping margins would have been the same under a prospective system during the above period, the maximum amount of duties collected under the prospective *ad valorem* system is the minimum amount of duties that could be collected under the retrospective system. As a result, the prospective *ad valorem* system results in an additional \$426.4 million in forgone revenue compared to the duties

<sup>49</sup> This would also apply to prospective per unit systems.

<sup>50</sup> Department of the Treasury, Duty Collection Problems FY 2003 – 2006, July 2007, p. 8 (“AD/CV” changed to “AD/CVD” for consistency with rest of report).

<sup>51</sup> The actual amount of forgone revenue from uncollected retrospective billings is likely to be somewhat overstated. Some of the billed duties are simply outstanding and not past due. Other billed duties may be subject to protest and will likely be collected, in whole or part, at a later date. Additional collections may also occur as a result of judgments, settlements or the bankruptcy process. However, a significant proportion of these duties are likely to be written off after review by DHS. AD/CV Enforcement Actions and Compliance Initiatives, Fiscal Year 2009 Report to Congress, U.S. Customs and Border Protection, December 19, 2008, p. 10; Antidumping and Countervailing Duty Enforcement: Fiscal Year 2009, Fiscal Year 2010 Report to Congress, U.S. Customs and Border Protection, June 7, 2010, pp. 7-9; and GAO Report, pp. 17-19.

collected under the retrospective *ad valorem* system.<sup>52</sup> This \$426.4 million accounts for approximately three percent of total AD/CVD duties due.

The amount of additional forgone revenue is likely to be reduced but not necessarily eliminated in other types of prospective systems. Under a prospective normal value system, the amount of duty collected would rise as the export price fell, provided the export price was below the normal value. The same would happen under a prospective *ad valorem* or per unit system that incorporates a floor price that triggers the collection of additional duties once the export price falls below the floor price.

Proponents of the prospective normal value system argued that its transaction-specific method for calculating and collecting duties is not only efficient but also more effective than other prospective systems in addressing dumped imports. Unlike a prospective *ad valorem* system, duty collection in a prospective normal value system is linked to dumping activity through the export price – if dumping increases as a result of declining export prices, duty collection increases accordingly. And if export prices rise, the amount of duty collected falls. These commenters also noted that, because the system responds immediately to export price declines, companies are unable to evade antidumping duties by taking advantage of low rates combined with long lag times in collection to lower prices, increase dumped exports, and then disappear before the duty bill arrives – a key part of the problem associated with uncollected duties under the retrospective system.<sup>53</sup>

Proponents of the retrospective system argued that, while the flexibility of prospective normal value systems may make them preferable to prospective *ad valorem* systems, they still do not fully address increased dumping that may occur following the issuance of normal values. That is because a prospective normal value system readily addresses only one side of the dumping equation – changes in export prices. However, dumping can also increase where the exporter does not respond to upward changes in home market prices or input costs. In many cases, these upward changes can be dramatic, and export prices that stay the same or only increase marginally will result in substantial dumping that would not be captured by a prospective normal value system. In such cases, prospective normal values become outdated and duty collection remains stagnant or even declines relative to the level of dumping that is occurring (in cases where export prices increase but not sufficiently to offset home market price or cost changes). These commenters noted that products such as lumber, chemicals and steel have been subject recently to significant price increases in key raw material inputs over relatively short time periods.<sup>54</sup> They asserted that dumping increases because, for whatever reason, exporters do not raise the prices of their final products in order to pass on increases in input prices to their U.S. customers. While such increased dumping can be addressed in a retrospective system,

---

<sup>52</sup> The actual amount of additional forgone revenue from a prospective *ad valorem* system is likely to be somewhat understated. While there may be some later collection of reported uncollected billings in the retrospective system, this cannot happen in a prospective *ad valorem* system because no billing has taken place.

<sup>53</sup> The [GAO Report](#) noted that DHS's ability to collect duties from foreign importers of record engaged in such activities is limited and the cost of attempting to collect is high. For U.S. importers of record, having assets in the United States that are reachable through legal action discourages such activities.

<sup>54</sup> One commenter noted that in 2008 and the first half of 2010, prices for certain raw materials – steel scrap, iron ore, nickel, zinc, molybdenum, coking coal, and hot rolled steel – sometimes doubled, tripled, quadrupled, or even quintupled over a period of several months. Shagrin Associates, [Public Comments](#), p. 4.

retrospective system proponents argue that a prospective normal value system will be hard-pressed to keep up with such rapid market changes, resulting in a failure to remedy dumped imports and a consequent loss in revenue to the U.S. Government. Proponents of prospective normal value systems argue that shifts in input pricing can be tracked and identified and addressed through changed circumstance reviews.

## **Reducing Incentives and Opportunities for Importers to Evade Antidumping and Countervailing Duties**

Although proponents of both systems commented that customs fraud will continue to exist no matter what type of collection system is in place, the choice of system may affect other types of duty avoidance.

Proponents of prospective systems argued that the immediacy and certainty of duty assessment at the time of entry reduces the opportunity and incentive for duty avoidance and encourages compliance. At the hearing, one commenter stated, “[a] system that responds immediately to price changes will have the immediate effect of changing purchasing decisions . . . . It will give [us] and other importers the ability to buy their goods at a fairly traded price and to know what a fairly traded [price] is at the time of importation.”<sup>55</sup> In fact, both the opportunity and the incentive for duty evasion, some commenters claimed, is a direct consequence of the retrospective system and the long lag times between entry and final duty assessment associated with it. These lag times give those seeking to evade duties both the time and means in which to do so and, as such, rewards the worst type of behavior.

Another commenter noted that prospective normal value systems are better able to address “hit and run” schemes whereby, in a retrospective system, an exporter with a low AD rate lowers prices to increase exports with the intention of disappearing before the duties come due. The significant lag times between entry and final duty assessment provide such exporters with a substantial window of opportunity for engaging in such schemes. This window is closed under the prospective normal value system. Not only is there little or no lag between entry and assessment of which to take advantage, increased dumping by lowering export prices is immediately addressed through the higher amount of duty collected as a result of the lower export price. This aspect of the prospective normal value system also helps address the problem of new shippers taking advantage of a single high-priced sale to establish a low AD rate because future shipments at lower prices will only result in higher duties at the border when compared to the normal value determined in the new shipper review.

Proponents of the retrospective system argued that prospective systems do not reduce incentives for duty avoidance because there is no consequence to increased dumping once the rate is established. In fact, under a prospective *ad valorem* system, the opposite occurs because a decrease in price means a reduction in the amount of duty assessed while price increases result in

---

<sup>55</sup> Toni Dembski-Brandl on Behalf of Target, Transcript – Public Hearing on Retrospective and Prospective Antidumping/Countervailing Duty Systems (Public Hearing Transcript), April 27, 2010, p. 187.

more duties owed.<sup>56</sup> These commenters argued that prospective *ad valorem* systems also provide a strong incentive to new shippers to increase dumping once they have established a low AD rate because the new shipper can increase dumping without the fear of incurring any additional duty liability for shipments once entered.

Retrospective system proponents also argued that a prospective system provides similar incentives to foreign governments to increase subsidization. Unlike under a retrospective system, increases in foreign government subsidization cannot be captured and remedied for shipments that have already entered. These commenters argued that governments can increase subsidies to offset CVD findings knowing that the only consequence will be a prospective increase in CVD duties after an administrative review is completed. At that point, the opportunity to increase subsidies to prevent the newly increased CVD duties presents itself again.<sup>57</sup>

These commenters note that under a retrospective system, increased dumping or subsidization is not without consequence; not only will future AD/CVD cash deposit rates increase on future entries, duties in the amount of the increased dumping or subsidization will be calculated and assessed retroactively. The prospect of additional retroactive duties acts as a disincentive to increase dumping or subsidization. Prospective system proponents note that this disincentive is diminished to some extent by the uncertainty of future duty increases at the time of importation and the fact that duties are often evaded.

Retrospective system proponents argued that even a prospective normal value system offers opportunities and incentives for duty avoidance in situations where normal values are rising rapidly whether because of significant increases in home market prices or the price of major inputs. In such situations, rather than respond to these market forces and raise prices, exporters can maintain export prices at existing levels and not face increased AD duties even though dumping has increased.

## **Effectively Targeting High-Risk Importers**

Proponents of prospective systems argued that prospective systems more effectively target high-risk importers.<sup>58</sup> Many of these same commenters also believed the problem of high-risk importers to be a direct and exclusive result of the delayed collection of duties under the current retrospective system. Some contend that the retrospective system has no reliable way to target high-risk importers as it is focused on the prices of goods after they are imported. In contrast, a prospective normal value system is focused on the price of the goods when they arrive at the port

---

<sup>56</sup> Retrospective system proponents also pointed out that in its discussion of the EU prospective *ad valorem* system, the GAO noted that “the EU system provides no direct financial incentive for firms to discontinue dumping.” GAO Report, p. 39.

<sup>57</sup> There is likely to be a limit to a government’s desire to engage in an ever-increasing cycle of increased subsidization. Also, it should be noted that in a retrospective system, governments may try to “avoid” the impact of a countervailed subsidy on their exporters or producers by eliminating or reducing the countervailable subsidy program while creating new programs to take its place.

<sup>58</sup> High-risk importers can include importers that try to evade the entire AD/CVD system by misclassifying goods or entry type, or those that properly declare the goods and pay the cash deposit but later abscond without paying the final duties owed to the U.S. Government.

and, by assessing a final duty immediately, greatly reduces, if not eliminates, the risk of non-payment, making the problem of high-risk importers less relevant.

Prospective system proponents stated that fraud would be detected sooner in a prospective system because transactions are examined at the time of entry. Further, a prospective normal value system responds immediately to decreases in prices as the goods cross the border, making it far more resistant to evasion by foreign exporters and high-risk importers.

In addition, they argued, to the extent that some importers would still attempt to evade duties, all of the same tools currently available to DHS to address fraud or duty evasion would continue to exist under a prospective system. In theory, one commenter contended that, without some of the heavy administrative burdens associated with the retrospective system, more resources would be freed up and could be devoted to targeting high-risk importers and customs fraud more effectively. As discussed in more detail in the *Minimizing Administrative Burden* section, DHS fully concurs with this comment.

Proponents of a retrospective system acknowledged that high-risk importers are a problem under the current system, but they still believed the existing system is preferable to a prospective system. They argued that the existing arrangement targets high-risk importers more effectively. These commenters maintained that a retrospective system treats all importers fairly and allows administrators to focus on high-risk importers. Proponents of the existing system argued that a prospective *ad valorem* or per unit system allows high-risk importers to evade duties because there is no mechanism for the collection of duties if dumping increases once the duty rate has been established. They argue that high-risk importers are actually rewarded by being able to dump more heavily and increase their imports when the duties are low. In a retrospective system, such behavior is deterred because of the eventual duty liability.

Even though a retrospective system may enable high-risk importers to increase dumping and then exit the market before the bill comes due, some retrospective system proponents argued that this is a better outcome than allowing them to increase dumping indefinitely without consequence which could occur under a prospective *ad valorem* system if the administering authority engaged in infrequent increases of the established margin. Even if DHS is unable to collect the full amount of the duty owed under a retrospective system, at least the high-risk importer has been stopped.

Retrospective system proponents also maintained that changing to a prospective system would offer no apparent advantage over the existing system in terms of targeting high-risk importers. DHS already employs sophisticated tools to conduct risk analysis and presumably can identify high-risk importers today. Additionally, U.S. law already allows a port director to suspend liquidation of entries where circumvention or evasion is suspected. Here again, these commenters maintained that the problem appears to have less to do with the mechanisms that are in place and more to do with using the tools U.S. Government agencies already possess more effectively. Should these tools prove wanting, these commenters suggested that simple regulatory or statutory changes could be made that would improve duty collection. These suggestions are discussed more fully in the *Alternative Means to Address Uncollected Duties* section of this report.

## Addressing the Impact of Retrospective Rate Increases on U.S. Importers and Their Employees

As discussed above, retrospective systems allow for final duty rates to be increased and assessed in amounts larger than the cash deposit paid at the time of importation based on facts of the actual sale that occur after the determination of the deposit rate. Prospective *ad valorem* and per unit systems generally do not allow for such retroactive increases. Collected AD duties will increase automatically as export prices fall under prospective normal value systems but will not be responsive to increased dumping resulting from increased home market prices or input costs.<sup>59</sup>

According to the GAO Report, “final duties are assessed, on average, more than 3 years after importation.”<sup>60</sup> This timing is, in part, a result of the U.S. retrospective system in that, as previously described, final assessment rates are set in a post-importation administrative review process. Further, additional time is required before final rates can be assessed due to the suspension of liquidation pending judicial review and the time required by DHS to administer the liquidation process after suspension has been lifted.

The GAO Report indicates that final duty rates increased 16 percent of the time, based on the GAO’s analysis of data over a six-year period.<sup>61</sup> The median rate increase was less than 4 percentage points. Due to some large increases, including those of 200 percentage points or more, the mean rate increase was 62 percentage points. The GAO analysis indicates that the average increased bill was for approximately \$2,000, but notes that the bills ranged up to \$7 million.<sup>62</sup>

As a function of our system of government, the duties calculated by Commerce in its final determination, regardless of the duty assessment system used, will be subject to possible judicial review. In these circumstances, while duties would likely be imposed from the date of the final agency determination, in order to give effect to its review of Commerce’s determination, a reviewing court would likely enjoin liquidation of entries until the duty rate calculation is finalized at the end of the litigation. It is possible that the ultimate result of such litigation would be the calculation of a higher duty rate than was imposed in the original final agency determination.<sup>63</sup> Thus, any system the United States might adopt would likely retain the possibility of retroactive rate increases in some circumstances.

---

<sup>59</sup> As discussed before, prospective normal value systems only apply to AD duty assessment. For CVD duties, prospective systems operate on an *ad valorem* or per unit basis.

<sup>60</sup> GAO Report, p. 40. One commenter stated that, in one example, final assessment occurred 20 years after entry for one of its member companies. Comments filed by U.S. Association of Importers of Textiles and Apparel, April 20, 2010, p. 4. Similarly, the GAO Report cites one entry that took more than 18 years from the date of entry to liquidate. GAO Report, p. 23. Most of the length of these time periods, however, is a function of the judicial review process and not the duty assessment system itself.

<sup>61</sup> GAO Report, p. 21.

<sup>62</sup> GAO Report, p. 22.

<sup>63</sup> The GAO found that roughly 16 percent of AD rates increased while 60 percent stayed the same and 24 percent declined. The average rate increase was 62 percent. GAO Report, p. 4.

Commerce received comments from a number of U.S. industries and their representatives on the issue of retrospective rate increases. Proponents of prospective systems typically commented that the possibility of retrospective rate increases has a substantial impact on the predictability of their operations, expenses and supply chains. Sound business decisions are based on predictability, these commenters say. Prospective system proponents noted that importers do not feel they have the information necessary to forecast what, if any, retrospective rate increases they may face on their imports. Additional costs incurred years after the imports have been sold or consumed cannot be passed on or factored into the prices charged to customers. The resulting volatility in their operations leads to the need to set aside large reserves against possible duties, hesitation in growth and investment plans, and decreased job creation.

Proponents of prospective systems observed that this unpredictable liability also causes importing manufacturers to change their purchasing decisions and disrupt their supply chains to avoid exporters covered by AD/CVD orders. Importing manufacturers may decide that, because they cannot hedge the risk of future retrospective rate increases, they have no choice but to purchase from a higher-cost supplier, even if that puts them at a competitive disadvantage with their foreign competitors. Some commenters noted that, because global supply chains have become an economic necessity in the modern world, this uncertainty may prompt the relocation of U.S. manufacturing operations offshore, where the company will not face the prospect of retrospective rate increases.

Several prospective system proponents noted that small businesses often face the greatest impact from retrospective rate increases. These businesses are less likely to be familiar with AD and CVD laws and procedures and how to participate in the process. They may also be unaware of the limited reliability of cash deposit rates as estimates of duty liability in a retrospective system and, in some cases, the full extent of their exposure to increased duties. One commenter from a family-owned seafood business noted that, “If an importer buys from a crawfish supplier with a zero or low duty rate but is then told years later that the proper duties were in fact 200+ percent higher, this becomes an immediate multi-million dollar liability that would likely bankrupt any significant importer of crawfish in the United States.”<sup>64</sup>

Comments from small business importers mirrored those of larger importers. At the hearing, one commenter from a small business that further processes domestic and imported shrimp observed that the possibility of years of uncertainty over duty liability hinders a company’s ability to make informed business decisions – long after the product has been sold, the company may incur significant costs with no ability to go back to the customer for additional payment. The commenter also noted that there were immediate consequences as a result of the uncertainty:

I can remember when [as] a seafood importer, your bond was \$50,000. My bond until recently [w]as \$1.8 million. Bonding companies, they don’t understand everything either so they just want to make sure they’re covered. So that \$1.8 [million] comes out of my working capital. And I think we all know from listening to the news, working capital is hard to come by now.<sup>65</sup>

---

<sup>64</sup> Maritime Products International, Public Comments, p. 2.

<sup>65</sup> Rob Paterson on behalf of Tampa Bay Fisheries, Public Hearing Transcript, p. 176.

Comments from retrospective system proponents on this issue were fewer in number. One proponent of the current retrospective system observed that importers of fairly traded goods would be disadvantaged under a prospective system because their competitors would have the opportunity to import unfairly traded goods that might have been dumped or subsidized in excess of the rates calculated and prospectively applied, with no liability for the decrease in U.S. prices or increases in subsidies. At the hearing in response to a question from the panel on the impact of either system on small businesses, a retrospective proponent noted that importers were not the only small business affected by the increased duties. Other small businesses, those competing with the increased dumped or subsidized imports that resulted in the increased duties, were also having difficulty keeping their operations running. And unlike retrospective systems, prospective systems are unable to go back and fully remedy these significant increases in dumping or subsidization. He also noted that, even though they may change, cash deposit rates can provide some guidance to the importer; however, importers also should be looking at their suppliers more carefully when buying their products.

## **Minimizing Administrative Burden**

The following discusses the separate impact on administrative burdens for the responsible agencies. In addition to comments received from interested parties, this section includes information on administrative burden provided by Commerce and DHS.<sup>66</sup>

### *Commerce*

Proponents of a prospective system argued that such a system would be less burdensome for Commerce. A fundamental premise of this assertion is that the transition to a prospective system would result in a decrease in the number of review requests and fewer legal challenges to decisions made by Commerce. Other prospective system proponents appear to tie a reduction in Commerce's burden to an assumption that the duties determined in the final AD/CVD investigation would remain unchanged until the five-year sunset review, thereby allowing Commerce to devote its limited resources to other enforcement activities. However, retrospective system proponents argued that, at a minimum, any U.S. prospective system would have to allow domestic industry the ability to request reviews to address increased dumping or subsidization through increases in future prospective duty rates.

Given the variation in current and yet to be designed alternative, prospective systems, there is no certainty that the transition from a retrospective to a prospective system would be any less burdensome on Commerce and its administration of the AD/CVD laws. Without a significant decrease in the number and complexity of administrative and new shipper reviews and a reevaluation of the judicial review alternatives currently in place, a move to a prospective system may result in a system that is equally, if not more, burdensome as the current retrospective system (though that is just one possible outcome).

In addition, in light of obligations under Article 9.3.2 of the Antidumping Agreement to conduct refund reviews, some proponents of the current retrospective system argued that a prospective

---

<sup>66</sup> A number of parties either refrained from commenting on this issue or noted that both systems are likely to have some sort of administrative burden associated with it.

system might actually result in more reviews which would increase the burden on Commerce. Specifically, importers facing any margins may be more likely to request reviews as, under certain current prospective systems, there would be no mechanism to increase the amount of duties owed and there would be no chance of a retroactive rate increase. Some retrospective system proponents also predict that there would be more administrative requests for review from petitioning domestic parties in a prospective system “due to the fact that import volumes will not be disciplined when margins and normal values do not match the actual level of dumping of subsidization. As such, U.S. producers will be more inclined to request review to at least insure appropriate margins on future entries.”<sup>67</sup>

Commerce notes that certain of its administrative functions could prove less burdensome under a prospective system as final duties would be collected at the time of entry. Accordingly, Commerce would no longer need to maintain the same level of detail within DHS’s ACE system. In ACE, Commerce maintains the AD/CVD Case Management System, which contains files for each AD/CVD case on a company-specific basis. For each company, Commerce inserts information about cases and companies including information pertaining to the current cash deposit, cash-bond status, and suspension of liquidation status, among a host of other pertinent information. Under certain prospective *ad valorem* systems, maintaining company-specific cash deposit rates, suspension of liquidation and bonding rates may not be necessary.

Under a prospective normal value system, however, that data would be replaced by the need for Commerce to enter thousands, if not hundreds of thousands, of company-specific, model-specific normal values on a regular basis for DHS to use as well as any additional information DHS would need to effectively match normal values with products crossing the border. At the hearing, proponents of the prospective normal value system observed that the key to effective enforcement under such a system depends on a robust system with regular and frequent updating of normal values to address changes in the market. As of June 30, 2010, Commerce administered 251 AD orders; a robust system with regular updating and recalculation of normal values is likely to substantially increase the administrative burden on Commerce. In fact, the initial task of merely establishing a prospective normal value system would impose an enormous burden before reaching the question of whether normal values for older orders need to be updated and recalculated. In contrast, as of December 31, 2009, Canada administered 36 AD orders covering considerably fewer entries given the substantial difference in size between the two economies.<sup>68</sup>

Commerce notes that under a prospective system it would likely issue fewer instructions to DHS. For example, Commerce would no longer need to issue liquidation instructions because final duties would be collected at the time of entry.<sup>69</sup> This could reduce Commerce’s administrative burden, as liquidation instructions account for more than half of the different types of instructions Commerce sends to DHS as well as the preponderance of DHS inquiries it receives.

---

<sup>67</sup> Alan Price on behalf of the Steel Manufacturers Association, Public Hearing Transcript, April 27, 2010, p. 25.

<sup>68</sup> As of the close of 2009, Canada also administered 9 CVD orders. Information on the number of orders administered by the other three companies described in the appendix is as follows: Australia – 26 AD, 1 CVD; Brazil – 66 AD, 1 CVD; EU – 135 AD, 8 CVD. WTO Semiannual Reports to ADP and SCM Committees.

<sup>69</sup> Some form of communication between Commerce and DHS or perhaps Treasury would have to be established to address refunds to importers arising out from refund reviews.

Commerce also observes that a prospective system may lower other administrative burdens as well. For example, the number of certain types of protests might be greatly reduced. In particular, protests regarding entries deemed liquidation by operation of law will largely be eliminated. Commerce would no longer have to keep track of whether and when liquidation instructions were issued in a given AD/CVD case.

Retrospective system proponents noted that, regardless of which system is used, the United States operates with a higher degree of transparency than other countries and its agencies' decisions are subject to litigation, likely making any system that it employs similarly burdensome. Instituting a prospective system would not necessarily result in final duties always being assessed prospectively because, as one commenter acknowledged at the hearing, "there should be an opportunity for all sides to get the margin as accurate as they can" and the United States is "a litigious society and we are going to litigate."<sup>70</sup> Because of this, a U.S. prospective system would likely be very different from prospective systems currently in place in other countries and Congress or the courts may take steps to ensure, at a minimum, that the results of challenges to Commerce's decisions, up or down, are implemented with respect to duty collection whether through injunction or suspension of liquidation. Thus, even supporters of a prospective system acknowledge that the administrative burden in terms of litigation and the need for accuracy in margin calculations that result may not change with a prospective system.

For example, should an interested party contest the amount of duties calculated by Commerce and subsequently collected by DHS, litigation may proceed against Commerce or DHS in those instances where a protest is denied. A more complicated prospective system might require suspension of liquidation of an entry until the time to file a law suit and/or appeal a court decision has been exhausted or until a law suit has been dismissed by the courts. Under this scenario, with the prospect that suspension of liquidation would continue to play a role, Commerce might have to continue to issue liquidation instructions to DHS following the conclusion of litigation. In such an environment, a prospective system is likely to be no less burdensome for Commerce than the retrospective system currently in place.

#### *Department of Homeland Security*

Proponents of prospective systems argued that under a prospective system a considerable burden for DHS would be reduced as duties would be collected at the time the goods entered the United States, eliminating the need for DHS to devote unnecessary time and resources to assessing duties on goods that entered the country many years prior. They further argued that a prospective system would increase the efficiency and effectiveness of AD/CVD duty collection, in part because retrospective systems are generally more complex to administer than prospective systems. DHS noted that it is subject to uncertainty with respect to the sufficiency of security posted and it must also process and post complex instructions on the suspension and lifting of suspension of entries subject to AD/CVD orders, determine whether to suspend liquidation and when to lift suspension of liquidation for AD/CVD entries, process protests involving liquidation instructions and deemed liquidations, collect from importers and sureties AD/CVD duties

---

<sup>70</sup> Lewis Leibowitz on behalf of the Consuming Industries Trade Action Coalition, [Public Hearing Transcript](#), p. 37.

resulting from rate increases and refund AD/CVD duties resulting from rate decreases in administrative reviews. They noted that these are labor-intensive and time-consuming tasks that would be reduced under a prospective system.

DHS observed that, depending on the type of prospective system selected, much of these administrative burdens could be reduced or eliminated. For example, if AD/CVD duties were assessed upon entry in the same manner as are regular customs duties, DHS's administrative process would be simplified significantly. Under the current retrospective system, import specialists engage in a number of administrative functions, including, but not limited to the following: a) searching/reviewing messages from Commerce; b) filing/retrieving entries related to these messages; c) reviewing entries for proper suspension codes and holding codes; d) ensuring proper collection of the required cash deposit; e) ensuring the sufficiency of any single entry bond used; and f) monitoring the Automated Commercial System (ACS).<sup>71</sup> DHS noted that because liquidations in the prospective system would be less complex, much of this burden would be greatly reduced.

Prospective system proponents also contended that if importers had a clearer knowledge of the final AD/CVD duties owed upon entry, the number of AD/CVD-related protests would be reduced significantly, resulting in a further reduction of DHS's administrative burden. In addition, DHS would find less of a need to dedicate resources to study trade trends or target AD/CVD-related entries for revenue-collection purposes. The ultimate duty obligation would be determined at the time of entry and DHS would be better able to require sufficient bonding as a result.

DHS also noted other areas where administrative burden would be reduced. For example, DHS would not have to devote significant assets and resources to deemed liquidations.<sup>72</sup> The uncertainty over the exact date of liquidation that is at the heart of the deemed liquidation protests creates a significant administrative burden because DHS officials must determine for each entry the specific date when it received notice that suspension was lifted, which requires sifting through potentially numerous liquidation notices from Commerce. Under a prospective system that allows subject entries to liquidate in the same manner as entries not subject to AD/CVD orders, deemed liquidation by operation of law would be easier to administer. This would also greatly reduce the need to keep track of unliquidated entries.

---

<sup>71</sup> ACS preceded ACE and is still in use as DHS extends its operations within ACE.

<sup>72</sup> A basis of many protests and something that poses an administrative burden to DHS is determining whether an entry that was suspended because it was subject to AD/CVD duties has actually been "deemed liquidated" as entered. The key event in determining whether an entry subject to an AD/CVD order has been deemed liquidated is the date on which DHS receives notice that suspension has lifted. However, determining the date that notice was provided to DHS has proven to be rather contentious. There has been a significant amount of litigation concerning which event provides DHS notice that the suspension of liquidation has lifted. Typically publication by Commerce of its final results in the *Federal Register* is the beginning of the six month period, however, in one case, the court ruled that an e-mail from a Commerce employee to DHS concerning whether entries had been liquidated would be sufficient notice that suspension had lifted as to those entries. The deemed liquidation problem with AD/CVD entries in a prospective system would largely be eliminated with the possible exception of suspension of liquidation arising from court-ordered injunctions.

Another area that is complicated by the features of the retrospective system and imposes administrative burdens on DHS pertains to the assessment of penalties for fraud or negligence on entries subject to AD/CVD duties. The lengthy time involved in determining the final duty assessment, particularly when cases are liquidated, can mean that penalty actions run up against statute of limitation deadlines and must be closely monitored. As the deadline nears, penalties may have to be completely revised because of changes in the amount of duties owed at assessment compared to the cash deposits at time of entry. In a prospective system, AD/CVD duty liability would be established at time of entry so there will be no fluctuation in AD/CVD duty rates and no need to recalculate penalty amounts and to reissue penalty notices.

Retrospective system proponents argued that circumvention and evasion schemes will continue to exist and may even increase in a prospective system, thus increasing DHS's burden with respect to addressing fraud and evasion. DHS acknowledges that, as with a retrospective system, circumvention and evasion schemes will continue under a prospective duty system though it is unclear to what extent they might increase or decrease. However, DHS notes that by lessening the administrative functions involved with a retrospective system, import specialists would be able to devote more time to review AD/CVD entries and non-AD/CVD entries to detect evasion. If evasion or potential evasion were found, the import specialists would be able to take appropriate enforcement actions as well as determine actual versus potential loss of revenue. DHS also maintains that the reduced burden of a prospective system would provide DHS field personnel the time and resources to strengthen the enforcement on the collection of AD/CVD duties and to focus on parties that evade the payment of proper AD/CVD duties such as undervaluation and outright circumvention as a result of a misleading description of the goods.

Commerce acknowledges that in a prospective normal value system numerous burdens on DHS would be substantially reduced, but notes that other burdens would increase. Based on existing prospective normal value systems (e.g., Canada), the responsibility for determining the final duty assessment and calculating all adjustments on the U.S. price side, line by line, entry by entry occurs at the border.<sup>73</sup> If the importer has not been provided with the proprietary model-specific normal values by the relevant exporter or producer, importers may not be able to self assess their duty liability.<sup>74</sup> To the extent that importers are unable to self-assess, DHS would be responsible for matching multiple line-items in entries with normal values based on its own analysis of product descriptions from entry documents that are may or may not correspond to the

---

<sup>73</sup> Under the retrospective system, such adjustments to U.S. price are made by Commerce prior to the issuance of duty assessment rates based on information gathered in the administrative review. Under a prospective normal system, such information would not be available to Commerce and the responsibility for the adjustments would shift. This information, which is needed to adjust the U.S. price back to an "ex-factory, packed price for proper duty assessment, may not be available to all importers, who would then be unable to self-assess their duty liability. To the extent that this occurs, DHS would be responsible for making these adjustments.

<sup>74</sup> As discussed earlier, a prospective normal value system would likely contain thousands, if not hundreds of thousands, of company-specific, model-specific normal values which DHS will have to administer. For example, there are currently 195 different company-specific AD rates covering imports of wooden bedroom furniture from China. Under a prospective normal value system, this number could expand by the various models of beds, headboards, night stands, dressers, chests, wardrobes and highboys that each company sells to the United States. Indeed, the rate calculated for one company covered by this order was based on an analysis and calculation involving more than 600 models of wooden bedroom furniture, each with their own normal value. In contrast, all types of wooden bedroom furniture fall under four 10-digit Harmonized Tariff Schedule codes, the most detailed level of product description for the general importation of goods into the United States.

proprietary, company-specific, model-specific normal values. Also, to the extent that a U.S. prospective normal value system mirrors the Canadian system, DHS would be responsible for responding to inquiries from importers asking whether duty liability exists on submitted price quotes prior to entry. The precise burden on DHS would depend on how a prospective normal value system would be implemented, and how DHS would employ its risk management techniques to the processing of entries under such a system.

## **Alternative Means to Address Uncollected Duties**

A number of commenters and hearing participants observed that the vast majority of uncollected duties were associated with AD orders on a few products from a single country. According to the GAO, 90 percent of all uncollected duties are associated with imports from China; 84 percent of all uncollected duties are associated with four Chinese products – crawfish, garlic, honey and mushrooms. In addition, uncollected duties are heavily concentrated among certain importers – four importers account for more than 33 percent of uncollected duties. These, and sixteen others, account for 63 percent of the uncollected duties. The remaining 37 percent is spread across 500 importers.<sup>75</sup>

Some commenters questioned whether changing the entire AD/CVD assessment system to address such a specific duty-collection problem alone was either necessary or appropriate.<sup>76</sup> While expressing no preference for either a prospective or retrospective system in the abstract, a group of multinational bearing manufacturers, JTEKT, Nachi Fujikoshi, NSK and NTN, with experience in antidumping systems from both sides, observed that:

Congress’s request that the Department evaluate the relative advantages and disadvantages of prospective and retrospective duty systems is somewhat misplaced to the extent that this evaluation is undertaken for the purpose of remedying the government’s failure to collect the full amount of outstanding antidumping and countervailing duties owed by a small subset of importers. . . . If evasion regularly arises with respect to a limited number of specific industries and importers, in the Companies view, the proper response is the implementation of measures that target these industries and importers as well as measures that strengthen customs enforcement regarding the relevant entries.<sup>77</sup>

---

<sup>75</sup> GAO Report, pp. 13-16. This pattern may be changing somewhat with respect to products. In FY 2009, DHS reported \$92.5 million of uncollected antidumping duties related to wooden bedroom furniture from China accounting for approximately 31 percent of the uncollected duties reported that year. Garlic, honey, crawfish and preserved mushrooms from China accounted for an additional 59 percent of uncollected duties. Polyethylene retail carrier bags from Thailand followed at roughly 4 percent. Continued Dumping and Subsidy Offset Act Annual Report FY2009 (2009 CDSOA Report), Section II – Uncollected Duties.

<sup>76</sup> “These collection difficulties, however, are strongly concentrated in the collection of duties on antidumping duty orders (not countervailing duty orders) that cover imports of agricultural and aquaculture goods from China. As such these difficulties, while real and disturbing, provide little general instruction regarding the benefits or disadvantages of the current system as a whole, the benefits of retrospective assessment vs. prospective assessment in particular, or the potential benefits and disadvantages of applying any system-wide changes. Moreover, the specific collection difficulties experienced with these orders, which included schemes aimed specifically at the evasion of antidumping duty assessments, would not have been avoided with a prospective assessment system, or have been addressed in other ways.” Committee to Support U.S. Trade Laws, Public Comments, p. 4.

<sup>77</sup> JTEKT and Other Bearing Companies, Public Comments, p. 4.

Proponents of the retrospective system argued that the most effective way of resolving the problem of uncollected duties was to address it directly by focusing monitoring, enforcement and collection efforts on high-risk imports and importers. They also noted that the GAO Report suggested changes that could be made within the current retrospective system, which they supported, to improve duty collection.<sup>78</sup> In particular, they focused on proposed changes to the treatment of new shippers and additional bonding for importers subject to AD/CVD duties.

### New Shippers

The GAO found that new shippers are responsible for a significant portion of uncollected duties.<sup>79</sup> They suggested two changes in the treatment of new shippers to address this issue and improve duty collection – suspending new shipper bonding privileges and establishing minimum export requirements for new shipper reviews.

Under U.S. law, new shippers are allowed to post a bond in lieu of paying a cash deposit on goods that enter the United States while Commerce is conducting the review of that new shipper. In August 2006, Congress suspended the new shipper bonding privilege for three years, requiring new shippers to pay cash deposits while Commerce conducts the new shipper review. Proponents of the retrospective system commented on the effectiveness of the three-year ban as well as its salutary effect on sureties which appear to have increased their examination of an applicant's creditworthiness before issuing a bond. The suspension has since expired and the ability of importers to post a bond while a new shipper review is underway has resumed. Retrospective system proponents support reinstating the suspension and making it permanent. However, Treasury, in a December 2008 report to Congress, stated that it did not believe that there would be any significant impact on duty collection resulting from a reinstatement of the bonding suspension. It noted that "the risk related to the former ability of new shippers to post bonds instead of having to pay cash deposits, is minimal. The added risk associated with the bond, as compared to the cash deposit, is equal to the probability of failing to collect on an obligation which is secured by a bond, which is low."<sup>80</sup>

The more significant problem with new shippers occurs after the new shipper review is completed. There are no minimum export requirements for new shipper reviews; the only requirement is that the sale being reviewed to establish the new shipper cash deposit rate is *bona fide*. Very often, new shipper reviews, and the resulting prospective cash deposit rate, are based on a single sale, usually at a high price. This results in the establishment of a low or even 0.00 percent cash deposit rate. These new shippers are then able to take advantage of these low rates by immediately reducing their prices and shipping large volumes of dumped merchandise. This continues until a new cash deposit rate is established following an administrative review which may not occur for more than a year. During that time, considerable duty liability has occurred

---

<sup>78</sup> GAO Report, pp. 42-46.

<sup>79</sup> New shippers account for 40 percent of uncollected duties. GAO Report, pp. 14-15.

<sup>80</sup> Department of the Treasury, Report to Congress, December 2008. While the direct impact on duty collection may not be great because of the limited risk of bond default, there may be a positive indirect impact on duty collection because firms that engage in this behavior may be more financially circumscribed due to their increased cash liability.

with the attendant collection problem.<sup>81</sup> Adopting minimum requirements for new shipper reviews will likely increase the reliability of calculated new shipper rates, making it less likely that the rate will be based on a single, unrepresentative high-priced sale.

### Revised Bonding Requirements

Retrospective system proponents suggested that one way to reduce the amount of uncollected AD/CVD duties is to protect the collection of such duties at the outset by requiring more realistic bonds from importers.<sup>82</sup> This could be done either by targeting high-risk importers based on financial risk of repayment or by increasing bonds for all importers of merchandise subject to AD/CVD duties.<sup>83</sup>

In 2004, DHS developed a revised bond policy for imports subject to AD/CVD duties. Importers were required to obtain a bond equal to 100 percent of the estimated AD/CVD duties for the previous year.<sup>84</sup> The new policy was first applied, as a pilot project, to shrimp imports from Brazil, China, Ecuador, India, Thailand and Vietnam. The enhanced bond policy was challenged at the CIT and at the WTO. In April 2009, following the adoption of the WTO Appellate Body's report finding that the enhanced bonding requirement was WTO-inconsistent with respect to imports of shrimp from India and Thailand and after receiving comments from interested parties, DHS ended the pilot program.<sup>85</sup>

---

<sup>81</sup> In the same report, Treasury notes that this is at the heart of the duty collection problem with new shippers. When a new shipper review results in a low or 0.00 percent cash deposit rate, any retrospectively assessed duties will not be secured by bond or cash deposit creating a significant collection risk. Importers can bring in dumped or subsidized goods at the low rate over an extended period and then abscond when the bill arrives. Treasury notes that "it should be emphasized that without the retrospective component of the U.S. AD/CV[D] duty system, which can result in unsecured obligations, there would be minimal risk of uncollected AD/CV[D] duties. If there were no retrospective component to the U.S. AD/CV[D] duty law, we would expect the duty collection rate to be similar to that for other duties, over 99 percent." Department of the Treasury, Report to Congress, December 2008. Commerce notes that, in a prospective *ad valorem* system, this elimination of the collection risk would come at the expense of the injured U.S. domestic industry. The low or 0.00 percent new shipper duty assessment rate in a prospective *ad valorem* system remains in place until changed through a completed interim or changed circumstances review with the same ability to bring in dumped or subsidized imports over an extended period. Once the prospective rate increases, the importer can simply move on to another source without cost, unlike a similarly situated importer in a retrospective system who must either pay increased duties or disappear in default of a government obligation. Having done nothing illegitimate, there is no need for the importer in the prospective *ad valorem* system to disappear; the importer is free to repeat the same activity with another new shipper. As discussed earlier, prospective normal value systems do not pose this same new shipper problem because future shipments at lower prices will only result in higher duties at the border when compared to the normal value determined in the new shipper review.

<sup>82</sup> The GAO Report found that the standard bond formula for importers – generally, the greater of 10 percent of the amount the importer was assessed in duties, taxes and fees over the preceding year or \$50,000 – was insufficient to protect AD/CVD collections in certain cases. Four importers accounted for \$210 million in uncollected duties or 34 percent of the total. This debt was secured by \$1.3 million in bonds; for one importer, \$25 million in uncollected duties was secured by a \$50,000 bond. GAO Report, p. 16.

<sup>83</sup> Prospective system proponents noted that this problem is specific to retrospective systems. Ensuring sufficient bonding would not be a concern if duties were paid at the time of entry, as occurs under a prospective system.

<sup>84</sup> Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases (Amended AD/CVD Bond Guidelines), July 9, 2004 and Clarification to Amended AD/CVD Guidelines, August 10, 2005.

<sup>85</sup> "Enhanced Bonding Requirements for Certain Shrimp Importers," 74 FR 14809-14812.

## Agency Steps to Increase Duty Collection

Effective enforcement of the AD/CVD laws is a key mission of both agencies and, to that end, Commerce and DHS have taken steps to increase duty collection.<sup>86</sup> Further, communications between the two agencies have greatly improved over the past several years. Commerce's Customs Liaison Unit was established in October 2006. One of the primary purposes of this unit is to work with AD/CVD case analysts to identify examples of potential evasion of AD/CVD orders and to share information on these activities with DHS. Commerce and DHS meet regularly to discuss these and other AD/CVD enforcement issues in order to improve both compliance and duty collection. Both agencies have increased efforts to ensure the timely issuance of assessment instructions to avoid uncollected duties resulting from deemed liquidations.<sup>87</sup> They have also worked together to process protests more quickly so that collection actions can occur and duty billings are not left open and uncollected. Finally, in an intensive joint effort which involved detailing analysts from Commerce's Customs Liaison Unit to DHS, the two agencies successfully developed and launched an AD/CVD case management system and entry summary system as part of DHS's new ACE system which will replace the more limited ACS system that often required slow and resource-intensive, manual entry-by-entry liquidation.

Commerce and DHS take all matters of potential AD/CVD evasion very seriously as the integrity and effectiveness of the trade remedy laws cannot be compromised. Recent publicized arrests and convictions involving merchandise subject to AD orders, *e.g.*, Chinese Honey and Vietnamese Catfish, are evidence of this. Further, in a recent AD investigation involving Oil Country Tubular Goods from China, an exporter submitted documentation to Commerce which differed significantly from documentation in the possession of DHS, thus making it impossible for Commerce to conduct a meaningful investigation. Commerce was able to reach this conclusion as a result of the cooperative relationship between the two agencies. While rules regarding disclosure of on-going investigations or trade enforcement actions often obscure the significant amount of AD/CVD enforcement activity underway (which could include DHS fines, other penalties, and seizures or forfeitures), Commerce has made numerous other referrals to DHS on importer and exporter efforts to evade the payment of AD or CVD duties including

---

<sup>86</sup> Commerce's trade enforcement priorities can be seen in International Trade Administration's 2007-2012 Strategic Plan, which includes "...ensuring fair trade and compliance with trade laws and agreements" and Import Administration's mission, the "primary role" of which, as outlined on its website, is "to enforce effectively the U.S. unfair trade laws (*i.e.*, the anti-dumping and countervailing duty laws) and to develop and implement other policies and programs aimed at countering foreign unfair trade practices" (<http://www.trade.gov/ia/>). Within DHS, the AD/CVD trade program has been elevated to Priority Trade Issue status which drives the use of DHS resources and enforcement efforts.

<sup>87</sup> As discussed earlier, barring a court-ordered injunction, liquidation of entries and collection of final AD/CVD duties must occur within six months of notification to DHS. If this does not happen, the entries are "deemed liquidated" such that additional AD/CVD duties determined in the administrative review to be due on imports may not be collected. The GAO found that the six-month deadline may be hard for DHS to meet, particularly in cases involving large import volumes or complex trading situations. The GAO Report and several commenters proposed extending the statutory deadline as a way to reduce the problem of uncollected duties resulting from deemed liquidation.

product mislabeling, incorrect reporting of country of origin, entry type, misclassification and potential transshipment through third countries.

Industries often approach both Commerce and DHS with enforcement concerns, particularly regarding potential circumvention and other forms of duty evasion.<sup>88</sup> In the past few years, Commerce has issued several affirmative circumvention findings involving, for example, Chinese Tissue Paper undergoing minor alterations in a third country and the inclusion of later-developed merchandise in the order on Petroleum Wax Candle from China. Matters involving potential customs fraud, whether brought by U.S. domestic industry or discovered by Commerce during the course of a proceeding are immediately referred to DHS through Commerce's Customs Liaison Unit.

To direct an effective trade facilitation and enforcement approach, DHS focuses its actions and resources around Priority Trade Issues that pose a significant risk to the U.S. economy, consumers, and stakeholders. DHS has encountered various types of circumvention schemes such as the misuse of entry type, intentional misclassification, false country of origin, smuggling, and transshipment occurring across the spectrum of the AD/CVD cases. Given the large number of AD/CVD orders and investigations and the risk associated with enforcement, DHS has designated AD/CVD compliance a Priority Trade Issue.

DHS's national enforcement efforts involve effective targeting of goods crossing the border. In addition, DHS often launches national operations to coordinate actions across the country to determine whether violations are occurring and to what extent. Prescribed actions within these national operations may include entry summary reviews and/or cargo examinations by the ports, domestic importer premises visits, domestic broker/filer visits, sampling by the ports for DHS laboratory testing, and, when available, foreign manufacturer visits by the DHS attaché to review production capability and/or existence of operations.

---

<sup>88</sup> Allegations of circumvention brought to Commerce generally extend beyond the definition provided in the statute – minor assembly in the United States or third countries; minor alterations of merchandise; later-developed merchandise – to broader circumvention or evasion concerns including improper country-of-origin designations, misidentification of merchandise, etc.

**Appendix I**  
**Congressional Request for Report**

## **Conference Report – 2010 Consolidated Appropriations Act**

*Anti-dumping and countervailing duties study.* – The conferees direct the Secretary of Commerce to work with the Secretaries of the Departments of Homeland Security and the Treasury to conduct an analysis and report to the House and Senate Committees on Appropriations, within 180 days of enactment of this Act, on the relative advantages and disadvantages of prospective and retrospective anti-dumping and countervailing duty systems. The report should address the extent to which each type of system would likely achieve the goals of remedying injuries dumping or subsidized exports, minimize uncollected duties, reduce incentives and opportunities for importers to evade anti-dumping and countervailing duties, effectively target high-risk importers, address the impact of retrospective rate increases on U.S. importers and their employees, and create a minimal administrative burden.

**Appendix II**  
**Federal Register Notice Requesting Public Comment**

75 FR 16079, March 31, 2010

DEPARTMENT OF COMMERCE

International Trade Administration

Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems; Request for Comment and Notice of a Public Hearing

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

Background: In the conference report accompanying the 2010 Consolidated Appropriations Act, Public Law: 111-117, the conferees directed the Secretary of Commerce to work with the Secretaries of the Departments of Homeland Security and the Treasury to conduct an analysis of the relative advantages and disadvantages of prospective and retrospective antidumping and countervailing duty systems. The report is currently scheduled to be transmitted to Congress on June 14, 2010. As part of its analysis, the conferees requested that the Department of Commerce (the Department) address the extent to which each type of system would likely achieve the goals of: (1) Remediating injurious dumping or subsidized exports to the United States; (2) minimizing uncollected duties; (3) reducing incentives and opportunities for importers to evade antidumping and countervailing duties; (4) effectively targeting high-risk importers; (5) addressing the impact of retrospective rate increases on U.S. importers and their employees; and (6) creating minimal administrative burden.

To help in its analysis, the Department is inviting the public to comment on the issue and the specific points raised by the conferees as well as identify additional issues or considerations that it believes are deserving of the Department's attention as it prepares its report. The Department is also notifying the public that it will hold a public hearing on April 27, 2010.

Date for Submitting Comments: The Department requests that comments be submitted by 5 p.m., April 20, 2010. Comments should be limited to no more than 25 pages. Comments may be submitted electronically or in writing. Electronic comments should be submitted to [webmaster-support@ita.doc.gov](mailto:webmaster-support@ita.doc.gov). If you submit comments electronically, you do not need to also submit comments in writing. People wishing to comment in writing should file, by the date specified above, a signed original and four copies of each set of comments at the address listed below. The Department will not accept nor consider comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason.

All comments will be available for public inspection at Import Administration's Central Records Unit, Room 1117, between the hours of 8:30 a.m. and 5 p.m. on business days. In addition, all comments will be made available to the public in Portable Document Format (PDF) on the Internet at the Import Administration Web site at the following address: <http://www.trade.gov/ia/>. To the extent possible, all comments will be posted within 48 hours. Any questions concerning file formatting, document conversion, access on the Internet, or other

electronic filing issues should be addressed to Andrew Lee Beller, Import Administration Webmaster, at (202) 482-0866, e-mail address: [webmaster-support@ita.doc.gov](mailto:webmaster-support@ita.doc.gov).

Hearing Date: The hearing will be held on April 27, 2010 starting at 9:30 a.m. in the auditorium at the Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC.

Hearing Participation: The hearing is open to the public. There are no prerequisites or conditions on participating at the hearing. All are welcome to speak at the hearing subject to the guidelines outlined in this notice. Those wishing to speak at the hearing must notify the Department no later than April 13, 2010. The request can be sent by e-mail to [webmaster-support@ita.doc.gov](mailto:webmaster-support@ita.doc.gov) or in writing to the address below. Individual presentations will be limited to five minutes to allow for possible questions from the Chair and the panel. Written comments, though strongly encouraged, are not required for those making presentations within the five minute time limit. Anyone requiring additional time for their presentation must seek an extension of the time limit at the time of their notification to the Department. Additional time may be granted as time and the number of participants permits. Also, please be aware that foreign nationals wishing to attend or participate in the hearing may be required to provide certain identification information to the Department by April 23, 2010 in order to gain access to the building. For further information, please contact Kelly Parkhill at (202) 482-3791.

ADDRESSES: Comments may be submitted electronically or in writing. Electronic comments should be submitted to [webmaster-support@ita.doc.gov](mailto:webmaster-support@ita.doc.gov). If you submit comments electronically, you do not need to submit comments in writing. People wishing to comment in writing should file a signed original and four copies of each set of comments by 5 p.m., April 20, 2010. Such comments should be addressed to Ronald K. Lorentzen, Deputy Assistant Secretary for Import Administration, Room 1870, Department of Commerce, 14th Street and Constitution Ave., NW, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Kelly Parkhill at (202) 482-3791.

New Reporting Requirements: There are no new paperwork or reporting requirements as a result of the action. In addition, all responses to the Department's Federal Register notice requests for information, including this request, are strictly voluntary.

Dated: March 26, 2010  
Ronald K. Lorentzen,  
Deputy Assistant Secretary for Import Administration

[FR Doc. 2010-7217 Filed 3-30-10; 8:45 am]  
BILLING CODE 3510-DS-P

**Appendix III  
Parties Submitting Public Comments and  
Participants at the April 27, 2010 Public Hearing**

## **List of Parties Submitting Comments on Retrospective and Prospective AD/CVD Systems**

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)  
Alcoa  
American Institute for International Steel (AIIS)  
American Apparel and Footwear Association  
Baker & Hostetler  
Bureau of Fair Trade for Imports and Exports – Ministry of Commerce of the People’s Republic of China  
China Chamber of Commerce  
Chinese National Federation of Industries  
Consuming Industries Trade Action Committee (CITAC)  
Coalition for Fair Lumber Imports  
Committee to Support U.S. Trade Laws (CSUSTL)  
Diamond Sawblade Manufacturers Coalition  
Emergency Committee for American Trade (ECAT)  
Gerdau Ameristeel  
Hughes Hubbard  
ICL Performance  
Innophus  
Kelley Drye  
King & Spalding  
Maritime Products International  
Michaels Stores  
Mid Continent Nail  
Mowry & Grimson  
National Retail Federation  
National Tooling and Machining Association  
Phillips  
Precision Metalforming Association  
Schagrin Associates  
Seaman Paper  
Sidley Austin  
Southern Shrimp Alliance  
Steel Manufacturers Association  
Stewart & Stewart  
Trade Remedy Reform Action Coalition  
U.S. Association of Importers of Textile and Apparel (USA-ITA)  
U.S. Steel  
United Steelworkers (USW)  
Vietnam Chamber of Commerce  
Walmart

**Retrospective and Prospective Antidumping/Countervailing Duty Systems  
Public Hearing – Department of Commerce, April 27, 2010**

**Hearing Panel**

Ronald Lorentzen, Deputy Assistant Secretary for Import Administration, Department of Commerce

Timothy Skud, Deputy Assistant Secretary of the Treasury for Tax, Trade and Tariff Policy, Department of the Treasury

Michael Walsh, Director, Antidumping and Countervailing Duty/Revenue Policy and Programs Division, U.S. Customs and Border Protection, Department of Homeland Security

Brenda Brockman Smith, Executive Director, Trade Policy and Programs, Office of International Trade, U.S. Customs and Border Protection, Department of Homeland Security

John McInerney, Chief Counsel for Import Administration, Department of Commerce

Gary Taverman, Senior Advisor to the Deputy Assistant Secretary for Operations, Import Administration, Department of Commerce

Kelly Parkhill, Director, Industry Support and Analysis, Import Administration, Department of Commerce

**Witnesses:**

Linda Andros on behalf of United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers (USW)

Lewis Leibowitz on behalf of the Consuming Industries Trade Action Coalition

Alan Price on behalf of the Steel Manufacturers Association

Eileen Bradner on behalf of Nucor

James Hecht on behalf of Skadden Arps

Tom Sneeringer on behalf of U.S. Steel

Victor Mroczka on behalf of Hughes, Hubbard and Reed

Geert De Prest on behalf of Stewart and Stewart

Gary Horlick on behalf of the Law Offices of Gary Horlick

David Phelps on behalf of the American Institute for International Steel

Berrnd Neuenkirchen on behalf of Coutinho and Ferrostahl

Stephanie Lester on behalf of the Retail Industry Leaders Association

David Hartquist on behalf of the Committee to Support U.S. Trade Laws

Michael Taylor on behalf of King and Spaulding

Marguerite Trossevin on behalf of the Trade Remedy Reform Action Coalition

Robert Paterson on behalf of Tampa Bay Fisheries

Toni Dembski-Brandl on behalf of Target Corporation

David Yocis on behalf of the Coalition for Fair Lumber Imports

Matthew Fass on behalf of Maritime Products International

**Appendix IV**  
**Selected Prospective Antidumping and Countervailing Duty**  
**Assessment Systems**

## **Selected Prospective Antidumping (AD) and Countervailing Duty (CVD) Assessment Systems**

The following overview of the AD/CVD systems in place in Australia, Brazil, Canada and the European Union (EU) is based on our understanding of information gathered from publically available materials provided by the authorities, previously issued U.S. Government reports on the subject, the laws and regulations of these WTO members, and official reports and notifications filed at the WTO. It is also important to recognize that AD/CVD assessment practices evolve over time and are not always clearly defined in national law, implementing regulations or the relevant WTO Agreements.

### **Australia**

Australia uses a prospective assessment system in which AD and CVD duties are assessed based on the margin of dumping or subsidy, normal values, non-injurious prices, and export prices calculated during an investigation.<sup>89</sup> Where simultaneous AD and CVD measures apply, CVD duties are calculated before deciding how much dumping duty should be imposed. The amount of export subsidy, if any, included in the amount of countervailing duty is deducted from the amount of dumping duty to be collected. In addition, the sum of the export price of the particular goods plus the amounts of interim dumping and countervailing duty to be imposed will not exceed the non-injurious price of the particular goods.<sup>90</sup> Duties are collected at the time of importation.

Australia calculates the amount of interim AD duties on a transaction- and product-specific basis. AD duties in Australia's system are composed of two parts: (1) the dumping margin found during the investigation, and (2) the amount where the actual, transaction-specific "determined" export price is less than the ascertained export price found in the investigation. When Australia makes a final decision to impose AD or CVD duties, any provisional AD or CVD duties are converted into interim duties. These duties are "interim" because an importer may apply for final duty liability assessment, where the interim duties are analyzed with any overpayment being refunded to the importer.

In establishing the ascertained variable factors in the final duty assessment process, Australian Customs will generally not depart from the approach taken in the original investigation or most recent review. Applicants must provide sufficient evidence in support of their opinion of the export price and normal value. Customs will then verify the evidence through visits to the applicant and, where appropriate, to the manufacturer/exporter. Where the non-injurious price is the operative measure, Australia uses the most recent information from the Australian industry in order to establish the non-injurious price. After verification, a weighted-average normal value, export price and non-injurious price will be calculated, as applicable. In calculating the normal value, adjustments are made to ensure that the normal value is properly comparable with the

---

<sup>89</sup> Australia's assessment system for final measures imposed before January 1, 1993, was significantly different than that currently in effect. Only the current system is described in this report, which applies to all measures imposed on or after January 1, 1993.

<sup>90</sup> Australian Customs & Border Protection Service: *Dumping and Subsidy Manual* (2009); p. 91.

export price.<sup>91</sup> In a final duty liability assessment, if the interim duties paid exceed the final duties payable as found in the assessment, the difference will be refunded to the importer. If the final duties payable are greater than the interim duties paid, the importer is not required to pay the difference. If no request for a final assessment is filed within the applicable timeframe, the interim duties collected at the time of importation are considered to be the correct/final amount of the duties payable.

In addition to transaction-specific assessment or “refund” reviews, a party affected by an anti-dumping measure (including an exporter, importer, Australian producer of like goods or a foreign government) may, after a measure has been in force for 12 months (and annually thereafter), seek a review of the “variable factors” used to determine the AD and CVD duties due, including: the normal value and ascertained export price, or the subsidy level; and, where applicable, the non-injurious price.<sup>92</sup> Australia publishes notices announcing its initiation and completion of reviews of the applicable variable factors, but does not publish the results of final assessment applications or “refund” reviews.

### **Brazil**

Brazil uses a prospective AD/CVD duty assessment system. In accordance with its law, the amount of the AD duty is calculated by imposing *ad valorem* or specific duties (*i.e.*, per-unit), either fixed or variable, or a combination of both<sup>93</sup>. The *ad valorem* duty is imposed on the customs value of the merchandise on a CIF basis. Where a specific duty is utilized, it is set in U.S. dollars (*e.g.*, \$25 a ton) and converted to Brazilian currency at the time of entry. The major form of AD duties imposed by Brazil in the 1990s was *ad valorem*. However, since 2000, Brazil has utilized specific duties more frequently, stating that it prefers to have the amount of the duty fixed, and therefore not subject to fluctuations in the export price.<sup>94</sup>

Brazilian law provides for interim reviews, in which the prospective AD or CVD duty (or duty rate) is maintained, eliminated, or revised. Under Brazilian law, if, as a result of a review, the duty in effect is found to be higher than is necessary for neutralizing the injury to the domestic industry, due restitution shall be made. Brazil’s law stipulates that in order for an interim review to be initiated, evidence must first be provided demonstrating that the duty is no longer necessary to neutralize dumping (or subsidization), it is improbable that injury would reoccur if the duty were revoked, or the current duty is not sufficient to neutralize dumping (or subsidization). In exceptional cases of substantial changes of circumstance, or when in the national interest, reviews may be made more frequently than the normal one-year interval when requested by the

---

<sup>91</sup> Ibid; p. 132.

<sup>92</sup> Productivity Commission 2009, *Australia’s Anti-dumping and Countervailing System*, Report no. 48, Canberra; p. 16.

<sup>93</sup> Occasionally, Brazil establishes the duty according to a prospective normal value AD system, with duties only collected in instances where an entry is made below the established normal value. In such case, the normal values are updated periodically (see, *e.g.*, the AD investigation of polyvinyl chloride from the United States).

<sup>94</sup> Ministerio de Desenvolvimento, Industria e Comercio Exterior, Nova Estrategia do Sistema Brasileiro de Defesa Comercial, 5 September 2003, p. 5.

interested party or organs or agencies of the Federal Public Administration, or by the investigating agency.<sup>95</sup>

## Canada

Canada assesses AD duties on a prospective basis, using what is commonly referred to as a “prospective normal value” system. In a prospective normal value assessment system for AD duties, exporters are informed of the normal values for the products they export to Canada, as determined in an investigation. After the imposition of a measure, if sales are made at price levels equal to or higher than the normal value of the product, no duties are assessed. Where the export price is below the normal value, the difference is payable as an AD duty. The assessment procedure for CVD duties is very similar, but there is one fundamental difference. Under a dumping measure, exporters can raise their prices equal to or greater than the prospective normal value and, as a result, no AD duties will be levied on their shipments at the time of importation. However, because CVD duties are based on calculated per unit amounts of subsidy rather than normal value,<sup>96</sup> the sales price of the exported merchandise does not impact the amount of CVD duties levied at the time of entry. The countervailing duty due is the amount of per unit subsidy multiplied by the appropriate volume of the goods.<sup>97</sup>

Canada updates the normal values, export prices, and subsidy levels, and establishes values for new models and new exporters, through a process termed “re-investigation.” When there are changes to domestic prices, market conditions, costs associated with production and sales and/or subsidy levels that might warrant a review of the established normal values and subsidy rates, the parties concerned may advise the administering authority, which will then determine whether to initiate a re-investigation. If a re-investigation is initiated, the authority will issue the updated values generally within 90 days of the date of initiation of the re-investigation.<sup>98</sup> Normally, such new values will not be applied retroactively, except in instances where the parties have not advised the Canadian administering authority in a timely manner of substantial changes which affect normal values, export prices, or amounts of subsidy.<sup>99</sup>

Importers may also request a “re-determination” after duties have been assessed and paid on a transaction for the purpose of obtaining a refund.<sup>100</sup> A request for a re-determination may cover:

---

<sup>95</sup> Decree N° 1602 OF 23 August 1995; Regulates the Norms Governing Administrative Procedures Regarding the Imposition of Anti Dumping Measures; Chapter 7 (as notified to the WTO Committee on Antidumping Practices in document G/ADP/N/1/BRA/2). Also, Decree N° 1.751, 19 December 1995. Regulates the norms which control administrative procedures for the application of countervailing measures; Chapter 8 (as notified to the WTO Committee on Subsidies and Countervailing Measures in document G/SCM/N/1/BRA/2).

<sup>96</sup> Government Accountability Office, Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection (GAO Report), p. 37, fn. 71.

<sup>97</sup> Memorandum D14-1-7 ( May 15, 2000); *Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act*; Anti-dumping and Countervailing Directorate, Canada Border Services Agency

<sup>98</sup> See Memorandum D14-1-8 (May 15, 2000); Anti-dumping and Countervailing Directorate, Canada Border Services Agency.

<sup>99</sup> Memorandum D14-1-7 ( May 15, 2000).

<sup>100</sup> Memorandum D14-1-3 (October 1, 2008); *Procedures for making a request for a Re-determination or an Appeal of Goods Under the Special Import Measures Act*. Canada Border Services Agency. A re-determination request may be filed by the importer or the importer’s agent. In the case of goods of a NAFTA country, the government of

(a) the normal value; (b) the export price; (c) the amount of subsidy; (d) the amount of the export subsidy; or (e) the description of the goods in terms of whether they are the same as those described in the finding of injury. In the case of AD duties, the re-determination will be on the basis of normal values and export prices, using information from the same period as the date of sale to Canada of the imported goods, or the most recently available information before that. In the case of CVD duties, the re-determination will be based on the amount of subsidy on the imported goods. A re-determination may result in an additional duty assessment or a refund depending on the specific situation.<sup>101</sup>

## **European Union**

The EU also operates a prospective AD and CVD duty system. Duties are imposed by the Commission, but are collected by the Member States, which maintain their own customs authorities. Duties may be *ad valorem*, specific (*i.e.*, per-unit), or determined based on established minimum import prices.<sup>102</sup>

Under the EU system, an interim review of a measure can be requested by: any exporter, importer or EU producer, once the measures have been in force for 1 year; or an EU country or the Commission, at any time. An interim review can be “full” – covering dumping, subsidization, injury and EU interest – or “partial” – *e.g.*, limited to dumping or subsidization only.<sup>103</sup> Interim reviews are most often requested to adjust the level of duty in force and, under EU law, an interim review will be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset the countervailable subsidy (or dumping) and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the countervailable subsidy (or dumping) which is causing injury.<sup>104</sup> For example, an exporter may claim that the amount of subsidy has fallen, in which case the subsidy margin is recalculated for a new investigation period. The Commission will also investigate whether or not the change in circumstances is lasting. If it is not, then the duty rate would not normally be changed.<sup>105</sup>

Importers of products subject to AD and CVD duties can also request a refund of duties paid when they believe the dumping margin or the amount of subsidies, on the basis of which the duties were paid, has been eliminated or reduced to a level which is below the level of the duty in force. They must address their request to the authorities of the EU country where the duties were paid, which will then transmit it to the Commission for investigation.<sup>106</sup> A request for a refund review must be filed within six months of the date of entry, and the Commission will normally

---

that NAFTA country or the producer, manufacturer or exporter of the goods, when they are of a NAFTA country, may file a request.

<sup>101</sup> Memorandum D14-1-7 (May 15, 2000); also Memorandum D14-1-3 (October 1, 2008).

<sup>102</sup> <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/measures/>.

<sup>103</sup> <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/reviews/>.

<sup>104</sup> Council Regulation (EC) No 384/96 of 22 December 1995; Article 11, paragraph 3. Also, Council Regulation (EC) No 597/2009 of 11 June 2009: Article 19, paragraph 2.

<sup>105</sup> <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/reviews/>.

<sup>106</sup> <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/refunds/>; also <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-subsidy/refunds/>.

make its refund determination within 12 months and in no circumstances within more than 18 months, from the date on which it received a properly filed request for refund. Applications for refunds must demonstrate that the dumping margin or subsidy rate that formed the basis on which duties were paid has been reduced or eliminated. In addition, a successful application is dependent on the cooperation of both the applicant and the exporting producer. The refund review involves the completion of a questionnaire, which may require researching all relevant commercial data for a defined period and accepting an examination to establish the accuracy of such information, including an on-the-spot verification visit.<sup>107</sup>

If the Commission finds that dumping or subsidization during the refund-review period has decreased, it will authorize the EU country's customs authorities to refund the importer that requested the review within 90 days.<sup>108</sup> It is our understanding that the amount of duties assessed following a refund review cannot exceed the duties collected at the time of entry, even if the data show that the margin of dumping or subsidization in the examined transactions was higher than the duty in place at the time of entry. In addition, refund reviews do not alter the established prospective AD or CVD duty rate. However, when examining any application for a refund, the Commission may decide at any time to initiate an interim review and the information and findings from such review, carried out in accordance with the provisions applicable for such reviews, shall be used to determine whether and to what extent a refund is justified.<sup>109</sup>

---

<sup>107</sup> Commission Notice Concerning the Reimbursement of Anti-dumping Duties (2002/C 127/06).

<sup>108</sup> Ibid.

<sup>109</sup> Ibid; also Council Regulation (EC) No 2026/97 of 6 October 1997.