

Two Furniture Cases Reveal Risks Of Importing AD/CVD Goods

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Importing is a tricky business at the best of times, requiring businesses to thread their way through many complex and shifting regulations. But the complexities—and risks—of importing grow exponentially when importers deal in goods subject to anti-dumping and countervailing duty orders.

AD/CVD orders result from petitions filed by U.S. manufacturers, alleging injury from “unfairly priced” imports from specific countries. Imported goods can be “unfairly priced” within the meaning of U.S. law in two ways. First, they may be sold below cost, or “dumped.” Second, their prices may be affected by foreign government subsidies. If the U.S. government determines that imports are unfairly priced and that these imports are hurting U.S. manufacturers of similar products, it may issue a “trade remedies” order that imposes additional duties on the relevant imports. These duties are meant to bring the price of imports up to fair, above-cost, nonsubsidized levels.

Plainly, importing AD/CVD goods means that importers face additional duty liability. But this simplified explanation of trade remedies understates the true risks that importers face in handling AD/CVD goods, as two recent opinions from the U.S. Court of International Trade—*P.F. Stores Inc. v. United States* and *Hutchison Quality Furniture Inc. v. United States*—illustrate.

Both cases were brought by importers of merchandise subject to the anti-dumping duty order on wooden bedroom furniture from China. Both importers posted estimated anti-dumping at the time of entry, based on the then-current “cash deposit” rates. However, the duty rates for both importers’ goods were subsequently revised upward

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pursuant to proceedings at the U.S. Department of Commerce. The Commerce Department then instructed U.S. Customs and Border Protection to liquidate, i.e., to assess final duties on the importers' goods at the higher rates.

This illustrates the first, and most substantial, risk that importers face when dealing in goods subject to trade remedies laws. Trade remedies duties are not established pursuant to a "set-it-and-forget-it" system. Such a system would risk permitting foreign producers to adjust their prices to take into account the extra duties and thus might not actually bring the price of imported goods up to a fair level. Rather, the duties collected on imports of AD/CVD goods at the time of importation are only "estimates," which can be revised—sometimes significantly upward—pursuant to annual reviews of foreign producers' and exporters' selling prices. The updated duty percentages are then applied retroactively to goods imported within the past year. As such, an importer of trade remedies goods cannot know with certainty what its ultimate duty liability will be at the time of importation.

Moreover, the lag time between entry and liquidation at the finally determined rate can be significant. Normally, CBP liquidates import shipments within 314 days of entry. But entries of AD/CVD goods are "suspended" from liquidation until the Commerce Department completes an annual administrative review of each trade remedies order or until the time for such a review expires. Inclusive of appeals, an importer may see several years pass between importation and final duty assessment on a shipment of AD/CVD goods.

Further, these rate changes can be unpredictable. Due to its budgetary and personnel constraints, the Commerce Department generally focuses on two or three large producers in conducting annual reviews of the dumping and subsidy rates, or "margins," established under individual trade remedies orders. The agency then applies revised duties based on those producers' costs and sales to all exports. Thus, an importer may find that his supplier's duty rate has changed due not to the supplier's own cost structure, but based on that of some wholly unrelated company. Given this level of unpredictability, it's small wonder that many importers require foreign suppliers to guarantee that their goods are not subject to AD/CVD orders and reserve the right to bow out of any contracts should an order go into place.

And, as the court's opinions show, carrying an unpredictable, contingent liability for duties is not the only risk faced by importers that handle AD/CVD products. Here, when CBP liquidated the plaintiffs' goods at the higher duty rate, both filed protests with the agency. Under 19 U.S.C. § 1504(d), CBP must liquidate AD/CVD goods within six months of receiving instructions from the Commerce Department as to how to liquidate the entries. If the goods are not liquidated within that time, they are "deemed" to have liquidated by operation of law at the rate claimed at the time of entry. Here, both importers argued that deemed liquidation had occurred, relieving them of any liability for the upwardly revised AD/CVD duties.

CBP denied the protests and the importers sued in the Court of International Trade, which hears appeals of both customs disputes and trade remedies decisions. However, rather than file direct challenges to CBP's protest denial, the importers invoked the court's "residual" grant of jurisdiction.

This brings us to another big risk of importing goods subject to trade remedies duties. The duties are very often high. Duty rates of over 100 percent are not uncommon, particularly for goods from China, the number one target country for trade remedies petitions. But one of the legal prerequisites for mounting a direct challenge to a CBP protest denial is payment of the duties that CBP claims are owed. Here, the anti-dumping duties owed on the entries were evidently higher than the importers felt they could pay.

Both plaintiffs attempted to side-step this payment requirement by styling their cases as challenges to the liquidation instructions that the Commerce Department issued to CBP. Examining the importers' claims, the court found that the "true nature" of each action was to appeal CBP's protest denials. In other words, despite alleging that they had been harmed by the Commerce Department's instructions, the court held that the complaints arose from CBP's protest denials and not from any act or omission of the Commerce Department. Finding that residual jurisdiction cannot be used as an "end-run" around the "pay-to-play" system for Customs protest appeals, the court dismissed both importers' cases with prejudice.

Right now, both importers are probably questioning their decision to import trade remedies goods in the first place. As their dismissed actions show, the risks of trade remedies imports are high—uncertain liability at the time of importation, coupled with a "pay-to-play" condition on litigating any subsequent liquidations.