Legal Sidebar

Import Tariff or Border Tax: What is the Difference and Why Does it Matter?

01/30/2017

On January 26, 2017, the Trump Administration floated the idea of imposing a 20% tax on imports from Mexico to pay for the proposed wall along the U.S.-Mexico border. Initial news reports evinced some confusion as to whether an import tariff or a border tax was being considered; indeed, various reports used the terms interchangeably. An import tariff, which imposes duties on specific imported goods, is distinct from a border tax. This Sidebar post briefly describes the difference between these two types of measures and whether the President may unilaterally impose them without congressional approval. It does not address the policy implications of either measure (e.g., the economic effects that might result from the imposition of either measure or the consequences for foreign relations, including compliance with international agreements or the rules of the World Trade Organization).

Import Tariffs

A tariff is a schedule of duties imposed by the government on imported goods. The United States' tariff schedule is the Harmonized Tariff Schedule of the United States (HTSUS), which the U.S. International Trade Commission publishes and maintains, but the Customs and Border Protection agency of the U.S. Department of Homeland Security interprets and enforces. The HTSUS details duties for specific imported goods by classifying all goods in trade using a hierarchical structure. Thus, the United States imposes duties on particular goods according to how they are classified in the tariff schedule.

The Constitution vests authority over the imposition of tariffs and international commerce exclusively in Congress (detailed in this CRS Report). Over time, however, Congress has delegated authority to the President to modify tariffs by proclamation in various provisions of federal law, including section 201 of the North American Free Trade Agreement (NAFTA) Implementation Act, section 125(c) of the Trade Act of 1974, and section 103 of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (BCTPAA). This delegation of authority, however, is granted only under certain circumstances, such as a declared national emergency, or if it is within the purview of existing trade agreements, such as NAFTA, or those entered into under the trade promotion authority of the BCTPAA.

With regard to a tariff on goods from Canada or Mexico, section 201(a) of NAFTA states: "The President may proclaim—(A) such modifications or continuation of any duty, (B) such continuation of duty-free or excise treatment, or (C) such additional duties, as the President determines to be necessary or appropriate to carry out or apply articles 302, 305, 307, 308, and 703 and Annexes 302.2, 307.1, 308.1, 308.2, 300-B, 703.2, and 703.3 of the Agreement." The referenced articles and annexes are provisions that obligate the NAFTA parties to phase out tariffs on goods among their territories; define duty-free treatment for certain goods; or otherwise specify tariff rates for particular goods. Thus, it does not appear that this provision would give the President authority to impose a blanket 20% tariff on all goods from Canada or Mexico.

Section 201(b) of NAFTA appears to give the President somewhat broader authority to modify tariffs under NAFTA: "the President may proclaim—(A) such modifications or continuation of any duty, (B) such modifications as the United States may agree to with Mexico or Canada regarding the staging of any duty treatment set forth in Annex 302.2 of the Agreement, (C) such continuation of duty-free or excise treatment, or (D) such additional duties, as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Canada or Mexico provided for by the Agreement." Thus, this provision gives the President authority to impose "such additional duties" if he determines the duties are "necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions." While this provision does not define the phrase "general level of reciprocal and mutually advantageous concessions," it does not appear to envision a blanket tariff on all goods coming from a particular country within the context of an agreement that specifies low tariffs on or duty-free treatment of imported goods from that country.

Outside of laws implementing NAFTA and providing trade promotion authority, the President has authority under other federal laws to take trade-related actions under certain circumstances. Such circumstances include, among others, a declared national emergency under the International Emergency Economic Powers Act of 1977 (IEEPA); "fundamental international payments problems" under section 122 of the Trade Act of 1974; or another country's violation of a trade agreement or denial of the United States' rights under an agreement pursuant to section 301 of the Trade Act of 1974. These provisions, however, require that certain prerequisites be met before the President imposes tariffs (i.e., a declared national emergency under IEEPA or a finding of a violation of a trade agreement under section 301), or limit the tariffs that may be imposed (i.e., section 122 only permits "a temporary import surcharge, not to exceed 15 percent").

Border Adjustment Taxes

The announcement of a 20% tax on imports from Mexico was also characterized as part of a broader domestic tax reform policy. On June 24, 2016, House Speaker Paul Ryan issued a tax reform blueprint that included proposals for a border-adjusted tax that would impose a tax on imports, while exempting exports from the tax. Under the World Trade Organization's definition, a border adjustment tax is "any fiscal measures which put into effect, in whole or in part, the destination principle (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products)." Thus, a border adjustment tax is a destination-basis cash-flow tax.

As a matter of domestic tax law, the imposition of a border adjustment tax would require Congressional action because the Constitution vests the taxing power exclusively in Congress. Although the same constitutional provision gives Congress the power to tax and to impose tariffs, Congress has not delegated its taxing authority to the President as it has done, to some extent, with tariffs. Accordingly, it appears the President could not unilaterally impose a 20% tax on imports from Mexico.

Posted at 01/30/2017 10:17 AM by Caitlain Devereaux Lewis | Share Sidebar
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