

April 20, 2010

**ELECTRONIC SUBMISSION**

Ronald K. Lorentzen  
Deputy Assistant Secretary for Import Administration  
U.S. Department of Commerce  
APO/Dockets Unit, Room 1870  
U.S. Department of Commerce  
14<sup>th</sup> Street and Constitution Avenue, N.W.  
Washington, DC 20230

**PUBLIC DOCUMENT**

**Re: Comments By King & Spalding LLP In Response To The Department's Request For Comments On The Report To Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems -- 75 Fed. Reg. 16079 (Mar. 31, 2010)**

Dear Mr. Lorentzen:

These comments are filed on behalf of the domestic industries represented by King & Spalding LLP in ongoing antidumping and countervailing duty proceedings in response to the Department's March 31, 2010 request for comments on the relative merits of retrospective versus prospective antidumping and countervailing duty assessment systems.<sup>1</sup> King & Spalding welcomes the opportunity to provide comments on this issue.

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<sup>1</sup> See, Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems; Request for Comment and Notice of Public Hearing, 75 Fed. Reg. 16079 (Mar. 31, 2010).

## I. INTRODUCTION

As the *Federal Register* notice indicates, in the conference report associated with the 2010 Consolidated Appropriations Act, Public Law 111-117, Congress directed the Department of Commerce (“the Department”) to work with the Secretaries of Homeland Security and the Treasury to conduct an analysis and provide a report on the relative advantages and disadvantages of prospective and retrospective antidumping (“AD”) and countervailing duty (“CVD”) assessment systems.<sup>2</sup> The *Conference Report* instructs the agencies at issue to address the extent to which each type of system would likely achieve the goals of

- Remediating injurious dumping or subsidized exports,
- Minimizing uncollected duties,
- Reducing the incentives and opportunities for importers to evade antidumping and countervailing duties,
- Effectively targeting high risk importers,
- Addressing the impact of retrospective rate increases on U.S. importers and their employees, and
- Creating a minimal administrative burden.<sup>3</sup>

Based on decades of experience representing domestic industries in scores of antidumping and countervailing duty proceedings, King & Spalding believes that the objectives outlined above would not be better served through a switch from the current retrospective system to a prospective system. In fact, for the reasons detailed below, King & Spalding believes that a prospective system would diminish the efficacy of the AD and CVD laws in remediating the effects of dumped and subsidized imports and would lead to even greater evasion and circumvention of duties owed. A prospective system would not diminish or eliminate the

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<sup>2</sup> 111<sup>th</sup> Cong., 1<sup>st</sup> Sess., Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010, H. Rep. 111-366 at 609, (“*Conference Report*”).

<sup>3</sup> *Id.*

problem of uncollected duties or deal effectively with high-risk importers, because it would not do anything to address the problem of “shell” importers or circumvention of duties via Customs fraud.

In addition, while a prospective system might simplify things for importers and Customs authorities, it would do so at the expense of fairness and accuracy and would undermine the remedy provided to U.S. companies injured by dumped and subsidized imports. If the rate of duty were fixed at the investigation rate, foreign producers could “game the system” by increasing their levels of dumping or by benefiting from additional government subsidies. The retrospective system, on the other hand, is fairer to both U.S. companies bringing successful AD or CVD cases and also foreign producers that are subject to such cases. Duty assessment and duty deposits rise or fall depending on the actual level of subsidization or dumping. This rewards exporters who have altered their pricing behavior or who have reduced their subsidies, but it also permits the duty rates to rise if dumping or subsidies increase. While the retrospective system may require more steps to achieve final duty assessment, reducing those steps would erode the efficacy of the remedy and take away existing incentives to eliminate dumping and subsidization.

Clients of King & Spalding have experienced first hand the negative impact that under-collection of duties and circumvention of orders can have. There are more effective and appropriate methods to deal with these problems, however, that do not entail simply scrapping the retrospective system and replacing it with a less accurate prospective system. Customs and Border Protection (“CBP”) has already taken affirmative steps to increase duty collections and to

deal with importers that do not pay duties owed. Other remedial steps are outlined in a *GAO Report* on shortfalls in duty collections.<sup>4</sup>

## **II. A RETROSPECTIVE DUTY ASSESSMENT SYSTEM IS MORE EFFECTIVE IN REMEDYING INJURIOUS DUMPING AND SUBSIDIZED IMPORTS THAN IS A PROSPECTIVE SYSTEM**

The WTO Antidumping Agreement permits member countries to assess antidumping duties on either a retrospective or prospective basis.<sup>5</sup> The United States employs a retrospective system. Many trading partners of the United States employ a prospective system.<sup>6</sup>

The retrospective duty assessment system as operated in the United States is designed to adjust the amount of duties assessed on imports to reflect the amount of dumping or subsidization that has actually occurred on the import entries at issue. U.S. AD and CVD laws provide that margins of dumping or subsidization be based on some historical time period -- a period preceding the filing of the AD or CVD petition. The margins calculated for this historical period form the basis the estimated duties that are required to be deposited by importers of product subject to an order. Later, if an administrative review is requested by an interested party, the Department looks back at a period of time (usually one year, or 18 months during a first

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<sup>4</sup> GAO-08-391, Report to Congressional Requesters, *Antidumping and Countervailing Duties, Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, March 2008, (“*GAO Report*”) at 37-39.

<sup>5</sup> See, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 168 (1994), (“*AD Agreement*”), Article. 9.3. By contrast, the Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 264 (1994), (“*SCM Agreement*”) does not address the method of duty assessment.

<sup>6</sup> The European Union (“EU”), Australia, Canada, and Mexico, for example, all employ prospective assessment systems.

review) since suspension of liquidation first occurred and calculates the actual level of dumping or subsidies applicable to those entries.<sup>7</sup> These margins of dumping or subsidization then form the basis of the duties actually assessed on the entries under review. If the duty deposit rate paid by the importers when the merchandise entered the United States is higher than the actual duties assessed, the difference is refunded to the importer with interest. If the actual rate is higher than the duty deposit rate, then the difference between the two is due from the importer with interest. The newly calculated margins also form the basis of the new duty deposit rates applicable to entries occurring after the date of the final determination in the review.

The approach to final duty assessment embodied in the retrospective system makes it a fair and balanced system for all the parties involved in AD/CVD proceedings. First, it is more accurate, because it relies on information that is more recent, based on the actual entries on which the duties are assessed. Second, it affords foreign producers the opportunity and incentive to adjust their pricing behavior to avoid dumping and to forego government subsidies. Third, the retrospective system protects domestic industries by ensuring the duties assessed will reflect any increase in the rate of dumping or subsidization.

By contrast, most prospective systems as currently operated in other countries or customs unions establish a margin of dumping or subsidization during the course of an initial investigation, which then becomes the fixed AD or CVD rate that applies to all subject entries, until such time that the AD or CVD measure expires.<sup>8</sup> Thus, unlike the retrospective system,

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<sup>7</sup> 19 U.S.C. 1677(9)(B). If a review is not requested, entries are liquidated at the deposit rate.

<sup>8</sup> GAO-08-391, Report to Congressional Requesters, *Antidumping and Countervailing Duties, Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, March 2008, (“GAO Report”) at 37-39.

duties paid at the time of entry in a prospective system are essentially final. Most prospective systems, however, do allow for reviews for refunding *overpayment* of duties upon the request of importers.<sup>9</sup> The refund provisions in prospective systems are established in accordance with Article 9.3.2. of the *Antidumping Agreement*, which provide that “when the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request of any duty paid in excess of the actual margin of dumping.” Similar provisions, however, do not exist for domestic producers to request a review for *underpayment* of duties when dumping or subsidization has increased, either in the *Antidumping Agreement*, or in the AD/CVD laws of countries with prospective systems. Some countries or customs unions, like EU, Australia, and Canada, do have procedures for reviewing and making adjustments (either higher or lower) to AD or CVD rates, but such changes are only made prospectively.<sup>10</sup> There is no provision that allows for duties on past imports to be adjusted even when those imports may have been dumped or subsidized at significantly higher levels.

The fact that there is no mechanism to apply higher duty rates when dumping or subsidization has increased is a serious flaw in the prospective system, and is reason enough to reject such a system in the United States. In fact, the way in which duties are calculated and assessed in some countries with prospective systems actually exacerbates the problem, leading almost inevitably to increased levels of dumping. In the EU for example, an AD duty rate is established by calculating a percentage based on the difference between the normal value and the export price. This percentage is then applied to the invoice price of the product when it enters

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

the EU to arrive at the AD duty owed. This *ad valorem* approach provides a tremendous incentive for exporters/importers to lower the value of the entered merchandise in order to reduce the amount of duties owed, thus increasing the level of dumping.<sup>11</sup>

As the *GAO Report* concedes, “{u}nder a prospective system, the amount of duties assessed may not match the amount of actual dumping or subsidization.” This ensures that a prospective systems would not achieve the Congressional objective of “remedying injurious dumping or subsidized exports” and “reduc{ing} incentives and opportunities for importers to evade anti-dumping and countervailing duties.”<sup>12</sup>

### **III. A PROSEPTIVE DUTY ASSESSMENT SYSTEM WOULD NOT BE EFFECTIVE IN MINIMIZING UNCOLLECTED DUTIES**

The introduction of a prospective system would not eliminate the problem of uncollected duties, it would simply sweep the problem under the rug by establishing fixed rates of duty that do not reflect the true rates of dumping or subsidization. The *GAO Report* outlines several reasons for the problem of uncollected duties: (1) the final amount of duties an importer can owe can significantly exceed the initial amounts paid when the products subject to AD or CVD duties entered the United States, (2) the length of time between an entry an the final assessment of duties can make duty collection difficult, (3) issues related to “new shipper” reviews, including low export thresholds for triggering such reviews and CBP’s standard formula for calculating bonding requirements for new shippers which frequently results in overly-low bonding levels, and (4) the fact that CPB does not collect appropriate information about importers and does not

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<sup>11</sup> *Id.* at 39.

<sup>12</sup> *Id.* at summary.

conduct background or financial checks, which contributes to challenges in locating and collecting AD and CVD duties.<sup>13</sup>

It is notable that all the problems identified by CBP relate specifically to difficulties associated with holding importers accountable for paying the ultimate duties assessed. The *GAO Report* notes that “some importers are unable to pay the additional amount because it exceeds their available assets. Others, such as illegitimate importers, expect that their final assessment will exceed their cash deposit and plan to avoid their final duty obligation . . . .”<sup>14</sup> The *GAO Report* also notes that between the time of importation and the time when final AD/CVD duties are assessed, importers may disappear, cease business operations, or declare bankruptcy, all of which create challenges to CBP’s ability to collect AD/CVD duties.<sup>15</sup> Despite the fact that all the duty collection difficulties identified in the *GAO Report* relate specifically to the problem of making importers accountable, the report nonetheless chooses to blame the assessment system itself, by noting that “the retrospective system component of the U.S. AD/CV duty system creates the risk of uncollected duties . . . .”<sup>16</sup> It is not appropriate to blame the assessment system for what is really a problem of holding importers accountable for duty assessments owed.

The real problem is not that importers are failing to make duty deposits, but rather that certain foreign producers and importers are increasing the level of dumping after an order goes into effect, and then simply disappearing. Thus, the problem involves the collection of duties associated with this increased dumping. A prospective system would “fix” this problem by

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<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.* at 21.

<sup>15</sup> *Id.* at 20.

<sup>16</sup> *Id.*

opting not to address increases in dumping other than prospectively. That simply defines the problem away without actually addressing the impact on U.S. companies injured by dumping or subsidies.

**IV. A PROSPECTIVE SYSTEM WOULD NOT REDUCE THE INCENTIVES AND OPPORTUNITIES FOR IMPORTERS TO EVADE ANTIDUMPING AND COUNTERVAILING DUTIES OR TO TARGET HIGH RISK IMPORTERS**

A prospective system would not reduce the incentives and opportunities for importers to evade AD and CVD duties, nor would it reduce the problems associated with high-risk importers. As explained above, a prospective assessment system would not eliminate or even reduce the likelihood for evasion of AD or CVD duties, because a prospective system would permit importers to avoid the consequences of increased dumping or subsidization. Foreign producers and importers would be free to increase levels of injurious dumping or subsidization without any recourse for domestic producers.

Often the focus of evasion concerns relates to AD orders. The *GAO Report*, for example, which was issued in March 2008, examined uncollected duties between fiscal years 2001 and 2007 and concluded that “{n}early 100 percent of these uncollected duties are AD duties.”<sup>17</sup> King & Spalding is concerned, however, that a prospective system, if one were implemented in the United States, could greatly expand opportunities for evasion of duties in CVD cases. In the past, the number of new CVD petitions filed was significantly smaller than the number of AD petitions. However, the number of CVD petitions filed since the *GAO Report* was issued has increased significantly, in particular since the clarification of the Department’s policy with

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<sup>17</sup> *Id.* at 13.

respect to the application of the CVD law to imports from China, which occurred in 2007.<sup>18</sup> According to data on the Import Administration website, there were only two CVD cases initiated in 2005, and only three in 2006.<sup>19</sup> When the change in the Department's policy regarding the application of the CVD law to China occurred, the number of CVD cases initiated rose to seven in 2007 and six in 2008<sup>20</sup> and then to 14 in 2009.<sup>21</sup> The number of CVD cases initiated relative to the AD cases has also increased. In 2007, CVD cases accounted for 19 percent of AD/CVD cases combined.<sup>22</sup> The portion of CVD cases rose to 25 percent in 2008 and 41 percent in 2009.<sup>23</sup>

The increases in CVD initiations resulted from an increase in the number of CVD petitions filed covering imports from China. In 2007, all seven of the CVD petitions filed covered products from China. In 2008, five of the six petitions filed covered products from China.<sup>24</sup> In 2009, ten of the fourteen CVD petitions filed covered Chinese products.<sup>25</sup>

A prospective system could significantly increase the likelihood of evasion of CVD duties. Under a retrospective system, if the level of subsidization increases after liquidation is first suspended or after an administrative review, the increase can be captured and the duty

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<sup>18</sup> See *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60645 (Oct. 25, 2007).

<sup>19</sup> Antidumping and Countervailing Duty Investigations Initiated After January 1, 2000, <http://ia.ita.doc.gov/stats/inv-initiations-2000-current.html>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

assessment rate adjusted accordingly, such that the actual duties imposed reflect the increased subsidization. Under a prospective system, however, this increase could never be captured at the time of final assessment. This gives rise to the possibility that a foreign government could increase the amount of subsidies provided to offset all or a portion of the CVD duty imposed. Although the CVD rate could be increased as a result of an administrative review, the increase would only apply prospectively. The foreign government could then increase subsidy amounts again, such that the foreign producer would never incur the consequences of the CVD duty and competing U.S. producers would never receive the intended benefit of a level playing field.

The fact that most of the CVD cases in recent year cover exports from China is of particular concern. As the *GAO Report* noted, importers purchasing from China were responsible for 90 percent of all uncollected AD/CVD duties.<sup>26</sup>

## V. CONCLUSION

The problem of duty evasion that results in significant levels of uncollected duties is of significant concern to firms like ours that represent petitioners in AD and CVD cases. The introduction of a prospective system, however, is not the solution to these problems -- it would simply define them out of existence. The purported ease of administrability would come at the expense of both accuracy and fairness, and would also cost the U.S. Treasury untold sums in duties that would otherwise be collected under a retrospective system. Instead, the goals articulated in the *Conference Report* could be achieved by adopting more robust enforcement and collection procedures.

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<sup>26</sup> *GAO Report* at 14.

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Please contact us if you have any questions about this submission.

Respectfully submitted,



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