

**COMMENTS OF THE  
TRADE REMEDY REFORM ACTION COALITION  
ON  
COMMERCE’S REPORT TO CONGRESS ON PROSPECTIVE v.  
RETROSPECTIVE ANTIDUMPING & COUNTERVAILING DUTY SYSTEMS  
(75 Fed. Reg. 16079, March 31, 2010)**

"I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times." *Thomas Jefferson*

**INTRODUCTION**

The U.S. antidumping and countervailing duty (AD/CVD) laws have their roots in the early 1900s and have not undergone any significant changes in 30 years. During that time, however, the world has changed a great deal. Agriculture and the factory floor have gone global and U.S. businesses depend more than ever on stable global supply chains to compete successfully, provide good jobs for American workers, and provide U.S. consumers with quality affordable goods, from cars to carpets and telephones to t-shirts. The U.S. retrospective system creates unnecessary unpredictability and instability in global supply chains. We should keep pace with the times; we need a system for the 21<sup>st</sup> century economy.

In advocating for change, our coalition is not suggesting that the United States should weaken its defenses against unfair trade. To the contrary, we believe that predictability and protection are not mutually exclusive, nor are efficiency and effectiveness. The United States can develop a prospective system that provides as

effective a remedy (and perhaps more effective) against unfair trade and at the same time provides greater predictability in the global supply chain.

We are therefore pleased that Congress has asked the Department of Commerce, working with the Departments of Homeland Security and Treasury, to undertake an analysis and report on the relative advantages and disadvantages of prospective and retrospective AD/CVD systems. We also appreciate the opportunity Commerce has provided for us to participate in that endeavor.

Commerce’s report is to address the extent to which each type of system would likely achieve the goals of: (1) remedying injurious dumped or subsidized imports, (2) minimizing uncollected duties, (3) reducing incentives and opportunities for importers to evade anti-dumping 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 a minimal administrative burden. We are please to provide the following comments on each of those issues.

1. ***Remedying Injurious Dumping or Subsidies.*** The purpose of any AD/CVD system is to eliminate or offset injurious dumping or subsidies. The methods to calculate rates of antidumping or subsidization are much the same regardless of the type of system.<sup>1</sup> Also, under what is known as a prospective normal value system,<sup>2</sup>

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<sup>1</sup> All major trading nations are members of the World Trade Organization (“WTO”) which has established rules governing the use of AD/CVD measures, including both how to calculate the amount of dumping or subsidization and certain procedures that must be followed. There is therefore a considerable degree of similarity between all AD/CVD systems.

<sup>2</sup> There is another type of prospective system, such as that used by the European Union, in which an *ad valorem* antidumping duty rate is calculated during the investigation and that rate is then assessed at the time of import on all entries of the subject merchandise. We have focused our comments on the prospective normal value system because we believe it provides the best option for achieving U.S. policy goals.

antidumping duties are calculated on a transaction-specific basis and assessed on an importer-specific basis – just as in the U.S. retrospective system. Likewise, under a prospective system a subsidy rate is determined on an exporter-specific basis and assessed on an *ad valorem* basis – just as in the U.S. retrospective system. The key difference in the two systems is how and when final duties are assessed.

In a prospective system, when the administering authority determines in an investigation or review what is a non-dumped price (*i.e.*, “normal value”) or what the subsidy rate is, those results are used to make a final assessment of AD/CVD on each import transaction at the time of entry.<sup>3</sup> Thus, the injurious dumping or subsidization is remedied, *and* companies know in advance what the actual fairly traded cost associated with each potential supplier is and can make informed decisions on choice of supplier and pricing.

In contrast, in the U.S. retrospective system, final duties are not assessed at the time of entry. Instead, Customs & Border Protection (“CBP”) collects a cash deposit from the importer at the time of entry.<sup>4</sup> CBP then holds all of those entries open (*i.e.*, suspends liquidation) until Commerce advises CBP, and importers, what the final duties are to be. Once a year, interested parties may request an administrative review to determine the final amount of duties owed on each entry made during the previous 12 months. If a review is conducted, Commerce then instructs CBP to assess duties on those

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<sup>3</sup> We note that under a prospective system the issue of “zeroing” in reviews does not come into play. Changing the system would therefore resolve the ongoing WTO dispute.

<sup>4</sup> The cash deposit is based on the dumping or subsidy rate determined by Commerce in the investigation or most recently completed review. 19 U.S.C. § 1675(a)(2)(C).

entries based on the results of the review.<sup>5</sup> On average, the importer does not know the final duty liability until 3.3 years after the date of entry.<sup>6</sup> Thus, the injurious dumping or subsidization is remedied, *but* U.S. companies do not, and cannot know in advance the actual fairly traded cost associated with each of various suppliers. Thus, the system creates substantial uncertainty in global supply chains.

The U.S. Government has acknowledged that, compared to a prospective system, the U.S. retrospective system is more complex and resource intensive, less predictable,<sup>7</sup> and plagued by collection problems.<sup>8</sup> So why does the United States have a retrospective system? The undesirable attributes of the U.S. system have been tolerated based on the notion that a retrospective system is more accurate and therefore must be a more effective remedy.<sup>9</sup> In fact, however, there seems little to support that theory.

First, the theory is based in part on the assumption that there are no reviews in prospective systems. That is not the case in the prospective normal value systems of countries such as Australia, Canada, and New Zealand, and certainly need not be the case in a U.S. system. Normal values and subsidy rates can be modified prospectively through reviews. Second, the theory is based on the fact that a retrospective antidumping system encourages changes in pricing behavior to eliminate dumping and thereby avoid paying

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<sup>5</sup> CBP collects the additional duties if the final rate is greater than the cash deposit rate, or refunds any excess cash deposits if the final rate is lower.

<sup>6</sup> See *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, U.S. Government Accountability Office, March 2008 (“GAO Report”) at 23.

<sup>7</sup> See Appellee Submission of the *United States, United States – Final Anti-dumping Measures on Stainless Steel from Mexico* (“U.S. Mexican Steel AB Submission”), para. 22.

<sup>8</sup> See GAO Report at 20.

<sup>9</sup> See U.S. Mexican Steel AB Submission, para. 23.

AD duties.<sup>10</sup> A prospective normal value system, however, creates the same (but more immediate) incentive to change pricing behavior to avoid payment of duties and, as discussed below, decreases the opportunity for evasion.

Third, the theory is based on the idea that the rates in a retrospective system can more accurately reflect the actual amount of dumping or subsidization during a given period because all of the data for transactions during a specific period are collected and analyzed after the fact. Before going further, it is worth noting that when there is no review, the cash deposit rate becomes the assessment rate,<sup>11</sup> *i.e.*, rates from the prior investigation or review are applied prospectively but without any of the benefits of a prospective system. So, the accuracy argument is limited to rates determined in reviews.

In an AD case, looking at the same entry, under either system the export price for that specific transaction would be compared to the normal value – either at the time of entry (prospective) or more than a year later (retrospective). The difference is that, in the U.S. retrospective system, the normal value is based on data from approximately the same period in which the import transaction occurred.<sup>12</sup> In a prospective system, the normal value is based on data from the prior period covered by the investigation or most recent review. From a remedial standpoint, therefore, the issue is whether dumping

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<sup>10</sup> *Ad valorem* subsidy rates may change over time as a result of amortization of benefits or elimination of subsidies, but they are unaffected by changes in pricing.

<sup>11</sup> See 19 C.F.R. § 351.212(c); this procedure is referred to as “automatic assessment”.

<sup>12</sup> We note that even in the U.S. retrospective system export price and normal value data are not always from the same period. In some instances, for example, costs (e.g., warranty) from a prior period are used to estimate costs that will be associated with sales in the current period. In addition, the sales used to calculate dumping are not necessarily the same as the transactions (entries) against which the duties are assessed.

increases in subsequent periods without resulting in the collection of additional duties.

Experience and logic demonstrate that this is not the case.

The GAO found that in the U.S. retrospective system, final AD duties are *lower than or the same* as the cash deposit rates (*i.e.*, rates from the prior period) 84% of the time.<sup>13</sup> In addition, the median decline in rates was 7 percentage points, while the median increase in rates was less than 4 percentage points.<sup>14</sup> In short, dumping tends to decrease over time.<sup>15</sup> As discussed above a prospective system provides an immediate incentive to change pricing behavior to avoid dumping duties. Logically, therefore, rates should trend downward over time. Moreover, under a prospective system, if export prices were to decline, it would result in an immediate increase in the duties assessed.<sup>16</sup> Thus, not only would a prospective system provide an effective remedy, it would also reduce duty collection problems, as discussed in the following section.

**2. *Minimizing Uncollected Duties.*** Obviously, regardless of how good a system we have for determining the proper amount of AD/CVD duties to assess, failure to collect those duties undermines the effectiveness of the remedy. The long time lag between entry and assessment in the U.S. system and unforeseen rate increases has unquestionably

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<sup>13</sup> See GAO Report at 21. Over a 9-year period, the GAO found that rates went down 24% of the time, up 16% of the time and stayed the same 60% of the time.

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

<sup>15</sup> In the case of subsidies, Commerce amortizes non-recurring subsidies over time using a declining balance method. Thus, absent receipt of new subsidies, subsidy rates will decline over time. In addition, the existence of a CVD order should discourage continued use of recurring subsidy programs (*e.g.*, tax incentives). New non-recurring subsidies and changes in the level recurring subsidies could be addressed in reviews, using a method designed to ensure a full offset of the subsidies.

<sup>16</sup> Logically, it would seem that there is little, if any, incentive for exporters to increase dumping by raising home market prices because that would not only increase the duty rate in a subsequent review, but also could have negative repercussions in the home market. Moreover, in non-market economy cases, exporters have little, if any, ability to change the normal value because it is generally not based on their prices or costs.

created duty collection problems,<sup>17</sup> resulting in a failure to collect over \$600 million in AD/CVD duties.<sup>18</sup> In the years between entry and final assessment a number of impediments to collection can arise, such as companies going bankrupt or ceasing operations. Collecting duties at the time of entry eliminates the collection problems associated with the lag time and unforeseen rate increases. A prospective system would therefore minimize uncollected duties and thereby improve the remedial effect of AD/CVD orders.

**3. *Reducing Evasion & Targeting High Risk Importers.*** Schemes to evade payment of duties may or may not involve customs fraud. Customs fraud (*e.g.*, falsifying entry documents) is a potential problem under any system and CBP’s authority to address fraud would be the same under either system. In a prospective system, however, transactions are examined for AD/CVD purposes at the time of entry. Thus, fraud may be detected sooner than would be the case under a retrospective system in which transactions are not examined until many months after import.

Under the U.S. retrospective system, evasion can also occur without fraud. A typical evasion scheme involves a foreign exporter with a low AD rate that subsequently reduces prices and increases exports and then disappears before the additional duties are collected. This type of “hit and run” evasion scheme could involve either an exporter that is also acting as the importer of record or a high-risk importer (*e.g.*, a foreign entity with no substantial U.S. presence). More importantly, such schemes are possible only in a retrospective system. Under a prospective system, CBP would immediately collect more

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<sup>17</sup> See GAO Report at 21-23.

<sup>18</sup> *Id.* at

duties if prices declined. The exporter or high-risk importer no longer has a window of opportunity to execute the hit and run. Moreover, U.S. importers would know what the non-dumped price is and can avoid being caught up in such a scheme.

In sum, because the prospective system responds immediately to changes in import pricing, it would be far more resistant to evasion by foreign exporters and high-risk importers.

**4. *Impact on Importers.*** Ask any businessperson what keeps them up at night and the answer is likely to be uncertainty. U.S. manufacturers, agricultural producers and processors, distributors and retailers depend on stable global supply chains. A prospective system would give them greater certainty when making sourcing decisions, which in turn would enhance their ability to compete in the global marketplace.

U.S. companies are willing to pay fairly traded prices – they simply need to know what they are so that they can make informed, sound business decisions. As a matter of policy, it makes no sense to say that the U.S. government cannot determine what is a fairly traded transaction until years after the fact, but still penalize U.S. industries with large rate increases for not knowing. Many U.S. importers invest millions of dollars in programs to qualify suppliers and ensure that they do not run afoul of U.S. trade laws. Nevertheless, there are countless stories of companies relying on Commerce’s estimated duties and then, through no fault of their own, being faced with bills years after import for additional duties of tens or hundreds of thousands, or even millions, of dollars.<sup>19</sup> A

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<sup>19</sup> For example, if the number of foreign exporters to be investigated or reviewed is too large, Commerce examines a manageable number of the largest exporters or a statistically valid sample. The remaining exporters receive a rate based on a weighted average of the results for the examined exporters. 19 U.S.C. § 1677f-1(c)(2). Thus, the importer may be forced to pay additional duties because another exporter, not their supplier, failed to fully cooperate in a review.

prospective system eliminates that unpredictability, allowing U.S. companies to purchase fairly traded goods while knowing their actual costs going in.

The unpredictability of the U.S. retrospective system also places U.S. companies at a competitive disadvantage. To compete in a global marketplace it is increasingly important for U.S. companies to have access to multiple sources of supply and to the most competitive sources. The U.S. retrospective system limits U.S. companies’ ability to source competitively. Our foreign competitors do not face that problem because the United States is the only country with a retrospective system. In any other country, the importer would know in advance what their actual costs would be and could select the most competitive (and fairly traded) option. The lack of similar sourcing flexibility puts U.S. manufacturing and agriculture at a competitive disadvantage.

**5. *Administrative Burden.*** As the United States has acknowledged, a “retrospective duty assessment system is more complex to operate, and requires a larger expenditure of administrative resources and personnel” than a prospective system.<sup>20</sup> As CBP officials have pointed out, under the retrospective system CBP requires resources to identify, track over time and process entries subject to AD/CVD duties, plus resources to collect those duties. According to CBP, the drain on resources also diverts focus from enforcement issues such as anti-circumvention.<sup>21</sup>

A prospective system would be much less resource-intensive for CBP to administer. CBP would collect AD/CVD duties at the time of entry, as is the case with normal import duties. CBP would no longer need to maintain suspension accounts or

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<sup>20</sup> See U.S. Mexican Steel AB Submission, para. 22.

<sup>21</sup> See GAO Report at 41-42 and Appendix 5 (Letter from the U.S. Department of Homeland Security).

hold open entries for months or years awaiting final instructions on AD/CVD duty assessments. Assessing duties at the time of entry also eliminates the burden of liquidating hundreds or thousands of entries at the end of a review in a short period of time.<sup>22</sup>

For Commerce, the major administrative burden is attributable to annual administrative reviews. Under a prospective system, reviews should be less burdensome. Under the current system, Commerce must collect and analyze data for purposes of calculating normal value, *and* collect all the data on U.S. export prices during the previous year. It must then compare the export price for each transaction – which often number in the hundreds if not thousands – to the normal value to calculate the duties owed on that transaction.

In contrast, under a prospective system, that transaction-to-average NV comparison would be done at the time of entry. Reviews by Commerce would be focused on periodically updating the normal value. The narrower focus of administrative reviews may significantly reduce the resources necessary to conduct them. That could in turn enable Commerce to do more exporter-specific reviews than it does currently, and direct more resources to other enforcement efforts.

## **CONCLUSION**

A prospective system is a win-win policy choice. It provides an effective remedy against injurious dumping and subsidies, while providing U.S. businesses the predictable

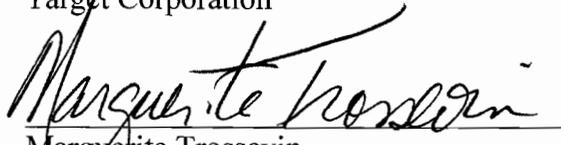
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<sup>22</sup> The general rule is that if Customs does not liquidate an entry within 6 months of Commerce’s final determination in a review, the entry is deemed liquidated by operation of law. 19 U.S.C. § 1504(d).

global supply chains so essential in today's economy. We therefore urge Commerce to support establishing a prospective AD/CVD system in the United States.

Respectfully submitted on behalf of,

The Trade Remedy Reform Action Coalition  
American Apparel and Footwear Association  
Emergency Committee for American Trade (ECAT)  
J.C. Penney Corporation, Inc.  
Jo-Ann Fabric and Craft Stores  
Maritime Products International  
Michaels Stores, Inc.  
National Fisheries Institute  
Retail Industry Leaders Association  
Target Corporation

  
Marguerite Trossevin  
JOCKUM SHORE & TROSSEVIN, PC