

ENFORCEMENT OF ANTIDUMPING & COUNTERVAILING DUTY MEASURES: CIRCUMVENTION AND EVASION

August 6, 2015

P. Lee Smith

King & Spalding

TOPICS

- **The Difference Between Circumvention And Evasion**
- **Overview Of Evasion Schemes**
- **WTO Rules Regarding Circumvention And Evasion**
- **The United States And Certain Other Countries' Approaches To Combating Circumvention And Evasion**
- **Conclusions And Questions**

THE DIFFERENCE BETWEEN CIRCUMVENTION AND EVASION

WHAT IS CIRCUMVENTION? U.S. PRACTICE

- **An Interested Party May Petition Commerce To Determine Whether A Product Being Imported Into The United States Is Within The Scope Of An Outstanding Antidumping Order**
- **Under 19 U.S. Code § 1677j, Commerce Only Will Investigate Four Types Of Circumvention:**
 - **Merchandise completed or assembled in United States**
 - **Merchandise completed or assembled in other countries**
 - **Minor alterations of merchandise**
 - **Later-developed merchandise**
- **U.S. Practice Is Similar To Other Countries**

UNFINISHED MERCHANDISE AND MINOR ALTERATIONS

- **Exporters Ship Unfinished Merchandise, Components, And/Or Parts Of The Subject Merchandise To A Third Country Or The Domestic Market**
- **The Products Are Assembled In The Domestic Market Or A Third Country**
- **In Addition, Exporters Make Minor Alterations To The Merchandise Which Does Not Change The Product, But Puts It Outside The Scope**
- **There Is No Economic Justification, Other Than To Avoid The AD/CV Duties**

WHAT IS EVASION?

- **Evasion Is Essentially Customs Fraud**
- **For Example, The U.S. Government Accountability Office (“GAO”) Reported That From 2007 To 2011, U.S. Customs & Border Protection (“USCBP”) Assessed Penalties For Evading AD/CV Duties Of \$208 Million**
- **Evasion Can Lead To Criminal Actions In The U.S.**
- **The GAO Reported That Immigration And Customs Enforcement (“ICE”) Investigations Led To 28 Criminal Arrests, 85 Indictments, And 37 Criminal Convictions During Fiscal Years 2007 Through 2011**

TYPES OF EVASION SCHEMES

- **Fraudulent Declaration Of Country Of Origin/Transshipment**
- **Fraudulent Mislabeling/Misclassification Of HTS Category**
- **Using Fraudulent Invoices To Misrepresent The Identity Of The Manufacturer**
- **Understatement Of Customs Value**
- **Not Declaring Goods On Entry Documents/Smuggling**

TYPES OF EVASION

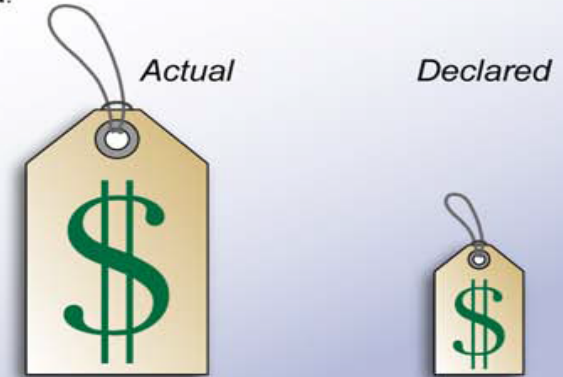
Illegal Transshipment

Disguising a shipment's true country of origin by routing it through an intermediate country not subject to AD/CV duties. This may involve adding false markings and packaging to mimic legitimate production in other countries.



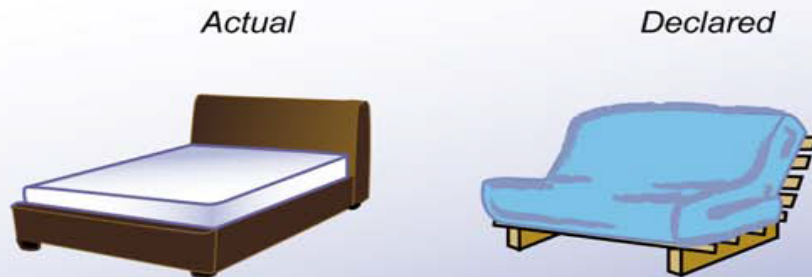
Undervaluation

Falsifying the price of an import to reduce the amount of AD/CV duties assessed.



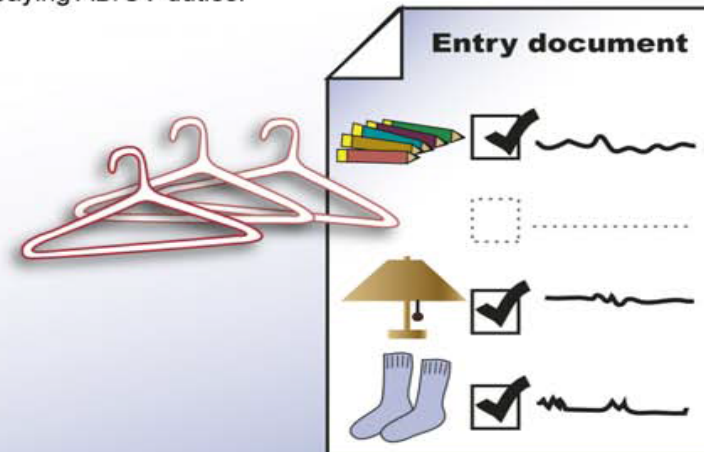
Misclassification

Falsely describing merchandise so that it falls outside the scope of an AD/CV duty order.



Smuggling

Failing to declare goods on entry documents in order to avoid paying AD/CV duties.



Sources: GAO analysis of CBP documentation; Map Resources (map).

FRAUDULENT DECLARATION OF COUNTRY OF ORIGIN: TRANSSHIPMENT

- **Transshipment Involves Shipping Merchandise Subject To An AD/CVD Measure To A Third Country**
- **The Subject Merchandise Is Re-labeled And, At Times, Removed From One Container To Another For Shipment To The Target Country**
- **Fake Country Of Origin Documentation Is Prepared For Entry Into The Target Country**
- **Companies Advertise Such Services Online**

FRAUDULENT DECLARATION OF COUNTRY OF ORIGIN: TRANSSHIPMENT

- **Companies Openly Advertise Their Services To Transship Subject Merchandise Through Third Countries To Avoid The Payment Of AD/CV Duties**
- **Staff For U.S. Senator Wyden Published A Report Titled “Duty Evasion: Harming U.S. Industry And American Workers” On November 8, 2010**
- **Staff Contacted Over 110 Companies That Advertised Their Evasion Services Online; Received 47 Responses And 10 Written Confirmations From Companies Willing To Help Evade Duties**
- **Such Services Are Not Limited To Evading U.S. Duties, The E.U., Mexico, Egypt, And Others Are Identified In The Report**

FRAUDULENT MISLABELING OF SUBJECT MERCHANDISE

- **Importers, In Conjunction With Their Foreign Exporters, Identify Merchandise Subject To AD/CV Duties As Non-Subject And Enter The Subject Merchandise Under The Incorrect HTS Code Or Incorrect Description**
- **Scopes Of Measures Identify The Relevant HTS Codes**
- **Evaders Use An HTS Code Similar To The HTS Code For Subject Merchandise To Confuse Border Officials**

USING FALSE INVOICES TO MISREPRESENT THE IDENTITY OF THE MANUFACTURER

- **AD/CVD Measures Can Result In A Range Of Rates For Different Exporters**
- **Where A Measure Has A Large Range Of Rates, High Rate Producers Funnel Subject Merchandise Through Low Rate Producers By Using False Invoices Identifying The Low Rate Company As The Seller/Exporter**
- **By Using The False Invoice, The Producer Pays Less AD/CV Duties**
- **Grey Area: CBP Has A Loose Definition Of Exporter, While Commerce Calculates AD Margins On The “Price Discriminator”**

UNDERSTATEMENT OF ENTERED VALUE

- **Importers, In Conjunction With Their Foreign Suppliers, May Be Fraudulently Undervaluing Merchandise On Entry Documents To Lower The Amount Of AD/CV Duties Due**
- **Two Sets Of Invoices Are Used: One Includes A Lower Price For Entry Purposes And The Other Includes The Actual Sales Price**
- **The Lower Price Lowers The Ad Valorem AD/CV Duties**

NOT DECLARING GOODS ON ENTRY DOCUMENTS/SMUGGLING

- **Importers, In Conjunction With Their Exporters, May Be Shipping Subject Merchandise With Other Products**
- **Subject Merchandise Is Included In The Shipment, But Not Declared On Entry Documents**
- **Subject Merchandise Can Be Placed In The Nose Of The Container To Hide The Merchandise When The Container Is Opened From The Back**

WTO RULES REGARDING CIRCUMVENTION AND EVASION

WTO RULES COVERING CIRCUMVENTION

- **No WTO Rules Regarding AD/CVD Circumvention**
- **No Rules On Evasion, Because It Is Considered Customs Fraud**
- **A Decision On Anti-Circumvention Was Issued During The Uruguay Round:**

DECISION ON ANTI-CIRCUMVENTION

Ministers,

Noting that while the problem of circumvention of anti-dumping duty measures formed part of the negotiations which preceded the Agreement on Implementation of Article VI of GATT 1994, negotiators were unable to agree on specific text,

Mindful of the desirability of the applicability of uniform rules in this area as soon as possible,

Decide to refer this matter to the Committee on Anti-Dumping Practices established under that Agreement for resolution

WTO RULES COVERING CIRCUMVENTION

- **There Appears To Be Some Consensus Regarding What Constitutes Circumvention And Evasion**
- **There Is No Consensus Regarding Whether The WTO Should Establish Formal Rules Regarding Circumvention**
- **Some Members Believe That Circumvention Can Be Addressed Under The Existing Rules**
- **Other Members Disagree And Have Established Rules To Address Circumvention In Domestic Law**
- **Most Countries Agree That Evasion Or Customs Fraud Is Best Addressed Under The Laws Of The Member States**

WTO: RECENT ACTIVITY

- **On March 16, 2015, The United States Circulated Its Antidumping Duty “Evasion Services” Paper**
- **The United States Explained That It Has Witnessed A Increase In Activities Expressly Designed To Evade The Application Of Antidumping Duties, Including Websites Marketing Such Services And Aggressive Outreach By Service Provider**
- **The United States Seeks To Shed Some Light On This Problem To This Group And To Discuss Possible Ways To Address This Growing Problem As It Not Only Serves To Undermine The Wto Agreements, But More Generally Harms The Trust And Confidence We All Place In The Multilateral Trading System**

THE UNITED STATES AND CERTAIN OTHER COUNTRIES' APPROACHES TO COMBATING CIRCUMVENTION AND EVASION

MEMBERS ARE TAKING ACTION

- **Despite No Official WTO Text Covering Circumvention, Members Are Taking Action To Combat Circumvention And Evasion**
- **There Is A Variety Of Circumvention Legislation Among The Member States**
- **Actions To Combat Evasion Are Less Clear**
- **The WTO Does Not Have Guidance Regarding Evasion Because It Is Typically Customs Fraud**
- **In Addition To Circumvention, Some Member's Investigating Authority Will Investigate Evasion Issues**
- **The United States Is Not Among These Members**

UNITED STATES: POTENTIAL ACTIONS

- **Circumvention And Evasion Are Distinct Concepts**
- **Circumvention Is Defined By Statute And Only Covers Scope-Related Issues**
- **Evasion Refers To Actions That Evade Full Payment Of AD/CV Duties Or Customs Fraud**
- **Circumvention Investigations Are Conducted By The Commerce Department And Evasion Investigations Are Conducted By U.S. Customs & Border Protection (“USCBP”)**
- **USCBP And Commerce Can Work Together**
- **Private Actions Also May Be Brought**

UNITED STATES: EVASION

- **USCBP Has The Authority To Investigate Evasion**
- **Procedures Are Informal And Confidential (No Access To Customs Data Or Documents)**
- **Anyone Can Provide Evidence To USCBP Through Its E-Allegation Website**
 - Only allows for limited information
 - Documents and other hard evidence must be sent through other avenues
- **USCBP Can Conduct An Investigation, But Will Not Inform Petitioner Of The Status Or Result**
- **This Resulted In The Two Bills Currently Before Congress**

UNITED STATES: EVASION

- **Investigations Can Take A Number Of Forms**
 - **Import Specialist At A Particular Port Of Entry Can Review Entry Documents And Request Action By The Port Director**
 - **Nation-Wide Effort At A Number Of Ports Under The Guidance Of The Centers Of Excellence And Expertise (“CEE”)**
 - **Analysis By The National Targeting And Analysis Group**
 - **USCBP Can Conduct A Regulatory Audit**
 - **USCBP Lab Analysis**
 - **A Joint Investigation With Homeland Security Investigation (“HSI”), Which Is Part Of Immigration And Customs Enforcement (“ICE”) (Both Are Under The Department Of Homeland Security)**
- **Petitioners Assist Through Port Visits By Discussing Scope, Manufacturing, And Identifying Bad Actors**

UNITED STATES: EVASION

- **USCBP Has A Number Of Tools To Use In An Investigation**
 - **Pursue Penalty Cases Under 19 U.S.C. 1592, Where There Is Negligence, Gross Negligence, Or Fraud (This Is USCBP's Primary Avenue For Investigations)**
 - **Execute Warrants For Search And Seizure Under Section 1595 To Discover Evidence Of Section 1592 Fraud**
 - **Open Containers For Physical Investigation**
 - **Issue CF-28s Questionnaires To Suspect Importers – A Blank Form Where USCBP Can Ask Importers Questions**
 - **Demonstrate Payment To Company In The Country Of Origin**
 - **Demonstrate Manufacturing Capabilities**
 - **Require An Importer To It Has The Right To Make Entry – A Financial Interest In The Merchandise**
 - **Seizures Of Evading Merchandise**
 - **Require Additional Bonding**

UNITED STATES: MORE ON BONDING

- **USCBP Has Increased Its Use Of Bonding Provisions To Combat Evasion And It Has Been Effective**
- **Office Of Administration, Revenue Division Typically Handles Bonding Where Office Of International Trade Handles Evasion Issues: Disjointed Agency**
- **Continuous Entry Bonds Are Based On A Standard Formula**
- **Single Transaction Bonds Can Be Required Where There Is A “Risk To Revenue”**
- **USCBP Has Issued Confidential Guidelines For Single Transaction Bonds**
- **Shrimp Customs Bonding Dispute Does Not Prohibit Enhanced Bonding – A Fact Based Analysis**

UNITED STATES: OTHER AGENCIES

- **In Addition To USCBP And ICE, Other Agencies Can Be Used To Assist In Combatting Evasion**
- **Where The Merchandise Is A Foodstuff, The Food & Drug Administration Can Get Involved**
- **Where The Merchandise Is An Agriculture Good, The Department Of Agriculture Can Get Involved**
- **These Agencies Typically Require Additional Safety Certifications That Can Be Useful To Prove Evasion**
- **Such Certifications Can Include Proof Of Manufacture At A Certain Facility That Has FDA Approval**

UNITED STATES: CHANGES TO COME?

- **Legislation Attempts To Formalize Investigations**
- **Senate And House Passed Separate Bills**
- **Key Issues Are**
 - **Which Agency Should Have Jurisdiction,**
 - **House Says USCBP; Senate Says Commerce**
 - **Whether There Should Be Judicial Review Of Decisions – Both Bills Allow Appeals To The CIT**
 - **Whether There Should Be Time Limits On The Investigations And If So What Should They Be**
 - **Both Have Mandatory Deadlines, But Senate (Commerce) Bill Is More Strict And Similar To An AD Investigation**
 - **Whether Business Information Can Be Accessed**
 - **Senate (Commerce) Allows Access; House (USCBP) Does Not**

UNITED STATES: CRIMINAL ACTIONS

- **HSI Or ICE Can Be Used To Initiate A Criminal Action**
- **Evidence From An Investigation Can Be Used In A Civil Proceeding, Criminal Proceeding, Or Both**
- **Relevant Provisions Covering Criminal Actions**
 - **Using a false invoice or making a false statement is punishable by up to 2 years imprisonment - 18 U.S.C. § 542**
 - **Smuggling merchandise using fraudulent documents is punishable by up to 20 years imprisonment - 18 U.S.C. § 545**
 - **Entering merchandise by payment of less than the amount of duty legally owed (undervaluing) is punishable by up to 2 years imprisonment - 18 U.S.C. § 541**

UNITED STATES: CRIMINAL ACTIONS

- **ICE Agents Use A Variety Of Tools To Investigate A Criminal Action**
- **Can Use Traditional USCBP Tools But Not Limited**
 - **Can Conduct Witness Interviews**
 - **Open Containers**
 - **Use Department Of Justice Resources**
 - **Request Assistance From Foreign Customs Authorities**
 - **Conduct Investigations In Foreign Countries**
 - **Request Assistance From Foreign Governments – Corp. Filings**
 - **Conduct Undercover Investigations At Trade Shows**
- **USCBP & ICE Have Concluded Successful Criminal Actions**
 - **Honey; Aluminum Extrusions; Retail Carrier Bags**

UNITED STATES: PRIVATE ACTIONS

- The False Claims Act (“FCA”) Prohibits Submitting False “Claims” To The U.S. Government, Regardless Of Whether Those Claims Are Made Seeking The Payment Of Monies From The Government Or Whether They Relate To A Party’s Obligations To Pay Monies To The Government (“Reverse False Claims”)
- The FCA Provides For Treble Damages, Civil Monetary Penalties Up To \$11,000 Per False Claim (*E.G.*, Per Customs Entry), And Reasonable Attorneys Fees And Costs
- The FCA Allows A Private Party Plaintiff — Called A “Relator” — To File A “*Qui Tam*” Action On Behalf Of The U.S. Against A Defendant
- Relators Generally Recover From 15 To 25 Percent, But Not More Than 25 Percent, Of The Proceeds Of The Action

UNITED STATES: PRIVATE ACTIONS

- United States *ex rel.* Huangyan Imp. & Exp. Corp. v. Nature's Farm Prod., Inc.:
 - The complaint alleged that the defendant avoided AD duties of approximately \$7.8 million by falsely designating the country of origin on shipments of Chinese mushrooms as Chilean
 - The defendants settled with the U.S. government -- The Bank of China paid \$5.25 million, and others paid \$150,000, \$27,500, and \$25,000
- United States *ex rel.* Dickson v. Toyo Ink Mfg. Co.:
 - Toyo Ink agreed to pay the U.S. government \$45 million to settle allegations that they violated the FCA by misrepresenting the country of origin of pigment entered into the U.S. in order to avoid (1) AD duties on CVP-23 from India and China and (2) CVDs on CVP-23 from India
 - Although the CVP-23 pigment underwent a finishing operation in Japan and Mexico, the relator alleged that such finishing was insufficient to change the country of origin
 - The relator received more than \$7.8 million as his share of the recovery

EUROPEAN UNION

- **Regulations Cover Certain Types Of Evasion Such As Transshipment**
- **Investigating Authority Conduct Investigation**
- **If Circumvention/Evasion Is Found, The Maximum Amount Of Duty That Can Be Extended To The Circumventing Imports Is The “All Others Duty/Residual Duty”**
- **In Case Of Circumvention By Individual Companies With Low Duty Rates, The Circumventing Company Is Made Subject To The Residual Duty Rate**
- **Companies May Request Exemption From The Application Of The Extended Duty**

ARGENTINA

- **Conducts Formal Circumvention Investigations**
- **Circumvention Is Identified As**
 - Introducing parts and/or components of the investigated product, assembled to produce a like product;
 - Introducing a like product, produced by the assembly of parts and/or components of the investigated product, or by some other operation effected in a third country; or
 - any other practice which undermines the remedial effects of the measure applied, reflecting in all cases a change in the characteristics of trade between third countries and the Argentine Republic as a result of a practice, process or activity for which there is no adequate cause or economic justification other than the imposition of the duty
- **Circumvention Rules Cover Evasion**

BRAZIL

- **Brazil Has Enacted Circumvention Provisions That Cover Certain Types Of Evasion**
- **Article 122 Provides “Circumvention is considered as a trade practice aimed at frustrating the effectiveness of an anti-dumping measure”**
 - **Pursuant to domestic Brazilian law, the existence of circumvention practices allows the authorities to extend the antidumping duty to the imports of like products or their parts originating from third countries or from the investigated country**
 - **“Whenever possible, extension of the scope of an anti-dumping measure shall be subject to an individual determination for each known producer, exporter, or importer of the product subject to the anti-circumvention review”**

SOUTH AFRICA

- **Conducts Formal Circumvention Investigations**
- **Circumvention Is Deemed To Exist Where One Or More Of The Following Conditions Are Met:**
 - **A change in the pattern of trade between third countries and South Africa or the common customs area of the Southern African Customs Union which results from a practice, process, or work for which there is no or insufficient cause or economic justification other than the imposition of the AD duty;**
 - **Remedial effects of the anti-dumping measure are being undermined in terms of the volumes or prices of the products under investigation;**
 - **Dumping can be found in relation to normal values previously established for the like or similar products**
- **These Investigations Are Conducted By The International Trade Administration Commission**

SOUTH AFRICA

- **The Following Types Of Circumvention Are Treated Separately And Referred To The Commissioner For The South African Revenue Service For Further Investigation, But The Commission Is Not Precluded From Taking Action:**
 - **Improper declaration of the value of the product; the origin of the product; or the nature or classification of the product.**
 - **Minor modifications to the subject product;**
 - **The export of parts, components, and sub-assemblies with assembly in a third country or within the Southern African Customs Union;**
 - **Absorption of the anti-dumping duty by either the exporter or the importer;**
 - **Country hopping – where imports switch to a supplier related to the supplier against which an AD investigation has been or is being conducted and that is based in another country or customs territory;**
 - **Declaration under a different tariff heading;**
 - **Any other form of circumvention as may be submitted for the Commission's consideration**

JAPAN

- **Japan Does Not Have Circumvention Rules In Place**
- **Rather Japan Is Wary Of Introducing Anti-circumvention Measures Because Japan Believes That They Could Restrict Even Legitimate Investment Activities, Potentially Contracting And Distorting Both Trade And Investment**
- **Japan Has Stated That It Believes That Only The Evasion Of AD Duties By Fraudulent Behavior Should Be Regarded As Circumvention Of Such Duties**

CONCLUSIONS AND QUESTIONS

- **Should The WTO Have A Role In Combatting Circumvention And/Or Evasion?**
- **What Are The Best Practices To Combat Evasion?**
- **Other Comments And Questions?**

- **Thank you!**
- **P. Lee Smith: lsmith@kslaw.com; 202-626-2940**