

PICARD KENTZ & ROWE

Picard Kentz & Rowe LLP
1750 K Street, NW
Suite 1200
Washington, DC 20006

tel +1 202 331 5042
fax +1 202 331 4011
dyocis@pkrlp.com

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Ronald K. Lorentzen
Deputy Assistant Secretary for Import Administration
Room 1870
Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Re: **Report to Congress on Retrospective versus Prospective Antidumping and
Countervailing Duty Systems**

Dear Deputy Assistant Secretary Lorentzen:

Pursuant to the notice published by the Department of Commerce (the “Department”) on March 31, 2010,¹ we provide these written comments on behalf of the Coalition for Fair Lumber Imports (“Coalition”)² with respect to the report requested of the Department by the Congress on the advantages and disadvantages of prospective and retrospective antidumping (“AD”) and countervailing duty (“CVD”) systems. The Coalition believes that the retrospective AD/CVD system currently employed by the United States best serves the interests of domestic industries affected by unfairly traded imports as well as importers and is particularly concerned that a prospective AD/CVD system would prove unworkable in several important respects if applied in

¹ Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems; Request for Comment and Notice of a Public Hearing, 75 Fed. Reg. 16,079 (Dep’t Commerce Mar. 31, 2010) (“Dep’t Notice”).

² The Coalition is an association of domestic entities interested in preventing unfairly traded imports of softwood lumber. Members of the Coalition have been petitioners in several antidumping and countervailing duty proceedings and have a strong interest in maintaining the effectiveness of U.S. trade laws.

certain types of markets, including softwood lumber. We address both of these points in more detail below.

I. A RETROSPECTIVE AD/CV DUTY SYSTEM BETTER SERVES THE INTERESTS OF ALL PARTIES AFFECTED BY UNFAIR TRADE

The primary purposes of the unfair trade laws, whether implemented in a retrospective or a prospective system, are to provide for a fairly traded market and to remedy injurious dumping and subsidization. The current U.S. retrospective AD/CVD system endeavors to do this by requiring importers of products subject to AD/CVD orders to deposit upon importation an amount equal to the estimated amount of antidumping or countervailing duties based on the margin of dumping or amount of subsidization determined in the original investigation or most recently completed periodic review. The final determination of AD/CVD liability is typically made in periodic assessment reviews, if requested by one or more interested parties. 19 C.F.R. § 351.212(a) (2009). In these “administrative reviews,” the Department analyzes imports that entered the United States during a defined period of review and determines the actual level of dumping or subsidization that occurred during that period.

If the Department’s review finds that dumping or subsidization occurred at lower levels than initially projected, then importers are entitled to refunds of deposits, with interest. Similarly, if the Department’s review reveals that dumping or subsidization occurred at higher levels than initially estimated, then the importer is required to pay the full assessed duty, including interest as required. Thus, under a retrospective system, the final AD/CVD duty assessment is equal to the actual amount of dumping or subsidization of imports.

Under a prospective AD/CVD system, such as those employed by Australia, Canada, and the European Union, final AD/CVD duty assessments are made at the time of importation, based

on the amount of dumping or subsidization found to have occurred in a prior period. There are a number of variations on such systems, but they share the common characteristic that duty rates are not routinely reconsidered after importation to reflect the actual amount of dumping or subsidization of the imports in question. As the Government Accountability Office (“GAO”) recognized in a recent study on this question, “{u}nder a prospective system, the amount of duties assessed may not match the amount of actual dumping or subsidization.”³

It is immediately evident that the retrospective system is more accurate than a prospective system in ensuring that importers will be assessed duties that are sufficiently high to fully offset dumping and subsidization, without being higher than the level of dumping or subsidization. Because liability for duties attaches upon importation, any change in the amount of dumping or subsidization can be remedied immediately, even if the actual assessment of the duties is delayed. If exporters can demonstrate that they have begun to price fairly or eschew additional subsidies, they know they will immediately reduce or eliminate the offsetting duties on their exports to the United States; if exporters respond to duties by reducing prices even further below fair value or obtain additional subsidies in order to remain in the U.S. market, such practices also will be immediately offset.

The importance of the greater accuracy of a retrospective AD/CVD system, of course, will vary from one case to another, depending on the nature of the dumping or subsidization at issue. For example, if a government provides a subsidy to construct production facilities over a two-year period that will have a useful life of fifteen years, a prospective CVD system could

³ General Accountability Office, Antidumping and Countervailing Duties, Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection, Report No. GAO-08-391, Mar. 2008, Highlights/Introduction.

offset such a subsidy in much the same way as would a retrospective CVD system. However, where the amount of subsidy or dumping is likely to vary significantly over time, the inaccuracy of a prospective AD/CVD system can, at different times, result in unfair outcomes from the perspective of both injured domestic industries and importers.

The Coalition's nearly three decades of experience of addressing the trade distortions resulting from Canadian provincial timber management policies indicate that the inaccuracy of a prospective AD/CVD system would be particularly problematic if applied to unfairly traded imports of softwood lumber. Although the market for softwood lumber is fully integrated across the U.S.-Canadian border, the market for the principal input to softwood lumber – softwood timber – is not. In most of Canada,⁴ the provincial governments own the vast majority of softwood timber used for lumber production, which they provide to softwood lumber producers under systems designed to promote employment and economic development rather than to maximize revenues. These policies lead to systematic and widespread pricing of government timber that is well below market value, which the Department has determined to be the provision of countervailable subsidies on several occasions. Additional aspects of provincial policies in place over the years, including minimum production requirements, domestic processing requirements, and restrictions on the export of logs, also have stimulated uneconomic production and facilitated dumping, which the Department also has found to exist on multiple occasions. U.S. softwood lumber producers, who operate in a very different environment in which timber is sold through open and competitive procedures at market prices, repeatedly have been found to

⁴ The provincial timber management systems of the provinces of Atlantic Canada (New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador) are somewhat different and pose a different situation. As these provinces account for a relatively small share of Canadian softwood lumber production, these differences need not be addressed here.

have been materially injured and threatened with material injury by imports of subsidized and dumped Canadian lumber. As the fundamental cause of these injurious trade practices is long-term and structural, during much of the last 25 years trade in softwood lumber has been governed by special regimes negotiated by the governments of the United States and Canada. However, members of the Coalition have on several occasions been forced to invoke the AD/CVD laws against injurious subsidized and dumped imports from Canada, and their continued access to effective U.S. trade remedy laws is a major factor in the continued existence of the domestic softwood lumber industry and the workers, families, and communities who depend upon it for their livelihood.

In this context, the accuracy of the retrospective AD/CVD system plays an important role in providing effective relief from unfairly traded softwood lumber from Canada. Lumber prices are extremely volatile; they fluctuate sharply from day to day and even from hour to hour, depending on market conditions. At the moment, lumber prices are rising sharply; the Random Lengths Framing Lumber Composite Index has increased by more than 16 percent in the past six weeks.⁵ Declines in lumber prices can be equally dramatic. The market value of sawtimber is largely driven by the price of lumber, and the market value of Canadian sawtimber is largely driven by the price of lumber in the U.S. market, as in most years exports to the United States account for the majority of Canadian softwood lumber shipments.⁶ Thus, while the fact of

⁵ The Composite was \$303 on March 5, 2010 and reached \$353 on April 16, 2010. Since the beginning of this year, the Composite has increased by more than 42 percent, having been at \$248 on December 31, 2009.

⁶ In fact, most Canadian provincial timber pricing systems include U.S. lumber prices and the U.S.-Canadian dollar exchange rate as factors in setting administered prices for government timber, although these administered prices fall far short of market value for a large number of other reasons.

subsidization of Canadian lumber producers is always with us, the precise amount of such subsidization – the difference between the government-set price of timber and its actual market value – can fluctuate greatly. Likewise, the incentives that make dumping in the U.S. market attractive to Canadian lumber producers – whether caused by government timber pricing and timber management policies or otherwise – will vary with ever-changing market conditions.

In this context, the remedial purposes of the AD/CVD laws are best served by ensuring that the liability for AD/CVD duties attaches at the time of entry, and that the amount of AD/CVD duties is assessed based on the levels of subsidization and dumping occurring at that time, and not at some other time. Otherwise, the amount of AD/CVD duties assessed will be less or more than the actual amount of subsidization and dumping, either of which would frustrate the remedial intent of U.S. trade remedy laws, and would likely exacerbate the volatility of lumber prices. Even if the actual assessment of duties takes place at a later time, AD/CVD duties are less likely to distort and more likely to restore market forces in the presence of unfair, injurious trading practices when they reflect the actual level of unfair trade at the time of importation.

While the Coalition of course can best speak from its own experience on this point, other industries in which the level of subsidies or dumping found to exist are likely to vary considerably would also be adversely affected by a prospective AD/CVD system. A clear example is afforded by the application of Canada's prospective CVD system in a recent investigation of alleged subsidies to U.S. producers of grain corn.⁷ In that investigation, the

⁷ Unprocessed Grain Corn, Excluding Seed Corn (for Reproductive Purposes), Sweet Corn, and Popping Corn, Originating in or Exported from the United States of America, Mar. 30, 2006 (final CVD determination), *available at* <http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1347/ad1347f-eng.html> (“Canadian Grain Corn CVD Determination”). As a result of a no

Canadian authorities determined that the amount of subsidy per bushel of U.S. corn during the period of investigation was US\$0.45, but that the amount of duty that would apply after an injury determination would be US\$0.87.⁸ The difference between the amount of subsidy Canada found to exist and the amount of duty to be prospectively collected appears to derive from Canada's treatment of corn-related direct and countercyclical payments under the 2002 U.S. "Farm Bill." These payments were made to owners of land on which corn was planted in a fixed base period, largely without regard to actual production. In addition, the amount of the countercyclical payment varied with market prices for corn in the year after production.

In determining the amount of subsidy during the period of investigation, Canada accounted for the fact that some recipients of corn-based payments did not in fact produce corn during that period, and that the counter-cyclical payment rate was lower than the maximum possible rate.⁹ In determining the actual prospective CVD rate, however, Canada assumed that all recipients of corn-related direct and countercyclical payments in the future would be corn producers, and the future counter-cyclical payment rate was estimated based on future U.S. corn prices as projected by the U.S. Department of Agriculture at the time of the Canadian determination. Whether this methodology is consistent with the WTO Agreement on Subsidies and Countervailing Measures is certainly open to question, and U.S. producers theoretically could have sought refunds if a CVD had actually been imposed in that case and the amount of subsidy turned out to be less than that projected by the Canadian authorities. Nonetheless, in this

injury finding by the Canadian International Trade Tribunal, no CVD order was ultimately issued as a result of that investigation and all provisional duties were refunded.

⁸ Canadian Grain Corn Determination, Appendix IV (table at end).

⁹ Canadian Grain Corn Determination, Appendix IV, Section 1.

industry where –as with Canadian subsidies to softwood lumber – the amount of alleged subsidy varies with market conditions, it is far from clear that the Canadian prospective CVD system provides greater certainty or fairness for Canadian importers of products subject to prospective CVDs, and it is certain that its outcomes are less accurate than those achieved under the U.S. retrospective system.

II. IMPLEMENTING A PROSPECTIVE AD/CV DUTY SYSTEM WOULD POSE SIGNIFICANT CHALLENGES TO THE DEPARTMENT

Even if a prospective AD/CVD system were ultimately considered to be on balance preferable to maintaining the current retrospective system, implementing a prospective system in the United States would pose a number of difficult challenges in order to fully offset injurious subsidies and dumping. Some of these challenges would be particularly important with respect to any future AD/CVD order on softwood lumber from Canada, and thus are of particular concern to the Coalition. In the remainder of our comments, we will touch briefly on a few of these concerns.

First, a fundamental principle in implementing any prospective AD/CVD system must be that both domestic producers and importing interests should be treated on an equal footing. Article 9.3 of the WTO Antidumping Agreement¹⁰ provides that importers may seek refunds in either a prospective or a retrospective AD system in the event that the margin of dumping is less than the cash deposit paid (in a retrospective system) or the duty assessed on importation (in a prospective system), but to be evenhanded domestic producers would have to be equally able to

¹⁰ The full title of the Antidumping Agreement is the “Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.”

seek higher duties to offset greater dumping or subsidization on past entries as well as future entries.

This could be accomplished, for example, by permitting any interested party, not just an importer, from seeking a changed circumstances review that would modify the duties paid on prior entries. If so, however, it is unclear whether such a system would in practice be very different from the current retrospective system. This, of course, raises the question as to whether the change in system would be worth the effort. Alternatively, the Department could – like the Canadian authorities in Grain Corn – set a duty rate that is at the high end of a projected range of future dumping or subsidization levels, and rely on importers to seek refunds if, as would be expected more often than not, actual dumping or subsidization levels turned out to be lower. But even this would not be completely evenhanded, as injured domestic producers would not be able to obtain relief if dumping or subsidization rates turned out to be even higher, while importers would face no limits in their ability to seek refunds.

Thus, it appears that any prospective system would result in either unfairness to domestic producers (if not given the ability to increase duties on prior imports) or essentially the same system we have today, but with a different name (if domestic producers are given this ability). Depending on the outcome of this fundamental issue, therefore, a shift to a prospective system would result in either a disadvantage for domestic producers or a lot of effort in rewriting the laws to end up essentially right back where we are today. Neither alternative seems particularly appealing.

In addition, the implementation of any prospective AD/CVD system would have to address products with highly volatile prices, such as softwood lumber, in order to prevent the

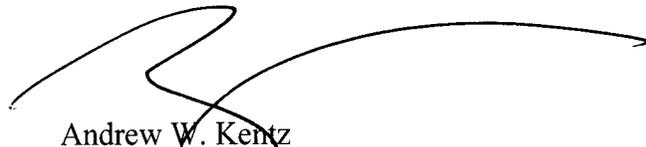
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assessed duty from getting too far out of line with current market conditions. It is difficult to see how the Department could implement changes quickly enough to prevent duties from becoming significantly out of line with market realities in a market that changes as quickly as the softwood lumber market does.

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Pursuant to the Department's request, an electronic file containing our comments has been submitted to webmaster-support@ita.doc.gov. In addition, for the Department's convenience, the original and one copy of these comments are being submitted in printed form at the captioned address.

Respectfully submitted,



Andrew W. Kentz

David A. Yocis

Kevin M. O'Connor

PICARD KENTZ & ROWE LLP

Counsel to the Coalition for Fair Lumber Imports