

COMMITTEE TO SUPPORT U.S. TRADE LAWS

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April 20, 2010

The Honorable Ronald K. Lorentzen
Deputy Assistant Secretary for Import Administration
United States Department of Commerce
14th Street and Constitution Avenue, NW, Room 3705
Washington, DC 20230

Attention: Kelly Parkhill, Supervisory Import Policy Analyst

Re: Report to Congress: Retrospective Versus Prospective Antidumping and
Countervailing Duty Systems; Request for Comment and Notice of a Public
Hearing; Comments of the Committee to Support U.S. Trade Laws

Dear Deputy Assistant Secretary Lorentzen:

The following is submitted on behalf of the Committee to Support U.S. Trade Laws (“CSUSTL”), in response to the notice published by the Department of Commerce on March 31, 2010, inviting comments and announcing Commerce’s intent to hold a hearing regarding the captioned matter. 75 Fed. Reg. 16079. In accordance with Commerce’s instructions, 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.

Submitter. The Committee to Support U.S. Trade Laws (“CSUSTL”) is composed of individuals, companies, trade associations, labor unions, and workers who are dedicated to preserving and enhancing U.S. trade laws. CSUSTL’s members are involved in many sectors of the economy, including manufacturing, technology, agriculture, and mining and energy. The mission of CSUSTL is to ensure that U.S. trade laws are not weakened through legislation or policy decisions in Washington, in international negotiations, or through dispute settlement processes at the WTO and elsewhere.

Conference Committee direction. The conference committee directed Commerce as follows:

The conferees direct the Secretary of Commerce to work with the Secretaries of the Departments of Homeland Security and the Treasury to conduct an analysis and report to the House and Senate Committees on Appropriations, within 180 days of enactment of this Act, on the relative advantages and disadvantages of prospective and retrospective anti-dumping and countervailing

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duty systems. The report should address the extent to which each type of system would likely achieve the goals of remedying injurious dumping or subsidized exports, minimize uncollected duties, reduce incentives and opportunities for importers to evade anti-dumping and countervailing duties, effectively target high-risk importers, address the impact of retrospective rate increases on U.S. importers and their employees, and create a minimal administrative burden.

111th Cong., 1st Sess., Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010, H. Rep. 111-366 at 609. CSUSTL provides comments on the various identified issues.

Remedying injurious dumping or subsidized exports. Under the U.S. system of retrospective assessment, importers, upon entry of merchandise subject to an antidumping or countervailing duty order, pay a deposit equal to the estimated amount of antidumping or countervailing duties. Then, generally on an annual basis and upon request of the domestic interested party, the producer or exporter, or the importer, Commerce conducts a review of subject imports that entered during the period of the review. In the case of an antidumping duty order, the review examines the actual U.S. prices and normal value of the subject imports that entered during the period examined, as well as the exporter's and the producer's costs for those products, under certain circumstances. Based on this review, Commerce then determines the total amount of antidumping duties necessary to offset the observed dumping margins, if any. Commerce similarly determines the value of the subsidies, and the total duties needed to offset them.

Once it has determined the total duties needed, Commerce forwards to Customs detailed assessment instructions, based on the total amount of duties needed to offset the unfair pricing or the subsidies. They contain instructions for the assessment of an *ad valorem* rate, or for the assessment of per unit amounts, or both. Where duties to be assessed exceed the amount of duties that were deposited, the importer, upon liquidation of the entries, is required to pay the additional duties (with interest) that were not covered by the deposits made. Conversely, where duties to be assessed are less than the amounts deposited, the importer is entitled to a refund of the excess (with interest). Upon completion of the review, Commerce also imposes new cash deposit rates applicable to imports postdating the review. These rates are based on the results of the review.

Thus, the U.S. retrospective assessment system affords interested parties, including importers, the opportunity to obtain determinations of duties that are based on the most recent information on U.S. and home market prices, and costs, collected from the exporters or importers subject to the antidumping duty order, or the most recent information on subsidies, in the case of a countervailing duty order. The U.S. system prioritizes the accurate measurement of dumping (or subsidies), and permits interested parties to obtain updated determinations.

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Because the duties finally assessed reflect actual economic behavior of subject exporters and importers (and governmental entities, in the case of subsidies) in the most recent period, the system minimizes the potential that dumping or subsidization that in fact occurs is not addressed by the imposition of an appropriate level of offsetting duties. Conversely, it also minimizes the potential that importers of products from exporters who have modified their pricing, or whose costs have changed, or who are no longer benefiting from subsidies, will be required to pay duties that exceed their actual levels of dumping or subsidization. Thus, the U.S. system inherently serves the goal of remedying injurious dumping and subsidized exports, identified in the report. The periodic nature of the retrospective review system (supported by verification efforts) also yields opportunities for the agency and interested parties to monitor compliance with the antidumping order, which serves the goal of “reduc{ing} incentives and opportunities for importers to evade anti-dumping and countervailing duties.”

No prospective system affords the same level of accuracy in addressing unfair trade practices or provides the same ongoing incentive for foreign producers to charge and/or importers to pay a fair price. Prospective systems are by their design not focused on an accurate offset of all unfair trade practices found. Some systems, like the EU’s, actually can reward behavior that is the opposite of a return to fair pricing. Others, working off of reference prices, are at most an estimate of fair price conditions – resulting in over or under collection of duties vs. the actual levels of dumping or subsidization.

Moreover, unlike the current U.S. retrospective system which requires both a refund for overpayments and the collection of underpayments, prospective systems have not permitted the correction of underpayments but do require the refund of overpayments.¹ While importers might like this type of system, it greatly diminishes the corrective effect of antidumping or countervailing duty orders. Prospective systems (even if they work as intended by the agreement) have operated one-way only, to reduce liability where dumping has been reduced. The correct collection of duties has not been permitted where dumping has increased. Because of this limitation, prospective systems do not fully achieve the conferees’ stated aims of “remedying injurious dumping or subsidized exports” and “reduc{ing} incentives and opportunities for importers to evade anti-dumping and countervailing duties.”²

¹ Article 9.3.2 of the antidumping agreement provides as follows with regard to prospective assessment and refunds: “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 margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.”

² The GAO recognized that “{u}nder a prospective system, the amount of duties assessed may not match the amount of actual dumping or subsidization.” GAO-08-391, Report to Congressional Requesters, *Antidumping and Countervailing Duties, Congress and Agencies*

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Minimize collection difficulties. We recognize that Customs has experienced substantial difficulties in the collection of duties in certain cases. These difficulties have been documented in recent reports of the Government Accountability Office.³ These collection difficulties, however, are strongly concentrated in the collection of duties on antidumping duty orders (not countervailing duty orders) that cover imports of agriculture and aquaculture goods from China.⁴ As such these difficulties, while real and disturbing, provide little general instruction regarding the benefits or disadvantages of the current system as a whole, the benefits of retrospective assessment vs. prospective assessment in particular, or the potential benefits and disadvantages of applying any system-wide changes. Moreover, the specific collection difficulties experienced with these orders, which included schemes aimed specifically at the evasion of antidumping duty assessments, would not have been avoided with a prospective assessment system, or have been addressed in other ways.

Finally, the “certainty” put forward by some as existing in a prospective system is no greater than that achieved by the collection of cash deposits in the retrospective system. The problem is not that cash deposits are not deposited but that foreign producers and importers in selected cases are dramatically increasing the dumping occurring and then disappearing, making the collection of *additional* duties the problem. A prospective system would “fix” this problem by opting not to address increases in dumping other than prospectively. That simply defines the problem away without actually addressing the problem faced by domestic producers.

Reducing incentives and opportunities for importers to evade anti-dumping and countervailing duties. A prospective system by the terms of the Antidumping Agreement provides foreign producers and their importers opportunities to evade antidumping duties (and by analogy, the same would be true in countervailing duty cases) that do not exist in a retrospective system.

As reviewed, prospective systems have not permitted the capture of any increase in dumping or subsidization on imports that have already come in. Prospective systems have only

Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection, March 2008, summary.

³ GAO-08-391. *See also*, GAO-07-50, Report to the Chairman, Committee on Ways and Means, House of Representatives, *INTERNATIONAL TRADE, Customs’ Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about Uneven Implementation and Effects Remain*, October 2006 and GAO-08-876R, *Agencies Believe Strengthening International Agreements to Improve Collection of Antidumping and Countervailing Duties Would Be Difficult and Ineffective*, July 24, 2008.

⁴ Nearly 100% of the uncollected duties are dumping duties. GAO-08-391 at 13. Further, the agriculture or aquaculture industries account for 87% of these. *Id.* at 14. Importers buying from China account for 90% of the uncollected duties. *Id.* In fact, “84 percent of the total amount of uncollected AD/CV duties is associated with four products, all from China: crawfish tail meat, garlic, honey, and mushrooms.” *Id.*

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permitted refunds of duties and modifications of duties going forward. Thus, adoption of a prospective system would simply encourage more foreign producers and their importers to increase the unfair trade practices engaged in because such activity is not addressable on entries made before a revision in duty rate is established. All of the problems that have been encountered with under-collections in a handful of cases where dumping has increased dramatically would not only continue but would be encouraged for other orders where evasion is currently much less of an issue and where the possibility that an increase in dumping or subsidization will result in increased liability is important in limiting the abuse in the market.

Prospective systems can be “jimmied” to achieve better results for domestic producers by not making refund proceedings readily available despite international agreement obligations. To date, the EU has rarely refunded antidumping duties collected on entries.⁵ The Commission published only 5 refund decisions from 1996 to 2003, of which 3 granted a partial refund.⁶ In effect, the duty rate as first determined becomes the established rate and is not subject to regular modification based on changed pricing patterns. Such systems are grossly inferior to the retrospective system currently used by the United States in achieving the statutory purpose of offsetting fully unfair trade practices that have been injurious to U.S. industry and its workers while not penalizing foreign producers and their importers when they have modified their behavior to reduce or eliminate dumping or subsidization.

Further, an analysis of effectiveness of the remedy vs. impact on importers should be seen in the context of the channels of trade through which the subject products are imported. Where the exporter sells the subject product directly to a U.S. customer, who then imports the subject product, the imposition of an antidumping duty has a direct effect on the pricing behavior of the exporter. The exporter may choose to increase prices (relative to normal value), and thereby avoid or decrease dumping margins and duties. Conversely, he may continue the same pricing behavior, and dumping margins and duties will remain. Finally, he may choose to decrease U.S. prices relative to normal value, thereby incurring a higher duty. While this obviously affects the importer’s ability to predict pricing, the result is in perfect keeping with the purpose of the law, and the goals identified in the report. As already reviewed, the same harmony is not present in a prospective system, and foreign producers and their importers can actually be encouraged to expand the unfair trade practice as any relief from such expanded unfair trade practice will not correct the actions that have already occurred and will affect only future imports.

⁵ See Stewart & Dwyer, Comparative Overview of Anti-Dumping Regulation in the European Communities and the United States of America, in 4 WTO – Trade Remedies: Max Planck Commentaries on World Trade Law 817-18 (Martinus Nijhoff Publishers 2008).

⁶ *Id.*, citing Evaluation of EC Trade Defence Instruments (Final Report December 2005), Annex 7 (at 16). From 2004 to 2007, the EC published 19 refund decisions, of which 7 granted a partial or full refund. EC Staff Working Documents Annexed to the Annual Reports on the Community’s Anti-Dumping, Anti-Subsidy, and Safeguard Activities (2004-2007).

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Impact of retrospective rate increases on U.S. importers. Retrospectively imposed increases in antidumping or countervailing duties, by definition, reflect determinations by the Department of Commerce that dumping or subsidies have increased. In such instances, additional duties are necessary to provide the full remedy required by the antidumping statute. A determination that balances the desire of importers not to pay such additional duties or the economic interests of the importers against the need for additional duties would be contrary to the intent of the law and ignores that the importers are beneficiaries of the unfair trade practices. The statute is intended to provide an effective remedy to the domestic industry that was found to have been injured by the subject imports. Any system which rewards unfair trade practices vs. providing an incentive to correct unfair trade practices cannot be reconciled with Congressional concerns or the purpose of the trade remedy laws.

Summary. The introduction of a prospective system in antidumping and countervailing duty assessments would come at the cost of fairness and accuracy, for both domestic interested parties and for importers, and would be contrary to important goals identified in the report, *i.e.*, remedying injurious dumping or subsidized exports and reducing incentives and opportunities for importers to evade anti-dumping and countervailing duties. Furthermore, the significant collection difficulties that have been identified by the GAO would not be modified by a move to a prospective system, but would simply be defined out of existence by the statute. Customs today generally correctly collects cash deposits owed at the time of entry. A move to a prospective system would simply say that the deposit is all the liability that exists. The fact that dumping or subsidization has increased would be ignored statutorily, by limiting liability to what is deposited/paid at the time of importation. The problems that exist presently in fully offsetting increased dumping from importers under certain orders would be dramatically expanded through a move to a prospective system, because a prospective system creates a free window of time when increased dumping or subsidization is not addressed. This is not a solution to the problem, just an ignoring of the problem.

Respectfully submitted,



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