

April 20, 2010

VIA E-MAIL

Ronald K. Lorentzen
Deputy Assistant Secretary for
Import Administration
Room 1870
U.S. Department of Commerce
14th Street and Constitution Ave., NW
Washington, DC 20230

**Re: Comments on Retrospective Versus Prospective
Antidumping and Countervailing Duty Systems**

Dear Mr. Lorentzen:

Our law firm, and its more than 15 international trade attorneys, serves as counsel to petitioning, exporting, importing, and consuming industries in antidumping and countervailing duty agency and judicial proceedings in the United States, and in other countries with prospective systems, as well as governments in related WTO and countervailing duty proceedings. We make this submission in response to the U.S. Department of Commerce's ("Department") request for comments to assist with the Department's report to Congress regarding the retrospective versus prospective antidumping and countervailing duty systems.¹ In the Notice, the Department is requesting comments on the extent to which each system would likely achieve six stated goals. These comments address each of the goals below.

1. Remedying Injurious Dumping or Subsidized Exports to the United States

Under the retrospective system, U.S. importers post estimated cash deposits equal to the antidumping and/or countervailing duties applicable to the merchandise being entered into the United States at the time of importation. The final duties are not owed until the Department has conducted and completed a putatively foreign producer/exporter-specific review of a prior period

¹ Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems; Request for Comment and Notice of a Public Hearing, 75 Fed. Reg. 16079 (Dep't of Commerce Mar. 31, 2010) ("Notice").

(usually 12 months). If no interested party requests a review, then the estimated cash deposit rate becomes the final duty rate. However, if an interested party requests an administrative review and the Department initiates a review on a specific foreign producer/exporter, then the amount of final duties owed may not be known for another 12-18 months while the Department conducts the administrative review (or longer if court appeals are conducted). The final duties owed may vary considerably, depending on the outcome of the administrative review and/or court appeals. Therefore, any final duties owed by a U.S. importer are unknown for what could be years while the process is carried out. This uncertainty severely restricts trade, even when the deposit rate is low, a trade-inhibiting impact far in excess of any legitimate "remedy."

In contrast, under the prospective system, there is no cash deposit system. Final duty rates are calculated based on data regarding historical levels of dumping and/or subsidies, and the final duty rate is applied at the time of entry. In some prospective system jurisdictions, interested parties can request a recalculation of the final duty rate on a forward-applicability basis if they can demonstrate that a change is required from the time when the original final duty rate was calculated. Examples of such changes are price increases in a comparison market, exchange rate fluctuations, and a change in market conditions that may impact the nature of sales made in a specific market. In others, retrospective refunds for excessive prospective duties paid also are possible, if sufficient information is provided in support of a refund review request.

In response to the goal of whether each system would likely remedy injurious dumping or subsidized exports to the United States, both systems serve as a remedy for dumping and/or subsidies. One purported advantage of the retrospective system is the accuracy of the margin calculated, but this benefit is mostly illusory. In reality, when conducting administrative reviews, the Department engages methodologies such as sampling (e.g., for respondent selection), application of an average rate of reviewed respondents to non-reviewed respondents (e.g., in instances where there are more respondents selected than reviewed), quarterly cost averaging, and zeroing - all instances where the results are not at all accurate as to the foreign producer/exporter and, by consequence, to the U.S. importer.

The prospective system serves the advantage of providing finality to all interested parties of the applicable duty rate, while minimizing the disruption of international trade. As opposed to the retrospective system, the finality of the prospective remedy provides certainty to the U.S. importers who are liable for the duties, and reduces the administrative burden on the agencies involved in administering the collection of duties (i.e., U.S. Customs and Border Protection ("Customs")) as the necessity of having to wait for a final outcome as to duty liability is eliminated. In addition, if there is any concern regarding the need for a reduced/increased remedy due to a change in conditions from the time of the original duty calculation, the prospective system provides a process for adjusting such duties if warranted.

2. Minimizing Uncollected Duties

As discussed above, under the retrospective system, years may pass before the amount of final duties owed by a U.S. importer is known. During that time, U.S. importers may have gone out of business, reorganized under a new name, or are just unable to pay, making collection of the final duties by Customs difficult at best. The General Accounting Office ("GAO"), in March 2008, issued a report stating that from 2001 to 2007 over \$613 million in antidumping and

countervailing duties went uncollected.² In addition, the report stated that Customs assess the prospects for collecting this amount as “slim,” primarily because many of the importers have disappeared, have no assets, or have declared bankruptcy.³ In fact, Customs has already written off approximately \$34 million in dumping/subsidy duties.⁴ The inability to collect these duties is primarily the result of the retrospective system.

This problem is eliminated in its entirety under the prospective system. There is no need to wait for the final duties. They are collected at the time of entry. Any adjustment to the rate as a result of a review is applied on future entries. Therefore, even if adjusted, the final duty amount will continue to be collected upon entry.

3. Reducing Incentives and Opportunities for Importers to Evade Antidumping and Countervailing Duties

According to the GAO report, U.S. importers purchasing from companies undergoing a special “new shipper” review accounted for about 40 percent of the uncollected duties.⁵ A new shipper review allows the U.S. importer, oftentimes related to a foreign producer/exporter, to merely post the cash deposit for the entry (often a low amount). Afterwards, when the duty increases because additional dumping and/or subsidy is found pursuant to an administrative review, the U.S. importer is no longer in existence to pay the final duty amount. This problem is primarily caused by the use of a retrospective system.

With a prospective system, the problem of the uncollected duties is eliminated. The final duties owed are paid upon entry and there is no need for Customs to try to track down the importer to collect an additional dumping/subsidy amount.

4. Effectively Targeting High-Risk Importers

High-risk importers essentially are an exclusive problem for (and caused by) the retrospective system. As discussed above, with a prospective system, final duties are paid upon entry. Therefore, the existence of having to identify, monitor, and track down high-risk importers (in terms of payment) is inapplicable. The final duties will have been paid.

5. Addressing the Impact of Retrospective Rate Increases on U.S. Importers and Their Employees

Under the retrospective system, there is a great burden on U.S. importers and their employees. First, as discussed above, there is the burden of carrying the uncertain liability indefinitely as the U.S. importer awaits the final determination (whether from the Department or the courts) to determine the amount owed. In some instances, this involves importers receiving a

² U.S. General Accounting Office, Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection, GAO-08-391 (Mar. 2008), at 3.

³ Id. at 4.

⁴ Id. at 18.

⁵ Id. at 3.

bill for an amount much larger than the cash deposit. When a refund is owed by Customs due to a lower final duty assessment, this impacts the importer as well as the cash is held by Customs upon a final determination and then there is a further delay at Customs as the refund is processed.

Second, there is a great burden on staff as records must continue to be kept (years after the date of entry) and accounts kept open until a final determination on the duties owed is made. This holds true even if the imported merchandise is fairly traded and court appeals ensue. There is also the overall burden that the retrospective system has on the U.S. importers as the final cost of purchasing the imported merchandise could change dramatically, depending on the final duties owed. For example, if the rate increases by 10 percent as a result of an administrative review, the price increases proportionally. If it cannot be passed on to the U.S. importer's customer, the cost is borne solely by the U.S. importer.

Finally, the burden of the retrospective system is inflicted upon the entire U.S. importing industry that is involved in importing merchandise subject to dumping/subsidy duties, when the overwhelming majority of U.S. importers are responsible actors in the process. According to the GAO report, of the \$613 million in uncollected duties, the concentration of amounts owed is only among a few industries:

- Of the nearly 27,000 importers subject to dumping/subsidy duties, less than two percent have unpaid bills;
- Four companies account for more than one-third of the total uncollected amount, and twenty companies account for sixty-three percent of the total;
- Four products are responsible for approximately eighty-four percent of the total amount uncollected; and
- Imported products from China account for ninety percent of the uncollected amount.⁶

Clearly, in each instance where the problems are concentrated, they have been facilitated by the retrospective system. Under the prospective system, the burden on U.S. importers is greatly reduced due to the certainty involved in the process. As the final duties owed are known upon entry, the dumping and/or subsidy liability is certain, there is less of an administrative burden on staff, and the final cost is known.

6. Creating Minimal Administrative Burden

The retrospective system leads to the necessity to identify, monitor, and track down high-risk importers owing uncollected duties in the hundreds of millions of dollars, and creates an enormous burden on U.S. importers as they await final duty liability. All of this creates a monitoring and enforcement burden on Customs, as it falls upon Customs to try to maintain the collection system currently in place.

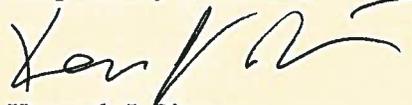
⁶ Id. at 3.

In contrast, the administrative burden upon U.S. importers and Customs is lessened considerably as the final duties are known upon entry and any change to the duty rate is only applied for future entries.

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On balance, a prospective system creates many advantages and addresses the problems currently present in the retrospective system. The advantages benefit both Customs and U.S. importers due to the certainty created by the final duties, as well as benefitting petitioning industries by enduring that these remedial duties actually are collected, while at the same time the artificial restraints on trade created by the retrospective system are avoided. We recommend that the Department report to Congress these advantages of the prospective system over the retrospective system.

Respectfully submitted,



Kenneth J. Pierce
Robert L. LaFrankie
Victor S. Mroczka
Andres A. Castrillon
Alicia R. Winston *

* Admitted in New York only.