Innophos

Innophos, Inc.
259 Prospect Plains Road
P.O. Box 8000 • Cranbury, NJ 08512-8000
Telephone: (609) 495-2495

April 20, 2010

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

Attention: Kelly Parkhill, Supervisory Import Policy Analyst

Re: *Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems: Comments of Innophos, Inc.*

Dear Deputy Assistant Secretary Lorentzen:

As explained in greater detail below, Innophos, Inc. is opposed to the adoption of a prospective system for the collection of antidumping and countervailing duties. Innophos is a domestic manufacturer of various phosphate chemicals. Innophos was a petitioner in the antidumping investigation concerning *Sodium Hexametaphosphate (SHMP) from China* and is actively participating in the administrative review with respect to that antidumping order. These comments are being filed electronically pursuant to the notice published by the Department of Commerce on March 31, 2010, 75 Fed. Reg. 16,079.

A. <u>The U.S. System Best Ensures Accurate and Fair Results</u>

The retrospective U.S. system produces the most fair and accurate determination of dumping or subsidization based upon the most currently available information. As do prospective regimes, the U.S. system provides refunds of any overpaid duties, in due course refunding duty deposits when dumping or subsidies cease. Unlike prospective regimes, however, the U.S. system also imposes additional duties when dumping margins or subsidies increase. In either case, importers pay duties that fairly reflect the actual margin of dumping or net subsidy. At the same time, domestic industry receives the relief intended by law: neither unjustified protection from fairly traded imports (in the case of duty rates that are higher than justified by actual prices or subsidies), nor inadequate protection (in the case of duty rates that are lower than indicated by actual prices or subsidies).

Fair, accurate antidumping and countervailing duty rates are fundamental to U.S. law. The Federal Circuit described the "overarching purpose of the antidumping statute" as being a "fair comparison."[1] In the words of the Court of International Trade, "it is axiomatic that fair and accurate determinations are fundamental to the proper administration of our dumping laws."[2] Accurate duties—imposed on imports based upon the actual price at which those same imports were sold in the U.S. market—are "fair" to importers and to domestic producers precisely because they are as accurate as possible.

The conference committee report accompanying the 2010 Consolidated Appropriations Act instructs Commerce to analyze and report concerning "the relative advantages and disadvantages of prospective and retrospective anti-dumping and countervailing duty systems."[3] In particular, the conference committee directed Commerce to consider the relative advantages of each system with respect to the following factors: (1) providing a remedy for injurious dumping or subsidies; (2) minimizing uncollected duties; (3) reducing incentives to evade antidumping and countervailing duties; (4) effectively addressing actions of "high risk" importers; (5) addressing the impact of retrospective rate increases on importers; and, (6) minimizing administrative burdens.[4] The report did not, however, require that all of these factors be weighted equally.

As noted above, a fair and accurate system is fundamental to U.S. law and a long line of judicial opinion. The retrospective U.S. system was designed to require that duties be deposited on entry, with an administrative review to adjust the duty rate up or down, because Congress was concerned about "the damage which delayed assessment

---

[1] *Micron Tech., Inc. v. United States,* 243 F.3d 1301, 1313 (Fed. Cir. 2001). *See also, e.g., Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994) (the purpose of the antidumping law "is to calculate antidumping duties on a fair and equitable basis"); *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990) ("the basic purpose of the statute: determining current margins as accurately as possible"); *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 102 F. Supp. 2d 486, 495 (Ct. Int'l Trade 2000) ("any given methodology must always seek to effectuate the statutory purpose—calculating accurate dumping margins").

[2] *Koyo Seiko Co. v. United States,* 14 CIT 680, 682, 746 F. Supp. 108, 1110 (1990) (discussing the fundamental goal of U.S. law in the context of correcting clerical errors to achieve an accurate result). *See also, e.g., EHWA Diamond Industrial Co., Ltd. v. United States,* Slip Op. 2010-24 at 9 (Ct. Int'l Tr., March 11, 2010)

[3] 111th Cong., 1st Sess., Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010, H. Rep. 111-366 at 609.

[4] *Id.*

may cause a domestic industry."[5] The adoption of a retrospective system distinguishes antidumping and countervailing duties from other forms of relief, such as Section 201, because "Congress has long been concerned that the administration of the unfair trade practice laws has not effectuated its intention to prevent such unfair trade practices from placing domestic producers in jeopardy."[6]

In other words, "providing a remedy for injurious dumping or subsidies" – the first factor identified by the Conference Committee – is a fundamental concern. Because it is most accurate and fair to importers and domestic industries, the current, retrospective system is best able to remedy injurious dumping or subsidies.

B. The U.S. System Creates Positive Incentives to Comply with the Law and Disincentives to Evade the Law

Not only does a retrospective system ensure that the fair (*i.e.,* most accurate) duty is imposed based upon the actual sales prices of the imported merchandise, but the prospect of an accurate result creates incentives for foreign producers and importers to avoid injurious dumping or reject subsidies that distort trade. The ability to obtain refunds of duty deposits when dumping or subsidies are eliminated or reduced creates a positive incentive to comply with the law, rather than attempt to evade duties or take advantage of time lags inherent in prospective systems.

At the same time, the prospect of additional duties, imposed retroactively, deters foreign producers and U.S. importers from increasing the extent of dumping or the amount of subsidies. As such, the current system is better able than a prospective system to keep domestic industries out of "jeopardy."[7]

For example, one concern identified by the Conference Report is so-called "high risk" importers. High risk refers to importers that will sell dumped and subsidized imports for which the duty deposit rate is relatively low compared to the actual amount of dumping or subsidies. These importers will put up bonds or low deposits so that the merchandise is released from Customs custody into the U.S. market. However, if an administrative review results in calculating a high duty rate, high-risk importers may exit the market, declare bankruptcy or otherwise disappear without paying the additional duties.[8]

---

[5] S. Rep. No. 96-249, at 76 (1979).

[6] H.R. Rep. No. 96-317, at 45 (1979).

[7] *Id.*

[8] The GAO report identified this potential "risk" and associated it with the retrospective nature of the U.S. system. GAO-08-391, *supra*, at 20.

A prospective system simply allows high-risk importers to evade duties. Because duty rates cannot be amended retrospectively, in a prospective system, high-risk importers have every incentive to increase their imports whenever the duty rates are low. By comparison, a retrospective system will at least deter high-risk importers. Although a retrospective system may cause these companies to exit the market, that is a far better outcome than allowing unfair trade to continue; even if Customs does not collect the full amount of duty, at least the high-risk importer has been stopped.

C. Prospective Systems are Unfair to Domestic Interests

Unlike the U.S. retrospective system, prospective systems favor importers at the expense of domestic industries that have suffered injury by reason of dumped or subsidized imports. Pursuant to the WTO Antidumping Agreement, any antidumping or countervailing duty regime must refund overpaid duties.[9] Yet, by definition, under a prospective system, there is no mechanism to collect underpaid duties if dumping or subsidies increase. Under a prospective system, an importer that engages in unfair trade is not presented with a bill for increased duties based upon its prior act. A prospective system simply resets the duty rate on future imports. Such a system is therefore biased in favor of foreign producers and importers that engage in unfair trade. In other words, a prospective system does not cure the problem of undercollection of duties; a prospective system condones the problem.

It is true that a prospective system provides an incentive to importers and foreign producers stop unfair trade practices. If dumping and subsidies are reduced, duties must be refunded under a prospective system. But, a prospective system is all "carrot" and no "stick." That is, a prospective system does not create any disincentive to increasing the amount of subsidies or dumping (at least in the near term). In fact, under a prospective system, importers pay the same amount of antidumping or countervailing duties even if their foreign suppliers reduce their prices more than enough to offset the duties.

---

[9] 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."

Under a prospective system, until Commerce could complete an administrative review,[10] foreign producers would have an incentive to increase the volume of dumped or subsidized imports and the amount of dumping or subsidies. Even assuming the antidumping or countervailing duty rates were later adjusted upward to account for increased dumping or subsidies, the imported products would already be in inventory in the U.S. market, where they would continue to cause material injury to the U.S. industry.[11] As such, a prospective system would not "reduce incentives and opportunities for importers to evade anti-dumping and countervailing duties."[12]

D. Sacrificing Fairness Will Not Necessarily Reduce Administrative Costs or Improve the Collection of Duties

The Conference Report indicates that Commerce should consider the administrative burdens of retrospective versus prospective systems. On the one hand, a prospective system could reduce the burden on Customs and Border Protection to, first, collect duty deposits, and, second, collect or refund duties at some future point in time. However, CBP is not the only agency with an administrative burden. Since, as noted above, any prospective system must provide a mechanism for refunding overpaid antidumping or countervailing duties within 12 to 18 months,[13] Commerce (or some agency) will be required to conduct administrative reviews. A prospective system therefore offers no advantage in terms of administrative costs borne by Commerce.

Moreover, because a prospective system invites abuse by foreign producers that increase dumping (or subsidies) to evade the law, a prospective system could result in an increase in the number of administrative reviews requested by domestic producers. If, as noted above, high-risk importers are not deterred by a prospective system, the number of administrative reviews requested by domestic industries could increase. In short, any reduction in Customs' burden may be offset by an increase in the burden on Commerce.

---

[10] Under U.S. law, administrative reviews currently require one year to 18 months to complete. 19 U.S.C. § 1675(a)(3)(A).

[11] This concern is analogous to the concern addressed by the statutory provision addressing "critical circumstances," 19 U.S.C. §§ 1671b(e) and 1673b(e), but under a prospective system Commerce would lack the ability to remedy such abuse.

[12] H. Rep. 111-366, at 609. 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 Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, March 2008, summary.

[13] WTO Antidumping Agreement, Art. 9.3.2, quoted above.

With respect to the under-collection of antidumping and countervailing duties, this problem also will exist in either system. Clerical errors in liquidation instructions, human error applying those instructions, calculation errors, and errors by importers concerning whether particular imports are subject to duties will occur whether or not the system is prospective or retrospective. In fact, because a retrospective system requires that entries be examined twice (when the deposit is made and, later, when the final duty is calculated), some errors that are currently corrected prior to liquidation would likely go unnoticed in a prospective system.

As discussed above, the GAO report identified four factors that contributed to undercollection of antidumping and countervailing duties.[14] However, the crux of the matter in each case is the "lag time" between entry of the merchandise and collection of duties and whether the importers are "illegitimate."[15] With respect to lag times in collection, though, domestic industries would prefer that importers "disappear, cease business operations, or declare bankruptcy,"[16] if the alternative is that the system will simply tolerate increased dumping and subsidies without any change in the duty rate. Regarding "illegitimate" importers, attempts to defraud the system or other evade duties will occur under any system, whether it is retrospective or prospective.

In fact, the only arguable advantage of a prospective system is that importers would not be subject to retrospective rate increases. First, there is little evidence that this issue is significant. The GAO found that "[f]inal AD duty rates are lower ro the same as the estimated duty rates the vast majority of the time."[17] Second, and more importantly, failure to offset fully the amount of dumping or subsidies is unfair to domestic industries found to be injured by unfairly traded imports. Any advantage to importers in terms of the certainty of duty rates would be obtained at the expense of diminishing the relief that is afforded to the domestic industry. Such rebalancing of the statute is manifestly contrary to Congress' intent to provide expeditious relief to U.S. companies injured by unfair trade.

E. Conclusion

The benefits of a retroactive system, in terms of accuracy and fairness, outweigh any efficiency loss or administrative cost. A prospective system that fails to collect the full amount of duty simply tolerates unfair trade. Given that the predicate for imposing antidumping or countervailing duties is a finding of material injury or threat of injury,

---

[14] GAO-08-391, *supra*, at 20.

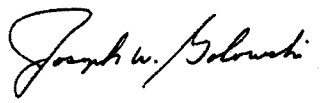
[15] *Id.* at 23.

[16] *Id.*

[17] GAO-08-391, *supra*, at 21.

this "advantage" from the perspective of importers is obviously unfair to those domestic industries already injured by dumped or subsidized imports. For these reasons, Commerce should not abandon the current retrospective system.

Respectfully submitted,



Joseph W. Golowski
Vice President
Specialty Phosphates Business