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April 20, 2010

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

Attn: Kelly Parkhill, Supervisor Import Policy Analyst

**Re: Report to Congress: Retrospective vs. Prospective Antidumping and
Countervailing Duty Systems; Request for Comment; and Notice of a
Public Hearing**

Dear Deputy Assistant Secretary Lorentzen:

The following comments are submitted on behalf of Schagrin Associates, a Washington law firm that has been active in filing antidumping and countervailing duty cases on behalf of domestic petitioners, both producers and labor unions, for the past twenty-six years. These cases have been filed across a broad range of products including but not limited to: steel pipe and tube products; flat rolled steel products; iron foundry products; abrasives; foundry coke; and finished consumer products. These comments are filed in response to the notice published by the Department of Commerce on March 31, 2010 inviting comments and announcing the Department's intent to hold a public hearing regarding the captioned matter (75 FR 16079). In accordance with the Department's instructions, an electronic file containing these comments has also been submitted electronically 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 to the Department.

I. The United States Retrospective System is an Effective System for Remediating Unfair Trade Practices

Under the United States retrospective system, importers post a cash deposit of an ad valorem amount of antidumping or countervailing duties as determined in either the investigation or a later administrative review stage by the Department of Commerce. Foreign producers, importers, or members of the domestic industry can request administrative reviews which will determine the actual amount of dumping liabilities on an entry basis or adjusted level of countervailing duties based on changes in the subsidies for the period in which the goods were entered. Future cash deposits are then adjusted. If no reviews are requested by any interested party, then liquidation is made on the suspended entries at the amount of the cash deposit.

With a system that is designed to give the most exact relief from the unfair trade practice to the injured domestic industry and its workers, while not imposing any duty liabilities on importers that exceed the actual amount of subsidy or dumping that has occurred, one must ask why there is a need for the Department of Commerce and the Congress to consider changing from the U.S. system to a prospective system. Unfortunately, the reasons behind such considerations all point to a concerted effort by the World Trade Organization to force upon the United States, by far the world's largest importer and the country with the world's largest trade deficit, a less effective system that will benefit WTO members that trade unfairly and penalize the United States. First, the WTO Dispute Settlement panel system has completely abrogated the standards of review that member countries agreed to in the Uruguay Round for a review of implementation of Article VI. While the Final Uruguay Round Dumping Code agreement withdrew language that existed in earlier drafts that would have prohibited the zeroing of negative duty amounts by the United States in antidumping investigations, the WTO Appellate Panels found that the use of zeroing by the United States contravened U.S. obligations and the Department of Commerce has now abandoned zeroing in investigations. WTO panels have now made similar determinations as to the use of zeroing in administrative reviews and the Department of Commerce will have to determine how to come into compliance with these outrageous WTO decisions. While changing to a prospective

system, which entails normal values and reference prices for foreign producers, might eliminate certain problems with the loss of zeroing, the United States should not be forced to change its antidumping regime solely in order to satisfy a WTO system that is out of control in its desire to ensure that the United States remain permanently the world's trade deficit country. It would be much better for the United States to change its positions in Geneva and to clearly let the WTO know that the United States will cease to continue tolerating the unfair use of the dispute settlement system in the dumping area to change previously negotiated agreements to the detriment of the United States.

Second, the massive avoidance of dumping liabilities by unscrupulous importers in several cases involving agricultural and aquaculture products, such as honey, garlic, crawfish, catfish, and shrimp, should not be a reason to throw the baby out with the bath water and completely change the U.S. antidumping system. Once again, the Department of Commerce and the Customs and Border Protection Service attempted to change the rules in a way to better ensure collection of duties in the area of agriculture and aquaculture. Unfortunately, the WTO overreached again through dispute settlement and Appellate Panel rulings to decimate these efforts. However, it does not make policy sense for the U.S. to completely change its antidumping methodology from a retrospective to a prospective system simply to eradicate the fraud being perpetrated by some unscrupulous importers on the U.S. Treasury. Instead, other mechanisms such as requiring greater assets to be held in the United States by importers of record, changing the U.S. system of allowing foreign producers to be importers of record by granting power of attorney to customs brokers; better bonding requirements that can survive WTO scrutiny; and new procedures by Commerce as to New Shipper reviews can lessen this under-collection problem.

II. The Prospective System will leave U.S. Producers and Workers Particularly Exposed to Injurious Dumping during Periods of High Volatility in Raw Material Prices.

Under the prospective system utilized by many foreign countries, a normal value or reference price is established by product type and by foreign producer. No duties are

collected from importers when import price is higher than the established normal value. The administrative review process under the prospective system does not adjust duty collection, but only establishes new normal values for future imports.

In the world market, the volatility over the past several years for the raw materials used by our client base for their manufactured products has been extreme when compared to the previous twenty or thirty years. For example, in years like 2008 and the first half of 2010, prices for raw materials such as steel scrap, iron ore, nickel, zinc, molybdenum, coking coal, and hot rolled steel have sometimes doubled, tripled, quadrupled, or even quintupled over a several month period. Hypothetically, if a foreign producer of steel pipe obtained a normal value of \$500 per ton for pipe exports to the United States under an antidumping duty order at a time when international hot rolled steel prices were \$300 per ton, and maintained that normal value for a year until an administrative review to change a normal value even though hot rolled sheet prices rose to \$800 per ton, then that foreign producer would have the opportunity to significantly undersell the U.S. industry without passing along its own cost increases to the severe detriment of the U.S. industry. The same hypothetical can apply to stainless products when nickel, a key ingredient in stainless steel, changes from \$10,000 to \$30,000 per ton over a short period of time. There are too many examples of these situations from the real world to elucidate here.

The Department of Commerce has recognized the changes entailed in the current retrospective system by the rapid changes in raw material cost by adopting a system of quarterly price and cost comparisons when raw material cost changes create changes of more than 25% between quarters in cost of production. Given the inability under a prospective system under WTO rules to collect additional dumping duties, the volatility of raw material prices would greatly undermine relief for basic manufacturing industries under a prospective system. The fact that other countries that operate under prospective systems may or may not be experiencing these problems may be more a function of the lack of transparency of their systems compared to the U.S. system rather than a direct ability to address these problems under their prospective systems.

III. Antidumping Duties Cannot Readily be Determined under a Prospective System when the First Sale to an Unaffiliated U.S. Purchaser Happens after Importation

In order to accurately determine antidumping duties the market prices upon which the normal values and EP or CEP are derived must be based on an objective and reasonable measure of the value of the subject merchandise. This is ordinarily provided by an arms-length price between unaffiliated sellers and purchasers. But subject merchandise may be imported into the United States without having been sold to an unaffiliated purchaser in the United States, as occurs when the U.S. importer is an affiliate of the foreign producer.

Under U.S. law the export price (EP) ordinarily involves a sale prior to importation between a foreign producer or exporters and an unaffiliated U.S. purchaser who imports the subject merchandise. In contrast, the constructed export price (CEP) ordinarily involves a sale between a foreign producer or exporter and an affiliated U.S. purchaser that imports the subject merchandise. Then some time after importation the affiliate of the foreign producer sells the imported merchandise to the first unaffiliated U.S. purchaser.¹ CEP sales, which do not arise until a sale is made to an unaffiliated U.S. purchaser, may not occur for months or even years after importation. Often the affiliated U.S. importer places merchandise into its inventory with physically identical merchandise already in inventory, and as a result it is not possible to identify the entry date of the merchandise released from inventory at the time of the sale to the first unaffiliated purchaser in the United States. The occurrence of the sale to the first unaffiliated U.S. purchaser months or years after importation, and the commingling of subject merchandise in inventory before sale to the first unaffiliated purchaser, make it especially difficult to identify a reasonably accurate value for CEP sales at the time of entry into the United States.

¹ This is explicit in the language of the U.S. statute where the “export price” involves “subject merchandise first sold (or agreed to be sold) before the date of importation by the producer or exporter outside the United States to an unaffiliated purchaser in the United States” and the “constructed export price” involves subject merchandise “first sold (or agreed to be sold) in the United States before or after importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter to a purchaser not affiliated with the producer or exporter.” See U.S.C. § 1677a(a)&(b)(emphasis added).

The transfer price between the foreign producer or exporter and an affiliated U.S. purchaser does not provide a reasonable or objective measure of the market value of the subject merchandise because factors other than the value of the subject merchandise are involved if the foreign producer or exporter and the U.S. purchaser are affiliated. One such factor is the affiliated importer's antidumping liability. If the transfer price were used to establish the CEP there would be an obvious incentive for the foreign producer or exporter and its affiliated U.S. purchaser and importer to set the transfer price above the normal value to avoid antidumping duty liability. Other countries may address this problem in part by the use of duty as a cost methodology, but this adjustment specifically authorized by the WTO Dumping Code has never been adopted by the U.S.

The unreliability inherent in determining the value of imported merchandise at the time of entry for prospective antidumping assessment when there is no sale to an unaffiliated party at the time of entry is overcome by the retrospective method used by the Department. Under the Department's retrospective method the assessment does not occur at the time of importation. The CEP is, therefore, not based on the price of merchandise at the time of importation when there is no sale to an unaffiliated party in the United States, but instead the CEP is based upon the price of the sale to the first unaffiliated purchaser in the United States which occurs after importation.

IV. Conclusion

For the above-stated reasons, we urge the Department to report to the Congress that the United States should maintain its retrospective system for the collection of antidumping and countervailing duties, but that steps to improve enforcement, particularly collection activities at the United States' Customs and Border Protection services should be implemented.

Respectfully submitted,



Roger B. Schagrin
SCHAGRIN ASSOCIATES