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VIA E-MAIL

Honorable Ronald K. Lorentzen
Deputy Assistant Secretary for Import Administration
Room 1870
Department of Commerce
14th Street and Constitution Ave., NW,
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Attention: Mr. 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
Steel Manufacturers Association**

Dear Mr. Lorentzen:

On behalf of the Steel Manufacturers Association, the following comments are submitted in response to the March 31, 2010, notice published by the United States Department of Commerce ("Commerce"), inviting comments and announcing Commerce's intent to hold a hearing regarding retrospective versus prospective antidumping and countervailing duty systems. *See* 75 Fed. Reg. 16, 079 (Mar. 31, 2010).

I. INTRODUCTION

The United States has always utilized a retrospective system for the purposes of calculating and assessing antidumping and countervailing duties ("AD/CVD"). Indeed, utilizing the retrospective system ensures that the United States fulfills its legal obligation to calculate and apply antidumping and subsidy margins "as accurately as possible."¹ Under the U.S. system, AD/CVD margins are applied to entries based on the actual levels of dumping or subsidization that occur during the period in which those entries arrive into the U.S. market. All parties, including importers, have the opportunity to obtain determinations, refunds and collections of duties based on the actual levels of dumping or subsidization that occurred during the period covered by a review. Accuracy is equity. This is a point

¹ *See Rhone Poulenc, Inc. v United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990).

Mr. Ronald K. Lorentzen
April 20, 2010
Page 2

shared by practitioners and scholars of the law.² As is made clear in these comments, a prospective system not only sacrifices accuracy, but also equity and fairness, and at great cost. As such, the current U.S. retrospective system serves the purpose of the law in a superior manner.

Prospective AD/CVD systems are neither equitable nor balanced, nor do they fulfill the requirements of U.S. law. Such systems are one-sided and put the interests of foreign producers, foreign exporters and importers ahead of the interests of domestic producers and workers for whom AD/CVD laws are meant to provide a level playing field. They are easily manipulated, particularly by “non-market economy” countries such as China through “new shipper” reviews, and often do not remedy the injurious dumping or subsidization that can occur prior to and after an order is entered. Prospective systems impose, inappropriately, duties on dumped or subsidized goods based on margins calculated from data collected from previous periods and do not necessarily reflect the degree of dumping or subsidization relating to current imports. Given these substantial flaws, and numerous others, it is clear that prospective systems are inadequate and operate to the great disadvantage of the injured domestic producers, manufacturers and workers.

The following discussion provides an analysis of both prospective and retrospective systems and demonstrates that the U.S. retrospective system better achieves the goals of:

- A. Remediating injurious dumping or subsidized imports into the United States;
- B. Minimizing uncollected duties;
- C. Reducing incentives and opportunities for importers to evade antidumping and countervailing duties;
- D. Effectively targeting high-risk importers;
- E. Addressing the impact of retrospective rate increases on U.S. importers and their employees; and
- F. Not imposing any greater administrative burden than prospective systems.

² See Ivo van Bael, *EEC Anti-Dumping Enforcement: An Overview of Current Problems*, 1 EJIL 118 (1990).

II. DISCUSSION

A. **A Retrospective AD/CVD System is More Accurate and Better Equipped to Remedy Injurious Dumping or Subsidized Imports into the United States**

A retrospective systems is more accurate and fair

The U.S. retrospective system ensures accurate and equitable measurement of dumping or subsidization. Retrospective systems allow authorities to closely calibrate antidumping and subsidy margins, as applied to entries, to the actual levels of dumping or subsidization observed on these same entries during the period covered by an investigation and any future or periodic reviews. The retrospective assessment system is designed to ensure that an individual importer's liability reflects the actual level of dumping associated with its actual transactions.

Therefore, the U.S. retrospective assessment system affords interested parties, including importers, the opportunity to obtain determinations of duties that are based on information on U.S. and home market prices, and the producer's costs at the time of importation. The U.S. retrospective system prioritizes the accurate measurement of dumping (or subsidies), and permits interested parties to obtain updated determinations of margins. It is a two-sided system that remedies injury to a U.S. industry caused by dumping and improper subsidization, while also allowing importers to obtain refunds when they trade at fair market value.

Prospective systems are inherently inaccurate and disadvantage those for whom the AD/CVD laws are meant to assist

As noted above, prospective systems apply AD/CVD margins to entries based on calculations that predate entries. Therefore, the legal requirement to calculate and apply antidumping and subsidy margins "as accurately as possible" would not be met if such a system were to be adopted by the United States. Accurate duties are not applied to the entries for which margins were calculated. As a consequence, only future imports could be effected by an increase in the margin of past dumping, and only if a review of an order is requested and performed. In contrast, in a retrospective system, the actual duties needed to offset the dumping will always be collected. As such, exporters are discouraged from flooding a market at unfairly traded prices, rather than given the open opportunity to do so.

Further, unlike the U.S. retrospective system, after a review is completed, prospective systems only provide for the refund of overpayments on dumping or

Mr. Ronald K. Lorentzen

April 20, 2010

Page 4

subsidy duties. In fact, Article 9.3.2 of the WTO Antidumping Agreement provides only for prompt refunds of any duty paid in excess of the margin of dumping when the duty is assessed on a prospective basis.³ The consequences of this provision are significant. Exporters can double or even triple their dumping or subsidy margins over the course of a review period without fear of liability for additional duties, because additional duties will never be retroactively assessed in a prospective system. The volume of dumped imports can greatly affect the economic viability of a domestic producer. Commerce has seen a number of cases where an exporter may have a low margin from a prior period, but does not ship to the United States because new sales would be dumped at higher margins. A retrospective system encourages fair trade.

Retrospective systems are better equipped to remedy injurious dumping or subsidized imports into the United States because they ensure market-based results

The U.S. retrospective assessment system is designed to ensure that an individual importer's liability reflects the actual level of dumping or improper subsidization associated with its transactions through the course of an investigation and in any period reviewed. Duties finally assessed reflect the actual pricing behavior of subject exporters and importers, or the level of improper subsidies that flow through to the producer or exporter. The underlying goal of the retrospective assessment system is not the collection of large amounts of antidumping or countervailing duties from importers, but rather to encourage exporters and importers to fairly price their products, and to encourage foreign governments to eliminate subsidies. In fact, analysis of outstanding orders indicates that dumping and subsidy rates often decrease over time, suggesting that the importers and exporters have responded to the remedy findings.⁴ The system thus encourages exporters and importers to adjust prices on their own, either through:

³ Article 9.3.2 of the antidumping agreement provides with respect 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."

⁴ According to the GAO (GAO-08-391 at 21), "In analyzing more than 6 years of CBP data covering over 900,000 entries subject to AD duties, we found that duty rates went up 16 percent of the time, went down 24 percent of the time and remained the same 60 percent of the time."

Mr. Ronald K. Lorentzen

April 20, 2010

Page 5

- The exporter reducing prices in their home market to bring down the “normal value,”
- The importer and exporter agreeing to a higher “export price,” or
- The importer raising its export market sales price in order to eliminate dumping margins and avoid paying antidumping duties.

These actions are entirely consistent with the objectives of the trade remedy laws and contribute to fair competition in the U.S. markets.

Prospective systems distort markets

Prospective systems are market distorting in first instance because they do not base duty rates on actual market behavior at the time of entry, but rather apply duty margins to current and future entries based on past market practices. Markets and product cost and prices can change dramatically over time, and applying outdated margins to new entries is inherently distortive.

Prospective systems such as those that levy duties based on “*ad valorem*” or percentage rates can also lead to pricing practices that are inconsistent with market considerations. For example, if *ad valorem* duties of 10 percent are applied to all entries regardless of their price, an entry valued at \$20 would pay \$2, whereas an entry that is dumped at half that price of \$10 would only pay \$1. Because the system is prospective, the importer of the \$10 entry will never pay any additional duty and will gain an unfair advantage over the exporter that priced at \$20. However, if there is a review, the margin will be prospectively applied.

Prospective “*ad valorem*” systems would also provide greater incentives for the distortive practice of invoice manipulation, especially where there is an affiliated party importer relationship. In such a system, exporters would have an incentive to lower the invoiced price to their affiliated party to evade duties that could not be assessed in the proactive assessment system.

Prospective systems are ineffective where costs and prices change rapidly

For many products such as steel, chemicals and paper, prices for inputs and raw materials can change dramatically through the course of just one year, and certainly over many years. However, because duty rates for prospective systems apply past margins to future shipments – for many years in some cases – such systems can be wildly inaccurate. As a result, exporters can flood a market with

Mr. Ronald K. Lorentzen
April 20, 2010
Page 6

dumped or subsidized goods under a “normal value” prospective system without incurring penalty. This can occur when input costs rise significantly and push export prices far above older “normal value” calculations. Although the exported products come in with prices higher than the “normal value,” they are still dumped products relative to what the current “normal value” actually should be.

B. Prospective Systems Increase the Amount of Uncollected Duties

Prospective systems result in additional uncollected duties

After a review, a prospective system only changes the duty rate for future entries. Increased dumping that occurred during the previous period – which would result in the collection of additional duties under the U.S. retrospective system – would never be addressed. This universe of duties amounts, in effect, to uncollected duties. Thus, prospective systems make the “uncollected” duty problem worse by ensuring non-collection and simply defining it away.

The vast majority of uncollected duties in the U.S. system are associated with a few industries in a few countries, and methods to remedy inefficiencies in the U.S. systems are apparent

While the U.S. Customs and Border Control (“CBP”) has experienced some difficulties in the collection of duties for certain entries, such collection difficulties are highly concentrated in certain imports from certain countries.⁵ As a result, specific methods can readily be implemented to correct for such difficulties.

Methods, as discussed in GAO-08-391, that can be implemented to further minimize uncollected duties, include: 1) focusing CBP collection and monitoring efforts on troubled countries and products; 2) higher thresholds for the initiation of “new shipper” reviews (*e.g.*, require a minimum amount of exports and cash only payments); 3) improvements to CBP bonding requirements, and 4) stronger due diligence on importers (*e.g.*, collection of additional information and credit or background checks). These corrective actions are a better solution to the problems of uncollected duties than the adoption of a prospective system. Finally, we believe

⁵ Nearly 100 percent of the uncollected duties are AD duties, and importers buying from China account for 90 percent of these duties. Further, 84 percent of the total value of uncollected AD/CV duties is associated with four agricultural or aquacultural products, all from China: crawfish tail meat, garlic, honey, and mushrooms.

Mr. Ronald K. Lorentzen
April 20, 2010
Page 7

there is just as much fraud and duty evasion occurring as a result of the prospective systems utilized by the EU and Canada.

C. Retrospective Systems Are More Effective at Reducing Incentives and Opportunities for Importers to Evade Antidumping and Countervailing Duties

Prospective systems create opportunities for duty evasion

Under a prospective system, importers and exporters – from China and other non-market economy countries in particular – have a greater ability to evade an AD/CVD order. Utilizing methods, such as “new shipper” reviews, foreign producers and exporters would have the ability to flood the U.S. market during the pendency of their review, and not be penalized. Following the imposition of a dumping or subsidy margin upon completion of the review, they could then shift their shipments to a different exporter and avoid any future penalty or discipline on their volumes. Because duties are collected prospectively and do not reflect the actual margin of dumping under a prospective system, such goods could possibly never be assessed a duty that reflects the real margin of dumping.

D. Prospective Systems Do Not Effectively Target High-Risk Importers

High-risk importers can game prospective systems to their advantage

As noted above, because prospective systems contain no mechanism for the collection of underpaid duties, high-risk importers can game the system by manipulating their practices year to year to evade duty payments.

Retrospective systems increase the likelihood that high-risk importers are identified

By providing for the ability to apply duties retrospectively, the U.S. retrospective system increase the likelihood that high-risk importers can be sanctioned for their behavior. As the GAO study (GAO-08-391), indicated, CBP can implement improvements to their process to further strengthen importer identification and payment requirements.

E. Adequately Addressing the Impact of Retrospective Rate Increases on U.S. Importers

Importers should appropriately address risk

To the extent that importers complain about a retrospective system, they are complaining about their own failure to manage risk appropriately. Implementing a prospective system puts the interests of importers ahead of those for whom the AD/CVD laws were meant to provide a level playing field.

F. There Would be no Reduction in Administrative Burdens if a Prospective System is Adopted

Administrative burden is endemic to both prospective and retrospective systems

Pursuant to Article 9 of the Antidumping Agreement, administration of a prospective system, appropriately applied, will potentially be just as complex as the administrative of a retrospective system, as it requires provision for a prompt refund to importers. Moreover, Article 11.2 requires procedures in both types of systems for periodic reviews of the margins and the need for continued imposition of an antidumping duty. Consequently, adoption of a prospective system would not necessarily entail any reduction in administrative burdens, particularly if the United States follows its customary practice of using transparent procedures. Indeed, a prospective system might encourage more administrative reviews due to the fact that import volumes will not be disciplined when margins are low. As such, U.S. producers will be more inclined to request reviews to ensure appropriate margins on future entries, and importers with margins will be likely to also request reviews as they have less to lose if a review does not result in a retroactive margin increase.

We recognize that there is evidence that many countries that utilize the prospective system do not give sufficient attention to the obligations of Articles 9.3.2, 9.3.3 and 11.2. Following a critical appraisal of the European prospective system, which is still timely, Ivo van Bael concluded:

In contrast, the U.S. authorities treat anti-dumping duties as being deposits of estimated duties. After a period of time these duties either become collectable or are reviewed. Needless to say, the practice of treating a duty as being an estimate of the amount actually owed is considerably

Mr. Ronald K. Lorentzen
April 20, 2010
Page 9

more equitable. It does not prejudge the issue of whether the duty is refundable.⁶

Both prospective and retrospective antidumping systems are complex. Much of this is due to the proliferation of trans-national corporations whose cost-allocation methods and transfer pricing practices require special investigatory and cost attribution methodologies. However, the difference is that retrospective systems is equitable and eliminates dumping while the “one-sided” certainty of prospective systems always favors those who sell dumped and subsidized goods.

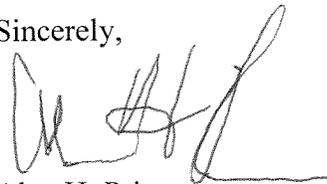
III. CONCLUSION

There is little doubt that foreign producers, foreign exporters and importers will strongly support a move away from the current U.S. retrospective system and to a prospective system. They know all too well that a prospective system will provide them with new opportunities to avoid the corrective measures of AD/CVD duties and manipulate market conditions to the detriment of U.S. producers.

As the above comments demonstrate, a prospective system will only increase injurious dumping and subsidized imports into the United States; expand the universe of uncollected duties; provide incentives and new opportunities for importers to evade antidumping and countervailing duties; not target high-risk importers; as applied in the United States, not better address the impact of retrospective rate increases on U.S. importers; and will not lead to a reduction in administrative burden, unless it is improperly applied.

The inherent flaws in prospective systems weaken the U.S. rules-based trading system by putting the interests of foreign producers, foreign exporters and importers ahead of those for whom the AD/CVD laws are meant to provide a level playing field: America’s producers, manufacturers and workers.

Sincerely,



Alan H. Price
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⁶ Ivo van Bael, *EEC Anti-Dumping Enforcement: An Overview of Current Problems*, 1 EJIL (1990) 142.