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Ronald K. Lorentzen
Deputy Assistant Secretary for Import Administration
Department of Commerce
Room 1870
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

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

Dear Mr. Deputy Assistant Secretary:

We are submitting the attached comments in response to the Department of Commerce's ("Commerce") request for comments, published in the *Federal Register* on March 31, 2010, on *Retrospective Versus Prospective Antidumping and Countervailing Duty Systems*.

Please contact the undersigned if you have any questions regarding this matter.

Sincerely,



Elliot J. Feldman

**RETROSPECTIVE VERSUS PROSPECTIVE
ANTIDUMPING AND COUNTERVAILING DUTY SYSTEMS**

**RESPONSE TO FEDERAL REGISTER NOTICE OF MARCH 31, 2010
REQUEST FOR COMMENT FROM THE IMPORT ADMINISTRATION
INTERNATIONAL TRADE ADMINISTRATION
UNITED STATES DEPARTMENT OF COMMERCE**

Submitted by

**BAKER & HOSTETLER LLP
April 20, 2010**

**Introduction: The American Way Compared To The Method Used By
Almost Everyone Else**

Remedies for disputes heard by panels of the World Trade Organization are prospective.¹ There are no penalties for past misdeeds. Procedural delay is rewarded. A country is not expected to change its ways before the absolute completion of proceedings and definitive adverse decisions. While it continues conduct ultimately found inconsistent with its international obligations, a country faces no penalty. Only when the decision requires change and a country refuses is the country subject to penalty, and then only indirectly.

Article 9 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement") provides for the imposition and collection of anti-dumping duties, and authorizes either prospective or retrospective assessment of duties. The prospective system governs international trade remedy systems in almost every country. It also governs the conduct of original antidumping and countervailing duty investigations in the United States. Except for the very limited exception of critical circumstances, which is almost never used, a company will not be liable for antidumping or countervailing duties on imports before there is at least a preliminary determination of dumping or countervailable subsidies. The United States may be unique in its application of a retrospective review system governing

the assessment of duties after an order is imposed, and is certainly the only major WTO member that uses a retrospective system.

The Request for Comment asks for a comparison of prospective and retrospective systems with respect to six criteria.² The first criterion refers to “remedying injurious dumping or subsidized exports to the United States.” This language carries at least two assumptions, that the result of an investigation will be to find dumping or subsidization, and that the dumping or subsidization will be found to be injurious. The language, thus, fails to recognize a key problem with the American system: the mere filing of a petition disrupts trade because it distorts markets.

Exporters to the United States, as a matter of prudence and precaution, invariably raise prices when an investigation is initiated. Importers and downstream customers start scrambling for alternative suppliers because of uncertainty about how imports from the country subject to the petition may be treated later on. Consequently, petitioners in the American system are rewarded for the filing of a petition, no matter whether the petition is frivolous or bound, ultimately, to fail. The main cause of that problem is the very low standard in the United States for accepting petitions, but retrospective duty assessment exacerbates the problem because importers know that, were an order to be imposed, their liability would be unlimited and would not be determined until well after the subject merchandise had been imported.

Where dumping or subsidization and injury are found, remedies are important. A system that imposes an implicit remedy where there may be no need, however, that imposes an *in terrorem* effect on trading partners, is defective, and may explain why other countries have thought better of this system. The United States ought to be asking itself, when comparing prospective and retrospective systems, why almost everyone else does things differently.

¹ See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125, 1237 (1994) (“DSU”).

The American retrospective system begins collecting bonds for prospective duties as soon as there is a preliminary determination estimating antidumping or countervailing duty margins. The negative effects of this initial bonding period are muted because the bonding rate acts as a cap on the duties that can be collected for imports entering between the Commerce Department's preliminary determination and the International Trade Commission's final determination. The actual duties assessed can go down for imports entering during this period, but they cannot go up.³

The bonding cap is lifted and replaced by a cash deposit requirement when the antidumping or countervailing duty order goes into effect. Thereafter, the actual duties assessed can be increased or decreased drastically, based on the results of administrative reviews that may not be completed until more than two years after the affected merchandise was imported. Should the results of those administrative reviews be appealed, the actual determination of duties owed could be delayed many years further.

Importers, who are held accountable for the duties, operate in an environment of substantial uncertainty for many years because of this system of assessment. It is impossible to know in advance of the Commerce Department's analysis what a final antidumping or countervailing duty tariff rate may be because there are so many variables that can affect the calculations, including methodological changes the Commerce Department may introduce between reviews, following importation. So, too, the U.S. Treasury cannot know how much money it will actually collect in duties during this extended period.

The prospective system in most other countries removes most of the uncertainty characteristic of a retrospective system. As in the United States, the investigation in a prospective system produces duty rates, updated regularly through administrative reviews.

² See Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems; Request for Comment and Notice of a Public Hearing, 75 Fed. Reg. 16079 (March 31, 2010).

However, reviews do not change rates retrospectively. The duties collected are the duties owed, without the possibilities of increased duties or money returned according to the results of an administrative review.⁴ The rates set in the investigation apply to all imports going forward until the first review; the rates set in administrative reviews also apply going forward only.

Not every prospective system is the same, but the principles are consistent and have similar market effects. In Canada, for example, the original investigation determines “normal values,” which are minimum acceptable prices. As long as goods are imported above those prices, no duties are collected. Goods imported below normal values, however, are taxed the difference in price.⁵ The system is designed not for the purpose of revenue collection, but for the purpose of fair trade: the normal values define prices above which goods are not determined to be dumped or subsidized, leaving no reason to be collecting duties on them. The purpose of the law is to assure fair competition for domestic products, not to disrupt the market or create uncertainty for importers.

The European Union also has adopted a prospective system. EU officials establish the normal value for a product in an investigation and then compare the normal value to the export price. The percentage difference between these two is fixed as the duty rate, which applies to all future imports of the product unless superseded on a prospective basis in a subsequent review.⁶

³ See 19 C.F.R. § 351.212 (d).

⁴ There are some exceptions to this rule, such as the provision in the European Union’s regulations that allow importers to petition for a refund of duties collected under certain limited situations. See European Commission – Antidumping Refunds, <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/refunds/>. However, the general rule in prospective systems is that the duty rates are final and definitive at the time of importation.

⁵ See Special Import Measures Act, R.S.C., 30.2 (1985) (“the margin of dumping in relation to any goods of a particular exporter is zero or the amount determined by subtracting the weighted average export price of the goods from the weighted average normal value of the goods, whichever is greater.”).

⁶ See United States Government Accountability Office, GAO-08-391, *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection* (2008) at 38-39.

Most systems are neither purely prospective or retrospective. In the United States, for example, parties must request administrative reviews. When none is requested, the previously found duty rates continue to apply between administrative review periods, and the cash deposit rate from the investigation becomes the duty rate when no first administrative review is conducted.⁷ A European Union importer may be able to recover previously collected duties, provided he can prove that dumping or subsidization has ended or that goods are being imported at rates below those that had applied when the goods had been imported.⁸

Relative Merits Of Prospective And Retrospective Systems

The American retrospective system is more accurate in assessing duties than the prospective system used in the European Union because it is based on the actual prices of imported sales compared to domestic prices (or contemporaneous costs) of like products sold at or near the same time. The American system is not necessarily more accurate, however, than the prospective normal value system used in Canada and several other countries. Although the Canadian system uses normal values calculated during a prior period, both systems use current import data. Because the Canadian prospective normal value system performs the necessary calculations at the time of importation, the risk of inaccuracy caused by lost data is reduced. Moreover, collection of total, accurate duties in a retrospective system requires assessment against importers well after the goods have been imported. It is not unusual for importers to be out of business by the time the final rates are supposed to be collected, leaving only deposits in the Treasury.

Early estimated rates usually are much higher than rates to be finally assessed. These estimated rates distort the market, often dramatically, but when an importer can survive the initial impact, he can also recover monies paid that exceeded what ultimately was due.

⁷ 19 C.F.R. § 351.212(a) ("If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered.").

⁸ See European Commission – Antidumping Refunds, *supra* note 4.

The American system is administratively very expensive because customs entries must be kept open, sometimes for years (subject to legal appeals and challenge), before final duties can be assessed. In the interval, the possibility of actual collection diminishes, while importers do not know whether they will be getting money back, or will owe more.

In the prospective system where normal values are fixed in advance, importers can know what their prices have to be to avoid duties. In other prospective systems where duty rates, rather than normal values, are fixed in advance, importers can know what prices they need to charge their customers in order to recover the costs of the duties and still make a profit. There is more certainty and stability in the market than in a retrospective system. Duties are collected at the time of importation. Consequently, there is much more certainty that they, in fact, will be collected, and as the amount to be collected is known at the time of importation, the administrative system is much less cumbersome and expensive.

The Goals Of The Comparison

Congress asked the Department of Commerce to compare prospective and retrospective antidumping and countervailing duty systems according to six goals. The current American retrospective system appears superior to a European style prospective system, but not a Canadian style prospective system, with respect to the first goal. All types of prospective systems appear preferable for the remaining five.

- The retrospective system may appear in theory to be superior for remedying injurious exports to the United States because it calculates duty rates based on a comparison of the actual import prices to normal values or subsidies calculated for a contemporaneous period. However, because the prospective system allows the importer to account fully for the antidumping or countervailing duties in its own pricing decisions (*i.e.*, where the

imports compete with the domestic product), it is arguable whether, even under this criterion, a retrospective system is superior.

- Prospective systems are better at collecting duties because they collect upon importation and do not have to wait through administrative and legal reviews and proceedings that can take years.
- Prospective systems are more likely to reduce incentives and opportunities for the evasion of duties because they are clearer in their expectations: normal values or fixed duty rates advise importers in advance of the prices they should apply to goods, information known to authorities with certainty at the time of importation.
- The retrospective system has no reliable way to “target high-risk importers,” as it is focused on the prices of goods after they are imported. The prospective system, focused on the price of the goods when they arrive at port, makes the relative “risk” of the importer less relevant.
- The American retrospective system, by creating much more uncertainty in the marketplace, creates competitive advantages for U.S. petitioners (through the advantages of market disruption), but the costs and consequences are visited upon importers, their employees, downstream businesses and their employees, and ultimately U.S. consumers.
- The retrospective system is by far more administratively cumbersome and expensive than the prospective system adopted by almost every other country and reflected in the principles governing the remedy system of the WTO.

The United States has maintained an expensive and inefficient system unlike any other country's. The systematic analysis Congress has invited has been overdue, and ought to lead to change.