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April 20, 2010

Via email to: webmaster-support@ita.doc.gov

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

Attention: 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 (75 Fed. Reg. 16,079, Mar. 31, 2010)

Dear Deputy Assistant Secretary Lorentzen:

The following comments are submitted by the law firm Kelley Drye & Warren on behalf of various domestic industries represented in Title VII cases before the Commerce Department. These comments respond to the Federal Register notice published by the Department on March 31, 2010 (75 Fed. Reg. 16,079). The Department has requested public comment to aid in its analysis of several issues raised by the conferees in Public Law 111-117.¹

¹ 111th Cong., 1st Sess., Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010, H. Rep. 111-366 at 609.66

1. Remedying Injurious Dumping or Subsidized Exports to the U.S.

The United States maintains a retrospective duty assessment system. On entry of merchandise subject to an antidumping (AD) or countervailing (CV) duty order, the importer of record pays a duty deposit equal to the estimated amount of AD or CV duty. Then, generally on an annual basis, Commerce conducts a review of subject imports that entered during the period of the review. In the case of an AD duty order, the review examines the actual U.S. prices and foreign market prices (or costs) of the subject imports that entered during the period examined; for CV cases Commerce investigates subsidies bestowed on specific industries for a calendar year. Commerce then determines the total amount of AD or CV duties necessary to offset the actual level of dumping, or benefits received, if any.

To implement its findings, Commerce provides detailed assessment, or liquidation, instructions to Customs based on the total amount of duties needed to offset the unfair pricing or the subsidies. The liquidation notice contains instructions for the assessment of an *ad valorem* rate, or for the assessment of per unit amounts, or both. Where duties to be assessed exceed the amount of duties that were deposited, the importer must pay the additional duties (with interest) that were not covered by the deposits made. Conversely, where duties to be assessed are less than the amounts deposited, refunds are made (with interest). Commerce also imposes new cash deposit rates applicable to imports postdating the review, which are based on the results of the review.

The retrospective assessment system employed in the U.S. affords interested parties, including importers, the opportunity to obtain AD determinations of duties that are based on the most recent, and most accurate, information on U.S. and home market prices and costs collected from the exporters or importers, or the most recent information on subsidies, in the case of a CV duty order. The U.S. system prioritizes the accurate measurement of dumping and subsidies based on up-to-date prices, costs and subsidy data. This comports with the findings of U.S. courts, which have held that a basic purpose of the AD law is determining current margins as accurately as possible. Rhone Poulenc v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Under a retrospective system, the duties finally assessed reflect actual economic behavior of subject exporters and importers (and governmental entities, in the case of subsidies) and minimizes the potential that dumping or subsidization that actually occurs is not captured. Conversely, it also minimizes the potential that importers of products from exporters who have modified their pricing, or whose costs have changed, or who are no longer benefiting from subsidies, will be required to pay duties that exceed their actual levels of dumping or subsidization. Thus, the U.S. system serves the principal goal of remedying injurious dumping and subsidized exports, identified in the report. The periodic nature of the retrospective review system also yields opportunities for the agency and interested parties to monitor compliance with the antidumping order, which serves the goal of “reduc[ing] incentives and opportunities for importers to evade anti-dumping and countervailing duties.”

Prospective AD/CV regimes do not provide the same level of accuracy in addressing unfair trade practices and do not provide the same incentives for foreign producers to charge and/or importers to pay a fair price. Prospective systems are by design not focused on an accurate offset of all unfair trade practices found. The EU's prospective system, which applies an *ad valorem* duty calculated as the percentage difference between the export price and normal value, actually can reward continued unfair pricing because duties are essentially final on importation and importers can lower their duty liability by declaring lower entry values. The Government Accountability Office ("GAO") also reported that Australia's prospective system "provides only limited financial incentives for firms to discontinue dumping."² Other prospective systems, such as Canada's, rely on reference prices and are simply an estimate of fair price conditions at a historic point in time that result in over- or under-collection of duties.

Importantly, unlike the U.S. retrospective system, which requires both a refund for overpayments and the collection of underpayments, prospective systems by the express language of the Antidumping Agreement *do not* permit the correction of underpayments but do require the refund of overpayments.³ There is no process under

² 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, 38 at n.74.

³ 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

the Antidumping Agreement for a government employing a prospective system to obtain additional duties on the same body of entries that they are required to examine for refunds, even though dumping may have increased. Stated differently, prospective systems (even if they work as intended by the agreement) operate one-way only, to reduce liability where dumping has been reduced. The correct collection of duties is not permitted where dumping has increased. From a public policy standpoint, this is a critical weakness in prospective regimes. Because of this limitation, prospective systems cannot fully achieve the conferees' stated aims of "remedying injurious dumping or subsidized exports" and "reduc{ing} incentives and opportunities for importers to evade anti-dumping and countervailing duties."⁴

2. Minimizing Uncollected Duties

The GAO has documented collection difficulties related to certain China cases involving agricultural products.⁵⁻⁶ The GAO report also notes that the Government has

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to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision."

⁴ 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.

⁵ GAO-08-391. *See also*, GAO-07-50, Report to the Chairman, Committee on Ways and Means, House of Representatives, *INTERNATIONAL TRADE, Customs' Revised Bonding Policy Reduces Risk of Uncollected Duties, but Concerns about Uneven Implementation and Effects Remain*, October 2006 and GAO-08-876R, *Agencies Believe Strengthening International Agreements to Improve Collection of Antidumping and Countervailing Duties Would Be Difficult and Ineffective*, July 24, 2008.

⁶ Nearly 100% of the uncollected duties are dumping duties. GAO-08-391 at 13. Further, the agriculture or aquaculture industries account for 87% of these. *Id.* at 14.

taken some corrective actions in this regard, but incorrectly concludes that the retrospective system “creates the risk of uncollected duties” and that this risk is ameliorated under a prospective system.⁷ In fact, prospective systems do not experience collection issues precisely because they do not accurately measure dumping and opt not to address increases in dumping other than prospectively. That simply defines the problem away without actually addressing the problem faced by domestic producers.

Unscrupulous importers can engage in undervaluation and, when faced with zero or low AD rates, can ship increased volumes at dumped prices without fear of additional duties – two conditions that lead to uncollected duties – under a prospective system as well. Indeed, as noted above, some prospective systems actually encourage continued dumping by providing importers with an incentive to undervalue entries to obtain lower AD duty liability. Under collections in the U.S. retrospective system also result from what is known as the “new shipper bonding” problem, which Congress initially corrected in August 2006 by suspending the new shipper bonding privilege for three years. The market has essentially corrected this problem now, with sureties now performing their due diligence on importers and refusing to issue bonds to under-capitalized or non-creditworthy importers. Moreover, GAO Report 08-391 includes options designed specifically to address the new shipper bonding problem, such as making permanent the suspension of the new shipper bonding privilege, assuming it can be done consistent with

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Importers buying from China account for 90% of the uncollected duties. *Id.* In fact, “84 percent of the total amount of uncollected AD/CV duties is associated with four products, all from China: crawfish tail meat, garlic, honey, and mushrooms.” *Id.*

⁷ GAO Report 08-391 at 20.

the Antidumping Agreement, revising the level of exports required for exporters applying for “new shipper” status,⁸ heightening the requirements for becoming a U.S. importer⁹ or extending the time allowed for liquidation of entries from six months to some longer period to prevent entries from being “deemed liquidated.”¹⁰ These or other simple regulatory or statutory alterations can remedy this problem without resorting to the more draconian measure of switching to a less accurate, prospective system to remedy unfair trade practices.

3. **Reducing Incentives and Opportunities for Importers to Evade AD and CV Duties and the Impact of Retrospective Rate Increases on U.S. Importers**

A prospective system, by the terms of the Antidumping Agreement, provides foreign producers and their importers opportunities to evade antidumping duties (and by analogy, the same would be true in countervailing duty cases) that do not exist in a retrospective system.

As noted, prospective systems do not permit the capture of any increase in dumping or subsidization on imports that have already come in. A prospective system only permits/requires refunds of duties and permits modifications of duties going forward. Thus, adoption of a prospective system would simply encourage more foreign

⁸ GAO Report 08-391 at 42-43 (noting that Congress could allow Commerce the discretion to require new shippers to have a greater volume of imports before establishing an individual AD/CV duty rate).

⁹ GAO Report 08-391 at 42-43 (noting current requirements are minimal and do not involve any financial or background checks). Heightened requirements for importers would be consonant with the increased duty of care and reporting requirements (e.g., *Safe Port Act of 2006*) now required of importers.

¹⁰ GAO Report 08-391 at 46.

producers and their importers to increase unfair trade practices because such activity is not addressable on entries made before a revision in duty rate is established. All of the problems that have been encountered with under-collections in a handful of cases where dumping has increased dramatically would not only continue but be encouraged for other orders where evasion is currently much less of an issue.

To date, the EU has rarely refunded antidumping duties collected on entries.¹¹ The Commission published only five refund decisions from 1996 to 2003, of which three granted a partial refund.¹² In effect, the duty rate as first determined becomes the established rate, and is not subject to regular modification based on changed pricing patterns. Such systems are grossly inferior to the retrospective system currently used by the United States in achieving the statutory purpose of fully offsetting injurious, unfair trade practices, while not penalizing foreign producers and their importers that have modified their behavior to reduce or eliminate dumping or subsidization.

The GAO has noted that the U.S retrospective system and the “threat of an administrative review can deter some companies from dumping” because importers that seek certainty may be “less inclined to purchase from exporters whose AD/CV duty rates

¹¹ See *Stewart & Dwyer, Comparative Overview of Anti-Dumping Regulation in the European Communities and the United States of America*, in 4 *WTO – Trade Remedies: Max Planck Commentaries on World Trade Law* 817-18 (Martinus Nijhoff Publishers 2008).

¹² *Id.*, citing *Evaluation of EC Trade Defence Instruments (Final Report December 2005)*, Annex 7 (at 16). From 2004 to 2007, the EC published 19 refund decisions, of which 7 granted a partial or full refund. EC Staff Working Documents Annexed to the Annual Reports on the Community’s Anti-Dumping, Anti-Subsidy, and Safeguard Activities (2004-2007).

fluctuate substantially over time.”¹³ Thus, legitimate importers adjust their behavior to minimize the probability of subsequent rate increases. Further, an analysis of effectiveness of the remedy versus impact on importers should be seen in the context of the channels of trade through which the subject products are imported. Where the exporter sells the subject product directly to a U.S. customer, who then imports the subject product, the imposition of an antidumping duty has a direct effect on the pricing behavior of the exporter. The exporter may choose to increase prices (relative to normal value), and thereby avoid or decrease dumping margins and duties. Conversely, the importer may continue the same pricing behavior, and dumping margins and duties will remain. Finally, prices may decrease relative to normal value, and importers will incur a higher duty. While this obviously affects the importer’s ability to predict pricing, the result is in perfect keeping with the purpose of the law, and the goals identified in the report. As already reviewed, the same harmony is not present in a prospective system.

4. Conclusion

The introduction of a prospective system would come at the cost of fairness and accuracy, for both domestic interested parties and for importers, and would be contrary to important goals identified in the report, *i.e.*, remedying injurious dumping or subsidized exports and reducing incentives and opportunities for importers to evade anti-dumping and countervailing duties. Furthermore, the significant collection difficulties that have been identified by the GAO are not remedied by a move to a prospective system, but can be by simple regulatory or statutory fixes to the current regime. Customs today generally

¹³ GAO Report 08-391 at 40.

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correctly collects cash deposits owed at the time of entry. A move to a prospective system would simply say that the deposit is all the liability that exists. Increased dumping or subsidization would be ignored statutorily, by limiting liability to what is deposited/paid at the time of importation. The problems that exist presently in fully offsetting increased dumping under certain orders would be dramatically expanded through a move to a prospective system, because a prospective system creates a free window of time when increased dumping or subsidization can never be addressed.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Hartquist". The signature is written in a cursive style with a large initial "D".

DAVID A. HARTQUIST

KELLEY DRYE & WARREN LLC