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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; Request for Comment and Notice
of a Public Hearing; Comments of Stewart and Stewart

Dear Deputy Assistant Secretary Lorentzen:

The following is submitted on behalf of the Law Offices of Stewart and Stewart, a firm that has represented companies and workers seeking relief from injurious, unfair trade practices in a wide array of antidumping and countervailing duty proceedings over the years. Our comments respond to the notice published by the Department of Commerce on March 31, 2010. In the notice, Commerce invited comments and announced its intent to hold a hearing regarding the captioned matter. 75 Fed. Reg. 16079. In accordance with Commerce's instructions, we emailed a pdf file of our comments to webmaster-support@ita.doc.gov. In addition, while not required, we filed the original and one copy of these comments in printed form at the captioned address.



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Our firm's history goes back to 1958. Over the last fifty-two years, in a large number of manufacturing and agricultural cases, our firm has represented domestic companies and their workers that have faced harm from imports and that were seeking redress under U.S. trade laws. Congress's consistent intent has been to provide an effective remedy against injurious dumping or subsidies. Indeed, vigorous enforcement of trade remedies has been repeatedly promised to companies and workers by the Congress and nearly every Administration during this time period. Nothing in the Appropriation Committee's request indicates that Congress has abandoned this intent.

While both retrospective and prospective trade remedy systems are permitted under the WTO Agreements, the U.S. system has been retrospective in design and operation. In our view, there is no question that the retrospective approach best matches U.S. interests in accuracy, transparency, due process and neutrality of the Administrator.

Replacing our current retrospective system with a prospective system, however, would likely seriously impair the effectiveness of the U.S. trade remedy laws. This is because the retrospective system as administered by the United States focuses on offsetting through the imposition of duties whatever level of dumping or subsidization has occurred on specific entries. The law is designed to avoid over-collection as well as under-collection of duties owed. All parties (foreign producers/exporters, importers, domestic producers) can make requests for annual reviews to obtain this accuracy. Prospective systems around the world, as administered, don't focus on accuracy. Liability is based on past actions which

may or may not reflect the actual situation at the time of importation. Typically such systems make no effort to address increased unfair trade practices on past entries. Thus, a change to a prospective system would be unlikely to deter evasion of orders and would in fact likely encourage such conduct. Any increased certainty of amounts collected flows simply from the fact that the law would no longer address increased unfair trade practices on past entries. This does not help the injured companies and workers but simply pretends that the problem does not exist. The change might be a benefit to importers, but only in the sense that opportunities to continue and increase the importation of merchandise at dumped or subsidized prices would be expanded. Such a result would be contrary to long-standing congressional intent to see that the laws effectively neutralize unfair trade practices.

1. Conference Committee direction.

The Conference Committee directed Commerce as follows:

The conferees direct the Secretary of Commerce to work with the Secretaries of the Departments of Homeland Security and the Treasury to conduct an analysis and report to the House and Senate Committees on Appropriations, within 180 days of enactment of this Act, on the relative advantages and disadvantages of prospective and retrospective anti-dumping and countervailing duty systems. The report should address the extent to which each type of system would likely achieve the goals of *remedying injurious dumping or subsidized exports, minimize uncollected duties, reduce incentives and opportunities for importers to evade anti-dumping and countervailing duties, effectively target high-risk importers, address the impact of retrospective rate increases on U.S. importers and their employees, and create a minimal administrative burden.*

111th Cong., 1st Sess., Departments of Transportation and Housing and Urban Development, and Related Agencies Appropriations Act, 2010, H. Rep. 111-366 at 609 (*italics added*). *Accord*, 75 Fed. Reg. 16079 (restating criteria).

2. Remediating injurious dumping or subsidized exports.

The U.S. retrospective assessment system affords interested parties, including importers, the opportunity to obtain assessments of antidumping duties that are based on the most recent information on U.S. and home market prices, and costs, and determinations of countervailing duties that are based on the most recent information on subsidies.¹ The U.S. system prioritizes the accurate measurement of dumping (or subsidies), and permits interested parties to obtain updated determinations as needed. The duties assessed reflect actual economic behavior of subject exporters and importers (and governmental entities, in the

¹ Under the U.S. system, importers, upon entry of merchandise, pay a deposit equal to the estimated amount of antidumping or countervailing duties. Then, generally on an annual basis and upon request of either the domestic interested party, the producer or exporter, or the importer, Commerce conducts a review of imports that entered during the period of the review. In the case of an antidumping duty order, the review examines the actual U.S. prices and normal value of the imports during the period examined, as well as the exporter's and the producer's costs for those products, under certain circumstances. Based on this review, Commerce determines the total amount of antidumping duties. Commerce similarly determines the value of the subsidies. Following the review, Commerce forwards to Customs detailed assessment instructions. Where duties to be assessed exceed the amount of duties that were deposited, the importer, upon liquidation of the entries, is required to 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, the importer is entitled to a refund of the excess (with interest). Upon completion of the review, Commerce also imposes new cash deposit rates applicable to imports postdating the review. These rates are based on the results of the review.

case of subsidies) in the most recent period. Because of this, the system minimizes the potential that dumping or subsidization that in fact occurs is not addressed by the imposition of an appropriate level of offsetting duties. At the same time, 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 inherently serves the goal of remedying injurious dumping and subsidized exports, identified in the report. The periodic nature of the retrospective review system (supported by verification efforts) also yields valuable 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.”

No prospective system affords the same level of accuracy in addressing unfair trade practices.² Unlike the current U.S. retrospective system which provides both a refund for overpayments and the collection of underpayments, prospective systems have not operated to permit the correction of underpayments, except going forward. At best, if implemented as intended, prospective systems have permitted *refunds* of *overpayments*, when dumping is shown to have

² 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*

decreased.³ Known prospective systems don't provide for the collection of additional duties on the same body of entries that they are required to examine for refunds, even though dumping may have increased. Indeed, if a prospective system were so administered to permit collection of additional duties on past entries, it would function identically to a retrospective system, undermining the supposed benefit of a prospective system.

Thus, known prospective systems have operated in a one-way manner only. Duty liability may (theoretically) be reduced where dumping has been reduced; but, there is no built-in means to correct the collection of duties where dumping has increased. Because of this limitation, existing 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."

No prospective system provides the same ongoing incentive for foreign producers to charge and/or importers to pay a fair price. Some systems, like the

Countervailing Duties, Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection, March 2008, summary.

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

EU's, where refunds are seldom actually obtained, reward behavior that is the opposite of a return to fair pricing. As the EU authority rarely revisits the assessment of entries where dumping decreased, there already is little incentive to decrease dumping. Moreover, when the duty is imposed as a simple percentage applied to the current export price, importers have a further incentive to lower export prices to lower their duty liability.⁴ The GAO concluded that “{a}s such, the EU system provides no direct financial incentive for firms to discontinue dumping.”⁵ Other prospective systems fare little better. The GAO reported that Australia’s prospective system “provides only limited financial incentives for firms to discontinue dumping.”⁶ Canada relies on reference prices for normal value.⁷ If the export price is lower, a duty is assessed.⁸ While there can be periodic reviews to set new reference prices, these only set normal values for future imports; the results are not used to correct prior assessments.⁹ Thus, the Canadian system necessarily results in over- or under-collection of duties.

⁴ GAO-08-391, page 39.

⁵ *Id.*, page 39, n.76.

⁶ *Id.*, page 38, n.74.

⁷ *Id.*, page 37.

⁸ *Id.*

⁹ *Id.*, page 38.

3. Reducing incentives and opportunities for importers to evade anti-dumping and countervailing duties

A prospective system provides foreign producers and their importers additional opportunities to evade antidumping duties (and by analogy, the same would be true in countervailing duty cases) that do not exist in the current U.S. retrospective system. As already reviewed, prospective systems generally do not capture any increase in dumping or subsidization on imports that have already come in. Thus, prospective systems do not correct actions by foreign producers and their importers to increase the unfair trade practices unless and until there is a review and a new normal value or rate is established. This also means that collection issues where dumping has increased dramatically would not only continue but would be encouraged for other orders where evasion is currently less of an issue. The possibility that an increase in dumping or subsidization will result in increased liability is important in limiting the abuse in the market. That discipline is abandoned in a prospective system.

Of course, prospective systems can be structured in ways to further reduce the transparency, due process and accuracy of the calculations, thus increasing the likelihood of over- or under-collection of duties that should be owed. In this regard, while the Antidumping Agreement talks about the need to make refunds readily available, WTO Members in some cases have operated their system to make it very difficult to request a review or refund. For example, to date, the EU

has rarely refunded antidumping duties collected on entries.¹⁰ The Commission published only 5 refund decisions from 1996 to 2003, of which 3 granted a partial refund.¹¹ In effect, the duty rate as first determined becomes the established rate and is not subject to regular modification based on changed pricing patterns. The EU system thus suffers from a lack of transparency, lack of due process and a lack of accuracy. Importers typically pay the rate initially determined regardless of changes in pricing in the exporting country, export prices or in underlying cost structures. Importers pay way too much or way too little. Domestic producers and their workers receive at most a rough form of relief. Other prospective systems may have more due process or transparency. None, however, can approach the accuracy of limiting amounts collected to the amount of unfair trade practice that has occurred. There is always over- or under-collection.

In the United States, the statutory purpose has always been to offset fully unfair trade practices which have been injurious to a U.S. industry and its workers while not penalizing foreign producers and their importers when they have modified their behavior to reduce or eliminate dumping or subsidization.

¹⁰ 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).

¹¹ *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).

4. Perceived advantage of prospective systems with regard to certainty of collection.

The “certainty” of collection put forward by some as favoring a prospective system is no greater than the certainty achieved by the collection of cash deposits in the retrospective system. The problem in a retrospective system such as the system deployed by the United States is not that cash deposits are not deposited but that foreign producers and importers, in selected cases, are dramatically increasing the dumping that is occurring after an order is issued. When these producers or exporters and/or their importers then disappear, or become insolvent, collection of the additional duties that are due becomes a problem because the additional security is presently limited to a continuous entry bond which is generally a very small amount. A prospective system, however, does not actually *fix* this problem; instead it simply chooses not to address increases in dumping (other than prospectively). In other words, the problem is not solved, only defined away. Moreover, the underlying problem, *i.e.*, that amounts paid upon entry insufficiently reflect subsequent increases in dumping, is likely to grow because, by design, a prospective system does not revisit past entries to make upward duty corrections if dumping increased.

Stewart and Stewart recognizes that Customs has experienced substantial difficulties in the collection of duties in certain cases.¹² These collection

¹² 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

difficulties, however, are strongly concentrated in the collection of duties on antidumping duty orders (not countervailing duty orders) that cover imports of agriculture and aquaculture goods from China.¹³ Moreover, the collection difficulties have been affected by specific evasion schemes that also would have been more pervasive in prospective assessment schemes. As such, these difficulties provide no instruction regarding the benefits or disadvantages of the current system as a whole, the benefits of retrospective assessment vs. prospective assessment in particular, or the potential benefits and disadvantages of applying any system-wide changes. Finally, as discussed above, the substitution of a prospective system does not solve collection issues – it only defines them away. In essence, Commerce would give up on the additional duties that should be collected, thus abandoning the remedial purpose of the statute. There are reasonable measures that can be taken by the U.S. to address the existing problem that would be WTO-consistent and leave in place the current retrospective system. We encourage the Administration and Congress to pursue those corrections vs. focusing on a fundamental change to the system of enforcement.

GAO-08-876R, Agencies Believe Strengthening International Agreements to Improve Collection of Antidumping and Countervailing Duties Would Be Difficult and Ineffective, July 24, 2008.

¹³ 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. 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.*

5. The impact of retrospective rate increases on U.S. importers and their employees.

Retrospectively imposed increases in antidumping or countervailing duties, by definition, reflect determinations by the Department of Commerce that dumping or subsidies have increased, requiring the collection of additional duties to provide the full remedy required by the antidumping and countervailing duty statutes. A determination that such additional duties should not be collected in order to protect the economic interests of importers and their employees would be contrary to the intent of the law, which is to provide an effective remedy to the domestic industry that has been found to have been injured by the subject imports. Moreover, in many instances, it is the importer who drives the unfair pricing from foreign producers/exporters. A system which rewards unfair trade practices vs. providing an incentive to correct unfair trade practices cannot be reconciled with congressional concerns or the purpose of the trade remedy laws.

6. Prospective systems and Commerce's administrative burdens.

Commerce's administrative burdens are related to the frequency with which dumping margins and subsidy rates are updated, not their timing. Thus, a prospective system in which margins are as frequently updated (as in our current retrospective system) would not entail lighter administrative burdens and, because of the time delay, would still yield a weaker remedy. To the extent that margins are *not* updated with sufficient frequency, administrative burdens would lessen, but the value of the remedy would weaken still more.

While a system that only requires Customs to collect the amount identified as due at entry simplifies the role and administrative burden of Customs, it does so at the expense of domestic producers and their workers. Both the Administration and Congress have talked about the primacy of job creation for our country at the present time. Taking actions which reduce the ability of U.S. companies to remain viable and for their workers to have good jobs cannot be consistent with our national objective of creating jobs.

7. Summary.

The introduction of a prospective antidumping and countervailing duty assessment system would come at the cost of accuracy and hence fairness, for both domestic interested parties and for importers, and would be contrary to important goals identified in the report and that are at the heart of U.S. law, *i.e.*, remedying injurious dumping or subsidized exports and reducing incentives and opportunities for importers to evade antidumping and countervailing duties. A move to a prospective system would either have the same uncertainty as to liability if it were structured to permit not only refunds but also increases based on reviews or would create certainty by ignoring increased dumping or subsidization on past entries. The latter is simply unacceptable for the companies and workers promised effective trade relief and undermines the core purpose of the remedies. The former makes the change one in name only.

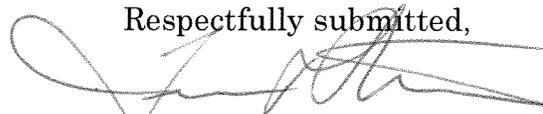
Importers are the beneficiaries of unfair trade practices and in many instances may be the driver of the practices as well. Nothing in U.S. law or policy contemplates rewarding the unfair trade practices. Existing U.S. law provides a

strong incentive to both foreign producers/exporters and U.S. importers to change their pricing behavior. U.S. law has never been premised on a comparison of benefits/costs. Rather, consistent with GATT Art. VI, injurious dumping is to be condemned. It is the needs of domestic manufacturers and their workers that the law is structured to protect.

Finally, there are no meaningful savings in administrative burden unless a move to a prospective system does not involve annual reviews or Customs will not pursue under-collections if determined to be owed. While prospective systems in other countries typically feature one or both aspects, adoption of such an approach in the U.S. not only goes against core values of transparency, due process and accuracy but the recognized imperative to create an environment to spur job growth.

In short, the U.S. retrospective system is objectively the fairest of the systems in place globally. There is no justification to weaken our trade remedies by shifting to a prospective system.

Respectfully submitted,



Terence P. Stewart
Geert De Prest

Stewart and Stewart