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April 20, 2010

VIA ELECTRONIC SUBMISSION

Ronald K. Lorentzen
Deputy Assistant Secretary for Import Administration
Room 1870
U.S. Department of Commerce
14th Street and Constitution Ave., N.W.
Washington, DC 20230

RE: Retrospective Versus Prospective Antidumping and
Countervailing Duty Systems

Dear Mr. Lorentzen:

On behalf of United States Steel Corporation ("U. S. Steel"), we hereby respond to the March 31, 2010 *Federal Register* notice from the U.S. Department of Commerce ("Commerce"),¹ seeking comments on the relative advantages and disadvantages of prospective and retrospective antidumping ("AD") and countervailing duty ("CVD") systems.

As discussed below, the current retrospective trade law system maintained by the United States has a number of significant advantages over prospective systems, and provides the most open, accurate and transparent trade law regime in the world. Preserving the strength and integrity of the existing system is vital in order to address the growing threat of unfair trade to our nation's industries and workers, and offers the most equitable outcomes for all market participants by ensuring that any AD/CVD measures are precisely calibrated to the actual level of unfair trade in the market. In this regard:

¹ U.S. Department of Commerce, International Trade Administration, "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) (hereinafter "Notice").

- * Only a retrospective system can enable U.S. trade law administrators to make fully accurate assessments of AD/CVD duties and to ensure that AD/CVD measures reflect current information as to the imports that are subject to such measures. As such, a retrospective system can operate with precision to offset market-distorting practices, with far less risk than other systems of introducing flawed incentives or distortions into the market.
- * By contrast, a prospective system cannot adjust AD/CVD duties to address situations in which the initial duty charged is not sufficient to offset the actual level of unfair trade on particular imports. Such systems may thereby permit and even encourage importers and foreign producers to flood the market with dumped and subsidized goods whenever the prospective duty rate is too low.
- * To the extent that U.S. policymakers are concerned about the ability of government agencies to collect the additional duties that sometimes occur as part of the review process employed under the existing retrospective system, numerous steps can and should be taken to address this concern directly – without making fundamental and harmful changes to our trade law system.

Background

The Study Request. In the conference report accompanying the 2010 Consolidated Appropriations Act,² the Secretary of Commerce was instructed to work with the Secretaries of Homeland Security and the Treasury to analyze the relative advantages and disadvantages of prospective and retrospective AD/CVD systems, and to report his findings to the House and Senate Committees on Appropriations.³ The conferees specifically requested that the report address the extent to which each type of system would likely achieve the following goals:

- (1) remedying injurious dumping or subsidized exports,
- (2) minimizing uncollected duties,
- (3) reducing incentives and opportunities for importers to evade AD and CVD duties;

² Public Law 111-117.

³ Notice at 16079.

(4) effectively targeting high-risk importers;

(5) addressing the impact of retrospective rate increases on U.S. importers and their employees, and

(6) creating a minimal administrative burden.

The report is currently scheduled to be transmitted to Congress on June 14, 2010.⁴

The study request contained in the 2010 Consolidated Appropriations Act appears to have been motivated, at least in part, by a March 2008 Government Accountability Office study (the "GAO Study")⁵ regarding problems encountered in the collection of AD/CVD duties by U.S. Customs and Border Protection ("CBP") – and suggesting certain steps that could be undertaken to address the issue of shortfalls in duty collection. The GAO Study indicated that one mechanism that might improve the rate of collection of AD/CVD duties would be for Congress to consider moving toward a prospective (as opposed to retrospective) system for the collection of such duties.⁶ In this regard, GAO recommended that Congress obtain an analysis "on the relative advantages and disadvantages of prospective and retrospective AD/CVD duty systems."⁷ The language of the study request contained in the 2010 Consolidated Appropriations Act (including the goals to be addressed by the study) is largely taken verbatim from the GAO Study.⁸

Retrospective and Prospective Systems. Before turning to the specific strengths and weaknesses of retrospective and prospective systems for collecting AD/CVD duties, it is helpful to clarify what is commonly understood by these

⁴ *Id.*

⁵ U.S. Government Accountability Office, *Antidumping and Countervailing Duties: Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection*, Doc. No. GAO-08-391 (March 2008) (hereinafter "GAO Study").

⁶ GAO Study at 36. GAO repeated this suggestion in a July 2008 letter. *See* Letter from GAO to the House and Senate Appropriations Committees, "Agencies Believe Strengthening International Agreements to Improve Collection of Antidumping and Countervailing Duties Would Be Difficult and Ineffective," Doc. No. GAO-08-876R (July 24, 2008) (hereinafter "2008 Letter").

⁷ GAO Study at 47; *see also* 2008 Letter at 2.

⁸ The GAO suggested that its proposed study should address the extent to which each type of AD/CVD duty system would address the following five goals: "remedying injurious dumping or subsidized exports, minimizing uncollected duties, reducing incentives and opportunities for importers to evade {AD/CVD} duties, effectively targeting high-risk importers, and creating a minimal administrative burden." GAO Study at 47.

designations. For example, the GAO Study describes the systems used in Canada, Australia, and the European Union ("EU") as "prospective," even though each of those systems is somewhat different.⁹ According to GAO, each system is "fundamentally prospective" because "the {AD/CVD} duties assessed at the time a product enters the country are essentially treated as final."¹⁰ Accordingly, for purposes of this discussion, the defining characteristic of a "prospective" system is that such a system does not in general adjust the level of duties levied at the time of entry – regardless of whether the actual level of dumping or subsidization for the imports at issue may have differed from this "prospective" duty rate.¹¹

⁹ According to the GAO, the Canadian government calculates a "normal value" for products subject to AD duties. For all future imports, if the normal value of the goods exceeds the export price, the importer owes AD duties in an amount equal to the differences between the two prices. GAO Study at 37. Canada may review the normal value, and calculate a new normal value for all future imports, but it generally will not increase the amount of duties owed on prior imports. *Id.* at 38. *See also* Canada Border Services Agency, "Assessment of Anti-Dumping and Countervailing Duties Under the Special Import Measures Act," Memorandum D14-1-7 (May 15, 2000), available at <http://www.cbsa-asfc.gc.ca> (last visited April 13, 2010).

In Australia, AD duties have two components, one fixed and one variable. The fixed component is the difference between the normal value and the export price during the AD duty investigation. The variable component consists of additional duties that will be assessed if an exporter lowers its price for an individual transaction below what is charged during the investigation. The additional duties will be assessed at an amount equal to the difference between the two prices. Australia periodically reviews the normal value and makes any adjustments on a prospective basis. GAO Study at 38. *See also* Australian Customs and Border Protection Service, *Dumping and Subsidy Manual* (June 2009) at 131-132, available at <http://www.customs.gov.au> (last visited April 13, 2010).

In the EU, the percentage difference between the normal value and the export price is used to set an AD/CVD duty rate, which is applied to all future imports. This rate may be reviewed, and a new rate of duty calculated, but any new rate will typically affect only future imports. GAO Study at 38-39. *See also* Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, available at <http://ec.europa.eu> (last visited April 13, 2010).

¹⁰ GAO Study at 37.

¹¹ As discussed in more detail below, prospective systems typically have some type of mechanism (as required by the WTO) providing at least a theoretical opportunity for importers to receive "refunds" for duty overpayments (i.e., situations where the actual level of unfair trade for imports is lower than the rate assessed upon entry), but in general only allow for duty rates to be increased on a "prospective" basis (i.e., there is usually no way to increase duties on imports that are dumped or subsidized at a level greater than the rate assessed upon entry).

By contrast, the United States has a "retrospective" system that accounts for the actual amount of unfair trade taking place.¹² At the completion of an AD/CVD investigation in the United States that results in the imposition of relief, Commerce issues an AD/CVD order, which sets forth the rates applicable to specific exporters and an "all others" rate for those exporters that did not receive a separate rate.¹³ This order instructs CBP to collect cash deposits at the time of importation at those rates on all merchandise subject to the order. Such merchandise, however, may also be subject to an administrative review by Commerce subsequent to the issuance of the AD/CVD duty order. As the GAO explains, "during the administrative review, Commerce analyzes previous imports to determine the *actual level of dumping or subsidization* for those imports."¹⁴ At the conclusion of the administrative review, a final duty rate – also known as a "liquidation rate" – is established for the merchandise. Commerce transmits the final duty rate to CBP through liquidation instructions and CBP instructs staff at each port of entry to assess final duties on all relevant entries. The liquidation process is complete when CBP refunds money (if the cash deposit rate was higher than the liquidation rate) or issues a supplemental bill (if the liquidation rate is higher than the cash deposit rate).¹⁵

The Retrospective AD/CVD System Employed in the United States Has Significant Advantages Over Prospective Systems, and Is Far Better Suited to Meeting Each of the Goals Articulated in the Study Request

The retrospective system employed by the United States enables administrators to accurately measure the amount of dumping or subsidization associated with any entry of imports subject to an AD/CVD order. In particular, the Department of Commerce can and does adjust AD/CVD duties up or down as necessary to ensure that the duties levied accurately reflect what is happening in the market.

Prospective systems, by definition, have much less flexibility and accuracy. As noted, prospective systems generally make no adjustment to the duties assessed on particular imports to account for the actual level of dumping or subsidization

¹² See 19 C.F.R. § 351.212(a) (2009) ("Unlike the systems of some other countries, the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported.")

¹³ See 19 U.S.C. §§ 1671e, 1673e (2006).

¹⁴ GAO Study at 10 (emphasis added).

¹⁵ *Id.* at 10-11; see also GAO Letter at 5. If the cash deposit rate is equal to the liquidation rate, CBP does not issue a refund or a supplemental bill and the entry is liquidated "as entered." GAO Study at 11.

associated with such imports. Instead, such systems generally apply a prospective duty rate (based on past practices of a given foreign producer or exporter) to imports at the time of entry. Where reviews are conducted to update these prospective duty rates, these adjustments are typically only applied to future imports, again on a prospective basis and without consideration of the actual level of unfair trade associated with such future imports. In this way, prospective systems rely on evidence of past behavior, rather than the actual facts applicable to particular sales in the market.

Because of these differences, the U.S. retrospective system offers numerous, compelling advantages over prospective systems:

- * A retrospective system provides for more accurate calculations of AD/CVD duties than a prospective system.
- * A retrospective system discourages importers and foreign producers from taking advantage of situations in which duty rates are too low to account for the actual level of dumping or subsidization occurring in the market. By contrast, prospective systems fail to address – and may even incentivize – increased levels of unfair trade that may occur when prospective duty rates are too low.
- * A retrospective system treats all importers and foreign producers fairly. In a prospective system, importers and foreign producers who trade fairly in the market may be at a significant disadvantage vis-à-vis importers and foreign producers that do not (particularly where prospective duty rates do not act to fully offset such unfair trade).
- * A retrospective system does not penalize foreign producers or importers where selling practices are revised to eliminate dumped or subsidized transactions. Because prospective systems typically do not revise the amount of duties assessed to account for actual sales practices, foreign producers and importers may (in the absence of a meaningful refund procedure) be forced to pay duties even when they are not engaged in unfair trading.
- * A retrospective system encourages support for open markets, because domestic producers and workers as well as importers trading fairly can be confident that they will compete on a level playing field. Prospective systems may permit substantial volumes of unfair trade to enter the market without adequate remedy, even when AD/CVD orders are in place – thereby undermining confidence in trade laws.

- * A retrospective system is designed to assess and collect duties that fully offset unfair trade practices occurring in the market. While collection of additional duties that may be assessed as a result of reviews occurring after entry of merchandise sometimes presents collection challenges, it is important to understand that such duties will not even be assessed under a prospective system.

Given these facts, it is clear that the current retrospective system employed in the United States is superior to prospective systems in achieving each of the six goals set out in the study request. The key points in this regard are summarized in Table 1, which is followed by a detailed discussion of each goal:

Table 1

A RETROSPECTIVE SYSTEM IS SUPERIOR TO A PROSPECTIVE SYSTEM WITH RESPECT TO EACH OF THE CONFEREES' GOALS

GOALS	Prospective System	Retrospective System
Remedying dumping and subsidization	Failure to assess accurate duties can encourage and reward unfair trade	Accurate assessment of duties effectively addresses unfair trade
Minimizing uncollected duties	Many appropriate AD/CVD duties likely never assessed, much less collected	Gives administrators power to collect all appropriate duties
Reducing incentives for evasion of AD/CVD duties	Importers may be encouraged to evade duties by shipping when prospective duties are too low	Administrators' ability to assess accurate duties discourages evasion
Effectively targeting high-risk importers	Can reward high-risk importers by creating opportunities to manipulate the system	Treats all importers fairly; allows administrators to focus on high-risk importers
Addressing the impact of retrospective rate increases on importers	In absence of retrospective rate increases, importers engaging in fair trade can be seriously disadvantaged vis-a-vis those importing dumped and subsidized goods.	Potential for retrospective rate increases means that all importers pay accurate duties
Creating a minimal administrative burden	Any administrative savings come at the expense of accuracy	Represents minimal burden necessary for effective and equitable trade law enforcement

1. Remediating injurious dumping or subsidized exports to the United States. This is the most important goal of our AD/CVD duty system. The same conference report that directed Commerce to take up the current study also emphasized the importance of preventing unfairly-traded imports from distorting the U.S. market:

The conferees are determined to ensure that the United States Government upholds its responsibility to enforce trade laws, particularly with China. If trading partners do not abide by the rules that are set in the global trading system, United States firms are unable to compete on a level playing field. *The United States Government has an obligation to ensure that U.S. companies are not forced to compete with foreign companies that are engaged in unfair trading practices.*¹⁶

The conferees' statement is consistent with Congress's longstanding policy regarding the importance of effective AD/CVD laws.¹⁷ Moreover, given the ongoing manufacturing crisis facing U.S. companies and workers, including the fact that the United States lost almost 5.8 million manufacturing jobs from July 2000 to March 2010 (33.2 percent of all such jobs in the country),¹⁸ the additional job losses resulting from increased unfair trade could be catastrophic. One recent study concluded that as a result of unfair trading practices in China alone – including China's provision of subsidies and the creation of the type of closed markets that lead

¹⁶ H.R. Rep. No. 111-366, at 607-608 (2009) (Conf. Rep.) (emphasis added).

¹⁷ *See, e.g.*, S. Rep. No. 96-249 on the Trade Agreements Act of 1979 at 37, *reprinted in* 1979 U.S.C.A.A.N. 423 ("{s}ubsidies and dumping are two of the most pernicious practices which distort international trade to the disadvantage of United States commerce"); H. Rep. No. 98-725 on the Trade Remedies Reform Act of 1984 at 19, *reprinted in* 1984 U.S.C.A.A.N. 5145 ("Basically, the countervailing duty and antidumping law should be used as Congress intended to try to ensure free and fair competition."); "Statement as to How the Uruguay Round Agreements Achieve Congressional Negotiating Objectives," at 9, *reprinted in* H.R. Doc. No. 103-316 on the Uruguay Round Agreements Act of 1994 ("URAA") at 1137 ("U.S. dumping and countervailing duty laws will continue to be the most important and most effective U.S. response to unfair trade practices."); "Statement as to How the Uruguay Round Serves the Interest of United States Commerce," at 8, *reprinted in* H.R. Doc. No. 103-316 on the URAA at 1151 ("One of the most significant U.S. accomplishments in the Uruguay Round negotiations was tightened disciplines on the use of subsidies by foreign governments.")

¹⁸ *See* U.S. Bureau of Labor Statistics Series CES3000000001 (all manufacturing employees) (showing a decline from 17,321,000 in July 2000 to 11,579,000 in March 2010) (17,321 – 11,579 = 5,742; 5,742 / 17,321 = 0.332 = 33.2 percent).

to dumping – 2.4 million American jobs were lost or displaced.¹⁹ Another study concluded that over a single three-year period, unfairly-traded imports of hot-rolled steel from Brazil, Japan, and Russia cost domestic producers of that product almost \$2.7 billion in revenue²⁰ – lost revenue that certainly hindered the ability of U.S. firms to hire American workers.

There is no question that a retrospective system such as that used in the United States is vastly superior to prospective systems in terms of remedying injurious dumping or subsidized exports – and in terms of achieving the repeatedly stressed goal of Congress to eliminate unfair trade and ensure a level playing field in the U.S. market.

The entire purpose of the administrative review system employed under U.S. trade law is to precisely calculate the actual level of unfair trade associated with particular imports, and to calibrate duties to offset that amount, and only that amount. Where foreign producers and exporters revise their selling practices to eliminate dumped and subsidized trade after an order is entered, the review system allows them to request a review, demonstrate their change in selling practices, and to eliminate any unfair trade duties on fairly-traded merchandise. (Indeed, such producers will be refunded any AD/CVD cash deposits associated with fairly-traded imports, along with interest.) In this circumstance, the law directly incentivizes and rewards foreign producers that revise practices to trade fairly in the U.S. market. It also serves to implement the best remedy for U.S. producers and workers – namely an elimination of dumped and subsidized imports and the chance to compete fairly in their own market.

Where foreign producers and exporters continue to trade unfairly in the U.S. market after an order is issued – or increase the level of dumping or subsidized trade – the U.S. system also offers a calibrated and accurate response, geared to precisely offset the level of unfair trade. In this situation, U.S. producers and workers may request a review of a foreign producer's imports. To the extent that the cash deposits collected upon entry are insufficient to account for the actual level of dumping or subsidization associated with particular imports, duties will be revised upwards and an additional bill for unfair trade duties will be sent to the importer. Once again, the law operates to remedy the exact level of unfair trade occurring in the market.

¹⁹ Robert E. Scott, "Unfair China Trade Costs Local Jobs," *EPI Briefing Paper # 260* (March 23, 2010), available at <http://www.epi.org> (last visited April 14, 2010).

²⁰ Alliance for American Manufacturing, *Enforcing the Rules: Strong Trade Laws as the Foundation of a Sound American Trade Policy* (2007) at 76.

Prospective AD/CVD systems are inferior in terms of offering an effective and accurate remedy for unfair trade. While such systems again differ somewhat in their operation, they share the common trait that duties are typically not revised after goods are entered to account for differences between the prospectively assessed duty rate, and the actual level of unfair trade associated with particular imports. This fundamental and defining attribute of prospective systems explains why they are likely to be much less effective in remedying unfair trade practices.

In essence, prospective systems allow foreign producers and exporters to increase the level of unfair trade associated with their exports after an order is issued – while being assessed a prospective duty rate that does not account for this higher level of unfair trade. As the GAO report states:

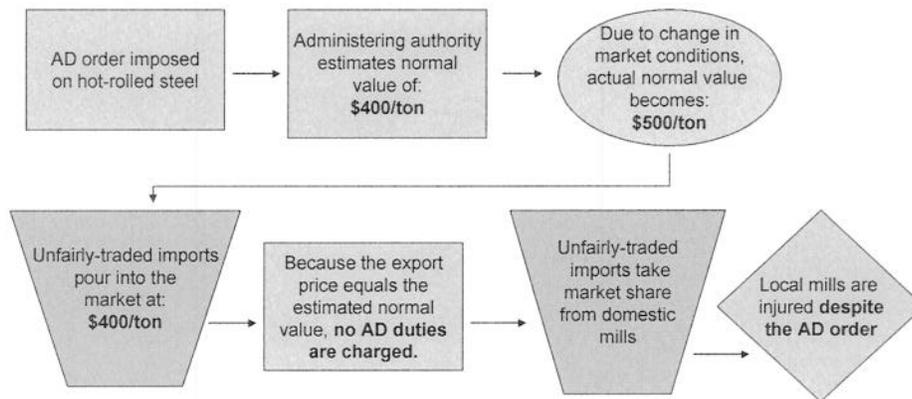
[T]he amount of {AD/CVD} duties an importer is assessed is based on dumping or subsidization that occurred in a previous period. As a result, if the amount of dumping or subsidization changes, the amount of duties paid in the current period may not equal the amount of dumping or subsidization that is currently occurring.²¹

This opens up the potential for large volumes of unfair trade to enter an importing market without effective remedy.

By way of example, some prospective “normal value” systems establish a normal value or reference price for imports and assess a duty based on the difference between the export price and the normal value. If the foreign producer has been assigned a normal value for imports of hot-rolled steel of \$400/net ton (“NT”), for example, and future exports from that producer sell for less than \$400/NT, duties will be charged in an amount equal to the difference between the export price and the normal value. No duties, however, will be charged so long as the export price equals or exceeds \$400/NT. The problem with this type of system, of course, is that normal values can and do change dramatically through time – e.g., where a foreign producer’s home market prices (with a price-based normal value calculation) or costs (with a cost-based normal value calculation) increase substantially. In this regard, and with reference to our example above, if the foreign producer’s normal value increases to \$500/NT (due to higher prices or costs in the home market), that producer can dump steel at \$400/NT – a price 20 percent below the fair value – without *paying any duties at all*.

²¹ GAO Study at 40.

Example of How a Prospective System Can Encourage Unfair Trade and Lead to Additional Material Injury



It is possible, of course, that in the example above the normal value will eventually be adjusted upward to \$500/NT, through a review under the prospective system. Such an adjustment, however, will not repair the damage caused by unfair trade while the normal value was too low. Nor will it prevent future surges of dumped and subsidized imports if the market changes such that the normal value is again too low.²²

It is important to recognize that exactly the same type of problems and loopholes can occur in cases involving non-market economies such as China, where surrogate values are used to calculate a "constructed" normal value. Once again, if market conditions change so as to increase the true constructed value of the merchandise at issue (valued using surrogate information), the use of a prospective

²² In general, the inaccuracies inherent in prospective systems can of course be reduced to the extent such systems are made to more closely resemble retrospective systems. In this regard, the greater the frequency of reviews conducted under a prospective system (to update normal values or duty rates), the more likely such systems will at least approximate the actual level of unfair trade associated with particular shipments. Having said this, any benefit in terms of ease of administration and simplicity would thereby be reduced or eliminated as well, and inaccuracies (often very substantial inaccuracies) will remain. The logical conclusion is that it is better to get it right to begin with – i.e., to employ a system like the United States that can assess the actual level of unfair trade for each transaction.

normal value established during an original investigation will be inadequate to remedy unfair trade. Chinese producers will be able to flood the market with merchandise priced below the true normal value – with no remedy other than the possibility of a review to increase the *prospective* normal value.

Similar problems occur in other types of prospective systems. The European AD system, for example, relies upon an examination of the difference between a foreign producer's normal values and export prices during a period of investigation, in order to calculate a percentage difference that is set as the prospective AD rate. This rate is then applied to all future imports of the product. The amount of the unfair trade duties owed for any given import is a simple *ad valorem* percentage of the export price for the merchandise. Obviously, such a system opens significant avenues to effectively avoid the remedial effect of an unfair trade order. Foreign producers or exporters can, for example, simply lower their export prices – and actually pay a *lower*, not higher, duty despite the greater margin of dumping. As the GAO recognized in describing the European system, "the lower the export price, the lesser the amount of duties owed; the higher the export price, the greater the amount of duties owed."²³ Not surprisingly, the GAO study concluded that "the EU system provides *no direct financial incentive* for firms to discontinue dumping."²⁴ Indeed, this system may actually encourage dumping.

In sum, *all* prospective systems suffer from the common flaw of failing to use actual, current information to determine AD/CVD liability. This in turn undermines their remedial effect and opens up significant loopholes for unfair trade.

One final point should be noted, namely that prospective systems are required by WTO rules to have some procedure in place to provide refunds to importers when the prospectively assessed duty is too high – *i.e.*, when the actual level of unfair trade for a given import is lower than the assessed duty.²⁵ In this respect, calling such

²³ GAO Study at 39; *see also* Max Planck Commentaries on World Trade Law: WTO – Trade Remedies, Vol. 4 at 817 (2008) ("In a prospective duty assessment system absent a request for a refund or interim review, more anti-dumping duties will be collected on imports from a foreign producer or exporter subject to an *ad valorem* dumping margin if they raise prices after the investigation.")

²⁴ GAO Study at 39 n.76 (emphasis added).

²⁵ *See* WTO Antidumping Agreement Art. 9.3.2 (providing that when the amount of an AD 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.") *See also* GAO Study at 38 ("Under Canadian law, importers . . . may request a redetermination of the normal value or export price after duties have been assessed on a transaction for the purpose of obtaining a refund."); *id.* at 39

systems “prospective” is somewhat misleading, in that they provide unbalanced rules with respect to the possibility of duty refunds, as opposed to additional duty assessments. In other words, importers may have a right to get duties back if they pay too much – but have no obligation to pay more duties where the assessed rate is too low. In practice, there is some question whether so-called “refund reviews” are fully and meaningfully available to importers under the structure of many prospective systems.²⁶ Nonetheless, the potential “one-way street” nature of prospective systems (whereby importers are given a key right that domestic producers and workers are not) offers yet another respect in which they fail to offer an effective remedy for unfair trade practices.

As the above makes clear, there is no question that a retrospective system (such as that used in the United States) is vastly superior to prospective systems in terms of remedying injurious dumping and subsidized imports.

2. Minimizing uncollected duties. One argument that is sometimes put forward in favor of prospective systems is the purported greater ease in collecting AD/CVD duties – and the elimination of the problem of uncollected duties resulting from adjustments made in the administrative review process. Indeed, this is the very suggestion that led the GAO to recommend the instant study of prospective and retrospective systems.²⁷

In reality, concerns regarding uncollected duties offer no legitimate argument whatsoever in favor of prospective systems. The argument itself is based upon a fundamental flaw in logic. To the extent one is concerned about CBP's ability to collect additional duties that are levied *as a result of administrative reviews*, switching to a prospective system would completely fail to rectify that problem. As shown above, the additional duties that may present collection challenges under a retrospective system will *not even be assessed* under a prospective system. Claiming that collection efforts will improve if we decide never to levy the duties in the first place makes no sense. It would be like legalizing mugging, and then bragging about the improvement in prosecuting violent crime and the reduction in the crime rate. Moving to a prospective system would not address the problem of uncollected duties, but would merely sweep it under the rug.

("EU regulations allow for the . . . refund of any duty paid determined to be in excess of the actual margin of dumping and/or subsidization of the exporter concerned.")

²⁶ See *Evaluation of EC Trade Defence Instruments* (Final Report Dec. 2005) at Annex 7, p. 16 (stating that in the EU, "the refund procedure appears to have gradually become irrelevant as a tool to obtain refund of duties paid in excess of what is necessary to offset the actual dumping margin.")

²⁷ See, e.g., 2008 Letter at 4.

The truth is that prospective systems will invariably feature very significant amounts of duties that are never collected – because they are never assessed to begin with. Seen in this way, it is evident that prospective systems do not “minimize uncollected duties” – but rather, guarantee that they will never be collected.

The problem of uncollected duties is one that can be, and should be, directly addressed through improvements in the collection system – not through undermining the basic effectiveness of our trade laws.²⁸

In this regard, numerous reforms should be strongly considered.

For example, the U.S. government should ensure that the various agencies charged with enforcement have the resources they need to adequately fulfill their responsibilities. In January 2008 Commerce had less than half (103 of 211) of the staff authorized to perform responsibilities related to AD/CVD duties.²⁹ Congress should also ensure that CBP has enough personnel to carry out its collection obligations, and that it has the right *type* of personnel – with expertise in the trade laws and the particular industries most impacted by unfair trade.

The government's collection efforts could also be improved by greater information-sharing with domestic parties. Such parties have both the expertise and incentive to provide invaluable assistance to government officials in identifying problem areas relating to AD/CVD collections (as well as circumvention and fraud issues), but are often hobbled by inadequate or non-existent access to critical Customs information. Working to enhance access while maintaining confidentiality of sensitive information could greatly assist in collection efforts.

The U.S. government should be more aggressive in its efforts to determine exactly what AD/CVD duties are not being collected. As the GAO has stated,

²⁸ It is important to keep in mind the actual facts with regard to duty under-collection. For fiscal years 2003 through 2006, the U.S. collection rate for AD/CVD duties was 96 percent. GAO Study at 8. Indeed, 84 percent of the total amount of uncollected AD/CVD duties was associated with only four products, all of which came from China: crawfish tail meat, garlic, honey, and mushrooms. *Id.* at 14 Importers purchasing from China are responsible for 90 percent of all uncollected AD/CVD duties. *Id.* While there is no question that duty under-collection is a significant issue that must be addressed, the problem has in many ways been concentrated in particular product areas and with respect to particular importers and countries. There is certainly no reason to conclude that the problem calls for a fundamental re-evaluation (and weakening) of our basic trade law system.

²⁹ *Id.* at 5; *see also* 2008 Letter at 9 (suggesting that the executive branch “develop a strategic human capital plan to ensure that Commerce has sufficient human capital to perform its roles in the {AD/CVD} duty process.”)

"CBP's problems collecting {AD/CVD} duties were first widely recognized following reporting based on the Continued Dumping and Subsidy Offset Act (CDSOA) of 2000."³⁰ Both domestic producers and Congressional Staff found CBP's detailed reporting on uncollected AD/CVD duties critical to analyzing CBP's collection efforts.³¹ Although the CDSOA (which required such detailed reporting) has been repealed, it is essential that government officials benefit from the experience with CDSOA – recognizing the value of reporting information and the assistance it can generate from interested parties.

In addition to the ideas mentioned above, the GAO Study identified several adjustments to the current system that could improve collection efforts:

- * ***Alter rules associated with new shipper reviews.*** The GAO study found that importers that had purchased goods from companies undergoing a "new shipper" review were responsible for approximately 40 percent of uncollected AD/CVD duties.³²

One potential response to this problem would be to make it more difficult for new shippers to obtain a separate duty rate. Commerce officials report that since new shippers have typically exported only one shipment of the goods subject to AD/CVD duties (which is almost always at a relatively high price), Commerce typically calculates a cash deposit rate of 0 percent for such producers.³³ Such a rate allows importers to bring in a significant volume of goods from such producers without paying any duty – even though retrospective duties may be levied after an administrative review. To avoid the inherent difficulties associated with collecting such duties, Congress could give Commerce the discretion to require companies applying for a new shipper review to have a greater volume of imports before it provides them with a separate AD/CVD duty rate.

- * ***Tighten the requirements for becoming an importer.*** The GAO Study reports that "the requirements for becoming an importer in the United States are minimal and do not involve any financial or

³⁰ GAO Study at 4.

³¹ *Id.*

³² *Id.* at 14.

³³ *Id.* at 42.

background checks."³⁴ In order to reduce the likelihood that importers ultimately prove unable to pay their duty liabilities, CBP or Congress could raise the requirements for a company applying to be an importer of record.

- * **Create stronger bond requirements.** CBP could establish stronger bond requirements based on its assessment of an importer's likely ability to pay AD/CVD duties. For example, the GAO Study mentioned the possibility that "CBP could create a set of criteria to judge each importer's ability to pay and require larger bonds of companies judged to have a lower likely ability to pay, which would increase the amount of {AD/CVD} duty revenue protected."³⁵
- * **Require a special AD/CVD duty bond.** Importers are required to post a security, usually a general obligation bond, when they import products into the United States.³⁶ This bond, which an importer obtains from a surety company, is generally equal to 10 percent of the amount the importer was assessed in duties, taxes, and fees over the preceding year (or \$50,000, whichever is greater).³⁷ CBP could require importers to provide a bond for each entry subject to AD/CVD duties in addition to the bond that is already required. As the GAO Study commented, "{s}ome representatives from surety companies said that this requirement could protect additional revenue while creating only a minimal burden on CBP."³⁸
- * **Extend the time for liquidating AD/CVD duties.** CBP has six months to liquidate entries subject to AD/CVD duties from the time that Commerce publishes a notice in the *Federal Register* establishing (1) the final AD/CVD duty rates or (2) the lifting of an injunction against liquidation, whichever comes last.³⁹ According to CBP officials, "this 6-month deadline can be very hard to meet, especially

³⁴ *Id.* at 43.

³⁵ *Id.* at 44.

³⁶ *Id.* at 26. *See also* 19 C.F.R. § 142.4 (2009).

³⁷ 2008 Letter at 5. GAO found one example of an importer that had outstanding AD/CVD duty bills amounting to \$35 million – an amount that was secured by a bond of only \$500,000. *Id.*

³⁸ GAO Study at 45.

³⁹ 19 U.S.C. § 1504(d) (2006).

when a large volume of imports needs to be liquidated or a case is extremely complex."⁴⁰ By extending the time for liquidation, Congress could "reduce the potential for entries to be 'deemed liquidated,' which can lead to foregone revenue if additional duties should have been paid."⁴¹

As these examples show, U.S. policymakers have many options to consider as they seek to improve CBP's ability to collect AD/CVD duties. This problem can and should be addressed directly, and there is absolutely no reason to undermine our overall trade law system merely to simplify collections.

3. Reducing incentives and opportunities for importers to evade antidumping and countervailing duties. As demonstrated above, a retrospective system allows authorities to levy accurate duties on all entries of dumped and subsidized imports. Such a system plainly makes it much more difficult for importers to evade AD/CVD duties. If foreign producers or exporters increase the level of dumping or subsidization after an order goes into effect, their imports will be subject to a potential review by trade law authorities and to additional duties to account for the increased level of unfair trade.

By contrast, prospective systems create obvious opportunities for importers to evade duties by taking advantage of situations when the prospective duty rates (or normal values) are too low to allow unfair trade to be fully offset. Foreign producers and exporters can simply increase shipments of unfair trade during periods when duties are inadequate to offset the full amount of dumping or subsidization – with the knowledge that no penalty will occur on those shipments. The only likely consequence is that rates *might* be increased (only on *prospective* shipments) as part of a subsequent review.

In terms of attempts to evade additional duties that may be assessed as part of an administrative review under the U.S. retrospective system, there is of course the possibility that collections will be complicated by inadequate AD/CVD cash deposits posted by importers. Once again, however, prospective systems offer no benefit in this regard, because they simply fail to assess *any* duties to account for such increased levels of unfair trade. In other words, while importers *may* evade such duties in a retrospective system, they will *certainly* do so under a prospective system. Once again, therefore, it is clear that a retrospective system is far more likely to reduce incentives and opportunities for importers to evade AD/CVD duties.

⁴⁰ GAO Study at 45.

⁴¹ *Id.* at 46.

4. Effectively targeting high-risk importers. For all the reasons discussed above, prospective systems are clearly inferior to retrospective systems in dealing with those importers who are most likely to manipulate the system.⁴² Indeed, as discussed above, an aggressive importer operating under a prospective system need only look for situations in which the assigned normal value or *ad valorem* rate is not sufficient to fully offset the unfair trade that is taking place. Faced with such a situation, an importer can bring large volumes of dumped and subsidized imports into the market without facing adequate repercussions.

Indeed, a prospective system may inadvertently put pressure on *all* importers to engage in unfair trade. The problem with allowing the type of loopholes described above is that any importer who fails to exploit them may be severely disadvantaged vis-à-vis more aggressive competitors. In other words, while a retrospective system treats all importers fairly – by ensuring that all instances of unfair trade are precisely offset – prospective systems raise the prospect of a "race to the bottom," whereby more responsible importers may be pressured to adopt the same practices as those who source large amounts of unfairly-traded merchandise.

By contrast, a retrospective system makes it easier to target high-risk importers. In the first place, it ensures that there is a legal consequence where high risk importers respond to AD/CVD orders by importing products with even greater dumping or subsidy margins. To the extent certain categories of importers – such as those who import from China, or those who deal with "new shippers" – represent a "high risk" of duty evasion, Congress, Commerce and CBP can work together to target and respond to such evasion. Indeed, as discussed above, the GAO has already put forward a number of suggestions in this regard, including proposals to require larger bonds from companies judged to have a lower likely ability to pay and at high risk for uncollected AD/CVD duties.⁴³

⁴² There are strong reasons to believe that any difficulties with uncollected duties are concentrated among a relatively small number of importers. According to the GAO, some 27,000 importers were subject to AD/CVD duties between October 2000 and July 2007. Of these importers, 520 (less than 2 percent of the total) had uncollected AD/CVD duties as of September 2007. *Id.* at 15. Furthermore, 20 of those 520 importers accounted for 63 percent of the uncollected duties. In fact, *one* single importer was responsible for \$122 million in uncollected duties – a figure equal to 20 percent of the total. *Id.* at 16. As such, the problem of high risk importers appears to apply to a relatively small percentage of the total, and remedial efforts should obviously be as focused as possible in dealing with these offenders.

⁴³ *Id.* at 44 (emphasis added); see also 2008 Letter at 5 (stating that "CBP's standard bond formula is insufficient to protect {AD/CVD} duty revenue in some cases").

5. Addressing the impact of retrospective rate increases on U.S. importers and their employees. In considering this goal, several points should be kept in mind. First, the possibility of retrospective rate increases has no impact on U.S. importers who import *fairly-traded products*. The only U.S. importers who face the potential for retrospective rate increases with respect to AD/CVD duties are those who import items from foreign industries that have already harmed U.S. producers and workers by their shipments of dumped and subsidized goods, and that continue to ship unfairly-traded products to this market.

Second, while this goal only mentions rate increases, it is important to recall that in a retrospective system duty rates may be adjusted up *or down* as necessary. Indeed, the GAO found that rate increases took place in only 16 percent of the instances they reviewed. By contrast, rates *declined* 24 percent of the time. Furthermore, half of all rate increases were four percentage points or less.⁴⁴ Thus, the retrospective nature of our system serves to *benefit* importers when unfair trade is reduced or eliminated, and only imposes additional costs when unfair trade increases.

Third, when additional duties are imposed on a retrospective basis, those duties are precisely calibrated to offset the actual level of dumping or subsidies. In other words, importers are not required to pay duties that increase the price of merchandise beyond its fair value, but rather pay only the amount of duties that will place unfairly-traded products on an equal footing with fairly-traded merchandise.

Fourth, it is important to evaluate the effect of potential retrospective rate increases on the importing community as a whole (as well as on all other market participants) – not just the impact on importers that are bringing in unfairly-traded merchandise. It must be acknowledged that a prospective system *would* be better for importers that focus on sales of unfairly-trade products, as well as foreign producers that supply such products. As discussed, a prospective system would provide numerous opportunities for such entities to evade duties and ship dumped and subsidized merchandise with little or no consequence. By contrast, however, a retrospective system is far better for importers, domestic producers and foreign producers engaging in fair trade. It ensures that everyone is playing by the same set of rules in the market. It removes the pressure for other market participants to adopt the practices of unfair traders. And it ensures that success will be the reward of hard work and innovation, as opposed to unfair practices such as dumping and subsidization.

⁴⁴ GAO Study at 4.

Finally, while it is sometimes argued that a prospective system would be simpler and provide greater certainty to importers and market participants,⁴⁵ that simplicity would come at the expense of accuracy – and would permit and even encourage distortions throughout the market. In this regard, any added complexity and time in getting things right is more than justified by the need to effectively and accurately combat unfair trade – the very purpose of the entire system.

6. Creating minimal administrative burden. There are significant administrative burdens associated with both retrospective and prospective systems.⁴⁶ Once again, to the extent that retrospective systems create additional administrative tasks, these are the direct result of gathering and analyzing information to determine the actual level of dumping or subsidization associated with particular imports – as opposed to relying upon the assumptions and guess work inherent in prospective systems. Again making an analogy to the criminal justice system, it would be far simpler and would reduce administrative burden to decriminalize any number of harmful activities – but that would come at the expense of public safety and the fair administration of justice. Similarly, ignoring the impact of unfair trade practices that are not captured in a “prospective” duty rate may simplify the system, but it would greatly reduce the effectiveness of the laws and expose American companies and workers to devastating trading practices. While of course every effort should be made to increase administrative efficiency where possible, a properly-functioning retrospective system represents the “minimal administrative burden” necessary for the effective enforcement of our trade laws.

* * *

At the end of the day, our trade laws not only serve to provide a level playing field for American workers and businesses, but are an essential element in promoting support for open markets and the global trading system. It is essential that our citizens have confidence that market distortions like dumping and subsidies will be vigorously opposed and effectively remedied, and that American workers and producers will be given a fair opportunity to compete for the fruits of enhanced trade. As described above, moving to a prospective AD/CVD system would open enormous avenues for foreign producers to take advantage of our market through unfair trade, and would severely lessen confidence in the fairness of the system. Our current trade law system is the most transparent, accurate and equitable in the world,

⁴⁵ See Rikard Lundberg, *Deemed Liquidation: A Case for the Statutory Amendment of U.S. Customs Law Governing the Collection of Antidumping and Countervailing Duties*, 83 Denv. U. L. Rev. 471, 486 (2005).

⁴⁶ GAO Study at 41 (“both prospective and retrospective {AD/CVD} duty systems may involve complex processes for determining appropriate {AD/CVD} duty rates”).

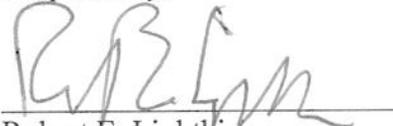
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and we should be looking for ways to strengthen it – not weaken it – if we want to promote greater support for global trade.

Conclusion

For the reasons given throughout this submission, the retrospective system for applying AD/CVD measures has numerous and compelling advantages in comparison with a prospective system – and is far better suited to achieving the goals being examined in the present study. It is imperative that the United States retain its retrospective system, and maintain an effective remedy against unfair trade for American companies and workers.

Respectfully,

A handwritten signature in black ink, appearing to read 'R. Lighthizer', written over a horizontal line.

Robert E. Lighthizer
James C. Hecht
Jeffrey D. Gerrish

*On behalf of United States Steel
Corporation*