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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

Re: Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems; Request for Comment and Notice of a Public Hearing; Comments of the Southern Shrimp Alliance

Dear Deputy Assistant Secretary Lorentzen:

The following is submitted on behalf of the Southern Shrimp Alliance ("SSA"), in response to the notice published by the Department of Commerce ("Commerce") on March 31, 2010, inviting comments and announcing Commerce's intent to hold a hearing regarding the captioned matter. 75 Fed. Reg. 16079 ("Commerce's Notice"). SSA is a non-profit alliance of members of the shrimp industry in eight states committed to preventing the continued deterioration of America's domestic shrimp industry and to ensuring the industry's future viability. SSA serves as the national voice for the shrimp industry in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Texas.

The domestic warmwater shrimp industry has participated in several antidumping duty investigations and administrative reviews, and members of SSA have participated in these proceedings as the Ad Hoc Shrimp Trade Action Committee. In addition, for the last several years SSA has worked extensively with Congress and U.S. Customs and Border Protection ("Customs") to improve and enhance enforcement of the antidumping duty orders on shrimp imports.

Commerce's request for comments.

As stated in Commerce's Notice,

> in the conference report accompanying the 2010 Consolidated Appropriations Act, Public Law: 111–117, the conferees directed the Secretary of Commerce to work with the Secretaries of the Departments of Homeland Security and the Treasury to conduct an analysis of the relative advantages and disadvantages of prospective and retrospective antidumping and countervailing duty systems…. As part of its analysis, the conferees requested that the Department of Commerce (the Department) address the extent to which each type of system would likely achieve the goals of: (1) Remedying injurious dumping or subsidized exports to the United States; (2) minimizing uncollected duties; (3) reducing incentives and opportunities for importers to evade antidumping and countervailing duties; (4) effectively targeting high-risk importers; (5) addressing the impact of retrospective rate increases on U.S. importers and their employees; and (6) creating minimal administrative burden.

75 Fed. Reg. 16079.

SSA's experience with respect to the antidumping duty orders on shrimp is relevant to the analysis that Congress has requested from Commerce. In particular, the trade relief obtained by the domestic shrimp industry to address material injury caused by unfairly traded imports has been undermined by intentional efforts by foreign exporters and U.S. importers to evade antidumping duties and consequent difficulties with collecting duties owed to the U.S.

government. The problems related to the evasion of antidumping duties and the consequent undercollection of duties are not materially affected by a decision to employ either a retrospective or prospective system of assessment. Thus, the root causes of many of the concerns identified by Congress (minimizing uncollected duties; reducing opportunities for evasion; and effectively targeting high-risk importers) would not be meaningfully addressed by a change from a retrospective to a prospective system. Accordingly, in the agency's report to Congress, Commerce (in cooperation with Customs and Treasury) should address these problems and identify potential solutions that should be undertaken regardless of whether a retrospective system is maintained or a prospective system is introduced.

Undercollection of Antidumping Duties Is a Symptom of Larger Problems with the Administration of Trade Remedy Laws.

Antidumping duties began to be assessed on imports of shrimp products into the United States in fiscal year 2006. In the last four fiscal years, Customs' annual reports regarding duty collection have reported that a cumulative amount of over $68 million has gone uncollected over the last four years ($11.1 million in FY2006; $14.8 million in FY2007; $42.5 million in FY2008; and $0.4 million in FY2009). Although some portion of these reported amounts eventually may have been collected, these amounts also may underreport the amount of duties that have gone uncollected on shrimp because Customs appears to report only duties that were not collected on entries made prior to October 1, 2007 (before the Continued Dumping and Subsidies Offset Act ("CDSOA") was repealed). At the same time, while the agency's annual reports indicate that more than $186 million in collected antidumping duties have been made available to the domestic industry pursuant to the CDSOA, that amount is significantly less than the $255 million

in assessed antidumping duties on shrimp imports. Thus, more than one-quarter of the assessed antidumping duties on shrimp imports have not been collected.

The problem of undercollection has been concentrated with respect to two of the six antidumping duty orders imposed on shrimp imports. Customs' reports indicate that roughly $10 million of the $57 million in duties assessed on shrimp imports from India has gone uncollected. While significant, this pales in comparison to the agency's reports regarding shrimp imports from China. In four years, Customs indicates that a total of $1.6 million in antidumping duties has been collected on Chinese shrimp while, incredibly, more than *$53 million* in duties has gone uncollected. For the domestic shrimp industry, this means that for every dollar assessed in antidumping duties, Customs has been able to collect only *three cents*.

Perversely, this horrible record of undercollection with respect to Chinese shrimp may reflect Customs' efforts to address rampant intentional circumvention of the antidumping duty orders by foreign exporters and U.S. importers. These companies have avoided payment of duties in a number of ways and, in the case of many undercapitalized importers, have gone out of business before Customs can obtain payment of uncollected duties. They have abused an ill-considered exclusion to the antidumping duty orders granted by Commerce over the objection of the domestic industry,[1] have misclassified imports at entry (as a "type 1" import not subject to

[1] U.S. Customs and Border Protection, "Report to Congress on (1) U.S. Customs and Border Protection's Plans to Increase AD/CVD Collections and (2) AD/CVD Enforcement Actions and Compliance Initiatives" at 11 ("Based on an allegation from the domestic shrimp industry, CBP conducted a special operation centered on cargo examination and lab analysis to determine whether imports of shrimp from China were being misdescribed as "dusted" shrimp so that the shipments would fall outside of the scope of the AD order. CBP's operations confirmed the allegation. CBP determined that fourteen importers evaded the AD order, resulting in $5 million in lost revenue.")

antidumping duties),[2] and have unlawfully transshipped Chinese shrimp through countries not subject to antidumping duties.[3] Although some established U.S. importers have participated in such schemes to evade antidumping duties, over the last couple of years SSA has witnessed a proliferation of thinly capitalized new importing businesses with no previous history of import activity obtaining large volumes of shrimp imports. In fact, there is little doubt that these businesses have been set up for this sole purpose. Consequently, where Customs is successful in uncovering circumvention schemes and identifying import entries that should be subject to antidumping duties, the implicated importers – many of them undercapitalized – fail to pay the duties owed and go out of business, leaving no recourse for Customs or affected domestic producers.

SSA is, therefore, sympathetic to the substantial obstacles faced by Customs in both enforcing antidumping duty orders and collecting antidumping duties. As an agency, Customs' experience has led to the following basic conclusion: the longer the gap in time between import entry and assessment of duties on that entry, the more difficult it is for the agency to collect antidumping duties. With that truism in mind, the specific problem of undercollection of duties

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[2] "Issues and Decision Memorandum" (comment 7) regarding Third Administrative Review of Frozen Warmwater Shrimp from the People's Republic of China, 74 Fed. Reg. 46,565 (Sept. 10, 2009) (Final Results of Antidumping Duty Administrative Review) (noting that U.S. importers had misclassified subject merchandise as nonsubject merchandise and that the "entered value of subject merchandise has been under reported by certain importers to CBP . . . .").

[3] U.S. Government Accountability Office, "Seafood Fraud: FDA Program Changes and Better Collaboration among Key Federal Agencies Could Improve Detection and Prevention" GAO-09-258 (Feb. 2009) at 16 ("CBP and {U.S. Immigration and Customs Enforcement ("ICE")}'s shrimp transshipping investigation also highlights the connection between economic fraud and food safety. CBP and ICE's investigation found that foreign manufacturers and importers were not only attempting to circumvent antidumping duties by sending Chinese shrimp to the United States through Malaysia, but these companies were also evading an FDA import alert aimed at stopping adulterated Chinese shrimp from entering the United States.").

may seem to be most easily addressed by a switch from a retrospective to a prospective system of antidumping and countervailing duty assessment. SSA's experience, however, indicates that regardless of whether a retrospective or prospective system is employed, undercollection problems will persist so long as intentional efforts to circumvent trade remedies are not comprehensively addressed.

Antidumping duties are uncollected for a variety of reasons. Duties may not be collected, for example, because of Customs error, because of importer error, because of significant increases in assessment rates over deposit rates, or because of intentional circumvention of trade remedies. With the possible exception of mitigating duty collection problems associated with increases in assessment rates over deposit rates (dependent on how the relevant prospective system is structured), the same problems that exist under a retrospective system would exist under a prospective system of assessment.

The undercollection of duties is severe and is a symptom of larger problems with respect to the administration of the trade remedy laws in the United States. Moreover, the problem is growing rather than receding. Previous analysis of undercollection has tended to emphasize that antidumping orders on agriculture/aquaculture products experience the worst problems. There is, however, no reason why the problems of undercollection would be limited to these types of products. Indeed, in fiscal year 2009, Customs reported that 37% of the $295 million in uncollected duties were on imports subject to three antidumping duty orders of non-agricultural products: wooden bedroom furniture from China ($92.5 million); polyethylene retail carrier bags from Thailand ($11.6 million); and tapered roller bearings from China ($3.9 million).[4] By

[4] The amount of uncollected duties related to these orders exceeded the amount of collected duties during the same fiscal year. Customs reported that $65.1 million in collected

the same token, there is little reason to believe that the problem of undercollection will remain overwhelmingly concentrated with respect to antidumping duty orders on products of Chinese origin. According to Customs' reports, significant undercollection problems exist with respect to a number of antidumping duty orders on products originating from countries other than China. From SSA's perspective, many of the circumvention tactics employed by U.S. importers of Chinese shrimp products could be just as easily applied to many other products from many other countries.

SSA's experience generally accords with the findings of the Government Accountability Office ("GAO") regarding problems with duty collection. In studying duty collection shortfalls, the GAO noted that there are four key factors that contribute to uncollected AD/CV duties: (1) the nature of the retrospective component of the U.S. AD/CV duty system, under which the final amount of duties an importer owes can exceed the amount it pays when goods originally entered the country; (2) the administration of "new shipper" reviews; (3) Customs' inadequate standard bond requirements; and (4) minimal information-gathering about importers, which creates challenges to locating and collecting duties.[5] All four of these issues affect the U.S. shrimp industry and, taken as a whole, do not support a conclusion that a switch from a retrospective to prospective system of duty collection would remedy the most severe problems that currently exist.

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duties was made available to the domestic wooden bedroom furniture industry in FY2009; $1.8 million in collected duties on polyethylene retail carrier bags from Thailand to the domestic industry; and $1.1 million in collected duties on Chinese tapered roller bearings was made available to the domestic industry.

[5] 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, p.14 ("GAO Duty Collection Report").

The factors identified by the GAO's report essentially can be reduced to risk allocation. Where a trade remedy is in place in a retrospective system, a U.S. importer of goods subject to an antidumping or countervailing duty order is required to shoulder the risk of assessed duties that exceed cash deposits by an unpredictable amount. For some antidumping or countervailing duty orders, the risk posed to importers by a retrospective system can be absorbed as a cost of doing business. For other orders, the risk posed is so great that established importers are unwilling to shoulder the burden of potentially limitless liability because of the threat posed by the existence of the contingency to the continuing operations of the importer. Into this void steps the thinly-capitalized importer. Such an importer willingly accepts the same contingency rejected by established importers because the risk borne by the new importer is inherently different – liability is not limitless because it is capped by the extremely limited ability of the importer to pay additional duties owed.

With respect to the shrimp antidumping duty orders, SSA has monitored the import patterns related to so-called "new shippers." In one recent case, a Chinese exporter was able to avoid the imposition of a cash deposit rate based on a single sale made into the U.S. market. When the decision to not assign a deposit rate to the company was finalized, the exporter shipped substantial quantities of shrimp to the U.S. marketplace. The vast majority of those exports went to a single U.S. importer, an importer with no other significant importing activities outside of receiving goods from the purported new shipper. The circumstances regarding this exporter's sales indicate that established importers understood the risk posed by importing product from a company that avoided a cash deposit rate by virtue of a new shipper review and, as such, the risk of the additional duties that would be assessed on the "new shipper's" import entries were pooled in a corporate entity that did nothing other than import shrimp from the "new shipper." This

represents intentional circumvention of trade relief that is not directly addressed under current law.

The same type of risk allocation and risk absorption drives blatant unlawful efforts to circumvent trade relief, such as misclassification and transshipment. Just as imports entered with a cash deposit may be subject to substantially higher assessed duties, imports falsely entered into the United States eventually may be subject to high assessed duties once the fraud is uncovered. The same logic therefore applies and, on a monthly basis, SSA's monitoring of imports identifies new importing companies which exclusively import "dusted" shrimp (a product improperly excluded from the antidumping duty orders on shrimp) or shrimp from "Malaysia" or "Indonesia" that appears to come from a foreign exporter actively involved in transshipment. These importers pop up, import millions of pounds of product in circumvention of the trade remedy, and then disappear.

This experience has convinced SSA that steps must be taken – again, regardless of whether the duty assessment system is retrospective or prospective in nature – to limit the ability of such importers to facilitate the circumvention of trade relief. Customs' bonding requirements provide inadequate protection in this respect. Importers generally are required to post security, usually in the form of a bond, when they import products into the United States so that the government is protected against revenue loss in the event that the importer does not pay all final duties. Each importer generally is required to obtain a bond equal to the greater of $50,000 or 10 percent of the amount the importer was assessed in duties, taxes and fees in the preceding year.[6]

[6] See Enhanced Bonding Requirement for Certain Shrimp Importers, 74 Fed. Reg. 14,809, 14,810 (CBP Apr. 1, 2009) ("In response to importers' increasing failure to pay additional duties determined to be due at liquidation, CBP reconsidered the general bond formula

This bonding formula almost always is insufficient to protect AD/CV duty revenue for new importers because the final duty amounts owed will far exceed these thresholds, leaving the government able to collect only pennies on the dollar.

Customs has attempted to take steps to address revenue loss via its bonding authority. In 2005, as a test case, CBP applied a revised bonding policy to imports of shrimp from the six countries subject to AD orders. The new policy required importers to obtain a bond equal to the entire amount of estimated AD/CV duties for imports over the previous year. This enhanced bonding requirement, however, was eliminated after the World Trade Organization dispute settlement body criticized the program in response to challenges from the governments of India and Thailand.

In the wake of these adverse rulings, Customs reportedly has created a Bond Working Group to explore whether and to what extent risk factors can be incorporated into the traditional bond formula to address revenue loss, including risk factors that impact AD/CV duty collections. Customs also meets with sureties on a regular basis to discuss potential areas of collection risk or over-exposure, among other issues. The agency reportedly will continue to evaluate methods to improve the effectiveness of bonding in protecting against revenue loss. SSA strongly supports these efforts and believes that, in the short term, enhanced bonding requirements on importing companies that appear, on their face, to have been created to pool risk of eventual duty collection can be effective in preventing undercollection.

The more significant problem related to undercollection of AD/CV duties, however, is that there are very minimal requirements to become an importer of record. Customs collects

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which provides that the minimum continuous bond may be in an amount equal to the greater of $50,000 or ten percent of the amount of the previous year's duties, taxes and fees.")

very little information from companies that apply to become importers of record – typically just basic information such as name and address, as well as a taxpayer identification or social security number. Too often, companies drop their identification numbers in order to avoid paying duties, and it is relatively easy for them to obtain new ones. Importing companies often cease business operations by the time Customs attempts to collect duties that are owed, only to establish new entities, with new identification numbers, to import goods.

Given the limitations and impact on resources, Customs has not taken steps to implement financial and background checks on importers of record. At a minimum, the agency should perform basic information gathering and background checks to prevent importers that have ceased operations and failed to pay duties from simply establishing a new entity to become an importer of record. Congressional action to enact legislation that would impose basic requirements on parties seeking to become an importer of record (i.e., basic licensing requirements) would further augment Customs' response to the problem.

If more efforts are not undertaken to reign in importers that abuse U.S. trade laws, any change from a retrospective to prospective system of assessment would be academic with respect to the problems of undercollection and circumvention. In a prospective system, if there is an antidumping duty on a widget from country X and an importer claims that a widget produced in country X is really from country Y, only to be discovered to have fraudulently made the claim at a later time, Customs still will be faced with going back to collect duties on entries of merchandise that already have been made. There is no reason to believe that basic circumvention schemes will stop or even decrease if a prospective system is adopted. As such, SSA has little reason to believe that a change in the orientation of the assessment system will have any significant impact on either undercollection or circumvention.

Undercollection, circumvention, and the effectiveness of trade relief are issues of paramount importance to SSA. For five years, SSA has worked continuously to try to improve the administration of the antidumping duty orders in the face of concerted, consistent, and widespread intentional efforts to circumvent trade relief. SSA strongly supports any intelligently designed efforts to improve the collection of duties and prevent circumvention. Unfortunately, SSA's experience indicates that a change from a retrospective to a prospective duty assessment system is unlikely to minimize uncollected duties, reduce incentives or opportunities to evade trade relief, or improve the effectiveness of targeting high-risk importers. Nevertheless, there are many steps that should be taken – including those previously recommended by the GAO – that may achieve all of these objectives.

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Pursuant to Commerce's request, an electronic file containing our comments has been submitted to webmaster-support@ita.doc.gov. In addition, for the Department's convenience, the original and one copy of these comments are being submitted in printed form at the captioned address.

Respectfully submitted,

John Williams
Executive Director