Before The

Department of Commerce

International Trade Administration

Import Administration

COMMENT IN OPPOSITION TO:
DEDUCTING SECTION 201 DUTIES AND COUNTERVAILING DUTIES
FROM GROSS UNIT PRICE WHEN DETERMINING
THE APPLICABLE EXPORT PRICE OR CONSTRUCTED EXPORT PRICE
USED IN ANTIDUMPING DUTY CALCULATIONS

(submitted pursuant to 68 Fed. Reg. 53104 (2003))

Comment of
Energizer Battery Manufacturing, Inc.

SONNENBERG & ANDERSON
333 West Wacker Drive, 20th Floor
Chicago, Illinois 60606
Telephone: (312) 899-1100
Facsimile: (312) 899-1101

Of Counsel:
Steven P. Sonnenberg
M. Jason Cunningham

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INTRODUCTION

On September 9, 2003, Import Administration issued a Federal Register Notice entitled *Antidumping Proceedings: Treatment of Section 201 Duties and Countervailing Duties*. 68 Fed. Reg. 53104. This notice requests public comments in response to ongoing lobbying by certain parties for the agency to change its longstanding practice of calculating antidumping margins. The agency seeks public comment on the appropriateness of deducting section 201 duties and countervailing duties from gross unit price in order to determine the applicable export price or constructed export price used in antidumping duty calculations.[1] On behalf of our client, Energizer Battery Manufacturing, Inc. ("Energizer"), we hereby submit the following comment in opposition to the proposed change in antidumping duty calculations.

The proposed change to the agency's longstanding dumping margin calculation practice is inappropriate. The proposed calculation change would negatively impact U.S. manufacturers who utilize imported products to produce their goods, especially those U.S. manufacturers who compete on a global level and export their goods. The proposed calculation change confuses the distinct goals of protectionist escape clause measures with antidumping remedies and, likely, encroaches upon Presidential

[1] The Federal Register Notice references Section 201 duties. The present comment references Section 201 duties when discussing Section 201 investigations and the resulting Section203 duties imposed by the President in connection with a Section 201 investigation.

authority to define and modify Section 201 remedies. Further, the proposed change runs contrary to the policy of free trade and will likely invite retaliation by our WTO trading partners.

Discussion

1. *The proposed duty calculation change will harm U.S. manufacturers.*

At the heart of the proposed change is an effort to additionally increase antidumping duties against imported goods that also pay Section 201 or countervailing duties. As discussed in further detail below, antidumping duty margins are essentially calculated by subtracting the "export price" from "normal value" and dividing the difference by the export price. Deducting Section 201 duties and countervailing duties from gross unit price in order to determine the export price will lower the export price. Lowering the export price in the dumping margin duty calculation formula will automatically increase the antidumping duty that importers will be required to pay. The proposed change will injure U.S. manufacturers who utilize imported components to further manufacture upstream goods.

First, the increased antidumping duties will increase costs for U.S. manufacturers that rely upon imported goods on a go-forward basis. With the exception of legally suspect Byrd Amendment distributions to domestic producers of

like products, there is relatively little direct benefit to the domestic antidumping petitioners.[2] However the cost to domestic manufacturers / consumers is direct. Certain foreign producers who fall outside of the scope of an antidumping order also stand to directly benefit either through increased prices they will receive from the upward pricing pressure of the increased antidumping duties or, possibly, from increased market share for products that more competitively enter U.S. commerce without payment of the antidumping duties. The costs to domestic manufacturers and consumers of imported products under the proposed calculation change outweigh the benefits to intended beneficiaries.

It is one thing to ask manufacturers and consumers to suffer the consequences of increased prices resulting from the imposition of antidumping duties that "level the playing field" between domestic and unfairly imported articles, it is beyond fairness to impose further increased costs to U.S. manufacturers and consumers that artificially raise prices beyond a "normal value." This comment must be viewed within the context of the business community's growing discontent that domestic petitioners and the agency already comfortably pad the finer details of the antidumping calculations in

[2] On January 27, 2003 the WTO's Dispute Settlement Body ("DSB") adopted the Appellate Body Report (WT/DS217/AB/R, WT/DS234/AB/R adopted January 27, 2003) and the Panel Report (WT/D217/R, WT/DS234/R, adopted January 27, 2003 as modified) declaring the Continued Dumping and Subsidy Offset Act of 2000 a violation of WTO obligations. The U.S. requested a "reasonable period of time" to implement the recommendations and rulings of the DSB. The U.S. was initially allowed 11 months, until December 27, 2003 for implementation.

ways that tend to increase antidumping rates to levels that possibly exceed fair and normal levels.[3]

Second, the proposed calculation change presents serious difficulties for businesses that have already deposited antidumping duties for items subject to Section 201 or countervailing duties. In many cases, under the proposed duty calculation change, duties have been deposited and accounted but will likely cost businesses more than anticipated if final duty calculations adopt the proposed calculation change where duty deposit calculations did not.

The United States operates a unique, retroactive antidumping collection system. Importers are required to deposit antidumping duties at rates estimated by the agency. Liquidation of antidumping entries is suspended. Subsequent to entry and prior to liquidation, the estimated dumping rates are reviewed and adjusted by the agency to conform to subsequently calculated, final dumping rates. This unique process is highly effective at discouraging circumvention of U.S. antidumping cases.

[3] For example, when calculating antidumping margins the agency has been known to: (1) rely upon the best available (adverse) information when an exporter is unwilling or unable to provide specific data requested by the agency. While this punitive practice's effect of raising antidumping rates is understandable when a party is unwilling to provide data, it ignores practical realities that organizations may be unable to provide information in the exact format requested; (2) ignore below cost sales in the foreign market when determining normal value; and (3) compare individual prices to average costs when determining normal value. All of these practices can have the effect of increasing the antidumping margin beyond the actual "normal value."

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Within the context of the U.S. antidumping duty deposit system, remains the constant fact that businesses have strong profit incentives to know the whole cost of imported goods, including all taxes, fees, and duties at the time of entry. Often, imported goods have irretrievably entered commerce or have been subsequently advanced by further manufacture before the agency can finalize the dumping margin. Businesses that have taken precautions to avoid circumvention and prevent foreseeable causes of upward final antidumping margin factors will suffer if the proposed rule is applied to entries for which estimated duties have already been deposited under the current, longstanding calculation practice.

Proponents of the calculation change might argue that importers and manufacturers of imported goods, which are subject to antidumping and Section 201 or countervailing duties, are accustomed to operating in an uncertain final pricing environment inherent in the final duty calculation and that they should have expected increased final dumping duties such as those that could arise from the proposed calculation change. However, importers' knowledge that attempts to circumvent antidumping duties will likely result in increased duty demands naturally results in their taking actions to suppresses circumvention activities or other factors that could increase final dumping margins.

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While refunds of antidumping deposits that reflect overpayments are always welcome, U.S. manufacturers, like Energizer, rely on long-term, "total value" relationships with suppliers where costs can be reasonably and timely anticipated. Energizer expects its suppliers to increase product value so that Energizer can promptly pass that value through to consumers. The proposed calculation change could result in significant, unanticipated price increases for products that have already reached the consumer market, where price increases can no longer be recouped.

Additionally, U.S. manufacturers who process imported goods for export will suffer a competitive disadvantage on the global market when competing against goods that are produced without the burden of (increased) antidumping duties.

The agency has a longstanding practice of calculating antidumping duties without deducting section 201 duties from gross unit price in order to determine the applicable export price used in antidumping duty calculations. Although some of the agency's known practices tend to increase antidumping duties, e.g. by ignoring below cost home-market sales or by applying adverse "best known" data when companies are unable to provide specific information, the agency has refrained from artificially inflating antidumping margins through the application of the proposed rule. In the

vast arena of antidumping laws, the lack of precisely defined rules for calculating and adjusting a myriad of cost factors leaves some discretion in the hands of those officials who implement the law. When viewed within the overall context of antidumping margin calculations, U.S. business is better served under the current, longstanding practice.

2. The proposed calculation change confuses the distinct goals of protectionist escape clause measures and antidumping remedies against unfair trade practices, resulting in the encroachment of Presidential authority.

The United States and its trading partners, which are members of the World Trade Organization ("WTO"), have decreased tariffs and non-tariff barriers to historic levels in order to reap the mutual benefits of freer global trade. Historically, the United States has benefited economically and socially from trade liberalization, as espoused under the rules of the WTO. Like many domestic manufacturers, Energizer's domestic production facilities benefit from free trade in component materials that the company further advances within the Unites States.

The agreement establishing the WTO incorporates mechanisms for trade liberalization, but also provides mechanisms for dispute resolution and sanctioned retaliation for violation of the free trade regime created under this multilateral

convention.

It is worth noting that dumping is not prohibited by the WTO's rules. For example, member countries are under no obligation to affirmatively prevent their citizens from exporting dumped goods to e.g. the United States, and a country that prosecutes dumped goods, which are imported into its customs territory, is not required to uniformly, consistently, or even non-discriminatorily prosecute dumpers. Many antidumping cases are initiated at the request of a well-organized or consolidated group that can legally assert that they represent the relevant domestic, competitive "industry." Cases are prosecuted by the government, often in coordination with the interested domestic industry or based upon information initially gathered and presented by the domestic industry. Consequently, goods that are produced by better-organized domestic producers are more actively prosecuted for dumping. WTO and U.S. laws offer no assurance that all imported goods will be equally scrutinized or prosecuted.

The WTO merely empowers member nations to classify dumping as an "unfair" trade practice and to impose antidumping duties to "level the playing field" between dumped goods and similar domestic goods. While antidumping duties are not mandated, they are allowed, within the general framework and limitations articulated

in GATT's Article VI, as a response to a perceived unfair trade practice.

The WTO separately authorizes the imposition of escape clause measures. Section 201 duties are allowed for conceptually different reasons than antidumping duties. Where antidumping duties react to an unfair trade practice by imposing duties that return goods to a normal value, Section 201 duties represent an "escape clause" for countries to evade, under certain circumstances, the negative impacts that an industry may experience as markets become freer under the WTO. In contrast to antidumping duties, exporters of products to the United States that pay Section 201 duties are not accused of unfair trade practices. The Section 201 duties serve to temporarily and artificially increase market prices so that a fragile domestic industry may retool or reorganize itself into a more globally competitive market participant. The cause of a 201 duty comes about through the natural application of liberal trade policies.

Antidumping and Section 201 duties are authorized under the WTO regime for conceptually different reasons, and U.S. law recognizes this when it implements each type of duty through legally and administratively distinct mechanisms.

Under U.S. law, generally, "dumping" refers to the sale or likely sale of

commodities in an export market at a "less than fair value." 19 USC ' 1677(34). If the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value, and the International Trade Commission determines that an industry in the United States is materially injured or threatened with material injury or the establishment of an industry in the U.S. is materially retarded, antidumping duties will be imposed upon the imported commodities. 19 CFR ' 1673.

As mentioned in the preceding section, antidumping duties are imposed in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. Id. Normal value may be the price at which the foreign like product is first sold (or offered for sale) for consumption in the exporting country, in usual commercial quantities and in the ordinary course of trade. 19 USC ' 1677b(a)(1)(B). Where comparable foreign sales data is lacking in the exporting country, third country sales data may be substituted to construct the normal value. Id. Export price is the price at which the subject merchandise is first sold (or agreed to be sold) by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or for export to the United States, as adjusted. 19 USC ' 1677a(a). Constructed export price is the price at which the subject merchandise is first sold (or agreed to be sold) in the United States

before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or export, to a purchaser not affiliated with the producer or exporter, as adjusted. 19 USC ' 1677a(b).

In short, the dumping margin is essentially calculated by subtracting the export price from the normal value and dividing the difference by the export price. The purpose (and the WTO's enforced limit) of the antidumping duty is to level the playing field by raising the price of goods exported from foreign markets to their normal price. This is a device for correcting market distortions that may arise during the process of trade liberalization. If protectionist at all, antidumping duties are defensively protectionist against unfairly trade goods.

Section 201 duties create a market distortion. They are affirmatively protectionist and typically increase prices by either imposing tariff rate quotas or additional tariffs. Although essentially contrary to the trade liberalizing goals of the WTO, Section 201 duties represent a crucial relief valve for countries that discover that certain industries are globally uncompetitive.

Because Section 201 duties essentially run contrary to the fundamental principals of the WTO, U.S. statute vests ultimate discretion and responsibility for

determining Section 201 duties and tariffs with the President of the United States. This recognizes the executive branch's unique relationship with foreign governments and ensures the President's ability to craft a diplomatically viable domestic relief scenario. While the ITC and other agencies may provide information and advice regarding Section 201 relief, the statute clearly mandates that discretion rests with the President.

U.S. law correctly separates antidumping and Section 201 duty cases in accordance with their fundamentally different justifications and authorizations under the WTO regime. The legal standards differ and the investigation processes differ significantly. This results in a deliberate independence of these duties from each other. In contrast, the proposed rule attempts to administratively create a nexus between these duties, which has the additional effect of encroaching Presidential authority to carefully tailor and administer Section 201 remedies.

The proposed calculation change would wrest Presidential discretion from the executive branch by effectively increasing the Section 201 duties that he has carefully considered and imposed. The proposal to deduct Section 201 duties from gross unit price in order to determine the applicable export price or constructed export prices will increase antidumping duties in an amount that is directly related to and completely

dependent upon the Section 201 duty. The link is undeniable. If the president imposes a high Section 201 duty, the agency will automatically increase antidumping duties by a large amount. If the President imposes a lower 201 duty, the agency will correspondingly increase antidumping duties by a relatively lower amount. If the President removes the Section 201 duties, the antidumping duties will revert to their normal level. In most instances the agency will create an echo effect that will distort the President's Section 201 duty and, consequently, decrease the statutorily granted latitude of the executive branch to finely tune the Section 201 remedy.

3. The proposed change counters the WTO policy of free trade and will likely invite retaliation by our WTO trading partners.

The proposal's confusion of the separate underlying justifications between WTO authorized remedies against dumping and an escape clause as implemented by Section 201 will not only lead to the encroachment of Presidential authority in the United States, but may also violate United States obligations under the WTO. The WTO provides the framework for trade liberalization. However, it also provides a dispute resolution body through which member countries may allege that a violation of WTO rules has occurred. The dispute resolution mechanisms of the WTO can also authorize retaliatory actions against the offending nation.

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As mentioned above, the legal standards for imposing additional duties under Section 201 investigations are different from the legal standards for imposing antidumping duties. However, in light of the proposed calculation's creation of an undeniable link between Section 201 duties and antidumping duties, the necessary legal standards required by the WTO will not be satisfied. While an antidumping investigation requires a finding of material injury (or threat thereof) caused by imports sold at less than fair value, a Section 201 investigation requires a finding that imports are a substantial cause of serious injury to a domestic industry. The standards are distinct, and the investigation processes are distinct as well. Where an antidumping investigation relies on the substantial investigatory experience of Commerce for dumping margins and the ITC for questions of material injury, a Section 201 investigation relies almost entirely upon the ITC to determine whether imports are a substantial cause of serious injury during the investigation process.

Despite the clearly distinct legal standards and processes of these two investigations, the proposed calculation change suggests that we blur the line. From one perspective, it would increase corresponding antidumping duties based upon a Section 201 finding. Conversely, Section 201 duties are multiplied through the antidumping duty on like merchandise. For reasons similar to those discussed in the preceding section, our trading partners are likely to register well-founded objections.

The United States is working its way out of a recession. Trade, especially the exportation of U.S. goods, is a convenient vehicle to accelerate our recovery. However, key trading partners are already poised to impose retaliatory sanctions against carefully targeted U.S. goods for previous WTO decisions against certain U.S. trade policies, i.e. the recent decision against U.S. foreign sales corporations. Until now, our key trading partners have refrained from exercising the full extent of retaliatory sanctions that have been authorized. The WTO recognizes that it is an institution created by sovereign members. The organization does not pretend to enforce the sanctions it authorizes. Enforcement is often tied to political considerations. However, the proposed change, if declared to be a violation of WTO obligations, may provide incentive for our partners to impose additional retaliatory sanctions at a time when our recovery remains in its infancy.

CONCLUSION

We hereby advocate and respectfully request that the agency reject the proposal to deduct section 201 duties and countervailing duties from gross unit price in order to determine the applicable export price or constructed export price used in antidumping duty calculations. The proposal will injure domestic manufacturers and consumers more than it would help the intended beneficiaries. It violates discretionary authority

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that is statutorily vested in the President to fine tune Section 201 remedies. It creates an undeniable link between Section 201 duties and antidumping duties while ignoring the distinct legal standards and fundamental justifications for each investigation.

Please contact the undersigned if we can offer any further assistance in reaching a decision in this matter.

Respectfully submitted,

SONNENBERG & ANDERSON
333 West Wacker Drive, 33rd Floor
Chicago, Illinois 60606
Telephone: (312) 899-1100
Facsimile: (312) 899-1101

By:
Steven P. Sonnenberg

Of Counsel:
M. Jason Cunningham