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DELIVERY BY HAND

Ron Lorentzen
Acting Director, Office of Policy
Import Administration
Room 3713
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Re: Request for Public Comment—Unfair Trade Practices Task Force

Dear Mr. Lorentzen:

On behalf of several U.S. producers,[1] we are submitting the following comments for consideration by the Unfair Trade Practices Task Force, pursuant to the Department's notice dated May 27, 2004 (69 Fed. Reg. 30285).

As the Department's notice indicates, the Department's report, "Manufacturing in America: A Comprehensive Strategy to Address the Challenges to U.S. Manufacturers" (at 77-

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[1] These companies and unions include: Allegheny Ludlum, AK Steel Corporation; J&L Specialty Steel, Inc.; United Steelworkers of America AFL/CIO; Butler Armco Independent Union and Zanesville Armco Independent Organization, Inc.; Carpenter Technology Corp.; Crucible Specialty Metals; Electralloy Corp., Gerdau Ameristeel Corp.; Georgetown Steel Co.; Keystone Consolidated Industries, Inc.; North Star Steel Texas, Inc.; American Spring Wire Corp.; Insteel Wire Products Company; Sumiden Wire Products Corp.; Maui Pineapple Co., Ltd.; the International Longshoremen's and Warehousemen's Union; Allegheny Foundry Co.; Bingham & Taylor; Deeter Foundry, Inc.; East Jordan Iron Works, Inc.; LeBaron Foundry, Inc.; Municipal Castings, Inc.; Neenah Foundry Co.; Tyler Pipe and U.S. Foundry & Manufacturing Co.

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78), called for the formation of a task force "to investigate allegations of . . . trade practices and develop a strategy for pursuing their elimination." The report claimed that this "would eliminate the underlying distortions and thereby reduce the use of anti-dumping and countervailing duty actions." The report recommends (at 78) that "the task force should review the implementation of current trade remedy rules, such as the procedures governing new shipper reviews." Of course, if the task force could really eliminate dumping and subsidization by producers and governments in other countries, then the use of antidumping and countervailing actions would be reduced. We would, however, warn against a strategy of reducing the use of antidumping and countervailing duty actions by the expedient of making the governing laws and regulations less effective. Rather, the task force should look toward reducing the incidence of dumping and subsidization by making the enforcing laws and regulations *more* effective, and more likely to catch such practices, thereby discouraging the practices. These comments are directed towards that goal.

I. THE LAWS, REGULATIONS AND PROCEDURES REGARDING THE GATHERING AND SHARING OF INFORMATION SHOULD BE IMPROVED

Information is the lifeblood of trade remedies. The United States is far ahead of any other country in terms of its ability to collect information, and to make that information available to interested parties in trade proceedings. Nevertheless, improvements could be made to promote the flow of information within U.S. government agencies. Furthermore, gathering information in other countries is extremely difficult and access to this information should also be promoted. Finally, there are areas in which the burden of collecting information is heavier than realistically feasible.

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A. The Rules Regarding the Sharing of Information Among U.S. Agencies Should Be Improved

There has been a steady improvement in the availability of business proprietary information ("BPI") to the appropriate persons since the implementation of the Trade Agreements Act of 1979. Under Section 777 of the Tariff Act of 1930, as amended (19 U.S.C. § 1677f) and implementing regulations, BPI is now served directly on parties under administrative protective order ("APO") at the same time it is filed with the Department or Commission, and the Department and Commission promptly make available to parties under APO the BPI information that they have generated or gathered, including verification exhibits and margin calculation programs. Parties can now retain and use BPI information obtained under a Commerce APO in up to two subsequent administrative reviews. The end result has been much more effective participation by the parties able to comment meaningfully on the BPI information in a timely manner.

What remains missing is the sharing of information among the agencies, and the ability of parties to use BPI information gathered in the course of one agency's proceedings in another agencies' proceedings. Respondents are often required to submit production, sales and price information for similar time periods to both the Department and the Commission, for instance, and there is no requirement that the information be consistent between the submissions. Parties with APO access at both agencies that notice such discrepancies are powerless to bring the discrepancies to the attention of either agency.[2]

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[2] The persons to whom the Department may disclose BPI are limited to those listed in 19 C.F.R. § 351.306(a). The Department itself may disclose BPI information to employees of the Commission, but parties under APO do not have a similar ability. 19 C.F.R. § 201.6(a) indicates

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Furthermore, section 351.306(a) specifically limits the Department's disclosure of BPI to the Customs Bureau to those instances in which Customs is directly involved in conducting a fraud investigation relating to an antidumping or countervailing duty proceeding. This becomes a circular difficulty, if Customs cannot decide whether to conduct a fraud investigation if it does not have access to the Department's BPI. In the other direction, Customs has on occasion provided entry information to the Department in the context of an investigation or review, but such cooperation is not the rule, or formalized in any sense. Discrepancies exist between what an importer will tell Customs and what it will tell the Department, a tendency that will disappear if the importer knows that Customs and the Department will routinely share information about those entries.

We therefore recommend that section 1677f be amended to provide that BPI information provided to the Commission may be provided by the Commission to the Department, and vice versa, upon request by either agency, and that parties receiving information under APO from either agency may submit that information to the other agency for use in an appropriate proceeding. We recommend that, similar to the current Department rules regarding being able to retain and submit BPI information for up to the second review after the receipt of the information, parties can submit BPI information received during a Department proceeding to the Commission pertinent to periods up to a year before and a year after the period of investigation (for use in a sunset review, for example). Similarly, information received under APO at the

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that the Commission is to keep BPI confidential unless it is required by law to disclose it, and the Commission is not required by law to disclose to the Department.

Commission can be submitted to the Department pertinent to periods up to a year before and a year after the period of review or investigation.

With regard to sharing information between the Department and Customs, we recommend that Customs designate a person who is a specialist in a particular industry to be the liaison to the Department when an AD or CVD investigation is initiated, and that this person have complete access to BPI information for that investigation. That person at Customs may share that BPI information with other persons at Customs for the purpose of either conducting an investigation at Customs or for assisting the Department in its proceedings. 19 C.F.R. § 351.306(a)(3) should be revised to reflect that a fraud investigation does not have to be underway before BPI information can be disclosed to the appropriate people at Customs. On the other hand, upon the initiation of an investigation or review by the Department, Customs will routinely make available to the Department, for release under APO, all entry information collected for merchandise entered during the period of investigation or review.

B. The Collection of Information from or in Other Countries Should Be Improved

It is relatively easy to gather information in the United States, particular public information such as import and export data. It is harder in many other countries, due to restrictions on information or simply due the lack of easy access to the information. Information of use in trade remedy actions is often in the hands of persons not interested in the information becoming part of the record of such actions. The United States Government can play a more active role in the information-gathering process.

For example, section 308 of the Trade Act of 1974 (19 U.S.C. § 2418) provides that the U.S. Trade Representative "shall make available" to persons who request in writing information

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concerning "the nature and extent of a specific trade policy or practice of a foreign country with respect to particular goods, services, investment, or intellectual property rights, to the extent that such information is available to the Trade Representative, or other Federal agencies." If the information is not available within the U.S. government, the Trade Representative shall, within 30 days after receipt of the request, either request the information from the foreign government or decline to request the information and inform the person in writing of the reasons for the refusal.

In theory, even though this provision leaves the Trade Representative with ample discretion to simply decide to decline the request, it should be a powerful tool for obtaining information regarding trade practices in other countries. In practice, the provision is rarely used, and when used, produces no results. For example, the Copper & Brass Fabricators Council filed a request under section 308 on November 10, 2003, asking for information regarding certain Chinese governmental practices. The 30-day time period came and went with no formal response from the Trade Representative, and there has been nothing from the Trade Representative since then. In fact, the Trade Representative has not informed the Council if it is declining the request.

Section 308 could be used "as is," with simply a commitment by the Trade Representative to be diligent in responding to requests pursuant to the provision. It would be more effective, however, if there were multiple procedures with time frames built into the statute. Thus, the statute could be amended to provide that within five days after receiving a request under section 308, the Trade Representative shall send a notice to all Federal agencies asking whether they have any information on the trade practices in question. Then, the agencies

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would have 21 days in which to respond with either the information or a written response that the agency has no pertinent information. The Trade Representative would then have four days to collate the responses and provide them to the person requesting the information. The statute or legislative history could also make it clear that the deadlines are mandatory.

Another problem is that in a number of countries there are legal obstacles to obtaining information. In China, data that would otherwise appear to be public, such as import and export data, are very difficult to obtain. In Mexico and the European Union, the methodologies used to calculate dumping margins are not made publicly available. The United States should continue to negotiate for the relaxation of these restrictions, so that there is more transparency about government to business dealings that could have an impact on international trade.

C. Given the Difficulties of Obtaining Information from Other Countries, the Burden Placed on Petitioners Should be Less Onerous

Finally, unless and until other countries make it easier for the public to obtain information, it should be recognized that petitioners in the United States will have a difficult time obtaining documented support for dumping or subsidy allegations. Although section 351.202 of the regulations (along with sections 701(b)(1) and 703(b)(1) of the statute) specify that the information in the petition should be that which is "reasonably available" to the petitioner, in practice the Department has often required petitioners to provide information that is uniquely in the possession of a foreign government or company before it will proceed to investigate an allegation. Such information is often not "reasonably available" to petitioners.

A change in the standard by which the Department decides to go forward with the investigation of an allegation would not require a change in either the statute or regulation, it would simply require a change in the Department's practice. We recommend that the

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Department implement a practice that starts from the assumption that information for which respondents would normally request BPI treatment when submitted in responses is not reasonably available to petitioners. Any doubts regarding the difficulty of obtaining this information should be resolved in favor of petitioners.

II. THE UNITED STATES SHOULD SEEK TO REMOVE THE INJURY TEST FROM COUNTERVAILING DUTY ACTIONS

The United States has participated in the OECD negotiations to reduce subsidies to the steel industry, but there has been little progress. The process needs additional impetus.

There is little disagreement that subsidies distort trade. Currently, export subsidies are "red light" subsidies, prohibited under the Agreement on Subsidies and Countervailing Measures. It has become apparent that domestic subsidies also distort trade, particularly those that bail out companies that would otherwise have gone out of business. The elimination of such subsidies would have a salutary effect on the worldwide steel industry, for example, and other industries as well.

One solution would be to increase the number of types of subsidies that are prohibited red light subsidies, to include all domestic subsidies that are not already "green light" subsidies. We believe, however, that the best solution would be to eliminate the injury test for countervailing duty cases.

For most of its history, the countervailing duty law had no injury test, while the antidumping law always had such a test. Pursuant to the 1979 Trade Agreements Act, the injury test was added for signatories to the Agreement, and the Uruguay Round agreements gave the injury test to all countries. Doubtless the existence of the injury test in the antidumping law was the impetus for seeking to include the test for the countervailing duty law, but there are essential

differences between the nature of the issues that each law addresses. The antidumping law addresses the pricing actions of individual companies in other countries with respect to how they sell in the United States. It therefore makes policy sense to expect that companies seeking relief from other companies' pricing actions should show that those actions have had a negative impact on those companies. The countervailing duty law addresses the actions of other governments, and should be seen more as a traditional government-to-government interaction. Domestic subsidies are more global in their trade-distorting effects, and there should not be a requirement that companies in particular countries need to show a negative impact from such government actions.

If the injury test is eliminated from countervailing duty cases, once one country went through the effort to investigate and countervail subsidies, all other countries could simply apply the same analysis as the first country, and apply countervailing duties, without going through the uncertainty of an injury investigation applicable to that particular country's industry. Knowing that it would become much easier for many countries to bring countervailing duty actions against countries that provide domestic as well as export subsidies, so that there would be the prospect of trade being restricted throughout the world, would be a powerful incentive to finally get serious about eliminating subsidies. We therefore recommend that the United States adopt as a negotiating objective the elimination of an injury test for countervailing duty actions.

III. THE EFFECTS OF UNFAIR LABOR PRACTICES AND ENVIRONMENTAL PRACTICES SHOULD BE OFFSET IN THE ANTIDUMPING LAWS

United States manufacturers and labor unions have long been concerned about competing with companies in other countries that have more lax environmental regulations, or have unfair labor practices. While trade negotiations have given lip service to environmental and labor

concerns, there is in fact no effective means to deal with these problems. The United States can address these issues in a way that both helps U.S. manufacturers compete with these companies, and encourages other countries to adopt better environmental and labor standards, by creating an offset in the antidumping law for the effects of unfair labor practices and lax environmental standards.

The most effective way to create such an offset would be to have an increase in a respondent's cost of production to account for the difference in costs between U.S. manufacturers and the respondents. For environmental costs, to get an offset, petitioners would submit information about their environmental costs as a percentage of cost of manufacture, and an average rate would be calculated for the petitioners. This percentage would be compared to the environmental costs as a percentage of cost of manufacture for each respondent. To the extent that the respondent's percentage is lower, an amount would be added to the respondent's cost of manufacture to bring that respondent's environmental costs into line with petitioners' costs. If no information is forthcoming from the respondent's or if the information is not verifiable or usable, the best information otherwise available could be used.

For labor costs, not every difference in such costs between U.S. manufacturers and manufacturers in other countries is inherently "unfair." There have been, however, a number of labor practices that have been deemed as not being consistent with International Labor Standards. The International Labor Organization ("ILO") has been working to develop these standards, and enforces these standards through "Article 24 Representations" and "Article 26

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Complaints."[3] Under Article 24 Representations, the ILO examines the labor practices of a country pursuant to a representation by a national or international workers' organization that a country has failed to apply an ILO Convention that it has ratified. Under Article 26 Complaints, the ILO examines the labor practices of a country pursuant to a complaint by another member country. In either case, the ILO issues a report regarding its findings.

The incentive to not be the subject of a representation or complaint, or to resolve quickly any report that the country has not lived up to its ILO Convention obligations, can be increased by providing that if a country has been found by an ILO report not to apply an ILO Convention, an offset to the costs of any respondent in that country can be made by comparing the cost of labor as a cost of manufacture of the petitioners to the proportion of the cost of labor to the cost of manufacture of a respondent. To the extent there is a difference between the respondent's labor cost and the petitioners' average labor cost, an offset is applied to the respondent's cost of manufacture. This procedure could be applied to any period of investigation or review during which the ILO had found that the country had failed to apply an ILO Convention.

Such changes in the Department's practice would require a statutory change, and may also require an agreement at WTO negotiations. They are nevertheless goals that the United States should pursue in its quest to enhance the prowess of its manufacturing sector in competition with manufacturers around the world, and they would also promote sounder environmental and labor practices in other countries.

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[3] See discussion of the International Labor Standards and their enforcement on the ILO web site at: http://www.ilo.org/public/english/standards/norm/whatare/index.htm.

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We hope that the Task Force finds these comments useful. If there are any questions, please do not hesitate to contact us.

Respectfully submitted,

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