



**Testimony of  
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**Trade Subcommittee  
House Ways and Means Committee  
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Good morning. I am Lewis Leibowitz, a partner at the law firm of Hogan & Hartson and General Counsel of the Consuming Industries Trade Action Coalition (CITAC), a coalition of industries that rely on open channels of trade to be globally competitive. I am pleased and privileged to appear before the Subcommittee today to talk about trade remedy (antidumping and countervailing duty) provisions in legislation pending before the Ways and Means Committee. We note for the record that Mr. David Phelps, a CITAC Board member, testified before the Subcommittee on March 15, 2007, with respect to H.R. 1229.

For the record, Mr. Chairman and Members of the Subcommittee, let me state clearly that CITAC supports trade remedy laws that are fairly administered. CITAC does not support and never has supported elimination of the trade remedy laws. CITAC does, however, strongly support the idea that the trade remedy laws should consider the interests of *all* Americans, including those in consuming industries.

In line with this theme, I will address five issues in my testimony this morning: (1) industrial user standing in trade remedy proceedings; (2) zeroing in Department of Commerce antidumping proceedings; (3) the retrospective system of antidumping and

countervailing duty collection; (4) limiting the imposition of antidumping and countervailing duties to situations where they will provide real benefits to domestic industries; and (5) trade remedy issues and the U.S.-China trade relationship.

All of these issues focus on what should be the Subcommittee's goal in our view: imposing the correct amount of taxes, because that is what antidumping and countervailing duties are. Excessive taxation of imports hurts United States industries employing millions of workers that depend on import competition to keep American business globally competitive.

### **Industrial User Standing**

CITAC strongly supports H.R. 1127, the "American Manufacturing Competitiveness Act," which would redress a serious shortcoming in our trade remedy laws: the exclusion of industrial users from meaningful participation in antidumping and countervailing duty cases. The bill would provide industrial users of subject products with full standing to participate in investigations and reviews of imports of this merchandise.

Consuming industries are unable to participate fully in trade remedy cases. They cannot present their views to the Department of Commerce and the International Trade Commission (ITC) based on the industries' review of the full record, nor can they appeal decisions that injure them and are contrary to law. This is fundamentally unfair. Just this week, steel consumers had to borrow time from foreign producers to state their views to the ITC in the five-year "sunset" review hearing for hot-rolled steel. The failure of the trade remedy law to recognize the important voice of consuming industries ignores an important part of the United States economy in the process and is not good policy.

While this fundamental inequity persists, the expansion of trade remedy laws to cover new and legally dubious situations carries too great a risk that the level of taxation will be too

high, or, equally damaging, arbitrary and uncertain. The threat of high taxes deters imports, whether fairly traded or not, and undermines the competitive position of thousands of U.S. businesses and millions of U.S. workers who count on globally priced raw materials to keep their competitive edge.

**“Zeroing”**

Another fundamental barrier to fair taxation is the practice of “zeroing.” My testimony proceeds from the assumption that the Subcommittee is familiar with the concept of zeroing. Consuming industries oppose zeroing as practiced by the Department of Commerce because zeroing imposes an excessive tax on downstream users of products subject to antidumping investigations and orders. The World Trade Organization (WTO) has ruled that zeroing is not permitted under the relevant WTO Agreements (the Antidumping Agreement and the GATT 1994), and the United States courts have ruled that Congress has not required, nor prohibited, the practice. This suggests two important conclusions: (1) that zeroing can be eliminated by the Department of Commerce without amending the statute; and (2) that zeroing, since it is optional under U.S. law, is not essential to the effectiveness of the antidumping law.

CITAC opposes legislation that would require the Department of Commerce to re-establish zeroing in antidumping investigations (it has been eliminated in these proceedings since February 2007 for most cases) and to maintain zeroing in other antidumping proceedings, including administrative reviews, sunset reviews, and changed circumstances reviews. Even if this ill-considered practice were to be agreed to by the other 150 Members of the WTO organization, which is highly unlikely, zeroing is not worth saving because it is bad policy. Indeed, the United States has committed to implementing the WTO Appellate Body’s decision in

the zeroing case brought by Japan by December 24, 2007. We strongly urge the Administration to follow through on this commitment.

For consuming industries, ensuring that the right amount of tax is collected in the administration of trade remedy laws is vitally important. Antidumping duties are intended to offset the unfair economic effects of subject imports and should not exceed that amount. Zeroing fails to accomplish this objective because the practice overstates the economic effect of subject imports (those imports subject to antidumping investigations and orders) in the U.S. market. Import selling prices above “normal value” are as relevant to measuring that effect as import selling prices below “normal value.” Domestic producers are entitled to no more protection than the difference between normal value and import prices *in the aggregate*. An amount based only upon those transactions below normal value (frequently a small minority of total transactions) overstates the impact of dumping on the domestic producing industry and therefore overtaxes consuming industries.

CITAC has reviewed the statements by the U.S. delegation in Geneva criticizing the WTO Appellate Body decisions. It is clear that these statements do not address the correct policy with respect to calculation of antidumping duties. Rather, they criticize the Appellate Body’s judicial reasoning. CITAC disagrees with USTR: we think that the Appellate Body decisions are soundly based and correct on the law. But even if the WTO Agreements permitted zeroing, that would not provide adequate justification for the United States to adopt a bad policy.

### **Retrospective Collection of Antidumping and Countervailing Duties**

The U.S. retrospective system of collection of antidumping and countervailing duties is very unusual; indeed it may be unique in the world in this era of the “global economy.” This system is detrimental to consuming industries, because it deters fairly traded imports more

frequently than a prospective system would. The reason is simple: the importer, at the time of importation, is unsure of the amount of duty that will be finally assessed on the imported shipment. Even if the deposit rate on a product subject to an antidumping or countervailing duty investigation or order is zero, the importer may face additional duties long after the product has been sold. In this situation, the importer will not import goods into the United States if there are less risky alternatives in other markets. Therefore, for products for which there is a robust world market, shipments of imported material to the United States will decline, even if duty deposit rates are low.

A prospective collection system would balance the interests of producers and consumers more effectively, because imports would be assessed definitive antidumping and countervailing duties at the time of importation. Such a system would not significantly affect the accuracy of the assessment over time, nor would it prevent assessed duties from being adjusted to reflect new shipment realities. A prospective collection system simply would make the imposition of duties more predictable.

### **Material Injury and Causation – the *Bratsk* Decision**

The 2006 Federal Circuit (“CAFC”) decision in *Bratsk* ensures that the impact of trade remedy decisions on consuming industries is considered alongside the interests of the producing industry. *Bratsk* requires that whenever an injury investigation is centered on a “commodity” product market with significant non-subject (fairly traded) imports, the ITC must explain “why the elimination of subject imports would benefit the domestic industry.”<sup>1</sup>

This decision accurately reflects today’s global marketplace. Consuming industries should not be required to pay antidumping or countervailing duties on products that are not

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<sup>1</sup> *Bratsk Aluminium Smelter v. United States*, 444 F.3d 1369, 1373 (Fed. Cir. 2006).

harming the producing industry in the United States. If such excessive duties are imposed, consuming industries and individual consumers are overtaxed, and the United States economy is less globally competitive. CITAC therefore opposes legislation that would *preclude* the ITC from considering whether import competition would decline if duties were imposed.

### **Trade Remedies and China**

Legislation pending before Congress also proposes to address the “problem” of Chinese exports through the trade remedy laws. The current U.S. trade deficit with China provides ample reason for concern, but does not provide justification for ill-considered actions that are destined to fail in their attempts to change China’s conduct, yet are likely to injure American consuming industries.

Trade, including trade with China, greatly benefits the vast majority of Americans. Many organizations speak eloquently about the export opportunities provided to U. S. businesses by expanding global trade, but CITAC focuses on the benefits of a healthy flow of imported goods for industrial use by American consuming industries. These small and medium-sized businesses need the ability to choose domestic or imported products, based on quality, availability and globally competitive pricing, in order to be successful in the global economy from their U.S. manufacturing base. If trade is unfair due to dumping or subsidies, a tax to equalize the effects of those practices is appropriate. However, as I have said before, the amount of the tax must be correct, and consuming industries should know the true price of the imported goods at the time of purchase. Unfortunately, our current antidumping and countervailing duty system does not pass these crucial tests.

Against this background, legislative proposals that would modify U.S. trade remedy laws as a mechanism to address trade imbalances with China are dangerous because they run the risk of causing more harm than good to the U.S. economy, particularly to consuming industries.

Two pending bills in the House, H.R. 2942 (the Ryan-Hunter bill) and H.R. 1229 (the Davis-English bill) illustrate this danger. First, these bills would impose countervailing duties on Chinese exports, despite the continuing status of China as a “non-market economy” (NME) for the purpose of Department of Commerce antidumping proceedings. Ryan-Hunter also would designate a “fundamentally misaligned” currency as a countervailable subsidy. In addition, both bills would require the Department of Commerce to use a non-“misaligned” exchange rate in calculating antidumping duties if the subject country did not revalue its currency within a specified period.

While CITAC does not favor misaligned exchange rates, the proposed remedies in Ryan-Hunter and Davis-English are objectionable. First, they would impose excessive taxes on U.S. consuming industries by increasing import prices and reducing the availability of imports beyond the level necessary to offset the actual effects of dumping and subsidization. Coupled with the fundamental unfairness of the trade remedy laws as currently structured (zeroing, no industrial user standing, retrospective collection, and the NME antidumping provisions), these new proposals would practically ensure that allegedly unfair trade practices would be subject to double counting under the antidumping and countervailing duty laws. Double counting is bad tax policy.

Second, the proposed amendments to the countervailing and antidumping duty law contained in the Ryan-Hunter bill are likely to be ruled WTO inconsistent. Under WTO rules, a “subsidy” requires: (1) a financial contribution by a government; (2) conferring a benefit upon a

domestic industry or enterprise; and (3) for a non-prohibited subsidy, that the subsidy be specific to an enterprise or industry or group of enterprises or industries. Currency “misalignment” does not appear to meet the definition of a subsidy. While H.R. 2942 would simply declare that currency misalignment is a “financial contribution,” that does not make it so.

Similarly, the proposed antidumping amendments in the Ryan-Hunter legislation are WTO inconsistent because they would mandate (subject to a possible presidential waiver) an artificial downward adjustment to the export price in the calculation of antidumping duties imposed on imports from countries with “fundamentally misaligned” currencies. The effect of this adjustment would be to increase antidumping duties on imports from these countries, based on “adjusting” the applicable exchange rate. The better rule from our point of view is that real prices and costs should be used to calculate antidumping duties.

Third, these provisions will neither protect the U.S. market from unfairly traded imports, nor induce a change in behavior by Chinese exporters, the bills’ apparent goals.

The first goal is unrealistic. Consuming industries have experienced first-hand the misguided policy of protecting a narrow subset of domestic producer industries without regard to the impact on other important segments of the American economy: many downstream consuming industries have been injured to a far greater extent than those few that have been helped. Quite simply, industry protection, as a goal of U.S. trade policy, does not work.

The second goal also is unlikely to be achieved through the use of the trade remedy laws. For example, if steel products are afforded protection by the imposition of trade remedies, we can expect increased shipments of upstream, higher value-added products containing steel that will not be subject to antidumping duties. Industrial users have seen this movie time and time again, and they do not like the ending. Indeed, the most recent round of U.S. pressure on China

to reduce exports may be causing a shift toward Chinese production and exports of value-added products that ultimately will compete directly with American manufacturers.

Fourth, as CITAC indicated in its testimony before the Subcommittee four months ago, Davis-English would require the use of competitive benchmarks outside of the exporting country, an unreliable and WTO-inconsistent methodology. Congress should not compel the Department of Commerce to resort to such suspect comparisons to impose trade remedies.

Finally, the Davis-English bill would require a joint resolution of Congress before the Department of Commerce could determine that a non-market economy such as China or Vietnam has successfully transitioned to a “market economy.” This would give Congress a veto over a decision that has long been within the purview of the Executive Branch. The responsibility for determining whether market-economy criteria have been met should remain with the Administration.

In summary, we believe it is inappropriate to use U.S. trade remedy laws in an attempt to achieve a reduction in the trade deficit with China. The trade deficit with China is due to many factors aside from dumping or subsidization, and the trade relationship between the United States and China will not be fundamentally altered by the imposition of excessive antidumping and countervailing duties on Chinese exports to the United States.

### **Conclusion**

In today’s globally competitive environment, U.S. consuming industries face intense and growing pressure from products that are made abroad and that compete with U.S.-made products. These pressures cannot be relieved by protection through the trade remedy laws. If taxes are to be imposed on the raw materials and components that consuming industries require at globally competitive prices, then those taxes should reflect the actual impact of imports on the United

States market. We respectfully ask the Subcommittee and the Administration to consider our concerns in designing proposals for change. The danger of excess taxation on American manufacturers is real, particularly given the fact that our current law unfairly and unwisely bars effective participation by consuming industries.

As major users of trade remedy laws, the United States lags in paying attention to the concerns of consuming industries. Attachment 1 to my testimony demonstrates that our current system is the least consumer friendly among five countries that extensively use antidumping and countervailing duty remedies.

Finally, let me repeat that CITAC does not support the elimination of trade remedy laws, nor does it support ignoring the effects of unfair trade. We do strongly support the idea that the trade remedy laws should serve the interests of *all* Americans, including those who work in consuming industries. We join you today in seeking effective answers to how to address our global trade problems and look forward to working with all of you to improve American manufacturing and to ensure that high-paying, value-added jobs remain here in the United States.

Thank you for the opportunity to state our views. I look forward to any questions you may have.



**CONSUMER-FRIENDLY PROVISIONS IN MAJOR ANTIDUMPING/COUNTERVAILING DUTY LAWS  
 OF TRADING NATIONS OF THE WORLD (July 2007 revision)  
 United States Has the Least Consumer-Friendly Trade Remedy Law of Any Major Trading Nation**

PROVISION	PRO-CONSUMER ANSWER	UNITED STATES	CHINA	EUROPEAN UNION	CANADA	MEXICO
<b>Industrial User/Consumer standing (full party)</b>	Yes	No	No	No	No	Yes
<b>Public Interest Test<sup>1</sup></b>	Yes	No	No	Yes	Yes	Yes
<b>Lesser Duty Rule<sup>2</sup></b>	Yes	No	No	Yes	Yes	Yes
<b>Suspension of Duties in Short Supply Conditions<sup>3</sup></b>	Yes	No	Yes	Yes	Yes	Yes
<b>Zeroing—Investigations</b>	No	No <sup>4</sup>	No	No	No	No
<b>Zeroing—Reviews</b>	No	Yes	Yes <sup>5</sup>	Yes <sup>6</sup>	No	No
<b>Prospective Collection of Duties<sup>7</sup></b>	Yes	No	Yes	Yes	Yes	Yes
<b>Duties Distributed to Petitioning Private Parties</b>	No	Yes <sup>8</sup>	No	No	No	No
<b>Antidumping Duties Deducted from Export Price<sup>9</sup></b>	No	No	Yes	Yes	No	No
<b>Consumer-Friendly Score</b>	<b>9</b>	<b>2</b>	<b>4</b>	<b>6</b>	<b>8</b>	<b>9</b>

<sup>1</sup> Refers to consideration by the authorities of impact of AD/CVD remedy on economy as a whole or downstream industries. Imposing restrictions without considering their impact harms consuming industries.

<sup>2</sup> Refers to imposition of duties at a lower rate than calculated, if a lesser duty is sufficient to remedy injury to the domestic industry. WTO agreements encourage countries to do this, but it is not required. Imposing higher duties than necessary to remedy industry harms consuming industries without furthering purpose of antidumping/countervailing duty remedy.

<sup>3</sup> Refers to history of such actions – CITAC believes the US authorities may lawfully suspend duties, but have never done so.

<sup>4</sup> Zeroing in investigations using the typical average to average comparison method eliminated effective February 22, 2007. *See* 71 Fed. Reg. 77722 (December 27, 2006); 72 Fed. Reg. 3783 (January 26, 2007).

<sup>5</sup> Only in circumstances where “targeted dumping” is alleged.

<sup>6</sup> Only in circumstances where “targeted dumping” is alleged.

<sup>7</sup> Refers to system where amount of AD/CVD duties is known at the time goods are imported. Uncertainty is damaging to consumers because the uncertainty of the amount acts as a deterrent to imports, whether dumped or not.

<sup>8</sup> Continued Dumping and Subsidy Offset Act (“Byrd Amendment”) repealed by PL. 109-171, § 7601 (February 8, 2006). Distributions continue for entries prior to October 1, 2007.

<sup>9</sup> Commonly referred to as “duty as a cost,” this provision has the effect of inflating antidumping and countervailing duties. Inflated duty levels harm consuming industries by raising barriers to trade.