THE US ANTIDUMPING LAW -- A US JOBS DESTROYER

TRADE ADJUSTMENT FOR COMPANIES -- A US JOBS CREATOR

BY WILLIAM E. PERRY

On January 3, 2011 the Wall Street Journal in an editorial article entitled "Mugging Magnesium" illustrated the problem with the US antidumping law. Although the US antidumping law is intended protect US companies from "unfair" imports, the real impact of this law is to destroy legitimate US companies, downstream industries and US jobs. As the Journal stated:

> Today, the U.S. magnesium industry and its thousands of jobs are in desperate shape, thanks to Washington trade barriers. In 2005, at the behest of America's monopolistic magnesium producer—U.S. Magnesium of Utah—the Commerce Department imposed antidumping duties on magnesium from Russia and magnesium alloy from Russia and China. Five years later magnesium alloy is in short supply in the U.S., leading to much higher prices than in the rest of world and a crisis for die casters, alloy producers and recyclers . . . .
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> At recent ITC hearings, Senator Claire McCaskill (D. Mo.) described "one small area of rural rural Missouri" where there are "over 1,000 jobs associated with companies that use magnesium. Their inability to compete with the price of magnesium internationally is causing these jobs to dry up, and that has a devastating impact on these communities."
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> ... All of this has been done in the name of saving 400 jobs at U.S. Magnesium, though there is no evidence that the sole American suppliers of the metal would have gone out of business without antidumping protection. Rather the duties have allowed the company to use monopoly pricing at home while expanding abroad.

In other words, the US antidumping law has allowed US Magnesium to charge higher prices in the home market than its export price, which is classic dumping.

Although many average Americans may think that Magnesium is just an exceptional case, antidumping orders are injuring numerous US downstream industries. In the recent 301 petition, for example, that the United Steel Workers ("USW") filed on Green Technology at the United States Trade Representative's office, the USW complains about Chinese government export quotas on various rare earth metals, antimony, tungsten, and various raw materials, such as bauxite, coke, magnesium, silicomanganese, silicon carbide, and silicon metal.

US industries, often single US companies, however, have brought numerous antidumping cases against metal products from China, including antimony, tungsten, magnesium, silicon carbide, silicon metal and silicomanganese. I successfully represented Chinese producers and US importers in the

Antimony Trioxide and in the Silicon Carbide case when General Motors showed up on the Chinese side. The Tungsten ore case, however, resulted in an antidumping order that excluded all Chinese tungsten ore from the United States for almost seven years. More importantly, antidumping orders are in place excluding all forms of magnesium and pure magnesium, silicomanganese, silicon metal, and foundry coke from the US market. In addition to these metals, US antidumping orders are in place excluding all electrolytic manganese dioxide (destroying many US battery producers), ferrovanadium (used in the steel industry), and refined brown aluminum oxide (used in US foundries). Yet the USW is screaming about Chinese export quotas when many of these Chinese metal products are excluded from the market because of US antidumping orders?

In addition to metal products, there are numerous antidumping orders excluding other raw materials, such as chemical products from China, including sulfanilic acid, citric acid, glycine, and potassium permanganate, the last of which has been excluded by an antidumping order from the US market since 1984, almost 30 years

Many people may argue that the US antidumping law is "protecting" US industries from UNFAIRLY dumped imports. To win an antidumping case, a US industry, which can be a single company, needs to show dumping at the Commerce Department ("Commerce") and injury to the US industry at the US International Trade Commission ("ITC"). Commerce, however, finds "dumping" in 95% of the cases. Since 1980 in more than 30 years work in this area, first in the government and later in private practice, the number of no dumping cases by the Commerce can be counted on one hand. Commerce has so defined "dumping" that any US company that imports a product into the US is dumping, especially from China, and I do mean import.

In classic dumping cases against Japan, Taiwan, or the EC countries dumping is defined as selling prices in the United States lower than prices in the home/foreign market or lower than the fully allocated cost of production. But Commerce treats China worse than Iran and has determined that since China is not a capitalist country and the Chinese government sets all the prices and costs, China is a nonmarket economy country (NME). Commerce, therefore, does not use actual prices and costs in China to determine whether a Chinese company is dumping. Instead, Commerce will compare the US price to a constructed cost of production for the Chinese company. To construct that cost, Commerce will use factors of production, that is how much raw materials, electricity and labor a Chinese company uses, valued by public published prices, often highly inflated above any reasonable value, in a surrogate country, such as India.

An example of how Commerce exaggerates dumping margins was a review investigation done several years ago on Silicomanganese from China, which was an attempt to break open the antidumping order and bring silicomanganese from China into the US. To value the electricity, the critical raw material input, Commerce used electricity prices from India of almost 10 cents a kilowatt hour to value electricity in China, when the actual price in China is 3 cents a kilowatt hour and in the US 6 cents a kilowatt hour. By inflating the cost of electricity in China, all Chinese silicomanganese was excluded and one can forget about calculating accurate antidumping rates for Chinese metal companies.

The problem is that the real damage of the antidumping orders is not to Chinese companies, but to US companies -- importers, distributors and downstream producers. Chinese companies do not pay antidumping duties. US import companies by law are liable for antidumping duties, and the importers can be retroactively liable if those antidumping duties go up in subsequent review investigations. As indicated above, however, the Chinese company, never mind the US importer, simply cannot know whether it is dumping because Commerce does not use actual prices and costs in China to determine whether the Chinese company is dumping.

Moreover, Commerce does not examine all the Chinese companies individually to determine whether they are dumping. In the ongoing Wood Flooring from China antidumping case, for example, out of more than 70 Chinese companies, Commerce will calculate individual dumping margins for only three companies. In the Wooden Bedroom Furniture case, over a hundred companies can be subject to the case but only two or three companies will get their own dumping margins. 90% of companies get the average dumping margin of the companies that are examined so long as the individual companies do not get 0 or the highest dumping margin. If all the Chinese respondent companies get 0 or the highest antidumping margin, Commerce gets to pick an antidumping rate for all the other Chinese exporters, which in the recent Ribbons from China antidumping case was more than 100% for more than 30 Chinese companies excluding all imports from the US of Chinese ribbons, but from one company.

To fix these problems, three points should be considered by Congress and the US government. First, the US government should make China a market economy under the US antidumping law, not to help Chinese companies, but to help US companies. Under the US-China WTO Agreement Commerce must make China a market economy country in five years or by 2016. If China becomes a market economy country, Commerce will use actual prices and costs to calculate dumping rates for Chinese companies and not only Chinese companies but also US companies can know whether the Chinese companies are truly dumping.

Moreover, if Commerce uses actual prices and costs in China, Chinese companies can monitor their US prices and make sure that they are not dumping. Monitoring, however, is useless, if Commerce uses arbitrary surrogate values in a third country, such as India, to construct a cost for Chinese companies.

For importers, knowing whether their Chinese supplier is dumping is critical to their survival because US importers are retroactively liable for additional antidumping duties in a review investigation. When U.S. companies import under an antidumping duty order, the "dumping"/percentage rate that they pay is not the dumping duty, but the cash deposit. The actual dumping duty can go higher in subsequent review investigations, and the importer will be retroactively liable for any increase in dumping duties over the cash deposit rate, plus interest.

In the Wooden Bedroom Furniture case, for example, estimates are that US importers have paid more than $500 million in retroactive antidumping duties from review investigations. This retroactive liability has wiped out US import companies throughout the United States. I have met with good old boys in North Carolina, who have had their entire $60 million company wiped because they had the temerity to import wooden bedroom furniture from China under an antidumping order. Another client has gone bankrupt because it imported ironing tables from a company with 0% dumping rate that went to 157% in an antidumping review investigation. 157% means that when a US importer imports $100 product into the US, it must pay the US government $157. This retroactive ruling created millions of dollars in liability for this small US company driving it into bankruptcy with the loss of US jobs associated with that company.

Thus the second proposal is the United States should follow the rest of the World and make antidumping duties prospective, not retroactive. Only the United States has retroactive liability, but as indicated above, US importers cannot know whether the Chinese companies are dumping because of the surrogate value methodology. In a purely prospective AD/CVD duty system, such as in Canada, it is generally understood that once the investigation is complete and the measure is imposed, antidumping duties are assessed at the time of entry with no potential liability in the future. In the rest of the world, but not the United States, importers then can import under an antidumping order with no fear of substantial additional liability in the future.

But there is a more important problem. Antidumping cases do not work. They do not help the US companies that have been injured by imports. If an antidumping case is filed against China, for example, US import companies just go to Vietnam, India, Indonesia, and other countries to get the product. In the

December 2010 ITC determination in the Wooden Bedroom Furniture from China Sunset Review investigation, ITC Commissioner Pearson gave an example of an antidumping order not helping the US industry:

> this investigation . . . raises some troubling questions. . . . This industry would have faced difficulties during the period of review under any circumstances, given the depth of the recession and its extensive effects on the housing market. But even before the recession began, the industry was not apparently gaining much benefit from the imposition of the order. The domestic industry's market share continued to decline after the order, as did production, capacity utilization, and employment. In the long run the domestic industry might have been expected to struggle to retain any benefits from this order as importers and retailers sought supply in other, lower-cost markets outside China. But the record here suggests that the domestic industry gained little even before those adjustments began to be made. . . .
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> I am mindful that the law does not require that an antidumping order or countervailing duty order be shown to benefit the domestic industry in order to reach an affirmative finding in a five-year review. . . .In this particular investigation, additional costs and distortions have been added by the use of the administrative review and settlement process, with little evidence that these distortions have yielded any benefits to the industry overall, the U.S. consumer, or the U.S. taxpayer.

But if dumping/unfair trade cases do not help the US industry, what does work? The program that truly helps US companies that have been injured by imports is Trade Adjustment Assistance for Firms ("TAAF"). This $16 million dollar Federal Program in the Northwest has been able to save 80% of the companies that entered the program since 1984 . If the company is saved, then the jobs in that company are saved.

The poster child for what is wrong with the US antidumping law and what is right with the TAAF program is Cascade Coil Drapery in Portland, Oregon. In 1982 an antidumping case was filed against Fireplace Mesh Panels from Taiwan. Cascade Coil Drapery was one of about ten companies in that US industry. At the end of the case, there only a few US companies were left standing. One of those companies was Cascade Coil, not because of the antidumping order but because of the TAAF program.

TAAF works because it does not restrict imports in any way. Instead it works with the company at the individual level to design a program so that the company can adjust to import competition. In Cascade Coil's situation, the TAAF program was able to identify architectural mesh as a made to order product, not a commodity product vulnerable to import competition. Although architectural mesh was only 3% of Cascade Coil's business, that is where it moved. Today, Cascade Coil Drapery has discovered that this same architectural mesh is an antiterrorism tool, because it can be used to block flying glass and

other objects in the event of a bomb blast and yet let the light in. Recently, certified by the Department of Defense, Guardian Coil is now being exported to countries around the World.

Although the amount of federal assistance is limited in the TAAF program to $75,000, which the company must match, just like Cascade Coil, it is the strategic planning and access to the industry experts that helps the company adjust to the import competition at the company level. This is the way for US companies to adjust to import competition, not through antidumping cases that distort the US market and destroy downstream industries.

In recent memory, the only President ideologically committed to free trade was Ronald Reagan. As a young attorney at the ITC during the Revolution in the Fall of 1980, I watched as President Reagan turned down requests for trade relief and appointed the most free trade Commissioners in the history of the ITC. Reagan truly believed in the power of capitalism and the free market to solve the trade problem.

Recently on Fox News Jim Rogers, a famous global investor, and Thomas Sowell, a famous economist, both have indicated that China is becoming more capitalist than the United States. Now isn't that a scary thought.

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