July 10, 2023

VIA ELECTRONIC FILING (REGULATIONS.GOV)

The Honorable Lisa W. Wang
Assistant Secretary for Enforcement and Compliance
Room 18022
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Re: Comments on Proposed Rule: Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws (Docket No. ITA–2023–0003-0001)

Dear Assistant Secretary Wang,

The undersigned food and agriculture trade associations[1] submit these comments on the amendments to the antidumping and countervailing duty ("AD/CVD") regulations proposed by the U.S. Department of Commerce ("Commerce") on May 9, 2023.[2] The undersigned associations represent companies in the U.S. agricultural and food industries, which collectively support 4.6 million U.S. jobs, contribute hundreds of billions of dollars to U.S. Gross Domestic Product ("GDP"), and are responsible for over $200 billion in U.S. exports to markets around the

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1 American Bakers Association, American Seed Trade Association (ASTA), Corn Refiners Association, Fresh Produce Association of the Americas, Independent Bakers Association, National Association of State Departments of Agriculture, National Corn Growers Association, National Fisheries Institute, National Grain & Feed Association, National Milk Producers Federation, National Sorghum Producers, National Turkey Federation, North American Export Grain Association, North American Renderers Association, Northwest Horticultural Council, Sweetener Users Association, U.S. Apple Association, U.S. Dairy Export Council, USA Poultry & Egg Export Council

2 *See Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws*, 88 Fed. Reg. 29850 (Dep't of Commerce, May 9, 2023) (hereinafter, "*Proposed AD/CVD Regulations*").

world.[3] As detailed in these comments, the undersigned associations oppose Commerce's proposed amendments as they relate to (1) foreign government "inaction" regarding property rights (including intellectual property), human rights, labor, and environmental protection issues; (2) excess capacity and oversupply of certain major inputs in the international market; and (3) transnational subsidization because they would reduce the efficiency of U.S. food production and, ultimately, increase consumer food prices.

In particular, the undersigned associations oppose the following proposed amendments to the AD/CVD regulations:

- The creation of a new category of countervailable subsidies for certain "fees, fines, and penalties" that are "otherwise required" to be paid, including fees, fines, and penalties in place to enforce laws related to property rights (including intellectual property rights), human rights, labor, and environmental protections;[4]

- Changes to § 351.511 authorizing Commerce to reject certain prices in benchmarking analyses, when parties have demonstrated that those prices "are derived from countries with weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections, and that the lack of such protections would likely impact such prices;"[5]

- Changes to § 351.408, authorizing Commerce to disregard certain surrogate values in nonmarket economy ("NME") AD investigations, when Commerce concludes that "weak, ineffective, or nonexistent property (including intellectual property), human rights, labor, or environmental protections" undermine the appropriateness of using a particular surrogate value;[6]

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[3] *See* USDA, SELECTED CHARTS FROM AG AND FOOD STATISTICS: CHARTING THE ESSENTIALS 4-5 (2023) (link); *see also* Karen Braun, *Column: U.S. agricultural exports top $200 billion in 2022 as China grabs record share*, REUTERS (Feb. 8, 2023) (link).

[4] *See Proposed AD/CVD Regulations*, at 29878.

[5] *See id.*

[6] *See id.* at 29874-29875.

- Changes to § 351.416 concerning Commerce's consideration of information—for purposes of identifying a "particular market situation" ("PMS")—that a subject country's enforcement of "property (including intellectual property), human rights, labor, or environmental protections . . . {is} weak, ineffective, or nonexistent, {that} those protections exist and are effectively enforced in other countries," and that the subject country's enforcement patterns "may contribute to distortions in cost of production of subject merchandise or prices or costs of a significant input into the production of subject merchandise in the subject country;"[7]

- Changes to § 351.416 identifying global overcapacity for significant inputs into the production of subject merchandise as a form of PMS in certain circumstances;[8]

- The removal of 19 C.F.R. § 351.527, which may open the door to countervailing duties on transnational subsidies.[9]

While the undersigned associations appreciate Commerce's efforts to ensure a level playing field between U.S. producers and foreign exporters, the undersigned associations believe that the amendments listed above would unduly harm U.S. producers and exporters in multiple ways. Specifically, these proposed amendments would (i) jeopardize the supply of inputs critical to agriculture and food product manufacturing in the United States, (ii) threaten U.S. exports by inviting legal challenges and retaliation from trading partners, and (iii) threaten U.S. exports by prompting other countries to make similar changes to their own AD/CVD rules. For these reasons, as explained below, the undersigned associations respectfully submit that Commerce should abandon the proposed amendments identified above.

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7 *See id.* at 29875-29877.

8 *See id*.

9 *See id.* at 29878.

I. The Proposed Amendments Would Threaten U.S. Agriculture and Food Product Manufacturing

As an initial matter, Commerce's proposed amendments to the AD/CVD regulations would jeopardize the supply of inputs critical to agriculture and food product manufacturers in the United States by increasing AD/CVD duties on imports and injecting new uncertainties into their business plans.

The proposed amendments would drastically expand the universe of countervailable subsidies, likely resulting in an increase in U.S. CVD investigations and affirmative determinations. Moreover, the proposed reforms concerning benchmarking analyses in CVD investigations, surrogate value calculations in AD investigations, and the identification of particular market situations may result in substantially higher AD/CVD duties in future cases.

The proposed amendments also contain many ambiguities and overbroad standards. For example, the regulations do not specify a point at which foreign countries' regulatory frameworks and enforcement patterns can be characterized as "weak" or "ineffective" (or conversely, what enforcement patterns qualify as "effective"). In multiple places, the amendments' broad language gives Commerce extreme discretion to reject respondents' data and brand nuanced regulatory conditions abroad as "subsidies." As a result, the proposed amendments fail to provide U.S. importers with any meaningful way to assess new costs of importing stemming from these regulations.

This uncertainty is exacerbated by the fact that Commerce's International Trade Administration lacks the appropriate expertise to assess how labor, environmental, human rights, and other social policies may interact to affect conditions in foreign countries. Such complex and contextual policy analyses would be better left to agencies—such as the Department of

Labor, Environmental Protection Agency, and Department of State—that specialize in these policy areas.

The likelihood of higher duties on imports—coupled with increased uncertainty as to the circumstances in which duties will be imposed—raises the risks of importing in general. These risks may, in turn, discourage U.S. agribusinesses and manufacturers from sourcing inputs from longstanding suppliers abroad. In some instances, U.S. farmers and manufacturers may be unable to find new domestic suppliers and/or adequate domestic volumes for critical materials. For example, the U.S. agriculture industry relies on imports for sufficient volumes of fertilizer, certain fertilizer components, and pesticide ingredients critical to farm operations.[10] Even when U.S. producers of critical materials could be located, U.S. farmers and manufacturers may face significant costs associated with supply chain restructuring—such as the costs of establishing new supplier relationships, vetting new suppliers, and reorienting their shipping and logistics networks.

Increased risks associated with importing would adversely impact the U.S. farm and food manufacturing industries, which, as mentioned above, collectively support over 4.6 million U.S. jobs, contribute hundreds of billions of dollars to U.S. GDP, and support strong U.S. export sales to numerous markets.[11] U.S. farmers and ranchers would face new uncertainties and costs

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10 *See, e.g.*, Press Release, USDA, USDA Announces Plans for $250 Million Investment to Support Innovative American-made Fertilizer to give US Farmers more choices in the Marketplace (Mar. 11, 2022) (link) ("The United States is a major importer and dependent on foreign fertilizer and is the second or third top importer for each of the three major components of fertilizer."); *see also* Joana Colussi & Gary Schnitkey, *War in Ukraine and its Effect on Fertilizer Exports to Brazil and the U.S.* (Univ. Illinois at Urbana-Champaign, 2022) (link) (noting that the United States relies on imports for 93 percent of potash supplies); USDA, USDA AGRI-FOOD SUPPLY CHAIN ASSESSMENT: PROGRAM AND POLICY OPTIONS FOR STRENGTHENING RESILIENCE 7, 13 (2022) (link) (discussing the United States' reliance on imports for certain pesticide components and strong market for imports of fresh fruits and vegetables).

11 *See* USDA, SELECTED CHARTS FROM AG AND FOOD STATISTICS: CHARTING THE ESSENTIALS 4-5 (2023) (link).

associated with importing fertilizers, pesticides, animal feed, and other inputs that support U.S. agricultural output. Similarly, uncertainties created by the amendments would raise costs for U.S. food manufacturers that import critical ingredients, potentially harming U.S. output of downstream food products. By jeopardizing imports of critical inputs and ingredients, these proposed amendments to the AD/CVD regulations threaten the operations of U.S. farms and food manufacturers.

II. The Proposed Changes Would Threaten U.S. Exports by Inviting Legal Challenges and Retaliation from Trading Partners

Commerce's amendments to the AD/CVD regulations would also threaten U.S. exports by inviting legal challenges and retaliation from trading partners of the United States.

Given that the proposed amendments are controversial and would substantially raise the costs and risks associated with exporting to the United States, countries with significant exports to the United States may unilaterally retaliate (i.e., outside of the World Trade Organization ("WTO") system) by imposing tariffs or other trade restrictions on U.S. imports. As the international response to the United States' recent tariff actions made clear, U.S. agriculture and food exports are distinctly vulnerable to, and harmed by, retaliatory measures by foreign countries.[12] Indeed, in response to the United States' Section 301 tariffs, China retaliated with tariffs of up to 25 percent on over 1,000 different U.S. agricultural products.[13] In 2022, the U.S. Department of Agriculture found that collective foreign retaliation in response to the U.S.

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[12] For a summary of foreign tariff retaliation against the U.S. Section 232 and Section 301 tariffs, *see generally* https://www.trade.gov/feature-article/foreign-retaliations-timeline.

[13] ANITA REGMI, CONG. RES. SERV., R45929, CHINA'S RETALIATORY TARIFFS ON U.S. AGRICULTURE: IN BRIEF 1-3 (2019) (link).

Section 232 and Section 301 tariffs "caused a reduction of more than $27 billion (or annualized losses of $13.2 billion) in U.S. agricultural exports" from mid-2018 to the end of 2019.[14]

Further, the proposed amendments may violate the United States' obligations under the WTO Agreements. For example, the new, nebulous category of countervailable subsidies for foregone regulatory fees, fines, and penalties could invite determinations that are inconsistent with rules regarding countervailable subsidy "specificity" in the WTO Agreement on Subsidies and Countervailing Measures ("SCM").[15] Future actions by Commerce to countervail transnational subsidies—facilitated by the proposed removal of 19 C.F.R. § 351.527—may violate the SCM Agreement as well.[16]

Given these potential WTO inconsistencies, there is a risk that U.S. trading partners will launch WTO disputes against these changes to the AD/CVD regulations, if implemented. Not only would WTO dispute settlement require the U.S. government to expend time, money, and legal resources to defend the amendments before a WTO tribunal, but it would also put U.S.

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14 *See* Stephen Morgan et al., *The Economic Impacts of Retaliatory Tariffs on U.S. Agriculture* (USDA ERS, 2022) (link).

15 This new category for certain "fees, fines, and penalties" that are "otherwise required" to be paid also raises issues related to SCM Article 1.1(a)(1)(ii), which names uncollected government revenue that is "otherwise due" as a potential form of subsidization. To show that revenue was "otherwise due" for purposes of Article 1.1(a)(1)(ii), WTO tribunals have typically required the investigating authority to either (1) pinpoint a general fiscal rule applied by the subject country and demonstrate that "but for" a preferential program, the general rule would apply; or (2) compare the treatment of income spared collection to the treatment of "comparable income" of "taxpayers in comparable circumstances in the jurisdiction in issue." Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities*, para. 98, WTO Doc. WT/DS108/AB/RW (adopted Jan. 29, 2022); Panel Report, *United States — Measures Affecting Trade in Large Civil Aircraft — Second Complaint*, para. 7.120, WTO Doc. WT/DS353/R (adopted Mar. 23, 2012). These standards pose significant challenges to any analysis of regulatory patterns in foreign countries. How will Commerce determine that the income of various companies that are spared full regulatory enforcement is "comparable"? If regulatory enforcement is so variable in a given country, what will Commerce use as the benchmark for "otherwise due"? How will Commerce be able to assess whether companies in such a country are in "comparable circumstances"?

16 *See* Gary Horlick, *An Annotated Explanation of Articles 1 and 2 of the WTO Agreement on Subsidies and Countervailing Measures*, 8 GLOBAL TRADE & CUSTOMS J. 297, 297-299 (2013).

agricultural and food exports in jeopardy. If a WTO tribunal were to reject the proposed amendments, and the United States were to maintain them, the complaining WTO Member could potentially retaliate with trade restrictions.[17] Time and again, WTO Members have targeted U.S. agricultural and food exports with such retaliatory measures.[18] By implementing the proposed amendments, the United States will invite WTO proceedings that could ultimately damage U.S. exporters of agricultural and food products.

III. The Proposed Changes May Threaten U.S. Exports by Prompting Similar AD/CVD Reforms by Foreign Countries

Further, Commerce's amendments to the AD/CVD regulations may threaten U.S. exports by prompting other countries to make similar changes to their AD/CVD rules.

As explained above, the proposed amendments would drastically expand the substantive reach and economic impact of U.S. trade remedy laws. The amendments also signal to U.S. trading partners that social values—including values only weakly related to market dynamics—can be infused into AD/CVD laws. This is a dangerous message for the United States to send to

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[17] DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 22, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

[18] *See, e.g.*, CONG. RES. SERV., RL 33045, THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT ("BYRD AMENDMENT") 15-16 (2006) (link); *see also* M. ANGELES VILLARREAL, CONG. RES. SERV., U.S.-MEXICO ECONOMIC RELATIONS: TRENDS, ISSUES, AND IMPLICATIONS 20-21 (2020) (link) (discussing WTO-authorized retaliation against the U.S. in the country-of-origin labeling ("COOL") dispute, and noting that Mexico was "considering imposing retaliatory tariffs on a wide variety of U.S. exports to Mexico, including fruits and vegetables, juices, meat products, dairy products, machinery, furniture and appliances, and others"); David Bennett, *Brazil Retaliatory tariffs in cotton case*, FARM PROGRESS (Mar. 10, 2010) (link).

any of its trading partners, and especially to trading partners with policy priorities, property rights regimes, and notions of human rights that diverge from American ideals.

Specifically, in implementing such extensive reforms to its AD/CVD regulations, the United States may prompt other countries to infuse their economic, social, and environmental values into their trade remedy laws. And indeed, it is not hard to imagine certain U.S. trading partners penalizing U.S. exports for what they consider to be inadequate U.S. action on climate change, an inadequate U.S. welfare system, or inadequate gender, racial, or socioeconomic justice in the United States. If Commerce's proposed amendments are implemented, there is a high risk that other countries will follow suit and reshape their AD/CVD laws to reflect wide-ranging, and unpredictably applied, social values. This would likely result in increased AD/CVD investigations against U.S. products—including farm and food products—in major export markets. Under analogous regulations implemented by other countries, U.S. exporters would face new challenges that reduce their chances of success in foreign trade remedy investigations and increase the risks that these investigations will result in very high duties on their products.

IV. Conclusion

For these reasons, the proposed amendments to the AD/CVD regulations would jeopardize U.S. agriculture and food product manufacturing output and imperil the exports of these U.S. industries. While the undersigned associations share Commerce's concern with leveling the playing field between U.S. producers and foreign exporters, the undersigned associations believe that the proposed amendments will, ultimately, do more harm than good to U.S. production, ultimately increasing the cost of American food production and food price inflation. The undersigned associations therefore oppose the elements of the proposed AD/CVD amendments discussed above.

Respectfully submitted,

American Bakers Association

American Seed Trade Association (ASTA)

Corn Refiners Association

Fresh Produce Association of the Americas

Independent Bakers Association

National Association of State Departments of Agriculture

National Corn Growers Association

National Fisheries Institute

National Grain & Feed Association

National Milk Producers Federation

National Sorghum Producers

National Turkey Federation

North American Export Grain Association

North American Renderers Association

Northwest Horticultural Council

Sweetener Users Association

U.S. Apple Association

U.S. Dairy Export Council

USA Poultry & Egg Export Council