The Committee on Ways and Means, Subcommittee on Trade
Hearing on Customs Trade Facilitation and Enforcement in a Secure Environment
May 20, 2010
Statement of John M. Herrmann

Good afternoon, Chairman Tanner, Ranking Member Brady, and members of the Ways and Means Subcommittee on Trade. My name is John Herrmann, and I am a special counsel in the Washington, DC office of Kelley Drye & Warren LLP, where I practice in the firm's international trade and customs group. Prior to my return to the private sector in April 2009, I served under President Bush as the Special Assistant to the President and Senior Director at the National Security Council for International Trade, Energy and Environment. I also served briefly with President Obama's Administration, working on the staff of the National Security Council and National Economic Council through early April 2009. I appreciate very much the opportunity to appear before the Subcommittee today.

As Chairman Tanner stated in announcing this hearing, a comprehensive review of the commercial operations of U.S. Customs and Border Protection ("CBP") is long overdue following the significant attention focused on the agency's security-related operations in the Trade Act of 2002 and the SAFE Ports Act of 2006.

I would like to highlight three issues for the Subcommittee's consideration today:

1. The importance of ensuring that CBP has the personnel and resources it needs to enforce actively our nation's trade laws;

2. The importance of creating new benefits for companies participating in CBP's voluntary public-private partnership programs, in order to expand participation in those programs and strengthen collaboration between CBP and the trade; and

3. The need to implement quickly technologies that will facilitate the efficient entry of goods and communications between and among the numerous government agencies with regulatory authority over products that enter the United States.

1. Ensuring Active Enforcement of U.S. Unfair Trade Laws

There has been much commentary over the last few years concerning the importance of ensuring that CBP is devoting appropriate resources and energy to enforcing our nation's trade laws, in addition to carrying out its important responsibilities for securing our nation's borders and preventing individuals who would seek to harm us and weapons from entering our country. Although the particular circumstances are often unique, many of the industries that have been injured by unfairly traded imports and successfully petitioned for relief under the U.S. antidumping and countervailing duty laws confront a number of common enforcement problems. I would like to highlight three issues for the Subcommittee.

- **Fraudulent Country of Origin Declarations and Product Descriptions**. It is becoming increasingly common for unscrupulous exporters and their U.S. customers to seek to evade the application of antidumping duty orders by making fraudulent declarations to CBP. One common practice involves U.S. importers mis-reporting the country of origin of a product that is subject to an antidumping order (i.e., falsely declaring to CBP that the imported product originated in a country that is not covered by an antidumping duty order). A second common practice involves mischaracterizing the imported product so that it falls outside the scope of an unfair trade order.

Some overseas exporters and their U.S. importers have become so brazen that they are initiating schemes to circumvent the application of antidumping orders before a final order is even issued. For example, in testimony before the U.S. International Trade Commission two weeks ago, a U.S. producer of pre-stressed concrete wire strand ("PC strand") – a wire-based product that is used to strengthen concrete in residential and non-residential construction – testified to the Commission regarding his knowledge of aggressive efforts by Chinese PC strand

producers and exporters to circumvent the application of duties to their shipments almost from the moment the domestic industry filed its petition for relief. Indeed, no Chinese producers or exporters participated in the proceedings before the Commerce Department or International Trade Commission, even though by failing to participate they are exposing themselves to each agency drawing adverse inferences under the statute that will likely result in an antidumping order with very high antidumping margins.

The industry executive informed the Commission of Chinese producers engaging in the "carry trade," whereby a Chinese producer transports the PC strand to a third country that is not subject to antidumping duties, and fraudulently re-labels and repackages the product with the country of origin of the third country instead of China to avoid the assessment of duties. Further, Chinese producers and exporters have been actively approaching potential U.S. customers with offers to assist them in circumventing the required cash deposit, including in one instance offering the potential U.S. customer a choice of multiple fraudulent country of origin documents from which to choose.

Regrettably, this behavior is not limited to the PC strand industry, with similar behavior being seen with respect to antidumping orders covering other steel and metals products, as well as chemical and agricultural products. One potential action that could be used to help slow the rampant and unchecked transshipment is for CBP, in order to protect the revenue, to collect a cash deposit for estimated antidumping duties where there is reason to believe that goods entering the United States are subject to an antidumping order.

In instances where we have reason to believe circumvention is occurring, we have promptly informed CBP and U.S. Customs and Immigration Enforcement ("ICE"). In particular, we have supplied those agencies with information concerning the identity of foreign producers or

exporters engaged in such activities and, to the extent we become aware of it, the identity of any U.S. entities involved in fraudulent activities. While CBP and ICE have been responsive in reacting to our concerns, the agencies have also been able to share only limited information with us in order to maintain the confidentiality of any investigations they may be conducting. It is frustrating to us and our clients not to have a sense of how the agencies' activities are progressing and to be limited in the assistance we can give to their efforts.

The Subcommittee may wish to consider three potential improvements that could increase cooperation between the private sector and CBP and ICE in such circumstances. First, it would be extremely helpful if CBP and/or ICE made selective public announcements where it is pursuing potential violations of the U.S. customs laws. While CBP and the relevant U.S. Attorney's Offices have issued public statements in connection with convictions obtained or settlements reached under similar circumstances, such announcements have been rare. A decision by CBP and ICE to publicize selective investigations examining whether a person has violated the U.S. customs laws – similar to the approach taken by the Commerce Department's Bureau of Industry and Security in regards to potential violations of the U.S. export control laws – could be very helpful. In particular, such an announcement would deter foreign exporters and U.S. importers who might otherwise be inclined to try to circumvent the unfair trade laws by making clear that relevant enforcement agencies are carefully monitoring such activities and that the potential penalties associated with engaging in that behavior are significant.

A second area for further consideration is the extent to which greater cooperation between the enforcement agencies and the private sector is possible. Obviously, confidentiality concerns limit the ability of CBP and ICE to share sensitive commercial information with individuals outside the government. It is worth considering, however, whether CBP and ICE

could share certain limited information with outside counsel to domestic industries under strict confidentiality limitations – similar to the manner in which confidential business information is released to outside counsel under administrative protective order in proceedings before the Department of Commerce and International Trade Commission. The Commerce Department currently releases limited information on imports of products subject to antidumping orders at the outset of its annual administrative reviews, and this information is often helpful. To the extent that CBP and ICE are able to share certain limited information with outside counsel – under a continuing protective order – it could assist these agencies in carrying out their enforcement responsibilities.

Perhaps most simply, I would encourage the Subcommittee to ensure that CBP and ICE have adequate personnel and resources to pursue the increasingly frequent efforts to circumvent unfair trade orders that domestic industries have invested significant time and resources in obtaining. Absent aggressive efforts by CBP and ICE to identify products that are subject to unfair trade orders when they enter the United States, the promise of relief to injured domestic industries will continue to be eroded by foreign exporters and U.S. importers that are determined to evade the application of these orders.

- **Efforts to Protect the Revenue By Collecting Past-Due Antidumping Liabilities**.

A second issue that has evolved significantly within recent months concerns efforts to ensure that CBP is pursuing the collection of unpaid antidumping duty liabilities – either from the U.S. importers responsible for entering the products into the United States or from the sureties that provide bonds to those importers. As members of the Subcommittee may be aware, CBP has acknowledged that it has assessed, but failed to collect, $897 million in antidumping duties on imports of garlic, honey, mushrooms, and crawfish alone that were imported into the United

States from China. Litigation commenced by a coalition of domestic producers (captioned as Sioux Honey Association v. United States) – as well as litigation commenced by the United States against several sureties – is still proceeding in the courts. These cases are significant, however, because they have the potential to ensure (belatedly) that previously incurred obligations are satisfied. Indeed, information published by CBP reflects a liquidation backlog, with CBP holding $550 million of cash deposits on entries that it appears should have been liquidated previously.

I encourage the Committee to continue to monitor this issue and these cases and to urge CBP to pursue all appropriate means for ensuring that the proper antidumping duties are collected – either from the U.S. importers that were responsible for bringing the products into the United States or the sureties that issued bonds to the importers, standing behind their potential liabilities. Indeed, while six collection actions have been initiated by the United States since the domestic industries brought their case, no such actions were filed before the domestic industry filed its lawsuit. The amounts at issue in these cases are significant, and with the repeal of the Byrd Amendment, the failure to collect antidumping duties that are due has an impact on the public fisc.

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The United States is one of the most open markets in the world, but we also must see to it that our trade laws are enforced so that foreign producers and exporters are not exploiting our open market at the expense of our domestic industries. At the same time, however, we should also be seeking to facilitate international commerce so that U.S. firms and their employees can take advantage of global markets to maximize their competitiveness. With products subject to antidumping and countervailing duty orders accounting for only about one percent of total U.S.

imports, there are large volumes of fairly traded products that we should be seeking to move across our borders and rapidly into the stream of commerce. As reflected in its mission statement, CBP has a vital role to play in "fostering our Nation's economic security through lawful international trade."

2. Increasing Participation in Voluntary Public-Private Partnership Programs

With the passage of the Customs Modernization Act in 1993, a new emphasis was placed on the private sector and CBP sharing responsibility for ensuring compliance with U.S. customs laws. Opportunities for the private sector to deepen its engagement in overseeing and self-directing its customs compliance efforts expanded further following 9/11, with CBP launching a number of voluntary public-private partnership programs that offered certain trade facilitation benefits to those companies that took on the added responsibilities associated with participation in the programs.

Many of these programs now have been up and running for several years, and there appears to be a strong desire among the trade to build additional benefits into them. This is a development that CBP should welcome, as it reflects not only a continued interest in participation in these voluntary public-private partnerships, but also a desire to deepen the interactions between the trade and CBP. Given the volume of trade entering the United States on a daily basis – in FY 2009, approximately 58,000 truck, rail and sea containers entered the United States every day (the equivalent of 21 million containers a year) – it would require massive amounts of resources to check every container entering the United States. With prevailing tight budgets and limited personnel, it simply is not feasible. That is why CBP should welcome – and seek to leverage – the private sector's interest in making investments in its own operations that will aid CBP in segregating low-risk trade from the high-risk trade that merits

close scrutiny. The drafting of legislation to reauthorize CBP provides a perfect opportunity to consider ways to reinvigorate the existing partnership programs and also make them attractive to a new group of potential members.

One potential means for expanding the scope of benefits in existing public-private partnership programs is through mutual recognition arrangements ("MRAs") of supply chain security programs. These MRAs are essentially agreements under which CBP recognizes the validation and audit procedures of foreign customs services as being similar to those applied by CBP under the Customs-Trade Partnership Against Terrorism ("C-TPAT"). Over the last three years, CBP has concluded MRAs with four trading partners: New Zealand (June 2007), Jordan (June 2007), Canada (June 2008) and Japan (June 2009). CBP is also working on concluding MRAs with an additional three customs authorities – the European Union, the Republic of Korea, and Singapore – all of which would yield significant benefits given the scope of our trading relations. Mexico is another obvious partner with which we should pursue an MRA. While Mexico does not currently operate a security-based industry partnership program similar to C-TPAT, it is planning to develop and implement one soon, and CBP is in the process of trying to coordinate the provision of technical assistance to Mexican Customs officials.

MRAs hold the promise of generating benefits for both the private sector and CBP. With respect to the private sector, they eliminate redundancy by reducing the number of audits to be performed by various customs authorities, and also promote the standardization of requirements, helping companies to streamline their operations. With respect to CBP, MRAs are desirable because they promote efficiency (requiring fewer overseas validations), as well as increased access to information from our partners. This increased access to information should provide

further assistance to CBP in segregating high-risk and low-risk trade, allowing CBP to target its resources more effectively.

A second potential option for increasing the attractiveness of public-private partnership programs is expanding the availability of account-based assistance. Expanding the availability of such services is consistently raised by the trade as a desirable benefit, and if structured appropriately could create efficiencies for both the trade and CBP.

Perhaps the best means for identifying benefits that will hold the greatest attraction for the trade is to encourage a detailed discussion of these issues between the trade and CBP. Such discussions could help to deepen the dialogue between CBP and the trade, and facilitate the identification of programs and procedures that would be of mutual benefit.

3. Using Technology to Facilitate Collection of and Access to Trade Information

A final issue that merits the Subcommittee's attention is the importance of rapidly bringing fully on-line the data systems that will facilitate electronic filing of trade information and dissemination of that information among the numerous federal agencies with responsibilities for overseeing the entry of goods into the United States.

A first system that merits scrutiny is the International Trade Data System ("ITDS"), which facilitates access to important trade-related data and information across the federal government. ITDS will create a "single window" system across the federal government concerning goods entering the United States and will generate numerous benefits. One particularly important benefit, however, is the system's ability to help strengthen our capacity to identify and track imported goods that threaten public health and safety. Indeed, the interagency working group created by President Bush in 2007 to address import safety, with which I played an active role during my time in government, specifically recommended that federal departments

and agencies have the capability to exchange information through ITDS by the end of 2009. The Food Safety Working Group established by President Obama in March 2009 has also recognized the importance of strengthening federal coordination where there is overlapping regulatory jurisdiction, an objective that ITDS can help achieve.

A second system that merits attention and resources is the Automated Commercial Environment ("ACE"), which will enable trade community users and CBP officials to electronically submit and retrieve import transaction data through a secure web portal. ACE is being brought on-line in tranches, but is still short of its full operational capabilities. The additional steps necessary to achieve full functionality with ACE should be completed as rapidly as possible, and I urge the Subcommittee to be actively engaged in its oversight efforts to ensure ACE is operating at its full capacity as quickly as possible.

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I appreciate very much the opportunity to testify before the Subcommittee this afternoon, and would be pleased to answer any questions you might have at the appropriate time.