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April 20, 2010

**VIA ELECTRONIC DELIVERY**

The Honorable Ronald K. Lorentzen  
Deputy Assistant Secretary for Import Administration  
U.S. Department of Commerce  
14<sup>th</sup> Street and Constitution Avenue, NW  
Washington, D.C. 20230

Re: Comments on Retrospective Versus Prospective Antidumping and Countervailing Duty Systems

Dear Secretary Locke:

On March 31, 2010, the Department of Commerce (the "Department") published a notice in the Federal Register requesting comments regarding "the advantages and disadvantages of prospective and retrospective antidumping and countervailing duty systems" to be taken into consideration in the Department's preparation of a report to Congress. Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems; Request for Comment and Notice of a Public Hearing, 75 Fed. Reg. 16,079 (Mar. 31, 2010) (hereinafter "March 31<sup>st</sup> Notice"). On behalf a diverse group of importers of wooden bedroom furniture (hereinafter "Furniture Importers Coalition" or "Coalition"), merchandise that is currently

subject to an antidumping duty order,<sup>1</sup> we hereby submit comments regarding retrospective versus prospective antidumping and countervailing duty systems.

The Furniture Importers Coalition supports a shift from the current retrospective antidumping (“AD”) and countervailing duty (“CVD”) regime to a prospective system. A shift to a prospective duty regime would enable the U.S. government to continue to remedy injurious dumping and subsidies while enhancing overall compliance with the regime. These gains in compliance would minimize uncollected duties, effectively targeting high-risk importers. Moreover, a change to a prospective regime would enhance the predictability of the current AD and CVD system, which is fraught with unpredictability for all actors involved – particularly for U.S. importers, the domestic industry and the government itself. A move to a more reliable system is especially warranted at a time when importers face increasingly rigorous requirements from the government, such as the so-called 10+2 Rule and Lacey Act amendment reporting requirements. These burdens are especially challenging for small businesses. A prospective system would preserve valuable government resources while helping to save U.S. jobs and minimizing bad actors. By contrast, the current retrospective system is affirmatively wasteful, creating more of a burden than necessary for the government and private parties alike. The time is ripe to leave the retrospective AD/CVD regime behind.

Additional comments on the specific questions set forth in the March 31<sup>st</sup> Notice are provided below.

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<sup>1</sup> Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture From the People’s Republic of China, 70 Fed. Reg. 329 (Jan. 4, 2005).

**I. A Prospective Antidumping and Countervailing Duty Regime Would Continue to Remedy Injurious Dumping While Minimizing Uncollected Duties (Questions 1 & 2)**

To effectively remedy the effects of injurious dumping and subsidies, the United States AD/CVD regime must, first, calculate and assess accurate duties and, second, take the steps necessary to collect those duties. Any AD/CVD regime is rendered ineffective by the government's inability to properly calculate duties and enforce collection of those duties. By statute, the Department is tasked with the calculation and imposition of duties, while U.S. Customs and Border Protection ("CBP") is tasked with the collection of those duties.<sup>2</sup>

**A. A Prospective Duty Regime Allows for the Effective Calculation and Imposition of Duties**

There are fundamental differences in the calculation and imposition of retrospective versus prospective duties. The U.S. Government Accountability Office ("GAO") discussed these differences in its 2008 Report on shortfalls in antidumping and countervailing duty collection. See U.S. GAO, Antidumping and Countervailing Duties; Congress and Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection, GAO-08-391 (Mar. 2008) ("2008 GAO Report"). Duties assessed prospectively are calculated on a historical basis as opposed to retroactively assessed duties, which are calculated on an "actual basis." Id. at 40.

As an initial matter, the Coalition disagrees with the GAO's characterization of duties calculated prospectively as not being "actual." Even though a prospective system may not provide a contemporaneous duty rate, it does not mean that the duty rate is inaccurate. Prospective duty rates are calculated using actual sales prices and production values from prior time periods. See id. at 4. Thus, a duty rate that was determined for a manufacturer or exporter

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<sup>2</sup> See 19 U.S.C. §§ 1673(e), 1675; Mitsubishi Elec. Am., Inc. v. United States, 44 F.3d 973, 977 (Fed. Cir. 1994).

who chooses to participate in an antidumping or countervailing duty proceeding will be applied to that party's goods. The mischaracterization of "actual" versus "contemporaneous" must be accurately addressed by the Department in its analysis of the effectiveness of a prospective duty regime as reported to Congress.

Further, it is also not accurate to characterize the retroactive method as resulting in the assessment of "actual" duties in every instance. The Department does not calculate an assessment rate based on company-specific data for the vast majority of imports subject to an AD/CVD case, because the Department typically does not have the resources to individually examine all exports. Thus, a very large percentage of goods subject to AD/CVD annual reviews are assessed final duties based on the weighted average of the duty rates of only a handful of companies. Such a rate bears no relation whatsoever to an "actual" rate of dumping or subsidization.

For foreign exporters that are individually examined, the Department calculates an assessment rate based on the entered values reported by the foreign exporter, which may differ from the actual entered values reported by the importers for reasons related to time-lags between export date and import date, the presence of a third-country reseller or other middleman, or adjustments made by the importer or its customs broker for non-dutiable charges. The foreign exporter, in general, is not in a position to know the actual entered values. As a result, the Department typically derives an entered value based on the exporter's reported gross selling prices minus non-dutiable charges of which the exporter is aware. See e.g., Koyo Seiko Co. v. United States, 258 F.3d 1340, 1346 (Fed. Cir. 2001) (quoting Torrington Co. v. United States, 44 F. 3d 1572, 1578 (Fed. Cir. 1995) ("{T}he antidumping statute merely requires that...the

difference between foreign market value and United States price serves as the basis for the assessment rate.”)).

In addition, for companies not undergoing an annual review for a given period, the Department orders CBP to assess final duties based on the amounts deposited upon entry. In other words, in a non-review situation, the United States is already applying a form of “prospective duties.”

B. A Prospective Duty Regime Allows for the Effective Collection of Duties

Any perceived or realized cost to effectiveness rendered by a prospective versus retrospective duty regime is compensated for many times over by the increase in the ability of CBP to collect duties in an efficient and consistent manner. The government’s inability to fully collect antidumping and countervailing duties assessed has long plagued the United States’ retrospective regime. For example, the government itself has lamented that “CBP only distributed about half of the CDSOA money that should have been available for distribution in 2004 because it failed to collect about \$260 million in applicable AD/CV duties.” GAO, *Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act of 2000*, GAO-05-9791 at 4 (Sept. 2005) (“CDSOA GAO Report”). Although “CBP has taken some steps to identify and address AD/CV duty collection problems, which undermine...the effectiveness of related trade remedies ... CBP recently reported to Congress that it is working with other U.S. agencies to develop legislative proposals another solutions by the end of 2005.” *Id.* Five years later, solutions have yet to be developed. A switch to a prospective system would alleviate the failure to collect assessed duties by enabling the government to collect duties owed at the time of importation.

One explanation for the challenge of collecting duties is that the current retrospective duty regime has an incredible impediment to its general efficacy – the inherent time lag in calculating contemporaneous antidumping and countervailing duties. With such a substantial lag between importation and assessment with a retroactive duty regime, two distinct issues arise. First, the ability of compliant U.S. importers to pay retroactive duties is compromised because their ultimate duty liability is unknown and unknowable at the time of import. Second, the system allows for a small number of “bad actors” to undermine and taint the entire AD/CVD system. An internal U.S. Department of Treasury review released in 2005 acknowledged that “the length of time between entry and liquidation is often several years, and in that time, some importers go out of business, leaving CBP with no way to go back for collection of additional duties.” *Id.* at 25. A 2008 GAO Report found that “final duties are assessed, on average, more than 3 years after importation.” 2008 GAO Report at 40. This is an *average*. The time between importation and assessment can be many times longer when litigation further prolongs assessment.

With assessment of final duties delayed for multiple years, even those U.S. importers who faithfully intend to pay final duties on all dutiable products they import may face difficulties meeting their obligations due to the lack of predictability and large-scale changes to a market that may occur in the intervening period. There are undoubtedly U.S. importers that have succumbed to the economic downturn between the time they imported goods and the time duties will be assessed. Yes, the current statute and regulations require these companies to make cash deposits upon importation, but as the first three administrative reviews of the antidumping duty order on wooden bedroom furniture show, cash deposit rates often bear no relation to final duties assessed.

In fact, assessed duties have been as much as 30 percent higher for importers who deposited at the separate rate only to see their ultimate liability be unfairly assessed at the PRC-wide rate. See, e.g., Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, 74 Fed. Reg. 41,374 (Aug. 17, 2009) (showing difference between the separate rate of 7.24% and PRC-wide rate of 216.01%). The crawfish industry provides another example. According to CBP, “{i}n the case of crawfish, the deposit rate for most imports was 91.5 percent but was increased to 201 percent at final liquidation. This type of substantial increased liability has also resulted in a number of importers being unable to meet their financial obligations for antidumping duty at liquidation and again the continuous bonds were insufficient to protect the revenue.”<sup>3</sup> This lack of certainty is yet another problem caused by the retroactive system. Absent payment of duties upon importation, unrelated industry factors can result in nonpayment years down the line.

Nonpayment by a small number of bad actors, those importers “who intentionally avoid paying required duties,” is another problem with the effectiveness of the retroactive duty regime. 2008 GAO Report at 40. This problem is not one, however, that should be ascribed to the entire importing community. For years, the Department and CBP have taken steps to prevent the nonpayment and circumvention of antidumping and countervailing duties, such as modifying the bonding formula, with little tangible success. The Treasury Department has acknowledged that “recovery could be difficult because ... port personnel are accepting bonds that are not sufficient to cover the duties owed plus interest when the entry is liquidated.” CDSOA GAO Report at 25. Changes to the bonding structure do not address the core of the issue, which is what happens

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<sup>3</sup> Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Duty Cases (Cust. and Border Prot., July 9, 2004), available at [http://www.cbp.gov/xp/cgov/trade/trade\\_programs/bonds/07082004.xml](http://www.cbp.gov/xp/cgov/trade/trade_programs/bonds/07082004.xml) (no longer permissibly applied following court litigation).

when the duties owed are significantly greater than those upon which the bonding was based. It is neither feasible nor fair to increase the bond burden to cover every potential increase in duty liability. Nor would it be consistent with the United States' World Trade Organization ("WTO") obligations. See Appellate Body Report, United States – Measures Relating to Shrimp from Thailand, WT/DS343/AB/R; United States – Customs Bond Directive for Merchandise Subject to Anti-dumping/Countervailing Duties, WT/DS345/AB/R (July 16, 2008) (finding U.S. bonding measures to be inconsistent with the United States' WTO obligations).

Overall, there is only one way for CBP to be sure it has final payment of the duties that are assessed – collect those duties upon importation and do not allow those items into U.S. customs territory until the payment is received. If CBP collects duties upon entry, there is little to no risk that these duties will remain uncollected at a later date. A prospective duty regime will provide this much-needed structure.

## **II. Prospective Regime Would Reduce Incentives and Opportunities for Importers to Evade Duties (Question 3)**

As discussed above, a prospective AD/CVD regime would enhance compliance with antidumping and countervailing duty orders by ensuring that the government actually collects duties at the time of importation, thwarting any attempt the evade duties by a few bad actors.

Enhanced compliance with antidumping and countervailing duty regimes that would be offered through a prospective system would significantly benefit the government. Although antidumping and countervailing duty assessments are primarily intended to remedy unfair trade, these duties also provide "a substantial source of revenue for the U.S. government." 2008 GAO Report at 7. This amounted to "over \$98 billion from fiscal years 2003 to 2006." Id. The effect is simple and immediate – enhanced compliance with antidumping and countervailing duty

assessments would result in higher government revenue. Most importantly, the government is more effectively remedying trade that is deemed to be unfair when duties are levied efficiently and uniformly as they would be under a prospective system.

**III. Prospective Antidumping and Countervailing Duty Regimes Would Effectively Target High-Risk Importers (Question 4)**

As discussed in sections II and III, supra, a prospective duty regime would enhance compliance with AD/CVD orders by removing incentives and opportunities for all importers, including high-risk importers, to avoid payment of final duties. Arguably, under a prospective duty regime, there are no high-risk importers because the payment of duties upon importation removes the question as to whether or not a party will pay later. Such a system would save the U.S. government millions in lost revenue by collecting money up-front rather than seeking pennies-on-the-dollar from defunct importers years after importation.

**IV. Prospective Antidumping and Countervailing Duty Regimes Would Impact U.S. Importers and Their Employees Positively (Question 5)**

Of paramount concern to U.S. importers and their employees is certainty. Those businesses that choose to import may not know their liability on goods subject to AD/CVD orders for years. With ever-changing markets and gains in technology allowing global commerce to move at an ever-increasing pace, this sort of unknown retroactive liability significantly affects the ability of U.S. businesses to make competitive business decisions. With the global economic downturn decimating many industries, certainty as to liability becomes ever more important. Certainty as to general liability also helps save American jobs. When importers are certain as to their duty liability, they can better protect their workforce.

The effect of certainty in liability has become extremely important for industries impacted by the global economic downturn, including the U.S. furniture industry. When an

industry experiences challenges, a relatively small liability like an unexpected duty obligation, can mean the difference between continuing operations and shuttering doors at the expense of U.S. jobs and tax revenue. It can also mean the difference between CBP being able to collect duties and having those duties go uncollected because the U.S. importer has legitimately ceased operations. Thus, certainty as to the collection of duties provides a double benefit – U.S. importers are certain as to their liability and CBP is certain as to collection of duties.

Having a prospective regime would also benefit the public at large by ensuring that publicly traded companies have the ability to accurately report their actual antidumping liability on a real-time basis. By contrast, having the unpredictable liabilities of a retrospective system may pose challenges to any public company's compliance with Sarbanes-Oxley's reporting requirements.

**V. Prospective Antidumping and Countervailing Duty Regimes Would Minimize Administrative Burdens (Question 6)**

The adoption of a prospective duty regime would provide administrative gains, especially for CBP. As the GAO noted in its 2008 report, “{p}rospective AD/CV duty systems create a smaller burden for customs officials because the full and final amount of AD/CV duties is assessed at the time of importation.” 2008 GAO Report at 41. A retrospective duty regime “places a unique and significant burden” on CBP, creating “a considerable amount of administrative duties related to identifying, tracking over time, and properly processing entries subject to AD/CV duties.” Id. If CBP needs to collect duties above the cash deposits made at the time of the entry of the good, “additional resources also are needed to attempt to collect those duties.” Id. Hence, the government itself realizes the burden it undertakes under the retrospective duty system.

Adding the constantly increasing demands the current retroactive duty regime places on CBP to the many national security demands placed on the agency after September 11<sup>th</sup>, has resulted in an agency that is spread remarkably thin. Even when the Department releases final liquidation instructions to CBP in a timely manner, it is commonplace to wait up to six months for duties to be assessed because of the incredible backlog of antidumping and countervailing duty assessment. 19 U.S.C. § 1504(d) (“...when a suspension required by statute or court order is removed, {CBP} shall liquidate the entry...within 6 months after receiving notice of the removal from the {Department}....”). Indeed, even when U.S. importers contact customs officers at the ports expressly offering to pay outstanding duties, they are frequently told that they will not receive an assessment for months after a message ordering liquidation is received. Moreover, it is commonplace for customs officers unfamiliar with the intricacies of antidumping duty cases and subsequent injunctions relating to ongoing litigation to issue assessments improperly. Both of these issues can lead to deemed liquidation, costing the government millions of dollars in lost revenue.

As a general matter, implementing a prospective duty regime is not as imposing as its opponents may argue. All major U.S. trading partners, including Canada, Australia and the European Union, utilize prospective antidumping and countervailing duty regimes. See 2008 GAO Report at 37. As such, the drafting of legislation for, and eventual implementation of, a prospective duty regime is not virgin territory. The U.S. government is in a particularly advantageous position of being able to evaluate the strengths and weaknesses of existing prospective duty regimes and tailor its own system to maximize the effectiveness of its own system. Creating uniformity within the international trading system also benefits the individual

The Honorable Ronald K. Lorentzen

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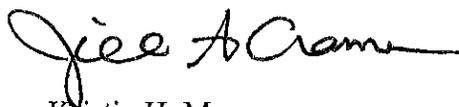
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importers and exporters, who are left to navigate the intricacies importing and exporting largely unaided.

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This document has been filed in accordance with the guidelines set forth in the Department's March 31<sup>st</sup> Notice. If you have any questions concerning this submission, please do not hesitate to contact the undersigned.

Respectfully submitted,



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