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April 5, 2006

The Honorable David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Attention: Weighted Average Dumping Margin

Re: Request For Comments - Antidumping Proceedings: Calculation Of The Weighted Average Dumping Margin During An Antidumping Duty Investigation

Dear Secretary Spooner:

We submit these comments on behalf of the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, the Free Trade Lumber Council, the British Columbia Lumber Trade Council and its constituent associations[1] and their companies (collectively "BCLTC"), the Québec Lumber Manufacturers Association, the Independent Lumber Remanufacturers Association, and the Canadian Lumber Remanufacturers Association in response to the Department of Commerce's ("the Department") *Federal Register* notice, dated March 6, 2006, requesting comments regarding the calculation of the weighted average dumping margin in an antidumping duty

[1] The Coast Forest Products Association (formerly known as Coast Forest & Lumber Association) and the Council of Forest Industries.

investigation. We are enclosing, pursuant to the Department's request, one original and six copies of this submission along with an electronic version in WordPerfect format on a CD-ROM.

The Department proposes that, in light of recent WTO dispute resolution findings, it will abandon its use of zeroing in average-to-average comparisons. The Department should implement that proposal as soon as possible, consistent with Section 123 of the Uruguay Round Agreements Act ("URAA").

Zeroing under all comparison methodologies is contrary to WTO obligations. Therefore, the Department should abandon zeroing regardless of the comparison methodology employed. It should do so in all of its antidumping proceedings, including reviews under Section 751 as well as in investigations under Section 731 of the Tariff Act.

The Department has solicited comments on alternative approaches that may be appropriate in future investigations. The Department should continue use of the average-to-average comparison methodology in investigations, but without zeroing. The Department should not switch to transaction-to-transaction comparisons except in the extremely rare cases described in the Statement of Administrative Action to the URAA and in the Department's own regulations. The Department should not seek to evade its responsibilities to bring its practices into compliance with WTO obligations by

adopting any other methodologies that continue to zero or have a similar effect on the antidumping margin calculations.

Respectfully submitted,

Elliot J. Feldman
John J. Burke

I. THE DEPARTMENT SHOULD ADOPT ITS PROPOSAL TO ABANDON ZEROING IN AVERAGE-TO-AVERAGE COMPARISONS

Neither the United States, nor any other party, has challenged that portion of the WTO Panel Report in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* that found the Department's use of zeroing in average-to-average comparisons to be inconsistent with Article 2.4.2 of the WTO Antidumping Agreement.[1] Therefore, that finding is final and binding upon the United States.[2] The WTO Appellate Body also found unambiguously in *United States – Final Dumping Determination On Softwood Lumber From Canada* that the practice of zeroing is inconsistent with the obligations of the United States pursuant to Article 2.4.2 of the Antidumping Agreement: "{T}he United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of 'zeroing.'"[3]

These WTO Appellate Body rulings are unambiguous. The only way the Department can bring its practices into conformity with U.S. obligations under the Antidumping Agreement is to abandon the use of zeroing in average-to-average comparisons. The Department's reviewing courts repeatedly have ruled that zeroing is

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[1] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*,WT/DS294/R, circulated 31 Oct. 2005, ¶ 7.32, *notices of appeal filed.*

[2] *See* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 Apr. 2003, ¶ 92 ("[A]n *unappealed* finding included in a panel report that is *adopted* by the DSB must be treated as a *final resolution* to a dispute between the parties in respect of the *particular* claim and the *specific* component of a measure that is the subject of that claim.") (emphasis in original).

[3] Appellate Body Report, *United States – Final Dumping Determination On Softwood Lumber From Canada*, WT/DS264/AB/R, adopted on 31 Aug. 2004, ¶ 183 ("*Lumber Appellate Body Report*").

not required under U.S. law.[4] Therefore, there is no legal impediment to the Department's compliance with international obligations, abandoning its use of zeroing.

The Department has announced in its March 6, 2006 *Federal Register* notice that it intends to abandon zeroing in average-to-average comparisons. It should do so as soon as the procedural requirements of Section 123 of the URAA have been completed.

II. THE DEPARTMENT SHOULD ABANDON ZEROING UNDER ALL COMPARISON METHODOLOGIES AND IN ALL ANTIDUMPING PROCEEDINGS

The WTO Appellate Body has issued several rulings that have found zeroing inconsistent with Articles 2.4 and 2.4.2 of the Antidumping Agreement.[5] Although those cases arose in the context of the average-to-average comparison methodology used in investigations, the reasoning of those rulings applies to zeroing in all contexts. The European Communities recognized this fact when, following the Appellate Body decision in *EC-Bed Linen*, which involved only a single investigation under the average-to-average methodology, it formally changed its practice and abandoned zeroing in its administrative reviews as well as in investigations.[6] The

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[4] *See, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1341 (Fed. Cir. 2004) ("the statute does not plainly require consideration of only those dumping margins with a positive value."); *Corus Staal BV v. United States*, 387 F. Supp. 2d 1291 (Ct. Int'l Trade 2005) ("'zeroing' is neither required nor prohibited by the U.S. statute....") (citations omitted), *appeal docketed*, No. 2005-1600 (Fed Cir. Sept. 27, 2005); *PAM, S.p.A. v. Dep't of Commerce*, 265 F. Supp. 2d 1362, 1371 (Ct. Int'l Trade 2003) ("The statute is silent on the question of zeroing negative margins.") (quoting *Bowe Passat Reinigungs-und Washchereitechnik GMBH v. United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996)).

[5] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 Mar. 2001, ¶ 86 ("*EC-Bed Linen*"); *Lumber Appellate Body Report* at ¶ 183.

[6] Press Release, European Commission, European Union Complies Fully With WTO Ruling in India Bed Linen Case and Suspends Anti-dumping Measures Against India (Aug. 14, 2001);

Department should reach the same conclusion as the European Communities as to the illegality of zeroing, and similarly abandon the use of zeroing under all methodologies and in all antidumping proceedings.

A. Zeroing Is Contrary To Article 2.4.2

The Department attempted to evade the Appellate Body's ruling in *Softwood Lumber* by switching to the transaction-to-transaction methodology and continuing to zero.[7] However, the Appellate Body's ruling that the U.S. practice of zeroing is inconsistent with the Antidumping Agreement was based primarily upon its finding that the term "'margins of dumping' can be found only for the product under investigation as a whole."[8] The term "margins of dumping" as used in Article 2.4.2 does not distinguish between average price comparisons and transaction-to-transaction comparisons.[9] The Department, the Appellate Body found, was not in compliance with the Antidumping Agreement, and as long as it zeroes it will remain out of compliance, whether it utilizes average-to-average comparisons or transaction-to-transaction comparisons.

Press Release, Europa, European Commission to Review Anti-dumping Measures To Conform Compliance With WTO Recommendations (May 8, 2002) (IP/02/685).

[7] *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22,636, 22,637-39 (May 2, 2005).

[8] *Lumber Appellate Body Report* at ¶ 96.

[9] The first sentence of Article 2.4.2 states that "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis." WTO Antidumping Agreement Article 2.4.2.

The Appellate Body explained that:

> For all these purposes, the product under investigation is treated as a whole, and export transactions in the so-called "non-dumped" sub-groups (that is, those sub-groups in which the weighted average normal value is less than the weighted average export price) are not excluded. We see no basis, under the *Anti-Dumping Agreement*, for treating the very same sub-group transactions as "non-dumped" for one purpose and "dumped" for other purposes. Indeed, in the anti-dumping investigation at issue in this dispute, the product as a whole—softwood lumber—has been treated as a "dumped" product, except at the stage of zeroing.[10]
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> . . .
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> Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole.[11]

Zeroing, regardless of comparison methodology, treats non-dumped transactions differently from dumped transactions (*i.e.*, pretending that the export prices were less than what they actually are). Therefore, zeroing is inconsistent with the obligation that the product under investigation be treated as a whole.

The Department's transaction-to-transaction methodology exacerbates the failure of the Department's zeroing practice to account for the product as a whole. The average-to-average methodology does not zero at the model (CONNUM) level. Thus, at this first stage in the comparison, all export transactions and prices are taken into account fully. The Department's use of zeroing in the context of its transaction-to-transaction approach in the Softwood Lumber 129 Determination zeroed below the model level. The Department did not compute a margin of dumping for a U.S.

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[10] *See Lumber Appellate Body Report* at ¶ 99.

[11] *See id.* at ¶ 101 (emphasis in original).

CONNUM, much less for the product under consideration as a whole, but rather for individual transactions.

The Appellate Body in *Softwood Lumber* upheld the finding of the WTO Panel that the U.S. practice of zeroing is inconsistent with the WTO Antidumping Argument. Therefore, the views expressed by that Panel also were adopted by the DSB and are instructive on the zeroing issue. That Panel noted:

> Although we are mindful that we are not called upon to decide whether zeroing is allowed or disallowed under the transaction-to-transaction and weighted-average-normal-value to individual export transaction methodologies, we are of the view that the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the *AD Agreement*.[12]

Thus, the WTO Appellate Body, albeit in *dicta*, already has concluded that the U.S. practice of zeroing would be inconsistent with Article 2.4.2 of the WTO Antidumping Agreement in the context of the transaction-to-transaction methodology.[13]

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[12] Panel Report, *United States- Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted as modified by the Appellate Body on 31 Aug. 2004, ¶ 7.219, n.361.

[13] This issue will be addressed directly by the Appellate Body in the next few months. The panel formed to review the Department's 129 determination in *Softwood Lumber* found that zeroing was permissible under a transaction-to-transaction comparison, contrary to the Appellate Body's findings and reasoning. Canada already has stated publicly that the panel's finding is inconsistent with the Appellate Body's decisions and we fully expect Canada to appeal that finding. The Appellate Body already has analyzed the key language in Article 2.4.2 that applies equally to transaction-to-transaction and average-to-average comparisons and found that language prohibits zeroing. Thus, the panel finding on zeroing in transaction-to-transaction comparisons is unlikely ever to have any legal effect. Regardless, the Department should not rely on it unless it becomes final and, like the Appellate Body decisions cited above, is adopted by the Dispute Settlement Body.

B. Zeroing Is Contrary To Article 2.4

Zeroing also is inconsistent with the fair comparison requirement of Article 2.4 of the WTO Antidumping Agreement. The bias toward inflated margins created by zeroing out higher priced export sales causes an inherent unfairness in the comparisons. The Appellate Body in *EC – Bed Linen* confirmed its view that zeroing denies a fair comparison:

> Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.[14]

The fair comparison requirement of Article 2.4 applies to all dumping calculations regardless of the comparison methodology used. Thus, zeroing is inconsistent with WTO obligations in transaction-to-transaction and average-to-transaction comparisons just as much as it is inconsistent with those obligations in weighted-average-to-weighted-average comparisons.

The Appellate Body's discussion of zeroing in *United States – Corrosion-Resistant Steel AD Sunset Review* further confirms that zeroing is inconsistent with the fair comparison requirement of Article 2.4 of the WTO Antidumping Agreement. The Appellate Body noted:

> When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing ... may lead to an affirmative determination that dumping

[14] *EC-Bed Linen*, ¶ 55.

> exists where no dumping would have been established in the absence of zeroing." Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.[15]

The Appellate Body did not rule on the zeroing issue in *United States – Corrosion-Resistant Steel AD Sunset Review* because it did not have a factual record before it as to whether the United States actually engaged in zeroing in that particular proceeding. Nevertheless, the Appellate Body's discussion of zeroing confirms that the practice, "in an original investigation or otherwise," is contrary to the obligation, set out in Article 2.4 of the WTO Antidumping Agreement, to make fair comparisons.

The fair comparison requirement of Article 2.4, as noted in the Appellate Body report quoted above, applies to reviews under Section 751 of the Tariff Act as a result of the obligation in Article 9.3 of the Antidumping Agreement that "{t}he amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." Consequently, zeroing is inconsistent with WTO obligations in all circumstances, including investigations under Section 731 of the Tariff Act, and reviews (administrative, changed circumstances, and sunset) under Section 751 of the Tariff Act.[16]

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[15] Appellate Body Report, *United States – Sunset Review Of Anti-Dumping Duties On Corrosion-Resistant Carbon Steel Flat Products From Japan*, WT/DS244/AB/R, adopted 9 Jan. 2004, ¶ 135.

[16] The panels in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* and *United States – Final Dumping Determination On Softwood Lumber From Canada Recourse To Article 21.5 Of The DSU By Canada* found that Article 2.4 does not prohibit zeroing. However, that issue is on appeal before the Appellate Body in the first case and will be appealed to the Appellate Body in the second., As noted above, the Appellate Body already has expressed its view that zeroing denies a fair comparison as required by Article 2.4. Thus, the Department should not rely upon those Panel findings, which have no current legal effect and are likely to be overturned by the Appellate Body in a matter of months.

III. THE ONLY LAWFUL ALTERNATIVE IS TO CONTINUE USING THE AVERAGE-TO-AVERAGE METHODOLOGY, BUT WITHOUT ZEROING

The Department has solicited comments on alternative approaches that may be appropriate in future investigations. The only lawful approach is the continuation of the average-to-average comparison methodology in investigations, but without zeroing. The Department should not switch to transaction-to-transaction comparisons except in the extremely rare cases described in the Statement of Administrative Action to the URAA and in the Department's own regulations. The Department should not seek to evade its responsibilities to bring its practices into compliance with WTO obligations by adopting any other methodologies that continue to zero or have a similar effect on the antidumping margin calculations.

The Department in its *Softwood Lumber Section 129 Determination* sought to evade its WTO obligations by switching to the transaction-to-transaction methodology while continuing to zero. Zeroing is prohibited under the transaction-to-transaction methodology for the reasons discussed in the preceding section. Moreover, as a matter of U.S. law, the Department may not employ the transaction-to-transaction methodology in the vast majority of cases.

U.S. law reserves the transaction-to-transaction comparison methodology for unusual situations involving very few sales and identical or very similar merchandise sold in each market. According to the SAA to the URAA,

> Commerce normally will establish and measure dumping margins on the basis of a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices. . . . Such a methodology {transaction-to-transaction} would be appropriate in

> situations where there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made.[17]

Congress explicitly approved the SAA in Section 101(a) of the URAA and provided in Section 102(d) of the URAA that the SAA is the authoritative expression of the United States concerning the interpretation and application of the URAA.[18] The Department is not free to disregard the SAA.

Employing the transaction-to-transaction methodology outside the very limited circumstances described in the SAA would be contrary to the Department's own regulation, which provides that:

> In an investigation, the Secretary normally will use the average-to-average method. The Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made.[19]

The regulation, consistent with the SAA, establishes a strong preference for the average-to-average method that can be overcome only in unusual circumstances, where the prerequisites of few sales and identical or very similar merchandise are met. These prerequisites cannot be met in most cases, which typically involve thousands of transactions and many different products.

The Department, in its *Softwood Lumber Section 129 Determination,* philosophized about technology to avoid the plain meaning of the SAA and its own

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[17] Statement of Administrative Action, H.R. Doc. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4171, 4178.

[18] *See* 19 U.S.C. §§ 3511(a) and 3512(d).

[19] 19 C.F.R. § 351.414(c).

regulation. The Department asserted that the transaction-to-transaction methodology was disfavored in 1997 because of computer and programming difficulties.[20]

The Department's philosophy is unreasonable for three reasons. First, the SAA and the Department's regulations nowhere state that the transaction-to-transaction methodology was disfavored in 1997 because of computer or programming difficulties, nor do they anywhere suggest that the preference would change were technology to change.

Second, the Department's rationale does not address the substantive reasons for the preference for average-to-average comparisons, which relate to the statistical biases created by transaction-specific price comparisons. The Court of International Trade explained, in *Borden, Inc. v. United States*, that "transaction-specific price comparisons are statistically biased toward a dumping finding."[21] Technology cannot overcome the bias.

Third, the Department is not free to disregard its own regulations by claiming they are obsolete. The Department implemented its regulation through a formal rulemaking process; it remains binding upon the Department until and unless the regulations are amended.[22] The Department may amend its regulations only through a formal rulemaking process satisfying all of the requirements of the Administrative

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[20] *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. at 22,639.

[21] *Borden, Inc. v. United States*, 4 F. Supp. 2d 1221, 1225-26 (Ct. Int'l Trade 1998) *rev'd on other grounds Borden, Inc. v. United States*, 7 Fed.Appx. 938, 2001 WL 312232 (Fed. Cir. 2001).

[22] *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,295 (May 19, 1997)(revising AD/CVD rules to conform to URAA after notice and comment period).

Procedures Act.[23] Therefore, the Department may use the transaction-to-transaction method only in unusual cases involving very few sales, and where the merchandise is identical or very similar. These prerequisites are not met here.

The use of the transaction-to-transaction methodology in most cases introduces a myriad of practical problems and new legal issues. For example, all of the parameters for deciding which home market sale to match with which U.S. sale are unexplored and unlitigated:

- Is a sale of a similar product on the same day to be preferred over a sale of the identical product, one day earlier, one week earlier, or six months earlier?
- If so, would that choice not thwart the statutory preference for identical product matches over similar product matches?
- Is the date of sale the best way to identify contemporaneous sales when the prices may have been set months apart?
- How should the Department handle price volatility, the effects of which tend to even out when averages are used?
- Should the Department compare spot sales to contract sales?
- If so, are there any further adjustments needed?
- What are the impacts on cost calculations and difference in merchandise adjustments?

The transaction-to-transaction methodology raises questions about how to match transactions; further adjustments that may need to be made to ensure fair comparisons; and the ramifications for other aspects of the Department's calculations. The interaction of all these cascading changes, and the techniques required to control them, are unknown and unexamined. They prove with evidence what the law already had

[23] 5 U.S.C. § 553 (establishing procedures for notice and comment rulemakings).

concluded: the transaction-to-transaction methodology cannot be used in all but the very rare cases for which it was designed.

IV. CONCLUSION

The accumulation of WTO decisions leads to only one option, the abandonment of zeroing in all instances. Commerce cannot pretend that it is complying with international obligations by changing methodologies, or distinguishing between investigations and administrative reviews. Zeroing is contrary to Articles 2.4 and 2.4.2 of the Antidumping Agreement, and the supposed cure, a switch to the transaction-to-transaction methodology, is contrary to the Statement of Administrative Action and the Department's own Regulations.