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April 5, 2006

PUBLIC DOCUMENT

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

Re: *BOFT Comments on the Department's Proposal to Terminate Its Practice of "Zeroing" When Calculating Antidumping Margins*

Dear Mr. Assistant Secretary:

The Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the Peoples's Republic of China hereby submits comments on the Department's proposal to terminate its practice of "Zeroing" when calculating antidumping margins.

The enclosed comments are submitted pursuant to the Departments's Request for Comments that was published in the *Federal Register* on March 6, 2006.

The comments are provided in the attached paper. In accordance with the Departments request we provide six copies of the comments and a CD containing BOFT's comments in electronic form.

Respectfully submitted,

Wang Shichun
Director General
Bureau of Fair Trade for Imp& Exp
Ministry of Commerce

Before the United States Commerce Department
International Trade Administration

Comments of The Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce, People's Republic of China

on

The Department's Proposal To Terminate Its Practice of "Zeroing" When Calculating Antidumping Margins

April 5, 2006

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Introduction and Summary

This submission provides the comments of The Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People Republic of China ("BOFT") concerning the Commerce Department's proposal to terminate its zeroing practice when calculating antidumping margins in antidumping investigations. These comments are submitted in response to the Department's request for such comments, as set forth in the Department's Federal Register notice of March 6, 2005.[1] BOFT appreciates the opportunity to submit these comments and participate in the discussion of this issue.

In brief, BOFT fully supports the Department's expressed intention to terminate its practice of ignoring non-dumped comparisons (i.e. its practice of zeroing) when calculating antidumping margins. Properly implemented, such termination should bring the Department's antidumping practices into alignment with its obligations under the World Trade Organization ("WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement").

BOFT notes that virtually all antidumping investigations and reviews involving exports from the People's Republic of China conducted by the United States are conducted using the so-called non market economy

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[1] *See* Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11,189 (Dep't Commerce March 6, 2006).

methodology. This methodology substitutes a constructed value for normal value based on factors of production of the exporters and a mixture of surrogate values and market economy purchased inputs to value those factors of production. As a result, the Department's determination to abandon the practice of zeroing in weighted average to weighted average comparisons between normal value and export or constructed export price would appear to apply to *all* investigations using the NME methodology because by definition such investigations cannot be based on transaction-to-transaction comparisons. Even so BOFT fully supports comments of others that argue the Department should not abandon average to average comparisons and, in any event, should not apply zeroing to transaction-to-transaction comparisons.

It is also our understanding that elimination of zeroing in investigations involving average-to-average comparisons requires neither a statutory nor regulatory change. As such, there are really no constraints on the timing of the implementation of such a change, allowing the Department to implement the termination of the zeroing practice immediately. Under these circumstances, we believe that the Department's zeroing practice should not be applied in any of the pending investigations against exports from China.

Finally, the WTO determination and the U.S. implementation of that determination raise the issue of how to address existing antidumping

measures which, because of zeroing, are being applied in a manner inconsistent with U.S. obligations. While we are aware that WTO decisions are not required to be applied retroactively, the fact remains that any existing antidumping order that was imposed as a result of an investigation initiated after the entry into force of the WTO agreements can be challenged on the basis of the application of zeroing in that investigation. If it is demonstrated that the margin of dumping for individual respondents or the industry as a whole would have been de minimis absent zeroing, continuing the antidumping measures would be inconsistent with U.S. WTO obligations. Rather than create an avalanche of WTO dispute settlement proceedings to correct this situation, we would propose that the U.S. undertake changed circumstance reviews under Section 751(b) of the Tariff Act of 1930, as amended, pursuant to requests for such reviews which demonstrate that the requesting party would have obtained a de minimis margin in the original investigation absent zeroing.

In summary, BOFT urges the Department to proceed with its proposal to eliminate the practice of zeroing in original antidumping duty investigations where the average-to-average comparisons methodology is used to calculate margins, including all investigations in which the Department's non market economy methodology is applied.. The elimination of zeroing is necessary in order to bring the U.S. practice into compliance

with the panel decision in *US-Zeroing*[2] and to make U.S. practice consistent with the United States' international obligations under the AD Agreement. BOFT also urges the Department to implement this new practice of not applying zeroing in all pending investigations and to provide parties currently subject to antidumping measures the opportunity to demonstrate that absent zeroing such measures would not presently be in effect.

Discussion

I. The Department's Proposal To Terminate Its Zeroing Practice In Original Investigations Should be Adopted.

On October 31, 2005, a WTO dispute settlement panel issued a decision consistent with earlier decisions by the Appellate Body that the U.S. practice of zeroing in antidumping investigations that apply an average-to-average margin calculation methodology is inconsistent with Article 2.4.2 of the AD Agreement.[3] Article 2.4.2 provides 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* (emphasis added)." By zeroing out margins on sales where the export price exceeds normal value before establishing the weighted-average dumping margin for the merchandise subject to investigation as a whole, the Department's existing

[2] *Panel Report, United States - Laws, Regulations and Methodology for Calculation Dumping Margins ("US - Zeroing")*, WT/DS294/R, para. 7.32, (Oct. 31, 2005).
[3] *Id.*

practice does not take fully into account the entirety of the export price for those transactions where price exceeds normal value. As such, the Department's practice fails to make a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2 of the AD Agreement. BOFT fully supports the Department's efforts to eliminate this unfair practice from its margin calculation methodology.

Moreover, consistent with Article 2.1 of the AD Agreement, margins of dumping can be found to exist only after considering all relevant export prices for the product subject to investigation, which necessitates the end of the zeroing practice. As the Appellate Body explained in *EC-Bed Linens,* "Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole."[4] Whether or not expressly prohibited by the panel decision currently under implementation by the Department, the practice of zeroing in any context clearly violates the principles expressed by the Appellate Body in *EC-Bed Linens.*

In addition to meeting the formal requirements for implementation of a dispute settlement body report pursuant to section 123(g) of the Uruguay Round Agreements Act, BOFT submits that the Department's decision to terminate its zeroing practice is the proper interpretation of existing U.S.

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4 *Appellate Body Report, European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen from India ("EC-Bed Linens"),* WT/DS141/RW, (March 12, 2001).

6 The Charming Betsy canon of statutory construction requires that whenever possible, U.S. law should be interpreted in a manner consistent with U.S. International Obligations. *Murray v. Charming Betsy*, 6 U.S. (Cranch) 64, 118, 2. L.Ed. 208 (1804).

laws, which have always allowed for the possibility that dumping margins can and should be estimated using a method that incorporates in their entirety the export prices for non-dumped sales. By eliminating zeroing, the Department's new practice more soundly reflects an interpretation of U.S. law that is in harmony with U.S. international obligations.[6]

II. The Use of Average-to-Average Calculation Methodology in Investigations Is Both the Expressed Preferred Practice and The Only Methodology Used for Cases Against NME Countries.

In addition to requesting comments on the elimination of zeroing in average-to-average investigations, the Department's request "seeks comment on the alternative approaches that may be appropriate in future investigations." BOFT takes this opportunity to remind the Department that there is a clear regulatory and statutory preference for the use of average-to-average comparisons in antidumping investigations, and the elimination of zeroing from these average-to-average comparisons in no way warrants a departure from this long-standing margin calculation practice. Indeed, to consider a broad revision to the Department's investigation methodology as a result of the WTO panel decision, when all that is required by the decision is the deletion of a single line of programming in the Department's standard margin calculation computer program, would introduce an inordinate level of complexity into what should be the simplest of tasks. Such an approach

would violate the spirit of transparency and fairness that is a hallmark of the world trade regime.

More importantly, BOFT submits that any "alternative approaches" that might exist for cases against market economy countries would not be applicable to cases against China. As noted above, all antidumping investigations and reviews involving exports from the People's Republic of China conducted by the United States are currently conducted using the so-called non market economy methodology. This methodology substitutes a constructed value for normal value based on factors of production of the exporters and a mixture of surrogate values and market economy purchased inputs to value those factors of production.

As a result, the Department's determination to abandon the practice of zeroing in weighted average to weighted average comparisons between normal value and export or constructed export price would appear to apply to *all* investigations using the NME methodology because by definition such investigations cannot be based on transaction-to-transaction comparisons.

III. Implementation Should Be Immediate and Should Apply to All Proceedings That Are Not Yet Final.

In its request for comments, the Department indicated that it intends to apply any changes in methodology, "in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the new weighted

average dumping margin calculation methodology." There is no reason for the Department to limit its implementation of the WTO panel decision in this way. Unlike implementation under section 129 of the URAA, which limits implementation to entries made, section 123(g) of the URAA in no way requires the Department to limit the implementation the US-Zeroing panel decision prospectively.[7]

A. The Department Normally Implements a Change in Practice Resulting from an Adjudicative Ruling in All Proceedings Where the Relevant Determination is Not Yet Final.

Under analogous situations, when implementing decisions made by U.S. adjudicative bodies the Department has made its methodological changes effective in all applicable proceedings where the dumping determination was not yet final. For example, when the Court of Appeals for the Federal Circuit ("CAFC") issued a decision finding it inappropriate to resort immediately to constructed value as the basis for foreign market value when home market sales were made "outside the ordinary course of trade," the DOC revised its practice and began comparing export sales to similar normal value sales prior to resorting to constructed value in all pending cases.[8] This decision-driven change in practice was implemented within two months of the CAFC's decision, even in investigations initiated prior to the

[7] 19 U.S.C. 3533(g).

[8] *Cemex v. United States*, 133 F.3d 897 (Fed. Cir. 1998)

decision, and even where the issue was not raised by any party in the proceeding.[9]

Implementation of the panel decision in *US-Zeroing* on a fully "retroactive" basis, in the sense that it should be applied to all pending cases, is consistent with the basic norms of adjudication by which the Department should be guided.[10] Purely prospective application of the rule articulated by the panel in October, as well as the Department's implementation of the rule only in the month following the month in which the change has been formalized in a Department memorandum, would inappropriately lead to the unequal administration of justice for similarly situated respondents. The principle of retroactive application of rules has been clearly articulated by the Supreme Court of the United States, which has stated, "when this Court applies a rule of federal law to the parties before it, that rule ... must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[11] While the principle embraced by the Supreme

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[9] See e.g., *Stainless Steel Wire Rod from Taiwan*. 63 Fed Reg. 10836 (Dep't Commerce March 5, 1998) ("This issue was not raised by any party in this proceeding. However,...the Department has reconsidered its practice in accordance with this court decision and has determined that it would be inappropriate to resort directly to CV, in lieu of foreign market sales, as the basis for NV if the Department finds foreign market sales of merchandise identical or most similar to that sold in the United States to be outside the 'ordinary course of trade.' Instead, the Department will use sales of similar merchandise, if such sales exist."). See also, Import Administration Policy Bulletin, "Basis for Normal Value When Foreign Market Sales Are Below Cost," No. 98.1 (Feb. 23, 1998)

[10] See, *Griffith v. Kentucky*, 479 U.S. 314 (1987) for a discussion of the principle of retroactivity of judgments in constitutional cases. ("After we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending" (pp 322-23)).

[11] Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993).

Court is not directly binding on administrative decision-making by the Department, to the extent that the agency is acting in an adjudicative capacity when it imposes an antidumping duty order, it would be prudent for the Department to be guided by the wisdom of the nation's highest Court.

B. Failure To Eliminate Zeroing in Any Pending Determinations Is Unreasonable.

The EC's challenge to the U.S. practice of zeroing in antidumping investigations is not the first time that the WTO has called into question its validity under the AD Agreement. In Lumber V, which challenged the practice as applied in the Department's antidumping investigation of softwood lumber from Canada, the WTO Appellate Body upheld the panel's finding that the United States acted inconsistently with Article 2.4.2 of the AD Agreement in determining the existence of margins of dumping *on the basis of a methodology* incorporating the practice of "zeroing"(emphasis added).[12] Although only technically applicable to the softwood lumber proceeding, the language of this widely publicized decision made it clear that the existing U.S. practice of zeroing was inconsistent with U.S. obligations under the AD Agreement with respect to investigations. Certainly, this decision, as well as the six months that have passed since the issuance of the panel decision in *US-Zeroing* have provided parties with adequate notice that change is imminent. There is no reason to further delay implementation. Moreover, to eliminate the practice in on-going investigations will promote

[12] Lumber V. at paragraph 183.

efficiency and avoid additional costly WTO appeals that the United States has virtually no chance of winning. For all of these reasons, BOFT urges the Department to implement its change in practice with respect to zeroing in all pending determinations.

IV. Zeroing Should Also be Abandoned in All Administrative Reviews, New Shipper Reviews, Changed Circumstance Reviews, and Sunset Reviews.

Notwithstanding the narrow applicability of the panel's decision in *US-Zeroing,* in addition to eliminating the practice of zeroing in original antidumping investigations, the Department should also terminate zeroing in antidumping duty administrative reviews, new shipper reviews, changed circumstance reviews and sunset reviews. Although the panel in *US-Zeroing* held only that zeroing was inconsistent with the AD Agreement in the context of average-to-average comparisons in original investigations, the practice nevertheless violates the overarching principles of fairness that are embodied in the WTO agreements. The reasons that zeroing is unfair in investigations, namely, that it introduces a distortion and inherent bias into the dumping comparison are equally applicable to administrative reviews. Just as in investigations, zeroing in reviews fails to take into account the entirety of some export price transactions and leads to exaggerated and often grossly distorted dumping margins. While the panel decision provides the United States with a loophole by which the Department can continue to zero in administrative reviews, it is incumbent upon the United States -- as a

good-faith member of the world trading community -- to put an end to the practice in all types of antidumping duty proceedings.

BOFT also takes this opportunity to note that the panel's narrow application of the AD Agreement's prohibition against zeroing only to original investigations is in error. The continuation of the application of zeroing in any type of inquiry into the existence of dumping, whether conducted pursuant to an average-to-average, transaction-to-transaction, or average-to-transaction comparison methodology violates the "fair comparison" principle articulated in Article 2.4 of the AD Agreement, as well as the requirement that margins of dumping should be estimated on the product as a whole, consistent with Article 2.1. As the Appellate Body explained in *Lumber V*, Article 2.1, defines dumping, "in relation to a product as a whole as defined by the investigating authority.... 'Dumping', within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.[13]

Moreover, the Appellate Body stated in *EC-Bed Linens* that , "a comparison between export price and normal value that does *not* fully take 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

13 Appellate Body Report, *Lumber V*,. para 93.

Article 2.4.2.[14] In light of the Appellate Body's interpretation of Articles 2.1 and 2.4, BOFT believes that the panel decision in US zeroing errs insofar as it does not also find that the zeroing practice is inconsistent with the AD Agreement in review proceedings.

V. It Is Very Easy for the Department To Terminate Its Zeroing Practice

The implementation of this change in policy is exceedingly simple to execute. The Department's standard margin program zeroes out all negative margins only when all other aspects of the margin calculation (e.g., cost test, concordance, calculation of weighted-average normal values and weighted average export prices) have been completed. After the Department compares weighted-average net U.S. prices to weighted-average normal values by CONNUM, the program sums these individual, CONNUM-specific comparisons and divides the result by the total net sales value in order to calculate the overall company-specific weighted-average margin.

However, the Department applies its zeroing methodology in this step by including only positive PUDDs in the numerator. Hence, to eliminate zeroing from its overall company-specific margin calculation, the Department need only delete one line of programming language from standard margin program. Specifically, the Department should delete "**WHERE EMARGIN**

14 Appellate Body Report, *EC-Bed Linen*, para 55 (italics in original, underline added).

GT 0;" from the data step in Part 10 titled "Calculate Overall Margin," as illustrated below:

```
PROC MEANS NOPRINT DATA = MARGIN;
/*WHERE EMARGIN GT 0;*/
VAR EMARGIN QTYU VALUE;
OUTPUT OUT = ALLPUDD  (DROP = _FREQ_ _TYPE_)
SUM = TOTPUDD MARGQTY MARGVAL;
    RUN;
```

Conclusion

BOFT appreciates the opportunity to comment on the Department's proposed modification. We respectfully urge the Department to consider these comments as it decides how best to implement the WTO Panel's ruling that the Department's zeroing practice is inconsistent with WTO Antidumping Agreement.