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COMMENTS ON THE COMMERCE DEPARTMENT'S "ZEROING" PROPOSAL

71 FED. REG. 11189 (MARCH 6, 2006)

SUBMITTED ON BEHALF OF THE CONSUMING INDUSTRIES TRADE ACTION COALITION

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INTRODUCTION

The following comments are submitted by the Consuming Industries Trade Action Coalition ("CITAC") in response to the Department's request for comments on its proposal to eliminate the practice of "zeroing" in initial antidumping duty investigations, published 71 *Fed. Reg*. 11189 (March 6, 2006) ("Zeroing Notice"). The Department's current practice of zeroing in average to average comparisons has been ruled inconsistent with WTO obligations in certain situations, and the U.S. has not appealed that ruling. The Department of Commerce requested public comment concerning its proposal to eliminate zeroing in initial antidumping investigations when it employs the "average to average" comparison methodology. 1/ Under the zeroing practice proposed to be abandoned, Commerce assigns a value of zero to negative margins in the process of aggregating specific products to arrive at a margin of dumping for the product as a whole.

We commend the Department for this proposal to eliminate zeroing in initial investigations based on the average to average comparison methodology, and for recognizing that the current

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1/ CITAC believes that the Department incorrectly characterized the zeroing practice as not "offsetting" non-dumped transactions. Zeroing Notice, 71 Fed. Reg. at 11189. However, we believe that the zeroing practice fails to account for comparisons where the normal value is lower than the export price or constructed export price, i.e., where the dumped amount is negative. The WTO correctly ruled that an antidumping calculation that fails to account for negative dumping amounts fails to consider the "product as a whole."

practice of zeroing in initial investigations is inconsistent with the WTO Antidumping Agreement. However, we respectfully submit that the Department's proposal does not go far enough. We urge further action, consistent with U.S. law, WTO rules and sound policy, to eliminate zeroing from *all* antidumping calculation methodologies – during both initial investigations and reviews – because zeroing unfairly inflates antidumping margins and thereby damages U.S. consuming industries.2/

CITAC is an organization of American manufacturers and retailers, from auto parts to household items, who seek to ensure that consuming industries and manufacturers in America have access to reliable supplies of materials necessary for those industries to produce and sell their products. CITAC's goal is to ensure that trade remedy actions, including antidumping actions, designed to protect one domestic industry not unduly harm other domestic industries, especially downstream industries. To remain competitive, it is critical that antidumping duties be fairly calculated and reasonably predictable by exporters. Abolition of the zeroing practice when applied to the Department's average to average methodology inadequately serves this interest; fairness and predictability would be better served if the practice of zeroing is eliminated in all antidumping calculations by the Department.

The practice of zeroing, regardless of its legality under WTO rules, is detrimental to the U.S. economy. Zeroing damages U.S. consuming industries by artificially increasing antidumping margins (or even creating dumping margins when they would not otherwise exist) and thereby unduly restricting trade. This practice is unfair when used in the original investigation; it is even

2/ Zeroing in other antidumping proceedings may also violate WTO obligations under the Antidumping Agreement. However, CITAC does not base its comments solely on WTO requirements; the Department should consider the national interest in maintaining and enhancing global competitiveness, which also indicates that zeroing should be eliminated in all antidumping proceedings.

more unfair when applied in the assessment or review phase, where actual liability for duties is imposed. The practice does much more harm than good. Therefore, the practice of zeroing should be discontinued in all antidumping proceedings.

COMMENTS ON THE DEPARTMENT'S PROPOSAL

CITAC believes that a change in policy on zeroing is long overdue, and commends the Department for taking this step. Failure to acknowledge the existence of negative price comparisons violates sound practice as well as WTO obligations. However, as noted above, the Department's proposal should be expanded: 1) to preclude the use of the zeroing methodology in all investigations, regardless of the methodology used; and 2) to apply to all antidumping proceedings, including administrative reviews, sunset reviews, and new shipper reviews.

I. The Department Should Abandon the Use of the Zeroing Methodology in All Investigations, Regardless of the Methodology Used

The stated purpose of the Department's proposal is to implement the WTO's determination in panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*US – Zeroing*"), WT/DS294/R (Oct. 31, 2005). 3/ The Department's proposal applies this decision narrowly to the Department's average to average methodology in initial investigations. However, to act in the interest of U.S. consuming industries, the policy change respecting zeroing should apply to all antidumping duty investigations, regardless of the methodology used. That is, whether the Department uses average to average, transaction to transaction, or some other methodology in an investigation, zeroing has no place in the calculation.

3/ Zeroing Notice, 71 Fed. Reg. at 11189.

The zeroing practice distorts antidumping comparisons, fails to consider sales of the product as a whole, and is fundamentally unfair in its application. The purpose of the antidumping law is to prevent or remedy injury to domestic industries. This purpose is not served by inflating dumping margins through the pretense of counting "only" positive dumping margins. The total impact of dumping can only be determined when all comparisons, positive and negative, are considered in the calculation. The zeroing practice may even create margins of dumping where none would otherwise exist. In all cases, except those with no negative price comparisons, zeroing incorrectly imposes a greater burden on importers and U.S. consuming industries (who ultimately pay the cost of these duties) than is appropriate. Zeroing is arbitrary because it does not compare actual export prices and actual normal values, but reduces export prices and constructed export prices to a level equal to the normal value without logical foundation.

Just as zeroing distorts the antidumping duty calculation when using the "average to average" methodology, it is no less distortive if the comparison is made using the "transaction to transaction" method. In both instances, negative comparisons would be zeroed in aggregating the comparisons to arrive at a margin of dumping. This is inherently unfair in the transaction to transaction method, no less than in the average to average method. Zeroing artificially inflates (or creates) dumping margins and, in ignoring or "adjusting" certain transactions it fails to calculate a margin of dumping for the product as a whole, as required by the WTO Antidumping Agreement as well as by common sense and fundamental fairness. The Department should acknowledge the presence of negative comparisons in all cases, regardless of the comparison method.

CITAC is very concerned that zeroing, even in one comparison methodology, will destroy the ability of any exporter to predict the possibility or magnitude of antidumping liability. It is unfair

to foreign producers, exporters and U.S. consumers who rely on imports to make it impossible for them to evaluate whether sales are below normal value. If an exporter faces zeroing in any possible comparison methodology, there will be no way that exporter can predict whether any sale would be dumped. The natural consequence of this uncertainty is that exporters will export less to the United States and U.S. consuming industries will lose access to essential imports.

II. The Department Should Maintain Its Strong Preference for the Average to Average Methodology

In addition to the issue of zeroing in transaction to transaction comparisons, the Department should continue its strong preference for using average to average comparisons in initial investigations. The Department's regulations make clear that in an initial investigation, the Secretary "normally" will use the average to average method, and will use the transaction to transaction methodology only in "unusual" situations. 4/ The Department's regulations reflect the clear preference in the Statement of Administrative Action ("SAA") 5/ for employing the average to average methodology. The SAA further explains that "given past experience with [the transaction to transaction] methodology and the difficulty in selecting appropriate comparisons, the Administration expects that Commerce will use this methodology far less frequently than the average to average methodology." 6/

4/ 19 C.F.R. § 351.414(c). See also, ITA, Final Rule Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27296, 27373 (May 19, 1997).

5/ Statement of Administrative Action, U.R.A.A., H. Doc. 316, Vol. 1, 103d Cong. (1994) ("SAA") at 842. The SAA states that "normally" the Department will measure dumping margins on the basis of weighted-average-to-weighted-average comparisons. CITAC agrees that this should be the normal methodology.

6/ SAA at 842-843. Contrary to the Department's determination in the Softwood Lumber Section 129 case, 70 Fed. Reg. at 22639, the "difficulty" with transaction to transaction

Unfortunately, the Department's recent Section 129 determination in the *Softwood Lumber* case 7/ suggests the disturbing possibility that the Department would no longer honor the SAA's preference for the weighted-average-to-weighted average methodology. In *Softwood Lumber*, the Department decided to apply a transaction to transaction methodology to the antidumping margin calculations in a revised antidumping calculation. This was done in order to avoid the need to eliminate zeroing in that case, which the Appellate Body's decision would have required if the normal average to average calculation methodology had been used. In using the transaction to transaction method in that case to maintain its use of zeroing, the Department disregarded the regulatory preference for the average to average methodology. We strongly urge the Department to resist institutionalizing this dangerous methodology, which would harm manufacturing and consumer welfare in the United States.

There are sound reasons why the transaction to transaction approach to determining antidumping duty margins is disfavored. As the SAA recognized, it is very difficult to select the appropriate normal value transaction to compare to each export sales transaction. Dumping margins

methodology was not inadequate computer resources available in 1994, but rather because the selection process is necessarily arbitrary and unpredictable.

7/ ITA, "Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada", 70 Fed. Reg. 22636 (May 2, 2005) ("Softwood Lumber Section 129 Determination"). This determination was designed to implement the WTO's Appellate Body's determination in United States – Final Dumping Determination of Softwood Lumber from Canada, WT/DS264/AB/R (August 11, 2004) ("Lumber Appellate Body Determination").

can vary greatly depending on which normal value Commerce chooses. 8/ Thus, the transaction to transaction method is inherently arbitrary.

III. The Department's New Approach Should Apply to All Administrative Reviews, New Shipper Reviews and Five-Year Reviews

The Department's proposal is limited to initial investigations. However, the Department's practice of zeroing is equally ill-advised in administrative reviews, when duties are assessed and collected and new deposit rates set, as in initial investigations. If anything, zeroing makes even less sense in administrative reviews than in initial investigations.

First, administrative reviews must set a deposit rate for future entries, the margin of dumping must be determined for the product as a whole (as it is in investigations). If zeroing is precluded in investigations, then it must necessarily be precluded in reviews as well, at least to the extent that deposit rates are recalculated. In addition to setting deposit rates, an administrative review also calculates assessment rates for antidumping duties of past entries. With respect to the assessment of antidumping duties, a particularly pernicious impact from the practice of zeroing is that assessed duties can, solely as a result of zeroing, exceed the amount of deposits. This is manifestly unfair to U.S. consumers, because it causes U.S. imports to decline, not because of dumping duties, but because of *excessive* dumping duties.

The reason for the deterrent effect on imports is clear: the importer must determine at what price to sell an imported product to a customer based on the market price of that product. Because the deposit rate for an imported product is generally *not* the upper limit of duty exposure under U.S.

8/ It is for this reason that transaction to transaction is only 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." SAA at 842.

law, the extent of liability for additional duties is unpredictable. Accordingly, importers are likely to decide simply not to import a product to avoid a serious risk of loss should the assessment rate be higher than the deposit rate. Because of the practice of zeroing, the prospect of assessed duties exceeding the deposits is significantly increased.

Therefore, CITAC urges the Department to expand on its proposal and eliminate zeroing in administrative reviews. This is a necessary step to avoid undue harm to consuming industries *regardless of the outcome of WTO proceedings on this issue*. Under U.S. law, whether to resort to zeroing in investigations and administrative reviews is within the discretion of the Department, 9/ and the current practice of zeroing in administrative reviews is inconsistent with sound trade policy for U.S. consuming industries. In reviews, therefore, CITAC proposes that, regardless of the comparison methodology employed (average to average, average-to-transaction or transaction to transaction), the Department commit to a policy of comparing actual normal values to actual export prices or constructed export prices, and aggregating them for the determination of a margin of dumping for the product based on the actual comparisons. This means recognizing negative margins when they occur.

Consuming industries in the United States that are adversely affected by excessive antidumping duty margins have an interest in eliminating the practice of zeroing in reviews as well as initial investigations, because the practice of zeroing is no more supportable from a legal or policy standpoint in the context of a review than in the context of an investigation.

9/ See, e.g., Timken Co. v. United States, 354 F. 3d 1334, 1342 (Fed. Cir. 2004) ("the statute does not directly speak to the issue of negative-value dumping margins").

IV. The Department Should Defer Any Changes to its Standard Comparison Methodology Until After a Final WTO Report Issues in *United States – Zeroing*

The Department proposes that changes to the antidumping comparison methodology be confined to the average to average methodology in initial investigations. As noted above, CITAC believes that consideration of U.S. economic interests requires a broader change than appears in the March 6 notice.10/

However, even if conformity with WTO obligations were the sole reason to contemplate a policy change, a WTO Appellate Body decision due by April 18th in a major case (*US-Zeroing*, brought by the European Communities) is reason to wait for the finalization of this policy. Te Appellate Body *US-Zeroing* decision is likely to clarify whether zeroing is ever proper under WTO rules. In particular, it is likely that this case will resolve the issue whether zeroing is permitted in administrative review calculations.

Thus, it would be advisable to await this decision and to receive comments on its proper interpretation before adopting a new policy on zeroing. This approach seems especially appropriate since the Appellate Body determination will be issued in only two weeks.

For these reasons, CITAC respectfully requests that the Department defer final action on this proposal until after the issuance of the *U.S. – Zeroing* Appellate Body determination and after interested persons have the opportunity to comment on the implications of this decision. To this end, CITAC requests that the Department extend the rebuttal comment period for two weeks after

10/ It is clear that WTO obligations would not prevent the elimination of zeroing in any phase of antidumping proceedings.

April 18, so that interested parties have an opportunity to comment upon the implications of the Appellate Body decision in *United States- Zeroing*.

V. The New Policy Should Be Effective for All Determinations Not Yet Final at the Time of the Final Policy Announcement

The Zeroing Notice states that the Department intends to apply any change in methodology to "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 calculation methodology.]" 11/ CITAC proposes a more ambitious effective date.

To ensure the fairest possible treatment of all exporters and their U.S. customers, we urge that the Department should apply any new methodology to all antidumping investigations and reviews where a final determination has not been issued at the time the policy enters into effect. This should not constitute an undue burden on the Department.

VI. Conclusion

The elimination of zeroing in all its forms is a priority for CITAC and indeed for all consuming industries. Zeroing arbitrarily increases antidumping duty liability beyond the actual margins of dumping. Its elimination will redress the current imbalance of interests between U.S. consuming industries and domestic petitioners and will comply with international requirements under WTO agreements. Thus, CITAC urges the Department to go further than the proposed practice contained in the *Federal Register* notice referenced above, and extend the elimination of zeroing to any comparison methodology in antidumping investigations and to administrative reviews of antidumping duty orders, changed circumstances reviews, new shipper reviews and five-year

11/ Zeroing Notice, 71 Fed. Reg. at 11189.

"sunset" reviews of antidumping duty orders. The total elimination of the Department's zeroing practice would assist U.S. consuming industries in improving their global competitiveness and would prevent the undue disruption of international commerce on which U.S. consuming industries increasingly depend.

Respectfully submitted,

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