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April 5, 2006

Mr. 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

Re: Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation

Dear Mr. Spooner:

On behalf of the Committee to Support U.S. Trade Laws ("CSUSTL"), these comments are presented in response to the Department's March 6, 2006 notice concerning the calculation of the weighted average dumping margin in an antidumping duty investigation. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (March 6, 2006).

I. INTRODUCTION

As discussed in the Department's notice, "the Department usually makes comparisons between average export prices and average normal values and does not offset any dumping that is found with the results of comparisons for which the average export price exceeds the average normal value." Id. As further described in the notice:

> Pursuant to section 777A(d)(1)(A) of the Tariff Act of 1930, in an investigation, the Department may determine whether the subject merchandise is being sold at less than fair value either

> by comparing weighted average normal values to weighted average export prices of comparable merchandise (the average-to-average comparison methodology), or by comparing normal values of individual transactions to the export prices of individual transactions for comparable merchandise (the transaction-to-transaction comparison methodology). The Department's regulations state that the Department will normally use the average-to-average comparison methodology in an investigation. 19 C.F.R. 351.414(c)(1).
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> In applying the average-to-average methodology during an investigation, the Department usually divides the export transactions into groups by model and level of trade ("averaging groups"), and compares an average of the export price of transactions within one group to an average normal value for the same or similar model of the foreign like product at the same or most similar level of trade. When aggregating the results of the comparisons of averaging groups in order to determine the weighted average dumping margin, the Department has not allowed the results of averaging groups for which export price exceeds normal value to offset the results of averaging groups for which export price is less than normal value.

Id.

As discussed in the Department's notice, a World Trade Organization ("WTO") dispute settlement panel report in United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R, circulated Oct. 31, 2005, "found the denial of offsets in certain antidumping duty investigations, when using the average-to-average methodology, to be inconsistent with Article 2.4.2 of the Antidumping Agreement." In response, the Department now "proposes that it will no longer make average-to-average comparisons without providing offsets for non-dumped comparisons" and seeks "comments pertaining to this proposal and appropriate methodologies to be applied in future antidumping duty investigations." 71 Fed. Reg. at 11189.

As described in greater detail below, CSUSTL submits that it is premature and inappropriate for the Department to abandon its practice of making average-to-average comparisons in antidumping investigations without providing offsets for non-dumped comparisons in light of the fact that this issue is being negotiated in the Doha Round. Moreover, the Department's practice is required by the statute and may not be altered without Congressional action. Assuming arguendo that the Department has statutory authority to change its practice, it should compare normal value and export price on a transaction-to-transaction basis, with no offset for non-dumped sales.

II. ABANDONING THE DEPARTMENT'S CONSISTENT AND LONGSTANDING PRACTICE WOULD BE INAPPROPRIATE AND PREMATURE IN LIGHT OF THE DOHA ROUND NEGOTIATIONS

As a threshold matter, it would be both premature and contrary to the Department's Congressional mandate for the Department unilaterally to change its practice regarding the calculation of dumping margins. The Trade Act of 2002 establishes a principal U.S. negotiating objective in the Doha Round "to preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, and avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies . . . ." 19 U.S.C. § 3802(b)(14). Moreover, the Craig-Rockefeller Amendment to the Tax Relief Act of 2005 expressed the sense of the Senate that the United States should not be a signatory to any agreement "outlawing the critical practice of 'zeroing' in antidumping investigations."[1] In light of these expressions of Congressional will, it

[1] S. Amdt. 2655 to S. 2020, "To express the sense of the Congress regarding the conditions for the United States to become a signatory to any multilateral agreement on trade resulting from the

would be inappropriate for the Department to cast aside its longstanding practice while the Doha Round is underway and the United States has taken a negotiating position supportive of the practice.

Even aside from this evidence of Congressional concern, the Department should decline to alter its longstanding practice at this time. Given the fact that the Department's dumping margin calculation methodology is on the table in the Doha Round, it would be counterproductive for the Department simply to abandon this methodology. Instead, the Department should vigorously maintain its practice and instead focus on obtaining a satisfactory resolution of the issue in the course of the negotiations.

III. THE DEPARTMENT'S PRACTICE IS REQUIRED BY THE STATUTE AND CANNOT BE CHANGED WITHOUT CONGRESSIONAL ACTION

In its notice, the Department proposed to change its practice by no longer calculating dumping margins in antidumping duty investigations based on comparisons of weighted average normal values to weighted average export prices without offsets for non-dumped sales. The statute, however, requires the Department not to provide offsets for non-dumped sales when calculating margins based on average-to-average comparisons. This is because offsetting dumping margins with non-dumped sales would render the provisions of 19 U.S.C. § 1677f-1(d) meaningless. If offsets are used, a respondent's dumping margin would always be the same regardless of whether weighted average or individual U.S. transaction prices are compared to a weighted average normal value. Because the only purpose of 19 U.S.C. § 1677f-1(d) is to

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World Trade Organization's Doha Development Agenda Round," 151 Cong. Rec. S13135 (daily ed. November 17, 2005). The amendment was agreed to by voice vote. *Id.* at S13136.

specify when weighted average or individual U.S. transaction prices are to be used, that provision would be deprived of meaning if the result is always the same regardless of the method used. Thus, the statute requires the Department not to provide offsets for non-dumped sales when making a weighted-average-to-weighted-average comparison, and the Department may not do so in the absence of an amendment to the statute.[2]

In Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir. 2004), cert. denied, 543 U.S. 976 (2004), the Federal Circuit, based solely on the statutory definitions of "dumping margin" and "weighted average dumping margin" in 19 U.S.C. §§ 1677(35)(A) and (B), found that it was a "close question" whether the statute mandated the denial of offsets for non-dumped sales. Instead, the court held that such definitions "at a minimum" authorized the Department to deny such offsets. The court followed the holding in Timken in Corus Staal BV v. United States, 354 F.3d 1334 (Fed. Cir. 2004), cert. denied, 543 U.S. 976 (2004).

Significantly, however, key provisions of the statute were not addressed in Timken and Corus Staal. If these provisions are considered, it is clear that the statute does not merely authorize the denial of offsets for non-dumped sales, but requires it.

Specifically, 19 U.S.C. § 1677f-1(d)(1)(A)(i) provides that in investigations without targeted dumping, the Department is to compare weighted average normal values to weighted average U.S. prices.[3] Section 1677f-1(d)(1)(B) provides that in investigations where there is targeted dumping, the Department is to compare weighted average normal values to individual

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[2] For a more complete discussion of the requirements of the statute, see comments filed today on behalf of U.S. Steel Corporation.

[3] As discussed below, section 1677f-1(d)(1)(A) also authorizes comparisons of prices of individual U.S. transactions to the prices of individual home market transactions.

U.S. transaction prices. As these provisions show, Congress specifically provided for different comparison methods to be used to calculate dumping margins depending on the circumstances of the case. The provision of different comparison methodologies can only mean that Congress intended to achieve different results under different circumstances. It would have been pointless for Congress to mandate in 19 U.S.C. § 1677f-1(d) that different comparison methodologies be used if they only achieved the same result.

The negotiating history of the Uruguay Round Agreements Act ("URAA") confirms that the two comparison methods in 19 U.S.C. § 1677f-1(d) were intended to achieve different results. Prior to the Uruguay Round negotiations and the URAA, the Department used only one approach in all circumstances, comparing individual export transaction prices to weighted average normal values.[4] In the negotiations, the U.S. sought to retain this methodology, while other countries negotiated to replace it with the use of weighted average export prices in all instances.[5]

The result reached was that weighted average export prices were to be used in investigations without targeted dumping. In investigations where there was evidence of targeted dumping, the dumping margins could be based on a comparison of the prices of individual export

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[4] See Statement of Administrative Action for the Uruguay Round Agreements Act, H. Doc. 103-316, Vol. 1 ("SAA"), at 810 (observing that the provision of the WTO Antidumping Agreement requiring weighted average to weighted average comparisons in investigations represented a "departure from [the then] current U.S. law").

[5] See, e.g., Communication from Japan Concerning the Anti-Dumping Code, Uruguay Round Negotiating Group on MTN, MTN.GNG/NG8/W/81 (July 9, 1990), available at www.worldtradelaw.net.

transactions to weighted average normal values.[6] Thus, both the outcome of the Uruguay Round negotiations and 19 U.S.C. § 1677f-1(d) show that the different comparison methods set forth in the statute were intended to achieve different results.

This intention, however, is nullified when margins on dumped sales are offset by non-dumped sales. If offsets are made, the dumping margin will always be the same, regardless of whether the Department compares weighted average normal values to weighted average U.S. prices or to individual U.S. transaction prices. This is because, if offsets are made, all non-dumped sales (i.e., negative values) will offset the margins on all of the dumped sales (i.e., positive values). It makes no difference mathematically whether the calculation of the final margin is based on comparing weighted average U.S. prices to weighted average normal value or on comparing individual U.S. prices to weighted average normal value. In either case, the total of the positive margins will be offset by the total of the negative values, and the results will be the same. This will always be the case no matter how many sales or product types are involved and no matter what their value or quantity.

The United States Government acknowledged this fact in *United States – Zeroing* in its analysis of Article 2.4.2 of the WTO Antidumping Agreement ("AD Agreement"), which corresponds to 19 U.S.C. § 1677f-1(d). It argued:

> If the offset requirement applies to both the average-to-average methodology and the average-to-transaction methodology, in both cases, non-dumped transactions would offset dumped transactions. Mathematically, the results of the two comparison methodologies would be identical. Despite a finding that average-to-transaction

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[6] See Agreement on Antidumping, Marrakesh Agreement Establishing the World Trade Organization (Apr. 15, 1994) at Article 2.4.2; SAA at 810, reprinted in 1994 U.S.C.C.A.N. at 4153.

> comparisons are appropriate, the result would be guaranteed to be the same as if average-to-average comparisons had been made.

Opening Statement of the United States at the First Meeting of the Parties in *United States – Zeroing* (March 16, 2005) at 5, para. 13. The WTO Panel similarly found that if offsets were required in all circumstances, "the alternative asymmetrical comparison [i.e., the weighted average normal value to individual U.S. transaction price] methodology would as a matter of mathematics produce a result that was identical to that of the first, average-to-average, methodology." Report of the Panel, *United States – Zeroing*, at para. 7.266 (emphasis in original).[7]

Established rules of statutory construction require an interpretation that avoids rendering any provision of a statute meaningless or unnecessary. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant.'" TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (citations omitted). As the Supreme Court has observed, "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute,'" and "[w]e are thus 'reluctant to

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[7] Despite recognizing that the use of offsets produces identical results regardless of the methodology used, both the United States and the WTO Panel failed to apply this recognition in a manner that comports with the AD Agreement and the U.S. statute. The United States argued -- and the Panel found -- that to achieve different results using the respective margin calculation methodologies, offsets should be used when weighted average normal values are compared with weighted average U.S. prices, but not when weighted average normal values are compared with individual U.S. transaction prices. See U.S. Opening Statement in *United States – Zeroing* at 5, paras. 13-14; Report of the Panel, *United States – Zeroing*, at para. 7.266. There is no support in either the AD Agreement or U.S. law, however, for the proposition that offsets are required for one margin calculation methodology but not for another. The only permissible interpretation that would give effect to the applicable provisions of the Agreement and the statute is that offsets may not be used in conjunction with any margin calculation methodology.

treat statutory terms as surplusage' in any setting." Duncan v. Walker, 533 U.S. 167, 174 (2001) (citations omitted).

In light of this principle, the Department must give effect to the different comparison methodologies provided in 19 U.S.C. § 1677f-1(d). Because this section only makes sense if dumping margins are calculated without the use of offsets, the statute undeniably requires the Department not to provide offsets for non-dumped sales when calculating dumping margins based on average-to-average comparisons. Consequently, the Department may not make the change in practice proposed in its March 6, 2006 notice without a change in the statute.

IV. ASSUMING ARGUENDO THAT THE DEPARTMENT HAS STATUTORY AUTHORITY TO CHANGE ITS PRACTICE, IT SHOULD COMPARE NORMAL VALUE AND EXPORT PRICE ON A TRANSACTION-TO-TRANSACTION BASIS, WITH NO OFFSET FOR NON-DUMPED SALES

Assuming, *arguendo*, that the Department has statutory authority to abandon the use of average-to-average comparisons without offsets for non-dumped comparisons in calculating the weighted-average dumping margin in an antidumping investigation, under no circumstances should it adopt another methodology that includes offsets for non-dumped comparisons. The Department's longstanding exclusion of offsets for non-dumped comparisons in calculating the dumping margin is based upon the recognition that price comparisons with "negative" dumping margins reflect an absence of dumping and should not be allowed to offset instances of dumping. This practice furthers the remedial purpose of the statute by fully capturing all dumping within the calculated margin.

Because the use of offsets for non-dumped comparisons in calculating the dumping margin is not an appropriate option in future investigations, the best alternative to the Department's current practice is a transaction-to-transaction methodology, with the exclusion of

offsets for non-dumped comparisons. This methodology is expressly provided for in the statute, which gives the Department the option of determining whether subject merchandise is being sold in the United States at less than fair value "by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A)(ii). It is also permitted by the Department's regulations. 19 C.F.R. § 351.414(b)(2). Because the transaction-to-transaction approach is consistent with both the statute and the regulations, there is no reason for the Department to search for a new and untested alternative to the weighted-average methodology.

The Department employed a transaction-to-transaction methodology in the Softwood Lumber Section 129 proceeding. 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). The WTO Appellate Body found that the Department's calculation of dumping margins using weighted-average-to-weighted-average comparisons without offsets for non-dumped comparisons was inconsistent with the AD Agreement. In the Section 129 proceeding, the Department made transaction-to-transaction comparisons without offsets for non-dumped sales. It did so because it concluded that there were "particular benefits from this analysis which do not exist in the context of the weighted-average-to-weighted-average comparisons." Id. at 22638.

The Department noted that U.S. law expresses no preference between weighted-average-to-weighted-average and transaction-to-transaction comparisons. Id. Although the SAA and the Department's regulations express a preference for weighted-average-to-weighted-average comparisons in investigations, the Department observed that this "was based upon past

experiences and an expressed difficulty in selecting appropriate comparison transactions." 70 Fed. Reg. at 22639. As the Department noted, however, its "computer resources have improved greatly in the last few years, and many resource and programming difficulties the Department faced in 1994 [when the URAA was adopted], and even in 1997 [when the Department's regulations were adopted], for conducting transaction-to-transaction matching on large databases no longer exist." Id.

For the reasons stated in Softwood Lumber, the most appropriate methodology for future antidumping investigations is the "transaction-to-transaction" methodology without offsets for non-dumped comparisons.[8] This methodology is permissible under U.S. law and effects the remedial purposes of the statute. As the Department noted in Softwood Lumber, the preference for a weighted-average-to-weighted-average approach is out of date due to advances in technology. Moreover, given the advantages of using this methodology, there is no reason why it should be limited to investigations involving price volatility, as was the case in Softwood Lumber. The continued exclusion of offsets for non-dumped comparisons in conjunction with this approach preserves the Department's longstanding practice.

Finally, the transaction-to-transaction methodology without offsets for non-dumped comparisons in an investigation was found by the WTO panel in Softwood Lumber to be consistent with the AD Agreement. The WTO Panel's final report in Canada's challenge to the Department's Section 129 determination was released to the public on April 3, 2006. The Panel found that "there is no basis to uphold Canada's claim that Article 2.4.2 required the DOC to

[8] CSUSTL notes that the precise transaction-to-transaction methodology used in Softwood Lumber is not the only such methodology potentially available to the Department. For purposes of these comments, CSUSTL takes no position with respect to whether the Softwood Lumber approach or some other transaction-to-transaction methodology is more appropriate.

establish margins of dumping by aggregating the results of all transaction-to-transaction comparisons, offsetting non-dumped comparisons against dumped comparisons.[9] Consequently, the Panel concluded that "the determination of the DOC in the section 129 proceeding investigation is not inconsistent with the asserted provisions of Articles 2.4 and 2.4.2 of the *AD Agreement.*"[10] Thus, there is no question that the Department may implement a transaction-to-transaction methodology without offsets for non-dumped comparisons consistently with the AD Agreement.

VI. CONCLUSION

CSUSTL appreciates the opportunity to provide the above comments to the Department and urges that the Department's approach to calculating the dumping margin in future investigations be undertaken consistent with these comments. Please contact the undersigned if you have any questions regarding these comments.

Respectfully submitted,

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[9] WTO Panel Report, United States - Final Dumping Determination on Softwood Lumber From Canada at 15, WT/DS 264/RW (Apr. 3, 2006) (emphasis added).

[10] Id. at 32 (emphasis added).