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PUBLIC DOCUMENT

Mr. David Spooner
Assistant Secretary for Important Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue at 14th Street, N.W.
Washington, D.C. 20230

Attention: Weighted Average Dumping Margin

Re: *Comments on Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*

Dear Mr. Spooner:

On behalf of the Department of Foreign Trade, Ministry of Commerce, Royal Thai Government ("DFT"), located at Nonthaburi 1 Road, Nontaburi 11000 Thailand, we hereby submit the attached Comments in response to the Department of Commerce's ("Department") request for comments regarding the calculation of the weighted average dumping margin in an antidumping duty investigation. 71 Fed. Reg. 11,189 (March 6, 2006).

As requested in the Department's Federal Register notice, a signed original and six copies of these comments are being filed today, accompanied by an electronic version to facilitate posting on the Department's website.

If there are any questions concerning this submission, please contact the undersigned.

Respectfully submitted,

Kenneth J. Pierce
Matthew R. Nicely

Counsel to Department of Foreign Trade, Ministry of Commerce, Royal Thai Government

UNITED STATES DEPARTMENT OF COMMERCE

INTERNATIONAL TRADE ADMINISTRATION - IMPORT ADMINISTRATION

Comments Regarding the Calculation of the Weighted Average Dumping Margin in Antidumping Proceedings: Proposal to Abandon Zeroing of Negative Dumping Margins

Department of Foreign Trade
Ministry of Commerce
Royal Thai Government

April 5, 2006

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Introduction and Summary

The Department of Foreign Trade, Ministry of Commerce, Royal Thai Government ("DFT") is pleased to have this opportunity to comment on the Department of Commerce's ("Department") March 6, 2006 proposal to no longer zero negative margins in its calculation of individual respondents' weighted average dumping margins in antidumping investigations when utilizing the average-to-average comparison methodology.[1] DFT congratulates the United States for taking this important step torward bringing its antidumping practices into compliance 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") following the Panel's findings in *US -- Zeroing*.[2]

At the very least, the United States should take this opportunity to clarify that nothing has changed under U.S. law to alter the preference for using the average-to-average method for comparing export prices and normal value in investigations. Any effort to loosen the standards for determining when an alternative comparison might be used -- which would reflect a thinly veiled attempt to overcome the prohibition against zeroing in investigations using average-to-average comparisons -- should be rejected out of hand.

Indeed, we urge the United States to take advantage of this moment to clarify, as did the European Commission following the WTO Appellate Body's ruling on the same

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

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

issue in *EC -- Bed Linens*,[3] that it intends to eliminate the use of zeroing in all contexts, regardless of proceeding (whether investigations or reviews of any kind) and regardless of the type of comparison being used (whether average-to-average, transaction-to-transaction, or average-to-transaction).

Finally, DFT urges the Department to implement this change in practice more broadly than the implementation timetable proposed in the request for comments. The Department should implement the change in practice as to all proceedings that are not yet final, and entries not yet liquidated. This includes any pending investigations or reviews -- whether pending due to an ongoing agency investigation or review, court remand, or otherwise. By taking a broad rather than narrow approach to implementation, the United States would be abiding by the true spirit of WTO membership, setting an example for other nations, and avoiding further litigation on this topic.

I. The Department Should Ban Zeroing in Average-to-Average Comparisons Used In Investigations.

In the third of a series of disputes challenging the use of zeroing in antidumping investigations, a WTO dispute settlement panel issued a decision in October 2005 consistent with earlier decisions by the Appellate Body that the practice of zeroing in investigations that apply an average-to-average margin calculation methodology is inconsistent with Article 2.4.2 of the AD Agreement.[4] 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

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[3] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001 (hereinafter "*EC - Bed Linen*").

[4] *U.S. -- Zeroing,* para. 7.32.

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 practice does not take fully into account the entirety of the export price for those transactions where the export 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. DFT fully supports the Department's efforts to remove 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."[5] Whether or not expressly prohibited by the panel decision currently being implemented by the Department, the practice of zeroing in any context clearly violates the principles expressed by the Appellate Body in *EC-Bed Linens*.

II. The Department Should Abide By The Preference Under U.S. Law To Use Average-to-Average Comparisons In Investigations.

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." As the Department is no

[5] *EC-Bed Linens,* para 53.

doubt well aware, there remains 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.

The question of whether to use alternative comparison methodologies when determining dumping margins was addressed at length by the Department in prior instances. When the Department revised its regulations pursuant to the Uruguay Round Agreements Act ("URAA"), it devoted considerable space in both the Preamble to the Proposed Rule and the Preamble to the Final Rule to the question of when methodologies other than average-to-average (i.e., average-to-transaction or transaction-to-transaction) might be appropriate. With respect to original investigations, the Department stated definitively that, "the preferred method in an antidumping investigation will be the average-to-average method."[6] Moreover, in rejecting a request by one commenter to place transaction-to-transaction comparisons on more or less equal footing with average-to-average comparisons by allowing such a comparison in "appropriate situations" rather than "unusual situations," the Department stated that "in [its] view, the [Statement of

[6] Preamble to the Proposed Rule, 61 Fed. Reg. 7308, 7348, (Dep't Commerce Feb. 27, 1996).

Administrative Action] makes clear that Congress did not contemplate broad application of the transaction-to-transaction method."[7]

The Department's regulations at 351.414 (c)(1) merely codify the preferences set forth in the Statement of Administrative Action ("SAA"),[8] when they state that, "in an investigation, the Secretary normally will use the average-to-average method."[9] According to the SAA, the Department, "normally will establish and measure dumping margins on the basis of a comparison of a weighted-average normal value with a weighted-average of export prices or constructed export prices." The SAA goes on to say that, with respect to the statutory alternative of transaction-to-transaction comparisons, the Department is expected to "use this methodology far less frequently than the average-to-average methodology." Hence, the trade laws of the United States establish a clear hierarchy between the two approaches, and transaction-to-transaction is plainly disfavored. In other words, unlike the practice of zeroing, which involved one possible interpretation of arguably ambiguous statutory language, the preference for average-to-average comparisons in antidumping investigations has been made unambiguously clear by Congress through its approval of the SAA as the, "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act."[10]

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7 Preamble to the Final Rule, 62 Fed. Reg. 27,296, 27,373-74 (Dep't Commerce May 19, 1997).

8 SAA at 842-43.

9 19 CFR 351.414 (c)(1)("Preferences").

10 19 U.S.C. 3512(d).

As Congress recognized in the SAA, the transaction-to-transaction methodology for margin calculations can only be used with great difficulty.[11] One need look no further than the Department's implementation of the Appellate Body decision in Lumber V[12] to see how complex such a comparison can become when examining a situation where there are a significant number of export transactions. In that case, the Department crafted a series of criteria intended to identify the most comparable normal value sale for any given export sale. The hierarchy of matching criteria began with the standard criteria used by the Department in average-to-average investigations, namely, level of trade and product similarity. However, because these criteria did not nearly limit the possible number of matching normal value sales sufficiently, the Department was forced to incorporate contemporaneity, quantity sold, customer category, channel of distribution, total movement expenses, commissions paid, and credit period into its matching criteria in an attempt to identify the most similar normal value sale. Even under this rather tortuous hierarchical approach, the Department was left with multiple possible matches in some instances, for which the first possible match among equal matches was applied by default.[13] Such complexity was surely not envisioned by Congress when it noted that a transaction-to-transaction methodology, "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."[14]

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[11] SAA at 843.

[12] *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004). ("*Lumber V*")

[13] *Preliminary Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, pages 5 - 7.

[14] SAA at 842.

III. The United States Should Broaden The Scope Of Its Proposal To All Proceedings And All Comparisons

The debate over what comparison methodology to use in investigations would be irrelevant to the question of zeroing if the Department would simply cease to apply zeroing in all contexts, meaning regardless of the type of comparison used, or the proceeding in which dumping margins are calculated. Specifically, zeroing whould be eliminated from the comparison of prices using average-to-average, transaction-to-transaction, or average-to-transaction comparisons, whether in investigations, administrative reviews, new shipper reviews, changed circumstance reviews, or sunset reviews. Although this may go beyond the narrow ruling of the Panel in *US-Zeroing,* the practice of zeroing 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 reviews. Just as in investigations, zeroing in reviews fails to take into account the entirety of some export price transactions and leads to exaggerated dumping margins. Although the panel decision provides the United States with a loophole by which the Department can continue to zero in 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.

Indeed, in the view of Thailand, 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 by definition 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.[15] 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 Article 2.4.2.[16] In light of the Appellate Body's interpretation of Articles 2.1 and 2.4, 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.

IV. Implementation Must 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." The Department need not limit its implementation of the WTO panel decision in this way. Unlike implementation under section 129 of the URAA, which

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[15] Appellate Body Report, *Lumber V,*. para 93.

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

limits implementation to entries made prospectively, section 123(g) of the URAA in no way requires the Department to limit the implementation the *US-Zeroing* panel decision prospectively.[17]

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.[18] This decision-driven change in practice was implemented within two months of the CAFC's decision, even in investigations initiated prior to the decision, and even where the issue was not raised by any party in the proceeding.[19]

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

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[17] 19 U.S.C. 3533(g).

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

[19] 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)

norms of adjudication by which the Department should be guided.[20] 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."[21] While the principle embraced by the Supreme 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.

Furthermore, 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

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[20] 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)).

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

dumping *on the basis of a methodology* incorporating the practice of "zeroing"(emphasis added).[22] 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 proceedings will promote efficiency and avoid additional costly WTO appeals that the United States has virtually no chance of winning. For all of these reasons, DFT urges the Department to implement its change in practice with respect to zeroing in all pending proceedings.

Finally, for reasons of administrative and judicial efficiency, the Department should also implement its change in practice in any remand redetermination of any final antidumping determination where the rates included in the antidumping duty order are not yet final. The WTO's reasoning in *US-Zeroing* makes it clear that, without exception, the failure to include the results of price comparisons in which the weighted average normal value is less than the weighted average export price in calculating a margin of dumping for the product under investigation as a whole, is inconsistent with the AD Agreement. Therefore, to continue to apply this practice in remand redeterminations would be a deliberate and purposeful violation of the AD Agreement. Hence, DFT urges the Department to exercise prudence and eliminate the practice of

[22] *Lumber V,* para 183.

zeroing in all investigations where a final determination is pending, including determinations pending as a result of U.S. litigation.

V. Implementation Involves A Simple Change in SAS Programming Code

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 in an investigation, 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 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

DFT appreciates the opportunity to comment on the Department's proposed modification to its zeroing practice in original investigations. If you have any questions about these comments, please contact one of the undersigned.

Respectfully Submitted,

Kenneth J. Pierce
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