Canadian Embassy

Ambassade du Canada

501 Pennsylvania Ave., N.W.
Washington, D.C. 20001

April 5, 2006

Honourable 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, D.C. 20230

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

Dear Mr. Spooner,

Attached please find the comments of the Government of Canada in response to the Department's notice of March 6, 2006 as indicated above.

Sincerely,

Claude Carrière
Minister (Economic) and
Deputy Head of Mission

COMMENTS BY THE GOVERNMENT OF CANADA TO THE INTERNATIONAL TRADE ADMINISTRATION U.S. DEPARTMENT OF COMMERCE

ANTIDUMPING PROCEEDINGS: CALCULATION OF THE WEIGHTED AVERAGE DUMPING MARGIN DURING AN ANTIDUMPING DUTY INVESTIGATION

Submitted by:
The Embassy of Canada
April 5, 2006

Introduction

The Government of Canada welcomes the proposal by the Department of Commerce to discontinue its treatment of non-dumped sub-groups or models as zero (i.e. "zeroing") in weighted-average-to-weighted-average comparisons in anti-dumping duty investigations. By choosing to bring itself into conformity with recent World Trade Organization (WTO) panel and Appellate Body decisions,[1] including most particularly the October 31, 2005 panel report further to a challenge brought by the European Communities[2], the United States takes a positive step in the evolution of anti-dumping duty law internationally. In addition, if this proposal were to be adopted, it would send a more general signal that the United States takes its WTO obligations seriously and is prepared to make the necessary amendments to its own methodologies in the wake of unfavourable WTO panel decisions. Furthermore, it would bring U.S. anti-dumping methodology, at least as it applies to this particular aspect of anti-dumping procedure, into conformity not only with the WTO but with the current methodologies of its major trading partners, including Canada.

The Department Should Prohibit Zeroing Under Average-to-Average Methodology

The United States should terminate the use of "zeroing" under the average-to-average methodology in anti-dumping duty investigations. In Canada's view, this is the only appropriate response to the results of recent WTO panel and Appellate Body reports with respect to "zeroing". In addition, the elimination of "zeroing" would be consistent with U.S. law. Canada understands that U.S. law does not require "zeroing" in anti-dumping investigations. It follows

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1 See e.g., *United States - Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS264/AB/R, adopted August 31, 2004; and, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R, adopted March 12, 2001.

2 *United States - Laws, Regulations and Methodologies for Calculating Dumping Margins ("Zeroing")*, Report of the Panel, WT/DS294/R, circulated October 31, 2005.

therefore that the prohibition on "zeroing" would only require only a change in computer programming, rather than a formal statutory or regulatory amendment. Canada would also note that the computer coding required to eliminate "zeroing" is a relatively simple adjustment in the calculation of dumping margins under the average-to-average methodology.

The Department Should Continue Its Preference for the Average-to-Average Methodology

It is also Canada's view that Commerce should continue its preference for use of the average-to-average methodology in anti-dumping duty investigations. The Statement of Administrative Action to the *Uruguay Round Agreements Act* ("SAA") makes clear that as a matter of U.S. law, the existence and measurement of dumping margins in an investigation shall normally be based on a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices[3]. Beyond the clear direction of the SAA, the use of the average-to-average comparison is the most practical and predictable of the possible methodologies, particularly in investigations involving a large number of transactions. It simplifies the calculation of dumping, yields more predictable results, and ensures that the results are less vulnerable to the impact of aberrant sales. Further, as also noted in the SAA and in the Department's Antidumping Manual, resort to the alternative transaction-to-transaction methodology is normally appropriate only in situations where there are very few sales of large capital goods made to order, such as transformers.[4] As suggested by both documents, it is expected that the Department will use the average-to-average methodology far more frequently than any other methodology.

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3 "Statement of Administrative Action" in *Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, vol. 1 at 842-843.

4 *Ibid.*, at 843; and U.S. Department of Commerce, *Antidumping Manual* (January 22, 1998), Chapter 6, at 7.

The reasoning of the Appellate Body and WTO panels concerning "zeroing" also applies to the use of zeroing under the transaction-to-transaction methodology. In Canada's view, the Department may not zero when using transaction-to-transaction comparison either.

Although a recent panel in the softwood lumber anti-dumping compliance proceedings reached the opposite conclusion, this panel improperly ignored the Appellate Body's reasoning in this case , which would prohibit zeroing under the transaction-to-transaction methodology.[5] Moreover, the compliance panel report has not been adopted by the WTO Dispute Settlement Body and is subject to appeal. Canada is carefully weighing its options concerning this compliance panel report.

The Department should not consider replacing the preference for the current average-to-average methodology with a preference for the transaction-to-transaction approach. There is no justification under the SAA or the Department's regulations or practice to support the application of the transaction-to-transaction methodology as the preferred calculation principle. The SAA, the Department's practice and its regulations all support the conclusion that anything other than average-to-average comparisons are to be used only in exceptional circumstances.

The use of averages are most appropriate in those cases where there are a large number of sales. The Department has commented in its own Antidumping Manual that it " normally compare(s) the weighted-average EP or CEP to the weighted-average NV for a comparable product sold during the POI."[6] While the Department states that alternative methodologies are possible, they are clearly only to be applied in special cases such as "for large capital goods made to order, such as transformers."[7] The emphasis on the limitation of use of such a

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5 *United States - Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada,* Report of the Panel, WT/DS264/RW/R, unadopted and circulated April 3, 2006, at paras. 5.19-5.21.

6 U.S. Department of Commerce, *Antidumping Manual* (January 22, 1998), Chapter 6, at 7.

7 *Ibid.*

methodology for exceptional circumstances serves to illustrate the wisdom and advisability of the general use of the average-to-average method.

As stated by the Department in its final regulations of May 19, 1997, "...the language of the SAA makes clear that Congress and the Administration contemplated the use of averaging groups for both U.S. and normal value sales. Nothing in the statute or SAA supports the view that normal value sales should not be averaged, or that normal value sales should not be averaged on the same basis as U.S. sales."[8]

Average-to-Average Methodology Is A Tool To Comply with U.S. Law

Adoption of the transaction-to-transaction methodology would also make it difficult for exporters to the United States to monitor their own pricing behaviour to ensure that they are not dumping. Under the annual average-to-average calculation methodology, U.S. anti-dumping duty law acts as a discipline on imports which may be unfairly priced. Based on the transparency evident in the current U.S. system, many Canadian exporters monitor their own shipments to comply with U.S. dumping law. While this may be relatively manageable when average-to-average comparisons are used, it is virtually impossible to implement under a transaction-to-transaction methodology. Under such a methodology, comparisons would be entirely dependent on the selection of the specific date of each home market sale to compare to each U.S. sale. It would be virtually impossible for exporters to apply any precision to the appropriate match that may be made by the Department. Exporters would be reduced to relying on little more than guesswork in determining the appropriate matches they should use to monitor their pricing behaviour. Particularly in view of the large number of transactions and elaborate model match hierarchies for certain products, use of the transaction-to-transaction methodology would render

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[8] *Anti-Dumping Duties; Countervailing Duties; Final Rule*, 62. Fed. Reg. 27,296, at 27,373. (May 19, 1997).

such monitoring of export prices pointless.[9]

The Department should administer the antidumping law in such a way as to make it possible for foreign producers and exporters to have some reliable notion of the normal value with which to compare with any given U.S. sale, the purpose being to allow exporters to comply with U.S. anti-dumping law. The more elaborate the scheme for ascertaining normal value, the less transparent and therefore less useful the process becomes for the foreign producer or exporter. This in turn makes it more difficult for the foreign producer or exporter to comply with U.S. dumping law. It is Canada's view that the Department should adopt a methodology that encourages rather than discourages compliance with U.S. dumping law.

Conclusion

The United States should prohibit "zeroing" under the average-to-average methodology in anti-dumping duty investigations. As stated, it is Canada's view, this is the only appropriate response to the results of recent WTO panel and Appellate Body decisions concerning "zeroing". It is Canada's view that the United States should continue to use the average-to-average methodology in anti-dumping duty investigations. As stated earlier, it is Canada's view that the Statement of Administrative Action to the *Uruguay Round Agreements Act* makes clear that the average-to-average methodology should be used to determine the existence and to measure the extent of dumping. Further, the average-to-average methodology is the most practical and predictable of the possible methodologies. It is Canada's view therefore that the Department should not apply the transaction-to-transaction methodology except in those tightly circumscribed situations where such a methodology might be more appropriate. In such instances, of course, "zeroing" should still not be used.

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[9] Canada assumes that interested parties would have an opportunity to comment on any proposed matching criteria in the context of any transaction-to-transaction methodology.