KAYE SCHOLER LLP

Donald B. Cameron
202 682-3630
Fax 202 414-0400
dcameron@kayescholer.com

The McPherson Building
901 Fifteenth Street, NW
Suite 1100
Washington, DC 20005
202 682-3500
Fax 202 682-3580
www.kayescholer.com

April 5, 2006

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: Comments on Calculation of Weighted Average Dumping Margin in an Antidumping Duty Investigation

Dear Mr. Spooner:

On behalf of the Korea Iron & Steel Association ("KOSA"), we are filing an original and six copies of this letter and the attached comments regarding the U.S. Department of Commerce's ("Department") calculation of the weighted average dumping margin in an antidumping duty investigation. We also enclose a CD-ROM with a copy of these comments in WordPerfect format. These comments are timely submitted in accordance with the Department's notice soliciting comments. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (March 6, 2006).

kosa-nme-meip-cmt.wpd

Please do not hesitate to contact the undersigned if there are any questions regarding this matter.

Respectfully submitted,

_____
Donald B. Cameron
Julie C. Mendoza
R. Will Planert
Brady W. Mills
Jahna M. Hartwig
Paul J. McGarr, Trade Analyst

Counsel to KOSA

kosa-nme-meip-cmt.wpd

Comments of the Korea Iron & Steel Association on Calculation of Weighted Average Dumping Margin in Antidumping Duty Investigations

The Korea Iron & Steel Association ("KOSA") submits these comments regarding the U.S. Department of Commerce's ("Department") calculation of the weighted average dumping margin in an antidumping duty investigation in accordance with the Department's notice soliciting comments. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (March 6, 2006).

A. The Department Should Continue To Use The Weighted-Average-to-Weighted-Average Comparison Methodology For Purposes Of Calculating Dumping Margins in Antidumping Duty Investigations

KOSA's comments are simple and straightforward -- the Department should continue its long-standing preference for using the weighted-average-to-weighted average comparison methodology in antidumping duty investigations and should do so without zeroing. This is the only way to bring the United States into conformity with its obligations under the Antidumping Agreement as interpreted by the WTO in its *Zeroing Report*.[1] Under no circumstances should the Department seek to perform an end-run around the WTO Panel's decision rejecting zeroing by jettisoning the Department's long-standing weighted-average-to-weighted-average practice in favor of using transaction-to-transaction comparisons. Consistent with U.S. law, the Department should continue to reserve use of the transaction-to-transaction comparison method for those rare cases "where there are very few sales and the merchandise sold in each market is identical or

---

[1] Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*Zeroing Report*"),WT/DS294/R, circulated 31 Oct. 2005, at ¶ 7.32, *notices of appeal filed*.

very similar or is custom made."[2] In addition, the Department should abandon its zeroing practice in transaction-to-transaction comparisons so as to bring its practice into accordance with the WTO Antidumping Agreement.

1. U.S. Law Clearly Expresses A Preference For The Use Of The Weighted-Average-to-Weighted-Average Comparison Methodology In Most Cases

The preference for the use of weighted-average-to-weighted-average comparisons in calculating dumping margins was clearly expressed in the administration's Statement of Administrative Action (SAA) to the Uruguay Round Agreements Act (URAA):

> Consistent with the {Antidumping} Agreement, new section 777A(d)(1)(A)(i) provides that in an investigation, Commerce normally will establish and measure dumping margins on the basis of a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices. To ensure that these averages are meaningful, Commerce will calculate averages for comparable sales of subject merchandise to the U.S. and sales of foreign like products.[3]

Congress explicitly endorsed the SAA in Section 101(a) of the URAA and provided in Section 102(d) that the SAA is the authoritative expression of the United States concerning the interpretation and application of the URAA.[4]

Following this clearly expressed preference for the use of weighted-average-to-weighted-average comparisons in normal cases, the Department's post-URAA regulations specifically incorporate this preference. Thus, the Department's regulations provide that "[i]n an

---

[2] Statement of Administrative Action, H.R. Doc. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4171, 4178 ("SAA") at 842.

[3] *Id.* at 842.

[4] *See* 19 U.S.C. §§ 3511(a) and 3512(d).

investigation, the Secretary normally will use the average-to-average method."[5] These regulations were implemented through a formal rulemaking process and remain binding upon the Department until they are amended through a separate rulemaking process under the Administrative Procedures Act.[6]

The Panel's *Zeroing Report* found that the Department's use of zeroing in average-to-average comparisons to be inconsistent with Article 2.4.2 of the WTO Antidumping Agreement.[7] The only way to bring the Department's practices into conformity with U.S. obligations under the Antidumping Agreement is to abandon the use of zeroing in average-to-average comparisons. The Department should do so and, consistent with current U.S. law, should continue its strong preference for the use of weighted-average-to-weighted-average comparisons in dumping investigations.

2. It Would Be Contrary To U.S. Law For The Department To Abandon Its Well-Settled Practice Of Using Weighted-Average-To-Weighted-Average Comparisons In Favor Of Transaction-To-Transaction Comparisons

In terms just as unequivocal as the expressed preference for the use of the weighted-average-to-weighted average comparison methodology, the SAA left no question that the transaction-to-transaction comparison methodology was to be used sparingly. Thus, the SAA states:

---

[5] 19 C.F.R. §351.414(c) (emphasis added).

[6] *See Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,295 (May 19, 1997) (revising AD/CVD rules to conform to URAA after notice and comment period); 5 U.S.C. §553 (establishing procedures for notice and comment rulemaking).

[7] *Zeroing Report* at ¶ 7.32.

> In addition to the use of averages, section 777A(d)(1)(A)(ii) also permits the calculation of dumping margins on a transaction-by-transaction basis. Such a 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. However, given past experience with this methodology and the difficulty in selecting comparison transactions, the Administration expects that Commerce will use this methodology far less frequently than the average-to-average methodology.[8]

Adhering to this well-expressed intent, the Department's regulations and its Antidumping Manual also make clear that transaction-to-transaction comparisons should be made only in unusual cases.

The Department's regulations provide that in an investigation "[t]he Secretary will use the transaction-to-transaction method only in unusual situations, such as when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made."[9] This language tracks almost verbatim the Administration's intent as expressed in the SAA. The Department's own internal Antidumping Manual also instructs personnel that transaction-to transaction comparisons are "normally done only for large capital goods made to order, such as transformers. The difference between these custom-made products render average prices meaningless."[10]

In addition, the use of transaction-to-transaction comparisons in most cases would introduce a whole host of practical problems and would make it virtually impossible for exporters to the United States to monitor their pricing behavior to prevent dumping. The use of

---

[8] SAA at 842-43.

[9] 19 C.F.R. §351.414(c).

[10] *Import Administration Antidumping Manual*, Chapter 6, page 7 (1997).

transaction-to-transaction comparisons would raise serious questions about the appropriate hierarchy of factors for determining which home market sale to match with which U.S. sale and whether new approaches to certain types of adjustments would be required to ensure fair comparisons.

Consistent with U.S. law the Department has wisely adhered to its practice of only resorting to transaction-to-transaction comparisons in unusual situations. In implementing the United States' obligations in light of the WTO Panel's *Zeroing Report*, we urge the Department to continue this well-established practice. Any other course would do violence to the United States' WTO obligations and would needlessly introduce uncertainty into the Department's well-established practice of calculating dumping margins in investigations.

B. The WTO Antidumping Agreement Prohibits Zeroing Both In Average-To-Average And In Transaction-To-Transaction Comparisons

The Department should also abandon its practice of zeroing under all comparison methodologies because the practice is prohibited under the WTO Antidumping Agreement. Specifically, the practice of zeroing is prohibited under both Article 2.4.2 and Article 2.4 of the Antidumping Agreement.[11]

---

[11] The recent Panel report in *United States - Final Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW (3 April 2006), does not require a contrary conclusion. That decision has not been adopted by the Dispute Settlement Body, and therefore has no legal effect. *See Japan - Taxes on Alcoholic Beverages*, WT/DS8/ABR, WT/DS10/ABR, WT/DS11/ABR (4 Oct. 1996) ("unadopted panel reports 'have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the Contracting Parties to GATT or WTO Members.'"). Furthermore, we expect this decision to be appealed, and existing Appellate Body decisions as described below suggest that this Panel Report will not stand.

The Appellate Body's ruling in *Softwood Lumber* that the U.S. practice of zeroing is inconsistent with the Antidumping Agreement was based primarily upon its finding that the term "'margins of dumping' can be found only for the product under investigation as a whole."[12] The term "margins of dumping" as used in Article 2.4.2 does not distinguish between average-to-average price comparisons and transaction-to-transaction comparisons. The Appellate Body found that the Department was not in compliance with the Antidumping Agreement and as long as it continues to zero it will remain out of compliance -- regardless of whether it uses average-to-average comparisons or transaction-to-transaction comparisons.

The Appellate Body in Softwood Lumber explained that:

> For all these purposes, the product under investigation is treated as a whole, and export transactions in the so-called "non-dumped" sub-groups (that is, those sub-groups in which the weighted average normal value is less than the weighted average export price) are not excluded. We see no basis, under the *Anti-Dumping Agreement*, for treating the very same sub-group transactions as "non-dumped" for one purpose and "dumped" for other purposes. Indeed, in the anti-dumping investigation at issue in this dispute, the product as a whole—softwood lumber—has been treated as a "dumped" product, except at the stage of zeroing.[13]
>
> Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted

---

[12] Appellate Body Report, *United States – Final Dumping Determination On Softwood Lumber From Canada*, WT/DS264/AB/R, adopted on 31 Aug. 2004, ¶ 96 ("*Lumber Appellate Body Report*").

[13] *See id.* at ¶ 99.

> average export price. Zeroing thus inflates the margin of dumping for the product as a whole.[14]

Thus, regardless of the comparison methodology zeroing treats non-dumped transactions differently from dumped transactions (*i.e.*, pretending that the export prices were less than what they actually are). The Department's practice of zeroing is therefore inconsistent with the obligation that the product under investigation be treated as a whole.[15]

Zeroing is also inconsistent with the fair comparison requirement of Article 2.4 of the Antidumping Agreement. The bias toward inflated margins created by zeroing out higher priced export sales causes an inherent unfairness in the comparisons. The Appellate Body in *EC – Bed Linen* confirmed its view that zeroing denies a fair comparison:

> Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully 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]

The fair comparison requirement of Article 2.4 applies to all dumping calculations regardless of the comparison methodology used.[17] Thus, zeroing is inconsistent with WTO obligations in

---

[14] *See id.* at ¶ 101 (emphasis in original).

[15] In *dicta* the Softwood Lumber Panel also concluded that the U.S. practice of zeroing would be inconsistent with Article 2.4.2 of the WTO Antidumping Agreement in the context of the transaction-to-transaction methodology. *See* Panel Report, *United States- Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted as modified by the Appellate Body on 31 Aug. 2004, ¶ 7.219, n.361.

[16] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 Mar. 2001, ¶ 86 ("*EC-Bed Linen*"); *Lumber Appellate Body Report* at ¶ 55.

[17] The Panel's finding in the *Zeroing Report* that Article 2.4 does not prohibit zeroing is inapposite. First, that finding is contradicted by the Appellate Body Reports described above.

transaction-to-transaction comparisons just as much as it is inconsistent with those obligations in weighted-average-to-weighted-average comparisons.[18]

C. Conclusion

The Department's proposal to abandon zeroing in weighted-average-to-weighted-average comparisons in antidumping duty investigations is fully endorsed by KOSA. In addition, we urge the Department to adhere to its long-standing practice of using the average-to-average comparison methodology in antidumping investigations without zeroing, and to not switch to transaction-to-transaction comparisons except in rare cases. Finally, we urge the Department to use this opportunity to abandon zeroing under all comparison methodologies because the practice is prohibited under the WTO Antidumping Agreement.

Respectfully submitted,

_____
Donald B. Cameron
Julie C. Mendoza
R. Will Planert
Brady W. Mills
Jahna M. Hartwig
Paul J. McGarr, Trade Analyst

Counsel to KOSA

Second, that finding has not been adopted by the Dispute Settlement Body and has been appealed, and therefore has no legal effect. *See supra* note 11. Finally, that finding is limited to the context of administrative reviews, and does not address the transaction-to-transaction methodology. *Zeroing Report* at ¶ 7.275.

[18] The Appellate Body's discussion of zeroing in *United States – Corrosion-Resistant Steel AD Sunset Review* further confirms that zeroing is inconsistent with the fair comparison requirement of Article 2.4 of the WTO Antidumping Agreement. *See* Appellate Body Report, *United States – Sunset Review Of Anti-Dumping Duties On Corrosion-Resistant Carbon Steel Flat Products From Japan*, WT/DS244/AB/R, adopted 9 Jan. 2004, ¶ 135.