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MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA
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May 4, 2006

PUBLIC DOCUMENT

The Honorable 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: *BOFT Rebuttal Comments on the Department's Proposal to Terminate Its Practice of "Zeroing" When Calculating Antidumping Margins*

Dear Mr. Assistant Secretary:

The Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the Peoples's Republic of China hereby submits its rebuttal comments on the Department's proposal to terminate its practice of "Zeroing" when calculating antidumping margins.

The enclosed comments are submitted pursuant to the Departments's Request for Comments that was published in the *Federal Register* on March 6, 2006.

The comments are provided in the attached paper. In accordance with the Departments request we provide six copies of the comments and a CD containing BOFT's comments in electronic form.

Respectfully submitted,

Wang Shichun
Director General
Bureau of Fair Trade for Imp& Exp
Ministry of Commerce

Before the United States Department of Commerce
International Trade Administration

Comments of Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People's Republic of China ("BOFT") on the Department's Proposal to Terminate Its Zeroing Practice When Calculating Antidumping Margins

May 4, 2006

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I. INTRODUCTION AND SUMMARY

These rebuttal comments are submitted by the Bureau of Fair Trade for Imports and Exports of the Ministry of Commerce of the People's Republic of China ("BOFT") in connection with the Department of Commerce's (the Department) March 6, 2006 request for comments regarding the calculation of individual respondents' weighted average dumping margins in antidumping investigations. Specifically, these rebuttal comments address the following arguments and suggestions raised by various domestic interested parties:

- That the U.S. law and the AD Agreement[1] require the Department to zero, such that a legislative act is required before the Department can abandon the practice;
- That the Department should replace its preference for average-to-average comparisons with transaction-to-transaction comparisons;
- That the Department is permitted to continue zeroing in average-to-average comparisons where normal value is based on constructed value in market economy cases or surrogate values in non-market economy cases;
- That the Department should continue to zero in reviews; and
- That the Department should delay implementation of the panel's decision in US-Zeroing until the completion of the Doha round of WTO negotiations.

What is notable about all of these comments and suggestions is that none are constructive in terms of ensuring timely U.S. implementation of its obligations under the WTO Antidumping Agreement. Indeed, several seek to perpetuate the practice of zeroing in other forms contrary to both U.S. law and U.S. WTO obligations. Finally, most of the suggestions would invite further WTO and U.S. court litigation rather than provide a resolution to the underlying WTO inconsistency which the Department of Commerce is proposing to address.

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[1] World Trade Organization ("WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement")

BOFT submits that each of the above-listed arguments should not be considered by the Department because they are lacking in legal foundation and are otherwise without merit. There is no legal or practical impediment to fully implementing the WTO panel report on zeroing[2] and doing so immediately. As discussed below, none of the comments submitted by domestic interested parties provide legal or other justification either for non-implementation or for delay in implementation. Furthermore, the most recent Appellate Body report in *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*[3] makes it clear that the practice of zeroing is inconsistent with U.S. WTO obligations not only in the context of average-to-average comparisons and investigations, but also in the application of other comparison methodologies permitted under Article 2.4[4] and in reviews under Article 9 of the Antidumping Agreement.[5] As such, efforts to continue the practice of zeroing in any context as advocated by some domestic interested parties are at best futile and at worst would constitute nothing more than a deliberate and transparent effort by the U.S. to continue to apply the Antidumping Agreement in a manner which is clearly inconsistent with its obligations under the WTO. There are WTO reports which have found the application of zeroing in average-to-average comparisons and in average-to-transaction comparison inconsistent with the requirements of the Antidumping Agreement, as well as reports finding the application of zeroing in initial investigations and reviews inconsistent with U.S. WTO obligations. What all these decisions have in common is that they rely on the fact that both the ADA and Article VI of

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

3 Report of the Appellate Body, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("US-Zeroing")*, WT/DS294/AB/R, circulated April 18, 2006.

4 *Id.* at para. 129.

5 *Id.* at para. 130.

the GATT 1994 require that "dumping" and the "margins of dumping" must be established for the product under investigation as a whole.[6]

The logic of these decisions makes it only a matter of time before there is a report finding that the application of zeroing in transaction-to-transaction comparisons to be similarly WTO inconsistent, that the application of zeroing when using constructed value or NME constructed value is similarly WTO inconsistent, and, ultimately, that zeroing is WTO inconsistent regardless of the comparison methodology being used or the stage of the proceeding under the ADA. Under these circumstances, it is inappropriate for the U.S. to continue the practice of zeroing in any context, be it an investigation or review or in comparisons involving average-to-average, transaction-to-transaction, or average-to-transaction comparisons. It is also equally inappropriate for the U.S. to continue the practice of zeroing when applying its NME methodology in either initial investigations or reviews.

Finally, we would note that the Department has requested comment on "appropriate methodologies to be used in future antidumping investigations." In this regard, the Department is clearly constrained by those methodologies permitted under the Antidumping Agreement and U.S. law, which coincide. Furthermore, if it were not clear as a result of the panel decision which precipitated the Department's request for comments, it is certainly clear as a result of the April 18 Appellate Body Report that any methodology employed by the Department in determining normal value and in comparing normal value to export or constructed export prices is WTO inconsistent if the practice of zeroing is applied.

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[6] Id. at paragraph 126.

II. NO LEGISLATIVE ACT IS REQUIRED IN ORDER FOR THE DEPARTMENT TO STOP ZEROING IN ANTIDUMPING INVESTIGATIONS

Several commenter filings on behalf of domestic interested parties have made the extraordinary claim that the statute requires the Department to calculate dumping margins "without applying offsets for non-dumped sales". Domestic interested parties are clearly misguided in their statutory interpretation. Nothing in the U.S. statute prohibits the Department from including the full value of all sales of subject merchandise when calculating dumping margins. Although an interpretation of the statute that *prohibits* zeroing would be the *best* interpretation of the statute, as it would not be inconsistent with U.S. international obligations, the Courts have recognized that the statute and Congressional intent are silent on whether the Department can or cannot use zeroing. While the courts have determined that the Department's practice of zeroing is permissible under the statute, the Court of International Trade ("CIT") and the Court of Appeals for the Federal Circuit ("CAFC") have held that "the statute *neither requires nor prohibits* Commerce from considering nondumped sales."[7] In Corus Staal BV, both the CIT and the CAFC found that the statute and Congressional intent were both silent on this particular issue and gave deference to the Department's interpretation of the statute.[8] For the reasons articulated by the courts, a statutory amendment is not required in order for Commerce to make this long-overdue change to its antidumping duty margin calculation practice.

One commenter attempts to draw an inference in favor of zeroing by comparing the statutory provision that allows for average-to-average comparisons with the provision that allows for average-to-transaction comparisons (i.e., the targeted dumping provision) to support its

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[7] *Corus Staal BV v. Dep't of Commerce*, 259 F. Supp. 2d 1253, 1261-63 (Ct. Int'l Trade 2003) (emphasis added); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1346 (Fed. Cir. 2005) cert. denied, __ U.S. __, 126 S. Ct. 1023, 163 L. Ed.2d 853 (2006).

[8] *Id.*

contention that zeroing is required by the statute.[9] The contorted reading of the statute necessary to even make this argument demonstrates that this claim is on its face frivolous. First, the practice of zeroing at issue in the Department's request for comments involves the average-to-average comparisons,[10] which the WTO has already found to be inconsistent with U.S. international obligations under the AD Agreement. Like the U.S. law, Article 2.4.2 of the WTO Agreement recognizes that in certain limited situations a weighted average normal value may be compared to individual export transactions, yet this did not prompt the panel to conclude that this provision was relevant to its finding against zeroing in the average-to-average context. Similarly, the fact that Congress, consistent with Article 2.4.2, set forth two different comparison methods in the statute which might render different results is also irrelevant. Indeed, both the U.S. law and the WTO Agreement anticipate different results from the two methodologies in that both provisions are specifically provided because the preferred methodologies -- average-to-average or transaction-to-transaction -- cannot "account appropriately" for the circumstances of targeted dumping. To attempt to wring from these two statutory provisions to be used under different circumstances support for the proposition zeroing must be used in average-to-average investigations is nothing short of absurd.

Second, the Court of International Trade has already noted the absence of any reference to zeroing in the Statement of Administrative Action ("SAA"), which is the "authoritative expression of the United States concerning the interpretation and application of the Uruguay Round Agreements."[11] Because the statute does not speak to this issue, the Department has

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9 Comments filed by Skadden, Arps, Meagher & Flom LLP on behalf of United States Steel Corporation: Weighted Average Dumping Margin (April 5, 2006).

10 Request for Comments on Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (Dep't Commerce March 6, 2006).

11 *Corus Staal BV v. Dep't of Commerce*, 259 F. Supp. 2d at 1261, n. 12 (Ct. Int'l Trade 2003) (quoting 19 U.S.C. § 3512(d) (2000))

authority to reasonably interpret 19 U.S.C. § 1677(35)(A) and (B) in the presence of ambiguity and amend its practice of zeroing.[12] Thus, this claim is contrary to findings already made by the courts.

Third, the Appellate Body has now resolved the issue of whether zeroing is appropriate in the average-to-transaction comparisons used by the Department of Commerce in reviews. The practice has been declared inconsistent with U.S. WTO obligations.[13] This issue has been resolved without regard to whether the results of different methodologies permitted under the Agreement (or, for that matter, U.S. law) produce different results. While the Panel in the proceeding underlying the most recent Appellate Body decision on zeroing seems to have been persuaded, in part, by the claim that "mathematically, the results of the [average-to-transaction and average-to-average] comparison methodologies would be identical" but for the practice of zeroing,[14] logic which contradicts the arguments of the domestic interested parties, the Appellate Body was not only not persuaded by this logic but apparently unconcerned about whether different methodologies yield different results. Given that the statute and legislative history evidence no concern in this regard and that the Appellate Body has evidenced no concern, it is difficult to see how this argument can be persuasive either in the context of U.S. law or U.S. international obligations.

The April 18 report of the Appellate Body confirms BOFT's belief that the practice of zeroing is inconsistent with United States WTO obligations under Articles 2.1, 2.4 and 2.4.2 of

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12 *The Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) ("While the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction.")

13 Report of the Appellate Body, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("US-Zeroing")*, WT/DS294/AB/R, circulated April 18, 2006.

14 Opening Statement of the United States at the First Meeting of the Parties in US - Zeroing, as cited in the submission to the Department by Skadden, Arps, Slate, Meagher & Flom LLP on behalf of United States Steel Corporation, "Weighted Average Dumping Margin" (April 5, 2006).

the AD Agreement regardless of the method of comparison being used. As expressed in our affirmative brief to the Department, the practice of zeroing 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. 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* under investigation as a whole."[15] Having now been again confirmed by the Appellate body in its April 18 report, BOFT reiterates its request that the Department put an end to the zeroing practice in all antidumping duty proceedings, including investigations, all types of reviews, and regardless of the basis of comparison between normal value and export price.

III. THE DEPARTMENT CANNOT UNILATERALLY AMEND ITS ANTIDUMPING PRACTICE TO CALCULATE MARGINS USING TRANSACTION-TO-TRANSACTION COMPARISONS

In its published notice for comments on its proposal to abandon the practice of zeroing, the Department also included a request that parties comment on "appropriate methodologies to be used in future antidumping investigations." While the Department is free to review these comments along with the public, the Department is unequivocally not free to amend its preference for average-to-average comparisons in antidumping investigations absent a statutory amendment.

As explained in the affirmative brief filed by BOFT in response to the Department's request for comments, there is a clear statutory preference for the use of average-to-average comparisons in antidumping investigations. The SAA makes it clear that the transaction-to-

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15 *Appellate Body Report, European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen from India ("EC-Bed Linens")*, WT/DS141/RW, (March 12, 2001), para 53.

transaction methodology is an option to be used only in extremely limited circumstances.[16] Because Congress has spoken definitively on this issue, the Department is not free to interpret the law in a way that is contrary to Congressional intent. Although the Department is afforded deference under *Chevron* when interpreting an ambiguous statutory provision, no such deference is appropriate when Congress has unambiguously addressed the issue at hand.[17] Under *Chevron*, the first question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress."[18] Because Congress has spoken directly to the issue of when a transaction-to-transaction comparison may be used in lieu of an average-to-average comparison, the Department is not free to interpret the statute differently. As BOFT pointed out in its April 5th comments, the Department itself has officially recognized that the SAA expresses a preference for average-to-average comparisons when it stated in the preamble to the Department's regulations that, "in our view, the SAA makes clear that Congress did not contemplate broad application of the transaction-to-transaction method."[19] Given the clear guidance on the preferred comparison methodology provided by statute, the Department would be foolhardy to attempt to revise its practice absent a direct grant of Congressional authority to do so.

Even if the Department were permitted to amend its preference for average-to-average comparisons in original investigations, as requested by several commenters on behalf of domestic interested parties, the agency would still be required to follow a formalized process in

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16 Statement of Administrative Action ("SAA") accompanying H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. (1994) at 842-43.

17 *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc ("Chevron")., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).*

18 *Zenith Elecs. Corp. v. United States, 77 F.3d 426, 429-30 (Fed. Cir. 1996) (emphasis added).*

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

order to revise its regulations to allow for such a change. The preference for average-to-average comparisons is codified in the Department's regulations at 351.414 (c)(1), which state that, "in an investigation, the Secretary normally will use the average-to-average method."[20] Thus, even if a statutory amendment were not required, at the very least, the regulations would have to be revised before the Department could amend its practice.

Because a change in the average-to-average methodological preference would require a substantive revision to the Department's regulations, it would constitute "rulemaking" that would be subject to the notice and comment requirements of the Administrative Procedures Act ("APA").[21] The comment forum provided in the Department's March 6, 2006 is in no way adequate under the APA to allow for an amendment to the agency's substantive regulations.[22] Rather, in order for such a change to occur, the Department would be required to include the actual proposed revision to the regulations in its request for comments, just as it included a proposal to "no longer make average-to-average comparisons without {including the total value of} non-dumped comparisons" in its March 6th comment request pertaining to the panel decision in *US - Zeroing*.

In accordance with the APA, agencies amending their rules "must provide notice sufficient to fairly apprise interested persons of the subjects and issues before the agency."[23] "The salient question is...whether interested parties reasonably could have anticipated the final rulemaking."[24] Given that the Department's federal register notice only contains one affirmative proposal, to make a policy change to end the practice of zeroing, the notice cannot be considered

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20 19 CFR 351.414 (c)(1)("Preferences").

21 5 U.S.C. §§ 551 et seq.

22 *Natural Resources Defense Council v. EPA*, 279 F.3d 1180, (9th Cir. 2002)

23 *Natural Resources Defense Council v. EPA,* 863 F.2d 1420, 1429 (9th Cir. 1988).

24 *Am. Water Works Ass'n v. EPA*, 309 U.S. App. D.C. 235, 40 F.3d 1266, 1274 (D.C. Cir. 1994)

adequate to apprise parties that the very essence of the antidumping duty calculation in investigations, the average-to-average comparison, may be replaced by a new, extra-statutory preference for transaction-to-transaction comparisons. Moreover, the limited number of comments received by the Department advocating such a change -- five, including two submitted by law firms on behalf of themselves -- is hardly sufficient to compel the Department to pursue this approach further.

The Department must also reject the assertion that the use of a transaction-to-transaction methodology for the purposes of dumping comparisons is somehow more accurate than the average-to-average methodology currently employed by the Department. In fact, unless the Department were dealing with a very small number of identical sales, the use of a transaction-to-transaction methodology is much more likely to lead to inaccurate results. For example, in its remand determination in Lumber, the Department limited home market matching to a two week period (i.e., one week before and one week after the U.S. transaction). It is easy to imagine a scenario where the home market and U.S. market use different dates of sale and while the home market may be viable, because of the different dates of sale and the limited matching window, you could potentially have no matching home market transactions for U.S. sales. This would then lead to the use of CV and the inflation of dumping margins. On the other hand, were the Department not to use a window period for matching purposes, one could envision a home market transaction matching to a U.S. transaction which is 12 months apart. Because of the volatility of exchange rates, there could be a dumping margin reflecting the exchange rate fluctuation rather than the ex-factory pricing in both markets.

Regardless of the methodology used, transaction-to-transaction comparisons would still lead to a greater complexity in matching. In order to accurately match home market transactions

with U.S. transactions it would be necessary to add additional criteria to ensure the most identical or similar sale is matched. Under its normal practice for matching sales, the DOC matches by manufacturer, prime, level of trade, CONNUM, matching type, difference in product characteristics, relative difference in cost, and difference in level of trade. However, in Lumber, the DOC used all of its standard criteria and included these additional criteria: sales quantity, customer category, channel of distribution, movement expenses, commissions, and credit. DOC chose these additional criteria without first seeking comment from parties. By including these additional criteria the DOC introduced an inordinate level of complexity into its antidumping practice, which if embraced on a broader scale would lead to a complete lack of predictability and fairness in the execution of what is supposed to be a remedial statute.

Finally, before considering statutory and regulatory changes to a transaction-to-transaction methodology in order to avoid the effects of the prohibition on zeroing on dumping margins in average-to-average comparisons, the Department should allow the Appellate Body to rule on the issue of whether zeroing in fact can be applied in transaction-to-transaction comparisons. The April 18 report of the Appellate Body finding that zeroing is prohibited in average-to-transaction comparisons makes it virtually certain that a similar decision will apply to transaction-to-transaction comparisons. The U.S. should not rely on the absence of a specific decision relating to transaction-to-transaction comparisons to perpetuate what is now an obvious WTO inconsistency in the U.S. calculation of the margins of dumping regardless of the comparison methodology.

IV. THE DEPARTMENT IS REQUIRED TO END ZEROING IN ALL INVESTIGATIONS, INCLUDING THOSE WHERE AVERAGE NORMAL VALUE IS CALCULATED USING CONSTRUCTED VALUE OR SURROGATE VALUES

One commenter claims that "no WTO panel or Appellate Body decision has found U.S. methodology in constructed value or NME situations to violate U.S. obligations under the antidumping agreement," and that therefore, the Department is not required to change its zeroing practice in these cases.[25] This claim fails on several points. First, the provisions of the AD Agreement upon which the panel relied to rule that zeroing is impermissible in AD investigations refers to the comparison of "a weighted average normal value with a weighted average price of all comparable export transactions."[26] In accordance with the statute, under U.S. law, normal value is determined by one of three methods: home market sales, third-country sales, or constructed value. If neither home market sales nor third-country sales form an adequate basis for comparison, then normal value is the constructed value of the imported merchandise. While the law establishes a preference for home market sales or third-country sales prior to resorting to constructed value as the basis for normal value, it nonetheless recognizes that constructed value can be a basis for determining normal value.

Moreover, the Department's investigation methodology calculates an overall average normal value, whether that normal value is based on home market sales, third country sales, or constructed value. As noted in 19 CFR 351.405(a), constructed value is based on the cost of manufacture, selling general and administrative expenses, and profit. In practice, the Department calculates a model-specific, weighted-average cost of manufacture based on the period of investigation or review. Thus, even when normal value is based on constructed value, the

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[25] Comments filed by Stewart and Stewart: Weighted Average Dumping Margin, pages 19-20 (April 5, 2006).

[26] Article 2.4.2.

Department still calculates an *average normal value*. The panel found in *US - Zeroing* that, "the United States has acted in breach of Article 2.4.2 of the AD Agreement when... USDOC did not include in the numerator used to calculate weighted average dumping margins any amount by which average export prices in individual averaging groups exceeded the *average normal value* for such groups (emphasis added)." Thus, constructed value, when it forms the basis of normal value in model-specific comparisons to export prices or constructed export prices, is clearly contemplated by and included in the Panel's decision. Furthermore, the issue of zeroing is fundamentally a question of the treatment of export prices in the margin calculation when the average export price exceeds average normal value, no matter which basis is used for determining average normal value. The WTO's decision rests on the Department's failure to examine all comparable export transactions. If the Department were to continue to zero in cases where NV was based on CV, the WTO-inconsistent practice of failing to examine all relevant export transactions would continue, in direct violation of the Department's compliance obligations under section 132(g) of the URAA. Consequently, BOFT maintains that zeroing when comparing constructed values to individual export prices would not conform the Department's practice to the Panel's decision and therefore must be rejected.

U.S. law also stipulates that, in an NME proceeding, the Department calculates normal value by constructing a value based on the non-market-economy producer's factors of production in a market economy country which is a significant producer of comparable merchandise and which is at a level of economic development comparable to the non-market economy. And, similar to its calculations in market economy proceedings, the Department calculates a model-specific, weighted-average normal value based on the factors of production of individual respondents and either imported values or surrogate values for each of those factors. Therefore,

for NME proceedings, as in market-economy proceedings, a type of constructed value forms the basis of average normal value used in model-specific comparisons to EP or CEP and all average export price comparisons to average normal value are included in the Panel's decision.

Furthermore, nothing in WTO Accession Protocol permits the Department to continue zeroing with respect to China in particular. While the Accession Protocol does permit the Department to continue calculating average normal value using surrogate values for a certain period, the protocol makes no exceptions for how overall antidumping duty margins will be calculated. Rather, it permits under certain circumstances for a substitute normal value to be used in the comparisons, but the comparisons between normal value and export price or constructed export price are unaffected by the Protocol.[27] Just as in market economy cases, in China cases, model-specific average normal values are compared to model-specific average export prices in order to calculate antidumping duty margins. To fail to include "all comparable export prices" in the margin calculation would violate article 2.4.2 of the AD Agreement using precisely the same methodology that was found to be WTO-inconsistent in US-Zeroing. All WTO signatories shall be granted the same rights and be subject to the same rules. To prejudice China in the application of antidumping duty comparisons would clearly be contrary to Article VI of the GATT and the objectives of the world trading system of which China is a contributing member.

Finally, if it has not been clear before, the April 18 Appellate Body report now makes it clear that "zeroing" is inconsistent with the Antidumping Agreement in all contexts. If one characterizes the NME methodology as comparing average-to-average or average-to-transaction,

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[27] Accession of the People's Republic of China, WT/L/432, I:14, circulated Nov. 23, 2001.

there is no longer any question that zeroing is WTO inconsistent in either comparison methodology.

V. THE DEPARTMENT SHOULD NOT CONTINUE TO ZERO IN REVIEWS.

As asserted in BOFT's April 6th comments, in addition to eliminating the practice of zeroing in original antidumping investigations, the Department should cease to apply zeroing in antidumping duty administrative reviews, new shipper reviews, changed circumstance reviews and sunset reviews, notwithstanding the narrow applicability of the panel's decision in *US-Zeroing*. Since BOFT submitted its comments on April 6th, the Appellate Body has further considered the issue of zeroing and found that it is also inconsistent with the WTO Antidumping Agreement in the context of average-to-transaction comparisons and in reviews.[28] Further attempts by the U.S. to use zeroing to inflate dumping margins are simply futile.

VI. THE DEPARTMENT CANNOT DELAY IMPLEMENTATION OF THE DECISION IN US-ZEROING

In an attempt to cling to the distortive and WTO-inconsistent practice of zeroing for as long as possible, several commenters have argued that the Department should delay implementation of the panel decision in *US-Zeroing* until the completion of the Doha round of WTO negotiations. The implementation provisions of section 123(g) of the URAA should not be interpreted to give the Department an open-ended opportunity to delay implementation of a ruling by the dispute settlement body of the WTO. While the provisions of 123(g) do not provide for specific deadlines regarding implementation of a WTO decision, they clearly contemplate that implementation be completed within a reasonable time frame.[29] Furthermore,

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[28] Appellate Body Report, *US-Zeroing*, paras. 130-134.

[29] See e.g., 19 U.S.C. 3533(g)(2) establishing a 60 day waiting period for implementation of a final rule or other modification, "unless the President determines that an *earlier* effective date is in the national interest" (emphasis added).

pursuant to article 21.1 of the Dispute Settlement Understanding, the United States has committed to ensuring, "prompt compliance with recommendations or rulings of the DSB ...in order to ensure effective resolution of disputes to the benefit of all Members." The suggestion that the Department delay implementation of the decision in US-Zeroing is antithetical to the commitment to prompt compliance embodied in the DSU, and should be disregarded by the Department.

In our initial comments, BOFT indicated its view that any antidumping measures imposed subsequent to the entry in effect of the WTO Agreement, or in the case of China since its accession to the WTO, where dumping was determined using zeroing are potentially subject to challenge. This is particularly true in those cases where margins of dumping would have been de minimis but for the application of zeroing. We would anticipate that sectors wrongly subject to antidumping measures will challenge the underlying determinations using zeroing. To needlessly delay addressing zeroing will expose the U.S. to a raft of litigation at the WTO on pending cases, as well as past cases, and ultimately expose the U.S. to retaliation pending full implementation of a prohibition on zeroing. Thus, while it is easy for domestic interested parties to cavalierly suggest that the U.S. simply delay implementation, the costs of delay could be significant both in terms of litigation and withdrawal of concessions.

The costs of delay in eliminating zeroing in calculating the margins of dumping have been magnified by the April 18 report of the Appellate Body which clearly applies the prohibition on zeroing to reviews and to average-to-transaction comparisons. Both antidumping measures applied based on zeroing and the amount of the duties calculated using zeroing are now subject to challenge and ultimately withdrawal of concessions by WTO Members if continued. While delay in implementing the prohibition on zeroing may temporarily provide protection to

U.S. industries, ultimately it will be at a significant cost to those industries which are targeted in the withdrawal of concessions by the Members whose industries are subjected to unjustified or inflated antidumping measures.

VII. CONCLUSION

BOFT appreciates the opportunity to provide this response to the comments filed by domestic parties regarding the Department's proposed modification to its zeroing practice in original investigations. The U.S. should eliminate zeroing in both investigations and reviews and regardless of the comparison methodology used. If it was not clear from the panel report which precipitated the proposed U.S. elimination of zeroing in average-to-average comparisons, it should be clear from the April 18 Appellate Body report: ***zeroing is simply not acceptable in calculating the margins of dumping regardless of whether it is applied in an investigation or review and regardless of the comparison methodology applied***. The U.S. should move immediately to bring its practice into conformity with the clear determinations of the WTO regarding zeroing.