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REBUTTAL COMMENTS ON THE COMMERCE DEPARTMENT "ZEROING" PROPOSAL

71 FED. REG. 11189 (MARCH 6, 2006)

SUBMITTED ON BEHALF OF THE CONSUMING INDUSTRIES TRADE ACTION COALITION (CITAC)

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INTRODUCTION

These rebuttal comments are submitted by the Consuming Industries Trade Action Coalition ("CITAC"). They respond to comments filed by several parties (collectively referred to as "Petitioners") [1]/ in the Department's request for comments on its proposal to eliminate the practice of "zeroing" in initial antidumping duty investigations employing the "average to average" comparison methodology. [2]/ CITAC timely filed initial comments in this proceeding on April 5, 2006 ("Initial Comments").

CITAC requested an extension to submit rebuttal comments to permit a detailed analysis of the WTO Appellate Body decision in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294.AB/R ("*AB Zeroing Determination*"), which was issued on April 18, 2005. The Department granted this request and extended the deadline to May 4, 2006. [3]/

In our original comments on behalf of consuming industries, we advocated the abandonment of the zeroing methodology in investigations and reviews, and regardless of the comparison methodology employed (average to average, average to transaction or transaction to transaction). The *AB Zeroing Determination* reinforces the correctness of many of the points

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[1]/ In particular, these rebuttal comments address comments filed by the Committee to Support U.S. Trade Laws ("CSUSTL"), Collier Shannon Scott ("CSS"), United States Steel Corporation ("USS"), Coalition for Fair Lumber Imports ("CFLI"), Committee on Pipe and Tube Imports ("CPTI"), and Stewart & Stewart ("S&S"). Because of the similar positions taken in many of these comments, we refer collectively to these comments as "Petitioners" comments.

[2]/ 71 *Fed. Reg.* 11189 (March 6, 2006) ("Zeroing Notice").

[3]/ 71 Fed. Reg. 23898 (April 25, 2006).

made by CITAC in its Initial Comments. The *AB Zeroing Determination* ruled that an antidumping calculation that fails to account for negative dumping calculations (where normal value is less than the export price or constructed export price) violates the WTO Antidumping Agreement, whether in an initial investigation or an administrative review. [4]/ We think that the *AB Zeroing Determination* was correct and based on the relevant law; but that is truly beside the point. The ruling is final and cannot be changed, once adopted by the Dispute Settlement Body, as it surely will be during May, without negotiating amendments to the relevant Agreements (in this case the GATT itself and the Antidumping Agreement). We strongly urge the Administration not to attempt this course, as discussed further below.

The legality of zeroing under WTO rules for transaction to transaction comparisons is now highly suspect based on the reasoning of the *AB Zeroing Determination,* because all calculation methods require consideration of the "product as a whole" to determine a "margin of dumping." The exception found by the Panel in *United States—Final Dumping Determination on Softwood Lumber from Canada*, [5]/ which sustained zeroing in a transaction to transaction comparison methodology case, is fatally undermined by the *AB Zeroing Determination*. Thus, the fundamental point in our initial comments that WTO requirements mandate the end of zeroing in all calculation methodologies and all stages of an antidumping proceeding has been sustained.

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[4]/ *AB Zeroing Determination* at ¶ 134.

[5]/ *United States—Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, Panel Report, WT/DS264/RW (April 3, 2006).

I. Negotiating of Zeroing in WTO Doha Round Negotiations Is Unsustainable and Unwise

Several Petitioners argued that the Department should not change its practice at this time because the precise issue is being negotiated in the Doha Round. [6]/ CITAC completely disagrees.

The Doha Round negotiations include antidumping rules on the agenda. When the *AB Zeroing Determination* was announced on April 18, the Office of the U.S. Trade Representative declared that the United States disagreed with the decision and intends to "pursue this issue in the Rules negotiations taking place as part of the [WTO] Doha Development Round." [7]/ We urge the USTR to reconsider that statement and that approach, for two simple reasons: (1) the abandonment of zeroing is in the economic interest of the United States, for reasons explained in CITAC's initial comments; and (2) the prospect that zeroing would be resurrected through negotiation is itself zero.

As noted, we previously have explained the reasons why the abandonment of the zeroing methodology serves the economic interest of the United States. With respect to the feasibility of negotiating permissible uses of zeroing in antidumping investigations, such an approach is very unlikely to be accepted by our trading partners, the vast majority of which are firmly opposed to this methodology for the same reasons CITAC opposes it; it is prejudicial to exporters and consuming industries in the importing country, and therefore does not serve the broader interests of the importing country or the exporting country.

In addition, the continuation of zeroing as a methodology through negotiations would require significant concessions by the Untied States in other areas, and these concessions might

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[6]/ CSUSTL Initial Comments at 3-4, CSS Initial Comments at 2; S&S Initial Comments at 1-5.

[7]/ Brevetti, Rossella, "WTO Appellate Body Reverses Panel Decision For U.S. on Zeroing in Administrative Reviews, BNA (April 19, 2006), quoting USTR spokeswoman Neena Moorjani.

well offend other U.S. interests. Bluntly, it is time we stopped this approach and recognize that zeroing's day is done.

Petitioners cite the Craig-Rockefeller Amendment to the Tax Relief Act of 2005 [8]/ for the proposition that it would be "inappropriate for the Department to cast aside its longstanding practice [of zeroing] while the Doha Round is underway and the United States has taken a negotiation position supportive of the practice." [9]/ The CUSTL comments do not cite any particular U.S. proposal on zeroing, so it is difficult to credit this assertion. Moreover, the argument is based on a mischaracterization of the Craig-Rockefeller Amendment. This is a non-binding sense of the Senate resolution. It is inapplicable to the present situation, simply because agreements to which the United States is already a party prohibit zeroing, as the recent *AB Zeroing Determination* makes clear. The Craig-Rockefeller Amendment, by contrast, urges the Administration to avoid *future* agreements "outlawing the critical practice of 'zeroing' in antidumping investigations." [10]/ Furthermore, the issue before the Department is what the Department's practice should be – an issue that is not addressed by the Craig-Rockefeller Amendment, which only refers to the negotiation of new international agreements.

II. The Recognition of Negative Margins Is Clearly Permitted by the Statute

Petitioners contend that the Department's current zeroing practice in initial investigations is required by the statute and cannot be changed without congressional action. [11]/ We strongly disagree. The law clearly permits the Department to discontinue zeroing in all antidumping proceedings.

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[8]/ S. Amdt. 2655 to S. 2020, 151 Cong. Rec. S13135 (daily ed. November 17, 2005).

[9]/ CSUSTL Initial Comments at p. 4.

[10]/ S. Amdt. 2655 to S. 2020, 151 Cong. Rec. S13135 (daily ed. November 17, 2005).

[11]/ CSUSTL Initial Comments at 4-6, CSS Initial Comments at 2, USS Initial Comments at 2-6.

Petitioners ignore the holding of the Court of Appeals for the Federal Circuit in *Timken Company v. United States* that "the statute does not directly speak to the issue of negative-value dumping [calculations]." [12]/ While the *Timken* decision applied to administrative reviews, the CAFC extended the reach of that decision to initial investigations in *Corus Staal BV v. Department of Commerce*, 395 F. 3d 1343 (Fed. Cir. 2005). Thus, CAFC precedent clearly provides that the statute does not require zeroing either in initial investigations or administrative reviews. [13]/ Petitioners' contention that the Department's current practice cannot be changed without congressional action is clearly wrong.

Petitioners incorrectly argue that "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." [14]/ Petitioners further contend that:

> [b]ecause the only purpose of 19 U.S.C. § 1677f-1(d) is to 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. [15]/

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[12]/ *Timken Company v. United States*, 354 F. 3d 1334, 1342 (Fed. Cir. 2004), rehearing denied, March 17, 2004. CSUSTL and others attempt to diminish the holding of this case by arguing that the court "found that it was a 'close question' whether the statute mandated the denial of offsets for non-dumped sales." CUSTL Initial Comments at 5. Even if it was a "close question," this does not diminish the precedential impact of this determination.

[13]/ Petitioners further contend that "key provisions of the statute were not addressed in *Timken* and *Corus Staal*" and that "[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" (CSUSTL Initial Comments at 5). This is simply an attempt to reargue a settled point of law and should not deter the Department from considering its future policy choices based on the law as it is rather than as Petitioners would like it to be.

[14]/ CSUSTL Initial Comments at 4. As we noted in our Initial Comments, CITAC views the term "offsets" as imprecise and incorrect in this context. A negative antidumping calculation is still an antidumping calculation. Negative numbers have been recognized as numbers since the time of Euclid.

[15]/ CSUSTL Initial Comments at 4-5; see also, USS Initial Comments at 6.

Petitioners' premise is incorrect. It is simply wrong to assume that a weighted average to weighted average comparison methodology yields the same margin of dumping as a transaction to transaction methodology, because not all normal value transactions would be used in the latter methodology. This is borne out by the comments submitted by the Petitioner firm of Stewart and Stewart. [16]/ In comparing the results in an initial investigation with those of a review, the mathematical equivalence is also lacking. The statute requires the Department to use normal value averaging periods of not more than a "calendar month" in administrative reviews, [17]/ while period-long averaging is permitted in investigations. [18]/ If zeroing is not used (as it should not be) in either investigations or reviews, the margin of dumping using monthly averaging periods could be quite different from the margins using period-long (usually 12 months) averages for both normal values and individual transactions. Please see **Exhibit 1**, attached. Basically, **i**f normal values or export values and quantities are not distributed uniformly throughout the period, the monthly average-to-transaction methodology will not yield the same result as the period-long average to average methodology when zeroing is not used. Petitioners' premise is wrong; the Department's current zeroing practice is not required to give meaning to the different methodologies prescribed by statute; nor does changing the practice require congressional action.

III. The Department Should Not Apply Zeroing In Any Antidumping Methodology

The Department's Zeroing Notice recognizes that the Commerce Department's zeroing practice in investigations violates the WTO. The recent *AB Zeroing Determination* makes clear that the Commerce Department's zeroing practice in administrative reviews violates the WTO as well. This provides additional support for CITAC's contention that the Department's zeroing

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[16]/ S&S Initial Comments at 11-16.

[17]/ 19 U.S.C. § 1677f-1(d)(2).

[18]/ 19 C.F.R. § 351.414.(d)(3).

proposal should be expanded: 1) to preclude the use of the zeroing methodology in all investigations, regardless of the methodology used; and 2) to apply to all antidumping proceedings, including administrative reviews, sunset reviews, and new shipper reviews. [19]/

The WTO in the *AB Zeroing Determination* held that the Department's zeroing methodology violated Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because the methodology applied by the U.S. Department of Commerce in the administrative reviews at issue results in amounts of assessed anti-dumping duties that exceed the foreign producer's or exporter's margin of dumping. [20]/ The rationale of this holding clearly applies to all investigations, regardless of the methodology used; and to all antidumping proceedings, including administrative reviews, sunset reviews, and new shipper reviews.

In an effort to preclude the Department from abolishing zeroing in any of its calculation methodologies, CSUSTL argues that there is "no support in either the AD Agreement or U.S. Law . . . for the proposition that offsets are required for one margin calculation methodology but not for another." [21]/ CITAC agrees that the Department should take a consistent approach to zeroing across its methodologies, but we reach the opposite conclusion from Petitioners. The only appropriate conclusion is that zeroing should be discontinued in all proceedings. The WTO in the *AB Zeroing Determination* has unambiguously ruled that the Department's current practice of zeroing in average to average comparisons is inconsistent with WTO obligations in all cases. [22]/ The Appellate Body has further ruled that the prohibition on zeroing extends to administrative reviews. [23]/ Thus, the Department should abandon its zeroing practice, and should

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[19]/ CITAC Initial Comments at 3.

[20]/ *AB Zeroing Determination* at ¶ 134.

[21]/ CSUSTL Initial Comments at p. 8, fn. 7.

[22]/ Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins WT/DS294/R. para 7.32.

[23]/ *AB Zeroing Determination.*

further eliminate zeroing from all antidumping calculation methodologies – during both initial investigations and reviews – because zeroing unfairly inflates antidumping margins and thereby damages U.S. industries.

Zeroing, even in one comparison methodology, will destroy the ability of any exporter to predict the possibility or the magnitude of antidumping liability. This uncertainty is unfair to foreign producers, exporters and U.S. consumers because it makes it impossible for them to determine whether their sales are below normal value. The natural consequence of this uncertainty is that exporters will export less to the United States and U.S. consuming industries will lose access to essential imports. [24]/ We strongly urge the Department to prevent this economic damage to U.S. manufacturers.

IV. The Department Should Maintain Its Strong Preference for the Average-to-Average Methodology

Petitioners asserted that the best alternative to the Department's current practice is a transaction-to-transaction methodology, with the "exclusion of offsets" (that is, with zeroing) for non-dumped comparisons. [25]/ Stewart & Stewart (S&S) further discuss some of the approaches the Department could take in applying a transaction-to-transaction methodology.

As noted in CITAC's Initial Comments, there are sound reasons why the transaction-to-transaction approach to determining antidumping duty margins is and should be disfavored. As the SAA [26]/ recognized, it may be difficult to select an appropriate normal value transaction to compare to each export sales transaction, especially when there are several normal value

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[24]/ CITAC Initial Comments at p. 5.

[25]/ CSS Initial Comments at 2, CFLI Initial Comments at 2-3; CPTI Initial Comments at 3, S&S Initial Comments at 8, and CSUSTL Initial Comments at 9.

[26]/ Statement of Administrative Action, U.R.A.A., H. Doc. 316, Vol. 1, 103d Cong. (1994) ("SAA") at 842. The SAA states that "normally" the Department will measure dumping margins on the basis of weighted-average-to-weighted-average comparisons, and that "given past experience with [the transaction-by-transaction] methodology and the difficulty in selecting appropriate comparison transactions, the Administration expects that Commerce will use this methodology far less frequently than the average-to-average methodology."

transactions that may serve as a comparison. Comparisons could vary greatly depending on which normal value Commerce chooses. Thus, the transaction to transaction method is inherently arbitrary and thus undesirable.

Furthermore, there is a clear regulatory preference for the use of average to average comparisons in antidumping investigations, [27]/ and the elimination of zeroing from these average-to-average comparisons does not warrant a departure from this long-standing calculation practice. The regulation, consistent with the SAA, establishes a strong preference for the average-to-average method that can be overcome only in "unusual" circumstances, where the prerequisites of few sales and identical or very similar merchandise are met. These prerequisites cannot be met in most cases. The Department cannot disregard its own regulations – they are binding on the Department until and unless they are amended.

The S&S Initial Comments ably illustrate the inherent arbitrariness of using the transaction by transaction methodology by acknowledging there will be instances where the Department will find that there is more than one home market transaction that is identical or equally similar to the U.S. transaction and the Department will have to select one among the group of equal matches. The S&S Initial Comments set forth four possible approaches that the Department could use to select the comparison transaction (including the clearly suspect method of selecting the transaction with the highest normal value) [28]/ and the margin would be very different depending on the transaction selected. Thus, the S&S comments demonstrate the amount of arbitrariness that would be injected into the Department's practice if it adopts the transaction-to-transaction approach for its investigation methodology. Such an approach would

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[27]/ In an investigation, the Secretary normally will use the average-to-average method. The 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. 19 C.F.R. § 351.414(c).

[28]/ S&S Initial Comments at 12-16.

violate the spirit of transparency and fairness and harm U.S. consuming industries. In addition, based on our reading of the *AB Zeroing Determination*, zeroing in such circumstances would violate the WTO Antidumping Agreement and Article VI of the GATT.

V. Conclusion

The elimination of zeroing in all its forms is a priority for consuming industries and for CITAC. Zeroing arbitrarily increases antidumping duties beyond the actual margins of dumping, which must reflect all comparisons, negative as well as positive. The elimination of zeroing will help reduce the current imbalance of interests between U.S. consuming industries and domestic petitioners and will comply with international requirements under WTO agreements. Thus, while the proposed policy change is a small step in the right direction, it is inadequate. CITAC urges the Department to go further and extend the elimination of zeroing to any comparison methodology in antidumping investigations and to administrative reviews of antidumping duty orders, changed circumstances reviews, new shipper reviews and five-year "sunset" reviews of antidumping duty orders. The elimination of zeroing would help U.S. consuming industries to improve their global competitiveness and would prevent the undue disruption of international commerce on which U.S. consuming industries increasingly depend.

Respectfully submitted,

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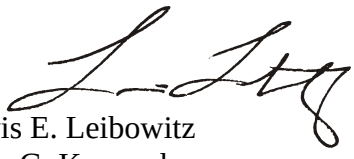

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EXHIBIT 1

Calculation of Monthly Comparison Value:

Month	Comparison Market Quantity	Unit Value	Extended Value
Month 1	3.00	1.00	3.00
	1.00	2.00	2.00
	3.00	3.00	9.00
Subtotals/Comparison Value Month 1	7.00	2.00	14.00
Month 2	5.00	3.00	15.00
	2.00	2.00	4.00
	2.00	1.00	2.00
Subtotals/Comparison Value Month 2	9.00	2.33	21.00
Month 3	2.00	5.00	10.00
	1.00	4.00	4.00
	1.00	3.00	3.00
Subtotals/Comparison Value Month 3	4.00	4.25	17.00
Month 4	4.00	2.00	8.00
	3.00	3.00	9.00
	7.00	2.43	17.00
Subtotals/Comparison Value Month 4			
	3.00	5.00	15.00
Month 5	1.00	4.00	4.00
	2.00	3.00	6.00
	6.00	4.17	25.00
Subtotals/Comparison Value Month 5			
	4.00	4.00	16.00
Month 6	3.00	3.00	9.00
	2.00	2.00	4.00
	1.00	1.00	1.00
	10.00	3.00	30.00
Subtotals/Comparison Value Month 6			

Calculation of the Margin Under Administrative Review Methodology (Monthly-Average Normal Value to U.S. Transaction):

Month	Export Price Quantity	Unit Value	Extended Value	Results Under Review Methodology. With Zeroing: Monthly NV	Unit "Dumping"	Extended "Dumping"	Percent Margin	Results Under Review Methodology. Without Zeroing: Monthly NV	Unit "Dumping"	Extended "Dumping"	Percent Margin
Month 1	1.00	5.00	5.00	2.00	-	-	0.0%	2.00	(3.00)	(3.00)	-60.0%
	1.00	4.00	4.00	2.00	-	-	0.0%	2.00	(2.00)	(2.00)	-50.0%
	1.00	3.00	3.00	2.00	-	-	0.0%	2.00	(1.00)	(1.00)	-33.3%
Month 2	1.00	1.00	1.00	2.33	1.33	1.33	133.3%	2.33	1.33	1.33	133.3%
	1.00	1.00	1.00	2.33	1.33	1.33	133.3%	2.33	1.33	1.33	133.3%
	1.00	1.00	1.00	2.33	1.33	1.33	133.3%	2.33	1.33	1.33	133.3%
Month 3	1.00	5.00	5.00	4.25	-	-	0.0%	4.25	(0.75)	(0.75)	-15.0%
	1.00	5.00	5.00	4.25	-	-	0.0%	4.25	(0.75)	(0.75)	-15.0%
	4.00	3.00	12.00	4.25	1.25	5.00	41.7%	4.25	1.25	5.00	41.7%
Month 4	2.00	3.00	6.00	2.43	-	-	0.0%	2.43	(0.57)	(1.14)	-19.0%
	2.00	1.00	2.00	2.43	1.43	2.86	142.9%	2.43	1.43	2.86	142.9%
	1.00	2.00	2.00	2.43	0.43	0.43	21.4%	2.43	0.43	0.43	21.4%
Month 5	1.00	5.00	5.00	4.17	-	-	0.0%	4.17	(0.83)	(0.83)	-16.7%
	2.00	4.00	8.00	4.17	0.17	0.33	4.2%	4.17	0.17	0.33	4.2%
	1.00	3.00	3.00	4.17	1.17	1.17	38.9%	4.17	1.17	1.17	38.9%
Month 6	3.00	1.00	3.00	3.00	2.00	6.00	200.0%	3.00	2.00	6.00	200.0%
	2.00	1.00	2.00	3.00	2.00	4.00	200.0%	3.00	2.00	4.00	200.0%
	1.00	2.00	2.00	3.00	1.00	1.00	50.0%	3.00	1.00	1.00	50.0%
	2.00	2.00	4.00	3.00	1.00	2.00	50.0%	3.00	1.00	2.00	50.0%
Overall Results			74.00		14.44	26.79	36.2%			17.31	23.4%

Calculation of Overall Normal Value for the Full Period:

Period	Home Market Quantity	Unit Value	Extended Value
Totals/NV for the Period	43.00	2.88	124.00

Calculation of the Margin Under Original Investigation Methodology (POI-Average Normal Value to POI-Average U.S. Price):

Period	Export Price Quantity	Unit Value	Extended Value	Margin. Without Zeroing: Monthly NV	Unit "Dumping"	Extended "Dumping"	Percent Margin
POI	29.00	2.55	74.00	2.88	0.33	9.63	13.0%

Difference in Results Based on Average-to-Transaction w/o Zeroing versus Average-to-Average	10.4%