CAMARA NACIONAL DE ACUACULTURA

Av. Francisco de Orellana y Miguel H. Alcivar,
Centro Empresarial Las Cámaras, 3er piso (Cdla. Kennedy Norte)
Telf: (593-4) 683017-683018 Fax: 683019
P.O. Box: 09 – 908-P
E mail: cna@cna-ecuador.com Web: www.cna-ecuador.com
Guayaquil - Ecuador

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VIA MESSENGER

Mr. David M. Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue & 14th Street, N.W.
Washington, D.C. 20230
Attention: Weighted Average Dumping Margin

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

Dear Assistant Secretary Spooner:

On behalf of the Camara Nacional de Acuacultura (National Chamber of Aquaculture) of Ecuador, an association of Ecuadorian seafood processors and exporters, we hereby respond to the Department's request for rebuttal comments on the appropriate methodology for calculating weighted-average dumping margins in antidumping duty investigations. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (Mar. 6, 2006).

In accordance with the Department's instructions, we are submitting the original and six copies of this submission, as well as an electronic version on the accompanying CD-ROM. If the Department has any questions regarding this submission or requires any additional information, please do not hesitate to contact the undersigned.

Respectfully submitted,

Cesar Monge
Executive President
Cámara Nacional de Acuacultura

REBUTTAL COMMENTS ON
THE CALCULATION OF THE WEIGHTED AVERAGE
DUMPING MARGIN IN AN ANTIDUMPING INVESTIGATION

The Camara Nacional de Acuacultura ("CNA") hereby responds to the comments filed by the following entities on April 5, 2006:

1. Collier Shannon Scott, PLLC ("Collier");
2. Committee to Support U.S. Trade Laws ("CSUSTL");
3. Coalition for Fair Lumber Imports, filed by Dewey Ballantine LLP ("Dewey");
4. Committee on Pipe and Tube Imports, filed by Schagrin Associates ("Schagrin");
5. United States Steel Corporation, filed by Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden"); and
6. Stewart and Stewart ("Stewart").

We will refer collectively to these six comments as the "Petitioners' Comments."[1] They raise just three claims: (1) the Department should not change any aspect of its current "average-to-average" margin calculation method, but instead should wait for the outcome of the Doha Round of WTO rules negotiations before deciding whether it needs to comply with the WTO decisions that have held zeroing to be impermissible; (2) the U.S. antidumping statute requires the Department not to provide offsets for non-dumped sales when calculating margins using the average-to-average method; and (3) assuming that the Department is required to eliminate zeroing when using the average-to-average method, it should change its "normal" calculation method in an investigation to the "transaction-to-transaction" method and continue to employ zeroing. In addition, Schagrin and Stewart propose specific ways of making transaction-to-transaction comparisons. However, none of these comments provides an adequate legal or

[1] Two other domestic interested parties filed comments. The short comments of the Cold Finished Steel Bar Institute merely adopt the comments of the CSUSTL and, therefore, the CNA does not reply separately to them. The comments of Florida Citrus Mutual address the subject of zeroing in administrative reviews, which is beyond the scope of the Department's request for comments. Therefore, no rebuttal is necessary except to point out, as we describe in more detail below, that the WTO's Appellate Body ruled on April 18, 2006 that zeroing in administrative reviews is inconsistent with the Anti-Dumping Agreement.

factual basis for departing from the methodology that the CNA recommended in its own April 5th submission for the reasons we now explain in detail.

I. THE DEPARTMENT HAS NO LEGAL BASIS OR FACTUAL JUSTIFICATION FOR WAITING UNTIL THE COMPLETION OF THE DOHA ROUND TO REVISE ITS MARGIN CALCULATION METHODOLOGY

The primary proponents of the "wait and see" approach to revising the margin calculation methodology are the CSUSTL and Stewart. Relying on a "sense of the Senate" statement in 2005 that the U.S. should not sign any trade agreement that prohibits zeroing, the CSUSTL states that, "it would be inappropriate for the Department to cast aside its longstanding [zeroing] practice while the Doha Round is underway and the United States has taken a negotiating position supportive of the practice." CSUSTL comments at 3-4.[2] See also Stewart comments at 3-6. This contention is so weak that neither Schagrin nor Skadden have bothered to raise it.

Their lack of agreement with the CSUSTL's position is hardly surprising because: (1) no one can state with assurance that the Doha Round will be completed or that, if completed, there will be any revision of the WTO Anti-Dumping Agreement that specifically addresses the subject of zeroing; (2) the "sense of the Senate" is neither an act of law nor an expression of the sense of the entire Congress and, therefore, has no legal or practical significance; (3) if the United States government declined at this time to implement the decisions of the WTO's Dispute Settlement Body pertaining to zeroing in the Canadian softwood lumber case and in the European Union case, then it would be acting in defiance of the DSB's directive that the United States bring its measures into conformity with the Anti-Dumping Agreement; and (4) if the United States can ignore or defy a DSB decision based on the highly uncertain possibility of a prospective rule

[2] The Collier comments (at 2) endorse the CSUSTL's position on the purported relevance of the Doha Round. The Dewey comments (at 2) generally endorse all of the CSUSTL's comments. However, neither Collier nor Dewey provides any additional reasoning in support of the claimed relevance of the Doha Round negotiations.

change in the Doha Round, then any WTO signatory can adopt the same position and ignore or defy any DSB decision on the purported ground that it intends to seek to overturn the effect of that decision through subsequent negotiations.[3]

As a matter of policy, this would render the WTO's dispute resolution process ineffective and cast into doubt its legitimacy. The dispute resolution process is a cornerstone of the WTO and the GATT 1994, and any signatory's effort to avoid the consequences of a loss in a DSB proceeding risks undermining the entire system by which international trade rights are exercised and vindicated. For this reason, the Schagrin comments (at 5) correctly state that, "[t]he *EU – Zeroing* decision accordingly imposes an obligation upon the United States to comply with the findings of the Panel."

II. THE PETITIONERS ARE NOT CORRECT IN CONTENDING THAT THE ANTIDUMPING LAW REQUIRES THE USE OF ZEROING

Collier, the CSUSTL, Dewey, and Skadden contend that 19 U.S.C. § 1677f-1(d) prohibits the Department from eliminating zeroing, regardless of whether it uses the average-to-average method or the average-to-transaction method of comparing U.S. price to normal value. The CSUSTL's comments (at 4-9) and the Skadden comments (at 2-12) contain the most detailed arguments. Indeed, the Skadden comments are devoted exclusively to this claim.

To summarize, the Petitioners' Comments allege that, if zeroing is prohibited (and "offsets" of negative dumping margins are instead applied), then "a respondent's dumping margin would always be the same regardless of whether weighted average or individual U.S.

[3] In addition, any rule change can only have prospective effect and, therefore, cannot affect the methodology used in investigations that take place before the effective date of the new rule.

transaction prices are compared to a weighted average normal value." CSUSTL comments at 4.[4] Skadden purports to establish the truth of this statement through an extended mathematical example. See Skadden comments at 7-9 and accompanying Exhibit 1. Then, both the CSUSTL and Skadden assert that Congress could not have intended this result. Rather, "[e]stablished rules of statutory construction require an interpretation that avoids rendering any provision of a statute meaningless or unnecessary." CSUSTL comments at 8.[5] Then, they conclude that Congress must have intended to prohibit the granting of offsets of negative dumping margins when the average-to-average method is used, even though there is not the slightest evidence in the legislative history of the Uruguay Round Agreements Act to this effect.

This analysis contains numerous flaws that compel the Department not to rely on it as the basis for continuing to employ zeroing. First and foremost is the fact that the DSB has already unequivocally declared that the Anti-Dumping Agreement prohibits zeroing when the Department uses the average-to-average method. This is precisely why the Department has stated that it can no longer calculate margins in an investigation using its prior practice. Thus, the petitioners are arguing, in effect, that the Department should ignore the DSB's directive.

Second, the U.S. Court of Appeals for the Federal Circuit ("CAFC") has twice rejected the argument that the antidumping statute requires the Department to use zeroing. Petitioners have no response to these dispositive holdings other than the lamentably weak claim that either the Department (and the intervenors that supported the Department) did not bring the proper

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[4] Skadden similarly notes that, "if such offsetting [of negative margins] is performed, it does not matter which of the two comparison methodologies (i.e., weighted average U.S. prices or individual U.S. transaction prices) is used: the resulting margin will always be the same. This conclusion is true to a mathematical certainty and cannot be disputed." Skadden comments at 7.

[5] Skadden similarly asserts that, "it would have been pointless for Congress to provide for the different comparison methods in the statute if the offsetting of dumping margins with non-dumped sales was allowed. This is

arguments to the CAFC's attention or the CAFC did not "address" those arguments. See CSUSTL Comments at 5 ("key provisions of the statute were not addressed in Timken and Corus Staal. If these provisions are considered, it is clear that that statute does not merely authorize the denial of offsets for non-dumped sales, but requires it."); Skadden Comments at 3-4 ("certain key provisions of the statute that relate to this issue were not brought to the Federal Circuit's attention in Timken and were not addressed by the Court in Corus Staal."). However, counsel for the parties in those cases that supported zeroing, including Skadden in Corus Staal and Stewart in Timken, had an ample opportunity to make all the arguments that they thought worthwhile. Moreover, it is indisputable that an adjudicating body is presumed to have considered all of the arguments that the contesting parties have raised. However, the CAFC is not required to explicitly respond to every argument that every party raises, and it undoubtedly failed to do so in this instance because it was not persuaded. For all of these reasons, the Department cannot avoid the effect of the CAFC's decisions, which state that zeroing is discretionary, not mandatory.

Third, the April 18, 2006 decision of the Appellate Body ("AB") in the zeroing challenge brought by the European Union fatally undermines the Petitioners' analysis. See *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"),* WT/DS294/AB/R. In that decision, the AB considered, among other issues, the question of whether the Department had the right to employ zeroing in several administrative reviews in which it had used the average-to-transaction method in order to calculate antidumping duties. Of course, this method is identical to the average-to-transaction method that the Department is

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because, if the offsetting was allowed, the same dumping margin would always be achieved no matter which comparison method is employed." Skadden comments at 6.

authorized to employ in an investigation of targeted dumping and upon which the Petitioners' Comments heavily rely.[6]

The AB has now ruled that zeroing is prohibited when the Department uses the average-to-transaction method in an administrative review:

> in the administrative reviews at issue, the USDOC assessed the anti-dumping duties according to a methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to calculate the anti-dumping duties owed by each individual importer. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this individual comparison. Because results of this type were systematically disregarded, the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Accordingly, the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.

Id. at para. 133. The AB's extensive legal analysis supporting its conclusion applies with equal force to the use of the average-to-transaction method in an investigation. Thus, zeroing, as the CNA noted in its initial comments (at 1, 11-13), is similarly prohibited when the Department uses its average-to-transaction methodology in an investigation in instances of targeting

[6] The average-to-transaction method is described in 19 C.F.R. § 351.414(e) as it applies to administrative reviews. The average-to-transaction method, when used in investigations to address targeted dumping, is described in 19 C.F.R. § 351.414(f). However, this latter provision states that the Department will apply the "average-to-transaction method, as described in paragraph (e) of this section, in an investigation" if certain conditions are satisfied. Thus, it is clear that the Department intended for the average-to-transaction method when used in an investigation to be the same as the average-to-transaction method when used in a review.

dumping.[7] As a consequence, the argument in the Petitioners' Comments that Congress intended to require zeroing in an investigation has no force or effect and is mooted by the AB's decision.

The Skadden comments (at 9-10) and the extended mathematical analysis in them (at 7-9) rely on the WTO Panel decision that the AB has just reversed. According to Skadden, "[t]he truth of the foregoing principle was expressly recognized by both the United States government and the WTO Panel in *United States – Zeroing* in conjunction with their analysis of Article 2.4.2 of the WTO Anti-Dumping Agreement." Id. at 9. Since the AB has now invalidated that "principle," i.e., "if offsetting is employed, the provisions of § 1677f-1(d) are devoid of meaning and superfluous," the Skadden analysis falls apart. Id.

III. THE DEPARTMENT DOES NOT HAVE THE LEGAL AUTHORITY TO ADOPT THE TRANSACTION-TO-TRANSACTION METHOD AS THE "NORMAL" METHOD OF CALCULATING MARGINS IN AN INVESTIGATION

All of the Petitioners' Comments, with the exception of the Skadden comments, insist that the Department has the legal right to make the transaction-to-transaction method, with zeroing, its "normal" method of calculating margins in an investigation. We anticipated this argument in our initial comments and explained why the antidumping law, as well as the Department's regulations, prohibit this outcome, so we need not repeat that discussion here. Suffice it to say that none of the Petitioners' Comments contains a persuasive rationale for departing from the Congressional mandate that the average-to-average method normally be used. In fact, all of the comments studiously avoid a candid analysis of the language in the Statement

[7] The Appellate Body's decision also casts serious doubt on the continued viability of the WTO Panel's Article 21.5 decision in the Canadian softwood lumber case that upheld the use of zeroing in conjunction with the transaction-to-transaction method in an investigation. In any event, the AB will soon resolve this issue in Canada's appeal of the panel's decision.

of Administrative Action on the URAA, as well as in the Department's proposed and final implementing regulations and the preambles to them.[8]

Instead, the commenters focus on the following insignificant facts. First, they make much of the Department's use of the transaction-to-transaction method in the Canadian softwood lumber Section 129 determination. See 70 Fed. Reg. 22636 (May 2, 2005). However, in that determination, the Department was careful to point out that it used the transaction-to-transaction method "[b]ecause lumber prices were extremely volatile and the market was in a constant state of flux during the period of investigation . . . ." Id. at 22637. Thus, "[t]o the extent that the sales volume of a particular product varies over time and between the markets, the weighted-average price of any particular product could be skewed toward a period of low prices in one market and toward a period of high prices in the other market. In such a case, the weighted-average margin calculated for that product would not reflect the dumping, or lack of dumping, that may have occurred on the individual sales incorporated into the average." Id. at 22638. Therefore, in explaining why this unusual situation justified a departure from the "normal" average-to-average method, the Department concluded that, "the volatility of prices of subject merchandise and of the product sold in Canada during the POI distinguishes this case from the norm."[9] Id. at 22639. (Emphasis added.) Importantly, the Department here implicitly recognized that the "norm" remained the average-to-average method.

[8] Some of the Petitioners' Comments claim that the statute contains "no stated preference" for either the average-to-average or transaction-to-transaction method, but such a suggestion requires the commenters to ignore the unequivocal intent of Congress that the Department use the average-to-average method in all but the most unusual cases. See, for example, Dewey comments at 5; CSUSTL comments at 10.

[9] The Dewey comments (at 5) claim that the Department employed the transaction-to-transaction method in the softwood lumber case "without reservation." In fact, the Department took pains to describe the unique circumstances that required use of this method. These circumstances constituted the Department's express "reservations."

Second, it is noteworthy that the commenters fail to identify any other investigation besides the softwood lumber Section 129 determination in which the Department used the transaction-to-transaction method, which implicitly confirms the Department's position that it cannot be used as the normal method of comparing U.S. price to normal value. The uniqueness of the softwood lumber dispute needs no recitation here.

Third, the Petitioners' Comments rely heavily on the Department's statement in the softwood lumber case that the transaction-to-transaction method could be more easily used nowadays because the "Department's computer resources have improved greatly in the last few years, and many resource and programming difficulties the Department faced in 1994, and even in 1997, for conducting transaction-to-transaction matching on large databases no longer exist." Id. at 22639. See, for example, CSUSTL comments at 11; Dewey comments at 5. However, neither the Congress nor the Department claimed at the time of the enactment of the statute and adoption of the implementing regulations that the lack of adequate "computer resources" was a factor in the decision not to make the transaction-to-transaction method the "normal" method in investigations. Thus, any reliance at this time on improved computer resources would constitute an impermissible *post hoc* rationale for making the transaction-to-transaction method the norm.[10]

Equally unavailing is the Department's speculation in the Section 129 determination that Congress might have acted differently had it known that offsets of negative antidumping margins would be applied to calculate antidumping margins: "Because the Department is precluded in this instance from not offsetting non-dumped sales after making weighted-average-to-weighted-average comparisons, it is not clear that the stated preferences at the time of the SAA and

[10] It is also impossible to evaluate the significance and validity of the claimed "resource and programming difficulties" that the Department allegedly encountered in the 1990s without a detailed explanation of what they were and how they have been overcome "in the last few years."

regulations should continue to apply." 70 Fed. Reg. at 22639. However, the "stated preferences" of the Congress and the regulations must be given effect until changed. In other words, the Department has no authority to depart from the will of Congress based on pure speculation about what the Congress might or might not have intended had it known at the time that the Department could not use zeroing when applying the average-to-average method.

In summary, the Petitioners' Comments provide no basis for the Department to make the transaction-to-transaction method, either with or without zeroing, the normal method of calculating margins in an investigation.

IV. THE SCHAGRIN PROPOSAL FOR APPLYING THE TRANSACTION-TO-TRANSACTION METHOD IS ILLEGAL

The Schagrin comments are primarily devoted to explaining a horribly complex and convoluted method of applying the transaction-to-transaction method, with zeroing.[11] If we understand it correctly (which is far from certain given the lack of a comprehensible and complete explanation), Schagrin envisions in "Step 3" of its proposal that the Department would compare each individual U.S. sale price within a single CONNUM to each individual home market/third country sale price within that same CONNUM. Schagrin comments at 13. Thus, as illustrated in the attachment to the Schagrin comments, if there are three U.S. sales of CONNUM #1 and two home market sales of CONNUM #1, then the Department would make six separate transaction-to-transaction margin calculations, even though only three U.S. sales had taken place. Thus, assume, for example, a very simple investigation in which a producer might have 1,000 U.S. sales transactions and 1,000 matching home market sales transactions over the course of a

[11] The Stewart comments (at 11-17) also discuss several theoretical ways that the Department could implement a transaction-to-transaction approach. However, each of these ways avoids the objectionable feature of the Schagrin approach because none of them requires the calculation of multiple dumping margins on the same U.S. sale transaction.

12-month period of investigation. Schagrin would have the Department make one million transaction-to-transaction comparisons.

The obvious and fatal defect in this methodology is that it violates the plain language of both Article 2.4.2 of the WTO Anti-Dumping Agreement and the U.S. antidumping law. Article 2.4.2 provides, in relevant part, for "a comparison of normal value and export prices on a transaction-to-transaction basis." Similarly, 19 U.S.C. § 1677f-1(d)(1)(A)(ii) implements Article 2.4.2 and provides that the Department may compare "the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise." Neither provision authorizes the Department to compare each individual U.S. sales transaction multiple times to each matching normal value.[12] This has the effect of calculating more than one dumping margin for each transaction, despite the so-called "apportionment ratio" that Schagrin proposes in "Step 5" of its methodology.[13] Step 6 of Attachment 1 confirms this conclusion because it shows the calculation of multiple dumping margins for U.S. EP sale nos. 3, 4, and 8. Thus, the actual margin of dumping is grossly overstated.

Our position is confirmed by the definition of the term "dumping margin" in 19 U.S.C. § 1677(35)(A), which means "the amount by which the normal value exceeds the export price or

[12] The United States agreed with this conclusion in its July 25, 2005 Rebuttal Submission in the Article 21.5 proceeding (at page 8, para. 27) in the Canadian softwood lumber case, where it stated that, under the transaction-to-transaction method, "each export transaction will result in a separate comparison." The reference to a single "comparison" necessarily precludes the use of multiple comparisons for each export transaction. See also para. 36 of that submission, where the U.S. stated that the use of the transaction-to-transaction method "will yield a price difference" for each comparison, i.e., it cannot yield more than one price difference for each U.S. transaction that is compared.

[13] We remain mystified by the purpose of this ratio, which the Schagrin comments never satisfactorily explain.

constructed export price of the subject merchandise."[14] The term "amount" is singular. Thus, there can be only one dumping "amount" for each U.S. sale. Nevertheless, the proposed Schagrin methodology would calculate more than one "dumping" amount, and theoretically dozens or hundreds of such amounts, every time that a U.S. price was compared to more than one normal value.

Similarly, 19 C.F.R. § 351.414(b)(2) uses the term "transaction-to-transaction method." Had the Department intended to authorize the Schagrin approach, it would have used the phrase "transactions-to-transactions method." All of these provisions explain why the Stewart comments (at 12) quite properly state that, "[t]o make transaction-to-transaction comparisons, the Department must match up each U.S. transaction with a single home market transaction." (Emphasis added.)

The practical consequences of implementing this method are just as problematic. Even the simplest transaction-to-transaction method is extremely difficult for foreign respondents to implement in order to avoid an allegation of dumping, and this is yet another reason why it should not be the normal method. Adoption of the Schagrin method would impose an impossible burden on exporters in terms of their obligation to monitor U.S. prices in order to avoid dumping. Needless to say, the Schagrin comments do not address the manifest unfairness of requiring exporters to adjust in advance to the proposed "multiple transaction-to-multiple transaction" method.

Nor do those comments address the serious problem created by the fact that the proposed methodology would inevitably require comparison of the least comparable transactions, not the most comparable transactions. However, the goal of the transaction-to-transaction method, as

[14] See also Article VI:1 and VI.2 of GATT 1994, which define the "margin of dumping" in the singular.

the Department stated in its Section 129 determination in the Canadian softwood lumber case, is to find "the most suitable match for a given U.S. transaction." 70 Fed. Reg. at 22637.[15] However, the Schagrin approach would also compare the "least suitable matches" in every situation where more than one home market (or third country) match existed. This result would be arbitrary, irrational, and unfair.

In summary, the illegal transaction-to-transaction method that Schagrin proposes should not be adopted. No form of the transaction-to-transaction approach can ever constitute the "normal" method in an investigation for the reasons we have previously explained. Moreover, the enormous complexity and unfairness of the Schagrin approach makes it even less desirable than other methods that the Department has at its disposal in those limited and unique circumstances in which Congress envisioned that the transaction-to-transaction method would be used.

V. ZEROING POLICY IN REVIEWS

The Department's March 6, 2005 Federal Register notice did not request comments on whether zeroing should be prohibited in administrative reviews. However, that notice did state that the Department was proposing to eliminate zeroing in investigations when it used the average-to-average approach due to the WTO Panel decision in "*U.S. – Zeroing*" that found that methodology to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. The Appellate Body, upon review of that Panel's decision, has now found that zeroing is also prohibited in administrative reviews. Therefore, we urge the Department to initiate a notice and comment proceeding in which it proposes to implement the AB's decision.

[15] Later in its determination, the Department referred to the "best possible match." Id. at 22638.

VI. CONCLUSION

For all of the foregoing additional reasons, the Department should adopt the CNA's approach to calculating investigation margins set forth in its April 5, 2006 comments.