Canadian Embassy

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501 Pennsylvania Avenue N.W.
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May 4, 2006

Honourable David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street N.W.
Washington, D.C. 20230

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

Dear Assistant Secretary Spooner,

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

Sincerely,

Claude Carrière
Minister (Economic) and
Deputy Head of Mission

enclosure

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

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

Submitted by:
The Embassy of Canada
May 4, 2006

Introduction

The Government of Canada wishes to offer additional comments with respect to certain observations made by other parties with respect to the proposal by the Department of Commerce, as made in the Federal Register Notice of March 6, 2006. The proposal is to discontinue its treatment of non-dumped sub-groups or models as zero (i.e. "zeroing") in weighted-average-to-weighted-average comparisons in anti-dumping duty investigations. As noted by the Government of Canada in its own comments, the proposal is a positive step by the United States in the evolution of anti-dumping duty law internationally as it would bring U.S. anti-dumping methodology, at least as it applies to this particular aspect of anti-dumping procedure, into conformity not only with the WTO but with the current methodologies of its major trading partners, including Canada. The Department will be aware that the Appellate Body Report of April 18, 2006 confirmed the original panel finding that the use of "zeroing" in weighted-average-to-weighted-average comparisons in anti-dumping duty investigations is inconsistent with the WTO[1].

The Government of Canada is concerned with several of the comments made by other parties that appear to be intended to either reverse the intended results of the proposal or to nullify their intended effect.

The Department Is Not Required to Zero

Some commentators have asserted that the Department is prohibited from making average-to-average comparisons in anti-dumping duty investigations without zeroing. This is patently false. The United States itself submitted, in the context of the recent WTO panel report

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

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

further to a challenge brought by the European Communities[2], that U.S. law does not mandate zeroing. It supported this statement by noting that the United States Court of Appeals for the Federal Circuit had held on two occasions that the U.S. Tariff Act of 1930 does not require the use of zeroing.

A Statutory Change Is Not Required

The Department is proposing to discontinue its "zeroing" in weighted average-to-weighted average comparisons in anti-dumping investigations. At least one commentator has stated that a statutory change would be required to allow the Department to discontinue its use of "zeroing". As indicated above, since the Department faces no statutory requirement to zero, it can discontinue its use of "zeroing" without a change in statute. The Department's proposal to discontinue its use of "zeroing" as described in its March 6, 2006 notice falls entirely within its administrative discretion. Accordingly, this change would only require a change in computer programming, rather than a formal statutory or regulatory amendment.

The Proposal Should Not be Delayed Pending Doha Round Results

It has been proposed that the United States delay implementation of any change in its treatment of non-dumped groups pending the outcome of the Doha Round of multilateral trade negotiations. This would amount to an unacceptable delay which would ignore recent WTO panel and Appellate Body reports by suggesting that the Doha Round will, explicitly or implicitly, re-establish "zeroing' as an acceptable element of calculation methodology in anti-dumping duty investigations. While there is no basis to believe that the Doha Round will produce that kind of result, there is no justification in any event to delay implementation of compliance even if there was such an expectation.

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[2]*United States - Laws, Regulations and Methodologies for Calculating Dumping Margins ("Zeroing")*, Report of the Panel, WT/DS294/R, circulated October 31, 2005 (page 86).

Average-to-Average Comparison Is the Preferred Approach

Canada wishes to reiterate its view that Commerce should continue its preference for use of the average-to-average methodology in anti-dumping duty investigations. As was noted in Canada's submission of April 5, 2006, the Statement of Administrative Action to the *Uruguay Round Agreements Act* ("SAA") makes clear that as a matter of U.S. law, the existence and measurement of dumping margins in an investigation shall normally be based on a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices[3]. Canada further believes that the use of the average-to-average comparison is the most practical and predictable of the possible methodologies, particularly in investigations involving a large number of transactions. There is nothing in any of the other submissions to refute that view.

Several commentators have suggested that the Department resort to the alternative transaction-to-transaction methodology in the wake of its proposal on "zeroing". There is no doubt that this suggestion is aimed at sustaining "zeroing" under an alternative methodology. There is no justification whatsoever under the SAA or the Department's legislation, regulations or internal policies to support the application of the transaction-to-transaction methodology as the preferred calculation principle. The SAA, the Department's own normal regulations and its own policy and approach to calculation methodology all support the conclusion that anything other than average-to-average comparisons are to be used only in exceptional circumstances. These exceptional circumstances do not include a thinly veiled attempt to nullify a WTO panel ruling.

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

As indicated in Canada's previous submission, and repeated here, the Department in its final regulations of May 19, 1997, said "...the language of the SAA makes clear that Congress and the Administration contemplated the use of averaging groups for both U.S. and normal value sales. Nothing in the statute or SAA supports the view that normal value sales should not be averaged, or that normal value sales should not be averaged on the same basis as U.S. sales.[4]"

Further, and perhaps more importantly, the adoption of any other methodology, particularly a transaction-to-transaction methodology, would make it impossible for exporters to the United States to monitor their own pricing behaviour to ensure that they are not dumping. As Canada stated in its submission of April 5, 2006, the Department should administer the antidumping law in such a way as to make it possible for foreign producers and exporters to comply with it. Clearly, a more complicated system for establishing normal values would be contrary to achieving that objective.

Finally, Canada sees no reason why the reasoning of the Appellate Body in *US - Softwood Lumber V* concerning zeroing under the average-to-average methodology would not also apply to prohibit zeroing under the transaction-to-transaction methodology. In Canada's view, the Appellate Body's reasoning in its report in *US - Zeroing* released on April 18, 2006 also supports this position. Canada also notes that the recent findings of the WTO softwood lumber dumping compliance panel concerning zeroing under the transaction-to-transaction methodology have not been adopted by the Dispute Settlement Body and are subject to appeal.

Conclusion

It is Canada's view that the Department should prohibit "zeroing" under the average-to-average methodology in antidumping investigations. It is also Canada's view that the Department should not apply the alternative transaction-to-transaction methodology, without the application

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

of "zeroing', except in those tightly circumscribed and exceptional situations described in the Statement of Administrative Action.