Rebuttal Comments regarding the
Calculation of Weighted Average Dumping Margins
in Antidumping Duty Investigations

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Introduction

As a preliminary matter, we note that without explanation the Department extended the deadline for these rebuttal comments by two weeks.[1] It is our understanding that this decision was made internally shortly after the WTO Appellate Body issued its report in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing").*[2] This report should not be considered for purposes of the Department's current analysis because: (1) as there is no adopted AB decision, there is no way for the United States to consider what action it should take; (2) as the decision is limited on its face to a handful of administrative reviews, it would be inappropriate to consider a systematic modification; (3) it raises serious question as to the Department's authority to address this methodology by regulation; and (4) in any event, the Department's notice inviting comments addresses only investigations so that it would be inappropriate for it to address reviews in this context and inconsistent with the statutory requirements of the Uruguay Round Agreements Act codified at 19 U.S.C. § 3533(g).

In our original comments we advocated that should the Department choose to make any changes, it should adopt a transaction-to-transaction approach as its standard

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1 *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 23,893 (Dep't Commerce April 25, 2006) (extension of rebuttal comment period).

2 Appellate Body Report, WT/DS294/AB/R, (not yet adopted) (circulated 18 April 2006) ("*United States – Margins*").

method for margin calculations. We advocated that at the same time, the Department should act to provide a real opportunity for parties to make allegations regarding targeted dumping. Nothing in any of the comments filed on April 5 in response to the Department's notice provides any basis for our recommendation to be changed or for the Department to take any other approach.

In general, the comments filed by many of those who provided original comments reflect a basic misunderstanding of the practical problems caused by imports sold at less than fair value and the theory that underlies the response to those problems. As we reviewed in our original comments, both United States law and the positions negotiated by the U.S. in connection with international trade agreements up to and including the Uruguay Round Agreements have always focused on what dumping really is: the presence in a market place of sales made at less than fair value. It is such sales that create false signals about pricing and harm the domestic industry by requiring it to sell at prices not dictated by the market place or to forego sales that it would otherwise have made.

Many of those who provided comments assert as a practical matter that the price of a sale made to a domestic customer at a less-than-fair value may be averaged with the price of some other sale made at a price that exceeds fair value so that no dumping is found. Such an approach does not respond to the harm caused by the unfairly-traded sale. Any action that the Department of Commerce takes in response to any perceived international obligations must preserve the remedy provided to domestic industries to combat unfair trading practices to the maximum extent possible.

Commerce officials should also be mindful that the trade remedies the United States negotiated for were the *quid pro quo* for other actions it has agreed to that have

provided the largest market in the world to the greatest number of foreign exporters with the lowest trade barriers.

That said, we turn to the comments made by foreign governments, those representing exporters and importers of goods into the United States, and those representing purchasers of imports whose primary concern is low prices without regard to whether those prices are fair. The primary issues raised by these parties were as follows:

1. The Department should extend its schedule.

2. In investigations, Commerce should continue to rely on weighted-average-to-weighted-average comparisons as its normal methodology and not use transaction-to-transaction comparisons except for exceptional cases.

3. Commerce should employ offsets regardless of which kind of comparisons it is making, including its comparison of transactions to weighted-averages in administrative reviews as well as for sunset reviews.

4. Commerce should apply its changes to all pending matters not just prospectively.

5. The Commerce Department cannot perform transaction-to-transaction comparisons when it determines margins under its non-market economy ("NME") methodology.

We address each of these arguments in turn.

1. As noted in our original comments, Commerce should not make any changes until completion of the Doha Round.

As we reviewed in our original comments,[3] the Department should not modify its practice pending the outcome of the Doha Round of WTO negotiations. Any changes at this time will weaken the bargaining position of the United States in the Rules negotiations.

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[3] Filed in response to the Department's notice of March 6, 2006, inviting comments on methods for calculating dumping margins in original antidumping duty investigations. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*. 71 Fed. Reg. 11,189 *et seq.* (March 6, 2006) ("*Calculation Notice")*.

We note that some comments[4] suggested that the Department stay its consideration of the margin calculation issue pending the outcome in the WTO Appellate Body proceeding in *United States – Margins.* One has proposed that the Department await the outcome in *Softwood Lumber*.[5]

Whatever the relevance of these determinations to the Department's present analysis, actual changes resulting from negotiations would be even more significant. The arguments supporting delay pending a dispute settlement body report reinforce the need to wait until negotiations are complete. In these circumstances, as we noted in our original comments, the best action for the Department is to delay any action until completion of the current round of negotiations.

2. If a change is made, Commerce should adopt a transaction-to-transaction approach.

The Department must ensure that, to the extent possible, it continues to account for all unfairly-traded imports. This should be done in a manner that is consistent with its own practice to date and with the guidance that has been given by the U.S. Congress. This means as a practical matter that the Department should adopt a transaction-to-transaction approach without offsets as its normal method of calculating dumping margins in an original investigation.

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4 These are: Comments of the Japanese Bearing Industrial Association at 3 (4/5/2006); Comments of the Consuming Industries Trade Action Coalition at 11 (4/5/2006).

5 Comments of Corus and Arcelor at 19-20(4/5/2006). These comments were filed, of course, prior to announcement of a settlement of the Softwood Lumber dispute; at this time it is not clear what will happen to the dispute settlement proceedings arising from the dispute

At least one respondent refers to weighted-average-to-weighted-average comparisons as a "long-standing" practice.[6] But that practice, as followed by Commerce, contemplated zeroing. To engraft offsetting into the calculation would change the practice at its core. The respondent ignores this critical point.

Similarly, a number of commenters[7] point to portions of the SAA as significant in support of their position.[8] It is true that the SAA provides that Commerce "normally" will establish margins on the basis of a comparison of weighted-average normal values and weighted-average export prices, but the statement further notes that the statute "also permits the calculation of dumping margins on a transaction-by-transaction" basis. SAA at 842. Moreover, as noted above, Commerce's "normal" practice assumed that there would be no offsets. If offsetting is introduced, then the SAA statement loses its force so far as comparisons of averages are concerned: it was written assuming the traditional practice and that understanding no longer applies. Therefore, for all intents and purposes, only the alternative method survives – transaction to transaction comparisons – if the SAA's original understanding is preserved.

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6 Comments of the Japan Iron & Steel Federation at 5; *see also* Comments of Royal Thai Government at 4.

7 Comments of Corus Group plc and Arcelor S.A. at 7-11; Comments of Consuming Industries Trade Action Coalition at 6; Comments of Dofasco Inc. at 9; Comments of Eurofer at 2-3; Comments of the Government of Canada at 3; Comments of the Camara Nacional de Acuacultura at 3-4; Comments of Yamaha Motor Co., Ltd. and Yamaha Motor Corp. at 7-8; Comments of the Japan Iron & Steel Federation at 5-6; Comments of the Korea Iron & Steel Association at 3-4.

8 Specifically, the language providing that the statute "also permits the calculation on a transaction-by-transaction basis" and that "{s}uch a methodology would be appropriate in situations where there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made" and finally that "the Administration expects that Commerce will use this methodology far less frequently than the average-to-average methodology." SAA at 842-43.

It is therefore important to stay true to the statute. Dumping is selling below fair value.[9] If a redesigned averaging methodology undercuts this basic understanding, then Commerce should act accordingly. In this regard, the statute provides that Commerce shall determine whether merchandise is being sold at less than fair value by comparing weighted-average normal values to weighted-average export prices "or" by comparing normal values of individual transactions to export prices of individual transactions. 19 U.S.C. § 1677f-1(d)(1)(A). Congress provided for the first alternative against the backdrop of a long-standing practice that contemplated zeroing, so if the WTO undercuts that practice, Commerce should resort to the alternative method in order to give effect to Congressional intent.

In sum, if the SAA[10] is deemed to be determinative of what Commerce is to do, then the Department should make no changes in its current practice of determining

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[9] 19 U.S.C. § 1677(34).

[10] In fact, the SAA, while deemed by Congress to be "an" authoritative expression concerning the interpretation and application of the URAA, cannot be considered more authoritative than the URAA itself. The URAA plainly provides Commerce with the authority to proceed on either a weighted-average-to-weighted-average basis or a transaction-by-transaction basis in determining dumping margins, and this statutory authority cannot be circumscribed by statements in the SAA.

While we are not aware of any cases that directly address any alleged conflicts between a statement of administrative action and a statute, more generally the courts have been consistent in finding that the unambiguous language of a statute must control both judicial and administrative interpretations of the law:

> There is, of course, no more persuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning.

margins for investigations. If, as the Department has indicated is the case, it feels obligated to alter its practice from that referenced in the SAA, then it must look to a method that best implements the purpose of the dumping law. In fact, the only way that Commerce may act in a manner consistent with the WTO report, Congressional intention, and its longstanding practice is to adopt a transaction-to-transaction approach without offsets.

Commerce has already recognized these conclusions. As the Department explained in its *Softwood Lumber* 129 determination, its position relying on average-to-average comparisons was drafted and implemented over ten years ago, "when the Department did not offset for non-dumped sales in its weighted-average-to-weighted-average comparisons in antidumping investigations and when computer technology was inferior to the computer technology of 2005." *Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 22,636, 22,641 (Dep't Commerce May 2, 2005) (notice of determination under section 129 of the URAA) ("*Softwood Lumber"*). Thus, "past experiences" do not require an average-to-average approach. *Id.* Moreover, earlier concerns about selection difficulties "are addressed to a great extent

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United States v. American Trucking Assns., Inc., 310 U.S. 534, 543, 84 L.Ed 1345, 1350 – 51 (1940). This elementary rule of statutory construction has been reaffirmed by the Supreme Court numerous times. See, e.g., *Caminetti v. United States*, 242 U.S. 470, 485, 61 L.Ed 442, 452 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if it is plain … the sole function of the courts is to enforce it according to its terms."); *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108, 64 L.Ed.2d 766, 772 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); and *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 – 254, 117 L.Ed.2d 391, 397 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

through modern computer technology." *Id.* For these reasons, the Department stated that its regulation on margin determination for investigations did not preclude the use of a transaction-to-transaction approach. *Id.*

Thus, as a matter of law, none of the arguments based on the SAA pose any impediment to the Department's adoption of a transaction-to-transaction approach. At the same time, that approach is the only one (given a decision to change) that allows the Department to reconcile implementation of the report with the mandate of Congress and Commerce's long-standing practice.

3. There are no reasons why there should be offsets when margins are calculated via a transaction-to-transaction or a weighted-average to transaction approach and many why there should not.

A number of those who filed comments asserted that in addition to offsetting when it makes weighted-average-to-weighted-average comparisons, the Department should also offset for all other dumping calculations it performs, regardless of what type (weighted-average-to-weighted-average, transaction-to-transaction, or weighted-average-to-transaction) or in what proceeding (investigations or administrative, new shipper, changed circumstance, or sunset reviews). These assertions should be rejected.

First, those arguing for changes in any type of proceeding other than investigations exceed the scope of the Department's inquiry. Commerce solicited comments "regarding the calculation of the weighted average dumping margin in an antidumping duty investigation."[11]

[11] *Calculation Notice* at 11,189.

Second, as we have reviewed in our original comments and discussed above, U.S. law has never contemplated that dumping margins would be calculated with "offsets." The Department of Commerce has solicited comments on how it may respond to a particular WTO Appellate Body report.[12] Given U.S. law and practice to date, the extension of any modification to existing practice beyond the scope of that report cannot be justified and would significantly damage the ability of the United States to protect its domestic industries from unfairly-trade imports.

Third, the statute itself, properly construed, precludes the agency from offsetting dumping margins when it is making weighted-average to transaction comparisons for purposes of addressing targeted dumping under 19 U.S.C. § 1677f-1(d)(1)(B). This is so because if the Department were to employ offsets, this methodology would produce the exact same results as comparing weighted-averages to weighted-averages with offsets.[13] Thus, an interpretation allowing offsets would render § 1677f-1(d)(1)(B) a nullity, contrary to the norms of statutory interpretation.

4. Any changes should only be prospective.

The Department indicated its intention of implementing any change in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of a final notice in the Federal Register. This is consistent with its regular practice when making changes under section 123 (19 U.S.C. § 3533(g)(1)). *See, e.g., Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders,* 70 Fed. Reg. 62,061 (Dep't Commerce Oct. 28, 2005); *Notice of Final Modifications of Agency Practice under Section 123 of*

[12] *Id.*
[13] *See* CSUSTL Comments at 4-9.

the Uruguay Round Agreements Act, 68 Fed. Reg. 37,125, 37,138 (Dep't Commerce June 23, 2003); and *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 69,186, 69,197 (Dep't Commerce Nov. 15, 2002) ("*Affiliated Parties*").

In response to an argument that changes under Section 123 should affect only entries after the change goes into effect, the Department said:

> It is significant that section 123 uses the term "go into effect" (which refers to the beginning of a use of a methodology) rather than language of section 129, which refers to which entries will be affected. There is no legislative inconsistency with the use of a new methodology "affecting" entries made prior to the date on which the methodology changed. Indeed, except where otherwise specified (as in section 129 with respect to the actions of the Department in the contested segment of the proceeding), the Department's practice has normally been to begin application of a new methodology with respect to segments of proceedings requested or initiated after a given date, rather than applying different methodologies within the same segment of the proceeding.

Affiliated Parties, 67 Fed. Reg. at 61,196-97.

5. Surrogates may be compared to transactions.

We conclude with general observations regarding other forms of normal value. None of the approaches recommended in our comments of April 5 should change depending on the nature of normal value. Nothing in U.S. law or in the Antidumping Agreement requires a different result. The normal value determined under the non-market economy or constructed value methodology is not a weighted-average normal value. A weighted-average normal value, by definition, is the weighted average of multiple home market prices. Under the NME methodology and the CV methodology, no actual home market prices are used. The normal value is a construction. This

construction may be based on average costs or surrogate values, but that does not result in the normal value determined being a weighted-average normal value. Rather, the normal value determined under the NME/CV methodology stands in the place of every transaction that took place (or did not take place) in the home market. Consequently, that constructed transaction may be compared with each export transaction individually to determine the existence of dumping.

Conclusion

We again urge the Department to implement a transaction-to-transaction comparison approach for all investigations at the same time as it provides a tangible method for parties to allege and demonstrate the existence of targeted dumping. Nothing in the comments submitted by other parties on April 5 derogates from this recommendation. Thank you for your attention to these comments.

Respectfully submitted,

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