



COMMENTS ON BEHALF OF THE CONSUMING INDUSTRIES TRADE ACTION COALITION

This responds to the Committee's request for comments on zeroing, dated January 31, 2007. The Consuming Industries Trade Action Coalition ("CITAC") is pleased to present these comments urging the Ways and Means Committee to take no action to disapprove, delay or block the change in policy announced by the Department of Commerce, which is now scheduled to take effect on February 22, 2007.

CITAC commends the Department of Commerce for deciding to eliminate zeroing in original investigations using the average to average comparison methodology. However, CITAC urges Commerce to go further and eliminate zeroing in administrative reviews, sunset reviews and all other significant antidumping proceedings where the aggregate margin of dumping is relevant.

Such changes are in the best interests of the American economy and are consistent with domestic law. The elimination of zeroing in other cases is also required by World Trade Organization decisions that hold that zeroing violates the requirements of the WTO Antidumping Agreement and Article VI:2 of the General Agreement on Tariffs and Trade 1994.

I. Zeroing Defined

In antidumping proceedings, the Commerce Department compares all U.S. sales (referred to herein as "export sales") to a "normal value" (usually home market sale prices) to determine whether, and the extent to which, dumping (sales at less than normal value of the product as a whole) has taken place. Often there are a large number of sales to compare. "Zeroing" refers to the practice employed by the Department, in which it considers only those U.S. sales where normal value (again, usually home market sales prices) is greater than the U.S. price, and ignoring transactions where the reverse occurs, instead setting such "negative comparison" transactions equal to zero. Under this practice, the weighted average margin of dumping is calculated without taking into account negative comparison sales. Zeroing is currently used in investigations and administrative reviews, as well as other proceedings under the antidumping law.

II. Zeroing Damages U.S. Consuming Industries

Zeroing damages American companies and consumers by imposing excessive duties on imports. Duties calculated by the use of zeroing are excessive because the correct measure of the extent of price discrimination between national markets (the essential definition of “dumping”) is the amount by which selling prices in the home market *in the aggregate* differ from selling prices in the export market, *also in the aggregate*. There is simply no basis in law or economic policy to isolate only export sales that are below normal value and ignore export sales above that level.

Because of zeroing, millions of dollars in antidumping duties are collected in excess of the fair measure of “dumping.” The exact amount of the excess is unknown, because publicly available information is lacking. However, we know from several WTO dispute settlement cases that both original investigations and reviews would have imposed far lower duties (in some cases none at all) if *all* relevant export sales had been compared to normal value, rather than just those that resulted in export price being *below* normal value.

The “Speeding Ticket” Analogy Is Inapplicable

An often-heard argument in support of continuing the practice of zeroing is that the enforcement of the antidumping law is like giving out tickets for speeding. Since, of course, speeds above the limit are not averaged with speeds below the limit, it is no defense to a speeding ticket that on another day the same motorist was going under the speed limit. Supporters of zeroing claim it should not be a defense against a charge of dumping that there are export transactions at prices greater than normal value.

In our view, measuring dumping is *not at all* like giving out speeding tickets. ^{1/} There are applicable analogies, including the one we provide below.

^{1/} Of course, speeding tickets are, a law enforcement tool, while antidumping duties are not. Speeding tickets and the fines they generate promote traffic safety; but giving out speeding tickets is not the only way to promote traffic safety, and the amount of the fines is not generally related to any economic impact. Again, this separates speeding tickets from antidumping duties. However, the basis for imposing fines for speeding is not based solely on the amount by which a motorist exceeds the speed limit in a given instant. In the United Kingdom, for example, authorities recently set up “average speed” zones on certain high-traffic areas of British motorways. The average speed between two widely spaced cameras is measured in these zones. *See The Hunts Post, Crunch Time for Speeders* (24 January 2007), available at <http://www.huntspost.co.uk/content/hunts/news/story.aspx?brand=HPTOnline&category=News&tBrand=camb24&tCategory=NewsHPT&itemid=WEED24%20Jan%202007>

The measurement of dumping requires evaluating *all* subject export sales and normal value comparisons and determining over a period of time the weighted average margin of sales below normal value. By ignoring sales above normal value, the zeroing practice conceals the true market impact of the sales activity. For example, an exporter may price its products half the time above normal value, and half the time below normal value; clearly, the extent of dumping cannot fairly be determined by only looking at the half of the sales that are below normal value. The economic impact of below-normal-value sales over a period of investigation or review is sharply lessened by above-normal-value sales. In short, all sales matter. Zeroing, by not measuring this obvious effect, conceals the economic impact of these sales on domestic competitors in the market. Therefore, eliminating zeroing will more accurately reveal the true market impact of imports in this market.

A better analogy than speeding tickets may be useful to describe the true distortive effect of zeroing in antidumping cases: if a college student needs to maintain a 3.0 GPA to keep an academic scholarship, an accurate measure of the student's performance would consider every grade earned by the student, and not treat every grade above B as if it were only a B. Zeroing works in much the same way as the "B average" example, providing inaccurate results.

Eliminating Zeroing Will Help U.S. Global Competitiveness

In addition to increasing the accuracy of antidumping calculations, eliminating zeroing will also benefit U.S. manufacturers that rely on imports for their raw materials and (of equal or greater importance) to bring competition to supply markets. Virtually all manufacturers are in this situation, meaning that virtually all will benefit from an end to the distortive practice of zeroing.

Ending zeroing will also remove a looming threat to U.S. exporters. With the clear decisions by the WTO condemning zeroing as a violation of WTO agreements, failure to abide by these decisions will inevitably mean loss of U.S. export markets. This, on top of the harm to U.S. manufacturers, makes the Commerce Department's determination to end zeroing in investigations 2/ clearly the correct course of action.

2012-3A32-3A313. The speeding ticket analogy truly has no real application to antidumping policy; but even in the speeding area, measuring average speed may be a better way to promote traffic safety than focusing on simple speeding at an instant in time. So it is with antidumping policy, where measuring weighted average margins of dumping is the correct approach, not taxing an individual sales transaction.

2/ 71 Fed. Reg. 77722 (December 27, 2006).

III. Zeroing Violates U.S. International Obligations in the WTO

World Trade Organization obligations are important and decisions must be implemented, both to avoid unpleasant effects and to maintain the effectiveness of the WTO system. While dispute settlement decisions are not automatically a part of U.S. domestic law, these decisions are binding on the United States and failure to abide by them, as the Committee notice suggests, can have adverse consequences for the U.S.

While some argue that the WTO Appellate Body decisions were wrong, we have examined the four major zeroing decisions of the Appellate Body ^{3/} and compared them with the decisions of the Panels that U.S. representatives have praised highly. Our analysis shows that, while there may be differences of opinion, and all Panel members and Appellate Body members are considered to be people of integrity and good will, the Appellate Body decisions are more closely based on the terms of the relevant agreements and more clearly consider the agreements' meaning based on accepted international rules of treaty interpretation than are the contrary Panel decisions. In short, these decisions are well within the bounds of acceptability.

Thus, while there may be genuine disagreement between the United States Administration and the tribunals that decided these cases, the decisions are legitimate and should be followed. Indeed, the decisions take a more reasoned view toward the text of the Antidumping Agreement than do the Panel decisions.

We accept that some will disagree with these decisions. However, these decisions did not “invent” obligations on the part of the United States, as some have charged.

The key concept in these Appellate Body decisions is that the measurement of the extent of dumping must be based on evaluation of sales of the “product.” A single sale of a product does not establish a “margin of dumping.” Only analysis of *all* the sales of the covered product for the period of investigation or review can establish a “margin of dumping.” It is not possible to interpret

^{3/} *EC – Bed Linen* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001; *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS 264/AB/R, adopted 30 August 2004; *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS 264/AB/R (article 21.5), adopted 1 September 2006; *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (EC)*, WT/DS294/AB/R, adopted 9 May 2006; *United States – Measures Relating to Zeroing and Sunset Reviews (Japan)*, WT/DS 322/AB/R, adopted 23 January 2007.

the Antidumping Agreement as a whole in a rational way (allocating rights and obligations) if one accepts, without textual support, that a single sale below normal value can be taxed without considering whether there may be one, a hundred or a hundred thousand other sales that are at or above normal value.

The Panel decisions, 4/ by contrast, came to a different conclusion. They determined that a certain article of the Antidumping Agreement (2.4.2) did not prohibit zeroing, except in cases where the average to average comparison methodology was employed. It should be noted, however, that this methodology is the only one that the Department of Commerce is changing with the policy that is currently under Committee review.

These comments do not provide sufficient opportunity to go through the entire legal analysis. Suffice it to say that CITAC respectfully but firmly disagrees with those critics who complain that the WTO Appellate Body failed to address major arguments or filled “gaps” in the Agreement with their own invented obligations. It can fairly be said that the Antidumping Agreement, which binds 150 members of the WTO (not just the 50 or so who have antidumping laws) requires members to administer the rules fairly and consistently, and prohibits relevant sales transactions from being ignored or reduced in significance.

IV. The Commerce Department May End Zeroing Administratively; No Statutory Change Is Required

The Department of Commerce has the authority to end zeroing by administrative action because it is required neither by statute nor regulation. While zeroing has been a consistent practice of the Department, the courts have ruled that the Department is not required by statute to use it. Two conclusive decisions of the United States Court of Appeals for the Federal Circuit support this view. 5/

4/ The Panel decisions the United States relied upon for this analysis were *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS 294/R, circulated 31 October 2005, reversed, by Appellate Body Report, WT/DS 294/AB/R; *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS 264/RW, adopted 1 September 2006, reversed by Appellate Body Report, WT/DS 264/AB/RW; and *United States – Measures Relating to Zeroing and Sunset Reviews (Japan)*, WT/DS 322/R, 20 September 2006, reversed by Appellate Body Report, WT/DS 322/AB/R.

5/ *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir.), *cert. denied*, *sub. nom. Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied*, 126 S.Ct. 1023 (2006). *See also Paul Muller Industrie GmbH v. United States*, 435 F. Supp. 2d 1241, 1245 (Ct. Int’l Trade 2006).

The Department acknowledged in its December 27 Federal Register notice that the U.S. antidumping statute does not require zeroing. Under the principles of *Chevron*, the Department can resolve an ambiguity in the statute, so long as the interpretation is reasonable. 71 Fed. Reg. at 77723. The Court of Appeals for the Federal Circuit, in *Timken*, held that the statute does not compel the Department to resort to zeroing. 6/ This view was reaffirmed in *Corus* in 2005. The Court of International Trade has, of course, followed these decisions in several cases it has decided. *See, e.g., Dorbest Ltd. v. U.S.*, 426 F.Supp.2d 1262 (Ct. Int'l Trade 2006), and cases cited therein.

Proponents of zeroing have asserted that the statute requires the Department to use zeroing, based on a reason not considered by the court in *Timken* or *Corus*. They claim that if zeroing is eliminated there will be no mathematical difference between the “average-to-average” and “average-to-transaction” methodologies provided for in the statute. 7/ Because a statutory interpretation should endeavor to give effect to each statutory provision, they argue, zeroing is required to make the different comparison methods yield different results.

However, this “mathematical equivalency” argument is mathematically wrong. Each sales comparison methodology identified in the statute (average to average, transaction to transaction, and average to transaction) fails to yield identical results to any other methodology if zeroing is eliminated from the calculations. We demonstrate this below.

Notably, the Department rejected this argument. In its December 27, 2006 notice announcing its new policy, the Department determined that it has the statutory authority to end zeroing in investigations using the average to average comparison methodology. Thus, the Department agrees with our analysis that U.S. domestic law does not compel zeroing and WTO law prohibits zeroing. 8/

6/ The court rejected the arguments of the United States and Timken Co. that the word “exceed” when applied to sales comparisons meant that only positive comparisons (i.e., those where normal value was greater than the export price) could be counted. *Timken*, 354 F.3d at 1342.

7/ *See, e.g.*, comments filed April 5 by CSUSTL.

8/ We note that a letter from eleven members of the Senate, dated December 11, 2006, argues that the statute requires zeroing by the Department. The letter does not explain the logic behind their claim. However, a group of United States Senators’ view of the law is not dispositive; it is a basic principle of law is that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

Domestic petitioning interests, *e.g.*, the Committee to Preserve U.S. Trade Laws (CSUSTL), made a claim in their comments on zeroing before the Department that the Court of Appeals for the Federal Circuit has never considered the argument that, if zeroing were abolished, two comparison methods (average to average and average to transaction) would always yield the same mathematical results. We test this hypothesis below.

However, in order for the “mathematical equivalency” argument to support the notion that the statute requires zeroing, its proponents must show that different comparison methods (*e.g.*, average to average and average to transaction) would *always* yield the same result. However, these comparison methodologies do not always yield the same result.

Comparison Methodologies in Original Investigations

The statutory provision cited by CSUSTL, 19 USC § 1677f-1(d)(1), which contains three authorized comparison methods, does not support mathematical equivalence argument. Subsection (d)(1) requires the Department to calculate sales at less than fair value in original investigations either based on the average to average or transaction to transaction method. In “targeted dumping” situations (where it is alleged that dumping differs based on purchasers, geographic regions or time periods), the Department is authorized to use the average to transaction methodology. These three methodologies, with or without zeroing, are not mathematically equivalent, because different transactions are used to calculate normal value under the three methods.

In average to average comparisons, all export transactions and all normal value transactions are considered. In transaction to transaction comparisons, by contrast, all export sales are considered, but each one is matched to a single normal value transaction, meaning that some (perhaps many) normal value transactions will not be used. In “targeted dumping,” only those export sales that are alleged to be “targeted” will be compared on an average to transaction basis, meaning that other export sales will not be included in the average to transaction comparisons. The Commerce regulations make this clear. *See* 19 CFR § 351.414(f)(2). Thus, each method uses different sales, either on the normal value side or the export sale side, and therefore they are not and cannot be mathematically equivalent.

Mathematical equivalence does not apply to average to average comparisons in investigations and reviews. Basically, these comparisons cannot yield identical results because the sales to be compared in an administrative review will never be the same as the sales examined in an original investigation (the investigation deals with pre-petition sales, while the

administrative review deals with sales that occur after the preliminary determination or during annual review periods after the antidumping order is issued).

Comparisons in Administrative Reviews

In administrative reviews, the U.S. statute indicates a preference for the Department to make comparisons based on the average to transaction comparison methodology. However, the Department has asserted the authority (never used thus far) to make comparisons in reviews using the average to average methodology.

These two methodologies in reviews are also not mathematically equivalent. This is so because the average-to-average comparisons involve averages on both sides (normal value and export price) based on period-long averages (usually one year) for each relevant model, while the average to transaction method calculates average normal value on a month-to-month basis (this is a statutory requirement if average to transaction comparisons are used (*see* 19 U.S.C. § 1677f-1(d)(2))).

Thus, there is no mathematical equivalency between annual average normal values and monthly average normal values, unless in every instance the normal value transactions are spread perfectly evenly through the one-year period of review. It is very unlikely that this would occur, and most cases would yield different monthly averages than the annual average normal values in investigations. Thus, here again, there is no mathematical equivalency.

Therefore, the comparison methodologies authorized by the U.S. statute are simply not mathematically equivalent. Domestic petitioner interests have not asserted any other argument that would require zeroing by the Department, nor can we conceive of one.

Because the statute does not unambiguously require zeroing, the Department is able to change its practice administratively, and has decided to do so. As we point out elsewhere in these comments, this change is in the economic interest of the United States, and is long overdue.

Given that there is no mathematical equivalency between “targeted dumping” and original investigations using the average to average comparison methodology, the domestic petitioners’ arguments that the statute compels zeroing cannot succeed. As this is their only argument, the Committee has no basis to conclude that the U.S. statute requires the

Department to continue zeroing as a matter of law, even if a congressional Committee could appropriately make such a determination.

V. Conclusion

CITAC urges the Committee, for the reasons stated above, to take no action to disapprove, delay or upset the decision of the Commerce Department to end the use of zeroing in investigations using the average to average comparison methodology.

Respectfully submitted,

Lewis E. Leibowitz
Hogan & Hartson LLP
Counsel to CITAC