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February 18, 2011

Docket No.: ITA-2010-0011
RIN No.: 0625-AA87

VIA ELECTRONIC SUBMISSION

The Honorable Gary F. Locke
Secretary of Commerce
Attn: Ronald K. Lorentzen
Deputy Assistant Secretary for Import Administration
Room 1870, Import Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings

Dear Secretary Locke:

On behalf of the Coalition for Fair Lumber Imports (the "Coalition"),[1] we hereby submit these comments in response to the request by the Department of Commerce (the "Department"), made pursuant to Section 123(g)(1) of the Uruguay Round Agreements Act (19 U.S.C. § 3533(g)(1)), for public comment on revisions to the Department's practice and regulations governing the calculation of the weighted-average dumping margin in certain reviews of

[1] The Coalition is an association of domestic entities interested in preventing unfairly traded imports of softwood lumber. Members of the Coalition have been petitioners in several antidumping and countervailing duty proceedings and have a strong interest in maintaining the effectiveness of U.S. trade laws.

antidumping orders. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 Fed. Reg. 81,533 (Dep't Commerce Dec. 28, 2010) ("Proposal").[2] The Department intends through this proposal to implement the rulings and recommendations of the World Trade Organization ("WTO") Dispute Settlement Body ("DSB") in certain WTO disputes addressing the use of "zeroing" in certain types of reviews. Id. at 81,534.

As an initial matter, the Coalition believes that the Department's current practice with regard to "zeroing" in administrative reviews is fully consistent with U.S. law and U.S. WTO obligations. As the submission being made today by the Committee to Support U.S. Trade Laws makes abundantly clear, the consistent position of the U.S. Government has been that WTO rulings regarding "zeroing" were wrongly decided, devoid of any basis in the WTO agreements, and improperly create obligations that the United States never agreed to accept. It is therefore regrettable that the Department now proposes to acquiesce in these fundamentally flawed DSB rulings and recommendations. Indeed, some of the complexities that the Department will face in implementing these WTO decisions are a direct result of the legal incoherence of those decisions. The Coalition therefore urges the United States not to implement these erroneous rulings and – whether they are implemented or not – to continue to seek their reversal in the ongoing Doha Development Agenda negotiations.

If, however, the Department chooses to implement these WTO rulings, it must do so consistently with U.S. law. The courts have held that Section 771(35)(A) of the Tariff Act of

[2] Although the Department originally specified a deadline of January 27, 2011 for public comments, the Department subsequently extended that deadline to February 18, 2011. 76 Fed. Reg. 5518 (Dep't Commerce Feb. 1, 2011). Thus, the Coalition's comments are timely submitted.

1930, as amended (the "Act") (19 U.S.C. § 1677(35)(A)) does not unambiguously require the Department to employ "zeroing" in all instances. U.S. Steel Corp. v. United States, 621 F.3d 1351, 1361 (Fed. Cir. 2010); Corus Staal BV v. United States, 395 F.3d 1343, 1347 (Fed. Cir. 2007); Timken Co. v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004). However, it does not follow that just any methodology for calculating dumping margins in administrative reviews without "zeroing" would necessarily be consistent with the Act as a whole.

When Congress implemented the WTO Antidumping Agreement in U.S. law, it expressly intended that "the preferred methodology in reviews will be to compare average {normal value} to individual export prices." H.R. Doc. No. 103-316, at 843 (1994) ("SAA") (emphasis added). Indeed, while U.S. law permitted the use of average export prices[3] prior to the Uruguay Round Agreements Act, the Department's

> preferred practice {had} been to compare an average normal value to individual export prices in investigations and reviews. In part, the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.

Id. at 842.

Thus, when Congress implemented the WTO Antidumping Agreement, it provided that the Department would "normally" use average-to-average comparisons (or, in certain unusual cases, transaction-to-transaction comparisons) in investigations, but that the average-to-transaction methodology would remain available in investigations where "targeted dumping may be occurring." Id. at 843; 19 U.S.C. § 1677f-1(d)(1). When the Court of Appeals upheld the

[3] As the Department has noted, the issues addressed in its proposal do not depend on whether U.S. sales price is based on an export price or a constructed export price methodology. Proposal, 75 Fed. Reg. at 81,533 n.1. Accordingly, the term "export price" in these comments, as in the Proposal, is intended to include both export price and constructed export price.

Department's decision to grant offsets in average-to-average comparisons in investigations, it specifically referred to this provision by explaining that Congress "gave Commerce a tool for combating targeted or masked dumping" by preserving an average-to-transaction methodology, without offsets for "negative" dumping margins. Thus, the court reasoned, "Congress may . . . have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences do not exist." U.S. Steel Corp., 621 F.3d at 1363. In other words, the court concluded that it was permissible – though of course not required – for the Department to use the average-to-average methodology, with offsets, in investigations, in large part because the court believed that the Department's interpretation of the statute left the Department sufficient flexibility to address situations of masked or targeted dumping.

The same concerns apply with even greater force in administrative reviews. While the statute authorizes the Department to use the average-to-average methodology in investigations (as well as the transaction-to-transaction methodology in limited cases and the average-to-transaction methodology in cases where targeted dumping exists), the statute does not provides similar flexibility in the case of administrative reviews. Rather, the statute directs the Department in reviews to determine "the normal value and export price (or constructed export price) of each entry of the subject merchandise" and "the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A). That the Department's calculation of dumping margins in reviews contemplates a transaction-specific approach is confirmed by the SAA, which states:

> The {WTO Antidumping} Agreement reflects the express intent of the negotiators that the preference for the use of an average-to-average or transaction-to-transaction comparison be limited to the "investigation phase" of an antidumping proceeding. Therefore, as permitted by Article 2.4.2, the preferred methodology in reviews will be to compare average {normal values} to individual export prices.

SAA at 843. As noted above, this continuing Congressional preference for an average-to-transaction approach over an average-to-average methodology in reviews is "based on a concern that {the latter} methodology could conceal 'targeted dumping.'" Id. at 842.

That Congress assumed the Department would continue to use an average-to-transaction methodology in reviews is further confirmed by the provision in Section 777A(d)(2) of the Act that, "when comparing export prices . . . of individual transactions to the weighted average price of sales of the foreign like product," the Department is to limit the averaging of foreign prices to one-month periods when calculating normal value. 19 U.S.C. § 1677f-1(d)(2). The circumstance in which the Department does not use this preferred average-to-transaction methodology was apparently considered so anomalous that Congress did not provide any guidance for averaging if other methodologies were used. Indeed, the only other circumstances addressed in the SAA are those in which normal value is calculated based on constructed value rather than on prices of the foreign like product, not those in which the Department would vary from the average-to-transaction methodology itself. See SAA at 842-43.

Notwithstanding the legislative preference for the average-to-transaction methodology, however, the courts have held that the Department's general statutory discretion to use averages in calculating dumping margins can authorize the use of an average-to-average methodology in administrative reviews, where sufficient justification exists. E.g., Floral Trade Council v. United States, 74 F.3d 1200, 1203-04 (Fed. Cir. 1996) (citing 19 U.S.C. § 1677f-1(b)). In Floral Trade Council, the Court of Appeals affirmed the Department's use of monthly averaging for export prices as well as normal value in the particular circumstance of a highly perishable product, where the Department reasonably concluded that individual transaction prices might not fully

account for perishability. The Department argued to the court that the use of an annual average export price, as requested by the respondent, would be inconsistent with the statute:

> The government argues in its brief that 19 U.S.C. § 1675(a)(2)(A) directs {the Department} to compare each entry of merchandise subject to the antidumping order, whereas Asocolflores's annual averaging would violate that mandate by masking individual instances of dumping. Under an annual averaging, dumping would only be found if the annual aggregate sales of a foreign seller were at less than fair value.

Floral Trade Council, 74 F.3d at 1203. The court agreed, reasoning:

> Based on the particular factual record before us, we agree with the government that an annual average would mask dumping related to individual sales. Although some dumping would also be masked under a monthly average, Commerce chose to use a monthly average as representative of the U.S. price to account for perishability of the flowers. . . . Basing the U.S. price on an annual average in this market would completely eviscerate determining dumping on the statutorily mandated "each entry of merchandise."

Id. at 1203-04.

It might appear at first blush that the court's decision in Floral Trade Council would provide support for the Department's legal authority under the statute to use of an average-to-average methodology with monthly average normal values and export prices. Importantly, however, the Department presumably did not make offsets if the dumping margin for any month was negative during the review at issue in Floral Trade Council. Indeed, an average-to-average methodology using monthly average export prices, but with offsets, is much more similar in its results to the average-to-average methodology using annual averages, which the court characterized as a methodology in which "dumping would only be found if the annual aggregate sales of a foreign seller were at less than fair value." Id. at 1203. But this is precisely the approach that the Court of Appeals rejected on the grounds that it would "completely eviscerate" the statutory requirement for the Department to calculate the margin of dumping for each entry

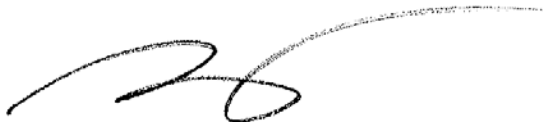
of the subject merchandise, in that it would "mask dumping related to individual sales." Id. at 1204.

The Department's discretion to use an average-to-average methodology in administrative reviews is therefore not without statutory limits. In particular, where the use of such a methodology results in the masking of dumping without a corresponding justification for the use of a monthly average export price (such as the improved representativeness the Department found in the case of the highly perishable product at issue in Floral Trade Council), the Department would be acting inconsistently with U.S. law. Accordingly, the Department is prohibited from adopting a general methodology, such as an average-to-average methodology with offsets, that fails to recognize and account for masked dumping. To do otherwise would, as the Court of Appeals has stated, "completely eviscerate" the statutory requirements for administrative reviews and plainly frustrate the Congressional preference for the average-to-transaction methodology in administrative reviews. Id.

The Proposal does not explain how the Department intends to ensure that it will comply with these statutory requirements if the Proposal is implemented. To a certain extent, this is understandable; in a Section 123 notice, the Department need only explain how it intends to comply with an adverse WTO ruling; it need not explain how it intends to comply with U.S. law. But comply with U.S. law it must. If the Department does implement the Proposal, the Coalition will look forward to examining closely how the Department intends to fulfill its statutory obligation to calculate dumping margins in reviews that properly reflect the margin of dumping on each sale of subject merchandise and ensure that domestic industries injured by dumping do not go without the relief provided by Congress.

Please do not hesitate to contact any of the undersigned should you have any questions concerning this submission.

Respectfully submitted,



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* - Admitted in California, Nevada, and New York; not admitted in the District of Columbia.