

February 18, 2011

To
Mr. Ronald K. Lorentzen
Deputy Assistant Secretary for Import Administration
International Trade Administration (ITA)
Department of Commerce (DOC)

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

Dear Mr. Lorentzen:

The Brazil Industries Coalition (BIC), the Brazil Steel Institute (IABr), the Brazil-U.S. Business Council, Brazilian Section (CEBEU), the Brazilian Association of Ferroalloys Producers (ABRAFE), the Federation of Industries of the State of São Paulo (FIESP), the National Association of Exporters of Citrus Juices (CitrusBR), and the National Confederation of Industry (CNI) are making this submission in response to the request by the Department of Commerce (DOC) for comments regarding the calculation of the weighted average dumping margin and antidumping duty assessment rate in certain antidumping duty proceedings. The request was published in the Federal Register on December 28, 2010.

The BIC is a Washington-based trade association that represents Brazilian companies and other Brazilian trade associations in the United States. Its membership is comprised of trade associations from the agribusiness and manufacturing sectors, as well as leading Brazilian companies, most of which have investment in the U.S. The BIC's mission is to work towards a stronger partnership between Brazil and the United States through wider and deeper economic relations and political ties.

Founded in 1963, IABr has the purpose of congregating and representing the Brazilian steelmaking companies, defending their interests and promoting their development. The Brazilian steel industry currently has an installed capacity of 47 million metric tons/year and accounts for approximately 10% of the country's industrial GDP.

CEBEU is a bilateral organization that provides a high-level private sector forum for the business communities of both Brazil and the United States. The Council's members engage in substantive dialogue on trade and investment issues and communicate those private sector priorities to the U.S. and Brazilian governments. The Brazilian Section of CEBEU is sponsored by CNI and represents a wide range of Brazilian corporations.

ABRAFE has 14 member companies, accounting for 21 plants throughout the country.

FIESP is the leading regional manufacturing sector organization in Brazil, and is comprised of 132 sectoral trade associations, representing approximately 150,000 companies of all sizes and over 65% of the country's industrial GDP.

CitrusBR represents the four largest Brazilian producers and exporters of citrus juices and derivatives.

CNI is the umbrella manufacturing sector organization in Brazil, comprised of 27 state-level Federations of Industries and over 1,000 sectoral trade associations representing more than 196,000 companies.

ZEROING IS UNFAIR TRADE PRACTICE

In numerous decisions, for over 12 years, the World Trade Organization (WTO) Dispute Settlement Body (DSB) asserted that the so-called "zeroing" methodology in antidumping proceedings is inconsistent with multilateral trade rules, particularly those codified in the Antidumping Agreement (ADA). In other words, zeroing is an unfair trade practice.

Zeroing was condemned by the WTO DSB both as a methodology "applied" to specific antidumping proceedings involving particular export products of other countries and "as such" (i.e. as a methodology per se).

The use of zeroing was also considered inconsistent with multilateral trade rules in all phases of antidumping proceedings: the original investigation, annual administrative reviews, five-year sunset reviews, and new shipper reviews.

Furthermore, the use of zeroing was condemned in its different "natures" as a methodology: the so-called "model zeroing" in weighted average-to-weighted average comparisons (W-W), "simple zeroing" in transaction-to-transaction comparisons (T-T), and "simple zeroing" in weighted average-to-transaction comparisons (W-T).

The United States is, today, the sole user of zeroing in antidumping proceedings. The European Communities (EC) readily abandoned its use in the early 2000s by complying with WTO DSB decisions emanated from two trade disputes initiated by India and Brazil in 1998 and 2000 respectively. The U.S., however, insists on using this unfair trade practice even after it has been established its unequivocal inconsistency with multilateral trade rules and in clear contradiction with both United States Congress demands for trade enforcement against other countries' allegedly unfair trade practices and U. S. international commitments at the highest level. The G-20 Seoul Summit Document, for instance, reads in Paragraph 7 that "[G-20 members] will refrain from introducing, and oppose protectionist trade actions in all forms [...]".

The use of zeroing by the United States was successfully challenged at the WTO by its three major developed countries' trade partners: Canada, the EC, and Japan. In the case of the latter two, zeroing was challenged twice with the complainants requesting their right to retaliate against U.S. exports in case of non-compliance.

In addition, the use of zeroing by the United States was also successfully challenged (or is being challenged) by several developing countries, both high-income (South Korea), upper-middle-income (Brazil and Mexico) and lower-middle-income (Ecuador, Thailand, and Vietnam) economies. These facts mean that half of G-20 members have already challenged or are currently challenging at the WTO the use of zeroing by the U.S.

It is worth noting that even the United States has adopted a “no contest” position in its disputes with Ecuador involving antidumping measures on shrimp, Thailand regarding antidumping measures on polythene retail carrier bags, and South Korea involving steel products and diamond saw blades. In other words, the U.S. recognized the inconsistency of the use of zeroing with multilateral trade rules, as well as past WTO Appellate Body (AB) rulings on this matter.

In fact, zeroing is not mandated by, included in, or referred to by the United States statutes, according to a North American Free Trade Agreement (NAFTA) Chapter 19 panel initiated by Mexico. The panel concluded that the use of zeroing is also inconsistent with U.S. law. In 2010, the United States Court of Appeals for the Federal Circuit (CAFC) concurred that zeroing is not mandated by U.S. statutes, as it had already done in at least two previous cases. DOC itself agreed with the Court’s interpretation when it decided to abandon the use of zeroing in original investigations in the end of 2006 – in itself an action deemed by the United States Court of International Trade (CIT) in accordance with U.S. law.

PROPOSED RULE IS A STEP FORWARD

In that context, the undersigned organizations believe the proposed rule issued by the DOC on December 28, 2010 is a step forward in the right direction. It builds on prior modifications of its methodologies in the context of other WTO DSB decisions. By proposing to implement the recommendations emanated from four disputes – *U.S.-Zeroing (EC)*, *U.S.-Zeroing (Japan)*, *U.S.-Stainless Steel (Mexico)*, and *U.S.-Continued Zeroing (EC)* –, the United States signals its disposition to stop using unfair trade practices and abide by multilateral trade rules that are also valuable to the U.S. when equally complied with by other countries. United States compliance with WTO rules also contributes to the strengthening of the multilateral trading system, in particular its dispute settlement mechanism.

It is the undersigned organizations understanding that the proposed rule foresees three specific modifications to DOC’s current methodologies:

1. In reviews (annual administrative, new shipper, and expedite), to abandon the W-T comparison method and use, as a general rule, a monthly W-W comparison method providing offsets for non-dumped comparisons across the entire period of review;
2. In original investigations, when unusual situations prevail (i.e. when there are very few sales of subject merchandise and the merchandise sold in each market is identical or very similar or is custom-made), to withdraw the T-T comparison method not providing offsets for non-dumped comparisons; and

3. In five-year sunset reviews, to calculate dumping margins in accordance with the two new methodologies, respectively regarding reviews and original investigations.

In accordance with the proposed rule text, the undersigned organizations imply that the DOC will no longer use zeroing in original investigations, neither through the W-W, nor the T-T method; nor use zeroing in annual administrative, new shipper, expedite, and sunset reviews, because it will abandon the W-T method and provide offsets for non-dumped comparisons when using the W-W method.

NO ZEROING "A LA CARTE"

The proposed rule, however, still seems to allow the selective use of zeroing in reviews as the text states that "[i]n particular, except where the Department [of Commerce] determines that application of a different comparison method is more appropriate, in reviews, the Department proposes to compare monthly weighted average normal values and to grant an offset for such comparisons that show export price exceeds normal value in the calculation of the weighted average margin of dumping and assessment rate."

As the proposed rule does not clearly define what is a "different comparison method", does not explain to which extent offsets for non-dumped comparisons will – or will not – be provided, and does not indicate the criteria defining when such an alternative approach "is more appropriate"; it seems that the DOC tries to preserve a certain policy space for using zeroing. In other words, the proposed rule, as it is, seems to allow the Department to use zeroing "a la carte".

In that regard, **the undersigned organizations respectfully request that the DOC closes this loophole by clarifying the final rule in order not to allow the use of zeroing in any circumstance either in annual administrative, new shipper, expedite or sunset reviews.**

NO ZEROING EXPANSION

In addition to the previously mentioned loophole, the proposed rule is silent with regard to the use of zeroing in changed circumstances reviews as well as in proceedings related to targeted dumping. As stated above, zeroing is an unfair trade practice and therefore the DOC should refrain from expanding it to other proceedings.

Under Article 11.2 of the ADA, authorities are required to review the need for the continued imposition of the duty, where warranted, on their own initiative or upon request by any interested party which submits positive information substantiating the need for a review, and, in turn, to terminate an antidumping duty if they determine that it is no longer warranted. In such cases, the DOC should stick to the modification advanced in the proposed rule with regard to reviews – that is, not to employ and not to rely on any dumping margin calculated using the WTO-inconsistent zeroing methodology.

Moreover, the use of zeroing in a targeted dumping analysis should be avoided as such approach is likely to drive up dumping margins and to distort the investigation results, leading

to a breach of the ADA rules. Considering that the WTO has already condemned the use of zeroing when using the W-T methodology, it necessarily ensues that the use of zeroing is also inconsistent in the case of targeted dumping.

To modify the methodology for calculating the margins of dumping so as to eliminate the use of zeroing in reviews in a manner that parallels the WTO-consistent methodology the DOC currently applies in original investigations as put forward in the proposed rule, but, on the other hand, to expand the use of zeroing to other areas such as changed circumstances reviews and targeted dumping is to perpetuate a recurrently condemned unfair trade practice, and, ultimately, to remain in violation of multilateral trade rules.

Hence, the undersigned organizations respectfully request that the DOC amends the final rule in order to clarify that zeroing will not be expanded to changed circumstances reviews or to targeted dumping proceedings.

PROHIBITING ZEROING

The undersigned organizations consider that the prohibition of zeroing under the ADA is not limited to a certain type of price comparison methodology in certain antidumping proceedings but extends more generally to any form of comparison methodologies in any such proceedings.

As repeatedly stated by the WTO DSB, zeroing is a distorting practice that artificially leads to inflated dumping margins. Furthermore, economic research has shown that it also creates non-existing dumping margins. As a consequence, it perverts the very essence of antidumping measures. That is, instead of preventing unfair trade from less than normal value exports, antidumping duties resulting from the use of zeroing will end up – themselves – giving cause to unfair trade.

Zeroing is also an element of unbalance in the negotiations within the Doha Round, as the insistence of the United States on having the methodology legalized creates a substantial obstacle to achieving a mutually acceptable package not only in the reform of the ADA, but in the overall negotiation.

In addition, the continuing use of zeroing by the United States undermines the multilateral trading system, specially the WTO dispute settlement mechanism. It is not in the best long-term interest of the U.S. that other countries refuse to implement WTO decisions. However, when the United States themselves refuse to comply with several disputes regarding zeroing it weakens the system.

According to data compiled and published by the Congressional Research Service (CRS) in a report on “WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases” dated January 29, 2010, there are 10 WTO cases pending compliance by the United States. In 4 of these 10 cases, zeroing is the matter at issue. Thus, by adopting an improved version of the proposed rule, the United States will not only partially clear its WTO compliance backlog, they will also avoid creating incentives that might lead other countries to mimic the use of zeroing against U.S. exports.

For all these reasons, **the undersigned organizations respectfully request that the DOC adopts a final rule that unequivocally prohibits the use of zeroing in each and every circumstance, irrespective of either the particular phase of the antidumping proceeding or the particular methodology elected for calculating margins of dumping. Once and for all, the DOC should eradicate all forms of zeroing.**

IMPLEMENTATION OF THE FINAL RULE

Finally, it is worthy noting that in order to halt all the damages pervasively caused by the use of zeroing and to fully comply with the ADA, the final rule should come into effect immediately. It should also encompass all the pending and future review proceedings, exactly as the final rule in investigations. Moreover, the final rule should also apply to unliquidated entries from past reviews. The proposed rule is not clear on these issues, however.

Therefore, the undersigned organizations respectfully request that the DOC amends the final rule to clarify its immediate applicability to reviews that are ongoing when the rule is adopted, as well as the actions to be taken in that respect with regard to annual administrative reviews that have already been completed, but for which entries remain unliquidated.

We look forward to working with the DOC and we are available at any time for clarification of any issue raised in this submission.

Respectfully,



Brazil Industries Coalition (BIC)



Brazil Steel Institute (IABr)



Brazil-U.S. Business Council, Brazilian Section (CEBEU)



Brazilian Association of Ferroalloys Producers (ABRAFE)



Federation of Industries of the State of São Paulo (FIESP)



National Association of Exporters of Citrus Juices (CitrusBR)



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