Caterpillar Inc.

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IMPORT ADMINISTRATION

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

Re: Targeted Dumping in Antidumping Investigations; Request for Comments

Dear Mr. Spooner:

On behalf of Caterpillar Inc., I am writing in response to the above-captioned notice published by the Department of Commerce in the Federal Register on October 25, 2007 (72 Fed. Reg. 60651) ("Targeted Dumping Notice"). Caterpillar is the world's leading manufacturer of construction and mining equipment, diesel and natural gas engines, and industrial gas turbines. We employ approximately 50,000 people in the United States alone. Because Caterpillar both exports a significant proportion of the equipment it manufactures in the United States and imports materials as needed for its U.S. production, we are highly sensitive to the regulations governing international trade. For many years, Caterpillar has been strongly committed to the principles of free and fair trade, and we have always been very interested in the Department's administration of the antidumping law.

In the Targeted Dumping Notice, the Department has noted that pursuant to the Tariff Act of 1930, it normally calculates dumping margins in antidumping investigations by comparing weighted average export prices with weighted average normal values, or (more rarely) by comparing transaction-specific export prices with transaction-specific normal values. 19 U.S.C. § 1677f-1(d)(1)(A). However, the Act also authorizes the Department to employ an alternative comparison methodology (comparing weighted average normal values to transaction-specific export prices) when certain requirements are satisfied. 19 U.S.C. § 1677f-1(d)(1)(B). Those requirements are that (i) for the imported product at issue, there must be a "pattern" of export prices that "differ significantly among purchaser, regions, or periods of time"; and (ii) the Department must explain "why such differences cannot be taken into account using" one of the two "normal" comparison methodologies. This alternative situation is commonly referred to as "targeted dumping". Caterpillar submits these comments to address only one aspect of the Department's dumping margin calculation methodology in the targeted dumping situation: the use of "zeroing".

Although there has been only one investigation in which the Department has accepted petitioners' allegations as to the existence of targeted dumping, the Department in that investigation apparently used the finding of targeted dumping as a justification not only to use the weighted-average to transaction comparison methodology authorized in the statute (19 U.S.C. § 1677f-1(d)(1)(B)), but also to use zeroing to calculate the dumping margins.

Specifically, in the "Issues and Decision Memorandum for the Final Determination of Less-Than-Fair-Value Investigation of Coated Free Sheet Paper from the Republic of Korea" ("Coated Paper from Korea I&DM"), the Department stated that, "when we performed the average-to-average calculation in this case, we allowed offsets for non-dumped sales." *Id.* at 19 (cmt. 7). In other words, the Department did not use zeroing when it calculated the margins on the "non-targeted" U.S. sales. However, it continued, "It is only when we combined the margin calculated for the targeted sales using the average-to-transaction methodology with the margin calculated for the non-targeted sales using the average-to-average methodology that we did not allow any offsets." *Id.* In other words, the Department used zeroing when calculating the combined margin for both the targeted and non-targeted sales.

Caterpillar submits that it is improper for the Department to use the zeroing practice to calculate dumping margins in any situation, including investigations in which targeted dumping has been found. The statute provides very specific authority for how the Department may respond to a finding of targeted dumping – i.e., in that situation, it permits the Department to calculate the margins on the targeted transactions in an investigation using the average-to-transaction comparison methodology that is normally reserved for administrative reviews. That is the only authority that is granted to the Department to address targeted dumping. It cannot go further and employ the zeroing methodology in calculating those margins or in "combin[ing]" them with the margins on the non-targeted sales.

This is especially true in light of the fact that, as the Department well knows, the zeroing practice has consistently been found to violate the *Anti-Dumping Agreement* of the World Trade Organization in all situations in which a WTO dispute has arisen. *See* Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R (30 January 2007); Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (9 January 2007); Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/AB/R (18 April 2006); Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada (Article 21.5 – Canada)*, WT/DS264/AB/RW (15 August 2006); Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (11 August 2004); Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001); Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141/AB/R (1 March 2001).

This degree of consistency of the WTO decision-making is unparalleled, and places the conclusion that zeroing is impermissible beyond question. Moreover, the WTO decisions have found zeroing to violate the *Anti-Dumping Agreement* when used in conjunction with both of the comparison methodologies involved in a targeted dumping situation – i.e., the average-to-average comparison methodology used in investigations for the "non-targeted" sales, and the average-to-transaction comparison when used in administrative reviews. The only distinction here is that the latter comparison methodology, in a targeted dumping situation, is being used in an investigation rather than an administrative review. Caterpillar submits that this is a distinction without a difference: there is no principled basis on which zeroing can permissibly be used to calculate dumping margins in investigations using the average-to-transaction comparison

methodology, when it has already been concluded that zeroing cannot permissibly be used to calculate dumping margins in administrative reviews using the average-to-transaction comparison methodology.

The Department argued in the Coated Paper from Korea I&DM (at 19, cmt. 7) that if it did not use zeroing, the result "would be essentially the same as using the average-to-average methodology for all sales to all customers" for the particular Korean exporter involved. The Department continued, "It would mask the targeted groups' margins by offsetting them with non-dumped sales to the non-targeted group, and as a result would not account for the targeted pricing." *Id.* This statement is a repeat of the argument regarding the so-called "mathematical equivalence" of the average-to-average and average-to-transaction comparisons if zeroing is not used, which has been discredited in the WTO disputes cited above, particularly in the Appellate Body Report in DS322. "Mathematical equivalence," alone, does not relieve the United States of its international obligations to not employ zeroing. If masked dumping is a concern, the Department needs to develop a methodology that avoids not only masked dumping but that is also consistent with its international obligations. Zeroing cannot accomplish both goals. In fact, permissible methods exist to ensure that the outcome of using the average-to-transaction comparison methodology for the targeted sales would not "be essentially the same" as using the average-to-average methodology, and therefore not mask targeted dumping.[1]

For the foregoing reasons, Caterpillar submits that, whatever technical elements the Department may adopt to determine the existence of targeted dumping in specific investigations, it cannot use the finding of targeted dumping as an excuse to resurrect the zeroing practice. That practice has been entirely discredited and its use would be just as inconsistent with the United States' international obligations in the targeted dumping situation as it is in any other situation.

Caterpillar appreciates the opportunity to submit these comments to the Department on this issue. If you have any questions regarding this submission, please feel free to contact the undersigned.

Respectfully submitted,

Bryan J. Brown
Attorney

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[1] One such method is provided in the statute and regulations themselves, which authorize the use of different averaging periods for the two different comparison methodologies – an *annual* average for the average-to-average comparison for the non-targeted sales in investigations (19 C.F.R. § 351.414(d)(3)), and a *monthly* average for the average-to-transaction comparison for administrative reviews. 19 U.S.C. § 1677f-1(d)(2). The same monthly average could be used as the basis for the average-to-transaction comparison for the targeted sales in an investigation. The result of the use of these two different averaging periods in almost all circumstances will differ from the result of the use of a single average over the entire universe of U.S. sales, thus ensuring that the result will not be "essentially the same".