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VIA HAND DELIVERY

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

Re: Withdrawal of Regulatory Provisions Governing Targeted Dumping in Antidumping Investigations; Request for Comment

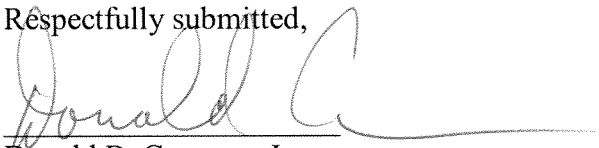
Dear Acting Assistant Secretary:

On behalf of the Government of the Republic of Korea ("GOK"), we hereby submit the enclosed comments in response to the request for comments that was published in the *Federal Register* on December 10, 2008. *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 74,930 (Dep't Commerce Dec. 10, 2008) ("Request for Comments"). These comments are timely filed in accordance with the deadline set forth in the U.S. Department of Commerce's ("Department") Request for Comments, as subsequently extended by the Department. *Id*; *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Investigations; Extension*

of Time to Comment, 74 Fed. Reg. 2,059 (Dep't Commerce Jan. 14, 2009). We are also submitting an electronic copy of these comments via email to the Department's Webmaster at webmaster-support@ita.doc.gov, as requested in the Request for Comments.

Please contact the undersigned if you have any questions regarding this matter.

Respectfully submitted,



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BEFORE THE
UNITED STATES DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION

COMMENTS OF THE GOVERNMENT OF THE REPUBLIC OF KOREA ON THE DEPARTMENT'S WITHDRAWAL OF ITS REGULATORY PROVISIONS CONCERNING TARGETED DUMPING

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In accordance with the request for comments that was published in the *Federal Register* on December 10, 2008, *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Investigations;* 73 Fed. Reg. 74,930 (Dec. 10, 2008) ("*Withdrawal Notice*"), the Government of the Republic of Korea hereby provides its comments on the Department's decision to withdraw the existing regulatory provisions concerning targeted dumping, which had been in effect since May 19, 1997.

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The Department's withdrawal of its regulations covering targeted dumping is a matter of concern in relation to the so-called zeroing method. Targeted dumping allegations have recently become more prevalent in antidumping investigations since the Department ended the use of zeroing in antidumping investigations that use the weighted average-to-weighted average method. Because the Department's policy is to continue zeroing negative dumping margins when it uses the weighted average-to-transaction comparison method pursuant to a finding of targeted dumping, domestic interested parties have increasingly filed allegations of targeted dumping. The Department's abrupt withdrawal of its regulations therefore raises the concern that the Department may be seeking to expand the use of targeted dumping findings as a means to reintroduce the widespread use of zeroing in antidumping investigations.

2. Whether or not the Department promulgates regulations, U.S. law and the WTO Antidumping Agreement both provide that targeted dumping is to be used only in exceptional situations, and that the Department employ standards and thresholds that clearly distinguish targeted dumping from normal variations in export prices. Similarly, U.S. law and the WTO Antidumping Agreement both require the Department to limit the use of the weighted average-to-transaction comparison method to only those transactions found to be targeted.

II. THE DEPARTMENT'S WITHDRAWAL OF ITS REGULATIONS SHOULD NOT FORM THE BASIS FOR AN UNWARRANTED EXPANSION OF THE USE OF TARGETED DUMPING FINDINGS IN ANTIDUMPING INVESTIGATIONS

The Department's December 10, 2008 notice withdrawing the Department's regulations on targeted dumping stated that the Department had determined to do so because those regulations had been "promulgated without the benefit of any departmental experience on the issue of targeted dumping."[1] According to the Department, it has now come to question "whether, in the absence of any practical experience, it established an appropriate balance of interests in the provisions," and has expressed concern that "{t}he Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping, contrary to the Congressional intent."[2]

The Department's notice does not identify, however, any particular "thresholds or other criteria" that it believes were inappropriately established in its regulations, nor does it indicate with any specificity how it believes those regulations may have failed to establish an appropriate balance of interests. Consequently, it is difficult to ascertain exactly why the Department believes that the withdrawal of those regulations will enhance the fair and efficient administration of the targeted dumping provisions in the U.S. antidumping statute.

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[1] *Withdrawal Notice*, 73 Fed. Reg. at 74,930.

[2] *Id.* at 74,930-74,931.

As the Department acknowledges, "until recently" there had been "very few" allegations or findings of targeted dumping. The recent increase in targeted dumping allegations, however appears to be due in large part to the Department's December, 2006 decision to follow, in part, the rulings of the World Trade Organization ("WTO") that zeroing of negative dumping margins is not permitted under the WTO Antidumping Agreement.[3] The Department's current practice in investigations is to calculate dumping margins without zeroing, but only where it uses the average-to-average methodology for computing dumping margins.[4] Thus, where dumping margins are calculated using the average-to-transaction method, as provided for in the case of targeted dumping, the Department's practice is to continue to zero negative dumping margins.[5]

Because a finding of targeted dumping is now the only circumstance in most investigations in which the Department will continue to zero dumping margins, the Department increasingly finds itself confronting targeted dumping allegations in virtually every new investigation conducted since the Department's publication of its *Final Modification*, as domestic interested parties seek to increase dumping margins through the use of zeroing. Given this context, the Department's unexpected withdrawal of its targeted dumping regulations at this time is a matter of concern to the Government of the Republic of Korea for several reasons. First, to the extent that the Department may be contemplating lowering the threshold for a finding of targeted dumping for the purpose of increasing the use of the weighted average-to-transaction methodology in order to expand the use of zeroing in antidumping investigations, we

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[3] *See Antidumping Proceedings: Calculation of Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification (*hereinafter *Zeroing Final Modification)*, 71 Fed. Reg. 77,722 (Dec. 27, 2006).

[4] *See id.*, 71 Fed. Reg. at 77,724.

[5] *Id.*; *See also Coated Free Sheet Paper from the Republic of Korea,* 72 Fed. Reg. 60,630, 60,631 (Oct. 25, 2007)("*Coated Free Sheet"*).

strongly urge the Department to refrain from such a change in policy. The *Final Modification* clearly stated the Department's commitment to comply with WTO's rulings concerning zeroing in antidumping investigations. Were the Department to now retreat from that commitment by reintroducing the use of zeroing under the pretext of combating targeted dumping, the United States would once again find itself in breach of its international obligations under the WTO Antidumping Agreement.

Second, the use of zeroing in investigations when making average-to-transaction comparisons in response to a finding of targeted dumping is not permitted under the WTO Antidumping Agreement any more than the use of zeroing when making weighted average-to-weighted average comparisons. To the contrary, the WTO has consistently held the use of zeroing is contrary to the WTO rules in every context in which it has been examined. *See* Appellate Body Report, *Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (01/09/2007) ("Japan Zeroing"); Panel Report *United States — Continued Existence and Application of Zeroing Methodology*, WT/DS350/P/R (01/10/2008)("US-Zeroing (EC) II"). Thus, a finding of targeted dumping by the Department will not shield the United States from another adverse ruling by the WTO with respect to zeroing.

Third, the Department's former targeted dumping regulations were largely procedural in nature. As noted above, the Department's *Withdrawal Notice* fails to identify any instances in which the Department believes that the regulations may have adopted unduly restrictive criteria as thresholds for defining targeted dumping. This raises the concern that the Department may have withdrawn the regulations for some other, unstated purpose, such as to attempt to shield the Department's practice from "as such" review by the WTO in any future challenge to the Department's targeted dumping practice.

Fourth, the fact that the domestic interested parties are increasing their allegations of targeted dumping in antidumping investigations, with the apparent goal of reintroducing widespread zeroing, is a reason for the Department to develop transparent and objective criteria for defining targeted dumping, *not* a reason to eliminate whatever such criteria already are in existence. In the first investigation conducted subsequent to the *Final Modification*, involving coated free sheet paper from the Republic of Korea, the Department accepted an allegation of targeted dumping made by petitioner in that case without adopting *any* criteria for defining targeted dumping.[6] To the Department's credit, however, in a subsequent antidumping investigation of steel nails, the Department developed and employed a generally reasonable and thoughtful methodology for analyzing and evaluating allegations of targeted dumping.[7]

The Department developed the *Steel Nails* methodology in the context of the facts and circumstances of that investigation, while also requesting public comments on the appropriateness of adopting those standards in future investigations.[8] The Government of Korea urges the Department to continue the process it has begun of adopting objective criteria, supported by the use of rigorous statistical analysis, to define targeted dumping in a manner that clearly distinguishes targeted dumping from normal variations in U.S. selling prices. As discussed in part III, below, the failure to do so would violate the U.S. antidumping law and would place the United States in violation of its international obligations under the WTO

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[6] *See Coated Free Sheet*, Issues and Decision Memo at Comment 7.

[7] *Certain Steel Nails from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 Fed. Reg. 33,977 (June 16, 2008) ("*Steel Nails*").

[8] *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment* 73 Fed. Reg. 26,371 (May 9, 2008). *See* comments posted on Commerce website at: http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html.

Antidumping Agreement.

III. U.S. LAW AND THE WTO ANTIDUMPING AGREEMENT BOTH REQUIRE THE DEPARTMENT TO DISTINGUISH TARGETED DUMPING FROM NORMAL VARIATIONS IN PRICE, AND TO LIMIT THE USE OF THE WEIGHTED AVERAGE-TO-TRANSACTION METHOD SOLELY TO TARGETED TRANSACTIONS

Both U.S. law and the WTO Antidumping Agreement make clear that targeted dumping is an exceptional practice and requires clear evidence of a persistent pattern of prices that cannot fairly be explained as normal variation in prices. In addition, U.S. law and the WTO Antidumping Agreement are clear that even where targeted dumping is found, the Department must provide an explanation of why it cannot account for those variations using the weighted average-to-weighted average comparison method, and must limit the use of the weighted average-to-transaction method to only the targeted transactions.

The targeted dumping provision is set forth in Section 777A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f-1. Subsection (d) of that section provides that in an antidumping investigation the Department shall normally compare the weighted average of the normal values during the period of investigation to the weighed average of export prices (or constructed export prices).[9] Subsection (d)(1)(B) then carves out a limited exception to this requirement:

> **SEC. 777A. SAMPLING AND AVERAGING; DETERMINATION OF WEIGHTED AVERAGE DUMPING MARGIN AND COUNTERVAILABLE SUBSIDY RATE.**
>
> . . . .

[9] 19 U.S.C. § 1677f-1(d)(1)(A)(i). The statute also permits the Department to compare the normal value of individual transactions to individual export prices or constructed export prices. *Id.* at § 1677f-1(d)(1)(A)(ii). The Uruguay Round Agreements Act Statement of Administrative Action ("SAA") makes clear, however, that the average-to-average method is the preferred method in investigations, and the transaction-to-transaction method is intended to be limited to unusual situations such as where there are few sales transactions in each market, and the merchandise is identical or custom-made. SAA at 842. Thus, for the vast majority of antidumping investigations, the Department is directed to make comparisons using the average-to-average method unless the targeted dumping provision applies.

> (B) Exception. The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if
>
> (i) there is a *pattern* of export prices (or constructed export prices) for comparable merchandise that *differ significantly* among purchasers, regions, or periods of time, and
>
> (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).[10]

This language tracks the comparable provision of the WTO Antidumping Agreement, which provides that dumping margins in investigations are to be based on a comparison of weighted average normal values to the weighted average export prices of the export transactions, but that

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison[11]

Thus both U.S. law and the applicable international agreement clearly indicate that the use of the weighted average-to-transaction method is to be an exceptional circumstance, to be reserved for instances in which the Department finds a *pattern* of export prices that *differ significantly* among purchasers, regions, or time periods. While the Department certainly has some discretion in defining the specific tests and thresholds used to implement those statutory standards, it is clear that the Department may not find targeted dumping merely because there are

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[10] 19 U.S.C. § 1677f-1(d)(1)(B) (emphasis added).

[11] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("WTO Antidumping Agreement") ¶2.4.2.

variances in the prices of the U.S. sales transactions being examined.

As the U.S. Court of International Trade has explained, targeting dumping as defined by the antidumping statute is not merely "the practice of selling to selected customers or regions at different and preferential prices as compared to the prices charged to other customers or regions."[12] Thus, the Court explained, it is not sufficient to support a targeted dumping finding merely by identifying statistical evidence of price variance, since under this definition "*most* pricing would constitute targeted dumping, in that there is price variance along multiple dimensions in many markets. Certainly, not all price variation, not even statistically significant variation, results from targeted dumping."[13] Rather, the Court explained:

> The concept of targeted dumping is that a company might not be able to, or might choose not to, use a dumping strategy toward a whole market but might strategically focus on a more narrowly defined market . . . To ferret out this more complicated dumping, the statute instructs Commerce to look not only at the *magnitude* of price variance but also for a *pattern* of significant price differences.[14]

It is equally clear that, even where targeted dumping is found, the Department may use the weighted average-to-transaction methodology only for the specific sales transactions that were found to be targeted. This is clear from the structure of the statute, quoted above, which recognizes that the use of the weighted average-to-transaction method is an *exception* to the statutory preference for using the weighted average-to-weighted average method. The WTO Antidumping Agreement similarly limits the use of the weighted average-to-transaction method solely to the transactions found to be targeted. Article 2.4.2 begins by stating dumping margins

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[12] *Borden, Inc. v. United States*, 4 F. Supp.2d 1221, 1228 (Ct. Int'l Trade 1998).

[13] 4 F. Supp.2d at 1228 (emphasis in original).

[14] *Id.* (*citing The Administration of the Antidumping Duty Law by the Department of Commerce, in Down in the Dumps* (Richard Boltuck & Robert E. Litan eds., 1991), at 240 (Comment of Michael Coursey).

shall "normally" be established using the weighted average-to-weighted average method, and then makes an exception for instances in which targeted dumping is found. Furthermore, all of Article 2.4.2 is prefaced by the statement that the comparison method chosen by the member state must independently comply with the fair comparison requirement of Article 2.4, which requires a "fair comparison" between export price and normal value. The WTO Appellate Body has held on many occasions that this is an independent requirement that must be satisfied.[15] Where the use of the weighted average-to-transaction method is expressly predicated upon a finding of targeted dumping, the application of that methodology to non-targeted transactions would constitute a "fair comparison."

In short, U.S. law and the WTO Antidumping Agreement require that any methodology employed by the Department with respect to targeted dumping, whether set forth in a regulation, a policy bulletin or other statement of practice, or merely adopted in the context of a specific investigation, must distinguish meaningfully between normal price variances and the exceptional practice of targeted dumping, and the Department must apply the weighted average-to-transaction method only to the transactions found to have been targeted. To do otherwise would allow the narrow exception to the use of the weighted average-to-weighted average method to swallow up the rule, in clear violation of both U.S. law and the WTO Antidumping Agreement.

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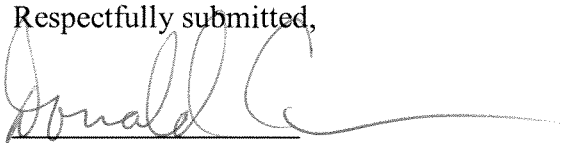
[15] *See* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AD/R (01/03/2001) at ¶ 59; Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (31/10/2005) at ¶ 7.153.

IV. CONCLUSION

For the foregoing reasons, Government of the Republic of Korea respectfully urges the Department to ensure that the withdrawal of the existing procedural regulations concerning the analysis of targeted dumping allegations will not lead to frequent and arbitral use of zeroing in antidumping investigations, and further urges the Department to ensure that any analysis used by the Department to examine allegations of targeted dumping fully complies with both U.S. law and the United States obligations under the WTO Antidumping Agreement.

Respectfully submitted,



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