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January 9, 2009

Mr. David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street and Constitution Ave. NW
Washington, DC 20230

Subject: Response to Request for Comments on Withdrawal of Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations (73 Fed. Reg. 74930 Dec. 10, 2008)

Dear Mr. Spooner:

On behalf of JTEKT Corporation and Koyo Corporation of U.S.A.; NSK Ltd., NSK Europe Ltd., NSK Corporation and NSK Precision Americas, Inc.; Nachi Fujikoshi Corp., Nachi America, Inc. and Nachi Technology, Inc.; and NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., NTN-Bower Corporation and NTN-BCA Corporation (hereinafter "the parties"), we hereby respond to the request by the Department of Commerce (the "Department") for public comments concerning the withdrawal of the regulatory provisions governing the evaluation of targeted dumping in antidumping duty investigations.[1] An original and two copies of these comments are being filed by the due date established in the request for comments.

[1] See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 Fed. Reg. 74930 (Dec. 10, 2008) ("Notice of Withdrawal").

As detailed below, the parties object to the Department's withdrawal of the regulatory provisions governing the evaluation of targeted dumping in antidumping duty investigations and respectfully request reinstatement of these provisions. The parties have organized their comments into three principal areas of concern:

(1) The Department has not adequately supported its withdrawal of the longstanding targeted dumping regulatory provisions;

(2) The Department should maintain procedural regularity with respect to targeted dumping in light of the uncertainty created by the Department's recent substantive changes to its targeted dumping methodology; and

(3) The Department should not use the withdrawal of its targeted dumping regulatory provisions as an opportunity to re-introduce the "zeroing" methodology in its dumping calculations.

Each of these concerns is discussed separately below.

I. The Department Has Not Adequately Supported Its Withdrawal of the Longstanding Targeted Dumping Regulatory Provisions

First, under well-established principles of administrative law, the Department has not adequately supported its withdrawal of the longstanding targeted dumping regulatory provisions.

Although an agency has the discretion to change a policy when new facts or circumstances justify such a change, the agency must explain how the change is rational in light of record evidence.[2] This well-established requirement of administrative law has been

[2] See Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983).

repeatedly applied to policy changes made by the Department in the context of antidumping proceedings.[3] The Department is therefore required to provide a "reasoned analysis" when making policy changes, including through revocation of its regulations. Indeed, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[4] Applying this fundamental principle of administrative law, it is clear that the Department has failed to provide a reasoned analysis for the withdrawal of the regulatory provisions governing the evaluation of targeted dumping in antidumping duty investigations. As explained below, the two justifications proffered by the Department in the Notice of Withdrawal are purely speculative and belied by the Department's recent experience in investigating targeted dumping allegations.

As an initial matter, the Department has provided no support for its proffered justification for withdrawing 19 C.F.R. § 351.301(d)(5). In the Notice of Withdrawal, the Department justified its action by noting that "the Department *may* have established an impractical deadline when it promulgated section 351.301(d)(5)."[5] However, the Department did not identify any specific cases in which a petitioner was unable to submit an allegation of targeted dumping by the deadline established in 19 C.F.R. § 351.301(d)(5) (i.e., 30 days before the scheduled date of the preliminary determination).

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[3] See, e.g., Save Domestic Oil, Inc. v. United States, 357 F.3d 1278, 1284 (Fed. Cir. 2004); Tung Mung Dev. Co. v. United States, 354 F.3d 1371, 1379 (2004).

[4] State Farm, 463 U.S. at 42.

[5] Notice of Withdrawal, 73 Fed. Reg. at 74931 (emphasis added).

The Department's inability to substantiate the impracticability of this deadline is unsurprising. When promulgating its targeted dumping regulations, the Department observed that, by virtue of its position in the U.S. market, the domestic industry should have the knowledge necessary to make targeted dumping allegation at a relatively early stage of an investigation. Specifically, the Department observed:

> It is the domestic industry that possesses intimate knowledge of regional markets, types of customers, and the effect of specific time periods on pricing in the U.S. market in general. Without the assistance of the domestic industry, the Department would be unable to focus appropriately any analysis of targeted dumping . . . . Ultimately, the domestic industry possesses the expertise and knowledge of the product and the U.S. market.[6]

In the Notice of Withdrawal, the Department suggests that this initial view of the information available to the domestic industry "may" have been inaccurate. However, if this were the case, the inadequacy of the filing deadline for targeted dumping allegations would have been brought to the attention of the Department well before publication of the Notice of Withdrawal in December 2008. That is, the Department previously provided *two* opportunities for parties to address any perceived problems or challenges with the Department's approach to targeted dumping, such as an impractical allegation deadline. The Department first requested comments in October 2007 about the guidelines, thresholds, and tests that should be used to determine whether targeted dumping has occurred.[7] In May 2008, the Department requested a second set of comments about its new methodology for

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[6] Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27296, 27374 (May 19, 1997).

[7] See Targeted Dumping in Antidumping Investigations; Request for Comment, 72 Fed. Reg. 60651 (Oct. 25, 2007).

determining whether targeted dumping exists.[8] Of the thirty-four sets of comments received in response to these two requests, *none* raised the concern that the Department's deadline for submitting targeted dumping allegations was impractical. In fact, one commentator observed that petitioners are given *more* time under the Department's regulations to submit allegations of targeted dumping than to submit allegations of sales below cost.[9]

The Department's unsubstantiated concern about the schedule for submitting targeted dumping allegations is insufficient to justify the withdrawal of the regulation establishing this deadline. Interested parties have been provided two opportunities to object to this schedule and yet have not done so. The only inference to be drawn from this silence is that the parties to antidumping investigations have found the 30 day deadline established by 19 C.F.R. § 351.301(d)(5) to be reasonable. This schedule has worked well over a number of years and should not be disturbed based on a justification by the Department that is belied by the conduct of the parties to antidumping investigations.

Next, the Department has provided no support for its proffered justification for withdrawing the regulations, 19 C.F.R. § 351.414(f) and (g). In the Notice of Withdrawal, the Department justified its action by noting that "the Department's regulations may have established *thresholds or other criteria* that have prevented the use of this comparison

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[8] See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 Fed. Reg. 26371 (May 9, 2008).

[9] See Targeted Dumping; Comments of Consuming Industries Trade Action Coalition (Dec. 10, 2007), available at http://ia.ita.doc.gov/download/targeted-dumping/comments-20071210/citac-td-cmt-20071210.pdf.

methodology to unmask dumping, contrary to the Congressional intent."[10] In fact, neither regulatory provision withdrawn by the Department cites any "thresholds or other criteria" by which the Department could evaluate allegations of targeting dumping. At most, 19 C.F.R. § 351.414(f) indicated that the Department would consider, "among other things, standard and appropriate statistical techniques". This equivocal statement does not identify specific thresholds or criteria and, indeed, expressly allows for the possibility that the Department may consider multiple forms of data when evaluating targeted dumping allegations. Thus, the Department's withdrawal of 19 C.F.R. § 351.414(f) and (g) on the basis that these regulatory provisions are unduly restrictive is unfounded.

This conclusion is supported by the fact that the Department was again unable to cite a single instance in which the procedures set forth in 19 C.F.R. § 351.414(f) and (g) actually thwarted the identification of targeted dumping. In the Notice of Withdrawal, the Department suggested that, at the time the targeted dumping regulations were issued, the Department's lack of experience in this area may have negatively impacted the content of its regulations.[11] However, since that time, the Department has developed more experience with targeted dumping allegations. Despite multiple opportunities to observe concrete problems in the threshold or other criteria purportedly identified in 19 C.F.R. § 351.414(f) and (g), the Department has been unable to do so. As noted above, the Department received over thirty sets of comments about its targeted dumping methodology in 2007 and 2008. If serious

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10 Notice of Withdrawal, 73 Fed. Reg. at 74931 (emphasis added).

11 Notice of Withdrawal, 73 Fed. Reg. at 74931.

problems existed in the "thresholds or other criteria" used by the Department to evaluate targeted dumping allegations, they would have been identified by the interested parties that submitted comments. Moreover, in 2008 alone, the Department evaluated targeted dumping allegations in at least twelve investigations.[12] Yet, in the Notice of Withdrawal, the Department was unable to cite to a single one of these determinations or sets of comments to substantiate its concern that its regulations "may" be problematic.[13]

As above, the Department's unsubstantiated concerns about the "thresholds and other criteria" purportedly identified in 19 C.F.R. § 351.414(f) and (g) are insufficient to justify the withdrawal of longstanding regulations which have worked well over a number of years. The parties therefore respectfully request that the Department reinstate the regulatory provisions governing the evaluation of targeted dumping until such time as the Department is able to justify their withdrawal with a "reasoned analysis."

II. The Department Should Maintain Procedural Regularity with Respect to Targeted Dumping in Light of the Uncertainty Created by the Department's Recent Substantive Changes to Its Targeted Dumping Methodology

Second, as a policy matter, the parties submit that the Department should maintain procedural regularity with respect to targeted dumping in light of the uncertainty created by the Department's recent substantive changes to its targeted dumping methodology.

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[12] See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from the Republic of Korea, 73 Fed. Reg. 35655 (June 24, 2008); Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from Thailand, 73 Fed. Reg. 55043 (Sept. 24, 2008).

[13] Notice of Withdrawal, 73 Fed. Reg. at 74931.

Until recently, the Department employed a predictable methodology for evaluating allegations of targeted dumping based on U.S. price data. This methodology, known as the Pasta test, was developed in response to a 1999 remand in the antidumping investigation of Certain Pasta from Italy.[14] This methodology was undisturbed by the Department for eight years, giving rise to the reasonable expectation that it would be used in future investigations involving allegations of targeted dumping.

Notwithstanding these settled expectations, in 2007, the Department declined to apply the Pasta test in its investigation of Coated Free Sheet Paper from the Republic of Korea.[15] In that proceeding, the Department explained its desire to reevaluate the Pasta test and then proceeded to accept the petitioner's targeted dumping allegation without endorsing the petitioner's test standards and procedures as a general practice. In early 2008, the Department again preliminarily accepted the petitioner's targeted dumping allegations in Certain Steel Nails from the United Arab Emirates and Certain Steel Nails from the People's Republic of China but noted that it was still in the process of developing a new test for evaluating allegations of targeted dumping.[16] By April 2008, the Department had developed a new test.

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[14] See Borden, Inc. v. United States, 23 CIT 372 (1999).

[15] See Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea, 72 Fed. Reg. 60630 (Oct. 25, 2007); Issues and Decision Memorandum for the Final Determination of the Less-Than-Fair-Value Investigation of Coated Free Sheet Paper from the Republic of Korea (Oct. 17, 2007) at 5-6, available at http://ia.ita.doc.gov/frn/summary/korea-south/E7-21035-1.pdf ("CFSP from Korea Decision Memo").

[16] See Certain Steel Nails from the United Arab Emirates; Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 Fed. Reg. 3945, 3947 (Jan. 23, 2008); Certain Steel Nails from the People's Republic of

In a post-preliminary determination memorandum in Certain Steel Nails from the United Arab Emirates and Certain Steel Nails from the People's Republic of China, the Department announced and applied a new targeted dumping standard and methodology.[17] Then in May 2008, the Department announced in a Federal Register notice its intention to uniformly apply this methodology for determining whether targeted dumping exists.[18]

Thus, in the span of a mere seven months, the Department upset eight years' worth of settled expectations concerning the substantive evaluation of targeted dumping allegations. Since October 2007, the Department has vacillated among multiple approaches to analyzing U.S. price data for the purpose of identifying instances of targeted dumping. As a result, parties to antidumping investigations are now unsure how to effectively support, or defend against, targeted dumping allegations, because it appears that the Department's methodological approach is subject to change on an investigation-by-investigation basis. This perception is reinforced by the fact that the Department received from multiple sources many highly critical comments about the new targeted dumping methodology announced in its May

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China: Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances and Postponement of Final Determination, 73 Fed. Reg. 3928, 3939 (Jan. 23, 2008).

[17] See Memorandum to David Spooner, titled "Post-Preliminary Determinations on Targeted Dumping," A-520-802 and A-570-909 (Apr. 21, 2008) (copies on file in Central Records Unit).

[18] See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 Fed. Reg. at 26372 (May 9, 2008).

2008 Federal Register notice.[19] These comments have seriously called into question the soundness of the Department's new methodology, giving rise to uncertainty as to how the Department will evaluate future allegations of targeted dumping.

In light of the turmoil surrounding the Department's substantive methodology for evaluating targeted dumping allegations, it is imprudent for the Department to further confuse the targeted dumping analysis by injecting procedural uncertainty as well. Yet, this is precisely the result achieved by the Department's withdrawal of the regulatory provisions governing the evaluation of targeted dumping in antidumping duty investigations. These provisions offer guidance to petitioners about the appropriate manner in which to make targeted dumping allegations, and these provisions also put respondents on notice of the type of statistical data considered by the Department in evaluating such allegations. The Department has declined to replace this guidance with new provisions, opting instead for case-by-case determinations. As a result, petitioners and respondents in antidumping investigations lack procedural regularity at a time when they also face continuing uncertainty about the Department's substantive approach to evaluating targeted dumping.

As a matter of sound policy, the Department should not permit such ambiguity to pervade administrative proceedings in which so much is at stake for both petitioners and respondents. The parties therefore respectfully request that the Department reinstate the

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[19] See Targeted Dumping in Antidumping Investigations, Public Comments Received June 23, 2008, available at http://ia.ita.doc.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html.

regulatory provisions governing the evaluation of targeted dumping until such time as the Department has normalized its approach to this important inquiry.

III. The Department Should Not Use the Withdrawal of Its Targeted Dumping Regulatory Provisions as an Opportunity to Re-Introduce the "Zeroing" Methodology in Its Targeted Dumping Margin Calculations

Third, if the Department will not reinstate the regulatory provisions related to targeted dumping, the Department should not use their withdrawal as an opportunity to re-introduce the "zeroing" methodology in its targeted dumping margin calculations for antidumping investigations.

As an initial matter, the parties submit that the withdrawal of 19 C.F.R. § 351.414(f)(2) should not be interpreted as an intent to apply the weighted average-to-transaction comparison methodology to all U.S. sales by an exporter covered by an investigation in which that exporter is found to have engaged in targeted dumping. Rather, as the Department has consistently found, this comparison methodology is appropriate only with respect to those U.S. sales for which targeted dumping has been found. But regardless of the set of sales to which the Department decides to apply the weighted average-to-transaction comparison methodology, the parties contend that it is inappropriate for the Department to use the "zeroing" methodology to calculate dumping margins with respect to any of these sales.

This conclusion is dictated by the commitments made by the United States in response to several decisions by the World Trade Organization ("WTO") Appellate Body concerning the "zeroing" methodology. First, based on the agreement by the United States to implement

the adverse WTO Appellate Body decision in United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"),[20] the Department issued a change in policy whereby it will no longer use the "zeroing" methodology in antidumping investigations that use average-to-average comparisons.[21] Second, the United States has also agreed to implement the adverse WTO Appellate Body decision in United States – Measures Relating to Zeroing and Sunset Reviews, [22] which determined that the "zeroing" methodology is contrary to the WTO Antidumping Agreement when used in administrative reviews, which utilize weighted average-to-transaction comparisons.[23] Together, these commitments mean that the Department will not use the "zeroing" methodology in calculating antidumping duties regardless of the comparison methodology used.

The logic of these commitments applies with particular force to antidumping investigations involving allegations of targeted dumping. In such investigations, the Department is authorized to use the weighted average-to-transaction comparison methodology which is normally reserved for administrative reviews.[24] As noted above, however, the United States has already committed to discontinue use of the "zeroing" methodology in

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[20] See United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R (adopted 9 May 2006).

[21] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722, 77725 (Dec. 27, 2006).

[22] See Press Release, U.S. Mission to the United Nations in Geneva, U.S. Statements at the WTO Dispute Settlement Body, Delivered by David P. Shark, Deputy Chief of Mission, U.S. Mission to the WTO (Feb. 20, 2007).

[23] See United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (adopted 23 January 2007).

[24] See 19 U.S.C. § 1677f-1(d)(1)(B).

administrative reviews. This commitment is based on the WTO Appellate Body's forceful rejection of the "zeroing" methodology in administrative reviews, which utilize the weighted average-to-transaction comparison methodology. There is no principled basis to distinguish between proceedings using the same comparison methodology simply because they consist of original investigations rather than administrative reviews. This is particularly true given that, as noted above, the Department has already discontinued the use of "zeroing" in investigations using other comparison methodologies.

There was therefore no basis for the Department's decision to use the "zeroing" methodology in its targeted dumping calculations in Coated Free Sheet Paper from the Republic of Korea.[25] The Department should not repeat this error when calculating dumping margins in future investigations involving targeted dumping, whether or not the Department operates outside the procedural framework offered by its longstanding targeted dumping regulations. The parties therefore respectfully request that the Department refrain from using the "zeroing" methodology regardless of the procedural framework used to evaluate allegations of targeted dumping in original investigations.

* * *

We appreciate the opportunity to provide comments concerning the withdrawal of the regulatory provisions governing the evaluation of targeted dumping in antidumping duty

[25] See CFSP from Korea Decision Memo at 19.

investigations. If the Department has any questions concerning these comments, please do not hesitate to contact the undersigned.

Respectfully submitted,

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