April 5, 2006

PUBLIC DOCUMENT

Via HAND DELIVERY

David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
HCHB Room 1870 - Central Records Unit
Pennsylvania Avenue and Fourteenth Street, NW
Washington, D.C. 20230

Attention: Weighted-Average Dumping Margin

Dear Assistant Secretary Spooner:

On behalf of Corus Group plc ("Corus") and Arcelor S.A., and its subsidiaries and affiliated companies (collectively "Arcelor") and pursuant to the Department of Commerce's ("the Department's") request for comments, we submit the following comments on the Department's proposal to abandon an average-to-average price comparison methodology that excludes the results of comparisons for which the average export price exceeds normal value ("zeroing") and request for comments[1] on alternative comparison methodologies to be used in investigations in light of the WTO panel report in *United States - Zeroing.*

As requested by the Department, Corus and Arcelor are enclosing one original and six copies of this submission as well as an electronic version in Word Perfect format on a CD-ROM. Please do not hesitate to contact the undersigned if you should have any questions.

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[1] *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During An Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (March 6, 2006) ("*Request for Comments*").

Respectfully submitted,

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Enclosure

PUBLIC DOCUMENT

RESPONSE BY CORUS AND ARCELOR TO THE DEPARTMENT OF COMMERCE'S MARCH 6, 2006 REQUEST FOR COMMENTS ON THE PROPOSAL TO ABANDON ZEROING IN WEIGHTED-AVERAGE-TO-WEIGHTED-AVERAGE PRICE COMPARISONS IN INVESTIGATIONS AND CONSIDERATION OF APPROPRIATE METHODOLOGIES TO BE APPLIED IN FUTURE ANTIDUMPING INVESTIGATIONS IN LIGHT OF THE WTO PANEL REPORT IN *UNITED STATES - ZEROING*

Dated: April 5, 2006

I. Introduction

The Department has issued this request for comments[2] pursuant to Section 123(g) of the Uruguay Round Agreements Act ("URAA") and in response to the adverse WTO panel report in *United States - Zeroing*[3]. The WTO panel in *United States - Zeroing* determined that, *inter alia*, the Department's use of an average-to-average price comparison methodology that excludes the results of comparisons for which the average export price exceeds normal value ("zeroing") as applied in multiple antidumping investigations violated the WTO Agreements.[4] The Department states that the United States has not appealed this aspect of the panel report and requested comments for two reasons.[5] First, to comment on the Department's proposal to abandon in investigations average-to-average comparisons with zeroing. Second, in order to develop for investigations a new standard comparison methodology "in light of the panel's report in *U.S. - Zeroing*."[6]

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[2] *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During An Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (March 6, 2006) ("*Request for Comments*").

[3] Panel Report, *United States - Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Circulated Oct. 31, 2005) ("*United States - Zeroing*").

[4] *United States - Zeroing*, para. 7.32.

[5] We note that the United States has appealed a number of the panel's findings in *United States - Zeroing*. *See*, Notification of an Other Appeal by the United States, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/13 (Feb. 1, 2006).

[6] *Request for Comments*, 71 Fed. Reg. at 11,189.

Corus Group plc ("Corus") has a direct interest in the Department's request for comments and implementation of the WTO report in *United States - Zeroing* because Corus was a respondent in the antidumping investigations on Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands ("*Hot-Rolled Investigation*")[7] and Stainless Steel Bar from the United Kingdom (*"UK Bar Investigation*")[8] - both investigations in which the WTO panel found the United States had violated the WTO Agreements through zeroing.[9] Indeed, in both the *Hot-Rolled Investigation* and the *UK Bar Investigation*, the Department was able to make an affirmative dumping determination only because it zeroed.[10] That is, a non-zeroed average-to-average price comparison would have required the Department to determine that Corus had not dumped in either investigation because its average export price would have been above normal value. Corus also has a direct interest in the Department's request for comments and implementation of the WTO report because it is a respondent in the series of annual reviews and duty assessment proceedings that the Department has conducted pursuant to the antidumping orders resulting from the *Hot-Rolled Investigation* and the *UK Bar Investigation*.

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[7]*Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 50,408 (Oct. 3, 2001).

[8]*Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from the United Kingdom*, 67 Fed. Reg. 3,146 (Jan. 23, 2002).

[9]*United States - Zeroing*, para. 7.32 and n. 119.

[10]*See*, Request for Establishment of a Panel by the European Communities, *United States - Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, pp. 7 and 9, WT/DS294/Rev.1 (Feb. 19, 2004).

Arcelor S.A., and its subsidiary and affiliated companies (collectively "Arcelor") has a direct interest in the Department's request for comments and implementation of the WTO report in *United States - Zeroing* because Arcelor was a respondent in the antidumping investigation on Stainless Steel Bar from France ("*French Bar Investigation*")[11] - one of the investigations in which the WTO panel found the United States had violated the WTO Agreements through zeroing.[12] Indeed, in the *French Bar Investigation*, the Department was able to make an affirmative dumping determination only because it zeroed.[13] That is, a non-zeroed average-to-average price comparison would have required the Department to determine that Arcelor had not dumped because its average export price would have been above normal value. Arcelor also has a direct interest in the Department's request for comments and implementation of the WTO report because it is a respondent in the series of annual reviews and duty assessment proceedings the Department has conducted pursuant to the antidumping orders resulting from the *French Bar Investigation* as well as the antidumping order on stainless steel plate in coil from Belgium.[14]

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[11] *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from France*, 67 Fed. Reg. 3,143 (Jan. 23, 2002).

[12] *United States - Zeroing*, para. 7.32 and n. 119.

[13] *See*, Request for Establishment of a Panel by the European Communities, *United States - Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, p. 7, WT/DS294/Rev.1 (Feb. 19, 2004).

[14] *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Belgium,* 64 Fed. Reg. 15,476 (March 31, 1998).

As discussed in detail below, Corus and Arcelor agree that the Department must abandon its policy of zeroing negative margins in investigations where average-to-average price comparisons were made. Thus, Corus and Arcelor agree with the proposal put forth in the *Request for Comments* that an average-to-average comparison methodology may be used only if the methodology excludes zeroing. The *Request for Comments* also solicits comments on the appropriate methodologies to be applied in future antidumping investigations in light of the impermissibility of zeroing in average-to-average comparisons. As described in detail below, Corus and Arcelor believe that in the vast majority of cases, an average-to-average comparison is required by the Antidumping Law,[15] the SAA,[16] and the Department's regulations.[17] Thus, Corus and Arcelor believe that in conducting antidumping investigations the Department must adopt the practice that it will normally use an average-to-average comparison - as in the past - but without zeroing. In the few cases where the Antidumping Law allows for the use of transaction-to-transaction comparisons, Corus and Arcelor believe that the Antidumping Law requires the Department to refrain from zeroing given that the Department will not be zeroing in average-to-average comparisons. Corus and Arcelor wish to emphasize, however, that the use of a transaction-to-transaction comparison methodology should be extremely rare, and limited to the unusual circumstances envisioned in the SAA and existing regulations.

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[15]The Tariff Act of 1930 as amended ("the Antidumping Law" or "the Act"); *see also*, 19 U.S.C. § 1673, *et seq.*.

[16]Uruguay Round Agreements Act Statement of Administrative Action, attached to H.R. Rep. No. 103-316 Vol. I (1994), *reprinted in* 1994 U.S.C.C.A.N. 37773, 4163 ("the SAA").

[17]19 C.F.R. § 351.101 *et seq.*.

These comments will address the following issues: first, whether abandoning zeroing in an average-to-average comparison methodology in investigations is consistent with the WTO panel decision in *United States - Zeroing*; second, how the Department may develop a new comparison methodology based on a principled rationale that is consistent with both the WTO Agreements and U.S. law; third, the extent to which the Department has, thus far, complied with notice and comment rulemaking under Section 123(g) of the URAA and the Administrative Procedures Act ("APA"); fourth, whether it would be appropriate for the Department to issue a final decision announcing a broader new practice or regulation prior to the WTO Appellate Body circulating reports in *United States - Zeroing* and *Softwood Lumber*; finally, in which investigations should the Department apply its proposal to abandon zeroing in average-to-average comparisons?

II The Proposal To Abandon Zeroing in The Average-to-Average Comparison Methodology in Investigations Is Consistent with the WTO Panel Decision in *United States - Zeroing*

The average-to-average with zeroing comparison methodology that the Department is proposing to abandon is the methodology which the Department used in the *Hot-Rolled Investigation*, the *UK Bar Investigation*, and the *French Bar Investigation*. This is the same comparison methodology that the *United States - Zeroing* panel found WTO inconsistent.[18] Pursuant to this methodology, the Department first compares normal values and export prices for individual models of the product under investigation. For each model, a weighted-average normal value is compared to a weighted-average of prices for all export transactions. The Department then aggregates the results of these model-specific weighted-average-to-weighted-average

[18] *United States - Zeroing*, para. 7.32 and n. 119.

comparisons into an overall dumping margin for the product under investigation for each producer / exporter. In order to calculate this margin, the Department includes in the denominator all export transactions but does not include in the numerator the results of those comparisons where the weighted-average export price of a model exceeds the weighted-average normal value.[19]

In *United States - Zeroing*, the panel found this failure to include the results of those comparisons that were above normal value to be inconsistent with the WTO Agreements. Specifically, the panel found that when a dumping margin is calculated on the basis of aggregating multiple intermediate comparisons, the aggregate margin must reflect the results of all such intermediate comparisons, including those comparisons where weighted-average export prices are above normal value.[20] This finding is consistent with multiple WTO reports where the Appellate Body found zeroing in investigations WTO inconsistent.[21] Indeed, the Appellate Body has condemned the unfairness of zeroing in unusually strong language:

> When investigating authorities use a zeroing methodology such as that examined in EC - Bed Linen to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. . . [Z]eroing may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing. Thus, *the inherent bias in a zeroing methodology* of

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[19] *United States - Zeroing*, para. 7.24.

[20] *United States - Zeroing*, para 7.31.

[21] Appellate Body Report, *European Communities - Anti-Dumping Duties on Imports Of Cotton-Type Bed Linen from India*, para. 66, WT/DS141/AB/R, (Adopted March 12, 2001); Appellate Body Report, *United States - Final Dumping Determination on Softwood Lumber from Canada*, para. 117, WT/DS264/AB/R (Adopted Aug. 31, 2004).

> this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.[22]

The aforementioned panel and Appellate Body statements are unequivocal. Consistent with the United States' international obligations as clarified through these WTO reports, the Department may not employ an average-to-average comparison methodology that includes zeroing. Thus, consistent with the Department's *Request for Comments*, Corus and Arcelor agree that it is appropriate and necessary for the Department to abandon the use of zeroing in average-to-average comparisons in investigations.

III. It Is Necessary for the Department To Choose A New Comparison Methodology Based on a Principled Rationale

In the *Request for Comments*, the Department states that it is soliciting comments not only for its proposal to abandon zeroing in average-to-average comparisons, but also in order to consider alternative comparison methodologies "in light of the panel's report in *U.S. - Zeroing*."[23] To the extent that the Department is considering broader methodological changes to its comparison methodology, it must do so based on a principled rationale. A principled rationale should include, for example, a consideration of the reasons why an average-to-average methodology is identified as the preferred methodology in both the SAA and the Department's regulations and what circumstances justify a departure from this norm to allow for one of the other permissible comparison methodologies. A principled rationale should also include an

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[22] Appellate Body Report, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, para. 135, WT/DS244/AB/R (Adopted Jan. 9, 2004) (emphasis added).

[23] *Request for Comments*, 71 Fed. Reg. at 11,189.

analysis of why the Antidumping Agreement prohibits zeroing in an average-to-average methodology and whether those reasons apply as well to a transaction-to-transaction methodology. Finally, a principled rationale should include an analysis of whether it would be permissible under U.S. law for the Department to employ zeroing in a transaction-to-transaction methodology given that the Department is proposing to abandon zeroing in an average-to-average methodology.

A. With or Without Zeroing, the SAA and the Department's Regulations Require the Department To Employ an Average-to-Average Price Comparison in Most Antidumping Investigations and Employ a Transaction-to-Transaction Methodology Only in Carefully Defined "Unusual Circumstances"

The Antidumping Law provides for three comparison methodologies in order to calculate a dumping margin, average-to-average, transaction-to-transaction or, when targeted dumping is alleged, weighted-average-to-transaction.[24] Both the SAA and the Department's regulations require the Department to use an average-to-average price comparison in most antidumping proceedings. For example, the SAA states:

> [I]n an investigation, Commerce normally will establish and measure dumping margins on the basis of a comparison of weighted-average of normal values with a weighted-average of export or constructed export prices. . . In addition to the use of averages, [the Antidumping Law] also permits the calculation of dumping margins on a transaction-by-transaction basis. Such a methodology would be appropriate in situations where there are very few sales and the merchandise sold in each market is identical or very similar or custom-made. However, given past experience with this

[24]Sec. 777A(d) of the Act (stating that, in general, an administering authority shall determine whether subject merchandise is being dumped in the United States by employing a weighted-average-to-weighted-average or a transaction-to-transaction comparison methodology and creating an exception in which the Department may make a weighted-average-to-transaction comparison if targeted dumping is alleged among purchasers, regions, or periods of time).

> methodology and the difficulty in selecting appropriate comparisons transactions, *the Administration expects that Commerce will use this methodology far less frequently than the average-to-average methodology*.[25]

This portion of the SAA establishes three principles. First, the SAA establishes that "normally" the Department will employ an average-to-average comparison methodology. Thus, in choosing a new comparison methodology, the Department must employ in the majority of dumping investigations an average-to-average comparison methodology. Second, the SAA establishes that the Department will only use a transaction-to-transaction comparison methodology when "there are very few sales and the merchandise sold in each market is identical or very similar or custom-made." Thus, in establishing a new comparison methodology the Department must not use a transaction-to-transaction methodology when there are numerous sales or many different models of the product under investigation. Finally, the SAA establishes that given past experience with the transaction-to-transaction comparison methodology the Department must use the average-to-average methodology far more frequently than the transaction-to-transaction methodology. Thus, in deciding whether to move to a new comparison methodology the Department must not only use an average-to-average methodology in the majority of dumping investigations, it must do so in the vast majority of dumping investigations.

The interpretations and principles announced in the SAA are more than ordinary legislative history. Congress has legally mandated that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the

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[25]SAA at 842-43 (emphasis added).

[WTO Agreements] and [Antidumping Law] in any judicial proceeding . . ."[26] As such, it arguably would be illegal for the Department to develop methodologies that are inconsistent with the SAA. Therefore, in developing a new comparison methodology in light of the WTO panel report in *United States - Zeroing*, the Department should consider and comply with the principles articulated in the SAA discussed above and develop a comparison methodology that "normally" employs an average-to-average comparison.

Similar to the SAA, the Department's regulations state that the Department will "normally" use the average-to-average price comparison methodology:

> *Preferences* (1) In an investigation, the Secretary normally will use the average-to-average method. The Secretary will use the transaction-to-transaction method only in unusual situations, such as 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.[27]

Thus, this regulation expresses a strong preference for the average-to-average methodology and specifically states that the transaction-to-transaction method may only be used in "unusual

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[26]Sec. 102(d) of the Uruguay Round Agreement Act ("URAA"); *see also*, *Koenig & Bauer-Albert AG v. U.S.*, 259 F.3d 1341, 1345 (Fed. Cir. 2001) (recognizing the authoritative nature of the SAA and determining the legality of the Department's interpretation of the Antidumping Law based largely on the SAA).

[27]19 C.F.R. § 351.414(c); *see also*, Preamble, *Antidumping and Countervailing Duty Final Rule*, 62 Fed. Reg. 27,296, 27,374 (May 19, 1997) (stating: "[i]n the Department's view, the SAA makes clear that Congress did not contemplate broad application of the transaction-to-transaction method. Specifically, the SAA recognizes the difficulties the agency has encountered in the past with respect to this methodology and suggests that even in situations where there are very few sales, the merchandise in both markets should also be identical or very similar before the agency would make transaction-to-transaction comparisons. Accordingly, we continue to maintain that the transaction-to-transaction methodology should only be applied in unusual situations.") (citations omitted).

situations." In developing a new comparison methodology the Department must comply with this regulation.[28] Otherwise, assuming *arguendo* that the Department may depart from the interpretations found in the SAA and amend or repeal this regulation, the Department must comply with the APA requirements for formal comment and rulemaking before doing so.[29] Until the Department complies with APA comment and rulemaking requirements, the Department is legally prohibited from amending or repealing its regulation. That is, the Department is legally prohibited from developing a methodology that normally employs something other than an average-to-average comparison.

Finally, in deciding whether to employ an average-to-average comparison methodology or a transaction-to-transaction methodology, the Department should consider the SAA's specific emphasis on the much greater difficulty of administering a transaction-to-transaction methodology. As the SAA recognizes, one of the most difficult aspects of administering a transaction-to-transaction comparison is selecting the appropriate sales for comparisons.[30] An average-to-average comparison, in contrast, is much easier to administer because matching sales on an individual basis is unnecessary.

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[28] *Torrington Co. v. United States*, 82 F.3d 1039, 1049 (Fed. Cir. 1996) ("Commerce, like other agencies, must follow its own regulations.") (citations omitted).

[29] *See, e.g.*, 5 U.S.C. § 553(c) (stating that after providing notice of rulemaking agencies must provide interested parties an opportunity to participate in the rule making process); *see also*, 5 U.S.C. § 551(5) (defining "rule making" under the APA to include the agency process for formulating, amending or repealing a rule).

[30] SAA at 843.

In the recent decision in *Softwood Lumber* the Department argued that increased computer resources allow it to conduct a transaction-to-transaction comparison with greater ease.[31] However, that case illustrates well the difficulties of employing the transaction-to-transaction methodology despite the Department's increased technological abilities, and how taking the unusual step of employing a transaction-to-transaction methodology is extraordinarily complicated and labor intensive. In *Softwood Lumber*, the Department employed a transaction-to-transaction comparison for hundreds of thousands of individual transactions. Not surprisingly, the Department identified several matches for each U.S. sale and, as predicted by the SAA, had difficulty selecting the sales to compare.

The Department had to create in *Softwood Lumber*, on a case-specific basis, a hierarchy of characteristics in order to identify the most comparable sales. Among those characteristics selected were market volatility and the limitations that volatility placed on the comparisons, individual sales quantities and customer categories (in addition to level of trade). The final hierarchy the Department selected included model matching, level of trade, date of sale, difference in the variable cost of manufacturing, size of sale, customer categories, total movement expenses, whether a commission was paid, and the number of days before payment.[32]

As in *Softwood Lumber*, in every investigation in which the Department adopts the transaction-to-transaction methodology, it will have to determine which market or product

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[31] *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 22,636, 22,639 (May 2, 2005) ("*Softwood Lumber*").

[32] *Softwood Lumber*, 70 Fed. Reg. at 22,637-38.

characteristics it must consider, the weight it must give each, and the order in which it must consider them. This process will be unique to each case. It is simply not practicable for the Department to dedicate the resources and time necessary to conduct the analyses required in *Softwood Lumber* to future new investigations. Similar resource concerns have given rise to the Department's current consideration of significantly increased sampling in administrative reviews.

Furthermore, in *Softwood Lumber*, even after limiting the possible transaction-specific comparisons according to the characteristic hierarchy, sales existed for which there were multiple matches. In the end the Department selected matches for these sales based on an entirely arbitrary characteristic - which observation appeared first on the list of equally comparable sales. For the Department to base a dumping margin on such an arbitrary factor raises serious questions about the methodology's appropriateness and legality[33] including whether such an administrative determination violates fundamental principles of administrative law that require transparency, predictability, and fairness.[34] A comparison methodology that selects comparison sales in a purely random and unpredictable manner cannot withstand scrutiny and is likely to be rejected as arbitrary and capricious.[35] It would create the appearance that the Department is choosing a

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[33]*See*, discussion *infra* at p. 16 discussing legal prohibitions pertaining to arbitrary and capricious agency action.

[34]*See*, *Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 791, 1999 WL 970743, p. 12 (1999) ("The application of any new standard must be transparent. Exactly what factors are now discounted and why, must be explained. As the court has stated previously, some clear standards are needed. Otherwise agency decision making may descend into arbitrariness.") (citations omitted).

[35]*Shakeproof Assembly Components, Div. of Ill. Toolworks, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (stating that the Department's goal should not be to establish merely a defensibly methodology, but instead, to choose a methodology that "establishes

methodology not to achieve an accurate comparison, but rather, simply to find a higher dumping margin.

B. There Is No Principled Basis Under the WTO Agreements for Using Zeroing in the Transaction-to-Transaction Methodology

Inherent in the Department's proposed abandonment of zeroing in an average-to-average comparison methodology is an acknowledgment that, in calculating the overall dumping margin for an exporter, the process of aggregating the results of intermediate comparisons must be fair. That is, consistent with the principles discussed in *United States - Zeroing*, the Department must aggregate the results of all of the intermediate comparisons, including those comparisons in which export price is above normal value.[36] Zeroing is impermissible precisely because it does not give full weight to these intermediate comparisons. In this sense, there is no difference whatsoever between zeroing the results of intermediate model group comparisons in the average-to-average comparison methodology and zeroing the results of intermediate transaction comparisons in the transaction-to-transaction method. Thus, in order for the Department to use zeroing in the transaction-to-transaction methodology, it would have to be able to articulate clearly a principled basis for concluding that unfairness and distortion do not arise through the use of zeroing in a transaction-to-transaction methodology. For the reasons discussed herein, Corus and Arcelor do not believe such a basis exists.

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antidumping margins as accurately as possible").

[36] *See, e.g., United States - Zeroing*, paras. 7.27 - 7.32.

C. There Is No Principled Basis under U.S. Law for Using Zeroing Only in the Transaction-to-Transaction Comparison Methodology and, In Fact, Such a Use of Zeroing Would Be Contrary to U.S. Law

U.S. law provides the Department with discretion to determine how to implement the three comparison methodologies available under the Antidumping Law. However, the Department's discretion is not without limits. Any implementation must comport with the other provisions of the Antidumping Law and general principles of constitutional and administrative law. The use of zeroing in transaction-to-transaction comparisons, while abandoning it in average-to-average comparisons, would violate all of these, and is accordingly impermissible as a matter of U.S. law.

The use of zeroing in a comparison methodology will almost always lead to the calculation of a significantly greater dumping margin from that calculated without zeroing.[37] This is just as true in transaction-to-transaction comparisons as it is in average-to-average comparisons. Indeed, the transaction-to-transaction comparisons in *Softwood Lumber* demonstrated that the differential caused by zeroing can be even more pronounced in a transaction-to-transaction comparison. The Antidumping Law cannot support the simultaneous use of two comparison methodologies that, when applied to the same body of sales, leads to such disparate results. Specifically, except in a targeted dumping context, the Antidumping Law embraces a singular definition of dumping.[38]

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[37]Appellate Body Report, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, para. 135, WT/DS244/AB/R (Adopted Jan. 9, 2004) (stating that "[w]hen investigating authorities use a zeroing methodology . . . to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated").

[38]The one exception would be in a targeted dumping analysis. There, Sec. 777A(d)(1)(B) of the Act, 19 C.F.R. § 351.414(f) of the Department's regulations, and the second sentence of Article 2.4.2 of the Antidumping Agreement permit a separate calculation with respect to a "targeted" subset of an exporter's U.S. sales.

Implicit in this singular definition is the expectation that the Department will calculate the same, or approximately the same, amount of dumping given the same set of U.S. sales, irrespective of the comparison methodology that the Department employs. Thus, to the extent that the Department attempts to interpret the comparison methodologies in a manner that would allow for significantly different dumping margins for the same U.S. sales, such an interpretation would be contrary to the Antidumping Law.

In addition, allowing the Department to interpret the Antidumping Law in a manner that would allow for such disparate results based solely on a methodological choice would allow the Department to determine margins in an arbitrary and capricious manner. It is axiomatic that both constitutional due process principles and the APA prohibit agencies from acting in an arbitrary and capricious manner.[39] To the extent the Department attempts to interpret the comparison methodologies to allow arbitrary and capricious agency action, such an interpretation would be contrary to U.S. law. Moreover, a comparison methodology that would yield dumping margins for certain sales if performed with zeroing but would not yield margins for the same sales if performed without zeroing lacks the essential transparency and predictability that underlies an international trade policy based on the rule of law.

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[39] *See, e.g.*, Alfred C. Aman, Jr. and William T. Mayton, *Administrative Law*, § 3.3 (West 2d ed. 2001) (noting that pursuant to the Due Process Clause courts have rejected agencies' arguments to proceed on an ad hoc basis and instead required agencies to proceed according to generally applicable rules in order to prevent, *inter alia*, arbitrary and capricious decision making); 5 U.S.C. § 706(2)(A) (requiring courts to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

In defending zeroing in the transaction-to-transaction methodology applied in *Softwood Lumber*, the Department relied on the formalistic textual argument that the wording of Article 2.4.2 of the Antidumping Agreement only requires consideration of all comparable sales in an average-to-average comparison methodology.[40] While the WTO Appellate Body has yet to decide the viability of this textual defense vis-à-vis the WTO Agreements,[41] Corus and Arcelor note that such a textual argument does not provide a principled basis for zeroing under U.S. law. That is to say, the text of the WTO Agreements are not self-executing and do not provide the Department with authority to act under U.S. law. Instead, Congress implemented the WTO Agreements into U.S. law through the URAA and the Department's legal authority to conduct antidumping investigations is based on the Antidumping Law as amended by the URAA. Thus, in order for the Department to defend zeroing in a transaction-to-transaction comparison methodology while not zeroing in an average-to-average methodology the Department must identify its legal authority to do so under the Antidumping Law. As Corus and Arcelor demonstrate above, no such authority exists. Therefore, the Department is legally prohibited from applying zeroing in a transaction-to-transaction methodology while at the same time using a non-zeroed application of the average-to-average methodology.

IV. The Department Must Comply with the Notice and Comment Requirements of Section 123(g) and the APA

[40] *Softwood Lumber*, 70 Fed. Reg. at 22,640.

[41] *See*, discussion *infra* at p. 20 discussing the recent panel decision in the *Softwood Lumber* compliance proceeding and likely appeal to the WTO Appellate Body.

In soliciting comments on a new comparison methodology the Department has invoked Section 123(g) of the URAA. This statutory provision requires the Department to undertake a series of actions prior to conforming a regulation or practice to an adverse WTO report. Specifically, before implementing any change in a regulation or practice, Section 123(g) requires the Department to publish the proposed change in the *Federal Register* and allow parties to comment on the proposal. This publication requirement comports with the notice and comment rulemaking prescribed by the APA which requires agencies to publish proposed rules or regulations, including proposals that would repeal a regulation, and allow the public an opportunity to comment prior to making the practice or rule final.[42]

Corus and Arcelor commend the Department for promptly initiating a procedure to implement that portion of the panel's decision in *United States - Zeroing* which the United States considers not to be covered by the appeal. Given that the practice of zeroing is not reflected in any Department regulation, the Department is free to abandon zeroing in average-to-average price comparisons in investigations without recourse to a formal rulemaking process. However, the preference for weighted-average-to-weighted-average comparisons in investigations is codified in the Department's regulations. Thus far, the Department has neither specified what its new comparison methodology will be nor published this proposal in the *Federal Register*. Instead, the Department has simply notified the public that it is considering changing its current standard practice in an unspecified way that may depart from its current regulation. Such a notification that

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[42] *See, e.g.,* 5 U.S.C. § 553(b) and (c) (stating that an agency must provide notice of rulemaking and allow interested parties an opportunity to participate in the rule making process); *see also*, 5 U.S.C. § 551(5) (defining "rule making" under the APA to include the agency process for formulating, amending or repealing a rule).

a change is being considered is insufficient for either Section 123(g) notice and comment or APA notice and comment. Instead, if the Department seeks to modify or repeal its preference for weighted-average-to-weighted-average comparisons in investigations, the Department must comply with all applicable APA requirements, publish the proposed new comparison methodology in the *Federal Register* and allow parties to comment before adopting a final rule or regulation and/or repealing an existing regulation.

V. The Department Should Defer Any Broad Changes to its Standard Comparison Methodology Until After A Final WTO Report Is Circulated in *United States - Zeroing* and *Softwood Lumber*

The Department is proposing to abandon its average-to-average methodology with zeroing "in light of the Panel's report in US - Zeroing." Multiple portions of that panel report have been appealed to the WTO Appellate Body. A final report is expected to be circulated on April 18, 2006. As discussed above and consistent with the *Request for Comments*, Corus and Arcelor believe that the correct manner for the Department to comply with that portion of the panel report not covered by the appeal is to abandon in investigations the average-to-average with zeroing comparison methodology. However, to the extent that the Department is considering broader changes to its standard comparison methodology, it would be inappropriate for the Department to propose any such changes until after the Appellate Body issues its report in *United States - Zeroing*. In the *United States - Zeroing* appeal, the Appellate Body is considering whether zeroing in investigations is "as such" inconsistent with the WTO Agreements and whether zeroing in administrative reviews is inconsistent with the WTO Agreements either on an "as such" or "as applied" basis. In deciding these issues, it is likely that the WTO Appellate Body will further

clarify the United States' obligations in a manner that will provide important guidance on what kind of comparison methodologies would be consistent with the WTO Agreements.

The Department also should defer making any changes to its standard comparison methodology that would use a transaction-to-transaction method until after the on-going compliance dispute in *Softwood Lumber* is resolved. The compliance panel circulated its report two days ago on April 3, 2006.[43] The Canadian parties are expected to appeal this decision to the WTO Appellate Body in which case the Appellate Body would circulate a report in August 2006.[44] It is likely that, as a result of this dispute, the United States will gain further clarification regarding how it may administer transaction-to-transaction comparison methodologies. Thus, to the extent the Department is considering broader methodological changes to its standard comparison methodology, particularly changes premised on a transaction-to-transaction comparison, it is incumbent upon the Department to wait until the *Softwood Lumber* compliance dispute is resolved.

VI. The Proposed Abandonment of Zeroing in Average-to-Average Comparisons Must Be Applied to the 15 Investigations Challenged "As Applied" and All Future Decisions in Investigations, Regardless of the Date the Petition Was Received

The Department has stated that it will apply the methodology established through the instant Section 123(g) proceeding only to "investigations initiated on the basis of petitions

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[43]Panel Report, *United States - Final Dumping Determination on Softwood Lumber from Canada - Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW (Circulated April 3, 2006).

[44]Under the WTO Dispute Settlement Understanding ("DSU")an appeal would be taken sometime in the next 2 months (*e.g.*, DSU Art. 16.4) and the Appellate Body would have approximately 60 to 90 days to circulate a report (*e.g.*, DSU Art. 17.5).

received on or after the first day of publication of the Department's final notice of the new weighted-average dumping margin calculation."[45] Such a limited application of the Department's proposal to abandon zeroing in average-to-average comparisons is inappropriate given the Department's initiation of a Section 123(g) proceeding in order to implement that portion of the panel report not covered by the appeal in *United States - Zeroing*. The non-appealed portion of the panel report pertains to the "as applied" challenge of 15 antidumping investigations including the *Hot-Rolled Investigation*, *UK Bar Investigation*, and *French Bar Investigation*. At a minimum and consistent with the Department's stated intent to implement the non-appealed portion of the panel decision, the Department must apply its proposal to abandon zeroing in its average-to-average comparison methodology to those antidumping investigations that were the subject of the "as applied" dispute.

In addition, it is unnecessary for the Department to apply in a limited manner its proposal to abandon zeroing in its average-to-average price comparison methodology in investigations because Section 123(g) allows the Department broad discretion in applying a new methodology or practice. Specifically, Section 123(g)(2) allows the Department to apply the new practice in any proceeding as long as the Department complies with a sixty day waiting period after consulting with Congress.[46] Thus, the Department is under no legal obligation to limit the application of its proposal to abandon zeroing in average-to-average comparisons only to investigations initiated

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[45]*Request for Comments*, 71 Fed. Reg. at 11,189.

[46]Section 123(g)(2) of the URAA.

based on petitions received after the date the Department publishes the new practice or regulation.

Moreover and importantly, such a limited application would be contrary to the United States' international obligations. The WTO panel found that WTO Agreements require the Department to refrain from zeroing in any antidumping investigation in which it employs an average-to-average comparison methodology.[47] This obligation exists with regard to the 15 investigations challenged "as applied" as well as all other antidumping investigations, not only those that are filed after final notice of the new methodology. Thus, the Department will be acting contrary to its international obligations if it implements this proposal to abandon zeroing only with regard to petitions filed after the final notice of the new methodology.

Finally, the importance of refraining from implementing adverse WTO reports in a narrow manner was a principal question in the *United States - Section 129* WTO proceeding.[48] In fact, the panel's decision to find Section 129 "as such" not inconsistent with the WTO Agreements was premised largely on the United States' representation to the panel that U.S. law allowed for application of the rule or principle decided in an adverse WTO report in proceedings not covered by the implementation of that report under Section 129 of the URAA.[49] Consistent with this representation to the WTO, the Department should apply the no-zeroing directive decided in

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[47] *United States - Zeroing*, para. 7.106.

[48] Panel Report, *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, paras. 6.6 - 6.12, WT/DS221/R (Adopted Aug. 30, 2002) ("*United States - Section 129*").

[49] *See, e.g., United States - Section 129*, para. 6.42; Second Written Submission of the United States, *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, para. 16, WT/DS221, (March 8, 2002).

United States - Zeroing to all final determinations made after the date on which the WTO Dispute Settlement Body adopts the *United States - Zeroing* report.

VII. Conclusion

In conclusion, Corus and Arcelor commend the Department for promptly initiating procedures to implement that portion of the panel's decision in *United States - Zeroing* that the United States considers not to be covered by the appeal. The importance of this issue is underscored by the fact that both Corus and Arcelor today must operate under antidumping orders that would not exist had the Department refrained from using zeroing in the original investigations. Corus and Arcelor agree that consistent with that panel decision, the Department should abandon zeroing in average-to-average comparisons employed during investigations. However, to the extent that the Department is considering broader changes to its comparison methodology, those changes must be made on a principled basis. For example, such a change in methodology must comport with the Antidumping Law, the SAA, the Department's regulations and the United States' obligations under the WTO Agreements. In addition, if any change in the comparison methodology would require a repeal or amendment to an existing regulation, the Department must comply with the notice and comment requirements of section 123(g) of the URAA and the APA. In proposing any broader changes in its comparison methodology, Corus and Arcelor believe that the Department should postpone its proposal until after the relevant Appellate Body reports are circulated in *United States - Zeroing* and *Softwood Lumber*. Finally, Corus and Arcelor believe that the Department should implement its proposal to abandon zeroing in average-to-average comparisons in all current and future investigations including the 15 investigations that were the subject of the "as applied" challenge in *United States - Zeroing*.