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April 5, 2006

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

THIS DOCUMENT CONTAINS NO PROPRIETARY INFORMATION

Number of Pages: 5

Attention: Weighted Average Dumping Margin

Dear Mr. Spooner:

On behalf of the Japan Bearing Industrial Association ("JBIA"), a trade association of foreign producers and exporters of ball bearings, and their affiliated U.S. producers and importers of ball bearings, we hereby submit comments concerning the Department's proposed changes to the manner in which it calculates weighted average dumping margins. Specifically, the JBIA responds to the Department's request for comments concerning its proposal, pursuant to section 123(g)(1) of the Uruguay Round Agreements Act (the "URAA"), to cease the practice of "zeroing" when it uses the average-to-average comparison methodology in calculating dumping margins during an antidumping duty investigation. *See* Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (March 6, 2006) ("Department Notice").[1]

[1] The "zeroing" practice is described as "not allow[ing] the results of averaging groups for which export price exceeds normal value to offset the results of averaging groups for which export price is less than normal value." Department Notice at 11189.

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As an initial matter, the JBIA strongly supports the Department's decision to act consistently with U.S. international obligations under the World Trade Organization ("WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "*Anti-Dumping Agreement*"); namely to cease its zeroing practice in investigations in which it uses an average-to-average comparison methodology. However, the JBIA submits that the Department should take this opportunity not merely to cease zeroing in situations in which it uses that comparison methodology, but also in any investigation or review regardless of the comparison methodology used by the Department. That is, the Department should also abandon the practice of zeroing when using a transaction-to-transaction or average-to-transaction comparison methodology to calculate dumping margins.[2] Indeed, to the extent that the Department's proposal is motivated by the WTO panel's decision in the EC's challenge to the Department's zeroing practice,[3] the JBIA notes that the Appellate Body will shortly issue its decision in that appeal. The Appellate Body has already made it clear 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 margin 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. . . . Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.

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[2] The JBIA notes that although the Department's zeroing practice has been upheld by the U.S. courts, they have repeatedly held that this practice is not compelled by U.S. law. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1341 (Fed. Cir.), cert. denied, 125 S.Ct. 412 (2004) (holding that the statutory definition of "dumping margin" in 19 U.S.C. § 1677(35) does not "compel a finding that Congress expressly intended to require zeroing").

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

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Appellate Body Report, *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, para. 135 (15 December 2003) (emphasis added). Thus, there is no reason to believe that the Appellate Body will not find that zeroing in all its guises is impermissible under the *Anti-Dumping Agreement*. The JBIA therefore proposes that in anticipation of that decision, the Department should cease zeroing in all cases, not merely in those investigations in which it applies an average-to-average comparison methodology. Alternatively, the JBIA proposes that the Department should postpone this section 123 proceeding until after the Appellate Body issues its decision in the EC's case, which is due to be released in mid-April 2006. Indeed, given that the Appellate Body's decision is due to be issued so soon, it would be inefficient and duplicative for the Department not to suspend this proceeding until after that has occurred.

Further, the JBIA submits that the Department should not implement this change on only a prospective basis. Although implementation under section 123 of the URAA may be prospective only, that provision is not the sole source of the Department's implementation authority. To the contrary, the United States has specifically acknowledged that other methods exist for implementing adverse WTO determinations. Specifically, in defending section 129(c)(1) of the URAA against a WTO challenge brought by Canada on the basis of the statute's prospective nature, the United States expressly stated that the statutory implementation procedures are not intended to be exclusive. The United States argued that the Charming Betsy doctrine, pursuant to which U.S. law, to the extent possible, must be construed in a manner consistent with international law, "might be relied upon by the Department of Commerce as a reasonable

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explanation for a change in its methodology in an administrative review determination distinct from a section 129 determination." *United States – Section 129(c)(1) of the URAA*, WT/DS221/R, at 20 n.32 (15 July 2002) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)). Relying on the United States' interpretation of the statute as setting out a non-exclusive means of implementing adverse WTO decisions, the WTO panel found that the prospective nature of section 129(c)(1) is not inconsistent with the United States' obligations under the *Anti-Dumping Agreement*. The JBIA thus submits that, pursuant to its authority to "change its methodology" as necessary to implement an adverse WTO determination through means other than those expressly enumerated in the statute, the Department should take action to recalculate dumping margins without zeroing in pending investigations and administrative reviews, including those currently pending judicial review.

Finally, regardless whether the Department adopts these additional proposals, it should, in making its determinations in sunset reviews of the magnitude of the dumping margin that is likely to prevail if an antidumping order is revoked, cease referring to margins that have been calculated in investigations using zeroing in the average-to-average comparison methodology. Inasmuch as the Department now recognizes that its practice of zeroing in investigations using average-to-average comparisons is inconsistent with U.S. international obligations, it necessarily follows that it is also impermissible for the DOC to rely in sunset review on margins calculated using zeroing in average-to-average comparisons in the underlying investigations.

In accordance with the Department Notice, the JBIA is submitting these comments within 30 days of the publication of the notice in the *Federal Register*. The JBIA is submitting an

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original and six copies of this letter, as well as a CD-ROM that includes an electronic version of these comments in WordPerfect format.

Thank you for your attention to this matter. Please do not hesitate to contact the undersigned if you have any questions regarding this letter.

Respectfully submitted,

Neil R. Ellis
Neil C. Pratt