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PUBLIC DOCUMENT

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

Attention: Weighted Average Dumping Margin

Re: *Comments on Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*

Dear Mr. Spooner:

On behalf of the Japan Iron & Steel Federation ("JISF"), we hereby submit the attached Comments in response to the Department of Commerce's ("Department") request for comments regarding the calculation of the weighted average dumping margin in an antidumping duty investigation. 71 Fed. Reg. 11,189 (March 6, 2006).

As requested in the Department's Federal Register notice, a signed original and six copies of these comments are being filed today, accompanied by an electronic version to facilitate posting on the Department's website.

If there are any questions concerning this submission, please contact the undersigned.

Respectfully submitted,

William H. Barringer
Daniel L. Porter
Valerie Ellis

Counsel to JISF

Before the United States Department of Commerce
International Trade Administration

Comments of the Japan Iron & Steel Federation on the Department's Proposal to Terminate Its Zeroing Practice When Calculating Antidumping Margins

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I. Introduction and Summary

This submission provides the comments of the Japan Iron and Steel Federation (JISF) in response to the Department of Commerce's ("the Department") March 6, 2006 request for comments regarding the calculation of individual respondents' weighted average dumping margin in an antidumping investigation. Specifically, these comments address the Department's proposal to no longer make average-to-average margin comparisons without including the full value of the average export price where export price exceeds normal value (i.e., to end the practice of zeroing).[1] JISF commends the Department's efforts to bring its antidumping practices into alignment with its obligations under the World Trade Organization ("WTO") Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), and appreciates the opportunity to provide these comments to the Department regarding the elimination of zeroing. These comments also address the appropriate methodologies to be applied in future antidumping investigations in light of this change in practice.

In brief, JISF urges the Department to proceed with its proposal to eliminate the practice of zeroing in original antidumping duty investigations where the average-to-average comparisons methodology is used to calculate margins. Not only is the elimination of zeroing necessary in order to bring the U.S. practice into compliance with the panel decision in *US-Zeroing,*[2] ending the zeroing practice represents a long-overdue change to the Department's interpretation of U.S. law that is in harmony with the United States' international obligations under the AD Agreement.

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1 *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (Dep't Commerce March 6, 2006).

2 *Panel Report, United States - Laws, Regulations and Methodology for Calculation Dumping Margins ("US - Zeroing")*, WT/DS294/R, para. 7.32, (Oct. 31, 2005).

JISF further urges the Department to continue to use the average-to-average methodology to calculate dumping margins in original investigations. The preference for average-to-average comparisons is an integral part of the trade laws of the United States, which are to be interpreted in light of the Congressional expression of intent contained in the Statement of Administrative Action ("SAA"). Moreover, the use of the only allowable alternative methodology permitted pursuant to the AD Agreement -- transaction-to-transaction comparisons -- would be an extreme and unwarranted revision to U.S. law and practice that would open anew the entire U.S. antidumping regime to legal scrutiny.

Finally, JISF urges the Department to implement this change in practice less narrowly than the implementation timetable proposed in the request for comments. In order to ensure the even-handed administration of justice and to avoid further litigation before the WTO and U.S. Courts, the Department should make implementation retroactive insofar as it should apply to all proceedings that are not yet final. This includes any pending investigations -- whether pending due to an ongoing administrative investigation, court remand, or otherwise -- as well as to all kinds of reviews (administrative, new shipper, changed circumstance, and sunset reviews), regardless of the type off comparison used (average-to-average, transaction-to-transaction, or average-to-transaction). A discontinuation of the zeroing practice as to all reviews and all comparisons would be consistent with the reasoning of the Appellate Body in previous decision, in which it found that zeroing resulted in the failure to find dumping with respect to the product as a whole, in violation -- among other provisions -- of the "fair

comparison" requirement of Article 2.4 of the AD Agreement. There is no rationale for abiding by this principle in investigations but not in reviews.

II. The Department's Proposal to Abandon Zeroing in Average-to-Average Investigations Should be Adopted.

On October 31, 2005, a WTO dispute settlement panel issued a decision consistent with earlier decisions by the Appellate Body that the U.S. practice of zeroing in antidumping investigations that apply an average-to-average margin calculation methodology is inconsistent with Article 2.4.2 of the AD Agreement.[3] Article 2.4.2 provides that "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* (emphasis added)." By zeroing out margins on sales where the export price exceeds normal value before establishing the weighted-average dumping margin for the merchandise subject to investigation as a whole, the Department's existing practice does not take fully into account the entirety of the export price for those transactions where price exceeds normal value. As such, the Department's practice fails to make a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2 of the AD Agreement. JISF fully supports the Department's efforts to eliminate this unfair practice from its margin calculation methodology.

Moreover, consistent with Article 2.1 of the AD Agreement, margins of dumping can be found to exist only after considering all relevant export prices for the product subject to investigation, which necessitates the end of the zeroing practice. As the Appellate Body explained in *EC-Bed Linens,* "Whatever the method used to calculate the

[3] *Id.*

margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole."[4] Whether or not expressly prohibited by the panel decision currently under implementation by the Department, the practice of zeroing in any context clearly violates the principles expressed by the Appellate Body in *EC-Bed Linens*.[5]

In addition to meeting the formal requirements for implementation of a dispute settlement body report pursuant to section 123(g) of the Uruguay Round Agreements Act, JISF further considers the Department's decision to change its margin calculation practice to make it compatible with the AD Agreement to be the proper interpretation of existing U.S. laws, which have always allowed for the possibility that dumping margins can and should be estimated using a method that incorporates in their entirety the export prices for non-dumped sales. By eliminating zeroing, the Department's new practice more soundly reflects an interpretation of U.S. law that is in harmony with U.S. international obligations.[6]

III. The Use of Average-to-Average Calculation Methodology in Investigations is the Preferred Practice and Should Continue to be the Standard.

In addition to requesting comments on the elimination of zeroing in average-to-average investigations, the Department's request "seeks comment on the alternative approaches that may be appropriate in future investigations." JISF takes this opportunity

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[4] *Appellate Body Report, European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen from India ("EC-Bed Linens")*, WT/DS141/RW, (March 12, 2001), para 53.

[5] JISF further notes that the use of zeroing should be eliminated from the Department's margin calculation practice for all phases of an antidumping inquiry, including investigations, administrative reviews, sunset reviews, new shipper reviews and remand redeterminations.

[6] The Charming Betsy canon of statutory construction requires that whenever possible, U.S. law should be interpreted in a manner consistent with U.S. International Obligations. *Murray v. Charming Betsy*, 6 U.S. (Cranch) 64, 118, 2. L.Ed. 208 (1804).

to remind the Department that there is a clear regulatory and statutory preference for the use of average-to-average comparisons in antidumping investigations, and the elimination of zeroing from these average-to-average comparisons in no way warrants a departure from this long-standing margin calculation practice. Indeed, to consider a broad revision to the Department's investigation methodology as a result of the WTO panel decision, when all that is required by the decision is the deletion of a single line of programming in the Department's standard margin calculation computer program, would introduce an inordinate level of complexity into what should be the simplest of tasks. Such an approach would violate the spirit of transparency and fairness that is a hallmark of the world trade regime.

A. The Department has a Clearly Articulated Preference for the use of Average-to-Average Comparisons in Antidumping Investigations.

The issue of using alternative comparison methodologies when determining dumping margins has been considered at length by the Department in prior instances. When the Department revised its regulations pursuant to the Uruguay Round Agreements Act ("URAA"), it devoted considerable space in both the Preamble to the Proposed Rule and the Preamble to the Final Rule to the question of when methodologies other than average-to-average (i.e., average-to-transaction or transaction-to-transaction) might be appropriate. With respect to original investigations, the Department stated definitively that, "the preferred method in an antidumping investigation will be the average-to-average method."[7] Moreover, in rejecting a request by one commenter to place transaction-to-transaction comparisons on more or less equal footing with average-to-average comparisons by allowing such a comparison in "appropriate situations" rather

[7] Preamble to the Proposed Rule, 61 Fed. Reg. 7308, 7348, (Dep't Commerce Feb. 27, 1996).

than "unusual situations", the Department stated that "in [its] view, the [Statement of Administrative Action] makes clear that Congress did not contemplate broad application of the transaction-to-transaction method."[8]

The Department's regulations at 351.414 (c)(1) merely codify the preferences set forth in the Statement of Administrative Action ("SAA"),[9] when they state that, "in an investigation, the Secretary normally will use the average-to-average method."[10] According to the SAA, the Department, "normally will establish and measure dumping margins on the basis of a comparison of a weighted-average normal value with a weighted-average of export prices or constructed export prices." The SAA goes on to say that, with respect to the statutory alternative of transaction-to-transaction comparisons, the Department is expected to "use this methodology far less frequently than the average-to-average methodology." Hence, the trade laws of the United States establish a clear hierarchy between the two approaches, and transaction-to-transaction is plainly disfavored. In other words, unlike the practice the zeroing, which involved one possible interpretation of ambiguous statutory language, the preference for average-to-average comparisons in antidumping investigations has been made unambiguously clear by Congress through its approval of the SAA as the, "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act."[11]

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[8] Preamble to the Final Rule, 62 Fed. Reg. 27,296, 27,373-74 (Dep't Commerce May 19, 1997).

[9] Statement of Administrative Action ("SAA") accompanying H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess.(1994) at 842-43.

[10] 19 CFR 351.414 (c)(1)("Preferences").

[11] 19 U.S.C. 3512(d).

B. Continuing to Make Average-to-Average Comparisons in Antidumping Investigations is the Only Reasonable Approach Available to the Department.

As Congress recognized in the SAA, the transaction-to-transaction methodology for margin calculations can only be used with great difficulty.[12] One need look no further than the Department's implementation of the Appellate Body decision in *Lumber V*[13] to see how very complex such a comparison can become when examining a situation where there are a significant number of export transactions. In that case, the Department crafted a series of criteria intended to identify the most comparable normal value sale for any given export sale.[14] The hierarchy of matching criteria began with the standard criteria used by the Department in average-to-average investigations, namely, level of trade and product similarity. However, because these criteria did not nearly limit the possible number of matching normal value sales sufficiently, the Department was forced to incorporate contemporaneity, quantity sold, customer category, channel of distribution, total movement expenses, commissions paid, and credit period into its matching criteria in an attempt to identify the most similar normal value sale. Even under this rather tortuous hierarchical approach, the Department was left with multiple possible matches in some instances, at which time the first possible match among equal matches was chosen.[15] Such complexity was surely not envisioned by Congress when it noted that a transaction-to-transaction methodology, "would be appropriate in situations where there

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[12] SAA at 843.

[13] *United States - Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) ("Lumber V").

[14] *Preliminary Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, pages 5 - 7 (Jan. 31, 2005).

[15] *Id.*

are very few sales and the merchandise sold in each market is identical or very similar or is custom-made."[16]

IV. Implementation Should Be Immediate and Should Apply to All Proceedings That Are Not Yet Final.

In its request for comments, the Department indicated that it intends to apply any changes in methodology, "in all investigations initiated on the basis of petitions received on or after the first day of the month following the date of publication of the Department's final notice of the new weighted average dumping margin calculation methodology." There is no reason for the Department to limit its implementation of the WTO panel decision in this way. Unlike implementation under section 129 of the URAA, which limits implementation to entries made prospectively, section 123(g) of the URAA in no way requires the Department to limit the implementation the US-Zeroing panel decision prospectively.[17]

A. The Department Normally Implements a Change in Practice Resulting from an Adjudicative Ruling in All Proceedings Where the Relevant Determination is Not Yet Final.

Under analogous situations, when implementing decisions made by U.S. adjudicative bodies the Department has made its methodological changes effective in all applicable proceedings where the dumping determination was not yet final. For example, when the Court of Appeals for the Federal Circuit ("CAFC") issued a decision finding it inappropriate to resort immediately to constructed value as the basis for foreign market value when home market sales were made "outside the ordinary course of trade" the Department revised its practice and began comparing export sales to similar normal value

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[16] SAA at 842.

[17] 19 U.S.C. 3533(g).

sales prior to resorting to constructed value in all pending cases.[18] This decision-driven change in practice was implemented within two months of the CAFC's decision, even in investigations initiated prior to the decision, and even where the issue was not raised by any party in the proceeding.[19]

Implementation of the panel decision in *US-Zeroing* on a fully "retroactive" basis, in the sense that it should be applied to all pending cases, is consistent with the basic norms of adjudication by which the Department should be guided.[20] Purely prospective application of the rule articulated by the panel in October, as well as the Department's implementation of the rule only in the month following the month in which the change has been formalized in a Department memorandum, would inappropriately lead to the unequal administration of justice for similarly situated respondents. The principle of retroactive application of rules has been clearly articulated by the Supreme Court of the United States, which has stated, "when this Court applies a rule of federal law to the parties before it, that rule … must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[21] While the principle embraced by the Supreme Court is

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[18] *Cemex v. United States*, 133 F.3d 897 (Fed. Cir. 1998)

[19] See e.g., *Stainless Steel Wire Rod from Taiwan*. 63 Fed Reg. 10836 (Dep't Commerce March 5, 1998) ("This issue was not raised by any party in this proceeding. However,...the Department has reconsidered its practice in accordance with this court decision and has determined that it would be inappropriate to resort directly to CV, in lieu of foreign market sales, as the basis for NV if the Department finds foreign market sales of merchandise identical or most similar to that sold in the United States to be outside the 'ordinary course of trade.' Instead, the Department will use sales of similar merchandise, if such sales exist."). See also, Import Administration Policy Bulletin, "Basis for Normal Value When Foreign Market Sales Are Below Cost," No. 98.1 (Feb. 23, 1998)

[20] See, *Griffith v. Kentucky*, 479 U.S. 314 (1987) for a discussion of the principle of retroactivity of judgments in constitutional cases. ("After we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to all similar cases pending" (pp 322-23)).

[21] *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993).

not directly binding on administrative decision-making by the Department, to the extent that the agency is acting in an adjudicative capacity when it imposes an antidumping duty order, it would be prudent for the Department to be guided by the wisdom of the nation's highest Court.

B. Failure To Eliminate Zeroing in Any Pending Determinations is Unreasonable.

The EC's challenge to the U.S. practice of zeroing in antidumping investigations is not the first time that the WTO has called into question its validity under the AD Agreement. In *Lumber V*, which challenged the practice as applied in the Department's antidumping investigation of softwood lumber from Canada, the WTO Appellate Body upheld the panel's finding that the United States acted inconsistently with Article 2.4.2 of the AD Agreement in determining the existence of margins of dumping "*on the basis of a methodology* incorporating the practice of 'zeroing'(emphasis added)."[22] Although only technically applicable to the softwood lumber proceeding, the language of this widely publicized decision made it clear that the existing U.S. practice of zeroing was inconsistent with U.S. obligations under the AD Agreement with respect to investigations. Certainly, this decision, as well as the six months that have passed since the issuance of the panel decision in *US-Zeroing* have provided parties with adequate notice that change is imminent. There is no reason to further delay implementation. Moreover, to eliminate the practice in on-going investigations will promote efficiency and avoid additional costly WTO appeals that the United States has virtually no chance of winning. For all of these reasons, JISF urges the Department to implement its change in practice with respect to zeroing in all pending determinations.

[22] Lumber V para 183.

C. Zeroing Should be Abandoned in All Antidumping Duty Proceedings, Including Administrative Reviews, New Shipper Reviews, Changed Circumstance Reviews, and Sunset Reviews.

In addition to eliminating the practice of zeroing in original antidumping investigations, the Department should cease to apply zeroing in antidumping duty administrative reviews, new shipper reviews, changed circumstance reviews and sunset reviews, notwithstanding the narrow applicability of the panel's decision in *US-Zeroing*. Although the panel in *US-Zeroing* held only that zeroing was inconsistent with the AD Agreement in the context of average-to-average comparisons in original investigations, the practice nevertheless violates the overarching principles of fairness that are embodied in the WTO agreements. The reasons that zeroing is unfair in investigations, namely, that it introduces a distortion and inherent bias into the dumping comparison are equally applicable to administrative reviews. Just as in investigations, zeroing in reviews fails to take into account the entirety of some export price transactions and leads to exaggerated and often grossly distorted dumping margins. Although the panel decision provides the United States with a loophole by which the Department can continue to zero in administrative reviews, it is incumbent upon the United States -- as a good-faith member of the world trading community -- to put an end to the practice in all types of antidumping duty proceedings. Moreover, as with investigations, the Department should implement any decision to eliminate zeroing in reviews for all proceedings where the results are not yet final.

JISF also takes this opportunity to note that the panel's narrow application of the AD Agreement's prohibition against zeroing only to original investigations is in error. The continuation of the application of zeroing in any type of inquiry into the existence of dumping, whether conducted pursuant to an average-to-average, transaction-to-

transaction, or average-to-transaction comparison methodology violates the "fair comparison" principle articulated in Article 2.4 of the AD Agreement, as well as the requirement that margins of dumping should be estimated on the product as a whole, consistent with Article 2.1. As the Appellate Body explained in *Lumber V*, Article 2.1, defines dumping, "in relation to a product as a whole as defined by the investigating authority.… 'Dumping', within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product."[23] Moreover, the Appellate Body stated in EC-Bed Linens that, "a comparison between export price and normal value that does *not* fully take into account the prices of *all* comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2."[24] In light of the Appellate Body's interpretation of Articles 2.1 and 2.4, JISF believes that the panel decision in *US-Zeroing* errs insofar as it does not also find that the zeroing practice is inconsistent with the AD Agreement in review proceedings.

D. Zeroing Should also be Abandoned in any Pending Remand Re-determinations for Orders Imposed Subsequent to the URAA.

For reasons of administrative and judicial efficiency, the Department should also implement its change in practice in any remand redetermination of any final antidumping determination where the rates included in the antidumping duty order are not yet final. The WTO's reasoning in *US-Zeroing* makes it clear that, without exception, the failure to include the results of price comparisons in which the weighted average normal value is

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[23] Appellate Body Report, *Lumber V,* para 93.

[24] Appellate Body Report, *EC-Bed Linen*, para 55 (italics in original, underline added).

less than the weighted average export price in calculating a margin of dumping for the product under investigation as a whole, is inconsistent with the AD Agreement. Therefore, to continue to apply this practice in remand redeterminations would be a deliberate and purposeful violation of the AD Agreement. Hence, JISF urges the Department to exercise prudence and eliminate the practice of zeroing in all investigations where a final determination is pending, including determinations pending as a result of U.S. litigation.

The implementation of this change in policy is exceedingly simple to execute. The Department's standard margin program zeroes out all negative margins only when all other aspects of the margin calculation (e.g., cost test, concordance, calculation of weighted-average normal values and weighted average export prices) have been completed. After the Department compares weighted-average net U.S. prices to weighted-average normal values by CONNUM, the program sums these individual, CONNUM-specific comparisons and divides the result by the total net sales value in order to calculate the overall company-specific weighted-average margin. However, the Department applies its zeroing methodology in this step by including only positive PUDDs in the numerator. Hence, to eliminate zeroing from its overall company-specific margin calculation, the Department need only delete one line of programming language from the standard margin program. Specifically, the Department should delete "**WHERE EMARGIN GT 0**;" from the data step in Part 10 titled "Calculate Overall Margin," as illustrated below:

```
PROC MEANS NOPRINT DATA = MARGIN;
/*WHERE EMARGIN GT 0;*/
VAR EMARGIN QTYU VALUE;
```

```
OUTPUT OUT = ALLPUDD  (DROP = _FREQ_ _TYPE_)
SUM = TOTPUDD MARGQTY MARGVAL;
RUN;
```

V. Conclusion

JISF appreciates the opportunity to comment on the Department's proposed modification to its zeroing practice in original investigations. If you have any questions about these comments, please contact one of the undersigned.

Respectfully Submitted,

William H. Barringer
Daniel L. Porter
Valerie Ellis