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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 Yamaha Motor Co., Ltd. and Yamaha Motor Corp., USA, located at 2500 Shingai, Iwata, Shizuoka 438-8501, Japan and 6555 Katella Avenue, Cypress, California, respectively, 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
Matthew P. McCullough

Counsel to

Yamaha Motor Co., Ltd. and
Yamaha Motor Corp., USA

Before the United States Department of Commerce
International Trade Administration

Comments of Yamaha Motor Co., Ltd. and Yamaha Motor Corp., USA on the Department's Proposal to Terminate Its Zeroing Practice When Calculating Antidumping Margins

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INTRODUCTION AND SUMMARY

On behalf of Yamaha Motor Co., Ltd. and Yamaha Motor Corp., USA ("Yamaha"), we are pleased to offer the following submission 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.[1] Yamaha's comments address both 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),[2] as well as the need to extend such change in practice to reviews.

Trading rules under the World Trade Organization ("WTO") are an important component of an efficient global economy and a fair and transparent global trade regime. Such rules are meaningless absent a commitment by WTO Members to respect them and honor the outcome of dispute settlement. In this regard, Yamaha recognizes that this comments process reflects the Department's efforts to bring U.S. antidumping practices into alignment with its obligations under WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"). Yamaha therefore applauds the Department's action and appreciates the opportunity to provide these comments regarding the elimination of zeroing.

In summary, Yamaha encourages the Department to quickly implement its proposal to eliminate the practice of zeroing in original antidumping duty investigations

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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 *Id*.

where the average-to-average comparison methodology is used to calculate margins. Such action is necessary to bring U.S. practice into compliance with the panel decision in *US-Zeroing*.[3] It is a long-overdue change to the Department's interpretation and application of U.S. law, embracing a fair comparison in the context of dumping calculations that is also in harmony with U.S. international obligations under the AD Agreement.

In changing its practice, the Department should further maintain its preference for average-to-average comparisons in calculating dumping margins in original investigations. Such preference is embodied in the trade laws of the United States, to be interpreted in light of Executive and Congressional intent as expressed in the Statement of Administrative Action ("SAA") that accompanied the Uruguay Round Agreements Act ("URAA"). Transaction-to-transaction comparisons -- the only allowable alternative methodology permitted under the AD Agreement -- would be an extreme and unsupported revision to U.S. law and practice that would only bring the U.S. antidumping regime under renewed legal scrutiny.

Finally, the Department should take the added step of eliminating the practice of zeroing in the context of administrative reviews. Although the panel in *US-Zeroing* limited itself to the narrow finding that zeroing was inconsistent with the AD Agreement in the context of average-to-average comparisons in original investigations, the reasons that zeroing is unfair in original investigations are equally applicable to administrative reviews. Simply put, zeroing introduces a distortion and inherent bias into the dumping comparison. The flaws are no less glaring in the context of an administrative review.

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

Whether in an original investigation or review, zeroing fails to take into account the entirety of some export price transactions and leads to exaggerated and often grossly distorted dumping margins. There is no reasonable logic to sustain the distinction in practice. The United States -- as a good-faith member of the world trading community -- should put an end to the practice in all types of antidumping duty proceedings.

DISCUSSION

I. Zeroing in Average-to-Average Investigations Should be Abandoned

The practice of zeroing in antidumping investigations has been found to be inconsistent with Article 2.4.2 of the AD Agreement.[4] Specifically, 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)." As expressly noted in the context of WTO dispute settlement, 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, zeroing does not take fully into account the entirety of the export price for those transactions where price exceeds normal value.[5]

The Department is to be commended, therefore, for advancing a proposal that would eliminate its practice of zeroing in investigations – a practice that fails to make a "fair comparison" between export price and normal value, as required by Article 2.4 and

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[4] *Id.*; *See also European Communities - Anti-Dumping Duties on Imports Of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R ("*EC – Bed Linens*"), para. 55. (Oct. 30, 2001).

[5] *Id*.

by Article 2.4.2 of the AD Agreement. Yamaha fully supports the proposal and its quick adoption.

Yamaha further believes that the proposal to abandon zeroing in investigations is supported by other aspects of U.S. international obligations and U.S. law. First, 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 demands the end of the zeroing practice. As the Appellate Body explained in *EC-Bed Linens,* "[w]hatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole."[6] This principle, though not expressly embraced by the panel in *U.S. – Zeroing*, would indicate that the practice of zeroing is invalid in any context.

Second, Yamaha believes that the Department's decision to change its margin calculation practice to make it compatible with the AD Agreement is not merely an action to implement a WTO dispute settlement ruling. To the contrary, Yamaha considers it to be a proper interpretation of existing U.S. law, which has 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 proposed new practice more soundly reflects an interpretation of U.S. law that is in harmony with U.S. international obligations.[7]

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6 *EC-Bed Linens,* para. 53.

7 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).

II. The Use of the Average-to-Average Calculation Methodology in Investigations Is Both Reasonable and Preferred.

Yamaha notes that the Department's request also "seeks comment on the alternative approach(s) that may be appropriate in future investigations."[8] In this regard, we would strongly dissuade the Department from considering any proposal that would move the Department's practice away from its average-to-average methodology toward a transaction-based methodology. Rather, all that is required by the WTO panel decision is the deletion of a single line of programming in the Department's standard margin calculation computer program. Under the circumstances, a broader revision to the Department's investigation methodology as a result of the WTO panel decision would make little sense. Moreover, there is a clear regulatory and statutory preference for the use of average-to-average comparisons in antidumping investigations. The elimination of zeroing from these average-to-average comparisons should not be considered an invitation to depart from this long-standing margin calculation practice.

A. Continuing to Make Average-to-Average Comparisons in Antidumping Investigations is Still The Most Reasonable Approach

The SAA clearly notes that the transaction-to-transaction methodology for margin calculations can only be used with great difficulty.[9] The Department's implementation of the Appellate Body decision in *Lumber V*[10] is a testament to this wisdom, demonstrating just how incredibly complex such a comparison can become when examining a situation where there are a significant number of export transactions. In the Lumber case, the

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[8] 71 Fed. Reg. 11189.

[9] Statement of Administrative Action accompanying H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. ("SAA") at 843 (1994).

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

Department employed a series of criteria to arrive at the most comparable normal value sale for any given export sale.

Beginning with the standard criteria used by the Department in average-to-average investigations -- level of trade and product similarity – the hierarchy quickly ballooned to incorporate contemporaneity, quantity sold, customer category, channel of distribution, total movement expenses, commissions paid, and credit period in an attempt to identify the most similar normal value sale. Still, even under this complex hierarchical approach, multiple possible matches were found in some instances, leaving the Department to choose the first possible match among equal matches.[11]

The legislative history to the URAA does not countenance such complex comparisons. Rather, a transaction-to-transaction methodology is to be applied in only rare cases, and specifically "in situations where there are very few sales and the merchandise sold in each market is identical or very similar or is custom-made."[12] The Department cannot justify a departure from the clear guidance and limits set by this expression of Executive and Congressional intent.

B. The Use of Average-to-Average Comparisons in Antidumping Investigations is Clearly Preferred.

The trade laws of the United States establish a clear hierarchy between average-to-average and transaction-to-transaction methodologies, with the transaction-to-transaction methodology plainly disfavored. In other words, unlike the practice of zeroing, which involved one possible interpretation of ambiguous statutory language, the

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[11] *Preliminary Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, pp. 5-7 (Jan. 31, 2005), accessible at http://ia.ita.doc.gov/download/ section129/Canada-Lumber-129-Prelim-013105.pdf.

[12] SAA at 842.

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."[13] 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." The Department's regulations at 19 C.F.R. § 351.414(c)(1) codify the preference set forth in the SAA,[14] stating that, "in an investigation, the Secretary normally will use the average-to-average method."[15]

The issue of using alternative comparison methodologies when determining dumping margins is not new to the Department. Specifically, when the Department revised its anti-dumping regulations pursuant to the URAA, it devoted considerable narrative and analysis 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

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13 19 U.S.C. § 3512(d).

14 SAA at 842-43.

15 19 CFR § 351.414(c)(1)("Preferences").

in an antidumping investigation will be the average-to-average method."[16] Indeed, 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." Comments suggesting even a subtle modification to the Department proposed regulations, allowing transaction-to-transaction comparisons in "appropriate situations" rather than "unusual situations," were rejected.[17]

III. The Department Should Extend its Change in Practice to Other 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 eliminate 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.* At stake are overarching principles of fairness embodied in the WTO agreements. Simply put, 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.

Thus, 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 Department should not receive this narrow finding as loophole by

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[16] *Antidumping Duties; Countervailing Duties: Proposed Rule*, 61 Fed. Reg. 7308, 7348, (Dep't Commerce Feb. 27, 1996).

[17] *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27,296, 27,373-74 (Dep't Commerce May 19, 1997).

which it may continue to zero in administrative reviews and perpetuate the distortions discussed above. Rather, 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.

Yamaha believes the panel's narrow application of the AD Agreement's prohibition against zeroing is plain 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. It also violates 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."[18] 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."[19] In light of the Appellate Body's interpretation of Articles 2.1 and 2.4, Yamaha believes that the panel decision in *US--Zeroing* errs insofar as it does

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[18] *Lumber V,* para 93.

[19] *EC-Bed Linen*, para 55 (italics in original).

not also find that the zeroing practice is inconsistent with the AD Agreement in review proceedings.

CONCLUSION

Yamaha 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,

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Daniel L. Porter
Matthew P. McCullough