May 4, 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,[1] we submit the following rebuttal 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 on alternative comparison methodologies to be used in investigations in light of the WTO panel report in *United States - Zeroing*.

[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*").

As requested by the Department, Corus and Arcelor are enclosing one original and six copies of this rebuttal 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.

Respectfully submitted,
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Enclosure

**PUBLIC DOCUMENT**

# REBUTTAL 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 AND APPELLATE BODY REPORTS IN *UNITED STATES - ZEROING*

Dated: May 4, 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 did not appeal this aspect of the panel report and requested comments on two issues:[5] first, the Department's proposal to abandon in investigations average-to-average price comparisons with zeroing; second, the proper course for the

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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) ("*Zeroing Panel Report"*).

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

[5] We note that the United States did appeal 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).

development of a new standard price comparison methodology for antidumping investigations "in light of the panel's report in *U.S. - Zeroing*."[6]

In response to the *Request for Comments*, Corus Group plc ("Corus") and Arcelor S.A., and its subsidiaries and affiliated companies (collectively "Arcelor") filed joint comments on April 5, 2006. Twenty-seven additional parties also filed comments in response to the *Request for Comments*. Corus and Arcelor submit these rebuttal comments in response to those additional parties' comments. In addition, since the Department published the *Request for Comments*, the WTO Appellate Body has circulated a report in the *United States - Zeroing* dispute.[7] Therefore, these comments also will address this Appellate Body report and the extent to which the Appellate Body's findings support the Department's proposal to abandon zeroing and provide guidance for the Department in developing a new standard comparison methodology.

As discussed fully below, Corus and Arcelor continue to support the Department's proposal to abandon zeroing in its average-to-average price comparisons in investigations. Abandoning zeroing in this manner will ensure that the United States is complying with its international obligations. For the reasons discussed below, however, Corus and Arcelor do not support various parties' comments arguing for the Department to change its standard

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

[7] Appellate Body Report, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (Circulated April 18, 2006) ("*Zeroing Appellate Body Report*").

methodology from an average-to-average to a transaction-to-transaction price comparison. Such a change is improper in light of the Statement of Administrative Action[8] ("SAA") and the Department's regulations. At a minimum, such a change is contrary to U.S. law unless the Department engages in formal notice and comment rulemaking in order to repeal or amend its current regulations. Finally, Corus and Arcelor believe that irrespective of the standard methodology the Department employs in future antidumping investigations, the Department must employ the average-to-average price comparison methodology without zeroing in the antidumping investigations that were the subject of the WTO dispute in *United States - Zeroing* and take appropriate action with respect to duty assessment in those proceedings.

These comments are organized in the following manner. First, Corus and Arcelor will discuss the recently circulated *Zeroing Appellate Body Report* and how this report supports the Department's proposal to abandon zeroing in average-to-average price comparisons in investigations. Second, Corus and Arcelor will discuss how the *Zeroing Appellate Body Report* supports Corus' and Arcelor's earlier arguments pertaining to the Department's development of a new comparison methodology. Third, these comments will address the *Zeroing Appellate Body Report* as it relates to the challenged antidumping administrative reviews. Fourth, these comments will address multiple parties' comments arguing that U.S. law requires the Department to zero. Fifth, these comments will address the extent to which the Department's

[8] 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. 3773, 4163.

proposal to abandon zeroing should be applied in investigations in which the Department employs a constructed normal value or surrogate value. Sixth, these comments discuss the extent to which the Department must meet notice and comment requirements in order to abandon zeroing and develop a new standard comparison methodology. Seventh, these comments address several parties' suggestion that the Department consider various transaction-to-transaction methodologies as its new standard comparison methodology. Eighth, these comments address the price comparison methodology that the Department must apply in the antidumping investigations that formed the basis of the *United States - Zeroing* WTO dispute. Finally, these comments discuss the extent to which the Department should rescind the results reached to date in the administrative reviews conducted in the challenged antidumping proceedings where the determination in the original investigations would have been negative absent zeroing.

## II. The Appellate Body's Report in *United States - Zeroing* Supports the Department's Proposal To Abandon Zeroing in Average-to-Average Price Comparisons in Investigations.

The WTO impermissibility of the use of zeroing by the United States in the average-to-average comparison methodology in investigations is now conclusively resolved by the April 18 *Zeroing Appellate Body Report*. That report states that the Appellate Body:

> *finds*, . . . that the zeroing methodology, as it relates to original investigations in which the weighted-average-to-weighted average comparison methodology is used to calculate margins of dumping, can be challenged, as such, in WTO dispute settlement; and *upholds* the Panel's conclusion . . . that this methodology is

> inconsistent, as such, with Article 2.4.2 of the *Anti-dumping Agreement*;[9]

There is no further room for dispute. Implementation of this *Zeroing Appellate Body Report* requires the United States to abandon the use of zeroing in average-to-average price comparisons in investigations.

## III. The Appellate Body's Report Supports Corus's and Arcelor's Earlier Arguments Pertaining to the Department's Development of a New Comparison Methodology

Corus and Arcelor argued in their original submission that there is no principled basis under the WTO Agreements to distinguish between zeroing in an average-to-average comparison methodology and zeroing in a transaction-to-transaction comparison methodology.[10] While the Appellate Body in *United States - Zeroing* did not have before it, and thus made no findings on, the issue of zeroing in the transaction-to-transaction methodology in investigations,[11] the rationale for its decision, when applied to the transaction-to-transaction methodology, clearly establishes that zeroing in the transaction-to- transaction methodology is equally WTO-impermissible. For example, in *United States - Zeroing* the Appellate Body adopts the reasoning of *EC - Bed Linen* and *US - Softwood Lumber V*, that "margins of dumping must be

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[9] *Zeroing Appellate Body Report*, para. 263(b).

[10] "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*," p. 14 (April 5, 2006) ("Corus and Arcelor Original Submission").

[11] *Zeroing Appellate Body Report*, para. 203 and n. 361.

established for the product under investigation as a whole," that this requires aggregating the results of "multiple comparisons or multiple averaging at an intermediate stage," and that this in turn requires inclusion in the aggregation of *all* these "intermediate values." Emphasizing this point, the Appellate Body said "there is no justification for taking into account the results of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other results."[12]

There can be no rational distinction between disregarding some of the results of model group comparisons in the average-to-average comparison methodology and disregarding some of the results of individual transaction comparisons in the transaction-to-transaction method. Indeed, in *United States - Zeroing*, the Appellate Body makes clear that it was articulating a principle of general applicability, one not limited to the average-to-average methodology:

> Although, in *US - Softwood Lumber V*, the Appellate Body dealt with a claim regarding the determination of a margin of dumping in an original investigation when using the weighted-average-to-weighted-average methodology provided for in the first sentence of Article 2.4.2, it stated unambiguously that the terms 'dumping' and 'margins of dumping' in Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to the product under investigation as a whole. This finding was based not only on Article 2.4.2, first sentence, but also on the context found in Article 2.1 of the *Anti-Dumping Agreement*.[13]

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[12] *Id.*, para. 126 (citations omitted).

[13] *Id.* (citations omitted).

This language leaves no doubt that zeroing will be found impermissible in any aggregation of the results of intermediate comparisons to reach the requisite overall margin of dumping for the product as a whole. Therefore, the United States will be found to have acted inconsistently with its obligations under the *Antidumping Agreement* if the Department employs zeroing in the transaction-to-transaction methodology.

## IV. To Fully Implement the *United States - Zeroing* report as Amended by the Appellate Body, the Department Must Correct the WTO-Impermissible Zeroing in the 16 Administrative Reviews that Were the Subject of the "As Applied" Challenge and Should Ensure that in All Other Administrative Reviews the Amount of Duty Assessed Does Not Exceed the Margins of Dumping Properly Calculated Without Zeroing

The Appellate Body report in *US - Zeroing* is equally definitive as regards the impermissibility of zeroing in duty assessments conducted in administrative reviews. For example, as to the administrative reviews challenged by the European Communities the Appellate Body:

> *reverses* the Panel's findings . . . that the United States did not act inconsistently with Article 9.3 of the *Anti-Dumping* Agreement and Article VI:2 of the GATT 1994, and *finds*, instead, that the United States acted inconsistently with those provisions;[14]

[14] *Id.*, para. 263(a)(i).

Implementation of this decision will require the Department, in each of the challenged administrative review assessment proceedings, to refund any cash deposits collected in excess of the margins of dumping calculated in a WTO-permissible manner, *i.e.* without zeroing.[15]

The Department also should terminate the practice of zeroing and perform appropriate recalculations in all on-going administrative reviews. While the Appellate Body did not "complete the analysis" necessary to find the U.S. practice of zeroing "as such" impermissible, it voided as moot the panel's finding that administrative review zeroing is permissible under the WTO Agreements.[16] More importantly, the Appellate Body's analysis sets forth principles of general applicability to all duty assessment proceedings.[17] Specifically, the Appellate Body addressed "the methodology applied by the USDOC in the administrative reviews at issue."[18] Because this methodology disregarded the results of individual comparisons where "the export price exceeded the contemporaneous average normal value"[19] (in other words, where the Department zeroed), the methodology "resulted in amounts of assessed anti-dumping duties that

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[15] In the context of a WTO decision concerning duty assessment conducted in an administrative review, limitation of implementation of the adverse WTO report to imports entering after the WTO report was circulated, for example, is obviously WTO-impermissible. To apply such a limitation in this context would make an as applied WTO decision on duty assessment a nullity.

[16] *Zeroing Appellate Body Report*, paras. 226-28.

[17] *Id.*, paras. 126-35.

[18] *Id.*, para. 132.

[19] *Id.*, para. 133.

exceeded the foreign producers' or exporters' margins of dumping," and therefore "the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994."[20]

This same analysis, of course, is equally applicable to every administrative review in which the Department assesses duties in excess of the properly calculated margins of dumping, *i.e.*, in every administrative review in which the Department zeroes. There is no reason to believe that any such administrative review decisions would survive a WTO challenge. Accordingly, the Department should abandon zeroing in every administrative review in order to ensure that the amount of duty assessed in administrative reviews does not exceed the margins of dumping established without zeroing and, where necessary, the Department should refund cash deposits collected in excess of this amount.

## V. Response to Other Parties' Comments

### *A. U.S. Law Permits the Department To Abandon Zeroing in Average-to-Average Price Comparisons in Investigations*

Notwithstanding the WTO panel's determination in *US - Zeroing* that zeroing in average-to-average price comparisons in investigations is WTO-inconsistent, a determination that the United States did not appeal, several parties argue that U.S. law precludes the

[20] *Id.*

Department from abandoning zeroing.[21] For the reasons discussed fully below, the Department should reject these arguments because they find no support in U.S. law and directly conflict with settled judicial interpretation of the Antidumping Law.[22] Instead, consistent with the Department's stated intention in the *Request for Comments*, the Department should abandon zeroing in average-to-average price comparisons made in investigations.

1. U.S. Law Does Not Require the Department To Zero

Several parties argue that the Antidumping Law requires the Department to zero in antidumping investigations. The Department must reject these arguments because they conflict with clear precedent from the United States Court of Appeals for the Federal Circuit. For example, in *Timken v. United States* ("*Timken*") the Federal Circuit held that the Antidumping Law does not require the Department to zero.[23] Instead, the court found that ambiguity in the

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[21] *See, e.g.*, Letter from Committee to Support U.S. Trade Laws to Assistant Secretary Spooner "Re: *Antidumping Proceedings: Calculation of Weighted Average Dumping Margin During Antidumping Investigations*," p. 4 (April 5, 2006) ("CSUSTL Comments"); Letter from Collier Shannon Scott, PLLC to Assistant Secretary Spooner, "Re: *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin*," p. 2 (April 5, 2006) ("Collier Comments"); Letter from United States Steel Corp. to Assistant Secretary Spooner, "*Attention: Weighted Average Dumping Margin*," p. 2 (April 5, 2006) ("U.S. Steel Comments").

[22] Sec. 731, *et seq.* of the Tariff Act of 1930 as amended ("the Act" or "the Statute"); *see also,* 19 U.S.C. § 1673, *et seq.*

[23] *Timken v. United States*, 354 U.S. 1334, 1342 (Fed. Cir. 2004) (concluding that the text of the Antidumping Law "does not unambiguously require that dumping margins be positive numbers").

Antidumping Law provides Commerce with discretion to determine whether to zero.[24] A year later, in *Corus Staal BV v. United States* ("*Corus Staal*"), the Federal Circuit affirmed *Timken, in toto*, and held that irrespective of whether the Department was conducting an antidumping investigation or administrative review, the Department's zeroing methodology was a reasonable, as opposed to required, interpretation of the Antidumping Law.[25] Both of these cases clearly establish that the Antidumping Law does not require zeroing and that the determination whether to zero is a matter left by the Antidumping Law to the Department's discretion. Moreover, it was the United States' explicit position in the *United States - Zeroing* dispute, relying largely on *Timken* and *Corus Staal*, that U.S. law does not require zeroing.[26] Therefore, the Department must reject out-of-hand arguments that are premised on the Antidumping Law requiring zeroing in contradiction to clear Federal Circuit precedent and the United States' own stated position.

Two parties attempt to evade the holding of *Timken* and *Corus Staal* by arguing that the Antidumping Law requires zeroing based on a statutory provision that they claim the Federal

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[24] *Id.*, 354 U.S. at 1342 ("We conclude Commerce based its zeroing practice on a reasonable interpretation of the statute. First, while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction.").

[25] *Corus Staal v. Dep't of Commerce*, 395 F.3d 1343, 1346-1347 (Fed. Cir. 2005) (stating that "*Timken* governs, and the Court of International Trade was correct to find Commerce's zeroing methodology permissible in the context of administrative reviews") ("*Corus Staal*").

[26] *See, e.g., Panel Report*, paras. 4.186 - 4.189.

Circuit did not consider in either of those cases.[27] Specifically, these parties argue that the Antidumping Law requires the Department to zero because otherwise the targeted dumping provision in the Antidumping Law would be rendered superfluous.[28] As an initial matter, Corus and Arcelor disagree that the Federal Circuit never has been presented with this argument.[29] Moreover, this argument fails because a determination to abandon zeroing will not render the targeted dumping provisions superfluous.[30]

The targeted dumping provision in the Antidumping Law allows the Department to make a dumping determination in an investigation for a subset of imports based on purchasers, regions, or a time period.[31] Under the targeted dumping analysis, the Department compares weighted-average normal values to the export prices (or constructed export prices) of individual transactions in the relevant subset.[32] Three aspects of the targeted dumping analysis ensure that

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[27] *See*, U.S. Steel Comments, pp. 3-4; CSUSTL Comments, pp. 5-9.

[28] *See*, U.S. Steel Comments, pp. 6-9.

[29] This issue was argued fully to the Federal Circuit in *Corus Staal*. *See, e.g.*, Brief of Defendant-Appellee United States Steel Corp., pp. 14-28, Corus Staal BV v. Dep't of Commerce, No. 04-1107 (Fed. Cir. April 13, 2004); Reply Brief of Plaintiffs-Appellants Corus Staal BV and Corus Steel USA Inc., pp. 17-22, Corus Staal BV v. Dep't of Commerce, No. 04-1107 (Fed. Cir. May 7, 2004).

[30] It should be noted that, although the United States presented this argument vigorously, this argument did not dissuade the Appellate Body in *United States - Zeroing*. *See, e.g., Zeroing Appellate Body Report*, para. 44.

[31] Sec. 777A(d)(1)(B) of the Act.

[32] 19 C.F.R. § 351.414(f).

irrespective of whether the Department abandons zeroing, the targeted dumping methodology will not produce the same results as the average-to-average or transaction-to-transaction comparison methodologies. First, the inherent, fundamental nature of the targeted dumping methodology, indeed its *raison d'etre*, is that it addresses a situation where an exporter's practice of dumping is not overall, but rather limited to a defined subset of its U.S. exports.[33] As explicitly provided for in the Department's regulations, a targeted dumping analysis employs a separate computation as to the targeted subset of imports.[34] The subset computation result is unaffected by the results of comparisons of sales outside the subset. Thus, a targeted dumping methodology does *not* inevitably yield the same result as an overall non-zeroed computation, whether the overall computation is done on an average-to-average or transaction-to-transaction basis.

Second and consistent with the first point, under the terms of the statutory provision, the exception is only applicable if the Department explains why the export prices (or constructed export prices) that differ within the targeted subset "cannot be taken into account using" the average-to- average or transaction-to-transaction methodology.[35]

Third, the manner in which home market sales are averaged in a targeted dumping analysis ensures different results irrespective of zeroing. The targeted dumping regulation

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[33] SAA at pp. 842-43.

[34] 19 C.F.R. § 351.414(f)(2).

[35] Sec. 777A(d)(1)(B)(ii) of the Act.

provides an exception to the requirement that the Department make its price comparisons in investigations either on an average-to-average or transaction-to-transaction basis. In a targeted dumping analysis, the Department employs as to the targeted subset the average-to-transaction comparison methodology that the Department normally employs for administrative reviews.[36] Under that methodology, the average home market prices which the Department compares to individual U.S. transactions are calculated in a different manner than the average home market prices that are used in the average-to-average comparison methodology in investigations.[37] This inherent difference signifies that irrespective of whether the Department abandons zeroing, the targeted dumping methodology will produce results distinct from the standard average-to-average comparison methodology. For all of these reasons, then, the Department's proposal to abandon zeroing will not render the targeted dumping provisions under U.S. law superfluous and the Department must reject the parties' arguments to the contrary.[38]

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[36] 19 C.F.R. § 351.414(f)(1).

[37] Compare 19 C.F.R. § 413(e) with 19 C.F.R. § 413(d) (evidencing that in administrative reviews averaging of home market prices is limited to a contemporaneous month and such monthly-average analyses are conducted month-by-month over a period as long as 17 months, while in investigations the averaging of home market prices creates a single weighted-average for the 12-month period of investigation).

[38] Corus and Arcelor note two additional arguments. First, one party argues that the Department should codify new targeted dumping regulations in order to establish when the Department must conduct a targeted dumping analysis. "Comments regarding the Calculation of Weighted Average Dumping Margins in Antidumping Duty Investigations Prepared by the Law Offices of Stewart and Stewart," p. 17-19 & n. 44 (April 5, 2006) ("Stewart & Stewart Comments"). Corus' and Arcelor's position is that the Department is, of course, free to amend its targeted dumping regulations. However, any amendment to the Department's regulations

2. The Antidumping Law Does Not Require the Department To Continue To Zero in Order To Properly Account for All Dumping

Two parties argue that the Antidumping Law requires the Department to zero in order "to account for all unfairly traded imports."[39] Under these parties' reasoning, the Department fails to account for all dumping when it makes a dumping determination based on an average of all of an exporters' sales because through the averaging process the sales that were made above normal value will mask those sales that were made below normal value. The Department must reject this argument because it misconstrues the basic concept of dumping and is a gross misstatement of the Department's current practice.

First, as an initial matter and as discussed above, clear Federal Circuit precedent establishes that the Antidumping Law does not require the Department to zero. Thus, a proper measurement of dumping is not dependent on zeroing. Indeed, this argument -- that it is only

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must be consistent with the targeted dumping provisions in the Act and comply with the APA's formal notice and comment rulemaking requirements. Second, one party argues that the Congress has implicitly endorsed zeroing because it made numerous amendments to the trade laws without requiring the Department to change how it zeros. Stewart & Stewart Comments, p. 8. This argument must be rejected for at least two reasons. First, it must be rejected because recent enactments to the Antidumping Law have altered how the Department conducts price comparisons (*e.g.*, the targeted dumping provisions). Second, as the Department noted before the WTO panel, nowhere has the Department announced or codified a "practice of zeroing." Thus, extensive congressional knowledge of how the Department zeroes is unlikely. For both of these reasons, then, congressional acquiesce to, or approval of, zeroing may not be inferred.

[39] *See,* Stewart & Stewart Comments, p. 8; Letter from Committee on Pipe and Tube Imports to Assistant Secretary Spooner, "Attention: *Weighted Average Dumping Margin*," pp. 9-10 (April 5, 2006) ("CPTI Comments").

through zeroing that the Department may capture all of an exporter's dumping -- interprets the meaning of dumping and the United States' WTO obligations 180 degrees backwards. As the WTO Appellate Body has made crystal clear, the task of an administering authority is to determine whether an exporter engages in an overall practice of dumping.[40] Such a practice exists whenever a margin greater than *de minimis* is found for the investigated product as a whole, that is, after aggregating the results of all intermediate comparisons made with respect to CONNUMs or transactions to determine an overall "margin of dumping." The Appellate Body has explicitly rejected the notion that the results of individual comparisons are "dumping margins"; rather, those are simply the results of intermediate comparisons, not "dumping margins."[41] Therefore, the requirement is not that "all dumped imports be addressed" but rather that "all imports must be addressed in order to determine whether dumping exists."

Second, it is simply false to say, as one party does, that the Department has always calculated dumping margins "so as to ensure that every instance of dumping above a *de minimis* level was accounted for in a determination of dumping."[42] For example, combining the above *de minimis* comparison results from some sales with the below *de minimis* comparison results on other sales is precisely what the Department does within each CONNUM in the first step of the

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[40] In the context of targeted dumping, the issue is whether the exporter has engaged in a practice of dumping with respect to a defined subset of sales.

[41] *See, e.g., Zeroing Appellate Body Report*, para. 126.

[42] Stewart & Stewart Comments, p. 7.

Department's average-to-average with zeroing comparison methodology. Thus, because this argument is premised on the incorrect assumption that the Department never has combined above and below *de minimis* margins in its average-to-average price comparison methodology, the Department should reject the argument and instead find that, consistent with Federal Circuit precedent and the United States' international obligations as clarified by the WTO Appellate Body, the Antidumping Law permits the Department to abandon zeroing in average-to-average price comparisons.[43]

3. The Ongoing Doha Round of Multilateral Trade Negotiations Does Not Require the Department To Continue To Zero

Several parties argue that the on-going Doha Round of multilateral trade negotiations makes it inappropriate for the Department to abandon zeroing.[44] For example, one party argues that the United States' Doha Round negotiating position is that any obligations with regard to zeroing should be negotiated through the Doha Round. This party also states that the United States has already placed zeroing on the agenda of the Negotiating Group on Rules.[45] In

[43] Corus and Arcelor note that under the rationale of this party's argument, the practice of combining the above and below *de minimis* sales leaves the sales priced below normal value partially "unaddressed." However, no one has ever explained, or could explain, any principled basis to distinguish the Department's inclusion of above-normal value exports in the intra-CONNUM average from the so called "offsetting" that results from abandoning zeroing.

[44] *See, e.g.*, Stewart & Stewart Comments, pp. 1-6; CSUSTL Comments, p. 3; and Collier Comments, p. 2.

[45] Stewart & Stewart Comments, p. 4.

addition, this party argues that language in the Trade Act of 2002 supports the Department continuing to zero during the pendency of the Doha Round. Thus, this party concludes that it is premature for the Department to abandon zeroing in response to the *United States - Zeroing* WTO dispute.[46] The Department must reject these arguments because neither the existence of the Doha Round nor the language in the Trade Act of 2002 to which the parties cite provides a basis for the Department to take the extraordinary step of refusing to implement, or delaying implementation of, an adverse WTO report.

First, irrespective of any United States desire to negotiate obligations pertaining to zeroing in the Doha Round, the Appellate Body and the panel in *United States - Zeroing* have made clear that the obligation not to zero in average-to-average price comparisons in investigations already exists under the WTO Agreements. The United States must accept this position in light of the United States' decision not to appeal the portion of the panel decision in *United States - Zeroing* that found zeroing in average-to-average price comparison in investigations WTO-inconsistent. Thus, irrespective of the United States' purported desire to negotiate obligations pertaining to zeroing in the ongoing Doha Round, the United States is under a current obligation to refrain from zeroing.

Second, neither the WTO Dispute Settlement Understanding nor U.S. law recognizes on-going multilateral trade negotiations as a basis to delay or refrain from implementing adverse WTO reports. Moreover, the language in the Trade Act of 2002 to which the parties cite does

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[46] *Id.*

not support their argument that the Department should delay implementing its decision to abandon zeroing during the pendency of the Doha Round. For example, the parties refer to a finding of Congress in the Trade Act of 2002 that simply states that some WTO dispute settlement panels and Appellate Body decisions have "raised concerns."[47] Another portion of the Trade Act of 2002 simply states that in conducting WTO negotiations one of the United States' principal objectives is to strengthen the effectiveness of trade remedy laws.[48] Obviously, neither of these portions of the Trade Act of 2002 provides a legal basis for the Department to take the extraordinary step of refusing to implement an adverse WTO report. To the contrary, the United States would weaken seriously its position in the international community if it were to fail to comply with its international obligations by refusing to abandon zeroing in average-to-average price comparisons in investigations.

### *B. The Department Should Abandon Zeroing in All Investigations Including Those In Which the Department Employs a Constructed Normal Value or a Surrogate Value*

One party argues that the Department's international obligation to abandon zeroing in average-to-average price comparisons in investigations excludes investigations where the Department calculates a constructed normal value or employs a non-market economy ("NME")

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[47] 19 U.S.C. § 3801(b)(3)(A).

[48] 19 U.S.C. § 3802(b)(14).

methodology.[49] This party reasons that the obligation does not exist because no WTO report has found the Department's average-to-average with zeroing price comparison violative of the WTO agreements in cases employing constructed normal value or a NME methodology.[50] This argument is factually and legally incorrect and must be rejected by the Department.

First, Corus and Arcelor note that this argument is factually incorrect because in several of the antidumping investigations that were the subject of the "as applied" challenge in *United States - Zeroing*, the Department employed a constructed normal value.[51] The WTO panel found that in every challenged investigation, without exception, the United States violated its WTO obligations when it employed an average-to-average with zeroing comparison methodology.[52] Moreover, the United States did not appeal this portion of the panel report. Therefore, there can be no question that the United States' obligation to abandon zeroing extends to investigations in which the Department employs alternative normal value methodologies such as constructed normal value.

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[49] Stewart & Stewart Comments, pp. 19-20.

[50] *Id.*

[51] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Sweden*, 63 Fed. Reg. 40449, 40452 (July 29, 1998); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. 40422, 40423-24 (July 29, 1998); *Notice of Preliminary Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Products from the Netherlands*, 66 Fed. Reg. 22146, 22151 (May 3, 2001).

[52] *Zeroing Panel Report*, para. 7.32.

Second, this argument is legally incorrect because it erroneously assumes that the method of determining normal value limits the United States' obligation to refrain from zeroing. However, the provisions of the Antidumping Agreement upon which the panel in *United States - Zeroing* based its determination that United States had acted inconsistently with its international obligations apply equally without regard to the method of calculating normal value. For example, Article 2.4. and Article 2.4.2 of the Antidumping Agreement make no reference to calculating a constructed normal value or employing an NME methodology and, in fact, apply *whenever* an investigating authority is establishing the existence of dumping. Thus, irrespective of how the Department calculates normal value and/or whether the Department is applying a NME methodology, the Department must calculate the dumping margin consistent with Article 2.4 and 2.4.2 of the Antidumping Agreement -- including complying with its obligation to apply an average-to-average comparison methodology without zeroing.

*C. The Department Must Meet All Notice and Comment Requirements*

In the *Request for Comments*, the Department is suggesting two distinct agency actions. First, the Department has made a specific proposal to abandon zeroing in its average-to-average comparison methodology. Second, the Department has announced that it is considering developing an new standard comparison methodology in antidumping investigations. As Corus and Arcelor discussed in their initial submission, each of these agency actions must meet

applicable notice and comment requirements under Section 123(g) of the URAA[53] and the Administrative Procedure Act ("APA").[54] For example, under Section 123(g) of the URAA the Department must, *inter alia*, publish a proposed modification to a rule or practice in the *Federal Register* and allow parties an opportunity to comment.[55] Similarly, under the APA, the Department must, *inter alia*, publish any proposed amendment to or repeal of an existing regulation and allow comment before changing existing regulations.[56] Thus, before the Department takes either action suggested in the *Request for Comments*, it must comply with all applicable notice and comment requirements.

1. The Department May Abandon Zeroing Without Any Additional Notice and Comment

The Department has proposed abandoning zeroing in its average-to-average comparison methodology. As discussed above and in Corus' and Arcelor's original comments, neither the Antidumping Law nor the Department's regulations require the Department to zero.[57] Moreover, the Department argued strenuously before the panel in *United States- Zeroing* that zeroing was

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[53] 19 U.S.C. § 3533(g).

[54] 5 U.S.C. § 551 *et seq.*

[55] 19 U.S.C. § 3533(g)(1)(A)-(F).

[56] 5 U.S.C. §§ 553(b) and (c); *see also*, 5 U.S.C. § 551(4) (defining "rule making" as the "agency process for formulating, amending, or repealing a rule").

[57] *See*, discussion *supra*, Sec. V.A; Corus and Arcelor Original Submission, p. 18.

not required by the Department's regulation and that zeroing does not even rise to the level of a practice.[58] Section 123(g) of the URAA only applies to changes in practice or regulation[59] and the APA notice and comment requirement only applies to agency rulemaking.[60] Therefore, because the proposed abandonment of zeroing results in neither a changed practice nor a change to an agency rule (or regulation), the Department has no additional notice and comment requirements to meet under either Section 123(g) of the URAA or the APA. That is, *the Department is free to abandon zeroing immediately*. Considering the United States' decision not to appeal the portion of the panel report in *United States - Zeroing* that found zeroing in average-to-average comparisons in investigations WTO-inconsistent as applied and the Appellate Body Report affirming that zeroing in average-to-average comparisons in investigations is WTO-inconsistent "as such,"[61] Corus and Arcelor believe that the only course for the Department is to immediately abandon zeroing in all average-to-average comparisons in investigations.

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[58] *See, e.g.*, First Written Submission of the United States, *United States - Laws, Regulations, and Methodology For Calculating Dumping Margins ("Zeroing")*, paras. 70-97, WT/DS294 (Jan. 31, 2005).

[59] *See*, 19 U.S.C. § 3533(g) (on its face, this statutory provision only applies to changes in agency regulations or practice).

[60] *See*, 5 U.S.C. §§ 553(b), and 553(c) (on their face, these statutory provisions only provide for notice and comment when an agency engages in rulemaking).

[61] *Zeroing Appellate Body Report*, para. 263(b).

2. The Department Must Provide Full Notice and Comment Before It May Adopt a Transaction-To-Transaction Standard Comparison Methodology

Several parties argue that the Department should change its standard comparison methodology from an average-to-average comparison to a transaction-to-transaction comparison.[62] As discussed in its original submission[63] and in more detail below, Corus and Arcelor believe that moving to a transaction-to-transaction methodology is improper given the statements in the SAA stating that a transaction-to-transaction comparison only will be used in limited circumstances and infrequently.[64] However, assuming *arguendo* that the Department may depart from the language in the SAA, the Department must fully comply with all applicable notice and comment requirements before adopting a standard comparison methodology that employs something other than an average-to-average comparison.

As Corus, Arcelor, and several parties note, the Department's current regulations specify that the Department's standard comparison methodology will be based on an average-to-average comparison.[65] Changing to a transaction-to-transaction methodology, therefore, would require

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[62] *See, e.g.*, CPTI Comments, p. 3; Stewart & Stewart Comments, p. 9; Letter from the Coalition for Fair Lumber Imports to Assistant Secretary Spooner, "Re: *Comments Regarding 'Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Investigation,'*" p. 3 (April 5, 2006) ("Lumber Coalition Comments").

[63] Corus and Arcelor Original Submission, pp. 15-17.

[64] SAA, pp. 842-43.

[65] *See,* Corus and Arcelor Original Submission, pp. 10-11; Lumber Coalition Comments, p. 5 and n.14.

repealing or amending the current regulation. As such, any move to a transaction-to-transaction comparison as the Department's standard methodology would require the Department to comply with full notice and comment requirements under both Section 123(g) of the URAA and the APA.

In the *Request for Comments* the Department does not propose a new standard comparison methodology. Instead, the Department only states that it is considering a change from its current methodology. Such an indefinite proposal fails to meet the notice and comment requirements of both Section 123(g) of the URAA and the APA. First, the *Request for Comments* fails to meet the notice requirements of Section 123(g) of the URAA because the *Federal Register* notice did not include a proposed new standard comparison methodology. However, section 123(g)(1)(C) of the URAA[66] requires the Department to publish any proposed modification to a regulation or practice in the *Federal Register* and provide an opportunity for public comment. Similarly under the APA, the Department's notice must include the range of alternatives that the Department is considering with a reasonable amount of specificity.[67] Obviously, an indefinite proposal that the Department may or may not change its standard methodology in some unspecified manner fails to meet this APA notice requirement. Thus,

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[66] 19 U.S.C. § 3533(g)(1)(C).

[67] *Small Refiner Lead Phase Down-Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (finding that agency notice of "unspecified changes" failed to meet notice requirements under the APA because adequate notice must describe the range of alternatives being considered with reasonable specificity).

unless and until the Department meets the notice and comment requirements under Section 123(g) of the URAA and the APA the Department is legally prohibited from changing its standard comparison methodology in investigations to a comparison based on something other than an average-to-average comparison.

### *D. Changing to A Standard Transaction-to-Transaction Comparison Methodology Would Be Improper*

#### 1. Introduction

Several parties suggest that the Department adopt a transaction-to-transaction approach with zeroing to determine the dumping margin in antidumping investigations.[68] The parties suggest that a transaction-to-transaction approach is permissible under U.S. law and find support in the fact that this methodology was used in *Softwood Lumber* and that it was upheld by an Article 21.5 panel as consistent with the United States' WTO obligations. As discussed above, this approach misconstrues the point of both the panel and Appellate Body reports in *United States - Zeroing*.[69] The offense committed by the average-to-average with zeroing methodology is not the averaging, the offense is the zeroing. The proper solution is to abandon zeroing, not averaging.

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[68] *See*, n. 62 *supra*.

[69] *See*, discussion of *Zeroing Appellate Body Report supra* at Sec. III (discussing how the Appellate Body's rationale for finding zeroing WTO-impermissible applies equally to an average-to-average and transaction-to-transaction comparison methodology).

Moreover, the parties advocating the abandonment of the average-to-average comparison methodology in favor of the transaction-to-transaction approach cannot overcome the fundamental flaw in their argument – namely, that the SAA specifically provides that the Department will "normally" employ an average-to-average comparison methodology, that the transaction-to-transaction methodology will be used only in very limited circumstances, and that the transaction-to-transaction methodology is to be used far less frequently than the average-to-average methodology.[70] The Department's regulations both echo and emphasize the SAA's preference for the average-to-average methodology.[71]

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[70] *See*, the SAA at 842-43 (stating: "[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 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.").

[71] *See*, 19 C.F.R. § 351.414(c) (stating: "*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."); *see also*, Preamble, *Antidumping and Countervailing Duty Final Rule*, 62 Fed. Reg. 27,296, 27,374 (May 19, 1997) (stating: "In 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.")

As noted above, the Department may not abandon the preference in the regulations for the use of the average-to-average comparison methodology without fulfilling notice and comment rulemaking requirements. But, in any event, the Department may not adopt new regulations that contravene existing U.S. law. As the Department is well aware, the SAA is a Congressionally "approved" "authoritative statement" of the United States' understanding of the WTO Agreements and the Antidumping Law.[72] Thus, under U.S. law, whatever method the Department adopts to replace the prohibited zeroing method, the Department should use the average-to-average methodology as the normal one in investigations, and should not use a transaction-to-transaction methodology, except in unusual circumstances.

Several parties have argued that the change in computer technology since the time that the SAA and the regulations were drafted provides justification for abandoning the average-to-average methodology as the Department's preferred approach in investigations.[73] As Corus and Arcelor noted in their initial comments, the practical difficulties in implementing a transaction-to-transaction methodology have more to do with the case-specific effort of

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(citations omitted).

[72] *See,* 19 U.S.C. §§ 3511(a)(2) and 3512(d) (where Congress both "approved" the SAA and legally mandated that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the [WTO Agreements] and [Antidumping Law] in any judicial proceeding . . ."); *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 largely based on the SAA).

[73] *See, e.g.,* Lumber Coalition Comments, p. 5; CSUSTL Comments, p. 11.

identifying and defining the criteria to be used in selecting the most appropriate comparison transactions.[74] Improved computer resources cannot mitigate the labor-intensive nature of that effort. But even if the Department were to find a way to make less burdensome the process of selecting the most appropriate comparisons, the Department still may not implement an approach that contravenes U.S. law. *Any* approach that abandons the average-to-average comparison methodology as the normal method to calculate antidumping margins in investigations would contradict directly the clear language of the SAA.

2. The Proposed Transaction-to-Transaction Methodologies Are Improper

A number of parties have proposed specific methodologies for making transaction -to-transaction, with zeroing, calculations. As noted above, each of the proposals suffers from the same fundamental defect: the Department may not employ any methodology as the "normal" methodology other than a methodology that uses average-to-average comparisons. Several of the variations also suffer from additional defects, which are addressed below.

a. The Proposed Transaction-to-Transaction Methodology Employing Home Market Sales Where Prime Is Closest to the Median of the "Comparable" Sales Impermissibly Mimics the WTO-Violative Price Comparison Methodology

One party has proposed a variation on the transaction-to-transaction methodology whereby a single sale would be selected from a group of equally comparable sales "by choosing

[74] Corus and Arcelor Original Submission, pp. 12-14.

the transaction that is closest in price to the median or mean of the prices of the transactions that are equally comparable."[75] This proposal cannot be adopted as it is specifically prohibited by statute.

In investigations, with the one exception of targeted dumping, the Antidumping Law permits comparisons either between average normal values and average export (or constructed export) prices or between individual transaction normal values and individual transaction export (or constructed export) prices.[76] Thus, except in cases of targeted dumping, in investigations the Antidumping Law does not permit a "hybrid" approach of comparisons between average normal values and individual export (or constructed export) prices. Yet, the proposal to compare individual U.S. transactions to the single comparison market sale that is closest to the mean of a group of sales is just such an impermissible hybrid approach.

Although the commentator calls this proposal an option under the transaction-to-transaction method, it is plainly a proposal for an average-to-transaction methodology. Any attempt to choose a "single" transaction by reference to the "median or mean" of a group of potential matches, is another way of saying that the normal value should be

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[75] *See,* Stewart & Stewart Comments, p. 16.

[76] *See,* Sec. 777A(d)(1)(B) of the Act (providing an exception under which the Department may compare average normal values to transaction specific export (or constructed export) prices when "(i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).").

established by reference to an average of comparison market prices. Calculating an average price from potential comparison market prices, and then choosing the single transaction closest to the mean to stand in for the average, simply reinstates the already discredited average-with-zeroing approach.

b. The Proposed Transaction-to-Transaction-Methodology Employing Random Selection Is Patently Arbitrary and Capricious

One party has offered as acceptable the adoption of the "random" method ultimately used in Softwood Lumber, whereby a single transaction would be selected from a group of equally comparable comparison market sales at random.[77] As Corus and Arcelor noted in their original comments,[78] for the Department to base a dumping margin on such an arbitrary factor raises serious questions about the methodology's appropriateness and legality including whether such an administrative determination violates fundamental principles of administrative law that require transparency, predictability, and fairness.[79] A comparison methodology that selects

[77] Stewart & Stewart Comments, pp. 14-15.

[78] Corus and Arcelor Original Comments, pp. 13-14.

[79] *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).

comparison sales in a purely random and unpredictable manner cannot withstand scrutiny and is likely to be rejected as arbitrary and capricious.[80]

c. The Proposed Transaction-to-Transaction Methodology Employing the Highest Priced Sale Among Equals Is an Impermissible Result-Oriented Approach Designed to Generate the Highest Possible Margin

One party has proposed a variation on the transaction-to-transaction methodology whereby a single sale would be selected from a group of equally comparable sales by selecting the single transaction with the highest price.[81] Of course, the selection of the highest price comparison market sale would result in the highest possible dumping margin. The proposal must be rejected by the Department out-of-hand as unprincipled, unfair and indefensible.

d. The Proposed 7 Step Transaction-to-Transaction Methodology Impermissibly Mimics the WTO-Violative Price Comparison Methodology within a Complicated and Non-Transparent Process

One party has proposed a convoluted seven-step approach to calculating the margin, which the commentator styles a transaction-to-transaction based method.[82] In fact, the proposal is another hybrid comparing individual U.S. transactions to an average normal value. The

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[80] *See, 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 antidumping margins as accurately as possible").

[81] Stewart & Stewart Comments, pp. 15-16.

[82] CPTI Comments, pp. 12 - 15 and Attachment 1.

commentator implements the normal value averaging by means of "apportionment ratios," which are nothing more than a re-named mechanism to yield a WTO-impermissible weighted-average normal value with zeroing.

The normal value averaging, with zeroing, begins in step 3 of the proposal, where the commentator proposes to match each U.S. sale (more than once if necessary), to each comparable home market sale. In step 4, the zeroing step, the commentator eliminates comparisons where the export price is greater than the normal value. In step 5, the commentator creates an "apportionment ratio," which is the ratio of the quantity of each comparison market sale to the total quantity of all sales of the same CONNUM in the comparison market. In step 6, the commentator calculates the dumping margin for each of the comparison pairs that were not deleted in step 4, thus a single sale to the United States could be compared to many sales in the home market. The resulting dumping margins are then assigned to each U.S. transaction based on the apportionment ratio created in step 5. The dumping margin results are then summed for all transactions, and allocated over all sales to the United States.

The Department's current methodology, which it proposes to abandon, is an average-to-average approach, with zeroing. Under current practice, the average normal value is calculated and compared to the U.S. average. Under the proposed seven-step alternative, a so-called transaction-specific margin would be calculated first and then the results would be weight-averaged by means of an apportionment ratio. This is a distinction without a difference.

The calculation of a weighted-average normal value at any stage in the margin calculation is still an average, and when combined with zeroing, as this proposal does, is WTO-impermissible.

*E. The Department Should Abandon Zeroing and Continue To Employ an Average-to-Average Price Comparison Methodology in the 15 Challenged Investigations*

As discussed above, the Department has suggested two agency actions in its *Request for Comments* -- abandoning zeroing and developing a new standard comparison methodology. The Department has made these suggestions in response to that portion of the panel report in *United States - Zeroing* which the United States did not appeal. That portion of the panel report pertains to the successful challenge of the Department's zeroing methodology as applied in 15 antidumping investigations. Consistent with the *Request for Comments*, the Department must abandon zeroing in the 15 challenged investigations. Additionally, general principles of administrative law require the Department also to continue to use a standard comparison methodology that employs an average-to-average comparison in the 15 challenged investigations.

Under general principles of administrative law, agencies are prohibited from engaging in retroactive rulemaking unless expressly authorized by Congress.[83] That is to say, an agency may

[83] *See*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 215-16 (1988) (invalidating retroactive agency rulemaking because the rulemaking lacked an express grant of statutory authority allowing for retroactive application); *Durr v. Nicholson*, 400 F.3d 1375, 1380 (Fed. Cir. 2005) ("Absent clearly expressed intent to the contrary, statutes and regulations are presumed not to have retroactive effect. Moreover, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless the power is conveyed by Congress in express terms.") (citations

not amend or repeal an existing regulation in a manner that affects the liability for past conduct, or imposes a new duty with respect to transactions already completed unless expressly authorized by Congress.[84] Congress has not authorized the Department to change its current price comparison methodology regulation retroactively. Thus, the Department is legally prohibited from applying a new regulation to the 15 challenged investigations. Instead, consistent with its past findings -- which have not been challenged -- that unusual circumstances do not exist in the 15 challenged investigations and its current regulation, the Department must apply an average-to-average price comparison methodology in those proceedings.[85] In contrast and as discussed above, the abandonment of zeroing does not implicate the Department's regulations.[86] As such, it is both permissible and proper for the Department to apply its abandonment of zeroing to the challenged 15 antidumping investigations.

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omitted).

[84] *See, Landgraf v. USI Film Prod.*, 511 U.S. 244, 269 (1994) ("[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already passed, must be deemed retrospective) (citations omitted); *Marrie v. Securities and Exchange Commission*, 374 F.3d 1196, 1207 (D.C. Cir. 2004) (the operative inquiry in determining whether rulemaking is retroactive is whether the new provision attaches new legal consequences to events completed before its enactment).

[85] *See, National Mining Assoc. v. Dep't of Labor*, 292 F.3d 849, 860 (D.C. Cir. 2002) (*per curiam*) (finding that a new regulation that is substantially inconsistent with a prior regulation is retroactive as applied to pending claims).

[86] *See*, discussion *supra* at Sec. V.C.1.

*F. The Department Should Rescind the Results Reached to Date in the Administrative Reviews Conducted in the Challenged Antidumping Proceedings Where the Dumping Determination in the Original Investigations Would Have Been Negative Absent Zeroing*

Corus and Arcelor identified 3 investigations in their original submission that were challenged in *United States - Zeroing* and in which Corus and Arcelor participated before the Department.[87] In these 3 investigations as well as certain additional investigations identified by the European Communities, the Department would have made a negative dumping determination, but for zeroing.[88] Because the antidumping orders that resulted from these investigations are dependent on zeroing, a WTO-inconsistent measure,[89] the Department has no legal basis under the WTO Agreements for imposing further measures pursuant to these antidumping orders. Therefore, the Department is obligated under the WTO Agreements to terminate or suspend all on-going proceedings conducted pursuant to these zeroing-dependent antidumping orders including, *inter alia*, administrative reviews and assessment proceedings.

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[87] Corus and Arcelor Original Submission, pp. 2-3 (identifying: *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); *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); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from France*, 67 Fed. Reg. 3,143 (Jan. 23, 2002).

[88] 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/DS294/7/Rev.1 (Feb. 19, 2004).

[89] *See, Zeroing Appellate Body Report*, para. 263(b) (finding zeroing in average-to-average price comparisons in investigations as such WTO-inconsistent).

Such a termination should be immediate, irrespective of any determination to reconduct the aforementioned investigations, because there currently exists no legal basis under the WTO Agreements for the Department to take any measures pursuant to these orders. In addition, the Department must also refund all cash deposits.

The exigent and obligatory nature of terminating the zeroing-dependent orders and taking the additional actions described above is further supported by the United States' decision not to appeal that portion of the panel report that pertained to the "as applied" challenges to the 15 antidumping investigations. As the panel recognized, the European Communities' challenges to these investigations included several measures -- including, *inter alia*, the 15 antidumping orders and duty assessment instructions issued pursuant to these antidumping investigations.[90] The panel found -- and the United States did not appeal -- that these investigations were WTO-inconsistent.[91] As a result, the United States cannot, consistent with its international obligations, assess antidumping duties pursuant to any of the measures that made up the European Communities' as applied challenge to the 15 antidumping investigations.

Any doubt as to the obligation of the United States on this point has been eliminated by the recent WTO Appellate Body report in the lumber countervailing duty compliance

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[90] *See, Zeroing Panel Decision*, para. 2.6.

[91] *See, Zeroing Panel Decision*, para. 7.32.

proceeding.[92] There the Appellate Body established that, where there is a sufficient nexus between an issue decided as to an initial investigation and the conduct of reviews and duty assessments made pursuant to the order resulting from that investigation, implementation must encompass the reviews and duty assessment, as well as the initial determination.[93] Here such a nexus clearly exists in that there could be no administrative reviews or assessments made pursuant to the zeroing-dependent orders had the Department not zeroed in the original investigation. Thus, the United States' obligations with regard to the identified investigations exists, not only with regard to those investigations themselves, but also as to resulting administrative reviews and duty assessment proceedings.

## V. Conclusion

Corus and Arcelor continue to support the Department's proposal to abandon zeroing in average-to-average price comparisons in investigations. Corus and Arcelor believe that, consistent with settled judicial precedent, U.S. law does not require zeroing. Additionally, the existence of the Doha Round does not provide a legal basis for the Department to take the extraordinary step of continuing to impermissibly zero in contradiction to the WTO report in *United States - Zeroing*. Moreover, contrary to one party's argument, the United States'

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[92] Appellate Body Report, *United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada - Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW (Adopted Dec. 20, 2005) ("*Appellate Body Report Canada Lumber CVD - 21.5*").

[93] *Appellate Body Report Canada Lumber CVD - 21.5,* paras. 90-92.

obligation not to zero exists without regard to the manner in which the Department calculates normal value. For example, the Department may not zero when employing surrogate values or a constructed normal value. Corus and Arcelor also believe that the Department must immediately implement its proposal to abandon zeroing. With regard to the Department's suggestions that it may develop a new standard comparison methodology, that methodology should be consistent with the SAA and existing regulations. If the new standard comparison methodology would require an amendment or repeal of an existing regulation, such a methodology would have to meet full notice and comment requirements under both Section 123(g) of the URAA and the APA. Corus and Arcelor also believe that the Department is required to apply its current regulation to the 15 investigations that were part of the as applied challenge in *United States - Zeroing*. As a result, the Department must employ an average-to-average comparison without zeroing in these investigations. Also, for all of the challenged investigations in which the Department would not have made an affirmative dumping determination absent zeroing, Corus and Arcelor believe that the Department must rescind the results reached to date including, *inter alia*, terminating or suspending all on-going administrative reviews and assessment proceedings and refunding all cash deposits. Finally, in light of the Appellate Body report in *United States - Zeroing*, the Department must ensure that the duties assessed in the 16 administrative reviews challenged by the European Communities do not exceed the properly calculated (*i.e.*, non-zeroed) margins of dumping for each of the reviewed exporters / producers.