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

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Attention: Weighted Average Dumping Margin

Dear Mr. Spooner:

On behalf of the Japan Bearing Industrial Association ("JBIA"), a trade association of foreign producers and exporters of ball bearings, and their affiliated U.S. producers and importers of ball bearings, we hereby submit comments in rebuttal to comments filed by certain other parties on April 5, 2006, concerning the Department's proposed revision to the manner in which it calculates weighted average dumping margins. Specifically, the JBIA is rebutting arguments made by certain parties in response to the Department's request for comments concerning its proposal, pursuant to section 123(g)(1) of the Uruguay Round Agreements Act (the "URAA"), to cease the practice of "zeroing" when it uses the average-to-average comparison methodology in calculating dumping margins during an antidumping duty investigation. *See* Antidumping Proceedings: Calculation of the Weighted Average Dumping

Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11189 (March 6, 2006) ("Department Notice").

Regardless of the Department's decision to abandon the zeroing procedures in investigations, a number of comments, including those filed on behalf of Florida Citrus Mutual ("FCM"), argue that zeroing should continue to be applied in administrative reviews because: (1) the WTO panel decision that spurred this section 123 proceeding found that zeroing as applied in administrative reviews is not inconsistent with the *Antidumping Agreement*; and (2) the "'zeroing' practice applied in administrative reviews legitimately combats the problem of masked dumping . . . ." FCM Comments at 3 (April 5, 2006).[1] As to the first of these positions, it should be noted that, subsequent to the filing of the initial comments on April 5, the WTO Appellate Body reversed the WTO panel decision on this point, and found that zeroing as applied in administrative reviews is inconsistent with U.S. international obligations under the *Antidumping Agreement*. *See United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R at ¶¶ 133-135 (April 18, 2006) ("*EC Zeroing*"). In so finding, the Appellate Body reaffirmed that:

> if the investigating authority establishes the margin of dumping on the basis of multiple comparisons made at an intermediate stage, it is required to aggregate the results of all multiple comparisons, including those where the export price exceeds the normal value. If the investigating authority chooses to undertake multiple comparisons at an intermediate stage, it is

[1] Some comments, including those filed by Collier Shannon Scott, PLLC (at 2) ("Collier"), and on behalf of the Committee on Pipe and Tube Imports (at 10-11) ("CPTI"), go so far as to assert that zeroing is *required* by U.S. law despite the fact that U.S. courts have repeatedly held to the contrary. In response, the JBIA simply notes that the U.S. Court of Appeals for the Federal Circuit has specifically held that the Department's zeroing procedures are not compelled by U.S. law. *See* Timken Co. v. United States, 354 F.3d 1334, 1341 (Fed. Cir.), cert. denied, 125 S.Ct. 412 (2004) (holding that the statutory definition of "dumping margin" in 19 U.S.C. § 1677(35) does not "compel a finding that Congress expressly intended to require zeroing").

> not allowed to take into account the results of only some multiple comparisons, while disregarding others.

Id. at ¶ 127. As a result, regardless of the method used to conduct the multiple comparisons incorporated in the calculation of a respondent's antidumping margin, and regardless whether the Department is conducting an investigation or an administrative review, it is impermissible under the *Antidumping Agreement* for the Department to engage in its zeroing procedure.

As to the second of FCM's justifications for the Department to continue employing its zeroing procedures in administrative reviews – namely that it is an acceptable response to targeted or masked dumping – the JBIA notes, as did the Law Offices of Stewart & Stewart ("S&S") in its initial comments, that a statutory provision exists to address this issue. S&S Comments at 17 (citing 19 U.S.C. § 1677f-1(d)(1)(B)). This statutory provision sets forth conditions which must be met to demonstrate that the specter of targeted dumping exists, and thus to justify the Department's use of a different type of comparison methodology in a specific proceeding. Given that Congress has already specified the method by which the Department may respond to the occurrence of targeted dumping, it is neither appropriate nor necessary for the Department to employ an extra-statutory procedure (zeroing) in all administrative reviews and investigations to address that concern.

Further, a number of parties propose that the Department should use its transaction-to-transaction ("T-T") comparison methodology in investigations, rather than its standard weighted-average to weighted-average ("W-W") comparison methodology, on the assumption that by using the T-T comparison methodology, the Department may continue to use its zeroing procedures as well. *See, e.g.,* S&S's Comments at 9-10 (citing the panel report decision in *United States* –

Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada, WT/DS264/RW (April 3, 2006) ("*Softwood Lumber*")); Collier's Comments at 3; CPTI Comments at 12-15; and the comments filed on behalf of the Coalition for Fair Lumber Imports at 1-6 ("CFLI"). This proposal, however, disregards the Department's regulatory preference for the latter comparison methodology. Indeed, 19 C.F.R. § 351.414(c)(1) specifically states that:

> 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.[2]

Moreover, the underlying assumption that it would be permissible for the Department to continue its zeroing procedures when using the T-T comparison methodology is flawed. The Article 21.5 panel decision relied upon by S&S and these other parties has effectively been reversed by the Appellate Body's more recent decision in the *EC Zeroing* dispute. The panel in the Article 21.5 proceeding specifically acknowledged that the T-T comparison methodology "involve[s] [the] aggregation or summing up of results of comparisons of transaction-specific prices . . . ." *Softwood Lumber*, at ¶ 5.29. Thus, because the T-T comparison methodology involves multiple comparisons, the Department, per the Appellate Body's decision in the *EC Zeroing* dispute, "is not allowed to take into account the results of only some multiple comparisons, while disregarding others" in establishing the margin of dumping. *EC Zeroing*, at ¶ 127. Therefore, even if the Department were to revise its regulations in order to state a preference for the T-T

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[2] Conversely, in a review, the regulatory preference is to use "the average-to-transaction method." 19 C.F.R. 351.414(c)(2). To blithely propose, as a number of the parties do, that these regulatory preferences should be disregarded in favor of conducting a T-T comparison ignores the complexities and difficulties involved in conducting this type of comparison.

comparison methodology, it would still be impermissible for the Department to engage in its zeroing practice. Accordingly, the JBIA sees no reason for the Department to go through the cumbersome process of amending its regulatory preference for W-W comparisons or to routinely impose on itself and parties in antidumping proceedings the complexities and burdens of the T-T comparison methodology.

Finally, S&S argues (at 1-6) that the Department should not revise its zeroing practice because the permissibility thereof under the *Antidumping Agreement* is the subject of discussion at the Doha Round of negotiations. This argument should be disregarded for several reasons. First, even if this issue is currently subject to negotiation and even if the United States were successful in negotiating revisions to the *Antidumping Agreement* that would authorize the use of zeroing procedures, this would not alter the fact that the Department's zeroing procedures are, at least for now, inconsistent with U.S. international obligations under the *Antidumping Agreement*. The Appellate Body has expressly found that the Department's zeroing procedures applied in investigations and administrative reviews are impermissible under the *Antidumping Agreement* as currently written. Until the WTO Members revise that Agreement – by no means a certainty – the Department is obliged to cease zeroing in order to bring its actions into conformity with U.S. international obligations.

Moreover, it would be inappropriate for the United States not to comply with the Appellate Body's decision in order for it to use the issue as a "bargaining chip" during the Doha negotiations. The WTO, by its very nature, is founded on the principle of reciprocity, and the United States cannot expect its fellow Members to act consistently with these Agreements if the

United States flouts its own obligations. It is evident that the United States recognizes this fact, given the United States' efforts to implement the panel's adverse decision through this Section 123 proceeding. The appropriate course, therefore, is not, as asserted by S&S, to disregard those obligations pursuant to the possible outcome of ongoing negotiations, but rather to broaden the scope of these Section 123 proceedings and to implement the Appellate Body's recent decision in the *EC Zeroing* dispute. Accordingly, the Department should, as submitted by the JBIA in its initial comments, cease zeroing not only in investigations when using the W-W comparison methodology, but in all investigations and administrative reviews, and regardless of the comparison methodology.

In accordance with the Department's April 19, 2006 notice extending the deadline for submitting rebuttal comments, the JBIA is submitting its rebuttal comments today. The JBIA is submitting an original and six copies of this letter, as well as a CD-ROM that includes an electronic version of these comments in WordPerfect format.

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

Respectfully submitted,

Neil R. Ellis
Neil C. Pratt