KAYE SCHOLER LLP

Donald B. Cameron
202 682-3630
Fax 202 414-0400
dcameron@kayescholer.com

The McPherson Building
901 Fifteenth Street, NW
Suite 1100
Washington, DC 20005
202 682-3500
Fax 202 682-3580
www.kayescholer.com

May 4, 2006

VIA HAND DELIVERY

David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

Re: Rebuttal Comments on Calculation of Weighted-Average Dumping Margin in an Antidumping Duty Investigation

Dear Mr. Spooner:

On behalf of the Korea Iron & Steel Association ("KOSA"), we are filing an original and six copies of this letter and the attached rebuttal comments regarding the U.S. Department of Commerce's ("Department") calculation of the weighted-average dumping margin in an antidumping duty investigation. We also enclose a CD-ROM with a copy of these comments. These rebuttal comments are timely submitted in accordance with the Department's notice soliciting comments, *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (March 6, 2006), and extension of the rebuttal comment period published in the *Federal Register*. *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping*

Duty Investigation; Extension of Rebuttal Comment Period, 71 Fed. Reg. 23,898 (April 25, 2006).

Please do not hesitate to contact the undersigned if there are any questions regarding this matter.

Respectfully submitted,

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Donald B. Cameron
Julie C. Mendoza
R. Will Planert
Jeffrey S. Grimson
Brady W. Mills
Jahna M. Hartwig
Paul J. McGarr, Trade Analyst

Counsel to KOSA

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REBUTTAL COMMENTS OF THE KOREA IRON & STEEL ASSOCIATION ON THE CALCULATION OF WEIGHTED AVERAGE DUMPING MARGIN IN ANTIDUMPING DUTY INVESTIGATIONS

The Korea Iron & Steel Association ("KOSA") submits these rebuttal comments in response to the comments filed by the representatives of various domestic interested parties regarding the U.S. Department of Commerce's ("Department") calculation of the weighted-average dumping margin in an antidumping duty investigation in accordance with the Department's notice soliciting comments.[1] *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11,189 (March 6, 2006). Rather than specifically rebutting each individual set of comments that it disagrees with, KOSA is instead providing a general rebuttal to comments made by various representatives of affected domestic industries who advocate the use of the transaction-to-transaction methodology in antidumping duty investigations, with zeroing.

The intervening decision of the Appellate Body in *United States--Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*[2] confirms that it is a futile exercise for the Department to search for methodologies that permit it to zero and the Department simply should terminate this entire exercise. As discussed below, the Appellate Body decision makes clear that the WTO antidumping agreement does not permit the Department to ignore negative margins because it must calculate a margin for the product as a whole.

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1 These rebuttal comments are principally submitted in response to the comments filed by the Coalition for Fair Lumber Imports, the Cold Finished Steel Bar Institute, Collier Shannon Scott LLC, the Committee on Pipe and Tube Imports, the Florida Citrus Mutual, Stewart and Stewart, and United States Steel Corporation. (hereinafter collectively referred to as "Domestic Parties").

2 Appellate Body Report, *United States--Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (18 April 2006) (hereinafter "*U.S.--Zeroing*").

A. The Department Should Not Abandon The Use Of The Weighted-Average-to-Weighted-Average Comparison Methodology In Favor Of The Transaction-To-Transaction Methodology For Purposes Of Calculating Dumping Margins in Antidumping Duty Investigations.

The main thrust of the comments filed by the Domestic Parties is that the Department should abandon its long-standing weighted-average-to-weighted-average comparison methodology in favor of the transaction-to-transaction methodology for purposes of calculating dumping margins in antidumping duty investigations.[3] Of course, they also advocate that in switching to this transaction-to-transaction methodology the Department should continue to zero out negative dumping margins.[4] In support of the propriety of using the transaction-to-transaction methodology, many of the Domestic Parties[5] point to the Department's use of the transaction-to-transaction methodology in the *Softwood Lumber* Section 129 proceeding and the World Trade Organization Panel's finding that the use of this methodology was not WTO-inconsistent.[6] But as discussed below, the *Softwood Lumber* Section 129 Determination was

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3 *See, e.g.*, Letter from Dewey Ballantine LLP on behalf of the Coalition for Fair Lumber Imports to David Spooner, Assistant Secretary for Import Administration (April 5, 2006) ("CFLI Comments"); Letter from Schagrin Associates on behalf of the Committee on Pipe and Tube Imports to David Spooner, Assistant Secretary for Import Administration (April 5, 2006) ("CPTI Comments").

4 *See, e.g.*, CFLI Comments at 4-7; CPTI Comments at 12-15.

5 *See, e.g.*, CFLI Comments at 4-6; CPTI Comments at 11-12; Letter from Collier Shannon Scott PLLC to David Spooner, Assistant Secretary for Import Administration (April 5, 2006), at 3; Letter from Stewart and Stewart to David Spooner, Assistant Secretary for Import Administration (April 5, 2006) ("Stewart and Stewart Comments"), at 9-10.

6 *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 22636, 22639 (May 2, 2005) (emphasis added) ("*Softwood Lumber* Section 129 Determination"); *United States - Final Dumping Determination on Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW (3 April 2006). As noted in our original comments this Panel decision has not been adopted by the Dispute Settlement Body, and therefore has no legal effect. *See* Letter from Kaye (continued...)

highly unusual and, by the Department's own admission, was limited to the facts and circumstances of that case.[7] It was not intended to signal a drastic change in the Department's well-settled practice of only resorting to transaction-to-transaction comparisons in unusual cases. As such, KOSA urges the Department to reject the Domestic Parties' invitation to favor the use of transaction-to-transaction comparisons in calculating dumping margins in antidumping duty investigations, and to instead adhere to its long-standing practice of using weighted-average-to-weighted-average comparisons, but without zeroing.

1. The *Softwood Lumber* 129 Proceeding Was *Sui Generis* And Does Not Support The Drastic Change Advocated By The Domestic Parties.

The Domestic Parties trumpet the Department's determination in the *Softwood Lumber* Section 129 proceeding as support for their recommendation that in all investigations the Department should calculate dumping margins using the transaction-to-transaction methodology without zeroing. Just by way of example, the Coalition for Fair Lumber Imports relies upon the Department's *Softwood Lumber* Section 129 Determination to support its assertion that "the transaction-to-transaction methodology without offsets is not merely a theoretically 'appropriate' alternative to the Department's weighted-average methodology, it is a viable, concrete alternative . . . which the Department employed without reservation in the recent Softwood

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Scholer LLP on behalf of the Korea Iron & Steel Association to David Spooner, Assistant Secretary for Import Administration (April 5, 2006) ("KOSA Comments") at 5, n. 11.

[7] KOSA does not weigh the merits of the Department's use of the transaction-to transaction methodology in the *Softwood Lumber* Section 129 Determination. However, any reference to that determination herein should not be viewed as an endorsement of the transaction-to-transaction methodology in that case. KOSA strongly believes that this decision was wrongly decided and that it will not stand under existing Appellate Body decisions as described in KOSA's Comments at 5-8.

Lumber Section 129 proceeding."[8] But the *Softwood Lumber* Section 129 Determination was truly *sui generis*, and does not support the drastic change proposed by the Domestic Parties.

Indeed, the Department indicated that the *Softwood Lumber* Section 129 Determination *was not* intended to reflect any far-reaching change to its accepted practice of only resorting to transaction-to-transaction comparisons in "unusual cases". Specifically, in its Section 129 Determination the Department noted:

> By applying the transaction-to-transaction analysis in this case, we are not intending to implement an approach that applies to all antidumping investigations. As discussed above, the use of this methodology is premised on the combination of facts and circumstances that have led to and support this determination.[9]

It is thus clear that the Department's decision to resort to transaction-to-transaction comparisons in that case was not intended to reflect a broad change in practice, but was instead a determination that was limited to the unusual facts and circumstances surrounding the Section 129 proceeding. As such, the Domestic Parties' heavy reliance on the *Softwood Lumber* 129 proceeding is misplaced.

2. The Transaction-To-Transaction Methodology Does Not Provide A WTO-Consistent Means Of Continuing Zeroing.

Furthermore, the use of the transaction-to-transaction methodology to try to circumvent the WTO Panel's ruling with respect to zeroing will be to no avail and should be abandoned as an ill-fated strategy with obvious consequences -- violation of the WTO antidumping agreement. On April 18, 2006, the WTO Appellate Body ruled that the Department's zeroing in weighted average comparisons in investigations is an "as such" violation and that the practice of zeroing in

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8 CFLI comments at 5.

9 *Softwood Lumber* Section 129 Determination, 70 Fed. Reg. at 22639 (emphasis added).

administrative reviews also violates the United States' obligations under the WTO antidumping agreement.[10] The Appellate Body extended its reasoning to zeroing in the context of administrative reviews by finding that Article 9.3 of the WTO Antidumping Agreement and Article VI:2 of GATT 1994 require that the antidumping duties assessed by the Department on all entries from a given producer or exporter cannot exceed the margins of dumping for the "product as a whole", *i.e.* the weighted average dumping margin determined for all products without zeroing.[11]

The analysis and reasoning of the Appellate Body in *U.S.--Zeroing* is fatal to the Domestic Parties' reliance on the transaction-to-transaction methodology as a means of preserving zeroing, either in antidumping investigations or administrative reviews.[12] In *EC--Bed Linen* and *US--Softwood Lumber V*, the Appellate Body had found that zeroing in original investigations using the average-to-average methodology violated the WTO Antidumping agreement because the terms "dumping" and "margins of dumping" in Article 2.1 must be established for the product as a whole, and that this required an aggregation of *all* dumping margin comparisons examined by the Department, not just those with positive dumping margins.[13]

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10 *U.S.--Zeroing* at ¶¶ 132-133.

11 *Id.* at ¶¶ 132-133.

12 The Appellate Body expressly reserved judgment on the "as such" claim in the case of transaction-to-transaction comparisons in original investigations, and did so only because the case before them did not specifically involve the use of transaction-to-transaction comparisons. *Id*. at ¶ 203.

13 Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 Mar. 2001 ("*EC-Bed Linen*"); Appellate Body Report, *United States – Final Dumping Determination On*

(continued...)

In *U.S.--Zeroing* the Appellate Body extended this analysis to administrative reviews, and did so using reasoning that leaves no ground for defending zeroing under a transaction-to-transaction methodology. The United States had attempted to defend zeroing in the context of methodologies other than average-to-average comparisons by arguing that:

> [D}uring the investigation phase, Article 2.4.2 authorizes the use of transaction-to-transaction comparisons, or, in specified circumstances, comparisons of individual export transactions to weighted-average normal values. In either case, the 'price' is the price of an individual export transaction . . . Article 2.4.2 does not require that the results of those multiple comparisons be aggregated to represent what the European Communities would consider the 'product as a whole.'[14]

The Appellate Body unequivocally rejected this argument and the related U.S. contention that "the term 'margin of dumping' can be interpreted as applying on a transaction-specific basis."[15] The Appellate Body reasoned that the term "margins of dumping" as used in Article 9.3 has the same meaning as the term "dumping" in Article 2.1 and therefore applies not to specific transactions, as the United States had contended, but rather to the overall weighted average dumping margin for a producer or exporter for the product as a whole.[16] The Appellate Body then held that this "margin of dumping" served as an upper limit on the amount of antidumping duties that may be assessed in an administrative review:

> Thus, pursuant to Article 9.3 of the *Anti-dumping Agreement* and Article VI:2 of the GATT 1994, investigating authorities are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not

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*Softwood Lumber From Canada***,** WT/DS264/AB/R, adopted on 31 Aug. 2004 ("*Lumber Appellate Body Report*").

14 *U.S.--Zeroing* ¶ 120.

15 *Id.* at ¶ 128.

16 *Id.* at ¶¶ 125, 128.

> exceed the margin of dumping established for that exporter. In other words, the margin of dumping established for an exporter or foreign producer operates as a *ceiling* for the total amount of antidumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding.[17]

Significantly, the Appellate Body made clear that Article 9.3 "does not prescribe a specific methodology according to which the duties should be assessed"[18] but regardless of the methodology used, the result must be that the assessed duties do not exceed the margin for dumping. Therefore, where the dumping margin calculation is calculated on the basis of multiple comparisons made at an intermediate stage, *i.e.*, on the basis of multiple model or product-specific comparisons, the "margin of dumping" that forms the ceiling on the imposition of duties is an aggregate dumping margin for the exporter that must be based on the results all comparisons examined by the Department, not just those with dumping margins above zero:

> We recall that, if a margin of dumping is calculated on the basis of multiple comparisons made at an intermediate stage, it is only on the basis of aggregating all these intermediate results that an investigating authority can establish margins of dumping for the product as a whole. Therefore, the margins of dumping with which the assessed anti-dumping duties have to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994 are foreign producers' or exporters' margins of dumping that reflect the results of *all of the multiple comparisons carried out at an intermediate stage of the calculation*.[19]

Obviously, the Appellate Body's reasoning in *U.S.--Zeroing* applies with equal force to dumping margin calculations based on a transaction-to-transaction methodology. Such a dumping margin calculation also involves "multiple comparisons made at an intermediate stage,"

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17 *Id.* at ¶ 130 (emphasis in original).

18 *Id.* at ¶ 131.

19 *Id.* at ¶ 132 (emphasis added).

i.e. the individual comparison of each U.S. sale to a single home market sale that will form the basis for normal value. It follows that such dumping margin calculations can be WTO-consistent only if the Department then aggregates the results those intermediate comparisons to calculate the overall weighted average dumping margin without zeroing. Only then will the resulting margin of dumping "reflect the results of all of the multiple comparisons carried out at an intermediate stage of the calculation" as required by the WTO Appellate Body.

Thus, were the Department to adopt the suggestion of the Domestic Parties and adopt the transaction-to-transaction methodology as the standard methodology in all investigations, the Department would not only overturn decades of administrative practice and contravene the express intent of Congress, but would do so to no avail. The reasoning of *U.S.--Zeroing* makes clear that the WTO Appellate Body would find such a practice in violation of Article 9.3 and will reverse the holding of the Article 21.5 compliance panel in *Softwood Lumber* that zeroing is permitted in the case of transaction-to-transaction comparisons. Having initiated this proceeding for the express purpose of bringing itself into compliance with the WTO's rulings on zeroing, it would make no sense for the Department to adopt a methodology that not only is totally unsuited for the vast majority of antidumping investigations, but that also fails to achieve compliance with the United States WTO obligations.

3. The Transaction-To-Transaction Methodology Is Lawful Only In Unusual Cases.

It is beyond cavil that Congress intended that the transaction-to-transaction comparison methodology would only be used in unusual cases. The SAA -- which constitutes the "authoritative expression by the United States concerning the interpretation and application of

the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application"[20] -- states:

> In addition to the use of averages, section 777A(d)(1)(A)(ii) 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 is custom-made. However, given past experience with this methodology and the difficulty in selecting appropriate comparison transactions, the Administration expects that Commerce will use this methodology far less frequently than the average-to-average methodology.[21]

The Department's regulations specifically reflect this intent. Thus, the Department's regulations provide that in an investigation "[t]he 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."[22]

The Department's practice also reflects the intent that the transaction-to-transaction methodology only be used in unusual cases. Other than the *Softwood Lumber* Section 129 proceeding which, as discussed above, the Department acknowledged was an unusual case, the Department has rarely used the transaction-to-transaction methodology in an investigation. Indeed, the post-URAA cases in which the Department has used the transaction-to-transaction methodology have been limited to the types of unusual cases identified in the SAA and its regulations: "situations where there are very few sales and the merchandise sold in each market

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20 19 U.S.C. § 3512(d).

21 Statement of Administrative Action, H.R. Doc. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4171, 4178 ("SAA") at 842-843 (emphasis added).

22 19 C.F.R. § 351.414(c).

is identical or very similar or is custom-made."[23] *See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany*, 61 Fed. Reg. 38,166 (July 23, 1996) (final determination); *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, 61 Fed. Reg. 38,139 (July 23, 1996) (final determination). The Domestic Parties would have the Department simply ignore the guidance of the SAA, the Department's regulations and practice, and walk off into virgin territory by applying a methodology whose impact -- when broadly applied -- is unknown.

Indeed, the Department's use of the transaction-to-transaction methodology in the *Softwood Lumber* Section 129 Determination clearly illustrates the significant difficulties that arise from adopting this methodology in a case where there are numerous transactions. The Department had to develop a model matching methodology on an *ad hoc* basis to deal with the specific facts of the *Softwood Lumber* case. The Department noted that prices in both the U.S. and Canadian markets were volatile and, using that finding to claim that the transaction-to-transaction methodology would be more accurate, proceeded to develop a hierarchy for determining "which specific home-market transaction would be the most suitable match for a given U.S. transaction."[24]

The matching hierarchy that the Department used was as follows: (1) identical match at the same level of trade on the same day; (2) identical home-market sale on the day before the U.S. sale, then the day after, and so forth, up to seven days before and after the U.S. sale; (3) if no identical sale at the same level of trade, an identical match at a different level of trade; (4) most similar sales, based on product characteristics and level of trade, within same time frame;

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[23] SAA at 842-843.

[24] *Softwood Lumber* Section 129 Determination, 70 Fed. Reg. 22,637.

and (5) with equally similar products based on product characteristics, the similar sale with the smallest difference in the variable cost of manufacturing, but not exceeding a 20 percent difference in the total cost of manufacturing. Even within these parameters, the Department found a significant number of instances where more than one home market sale was an equally appropriate match, and thus adopted various tie-breakers, including: (i) most similar quantity; (ii) customer categories, which the Department ranked to determine the most similar; (iii) most comparable channel of distribution; (iii) total movement expenses; (iv) number of days between shipment and payment; and (v) first observation on short list of equally comparable sales.[25]

The Domestic Parties implicitly recognize the complexity of the problem of finding the most suitable match in the transaction-to-transaction methodology and have thus proffered various methodologies to implement the practice broadly.[26] Apart from appearing to be designed to find the highest dumping margins possible, in line with their continued preference for zeroing, none acknowledge the central fact in the *Softwood Lumber* Section 129 Determination that the Department recognized -- that in using the transaction-to-transaction methodology it would be necessary to develop a model matching methodology based on the specific facts of each case at hand. That, of course, presumes an understanding of an array of facts that is not usually present at the investigation stage.

The selection of a workable model matching methodology is not the only problem that the transaction-to-transaction methodology presents. As the Department is well aware, in the normal course of business there are numerous factors (frequently beyond a company's control) that can result in aberrant net prices for an individual sale. The use of weighted-averages largely

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25 *See id*. at 22,637-38.

26 *See, e.g.*, CPTI Comments at 12-15; Stewart and Stewart Comments at 11-16.

reduces the effect of such aberrations as the relatively few aberrant sales are absorbed in the weighted average. However, under a transaction-to-transaction comparison methodology, such aberrant sales could be used and result in significant positive or negative margins. With its long-established practice of using weighted-average-to-weighted-average comparisons, the existence of such aberrant sales could generally be ignored, and thus the Department has not developed any practices for determining whether, or how, such aberrant sales should be used so that such sales do not create distortions in determining whether a specific transaction was dumped.

In short, adopting the transaction-to-transaction methodology does not in itself resolve anything. Instead, its adoption would open up a whole new set of issues with which the Department has no established procedures for dealing with and for which it would have to undergo a whole new round of rulemaking and litigation until some workable guidelines emerged.[27] Accordingly, in implementing the United States' obligations in light of the WTO Panel's *Zeroing Report*, we urge the Department to continue to only resort to transaction-to-transaction comparisons in the types of highly unusual cases identified in its prior administrative determinations, regulations and the SAA.

[27] *See* 5 U.S.C. § 553 (establishing procedures for notice and comment rulemaking).

B. Conclusion

The Department's proposal to abandon zeroing in weighted-average-to-weighted-average comparisons in antidumping duty investigations is fully endorsed by KOSA, and we encourage the Department to reaffirm its long-standing practice of applying this weighted-average-to-weighted average methodology (without zeroing) in the vast majority of cases. Nothing offered by the Domestic Parties supports moving away from this well-settled practice in favor of transaction-to-transaction comparisons. Finally, and as fully elaborated in our original comments, we urge the Department to use this opportunity to abandon zeroing under all comparison methodologies because the practice is prohibited under the WTO Antidumping Agreement.[28]

[28] *See* KOSA Comments at 5-8.