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May 4, 2006

PUBLIC DOCUMENT

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

Attention: Weighted Average Dumping Margin

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

Dear Mr. Spooner:

On behalf of Yamaha Motor Co., Ltd. and Yamaha Motor Corp., USA, located at 2500 Shingai, Iwata, Shizuoka 438-8501, Japan and 6555 Katella Avenue, Cypress, California, respectively, we hereby submit the attached Rebuttal Comments in response to the Department of Commerce's ("Department") request for comments regarding the calculation of the weighted average dumping margin in an antidumping duty investigation. 71 Fed. Reg. 11,189 (March 6, 2006).

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

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

Respectfully submitted,

William H. Barringer
Daniel L. Porter
Matthew P. McCullough

Counsel to

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

Rebuttal Comments of Yamaha Motor Co., Ltd. and Yamaha Motor Corp., USA on Termination of the Department of Commerce's Zeroing Practice

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INTRODUCTION AND SUMMARY

On behalf of Yamaha Motor Co., Ltd. and Yamaha Motor Corp., USA ("Yamaha"), we are pleased to offer the following rebuttal comments in connection with the Department of Commerce's ("the Department") March 6, 2006 request for comments regarding the calculation of individual respondents' weighted average dumping margins in antidumping investigations.[1] In the interim period between the time Yamaha filed its original comments with the Department and these rebuttal comments, the World Trade Organization ("WTO") Appellate Body released its report in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*.[2] Consistent with Yamaha's original comments on the subject, the Appellate Body decision in *U.S. – Zeroing* underscores both the legal and practical importance of eliminating the zeroing practice in all contexts.

The Appellate Body decision also undercuts the arguments and suggestions raised by other parties in this comments process that seek only to "tweak" the zeroing practice or delay its elimination. On their face, these comments seek to perpetuate the practice of zeroing in forms contrary to both U.S. law and U.S. WTO obligations. The Department would only invite more WTO and U.S. court litigation if it indulged in any of these proposals.

This comments process was predicated on finding a practical and legal resolution to the inconsistencies found by a WTO dispute settlement panel

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

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

regarding the Department's practice of zeroing in original investigations.[3] Dispute settlement has since overtaken the process, providing the strongest condemnation yet of the practice of zeroing in all forms and in all settings. Beyond the problems associated with original investigations, the Department now unequivocally knows that the application of zeroing in administrative reviews is, *at a minimum*, inconsistent with Article 9.3 of the WTO Antidumping Agreement ("AD Agreement") and Article VI:2 of GATT 1994.[4] Yamaha therefore submits that it is incumbent on the Department to change its practice consistent with Yamaha's original comments, eliminating zeroing in both original investigations and other review proceedings. There are no legal or practical impediments to taking such action, and no reasonable excuse exists for adopting what are plainly cynical approaches to the problem proposed by some of the other parties participating in this comments process.

I. The Department is Well Within its Discretion to Eliminate the Practice of Zeroing

Certain parties filing comments have made the extraordinary claim that the statute requires the Department to calculate dumping margins "without applying offsets for non-dumped sales."[5] These parties are wrong. Nothing in the U.S. statute prohibits the Department from including the full value of all sales of subject merchandise when calculating dumping margins. Indeed, the Courts have recognized that the statute and Congressional intent are silent on whether the

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[3] 71 Fed. Reg. at 11189.

[4] *See U.S. – Zeroing (AB)*, paras. 130 and 133.

[5] *See, e.g.*, CSUSTL Comments at 3.

Department can or cannot use zeroing. Both the Court of International Trade ("CIT") and the Court of Appeals for the Federal Circuit ("CAFC") have held that "the statute *neither requires nor prohibits* Commerce from considering nondumped sales."[6] In Corus Staal BV, both the CIT and the CAFC found that the statute and Congressional intent were both silent on this particular issue and gave deference to the Department's interpretation of the statute.[7] For the reasons articulated by the courts, a statutory amendment is not required in order for Commerce to make this long-overdue change to its antidumping duty margin calculation practice. Moreover, in light of the more recent WTO Appellate Body decision in *U.S. – Zeroing,* an interpretation of the statute that *prohibits* zeroing would be the *best* interpretation of the statute, as the statute could then be read consistent with U.S. international obligations.

One commenter attempts to draw an inference in favor of zeroing by comparing the statutory provision that allows for average-to-average comparisons with the provision that allows for average-to-transaction comparisons (*i.e.*, the targeted dumping provision) to also support the contention that zeroing is required by the statute.[8] This attempt at an inference fails for three important reasons.

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[6] *Corus Staal BV v. Dep't of Commerce*, 259 F. Supp. 2d 1253, 1261-63 (Ct. Int'l Trade 2003) (emphasis added); *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1346 (Fed. Cir. 2005) cert. denied, __ U.S. __, 126 S. Ct. 1023, 163 L. Ed.2d 853 (2006).

[7] *Id.*

[8] Comments filed by Skadden, Arps, Meagher & Flom LLP on behalf of United States Steel Corporation: Weighted Average Dumping Margin (April 5, 2006).

First, the practice of zeroing at issue in the Department's request for comments involves average-to-average comparisons,[9] which the WTO has already found to be inconsistent with U.S. international obligations under the AD Agreement. Like U.S. law, Article 2.4.2 of the WTO Agreement recognizes that in certain limited situations a weighted average normal value may be compared to individual export transactions, yet this did not prompt the panel to conclude that this provision was relevant to its finding against zeroing in the average-to-average context. Similarly, the fact that Congress, consistent with Article 2.4.2, set forth two different comparison methods in the statute which might render different results is also irrelevant. Indeed, both U.S. law and the WTO Agreement anticipate different results from the two methodologies in that both provisions are specifically provided because the preferred methodologies -- average-to-average or transaction-to-transaction -- cannot "account appropriately" for the circumstances of targeted dumping. The idea that this somehow creates a requirement that zeroing be used in average-to-average investigations is preposterous.

Second, the CIT has already noted the absence of any reference to zeroing in the Statement of Administrative Action, which is the "authoritative expression of the United States concerning the interpretation and application of the Uruguay Round Agreements."[10]. Because the statute does not speak to this issue, the Department has authority to reasonably interpret 19 U.S.C. § 1677(35)(A) and

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[9] *Request for Comments on Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 Fed. Reg. 11189 (Dep't Commerce March 6, 2006).

[10] *Corus Staal BV v. Dep't of Commerce*, 259 F. Supp. 2d at 1261, n. 12 (Ct. Int'l Trade 2003) (quoting 19 U.S.C. § 3512(d) (2000))

(B) in light of this silence and amend its practice of zeroing.[11] Thus the claim of a statutory requirement is contrary to findings already made by the courts.

Third, nothing in the AD Agreement specifically contemplates, much less requires, that member countries engage in the practice of zeroing. To the contrary, the AD Agreement in fact prohibits the practice of zeroing in all contexts. Those who suggest otherwise cling to what is a rather dubious intellectual argument adopted by the panel in *Lumber - Article 21.5* that "mathematically, the results of the [average-to-transaction and average-to-average] comparison methodologies would be identical but for the practice of zeroing," hence the AD Agreement must allow for zeroing in order to make sense of the Agreement.[12] This finding by the panel is plain error. While it is possible to engineer a hypothetical scenario where this statement could be true, the argument is alarmingly disingenuous. In order for average-to-transaction comparisons and average-to-average comparisons to be mathematically equivalent the normal value calculated in the two scenarios must be identical. In the United States, however, this is not how the calculation is performed. Rather, with respect to average-to-transaction comparisons in investigations, the Department's regulations provide that the averages used in the average-to-transaction comparison allowable under the

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[11] *The Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) ("While the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction.")

[12] Opening Statement of the United States at the First Meeting of the Parties in US - Zeroing, as cited in the submission to the Department by Skadden, Arps, Slate, Meagher & Flom LLP on behalf of United States Steel Corporation, "Weighted Average Dumping Margin" (April 5, 2006).

targeted dumping provisions of the antidumping agreement and U.S. law shall be limited, "to sales incurred during the contemporaneous month."[13]

More importantly, although the panel in *Lumber - Article 21.5* was distracted by this argument, the Appellate Body in *US-Zeroing* was not. The Appellate Body made it clear that whenever "multiple comparisons {are} made at an intermediate stage, it is required {pursuant to Article 9.3} to aggregate the results of all of the multiple comparisons, including those where the export price exceeds normal value."[14] This reasoning extends to average-to-average comparisons, transaction-to-transaction comparisons, and average-to-transaction comparisons, as evidenced by the Appellate Body's further ruling on the "as applied" challenges on the Department's practice of zeroing under its comparison methodology used in administrative reviews.[15]

A further examination of the way in which the average-to-transaction methodology works serves to highlight the soundness of the Appellate Body's reasoning in *US-Zeroing*. First, we agree that it is possible to have identical comparisons in the average-to-transaction methodology under the targeted dumping provision. Nonetheless, the use of a limited averaging window can, *and often does*, result in exaggerated dumping margins when compared to the average-to-average methodology.

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13 19 CFR § 351.414(f).

14 *US-Zeroing (AB)*, para. 127.

15 *Id.* at para. 133.

For example, suppose that a U.S. widget is sold at a net price of $10 and in a quantity of 10. Further suppose that the same widget is sold in the respondent's home market during that same month at a net price of $12 and in a quantity of 10. However, that same widget is also sold in the respondent's home market in 4 other months during the period of investigation at net prices of $9 in two months and $10 in two months and all in quantities of 10. Under the limited window presumed by the targeted dumping scenarios, the comparison would result in a dumping margin of 20%:

Dumping margin calculation
((\$12-\$10)*10)/10) = 20%

However, in the standard average-to-average comparison, the higher-priced home market transactions would be evened out by the weight-averaging of the other home market sales of the same product:

Weighted-average home market price
(12*10)+(10*10)+(10*10)+(9*10)+(9*10)/50 = $10
Dumping margin calculation
((\$10-10)*10)/10) = 0%

Therefore, it is clear that the average-to-transaction and average-to-average calculation methodologies are not mathematically equivalent and that the scenario dreamed up by certain commenting parties does not reflect either Department practice or commercial reality.

It is the effect of zeroing in the aggregate that persuaded the Appellate Body in *US-Zeroing* to overturn the panel's decision with respect to zeroing in contexts other than average-to-average comparisons. As the Appellate Body stated, "under article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, the amount of the assessed anti-dumping duties shall not exceed the margin of dumping as established for the product as a whole... If the investigation authority chooses to undertake multiple comparisons at an intermediate stage, it is no allowed to take into account the results of only some comparisons, while disregarding others."[16] In other words, the Appellate Body saw through the "mathematical equivalency" fallacy. Comments made to the Department in support of the fallacy should therefore be rejected.

Other comments to the Department have also suggested that the AD Agreement permits zeroing because it allows member countries to measure the "margin of dumping." Citing to the panel decision in *Lumber - Article 21.5*, the Committee on Pipe and Tube Imports ("CPTI") asserts that, "the existence of dumping is determined based on an inequality, *i.e.*, whether or not the EP is less than the NV, and the dumping margin is the difference between EP and NV when

[16] *Id.* (internal citations omitted).

the EP is less than NV. This dictates that non-dumped sales... must be excluded in calculating dumping margins."[17] Although the panel in *Lumber - Article 21.5* agreed with this reasoning by limiting its focus to "the relevant part of the first sentence of Article 2.4.2, even though it does not reflect the full results of all comparisons," the panel's admission that the zeroing practice "does not reflect the full results of all comparisons" will be fatal to the reasoning once reviewed by the Appellate Body. Facing this same argument, the Appellate Body in *U.S. – Zeroing* has since found that "{Regarding} the United States' contention that, in duty assessment proceedings, the term 'margins of dumping' can be interpreted as applying on a transaction-specific basis, {w}e disagree."[18] Thus, there can no longer be any doubt that "margins of dumping" is not a transaction-specific term and that the determination of dumping must be made *for the product as a whole.*[19] Because zeroing does not permit an analysis of prices in the two markets for the product as a whole, such a practice violates the AD Agreement in whatever context it is applied.

Finally, although the Appellate Body's declined review of the "fair comparison" arguments under Article 2 raised in *US-Zeroing* because the issue was mooted by its finding regarding Article 9.3, the Appellate Body did everything short of explicitly reversing the panel's findings with respect to Article 2. First, the Appellate Body found the panel's reasoning with respect to the "fair comparison"

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17 Comments filed by Schagrin Associates on behalf of the Committee on Pipe and Tube Imports, "Weighted Average Dumping Margin", page 11 (April 5, 2006).

18 *US-Zeroing (AB)*, para. 128.

19 *Id.*

arguments upholding the consistency of U.S. zeroing practice in reviews were a legal nullity and of "no legal effect."[20] Second, the Appellate Body concluded that Article 9.3 offers important context for Article 2 *as a whole*, noting that Article 9.3 refers to Article 2.[21] Finally, the Appellate Body stated, "the Panel's reasoning with respect to the first sentence of Article 2.4 {concerning fair comparisons} depends *to a large extent* on its findings in Article 2.4.2 and Article 9.3. We recall that we reversed the Panel's finding on Article 9.3."[22] Given the Appellate Body's rather explicit findings on Article 9.3, it takes very little imagination to conclude what a proper determination on fair comparison and the first sentence Article 2.4 would have looked like. Yamaha therefore reiterates its original comments that the practice of zeroing fails to make a fair comparison between export price and normal value, as required by Article 2.4 and by Article 2.4.2 of the AD Agreement. Moreover, consistent with Article 2.1 of the AD Agreement, margins of dumping can be found to exist only after considering all relevant export prices for the "*product* under investigation as a whole."[23] The Department should put an end to the zeroing practice in all antidumping duty proceedings, including investigations and all types of reviews.

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20 *Id.* at para. 56.

21 *Id.* at para. 127.

22 *Id.* at para. 147 (emphasis added).

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

II. The Department Has No Authority to Amend its Antidumping Practice to Calculate Margins Using Transaction-to-Transaction Comparisons

In its published notice for comments on its proposal to abandon the practice of zeroing, the Department also included a request that parties comment on, "appropriate methodologies to be used in future antidumping investigations." There are limits, however, on what methodologies may be used absent new legislative action given the current statutory preference for the use of average-to-average comparisons in antidumping investigations.

As Yamaha pointed out in its original comments, the SAA states that the transaction-to-transaction methodology is an option to be used only in extremely limited circumstances. Simply put, Congress has spoken on this issue and the Department is not free to interpret the law in a way that is contrary to Congressional intent. Although the Department is afforded deference under *Chevron* when interpreting an ambiguous statutory provision, no such deference is appropriate when Congress has unambiguously addressed the issue at hand.[24]

Under *Chevron*, the first question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress."[25] Because Congress has spoken directly to the issue of when a transaction-to-transaction comparison may be used in lieu of an average-to-average comparison, the Department is not free to interpret

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[24] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc ("Chevron").*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

[25] *Zenith Elecs. Corp. v. United States,* 77 F.3d 426, 429-30 (Fed. Cir. 1996) (emphasis added).

the statute differently. The Department itself agrees: "In our view, the SAA makes clear that Congress did not contemplate broad application of the transaction-to-transaction method."[26] Given the clear guidance on the preferred comparison methodology provided by statute, it would be clear error for the Department to revise its practice absent a direct grant of Congressional authority to do so.

Even if the Department were permitted to amend its preference for average-to-average comparisons in original investigations, as requested by several commenters, the agency would still be required to follow a formalized rulemaking process. Specifically, the preference for average-to-average comparisons is codified in the Department's regulations at 351.414 (c)(1), which state that, "in an investigation, the Secretary normally will use the average-to-average method."[27] Thus, even if a statutory amendment were not required, at the very least, the regulations would have to be revised before the Department could amend its practice.

A substantive change to the Department's regulations would constitute "rulemaking," which is subject to the notice and comment requirements of the Administrative Procedure Act ("APA").[28] In this regard, the current comments process is in no way adequate under the APA to allow for an amendment to the agency's substantive regulations.[29] Rather, the Department would be required to include the actual proposed revision to the regulations in its request for comments,

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

[27] 19 CFR § 351.414 (c)(1)("Preferences").

[28] 5 U.S.C. §§ 551 et seq.

[29] *Natural Resources Defense Council v. EPA*, 279 F.3d 1180, (9th Cir. Ct. App. 2002)

just as it included a proposal to "no longer make average-to-average comparisons without {including the total value of} non-dumped comparisons" in its March 6th comment request pertaining to the panel decision in *US - Zeroing*.

In accordance with the APA, agencies amending their rules, "must provide notice sufficient to fairly apprise interested persons of the subjects and issues before the agency".[30] "The salient question is...whether interested parties reasonably could have anticipated the final rulemaking".[31] Given that the Department's federal register notice only contains one affirmative proposal, to make a policy change to end the practice of zeroing, the notice cannot be considered adequate to apprise parties that the very essence of the antidumping duty calculation in investigations, the average-to-average comparison, may be replaced by a new, extra-statutory preference for transaction-to-transaction comparisons. Moreover, the limited number of comments received by the Department advocating such a change -- five, including two submitted by law firms on behalf of themselves -- is hardly sufficient to compel the Department to pursue this approach further.

The Department must also reject the assertion that the use of a transaction-to-transaction methodology for the purposes of dumping comparisons is somehow more accurate than the average-to-average methodology currently employed by the Department. In fact, unless the Department were dealing with a very small number of identical sales, the use of a transaction-to-transaction methodology is much more likely to lead to inaccurate results. For example, in its

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30 *Natural Resources Defense Council v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988).

31 *Am. Water Works Ass'n v. EPA*, 309 U.S. App. D.C. 235, 40 F.3d 1266, 1274 (D.C. Cir. 1994).

remand determination in Lumber, the Department limited home market matching to a two week period (*i.e.*, one week before and one week after the U.S. transaction). It is easy to imagine a scenario where the home market and U.S. market use different dates of sale and while the home market may be viable, because of the different dates of sale and the limited matching window, you could potentially have no matching home market transactions for U.S. sales. This would then lead to the use of CV and the inflation of dumping margins. On the other hand, were the Department not to use a window period for matching purposes, one could envision a home market transaction matching to a U.S. transaction which is 12 months apart. Because of the volatility of exchange rates, there could be a dumping margin reflecting the exchange rate fluctuation rather than the ex-factory pricing in both markets.

Regardless of the methodology used, transaction-to-transaction comparisons would still lead to a greater complexity in matching. In order to accurately match home market transactions with U.S. transactions it would be necessary to add additional criteria to ensure the most identical or similar sale is matched. Under its normal practice for matching sales, the DOC matches by manufacturer, prime, level of trade, CONNUM, matching type, difference in product characteristics, relative difference in cost, and difference in level of trade. However, in Lumber, the DOC used all of its standard criteria and included these additional criteria: sales quantity, customer category, channel of distribution, movement expenses, commissions, and credit. DOC chose these additional criteria without

first seeking comment from parties. By including these additional criteria the DOC introduced an inordinate level of complexity into its antidumping practice, which if embraced on a broader scale would lead to a complete lack of predictability and fairness in the execution of what is supposed to be a remedial statute.

III. The Department is Required to End Zeroing in All Investigations

One commenter claims that "no WTO panel or Appellate Body decision has found U.S. methodology in constructed value or NME situations to violate U.S. rights under the antidumping agreement," and that therefore, the Department is not required to change its zeroing practice in these cases.[32] This claim fails for at least three reasons.

First, the provisions of the AD Agreement upon which the panel relied to rule that zeroing is impermissible in AD investigations refers to the comparison of "a weighted average normal value with a weighted average price of all comparable export transactions."[33] Under U.S. law, normal value is determined by one of three methods: (1) home market sales; (2) third-country sales; or (3) constructed value. If neither home market sales nor third-country sales form an adequate basis for comparison, then normal value is the constructed value of the imported merchandise. While the statute establishes a preference for home market sales or third-country sales prior to resorting to constructed value as the basis for normal value, it nonetheless recognizes that *constructed value can be a basis for determining normal value.*

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[32] Comments filed by Stewart and Stewart: Weighted Average Dumping Margin, pages 19-20 (April 5, 2006).

[33] Article 2.4.2.

Second, the Department's investigation methodology calculates an overall average normal value, whether that normal value is based on home market sales, third country sales, or constructed value. As noted in 19 C.F.R. § 351.405(a), constructed value is based on the cost of manufacture, selling general and administrative expenses, and profit. In practice, the Department calculates a model-specific, weighted-average cost of manufacture based on the period of investigation or review. Thus, even when normal value is based on constructed value, the Department still calculates an *average normal value*. The panel in *US - Zeroing* found that, "the United States has acted in breach of Article 2.4.2 of the AD Agreement when... USDOC did not include in the numerator used to calculate weighted average dumping margins any amount by which average export prices in individual averaging groups exceeded the *average normal value* for such groups. " (emphasis added) Thus, constructed value, when it forms the basis of normal value in model-specific comparisons to export prices or constructed export prices, is clearly contemplated by and included in the Panel's decision.

Finally, the issue of zeroing is fundamentally a question of the treatment of export prices in the margin calculation when the average export price exceeds average normal value no matter which basis is used for determining average normal value. The WTO's decision rests on the Department's failure to examine all comparable export transactions. If the Department were to continue to zero in cases where NV was based on CV, the WTO-inconsistent practice of failing

to examine all relevant export transactions would continue, in direct violation of the Department's compliance obligations under section 132(g) of the URAA.

For these reasons, the Department cannot resort to zeroing when comparing constructed values to individual export prices since it would not conform the Department's practice to the Panel's decision. Suggestions to the contrary must be rejected.

IV. In Light of the Appellate Body Decision in *U.S. – Zeroing*, the Department Should Eliminate the Practice of Zeroing in Reviews.

In addition to eliminating the practice of zeroing in original antidumping investigations, Yamaha reiterates that the Department should also eliminate the practice in antidumping duty administrative reviews, new shipper reviews, changed circumstance reviews and sunset reviews. If there was any doubt that this is the proper course of actions, the Appellate Body's decision in *US-Zeroing* makes it very clear: The practice of zeroing in all types of investigations and reviews is prohibited by the AD Agreement.

While we expect proponents of zeroing to twist the language of the Appellate Body's determination as best they can, the explanation of the Appellate Body is unambiguous. At its core, the issue for the Appellate Body was a methodology that systematically eliminated comparisons that show no dumping (*i.e.*, zeroing) from consideration of the dumping margin for the product as a whole. The effect of such practice is an inflated assessment of duties, inconsistent with Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994. Thus, the Appellate Body concluded that, "{zeroing} in the administrative reviews at issue

results in amounts of assessed anti-dumping duties that exceed the foreign producers' or exporters' margins of dumping," prohibited by Article 9.3 of the AD Agreement and Article VI:2 of the GATT 1994.[34]

Thus, the Department should abandon its attempt to limit its WTO compliance to prohibiting zeroing in investigations. Such an interpretation is unnecessarily narrow and, as clarified by the Appellate Body, violates Article 9.3 of the AD Agreement and Article VI:2 of the GATT (in addition to the fairness provisions of the AD Agreement).

V. The Appellate Body Ruling in *US-Zeroing* Requires Implementation Within a Reasonable Period of Time

Several commenters have argued that the Department should delay implementation of the panel decision in *US-Zeroing* until the completion of the Doha round of WTO negotiations. The implementation provisions of section 123(g) of the URAA should not be interpreted to give the Department an open-ended opportunity to delay implementation of a ruling by the dispute settlement body of the WTO. While the provisions of 123(g) do not provide for specific deadlines regarding implementation of a WTO decision, they clearly contemplate that implementation be completed within a reasonable time frame.[35]

Furthermore, pursuant to article 21.1 of the Dispute Settlement Understanding, the United States has committed to ensuring, "prompt compliance

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[34] *See U.S. – Zeroing (AB)*, para. 133

[35] *See, e.g.*, 19 U.S.C. 3533(g)(2) establishing a 60 day waiting period for implementation of a final rule or other modification, "unless the President determines that an *earlier* effective date is in the national interest" (emphasis added).

with recommendations or rulings of the DSB ...in order to ensure effective resolution of disputes to the benefit of all Members." Prompt compliance has been understood to mean no more than 15 months. If the United States intends to act in good faith, it would take far less than 15 months to resolve that the practice of zeroing will no longer be applied. Indeed, it could be done tomorrow. There are no logistical impediments to swift action.

CONCLUSION

Yamaha appreciates the opportunity to provide these rebuttal comments. For all the reasons discussed above, the practice of zeroing should be completely eliminated. If you have any questions about these comments, please contact one of the undersigned.

Respectfully Submitted,

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