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June 23, 2008

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

ATTN: Anthony Hill, Office of Policy
Michael Rill, Director, Antidumping Policy

Re: Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment: Comments of Mitsubishi HiTec Paper Flensburg GmbH, Mitsubishi HiTec Paper Bielefeld GmbH, and Mitsubishi International Corporation

Dear Mr. Spooner:

On behalf of Mitsubishi HiTec Paper Flensburg GmbH and Mitsubishi HiTec Paper Bielefeld GmbH (collectively, "Mitsubishi HiTec Paper"), and Mitsubishi International Corporation ("MIC"), we hereby submit the following comments in response to the Department of Commerce's ("Commerce") May 9, 2008 Federal Register notice requesting public comments as to the methodology proposed by Commerce for identifying and analyzing targeted dumping in antidumping investigations. See Proposed Methodology for Identifying and Analyzing Targeted

Dumping in Antidumping Investigations; Request for Comment, 73 Fed. Reg. 26,371 (Dep't of Commerce May 9, 2008) ("Request for Comments").¹

Mitsubishi HiTec Paper and MIC submit these comments to address two specific issues raised by Commerce's Request for Comments: (1) the use of zeroing to calculate dumping margins in investigations in which Commerce employs its alternative average-to-transaction comparison methodology; and (2) the application of any weighted average margins calculated for sales within the targeted subset to non-selected respondents as to which allegations of targeted dumping have not been received by Commerce and, thus, that have not specifically been found to have targeted sales of subject merchandise by Commerce.² With respect to the foregoing, and as discussed more fully below, Mitsubishi HiTec Paper and MIC respectfully submit that:

- It is improper and violative of the World Trade Organization ("WTO") Anti-Dumping Agreement for Commerce to use zeroing to calculate dumping margins in any situation, including investigations in which Commerce employs its alternative average-to-transaction comparison methodology; and

¹ Mitsubishi HiTec Paper and MIC note that the deadline for filing such comments was extended to June 23, 2008, and thus these comments are timely. See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Extension of Comment Period (Dep't of Commerce June 6, 2008), available at, <http://ia.ita.doc.gov/download/cost-avg-comments/cost-avg-cmt-ext.pdf>.

² By limiting their comments to these two specific issues, Mitsubishi HiTec Paper and MIC do not waive their rights to challenge any aspect of Commerce's targeted dumping analysis or the application of Commerce's alternative average-to-transaction comparison methodology in the context of a specific investigation. Accordingly, Commerce should not interpret these comments as waiving such rights and such rights are specifically reserved by Mitsubishi HiTec Paper and MIC.

- Should Commerce find that a selected respondent targeted sales of subject merchandise during an investigation period, Commerce may not apply any weighted average margins calculated for sales within the targeted subset to non-selected respondents as to which allegations of targeted dumping have not been received by Commerce and, thus, that have not specifically been found to have targeted sales of subject merchandise by Commerce. In such situations, any margins applied to non-selected respondents must be based exclusively on the weighted average margins calculated for sales outside the targeted subset (i.e., based upon Commerce's "normal" or "general" average-to-average or transaction-to-transaction comparison methodologies).

I. IT IS IMPROPER FOR COMMERCE TO USE ZEROING TO CALCULATE DUMPING MARGINS IN INVESTIGATIONS PURSUANT TO ITS ALTERNATIVE AVERAGE-TO-TRANSACTION COMPARISON METHODOLOGY

The WTO Appellate Body ("AB") has clearly stated that zeroing is impermissible in any aggregation of margins in an antidumping proceeding. Each aspect of the targeted dumping methodology, including the computation of a weighted average margin for sales within the targeted subset utilizing the average-to-transaction comparison methodology, the computation of a weighted average margin for sales outside the targeted subset utilizing the average-to-average or transaction-to-transaction comparison methodologies, and the aggregation of those two margins to reach an overall weighted average margin, involves a process of aggregation and is therefore subject to the non-zeroing rule enunciated by the WTO AB. Accordingly, should Commerce find that the statutory thresholds (pursuant to whatever standards are ultimately adopted by Commerce) for utilizing its alternative calculation methodology are satisfied by a

particular respondent's sales, zeroing is nevertheless prohibited and thus should not be used by Commerce.

Commerce's practice of zeroing has consistently been found by the WTO AB to be improper and violative of the WTO Anti-Dumping Agreement. See, e.g., United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (WTO App. Body Jan. 9, 2007); United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (WTO App. Body Apr. 18, 2006); United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (WTO App. Body July 24, 2001). Specifically, in the context of these disputes, the WTO AB has found Commerce's use of zeroing in, among others, average-to-average comparisons and average-to-transaction comparisons to be WTO inconsistent on both an "as applied" and "as such" basis.³ In short, and based on the consistent body of WTO AB precedent, the impermissibility of zeroing is beyond question.

Mitsubishi HiTec Paper and MIC acknowledge that the findings of the WTO AB with respect to Commerce's use of zeroing in average-to-transaction comparisons were made in the context of antidumping administrative reviews, as opposed to an antidumping investigation. This, however, is a distinction without a difference. Commerce's regulations specify that the average-to-transaction comparison methodology utilized by Commerce in administrative reviews

³ Notably, the average-to-average comparison methodology and the average-to-transaction comparison methodology are the two methodologies that are utilized to calculate an overall weighted average margin where targeted dumping is found to exist. Pursuant to Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77,722 (Dep't of Commerce Dec. 27, 2006), Commerce no longer employs a zeroing methodology in calculating weighted average margins in investigations pursuant to its average-to-average comparison methodology.

is the methodology to be utilized by Commerce where targeted dumping has been found to exist. See 19 C.F.R. § 351.414(f)(1). Moreover, both the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) and the WTO have ruled that, for purposes of zeroing, the differences between administrative reviews and investigations are not relevant. See Corus Staal BV v. Dep’t of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005), reh’g denied, 2005 U.S. App. LEXIS 10462 (Fed. Cir. May 18, 2005), cert. denied, 126 S. Ct. 1023 (2006); see also United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R at ¶ 135 (WTO App. Body Dec. 15, 2003). Similarly, the U.S. Government and Commerce itself have concluded that the differences between the two are irrelevant for purposes of the applicability of United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (WTO App. Body Apr. 18, 2006). See United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/18, Communication by the United States at ¶ 12 (June 12, 2006); see also Brief of Defendant-Appellee, Department of Commerce at 23-26, Corus Staal BV. v. United States, Fed. Cir. Court No. 04-1107 (Apr. 13, 2004) (the statute’s directive “for calculating an overall dumping margin in an investigation and a review are identical”). Indeed, it cannot be disputed that zeroing is categorically prohibited in “all contexts” of antidumping proceedings. See Press Release of the U.S. Mission to the United Nations in Geneva, U.S. Statement at the WTO Dispute Settlement Body Meeting at Item 9 (Jan. 23, 2007), available at <http://www.usmission.gov/press2007/0123dsb.html>.

Accordingly, whether in the context of Commerce’s targeted dumping methodology in an investigation, or an administrative review, or indeed for that matter any other segment of an

antidumping proceeding, there can be no dispute that zeroing by Commerce is categorically prohibited by international decisional law – a conclusion the United States has repeatedly acknowledged to the international trade community and has repeatedly agreed to implement. Id.

In the targeted dumping methodology proposed by Commerce (as clarified by Commerce in Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 Fed. Reg. 33,977, Issues and decision Memo, at cmt. 9 (Dep't of Commerce June 16, 2008), see also 73 Fed. Reg. 33,985), Commerce proposes to utilize its WTO-inconsistent zeroing methodology in computing the weight average margin for sales within the targeted subset and in combining the weight average margin for sales within the targeted subset with the weight average margin for sales outside the targeted subset. While Commerce's proposed methodology does not utilize its zeroing methodology in computing the weighted average margin for sales outside the targeted subset, the effect of Commerce's use of its zeroing methodology in combining the targeted and non-targeted margins is tantamount to utilizing its zeroing methodology in an average-to-average comparison in an investigation. Accordingly, Commerce's proposed targeted dumping methodology directly contravenes WTO precedent prohibiting the use of zeroing in calculating weighted average margins in investigations pursuant to an average-to-average comparison methodology – WTO precedent which the United States has implemented into US law. While Mitsubishi HiTec Paper and MIC believe that zeroing is prohibited in any aggregation of margins in an antidumping proceeding, it is particularly egregious that Commerce is now utilizing targeted dumping as a mechanism to circumvent WTO decisional law which the United States has specifically implemented.

II. COMMERCE MAY NOT APPLY ANY WEIGHTED AVERAGE MARGINS CALCULATED FOR SALES WITHIN THE TARGETED SUBSET TO NON-SELECTED RESPONDENTS

In addition to the above, should Commerce find that a selected respondent targeted sales of subject merchandise during the investigation period, Commerce may not apply any weighted average margins calculated for sales within the targeted subset to non-selected respondents that have not specifically been found to have targeted sales of subject merchandise by Commerce. In such situations, any margins applied to non-selected respondents must be based exclusively on the weighted average margins calculated for sales outside the targeted subset (*i.e.*, non-targeted sales) pursuant to Commerce's normal or general average-to-average or transaction-to-transaction comparison methodologies.

Commerce's regulations directly address the limitation of the average-to-transaction comparison methodology of targeted dumping to the particular sales analyzed. Specifically, 19 C.F.R. § 351.414(f)(2), entitled "Limitation of average-to-transaction method to targeted dumping" provides: "Where the criteria for identifying targeted dumping under paragraph (f)(1) of this section are satisfied, the Secretary normally **will limit the application of the average-to-transaction method to those sales that constitute targeted dumping** under paragraph (f)(1)(i) of this section." *Id.* (emphasis added). Accordingly, if there has been no allegation of targeted dumping as to non-selected respondents and, thus, no finding of targeted dumping as to those non-selected respondents, any weighted average margins calculated utilizing Commerce's average-to-transaction comparison methodology cannot be applied to such non-selected respondents.

This conclusion is supported by Commerce's clarification letter to the Post-Preliminary Determinations on Targeted Dumping in Antidumping Duty Investigation of Certain Steel Nails from the Peoples Republic of China (PRC) and the United Arab Emirates (UAE). See Clarification Letter – Post-Preliminary Determinations on Targeted Dumping in Antidumping Duty Investigation of Certain Steel Nails from the Peoples Republic of China (PRC) and the United Arab Emirates (UAE), Inv. Nos. A-570-909, A-520-802 (Dep't of Commerce Apr. 24, 2008). Therein, Commerce clarified, in accordance with 19 C.F.R. 351.414(f)(2) and the Preamble to Commerce's regulations, that the application of the average-to-transaction methodology would be limited "to only those sales that constitute targeted dumping – *i.e.*, only sales made to the alleged target customer/region that pass the first and second stages of the targeted dumping methodology." Id. at 1-2 (citing Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27, 375 (Dep't of Commerce May 19, 2007)).

If a petitioner believes that a dumping margin derived from targeted dumping should be applied to a non-mandatory respondent, it would be a petitioner's burden to file an appropriate allegation of targeted dumping with Commerce as to that non-mandatory respondent in order for Commerce to make the appropriate determination. As recognized by Commerce, petitioners are uniquely positioned to carry the burden of substantiating any allegation of targeted dumping. Commerce has stated that:

It is the domestic industry that possesses intimate knowledge of regional markets, types of customers, and the effect of specific time periods on pricing in the U.S. market in general. Without the assistance of the domestic industry, the Department would be unable to focus appropriately any analysis of targeted dumping Ultimately, the domestic industry possesses the expertise and knowledge of the product and the U.S. market Fundamentally, the Department needs the assistance of the domestic industry to focus the inquiry and to properly investigate the possibility of targeted dumping.

Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,374-75 (Dep't of Commerce May 19, 1997). If a petitioner fails to provide Commerce with sufficient evidence to make a determination of targeted dumping as to non-mandatory respondents, Commerce should not speculate as to that respondent's pricing practices in the U.S. market, and most certainly cannot simply assume without evidence that the non-mandatory respondent is also engaged in targeted dumping.

Moreover, the conclusion that a dumping margin based on targeted dumping cannot be applied to non-mandatory respondents that have not specifically been found to have targeted sales of subject merchandise by Commerce is buttressed by and consistent with the U.S. statute and Commerce's practice with respect to margins based upon adverse facts available ("AFA"). See 19 U.S.C. § 1673d(c)(5)(A). Specifically, and as instructed by the U.S. statute, Commerce has determined that it is inappropriate to apply any rate based upon AFA to a non-mandatory respondent where Commerce selection methodology is based upon the largest exporter(s). See, e.g., Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 Fed. Reg. 44,827 (Dep't of Commerce Aug. 9, 2007) (the dumping margin for "the two non-mandatory respondents in this review, which demonstrated their entitlement to a separate rate, is based on the weighted average of the

calculated margins of the mandatory respondents which are not de minimis or based on AFA, in accordance with Department practice”); Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People’s Republic of China, 62 Fed. Reg. 9160 (Dep’t of Commerce Feb. 28, 1997) (with respect to non-mandatory respondents, “we have assigned these companies a weighted-average dumping margin based on the calculated margins of the selected brake rotors respondents, excluding margins which were zero, de minimis or based on facts available”).

The CIT and Commerce have reasoned it would be “inequitable if Commerce were to assign an adverse facts available rate” to non-selected respondents. See Nat’l Knitwear & Sportswear Assoc. v. United States, 779 F. Supp. 1364, 1372-73 (Ct. Int’l Trade 1991) (the application of a punitive, or quasi-punitive, rate to innocent parties would be contrary to the intent that antidumping law be remedial). The CIT has further reasoned that Commerce’s approach also comports with the directive of the URAA in this regard which is “designed to prevent the unrestrained use of facts available as to a firm which makes its best effort to cooperate with the Department.” Coalition for the Preservation of Am. Brake Drum and Rotor Aftermarket Manufacturers v. United States, 44 F. Supp. 2d 229, 252 (Ct. Int’l Trade 1999).

Commerce’s position and reasoning with respect to the application of margins based upon AFA to non-mandatory respondents is equally applicable to the application of margins based upon Commerce’s average-to-transaction comparison methodology pursuant to a finding of targeted dumping to non-mandatory respondents. Any rate that reflects a mandatory respondent’s targeted dumping behavior in the U.S. market cannot be applied to parties such as non-mandatory respondents for which no such behavior has been shown. Indeed, application of

such rates to non-mandatory respondents would be contrary to the remedial nature of the antidumping law and contrary to the design of the URAA to prevent the application of rates to parties that bear no relation to their activities in the marketplace or participation in the proceeding.

Accordingly, where Commerce finds that a selected respondent targeted sales of subject merchandise during an investigation period, the dumping rate applicable to non-selected respondents can only be based upon the weighted average margins calculated for sales outside the targeted subset pursuant to Commerce's normal or general average-to-average or transaction-to-transaction comparison methodologies.

Pursuant to Commerce's request, Mitsubishi HiTec Paper and MIC are filing an original and six (6) copies of this submission. As also requested by Commerce, Mitsubishi HiTec Paper and MIC has attached hereto a CD-ROM containing an electronic version of this submission, in PDF format.

Please do not hesitate to contact the undersigned if you should have any questions regarding this submission.

Respectfully submitted,



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