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

Dear Mr. Assistant Secretary:

On behalf of the Board of Directors of the Japan Machinery Center for Trade and Investment (JMC) and its 282 member corporations, I write to express our views on a methodology to determine the existence of targeted dumping. We sincerely request that the Department of Commerce (the "Department") consider the following points when developing its methodology.

JMC is a non-profit organization that represents Japan's major electronics and machinery manufacturers, trading companies and engineering companies. JMC's activities emphasize multilateral trade and investment rules, bilateral free trade agreements, environmental protection regulations, national industrial policies, trade related security measures, and trade insurance. The Japanese machinery sector accounted for over 80 percent (\$119.3 billion) of total Japanese exports in 2006 to the United States.

Before presenting our specific comments on the methodology for targeted dumping, JMC would like to emphasize that the methodology the Department adopts should be objective and transparent, and should be consistent with the sustainable development of international trade. The Department is a leader in setting rules in the multilateral trade community. Other countries that use antidumping measures are closely watching the Department's rule-making process on this issue. The Department's rules will establish important precedent for the international trade remedy regimes of other countries. Accordingly, the Department's new methodology for targeted dumping may affect not only the U.S. industries requesting remedial actions against imports and their U.S. importers, but also U.S. exporters.

In light of the importance of this rule-making process from the viewpoint of not only the U.S. antidumping procedures but also the international trade remedy system, JMC believes that the Department should incorporate the following points in the methodology to determine targeted dumping:

- **Targeted dumping may be found only where an exporter “targets” its pricing to specific purchasers, regions, or periods of time.** Price differences among purchasers, regions or periods of time may occur for various reasons. For example, the price of a good is normally lower during a period in which the supply to the market exceeds demand. A seller follows changes in price to meet the market price set by other competitors, including U.S. domestic producers. A distributor will give discounts to customers who purchase a larger volume of the product. A producer may sell current products at a lower price when the producer will introduce new products in the near future. These pricing practices differentiate purchasers, regions or the period of time. They all are, however, ordinary business practices. These sellers are not “targeting” their pricing practices to certain purchasers, regions or periods of time. Nevertheless, incidental pricing variations might occur in these situations. Such ordinary business practices should not support a finding of “targeted dumping.” The Department’s adopted methodology should not recognize such ordinary commercial practices as instances in which “targeted dumping” may occur.
- **Targeted dumping should be found only in exceptional cases.** As discussed above, pricing variations are not “targeted” where an exporter sells its product in a manner consistent with ordinary business practices. This means that mere differences in price among purchasers, regions, or periods of time alone do not provide a sufficient basis to find targeted dumping. Targeted dumping may be occurring only when the price differences cannot be explained by the ordinary business practice in the market. Considering such various common pricing practices in the market place, JMC is of the view that “targeted dumping” situations exist only in very exceptional cases.
 - **The existing language in the Department’s regulations further clarifies that targeted dumping may be found only in exceptional cases.** Section 351.414(f)(1)(ii) of the Department’s regulations, 19 C.F.R. § 351.414(f)(1)(ii), provides explicitly that targeted dumping may be found only where the difference between pricing to targets and non-targets “cannot” be taken into account using the average-to-average method or the transaction-to-transaction method. Section 351.414(c)(1) states that the average-to-average method is “normally” applied to antidumping investigations, and the transaction-to-transaction method applies only to “unusual situations.” Targeted

dumping, to which the average-to-transaction method applies, can be found only where the situation is not “normal” and is even beyond “unusual.” Thus, resort to a targeted dumping method should be applied only where the pricing pattern clearly demonstrates such a situation.

- **The scope of targeted dumping should be interpreted consistently with international antidumping rules, which require that the targeted dumping methodology be applied only in exceptional cases.** The language of Section 351.414(f)(1)(i) — “a pattern of export prices ... differ[s] significantly among purchasers, regions, or periods of time” — follows almost verbatim the second sentence of Article 2.4.2 of the WTO Anti-dumping Agreement. As the global leader in development of international trade rules, particularly with respect to trade remedies, the Department should apply its own regulations consistently with WTO standards. In this connection, the WTO Appellate Body has stated that targeted dumping using the average-to-transaction method is “an exception to the two normal methodologies,”¹ *i.e.*, the average-to-average and transaction-to-transaction methods. The Appellate Body’s assessment reinforces our earlier point that targeted dumping applies only to exceptional cases.
- **A “pattern” of “targeted” dumping should be found only in exceptional cases, in which the pricing pattern cannot be explained from ordinary business practices.** The pattern of the price difference supporting a finding of “targeted” dumping must be understood in the context of the above discussion, *i.e.*, the pricing pattern indicating targeted dumping is a pattern that is not normal, nor is the pricing pattern even simply unusual; it must be exceptional. At a minimum, where the pricing pattern can be explained in the context of ordinary business practices, “targeted” dumping does not exist. In other words, only a pattern that cannot be explained from the viewpoint of the ordinary business practice could possibly support a finding of targeted dumping.
- **In order to apply the targeted dumping methodology, the Department should find that the pricing pattern is “significant”, *i.e.*, the pattern of differential pricing must be extensive, having a major effect on the market.** In addition to the requirement that the differential pricing pattern is not normal, and is beyond unusual situations, and cannot be explained from ordinary business practices, the targeted dumping pattern

¹ Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, para. 118, adopted by the WTO Dispute Settlement Body on 23 January 2007.

must be “significant.” A mere finding of a differential pricing pattern is not sufficient to apply the targeted dumping methodology.

The word “significant” should be interpreted consistently with the WTO rules. In interpreting the meaning of WTO terminology, it is well established that the interpreter must first look into the ordinary meaning of the language. The ordinary meaning of “significant” is “extensive”² or “having or likely to have a major effect.”³ As such, the investigating authority may apply a targeted dumping methodology only where the pricing pattern shows that the targeted dumping is extensive and has a major effect on the market. Without a finding of an extensive scope or major effect on the market, the targeted dumping methodology may not be applied.

- **The Department should adopt a “standard” and “statistical technique” to identify differential pricing practices that is not in ordinary business, is extensive and has a major effect on the market.** As discussed above, the targeted dumping methodology may be applied only to situations where the differential pricing pattern is cannot be explained from the ordinary business practice, is extensive and has a major effect on the market. The standard that the Department adopts, therefore, should be the one that identifies these patterns. Any statistical technique that the Department adopts should assist the Department in evaluating whether the pricing pattern is one that cannot be found in ordinary business practice, and that is extensive and has a major effect on the market.
- **The application of the average-to-transaction method should be limited to the universe of differential pricing targets.** Because the application of the average-to-transaction method is intended to unmask targeted dumping, there is no reason to apply the average-to-transaction method to non-targets. In this connection, the WTO Appellate Body has suggested:

The emphasis in the second sentence of Article 2.4.2 is on a "pattern", namely a "pattern of export prices which differs significantly among different purchasers, regions or time periods." The prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices. We therefore read the phrase "individual export transactions" in that sentence as

² Concise Oxford English Dictionary, tenth edition, revised, p. 1335.

³ American Heritage Dictionary of the English Language, at http://education.yahoo.com/reference/dictionary/entry/significant;_ylt=AplbdioIK82FBEq6TXgbNPSsgMMF

referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply.⁴

As suggested by the WTO Appellate Body, non-targets are outside of the scope of targeted dumping, and therefore outside of the application of the targeted dumping methodology. For non-targets, therefore, the average-to-average method must apply. The average-to-transaction method should apply only to targets. Moreover, the targeted dumping methodology should not in any way undermine the WTO Appellate Body's express proscription of "zeroing" for calculation of margins of dumping.

- **Finally, in applying the targeted dumping methodology, the Department must fully explain its reasons to apply the methodology in both preliminary and final determinations.** This requirement also arises from the second sentence of Article 2.4.2 of the WTO Anti-dumping Agreement, and is adopted in Section 351.414(f)(1)(ii) of the Department's regulations. Such explanation must include fact findings showing how the pattern of differential pricing cannot be viewed as an ordinary business practice of exporters. Such determinations must also include explanations that the price pattern is extensive and has a major effect on the market. Furthermore, the Department should provide sufficient opportunity to responding parties to present rebuttal evidence and argument. The Department should issue its preliminary determinations only after providing such opportunity and considering the respondents' evidence and argument. Without preserving the due process right of responding parties and without examining all relevant evidence and arguments, the Department cannot provide sufficient explanation of reasons, nor can it reach an objective determination in a transparent manner.

JMC appreciates the Department's consideration of our comments and respectfully requests that the Department incorporate the above comments into its methodology for determining targeted dumping. We would be happy to answer any questions that the Department may have.

⁴ Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R, para. 135, adopted by the WTO Dispute Settlement Body on 23 January 2007.



Japan Machinery Center for Trade and Investment

Sincerely yours,

Haruhiko Kuramochi
Executive Managing Director
Japanese Machinery Center for
Trade and Investment (JMC)

See attached member list