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The Honorable David Spooner
Assistant Secretary for Import Administration
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 278 member corporations, I write to express our views on the Department’s proposed methodology for analyzing targeted dumping allegations.¹

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 (\$116.4 billion) of total Japanese exports in 2007 to the United States.

JMC appreciates the Department’s efforts to develop a standard methodology for analyzing targeted dumping allegations. In particular, JMC agrees with the Department’s decision to abandon the 2% deviation test applied in *Coated Free Sheet Paper from the Republic of Korea* (“*CFS Paper*”).² That said, although an improvement over the *CFS Paper* test, the Department’s proposed methodology remains flawed in several respects. Thus, JMC respectfully requests that the Department modify the proposed methodology in accordance with the following comments.

¹ See *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26371 (May 9, 2008).

² See *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 Fed. Reg. 60630 (Oct. 25, 2007).

The Department's proposed targeted dumping methodology is a two-part test. The first stage of the test examines whether there is a "pattern" of price differences, and the second stage examines whether the export prices in the pattern differ "significantly" from prices to non-targets. JMC discusses proposed modifications to the first-stage test in Section I and proposed modifications to the second-stage test in Section II. JMC makes comments on other issues in Sections III and IV.

I. PROPOSED MODIFICATIONS TO THE FIRST-STAGE TEST ("PATTERN REQUIREMENT")

The first-stage test examines whether there is a pattern of price differences between the alleged target and non-targets. The Department examines, on an exporter-specific basis, whether the price of each CONNUM to the alleged target is more than one standard deviation below the weighted-average price of the identical CONNUM to all customers. The Department will find that the pattern requirement is met if the value of sales meeting the standard deviation test exceeds 33% of the total value of the exporter's sales of subject merchandise to the alleged target. JMC proposes that the Department modify the first-stage test as follows.

A. The 33% Benchmark Should Be Changed

As noted above, the Department will find that the pattern requirement is met if the value of sales meeting the one standard deviation test exceeds 33% of the total value of the exporter's sales of subject merchandise to the alleged target. The use of a 33% benchmark is inconsistent with section 777A(d)(1)(B) of the Act and Article 2.4.2 of the WTO Antidumping Agreement, which mandate that targeted dumping be found only where there is a "pattern" of export prices to the alleged target that differ significantly from prices to non-targets. The 33% test is insufficient to identify a "pattern" of such prices.

Both the U.S. statute and the WTO Antidumping Agreement require the Department to find a "pattern" of export prices for comparable merchandise that differ significantly among purchasers, regions, or time periods. In accordance with U.S. canons of statutory construction and WTO jurisprudence, the term "pattern" in these provisions must be accorded its common meaning: an "arrangement or sequence regularly found in comparable objects."³ Thus, to find targeted dumping, the Department must find that significantly lower prices to the alleged target occur *regularly*.

³ Concise Oxford English Dictionary (10th edition) at 1047.

The Department's proposed 33% benchmark fails to meet the statutory and WTO standard. The 33% benchmark allows the Department to find a "pattern" even where no patterns of price differences were found in two-thirds of the sales to the alleged target. Such a result would be insufficient to find that sales prices to the target are *regularly* different from prices to non-targets, and thus would provide an inappropriate basis to find a "pattern."

The Department, therefore, should modify the first-stage test to make the finding of a "pattern" required by the U.S. statute and WTO Antidumping Agreement, as discussed above..

B. The First-Stage Test Should Be Modified to Apply Standard and Appropriate Statistical Techniques

The Department's regulations require targeted dumping to be analyzed using "standard and appropriate statistical techniques"⁴ However, in the antidumping investigations of *Steel Nails from the United Arab Emirates and China* – the only cases in which the Department has applied the proposed methodology thus far – the Department did not use commonly accepted techniques for calculating one standard deviation.⁵ Instead, the Department used unorthodox calculation methods, which did not fairly reflect actual sales transactions to customers, and arbitrarily caused more sales to pass the first-stage test. The Department should use common and generally accepted methods to calculate standard deviations in applying the first-stage test.

First, in calculating the CONNUM-specific average price to each customer, the Department used a simple average instead of an average weighted by volume. To calculate the simple average price, the Department divided the sum of all transaction prices of a particular CONNUM to the customer by the number of transactions. In doing so, the sales volume of these transactions was ignored. Because the "average" price resulting from this calculation was not a weighted-average price in an ordinary sense, it did not fairly reflect actual transactions.

Second, the Department used an unorthodox method to calculate the CONNUM-specific weighted-average price to all customers. For each customer, the Department first calculated the ratio of the total sales value of a CONNUM to the customer over the total sales value of the CONNUM to all customers. Next, the Department multiplied this ratio by the above-discussed simple average price to the customer. Last, the Department added up the results for each

⁴ 19 C.F.R. § 351.414(f)(1)(i).

⁵ See *TARGETED DUMPING PROTOTYPE PROGRAM*, PETER KNAPP (A-570-909 & A-520-802) (MARCH 2008) (public version); Memorandum from Stephen J. Claeys to David M. Spooner, *Post-Preliminary Determinations on Targeted Dumping, Antidumping Duty Investigations of Certain Steel Nails from the Peoples Republic of China (PRC) and the United Arab Emirates (UAE)* (A-570-909 & A-520-802) (Apr. 21, 2008).

customer to derive the weighed-average price (weighted by sales value) to all customers, which the Department used to calculate one standard deviation. As a mathematical matter, this method resulted in a higher weighted-average price than would be calculated using normal techniques (*i.e.*, using actual sales prices and volumes) because more weight is given to higher average prices. Consequently, this calculation method causes more sales to a particular customer to fall more than one standard deviation below the weighted-average price to all customers.

As discussed above, the Department's calculation methods would arbitrarily increase the number of sales that meet the standard deviation test. To apply the test fairly and satisfy the regulatory requirement to use "standard and appropriate statistical techniques," the Department should use ordinary weight-averaging methods based on actual sales prices and volumes.

II. PROPOSED MODIFICATIONS TO THE SECOND-STAGE TEST

The second-stage test examines the significant difference requirement. The Department examines all of the sales for which the pattern requirement in the first-stage test is met, and determines the total sales value for which the difference between (1) the weighted-average price to the alleged target and (2) the next higher weighted-average price to a non-target exceeds the average price gap for the non-targeted group (the "price gap test"). The Department will find that the significant difference requirement is met if the sales meeting the price gap test exceed 5% of the total sales value to the alleged target. The second-stage test should be modified as follows.

A. The Price Gap Test Should Be Modified so as to Take Differing Customer Characteristics into Account and Use the Largest Individual Price Gap for Non-Targets as a Benchmark

The Department's proposed price gap test fails to identify export prices that "differ significantly," and therefore should be modified.

Under the price gap test, the Department uses the weighted-average price gap among non-targets as the benchmark against which to measure the significance of the gap between the average price to the alleged target and the next higher average price to a non-target. However, because this test fails to take differing customer circumstances into account, it fails to provide any meaningful basis to assess the price gap. For example, in calculating the non-target benchmark for the price gap test in the antidumping investigations of *Steel Nails from the United Arab Emirates and China*, the Department did not take into account different customer characteristics, such as customer category (*i.e.*, whether the customer is a distributor, retailer, or

end user) or the channel of distribution used to supply to the customer.⁶ Nor did the Department consider such differences in applying the benchmark to the gap between the price to the target and the next higher price to a non-target.⁷ Absent consideration of customer differences that affect price, the proposed price gap test cannot provide meaningful results.

Moreover, the Department's price gap test fails to detect export prices that differ "significantly." As applied in statistics, the term "significance" means "the extent to which a result deviates from that expected to arise simply from random variation or errors in sampling."⁸ Applying this definition, the price gap could be considered "significant" when the gap between the price to the target and the next higher price to a non-target is larger than any individual price gap between non-targets. The Department's price gap test, however, uses the weighted-average price gap for non-targets as the benchmark. This is unreasonable because there will always be individual price gaps among non-targets that are larger than the benchmark, which is an average. As a result, the price gap test would be satisfied even though the gap between the price to the target and the next higher price to a non-target is less than individual price gaps between non-targets. Therefore, the price gap test cannot be the basis to find that the price difference between the target and non-target is significant, *i.e.*, "deviate[d] from that expected to arise."

For these reasons, the Department's price gap test fails to provide meaningful results and identify "significant" price differences. JMC submits that the Department should modify the price gap test to take differing customer characteristics into account and use the largest individual price gap between non-targets as a benchmark.

B. The Second-Stage Test Should Be Modified to Require that All Sales Meeting the Pattern Requirement Also Satisfy the Price Gap Test

As noted above, the Department will find that the significant difference requirement is met if the sales meeting the price gap test exceed 5% of the total sales value to the alleged target. As with the 33% benchmark in the first-stage test, the 5% test in the second stage is inconsistent with section 777A(d)(1)(B) of the Act and Article 2.4.2 of the WTO Antidumping Agreement, which mandate that targeted dumping be found only where there is a pattern of export prices to the alleged target that differ "significantly" from prices to non-targets. Under the Department's proposed test, only 5% of sales satisfying the pattern requirement in the first stage would need to

⁶ *TARGETED DUMPING PROTOTYPE PROGRAM*, PETER KNAPP (A-570-909 & A-520-802) (MARCH 2008) (public version).

⁷ *See id.*

⁸ Concise Oxford English Dictionary (10th edition) at 1335.

satisfy the price gap test in the second test – contrary to the statute’s requirement that the entire pattern of export prices differ significantly.

Under section 777A(d)(1)(B)(i) and Article 2.4.2 of the Antidumping Agreement, targeted dumping may be found only if there is a “pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time.”⁹ Under a plain reading of this provision, all prices found in the pattern of export prices must differ significantly from the prices of comparable merchandise to non-targets. The WTO Appellate Body has confirmed this interpretation, stating that “the prices of transactions that fall within this *pattern* must be found to differ significantly from other export prices.”¹⁰

Applying this requirement to the Department’s proposed methodology, all of the sales that meet the pattern requirement in the first-stage test (standard deviation) would also need to meet the price gap test for significant difference in the second-stage test. The Department’s proposed methodology, however, finds targeted dumping even when only 5% of sales to the alleged target satisfy the price gap test. Thus, the Department’s proposed 5% test is contrary to the express terms of the U.S. statute and the WTO Antidumping Agreement.

For these reasons, the Department should abandon use of the 5% test, and modify the second-stage test to require that *all* prices meeting the pattern requirement in the first-stage test also satisfy the price gap test in the second stage.

III. EVEN IF IT FINDS A PATTERN OF EXPORT PRICES THAT DIFFER SIGNIFICANTLY AMONG PURCHASERS, REGIONS, OR PERIODS OF TIME, THE DEPARTMENT MUST CONDUCT A MARKET-SPECIFIC ANALYSIS TO CONFIRM THAT SUCH SALES WERE NOT MADE IN THE ORDINARY COURSE OF TRADE; THE PETITIONER SHOULD BE REQUIRED TO MAKE A *PRIMA FACIE* SHOWING THEREOF IN ITS REQUEST FOR A TARGETED DUMPING INVESTIGATION

Under the statute and the WTO Antidumping Agreement, the Department cannot make an affirmative finding of targeted dumping, unless it conducts a market-specific analysis to confirm that export sales found to be made at significantly lower prices were not made in the ordinary course of trade. In order to accept a targeted dumping allegation, the Department should require the party alleging targeted dumping to establish a *prima facie* case that the allegedly targeted

⁹ 19 U.S.C. § 1677f-1(d)(1)(B); *see also* Article 2.4.2 of the WTO Antidumping Agreement.

¹⁰ 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.

sales were not made in the ordinary course of trade. Furthermore, the Department should consider explanation by responding parties in analyzing targeted dumping.

As JMC explained in its November 23, 2007 submission, targeted dumping may be found only in exceptional cases.¹¹ If sales to an alleged target were in fact made in accordance with normal pricing behavior, they cannot be identified as targeted under the relevant provisions of the U.S. statute and WTO Antidumping Agreement. Section 351.414(c)(1) of the Department's regulations states that the Department "normally" applies the average-to-average method, and uses the transaction-to-transaction method only in "unusual situations." Thus, targeted dumping, for which the average-to-transaction applies, should be found only under exceptional circumstances. The WTO Appellate Body confirmed that use of the average-to-transaction method upon a finding of targeted dumping is "an exception to the two normal methodologies."¹² Applying this requirement, targeted dumping may not be found where the price difference between the alleged target and non-targets results from normal pricing practices in the ordinary course of business. Unfortunately, through the use of a one-standard deviation test, the first-stage test of the Department's proposed methodology would improperly identify sales that were made in the ordinary course of business as targeted.

As noted in Section I, the Department proposes to examine prices to the alleged target that are more than one standard deviation below the weighted-average price of the identical CONNUM to all customers. As a statistical matter, however, 31.7% of all sales prices to the alleged target would automatically fall outside of one standard deviation of the average price in the normal distribution situation. Consequently, the one-standard deviation method would identify sales as potentially targeted, even though such sales were made in the ordinary course of business. For example, in the ordinary course of business, sellers often provide larger discounts or rebates to customers that purchase larger quantities. The net sales prices to such customers could fall below one standard deviation of the average price, even though such prices were offered to all customers in accordance with normal business practices – not due to targeted dumping. The one standard deviation test would also mask price fluctuations resulting from changes in raw material costs, supply and demand, and other common economic factors. As a result, a customer could be identified as targeted simply because it happened to buy subject merchandise during a month when market prices were low. Even if sales by an exporter to an alleged target would appear to be in a pattern of significant price differences when examined transactions

¹¹ See Letter from JMC to the Department (Nov. 23, 2007) at 2-3.

¹² 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.

made by the exporter alone, analysis on all transactions in the relevant market would show that sales to the alleged target were made in the ordinary course of trade.

As written, the Department's proposed methodology for determining targeted dumping is mechanical and fails to account for possible market-specific explanations for why certain sales were made to certain purchasers or regions at significantly lower prices. Accordingly, in selecting a final methodology, the Department should make clear that its targeted dumping analysis will not rest on the application of mechanical, statistical tests alone; rather, the Department will also conduct the necessary market-specific inquiry to confirm that sales identified as targeted were not made in the ordinary course of trade, and, in doing so, will afford respondents a meaningful opportunity to present information and argument.

A market-specific analysis is required by section 777A(d)(1)(B)(ii) of the Act and Article 2.4.2 of the WTO Antidumping Agreement. These provisions mandate that the Department explain why the pattern of significant price differences cannot be taken into account in the average-to-average method or the transaction-to-transaction method. As noted above, significant price differences may result from ordinary market forces or business practices, such as fluctuations in raw material costs or the provision of volume discounts. Such ordinary pricing factors can be taken into account in either the average-to-average method or the transaction-to-transaction method. Thus, in order to find targeted dumping and apply the average-to-transaction method, the Department must explain why a particular pattern of significant price differences is exceptional in light of the specific characteristics of the market. Consistent with this reading of the statute and the WTO Antidumping Agreement, the preamble to the Department's targeted dumping regulation specifies that an analysis of targeted dumping requires "insight as to how the market truly functions"¹³

JMC also submits that the party alleging targeted dumping must submit sufficient evidence establishing a *prima facie* case that the pricing pattern alleged to result from targeted dumping did not result from sales made in the ordinary course of trade. It would be inappropriate for the Department to initiate a targeted dumping investigation without a sufficient evidentiary basis.

Moreover, in examining the particular characteristics of the market, due process principles require the Department to consider comments, evidence, and explanation from respondents that allegedly targeted sales were made in the ordinary course of business, and thus that the respondents did not engage in targeted dumping.

In sum, in examining targeted dumping, the Department must not rely solely upon mechanical tests, but must also conduct a case-specific analysis in light of the particular characteristics of the

¹³ *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27296, 27374 (May 19, 1997).

market. Moreover, as a precondition to the initiation of a targeted dumping inquiry, the Department should require the party alleging targeted dumping to establish a *prima facie* case that the allegedly targeted sales were not made in the ordinary course of trade. Finally, principles of due process dictate that the Department should consider comments and information from responding parties, and reach an objective conclusion with reasoned and adequate explanation of its targeted dumping analysis.

IV. THE DEPARTMENT SHOULD NOT APPLY THE AVERAGE-TO-TRANSACTION METHOD TO NON-TARGETS, AND SHOULD NOT USE TARGETED DUMPING TO EVADE THE NON-ZEROING RULES

The Department must limit application of the average-to-transaction method to sales found to be targeted. 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-targeted sales.

This interpretation is supported by the WTO Appellate Body, which stated,

We therefore read the phrase "individual export transactions" in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions {to which the average-to-transaction method applies} 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.¹⁴

As suggested by the WTO Appellate Body, non-targeted sales are outside the scope of targeted dumping, and therefore cannot be used in average-to-transaction comparisons.

Finally, the targeted dumping methodology should not be utilized in any way to circumvent the WTO Appellate Body's express proscription of "zeroing" for calculation of margins of dumping.

¹⁴ 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.



V. CONCLUSION

Although the Department's proposed methodology is an improvement over the *CFS Paper* test, JMC respectfully requests that the Department adopt the suggestions discussed above so as to ensure that its standard targeted dumping analysis is consistent with U.S. statutory and regulatory provisions, U.S. international obligations under the WTO Antidumping Agreement, and principles of due process.

We would be happy to answer any questions that the Department may have.

Sincerely yours,

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

See attached member list