Comments Submitted by the Government of the Republic of Korea Regarding the Proposed Change of the Department's Zeroing Practice

First of all, the Government of the Republic of Korea ("GOK") welcomes the decision of the United States Department of Commerce ("the Department") to abandon its so-called zeroing practice in average-to-average comparisons of export prices and normal values in original investigations in accordance with the panel decision in *United States – Regulation and Methodology for Calculating Dumping Margins ("U.S.-Zeroing"),* WT/DS294 (Oct. 31, 2005).[1] The GOK also appreciates this opportunity to submit a comment.

The GOK, however, would like to note that, except for its brief reference to the panel decision in *U.S.-Zeroing*, the relevant Federal Register notice does not provide a draft methodology or practice, which adequately explains the Department's future course of action and which would allow the GOK to provide more specific comments.[2] Instead, all the Federal Register notice contains is a short statement that the Department will abandon zeroing practice in an average-to-average comparison methodology in antidumping investigations pursuant to *U.S.-Zeroing*.

Although the absence of a specific draft methodology or relevant information has limited the GOK's ability to provide meaningful comments, the GOK offers the following comments to assist the Department in formulating a methodology, which is

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

[2] In this regard, the GOK brings the Department's attention to Section 123(g)(1)(G) of the Uruguay Round Agreements Acts ("URAA"), which requires that the Department provide an opportunity for public comment by publishing "the proposed modifications and the explanation of the modification." The GOK believes that this provision requires the Department to provide more information on the proposed change.

consistent with both *the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* ("Antidumping Agreement") and *the Uruguay Round Agreements Acts* ("URAA") implementing the Antidumping Agreement in the United States. If the Department's intention were to simply terminate the use of the "zeroing" practice in certain instances, it could have easily done so by ceasing to use "Standard Zeroing Procedures" computer code in such instances. Instead, the Department is soliciting comments in this respect. As such, the GOK believes it appropriate to submit its comments to make the methodology at issue in compliance with the Antidumping Agreement as much as practicable.

When carefully read, the Federal Register notice appears to indicate that the Department is planning to abandon the "zeroing" practice *only* in the average-to-average comparison in original investigations. Our comments below are based on this understanding.

1. The Department Should Abandon "Zeroing" in All Antidumping Proceedings including Administrative Reviews

At the outset, the GOK stresses that any change of the Department's "zeroing" practice must apply to all antidumping proceedings, whether they are original investigations or subsequent reviews. The GOK requests the Department to appreciate the practical aspect of the administrative reviews under the Department's regulation. Under the Department's retrospective assessment system, an administrative review cannot be separated from the original investigation; rather an administrative review is the final stage of imposing an applicable antidumping duty on a particular importer.

Under U.S. law, the GOK understands that administrative reviews carry out two

things; (i) they *retrospectively* assess *final* liability for applicable antidumping duty amounts, based on the *re-investigation* of contemporaneous or actual normal values, export prices and margins of dumping, and (ii) they *prospectively* determine the "cash deposit rate," which basically operates as a *provisional* antidumping duty until the next administrative review. As such, under the U.S. system an administrative review constitutes an essential element of a particular antidumping proceeding. The Department's apparent attempt to detach administrative reviews from original investigations negates both its own regulation and reality. It would be absurd, therefore, for the Department to apply two different rules to original investigations and administrative reviews. If the Department abandons "zeroing" in original investigations, it is required to do the same in administrative reviews. As long as the Department is allowed to utilize "zeroing" in the administrative reviews, regardless of its abandonment of the practice in the original investigation, the inflated margin flowing from "zeroing" would render any final assessment and cash deposit rate inherently inaccurate. Simply put, it is preposterous to state that one form of "zeroing" is prohibited in investigations while another form is permitted in duty assessment proceedings.

Furthermore, this position is supported by ample precedents of the WTO Appellate Body. The Appellate Body has consistently held that "zeroing" should be condemned as unfair and prohibited in both the original investigations and reviews.[3]

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[3] *See European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R, (Mar. 1, 2001) ("*EC-Bed Linen*"); *United States-Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS244/AB/R, (Dec. 15, 2003); *United States – Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS264/AB/R, (Aug. 11, 2004) ("*U.S.-Softwood Lumber*").

The Appellate Body jurisprudence should be carefully contemplated by the Department in this process given the fact that the whole purpose of the proposed change is to bring the Department's methodology in conformity with relevant WTO norms. Thus, the GOK believes that any change that adopts relevant WTO jurisprudence must be done in a comprehensive manner rather than piecemeal incorporation of a cherry-picked methodology.

To illustrate some of the precedents, in *EC-Bed Linen* the Appellate Body has noted the inherent bias of "zeroing" that generally inflates the margins calculated and can, in some instances, find that dumping exists where there is actually none. The Appellate Body consequently found that "zeroing" is inconsistent with the "fair comparison" requirements of the Articles 2.4 and 2.4.2.[4] In *EC-Bed Linen*, the Appellate Body concluded that the investigating authority failed to establish the existence of margins of dumping for the product at issue on the basis of *all* export transactions, as required by Article 2.4.2. Likewise, in *Canadian Lumber*, the Appellate Body based its analysis on the language of Article 2.4.2 of the Antidumping Agreement and its requirement that the calculation of dumping margins on an average-to-average basis must consider "*all* comparable export transactions."[5] In the decision, the Appellate Body then concluded that "zeroing" is inconsistent with Article 2.4.2. Although underlying disputes leading to these decisions were original investigations, in

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[4] *See EC – Bed Linen,* para. 55. The GOK notes that Article 2.4 of the Antidumping Agreement provides an *overarching* and *independent* obligation to make a fair comparison that goes beyond the obligations to make "due adjustments" described in Article 2.4. In this regard, the GOK notes that the "fair comparison" requirement, which is set forth independently in the first sentence of Article 2.4, also stipulates that "[a] fair comparison shall be made between the export price and the normal value." This language of Article 2.4 also appears to be unambiguous and clearly establish an independent obligation to conduct "fair comparison" in all antidumping proceedings, whether they are original investigations or administrative reviews.

[5] *See U.S.–Softwood Lumber,* paras. 86-87.

the GOK's view the rationale of the Appellate Body does not distinguish between original investigations and administrative reviews. These decisions stand for the proposition that given the egregious distortion caused by "zeroing," any calculation methodology adopting the practice *per se* is inaccurate and unreasonable, and the practice, in and of itself, constitutes violation of the relevant provisions of the Antidumping Agreement.

In the light of the Appellate Body's past decisions noted above, the GOK believes that "zeroing", which the Department has consistently used for calculating dumping margins in *both* original investigations and subsequent reviews is inconsistent with the requirements of the Antidumping Agreement and URAA and, therefore, must be abandoned at this juncture.[6] In an administrative review, where the Department chooses to calculate a *new* dumping margin for the final duty assessment after *re-investigation* based on actual data, the calculation of the dumping margin must be done without using "zeroing," consistent with the requirements of Articles 2.4 and 2.4.2 of

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[6] The GOK provides the following explanation to support its argument. The instances where the term "investigation" appears in Article 2 are as follows:

- weighted average per unit costs for the period of investigation (2.2.1)
- the exporter or producer under investigation (2.2.1.1 and 2.2.2)
- the exporter or producer in the course of the investigation (2.2.1.1.)
- costs during the period of investigation (2.2.1.1)
- other exporters or producers subject to investigation (2.2.2(ii))
- in an investigation, the authority shall allow exporters at least 60 days to have adjusted their export prices (2.4.1.)
- movement in exchange rates during the period of investigation (2.4.1)
- the existence of margins of dumping during the investigation phase. (2.4.2)

It is a reasonable interpretation that the term "investigation" in these instances includes the subsequent investigations, such as the review investigations, as it is a general practice that the Members usually apply those provisions of Article 2 in the subsequent proceedings following the initial investigation. There is, therefore, no reason to carve out Article 2.4.2 from applying provisions of Article 2 in all proceedings involving the calculation of a dumping margin.

the Antidumping Agreement and relevant provisions of the URAA. The GOK strongly proposes that this aspect be clarified in the proposed change of the Department's methodology.

2. "Zeroing" Must Be Abandoned Not Only for Average-to-Average Comparison, But Also for Transaction-to-Transaction and Average-to Transaction Comparisons

The Department seems to argue that based on *U.S.-Zeroing*, where the panel has found that the weighted average-to-weighted average method incorporating "zeroing" is inconsistent with Article 2.4.2 of the Antidumping Agreement, "zeroing" is only prohibited when establishing the margins of dumping under the weighted average-to-weighted average method in Article 2.4.2. The GOK notes that the Department's position is flawed.

The GOK notes that the *U.S.-Zeroing* panel has had no option but to address only the issue of whether "zeroing" is prohibited under the weighted average-to-weighted average method merely because the issue of whether "zeroing" is also prohibited under other two methodologies (that is, transaction-to-transaction and weighted average-to-transaction) was not properly asked.[7] Thus, the GOK believes that should the panel continue to review the issue that was not asked, it would be able to reach the same conclusion that "zeroing" is also prohibited under the other two methodologies.

The GOK submits that "zeroing" must be prohibited entirely and completely under all three methods described in Article 2.4.2 for the reasons stated below. When the investigating authorities choose to engage in multiple comparisons, they are

[7] *See U.S.-Softwood Lumber*, paras. 104-105.

required to combine the results of those comparisons to determine the overall dumping margins for the product as a whole.[8] The methodology used to combine the individual comparisons must include *all* of the individual comparisons.[9] This is true whether the multiple comparisons are made using *any* of all three methodologies. However, if "zeroing" is used in combining the results of individual comparisons, as some individual comparisons with a "negative" dumping margin are purposefully and systemically excluded, *all* of the individual comparisons cannot be taken into account in the calculation of dumping margin, regardless of which particular comparison method out of the three has been selected. Under these circumstances, the GOK notes that the "fair comparison" that is required under Articles 2.4 and 2.4.2 cannot be achieved.

With the above in mind, in the GOK's view, the Department's proposed change

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[8] Thus, in *U.S.-Softwood Lumber*, the Appellate Body held that:

> It is clear that an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation. In our view, the results of the multiple comparisons at the sub-group level are, however, not "margins of dumping" within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating all these "intermediate values" that an investigating authority can establish margins of dumping for the product under consideration as a whole.

U.S.-Softwood Lumber, para. 97.

[9] Thus, the Appellate Body further explained that:

> There is no textual basis under Article 2.4.2 that would justify taking into account the "result" of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other "results." If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2.

Id., para. 98. *See also*, paras. 99-100.

of methodology must take into account this aspect, and abandon “zeroing” in all three methods listed in Article 2.4.2 in order to ensure a “fair comparison” as required under Articles 2.4 and 2.4.2.

3. Conclusion

The GOK reiterates that “zeroing” *per se* in both the original investigation and subsequent reviews are in violation of both the Antidumping Agreement and the URAA implementing the Agreement. Such being the case, the GOK respectfully submits that the new methodology to be adopted by the Department adequately reflects these issues to fully address the distortion in calculation caused by the “zeroing” practice. The GOK would like to provide more detailed comments once the Department offers its suggested draft methodology or future course of action in this regard.

Once again, the GOK appreciates the opportunity to submit its comment in the Department’s process to amend its “zeroing” practice.