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May 4, 2006

Mr. David M. Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, NW
Washington, DC 20230

Re: Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation

Dear Mr. Spooner:

These rebuttal comments are timely made pursuant to the Department's recent notices concerning the referenced matter.[1] We appreciate this further opportunity to present our views to the Department in light of others' remarks that have already been filed.[2]

I. INTRODUCTION

It would be difficult to overstate the importance of the offsets/zeroing question to the antidumping law's effective administration. As described more fully below, therefore, these rebuttal comments will address three basic points, as follows:

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[1] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 Fed. Reg. 11,189 (March 6, 2006), and Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Extension of Rebuttal Comment Period, 71 Fed. Reg. 23,898 (April 25, 2006).

[2] Please note that, effective April 17, 2006, Collier Shannon Scott, PLLC, merged with Kelley Drye & Warren LLP, thus changing our name to Kelley Drye & Warren LLP. Our firm's office in Washington, D.C., is doing business as Kelley Drye Collier Shannon.

(1) The use of zeroing in any segment of a dumping proceeding (including original investigations, administrative reviews or sunset proceedings) should be addressed by Congress statutorily before any changes to the current methodology are implemented;

(2) At the same time, consistent with congressional direction, the United States should make a concerted effort in the Doha Round to clarify and confirm (a) that the Member States of the World Trade Organization ("WTO") have not by negotiation agreed to bar zeroing and (b) that zeroing is a permissible methodology in both investigations and reviews under the provisions of the Antidumping Agreement, and the Department should not change its zeroing practice prior to the conclusion of the Doha Round; and

(3) While deferring to an eventual legislative resolution by Congress overall, in the interim the Department should continue to adhere to its zeroing methodology for weighted-average-to-weighted-average ("W-W") dumping comparisons in original antidumping investigations. In the alternative, in its original investigations the Department should employ transaction-to-transaction ("T-T") dumping comparisons, which are authorized in original investigations under 19 U.S.C. § 1677f-1(d)(1)(A)(ii) and under 19 C.F.R. §§ 351.414(b)(2) and (c)(1).

For the reasons discussed in detail below, we believe that no further action should be taken by the Department with respect to zeroing in any segment of an antidumping proceeding until Congress has addressed this issue and until the Doha Round is complete. Recognizing, however, that the Department has requested comments on the methodology to be used in original investigations in the event that it decides to change its current practice, we first comment on issues raised by those representing the foreign producers/exporters ("the respondents") that address the calculation of the weighted-average dumping margin during original investigations.

II. THE TRANSACTION-TO-TRANSACTION METHODOLOGY IS ALLOWED BY STATUTE AND SHOULD BE USED IN ORIGINAL INVESTIGATIONS IF THE DEPARTMENT DECIDES THAT IT WILL NO LONGER RELY ON THE WEIGHTED-AVERAGE METHODOLOGY WITH ZEROING

The comments filed by the respondents put forth three general themes with respect to the calculation of dumping margins in original investigations.[3] [4] First, the respondents propose that the Department calculate dumping margins in original investigations by using a weighted-average methodology that would include offsets (thereby eliminating zeroing). Second, the respondents argue that the transaction-to-transaction methodology was only intended to be used in limited circumstances and therefore should not become the predominant calculation methodology in original investigations. Third, the respondents argue that even if the Department uses the transaction-to-transaction methodology, the Department should not use zeroing. These issues are addressed in turn.

A. The Statute Prohibits the Department from Making an Average-to-Average Comparison Without Zeroing

If the Department determines that it will change its policy as a result of the WTO decision, the Department cannot adopt a methodology that includes offsets for non-dumped comparisons. In the first instance, the Department's longstanding exclusion of offsets for non-dumped comparisons in calculating the dumping margin is required by U.S. law, as explained fully in the comments submitted this day by the Committee to Support U.S. Trade Laws ("CSUSTL"). Moreover, the practice of zeroing is based on the fundamental recognition that

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[3] See, e.g., Coast Forest Products Association and the Council of Forest Industries' Comments at 2.

[4] The comments in Sections III and IV of this letter respond to the comments made by the respondents on issues beyond the calculation of the dumping margin in original investigations, including the use of offsets in administrative reviews or sunset proceedings.

dumping, even on some sales, results in injury to the domestic industry. See also Section III. As a result, the longstanding zeroing practice satisfies the remedial purpose of the statute by fully capturing all dumping within the calculated margin.

In this regard, some parties have argued that zeroing creates an "unfairness" in the law. In particular, the American Institute for International Steel ("AIIS") points out that:

> Commodity grade materials traded in these categories are generally the source of the "positive" anti-dumping margins. These products are much more likely to be sold on a highly competitive price basis – such imports historically carry a 5-10% discount from domestic producers' market prices in order to offset the cost associated with long lead times and larger volumes that need to be purchased.

AIIS Comments at 1-2.

The AIIS comments then note that other higher-value products may not be dumped. The conclusion that AIIS reaches is that the dumping of commodity-grade materials should in essence be excused because other, higher-value, products may not be dumped.[5]

This discussion of dumping goes to the very heart of why the U.S. law mandates zeroing. First, this description openly and readily acknowledges that dumping is a common practice. Yet, by seeking to eliminate the zeroing requirement, the respondents are seeking to excuse this practice if they do not dump on every sale. Injury to the domestic industry results not because every single export sale is being dumped but because foreign producers are seeking to gain some portion of market share by selling certain products at unfair prices. The Department's zeroing practice ensures that the injury caused by this type of dumping is remediated. Conversely,

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[5] AIIS contends that zeroing results in the imposition of antidumping duties on all sales, including those that are not dumped. AIIS Comments at 2. As also discussed in Section III, these arguments do not reflect a complete understanding of the calculation methodology used by the Department. By including the total value of all U.S. sales made in the denominator, the actual amount of duties imposed is based on the total amount of dumping on all U.S. sales.

failure to zero the non-dumped sales would perpetuate the injury and therefore thwart the fundamental purpose of the law.

B. As Authorized by Statute, the Transaction-to-Transaction Methodology Should be Relied Upon if the Weighted-Averaging Methodology Is Not Used

Well aware that the Department has relied on the T-T methodology in the recent Softwood Lumber case, the respondents contend that the Department should not rely on this methodology as a general practice because it was intended to be used only in exceptional circumstances or is not permitted by the WTO. These arguments have no merit.

If the Department determines that it will not continue to use its weighted-average methodology with zeroing because of the WTO decision, the only other alternative allowed by statute is the transaction-to-transaction methodology. 19 U.S.C. § 1677f-1(A)(ii). It is also permitted by the Department's regulations. 19 C.F.R. § 351.414(b)(2). Thus, if the weighted-average methodology with zeroing is deemed unusable by the Department, the T-T must be used to ensure the Department is in compliance with the statute. While nothing in the statute itself suggests that this methodology is "exceptional," even if the Department views it as such, it is clearly authorized by the statute.

Respondents have suggested that the WTO Appellate Body has indicated that zeroing must be abandoned in all types of calculations, including transaction-to-transaction. In the first instance, as noted earlier and described in other submissions, zeroing is required under U.S. law. Moreover, as a general principle, the T-T approach is allowed by the statute. Furthermore, as also discussed in the CSUSTL comments being submitted this day, the Appellate Body report in United States – Zeroing (EC) did not consider or make findings with respect to the transaction-to-transaction comparison methodology in investigations, as that methodology was not before it.

Indeed, in discussing its view of the definition of "margin of dumping" and the requirement to determine the margin of dumping for the "product as a whole," on which it has elaborated in previous decisions, the Appellate Body recalled that "in *US – Softwood Lumber V*, the Appellate Body stated that the investigating authority is required to take into account the results of all multiple comparisons in order to establish margins of dumping for the product as a whole in the specific context of the weighted-average-to-weighted-average methodology, and that it did not address the issue of zeroing in the context of the other methodologies set out in Article 2.4.2." See United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB-R (April 18, 2006) para. 127 (emphasis added). In this report, the Appellate Body likewise clarified that it was "not making any finding here with respect to the consistency of the zeroing methodology, as such, with the second or third methodology set forth in Article 2.4.2 for establishing the existence of margins of dumping." Id. at para. 203.

Thus, contrary to the respondents' broad, unsupported claims, the Appellate Body has not prohibited zeroing under the T-T- methodology in original investigations. As a result, to ensure consistency with U.S. law and to the extent it is deemed necessary by the Department to alter its policy at this time, the T-T methodology should be adopted.

III. THE ISSUE OF WHETHER THE STATUTE'S LONGSTANDING ZEROING METHODOLOGY SHOULD BE AMENDED IN ANY WAY SHOULD BE RESOLVED BY CONGRESS AND NOT ADMINISTRATIVELY

Various respondents have urged the Department administratively in the name of a "fair" comparison under Article 2.4 of the Antidumping Agreement to cease zeroing entirely and to grant offsets in original investigations and in reviews, regardless of the type of comparison used to compute dumping margins (that is, W-W, T-T, or weighted-average-to-transaction dumping

comparisons ("W-T")).[6] The Department should decline to take this route for a series of reasons and should refer the question of zeroing versus offsets to Congress.

First, as set forth thoroughly by United States Steel Corporation but glossed over by respondents, the statute at 19 U.S.C. § 1677f-1(d)(1) requires that the Department's dumping calculations in original investigations be performed without offsets being granted for non-dumped sales.[7] The mathematics of offsets yield the same dumping margins no matter what type of comparison is employed (W-W or W-T). This fact makes clear that Congress intended that positive dumping margins not be offset with negative dumping margins and that negative dumping margins must be zeroed, because otherwise there would be no purpose in having two dumping methodologies (W-W and W-T) that lead to exactly the same result with offsetting. Having thus statutorily mandated zeroing, Congress should decide whether or not U.S. domestic law should be amended to prevent zeroing in the future in favor of offsets to any degree.

Second, the notion that offsets are conducive to a "fair" comparison under Article 2.4 of the Antidumping Agreement, but that zeroing is not, overlooks that companies can engage in sporadic or short-run dumping as well as in predatory or long-run dumping[8] and that the presence of even a small number of dumped sales can cause or threaten to cause material injury to U.S. industries depending upon the specific circumstances in the given case. Indeed, most of the affirmative determinations of dumping-related injury over the years by the U.S. International Trade Commission and its predecessor, the U.S. Tariff Commission, have so recognized.

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[6] See, e.g., Letter on behalf of the Royal Thai Government, pp. 7-8 (Apr. 5, 2006).

[7] Letter on behalf of United States Steel Corporation, pp. 2-12 (Apr. 5, 2006).

[8] See, e.g., J. Viner, Dumping 110-126 (1st ed. 1923).

Zeroing properly acknowledges these related precepts of dumping and injury, while the practice of offsets wrongly does not.

This situation is parallel to those in which a company engages in inflated price-fixing of a portion, but not all, of its sales or when a person drives an automobile a distance of five miles at ten miles per hour over the speed limit, but then drives the next five miles at ten miles per hour under the speed limit. Such price-fixing and speeding are not excused under the law because arguably offset.

By the same token, selectively dumped imports that have been found to be injurious have always and correctly been eligible for the imposition of antidumping duties under the U.S. antidumping law. Congress has never directed or authorized that injury due to a foreign producer's dumping of some of its U.S. sales is to be disregarded and not remedied merely because other U.S. sales by that foreign producer were not dumped. Congress has not done so, because such an approach makes no sense. There is nothing "fair" about allowing unfairly dumped, injurious sales to go unchecked on account of other sales that have not been dumped. Again, it should be left to Congress to answer whether or not offsetting is statutorily to replace zeroing.[9]

Third, there should be no mistaking or understatement of the devastating impact that almost certainly will occur if the U.S. statute's longstanding zeroing methodology is shunted aside for offsetting. To observe that the antidumping law will be ineffectual in this event is not

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[9] In this connection, it should also be noted that the respondents have said little, if anything, about the element of fairness that is attributable to the U.S. antidumping statute's congressionally-structured framework so that the value of non-dumped U.S. sales must be taken into account in the denominator of the dumping fraction and the ad valorem dumping percentage accordingly reflects the value of all U.S. sales by the foreign producer, not just the value of the dumped sales.

an exaggeration. As discussed above, dumping is often sporadic or short-run in nature. Especially in those instances, but even when dumping is predatory or long-run, it is apparent that it will not be difficult for foreign producers to offset injuriously dumped sales with non-dumped sales, so that the subject "product as a whole" (a phrase that was coined and heavily depended upon by the Appellate Body during dispute settlement, but that is not contained anywhere in the Antidumping Agreement or in Article VI of the General Agreement on Tariffs and Trade) will not be dumped and the material injury caused or threatened by the imports that have been dumped will go uncorrected.

Realistic recognition of offsetting's debilitating effect on the viability of the U.S. antidumping statute should trigger congressional review of this issue. For many years since the crafting and passage of the Antidumping Act of 1921, Congress time and time again has emphasized the importance to the United States of a strong antidumping statute. In the 1994 Uruguay Round Agreements Act and in the Bipartisan Trade Promotion Authority Act of 2002, Congress punctuated its determination to maintain this U.S. law in a healthy state.[10] Once more,

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[10] Thus, for example, in 19 U.S.C. § 3802(b)(14)(A), Congress identified as a principal trade negotiating objective of the United States the preservation of the ability of the United States to enforce rigorously its trade laws, including the antidumping law, and to avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade, especially, as relevant, dumping. Similarly, in 19 U.S.C. § 3801(b)(3)(A), as germane, Congress made the finding that support for continued trade expansion requires that dispute settlement procedures not add to or diminish the rights and obligations provided in international trade agreements and expressed its concerns that decisions by dispute settlement panels and the Appellate Body of the WTO were exhibiting a pattern of imposing obligations and restrictions on the use of antidumping measures. In 19 U.S.C. § 3801(b)(3)(B), Congress also voiced its concern that the deferential standard in Article 17.6 of the Antidumping Agreement for dispute settlement at the WTO should be appropriately applied by panels and the Appellate Body. In addition, 19 U.S.C. § 3512(a)(1) stipulates generally that "{n}o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." The replacement in U.S. domestic law of zeroing

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therefore, with an issue of the magnitude and far-reaching impact of offsetting versus zeroing, whether or not the U.S. antidumping statute is to be so seriously weakened as to be rendered of little utility should be referred to Congress.

Fourth, a number of respondents have asserted that the Department is not at liberty under U.S. domestic law and the Department's regulations to carry out T-T dumping comparisons except in a few, very restricted instances.[11] As discussed above in Section II, these claims are not correct. On the other hand, if this argument were to be given any credence, there would be all the more justification and need for Congress to deliberate on whether any statutory change were warranted.

As far back as can be remembered, and at least since the Trade Agreements Act of 1979, the United States has always relied upon zeroing as integral to the administering authority's dumping calculations in original investigations and reviews. When the Uruguay Round Agreements Act of 1994 was considered, therefore, Congress drafted the statute at 19 U.S.C. § 1677f-1(d) with the understanding that zeroing was required. Likewise, the concept of zeroing underlies the Department's regulations at 19 C.F.R. § 351.414 that flow from this statutory provision.

When put in historical context, it can be seen that any implementation of offsetting rather than zeroing of negative dumping margins would represent a fundamental change in the administration of the U.S. antidumping statute. For the United States years after the negotiations

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by offsetting in any fashion would be dramatically and flagrantly at odds with each of these legislative, statutory expressions.

[11] See, e.g., Letter on behalf of the Ontario Lumber Manufacturers Association, et al., pp. 8-12 (Apr. 5, 2006).

to be told by panels and the Appellate Body that the WTO's Antidumping Agreement does not allow zeroing is something that has crippling implications for the statute's continued effectiveness and that could not reasonably have been foreseen by Congress at the time of the Uruguay Round or of the Uruguay Round Agreements Act. Now that the WTO's dispute-settlement process has arrived at this juncture, it is only right that the task of evaluating how the United States should respond to this development be left to Congress at the statutory level. It is Congress, after all, that is charged and empowered by Article I, Section 8, Clause 3 of the U.S. Constitution to regulate commerce with foreign nations.

IV. THE UNITED STATES ALSO SHOULD STRIVE IN THE DOHA ROUND TO ENSURE THAT ZEROING IS CONFIRMED AS PERMISSIBLE IN ORIGINAL INVESTIGATIONS AND IN REVIEWS, AND THE DEPARTMENT SHOULD NOT CHANGE ITS ZEROING PRACTICE PRIOR TO THE CONCLUSION OF THE DOHA ROUND

In addition to the advisability and imperative of having Congress address zeroing at the statutory level in a comprehensive manner, the United States should act in the Doha Round to ensure that zeroing is confirmed as permissible in original investigations and reviews, and the Department should not change its zeroing practice prior to the conclusion of the Doha Round. The respondents in their comments to the Department have essentially been silent in this regard, perhaps understandably from their vantage, but inappropriately nevertheless, because the rulings of the WTO on zeroing are probably as egregious an example of the malfunctioning of the WTO's dispute settlement system as it is possible to have. Panels and the Appellate Body are to interpret what has been negotiated and agreed, not legislate, but wrongly have been legislating with regard to zeroing. This point, as fundamental as it is, should be taken into account as far as zeroing is concerned.

In fact, a prohibition against zeroing was never negotiated or agreed to in the Uruguay Round or otherwise. As a matter of public international law, Articles 3.2 and 19.2 of the WTO's Understanding on Dispute Settlement ("DSU") stipulate that dispute settlement is not to add to or diminish the rights and obligations provided in the WTO's covered agreements. These Articles reflect the public international legal principle that rights and obligations do not arise in public international law for a nation state without that nation state's consent. This axiom lies at the heart of public international law. The Vienna Convention on the Law of Treaties is replete with provisions that incorporate and reflect this precept, including but not limited to Articles 7.1, 9.1, 11-17, 24, 34, 46.1, and 62.[12] In the words of one scholar, one of the principal corollaries of the sovereignty and equality of nation states is ". . . the dependence of obligations arising from customary international law and treaties on the consent of the obligor."[13]

Any modification of the Department's zeroing methodology under the U.S. antidumping statute should come about only as a result of an agreement negotiated and accepted by the United States in the Doha Round and not as the result of new obligations wrongly created by panels and the Appellate Body during dispute settlement. Indeed, the rule of consent by individual nation states is a relevant rule of customary public international law that is applicable in the relations between and among the individual member states of the WTO. As such, under Article 31.3(c) of

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[12] Vienna Convention on the Law of Treaties, opened for signature, May 23, 1969, entered into force, Jan. 27, 1980, 1155 U.N.T.S. 331 ("Vienna Convention").

[13] Ian Brownlie, Principles of Public International Law 289 (5th Ed. 1998); see also David M. Walker, The Oxford Companion to Law 634 (1980) (defining international law as the body of customary and treaty rules that ". . . owe their validity both to the consent of states as expressed in custom and treaties and to the fact of the existence of an international community of states and individuals.").

the Vienna Convention, this rule of consent should be taken into account by panels and the Appellate Body during dispute settlements under the DSU interpreting the WTO's agreements.

It is especially important that the negotiations at the Doha Round address zeroing. Legislating any significant issue through dispute settlement as a way of by-passing an inability to gain consent and agreement by the Member States through negotiations is invalid as a matter of public international law, is disruptive, and reduces the stature and the effectiveness of the WTO. The outcome of negotiations should be clear and honored; either an agreement was reached on an issue or not. Individual member states of the WTO should not be left to wonder what obligations might be created by panels and the Appellate Body in a dispute settlement proceeding conducted years later on an issue like zeroing when no consent was given and no agreement was arrived at on that issue during the negotiations themselves.

In a recent speech on the Senate floor, Senator Grassley (R-IA), Chairman of the Senate Finance Committee, made some general observations about the importance of negotiations and the proper role of dispute settlement at the WTO. Excerpts from his remarks, while somewhat focused on agricultural issues, are relevant in the present context as well.

> As for World Trade Organization members that see litigation in dispute settlement – as Brazil did in the cotton case – as a practical alternative to negotiations, I would remind those who are tempted to adopt this position that litigation, even under the new, improved WTO rules, is unpredictable, costly, time-consuming, and not the way to resolve unfair trade.
>
> Moreover, litigation is not always the most effective way to open markets and eliminate trade barriers, especially over the long haul. Historically, we have also depended on negotiations and the everyday management of trade and commercial relations as much better ways to achieve and maintain open markets.
>
> Make no mistake, we can and will defend our interests through dispute settlement when it is necessary to do so, and we

> have done so as the United States in the World Trade Organization quite successfully. But substituting litigation for negotiations or for management of our commercial relations is neither practical nor desirable, nor is it the way to bolster confidence in the World Trade Organization as an effective negotiating forum.

152 Cong. Rec. S3181 (daily ed. Apr. 6, 2006) (statement of Sen. Grassley) (emphasis added).

With respect to "zeroing" in particular, the United States entered the Uruguay Round's negotiations with a longstanding, consistent practice of "zeroing" rather than offsetting negative dumping margins with positive dumping margins. At the conclusion of the Uruguay Round's negotiations, the United States reasonably and justifiably understood that the changes in dumping methodologies that had been agreed to did not include a ban on "zeroing" and a requirement that positive dumping margins be offset by negative dumping margins. The United States, and the Department specifically, accordingly have continued the longstanding practice under the U.S. antidumping statute of "zeroing" in the aftermath of the Uruguay Round.

In the Doha Round, countries such as Japan[14] and China[15] have advocated that the Doha Round should serve to prohibit zeroing. Japan has gone so far as to contend that the logic against zeroing is compelling and that it would be useful and without prejudice to the definition of "dumping" in Article 2.1 of the Antidumping Agreement to clarify in the text of Article 2.4.2 of the Antidumping Agreement that zeroing is prohibited both in original investigations and in "subsequent proceedings."[16]

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[14] Communication from Japan, Proposals on the Prohibition of Zeroing, TN/RL/GEN/126 (24 Apr. 2006).

[15] International Trade Reporter, "China Urges Ban on Zeroing in Dumping Investigations as Part of WTO Rules Talks," p. 695 (May 4, 2006).

[16] Communication from Japan, Proposals on the Prohibition of Zeroing, TN/RL/GEN/126, pp. 4-5 (24 Apr. 2006).

In response, the United States should stand its ground. The logic against zeroing advanced by Japan and by panels and the Appellate Body in dispute settlement is not compelling, and the definition of "dumping" would be severely and unjustifiably restricted were zeroing prohibited. Moreover, the United States has never consented to an obligation under public international law to forego "zeroing" in any of its dumping calculations. This fact is reflected, for instance, in the Craig-Rockefeller Amendment to the Tax Relief Act of 2005 (S. Amdt. 2655 to S. 2020), which expresses the sense of the Senate that the United States should not be a signatory to any agreement that outlaws "the critical practice of 'zeroing' in antidumping investigations." In the Doha Round, therefore, the United States should make explicit that it has not previously consented and will not consent to a ban against zeroing and that it views zeroing as permissible.

V. CONCLUSION

In sum, we urge the Department to take the following approach. First, before implementing any changes to the current calculation methodology in original investigations, Commerce should seek direction from Congress through statutory clarification. Second, the United States should focus on obtaining a satisfactory resolution of this issue during the course of the Doha Round negotiations. Finally, if the Department determines that it will not defer any changes to its policy pending consideration by Congress, it should rely on the T-T methodology to calculate dumping margins in original investigations.

We appreciate the opportunity to provide these rebuttal comments to the Department. Please contact the undersigned if you have any questions.

Respectfully submitted,

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