August 30, 2002

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DELIVERY BY HAND

Mr. Faryar Shirzad
Assistant Secretary for Import Administration
U.S. Department of Commerce
Attn: Import Administration
Central Records Unit, Room 1870
14th Street and Constitution Avenue, N.W.
Washington, DC 20230

Attn: Mr. Kris Campbell; Ms. Linda Chang; and Ms. Mimi Steward

Re: Affiliated-Party Sales

Dear Mr. Shirzad:

This letter is submitted by counsel to a number of U.S. companies and workers in response to the Department's notice, Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 53,339 (August 15, 2002) ("Notice"). As required, the original and six copies of these comments are being timely filed by today's deadline. Also as directed, this submission is being made as well in electronic form on a DOS-formatted 3.5-inch diskette in WordPerfect format.

As explained in the Notice, the Department is proposing to modify its practice concerning whether home market sales between affiliated parties have been made in the "ordinary course of trade" and, if so, may thus be relied upon to calculate normal value in antidumping duty proceedings. This action has been precipitated by the Report of the World Trade Organization's Appellate Body in United States -- Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan, WT/DS184/AB/R (July 24, 2001) ("AB Report"). In that case, the Appellate Body found that the Department's current practice is inconsistent with the public international legal obligations of the

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United States under Article 2.1 of the Antidumping Agreement. Accordingly, pursuant to 19 U.S.C. § 3533(g)(1)(C), the public is being accorded the opportunity to comment on the Department's proposal.

In essence, the Appellate Body concluded that the Department's present practice lacks "even-handedness" as the result of not taking equal account of the possibility that high-priced sales as well as low-priced sales between affiliates may be so aberrational as to be distortive and outside the "ordinary course of trade" for the purpose of computing normal value. See AB Report at ¶¶ 148, 154, and 157. In its notice, therefore, the Department has advanced a new standard to supersede the present 99.5-percent test applied in determining which affiliated-party sales are priced so low as not to be considered at arm's-length. In particular, without changing the mathematical calculations performed, the Department would normally use sales to an affiliate when the overall ratio serving as the benchmark was within a band ranging from 98 percent to 102 percent, inclusive, of the prices to unaffiliated parties. See Notice, 67 Fed. Reg. at 53,340. For the reasons discussed below, we propose that the Department make certain adjustments to its policy with respect to the use of sales between affiliates for the purpose of determining normal value.

I. THE DEPARTMENT SHOULD RELY ON THE PRICES OF DOWNSTREAM SALES BY AFFILIATED PARTIES TO THEIR FIRST UNAFFILIATED CUSTOMERS, NOT AFFILIATED-PARTY SALES, TO DETERMINE NORMAL VALUE

A. For Most Situations, the Department Should Require Respondents to Submit Downstream Sales to Unaffiliated Customers

To achieve the "even-handedness" that the Appellate Body has prescribed, the Department should keep in mind the larger context and basic antidumping principles involved here.

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In particular, the Department is charged with calculating dumping margins as accurately as possible. See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990) ("Rhone Poulenc"). On the U.S. side of the dumping equation, the statute requires that U.S. price be the foreign producer or exporter's price for the subject merchandise to the first unaffiliated U.S. customer. See 19 U.S.C. §§ 1677a(a) and (b). Arm's-length prices for the subject merchandise give the best basis for setting U.S. price and computing dumping margins as precisely as feasible.

On the other side of the dumping equation concerning normal value, the antidumping statute's focus is on the price of the foreign like product when it is first sold in the foreign home market or third-country market. Among other criteria, this sale must be for consumption in the relevant foreign market and be in the "ordinary course of trade." See 19 U.S.C. §§ 1677b(a)(1) and 1677(15). Under the regulations at 19 C.F.R. § 351.403 and the Department's practice, in keeping with Rhone Poulenc the general preference is that normal value rest on the arm's-length prices of sales of the foreign like product to the first unaffiliated buyer.

Indeed, as a general rule, use of the sale to the first unaffiliated buyer makes the most sense. This price would normally reflect an actual market price, unaffected by corporate affiliation. Clearly, no arm's-length test would be required for these prices. As such, no concerns about "even-handedness" are raised when these prices are used. Thus, in keeping with the statutory and regulatory directives and preferences, and in keeping with the Appellate Body's directive for "even-

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handedness," respondents should be required at the outset to submit all downstream home market sales to the first unaffiliated buyer.[1]

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[1] In the Department's Notice, the option that all affiliated-party sales be automatically excluded from consideration in arriving at normal value was evaluated. See Notice, 67 Fed. Reg. at 53,340. The reasons given by the Department for not pursing this option include there being no need for such a drastic step to implement the AB Report, inconsistency with the acceptability of affiliated-party prices for normal value on some occasions, and less frequent reliance on the preferred basis of normal value being a price to compare with the U.S. price. Id.

As discussed in this letter, however, automatic exclusion of most affiliated-party sales from consideration for normal value is not only appropriate but would best implement the intent of the statute and would best implement the AB Report. First, the statute does not expressly require affiliated-party sales to be considered for normal value. Moreover, rejection of any and all affiliated-party sales for normal value would be consistent with the rejection of any and all affiliated-party sales for U.S. price and in general would further the purpose of calculating dumping margins as accurately as possible by means of reliance on arm's-length prices to unaffiliated customers on both sides of the dumping equation.

Finally, less frequent reliance on sales to affiliated parties would not necessarily lead to less reliance on price to establish normal value (as opposed to constructed value). In most instances, respondents would simply be required to submit to the Department precisely their same sales to unaffiliated purchasers. Thus, the same body of sales would be used for normal value in any event. In those limited circumstances when downstream sales were not reported (for reasons identified in the following section), under the Court's directive in Cemex, S.A. v. United States, 133 F.3d 897 (Fed. Cir. 1998), the Department would simply be required to rely on the next most similar sale for purposes of establishing normal value. Thus, while the pool of home market sales eligible for use as normal value might be somewhat smaller, there is nothing to suggest from this methodology that price would not be relied upon to establish normal value.

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B. The Affiliated-Party Test Could Be Applied Under the One Limited Circumstance Where the Affiliate Further Manufactures or Adds Value That Transforms the Foreign Like Product Into a New, Downstream Product

Starting from the premise that respondents should in the first instance be required to submit their downstream home market sales, there have been two main instances in the past when respondents have not been required to submit these data.

First, with affiliated-party transactions in the relevant foreign market, there is the possibility that the affiliated buyer will consume, or further manufacture and add value to, and thereby transform the foreign like product that it has purchased from its affiliated seller into a product that is no longer the foreign like product. In this instance, the price charged by the affiliated buyer to its unaffiliated customer for the new, downstream product has not served as the basis for normal value because that product is not like the subject merchandise sold in the United States.[2]

Secondly, even if the affiliated buyer merely resells the foreign like product to an unaffiliated purchaser in the relevant foreign market, respondents have often claimed (despite the affiliation found under the antidumping statute at 19 U.S.C. § 1677(33)) that they are not be in a position to obtain the affiliated buyer's resale price for submission to the Department. In such cases, the respondents argue that their affiliation is so commercially attenuated that the affiliated seller cannot

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[2] When value is added to subject merchandise after importation into the United States, under the statute at 19 U.S.C. § 1677a(d)(2), the Department is directed to make an adjustment for further manufacturing expenses due to the complete statutory ban on using any sales to affiliates in determining U.S. price. In contrast, given that the statute does allow (although does not prefer) the use of normal value that is based on arm's-length sales to affiliated parties and does not otherwise specify similar adjustment for further manufacturing expenses in the relevant foreign market, this factual pattern gives rise to a situation in which the Department might apply and rely on an arm's-length test.

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require its affiliated buyer to provide the affiliated seller with the affiliated buyer's resale price to an unaffiliated customer for consumption in the relevant foreign market.

In deciding how to treat these two situations, we again urge the Department to consider the basic statutory objectives. The overarching goal of the antidumping statute is the most accurate computation of dumping margins possible, and the most reliable means to that end is reliance upon arm's-length prices with respect to both sides of the dumping equation. Thus, U.S. price can and must always be taken from transactions between unaffiliated parties. Normal value likewise should be the product of transactions between unaffiliated parties as much as is feasible, both in original investigations and in subsequent annual administrative reviews. This should be the general guiding rule or principle in calculating dumping margins.

In the past, however, the general rule in favor of downstream sales to unaffiliated parties for use as normal value has been swallowed by the exceptions; that is, rather than requiring respondents in the first instance to submit sales to unaffiliated parties in the home market, the Department instead has allowed respondents too much leeway in deciding what home market sales data are submitted. With respect to the basic principles of the statute, consideration of whether affiliated-party sales are in the "ordinary course of trade" and at arm's-length prices that can serve as the basis for normal value should be restricted to the two situations indicated above.

Furthermore, these two situations should also be separately evaluated by the Department, as discussed below.

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1. For Purposes of Establishing Normal Value, Affiliated-Party Sales of A Foreign Like Product That Is Further Manufactured Into a New, Downstream Product Should Be Subject to the Arm's-Length Test

Clearly, the price of a new, downstream product that has been further manufactured from a foreign like product by an affiliate cannot (without adjustment) serve as the proper basis for comparison to a U.S. sale of subject merchandise. Under these special circumstances, then, some different analysis must be performed to ensure an appropriate comparison. As noted earlier, when further manufacturing occurs in the United States, adjustments are made to U.S. price to obtain the price of a product "as imported." Yet, for home market or third-country sales, as also noted earlier, given that the statute does not authorize similar adjustments and does not ban the use of a selling price to an affiliate, the affiliated-party price of the foreign like product before its transformation into a new, downstream product could be used as long as the Department can be assured that the sale is made in the "ordinary course of trade." Under these circumstances, the arm's-length test (using the ranges discussed later in this letter) could be applied. For the reasons next described, this one occasion (that is, transformation of the foreign like product by further manufacturing or value-added operations into a new, downstream product), should be the sole instance when the Department would make an exception to the general rule requiring that normal value be based upon unaffiliated downstream sales.

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2. The Department Should Not Rely on Home Market Sales to Affiliates When A Respondent Claims That It Cannot Submit the Downstream Sales; The Treatment of These Sales Should Be Different for Administrative Reviews Than for Original Investigations

In past cases involving sales to affiliates, the Department has also taken into consideration respondents' claims that there was insufficient control by the one affiliate over its downstream affiliate to require that downstream affiliate to submit its unaffiliated downstream sales. In keeping with the statute's overall objective, and to ensure the AB Report's concern over "even-handedness" is properly addressed, reconsideration of the Department's practice in this regard is warranted.

As discussed above, the overriding principle is to calculate accurate dumping margins. The statute recognizes that the best way to accomplish this is to compare an unaffiliated selling price in the U.S. to an unaffiliated selling price as the basis for normal value. Yet, in also keeping with the statutory requirements, and as the Department acknowledges in its Notice, the Department has not adopted adverse facts available when a respondent acts to the best of its ability in attempting, but failing, to acquire its affiliated buyer's downstream sales data. See Notice, 67 Fed. Reg. at 53,340.

In deciding the best policy to apply under these circumstances, two factors should be fully considered: (1) the statutory preference for an arm's-length price; and (2) the critical differences between an original investigation and an annual administrative review.

First, given the statutory preference for an arm's-length price, in an original investigation when a respondent can demonstrate to the Department's satisfaction that it cannot obtain the sales data of its downstream affiliates, the Department should simply disregard these home market sales.

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A different approach should be taken in an annual administrative review. In considering this issue, the Department should take into account that respondents have not found it difficult to establish their cooperation simply by sending the affiliated buyer a letter or two requesting the data. The affiliated buyer will logically not be inclined to respond by providing the data to its affiliated seller for the Department's use in computing dumping margins unless that step is perceived by the respondents as being in their self-interest.

In the latter regard, once an antidumping duty order has been issued, respondents should be put on notice that in any subsequent annual administrative review an affiliated buyer's downstream sales of the foreign like product to an unaffiliated customer in the relevant foreign market will be fully reportable by the affiliated buyer to the Department, either directly or through counsel.

More specifically, in the final affirmative determination of each proceeding's original investigation, the Department should explain that -- from the date of publication in the Federal Register of the antidumping duty order forward -- an affiliated seller will be obliged to include as a condition of sale with each of its affiliated buyers that the affiliated buyer will provide the Department with data on the affiliated buyer's resales of the foreign like product to the affiliated buyer's first unaffiliated customers in the relevant foreign market. In this way, the Department more often than otherwise should be able to obtain the actual downstream pricing data of each affiliated buyer and enhance the accuracy of the dumping margins, while at the same time guaranteeing that the affiliated buyer's proprietary data are protected under administrative protective order from improper disclosure to any unauthorized person, including the affiliated seller. In addition, this

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approach also avoids the frequently knotty and time-consuming exercise for the Department and the parties of analyzing and debating whether the affiliated seller has cooperated to the best of its ability to obtain the pertinent data for its affiliated buyer's downstream sales of the foreign like product to the first unaffiliated customers in the relevant foreign market.[3]

In reaching its final position in this matter, therefore, the Department is urged to recapitulate and consolidate its practice along the following lines:

In original investigations --

To determine dumping margins as accurately as possible, the Department will require the reporting of a respondent's affiliate's downstream sales in the relevant foreign market to each of its first unaffiliated customers except when either (1) the affiliated buyer converts the affiliated seller's foreign like product into a new, downstream product that is no longer the foreign like product and that consequently cannot be compared with the subject merchandise sold in the United States or (2) the affiliated seller can document that it cannot secure its affiliated buyer's downstream sales data for lack of control over the affiliated buyer. If the first situation exists, the Department will apply an arm's-length test to affiliated-party sales of the foreign like product before it is further manufactured into a new, downstream product. If the second situation occurs, the Department will disregard the affiliated-party sales concerned.

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[3] By giving affiliated respondents fair notice that the downstream sales data of each affiliated buyer are expected by the Department and contractually to be made available to the Department in annual administrative reviews, the Department appropriately can remove the obstacles that exist with the current process and increase the chances of obtaining the data in question. Also, if the affiliated seller and its affiliated buyer do not cooperate with the Department in the indicated manner, that lack of cooperation will be meaningfully clear-cut so that adverse facts available can be employed by the Department with a minimum of uncertainty and time expended in that regard. Indeed, the alleged inability of a respondent to provide the selling prices of its U.S. affiliates does not eliminate the statutory requirement to do so when establishing U.S. price.

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In annual administrative reviews --

To determine dumping margins as accurately as possible, the Department will require the reporting of a respondent's affiliate's downstream sales in the relevant foreign market to each of its first unaffiliated customers except when the affiliated buyer converts the affiliated seller's foreign like product into a new, downstream product that is no longer the foreign like product and that consequently cannot be compared with the subject merchandise sold in the United States. If a respondent claims that it is otherwise unable to submit the downstream sales data of an affiliated seller, the Department will apply adverse facts available.

In summary to this point, normal value should be determined by arm's-length prices of sales between unaffiliated parties, with only one exception. Consideration of affiliated-party sales for normal value, and resort to testing of those sales to ascertain whether they are in the "ordinary course of trade" and at arm's-length prices, should at most be undertaken in the limited circumstances outlined above.

II. THE DEPARTMENT'S PROPOSED TEST FINDING SALES BETWEEN 98 PERCENT AND 102 PERCENT, INCLUSIVE, TO BE IN THE "ORDINARY COURSE OF TRADE" SHOULD BE REVISED

To the extent that the Department applies any test to discern when affiliated-party sales are in the "ordinary course of trade" and eligible or not to serve as the basis for normal value, there is unavoidably some arbitrariness. Whatever percentage numbers or range might be chosen for this test will amount to an estimation of what sales were or were not in the "ordinary course of trade" in the case at hand. For this reason, the actual downstream prices by the affiliated buyer to its first unaffiliated customers for the foreign like product should serve for normal value always or at least as much of the time as possible. Actual data eliminate any speculation and yield the most accurate dumping margins.

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Perhaps in part due to an implicit recognition of this unavoidable arbitrariness inherent in any test or range, and perhaps also in acknowledgment that the United States should have a flexibility in the selection of the numerical limits of the range, the Appellate Body in its Report explained that by "even-handedness" it was not saying that the United States must produce a test that requires the Department to " . . . scrutinize, according to *identical* rules, *each and every* category of sale that is potentially not 'in the ordinary course of trade.'" AB Report at ¶ 146 (emphasis in the original). Similarly, the Appellate Body elsewhere emphasized that it was not suggesting that the notion of "even-handedness" mandated that " . . . the methods for verifying whether high and low-priced sales to affiliates are 'in the ordinary course of trade' must necessarily be *identical*." AB Report at ¶ 154, n.113 (emphasis in the original). Instead, the thrust of the Appellate Body's thinking is that there should be "even-handed" guidelines for testing of both low- and high-priced affiliated sales, not just of low-priced affiliated sales, to decide whether the sales are in the "ordinary course of trade." See, e.g., AB Report at ¶ 157.

In deciding upon the exact percentages for the test's range, it is also important to keep in mind certain factors. With the test for low-priced sales, the danger is that affiliated parties will understate their transfer prices to one another in the hope of reducing normal value and thereby attempt to lessen or eliminate any dumping margins. Commensurate with this risk is the commercial reality that a company will not sell its products to arm's-length customers at any loss at all if possible. Likewise, sales by a respondent of its foreign like product made at a loss within an extended period of time in substantial quantities and at prices that do not permit recovery of all costs

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over a reasonable period of time are treated by the antidumping statute as not in the "ordinary course of trade." See 19 U.S.C. § 1677b(b)(1).

With the test for high-priced sales, a different set of circumstances exists. The higher the transfer prices of the foreign like products are between affiliated parties, the larger will be normal value and the dumping margins. Any manipulation or adjustment by respondents occurring in this regard, therefore, is likely attributable to some consideration other than that of artificially restraining dumping margins. The diminishment/elimination of this risk should be construed by the Department as signifying that affiliated-party sales can have prices that on average are substantially above the average price of unaffiliated-party sales and still be in the "ordinary course of trade."

Against all of this background, the Department should consider a range of 99.5 percent to 125 percent, inclusive, for this test. In other words, any affiliated average price below 99.5 percent would be treated -- as is the case now -- as being outside the "ordinary course of trade," while any affiliated average price above 125 percent would likewise be treated as being outside the "ordinary course of trade." Thus, any affiliated average from 99.5 percent to 125 percent, inclusive, would be in the "ordinary course of trade" and could serve as normal value. As remarked earlier, the Appellate Body has not insisted upon an identical range, and so different ranges are clearly permissible. This aspect of the Appellate Body's Report seems not to have been taken into account in the Department's Notice.

Moreover, reliance upon the 99.5-percent benchmark for the low end of the test's range is needed, because the potential for manipulation and the unnatural quality of below-cost sales

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discussed above are so pronounced. This standard accordingly is well-grounded, has served well in the past, and should not be altered.

Reliance upon the 125-percent benchmark for the upper end of the test's range is also appropriate, first, because the danger of manipulation to avoid dumping margins is not present at all. Second, there is no cause to think that this level represents a distortion such that the affiliated sales generating an average up to this level should be deemed "outside the ordinary course of trade." To the contrary, respondents regularly seek to maximize the prices of their home market unaffiliated sales particularly. Such behavior is to be expected in a competitive environment, and profits of 25 percent generally are not unusual. The benchmark of 125 percent consequently is reasonable for use as the upper end of the test's range.

In its Notice, the Department has cited as something that has influenced its range of 98 percent to 102 percent the consideration that a narrower band would result in fewer sales to affiliates being used for normal value and would potentially lead to fewer price-to-price comparisons and more reliance upon constructed value in determining normal value. See Notice, 67 Fed. Reg. at 53,340. Notably, the range proposed herein would expand the number of sales to affiliates to be used and therefore would further promote the objectives of the statute. Stated differently, many more affiliated-party sales would fall within the range proposed herein than in the Department's proposed range, and this broader test would therefore allow the sort of price-to-price comparisons that are preferred by the antidumping statute over constructed value in most instances.

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In summary of this portion of our comments, then, any consideration and use of affiliated-party sales for normal value should be based upon a range of 99.5 percent to 125 percent, inclusive, of prices to unaffiliated parties.

III. WHATEVER NUMERICAL TEST IS EMPLOYED BY THE DEPARTMENT IN THE FUTURE, THAT TEST SHOULD BE APPLIED TO ALL SALES OF THE FOREIGN LIKE PRODUCT MADE TO EACH AFFILIATED PARTY AND SHOULD FIND AS "OUTSIDE THE ORDINARY COURSE OF TRADE" ANY AFFILIATED-PARTY SALES OF A FOREIGN LIKE PRODUCT WITH A CONNUM THAT WAS NOT ALSO SOLD TO UNAFFILIATED PARTIES

Under the Department's current practice, the issue of whether sales to affiliated parties of the foreign like product with a particular CONNUM are in the "ordinary course of trade" and at arm's-length prices is not addressed by the Department at all if the foreign like product with the same CONNUM was not likewise sold to unaffiliated customers in the relevant foreign market. This procedure invites manipulation, for example, whereby the respondent sells to unaffiliated customers a small quantity, and to affiliated customers some comparable amount, of the foreign like product with carefully selected, matching CONNUMS. The Department will test these affiliated-party sales and find them in the "ordinary course of trade" and acceptable for use to determine normal value as long as the affiliated-party sales with the same CONNUMS on average are at prices at or above the average prices of the unaffiliated-party sales. At the same time, if the respondent sells large volumes of foreign like product with other CONNUMS to affiliated parties, but not to unaffiliated parties, those affiliated-party sales under the Department's present system will not be tested at all. In this scenario, the Department will nevertheless consider all of the respondent's affiliated-party sales to

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have passed the arm's-length test on the basis of just a minor fraction of the respondent's total affiliated-party sales having actually been tested and found to be at arm's-length prices.

The opportunity for this sort of manipulation should be denied respondents. When faced with the circumstances just described, the Department should treat as "outside the ordinary course of trade" all affiliated-party sales of foreign like product with CONNUMS that are not also sold to unaffiliated parties.

Indeed, use of a CONNUM-specific basis for performing this test is in keeping with the Department's general practice in all other areas. For example, at the most basic level, the Department calculates the dumping margins on a CONNUM-specific basis. The Department performs its cost test also at a CONNUM-specific basis. Given the overall statutory preference to rely only on arm's-length prices, it simply does not make sense to excuse any sales in this situation from the arm's-length test.

In sum, all affiliated-party sales should be tested and pass the arm's-length test before any affiliated-party sales are deemed an acceptable basis for normal value.

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In conclusion, in response to the Appellate Body's call for "even-handedness," the Department has an occasion to stand back and look at the larger elements at play in this matter. Above all, the antidumping statute's purpose of achieving the most accurate dumping margins possible should be considered foremost. The truest way to accomplish that task is the use of arm's-

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length prices of unaffiliated-party sales on both sides of the dumping equation. Development of the administrative record to the fullest extent to include these data is critical.

Furthermore, under the limited circumstances when arm's-length testing is appropriate, we urge the Department to adopt for the arm's-length test the range of 99.5 percent to 125 percent, inclusive. As the Appellate Body recognized, affiliated-party sales whose prices are below or above these numerical limits should be viewed as being outside the "ordinary course of trade." While recognizing that there also needed to be an upper limit to sales being treated as outside the "ordinary course of trade," the Appellate Body expressly did not mandate that these ranges would have to be identical. Accordingly, the upper level of 125% is in keeping with the intent of the AB Report. Lastly, unless an affiliated-party sale is actually tested on a CONNUM-specific basis, the presumption should be that that sale was not made at arm's -length and should be disregarded for normal value.

Finally, we ask that the Department extend the deadline for rebuttal comments by two weeks, from September 6, 2002, to September 20, 2002. This issue is an important one and deserves careful consideration. The deadline set by the arbitrator for the United States to bring its measures into conformity with the obligations of the United States is November 23, 2002. See Notice, 67 Fed. Reg. at 53,340. The additional time for rebuttals will still leave the Department with two months remaining to meet that deadline. Such an extension will also be consistent with the congressional directive at 19 U.S.C. § 3533(g)(1)(C) that the public be heard on this subject.

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Thank you for your attention to these comments. Please contact the undersigned with any questions that might arise.

Respectfully submitted,

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