

August 30, 2002

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The Honorable Faryar Shirzad
Assistant Secretary
for Import Administration
Room 3099B
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Attn: Kris Campbell, Room 3713
Linda Chang, Room 3622
Mimi Steward, Room 3622
Import Administration

Re: Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade

Dear Assistant Secretary Shirzad:

We hereby submit comments on the proposed modification of the U.S. Department of Commerce's ("the Department") practice concerning the determination of whether home market sales to affiliated parties are made in the ordinary course of trade and thus may be used in the calculation of normal value in antidumping proceedings. We submit these comments pursuant to the Department's Notice of August 15, 2002 seeking comments on the agency's proposed modification of its so-called "arm's-length test" -- i.e., the test performed to determine whether home market sales to affiliated parties were

made in the ordinary course of trade.¹ The Department's current methodology for identifying home market sales to affiliated parties made outside the ordinary course of trade is described in detail in the agency's August 15, 2002 Notice.²

The Department is proposing to change its methodology for determining which home market sales to affiliated parties are outside of the ordinary course of trade in response to the World Trade Organization ("WTO") Appellate Body ruling in Certain Hot-Rolled Steel Products from Japan ("Japan Hot-Rolled").³ Under the Department's proposed change, if the home market sales prices to an affiliated party were, on average, between 98 percent and 102 percent of the sales prices charged for identical products sold to unaffiliated parties, then the sales to that affiliated party would be deemed to be within the ordinary course of trade. If that condition were not met, then the sales to the affiliated party would be deemed to be outside the ordinary course of trade.⁴ The Department has thus proposed to adopt a symmetrical numeric test, treating sales prices to an affiliated party which are above the weighted-average price to unaffiliated parties in the same manner as it treats sales prices to an affiliated party which are below the weighted-average price to unaffiliated parties. That is, under the Department's proposed methodology, in order for the sales made to an affiliated party to be considered to be

¹ Request for Public Comment Pursuant to Section 123(g)(1)(C) of the Uruguay Round Agreements Act, Requirements for Agency Action, 67 Fed. Reg. 53,339 (Aug. 15, 2002).

² 67 Fed. Reg. at 53,339-40.

³ 67 Fed. Reg. at 53,339 (citing Appellate Body Report on Japan Complaint Concerning U.S. Antidumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (Jul. 24, 2001) ("AB Report")).

⁴ 67 Fed. Reg. at 53,340.

within the ordinary course of trade, those sales must have been made at prices which, on a weighted-average basis, were within 2 percent of the prices charged for identical products to unaffiliated parties.

Such a radical change in the Department's "arm's-length test" methodology is not mandated by the Appellate Body ruling. To fully address the concerns expressed in the Appellate Body ruling, the Department need only adopt a bright-line test for high-priced (above the average) sales which will be automatically applied to all sales made to affiliated parties (just as it now has a bright-line test for low-priced (below the average) sales which it currently applies to all sales made to affiliated parties). As long as the agency adopts a "two-sided" test which is applied automatically, the Department's practice will be fully in line with the requirements of the Antidumping Agreement as interpreted by the Appellate Body in Japan Hot-Rolled. Accordingly, we suggest that the Department maintain as a bright-line test the 99.5 percent test it currently uses for low-priced sales, and adopt a new bright-line test of 120 percent for high-priced sales.

The Appellate Body ruling in Japan Hot-Rolled does not require the Department to apply a symmetrical numeric test in determining whether home market sales to affiliated parties are made outside the ordinary course of trade. While the ruling stated that "there is a lack of *even-handedness* in the two tests applied by the United States,"⁵ it also specifically noted that

{w}e wish to emphasize that in finding that the application of the 99.5 percent test was not sufficiently *even-handed*, we do not suggest that the methods for

⁵ AB Report at Para. 154 (emphasis in original).

verifying whether high and low-priced sales to affiliates are "in the ordinary course of trade" must necessarily be *identical*.⁶

Thus, the Appellate Body in Japan Hot-Rolled emphasized that, in its view, there is nothing in the Antidumping Agreement which compels the Department to adopt a numerically symmetrical test to determine which low-priced and high-priced home market sales to affiliated parties are outside the ordinary course of trade.

The Appellate Body found that the Department's current "arm's-length test" -- which consists entirely of a one-sided 99.5 percent test -- is outside the requirements of the Antidumping Agreement for three reasons. First, under current practice, low-priced sales are tested with a bright line rule - the 99.5 percent test - while the Department "does not have any standard, nor even guidelines, for determining the threshold" for high-priced sales.⁷ Second, the agency currently automatically tests low-priced sales and excludes those that fail the 99.5 percent test,⁸ but does not test high-priced sales⁹ and automatically includes such sales.¹⁰ Third, while all low-priced sales outside a "*very narrow*" range are excluded, "*only 'aberrationally' high-prices are excluded.*"¹¹

In order to fully address the Appellate Body ruling in Japan Hot-Rolled, the Department should therefore modify its current practice in three ways. First, it should adopt a bright line test for high-priced sales. Second, it should automatically apply that test to all sales to affiliated parties. Third, while applying a test to high-priced sales to

⁶ AB Report at Footnote 113 (emphasis in original).

⁷ AB Report at Para. 151.

⁸ AB Report at Para. 149.

⁹ AB Report at Para. 151 (emphasis in original).

¹⁰ AB Report at Para. 152.

¹¹ AB Report at Para. 152 (emphasis in original).

comport with the "even-handedness" requirement, that test need not and should not be identical to the test applied to low-priced sales.

The Department's proposed new methodology goes too far, as it unnecessarily imposes a symmetrical test on high-priced and low-priced sales to affiliated parties. Instead, the Department should adopt a two-sided asymmetrical test which systematically (*i.e.*, automatically) tests all sales to affiliated parties and excludes (as being outside the ordinary course of trade) all sales to an affiliated party if, and only if, the weighted-average ratio of the sales prices to that affiliated party over the sales prices to unaffiliated parties for identical products is either below .995 or above 1.20.

Such a methodology would have several important advantages over other possible methodologies:

- A 99.5/120 Test is Consistent with Japan Hot-Rolled - First, and most importantly, this new methodology would be fully in accordance with the instructions handed down by the Appellate Body in Japan Hot-Rolled, and so would bring the Department's practice into full conformance with the Antidumping Agreement (as interpreted by the Appellate Body).
- A 99.5/120 Test is Similar to Current Practice - Second, this new methodology would be quite similar to the agency's current methodology (in effect, merely adding a second prong to the current test), so administering the new methodology should be quite simple.
- A 99.5/120 Test Continues Asymmetrical Analysis - Third, the new methodology would maintain the Department's recognized need for an asymmetrical test. The Department has long recognized, correctly, that sales to affiliated parties are far more likely to be manipulated downwards (*i.e.*, below market), than upwards, so a stringent test of low-priced sales to affiliated parties is required. Such a test would remain within the new "99.5/120" methodology, coupled with a less stringent (but nonetheless exclusionary) test for high-priced sales to affiliated parties.
- A 99.5/120 Test Retains Profitable Sales for Analysis - Fourth, using a standard of 120 percent to test for high-priced sales would better reflect the purpose and policy motivating the Department's arm's length test than would a standard of 102

percent. The purpose of the arm's length test is to eliminate from dumping calculations those sales that are outside the ordinary course of trade. Sales which are not profitable are considered by the Department to be outside the ordinary course of trade. Thus, for instance, the Department disregards sales that are made below the cost of production as outside the ordinary course of trade (when made in sufficient volume), precisely because these sales are not profitable. However, profitable sales made at non-aberrational prices are the epitome of sales within the ordinary course of trade. To eliminate profitable sales made at non-aberrational prices would be inconsistent with the entire policy and purpose of the Department's various tests - including the arm's length test under consideration and the "cost test" - for identifying sales made outside the ordinary course of trade. Under the Department's proposal, sales to affiliated parties made at 104 percent of the average would be disregarded even if they are above cost and even if there is no showing that such a price is somehow unusual or aberrational. Thus, the Department should not adopt a standard of 102 percent, because that standard would defeat the entire purpose and frustrate the policy motivating the Department's attempts to ensure that all sales within the ordinary course of trade are accounted for in calculating normal value. In fact, the Department's proposal would tilt the equities against petitioners by automatically disregarding prices only slightly above the average without reason.

- A 99.5/120 Test is Reasonable and Consistent with Department Practice - Fifth, a threshold of 120 percent of the weighted-average of prices to unaffiliated parties is reasonable. It is at the same time high enough to include sales prices that are normal but not so high as to regularly include sales that might be considered aberrational. It is a figure that balances the interests of inclusion of reliable prices and exclusion of unusual prices. By analogy, the Department uses a threshold of 20 percent (of cost) to determine when products are too dissimilar to be compared. Accordingly, 20 percent is consistent with other elements of the Department's practice and a reasonable, bright-line threshold to establish a distinction between normal sales and those to be regularly deemed to be outside the ordinary course of trade.
- The Department's Proposal Encourages Manipulation - Sixth, the Department's proposal would encourage gaming by respondent companies to manipulate and artificially eliminate certain home market sales and underestimate the actual magnitude of dumping, particularly in successive administrative reviews. Respondent companies could simply acquire a minimal stake in formerly unaffiliated customers, declare that these customers are affiliated, and insulate high-priced home market sales from inclusion in the calculation of normal value. For example, assume that sales in the home market are made at prices of \$48 and \$50 to unaffiliated parties. Without changing sales prices at all, a respondent need only purchase 5 percent of the stock of those customers buying at \$50 to reduce the measured home market price to \$48. The prices to the "affiliates"

would then be excluded as being more than 102 percent of the unaffiliated price yet no change in the prices in the home market overall has occurred.

- A 99.5/120 Test is Consistent with U.S. Law - Finally, the new "99.5/120" methodology is a reasonable test consistent with United States law. The Department's current test has been repeatedly upheld as a reasonable test and one that is a permissible interpretation and application of the Tariff Act of 1930 ("the Act").¹² Thus, under U.S. law, there is no requirement that the Department use a symmetrical numeric test to determine whether low- and high-priced sales to affiliates are outside the ordinary course of trade. Nothing in the numerous decisions upholding the Department's practice suggests that systematic application to all sales of an asymmetric test such as a "99.5/120" methodology would be unreasonable or in any way inconsistent with the Act.

Alternatively, if the Department determines not to adopt the type of asymmetrical testing methodology proposed above, then it could, and should, adopt a policy whereby it eliminates from its calculation of normal value all sales to affiliated parties. Such a methodology also would be consistent with the Appellate Body ruling in Japan Hot-Rolled. Such a methodology would reflect the fact that affiliated party sales are inherently suspect and subject to manipulation (hence the need for an "arm's length test" in the first place). Eliminating all home market sales to affiliated parties from the calculation of normal value would eliminate the need to devise an ordinary course of trade test for such sales, the sole purpose of which is to ensure that only sales with bona-fide market prices are used in calculating normal value. In addition, eliminating all affiliated party sales from the calculation of normal value would have the advantage of simplifying the Department's calculations. Finally, the statute expressly authorizes the

¹² See NSK Ltd. v. Koyo Seiko Co., 190 F.3d 1321 (CAFC 1999); NTN Bearing Corp. of America v. U.S., 186 F. Supp. 2d 1257, 1287-88 (Ct Int'l Trade 2002); Usinor v. U.S., 872 F. Supp. 1004 (Ct Int'l Trade 1994); NTN Bearing v. U.S., 905 F. Supp. 1099-1100 (Ct Int'l Trade 1995); Torrington Co. v. U.S., 960 F. Supp. 348 (Ct Int'l Trade 1997); NSK v. U.S., 190 F. 3d 1328 (Ct Int'l Trade 1999); NTN Bearing v. U.S., 104 F. Supp. 2d 148 (Ct Int'l Trade 2000).

use of sales prices from affiliated parties to unaffiliated customers while the statute does not require the use of sales prices between affiliates. In fact, the statute in several instances makes clear that transactions between affiliated parties are suspect and not entitled to the same presumption of reliability as is the case with transactions between unaffiliated parties.

For the reasons cited above, the Department should adopt a two-sided asymmetrical "arm's-length test" test which tests all sales to affiliated parties and excludes (as being outside of the ordinary course of trade) all sales to an affiliated party if, and only if, the weighted-average ratio of the sales prices to that affiliated party over the sales prices to unaffiliated parties for identical products is either below .995 or above 1.20. Alternatively, if the Department decides not to adopt such an asymmetrical test, it should adopt a policy whereby it eliminates all home market sales to affiliated parties from its calculation of normal value.

Finally, but importantly, we would like to comment on the manner in which the Department's "arm's-length test" should be performed. Under current Department practice, CONNUMs sold to a particular affiliated party which are not sold to any unaffiliated party are not examined in the "arm's-length test." This approach can lead to an anomalous result in which an affiliated party is deemed to pass the "arm's-length test" even though only a fraction (perhaps even a small fraction) of the sales made to the affiliated party were actually tested. Such a result is inappropriate and lends itself to gaming by respondents. Sales to an unaffiliated party should only be deemed to have been made in the ordinary course of trade if all of the sales to the affiliate are tested and found to have been made at prices which, on a weighted-average basis, were within the

ordinary course of trade. Accordingly, regardless of which "arm's-length test" the agency should ultimately decide to adopt,¹³ the Department should include all sales made to each affiliated party within the test, and should assume that any sales of CONNUMs which are untestable (i.e., were not also sold to unaffiliated parties) failed the test.¹⁴

Please call any of the undersigned should you have any questions regarding this submission.

Respectfully submitted,

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¹³ The obvious exception is if the Department decides to automatically eliminate all sales to affiliated parties from consideration as a matter of course.

¹⁴ There are two possible "default" assumptions: either that untestable CONNUMs passed the test, or that untestable CONNUMs failed the test. Given that sales prices to affiliated parties are inherently suspect (hence the need for the "arm's-length test" in the first place), the latter assumption seems to be far more logical and reasonable than the former.