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VIA HAND DELIVERY

The Honorable Faryar Shirzad
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Attn: Affiliated Party Sales

Re: Antidumping Proceedings: Affiliated Party Sales In The Ordinary Course Of Trade

Dear Assistant Secretary Shirzad:

We are filing these rebuttal comments pursuant to the U.S. Department of Commerce's ("the Department") request for comments on its proposed modification of its practice concerning the determination of whether respondents' home market sales to

affiliated parties are made in the ordinary course of trade.[1]

I.The Goal Must Be Even-handedness

The Appellate Body ruled that WTO members must exercise their discretion in formulating rules for excluding transactions between affiliates as outside the ordinary course of trade in an "even-handed" manner, whether such transactions are high or low priced.[2] This principle of "even-handed" treatment requires that whatever rules the Department formulates must be "even," which is defined to mean "equal or identical in degree, extent or amount; equally matched or balanced."[3] The Department has

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1 *See* Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade; Request for public comment pursuant to section 123(g)(1)(C) of the Uruguay Round Agreements Act, Requirements for Agency Action, 67 Fed. Reg. 53339 (Aug. 15, 2002).

2 *See* United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R, July 24, 2001, ("Appellate Body Report") at para. 145-148.

3 *See* Webster II New College Dictionary, 1999 Ed. at 388.

recognized correctly that whatever rule it adopts must be symmetrical in order to comply with this principle.[4] Thus, the Department must resist all arguments for it to adopt radical asymmetrical arm's length tests which, by definition, would be at variance with the Appellate Body's requirements.

The Department should apply the same principle of even-handed treatment to all of its antidumping methodologies, including the determination whether to disregard affiliated party transactions in its cost of production, constructed value and CEP profit calculations. This broader application of the even-handedness principle would address the concern of one commentator that the Department's proposal would create a different definition of foreign like product for sales to sales comparisons versus constructed value comparisons in contravention of the Federal Circuit's holding in *SKF USA Inc. v. United States*.[5]

II.The Department Should Preserve Flexibility

We agree in principle with the Department's proposal to bring its practice into

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4 *See* 67 Fed. Reg. at 53340.

5 *See* Comments of Wiley, Rein & Fielding LLP to the U.S. Department of Commerce, dated August 30, 2002, at 13-14 ("Comments of Wiley, Rein & Fielding") *citing FAG Italia v. United States*, 291 F.3d 806 (Ct. Int'l Trade 2002).

conformity with the WTO Appellate Body's ruling requiring even-handed treatment of affiliated party sales. However, we recommend that the Department adopt a somewhat more flexible approach for its arm's length test than the automatic 98 percent to 102 percent band proposed in the *Federal Register* notice.

The Department correctly noted that "the narrower the band the fewer sales to affiliates would (survive the arm's length test), potentially resulting in fewer price-to-price comparisons and more use of constructed value in determining normal value."[6] Legitimate arm's length sales to any one customer could on average vary by more than 2 percent from the average sales price to all unaffiliated customers for reasons such as day-to-day fluctuations in market prices, slight variations in the terms and conditions of sale, or even slight variations in the merchandise being sold. Therefore, we agree with those commentators who propose a band of 95 percent to 105 percent.[7]

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6 *See* 67 Fed. Reg. at 53340.

7 *See e.g*. Comments of O'Melveny & Myers LLP to the U.S. Department of Commerce, dated August 30, 2002, at 8; Comments of the Government of the Republic of Korea to the U.S. Department of Commerce, dated August 30, 2002, at 5.

We also agree with those commentators who urge the Department to account in its arm's length test for factors, such as level of trade, product mix, volume, etc., which in a particular case can affect price comparability. As the WTO Appellate Body noted, "price is merely one of the terms and conditions of a transaction."[8] The Department should not adopt an inflexible "one size fits all" rule that results in the exclusion of legitimate arm's length sales from the calculation of normal value, simply because the transaction may be between companies that meet the rather attenuated definition of "affiliated." However, whatever rules the Department adopts must be applied in an even-handed manner, recognizing that non-arm's length transactions may exist due to affiliation preferences going either way (*i.e.,* the sales price may be too high or too low in relation to what an arm's length market price would be).

III.The Department Should Resist Proposals To Be Inflexible And Contrary To The Principle Of Even-Handedness

We recommend the Department resist the arguments made by several commentators to: (1) apply an asymmetrical test to affiliated party sales; (2) disregard affiliated sales altogether in favor of greater reliance on downstream sales in the home market; (3) narrow the band within which affiliated party sales must fall to be considered

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8 *See* Appellate Body Report at para. 142.

within the ordinary course of trade; (4) apply the arm's length test on a CONNUM-by-CONNUM basis and presume that affiliated sales for which there is not an identical match among the unaffiliated sales are not at arm's length; (5) apply a different arm's length test for reviews than it applies in investigations; (6) apply its new methodology inconsistently in future reviews depending upon the entry date of particular merchandise; or (7) switch the burden of proof onto the respondent to prove that affiliated party sales are inside the ordinary course of trade. Were the Department to accept any of these radical arguments, it would ignore its duty to bring its practices into conformity with the international obligations of the United States. It would contradict the mandate to be even-handed, and would greatly increase the administrative burdens on the Department and respondents while at the same time reducing the accuracy of the Department's calculations. Some of the proposals even go so far as to require the Department to apply adverse facts available unless respondents join in conspiracies with their customers in violation of antitrust and other laws.

Commentators urging the arguments listed in the preceding paragraph claim that their proposals are needed to prevent respondents from "manipulating" or "gaming" the process. However, none of those claims is substantiated. Most assume a level of respondent control over home markets that could not exist absent a perfect monopoly.

These radical responses to imagined "manipulation" or "gaming" would require rejection of legitimate home market sales so that normal value would more frequently be based on less reliable methods such as similar, rather than identical, merchandise, constructed value, or “facts available.”

Commentators urging radical asymmetrical arm’s length tests, such as bands between 99.5 percent and 120 percent or even 125 percent,[9] operate under two false premises. First, they claim that the Appellate Body’s notation that the tests the Department applies do not need to be identical would allow for radical asymmetry. This notation is best understood, however, in the context of the Appellate Body’s recognition that more than just price affects sales comparability. Thus, the Department needs to allow some flexibility to account for factors other than price that would affect whether a particular transaction is at arm’s length. The notation that identical tests are not necessarily required is not a license to ignore the obligation of even-handedness. None of the commentators urging radical asymmetrical tests articulates how such tests could ever be even-handed. As the Department correctly recognized, even-handedness

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9 *See e.g.,* Comments of Dewey Ballantine LLP to the U.S. Department of Commerce, dated August 30, 2002, at 3; Comments of Collier Shannon Scott, PLLC to the U.S. Department of Commerce ("Comments of Collier Shannon Scott"), dated August 30, 2002, at 13.

requires symmetry.[10]

The second false premise is the commentators' assumption that the only reason why sales between affiliates would vary from an arm's length price is because the respondent is attempting to manipulate margins, in which case only lower prices need to be of concern to the Department. It is exactly this bias in the Department's existing practice that caused the Appellate Body to rule against that practice.

Prices between affiliates may vary from arm's length prices for a myriad of reasons totally unrelated to dumping calculations. These reasons may include desires to maximize profits where the tax consequences may be lower; clauses in financing contracts that require a parent company to ensure that its purchases from an affiliate are at a price high enough for the affiliate to service its debts; internal company political or accounting considerations that cause changes in transfer prices to lag behind or not fluctuate as much as external market prices. All of these reasons are as likely to cause prices between affiliates to be higher than an arm's length price as they are to be lower. None involves margin manipulation.

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[10] *See* 67 Fed. Reg. at 53340.

IV.The Department Cannot Satisfy The WTO By Abandoning Affiliated Sales

Commentators who urge the Department to disregard affiliated sales altogether in favor of total reliance on downstream sales ignore the burden this proposal would place on the Department, respondents, and third parties who have no real interest in the Department's investigation and no incentive to cooperate. As the Department stated in the preamble to its current regulations, it "does not believe it is necessary or appropriate to require the reporting of downstream sales in all instances. Questions concerning the reporting of downstream sales are complicated, and the resolution of such questions depends on a number of considerations."[11] The Appellate Body also noted that, "when investigating authorities decide to use downstream sales to independent buyers to calculate normal value, they come under a particular duty to ensure the fairness of the comparison because it is more than likely that downstream sales will contain additional price components which could distort the comparison."[12] The Department for these reasons should take steps to reduce its reliance on downstream sales and not, as proposed by certain commentators, increase the need

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11 Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27,296, 27,356 (May 19, 1997).

12 *See* Appellate Body Report at para. 168.

for such sales.

The added burdens of increased reliance on downstream sales reporting, particularly on disinterested third parties, would increase the frequency with which the Department would have to rely on "facts available." "Facts available" is and should remain a last resort, not a convenient answer to investigative failure. The Department should avoid adopting methodologies that would increase its reliance on facts available.

V.The Department Should Reject Transparent Recommendations To Emasculate The Intent Of The WTO

Various commentators urge the Department to narrow its test for arm's length sales to an extremely narrow band of only 99.5 percent to 100.5 percent.[13] Such a narrow band would be unreasonable and would ignore commercial realities, including the non-price factors affecting price comparability that the Appellate Body noted. The Appellate Body already has criticized the existing 99.5 percent threshold as "very narrow."[14] Converting a "very narrow" threshold into a very "narrow band" is unlikely to

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13 *See e.g.,* Comments of Skadden, Arps, Slate, Meagher & Flom LLP, to the U.S. Department of Commerce, dated August 30, 2002, at 8.

14 *See* Appellate Body Report at para. 152.

satisfy the Appellate Body. Its only real purpose would be to force the Department to rely on alternative means for calculating normal value in lieu of legitimate arm's length transactions.

Some commentators urge the Department to apply its arm's length test on a CONNUM-by-CONNUM basis and reject as not being at arm's length any affiliated party sales for which there is not an identical matching CONNUM among the unaffiliated sales.[15] CONNUM-by-CONNUM arm's length testing would increase the burden on the Department unnecessarily. Due to even tiny variations in market prices, as well as the other factors the Appellate Body said the Department must consider, any given transaction will vary from an average price. That variation does not mean the transaction is not at arm's length. Thus, the proposal to apply the arm's length test on a CONNUM-by-CONNUM basis also would result in the rejection of legitimate arm's length transactions that otherwise could be used for identical product matches to U.S. sales, creating a reliance on less accurate similar matches or constructed value. Moreover, the proposal would in effect shift improperly the Department's statutory burden to ensure that the calculation of normal value is based on sales in the ordinary course by requiring the respondent to have a matching sale in order to prove the arm's

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15 *See* Comments of Collier Shannon Scott at 15-16.

length nature of the affiliated party sale.

The Department should resist comments urging it to apply a different arm's length test in reviews than it applies in investigations. In particular, one commentator urged the Department to adopt a rule requiring respondents to include, as a condition of sale in all their transactions with affiliated parties (no matter how attenuated the affiliation), a contractual obligation on the part of the buyer to provide reports on the buyer's downstream sales.[16] This proposal, if adopted, would constitute an infringement on the sovereignty of foreign governments to regulate commercial transactions within their own territory.

The Department has never before attempted to dictate to a foreign company the terms of sale it must employ in its home market. In many countries such a condition could be considered evidence of illegal downstream price maintenance in contravention of antitrust laws. Yet, the commentator further proposes that the Department enforce such a covenant by a strict rule of adverse facts available whenever a respondent is unable to submit the downstream sales data of an affiliated buyer. Such a rule would

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16 *See* Comments of Collier Shannon Scott at 9.

be a *per se* violation of Section 782 of the Tariff Act of 1930, as amended, and Article 6 of the WTO Antidumping Agreement.

Stewart and Stewart challenged the Department's authority under Section 129 of the Uruguay Round Agreements Act to apply its proposed new methodology uniformly to all relevant transactions in future proceedings.[17] They propose that the Department apply the new methodology only to those individual customs entries that enter the United States after the implementation date.

The error here is that the Department is acting pursuant to Section 123, not Section 129.[18] Section 123 does not impose any special requirements with respect to customs entries to which the new methodology may be applied.[19] Therefore, the

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17 *See* Comments of Stewart and Stewart to the U.S. Department of Commerce, dated August 30, 2002, at 2-9. Section 129 refers to the application of a WTO report to Customs entries only after the report's implementation.

18 *See* 67 Fed. Reg. at 53341.

19 *See* Section 123 of the Uruguay Round Agreements Act codified at 19 U.S.C. § 3533 (1999).

Department should follow its normal rulemaking practice, and apply the new methodology uniformly to all relevant sales in all investigations or reviews initiated on or after the publication date of the final notice of the new methodology. Any other approach would require the Department to apply different methodologies to similar fact patterns within the same segment of a proceeding, based solely upon the date merchandise entered the United States.

The approach advocated by Stewart & Stewart would require the Department knowingly to violate the Appellate Body's authoritative interpretation of the WTO Antidumping Agreement in future proceedings. The Department would then open itself up unnecessarily to WTO challenges in every one of those proceedings. Moreover, because the U.S. statute does not mandate the Department's former methodology, the Department's reviewing courts would be required, pursuant to the *Charming Betsy* doctrine, to overturn the Department's continued use of that former methodology.[20]

Another commentator asked the Department to "clarify" its regulations by

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20 *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 6 U.S. 64, 2 L. Ed 208 (U.S. Md. Feb. Term 1804)(whenever possible U.S. law must be interpreted in such a way as not to conflict with the international obligations of the United States).

adopting a policy that it will disregard all affiliated party sales unless and until the respondent proves they are not outside the ordinary course of trade.[21] However, the preamble to the Department's current regulations states that the burden of proof that sales are outside the ordinary course of trade lies with the party making the claim.[22] The Department should reject any arguments to shift this burden onto a respondent to prove its sales are inside the ordinary course of trade. Moreover, the Appellate Body found that Article 2.1 of the Antidumping Agreement requires the investigating authorities to ensure that the calculation of normal value is based on sales in the ordinary course of trade, and that the burden should not be placed on exporters.[23]

VI.Conclusion

The Department should adopt rules for testing the arm's length nature of affiliated party transactions, including such transactions that arise in connection with its

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21 *See* Comments of Wiley, Rein & Fielding, dated August 30, 2002, at 15.

22 *See* 62 Fed. Reg. at 27299.

23 *See* Appellate Body Report at para. 153-54.

cost of production calculations, which comply with the Appellate Body's requirement of even-handedness. Such rules need to be flexible enough to account for factors other than price that may affect the comparability of sales, so that legitimate arm's length transactions are not disregarded. The Department should resist proposals that would breach the principle of "even-handedness" or are designed to increase the burden on parties or the Department out of unreasonable and unsubstantiated fears of "manipulation" or "gaming." The Department's goal must be the accurate calculation of normal value, not the artificial inflation of dumping margins.

Respectfully submitted

Elliot J. Feldman

Rebuttal Comments 9-6-02.WPD