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PUBLIC DOCUMENT

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:

These rebuttal comments are filed by the undersigned with respect to the Department's recent notice, Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 53,339 (August 15, 2002) ("Notice"), and are timely submitted in accordance with the Department's extension from last Friday, September 6, 2002, until the close of business today, September 9, 2002. The original and six copies of this rebuttal are included for filing, and a DOS-formatted 3.5-inch diskette in WordPerfect format is also enclosed. We appreciate the opportunity to express our views in this important matter.

I. THE DEPARTMENT SHOULD MAKE CLEAR THAT WHATEVER ACTION IT TAKES WILL BE LIMITED TO THE UNDERLYING ANTIDUMPING CASE INVOLVING JAPANESE HOT-ROLLED STEEL

The catalyst for the Department's Notice is the Appellate Body's report adopted by the World Trade Organization's Dispute Settlement Body regarding Japanese hot-rolled steel. In responding

to this report, the Department should restrict the application of whatever measure it adopts at this time to the antidumping duty proceeding concerning imports of the subject Japanese hot-rolled steel.

The Department should do so, first, because the Appellate Body considered only the application of the Department's 99.5-percent test in the context of that particular case. The impending deadline of November 23, 2002 that the arbitrator has set consequently concerns implementation of the report solely in the antidumping case against Japanese hot-rolled steel. This approach is consistent with the way in which the Department has treated other dispute settlement decisions by the World Trade Organization in the past.

Addressing no more than the shortcomings discerned in the specific application of the 99.5-percent test in the proceeding on Japanese hot-rolled steel is also appropriate and feasible, second, because the Appellate Body touched on just one aspect of the test, the perceived need for "even-handedness" by having both a ceiling as well as a floor for resolving what affiliated-party sales might serve as the basis for normal value. See, e.g., United States -- Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan, WT/DS184/AB/R at ¶¶ 148, 154 (July 24, 2001) ("AB Report"). In other words, the discrete issue raised should be resolved equally discretely.

Lastly, the comments received by the Department thus far in response to its Notice indicate a need for a deliberate and thorough review of the Department's procedures pertaining to affiliated-party sales and normal value. However, as discussed above, there is no need to undertake this evaluation on account of the dispute settlement at hand. Instead, this task can better be achieved by the more ample time afforded by a normal rulemaking.[1]

[1] In any event, pursuant to 19 U.S.C. § 3538(c)(1), the methodology chosen by the Department in light of the AB Report should be applied only prospectively, to entries made on or after the date when the Department is instructed by the U.S. Trade Representative to proceed with implementation in this matter regarding Japanese hot-rolled steel.

II. THE DEPARTMENT'S UPPERMOST CONCERN SHOULD BE TO ESTABLISH NORMAL VALUE TO THE GREATEST EXTENT PRACTICABLE ON THE BASIS OF DOWNSTREAM SALES' PRICES BY AFFILIATED PARTIES TO THEIR FIRST UNAFFILIATED CUSTOMERS

The initial comments on behalf of respondents urge the Department to rely on affiliated-party sales as much as possible for setting normal value and seek to steer the Department away from obtaining and using for normal value downstream sales' prices by affiliated parties to their first unaffiliated-party customers. From the respondents' perspective, the task of reporting downstream sales' prices is overly onerous, if not impractical, and unreasonably burdensome. In its place, as discussed more fully in sections III. B and IV below, respondents advance changes to the current test and different tests that would be variously tedious, speculative, and open to manipulation and that would have the effect of allowing low-priced, affiliated-party sales to serve in the determination of normal value in most instances.

In broad terms, the respondents' proposals should be recognized and rejected for what they are, namely, misguided attempts to have the exception swallow the rule establishing how normal value is set. Arm's-length prices are required under the antidumping statute for U.S. price and preferred for normal value, because such prices are the most reliable for computing accurate dumping margins. By the same token, affiliated-party prices are never permitted for U.S. price and are suspect where normal value is concerned.

It follows, then, that the Department's emphasis from the outset must be on developing the administrative record to include the first unaffiliated-party prices, both in the United States and in the relevant foreign market. The fact that respondents usually do not want to report their downstream sales' prices for purposes of normal value should not deter the Department from insisting that these downstream sales be reported. The respondents' mindset not only ignores the antidumping law's framework of viewing arm's-length prices as the best means to the overarching

goal of accurate dumping margins, but also rests on two fundamentally unsound premises: first, that such reporting is not "even-handed" because downstream sales allegedly are normally higher-priced than are affiliated-party sales and thus are disadvantageous to exporters (Comments by O'Melveny & Myers at 5); and, second, that there are great difficulties involved in gathering downstream sales' prices.

On the former score, however downstream sales have been priced, whether above or below affiliated-party sales' prices, accurate and historical reporting of the downstream sales has the advantages of simplicity and lack of potential manipulation, both qualities absent from the testing and use of affiliated-party sales for setting normal value. Once downstream sales have been reported, at that juncture the Department can make any adjustments that might be appropriate for differences in level of trade and so on, knowing that the market-driven prices of the unaffiliated downstream sales provide the soundest platform for calculating and comparing normal value with the arm's-length unaffiliated U.S. prices of the respondent. This approach is "even-handed" and not unfair and does no more than identify and quantify accurately any dumping margins that might exist, the purpose of the antidumping statute.

On the latter score (as we noted in our initial comments on August 30, 2002, at 8 - 11), there should typically not be insurmountable problems for affiliated respondents to report downstream sales. In original investigations, if downstream sales of the foreign like product are not reported, the affiliated-party sales should be disregarded by the Department for normal value. In annual administrative reviews, respondents should be on notice from the time of the final determination in the Department's original investigation that after the antidumping duty order's publication downstream sales will be required by the Department. Inclusion of a provision to this effect as a condition of sale in the contract between the affiliated seller and its affiliated buyer will suffice for this purpose.

Ultimately, the issue here is whether the Department can have the administrative record developed to incorporate the downstream sales to unaffiliated parties. There is really no reason why not. Consistently with the antidumping statute, the system just noted will yield the necessary downstream data (or not, if a respondent so chooses) in a way both straightforward and fair. In this event, the issue of whether and how to test affiliated-party sales largely disappears, the one exception being when the downstream sales are no longer of the foreign like product, and therefore no longer a proper basis of comparison, due to value having been added by the affiliated buyer.[2]

The alternative to this approach is to have respondents withhold their downstream sales data (unless respondents in a given case decide it is to their advantage to report their downstream sales), urging the Department to exercise its discretion and modify the reporting requirements under 19 U.S.C. § 1677m(c)(1) to permit that withholding. In this scenario, respondents then would have the Department engage in time-consuming and speculative tests that would be susceptible to manipulation for the purpose of declaring affiliated-party sales fit for use as normal value in most instances.

Again, respondents would have the exception swallow the rule. In the interest of accurate dumping margins, the antidumping statute insists on arm's-length transactions to set U.S. price and tolerates (only under carefully restricted circumstances), but does not encourage reliance on affiliated-party sales for normal value. As between the historical simplicity and accuracy of downstream sales and the complexity and inherent risk of manipulation with affiliated-party sales, only the former make sense. Why should the Department and petitioners go through contortions spending precious time and resources analyzing under one or more speculative tests affiliated-party

[2] In that circumstance, the Department should apply the test incorporating the 99.5 percent to 125 percent band identified in our August 30th comments.

sales when reliance on downstream sales in the first instance avoids all the distortions inherent in use of affiliated-party transactions?

Finally, when downstream sales are no longer of the foreign like product due to some further manufacturing having been performed, the upstream affiliated-party sales can be scrutinized as a potential basis for normal value. As we mentioned in our August 30th comments, the test employed to gauge whether affiliated-party sales are in the "ordinary course of trade" in these circumstances should be from 99.5 percent to 125 percent, inclusive. Any affiliated average price within this range should be considered in the "ordinary course of trade" and eligible for purposes of setting normal value. This test is in keeping with the AB Report's call for "even-handedness" and reflects that affiliated average prices below 99.5 percent and at a loss are not the sort of average prices ordinarily found with arm's-length sales and that, as to the 125-percent upper limit, profits of 25 percent to unaffiliated customers are not unusual.[3]

III. ADJUSTMENTS OR CHANGES TO THE CURRENT AFFILIATED-PARTY TEST

Many interested parties proposed that the Department make adjustments or changes to the affiliated-party test in addition to altering the band. As discussed earlier, in considering how the affiliated-party test should be conducted, the Department should be guided by two principles. First, and foremost, the Department must be guided by the fundamental objective of the antidumping duty law, which is to calculate an accurate dumping margin. Second, as the Department recognized in its notice, simplicity must also be a driving factor in any affiliated- party test. Simplicity of the test

[3] Assuming, arguendo, that the Department does not seek downstream sales at the outset of its inquiry, but instead solicits affiliated-party sales and applies a test to determine which sales to rely upon as the basis of normal value in the first instance, in that circumstance we would endorse the 99.5-100.5 percent, inclusive, band proposed by several commenters. See, e.g., Skadden Arps Comments at 9; Stewart & Stewart Comments at 12; Wiley Rein Fielding Comments at 10-11. If the average prices of the upstream affiliated-party sales that have been reported fall outside this range and thus are not deemed in the "ordinary course of trade," those sales will be disregarded for normal value, and a respondent will be under an obligation to cooperate to the best of its ability to report the downstream sales of the foreign like product.

ensures not only that the test is easy for the Department to administer but also minimizes the potential for manipulation of the test by the respondents.

As discussed in more detail below, the one change to the Department's current practice that would promote both of these objectives would be to perform the test on a model-specific or CONNUM-specific basis only, rather than on a customer-specific basis. The other proposals that have been made would, however, create further complexity to the test, thereby making it more difficult to administer and creating more opportunities for manipulation.

A. The Department Should Apply the Affiliated-Party Test on a CONNUM-Specific Basis

As discussed in several of the submissions made on August 30th, the Department should apply the test on a CONNUM-specific basis. Collier Shannon Scott Comments at 15-16; Dewey Ballantine Comments at 8-9; Wiley Rein Fielding Comments at 12-13.

First, use of a CONNUM-specific test promotes the accuracy of the dumping margins. As discussed more fully in the August 30th comments, given that the dumping margins are calculated on a CONNUM-specific basis, it makes sense to conduct the affiliated-party test on a corresponding CONNUM-specific basis. This method ensures that the home market prices that the Department will be using have been affirmatively demonstrated to be at arm's-length.

Second, and also of importance, use of a CONNUM-specific test is simple, straightforward, and avoids manipulation. Given that, as noted earlier, the dumping margins will be calculated on a CONNUM-specific basis, undertaking the affiliated-party test on a CONNUM-specific basis is a simple procedure that does not add any administrative burden to the Department at the outset of the investigation. Furthermore, and perhaps the most important aspect of this refinement of the test, use of a CONNUM-specific test prevents potential manipulation by the respondent. As noted in the August 30 comments, under the current test as administered, if certain sales to a particular affiliate

are not "testable," the Department will nevertheless rely on those sales if other CONNUM-specific sales to that affiliate can pass the arm's-length test. Yet, this practice allows manipulation by the respondent. A respondent can set up a small group of "testable" sales to a particular customer to ensure that those sales pass the arm's-length test, while allowing a large group of sales that are not at arm's-length to escape the purview of the test because those particular sales (on a CONNUM-specific basis) are not sold to unaffiliated customers. This type of manipulation thwarts the overall purpose of the antidumping law and should not be allowed.

The best, most simple solution to this problem is to conduct the test on a CONNUM-specific basis. If the Department is unable to test certain sales to affiliated parties on a CONNUM-specific basis, then those sales should not be relied upon to calculate the dumping margins.

B. The Department Should Not Make Any Other Adjustments to the Affiliated-Party Test

Many parties proposed other adjustments or changes to the Department's affiliated-party test. For example, parties proposed, among other things, that the Department incorporate the difference-in-merchandise ("DIFMER") test as part of the affiliated-party test. See Hunton & Williams' Comments at 2-6. Similarly, parties proposed that the test be conducted on a foreign like product basis, rather than a CONNUM-specific basis. O'Melveny & Myers' Comments at 9. Parties also suggested that the Department consider other factors, such as the quantity or volume of sales, the terms of sale, levels of trade, customer categories, and product mix. See Barnes, Richardson & Colburn Comments at 1-2, O'Melveny & Myers Comments at 4-6, Republic of Korea Comments at 4-5, Sidley Austin Brown Wood Comments at 3.

First and foremost, the commenters have not demonstrated that adding other adjustments or changes to the test would enhance the affiliated-party test. Accordingly, these adjustments would do nothing to promote the accuracy of the dumping calculations, and therefore, on this basis alone, the adjustments are not warranted.

Second, these proposals add unnecessarily to the complexity of the Department's test. Each of these steps requires further and in most cases substantial analysis on the part of the Department. Notably, when the test is conducted at the outset of the investigation, the Department has not yet had the opportunity to seek supplemental information and has not yet had the opportunity to analyze fully the response.[4] For example, with respect to the level of trade analysis, the Department must conduct a thorough review of all the information that is put on the record before it determines whether sales are made at differing levels of trade. If the Department were required to incorporate this level of trade analysis at the outset of the procedures to determine whether downstream sales should be submitted, the entire process of deciding whether to include the data would be delayed while the Department undertook a full analysis of the various levels of trade. Furthermore, even if the Department undertook such an analysis, it would not have had the opportunity to seek supplemental information from the respondent that might significantly affect this underlying analysis.

The other proposals suffer from the same inherent problem. These proposals would complicate the Department's procedures for performing the test at the outset, and the Department would be required to rely on a substantial amount of data that might need to be supplemented and corrected in future submissions. As such, adding these complexities to the test by relying on data that would not have been fully analyzed or that would need to be supplemented would clearly not add to the accuracy of the results while causing significant complications to the investigation. Thus,

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[4] If the Department were to alter its practice, as proposed in these and other comments, by requiring the submission of downstream sales at the outset of an investigation or review, then further adjustments or refinements to the affiliated-party test might properly be made at a later time in the investigation, after the data have been subject to further scrutiny by the Department. Assuming that the Department continues to conduct the test at the outset of an investigation or review, however, further adjustments that would involve the use of additional data, such as cost data for a DIFMER adjustment, should not be made because they do not significantly enhance the test and they complicate the administration of the test. An early decision made by the Department not to request downstream sales based on such cost data that were later found to be in error would call into question the accuracy of the Department's initial decision not to request the sales. Further analysis would have to be made after-the-fact, further complicating the Department's decision-making process.

adding this new level of analysis would complicate the Department's process and would increase the potential unreliability of the test.

Adding these adjustments and changes would also promote the potential for manipulation by the respondent. At the outset of an investigation or review, if the affiliated-party test were to be adjusted by a wide variety of factors, including levels of trade or differences-in merchandise, a respondent would be more able to manipulate the results of the affiliated-party test at the outset of an investigation. In other words, the respondent could make unwarranted claims with respect to these adjustments simply to try to influence the affiliated-party test, even though these claims could not withstand further scrutiny at a later point. By relying instead on the basic pricing data submitted, the current affiliated-party test relies on simple, basic data that have overall less ability to be manipulated. Accordingly, further adjustments and changes to the test are not warranted.

IV. THE DEPARTMENT SHOULD NOT RELY ON OTHER METHODOLOGIES TO CONDUCT THE AFFILIATED-PARTY TEST

Several parties proposed that the Department rely on other tests to determine whether sales made to affiliated parties are within the ordinary course of trade. Two of these alternative tests were a "cushion methodology" or a standard deviation test. See Sherman Sterling Comments at 4-10, Willkie Farr Comments at 6. As part of these proposals, the comments have argued that the Department should not establish an "irrebuttable presumption" through the use of the affiliated-party test, but instead should allow respondents to use other methodologies to demonstrate that their sales were in the ordinary course of trade if the respondent otherwise failed the Department's arm's-length test. See O'Melveny & Myers's Comments at 8-9; Sherman Sterling Comments at 4-10.

Use of these alternative methodologies would not promote the fundamental objective of the antidumping law and should be rejected out of hand. As made clear through these parties' comments, the sole goal of relying on these alternative tests is to allow the respondents to submit

additional, lower-priced sales to affiliated purchasers. The outcome-determinative nature of these proposals is obvious: if a respondent fails to demonstrate that its sales to affiliates are at arm's-length under the Department's standard arm's-length test, the respondent wants another, broader test to be conducted that would allow the use of additional, low-priced home market sales. These proposals lose sight of the objective of the statute. The fundamental goal of the statute is not, as these commenters appear to believe, to create the largest home market sales database possible. The goal of the statute is to promote a fundamentally fair comparison that is based on arm's-length, market-driven prices. With the modifications we have proposed, the Department's current affiliated-party test properly and adequately performs this objective. The current test properly assures that the prices to affiliates must closely align to prices to unaffiliated parties. As such, creating a second-tier of testing simply as a means to include an additional number of lower-priced sales to affiliates is not appropriate and should be rejected.

Respectfully submitted,

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Enclosure