September 9, 2002

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BY HAND DELIVERY

The Honorable Faryar Shirzad
Assistant Secretary for Import Adminstration
U.S. Department of Commerce
Attn: Import Administration
14th Street & Constitution Avenue, N.W.
Washington, D.C. 20230

Attention: Kris Campbell (Rm. 3713); Linda Chang (Rm. 3622); Mimi Steward (Rm. 3622)

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

Dear Assistant Secretary Shirzad:

On behalf of our client, Mexinox S.A. de C.V. ("Mexinox"), we hereby submit an original and six copies of Mexinox's rebuttal comments in response to the Department's request for public comments concerning proposed changes in the Department's practice for the identification of affiliated party sales that are in the "ordinary course of trade." 1/

Please do not hesitate to contact the undersigned if you have any questions concerning this matter.

Respectfully submitted,

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Counsel to Mexinox S.A. de C.V.

1/ Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 53,339 (Dep't Commerce)(Aug. 15, 2002)(request for public comment pursuant to section 123(g)(1) of the Uruguay Round Agreements Act) ("Arm's Length Proposal").

U.S. DEPARTMENT OF COMMERCE
INTERNATIONAL TRADE ADMINISTRATION
WASHINGTON, D.C.

ANTIDUMPING PROCEEDINGS: AFFILIATED PARTY SALES IN THE ORDINARY COURSE OF TRADE	)	**PUBLIC DOCUMENT**

REBUTTAL COMMENTS OF MEXINOX S.A. DE C.V.

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AFFILIATED PARTY SALES IN THE ORDINARY COURSE OF TRADE

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MEXINOX S.A. DE C.V.

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AFFILIATED PARTY SALES IN THE ORDINARY COURSE OF TRADE

REBUTTAL COMMENTS OF
MEXINOX S.A. DE C.V.

The following rebuttal comments are submitted on behalf of Mexinox S.A. de C.V. ("Mexinox") in response to the Department's request for public comments regarding proposed changes in the Department's practice for the identification of affiliated party sales that are in the "ordinary course of trade." 2/ The request for comments and rebuttal comments have been published pursuant to section 123(g) of the Uruguay Round Agreements Act, 3/ in response to an adverse decision by the World Trade Organization's Appellate Body in United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan. 4/ The Appellate Body found in that decision that the Department's established "99.5%" arm's-length test is inconsistent with the obligations of the United States under Article 2.1 of the WTO Antidumping Agreement. In so doing, the Appellate Body faulted the U.S. practice as failing to apply an ordinary course of trade test "even-handedly" to both high and low priced sales. 5/ At the same time, the Appellate Body accepted the principle that it may be permissible in certain circumstances to use "downstream" sales by affiliated resellers to calculate normal value, and

2/ Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 53,339 (Dep't Commerce)(Aug. 15, 2002)(request for public comment pursuant to section 123(g)(1) of the Uruguay Round Agreements Act) ("Arm's Length Proposal").

3/ 19 U.S.C. § 3533(g)(1)(c).

4/ WT/DS184/AB/R (July 24, 2001)("AB Report").

5/ AB Report at ¶¶ 148-158.

thereby left undisturbed the Department's current practice for requiring the reporting of downstream sales where sales to affiliates are not made in the ordinary course of trade. 6/

In it's August 15, 2002 notice, the Department proposed to implement the Appellate Body's recommendations by modifying the test currently used to determine whether sales to affiliated parties are "in the ordinary course of trade," to require that prices charted to affiliates on an overall average basis fall within a range of 98 percent to 102 percent of the average prices charged to unaffiliated customers. 7/ At the same time, the Department refrained from making any changes to its practices concerning the reporting of "downstream" sales in the comparison market.

As discussed below, Mexinox generally favors the Department's proposals with a few necessary modifications. Mexinox's position is summarized as follows:

- The Department should continue to apply a price-based test for "arm's length" transactions, but should widen the price band to 95 percent-105 percent;
- The Department should not lower its current five percent threshold for the exclusion of downstream sales reporting;
- The Department should apply these policy changes to all proceedings initiated on or after the implementation date.

As the above indicates, Mexinox strongly disagrees with any of the proposals either to narrow the price band proposed by the Department or to apply "asymmetrical" tests. Mexinox also strongly disagrees with the proposals to further restrict the Department's practices for excluding downstream sales reporting.

6/ Id. at ¶¶ 159-166.

7/ Arm's Length Proposal, 67 Fed. Reg. at 53,340.

I. THE DEPARTMENT SHOULD REJECT PROPOSALS TO APPLY NARROWER AND/OR "ASYMMETRICAL" PRICE BAND

Several law firms commenting on behalf of petitioners have argued either for narrower price bands (i.e., 99.5 percent to 100.5% 8/) or for "asymmetrical" price bands (i.e., 99.5 percent to 120 percent 9/ or 99.5 percent to 125 percent 10/). The Department should reject both proposals as ill-conceived and contrary to the specific findings and recommendations of the Appellate Body.

A. A 99.5 Percent to 100.5 Percent Ratio Would Render the Arm's Length Test Meaningless

First, as the Department already correctly recognized in its Federal Register notice, defining the price band too narrowly is unrealistic from a commercial standpoint and will also have the undesirable consequence of rendering the arm's length test meaningless. Indeed, the Department has already considered and properly rejected proposals to narrow the band to 99.5 percent to 100.5 percent:

> Narrowing the band significantly (such as using a 99.5 percent – 100.5 percent test) would reduce the utility of such test, as few affiliates would pass. Thus the test would serve little purpose. For this reason, the Department is concerned that the band not be overly narrow. 11/

8/ Letter from Skadden Arps Slate Meagher & Flom to the U.S. Department of Commerce (Aug. 30, 2002); Letter from Wiley, Rein & Fielding to the U.S. Department of Commerce (Aug. 30, 2002); Letter from Stewart & Stewart to the U.S. Department of Commerce (Aug. 30, 2002).

9/ Letter from Dewey Ballantine to the U.S. Department of Commerce (Aug. 30, 2002)("Dewey Ltr.").

10/ Letter from Collier Shannon Scott to the U.S. Department of Commerce (Aug. 30, 2002)("CSS Ltr.").

11/ Arm's Length Proposal, 67 Fed. Reg. at 53,340.

Mexinox agrees. Moreover, it is simply unrealistic, from a commercial standpoint, to expect price variability in any product or market to remain within such narrow limits. As one commenter pointed out customers with strong bargaining power can easily obtain 5 to 7 percent discounts and volume discounts often exceed five percent. Treating variations of as little as 0.51 percent from the average price charged to unaffiliated customers as "out of the ordinary course of trade" is simply unreasonable.

Accordingly, Mexinox agrees with the Department that proposals for a narrow price band, if implemented, would effectively render the arm's length test ineffective by determining in all, or virtually all, cases that sales to affiliates are not in the ordinary course of trade. 12/ While petitioners' counsel might welcome this result, it is not consistent with the Department's stated objective to implement the WTO Appellate Body's decision in United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan. That decision requires the Department to modify it's arm's length test to achieve a more even-handed and commercially realistic treatment of higher and lower-priced sales to affiliates – not to ignore these sales completely.

B. There is No Possible Justification for An "Asymmetrical" Price Band

The several proposals by petitioners' counsel for application of an "asymmetrical" price band should also be rejected as there is no possible justification for those proposals.

12/ Petitioners' counsels' various arguments to the contrary are unconvincing. Essentially, Petitioners counsel argues that where respondents fail this distorted test, the Department can achieve its objectives by simply requiring downstream sales reporting. See, e.g. Letter from Wiley, Rein & Fielding to the U.S. Department of Commerce at 11-12 (August 30, 2002); Letter from Stewart & Stewart to the U.S. Department of Commerce at 10-11 (August 30, 2002) ("S&S Ltr."); Letter from Skadden Arps Slate Meagher & Flom to the U.S. Department of Commerce at 12 (August 30, 2002). However, these arguments are tantamount to an admission that their proposals are nothing more than a subterfuge to categorically reject sales to affiliated parties in favor of downstream sales reporting – a position the Department should not give serious consideration to for the reasons discussed herein.

First, the key holding of the Appellate Body in invalidating the Department's 99.5 percent test was a finding that the test does not operate "even-handedly" with regard to high and low priced sales. While it is true that the Appellate Body did not find that the treatment necessarily needs to be "identical," 13/ it is impossible to conceive of how the specific proposals for "asymmetrical" treatment of high and low priced sales contained in petitioners' letters could be viewed as "even-handed." Collier Shannon Scott, for example, argues for a price band on the high end that is fifty times larger than the price band on the low end. 14/ Dewey Ballantine's proposal – recommending a price band that is 40 times larger on the high end than the low end -- is little better.

Petitioners' results-oriented motivation for suggesting these "asymmetrical" price bands is transparent. The obvious hope is that such a test will either gut the arm's length test and require downstream sales reporting in all, or virtually all, cases or that it will very strictly exclude lower-priced sales (that might otherwise be shown to be in the ordinary course of trade) while leaving expansive opportunity for the inclusion of high-priced sales.

Mexinox submits that while the Appellate Body does not require identical rules for all sales, the obligation to apply such rules even-handedly as applied in the context of a bright-line price-based test, requires equal treatment on both ends. There is, contrary to Petitioners' claims, 15/ no a priori basis for concluding that prices to affiliates that are below the average to unaffiliated parties are more likely to be influenced by non-commercial factors than are prices above that threshold. Petitioners' mistake is in assuming that the only factor that can

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13/ AB Report at ¶ 146.

14/ CSS Letter at 13-14 (arguing for a 99.5 percent to 125 percent price band).

15/ See, e.g. CSS Ltr. at 13.

"distort" normal value for the Department's purposes is the manipulation of prices downward to lower normal value. However, it is to precisely this type of reasoning that the Appellate Body objected. The Department should be equally concerned with prices to affiliates that are higher than arm's length and which would distort normal value upwards. In devising an arm's length test, the Department's obligation is to protect evenhandedly against either type of distortion. Petitioners' proposals for asymmetrical treatment would simply perpetuate, if not exacerbate, the bias identified by the Appellate Body in the Department's prior 99.5 percent practice.

C. The Department Should Adopt a 95 Percent to 105 Percent Ratio

As discussed above, the various proposals from the quarters of petitioners for narrower or asymmetrical price bands are ill-conceived and contrary to the recommendations of the Appellate Body. To the extent that the Department utilizes price comparisons in determining whether sales are at arm's length, the Department must apply equivalent price bands for high and low priced sales.

That said, Mexinox agrees with comments from other respondents that the 98 percent to 102 percent price band is too narrow. As noted above, arm's length pricing to unaffiliated companies frequently displays variations of upwards of 10 percent or more, from customer to customer, or transaction to transaction. Thus, a price band of only 2 percent is unduly restrictive and does not reflect commercial reality. As a moderate measure –one that steers a reasonable course between the economic reality of price variability and the Department's legitimate concern regarding the possibility of price clustering at the lower end of the band to influence the arm's length test -- Mexinox endorses the proposal for a slightly enlarged price band of 95 percent to 105 percent.

D. The Arm's Length Test Should Continue to be Applied on a Total Basis

Several commentators for Petitioners also argued for a modification of the Department's current practice of applying the price ratio on a total basis, by affiliated customer, to apply the test on a product-by-product basis. 16/ This proposal, too, should be rejected.

While Petitioners have conjured up all manner of alleged "manipulation" that can occur in applying the Department's traditional practice, there is no evidence that such manipulation has ever occurred. In this regard, we note that the Department has applied the 99.5 percent test in its present form for at least a decade now. During that period, including the recent administrative reviews conducted of Mexinox, the Department has countless times obtained downstream sales information from respondents that would presumably show evidence of any such "manipulation." Mexinox is not aware of a single case, under any order administered by the Department, where there was evidence of such manipulation occurring.

The Department should not entertain radical changes to its arm's length test on the basis of exaggerated and wholly unrealistic fears of "manipulation." Moreover, if, in fact, the Department were to determine that such manipulation is occurring in specific cases, the Department is free to take whatever action is appropriate to respond. As a matter of policy, however, the Department should not alter its present practice of administering the test on a total basis.

II. THE DEPARTMENT SHOULD NOT ALTER ITS PRACTICES WITH REGARD TO THE EXCLUSION OF "DOWNSTREAM" HOME MARKET SALES

In its proposal notice, the Department indicated that it has no intention in the context of this proceeding to alter its present practices with regard to the exclusion of

16/ See, e.g. CSS Ltr. at 15-16.

downstream home market sales. 17/ In response, several commentators for petitioners' interests urged the Department to radically alter its practices in this area – indeed, to effectively abolish the use of sales to affiliates. As discussed below, Mexinox submits that such a radical departure from prior practice is unnecessary, would be unlawful in the context of this proceeding, and is ill-conceived from a policy standpoint.

A. Nothing in the Appellate Body Decision Requires the Department to Reconsider is "Downstream Sales" Reporting Methodology

As a preliminary matter, nothing in the Appellate Body decision requires, or even suggests, that a change is necessary in the Department's practices for the exclusion of downstream sales in order to implement the findings and recommendations of that body. To the contrary, although not directly addressed, the discussion provided at paragraphs 159 through 166 of the AB Report strongly suggests that the Department's practices in this area are acceptable.

The ostensible purpose of this proceeding is to implement the findings and recommendations of the Appellate Body and, to the extent that such implementation affects general policy, to amend such policy as applicable to proceedings outside the context of the WTO dispute resolution proceeding at issue. Since the Japan Hot-Rolled decisions neither address, nor implicate, the Department's practice (supported by regulation) 18/ of excluding downstream sales where such sales account for less than five percent of total home market sales, there is no reason why the Department should address that practice here.

17/ Arm's Length Proposal, 67 Fed. Reg. at 53,340.

18/ See 19 C.F.R. § 351.403(d).

B. Petitioners' Proposals Would Require Amendment of the Department's Regulations Through a Formal Notice and Comment Proceeding

Petitioners proposals to alter or eliminate the Department's practice concerning the exclusion of downstream sales also ignores the fact that this is not merely an administrative practice, but is a methodology codified in the Department's regulations. The methodology at issue, as set forth at 19 C.F.R. § 351.403(d), states that:

> the Secretary normally will not calculate normal value based on the sale by an affiliated party if sales of the foreign like product by an exporter or producer to affiliated parties account for less than five percent of the total value (or quantity) of the exporter's or producers sales of the foreign like product in the market in question or if sales to the affiliated party are comparable, as defined in paragraph (c) of this section.

In the Preamble to the regulations, the Department makes it clear that it considered similar proposals to require downstream sales in all cases but rejected it as neither "necessary or appropriate." 19/ The Department at that time recognized that the question of downstream sales reporting is "complicated" but determined to "codify the Department's current practice regarding the reporting of downstream sales when the volume of sales.

Mexinox notes that such collateral attacks on the Department's regulations concerning downstream sales exclusions have been repeatedly rejected by the Department in the past. For example, in Stainless Steel Sheet and Strip in Coils from Mexico, 20/ the Department rejected arguments contrary to 19 C.F.R. § 351.403(d), that downstream sales should be reported in all cases:

19/ Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,356 (Dep't Commerce)(May 19, 1997)(final rule)(codifying 19 C.F.R. § 351.403)("Preamble").

20/ 64 Fed. Reg. 30,790 (Dep't Commerce)(June 8, 1999)(final determination of sales at less than fair value).

> We agree . . . that the context for the petitioners' comments is the rule-making process. Furthermore, we will not use this final determination to promulgate announcements on reporting requirements for possible future segments of this proceeding. Such requirements are determined on a case-by-case basis based on the facts of each administrative review. 21/

When the same argument resurfaced in a subsequent administrative review, the Department again rejected the proposal to require downstream sales reporting in all cases, noting that such proposal is in conflict with the Department's regulations:

> We disagree with Petitioners' suggestion that, as a matter of policy, the Department should always use the final, arm's-length sales in the chain of distribution in calculating NV. Such a requirement would be contrary to section 351.403(d) of the Department's regulations and the balance of policy factors the Department considered in promulgating that regulation. See the discussion regarding downstream sales in Antidumping Duties; Countervailing Duties; 62 FR 27296, 27356 (May 19, 1997). 22/

It is clear, therefore, that any attempt along the lines proposed by Petitioners to alter the Department's practices with respect to excluding downstream sales from the reporting requirements requires an formal amendment to 19 C.F.R. § 351.403(d) through formal APA notice and comment procedures. However, in this case the Department has given no notice, formal or otherwise, of an intention to amend this regulation (to the contrary, the Department has provided notice that it does not intend to do so). For the Department to attempt to do so at this point, therefore, would be unlawful, null and void.

21/ Id.. 64 Fed. Reg. 20,810 (comment 9).

22/ Decision Memorandum at Comment 11 in Stainless Steel Sheet and Strip in Coils from Mexico, 67 Fed. Reg. 6490 (Dep't Commerce)(Feb. 12, 2002)(final results of administrative review).

C. There is No Policy Justification for Petitioners' Suggested Abolition of the Exclusions from Downstream Sales Reporting

Contrary to the arguments presented by counsel for various U.S. producers in the context of this proceeding, the Department has fully considered the policy implications of the regulations currently governing exclusions from downstream sales reporting. In the Preamble to the Department's regulations, the Department noted that where the volume of home market sales is small, the considerations of the burdens on the Department and the interested parties are simply not outweighed by any theoretical benefit in terms of accuracy in the margins calculations:

> [T]he Department believes that imposing the burden of reporting small numbers of downstream sales often is not warranted, and that the accuracy of determinations generally is not compromised by the absence of such sales. 23/

As noted above, the Department in recently rejecting a similar proposal from Petitioners' counsel, indicated its concern that it not take action contrary to the terms of 19 C.F.R. § 351.403(d) that might upset "the balance of policy factors the Department considered in promulgating that regulation." 24/ The Department has already carefully considered and balanced the policy considerations raised (yet again) by Petitioners' counsel. The compromise reached by the Department and codified in the regulations permitting exclusions of downstream sales where the quantity at issue is small and/or other factors (such as the nature of the merchandise sold to and by he affiliate and levels of trade involved 25/) indicate that such reporting is unnecessary, should not be overturned through this proceeding.

23/ Preamble, 62 Fed. Reg. at 27,356.

24/ Stainless Steel from Mexico, supra, Decision Memorandum at comment 11.

25/ See Preamble, 62 Fed. Reg. at 27,356 ("Questions concerning reporting of downstream sales are complicated, and the resolution of such questions depends upon a number of considerations. including the

III. THE DEPARTMENT'S CHANGE IN PRACTICE SHOULD APPLY TO ALL PROCEEDINGS INITIATED ON OR AFTER PUBLICATION OF THE FINAL NOTICE

Finally, as a procedural matter, Mexinox wishes to register its disagreement with the comments submitted by Stewart & Stewart, suggesting incorrectly that the Department has no authority to apply its change in practice in administrative reviews involving entries made after the date of implementation. 26/ While it is certainly imaginative, Stewart & Stewart's argument is not persuasive.

Stewart & Stewart make a convincing case that under U.S. law, in particular Section 129(c) of the Uruguay Round Agreements Act, 19 U.S.C. § 3538(c)(1), redeterminations made in a particular Title VII case pursuant to WTO dispute resolution are intended to be applied prospectively to entries made on or after implementation, for entries subject to the contested determination. However, their arguments for extension of that directive to cases not subject to the WTO dispute resolution proceedings is unpersuasive.

As Stewart & Stewart concede, Section 129, "strictly interpreted, does not reach agency action that is not the subject of the dispute." 27/ Stewart & Stewart also concede that the provision of U.S. law that might actually apply in this context, namely Section 123(g)(1), 19 U.S.C. § 3533(g)(1), "does not expressly address what entries such implementation may cover." Thus, even from Petitioners' standpoint, there is nothing in the law that precludes the Department from applying its policy changes made in the course of this proceeding to reviews initiated after the implementation date for this proceeding, which cover entries made prior to the

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nature of the merchandise sold to and by the affiliate, the volume of sales to the affiliate, the levels of trade involved, and whether sales to the affiliates were made at arm's length.").

26/ See S&S Ltr. at 1-9.

27/ Id. at 5.

implementation date. Thus, the Department, as a legal matter is clearly acting within its authority as outlined in the "Timetable" section of the proposal notice.

Stewart & Stewart's remaining argument is that the Department should exercise its discretion to apply the policy change only with respect to proceedings involving entries made after the implementation dates. For example, Petitioners argue that the Department's approach would lead to different effective dates for implementation of WTO recommendations under "retrospective" assessment systems such as that applied in the United States as compared to the "prospective" assessment systems applied in the European Union and elsewhere. 28/ However, the fact that the timing of implementation will be affected differently under the two systems by virtue of their prospective or retrospective nature, does not mean that the implementation procedures are "inconsistent" in any meaningful sense. The timing is different because the systems are different.

Stewart & Stewart's suggestion that the Department is somehow arrogating undelegated powers to itself by applying the policy change to reviews initiated on after the implementation date 29/ is also misplaced. The Department's authority to develop otherwise permissible policies affecting its administration of the antidumping laws is not derived from Section 123 or 129 of the URAA, but rather from the governing provisions of the antidumping laws themselves. The Department is exercising no authority that it did not already have.

For all of these reasons, we submit that the Department has the authority to apply its policy changes prospectively to all proceedings initiated on or after the implementation date.

28/ Id. at 7-8.

29/ Id. at 8.

IV. CONCLUSION

Mexinox respectfully request that the Department take these comments into consideration in making its determination regarding modifications to its arm's length test. Specifically, Mexinox urges the Department to:

- continue to apply a price-based test for "arm's length" transactions, but should widen the price band to 95 percent to 105 percent;
- not lower its current five percent threshold for the exclusion of downstream sales reporting;
- apply these policy changes to all proceedings initiated on or after the implementation date.

Respectfully submitted,

HOGAN & HARTSON L.L.P.

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