September 9, 2002

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The Honorable Faryar Shirzad
Assistant Secretary of Import Administration
U.S. Department of Commerce
International Trade Administration
Central Records Unit, Room 1870
14th Street and Constitution Avenue, 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:

Pursuant to the Department of Commerce's August 15 Notice requesting comments on the proposed modification of its practice concerning the determination of whether sales to affiliated parties are made in the ordinary course of trade,[1] we hereby submit one original, six copies and one diskette of the following rebuttal comments.

Please do not hesitate to contact me with any questions or concerns regarding this request.

Sincerely,

Gary N. Horlick
of O'MELVENY & MYERS LLP

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[1] 67 Fed. Reg. 53,339 (August 15, 2002).

Affiliated Party Sales in the Ordinary Course of Trade
Rebuttal Comments filed by O'Melveny & Myers LLP
September 9, 2002

Pursuant to the Department of Commerce's (the "Department") August 15 notice requesting comments on the proposed modification to determining whether affiliated party sales are in the ordinary course of trade, and the revised submission deadlines indicated on the Department's web page, O'Melveny & Myers LLP submits the following comments. These comments address issues raised by other parties in their initial submissions of August 30, 2002.

I. CONTRARY TO CLAIMS BY CERTAIN PETITIONERS' COUNSEL, THE DEPARTMENT MAY NOT PRESUME ALL SALES TO AFFILIATED PARTIES ARE OUTSIDE THE ORDINARY COURSE OF TRADE.

Several commentators, notably Collier Shannon Scott ("Collier Shannon") and Nucor Corporation, the Coalition for Fair Beam Imports, and the Rebar Trade Action Coalition (collectively "Wiley, Rein & Fielding"), argue that the Department should automatically reject all sales to affiliated parties in calculating normal value and require the reporting of downstream sales in all instances. These parties argue that the Department should not conduct any arm's length test.

Such an approach requires the Department to ignore sales that are made in the ordinary course of trade (because it creates an irrebuttable presumption that all affiliated party sales are not in the ordinary course of trade) and makes it extremely difficult, if not impossible, for the Department to conduct a "fair comparison." As such, this approach would not be consistent with U.S. law or with the obligations of the WTO Antidumping Agreement.

When there are sales to affiliated entities in the relevant market, U.S. law requires the consideration of transactions between affiliated entities (as well as any sales to unaffiliated entities) as the starting point of the normal value analysis. 19 U.S.C. § 1677b (f) (2) provides that a transaction between affiliated persons "may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration . . ." By ignoring affiliated

party transactions and using downstream sales to unaffiliated parties in all situations (or even as the initial premise) the Department would not consider whether "any element of the value required to be considered" did or did not "fairly reflect the amount usually reflected in sales" of the merchandise. Thus, such an approach would be contrary to U.S. law.

Similarly such an approach is unlikely to be consistent with the obligations of the WTO Antidumping Agreement. Wiley, Rein & Fielding's submission states, incorrectly, that the Appellate Body approved the Department's practice of using the downstream sales by affiliated resellers as the basis for normal value.[2] The Appellate Body did not. The Appellate Body disagreed with the Panel's finding that the use of downstream resellers' sales was *per se* inconsistent with the WTO Antidumping Agreement. The Appellate Body found, however, that it could not address Japan's complaints concerning whether the Department's methodology for calculating normal value from downstream sales transactions was consistent with the Antidumping Agreement because the Panel had not made the requisite factual findings.[3]

This is not an endorsement of Department practice with respect to downstream sales. Indeed, in discussing the theoretical possibility of using such downstream sales, the Appellate Body noted the many difficulties inherent in making a fair comparison in that instance:

> The use of downstream sales prices to calculate normal value may affect the comparability of normal value and export price because, for instance, the downstream sales may have been made at a different level of trade from the export sales. Other factors may also affect the comparability of prices, such as the payment of additional sales taxes on downstream sales, and the costs and profits of the reseller. Thus, we believe 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 <u>more than likely that downstream sales will contain additional price components which could distort the comparison</u>.[4]

Thus, while it may be possible to use such downstream sales, the Appellate Body certainly did not encourage their use and urged investigating authorities to exercise considerable caution when

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[2] Comments of Wiley, Rein & Fielding LLP at 2, *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade* (August 30, 2002) ("Wiley, Rein & Fielding Comments").
[3] Report of the Appellate Body, *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, AB-2001-2, WT/DS184/AB/R at para. 180 (July 24, 2001) ("*Japanese Hot-Rolled*").
[4] *Id.* at para. 168 (footnotes omitted) (emphasis added).

doing so.

Moreover, in determining normal value, the Department must consider all sales in the ordinary course of trade. The parties that advocate ignoring all affiliated party sales have provided no evidence that such sales are never in the ordinary course of trade. As such, to ignore sales made in the ordinary course of trade (*i.e.*, consistent with the normal terms and conditions of sales in the marketplace at issue) because they were made to affiliates would skew the calculation of normal value and prevent the Department from conducting a fair comparison, as required by U.S. law. Finally, requiring the reporting of all downstream sales would be a massive undertaking for both respondents and the Department.

II. THE DEPARTMENT SHOULD NOT USE A "99.5/100.5" TEST.

The Department is proposing a new test for determining whether or not sales to affiliates are made within the ordinary course of trade. The Act defines ordinary course of trade as "the conditions and practices which … have been *normal* in the trade on consideration …"[5] Section 771(15) of the Act further notes that the Department shall consider certain transactions to be outside the ordinary course of trade, including any transaction between affiliated persons that "does not *fairly reflect* the amount usually reflected in sales of merchandise under consideration in the market under consideration."[6] Accordingly, Congress's intent is explicit that sales made under commercial terms that are normal and fairly reflect the values prevailing in the market under consideration shall be within the ordinary course of trade. Commerce itself, in Section 351.403 of its regulations, has interpreted such Congressional intent by promulgating a rule that it may accept sales to affiliates in its calculation of normal value (*i.e.*, will consider such sales to be within the ordinary course of trade) if "satisfied that the price *is comparable to* the price [to an unaffiliated party] … "[7]

Several commentators urge the Department to employ a band even narrower than the

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[5] 19 U.S.C. § 1677(15) (1999) (emphasis added).
[6] 19 U.S.C. § 1677b (f) (2) (1999) (emphasis added).
[7] 19 C.F.R. § 351.403(c) (2002) (emphasis added).

"98/102" band proposed by the Department, *i.e.,* ranging from 99.5 to 100.5 percent of the average price to unaffiliated customers. As stated in its Federal Register notice of August 15, 2002, the Department is proposing a new test, which is consistent with the view expressed by the Appellate Body, that rules aimed at preventing the distortion of normal value through sales between affiliates should reflect "even handedly," that "both high and low priced sales between affiliates might not be 'in the ordinary course of trade.'"[8] In implementing the Appellate Body's findings, the Department should not narrow the band significantly, such as through a 99.5 to 100.5 percent test, because this would "reduce the utility of such a test, as few affiliates would pass."[9] We disagree with the range proposed by Wiley, Rein & Fielding because it is simply too narrow to accomplish the Department's stated goals.[10]

In advocating a "99.5/100.5" test, Wiley, Rein & Fielding claims that such a test would, "make it more difficult to manipulate home market sales, and … lessen the impact of affiliated sales on the margin calculation."[11] There is no evidence that companies manipulate home market sales. If companies were to cluster their sales to affiliates at the low end of the price spectrum, Commerce would be able to detect this by analyzing the data supplied in questionnaire responses. Therefore, there is no reason to impose a test designed largely to prevent such hypothetical manipulation, especially when the proposed test would hinder the Department from ensuring an accurate calculation of the normal value.

Wiley, Rein & Fielding's proposal to narrow the band will lead to more sales failing the arm's length test and thus the requirement of reporting downstream sales where sales to affiliates are found to be at non-arm's length prices. Such a requirement will continue to impose onerous reporting requirements on affiliates, and would likely increase the use of facts available. The Department is aware of the significant difficulties faced by exporters in reporting downstream sales. In some circumstances it may be impossible for the exporter to obtain the cooperation of

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[8] 67 Fed. Reg. 53,339, 53,340 (Aug. 15, 2002).
[9] *Id.*
[10] Similarly, we disagree with the "99.5/100.5" test for administrative reviews proposed by Skadden, Arps, Slate, Meagher & Flom LLP for the same reasons. There should be no difference in the treatment of affiliated party sales between investigations and administrative reviews.
[11] Wiley, Rein & Fielding Comments at 11.

an affiliate that it does not control.[12] In many situations, the affiliate does not maintain records in such a way that it can trace its downstream sales back to the individual affiliated party transaction at the level of detail needed to respond to a Department questionnaire, or even at all. Increasing the instances in which downstream sales reporting would be required imposes an administrative burden on the Department as well by increasing the number of companies that need to respond (and whose responses need to be analyzed and verified) and by increasing the complexity of the analysis.

Although Wiley, Rein & Fielding may wish to lessen the impact of affiliated sales on the margin calculation, this is not the goal of testing such sales.[13] The goal of the analysis is to achieve as accurate a calculation of normal value as possible based on sales in the ordinary course of trade. As the Department acknowledged, a band that is too narrow could result in fewer price-to-price comparisons (the preferred method of comparison). Under the Department's regulations, "the Secretary may calculate normal value based on that sale [to an affiliated party] only if satisfied that the price *is comparable to* the [unaffiliated] price."[14] The assertion that only sales that are within 0.5 percentage point (plus or minus) of the average price to all unaffiliated parties are "comparable" is unduly restrictive and counter to the commonsense notion of the term "comparable."[15] This is particularly true given the Department's current practice of comparing each individual affiliated party's sales to all unaffiliated parties' sales taken together and its disregard of customer categories, levels of trade, contemporaneity, quantities sold, etc. Furthermore, U.S. law and the Department's regulatory scheme favor price-to-price comparisons in determining normal value and calculating any antidumping margin. Accordingly, a Department rule whereby any sale to an affiliate that is outside the overly-narrow 99.5 percent to 100.5 percent range of unaffiliated prices is presumptively outside the ordinary course of trade risks significantly reducing the number of home market sales prices eligible for use in calculating

[12] Given the Department's strict definition of affiliation, including parties with only a 5 percent equity relationship, it is often the case that a respondent does not control its affiliates.
[13] We note, however, that the statement certainly reflects the inherent bias underlying such a narrow band.
[14] 19 C.F.R. § 351.403(c) (2002) (emphasis added).
[15] *See* Webster's Ninth New Collegiate Dictionary 267 (9th ed. 1998). "Comparable, adj., 1. capable of or suitable for comparison."

normal value and, thus, the number of available sales for comparison to U.S. sales. Such a rule would also be unlikely to pass the scrutiny of another WTO panel.

In addition, establishing an onerous reporting burden for exporters is not an even-handed approach. Too narrow a band that operates to the disadvantage of exporters will increase the use of facts available and will decrease the accuracy of the dumping calculation. Such a result is inconsistent with the requirements of U.S. law, the WTO Antidumping Agreement, and the Appellate Body determination in the *Japanese Hot-Rolled* case.

Skadden, Arps, Slate, Meagher & Flom ("Skadden") urged the Department to link any price band used for determining whether sales to affiliates are within the ordinary course of trade with applicable *de minimis* standards. Such an approach would require the Department to ignore commercial reality and the commonsense notion of the term "comparable."

Skadden justifies its proposal with an illogical and unsupported link between the Department's *de minimis* standard and its legal requirements to determine whether affiliated sales are comparable to, and fairly reflect, the terms of unaffiliated sales. *De minimis* is defined as miniscule, trivial, or of no significance. The Court of International Trade has noted that "a *de minimis* benefit is, by definition, of no significance whatever …"[16] In fact, the *de minimis* test is the Department's threshold for determining when the margin of dumping, or the amount of a benefit, is so minor that it cannot warrant remedial duties. Commentators that propose the use of such a test to determine whether sales are comparable in the ordinary course of trade context have not explained why prices must be nearly identical (within 2% or 0.5%, based on the *de minimis* standards) in order to be "comparable." Such a narrow and inflexible view ignores commercial reality and the commonsense notion of the term comparable.[17] Moreover, the misplaced proposal to tie comparability to relevant *de minimis* standards is further eroded by the potential inconsistent application of such a test, whereby a sale at $302 would be deemed

[16] *Carlisle Tire & Rubber Co. v. United States*, 1 CIT 352, 517 F. Supp. 704, 706 (Ct Int'l Trade 1981).
[17] For example, under the proposal of Skadden, for an arm's length test in an administrative review, the Department would be forced to determine that a sale of Product X made at $302 to an affiliate would not be comparable to, nor could it fairly reflect, a sale of the same product made at $300. The absurdity of this proposal is obvious.

comparable to a sale at $300 (and, thus, within the ordinary course of trade) in an investigation, but inexplicably the very same $302 sale would become not comparable to, and not fairly reflective of, the same benchmark $300 unaffiliated sale in a review.

In any new arm's length test the Department promulgates, it should consider, according to the Act and its regulations, whether sales are comparable to, or fairly reflect the terms of, other sales without constraining itself by misplaced analogies to the *de minimis* standard. To do otherwise, would be to abandon commercial reasonableness and expect that two sales must have practically identical sales prices in order to be comparable.

III. THE DEPARTMENT SHOULD NOT ADOPT AN ASYMMETRICAL PRICE BAND TEST OF UP TO 125 PERCENT OF THE AVERAGE PRICE TO UNAFFILIATED ENTITIES.

Both Dewey Ballantine LLP and Collier Shannon propose that, instead of narrowing the suggested band, the Department should instead asymmetrically widen the band to capture affiliated sales at prices 120 and 125 percent above average price, respectively, while leaving the low price range at 99.5% of average price.

Dewey Ballantine asserts that such a bright line rule of 120 percent of the average price for high-priced sales similar to the 99.5 percent of average price test for lower-priced sales currently applied is necessary in order to exclude only aberrationally high-priced sales.[18] Collier Shannon argues that reliance upon a 125 percent benchmark of the average price is appropriate because it eliminates the danger of manipulation to avoid dumping margins and because respondents "regularly seek to maximize the prices of their home market unaffiliated sales particularly."[19] Collier Shannon contends that a benchmark of 125 percent is reasonable for use as the upper end of the test's range.

These proposals appear to skew systematically the normal value calculation upwards. At

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[18] Comments of Dewey Ballantine LLP at 4, 5, *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade* (August 30, 2002).
[19] Comments of Collier Shannon Scott PLLC at 14, *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade* (August 30, 2002).

a minimum, they have a strong potential to be applied in a manner that would systematically tend to raise normal value through the required reporting of (normally) higher-priced downstream sales and the elimination of comparable lower-priced sales, consequently artificially creating or increasing dumping margins and thereby disadvantaging exporters.

The narrow range would likely lead to the excessive use of downstream sales. The reporting of such downstream sales has become a major burden on the Department and respondents, often involving additional questionnaire responses and verifications of entities with only an indirect interest in the investigation. Counsel for petitioners' main interest in pursing the reporting of downstream sales may well be the possibility of the resulting use of facts available, which leads to further problems for the Department and increased litigation.

Finally, we note that neither the proposal of a narrower, symmetric price band nor an asymmetric price band addresses the underlying problem for the Department found by the Appellate Body. In *Japanese Hot-Rolled*, the Appellate Body found that a price comparison alone is an insufficient basis to determine whether or not sales are in the ordinary course of trade. [20] The bands proposed by counsel for petitioners continue to be based solely on a price comparison, fail to consider other relevant factors, and fail to provide an opportunity for parties to rebut a presumption regarding whether transactions are in the ordinary course of trade. They also "tilt" the comparison in favor of (illusory) findings of dumping, inconsistent with the Antidumping Agreement.

IV. THE DEPARTMENT MAY NOT ASSUME THAT AN UNMATCHED CONNUM IS OUTSIDE THE ORDINARY COURSE OF TRADE.

Certain commentators argue that the Department should continue to first apply the price-band analysis on a CONNUM-specific basis. These same commentators generally argue that the Department should, however, presume that, for CONNUM's that have no identical match in the sales to unaffiliated persons, all such sales of that CONNUM are outside the ordinary course of trade.

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[20] "Price is merely one of the terms and conditions of a transaction." *Japanese Hot-Rolled* at para. 142.

Such a presumption is inconsistent with U.S. law and with the WTO Antidumping Agreement. As noted in Section I above, 19 U.S.C. § 1677b (f) (2) provides for disregarding affiliated party transactions if certain circumstances are met. By imposing a presumption that unmatched CONNUM sales are outside the ordinary course of trade, the Department would be ignoring any evidence as to whether the required circumstances are met. Therefore, such a presumption is not permitted under U.S. law.

Similarly, the WTO Antidumping Agreement requires that a comparison be made based on normal value determined from sales in the ordinary course of trade. It permits excluding from that value sales that are outside the ordinary course of trade but does not permit the systematic exclusion of sales without considering whether they are sold on terms or conditions that are outside the ordinary course of trade. Thus, the Antidumping Agreement does not permit the systematic exclusion of certain model matches where such action would most likely lead to a systematic move away from price-to-price comparisons, which would disadvantage the exporter. We suggest that, in order to avoid the problem of unmatched CONNUMs, the Department do away with the two-stage test it currently employs: *i.e.,* first comparing the prices at the CONNUM level and then calculating an overall average for each affiliated entity. Instead, the Department should employ the test on a company-wide basis for all sales to that affiliated entity.

This is reasonable because most companies do not pick and choose their relations with a company on a CONNUM basis. In other words, if for one CONNUM the terms and conditions of sale (all such terms and conditions, not just price) indicate that affiliated party sales are made on a commercial basis, it is unlikely that the company will sell products (i.e., CONNUMs) to that affiliate on a non-commercial basis.

V. THE PROPOSED 0.5 PERCENT STANDARD FOR REPORTING OF SALES TO AFFILIATES SHOULD BE IGNORED.

Commentator Stewart & Stewart proposes that the Department should modify its practice regarding downstream sales by lowering or eliminating the current 5 percent standard for collecting such data. Stewart & Stewart erroneously claim that a modification to 0.5% would increase the use of price-to-price comparisons and conform to the current *de minimis* margin for

administrative reviews.

While the intent of Stewart & Stewart's proposed modification may be to increase the use of price-to-price comparisons, it will instead result in an increased administrative burden on the Department through additional questionnaire responses, verifications, and litigation. As noted previously, the reporting of downstream sales has become a major burden on the Department and respondents. Stewart & Stewart's main objective in pursing the reporting of an increased number of downstream sales appears to be the likelihood of the resulting increased use of facts available. Rather than lowering the threshold for reporting of downstream sales by affiliated resellers to 0.5 percent of total home market sales, the Department should raise the threshold to 20 percent. Because the Department already considers 20 percent of sales below cost not to be distortive of normal value, the Department should adopt an analogous provision with respect to affiliated resellers and not require downstream reporting if non-arm's length sales to affiliated resellers constitute less than 20 percent of home market sales.

With regard to Stewart & Stewart's second argument that a modification to 0.5 percent will conform with the current *de minimis* margin for administrative reviews, there is no linkage between the reporting of downstream sales by affiliated resellers if those sales are less than 0.5 percent of total home market sales and the *de minimis* margin for administrative reviews, other than the number 0.5. The current 5 percent rule in 19 C.F.R. § 351.403(d) was instituted under the assumption that if there is a viable home market, sales to affiliates that constitute less than 5 percent of total home market sales would be, even if found to be at non-arm's-length prices, not significant enough to affect home market viability and the availability of price-to-price comparisons. The 0.5 percent *de minimis* margin was instituted under the assumption that if the level of dumping is so miniscule as to be under 0.5 percent that any dumping occurring under that level has no practical effect and thus there is no need for duties to remedy it.