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

September 9, 2002

Re: Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade; 67 Fed. Reg. 53,339 (August 15, 2002)

Dear Assistant Secretary Shirzad:

These comments are filed in response to the Department of Commerce' s ("DOC") proposal to conform U.S. administrative practice to the World Trade Organization ("WTO") Appellate Body decision in United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, by modifying the arms length test to require that "the overall ratio calculated for an affiliate be between 98 and 102 percent, inclusive, in order for sales to that affiliate to be considered 'in the ordinary course of trade' and used in normal value calculation." 67 Fed. Reg. at 53,340.

We agree with comments filed by other counsel that the DOC, at the very least, should widen its proposed 98/102 band to 95/105, thereby increasing the probability that sales to affiliates can be used for comparison purposes, while avoiding the possibility that a respondent could use the band to manipulate margins.

The DOC also should allow both petitioners and respondents to present evidence that sales to affiliates whose prices fall outside the 95/105 band remain within the "ordinary course of trade," and not create a per se rule that may not be appropriate in particular circumstances.

Finally, the DOC should summarily reject Petitioners suggestion that Commerce apply "adverse facts available" to any respondent who does not report all downstream sales to the first unaffiliated customer in the relevant foreign market, regardless of whether the manufacturer's sales to its affiliated resellers are at arm's length. Collier Shannon Scott, August 30, 2002 Comments, at 11.[1]

[1] See also Wiley Rein Fielding, August 30, 2002 Comments at 5 ("For affiliated resellers, the sale to the first unaffiliated purchaser in the home market should be used as the basis for normal value.), 10 ("Disregarding all home market sales to affiliates (and using the sale to the first unaffiliated customer for sales through an affiliated party) is the best solution"); Skadden Arps, August 30, 2002 Comments at 3 ("there are more acceptable options for implementing the Appellate Body's decision, including automatically using the downstream sales from an affiliated party to its customer in all instances…").

Petitioners' proposals constitute a thinly veiled attempt to maximize margins by placing insurmountable reporting burdens on prospective respondents. For the reasons set forth below, they should be rejected.

1. Petitioners' proposals are contrary to U.S. law

While Section 772, Tariff Act of 1930, as amended, requires that in calculating dumping margins U.S. sales prices must be based on sales to unaffiliated purchasers,[2] Section 773(a)(1)(B) creates a presumption that the starting point for home market sales is the "first" sale "in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price," regardless of the affiliation between the buyer and seller.

One of several exceptions to the general rule that the home market sales price should be based on the "first" sale in the ordinary course of trade at the same level of trade is found in Section 773(a)(5), which **permits** the DOC to calculate normal value based on "the prices at which the foreign like product is sold…by …{an} affiliated party" to its customers, "if the foreign like product is sold…{by a producer}…through an affiliated party."

If a respondent is "unable to submit…information requested {by the DOC, including downstream sales data} in the requested form and manner," the DOC, pursuant to Section 782(c)(1) is required to "consider the ability of the interested party to submit the information," and "may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party."

As the foregoing statutory scheme confirms, Petitioners' suggestion stands the law on its head. By requiring that Respondents always report downstream sales by affiliated home market customers, the DOC would be ignoring the differences between the language of Section 772 and 773, and the presumption in Section 773 that normal value should be based on the sale between a producer and its customer, regardless of the relationship. By calculating normal value based on "adverse facts available" if downstream sales data is not submitted, the DOC would be ignoring its responsibilities under Section 782.

2. Petitioners' proposals are contrary to DOC Regulations

Not only are Petitioners' suggestions at odds with the statutory scheme, they also are directly contrary to DOC Regulations.

[2] This result is achieved pursuant to Section 772(a) ("export price") when the sales are by the producer or exporter directly to an unaffiliated customer or pursuant to Section 772(b) ("constructed export price") when the sales used as a starting point to calculate margins are by a seller affiliated with the producer or exporter,

Section 351.403(c) provides that the DOC "may calculate normal value based on {sales by a manufacturer to its affiliated customers}… if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." In its comments implementing this Regulation, the DOC noted that it was neither "necessary {n}or appropriate to require the reporting of downstream sales in all instances," reasoning that

> Questions concerning the reporting of downstream sales are complicated and the resolution of such questions depends on a number of considerations, including the nature of the merchandise sold to and by the affiliate, the volume of sales to the affiliate, the level of trade involved, and whether sales to affiliates were made at arm's length.
> 62 Fed. Reg. at 27,356 (May 19, 1997)

Thus, DOC Regulations clearly preclude adoption of Petitioners' suggestions.

3. Petitioners' proposals are contrary to the Appellate Body decision in United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan.

Petitioners' suggestions not only are not mandated by United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, but they are directly contrary to the rationale which led the Appellate Body to find that the DOC's 99.5 percent test was contrary to U.S. international obligations.

While the Appellate Body concluded that Article 2.1 of the International Antidumping Agreement does not "expressly preclude that relevant sales transactions might be downstream, between affiliates of the exporter and independent buyers," (para. 166), it cautioned WTO members as to the inherent dangers of calculating normal value based on resale prices. The Appellate Body noted that "the identity of the seller" was not "irrelevant in calculating normal value,' and that if resales were to be used as the basis of comparison, "to ensure that prices are comparable," the investigating authorities should "take full account of the fact, as appropriate, that a relevant sale was not made by the exporter or producer itself, but was made by another party." (para 167). Examples of the factors which the Appellate Body urged WTO members to consider were that "the downstream sale may have been made at a different level of trade from the export sales,' "payment of additional sales taxes on downstream sales," and "costs and profits of the reseller." (para 168). For these reasons, the Appellate Body expressly warned 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 likely that downstream sales will contain additional price components which could distort the comparison. (para 168)

Given the concerns regarding downstream sales expressed by the Appellate Body, the DOC would be flaunting the international consensus to use this decision as a vehicle for expanding its reliance on downstream sales as the starting price for normal value.

4. Petitioners' proposals are contrary to the over-riding principle of U.S. law to calculate accurate dumping margins

Petitioners claim that calculation of normal value based on affiliated party resale prices constitutes the best method of calculating "accurate dumping margins." As the DOC should be aware after wrestling with downstream sales issues for the past twenty-two years, nothing could be further from the truth.

Downstream sales reporting requirements have all too often resulted in margin calculations based on "best information available" and its successor "facts available," due to the inability of a manufacturer's affiliated customer to prepare the complex database required by the DOC in the short time frame required to complete a DOC initial investigation or Annual Review.[3] The difficulties associated with reporting downstream sales arise from a variety of factors, including, but not limited to, the following:

1. Affiliated customers often are independent corporations, responsible for their own profits and losses, who are not directly controlled by the manufacturer/respondent and who have neither the economic incentive (i.e., they have no presence in the U.S. market) nor available internal resources (e.g., English speaking staff) to prepare a complex Questionnaire response.

2. Affiliated customers often purchase subject merchandise from both affiliated and unaffiliated manufacturers, which is commingled in inventory, thereby making it extremely difficult to trace purchases from a particular vendor to resales.

3. Affiliated customers often further process subject merchandise prior to resale, which exacerbates the difficulties of tracing sales to resales, and requires preparation of cost of production data, in order to create the requisite "apples to apples" comparison.

4. Affiliated customers often resell a wide variety of subject merchandise in numerous sales, to numerous customers in relatively small quantities, thereby requiring creation of a voluminous database, in which all resales must be categorized into designated product categories (i.e., CONNUMs), based on numerous objective physical

[3] Downstream sales reporting requirements also have been one of the reasons why certain respondents have chosen to "opt out" of DOC initial investigations, thereby allowing margins to be calculated based on a facts available adverse inference, or to refrain from requesting an Annual Review, thereby perpetuating deposit of AD duties based on stale information. Clearly, the DOC should not administer the AD law in a manner in which margins reflect the burden of reporting data rather than whether merchandise actually is sold to the U.S. at less than fair value.

characteristics, which have no relationship to data maintained by the customer in the ordinary course of business.

Accordingly, contrary to Petitioners' claims, as a practical matter requiring a respondent to report downstream sales generally does not result in the calculation of the most accurate margins; rather, it often leads to resort to a facts available adverse inference.

In contrast to the burden placed on affiliated companies to report their downstream sales, the information in a resale database often will have no impact, or at most a very limited impact, on the DOC's calculation of margins. For example,

1. Downstream sales of subject merchandise which are neither identical nor "similar" to U.S. sales (i.e., sales with a DIFMER greater than 20 percent) will never be used to calculate margins.

2. Assuming that the manufacturer sells identical merchandise to unaffiliated home market customers at prices above cost, downstream sales of similar merchandise will not be used to calculate margins.

3. Assuming that the DOC concludes that downstream sales are at a more advanced level of trade ("LOT") than sales by the manufacturer to its customers,[4] even downstream sales of identical merchandise will not be used to calculate margins if the manufacturer sells identical merchandise to its customers.

4. Even if downstream sales are deemed to be at the same LOT as sales by the manufacturer to its customer, and even if downstream sales fall within an identical or most similar CONNUM which will be used for comparison purposes, reporting downstream sales is unnecessary if the manufacturer has sold subject merchandise to unaffiliated customers in an identical or most similar CONNUM. In these cases, the potential impact of reporting downstream sales on the ability of the DOC to calculate accurate margins is clearly outweighed by the burden of requiring a downstream customer to complete a DOC questionnaire.

[4] As noted in United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan, para. 167 – 168, and as is evident from reviewing DOC precedent, such a conclusion is likely to take place.

It is for these reasons that the DOC should continue its policy of excusing respondents from reporting downstream sales when:

1. The burden of reporting such sales is unreasonable (regardless of whether the sales account for five percent or less of all comparison market sales and regardless of whether sales to the affiliates pass the arm's length test), or

2. Respondents present evidence (subject to verification) that the burden of reporting downstream sales outweighs the potential utility of the data, for the reasons discussed above.

Please contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,

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