

September 9, 2002

**PUBLIC DOCUMENT**

**DELIVERY BY HAND**

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

Attn: Kris Campbell, Room 3713  
Linda Chang, Room 3622  
Mimi Steward, Room 3622  
Import Administration

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

Dear Assistant Secretary Shirzad:

We hereby submit our rebuttal to comments on the proposed modification of the U.S. Department of Commerce's ("the Department") practice concerning the determination of whether home market sales to affiliated parties are made in the ordinary course of trade.<sup>1</sup> The Department's proposal to change its methodology for determining which home market sales to affiliated parties are outside of the ordinary course of trade is in response to the World Trade Organization ("WTO") Appellate Body ruling in Certain

---

<sup>1</sup> Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 53,339 (Aug. 15, 2002)(Request for Public Comment Pursuant to Section 123(g)(1)(C) of the Uruguay Round Agreements Act, Requirements for Agency Action) ("Notice").

Hot-Rolled Steel Products from Japan.<sup>2</sup> The Department's current methodology for identifying home market sales to affiliated parties made outside the ordinary course of trade is described in detail in the agency's August 15, 2002 Notice.<sup>3</sup>

Our original comments filed on August 30, 2002 urged the Department to adopt a two-sided asymmetrical test that systematically (i.e., automatically) tests all sales to affiliated parties and excludes (as being outside the ordinary course of trade) all sales to an affiliated party if, and only if, the weighted-average ratio of the sales prices to that affiliated party over the sales prices to unaffiliated parties for identical products is either below .995 or above 1.20.<sup>4</sup> In the alternative, we urged that if the Department determines not to adopt the type of asymmetrical testing methodology proposed above, then it could, and should, adopt a policy whereby it eliminates from its calculation of normal value all sales to affiliated parties.

Several of the proposals suggested by other parties, rather than offering alternatives that appropriately balance the statutory obligations of the Department as an investigative body and the concerns expressed by the WTO Appellate Body, would unnecessarily increase the complexity of analysis, the time and resources required to identify the relevant facts and characteristics, and ultimately the need for and quantity of litigation.

---

<sup>2</sup> Notice, 67 Fed. Reg. at 53,339 (citing United States Antidumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001)).

<sup>3</sup> Notice, 67 Fed. Reg. at 53,339-40.

<sup>4</sup> Letter from Dewey Ballantine LLP to U.S. Department of Commerce, regarding Affiliated Party Sales in the Ordinary Course of Trade (Aug. 30, 2002).

Our proposals, however, are not only consistent with the WTO Appellate Body ruling, but also provide a balanced approach to this issue that is clear, consistent, simple, and predictable. Accordingly, we urge the Department to adopt our proposal to use a 99.5/120 percent test, or alternatively, to disregard all affiliated party sales.

I. **THE DEPARTMENT SHOULD NOT EMPLOY SO-CALLED "STATISTICAL TESTING" AS ITS AFFILIATED PARTY TRANSACTIONS METHODOLOGY**

Comments encouraging the establishment of a "statistical testing" methodology should be disregarded because such testing would prove burdensome for the Department, the proposals are vague, and even where the proposals are more specific, they are wrong. The Department correctly rejected this suggestion in its Notice<sup>5</sup> because "statistical testing" would promote additional (and likely, continual) contention in determining the appropriate testing methodology. Further, as the Department recognizes, there is no reason to believe that a "statistical test" would necessarily enhance the reliability of the information used for the specific purposes of antidumping analysis. Indeed, such a test would only foster increased litigation in each case.

Some parties urge adoption of "statistical testing" without providing even a minimal suggestion as to what the specifics of such testing would include. For instance, Sidley Austin Brown & Wood LLP ("Sidley") encourages the Department to "adopt a more sophisticated approach . . . , such as statistical testing . . . ." <sup>6</sup> Sidley, however, does

---

<sup>5</sup> Notice, 67 Fed. Reg. at 53,339-40.

<sup>6</sup> Letter from Sidley Austin Brown & Wood LLP to U.S. Department of Commerce, regarding Proposed Modification of the Department's Practice Concerning the Determination of Whether Sales to Affiliated Parties are in the Ordinary Course of Trade at 7 (Aug. 30, 2002) ("Sidley August 30 Letter").

not identify the specifics of the "statistical testing" envisioned. In fact, Sidley's comment is limited to criticisms of the Department without substantiation or explanation.<sup>7</sup> Sidley's sole recommendation is that the Department should aim for a "sophisticated" (in other words, more complex) approach.<sup>8</sup> Increased complexity without a demonstrated increase in accuracy or reliability merely increases the burden on the Department in administering the law.

Willkie Farr & Gallagher ("Willkie"), for example, urges adoption of what it claims to be a "statistical test" based on a standard deviation.<sup>9</sup> Willkie claims that this "accepted" statistical process for determining the information in question is wrong.<sup>10</sup> Willkie further suggests that "{r}espondents would be free to argue that other tests may

---

<sup>7</sup> Id. at 4-5.

<sup>8</sup> Id. at 7.

<sup>9</sup> Letter from Willkie Farr & Gallagher to U.S. Department of Commerce, regarding Comments on the Department's Proposed Modification to the Arm's Length Test for Antidumping Proceedings at 6-7 (unnumbered) & Atts. 1-3 (Aug. 30, 2002).

<sup>10</sup> Id. at n.8. While the "statistical test" proffered by Willkie Farr & Gallagher ("Willkie") may contain a statistical concept (i.e., the standard deviation of unaffiliated party prices), that test is certainly not in accordance with standard statistical testing techniques. Specifically, Willkie confuses, either intentionally or unintentionally, the concept of standard deviation with the concept of standard error. Standard statistical hypothesis tests (which appears to be the type of test Willkie is proposing) employ the concept of standard error, not standard deviation. Insofar as standard error is generally understood to represent the standard deviation of a population mean divided by the square root of the sample size (i.e., the number of observations or total volume within the sample), this distinction is a significant one. See Wonnacott and Wonnacott, Introductory Statistics for Business and Economics at 262-263 (3d. ed. 1984); McClave, Benson & Sincich, Statistics for Business and Economics at ch. 8 (7th ed. 1998); Bhattacharyya and Johnson, Statistical Concepts and Methods at ch. 8 (1977). Accordingly, even if the Department were to accept a statistical test (which would be grossly inappropriate in our opinion), it cannot accept the test proposed by Willkie.

also be reasonable . . . on a case-by-case basis."<sup>11</sup> This suggestion directly contradicts the goal of a consistent, administrable methodology for addressing affiliated party sales, for which a bright-line test is required.

Adoption of a general concept of "statistical testing" would encourage endless debate and litigation about the appropriate means of testing. Adoption of a single common test, while limiting future litigation, would require extensive analysis and comment without any assurance that the complicated test that would likely emerge from such a process would necessarily be more appropriate to the antidumping analysis than a simple 99.5/120 percent test. The Department should reject the concept of "statistical testing." Before considering adoption of a statistical testing methodology, the Department should prefer to disregard the use of sales to affiliated parties altogether.

## **II. THE DEPARTMENT SHOULD NOT TAKE ACCOUNT OF NON-PRICE FACTORS**

The Department should reject the suggestion to include non-price factors in its analysis because it would be impractical to administer. Introducing non-price factors into the analysis of sales to affiliated parties requires the Department to attempt to quantify factors and considerations that are not quantifiable. Evaluating such factors would lead not only to increased complexity, but also subjective and unpredictable decisionmaking. Such an outcome plainly is contrary to concerns expressed by the WTO Appellate Body in its decision.

O'Melveny & Myers LLP, for instance, suggests that "{p}arties . . . should be able to identify other factors that might affect the application of the arm's-length test in a

---

<sup>11</sup> Id. at 7.

particular case."<sup>12</sup> Similarly, the Republic of Korea suggests that the Department "must include all components of the transaction" in its examination.<sup>13</sup> The result of permitting unbounded argument regarding issues such as accounting for product mix,<sup>14</sup> level of trade,<sup>15</sup> terms of sale,<sup>16</sup> or degree of affiliation or control,<sup>17</sup> factors that are exceedingly difficult if not impossible to quantify, would be prolonged and inordinately complicated litigation as well as inconsistent decisionmaking. Accordingly, consideration of non-price factors in the analysis of sales to affiliated parties promises to increase complexity without demonstrated improvement of outcome. Accordingly, the Department should disregard comments suggesting a broad analysis of a nearly unlimited number of allegedly non-price factors.

### **III. A BRIGHT-LINE TEST ASSURES CONSISTENT APPLICATION OF THE LAW**

Part of the impetus in proposing a new test is to encourage consistent and predictable application of the law that is insulated both from political pressures and the quality of argument in any given case. A bright-line test is helpful in limiting gaming, reducing conflicting determinations, and avoiding unnecessary expenditure of litigation time and resources. Contrary to this general interest, the O'Melveny comments rejected a

---

<sup>12</sup> Letter from O'Melveny & Myers LLP to U.S. Department of Commerce, regarding Affiliated Party Sales in the Ordinary Course of Trade, Enc. at 9 (Aug. 30, 2002) ("O'Melveny August 30 Letter").

<sup>13</sup> Letter from Republic of Korea to U.S. Department of Commerce, regarding Comment on Affiliated Party Sales filed with the Department of Commerce at 5 (Aug. 30, 2002).

<sup>14</sup> Id.; O'Melveny August 30 Letter at 9.

<sup>15</sup> O'Melveny August 30 Letter at 9.

<sup>16</sup> Sidley August 30 Letter at 3.

<sup>17</sup> O'Melveny August 30 Letter at 3.

bright-line test and advocate that the Department "establish clear guidelines as to how any presumption may be rebutted."<sup>18</sup> Rather than "eliminating the need to address specious arguments,"<sup>19</sup> this approach would invite and encourage litigation, contention, and argument in an area that heretofore was administered efficiently (and without apparent distortion) by use of a consistent, bright-line test. Accordingly, consistent with the concerns identified by the Appellate Body, the Department should disregard suggestions to open the testing of sales to affiliated parties to all manner of argument.

**IV. QUANTITY CUSHION METHODOLOGY AND FURTHER SALE SPECIFICITY ARE NOT PRACTICAL**

Shearman & Sterling ("Shearman") advocates adoption of a quantity cushion methodology under which sales to affiliated parties are deemed to be within the ordinary course of trade, provided a sufficient quantity of sales to unaffiliated customers exist at prices above and below the average sales price to affiliated parties.<sup>20</sup> The Shearman comments acknowledge that the Department rejected this methodology because it poses concerns of complexity and practicality.<sup>21</sup> Indeed, such a methodology provides no apparent advantages over the 99.5/120 percent proposal, but it does render the analysis significantly more complicated.<sup>22</sup>

---

<sup>18</sup> O'Melveny August 30 Letter at 4.

<sup>19</sup> Id.

<sup>20</sup> Letter from Shearman & Sterling to U.S. Department of Commerce, regarding Comments on Proposal Concerning Test for Determining whether Affiliated Party Sales Were Made in the Ordinary Course of Trade at 8-9 (Aug. 30, 2002).

<sup>21</sup> Id. at 8-9.

<sup>22</sup> Note that Shearman, in an attempt to reveal a fundamental flaw in the Department's proposed methodology, has extended a hypothetical pricing example. See id. at 8. However, Shearman's suggested alternative arm's-length

As the Department has noted, adoption of a "quantity cushion" methodology would increase the burden on the Department and increase the complexity of the analysis of affiliated party sales. Calibrating the optimal cushion size and determining the "normal" price range are only a few of the myriad difficulties inherent in any "cushion" methodology. As noted with respect to other proposals, adoption of a "cushion" methodology would conflict with the Department's overarching interest in a methodology that is consistent and administrable without any demonstration of an improvement in the quality of outcome.

V. **THE DEPARTMENT'S STRONG PREFERENCE FOR SALES PRICES BETWEEN UNAFFILIATED PARTIES NECESSARILY LIMITS THE CIRCUMSTANCES IN WHICH TESTING OF SALES PRICES TO AFFILIATED PARTIES IS APPROPRIATE**

The Department properly prefers prices between unaffiliated parties for its analysis because of the presumption, absent evidence to the contrary, that each party negotiates so as to maximize the benefits to it. Transactions between affiliated parties on the other hand do not carry such a presumption of reliability.<sup>23</sup> Accordingly, the Department should continue its stated preference for home market downstream sales from an affiliate to an unaffiliated party and test affiliated party sales only in limited

---

test, based on its so-called "cushion" approach, yields precisely the same result per the hypothetical example as the proposed methodology. Moreover, Shearman tacitly admits to this point by acknowledging that a "slight modification in the proposed methodology may be required." *Id.* at 9, n.6.

<sup>23</sup> Comments by certain parties suggest that sales to affiliated parties "should" be included in the Department's analysis. *See, e.g., id.* at 4. The statute is clear, however, that the Department is authorized expressly to use sales by affiliated parties to unaffiliated parties. 19 U.S.C. § 1677b(a)(5) (1995) (downstream sales "may be used in determining normal value."). There is no statutory provision expressly authorizing the use of sales to affiliated parties nor is there a compelling policy reason to prefer sales to affiliated parties over sales to unaffiliated parties.



circumstances. Where affiliated parties resell the subject merchandise which, even though possibly altered in some way, remains within the foreign like product, the Department should obtain the sales by the affiliated party to an unaffiliated party.

There may be circumstances, however, in which the downstream sales are not available. In such cases, it is appropriate for the Department to apply the 99.5/120 percent test. One such limited circumstance is when the affiliated party converts the merchandise into non-subject merchandise. In such circumstances, there is no downstream sale of a foreign like product. Another limited circumstance in which it may be appropriate to apply the 99.5/120 percent test is when the downstream sales are literally and verifiably unobtainable. Otherwise, the appropriate basis for normal value is the reliable sales made to unaffiliated parties, and the Department should prefer reporting of the downstream sales for purposes of its analysis.

\* \* \*

In summary, for the reasons stated, the Department should adopt a two-sided asymmetrical test that automatically tests all sales to affiliated parties that excludes sales either below .995 or above 1.20 of the average price to unaffiliated parties. In the alternative, the Department should eliminate affiliated party sales from consideration altogether. The Department also should reject the proposals described above and limit the circumstances in which it will test prices of sales to affiliated parties.

Please call any of the undersigned should you have any questions regarding this submission.

Respectfully submitted,

Bradford L. Ward  
Michael H. Stein  
Gregory I. Hume, Economist

**DEWEY BALLANTINE LLP**  
1775 Pennsylvania Avenue, N.W.  
Washington, DC 20006-4605  
(202) 862-1000