REBUTTAL COMMENTS ON THE DEPARTMENT?S PROPOSED MODIFICATION TO THE ARM?S LENGTH TEST FOR ANTIDUMPING PROCEEDINGS (67 Fed. Reg. 53339)

SUBMITTED ON BEHALF OF NIPPON STEEL CORPORATION, NKK CORPORATION, KAWASAKI STEEL CORPORATION, SUMITOMO METAL INDUSTRIES, LTD., KOBE STEEL, LTD., AND NISSHIN STEEL CO., LTD., AND JAPAN IRON AND STEEL FEDERATION

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I. INTRODUCTION

On behalf of Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, Sumitomo Metal Industries, Ltd., Kobe Steel, Ltd., and Nisshin Steel Co., Ltd., and the Japan Iron and Steel Federation, we hereby rebut certain comments submitted on the proposed revisions to the Department?s arm?s length test.[1] These comments are timely submitted in accordance with the Department?s extension of time for rebuttal comments until September 9, 2002. Below, we address only those comments that have the greatest potential to distort the Department?s proposed rule.

II. PROPOSALS TO NARROW THE PROPOSED FIXED BAND RANGE WOULD VIOLATE THE APPELLATE BODY?S DECISION

A. Several Parties Recommended an Unreasonably Narrow Range of 99.5-100.5 Percent of Prices to Unaffiliated Customers

Three firms recommended narrowing the proposed arm?s length test to exclude affiliated party sales that are less than or equal to 99.5 percent or greater than or equal to 100.5 percent of prices to unaffiliated parties.[2] The Department already rejected this proposal: ?Narrowing the band significantly (such as using a 99.5 percent-100.5 percent test) would reduce the utility of such a test, as few affiliates would pass. Thus the test would serve little purpose.?[3] The Appellate Body also noted with disapproval that the Department?s current 99.5 percent test is ?*very narrow*?[4] and seeks to minimize possible price distortions ?to an extreme degree.?[5] A 99.5/100.5 percent test would be even narrower.

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1 *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. 53339 (Aug. 15, 2002).

2 Comments Submitted by Stewart and Stewart (Aug. 30, 2002); Comments Submitted by Skadden Arps Slate Meagher Flom (Aug. 30, 2002); Comments Submitted by Wiley Rein and Fielding (Aug. 30, 2002).

3 *Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. at 53340.

4 Appellate Body Report at para. 152 (emphasis original).

5 Appellate Body Report at para. 150.

This circumspection is for good reason. By allowing only a very small range within which prices to affiliates may vary from prices to unaffiliated parties, the proposed 99.5-100.5 percent virtually assures that sales to affiliated parties will fail. The Department would then likely default to using the prices of downstream sales by affiliated resellers, which tend to be at higher prices, thereby increasing normal value and the dumping margin. Moreover, it is well documented that respondents often do not exercise the control required to obtain such data. If the Department nonetheless requires respondents to report downstream sales and respondents are unable to comply, then a greater resort to facts available is likely.

At the root of the Appellate Body's decision is the requirement that all parties to an antidumping proceeding be treated fairly, including exporters. Although an administering authority has discretion to determine which sales are outside the ordinary course of trade, "that discretion is not without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation."[6] An overly narrow test that by design requires respondents to report an even greater number of downstream sales unfairly disadvantages respondents and does not meet the Appellate Body's standard for fairness. The Department therefore should disregard these comments as inconsistent with the holding of the Appellate Body.

B. Other Parties Recommended Lop-Sided Ranges That Unfairly Disadvantage Respondents

[6] Appellate Body Report at para. 148 (emphasis original).

Two commenters recommended lop-sided ranges that would include more high-priced sales than low-priced sales. One commenter suggested a range of 99.5 percent to 125 percent of prices to unaffiliated customers.[7] The second recommended a range of 99.5 percent to 120 percent.[8] Both claimed incorrectly that the Appellate Body did not require a symmetrical test. Also, they claimed that a wider range for high-priced sales is reasonable because respondents are less likely to manipulate prices upward. These arguments are equally without merit.

An arm's length test that favors inclusion of more high-priced sales, which would tend to increase normal value and the dumping margin, does not meet the Appellate Body's requirement for an even-handed analysis. At least, the test must be symmetrical, reflecting the notion that equally low-priced and high-priced sales can be outside the ordinary course of trade.[9] According to the Appellate Body:

> If a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be 'in the ordinary course of trade'.[10]

A lop-sided rule that effectively favors inclusion of high-priced sales and exclusion of low-priced sales is not even-handed.[11] Not only must the test treat high and low priced sales equally, it must be fair.[12] As discussed above, a test that unfairly disadvantages respondents without any supportable justification does not satisfy the Appellate Body's holding. The proposed tests are unfair because on the lower end of the range, prices may vary by only a very small percentage from prices to unaffiliated customers. On the upper end of the range, the lop-sided tests will skew normal value (and the dumping margin) upward by allowing more higher-priced sales to pass the test. The responsibility of the administering authority to test prices is the same on both sides of the equation.[13]

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7 Comments Submitted by Collier Shannon Scott (Aug. 30, 2002).

8 Comments Submitted by Dewey Ballantine (Aug. 30, 2002).

9 Appellate Body Report at para. 144.

10 Appellate Body Report at para. 148 (emphasis added).

11 Appellate Body Report at para. 154; *see also Affiliated Party Sales in the Ordinary Course of Trade*, 67 Fed. Reg. at 53340 ('Because this band is symmetrical in its treatment of higher priced sales, it meets the concern of

The two petitioner firms argued that a narrower range for lower-priced sales and wider range for higher-priced sales are reasonable because respondents are more likely to manipulate the margin calculation by selling at lower prices to affiliated customers. However, even the Appellate Body recognized that other factors often guide companies? pricing decisions. Price is merely one of many terms and conditions of a transaction. For example, quantity and assumption of liability or certain responsibilities can significantly impact the price.[14] Petitioner representatives seem to forget that respondents operate in marketplaces that are not driven solely by the U.S. antidumping law. Indeed, the accusation that respondents can easily manipulate prices within a narrow margin of 2 percent of prices to unaffiliated customers (under the Department?s proposal) is unfounded.[15] To be able to do this assumes a facility with the Department?s matching criteria, which most respondents are incapable of mastering.

Finally, we note that the Department?s proposed 98/102 percent rule is even-handed, but too narrow. A range of 90 to 110 percent of prices to unaffiliated customers better reflects commercial practices. We urge the Department to disregard narrower bands that increase the likelihood of sales failing the arm?s length test without any regard for other circumstances of the sales.

III. PETITIONER FIRMS URGED THE DEPARTMENT TO REJECT ALL SALES TO AFFILIATES AND USE DOWNSTREAM SALES

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the Appellate Body that any arm?s-length test be ?even-handed.??).

[12] Appellate Body Report at para. 148.

[13] Appellate Body Report at para. 145.

[14] Appellate Body Report at 142.

[15] Similarly, some firms also want the Department to assume adversely that sales of products that are made only to affiliated customers are always outside the ordinary course of trade, regardless of price. *See* Comments Submitted by Collier Shannon Scott (Aug. 30, 2002); Comments Submitted by Dewey Ballantine (Aug. 30, 2002). As discussed in our initial comments on the Department?s proposal, this assertion is without merit. The Department should not assume ? without any foundation ? that such sales are not arm?s length. Rather, to be fair, the Department should include such sales, absent other evidence that these sales are extraordinary.

Several comments were submitted arguing for greater use of prices for downstream sales by affiliated resellers.[16] These firms take the draconian view that all sales to affiliated customers are manipulated and therefore must be disregarded in favor of using generally higher-priced and sometimes unavailable downstream sales. Such widespread support from petitioners' firms must mean that this approach would increase dumping margins. These recommendations, which are in clear violation of the Appellate Body decision, are without merit.

The Appellate Body criticized the Department's current arm's length test in part because it is an automatic rule that provides respondents no opportunity to argue that sales to affiliates that fail the test were nonetheless within the ordinary course of trade.[17] The proposal essentially to skip the arm's length test and automatically disregard sales to affiliates is even worse. The Department would make no effort to evaluate such sales; not even price variations would be considered.

One commenter argued for automatic exclusion of sales to affiliates because such a rule comports with the Appellate Body's requirement for an 'even-handed' test.[18] Again, as noted above, the Appellate Body held that any such test must be even-handed *in the sense that it is fair to all parties involved*.[19] A draconian methodology that virtually assures higher dumping margins is not fair by any definition. When faced with sales to affiliated customers, the Department's task is to determine whether such sales are in the ordinary course of trade. Inherently, this assumes that some sales to affiliates may meet this definition and therefore should be included in the margin calculation. An arbitrary rule that excludes such sales without any evaluation of the facts on the record therefore does not satisfy even the most basic premise of the Appellate Body decision ' fair and even administration of the process.

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[16] Comments Submitted by Collier Shannon Scott (Aug. 30, 2002); Comments Submitted by Dewey Ballantine (Aug. 30, 2002); Comments Submitted by Stewart and Stewart (Aug. 30, 2002); Comments Submitted by Wiley Rein and Fielding (Aug. 30, 2002).

[17] Appellate Body Report at para. 149.

[18] Comments Submitted by Collier Shannon Scott (Aug. 30, 2002).

[19] Appellate Body Report at para. 148 (emphasis original).

Any rule that increases the use of downstream sales is problematic for another reason ? it places an extreme burden on respondents to obtain and report detailed sales information that is often outside of their control. We note that the affiliation standard, which triggers the arm?s length test, is too low. Cross-ownership of 5 percent does not equate to control in commercial reality. The Department is well aware of and has verified respondents? inability to always obtain downstream sales information. Moreover, even if respondent can obtain such information, the burden is enormous and is amplified when the respondent is deemed affiliated with a large number of customers.

For these reasons, we recommended that the arm?s length test be applied only to sales to affiliates with common ownership of more than 50 percent, which is considered by many countries to be sufficient control of a company to require consolidation in the parent?s financial statements.

IV. THE DEPARTMENT SHOULD ADOPT THE SAME STANDARD FOR INVESTIGATIONS AND ADMINISTRATIVE REVIEWS

The Department received two suggestions to employ a different standard in original investigations and subsequent administrative reviews. Concerning the reporting of downstream sales, one commenter acknowledged that the Department may excuse reporting in an investigation when a respondent can demonstrate that it is unable to report such data.[20] For administrative reviews, respondents and their affiliates would be on notice of their reporting requirements and therefore could not avoid providing downstream sales data.[21] With respect to a narrower fixed band rule, another commenter argued to maintain the proposed 98/102 percent rule, but apply an arm?s length test of 99.5 to 100.5 percent in administrative reviews.[22] However, these commenters failed to justify such unequal treatment.

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[20] Comments Submitted by Collier Shannon Scott (Aug. 30, 2002).

[21] *Id.*

[22] Comments Submitted by Skadden Arps Slate Meagher Flom (Aug. 30, 2002).

Respondents should not be held to a higher standard for reporting downstream sales in administrative reviews. The commenter seems to think that a respondent's control over an affiliated customer somehow changes with the administrative review. If a respondent is unable to obtain data in an investigation, it is equally unlikely to meet that burden in reviews. The commenter suggested that the Department require respondents to include submission of downstream sales data as a condition of sale to the affiliate once an affirmative determination has been issued. The Department cannot reasonably expect respondents to include such an absurd term of sale. Heretofore, the Department has managed to evaluate respondent's ability to obtain downstream sales data when needed – in investigations and reviews – without meddling in respondents' commercial transactions. There is no reason to change now.

Respondents should also not be subject to a stricter arm's length test in administrative reviews. The commenter attempted to justify the suggestion by obscurely linking the proposed 98/102 percent test to the *de minimis* standard in antidumping investigations, which is 2 percent. The commenter is correct that the *de minimis* standard drops to 0.5 percent in administrative reviews, but it does not follow that the arm's length test to change accordingly. First, the Department did not suggest that its proposed test is linked to the *de minimis* standard; therefore, there is no foundation for the proposal. Second, the commenter somehow overlooks the fact that the essence of the *de minimis* standard is that such margins are so small that they should be disregarded. Similarly, a price variation of +/- 0.5 percent is so small that it is meaningless.[23] Rather, wider range (such as +/- 10 percent, which we proposed) gives effect to commercially acceptable price differences.

[23] The commenter apparently misunderstood the Government of Japan's arguments on this subject before the WTO Panel. Japan argued there that it is inconsistent to assume in one context (*i.e.*, the arm's length test) that a variation of 0.5 percent is meaningful, but not in another context (*i.e.*, *de minimis* margins). Japan's claims that the 99.5 percent test was statistically arbitrary did not rely on this argument. It was merely another way of demonstrating that the current test violated U.S. obligations under the Antidumping Agreement.

Again, the issue of changing the standard in administrative reviews raises concerns over fairness. As noted in our initial comments on the proposed rule, some predictability should be assured by explicitly stating that the same test would be applied throughout a case absent a showing that a change is warranted.

V. THE DEPARTMENT SHOULD NOT CHANGE ITS PRACTICE WITH RESPECT TO TREATMENT OF SALES TO AFFILIATES THAT CONSUME THE FOREIGN LIKE PRODUCT

Comments varied on how the Department should address sales to affiliates that consume the foreign like product, manufacturing a downstream product that is not within the scope of the proceeding. One party suggested that the Department use the affiliated-party test *only* when the affiliate further manufacturers or adds value to the foreign like product.[24] Another party argued that the Department should simply disregard all sales to affiliated customers that consume the foreign like product.[25] Currently, the Department applies the arm?s length test to sales to all affiliates (regardless of whether they resell or consume the foreign like product). The Department should continue this practice with the new test.

As discussed above with respect to other issues, the arm?s length test should be applied evenly. There is no reason to apply the arm?s length in one context and not another. Sales to affiliates that consume the foreign like product are no more or less suspect of price manipulation than sales to resellers. The Department?s test should fairly evaluate whether such prices are in the ordinary course of trade, applying a test based on a reasonable fixed band rule or some other justifiable alternative methodology.

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[24] Comments Submitted by Collier Shannon Scott (Aug. 30, 2002) (also recommending that sales to affiliated resellers should be disregarded automatically without an arm?s length test).

[25] Comments Submitted by Skadden Arps Slate Meagher Flom (Aug. 30, 2002).

We appreciate the opportunity to submit rebuttal comments on the Department?s proposed modification to its practice concerning sales to affiliated home market customers. If you have any questions about these comments, please contact one of the undersigned.

Respectfully submitted,

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