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August 30, 2002

Honorable Faryar Shirzad
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Attn: Affiliated Party Sales

Re: Proposed Modification of the Department's Practice Concerning the Determination of Whether Sales to Affiliated Parties are in the Ordinary Course of Trade

Dear Assistant Secretary Shirzad:

We are writing on behalf of Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively, "Koyo"), in response to the Department's notice, published in the Federal Register on August 15, 2002, regarding the above-captioned topic. See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 Fed. Reg. 53339 (Aug. 15, 2002) ("the Notice"). These comments are being filed on August 30, 2002, the date designated in the Notice. Koyo's interest in this issue is manifested in the fact that it is a respondent in administrative reviews in which the Department's arm's length methodology has been applied, and in that it has challenged that methodology in judicial proceedings currently pending before the Court of International Trade.[1]

[1] See Timken Co. v. United States, CIT Consol. No. 01-00127; SNR Roulements v. United States, CIT Consol. No. 01-00686.

The Notice describes the Department's existing methodology for determining whether sales to affiliates in a respondent's comparison market are at arm's length (and hence "in the ordinary course of trade") and the finding of the WTO Appellate Body that this methodology is inconsistent with Article 2.1 of the Anti-Dumping Agreement. It then goes on to propose a new methodology that is intended to resolve the inconsistencies identified by the Appellate Body. In particular, the Department's proposal, as described in the Notice, would replace the existing methodology, whereby the Department considers sales to an affiliate in the comparison market to be at arm's length if they are "at least 99.5 percent of the prices charged by that [respondent] to unaffiliated comparison market customers,"[2] with a methodology that instead would utilize a "range" or "band" of prices around the average sales prices charged to unaffiliated customers. In other words, the sales prices to affiliates "must fall, on average, within a defined range, or band, around sales prices of the same merchandise sold by that [respondent] to all unaffiliated customers." The Notice then proposes that this "range" would consist of plus or minus two percent of the average prices charged to unaffiliated customers – i.e., the prices charged to an affiliated party must fall within the range of 98 percent to 102 percent of the average prices charged to unaffiliated customers in order to be considered "in the ordinary course of trade."[3]

Koyo agrees with the Department that the proposed modification to its "arm's length" methodology would address the narrowest aspect of the concern expressed by the WTO Appellate Body – namely, the lack of "even-handedness" in the current methodology,[4] which has

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2 Notice, 67 Fed. Reg. at 53339.

3 Id. at 53340.

4 Id.; see also United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (adopted 24 July 2001).

the effect of eliminating all low-priced sales to affiliates (i.e., those whose sales prices are less than 99.5 percent of the average prices charged to unaffiliated customers) as outside the ordinary course of trade, but not eliminating high-priced sales, unless they are proven to be "aberrationally high."

Koyo submits, however, that the methodology proposed in the Notice is overly simplistic, and fails to address the primary principle that should underlie an analysis of whether sales to an affiliated party are in the "ordinary course of trade." This principle is reflected in the statutory definition of that term, which is "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind."[5] On the basis of this definition, the key point should be whether or not the sales to an affiliate reflect the normal commercial practices for the respondent or the industry involved in a given antidumping proceeding; if so, then those sales should be found to be in the "ordinary course of trade" and retained in the comparison market database. Recognition of this basic principle would necessitate a more sophisticated method of analyzing sales to affiliates, including, for example, a study of normal commercial practices in the industries involved in individual proceedings, combined with statistical testing to compare an individual respondent's affiliated sales prices to the normal commercial practices. Likewise, other factors involved in the affiliated party transactions – such as their quantities, terms of sale, etc. – in addition to their prices should be considered in determining whether they are in the "ordinary course of trade."

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[5] 19 U.S.C. 1677(15).

The Department's approach, on the other hand, while reflecting the Appellate Body's narrow concern as to "symmetry" or "even-handedness" of the treatment of the price element of affiliated party transactions, does so in an entirely arbitrary way that fails to recognize the important principle of commercial reasonableness that underlies the "ordinary course of trade" definition. Moreover, Koyo is concerned that the Department apparently has already rejected the possibility of engaging in a statistical approach, and in particular that it has done so for inappropriate reasons. The Notice states that the Department has decided not to select a statistical approach because "[s]uch [statistical] tests, *properly applied*, would allow certain affiliated party sales to be deemed to be in the ordinary course of trade, including affiliated party sales *with prices below unaffiliated sales prices*, that we believe would distort dumping calculations."[6] Koyo submits that this is unacceptable result-oriented reasoning, in that the Department is focusing on low-priced sales to affiliates and expressly rejecting statistical tests, because, *when properly applied*, those tests would not exclude affiliated party transactions that the Department believes would result in the calculation of "distort[ed]" margins, by which the Department clearly is inferring, margins that it considers too low. The Department's assertion that statistical approaches somehow will "distort dumping calculations," is inappropriate in light of the fact that such approaches, if properly structured, by definition are intended to operate in a mathematically neutral (or, in the Appellate Body's parlance, "even-handed") manner. Surely the point involved in establishing a new methodology is not to ensure that preferred results will

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[6] Notice, 67 Fed. Reg. at 53340 (emphasis added).

be reached, but rather to generate accurate margins, as the Court of Appeals recognized long ago.[7]

If, despite the foregoing considerations, the Department nonetheless decides to use a simple "band" approach, Koyo agrees with the Department that the crucial consideration is the width of the appropriate band around the average prices charged to unaffiliated parties. However, Koyo submits that, in selecting the width of the band, the Department has erred on the side of making the band too narrow. By limiting the width of the band to only two percentage points around the average prices charged to unaffiliated parties, the Department has failed to avoid the concern it raised regarding a band that is too narrow – namely, "[n]arrowing the band significantly . . . would reduce the utility of such a 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."[8] It also noted that "the narrower the band, the fewer sales to affiliates would be used, potentially resulting in fewer price-to-price comparisons and more use of constructed value in determining normal value."[9]

In particular, a band that is only plus-or-minus two percentage points in width is so narrow that it falls within the range of what the Department, in another context, would consider de minimis – i.e., in the identification of margins in the investigation phase of a proceeding.[10] Although it is true that the two figures are used in different contexts, the fact that two percent is considered de minimis reflects the extreme narrowness of the Department's proposed band. This

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7 See, e.g., Rhone Poulenc v. United States, 899 F.2d 1185 (Fed. Cir. 1990).
8 Notice, 67 Fed. Reg. at 53340.
9 Id.
10 19 U.S.C. 1673b(b)(3).

fact is emphasized by another example – namely, that for some expense adjustments (for example, movement expenses or indirect selling expenses), the difference between the adjustments a respondent may incur in the U.S. and comparison markets could be equal to or greater than two percent. Koyo submits that it would be anomalous for the Department to adopt a band whose width is so narrow that it would be lost in the magnitude of comparative adjustments made to U.S. and comparison market sales.

For these reasons, Koyo submits that the band proposed by the Department should be widened by a small amount – to plus-or-minus five percent, or 95 percent to 105 percent of the average prices charged to unaffiliated customers in the comparison market. This band reduces the anomalies mentioned above, while continuing to address the concerns raised by the Department. That is, the band is not so narrow that it would "reduce the utility of such a test" or lead to an inappropriately heavy reliance on constructed value. On the other hand, although it would be wider than the band proposed by the Department, Koyo's proposed five percent band would still not be so wide that it would permit manipulation of normal value calculations (a problem that Koyo does not necessarily concede). Moreover, the statute provides mechanisms for directly addressing efforts by a respondent to manipulate margins through the prices at which it sells to affiliates – namely, the "fictitious markets" provision, 19 U.S.C. 1677b(a)(2), as well as the ordinary course of trade provision itself. The Department should not develop an overly narrow "band" for affiliated sales as an exaggerated reaction to an issue that can be adequately, and more directly, addressed through other statutory means.

Finally, Koyo submits that this band is not so much broader than the plus-or-minus two percent band proposed by the Department that it requires the imposition of an "additional

requirement," such as the rejected option discussed later in the Notice.[11] Koyo submits that the inclusion of such an additional requirement and the establishment of a two-step test should only be considered necessary if the Department were to consider an even broader band, such as plus-or-minus ten percent.

For the foregoing reasons, Koyo submits that the Department should adopt a more sophisticated approach to address the "ordinary course of trade" issue, such as statistical testing, or, alternatively, if the Department decides to apply the "band" approach, it should amend the width of the proposed "band" to plus-or-minus five percent of the average prices to unaffiliated parties in the comparison market.

Pursuant to the instructions in the Department's notice, we are filing an original and six copies of these comments. In addition, we are filing a copy on a DOS formatted 3.5" diskette, in WordPerfect format.

Koyo very much appreciates the opportunity to address this important issue. If you have any questions regarding the contents of this letter, please feel free to contact the undersigned.

Sincerely,

Neil R. Ellis
Neil C. Pratt

Counsel to Koyo Seiko Co., Ltd. and
Koyo Corporation of U.S.A.

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[11] 67 Fed. Reg. at 53341.