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August 30, 2002

The Honorable Faryar Shirzad
Assistant Secretary for
Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street & Pennsylvania Avenue, N.W.
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**Public Document**
Antidumping Proceedings
*Affiliated Party Sales in the Ordinary Course of Trade* -- Request for public comment pursuant to section 123(g)(1)(C) of the Uruguay Round Agreements Act, Requirements for Agency Action.

*Attention*: Affiliated Party Sales
Kris Campbell, Linda Chang, Mimi Steward

Dear Assistant Secretary Shirzad:

On behalf of Stewart and Stewart, we hereby submit the following comments regarding the proposed modification of the agency's practice concerning the determination of whether sales to affiliated parties are made in the ordinary course of trade and thus may be considered for use in calculating normal value in antidumping proceedings. 67 Fed. Reg. 53339 (August 15, 2002) (requesting comments).

In accordance with the agency's instructions, as clarified by agency staff, the submission consists of an original and six copies, accompanied by a 3.5 inch diskette containing an electronic copy in PDF format.

Respectfully submitted,

Terence P. Stewart
Geert De Prest

Antidumping Proceedings
*Affiliated Party Sales in the Ordinary Course of Trade*
Request for public comment pursuant to section 123(g)(1)(C) of the Uruguay Round Agreements Act, Requirements for Agency Action
67 Fed. Reg. 53339 (August 15, 2002)

Comments of Stewart and Stewart

## I. Implementation of the proposed changes

### A. THE PROPOSAL IS CONTRARY TO THE INSTRUCTION OF SECTION 129(C) OF THE URAA

#### *1. Commerce's decision, in part, affects entries predating the implementation date*

Within the context of the investigation that was the subject of the WTO dispute process, Commerce proposes to apply the new method only to imports that entered on or after the implementation date:

> In accordance with section 129(b) of the URAA (19 U.S.C. 3538(b)), this methodology will be utilized to prepare an amended final determination in the Japan Hot-Rolled investigation. In accordance with section 129(c)(1) of the URAA (19 U.S.C. 3538(c)(1)), this amended final determination will establish new cash deposit rates for all producers for whom the investigation rates are still applicable and will apply with respect to *unliquidated entries of the subject merchandise which are entered, or withdrawn from warehouse, for consumption on or after the date* on which the United States Trade Representative directs the Department to implement the amended final determination.

67 Fed. Reg. at 53341 (italics added).

Outside the context of the Hot Rolled investigation, however, Commerce proposes a different method:

> With respect to other proceedings and other segments of the Japan hot-rolled proceeding, the new methodology will be applied *in all reviews* initiated on the basis of requests received on or *after the first day of the month following the date of publication of the Department's final notice of the new arm's-length methodology*, all investigations and other segments of proceedings initiated on the basis of petitions filed or requests made on or after such publication date, and all segments of proceedings self-initiated on or after such publication date.

67 Fed. Reg. at 53341 (italics added). Thus, by applying the determination to any review initiated after the date of implementation, and because reviews are retrospective (reviewing imports which entered before the initiation of the review), the new methodology would affect imports which entered *before* the implementation date.

*2. Section 129(c)(1) instructs that WTO decisions be implemented on entries on or after the date of implementation only*

Section 129(c)(1) of the Uruguay Round Agreements Act (URAA) instructs that determinations by Commerce to implement WTO reports should be applied to post implementation entries only:

> Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C. § 1677]) that are entered, or withdrawn from warehouse, for consumption *on or after*—
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> ****
>
> (B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

19 U.S.C. § 3538(c)(1) (italic emphasis added).

The legislative history explains that this instruction flows from the general principle that WTO or GATT decision apply prospectively only:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsection (a) or (b), such determinations have *prospective* effect only. That is, they apply to unliquidated *entries of merchandise entered or withdrawn from warehouse, for consumption on or after the date* on which the Trade Representative directs implementation.

Uruguay Round Agreements Act Statement of Administrative Action at 357, H. Doc. 103-316, Vol.. 1, at 1026; U.S. Code Cong. & Adm. News, 103d. Cong., 2d. Sess., 1994, Vol. 6, at 4313 (italics added). Similar explanations and instructions are found in the House Report:

> Effects of determinations.—As provided in Section 129(c), determinations by the ITC or Commerce implemented under subsections (a) or (b) concerning antidumping or countervailing duties shall have prospective effect only, consistent with the principle that GATT panel recommendations apply only prospectively. Such determinations shall apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which USTR directs implementation.

HR 103-826(I) at 39, U.S. Code Cong. & Adm. News, 103d. Cong., 2d. Sess., 1994, Vol. 6, at 3811. And in the Senate Report:

> Section 129(c) makes clear that ITC or Department of Commerce determinations under this section concerning Title VII apply prospectively only. This is consistent with the general principle in the GATT, and in the future WTO, that panel decisions do not have retroactive effect, i.e., they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which USTR directs implementation. If

> implementation of a WTO panel or Appellate Body report results in revocation of an antidumping or countervailing duty order, entries made prior to USTR's direction would still be subject to potential duty liability.

103d. Cong., 2d. Sess., 1994, S. Rep. 103-412 at 27. Application of the new methodology to entries which precede the date of implementation is contrary to this general instruction. *See, infra,* discussion of the application on Section 129.

*3. Commerce should implement the new method consistently and only on imports which entered on or after the implementation date*

In the context of a recent WTO dispute regarding Section 129, the United States took the position that Section 129, in of itself, does not require any particular action with regard to entries that are *not the subject of the particular decision in dispute*. United States - Section 129(c)(1) of the Uruguay Round Agreements Act, WT/DS221/R (July 2002) at 19, ¶ 3.76.[1] Commerce explained that it always has the authority to change its

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[1] The report describes the U.S. position as follows:

> Canada's failure to meet its burden of proof arises from its misinterpretation of the term "determination" as that term is used in section 129(c)(1). When the term is properly understood, it becomes clear that section 129(c)(1) only addresses the application of the particular determination issued under the authority of section 129(c)(1) to entries made after the date of implementation, and only with respect to that particular segment of the proceeding. Section 129(c)(1) does not address what actions the Department of Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding, and thus does not mandate that the Department of Commerce take (or preclude it from taking) any particular action in any separate segment of the proceeding. [footnote omitted]
>
> ***

administrative practice, provided the change is reasonably explained. Such a change, according to Commerce, could include the adoption of new calculation methods conforming to WTO decisions.

Even if one accepts the premise that Section 129, strictly interpreted, does not reach agency action that is not the subject of the dispute[2], the agency's proposed action remains unlawful.

Section 123(g)(1), not in issue in WT/DS221, imposes implementation requirements on Commerce where "a dispute settlement panel or the Appellate Body finds in its report that a regulation *or practice* of a department or agency of the United

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(footnote continued from previous page)

> The Department of Commerce has the authority to alter its statutory interpretations or its methodologies used to implement those interpretations, provided that it gives a reasonable explanation for doing so. [footnote omitted] In an administrative review, the Department of Commerce would have the authority to alter its statutory interpretation or methodology from one announced prior to the implementation of the WTO panel report, and use the same, WTO-consistent interpretation or methodology adopted in the section 129 determination. [footnote omitted] This would not, however, be an application of the section 129 determination to what Canada has termed "prior unliquidated entries."

WT/DS221/R at 19, ¶ 3.76 and 3.79 (italics added).

[2] We note, however, that Section 129(c)(1) is broadly worded. The instruction is said to apply to "[d]eterminations concerning title VII of the Tariff Act of 1930 *** that are implemented under this section ***." 19 U.S.C. § 3538(c)(1). Commerce's decision that it would adopt a new practice regarding the testing of affiliated party sales in its dumping calculations is a determination "concerning title VII of the Tariff Act of 1930". Similarly, as "this section" refers to Section 129, governing administrative action following WTO panel reports, Commerce's decision is also a decision implemented "under this section", at least in part.

States is inconsistent with any of the Uruguay Round Agreements". 19 U.S.C. § 3533(g)(1) *(italics added)*. Subsection (g)(2), concerning the effective date of such implementation provides that any change may not go into effect until 60 days after Commerce has commenced consultations with Committee on Ways and Means of the House of Representatives and the Committed on Finance of the Senate.

Section 123, however, unlike Section 129, does not expressly address what entries such implementation may cover. Hence, the interpretative issue to be resolved by Commerce, is whether implementation under Section 123 permits what is expressly not permitted under Section 129, *i.e.*, application of a new decision to prior entries.

For the many reasons reviewed below, the answer is no.

- The instruction in section 129(c)(1) constitutes Congressional recognition of the *general* principle that GATT or WTO decisions would be accorded prospective effect only, *based on the date of entry*. *Supra* (quoting legislative history). There is no indication in the statute that this recognition or the underlying principles are not equally applicable to implementation decisions which incorporate a change in practice under section 123.

- Keying prospective application to the *date of entry* (rather than the date of initiation of a segment of a proceeding) is consistent with WTO obligations:

> Using the date of entry as the basis for implementation is consistent with the basic manner in which the AD and SCM Agreements operate. Throughout those agreements, the critical factor for determining whether particular entries are subject to the assessment of antidumping or countervailing duties is the date of entry.

WT/DS221/R at 23, ¶ 3.97 (summarizing U.S. position).

> Canada has failed to make even a *prima facie* case that the WTO Agreements require Members to implement adverse WTO reports regarding antidumping or countervailing duty measures with respect to entries that have occurred prior to the conclusion of the reasonable period of time for implementation.

*Id.,* ¶ 3.100

> Nothing in the text of the WTO agreements requires anything other than prospective implementation of adverse WTO reports. Just as importantly, nothing in the agreements requires Members to apply adverse WTO reports not only to entries that take place after implementation, but also to entries that took place prior to implementation. Without a basis to assert that implementation decisions must apply in any way but prospectively -- i.e., to new entries only -- Canada's specific claims of violation under Articles 1, 9.3, 11.1 and 18.1 of the AD Agreement; Articles 10, 19.4, 21.1 and 32.1 of the SCM Agreement; and Articles VI:2, VI:3 and VI:6(a) of the GATT 1994 are inapposite. Section 129(c)(1) is fully consistent with the aforementioned WTO obligations of the United States.

*Id.* at 27-28, ¶ 3.122 (summarizing U.S. position). There is no support for the proposition that the above discussion is inapplicable in the context of implementation which includes a change in agency practice.

- Keying implementation to the date of entry (rather than the initiation of the proceeding) is important because it assures that implementation obligations are the same for all Members, whether or not a Member's assessment system is retroactive or prospective. WT/DS221/R at 25-27, ¶¶ 3.108-121 (summarizing U.S. position). The implementation method proposed by Commerce, which keys to the date the administrative review is initiated, results in *earlier* implementation in the U.S., merely because the U.S. relies on a retrospective system of assessment.

- The proposed implementation produces anomalous results: more expansive implementation in other cases than is permitted by Congress with regard to the particular matter that is the subject of the dispute.

- The proposed implementation is contrary to accepted principles of statutory interpretation.

    - Section 123(g) and Section 129 are in *pari materia* and should be interpreted consistently. *Lee v. Thornburgh*, 877 F.2d 1053, 1057 (D.C. Cir. 1989) (rejecting the proposition that "different measuring sticks" applied to two separate provisions of the National Historic Preservation Act).

    - Administrative agencies derive their power from the statute only, additional powers should not be inferred or assumed. *FAG Italia S.p.A. v. U.S.*, 291 F.3d 806, 816 (Fed. Cir. 2002), citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). It is also "well established that the absence of a statutory prohibition cannot be the source of agency authority." *Id.* The absence of an express direction in Section 123 should not be interpreted by Commerce as giving it authority to do in Section 123 what it cannot under Section 129.

    - An analogy[3] to the principle that *statutes in derogation of sovereignty* "will be kept within the narrowest possible limits to preserve sovereignty"[4] is instructive. *See also*, *Bennett v. Department of Navy*, 699 F.2d 1140, 1144-

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[3] The principle traditionally applies to statutes affording rights to private parties in derogation of the sovereignty of the *state*. Norman J. Singer, Sutherland Statutory Construction, 6th Ed., Vol. 3, §62.1, page 258-59.

[4] *Id.*, at page 261.

1145 (Fed. Cir. 1983). Congress was concerned that no sovereignty would be ceded in the context of the agreements. *See, e.g.*, 103d. Cong., 2d. Sess., 1994, S. Rep. 103-412 at 13 (reviewing Section 102 of the Act, regarding the relationship of the Agreements to U.S. law and state law) and 21 (reviewing Section 122 of the Act, regarding WTO decision making and US sovereignty). In keeping with the interpretative principle and the Congressional concern, Section 123 should not be interpreted to yield a more expansive implementation that permitted in Section 129.

## II. Comments on the proposed changes

### A. PRIOR PRACTICE

Under current practice, Commerce tests sales to *affiliated* customers in the home market to determine whether they were lower priced than sales to other customers. If lower Commerce refrains from using sales to this customer. Specifically, Commerce compares prices product by product, and then calculates an average ratio for each affiliated customer tested:

> Under current Department practice, comparison market sales by an exporter or producer to an affiliated customer are treated as having been made at arm's length, and may be considered to be within the ordinary course of trade [footnote omitted], if prices to that affiliated customer are, on average, at least 99.5 percent of the prices charged by that exporter or producer to unaffiliated comparison market customers. Under this 99.5 percent test, the Department determines the weighted-average selling price for each product for sales by the exporter or producer to each affiliated party. The Department also determines the weighted-average selling price for each product to the group of nonaffiliated comparison market customers. For

> each affiliated customer, the Department compares the weighted-average price to that affiliate for each product to the weighted-average price of the same product to all unaffiliated customers. The Department then weight averages the ratios found for all products sold to the affiliated customer.

67 Fed. Reg. at 53339.

Where sales to a particular affiliated customer fail the test (ratio lower than 99.5%), the sales are disregarded for purposes of the normal value calculation:

> If the result shows sales prices to an individual affiliated party are, on average, at least 99.5 percent of the sales prices to all unaffiliated comparison market customers (*i.e.*, the overall ratio is at least 99.5 percent), all of the sales to that affiliated party may be treated as being made in the ordinary course of trade and may be used in calculating normal value. Otherwise, if the prices to the affiliate are, on average, less than 99.5 percent of prices to nonaffiliates, it is the Department's practice to disregard them.

67 Fed. Reg. at 53339-53340.

Disregarding the failed sales may result in the use of other sales or constructed value, where no useable price data are otherwise available. In the case of affiliated customers who resell the product, it may also result in the use of downstream resale data. Commerce describes that practice (which it proposes to leave unchanged) as follows:

> We will continue our present practices with regard to the use of so-called ``downstream'' sales (sales made by an affiliated buyer to that buyer's subsequent customer). Specifically:
>
> 1. If sales to all affiliates account for less than five percent of all comparison market sales, we normally will disregard downstream sales.
>
> 2. If sales to an affiliate fail the arm's-length test, and (1) does not apply, we normally will request the

> affiliate's downstream sales and use these instead of the sales which failed that test.
>
> 3. If a respondent has cooperated to the best of its ability and is unable to obtain downstream sales, we will not use adverse facts available.

67 Fed. Reg. at 53340.

B. PROPOSED MODIFICATION

Commerce proposes to disregard all sales to particular affiliated customers whenever the average ratio for that customer is either below 98% or above 102%:

> Instead of using sales to an affiliate for normal value purposes when the prices to the affiliate are, on average, at or above a *threshold* of 99.5 percent of prices to unaffiliated parties, the Department would normally use sales to an affiliate when that overall ratio is within a *band* ranging from 98 percent to 102 percent, inclusive, of the prices for sales to unaffiliated parties. Because this band is symmetrical in its treatment of higher and lower priced sales, it meets the concern of the Appellate Body that any arm's-length test be ``even-handed."

67 Fed. Reg. at 53340 (italics in original).

Commerce also lists and explains a number of alternative proposals, which it considered but rejected: (1) rejecting all affiliated party sales for purposes of calculating price-based normal value; (2) statistical testing of home market prices to affiliated and unaffiliated customers; (3) a two-part test, where Commerce would not only examine *per-customer* ratios (as done now) but would also calculate an overall ratio (covering all reported sales); (4) a test where Commerce would also examine quantities sold. *Id.* at 53340-41.

C. COMMERCE SHOULD NARROW THE BAND OF SALES USED

The test should be narrowed. We propose that sales to particular affiliated customers be used only if the average ratio for that customer is between 99.5 and 100.5. Under the proposed system, an incentive is created for a respondent to manipulate affiliated party prices to attempt to reduce margins where based on affiliated party sales by up to two percent. This incentive is largely removed if a narrower test is used. While this modification results in the use of fewer price comparisons, this may be addressed by expanded use of downstream sales. *Infra*.

D. COMMERCE SHOULD EXPAND THE USE OF DOWNSTREAM SALES DATA TO COUNTERACT UNDESIRABLE RESULTS FLOWING FROM THE MODIFIED TEST

Commerce correctly recognizes in its discussion that the statute prefers that normal value be calculated on home market price data (rather than constructed value). 67 Fed. Reg. at 53340. It also correctly recognizes 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." *Id.*

This undesirable result, however, derives in most part from Commerce's decision to reject high priced sales as well as lower priced sales. In the case of sales to affiliated customers, the new test will result in dramatically fewer price comparisons, regardless of any tinkering with the band's latitude. To address the issue more effectively, Commerce should modify its practice regarding downstream sales.

Commerce should eliminate or lower the current 5% threshold for collecting such data. *Supra.* Such a modification would increase the use of price-to-price comparisons,

in recognition of the statutory preference. If Commerce determines to maintain a threshold, we suggest that it be lowered to 0.5%. Such a low threshold would conform with the current *de minimis* margin for administrative reviews. It also recognizes that the calculation of a threshold based on the share of affiliated party sales in total home market sales is but a crude tool, as even very few sales to affiliated customers may be significant where no other sales are available to measure normal value on the basis of direct price observations.

E. OTHER COMMENTS

The relative merits of the proposed method or the various alternative depend in large part on the particular circumstances of the case. Commerce should consider a more flexible approach, under which the method might vary, as warranted by the particular facts in the case.

**Conclusion**

Commerce should avoid implementation on prior entries. In addition, Commerce should modify its proposal to narrow the range of permissible comparison sales and permit more extensive use of downstream sales data.

Respectfully Submitted,

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