



1900 K STREET, N.W.
WASHINGTON, D.C. 20006-1109

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

William Silverman
Partner
Direct dial: 202 • 419 • 2013
Email: wsilverman@hunton.com

August 29, 2002

Faryar Shirzad

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

Attn: Affiliated Party Sales

Re: Affiliated Party Sales in the Ordinary Course of Trade - Public Comments

Dear Mr. Secretary:

On behalf of Ivaco Inc. (“Ivaco”), we hereby file the following comments regarding the U.S. Department of Commerce’s (“Department”) treatment of affiliated party sales in calculating normal value in antidumping proceedings. These comments are timely filed pursuant to the Department’s request for public comment, by August 30, 2002, pursuant to section 123(g)(1)(C) of the Uruguay Round Agreements Act, Requirements for Agency Action, as published in the Federal Register August 15, 2002 (67 Fed. Reg. 53339).

Ivaco agrees in principle with the Department’s proposal to establish a band between 98 and 102 percent (inclusive) within which affiliated party sales may be considered to have been made at arm’s length for the purposes of establishing normal value. Nevertheless, while the Department’s proposal is a good step forward, the Department’s proposal does not go far enough. Under current Department practice, Department excludes comparison market sales if they are (1) less than 99.5% of price sold to unaffiliated customers, or (2) if there are no



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comparison market sales to unaffiliated customer of the same product upon which the Department can base its comparison. Although the Department's proposal represents an improvement on the definition of sales made in the ordinary course of trade, it does not remedy the second problem. Failure to correct the second aspect of the Department's policy (i.e., of excluding comparison market sales if there are no sales to an unaffiliated customer of the same product, known popularly as the control number, or "CONNUM") undermines the effectiveness of the Department's proposed remedy, because the Department would still exclude sales made within the 98- to 102-percent band if there were sales of similar merchandise made to unaffiliated customers in the comparison market.

For example, if you sell Product A to an unaffiliated customer and Product B to an affiliated customer in the comparison market for the exact same price, and the only difference between Product A and Product B is a small difference in width (which is the last part of the control number), then one might logically conclude that Product B -- which is sold to the affiliated customer -- would pass the arm's length test. However, under the Department's current practice, the comparison market sales to the affiliated customer would not pass the arm's length test because no identical Product B sales were made to unaffiliated customers against which the Department could make the comparison.

We believe that the Department can and should adjust for this situation by making a difference in merchandise adjustment for several reasons. Most significantly, we note that the



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Department already makes such an adjustment when it makes comparisons of non-identical merchandise (the Department compares product A sold in the home market to Product B sold in the comparison market, and then adjusts the price of the comparison market merchandise by the difference in variable cost caused by the difference in physical characteristics). If the methodology is reliable enough to calculate a company's dumping margin, the same methodology should be reliable enough to determine whether comparison market sales made to affiliated companies fall within the 98 percent to 102 percent price range. By using the difference in merchandise adjustment, the Department would be testing all sales sold to an affiliate rather than just possibly a few identical sales made to the customer and would encompass all quantities sold to the affiliated customer.

Second, the use of identical products only may or may not be representative of prices to the affiliate, especially since the quantity of identical products could be significantly less than the quantity of all sales -- both identical and similar -- to an affiliated customer. As the Department itself has noted, a narrow band "would reduce the utility of such a test, as few affiliated would pass. Thus the test would serve little purpose. For this reason, the Department is concerned that the band not be overly narrow." See Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 53339, 53340. While setting the band from 98 to 102 may resolve some of the Department's concerns in that regard, the use of all products -- both identical and similar -- sold to affiliated companies also would further increase the

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quantity of sales used in the arm's length test analysis, which is a legitimate goal expressed in the Department's proposal¹.

Third, a Department decision to include comparisons with non-identical merchandise for purposes of conducting the arm's length test would better reflect the language of 19 C.F.R. 301.403(c). Specifically, 302.403(c) states:

“Sales to an affiliated party. If an exporter or producer sold the foreign like product to an affiliated party, the Secretary may calculate normal value based on that sale only 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.” {Emphasis added}.

We note that the regulations explicitly refer to sales of the foreign like product, not the “identical” product. It is hard to conceive that the Department has adopted a policy of considering only identical matches out of necessity: as mentioned above, the Department has available to it a tool (i.e., the difference in merchandise adjustment) which it considers perfectly appropriate for adjusting for minor differences. Therefore, it would appear to make more sense to expand the pool of potential affiliated party comparison sales to include all affiliated party sales of the foreign like product for which the Department possesses a means of making an accurate adjustment to account for differences in merchandise.

¹ See Quality-Cushion Portion of Proposal.

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Finally, we note that the use of the difference in merchandise adjustment for this purpose would more fully address the Panel Report's concerns with respect to consistency with Article 2.1 of the Anti-Dumping Agreement. Article 2.1 states:

"For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

As can be seen from the text, the "comparable price" against which export price is compared is limited solely to the "like product" for sales made "in the ordinary course of trade." The Panel Report then discusses the "ordinary course of trade" provision, stating:

"We note that determining whether a sales price is higher or lower than the 'ordinary course' price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or lower, the price must be assessed in light of the other terms and conditions of the transaction. Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price." See Panel Report, Paragraph 142, page 52.

Given that a company's reported sales of similar merchandise are sales of the "like product," then, the Department must next turn to the Panel's observation that "determining whether a sales price is higher or lower than the 'ordinary course' price is not simply a question of comparing prices." That is, the Department must take into account factors such as volume, differences in terms of sale, and a "number of other factors," such as *differences in*



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merchandise. Only by doing so will the Department meet its mandate to ensure that the proper pool of sales of the like product made in the ordinary course of trade is used to determine dumping margins. In this respect, we note that the Panel in fact stated that, “under Article 2.1, it is for the *investigating authorities*, and not exporters, to ensure that the calculation of normal value is based on sales made “in the ordinary course of trade.” {emphasis in original} See Panel Report, Paragraph 153, page 55. Surely this mandate applies not only to the exclusion of sales made outside the ordinary course of trade, but also to the inclusion of sales in fact made in the ordinary course of trade. To interpret this mandate otherwise would be to countenance an administering authority’s practice of removing *perfectly legitimate* sales made in the ordinary course of trade from the normal value calculation.²

We appreciate the Department’s consideration of these comments on behalf of Ivaco.

Respectfully submitted,

William Silverman
Douglas Heffner
Rick Johnson, International Trade Analyst

² The Department also employs a second test to determine whether it should include affiliated party sales when calculating normal value. Although the sales price for certain sales may be more than 99.5% of unaffiliated party sales, the Department does not include those sales unless the sales to the customer overall are 99.5% of prices to unaffiliated parties. This second prong may be acceptable for resales by affiliated parties, but it makes no sense whatsoever when the affiliate consumes the merchandise by producing and selling a product that is outside the scope of the investigation or order. As such, the Department should eliminate the second prong of the test for sales to affiliates that consume the merchandise.