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A-122-840
Second Administrative Review
POR: 10/01/03 - 9/30/04
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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

DATE: January 17, 2006

SUBJECT: Issues and Decision Memorandum for the Final Results of the Second Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada

Summary

We have analyzed the comments in the case and rebuttal briefs submitted by interested parties in the second administrative review of carbon and certain alloy steel wire rod from Canada. As a result of our analysis, we have made revisions to our margin calculation. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is a complete list of the issues in this review for which we have received comments from the parties:

I. General Issues

Comment 1: Freight to Unaffiliated Processors as Further Manufacturing

II. Company Specific Issues

Issues Specific to Ivaco

Comment 2: Use of Level of Trade Adjustment for IRM's and Sivaco's U.S. Sales

Comment 3: Level of Trade Methodology Used for IRM's and Sivaco's U.S. Sales

Comment 4: Ministerial Error Allegations Specific to Ivaco

Issues Specific to Ispat

Comment 5: Cost Averaging Periods

Comment 6: CEP Profit

Comment 7: Negative Net-Prices for U.S. Sales

Comment 8: Treatment of Certain Sales as CEP Sales

Comment 9: Offsetting for Export Sales that Exceed Normal Value

Comment 10: Ministerial Error Allegations Specific to Ispat

Background

On July 20, 2005, the Department of Commerce (the Department) published the preliminary results of the second administrative review of carbon and certain alloy steel wire rod from Canada. The period of review (POR) is October 1, 2003, through September 30, 2004. We invited parties to comment on the preliminary results. The petitioners[1] and respondents, Ivaco Inc. and Ivaco Rolling Mills (IRM) (collectively, "Ivaco") and Ispat Sidbec, Inc. (Ispat) (now known as Mittal Canada Inc. (Mittal)) submitted case and rebuttal briefs. A public hearing was not requested.

Discussion of the Issues

I. General Issues

Comment 1: Freight to Unaffiliated Processors as Further Manufacturing

For the *Preliminary Results*,[2] the Department adjusted the amount of freight Ivaco and Ispat reported by treating the freight expense from the company to U.S. processors as a cost of further manufacturing. Both Ivaco and Ispat have submitted case briefs requesting that the Department reverse its preliminary decision and treat the total freight amount submitted as a movement expense.

Ivaco argues that, for the *Preliminary Results*, the Department did not explain how treating freight to an unaffiliated processor as a further manufacturing expense is consistent with Section

[1] The petitioners in this proceeding are Gerdau Ameristeel US Inc., ISG Georgetown Inc., Keystone Consolidated Industries, Inc., and North Star Steel Texas, Inc.

[2] *Notice of Preliminary Results of Antidumping Duty Administrative Review: Carbon and Certain Steel Alloy Steel Wire Rod from Canada*, 70 FR 41681 (July 20, 2005) (*Preliminary Results*).

E of the Department Questionnaire. Ivaco contends that section E of the Department's questionnaire response only asks for information on "further manufacturing" performed by an affiliated party in the United States. Because the Section E does not refer to further manufacturing by an unaffiliated party in the United States, Ivaco argues that it is not possible for a respondent to conclude how to treat an unaffiliated party's further manufacturing cost in its cost database.

Moreover, Ivaco claims that the Department's practice is to treat movement expenses only to affiliated parties in the United States as further manufacturing, and freight to a U.S. toll processor should be treated as a movement expense (Citing *Steel Flat Products from Canada*[3] and *Steel Flat Products from the Netherlands*[4]). Therefore, Ivaco contends all of its reported freight should be treated as a movement expense.

Finally, Ivaco states that the Department has consistently treated freight to U.S. warehouses as a movement expense. Ivaco argues that there is no logical difference between freight to a warehouse and an unaffiliated processor. In both instances, the product being transported is not an "input," as in the case of the product being shipped to an affiliated processor, and should not be considered a manufacturing expense.

Ispat argues that the instructions in section E of the questionnaire contemplate a situation where the further manufacturer picks up the product at the port and incurs a cost for its account to bring it to its facilities. According to Ispat, this cannot mean that a shipment which goes directly from the foreign plant to the U.S. plant and freight is paid for by the exporter directly in its own currency should be split in the manner done for the *Preliminary Results*. In support of this argument, Ispat cites to *Steel Flat Products from Canada*. Ispat requests that the Department consider Ispat's total reported freight to warehouse or to further processor as a movement expense, which would exclude it from the CEP profit calculation.

The petitioners counter that the Department properly considered the costs incurred by Ivaco for shipping unprocessed wire rod as further manufacturing because the final product was processed rod. The petitioners note that the Department's questionnaire defines movement expenses as:

> Movement expenses directly attributable to bringing the merchandise from the original place of shipment to the place of delivery to the United States or in the foreign market.

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[3] *See Final Results of the Ninth Administrative Review of Certain Corrosion-Resistant Carbon Steel Flat Products from Canada for Dofasco Inc. and Sorevco Inc.*, 68 FR 2566 (January 16, 2004) (*Steel Flat Products from Canada*) and accompanying Issues and Decision Memorandum at Comment 4.

[4] *See Certain Steel Flat Products from the Netherlands: Notice of Final Determination of Sales at Less Than Fair Value*, 66 FR 50408 (October 3, 2001) (*Steel Flat Products from the Netherlands)* and accompanying Issues and Decision Memorandum at Comment 10.

Based on the Department's definition, the petitioners assert that movement expenses only apply to the expenses of shipping a finished product to an unaffiliated party. The petitioners further cite the *Wire Rod from Canada LTFV Determination*[5] as evidence that the Department properly assigned the freight costs to ship unprocessed green rod to Ivaco's processor as part of manufacturing costs as it involved raw material.

The petitioners contend that Ivaco's argument that no further manufacturing occurred is misplaced. The petitioners argue that regardless of affiliations, further manufacturing occurred in the United States. Moreover, the petitioners state that the Department, in such circumstances, will examine whether the product sold to the customer in the United States is sold as imported by the respondent or is processed in the United States, and whether the freight costs involve shipping the final product to the first unaffiliated customer or an input to a processor's location. The petitioners claim that the Department is following its standard methodology in dealing with freight costs (Citing to the *Final Results of Portland Cement and Clinker from Japan*, 60 FR 43761 (August 23, 1995), *Preliminary Determination of Certain Cold-Rolled Carbon Steel Flat Products from Belgium*, 67 FR 31195 (May 9, 2002), and *the Final Results of Stainless Steel Sheet and Strip in Coils from France*, 70 FR 7240 (February 11, 2005) (*Stainless Steel Sheet from France*) and accompanying Issues and Decision Memorandum at Comment 7). The petitioners agree with Ivaco's interpretation of *Steel Flat Products from Canada* and *Steel Flat Products from the Netherlands*, however, the petitioners argue that as Ivaco's shipped green rod is an input, the Department correctly identified the freight as a manufacturing expense.

Finally, the petitioners assert that Ivaco's argument that merchandise sent to a further processor is analogous to merchandise shipped to a warehouse is misplaced. The petitioners argue that the green rod shipped to the United States does in fact undergo some further manufacturing and, hence, cannot be compared to merchandise that is shipped to a warehouse where it is only held in inventory. Therefore, the petitioners state that there is no logical reason for the Department not to continue with its methodology for the final results.

With regard to Ispat's argument, the petitioners state that the movement expenses at issue were not incurred to transport merchandise to the customer, but to transport merchandise to be further processed in the United States. The petitioners also cite to *Stainless Steel Sheet from France* and argue that it is the Department's practice to treat these movement expenses as further manufacturing expenses.

Department's Position

We agree with the petitioners, and have continued to treat freight from the company to the further processors in the United States as further manufacturing costs. As an initial matter, we note that

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[5] *See Carbon and Certain Alloy Steel Wire Rod from Canada Final Determination*, 67 FR 55782 (August 30, 2002) (*Wire Rod from Canada LTFV Determination*) and accompany Issues and Decision Memorandum at Comment 2.

the Department has not been consistent in its treatment of freight to U.S. further processors. We acknowledge that in *Steel Flat Products from Canada* and *Steel Flat Products from the Netherlands* we indicated that freight to the further manufacturers would not be included in further manufacturing costs.[6] However, looking at the totality of precedent on this topic, we believe that the Department's determination in *Stainless Steel Sheet from France,* which was published in February 2005, best reflects our current practice.[7]

In that case, the Department referenced the instructions given in Section E of the questionnaire as a correct reflection of our policy in determining that freight to the further processor should be included in further manufacturing, specifically indicating that this was to be done regardless of the party paying for the freight.[8]

Although Ivaco is correct that Section E applies when further processing is done by an affiliated party, we referred to Section E in the *Preliminary Results* of this case because we believe the situation is analogous whether the further processing is done by an affiliated party or by an unaffiliated toller. In both instances, the sale under consideration in the dumping analysis is the sale of the further-processed merchandise.

Further, including the freight to a further processor as part of the cost of manufacturing (COM) is consistent with the way we treat such costs in the home market. *See* section 773(b)(3) of the Tariff Act of 1930 (the Act), as amended. We see no reason to be inconsistent between how we calculate in the home market and U.S. market. For example, the cost of transporting green rod from a Canadian plant to a Canadian further processor (whether it is an affiliated processor or an unaffiliated toller) is included in COM, not counted as a movement expense. This is because the green rod is not being sold to a customer, but rather, is the raw material input the further processors use to create the finished product.

With respect to Ivaco's final argument, we disagree that shipping merchandise to a warehouse for sale is equivalent to shipping merchandise for further processing. The former is a step in the sales process while the latter is a step in the production process.

Finally, we disagree with Ispat. The logic underlying the decision to "split" the freight costs (*i.e.*, treat the portion within Canada as a movement expense and the portion from the U.S./Canada border to the processor as a further manufacturing cost) is consistent with Section E of the questionnaire. The calculation, in both instances, recognizes that the product must be moved from Canada to the United States in order to be sold in the United States. Hence, the portion

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[6] *See*, *e.g.*, *Steel Flat Products from Canada* and accompanying Issues and Decision Memorandum at Comment 4 and *Steel Flat Products from the Netherlands* and accompanying Issues and Decision Memorandum at Comment 10.

[7] *See Stainless Steel Sheet from France* and accompanying Issues and Decision Memorandum at Comment 7.

[8] *See Id.*

from the Canadian producer to the Canada/U.S. border is treated as a movement expense, as is the portion from the U.S. toller to the U.S. customer.

II. Company Specific Issues

Issues Specific to Ivaco

Comment 2: Use of Level of Trade Adjustment for IRM's and Sivaco's U.S. Sales

For the *Preliminary Results*, the Department found that two levels of trade (LOT) existed in the home market for Ivaco, corresponding to sales by Ivaco's two operating units, IRM and Sivaco Ontario (Sivaco). On the U.S. side, the Department found three levels of trade corresponding to: (1) export price (EP) sales by IRM; (2) EP sales by Sivaco; and (3) constructed export price (CEP) sales by both IRM and Sivaco. The petitioners disagree that home market sales by IRM and Sivaco are made at different levels of trade. Similarly, petitioners disagree that IRM's and Sivaco's EP sales are made at different levels of trade.

Citing Ivaco's Section A Response[9] and the *Preliminary Results,*[10] the petitioners assert that Ivaco and the Department both see the difference in inventory services as one of the central criteria in finding separate levels of trade for sales by IRM and Sivaco. However, upon examination of the record, the petitioners contend that there is no difference between IRM and Sivaco in terms of inventory services. Specifically, the petitioners point to statements by Ivaco indicating that the inventory held by Sivaco is green rod, and that green rod is an input for Sivaco which is predominantly a seller of processed rod. Consequently, holding green rod in inventory is a manufacturing activity for Sivaco, and not a selling activity, according to the petitioners. In support, the petitioners point to *Wire Rod from Canada LTFV Determination,*[11] where the Department agreed with Ivaco that its affiliated processor's inventory of green rod should not be accounted for in inventory costs but in further manufacturing costs.

The petitioners claim that the Department has consistently rejected respondents' attempts to mix production activities into its level of trade analysis. In support, the petitioners point to *Stainless Steel Bar from France.*[12]

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[9] *See*, Ivaco's Section A Questionnaire Response dated January 11, 2005 (Ivaco's Section A Response) at A-35.

[10] *See Preliminary Results*, 70 FR at 41685.

[11] *See Wire Rod from Canada LTFV Determination,* 67 FR at 55782.

[12] *See Final Results of Stainless Steel Bar from France*, 70 FR 46482 (August 10, 2005) and accompanying Issue and Decision Memorandum at Comment 4 (*Stainless Steel Bar from France*).

The petitioners further argue that other factors used by Ivaco to support its LOT adjustment are insufficient and fail to establish distinct levels of trade for sales by IRM and Sivaco. First, the petitioners contend that, despite Ivaco's claims to the contrary in *Ivaco's Section A Response*[13] and *Ivaco's June 23 Letter*,[14] Ivaco does not provide clear evidence that IRM provided "full truckloads" of processed rod to its customers as opposed to Sivaco's short lead time and small quantity processed rod sales. Second, the petitioners assert that IRM's credit programs were at a more sophisticated level than Ivaco stated. As support, the petitioners, using examples derived from Ivaco's submitted sales databases, cite to IRM's extended credit for home market customers and arranged installment payments as well as its average payment days. Third, the petitioners contend that Ivaco's use of product matching physical characteristics, as support for its argument that IRM and Sivaco sales are at different levels of trade is misplaced. The petitioners note that product matching is done at the outset of the proceeding under separate rules[15] and has no bearing on the Department's LOT analysis. Finally, the petitioners argue that Ivaco has not provided sufficient information on the record in regards to IRM's and Sivaco's early discount programs and freight expenses. The petitioners assert that Ivaco's claims of Sivaco's more advanced financial and freight services do not match Ivaco's narrative description or submitted sales databases.

Based on the lack of evidence to support Ivaco's claim, the petitioners ask the Department to find a single level of trade in the home market and a single level of trade corresponding to EP sales made by IRM and Sivaco in the United States. Moreover, the petitioners state that these levels of trade are the same and no level of trade adjustments should be allowed for Ivaco's EP sales.

Ivaco counters that it is basing its level of trade claim on two distinct marketing stages for the subject merchandise: (1) direct mill sales and (2) resales by its affiliated service center. Contrary to the petitioners' allegation, the claim is not based merely on the fact that IRM and Sivaco are different companies selling different products.

Citing 19 C.F.R. 351.412(c), which states "{t}he Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages, or their equivalent," Ivaco asserts that Sivaco's sales are made at a more remote marketing stage than IRM's, and notes, citing *Stainless Steel Sheet Coils from France* and *Steel Plate Products from France*,[16] that the

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[13] *See Ivaco's Section A Response* at A-36.

[14] *See Ivaco's June 23 Letter* at 15-17.

[15] *See* 19 C.F.R. 351.411.

[16] *See, e.g., Notice of Final Determination of sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from France*, 64 FR 30820, 30824 (June 8, 1999) *(Stainless Steel Sheet Coils from France)* and *Preliminary*

Department has found LOT differences in other cases where sales were made through a downstream affiliate. Ivaco argues that the Department found two levels of trade corresponding to direct mill sales and service center sales for Ivaco in the investigation and the first review, and that the information presented by Ivaco in this review does not differ from that in the latter segments of this proceeding.

Moreover, Ivaco notes that the petitioners fail to acknowledge that Sivaco did not have any sales during the POR that were not first purchased from IRM. Therefore, for each Sivaco sale, both Sivaco's and IRM's selling functions apply, while for each IRM sale, only IRM's selling functions apply. Ivaco contends this factor makes it obvious that IRM and Sivaco operate at different marketing stages. Ivaco further argues that nothing in this proceeding should alter the Department's previous finding that Sivaco operates as a service center. Ivaco concedes that Sivaco processes green rod, but notes that there are several factors that cause Sivaco to be at a more remote marketing stage than IRM; for example, its just-in-time services.

Ivaco also counters the petitioners' argument that it requested the Department to base its LOT analysis on the products sold by each company. Ivaco asserts that it has always requested the Department to consider the marketing stages and channels of distribution of all sales through each company in its LOT analysis. Ivaco further argues that it has always stated, regardless of the product (green or processed rod), that Sivaco provides extensive just-in-time delivery and other services. In contrast, IRM provides few services and its customers must wait months for its merchandise.

Ivaco further argues that the petitioners' allegation that Sivaco's green rod inventory should not be counted as an indirect selling expense, but rather as production costs, is misplaced. Ivaco states that Sivaco has not altered its business practices in this proceeding and has inventoried the green rod as it had when it received a LOT adjustment in the previous administrative review and investigation. Ivaco adds that the petitioners' argument on the green rod inventory ignores a critical point, *i.e.*, that Sivaco sells both green and processed rod. Ivaco concedes that Sivaco inventories green rod, but it does not mean it is not a selling function. It again states that Sivaco holds inventory so that it may provide just-in-time services and notes that, contrary to the petitioners' argument, the inventory function has no bearing on the product, but rather the selling functions offered by Sivaco. It is not the physical cost of holding the wire rod that Ivaco has reported to the Department as a selling expense for Sivaco, but the sales and shipping department expenses associated with providing Sivaco's customers wire rod on a just-in-time basis and providing other special services to its customers. Finally, Ivaco counters petitioners' argument that *Stainless Steel Bar from France* supports their position. Ivaco contends that the selling expenses at issue were light warehousing services and further manufacturing/special services.

Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from France, 64 FR 41197, 41200 (July 29, 1999) (*Steel Plate Products from France*).

Ivaco notes that neither of these expenses is a part of the Department's LOT analysis as both expenses were reported in Ivaco's cost of production.

Ivaco also counters petitioners' argument that the Department should disregard Ivaco's other selling functions as they are associated with its alleged production costs. Ivaco asserts, to the contrary, that it did not report the physical holding of green rod in inventory as a selling expense to the Department. Therefore, even if the Department were to consider the inventorying process as a production cost, it still would not affect the Department's LOT analysis.

Ivaco reiterates that the inventorying of green rod only provides Sivaco with the opportunity to offer just-in-time delivery services, which IRM does not offer. Ivaco also asserts that petitioners' argument that IRM has a more sophisticated payment system is misplaced. Citing *Ivaco's Section B Response*,[17] Ivaco states that it has provided the Department with the necessary evidence to determine that Sivaco, in comparison to IRM, has: payment terms at a more advanced level, longer average payment days, and a higher credit risk. Ivaco notes that some of IRM's customers did pay in installments. This, however, was a result of customers' actions rather than IRM policy.

Finally, Ivaco asserts that petitioners' argument that Ivaco provided product matching characteristics as support for its LOT adjustment is misplaced. Ivaco states that it provided the product matching criteria in *Ivaco's June 23 Letter* to counter arguments made by the petitioners, not to further support its request for a LOT adjustment. Ivaco also counters petitioners' argument that IRM did not sell subject merchandise in full truckloads. Ivaco argues that it is clear from the data highlighted by petitioners[18] that the average sales quantity by IRM is double the average quantity of Sivaco, thereby proving Ivaco's assertion that IRM does ship in larger quantities than Sivaco. Finally, Ivaco counters petitioners' early payment discount argument by stating that it has never raised early payment discounts as a factor in an LOT analysis. Ivaco concedes that IRM did have more early payment discounts than Sivaco, but does not believe that the Department should use this one factor in deciding whether a LOT adjustment is warranted. Citing 19 C.F.R. 351.412 (c), Ivaco notes that "{s}ome overlap in selling activities will not preclude a determination that two sales are at different stages of marketing."

Department's Position

We agree with Ivaco and have continued to find two levels of trade corresponding to direct mill sales and affiliated reseller sales. Pursuant to section 773(a)(7) of the Act and 19 C.F.R. 351.412(b)(2), the respondent is charged with providing evidence to the Department that an

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[17] *See* Ivaco's Section B Questionnaire Response at B-27 - B-28 (February 3, 2005) (*Ivaco's Section B Response*).

[18] *See Petitioners Case Brief* at Attachment 3.

allowance for the difference between its EP or CEP sales and normal value be permitted due to a difference in level of trade based on the performance of different selling functions. In addition, these selling functions must affect price comparability, wholly or partly, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined. For the *Preliminary Results*, Ivaco presented substantial evidence regarding selling functions of Sivaco and IRM, and the significant differences between the two entities. Some of the examples cited in the *Preliminary Results* were Sivaco's just-in-time delivery and freight services as well as its customer services such as (1) bid assistance to customers, (2) assistance with product specification and material processing review, and (3) a wider range of technical assistance, including helping customers solve usage problems and choose the best type of rod for their applications and machinery.[19] The above functions demonstrate that Sivaco operated at a more advanced marketing stage than IRM, which has a quarterly rolling schedule and less sophisticated marketing applications, and had an affect on price compatibility based on consistent price differences. These facts have not changed since the *Preliminary Results.*

Furthermore, we disagree with the petitioners' assertion that Sivaco's costs associated with keeping green rod in inventory are strictly production costs and, therefore, none of the activities associated with the sales of this inventory should be considered in our LOT analysis. The petitioners cite to *Wire Rod from Canada LTFV Determination* where the Department determined that inventory carrying costs on green rod, which was further processed by Ivaco's U.S. affiliate Sivaco Georgia, should not be considered a selling expense is not apposite. In this case, Sivaco buys green rod from IRM and it sells both green and processed rod to unaffiliated customers. Ivaco did not report Sivaco's imputed inventory carrying cost on green rod as a selling expense. What Ivaco did report as selling expenses for the green rod sales in question are the indirect selling expenses related to running its sales and shipping departments, which were properly allocated over all sales including sales of green rod. The fact that Sivaco inventoried green rod for production as well as, to a lesser degree, for sales does not preclude the Department from considering selling activities performed for the green rod which was sold. The basis of Ivaco's claim for the LOT adjustment are Sivaco's selling functions (*e.g.,* just-in-time delivery, freight and customer services), which were documented by Ivaco in its submissions and explained by the Department in the *Preliminary Results*.

Both the petitioners and Ivaco cite *Stainless Steel Bar from France* in support of their arguments. However, we note that the Department did not grant a LOT adjustment in that case because it did not find different selling activities among the inventory and pre-inventory sales or receive further explanation after its preliminary results to reverse its decision. In this case, we have one company, IRM, operating on a quarterly schedule with limited selling functions and a customer service center, Sivaco, that offers advanced freight, delivery and customer services. Therefore, the case relied upon by both petitioners and Ivaco does not address the issues raised in this

[19] *See Preliminary Results* 70 FR at 41685 - 41686.

proceeding, where we have sufficient information on the record to make an informed decision.

Comment 3: Level of Trade Methodology Used for IRM's and Sivaco's U.S. Sales

The petitioners argue that if the Department finds two levels of trade in the home market and for EP sales, then the Department should not base the LOT adjustment on the average price difference between IRM's and Sivaco's sales because they are not representative sales. The petitioners assert that it would be unreasonable for the Department to provide a LOT adjustment based on IRM's and Sivaco's sales because IRM made few sales of processed rod and Sivaco made few sales of green rod, and there was little overlap in the few products because of different physical characteristics. The petitioners state that this latter point is critical because the products that actually match involved sales with dramatic price differences. The petitioners argue that these matched sales used to calculate the LOT adjustment do not make commercial sense and the differences cannot be dependent on IRM's and Sivaco's selling activities.

The petitioners also question the pricing of Sivaco's green wire rod sales in comparison to IRM's own green rod prices and note the enormous profit margin for Sivaco's sales. Based upon the above information, the petitioners argue that the Department should consider the sales outside the ordinary course of trade. Citing *Canned Pineapple Fruit from Thailand,*[20] the petitioners assert that Ivaco's sales satisfy the criteria established by the Department for finding sales to be outside the ordinary course of trade. As evidence, the petitioners note that: Sivaco's profit margin was substantially higher on certain sales of green rod than its weighted average profit earned on other sales during the POR; Sivaco's green rod sales represent an insignificant portion of Ivaco's POR sales; the quantity of Sivaco's green rod sales used in the LOT adjustment fall within one control number; Sivaco's sales quantity is less than most of IRM's sales of the same product; and a significantly higher sales price charged by Sivaco over Ivaco's average sales price for the product within the same control number. The petitioners argue there is sufficient evidence on the record to determine that Ivaco's sales used in the LOT adjustment calculation were outside the ordinary course of trade.

The petitioners also note Ivaco's statement that the quantities and control numbers that the Department used in calculating the LOT adjustment represented more control numbers and a greater volume of sales comparisons than those used in either the investigation or previous administration review.[21] However, based upon the timing, quantity and location of sales by Sivaco and IRM that are included in the LOT calculation, the petitioners argue that Ivaco has taken advantage of the LOT adjustment applied in previous proceedings and is attempting to lead the Department into improperly applying the same LOT adjustment calculation to its benefit.

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[20] *See Final Determination of Canned Pineapple from Thailand*, 60 FR 29553, 29563 (June 5, 1995) (*Canned Pineapple Fruit from Thailand*).

[21] *See Ivaco's June 23 Letter at 22.*

Citing *Hoogovens Staal* and *Citrosuco Paulista*,[22] the petitioners assert that the Department does not need to follow its previous interpretation if new facts warrant a different conclusion and, therefore, has an obligation to look at the unique facts of this proceeding.

Finally, the petitioners argue that the following factors explain the price differences between IRM's and Sivaco's sales: (1) Sivaco misreported the costs incurred to inventory green rod as indirect selling expenses instead of as production costs; (2) the Department's LOT adjustment calculation compared sales which occurred at different periods of the POR, which had a direct influence on the price differences between IRM and Sivaco; (3) the type of product identified by IRM and Sivaco did not reflect the actual product sold and its associated production costs; (4) the manner by which Sivaco charged its freight surcharge; and (5) IRM's use of post-sale price adjustments (*e.g.,* rebate program).

The petitioners concluded that the Department should exclude specific green rod sales[23] or, in the alternative, compare sales by IRM and Sivaco of the same product made during the same month or during the contemporaneous months (an IRM sale three months prior or two months after the Sivaco sale) in calculating the LOT adjustment.

Ivaco counters that the sales used in the Department's LOT adjustment calculation are not outside the ordinary course of trade. Ivaco notes that, based on its submitted sales databases, sales of green and processed rod by IRM and Sivaco occurred throughout the POR and within the normal course of business. It also notes that it made such sales in the previous administrative review and investigation, and the Department used these sales in its LOT adjustment calculation. Citing *Structural Steel Beams from Korea*,[24] Ivaco adds that sales made in a limited number does not preclude them from being found in the ordinary course of trade and notes that as Sivaco's sales meet the definition of sales made in the ordinary course of trade under Section 771(15) of the Act, they should be accepted by the Department. Finally, Ivaco counters petitioners' argument that Sivaco's profit margin on sales used in the LOT adjustment calculation are unusually high. Ivaco again states that Sivaco provides smaller quantities of subject merchandise to customers on a just-in-time delivery basis. As such, Ivaco would expect Sivaco's prices to be higher than IRM's for similar products and argues that the petitioners' references to Sivaco's sales are misplaced. Ivaco claims that the data demonstrates that Sivaco's sales are

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[22] *Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213, 1217 (CIT 1998) (*Hoogovens Staal*), and *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209 704 F. Supp. 1075, 1088 (1998) (*Citrosuco Paulista*).

[23] The specific sales named by petitioners are proprietary. *See* the Petitioners Case Brief (August 29, 2005) (*Petitioner's Case Brief*) at 32.

[24] *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams from South Korea*, 65 FR 6984, 6986 (February 20, 2000) (*Structural Steel Beams from Korea*).

representative and fall within the range of profit margins normally realized by Sivaco. It further notes that the one sale that petitioners highlighted also fell within Sivaco's average profit margin.

Ivaco argues that the Department may not use an alternative calculation of the LOT adjustment and, therefore, may not take the petitioners' suggestion into consideration. In support of this contention, Ivaco cites to 19 C.F.R. 351.412(e) (defining how the Department calculates the LOT adjustment) and the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H. Doc. No. 316, 103d Cong., 2d Session, Vol. 1 (1994) at 830, which states "any adjustments under section 773(a)(7)(A) will be calculated as the percentage by which the weighted-average prices at each of the two levels of trade differ in the market used to establish normal value." Ivaco argues that petitioners' contention that Ivaco manipulated its LOT adjustments through sales of unique rod is unfounded. It states that all of its sales occurred throughout the POR and it had no influence on when, what or how much a customer bought. Therefore, Ivaco maintains that the Department must derive the LOT adjustment using its standard practice.

Finally, Ivaco counters the petitioners' claims that the price differences between IRM and Sivaco are caused by factors other than a difference in LOT and that an alternative LOT calculation should be applied. Citing section 773(a)(7) of the Act which states the price differential must be demonstrated to be "wholly or partly due to a difference in level of trade" and *Pipe and Tube from India*,[25] Ivaco asserts that the Department may not create a new standard which requires that the exact price effect is caused by differences in LOT.

Moreover, Ivaco argues that the petitioners' support for their position is misplaced. First, Ivaco reiterates that even if the inventory carrying costs are attributed to the cost of manufacturing that does not change the fact that Sivaco is able to charge a premium because it provides just-in-time services, short-lead times, and special delivery and freight services. Second, Ivaco asserts that it knows of no prior case where the Department made a LOT adjustment calculation based on specific periods within the POR. Third, Ivaco contends that the Department uses a weighted average calculation to account for changes in marketing trends, patterns and timing differences which occur in all cases, making the timing of sales irrelevant. Fourth, Ivaco argues that its selling a type of product under another name had no impact on the LOT analysis. Fifth, citing *Ivaco's Supplemental A - C Response*,[26] Ivaco argues that it has previously explained Sivaco's freight surcharge program and again reiterates that no matter whether the customer wants the freight included in the invoice for the merchandise or wants to pay a separate freight invoice, the customer pays the same amount. Finally, Ivaco contends that the rebate discussed in the

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[25] *See Certain Welded Carbon Steel Pipes and Tubes from India*, 63 FR 32825, 32828 (June 16, 1998) (*Pipe and Tube from India*).

[26] *See* Ivaco's Sections A - C Supplemental Questionnaire Response(June 3, 2005) (Ivaco's Supplemental A - C Response) at 51 - 52.

petitioners' case brief was not applied to any sale in the LOT adjustment calculation and, therefore, could not distort or have any bearing on this issue.

Department's Position

We disagree with the petitioners' assertion that sales made by Ivaco should be considered outside the ordinary course of trade for purposes of calculating the LOT adjustment. Section 773(a)(7)(ii) of the Act allows the adjustment if the difference in LOT "is demonstrated to affect price comparability based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined."

Section 771(15) of the Act provides the statutory definition of ordinary course of trade and the essential factors to examine in which to determine whether sales are outside the ordinary course of trade. These factors include the time period, terms and conditions under which the subject merchandise is traded. In *Canned Pineapple Fruit from Thailand*, we established a number of criteria to examine in determining whether sales were made outside the ordinary course of trade. Some factors mentioned are: terms, frequency, and volume of sales; sales quantity and price; profitability and market demand. We note that in conducting an ordinary course of trade analysis, all factors must be weighed in determining whether sales are outside the normal business practices of the company. Based upon our examination of these factors in regards to the sales in question, we determined that the sales were made within the ordinary course of trade. For terms of sales, we noted that IRM and Sivaco sold green and processed rod on the same terms. We also found that IRM and Sivaco both sold green and processed rod over the course of the POR. In terms of quantity, price and volume of sales, we noted that both entities sold green and processed rod in similar average price ranges, average tonnage per sale and volume in terms of each company's capabilities. Finally, the customers purchasing green and processed rod from IRM and Sivaco represented their normal customer base with few overlapping customers. Based on IRM's and Sivaco's customer base, there was a clear market demand for green and processed rod and the profitability rate reflected this fact. Therefore, we included the sales in the LOT adjustment.

Based on the petitioners' and Ivaco's submissions as well as the information on the record of this proceeding, we do not see any evidence to reverse our preliminary decision. We note that during the course of this administrative review, Ivaco has fully answered the Department's questions and provided further information based on supplemental questionnaires. We have found no reason to suspect that Ivaco manipulated sales that occurred over the course of the POR, its submitted data were erroneous, or other non-market factors were the basis for price differences in IRM and Sivaco sales. Although the petitioners point out that some factors, other than a difference in LOT, may have some influence on the price differences between IRM and Sivaco, we agree with Ivaco's argument that differences in price must be "wholly or partly due" to differences in the LOT. Section 773(a)(7)(A) explicitly states that the difference in price is shown to be wholly or partly due to a difference and we have reiterated this position in *Carbon Steel Pipes and Tubes*

from India.[27] Because these differences are partly due to differences in LOT, the other factors mutually responsible for the differences are not relevant to our determination to grant the LOT adjustment. We have substantial evidence on the record demonstrating a difference in LOT. This evidence is consistent with the previous administrative review and the investigation. Therefore, for the final results of this review, the Department will continue to calculate a LOT adjustment for Sivaco and IRM's sales. Because we are applying the LOT adjustment, we will not use petitioners' alternative calculation methodology.

Comment 4: Ministerial Error Allegations Specific to Ivaco

Ivaco claims the Department made four ministerial errors. First, Ivaco contends that the Department failed to include indirect selling expenses incurred in Canada and warranty expense in the aggregate U.S. selling expenses used to calculate CEP profit; it also contends that the Department failed to include indirect selling expenses incurred in Canada in the aggregate indirect selling expenses variable. Second, Ivaco reported some home market sales in U.S. dollars. For these sales, Ivaco also reported credit expenses in U.S. dollars. Ivaco argues that the Department erroneously treated these U.S. dollar credit expenses as if they had been reported in Canadian dollars.

Third, Ivaco argues that the Department's method for identifying sales that were further processed in the United States by unaffiliated processors unintentionally included merchandise that went to a warehouse or was only warehoused at an unaffiliated processor, but was not further manufactured. Fourth and finally, Ivaco argues that the Department incorrectly included freight to the border in further manufacturing expenses, rather than the freight from the border to the further processor. Ivaco provided suggested programing language to fix this error.

The petitioners did not comment on the first ministerial error, but contend that the Department correctly denominated the credit expenses in Canadian dollars. To support their claim, the petitioners point to the file layout of the home market database submitted by Ivaco which states that the imputed credit expense field is denominated in Canadian dollars.

The petitioners also allege a ministerial error and argue that when the Department reset the date of sale for sales in which Ivaco reported an earlier shipment date, certain U.S. sales were inappropriately removed from the database. Ivaco did not comment on this issue.

As to Ivaco's further processed sales, the petitioners argue that Ivaco's suggested programming language is misleading and would remove a number of green rod sales that were actually processed. The petitioners do not dispute Ivaco's point that freight on sales which were not further processed should have CEP profit applied, but the petitioners have submitted alternative programming language to accomplish this.

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[27] *See Certain Welded Carbon Steel Pipes and Tubes from India; Final Results of Antidumping Review*, 63 FR 32825, 32828 (June 16, 1998) (*Carbon Steel Pipes and Tubes from India*)..

Department's Position

We have made both parties' requested changes to Ivaco's final dumping margin calculation. Although Ivaco did not correctly identify the currencies in the credit field, the sales are clearly made in U.S. dollars and a U.S. dollar interest rate was reported. Therefore, we have recalculated the credit expenses to ensure that U.S. dollar denominated home market sales have their associated credit expenses correctly denominated in U.S. currency.

As per the petitioners' and Ivaco's requests, we have adjusted the margin programs to address the errors from the *Preliminary Results*. Please see the *Ivaco's Analysis Memo*[28] for the corrections, including the programing language actually used to identify sales which are further processed in the United States.

Issues Specific to Ispat

Comment 5: Cost Averaging Periods

Ispat argues that the Department should have split the cost reporting period between 2003 and 2004 because of the sharp rise in the cost of raw materials that occurred in 2004. While Ispat recognizes that it is the Department's practice to calculate a single weighted-average cost for the POR, Ispat argues that the Department has the discretion to calculate costs over a shorter period if it concludes that the use of a single weighted-average cost would lead to inappropriate results.[29] According to Ispat, many of its 2003 sales are failing the cost test because the Department is applying 2004 costs to these sales. Ispat maintains that the increasing costs of scrap and ore, which make up the majority of its raw materials, were significant and consistent. Moreover, these cost increases, Ispat maintains, were passed on to its customers by means of "Raw Materials surcharges."[30] Ispat states that the proprietary record shows it experienced sharp, unusual and significant increases in basic raw material costs in 2004 and that these costs accounted for a significant portion of Ispat's total production costs. With the exception of early January 2004, these costs remained consistently above their 2003 values. Because of this, Ispat argues that the use of a single cost period is distoritve and is causing a one percent increase in the margin. Therefore, Ispat requests the Department use two separate weighted-average costs "in

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[28] Memorandum from David Neubacher, Analyst, to the File, Regarding the Final Results for Antidumping Duty Review of Carbon and Certain Alloy Steel Wire Rod from Canada, dated January 17, 2006. (Ivaco's Analysis Memo).

[29] *See*, *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 88852 (December 13, 2000)(*Pasta from Italy*) and accompanying Issues and Decision Memorandum at Comment 18; *see also*, *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands*, 65 FR 742 (January 6, 2000) (*Brass Sheet and Strip from the Netherlands*) and accompanying Issues and Decision Memorandum at Comment 2.

[30] *See*, *e.g.*, Ispat's January 11, 2005 Section A response at A-24 and; February 10, 2005 Sections B&C response at B-25 and C-19.

order to capture the appropriate costs for the reported sales," consistent with *Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea*, 58 FR 15467,15473 (March 23, 1993) (*DRAMS from Korea*).

The petitioners argue that, consistent with its long-standing practice, the Department should continue to calculate a single average cost for the POR. The petitioners note that the Department has rarely exercised its authority to deviate from this practice, doing so only in extreme cases when the facts clearly demonstrate that the dumping calculations would be distorted by the use of annual averaging. According to the petitioners, this issue was fully considered in the *Preliminary Results*, and there is no reason for the Department to depart from its normal practice.

Department's Position

We disagree with Ispat that the Department should deviate from its normal practice of calculating a single cost of production (COP) for these final results. We use annual average costs in order to even out swings in production costs experienced by respondents over short periods of time. This way, we smooth out the effect of fluctuating raw material costs.[31] Although Ipsat has pointed to *DRAMS from Korea* as a case where the Department used cost periods shorter than the whole POR, we note that the instant case does not involve a high technology product which experienced drastic cost and price changes over a short period of time due to rapid technological advancements in the production process. Therefore, *DRAMS from Korea* can be distinguished from this review.

In reaching our decision, we analyzed the significance of the change in the COM, whether the change in cost occurred consistently and significantly throughout the POR, and whether the direct material inputs causing the cost fluctuation can be directly tied to the related sales transactions. We found that Ispat's COM both decreased and increased during the two periods identified by Ispat. While we agree with Ispat that the average COM for 2004 is higher than the average COM for 2003, we disagree that the difference is significant. In analyzing this point, we identified the five highest volume home market control numbers and examined the impact of using the POR average cost of manufacturing versus the period-specific average costs of manufacturing suggested by Ispat. Specifically, we computed the difference in the total cost of manufacturing as well as the cost of the input raw materials for the 2003 portion of the POR and the POR-wide values. For both measures, the differences between the 2003 costs and the POR average costs ranged from approximately seven to 12 percent. *See* Memorandum from Salim Bhabhrawala, International Trade Compliance Analyst to the File, entitled "Summary for Five Selected Control Numbers" (January 17, 2006). The Department does not consider differences of this magnitude to be significant.[32] We note however, that we make our decision on the totality of

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[31] *See Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 55 FR 26225, 26228 (June 27, 1990).

[32] *See Pasta from Italy* at Comment 18; *see also Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part*, 70 FR 67665 (November 8, 2005)(*Rebar from Turkey*) and accompanying Issues and Decision Memorandum at Comment 1.

the evidence, and this analysis should not be construed as a bright-line test.

Unlike the facts in *Brass Sheet and Strip from the Netherlands*, where the price of the raw material inputs was a direct pass-through item (*i.e.*, as a service to its customers, the respondent purchased the input metals on the customers' behalf and then billed the customer for the cost of the metals, the terms of which were set forth on the finished brass sales invoice) and it could be directly tied to each related sales transaction, sales transactions in this case cannot be directly tied to costs in a particular portion of the POR. Thus, even if we considered the fluctuation in manufacturing costs to be significant enough to adopt shorter cost averaging periods, comparing costs and sales prices occurring in the same period may not make the result any more accurate. Although Ispat has stated that it charged its customers a "raw material surcharge," it has not tied these surcharges to specific purchases of raw materials, or indeed tied any specific raw material purchase to a final sale. Without a direct link between the input raw material costs and the related sales transactions, as was the case in *Brass Sheet and Strip from the Netherlands*, there is no basis to conclude that the respondent's approach would yield a more accurate result.

Therefore, for the final results we have continued to follow our longstanding practice of calculating POR costs.

Comment 6: CEP Profit

Ispat argues that CEP profit is overstated for several reasons. First, Ispat argues that the Department incorrectly used EP sales in the calculation of CEP profit. Because the EP sales' profit margins are higher than those of the CEP sales, Ispat argues that the EP sales profit is skewing the profit calculation upward. Ispat argues that it is mindful of court decisions such as *NTN Bearing Corporation v. United States*, 186 F.Supp. 1257, 1273 (CIT 2002), in which the Court upheld the Department's inclusion of EP sales in the calculation of CEP profit. However, Ispat argues that the practice is "misguided and should be reconsidered."[33] Ispat also argues that CEP profit is overstated because imputed costs such as imputed credit and inventory carrying costs, were deducted from its calculation. Ispat notes that the Court of Appeals for the Federal Circuit stated in *SNR Roulements v. United States*, 402 F.3d 1358, 1361 (Fed. Cir. 2005), that:

> Commerce may account for credit and inventory carrying costs using imputed expenses in one instance and using actual expenses in the other provided that Commerce affords a respondent who so desired the opportunity to make a showing that the amount of imputed expenses is not accurately reflected or embedded in its actual expenses.

Ispat submits that the record shows the imputed expenses it reported to the Department in this proceeding were not reflected in or embedded in its actual selling expenses, and accordingly, for the final results, the Department should not deduct the imputed expenses in question from the

[33] *See* case brief submitted by Ispat Sidbec Inc. (Ispat) on August 29, 2005, at page 17.

denominator for purposes of calculating CEP profit.

Additionally, Ispat argues that the Department incorrectly omitted home market sales to affiliates in making the CEP profit calculation because the Department determined those sales were not at arm's length. Ispat argues that while it was appropriate to disregard these sales in making price-to-price comparisons, it was not appropriate to disregard them when calculating CEP profit because all home market expenses, including expenses related to sales to affiliates, must be included in the CEP profit calculation.

Finally, Ispat contends that CEP profit is inflated because in the *Preliminary Results*, the Department treated certain U.S. freight movement expenses as further manufacturing costs. *See* Comment 1, above.

Petitioners argue that Ispat's entire argument is contrary to the statute, the regulations, and the Department's longstanding practice that the Department will calculate CEP profit by including all aggregated non-imputed U.S. selling expenses and revenues, including those related to EP sales, within its calculation of CEP profit.[34] The petitioners cite to 19 U.S.C. 1677a(d) and 19 C.F.R. 351.402(d)(1). The petitioners also argue that the Department properly excluded sales to affiliates when those sales failed the arm's length test because such sales are out of the ordinary course of trade. The petitioners contend that Ispat cited to no cases which could support its contention that the Department should include sales to affiliates when calculating CEP profit. Finally, the petitioners argue that the movement expenses which Ispat asserts should not be classified as further manufacturing, were classified correctly by the Department within the preliminary results.

Ivaco did not comment on this issue.

Department's Position

We agree with the petitioners that sales to affiliated parties that fail the arm's length test should not be included in the calculation of CEP profit; nor should imputed expenses. We also agree with the petitioners that transportation expenses incurred for the shipment of goods from the border to a further processor are further manufacturing costs and, as such, must have CEP profit applied to them. *See* Comment 1, above.

Regarding Ispat's claim that its imputed expenses should be included in the CEP profit calculations, we note that in *SNR Roulements* the Court upheld the Department's methodology for calculating CEP profit when applying section 772(d)(3) of the Act. From Ispat's case brief, it is not clear how Ispat comes to the conclusion that its financial expenses were less than its imputed expenses. A difference in the ratios alone is not sufficient to demonstrate that the company's financial expenses were less than its imputed expenses, as the imputed expenses

[34] *See* Petitioners' Rebuttal Brief for Ispat/Mittal (September 9, 2005) at pages 2-3.

typically cover a short period. An analysis of the total imputed credit and inventory carrying expenses deducted from the data base shows that the total imputed expenses are in fact less than the total financial expenses attributed to the sales.[35] This is logical, as not all of the financial expenses are necessarily related to credit or inventory carrying expenses. However, since there is no way to determine from information on the record how much of the total financial expense is related to these elements, we have continued to use our standard methodology, upheld by the Court in *SNR Roulements* and have not included imputed expenses in the CEP profit calculation.

With regard to removing sales that fail the arm's length test from the calculation of CEP profit, the Department has previously stated that it is appropriate to omit such sales because they "do not reflect actual market prices and, thus, do not represent actual profit (or loss)." *See Stainless Steel Sheet and Strip in Coils From the Republic of Korea; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 68 FR 6713 (February 10, 2003) and accompanying Issues and Decision Memorandum at Comment 9; *see also Certain Stainless Steel Wire Rods from France; Final Results of Antidumping Duty Administrative Review*, 63 FR 30185, 30187 (June 3, 1998). *See* Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 69186, 69195 (November 15, 2002).

Therefore, for all of the above-stated reasons, we have not changed the calculation of CEP offset for these final results.

Comment 7: Negative Net-Prices for U.S. Sales

Ispat notes that certain CEP sales have net prices which were negative after the CEP deductions were made. For these sales, Ispat argues that the Department should either apply the "Special Rule" for further manufactured sales where the further manufacturing is significant, or should set such prices to zero, because Ispat does not sell its goods at negative prices. Ispat argues that the Department's failure to apply the "Special Rule" was an unreasonable exercise of its discretion. As is clear, the cost of further manufacture or assembly in the United States far exceeds 65 percent of the sales price. *See* 19 C.F.R. 351.402(c)(2). Further, Ispat contends that the plain language of Section 772(e) of the Act excepts transactions whose margins are calculated based on the "Special Rule" from the CEP profit provision. Ispat argues that, "as a consequence, the profit allocable to such overstated cost of further manufacture should not be deducted here."[36]

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[35] *See* Memorandum from Salim Bhabhrawala, Analyst, to the File, Regarding the Final Results for Antidumping Duty Review of Carbon and Certain Alloy Steel Wire Rod from Canada, dated January 17, 2006. (Ispat's Analysis Memo).

[36] *See* Ispat's September 28, 2005 case brief at 23.

Ispat differentiates the current case from *Pasta from Italy*[37] where the Department specifically stated that it would not set net prices to zero. First, Ispat points out that *Pasta from Italy* involved sales which were not further processed in the United States, so there was no possibility of invoking the "Special Rule." Second, Ispat argues that in *Pasta from Italy* the negative U.S. prices were caused by rebates and discounts, whereas in the instant case they are caused by additional CEP deductions from the starting price and the unreasonable non-application of the "Special Rule."

Finally, Ispat argues that the negative price penalizes the exporter twice: the negative price raises the numerator of the margin calculation significantly beyond a reasonable point; it also decreases the denominator unreasonably by actually deducting amounts from the denominator. Further, Ispat states this could lead to absurd results should the denominator itself become negative. Therefore, Ispat reiterates that the Department should apply the "Special Rule" or set the negative net prices to zero.

The petitioners argue that the Department's precedent in *Pasta from Italy* is applicable in this case. The reason for this policy is clear. According to the petitioners, even if the producer loses money on a sale, it is still a sale. It is precisely this type of sale that is causing injury to the domestic industry. The petitioners argue that the Department should ignore Ispat's attempt to minimize the impact of its injurious dumping.

Further, with regard to the "Special Rule," the petitioners point out that the Department "normally will base this determination on averages of the prices and the value added to the subject merchandise" *See* 19 C.F.R. 351.402(c)(2). Thus, the "Special Rule" is not applied to specific transactions. The petitioners state that the Department requires a party to claim coverage under the "Special Rule" at the outset of a proceeding and to demonstrate that it would be difficult to calculate the value added. In this case, the relevant data are already on the record, so there is no need to apply the "Special Rule."

Department's Position

We disagree with Ispat. Ispat completely misinterprets the "Special Rule." As the petitioners point out, the "Special Rule" is designed to allow respondents not to report further manufacturing expenses in cases that have complicated further manufacturing processes. It is for this reason that parties request application of the "Special Rule" early in the proceeding. In determining whether the use of either of the two proxy methods under the "Special Rule" is appropriate, the Department looks to the underlying purpose of the rule, which is to avoid imposing an unnecessary burden on the Department, while still ensuring reasonably accurate results. *See* SAA at 825-826.

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[37] *See Certain Pasta From Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852, (December 13, 2000)(*Pasta from Italy*) and Accompnaying Issues and Decision Memorandum at Comment 26.

Because the purpose of section 772(e) of the Act is to reduce the administrative burden on the Department, the Department retains the authority to refrain from applying the "Special Rule" in those situations where the value added, while large, is simple to calculate.[38] In this case, the Department is clearly not burdened by using the same information it used in the *Preliminary Results*. Further, use of proxy sales which earned a profit would clearly lead to inaccurate results. Specifically, Ispat is asking the Department to disregard those sales where Ispat is losing money because of its high further manufacturing costs, and to replace them with other sales which were non-dumped, or dumped to a lesser degree. Clearly, this would lead to an unreasonable and distorted result, in that the most dumped sales would not be captured.

Ispat has stated that it does not sell its products for negative amounts. This is true; however, just because the amount on the invoice is not negative, does not guarantee that Ispat is earning money on the sale. When all the expenses related to the sales are deducted as mandated in our regulations, it is clear that the sales in question are made at a loss. These are then, the most dumped sales. There is nothing Ispat can point to in the statute or regulations that would allow us to mitigate the effect on the margin of these highly dumped sales.

With regard to its argument that the exporter is penalized twice because the amounts are deducted from both the numerator and the denominator of the calculation, we disagree. The duty owed for each sale reflects the amount by which each sale was dumped. This amount is calculated for the sales with negative U.S. prices in the exact manner in which it is calculated for all the other sales, in conformity with section 771(35)(A) of the Act. The numerator of the margin calculation represents the sum of the differences between U.S. price and normal value. Section 771(35)(B) of the Act defines the weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." Therefore, the denominator reflects the total U.S. value of all of a respondent's sales. Clearly, a loss generating sale reduces the total value of all the respondent's sales. The statute does not mention excluding or changing any of the export prices and constructed export prices for purposes of this calculation, and we have not done so. Although Ispat posits that the total value of a respondent's sales could be negative and result in an absurd result, we will note only that this is highly unlikely to occur and, in fact, did not occur in this proceeding. Therefore, consistent with *Pasta from Italy*, we have not set to zero those transactions where a negative net price resulted nor have we applied the "Special Rule."

Comment 8: Treatment of Certain Sales as CEP Sales

Ispat argues that certain sales which the Department classified as CEP sales were correctly reported as EP sales.

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[38] *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*, 63 FR 33320, 33338 (June 18, 1998).

The petitioners reject Ispat's arguments as being without merit and argue that the sales in question were correctly reclassified by the Department.

Department's Position

We disagree with Ispat. Ispat's Section A Questionnaire Response states "Price and quantity can change until the date of shipment. Once an order has been produced, an invoice is issued when the product is shipped."[39] Consequently, Ispat used invoice date as its date of sale.

The statutory definition for EP sales, expressly states it is "the price at which the subject merchandise is first sold (or agreed to be sold) *before* the date of importation," (emphasis added). *See* Section 772(a) of the Act. For the sales in question, the invoice was issued and the product was shipped after the date of importation. Because the merchandise is in the United States at the time the sale occurs, these sales are, in fact, CEP sales. Therefore, consistent with the statute, we have continued to treat the EP sales which were re-coded as CEP sales for the preliminary results as CEP sales for the final results.

Comment 9: Non-Offsetting for Export Sales that Exceed Normal Value

Ispat argues that the Department's refusal to offset non-dumped sales is contrary to WTO findings and should not be employed for the final results. Ispat notes that it is mindful that the Department has refused to use negative calculated margins and instead sets the margin of those sales to zero, and that the practice has been upheld in the U.S. courts, but states that Canada has recently discontinued the practice of "zeroing," and that the time has come for the United States to discontinue its practice of "zeroing" as well.

The petitioners argue that the Department is correct to zero negative calculated margins. According to the petitioners, Ispat ignores all binding precedent from the Court of International Trade and Court of Appeals for the Federal Circuit which upholds the Department's zeroing methodology as permissible under the law. Further, the petitioners note that by their express terms, all past WTO decisions on the Department's zeroing policy apply only to the specific and unique facts of the individual cases. Finally, the petitioners state that it is not the Department's responsibility to interpret and apply the WTO agreements or decisions of its dispute settlement bodies, and that 19 U.S.C. § 3533 expressly prohibits the Department from doing so.

Department's Position

We have not changed our calculation of the weighted-average dumping margin for the final results. As we have discussed in prior cases, our methodology is consistent with the Act. *See*, *e.g.*, *Notice of Final Results of Antidumping Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada*, 69 FR 75921 (December 20, 2004) and accompanying Issues and Decision

[39] *See* Ispat's Section A questionnaire response (January 11,2005) at A-13.

Memorandum at Comment 4 (*Softwood Lumber*); and *Final Results of Administrative Antidumping Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand,* 69 FR 61649 (October 20, 2004) and accompanying Issues and Decision Memorandum at Comment 7.

The Federal Circuit has affirmed the Department's methodology as a reasonable interpretation of the statute. *See Timken v. United States*, 354 F.3d 1334, 1342-43 (Fed. Cir. 2004) (covering an antidumping administrative review of tapered roller bearings from Japan). More recently, the Federal Circuit again affirmed the Department's methodology as consistent with the statute with respect to an antidumping investigation in *Corus Staal v. United States Department of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005) (Corus Staal II). The Court in Corus Staal II held that the Department's interpretation of section 771(35) of the Act to permit this methodology was permissible whether it be in the context of an administrative review or investigation. *See id.* at 1346.

With regard to Ispat's argument concerning the WTO Appellate Body report in *Softwood Lumber*, at the instruction of United States Trade Representative, the Department implemented the WTO report on May 2, 2005, pursuant to section 129 of the URAA. *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 FR 22636 (May 2, 2005). Under section 129, the implementation of the WTO report affects only the specific administrative determination that was the subject of the dispute before the WTO: the antidumping duty investigation of softwood lumber from Canada. *See* 19 U.S.C. 3538. The implementation of *Softwood Lumber* has no bearing on this or any other antidumping duty proceeding. *See Corus Staal v. United States*, 387 F. Supp. 2d 1291 (CIT 2005). Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed normal value.

Comment 10: Ministerial Error Allegations Specific to Ispat

Ispat argues that the Department made three ministerial errors in the preliminary margin calculation: (1) the Department used an incorrect database for CEP selling expenses; (2) the Department erroneously set the CEP offset to zero and; (3) the Department failed to carry out its stated intent to exclude interest income from the calculation of the financial expense ratio; rather, it treated interest income as an expense, by adding it to Ispat's reported financial expenses.

Department's Position

With regard to the first two allegations, we agree that these are clerical errors and have corrected them for the final results. With regard to the interest expense allegation, we disagree. In the preliminary results analysis memorandum, we stated that in the recalculation of the financial expense ratio we "excluded interest income."[40] Ispat had calculated its financial expense ratio by

[40] *See* Memorandum from Daniel O'Brien and Ashleigh Batton, International Trade Compliance Analysts, to Constance Handley, Program Manager, Re: Analysis Memorandum for Ispat Sidbec Inc. (July 5, 2005) at page 9.

deducting its interest income from its total financial expenses. Our intent was to exclude interest income from Ispat's calculation of its financial expense. Had we started with the total interest expense as reported in the financial statement, we would have achieved the desired result by simply not making a deduction for interest income. However, because we began with the financial expense figure reported by Ispat, which was already net of interest income, it was necessary to add the interest income back to arrive at a financial expense ratio which did not have a deduction for interest income.

The Department reduces the amount of interest expense incurred by any interest earned by the company on short-term investments of its working capital. In previous cases, the Department has clearly stated that the "burden of proof to substantiate the legitimacy of a claimed adjustment falls on the respondent party making that claim." *See, e.g., Notice of Final Results of the Antidumping Duty Administrative Review of Silicon Metal from Brazil*, 64 FR 6305, 6323 (February 9, 1999). *See Fujitsu General v. United States*, 88 F. 3d 1034, 1040 (Fed. Cir. 1996) (citing *Timken Co. v. United States*, 673 F.Supp. 495, 513 (CIT 1987)). Because Ispat's 2004 consolidated financial statements, which were used to calculate the financial expenses ratio, do not have separate line items for short-term and long-term interest, we do not know the exact nature of the line items for interest income; therefore, we have no way of establishing the amount of short-term interest income with any degree of certainty.[41] Further, Ispat's response to the Department's supplemental question on the source of the interest income was inadequate to allow us to determine whether the interest income was short-term. Consequently, we have not allowed any offset for interest income in this case.

[41] *See Certain Preserved Mushrooms from the People's Republic of China: Notice of Final Results of the Eighth New Shipper Review*, 70 FR 60789 (October 19, 2005) ans accompanying Issues and Decision Memorandum at Comment 3.

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final results in the *Federal Register*.

Agree_____ Disagree_____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date