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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Jeffrey A. May
Deputy Assistant Secretary
for Import Administration, Group I

SUBJECT: Issues and Decision Memorandum for the Final Results in the First
Antidumping Duty Administrative Review of Certain Hot-Rolled
Carbon Steel Flat Products from India

Summary

We have analyzed the comments and rebuttal comments of interested parties in the first administrative review of certain hot-rolled carbon steel flat products (HRS) from India for the period May 3, 2001, through November 30, 2002. As a result of our analysis, we have made changes, including corrections of certain inadvertent clerical errors, to the preliminary margin calculation. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum.

Background

On December 23, 2003, the Department of Commerce (the Department) published the preliminary results of the antidumping duty administrative review of certain hot-rolled carbon steel flat products from India. See Certain Hot-Rolled Carbon Steel Flat Products from India; Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 68 FR 74209 (December 23, 2003) (Preliminary Results). The period of review (POR) is May 3, 2001, through November 30, 2002. On January 22 and 23, 2004, the respondent, Essar Steel Ltd. (Essar), and the petitioners,¹ submitted case briefs; and on January 29, 2004, all parties submitted rebuttal briefs. The Department received a request for a public hearing from Nucor which was later withdrawn; therefore, no public hearing was held. On April 27, 2004, the Department extended the deadline for the final results of review until June 20, 2004. See Certain Hot-Rolled Carbon Steel Flat Products From India: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review, 69 FR 22761 (April 27, 2004).

¹The petitioners in this review are Nucor Corporation (Nucor), and United States Steel Corporation (U.S. Steel), (collectively the petitioners).

List of Issues

Below is the complete list of issues for which we received comments and rebuttal comments from parties:

- Comment 1: Whether the Department Should Base Essar's Dumping Margin on Total Adverse Facts Available
- Comment 2: Whether the Adverse Inferences Made With Respect to Essar in the Preliminary Results of Review are Sufficiently Adverse
- Comment 3: Whether Essar Under-Reported its Interest Expense
- Comment 4: Whether the Department Should Increase Essar's U.S. Price by the Amount of Duty Drawback Claimed
- Comment 5: Whether Essar Under-Reported its Electricity Expense
- Comment 6: Ministerial Errors

Discussion of the Issues

Comment 1: Whether the Department Should Base Essar's Dumping Margin on Total Adverse Facts Available

Nucor argues that the Department should base Essar's dumping margin on total adverse facts available (AFA), rather than partial AFA, because of Essar's repeated and blatant failures to provide certain requested information regarding affiliation; information that the Department found to be readily available to Essar.² Nucor notes that in the antidumping duty investigation of certain hot-rolled carbon steel flat products from Ukraine, the Department found that a respondent's "{f}ailure to provide 'critical information which was readily at the company's disposal' justified application of total {AFA}."³

Furthermore, Nucor claims that Essar's reporting failures make it impossible for the Department to calculate an accurate dumping margin for the company and undermine the integrity of Essar's entire response in this review. Specifically, Nucor notes that the reporting failures have left the Department without accurate cost data and, as a result, the Department cannot determine whether Essar's home market sales pass the cost test, nor can it calculate constructed value, if necessary.⁴

² U.S. Steel did not challenge the Department's preliminary decision to resort to the use of partial, rather than total, AFA in calculating Essar's dumping margin.

³ See Certain Hot-Rolled Carbon Steel Flat Products From Ukraine; Notice of Final Determination of Sales at Less Than Fair Value, 66 FR 50401, 50405 (October 3, 2001).

⁴ See Certain Cut-to-Length Carbon Steel Plate from Mexico; Preliminary Results of Antidumping Duty Administrative Review, 63 FR 48181, 48182-83 (September 9, 1998) (discussing the Departmental practice of applying total AFA if flawed and unverifiable cost data render the rest of a respondent's submitted data unusable).

Nucor notes that the Department previously found that the failure of a respondent to provide usable cost information warranted the application of total AFA. See Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation; Notice of Final Determination of Sales at Less Than Fair Value, 64 FR 38626, 38633 (July 19, 1999). Additionally, Nucor contends that Essar's blatant non-cooperation significantly reduced the resources the Department was able to devote to other issues in this review. In short, Nucor claims that Essar's actions undermined the integrity of its entire response.

Essar asserts that the use of total AFA is not warranted because the Department verified virtually all of its sales and cost information, information that was supplied in a timely fashion and in the form requested.⁵ Essar points out that section 782(e) of the Tariff Act of 1930, as amended (the Act), requires the Department to use the verified information that Essar submitted (section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party that acted to the best of its ability in providing timely, verifiable information that can be used without undue difficulties and that is not so incomplete as to be unreliable). Furthermore, Essar notes that the Court of International Trade (CIT) stated that "Commerce shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the available requirements, if it meets the five statutory criteria."⁶ Additionally, Essar cites the Panel Report on Steel Plate from India, issued by the World Trade Organization's (WTO) Appellate Body, which states that the use of total AFA is not appropriate when only *portions* of the information are found to be unverifiable.⁷

While Essar does not contest the application of partial AFA, it contends that its reporting failures involve inadvertent mistakes regarding affiliation, mistakes that it sincerely attempted to correct (*e.g.*, Essar notes that, during the course of the review, it conceded that it was affiliated with certain of the companies in question, and, at verification, once it realized that mistakes were made, it provided the Department with the appropriate information as quickly as possible). Thus, Essar requests that the Department affirm its preliminary decision to base Essar's dumping margin on partial AFA.

Department's Position:

In the preliminary results of review, the Department found that Essar 1) withheld requested information regarding companies with which it was potentially affiliated; 2) reported information regarding its relationships with the potential affiliates that does not agree with the Department's verification findings;

5 See Verification of the Responses of Essar Steel Limited in the 2001-2002 Administrative Review of the Antidumping Duty Order on Certain Hot-Rolled Carbon Steel Flat Products from India (Verification Report) (December 15, 2003).

6 See Shandong Huarong General Group Corp. v. United States, No. 01-00858, Slip Op. 03-135 (Ct. Int'l Trade October 22, 2003)(Shandong Huarong).

7 See United States—Anti-Dumping and Countervailing Measures on Steel Plate from India, Report of the Panel WT/DS206/R (June 28, 2002).

and 3) significantly impeded the proceeding with respect to the issue of affiliation. Moreover, the Department determined that Essar did not cooperate by acting to the best of its ability to comply with requests for information regarding its relationships with the companies at issue.

Therefore, as partial AFA, the Department preliminarily determined that Essar is affiliated with all of the companies at issue and incurred costs as a result of its transactions with these companies that are less than the costs it would have incurred had the transactions been conducted with unaffiliated parties. Transactions with these companies affect Essar's general and administrative (G&A) expenses, financial expenses, and variable manufacturing overhead expenses. Thus, in the preliminary results of review, we recalculated Essar's G&A ratio using information contained in Ispat Industries Ltd.'s (Ispat) 2000-2001 financial statements (see Comment 2). We also adjusted Essar's financial expenses and variable manufacturing overhead expenses based on available information regarding the amount by which the costs that Essar incurred as a result of its transactions with affiliated parties are less than market prices. None of the interested parties in this administrative review object to the Department's preliminary determination to resort to the use of AFA with respect to Essar.

With regard to the argument that we should use total AFA, we disagree with Nucor. In the preliminary results of review, the Department determined that Essar withheld information regarding its relationships with companies in the Essar Group and companies identified in footnote 41 of its financial statement (information that had been requested by the Department) and reported information regarding such relationships that does not agree with the Department's verification findings. In addition, the Department determined that Essar significantly impeded the proceeding with respect to the issue of affiliation. See the memorandum dated December 15, 2003, from Thomas F. Futtner to Holly A. Kuga regarding the application of partial AFA. However, the Department did not make these findings with respect to any of the other information provided by Essar. As noted above, Essar's reporting failure only affected certain costs, costs that the Department increased as partial AFA. Moreover, as Essar indicated, in Shandong Huarong the CIT made it clear that the Department is obligated to use submitted information provided that the information meets the five requirements of section 782(e) of the Act. In this instance, other than certain information regarding affiliation, the information submitted to the Department by Essar meets the requirements of section 782(e) of the Act. Specifically, the Department received complete, timely submissions regarding Essar's sales and cost practices during the POR and verified the information contained therein. Accordingly, in supplying the rest of this information, Essar cooperated to the best of its ability. Thus, the facts on the record do not warrant rejecting the remainder of Essar's timely, complete and verified information in favor of total AFA.

Comment 2: Whether the Adverse Inferences Made With Respect to Essar in the Preliminary Results of Review are Sufficiently Adverse

All of the interested parties in this review agree with the Department's preliminary decision to resort to the use of AFA with respect to Essar. However, they disagree as to the source of the secondary information to be used as partial AFA, and the methodology to be used in applying the secondary

information.⁸ U.S. Steel argues that the Department should not rely upon the secondary information that was used as partial AFA in the preliminary results of review because that information resulted in a dumping margin of zero percent, and thus will not ensure future cooperation on Essar's part. U.S. Steel notes that when a respondent patently fails to cooperate, as is the case here, facts available are to be used not merely to fill gaps in the record, but to "ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See Statement of Administrative Action (SAA) H. Doc. No. 103-316, Vol. 1, at 870. U.S. Steel notes that this principle from the SAA has been endorsed by the CIT and followed by the Department in numerous cases.⁹ Moreover, U.S. Steel points out that in other cases where the Department applied partial AFA, it noted that "our aim in selecting facts available for non-cooperative respondents is to choose a margin which is sufficiently adverse to induce respondents to provide (the Department) with complete and accurate information in a timely fashion." See **Certain Welded Stainless Steel Pipe from Taiwan: Final Results of Administrative Review**, 62 FR 37543,37554 (July 14, 1997).

In addition, U.S. Steel submits that the Department has significant discretion in selecting from among adverse information available. Specifically, U.S. Steel notes that the Department is not required to select the most accurate estimate for the missing or unusable information¹⁰ but has the leeway to impose "the most adverse rates upon those refusing to cooperate or otherwise significantly impeding the proceedings" and apply less adverse information to those respondents who substantially cooperated with a request but who failed to supply the requested information in a timely manner or in the form requested.¹¹

U.S. Steel contends that, in the instant review, the Department should base Essar's dumping margin on the most adverse information available because 1) Essar significantly impeded the review by withholding information concerning affiliation; information that can play a crucial role in the outcome of the case, 2)

8 Nucor urges the Department to consider alternative sources of partial AFA only if the Department does not base Essar's dumping margin on total AFA.

9 See Ta Chen Stainless Steel Pipe v. United States, 24 CIT 841 (2000), in which the Court upheld the Department's selection of AFA noting that "{i}f Commerce had used one of the lower margins, as suggested by Ta Chen, Ta Chen might have achieved a better result by failing to cooperate than by cooperating." See, also, Certain Circular Welded Carbon Steel Pipes and Tubes from Taiwan: Final Results of Antidumping Duty Administrative Review, 64 FR 69488, 69490 (December 13, 1999) in which the Department noted that the partial AFA used was sufficiently adverse because "{u}se of costs other than those we have used ... could reward KHC for failure to fully cooperate in this review because use of such data could potentially result in a lower margin than would have resulted from use of KHC's actual costs."

10 See SAA at 874 (the Department need not prove that the selected facts available are the best alternative information).

11 See Allegheny Ludlum Corp. v. United States, 215 F. Supp. 2d 1322, 1343 (Ct. Int'l Trade 2000).

the lengths to which Essar went to avoid providing the information regarding affiliation indicate that if the dumping margin had been based on accurate information regarding affiliates, it would have been significantly greater than the dumping margin calculated from the incomplete information, and 3) the secondary information used as partial AFA by the Department in the preliminary results of review resulted in the most favorable outcome possible for any respondent, no dumping margin. Thus, U.S. Steel argues that the secondary information used in the preliminary results of review does not ensure that Essar did not receive a more favorable result by failing to cooperate than if it had cooperated fully. U.S. Steel notes that, as partial AFA, the Department based Essar's G&A ratio on expenses in Ispat's 2000-2001 financial statements. The Department obtained these statements from the record of the investigation of certain cold-rolled carbon steel flat products from India (cold-rolled investigation), a record that also contains the 2000-2001 financial statements of Tata Iron and Steel Company, Ltd. (Tata). According to U.S. Steel, Tata, like Essar and Ispat, is an Indian producer of hot-rolled steel products, and its financial statements from the cold-rolled investigation, like those of Ispat, cover the period April 1, 2000, through March 31, 2001. However, U.S. Steel adds that Tata, unlike Ispat, appeared as a respondent in the instant administrative review (before withdrawing its request for review). Based on the foregoing, U.S. Steel concludes that Tata's financial statements constitute facts available that are at least as, if not more, reliable and relevant than Ispat's 2000-2001 financial statements. Therefore, U.S. Steel urges the Department to examine both Ispat's and Tata's financial statements and, as AFA, base Essar's G&A ratio on whichever financial statement yields the result most adverse to Essar.

Nucor urges the Department to calculate Essar's G&A ratio using Ispat's 2001-2002 financial statements because these statements are now available and they are contemporaneous with the POR.¹²

Essar asserts that use of the most adverse facts available is not required by the statute nor is it warranted in this administrative review. While the CIT pointed out that AFA must serve as a deterrent to withholding data in future proceedings, Essar notes that the Court stated that Congress tempered the deterrent value of AFA with the corroboration requirement "to block any temptation by Commerce to overreach reality in seeking to maximize deterrence." See Krupp Thyssen Nirosta GMBH and Krupp Hoesch Steel Products, Inc. v. United States, USCIT Slip. Op. 00-89 (July 9, 2001), Court No. 99-08-00550 (Krupp). Essar contends that the facts available selected by the Department in the preliminary results of review are enough to induce compliance in future segments of the proceeding because the Department more than doubled the costs that Essar incurred through transactions with its undisclosed affiliated parties. According to Essar, focusing on the end results (*i.e.*, the dumping margin) ignores how adverse the Department's actions are.¹³

12 However, in its rebuttal brief, Nucor states that it has considered U.S. Steel's case brief and supports U.S. Steel's position that the Department should calculate Essar's dumping margin using the G&A rate that is most adverse to Essar's interests.

13 Although Essar does not challenge the Department's preliminary determination to use AFA, it requests that the Department consider whether it erred by basing all of Essar's G&A expenses on AFA rather than just those G&A expenses that Essar incurred through transactions with its undisclosed

Moreover, Essar contends that it has not benefitted from withholding information regarding parties with which it may be affiliated. Essar believes that its reporting failures with respect to affiliation led to a verification in this review and most likely will cause the Department to verify Essar in the next review in which it participates. According to Essar, these verifications will cost it tens of thousands of dollars and thus, it is not better off than it would have been had it addressed affiliation more fully at the outset of the instant review.

Finally, Essar requests that the Department consider the circumstances surrounding the reporting failures in deciding how adverse the facts available should be. Specifically, Essar notes that much of the information which led the Department to determine that Essar failed to identify certain parties with which it is potentially affiliated came from Essar's website and its annual report, which it placed on the record of this review. Therefore, Essar maintains that it cannot be said that it was hiding anything from the Department. Also, Essar notes that it "has a closely held ownership structure" and thus certain information regarding its potential affiliates that came to light at verification was not previously known by its officials. See Essar's January 29, 2004, rebuttal brief (rebuttal brief) at 9. Essar points out that, when asked about certain potential affiliates at verification, its officials provided all of the requested information. Additionally, Essar points out that the transactions with its potential affiliates are insignificant compared to the affiliated party transactions that it did report. Also, Essar states that it believed that the transactions with the potential affiliates did not involve subject merchandise and were therefore not relevant to the instant review. Essar notes that the Department verified that most of its transactions with its affiliates did not involve subject merchandise. In short, Essar requests that the Department consider the information that it correctly reported and the magnitude of the information that it incorrectly reported in selecting adverse inferences.

Department's Position:

We disagree with petitioners and will continue to calculate a G&A ratio for Essar based on 2000-2002 financial data from Ispat. Both petitioners argue that the Department's use of AFA was not sufficient to ensure cooperation, as discussed in the SAA, because it did not result in a positive margin for Essar. However, 19 U.S.C. § 1677e(b) does not specify that adverse inferences must result in a positive margin. Rather, the CIT has held that "the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." See F.li. De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (De Cecco). Further, the CIT has held that the Department has "'particularly great' discretion under the statute... to ensure a reasonable margin." See Allegheny Ludlum Corp v. United States, 215 F.Supp.2d 1322, 1343 (Allegheny) citing De Cecco. Here, the Department selected Ispat's 2000-2001 financial statements because 1) they are the most recent complete financial statements available from an Indian steel producer with operations comparable to those of Essar and 2) Ispat's G&A ratio is greater than

affiliated parties.

Essar's G&A ratio and thus using Ispat's G&A ratio in place of Essar's G&A ratio is an adverse inference. The Department analyzed the structure of Ispat, Tata and Essar and came to the conclusion that Ispat was organizationally more similar to Essar than Tata is. Specifically, Ispat is more similar to Essar than is Tata in terms of level of vertical integration, net income, production (volume), range of products marketed, and percentage of operations dedicated to the production of subject merchandise. In contrast, Tata is more integrated than Ispat and Essar and manufactures a broader range of products. Further, it appears from Tata's website that it engages in consulting operations. Neither Ispat, nor Essar, apparently have consulting operations. Thus, the Department regards Ispat's G&A ratio as a reasonable estimate of Essar's G&A ratio albeit with a built-in increase which is an adverse inference. With respect to Nucor's suggestion that the Department base Essar's G&A ratio on Ispat's 2001-2002 financial statements, we note that these financial statements, which are available on Ispat's website, do not contain sufficient detail for the Department to calculate a reliable G&A ratio. The Department has been unable to locate a complete, accurate and detailed version of these statements.

Moreover, the CIT has held that when determining how adverse the inference should be, “[i]f the missing information is important and a large volume of that information is missing, it is logical to draw a more adverse inference because that would further the goal of creating an incentive for respondents to provide the information.”¹⁴ In this instance, Essar's reporting failures did not involve affiliates that supplied Essar with major inputs used to produce subject merchandise. Furthermore, although Essar did not provide all of the necessary information regarding the potential affiliates, it did provide certain information regarding these parties. Thus, we believe that the adverse inference used in the preliminary results of review is commensurate with the volume and importance of the information that Essar failed to supply.

In addition, we note that the CIT's decision in Krupp indicates that adverse facts selected by the Department should not be “unduly harsh or punitive.”¹⁵ Based on an analysis of Ispat, Tata and Essar, the Department concluded that Ispat's G&A ratio is 1) for a period that is reasonably close to the POR, 2) results in a sufficient increase in costs to serve as a deterrent to non-compliance, and 3) is rationally related to Essar's operations based on the organizational similarity of Ispat and Essar.

Therefore, the Department will continue to rely on Ispat's 2000-2001 G&A ratio for the final results of review.

Comment 3: Whether Essar Under-Reported its Interest Expense

A. Discrepancies From the Interest Expense Reported in Essar's Financial Statements

Nucor contends that Essar may have under-reported its interest expense based on the following observations. First, Nucor notes that the total amount of interest expense incurred by Essar in

¹⁴ See Kawasaki Steel Corporation v. United States, 110 F. Supp.2d 1029, 1041 (Kawasaki).

¹⁵ Krupp at 4.

connection with transactions with its affiliates, as reported in footnote 41 of the financial statements placed on the record of this review, is less than the amount reported in the financial statements on Essar's web site.¹⁶ Additionally, Nucor states that it is unclear how the Department derived the total amount of interest expense that Essar incurred through transactions with its affiliates. Nucor requests that the Department disclose how it derived this figure. Nucor states that if the Department cannot confirm the amount of the interest charged to Essar by affiliated parties, as reported in footnote 41 of the submitted financial statements, it should increase all of Essar's interest expenses by the percentage increase that was preliminarily applied only to the interest expenses charged by affiliates.

Second, Nucor notes that there are a number of other discrepancies between the reported interest expenses and those listed on Essar's publicly available 2001-2002 financial statements. Specifically, Nucor notes that the reported net interest expense and the net interest expense that is **recorded in Essar's records**, differ from the net interest expense of Rs. 944.22 crores (1 crore = 10,000,000) that is identified in Essar's 2001-2002 financial statement. Nucor also states that the expense categories that are included in the net interest expense on the financial statements (*i.e.*, Guarantee and Other Charges, Plant and Equipment Lease Rentals, and Exchange Variation) are the types of expenses normally included in the Department's interest expense calculations. According to Nucor, it is not clear whether Essar has included certain of these expenses in other categories of the reported costs. Moreover, Nucor notes that two of these expense categories (Guarantee and Other Charges and Plant and Equipment Lease Rentals) appear in footnote 41 of Essar's Annual Report as categories of expenses incurred by Essar in connection with transactions with its affiliates. Nucor contends that the Department should not reward Essar by relying on understated interest expenses, especially when the amount of the understatement may relate to transactions with unreported affiliated parties. Thus, Nucor states that the Department should rely upon the interest expense that is identified in Essar's financial statements, and if necessary, avoid double-counting by reducing the amount of reported selling expenses or manufacturing costs that may include certain interest expenses.

In response, Essar claims that its online financial statements contain typographical errors which were corrected in the version of the financial statements submitted to the Department.¹⁷ For example, Essar notes that one of the sales figures in footnote 41 of its online financial statement differs by Rs. 187.18 crores from the corresponding figure in the financial statements that it submitted to the Department. The Rs. 187.18 crores is a sales figure that appears in both financial statements in a column that is adjacent to the column containing the sales figure that differs between the statements. According to Essar, this

16 Nucor also notes that several other amounts reported in footnote 41 of the financial statements that were placed on the record of this review, differ from the amounts reported in the financial statement on Essar's web site. Nucor included copies of the online financial statements with its brief, noting that it may include such information with its arguments because the Department has ruled that information in the public realm is not new factual information.

17 Essar requests that the Department instruct Nucor to remove from its brief copies of the online financial statement because these statements constitute untimely new factual information.

indicates that the online financial statement erroneously included the Rs. 187.18 sales figure twice. In short, Essar argues that the Department fully verified the reported interest expense and thus, it should dismiss Nucor's argument.

Moreover, Essar asserts that if the Department were to revise the reported interest expense to equal the Rs. 944.22 crores expense that is listed in the financial statements located on the Internet, the Department would double-count certain interest expenses. According to Essar, this is the case because it reported certain components of the interest expense that is listed in the financial statements as either manufacturing expenses or direct or indirect selling expenses, depending on the nature of the expense. Essar notes that the Department verified its reclassification of certain interest expenses, and Exhibit EC-3 to the Department's verification report demonstrates that the reclassified expenses reconcile to the Rs. 944.22 crores interest expense listed in the financial statements.

Finally, according to Essar, the interest expenses that it incurred in connection with transactions with its affiliates is captured in the Rs. 944.22 crores interest expense. As Essar has captured this total interest expense in either the reported interest expense, the reported cost of manufacturing, or the reported direct or indirect selling expenses, Essar argues that its reported expenses properly include interest expenses related to transactions with its affiliates.

Department's Position:

As a preliminary note, the financial statements placed on the record by Nucor will remain on the record. The Department has ruled that parties may "draw on information in the public realm to highlight any perceived inaccuracies in a report."¹⁸ However, we disagree with Nucor regarding the usefulness of these financial statements. At verification, the Department examined the information reported in footnote 41 of the financial statements that were submitted by Essar and reconciled this information to supporting documentation. The same cannot be said for Essar's online financial statements. Moreover, there is no indication that the differences between Essar's online financial statements and the financial statements examined at verification resulted from corrections or updates to the examined statements. Therefore, there is no basis for rejecting the affiliated party interest charges reported in footnote 41 of the financial statements that the Department examined at verification.

In addition, the record does not support Nucor's claim that the total interest expense reported by Essar does not reconcile to the interest expense listed in Essar's 2001-2002 financial statements. During the course of this review, Essar submitted detailed information regarding the reported interest expense and demonstrated how it apportioned the Rs. 944.22 crores financing cost from its financial statement to various cost categories included in the reported cost of production. *See, e.g.,* Exhibits 36 and 38 of Essar's May 21, 2003, submission to the Department. At verification, the Department reconciled the figures reported in Exhibits 36 and 38 of Essar's May 21, 2003, submission to supporting

¹⁸ *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27,296, 27,332 (May 19, 1997).

documentation, including the fiscal year trial balance and general ledgers, and noted no discrepancies. See Verification Exhibit EC-17. Furthermore, the record indicates that the financing costs that Essar excluded from the reported interest expense were allocated to Essar's reported cost of manufacturing, direct selling expenses, or indirect selling expenses. See Exhibit 13 of the February 28, 2003, submission to the Department (revised on May 21, 2003, at Exhibit 24). Thus, except for the interest expenses that Essar incurred in connection with transactions with unreported affiliates (which the Department based on AFA), there is no basis for revising the reported interest expenses. A spreadsheet showing how the Department calculated the total interest expenses that Essar incurred through transactions with unreported affiliates is in Attachment V to the calculation memorandum that was released to interested parties on December 17, 2003.

B. Differential Interest Expense

U.S. Steel argues that the Department should include certain unrecognized interest expenses in the numerator of Essar's financial expense ratio. Specifically, U.S. Steel asserts that the auditor's report to Essar's 2001-2002 financial statements points out that Essar did not provide for differential interest expense totaling Rs. 175.72 crores (Rs. 67.60 crores of this amount relates to the fiscal year ending March 31, 2001).¹⁹ The differential interest expense is the difference between interest accrued on certain loans at the original rate and interest accrued on those loans at 14 percent per annum, the rate established under a comprehensive financial restructuring plan.

U.S. Steel argues that the auditor's acceptance of Essar's financial statements was made subject to the exception relating to differential interest. Under section 773(f)(1)(A) of the Act, U.S. Steel asserts, costs must be calculated based on the records of the producer or exporter of the merchandise if such records are kept in accordance with general accepted accounting principles (GAAP) and reasonably reflect the costs associated with the production and sale of the merchandise. U.S. Steel asserts that Essar's omission of the differential interest expenses is not consistent with Indian GAAP and does not reasonably reflect production costs. Therefore, U.S. Steel contends that these expenses should be included in the financial expense ratio.

Essar notes that, despite the fact that its 2001-2002 financial statements have been on the record since April 2003, U.S. Steel has raised this issue regarding differential interest for the first time in its briefs when Essar is not in a position to fully respond to it. Nevertheless, Essar states that its costs have been fully verified and should be used in the final results of review.

Department's Position:

We disagree with U.S. Steel. As described in the auditor's report to Essar's 2001-2002 financial statements, Essar was in the advanced stages of a debt restructuring agreement at the date of issuance

¹⁹ See Exhibit 12 of Essar's April 22, 2003, submission at page 25 (note 3) (the 2001-2002 Annual Report).

of those financial statements.²⁰ A review of Essar's 2002-2003 financial statements shows that the agreement was finalized in October 2002, a date that falls within the POR.²¹ Under the terms of the agreement with its creditors, Essar negotiated a reduced interest rate of 14 percent on a majority of its long-term loans. Thus, the effective interest payable and due on these loans during fiscal year 2001-2002 and the entire POR was 14 percent. Any interest expense in excess of the revised effective interest rate (*i.e.*, differential interest) was not due or payable under the terms of the restructuring agreement.

An analysis of Essar's financial statements shows that Essar recorded the actual interest expense incurred during fiscal year 2001-2002 in accordance with the terms of the aforementioned debt restructuring agreement. Thus, we find that the interest expense recorded by Essar in its financial statements reasonably reflects the interest expense actually incurred during the fiscal year and the costs associated with the merchandise produced during the POR, in accordance with section 773(f)(1)(A) of the Act. Contrary to the petitioner's assertions, we do not find that it would be reasonable to adjust the interest expense in Essar's books and records (*i.e.*, financial statements) to reflect an amount of interest that was never actually due and payable. Thus, for the final results of review, we have not adjusted Essar's financial expense ratio for the differential interest.

Comment 4: Whether the Department Should Increase Essar's U.S. Price by the Amount of Duty Drawback Claimed

Essar contends that the Department incorrectly denied its claim for a duty drawback adjustment because the Duty Free Replenishment Certificate (DFRC) program satisfies both prongs of the Department's duty drawback test. Moreover, Essar claims that actual receipt of duties is not one of the two prongs of the Department's duty drawback test.

According to Essar, after it exports merchandise and receives payment from the overseas customer, it files an application with the government of India (GOI) under the DFRC program which identifies the quantity and F.O.B. value of the merchandise exported, the quantity of raw materials used to manufacture the exported merchandise (as prescribed by GOI standard input output norms (SION), specifically SION C-508), and other details regarding the raw materials used in production. Essar notes that the DFRC program is a substitution drawback program in which the physical inputs included in the exported merchandise do not have to be the exact inputs for which drawback is claimed, but simply must have the same quality and characteristics as the inputs for which drawback is claimed. In addition, Essar claims that the DFRC program is nearly identical in scope and purpose to the Advanced License program (ALP), a program that the Department previously found to be a legitimate duty drawback program.

²⁰ *Id.* at page 25, note 3.

²¹ See Verification Exhibit EC-3 at 000284 (page 29 of the 2002-2003 Annual Report).

Essar contends that under the DFRC program, import duties and rebates are directly linked to, and dependent upon, one another because 1) specific shipping bills for exports of subject merchandise are linked to bills of entry for imports of raw materials through DFRC certificate numbers, and 2) in processing bills of entry, the GOI will only grant remission of duty on the quantity of each input specified in the DFRC certificate. Also, Essar claims that the Department verified the link between import duties and the duty drawback claimed and that duties were actually collected, paid and rebated.²²

Furthermore, Essar claims that it demonstrated that it imported sufficient quantities of the relevant inputs to account for the duty drawback claimed on the subject merchandise. Specifically, Essar notes that it had substantial imports of inputs in 2002 and it provided the Department with its 2002 import data and copies of its bills of entry. Thus, Essar maintains that it satisfied the Department's two pronged duty drawback test.

Nevertheless, Essar notes that the Department refused to increase U.S. price by the amount of the claimed duty drawback because Essar did not actually receive the duty drawback. According to Essar, the Department has never before required actual receipt of the duty drawback in order to grant the duty drawback adjustment. In fact, Essar states that the Department's practice is to allow companies to base the duty drawback claim on their experience if it is impossible to report the claim on a more specific basis. Essar notes that in circular welded non-alloy steel pipe from the Republic of Korea, the Department stated that "we do accept methodologies {for calculating duty drawback}...which employ averages when the calculation of more specific figures is impossible or unduly burdensome to the respondents, and when the methodology proves to be reasonable." **See Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe From the Republic of Korea 57 FR 42942, 42946 (Sept. 17, 1992) (Welded Non-Alloy Pipe From Korea).**²³ Here, Essar based the reported average amount of the duty drawback on its experience with several **Indian drawback programs**. Essar points out that this was necessary because it did not make the sale under review until the end of the POR and thus it has not received duty drawback on this sale. Essar also notes that it could not apply to the DFRC program until after it shipped the subject merchandise and received payment from the U.S. customer. Although the reported average drawback per ton of HRS is based on exports prior to the POR, Essar argues that the reported average drawback amount serves as evidence that it has received duty drawback under the DFRC program. Moreover, Essar contends that the methodology it used to calculate the average duty drawback amount received in the past is reasonable because it ties the quantity of inputs that were imported to the quantity of product

22 See Verification Exhibit ES-12. Essar notes that this exhibit shows, among other things, how it calculated the allowable amount of duty drawback per metric ton of HRS coil, its imports and the import duty paid for 2002, SION amounts, and entry documents to verify that imports and duty remission did occur under the DFRC program during the POR.

23 See also Laclede Steel Co. v. United States, No. 92-12-00784, CIT Slip. Op. 94-160 at 23 (October 12, 1994) (concluding that the International Trade Administration's decision to accept average duty drawback information was supported by substantial evidence).

exported. Essar also notes that the Department has based other price adjustments on historical data (e.g., the adjustment for warranty expenses).²⁴

Finally, Essar contends that requiring a respondent to actually receive duty drawback before making a duty drawback adjustment, inappropriately creates a third prong to the duty drawback test used by the Department. Essar notes that in welded pipe from Taiwan, the Department stated that “other claims by petitioners do not speak to the test traditionally applied by the Department, but rather seek to impose additional requirements for duty drawback claims, which are not required by the statute, the regulations, or past Department practice.” See Final Determination of Sales at Less Than Fair Value: Certain Welded Stainless Steel Pipes from Taiwan, 57 FR 53705 (November 12, 1992). Therefore, Essar urges the Department to make the claimed duty drawback adjustment.

U.S. Steel asserts that the receipt of duty drawback is an absolute prerequisite for a duty drawback adjustment given that the statute provides for an adjustment for import duties that have been rebated or not collected. See section 772(c)(1)(B) of the Act. However, U.S. Steel claims that the record shows that Essar did not receive any drawback under the DFRC program.²⁵ Specifically, U.S. Steel notes that Essar did not provide the Department with its application for drawback under the DFRC program, nor did it provide any documentation showing that the drawback had been granted. U.S. Steel maintains that Essar bears the burden of establishing its entitlement to any favorable adjustment. Moreover, U.S. Steel notes that under similar circumstances, the Department has denied claims for a duty drawback adjustment.²⁶ In particular, U.S. Steel notes that in Certain Small Business Telephone Systems and Subassemblies Thereof From Korea; Final Results of Antidumping Duty Administrative Review, 60 FR 20048 (May 4, 1995), the respondent, noting that it routinely submits the required documents to Customs for duty drawback and receives drawback, argued that there was no reason to believe that its application for drawback would not be granted. However, the Department rejected this argument, noting that the respondent had not received any duty drawback for the one U.S. sale in

24 See Final Determination of Sales at Less Than Fair Value: Certain Carbon and Alloy Steel Wire Rod from Canada, 59 FR 18791, 18795 (April 20, 1994) in which the Department relied upon average historical warranty expenses because the respondents’ warranty information was unavailable for the period of investigation.

25 U.S. Steel notes that in the June 27, 2003, supplemental questionnaire response, Essar reported, for the first time, that it had applied for drawback under the DFRC program. Prior to that, Essar had reported that it had applied for drawback under the Duty Entitlement Passbook Scheme (DEPS) and then converted its request from the DEPS to the ALP.

26 See Primary Steel Inc. v. United States, 834 F. Supp. 1374, 1383 (CIT 1993) in which the CIT upheld the Department’s denial of a drawback adjustment because the respondent could not document the drawback it claimed it received; See also Certain Welded Carbon Standard Steel Pipes and Tubes from India; Final Results of New Shipper Antidumping Duty Administrative Review, 62 FR 47632 (September 10, 1997) at Comment 1 where the Department stated that “the record lacks any evidence supporting Rajinder’s claimed duty drawback.” U.S. Steel notes that in that case, the respondent did not provide the Department with a copy of the drawback license.

question. Thus, U.S. Steel contends that Essar's arguments that it satisfied the duty drawback test are irrelevant given that Essar failed to show that it received any drawback under the DFRC program with respect to the U.S. sale at issue. U.S. Steel argues that the actual receipt of drawback is not a third prong of the duty drawback test, but is a factual condition necessary for the Department to reach the two-prong duty drawback test. Finally, U.S. Steel points out that the Department has never determined that the DFRC program is a valid drawback program

With respect to the use of average drawback amounts, U.S. Steel states that averages may be used in certain circumstances to allocate duty drawback to particular sales; however, the drawback must have been received to be allocated. U.S. Steel notes that in the case cited by Essar to support the use of averages, **Welded Non-Alloy Pipe From Korea**, the Department clearly stated that "{w}e confirmed that import duties were in fact paid and rebated." (57 FR 42942, 42946). Based on the foregoing, U.S. Steel urges the Department to deny Essar's request for a duty drawback adjustment.

Nucor argues that the Department should not adjust the U.S. price of Essar's sale by the amount of the duty drawback claimed because Essar has not received duty drawback related to its U.S. sale. In fact, Nucor notes that Essar has not even been approved to participate in the DFRC program.

Nucor claims that the statute, case law, and Departmental practice require, as a prerequisite, import duties to have been rebated or not collected in order for U.S. prices to be adjusted by the amount of the duty drawback. Specifically, Nucor notes that section 772(c)(1)(B) of the Act requires U.S. price to be increased by the amount of duties imposed by the country of exportation *which have been rebated or which have not been collected*, by reason of exportation of the subject merchandise to the United States" (emphasis added). Nucor asserts that, in the instant review, Essar conceded that no such duties have been rebated or not collected. Nucor also points to Essar's brief, which states that the CIT noted that duty drawback "may give rise to an adjustment to United States price provided import duties are actually paid *and rebated ...*" (emphasis added). Again, Nucor asserts that, in this case, duties have not been rebated and therefore a duty drawback adjustment is not warranted. In addition, Nucor states that the requirement that duty drawback be received is noted in both prongs of the Department's duty drawback test, which requires import duties and *rebates* to be linked and a sufficient quantity of raw material imports to account for the duty drawback *received*. Finally, Nucor maintains that without knowing the amount of the credits to be issued under the DFRC program, Essar cannot demonstrate that it has satisfied either prong of the duty drawback test.

Furthermore, Nucor claims that Essar's approach of reporting an average duty drawback based on past drawback amounts is flawed because 1) the record does not show that Essar received any benefits under the DFRC program, 2) Essar failed to demonstrate that the previously granted drawback was not granted under the DEPS, a drawback system which does not satisfy the duty drawback test, and 3)

even if Essar earned benefits under the ALP, the ALP is not comparable to the DFRC program.²⁷ In particular, Nucor notes that the ALP and the DFRC program differ in that 1) ALP applications are made prior to importation while DFRC credits are granted after the fact, 2) DFRC credits are transferable but ALP credits are not transferable, 3) the DFRC program imposes strict limitations on the quantity of imports eligible for the duty drawback, and 4) the ALP requires only a positive addition to value whereas the DFRC program requires a minimum addition to value of 25 percent.

Given the foregoing characteristics of the DFRC program, Nucor contends that it would be inappropriate for the Department to rely upon an average duty drawback amount based on Essar's experience ~~with other drawback programs~~. As an initial matter, Nucor notes that it is unclear whether Essar would even meet the 25 percent value addition requirement of the DFRC program. Further, Nucor maintains that the DFRC program's limitations on the quantity of eligible imports is based on the value of current exports and thus, it would be inappropriate to accept a drawback amount based on prior exports. Additionally, Nucor points out that Essar may sell its DFRC credits for less than their face value, thus receiving less benefit than it would have received under the ALP. Nucor also claims that, while the Department, in some instances, has approved duty drawback under the ALP, it has denied it under the DFRC program (Nucor notes that this may be due to differences as to when applications are filed in the two programs (ALP - before importation, DFRC program - after the fact)). Finally, Nucor maintains that the determinations relied upon by Essar to show that the Department has accepted an average duty drawback in the past are not applicable here because the average accepted was an average of drawback received whereas Essar has not received any drawback at all.

Lastly, Nucor notes that in the companion countervailing duty (CVD) administrative review, which covers a period that includes the instant POR, the Department found that Essar did not use the DFRC program.²⁸ Nucor questions how Essar can claim a duty drawback in the instant review while, in the CVD administrative review, the Department found that Essar did not move to the DFRC program until almost one year after the POR. Given this discrepancy, Nucor requests that the Department examine the record in the CVD administrative review and the instant antidumping duty administrative review and reach consistent conclusions in both reviews.

Department's Position:

Section 772(c)(1)(B) of the Act requires the Department to increase the export price by the amount of

²⁷ However, Nucor contends that the record does not indicate that Essar received any benefits under the ALP.

²⁸ See Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 69 FR 907, 913 (January 7, 2004) in which the Department stated that “[s]ince the company {Essar} switched from a DEPS to a DFRC in 2003, we find that this occurred after the POR and therefore, Essar did not use this program during the POR.” Nucor also notes that in the CVD administrative review, the Department found that during the POR, Essar did not use the DEPS for subject merchandise sales to the United States.

import duties imposed by the exporting country that have been rebated, or which have not been collected, by reason of exports of the subject merchandise to the United States (the duty drawback adjustment). In practice, the Department makes the duty drawback adjustment if it finds that 1) import duties and rebates are directly linked to, and are dependent upon, one another, and 2) the company claiming the adjustment can demonstrate that there are sufficient imports of raw materials to account for the duty drawback received on exports of the manufactured product.²⁹ In the preliminary results of review, the Department denied Essar's claimed duty drawback adjustment under India's DFRC program because "Essar failed to demonstrate that it received a duty drawback from the Government of India (GOI) under the DFRC program." See Preliminary Results, 68 FR 74209, 74212. The Department went on to note that "{i}n fact, Essar indicated that its application for the DFRC program had not yet been approved." See id.

We disagree with Essar. Essar contends that as a "threshold matter" the Department created a third prong to the drawback test, the actual receipt of duties, when it denied the drawback adjustment. However, Essar is not entitled to the drawback adjustment because there is no evidence indicating that Essar is participating in the DFRC program with respect to its U.S. sales. Essar did not, in fact, establish that its application to the DFRC program was granted. Without approval from the GOI, the Department has no program experience to evaluate against the prongs of the drawback test.

Moreover, although Essar states that the Department verified that duties were "collected and paid and rebated,"³⁰ the Department's verification report actually states: "Company officials noted that once the application was approved (company officials believed that the application would be approved by the end of the month), Essar could begin importing raw materials for which duties will be remitted."³¹ However, the Department *did not* verify that duties had been rebated, only that an application had been made. Essar presented to the Department an overview of the DFRC program, supporting worksheets and input-output norms for its calculation of the drawback claimed. The claimed amount is based on Essar's drawback experience during 2002. Essar did not present the drawback application related to the U.S. sale, neither did it present any other documentation related to any other drawback claims under the DFRC program, nor any indication from the GOI that drawback was to be granted. Rather, Essar presented sample entry bills that demonstrate that imports are made pursuant to specific license numbers, a fact not disputed by the Department. Nonetheless, at no point during the course of this review did Essar establish that its application to the DFRC program was approved.

Essar's argument that the Department may accept duty drawback amounts based on averages is irrelevant. Essar failed to demonstrate that the drawback application had been approved or that a

29 See Carbon Steel Wire Rope From Mexico; Final Results of Antidumping Duty Administrative Review 63 FR 46753, 46755 (September 2, 1998), citing Far East Mach. v. United States, 699 F. Supp. 309, 311 (CIT 1988).

30 See Essar's January 22, 2004, case brief at 13.

31 Verification Report at 26.

remission of duty had been received during the course of the review. Essar argues that when other information is not available, the Department traditionally accepts duty drawback based on a company's experience. However, the record of this review does not support that Essar has ever been granted drawback under the DFRC program, or that it presented evidence that its application was anything other than pending. In Welded Non-Alloy Pipe from Korea the Department conceded that it would allow methodologies for reporting drawback "which employ averages when the calculation of more specific figures is impossible or unduly burdensome." However in that case, the respondent had an existing license in a drawback program. In the instant review, the calculation of averages is impossible because there is no information on the record suggesting that Essar has ever received benefits under the DFRC program.

Because the drawback requested by Essar fails to meet the threshold requirements of the two-prong drawback test, *i.e.*, that a legitimate drawback scheme is in place and drawback is permitted by the governing entity, the Department has not adjusted Essar's U.S. price by the claimed duty drawback.

Comment 5: Whether Essar Under-Reported its Electricity Expense

Nucor claims that Essar failed to report all of its electricity costs for the POR because it converted Rs. 454.18 crores that it owed to Essar Power for electricity to an unsecured loan (see Verification Report at 9). Nucor states that because Essar owes the Rs. 454.18 crores, which amounts to 52 percent of the total "Power and Fuel" expense reported on Essar's 2002 financial statements, the amount has not been captured in Essar's reported costs. Essentially, argues Nucor, Essar has used this unsecured loan from an affiliated party to reduce its period costs. Accordingly, Nucor requests that the Department either increase Essar's reported "Power and Fuel" costs by 52 percent or add Rs. 454.18 crores to the reported interest expense.

Additionally, the petitioners point out that in Essar's 2001-2002 financial statements, the company's auditor stated that Essar failed to recognize as an expense Rs. 173.39 crores that was classified as a prepaid power cost at the beginning of the 2001-2002 fiscal year. Although the petitioners note that the Department normally relies upon a respondent's records if they are prepared in accordance with the GAAP of the respondent's country and are not distortive,³² here the petitioners argue that Essar's omission of the Rs. 173.39 crores from its power costs is inconsistent with Indian GAAP and does not result in costs that reasonably reflect the cost of producing the subject merchandise. Thus, U.S. Steel urges the Department to include the omitted Rs. 173.39 crores in Essar's reported cost of production.

While Essar acknowledges that its auditor raised questions about the prepaid power costs at issue, it

³² See Nucor's Case Brief at 15, citing Cultivos Miramonte S.A. and Flores Mocari S.A. v. United States, 980 F. Supp. 1268 (CIT September 17, 1997) (citing Laclede Steel Co. v. United States, 18 CIT 965, 972-974 (October 12, 1994); Hercules, Inc. v. United States, 673 F. Supp. 454 (CIT 1987)).

notes that it explained its position on these costs in its 2001-2002 financial statements³³ and its auditor eventually agreed with its challenge to the auditor's opinion regarding these costs. In fact, Essar notes that its auditor did not include a note regarding these prepaid costs in Essar's 2002-2003 financial statement (Essar challenged the auditor's opinion on these costs after the 2001-2002 financial statement was issued). Moreover, as noted above, Essar states that despite the fact that its 2001-2002 financial statements have been on the record since April 2003, the petitioners have raised this issue for the first time in their briefs when Essar is not in a position to fully respond to it. Nevertheless, Essar states that its costs have been fully verified and should be used in the final results of review.

Department's Position:

We disagree with the petitioners, in part. Contrary to Nucor's claim, there is no evidence on the record indicating that Essar reduced its period costs by converting its accounts payable for power of Rs. 454.18 crores to an unsecured loan. Given that Essar records its expenses on an accrual basis, rather than a cash basis, the Rs. 454.18 crores would have been recognized as an expense, or if appropriate, capitalized, when the liability was incurred. Changing the form of the liability from a payable to an unsecured loan does not affect Essar's costs. Moreover, any potential interest associated with the unsecured loan would not be captured in this administrative review because the accounts payable was converted to an unsecured loan during Essar's 2002-2003 fiscal year but the Department based Essar's interest expenses on its 2001-2002 fiscal year financial statements.

However, we agree with the petitioners that Essar failed to recognize certain power charges in its 2001-2002 fiscal year financial statement (which covers the period April 1, 2001, through September 30, 2002). As of April 1, 2002, Essar changed the method that it used to account for certain fixed cost components of power (*i.e.*, depreciation and interest/lease rent). Specifically, beginning in April 2002, Essar no longer allocated the cost of the fixed components of power to future periods (see Essar's 2001-2002 financial statements at Schedule 22, note 18). In connection with this change, Essar's auditor noted that the fixed cost of power that was treated as a prepaid expense as of March 31, 2002, has not been "charged off" (see the auditor's report on Essar's 2001-2002 financial statements at item 4(a)(v)) and consequently the company's loss for fiscal year 2001-2002 is lower by Rs. 173.39 crores. Although the auditor does not explicitly state that this cost should be recognized as an expense in the current period (*i.e.*, charged off), Verification Exhibit EC-10 indicates that part of the Rs. 173.39 crores relates to the cost reporting period for this review. Given that Essar recognized the fixed cost of power in its profit and loss account after April 1, 2002, and a portion of the prepaid fixed power costs as of March 31, 2002, relate to the POR, for the final results of review, the Department has increased the power costs included in the cost of manufacturing based on Verification Exhibit EC-10 (for further details, see the Calculation Memorandum for the final results of review for Essar Steel Limited, dated concurrently with this memorandum). Contrary to Essar's claim, the fact that its auditor did not include a note regarding prepaid power in the subsequent financial statement does not necessarily indicate that

33 Specifically, Essar's management explained that these prepaid power costs should be apportioned prospectively over the remaining term of its purchase agreement with the power company.

the auditor agreed that the prepaid power costs should continue to be allocated to future periods.

Comment 6: Ministerial Errors

Essar claims that the Department made the following ministerial errors in its preliminary calculations. First, Essar states that the Department incorrectly increased normal value by the amount of a commission offset even though Essar did not pay commissions in either the home or the U.S. market. Second, Essar states that the Department should not have calculated G&A expenses, interest expenses, and the variable cost variance adjustment by multiplying the G&A, interest, and variance percentages by manufacturing costs that were increased pursuant to the major input rule. Essar notes that its G&A, interest, and variance percentages are based on the costs recorded in its books, before any adjustment for the major input rule. Thus, it is inappropriate to multiply these percentages by manufacturing costs that have been increased under the major input rule. Third, Essar contends that the variable and total manufacturing costs used to calculate the difference in merchandise adjustment should not have been increased under the major input rule nor should they have been increased by the AFA adjustment to variable manufacturing costs. Lastly, Essar maintains that the AFA increase to variable manufacturing costs should be added to its total cost of production rather than its variable manufacturing costs. In the preliminary results of review, the Department added the AFA adjustment to variable costs directly to variable manufacturing costs, and then multiplied the G&A and interest percentages by a total cost of manufacturing that included the AFA adjustment.

In the preliminary results of review, the Department, as AFA, calculated Essar's total G&A expenses by multiplying a G&A ratio derived from Ispat's financial statements by Essar's total cost of manufacturing. As noted above, Essar took issue with the fact that the Department multiplied the AFA G&A ratio by its total cost of manufacturing which had been increased by a separate AFA adjustment made to variable manufacturing costs. U.S. Steel interpreted Essar's argument on this point as a request by Essar to increase Ispat's cost of goods sold by the AFA adjustment to variable manufacturing costs so that the denominator used to calculate the AFA G&A ratio (*i.e.*, Ispat's cost of goods sold) would be comparable to Essar's total cost of manufacturing. However, U.S. Steel notes that the Department did not calculate the G&A ratio using Essar's expenses, but instead used, as AFA, Ispat's expenses and then multiplied Ispat's G&A ratio by Essar's total cost of manufacturing.

With respect to the ratio used to calculate Essar's interest expenses, U.S. Steel maintains that the Department included the AFA increase to variable manufacturing costs in the denominator used to calculate the interest expense ratio (*i.e.*, Essar's cost of goods sold) and thus no correction should be made.

Nucor contends that, in the preliminary results of review, the Department used standard SAS programming language to calculate Essar's normal value by comparing either home market commissions or home market indirect selling expenses to U.S. commissions and calculating an appropriate offset. With respect to Essar's argument regarding the major input rule, Nucor, argues that under the major input rule, the Department should increase, not only the transfer price of the direct material input, but any other costs based upon, or affected by, the cost of manufacturing (which includes the increase in

direct material costs under the major input rule). In sum, although Nucor continues to urge the Department to base Essar's dumping margin on total AFA, if the Department does not resort to total AFA, Nucor contends that the Department should not make the corrections advocated by Essar.

Department's Position:

We agree with Essar, in part. At line **2345** of the preliminary margin calculation program, we inadvertently set the weighted-average home market commission expense equal to the weighted-average home market indirect selling expense. This error caused the home market price to be increased by a commission offset. We have corrected this error in our final margin calculation program.

Moreover, we also agree with Essar that its G&A and interest expense should not be calculated by multiplying the G&A and interest expense ratios by manufacturing costs that have been increased under the major input rule. In other antidumping proceedings, the Department has calculated respondents' G&A and interest expenses by multiplying the G&A and interest expense ratios by the respondent's actual manufacturing costs, before restating those costs to account for transactions with affiliated parties. See Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of Antidumping Duty Administrative Review, 69 FR 6259, 6260 (February 10, 2004) (in which the Department noted that it applied the G&A and financial expense ratio to the cost of manufacturing prior to making adjustments for major inputs). Although the G&A and interest expense ratios used by the Department in this review are based entirely, or partially, on AFA, they substitute for Essar's reported G&A and interest ratios and thus they should be applied in a manner that is consistent with the Department's normal methodology. Therefore, for the final results of review, we calculated Essar's G&A and interest expenses by multiplying the G&A and interest ratios by the company's total actual manufacturing costs before restating those costs to reflect major input and AFA adjustments. Additionally, including the adjustment for a major input in the calculation of Essar's standard-to-actual cost variance, (*i.e.*, VCOMVAR) distorts the variance and thus, for the final results of review, we calculated the amount of the variance by multiplying the variance percentage by manufacturing costs that have not been increased under the major input rule.

However, we disagree with Essar's argument that the major input adjustment should not be made to the variable and total manufacturing costs (VCOM and TCOM, respectively) used to calculate the difference in merchandise adjustment. Although, section 773(f)(1)(A) of the Act directs the Department normally to calculate costs based on a respondent's records, sections 773(f)(2) and (3) of the Act permit the Department to value a major input at the higher of the transfer price, the market price, or the affiliated supplier's cost of production. The Act does not provide an exception to the major input rule. Moreover, it would be inappropriate to base cost of production and constructed value on manufacturing costs that have been adjusted under the major input rule while using manufacturing costs that have not been adjusted under the major input rule to calculate the difference in merchandise adjustment. This is consistent with the Department's position in the Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta From Italy, 65 FR 7349, 7353 (February 14, 2000) in which the Department noted that "we should also have adjusted the material cost component for both VCOM and TCOM to reflect the use of transfer price for the material cost,

but did not {(the respondent incorrectly valued the major input at its affiliated supplier's cost of production)}. Accordingly, we have now adjusted the VCOM and TCOM to reflect the use of transfer price for the material cost and have made our determination of whether a difference in merchandise (DIFMER) adjustment is appropriate using the revised VCOM data." Similarly, it would be inappropriate to base cost of production and constructed value on manufacturing costs that reflect the AFA adjustment to variable costs while using manufacturing costs that do not reflect this adjustment to calculate the difference in merchandise adjustment. Therefore, for the final results of review, the Department calculated the difference in merchandise adjustment using costs that reflect the AFA adjustment to variable manufacturing costs and the major input adjustment.

Recommendation

Based on our analysis of the comments received, we recommend adopting the positions described above. If these recommendations are accepted, we will publish the final determination and the final weighted-average dumping margin in the Federal Register.

Agree _____ Disagree _____ Let's Discuss _____

James J. Jochum
Assistant Secretary
for Import Administration

Date