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MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Carbon and Certain Alloy Steel Wire Rod From Germany; Issues and Decision Memorandum for the Final Determination

Summary

We have analyzed the comments and rebuttals of interested parties in the antidumping duty investigation of carbon and certain alloy steel wire rod from Germany (67 Fed. Reg. 17,384, April 10, 2002). As a result of our analysis, we have made changes, including corrections of certain inadvertent programming and ministerial errors, in the margin calculations. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments and rebuttals by parties:

1. Indirect Selling Expenses Incurred in Germany on U.S. Sales
2. Adverse Facts Available for Unreported U.S. Sales
3. Interest Rates for Euro-Denominated Sales
4. Missing Payment Dates
5. Credit Expense Calculation for "Split Payments"
6. Critical Circumstances
7. Use of Facts Available for Freight Expenses
8. Use of Facts Available for Packing Expenses
9. Exclusion of Tire Cord and Tire Bead Wire Rod
10. The "Zeroing" Methodology
11. The Arm's-Length Test
12. Level of Trade

Background

We published in the *Federal Register* the preliminary determination in this investigation on April 10, 2002. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Germany*, 67 Fed. Reg. 17,384 (*Preliminary Determination*)

The period of investigation (POI) is July 1, 2000, through June 30, 2001. The investigation covers sales of carbon and certain alloy steel wire rod made by one manufacturer/exporter, Saarstahl AG (Saarstahl). We invited parties to comment on our preliminary determination. We received case briefs from Saarstahl and petitioners (Co-Steel Raritan, Inc., GS Industries, Keystone Consolidated Industries, Inc., and North Star Steel Texas, Inc.) on July 25, 2002. We received rebuttal briefs from the same parties on July 30, 2002. Respondent requested a public hearing, which we held on August 5, 2002.

Scope of Investigation

The merchandise covered by these investigations is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. This grade 1080 tire cord quality rod is defined as: (i) grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no inclusions greater than 20 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04-114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

This grade 1080 tire bead quality rod is defined as: (i) grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an

average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) having no inclusions greater than 20 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04-114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

The designation of the products as "tire cord quality" or "tire bead quality" indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products under investigation are currently classifiable under subheadings 7213.91.3010, 7213.91.3090, 7213.91.4510, 7213.91.4590, 7213.91.6010, 7213.91.6090, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0010, 7227.20.0020, 7227.20.0090, 7227.20.0095, 7227.90.6051, 7227.90.6053, 7227.90.6058, and 7227.90.6059 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

See the Department's scope memorandum, "Carbon and Certain Alloy Steel Wire Rod; Antidumping Duty (Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Ukraine, and Venezuela) and Countervailing Duty (Brazil, Canada, Germany, Trinidad and Tobago, and Turkey) Investigations: Requests for Scope Exclusion" dated August 23, 2002.

Discussion of the Issues

Comment 1: Indirect Selling Expenses Incurred in Germany on U.S. Sales

Saarstahl made use of an affiliated sales company in Germany, Vertriebsgesellschaft Saarstahl GmbH (VGS), to perform numerous functions pertaining to its home market and U.S. sales to unaffiliated customers. Petitioners note VGS performed such activities on U.S. sales as:

- processing and approving U.S. purchase orders;
- traveling to visit existing and potential U.S. customers;
- negotiating and setting final prices;
- providing credit on warranty;
- arranging the resale of any rejected merchandise;
- negotiating price adjustments
- providing on-site customer support to U.S. customers
- negotiating and arranging U.S. freight.

Petitioners Case Brief at 2 and 3.

Petitioners continue to suggest VGS's role in Saarstahl's U.S. sales constitutes "U.S. economic activity;" as such, petitioners aver, the Department must deduct VGS's indirect selling expenses (reported as DINDRSU) from Saarstahl's constructed export price (CEP) sales. According to petitioners, the Department recently faced a similar case in a review of stainless steel sheet and strip in coils from Germany. There, petitioners maintain, the Department deducted the indirect selling expenses incurred by the respondent's home market affiliate on U.S. sales as these expenses were "associated with economic activities in the United States..." *Id.* at 6, quoting the "Issues and Decision Memorandum" accompanying the *Final Results of Administrative Review: Stainless Steel Sheet and Strip in Coils From Germany*, 67 Fed. Reg. at 7,668 (February 20, 2002).

Petitioners recount Saarstahl's claim that it allocated home market indirect selling expenses incurred on export sales equally among all export markets because it was unable to differentiate these expenses by market. This methodology, petitioners assert, "is a reasonable calculation of the applicable costs;" accordingly, petitioners urge the Department to deduct Saarstahl's reported foreign indirect selling expenses from the respondent's CEP sales prices.

Saarstahl counters by suggesting petitioners' request is contrary to section 772(d)(1) of the Tariff Act, which describes the adjustments the Department must make in calculating CEP. Because indirect selling expenses, by definition, do not result from, nor bear a direct relationship to, U.S. sales of the subject merchandise, Saarstahl maintains the Department may not deduct them from U.S. price. *See* Respondent's July 30, 2002, Rebuttal Brief at 2, citing the Statement of Administrative Action accompanying the URAA. First, Saarstahl argues, the only expenses which may be deducted from CEP are those "incurred between importation and resale." *Id.* at 3,

quoting *Micron Technologies v. United States*, 243 F.3d 1301, 1304 (Fed. Cir. 2001). Since indirect selling expenses incurred by VGS in Germany do not meet this criterion, Saarstahl avers, the may not be deducted. Second, Saarstahl continues, whether speaking of direct or indirect expenses, only those incurred *in the United States* may be deducted from CEP. *Id*. Saarstahl points to a line of judicial precedent as upholding the Department's post-URAA practice of not deducting indirect selling expenses incurred outside the United States. In *Mitsubishi Heavy Industries, Ltd. v. United States*, 54 F. Supp. 2d 1183, (Ct. Int'l Trade 1999) and *Timken Co. v. United States*, 16 F. Supp 2d 1102, 1004 (Ct. Int'l Trade 1998), Saarstahl argues, the Court upheld the Department's refusal to adjust for indirect expenses incurred in the exporting country. Finally, Saarstahl asserts, inasmuch as any deduction for these expenses is permissible, that deduction may not include any expenses related to Saarstahl's sales of subject merchandise to its affiliate Saarsteel, Inc.; rather, only expenses arising from Saarsteel's first sale to an unaffiliated customer in the United States could be deducted. *Id*. at 5, quoting 19 CFR 351.402(b).

Department's Position:

As petitioners noted, the Department has previously deducted from U.S. price certain indirect selling expenses incurred in the country of manufacture if those expenses are associated with economic activities in the United States. However, in this case, there is no evidence on the record to suggest the reported DINDRSU expenses are associated with economic activity in the United States. No details linking these expenses to U.S. economic activities were identified at verification, and the Department did not identify any discrepancies in the reported field (*see* Sales Verification Report at 33). Consequently, the Department has not altered from the *Preliminary Determination* in its treatment of reported indirect selling expenses for U.S. sales.

Comment 2: Adverse Facts Available for Unreported U.S. Sales

According to petitioners, the Department's Sales Verification Report at 22, n. 1, states Saarstahl "inadvertently missed picking up the POI invoices issued by Saarstahl to [a U.S. customer] ... for the months of July, August, and September." Petitioners Case Brief at 7, quoting the Department's July 10, 2002, Sales Verification Report (Verification Report). Petitioners detail the exactitude with which Saarstahl reported its U.S. sales, noting the company revised its U.S. sales data two times, and filed a separate sales reconciliation on April 2, 2002. *Id.* at 6. Petitioners note Saarstahl reported all sales of tire cord quality wire rod, even though certain grade 1080 tire cord wire rod is not covered by the scope of the investigation. *Id*. at 7. Nonetheless, petitioners maintain, at verification Saarstahl for the first time notified the Department of the additional unreported U.S. sales.

According to petitioners, record information will permit the Department to quantify these unreported sales for purposes of applying adverse facts available. While petitioners note Saarstahl's claim that the unreported sales were of tire cord quality wire rod, petitioners dismiss this claim, stating "nothing in this record, however, corroborates that statement or demonstrates that the unreported sales were of grade 1080 wire rod." Given Saarstahl's failure to report these

U.S. sales, petitioners submit, "the only inference that can be drawn is that all of the unreported sales were of subject merchandise." Petitioners' Case Brief at 8. Petitioners suggest the unreported sales would likely boost Saarstahl's dumping margin; petitioners point out these sales remained unpaid, and argue their resultant high imputed credit expenses would result in high margins on these transactions.

Petitioners cite the statutory language of section 776(a)(2) of the Tariff Act of 1930, as amended (the Tariff Act), as requiring the use of facts available when a respondent "fails to provide such information by the deadlines for submission of the information ..." Petitioners Case Brief at 9 (petitioners' emphasis omitted). Further, petitioners urge the Department to exercise its discretion under section 776 by applying an adverse inference in selecting among the facts otherwise available, arguing that the failure to report even a single U.S. sale constitutes a "serious error." *Id* at 10, citing *Florex v. United States*, 705 F. Supp. 582, 588 (Ct. Int'l Trade 1989). Even if Saarstahl's failure to report all U.S. sales arose through inadvertence, petitioners continue, the Court of International Trade in *Acciai Speciali Terni*, 142 F. Supp. 2d 969 (Ct. Int'l Trade 2001) held inadvertence to be no justification for failing to timely report all U.S. sales.

Petitioners, anticipating Saarstahl's rebuttal, argue that, even if, as here, the unreported sales constitute a small percentage of Saarstahl's total U.S. sales, agency practice and judicial precedent support the use of adverse inferences. Petitioners Case Brief at 10, citing *Tatung v. United States*, 18 CIT 1137, 1140 (Ct. Int'l Trade 1994), *Stainless Steel Sheet and Strip in Coils From Italy*, 64 Fed. Reg. 30,750, 30,757 (*Sheet and Strip From Italy*). In fact, petitioners note, the Department used adverse facts available in the Italian sheet and strip case even though the respondent reported the missing sales three days prior to verification; here, petitioners point out, Saarstahl never reported the missing sales and only informed the Department of their existence at verification. Petitioners cite the Department's findings in *Sheet and Strip From Italy* that i) the missing data were untimely filed and ii) the respondent's failure to report all U.S. sales "indicate[d] a lack of best efforts;" thus, the respondent had not acted to the best of its ability in responding to our questionnaire. *Id.* at 11, quoting *Sheet and Strip From Italy*. Petitioners assert similar findings are warranted here, as none of the extenuating circumstances the Department cited in other cases where it did accept late revisions to sales data obtain. Rather, as in *Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, petitioners argue the Department should apply adverse facts available to Saarstahl's unreported U.S. sales. *Id.* at 12, citing *Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed. Reg. at 50,408.

Petitioners suggest two possible adverse inferences the Department may apply in this case. The first calls for the Department to apply the highest non-aberrational margin calculated on Saarstahl's reported sales to the total sales value of the unreported sales.[1] The resultant potentially uncollectible dumping duties, or PUDD, could then be added to the PUDD calculated on Saarstahl's reported U.S. sales, and the sales value added to Saarstahl's total U.S. sales value,

[1]To discern the extent of the unreported sales, and as part of reconciling Saarstahl's reported sales to its financial statements, at verification the Department collected information on their overall value; we did not verify the individual sales prices, or any applicable adjustments thereto.

in calculating an overall weighted average dumping margin for Saarstahl. Petitioners' Case Brief at 13. Alternatively, petitioners suggest the Department could assign adverse facts available by assigning to this quantity the lowest reported U.S. sales price for tire cord quality wire rod, adjusting that price by the highest reported expenses. *Id*. at 13 and 14.

Saarstahl claims "excusable inadvertence," rather than a failure to act to the best of its ability, accounts for the small number of unreported U.S. sales. Respondent's Rebuttal Brief at 5. Saarstahl next provides an explication of its U.S. sales processes during the POI, and relates how one customer stopped paying for its sales from Saarstahl, prompting the latter to suspend its shipments to this customer. However, Saarstahl claims, the customer continued to withdraw merchandise shipped previously for its account which remained in a distribution warehouse; Saarstahl, as is its customary practice, issued contemporaneous invoices as these withdrawals were made. *Id.* at 6 and 7. Saarstahl claims the unreported U.S. sales arose from these withdrawals by that one customer.

According to Saarstahl, when it revised its U.S. sales listing to include sales made *by* Saarsteel, Inc. (rather than VGS's sales *to* Saarsteel, as in its initial response), the company based its response on VGS invoices issued during the POI. However, these errant "sales" represented material shipped on VGS invoices issued *prior* to the beginning of the POI. *Id.*

Saarstahl submits this oversight stemmed from inadvertence and, what is more, from excusable inadvertence. The order, production and shipment for these missing transactions, according to Saarstahl, all occurred prior to the POI, and Saarstahl no longer has any dealings with the customer. In such cases of inadvertence, Saarstahl avers, the Department has the discretion to disregard entirely the small body of data omitted. *Id*. at 8. It may not, Saarstahl insists, make any adverse inference with respect to these data. *Id*.

According to Saarstahl, "[t]hat Commerce requested the data in question, that the data were within Saarstahl's control, and that Saarstahl failed to provide them until their absence was discovered at verification serve, at the very most, as the legal predicate to the use of neutral facts available." *Id*. at 9, citing *Nippon Steel Corp. v. United States*, 146 F. Supp 2d 837, 840 (Ct. Int'l Trade 1999) (*Nippon Steel*). In this case, Saarstahl suggests, rather than leaping to adverse inferences, the Department must first make the additional finding that a respondent "failed to cooperate by not acting to the best of its ability." *Id.*, quoting section 776(b) of the Tariff Act. Saarstahl maintains only a "pattern of unresponsiveness" or other evidence of evasiveness would warrant an adverse inference. *Id.* at 10, citing *Nippon Steel, op. cit.*; *see also* the discussion at pages 16 and 17 of Respondent's Rebuttal Brief.

Saarstahl suggests it cooperated throughout this investigation, responding to voluminous information requests, and operating under severe time constraints. Saarstahl argues its failure to report these sales would have, at best, a "negligible" beneficial impact on the margin, rendering implausible any suggestion the company deliberately withheld the sales to reduce its overall margin. Saarstahl also insists the missing sales involved tire cord wire rod, and that tire cord wire rod is excluded from the scope of these investigations. This, Saarstahl concludes, is

additional grounds for disregarding the unreported sales entirely. If the Department grants Saarstahl's late plea to exclude *all* grades of tire cord wire rod, all of the unreported sales would be outside the scope of the investigations. Respondent's Rebuttal Brief at 13. Alternatively, Saarstahl presses the Department to determine the omitted transactions are not sales at all but, rather, cancelled sales. Saarstahl relates its belief that "at the time the Customer withdrew the merchandise from the distribution warehouse, it had neither the present intention nor the ability to pay for that merchandise but knowingly engaged in conversion." *Id.* at 15. The customer's refusal to pay, Saarstahl argues, rendered the original sales contract void. Thus, Saarstahl concludes, the Department should simply treat these transactions as cancelled sales.

Department's Position:

We agree, in part, with petitioners. In this regard, we note that Section 776(a) of the Tariff Act instructs the Department to use "the facts otherwise available" in reaching its determination if "necessary information is not available on the record" or an interested party "fails to provide such information by the deadlines for submission of the information or in the form or manner requested." When the Department determines that the use of facts available is appropriate pursuant to Section 776(a), the statute further provides that the Department may use an inference that is "adverse" to the interested party when selecting from the facts available if the Department determines that the interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." Section 776(b). In making this determination, the Department considers "the respondent's overall conduct, the importance of the information, the particular time pressures of the investigation, and any other information that bears on the issue of whether the deficiency was an excusable inadvertence or a demonstration of a lack of regard for its responsibilities in the investigation." *See Tung Mung Development Co., Ltd. v. United States*, Slip Op. 2001-83, Court No. 99-07-00457 (CIT 2001).

The record clearly reflects, and Saarstahl does not dispute, that it failed to report all of its U.S. sales by the appropriate deadlines. We determine that Saarstahl did not act to the best of its ability, and that it is therefore appropriate to apply an adverse inference for the missing U.S. sales. In reaching this conclusion, we note that the omission of U.S. sales is a serious error. Saarstahl had ample opportunity to fully report its U.S. sales, but failed to do so until the third day of verification. Moreover, it is evident from the verification that there were pervasive discrepancies between Saarstahl's financial statements and records and the reported U.S. database. *See* Sales Verification Report at 23, 24. Furthermore, given that the precise volumes, types of products, and associated expenses are unknown, as a result of Saarstahl's failure to report the sales in question, it is not possible to determine what portion of Saarstahl's total U.S. sales volume was unreported, or to conclude that the effects on the overall dumping margin would be minimal.

Saarstahl's argument that the customer did not pay for the unreported sales is not persuasive. Even if such a point were relevant in this context, the basis for Saarstahl's conclusion is not supported by the record. In fact, in at least one instance where an invoice was identified in Saarsteel's accounting system and reflected in its financial statements, but not reported in its U.S.

sales database, "...the company could not locate the original invoice; apparently some payment had been received from the customer that could not be linked to a specific invoice or merchandise." Sales Verification Report at 23.

The Department finds that Saarstahl's failure to provide such fundamental information as all of its U.S. sales until the third day of verification is not, as Saarstahl claims, due to "excusable inadvertence," but rather demonstrates a reckless disregard for its responsibilities in this investigation. Accordingly, we determine it is appropriate to use an inference adverse to Saarstahl in selecting from the facts available for these sales.

In selecting from the facts available, we note that the Sales Verification report indicates "[t]he company claimed [the customer's] purchases were of tire cord wire rod." *Id.* at 22, n. 1. Consequently, we have based our adverse facts available on the highest margin for reported tire cord wire rod sales.[2] We estimated the total volume (quantity) of unreported sales to this customer by dividing the total missing value referenced above by the lowest gross unit price of those highest-margin reported tire cord wire rod sales. Finally, we estimated the net U.S. price of the unreported sales by applying the highest net U.S. price of those highest-margin reported tire cord wire rod sales with the lowest gross unit price. The adverse facts available margin, quantity, and net price figures allowed us to account for the unreported sales in the weighted-averaging needed for the final overall margin. *See* the Final Analysis Memorandum for more details on these calculations.

Comment 3: Interest Rates for Euro-denominated Sales

According to petitioners, Saarstahl incorrectly applied a Deutsche-mark interest rate in reporting its imputed credit expenses on sales denominated in euros. Petitioners assert the Department's policy in this regard is explicit, quoting Import Administration's Policy Bulletin 98.2: "...we will use a short-term interest rate tied to the currency in which the sales are denominated." Petitioners' Case Brief at 15. Petitioners are not aware of any exception to this rule allowing respondents in the European Monetary Union to base credit expenses on euro-denominated sales upon some other currency's short-term interest rate.

If Saarstahl had any evidence, petitioners continue, to support its application of a Deutsche-mark interest rate to loans in euros, it was incumbent upon the respondent to submit it; Saarstahl, petitioners note, did not. *Id.* In fact, verification demonstrated that Saarstahl uses euro-denominated discount rates in collecting interest revenue for late payment on home market sales. Even if, petitioners argue, Saarstahl had no euro-denominated short-term loans, the company nevertheless failed to provide any evidence the Deutsche-mark interest rates provided in its response were equally applicable to its euro-denominated loans by the Deutsche Bundesbank.

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[2] Some tire cord wire rod has been excluded from the scope of the investigation, but much of it has not and, furthermore, based on the verification it is evident Saarstahl has not always properly distinguished tire cord wire rod excluded from the scope from tire cord wire rod that has not been excluded from the scope (see issue 9, below).

Petitioners' Case Brief at 16. Nor did Saarstahl document any German commercial bank using the same interest rates for either Deutsche-mark or euro loans. Petitioners suggest further support for using a euro-based interest rate can be found in the Verification Report, which notes "under the German civil code, companies are required to use the European Central Bank discount rate for bills of exchange...in calculating late-payment interest due." *Id*., quoting the Verification Report at 34 (ellipses in original). According to petitioners, in collecting late-payment interest, Saarstahl added a number of percentage points to this discount rate to derive the "punitive" interest rate applied to late payments. However, petitioners continue, as this rate does include a punitive element, the Department should disregard it and use the base rate in re-calculating Saarstahl's credit expenses on euro-denominated sales. Using this rate including its punitive element would, petitioners maintain, reward Saarstahl for failing to report properly its home market credit expenses. Likewise, petitioners conclude, the Department should reject use of other, higher euro interest rates included at Exhibit 45 to the Verification Report, as these would reward Saarstahl's "refusal to provide proper interest rates during the course of the investigation..." *Id.* at 18.

Petitioners adduce further evidence that the proper interest rate applicable to euro-denominated loans is the single interest rate prevailing throughout the European Monetary Union; "[a] single currency means the interest rates are the same in all countries where it is the only money." Petitioners' Case Brief at 18, quoting a website sponsored by the Julian Hodge Bank (www.euro-know.org)[3] According to petitioners, the time value of euro-denominated receivables is properly measured using a euro interest rate. Petitioners cite further to the "early creation" of the "Euro Interbank Offered Rate," or EURIBOR, the rate banks within the Monetary Union offer each other for inter-bank term deposits. Petitioners aver monies loaned in euros "must be valued at a single universal Euro rate." *Id.* at 19.

Petitioners close by arguing, apparently in the alternative, that the Department continue to apply Saarstahl's reported Deutsche-mark interest rates in calculating credit expenses for sales denominated in euro. However, petitioners contend, Saarstahl used the incorrect Deutsche-mark rate in reporting its imputed credit. Noting the different Deutsche-mark interest rates applicable to loans of varying size, petitioners note Saarstahl selected the rate applicable to the smallest category of loans (DM200,000 to DM1,000,000). Given "Saarstahl's large industrial status, the size of its receivables to be financed, and it[s] actual history of obtaining favorable rates," petitioners claim Saarstahl would, in fact, receive a much more favorable Deutsche-mark rate. If the Department insists on using a Deutsche-mark interest rate, petitioners urge the Department to select the rate more in line with the value of Saarstahl's receivables.

Saarstahl rebuts noting it had no short term borrowing, in either Deutsche-marks or euros, during the POI. Therefore, Saarstahl explains, in reporting home market credit expenses, as well as inventory carrying costs, it simply followed the Department's instructions to use "a published commercial short-term lending rate." This rate represented the average published interest rates for current account credits maintained by the Deutsche Bundesbank. Saarstahl accuses

[3]This web site provides data and discussion arguing against Britain's accession to the Monetary Union.

petitioners of i) having "a complete lack of understanding" of the European Monetary Union, ii) proffering unreliable alternate rates, and iii) supplying a grossly inaccurate average of these rates. Respondent's Rebuttal Brief at 18.

The respondent asserts the rate it used comported with both the Department's questionnaire and with Policy Bulletin 98.2. This document, Saarstahl avers, specifically recognized "the acceptability of using borrowing rates incurred in a different currency from that of the transaction, provided that the rates are adjusted for exchange rate fluctuations." Respondent's Rebuttal Brief at 19, quoting Policy Bulletin 98.2. The Bundesbank rates used by Saarstahl, the company insists, conform to this Bulletin. According to Saarstahl, the Deutsche mark has had a fixed euro exchange rate of 1.95583. Thus, Saarstahl suggests, its interest rate would be the same irrespective of the currency. As confirmatory evidence, Saarstahl refers to two rate sheets from Deutsche Bundesbank. The January 2001 report, Saarstahl explains, covering February 2000 through October 2001, includes rates tied to the Deutsche-mark. The February 2002 report, appended to Respondent's Rebuttal Brief, covers March 2001 through January 2002 and is denominated in euro. "The rates, however, *are identical*." *Id*. (original emphasis).

Saarstahl turns next to the alternate rates posited by petitioners, dismissing these as facially unreliable and "grossly inaccurate." The company characterizes petitioners' rates as "an imperfectly weighted average of heterogeneous national interest rates in all of the euro-area countries." Respondent's Rebuttal Brief at 20. Saarstahl quotes from the document petitioners included in their comments on interest rates, noting it urges caution in using retail bank interest rates. This document explains that the rates represent an aggregation of national rates which are not harmonized in their coverage, compilation methods, or in the nature of the data provided (nominal rates *versus* effective rates). Saarstahl claims this document explicitly states the only appropriate rates are those supplied by Deutsche Bundesbank. In addition, Saarstahl points out, petitioners' interest rate sheet only includes rates through September of 2000, thus including only three months of the POI (*i.e.*, July, August and September). In fact, Saarstahl suggests, the 6.24 percent rate posited by petitioners represents "an average of rates for some indeterminate period that may go back as far as 1997, but that covers a significant period outside of the POI and includes only the first three months of the POI." *Id*. at 21.

Department's Position:

We agree with petitioners that it is appropriate to use a euro interest rate for calculation of imputed credit of sales denominated in euros. As noted in Policy Bulletin 98:2, the Department "uses a short-term interest rate tied to the currency in which the sales are denominated." Under this policy, the Department bases this interest rate on the respondent's weight-average short-term borrowing experience in the currency of the transaction. If the respondent has no such borrowing, then the Department uses "publicly available information to establish a short-term interest rate applicable to the currency of the transaction."

Since Saarstahl's home market sales are reported in euros, and since Saarstahl did not report any short-term borrowing in euros, we are using the European Central Bank euro discount rates cited

on page 34 of the Sales Verification Report (appearing in Sales Verification Exhibit 47) for purposes of calculating Saarstahl's home market imputed credit expenses. To make those rates applicable to the entire POI, the Department has weight-averaged the rates in that exhibit according to the number of days in which they were in effect. *See* the Final Analysis Memorandum for more details on these calculations. Although Petitioners have indicated this rate should only be applied to Saarstahl's home market sales, the Department has also applied this same rate to Saarstahl's U.S. sales that were denominated in euros for consistency.

Comment 4: Missing Payment Dates

Petitioners note Saarstahl's most recent U.S. sales file includes a small number of CEP and export price (EP) sales which lack payment dates. Petitioners suggest the Department should use the date of the Department's final determination (August 23, 2002) to represent the payment date for these transactions.

Saarstahl dismisses petitioners suggestion as "a punitive and unauthorized application of adverse facts available." Saarstahl Rebuttal Brief at 22. The company instead suggests the Department plug the missing pay dates with the average number of days between shipment and payment for all EP and CEP sales, as applicable, calculated from Saarstahl's sales data.

Department's Position:

We disagree, in part, with both petitioners and with Saarstahl. The Department's recent practice has been to use the last day of verification as the date of payment for all unpaid sales. This was the last possible date on which Saarstahl could have updated its databases, and is consistent with Department practices in various other cases (*see, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea*, 64 FR 15444,15455 (March 31, 1999)). Furthermore, the Department has utilized this methodology for all reported sales with missing payment dates, not just U.S. sales with missing payment dates. Therefore, we have used the last day of verification as the payment date for all such unpaid sales.

Comment 5: Credit Expense Calculation for "Split Payments"

According to petitioners, the Department discovered at verification that Saarstahl actually received payment for at least one U.S. sale in three separate payments; however, in reporting its credit expenses, Saarstahl reported only the most recent payment date (thereby understating its imputed credit expenses). To correct this, petitioners aver, the Department should weight-average the days-sales-outstanding using the actual payment dates for this transaction. Furthermore, as facts available, the Department should assume payment dates for all sales to this customer were similarly mis-reported. Therefore, petitioners maintain, the Department should increase the credit expenses for all sales to this U.S. customer by the factor derived from the one verified observation (the actual figure is proprietary). Petitioners Case Brief at 21 and 22.

Saarstahl does not challenge petitioners arguments, but calls the actual suggested correction "overstated" because petitioners calculated it based on the total value of the payment, rather than the portion of that payment properly applicable to the invoice at issue. The company proceeds to supply it's suggested correction (the actual figure is proprietary).

Department's Position:

We agree with petitioners, and have applied the weighed-average days-sales-outstanding for this transaction to all of Saarstahl's sales to this customer. Additionally, the use of this weighted-average amount is appropriate given Saarstahl's failure to provide the date of payment for these transactions. We have corrected a minor error in petitioners' calculation of the factor used to effect this correction. *See* the Final Analysis Memorandum accompanying this notice.

Comment 6: Critical Circumstances

Saarstahl notes that in making a determination of critical circumstances the statute requires that the Department make an affirmative finding of either a history of dumping and material injury, *or* knowledge on the part of the importer that the exporter was selling subject merchandise at less than fair value and that such sales were likely to cause material injury. In addition, Saarstahl adds, the Department must find "massive imports" of the subject merchandise over a relatively short period. Saarstahl insists the Department's preliminary determination of critical circumstances (*see Carbon and Alloy Steel Wire Rod From Germany, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Notice of Preliminary Determination of Critical Circumstances*, 67 Fed. Reg. 6,224, February 11, 2002 (*Critical Circumstances Determination*)) fails on both prongs of the statutory test. *See* Respondent's Case Brief at 2 and 3.

Saarstahl contends that, pursuant to section 733(e)(1) of the Tariff Act, the Department correctly found no history of dumping of the subject merchandise from Germany. The Department turned, therefore, to examine whether importers knew or should have known Saarstahl was selling subject merchandise at less than fair value. Saarstahl notes the Department's established practice of imputing knowledge on the part of importers in cases where export price sales have margins of 25 percent or more, or constructed export price sales bear margins of 15 percent or more. The decision to impute knowledge is, Saarstahl states, normally based upon the margins calculated in the preliminary determination. However, Saarstahl points out, here the Department made its preliminary critical circumstances determination in the absence of any calculated margins for Saarstahl; as a result, the Department based its finding of imputed knowledge solely upon the margins in the petition. However, Saarstahl argues, these margins proved to be "wildly inaccurate" given Saarstahl's calculated preliminary margin of 14.56 percent. Respondent's Case Brief at 5. This margin does not meet the threshold for imputing knowledge to importers for purposes of a critical circumstances determination. *Id.* Saarstahl urges the Department to follow the precedent of *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24,329, 24,337 (May 6, 1999) where, Saarstahl asserts, the Department reversed its

affirmative critical circumstances determination when the respondents' margins fell below 25 percent.

Saarstahl also disagrees with the Department's conclusions as to the second prong of the statutory test, massive imports. Saarstahl accuses the Department of "manipulat[ing] the base and comparison periods to find ‹massive imports'." Respondent's Case Brief at 6. Had the Department acted consistently with its regulations and past practice, Saarstahl asserts, the Department would have found imports declined during the comparison period, rather than increasing massively. Saarstahl recounts the Department's preliminary critical circumstances determination, where the Department concluded importers, exporters or producers knew a proceeding was imminent no later than June 2001. As a result, the Department used June 2001 as the beginning of the comparison period, rather than the August 2001 petition filing. *See Critical Circumstances Determination* at 6,226.

Additionally, Saarstahl disputes the Department finding exporters "had reason to believe, some time prior to the beginning of the proceeding, that a proceeding was likely." *Id.*, quoting 19 CFR 351.206(i). According to Saarstahl, the Department's primary evidentiary bases for this finding were two April, 2001 articles appearing in *Metal Bulletin* which referred only to possible antidumping cases against Turkey, Moldova, Ukraine and Brazil. Saarstahl states that the only other evidence supporting an early finding of exporter knowledge were two "ambiguous" sources: a letter from a private party, and a June 2001 newsletter from the American Wire Producers Association. *Id.* at 7. These last two references, the company contends, may well have referred not to antidumping petitions, but to a possible section 201 Safeguards case against steel wire rod.[4] Given the existing record evidence, Saarstahl believes, the Department had no basis for selecting June as the first month of the comparison period. In fact, Saarstahl asserts the Department had just one option if it chose to abandon the petition filing date in selecting its base and comparison periods for a critical circumstances determination. That date would be April 1, the first day of the month in which the *Metal Bulletin* articles appeared. Had it used April 1, 2001 as the beginning of the comparison period, Saarstahl continues, the Department would have found imports decreased, whether it chose to examine periods of three, four, or six months in duration. *Id* at 8. In fact, Saarstahl concludes, only by selecting June 1st as the basis of its comparison was the Department able to find an increase in imports. Selecting the later date, Saarstahl insists "conflicts with the plain language of [the Department's] regulations and with its established practice." *Id.*

Saarstahl's arguments are, petitioners aver, "seriously flawed and should be rejected." Petitioners' Rebuttal Brief at 4. Petitioners assert the Department's critical circumstances determination was proper in all respects. First, petitioners dispute Saarstahl's argument that importers did not know, nor could they have known, the merchandise was being sold at less than fair value. Petitioners claim Saarstahl even concedes that the preliminary margin was above the 15 percent threshold for making a critical circumstances determination. Because the

[4]On February 11, 2000, the President announced Safeguards relief for the domestic steel wire rod industry pursuant to section 203 of the Trade Act of 1974. This relief took the form of a three-year tariff-rate quota.

Department's preliminary finding of critical circumstances was issued prior to the *Preliminary Determination*, petitioners insist, it was entirely proper for the Department to consider to the margins alleged in the petition in making this part of its critical circumstances finding.

Petitioners contest Saarstahl's assertion that because the preliminary margin actually calculated, 14.56 percent, fell below the 15 percent threshold, the Department must issue a negative final critical circumstances determination. But Saarstahl's own precedent, petitioners contend, does not support its argument. In that case, petitioners note, the Department only made its negative critical circumstances for those producers whose margins *in the final determination* fell below the required level. Petitioners Rebuttal Brief at 5, citing *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24,329, 24,337 (May 6, 1999). Here, petitioners assert, Saarstahl is asking the Department to base its final critical circumstances determination upon the rates found at the *Preliminary Determination*. Rather, petitioners insist, "if the final margin is above 15 percent, the Department should make an affirmative final critical circumstances determination." *Id*.

Petitioners turn next to Saarstahl's disagreement with the Department's finding of "massive imports" in the relatively short comparison period. Petitioners assert that Saarstahl is being "disingenuous" in suggesting petitioners' evidence of pending trade cases allows only the one cut-off date for importer knowledge which is most advantageous to the respondent. In fact, petitioners insist, the June date selected by the Department was reasonable, given the evidence before it. Petitioners' Rebuttal Brief at 6. Petitioners maintain their proffered date of June 2001 was proper, given their contention that importers would be on notice of pending trade cases by May 2001. Petitioners cite to the two *Metal Bulletin* articles appearing in April 2001, as well as a June article in a newsletter of the American Wire Producers Association. According to petitioners, the Department properly found the articles "sufficient to put importers and exporters on notice, after a reasonable lag time, on or about May and June 2001" that trade cases were likely. *Id.* at 7. Petitioners note the June 1 deadline applied to all the wire rod cases and, as such, could not have been selected to "cherry pick" a comparison period for the German investigation.

Petitioners point out that the Department has never set forth a bright-line test in evaluating whether importers and exporters "had reason to believe" cases were forthcoming, whether looking at the products covered, the countries targeted, or the type of case (antidumping *versus* countervailing duty). Petitioners' Case Brief at 8. Rather, petitioners maintain, the Department typically relies on published accounts which vary greatly from case to case in both their content and volume. According to petitioners, the Department has never required these articles to specifically name a target country as a prerequisite for finding importers and exporters had reason to believe trade cases were imminent. *Id.* Rather, that determination has always been case-specific, depending on the facts in a given situation.

Petitioners further assert that Saarstahl's own export data, as well as import data from the U.S. Customs Service, both show exporters from Germany did, in fact, expect trade actions, and acted accordingly, ramping up their U.S. exports dramatically in the six months beginning in June 2001, compared to the previous six months. Even if the Department were to ignore the published

accounts and the newsletter altogether and base its comparison period on the petition filing date, petitioners argue, it would *still* find massive imports had occurred. Petitioners' Case Brief at 10. In fact, petitioners note, Saarstahl's brief fails to address the massive imports for Saarstahl, as well as for Germany overall, in this period when there can be no doubt exporters had actual knowledge of the cases already filed. These data, petitioners insist, are grounds for finding affirmative critical circumstances for Saarstahl as well as for all other German producers. *Id.* Thus, petitioners suggests the Department "need not reach the questions of whether German producers and their U.S. customers had reason to believe on or before May 2001 that cases were imminent." *Id*. at 11.

Department's Position:

We disagree with Saarstahl. We continue to maintain that it is appropriate to use June 2001 through November 2001 as the comparison period to determine whether there are "massive imports" over a "relatively short period," pursuant to section 733(e)(1)(B) of the Tariff Act. While the presence of a section 201 trade remedy covering global imports of wire rod, coupled with the long history of previous antidumping investigations, heightened the sensitivity of importers, exporters or producers concerning reports of potential new trade cases, the April publications in, *Metal Bulletin*, and the article in the June edition of the newsletter, *WireLine*, alerted steel wire rod importers, exporters, and producers the proceedings concerning the subject merchandise were likely in a number of countries, regardless of whether Germany was specifically mentioned in the articles. The Department found Germany was a leading exporter of steel wire rod to the United States, with significant volumes in 2000 and 2001. The Department also concluded the importers, exporters and producers of steel wire rod from Germany had reason to believe a proceeding was likely. *See* Memorandum from Joseph A. Spetrini to Faryar Shirzad, "Carbon and Alloy Steel Wire Rod from Germany; the Preliminary Affirmative Determination of Critical Circumstances," dated February 2, 2002. As stated in the Department's preliminary affirmative determination of critical circumstance, we inferred, "that by June 2001, importers, exporters, or producers from all of those countries with the largest volume of exports had knowledge proceedings were likely." *Id.* Saarstahl has provided no credible evidence to the contrary to undermine this finding in the final determination. For these reasons, June 2001 is a more appropriate month than April 2001 for establishing that imports had become "massive" within the meaning of the Tariff Act.

The Department agrees with petitioners that the June 2001 through November 2001 comparison period was used for all of the Carbon and Certain Alloy Steel Wire Rod cases; therefore it was not selected for an advantageous comparison period for this case. Because June 2001 through November 2001 is an appropriate comparison period to determine whether there are "massive imports" over a "relatively short period," pursuant to section 733(e)(1)(B) of the Tariff Act, we have concluded in this final determination that critical circumstance exist for imports of steel wire rod from Germany.

Comment 7: Use of Facts Available for Freight Expenses

Saarstahl disagrees with the Department's preliminary decision to base Saarstahl's freight expenses on facts available. Saarstahl maintains its allocation methodology was fully documented, and is a reasonable and non-distortive alternative approach, given what Saarstahl terms the "infeasibility of providing actual, transaction-specific movement expenses." Respondent's Case Brief at 9. Saarstahl notes the Department's preliminary finding that Saarstahl's freight expense methodology was not i) based on actual expenses, ii) sufficiently documented, iii) fully explained, or iv) accompanied by independent means for assessing its accuracy. Saarstahl attributes these findings to "Commerce's misunderstanding of Saarstahl's sales and accounting procedures, and by Commerce's terminological imprecision..." *Id*. at 10. In using terms such as "estimate," "transaction-specific," and "aggregate freight costs," Saarstahl further suggests that the Department's decision on Saarstahl's freight expenses were based upon "'estimates of aggregate expenses adjusted by [an annual] adjustment factor'." *Id.*, quoting the Department's April 2, 2002, supplemental questionnaire. To the contrary, Saarstahl responds, the reported freight expenses were "highly accurate transaction-specific standard costs" adjusted to actual expenses by application of a variance between standard and actual costs. *Id* An allocation based upon standard costs adjusted to actual costs is, Saarstahl notes, "expressly permitted by Commerce's rules." *Id.* at 11.

Saarstahl insists that, since the *Preliminary Determination* it has provided voluminous information and documentation addressing the Department's previous concerns over the company's freight expenses. Further, Saarstahl submits, the Department verified this information exhaustively and found no errors or discrepancies. Thus, Saarstahl asserts, it has fully resolved any problems the Department may have had. Respondent's Case Brief at 11.

For example, Saarstahl continues, while the Department may prefer transaction-specific movement expenses, its regulations "expressly contemplate that even where it might be theoretically possible to furnish transaction-specific costs, it may not be feasible to do so," given resource or time constraints. *Id.* at 12. Saarstahl points out the instructions in the Department's standard antidumping questionnaire expressly cite cases where transaction-specific costs may be unavailable, or multiple expenses may be aggregated as a single item, or multiple items may have been included in a single shipment. *Id.*, citing the Department's instructions for fields 23 through 26 (home market movement expenses). The questionnaire continues with instructions on how respondents are to use alternative reporting methodologies in the absence of transaction-specific costs.

Saarstahl proceeds with a detailed explanation of the accounting system it maintains in the ordinary course of business. Each sales invoice, Saarstahl explains, contains a specific freight charge for that sale called a *Frachtrückstellung*. Saarstahl states this represents a customer-, destination-, and mode-specific standard cost which accounts for each possible combination of freight services, handling charges, *etc.* Respondent's Case Brief at 14. These standard costs, Saarstahl avers, are constantly updated using actual historical experience, contract freight costs,

and tariff schedules. As Saarstahl's freight providers do not invoice on a shipment by shipment basis but, rather, on an aggregate basis, Saarstahl claims it had to work from this level of aggregation. Saarstahl notes its *Frachtrückstellung* captures all applicable freight expenses for both home market and U.S. sales; the company notes it allocated some of these expenses to separate variables (*e.g.*, inland freight, warehousing, insurance) in order to respond to the Department's questionnaire. *Id.* at 16 and 17. *Frachtrückstellung* for U.S. sales comprises four separate expense items which correspond roughly to the Department's separate fields for inland freight, international freight, marine insurance and U.S. duties. *Id*. at 18.

Saarstahl asserts it reported its freight expenses "at the most precise level of detail provided in its accounting records." Respondent's Case Brief at 19. The Department, Saarstahl notes, will not require a respondent to report transaction-specific expenses where, as here, it would be infeasible to do so. Saarstahl emphasizes that its normal accounting system maintains both transaction-specific standard costs and aggregate actual costs; by comparing the former to the latter, Saarstahl claims it is able to track the accuracy of the standard costs and adjust them on an ongoing basis. *Id.* at 20. Saarstahl suggests it might be theoretically possible to re-construct the paper trail linking each shipment to its attendant freight expenses, but claims such an effort would, given the nature of its normal accounting records, the number of sales involved, and the limitations of its computer archiving resources, be entirely unreasonable. *Id.* at 20 through 25. The company suggests without irony that any such effort would consume between 76 and 94 *man-years* of labor. *Id*. at 25.

Given the infeasibility of reporting transaction-specific freight expenses, Saarstahl argues, it allocated these expenses based upon standard costs adjusted to actual costs by a variance. The use of properly allocated costs is met, Saarstahl avers, and is consistent not only with Departmental practice, but with the Uruguay Round Agreements Act. Respondent's Case Brief at 26, n. 11 (citing the *Final Rule's* quote from the Statement of Administrative Action). Saarstahl insists that because its allocation methodology is highly specific to the circumstances of each sale, and introduces no inaccuracies or distortions, it is eminently acceptable. *Id*. at 27. By applying its variances, which are determined annually, Saarstahl further refines this allocation to reconcile it with Saarstahl's actual freight expenses. Saarstahl suggests it has "[p]owerful economic incentives" to ensure its normal bookkeeping records are as accurate as possible, since these books, including their recording of freight costs, are how the company keeps track of its expenses and sets prices for its goods. *Id*. at 29. Were Saarstahl to inadvertently under-charge customers for freight, the company insists, it would have to absorb the resulting losses.

Saarstahl repeats its claim that since the *Preliminary Determination* it has succeeded in supplementing the record to the point the Department now has all it needs to use Saarstahl's freight expenses as reported. Respondent's Case Brief at 29. Saarstahl contends its April 30, 2002 supplemental response largely addresses the concerns voiced in the *Preliminary Determination* concerning the nature of these expenses, how they are recorded, and how Saarstahl allocated them for reporting purposes. The company also claims it "made available to Commerce at verification the underlying freight invoices for *all sales* of subject merchandise ..."

Id. at 28 (original emphasis). Finally, Saarstahl notes, the verification report indicates the company provided all requested documentation for its movement expenses. *Id*. at 30.

Petitioners dismiss Saarstahl's protestations as gross overstatements in some cases and selective disregard of the record in other instances. Petitioners also dispute Saarstahl's contention that the Department's verification "uncovered ‹no errors, discrepancies, or lacunae in [those] data.'" Petitioners' Rebuttal Brief at 12, quoting Respondent's Case Brief. The respondent, petitioners aver, failed to report actual transaction-specific movement expenses as invoiced by its freight vendors. Instead, petitioners insist, Saarstahl relied upon "estimates derived from applying year-end variance factors to myriad standard cost elements." *Id*. at 13.

Petitioners term "a fiction" Saarstahl's characterization of its reported freight expenses as an otherwise unremarkable allocation methodology unjustly cast aside by the Department. What the Department considers "allocations," petitioners note, entail the distribution of actual period costs over the appropriate body of U.S. or home market sales. Rather, petitioners insist, Saarstahl's data represent "adjusted standard costs." Petitioners' Rebuttal Brief at 13, quoting Respondent's Case Brief.

Petitioners contrast what they deem the appropriate use of standard costs in a *cost* response to Saarstahl's present methodology in the context of its *sales* response. Whereas allocation of adjusted standard costs for COP purposes is entirely met in deriving a single per-unit value for the POI, petitioners explain, price adjustments pertain to each individual sale and must reflect the circumstances of each sale. Petitioners' Rebuttal Brief at 14. Petitioners further assert Saarstahl relied on a demonstration, based upon a single transaction chosen at Saarstahl's discretion, as substantiation of its entire response. Petitioners contend that, "far more significant discrepancies were found when the Department controlled the selection process."

Petitioners maintain that the case record established that the Department found "multiple errors, discrepancies and lacunae in Saarstahl's reporting." *Id*. Among these, petitioners cite: i) the inclusion of expenses from prior fiscal years in deriving the cumulative accrued and actual expense figures; ii) the use of average standard costs for certain U.S. sales, figures "yet one more step removed from the actual transaction-specific charges" the Department sought; iii) the inclusion of estimates of certain charges, further distorting the standard costs; iv) the reliance on estimates of wagon mixes in determining standard per-wagon rail freight costs, when charges vary sharply according to wagon type; v) discrepancies between contractual rates in effect and the rates recorded in Saarstahl's standard costing system; vi) the failure to report transaction-specific expenses for Saarsteel's sales where such data were available; and vii) the use of the most-advantageous possible estimates in valuing containerized shipments.[5] *Id.* at 15 through 17.

Petitioners accuse Saarstahl of relying on estimated standard costs when far more accurate actual costs were available. While the Tariff Act permits the use of allocations, where necessary, in

[5]Petitioners note Saarstahl simply assumed every container was completely full, a result which, petitioners aver "is the ideal," but is "not met consistently." *Id.*

reporting movement expenses, petitioners argue, there is no provision for using estimated costs, such as the standard costs maintained in a cost accounting system. Thus, petitioners argue, while allocations may be permissible when based upon actual period costs, "Saarstahl does not, and petitioners maintain cannot, reference any regulatory element that permits estimated costs to be the starting point of the reporting process." Petitioners' Rebuttal Brief at 19.

Petitioners dispute Saarstahl's assertion that it would be infeasible to provide more specific movement expenses. According to petitioners, the Verification Report makes it clear that existing records would have permitted at least heat-specific reporting or shipment-specific reporting. Petitioners' contrast Saarstahl's chosen methodology in this case with its behavior in a prior antidumping proceeding, certain hot-rolled lead and bismuth carbon steel products, where it based its reported freight on actual freight invoices. Saarstahl's estimate of the burden to report actual expenses (*e.g.*, 20 to 24 hours per transaction on U.S. sales) is, petitioners argue, grossly overstated. *Id*. at 21. Saarstahl, petitioners suggest, calculated the time involved in tracing a single sale's invoices and extrapolating that figure by multiplying by the number of invoices in question. This estimate would make sense, petitioners note, only if Saarstahl insisted on submitting a separate computer command to search for each individual invoice; instead, available business software would allow unified searches to cover the entire universe of sales in a single procedure. *Id.* at 22. At a minimum, petitioners conclude, the much smaller universe of U.S. sales would at least allow Saarstahl to report actual expenses on U.S. sales.

Petitioners also assert that Saarstahl's allocation of freight expenses is flawed. According to petitioners, the sample examined by the Department at verification is sufficient to reveal the shortcomings in its methodology. Petitioners assert that the Department verified actual expenses for all sales, it would have effectively introduced those actual expenses into the record well past the deadline for such information. Second, petitioners contend that, if Saarstahl was able to gather "the underlying invoices for *all sales* of subject merchandise" for verification it should have available the data to report the actual transaction-specific expenses as the Department requested? Petitioners' Rebuttal at 25.

Petitioners close by noting a claim of "burden" does not absolve a respondent from accurate and complete reporting. Petitioners point to Saarstahl's account of the burden it bore in providing exhaustive documents and analysis supporting of its use of estimated costs, and suggest Saarstahl's time would have been better spent simply gathering the most transaction-specific actual data available from its records. Petitioners also note that simply because supplying actual data may be more involved and time-consuming than relying on estimates does not excuse failure to report the more accurate data. Citing *Mannesmannrohren-Werke AG v. United States*, 120 F. Supp. 2d 1075 (Ct. Int'l Trade 2000), "the Department should reasonably expect Saarstahl to have access to and report required information on its [own] business operations related to freight expenses." Petitioners Rebuttal Brief at 26.

Department's Position:

We have continued to use facts available to calculate Saarstahl's freight expenses in the final determination. As already noted, Section 776(a)(2)(B) authorizes the Department to use "facts otherwise available" in reaching its determination if an interested party fails to provide the necessary information "in the form and manner requested ... ." Where the Department determines that a response to a request for information does not comply with the request, Section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits, the Department may disregard all or part of the original and subsequent responses, as appropriate.

Despite the Department's repeated requests,[6] Saarstahl did not report actual freight expenses as requested for many different freight elements associated with its home market and U.S. sales. Rather, Saarstahl reported its freight expenses based on what it characterizes as its "standard cost" expenses for aggregated freight variables for which it maintains data, adjusted at an aggregate level for the variance of total actual freight expenses to total standard freight allocations.

Saarstahl's reported data represent "estimates" of its actual freight expenses, and not allocations of "actual" expenses. Such freight "estimates" based on standard costs are not the same as allocations of "actual" expenses, and are replete with distortions. Indeed, in a previous review of Saarstahl, the Department noted Saarstahl had "reported the estimated freight amount for each transaction, rather than the actual expense amount incurred per transaction" (*see* Appendix S-66 of Saarstahl's April 30, 2002, submission, which was a resubmission of its Appendix S-17 from a prior submission). The Department's report had even noted concerns about the methodology used (*e.g.*, "[b]ased on Saarstahl's freight estimate methodology, we would expect the actual amounts to be lower than the reported amounts, rather than higher" *ibid*). This information indicates the Department had previously characterized reported expenses as "estimates" that were the subject of some concern.

In any case, in this investigation there is ample reason to reject Saarstahl's reported expense data based on various problems. First, information in the underlying freight contracts and schedules provided by Saarstahl do not demonstrate that the basis of Saarstahl's internal freight allocations are accurate. For example, in response to the Department's request that it "list the contracted freight rates (*e.g.*, Euros/metric ton by destination, *etc.*) in effect during the entire period covering your home market database," Saarstahl asserted that it "is unable to provide a list of contracted freight rates in effect during the POI," noting "[t]he applicable rates are entered into Saarstahl's computer system at the time the rates are effective, but [these] data [are] continually updated to

[6]The Department provided Saarstahl several lengthy deadline extensions for complying with its request for additional information, and even accorded Saarstahl the opportunity to revise its databases well after the publication of its *Preliminary Determination.*

reflect current rates, and there is no way to access the conditions that existed as much as two years ago during the POI." *See* Saarstahl's March 15, 2002, submission at 34. [7] Moreover, at verification the company noted that Appendix S-63.2 does not contain contracted freight rates for train shipments for sales within Germany, "but that a sample of such a contract had been provided in Appendix S-64 (at pages 304 through 306 in that appendix)." Sales Verification Report at 28. Consequently, there is little basis for judging the accuracy of Saarstahl's internal data base for home market freight expenses, as there is relatively little Saarstahl could produce to show the basis for what appears in its system for such expenses.

Second, regarding international freight (a major component of freight expenses for trans-ocean U.S. sales), Saarstahl's contract and tariff rate agreements covering such freight demonstrate additional problems with respect to the consistency and basis of Saarstahl's budgeted ocean freight expenses. For example, based on the sampling done at verification, there are concerns about the accuracy of the Saarstahl's system in this respect. For one sample observation "[t]he company stated the ocean freight information in its system (*see* page 6) for this transaction is incorrect," and that "[t]his rate reflects winter freight rates to Philadelphia" rather than the presumably accurate "summer rates through Cleveland." Sales Verification Report at 29.

Third, for U.S. channel 2 sales, which account for a large share of reported U.S. sales, Saarstahl indicated at verification that reported freight expenses were based on "averages of standard costs" by customer. However, it is clear that freight rates were varying over time, and that rates vary depending upon the freight providers involved (*see*, *e.g.*, Sales Verification Report at 27), making such averages even less precise estimates of actual incurred expenses than the standard costs for the individual transactions. Furthermore, it is clear that shipment routes are only "typically" the same for any given customer (*see* Sales Verification Report at 25), adding another source of variability in the specific incurred expenses and, hence, another source of imprecision in the averaged budgeted costs. Also, as noted above, evidence of inaccurately entered information in Saarstahl's system further undermines the credibility of the reported budgeted freight expenses as a proxy for what the Department requested, the actual incurred expenses.

Fourth, Saarstahl acknowledged the standard costs sometimes do not accurately reflect the actual expenses incurred (*see* Sales Verification Report at 27: "[t]he company also stated it may adjust the standard costs used based on its experiences," such as "when a standard cost does not appear to reflect accurately the actual expenses as they are incurred"). While such a procedure is understandable in the context of a standard cost system, it represents a clear indication of why such a reporting methodology is suspect with respect to providing an appropriate proxy for actual incurred expenses. As noted by petitioner, the fact that it may be appropriate to use standard or budgeted costs for purposes of preparing a *cost response* does not necessarily mean it is appropriate to use such standard or budgeted costs in preparing *selling expense* information for

[7] Saarstahl later stated "[i]n response to the Department's requests, the company searched through its current and archived documents and assembled all available contracts, rate schedules, and other documents related to all providers of logistic services in effect during the POI in a single Appendix S-63.2. April 28, 2002, submission at page 1 of Appendix S-63.

purposes of a *sales response*. There are various examples of additional freight expenses that, by definition, are subject to variance from the actual expenses incurred, and aggregate variance adjustment factors such as those applied by Saarstahl would not correct adequately.[8]

Fifth, other potential sources of distortion arise from assumptions made by Saarstahl in the context of converting the budgeted expenses to per unit expenses. For example, for exported products that are containerized – tire cord wire rod (*see* Sales Verification Report at 27) – the company divided the total container expenses by the maximum allowable weight per container, which was based on simply an assumption by Saarstahl that the containers would have been fully loaded (*see* Sales Verification Report at 30).

Finally, with respect to home market freight expenses, the derivation of the reported per unit expenses from the budgeted contract-based train expense information was prepared by Saarstahl using assumptions that appear arbitrary and potentially flawed. We reviewed a sample of contracted freight rates pertaining to train shipments for home market shipments (*see* Sales Verification Report at 27). Trains are assembled from wagons with expenses ranging widely per wagon. Saarstahl assumes a certain mix of different types of wagons to estimate the total length of the train, calculates the total expense for the train based on the assumed mix of wagons, and divides the total budgeted cost by the maximum allowable weight of packed merchandise on a train to yield a per-metric-ton freight expense. Various types of wagons may be used to carry multiple types of merchandise, subject and non-subject, and others may not even be able to carry coiled products (such as wire rod). Individual trains may contain some merchandise destined for German destinations and other merchandise destined for other destinations. Such assumptions, as Saarstahl noted straightforwardly at verification, may at times not be properly representative of typical trains being used.

In short, Saarstahl's methodology does not meet the Department's request for transaction-specific actual freight expenses, cannot be shown to provide accurate allocations of such expenses, is subject to questionable assumptions regarding the derivation of the standard costs and the allocation of such costs via averaging and allocation methodologies that further remove them from transaction-specific expenses, and is subject to some level of error due to uncorrected information in Saarstahl's systems.

Consequently, we are continuing to apply the facts available for the freight expenses as explained and applied in our preliminary results. In selecting from among the facts available, we have not, however, applied an adverse inference under section 776(b) of the Tariff Act, in light of the very significant burden associated with reporting the actual expense information, as is evident from the verification. It is evident from the record that, even considering the several months the

[8] For example, regarding U.S. Customs duties, Saarstahl clarified at the sales verification that reported U.S. Customs duties were based on "the HTSUS rate in effect at the time the estimates were made," and that "as HTSUS duty rates changed during the POI, it revised its formula for calculating the standard costs to reflect the change." Sales Verification Report at 26. As weeks or even months may pass between the estimation of the duties and the actual entry of the merchandise, this is another potential source of discrepancy between actual incurred expenses and the reported expenses

company had to gather these data, such reporting would have been very difficult, given that Saarstahl's accounting and record keeping system does not easily keep track of transaction-specific freight expenses, and the company had only recently emerged from bankruptcy. As in the preliminary determination, as non-adverse facts available for U.S. sales, for the movement expenses at issue, we set these expenses to no less than the median value reported for each expense; similarly, for the home market, we set the movement expenses to no greater than the median value reported for each expenses. *See* the Department's "Carbon and Alloy Steel Wire Rod from Germany: Preliminiary Analysis Memorandum for Saarstahl AG (Saarstahl)" from Steve Bezirganian and Mark Flessner through Robert James, dated April 2, 2002 at pages 6 and 7. In future proceedings, however, Saarstahl should note the Department would expect full and complete reporting of transaction-specific actual incurred expenses, or a reasonable allocation of such actual expenses.

Comment 8: Use of Facts Available for Packing Expenses

Saarstahl disputes the Department's explanation for its use of facts available for Saarstahl's packing costs. As with its freight costs, Saarstahl argues the state of the record regarding its packing costs has changed completely, thus attenuating the need for facts available. Since the *Preliminary Determination*, avers the company, it has "provided a full break-out of the cost of packing materials at the three mills that produce subject merchandise." Respondent's Case Brief at 31. As to packing labor and overhead, Saarstahl maintains these are properly recorded as zero since these expenses are captured in its cost centers for internal shipping and handling. *Id.* at 32. Further, Saarstahl asserts, the Department fully verified the company's reported packing costs noting "no errors, discrepancies or lacunae in its data." *Id.*

Saarstahl rejects as unsubstantiated the Department's "intuitive" assertion in the *Preliminary Determination* that U.S. sales would require more packing materials and labor. Since its coils of subject steel wire rod are loaded into containers prior to shipment, there is no need for additional materials to protect the wire rod during shipment. *Id.* Because the company responded fully to all requests for information, Saarstahl concludes, the Department has no basis for resorting to facts available.

Petitioners dispute Saarstahl's conclusion that the Department's verification of its packing expenses found no errors or discrepancies. According to petitioners, the Verification Report "only repeats the company's descriptions of its reporting methodology, offering neither a listing of discrepancies, nor the confirmatory phrase ‹no discrepancies were found.'" Petitioners' Rebuttal Brief at 27, quoting the Verification Report at 34 and 35. Petitioners assert that the verification report includes neither documentation of packing costs, nor any exhibit covering these expenses. This may be, petitioners suggest, because the Department was loathe to accept untimely new factual information within the context of verification. Because Saarstahl's underlying methodology suffered from "systemic problems," petitioners insist the Department is warranted in applying facts available, as it did in the *Preliminary Determination*. *Id.*

Department's Position:

We have used identical packing costs for both home market and U.S. sales because the record suggests at most a minimal difference in Saarstahl's plant packing costs for export sales *versus* domestic sales. The only indication on the record of possible differences in subject wire rod packing costs incurred by Saarstahl at its plants is a reference made at verification by the company that "...coils intended for shipment overseas would also be covered in plastic...." *See* Sales Verification Report at 16. There is no indication of the actual magnitude of such differences. Information provided by Saarstahl, and not contradicted by findings at verification, support the Department's contention that the expenses associated with plastic are minimal. *See* March 15, 2002, submission at Appendix S-19. For additional explanation, please *see* the Final Analysis Memorandum.

However, the Sales Verification report also indicates, at page 34, that the reported plant-specific packing expenses (*see* Appendix S-69 of the April 30 submission) cover all products, not just subject merchandise. No information on the record suggests that Saarstahl maintains any product-specific packing cost data, but the plant-specific packing cost data provided by Saarstahl consists of many varieties of steel that differ significantly in size and shape from the subject merchandise. The Burbach mill appears to be the most representative of subject merchandise, based on the size of the wire rod mill and the mix of products (*see, e.g.*, Verification Exhibit 1 at 4). Consequently, we have used the average 2000-2001 packing cost per ton for that mill for all sales in both markets.

Comment 9: Exclusion of Tire Cord and Tire Bead Wire Rod

Respondent argues the Department should amend the scope of the investigations to exclude grades 1070, 1080 and 1090 tire cord and tire bead quality wire rod (tire cord wire rod). Saarstahl recounts the history of various interested parties seeking the exclusion of these grades of tire cord wire rod. The Department responded in its *Preliminary Determination* by granting only a limited exclusion for grade 1080 tire cord wire rod, Saarstahl claims, including petitioners' suggested end-use certification requirements.[9] Respondent's Case Brief at 33 and 34. According to Saarstahl, petitioners continue to oppose any additional exclusions for tire cord wire rod, despite conceding they are not capable of making these grades. *Id.* at 34. Saarstahl dismisses petitioners' claim that three domestic manufacturers presently supply grade 1070 tire cord wire rod, quoting a July 8, 2002, submission of the Rubber Manufacturer's Association, a coalition of five major tire producers. According to Saarstahl, the tire makers concluded suitable tire cord wire rod "is simply not available from domestic sources." *Id*. quoting the Rubber Manufacturers Association's July 8, 2002, letter.

[9]We note the scope, as amended by petitioners, does not presently require any certification of the end-use of grade 1080 tire cord wire rod. The scope does include a provision which might trigger the importer certifying end use, but only after petitioners adduced evidence that this product is being imported for other applications.

Saarstahl submits the exclusion of tire cord wire rod would be consistent with past practice in investigations under both Title VII and section 201 of the Trade Act of 1974 (or "Safeguards" investigations). Respondent's Case Brief at 35, citing Commission determinations in March 1994, November 1997, July 1999, and February 2000. Furthermore, Saarstahl contends, including these grades in this investigation "would penalize U.S. industries that are end-users of tire cord wire rod without significantly helping the domestic steel wire rod industry, which has failed to produce commercially acceptable tire cord and tire bead wire rod ... ." *Id.* Saarstahl points to a post-conference brief filed with the Commission in its concurrent injury investigation by the American Wire Producers Association (AWPA) in which the AWPA claimed a 25-year history of futility in qualifying domestic wire rod producers' tire cord wire rod. *Id.* at 35, quoting the AWPA's September 21, 2001, Post-Conference Brief. Saarstahl claims that petitioners of "using the 1080 wire rod exclusion as a means to extort financial concessions from its customers." *Id*. at 36. As evidence for this charge, Saarstahl quotes an October 9, 2001, letter filed by petitioners with the Commission in which they suggest the pendency of these investigations will induce tire makers "to *invest* in the qualification process with domestic wire rod producers." *Id.*, quoting Petitioners' October 9, 2001, letter (Saarstahl's emphasis). Saarstahl exhorts the Department to forestall this "abuse of the U.S. legal system," and grant the requested exclusions for tire cord wire rod. *Id.*

Petitioners declare Saarstahl's request should be rejected as "there is no basis in fact or law" for acceding to it. Petitioners Rebuttal Brief at 29. The grades of tire cord wire rod Saarstahl would like excluded "clearly fall within the scope of this case," petitioners insist. Petitioners label "absurd" Saarstahl's argument that petitioners "are using the 1080 wire rod exclusion as a means to extort financial concessions from its customers," claiming Saarstahl's dumping more accurately explains why U.S. producers have been locked out of the tire cord wire rod market. *Id.* at 30, quoting Respondent's Case Brief.

Saarstahl, petitioners claim, makes two additional arguments, both "devoid of legal merit." *Id.* First, petitioners aver, Saarstahl suggests that because tire cord quality wire rod was excluded from prior cases it should, therefore, be excluded from the present case. Petitioners reject that notion by pointing out that this is a new investigation with a new determination of its scope. "Nothing binds the Department to the scope defined in those prior cases, which is evidenced by Saarstahl's inability to cite a regulation or a case supporting its argument." *Id.* Petitioners dismiss Saarstahl's second argument, that including tire cord wire rod will "penalize" U.S. tire makers without benefitting domestic wire rod producers, claiming it represents the respondent's self-serving conclusion that it would prefer that the scope were different.

Petitioners claim the Court has "carefully considered" how to deal with challenges to the Department's scope determinations, and has consistently deferred to the petitioning industries' leading role in defining the scope. For example, petitioners note, in *FAG Kugelfischer Georg Schafer KgaA v United States*, 932 F. Supp. 315, 318 (Ct. Int'l Trade 1996) the Court spoke approvingly of the Department's "inherent authority to define the scope of an antidumping duty investigation." The Department, the Court noted, must make its scope determinations "with ample deference to the intent of the petition." Petitioners' Rebuttal Brief at 31. Similarly, the

Department's regulations indicate the Department "typically accommodates the domestic industry's desire to include a product in the scope of an investigation." *Id.* at 32. Finally, petitioners cite a case where the Department noted the "great weight" it affords petitioners in best defining the products for which they require relief: "[t]he Department generally does not alter the petitioner's scope definition except to clarify ambiguities in the language or address administrability problems." *Id*., quoting *Melamine Institutional Dinnerware Products From the People's Republic of China*, 67 Fed. Reg. 1,708, 1,712 (January 13, 1997).

Petitioners suggest an ulterior motive behind Saarstahl's "expansion" of its scope exclusion request: its "failure to substantiate that it has been reporting excluded 1080 grade products in accordance with the Department's instructions." Petitioners' Rebuttal Brief at 33. Petitioners accuse Saarstahl of reporting as excluded grade 1080 tire cord wire rod products which do not meet the tightly limited definition of excluded tire cord wire rod in the investigation's scope. In petitioners' view, Saarstahl was unable to substantiate the physical and chemical characteristics of its tire cord wire rod as meeting the definition of high-carbon, high-tension grade 1080 tire cord and tire bead quality wire rod. *Id.* at 34. In fact, petitioners assert, when pressed at verification on this point, Saarstahl could only provide certification for a single customer; sales of putative grade 1080 wire rod did not include the certifications required to demonstrate the product met the requirements for inclusions, decarburization, segregation and fissures set forth in the *Preliminary Determination.* According to petitioners, one such sale was certified only as a high-carbon product, and not as a tire cord quality product at all. *Id.* Petitioners insist the Department should apply facts available to all sales of so-called grade 1080 tire cord quality wire rod which lack the requisite documentation of its meeting the Department's specific exclusion for this product.

Department's Position:

We disagree with Saarstahl. We have determined the scope of these investigations properly includes the tire cord wire rod at issue. As noted in the Department's memorandum from Richard Weible to Faryar Shirzad, "Carbon and Certain Alloy Steel Wire Rod; Antidumping Duty (Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine) and Countervailing Duty (Brazil, Canada, Germany, Trinidad and Tobago, and Turkey) Investigations: Requests for Scope Exclusion," dated August 23, 2002, the tire cord wire rod products at issue clearly meet the physical and chemical descriptions of the merchandise subject to these investigations and the requesting parties have adduced no substantive grounds for their exclusion. Furthermore, petitioners continue to oppose any additional alterations to the scope of these investigations to exclude additional tire cord wire rod products.

Based on our findings at verification, we determined that one U.S. sale Saarstahl had identified as outside of the scope should in fact be included in the database, as it is clear that the merchandise in question cannot be classified as excluded 1080 tire cord wire rod merchandise. *See* Final Analysis Memorandum for additional explanation.

Comment 10: The "Zeroing" Methodology

Saarstahl urges the Department to conform its final determination with the findings of a WTO Dispute Settlement Panel in *European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/R (October 30, 2000) (*Bed Linen*). In that case the Panel struck down the European Commission's practice of assigning a zero margin to any transaction where the export price *exceeded* normal value. Saarstahl claims the Panel found this practice, termed the "zeroing" methodology, violative of the averaging provisions of Article 2.4.2 of the WTO Antidumping Code. Respondent's Case Brief at 36 and 37. According to Saarstahl, the Panel concluded the zeroing methodology is contrary to the Code's requirement that margin calculations be based on a comparison of prices of all comparable export transactions. *Id.* The Department, Saarstahl notes, uses the same methodology in its calculations by setting to zero all negative dumping margins.

Saarstahl rejects the Department's previous arguments that it accounts for negative dumping margins by including the value of these sales in the denominator used to calculate the overall weighted average dumping margin (this calculation sums the potentially uncollectible dumping duties and divides this figure by the total value of the respondent's reported U.S. sales). Saarstahl accuses the Department of disingenuousness in forwarding this argument, suggesting that, at best, this approach only partially attenuates the effect of zeroing out negative margins. Saarstahl suggests that to properly address the impact of negative margin transactions, the Department must include the negative margins in the numerator as well as include their sales value in the denominator. Respondent's Case Brief at 38. In fact, Saarstahl asserts, the WTO Panel explicitly rejected the half-measure employed by the Department. More to the point, Saarstahl declares, the Department's interpretation "is a clear violation of U.S. law." *Id*., citing the Department's *Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 Fed. Reg. 49,622, 49,625 (September 28, 2001).

Saarstahl maintains section 771(35)(A) of the Tariff Act calls for weighted average margins to be based upon "aggregate dumping margins" divided by the "aggregate export prices and constructed export prices." *Id*., quoting section 771(35)(A) of the Tariff Act. "The plain meaning of 'aggregate' is the sum of *all*, and not the sum of only some." *Id.* The Department, Saarstahl avers, is even inconsistent in defining "aggregate" within a single sentence, using the correct meaning in describing the denominator used (*i.e.*, the sum of all sales values, including negative margin sales) while using an incorrect meaning in defining the numerator (*i.e.*, the sum of all positive margins, disregarding negative margins). Saarstahl submits "aggregate" must mean the same thing when it is used twice in a single sentence; if the Department believes it appropriate to include negative margin sales in the overall average, it must include them in both halves of the equation. *Id*. at 39.

Saarstahl concludes there are no distinctions between the Department's zeroing methodology and the methodology proscribed in *Bed Linen*. As the WTO represents a binding obligation upon the United States, and as acts of Congress "ought never be construed to violate the law of nations, if any other possible construction remains," Saarstahl holds the Department must abjure its zeroing

methodology for this final determination. *Id.* citing *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1985).

Petitioners counter that "[i]n every instance that this issue has been raised, the Commerce Department has properly rejected this argument." Petitioners Rebuttal Brief at 28. Petitioners cite "Issues and Decision Memoranda" arising from *Certain Stainless Steel Wire Rod From India*, 67 Fed. Reg. at 37,391 (May 29, 2002), and *Structural Steel Beams From Spain*, 67 Fed. Reg. 35,482 (May 20, 2002). In those cases, petitioners aver, the Department firmly rejected the same argument, finding the WTO's *Bed Linen* decision was inapplicable to U.S. antidumping proceedings. Petitioners urge the Department to find similarly in this case.

Department's Position:

We disagree with Saarstahl and have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for the final determination. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Tariff Act. *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Standard Steel Beams from Spain*, 67 FR 35482 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 15. As discussed below, non-dumped sales are included in the weighted- average margin calculation as just that - sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow non-dumped sales to cancel out dumping found on other sales.

This methodology is required by U.S. law. Section 771(35)(A) of the Tariff Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) defines "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." These sections, taken together, direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not itself apply on an aggregate basis. At no stage in this process is the amount by which export price or constructed export price exceeds normal value on non-dumped sales permitted to cancel out the dumping margins found on other sales.

This does not mean, however, that non-dumped sales are ignored in calculating the weighted-average rate. It is important to note that the weighted-average margin will reflect any 'non-dumped' merchandise examined during the investigation: the value of such sales is included in the denominator of the dumping rate, while no dumping amount for 'non-dumped' merchandise

is included in the numerator. Thus, a greater amount of 'non-dumped' merchandise results in a lower weighted-average margin.

This is, furthermore, a reasonable means of establishing duty deposits in investigations, and assessing duties in reviews. In an investigation such as the present case, the deposit rate calculated must reflect that fact that the Customs Service is not in a position to know which entries of merchandise entered after the imposition of a dumping order are dumped and which are not. By spreading the estimated liability for dumped sales across all investigated sales, the weighted-average dumping margin allows the Customs Service to apply this rate to all merchandise entered after an order goes into effect.

Finally, with respect to respondent's WTO-specific arguments, we note that U.S. law, as implemented through the URAA, is fully consistent with our WTO obligations.

Comment 11: The Arm's-Length Test

Saarstahl suggests the Department erred in running its arm's-length test by excluding all sales of non-prime merchandise; these sales, however, were included in the actual margin calculations. Eliminating these non-prime sales, Saarstahl alleges, caused one customer to fail the arm's-length test, when it would have passed had they been included. Respondent's Case Brief at 40. Saarstahl asks that we treat non-prime sales consistently in both the margin calculation and the arm's length test.

Petitioners disagree, claiming that exclusion of non-prime merchandise from the arm's-length test "permits testing relative price levels without the potentially aberrant pricing patterns resulting from the type of deeply discounted, fire-sale pricing often required to get rid of non-prime merchandise." Petitioner's Rebuttal Brief at 36. If the Department determines it should include non-prime merchandise, petitioners suggest the only appropriate test would be to compare affiliated and unaffiliated models by both model number (CONNUMH) and prime/non-prime designation (PRIMEH).

Department's Position:

We disagree with Saarstahl. The Department frequently excludes sales of non-prime merchandise when running the arm's-length test. Furthermore, potential problems with the accuracy of Saarstahl's processing system with respect to prime *versus* non-prime sales suggest that it would be particularly inappropriate to include non-prime sales from the arm's length test in this case. For example, there is evidence that Saarstahl's order processing system – "the only place in which the prime and non-prime codes are used" – contains inaccurate information with respect to the coding of non-prime merchandise, and that such information had not been corrected in Saarstahl's order processing system even when it was discovered. *See* Saarstahl's April 30, 2002, submission at 1 and 2. The example of the identified problem cited by Saarstahl involves specific merchandise shipped to one customer, then re-shipped to another customer.

Ibid. Because the very essence of the arm's-length test requires proper identification of specific products by customer, such uncorrected, and potentially systematic, problems with Saarstahl's internal documentation warrants the Department's continued exclusion of non-prime sales from the arm's-length test, consistent with past Department practice.

Comment 12: Level of Trade

Saarstahl accuses the Department of improperly denying the company a level of trade (LOT) adjustment for its home market and U.S. market sales through Channel 2. Respondent notes sales in home market and U.S. channel 1 are shipped directly from the mill to the customer, whereas channel 2 sales in either market are shipped to a distribution warehouse and held for just-in-time delivery, Respondent's Case Brief at 40. For many of these transactions, including U.S. channel 2 sales, where Saarsteel, Inc. rents the warehouse space, Saarstahl bears the warehousing costs. An even more significant difference involves the invoicing for the two types of transactions. According to Saarstahl, it invoices channel 1 sales upon shipment. However, channel 2 sales are only invoiced at the time merchandise is withdrawn from warehouse. As a result, Saarstahl avers, it "effectively finances the cost of merchandise until the customer chooses to withdraw it." *Id*. at 41. As a final note, Saarstahl refers to "the Department's consistent practice" of finding different levels of trade between produced-to-order sales and just-in-time delivery sales from inventory. *Id*., citing the Department's January 15, 2002 "Issues and Decision Memorandum" for *Stainless Steel Bar From Germany*, at comment 3. Accordingly, Saarstahl asks the Department to grant it a LOT adjustment for its channel 2 sales.

Petitioners assert that the record does not support finding separate levels of trade in either market. As to the home market, petitioners point to Saarstahl's section A response as the respondent's admission that no significant differences exist in direct technical expenses and advertising. While Saarstahl claimed significant differences in warehousing, petitioners continue, the respondent reported very little warehousing expenses because, in most cases, its customers actually bear the costs. Petitioners' Rebuttal Brief at 37 and 38. Similarly, no difference in warranty expenses was reported in Saarstahl's responses. Accordingly, petitioners declare, all home market sales should be assigned the same level of trade.

Turning next to the U.S. market, petitioners suggest Saarstahl "failed to demonstrate any substantial differences in selling functions between its supposed ‹levels of trade.'" *Id.* at 39. As in the home market, petitioner claims there were no significant differences between sales channels for technical expenses and advertising. Saarstahl incurred little warehousing expenses, and reported none at all, petitioners note, despite Saarstahl's claim that its warehousing expenses would support its level-of-trade claim. As in the home market, petitioners charge Saarstahl with failing to report warranty expenses separately to substantiate its claim of varying levels of trade. Instead, petitioners aver, any warranty claims were merely lumped together with other billing adjustments. Even CEP sales through Saarsteel fail to establish a separate level of trade because, petitioners argue, the *adjusted* CEP sale (i.e., that from VGS to Saarsteel) is at the same level of trade as VGS's EP sales to unaffiliated customers. *Id*. at 41. Petitioners dismiss Saarstahl's

suggestion that differences in invoicing practices between channel 1 (direct shipment) and channel 2 (sales from consignment warehouses) justify a level of trade distinction. The only real distinction, petitioners aver, is the extended opportunity cost on revenues for the warehoused sales, an expense petitioners maintain is offset by the corresponding reduction in costs of warehousing inventory at Saarstahl's mill. *Id*. at 43. Petitioners suggest *Stainless Steel Bar From Italy* (67 Fed. Reg. at 3,155, January 23, 2002) supports finding one level of trade where the respondent made sales directly to customers and also through stocking service centers - even if the respondent in that case, unlike here, bore the costs of the warehousing.

Finally, petitioners claim no CEP offset is warranted in lieu of a level-of-trade adjustment. Citing *Stainless Steel Plate in Coils From Belgium* (67 Fed. Reg. 39,354, 39,356, June 7, 2002), petitioners note the Department declined to find separate levels of trade, despite similar differences in selling functions for the respondent, ALZ. As there is no basis for finding separate levels of trade, petitioners conclude, there is no justification for either a level-of-trade adjustment or the alternative CEP offset.

Department's Position:

We agree with petitioners that Saarstahl has failed to establish entitlement to a level of trade adjustment. In accordance with section 773(a)(1)(B) of the Tariff Act, to the extent practicable, we determine the NV based on sales in the comparison market at the same level of trade (LOT) as the EP or CEP transaction. The NV LOT is that of the starting-price sales in the comparison market or, when NV is based on constructed value, that of the sales from which we derive SG&A expenses and profit. For EP the U.S. LOT is also the level of the starting-price sale, which is usually from the exporter to the importer. For CEP it is the level of the constructed sale from the exporter to the importer. To determine whether NV sales are at a different LOT than EP or CEP, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and sales at the LOT of the export transaction, we make a LOT adjustment pursuant to section 773(a)(7)(A) of the Tariff Act. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From South Africa*, 62 FR 61731 (November 19, 1997).

In the preliminary determination, we found no significant differences between the LOT of Saarstahl’s U.S. sales and the LOT of its home market sales. Accordingly, we determined that all sales in the U.S. and the home market were made at the same LOT, and a LOT adjustment was not appropriate. As discussed below, Saarstahl has not provided any evidence in the final determination, demonstrating otherwise.

In the home market, Saarstahl reported that it sold through two channels of distribution: channel 1 home market sales were manufactured to order and shipped directly to the customer, while channel 2 home market sales were manufactured to order and maintained in specific warehouses for withdrawal by the customer. Saarstahl indicates that channel 1 in both markets constitutes

one level of trade, while channel 2 in both markets constitutes a second level of trade. Saarstahl's distinction between the proposed levels of trade is based upon the performance of just-in-time warehousing for channel 2 sales in both markets. The warehousing to which Saarstahl refers for channel 2 U.S. sales, which are CEP transactions, takes place after the sale from VGS to Saarsteel and after the entry of the merchandise into the United States. Therefore, such warehousing is not relevant for purposes of the level of trade analysis, and based on Saarstahl's own analysis there would exist just one level of trade for all U.S. sales, which would also be the same as the level of trade for channel 1 home market sales.

Regarding channel 2 home market sales, we agree with petitioners that the warehousing function performed by Saarstahl is minimal, given that it incurs very little warehousing expenses due to the fact that, in most instances, the customers actually bear the costs of the warehousing. Also, there are some inventory-related functions performed by Saarstahl with respect to export sales in particular, such as its involvement in the accumulation of wagons in Saarbrucken to form trains of steel products for export, and in the accumulation of steel at the port for loading for export (which in some instances may take several weeks). Furthermore, for the mill we chose to visit, the Burbach Mill, Saarstahl does maintain a considerable portion of its output as inventory, with no indication that such inventory is targeted specifically by market or by channel of trade: As noted in the Sales Verification Report, "Mr. Lilienthal stated that about 60 percent of the coils go directly to the transport out of the plant, with the remaining 40 percent going into stock at the mill." *See* Sales Verification Report at 16. While these inventory-related functions pertaining to export sales and to merchandise generally are not particularly significant, neither is that described by Saarstahl for its channel 2 home market sales, and on balance it is evident that there is no basis for differentiating levels of trade based on such minimal functions.

Also, for all channel 2 sales, Saarstahl has identified as the appropriate date of sale the date of the invoice from VGS to the unaffiliated customers, and the issuance of this invoice occurs only after the customers' withdrawal of merchandise from inventory. By implication, no sale has taken place during the time the merchandise is in inventory, and it is possible that customer withdrawal may never even take place. Saarstahl has noted that neither the sales quantity nor the price are finally known until a customer withdraws the merchandise from inventory (*see* the March 15, 2002, submission at 32), and that "VGS holds title to all merchandise at the warehouses in Germany until the full purchase price is paid by the unaffiliated customer" (ibid, at 44). Saarstahl also claims that the customer is obliged to eventually withdraw the merchandise from the warehouse and pay the price. Nevertheless, if post-order-confirmation changes to size and delivery date "occur quite often" (*see* the February 1, 2002, submission at 22), then the very essence of what constitutes just-in-time delivery (specific merchandise available at a specific time) is frequently changing after the original sales agreements take place. If agreement on such factors (specific sizes and delivery dates) are subject to change, and in fact frequently do change, throughout the entire process, then it is unclear what if any predictable service has been provided to the unaffiliated customers, regardless of whether or not they bear the actual costs of the warehousing.

In any case, Saarstahl has not demonstrated that any possible minimal difference in selling activities that might exist across channels of trade and markets constitutes enough for separate LOTs to exist. As a result, we determine that Saarstahl's U.S. and home market sales are all at the same level of trade, regardless of channel.

Therefore, we have not made a LOT adjustment because all price comparisons are at the same LOT and an adjustment pursuant to section 773(a)(7)(A) of the Act is not appropriate. Additionally, because we found that the LOT in the home market matched the LOT of the CEP transactions, we are not providing a CEP offset by adjusting normal value under section 773(a)(7)(B) of the Act.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the positions set forth above and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination and the final weighted-average dumping margins for all firms in the *Federal Register*.

Agree_____ Disagree_____ Let's Discuss_____

_____

Faryar Shirzad
Assistant Secretary
for Import Administration

_____

Date