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June 23, 2008

VIA HAND DELIVERY

The Honorable Carlos M. Gutierrez
Secretary of Commerce
Attn: Import Administration
APO/Dockets Unit, Room 1870
U.S. Department of Commerce
14th Street & Constitution Ave., NW,
Washington, DC 20230.

Re: Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods

Dear Mr. Secretary:

On behalf of Nucor Corporation, a U.S. producer of steel products and participant in multiple antidumping duty investigations and administrative reviews, we file these comments in response to Department's May 9, 2008 request regarding development of a predictable methodology for using shorter cost averaging periods.[1] Nucor believes that the Department should maintain a strong preference for annual periods and should only deviate from annualized costs in extreme circumstances. Nucor further believes that any methodology for determining when

[1] *Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment*, 73 Fed. Reg. 26364 (May 9, 2008).

such deviations are appropriate should be formulated to safeguard the integrity of agency proceedings and to reduce the administrative burden on the Department.

As such, Nucor outlines below certain suggestions that may aid the Department in developing a solid methodology that is not subject to abuse and does not create undue burdens on the Department. Among other things, the Department should ensure that the burden of proof for deviating from annualized costs lies on the party seeking the use of a shorter period, and that the requisite showing guarantees that a shorter averaging period will increase accuracy in the calculations. The Department should also limit the use of shortened averaging periods so as to ensure that the use of a shorter averaging period is not inconsistent with the treatment of costs in other areas of the investigation or review.

A. The Party Seeking the Use of a Shorter Period Should Bear the Burden of Proof

In developing its methodology, the Department should start with the presumption that annual cost reporting is the most appropriate method for calculating dumping margins. Accordingly, the burden of proof for demonstrating otherwise should be on the party requesting a shorter period. That party should be required to put forth a clear and convincing argument, supported by direct evidence, and filed on a timely basis and in complete form. Nor should the Department take the position that the agency bears the burden of notifying the party of any deficiencies in its request.

The Department should require parties seeking changes in the cost-averaging methodology to make their claim early in the proceedings. This will permit other parties a meaningful opportunity to submit evidence and argument on

the issue, and will also ensure that the Department has sufficient time to evaluate the claim. With this in mind, the Department should require that such claims be made within twenty days of the submission of the initial Section D response. Finally, pending a determination as to the proper cost-averaging period in a given proceeding, the Department should allow a respondent to submit cost data on a shortened basis only in addition to, rather than in substitution for, annual data.

Annual cost averaging promotes accuracy in dumping calculations by smoothing out short-term fluctuations in production costs. As the Department itself noted in its the request for comments, there are certain factors inherent in every company's cost structure that do not lend themselves to a shortened cost period. Items such as year-end adjustments, equipment shutdowns, startups, etc, cannot easily be accounted for using shortened cost-averaging periods without causing significant distortions. In addition, the annualized period gives the Department a solid basis upon which to analyze whether a respondent company has achieved a reasonable recovery of costs. Accordingly, the quantum of evidence necessary to deviate from annualized costs must involve a showing that a shorter averaging period would be more accurate than annualized costs.

In respect of this, the evidence the Department should require of a party seeking a change away from annualized costs must involve a demonstration of a direct linkage between costs and sales prices within the proposed period. The Department has rightly found that a linkage between costs and sales prices must underpin claims for using shorter periods in the past. While some companies approach their pricing strategy on a cost plus basis, this practice is not uniform, nor

is it the only basis for pricing. Indeed, many companies use a market based pricing strategy, while others use predatory pricing that may not reflect either costs or market conditions. Therefore, the Department must ensure that respondents bear the burden of demonstrating a linkage between prices and costs.

With that in mind, the Department should only consider requests to deviate from annualized costs in those situations where the respondent uses batch accounting for its costs. As demonstrated by the Department's findings in *Brass Sheet and Strip from the Netherlands*, it is only in a batch accounting environment that the respondent can show, and the Department can accordingly evaluate, a direct linkage between sales and costs. Indeed, even in a batch accounting environment, this will only be possible where the respondent maintains inventory records whereby the Department can trace the actual production costs to the actual sales prices, or where there is a pass-through situation as seen in *Brass Sheet*.

The Department should not permit respondents to attempt to demonstrate a link between costs and sales prices on the basis of indirect links because, absent the direct link (i.e. price and cost) that it normally considers, a party will not be able to isolate the two factors. In such situations, factors apart from cost disruptions (such as poor supply chain management), may be partially or wholly responsible for any claimed distortions. In addition, Nucor notes that, in its experience involving antidumping duty orders on steel products, almost all sales in respondents' home markets sales are made from inventory. A respondent's inventory carrying period necessarily distorts any attempt to evaluate an indirect linkage between sales and costs. The greater the period, the greater the distortion. Therefore, absent

demonstrable direct linkages between input costs and output prices within a given period, the Department should be prepared to deny claims for the use of a shorter-than-annual cost-averaging period.

B. The Department Should Limit the Use of Shortened Periods

Where the Department determines that the party seeking the use of a shorter-than-annual cost-averaging period overcomes the burden of proof, the Department must nonetheless be careful to limit the use of shortened periods to those situations and applications in which it is obviously necessary to promote accuracy. Where the use of such shorted period costing is either unnecessary to promote accuracy, or irrelevant or inconsistent with the calculation at issue, the Department should proceed on the basis of normal, annualized costs. The Department will also have to address how to handle a request for a shortened averaging period in the context of first administrative reviews, which normally cover 18 months, and new shipper reviews, which can be limited to six months.

Prior to agreeing to deviate from annual costs, the Department should consider the effects of such deviations. Nucor foresees the likelihood wherein respondents will argue for the use of shorter periods because the resulting comparison will yield a distorted, yet beneficial result, such as where a model with a shortened period is used as a surrogate for a model with no production during the POR. The Department should establish a policy regarding those types of comparison in which it is inappropriate to use a shortened period, regardless of the arguments and evidence on the record.

For example, the Department should limit the use of shortened cost averaging periods to proceedings involving a sales-below-cost investigation. In those investigations or reviews where constructed value forms the basis for normal value, the Department should continue to use an annual period at all times. Likewise, the Department should not allow respondents to use a shorter averaging period when reporting VCOM/TCOM in its Sections B and C databases. The Department should also restrict the use of a shortened cost period where there are models with no production during the POR/POI and a surrogate cost is being reported. Given that surrogate costs are less accurate then actual costs, there is no gain in accuracy by introducing another layer of distortion.

Another issue that the Department should consider is whether, even in the absence of shortened cost-averaging period analysis, sales and costs are being reported on the basis of shorter periods (i.e. a shortened cost reporting period) because the respondent only made U.S. sales in a particular month or months. In that scenario, the agency should not allow a further subdivision of the period.[2] Finally, respondents should not be allowed to argue that the special type of constructed value used in the Department's non-market methodology is subject to a shorter averaging period when there is a significant change in the surrogate values.

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[2] Nucor can easily foresee a situation whereby a respondent requests a waiver to report home market sales data only for the window months rather than the full POR and then requests shortened costs data matching to the home market sales months, and then requests that the cost data be further subdivided into short averaging periods. If respondents are allowed such a request, an extremely contrived analysis would result, shielding large amounts of relevant data from review.

Moreover, the Department should make any adjustments to the cost reporting period in a manner consistent with its treatment of the underlying inputs in other parts of its cost analysis. For example, it would be inappropriate for Commerce to allow a respondent to argue that an input is not major for purposes of the major input rule, but then consider the use of a shorter cost averaging period based on significant cost changes in that same input(s).[3] In a similar vein, the calculation of constructed value profit, the calculation of CEP profit, VCOM/TCOM in both the arm's-length test and the concordance analysis, as well as the cost test itself all rely on data derived from the Section D database. Therefore, the Department should consider whether any changes to the cost averaging period would conflict with the statutory and regulatory provisions that govern those calculations. For example, the CEP profit calculation requires that profit be measured on a full compliment of data by use of the terms "total expenses" and "total actual profit."

Finally, where a party does satisfy the conditions for use of shorter cost averaging periods, the Department should attempt to minimize the number of periods used. Any division of an annualized period will itself create distortion because of the abandonment of the reasonable recovery prong of the below-cost test. The greater the number of periods, the greater the distortion. Given the Department's directive to calculate margins on an as accurate basis as is possible,

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[3] Nucor notes that the Department has recently altered its analysis to rely on COM rather than major inputs. Nucor supports the use of COM as the focus of this analysis.

the Department should proceed on the basis of the longest periods that are possible given the facts at hand.

C. Other Concerns

In evaluating a claim for the use of shorter averaging periods, the Department should act to ensure that the evaluation is taken on a broad basis, such that the potential to "game the system" is reduced. For example, the Department should evaluate the claim by reviewing the impact of cost increases or decreases on all models, rather than on the basis of a limited number of self-selected comparison. Moreover, Commerce should consider whether all respondents have the same cost disruptions or not. For example, if one respondent meets its burden of proof in those scenarios that allow for a shortened cost averaging period, Commerce should still consider whether the lack of such an experience by other respondents suggests some other cause for the cost variation.

The Department should also clarify and distinguish between a shortened cost reporting period and a shortened cost averaging period. As stated above, as a rule the agency should not allow a shortened averaging period when it is also allowing a shortened cost reporting period. In addition, the Department should eliminate the recovery of costs test when it allows a shorter cost averaging period.[4]

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[4] The Department already has a practice of eliminating this prong of the cost test where limited home market sales are reported. *See* Mem. from Timothy Finn to Holly A. Kuga, re: *Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products From India*: Request for Limited Reporting Periods (Feb. 25, 2003), included at Attachment 1. *See also Certain Pasta From Turkey*, 66 Fed. Reg. 34410 (Dep't Commerce June 28, 2001) (prelim. results of the antidumping duty admin. rev. and partial rescission).

Finally, Nucor strongly disagrees with the Department's suggestion that boilerplate questions on cost averaging be added to the Section A questionnaire. Commerce should not be in the position of encouraging the use of what should be a rarely used methodology. Including such questions would only encourage respondents to "try their luck" when conditions are favorable, wasting Commerce's limited resources and increasing its burden.

II. CONCLUSION

The Department should proceed cautiously in considering any changes to the practice that it has developed in respect of shorter cost periods. While Nucor appreciates the Department's concern that a clear and predictable framework for analysis be formed, the Department should make clear that such a formulation does not signal a change in the frequency of use of shorter cost averaging periods. To guard against the possible distortions and administrative burdens that could result from an increase in the use of such periods, the Department should implement strong evidentiary burdens and a high bar for the linkage of sales and costs prior to granting such a request.

Respectfully submitted:

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Attachment 1

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UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

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POR: 5/3/01-11/30/02
Proprietary Document
G2/O4: TPF
PUBLIC VERSION

FEB 25 2003

FOR OFFICIAL FILE

MEMORANDUM TO: Holly A. Kuga
Senior Office Director
Group II, Office IV
AD/CVD Enforcement

THROUGH: Howard Smith
Program Manager
Group II Office IV
AD/CVD Enforcement

FROM: Timothy Finn
Import Compliance Specialist
Group II Office IV
AD/CVD Enforcement

DATE: February 25, 2003

RE: Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products From India: Request for Limited Reporting Periods

Background

In response to timely requests for an administrative review from Essar Steel Limited (Essar) and Tata Iron and Steel Company Limited (Tata), on January 15, 2003, the Department of Commerce (the Department) initiated administrative reviews of these two companies with respect to the antidumping duty order on certain hot-rolled carbon steel flat products from India. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 68 FR 3009 (January 22, 2003). Essar filed its response to section A of the Department's questionnaire on January 24, 2003. Its response to the other sections of the questionnaire are due on February 28, 2003. Tata's response to section A and sections B and C of the questionnaire are not due until February 27, 2003 and March 3, 2003, respectively.

Argument

On January 15, 2003, Essar requested that it be allowed to report cost information and home market sales for periods other than the May 3, 2001 through November 30, 2002, period of review (POR). Specifically, Essar requests that it be allowed to report home market sales for the six-month period August 1, 2002 through January 31, 2003 because it [
] and the Department's questionnaire requires respondents to only report

sales of foreign like product during the months in which U.S. sales were made, as well as three months before and two months after the first and last of those months (the 90/60 day window period).[1] In addition, Essar requests that it be allowed to report costs incurred during its fiscal year, April 1, 2001 through September 30, 2002, because its fiscal year ended less than three months before the end of the POR.[2] Essar notes that this fiscal year extended beyond its normal fiscal year because it was in the process of changing its depreciation method and did not close its books until September 30, 2002. According to Essar, reporting costs for its fiscal year will facilitate reconciling those costs to its financial statements, and thus simplify verification.

On January 29, 2003, Tata, notified the Department that it only made U.S. sales during the month of October 2002. Therefore, based on instructions in the questionnaire to report sales of foreign like product during the months of its U.S. sales, as well as three months before and two months thereafter, Tata states that it intends to limit its reporting of home market sales to the six-month period July 1, 2002 through December 31, 2002. Tata also notified the Department that it intends to limit its reporting of home market indirect selling expenses to the same period for which it is reporting home market sales. Tata maintains that allowing it to engage in limited reporting is consistent with the approach taken by the Department in several cases with similar circumstances and would greatly facilitate preparation of the questionnaire response.[3]

Tata was not a respondent in the investigation of certain hot-rolled carbon steel flat products from India and no sales-below cost allegation has been made against it. Therefore, it is not required to report costs to the Department.

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[1] See the Department's January 3, 2003 questionnaire at B -1.

[2] The Department's January 3, 2003 questionnaire states "{i}f your company's fiscal year ends within three months of the POR and you want to report COP and CV based on your company's fiscal year, you must contact the official in charge within 14 days after receipt of the initial questionnaire. See the Department's January 3, 2003 questionnaire at D-2.

[3] See Notice of Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Intent Not To Revoke Order in Part Pure Magnesium From Canada; 67 FR 57217 (September 9, 2002)(Pure Magnesium From Canada), where the Department allowed the respondent to report home market sales for a limited period. See Notice of Preliminary Results and Partial Rescission of Antidumping Administrative Review; Certain Pasta from Turkey; 65 FR 48,474 (August 8, 2000); Notice of Preliminary Results and Partial Rescission of Antidumping Administrative Review; Certain Pasta from Turkey; 66 FR 34,410 (June 28, 2001); Notice of Preliminary Results of the Antidumping Duty Administrative Review; Certain Corrosion-Resistant Carbon Steel Flat Products from Japan; 64 FR 44,483 (August 16, 1999) (Certain Corrosion-Resistant Carbon Steel Flat Products From Japan).

On February 4, 2003, Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation (collectively, the petitioners), submitted comments opposing Essar's and Tata's requests to engage in limited reporting of home market sales.[4] The petitioners note that the Department has not yet made a decision regarding the appropriate date of U.S. sales which may affect the 90/60 day window period for reporting home market sales. Additionally, the petitioners note that Tata has not yet filed a response to the Department's questionnaire, so it is unclear whether it made sales of subject merchandise during months other than October 2002.[5] The petitioners also point out that in the ongoing administrative review of certain hot-rolled carbon steel flat products from Thailand, the Department rejected a similar request.

Finally, with respect to Tata, the petitioners maintain that if the Department decides to alter the home market sales reporting period, it should take all possible dates of sale into consideration. According to the petitioners, this would result in a reporting period no shorter than the period May 1, 2002 through January 31, 2003.

On February 11, 2003, Tata submitted comments rebutting the petitioners' arguments. Tata notes that it [

]. Based on these dates, Tata argues that it is appropriate to report home market sales for a period much shorter than the POR.

Moreover, Tata contends that the petitioners' position is contrary to Departmental practice and the instructions in the questionnaire. Tata notes that the petitioners would have the Department delay its decision in this matter until it determines the appropriate date of sale and performs sales completeness tests. However, Tata maintains that the Department regularly decides to limit the reporting period for home market sales before such events occur. See Pure Magnesium From Canada, 67 FR 57217, 57218 ; see also, Certain Corrosion-Resistant Carbon Steel Flat Products From Japan, 64 FR 44483 (in both cases, within approximately a month of publishing the initiation notice, the Department granted the respondent's request to limit the home market sales reporting period). Further, Tata asserts that the petitioners' position would require the Department to revise its questionnaire instructions because, following the petitioners' logic, a decision regarding the home market sales reporting period could not be made until after a verification has been conducted and the sale date and universe of U.S. sales has been confirmed.

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[4] The petitioners did not comment on Essar's request regarding the cost reporting period.

[5] The petitioners note that U.S. Census data shows imports of subject merchandise throughout the POR.

Analysis

Section 773(a)(1)(A) of the Tariff Act of 1930, as amended (the Act), defines normal value as the price at which the foreign like product is first sold for consumption in the exporting country at a time reasonably corresponding to the time of the sale used to determine export price or constructed export price. Regarding this reasonably corresponding time period, section 351.414 of the Department's regulations provides that in administrative reviews, the Department will base normal value on the weighted-average value of sales of the foreign like product during the contemporaneous month (*i.e.*, the first of either: 1) the month in which the U.S. sale was made, 2) the most recent of the previous three months, or 3) the earlier of the two months following the month in which the U.S. sale was made). Accordingly, in administrative reviews, comparison market sales used to establish normal value are limited to those sales made in the month in which the U.S. sale under consideration is made or in a month within the 90/60 day window period described above. Thus, as noted in the Department's questionnaire, the reporting period for comparison market sales depends on the dates of the respondent's U.S. sales. See page B-1 of the questionnaire issued in this administrative review.

Consistent with the statute and regulation cited above, and in accordance with the instructions in the Department's questionnaire, we recommend allowing the respondents to limit their home market sales reporting periods. However, we do not recommend accepting the reporting periods proposed by the respondents. In its section A response, Essar indicated that it finalizes commercial terms before issuing the sales contract. Although Tata has not yet submitted a response to section A of the Department's questionnaire, in comments regarding the appropriate reporting period, Tata identified two dates as potential dates of sale for its U.S. sales, order confirmation date and invoice date. Given that the information on the record raises questions as to whether the sales invoice date is the appropriate date of U.S. sales, we recommend limiting the home market sales reporting period to a period which takes into account the possibility that the date of sale may be the sales contract or order confirmation dates reported by the respondents. Therefore, we recommend allowing Essar and Tata to limit their home market sales reporting periods to the periods May 1, 2002 through January 31, 2003 and April 1, 2002 through December 31, 2002, respectively. These periods extend from 3 months before the month in which the sales contract or order confirmation is dated, until 2 months after the latest month in which a U.S. sales invoice is dated. If the Department determines that the U.S. sales identified by the respondents were made during a month or months other than the month claimed by each respondent, or it finds that a respondent made other U.S. sales, it may request that the respondent(s) report additional home market sales. In addition, if the Department determines that it requires information that has not been placed on the record of this review because of the decision to grant a limited reporting period for home market sales, it may request that the respondent(s) report this information. However, if the Department determines that there is insufficient time to obtain and analyze the additional information, it may resort to the use of the facts otherwise available, including the use of adverse inferences, in determining the dumping margin for the respondent.

Furthermore, a respondent that limits its home market sales reporting period to a period less than the period of investigation or review, will forgo the application of the "recovery of cost" test described in section 773(b)(2)(D) of the Act. See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta From Turkey, 66 FR 34410 (June 28, 2001). We made our decision in this matter under the belief that both Tata (if the test becomes applicable) and Essar will agree to forgo this test. We will request that both parties confirm this assumption in writing if our recommendation to limit the sales reporting period is accepted.

Accordingly, under these facts, we recommend limiting the home market sales reporting period for each respondent. However, we do not recommend allowing Tata to limit its reporting of home market indirect selling expenses to the six-month period requested. Rather, we recommend requiring Tata to report its home market indirect selling expenses based on indirect selling expenses and sales for the fiscal year that coincides with the home market sales reporting period April 1, 2002 through December 31, 2002. Home market indirect selling expenses derived from the limited reporting period for home market sales may be distortive because they may not reflect year-end accounting adjustments or accruals.

Finally, we will determine whether to allow Essar to report costs incurred during its fiscal year after we have analyzed the additional information requested from the company on February 19, 2002.

Recommendation

We recommend allowing Essar and Tata to limit their home market sales reporting periods to the periods May 1, 2002 through January 31, 2003 and April 1, 2002 through December 31, 2002, respectively. In addition, we recommend requiring Tata to report its home market indirect selling expenses based on data for the fiscal year that coincides with the period April 1, 2002 through December 31, 2002.

Agree ✓ Disagree _____ Let's Discuss _____

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