

MEMORANDUM TO: David M. Spooner  
Assistant Secretary  
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Administrative Review of Certain Hot-Rolled Carbon Steel Flat  
Products from Romania for the Period of Review November 1,  
2005, through October 31, 2006

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from Romania for the period November 1, 2005, through October 31, 2006. We recommend that you approve the positions described in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments by parties:

Comment 1: Date of Sale  
Comment 2: Offsetting of Negative Margins

Background

On August 9, 2007, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products from Romania (72 FR 44821) (Preliminary Results). The review covers Mittal Steel Galati S.A. (MS Galati). The period of review is November 1, 2005, through October 31, 2006. We invited parties to comment on our preliminary results of review. MS Galati and one domestic interested party, United States Steel Corporation (USSC), filed case briefs on September 12, 2007. MS Galati and two domestic interested parties, USSC and Nucor Corporation, filed rebuttal briefs on September 19, 2007.

Other Abbreviations

Nucor - Nucor Corporation (domestic producer)  
POR - Period of review  
The Act - The Tariff Act of 1930, as amended

USSC - United States Steel Corporation (the petitioner)

MSNA - Mittal Steel North America (MS Galati's U.S. affiliate formerly known as Ispat North America (INA))

SAA - Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103- 316, Vol. 1 (1994)

## Discussion of the Issues

### *1. Date of Sale*

Comment 1: USSC argues that the Department should use the date of shipment as the date of sale for MS Galati's home-market sales where the invoice date postdates the date of shipment. USSC asserts that, for a majority of the sales MS Galati reported in its home-market sales database, the invoice date postdates the date of shipment. USSC argues further that, pursuant to 19 CFR 351.401(i), the Department normally uses the "date of invoice, as recorded in the exporter's or producer's records kept in the ordinary course of business" as the date of sale. USSC asserts that, where the invoice date postdates the date of shipment, the Department treats the shipment date as the date of sale, citing Certain Cut-to-Length Carbon Steel Plate from Romania: Preliminary Results of the Antidumping Duty Administrative Review and Intent to Rescind in Part, 72 FR 36658, 36659 (July 5, 2007). USSC concludes that the Department should follow its well-established date-of-sale practice of using the earlier of either the shipment date or the invoice date as the date of sale.

With respect to U.S. sales, USSC argues that the Department should use the date of invoice as the date of sale and that, in Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago (70 FR 69512, Issues and Decision Memorandum at Comment 2 (November 16, 2005)), the Department determined the date of invoice to be the date of sale under virtually identical circumstances as in the instant review. USSC also argues that, if the Department finds that the more appropriate date of sale is the shipment date from Romania, the Department should revise the calculation of MS Galati's U.S. credit expense by treating as the credit period the period between the date of shipment from Romania and the date of payment by the U.S. customer.

MS Galati agrees that Department precedent supports the use of shipment date as date of sale when shipment occurs prior to invoicing. MS Galati argues, however, that this well-established date-of-sale practice is not limited to the determination of the appropriate date of sale on home-market sales. MS Galati argues further that the Department should use as date of sale for U.S. sales the shipment date from Romania or, in the alternative, the earlier of shipment date or invoice date. MS Galati asserts that, for all U.S. sales in this POR, the quantities invoiced by MSNA to the U.S. customers are identical to the quantities shipped from Romania to MSNA. MS Galati also asserts that, because there were no variations in price, all terms of sale were essentially final as of the date of shipment from Romania. Citing Coated Free Sheet Paper from Korea (72 FR 30766, 30768 (June 4, 2007)), MS Galati refers to the Department's practice of finding that, where shipment date precedes invoice date, the Department uses shipment date as the date of sale because shipment date better reflects the date on which the material terms of sales are established. MS Galati concludes that, should the Department determine to use the

earlier of shipment date or invoice date as date of sale for MS Galati's home-market sales, the same date-of-sale methodology should also apply with respect to MS Galati's U.S. sales.

Department's Position: Under 19 CFR 351.401(i), normally the Department will use the invoice date to determine the date of sale. We will use a different date, however, if we are satisfied that it better reflects the date on which the material terms of the sale are established. See 19 CFR 351.401(i).

In the Preliminary Results, we used the invoice date as the date of sale because the record evidence showed variations in quantity between customer order acknowledgments and invoices; the customer order acknowledgments predate the invoices. Preliminary Results, 72 FR at 44822. The record indicates that there were no variations in price and quantity after the invoice date. See Supplemental Questionnaire response dated May 24, 2007, at page B-8.

Upon closer review of MS Galati's sales databases, however, we found several instances in which the invoice date postdates the shipment date. See analysis memorandum dated December 7, 2007, at page 2. The respondent has acknowledged that the quantity shipped can vary from the order acknowledgment (Supplemental Questionnaire response dated May 24, 2007, at page B-8). Otherwise, MS Galati has reported that the material terms of sale do not change. Id. Therefore, consistent with our practice, the use of the earlier of either the shipment date or the invoice date reflects more appropriately the date on which the material terms of the sale are established (Notice of Final Determination Sales at a Less than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen Canned Warmwater Shrimp From Thailand, 69 FR 76918, 76920 at comment 10, December 23, 2004). We have used the earlier of either the shipment date or the invoice date as the date of sale for home-market and U.S. sales.

In addition, we have ensured that the U.S. credit-expense period always starts with the date of shipment of the merchandise from Romania as is our practice. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Germany (67 FR 35497, 35499 at comment 2 (May 20, 2002)). Finally, contrary to USSC's claims, date of sale was not the issue in Comment 2 of Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago. The issue was the methodology for calculating imputed expenses for constructed export-price sales.

## 2. *Offsetting of Negative Margins*

Comment 2: MS Galati argues that the Department set negative margins (amounts by which U.S. sales exceeded normal value) improperly to zero in calculating the overall weighted-average margin (commonly known as "zeroing"). MS Galati argues further that employing the zeroing practice in administrative reviews is not required by the statute and has been found to be inconsistent with the WTO Anti-Dumping Agreement.

In rebuttal, Nucor argues that, although MS Galati challenges the Department's determination to use zeroing in its margin calculation, that methodology is currently required under the Department's practice, a practice that cannot be changed without certain statutorily decreed steps that have not yet been taken with regard to administrative reviews. Nucor and USSC contend that the use of this methodology has been upheld numerous times by the Court of International Trade and Court of Appeals for the Federal Circuit (CAFC), despite constant

challenges by respondent parties and appeals to the WTO.

USSC argues that, contrary to MS Galati's contention, the use of zeroing is required by U.S. law. Citing section 777A(d) of the Tariff Act of 1930, as amended (the Act), USSC contends that the statute sets forth the comparison methodologies the Department must use in calculating a company's dumping margin depending on the circumstances of the case. USSC argues that, if the Department does not "zero" in its calculations, the provisions of section 777A(d) will be rendered meaningless because the margin result will be exactly the same regardless of the methodology used. In other words, USSC conclude zeroing is required to give meaning and effect to the provisions of section 777A(d) of the Act.

Department's Position: We have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for these final results of review.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise." (Emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. Timken Co. v. United States, 354 F.3d 1334, 1342 (CAFC), cert. denied sub nom., Koyo Seiko Co. v. United States, 543 U.S. 976 (2004). See also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (CAFC 2005), cert. denied; 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006) (Corus Staal).

The respondent has cited WTO dispute-settlement reports finding the denial of offsets by the United States in specific administrative determinations to be inconsistent with the Antidumping Agreement. With respect to United States - Final Determination on Softwood Lumber from Canada, WT/DS264/AB/R (App. Body Rep't Aug. 11, 2004) (*US-Softwood Lumber*), consistent with section 129 of the URAA, the United States' implementation of the WTO report affected only the specific administrative determination that was the subject of the WTO dispute; the antidumping duty investigation of softwood lumber from Canada. See 19 U.S.C. 3538.

With respect to United States-Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (WT/DS294) (October 2005) ("US Zeroing (EC)"), the Department has modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006). In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See 71 FR at 77724.

With respect to *US - Corrosion-Resistant Steel*, the Federal Circuit refused to find the Department's interpretation of the Act unreasonable on the basis of this report. See Corus Staal, 395 F.3d at 1349. The Federal Circuit stated that *US - Corrosion-Resistant Steel* is not binding because the Appellate Body did not make a finding regarding the Department's methodology. *Id.* More importantly, the Federal Circuit recognized that the WTO reports do not have any effect on

U.S. law unless and until adopted pursuant to the express statutory scheme. Id.

As such, the Appellate Body's reports in *US - Corrosion-Resistant Steel*, *US - Softwood Lumber*, and *US - Zeroing (EC)* have no bearing on whether the Department's denial of offsets in this administrative determination is consistent with U.S. law. See Corus Staal, 395 F.3d at 1347-49 and Timken, 354 F.3d at 1342.

With respect to *United States - Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003), Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute-settlement reports. See 19 U.S.C. 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute-settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary); see also SAA at 354 ("{a}fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is not inconsistent with the panel or Appellate Body recommendations. . . .") Because no change has yet been made with respect to the issue of "zeroing" in administrative reviews, the Department has continued with its current approach to calculating and assessing antidumping duties for this administrative review.

Accordingly, the Department has continued in this case to deny offsets to dumping based on export transactions that exceed normal value.

### Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margin for MS Galati in the Federal Register.

Agree \_\_\_\_\_ Disagree \_\_\_\_\_

---

David M. Spooner  
Assistant Secretary  
for Import Administration

---

Date