

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,  
2004, through October 31, 2005

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, 2004, through October 31, 2005. 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: Sales and Cost Data from Different Periods
- Comment 3: Calculation of Credit Expense
- Comment 4: Offsetting of Negative Margins

Background

On October 23, 2006, 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 (71 FR 62082) (Preliminary Results). The review covers Mittal Steel Galati S.A. (MS Galati). The period of review is November 1, 2004, through October 31, 2005. We invited parties to comment on our preliminary results of review. MS Galati and one domestic interested party, Nucor Corporation, filed case briefs on January 19, 2007. MS Galati and a domestic interested party, United States Steel Corporation, filed rebuttal briefs on January 26, 2007. Nucor Corporation filed a rebuttal brief on January 29, 2007.

## Other Abbreviations

CEP - Constructed export price

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: Nucor argues that MS Galati did not provide sufficient documentary evidence necessary to meet the burden of proof for shifting date of sale away from the firm's invoice date. Nucor asserts that, in a recent determination regarding MS Galati's date of sale for the 2003-2004 period in a proceeding related to a different dumping order, the Department found that invoice date was the most appropriate date of sale. Nucor also asserts that, to the extent the Department relies on verification information from the prior review of this order in making its determination, that information is not on the record here and cannot be used to rebut the Department's presumption in favor of invoice date. Moreover, Nucor asserts, MS Galati admitted that its sales terms remained subject to change after the date of the customer acknowledgment by stating on the record that, if there is a change in terms of sale, MSNA would reissue the order acknowledgment. Nucor concludes that the Department did not confront these issues in the last administrative review fully and should do so prior to issuance of the final results of this administrative review.

MS Galati states that the Department determined properly that the date of sale of the U.S. sales it made through MSNA is the date of order confirmation and that this conclusion is supported by the complete sales documentation on the record and by Department precedent. MS Galati indicates that it has provided the MSNA customer acknowledgments, all of which state that material terms of sale are final or fixed, and that the record contains the affidavits of MSNA's employees and the customer affidavit stating that there was no expectation that the material terms of sale would be revised at a later date. MS Galati also argues that it did not "admit" that the terms of sale are susceptible to change but that Nucor had taken some record language out of context. Instead, MS Galati indicates, an "old" order acknowledgment by its own terms cannot be re-issued. Instead, it explains, the firm would cancel and issue a new order acknowledgment which corresponds to a new sale.

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).

Based on our verification of MS Galati's U.S. sales response in the 2003-2004 POR, which included the same U.S. sales under review for the 2004-2005 POR, we confirmed that the customer order acknowledgment represents the point in time when the parties agree on all material terms of sale including, inter alia, price and quantity. We have placed on the record of this review the verification report and relevant verification exhibits from the previous period. We also find that MS Galati has provided complete documentation for the U.S. sales covered by the 2004-2005 administrative review which demonstrates that any quantity changes from the original customer order acknowledgments to the final invoices did not exceed the accepted industry tolerance, unlike the determination to which Nucor refers. Compare Certain Cut-to-Length Carbon Steel Plate from Romania: Preliminary Results of the Antidumping Duty Administrative Review and Partial Rescission, 70 FR 53333, 53335 (September 8, 2005) (rejecting the date of the customer order acknowledgment date as date of sale in part because "quantities changed in excess of allowable variations") (unchanged in the final results of review due to the application of adverse facts available; see Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania, 71 FR 7008 (February 10, 2006)).

Accordingly, we find that the customer order acknowledgment date better reflects the date on which the material terms of the sale were established. In addition, we find no evidence on the record indicating that the customer order acknowledgment is susceptible to change or modification because MS Galati has explained that such changes require a new customer order acknowledgment. Therefore, after full consideration of Nucor's concerns, we have continued to use customer order acknowledgment date as date of sale for these final results of administrative review.

## 2. *Sales and Cost Data from Different Periods*

*\_\_\_\_\_ MS Galati made U.S. sales during the 2003-2004 POR for which the merchandise did not enter the United States until the start of the 2004-2005 POR. The Department separated these sales from the 2003-2004 review results and is reviewing them in the current 2004-2005 review. MS Galati made no other U.S. sales or entries during the 2004-2005 POR. The home-market sales which were contemporaneous with U.S. sales under review were also home-market sales MS Galati made during the 2003-2004 POR. For the Preliminary Results the Department compared costs MS Galati incurred during the 2004-2005 POR to test whether the home-market sales MS Galati made during the 2003-2004 POR were made at prices below their cost of production pursuant to section 773(8)(b)(1) of the Act.*

Comment 2: Nucor argues that the Department's Preliminary Results mixed cost and sales data from different periods improperly. Asserting that the Department should use invoice date as the date of sale as discussed in Comment 1, Nucor contends that the Department should obtain and use home-market sales data from the 2004-2005 POR and use cost data from the 2004-2005 POR to conduct the cost test. Nucor argues further that the Department should use MS Galati's 2005 financial statements, which were not available for the Preliminary Results, to

adjust financial-expense ratios for the 2004-2005 POR.

In rebuttal MS Galati argues that the Department's use of 2003-2004 sales data and cost data for the 2004-2005 POR was correct.

Department's Position: We disagree with Nucor that we should use invoice date as the date of sale and, consequently, obtain and use home-market sales data from the 2004-2005 POR (see our response to Comment 1). Further, we disagree with Nucor's argument that we should obtain and use home-market sales data from the 2004-2005 POR and use cost data from the 2004-2005 POR to conduct the cost test. We see no reason to obtain sales that we will never use in our price comparison.

The dates of sale for the U.S. sales we are examining in this review occurred during the 2003-2004 POR although the subject U.S. sales entered the United States during the current 2004-2005 POR. The sale dates of all home-market sales within our 90/60-day contemporaneity window occurred during the 2003-2004 POR as well. While our usual practice is to use costs that were incurred by a manufacturer during the current POR when we test home-market sales prices under section 773(b)(1) of the Act which in this case would be 2004-2005, due to the unusual circumstance in which all of MS Galati's contemporaneous home-market sales fall within the previous period we find it appropriate to use cost data from the previous period (2003-2004) to conduct the cost test under section 773(b)(1) of the Act. We have moved information from the record of the 2003-2004 segment of the proceeding to the record of the 2004-2005 segment (see Memorandum to File entitled "Transfer of Information to 2004-2005 Record" dated March 28, 2007).

Finally, our use of the 2003-2004 POR cost data makes Nucor's argument that we use MS Galati's 2005 financial statements to adjust any financial-expense ratios for MS Galati moot.

### 3. *U. S. Credit Expenses*

Comment 3: MS Galati argues that the Department's adjustment for imputed U.S. credit expense improperly includes expenses that are not associated with commercial activity in the United States. MS Galati asserts that, under 19 CFR 351.402(b) and the SAA at 870, it is clear that only those expenses associated with economic activities in the United States should be deducted from CEP. MS Galati states that MSNA took title to the subject merchandise and was actively involved with the delivery of the merchandise to the first unaffiliated U.S. customer. MS Galati claims that the time between the date of shipment from Romania to the date of arrival in the United States is connected solely to MS Galati's sale of subject merchandise to MSNA, a transaction between two affiliated parties. MS Galati concludes that the Department erred in including this time in the calculation of the U.S. credit expense and that it is more appropriate to categorize it as inventory carrying cost.

USSC and Nucor argue that the Department should not revise the calculation for U.S. credit expense because the commercial reality of the transactions between MS Galati, MSNA, and the customers was such that the goods which were produced to order and shipped directly to the U.S. customer were never sold from MSNA's inventory in the United States. As such, they contend, the Department's calculation of U.S. credit expense from the date of shipment of goods from Romania to the date of payment of the U.S. customer was proper.

Department's Position: Although 19 CFR 351.402(b) explains that the Department will not make adjustments for expenses related solely to a sale to a U.S. affiliated importer, MS Galati's sales for this review do not fall under that regulatory guideline. MS Galati produced its merchandise to order such that the subject merchandise had already been sold to the U.S. customer when it left Romania. See MS Galati's June 21, 2006, Supplemental Questionnaire Response, Vol. #4 at 27 ("the subject goods sold to the United States were made to order, rather than sold from inventory"). Further, as the petitioner and Nucor point out, the U.S. sale is not sold from MSNA's inventory to the U.S. customer. Instead, MSNA unloads the subject merchandise from the ship onto a truck where the customer picks it up. See MS Galati's June 21, 2006, Supplemental Questionnaire Response, Section C at C-21. As such, the credit expenses MS Galati incurred relate to sales destined for specific unaffiliated U.S. customers. Under these circumstances, our normal practice is to calculate credit expense from the date the merchandise is first shipped to the customer to the date of payment by that customer. See Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 70 FR 12648 (March 15, 2005), and accompanying Issues and Decision Memorandum at Comment 6. Accordingly, we have calculated U.S. credit expenses from the date the merchandise left Romania to the date of payment by the U.S. customer.

#### 4. *Offsetting of Negative Margins*

Comment 4: MS Galati argues that the Department improperly set negative margins (amounts by which U.S. sales exceeded normal value) 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.

Neither Nucor nor USSC commented on this issue.

Department's Position: Section 771 (35)(A) of the Act defines "dumping margin" as the "amount by which the normal value *exceeds* the export price and constructed export price of the subject merchandise" (emphasis added). 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. See Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir.), 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 (Fed. Cir. 2005), cert. denied, 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

The respondent has cited two 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 *US – Softwood Lumber*, consistent with section 129 of the URAA, the United States' implementation of that 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 USC 3538.

With respect to *US – Zeroing (EC)*, the Department announced recently that it was modifying 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 (71 FR at 77724). In addition, the United States has not yet completed the statutorily mandated process of determining how to implement the report with respect to the specific administrative reviews that were subject to the *US – Zeroing (EC)* dispute. See 19 USC 3538.

As such, the Appellate Body’s reports in *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; Timken, 354 F.3d at 1342. 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