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October 3, 2005

MEMORANDUM FOR: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

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

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 flat-rolled carbon quality steel products from Brazil (A-351-828) for the period March 1, 2003, through February 29, 2004. 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 review for which we received comments and rebuttal comments by parties:

1. Date of Sale
2. General and Administrative Expenses
3. Treatment of Non-Dumped Sales
4. Expand Cost Reporting Period to Cover the 90/60 Window Period
5. Window Period for Home Market Sales

Background

On April 6, 2005, the Department published the preliminary results of this administrative review in the Federal Register. *See Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil; Preliminary Results of Antidumping Duty Administrative Review (“Preliminary Results”)*, 70 FR 17406. The period of review (POR) is March 1, 2003, through February 29, 2004.

This review covers sales of certain hot-rolled flat-rolled carbon quality steel products made by Companhia Siderúrgica Nacional (“CSN”) and further manufactured in the United States by CSN’s wholly-owned subsidiary, Companhia Siderúrgica Nacional, LLC (“CSN, LLC”). We invited parties to comment on our preliminary results. We received case briefs from respondent CSN, and Nucor Corporation (“Nucor”), a domestic interested party in accordance with section 771(9)(C) of the Tariff Act of 1930, as amended (“the Act”), on August 24, 2005. At the Department’s request, CSN filed a brief with revised bracketing on August 26, 2005. We received rebuttal briefs from CSN and Nucor on August 29, 2005. The petitioner in this case, U.S. Steel Corporation, did not file comments.

Discussion of the Issues

Comment 1. Date of Sale

Respondent’s Position

CSN argues that the Department should use the purchase order (PO) date as the date of sale for the U.S. sale, instead of the invoice date. CSN claims that the Department applied the wrong legal standard in the Preliminary Results when it concluded that the price term of sale was not fixed by the PO because of CSN, LLC’s subsequent imposition of unpredictable surcharges. CSN argues that under the Department’s longstanding practice, it is not necessary that the final price be known at the time the sale is made, or even that this price can be anticipated, but only that agreement be reached on a specific and irrevocable mechanism for determining the final price so that there is nothing further for the parties to negotiate. CSN points out that when the order was placed, the parties agreed that CSN would apply the metals surcharge in effect at the time of invoicing. CSN argues that this agreement did not give CSN discretion in determining the amount of the surcharge to apply to the sale to this customer, because CSN bound itself to apply the same surcharge applied to all of its other customers. Thus, according to CSN, the price term was clearly established within the meaning of the Department’s prior practice. CSN notes the Department’s policy regarding long-term contracts of considering the price terms to be fixed as long as there is evidence of an agreement on a mechanism that will be used to determine the price, citing Emulsion Styrene-Butadiene Rubber from Mexico: Final Determination of Sales at Less Than Fair Value, 64 FR 14872 (March 29, 1999) (“Rubber from Mexico”). In that case, the Department determined that the “price term is fixed if it is established by a published source outside of the control of either party to the contract, such that there is nothing more the parties need to negotiate concerning the price of the goods sold.” *Id.* at 14880. CSN also cites Brass Sheet and Strip from France: Final Determination of Sales at Less Than Fair Value, 52 FR 812 (January 9, 1987) (“Brass Sheet and Strip”), where the Department considered the price as fixed where it was based on a fixed fabrication cost plus a metal cost “based on publicly quoted sources as of a date chosen by the customer during a period specified in the contract.” *Id.* at 814. In Offshore Platform Jackets and Piles from Japan: Final Determination of Sales at Less Than Fair Value, 51 FR 11788, 11793-94 (April 7, 1986), CSN points out that the Department found

the price to be determinable “in the sense that there was basically nothing more on which the parties to the contract needed to agree.”

CSN claims that while the exact amount of the surcharge to be applied was not known at the time the order was placed on February 20, 2004, this does not distinguish the situation from those accepted by the Department where the value was tied to a third-party index. CSN insists that the legally relevant facts are that a fixed mechanism for determining the price was agreed to and followed, and that there was nothing left to negotiate. CSN claims that the fact that CSN, LLC determined the metals surcharge, as opposed to the surcharge being derived from a published third-party source or through application of a mathematical formula does not change the result. CSN argues that it was not left to CSN, LLC’s unfettered discretion to determine the final amount of surcharge applied to the customer’s sale because CSN, LLC bound itself at the time it accepted the purchase order to apply the same metals surcharge then in effect for all customers. Thus, CSN argues, by agreement of the parties, CSN, LLC was not free to apply any other surcharge than the one in effect at the time of invoicing. CSN argues further that even if CSN, LLC *had* exercised some discretion with respect to the metals surcharge applied, this would not be fatal, citing Brass Sheet and Strip, in which even though the customer in that case exercised considerable unilateral discretion in determining exactly when to “lock in” the metal value, the Department found it significant that the parties had at least agreed to the time period during which this lock in could occur. CSN claims that the facts are even more compelling in this case because, after reaching agreement on February 20, 2004, neither CSN, LLC nor the customer retained *any* real discretion in determining the final price. Once agreement was reached, CSN was bound to apply the agreed-upon base price, freight surcharge, and metals surcharge that would be in effect for all customers at the time of invoicing, and no further negotiations were necessary to determine the price.

Domestic Party’s Position

Nucor argues that the Department correctly determined that invoice date, not PO date, is the appropriate date of sale for CSN’s U.S. sale. Nucor notes that the use of invoice date is the Department’s preferred method for determining the date of sale, and cites the Department’s regulations in support of its argument. According to 19 CFR 351.401(i), “in identifying the date of sale of the subject merchandise or foreign like product, the Secretary will use the date of invoice,” and the Department “considers the date of sale to be the date on which all substantive terms of sale are agreed upon by the parties.” Nucor claims that the most important substantive term of sale, the price to the customer, was not determined until invoice date in this particular review, and cites the Department’s Preliminary Results to argue that the burden is on CSN to “cite sufficient evidence to compel a rejection of the regulatory presumption in favor of invoice date as the date of sale.” In this case, Nucor argues that CSN has not successfully overcome the regulatory presumption. Nucor rejects the significance of CSN’s argument that the customer was aware of the possibility of a surcharge, stating that this does not provide a basis for concluding that the price was established on the date of the PO.

Nucor explains that there was a great deal of volatility in raw material costs and finished product prices during the POR, and that due to these abnormal market conditions, if CSN's customer did agree to a surcharge, it was simply agreeing to pay CSN's going rate for the product at the time of purchase. According to Nucor, CSN alone determined the surcharge rate and was free to change it as often as it wanted until the time of invoicing. Nucor further argues that CSN has put no evidence on the record proving that it committed itself at the time of acceptance of the PO to applying the same surcharge to all customers or showing that CSN LLC was not free to apply any other surcharges. Nucor claims that by using surcharges, CSN was free to change the price at will up until the invoice date, and that accordingly the price was not final until then. Responding to CSN's claim that the fact that it was free to change the amount of the surcharge at any time is not relevant to whether the terms of sale were fixed, Nucor argues that the cases cited by CSN prove the opposite. Nucor points out that the Department determined in Brass Sheet and Strip that the price was fixed when it was "based on publicly quoted sources as of a date chosen by the customer during a period specified in the contract," and in Rubber from Mexico that "a long-term contract's price term is fixed if it is established by a published source outside of the control of either party to the contract, such that there is nothing more that the parties need to negotiate concerning the price of the goods sold."

Nucor notes that while CSN did not link its surcharges to published third-party sources, some steel producers did. According to Nucor, CSN could have tied its surcharges to a neutral third-party index, but did not do so for price-control purposes. Nucor concludes that CSN did not set the price until the merchandise was shipped and the invoice prepared, and that CSN benefitted from pricing at the time of delivery. Nucor urges the Department to continue to use invoice date as the date of sale.

Department's Position:

We agree with Nucor that CSN did not provide sufficient evidence to cause the Department to reject the regulatory presumption in favor of invoice date as the date of sale. The surcharges imposed by CSN, LLC during the POR significantly impacted the final price to the customer, and therefore the final price to the customer was not established on the date of the PO, but rather on the date of invoicing.

By imposing surcharges, CSN, LLC was able to change the price at will up until the invoice date. However, we disagree with Nucor's claim that there is no record evidence that CSN, LLC was committed to applying the same surcharge to all customers, as the same surcharge notifications were sent to all customers. In this particular case, between the date of the PO and the date CSN, LLC issued the invoice for the sale under review, CSN, LLC twice notified its customers of increases in the amount of the surcharge that would be applied to future shipments. *See* CSN's Section A Questionnaire Response at Exhibit 15B, dated June 15, 2004, and CSN's Response to the January 18, 2005, Supplemental Questionnaire dated January 31, 2005, at Attachment A-30. We continue to find that although CSN, LLC's customers were notified periodically that surcharges of a particular amount would be effective on a given future date, these surcharges were not predictable because they changed frequently and were not explicitly linked to a specific

known formula or third-party source. Thus, the customer could not have anticipated the final amount due at any point in time prior to the date of shipment and invoicing. We disagree with CSN's argument that Rubber from Mexico and Brass Sheet and Strip established that as long as the price terms are sufficiently well-defined so that there is nothing further for the parties to negotiate, it is not necessary that the customer be in a position to anticipate the final price. Rubber from Mexico clearly states that "the Department has determined that a long-term contract's price term is fixed if it is established by a published source outside of the control of either party to the contract, such that there is nothing more the parties need to negotiate concerning the price of the goods sold." See Rubber from Mexico, 64 FR at 14880. Brass Sheet and Strip also points out the importance of "publicly quoted sources" where the setting of price terms is concerned. See Brass Sheet and Strip, 52 FR at 814. Having reviewed the information on the record, we have not found any evidence that CSN's surcharges were based on published sources outside of its control, and therefore find that the surcharges were indeed unpredictable. As we cited in our Preliminary Results, the decision of the U.S. Court of International Trade in Allied Tube and Conduit Corp. v. United States, 132 F. Supp. 2d 1087 (CIT 2001) ("Allied Tube") states, "as elaborated by the Department practice, a date other than invoice date 'better reflects' the date when 'material terms of sale' are established if the party shows that the 'material terms of sale' undergo no meaningful change (and are not subject to meaningful change) between the proposed date and the invoice date." See Allied Tube, 132 F. Supp. 2d at 1090. Due to the unpredictable nature of the surcharges imposed on the customer after the PO date, we find that CSN did not establish the material terms of sale until the invoice date and decline to change our date of sale methodology in this case.

Comment 2. General and Administrative Expenses

Respondent's Position

CSN asserts that the Department incorrectly included service fees in CSN, LLC's General and Administrative ("G&A") expense calculation. CSN argues that the feasibility study expenses in question were incurred on behalf of its Brazilian parent company and not CSN, LLC because CSN, LLC is a subsidiary company and does not have the authority to make investment decisions. CSN states that the expenses at issue were attributable more to the Brazilian parent rather than CSN, LLC because they had to do with the feasibility of an acquisition.

CSN further argues that these expenses occurred outside of the POR and should not be included in CSN, LLC's G&A calculation. CSN states that the service fees were capitalized in 2002 but expensed in 2003 for accounting purposes. CSN claims that these expenses do not relate to the cost of production during the current year and that it is the Department's practice to exclude such prior period adjustments from the G&A calculation.¹

¹See Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Japan: Notice of Final Determination of Sales at Less Than Fair Value, 64 FR 24329 (May 6, 1999) at Comment 19 ("HR from Japan"); Stainless Steel Bar from India: Final Results of Antidumping Duty Administrative Review, 68 FR 47543, 47546 (August 11, 2003) and the accompanying Issues

Domestic Party's Position

Nucor argues that the feasibility study expenses were recorded in CSN, LLC's 2003 financial statements that were prepared in accordance with U.S. GAAP and should be included in the numerator of the G&A calculation. Nucor concludes that CSN, LLC's financial statements are accurate because CSN, LLC's accountants did not restate the 2002 financial statements to recognize the expenses in 2002. Nucor maintains that section 773(f)(1)(A) of the Act requires the Department to rely on a company's normal books and records if such records are in accordance with the country's generally accepted accounting principles ("GAAP") and reasonably reflect the costs associated with production of the merchandise. Nucor cites Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results in the Antidumping Administrative Review, 69 FR 55574 (September 15, 2004) at Comment 7, as an example of the Department relying on the normal books and records of the home country, whereby, the Department included certain restructuring expenses that were reported in accounting records as part of G&A.

Department's Position:

We disagree with CSN. There is no reason to shift these costs from CSN, LLC to CSN Brazil. In accordance with section 773(f)(1)(A) of the Act, the Department relies on the normal books and records of the company being investigated if those records are kept in accordance with home country GAAP and reasonably reflect the costs associated with the production and sale of the merchandise. The costs in question are recorded as expenses on CSN, LLC's financial statements, not CSN Brazil's financial statements. Because CSN, LLC's financial statements are prepared in accordance with U.S. GAAP and the costs in question are recorded on CSN, LLC's financial statements, the evidence on the record demonstrates that these are expenses of CSN, LLC and not the expenses of CSN Brazil. If these expenses did not belong to CSN, LLC, then CSN, LLC, in accordance with U.S. GAAP, would have recorded them as a receivable from an affiliate and not as an expense. Moreover, it is not unreasonable for a company, whether it is a subsidiary of another company or not, to incur these types of expenses to investigate a potential expansion opportunity as CSN, LLC did. Therefore, because these expenses are recognized in CSN, LLC's normal books and records that are kept in accordance with U.S. GAAP and it is reasonable that these costs would be incurred by a company investigating an opportunity to expand, we have continued to include these expenses in CSN, LLC's G&A rate calculation.

Further, we disagree with CSN's argument that because the cash transferred hands in 2002 and not 2003 (which are the financial statements we are using for G&A), they really were not expenses of 2003 even though they are recorded in their 2003 financial statements. In accordance with U.S. GAAP CSN, LLC uses the accrual basis, rather than cash basis, of

and Decision Memorandum at Comment 16 ("SS Bar from India"); and Carbon and Certain Alloy Steel Wire Rod from Canada: Notice of Final Determination of Sales at Less Than Fair Value, 67 FR 55782 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 12 ("Wire Rod from Canada").

accounting to keep its books and records and prepare its financial statements. *See* CSN's Section A Questionnaire Response at Exhibit 18, dated June 15, 2004. Thus, in accordance with the accrual basis of accounting, during 2002 CSN, LLC capitalized the amounts because they expected these costs to have future benefits. In 2003 CSN, LLC recognized that the project did not come to fruition and had no future benefit, so it expensed these costs. We do not consider CSN, LLC's accounting treatment to be unreasonable. Because these expenses are recorded in CSN, LLC's 2003 audited financial statements and not in CSN Brazil's, and because such treatment reasonably reflects CSN, LLC's costs associated with the production of merchandise, we have continued to include the expenses in question in CSN, LLC's G&A expenses.

CSN's reliance on HR from Japan and Wire Rod from Canada is misplaced. These cases support the Department's normal practice of excluding prior period adjustments from the G&A expense calculation. *See* HR from Japan, 64 FR at 24329; and Wire Rod from Canada, 67 FR at 55782. The issue in this case, however, is whether CSN relied on a cash basis versus accrual basis of accounting, not whether it is appropriate to reduce current period costs for the correction of prior period adjustments. CSN's citation to SS Bar from India claiming that the Department excluded losses on the sale of assets is erroneous. In SS Bar from India, the Department included the losses on the routine disposition of assets. SS Bar from India, 68 FR at 47546. Losses on the sale of assets have nothing to do with the correction of prior period adjustments. However, in SS Bar from India, the Department did exclude a particular prior-period adjustment because it related to certain taxes which are not typically included in our COP and CV calculations. SS Bar from India, 68 FR at 47546.

Comment 3. Treatment of Non-Dumped Sales

Respondent's Position

CSN argues that the Department should not calculate the overall margin of dumping by assigning a zero dumping margin for sales to the United States made at or above normal value, arguing that this practice results in a violation of the Department's obligations under U.S. law. CSN cites the World Trade Organization ("WTO") Appellate decision in United States—Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004) ("US-Softwood Lumber") that this practice is prohibited. CSN argues that it is a well-established principle of U.S. law that the Department must, to the extent possible, interpret and apply the U.S. dumping laws in a manner that does not conflict with its international obligations, citing Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64 (1804) ("Charming Betsy"). According to CSN, this includes obligations under the WTO Antidumping Agreement. CSN insists that the Department is not directed by any provision of U.S. law to use zeroing and therefore does so purely as a matter of interpretation, and that the WTO Antidumping Agreement does not permit zeroing as applied by the Department.

CSN claims that the antidumping statute does not require the Department to zero negative margins, noting that the CIT has repeatedly ruled that the U.S. statute is at best "silent" on the question of zeroing. CSN cites Corus Staal BV v United States, Slip Op. 03-25 at 13-14 (CIT

1993) (“Corus”), in which the CIT considered DOC’s statutory arguments in the context of a final determination in an investigation but concluded: “The truth of the matter is that the statute is silent as to the impact of negative margins. The statute neither requires or prohibits Commerce from considering nondumped sales.”

CSN also cites a CIT decision in an administrative review, Pam, S.p.A. v. United States, Slip Op. 03-48 (CIT 2002) (“PAM”), in which the CIT held that “{t}he statute is silent on the question of zeroing negative margins.” *Id.* at 15-16. CSN asserts that the court flatly rejected the Department’s claims that its zeroing practice was required by 19 U.S.C. § 1677(35)(A) and (35)(B), but that it upheld the practice of zeroing solely on the grounds that the practice was “reasonable, gap-filling” interpretation of statutory language under the doctrine in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S.837 (1984) (“Chevron”). Finally, CSN cites the decision of the Court of Appeals for the Federal Circuit in Timken Co. v. United States, 354 F.3d 1334, 1340-42 (Fed. Cir. 2004) (“Timken CAFC”), arguing that the court clearly and unequivocally stated that the statute does not require the practice of zeroing. CSN notes that the Department argued in Timken CAFC that the practice of zeroing was derived from “explicit statutory language.” *Id.* at 1339. Specifically, 19 U.S.C. § 1677(35)(A) defines “dumping margin” as “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” CSN points out that the court disagreed with the Department’s argument that the word “exceeds” limits the definition of “dumping margin” to positive numbers, quoting the court’s statement, “Congress’s use of the word ‘exceeds’ does not unambiguously require that dumping margins be positive numbers.” *Id.* at 1341, 1342.

CSN argues that these cases demonstrate that the Department’s frequently stated position that its zeroing practice is required by the statute is simply wrong, and that the Department has adopted and applied this practice solely as a matter of interpretive “gap-filling.” CSN insists that the Department is obligated as a matter of settled U.S. law to exercise its gap-filling authority in a manner that is consistent with international law as embodied in the WTO Antidumping Agreement, and that the WTO Appellate Body decisions in European Communities--Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India² (“EC-Bed Linens”) and, more recently with respect specifically to the U.S. practice, in US-Softwood Lumber clearly show that the WTO does not permit zeroing.

CSN argues that EC-Bed Linens establishes clearly that the practice of zeroing is inconsistent with the binding terms of the WTO Antidumping Agreement, and that in US-Softwood Lumber, where the Department’s own zeroing practice was directly at issue, the Appellate Body, consistent with its decision in EC-Bed Linens, upheld the Panel’s determination that the Department’s practice of zeroing in the aggregation of margins to determine “overall” margins of dumping violates Article 2.4.2 of the Antidumping Agreement.

²WT/DS141/AB/R (March 1, 2001).

According to CSN, the Appellate Body noted that Articles 2.2.1 and 9.4 of the Antidumping Agreement explicitly sets forth circumstances where certain sales may be disregarded. CSN argues that these are therefore the only instances where sales may be disregarded for the purposes of calculating the weighted average margin, and since Article 2.4.2 contains no such express language permitting an investigating authority to disregard sales at or above normal value, the practice of zeroing is not permitted. CSN argues that because the United States was a direct party to the US–Softwood Lumber dispute it is bound by its results. CSN argues that because zeroing is allegedly not required by the U.S. antidumping statute, there is no direct conflict between U.S. and international law, and that under the Charming Betsy doctrine the U.S. antidumping statute must, to the extent possible, be interpreted in a manner consistent with the WTO Antidumping Agreement. CSN concludes that any interpretation of the antidumping statute that supports zeroing is, therefore, impermissible as a matter of U.S. law.

CSN notes that it is aware of language in the PAM and Corus cases to the effect that the WTO Antidumping Agreement, at least in the opinion of those U.S. judges, does not expressly prohibit zeroing. Corus, Slip Op. 03-25 at 16 (“the {WTO AD} Agreement itself does not appear to expressly prohibit this practice. The Agreement merely requires that all sales be considered.”); Pam, Slip Op. 03-48 at 19 (“The WTO AD Agreement on its face does not preclude Commerce’s interpretation of the U.S. law. In particular, the WTO AD Agreement does not explicitly prohibit zeroing, and, indeed, does not even use the term zeroing.”). However, CSN argues that the CIT is not empowered to issue legal interpretations of the WTO Agreements and lacks necessary expertise to do so. CSN concludes that the CIT, and the Department, therefore should not adopt interpretations that are so clearly in conflict with WTO panel decisions, and that for this reason, the Department should not consider such language in determining the proper bounds of its discretion with respect to this practice.

Domestic Party’s Position

Nucor notes that the Department has repeatedly found that the practice of zeroing “is required by U.S. law,” citing Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands, 66 FR 50408 (Oct. 3, 2001), and accompanying Issues and Decision Memorandum at Comment 1. Nucor also cites the Department’s statement in Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People’s Republic of China, 67 FR 6482 (Feb. 12, 2002), and accompanying Issues and Decision Memorandum at Comment 34, that in calculating aggregate dumping margins, “{a}t no stage in this process is the amount by which export price or constructed export price exceeds normal value on sales permitted to cancel out the dumping margins on other sales.” Nucor cites additional final determinations in which the Department concluded that “our methodology is consistent with our statutory obligations under the Act.”

Nucor argues that the statutory language in 19 U.S.C. § 1673d(c)(1)(B)(i)(I) (2001) does not provide for calculation of negative dumping margins, but instead requires the Department to determine an estimated weighted average dumping margin for each exporter and producer

investigated. Nucor notes that the Act defines the term “weighted average dumping margin” as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer” by the sum of export prices (EP) and constructed export prices (CEP) for that producer, referencing section 1677(35)(B). Finally, Nucor points out that the Act defines “dumping margin” in section 1677(35)(A) as the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” Nucor argues that an individual dumping margin may only reflect the amount by which normal value (NV) *exceeds* EP or CEP, not the amount by which NV is less than EP or CEP. Therefore, Nucor concludes that the calculation of the weighted average dumping margin is based on the aggregate value of individual margins, each of which may only reflect the amount by which NV exceeds EP or CEP.

Nucor argues that the WTO Appellate Body decision in EC-Bed Linens does not require a different result. Nucor points out that the Department has found that this case has no impact on U.S. law or Department practice, and that the decision applies only to a dispute between the European Community and India. Therefore, Nucor asks the Department to reject CSN’s argument and continue its practice of “zeroing” negative dumping margins.

Department’s Position

As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. Therefore, we have not changed our margin calculation methodology as suggested by CSN for these final results. *See, e.g.,* Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review, 70 FR 34448 (June 14, 2005), and accompanying Issues and Decision Memorandum at Comment 8; Final Results of Antidumping Administrative Review and Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada, 69 FR 75921 (December 20, 2004), and accompanying Issues and Decision Memorandum at Comment 4; Final Results of Administrative Antidumping Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand, 69 FR 61649 (October 20, 2004), and accompanying Issues and Decision Memorandum at Comment 7; and Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 69 FR 68309 (November 24, 2004), and accompanying Issues and Decision Memorandum at Comment 8. The CIT has consistently upheld the Department’s treatment of non-dumped sales. Although the CIT in PAM, addressed the argument of whether the denial of offsets is required by statute, since that case, the Federal Circuit has held that the statute is silent with respect to the provision of offsets, and that Commerce’s interpretation of the statute is reasonable. *See PAM*, at 15-16. Specifically, the Court of Appeals for the Federal Circuit (“CAFC”) in Timken CAFC, and most recently in Corus Staal BV v. Department of Commerce, 395 F.3d 1343 (Fed. Cir. 2005) (“Corus CAFC”), has affirmed the Department’s methodology as a reasonable interpretation of the statute.

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.” Section 771(35)(B) of the Act 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.” The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department’s interpretation of the singular “dumping margin” in section 771(35)(A) as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the normal value on sales that did not fall below normal value permitted to cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, 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.

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that U.S. Customs and Border Protection (CBP) is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows CBP to apply this rate to all merchandise subject to review.

We disagree with CSN’s assertion that the WTO Appellate Body rulings in EC-Bed Linens and US-Softwood Lumber render the Department’s interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. The CAFC in Timken CAFC found specifically that EC-Bed Linens was not only distinguishable but, more importantly, not binding. With regard to CSN’s argument concerning US-Softwood Lumber, at the instruction of the U.S. Trade Representative, the Department implemented the WTO report on May 2, 2005, pursuant to section 129 of the Uruguay Round Agreements Act. *See* Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 FR 22636 (May 2, 2005). Under section 129, the implementation of the WTO report affects only the specific administrative determination that was the subject of the dispute before the WTO: the antidumping duty investigation of softwood lumber from Canada. *See* 19 U.S.C. 3538. The implementation of US-Softwood Lumber has no bearing on this or any other antidumping duty proceeding. *See* Corus Staal v. United States, *Crt. No. 04-00316*, Slip Op. 05-85 (July 19, 2005). Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed normal value.

Comment 4. Expand Cost Reporting Period to Cover the 90/60 Window Period

Domestic Party's Position

Nucor maintains that the costs reported by CSN do not capture the costs associated with the further manufactured subject merchandise. Nucor claims that it is the section 773(b)(2)(C)(ii) of the Act requires the Department to obtain and use costs for the period in which sales were made. Nucor argues that CSN reported cost data for 2003-2004 POR but because both the CEP sale of the further manufactured product and the home market sale to which it was compared were in the subsequent POR, the Department must request new cost data from CSN for the post-POR window period. Nucor further notes that in this case it was particularly important to expand the cost reporting period to include the period when its sales were made because CSN's costs were significantly increasing during the period in question.

Nucor points out that the Department in the past has used costs for different reporting periods where there were significant cost changes that rendered comparisons using POR data unreasonable. Nucor cites several cases which it claims supports its position that the Department should expand the cost reporting period for this case. *See Live Cattle from Canada: Notice of Final Determination of Sales at Less Than Fair Value, 64 FR 56738 (October 21, 1999) at Comment 4 (“Live Cattle”); and Stainless Steel Bar from Spain: Notice of Final Determination of Sales at Less Than Fair Value, 59 FR 66931 (December 28, 1994) at Comment 12 (“SS BAR from Spain”). *See also Final Results of Redetermination Pursuant to United States Court of International Trade Remand Order Thai Pineapple Canning Industry Corp., Ltd. And Mitsubishi International Corp. vs. United States, Court No. 98-03-00487 (May 31, 2002) (“CPF”); and Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea: Notice of Final Determination of Sales at Less Than Fair Value, 58 FR 15467, 15476 (March 23, 1993) at Comment 29 (“DRAMs”); and Fresh and Chilled Atlantic Salmon from Norway: Final Results of Antidumping Duty Administrative Review, 58 FR 37912 (July 14, 1993) at Comment 1 (“Salmon from Norway”).**

Respondent's Position

CSN maintains that the Department may use sales 90 days before and 60 days after the POR in order to fulfill the statutory requirements in section 773(a)(1) of the Act. *See Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 61 FR 1328 (January 19, 1996) at Comment 2 and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Review, 62 FR 2081 (January 15, 1997) at Comment 6.2.* CSN continues that it is the Department's normal practice to compare the reported comparison market sales to the weighted-average POR cost of production even when using window period sales as a basis for normal value. Therefore, CSN contends that the Department applied the proper cost methodology by comparing prices for the reported home market sales made during an extended 17-month period to the cost of production incurred during the 12-month POR. CSN maintains that although Nucor desires a special reporting methodology to be implemented in this case, Nucor did not

raise this issue earlier in the case when it could have been explored. CSN notes that even if the Department was to apply a 50 percent increase in total direct materials, this hypothetical increase in cost would still result in the same normal value as used at the preliminary results, *i.e.*, the comparison home market sales would still be above the cost of production.

Department's Position

We disagree with Nucor's claim that section 773(b)(2)(C)(ii) of the Act requires the Department to use post POR costs (*i.e.*, calculate a cost specific to each sale) when comparing COP to window period sales. Section 773(b)(3) of the Act defines the cost of production as an "amount equal to (A) the cost of materials and fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business." We note, however, that section 773(b)(3) does not direct the Department to use the cost to produce each specific sale. Consistent with the provision, we normally require respondents to report their cost of production for the subject merchandise during the period of investigation or review (*i.e.*, the cost to produce the merchandise during the period in which they are making sales, as opposed to the cost to produce each individual product sold during the reporting period). *See* the standard section D questionnaire and the standard dumping program. While the language in section 773(b)(3) of the Act is broad enough to reasonably allow for either method, our consistent and predictable approach has been to use the per-unit cost of manufacturing incurred during the POR/POI³ (*see* the standard section D questionnaire and the standard dumping program). Using the per-unit cost of manufacturing incurred during the POR/POI is entirely consistent with the statute. Moreover, our standard section D and E questionnaires under the section addressing the cost reporting period for COP and CV instructs respondents to report "actual costs incurred by your company during the POR/POI as recorded under its normal accounting system." In some instances, the cost of manufacturing the particular product sold during the POR/POI is higher than the cost of the identical product manufactured during the POR/POI; however, sometimes it is lower. We believe that having a consistent and predictable approach as to which method we use eliminates results-oriented arguments regarding which approach to take in a given case.

While the specific coil sold was further manufactured after the POR, CSN, LLC produced the identical product during the POR. Nucor is incorrect in stating that production did not occur in the POR. The subject merchandise was produced in Brazil during the POR. The subject coils that were sold in the United States were simply further manufactured after the POR. The Department normally performs the cost test based on a single weighted average POI or POR cost even if there are window period sales (*i.e.*, sales made up to 90 days before the POR or up to 60 days after the POR) being used as comparison market sales. This is evidenced in the Department's standard section D questionnaire and the standard dumping program. However, if the facts of a particular case show that using a single average POI or POR cost will distort the dumping analysis, the Department may modify the cost reporting period to rely on average costs for a period shorter than the entire POI/POR. For example, in CPF at Court No. 98-03-00487

³POI = period of investigation.

(May 31, 2002), DRAMS at 58 FR 15467, 15476 and Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke The Antidumping Duty Order: Brass Sheet and Strip from the Netherlands, 65 FR 742, 746 (January 6, 2000) (“Brass”), the Department modified the cost reporting periods because the facts in those cases warranted reliance on shorter period average costs. Specifically, in CPF at Court No. 98-03-00487 (May 31, 2002) because there was a significant fluctuation in raw material costs during the POR and because the POR covered such a long period (*i.e.*, it covered portions of three fiscal years), we split the cost reporting period into three fiscal periods before performing the cost test. In DRAMS at 58 FR 15467, 15476, where the production process was extremely long and the respondents’ cost accounting system did not capture the appropriate costs of the sales, we lagged the costs for less than one quarter. Likewise, in Brass the Department computed monthly average costs throughout the POR to account for the significant metal price fluctuations and the fact that each purchase of copper and zinc was directly tied to each specific sale. Brass, 65 FR at 746. Each of these cases demonstrates that the Department has modified the cost reporting periods used for the cost test when the specific facts of the case warrant such a change.

In this case, other than making a claim that production costs likely increased after the POR, Nucor failed to demonstrate that the submitted POR costs resulted in a distorted dumping analysis. While Nucor commented on May 27, 2005, on CSN’s request to shift the cost reporting period to its fiscal year end, it did not raise the issue that the dumping analysis may be distorted if the Department were to use POR costs until its case brief was filed on August 24, 2005. As a result, there is no record evidence to support Nucor’s request to reject the submitted POR production costs and instead rely on post POR costs. Therefore, for these final results, we have continued to rely on our normal practice and computed the cost of production and further manufacturing costs based on the POR.

Nucor’s citations to Live Cattle and SS Bar from Spain to support its contention that the Department obtains costs for when the home market products are sold are misplaced. In fact, in Live Cattle we declined to modify the cost reporting period to include the period when the specific sold cattle were raised. In that case we relied on the normal cost reporting period for our cost test regardless of the period when the cattle were raised. *See* Live Cattle, 64 FR at 56754. In SS Bar from Spain, the Department also declined to shift the cost reporting period from the POI to the production period for the product that was sold in the home market during the POI. In SS Bar from Spain the Department stated:

The Section D questionnaire clearly requests weighted-average production data based on the costs incurred during the POI. We have departed from this general policy only when unique circumstances arise, such as when production did not occur during the period of investigation.

See SS Bar from Spain, 59 FR at 66938. Additionally, Nucor’s citation to Salmon from Norway as an example of the Department requiring reported costs to correspond to the period in which

the comparison sales are sold is misplaced. In Salmon from Norway, the Department modified the cost reporting period to encompass the entire growth cycle of salmon, which was 18 to 24 months. See Salmon from Norway, 58 FR 37912, 37912. Here, however, there are no unique circumstances that would warrant a modification to the cost reporting period.

Comment 5. Window Period for Home Market Sales

Respondent's Position

CSN argues that the Department made an error in SAS programming in setting the six-month window period for home market sales which resulted in excluding sales made in November 2003.

Domestic Party's Position

Nucor did not comment on this issue.

Department's Position

We agree with CSN and have corrected this error for the final results.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the margin calculation accordingly. If these recommendations are accepted, we will publish the final results of the review and the final weighted-average dumping margin for CSN in the Federal Register.

AGREE _____ DISAGREE _____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

Date