

DATE: July 12, 2011

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of 2008 –
2009 Administrative Review of the Antidumping Duty Order on
Certain Hot-Rolled Carbon Steel Flat Products from India

Summary

On January 13, 2011, the Department of Commerce (“the Department”) published in the Federal Register, the Preliminary Results of the above referenced administrative review.¹ We have analyzed the case briefs filed by United States Steel Corporation (“U.S. Steel”) and Nucor Corporation (“Nucor”), and the rebuttal brief filed by Tata Steel Limited (“Tata”). Based on our analysis of the comments received, we recommend that you approve the position described in the Discussion of Interested Party Comments, section III, infra. Outlined below is the complete list of the issues in this review for which we have received comments from the interested parties.

I. Background

In the Preliminary Results, the Department determined that Essar Steel Limited, Ispat Industries Limited (“Ispat”), JSW Steel Limited, and Tata had no reviewable entries during the period of review (“POR”). The Department indicated, however, that based on our review of recently obtained documentation, we would seek clarifying information from Tata with respect to its exports. Preliminary Results, 76 FR at 2345-46.

On March 29, 2011, the Department issued a supplemental questionnaire to Tata.² On April 6, 2011, Tata submitted its response to the Department’s supplemental questionnaire.

¹ See Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review, 76 FR 2344 (January 13, 2011) (“Preliminary Results”).

² See Letter to Tata Steel Limited from the Department, regarding the 6th Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India, dated March 29, 2011.

On April 14, 2011, U.S. Steel and Nucor submitted comments on the Preliminary Results.³ On April 19, 2011, Tata submitted its reply to U.S. Steel and Nucor's comments.⁴

II. List of Comments

A. General Issues

Comment 1: Whether There is a Reviewable Entry

Comment 2: Application of Adverse Facts Available

Comment 3: Referral of this Matter to U.S. Customs and Border Protection

III. Discussion of Interested Party Comments

Comment 1: Whether There is a Reviewable Entry

Tata agrees that the Department reached the correct preliminary results by finding that there were no reviewable entries during the POR; albeit for different reasons. Tata maintains that the entry in question was not reviewable because it was a non-commercial sale made outside the ordinary course of business.⁵ Tata asserts that the transaction at issue involved the sale of a small volume of test material intended for testing by a third-party Mexican company intending to produce auto parts in India from Indian steel. Tata further asserts that the small quantity of steel never entered U.S. commerce, but was either destroyed in the course of testing, or used in production of prototype parts sent outside the United States.

Nucor and U.S. Steel argue that Tata made a sale of subject merchandise to the United States during the POR and the Department should consider the sale to be a reviewable transaction during this administrative review. They assert that Tata's shipment clearly consisted of subject merchandise and Nucor notes that Tata does not contest that the shipment was composed of subject merchandise.

Nucor notes that 19 CFR 351.213(e) provides that administrative reviews cover "entries, exports or sales of subject merchandise" during the POR. Nucor argues that the Department should determine that Tata's sale of subject merchandise to the United States is a reviewable transaction for the purpose of the current administrative review, which includes establishing a cash deposit rate. U.S. Steel asserts that the statute provides that the Department must, where properly requested, conduct a review of an antidumping duty order whenever there are entries of subject merchandise during the relevant POR. Further, U.S. Steel argues that 19 CFR 351.213(d)(3) provides for rescission of an administrative review only where there are no entries

³ See Letter from U.S. Steel to the Department, regarding Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from India, dated April 14, 2011; and Letter from Nucor to the Department, regarding Certain Hot-Rolled Carbon Steel Flat Products from India: Case Brief, dated April 14, 2011.

⁴ See Letter from Tata to the Department, entitled "Antidumping Duty Review of Certain Hot-Rolled Carbon Steel Flat Products from India: Reply Brief of Tata Steel Limited" ("Tata Rebuttal Brief") dated April 19, 2011.

⁵ See Tata Rebuttal Brief at 3.

of subject merchandise during the POR and, as such, the Department does not have the discretion under either the statute or its own regulations to decline to review an entry of subject merchandise based on the circumstances present in this case.

U.S. Steel argues that cash deposit requirements serve to secure the collection of antidumping duties and ensure that complete information will be submitted to the Department in a timely manner.⁶ U.S. Steel notes that Tata's current cash deposit rate is zero and that Tata refused to respond to the Department's questionnaire. Thus, U.S. Steel concludes, it is imperative that the Department update Tata's cash deposit rate as appropriate to ensure Tata's cooperation in future reviews.

U.S. Steel urges the Department to reject Tata's contention that it has no reviewable entries because its one entry was not made in the ordinary course of trade.⁷ U.S. Steel argues that the Court of International Trade ("CIT") has recognized that "U.S. sales outside the ordinary course of trade ordinarily should be included."⁸ Further, U.S. Steel argues that the Department will only decline to review U.S. sales under exceptional circumstances⁹ and there is no record evidence indicating that such exceptional circumstances exist with respect to Tata's entry.

Both U.S. Steel and Nucor make additional arguments that are based on proprietary information which are summarized and to which we have responded in the concurrent proprietary memorandum entitled "Proprietary Issues and Decisions Memorandum for the Final Results of 08/09 Administrative Review of the Antidumping Duty Order on Certain Hot-Rolled Carbon Steel Flat Products from India" ("Proprietary Memo").

Department's Position:

We disagree with Tata's assertion that the fact its sale was a non-commercial sale outside the normal course of business warrants a finding that it is a non-reviewable entry. As Nucor points out, Tata admits that it made a sale of subject merchandise that was exported to the United States during the POR. Further, as Tata itself acknowledges, the Department does not have a de minimis exception for sales of small quantities.

We also disagree with U.S. Steel and Nucor that the Department is required to conduct an administrative review whenever there is an entry of subject merchandise into the United States. As discussed more fully in the Proprietary Memo, the Department has a long-standing, well-established practice of not conducting an administrative review based on the circumstances present in this case. Therefore, we continue to find that Tata does not have any reviewable entries.

Comment 2: Application of Adverse Facts Available

⁶ Citing to National Fisheries Institute, Inc. v. U.S. Bureau of Customs and Border Protection, 637 F. Supp. 2d 1270, 1291 (Ct. Int'l Trade 2009)(quoting H.R. Rep. No. 96-317, at 69 (1979)).

⁷ Citing to Tata's February 18, 2010, letter of non-participation.

⁸ See American Permac, Inc. v. United States, 783 F. Supp. 1421 (CIT 1992).

⁹ Citing to Silicon Metal from Brazil: Notice of Final Results of Antidumping Duty Administrative Review, 64 FR 6305, 6317 (February 9, 1999).

U.S. Steel and Nucor assert that Tata has refused to fully participate in this administrative review and, therefore, the Department should apply adverse facts available (“AFA”) to determine Tata’s dumping margin and future cash deposit rate. They further assert that when selecting an AFA rate, the Department will generally select the highest margin determined for any party from any segment of the proceeding. Therefore, both U.S. Steel and Nucor recommend that the Department select as AFA, the rate calculated for Ispat in the original investigation.

Tata argues that the rates suggested by U.S. Steel and Nucor are impermissible because they bear no relationship to Tata’s actual rate of zero percent. Tata references Gallant Ocean¹⁰ and argues that the Department may not apply a rate that is punitive, aberrational, or uncorroborated. Tata argues that although its current cash deposit rate is zero, as calculated in the December 2005-November 2006 administrative review, Tata had previously been subject to the all others rate from the underlying investigation, as adjusted for export subsidies. Tata claims that as compared to the rates suggested by U.S. Steel and Nucor, the rate of 23.87 percent is more likely an accurate indication of any dumping by Tata, albeit with a built-in increase and constitutes a sufficient deterrent to induce future compliance.

Department Position:

Because we have determined that Tata does not have any reviewable entries, this issue is moot.

Comment 3: Referral of this Matter to U.S. Customs and Border Protection

Nucor asserts that the Department should alert U.S. Customs and Border Protection (“CBP”) to the transaction at issue and should request that CBP conduct further investigation. While taking no position with respect to referring the transaction to CBP, Tata takes exception to Nucor’s mischaracterization of the facts and evidence on the record with respect to Tata.

Department Position:

The issue of whether the Department refers the matter to CBP for further investigation is a separate determination from the Department’s final results of review. Accordingly, the Department has not addressed this matter in these final results of review.

¹⁰ Gallant Ocean (Thailand) Co., Ltd. v. United States, 602 F.3d 1319 (Fed. Cir. 2010).

Recommendation:

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of this review in the Federal Register.

AGREE: _____ DISAGREE: _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date