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

FROM: Barbara Tillman
Acting Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Administrative Review of the Suspension Agreement on Certain Cut-to-Length Carbon Steel Plate from Ukraine

SUMMARY:

We have analyzed the comments and rebuttal comments of interested parties in the administrative review of the suspension agreement on certain cut-to-length carbon steel plate from Ukraine. We recommend you approve the positions we have developed in the "Discussion of Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments by parties:

1. Termination of the Suspension Agreement and the Underlying Investigation

BACKGROUND

On December 9, 2002, the Department of Commerce (the Department) published the preliminary results of administrative review of the suspension agreement on certain cut-to-length carbon steel plate from Ukraine (the Agreement). *See Notice of Preliminary Results of the Administrative Review of the Suspension Agreement on Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 67 Fed. Reg. 72,916 (December 9, 2002) (*Preliminary Results*). The merchandise covered by this administrative review is certain cut-to-length carbon steel plate as described in the "Scope of the Review" section of the *Federal Register* notice. The period of review (POR) is November 1, 2000 through October 31, 2001.

DISCUSSION OF THE ISSUE:

1. Termination of the Suspension Agreement and the Underlying Investigation.

Azovstal Iron and Steel Works and Ilyich Iron and Steel Works (hereafter referred to as respondents) assert the Government of Ukraine (GOU) has been in compliance with the Agreement. In addition, respondents contend the Agreement has not been violated in any substantive manner. Therefore, respondents aver the Department should terminate the Agreement and the underlying investigation of cut-to-length carbon steel plate from Ukraine.

Respondents support their argument by referencing the Department's *Preliminary Results*, where the Department found the GOU adhered to the major terms of the Agreement. The respondents also maintain the Department's verification report confirms the GOU's compliance with the Agreement and insist it has not been violated in any substantive manner. Respondents assert the verification report confirms the GOU established and implemented an export licensing program for all exports of CTL plate to the United States. Respondents, citing to the verification report, provide a description of the export licensing process. They reference to the application submitted by the mills to the Ministry of Economy and European Integration of Ukraine (MINECON); applications are reviewed and verified for accuracy by MINECON; applications must include sales contract (which contains a clause not to resell the merchandise to any other downstream customer other than those identified in the contract). Respondents also noted the application for export certificates must include a copy of the bill of lading and the approved export license. The licensing program, they contend, insured that CTL plate sold to the United States did not exceed the Agreement's export limits nor was sold below the set reference price. Respondents assert the Department's verification in Ukraine did not reveal any material discrepancies between the export licenses issued and the corresponding transaction in regards to quantity and price. *See* Respondents' Case Brief at 5.

Respondents maintain the Department's verification of producers and exporters confirmed that Ukraine has not violated the Agreement in any substantive manner. *See* Respondents' Case Brief at 6. They contend that two specific items discussed at verification were inadvertent oversights and not willful attempts at either non-compliance or circumvention. The first instance is Ilyich incorrectly reporting its third country sales to MINECON; and the second instance is Azovstal marking an affiliated trading company as "unaffiliated" on its export license application. Respondents assert Ilyich notified the verifiers that it misunderstood its reporting requirements to MINECON and only reported sales of CTL plate manufactured to the standards set forth in the Agreement. Respondents aver Ilyich actually reported to MINECON all grades of plate which started with the letter "A", *i.e.*, Lloyd's Registry grades and British Standard grades of shipbuilding steel. *See* Respondents' Case Brief at 6.

In its discussion of Azovstal listing an affiliated trading company as "unaffiliated" on the export license application, Respondents contend this action is not a substantive violation of the Agreement.

Respondents assert the company explained that 1) MINECON and the mill agreed on the format for submitting data in its Export License application, 2) at the onset of its business relationship, Azovstal and the now-affiliated trading company, were not affiliated. They further assert, as the relationship between Azovstal and the trading company evolved, the individual preparing the export licenses was not aware of the affiliation and did not update the application to reflect the most current circumstances. Respondents contend Azovstal did not withhold its affiliation with the trading company, and in fact, in its third country sales report to MINECON listed the trading company as affiliated. Therefore, respondents aver GOU and the Department were aware of the affiliation. Respondents assert the Department's verification of the affiliated trading company demonstrated that sales were made above the reference price. Respondents conclude their argument by requesting to terminate the Agreement and the underlying investigation, in light of the Department's preliminary determination that the GOU has been in compliance with the Agreement and that the Agreement has not been violated in any substantive manner.

Petitioners counter respondents' request for termination of the Agreement and the underlying investigation by asserting 1) the Department does not have substantive authority to terminate the Agreement together with the underlying investigation, 2) procedural deficiencies do not permit the Department to terminate the Agreement together with the underlying investigation, and 3) there is no precedent for the Department to terminate a suspension agreement based on a claim of compliance. First, petitioners assert there is no legal authority for the Department to terminate the Agreement for the underlying investigation, and there is no express or implied requirement in the law or the Agreement that the Department do so. *See* Petitioners' Rebuttal Brief at 5. Petitioners contend section 351.222 of the Department's regulation is the only regulation that provides a basis for revocation of antidumping duty orders or termination of antidumping suspension agreement. Petitioners assert the regulation requires 1) all exporters and producers covered by the suspension agreement to have sold the subject merchandise at not less than normal value for at least three consecutive years, and 2) continued application of the order is not otherwise necessary to offset dumping.

Petitioners maintain there has not been an administrative review of the Agreement that compared normal value to prices in the United States to determine the existence of dumping. Petitioners cite the Department's Sunset Review stating that other than the instant review, there has not been another administrative review of the Agreement. Petitioners contend the requirements in section 351.222(b)(1)(i)(A) of the Department's regulation were not met because the Department did not determine whether Ukrainian producers sold subject merchandise at not less than normal value for at least three consecutive years. Petitioners add to their argument by stating compliance with the terms of the Agreement does not indicate sales at normal value. They contend the Agreement does not "purport to eliminate dumping and does not purport to have established reference prices at levels that prevent or eliminate dumping."

The second aspect to Petitioners' assertion, that the Department does not have the substantive authority to terminate the Agreement and the underlying investigation, is the Department must determine

that the continued application of the antidumping order is [not] otherwise necessary to offset dumping. Petitioners cite the Sunset Review where the Department determined that termination of the suspended antidumping duty investigation on CTL Plate from Ukraine would likely lead to continuation or recurrence of dumping at the following weighted-average margins: Azovstal at 81.43 percent, Ilyich at 155 percent, and Ukraine-wide at 237.91 percent. Petitioners interpret the Sunset Review finding to mean that the "application of the order or continuation of the Agreement 'is otherwise necessary to offset dumping' because termination of the Agreement (or failure to impose an antidumping duty order in its place) in this case would lead to a continuation or recurrence of sales at less than fair value by the Ukrainian producers and exporters." *See* Petitioners' Rebuttal Brief at 8.

Petitioners' comparison of estimated normal value for Ukrainian plate and average unit values (AUV) of plate imported from Ukraine indicated that dumping would continue if the Agreement was terminated. Petitioners calculated normal value by using the AUV of plate imports from Ukraine during the POI (April -September 1996), $382.25. They calculated the average normal value by increasing the AUV by the dumping margins determined in the original investigation. Petitioners assert the resulting calculations produce an average normal value of $693.52 for Azovstal, $974.74 for Ilyich, and $1291.66 Ukraine-wide. Per their calculations, petitioners contend, normal values exceeded the average price of CTL plate from Ukraine sold in the United States. Therefore, petitioners aver the information indicates that dumping would continue were the Agreement to be terminated. *See* Petitioners' Rebuttal Brief at 8.

Second, Petitioners assert the procedural conditions for termination of the Agreement have not been met. Petitioners contend neither the GOU nor Ukrainian producers submitted 1) a certification that the person did not sell at less than normal value during the period of review and that the person will not sell at less than value in the future, and 2) certification that during each of the consecutive years, the person sold the subject merchandise in commercial quantities. Petitioners maintain Ukraine's request for an administrative review did not contain the necessary certifications. Petitioners argue the Department did not follow the procedural requirements mandated by its regulations, which dictate that all of the following procedures be followed:
"1) initiation of and conducting an administrative review upon receipt of timely request for termination, (2) publication of notice of initiation together with notice of 'Request for Termination of Suspended Investigation,' (3) conducting of verification, and (4) inclusion in preliminary result of review the [Department's] decision whether there is a reasonable basis to believe that the requirements for termination are met together with notice of 'Intent to Terminate Suspended Investigation' where the requirements for termination are met." *See* Petitioners' Rebuttal Brief at 14. Petitioners contend the Department did not publish a notice of request for termination, nor did it publish a notice of intent to terminate along with the preliminary results of this administrative review. Petitioners assert the Department cannot terminate this Agreement and refuse to impose an order, particularly where petitioners were not put on proper notice of any such intention of the parties. *See* Petitioners' Rebuttal Brief at 15.

Lastly, Petitioners argue the Department has not terminated a suspension agreement based on a lack of substantive violation of an agreement. Petitioners cite *Sheet Piling from Canada* as a case where the Department conducted an administrative review of a suspension agreement, found a de minimus margin for the period of review and therefore no violation, received no comments from interested parties after publication of the preliminary results. However, the Department still did not terminate the suspension agreement. *See Final Results of Administrative Review of Suspension Agreement: Sheet Piling from Canada*, 49 Fed. Reg. 28,593 (July 13, 1984). They also cite *Carbon Steel Plate from Romania*, where the Department's administrative review of the suspension agreement concluded that there were no shipments of the subject merchandise to the United States during the period of review, and that therefore the exporter had complied with the terms of the suspension agreement. *See Final Results of Administrative Review of Suspension Agreement; Carbon Steel Plate from Romania*, 49 Fed. Reg. 12,292 (March 29, 1984). Nonetheless, petitioners argue, the Department refused to terminate the agreement.

The two cases, petitioners assert, were eventually cancelled and the investigation were resumed. Petitioners point out that compliance in these cases was not sufficient evidence for immediate termination of the agreements without resuming the investigation. Petitioners have not found evidence or precedent that any prior suspension agreement was terminated for any reason other than 1) a sunset review or U.S. International Trade Commission decision determining that dumping was not likely to continue or recur in the absence of the suspension agreement or order, 2) withdrawal of the petition or lack of interest, 3) violation of the agreement (leading to issuance of the order or continuation of the investigation), 4) termination by the respondent (leading to issuance of the order or continuation of the investigation). *See* Petitioners' Rebuttal Brief at 18. Petitioners conclude for the reasons stated above, the Department should determine not to terminate the Agreement. In addition, if the Department were to terminate the Agreement, petitioners insist the Department would be required to impose an antidumping duty order corresponding to the final determination of sales at less than fair value.

Department's Position:

Section 351.222(b)(1)(i) of the Department's regulation states the Department, in determining whether to revoke an antidumping order or terminate a suspended antidumping investigation, will consider: A) whether all exporters and producers covered at the time of revocation by the order or the suspension agreement have sold the subject merchandise at not less than normal value for a period of at least three consecutive years; B) whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

The Department disagrees with petitioners' assertion that there has not been a determination of an absence of dumping and the administrative review of the Agreement did not compare normal value to prices in the United States. As the Court of International Trade (the Court) found in *Floral Trade Council v. the United States* (*Floral Trade Council*), adherence to the terms, *i.e.*, reference prices

and export limits, set by a suspension agreement is a reasonable substitute for a determination that sales of the subject merchandise were above or at normal value. *See Floral Trade Council v. United States*, 991 F.Supp. 655, 663-664 (CIT 1997), and the underlying administrative reviews, *Roses and Other Cut Flowers from Colombia; Miniature Carnations from Colombia*, 61 Fed. Reg. 45,941 (August 30, 1996). We have found no evidence in the questionnaire responses or at verification in March 2003 or the Department's verification in December 1998 that would cause the Department to reconsider our position, in this POR or since the effective date of the Agreement, that the respondents have complied with the terms of the Agreement. *See* "Verification ... in the context of the Suspension Agreement for CTL Carbon Steel Plate from Ukraine," from Heather Osbourne and Ilissa Kabak to Richard Weible dated December 1, 1998 and "Verification of Ministry of Economy Responses," from Robert James and Patricia Tran to the File dated May 2, 2003. Therefore, the Department finds, consistent with *Floral Trade*, that by its compliance with the terms of the Agreement, the GOU has effectively satisfied the requirements of section 351.222(b)(1)(i)(A).

In evaluating the second criterion for termination of the suspension agreement at section 351.222(b)(1)(i)(B), the Department has determined that the continued application of the antidumping duty order is necessary to offset dumping because the evidence indicates that Ukraine will sell subject merchandise at less than normal value in the future were we to terminate the Agreement and the underlying investigation. In reaching this decision, we have examined all the information on the record, including publicly available data regarding market conditions both in the United States and in Ukraine. The Department took into consideration the Ukrainians' utilization of its export limits in this Agreement; the market for plate in Ukraine and capacity utilization of Ukrainian production; and trends in consumption in the U.S. market and plate-making capacity of the U.S. industry.

As the Court has noted, the determination of whether a respondent is likely to resume dumping "is an independent criterion that must be established to Commerce's satisfaction to attain revocation." *Hyundai Electronics Co., Ltd. And Hyundai Electronics America, Inc.* et al., *v. United States*, 53 F. Supp.2d 1334, 1340 (CIT May 19, 1999). In this case, we have determined that continued application of the Agreement is necessary given i) Ukrainian producers' inability to meet their existing quota, despite steadily falling reference prices, ii) Ukraine's under-utilization of its existing capacity and inability to sell significant quantities of its steel in the home market and attendant shift towards export markets, iii) the panoply of trade restrictions imposed by other countries which limits Ukraine's access to alternative markets; iv) the falling demand for carbon steel plate in the United States; and v) the Department's finding in its recently-completed Sunset review that if the Agreement were terminated and the reference prices eliminated, dumping would likely continue or recur.

We examined the Ukrainians' utilization of the Agreement's export limits and reference prices. The reference prices first came into effect on October 24, 1997 and pursuant to the Agreement were adjusted on a quarterly basis to reflect the change in the producer price index (PPI) for carbon steel plate. As indicated by the PPI, the reference price for A36 plate has dropped from $359.00 per metric ton during November 1997 to January 1998 to $293.56 per metric ton during November 2002 to

January 2003. This constitutes a decrease of 18 percent in the reference price.

Pursuant to the Agreement, export limits are adjusted based upon changes in U.S. apparent consumption for steel plate and calculated using statistics from the U.S. Census Bureau and data from the American Iron and Steel Institute. The Department has adjusted the export limit based on U.S. apparent consumption from 158,000 metric tons during November 1, 1997 to October 31, 1998 to 139,106 metric tons during November 1, 2001 to October 31, 2002[1]. The Ukrainian producers and exporters have not been able to meet the quota the Agreement provided. Imports from Ukraine during November 1, 1995 to October 31, 1996 were as high as 526,878 metric tons. Since the origination of the Agreement, Ukraine's shipments of plate to the U.S. have fallen significantly. The actual import volumes of CTL plate from Ukraine during the suspension period are as follows: 116,158 metric tons for November 1, 1997 to October 31, 1998; 23,196 metric tons for November 1, 1998 to October 31, 1999; 24,641 metric tons for November 1, 1999 to October 31, 2000; 19,454 metric tons for November 1, 2000 to October 31, 2001; 14,287 metric tons for November 1, 2001 to October 31, 2002[2]. Although the reference prices decreased steadily by 18 percent since November 1997, over the life of this Agreement the Ukrainian exporters and producers were only able to fill an ever-declining share of their available export limit. Ukraine shipped 73.5 percent of its export limit in 1997 - 1998, a figure which dropped sharply until, by 2001 - 2002, Ukraine filled only 10.3 percent of a much lower export limit. This trend would indicate that, absent the Agreement, Ukraine would be compelled to sell below normal value in the future in order to remain competitive in the U.S. market.

We also examined the Ukrainian plate market for any indication of potential reaction if the Agreement and the underlying investigation were to be terminated. The Ukrainian production capacity, according to *World Steel Dynamics,* is 4.6 million metric tons; however its production varied from 1.3 million metric tons in 1996 to 1.86 million metric tons in 2001. *See* Marcus, Peter F. and Kirsis, Karlis M., "World Flat-Rolled Market: Core Report CCCC," *World Steel Dynamics*, April 2003 at 6-10. Thus, the steel industry in Ukraine is presently operating far below capacity. Were the Department to terminate the Agreement and the underlying investigation, Ukraine would have substantial unused capacity with which to increase production and ship vast quantities of subject plate, as was evidenced by the half-million tons of Ukrainian plate imported in the year preceding the Agreement.

Further, we note that Ukraine has an export-oriented industry. Ukraine's apparent consumption of steel products averaged 714,000 metric tons a year over the life of the Agreement. However, in sharp contrast, Ukraine's exports rose steadily from 700,000 metric tons in 1996 to 1.16 million metric tons in 2001. *See id.* at 2-100. Exports from Ukraine have grown from 54 percent of

[1] Pursuant to the Agreement, a maximum adjustment of plus or minus 6 percent can be applied to the export limit for the next relevant period.

[2] United States Bureau of the Census trade statistics.

production to 62 percent of production. Thus, available evidence suggests the Ukrainian steel industry has a clearly limited home market demand, and is focusing increasingly on the export market as an avenue for marketing its steel products.

In addition, the Department has considered unfair trade actions taken against the Ukrainian steel industry by other countries. As noted in *Metal Bulletin* in May, 2003, Ukrainian plate producers have faced antidumping measures originally imposed in 1999 by the Canadian International Trade Tribunal on its exports of carbon steel plate products.[3] Moreover, *Metal Bulletin* noted Hungary, in April 2003, imposed tariff-rate quota restrictions on imports of steel, including hot-rolled plate products, from, *inter alia*, Ukraine. These measures call for duties of between 15 and 25 percent for imports above the quota.[4] Ukrainian producers face additional limits on their exports to Russia. *Metal Bulletin* reported in August, 2002 that "problems for producers are arising from the 104,920 tonne quota for heavy plate exports from Ukraine. At least one of the large mills has used up its quota for the year, although others have not."[5] Clearly, then, the Ukrainian steel industry faces considerable difficulty in marketing its steel products to other regions of the world.

As noted, the Ukraine steel industry is increasingly focused on the export market, while at the same time facing significant obstacles to shipping to major steel-consuming markets due to trade restrictions from other countries. Coupled with the significant under-utilization of its existing production capacity, we view all of this evidence as indicating that Ukraine would sell the subject merchandise at less than normal value in the future in the U.S. market.

Turning to the U.S. market specifically, the Department considered the consumption and capacity in steel plate in the United States. The United States has increased its plate mill capacity from 8,053,000 metric tons in 1996 to 11,658,000 metric tons in 2002. *See World Steel Dynamics* at 6-22. However the apparent consumption of heavy plate in the United States has dropped from 8,413,244 metric tons in 1996 to 5,689,437 metric tons in 2002[6]. The increase in the United States' capacity, the shrinking market for subject merchandise, and the restrictions on exports of Ukrainian plate to other markets, are indicators that Ukraine will sell subject merchandise at less than normal value in the absence of the Agreement in order to be competitive with U.S. producers.

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[3] "CITT Starting Reviews of Steel Plate Trade Cases," May 12, 2003.

[4] "Hungary Outlines Extra Tariffs," April 7, 2003.

[5] "Russian Mills Await Export Licenses," August 12, 2002

[6] American Iron and Steel Institute Statistics January 1996 - December 1996 and January 2002 - December 2002. Statistics from American Iron and Steel Institute are reported in net tons. The information here was converted to metric tons to be consistent with other statistical data used. One net ton is equal to 0.9071847 metric ton. *See* also Letter from Joseph A. Spetrini to Igor Gaiduchak dated September 1, 1998, Letter from Joseph A. Spetrini to Sergei Gryshchendo dated August 31, 1999, September 1, 2000, and August 29, 2001.

Moreover, in the recently completed *Sunset Review*, we determined if the Agreement were terminated and the reference prices eliminated, dumping would likely to continue or recur. *See Final Results of Five Year Sunset Review of Suspended Antidumping Duty Investigation on Certain Cut-to-Length Carbon Steel from Ukraine*, 68 Fed. Reg. 24,434 (May 7, 2003). Given the above information and the finding in the *Sunset Review*, we determine the continued maintenance of the antidumping duty order is otherwise necessary to offset dumping.

Petitioners cite section 351.222(e)(1) as a third criterion for revocation of an order or termination of a suspension agreement. Petitioners state respondents must submit a "1) certification that the person did not sell at less than normal value during the period of review and that the person will not sell at less than normal value in the future, and 2) certification that during each of the consecutive years in paragraph (b), the person sold the subject merchandise in commercial quantities." *See* Petitioners' Rebuttal Brief at 14. Respondents requested termination of the Agreement pursuant to the terms of section XII of the Agreement and section 353.25 (now 351.222) of the Department's regulations. While this request may satisfy the procedural and substantive requirements of section 351.222 (e), this issue is moot given our determination that the continued application of the antidumping duty order is otherwise necessary to offset dumping in the future.

In conclusion, the Department determines that Ukraine complied with the terms of the Agreement. However, the Agreement and the underlying investigation will not be terminated. The Department finds that continued application of the antidumping duty order is otherwise necessary to offset dumping because substantial evidence exists that future sales of subject merchandise at less than normal value will occur if the Department were to terminate the Agreement and the underlying investigation.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the positions set forth above. If these recommendations are accepted, we will publish the final results of the antidumping duty administrative review in the *Federal Register*.

AGREE____ DISAGREE____

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Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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DATE