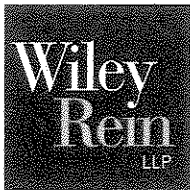

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June 23, 2008

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VIA HAND DELIVERY

David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
14th Street & Constitution Ave., NW.
Washington, DC 20230

Re: Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment

Dear Mr. Spooner:

On behalf of Nucor Corporation, a U.S. producer of steel products and participant in a number of antidumping duty proceedings, we respectfully submit the following comments with respect to the Department's request for comments on its proposed targeted dumping methodology.[1] Nucor believes that the Department's proposed test set the bar far for determining the existence of a significant pattern of export price differences so high as to be utterly impracticable. The Department has not adequately explained why the test, particularly its rigid application of statistical methods and arbitrary cutoffs, is sensitive enough to ensure that dumped sales are identified.

[1] *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26,371 (Dep't Commerce May 9, 2008). These comments are timely filed pursuant to the Department's extension of the comment deadline. *See Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment and Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 32,557 (Dep't Commerce June 9, 2008).

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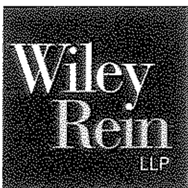

Nucor fully subscribes to the comments being filed by King & Spalding LLP and those filed on behalf of the Committee to Support U.S. Trade Laws ("CSUSTL"), which argue that the Department's proposed test is arbitrary and likely to leave clear instances of targeted dumping unidentified. In particular, those comments explain, in great clarity, the flaws inherent in the Department's attempt to borrow certain statistical concepts and notions and put them to use in a situation to which they are completely inapplicable.

While supporting the King & Spalding and CSUSTL comments in full, Nucor would also like to state its belief, as detailed below, that the Department's proposed use of standard deviations in the "pattern" prong of the test fails to give proper effect to the relevant portion of the Tariff Act, and is likely to fail to identify instances of targeted dumping that result in U.S. producers being forced to compete, for certain customers, or in certain regional markets and time periods, with goods that are sold at less than their fair value. Furthermore, Nucor is concerned that the Department's test for targeted dumping, being far more restrictive than the tests used by other WTO members and more restrictive than necessary under the WTO Antidumping Agreement, puts domestic producers at a significant disadvantage in the global trade regime.

A. <u>The Proposed Use of Standard Deviations in the "Pattern" Prong Violates the Tariff Act</u>

The first step of the Department's test involves determining, on an exporter-specific basis, "the share of the allegedly targeted customer's purchases of subject merchandise, by sales value, that are at prices more than one standard deviation below the weighted-average price to all customers of that exporter, targeted and non-targeted."[2] Nucor believes that the proposed use of standard deviations in the first prong of the test is not statutorily sound. Specifically, the Department's proposed comparison of an exporter's allegedly targeted sales to all sales (targeted and non-targeted) fails to give full effect to the statutory text.

The Tariff Act directs the use of an average-to-transaction methodology where there is "a pattern of export prices . . . that differ significantly among purchasers, regions, or periods of time."[3] The Department appears to understand this direction as requiring the agency to make two findings: first, to establish a pattern of export price differences, and subsequently to establish significant differences in prices among different customers, regions, and time periods. In order to establish a pattern of export price differences, the Department proposes to compare sales to targeted segments against a standard deviation of the plot of all sales by the exporter, whether targeted or untargeted.

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2 *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment*, 73 Fed. Reg. 26,371, 26,372 (Dep't Commerce May 9, 2008).

3 19 U.S.C. § 1677f-1(d)(1)(B)i.

This methodology fails to conform to the statute. The statute directs that in considering patterns of export price differences, the relevant patterns related to differences among customers, regions and time periods. The "pattern" prong of the Department's test, however, does not compare sales prices in respect of allegedly targeted customers, regions, and time periods with sales prices to those customers, regions, and time periods that are not alleged to have been targeted. Put another way, the Department's test does not evaluate whether a pattern of price differences exists among differently situated customers, regions, or time periods, as directed by the statute. Rather it evaluates whether a pattern of export prices exists "among" all the sales in the database.

B. <u>The Department's Proposed Test Will Fail to Identify Instances of Harmful Dumping</u>

Even if such a test were not forbidden by the statutory text, it leads to clearly perverse results through arbitrarily biasing the data to be taken into account. Under the Department's proposed test as currently formulated, the Department would plot the sales to Customer A, and then plot sales to both Customers A & B. The Department would then consider the number of sales to Customer A, which were priced at more than one standard deviation below the mean price of sales to both Customers A & B. However, by taking the allegedly dumped sales into account when determining the correct standard deviation for comparison, the Department runs the risk that the effect of the dumped sales' inclusion in the

comparison sales group will cause a number of sales that have actually been targeted to go unidentified by the test.

As an example, consider an exporter with two customers, A & B. The exporter has five sales to each customer, for a total of ten U.S. sales during the period of investigation. He charges prices of $3, $4, $5, $6, and $7, an average of $5 per unit, to Customer A over the POR. He charges $8, $9, $10, $11, and $12, an average $10 per unit, to customer B over the same time period. The mean for sales to A & B is $7.5, and the standard deviation for the plot of all sales to A & B is $2.83. One standard deviation below 7.5 is $4.67. Thus, the first two sales to Customer A are identified as having a relevant pattern of export prices, but not the latter three.

However, if the standard deviation that is used to evaluate Customer A sales is calculated on the basis of the plot of all sales not alleged to be targeted, a far different result occurs. In that case, the mean price of non-alleged sales is $10, and the standard deviation is 2. All sales under $8 will be considered to exhibit a pattern of price differences. Accordingly, under this calculation, all sales to Customer A exhibit such a pattern.

Now let us assume that the actual normal value for these goods is $7.5. The problems inherent in Department's proposed use of all sales, targeted and non-targeted, for developing standard deviation to which targeted sales must be compared, becomes clear. Not only does this methodology give far different results

that identify significantly fewer sales as non-targeted, it has the possibility of failing to identify clearly dumped sales as subject to a pattern of export price differences.

Again, Nucor refers the Department to the comments filed by King & Spalding LLP and on behalf of CSUSTL for a more complete analysis of the issues raised by all of the various parts of the proposed test. However, Nucor respectfully submits that the commentary and examples relating to just the issue of the derivation of the standard deviation for identifying patterns of export price differences are illustrative of the flaws in the current proposal as a whole. While we are appreciative of the fact that the Department is faced with the challenge of applying a little-used portion of the Tariff Act in such a way as to create a workable test for repeated future use, Nucor believes the Department should ensure that the resulting test is both statutorily compliant and reasonably formulated to identify dumping in the U.S. market.

C. The Proposed Test Puts U.S. Producers at a Disadvantage Relative to Producers in Other Countries

Further, the test proposed by the Department is very different from the tests used by other members of the WTO's Agreement on Anti-Dumping, particularly the European Union. The EU's regulation on the use of average-to-transaction methodologies is, like the U.S. statute, based on Article 2.4.2 of the Agreement on Anti-dumping, and features nearly identical language. The EU regulation states:

> A normal value established on a weighted average basis may be compared to prices of all individual export transactions to the Community, if there is a pattern of export prices which differs significantly among different purchasers, regions, or periods.[4]

In evaluating claims of targeted dumping, the EU has used a methodology that is far simpler than the one currently proposed by the Department, and which is much more likely to identify the existence of targeted dumping. The EU's methodology also has built-in flexibility that permits the EU to adapt its evaluation to the facts of a specific case. A rigidly formulated test like the one proposed by the Department, by contrast, not only may produce perverse results under certain fact patterns, it is susceptible to manipulation by respondents indulging in set-up sales.

Where targeted dumping is alleged during an EU antidumping inquiry, the EU compares sales prices offered in respect of the allegedly targeted customer/time period/region to those offered in respect of the dumped/non-dumped customer/time period/region.[5] It does not, as the Department proposes to do, compare the alleged subset of targeted sales against the full sales database, and does not go to the lengths of comparing the allegedly targeted sales against data based on the standard deviations of the exporter's full sales. Rather, it appears that the EU evaluates the

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[4] Council Regulation (EC) No. 384/96 (Dec. 22, 1995), as amended by Council Regulation (EC) No. 2238/2000 (Oct. 9, 2000) at Article 2(11).

[5] *See Ritek Corp. and Prodisc Technology, Inc. v. Council of the European Union*, Case T-274/02, Judgment of the Court of First Instance (Oct. 24, 2006) at para. 51.

question of a pattern by averaging the allegedly targeted prices, and comparing them against the average of allegedly non-targeted prices.[6]

Further, in determining the significance of the price differences, the EU simply calculates the exporter's margin on both an average-to-average and an average-to-transaction basis, and considers the difference in the results, in the context of the results themselves.[7] Accordingly, where the margin is 48% under one method, and 50% under the other, a significant pattern may not have been established. However, if the margin is 6% under one method, and 4% under the other, then the EU will likely find that the pattern of price differences is significant.[8]

The European Union, then, has established a methodology for addressing concerns related to targeted dumping that is far simpler and more flexible than that proposed by the Department. The EU method achieves the fundamental task of determining whether a pattern of price differences exists in respect of sales to various customers/regions/and time periods by simply and directly comparing prices alleged to be dumped against prices not alleged to be dumped. Further, it establishes the significance of any such patterns in an equally simple, but appropriately flexible manner – by comparing the results of calculations conducted on an average-to-average and average-to-transaction basis.

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6 *Id.*

7 *Id.* at paras 79-84; *see also Petrotub SA and Republica SA v. Council of the European Union*, Case C-76/00 P (Judgment of the Court of First Instance Jan. 9, 2003) at para. 110.

8 *See Ritek* at paras. 79-84.

Nucor submits that the EU has developed an approach that (1), goes to the fundamental questions of determining the existence of a pattern of price differences; (2), is easy to apply, and (3) is flexible enough to both permit the agency to use its discretion to consider novel and particular fact patterns and to stymie efforts by respondents to disguise dumping through the use of set-up sales. This approach, moreover, is far more conducive to the goal of accurately identifying targeted dumping, and thus ensuring a level playing field for EU producers, than the Department's proposed test would be in respect of protecting the U.S. market from unfair pricing.

D. Conclusion

Nucor agrees with the critiques of the Department's proposed rule laid out in the comments filed by King & Spalding LLP and on behalf of CSUSTL. As a supplement to those critiques, Nucor notes that the Department's test departs significantly from the directives of the Tariff Act, and seems perversely susceptible to a failure to identify targeted dumping with the potential to harm U.S. industry. Further, the proposed test is far more restrictive than the targeted dumping tests employed by the U.S.' trading partners, and thus puts U.S. producers at a significant disadvantage in compared with foreign producers.

Sincerely,

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