

Nucor Corporation, Gerdau Ameristeel Corporation, and Commercial Metals Company v. United States

Court No. 05-00616 (December 15, 2005)

FINAL RESULTS OF REDETERMINATION

PURSUANT TO COURT REMAND

SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to the remand order from the U.S. Court of International Trade (the Court) in Nucor Corporation, Gerdau Ameristeel Corporation, and Commercial Metals Company v. United States, Court No. 05-00616 (Dec.15, 2005) (Nucor v. United States). The Court remanded the date of sale issue in this case to the Department for further review based on the Department's request for a remand. Specifically, the Department requested a remand to reconsider whether it reasonably found contract date, rather than invoice date, to be the appropriate date of sale for U.S. entries of subject merchandise by ICDAS Celik Enerji Tersane ve Ulasim Sanayi A.S. (ICDAS).

The Department issued its draft final remand results to all interested parties on December 29, 2005. On January 5, 2006, we received comments on these final results from ICDAS. We received rebuttal comments from Nucor Corporation, Gerdau AmeriSteel Corporation, and Commercial Metals Company, the petitioners, on January 9, 2006. These comments are addressed below.

In accordance with the Court's instructions, the Department has reconsidered its date of sale methodology for ICDAS's U.S. entries in the 2003-2004 antidumping duty administrative

review. As a result, we have recalculated the margin for ICDAS using the invoice date as the date of sale for these transactions. In addition, because this margin is above de minimis, we have determined that ICDAS does not qualify for revocation under 19 CFR 351.222(b)(2)(i)(A).

A. Background

On November 8, 2005, the Department published its final results of the 2003-2004 antidumping duty administrative review. See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 FR 67665 (Nov. 8, 2005), and accompanying Issues and Decision Memorandum (Final Results). The antidumping duty order subject to this review was issued on April 17, 1997. See Antidumping Duty Order: Certain Steel Concrete Reinforcing Bars from Turkey, 62 FR 18748 (Apr. 17, 1997). The period of review (POR) covers the period from April 1, 2003, to March 31, 2004.

In the Final Results, the Department reversed its preliminary decision with respect to date of sale for ICDAS and used the contract date as the date of sale for ICDAS's U.S. sales, rather than the invoice date, because we determined that the material terms of sale were established at the contract date. See Final Results at Comment 6.

On November 14, 2005, the petitioners filed a summons and complaint with the Court challenging the Department's date of sale methodology for ICDAS in the Final Results. In the complaint, the petitioners alleged that the Department's date of sale determination was erroneous because the record showed price changes for several transactions between contract and invoicing. On November 18, 2005, the Department requested a voluntary remand in order to reconsider the date of sale issue. On December 15, 2005, the Court granted the Department's request to

reconsider whether, based upon the record evidence, the Department reasonably applied its date of sale methodology to the facts at issue here.

Pursuant to the Court's remand, the Department has further reconsidered the date of sale issue for ICDAS's U.S. sales during the POR. As discussed below, we have made changes to the Department's Final Results with regard to the date of sale used in the margin calculations for ICDAS. As a result, we have determined that ICDAS does not qualify for revocation under 19 CFR 351.222(b)(2)(i)(A).

B. Analysis

The Department based the date of sale for ICDAS's U.S. sales in the underlying administrative review on the contract date. Although the Department's regulations provide for a rebuttable presumption that the date of sale for purposes of comparing the normal value of a respondent's home market sales to its U.S. sale price is the invoice date, they also stipulate that the Department may use a date other than the invoice date if it is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. See 19 CFR 351.401(i). Based on an incomplete analysis of the administrative record of this review, the Department found that the material terms of sale for ICDAS's U.S. sales of subject merchandise were established by the contract date. Specifically, upon reviewing the contracts on the record of this case, we concluded that there were no changes to quantity outside the specified contract tolerances for each U.S. entry of subject merchandise. In our final decision memorandum, we stated the following:

[W]e agree...that contract date may be the appropriate date of sale in cases where there are no changes to the material terms of sale specified in the contracts. Therefore, we examined the data on the record for ICDAS, the only other respondent which provided

contract date information to the Department. According to this information, there were no changes outside the tolerances specified in the contracts between the quantities shown on the contracts and the actual quantities shipped. {footnote omitted}. Therefore, for the final results, because we find that ICDAS has demonstrated that there were no changes outside the specified contract tolerances for each POR U.S. sale, we have revised calculations to use contract date as the date of sale for all of its U.S. sales.

See Final Results at Comment 6.

In the complaint to the Court, the petitioners asserted that the Department initially determined that the correct date of sale for ICDAS's U.S. sales was the invoice date. However, the petitioners asserted that, although neither they nor the respondent raised the issue of date of sale for ICDAS in their case briefs, the Department inappropriately altered its determination regarding date of sale for ICDAS and found that contract date was the appropriate date of sale. According to the petitioners, this decision is unsupported by substantial evidence. See Nucor v. United States, Complaint at 3.

Because our intention was to base the date of sale for ICDAS on a date that accurately reflects when the material terms of sale were established, we requested that the Court remand the issue to the Department for further analysis. After further examination of the information on the record in the underlying administrative review, we find that: 1) the analysis performed in the Final Results related solely to changes (or lack thereof) in the quantity of ICDAS's U.S. entries during the POR; 2) there were differences between the prices listed on the contract and the invoice for two subject invoices; and 3) the transactions represented by these invoices constitute a significant portion of the total universe of U.S. transactions examined both in number of invoices issued on POR entries and total quantity of entered merchandise.¹ Given the

¹ We note that the underlying data is proprietary and cannot be discussed here. For further discussion, see the memorandum from Brianne Riker to the File entitled "Placing

significance of these price changes, we find that the material terms of sale were not established on the contract date, and as a result, we find that it is appropriate to base the U.S. date of sale for ICDAS on the earlier of shipment or invoice date since this date represents the first time the material terms of sale (i.e., both price and quantity) were established for ICDAS's U.S. sales. This finding is in accordance with our practice. See Allied Tube and Conduit Corp. v. United States, 127 F.Supp.2d 207 (CIT 2000) (Allied Tube I); Allied Tube and Conduit Corp. v. United States, 132 F.Supp.2d 1087 (CIT 2001) (Allied Tube II); see also Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Japan, 64 FR 30574, 30587 (June 8, 1999); Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Belgium, 64 FR 15476, 15481-82 (Mar. 31, 1999). Consequently, we have recalculated the margin using ICDAS's invoice date as the date of sale.

After incorporating the revised date of sale methodology, our margin calculations show that ICDAS sold rebar at less than normal value during the 2003-2004 review period. Therefore, we find that ICDAS is not eligible for revocation because it fails to meet the requirements of 19 CFR 351.222(b)(2).

C. Comments from Interested Parties

On January 5, 2006, ICDAS submitted comments on our draft redetermination issued on December 29, 2005. On January 9, 2006, the petitioners submitted rebuttal comments. These comments are addressed below.

Information on the Record in the Remand Redetermination Nucor Corporation, Gerdau Ameristeel Corporation, and Commercial Metals Company v. United States (Court No. 05-00616), ” dated December 29, 2005 (“Memo to the File”).

Date of Sale Methodology for ICDAS

ICDAS maintains that the Department should continue to use contract date as the date of sale for ICDAS's U.S. sales. According to ICDAS, the Department's decision in the draft redetermination to use invoice date is inappropriate because it is neither supported by the Department's regulations and precedent nor the facts of this proceeding. ICDAS argues the central issue in the date of sale analysis is determining which date overall reflects the point at which the material terms of sale were established. Therefore, ICDAS contends that, while it did negotiate a price increase in one of the contracts signed during the POR, this change was not significant or pervasive enough to invalidate the date of sale methodology used in the Final Results. Rather, ICDAS argues that the overall evidence on the record demonstrates that the material terms of sale for its U.S. sales were established at the contract date for all but one of its U.S. sales and at the contract amendment date for the single exception.

According to ICDAS, 19 CFR 351.401(i), the regulation relevant to the date of sale analysis, states that the Department will normally use invoice date as the date of sale. However, ICDAS asserts that the Department's regulations do not mandate using invoice date as the date of sale, but rather require the Department to use an alternate date if that date "better reflects the date on which the exporter or producer established the material terms of sale." See Antidumping Duties: Final Rule, 62 FR 27295, 27349 (May 19, 1997) (Preamble). See also Notice of Final Determination of Sales at Less Than Fair Value: Bottle Grade Polyethylene Terephthalate Resin from Indonesia, 70 FR 13456 (Mar. 21, 2005), and accompanying Issues and Decision Memorandum at Comment 1. ICDAS argues that, while the Department's regulations do specify that invoice date is the presumptive date of sale, this presumption is merely the starting point for

analysis and does not permit the Department to dismiss the possibility of using an alternate date. See Allied Tube I. See also Colakoglu Metalurji v. United States, Ct. No. 04-00621, 2005 WL 2375177 (CIT Sept. 27, 2005) (Colakoglu v. United States) and the Preamble, 62 FR at 27348.² Furthermore, ICDAS states that this interpretation is consistent with U.S. obligations under the World Trade Organization Antidumping Agreement, which indicates that the date of sale can be “the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.” See Agreement on the Implementation of Article VI of the General Agreements on Tariffs and Trade 1994, Article 2.4.1, fn. 8. According to ICDAS, by enacting the Uruguay Round Agreements Act, Congress expressed the intent that the Department’s date of sale methodology be flexible in order to accurately reflect the true date of sale. See Allied Tube I, 127 F.Supp. 2d at 219.³ Moreover, ICDAS argues that while the Department may have concerns about situations in which U.S. buyers act to obtain the lowest possible price from foreign producers, this concern is not present here because ICDAS sought a price increase, rather than permitting a price decrease. See Preamble 62 FR at 27348-9. ICDAS contends that in light of the facts that: 1) there is less of a concern for dumping due to the price increase; and 2) because there was no attempt to import a larger quantity, the Department should find that there is

² ICDAS states that in Colakoglu v. United States, the Department is considering comments on its November 18, 2005, draft remand redetermination, in which it had indicated that the appropriate date of sale for Colakoglu in the 2002-2003 administrative review is contract date. We note that the final redetermination was submitted to the Court on January 13, 2006. Further, ICDAS notes that the date of sale issue is currently the subject of an appeal to the Court involving another respondent in the 2003-2004 administrative review. See Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States, Ct. No. 05-00613.

³ ICDAS argues that a flexible date of sale methodology is a corollary to the Department’s obligation to determine antidumping margins as accurately as possible. See NTN Bearing Corp. v. United States, 74 F.3d.1204, 1208 (Fed. Cir. 1995).

a lesser need for the presumption in favor of using invoice date as the date of sale.

In addition to the relevant regulations, ICDAS argues that the Department has established a practice of looking beyond the invoice date in determining the most accurate date of sale. See Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 63 FR 32833, 32835-6 (June 16, 1998) (Steel Pipe from Korea) (where the Department stated “if the invoice date does not reasonably approximate the date on which the material terms of sale were established, then its blanket use as the date of sale in an antidumping analysis is untenable”) and Circular Welded Non-Alloy Steel Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review, 65 FR 37518 (June 15, 2000), and accompanying Issues and Decision Memorandum at Hylsa Comment 1 (Steel Pipe from Mexico) (where the Department found that it has flexibility in its date of sale analysis and is permitted to conduct a full factual review of the record to find the most accurate date of sale). ICDAS argues that this precedent establishes that the central focus of the Department’s date of sale analysis is on whether the seller and the buyer believed they had a “meeting of the minds” when they entered into an agreement, and not whether there was a single change in price after the contract date. Consistent with this point, ICDAS claims that the Department has held in numerous cases that evidence that the material terms of sale could or did change does not automatically warrant the use of invoice date as the date of sale. See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 65 FR 60910 (Oct. 13, 2000), and accompanying Issues and Decision Memorandum at Comment 1 (Pipes and Tubes from Thailand); Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard,

Line and Pressure Pipe from Mexico, 65 FR 39358 (June 26, 2000), and accompanying Issues and Decision Memorandum at Comment 2 (Line Pipe from Mexico). ICDAS illustrates this point using the Department's decision in Steel Pipe from Korea, where the Department used contract date as the date of sale, despite the fact that there were changes in the material terms of sale, because there was no evidence that the material terms of sale changed frequently enough to give either the seller or buyer the expectation that the terms of sale were different from what was agreed upon in the contract.

Further, ICDAS contends that the Department has also used contract date as the date of sale even when the producer attempted to or did renegotiate the material terms on the contract. ICDAS contends that in Notice of Final Determination of Sales at Less than Fair Value: Polyethylene Retail Carrier Bags from Thailand, 69 FR 34122 (June 18, 2004), and accompanying Issues and Decision Memorandum at Comment 3 (PRCBs from Thailand), the Department found that even though the respondent unsuccessfully attempted to renegotiate the terms of sale, the evidence showed that the producer understood that it was still bound to perform the terms of the original contract. ICDAS also points to Notice of Final Determination of Sales at Less than Fair Value: Sulfanilic Acid from Portugal, 67 FR 60219 (Sept. 25, 2002), and accompanying Issues and Decision Memorandum at Comment 1 (Sulfanilic Acid from Portugal), where in one instance the original contract was amended twice to increase the price, and Department treated the price changes as amendments to the contract and used the date of the amendment as the date of sale. See also Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France, 70 FR 54359 (Sept. 14, 2005), and accompanying Issues and Decision Memorandum at Comment 11 (Uranium from France) (where

the Department determined that the appropriate date of sale was the contract date, except for one instance in which the material terms of sale were revised, making the date of the amended contract the appropriate date of sale) and Certain Hot-Rolled Carbon Steel Products from Kazakhstan: Notice of Preliminary Determination of Sales at Less Than Fair Value, 66 FR 22168, 22172 (May 3, 2001) (Hot-Rolled Steel from Kazakhstan) (where the Department used the dates of addenda to an annual sales agreement with the buyer because the material terms of sale for individual transactions were established on the addenda dates).

ICDAS points to three factors that it contends the Department analyzes in determining the appropriate date of sale: 1) evidence of a formal contract; 2) whether the sale was made-to-order or from inventory; and 3) lag time between the contract date and invoice date. Regarding the first factor, ICDAS argues that, when analyzing the use of contract date in Steel Pipe from Korea, the Department examined whether the parties engaged in conduct that resulted in firm expectations as to their contractual obligations. ICDAS maintains that the Department has also found that contract date is the appropriate date of sale when parties formally negotiated a contract and took steps to honor the contract, even if there was a possibility of change in the material terms of sale. See Line Pipe from Mexico (where the Department used the date on the sales acknowledgment form as the date of sale even when there were slight changes in the quantity shipped between the sales acknowledgment date and invoice date for certain transactions) and Notice of Final Results of Antidumping Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey, 70 FR 73447 (Dec. 12, 2005), and accompanying Issues and Decision Memorandum at Comment 1 (Pipe and Tube from Turkey) (where the Department found that the date of the email confirmation from the buyer established the material terms of

sale). ICDAS contends that, like in the abovementioned cases, the terms of its U.S. sales are firmly established on the date of the formal contract, and thus the contracts cannot be characterized simply as preliminary agreements. ICDAS states that the Department confirmed this fact at verification because it found that, after the buyer submits a written order and ICDAS responds with a written offer, the parties come to a general agreement over the price, quantity, and shipping conditions. See the April 1, 2005, memorandum from Irina Itkin, Alice Gibbons, and Brianne Riker to Louis Apple entitled, “Verification of the Sales Questionnaire Responses of ICDAS Celik Enerji Tersane ve Ulasim Sanayi A.S. in the Antidumping Duty Administrative Review on Certain Steel Concrete Reinforcing Bars (Rebar) From Turkey” (“ICDAS Sales Verification Report”) at 4 and ICDAS’s August 16, 2004, Section A response at A-23. According to ICDAS, after this agreement, the parties create a formal, written contract in which the product specifications, quantity, unit price, packing requirements, payment method, risk of damage or loss, shipment date, and method of shipment are established. ICDAS states that this process differs greatly from the sales process for its home market sales which consists of an order and order confirmation immediately prior to shipment. See ICDAS’s December 23, 2004, supplemental response at S-6.

Second, ICDAS asserts that the Department considers whether the subject merchandise was made-to-order when conducting its date of sale analysis because there is greater flexibility to revise the terms of sale if a sale is made out of inventory. See Steel Pipe from Korea, 63 FR at 32836. ICDAS argues that, where made-to-order merchandise is concerned, parties are less likely to begin performance of a contract unless the material terms of sale are firmly established because of the production costs that will be incurred. See Certain Hot-Rolled Carbon Steel Flat

Products from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 69 FR 19388 (Apr. 13, 2004), and accompanying Issues and Decision Memorandum at Comment 1 (Hot-Rolled Steel from Thailand). ICDAS asserts that the instant case is similar to several cases in which the merchandise was made-to-order and the Department used contract date as the date of sale because the parties generally engaged in formal negotiation and contracting procedures. See Final Determination of Sales at Less Than Fair Value: Mechanical Transfer Presses from Japan, 55 FR 335, 341 (Jan. 4, 1990); Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses, and Components Thereof, Whether Assembled or Unassembled, From Japan, 61 FR 38139, 38159 (July 23, 1996) (LNPP from Japan); and Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany, 66 FR 11557 (Feb. 26, 2001), and accompanying Issues and Decision Memorandum at Comment 1 (LNPP from Germany). ICDAS argues that, given the made-to-order nature of its U.S. sales, the size of the orders, and the costs incurred before the issuance of an invoice, both it and the buyer have strong expectations that the contract is binding and firm. Specifically, ICDAS contends the rebar sold to U.S. customers cannot generally be sold out of inventory because: 1) ICDAS does not have the capacity to stock, in advance, the thousands of metric tons of rebar sold to the United States; and 2) if a party reneges on the contract, ICDAS would have difficulty selling the rebar rolled to U.S. dimensions in the home market. According to ICDAS, the production data on the record supports this assertion by demonstrating that ICDAS's normal practice is to begin production only after a signed contract is received. See "ICDAS Sales Verification Report" at 4 and the memorandum from Robert Greger and Ji Oh Young to Neal Halper entitled, "Verification Report on the Cost of

Production and Constructed Value Data Submitted by ICDAS Celik Enerji Tersane ve Ulasim Sanayi,” dated April 5, 2005, at verification exhibit 14. In addition, ICDAS contends that it performs a vast majority of its contractual duties before issuing the invoice, such as having the merchandise tested, transporting the merchandise to the port, paying brokerage and handling fees, arranging marine insurance, and complying with Turkish customs and loading requirements.

ICDAS contends that the third factor, lag time, can indicate that the sales processes for U.S. and home market transactions are not the same and require different dates of sale. See Steel Pipe from Korea. See also Extruded Rubber Thread from Malaysia: Final Results of Antidumping Duty Administrative Review, 64 FR 12967, 12968 (Mar. 16, 1999) (Thread from Malaysia) (where the Department used the bill of lading date rather than invoice date as the date of sale when calculating constructed export price to account for lag time). ICDAS asserts that because the lag time is significant in this case, use of invoice date as the date of sale undermines the fairness and accuracy of the Department’s margin calculations because the Department compared sales that occurred in different months and under different economic conditions.

ICDAS argues that, while it was successful in the renegotiation of price in the sale in question, it continued to honor the remaining terms of the original contract. Specifically, ICDAS contends that it understood that it was legally and financially bound to perform on this contract regardless of whether the customer accepted the increase in price, as evidenced by the fact that it produced the merchandise, and delivered it to the port, before the price increase was finalized on the sale invoice.

ICDAS contends that, based on the foregoing, in this case both the Department’s regulations and practice support the finding that contract date is the appropriate U.S. date of sale

for all but one of its U.S. transactions during the POR. ICDAS maintains that, for the contract with the price increase, the sale invoices were the first documents to reflect the change.

Therefore, ICDAS contends that the Department should treat the invoice date as the date of the amendment to the contract, and thus, the date of sale for these U.S. entries.

The petitioners support the Department's draft redetermination. Specifically, the petitioners argue that: 1) the Department's determination is in accordance with the Department's regulations; 2) the evidentiary burden of rebutting the presumption that invoice date is the date of sale rests with the respondent, and in this case ICDAS has failed to meet this burden; 3) the evidence on the record demonstrates that changes in the material terms of sale occurred after the contract date; and 4) given these facts, ICDAS's arguments regarding formal contracting, made-to-order merchandise, and lag time are irrelevant.

First, the petitioners note that the Department's regulations indicate a preference for using invoice date as the date of sale. See 19 CFR 351.401(i). Although the petitioners acknowledge ICDAS's argument that an alternate date may be used, they argue that ICDAS did not provide satisfactory evidence that its material terms of sale were set at an earlier date. Further, the petitioners contend that the Court has held that: 1) while the Department has the discretion to use an alternate date, it is not required to do so; and 2) the Department should only depart from the use of invoice date in unusual situations. See Thai Pineapple Canning Industry Corp., Ltd. and Mitsubishi International Corp. v. United States, 24 CIT 107, 109 (2000), rev'd on other grounds, Thai Pineapple Canning Industry Corp. v. United States, 273 F.3d 1077 (Fed. Cir. 2001) (Thai Pineapple v. U.S.). The petitioners also cite Hornos Electricos de Venezuela, S.A. (Hevensa) v. United States, 285 F.Supp. 2d 1353, 1367 (CIT 2003) (Hevensa v. United States), where the

Court found that even if the material terms of sale were not subject to change at an earlier date, the Department had the authority to use invoice date as the date of sale. Thus, the petitioners contend the Department is not required to use a date other than invoice date as date of sale in this proceeding, even if ICDAS provided evidence that its material terms of sale were established at an alternate date.

The petitioners note that the use of invoice date as date of sale was raised not only previously in this segment of the proceeding but also in previous segments, and the Department has consistently used invoice date as the date of sale for all respondents.⁴ Therefore, the petitioners argue that the Department must be cautious about changing a long-standing date of sale methodology due to concerns over avoiding manipulation, as well as double-counting or omitting sales. According to the petitioners, the Department has placed great weight on this concern in other cases. See Oil Country Tubular Goods from Korea; Final Results of Antidumping Duty Administrative Review, 65 FR 13364 (Mar. 31, 2000), and accompanying Issues and Decision Memorandum at Comment 1 (OCTG from Korea) (where the Department found that the date of sale determination should not be changed from review to review without evidence that changes occurred in a company's business or marketing practices).

Second, the petitioners argue that ICDAS did not satisfy its evidentiary burden of demonstrating that invoice date is not the appropriate date of sale. The petitioners contend that

⁴ The petitioners acknowledge that the Department has indicated that it intends to use contract date as the date of sale for another respondent in the draft remand results in the prior administrative review. However, they note that the remand is not yet final and conclusive. In any event, the petitioners contend that the fact pattern underlying this decision is not analogous because the evidence on the record for that respondent shows that there were no changes in the material terms of sale for any sales. See Colakoglu v. United States, "Draft Results of Remand Redetermination Pursuant to Court Remand," dated November 18, 2005.

in Allied Tube II, the Court found that the party seeking to establish a date of sale other than invoice date bears the burden of providing sufficient evidence. See Allied Tube II, 132 F.Supp.2d at 1090. According to the petitioners, to overcome this presumption a party must: 1) establish a complete record including all relevant sales documents for all reported sales; and 2) satisfy the Department that the material terms of sales were established at a date other than invoice date. The petitioners assert that to satisfy the second criterion, a party should not only demonstrate that there were no actual changes to the material terms of sale between the alternate date and the invoice date, but also prove that the material terms of sale were not subject to change. See Hevensa v. United States (where the Court found that the Department may only exercise its discretion to use a date other than sale invoice date as the date of sale if the material terms are not subject to change between the proposed date and the invoice date). See also Steel Pipe from Mexico (where the Department found that the material terms of home market sales were in fact subject to change due to changes in the sample documents provided by the respondent).

The petitioners contend that ICDAS did not meet this burden of proof because it only provided one sample set of documents on its own accord. According to the petitioners, while the Department collected additional documents at verification, the record does not contain a complete and comprehensive set of sales documents for all of ICDAS's U.S. transactions. The petitioners maintain that, consistent with the Department's finding in OCTG from Korea, without a complete set of sales documentation supporting a party's argument for a change in date of sale methodology, the Department cannot conclude that invoice date is not appropriate. The petitioners assert that this principle was also set forth in Certain Cold-Rolled and Corrosion-

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Administrative Review, 64 FR 12927, 12935 (Mar. 16, 1999), and accompanying Issues and Decision Memorandum at Comment 4, where the Department found that even if documentation from certain U.S. sample sales suggest that the material terms of sale did not change after the contract date, that does not demonstrate that the terms of sale were not subject to change or did not actually change for other sales. The petitioners contend that this precedent is particularly applicable to this case because: 1) the evidence on the record demonstrates that there were changes in the material terms of sale for certain sales; and 2) ICDAS did not show that the material terms were not subject to change.

Regarding the former point, the petitioners contend that the transactions in question represent a significant portion of ICDAS's sales, and therefore, the change in material terms of sale should not be viewed as rare or aberrational.⁵ In fact, the petitioners point out that ICDAS officials themselves acknowledged at verification that these changes were significant because they admitted that invoice date is the appropriate date of sale for ICDAS. See "ICDAS Sales Verification Report" at 5.

Finally, the petitioners argue that ICDAS's assertions regarding formal contracting practices, made-to-order inventory, and lag time are irrelevant to the proper resolution of this issue. Regarding the first two of these factors, the petitioners assert they are germane only in situations where a party has demonstrated that the material terms of sale were established at an alternate date. The petitioners contend that these factors are not applicable here because the evidence demonstrates that there were changes in ICDAS's material terms of sale after the

⁵ For further discussion, see "Memo to the File."

contract date. Similarly, the petitioners argue that ICDAS's argument regarding lag time is not on point. The petitioners contend that the facts present in Steel Pipe from Korea are dissimilar to those in this proceeding because the Korean respondent made sales pursuant to long-term contracts with exceptionally long periods of time between the contract date and invoice date. The petitioners assert that the lag times here are relatively short, and thus they are not significant enough to justify a change in the Department's date of sale methodology.

Department's Position:

We have examined the information on the record of this segment of the proceeding and disagree with ICDAS that the contract date forms the appropriate date of sale for its U.S. transactions. The Department's regulations at 19 CFR 351.401(i) establish the date of sale as the date on which the material terms of sale (*i.e.*, price and quantity) are established. Specifically, 19 CFR 351.401(i) states:

In identifying the date of sale of the subject merchandise or the foreign like product, the Secretary will normally use the date of invoice, as recorded in the exporter or producer's record kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

The Court has held that the Department has the discretion over when to use invoice, or some alternative date, as date of sale. For example, in Hevensa v. United States, the Court stated, "even if the material terms of sale are not subject to change, Commerce has the authority to nonetheless use the invoice date as the date of sale; discretion in this instance means that Commerce may use a date of sale other than invoice date, but it is not required to do so." See Hevensa v. United States, 285 F.Supp. 2d at 1367. The Court in that case went on to say:

Commerce correctly applied the regulatory presumption in favor of invoice date in this instance. "[T]he party seeking to establish a date of sale other than invoice date bears the

burden of producing sufficient evidence to ‘satisfy’ the Department that ‘a different date better reflects the date on which the exporter or producer established the material terms of sale.’” (citation omitted).

Id. See also Thai Pineapple v. U.S. (where the Court found that the Department should only abandon the use of invoice date in “unusual” instances).

In the Preamble, the Department explains the exception to using the invoice date as the presumptive date of sale, as follows:

If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale. For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice. However, the Department emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed. A preliminary agreement on terms, even if reduced to writing, in an industry where renegotiation is common does not provide any reliable indication that the terms are truly “established” in the minds of the buyer and seller. This holds even if, for a particular sale, the terms were not renegotiated.

See Preamble, 62 FR at 27349.

In this case, ICDAS sold rebar pursuant to formal sales agreements with its U.S. customers. After re-examining these contracts, we find that they do not provide the best evidence of when the “material terms of sale are finally established” within the meaning of 19 CFR 351.401(i). Specifically, we find that the material terms of sale set forth on these contracts were subject to renegotiation between ICDAS and its U.S. customers, as demonstrated by the facts that: 1) there were differences between the prices listed on the contract and the invoice for two subject invoices; and 2) the transactions represented by these invoices constitute a significant portion of the total universe of U.S. transactions examined both in number of invoices issued on POR entries and total quantity of entered merchandise.

We agree with ICDAS that a single change in price does not automatically disqualify contract date from selection as the proper date of sale. In this case, however, we find that the price change, while limited to a single contract, related to a significant percentage of ICDAS's U.S. entries during the POR. Under these circumstances, we determine that the contract date does not represent the date on which the parties had a real "meeting of the minds" because the material terms of sale not only could be, but were altered after that date in the ordinary course of business.

The Department's preference is to select a date of sale methodology and apply it consistently across all segments of a proceeding, unless there is evidence of changes in selling practices between segments. See OCTG from Korea at Comment 1. In this case, we have consistently used invoice date as date of sale for ICDAS in all previous segments. See Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Notice of Intent To Revoke in Part, 70 FR 23990, 23992 (May 6, 2005). Not only did ICDAS not contest this action in its June 21, 2005, case brief submitted before the final results, but the company officials affirmatively stated at verification that they believed that invoice date is the appropriate date of sale for ICDAS's U.S. sales. See "ICDAS Sales Verification Report" at 4.⁶ Therefore, we are not persuaded by ICDAS's arguments here.

⁶ The "ICDAS Sales Verification Report" states the following:

Procedures: Discussed with company officials which date of sale is appropriate for its U.S. sales.

Results: Company officials stated that invoice date is the appropriate date of sale for ICDAS's U.S. sales.

We disagree with ICDAS that the fact that it negotiated a price increase (rather than permitting a price decrease) is relevant to this question. There is no correlation between the Department’s “concern about dumping” and/or any “attempt to import a larger quantity of the foreign merchandise” and the selection of an appropriate date of sale methodology. Rather, the focus of the Department’s analysis is establishing when the parties reach a final agreement on the material terms of sale (e.g., price and quantity).⁷

We also disagree with ICDAS that the fact that it produced the products and shipped them to the port prior to negotiating a price change indicates that it “believed the contract terms were firm and binding irrespective of its renegotiation attempt.” It is obvious that the terms of sale were not firm (despite ICDAS’s characterization to the contrary), given that the price term was changed at or before invoicing. Indeed, ICDAS’s assertion that it would have shipped the merchandise even had it failed to negotiate a higher price is merely speculation, and as such we do not accord it any weight. The relevant issue at hand is whether ICDAS’s material terms of sale changed after the contract date, not the course of action ICDAS claims it would have taken had it not been successful in the price renegotiation with the customer.

Similarly, we find unpersuasive ICDAS’s argument that it considers its contracts to be binding because the merchandise it sells to the United States would be difficult to resell. We note that the issue at hand is not whether the contract was cancelled and the merchandise inventoried, but rather whether the material terms of sale changed. In any event, based on the evidence on the record, we note that the merchandise in question could have been resold because:

⁷ Indeed, if the Department were to express any “concern” over the facts here, it would be attributable to ICDAS’s shift in stance after the company learned that its revocation from the antidumping duty order hinged on the outcome of this issue.

1) ICDAS states the rebar it sells in the home market is of an equivalent specification to the rebar it sells in the United States; 2) ICDAS did, in fact, sell some rebar to these specifications in the home market during the POR (see the January 5, 2006, submission at page 19); and 3) the products on the invoices with the price increase were of the same combination of grade, form, size, and specification as rebar sold to several other customers in the United States during the POR.

Finally, we find the cases cited by ICDAS in support of this argument to be inapposite. Regarding Pipes and Tubes from Thailand and Pressure Pipe from Mexico (cited by ICDAS to demonstrate support for the proposition that evidence that the material terms of sale could or did change does not warrant the use of invoice date as date of sale), we find that these cases are not on point because: 1) the only changes to the material terms of sale related to differences in the quantities agreed upon in the contract and those actually shipped; and 2) these differences were within the quantity tolerances indicated on the contracts and thus did not constitute significant changes. Regarding Steel Pipe from Korea (cited for the proposition that despite changes in the material terms of sale, there was no evidence that the material terms of sale changed frequently enough to give either the buyer or the seller the expectation that the terms of sale were different from what was agreed upon in the contract), we find this case not on point because the percentage of ICDAS's U.S. entries that had changes in the material terms of sale was significant. Regarding Pipe and Tube from Turkey (cited by ICDAS to demonstrate support for the proposition that the Department found that email confirmations firmly established the material terms of sale), we find that this case is not on point because there were no changes between the date of the email confirmation and the shipment date for any transactions.

In addition, ICDAS cites PRCBs from Thailand, arguing that the Department used contract date in this case even though the respondent attempted to renegotiate the material terms of the contract. We disagree that this case is relevant because, unlike here, in PRCBs from Thailand the respondent failed to actually change the material terms of sale.

ICDAS also cites Sulfanilic Acid from Portugal, Uranium from France, and Hot-Rolled Steel from Kazakhstan, asserting that the Department treated the date of an amendment to the contract as the date of sale in these cases. However, in this segment of the proceeding, ICDAS did not amend the contract in question, but rather merely issued sales invoices reflecting a different material term of sale (i.e., price).

Regarding ICDAS's argument that the Department should apply a "three-factor test" (i.e., evidence of formal contracts, whether the sales are made-to-order or from inventory, and lag time between the contract date and invoice date) to resolve this issue, we agree with the petitioners that these factors are not relevant here in light of the above analysis. Nonetheless, we find that ICDAS misconstrued the Department's precedent regarding these factors. Specifically, ICDAS cites Hot-Rolled Steel from Thailand, LNPP from Japan, and LNPP from Germany, to support its argument that companies are not likely to engage in the production of made-to-order merchandise unless the material terms of sale are established in a contract. However, we find that in these cases, unlike the instant case, the Department determined that the material terms of sale were in fact set by the contract, and there were no changes in quantity or price, with the exception of quantity differences within a contractual tolerance in the case of Hot-Rolled Steel from Thailand. Also, we find that the merchandise in the LNPP cases was highly customized (i.e., produced to a particular customer's specifications) and thus, it could not be resold to alternative purchasers.

Finally, ICDAS asserts that lag time is an important factor in determining the appropriate date of sale because lag time can affect the Department's margin calculations by comparing sales that occurred in different months. ICDAS points to Thread from Malaysia (where the Department found that for cases where the respondent directly shipped merchandise to the U.S. customer, bill of lading was the appropriate date of sale rather than sale invoice). However, we find ICDAS's reliance on this case misplaced because this case merely illustrates the Department's policy of using the date of shipment as the date of sale where shipment occurs prior to invoicing. See also the memorandum to Louis Apple from the team entitled "Concurrence Memorandum," dated May 2, 2005, at page 5 (where the Department states "we have used the earlier of invoice date or shipment date without exception for all respondents in all previous segments because the actual material terms of sale regarding price and quantity are established at the earlier of the two dates").

Consequently, because we determined that ICDAS's material terms of sale were not established at the contract date for its U.S. sales, we find that invoice date is the appropriate date of sale. Accordingly, we have recalculated the margin using ICDAS's reported invoice date as the date of sale.

D. Conclusion

The Department hereby complies with the remand order as directed by the Court in Nucor v. United States and assigns a final dumping margin of 1.63 percent to ICDAS. Based on this finding, we find that ICDAS does not qualify for revocation based on the requirements of 19 CFR 351.222(b)(2)(i)(A). Upon a final and conclusive court decision, we will publish an amended final results to that effect.

David M. Spooner
Assistant Secretary
for Import Administration

(Date)