PUBLIC VERSION

Nucor Corporation, Gerdau Ameristeel Corporation, and Commercial Metals Company v. United States
Consol. Court No. 05-00616, Slip Op. 09-20 (CIT March 24, 2009)

FINAL RESULTS OF REDETERMINATION

PURSUANT TO COURT REMAND

A. 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 (Court) in Nucor Corporation, Gerdau Ameristeel Corporation, and Commercial Metals Company v. United States, Consol. Court No. 05-00616, Slip Op. 09-20 (CIT Dec. 15, 2005) (Nucor I) and Nucor Corporation, Gerdau Ameristeel Corporation, and Commercial Metals Company v. United States, Consol. Court No. 05-00616, Slip Op. 09-20 (CIT Mar. 24, 2009) (Nucor II). In Nucor I, the Court granted the Department's request to reconsider its U.S. date of sale methodology for ICDAS Celik Enerji Tersane ve Ulasim Sanayi A.S. (ICDAS), an exporter of rebar in Turkey on remand. In Nucor II, the Court disagreed with the Department's analysis in its remand redetermination and again remanded to the Department the date of sale issue for further explanation. At the same time, the Court granted the Department's request for a voluntary remand to: 1) reconsider the calculation of the cost of production (COP) for steel concrete reinforcing bars (rebar) produced by ICDAS; and 2) explain the reason the Department changed its methodology for determining the universe of U.S. sales transactions examined during the review period.

The Department issued its draft final remand results to all interested parties on September 30, 2009. On October 9, 2009, 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 October 15, 2009. Because the petitioners' rebuttal comments contained a new argument, we afforded ICDAS an opportunity to respond, which it did on October 21, 2009. These comments are addressed below.

For purposes of this remand redetermination, we have reconsidered anew both the calculation of COP, and the appropriate methodologies for defining the universe of examined U.S. transactions and the U.S. date of sale, as discussed further below. As a result, we have recalculated the margin for ICDAS using quarterly COP data.

B. BACKGROUND

On November 8, 2005, the Department published the final results of the 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). In the final results, the Department: 1) reversed its preliminary decision with respect to U.S. 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 it determined that the material terms of sale were established at the contract date;[1] 2) computed ICDAS's COP using annual-average, rather than quarterly, costs; and 3) changed the methodology used to define the universe of U.S. sales transactions examined during the administrative review to rely on the date that subject merchandise entered the customs territory of the United States, rather than the date that subject merchandise was sold here.

[1] Neither the petitioners nor ICDAS raised this issue. However, because this issue was raised for another respondent, Habas Tibbi ve Sinai Gazlar Istihsal Endustrisi A.S., the Department applied its date-of-sale methodology across all respondents.

On November 14, 2005, Nucor Corporation (Nucor) filed its summons and complaint with the Court challenging the Department's date-of-sale methodology for ICDAS for the period of review (POR).[2] In its complaint, Nucor 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.

On January 3, 2006, ICDAS filed its own complaint in a separate case, challenging the Department's use of an annual weighted-average cost of production, use of the date of entry to determine the universe of sales, and two other issues. On February 17, 2006, this Court consolidated both cases into one.

On January 31, 2006, the Department filed its remand results on the date of sale issue with the Court. See Nucor Corporation, Gerdau Ameristeel Corporation, and Commercial Metals Company v. United States; Final Results of Redetermination Pursuant to Court Remand, January 31, 2006 (First Remand). In its remand results, the Department determined that the invoice date is the appropriate date of sale for ICDAS's U.S. sales in the 2003-2004 administrative review.

On March 24, 2009, the Court again remanded this issue to the Department, finding that the Department's use of invoice date was not in accordance with law or supported by substantial evidence. In addition, the Court remanded two additional issues, at the Department's request,

[2] The POR in this review is April 1, 2003, through March 31, 2004.

related to the calculation of ICDAS's COP and the methodology used to determine the universe of U.S. sales examined in the review. See Nucor II.

Pursuant to the Court's remand in Nucor II, the Department has further reconsidered the appropriate methodologies used to determine ICDAS's COP, the universe of U.S. sales examined, and the U.S. date of sale. As discussed further below, we have made changes to the Department's Final Results with regard to the calculation of ICDAS's COP. We have also explained both the Department's practice with respect to defining the universe of U.S. sales transactions examined and the reasons the Department is changing its methodology from the one used in the preliminary results in this segment of the proceeding. Finally, we have performed the date of sale analysis required by the Court.

C. ANALYSIS

1. Quarterly Costs

The matter at issue for purposes of this remand redetermination is the Department's calculation of ICDAS's COP. ICDAS argued in its brief to the Court, as it did in the underlying administrative review, that its costs should be calculated on a quarterly-average basis, rather than a single average POR COP. In the Final Results, the Department calculated a single average cost for the POR. ICDAS argued that this created a mismatch between sales and costs which distorted the comparisons between U.S. prices and normal value (NV). ICDAS stated that, when the COP was calculated on a POR-average basis, the surge in scrap costs in the fourth quarter of the POR significantly increased the COP when compared to a first and second quarter average cost.

a. The Department's Established Practice Is To Calculate a Respondent's COP on an Annual Basis

It is the Department's practice normally to calculate a respondent's COP on an annual average basis. The calculation of COP is relevant in determining which sales of merchandise in the foreign market will be used to compare to sales in the U.S. market to determine dumping margins. Pursuant to section 771(34) of the Tariff Act of 1930, as amended (the Act), dumping occurs when imported merchandise is sold in, or for export to, the United States at less than the NV of the merchandise. Section 771(35)(A) of the Act defines the dumping margin as the amount by which the NV exceeds the export price (EP) or constructed export price (CEP) of the subject merchandise. In calculating NV, the Department will consider only those sales in the comparison market that are in the "ordinary course of trade." Generally, sales are in the "ordinary course of trade" if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product. See section 771(15) of the Act.

Sales disregarded under section 773(b)(1) of the Act are defined by section 771(15)(A) of the Act as outside the "ordinary course of trade." Section 773(b)(1) of the Act describes how sales may be disregarded if they have been made at prices which represent less than the COP of that product. Section 773(b)(3) of the Act defines the COP as:

> an amount equal to the sum of –
>
> (A) the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business;
>
> (B) an amount for selling, general, and administrative expenses based on actual data pertaining to production and sales of the foreign like product by the exporter in question; and

> (C) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the foreign like product in condition packed ready for shipment.

As can be seen above, the Act does not dictate the method of calculating COP during the POR, nor does it provide a definition for the term "period" in calculating COP. The Department has, therefore, adopted a consistent and predictable approach in using annual-average costs over the entire POR - the result being a normalized, average production cost to be compared to sales prices covering the same extended period of time. See Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 55 FR 26225, 26228 (June 27, 1990) (where the Department stated that the use of quarterly data would cause aberrations due to short-term cost fluctuations). See also Grey Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review, 58 FR 47253, 47257 (Sept. 8, 1993) (where the Department explained that the annual period used for calculating costs accounts for any seasonal fluctuation which may occur as it accounts for a full operation cycle). As the Department explained in those cases, the result of this approach normally evens out swings in production costs that a respondent may have experienced over short periods of time (i.e., months or quarters).

Moreover, the Department prefers to calculate costs on an annual weighted-average basis in an antidumping context because, as costs are calculated over shorter periods, it directly limits the periods of time over which sale prices can reasonably be matched, thus limiting price-to-price comparisons contrary to Department preference. Therefore, the Department requests in its standard questionnaire that respondents report their costs on an annual-average basis over the entire POR. See, e.g., Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review, 65 FR 77852 (Dec. 13, 2000), and accompanying Issues and

Decision Memorandum at Comment 18 (Pasta from Italy) and Notice of Final Results of Antidumping Duty Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada, 71 FR 3822 (Jan. 24, 2006), and accompanying Issues and Decision Memorandum at Comment 5 (Wire Rod from Canada) (where the Department explained its practice of computing a single weighted-average cost for the entire period).

b. Department Practice When Deviating from the Normal Annual Average Cost Methodology

The Department has nonetheless departed from its normal annual average COP methodology in a limited number of past cases. The Department has articulated in those past proceedings that the use of an alternative cost averaging period may be appropriate in situations where reliance on our normal annual weighted- average cost methodology would be distortive due to significant cost changes. These situations include high inflation and raw material cost volatility. See, e.g., Certain Steel Concrete Reinforcing Bars from Turkey; Final Results of Antidumping Duty Administrative Review, 66 FR 56274 (Nov. 7, 2001) (1999 – 2000 Rebar from Turkey); and Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order: Brass Sheet and Strip from the Netherlands, 65 FR 742, 746-748 (Jan. 6, 2000) (Brass Sheet & Strip from the Netherlands). For purposes of this remand determination, the Department has therefore taken into consideration those past determinations and other appropriate considerations and developments when reevaluating the record evidence of this case.

In several recent cases, the Department considered whether to deviate from its normal annual average cost methodology due to significant changes in the cost of manufacturing (COM) throughout the cost reporting period. See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and Determination To

Revoke in Part, 73 FR 66218 (Nov. 7, 2008), and accompanying Issues and Decision Memorandum at Comment 2 (Rebar from Turkey); Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 73 FR 75398, 75399 (Dec. 11, 2008), and accompanying Issues and Decisions Memorandum at Comment 4 (SSPC from Belgium); Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 74 FR 6365 (Feb. 9, 2009), and accompanying Issues and Decisions Memorandum at Comment 5 (SSSSC from Mexico); and Certain Welded Stainless Steel Pipes From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 74 FR 31242 (June 30, 2009), and accompanying Issues and Decisions Memorandum at Comment 1 (SS Pipe from Korea). The Department recognized in each of those decisions the importance of having a consistent and definitive approach to analyzing significant changes in the COM during the cost reporting period and determining when to deviate from its normal annual average cost methodology. Accordingly, the Department refined its methodology for determining when the use of shorter cost averaging periods would be more appropriate than the established practice of using annual cost averages, due to the occurrence of significant cost changes throughout the period of investigation (POI) or review.

To ensure that it considered all the various challenges such a refinement might entail, on May 9, 2008, the Department solicited comments on this issue from the public with the explicit caveat that it would continue to regard its practice of using annual cost averages in proceedings as generally the most appropriate methodology, deviating from this practice only under limited unusual circumstances. 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, 73 FR 26364,

26366 (May 9, 2008) (Quarterly Request for Comment). In its request for comment, the Department noted the distortion caused by periods of significant cost changes under the agency's normal practice, but also acknowledged that relying on shorter cost reporting periods can be distortive as well and result in an average cost that does not relate to the sales that occurred during the same shorter period. In light of these competing considerations, the Department invited the public to comment and provide suggestions on the factors to consider, tests to apply, and thresholds to apply when deciding whether to rely on cost averaging periods of less than one year. The Department received comments from nine parties on June 23, 2008, and considered this input in refining its methodology in Rebar from Turkey, SSSSC from Mexico, SSPC from Belgium, and SS Pipe from Korea.

In the various determinations listed above, the Department reaffirmed that the two most important factors in considering whether to deviate from our normal average cost methodology were: 1) whether the cost changes throughout the POI or POR were significant; and 2) whether sales during the shorter cost averaging period could be reasonably linked with the COP during the same averaging period. As explained further below, we have applied the same standards to this remand as in Rebar from Turkey, SSSSC from Mexico, SSPC from Belgium, and SS Pipe from Korea. The only difference between our past practice and the approach taken in these recent decisions is that in these decisions we more clearly defined the significance and linkage thresholds. As a result, pursuant to the Court's direction, we have addressed the various factors considered by the Department in determining to use a shorter cost averaging period in this case.

1. Significance of Cost Changes

The Court directed the Department to clarify the test that it is applying for the use of multiple cost-averaging periods and to fully articulate the rationale for its redetermination. See

Nucor II at 127-128. We have therefore reanalyzed the facts of this case in light of the Department's recent refinements of its significance and linkage thresholds. In SSSSC from Mexico, SSPC from Belgium, Rebar from Turkey, and SS Pipe from Korea, the Department established a threshold of a 25 percent change in COM from the low cost quarter to the high cost quarter. In other words, the Department concluded that the threshold for when the change in production costs is significant enough to consider deviating from the agency's normal annual average cost methodology is 25 percent.

The 25 percent threshold amount was determined to be appropriate in light of the Department's practice for high inflationary economies. In high inflation cases, the Department has established a threshold of 25 percent annual inflation which is used to determine when the Department deviates from its normal methodology of calculating an annual weighted-average cost. This threshold is based upon generally accepted accounting standards set forth in International Accounting Standard (IAS) 29, an International Financial Reporting Standard (IFRS). IAS 29 provides that an entity should depart from IFRS accounting standards and adopt an alternative methodology when the existing methodology (i.e. historical costing) will result in distortions. Under IAS 29, an economy is considered hyperinflationary if the cumulative inflation rate over three years approaches or exceeds 100 percent. Approaching or exceeding 100 percent inflation over a three year period equates to approximately a 25 percent annual inflation rate. If the annualized rate of inflation exceeds 25 percent, to be consistent with IAS 29, the Department will determine that the associated country experienced high inflation during the POI or POR and will resort to an alternative cost averaging methodology in order to avoid the distortive effect of inflation on our comparison of costs and prices.[3]

[3] See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Indonesia, 64 FR 73164, 73169-73171 (Dec. 29, 1999); Silicomaganese

The distortive impact of high inflation on our normal annual weighted-average cost calculation methodology is similar to that resulting from a significant change in costs. The primary difference is that in high inflationary economies, many COM cost components typically rise from month to month whereas in non-high inflationary economies, significant cost changes are usually driven by one or two main inputs. For high inflation situations, we expect production costs and prices for all products generally to increase significantly. Thus, we are able to look to a published index like the producer price index (PPI) or wholesale price index (WPI), specific to a country, in quantifying the degree of currency devaluation over a given period, and can make a threshold decision for the company as a whole. On the other hand, when the significant cost change is driven by one or two main inputs, the extent to which production costs change may vary widely from product to product because each product typically requires different quantities of a given input. As such, the cost change should normally be analyzed on a product-specific basis.

Furthermore, in high inflationary situations, the PPI or the WPI typically trend upward. Thus, calculating the percent increase in the index from the beginning to the end of the POI/POR provides a good measure of the magnitude of change during the period. In contrast, in the situation where significant cost change is driven by one or two main inputs, the cost of the inputs driving the change may be increasing, decreasing, or trending in both directions throughout the period. Even though the change in costs from the beginning to the end of the POI/POR may not be significant, the change within the period may be significant.

From Brazil: Final Results of Antidumping Duty Administrative Review, 69 FR 13813 (Mar. 24, 2004), and accompanying Issues and Decision Memorandum at Comment 4 (Silicomanganese from Brazil); Certain Pasta From Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review, 69 FR 47876, 47878 (Aug. 6, 2004), unchanged in Certain Pasta from Turkey: Final Results of Antidumping Duty Administrative Review, 70 FR 6834 (Feb. 9, 2005); Rebar from Turkey at Comment 2; and Light-Walled Rectangular Pipe and Tube from Turkey; Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 69 FR 19390 (Apr. 13, 2004), unchanged in Light-Walled Rectangular Pipe and Tube From Turkey: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53675 (Sept. 2, 2004).

Recognizing the similarities of the impact of high inflation and significant cost changes due to one or two main inputs on the cost-based antidumping computations, and taking into account the above noted differences between the two situations, we refined our methodology to measure the cost change and significance threshold. See SSPC from Belgium at Comment 4; Rebar from Turkey at Comment 2; SSSSC from Mexico at Comment 5; and SS Pipe from Korea at Comment 1. In determining whether the change in production costs is significant, we analyzed, on a product-specific basis, the extent to which each COM changed during the POR. We did this by analyzing, on a control number- (CONNUM-) specific basis, the percentage difference between the low quarterly-average COM and the high quarterly-average COM, as a percentage of the low quarterly-average COM. Thus, under the Department's refined methodology, if the percentage difference exceeds 25 percent, we will normally consider the significant cost change threshold to be met. Also, consistent with our approach in SSPC from Belgium, Rebar from Turkey, SSSSC from Mexico, and SS Pipe from Korea, we have analyzed for ICDAS the difference in COM for the five most frequently sold CONNUMs in the home market for purposes of this remand redetermination. Based on our analysis, we found that the difference between the low quarterly average COM and the high quarterly average COM exceeded the 25 percent threshold. See Memorandum from Gina Lee to Neal Halper, Adjustments to the Cost of Production and Constructed Value Pursuant to the Second Remand Redetermination – Icdas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S., September 30, 2009 (Remand Cost Calculation Memo). We acknowledge that in the Final Results of this case, we analyzed cost changes by comparing the quarterly averages to the annual average cost in order to establish whether such changes were significant. However, as explained above, our practice has been refined since the Final Results, and we have since adopted a high-to-low quarter

approach that more closely follows our high inflation methodology and the related 25 percent threshold.

2. Linkage Between Costs and Sales Prices

As noted above, the Court directed the Department to clarify the test that it is applying for the use of multiple cost-averaging periods and to fully articulate the rationale for its redetermination. See Nucor II at 127-128. We have therefore reevaluated information on the record of this case with regard to the linkage between costs and sales prices to determine whether it is appropriate to deviate from our normal annual-average cost methodology. Normally, if the Department finds changes in costs to be significant in a given investigation or administrative review, the Department subsequently evaluates whether there is evidence of linkage between the cost changes and the sales prices during the shorter cost periods within the POI or POR. In three recent determinations the Department explained that its definition of linkage does not require direct traceability between specific sales and their specific production costs, but rather relies on whether there are elements which would indicate a reasonably positive correlation between the underlying costs and the final sales prices charged by a company. See SSPC from Belgium at Comment 4; SSSSC from Mexico at Comment 5; and SS Pipe from Korea at Comment 1. Being able to reasonably link sales prices and costs during a shorter cost period is an important factor for the Department to consider in deciding whether to depart from its normal annual average cost methodology.

A review of past Department determinations reveals that the Department has approached its consideration of linkage between sales and costs in various ways and to varying levels of precision. In Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8911 and 8925-8926 (Feb. 23,

1998) (SRAMs from Taiwan), for example, we did not require any linkage between price and costs but rather agreed with the parties that because both price and costs consistently trended downward due to expected technological advancements, we would use quarterly data. However, in Brass Sheet and Strip from the Netherlands, we examined the correlation between sales prices and cost during the shorter cost averaging periods and found that the information on the record revealed that the sales prices and costs for the subject merchandise correspondingly and consistently changed during the POR. See Brass Sheet and Strip from the Netherlands, 65 FR at 746-48. We found in this case that the sales prices and costs were directly linked because the respondent purchased the raw material input on the customer's behalf and then billed the customer for the cost of the metals, the terms of which were set forth on the finished products' sales invoice along with the associated processing costs as a separate item describing this factual situation as a pass-through. Id. Thus, a review of past determinations reveals that the Department has accepted varying degrees of correlation between sales and costs.

In recent cases, such as SSSSC from Mexico and SSPC from Belgium, we found reasonable linkage due to the fact that the companies operated using an alloy surcharge mechanism. That is, they made sales with a provision that allowed them to pass on any increase in the cost of their main inputs to their customers. See SSSSC from Mexico at Comment 5; and SSPC from Belgium at Comment 4. ICDAS, unlike the respondents in SSPC from Belgium and SSSSC from Mexico, does not have an alloy surcharge mechanism in place. Therefore, we looked to other correlative elements to determine whether sales and costs were reasonably linked.

There is no requirement of direct traceability between specific sales and their specific production costs to prove linkage in the Department's practice. Correlative elements may be

measured in a number of ways depending on the associated industry, the overall production process, inventory tracking systems, company-specific sales data, inventory turnover ratios, price and cost trend analysis, and pricing mechanisms used in the normal course of business (e.g., surcharges, raw material pass through devices). In other words, for the Department to find linkage in a given case depends highly on the facts of the record before the agency.

For this remand redetermination, the Department analyzed a comparison, by quarter, of the weighted-average sales prices for ICDAS's five most frequently sold CONNUMs in the home market and the weighted-average direct material costs (i.e., steel scrap input). This analysis revealed that the changes in quarterly prices trended consistently with the change in quarterly costs. The analysis in the Remand Cost Calculation Memo compiles the data for the four quarters of the POR and shows the relative trend of the sales prices and the material costs. We found that in every instance, when the average quarterly material costs increased, the average quarterly price increased, and when the average quarterly material costs decreased, the average quarterly price decreased. As our concern is whether there is a reasonable correlation that can be found between trends in material costs and sales prices, these charts depict that there is indeed such a correlation during the POR.

In addition, the Department considered another factor for purposes of determining if sufficient evidence of linkage existed for ICDAS, the inventory turnover period for raw material inputs and finished goods. We computed ICDAS's raw material inventory turnover period for its raw material input (i.e., scrap) and for finished goods (i.e., rebar). See Remand Cost Calculation Memo at Attachment 4. The short average raw material inventory turnover period shows that ICDAS purchased input scrap relatively frequently and also used it in the production of merchandise under consideration relatively quickly. The short finished goods inventory

turnover period tells us that ICDASs also sold its production in a small amount of time, and, therefore, costs in the quarter are reasonably representative of the sales that occurred within the same quarter. ICDAS's quick inventory turnover allowed ICDAS to revise its prices in response to the highly volatile material costs and allowed current costs to be reflected quickly in its COM. In summary, these correlative elements, taken together, are sufficient to establish a reasonable link between the changes in ICDAS's COM and the changes in sales prices.

3. The Elimination of the Window Period for Price-to-Price Comparisons

For the antidumping duty margin recalculation in this remand redetermination, we have eliminated the window period sales for price-to-price comparisons. We have done this because the Department's use of a shorter cost averaging period without elimination of the window period would result in further distortions of ICDAS's antidumping calculations. We have made this change because it is an integral part of the Department's refined shorter cost averaging period methodology and an integral part of our response to the Court's order to fully articulate the rationale for our redetermination. See Nucor II at 128. See also SS Pipe from Korea at Comment 1, where this issue was fully addressed by the Department.

In administrative reviews, the Department generally bases NV for the POR on monthly weighted-average prices and compares them to individual EPs or CEPs. See 19 CFR 351.414(c)(2). Where no sales of the like product are made in the exporting country in the month of the U.S. sale, the Department will attempt to find a weighted-average monthly price one month prior, then two months prior, and then three months prior to the month of the U.S. sale. If unsuccessful, we will then look one month after, and finally two months after, the month of the U.S. sale. This practice is commonly referred to as the "90/60" day contemporaneity guideline, and is codified in the Department's regulations at 19 CFR

351.414(e)(2). Where costs and prices are changing significantly due to high inflation, the Department has in the past eliminated the "90/60" day window period and limited comparisons of U.S. price to home market sales made during the same month in which the U.S. sale occurred (i.e., the sales "contemporaneity" period was modified to conform with the shortened cost averaging period). See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey, 61 FR 69067, 69071 (Dec. 31, 1996), (wherein the Department reasoned that such a methodology minimized the extent to which calculated dumping margins are overstated or understated due solely to price inflation that occurred in the intervening time period between the U.S. and home market sales). See also Certain Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review, 62 FR 42946, 42505-42506 (Aug. 7, 1997).

In this remand we have determined that the changes in ICDAS's COM throughout the POR due to fluctuating raw material input prices are significant enough to depart from our normal annual average costing methodology. As in inflationary economies, these significant changes in costs lead to distortions in the Department's sales-below-cost test, as well in the overall margin calculation when our normal methodologies are used. When significant cost changes have occurred during the POR, these same conditions are accompanied by changes in prices as the market reacts to changing economic conditions. In this situation, we find that price-to-price comparisons should be made over a shorter period of time to lessen the distortive effects of changes in sales prices which result from significant changes in costs. See SS Pipe from Korea at Comment 1. In other words, we find that using a 90/60 day window period may either understate or overstate margins simply due to the timing of price comparisons.

U.S. sales should be compared with contemporaneous NVs in the ordinary course of trade which have been established in the sales-below-cost test. We note that, although 19 CFR 351.414(d)(3) is applicable to the average-to-average methodology, we find that the principle pertaining to the use of a shorter period for averages is relevant to the average-to-transaction method for purposes of the averaging aspect of that methodology. Accordingly, we find that it is appropriate in this case to match sales only within the same period (i.e., quarter) as the shortened cost period. Further, we maintain here the average-to-transaction method preference for matches within the "month during which the particular U.S. sale under consideration was made." 19 CFR 351.414(e)(2)(i).

Comparing U.S. sales to NVs outside the quarter would result in comparisons with NVs that are not reflective of market conditions at the time of the U.S. sale in that the NVs would not reflect the increasing or decreasing prices due to the significant changes in costs. While minor price fluctuations are normal and do not typically have a significant effect on our price comparisons and subsequently calculated margins, substantial changes in costs and prices as evidenced in this case can lead to distorted results when margins are calculated on non-contemporaneous price comparisons. Id. Since we have recognized that significant cost changes have occurred during the POR which have led us to depart from our normal annual average cost methodology to limit the distortion, these same conditions have led to changes in prices as the market reacts to the changing economic conditions. Moreover, the limitation of price-to-price comparisons to the same quarter not only lessens the distortive effects of comparing U.S. sales prices with NVs that are not reflective of market conditions when the U.S.

sales are made, but it also ensures that any difference-in-merchandise adjustments[4] for comparisons of non-identical products are calculated based on variable manufacturing costs (which include costs attributable to the significantly changing material input) from the same quarter.

Accordingly, we have determined it appropriate to make price-to-price comparisons over a shorter period of time to lessen the distortive effect of the significantly changing costs. We have not made comparisons outside of a quarter for the remand because of our above-noted concerns regarding the calculation of difference-in-merchandise adjustments and the fact that significant costs changes are typically accompanied by significant price changes.

4. The Cost Recovery Test

For the antidumping duty margin recalculation, we have also adopted an alternative methodology for the recovery-of-cost test that we determine complies with the statute's weighted-average costs requirements while taking into account the distortive effect of significant cost changes. We have done this because the Department's use of a shorter cost averaging period without the adoption of an alternative methodology for the recovery-of-cost test would result in further distortions of ICDAS's antidumping calculations. We have made this change because it is an integral part of the Department's refined shorter cost averaging period methodology and an integral part of our response to the Court's order to fully articulate the rationale for our redetermination. See Nucor II at 128. See also SSSSC from Mexico at Comment 4; and SS Pipe from Korea at Comment 1 (where this issue was fully addressed by the Department once the Department elected to apply the 25 percent threshold). Section 773(b) of the Act provides that sales may be disregarded in the determination of NV if those sales have

[4] When comparing a U.S. sale with a foreign market sale that does not have the same physical characteristics, the Department makes an adjustment to NV to account for differences in variable costs associated with the physical differences. See CFR 351.411(a) and (b).

been made within an extended period of time in substantial quantities and were not at prices which permit recovery of all costs within a reasonable period of time. Section 773(b)(2)(D) of the Act further defines the recovery-of-cost requirement by stating that if prices which are below the per-unit COP at the time of the sale (i.e., sales below cost) are above the weighted-average per-unit COP for the POI or POR, such prices shall be considered to provide for the recovery of costs within a reasonable period of time (i.e., the recovery-of-cost test). In performing the sales-below-cost and recovery-of-cost tests in situations where the COM is changing significantly throughout the cost reporting period, it is important to adopt an approach that addresses the distortive impact that a significantly changing COM has on the annual average cost calculation in order to achieve a fair and reasonable result. See SSSSC from Mexico at Comment 4; and SS Pipe from Korea at Comment 1. In this case, we have determined that the changes in ICDAS's COM throughout the POR are significant and have therefore departed from the use of our normal annual average cost methodology in conducting the sales-below-cost test.

As to the recovery-of-cost test, we have adopted an alternative methodology that we determine complies with the statute's weighted-average costs requirements while taking into account the distortive effect of significant cost changes. We find that indexing the significantly changing raw material costs to a common end-of-period cost level, calculating a POR-specific weighted-average material cost for ICDAS, and then indexing the weighted-average annual per-unit cost for the input to the appropriate period (similar to the Department's high inflation methodology), addresses the statute's requirement of weighted-average costs for the period (i.e., the recovery-of-cost test) while preserving the indexed differences between quarters and the end of the period resulting from the significant price level changes. See SSSSC from Mexico at Comment 4; and SS Pipe from Korea at Comment 1.

The purpose of section 773(b)(2)(D) of the Act is to allow for the recovery of costs in a reasonable period of time for those sales which were made below cost at the time of sale. Normally, the calculation of an annual weighted-average per-unit cost for the cost period smoothes out any non-significant variations in costs that may occur during the course of the cost period. As long as the producer's or exporter's sales price is above that annual weighted- average per-unit cost, the costs are considered to be recovered. In other words, the sales prices account for non-significant fluctuations in costs throughout the cost reporting period.

In the Department's calculation for ICDAS on remand, however, the calculation of an unadjusted annual weighted-average per-unit cost would not smooth out the fluctuations in costs to provide for cost recovery but would rather result in significant distortions in the application of the cost recovery test. ICDAS's raw material costs in this case changed significantly throughout the cost period. The Department has, therefore, based the sales-below-cost test on an alternative cost-averaging method which takes into consideration only those raw material cost fluctuations that occur within a particular quarter.

If the Department were to use an unadjusted weighted-average per-unit cost for the POR for purposes of the cost recovery test, sales prices which were determined to be below cost could be erroneously considered to have recovered costs based simply on the timing of the sale. For example, a sale that occurred in the last quarter of the POR that failed the cost test based on the alternative cost-averaging method would pass the cost recovery test because lower costs from the beginning of the period offset the higher costs at the end of the period in the unadjusted annual cost calculation. In light of the possible distortions that may arise in using such costs for cost recovery purposes, in recent cases we have adopted a POR-specific average cost calculation

approach for the cost recovery test that incorporated an indexing methodology in order to adjust for the distortive effects the significant change raw material costs would have on the calculations. See, e.g., SSSSC from Mexico at Comment 4 and SS Pipe from Korea at Comment 1. Likewise, the Department has adopted the same approach in this remand. The Department finds that this approach satisfies the requirements set forth in section 773(b)(2)(D) of the Act and fully addresses the Court's direction to fully articulate the rationale for our redetermination. See Nucor II at 1285.

5. Conclusion

After taking a fresh look at the case evidence in accordance with the Department's recent refinement of its cost period methodology, we have reconsidered the calculation of ICDAS's COP, and have determined that, due to the significant change in ICDAS's COM of rebar during the POR, and the fact that its costs and prices are reasonably linked during the shorter periods, it is appropriate to deviate from our normal annual average cost methodology in this case and instead compute ICDAS's COM using our alternative cost calculation methodology. As such, we have used the alternative cost-averaging methodology used in SSSSC from Mexico, SS Plate from Belgium, and SS Pipe from Korea to calculate COP for purposes of recalculating ICDAS's dumping margin. Further, we have included in the remand redetermination a discussion of certain additional calculation changes which are necessary as a result of our reliance on quarterly costs (i.e., the elimination of the window period for price-to-price comparisons, and an adjustment to the methodology for the cost recovery test) because these issues are an integral part of the shorter cost averaging period methodology and are necessary to avoid distortions in the antidumping duty margin calculation. See Remand Cost Calculation Memo for the details of the alternative calculation methodology used in this remand redetermination for ICDAS.

2. Universe of Reviewed U.S. Sales Transactions

In the Final Results, the Department changed its methodology for determining which U.S. sales transactions were subject to review, finding that it was appropriate to base the universe of reviewed transactions for ICDAS on its entries during the POR (where entry date was known) or shipment date (where it was not). ICDAS challenged the Department's decision to change methodology, contending that the Department had not adequately explained the basis for its change. After reviewing ICDAS's brief to the Court, we requested that the Court grant us a voluntary remand to explain our change in methodology.

In its opinion, the Court granted the Department's request for a voluntary remand, directing the Department as follows:

> On remand, the Commerce Department shall consider anew Commerce's use of the date of sale *versus* the date of entry to define ICDAS' universe of sales for the administrative review at issue here, weighing all appropriate factors (including past agency practice). In addition, Commerce shall fully articulate the rationale for its redetermination on the issue, and recalculate ICDAS' dumping margin, if appropriate.

Nucor II, at 133.

In accordance with the Court's order, we have considered this issue anew. After analyzing the applicable provisions of the Act and the regulations, the Department's standard practice in this area, and arguments on the record of this review, we continue to find that using the date of entry to define the universe of reviewed transactions is the appropriate methodology here.

a. Analysis

As a starting point in our analysis, we looked to the Act for guidance on this issue. According to section 751(a)(2)(A) of the Act:

> the administering authority shall determine (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry.

See section 751(a)(2)(A) of the Act (emphasis added). This provision is clear – the Act directs the Department to determine the dumping margin for each entry of subject merchandise during the review period. This task is straightforward in cases (as here), where the respondent is the importer of record, the transactions under review are EP transactions, and there is a direct link between the entry of subject merchandise and the sale to the first unaffiliated customer. This task is less straightforward where sales to the first unaffiliated customer are CEP transactions. In CEP situations, although the respondent's affiliate is generally the importer of record and thus has in its possession specific information related to its entries of subject merchandise during the POR, respondents often cannot link those entries to the ultimate sale, either because the respondent sells products from inventory and does not have records which permit it to link entries and sales, or because the merchandise which entered during the POR was placed in inventory and may not have yet been sold.

The Department's regulations recognize the inherent problems in gathering entry data in all situations. Section 19 CFR 351.213(e)(1)(i) therefore permits the Department to define the universe of transactions examined during an administrative review using "entries, exports, or sales of the subject merchandise" during the review period. However, while the regulations reference all three bases during the POR, they are not, as a practical matter, equally preferable. As we explained in our Final Results:

> Although the regulation lists entries, exports, and sales, it does so because the facts in some cases do not permit the linking of sales with exports or entries. When sales and entries can be linked, the Department prefers restricting the universe of sales encompassed in a review to entries in that period of review. In doing so, the Department is able to precisely quantify all expenses incurred in connection with each reviewed sale to the United States, which is not always possible when the universe of

> sales is not limited to actual entries. In addition, this methodology ensures the calculated rate will correspond to the merchandise on which the duties are collected.

See Final Results at Comment 5.

Given that section 751(a)(2)(A) of the Act requires the Department to determine dumping margins for entries during the POR, the Department's normal methodology is to define the universe of reviewed transactions using entry date for EP sales, where possible. This makes sense in light of the overall construction of the Act, which requires the Department to inevitably assess duties on "entries" that were reviewed in an administrative review. See section 751(a)(2)(C) of the Act. This practice is reflected in the standard antidumping duty questionnaire, which instructs respondents to:

> Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR; and (2) for CEP sales made after importation, report each transaction that has a date of sale within the POR. Do not report canceled sales. If you believe there is a reason to report your U.S. sales on a different basis, please contact the official in charge before doing so.

See the Department's antidumping duty questionnaire issued to ICDAS on May 13, 2004 (emphasis added).

The rationale behind our practice is set forth in the preamble to the Department's regulations. Specifically, the preamble states the following:

> {B}ased on the results of each review, the Department generally will assess duties on entries made during the review period and will use assessment rates to effect those assessments. However, on a case-by-case basis, the Department may consider whether the ability to link sales with entries should cause the Department to base a review on sales of merchandise entered during the period of review, rather than on sales that occurred during the period of review. These two approaches differ, because, in the case of CEP sales, the delay between importation and resale to an unaffiliated customer means that merchandise entered during the review period often is different from the merchandise sold during that period. Because of the inability to tie entries to sales, the Department normally must base its review on sales made during the period of review. Where a respondent can tie its entries to its sales, we potentially can trace each entry of subject

> merchandise made during a review period to the particular sale or sales of that same merchandise to unaffiliated customers, and we conduct the review on that basis.

See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27314 (May 19, 1997) (Preamble) (emphasis added).

The preamble goes on to describe certain limited exceptions to the general rule outlined above. Specifically, the preamble states:

> {T}he determination of whether to a {sic} review sales of merchandise entered during the period of review hinges on such case-specific factors as whether certain sales of subject merchandise may be missed because, for example, the preceding review covered sales made during that review period or sales may not have occurred in time to be captured by the review. Additionally, the Department must consider whether a respondent has been able to link sales and entries previously for prior review periods and whether it appears likely that the respondent will continue to be able to link sales and entries in future reviews.

Id.

In this case, there is no concern that certain transactions have been or will be "missed" because of a timing issue. ICDAS's last shipment in the 2001-2002 review was several months before the start of this POR, and thus it likely entered during that review period.[5] Moreover, ICDAS has reported all transactions having a date of shipment in the POR.[6] Therefore, the record supports the conclusion that there have been no "missed" transactions in this case. Furthermore, a review of the record and past determinations supports the conclusion that ICDAS

[5] Although ICDAS did not report entry dates associated with its shipments during the 2001-2002 review period, it is reasonable to infer that the transit time between Turkey and the United States for these shipments was approximately the same as the time reported in the instant review. When the longest transit time reported for any sale is added to the last shipment date in the 2001-2002 sales listing, the estimated entry date is still approximately one month before the end of that POR. See the September 30, 2009, memorandum to The File from Elizabeth Eastwood, Senior Analyst, entitled "2003-2004 Antidumping Duty Administrative Review on Certain Steel Concrete Reinforcing Bars from Turkey: Factual Information Related to U.S. Sales Reported in Prior Segments of the Proceeding" (Prior Segment Information Memo).

[6] We note that none of these reported transactions was reviewed in the prior administrative review.

has had the ability in this and past segments of the proceeding to link sales with entries. Therefore, we find that the exceptions outlined in the Preamble do not apply here.

In the underlying administrative review, ICDAS cited several cases to support its position that the Department may review sales made during the POR, rather than sales associated with POR entries. While we acknowledge that the Department's decision to review sales, rather than entries, in certain cases has been upheld by the CIT, we find that neither of the cases relied upon by ICDAS are on point. Specifically, we note that ICDAS's reliance on Notice of Final Results of Antidumping Duty Administrative Review and Recission of Administrative Review in Part: Canned Pineapple Fruit From Thailand, 66 FR 52744 (Oct. 17, 2001), and accompanying Issues and Decision Memorandum at Comment 11 (Pineapple from Thailand) is misplaced because the Thai respondent's sales in that review were CEP transactions. See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand, 66 FR 18596, 18598 (Apr. 10, 2001) (unchanged by the final results). Further, we note that in that case, the Department was concerned that "shifting the basis of {the} review at {that} stage may exclude a significant number of sales with entry dates within the POR but sale dates outside the POR." See Pineapple from Thailand at Comment 11 (where we noted that FAG Kugelfischer Georg Schafer KGaA v. United States, 19 CIT 1177, 1181 (CIT 1995), aff'd, 86 F.3d 1179 (Fed. Cir. 1996) addressed the appropriateness of using sales versus entry data in the context of a sampling situation, unlike the use of actual sales and entry data here). The Department found in that case that, because there was "no disconnect between reviewed sales and entered transactions," it would continue to review all reported transactions. Conversely, in this review, there is a disconnect between the sales reviewed for the preliminary

results and the entries which occurred during the POR. Because ICDAS provided sufficient data to permit the Department to review all entries during the POR,[7] the Department finds it appropriate to base its analysis on POR entries of subject merchandise.

We are also unpersuaded by ICDAS's argument from the underlying administrative review that neither the Act nor the standard questionnaire specifies the reporting only of entries. The antidumping regulations provide the Department with the flexibility to include just shipments (or just sales) in situations in which the facts do not permit us to restrict the universe of sales to entries. Nonetheless, it remains within the Department's discretion, and is, in fact, the Department's preference and practice, to restrict the universe to entries when the facts permit us to do so.

For the foregoing reasons, we have continued to use date of entry to define the universe of reviewed transactions for ICDAS on its entries during the POR (where entry date was known) or shipment date (where it was not). This action is consistent with our general practice in this area, as well as our practice in this segment of the proceeding for all other respondents participating in the review. See Final Results at Comment 5. See also Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part, 69 FR 64731 (Nov. 8, 2004), and accompanying Issues and Decision Memorandum at Comment 6 (2002-2003 Rebar from Turkey); Pineapple from Thailand at Comment 11; and Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Administrative Review, 66 FR 18747 (Apr. 11, 2001), and accompanying Issues and Decision Memorandum at Comment 2.

[7] As noted above, ICDAS properly did not report data related to entries which were reviewed in the prior administrative review.

b. Explanation for the Change In Methodology for ICDAS from the Preliminary Results

From the time that the antidumping duty order on rebar from Turkey was put in place through the end of this administrative review, the Department conducted seven administrative reviews of this order. ICDAS was a respondent in five of these seven segments. See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and New Shipper Review, 64 FR 49150 (Sept. 10, 1999) (1996-1998 Rebar from Turkey); 1999-2000 Rebar from Turkey; Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Partial Rescission of Antidumping Duty Administrative Review, and Determination Not to Revoke in Part, 68 FR 53127, (Sept. 9, 2003) (2001-2002 Rebar from Turkey); 2002-2003 Rebar from Turkey, and Final Results.

As an initial matter, we respectfully disagree with the Court's statement that the Department's practice in each of these reviews was to define the universe of reviewed transactions using the date of sale.[8] The Department has a consistent practice of rescinding reviews requested for companies that made no entries of subject merchandise into the United States during the period under review, irrespective of whether the company sold subject merchandise during the period.[9] Indeed, the Department rescinded two administrative reviews for ICDAS itself, despite the company's request in these segments that we conduct a review of its U.S. sales of rebar, because ICDAS made no entries during those reviews (and correspondingly had no reviewable transactions). See Certain Steel Concrete Reinforcing Bars from Turkey; Rescission of Antidumping Duty Administrative Review, 64 FR 44892 (Aug. 18,

[8] See Nucor II, at 128.

[9] See, e.g., 2001-2002 Rebar from Turkey, 68 FR at 53127 (stating that the Department was rescinding the administrative review for two respondents who did not have entries during the POR).

1999) (where the Department stated ". . . because the Department of Commerce has determined that there were no entries of the subject merchandise made by Icdas Celik Enerji Tersane ve Ulasim Sanayi, A.S. during the period of review, we are rescinding the 1998 - 1999 administrative review of certain steel concrete reinforcing bars from Turkey"). See also Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 66110, Oct. 30, 2002 (where we stated that "{w}e are rescinding the review with respect to Diler Demir Celik Endustrisi ve Ticaret A.S., Yazici Demir Celik Sanayi ve Ticaret A.S., and Diler Dis Ticaret A.S.; and ICDAS Celik Enerji Tersane ve Ulasim Sanayi, A.S. because these companies had no entries of subject merchandise to the United States during the period of review").

With respect to the five reviews conducted for ICDAS, we concede that our computer programs defined the universe of transactions examined using the company's U.S. date of sale. However, while use of this date to determine the universe of reviewed transactions was not in accordance with the Department's practice (see above), the error was a harmless one because, in all but the instant segment, the universe of sales during each POR was identical to the universe of entries during the period. See the Prior Segment Information Memo at Attachments I through V.

In our request for a voluntary remand, we asked the Court to permit us to explain the change in methodology with respect to ICDAS. After examining the facts on the record surrounding the reviews conducted for ICDAS, we now conclude that the change made in the Final Results was one of form and not of substance, based on the following two facts: 1) in each of the segments in which ICDAS participated, ICDAS was issued the same standard

questionnaire and required to provide the same universe of data – all entries during the POR; and 2) in all reviews, with the exception of the preliminary results in the instant one, the Department examined all entries made by ICDAS during the POR. See the Prior Segment Information Memorandum.

With respect to the error in the computer program noted above, we note that this error was inadvertent and in direct conflict with our stated policy of reviewing entries made during a given POR associated with EP sales. After researching the issue, we find that the error was attributable to programming language contained in the Department's standard computer program, which is typically used in antidumping duty administrative reviews conducted by Import Administration; this language defined the universe of examined transactions using sale date as the default date. In the first five administrative reviews conducted in this proceeding, no interested party brought this issue to the Department's attention, and the Department was unaware that a potential problem existed. Indeed, as noted above, there is no evidence on the record that indicates a problem in fact existed in any of these segments for ICDAS.

However, once a party raised this issue in its administrative case briefs, as the domestic industry did in this segment of the proceeding with respect to ICDAS, the Department was required to consider the issue fully and to render a decision which was in accordance with the Act and our practice. As a result of our reconsideration of this issue in the Final Results, we changed the universe of transactions examined for ICDAS from the universe examined in the preliminary results to review all entries made during the POR.

We disagree with ICDAS's claim that the company had inadequate notice with respect to this change in practice, or that it was harmed by our actions. See Nucor II, at 130 (describing

ICDAS's notice argument). As explained above, the Department's change in methodology in the final results of this review was not a departure from prior reviews (other than in the variable name used in the computer program). In any event, as shown above, ICDAS was well aware of the Department's practice, given that it requested on multiple occasions that the Department review its U.S. sales during particular PORs and the Department rejected ICDAS's requests because the company had no entries during those periods (thus signaling that the Department reviews entries, not sales). Moreover, ICDAS responded to questionnaires in every administrative review in which it participated which required the company to report all entries during the period under review which were associated with EP sales (thus providing specific guidance on which transactions would be reviewed). See, e.g., the questionnaire issued to ICDAS on May 27, 2004, at page C-1. Finally, the Department considered an identical issue in the immediately preceding review period for another respondent and reached the identical conclusion (i.e., that the Department reviews entries, not sales, made during the review period for EP transactions). See 2003-2003 Rebar from Turkey at Comment 6.

Indeed, ICDAS itself acknowledged that it understood this practice in the Final Results, when it stated that it properly reported all transactions with entry dates, invoice/shipment dates, or contract dates within the POR in order to give the Department the discretion to choose the appropriate universe of sales. See Final Results at Comment 5. Thus, ICDAS's argument that it relied on the Department's practice of reviewing sales, rather than entries, made during the POR when certifying that it qualified for revocation and/or otherwise dealing with this case (see Nucor II at 131), is simply unsupported by its participation and statements in this and previous administrative reviews.

Finally, ICDAS's claim that the Department considered the impact on the dumping margin in deciding this issue is simply baseless.[10] While the domestic industry urged the Department to take the impact of a change in methodology into account when deciding this issue (see Final Results at Comment 5), the record reflects that the Department took no steps to assess or quantify in any manner the impact of this change on the margin. Instead, the record of the underlying administrative proceeding reflects the Department's analysis of this issue and its determination was based exclusively on the analysis set forth in the underlying Issues and Decision Memorandum and in the First Remand. Thus, there is no basis upon which to support the contention that the Department "recognized" the margin impact of this change as a factor in making its determination. As we did in the Final Results, we are conducting our analysis in this remand redetermination consistent with our practice and the facts on the record.

Therefore, after reconsidering this issue, we continue to find that the appropriate universe of transactions examined in this review is comprised of entries, rather than sales, of rebar into the United States during the POR.

3. U.S. Date of Sale

a. Background

The Department based the date of sale for ICDAS's U.S. sales in the preliminary results of this administrative review on invoice date, in accordance with our long-standing practice for this respondent. As noted above, ICDAS did not contest this decision in its administrative case brief, and at verification, company officials even indicated their support for the use of invoice date. Nonetheless, as part of a general reevaluation of our date of sale methodology for all

[10] See Nucor II, at 129, where the Court stated "ICDAS pointedly notes that "Commerce decided to make this change even though Commerce recognized that it . . . could make the difference between revocation of the {antidumping} order as to ICDAS and an above-de minimis margin."

respondents involved in the review, we reexamined the information on the record with respect to ICDAS's U.S. sales transactions. Based on this examination, we concluded that the appropriate U.S. date of sale for ICDAS was the contract date, and we used this date in the Final Results.

Subsequently, the domestic industry challenged the Department's decision to alter the date of sale methodology for ICDAS, claiming that this decision is unsupported by substantial evidence. See Nucor's Rule 56.2 Motion (Nucor's Brief) 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. In our first remand redetermination on this issue, we found that there were differences between the prices listed on the contract and the invoice for two subject invoices, and 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. See First Remand at 4-5. Given the significance of these price changes, we found that the material terms of sale were not established on the contract date, and as a result, we found that it was 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. Id.

On March 24, 2009, the Court again remanded to the Department the date of sale issue, holding that our decision in the remand redetermination was neither in accordance with law nor supported by substantial record evidence. Nucor II, at 84 and 101. In its second remand order, the Court required the Department to "focus its date of sale analysis" on "the date on which the parties had a real 'meeting of the minds,"' to ascertain "the date on which the material

terms of sale (*i.e.*, price and quantity) {were} established." The Court further directed the Department to consider in its analysis, *inter alia*:

- the differences between the sales and production processes for ICDAS's U.S. sales, compared to its home market sales;
- the parties' understanding of the sales process;
- the parties' course of conduct;
- the practical effect (if any) of the single price increase on parties' expectations as to the legally binding nature of their contracts; and
- all other relevant facts.

Nucor II, at 84.

In determining the date on which the parties had a real meeting of the minds on the material terms of sale (i.e., price and quantity), the Court directed the Department to consider in detail – and in the context of other similar cases such as 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) (Pipe from Korea) – all record evidence concerning, *inter alia*:

- ICDAS's use of formal negotiation and contracting procedures for its U.S. sales;
- the made-to-order nature of the rebar ICDAS produced for the U.S. market, the lead time required to produce that rebar, and the implications of those facts for the expectations of the contracting parties;
- the lag time between contract date and invoice date for ICDAS's U.S. sales;
- the contracting parties' general course of conduct in ICDAS's U.S. sales;
- precisely how – if at all – that conduct differed in the case of the contract as to which there was a price increase;

- the fact that there was a single price increase, as to a single contract;
- the use of an invoice (rather than a formal contract amendment) to reflect the price increase;
- the timing of the price increase, relative to the timing of actions that ICDAS took to fulfill its obligations under the contract;
- the ability of ICDAS (as a practical matter) to resell either in the home market or the U.S. market the volume of rebar subject to the price increase or to warehouse that rebar, for whatever period necessary, had ICDAS not fulfilled its contractual obligations by completing the subject sales; and
- the specific effect – if any – of the price increase on the expectations of contracting parties.

Nucor II, at 102.

Further, in the event that the Department determines that the date of sale is some date other than contract date (or, in the case of the contract affected by the price increase, invoice date), the Court directed the Department to:

- expressly identify all record evidence indicating that ICDAS's U.S. contracts were not legally-binding instruments, as well as all legal authority on which the agency relies to support that conclusion; and
- be mindful that the "substantial evidence" standard requires consideration of the entirety of the administrative record, "tak{ing} into account whatever in the record fairly detracts from {the} weight {of the evidence on which it relies to support its determination} – which includes "contradictory evidence or evidence from which conflicting inferences could be drawn."

Id.

We have analyzed anew the information on the record of this administrative review. The evidence on which we relied, as well as our analysis of this evidence, is set forth below, in accordance with the Court's order. However, as an initial matter, the Department notes that the

Court has applied many tests derived from contract law in its analysis. As the Supreme Court recently held in United States vs. Eurodif S.A., 129 S.Ct. 878, 55 U.S. ___ (2009) (U.S. v. Eurodif) at 887-890, the Department is not restricted by contract law in its implementation and enforcement of the Act. The Department's primary guidance, as the Supreme Court stated, is the "economic reality" and "substance" of the facts before it in enforcing the antidumping law. See U.S. v. Eurodif, 129 S.Ct. at 887, citing Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). Thus, the Department has attempted to address the concerns expressed by the Court in Nucor II, while being mindful that the ultimate goal of the remand redetermination is to determine the "economic reality" of ICDAS's sales transactions for purposes of selecting the appropriate date of sale.

b. Evidence on the Record

i. Data

In its U.S. sales listing, ICDAS reported sales data for 29[11] contracts[12] with U.S. customers, signed between April 30, 2003, and March 10, 2004. Of those contracts, 12 were associated with shipments of rebar which entered the United States during the POR, and 17 covered shipments of rebar which entered after the POR. ICDAS shipped three products on the POR-entry contracts (i.e., straight length rebar in sizes of 3/8", 4/8", and between 5/8" and 7/8")

[11] The administrative record information does not contain certain of the contracts related to the reported U.S. shipments. Therefore, we have assumed that each invoice associated with a contract which is not on the record is related to a separate contract.

[12] For ease of discussion, this remand redetermination refers to the sales agreements at issue as "contracts." However, certain of these agreements appear to be more analogous to sales confirmations, rather than formal contracts containing explicit terms governing the responsibilities and obligations of each party. For example, the "contract" contained in sales verification exhibit 12 is a series of signed purchase orders, with no terms and conditions other than an indication of price, quantity, delivery terms, and payment terms.

and five products on the post-POR-entry ones (i.e., straight length rebar of the same sizes noted above, as well as rebar of sizes between 1" and 1 2/8" and of greater than 1 3/8").

The administrative record information contains supporting documentation relating to 8 out of the 12 contracts related to POR entries. This documentation is contained in Exhibit A-9 to ICDAS's August 16, 2004, response to section A of the questionnaire, as well as in the Sales Verification Exhibits 12 through 14. Upon reviewing this documentation, we found that the contract price and quantity matched the price and quantity invoiced to the customer in five instances (see Contracts A through E in the September 30, 2009, memorandum to The File from Elizabeth Eastwood, Senior Analyst, entitled "Summary of U.S. Contract Information Reported by ICDAS Celik Enerji Tersane ve Ulasim Sanayi A.S. (ICDAS) in the 2003-2004 Antidumping Duty Administrative Review on Steel Concrete Reinforcing Bars from Turkey" (Contract Memo) at Attachment I). Regarding the remaining three contracts, we found that the quantity matched in one instance but the price on the two associated invoices differed (see Contract L in Contract Memo at Attachment I), while the price matched in the second and third instances but the quantity on the invoices did not (see Contracts F and G in Contract Memo at Attachment I). In this latter instance, the quantity for one of the two lots was amended 16 days later via the addition of a quantity tolerance in the letter of credit. See ICDAS's December 23, 2004, supplemental response at Exhibit SA-1. Therefore, ICDAS's U.S. contracts did not establish the material terms of sale in 37.50 percent (i.e., three out of eight) of the agreements examined; collectively, the three contracts account for [ ] percent of the quantity shipped under the eight examined contracts and [ ] percent of total shipments under the 12 POR contracts. See Contract Memo at Attachment I.

In addition to the eight contracts noted above, the administrative record also contains copies of five additional contracts, all of which were signed during the POR but were associated with entries after the POR. This documentation is contained in Sales Verification Exhibits 7 through 11. Upon reviewing this documentation, we found that the contract price and quantity matched the price and quantity invoiced to the customer in two instances (see Contracts O and P in Contract Memo at Attachment II). Regarding the remaining three contracts, we found that the price matched in one instance but the quantity for certain products did not (see Contract M in Contract Memo at Attachment II), the contract did not specify particular products on the second (see Contract N in Contract Memo at Attachment II), and the contract associated with the third had a combination of these problems (see Contract Q in Contract Memo at Attachment II). In this latter instance, the quantity tolerance specified in the contract and on the letters of credit also did not match. See Sales Verification Exhibit 7. Therefore, the contracts did not set the material terms of sale in 60 percent of ICDAS's U.S. contracts covering post-POR entries, representing [ ] percent of the quantity shipped under the five contracts. See Contract Memo at Attachment II.

Below is a chart summarizing the relevant information on the record with respect to the contracts reported by ICDAS during the period under review:

Customer	Vessel	Comments
[ ]	[ ]	Price and quantity shipped match purchase order (Contracts A through E)
[ ]	[ ]	Quantity shipped does not match contract quantity; Quantity tolerance was added to the letter of Credit (Contracts F and G)

[ ]	[ ]	Price on invoice does not match contract price (Contract L)
[ ]	[ ]	Quantity shipped does not match contract quantity for certain items; quantity was amended on the letter of credit issued after invoicing (Contract M)
[ ]	[ ]	Contract does not specify product breakdown (Contract N))
[ ]	[ ]	Purchase order does not specify product breakdown; Quantity tolerance was modified in the letter of credit; the quantity shipped exceeded the quantity in both the letter of credit and in the purchase order (Contract Q)

When these contracts are considered collectively, we find that ICDAS's contracts did not set the price, quantity, or products in six (or 46 percent) of the 13 contracts on the record. These six contracts account for [ ] percent of the total quantity shipped under the 13 contracts, and [ ] percent of the value. See Contract Memo at Attachment III.

ii. Date of Sale

ICDAS discussed its U.S. date of sale methodology in its August 16, 2004, section A response at pages A-22 through A-25. According to ICDAS, the company signs contracts with its U.S. customers which establish the material terms of sale, including price and quantity. ICDAS also stated that, during the POR, there were no changes in the price and quantity between the date the contract was entered into and the shipment/invoice date. Therefore, ICDAS reported the date of contract as the U.S. date of sale.

In its December 23, 2004, supplemental response, ICDAS justified its U.S. date of sale methodology as follows:

> Selling practices for sales to the U.S. market are different than those used in the home market because of the lead time that is necessary to produce

> the product in Turkey and ship it to the United States. Both the buyer and the seller want to get certainty as to the price and quantity at the time that the contract is signed, even though the product will not be delivered until what is usually months later. The buyer wants certainty in order to ensure the supply needed to fill orders from the buyer's purchasers; the seller wants certainty before beginning production of the product (since merchandise sold to the U.S. is generally manufactured to order).
>
> The price and quantity generally do not change between the date the contract was entered into and the shipment/invoice date. . .
>
> The allowance in quantity variance is standard practice and changes between 5 to 10% depending on the customer's preferences. For all the sales during the POR the quantities shipped were within the tolerances provided in the contracts.
>
> The Department's regulations state that the Department "may use a date other than the date of invoice if {the Department} is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." 19 C.F.R. 351.401(i). Particularly in light of the long lag time between the contract and shipment/invoice for U.S. sales and the fact that price and quantity are fixed in the contract, the contract date "better reflects the date on which the exporter or producer establishes the material terms of sale."

See ICDAS's December 23, 2004, submission at pages S-7 through S-8.

At verification, the Department also discussed with company officials the company's reported date of sale methodology. During this discussion, ICDAS officials changed their position noted above and stated that invoice date is the appropriate date of sale. See the ICDAS Sales Verification Report at 5. In the preliminary results, the Department used ICDAS's invoice date as date of sale for both home market and U.S. sales, and ICDAS did not contest this decision in its administrative case brief. See generally ICDAS's June 21, 2005, submission (ICDAS's administrative case brief).

iii. Other Information on the Record

In order to aid in the analysis of this issue, we also reviewed the data on the administrative record related to ICDAS's production, storage, and sale of rebar, including its daily production volume, its home market sales volume per day, its inventory carrying period for finished goods, and the packing process for home market and U.S. sales. Specifically, we found the following information:

Type	Amount
Daily Production Volume	[ ] MT[13]
Finished Goods Turnover	[ ] Days[14]
POR Daily Average Home Market Sales Volume	[ ] MT[15]
Home market packing (per bundle)	[ ][16]
U.S. packing (per bundle)	[ ][17]
Time between U.S. contract and shipment	[ ] days[18]
Time to produce U.S. shipments	[ ] days[19]

[13] This figure is computed using total POR production quantity of [ ] MT, shown in cost verification exhibit 12, divided by 365 days.

[14] See Remand Cost Calculation Memo at Attachment 4.

[15] This figure is computed as total home market POR sales volume of [ ] MT divided by the number of days during the POR on which ICDAS made sales of rebar in the home market (i.e., 323). See the September 30, 2009, memorandum to The File from Elizabeth Eastwood, Senior Analyst, entitled "Calculations Performed for ICDAS Celik Enerji Tersane ve Ulasim Sanayi A.S. (ICDAS) for the Draft Second Remand Redetermination in the 2003-2004 Antidumping Duty Administrative Review on Steel Concrete Reinforcing Bars from Turkey" (Sales Calculation Memo) at Attachment II.

[16] See ICDAS's August 16, 2004, Section B response at Exhibit B-11. Note that the figures presented are for standard-length straight rebar. Rebar sold in coil form does not require any lifting ties, according to this exhibit.

[17] See ICDAS's August 16, 2004, Section C response at Exhibit C-14 and sales verification exhibits 12 and 14.

[18] See the U.S. sales listing. See also Sales Calculation Memo at Attachment II.

Days of home market sales represented
by U.S. shipment volume [ ] days[20]

c. Analysis

As a starting point in complying with the Court's order, we have once again examined the information on the record with respect to ICDAS's U.S. sales. Our findings are set forth in section 3.b.i, above ("Data"). This data shows that changes to the material terms of sale set forth in ICDAS's contracts were not limited to changes in price, as the Department had initially concluded. Rather, we found that in several contracts ICDAS shipped rebar to its U.S. customers in quantities outside the quantity tolerance, while other contracts did not contain certain basic information, such as product dimensions. These changes were not limited to particular customers, nor did they occur infrequently during the POR. Indeed, based on the data on the record, we find that changes to the material terms of ICDAS's U.S. contracts were so commonplace that they effectively constituted an ordinary business practice.

Under these circumstances, we find that ICDAS's U.S. contracts cannot be relied upon to establish the U.S. date of sale because they do not provide satisfactory evidence of a "meeting of the minds" between ICDAS and its U.S. customers on the material terms of sale. This conclusion is consistent with the "date of sale" directive set forth under 19 CFR 351.401(i), which states:

> In identifying the date of sale of the subject merchandise or the foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date

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[19] These figures are computed as the quantity for the largest, as well as the smallest, contract reported in the U.S. sales listing divided by the average daily production volume (i.e., [ ] and [ ]). See Sales Calculation Memo at Attachment II.

[20] This figure is computed as the quantity for the largest, as well as the smallest, contract in the U.S. sales listing divided by the POR daily average home market sales volume (i.e., [ ] and [ ]). See Sales Calculation Memo at Attachment II.

> 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.

This conclusion is also consistent with the guidance provided in the Preamble of the Department's regulations, which states:

> 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.

After weighing the frequency of the changes to ICDAS's contracts, we find that they are more appropriately characterized for purposes of our analysis as "preliminary agreements" which were "reduced to writing," rather than as firmly established. With regard to whether these contracts are binding legal agreements between two contracting parties, the Department does not purport to speak with the authority of a court adjudicating a contract dispute between the parties, but notes that the commercial reality is that the parties could, and frequently did, depart from the terms of these contracts. Therefore, following the guidance set forth in the Preamble, we have continued to use date of invoice as the date of sale for ICDAS.

This conclusion is not contradicted by the contracting parties' general course of conduct with respect to ICDAS's U.S. sales. It is undisputed that both ICDAS and its customers signed agreements, the customers opened letters of credit, ICDAS shipped the merchandise and issued

invoices, and the customers paid for the merchandise.[21] However, as noted above, the final price and/or quantity often differed from the amounts initially agreed upon. Moreover, there is no evidence in any of these instances that ICDAS and the customer formally re-negotiated the contract terms for the sale. Rather, in the case of the price change, the invoice simply reflected a different price, while in the case of the quantity changes, at times the quantity increase appeared in the letter of credit, but other times the only evidence of the change in terms was on the invoice. These facts – changes unaccompanied by formal contract amendments – lend support to the conclusion that the initial sales documents were merely "preliminary agreements" which served to provide a general framework for the terms ultimately accepted by the parties.

Finally, this conclusion is supported by ICDAS's own actions in this administrative review. Specifically, as noted above, the Department also discussed the company's reported date of sale methodology with company officials at verification. During this discussion, ICDAS officials stated that invoice date is the appropriate date of sale. See the ICDAS Sales Verification Report at 5. Further, in the preliminary results, the Department used ICDAS's invoice date as date of sale for both home market and U.S. sales, and ICDAS did not contest this decision in its administrative case brief.[22]

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[21] That said, there is no evidence on the record documenting either the initial negotiation of the terms of sale (including emails or other correspondence discussing the initial offers/counteroffers), nor any correspondence documenting re-negotiation of those terms of sale, once set. Therefore, it is not apparent that ICDAS' engaged in a "formal" negotiation/contracting process, rather than an informal one.

[22] ICDAS argues that it "was not represented by counsel at verification" and we agree that ICDAS's U.S. trade attorneys were not present. See Nucor II at 86. However, as the sales verification report shows, the individual who was retained by ICDAS as its legal representative for antidumping proceedings was, in fact, present, despite ICDAS's apparent claim to the contrary. See the ICDAS Sales Verification Report at Appendix II. Moreover, although perhaps the Department did not articulate its reasons clearly in the first remand redetermination in this litigation, the company representative's position does "carry significant weight" with respect to the issue of the "meeting of the minds" on ICDAS's terms of sale because it corroborates the information on the record and was expressed by one of the officials who was presumably a party to communications with ICDAS's U.S. customers.

We recognize the Court's concern that the Department has relied on invoice date to determine the date of sale in both the home and U.S. markets, despite the fact that the sales process differed in each market. However, we find that, under the circumstances noted above, the differences in sales process are more ones of form than of substance, given that ICDAS changed the terms of sale in almost half of its contracts issued during the POR.

We also recognize that the merchandise shipped to the United States was produced to order, rather than sold out of inventory. However, this fact alone is not enough to overcome the finding that a meeting of the minds over the material terms of sale did not occur at contract date for a significant portion of ICDAS's U.S. sales. Moreover, despite ICDAS's assertions to the contrary, this situation is distinct from those involving "custom-made merchandise" as contemplated by the Preamble to the Department's regulations. See Preamble, 62 FR at 27349. "Custom-made merchandise" refers to products which are produced to a customer's proprietary specifications, and which are not commodity products that can be inventoried and sold to any willing buyer. The classic example of "custom-made merchandise" is a large newspaper printing press, where each press is unique because it is designed to meet the purchaser's specific custom requirements. See 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 38138, 38140 (July 23, 1996) (where the Department found that a particular market situation existed because the requirement "that the subject merchandise be built to each customer's specifications" did not permit proper price-to-price comparisons). These printing

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As for ICDAS's assertion that "the pivotal significance of the date of sale issue became clear only after Commerce changed its universe of sales methodology," we disagree that our universe of sale methodology changed or that ICDAS was unaware of the proper methodology. See Nucor II at 86; see also issue 2, above. Moreover, even assuming arguendo that ICDAS's counsel expected the Department to decide the universe of sales issue differently, this does not alter the fact that company officials themselves indicated that invoice date was the proper date of sale.

presses cannot be inventoried because they are not standard units which can be sold to any customer; indeed, their physical characteristics are not finally determined until after the sales negotiations are complete. Id. Another, more pedestrian, example is mechanical tubing, a custom-made product excluded from the scope of the antidumping duty order on circular welded non-alloy steel pipe from Mexico. See Redetermination on Remand; Circular Welded Non-Alloy Steel Pipe from Mexico; Scope Determination for Glavak {sic}; In the Matter of: Final Scope Ruling – Antidumping Order on Circular Welded Non-Alloy Steel Pipe From Mexico, Secretariat File No. USA-Mex-98-1904-05, issued March 7, 2003 (Mexican Pipe Scope Remand). In its remand redetermination on a scope-related issue, the Department defined the custom-made nature of this product as

> "custom designed to meet a customer's specific needs, and manufactured to non-standard specifications. While it is possible that such mechanical tubing *could* be used in certain limited standard pipe applications, its custom design and non-standard specifications are what set it apart from standard pipe."

See Mexican Pipe Scope Remand at 16.

Both of these products are fundamentally different in nature from rebar. While ICDAS's rebar is produced after order, it is not "custom-made" because it is a commodity product, produced to standard specifications, and primarily differentiated by size and country of intended use (via technical specifications, such as ASTM or TSE).

As a practical matter, rebar can be sold to any purchaser requiring standard rebar products made to common technical specifications, and if a given sale falls through, the same rebar can be resold to a different customer with the same technical requirements. The proof of this statement can be found in ICDAS's U.S. sales database itself. All of ICDAS's U.S.

customers purchased a virtually identical mix of products, produced to the same technical specifications and sizes.[23] Therefore, we find that, had ICDAS not fulfilled its contractual obligations, there would have been no practical prohibition to its reselling the same merchandise to its existing U.S. customers. Moreover, ICDAS did, in fact, sell some rebar to these specifications in the home market during the POR (see ICDAS's January 5, 2006, submission at page 19), further undermining its claim that it would be unable to resell merchandise sold under specific contracts were those contracts to fall through. Indeed, reselling this merchandise in the home market would require no alterations to the products, given that the packing for rebar in the two markets is virtually identical (the only consistent difference being the existence of one additional metal tag on U.S. shipments).[24]

As for ICDAS's assertion that it does not have the capacity to stock, in advance, the thousands of metric tons of rebar sold to the United States, we find that ICDAS has similarly overstated the magnitude of the sales in question. It is a mischaracterization to term them "massive," especially when they are considered in the context of ICDAS's total sales experience. Specifically, as noted above, the smallest of ICDAS's U.S. shipments represented less than [ ] days of home market sales, while the largest represented just over [ ]. In light of the fact that ICDAS's average home market inventory time was [ ] days, we find it highly unlikely that

[23] Specifically, ICDAS's sales to U.S. customer [ ] were of "control number" 12, its sales to U.S. customers [ ] were of "control numbers" 12, 13, and 15, its sales to U.S. customers [ ] consisted of "control numbers 12, 13, 15, and 16, and its sales to U.S. customer [ ] consisted of "control numbers" 12, 13, 15, and 17. See the Contract Memo at Attachment III.

[24] We note that rebar is not "packed," in the traditional sense. Rather, it is bundled together in stacks containing a standard number of pieces, tied along several points of the bundle with short pieces of wire, and then tagged with small metal tags. Moreover, rebar may also have a couple of "lifting ties" wrapped around the bundle to aid the lifting of the rebar onto the transport vehicle. In the home market, ICDAS "packs" its 12 meter standard-length rebar using six pieces of wire, one metal tag, and two lifting ties. For U.S. exports, ICDAS "packs" its 12 meter rebar using seven pieces of wire and two metal tags, as well as two to three lifting ties (depending on the length of the rebar shipped). See Exhibit C-14 of the section C response as well as Sales Verification Exhibit 14.

adding an additional [ ] days of product inventory would tax the company's inventory capacity (particularly where ICDAS had a ready market of U.S. customers which all purchased the same standard products). Moreover, while the lag time between the signing of the contract and the ultimate shipment of the merchandise was at times more than three months, this timing difference seems to have little to do with the size of the sales or the time needed to produce the order, given that, as noted above, it took no more than [ ] days to produce any of the orders and several orders were produced in less than [ ].

With regard to ICDAS's argument that the Department consider the time and expense incurred to ship the merchandise to the port as an indication that it expected to complete its contractual obligations, we note that this argument has a superficial appeal. Because there is no evidence on the record as to when the contract terms changed for the sale at issue in ICDAS's argument, it is impossible to determine when the new terms were set in relation to shipment from the factory (e.g., ICDAS and its customer could have reached a new agreement before shipment commenced). Moreover, while we agree that ICDAS's delivery of merchandise to the port indicates that the company expected to ship rebar to the United States, we disagree that this shipment speaks to whether the company intended to meet its contractual obligations. Significantly, a contractual obligation involves more than the shipment of merchandise; it also involves delivering the contracted quantity of goods at the contracted price. Because ICDAS intended to change the contracted price (and because it in fact did so), the mere movement of rebar in itself is not dispositive.[25]

[25] We note that ICDAS's argument does not apply equally to all U.S. sales during the POR, because ICDAS's factory is located at one of the ports from which ICDAS exported subject merchandise (see ICDAS's August 16, 2004, submission at page C-23).

We find that the facts in this review differ significantly from those present in cases where the Department has deemed contract date the appropriate date of sale. For example, in Pipe from Korea, the Department found that there was "no information on the record indicating that the material terms of sale change frequently enough on U.S. sales so as to give both buyers and sellers any expectation that the final terms will differ from those agreed to in the contract." See Pipe from Korea, 63 FR at 32835-6. Those facts stand in marked contrast to the facts here, where informal changes to price and/or quantity were common. Similarly, 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 2, the Department found that "the record supports a determination that {the respondent} honored the original terms of the contract for the contract's duration;" in contrast, here, we found that ICDAS did not honor the terms of its contracts for a significant portion of its U.S. sales.

The facts in this case also differ from those where the Department found that the date of contract amendment constituted the appropriate date of sale. For example, in 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), the Department was "satisfied that the parties acted in a manner consistent with a 'meeting of the minds' to be bound by the terms of the original contract and only modified certain aspects of the agreement when anticipated production quantities could not be met;" under those circumstances, the parties entered into formal agreements which modified the contract in question. In contrast, here there is no evidence on the record that ICDAS could not meet the terms of its contracts, nor is there any indication that ICDAS entered into renegotiations with its

customers (formal or otherwise) to amend the contract terms.[26] Rather, the only evidence of the changes in terms appears either on the sales invoices issued by ICDAS or on amendments to the letters of credit opened by the customers.

Finally, in response to the Court's directive that the Department "expressly identify all record evidence indicating that ICDAS's U.S. contracts were not legally-binding instruments, as well as all legal authority on which the agency relies to support that conclusion" (see Nucor II, at 102), we have never questioned that ICDAS's U.S. contracts were "legally binding instruments." In every antidumping investigation or administrative review, in selecting a date of sale, the Department does not, as a rule, question the "legally binding" nature of contracts between an overseas producer and/or exporter of subject merchandise and the U.S. customer. As was the case in U.S. v. Eurodif, the fact that "legally binding" contracts exist is not the issue before the Department. The question is only when "material terms of sale" are established, as set forth in 19 CFR 351.401(i), for determining the correct date of sale for purposes of the antidumping analysis. It is abundantly clear that as a matter of commercial reality the material terms were not finally established in 46 percent of its U.S. contracts, accounting for over [ ] percent of the total quantity and value of its sales to all U.S. customers during the POR. Therefore, the Department has determined that the appropriate date of sale for ICDAS continues to be invoice date for purposes of this administrative review.

D. COMMENTS FROM INTERESTED PARTIES

[26] The lack of information with regard to the negotiations between ICDAS and its customers exists because ICDAS provided no such documentation on the record. ICDAS was well aware that it had an opportunity to provide this information because the Department requested, in its verification agenda, that ICDAS provide "{c}omplete sales records and sequential invoice and credit memo files, as well as customer correspondence files or customer-specific sales logs for each POR rebar customer" and "{c}ustomer purchase orders and any other customer correspondence." See the sales verification agenda for ICDAS, dated February 16, 2005, at pages 2 and 8, respectively.

On October 9, 2009, ICDAS submitted comments on our draft redetermination issued on September 30, 2009. On October 15, 2009, the domestic industry submitted rebuttal comments. Because these rebuttal comments contained a new argument, we afforded ICDAS an opportunity to respond, which it did on October 21, 2009.

All comments submitted by the interested parties are addressed below.

Comment 1: *Application of Indices in Calculating Quarterly Average Costs*

ICDAS agrees with the Department's decision to use quarterly average costs in its margin calculations. However, ICDAS argues that the Department should have instead indexed all costs (i.e., TOTCOM), rather than direct materials (i.e., DIRMAT), in implementing its quarterly costing methodology. ICDAS notes that it is the Department's practice to examine whether the change in TOTCOM from the low-cost quarter to the high-cost quarter exceeds a threshold of 25 percent when determining whether a change in COM is significant. ICDAS asserts that the use of a quarterly indexed TOTCOM, therefore, is more consistent with the Department's initial examination of TOTCOM to determine whether there has been a significant change in costs that would warrant the use of multiple cost averaging periods.

As support for its contention that indexing is more appropriately applied to TOTCOM, ICDAS notes that the Department has previously found that "it is the change in COM and not the change in the price of one input that directs the Department's analysis." See Final Results of Redetermination Pursuant to Court Remand in Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States, Court No. 05-00613 (Mar. 3, 2008) (Habas Remand), at 8-9. ICDAS asserts further that in the Quarterly Request for Comment, the Department emphasized that the

determination of significance in the three proceedings described in that notice[27] was based on total TOTCOM, rather than the cost of a single input or one element of TOTCOM.

ICDAS additionally argues that, while the Department used DIRMAT for the second part of its analysis to determine linkage between costs and prices in its draft determination, the appropriate measure for establishing linkage would have been TOTCOM, given the focus on this variable for determining significance. ICDAS asserts that record evidence in this case shows that the results would be similar with the percentage increase in TOTCOM somewhat greater than the percentage increase in DIRMAT from the low to high quarter and that the TOTCOM, like DIRMAT, correlates closely with quarterly home market prices.

ICDAS maintains that applying the index to anything less than TOTCOM would create uncertainties and inconsistencies in the margin calculation. ICDAS suggests that not applying the index to TOTCOM could produce anomalous analyses (such as where the percentage change in TOTCOM is above 25 percent but the percentage change in DIRMAT is below that threshold) and difficulties resulting from the Department's trying to decide on a case-by-case basis which cost variable to select for indexing based upon the level of cost detail provided by the respondents, the Department's review of cost changes for different types of costs, and various arguments from interested parties as to which costs should be indexed.

Citing Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke in Part, 68 FR 23972, 23975 (May 6, 2003), ICDAS further argues that applying indices to TOTCOM would be more in line with the Department's high inflation methodology, where all elements of cost are

[27] See Final Results at Comment 1; Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 71 FR 3822 (Jan. 24, 2006); and Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France, 71 FR 6269 (Feb. 7, 2006).

indexed over a shorter period. ICDAS asserts that if the Department is paralleling its approach in high inflation cases for purposes of determining when changes in cost are significant (i.e., by applying a 25 percent threshold), and for purposes of eliminating the window period for price-to-price comparisons, the Department should also parallel its approach in high inflation cases by indexing all costs.

ICDAS accordingly urges the Department to modify its margin calculations by indexing all costs (i.e., TOTCOM) rather than just indexing direct materials (i.e., DIRMAT).

The domestic industry did not respond to ICDAS's arguments on this issue.

Department's Position:

We disagree that quarterly indices should be applied to TOTCOM, rather than DIRMAT, in calculating quarterly average costs. As noted above, to mitigate distortions in the margin calculations for ICDAS resulting from significantly changing raw material input (i.e., steel scrap) costs during the POR, the Department used CONNUM-specific quarterly indexed average direct material costs in calculating COP for purposes of this remand redetermination. For all other cost variables (i.e., labor and overhead), the Department followed its normal methodology and calculated a single, annual-average cost. See Remand Cost Calculation Memorandum at page 4. The application of quarterly indices to TOTCOM, however, would have the effect of indexing these other cost elements for which there were no significant changes during the period. Indexing the other cost elements included in TOTCOM that were not subject to significant changes during the POR is simply unnecessary, as the use of an annual-average figure where costs are relatively stable does not introduce distortion into the margin calculations. Making such changes would run counter to the Department's otherwise consistent and predictable use of

annual-average costs in its calculations, barring limited exceptions. This approach is consistent with the Department's indexing methodology in SSSSC from Mexico, SSPC from Belgium, and SS Pipe from Korea. In each of those determinations, the Department applied its indexation methodology only to those inputs (specifically, DIRMAT) undergoing significant cost changes throughout the period.

ICDAS suggests that the Department's quarterly cost indexing methodology should parallel that of high inflation cases, indexing TOTCOM as opposed to a single cost element such as DIRMAT. However, an important distinction can be made between countries that are experiencing high inflation, and those for which the price of one or a few inputs are undergoing significant price fluctuations. A high inflationary economy is characterized by rapidly escalating prices that affect all elements of production cost (i.e., labor, materials, etc.). In cases where the Department finds that a country experienced high inflation during the POI or POR, all costs are accordingly indexed in order to alleviate distortion in the antidumping analysis. In contrast, if the Department determines that a single input is causing a significant change in COM throughout the period, only the cost variable for which there were significant changes should be indexed. The Department has concluded that it is reasonable to calculate all other elements of COM (i.e., those for which significant costs changes were not present) using the Department's normal annual-average methodology.

The Department has examined evidence on the record of this proceeding and found that the primary driver of the significant change in ICDAS's costs during the POR was the change in the cost of input scrap material. See Remand Calculation Memo at page 2 and Attachment 3. Because input scrap was the primary driver of the significant change in costs, the Department

applied quarterly indices to direct materials costs in calculating COP, while preserving its normal annual-average methodology for all other cost variables.

We agree with ICDAS that in determining whether costs and prices are reasonably linked during the shorter cost-averaging periods, comparing quarterly home market prices with either TOTCOM or DIRMAT will result in the same conclusion that a reasonable correlation exists. As noted above, normally if the Department finds changes in costs to be significant in a given investigation or administrative review, it subsequently evaluates whether there is evidence of linkage between the cost changes and the sales prices during the shorter cost periods within the POI or POR. For this remand redetermination, the Department analyzed a comparison, by quarter, of the weighted-average sales prices for ICDAS's five most frequently sold CONNUMs in the home market and the weighted-average direct material costs (i.e., steel scrap input). This analysis revealed that the changes in quarterly prices trended consistently with the change in quarterly material costs; therefore, we find that they are reasonably linked. See Remand Calculation Memo at page 3 and Attachment 4.

Consequently, for these final remand results, the Department has made no changes with respect to its indexing methodology and has continued to index ICDAS's reported direct material costs rather than indexing all production costs.

Comment 2: *Deviation from an Annual Cost Averaging Methodology*

The domestic industry disputes the Department's use of quarterly cost averaging periods to calculate ICDAS's COP. Citing SS Pipe from Korea at Comment 1 and Quarterly Request for Comment, 73 FR at 26366, the domestic industry points out that, since the Department began to develop a refined test for the use of alternative cost averaging periods, it has clearly articulated

its preference for calculating the COP on an annual average basis. For example, the domestic industry notes that in its Quarterly Request for Comment, the Department stated that "we continue to regard our practice of using annual cost averages in proceedings as generally the most appropriate methodology." See Quarterly Request for Comment, 73 FR at 26366. Moreover, the domestic industry argues that in SS Pipe from Korea at Comment 1, the Department confirmed its preference for the calculation of an annual weighted-average COP, and it defined the following factors that would justify deviating from an annual cost averaging period: 1) cost changes during the period that were significant; and 2) there existed sales during the shorter cost averaging periods that could be reasonably linked with the COP during the same averaging period.

With regard to the second factor, the domestic industry recognizes that the Department has explained that linkage between costs and sales may rely on certain elements that would indicate a reasonable correlation between the two and does not require direct traceability between sales prices and costs. The domestic industry asserts that the Department recognized that correlative elements could be "measured in a number of ways depending on the associated industry, the overall production process, inventory tracking systems, company-specific sales data, inventory turnover ratios, price and cost-trend analysis, and price mechanisms used in the normal course of business." See SS Pipe from Korea at Comment 1. The domestic industry contends that the Department's remand redetermination analysis only compares prices and costs over time, and that the Department's linkage determination requires more of an analysis. According to the domestic industry, the Department should look to the other correlative elements discussed in SS Pipe from Korea to determine whether sales prices and costs are reasonably

linked. The domestic industry further notes that the Department has relied on a variety of other factors in other administrative reviews to establish linkage, including technological advancements, direct pass-through of costs to customers through requiring customers to purchase input materials, and alloy-surcharge mechanisms. See SSSSC from Mexico at Comment 4. In sum, the domestic industry argues that the Department, consistent with its past practice, should require evidence beyond mere trends or correlation to determine whether costs and prices are linked for such an analysis to be methodologically sound.

The domestic industry points out that the Department, in its Draft Redetermination, compared the weighted average sales prices for ICDAS's five most frequently sold home market CONNUMs with quarterly input prices for steel scrap and determined that prices and costs were reasonably correlated. The domestic industry further notes that the Department determined that ICDAS's short inventory turnover period allowed ICDAS to revise its prices in response to changing material costs, thereby allowing current costs to be reflected quickly in COM. However, the domestic industry suggests that the Department should require additional evidence beyond the mere trending of prices and costs together over time. According to the domestic industry, the fact that two variables have a linear relationship does not indicate a causal relationship between them. Based on its own analysis of ICDAS's price and cost trends, the domestic industry asserts that a comparison of such trends reveals that, while prices and costs trended upwards and downwards in unison, they did not do so to the same degree. See the domestic industry's October 15, 2009, comments at 10-11. Further, with respect to the Department's use of ICDAS's inventory turnover ratio to confirm correlation, the domestic industry argues that short inventory holding periods can only confirm a causal connection

between costs and prices when such costs and prices experience similar trends within each quarter. However, the domestic industry argues that evidence on the record serves to undermine the conclusion in the Draft Redetermination that there is a causal relationship between ICDAS's prices and costs within each quarter. See the domestic industry's October 15, 2009, comments at 11. The domestic industry argues that, in the absence of any correlative elements to determine whether sales and costs were reasonably linked, the Department cannot be certain that quarterly cost averaging periods eliminate distortions resulting from the use of an annual cost averaging period. Therefore, the domestic industry concludes that the Department should adhere to its preference for the use of an annual cost averaging period.

ICDAS responds that the domestic industry's insistence on a correlative and causative linkage standard conflicts with the Department's established practice, which does not require direct traceability between specific sales and their specific production costs, but relies instead on the presence of certain correlative elements that indicate a reasonably positive correlation between prices and costs. ICDAS further argues that, contrary to domestic industry's claims, the Department has used two correlative elements – cost and price trends and inventory turnover periods – to confirm linkage between sales and costs during the shorter cost averaging periods. ICDAS points out that the domestic industry is attempting to discount the Department's analysis in its Draft Redetermination by arguing that the comparison of cost and price trends shows mixed results because prices and costs did not trend upward and downward to the same degree. However, according to ICDAS, the domestic industry's arguments only underscore the Department's finding that quarterly prices trended consistently with changes in quarterly costs. ICDAS additionally argues that, just as there is no direct traceability requirement for determining

linkage, there is no requirement that costs and prices trending together in unison do so to the same degree.

Department's Position:

As articulated above, when deciding whether to depart from its normal practice of calculating COP on an annual average basis, the Department considers two factors: 1) whether the cost changes throughout the POI or POR were significant; and 2) whether sales during the shorter cost averaging period can be reasonably linked with the COP during the same averaging period. For purposes of this remand determination, the Department conducted an analysis of information on the record with respect to fluctuations in ICDAS's costs throughout the POR and determined that the cost changes were significant. The Department also determined that sales prices and costs were reasonably correlated during the shorter cost averaging periods, based on an analysis of cost and price trends in relation to each other, as well as a review of ICDAS's inventory turnover period for raw materials and finished goods. See Remand Cost Calculation Memo at page 3 and Attachment 4.

The domestic industry, however, contends that the cost/price trend analysis undertaken by the Department for purposes of its Draft Redetermination is insufficient to establish a linkage between prices and costs. As noted above, the domestic industry asserts that additional evidence must exist to link costs and prices and confirm a correlative, as well as causative relationship, between the two. However, in several recent determinations where the Department has discussed this issue, the agency has clearly articulated that the linkage between costs and prices may be evaluated in terms of a number of possible correlative elements. See SSPC from Belgium at Comment 4, SSSSC from Mexico at Comment 5, and SS Pipe from

Korea at Comment 1. The Department has stated that these "correlative elements may be measured in a number of ways depending on the associated industry, the overall production process, inventory tracking systems, company-specific sales data, inventory turnover ratios, price and cost trend analysis, and price mechanisms used in the normal course of business." See SS Pipe from Korea at Comment 1. The Department's intent in these cases has been to note that there are options in how the correlative elements may be measured, not that it intends to analyze linkage using all noted possibilities. The administrative record of every proceeding is different, and therefore the elements relevant to the Department's analysis will naturally vary depending on the record before it.

As discussed in detail above, the Department carefully examined evidence on the record of this case and analyzed the correlation between sales and costs using cost and price trends and inventory turnover periods. Contrary to the domestic industry's claims, these correlative elements do exist, and the Department has concluded that they are sufficient to establish a link between sale prices and costs for ICDAS during the POR.

With respect to the domestic industry's argument that cost and price trends are not sufficient to establish linkage in this case because costs and prices did not change to the same degree between quarters (see the domestic industry's October 15, 2009, comments at 10), we note that it is an unrealistic standard to require that the percent cost change from quarter to quarter track the percent price change for the same time period.

Regarding the domestic industry's assertion that additional evidence must exist to make the link between costs and prices and confirm a correlative as well as *causative* relationship, we disagree. While there may be reviews of products where underlying costs and final sales prices

can be directly linked through the existence of a pass-through mechanism, such as an alloy surcharge (see, e.g., SSSSC from Mexico at Comment 5), the Department has not required a demonstrated relationship between costs and prices as a condition for establishing a link between them in administrative reviews of rebar. In fact, the Department has previously acknowledged that requiring too strict a standard for linkage (and indeed a "causative" relationship would be such a standard) would unreasonably preclude this remedy for commodity-type products where it may be difficult to precisely link production costs to sales. See SS Pipe from Korea at Comment 1. The Department maintains that a correlation based on record evidence between sales prices and costs, whether it be established through price/trend analysis, or any of the other "correlative elements" identified above, provides a reasonable basis for concluding that a respondent's sales prices reasonably reflect changes that are related to the significantly changing costs of inputs during a period (i.e., that they are "linked").

For purposes of this remand redetermination, consistent with the approach in SS Pipe from Korea, the Department analyzed sales price and direct material cost data for five of ICDAS's home market CONNUMs[28] for the POR, and concluded that the prices and costs trended consistently (i.e., generally moved in tandem with each other) throughout the POR. See Remand Calculation Memo at page 3 and Attachment 4. The Department concluded based on its analysis that the correlative relationship between ICDAS's costs and prices, and additionally ICDAS's relatively quick inventory turnover period for raw materials and finished goods, indicated that sales prices and costs were reasonably linked during the shorter cost averaging periods.

[28] These CONNUMs accounted for a large majority of ICDAS's home market sales during the POR.

For purposes of this final remand redetermination, the Department has continued to rely on the analysis set forth in the Draft Redetermination and section C.1 above regarding ICDAS's cost and price trends, in addition to the company's inventory turnover period, in order to establish linkage between sales prices and costs. Furthermore, as articulated above, based on an analysis of information on the record of this proceeding, the Department has concluded that the change in ICDAS's costs during the POR was significant and that sales prices and costs during the shorter averaging periods were reasonably linked, and we have accordingly employed a quarterly cost methodology for this final remand redetermination.

Therefore, after taking a fresh look at the case evidence in accordance with the Department's recent refinement of its cost period methodology, the Department has reconsidered ICDAS's arguments, as well as the domestic industry's comments, and determined that, due to the significant change in ICDAS's costs during the POR, and the fact that its costs and prices were reasonably linked during the shorter cost averaging periods, it is appropriate to deviate from the normal annual average cost methodology in this case and instead compute ICDAS's COM using an alternative cost calculation methodology. As such, we have used the alternative cost-averaging methodology applied in SSSSC from Mexico, SS Plate from Belgium, and SS Pipe from Korea to calculate COP for purposes of recalculating ICDAS's dumping margin. Further, the Department has included in the remand redetermination a discussion of certain additional calculation changes which are necessary as a result of the reliance on quarterly costs (i.e., not going outside of a quarter for price-to-price comparisons, and an adjustment to the methodology for the cost recovery test) because these issues are integrally part of the shorter cost

averaging period methodology and are necessary to avoid distortions in the antidumping duty margin calculation. See Remand Cost Calculation Memo for calculation-specific details.

Comment 3: *Universe of Reviewed Transactions*

As noted above, for purposes of this remand redetermination, the Department continued to define the universe of transactions examined in the review using the date that the subject merchandise entered U.S. customs territory, rather than the date on which this merchandise was sold to the first unaffiliated customer in the United States. ICDAS contends that this decision does not comply with the Court's instructions to "consider {the universe issue} anew." Specifically, ICDAS argues that the Department neither weighed all appropriate factors in reaching its decision in this segment of the proceeding nor identified any change in fact or law that would justify the change in methodology from that used in past segments. ICDAS contends that the Department inappropriately discounted the agency practice that has been consistently used in this case.

According to ICDAS, it should be undisputed that the Department's practice has been to use the date of sale to define the universe of examined transactions, and the Department itself conceded this point. However, ICDAS contends that, in the remand redetermination, the Department attempted to distance itself from this established practice by claiming that its adoption was unintentional and the result of a computer programming error. ICDAS maintains that the Department's claim is implausible for three reasons: 1) the computer program is at the core of the Department's practice, with the program functioning merely as a tool to implement practice; 2) although the error now alleged by the Department is potentially a far-reaching issue that cannot be limited to this proceeding, the Department has cited no similar errors in other

cases; and 3) the Department faced the same issue in the immediately preceding administrative review, and thus it already should have been aware that the error existed (implying that, if the error were real, the Department would have corrected it in the prior review and then would not have made the same error in this segment).

ICDAS also disagrees with the Department that, because the universe of sales and entries was the same in every prior segment, the change in methodology was one of form, rather than of substance. ICDAS claims that the documents placed on the record by the Department to support its conclusion do not, in fact, stand for the proposition that the change was meaningless, but rather they simply serve to illustrate that the Department defined the universe of examined transactions using the date of sale. ICDAS asserts that the Department's use of average shipping times to "test" whether the two universes were identical is similarly unpersuasive, given that the Department performed this test only for the instant redetermination. ICDAS finds it telling that the Department did not perform the same test in prior segments in order to confirm that it was following its deliberate practice of reviewing entries rather than sales.

ICDAS concedes that the Department has discretion to reconsider the methodologies it uses in its antidumping analysis, but it maintains that its discretion is not unbounded. As support for this position, ICDAS cites two CIT cases: Anshan Iron & Steel Co. v. United States, Slip Op. 03-83 (CIT 2003) (Anshan) (in which the Court stated that "Commerce may not alter its methodology where a respondent has detrimentally relied on an old methodology used in previous reviews" and "Commerce must explain the basis for its change of methodology") and Shikoku Chemicals Corp. v. United States, 16 CIT 382, 795 F. Supp. 417 (1992) (Shikoku) (where the Court stated that "Commerce abused its discretion in adopting a slightly improved

allocation methodology in the face of years of acceptance of the prior approach"). ICDAS asserts that the Court's decision in Shikoku is directly on point here, as there the Court held that the Department's obligation to administer the antidumping law fairly precluded it from changing its methodology at a late stage, given that the change (albeit more accurate) would have raised the dumping margin to an above-*de minimis* level and denied the respondent revocation.

ICDAS further asserts that the Department itself has recognized in past cases that the concern over administrative equity may outweigh the need for accuracy. As support for this assertion, ICDAS cites Calcium Hypochlorite From Japan; Final Results of Antidumping Duty Administrative Review and Revocation in Part, 55 FR 41259, 41260 (Oct. 10, 1990). ICDAS contends that, were the Department to weigh equity and accuracy in this case, it should reach a similar conclusion.

Irrespective of those trade-offs, however, ICDAS contends that the Department has no reason to change its methodology here, given that there were no changes in either the law or fact since the completion of the last review. According to ICDAS, the Department has failed to point to any requirement that it make the change; instead, ICDAS asserts that the Department recognized that "both the law and the questionnaire lack specificity regarding this issue" and that this change is within its discretion. ICDAS contends that, because there are no new facts in this review, the Department's change in methodology is not an appropriate exercise of its discretion, but an abuse of it. ICDAS claims that this is particularly true, given that it developed a strong and reasonable expectation that the Department would continue to employ the same universe of reviewed transactions methodology from segment to segment.

ICDAS disputes the Department's conclusion that ICDAS was aware of the Department's policy of reviewing entries (not sales), arguing that the precedent cited by the Department is not on point and both the questionnaire and the law are unclear. Specifically, ICDAS disagrees that the Department's rejection of ICDAS's review requests relating to periods where ICDAS had no entries of subject merchandise has any bearing on this issue because the decision whether to initiate a review is governed by a different provision of the Department's regulations from that governing the decision over which sales to examine once a review has begun. See 19 CFR 351.213(d)(3) and 19 CFR 351.213(e)(1), respectively. Moreover, although ICDAS acknowledges that it responded to questionnaires requiring it to report all entries during the review period, ICDAS claims that this fact alone is not sufficient to impute knowledge of the Department's practice because: 1) the Department itself indicated that "both the law and the questionnaire lack specificity regarding this issue"; and 2) the questionnaire does not require the submission of entry dates. In any event, ICDAS contends that the Department cannot view the questionnaire in isolation, but rather must consider how the use of the data provided in response to it impacted the parties' expectations; ICDAS asserts that, because the Department collected the data and then used the reported date of sale to define the universe, the expectation grew stronger that the Department would continue to apply the same methodology with each review.

ICDAS also disagrees that the Department's position taken on an identical issue in the immediately preceding review should have made it aware of the Department's policy. See 2002-2003 Rebar from Turkey at Comment 6. Specifically, while ICDAS agrees that the issue was the same, it disagrees that the Department did, in fact, use the entry date to define the universe. According to ICDAS, in that decision the Department expressly decided to continue

to use date of sale to define the universe of sales examined – and its computer program was consistent with that decision.[29]

Finally, ICDAS asserts that, because it has been harmed by the Department's change in methodology, the Department would violate the "basic principles of fairness" by continuing to define the universe of examined transactions using entry date. ICDAS maintains that it would be improper for the Department to abruptly change its methodology here unless it can articulate specific reasons that differentiate this review from all the prior reviews. ICDAS claims that the Department admits that it did not take into account the fact that this change would have a significant, adverse effect on ICDAS, and thus it should reverse this change in the final results of this remand redetermination.

The domestic industry agrees with the Department's decision to use entry date to define the universe of sales examined. According to the domestic industry, the draft remand redetermination provides legally and factually sound explanations for this decision. The domestic industry also contends that the Department's conclusions are well-reasoned, clearly articulated, and fully consistent with both the evidence in this review and the Department's well-established practice. Thus, the domestic industry contends that the Department should continue to define the universe of examined transactions using entry, rather than sale, date.

Department's Position:

After thoroughly considering all comments on this issue, we are continuing to define the universe of transactions examined in this review using the date that the subject merchandise entered the customs territory of the United States. This action is consistent with our general

[29] ICDAS did not provide any support for this assertion, other than a copy of the relevant portion of the decision memorandum issued in connection with the final results.

practice in this area, as well as our practice in this segment of the proceeding for all other respondents participating in the review. See Final Results at Comment 5.

As an initial matter, we disagree with ICDAS that our decision fails to comply with the Court's order to consider the issue anew.[30] In analyzing the issue, we took into account the relevant provisions of the Act, the Department's regulations, and our practice in this area. We also weighed all additional factors relevant to this decision, including the facts of the instant segment, the facts in previous segments, and ICDAS's comments and objections. For the reasons set forth in section C.2 above, we continue to find it appropriate to include all entries made during the POR in our analysis, irrespective of when the sale was made.

In its October 9, 2009, submission, ICDAS characterizes the Department's decision purely as an exercise of discretion, and it attempts to minimize the constraints imposed by the law, as well as by administrative practice on the Department in making this decision. ICDAS implies that the Department agrees with this characterization by repeatedly claiming that the Department "recognized" that "both the law and the questionnaire lack specificity regarding {the reporting only of entries}" and thus "it is 'within the Department's discretion' to choose the methodology for determining the universe of sales."[31] See, e.g., ICDAS's October 9, 2009,

[30] The Department requested a voluntary remand on this issue to fully explain its reasoning. Because the Court directed the Department to reconsider the issue anew, rather than to limit our response to an explanation, we have analyzed the facts of this case vis-à-vis the facts in other segments, discussed why it is appropriate to use a different variable in the computer program to determine which sales are reviewed, and weighed ICDAS's concerns against these facts.

[31] This quote was taken from the Final Results. The entire quote reads as follows:

> Similarly, we are unpersuaded by ICDAS's argument that neither the Act nor the standard questionnaire specify the reporting only of entries. Both the law and the questionnaire lack specificity regarding this issue, and thus provide the Department with the flexibility to include shipments (or just sales) in situations in which the facts do not permit us to restrict the universe of sales to entries. Nonetheless, it remains within the Department's discretion, and is, in fact, the

comments at 18. However, as the analysis in section C.2 above explains, ICDAS misrepresents the requirements of the Act and the Department's directions in its questionnaire.[32] Both transmit the clear intention that Department use entries in its antidumping analysis. Neither, however, is so rigid as to prohibit the Department the flexibility to include shipments (or just sales) in situations in which the facts warrant such a change to the universe of reviewed sales.

Section 751(a)(2)(A) of the Act specifically requires the Department to determine dumping margins for entries during the POR, and this requirement is explicitly reflected in the Department's questionnaire, which directs companies to report "each U.S. sale of merchandise entered for consumption during the POR." See the Department's antidumping duty questionnaire issued to ICDAS on May 13, 2004 (emphasis added).

Because there are inherent problems in gathering entry data in all situations, the Department's regulations give the Department the flexibility to examine an alternate set of sales data where circumstances warrant. Specifically, 19 CFR 351.213(e)(1)(i) permits the Department to define the universe of transactions examined during an administrative review using "entries, exports, or sales of the subject merchandise" during the review period to account for situations where sales and entries cannot be linked. This flexibility is again echoed in the questionnaire, which directs respondents to contact the Department for guidance on which sales transactions to report where they "believe there is a reason to report {their} U.S. sales on a different basis." Thus, we disagree with ICDAS that it is purely "within the Department's

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Department's preference and practice to restrict the universe to entries when the facts permit us to do so.

[32] We acknowledge that the statement quoted by ICDAS contained a poor word choice and that the correct word should have been "rigidity."

discretion" to review sales or entries in any given review or that the Department is not bound by the intent of the Act or its instructions in the questionnaire.

In its October 9, 2009, comments, ICDAS makes three additional arguments that are simply not supported by the administrative record. First, ICDAS implies that it is disingenuous for the Department to claim the existence of a computer error at this stage of the proceeding. Specifically, ICDAS contends that the Department's attempt to distinguish between its practice in theory and its practice as it is implemented is improper because the computer program is the Department's core tool for analyzing data provided by the parties and for calculating margins. ICDAS concludes that, because the Department consistently used the date of sale variable in its computer program to define the universe of reviewed transactions, the selection of this variable must have been intentional.

This argument is unavailing and based entirely on unsupported speculation as to the Department's alleged "motivation." First, we note that the computer program is not the only "tool" used by the Department to determine dumping margins. Equally important is the Department's questionnaire, which provides guidance to the respondents on how to report their data to the Department. As noted above, the questionnaire issued to ICDAS, not only in the instant review but in all prior segments, instructed ICDAS to report "each U.S. sale of merchandise entered for consumption during the POR."

Although ICDAS claims that the Department's practice is ambiguous, this language is quite clear: for EP sales, questionnaire respondents are required to report all entries of subject merchandise during the POR. These entries define the universe of transactions to be reviewed during the period under consideration; had the Department intended (or wished to have the

option) to review sales instead of entries, the questionnaire would have directed respondents to report that data. Moreover, this language is part of the Department's standard questionnaire, and as such it is not limited to ICDAS in particular or the larger rebar industry. Rather, it applies to all respondent companies with EP sales involved in an antidumping duty administrative review.

Although the Department may alter the universe of transactions examined when circumstances warrant (for example, when sales of a particular product are made in pieces and involve multiple entries, as in the large newspaper printing press industry), the questionnaire also provides explicit guidance there as well. Where extenuating circumstances are present (or indeed in any case where a respondent wishes to report a different set of sales transactions), the questionnaire instructs parties to contact the official in charge of the case, rather than simply reporting their sales using an alternative method. Id.

In all previous administrative reviews, ICDAS reported its data in conformance with the questionnaire instructions, which were identical in each of these reviews. In all four of these reviews, the universe of ICDAS's U.S. sales during the POR was the same as the universe of its entries. While ICDAS now implies that it ignored these instructions, relying instead on established practice gleaned solely through the Department's choice of a particular variable embedded in the standard computer program, there is no support for this argument in the record. Instead, it is more logical to conclude that ICDAS followed these instructions in the first four reviews, and that it did not contact the Department for permission to report a different set of sales because it had no reason to do so. In this review, ICDAS made sales during the POR which entered after the end of the POR. ICDAS again did not contact the Department for guidance on

which sales to report, but instead reported all entries (and all sales) during the POR. While ICDAS now claims that it reported its data in this fashion because the questionnaire instructions were ambiguous, these instructions were in fact quite clear, as noted above.

ICDAS also implies that the Department is being dishonest when it claims that a computer error exists. If there were such an error, ICDAS argues that it would have been noticed in other proceedings. This argument is also unpersuasive because it assumes that the Department would, in fact, make an identical error in other cases. However, that assumption is without basis. As a threshold matter, we note that the computer programs generated in each case are treated as business proprietary in their entirety, and as a consequence, there is no public information available on instances where the Department correctly defined the universe of EP transactions using entry dates. Moreover, while it is possible that other errors in other proceedings have been made with respect to this issue without parties noticing or commenting on the public record, it is equally possible that the errors were not in fact made.

As to ICDAS's argument that the Department faced the same issue in the immediately preceding review and reached a different outcome, we disagree. In the Issues and Decision Memorandum in that case, provided as Attachment 3 to ICDAS's October 9, 2009, submission, the Department's position states:

> In this case, we find that the petitioners' concern regarding unreported sales by Colakoglu is misplaced. Colakoglu has stated that it reported all sales pursuant to entries in this administrative review. Moreover, these are all of its sales shipped and invoiced during the POR. Thus, we find that Colakoglu did not fail to report any reviewable transactions.

See 2002-2003 Rebar from Turkey at Comment 6 (emphasis added).

It is clear from this excerpt that the Department reviewed all entries made by the respondent in question during the previous POR, consistent with the Department's general practice.[33] Although ICDAS believes that the Department should have identified (and fixed) the computer error at that time, from the excerpt it appears that there was no need to do so, given that the universe of sales and entries in that case, like in ICDAS's case, was the same.[34]

For the foregoing reasons, we disagree with ICDAS that our explanation of the computer error in question is not valid or that the error was one of substance. As the documents supporting our explanation reveal, the data reviewed in the first four of the five segments of this proceeding for ICDAS would not have differed whether the Department defined the universe using sale or entry date.

We also disagree with ICDAS's argument that, because the Department did not perform any tests to confirm that it was reviewing entries in the prior segments, our assertions regarding our practice are suspect. In those segments, there is no evidence that this issue was raised by any of the parties and thus there was no reason to question whether ICDAS followed the instructions provided in the questionnaire.

As to ICDAS's arguments that it was unaware of the Department's practice, and thus the change in methodology caused it harm, we disagree. As noted above, the questionnaire instructions issued to ICDAS were explicit as to which sales to report and ICDAS followed these instructions in all five segments in which it participated. Further, while the questionnaire does

[33] In its comments, ICDAS makes much of the phrase "in the past the disconnect between reviewed sales and entered transactions." However, there was no disconnect between reviewed sales and entered transactions in the 2002-2003 review. Moreover, because no party raised the universe of reviewed transactions issue in past reviews, the Department had no reason to affirmatively address it in those segments.

[34] With every programming change, there exists the possibility of programming error, and thus the Department has reason to avoid unnecessary changes.

not mandate the reporting of entry dates, it is not credible that ICDAS would conclude as a result of this omission that explicit instructions provided elsewhere in the questionnaire were incorrect. Further, had ICDAS been confused by any perceived discrepancy, it had multiple opportunities to contact the Department for clarification, but it did not.[35]

While we acknowledge that the computer program forms an essential part of the Department's dumping analysis, it is also not credible that ICDAS developed a "strong expectation" that the Department would review sales, rather than entries, in the instant review given that: 1) the universe defined under either methodology (sales or entry) was the same in prior reviews, and thus the particular computer variable did not impact the outcome of the case; 2) the questionnaire to which ICDAS responded required the reporting of entries; and 3) ICDAS itself reported the data in three ways (as all contracts signed, invoices issued, and entries made) to give the Department the ability to define the universe of transactions examined in the manner it deemed appropriate. See Final Results at Comment 5.

Finally, we recognize that the decision to initiate a review and the sales examined during the course of it are different questions provided for under different sections of the regulations. However, we disagree with ICDAS that the two decisions are entirely separate. The logic of linking entries to a particular review is the same in both cases. Because one of the purposes of an administrative review is to assess appropriate dumping duties on entries made during a given period, the Department initiates reviews only in instances where it can capture an actual entry and it includes in those reviews all entries during that period (where possible). We agree that

[35] Indeed, in its administrative case brief, ICDAS stated that it properly reported all transactions with entry dates, invoice/shipment dates, or contract dates within the POR in order to give the Department the discretion to choose the appropriate universe of sales. See Final Results at Comment 5. Thus, ICDAS acknowledged that, far from being "undisputed" as it argues in its October 9, 2009, submission, the use of entry date was a viable option.

this linkage, taken in isolation, is not dispositive; however, when considered in the context of the history of this case, it serves to corroborate our conclusion that ICDAS should have been aware that the Department reviews entries, not sales, in EP situations.

In light of the analysis set forth above, we find that the cases cited by ICDAS to support its arguments are inapposite. Although the Department may not abuse its discretion, it may alter an existing methodology provided that it gives an adequate and reasoned explanation for the change. Here, we have provided an extensive explanation and the Department's correction of the error is certainly reasonable. Further, despite ICDAS's current claims to the contrary, there is no basis to conclude that ICDAS relied on Department's computer error or that the Department has abused its discretion. Thus, we continue to find that it is appropriate to define the universe of transactions reviewed in this case using the date of entry.

Comment 4: *Date of Sale Methodology for ICDAS*

In accordance with the Court's directive, in the Draft Redetermination the Department performed an in-depth analysis of ICDAS's U.S. selling practices in order to determine when the company and its U.S. customers established the essential terms of sale. Based on this analysis, the Department found that ICDAS's U.S. sales agreements cannot be relied upon to establish the U.S. date of sale because they do not provide satisfactory evidence of a "meeting of the minds" on the material terms of sale. Rather, the Department found that these agreements functioned as "preliminary agreements" which were "reduced to writing," and that changes to the material terms of sale were so commonplace that they effectively constituted an ordinary business practice.

ICDAS disagrees with the Department's conclusion, contending that the analysis on which it is based improperly focuses on whether changes occurred in the material terms of sale. ICDCAS argues that this "mechanical" analysis does not comply with the Court's directive to consider the nature of the relevant sales process and the expectations of the contracting parties when deciding this issue. According to ICDAS, while the Department goes to great effort to state what it considers the "economic reality," the Draft Redetermination contains little meaningful analysis of the verified record evidence that truly shows the economic reality in which the contracting parties operated.

Specifically, ICDAS claims that the Department places little to no weight on ICDAS's U.S. sales process, and it fails to consider why ICDAS uses a completely different process for negotiating and formalizing U.S. sales than for home market sales and how its formal contracts impact the parties' expectations. ICDAS claims that this omission violates the Court's explicit instruction that the Department "weigh the record evidence" and "tak{e} into account whatever in the record fairly detracts from {the} weight {of the evidence on which it relies}."

According to ICDAS, its U.S. sales were made pursuant to a deliberate and formal negotiation process, whereby the company signed contracts with its customers memorializing the parties' agreement and identifying the final price and quantity of the products sold. ICDAS claims that these contracts also established the specifications of the rebar, the packing requirements, the method of payment, the risk of damage or loss, the shipment date, and the method of shipment. Moreover, ICDAS contends that the average quantity per invoice for its U.S. sales was more than [ ] metric tons – [ ] times larger than the average home market sale – and the average lead time needed to complete its U.S. orders was [ ] days – about [

] longer than the average time to complete home market sales. Thus, ICDAS contends that, unlike the parties in the home market sales process, parties in the U.S. sales process required that the terms of sale be fixed on the date of contract because they understood that they were contracting for massive shipments of made-to-order rebar that would require significant time and expense to produce. Specifically, ICDAS claims that both it and the U.S. customers required a degree of certainly that only a written, legally-binding contract could provide because they knew that the rebar needed to be: 1) made-to-order and rolled in inches rather than millimeters; 2) tested; 3) marked differently than rebar sold in the home market; and 4) packed for export.

As to the expectations of the parties, ICDAS claims that the buyer expected ICDAS to begin production with sufficient lead time to make, pack, and ship the subject merchandise according to the terms in the contract. Moreover, ICDAS contends that it required certainty that the sale would go through for three reasons: 1) it lacked the capability to stock, in advance, the thousands of metric tons of various specific sizes of rebar sold to the United States; 2) the cost of production for a contract involving millions of dollars is sizeable; and 3) were the sale to be canceled, it would be commercially infeasible either to resell the rebar in the home market which was rolled to U.S. dimensions or to warehouse such large amounts of merchandise for future U.S. sales.

In addition to failing to take the above expectations into account, ICDAS claims that the Department's analysis improperly minimized two factors important in determining date of sale: the lag time between production and shipment and the made-to-order nature of the merchandise at issue. With regard to lag time, ICDAS disagrees with the Department's implication in the

Draft Redetermination that this lag time was either illusory or unnecessary. According to ICDAS, there is no reasonable evidence to support this claim, as ICDAS's production process cannot be reduced down to the mere time that it takes to roll scrap into rebar. ICDAS asserts that the parties understand that it takes a "not insignificant" amount of lead time for ICDAS to assemble the materials needed to produce the rebar at issue, schedule a time to produce it, and reset its production line to roll it to U.S. specifications. ICDAS contends that the trivialization of the lead time is particularly inappropriate considering the impact the time between contract date and invoice date has in the antidumping calculation. Specifically, ICDAS asserts that the blanket use of invoice date prevents accurate comparisons because the Department is effectively comparing home market sales in any given month to U.S. sales whose material terms of sale were set in a different month.

With regard to the made-to-order nature of the merchandise, ICDAS disagrees with the Department's analysis on three grounds: 1) the Department misunderstood ICDAS to say that its rebar was custom-made, when in fact ICDAS's argument was that its rebar is "comparable or analogous to" custom-made merchandise reviewed by the Department in other cases (given that the sales in question involved formal contracts for tens of thousands of tons of merchandise tailor-rolled to U.S. specifications, worth millions of dollars, and requiring significant lead time to produce); 2) it would not be practical for ICDAS to inventory produced, but canceled, orders with a view towards selling them in future U.S. orders; and 3) the Court has already accepted ICDAS's claim that there is "simply no meaningful home market demand for U.S.-sized rebar."

According to ICDAS, these repeated, inadequately-supported attempts to discount the verified evidence of the nature of ICDAS's U.S. sales process completely undermines the

credibility and validity of the assertions made in the Draft Redetermination because they demonstrate that the Department fundamentally failed to take into account how both the scale and the nature of ICDAS's U.S. sales process impacted the expectations of the contracting parties.

In addition to the above arguments, ICDAS also contends that the Department's decision to use invoice date as U.S. date of sale is invalid on other grounds. First, ICDAS maintains that this decision is inconsistent with the Department's decision to use contract date as U.S. date of sale for two other respondents in this review, even though both of those companies also made sales pursuant to written contracts and produced merchandise to order for shipment to the United States. ICDAS points out that the Department also used contract as date of sale for one of these companies when the issue was reconsidered on remand in the preceding 2002-2003 review. ICDAS contends that, since it follows a U.S. sales process similar to those of the other two companies, it would be unreasonable for the Department to use invoice date as date of sale for it and contract date for them.

Second, ICDAS contends that the Draft Redetermination attributes improper weight to the statement of an ICDAS company official. According to ICDAS, not only were the attorneys hired by the company to assist in this trade case not present when the statement was made, but the Court has already rejected its use as an appropriate justification.

Finally, ICDAS contends that the analysis performed in the Draft Redetermination is improper because it was not the analysis that the Court instructed the Department to undertake. Specifically, ICDAS argues that the Department's focus on the changes in contractual terms, and its presentation of these changes as a percentage of the total number of contracts or quantities

shipped, is inappropriate. ICDAS maintains that the Court explicitly directed the Department to consider any changes in the context of the company's sales process and the expectations of the contracting parties, and not in a summary fashion. ICDAS asserts that, were the Department to follow the Court's instructions with respect to the sale for which the price changed, it would have reached the conclusion that the change was an amendment to the original contract and that the amendment date should be used as the date of sale for this particular transaction.[36]

Moreover, ICDAS maintains that the Department's analysis is also improper because it took into account changes in product mix and size breakdown, in addition to changes in price. However, ICDAS claims that the "economic reality" is that the contracting parties are focused only on price and overall quantity. Further, since the price is the same regardless of product mix or size breakdown, ICDAS claims that it is price that has the impact on the margin calculation, and not product mix or size.

According to ICDAS, the Department's overemphasis on product mix led it to conclude that the terms of sale changed in two contracts, when in fact the price did not change for them and the overall quantity shipped was within the tolerance. ICDAS complains that this is particularly apparent for one of the contracts, where the quantity of two products shipped exceeded the line-item specific tolerance by only [ ] metric tons (or [ ] percent of the total shipment).

ICDAS argues that the Department's analysis for three additional contracts is similarly inappropriate. According to ICDAS, the omission of a quantity tolerance in two of these contracts, and the statement of an incorrect tolerance on the third, does not evince that the parties

[36] ICDAS fails to note that the amendment date in this case would be the date of invoice, which is the date used by the Department in its analysis.

believed that the contracts were "not legally binding." ICDAS contends that, to the contrary, the contracts show that the parties performed their obligations specified therein and that the quantities shipped are within the required tolerance, as amended by the letter of credit.

For the foregoing reasons ICDAS requests that the Department use the contract date, or the date of the amendment to the contract, as the date of sale for ICDAS's sales to the United States.

The domestic industry disagrees that any change to the Draft Redetermination is appropriate. According to the domestic industry, the Department's analysis was comprehensive, addressing both the economic reality and the substance of the facts before it, as well as the specific pieces of evidence that the Court directed it to consider. The domestic industry maintains that the Department concluded that invoice date was a more appropriate date of sale only after thoroughly analyzing the circumstances surrounding the formation of the contracts.

The domestic industry contends that use of invoice date is strongly supported by the record evidence, and it is consistent with both the "date of sale" directive set forth under 19 CFR 351.401(i) and echoed in the Preamble. The domestic industry further contends that the use of invoice date is not contradicted by the parties' general course of conduct with respect to ICDAS's U.S. sales. Therefore, the domestic industry argues that the Department's use of invoice date is in accordance with law and supported by substantial evidence.

Department's Position:

After considering all comments on this issue, we continue to find that invoice date represents the appropriate U.S. date of sale in this case. This finding is based on a

comprehensive reexamination of the data on the record, which shows that the material terms of sale set forth in ICDAS's U.S. sales agreements frequently changed after the agreements were signed. Under these circumstances, we find that ICDAS's U.S. contracts cannot be relied upon to establish the U.S. date of sale because they do not provide satisfactory evidence of a "meeting of the minds" between ICDAS and its U.S. customers on all the material terms of sale. This conclusion is consistent with the "date of sale" directive set forth under 19 CFR 351.401(i), as well as with the guidance provided in the Preamble of the Department's regulations, and it is not contradicted by the contracting parties' general course of conduct. Moreover, this conclusion was advanced by ICDAS officials themselves when the Department discussed the issue with them at verification,[37] and it was reinforced by the company's silence on the topic in ICDAS's administrative case brief.

The Department's analysis on this issue is set forth in section C.3, above. In its October 9, 2009, comments, ICDAS disagreed with that analysis, arguing that the Department cannot consider the terms of the contracts in isolation, but rather must view them within context in which the contracts were signed. According to ICDAS, it is essential to consider why ICDAS uses a completely different process for negotiating and formalizing U.S. sales than for home

[37] We disagree with ICDAS that the Department should put no weight on a statement by a company official at verification. As noted in the "Date of Sale" section, above, the statement was made by one of the officials presumably involved in communications with ICDAS's U.S. customers and thus it is relevant to the question of when the "meeting of the minds" on the terms of sale occurred. While the Department prefers to rely on documentation as a general rule, it would be inappropriate to reject categorically all statements made by the company at verification. Here, the statement by ICDAS officials serves to corroborate the Department's own analysis, and we find that it is proper to cite it as a corroborating statement.

Further, with regard to ICDAS's point that it "was not represented by counsel at verification," we note that this statement is misleading at best. ICDAS was represented at verification by an employee of Trade Resources Company, a U.S. consulting firm whose area of expertise is U.S. antidumping proceedings. Moreover, the individual present had many years of experience working on dumping reviews involving the rebar industry in Turkey. Thus, we disagree with ICDAS's implication that a trade attorney was procedurally required at verification to ensure that ICDAS understood the import of its statements.

market sales and how its formal contracts impact the parties' expectations when deciding when the "meeting of the minds" occurred.

While we agree that the sales process is germane to the question of what constitutes the appropriate date of sale, we disagree that it should trump whether or how consistently the parties perform according to the terms of their contracts. When addressing the expectations of the parties, the focus is not on whether the parties expected the merchandise to ship at all, but rather it is on when the parties agreed on the material terms of sale for that shipment (i.e., which products were sold, how much of each was shipped, and at what price). This is a very different test from a contract dispute in which a court might consider if a contract is binding between two parties. In that situation, the Court is looking to see if a "meeting of the minds" existed to bind the parties to a contract. Here, there is no dispute the parties were ultimately bound to ICDAS's contracts. The only relevant question is when all material terms were set – a different question requiring a different focus by the Department.

In this case, we do not dispute that the parties gained a benefit from reducing their sales agreements to writing, nor that each party to the sale wished to have a certain degree of certainty as to the terms of sale given the size of the orders in question. However, it is clear from the documents on the administrative record of this proceeding that the agreements initially signed by the parties were intended to establish a framework for the sales in question, rather than irrevocably to set the final terms.[38] Specifically, after analyzing the contracts on the record, we

[38] As an aside, we dispute ICDAS's contention that these agreements established the specifications of the rebar, the packing requirements, the method of payment, the risk of damage or loss, the shipment date, and the method of shipment. See ICDAS's October 9, 2009, submission at 28. While it is true that certain of these agreements were written to this level of specificity, it is not true that all were similarly explicit. Indeed, some of the agreements in question merely contained price, quantity, and either product specifications or the expected shipment date. See Sales Verification Exhibits 8 and 9.

found that the terms of sale changed in just under 40 percent of the contracts associated with rebar which entered the United States during the POR and in 60 percent of the contracts for rebar which entered afterwards. Based on these facts, we concluded that: 1) these contracts functioned as preliminary agreements which were reduced to writing; 2) as time passed material terms changed between ICDAS and its customer; and 3) the changes were part of the ordinary course of business.

We agree with ICDAS that establishing the correct date of sale is essential to the calculation of an accurate margin, because this date determines both which home market sales will form the basis for normal value for comparison with individual U.S. sales and the exchange rate at which foreign currencies are converted into U.S. dollars. However, we disagree with ICDAS that selecting contract date as the date of sale will increase the accuracy of the margin calculation in this case, given that ICDAS's terms of sale are not set then. Indeed, under these circumstances, we find that using contract date to make comparisons would likely lead to distortions, not increased accuracy, in ICDAS's final dumping margin.[39]

As to ICDAS's arguments relating to "lead time" and the "made-to-order" nature of the merchandise, we find that ICDAS has given undue weight to these factors. Regarding lead time, if the Department were to be faced with two equally valid choices for date of sale, lead time could certainly be a significant factor. In this case, however, the length of time between the signing of the initial agreement and the shipment of the merchandise is less relevant, as the

[39] This is particularly true in this case because the Department has defined the date of sale for ICDAS using invoice date in every segment of the proceeding in which it has participated. As noted in Comment 3, above, ICDAS asserts that the company relies on the Department's consistent practice when complying with the dumping order.

starting point (the date that the preliminary agreement is signed) is not an equally valid choice because, as we have explained above, the terms of sale were not established at the contract date.

Similarly, we find that the timing of production vis-à-vis the signing of the agreements does not alter our finding that invoice date is the appropriate date of sale. Whether the merchandise is termed "tailor-rolled" or "comparable or analogous to" custom-made merchandise, the central fact is that this merchandise more closely resembles "off-the-shelf" merchandise than "custom-made" products. As discussed in the "Date of Sale Analysis" section above, there is no prohibition to ICDAS reselling this merchandise to other U.S. customers (as it would have were its products to involve a trademark, patent, or other type of restriction), irrespective of whether it may be time-consuming to do so.[40] Neither do we find the size of the sales in question to be germane. While ICDAS terms these sales as "massive" and "huge," we note that shipments of this size are not unusual in many cases before the Department, and they are particularly common in those involving the steel industry. The relevance of the size of a shipment is directly related to the industry and product being reviewed. Were the Department to consider size of the shipment in isolation, as ICDAS wishes, it would never find invoice date to be the appropriate date of sale. This is an absurd result, of course,

[40] Although ICDAS claims that rebar produced for one customer could not be profitably sold to another, there exists no support in the record for such a conclusion. Rebar is a commodity product, with few distinguishing characteristics other than size. As noted in the analysis section above, ICDAS's U.S. customers purchased a virtually identical product mix, and we find no reason why ICDAS could not sell products produced at the behest of one U.S. customer to fill an order of another U.S. customer.

There exists a similar lack of support on the record for ICDAS's assertion that it lacked the capability to stock, in advance, thousands of tons of specific sizes of rebar sold to the United.States. See ICDAS's October 9, 2009, comments at 35. As noted in the analysis section above, although each U.S. shipment was sizeable, each was also ultimately only a small proportion of ICDAS's overall business (e.g., the smallest U.S. sale accounted for less than one day's total production and only a fraction of the inventory held at any given time). Thus, ICDAS's claimed decision not to stock products sold to the United States is apparently a business decision the company has made for its own internal reasons.

given that 19 CFR 351.401(i) explicitly directs the Department to perform a date of sale analysis in every case, and to treat invoice date as the "default" date of sale, all things being equal.

In any event, however, as we have noted, the central question in any date of sale inquiry is when the material terms of sale are firmly established for such merchandise, not whether it is in the parties' interest to establish them at all. We agree that ICDAS's practice of producing rebar only after an agreement was concluded[41] signaled its serious intent to finalize the sale; where we disagree is whether its initial agreement established the ultimate terms.

As to the specifics of the analysis performed on this issue, as an initial matter we disagree with ICDAS that it is beyond the scope of the remand order to examine the terms of each contract contained on the administrative record, or to take any findings made from this examination into account in our analysis. The Court clearly instructed the Department to consider "the contracting parties' general course of conduct in ICDAS's U.S. sales and precisely how – if at all – that conduct differed in the case of the contract as to which there was a price increase." Nucor II, at 84. The Court also required the Department to "be mindful that the "substantial evidence" standard requires consideration of the entirety of the administrative record." Id., at 102. Were the Department to disregard the evidence contained in each of these contracts, we would fail to comply with the Court's explicit instructions on this matter.

Further, to the extent that ICDAS argues that the Court indicated that the Department must, as a matter of law, follow traditional contract law requirements, the Supreme Court in U.S. v. Eurodif clearly indicated that this is not the case. See U.S. v. Eurodif, 129 S.Ct. at 887-890. The Department's analysis of the appropriate date of sale is made pursuant to the Tariff Act of

[41] We also do not dispute that ICDAS's payment of certain movement expenses signaled its intent to conclude the sale.

1930, as amended, not rules of general contract law. This is the analysis the Department has thoroughly conducted fully in this remand redetermination.

We also disagree with ICDAS that we should limit our analysis to price and overall quantity, or that we should treat changes in price (or lack thereof) as paramount. The Department's long-standing practice is to view the price and quantity for specific products as the essential terms of sale, and ICDAS provides no valid reason for departing from this practice here. For example, on remand in the 2002-2003 administrative review of this order, the Department found that the essential terms of sale were established for another respondent when the price, quantity, and final product characteristics were firmly established. See Final Results of Redetermination Pursuant to Court Remand in Colakoglu Metalurji A.S. v. United States, Court No. 04-00621 (Jan. 10, 2006) (Colakoglu Remand) at 1-2 (where the Department stated that "we have recalculated the margin for Colakoglu using the later of the purchase "order" date or the date that the customer provided final product size specifications to Colakoglu as the date of sale).

Further, while ICDAS may price its products per ton of rebar, without setting separate prices for differing sizes, the product itself is not known until the parties agree on what is to be shipped. Thus, despite ICDAS's assertions to the contrary, product mix is fundamental to the terms of sale and, consistent with our practice, we have treated it as such.[42] Similarly, we disagree with ICDAS that, because the overall quantity shipped under particular agreements was within the global tolerance specified, it is unimportant that ICDAS failed to meet the agreed-upon quantity terms for individual products. The agreements in question were for sales

[42] We note that ICDAS in essence concedes this point when it requests that we follow the same date of sale methodology used for the respondent in the Colakoglu Remand.

of particular products at a particular price, and the goal of the Department's date of sale analysis is to determine when the essential terms of sale for those products were established. In view of this goal, it would be inappropriate to disregard the product-specific quantities, as they are one of the focal points of the Department's analysis.[43]

Finally, we disagree that the Department should look at price in isolation or consider it to be a more important term of sale than quantity. In its essence, a sale is made when a buyer agrees to purchase a given quantity of merchandise, for a particular amount per unit, and the seller accepts those terms. Thus, while price is indisputably important, it is inextricably linked to quantity and cannot be viewed as separate from it.[44]

As for ICDAS's remaining arguments, we disagree that the Department's decision results in inconsistent treatment of respondents (both within this segment of the proceeding and across other segments), even though those companies sold rebar to the United States in the same fashion as ICDAS. While the sales process may be the same for those companies, the firmness of the sales terms (or when the meeting of the minds between the customer and these companies occurs) is not. Specifically, in both this review for one respondent and in the 2002-2003 review for another, we found that there were no changes to the respondents' material terms of sale after the companies signed agreements with their customers. See, e.g., Habas Remand at 48 (where we stated "because: 1) we do not find that the billing adjustment reported by Habas constitutes a

[43] With respect to ICDAS's argument that one of the particular quantity differences is minimal, we note that ICDAS's analysis understates the amount of the difference. Specifically, the quantity shipped differed from the quantity in the agreement by the full amount of the tolerance, as well as by the difference pointed out by ICDAS in its October 9, 2009, submission.

[44] For example, if a purchaser agrees to purchase 100 tons at a price of $1 per ton, and the seller ships 105 tons, the price was established only for the first 100 tons at the time that the purchase agreement was made; the price for the remaining five tons was not set until the buyer agreed to accept the additional quantity. By analogy here, while ICDAS's customer may have agreed to accept a particular tonnage of rebar at a specified price, there was no agreement in effect covering the amount over that quantity – until the customer agreed to accept the additional rebar.

change to the material terms of sale; 2) there is no other evidence on this administrative record to demonstrate that the prices and quantities shown in Habas' contracts are changeable; and 3) the Department had not made such a determination with respect to Habas' contracts in prior segments of this proceeding, we find that the contract date is the appropriate date of sale for Habas' U.S. sales.") and Colakoglu Remand at 14 (where we stated "because: 1) we do not find that the quantity changes within the tolerances specified in the contracts constitute changes to the material terms of sale; and 2) Colakoglu demonstrated that no other changes occurred to the material terms of sale after 'order' date, we find that the 'order' date is the appropriate date of sale for Colakoglu's U.S. sales."). As both of these cases illustrate, the Department's position is not that the contract date is never the appropriate date of sale for made-to-order merchandise sold pursuant to written agreements. Rather, it is that, where there is evidence that the terms are not set by the written agreements, the agreement date cannot form the appropriate date of sale.

Finally, even were we to find merit in ICDAS's argument, the selection of accurate alternate dates of sale would be impossible on the current administrative record. As noted above, adequate data does not exist on the record to determine the appropriate date of sale for all U.S. transactions because the record contains only eight out of the 12 contracts related to POR entries. Given the prevalence of the changes to ICDAS's agreements, we cannot presume that the agreement date is valid for the four contracts not on the record. For three of the remaining eight, moreover, we are satisfied that a change occurred; however, there is no written evidence documenting this change for two and a half of these three (and thus the default date of sale would be invoice date) and the only written evidence of the change for the other half contract is an amendment to the original letter of credit. As this analysis shows, acceptance of ICDAS's

argument would lead at a minimum to the determination of date of sale on an ad hoc basis and would yield a hodgepodge of dates (agreement date, invoice date, and letter of credit amendment date). Moreover, it would lead to the same result for a significant proportion of ICDAS's sales database anyway, as the Department would use invoice date for at least a quarter of ICDAS's sales under this approach. All of this analysis goes against the Department's practice of selecting a predictable, consistent date of sale methodology for a given respondent for a particular period of review.

Finally, we note that ICDAS had a numerous opportunities to provide the data needed to establish an ad hoc date of sale, and instead, it consistently (and erroneously) maintained that the terms of is contracts did not change. See, e.g., ICDAS's August 16, 2004, section A response at page A-23 (where ICDAS stated that "{d}uring the POR, there were no changes in the price and quantity between the date the contract was entered into and the shipment/invoice date); ICDAS's August 16, 2004, section C response at page C-10 (where ICDAS repeated the same statement); ICDAS's December 23, 2004, supplemental section A response at pages S-7 and S-8 (where ICDAS states "{t}he price and quantity generally do not change between the date the contract was entered into and the shipment/invoice date" and "price and quantity are fixed in the contract"); the ICDAS Sales Verification Report at 1-2 (where ICDAS identified an error in a contract date but not in contract terms). Thus, the Department's rejection of contract date is fully consistent with the information and arguments provided by ICDAS itself during the administrative review.

For the foregoing reasons, we continue to find that invoice date is the appropriate U.S. date of sale for ICDAS.

E. 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 0.70 percent to ICDAS. Upon a final and conclusive court decision, we will publish amended final results to that effect.

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Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

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(Date)