

July 30, 2010

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

FROM: Edward C. Yang  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of  
Antidumping Duty Administrative Review of Certain  
Cut-to-Length Carbon-Quality Steel Plate Products From Italy

### Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on certain cut-to-length carbon-quality steel plate products from Italy for the period of review (POR) February 1, 2008, through January 31, 2009. As a result of our analysis we have made changes in the margin calculations. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this review for which we received comments and rebuttal comments by parties:

1. Date of Sale
2. Conversion of U.S. Prices and U.S. Price Adjustments

### Background

On January 29, 2010, we published *Certain Cut-to-Length Carbon-Quality Steel Plate Products From Italy: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 4779 (January 29, 2010) (*Preliminary Results*), in the *Federal Register*. We invited interested parties to comment on the *Preliminary Results*. On March 9, 2010, we received a case brief submitted by Evraz Palini e Bertoli S.p.A. (hereinafter, Palini). On March 18, 2010, we received rebuttal comments from a domestic producer, Nucor Corporation (hereinafter, Nucor). Although a hearing was requested, the request was withdrawn and we did not hold a hearing. On May 28, 2010, we published *Certain Cut-to-Length Carbon-Quality Steel Plate Products From Italy: Extension of the Final Results of Antidumping Duty Administrative Review*, 75 FR 29976 (May 28, 2010), in which we extended the deadline for the final results to August 4, 2010.

## Discussion of the Issues

### **Date of Sale**

In its questionnaire responses, Palini asserted that the invoice date better reflects the date of sale because the material terms of sale were subject to change and, in fact, did change when Palini's affiliated trading company and its unaffiliated U.S. customer agreed to a price adjustment. In the *Preliminary Results*, we used the date of the purchase-order confirmation as the date of sale for Palini's U.S. sales. See *Preliminary Results*, 75 FR at 4780. We explained that the material terms of U.S. sales did not change between the date of the purchase-order confirmation and the date of commercial invoices and that the price adjustment to which Palini referred is a post-sale adjustment because it occurred after the invoices were issued and the product was shipped. *Id.*

Comment 1: Palini argues that the Department erred in using the date of the purchase-order confirmation as the date of U.S. sales. Palini asserts that, because there were changes to the material terms of sale (*i.e.*, price) after the date of the purchase-order confirmation, the Department should use the invoice date as the date of U.S. sales. Citing 19 CFR 351.401(i), Palini asserts that a date other than the invoice date may be used only if it reflects the date on which the exporter or producer establishes the material terms of sale. Citing *Antidumping Duties; Countervailing Duties; Final rule*, 62 FR 27296, 27349 (May 19, 1997) (*Preamble*), Palini asserts that, to use a date other than an invoice date, the material terms of sale must be finally established on that date and not merely proposed or first agreed upon between a buyer and a seller. Citing *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France*, 68 FR 69379 (December 12, 2003), and accompanying Issues and Decision Memorandum at Comment 1, Palini argues that a date other than an invoice date better reflects the date when the material terms of sale are established if there is no meaningful change in the material terms of sale between the proposed date and the invoice date. Citing *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 FR 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 26 and the Department's *2009 Antidumping Manual*, Palini asserts that the Department defines the material terms of sale as price and quantity.

Citing *Allied Tube and Conduit Corp. v. United States*, 127 F. Supp. 2d 207, 217 (CIT 2000) (*Allied Tube*), Palini asserts that the date of sale could be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale. Palini argues that, if changes in the material terms of sale occur after the initial agreement, the Department generally considers that to be evidence that the material terms of sale were not established on the date of agreement and, accordingly, the Department finds that the invoice date is the proper date of sale. In support of its argument Palini cites, among others, *Stainless Steel Sheet and Strip in Coils From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 7519 (February 13, 2006), and accompanying Issues and Decision Memorandum at Comment 4 and *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 (November 8, 2004), and accompanying Issues and Decision Memorandum at Comment 5.

Similarly, Palini argues, if no quantity or price changes occur between the date of the agreement and the date of invoice or, if there are changes but they fall within agreed-upon tolerances in the agreement, then the Department concludes that the material terms of sale were established on the date of the agreement and, accordingly, the Department finds that the agreement date is the proper date of sale. In support of its argument Palini cites, among others, *Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review*, 72 FR 18204 (April 11, 2007), and accompanying Issues and Decision Memorandum at Comment 1 (*2004-2005 Carbon Steel Flat Products from Romania*), *Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania*, 72 FR 6522 (February 12, 2007), and accompanying Issues and Decision Memorandum at Comment 1 (*Carbon Steel Plate from Romania*), *Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review and Rescission in Part of Administrative Review*, 71 FR 30656 (May 30, 2006), and accompanying Issues and Decision Memorandum at Comment 7 (*2003-2004 Carbon Steel Flat Products from Romania*), and *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 FR 49622 (September 28, 2001), and accompanying Issues and Decision Memorandum at Comment 9 (*Carbon Steel Flat Products from Thailand*).

Citing *Stainless Steel Sheet and Strip in Coils From the Republic of Korea; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 72 FR 4486 (January 31, 2007), and accompanying Issues and Decision Memorandum at Comment 5 and *Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 70 FR 73727 (December 13, 2005), and accompanying Issues and Decision Memorandum at Comment 3, Palini asserts that the Department considers not only actual changes in the material terms of sale but also the possibility of such changes in light of parties' reported selling practices. Palini argues that in this review it explained to the Department that not only were the terms of its reported U.S. sales susceptible to change after the purchase-order confirmation but Palini and its U.S. customer did, in fact, renegotiate the price after the invoices were issued.

Palini points to record evidence which, it argues, demonstrates that a dispute concerning the price<sup>1</sup> arose between Palini's trading arm and its U.S. customer after the date of the order confirmation and prior to the date of invoice; the parties were not able to resolve the dispute before the merchandise was shipped and invoiced. Palini asserts that the nuances of the dispute demonstrate that Palini's trading arm and the U.S. customer interpreted this term of sale differently and agreed to reconcile their divergent interpretations by negotiating a post-sale price adjustment. Palini asserts that, because parties agreed to a price adjustment after the date of the purchase-order confirmation, the material terms of sale were not established at that date.

Palini argues that the court decisions upholding the Department's practice of adhering to the regulatory presumption in favor of an invoice date confirm further that the appropriate date of sale in the instant review is the invoice date. Citing *Allied Tube*, 127 F. Supp. 2d at 220, Palini asserts that the court upheld the Department's use of invoice date because it found that the nature and frequency of the quantity changes constituted evidence that the quantity term was not firmly established on the date of the contract. Citing *SeAH Steel Corp., Ltd. v. United States*, 25

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<sup>1</sup> Because Palini requested business-proprietary treatment for the details of the dispute, we cannot discuss the specific information.

CIT 133 (CIT 2001), Palini argues that the court upheld the Department's use of invoice date because it found that quantity changes beyond the tolerance levels allowed by the contract do not constitute amendments to the contract and amount to changes to a material term of sale.

Palini argues further that the Department's decision in the instant review to disregard the post-sale price adjustment as evidence of a change in the price in its date-of-sale analysis is contrary to the Department's earlier decision involving a case with similar facts. Citing *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 (November 8, 2005), and accompanying Issues and Decision Memorandum at Comment 6 (*Bars from Turkey*) (where the Department used an invoice date as the date of sale), Palini asserts that the Department found that there were changes to the contract price subsequent to the contract date because the amount paid by the customer was less than the amount specified in the contract (due to a post-sale billing adjustment). Palini observes that the court in *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 31 CIT 1793 (CIT 2007), and *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 625 F. Supp. 2d 1339 (CIT 2009) (collectively, *Habas*), reversed the Department's decision in *Bars from Turkey* and found that the contract date is the appropriate date of sale because the change in the price reflected a late-delivery charge stipulated in the contract. Palini asserts that the change in price in the instant review was not based on any contract clause – further evidence, Palini argues, that the invoice date is the appropriate date of sale in this review.

Finally, Palini asserts that, even if the Department is correct in its finding that the material terms of sale were established at a time prior to the invoice, the record evidence shows that the purchase-order confirmation in question was amended subsequently to change the identification of the seller from Palini to its affiliated trading arm, East Metals S.A. Palini argues that this amendment to an essential term of agreement is further evidence that the invoice date is the appropriate date of sale.

Nucor argues that the Department's decision to use the date of the purchase-order confirmation as the date of U.S. sales is supported by record evidence. Citing *Hornos Electricos de Venezuela, S.A. (Hevensa) v. United States*, 285 F. Supp. 2d 1353, 1367 (CIT 2003) (*Hornos*), Nucor argues that the Department has the discretion to use a date other than the invoice date as the date of sale and, in fact, exercised its discretion in favor of the date of the purchase-order confirmation because it found that the billing adjustment constituted a post-sale price adjustment rather than a change to the material terms of sale.

Nucor argues that Palini's analysis rests mainly on *Bars from Turkey* (and the subsequent appeal in *Habas* by the respondent in that case) which, Nucor contends, is at odds with the facts in this case and stands alone as unique precedent. Nucor asserts that, in *Habas*, the respondent argued that there were no changes to the material terms of sale subsequent to the date of contract because the post-sale adjustment reflected a late-delivery penalty, a clause that was in the contract. In the instant case, Nucor argues, although there was no clause in the contract stipulating the adjustment, Palini's post-sale billing adjustment did not alter the underlying contract which remained intact and fulfilled according to its terms. Nucor challenges Palini's assumption that, when the facts are reversed from those in *Habas* (*i.e.*, when a potential adjustment is not stipulated in the contract), the Department's date-of-sale analysis should also be reversed in favor of using the date of invoice as the date of sale (because there is, allegedly, a change in the material terms of sale). Nucor asserts that Palini's extension of *Habas* in such a

way is not logical because Palini's billing adjustment does not constitute the new price or is the result of renegotiation of the contract. Further, according to Nucor, *Habas* is at odds with the weight of numerous other court rulings such as in *Hornos* where the court upheld the Department's discretion to use or not use the invoice date.

Nucor contests Palini's assertion that the contract was renegotiated. Nucor argues that the existing contract was not replaced with a new contract and no party to the transaction requested or signed a contract amendment which addressed the dispute over the material term of sale in question. Instead, Nucor argues, the contract was settled, albeit with a negotiated adjustment to the total invoiced value, which Palini itself treated and reported to the Department as a billing adjustment. Further, Nucor argues, an amendment to the purchase-order confirmation to which Palini refers (*i.e.*, changing the name of the seller to that of the seller's affiliate) does not constitute a change to the material terms of sale and is merely semantic. Nevertheless, Nucor argues, the use of the date of the amended purchase-order confirmation does not alter the contemporaneity hierarchy.

Nucor argues that the record evidence supports the Department's treatment of the post-sale price adjustment as such and not as a change to the material terms of sale. Nucor argues that the dispute between Palini and its U.S. customer arose over the definitional interpretation of a specific provision in the contract and one that did not involve the material terms of sale *per se*. Nucor argues that changes in quantity within contract tolerances do not represent a change in the material terms of sale.

Department's Position: We continue to find that the material terms of sale were firmly established at the time of purchase-order confirmation and were not subject to change. Consequently, as in the *Preliminary Results*, we have relied on the date of the purchase-order confirmation as the date of sale for Palini's reported U.S. sales. Because our analysis of this issue involves extensive use of Palini's business-proprietary information, a full discussion of our decision is available in the memorandum entitled "Certain Cut-to-Length Carbon-Quality Steel Plate Products from Italy – Date-of-Sale Analysis for Evraz Palini e Bertoli S.p.A.," dated concurrently with this notice (the Date-of-Sale Memo).

The regulations at 19 CFR 351.401(i) 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." The *Preamble* states that "the date on which the terms of a sale are first agreed is not necessarily the date on which those terms are finally established. In the Department's experience, price and quantity are often subject to continued negotiation between the buyer and the seller *until a sale is invoiced* (emphasis added); "...even though a buyer and seller may initially agree on the terms of a sale, those terms remain negotiable and are not finally established *until the sale is invoiced*" (emphasis added); "...the relevant issue is that the terms be fixed when the seller demands payment (*i.e.*, *when the sale is invoiced*)" (emphasis added). See *Preamble*, 62 FR at 27348, 27349.

Both the regulations and the *Preamble* make it clear that, in determining to use a date other than the date of invoice as the date of sale, the record evidence must show that the material terms of sale were firmly established at such a date. The reasonable interpretation of the language in the *Preamble* suggests that, in order to have confidence that the material terms of sale were firmly established at such a date, record evidence must show that the material terms did not change or were not subject to change between this date and the invoice date.

As detailed in the Date-of-Sale Memo, the record evidence is unequivocal that there were no changes to the material terms of sale between the date of the purchase-order confirmation and the date of invoice. Specifically, the invoiced quantity and value for each product conformed to the contractual quantity and value provisions stated in the letter of credit, as agreed to by parties in the purchase-order confirmation. The invoiced plate-specific per-metric-ton prices were the same as stated in the letter of credit, as agreed to by parties in the purchase-order confirmation. The total invoiced quantity and the total invoiced value also conformed to the contractual total quantity and value provisions specified in the letter of credit, as agreed to by parties in the purchase-order confirmation.

Where there are no changes to the material terms of sale between the date of the contract and the date of the invoice or there are changes but they fall within the parameters allowable by the contract, it is our practice to use the date of the contract as the date of sale. This practice is supported by the same precedent that Palini cites. Specifically, in *2003-2004 Carbon Steel Flat Products from Romania* and in *2004-2005 Carbon Steel Flat Products from Romania*, we found that the customer order-acknowledgment date better reflects the date on which the material terms of the sale were established because “quantity changes from the original customer order acknowledgments to the final invoices did not exceed the accepted industry tolerance;” in *Carbon Steel Plate from Romania*, we found that the order-acknowledgment date is the appropriate date of sale because order acknowledgment “states that the terms of sale are finalized within a quantity tolerance (*i.e.*, plus or minus 10 percent or one plate), and all but one small sale fell within the tolerance;” in *Carbon Steel Flat Products from Thailand*, we found that the date of the final contract is the appropriate date of sale because “any differences between the quantity ordered and the quantity shipped which fall within the tolerance specified by the entire contract do not constitute changes in the material terms of sale.”

Palini argues that the material terms of sale were subject to change as evidenced by the dispute between Palini’s trading arm and its U.S. customer and the resultant compromise in the form of an adjustment to the total invoiced value that the parties reached after the product was invoiced and shipped. As a preliminary matter, 19 CFR 351.401(i) and the *Preamble* make it clear that our analysis of potential changes to the material terms of sale must be confined to a fixed period of time between the proposed date of sale and the date of invoice and not to an undefined period of time after the proposed date of sale and the eventual post-shipment date on which parties allegedly finalize the terms of a sale. This is so because, as the *Preamble* makes clear, the sale terms are fixed at the time of issuance of a commercial invoice. Because sale terms are fixed at the date of invoice and there are no changes, as in this case, to the sale terms between the date of the purchase-order confirmation and the date of invoice, the material terms of sale are, thus, final on the date of the purchase-order confirmation and are not subject to change. In our determination of the appropriate date of sale, any post-shipment events that result in changes to the invoiced value do not affect our analysis in establishing whether the material terms of sale were subject to change between the proposed date of sale and the invoice date. As a result, we treated the adjustment in question in the *Preliminary Results* as a post-sale adjustment and not as a change in the material terms of sale (*i.e.*, price).

Nevertheless, we have analyzed the factual scenario underpinning Palini’s argument on this point. As detailed in the Date-of-Sale Memo, the record evidence demonstrates that the dispute between Palini’s trading arm and its U.S. customer did not concern the material terms of sale (*i.e.*, contractual per-metric-ton prices, ordered per-plate quantity, ordered total quantity, or

ordered number of plates). Rather, the dispute concerned parties' divergent interpretations of a contract provision related to a peripheral aspect of the total invoiced value.<sup>2</sup> As discussed in the Date-of-Sale Memo, contrary to Palini's assertion, there is no record evidence that the resolution of the dispute resulted in the renegotiated, revised, or restated plate-specific per-metric-ton prices to which parties agreed in the purchase-order confirmation or in the amendment to the letter of credit or purchase-order confirmation. On the contrary, the contract was executed precisely according to its terms. Further, as discussed in the Date-of-Sale Memo, the record evidence indicates that Palini's trading arm issued a general-type credit adjustment against the total value of sales that was invoiced to the U.S. customer; the record is not dispositive that this credit adjustment represents the resolution to the dispute over the total invoiced value or a concession to the U.S. customer's expressed concern over the delayed shipment or both. In sum, the record evidence does not support Palini's assertion that the dispute between Palini's trading arm and its U.S. customer (and the subsequent resolution thereof) provides evidence that the material terms of sale were not firmly established on the date of the purchase-order confirmation. See the Date-of-Sale Memo for a complete discussion.

Palini argues that our disregard in the instant review of a post-sale price adjustment as evidence of a change in price for purposes of determining the appropriate date of sale contradicts our decision in *Bars from Turkey*. Palini's reliance on *Bars from Turkey* is misplaced. Contrary to our reasoning in *Bars from Turkey* and in accordance with our discussion above, the post-sale price adjustment in question does not amount to a change in the material term of sale between the purchase-order confirmation and the date of invoice – simply put, there was no change in price in the context of our date-of-sale analysis. Further, as explained above, our typical analysis focuses on whether the material terms of sale change, or are subject to change, between the proposed date of sale and the invoice date. Thus, for purposes of determining the appropriate date of sale pursuant to 19 CFR 351.401(i), we do not look to a post-sale price adjustment as evidence of a change in price for a sale transacted at the contracted price.

Palini's reliance on *Habas* is also misplaced. First, Palini's factual scenario in the instant review is different from that of the respondent in *Bars from Turkey* in that the billing adjustment did not render, as discussed above, new, restated, or renegotiated per-metric-ton prices. More importantly, the main point in *Habas* is not that the presence or absence of a clause in the contract, stipulating a potential change to price, in itself is dispositive to the determination that the appropriate date of sale is the contract date. In *Habas*, the material terms of sale were established on the date of the contract because the parties were aware at that time that the ultimate price to be paid by the buyer may differ, by the pre-determined amount, from that agreed to in the contract (as a result of the late-delivery penalty clause in the contract). In contrast for this review, notwithstanding the subsequent dispute regarding the definition of a specific clause, the material terms were established on the date of the contract because both parties were aware at that time that the ultimate price to be paid by the buyer could not differ from that agreed to in the contract. Accordingly, in this review, as in *Habas*, the date of the contract (*i.e.*, the date of the purchase-order confirmation) better reflects the date on which the exporter or producer established the material terms of sale.

Finally, contrary to Palini's assertion, we do not find a change in the name of the seller in the purchase-order confirmation from Palini to its affiliated trading arm, East Metals S.A., as

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<sup>2</sup> The nuances of the dispute involve the extensive use of the information for which Palini claimed business-proprietary treatment. For a full discussion see the Date-of-Sale Memo.

constituting an amendment to a material term of sale. We do not find a change in the name of the seller to the seller's agent to be a change in a material term.

For these reasons and as discussed in the Date-of-Sale Memo, we have used the purchase-order confirmation date to establish the date of sale for Palini's reported U.S. transactions.

### **Conversion of U.S. Prices and U.S. Price Adjustments**

Comment 2: Palini asserts that, in converting the reported per-unit U.S. prices (and applicable U.S. price adjustments) from a theoretical-weight basis to an actual-weight basis, the Department erred in using the theoretical weight as reflected in the purchase order instead of the theoretical weight as reflected in the invoices. Palini urges the Department to adjust its conversion of per-unit U.S. prices and U.S. price adjustments to an actual-weight basis using the theoretical weight reflected in the invoices.

Nucor did not comment on this issue.

Department's Position: We agree with Palini that, for the purpose of converting prices and applicable price adjustments to an actual-weight basis, it is appropriate to use the theoretical weight as reflected in the invoices because it is the quantity that was actually sold to a U.S. buyer. Thus, we have recalculated the per-unit U.S. prices and U.S. price adjustments using the conversion method which uses theoretical weight as reflected in the invoices.

### **Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the review and the final dumping margin for Palini in the *Federal Register*.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

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Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

\_\_\_\_\_  
(Date)