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Washington, D.C. 20230

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Investigation
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April 3, 2014

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Decision Memorandum for the Final Affirmative Determination of the Antidumping Duty Investigation of Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan

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I. Summary

We have analyzed the case and rebuttal briefs of interested parties in this antidumping duty investigation of diffusion-annealed, nickel-plated flat-rolled steel products (certain nickel-plated, flat-rolled steel) from Japan. As a result of our analysis, we made changes from the *Preliminary Determination* to the margin calculation.[1] We recommend that you approve the conclusions described in the "Discussion of Issues" section of this memorandum. The issues for which we received comments are discussed below.

II. Background

On November 19, 2013, the Department of Commerce (the Department) published the *Preliminary Determination* in the *Federal Register*.[2] This investigation covers two producers of the subject merchandise, Toyo Kohan Co., Ltd. (Toyo Kohan) and Nippon Steel & Sumitomo

[1] *See* Memorandum to the File, through Angelica Mendoza, Program Manager, Office VI, from Dena Crossland, International Trade Compliance Analyst, Office VI, entitled "Analysis of Data Submitted by Toyo Kohan Co., Ltd. in the Final Determination of the Antidumping Duty Investigation of Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan" dated April 3, 2014 (Analysis Memo); *see also* Memorandum to Neal M. Halper, Director, Office of Accounting, through Michael P. Martin, Lead Accountant, from Gary Urso, Senior Accountant, entitled, "Cost of Production Calculation Adjustments for the Final Determination - Toyo Kohan Co., Ltd.," dated April 3, 2014 (Calculation Memo).

[2] *Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products From Japan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 78 FR 69371 (November 19, 2013), and accompanying Preliminary Decision Memorandum (*Preliminary Determination*).

Metal Corporation (NSSMC). The petitioner in this proceeding is Thomas Steel Strip Corporation.

During the weeks of November 11, 2013, and December 9, 2013, the Department verified the information submitted by Toyo Kohan for the final determination. Costs and sales verification reports were issued on January 17, 2014, and January 22, 2014, respectively.[3] The Department used standard verification procedures, including examination of relevant accounting and production records, as well as original source documents provided by Toyo Kohan.

On December 10, 2013, Toyo Kohan requested a hearing pursuant to 19 CFR 351.310(c).[4] On February 11, 2014, Toyo Kohan, pursuant to 19 CFR 351.310(c), withdrew its request for a hearing.[5]

We invited parties to comment on the *Preliminary Determination*. We received case briefs from Toyo Kohan and NSSMC on January 31, 2014,[6] and a rebuttal brief from petitioner on February 6, 2014.[7]

III. Period of Investigation

The period of investigation (POI) is January 1, 2012, through December 31, 2012.

IV. Scope of the Investigation

The diffusion-annealed, nickel-plated flat-rolled steel products included in this investigation are flat-rolled, cold-reduced steel products, regardless of chemistry; whether or not in coils; either plated or coated with nickel or nickel-based alloys and subsequently annealed (*i.e.*, "diffusion-annealed"); whether or not painted, varnished or coated with plastics or other metallic or nonmetallic substances; and less than or equal to 2.0 mm in nominal thickness. For purposes of this investigation, "nickel-based alloys" include all nickel alloys with other metals in which nickel accounts for at least 80 percent of the alloy by volume.

[3] *See* Memoranda to the File entitled "Verification of the Cost Response of Toyo Kohan Co., Ltd. in the Antidumping Duty Investigation of Diffusion-Annealed Nickel-Plated Flat Rolled Steel Products from Japan," dated January 17, 2014 (Cost Verification Report); and "Home Market Verification of the Sales Response of Toyo Kohan Co., Ltd. in the Antidumping Duty Investigation of Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan," dated January 22, 2014 (Sales Verification Report).
[4] *See* Letter from Toyo Kohan Co., Ltd. to the Secretary of Commerce, dated December 10, 2013.
[5] *See* Letter to the Secretary of Commerce from Toyo Kohan Co., Ltd., dated February 11, 2014.
[6] *See* Letter from Toyo Kohan Co., Ltd. to the Secretary of Commerce, dated January 31, 2014 (Toyo Kohan's Case Brief) and Letter from Nippon Steel & Sumitomo Metal Corporation to the Secretary of Commerce, dated January 31, 2014 (NSSMC's Case Brief).
[7] *See* Letter from Thomas Steel Strip Corporation to the Secretary of Commerce, dated February 6, 2014 (Petitioner's Rebuttal Brief).

Imports of merchandise included in the scope of this investigation are classified primarily under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7212.50.0000 and 7210.90.6000, but may also be classified under HTSUS subheadings 7210.70.6090, 7212.40.1000, 7212.40.5000, 7219.90.0020, 7219.90.0025, 7219.90.0060, 7219.90.0080, 7220.90.0010, 7220.90.0015, 7225.99.0090, or 7226.99.0180. The foregoing HTSUS subheadings are provided only for convenience and customs purposes. The written description of the scope of this investigation is dispositive.

V. Discussion of Issues

Issue 1: Whether Toyo Kohan's Overrun Sales Were Made Outside the Ordinary Course of Trade

Toyo Kohan states that in the *Preliminary Determination*, the Department found that overrun sales made by Toyo Kohan in the home market were outside the ordinary course of trade and excluded these sales from the normal value calculation.[8] Toyo Kohan argues that the Department should consider its sales of overrun merchandise in the home market as being made in the ordinary course of trade, citing prior steel cases in which the Department determined that overrun sales were not outside the ordinary course of trade.[9]

Toyo Kohan states that section 771(15) of the Act defines "ordinary course of trade" as the "conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind."[10] Toyo Kohan further states that the Statement of Administrative Action (SAA) further clarifies this portion of the statute where it provides that, "Commerce may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market."[11]

According to Toyo Kohan, the Department considers various factors when determining whether overrun sales are made in the ordinary course of trade in its analysis, and no single factor is

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[8] *See* Toyo Kohan's Case Brief at 2, citing Analysis Memorandum for the Preliminary Determination of the Antidumping Duty Investigation of Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Toyo Kohan Co., Ltd., from Dena Crossland and David Cordell, International Trade Analysts, AD/CVD Operations, Office VI, Enforcement and Compliance, to The File, through Angelica Mendoza, Program Manager, AD/CVD Operations, Office VI, Enforcement and Compliance, dated November 8, 2013 (Preliminary Analysis Memo), at 2 through 4.

[9] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 64 FR 38756, 38770 (July 19, 1999) (*Hot-Rolled Steel from Brazil*); *Certain Hot-Rolled Carbon Steel Flat Products From India: Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 2018, 2020 (January 12, 2006) (*Hot-Rolled Carbon Steel from India Prelim*); and *Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review*, 73 FR 31961 (June 5, 2008) (*Hot-Rolled Carbon Steel from India*), and accompanying Issues and Decision Memorandum at Comment 2.

[10] *See* section 771(15) of the Act.

[11] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act (SAA), H.R. Doc. 103-316, vol. 1, at 834 (1994).

dispositive.[12] Toyo Kohan states that in prior cases, the Department has considered: (1) whether there are different standards and product uses, and (2) whether sales in the home market consisted of production overruns or seconds.[13] Additionally, Toyo Kohan states that "the Department has previously determined that sales of overrun merchandise that consisted of 'sales of a greater quantity of {product} than the customer ordered due to overproduction,' or prime overruns, were *de facto* produced to the same standards and similar in quality to non-overruns sold in the ordinary course of trade."[14]

Toyo Kohan adds that "the Department has considered home market overrun sales to be within the ordinary course of trade where: (1) the overrun purchasers were not an aberrational category, but many of the same companies that purchased made to order merchandise also purchased the overruns; (2) the pricing of overruns provided no clear pattern; and (3) there was variance in {control number (CONNUM)} pricing, with average overrun prices being higher or lower than non-overrun merchandise with the same CONNUM."[15] Toyo Kohan argues that even where certain custom-made products were sold at a discount, the Department found no reason to find such overrun sales outside the ordinary course of trade.[16]

Toyo Kohan states that the Department must consider the entirety of the evidence before it. Toyo Kohan notes that, in the *Preliminary Determination*, the Department relied on the quantity of overrun sales and their prices, as well as the quantity of customers that purchased overrun sales in determining whether overrun sales were outside the ordinary course of trade.[17] Toyo Kohan claims that if the Department only considers these factors, then most overrun sales would be considered outside the ordinary course of trade because overrun sales typically constitute a minority of a producer's total sales and would only in extraordinary circumstances be made to all of a producer's customers.

According to Toyo Kohan, the Department has historically looked at whether there are characteristics of the overrun sales that distinguish them from the sales made in the ordinary course of trade.[18] Toyo Kohan argues that there were no material differences between its "normal" sales and its overrun sales.

First, according to Toyo Kohan, the overruns were high-quality, prime product, as noted in the Department's verification report.[19] Toyo Kohan adds that as stated in the verification report, an "overrun may be the result of (1) excessive prime production or (2) a product that does not meet the customer's precise specifications, but remains a prime product."[20] In either case, Toyo

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[12] *See Laclede Steel Co. v. United States*, 19 CIT 1076, 1078 (1995) (*Laclede Steel Co. v. United States*); and *Hot-Rolled Steel from Brazil.*

[13] *See Hot-Rolled Carbon Steel from India* and accompanying Issues and Decision Memorandum at Comment 2.

[14] *Hot-Rolled Carbon Steel from India Prelim,* and *Hot-Rolled Carbon Steel from India* and accompanying Issues and Decision Memorandum at Comment 2.

[15] *See Hot-Rolled Carbon Steel from India* and accompanying Issues and Decision Memorandum at Comment 2; *see also Hot-Rolled Steel from Brazil* at 38770-38771.

[16] *See Hot-Rolled Steel from Brazil* at 38770.

[17] *See* Preliminary Analysis Memo at 3 and 4.

[18] *See Hot-Rolled Steel from Brazil* at 38770; *see also Hot-Rolled Carbon Steel from India Prelim* and *Hot-Rolled Carbon Steel from India* and accompanying Issues and Decision Memorandum at Comment 2.

[19] *See* Sales Verification Report at 75.

[20] *Id.*

Kohan avers, the product is not off-quality and does not differ from the product sold in the ordinary course of trade.

Second, according to Toyo Kohan, the prices for the overrun sales were not "aberrational" or sold at "unusually high profits or according to unusual terms of sale."[21] Toyo Kohan adds that overruns are not subject to automatic discounts that would produce aberrational pricing patterns. Toyo Kohan argues that "{t}his is demonstrated by the fact that, for many of the CONNUMs which include both overruns and 'normal' sales business transactions, the prices for the overrun sales were at least the same price as the minimum normal course of business transaction for the same CONNUM."[22] Moreover, Toyo Kohan maintains that the selling process for overrun and non-overrun merchandise is the same.

Toyo Kohan states that the SAA instructs the Department to consider whether there are characteristics with the sale that distinguish an overrun sale from an ordinary sale.[23] Toyo Kohan argues that these two factors are critical to determining whether overrun sales can be distinguished from the sales made in the ordinary course of trade. Toyo Kohan concludes that the key characteristics of its overrun and "normal" sales are indistinguishable, and that its home market sales of prime overruns do not exemplify the characteristics that the Department has traditionally considered outside the ordinary course of trade.[24] Therefore, according to Toyo Kohan, the Department should include its home market overrun sales in its calculation of normal value because overruns are sold within the ordinary course of trade.

In rebuttal, petitioner states that the record establishes that Toyo Kohan's overrun sales were sold: (1) at prices below the prices normally obtained for the same product, (2) to certain customers, and (3) on a "spot market" basis.[25] As such, according to petitioner, Toyo Kohan's overrun sales were not sold in the ordinary course of trade for purposes of section 773(a)(1)(B)(i) of the Act.

Petitioner states that although Toyo Kohan claimed during the sales verification that "there is no rule regarding pricing for overruns,"[26] overruns were, in fact, sold at prices below the prices obtained in the ordinary course of trade. Referring to the price ranges for the overrun sales, petitioner emphasizes that Toyo Kohan conceded that the overrun prices were consistent with "the minimum normal course of business transaction for the same CONNUM."[27] Petitioner argues that it is telling that Toyo Kohan did not address "an average price comparison between an overrun sale and a commercial sale."[28]

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[21] *See China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1364-1365 (CIT 2003).
[22] *See* Toyo Kohan's Case Brief at 6.
[23] *See* SAA at 834.
[24] *See Hot-Rolled Steel from Brazil* at 38770 ("Examples of sales that we might consider outside the ordinary course of trade are sales involving off-quality merchandise. . .merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm's length price.")
[25] *See* Petitioner's Rebuttal Brief at 3.
[26] *Id.*, citing Sales Verification Report at 75.
[27] *Id.* at 4, citing Toyo Kohan's Case Brief at 6 (emphasis added by petitioner).
[28] *Id.*, citing *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1364 (CIT 2003) (quoting the factors "typically examined by the Department" (emphasis added by petitioner)).

Regarding Toyo Kohan's assertion that there is no difference between the sales process for overruns and normal sales,[29] petitioner asserts that the Department verified that the overruns were sold on a spot basis.[30] Petitioner adds that there were no purchase orders for overrun sales and customers did not order overrun material months before shipment or prior to production.[31] By contrast, petitioner argues the normal practice for home market sales is to produce subject merchandise to order, with purchase orders listing customer's specifications and shipment taking place several months after the purchase orders are received by Toyo Kohan's production department. Furthermore, petitioner argues that overruns are offered for sale after being produced, and when excess quantities are available, such as when a customer rejects Toyo's DANP for failing to meet the specified coil weight, overruns are offered "as is."[32] In support of its argument, petitioner provides a table showing the customers that purchased overrun material and the customers that purchased non-overrun material.[33]

Regarding Toyo Kohan's assertion that all overruns are high-quality, prime product[34] and that overruns consist of excessive prime production or a product that does not meet a customer's specification but does meet another customer's specification,[35] petitioner contends that Toyo Kohan's overruns included off-quality or rejected subject merchandise. Specifically, according to petitioner, Toyo Kohan previously stated that overruns "may have light defects on the surface that are sometimes not accepted by the intended customer, {causing Toyo to} sell the coil that did not meet the original customer's quality requirements as an 'overrun.'"[36] Petitioner adds that Toyo Kohan reported that it does not maintain production records that would show why certain sales invoices become overrun sales.[37] However, according to petitioner, even if overruns met some specification, there is no dispute that overruns exist because the products did not meet the specifications of the original customer (even if only as to coil weight or surface defects).[38] Petitioner stresses that there is no evidence on the record that overruns were used for the same applications as intended by the original specification or the original customer. In light of the above, according to petitioner, it is unreasonable to conclude that overruns were equal in quality or performance to prime subject merchandise based on the record.

Moreover, according to petitioner, the sales volume of Toyo Kohan's overrun sales was not characteristic of sales in the ordinary course of trade. Petitioner adds that Toyo Kohan does not dispute this, but argues that overruns "by their very nature . . . will constitute a minority of a producer's total sales."[39] Petitioner argues that when considering all of the other factors

[29] *Id*., citing Toyo Kohan's Case Brief at 6.
[30] *Id*., citing the Sales Verification Report at 14.
[31] *Id*., citing the Sales Verification Report at 20, 58 ("For overrun sales, Toyo Kohan does not use the usual purchase order sheet or confirmation of purchase order sheet. Toyo Kohan's sales section instead inputs the price and quantity in the system directly and the product is shipped.")
[32] *Id.* at 5.
[33] *Id*. at 5, 6, and Table 1.
[34] *Id*. at 8, citing Toyo Kohan's Case Brief at 5.
[35] *Id*., citing Sales Verification Report at 75.
[36] *Id*., citing Toyo Kohan's Second Sales Supplemental Questionnaire Response, dated September 23, 2013 (Toyo Kohan's ABC Supplemental), at 6.
[37] *Id*.
[38] *Id*. at 8, where petitioner cites Toyo Kohan's ABC Supplemental at 7 and states that Toyo Kohan conceded that "small surface defects (such as spots or scratches) {can be} refused by the intended customer."
[39] *See* Petitioner's Rebuttal Brief at 9, citing Toyo Kohan's Case Brief at 5.

discussed above, the fact that overruns accounted for such a small quantity of sales supports the conclusion that such sales were "extraordinary for the market in question" within the meaning of 19 CFR 351.102(b).[40]

Regarding the cases that Toyo Kohan cited in its case brief, including *Hot-Rolled Carbon Steel from India*, involving overrun steel products that were found to be sold in the ordinary course of trade, petitioner argues that certain nickel-plated, flat-rolled steel is sold to a far smaller and far more demanding group of end-users than hot-rolled, flat-rolled carbon steel. Petitioner further argues that hot-rolled steel is like a commodity product that customers are willing to purchase in lower volume than was ordered by the original customer. Petitioner adds that service centers purchase standard specification hot-rolled coil, maintain the product in inventory and slit the coils for customers that require smaller volumes.[41]

According to petitioner, certain nickel-plated, flat-rolled steel has few end-users, is not produced to standard ASTM or JISI specifications, and is sold directly to the customer and not to any steel service centers.[42] Petitioner adds that certain nickel-plated, flat-rolled steel end-users have close associations with their suppliers, based on "the lengthy qualification process . . . ; the uniqueness of each battery producer's production process (and {concomitant} need for producer-specific material); and the process improvement made possible by working closely with only one supplier."[43] As such, according to petitioner, there is no significant market for subject merchandise produced to the specifications of a particular end-user other than for sale to that end-user.

Petitioner concludes that there are material differences between Toyo Kohan's overrun sales and its non-overrun sales, in terms of price, customers, and sales process. Accordingly, petitioner avers, the Department should find that Toyo Kohan's overrun sales were not sold in the ordinary course of trade for purposes of section 773(a)(1)(B)(i) of the Act.

Department's Position:

We continue to find that Toyo Kohan's home market sales of overrun products are outside the ordinary course of trade. Section 773(a)(1)(B) of the Act provides that normal value shall be based on the price at which the foreign like product is first sold, *inter alia*, in the ordinary course of trade. Section 771(15) of the Act, as noted above, defines "ordinary course of trade" as the "conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of

[40] *Id*. at 10, citing *U.S. Steel Group v. United States*, 177 F. Supp. 2d 1327, 1332 (CIT 2001) ("Commerce looks at all the circumstances surrounding the transactions in question. It does not focus on a single circumstance in isolation.")
[41] *Id*., citing *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, Japan, and Russia*, Inv. Nos. 701-TA-384 and 731-TA-806-808 (Second Review), USITC Pub. 4237 at I-29 (June 2011) ("Many service centers maintain extensive inventories of a variety of steel products, providing availability and inventory management services for customers of all sizes, including those with smaller purchasing needs that must place low-volume orders.")
[42] *Id.* at 11, citing *Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan*, Inv. No. 731-TA-1206 (Preliminary), USITC Pub. 4359 at I-8 (May 2013).
[43] *Id*., citing USITC Pub. 4359 at II-1.

the same class or kind." Furthermore, section 771(15) of the Act indicates that the Department shall consider, "among others," sales and transactions made below the cost of production pursuant to section 773(b)(1), and certain sales between affiliated parties within the meaning of section 773(f)(2) of the Act, to be outside the ordinary course of trade. Other than these two statutory exclusions, the Act provides "'little assistance in determining what is outside the scope of that definition.'"[44] Thus, Commerce possesses the "discretion to determine what sales are outside the ordinary course of trade."[45]

The Department's regulations provide that it:

> may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question. Examples of sales that the Secretary might consider as being outside the ordinary course of trade are sales or transactions involving off-quality merchandise or merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm's length price.[46]

With specific regard to "overrun" sales, the Department examines various factors to determine whether overrun sales are in the ordinary course of trade, including, but not limited to, the following: (1) whether the merchandise is "off-quality" or produced according to unusual specifications; (2) the comparative volume of sales and the number of buyers in the home market; (3) the average quantity of an overrun sale compared to the average quantity of a commercial sale; and (4) price and profit differentials in the home market.[47]

Given the discretion afforded the Department in conducting this analysis,[48] and considering the totality of the circumstances, we find Toyo Kohan's sales of overrun merchandise to be outside the ordinary course of trade because these sales have characteristics that are different from those of sales generally made in the home market. Specifically, the quality of the merchandise sold, the quantity of individual sales, the profit and net unit sales price, and the customer base are not similar for Toyo Kohan's overrun and non-overrun sales. Due to the proprietary nature of this

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[44] *See United States Steel Corp. v. United States*, 953 F. Supp. 2d 1332, 1341 (CIT 2013) (quoting *NSK Ltd. v. United States*, 170 F. Supp. 2d 1280, 1296 (CIT 2001)).
[45] *Id*. at 1341 (citing, *e.g.*, *Torrington Co. v. United States*, 146 F. Supp. 2d 845, 861 (CIT 2001), *aff'd*, 62 Fed. Appx. 950 (Fed. Cir. 2003)); *see also Laclede Steel Co. v. United States*, 19 CIT 1076, 1078 (CIT 1995).
[46] *See* 19 CFR 351.102(b)(35).
[47] *See, e.g.*, *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 4385 (January 22, 2013) (*CTL Plate Korea 2011-12 Prelim*), and the accompanying Preliminary Decision Memorandum at 7, unchanged in *Certain Cut-to-Length Carbon-Quality Steel Plate Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 29113, 29114 (May 17, 2013) (*CTL Plate Korea 2011-12 Final*).
[48] *See Laclede Steel*, 19 CIT at 1078.

information, the Department's analysis regarding this issue is available in a separate decision memorandum.[49]

Issue 2: Whether the Scope of the Investigation is Ambiguous

NSSMC expressed concerns regarding the following language in the scope of the investigation: either plated or coated with nickel or nickel-based alloys and subsequently annealed (*i.e.*, "diffusion-annealed").[50] According to NSSMC, this language is ambiguous because it is susceptible to a reading that would encompass any type of post-coating or post-plating heat treatment as diffusion-annealed.[51]

NSSMC states that it had previously requested that the scope of the investigation not include two of its flat-rolled, cold-reduced steel products that are plated with nickel, and are subsequently heated, but do not form an intermediate iron-nickel alloy layer as a result of the heat treatment.[52] NSSMC points out that petitioner agreed that neither product was covered by the investigation, stating that it did "not object to indicating in the scope language that the result of the annealing process forms an intermediate layer that consists of an alloy containing principally nickel and iron (and other elements)."[53]

NSSMC argues that the Department should avoid ambiguity by amending the scope of the investigation by adding the following language: "…either plated or coated with nickel or nickel-based alloys and subsequently heat-treated to form an intermediate layer consisting of a nickel and iron based alloy (*i.e.*, 'diffusion annealed')."[54] Specifically, according to NSSMC, there is ambiguity surrounding the meaning of "annealed," and its proposed change will clarify whether other products, which may be coated or plated with nickel and subsequently heated under conditions that do not result in formation of a nickel-iron alloy layer, are intended to be within the scope description.

Additionally, NSSMC argues that its proposed amendment would better reflect petitioner's statements regarding the key defining feature of the merchandise under investigation.[55] NSSMC adds that its request for an amendment adopts the language petitioner proposed in its May 20, 2013, comments on NSSMC's scope clarification, and therefore is consistent with the Department's practice of "giv{ing} 'ample deference to the petitioners' on the definition of the

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[49] *See* the Memorandum to Richard Weible, Director, Office VI, entitled "Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Home Market Sales of Overrun Merchandise" dated concurrently with this memorandum.

[50] *See* NSSMC's Case Brief at 2.

[51] *Id*.

[52] *See* NSSMC's Request for Scope Clarification, dated May 8, 2013, at 1-5.

[53] *See* NSSMC's Case Brief at 3, citing Petitioner's Response to NSSMC Scope Comments, dated May 20, 2013, at 1.

[54] *Id*.

[55] *Id*. at 4, citing, for example, NSSMC's Request for Scope Clarification, dated May 8, 2013, at Attachment 3 ("{p}erhaps the most significant difference between diffusion-annealed nickel plate and other types of nickel plate. . ."); and Petitioner's Response to NSSMC Scope Comments, dated May 20, 2013, at 2 and 3 ("{if} the heat treatment does not form a nickel-iron diffusion layer between the steel substrate and the nickel alloy coating, {then the resulting product} is not 'diffusion annealed' nickel plate.").

product for which they seek relief."[56] In sum, according to NSSMC, the Department should amend the scope description because petitioner has already indicated that it does not object to the amended language.

In rebuttal, petitioner argues that there is no debate that the subject merchandise is annealed after it undergoes the plating process, creating the "diffusion" layer, which consists of a nickel-iron alloy and other elements.[57] NSSMC's request concerned two products (TERNESHEET and ECOTRIO)[58] and petitioner notes that it agreed that these products are not covered by the existing scope language. Petitioner states that NSSMC is now requesting a change to the scope language that would not be limited to specific products discussed above.

Petitioner maintains that the existing scope language excludes the specific products identified by NSSMC, and there is no compelling reason to amend that language to address some unidentified or as yet unknown product.[59] According to petitioner, in the event that NSSMC in the future imports nickel-plated flat-rolled steel products that are heat treated after plating without creating a "diffusion" layer of nickel-iron alloy, the coverage of such imports by the scope can be considered by the Department pursuant to 19 CFR 351.225 by reference to the existing language and administrative record. Therefore, according to petitioner, further clarification of the existing scope language is not necessary or appropriate.

Department's Position:

After considering all comments by petitioner and NSSMC, we continue to find it unnecessary to amend the existing scope of this investigation. The Department noted previously that one of the purposes of an investigation is to determine that the scope of any resulting order adequately reflects the product(s) for which the domestic industry is seeking relief, and excludes those products for which the petitioner does not seek relief.[60] Therefore, as acknowledged by NSSMC, the Department's practice is to provide ample deference to the petitioner with respect to the definition of the product(s) for which it seeks relief during an investigation.[61]

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[56] *See* NSSMC's Case Brief at 5, citing *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan*, 65 FR 42985 (July 12, 2000) (*Stainless Steel Hollow Products from Japan*), and accompanying Issues and Decision Memorandum at Comment 1.

[57] *See* Petitioner's Rebuttal Brief at 14, citing NSSMC Case Brief at 2 and 3, and Petitioner's Response to NSSMC Scope Comments, dated May 20, 2013, at 4.

[58] *Id.*, citing NSSMC's Request for Scope Clarification, dated May 8, 2013.

[59] *Id.*, citing *Shenyang Yuanda Aluminum Industry Engineering Co., Ltd. v. United States*, Slip Op. 14-10 at 14-15 (January 30, 2014) ("The Department 'properly confined' its scope ruling to the specific question presented rather than expand its inquire to consider 'kits.'").

[60] *See, e.g., Certain Steel Nails from the People's Republic of China: Final Determination of Sales Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977, 33979 (June 16, 2008) (excluding products which fell within the general scope definition, but for which the petitioner did not seek relief).

[61] *See, e.g., Stainless Steel Hollow Products from Japan* at Comment 1; *see also Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers From the Republic of Korea*, 77 FR 75988 (December 26, 2012), and accompanying Issues and Decision Memorandum at Comment 1 (citing, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products From Canada*, 67 FR 15539 (April 2, 2002), and accompanying Issues and Decision Memorandum at Scope Issues (stating that the Department possesses the authority to define or clarify the scope of an investigation throughout the investigation**)**; *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final*

Petitioner maintains that the specific products referenced by NSSMC (*i.e.*, TERNESHEET and ECOTRIO) are clearly outside the scope of the investigation. Additionally, petitioner argues that there is no ambiguity because the scope explicitly states that the subject merchandise is annealed after it undergoes the plating process, creating the "diffusion" layer, which consists of a nickel-iron alloy and other elements. We agree with petitioner that NSSMC's two products are clearly excluded from the scope of the investigation because they are not annealed after they undergo the plating process, which results in the "diffusion" layer of a nickel-iron alloy and other elements. We also agree with petitioner that should the scope require modifications in the future, a scope ruling could be initiated in accordance with 19 CFR 351.225.

Based on petitioner's arguments concerning the clarity of the scope language, and the absence of any compelling reasons to modify it, we find no reason to amend the scope language. Therefore, we have made no revision to the scope of this investigation for the final determination.

Issue 3: Whether the Final Determination Reflects the Department's Conclusions from Its Cost Verification

A. *Scrap Revenue:*

Toyo Kohan maintains that it inadvertently overstated scrap revenue for the *Preliminary Determination* by using budgeted scrap revenue rather than actual scrap revenue and that the Department should make this correction to Toyo Kohan's reported costs for the final determination.

Petitioner did not comment on this issue.

Department's Position:

We agree with the respondent that an adjustment should be made to its reported costs to reflect the actual scrap revenue recorded in its normal books and records. At the cost verification, we noted that Toyo Kohan's actual sales value of scrap was less than the standard value used in its reported costs.[62] Toyo Kohan deducted the standard value of scrap from the reported costs when Toyo Kohan should have deducted the actual value of scrap.[63] Therefore, for the final determination, we included the scrap variance between the standard value and the actual value in the total cost of manufacturing.

B. *Financial Expense Ratio:*

Toyo Kohan claims that it reported as a minor correction at the beginning of the cost verification

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Determination: Outboard Engines from Japan, 69 FR 49863, 49871 (August 12, 2004) (citing *Final Determination of Sales at Less Than Fair Value: Certain Carbon Alloy Wire Rod from Japan*, 59 FR 5987, 5988-5989 (February 9, 1994) and accompanying Issues and Decision Memorandum at Comment l); *Allegheny Bradford Com. v. United States*, 342 F. Supp. 2d 1172, 1187-88 (CIT 2004) (explaining the deference given to the Department in determining the scope of antidumping duty and countervailing duty orders)).

[62] *See* Cost Verification Report at step IV.D.2.

[63] *Id*. at step I.A.2.

that it inadvertently excluded net exchange gains from its financial expense ratio calculation.[64] In doing so, Toyo Kohan argues it overstated its net financial expense ratio and urges the Department to include net exchange gains in the financial expense ratio calculation for the final determination.

Petitioner did not comment on this issue.

Department's Position:

We agree with Toyo Kohan that its financial expense ratio should be adjusted for the final determination to take into account net exchange gains. In this case, after including the foreign exchange gains in the net interest expense calculation, Toyo Kohan's financial income exceeds its financial expense. We have, therefore, set the interest income to zero. If a company has enough financial income to cover its financial expenses, then it will not have a resulting cost for financing and the interest expense rate used for COP and CV will be zero. It would be inappropriate for the company to reduce other components of the COP by the net financing income. Sections 773(b)(3) and 773(e) of the Act identify the specific components of cost that the Department is to measure. Moreover, while certain types of income can legitimately be used to offset an expense, they can be used to do so only to the extent that there are costs to offset.[65] Previously, the CIT has upheld this position. Specifically, it said "{t}he Court finds that expenses by their nature cannot produce a negative effect on the COP. Expenses, as a component of costs, cannot become a profit by the nature of their designation. Based on sound accounting and economic principles, the Court declines to accept a finding of negative costs when calculating COP."[66]

Financial expenses, as a component of COP, are a discrete expense account and as such, cannot provide an offset to any other expense accounts.[67] For these reasons and for the final determination, we have included the net foreign exchange gains in the interest expense rate computation, and have set the interest expense rate to zero.

C. *Alternative Cost Database:*

Petitioner states that Toyo Kohan should continue to allocate its variances using the relative standard cost for each product code rather than allocating variances on per-ton method. Petitioner also cites to the cost of production verification report[68] where it was disclosed that allocating variances on a per-ton method, in some cases, yields "negative" per-unit costs which it contends is unreasonable.[69] Therefore, petitioner argues, the Department should continue to allocate variances to individual products using the relative costs, not the relative volume, as was done in the preliminary determination.[70]

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[64] *Id*. at step I.A.3.
[65] *See Porcelain-on-Steel Cookware from Mexico: Final Results of Antidumping Duty Administrative Review*, 61 FR 54616 (October 21, 1996) at Comment 6.
[66] *See Cinsa, S.A. de C. V. v. United States*, 966 F. Supp. 1230, 1239-1240 (CIT 1997).
[67] *Id.* at 1239-40.
[68] *See* Cost Verification Report at 33.
[69] *See* Petitioner's Rebuttal Brief at 12 and 13.
[70] *Id*.

Toyo Kohan states that it has no objection to the Department continuing to use the alternative cost data which allocates variances using relative costs.[71]

Department's Position:

We agree with the parties that the cost database which includes variances allocated to individual products based on their relative standard cost is appropriate and we will continue to use the cost database that reflects this methodology in the final determination.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final determination of this investigation and the final weighted-average dumping margins in the *Federal Register*.

Agree _____ Disagree _____

_____
Paul Piquado
Assistant Secretary
for Enforcement and Compliance

_____
Date

[71] *See* Toyo Kohan's Case Brief at 7.