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MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
Performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Senior Director
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Administrative Review of the Antidumping Duty Order on
Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from
Japan; 2015-2016

I. SUMMARY

The Department of Commerce (the Department) has analyzed the case and rebuttal briefs submitted by interested parties. This review covers the following companies: Toyo Kohan Co., Ltd (Toyo Kohan) and Nippon Steel & Sumitomo Metals Corporation (NSSMC). As a result of our analysis, we have made changes to Toyo Kohan's margin calculations, as discussed below. Based on those changes, we continue to find that Toyo Kohan sold diffusion-annealed, nickel-plated flat-rolled steel products (nickel-plated, flat-rolled steel) in the United States below normal value, and that NSSMC had no shipments during the period of review (POR). We recommend that you approve the positions described in the "Discussion of Interested Party Comments" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

II. LIST OF ISSUES

Comment 1: Classification of EP Sales as CEP Sales

Comment 2: Using Lower of Cost or Market Rule for Overrun Production Costs

Comment 3: The Department Should Correct Certain Clerical Errors in its *Preliminary Results*



III. BACKGROUND

On June 6, 2017, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on nickel-plated, flat-rolled steel from Japan for the period May 1, 2015, through April 30, 2016.¹ The review covers two producers/exporters of the subject merchandise: Toyo Kohan and NSSMC. At the *Preliminary Results*, we preliminarily determined that NSSMC did not have any reviewable transactions during the POR.

On July 6, 2017, the petitioner, Thomas Steel Strip Corporation (TSS or the petitioner), timely submitted a case brief commenting on the *Preliminary Results*. Toyo Kohan timely filed a rebuttal brief on July 14, 2017. The Department held a public hearing on October 6, 2017. On October 3, 2017, the Department extended the final results deadline until November 3, 2017, and again extended that deadline to December 1, 2017 on October 31, 2017.²

Based on our analysis of the comments received, we revised the weighted-average dumping margin for Toyo Kohan from the *Preliminary Results*.

IV. SCOPE OF THE ORDER

The diffusion-annealed, nickel-plated flat-rolled steel products included in this order 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 order, “nickel-based alloys” include all nickel alloys with other metals in which nickel accounts for at least 80 percent of the alloy by volume.

Imports of merchandise included in the scope of this order 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. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

¹ See *Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments; 2015–2016*, 82 FR 26046 (June 6, 2017) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum.

² See Memorandum, “Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Extension of Deadline for Final Results of Antidumping Duty Administrative Review; 2015-2016,” dated October 3, 2017; *see also* Memorandum, “Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Extension of Deadline for Final Results of Antidumping Duty Administrative Review; 2015-2016,” dated October 31, 2017.

V. DISCUSSION OF THE ISSUES

Comment 1: Classification of EP Sales as CEP Sales

The petitioner's Comments:

- The petitioner argues that Toyo Kohan and its sole U.S. customer are affiliated based on an agency relationship, and therefore U.S. sales should be reclassified from export price (EP) to constructed export price (CEP) sales.³ The petitioner further argues that the Department should use facts otherwise available to make the appropriate CEP adjustments.⁴
- The petitioner believes that the facts in the present case are nearly identical to the facts in *Turbo-Compressors from Japan*, where the Department found there was an agency relationship.⁵ The petitioner also argues that all but one of the seven factors analyzed by the Department in *Steel Threaded Rod from India* support finding that Toyo Kohan and its sole U.S. customer have an agency relationship.⁶
- First, the petitioner avers that Toyo Kohan plays a significant role in negotiating price and other terms of sale between its U.S. customer and the U.S. customer's end customers, because Toyo Kohan, its U.S. customer, and end customers negotiate a general price mechanism.⁷ Even though Toyo Kohan does not know the final price invoiced by the sole U.S. customer to its end customers, the petitioner believes that Toyo Kohan effectively controlled the price charged by the sole U.S. customer by participating in negotiations and expressly setting the parameters of the final price.⁸
- Second, the petitioner states that Toyo Kohan has extensive interaction with the U.S. customer's end customers, because sales terms are discussed periodically throughout the year with the end customers, price negotiations are handled at in-person meetings, and Toyo Kohan is involved with delivery, technical services, and research and development for end customers, the latter of which involved communicating directly with end customers.⁹ The petitioner argues that this second factor presents a much stronger case

³ See Petitioner's Case Brief, "Case Brief of Thomas Steel Strip Corporation," dated July 6, 2017 (Petitioner's Case Brief) at 2.

⁴ *Id.* at 13-14.

⁵ *Id.* at 5, 7 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan*, 62 FR 24394 (May 5, 1997) (*Turbo-Compressors from Japan*)).

⁶ See Petitioner's Case Brief at 4, 12 (citing *Steel Threaded Rod from India: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances, in Part, and Postponement of Final Determination*, 79 FR 9164 (February 18, 2014), (*Steel Threaded Rod from India Prelim*) and accompanying Preliminary Decision Memorandum, *unchanged in Steel Threaded Rod from India: Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part; 2012-2013*, 79 FR 40714 (July 14, 2014), (*Steel Threaded Rod from India Final*) and accompanying Issues and Decision Memorandum).

⁷ See Petitioner's Case Brief at 6-7.

⁸ *Id.*

⁹ *Id.* at 7-8.

than in *Turbo-Compressors from Japan*.¹⁰ The petitioner contends that these extensive interactions should be expected given the highly specialized nature of the subject merchandise, and points to evidence from the International Trade Commission's (ITC's) observation in its injury investigation that there is a lengthy qualification process for producers of the merchandise and there are periodic audits, which, to the petitioner, indicates that customers of this merchandise look to producers and not resellers when establishing and maintaining long-term supply relationships.¹¹

- Third, the petitioner claims the sole U.S. customer does not maintain an inventory.¹² The terms of sale indicate that the delivery location is not at a warehouse or other inventory storage location for the sole U.S. customer.¹³ Furthermore, the petitioner's industry analysts were not able to locate evidence that the sole U.S. customer maintains U.S. inventory.¹⁴
- The petitioner states that the fourth factor, whether the reseller takes title to the merchandise and bears the risk of loss, is not met. However, the petitioner argues that this does not undercut a finding of an agency relationship because, based on the totality of the circumstances, the Department previously concluded in *Steel Threaded Rod from India* that there was an agency relationship although this particular factor was not met.¹⁵
- Fifth, the petitioner states the U.S. customer does not further process or add value, supporting a finding of an agency relationship.¹⁶
- Sixth, the petitioner asserts that Toyo Kohan's sole U.S. customer does not appear to perform any marketing of subject merchandise in the United States, whereas the means by which Toyo Kohan marketed the subject merchandise indicates involvement by Toyo Kohan in this activity. Therefore, according to the petitioner, these two facts together support the finding that Toyo Kohan and the U.S. customer have an agency relationship.¹⁷
- Finally, the petitioner asserts that the end customer knows Toyo Kohan to be the producer through mill certificates and other situations that are business proprietary information.¹⁸ Moreover, the ITC has found that producers of the merchandise and end customers have robust, cooperative relationships.¹⁹

¹⁰ *Id.* at 12.

¹¹ *Id.* at 9, 12.

¹² *Id.* at 10.

¹³ *Id.* Petitioner made an argument to support its claim that the U.S. customer does not maintain inventory which includes proprietary information. These arguments are addressed in a separate memorandum to the file. *See* Memorandum, "Analysis Memorandum for Toyo Kohan Co., Ltd. in the Final Results of the 2015/2016 Administrative Review of the Antidumping Duty Administrative Review of Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan," dated concurrently with this memorandum (Final Analysis Memorandum) at 2.

¹⁴ *See* Petitioner's Case Brief at 10.

¹⁵ *Id.* at 10-11.

¹⁶ *Id.* at 11.

¹⁷ *Id.* Petitioner made certain arguments related to the means of marketing the subject merchandise by Toyo Kohan to the end customer in the pre-sale period. Certain of these arguments include proprietary information and are addressed in a separate memo to the file. *See* Final Analysis Memorandum at 2.

¹⁸ *Id.* at 11-12.

¹⁹ *Id.* at 12.

- Given these arguments, the petitioner contends that sales to this customer should be classified as CEP sales, not EP sales.²⁰ Because the administrative record lacks the information required to make statutory adjustments to CEP sales reflecting the U.S. customer's U.S. selling expenses, the petitioner concludes that the Department should resort to non-adverse facts available to make the necessary adjustments.²¹

Toyo Kohan's Rebuttal Comments:

- Toyo Kohan states that there is no justification to classify its U.S. sales as CEP sales, rather than as EP sales, and that the petitioner asserts a factual argument that is premised upon a fundamental misunderstanding and misreading of the evidentiary record. Toyo Kohan believes that the legal basis argued by the petitioner is an incorrect interpretation of prior Department precedent, and that the petitioner's reasoning asks the Department to adopt a calculation methodology that is contrary to law.²²
- Toyo Kohan claims that nothing has changed since the investigation or the verification in the investigation, where the Department carefully examined Toyo Kohan's sales to its sole U.S. customer and found that the two companies are not affiliated or part of the same "keiretsu."²³ Toyo Kohan contends that the facts also were no different in the first administrative review, where the Department relied on EP.²⁴
- Toyo Kohan states that while it does engage in initial negotiations regarding a price formula mechanism between itself, its sole U.S. customer, and end customers, Toyo Kohan does not know, nor has it ever known, the actual prices charged by the sole U.S. customer to end customers.²⁵
- Toyo Kohan argues that, unlike the Department's findings in *Turbo-Compressors from Japan* (where the Department found an agency relationship), Toyo Kohan's sales are produced to order, and that the U.S. customer takes ownership and handles negotiations of sales terms with the end customer.²⁶ The sole U.S. customer continues to negotiate and set prices independently from Toyo Kohan.²⁷
- Toyo Kohan also believes that the fact pattern is different from *Steel Threaded Rod from India* Toyo Kohan does not negotiate sales terms with end customers. The sole U.S. customer handles all negotiations and does not seek Toyo Kohan's approval.²⁸
- Further, Toyo Kohan argues the petitioner is asking the Department to violate U.S. antidumping laws by deducting some amount for CEP sales expenses even though the Department does not have CEP sales prices.²⁹

²⁰ *Id.* at 2.

²¹ *Id.* at 13-14.

²² See Toyo Kohan's Rebuttal Brief, "Toyo Kohan's Rebuttal Brief Diffusion-Annealed, Nickel-Plated Flat Rolled Steel Products from Japan," dated July 14, 2017 (Toyo Kohan Rebuttal Brief) at 2.

²³ *Id.* at 3-4.

²⁴ *Id.* at 5.

²⁵ *Id.* at 6-7, 11.

²⁶ *Id.* at 9-10.

²⁷ *Id.*

²⁸ *Id.* at 10-12.

²⁹ *Id.* at 12-16.

Department's Position:

Based on record evidence, the Department finds that Toyo Kohan and its sole U.S. customer did not have an agency relationship, and therefore were not affiliated during the POR. Further, we determine that in this review, Toyo Kohan's sales to the sole U.S. customer should remain classified as EP sales.

Under section 771(33)(G) of the Tariff Act of 1930, as amended (the Act), principals and agents are affiliated through a control relationship because, "by definition, a principal controls its agent."³⁰ In determining whether an agency relationship exists, the Department first examines whether an explicit agreement exists from the alleged principal, authorizing the agent to act on its behalf in a specified context. This agreement must not only state that such a relationship exists, but the alleged agent must expressly consent to such representation on behalf of the principal.³¹ However, the Department also recognizes that while agency relationships are "frequently established by written contract, this is not essential."³² In the absence of an agency contract, "the analysis of whether a relationship constitutes an agency is case-specific and can be quite complex; there is no bright line test."³³ The Department's examination of the allegation of an agency relationship has focused on a range of criteria, including, but not limited to the following: (1) the foreign producer's role in negotiating price and other terms of sale; (2) the extent of the foreign producer's interaction with the U.S. customer; (3) whether the agent/reseller maintains inventory; (4) whether the agent/reseller takes title to the merchandise and bears the risk of loss; (5) whether the agent/reseller further processes or otherwise adds value to the merchandise; (6) the means of marketing a product by the producer to the end customer in the pre-sale period; and (7) whether the identity of the producer on sales documentation inferred such an agency relationship during the sales transactions.³⁴

³⁰ See *Turbo-Compressors from Japan*, 62 FR at 24403.

³¹ See *Stainless Steel Sheet and Strip in Coils from Taiwan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 66 FR 41509, 41512 (August 8, 2001) (*Stainless Steel from Taiwan Prelim*) (citing *Turbo-Compressor Systems from Japan*, 62 FR at 24402-24403), *unchanged in Stainless Steel Sheet and Strip from Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 6682 (February 13, 2002) (*Stainless Steel from Taiwan Final*) and accompanying Issues and Decision Memorandum at Comment 23.

³² See *Turbo-Compressor Systems from Japan*, 62 FR at 24403; see also *Stainless Steel from Taiwan Prelim*, 66 FR at 41512, *unchanged in Stainless Steel from Taiwan Final*, and accompanying Issues and Decision Memorandum at Comment 23.

³³ See *Turbo-Compressors from Japan*, 62 FR at 24403; see also *Stainless Steel from Taiwan Final*, and accompanying Issues and Decision Memorandum at Comment 23 ("the Department may examine a range of criteria to determine if an agency relationship exists").

³⁴ See *Steel Threaded Rod from India Prelim*, and accompanying Preliminary Decision Memorandum at 14-15, *unchanged in Steel Threaded Rod from India Final*, and accompanying Issues and Decision Memorandum at Comment 2; see also *Stainless Steel from Taiwan Final*, and accompanying Issues and Decision Memorandum at Comment 23.

As there was no agency contract on the record of this review, we examined the above factors as an analytical framework to determine the nature of the agency relationship, or lack thereof, between Toyo Kohan and the sole U.S. customer. As discussed below, based on the totality of the circumstances, we find that there is no agency relationship between Toyo Kohan and its sole U.S. customer during the POR.

A. The Foreign Producer's Role in Negotiating Price and Other Terms of Sale

Toyo Kohan reported that it negotiated a general price mechanism with the sole U.S. customer and the end customer, and indicated that the price formula mechanism is only for the price from Toyo Kohan to the sole U.S. customer.³⁵ Additionally, Toyo Kohan stated that it has no knowledge or documentation to identify what mark-up the U.S. customer charges to the end customer. Toyo Kohan stated that it does not know, nor has it ever known, the actual price charged by the the U.S. customer to the end customer.

As previously stated, the petitioner argues that Toyo Kohan effectively controls the price to the end customer, similar to the fact pattern in *Turbo-Compressors from Japan*. The petitioner further claims that in *Turbo-Compressors from Japan* “the Department’s description of MHI’s {the producer’s} involvement does not suggest that MHI dictated the unit price; it describes a broader role in negotiations.”³⁶ For the reasons set forth below, the Department finds that Toyo Kohan did not have involvement in negotiating the price to end customers such that it “effectively controlled the price” at which the sole U.S. customer, in turn, charged to end customers. Toyo Kohan stated that it negotiates a general price mechanism with the sole U.S. customer, and this price negotiated is the price charged by Toyo Kohan to the U.S. customer.³⁷ Toyo Kohan indicates that the end customer is present during the price negotiation between Toyo Kohan and the U.S. customer.³⁸ However, Toyo Kohan states that it does not know, nor has it ever known, the price charged by the U.S. customer to the end customers.³⁹ Furthermore, there is no evidence on the record that indicates that Toyo Kohan effectively controlled the price or other material terms of sale to the end customers. Therefore, based on the information on the record, we find that Toyo Kohan does not have a meaningful role in negotiating the price charged to the end customer.

The petitioner states that Toyo Kohan’s identity is well known to the end customer. The Department does not find this fact overly persuasive with regard to Toyo Kohan’s role in negotiating the price and other terms of sale charged to the end customers. While the end customers know Toyo Kohan’s identity, this is common in the production of end customer-

³⁵ See Toyo Kohan August 22, 2016 Section A Questionnaire Response (Toyo Kohan August 22, 2016 AQR) at 14-15; see also Toyo Kohan’s February 21, 2017 Supplemental Questionnaire Response (Toyo Kohan February 21, 2017 SQR) at 7.

³⁶ See Petitioner’s Case Brief at 7.

³⁷ See Toyo Kohan’s Letter, “Toyo Kohan’s Pre-Preliminary Rebuttal Comments Diffusion-Annealed Nickel-Plated Steel from Japans,” dated May 18, 2017 at 6 (Toyo Kohan’s Pre-Prelim Comments).

³⁸ *Id.*

³⁹ See Toyo Kohan’s February 21, 2017 SQR at 24; see also Toyo Kohan’s Rebuttal Brief 6-7.

specific products and does not necessarily indicate that Toyo Kohan has a significant role negotiating the price or that there is the existence of an agency relationship.

B. The Extent of The Foreign Producer's Interaction with the U.S. Customer

The record indicates that Toyo Kohan has interactions with the end customers. As discussed above, Toyo Kohan, the U.S. customer, and end customers are present during the price negotiations for the customer-specific products.⁴⁰ The petitioner argues that Toyo Kohan discussed sales terms for shipments of subject merchandise intended for the end customer.⁴¹ However the record indicates these discussions were about the price between Toyo Kohan and the U.S. customer, not between the U.S. customer and end customers.⁴² Toyo Kohan explained that it discussed arranging delivery, technical service issues, and minor changes that could be made to the subject merchandise manufacturing process in order to improve the merchandise and its operational efficiency.⁴³

Toyo Kohan argues that these interactions are simply a result of industry norms for the product because the subject merchandise is highly specific to an end customers (*e.g.*, it is critical that the steel be tested and designed to the end customers' production process, end use applications, and specifications).⁴⁴ While there is interaction with the U.S. customer, we find that these types of interactions are inherent in the production of specialized end customer-specific products. Therefore, this factor weighs against finding an agency relationship.

C. Whether the Agent/Reseller Maintains Inventory

With regard to whether Toyo Kohan's sole U.S. customer maintains inventory, the issue of whether or not the U.S. customer maintains inventory is inconclusive.⁴⁵ Toyo Kohan has stated that it believes the U.S. customer does maintain inventory.⁴⁶ We do not have evidence on the record to indicate the sole U.S. customer either does, or does not, maintain inventory. Therefore, this factor is inconclusive. We intend to request further information about this issue in the next review.

D. Whether the Agent/Reseller Takes Title to the Merchandise and Bears the Risk of Loss

Based on the record, title of merchandise and risk of loss is transferred to Toyo Kohan's sole U.S. customer for all sales to its U.S. customer during the POR.⁴⁷ This fact weighs against a finding of an agency relationship.

⁴⁰ See Toyo Kohan's Pre-Prelim Comments at 5-6.

⁴¹ See Petitioner's Case Brief at 6-7.

⁴² See Toyo Kohan August 22, 2016 AQR at 17.

⁴³ See Toyo Kohan's February 21, 2017 SQR at 6,

⁴⁴ See Toyo Kohan's Rebuttal Brief at 8.

⁴⁵ See Final Analysis Memo at X for a discussion of proprietary information.

⁴⁶ *Id.* at 3.

⁴⁷ See Toyo Kohan February 21, 2017 SQR at 3.

E. Whether the Agent/Reseller Further Processes or Otherwise Adds Value to the Merchandise

Toyo Kohan reported that the U.S. customer does not further process the subject merchandise.⁴⁸ We find that this fact weighs in favor of an agency relationship.

F. The Means of Marketing a Product by the Producer to the U.S. Customer in the Pre-Sale Period

In response to a supplemental question asking Toyo Kohan to identify and list any marketing or business trips, Toyo Kohan stated that it made business and/or marketing trips to the United States during the POR. However, despite calling such travel “business and/or marketing trips,” based on the proprietary descriptions of the trips, the Department finds that the purpose of the trip was not to market a product by Toyo Kohan during the pre-sale period.⁴⁹ Additionally, there is no evidence on the record that indicates Toyo Kohan engages in any marketing or promotion of subject merchandise in the United States.

G. Whether the Identity of the Producer on Sales Documentation Inferred such an Agency Relationship During the Sales Transactions

While we note that Toyo Kohan is listed on the mill certificate provided to the end customers, the Department does not consider this to be sales documentation that would infer an agency relationship.⁵⁰ As a general matter, in the steel industry, producers typically provide mill certificates to customers.⁵¹ Additionally, we note there is no evidence on the record demonstrating that Toyo Kohan’s identity “was disclosed throughout the sales documentation governing the sale in a manner indicative of an agency relationship.”⁵²

Conclusion

After considering the totality of the evidence and circumstances discussed above, we find that an agency relationship does not exist between Toyo Kohan and the sole U.S. customer during the POR. The negotiations for a price formula mechanism between Toyo Kohan, the sole U.S. customer, and end customers, which sets the price charged by Toyo Kohan to the sole U.S. customer, does not provide a basis to conclude that Toyo Kohan exercised control over the sole U.S. customer’s pricing to end customers. In particular, although Toyo Kohan, the sole U.S. customer, and the end customers discuss the price formula mechanism under which the subject

⁴⁸ See Toyo Kohan August 22, 2016 Section A Questionnaire Response (Toyo Kohan August 22, 2016 AQR) at 38.

⁴⁹ See Toyo Kohan February 21, 2017 SQR at 5-6; see also Final Analysis Memorandum at 2 for a discussion of business proprietary information.

⁵⁰ See Petitioner’s Case Brief at 11.

⁵¹ See, e.g., *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany: Final Results of Antidumping Administrative Review*, 64 FR 43146 (August 9, 1999), and accompanying Issues and Decision Memorandum at Comment 2 (discussing features of a mill certificate that supported Department’s finding that “customer received sufficient information to determine if its specifications were met”).

⁵² See *Turbo-Compressors from Japan*, 62 FR at 24403.

merchandise is sold, the negotiation is only for the price between Toyo Kohan and the sole U.S. customer.

In *Steel Threaded Rod from India*, the producer either negotiated the material terms of sale directly with the end customer or the reseller negotiated the terms on the producer's behalf and the producer had final approval.⁵³ Furthermore, in *Turbo-Compressors from Japan*, the record contained evidence that the producer was effectively controlling the price.⁵⁴ Unlike these two cases, there is no evidence on the record of this segment of the proceeding that Toyo Kohan effectively controlled the price the U.S. customer charged to the end customer, that Toyo Kohan directly negotiated a particular end customer's price, or had final approval over that price. Toyo Kohan has stated that it does not know the ultimate price that the sole U.S. customer charges to end customers, and there is no evidence on the record to indicate otherwise. Additionally, we find that while Toyo Kohan interacts with the end customers, makes some business trips to the United States, and the sole U.S. customer does not further process the merchandise, these facts are inherent in the production of specialized end customer-specific products. The fact pattern does not indicate the existence of an agency relationship. Finally, the title of the merchandise and risk of loss is transferred to the sole U.S. customer upon delivery, which weighs against finding an agency relationship.

For these reasons, the Department determines that Toyo Kohan and the sole U.S. customer do not have an agency relationship and are not affiliated pursuant to section 771(33)(G) of the Act. Consequently, we continue to base Toyo Kohan's U.S. sales on EP, based on sales between Toyo Kohan and the sole U.S. customer. Accordingly, we find the petitioner's proposal to resort to facts available to make CEP adjustments to Toyo Kohan's U.S. sales moot.

Comment 2: Using Lower of Cost or Market Rule for Overrun Production Costs

The petitioner's Comments:

- The petitioner argues that the Department should find that the reported cost of production of Toyo Kohan's overrun products is overstated and that reallocation of production costs is appropriate.⁵⁵ The petitioner also claims that the overrun products have a different quality and value than non-overrun transactions.⁵⁶ Because the overrun products are not prime products, the Department should reallocate some production costs to prime products by applying the lower of cost or market rule.⁵⁷

⁵³ See *Steel Threaded Rod from India Prelim*, and accompanying Preliminary Decision Memorandum at 14-15, 17, unchanged in *Steel Threaded Rod from India Final*, and accompanying Issues and Decision Memorandum at Comment 2.

⁵⁴ See *Turbo-Compressors from Japan*, 62 FR at 24403.

⁵⁵ See Petitioner's Case Brief at 14-19.

⁵⁶ *Id.* Petitioner made certain arguments to support its claim that overrun products were not prime products which include proprietary information. These arguments are addressed in a separate memorandum to the file. See Final Analysis Memorandum at 2-3.

⁵⁷ The petitioner made some arguments for the differences between overrun and prime products which include proprietary information. These arguments are addressed in a separate memorandum to the file. See Final Analysis Memorandum at 2-3.

- The petitioner cites to *Certain Oil Country Tubular Goods from Taiwan*⁵⁸ and *Certain Oil Country Tubular Goods from Korea*,⁵⁹ where the petitioner argues the Department sometimes downgrades a product that is so different from the original product that it no longer belongs to the same group and cannot be used for the same applications.⁶⁰ The petitioner asserts in such cases, the market value of the product is significantly impaired, often to a point where its production cost cannot be recovered. Furthermore, the petitioner states the Department looks at whether the downgraded product can still be used in the same applications as the prime merchandise. The petitioner states if it cannot be used in the same application, and the market value is not sufficient to recover production costs, the Department reconsiders valuation of the downgraded product.⁶¹

Toyo Kohan's Rebuttal Comments:

- Toyo Kohan states that overruns are of the same quality as non-overrun products and that the only difference is that some additional quantity has been produced.⁶² According to Toyo Kohan, the products are not downgraded as scrap nor are they by-products.⁶³ Toyo Kohan avers that the petitioner cites to facts about different circumstances of the sales for these products, but argues that the petitioner does not allege any difference in the physical quality of the overrun products.⁶⁴ The overrun products meet the same quality specifications, according to Toyo Kohan.⁶⁵ Toyo Kohan asserts that there is no support for rejecting its use of normal accounting practices to value physically identical merchandise that has not been downgraded.⁶⁶

Department's Position:

We disagree with the petitioner that the overruns represent scrap or downgraded merchandise and that Toyo Kohan's cost should be adjusted for the *Final Results*.

Our practice with respect to overruns is to analyze the products at issue on a case-by-case basis to determine how such products are accounted for, in terms of costs, in the respondent's normal books and records, whether they remain in scope, and likewise whether they can still be used in the same applications as the prime subject merchandise. If the product is not capable of being used for the same applications, the product's market value is usually significantly impaired, often

⁵⁸ See *Certain Oil Country Tubular Goods from Taiwan: Final Determination of Sales at Less Than Fair Value*, 79 FR 41979 (July 18, 2014), and accompanying Issues and Decision Memorandum at Comment 5 (*OCTG from Taiwan*).

⁵⁹ See *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 18105 (April 17, 2017), and accompanying Issues and Decision Memorandum at Comment 33 (*OCTG from Korea*).

⁶⁰ See Petitioner's Case Brief at 15.

⁶¹ *Id.*

⁶² See Toyo Kohan's Rebuttal Brief at 16-18.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

to a point where its full cost cannot be recovered, and assigning full costs to that product would not be reasonable.⁶⁷

We reviewed the information on the record of this review regarding the overruns. Toyo Kohan stated that the overruns meet the specifications of the original customer in all respects; *i.e.*, Toyo Kohan's overruns are not "off-quality" (*e.g.*, having defects). Record evidence indicates that in Toyo Kohan's system, an "overrun" refers to that quantity which exceeds the quantity specified in the customer's purchase order, and the dimensions for overruns do not differ in any way from prime products. Moreover, if any defect or blemish occurs during the production process, the product is immediately segregated as "off-spec" and is not an overrun.⁶⁸ Thus, the record shows that overruns meet the specifications and dimensions of prime products in all respects, and such products are capable of being used in the same applications as non-overrun prime products.⁶⁹

Therefore, we find that Toyo Kohan treats overruns in its normal books as prime products, and that assigning the full cost of prime products to the overruns is reasonable. Furthermore, we find no evidence to support the petitioner's suggestion that the Department assign a lower cost, rather than full production costs, to the overruns.

In both cases cited to by the petitioner, *OCTG from Korea* and *OCTG from Taiwan*, the Department's decision to reallocate costs was based on whether the products at issue could be used in the same applications as the prime merchandise.⁷⁰ If a product cannot be used in the same applications, the Department reconsiders valuation of the downgraded product. In this case, distinguishable from *OCTG from Korea* and *OCTG from Taiwan*, the overruns at issue can be used in the same applications as prime products.⁷¹

For the reasons stated above we have continued to treat the overruns as prime products and have not revalued them for the final results.

⁶⁷ See *Steel Concrete Reinforcing Bar from Mexico: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 27233 (June 14, 2017), and accompanying Issues and Decision Memorandum at Comment 3; see also *Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015), and accompanying Issues and Decision Memorandum at Comment 9; *OCTG from Korea*, and accompanying Issues and Decision Memorandum at Comment 33; *OCTG from Taiwan*, and accompanying Issues and Decision Memorandum at Comment 5.

⁶⁸ See Toyo Kohan February 21, 2017 SQR at pages 23 and 24.

⁶⁹ *Id.*

⁷⁰ See *OCTG from Korea*, and accompanying Issues and Decision Memorandum at Comment 33 ("the company's downgraded, non-OCTG pipe cannot be used in the same 'down hole' or 'in the well' applications as the subject OCTG products"); *OCTG from Taiwan*, and accompanying Issues and Decision Memorandum at Comment 5 ("in other words, the non-prime pipe is not sold as OCTG").

⁷¹ For further discussion of this issue which includes proprietary information. See Final Analysis Memorandum at 2-3.

Comment 3: The Department Should Correct Certain Clerical Errors in its *Preliminary Results*

The petitioner's Comments:

- The petitioner states that the Department inadvertently used the customer code (field CUSCODH) for the arm's length test instead of the consolidated customer code (field CCUSCODH).⁷² The consolidated customer code should be used to identify the customer irrespective of office location.⁷³
- The petitioner states that the Department inadvertently included Toyo Kohan's overrun sales in the *Preliminary Results* margin calculation.⁷⁴

Toyo Kohan's Rebuttal Comments:

- Toyo Kohan did not file any comment with respect to this issue.

Department's Position:

The Department agrees that we inadvertently used field CUSCODH instead of field CCUSCODH for the arm's length test in the *Preliminary Results*. We have made appropriate corrections to the calculation.⁷⁵

Additionally, although we intended to exclude overrun sales, we inadvertently included them in the *Preliminary Results* margin calculation. We have excluded these sales in the calculation of the final results of this review. This is consistent with our final determination in the investigation and the final results of the first administrative review.⁷⁶ We corrected the programming language to remove overrun sales in the *Final Results* margin calculation.⁷⁷

⁷² See Petitioner's Case Brief at 19-20.

⁷³ *Id.*

⁷⁴ *Id.* at 20.

⁷⁵ See Final Analysis Memorandum at 3-4 for the programming language.

⁷⁶ See Notice of Affirmative Final Determination of Sales at Less Than Fair Value: *Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan*, 79 FR 19868 (April 10, 2014), and accompanying Issues and Decision Memorandum at 7-9; see also *Diffusion-Annealed, Nickel-Plated Flat-Rolled Steel Products from Japan: Final Results of Antidumping Duty Administrative Review; 2013-2015*, 81 FR 91116 (December 16, 2016), and accompanying Issues and Decision Memorandum at 6.

⁷⁷ *Id.*

VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the positions set forth above. If this recommendation is accepted, we will publish the final determination in the investigation in the *Federal Register*.



Agree

Disagree

12/1/2017

X 

Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance