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MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2016-2017 Administrative Review of the Antidumping Duty Order
on Certain Steel Nails from the Republic of Korea

I. SUMMARY

We analyzed the comments submitted by interested parties in the 2016-2017 administrative review of the antidumping duty order on certain steel nails (steel nails) from the Republic of Korea (Korea). Following the *Preliminary Results*¹ and based on our analysis of the comments received, we made changes to the margin calculations for Koram Inc. (Koram) and Korea Wire Co., Ltd. (Kowire) for the final results. We did not make changes to the margin calculation for Daejin Steel Co. (Daejin). We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a list of the issues in this administrative review for which we received comments from interested parties:

Daejin-Specific Issues

Comment 1: Scrap Offset

Comment 2: Cost Variations Not Due to Differences in Physical Characteristics

Comment 3: SG&A Expenses

Comment 4: Differential Pricing

¹ See *Certain Steel Nails from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 32265 (July 12, 2018) and accompanying Preliminary Decision Memorandum (*Preliminary Results*).

Kowire-Specific Issues

Comment 5: Date of Sale

Comment 6: Relationship with Subcontractor A

Comment 7: Affiliated Party Transactions

II. BACKGROUND

On July 12, 2018, we published the *Preliminary Results* of this administrative review.² From July 23, 2018 through August 2, 2018, we conducted verification of Koram Inc. (Koram) and Korea Wire Co., Ltd. (Kowire).³

Following issuance of our verification reports, we invited interested parties to comment on the *Preliminary Results* and the verification reports.⁴ On September 25, 2018, we received case briefs from interested parties,⁵ and on October 1, 2018 we received rebuttal briefs.⁶ A hearing was not requested. On October 26, 2018 and December 10, 2018, we postponed the deadline for the final results of this review.⁷

III. SCOPE OF THE ORDER

The merchandise covered by this order is certain steel nails having a nominal shaft length not exceeding 12 inches.⁸ Certain steel nails include, but are not limited to, nails made from round wire and nails that are cut from flat-rolled steel. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and may have any type of surface finish, head type, shank, point type and shaft diameter. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, including

² See *id.*

³ See Memorandum, “Verification of the Sales and Cost Responses of Koram Inc. (Koram) in the Antidumping Review of Steel Nails from Korea,” dated September 7, 2018 (Koram Verification Report); Memorandum, “Verification of the Sales and Cost Response of Korea Wire Co., Ltd. in the Antidumping Duty Administrative Review of Certain Steel Nails from the Republic of Korea,” dated September 14, 2018 (Kowire Verification Report). We note that Daejin was previously verified in the investigation.

⁴ See Memorandum, “Deadline for Case Briefs and Rebuttal Briefs,” dated September 18, 2018.

⁵ See Letter, “Certain Steel Nails from Korea: Case Brief on Korea Wire Co., Ltd.,” dated September 25, 2018 (Petitioner Case Brief – Kowire); Letter, “Certain Steel Nails from Korea: Case Brief of Daejin Steel Co.,” dated September 25, 2018 (Daejin Case Brief); Letter, “Steel Nails from the Republic of Korea – Case Brief,” dated September 25, 2018 (Kowire Case Brief).

⁶ See Letter, “Certain Steel Nails from Korea: Rebuttal Brief to Daejin Steel Co.’s Case Brief,” dated October 1, 2018 (Petitioner Rebuttal Brief – Daejin); Letter, “Steel Nails from the Republic of Korea – Rebuttal Brief,” dated October 1, 2018 (Kowire Rebuttal Brief).

⁷ See Memorandum, “Certain Steel Nails from the Republic of Korea: Extension of Deadline for the Final Results of Antidumping Duty Administrative Review; 2016-2017,” dated October 26, 2018; see also Memorandum, “Certain Steel Nails from the Republic of Korea: Extension of Deadline for the Final Results of Antidumping Duty Administrative Review; 2016-2017,” dated December 10, 2018 (postponing the deadline for the final results of this review to January 8, 2019).

⁸ The shaft length of certain steel nails with flat heads or parallel shoulders under the head shall be measured from under the head or shoulder to the tip of the point. The shaft length of all other certain steel nails shall be measured overall.

but not limited to electroplating or hot dipping one or more times), phosphate, cement, and paint. Certain steel nails may have one or more surface finishes. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted. Screw-threaded nails subject to this proceeding are driven using direct force and not by turning the nail using a tool that engages with the head. Point styles include, but are not limited to, diamond, needle, chisel and blunt or no point. Certain steel nails may be sold in bulk, or they may be collated in any manner using any material.

Excluded from the scope of the order are nails packaged in combination with one or more non-subject articles, if the total number of nails of all types, in aggregate regardless of size, is less than 25. If packaged in combination with one or more non-subject articles, nails remain subject merchandise if the total number of nails of all types, in aggregate regardless of size, is equal to or greater than 25, unless otherwise excluded based on the other exclusions below.

Also excluded from the scope are nails with a nominal shaft length of one inch or less that are (a) a component of an unassembled article, (b) the total number of nails is sixty (60) or less, and (c) the imported unassembled article falls into one of the following eight groupings: 1) builders' joinery and carpentry of wood that are classifiable as windows, French-windows and their frames; 2) builders' joinery and carpentry of wood that are classifiable as doors and their frames and thresholds; 3) swivel seats with variable height adjustment; 4) seats that are convertible into beds (with the exception of those classifiable as garden seats or camping equipment); 5) seats of cane, osier, bamboo or similar materials; 6) other seats with wooden frames (with the exception of seats of a kind used for aircraft or motor vehicles); 7) furniture (other than seats) of wood (with the exception of i) medical, surgical, dental or veterinary furniture; and ii) barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements); or 8) furniture (other than seats) of materials other than wood, metal, or plastics (*e.g.*, furniture of cane, osier, bamboo or similar materials). The aforementioned imported unassembled articles are currently classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 4418.10, 4418.20, 9401.30, 9401.40, 9401.51, 9401.59, 9401.61, 9401.69, 9403.30, 9403.40, 9403.50, 9403.60, 9403.81 or 9403.89.

Also excluded from the scope of the order are nails that meet the specifications of Type I, Style 20 nails as identified in Tables 29 through 33 of ASTM Standard F1667 (2013 revision). Also excluded from the scope of the order are nails suitable for use in powder-actuated hand tools, whether or not threaded, which are currently classified under HTSUS subheadings 7317.00.20.00 and 7317.00.30.00.

Also excluded from the scope of the order are nails having a case hardness greater than or equal to 50 on the Rockwell Hardness C scale (HRC), a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.

Also excluded from the scope of the order are corrugated nails. A corrugated nail is made up of a small strip of corrugated steel with sharp points on one side.

Also excluded from the scope of the order are thumb tacks, which are currently classified under HTSUS subheading 7317.00.10.00.

Nails subject to the order are currently classified under HTSUS subheadings 7317.00.55.02, 7317.00.55.03, 7317.00.55.05, 7317.00.55.07, 7317.00.55.08, 7317.00.55.11, 7317.00.55.18, 7317.00.55.19, 7317.00.55.20, 7317.00.55.30, 7317.00.55.40, 7317.00.55.50, 7317.00.55.60, 7317.00.55.70, 7317.00.55.80, 7317.00.55.90, 7317.00.65.30, 7317.00.65.60 and 7317.00.75.00. Nails subject to the order also may be classified under HTSUS subheadings 7907.00.60.00, 8206.00.00.00 or other HTSUS subheadings.

While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

IV. CHANGES SINCE THE PRELIMINARY RESULTS

Based on our analysis of the comments received from interested parties, and our findings at verification, we made certain changes to our margin calculations for Koram and Kowire. Specifically, we:

- We incorporated the September 21, 2018 revised sales and cost databases for Koram, which reflected minor corrections accepted at verification.⁹
- We modified Kowire's date of sale.¹⁰
- We incorporated Kowire's updated credit expenses, which reflect new payment information (in the home market) and revised short-term interest rates (in both the U.S. and home market).¹¹
- We incorporated Kowire's updated inventory carrying costs in the U.S. and home market to reflect revisions to the applicable short-term interest rates.¹²
- We corrected Kowire's reported domestic inland freight for two sequence numbers.¹³

V. DISCUSSION OF THE ISSUES

Daejin-Specific Issues

Comment 1: Scrap Offset

Daejin's Comments

⁹ See Letter, "Certain Steel Nails from the Republic of Korea: Revised Databases," dated September 21, 2018; see also Koram Verification Report.

¹⁰ See Comment 5, below.

¹¹ See Letter, "Steel Nails from the Republic of Korea – KOWIRE's Submission of Revised Sales Databases," dated October 5, 2018.

¹² See *id.*

¹³ See *id.*

- Daejin only sells scrap generated by its own production operations. Therefore, the quantity of scrap sold by Daejin over any extended period of time cannot differ markedly from the quantity generated.
- Daejin sells steel scrap at periodic intervals, typically every month, but occasionally once every two months. During the current review period, Daejin sold scrap every month. When Daejin sells its scrap, it sells all of the scrap that it has accumulated since the last scrap sale.
- Daejin's yield loss demonstrates the quantity of scrap produced since Daejin only produces steel nails at its facilities and does not purchase any steel scrap.
- While it is theoretically possible that sales of scrap during July 2016, the first month of the review period, might have included scrap generated in June 2016, it is impossible for any of the scrap sold in subsequent months to have been generated before the review period. All of the scrap sold by Daejin from August 2016 to June 2017 must have been generated during the review period. At a minimum, then, Commerce is required to calculate a scrap offset based on 11 months of scrap sales.
- Furthermore, while it is theoretically possible that scrap sold by Daejin in July 2016 might have included some scrap generated in June 2016, a comparison of the July 2016 figures to the scrap sales in other months of the review period does not support that conclusion.

The Petitioner's Rebuttal Comments

- Daejin's reported scrap offset is based on the company's revenues from scrap *sales* during the POR. Because Daejin's offset is based on the scrap *sales*, rather than the quantity of scrap *generated*, Commerce should deny the scrap offset.
- Furthermore, Daejin has not established a direct link between the quantities of scrap sold and the quantities actually generated during the period of review (POR). In fact, Daejin's reported scrap sales show substantial fluctuation on a month to month basis, and there is not a strong correlation between production levels and scrap sales. Unlike in the previous administrative review, Daejin's scrap sales do not reasonably approximate its generation of scrap on a POR basis. Therefore, Daejin's sales data are an unreliable proxy for its scrap generation.
- There is no evidence on the record to support a conclusion that the quantity of scrap sold is less than the quantity generated. Daejin has failed to properly calculate the offset as a percentage of the CONNUM-specific per-unit direct material costs.
- For the final results, Commerce should continue to disallow Daejin's scrap offset claim.

Commerce's Position: We agree with the petitioner in part, and with Daejin in part.

Commerce's practice with respect to scrap offsets to normal value (NV) is to allow such offsets based on the amount of scrap generated, once the generated scrap has been shown to have commercial value, through evidence of sales or reintroduction into the production process.¹⁴ Scrap offsets are only granted for merchandise that is either sold or reintroduced into production

¹⁴ See, e.g., *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35245 (June 12, 2013), and accompanying Issues and Decision Memorandum at Comment 10.

during the POR, up to the amount of scrap actually produced during the POR.¹⁵ Moreover, parties requesting a scrap offset have the burden of presenting to Commerce not only evidence that the scrap is sold or re-used in the production of the subject merchandise, but also all the information necessary for Commerce to incorporate such offsets into the margin calculation.¹⁶

Daejin reported that it records the quantity of steel scrap collected and sold, and it used these revenues to report a scrap offset to its direct material cost.¹⁷ In response to a supplemental questionnaire requesting supporting documentation for the quantity of steel scrap that Daejin generated, Daejin stated that it does not know the quantity of scrap that it produced until it weighs the scrap at the time of sale.¹⁸ Daejin then submitted a chart which compared the weight of the scrap steel that it sold during the POR to the weight of the finished goods during the POR.¹⁹ While Daejin claims that this chart demonstrates the ratio of scrap sales to production, this information fails to establish a connection between scrap revenue and scrap production.

In our preliminary results, we denied Daejin's scrap offset, finding that although Daejin tracked the quantity of scrap sold, it did not actually track the amount of scrap generated, and thus could not accurately calculate the scrap offset. However, for the final results, we have reexamined the record and have determined to grant Daejin an adjusted scrap offset because the yield loss information submitted by Daejin allows us to calculate the quantity of steel scrap that Daejin could have reasonably produced.²⁰

Specifically, our practice is to allow for a scrap offset related to the quantity of scrap generated during the POR.²¹ Thus, when the quantity sold exceeds the quantity generated, we limit the scrap offset to the quantity generated during the POR because it would be unreasonable to offset the POR costs for scrap produced outside of the POR.²²

¹⁵ See, e.g., *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments and Final Partial Rescission; 2014-2015*, 82 FR 14344 (March 20, 2017), and accompanying Issues and Decision Memorandum at Comment 6.

¹⁶ See *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sale at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 74 FR 40485 (July 15, 2018), and accompanying Issues and Decision Memorandum at Comment 34.

¹⁷ See Letter, "Response of Daejin Steel Company to Section D of the Department's October 10, 2017 Questionnaire," dated November 30, 2017 (Daejin IQR Sec D), at 14.

¹⁸ See Letter, "Second Administrative Review of the Antidumping Duty Order on Certain Steel Nails from Korea – Response to February 6 Supplemental Questionnaire," dated February 22, 2018 (Daejin Sec D SQR I) at 4.

¹⁹ See *id.* at Exhibit SD-4.

²⁰ Daejin Sec D SQR I at SD-5.

²¹ See, e.g., *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 65272 (October 31, 2013) and accompanying Issues and Decision Memorandum at Comment 11 (*CWP from Thailand*); *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Thirteenth Administrative Review*, 73 FR 14220 (March 17, 2008) and accompanying Issues and Decision Memorandum at Comment 5; and *Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Final Determination of Sale at Less Than Fair Value*, 77 FR 64480 (October 22, 2012) and accompanying Issues and Decision Memorandum at Comment 3 (*CWP from Oman*); see also *Mid Continent Nail Corp. v. United States*, 34 C.I.T. 498, 510-12 (CIT 2010) (affirming Commerce's practice concerning the scrap offset).

²² See, e.g., *CWP from Oman* Issues and Decision Memorandum at Comment 3.

Our review of the record indicates that, based on Daejin's yield losses, Daejin sold more scrap during the POR than it could have reasonably generated.²³ Accordingly, for the final results, we have adjusted Daejin's reported scrap offset by capping it at the quantity of scrap it could have reasonably produced during the POR.²⁴

Comment 2: Cost Variations Not Due to Differences in Physical Characteristics

Daejin's Comments

- Daejin's reported costs for certain control numbers (CONNUMs) varied based on the timing of production, since both raw material costs and factory utilization rates varied over the course of the review period. Commerce "smoothed" these differences in the *Preliminary Results* by weight-averaging the costs for CONNUMs which shared certain characteristics.
- When calculating the cost of materials and fabrication employed in producing the foreign like product, the costs recorded in the producer's normal accounting system must be used as long as those costs "are kept in accordance with the generally accepted accounting principles of the exporting country ... and reasonably reflect the costs associated with the production and sale of the merchandise."
- Daejin's costs are calculated in accordance with the requirements of generally accepted accounting principles in Korea. The reported costs for each product reflect the actual costs incurred in the production of that product at the time that product was actually produced. Under the statute, there is no basis for departing from the costs reported by Daejin.
- Commerce's authority to limit the "difference in merchandise" adjustment to cost differences related to actual physical differences does not authorize Commerce to disregard the actual costs recorded in the respondents' normal accounting system when calculating cost of production for the entirely separate sales below cost test.

The Petitioner's Rebuttal Comments

- In its case brief, Daejin objected to Commerce's "cost-smoothing" methodology, arguing that this adjustment was "contrary to the statutory provisions concerning the calculation of cost of production for purposes of the sales-below-cost test." Daejin's objection is misguided, ignores Commerce's past practice, and should be rejected.
- In the previous administrative review in these proceedings, Commerce found that "the costs reported for similar CONNUMs are substantially different based on factors unrelated to the physical characteristics of the products themselves. Therefore, the cost differences are not driven by differences in the CONNUM's physical characteristics. We, accordingly, find such differences to be distortive." Daejin ignored Commerce's findings in the previous administrative review and made no efforts to address this issue in the instant review.

²³ See Memorandum, "Analysis Memorandum for the Final Determination of the Antidumping Duty Administrative Review of Certain Steel Nails from the Republic of Korea: Daejin Steel Company," (Daejin Final Analysis Memorandum) dated concurrently with this memorandum.

²⁴ *Id.*

- Daejin made it clear that the differences in costs for certain CONNUMs are due to timing differences because they are based on monthly costs. Commerce has determined that cost fluctuations caused by factors other than the physical characteristics of the product, including fluctuations in monthly costs, are inappropriate, and has reallocated respondents' costs to eliminate such fluctuations.
- For the final results, Commerce should continue to apply its “cost-smoothing” methodology in accordance with past practice and prior determinations relating to this *Order*.

Commerce’s Position: We agree with the petitioner. Pursuant to section 773(f)(1)(A) of the Tariff Act of 1930, as amended (the Act), “costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.”

Accordingly, we are instructed by the Act to rely on a company’s normal books and records if two conditions are met: (1) the books are kept in accordance with the home country’s generally accepted accounting principles (GAAP); and (2) the books reasonably reflect the cost to produce and sell the merchandise. In the instant case, Daejin reported its costs as those costs are recorded in the company’s normal books and records, which are kept in accordance with Korean GAAP. Therefore, the question facing Commerce is whether the per-unit costs from Daejin’s normal books and records reasonably reflect the cost to produce and sell the subject merchandise.

Here, we identified several instances where pairs of CONNUMs that were similar in terms of physical characteristics had meaningfully different manufacturing costs reported. We asked Daejin to explain the reason for these cost differentials in a supplemental questionnaire. In the supplemental questionnaire, we identified three CONNUMs and requested an explanation for the substantially different costs associated with each product.²⁵ Daejin explained that the discrepancy was a function of the manner in which Daejin maintains its book and records.²⁶ Daejin also explained that the differences in cost were caused by the fact that Daejin calculated certain costs separately for each half of the POR.²⁷ Furthermore, Daejin stated that the monthly costs for each product could vary as a result of changes in raw material costs and total factory fabrication costs from month to month, as well as changes in total factory production quantities (which affected the allocation of fabrication costs to each product, as well as the calculation of the per-unit amounts) from month to month.²⁸

Daejin’s responses to our supplemental questionnaire indicate that, in some instances, the costs reported for similar CONNUMs are substantially different based on factors unrelated to the physical characteristics of the products themselves. Therefore, the cost differences are not

²⁵ See Letter, “Certain Steel Nails from the Republic of Korea: Supplemental Questionnaire,” dated February 6, 2018 (Daejin Sec D SQ I), at 3.

²⁶ See Daejin Sec D SQR I, at 9.

²⁷ See *id.* at 11.

²⁸ See *id.* 9.

driven by differences in the CONNUMs' physical characteristics. Accordingly, we find such differences to be distortive.

Although we generally rely on costs as reported by respondents, we will not do so if we find the costs to be distortive. For instance, in *Circular Welded Non-Alloy Steel Pipe*, we described several scenarios where we opted not to rely on respondents' costs, as reported, where cost differentials between CONNUMs appeared to be driven by factors other than product characteristics:

{t}he Department faced similar situations where a CONNUM's costs were highly dependent on either specific production runs or on the timing of the main raw material purchases under a cost allocation methodology that reflects a narrow population of the main raw material purchases (*e.g.*, coil-specific, first in first out, monthly weight-averages, etc.) when allocating raw material costs to the products produced. For example, in *UK Bar*, the Department found that the respondent's costs from its normal books and records were distortive. In that case, the respondent assigned a specific billet purchase price to each job order within a CONNUM, and because it produced and sold each product only a limited number of times during the cost reporting period, the specific billet costs did not represent the unit cost normally experienced by the company to produce the product during that time period. Similarly, in *Nails from the UAE*, the Department reallocated the respondent's direct material costs from its normal books and records because the product-specific cost differences were related to timing differences rather than differences in physical characteristics.²⁹

Similarly, in *Certain Cut-to-Length Carbon-Quality Steel Plate from Korea*, we were recently faced with facts similar to this case.³⁰ There, we adjusted cost differences across CONNUMs that were not attributable to physical characteristics.³¹ We explained:

where the differences in costs between similar CONNUMs could not be explained by the differences in the physical characteristics of those CONNUMs, we determined that {the respondent's} reported costs did not reasonably reflect the costs associated with the production and sale of the merchandise. To mitigate the impact of the cost fluctuations which were unrelated to the reported products' physical characteristics, we reallocated {the respondent's} conversion costs We continue to find our recalculation of {the respondent's} conversion costs to be a reasonable methodology for mitigating the distortions found in {the respondent's} reported costs.³²

²⁹ *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35248 (June 12, 2013), and accompanying Issues and Decision Memorandum at Comment 1.

³⁰ See *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2014-2015*, 81 FR 62712 (September 12, 2016), and accompanying Issues and Decision Memorandum at Comment 1.

³¹ *Id.*

³² *Id.*

Here, we find that Daejin's reported costs are distortive because the cost differences between similar products are the result of factors other than the physical characteristics of the merchandise.

Accordingly, we recalculated Daejin's reported costs by applying an average cost to CONNUMs that match on all product characteristics except diameter and length.³³ This approach reasonably mitigates the distortions in the reported costs by smoothing out differences in costs for very similar products caused by differences in production timing and/or volume. Our methodology here is consistent with Commerce's past practice.³⁴ Due to the use of proprietary information, we included further details on our cost adjustment in the Daejin Final Analysis Memorandum.³⁵

For the reasons stated above, and pursuant to section 773(f)(1)(A) of the Act, for the final results, we will continue to adjust Daejin's costs to ensure that similar CONNUMs are not assigned substantially different costs.³⁶

Comment 3: SG&A Expenses

Daejin's Comments

- Commerce revised Daejin's general and administrative (G&A) expense calculation to add an amount for "loss on disposal of property and equipment."
- Because this loss does not relate to property and equipment used in Daejin's business operations, it was properly excluded from Daejin's calculation of the G&A expense rate. Commerce should exclude this amount from the G&A expense calculation.

The Petitioner's Rebuttal Comments

- Commerce correctly included the loss on disposal of property and equipment in its calculation of Daejin's G&A expense and for the final results, Commerce should continue to do the same.

Commerce's Position: We agree with the petitioner. Based on our review of record evidence, we will continue to include the loss on the disposal of property and equipment in Daejin's G&A expense calculation for the final results. Due to the proprietary nature of our discussion of this issue, we have included the discussion in Daejin's Final Analysis Memorandum, dated concurrently with this memorandum.

Comment 4: Differential Pricing

³³ See Daejin Final Analysis Memorandum.

³⁴ See, e.g., *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*; 2013-2014, 81 FR 39908 (June 20, 2016), and accompanying Issues and Decision Memorandum at Comment 9; 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 5.

³⁵ See Daejin Final Analysis Memorandum.

³⁶ See Memorandum, "Analysis Memorandum for the Preliminary Determination of the Antidumping Duty Administrative Review of Certain Steel Nails from the Republic of Korea: Daejin Steel Co.," dated July 5, 2018 (Daejin Preliminary Analysis Memorandum).

Daejin's Comments

- Commerce has failed to justify the numerical thresholds used in the differential pricing analysis based on substantial evidence on the record. Because these thresholds were not adopted pursuant to notice and comment requirements of the Administrative Procedure Act (APA), Commerce must justify these thresholds in every case, and must provide substantial evidence on the record showing that the analysis is appropriate under the facts of this particular case.
- Commerce's differential pricing analysis fails to explain why any patterns of price differences were not, or could not be, taken into account using an average-to-average (A-to-A) comparison. Demonstrating that dumping margins are different under an alternative methodology does not amount to an explanation of why an A-to-A price comparison is inappropriate.
- There is, in fact, no reason to believe that the price differences that give rise to a finding of "targeted dumping" are the cause of the divergent results across the comparison methodologies. Instead, the divergent margin calculations are primarily a function of the different treatment of negative dumping margins under Commerce's standard methodology (where zeroing is not used) and its alternate methodologies (where negative margins are zeroed).
- The World Trade Organization (WTO) Appellate Body has held that zeroing of negative dumping margins is not permitted even when the average-to-transaction (A-to-T) methodology is justified.³⁷ In the event that Commerce decides to utilize the A-to-T methodology in this review, it should not zero any negative dumping margins found in its comparisons.

The Petitioner's Rebuttal Comments

- Commerce's differential pricing analysis is consistent with the statute and supported by substantial evidence on the record.
- The CIT has held that Commerce's differential pricing analysis is not a legislative rule, but instead is a change in Commerce's practice and therefore is not subject to notice and comment requirements under the APA for rule making. Accordingly, Commerce's change in its differential pricing practice is supported by substantial evidence.
- The courts have repeatedly upheld the use of numerical thresholds used in the differential pricing analysis, *i.e.*, the 0.8 cut-off used for the "Cohen's *d*" test and the 33 and 66 percent cut-offs used for the "ratio test."³⁸
- Commerce's application of the meaningful difference test, and the different result obtained through each method, *i.e.*, the margin obtained through the A-to-A method and the margin obtained through the A-to-T method, demonstrates why the A-to-A method cannot account for the pattern of significant price distortions here.³⁹

³⁷ See Daejin Brief at 13 (citing *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, Appellate Body Report, WT/DS464/AB/R (Sept. 7, 2016), at paras. 5.153-5.171).

³⁸ See Petitioner Rebuttal Brief at 14 (citing *Tri Union Frozen Products, Inc. v. United States*, 163 F. Supp. 3d 1255, 1301 (CIT 2016); *Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1326, 1339 (CIT 2017)).

³⁹ *Id.* at 16-18 (citing *Apex Frozen Foods Pvt. Ltd. v. United States*, 144 F. Supp. 3d 1308, 1332-35 (CIT 2016) (*Apex II*), *aff'd*, *Apex Frozen Foods Pvt. Ltd. v. United States*, 862 F.3d 1337, 1346, 1348-49 (Fed. Cir. 2017)).

- To date, the United States has not implemented the WTO's findings in *Washers from Korea*. Therefore, the WTO determination in that case is not binding on the United States, and Commerce has no obligation to change its use of zeroing in the final results of this review.

Commerce's Position: We disagree with Daejin's assertion that we have not justified the numerical thresholds used in our differential pricing analysis. We also disagree with Daejin's assertion that we failed to provide an explanation of why an A-to-A price comparison is inappropriate here. Accordingly, for the final results, we continue to apply our standard differential pricing analysis, and continue to calculate Daejin's margin using the A-to-T methodology.

As an initial matter, we note that there is nothing in section 777A(d) of the Act that mandates how we measure whether there is a pattern of prices that differ significantly or explains why the A-to-T method cannot account for such differences. On the contrary, carrying out the purpose of the statute⁴⁰ here is a gap filling exercise properly conducted by Commerce.⁴¹ As explained in the *Preliminary Results*, as well as in various other proceedings,⁴² Commerce's differential pricing analysis, including the use of the Cohen's *d* test as a component in this analysis, is reasonable and is not contrary to the law.

Daejin contends that we must explain why the numerical thresholds used in this case are appropriate given the specific record because Commerce has not promulgated a rule regarding the numerical thresholds for its differential pricing analysis through notice and comment procedures. We disagree. We normally make these types of changes in practice (*e.g.*, the changes from the targeted dumping analysis to the current differential pricing analysis) in the context of our proceedings, on a case by case basis. As the CIT has recognized, we are entitled to make changes and adopt a new approach in the context of our proceedings, provided we explain the basis for the change, and provided the change is a reasonable interpretation of the statute.⁴³ Moreover, the CIT in *Apex II* recently held that Commerce's change in practice from

⁴⁰ See *Koto Seiko Co., Ltd. v. United States*, 20 F. 3d 1156, 1159 (Fed. Cir. 1994) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as 'masked dumping.' By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently - sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result." (internal citations omitted)).

⁴¹ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (recognizing deference where a statute is ambiguous and an agency's interpretation is reasonable).

⁴² See, *e.g.*, *Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015) (Line Pipe from Korea), and accompanying Issues and Decision Memorandum at Comment 1; *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 32937 (June 10, 2015), and accompanying Issues and Decision Memorandum, at Comments 1 and 2; *Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46647 (July 18, 2016), and accompanying Issues and Decision Memorandum at Comment 4.

⁴³ See *Carlisle Tire v. United States*, 634 F. Supp. 419, 423 (CIT 1986) (*Carlisle Tire*) (discussing exceptions to the notice and comment requirements of the APA).

targeted dumping to its differential pricing analysis was exempt from the APA's rule making requirements, stating:

Commerce explained that it continues to develop its approach with respect to the use of A-to-T as it gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the {A-to-A} comparison method. Commerce additionally explained that the new approach is a more precise characterization of the purpose and application of {19 U.S.C. § 1677f- (d)(1)(B)} and is the product of Commerce's experience over the last several years . . . further research, analysis and consideration of the numerous comments and suggestions on what guidelines, thresholds, and tests should be used in determining whether to apply an alternative comparison method based on the {A-to-T} method. Commerce developed its approach over time, while gaining experience and obtaining input. Under the standard described above, Commerce's explanation is sufficient. Therefore, Commerce's adoption of the differential pricing analysis was not arbitrary.⁴⁴

Moreover, the CIT acknowledged in *Apex II* that as Commerce "gains greater experience with addressing potentially hidden or masked dumping that can occur when {Commerce} determines weighted-average dumping margins using the {A-to-A} comparison method, {Commerce} expects to continue to develop its approach with respect to the use of an alternative comparison method."⁴⁵ Further developments and changes, along with further refinements, are expected in the context of our proceedings based upon an examination of the facts and the parties' comments in each case.

The CIT's holding in *Apex II* has since been upheld by the U.S. Court of Appeals for the Federal Circuit (CAFC).⁴⁶ Thus, we find that the numerical thresholds used in Commerce's standard differential pricing analysis are reasonable and consistent with the requirements of section 777A(d)(1)(B) of the Act. Accordingly, Commerce's development of the differential pricing analysis and the application of this analysis in this case, including the thresholds relied upon herein, are consistent with established law. Daejin has submitted no factual evidence or argument that demonstrates that these thresholds should be modified for Daejin for the purposes of this review.

Next, Daejin asserts that we failed to explain why the A-to-A method cannot account for any pattern of price differences observed. We disagree. We find that the comparison of each of the calculated weighted-average dumping margins using the standard and alternative comparison methodologies exactly quantifies the extent of the masked dumping. As the CIT has explained,

where the amount of uncovered masked dumping results in an A-T calculated margin that is not *de minimis*, and the A-A calculated margin would be *de minimis*,

⁴⁴ See *Apex II*, 144 F. Supp. 3d, at 1330 ("Commerce is not restricted in what type of sales it may consider in assessing the existence of such a pattern so long as its methodological choice enables Commerce to reasonably determine whether application of A-to-T is appropriate.") (internal citations and quotations omitted).

⁴⁵ *Id.*

⁴⁶ See *Apex Frozen Foods Private Ltd.*, 862 F.3d at 1337.

it is reasonable for Commerce to presume that A-A cannot account for the pattern of significant price differences because, unlike A-T, A-A cannot uncover the dumping that was masked by the differentially priced sales. The fact that A-A was unable to calculate more than a negligible dumping margin while A-T was able to is reason enough to demonstrate that A-A could not account for the pattern of significant price differences here.⁴⁷

Here, the A-to-A and A-to-T methodologies calculated different dumping margins. This result demonstrates that the A-to-A method cannot account for the pattern of significant price differences.

Finally, we disagree with Daejin's arguments regarding Commerce's treatment of negative margins in light of WTO reports, including the WTO Appellate Body's findings in *US – Washing Machines (Korea)*. The CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA).⁴⁸ In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.⁴⁹ As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically supersede the exercise of Commerce's discretion in applying the statute.⁵⁰ We have not revised or changed our use of the differential pricing methodology in light of the case cited by Daejin, nor has the United States adopted changes to its methodology pursuant to the URAA's implementation procedure. Accordingly, for the final results, we will continue to apply our differential pricing methodology.

Kowire-Specific Issues

Comment 5: Date of Sale

The Petitioner's Comments

- At verification, Commerce found inconsistencies regarding the specific date on which the terms of sale were finalized for particular sales in Kowire's U.S. sales database. Specifically, for certain sales, there was a substantial delay between the recorded shipment date and invoicing.
- The reported shipment date was based on the date that merchandise was shipped from Kowire's factory to a Container Freight Station (CFS), where the merchandise awaited consolidation into a complete shipment. However, in some instances, Kowire was still determining key terms of sale for the subject transactions, even after the merchandise arrived at CFS. Therefore, because material terms of sale were not always fixed at the time of shipment from the factory, the factory shipment date should not be used as the date of sale.
- Rather than using the earlier of shipment date or invoice date, Commerce should rely

⁴⁷ See *Apex II*, 144 F. Supp. 3d 1308 at 1332-1335.

⁴⁸ See *Corus Staal BV v. U.S. Dep't of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied 126 S. Ct. 1023 (2006), accord *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

⁴⁹ See, e.g., 19 U.S.C. 3533, 3538 (sections 123 and 129 of the URAA).

⁵⁰ See e.g., 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary).

solely on the invoice date as the date of sale for all transactions reported in Kowire's U.S. sales file. Such an approach would be consistent with 19 CFR 351.401(i), which provides that the date of invoice is presumptively the proper date of sale unless and until a respondent can establish otherwise.

Kowire's Rebuttal Comments

- It is Commerce's longstanding practice to use the earlier of shipment date or invoice date as the date of sale for U.S. sales.
- Although there was a substantial lag between factory shipment and invoice date for a small number of transactions that were held at the CFS location, such delays were anomalies.
- Commerce should not adjust the reported U.S. date of sale for all of Kowire's U.S. sales merely because a few transactions, which represent a clear divergence from Kowire's normal sales practice, had longer-than-usual holding times at the CFS prior to vessel loading.
- Typically, at the time that merchandise was prepared for shipment at Kowire's facility, the customer was known, the quantity was known, and the destination was known. Accordingly, the date of shipment from Kowire's factory can be relied on as the date of sale.

Commerce's Position: We agree with the petitioner. In our review of Kowire's U.S. sales database, we observed that there were a significant number of sales that experienced a delay between factory shipment and invoicing. We selected several of the sales with the longest periods of delay for further examination at verification.⁵¹ Our analysis of these sales at verification revealed multiple instances where key terms of sale were not firmly established at the time of factory shipment.⁵² As a result, we find that it is inappropriate to use factory shipment date as the date of sale for these shipments.

Additionally, there is no practical way to determine whether the key terms of sale for all other sales were fixed at the time of shipment from the factory. Therefore, for the final results, consistent with our regulation and practice, we find it appropriate to change the date of sale for all sales to invoice date.⁵³

Comment 6: Relationship with Subcontractor A⁵⁴

The Petitioner's Comments

- Commerce's finding that Subcontractor A (owned and operated by Owner A),⁵⁵ which provided processing services to Kowire, was not affiliated with Kowire was contrary to

⁵¹ See Kowire Verification Report at 11-12.

⁵² See *id.*

⁵³ See Memorandum, "Analysis Memorandum for the Final Determination of the Antidumping Duty Administrative Review of Certain Steel Nails from the Republic of Korea: Korea Wire Co., Ltd.," (Kowire Final Analysis Memorandum) dated concurrently with this memorandum.

⁵⁴ We have omitted names and identifying details in our discussion of Kowire's relationship with its subcontractor. The corresponding business proprietary information is contained in the Kowire Final Analysis Memorandum, dated concurrently with this memorandum.

⁵⁵ See Kowire Final Analysis Memorandum at III.A.1 and III.A.2.

the record of this review and precedent.

- This case is not analogous to the *Nails from Taiwan* investigation and subsequent CIT case, a precedent relied on by Commerce in the preliminary results. Commerce discussed five of the key factors considered in *Nails from Taiwan* in its preliminary analysis; however, contrary to Commerce's interpretation, these factors do not suggest that Subcontractor A was able to act independently from Kowire during the POR. In fact, these criteria actually support a finding of control/affiliation here.
- First, Subcontractor A was not operating prior to doing business with Kowire, and never performed processing services for any company other than Kowire. Although Commerce noted that the owner/employee of the subcontractor previously worked at another company, that fact is irrelevant, because it is Subcontractor A rather than Owner A that is under consideration.
- Second, Commerce's conclusion that Kowire was not prevented from providing services to other companies was unsupported by substantial evidence. Kowire claims that, pursuant to the informal agreement between Kowire and Subcontractor A, Subcontractor A was permitted to provide processing services to other companies. However, the fact that Subcontractor A never actually did so indicates that such restrictions were, in fact, in place.
- Third, Kowire's assertion that it could switch to other tolling companies for processing services was unsupported by substantial evidence.
- Fourth, the relationship between Kowire and Subcontractor A represented an employer-employee relationship, supporting a finding of affiliation.
- Fifth, the relationship between Kowire and Subcontractor A had the ability to affect the production, pricing and cost of the subject merchandise.

Kowire's Rebuttal Comments

- Commerce has determined, on two occasions, that Kowire and Subcontractor A are not affiliated. The petitioner does not point to a single fact that renders Commerce's determination unreasonable or unsupported by substantial evidence, and the factual underpinnings of Commerce's decision were verified.
- The focus of Commerce' inquiry regarding affiliation between Kowire and Subcontractor A, via a close supplier relationship, is whether one entity functionally controlled the other. Based on the totality of the circumstances, Commerce determined that Kowire did not functionally control Subcontractor A.
- The fact that Subcontractor A did not exercise its right to provide services to other manufacturers does not constitute evidence that Subcontractor A did not have such a right. As in the prior administrative review, Commerce weighed the evidence and determined that there was no restriction on Subcontractor A's ability to provide such services to other parties.
- The relationship between Kowire and Subcontractor A during the POR did not amount to an employer-employee relationship. Commerce credited Kowire's explanation that Kowire could not dictate Subcontractor A's production schedule. Furthermore, Kowire provided an explanation as to why the less formal relationship between Kowire and Subcontractor A was appropriate under the circumstances. The fact that Owner A provided the same services before and after his hiring by Kowire is unsurprising, and does compel a conclusion that an employer-employee relationship was established

while he was formally employed at Subcontractor A. Finally, Kowire provided an explanation of the ways that the parties' relationship changed after Owner A's hiring.

- Kowire provided substantial evidence that it relied on a separate subcontracting relationship for processing services. This second relationship supports Commerce's conclusion that Kowire did not have control over Subcontractor A.
- Although the petitioner highlights differences between *Nails from Taiwan* and this case, none of the differences indicate that the fundamental holding of *Nails from Taiwan*, that long-standing/exclusive relationships are not dispositive on the issue of affiliation, is inapplicable here.
- The specific processing conducted by Subcontractor A represents an extremely minor portion of Kowire's business. This fact belies the petitioner's claim that the nature of the tolling relationship between Kowire and Subcontractor A can affect the production, pricing, or cost of finished steel nails.

Commerce's Position: In the preliminary results of this review, we found that the facts did not change between this review period and the first administrative review (AR1) period, and we continued to find that Kowire and Subcontractor A were not affiliated.⁵⁶ The petitioner asserts that we should reconsider our earlier finding. We disagree as there are no additional or new material facts to consider.

In our preliminary results, as in AR1, we based our determination that Kowire and Subcontractor A were not affiliated on numerous factors.⁵⁷ These factors have been identified as key indicia of whether a close supplier relationship amounts to an affiliation.⁵⁸ In our analysis, we highlighted that (1) Subcontractor A's owner/operator had experience working with another nail manufacturer prior to working with Kowire, (2) the record did not support a finding that Subcontractor A was prohibited from providing services to other companies, (3) a second toller provided Kowire with the services in question, (4) the record did not support a finding that Kowire and Subcontractor A had a typical employer-employee relationship, and (5) the tolling relationship did not have the ability to affect the production, pricing or cost of the subject merchandise or foreign like product.⁵⁹ The petitioner asserts that Commerce's analysis was flawed and argues that we must reevaluate our examination of the above-referenced factors. We treat each argument in turn.

Subcontractor A's Reliance on Kowire

The petitioner emphasizes that Subcontractor A never provided services to companies other than Kowire throughout its existence, and states that "the tolling services to Kowire represented 100%

⁵⁶ See Preliminary Decision Memorandum at 4.

⁵⁷ See Memorandum, "Analysis Memorandum for the Preliminary Determination of the Antidumping Duty Administrative Review of Certain Steel Nails from the Republic of Korea: Korea Wire Co. Ltd.," dated July 5, 2018 (Kowire Preliminary Analysis Memorandum).

⁵⁸ See, e.g., *Certain Steel Nails from Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 FR 28959 (May 20, 2015), as affirmed in *Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1326 (Ct. Intl Trade, March 23, 2017) (*Nails from Taiwan*), at 1334-35.

⁵⁹ See Kowire Preliminary Analysis Memorandum at 2-3.

of {Subcontractor A's} sales for as long as that entity existed.”⁶⁰ The petitioner argues that this fact supports a finding that Subcontractor A is reliant on Kowire. The petitioner also takes issue with Commerce’s observation, in our preliminary results, that the owner of Subcontractor A, Owner A, had previously worked for another nail company performing the same services.⁶¹ The petitioner asserts that this fact is insignificant because it is the toller itself (Subcontractor A), and not the owner/operator of Subcontractor A (Owner A), whose prior experience is relevant.⁶²

We do not agree. The petitioner asks us to ignore the experience of Owner A, because Owner A is a different legal entity than Subcontractor A. However, the petitioner’s interpretation is not consistent with our close supplier relationship inquiry, more generally. The underlying purpose of our inquiry is to assess whether Subcontractor A is reliant on Kowire, or whether Subcontractor A could perform comparable services elsewhere. The fact that Owner A previously worked for another company is directly relevant to whether Subcontractor A – which was a sole proprietorship owned and operated by Owner A during the POR – could conceivably work for another company. The record demonstrates that Owner A has in fact worked for another nail company and this fact supports our finding that Subcontractor A and/or Owner A could perform processing services elsewhere.⁶³

The petitioner also emphasizes that there is only one potentially affiliated toller in this proceeding and suggests that this fact distinguishes this case from earlier cases, such as *Nails from Taiwan*.⁶⁴ We do not agree. First, even where a processor provides services exclusively to a respondent company, based on the underlying facts, we may still find the service provider to be unaffiliated with the respondent.⁶⁵ Second, although the petitioner asserts that Kowire only has a single “potentially affiliated toller,” Kowire did rely on another company to provide similar services during the POR.⁶⁶ Third, even though the number of tollers here is limited to two, this may be explained by the fact that the tollers’ processing services are needed only for a performing a limited set of services. As noted above, Subcontractor A’s contribution to the overall cost of manufacturing is extremely limited.

Contractual Limitations on Subcontractor A

Next, the petitioner asserts that we should find that the informal/oral contract between Kowire and Subcontractor A did, in fact, limit Subcontractor A’s ability to provide services to other companies. The petitioner asserts that, because Subcontractor A never provided such services to other companies throughout the duration of its existence, we must assume that it was prevented from doing so by agreement.⁶⁷ The record does not support this interpretation. As an initial

⁶⁰ Petitioner Brief at 7.

⁶¹ See Kowire Preliminary Analysis Memorandum at 2.

⁶² See Petitioner Brief at 7.

⁶³ See Kowire Verification Report at 5.

⁶⁴ See, e.g., *Certain Steel Nails from Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 FR 28959 (May 20, 2015), as affirmed in *Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1326 (Ct. Intl Trade, March 23, 2017) (*Nails from Taiwan*).

⁶⁵ See, e.g., *Nails from Taiwan*, 219 F. Supp. 3d at 1334.

⁶⁶ See Kowire Final Analysis Memorandum at III.A.3.

⁶⁷ See Petitioner Brief at 10-12.

matter, Kowire and Subcontractor A have repeatedly stated on the record that no such limitation existed.⁶⁸ We did not find any contrary evidence during our review of the questionnaire response or during verification. Additionally, Owner A stated that the arrangement between Kowire and Subcontractor A was intentionally created to be flexible in terms of hours and production capacity.⁶⁹ The fact that Owner A sought a limited production schedule in his relationship with Kowire is consistent with his explanation that Subcontractor A was permitted to – but did not – procure outside work. Ultimately, the petitioner’s argument requires us to speculate, contrary to record evidence, about the informal contract between Kowire and Subcontractor A. We decline to do so. We find that the record here supports a finding that “there was no legal obligation prohibiting the tollers from providing services to other companies.”⁷⁰

Second Subcontractor

The petitioner disagrees with our conclusion that Kowire had a second subcontractor, Subcontractor B,⁷¹ that performed similar processing services on Nail Type A.⁷² The petitioner asserts that Kowire misconstrued its relationship with Subcontractor B. The petitioner bases its claim on several lines from Kowire’s response where Kowire indicated that Subcontractor B was involved in one particular processing step for Nail Type A.⁷³ However, other portions of Kowire’s response indicate that Subcontractor B was, in fact, involved in performing substantially the same processes as Subcontractor A. Because this discussion contains BPI, we have included our analysis of this item in the Kowire Final Analysis Memorandum.⁷⁴

The Nature of the Relationship between Kowire and Subcontractor A

The petitioner also continues to assert that the relationship between Kowire and Subcontractor A during the POR represented a typical employer-employee relationship. The petitioner asserts that there is no evidence to support Kowire’s claim that Subcontractor A’s sole employee, Owner A, was treated differently than any other employee of Kowire while he was working for Subcontractor A. We again disagree.

At verification, we discussed the nature of the relationship between Subcontractor A and Kowire at length.⁷⁵ Owner A stated, consistent with Kowire’s representations to Commerce, that the subcontracting relationship afforded him work and production flexibility.⁷⁶ We did not find evidence to contradict this statement. Additionally, we asked Owner A how the relationship between Subcontractor A and Kowire changed after Kowire hired Owner A as an employee of

⁶⁸ See, e.g., Kowire’s January 23, 2018 Supplemental Questionnaire Response (Kowire January 23, 2018 SQR) at 4-5.

⁶⁹ See *id.* at 3.

⁷⁰ See Kowire Preliminary Analysis Memorandum at 3.

⁷¹ See Kowire Final Analysis Memorandum at III.A.3.

⁷² See *id.* at III.A.4.

⁷³ See *id.* at III.A.5.

⁷⁴ See *id.*

⁷⁵ See Kowire Verification Report at 5.

⁷⁶ See *id.*; see also Kowire January 23, 2018 SQR at 4.

the company.⁷⁷ Owner A stated that he, not unexpectedly, performs the same nail-making operations as before.⁷⁸ However, he also provided examples of ways in that his responsibilities have changed.⁷⁹

During our verification of this issue, we did not find any information that would warrant a departure from our earlier finding that Kowire did not maintain an employer-employee relationship with Owner A during the POR.⁸⁰

Ability to affect the production, pricing or cost of the subject merchandise

Finally, the petitioner disagreed with our conclusion that the relationship between Subcontractor A and Kowire did not have the ability to affect the production, pricing or cost of subject merchandise. The record supports our finding.

First, with respect to Subcontractor A's operations, even though Subcontractor A's machines were housed on Kowire premises, there is no evidence on the record indicating that Subcontractor A was barred from access to that machinery. Kowire and Owner A have also repeatedly stated that Subcontractor A, if it chose to do so, could at any time have ended the arrangements and removed its machinery.⁸¹

Second, with respect to Kowire's operations, we found that Subcontractor A's role in the production process was limited, as it performed particular processing services for a particular product that was not sold at all in the home market, and overall represented a minor portion of Kowire's production and sales. Therefore, Subcontractor A could not have a meaningful effect on the production, pricing or cost of the subject merchandise. This finding is further supported by the record evidence demonstrating that Kowire relied on a second toller to perform substantially the same services, as noted above.

For the reasons stated, and consistent with AR1 and the preliminary results in this review, we continue to find Kowire and Subcontractor A to be not affiliated. As a result, the petitioner's argument regarding application of the transaction disregarded rule to Kowire's purchases of processing services from Subcontractor A is moot.

Comment 7: Affiliated Party Transactions

The Petitioner's Comments

- Commerce should apply the transactions disregarded rule to Kowire's purchases of wire rod from an affiliated supplier. The weighted average market price is greater than the transfer price. Specifically, the affiliated supplier's full purchase cost exceeds both the

⁷⁷ See Kowire Verification Report at 5.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ The petitioner also highlights the fact that Subcontractor A previously had a second employee and implies that this information should have been contained in Kowire's questionnaire response. However, we did not request a full accounting of Subcontractor A's employment history. In the instances where we requested pre-POR information regarding Subcontractor A, the information was provided by Kowire.

⁸¹ See, e.g., Kowire Rebuttal Brief at 10.

transfer price from the affiliated input supplier and Kowire's average purchase price from unaffiliated wire rod suppliers.

Kowire's Rebuttal Comments

- The petitioner's calculation is based on an incorrect application of the law and facts. Kowire's POR weighted-average transfer price to the affiliated supplier exceeds the POR weighted-average market price, which is based on the prices that Kowire paid to unaffiliated suppliers, as well as the supplier's acquisition cost after accounting for SG&A expenses.
- Accordingly, consistent with the preliminary results, Commerce should continue to conclude that no arm's length adjustment is warranted.

Commerce's Position: We agree with Kowire. For the purposes of the transactions disregarded rule, when the respondent purchases inputs from an affiliated supplier, we test the transfer price between the affiliated supplier and the respondent with the available market prices for the input.⁸² Available market prices may relate to a respondent's purchases of the same input directly from unaffiliated suppliers, or an affiliated reseller's average acquisition price plus the affiliated reseller's general expenses.

Here, we have two available sources for a market price. First, we have the prices paid by Kowire directly to unaffiliated suppliers. Second, we have the price Kowire's affiliated supplier paid to its unaffiliated suppliers for the inputs. As we have explained in cases where the affiliated supplier is a trading company that functions as a middleman between the respondent and the unaffiliated supplier, the trading company's cost of providing services (*e.g.*, the cost of purchasing the input, taking title to the input, and arranging for the item's sale and transportation to the respondent) should be included in the determination of the market price when performing the transactions disregarded rule analysis.⁸³ Therefore, we must adjust upward the price paid by Kowire's affiliated supplier, based on the supplier's G&A.

Since the two prices referenced above represent market prices, we calculated a weighted average market price to use in the transactions disregarded analysis. Using this composite price for our analysis, we found that Kowire's POR weighted-average transfer price to its affiliate exceeds the POR weighted-average market price.⁸⁴ Accordingly, we continue to find that no arm's length adjustment is warranted.

VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish the final results of this

⁸² See *Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium: Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part*, 82 FR 16378 (April 4, 2017), and accompanying Issues and Decision Memorandum at Comment 6.

⁸³ See *id.*

⁸⁴ See Kowire Final Analysis Memorandum.

administrative review in the *Federal Register*.



Agree

Disagree

2/8/2019

X 

Signed by: CHRISTIAN MARSH

Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance