



A-588-874
Administrative Review
POR: 10/01/2017 - 09/30/2018
Public Document
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December 10, 2019

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Preliminary Results of
Antidumping Duty Administrative Review and Preliminary
Determination of No Shipments: Certain Hot-Rolled Steel Flat
Products from Japan; 2017-2018

I. SUMMARY

In response to requests from interested parties, the Department of Commerce (Commerce) is conducting an administrative review of the antidumping duty (AD) order on certain hot-rolled steel flat products (hot-rolled steel) from Japan for the period of review (POR) October 1, 2017 through September 30, 2018. This review covers 25 producers/exporters of the subject merchandise. Commerce selected two mandatory respondents for individual examination, Nippon Steel Corporation (NSC)¹ and Tokyo Steel Manufacturing Co., Ltd. (Tokyo Steel). We preliminarily determine that NSC and Tokyo Steel did not make sales of subject merchandise at prices below normal value (NV) during the POR.

II. BACKGROUND

On October 3, 2016, Commerce published in the *Federal Register* the AD order on hot-rolled steel from Japan.² On October 1, 2018, we published in the *Federal Register* a notice of

¹ In a recent completed changed circumstances review, we found that NSC, Nippon Steel Nisshin Co., Ltd. (Nippon Nisshin), and Nippon Steel Trading Corporation (NSTC) are affiliated companies that should be treated as a single entity and as the successor-in-interest to Nippon Steel & Sumitomo Metal Corporation (NSSMC), Nisshin Steel Co., Ltd. (Nisshin Steel), and Nippon Steel & Sumikin Bussan Corporation (NSSBC), respectively. See *Certain Hot-Rolled Steel Flat Products from Japan: Notice of Final Results of Antidumping Duty Changed Circumstances Review*, 84 FR 46713 (September 5, 2019).

² See *Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Republic of Korea, the Netherlands, the Republic of Turkey, and the United Kingdom: Amended Final Affirmative Antidumping Determinations for*

opportunity to request an administrative review of the *Order*.³ On October 31, 2018, the petitioners⁴ requested an administrative review of 25 Japanese hot-rolled steel producers/exporters.⁵ Tokyo Steel also self-requested an administrative review of its exports to the United States during the POR.⁶ Based on those timely requests, on December 11, 2018, we initiated an administrative review on these 25 companies.⁷

In the *Initiation Notice*, we stated that, in the event we limited the number of respondents selected for individual examination, we intended to select respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports during the POR.⁸ On December 14, 2018, Commerce released U.S. import data from CBP for the purpose of respondent selection, and provided an opportunity for interested parties to comment on these data.⁹ Several interested parties commented on the information contained in the CBP Data Memorandum.¹⁰

As required by the *Initiation Notice*, Honda Trading Canada Inc. (Honda) timely notified Commerce that it made no shipments of subject merchandise during the POR.¹¹

On March 11, 2019, we selected the two producers or exporters accounting for the largest volume of subject merchandise during the POR as mandatory respondents, in alphabetical order, NSC and Tokyo Steel.¹² On March 11, 2019, we issued standard AD questionnaires to NSC and Tokyo Steel.¹³ Tokyo Steel and NSC submitted timely responses to Section A of the Initial

Australia, the Republic of Korea, and the Republic of Turkey and Antidumping Duty Orders, 81 FR 67962 (October 3, 2016) (*Order*).

³ See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 83 FR 49358 (October 1, 2018).

⁴ The petitioners are AK Steel Corporation; ArcelorMittal USA LLC; Nucor Corporation; SSAB Enterprises, LLC; Steel Dynamics, Inc.; and United States Steel Corporation (collectively, the petitioners).

⁵ See Petitioners' Letter, "Tokyo Steel's Request for AD administrative Review: Certain Hot-Rolled Steel Flat Products from Japan," dated October 31, 2018.

⁶ See Tokyo Steel's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: Request for Administrative Review," dated December 26, 2018.

⁷ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 63615 (December 11, 2018) (*Initiation Notice*).

⁸ See *Initiation Notice*, 83 FR at 63615.

⁹ See Memorandum, "Administrative Review of the Antidumping Duty Order on Hot-Rolled Steel Flat Products from Japan: Release of U.S. Customs Entry Data for Respondent Selection," dated December 14, 2018 (CBP Data Memorandum). The deadline was then extended to December 26, 2018.

¹⁰ See Tokyo Steel's Letter, "Tokyo Steel's Comments on CBP Data, Certain Hot-Rolled Steel Flat Products from Japan," dated December 26, 2018; see also Toyota Tsusho Corporation's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: Toyota Tsusho Corporation is Not an Appropriate Respondent," dated December 26, 2018; and Mitsui & Co., Ltd.'s Letter, "Antidumping Administrative Review of Certain Hot-Rolled Steel Flat Products from Japan: Mitsui Comment on U.S. Entry Documents Placed on the Record," dated December 27, 2018.

¹¹ See Honda's Letter "Administrative Review of Certain Hot-Rolled Steel Flat Products from Japan: Honda Trading Canada, Inc.'s No Shipment Certification," dated December 20, 2018.

¹² See Memorandum "Respondent Selection for the 2017-2018 Antidumping Duty Administrative Review of Certain Hot-Rolled Steel Flat Products from Japan," dated March 11, 2019.

¹³ See Commerce's Letters, "Antidumping Duty Questionnaire," dated March 11, 2019 (Initial Questionnaire). We sent the Initial Questionnaire to NSC and Tokyo Steel.

Questionnaire on April 1, and April 9, 2019,¹⁴ respectively, and to the remaining sections of the Initial Questionnaire on May 1, 2019.¹⁵

On October 17, 2019, Commerce issued a supplemental questionnaire to Tokyo Steel regarding its responses to sections A through D of the Initial Questionnaire, and Commerce received responses to this supplemental questionnaire on November 12, 2019.¹⁶ On October 18, 2019, Commerce issued a supplemental questionnaire to NSC regarding its responses to sections A through E of the Initial Questionnaire, and Commerce received responses to this supplemental questionnaire on November 15 and 18, 2019.¹⁷ In addition, Commerce issued a supplemental questionnaire to Tokyo Steel and received a timely response on November 22, 2019.¹⁸

The petitioners commented on NSC's questionnaire responses on May 6 and June 7, 2019.¹⁹ The petitioners commented on Tokyo Steel's questionnaire responses on July 26, 2019.²⁰ On May 21 and July 29, 2019, NSC responded to the petitioners' comments on NSC's initial questionnaire responses.²¹ On December 2, 2019, the petitioners submitted rebuttal factual information on Tokyo Steel's supplemental questionnaire response.²² On December 5, 2019, Tokyo Steel

¹⁴ See Tokyo Steel's Letter, "Tokyo Steel's Section A Questionnaire Response - Certain Hot-Rolled Steel Flat Products from Japan," dated April 1, 2019 (Tokyo Steel's AQR); see also NSC's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: NSC's Response to the Department's Section A Questionnaire," dated April 9, 2019 (NSC's AQR).

¹⁵ See NSC's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: NSC's Response to the Department's Section B Questionnaire," dated May 1, 2019 (NSC's BQR); NSC's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: NSC's Response to the Department's Section C Questionnaire," dated May 1, 2019 (NSC's CQR); NSC's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: NSC's Response to the Department's Section D Questionnaire," dated May 1, 2019 (NSC's DQR); NSC's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: NSC's Response to the Department's Section E Questionnaire," dated May 1, 2019 (NSC's EQR); Tokyo Steel's Letter, "Tokyo Steel's Section B Questionnaire Response Certain Hot-Rolled Steel Flat Products from Japan," dated May 1, 2019 (Tokyo Steel's BQR); Tokyo Steel's Letter, "Tokyo Steel's Section C Questionnaire Response Certain Hot-Rolled Steel Flat Products from Japan," dated May 1, 2019 (Tokyo Steel's CQR); and Tokyo Steel's Letter, "Tokyo Steel's Section D Questionnaire Response Certain Hot-Rolled Steel Flat Products from Japan," dated May 1, 2019 (Tokyo Steel's DQR).

¹⁶ See Tokyo Steel's Letter, "Tokyo Steel's First Supplemental Response, Certain Hot-Rolled Steel Flat Products from Japan," dated November 12, 2019 (Tokyo Steel's SQR1).

¹⁷ See NSC's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: NSC's Response to Commerce's Sections B, C, D and E Supplemental Questionnaire," dated November 15, 2019 (NSC's SQR).

¹⁸ See Tokyo Steel's Letter, "Tokyo Steel's Second Supplemental Response, Certain Hot-Rolled Steel Flat Products from Japan," dated November 22, 2019 (Tokyo Steel's SQR2).

¹⁹ See Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from Japan: Deficiency Comments on NSC's Section A Questionnaire Response," dated May 6, 2019; see also Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from Japan: Deficiency Comments on NSC's Section A Questionnaire Response," dated June 7, 2019.

²⁰ See Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from Japan: Deficiency Comments on Tokyo Steel's Questionnaire Response," dated July 26, 2019.

²¹ See NSC's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: NSC's Rebuttal to Petitioner's Comments on NSC's Section A Response," dated May 21, 2019; NSC's Letter, "Certain Hot-Rolled Steel Flat Products from Japan: NSC's Rebuttal to Petitioner's Comments on NSC's Sections B-E Response," dated July 29, 2019.

²² See Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from Japan: Rebuttal Factual Information on Tokyo Steel's Supplemental Questionnaire Response," dated December 2, 2019.

submitted a request to reject the petitioners' rebuttal factual information.²³ On December 6, 2019, the petitioners submitted pre-preliminary comments on NSC.²⁴ On December 9, 2019, the petitioners submitted pre-preliminary comments on Tokyo Steel.²⁵

On January 28, 2019, Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018 through the resumption of operations on January 29, 2019.²⁶ On July 29, 2019, we extended the deadline for the preliminary results of this review by 88 days.²⁷ On October 22, 2019, we extended the deadline for the preliminary results of this review by an additional 32 days, resulting in a deadline of December 10, 2019 for these preliminary results.²⁸

We are conducting this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

III. SCOPE OF THE ORDER

The products covered by this order are certain hot-rolled, flat-rolled steel products, with or without patterns in relief, and whether or not annealed, painted, varnished, or coated with plastics or other non-metallic substances. The products covered do not include those that are clad, plated, or coated with metal. The products covered include coils that have a width or other lateral measurement ("width") of 12.7 mm or greater, regardless of thickness, and regardless of form of coil (*e.g.*, in successively superimposed layers, spirally oscillating, etc.). The products covered also include products not in coils (*e.g.*, in straight lengths) of a thickness of less than 4.75 mm and a width that is 12.7 mm or greater and that measures at least 10 times the thickness. The products described above may be rectangular, square, circular, or other shape and include products of either rectangular or non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been "worked after rolling" (*e.g.*, products which have been beveled or rounded at the edges). For purposes of the width and thickness requirements referenced above:

²³ See Tokyo Steel's Letter, "Tokyo Steel's Request to Reject Petitioner's December 2nd Submission," dated December 5, 2019.

²⁴ See Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from Japan: Pre-Preliminary Comments on NSC's Questionnaire Responses," dated December 6, 2019.

²⁵ See Petitioners' Letter, "Certain Hot-Rolled Steel Flat Products from Japan: Pre-Prelim Comments on Tokyo Steel's Questionnaire Responses," December 9, 2019.

²⁶ See Memorandum to the Record from 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, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.

²⁷ See Memorandum, "Certain Hot-Rolled Steel Flat Products from Japan: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review – 2017-2018," dated July 29, 2019.

²⁸ See Memorandum, "Certain Hot-Rolled Steel Flat Products from Japan: Extension of Deadline for Preliminary Results of Antidumping Duty Administrative Review – 2017-2018," dated October 22, 2019.

- (1) where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the resulting measurement makes the product covered by the existing antidumping²⁹ or countervailing duty³⁰ orders on Certain Cut-To-Length Carbon-Quality Steel Plate Products From the Republic of Korea (A-580-836; C-580-837), and
- (2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, etc.), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

- 2.50 percent of manganese, or
- 3.30 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 2.00 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium, or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium.

Unless specifically excluded, products are included in this scope regardless of levels of boron and titanium.

For example, specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, the substrate for motor lamination steels, Advanced High Strength Steels (AHSS), and Ultra High Strength Steels (UHSS). IF steels are recognized as low carbon steels with micro-alloying levels

²⁹ See Notice of Amendment of Final Determinations of Sales at Less Than Fair Value and Antidumping Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate Products From France, India, Indonesia, Italy, Japan and the Republic of Korea, 65 FR 6585 (February 10, 2000).

³⁰ See Notice of Amended Final Determinations: Certain Cut-to-Length Carbon-Quality Steel Plate From India and the Republic of Korea; and Notice of Countervailing Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate From France, India, Indonesia, Italy, and the Republic of Korea, 65 FR 6587 (February 10, 2000).

of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum. AHSS and UHSS are considered high tensile strength and high elongation steels, although AHSS and UHSS are covered whether or not they are high tensile strength or high elongation steels.

Subject merchandise includes hot-rolled steel that has been further processed in a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the hot-rolled steel.

All products that meet the written physical description, and in which the chemistry quantities do not exceed any one of the noted element levels listed above, are within the scope of this order unless specifically excluded. The following products are outside of and/or specifically excluded from the scope of this order:

- Universal mill plates (*i.e.*, hot-rolled, flat-rolled products not in coils that have been rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, of a thickness not less than 4.0 mm, and without patterns in relief);
- Products that have been cold-rolled (cold-reduced) after hot-rolling;³¹
- Ball bearing steels;³²
- Tool steels;³³ and
- Silico-manganese steels;³⁴

The products subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7208.10.1500, 7208.10.3000, 7208.10.6000,

³¹ For purposes of this scope exclusion, rolling operations such as a skin pass, levelling, temper rolling or other minor rolling operations after the hot-rolling process for purposes of surface finish, flatness, shape control, or gauge control do not constitute cold-rolling sufficient to meet this exclusion.

³² Ball bearing steels are defined as steels which contain, in addition to iron, each of the following elements by weight in the amount specified: (i) not less than 0.95 nor more than 1.13 percent of carbon; (ii) not less than 0.22 nor more than 0.48 percent of manganese; (iii) none, or not more than 0.03 percent of sulfur; (iv) none, or not more than 0.03 percent of phosphorus; (v) not less than 0.18 nor more than 0.37 percent of silicon; (vi) not less than 1.25 nor more than 1.65 percent of chromium; (vii) none, or not more than 0.28 percent of nickel; (viii) none, or not more than 0.38 percent of copper; and (ix) none, or not more than 0.09 percent of molybdenum.

³³ Tool steels are defined as steels which contain the following combinations of elements in the quantity by weight respectively indicated: (i) more than 1.2 percent carbon and more than 10.5 percent chromium; or (ii) not less than 0.3 percent carbon and 1.25 percent or more but less than 10.5 percent chromium; or (iii) not less than 0.85 percent carbon and 1 percent to 1.8 percent, inclusive, manganese; or (iv) 0.9 percent to 1.2 percent, inclusive, chromium and 0.9 percent to 1.4 percent, inclusive, molybdenum; or (v) not less than 0.5 percent carbon and not less than 3.5 percent molybdenum; or (vi) not less than 0.5 percent carbon and not less than 5.5 percent tungsten.

³⁴ Silico-manganese steel is defined as steels containing by weight: (i) not more than 0.7 percent of carbon; (ii) 0.5 percent or more but not more than 1.9 percent of manganese, and (iii) 0.6 percent or more but not more than 2.3 percent of silicon.

7208.25.3000, 7208.25.6000, 7208.26.0030, 7208.26.0060, 7208.27.0030, 7208.27.0060, 7208.36.0030, 7208.36.0060, 7208.37.0030, 7208.37.0060, 7208.38.0015, 7208.38.0030, 7208.38.0090, 7208.39.0015, 7208.39.0030, 7208.39.0090, 7208.40.6030, 7208.40.6060, 7208.53.0000, 7208.54.0000, 7208.90.0000, 7210.70.3000, 7211.14.0030, 7211.14.0090, 7211.19.1500, 7211.19.2000, 7211.19.3000, 7211.19.4500, 7211.19.6000, 7211.19.7530, 7211.19.7560, 7211.19.7590, 7225.11.0000, 7225.19.0000, 7225.30.3050, 7225.30.7000, 7225.40.7000, 7225.99.0090, 7226.11.1000, 7226.11.9030, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.5000, 7226.91.7000, and 7226.91.8000. The products subject to the order may also enter under the following HTSUS numbers: 7210.90.9000, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7214.99.0060, 7214.99.0075, 7214.99.0090, 7215.90.5000, 7226.99.0180, and 7228.60.6000.

The HTSUS subheadings above are provided for convenience and U.S. Customs and Border Protection purposes only. The written description of the scope of the order is dispositive.

IV. PRELIMINARY DETERMINATION OF NO SHIPMENTS

Among the companies under review, Honda Trading Canada, Inc. (Honda) properly filed a certification reporting that it made no shipments of subject merchandise to the United States during the POR. Commerce issued an instruction to the U.S. Customs and Border Protection (CBP) asking for any entry activity regarding Honda, and is awaiting CBP's response.³⁵ Based on the certification submitted by Honda, we preliminarily determine that Honda had no shipments during the POR.³⁶

Thus, we preliminarily determine that Honda had no shipments of subject merchandise to the United States during the POR. Also, consistent with our practice, we will not rescind the review with respect to Honda but, rather, will complete the review and issue instructions to CBP based on the final results of this review.³⁷

V. USE OF FACTS AVAILABLE AND ADVERSE FACTS AVAILABLE

A. Legal Authority

Sections 776(a)(1) and 776(a)(2) of the Act provide that Commerce shall, subject to section 782(d) of the Act, apply facts otherwise available in reaching the applicable determination if necessary information is not on the record, or if an interested party: (A) withholds information that has been requested by Commerce; (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding; or (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act.

³⁵ See No Shipment Inquiry to CBP dated December 9, 2019.

³⁶ See Honda's Letter, "Administrative Review of Certain Hot-Rolled Steel Flat Products from Japan: Honda Trading Canada, Inc.'s No Shipment Certification," dated December 20, 2018.

³⁷ See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

Section 782(c)(1) of the Act provides that, if an interested party “promptly after receiving a request from {Commerce} for information, notifies {Commerce} that such party is unable to submit the information requested in the requested form and manner,” Commerce shall consider the ability of the interested party to provide the requested information, and may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if Commerce determines that a response to a request for information does not comply with the request, Commerce shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person an opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, Commerce may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that Commerce shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that Commerce may use an adverse inference in selecting from among the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In doing so, Commerce is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.³⁸ Section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. In addition, the SAA explains that Commerce may employ an adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”³⁹ Further, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.⁴⁰ The Court of Appeals for the Federal Circuit, in *Nippon Steel*, explained that the ordinary meaning of “best” means “one’s maximum effort,” and that the statutory mandate that a respondent act

³⁸ See Section 776(b)(1)(B) of the Act.

³⁹ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, Vol. 1, 103d Cong. (1994) (SAA) at 870.

⁴⁰ See, e.g., *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*); *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); *Antidumping Duties, Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997) (*Preamble*).

to the “best of its ability” requires the respondent to do the maximum it is able to do.⁴¹ Further, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.⁴²

Section 776(c) of the Act provides that, when Commerce relies on secondary information rather than on information obtained in the course of a review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.⁴³

B. Application of Facts Available to NSC

As noted further below in this section, NSC did not provide certain requested information necessary for Commerce to calculate dumping margins for NSC in this review. Specifically, NSC did not submit the downstream sales of certain affiliated home market resellers whose sales failed the arm’s-length test. As such, necessary information is not on the record of this review. In addition, NSC withheld information requested by Commerce, failed to provide such information by the deadlines for submission of the information or in the form and manner requested by Commerce, and significantly impeded this proceeding. Accordingly, the use of facts available is warranted in determining a weighted-average margin for NSC, pursuant to sections 776(a)(1) and (2)(A), (B), and (C) of the Act.

C. Application of Facts Available with an Adverse Inference

In the initial and supplemental questionnaires, Commerce requested that where sales between NSC and its home market affiliated resellers were not made at arm’s length, NSC also report the downstream sales of such affiliates.⁴⁴ NSC’s sales to these affiliated customers accounted for more than five percent of its total sales of foreign-like product in the home market,⁴⁵ therefore, NSC is required to report affiliated resales that failed the arm’s length test. In its supplemental questionnaire response, NSC stated that it was unable to obtain the downstream sales for certain affiliated resellers, although it expended a significant amount of time and resources attempting to collect all downstream sales data.⁴⁶ NSC also stated that it had made multiple rounds of requests and put the correspondence in which it requested the resale information from its affiliated resellers on the record.⁴⁷ NSC reported that certain affiliated resellers could not and/or would not provide this information in the detail and format required by Commerce.⁴⁸

⁴¹ See *Nippon Steel*, 337 F.3d at 1382.

⁴² *Id.* at 1382-83; see also *Preamble*, 62 FR at 27340.

⁴³ See 19 CFR 351.308(c)(1).

⁴⁴ See Commerce’s initial questionnaire and supplemental questionnaires.

⁴⁵ See NSC’s BQR and Home Sales database.

⁴⁶ See NSC’s SQR at 3-5.

⁴⁷ See NSC’s SQR at Revised Exhibit B-23.

⁴⁸ See NSC’s SQR at 3-5.

Notwithstanding NSC's efforts, necessary home market price data are missing from the record. The home market sales information is fundamental data, without which Commerce cannot perform the dumping calculation as required by the statute. Additionally, a uniform application of the requirement that respondents report downstream sales in situations where the sale between the respondent and the affiliated party are not made at arm's length mitigates the potential and incentive for manipulation of the margin calculations by respondent parties. Respondents have the ability to cease selling to, or continuing to do business with, an affiliate if that party declines to provide the necessary information requested by Commerce. Further, it is NSC's own business decisions that determine whether the requirement to report downstream sales applies, as it is the one that establishes the prices to its affiliates, and is thus in a position to make them at arm's-length prices or not. NSC argues that Japanese law prevents them from obtaining the data; however, NSC has not demonstrated that Japanese law requires NSC to sell to the uncooperative affiliates. Moreover, even if the Japanese law did apply to this circumstance, there is no provision of the U.S antidumping statute that provides that countries can legislate away respondents' obligations to submit relevant data in an antidumping proceeding to shield respondents from the adverse consequences of not providing the data required to perform dumping calculations. We have preliminarily determined that NSC is in a position to induce these companies to report their downstream sales.⁴⁹ As such, NSC has failed to cooperate to the best of its ability in obtaining these companies' downstream sales. Pursuant to 776(b) of the Act, we are using an adverse inference in applying the facts otherwise available, because NSC has failed to cooperate to the best of its ability to comply with our request for information. As adverse facts available, we have preliminarily applied the highest unaffiliated home market price of the commonly sold CONNUMs to the unreported downstream sales at issue.⁵⁰

VI. RATES FOR NON-EXAMINED COMPANIES

The statute and Commerce's regulations do not address the establishment of a rate to be applied to companies not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in a market economy investigation, for guidance when calculating the rate for companies which were not selected for individual examination in an administrative review. Under section 735(c)(5)(A) of the Act, the all-others rate is normally "an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero or *de minimis* margins, and any margins determined entirely {on the basis of facts available}."

In this review, we have preliminarily calculated weighted-average dumping margins for NSC and Tokyo Steel that are zero. Accordingly, Commerce preliminarily has assigned to the companies not individually examined a margin of 0.00 percent.

⁴⁹ See NSC's SQR at Revised Exhibit B-23.

⁵⁰ See NSC Preliminary Calculation Memorandum.

VII. DISCUSSION OF THE METHODOLOGY

A. Normal Value Comparisons

Pursuant to section 773(a) of the Act and 19 CFR 351.414(c)(1) and (d), in order to determine whether NSC's and Tokyo Steel's sales of subject merchandise were made at less than NV, Commerce compared the export price (EP) or constructed export price (CEP), as appropriate, to the NV as described in the "Export Price and Constructed Export Price" and "Normal Value" sections of this memorandum.

1. Determination of Comparison Method

Pursuant to 19 CFR 351.414(c)(1), Commerce calculates weighted-average dumping margins by comparing weighted-average NVs to weighted-average EPs (or CEPs) (*i.e.*, the average-to-average method) unless the Secretary determines that another method is appropriate in a particular situation. In less-than-fair-value investigations, Commerce examines whether to compare weighted-average NVs with the EPs (or CEPs) of individual sales (*i.e.*, the average-to-transaction method) as an alternative comparison method using an analysis consistent with section 777A(d)(1)(B) of the Act. Although section 777A(d)(1)(B) of the Act does not strictly govern Commerce's examination of this question in the context of administrative reviews, Commerce nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in administrative reviews is, in fact, analogous to the issue in less-than-fair-value investigations.⁵¹

In recent investigations, Commerce applied a "differential pricing" analysis for determining whether application of the average-to-transaction method is appropriate in a particular situation pursuant to 19 CFR 351.414(c)(1) and section 777A(d)(1)(B) of the Act.⁵² Commerce finds that the differential pricing analysis used in recent investigations may be instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. Commerce will continue to develop its approach in this area based on comments received in this and other proceedings, and on Commerce's additional experience with addressing the potential masking of dumping that can occur when Commerce uses the average-to-average method in calculating a respondent's weighted-average dumping margin.

The differential pricing analysis used in these preliminary results examines whether there exists a pattern of prices for comparable merchandise that differ significantly among purchasers, regions,

⁵¹ See *Ball Bearings and Parts Thereof from France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews*; 2010–2011, 77 FR 73415 (December 10, 2012), and accompanying Issues and Decision Memorandum (IDM) at Comment 1; *Apex Frozen Foods Private Ltd. v. United States*, 37 F. Supp. 3d 1286, 1322 (CIT 2014), *aff'd*, 862 F. 3d 1337 (Fed. Cir. 2017); and *JBF RAK LLC v. United States*, 790 F.3d 1358, 1363–65 (Fed. Cir. 2015) ("{t}he fact that the statute is silent with regard to administrative reviews does not preclude Commerce from filling gaps in the statute to properly calculate and assign antidumping duties") (citations omitted).

⁵² See, e.g., *Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair*, 78 FR 33351 (June 4, 2013); see also *Steel Concrete Reinforcing Bar from Mexico: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 79 FR 54967 (September 15, 2014); and *Welded Line Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 80 FR 61362 (October 13, 2015).

or time periods. The analysis evaluates all export sales by purchaser, region and time period to determine whether a pattern of prices that differ significantly exists. If such a pattern is found, then the differential pricing analysis evaluates whether such differences can be taken into account when using the average-to-average method to calculate the weighted-average dumping margin. The analysis incorporates default group definitions for purchasers, regions, time periods, and comparable merchandise. Purchasers are based on the reported (consolidated) customer codes. Regions are defined using the reported destination code (*i.e.*, zip, state) and are grouped into regions based upon standard definitions published by the U.S. Census Bureau. Time periods are defined by the quarter within the POR based upon the reported date of sale. For purposes of analyzing sales transactions by purchaser, region and time period, comparable merchandise is defined using the product control number and all characteristics of the U.S. sales, other than purchaser, region and time period, that Commerce uses in making comparisons between EP (or CEPs) and NV for the individual dumping margins.

In the first stage of the differential pricing analysis used here, the “Cohen’s *d* test” is applied. The Cohen’s *d* coefficient is a generally recognized statistical measure of the extent of the difference between the mean (*i.e.*, weighted-average price) of a test group and the mean (*i.e.*, weighted-average price) of a comparison group. First, for comparable merchandise, the Cohen’s *d* coefficient is calculated when the test and comparison groups of data for a particular purchaser, region or time period each have at least two observations, and when the sales quantity for the comparison group accounts for at least five percent of the total sales quantity of the comparable merchandise. Then, the Cohen’s *d* coefficient is used to evaluate the extent to which the prices to the particular purchaser, region, or time period differ significantly from the prices of all other sales of comparable merchandise. The extent of these differences can be quantified by one of three fixed thresholds defined by the Cohen’s *d* test: small, medium, or large (0.2, 0.5 and 0.8, respectively). Of these thresholds, the large threshold provides the strongest indication that there is a significant difference between the mean of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists. For this analysis, the difference is considered significant, and the sales in the test group are found to pass the Cohen’s *d* test, if the calculated Cohen’s *d* coefficient is equal to or exceeds the large (*i.e.*, 0.8) threshold.

Next, the “ratio test” assesses the extent of the significant price differences for all sales as measured by the Cohen’s *d* test. If the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test account for 66 percent or more of the value of total sales, then the identified pattern of prices that differ significantly supports the consideration of the application of the average-to-transaction method to all sales as an alternative to the average-to-average method. If the value of sales to purchasers, regions, and time periods that pass the Cohen’s *d* test accounts for more than 33 percent and less than 66 percent of the value of total sales, then the results support consideration of the application of an average-to-transaction method to those sales identified as passing the Cohen’s *d* test as an alternative to the average-to-average method, and application of the average-to-average method to those sales identified as not passing the Cohen’s *d* test. If 33 percent or less of the value of total sales passes the Cohen’s *d* test, then the results of the Cohen’s *d* test do not support consideration of an alternative to the average-to-average method.

If both tests in the first stage (*i.e.*, the Cohen's *d* test and the ratio test) demonstrate the existence of a pattern of prices that differ significantly such that an alternative comparison method should be considered, then in the second stage of the differential pricing analysis, Commerce examines whether using only the average-to-average method can appropriately account for such differences. In considering this question, Commerce tests whether using an alternative comparison method, based on the results of the Cohen's *d* and ratio tests described above, yields a meaningful difference in the weighted-average dumping margin as compared to that resulting from the use of the average-to-average method only. If the difference between the two calculations is meaningful, then this demonstrates that the average-to-average method cannot account for differences such as those observed in this analysis, and, therefore, an alternative comparison method would be appropriate. A difference in the weighted-average dumping margins is considered meaningful if 1) there is a 25 percent relative change in the weighted-average dumping margins between the average-to-average method and the appropriate alternative method where both rates are above the *de minimis* threshold, or 2) the resulting weighted-average dumping margins between the average-to-average method and the appropriate alternative method move across the *de minimis* threshold.

Interested parties may present arguments and justifications in relation to the above-described differential pricing approach used in these preliminary results, including arguments for modifying the group definitions used in this proceeding.

2. *Results of the Differential Pricing Analysis*

NSC

Based on the results of the differential pricing analysis, Commerce preliminarily finds that 30.59 percent of the value of U.S. sales pass the Cohen's *d* test, and does not confirm the existence of a pattern of prices that differ significantly among purchasers, regions or time periods. Thus, the results of the Cohen's *d* and ratio tests do not support consideration of an alternative to the average-to-average method. Accordingly, Commerce preliminarily determines to apply the average-to-average method for all U.S. sales to calculate the weighted-average dumping margin for NSC.⁵³

Tokyo Steel

For Tokyo Steel, based on the results of the differential pricing analysis, Commerce preliminarily finds that 64.37 percent of the value of U.S. sales pass the Cohen's *d* test, and confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods. Further, Commerce preliminarily determines that there is no meaningful difference between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using an alternative comparison method. Thus, for these preliminary results, Commerce is applying the average-to-

⁵³ See NSC Preliminary Calculation Memorandum.

average method for all U.S. sales to calculate the weighted-average dumping margin for Tokyo Steel.⁵⁴

B. DATE OF SALE

Section 351.401(i) of Commerce's regulations states that, normally, we will use invoice date as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale. Furthermore, if the shipment date precedes the invoice date, then Commerce will use the shipment date as the date of sale. The regulation provides that we may use a date other than the invoice date if Commerce is satisfied that a different date better reflects the data on which the material terms of sale are established.⁵⁵ Furthermore, if the shipment date precedes the invoice date, then Commerce will use the shipment date as the date of sale.⁵⁶

The Court of International Trade (CIT) has stated that a "party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to 'satisfy' Commerce that a different date better reflects the date on which the producer or exporter establishes the material terms of sale."⁵⁷ The date of sale is generally the date on which the parties establish the material terms of the sale,⁵⁸ which normally include the price, quantity, delivery terms and payment terms.⁵⁹

NSC

NSC reported the date of invoice for home market sales as date of sale. For the U.S. market, NSC reported date of invoice for its EP sales and for certain CEP sales made by Steelscape.⁶⁰ Consistent with our regulations and record evidence, we are using the invoice date as the date of sale for these sales. For other CEP sales, Steelscape shipped the subject merchandise prior to the date of invoice. NSC reported the date of shipment as the date of sale for these sales.⁶¹ Consistent with Commerce's practice of using the earlier of shipment or invoice date as the date of sale, we used shipment date as the date of sale in such instances.

⁵⁴ See Tokyo Steel Preliminary Calculation Memorandum.

⁵⁵ See 19 CFR 351.401(i); *Yieh Phui Enterprise Co. v. United States*, 791 F. Supp. 2d 1319 (CIT 2011) (affirming that Commerce may use invoice date unless a party demonstrates that the material terms of its sale were established on another date); and *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090-1092 (CIT 2001).

⁵⁶ See *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 52065 (September 12, 2007), and accompanying IDM at Comment 11; and *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 FR 35497 (May 20, 2002), and accompanying IDM at Comment 2.

⁵⁷ See *Allied Tube & Conduit Corp.*, 132 F. Supp. 2d at 1090 (brackets and citation omitted).

⁵⁸ See 19 CFR 351.401(i).

⁵⁹ See *USEC Inc. v. United States*, 489 F. Supp. 2d 1337, 1055 (CIT 2007).

⁶⁰ See NSC's BQR at B-26, and CQR at C-29.

⁶¹ *Id.*

Tokyo Steel

Tokyo Steel reported the date of invoice as the date of sale for its home market and U.S. sales. Record evidence demonstrates that changes in price or quantity occur after the issuance of the purchase order until the issuance of the invoice.⁶² Moreover, Tokyo Steel always issued the invoices in both markets on or before the date of shipment.⁶³ Consistent with Commerce's regulations and record evidence, we used the invoice date as the date of sale for both markets.

C. PRODUCT COMPARISONS

In accordance with section 771(16) of the Act, we considered all products produced and sold by the respondents in Japan during the POR that fit the description in the "Scope of the Order" section, above, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We compared U.S. sales to sales made in the home market, where appropriate. Where there were no sales of identical merchandise in the home market made in the ordinary course of trade to compare to U.S. sales, we compared U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade.

In making product comparisons, we matched foreign like products based on prime versus non-prime merchandise and the physical characteristics reported by the respondents in the following order of importance: paint, carbon, quality, strength, thickness, width, form, pickled and pattern. For NSC's and Tokyo Steel's sales of hot-rolled steel in the United States, the reported control number (*i.e.* CONNUM) identifies the characteristics of the hot-rolled steel as exported by NSC and Tokyo Steel.

D. EXPORT PRICE AND CONSTRUCTED EXPORT PRICE

Section 772(a) of the Act defines EP as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c)." Section 772(b) of the Act defines CEP as "the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d)." As explained below, we based the U.S. price on EP and CEP for NSC and on EP for Tokyo Steel.

Treatment of Duties Under Section 232 of the Trade Expansion Act of 1962

In March 2018, the President exercised his authority under Section 232 of the Trade Expansion Act of 1962, as amended,⁶⁴ and issued Proclamation 9705 that mandated, to address national

⁶² See Tokyo Steel's BQR at 27, and CQR at 23.

⁶³ See Tokyo Steel's AQR at 17.

⁶⁴ See 19 U.S.C. § 1862.

security concerns, the imposition of a global tariff of 25 percent on imports of steel articles in order to reduce imports to a level that the Secretary assessed would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. In considering whether U.S. price should be adjusted for section 232 duties, we look to section 772 of the Act. In particular, section 772(c)(2)(A) of the Act directs Commerce to adjust EP and CEP for “the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties . . .” Therefore, we find that the analysis here depends on whether section 232 duties constitute “United States import duties,” and whether the duties are “included in such price.”

The Court of Appeals for the Federal Circuit (CAFC) has previously considered whether certain types of duties constitute “United States import duties” for purposes of section 772(c)(2)(A) of the Act. In *Wheatland*, the CAFC sustained Commerce’s determination not to adjust U.S. price in antidumping proceedings for section 201 safeguard duties under that statutory provision.⁶⁵ Having acknowledged Commerce’s analysis of the legislative history to the Antidumping Act of 1921, which “referred to ‘United States import duties’ as normal customs duties and referred to antidumping duties as ‘special dumping duties’ and that ‘special dumping duties’ were distinguished and treated differently from normal customs duties,” the CAFC in *Wheatland* agreed that “Congress did not intend all duties to be considered ‘United States import duties.’”⁶⁶

The CAFC then found reasonable Commerce’s analysis that section 201 duties were more akin to antidumping duties than “ordinary customs duties.”⁶⁷ In comparing section 201 duties with antidumping duties, the CAFC found that: (1) “[l]ike antidumping duties, {section} 201 duties are remedial duties that provide relief from the adverse effects of imports;” (2) “[n]ormal customs duties, in contrast, have no remedial purpose;” (3) “antidumping and {section} 201 duties, unlike normal customs duties, are imposed based upon almost identical findings that the domestic industry is being injured or threatened with injury due to the imported merchandise;” and (4) “[section] 201 duties are like antidumping duties . . . because they provide only temporary relief from the injurious effects of imports,” whereas normal customs duties “have no termination provision, and are permanent unless modified by Congress.”⁶⁸ In sustaining Commerce’s decision regarding section 201 duties in *Wheatland*, the CAFC also held that “[t]o assess both a safeguard duty and an antidumping duty on the same imports without regard to the safeguard duty, would be to remedy substantially overlapping injuries twice.”⁶⁹

Section 232 duties are not akin to antidumping or 201 duties. Proclamation 9705 states that it “is necessary and appropriate to adjust imports of steel articles so that such imports will not threaten

⁶⁵ See *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1363 (Fed. Cir. 2007) (*Wheatland*).

⁶⁶ *Id.* at 1361.

⁶⁷ *Id.* at 1362.

⁶⁸ *Id.* at 1362-63.

⁶⁹ *Id.* at 1365.

to impair the *national security* . . .”⁷⁰ The text of section 232 of the Trade Expansion Act of 1962 also clearly concerns itself with “the effects on the *national security* of imports of the article.”⁷¹ The particular national security risk spelled out in proclamation 9705 is that the “industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of steel to meet our national security needs—a situation that is fundamentally inconsistent with the safety and security of the American people.”⁷² In other words, section 232 duties are focused on addressing national security prerogatives, separate and apart from any function performed by antidumping and 201 safeguard duties to remedy injury to a domestic industry.

Even more critical to this point is that the Presidential Proclamation states that section 232 duties are to be imposed in addition to other duties unless expressly provided for in the proclamations.⁷³ The Annex to Proclamation 9740 refers to section 232 duties as “ordinary” customs duties, and it also states that “{a}ll anti-dumping or countervailing duties, or other duties and charges applicable to such goods shall continue to be imposed, except as may be expressly provided herein.” Notably, there is no express exception in the HTSUS revision in the Annex. In other words, section 232 duties are intended to be treated as any other duties for purposes of the trade remedy laws. Had the President intended that AD duties would be reduced by the amount of section 232 duties imposed, the Presidential Proclamation would have expressed that intent.

We have determined that section 232 duties should be treated as “United States import duties” for purposes of section 772(c)(2)(A) of the Act - and thereby as “U.S. Customs duties,” which are deducted from U.S. price.

NSC reported paying 232 duties on certain U.S. sales.⁷⁴ Tokyo Steel made its U.S. sales through a Japanese trading company who takes possession of the subject merchandise and arranges the

⁷⁰ See Proclamation 9705, 83 FR at 11627 (emphasis added); Proclamation 9711 of March 22, 2018, 83 FR 13361, 13363 (March 28, 2018) (Proclamation 9711) (“In proclaiming this tariff, I recognized that our Nation has important security relationships with some countries whose exports of steel articles to the United States weaken our national economy and thereby threaten to impair the national security”); Proclamation 9740 of April 30, 2018, 83 FR 20683 (May 7, 2018) (Proclamation 9740) (similar); Proclamation 9759 of May 31, 2018, 83 FR 25857 (June 5, 2018) (Proclamation 9759) (similar); Proclamation 9772 of August 10, 2018, 83 FR 40429 (August 15, 2018) (Proclamation 9772) (similar); Proclamation 9777 of August 29, 2018, 83 FR 45025 (September 4, 2018) (Proclamation 9777) (similar).

⁷¹ See section 232(b)(1)(A) of the Trade Expansion Act of 1962 (emphasis added); *see also* section 232(a) of the Trade Expansion Act of 1962 (explaining that “{n}o action shall be taken . . . to decrease or eliminate the duty or other import restrictions on any article if the President determines that such reduction or elimination would threaten to impair the national security”).

⁷² See Proclamation 9705, 83 FR at 11627.

⁷³ See Proclamation 9705, 83 FR at 11627; Proclamation 9711, 83 FR at 13363; Proclamation 9740, 83 FR at 20685-87 (“All anti-dumping or countervailing duties, or other duties and charges applicable to such goods shall continue to be imposed, except as may be expressly provided herein.”); Proclamation 9759, 83 FR at 25857; Proclamation 9772, 83 FR at 40430-31; Proclamation 9777, 83 FR at 45025. The proclamations do not expressly provide that 232 duties receive different treatment.

⁷⁴ See NSC’s CQR at Exhibit C-23.

freight delivery to U.S. customer. Thus, Tokyo Steel did not report paying 232 duties on its sales.⁷⁵

NSC

We based EP on the price to the first unaffiliated purchaser in the United States. We made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act, which included, where appropriate, foreign inland freight, foreign brokerage and handling, U.S. brokerage and handling, international freight, marine insurance, and U.S. inland freight.

We calculated the CEP based on the price to the first unaffiliated purchaser in the United States. We made deductions from the starting price for any movement expenses (*e.g.*, foreign inland freight, foreign brokerage and handling, U.S. brokerage and handling, international freight, marine insurance, and U.S. inland freight), in accordance with section 772(c)(2)(A) of the Act.⁷⁶ In addition, we made an adjustment to price for the cost of any further manufacturing or assembly for sales used in the calculations, in accordance with section 772(d)(2) of the Act.

In accordance with section 772(d)(1) of the Act, we calculated the CEP by deducting selling expenses associated with economic activities occurring in the United States, which include direct selling expenses (imputed credit expenses, bank charges, and other direct selling expenses) and indirect selling expenses. Finally, we made an adjustment for profit allocated to these expenses, in accordance with section 772(d)(3) of the Act. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by NSC and its U.S. affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.⁷⁷

Tokyo Steel

We based EP on the price to the first unaffiliated purchaser in the United States. In accordance with section 772(c)(2) of the Act, we made deductions for certain movement expenses, which included, where appropriate, foreign brokerage and handling, and other shipping costs. Pursuant to section 772(d)(1) of the Act, we made additional adjustments to export price for other direct selling expenses (*i.e.*, interest expense on deposits, and wire transfer fees), credit expenses, and indirect selling expenses.

E. NORMAL VALUE

1. Home Market Viability

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, *i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales, we

⁷⁵ See Tokyo Steel's CQR at Exhibit C-11.

⁷⁶ See NSC Preliminary Calculation Memorandum.

⁷⁷ *Id.*

normally compare the respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with sections 773(a)(1)(A) and (B) of the Act. If we determine that no viable home market exists, we may, if appropriate, use a respondent's sales of the foreign like product to a third country market as the basis for comparison market sales, in accordance with section 773(a)(1)(C) of the Act and 19 CFR 351.404.

In this review, we determined that the aggregate volume of home market sales of the foreign like product for each respondent was greater than five percent of the aggregate volume of its U.S. sales of the subject merchandise. Therefore, we used home market sales as the basis for NV for both respondents, in accordance with section 773(a)(1)(B) of the Act.

2. *Affiliated-Party Transactions and Arm's-Length Test*

Commerce may calculate NV based on a sale to an affiliated party only if it is satisfied that the price to the affiliated party is comparable to the price at which sales are made to parties not affiliated with the exporter or producer, *i.e.*, sales were made at arm's-length prices.⁷⁸ Commerce excludes home market prices to affiliated customers that are not made at arm's-length prices from our margin analysis because Commerce considered them to be outside the ordinary course of trade. Consistent with 19 CFR 351.403(c) and (d) and our practice, "Commerce may calculate normal value based on sales to affiliates if satisfied that the transactions were made at arm's length."⁷⁹

In this review, NSC sold foreign like product to affiliated customers in the home market as defined in section 771(33) of the Act. Consequently, we conducted the arm's-length test on these sale between NSC and its affiliated customers and determined that the prices were not arm's-length prices and will not use them in the normal value calculation because we considered the failed-test sales to be outside the ordinary course of trade.⁸⁰ Once the prices to the affiliated parties fail the arm's-length test, we will generally rely on the affiliate resellers' prices to its customers for NV for the margin calculations.

3. *Level of Trade*

Section 773(a)(1)(B)(i) of the Act states that, to the extent practicable, Commerce will calculate NV based on sales at the same level of trade (LOT) as the U.S. sales. According to 19 CFR 351.412(c)(2), sales are made at different LOTs if they are made at different marketing stages (or their equivalent), and substantial differences in selling activities are a necessary, but not

⁷⁸ See 19 CFR 351.403(c).

⁷⁹ See *China Steel Corp. v. United States*, 264 F. Supp. 2d 1339, 1367 (CIT 2003), *aff'd*, 306 F. Supp. 2d 1291 (CIT 2004) (citing *Light-Walled Rectangular Pipe and Tube from Mexico: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 55352, 55355 (September 7, 2011)).

⁸⁰ See section 771(15) of the Act and 19 CFR 351.102(b).

sufficient, condition for determining that there is a difference in the stages of marketing.⁸¹ In order to determine whether the home market sales are at different marketing stages than the U.S. sales, we examine the distribution chain in each market, including selling functions and customer categories, and the level of selling activities for each type of sale.

Pursuant to section 773(a)(1)(B)(i) of the Act, in identifying LOTs, we consider the starting price before adjustments for EP and home market sales,⁸² and the starting price as adjusted under section 772(d) of the Act for CEP sales.⁸³

When Commerce is unable to match U.S. sales to sales in the home market at the same LOT as the EP or CEP, Commerce may compare the U.S. sale to sales at a different LOT in the home market. In comparing EP or CEP sales at a different LOT in the home market, where available data make it possible, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales only, if the NV LOT is at a more advanced stage of distribution than the LOT of CEP but the data available do not provide a basis to determine whether the difference in LOTs is demonstrated to affect price comparability (*i.e.*, no LOT adjustment is possible), Commerce will grant a CEP offset, as provided in section 773(a)(7)(B) of the Act.⁸⁴

In this administrative review, we obtained information from each respondent regarding the marketing stages involved in making their reported home market and U.S. sales, including a description of the selling activities performed by each respondent for each channel of distribution. Our LOT findings are summarized below.

NSC

In the home market, NSC sells merchandise under consideration through three channels of distribution.⁸⁵ In channel 1, NSC negotiates sales with affiliated and unaffiliated primary customers through affiliated and unaffiliated trading companies, this channel of distribution accounts for the vast majority of the group's home market sales.⁸⁶ In channel 2, NSC sells to affiliated and unaffiliated trading companies that re-sell the steel in quantities and prices negotiated by the trading companies.⁸⁷ In channel 3, NSC sells directly to affiliated and unaffiliated primary customers without the assistance of the trading companies.⁸⁸ In connection with all three types of sales, NSC performed the following categories of selling

⁸¹ See *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administration Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010) (*OJ Brazil*), and accompanying IDM at Comment 7.

⁸² Where NV is based on CV, we determine the NV LOT based on the LOT of the sales from which we derive selling, general and administrative (SG&A) expenses, and profit for CV, where possible. See 19 CFR 351.412(c)(1).

⁸³ See *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314-16 (Fed. Cir. 2001).

⁸⁴ See *OJ Brazil* IDM at Comment 7.

⁸⁵ See NSC's AQR at A-24

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

functions: production planning, strategic planning & marketing, order evaluation, order/invoice system, end-user sales contact, advertising, warranty, technical services, administration, packing, freight & delivery.⁸⁹ Further, NSC reported performing the essentially the same functions at the same relative level of intensity for all of its home market sales. On this basis, we preliminarily determine that all NSC's home market sales are at the same LOT.⁹⁰

NSC reported that it made U.S. sales through one channel of distribution. However, we find that NSC made sales through two channels of distribution: EP sales through unaffiliated trading companies for sales to unaffiliated U.S. customers and CEP sales by NSC's affiliated U.S. further manufacturers to unaffiliated customers. We find that NSC performed all selling functions at the same relative level of intensity,⁹¹ as NSC negotiates prices with the assistance of the trading companies, and the trading companies arrange transport to the primary customers.⁹² Thus, we preliminarily determine that NSC's U.S. sales are made at the same LOT.

We then compared the home market LOT to the U.S. LOT and found that the selling functions NSC performed for its home market customers are virtually the same as those performed for its U.S. customers at a similar level of intensity. The only difference is that NSC coordinates freight & delivery at a relatively lower level of intensity for U.S. sales. This difference is not sufficient to determine that NSC's LOT for U.S. sales is different from the home market LOT. Therefore, we preliminarily determine that home market sales and the U.S. were made at the same LOT, and that no LOT adjustment was warranted. Because NSC's home market LOT is not at a more advanced stage of distribution than its U.S. LOT, a CEP offset is not warranted.

Tokyo Steel

In the home market, Tokyo Steel sells merchandise under consideration through three channels of distribution.⁹³ In channel 1, Tokyo Steel sells to a trading company who then sells the merchandise to distributors or end users. In channel 2, Tokyo Steel sells directly to distributors, and in channel 3, Tokyo Steel sells directly to end users. In connection with all three types of sales, Tokyo Steel performed the following categories of selling functions: sales forecasting, sales promotion, packing, order input/processing, direct sales personnel, sales/marketing support, market research, freight and delivery.⁹⁴ Further, Tokyo Steel reported performing essentially the same functions at the same level of intensity for all of its home market sales. On this basis, we preliminarily determine that all home market sales are at the same LOT.⁹⁵

Tokyo Steel reported that it made U.S. sales through an unaffiliated Japanese trading company.⁹⁶ The selling functions performed were nearly the same as those performed for home market

⁸⁹ See NSC's AQR at Exhibit A-10.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See NSC's AQR at A-29.

⁹³ See Tokyo Steel's AQR at 11-12.

⁹⁴ See Tokyo Steel's AQR at Exhibit A-8

⁹⁵ *Id.*

⁹⁶ *Id.*; see also Tokyo Steel's SQR1 at 2 and Exhibit SA1-1.

customers. Thus, we find that Tokyo Steel had one channel of distribution in the U.S. market and preliminarily determine that all Tokyo Steel's U.S. sales are made at the same LOT.

We then compared the home market LOT to the U.S. LOT and found that the selling functions Tokyo Steel performed for its home market customers are nearly the same as those performed for its U.S. customers at a similar level of intensity. Therefore, we preliminarily determine that home market sales and the U.S. sales were made at the same LOT, and that no LOT adjustment was warranted.

4. Cost of Production Analysis

In accordance with section 773(b)(2)(A) of the Act, we requested cost information from the respondents in this review to determine if there were reasonable grounds to believe or suspect that sales of foreign like product had been made at prices less than the COP of the product.⁹⁷ We examined NSC's and Tokyo Steel's cost data and preliminarily determine that our quarterly cost methodology is not warranted. Accordingly, we are applying our standard methodology of using annual costs based on the reported data.

a. Calculation of COP

In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of the costs of materials and fabrication for the foreign like product, plus amounts for general and administrative (G&A) expenses and interest expenses.

NSC

We relied on the COP data submitted by NSC except as follows:⁹⁸

- We adjusted the reported transfer prices of lump iron ore, fine iron ore and iron ore pellets to reflect higher market prices in accordance with section 773(f)(2) of the Act.⁹⁹
- We adjusted the electricity purchased from affiliated companies to reflect the higher market prices in accordance with section 773(f)(2) of the Act.¹⁰⁰
- We increased TOTCOM to include Nisshin's certain general and administrative expense rate.¹⁰¹

⁹⁷ See NSC's DQR; and Tokyo Steel's DQR.

⁹⁸ See NSC's SDR at Exhibit SD-1.

⁹⁹ See NSC Preliminary Calculation Memorandum.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

- We denied NSC’s reported offset to its financial expenses for interest income, as NSC did not provide adequate documentation to support its claim that the interest income was generated from short-term interest-bearing assets.¹⁰²
- We adjusted Steelscape LLC’s reported cost of services obtained from an affiliated party to reflect transfer prices, in accordance with section 773(f)(3) of the Act, because the transfer prices were higher in comparison to the affiliate’s reported cost and market prices.¹⁰³

Tokyo Steel

We relied on the COP data submitted by Tokyo Steel and did not make any cost adjustment.

b. COP Test

On a product-specific basis, pursuant to section 773(a)(1)(B)(i) of the Act, we compared the adjusted weighted-average COPs to the home market sales prices of the foreign like product, in order to determine whether the sales prices were below the COPs. For purposes of this comparison, we used COPs exclusive of selling and packing expenses. The prices were exclusive of any applicable billing adjustments, movement charges, actual direct and indirect selling expenses, and packing expenses.

c. Results of the COP Test

In determining whether to disregard home market sales made at prices below the COP, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether: (1) within an extended period of time, such sales were made in substantial quantities; and (2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with sections 773(b)(2)(B) and (C) of the Act, where less than 20 percent of a respondent’s home market sales of a given product are at prices less than the COP, we do not disregard any below-cost sales of that product because we determine that in such instances the below-cost sales were not made within an extended period of time and in “substantial quantities.” Where 20 percent or more of a respondent’s sales of a given product are at prices less than the COP, we disregard the below-cost sales because: (1) they were made within an extended period of time in “substantial quantities,” in accordance with sections 773(b)(2)(B) and (C) of the Act; and, (2) based on our comparison of prices to the weighted-average COPs for the POR, they were at prices which would not permit the recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act.

We found that, for certain products, more than 20 percent of sales of certain home market products during the POR were at prices less than the COP and, in addition, such sales did not permit for the recovery of costs within a reasonable period of time. We, therefore, excluded

¹⁰² *Id.*

¹⁰³ *Id.*

these sales and used the remaining sales, as the basis for determining NV, in accordance with section 773(b)(1) of the Act.

5. *Calculation of Normal Value Based on Home Market Prices*

NSC

We increased, where appropriate, the starting price to account for billing adjustments, in accordance with 19 CFR 351.401(c). We also made a deduction from the starting price for inland freight, under section 773(a)(6)(B)(ii) of the Act.

For comparisons made to EP sales (NSC U.S. sales Channel 1), we made adjustments for differences in circumstances of sale (COS) pursuant to section 773(a)(6)(C)(iii) of the Act. We made COS adjustments by deducting direct selling expenses incurred for home-market sales (*e.g.*, imputed credit) and adding U.S. direct selling expenses (*e.g.*, imputed credit), where appropriate.

For comparisons to CEP sales (NSC U.S. sales Channels 2), in accordance with section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410, we deducted from NV direct selling expenses (*e.g.*, imputed credit).

For comparisons to both EP and CEP sales, we deducted home-market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act. When comparing U.S. sales with home market sales of similar merchandise, we also made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacturing for the foreign like product and subject merchandise.¹⁰⁴

Tokyo Steel

With respect to Tokyo Steel, we made adjustments to the starting price for billing adjustments, discounts, and sales promotion expenses, where appropriate. We also made a deduction from the starting price for certain movement expenses under section 773(a)(6)(B)(ii) of the Act.¹⁰⁵

In addition, we made adjustments for differences in COS, pursuant to section 773(a)(6)(C)(iii) of the Act, by deducting direct selling expenses incurred for home-market sales (*e.g.*, imputed credit) and adding U.S. direct selling expenses (*e.g.*, imputed credit), where appropriate.

We deducted home-market packing costs and added U.S. packing costs, in accordance with sections 773(a)(6)(A) and (B) of the Act. When comparing U.S. sales with home market sales of

¹⁰⁴ See 19 CFR 351.411(b).

¹⁰⁵ See Tokyo Steel Preliminary Calculation Memorandum.

similar merchandise, we also made adjustments for differences in costs attributable to differences in the physical characteristics of the merchandise, in accordance with section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411. We based this adjustment on the difference in the variable cost of manufacturing for the foreign like product and subject merchandise.¹⁰⁶

VIII. CURRENCY CONVERSION

Where appropriate, we made currency conversions into U.S. dollars, in accordance with section 773A of the Act and 19 CFR 351.415, based on the exchange rates in effect on the date of the U.S. sales as certified by the Federal Reserve Bank.

IX. RECOMMENDATION

We recommend applying the above methodology for these preliminary results.

Agree

Disagree

12/10/2019

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

¹⁰⁶ See 19 CFR 351.411(b).