

December 17, 2020

Husteel Co., Ltd., et al. v. United States,
Court No. 19-00107, Slip Op. 20-147 (CIT October 19, 2020)

**FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT ORDER**

I. SUMMARY

The U.S. Department of Commerce (Commerce) prepared these final results of redetermination pursuant to the remand order of the United States Court of International Trade (the Court) in *Husteel*.¹ This litigation pertains to the 2016-2017 antidumping duty (AD) administrative review of circular welded non-alloy steel pipe (CWP) from the Republic of Korea (Korea).²

In *Husteel*, the Court remanded Commerce’s particular market situation adjustment, finding that it was not in accordance with the law “‘{b}ecause Commerce may not adjust the cost of production when using normal value based on home market sales.’”³ As discussed below, we continue to find that a particular market situation exists in Korea that distorts the price for hot-rolled steel coil (HRC). Therefore, under respectful protest,⁴ we based normal value on constructed value (CV) and made particular market situation adjustments to the respondents’ costs used to calculate CV.

¹ See *Husteel Co., Ltd., et al. v. United States*, Consol. Court No. 19-00107, Slip Op. 20-147 (CIT October 19, 2020) (*Husteel*).

² See *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 26401 (June 6, 2019) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).

³ See *Husteel* at 14.

⁴ See *Viraj Group v. United States*, 343 F. 3d 1371 (Fed. Cir. 2003).

In addition, the Court, in the interest of accuracy, remanded to Commerce to reconsider the separate entity treatment of Hyundai Steel Company (Hyundai Steel) and Hyundai Steel (Pipe Division).⁵ Upon review of the record, Commerce concludes that Hyundai Steel and Hyundai Steel (Pipe Division) are the same legal entity and, consequently, should be treated as a single entity for cash deposit and suspension of liquidation purposes upon the conclusion of litigation.

On November 4, 2020, Commerce issued the Draft Results of Redetermination.⁶ On November 20, 2020, interested parties filed comments on the Draft Results of Redetermination.⁷

II. REMANDED ISSUES

The Statute Limits the Application of an Adjustment to Respondents' Cost of Production for a Particular Market Situation to the Calculation of Constructed Value

1. Legal Framework

Section 504 of the Trade Preferences Extension Act of 2015 (TPEA) added the concept of “particular market situation” in the definition of the term “ordinary course of trade,” and for purposes of CV under section 773(e) of Tariff Act of 1930, as amended (the Act).⁸ Section 773(e) of the Act states that “if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation

⁵ See *Husteel* at 22.

⁶ See Draft Results of Redetermination Pursuant to Remand *Husteel Co., Ltd., et al. v. United States*, Court No. 19-00107, Slip Op. 20-147 (CIT October 19, 2020), dated November 4, 2020 (Draft Results of Redetermination).

⁷ *Husteel Co., Ltd.’s (Husteel) Letter*, “Circular Welded Non-Alloy Steel Pipe from South Korea: Comments on the Department’s Draft Results of Redetermination,” dated November 20, 2020 (Husteel Comments); see also *Hyundai Steel’s Letter*, “Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Comments on Draft Remand Results,” dated November 20, 2020 (Hyundai Steel Comments); *NEXTEEL Co., Ltd.’s (NEXTEEL) Letter*, “Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Comments on Draft Remand Redetermination,” dated November 20, 2020 (NEXTEEL Comments); and *SeAH Steel Corporation’s (SeAH) Letter*, “Circular Welded Non-Alloy Steel Pipe from Korea – Comments on Draft Redetermination on Remand in Response to Slip Op. 20-147,” dated November 20, 2020 (SeAH Comments).

⁸ See *Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362 (2015) (TPEA).

methodology under this subtitle or any other calculation methodology.” Although the Act does not define “particular market situation,” the Statement of Administrative Action (SAA) explains that examples where such a situation may exist include “where there is government control over pricing to such an extent that home market prices cannot be considered competitively set.”⁹

Section 504 of the TPEA also amended the Act to provide Commerce with additional discretion when applying the “particular market situation” concept to determine normal value.¹⁰ Specifically, in section 504 of the TPEA, Congress added the particular market situation concept to sales and transactions that Commerce will consider outside the “ordinary course of trade,” and thus not usable in its antidumping calculations. Under section 771(15) of the Act, Commerce shall find “sales and transactions” to be “outside the ordinary course of trade” in situations in which it “determines that the particular market situation prevents a proper comparison with the export price or constructed export price.”¹¹

Further, section 504 of the TPEA amended the CV provision in section 773(e) of the Act by permitting Commerce to use alternative cost calculation methodologies upon a particular market situation finding. Under section 773(e) of the Act, when Commerce, in calculating CV, finds that a “particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade,” Commerce “may use another calculation methodology under this part or any other calculation methodology.”

2. Background

On January 11, 2018, Commerce initiated an AD administrative review of CWP from

⁹ See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) at 822 (SAA).

¹⁰ See TPEA.

¹¹ *Id.*

Korea covering the period from November 1, 2016 to October 31, 2017.¹² On February 20, 2018, Commerce selected Husteel and Hyundai Steel as mandatory respondents.¹³ On August 27, 2018, Commerce received a particular market situation allegation pursuant to section 773(e) of the Act from Wheatland Tube (Wheatland), a domestic producer of CWP and a member of the original group of petitioners in the less-than-fair-value investigation.¹⁴ Wheatland argued that Commerce had previously found a particular market situation exists in Korea in the prior administrative review and submitted factual information alleging that a particular market situation continues to exist in the Korean HRC market that distorted the production costs of CWP.¹⁵ Wheatland predicated its particular market situation allegation on four factors: (1) Korean subsidies on HRC, the primary input for CWP; (2) Korean imports of HRC from the People's Republic of China (China); (3) alleged strategic alliances between Korean HRC suppliers and Korean CWP producers; and (4) government involvement in the Korean electricity market.¹⁶

On December 3, 2018, Commerce issued the *Preliminary Results* and determined that a particular market situation exists in Korea that distorted the cost of production of CWP and applied an upward adjustment to the cost of production based on subsidy rates of HRC.¹⁷ After further analyzing the record evidence and comments from interested parties, Commerce

¹² See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 1329, 1331 (January 11, 2018) (*Initiation Notice*).

¹³ See Memorandum, "Antidumping Duty Administrative Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea," dated February 20, 2018.

¹⁴ See Wheatland's Letter, "Certain Circular Welded Non-Alloy Steel Pipe from Korea: Re-Allegation that a Particular Market Situation Continues in Korea," dated August 27, 2018 (Particular Market Situation Allegation).

¹⁵ See *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 27541 (June 13, 2018), and accompanying IDM at Comment 1.

¹⁶ See Particular Market Situation Allegation at 1-2.

¹⁷ See *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 63619 (December 11, 2018) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM) at 9-16.

maintained its particular market situation determination in the *Final Results* regarding the existence of a cost-based particular market situation¹⁸ but modified the adjustment rate in accordance with the Court's decision in *POSCO*.¹⁹ Commerce calculated weighted-average dumping margins of 10.91% *ad valorem* for Husteel and 8.14% *ad valorem* for Hyundai Steel.²⁰

3. Remand Order

The Court held that, pursuant to section 504 of the TPEA and section 773(e) of the Act, upon the finding of a particular market situation, Commerce is only permitted to adjust its cost of production for a particular market situation when calculating normal value based upon CV, as opposed to calculating normal value based upon home market sales,²¹ and, consequently, the Court concluded that “Commerce’s particular market situation adjustment to the cost of production is not in accordance with the law.”²² Additionally, the Court stated that, although section 504 of the TPEA did amend section 773(e) for CV and section 771(15) for ordinary course of trade, the TPEA did not amend section 773(b) to allow Commerce to adjust the cost of production for purposes of the sale-below-cost-test.²³ As such, the Court found that Commerce’s contention that section 504 of the TPEA authorizes the inclusion of a particular market situation adjustment in the calculation the respondents’ cost of production in the sales-below-cost test was not supported by the statute, and that Commerce’s particular market situation adjustment was not in accordance with law.²⁴ Finally, having found Commerce’s particular market situation adjustment not in accordance with the law, the Court stated that it was not necessary to address the lawfulness or reasonableness of Commerce’s particular market situation adjustment

¹⁸ See *Final Results* IDM at 5-16.

¹⁹ See *POSCO v. United States*, 378 F. Supp. 3d 1348 (CIT 2019) (*POSCO*); see also *Final Results* IDM at 16-20.

²⁰ See *Final Results*, 84 FR at 26402.

²¹ See *Husteel* at 14.

²² *Id.* at 14.

²³ *Id.* at 12-13.

²⁴ *Id.* at 9-14.

calculation or whether Commerce's particular market situation determination was supported by substantial evidence.²⁵

4. Analysis

As an initial matter, for the reasons explained in the *Final Results*,²⁶ we respectfully disagree with the Court's finding that the inclusion of a particular market situation adjustment in the calculation of the respondents' cost of production in the sales-below-cost test is not supported by the statute, and that Commerce's particular market situation adjustment was not in accordance with law.

Nevertheless, section 771(15) of the Act defines the term "ordinary course of trade" to mean the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. Subsection (C) explicitly states that Commerce shall consider situations in which we determine that a particular market situation prevents a proper comparison with the export price or constructed export price, to be outside the ordinary course of trade.²⁷ Thus, the statute enquires whether the particular market situation prevents a proper comparison with the export or constructed export price.

Additionally, section 773(a)(1)(B)(i) of the Act states that the normal value of subject merchandise shall be based on the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the

²⁵ *Id.* at 14 and 16.

²⁶ See *Final Results* IDM at Comment 1-A.

²⁷ See section 771(15)(C) of the Act.

same level of trade as the export price or constructed export price. On this basis, home market sale prices used as normal value must be sold in the ordinary course of trade.²⁸

In the *Preliminary Results*, we found that the respondents' cost of materials and fabrication or other processing of any kind do not accurately reflect the cost of production of CWP in the ordinary course of trade.²⁹ As noted above, section 771(15)(C) of the Act states that Commerce shall consider situations in which we determine that a particular market situation prevents a proper comparison of normal value with the export price or constructed export price, to be outside the ordinary course of trade. On this basis, we determine that, absent a particular market situation adjustment to the cost of production used in the sales-below-cost test, the particular market situation that existed with respect to the cost of production of CWP in Korea prevents us from performing a meaningful sales-below-cost test. Comparing home market sale prices to a cost of production that does not accurately reflect production costs in the ordinary course of trade fails to accomplish the intent of the sales-below-cost test, which is to determine whether the respondents' home market sales were made in the ordinary course of trade. As such, pursuant to section 771(15)(C) of the Act, we find that the particular market situation with respect to the cost of production of CWP prevents a proper comparison of normal value based on the respondents' home market sale prices with the respondents' export prices or constructed export prices. Therefore, absent the ability to determine whether the comparison market sales were made within the ordinary course of trade, we have based normal value on CV in accordance with section 773(a)(4) of the Act.³⁰

²⁸ See section 773(a)(1)(B)(i) of the Act.

²⁹ See *Preliminary Results* PDM at 9-16, unchanged in *Final Results*, and accompanying IDM.

³⁰ See *Husteel Co., Ltd. v. United States*, 426 F. Supp. 3d 1376, 1388 (CIT 2020) (“Congress provided for the existence of a {particular market situation} when market sales are used for normal value by allowing Commerce to disregard specific sales (because they were made outside the ordinary course of trade) or to move off of home market sales to use third country sales or constructed value.”); see also section 773(a)(1)(B) – (C), (a)(4).

Section 773(e)(1) states that CV is the amount equal to the “cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade.” The TPEA added language to section 773(e) of the Act which states that “if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.”

As noted above, Commerce found that a particular market situation existed with regard to the price of HRC as a constituent element of the cost of production of CWP in Korea. This particular market situation existed such that the cost of materials and fabrication reported by each respondent does not accurately reflect its cost of production of CWP in the ordinary course of trade. Therefore, pursuant to section 773(e) of the Act, we will adjust each respondents’ cost of production in the calculation of its CV to account for the distorted prices of HRC in Korea.³¹

In accordance with section 773(e) of the Act, for each respondent, we separately calculated CV based on the sum of the costs of materials and fabrication employed in producing the subject merchandise, plus amounts for general and administrative (G&A) expenses, financial expenses, CV profit, selling expenses, and U.S. packing costs. We recalculated the respective cost of materials and fabrication to account for distorted HRC prices in Korea based on

³¹ See Memorandum, “Analysis Memorandum for the Draft Remand Redetermination of Circular Welded Non-Alloy Steel Pipes from the Republic of Korea: Husteel Co Ltd,” dated November 4, 2020 (Husteel Draft Remand Analysis Memorandum); *see also* Memorandum, “Analysis Memorandum for the Draft Remand Redetermination of Circular Welded Non-Alloy Steel Pipes from the Republic of Korea: Hyundai Steel Company,” dated November 4, 2020 (Hyundai Steel Draft Remand Analysis Memorandum).

information submitted by each respondent in their original and supplemental questionnaire responses.

Due to the absence of comparison market sales in the ordinary course of trade, we are unable to calculate CV profit for each of the respondents using the preferred method and must instead rely on one of the three alternatives outlined in section 773(e)(2)(B)(i) through (iii) of the Act. These alternatives are: (i) the use of the actual amounts incurred and realized by the specific exporter or producer in connection with the production and sale in the foreign country of merchandise that is in the same general category of products as the subject merchandise; (ii) the use of the weighted average of the actual amounts incurred and realized by exporters or producers (other than the respondent) in connection with the production and sale of the foreign like product, in the ordinary course of trade country, for consumption in the foreign country; or (iii) based on any other reasonable method, except that the amount for profit may not exceed the amount realized by exporters or producers (other than the respondent) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise (*i.e.*, the “profit cap”).

The statute does not establish a hierarchy for selecting among the alternatives for calculating CV profit.³² Moreover, as noted in the SAA, “the selection of an alternative will be made on a case-by-case basis, and will depend, to an extent, on available data.”³³ Thus, Commerce has the discretion to select from any of the three alternative methods, depending on the information available on the record.

In accordance with section 773(e)(2)(B)(iii) of the Act, (*i.e.*, any other reasonable

³² See SAA at 840 (“At the outset, it should be emphasized, consistent with the Antidumping Agreement, new section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods. Further, no one approach is necessarily appropriate for use in all cases.”)

³³ See SAA at 840.

method), as an available option for calculating each respondent's CV profit rate,³⁴ Commerce used Husteel's comparison market profit rate from its home market sales in the 2014-2015 administrative review.³⁵ Husteel's comparison market profit rate from the 2014-2015 administrative review period reflects the profit of a Korean CWP producer, on home market sales of the merchandise under consideration, in the ordinary course of trade. Likewise, Husteel's constructed export profit from the 2014-2015 administrative review period reflects the profit of a Korean CWP producer, on home market and export sales of subject merchandise, in the ordinary course of trade. We have continued to use Husteel's and Hyundai Steel's home market selling expenses as calculated in the *Final Results* as CV selling expenses (*i.e.*, CV selling expenses, CV credit expenses and CV commission expenses). Further, we are unable to calculate the profit amount realized by exporters or producers in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category of products as the subject merchandise (*i.e.*, "the profit cap"), in accordance with section 773(e)(2)(B)(iii) of the Act, because the record does not contain information for making such a calculation. However, the SAA makes clear that Commerce might have to apply alternative (iii) on the basis of facts available.³⁶ Therefore, we conclude that the method used to calculate CV profit serves as a reasonable profit cap for this remand redetermination.

For U.S. packing expenses, we will continue to use the amounts reported by each respondent in their respective U.S. sales data.³⁷

³⁴ See Hyundai Steel Draft Remand Analysis Memorandum at "Constructed Value"; see also Husteel Draft Remand Analysis Memorandum at "Constructed Value."

³⁵ See Memorandum, "Placing Documents on the Record of the Remand Redetermination," dated concurrently with the instant memorandum at Attachment 1. The 2014-2015 administrative review covered the most recent period of review in which Commerce had not found the existence of a particular market situation.

³⁶ See SAA at 840.

³⁷ See Husteel Draft Remand Analysis Memorandum at Attachment 1; see also Hyundai Steel Draft Remand Analysis Memorandum at Attachment 1.

Separate Entity Treatment

1. Background

On November 2, 2017, Commerce issued an opportunity notice, inviting interested parties to submit requests for administrative review of the 2016-2017 period of review on CWP from Korea.³⁸ On November 28, 2017, Commerce received an administrative review request from “Hyundai Steel Company” for its own entries of subject merchandise.³⁹ On November 30, 2017, Commerce received an administrative review request for “Hyundai Steel (Pipe Division),” headquartered at 12 Hunneung-No, Seocho-Gu, Seoul, South Korea, from Wheatland.⁴⁰ Wheatland did not request a separate review for “Hyundai Steel Company.”⁴¹ On January 11, 2018, Commerce issued the *Initiation Notice*, which separately listed “Hyundai Steel Company” and “Hyundai Steel (Pipe Division).”⁴² On February 20, 2018, Commerce selected “Hyundai Steel Company” as a mandatory respondent and issued the initial questionnaire to Hyundai Steel.⁴³ On December 3, 2018, Commerce issued the *Preliminary Results*, which contained separate rates for “Hyundai Steel Company” and “Hyundai Steel (Pipe Division).”⁴⁴ On June 6, 2019, Commerce issued the *Final Results*, and continued to treat “Hyundai Steel Company” and

³⁸ See *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 82 FR 50620 (November 1, 2017).

³⁹ See Hyundai Steel’s Letter, “Certain Circular Welded Non-Alloy Steel Pipe from Korea: Request for Administrative Review,” dated November 28, 2017 (Hyundai Steel’s AR Request).

⁴⁰ See Wheatland’s Letter, “Certain Circular Welded Non-Alloy Steel Pipe from Korea: Request for Administrative Review,” dated November 30, 2017 (Wheatland’s AR Request).

⁴¹ *Id.*

⁴² See *Initiation Notice*, 83 FR at 1331.

⁴³ See Memorandum, “Antidumping Duty Administrative Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Respondent Selection Memorandum,” dated February 20, 2018 (Respondent Selection Memorandum); see also Commerce’s Letter, “Antidumping Duty Administrative Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Initial Questionnaire,” dated February 20, 2018.

⁴⁴ See *Preliminary Results*, 83 FR at 63620.

“Hyundai Steel (Pipe Division)”⁴⁵ as separate entities.

2. Analysis

In evaluating whether “Hyundai Steel Company” and “Hyundai Steel (Pipe Division)” are the same legal entity, Commerce notes that the origin of the separation appears to have developed not from the record of the instant administrative review but from the form in which Commerce received the requests for the review. Notably, Wheatland’s AR Request and Hyundai Steel’s AR Request appear to be for the same company, Hyundai Steel, located at identical headquarters.⁴⁶

Record evidence does not indicate that there is a distinction between “Hyundai Steel Company” and “Hyundai Steel (Pipe Division).” In its Section A response, Hyundai Steel provided an organization chart, which indicates that its pipe-producing division in Ulsan is part of the same legal entity.⁴⁷ In its Sections B-D responses, Hyundai Steel also refers to its “pipe division” multiple times as part of its overall, subject merchandise-producing operations.⁴⁸ While Hyundai Steel does list several affiliated tolling companies that might be confused with “Hyundai Steel (Pipe Division),” these appear to be separate from Hyundai Steel itself and have different addresses from “Hyundai Steel (Pipe Division).”⁴⁹ Consequently, Commerce appears to have inadvertently listed “Hyundai Steel (Pipe Division)” as a separate entity in its *Preliminary Results* and *Final Results*. Therefore, due to lack of evidence to the contrary, we determine that Hyundai Steel (Pipe Division) is part of the Hyundai Steel legal entity, and, consequently, no

⁴⁵ See *Final Results*, 84 FR at 26402.

⁴⁶ See Wheatland’s AR Request at 3 (indicating the address of Hyundai Steel (Pipe Division) as 12 Hunneung-No, Seocho-Gu, Seoul, South Korea); see also Hyundai Steel’s Section A Response at Exhibit A-3 (indicating the address of Hyundai Steel Company as 12 Hunneung-No, Seocho-Gu, Seoul, South Korea).

⁴⁷ See Hyundai Steel’s Letter, “Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Section A Questionnaire Response,” dated March 20, 2018 at Exhibit A-2.

⁴⁸ See, e.g., Hyundai Steel’s Letter, “Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Sections B, C, and D Questionnaire Responses,” dated April 16, 2018 at B-7 and D-25.

⁴⁹ See Hyundai Steel’s Section A Response at Exhibit A-3.

collapsing analysis is necessary.

III. COMMENTS ON DRAFT RESULTS OF REDETERMINATION

Issue 1 **Whether Commerce’s Draft Results of Remand Redetermination Complies with the Court’s Decision**⁵⁰

Respondents’ Comments

- The Court explicitly found Commerce’s particular market situation adjustment unlawful. Rather than simply complying with the Court’s instructions and recalculating the respondents’ weighted-average dumping margin absent the particular market situation adjustment, Commerce maintained the particular market situation adjustment through an “end run around the Court’s instructions.”⁵¹
- Instead of recalculating the respondents’ weighted-average dumping margin as directed by the Court, Commerce attempted to circumvent the Court’s order by improperly using CV as the basis for normal value.⁵²
- Particular market situation adjustments are reserved for extreme situations, which have not been demonstrated to exist in the underlying review.⁵³
- Commerce’s particular market situation adjustment is outdated and must be removed in the interest of accuracy.⁵⁴ Commerce has found smaller adjustments in more recent and overlapping reviews. In addition, Commerce applied the particular market situation

⁵⁰ Enforcement and Compliance’s Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS) contained a notification of a one-day lag submission by Wheatland. However, the document was not timely filed because no final version was submitted in accordance with 19 CFR 351.303(c)(2)(ii) and (iii). Consequently, there are no timely-filed comments by Wheatland on the record of the remand that need to be considered by Commerce, at this time.

⁵¹ See Husteel Comments at 10; *see also* Hyundai Steel Comments at 18; NEXTEEL Comments at 2; and SeAH Comments at 3-4.

⁵² See Husteel Comments at 10-11; *see also* Hyundai Steel Comments at 8-11; NEXTEEL Comments at 3-4; and SeAH Comments at 3-4.

⁵³ See Hyundai Steel Comments at 13.

⁵⁴ *Id.* at 19.

adjustment to non-Korean HRC producers, but Commerce has not demonstrated that these purchases were unfairly traded or would lower the market price for domestically produced HRC.⁵⁵

Commerce’s Position: We disagree with the respondents. The Court did not order Commerce to recalculate each of the respondents’ weighted-average dumping margins without making a particular market situation adjustment. Instead, the Court’s ruling focused on Commerce’s application of the particular market situation adjustment pursuant to section 504 of the TPEA and section 773(e) of the Act. Specifically, the Court held that, upon the finding of a cost-based particular market situation, Commerce is only permitted to make an adjustment to the cost of production when CV is used as the basis for normal value, rather than when comparison market sale prices are used to derive normal value.⁵⁶ Thus, the Court found that “{b}ecause Commerce based normal value on home market sales here, not constructed value, Section {773b(e)} is inapplicable.”⁵⁷ Therefore, because the Court remand opinion does not preclude Commerce from maintaining its particular market situation determination, we consider our final remand redetermination to be in compliance with the Court’s remand opinion.⁵⁸

Issue 2 Whether the Regulations and Procedural Fairness Require that Commerce Abandon its Sales-Based Particular Market Situation Determination in the Final Results of Redetermination Pursuant to Remand

Respondents’ Comments

- Commerce made an improper sales-based particular market situation determination when no such allegation was properly made by Wheatland because there is no dispute that, in the underlying review, Commerce initiated its particular market situation inquiry based on

⁵⁵ *Id.* at 20.

⁵⁶ *See Husteel* at 13-14.

⁵⁷ *Id.* at 14.

⁵⁸ *Id.*

a “cost-based” particular market situation allegation, and that Commerce made a “cost-based” particular market situation determination in the *Final Results*.⁵⁹

- In its Draft Results of Remand Redetermination, Commerce made a sales-based particular market situation determination.⁶⁰ Wheatland did not meet the deadline set by 19 CFR 351.301(c)(2), for making a sales-based particular market situation allegation, and Commerce therefore did not properly initiate its particular market situation allegation inquiry.⁶¹ Commerce failed to meet the regulatory and initiation requirements for a sales-based particular market situation, and Commerce does not have the authority to not comply with its own regulations.⁶²
- Therefore, Commerce’s revised margin calculations for the respondents do not comport either with procedural fairness or with Commerce’s regulations. As such, Commerce should not make any particular market situation adjustments when it issues its final results of redetermination pursuant to remand.⁶³

Commerce’s Position: We disagree with the respondents’ contention that Commerce made a sales-based particular market situation determination in the Draft Results of Remand Redetermination. Commerce has not considered whether a particular market situation existed in the home market for the sale of the foreign like product such that home market sale prices cannot be used as the basis for normal value. As discussed above, home market sale prices used as normal value must be sold in the ordinary course of trade.⁶⁴ Without being able to make a

⁵⁹ See Husteel Comments at 5; see also Hyundai Steel Comments at 6.

⁶⁰ See Husteel Comments at 5; see also Hyundai Steel Comments at 6.

⁶¹ See Husteel Comments at 6; see also Hyundai Steel Comments at 6.

⁶² See Husteel Comments at 6-7 (citing *United States Steel & Fasteners, Inc. v. United States*, 947 F.3d 794 (Fed. Cir. 2020); *AMS Associates, Inc. v. United States*, 737 F.3d 1338, (Fed. Cir. 2013); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Auer v. Robbins*, 519 U.S. 452 (1997)); see also Hyundai Steel Comments at 6-7.

⁶³ See Husteel Comments at 5-7; see also Hyundai Steel Comments at 7.

⁶⁴ See section 773(a)(1)(B)(i) of the Act.

particular market situation adjustment in calculating the respondents' cost of production and perform an accurate sales-below-cost test, we find that the particular market situation in Korea which distorted the acquisition costs of HRC, resulted in each respondent's home market sales being outside of the ordinary course of trade.⁶⁵ Therefore, consistent with the statute, Commerce has relied on CV as the basis for normal value.⁶⁶

As noted by the respondents, Commerce found that a cost-based particular market situation existed in Korea which distorted the acquisition cost of HRC, the primary input used in the production of CWP. On this basis, we found that the respondents' cost of materials and fabrication or other processing do not accurately reflect the cost of production of CWP in the ordinary course of trade.⁶⁷ The record of this court proceeding shows that Commerce relied on the cost-based particular market situation finding made in the *Final Results* and in the Draft Results of Remand Redetermination, with no change to our determination that a cost-based particular market situation existed during the period of review.⁶⁸ As such, the respondents' arguments that Commerce is not complying with its own regulations by switching to a sales-based particular market situation, lacks merit.

⁶⁵ See section 771(15)(C) of the Act.

⁶⁶ See section 773(a)(4) of the Act; see also *Husteel Co., Ltd.*, 426 F. Supp. 3d at 1388-89 (stating "A {particular market situation} that affects costs of production would presumably affect prices for domestic sales and export sales so there would be no reason to adjust only the home market prices. If the {particular market situation} was of a kind that only affected domestic sales, then it would be one which prevented 'a proper comparison with the export price or constructed export price' and Commerce would move to either third country sales or constructed value."); see also sections 773(a)(1)(B)(ii)(III), (a)(1)(C)(iii), and (a)(4).

⁶⁷ See *Final Results* and accompanying IDM at Comment 1.

⁶⁸ See Memorandum, "Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Analysis Memorandum for Husteel Co., Ltd.," dated May 30, 2019 (Husteel Final Analysis Memorandum); see also Memorandum, "Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Analysis Memorandum for Hyundai Steel Company," dated May 30, 2019 (Hyundai Steel Final Analysis Memorandum); Husteel Draft Remand Analysis Memorandum; and Hyundai Steel Draft Remand Analysis Memorandum, where we adjusted the respective respondents' total cost of manufacturing (TCOMCOP) by the same calculated particular market situation adjustment used in both the *Final Results* and the *Draft Remand Results*.

Issue 3 Whether Commerce’s Use of Constructed Value for All Respondents Is Illogical and Statutorily Impermissible

Respondents’ Comments

- Commerce failed to demonstrate how alleged distortions in the Korean market prevent a proper comparison between U.S. price and home market prices. That is, Commerce fails to explain the rationale for its determination that the home market price and export price (or constructed export price) cannot be meaningfully compared.⁶⁹
- Commerce’s finding that, “absent a particular market situation adjustment to the cost of production used in the sales-below-cost test, the particular market situation that existed with respect to the cost of production of CWP in Korea prevents us from performing a meaningful sales-below-cost test” is illogical. Essentially, Commerce’s position is circular in that, when Commerce cannot adjust for costs for the sales-below-cost test to account for a particular market situation, Commerce cannot make a meaningful comparison as to whether a particular market situation exists but that a particular market situation must exist such that home market sales are outside the ordinary course of trade.⁷⁰
- Commerce impermissibly resorted to the use of CV to determine normal value because it failed to exhaust the statutory requirement of relying first on home market sale prices.⁷¹ Basing normal value on CV in accordance with section 773(a)(4) of the Act requires first that Commerce make an affirmative finding that “the normal value of the subject merchandise cannot be determined” by using home market sale prices under section 773(a)(1)(B)(i) of the Act.⁷² In ignoring the home market sales, Commerce effectively

⁶⁹ See *Husteel Comments* at 8-9; *see also* *Hyundai Steel Comments* at 8.

⁷⁰ *See* *Hyundai Steel Comments* at 9-10; *see also* *SeAH Comments* at 3.

⁷¹ *See* *Husteel Comments* at 1-3; *see also* *Hyundai Steel Comments* at 10; and *Nexteel Comments* at 3.

⁷² *See* *Hyundai Steel Comments* at 10.

determines that all of the respondents' home market sales are below-cost as facts otherwise available.⁷³

- Under the regulations, Commerce is only permitted to disregard those home market sales that are “outside the ordinary course of trade.”⁷⁴ Moreover, Commerce can disregard a respondent's viable home market if it determines that there is a “particular market situation in the exporting country {home market} {that} does not permit a proper comparison with” the U.S. sales prices.⁷⁵
- Taken together, the statute and Commerce's regulations identify the following home market sales that might be considered outside the ordinary course of trade:
 1. Sales that are below the cost of production;
 2. Sales made to an affiliated customer at non-arms' length price;
 3. Sales involving off-quality merchandise or merchandise produced according to unusual product specifications;
 4. Sales made at aberrational prices or with abnormally high profits; and
 5. Sales made at unusual terms of sale⁷⁶
- Commerce has made no such determination.⁷⁷ By conflating the specific statutory “cannot be determined” standard with an *ultra vires* “cannot determine whether” standard, Commerce impermissibly resorted to CV. Moreover, Commerce's admission that it cannot determine whether the comparison market sales were made within the ordinary course of trade, must result in a conclusion that Commerce in fact has not found that the comparison market sales were outside the ordinary course of trade.⁷⁸

⁷³ See Hyundai Steel Comments at 11; *see also* Nexteel Comments at 3.

⁷⁴ See Husteel Comments at 1-3; *see also* Hyundai Steel Comments at 8.

⁷⁵ See Husteel Comments at 3; *see also* Hyundai Steel Comments at 8-9.

⁷⁶ See Husteel Comments at 3-4.

⁷⁷ See Husteel Comments at 4; *see also* Hyundai Steel Comments at 10.

⁷⁸ See Hyundai Steel Comments at 10.

Commerce's Position: We disagree with the respondents that Commerce failed to demonstrate how distortions in the Korean market prevent a proper comparison between U.S. price and home market prices. In the *Final Results*, we found that a particular market situation existed in Korea which distorted the acquisition cost of HRC, the primary input used in the production of CWP. On this basis, we found that each of the respondents' cost of materials and fabrication or other processing do not accurately reflect the cost of production of CWP in the ordinary course of trade.⁷⁹ As noted above, section 771(15)(C) of the Act states that Commerce shall consider situations in which we determine that a particular market situation prevents a proper comparison of normal value with the export price or constructed export price, to be outside the ordinary course of trade. On this basis, we find that the existence of the particular market situation concerning the cost of production of CWP in Korea precludes a proper comparison of normal value with U.S. price, pursuant to section 771(15)(C) of the Act.⁸⁰

In addition, section 773(a)(1)(B)(i) states that the NV of subject merchandise shall be based on the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price. This statutory provision also requires that home market prices, used as NV, must be sold in the ordinary course of trade.

We note that comparing home market sale prices to a cost of production that does not accurately reflect production costs in the ordinary course of trade would be illogical and defeat the intent of the sales-below-cost test, which is to determine whether a respondent's home

⁷⁹ See *Final Results* IDM at Comment 1.

⁸⁰ Section 771(15)(C) of the Act explicitly states that Commerce shall consider situations in which we determine that a particular market situation prevents a proper comparison with the export price or constructed export price, to be outside the ordinary course of trade.

market sales were made in the ordinary course of trade. Thus, we are not making any facts available determinations, pursuant to section 776(a) of the Act. Rather, we are reverting to CV because the sales-below-cost test itself would be fruitless due to the particular market situation. In the *Final Results*, we calculated particular market situation adjustments ranging from [], meaning that the HRC acquisition costs reported in the respondents' books and records were highly distorted.⁸¹ Given that these distorted HRC costs comprise a high percentage of the cost of production of CWP, a sales-below-cost test run without a particular market situation adjustment would lead to a significant number of below-cost home market sale prices being used as a basis of NV, which would be compared to export price or constructed export price.

In determining whether to disregard a respondent's home market sales made as a result of the sales-below-cost test, we examined, in accordance with sections 773(b)(1)(A) and (B) of the Act, whether, within an extended period of time, such sales were made in substantial quantities, and whether such sales were made at prices which did not permit the recovery of all costs within a reasonable period of time in the normal course of trade. In accordance with section 773(b) of the Act, where less than 20 percent of a given product was sold at prices less than the COP, we did not disregard below-cost sales of that product, because the below-cost sales were not made in "substantial quantities." However, we disregarded the below-cost sales that: (1) have been made within an extended period of time (within six months to one year) in substantial quantities (20 percent or more), as defined by sections 773(b)(2)(B) and (C) of the Act; and (2) were not made at prices which permit recovery of all costs within a reasonable period of time, as prescribed by section 773(b)(2)(D) of the Act. Given the Court's instructions

⁸¹ See *Husteel Final Analysis Memorandum*; *see also* *Hyundai Steel Final Analysis Memorandum*.

to not apply a cost-based particular market situation adjustment in the context of the sales-below-cost test, pursuant to section 771(15)(C) of the Act, we find that the particular market situation with respect to the cost of production of CWP prevents a proper comparison of the respondents' home market prices with the respondents' export prices or constructed export prices. Therefore, we find that the particular market situation results in the respondents' comparison market sales being outside of the ordinary course of trade, and we continue to base normal value on CV in accordance with section 773(a)(4) of the Act for these final results of redetermination.

Issue 4 CV Profit

Hyundai Steel's Comments

- If Commerce continues to rely on CV for normal value in its final results of redetermination, Commerce at a minimum should not use Husteel's profit ratio from the 2014-2015 administrative review and revise its determination of the proper amount of CV profit using Hyundai Steel's data.⁸²
- Commerce inappropriately disadvantaged Hyundai Steel from analyzing the Draft Results of Redetermination by using Husteel's CEP and CV profit ratios because the data is business proprietary information (BPI) that Hyundai Steel cannot access pursuant to the administrative protection order (APO).⁸³
- Commerce has not justified its use of Husteel's profit ratios or provided opportunity for parties to submit comments and factual information on the data, which Commerce selected from another proceeding unilaterally.⁸⁴ Furthermore, because Hyundai Steel is

⁸² See Hyundai Steel Comments at 14.

⁸³ *Id.*

⁸⁴ *Id.* at 15-16.

prevented from analyzing the BPI due to the APO, Hyundai Steel cannot meaningfully submit rebuttal factual information.

- Commerce must conduct a sales-below-cost test based on the home market sales and cost data submitted by Hyundai Steel in this administrative review.⁸⁵ By doing so, Commerce will be able to calculate a CV profit ratio based on its preferred method. Because Commerce is able to calculate a CV profit rate under section 772(e)(2)(A) of the Act for Hyundai Steel, Commerce does not need to use the alternative methodologies prescribed under section 772(e)(2)(B) of the Act because the alternatives apply only when the respondent does not have useable data.⁸⁶

Commerce's Position: In accordance with section 773(e) of the Act, for each respondent, we have continued to separately calculate CV based on the sum of the costs of materials and fabrication employed in producing the subject merchandise, plus amounts for G&A expenses, financial expenses, CV profit, selling expenses, and U.S. packing costs. We disagree with Hyundai Steel's argument that the preferred method of calculating CV profit could be used in this situation because we have found that there are no comparison market sales with which we can perform the sales-below-cost tests in order to establish whether such comparison market sales were made within the ordinary course of trade, where CV profit would be calculated under the preferred method.

Due to the absence of comparison market sales in the ordinary course of trade, we are unable to calculate CV profit for each of the respondents using the preferred method and must instead rely on one of the three alternatives outlined in section 773(e)(2)(B)(i) through (iii) of the Act. These alternatives are: (i) the use of the actual amounts incurred and realized by the

⁸⁵ *Id.* at 16.

⁸⁶ *Id.* at 16-17.

specific exporter or producer in connection with the production and sale in the foreign country of merchandise that is in the same general category of products as the subject merchandise; (ii) the use of the weighted average of the actual amounts incurred and realized by exporters or producers (other than the respondent) in connection with the production and sale of the foreign like product, in the ordinary course of trade country, for consumption in the foreign country; or (iii) based on any other reasonable method, except that the amount for profit may not exceed the amount realized by exporters or producers (other than the respondent) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise (*i.e.*, the “profit cap”).

In conducting this analysis, we note that the specific language of both the preferred and alternative methods show a preference that the profit and selling expenses: (1) reflect production and sales in the foreign country; and (2) represent the foreign like product, *i.e.*, the merchandise under consideration. However, when selecting a profit rate from available record evidence, we may not be able to find a source that reflects both factors. Consequently, we must weigh the quality of the data against these factors.

The statute does not establish a hierarchy for selecting among the alternatives for calculating CV profit.⁸⁷ Moreover, as noted in the SAA, “the selection of an alternative will be made on a case-by-case basis, and will depend, to an extent, on available data.”⁸⁸ Thus, Commerce has the discretion to select from any of the three alternative methods, depending on the information available on the record. We continue to find that Commerce cannot rely on alternative (i) because there is no general category of merchandise profit information on the

⁸⁷ See SAA at 840 (“At the outset, it should be emphasized, consistent with the Antidumping Agreement, new section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods. Further, no one approach is necessarily appropriate for use in all cases.”)

⁸⁸ *Id.*

record for the respondents. Further, Commerce cannot rely on alternative (ii) because there no other respondents in this review that have comparison market sales in the ordinary course of trade. Therefore, Commerce must resort to the alternative under subsection (iii), *i.e.*, any other reasonable method.

In accordance with section 773(e)(2)(B)(iii) of the Act, (*i.e.*, any other reasonable method), as an available option for calculating each respondent's CV profit rate and selling expenses (*i.e.*, CV selling expenses, CV credit expenses and CV commission expenses), Commerce will continue to use Husteel's comparison market selling expense ratios and profit rate from its home market sales in the 2014-2015 administrative review⁸⁹ because Husteel's comparison market selling expense ratios and profit rate from the prior period reflect the profit and selling expenses of a Korean CWP producer, on home market sales of the merchandise under consideration, in the ordinary course of trade. By contrast, Hyundai Steel's home market sales information from the instant POR is not a viable alternative because of the particular market situation and section 773(e)(2)(B)(iii) does not require Commerce to use each of the respective respondents' BPI for their calculations.

Likewise, Husteel's constructed export profit from the 2014-2015 administrative review period reflects the profit of a Korean CWP producer, on home market and export sales of subject merchandise, in the ordinary course of trade. We continue to use Husteel's and Hyundai's home market selling expenses as calculated in the *Final Results* as CV selling expenses (*i.e.*, CV selling expenses, CV credit expenses and CV commission expenses).

⁸⁹ See Memorandum, "Redetermination Pursuant to Remand: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; *Husteel Co., Ltd., et al. v. United States*, Court No. 19-00107, Slip Op. 20-147: Placing Documents on the Record of the Remand," dated November 4, 2020 at Attachment 1.

Further, we are unable to calculate the profit amount realized by exporters or producers in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category of products as the subject merchandise (*i.e.*, the profit cap), in accordance with section 773(e)(2)(B)(iii) of the Act, because the record contains no information for making such a calculation. However, the SAA makes clear that Commerce might have to apply alternative (iii) on the basis of facts available.⁹⁰ Therefore, we conclude that the method used to calculate CV profit serves as a reasonable profit cap for this remand redetermination.

⁹⁰ See SAA at 840-41.

IV. FINAL RESULTS OF REDETERMINATION

Pursuant to the Court’s remand order, we have prepared these final results of redetermination. Based upon the analysis above, we find a weighted-average dumping margin of 14.65 percent for Husteel, 13.55 percent for Hyundai Steel, and 14.10 percent for the non-examined companies, SeAH and NEXTEEL.

Company	<i>Final Results</i> Rate	Remand Rate
Husteel	10.91%	14.65%
Hyundai Steel	8.14%	13.55%
Non-Examined	9.53%	14.10%

Additionally, as described above, we also find that “Hyundai Steel Company” and “Hyundai Steel (Pipe Division)” are the same legal entity and, consequently, should be treated as a single entity for cash deposit and suspension of liquidation purposes upon the conclusion of litigation.

12/17/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance