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**DATE:** June 7, 2019

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

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

**SUBJECT:** Issues and Decision Memorandum for the Final Results of the  
2016-2017 Administrative Review of the Antidumping Duty Order  
on Welded Line Pipe from Korea

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## **I. SUMMARY**

We analyzed the comments of the interested parties in the 2016-2017 administrative review of the antidumping duty (AD) order covering welded line pipe (WLP) from the Republic of Korea (Korea). As a result of our analysis, we made changes to the margin calculations for the mandatory respondents NEXTEEL Co., Ltd. (NEXTEEL) and SeAH Steel Corporation (SeAH). We recommend that you approve the positions described in the “Discussion of Issues” section of this memorandum. Below is the complete list of issues in this administrative review for which we received comments from the interested parties:

### General Issues:

- Comment 1: Lawfulness of Commerce’s Interpretation of the Particular Market Situation (PMS) Provision
- Comment 2: Evidence of a PMS
- Comment 3: PMS Adjustment
- Comment 4: Source for Constructed Value (CV) Selling Expenses and Profit

### NEXTEEL-Specific Issues:

- Comment 5: NEXTEEL’s Affiliation With POSCO
- Comment 6: Importer-Specific Assessment Rate for NEXTEEL/POSCO
- Comment 7: Major Input Analysis for NEXTEEL
- Comment 8: Non-Prime Costs for NEXTEEL
- Comment 9: Suspended Production Loss for NEXTEEL

## SeAH-Specific Issues:

Comment 10: Canada as Comparison Market for SeAH

Comment 11: Capping of Freight Revenue for SeAH

Comment 12: Application of Quarterly Costs to SeAH

Comment 13: Adjustment for General and Administrative (G&A) Expenses for SeAH's U.S. Affiliates

## **II. BACKGROUND**

On February 14, 2019, the Department of Commerce (Commerce) published the *Preliminary Results* of this administrative review.<sup>1</sup> From March 4 through 6, 2019, we conducted the sales verification of Pusan Pipe America (PPA), one of SeAH's U.S. affiliates, in accordance with section 782(i) of the Tariff Act of 1930, as amended (Act).<sup>2</sup> This review covers 32 producers or exporters. Commerce selected NEXTEEL Steel and SeAH for individual examination.<sup>3</sup> The period of review (POR) is December 1, 2016, through November 30, 2017.

We invited parties to comment on the *Preliminary Results*.<sup>4</sup> On April 4, 2019, we received case briefs from NEXTEEL, SeAH, Husteel Co. Ltd. (Husteel), Hyundai Steel Company (Hyundai Steel), and Maverick Tube Corporation<sup>5</sup> (Maverick).<sup>6</sup> On April 12, 2019, we received rebuttal briefs from SeAH, Maverick, and domestic producers California Steel Industries, TMK IPSCO, and Welspun Tubular LLC USA<sup>7</sup> (collectively, "Domestic Interested Parties").<sup>8</sup> After analyzing the comments received, we changed the weighted-average dumping margins from those presented in the *Preliminary Results*.

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<sup>1</sup> See *Welded Line Pipe from Korea: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016-2017*, 84 FR 4046 (February 14, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

<sup>2</sup> See Memorandum, "Verification of Pusan Pipe America, Inc. in the 2016-2017 Antidumping Duty Administrative Review of Welded Line Pipe from the Republic of Korea," dated March 21, 2019.

<sup>3</sup> See Memorandum, "2016-2017 Antidumping Duty Administrative Review of Welded Line Pipe from the Republic of Korea: Respondent Selection," dated March 19, 2018.

<sup>4</sup> See *Preliminary Results*, 83 FR at 1024.

<sup>5</sup> Maverick was a petitioner in the underlying less-than-fair-value (LTFV) investigation of WLP from Korea.

<sup>6</sup> See NEXTEEL's Case Brief, "Welded Line Pipe from the Republic of Korea: NEXTEEL's Case Brief," dated April 4, 2019 (NEXTEEL Case Brief); SeAH's Case Brief, "Case Brief of SeAH Steel Corporation," dated April 4, 2019 (SeAH Case Brief); Husteel's Case Brief, "Welded Line Pipe from the Republic of Korea, 12/1/2016-11/30/2017 Administrative Review, Case No. A-580-876; Case Brief," dated April 4, 2019 (Husteel Case Brief); Hyundai Steel's Case Brief, "Welded Line Pipe from the Republic of Korea: Case Brief," dated April 4, 2019 (Hyundai Steel Case Brief); and Maverick's Case Brief, "Welded Line Pipe from the Republic of Korea: Case Brief of Maverick Tube Corporation," dated April 4, 2019 (Maverick Case Brief).

<sup>7</sup> TMK IPSCO, and Welspun Tubular LLC USA were petitioners in the underlying LTFV investigation.

<sup>8</sup> See SeAH's Rebuttal Brief, "Rebuttal Brief of SeAH Steel Corporation," dated April 12, 2019 (SeAH Rebuttal Brief); Maverick's Rebuttal Brief, "Welded Line Pipe from Korea: Rebuttal Brief of Maverick Tube Corporation," dated April 12, 2019 (Maverick Rebuttal Brief); and Domestic Interested Parties Rebuttal Brief, "Welded Line Pipe from the Republic of Korea: Rebuttal Brief," dated April 12, 2019 (Domestic Interested Parties Rebuttal Brief).

### III. MARGIN CALCULATIONS

For NEXTEEL and SeAH, we calculated export price (EP), constructed export price (CEP), and normal value (NV) using the same methodology stated in the *Preliminary Results*, except as follows:<sup>9</sup>

- We revised the PMS adjustment on NEXTEEL's and SeAH's reported hot-rolled coil (HRC) costs to reflect POSCO's subsidy rate. *See* Comment 2 below for further discussion.
- We are no longer applying the major input adjustment for HRC obtained from POSCO by NEXTEEL. *See* Comment 7 below for further discussion.
- We revised our adjustment for valuing prime products vs NEXTEEL's non-prime products as recorded in NEXTEEL's normal books to derive the average per unit loss to allocate to the prime products. Specifically, we have calculated the difference between the cost of non-prime and its net realizable value and allocated it to the prime products. *See* Comment 8 below for further discussion.
- We applied the G&A expense rate of SeAH's U.S. further manufacturers to their further manufacturing costs, including the cost of the imported pipes as well as the products that were sold without further manufacturing. *See* Comment 13 below for further discussion.
- We revised SeAH's reported consolidated financial expense ratio to limit the interest income offset to the amount that was demonstrated to be generated on assets that were short-term in nature (*i.e.*, related to working capital).
- We applied SeAH's consolidated financial expense ratio to the further processing costs incurred by PPA and State Pipe and Supply, Inc. (SPS) in the United States.
- As a result of Commerce's verification of PPA, Commerce requested that SeAH submit a revised U.S. sales database including certain corrections.<sup>10</sup> Due to certain errors in SeAH's revised U.S. sales database, we reassigned the values of inland freight expenses incurred in the United States (INLFWCU) for certain invoices.<sup>11</sup>

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<sup>9</sup> *See* Memoranda, "Final Results Margin Calculation for NEXTEEL" dated concurrently with this memorandum (NEXTEEL Final Calculation Memo), "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – NEXTEEL Co., Ltd.," dated concurrently with this memorandum (NEXTEEL Final COP Memo); "Final Results Margin Calculation for SeAH," dated concurrently with this memorandum (SeAH Final Calculation Memo); and "Cost of Production and Constructed Value Calculation Adjustments for the Final Results – SeAH Steel Corporation," dated concurrently with this memorandum. (SeAH Final COP Memo).

<sup>10</sup> *See* SeAH's Letter, "Administrative Review of the Antidumping Order on Welded Line Pipe from Korea — Revised U.S. Database," dated March 26, 2019, and accompanying revised U.S. sales database.

<sup>11</sup> *See* SeAH Final Calculation Memo.

## IV. DISCUSSION OF ISSUES

### Comment 1: Lawfulness of Commerce's Interpretation of the PMS Provision

In the *Preliminary Results*, Commerce determined that a PMS existed in Korea which distorted the cost of production (COP) of WLP, based on the cumulative effect of: (1) Korean subsidies on the HRC input; (2) Korean imports of HRC from China; (3) strategic alliances between Korean HRC and WLP producers; and (4) distortions in the Korean electricity market.<sup>12</sup> In the *Preliminary Results*, we quantified the impact of the PMS in Korea by making an upward adjustment to the respondents' reported HRC costs, basing that adjustment on the subsidy rates, net of export subsidies, from the countervailing duty (CVD) investigation in *Hot-Rolled Steel from Korea*.<sup>13</sup>

#### *NEXTEEL's Case Brief*

- In the *Preliminary Results*, Commerce determined that a PMS existed with regard to NEXTEEL's COP due to alleged upstream subsidies provided by the Korean government to Korean producers of HRC.<sup>14</sup> This finding is contrary to law because Commerce is precluded from construing general statutory provisions governing PMS to override the more specific statutory provisions governing upstream subsidies. In particular, Commerce's application of antidumping duties to remedy alleged subsidies improperly allows for double remedies. The appropriate avenue for addressing this allegation is through the CVD laws, not the PMS provision, which would preclude Commerce from adjusting upstream subsidies in an AD proceeding with the application of a PMS.<sup>15</sup>
- Commerce must address this issue through the CVD laws, even if the AD laws are "broad enough to include {the question at issue}."<sup>16</sup> In fact, Commerce investigated subsidy allegations affecting WLP from Korea and determined that no such subsidies were provided.<sup>17</sup>
- Commerce's application of the CVD rates from *Hot-Rolled Steel from Korea* implies that POSCO passed 100 percent of its hot-rolled subsidies on to NEXTEEL, although there is no record evidence to support this presumption. If Commerce relies on subsidy rates as the basis of any PMS adjustment, that adjustment must be limited to the amount which the record demonstrates that the supplier actually passed on to the producer.
- Commerce must perform a five-part benefit pass-through analysis, as outlined in 19 CFR 351.523(c)(1) before an alleged subsidy can be countervailed. Accordingly, Commerce's

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<sup>12</sup> See PDM at 14-16.

<sup>13</sup> See *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination*, 81 FR 53439 (August 12, 2016), as amended by *Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders*, 81 FR 67960 (October 3, 2016) (collectively, *Hot-Rolled Steel from Korea*).

<sup>14</sup> See NEXTEEL Case Brief. at 23 (citing PDM at 15).

<sup>15</sup> *Id.* at 22-24 (citing section 771A of the Act).

<sup>16</sup> *Id.* at 24-25 (citing *Bloate v. United States*, 559 U.S. 196 (2010); and *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)).

<sup>17</sup> *Id.* at 25-26 (citing *Welded Line Pipe from the Republic of Korea: Final Negative Countervailing Duty Determination*, 80 FR 61365 (October 13, 2015) (*WLP CVD Final*)).

use of a CVD rate as PMS adjustment without conducting any pass-through analysis is inconsistent with Commerce's analysis under its CVD provisions, as well as illogical and unreasonable.<sup>18</sup>

- If the Domestic Interested Parties had filed an upstream subsidy allegation against NEXTEEL in a CVD proceeding, Commerce would have found that no subsidies were passed through under the preferred benchmark in a "competitive benefit" analysis. Specifically, NEXTEEL provided information on its purchases of HRC from an unaffiliated Japanese supplier; these prices serve as a clean benchmark for what the price of HRC would or should have been from POSCO, absent any alleged subsidy. Further, NEXTEEL paid POSCO a higher price for the same grade of HRC than it did to its unaffiliated Japanese supplier, demonstrating that POSCO did not pass any competitive benefit on to NEXTEEL as an upstream subsidy.<sup>19</sup>
- Commerce's application of a CVD margin from the January 1, 2014, through December 31, 2014, period of investigation as a PMS adjustment to this POR of December 1, 2016, through November 30, 2017, is inconsistent with Commerce's practice to conduct benefit analyses using contemporaneous data.
- By applying a CVD rate without an upstream subsidy analysis, Commerce has imposed a CVD remedy against NEXTEEL in an antidumping proceeding. Commerce already conducted a CVD investigation on WLP from Korea; thus, the use of a CVD remedy in this antidumping proceeding constitutes unlawful double remedies.
- Commerce has an established policy against double-counting of remedies across AD and CVD proceedings, as articulated in such cases as *Low Enriched Uranium from France*.<sup>20</sup>
- The Domestic Interested Parties filed a CVD petition regarding subject merchandise, and Commerce found no countervailable subsidies in the *WLP CVD Final*. Incorporating an additional upstream subsidies allegation in this AD proceeding creates a troubling precedent by allowing upstream subsidies to be addressed in an AD proceeding.

### *Hyundai Steel's Case Brief*

- Commerce improperly relied on alleged upstream subsidies to HRC producers for making its PMS determination and, in turn, effectively applied adverse facts available

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<sup>18</sup> *Id.* at 27-29 (citing *Beijing Tianhai Industry Co., Ltd. v. United States*, 52 F. Supp. 3d 1351, 1365 (CIT 2015); *Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73448 (December 12, 2005); and *Delverde, SrL v. United States*, 202 F. 3d 1360, 1364 (Fed. Cir. 2000)).

<sup>19</sup> *Id.* at 29-30 (citing NEXTEEL's August 3, 2018 Supplemental Section D Response (NEXTEEL August 3, 2018 SQR) at Exhibit SD2-6-a).

<sup>20</sup> *Id.* at 31-32 (citing *Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France*, 69 FR 46501, 46506 (August 3, 2004) (*Low Enriched Uranium from France*); *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 62 FR 18404, 18422 (April 15, 1997) (*Cold-Rolled and CORE from Korea*); and *Certain Cut-To-Length Carbon Steel Plate from Germany: Final Results of Antidumping Duty Administrative Review*, 62 FR 18390, 18394 (April 15, 1997)).

(AFA) unlawfully to the respondents from a completely separate CVD proceeding to adjust respondents' purchases of HRC.<sup>21</sup>

### *Husteel's Case Brief*

- Commerce's determination that a PMS exists in Korea is not in accordance with law.
- Under Section 773(e) of the Act, as amended by the TPEA, Commerce must demonstrate there exists sufficient evidence that respondent's costs do not accurately reflect the COP in the ordinary course of trade to make an affirmative PMS determination. In addition, section 773(b) and (e) of the Act, as well as Commerce's longstanding practice, require Commerce to use a company's own books and record to determine costs.<sup>22</sup>
- Commerce has normally found that a finding of a PMS requires a high bar of evidence to determine a PMS. In this proceeding, Commerce has failed to conduct the thorough analysis required by law to establish whether a PMS exists.<sup>23</sup>
- The statute governing AD and CVD proceedings laws require application of distinct remedies for such cases. Thus, Commerce's determination in *Hot-Rolled Steel from Korea* is specific to that investigation. The proper remedy for a subsidy allegation is through the CVD laws, not through the PMS provision.<sup>24</sup>
- Commerce's long-standing practice is not to consider subsidies in AD proceedings. In the instant review, Commerce is effectively double-counting the subsidy to POSCO measured in the CVD investigation, and again in applying the subsidy rate to the HRC inputs obtained by the WLP respondents. Further, Commerce failed to conduct an upstream subsidy analysis to determine whether the alleged subsidies received by the WLP input suppliers were actually passed on to the WLP producers.<sup>25</sup>

### *Domestic Interested Parties' Rebuttal Brief*

- Commerce properly found that a PMS exists in Korea that distorts the COP of WLP. In making its determination, Commerce properly applied the cost-based PMS provision of the antidumping statute to address distortive input costs.<sup>26</sup>

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<sup>21</sup> See Hyundai Steel Case Brief at 18-21 (citing PDM at 17; sections 771A and 776(b) of the Act; *Hot-Rolled Steel from Korea* Issues and Decision Memorandum (IDM) at Comment 5; *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264, 1276 (CIT 2009); *Carpenter Technology Corp. v. United States*, 26 C.I.T. 830, 843 (2002); *China Steel Corp. v. United States*, 306 F. Supp. 2d 1291 (CIT 2004); Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994) (SAA) at 869-70; and *POSCO v. United States*, 337 F. Supp. 3d 1265 (CIT 2018) (*POSCO Hot-Rolled*)).

<sup>22</sup> See Husteel Case Brief at 3 (citing *Certain Tapered Roller Bearings from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less-Than-Fair-Value, Postponement of Final Determination, and Extension of Provisional Measures*, 83 FR 4901 (February 2, 2018), and accompanying PDM at 12).

<sup>23</sup> *Id.* at 3-4 (citing SAA at 822).

<sup>24</sup> *Id.* at 14-15 (citing sections 706 and 771A(a) of the Act).

<sup>25</sup> *Id.* at 15-16 (citing *Tool Steel from the Federal Republic of Germany: Correction to Early Determination of Antidumping Duty*, 51 FR 10071 (March 24, 1986); and *Final Results of Antidumping Duty Administrative Review of Solid Urea From the Former German Democratic Republic*, 62 FR 61271 (November 17, 1997), and accompanying IDM at Comment 3).

<sup>26</sup> See Domestic Interested Parties Rebuttal Brief at 2-3 (citing *Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362 (2015) (TPEA); and section 773(e) of the Act).

- The respondents’ objections to the application of the cost-based PMS are based on the pre-TPEA statute and case precedents; thus, they are not relevant to Commerce’s analysis of cost-based distortions that result in a PMS finding under the post-TPEA statute.
- As provided under section 773(e)(3) of the Act, Commerce has broad discretion to resort to another calculation methodology to address a PMS through a COP adjustment. Thus, Commerce’s interpretation and application of the statute to find a PMS in Korea for the HRC input is in accordance with the law.<sup>27</sup>

**Commerce’s Position:** For the final results, we continue to find that a PMS existed in Korea that distorted the COP of WLP during the POR, and, thus, for these final results we continue to make an adjustment to the costs of HRC inputs for NEXTEEL and SeAH. Section 504 of the TPEA added the concept of PMS in the definition of the term “ordinary course of trade,” for purposes of CV under section 773(e) of the Act, and through these provisions for purposes of the COP under section 773(b)(3) of the Act. Section 773(e) of the Act states that “{i}f a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the COP in the ordinary course of trade, the administering authority may use another calculation methodology under the subtitle or any other calculation methodology.” Thus, under section 504 of the TPEA, Congress has given Commerce the authority to determine whether a PMS exists within the foreign market from which the subject merchandise is sourced and to determine whether the cost of materials, fabrication, or processing of such merchandise fail to accurately reflect the COP in the ordinary course of trade.<sup>28</sup>

In the instant review, we preliminarily determined that a PMS exists in Korea which distorted the WLP costs of production based on the following four factors alleged by the Domestic Interested Parties, as discussed below: (1) subsidization of Korean hot-rolled steel products by the Korean government; (2) the distortive pricing of unfairly traded Chinese HRC; (3) strategic alliances between Korean HRC suppliers and Korean WLP producers; and (4) distortive government control over electricity prices in Korea. Section 504 of the TPEA does not specify whether to consider these allegations individually or collectively. In *2015-2016 Final Results*, Maverick alleged that a PMS existed in Korea based on the same four factors and, upon analyzing the four allegations as a whole, Commerce found that a PMS existed in Korea during the first administrative review of this order.<sup>29</sup> In examining this approach as applied in the 2014-2015 administrative review of oil country tubular goods (OCTG) from Korea, the CIT concluded that considering the totality of circumstances in the market (including these four factors) is reasonable.<sup>30</sup>

For the current review, as in the previous administrative review of this order, Commerce considered, as a whole, the four PMS allegations based on their cumulative effect on the Korean WLP market through the COP for WLP and its inputs. Based on the totality of the conditions in

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<sup>27</sup> *Id.* at 4-5 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

<sup>28</sup> See section 773(e) of the Act.

<sup>29</sup> See *Welded Line Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 33919 (July 18, 2018) (*2015-2016 Final Results*), and accompanying IDM at Comment 1.

<sup>30</sup> See *NEXTEEL Co., Ltd. v. United States*, 355 F. Supp. 3d 1336, 1349 (CIT 2019) (*NEXTEEL*) (discussing legislative history and finding that Commerce’s approach was reasonable).

the Korean market, Commerce continues to find that the allegations represent facets of a single PMS, as explained in further detail in Comment 2, below.

We disagree with NEXTEEL's and Husteel's argument that the use of subsidies provided to HRC producers as a basis for finding a PMS is inconsistent with the Act's separate remedy for alleged upstream subsidies. Commerce considers neither the benefit nor the specificity of a government subsidy program in the context of an AD proceeding. Accordingly, we do not find the determinations in this administrative review that are inconsistent with section 771A of the Act.<sup>31</sup>

Furthermore, the legislative history of TPEA indicates that Congress intended to provide Commerce with the ability to address price and cost distortions resulting from subsidization through the PMS provision. The TPEA states "that Commerce can disregard prices or costs of inputs that foreign producers purchase if the Commerce has reason to believe or suspect that the inputs in question have been subsidized or dumped."<sup>32</sup> Further, during the Senate debate on this bipartisan legislation, Senator Brown called the proposed legislation "one of the most important bills to come in front of the Senate" which would "guarantee that Americans can find a more level playing field as we compete in the world economy...."<sup>33</sup> He also identified the Korean steel industries as an example of industries that do not play by the rules, specifically referencing unfair subsidization of the Korean OCTG industry, which shares many characteristics of the Korean WLP industry, by the Korean government:

These {U.S. OCTG} producers increasingly lose business to foreign competitors that are not playing by the rules. Imports for OCTG, Oil Country Tubular Goods, have doubled since 2008. By some measures imports account for somewhat more than 50 percent of the pipes being used by companies drilling for oil and gas in the United States.

Korea has one of the world's largest steel industries, but get this, not one of these pipes that Korea now dumps in the United States – *illegally subsidized* - is ever used in Korea for drilling because Korea has no domestic oil or gas production. In other words, *Korea has created this industry only for exports and has been successful because they are not playing fair*. So, their producers are exporting large volumes to the United States, the most open and attractive market in the world, at below-market prices. This is clear evidence that our workers and manufacturers are being cheated and it should be unacceptable to the Members of this body. It hurts our workers, our communities, and our country. It is time to stop it.<sup>34</sup>

We also do not share NEXTEEL's view that provisions concerning upstream subsidies under CVD law are more specific than PMS provisions under AD law, and, thus, must control. The

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<sup>31</sup> See *Large Diameter Welded Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 84 FR 6374 (February 27, 2019), and accompanying IDM at Comment 1.

<sup>32</sup> See section 504(b) of the TPEA.

<sup>33</sup> See Congressional Record-Senate, S2899, S2900 (May 14, 2015).

<sup>34</sup> *Id.* (emphasis added).



legislative history discussed above indicates that in amending the AD statute, Congress, which was well aware of the CVD laws it previously enacted, was specifically concerned with price and cost distortions in AD calculations that resulted from unfair trade practices, including subsidization, and provided Commerce with tools to address such distortions in an AD proceeding. NEXTEEL's misinterpretation of the Act seeks to create a conflict between different statutory provisions where none exists. In contrast, our statutory interpretation construes the statutory provisions harmoniously and does not result in a statutory conflict. Provisions regarding upstream subsidies are specific to CVD determinations and apply in CVD proceedings, while provisions regarding PMS are specific to AD determinations and apply in AD proceedings. This administrative review is part of an AD proceeding, to which section 773 of the Act applies directly. Section 771A of the Act does not govern in an AD proceeding.

Further, NEXTEEL's argument regarding application of double remedies in this review is speculative and unfounded because there is no parallel CVD order on WLP from Korea.

Finally, Husteel's argument that Commerce must use a respondent's own books and records to determine costs under section 773(e) of the Act is misplaced. We have used the respondents' own books and records to determine costs, and, where appropriate, made an adjustment to address distortions resulting from PMS under section 773 of the Act, which expressly provides Commerce with authority to make such adjustments. Regarding Husteel's argument that the application of the PMS provision has a high evidentiary threshold and is reserved for unusual situations, section 504 of the TPEA expanded Commerce's authority to apply the concept of PMS to COP and, in this review, as explained below in Comment 2, Commerce considered the evidence of a PMS and properly found that the evidence supported a finding that a PMS existed in Korea during the POR.

## **Comment 2: Evidence of a PMS**

### *NEXTEEL's Case Brief*

- Since the *Preliminary Results*, the Court of International Trade (CIT) concluded that Commerce's finding of the existence of PMS in *OCTG 2014-2015 Final Results* was unsupported by substantial evidence. In that decision, the CIT highlighted that Commerce itself determined the lack of support to find whether a PMS exists based on the four criteria it relied upon in that review.<sup>35</sup>
- In this review, the Domestic Interested Parties made the same allegations and submitted much of the same evidence as in the first administrative review of WLP, which, in turn, is the same evidence upon which the PMS finding in *OCTG 2014-2015 Final Results* was based, as the Domestic Interested Parties acknowledged.<sup>36</sup>

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<sup>35</sup> See NEXTEEL Case Brief at 5-6 and 10-12 (citing PDM at 12-18; *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 18105 (April 17, 2017) (*OCTG 2014-2015 Final Results*); and NEXTEEL, 355 F. Supp. 3d at 1349-1351).

<sup>36</sup> *Id.* at 11-12 (citing Letter from Domestic Interested Parties entitled, "Welded Line Pipe from the Republic of Korea: Particular Market Situation Allegation and Other Factual Information," dated August 6, 2018 (PMS Allegation) at 6.).

- Thus, because the Domestic Interested Parties submitted no new information to support the PMS allegation in this review, pursuant to the CIT’s ruling in *NEXTEEL*, Commerce must conclude that a PMS does not exist for this POR.<sup>37</sup>
- A PMS finding should be reserved for limited and unique circumstances, and should not be the norm in AD proceedings.<sup>38</sup>
- Commerce evaluated PMS allegations in other proceedings in the sales pricing context under section 773(a)(1)(B)(ii)(III) of the Act, and recognized that a PMS finding relies on strong substantial evidence to establish that a respondent’s actual data is unusually and extensively distorted. Commerce should apply the same standard under section 773(e) of the Act, and in doing so, will find that there is no PMS with respect to NEXTEEL’s purchases of HRC in the instant administrative review.<sup>39</sup>
- Nothing on the record of this review indicates that the Korean market for HRC is distorted to justify a finding that the input transactions are outside the ordinary course of trade and that a PMS exists.
- The Korean market does not involve government interference in the HRC market. Rather, the Korean HRC market functions on the basis of global supply and demand trends consistent with that expected of an open marketplace. NEXTEEL placed information on the record of this review which demonstrates that its prices are reflective of market reality and not outside the ordinary course of trade.<sup>40</sup>
- Commerce failed to consider NEXTEEL’s data for the *Preliminary Results*, relying on conclusory qualitative assertions regarding the Korean market.<sup>41</sup> Under a proper analysis, no PMS would be found to exist, and no PMS adjustment is warranted.
- If Commerce continues to find that it is necessary to make an adjustment to NEXTEEL’s costs under the PMS provisions, Commerce should ensure that any such adjustment considers the actual data to provide HRC is properly valued and reflective of functioning markets.
- The volume of imports from China into Korea is not significant enough to have an impact on the Korean market, which operates under normal market conditions.<sup>42</sup>
- Commerce’s *Preliminary Results* failed to identify any data which indicate that Chinese imports constitute a “flood” relative to the overall production of hot-rolled steel sheet products in Korea.<sup>43</sup>

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<sup>37</sup> *Id.* at 12-13 (citing PMS Allegation at 6-16 and Exhibits 15, 16, 21, and 29).

<sup>38</sup> *Id.* at 8 (citing SAA at 822; and *Antidumping Duties; Countervailing Duties, Final Rule*, 62 FR 27296, 27323 (May 19, 1997) (*Preamble*)).

<sup>39</sup> *Id.* at 8-9 (citing *Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52741 (September 5, 2003) (*Wheat from Canada*), and accompanying IDM at Comment 1; *Cold-Rolled and CORE from Korea* IDM at Comment 1; and *Certain Frozen Warmwater Shrimp from Thailand: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 76 FR 40881 (July 12, 2011) (*Shrimp from Thailand 2009-2010*), and accompanying IDM at Comment 3)).

<sup>40</sup> *Id.* at 13-17 (citing Letter from NEXTEEL entitled, “Welded Line Pipe from the Republic of Korea: NEXTEEL’s Particular Market Situation Comments and Rebuttal Factual Information,” dated September 7, 2018 (NEXTEEL PMS Comments) at 15-16 and Exhibits 8, 10, and 13).

<sup>41</sup> *Id.* at 16-17 (citing PDM at 17).

<sup>42</sup> *Id.* at 17-18 (citing NEXTEEL PMS Comments at Exhibit 5).

<sup>43</sup> *Id.* at 18 (citing NEXTEEL PMS Comments at Exhibit 6).

- The Domestic Interested Parties point to no evidence that Chinese overcapacity is directed to the Korean market.<sup>44</sup>
- The strategic alliance element relied upon by Commerce is unsupported by the record. Commerce failed to articulate how the alleged strategic alliance impacted the market for HRC and contributed to a meaningful PMS, as well as failed to quantify its findings. In fact, Commerce stated that the “record does not contain specific evidence showing that strategic alliances directly created a distortion in HRC pricing in the current POR....”<sup>45</sup>
- Commerce’s *Preliminary Results* PMS findings with respect to the alleged “strategic alliance” between NEXTEEL and POSCO have been fully discredited by the CIT, which affirmed Commerce’s decision to reject the “strategic alliance” argument, noting that it was “highly speculative.”<sup>46</sup>
- Contemporaneous record evidence demonstrates that NEXTEEL’s electricity rates reflect market principles.<sup>47</sup>
- Commerce found no countervailable subsidies with respect to electricity provided to Korean steel producers, including in the CVD investigation of WLP from Korea.<sup>48</sup> Commerce has reached similar findings in other proceedings, which have been upheld by the CIT. In light of these determinations, Commerce cannot point to the Korea electricity market as a PMS factor.<sup>49</sup>
- If Commerce nevertheless relies on Korea’s electricity market for reaching a PMS determination, Commerce should decline to make any PMS adjustment for electricity, particularly given the miniscule portion of WLP’s COP that electricity represents.<sup>50</sup>
- Should Commerce continue to find that a PMS exists with respect to NEXTEEL’s HRC, Commerce must base its finding on empirical and quantitative analysis of the PMS allegation with respect to NEXTEEL’s actual costs of production, consistent with its practice in such cases as *Rebar from Taiwan* and *Biodiesel from Argentina*.<sup>51</sup>

### *SeAH’s Case Brief*

- Because Commerce relied on the same record evidence and PMS finding for its PMS determination in this proceeding as it did for the *OCTG 2014-2015 Final Results*, in light of the CIT’s decision in *NEXTEEL* that there was no evidence of the existence of a PMS

<sup>44</sup> *Id.* (citing PMS Allegation at 16).

<sup>45</sup> *Id.* at 18-19 (citing PDM at 16).

<sup>46</sup> *Id.* at 21 (citing *Husteel Co., Ltd. v. United States*, 98 F. Supp. 3d 1315, 1359 (CIT 2015) (*Husteel*)).

<sup>47</sup> *Id.* (citing NEXTEEL PMS Comments at Exhibits 14-16).

<sup>48</sup> *Id.* (citing *WLP CVD Final*, 80 FR at 61365).

<sup>49</sup> *Id.* at 21-22 (citing *Maverick Tube Corporation v. United States*, 273 F. Supp. 3d 1293, 1303-08 (CIT 2017) (*Maverick Tube*); *POSCO Hot-Rolled*; *POSCO v. United States*, 353 F. Supp. 3d 1357 (CIT 2018) (*POSCO CTL Plate*); and *Nucor Corporation v. United States*, 286 F. Supp. 3d 1364 (CIT 2018) (*Nucor CORE*)).

<sup>50</sup> *Id.* at 22 (citing NEXTEEL PMS Comments at 19).

<sup>51</sup> NEXTEEL Case Brief at 33-36 (citing *Steel Concrete Reinforcing Bar from Taiwan: Final Determination of Sales at Less Than Fair Value*, 82 FR 34925 (July 27, 2017) (*Rebar from Taiwan*), and accompanying IDM at Comment 1; and *Biodiesel from Argentina: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 83 FR 8837 (March 1, 2018) (*Biodiesel from Argentina*), and accompanying IDM at Comment 3.

for HRC in Korea based on the four factors relied upon by Commerce, Commerce should follow *NEXTEEL* and calculate the final results margins without PMS adjustments.<sup>52</sup>

- Two of the factors leading to Commerce’s PMS finding in the *Preliminary Results*, strategic alliances and government control over electricity costs, are irrelevant to SeAH. With respect to strategic alliances, Commerce has consistently found that SeAH and POSCO are not affiliated. With respect to electricity, Commerce found that the prices SeAH paid for electricity did not confer any subsidy benefit.<sup>53</sup>
- There is no evidence that the prices SeAH paid for HRC were affected by subsidies allegedly provided to POSCO or Chinese suppliers’ alleged predatory practices, as evidenced by:
  - a) the subsidy finding in *Hot-Rolled Steel from Korea* was based completely on AFA;<sup>54</sup>
  - b) a comparison of the average prices for SeAH’s purchases of HRC from Korean producers and from Japanese producers substantiates that POSCO’s prices were not unfairly low;<sup>55</sup>
  - c) there is no evidence of any findings of dumping against Chinese coil producers by the Korean government; and
  - d) a comparison of prices SeAH paid for HRC from Chinese producers demonstrates that these purchase prices were not unfairly low.<sup>56</sup>
- There is no evidence that the broader Korean market prices for HRC in Korea did not “accurately reflect the COP in the ordinary course of trade.” Thus, there is no basis to make a PMS adjustment for SeAH.<sup>57</sup>

#### *Hyundai Steel’s Case Brief*

- Commerce’s finding of alleged “distortions” in the Korean HRC market was insufficient to satisfy the statutory requirement under section 773(b)(3) of the Act for making a PMS adjustment. Specifically, Commerce failed to make a finding under that provision that

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<sup>52</sup> See SeAH Case Brief at 17-18 (citing *NEXTEEL*, 355 F. Supp. 3d at 1350; and PDM at 15).

<sup>53</sup> *Id.* at 18-19 (citing *Welded ASTM A-312 Stainless Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 742 (January 7, 2016) (*Stainless Steel Pipe from Korea Preliminary Results*), and accompanying PDM at 7-8; *Welded Line Pipe from the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 80 FR 29620 (May 22, 2015) (*LTFV Preliminary Determination*), and accompanying PDM at 18; and *WLP CVD Final IDM* at Comment 1).

<sup>54</sup> *Id.* at 20 (citing *Hot-Rolled Steel from Korea IDM* at Comment 5

<sup>55</sup> *Id.* at 21 (citing SeAH’s May 14, 2018, Sections B through E Questionnaire Response (SeAH BCDEQR) at Appendix D-4-A).

<sup>56</sup> *Id.* at 22 (citing SeAH BCDEQR at Appendix D-4-A).

<sup>57</sup> *Id.* at 22-24 (citing Commerce’s December 21, 2018, Response Brief, in *NEXTEEL Corporation, Ltd. v. U.S.*, Consol. Court No. 18-00083, at 16-17; Section 773(e) of the Act; and *Corley v. United States*, 556 U.S. 303, 314 (2009)).

“the cost of materials and fabrication or other processing of any kind does not accurately reflect the COP in the ordinary course of trade” as a result of the PMS.

- The record contains no evidence that any of the four factors Commerce relied upon in making a PMS finding under a “collective impact” exist.<sup>58</sup> In *NEXTEEL*, the CIT found that it “does not stand to reason that individually, the facts would not support a particular market situation, but when viewed as a whole, these same facts could support the opposite conclusion.”<sup>59</sup> As Commerce’s PMS finding in this proceeding relies on the underlying *OCTG 2014-2015 Final Results* reversed in *NEXTEEL*, Commerce should similarly find that the PMS allegations considered collectively failed to establish a PMS.
- Commerce has not determined that the PMS in Korea is not “ordinary.” Rather, because Commerce has found that a PMS has existed in Korea that has distorted the COP since July 2014 for a number of Korean steel cases, the market situation represents a normal condition which Commerce can no longer consider outside the ordinary course of trade.<sup>60</sup>
- A PMS adjustment should be reserved for only the most unusual of circumstances. In reaching affirmative PMS determinations in several Korean steel cases, Commerce has departed from its prior, reasoned analysis; thus, these PMS determinations cannot withstand judicial review.<sup>61</sup>
- Commerce must empirically and quantitatively analyze the PMS allegation with respect to a respondent’s actual COPs, using a data-driven methodology for benchmarking the relevant COPs, as it has in other recent cases. Commerce failed to perform this level of analysis in the *Preliminary Results* and must do so for the final results in order to determine whether a PMS exists.<sup>62</sup>
- Commerce made no new factual finding in the *Preliminary Results* to support a determination that HRC inputs for WLP are not within the ordinary course of trade or to support an overall affirmative PMS finding.<sup>63</sup>
- There is no evidence on the record of the alleged effects of global overcapacity on direct material costs for WLP production contributing to a PMS, nor did Commerce undertake any analysis in this review to establish that the HRC input prices were inconsistent with market conditions or below COP.

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<sup>58</sup> See Hyundai Steel Case Brief at 15-18 (citing *POSCO CTL Plate*; *POSCO Hot-Rolled*; *POSCO v. United States*, 296 F. Supp. 3d 1320, 1350 (CIT 2018) (*POSCO Cold-Rolled 1*); *Nucor CORE*, appeal docketed, No. 18-1787 (Fed. Cir. April 6, 2018); *Maverick Tube*, appeal docketed, No. 18-1351 (Fed. Cir. December 28, 2017); and PDM at 15-18).

<sup>59</sup> *Id.* at 18 (citing *NEXTEEL*, 355 F. Supp. 3d at 1351).

<sup>60</sup> See Hyundai Steel Case Brief at 2-3 (citing section 771(15) of the Act; and PDM at 12-17).

<sup>61</sup> *Id.* at 3-5 (citing SAA at 822; *Preamble*, 62 FR at 27323; *Wheat from Canada* IDM at Comment 1; *Cold-Rolled and CORE from Korea* IDM at Comment 1; and *Shrimp from Thailand 2009-2010* IDM at Comment 3).

<sup>62</sup> *Id.* at 5- 8 (citing *Rebar from Taiwan* IDM at Comment 1; *Biodiesel from Argentina: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 50394 (October 31, 2017) (*Biodiesel from Argentina Preliminary Determination*), and accompanying PDM at 23; *Biodiesel from Argentina* IDM at Comment 3; *Biodiesel from Indonesia: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 50379 (October 31, 2017) (*Biodiesel from Indonesia Preliminary Determination*), and accompanying PDM at 23; and *Biodiesel from Indonesia: Final Determination of Sales at Less Than Fair Value*, 83 FR 8835 (March 1, 2018) (*Biodiesel from Indonesia*), and accompanying IDM at Comment 3).

<sup>63</sup> *Id.* at 8-9 (citing PDM at 15-17).

- Commerce properly declined to adjust costs based on alleged distortions by China-sourced HRC.<sup>64</sup>
- There is no evidence on the record to support Commerce’s finding of alleged “strategic alliances” between HRC and WLP producers in Korea during the POR. In *Husteel*, the CIT considered and rejected the argument that a “silent agreement” existed between POSCO and the Korean OCTG and WLP producers, calling such an argument “highly speculative and unpersuasive.”<sup>65</sup>
- There is no basis to find a PMS with respect to electricity because Commerce and the CIT consistently have not found any countervailable subsidies associated with electricity provided to Korean steel producers. Further, nothing on the record of the instant review suggests that Korean electricity prices are aberrant or distorted.<sup>66</sup>

### *Husteel’s Case Brief*

- In previous cases, Commerce conducted PMS analyses that sought strong evidence and direct causes between the PMS and a respondent’s pricing, rather than a generalized “totality of circumstances.”<sup>67</sup>
- In post-TPEA proceedings other than the Korean steel cases where the PMS determination was based on the now CIT-rejected *2014-2015 OCTG Final Results*, Commerce recognized that a PMS determination must be based on evidence of actual cost distortions for particular producers in a particular market. In those proceedings, Commerce conducted a quantitative analysis and examined the effect on the respondents’ actual costs.<sup>68</sup>
- In this review, however, Commerce relied upon speculation about general market conditions prior to the POR, and failed to examine the respondents’ actual costs to

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<sup>64</sup> *Id.* at 13 (citing PDM at 17-18).

<sup>65</sup> *Id.* at 13-14 (citing *Husteel*, at 1359).

<sup>66</sup> *Id.* at 14-15 (citing *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination*, 81 FR 49943 (July 29, 2016), and accompanying IDM at Comment 2; *CTL Plate from Korea*; *Hot-Rolled Steel from Korea* IDM at 44-45; *WLP CVD Final*; and PDM at 18).

<sup>67</sup> See *Husteel Case Brief* at 5-7 (citing *Cold-Rolled and CORE from Korea*; *Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol from the Republic of South Africa*, 62 FR 61084 (November 14, 1997); *Wheat from Canada* IDM at Comment 1; *Cold-Rolled and CORE from Korea* IDM at Comment 1; *Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 FR 7011 (February 14, 2007), and accompanying IDM at Comment 1; *NEXTEEL*, 355 F. Supp. 3d at 1350; *Shrimp from Thailand 2009-2010* IDM at Comment 3; *Final Determination of Sales at Not Less Than Fair Value: Prestressed Concrete Steel Rail Tie Wire from Thailand*, 79 FR 25574 (May 5, 2014), and accompanying IDM at Comment 2; *Notice of Final Determination of Sales at Less than Fair Value: Fresh Atlantic Salmon from Chile*, 63 FR 31411 (June 9, 1998); and *Electrolytic Manganese Dioxide from Greece: Final Results of Antidumping Duty Administrative Review*, 65 FR 68978 (November 15, 2000), and accompanying IDM at Comment 3).

<sup>68</sup> See *Husteel Case Brief* at 8-9 (citing *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 82 FR 51806 (November 8, 2017), and accompanying IDM at Comment 17; *Rebar from Taiwan* IDM at Comment 1; *Biodiesel from Argentina Preliminary Determination* PDM at 23-24; *Biodiesel from Argentina* IDM at Comment 2; *Biodiesel from Indonesia Preliminary Determination*; and *Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2016-2017*, 83 FR 26951 (June 11, 2018), and accompanying PDM at 4).

determine if the various factors cited by Commerce in making the PMS determination distorted the respondents' actual costs.

- Commerce's preliminary finding is not based on substantial record evidence in this review and instead relies on the determination made in the *2015-2016 Final Results*, which in turn, was based on the PMS determination in *2014-2015 OCTG from Korea Final Results*, which the CIT rejected as unsupported by substantial evidence.<sup>69</sup>
- Because Commerce is relying upon the same evidence in this review as it relied upon in the *2014-2015 OCTG from Korea Final Results*, without addressing the specific HRC costs incurred by NEXTEEL and SeAH during the POR, nor the significant differences between the OCTG and WLP markets, Commerce should reverse its *Preliminary Results* finding that that a PMS exists in this review.<sup>70</sup>

#### *Domestic Interested Parties' Rebuttal Brief*

- Commerce based its PMS finding in this review on substantial record evidence demonstrating the combined impact of a variety of distortions present in the Korean HRC market. Commerce's reasoning is contrary to the respondents' assertions that Commerce's PMS finding in this review encourages "spurious PMS allegations" that are not subjected to critical analysis.<sup>71</sup>
- The respondents' arguments that *NEXTEEL* precludes Commerce from finding a PMS in this review are incorrect because *NEXTEEL* does not reflect a final judgment by the CIT and may be appealed. Further, the record in this review differs from the *OCTG 2014-2015 Final Results*, reflecting the unique and distinct facts developed in this review.<sup>72</sup>
- The respondents' arguments against the PMS finding fail to account for Commerce's "totality of the circumstances" analysis. Under this approach, while no single element may establish a PMS, the combined effect of the factors lead to an affirmative PMS determination, as Commerce found in this review.<sup>73</sup>
- In arriving at the PMS determination based on the totality of the circumstances, Commerce properly considered each of the PMS factors. With respect to Korean government subsidies on HRC, as well as the downward price pressure from cheap Chinese steel, Commerce found that the record evidence demonstrated the distortion caused by these factors on Korean HRC prices.<sup>74</sup>

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<sup>69</sup> *Id.* at 10 (citing PDM at 14-15; and *NEXTEEL*; and *2015-2016 Final Results* IDM at Comment 1).

<sup>70</sup> *Id.* at 10-14 (citing PDM at 14-16; *NEXTEEL*, 355 F. Supp. 3d at 1350-1351; *NEXTEEL* PMS Comments at 8-16; SeAH PMS Comments at 2-3; *Alloy Piping Prods., Inc. v. United States*, 33 C.I.T. 349, 353-54 (2009) (*Alloy Piping* 2009); *Hot-Rolled Steel from Korea* IDM at Comment 1; and *Maverick Tube*).

<sup>71</sup> See Domestic Interested Parties Rebuttal Brief at 5-6 (citing *NEXTEEL* Case Brief at 8; PDM at 14-18; and *Biodiesel from Indonesia* IDM at Comment 3).

<sup>72</sup> *Id.* at 7-8 (citing PMS Allegation at 18 and Exhibits 36-48).

<sup>73</sup> *Id.* at 8-11 (citing *US Magnesium LLC v. United States*, 839 F. 3d 1023, 1028 (Fed. Cir. 2016); *Bergerac, N.C. v. United States*, 102 F. Supp. 2d 497, 507 (CIT 2000); *Evonik Rexim (Nanning) Pharm. Co. Ltd. v. United States*, 253 F. Supp. 3d 1364, 1372-73 (CIT 2017); PDM at 15-16; and *2015-2016 Final Results* IDM at Comment 1).

<sup>74</sup> *Id.* at 11-12 (citing PDM at 18; *2015-2016 Final Results* IDM at Comment 1; *OCTG 2014-2015 Final Results* IDM at Comment 1; *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2015-2016*, 83 FR 17146 (April 18, 2018) (*OCTG 2015-2016 Final Results*), and accompanying IDM at Comment 1; and *Circular Welded Non-Alloy Steel*

- For the purpose of its PMS analysis, Commerce need not show that subsidies affected the specific prices of specific inputs of any one respondent's specific costs. It is enough to find that, taken alongside other elements, the subsidy benefits affected the overall market conditions for HRC. The respondents' arguments that subsidization of HRC input should be addressed through CVD proceedings does not take into account Commerce's empowerment under the TPEA to remedy distortions in input costs through the AD laws.<sup>75</sup>
- Commerce correctly found that cheap Chinese HRC imports distorted the Korean market, even if the impact cannot be directly quantified in the respondents' steel costs, or demonstrated to be directed intentionally at the Korean market.<sup>76</sup>
- Comparing the Korean and Chinese HRC prices to benchmark prices, as NEXTEEL and SeAH do, fail to disprove a PMS for HRC in Korea, as it is possible for the Korean HRC market to be distorted, and at the same time, Korean HRC prices to fluctuate according to global prices.<sup>77</sup>
- Commerce properly found that strategic alliances exist between HRC suppliers and WLP producers in Korea, based on credible evidence on the record.<sup>78</sup> Although the respondents claim that this allegation is not supported by evidence, and Commerce did not explain how such alliances would affect the HRC market, Commerce is not required to prove causation in order to establish that these alliances contributed to a finding of a PMS.<sup>79</sup> Moreover, the CIT decision in *Husteel* is inapplicable because the CIT addressed a different question than the instant one, and that case predated the TPEA.<sup>80</sup>
- Commerce properly found that government control of electricity prices in Korea contributed to a PMS, even though Commerce has never found measurable countervailable subsidies with regard to electricity. A finding of a countervailable subsidy is different from a finding of the distortive impact on pricing for a PMS determination.<sup>81</sup>

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

<sup>75</sup> *Id.* at 12-14 (citing *China Nat. Machinery Import & Export Corp. v. United States*, 264 F.Supp.2d 1229, 1237 (CIT 2003); *Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 77 FR 52683 (August 30, 2012), and accompanying Memorandum, "Final Determinations: Section 129 Proceedings Pursuant to the WTO Appellate Body's Findings in WTO DS 379 Regarding the Antidumping and Countervailing Duty Investigations of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China," dated July 31, 2012, at Double Remedies Comment 2; *2015-2016 Final Results* IDM at Comment 1; and TPEA S. Rep. No. 114-45 (2015)).

<sup>76</sup> *Id.* at 14-15 (citing PDM at 15, PMS Allegation at Exhibits 19 and 23; and *2015-2016 Final Results* IDM at Comment 1).

<sup>77</sup> *Id.* at 15-16 (citing SeAH Case Brief at 21-22; NEXTEEL Case Brief at 15-16; and *OCTG 2015-2016 Final Results* IDM at Comment 1).

<sup>78</sup> *Id.* at 16-17 (citing PDM at 15-16; *OCTG 2014-2015 Final Results* IDM at Comment 1; and *OCTG 2015-2016 Final Results* IDM at Comment 1).

<sup>79</sup> *Id.* at 17 (citing *Biodiesel from Argentina* IDM at Comment 3).

<sup>80</sup> *Id.* at 17-18 (citing *Husteel*, 98 F. Supp. 3d at 1359).

<sup>81</sup> *Id.* at 18-19 (citing PDM at 16).



**Commerce’s Position:** As stated above, in the instant review, the Domestic Interested Parties alleged that a PMS existed during the POR in Korea which distorts the WLP costs of production based on the following four factors: (1) subsidization of Korean hot-rolled steel products by the Korean government; (2) the distortive pricing of unfairly traded Chinese HRC; (3) strategic alliances between Korean HRC suppliers and Korean WLP producers; and (4) distortive government control over electricity prices in Korea. For the current review, as in the previous review of this order, Commerce considered, as a whole, the four PMS allegations based on their cumulative effect on the Korean production costs of WLP through the COP for WLP and its inputs. Based on the totality of the conditions in the Korean market, we continue to find that the allegations represent facets of a single PMS. We hereby address arguments raised on each of these elements.

Record evidence shows subsidization of HRC by the Korean government, as well as purchases of HRC from POSCO by the mandatory respondents.<sup>82</sup> Record evidence also shows that the subsidies received by Korean hot-rolled steel producers totaled almost 60 percent of the cost of hot-rolled steel, the primary input into WLP production.<sup>83</sup> Additionally, the respondents report that HRC as an input of WLP constitutes the largest portion of the cost of WLP production; thus, distortions in the HRC market have a significant impact on production costs for WLP.<sup>84</sup> Further, as a result of significant overcapacity in Chinese steel production, which stems in part from the distortions and interventions prevalent in the Chinese economy, the Korean steel market has been flooded with imports of cheaper Chinese steel products, placing downward pressure on Korean domestic steel prices.<sup>85</sup> This situation, along with the domestic steel production being heavily subsidized by the Korean government, distorts the Korean market prices of HRC, the main input in Korean WLP production.

Record information demonstrates that, as a result of the fact that Korean companies import large volumes of HRC from China,<sup>86</sup> the Korean steel market has been adversely impacted by the cheaper imported Chinese steel products, placing downward pressure on Korean domestic steel prices.<sup>87</sup> Regarding this individual facet of our PMS analysis, we find that respondents’

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<sup>82</sup> See, e.g., PMS Allegation at 15-16 and Exhibit 15 (citing *Hot-Rolled Steel from Korea*; and, *inter alia*, NEXTEEL August 3, 2018 SQR at 3 and Exhibit SD2-6-a; and SeAH BCDEQR at Section D, page 8, and Appendix D-4-A).

<sup>83</sup> *Id.* at Exhibit 17 (containing Memorandum re: “Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Amended Final Determination Calculation Memorandum for POSCO,” dated August 23, 2016 (HR Korea Amended Calculation Memo for POSCO)).

<sup>84</sup> *Id.* at 15-16 (citing NEXTEEL’s May 15, 2018, Section D Questionnaire Response (DQR) at 5 and Exhibit D-4; and SeAH BCDEQR at Appendices D-4-A and D-4-C). NEXTEEL and SeAH requested proprietary treatment for the percentage of WLP cost that HRC represents.

<sup>85</sup> *Id.* at Exhibits 18 and 19 (containing “Announcement for and Excerpts from Relevant Ministries of the Government of Korea, Proposal for Strengthening the Competitiveness of the Steel Industry,” dated September 30, 2016; and Bloomberg News Article, “POSCO Posts Smallest Ever Profit Amid Chinese Steel Deluge,” by Heesu Lee (January 28, 2016)); and Asian Steel Watch, *China’s Steel Exports Reaching 100 Mt: What it Means to Asia and Beyond*, (January 2016)).

<sup>86</sup> *Id.* at Exhibit 39 (containing import data sourced from Global Trade Atlas (GTA) of Korea Import Statistics of hot-rolled products in which China is among Korea’s top suppliers).

<sup>87</sup> *Id.* at Exhibits 44 through 48 (containing The Investor, Korea Herald, “Hyundai Steel strongly denies merger with POSCO,” by Ahn Sung-mi (November 1, 2016); Pulse - Maeil Business News Korea, “Hyundai Steel, Dongkuk

arguments are unsubstantiated. For instance, with respect to the respondents' argument that the record does not demonstrate that Chinese imports "flood" the Korean market with hot-rolled sheet products, the respondents have not substantiated their claim with data analysis rebutting the information placed on the record by the Domestic Interested Parties. In fact, the record evidence undermines the respondents' contentions. For instance, information reported by Asian Steel Watch demonstrates that Korea is not only among the top ten steel export destinations for China, but that it is China's largest export destination, accounting for 14 percent (about 13 metric tons (MT)) of China's total exports in 2014.<sup>88</sup> Furthermore, import data sourced from GTA covering the period August 2012-2017 demonstrates that in each calendar year, China served as the largest exporter of hot-rolled steel into Korea.<sup>89</sup> International Steel Statistics Bureau data for the POR also demonstrates that China is the top exporter to Korea of HRC in terms of both quantity and value.<sup>90</sup> POSCO's own Chief Executive Officer, Kwon Oh Joon, acknowledged the economic strain from the excess inflow of steel products into Korea, stating in a briefing that POSCO is "struggling mostly because China is flooding the market with extremely cheap products with the support from the government." Mr. Joon also pointed out in that briefing that "it's impossible for {POSCO} to produce at the same level and be competitive."<sup>91</sup> As indicated above, none of the respondents have specifically rebutted this information.

With respect to the Domestic Interested Parties' allegation that certain Korean HRC suppliers and Korean WLP producers attempt to compete by engaging in strategic alliances, Commerce agrees that the record evidence supports that such strategic alliances existed in Korea and that these strategic alliances may have affected prices in the period covered by the original LTFV investigation of OCTG. Further, this information points to price-fixing schemes engaged in by various Korean steel suppliers and pipe producers, including SeAH.<sup>92</sup> Although the record does not contain specific evidence showing that strategic alliances directly created a distortion in HRC pricing in the current POR, Commerce nonetheless finds that these strategic alliances and price fixing schemes between certain Korean HRC suppliers and Korean WLP producers are relevant as an element of Commerce's analysis in that they may have created distortions in the prices of

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Steel become latest beneficiaries of fast-track restructuring program," by Ko Jae-man and Moon Ji-Woong (November 23, 2016); Business Korea, "Korean Steel Industry Advised to Reduce Number of Steel Plate Plants by Half," by Jung Min-hee (September 19, 2016); Korea Herald, "POSCO, Hyundai Steel merger to benefit industry: report," by Ahn Sung-mi (September 9, 2016); and Korea Times, "Voices growing for merger of POSCO, Hyundai Steel," by South East Asia Iron and Steel Institute (September 22, 2016)).

<sup>88</sup> *Id.* at Exhibit 9 (containing Asian Steel Watch, "China's Steel Exports Reaching 100 Mt: What It Means to Asia and Beyond" (January 2016)).

<sup>89</sup> *Id.* at Exhibit 39.

<sup>90</sup> *Id.* at Exhibit 40.

<sup>91</sup> *Id.* at Exhibit 19 (containing Bloomberg News Article, "POSCO Posts Smallest Ever Profit Amid Chinese Steel Deluge," by Heesu Lee (January 28, 2016)).

<sup>92</sup> See Maverick's letter, "Welded Line Pipe from the Republic of Korea: Comparison Market Viability Allegation as to SeAH," dated May 24, 2018 (Maverick May 24 Submission) at Exhibit 1 (containing Notice from Korea Fair Trade Commission (KFTC), "KFTC punishes six steel pipe manufacturers for rigging bids offered by Korea Gas Corporation," (December 21, 2017)); and Exhibit 2 (containing Korea Times Article, "Steelmakers fined W92 bil. for bid rigging," by Park Jae-hyuk (December 20, 2017)); and PMS Allegation at Exhibit 35: (containing KFTC's Decision No. 97-45, regarding a finding that certain pipe manufacturers, including SeAH, improperly colluded on bids relating to purchases by the Korea Water Resources Corporation in 1996).

HRC in the past, and may continue to impact HRC pricing in a distortive manner during the instant POR and in the future.

With respect to the allegation of distortion present in the electricity market, we find that the price of electricity is set by the GOK and that electricity in Korea functions as a tool of the government's industrial policy.<sup>93</sup> The GOK has tight control over the domestic electricity market, including supply and pricing.<sup>94</sup> Furthermore, the largest electricity supplier, KEPCO, is a government-controlled entity.<sup>95</sup> As a government-controlled entity, KEPCO is responsible for the transmission, distribution, and sale of electricity to customers.<sup>96</sup> Consistent with the SAA, a PMS may exist where there is government control over prices to such an extent that home market prices cannot be considered to be competitively set.<sup>97</sup> Because of the distortion in this Korean utility, and the fact that such distortion places downward pressure on the pricing of electricity, we find this element constitutes part of the PMS.

These intertwined market conditions signify that the production costs of WLP, especially the acquisition prices of HRC in Korea, are distorted and, thus, demonstrate that the costs of HRC to Korean WLP producers were not in the ordinary course of trade. Accordingly, Commerce continues to find that various market forces result in distortions which impacted the costs of production for WLP from Korea. Considered collectively, Commerce continues to find that the allegations support a finding that a PMS existed during the POR of this administrative review.

In their case briefs, NEXTEEL, SeAH, Hyundai Steel, and Husteel argue that the record in the current review is virtually identical to that of the previous segment of this proceeding and, as such, there is no new information on this record that would otherwise support an affirmative PMS finding. We disagree with the respondents that the record in this review is virtually the same as that in prior segments of the proceeding. Although there is a certain overlap in evidence with the previous administrative review, the record of this administrative review contains different data submitted by the respondents, along with additional qualitative and quantitative information submitted by the Domestic Interested Parties regarding the Korean market. Furthermore, we evaluate the record of each administrative segment of a proceeding, such as an

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<sup>93</sup> See PMS Allegation at Exhibit 24 (containing Korea Electric Power Corporation Form 20-F (April 30, 2015) (KEPCO 20-F) ("Because the Government heavily regulates the rates we charge for the electricity we sell..., our ability to pass on such cost increases to our customers is limited....")).

<sup>94</sup> *Id.* at Exhibit 24 (for instance, Maverick states at p. 14, n. 25, of Exhibit 24 that, "{i}n 2013, KEPCO's generation subsidiaries imported 79.4 million tons of coal (See Form 20-F at page 46, attached as Exhibit 2 {to Exhibit 24}) and 84 percent of Korea's total 2013 imports of 94.8 million tons (Korea Import Statistics, attached as Exhibit 8 {to Exhibit 24}). KEPCO purchases all natural gas from the Korea Gas Corporation, a state-owned enterprise in which KEPCO owns a 24.5 percent equity interest, pursuant to supply contracts that are subject to GOK approval. See Form 20-F p. 47, attached as Exhibit 2 {to Exhibit 24}. For a discussion of GOK involvement in KEPCO's electricity prices, see Form 20-F at p. 49-51, attached as Exhibit 2 {to Exhibit 24}.").

<sup>95</sup> *Id.* at Exhibit 24.

<sup>96</sup> *Id.* at Exhibit 24 (containing, *inter alia*, U.S. Energy Information Administration, Korea (April 1, 2014); GOK's Initial Questionnaire Response at I-39 and Exhibit E-4; and GOK's Electricity Supplemental Questionnaire Response).

<sup>97</sup> See SAA at 822.

administrative review, on its own,<sup>98</sup> which is what we did in this case. Our decisions are based on the evidentiary record developed in each individual segment of a proceeding. In this segment, we based our PMS adjustment on the quantitative and qualitative information submitted onto the record of this review that supports our affirmative finding of PMS, including information that was not on the record of the first administrative review.

Specifically, the Domestic Interested Parties' PMS allegation in this review contains additional qualitative and quantitative information in support of finding that a PMS exists in Korea.<sup>99</sup> For instance, this record includes quantitative data such as Korean import statistics of hot-rolled products sourced from the GTA, International Steel Statistics Bureau data on HRC imports into Korea, world market prices for hot-rolled products sourced from COMTRADE, and data on Korean purchases of HRC sourced from COMTRADE.<sup>100</sup> The GTA data demonstrate that over a six-year period, from 2012 through 2017, Chinese imports of HRC increased overall from 55 percent in 2012 to over 63 percent in 2017. These data also demonstrate that imports from Japan rank as second highest among imports from all other countries, accounting for approximately 30 percent of hot-rolled steel imports into Korea. These data lend further credence to the contention that during the POR there was a deluge of steel products, including HRC, into Korea, particularly from China. This review record also contains qualitative data that are distinct from the data submitted in the prior segment of this proceeding, including information from the KFTC regarding information on a price-fixing scheme carried out by six Korean pipe producers, including SeAH, as well as relevant articles that pertain to the Korean steel industry.<sup>101</sup>

We disagree with the respondent's arguments that the four alleged factors were not present in Korea during this POR. We find that the record evidence demonstrates that the four alleged factors were present during the instant administrative review, and that the facts on this record support the finding that a PMS existed during this POR. Regarding the various parties' arguments concerning the remand decision by the CIT in *NEXTEEL*, we note that this decision is not yet final and conclusive. Moreover, the CIT in *NEXTEEL* affirmed our general approach to finding a PMS as reasonable. To the extent that the CIT made evidentiary findings with respect to the *2014-2015 OCTG Final Results*, as we explained above, the record in this administrative review on the issue of PMS is more developed and robust, and contains numerous documents that were not on the record of *2014-2015 OCTG Final Results*, or on the record of *2015-2016 Final Results*.

The Domestic Interested Parties and NEXTEEL submitted quantitative information on the record of this review. However, the submitted data, while informative and helpful in a limited capacity, do not enable a thorough or comprehensible analysis. For instance, the Domestic Interested Parties submitted COMTRADE data on Korean HRC purchases by weight and value from various countries for specific tariff numbers, some of which are not relevant to the major input, and others of which may "potentially be used" in the production of WLP, which has only

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<sup>98</sup> See *Inland Steel Industries, Inc. v. United States*, 967 F. Supp. 1338, 1361 (CIT 1997), *affirmed* 188 F. 3d 1349 (Fed. Cir. 1999) (*Inland Steel*).

<sup>99</sup> See PMS Allegation at Exhibits 36-48.

<sup>100</sup> *Id.* at Exhibits 39-42.

<sup>101</sup> *Id.* at Exhibits 33, and 44-48.

introduced uncertainty as regarding the validity of the submitted data.<sup>102</sup> NEXTEEL resubmitted the Domestic Interested Parties' COMTRADE data with additional information that included calculated average unit prices for Korean imports of hot-rolled steel.<sup>103</sup> NEXTEEL also submitted Steel Benchmark data and calculated average unit prices for Korean imports of hot-rolled steel during the POR.<sup>104</sup> NEXTEEL argues that its costs are in line with average unit prices of steel imports from various countries. However, the average calculated price holds little meaning for this analysis. As explained below, a comparison of NEXTEEL's costs with average unit import prices in Korea does not address the purpose of a PMS analysis, which concerns distortions in the market as a whole.

NEXTEEL also submitted data on HRC imports into Italy, attempting to show average price points on Korean imports of HRC to demonstrate that NEXTEEL's reported costs for HRC are within the ordinary course of trade.<sup>105</sup> Again, we find that the general nature of the data analysis does not permit a meaningful comparison. NEXTEEL provides a chart that compared its own actual, average costs with the average unit price for HRC imports into Italy and Korea, the Global Export price, the Western European price, and the China benchmark price of HRS.<sup>106</sup> However, NEXTEEL's point that its input costs are consistent with prices in other markets does not refute our finding that global excess steel capacity contributes to a PMS in Korea. As reported in Asian Steel Watch, "China's oversupply situation... is expected to result in increased exports and price decline pressures."<sup>107</sup> This global excess steel capacity has the potential to depress steel prices not just in Korea but in various markets. Although the effect may vary, steel prices in various countries are likely lower than they would be but for global excess capacity. Therefore, a comparison of HRS prices in various countries does not prove that HRS prices in Korea are not lower than they would be but for global excess steel capacity.

NEXTEEL claims that, since its reported cost average is within the range of possible average import unit values of HRC from various countries (depending on how the average is calculated), it is "in line" with benchmark prices.<sup>108</sup> However, the values for the countries provided range significantly from \$355 per MT for HTS subheading 720837 in New Zealand in 2017, to \$11,894.44 per MT for HTS subheading 720836 in Turkey in 2017.<sup>109</sup> Therefore, that NEXTEEL's cost average happens to fall near the average of the countries listed is not indicative of it being "in line" with global HRC prices.

NEXTEEL's attempts to compare average unit prices to NEXTEEL's own costs does not address the purpose of a PMS analysis. In *Biodiesel from Argentina*, Commerce stated that "a PMS analysis is, by definition, concerned with distortions in the overall 'market,' rather than

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<sup>102</sup> *Id.* at Exhibit 42.

<sup>103</sup> See NEXTEEL PMS Allegation Rebuttal at 13-14 and Exhibits 11 and 12.

<sup>104</sup> *Id.* at 13 and Exhibit 10.

<sup>105</sup> *Id.* at 15 and Exhibit 13.

<sup>106</sup> *Id.* at 15.

<sup>107</sup> See PMS Allegation at Exhibit 3 (citing article, Asian Steel Watch, "China's Steel Exports Reaching 100 Mt: What It Means to Asia and Beyond," (January 2016)).

<sup>108</sup> See NEXTEEL PMS Allegation Rebuttal at 16 and Exhibits 9 - 11.

<sup>109</sup> *Id.* at Exhibit 11.

distortions in particular sales or transactions in relation to the general market.”<sup>110</sup> Thus, for the foregoing reasons, we find that the data presented by NEXTEEL are unpersuasive as to whether NEXTEEL’s own input costs are within the ordinary course of trade and, more importantly, how it demonstrates that a PMS does not exist within the Korean market. As we explained in *2015-2016 Final Results*, companies compete in a market and have to adjust their pricing in response to market trends.<sup>111</sup> If the market is distorted, companies have to either adjust their pricing to market distortions or leave the market. Thus, NEXTEEL’s comparison of the average prices, by tariff code, against world market prices, does not demonstrate that the prices within the Korean market are not distorted.

We further disagree with the respondents’ argument that the record is devoid of quantitative or empirical analysis to determine whether NEXTEEL’s HRC costs were incurred in the ordinary course of trade or that such an analysis is necessary. The record of this review contains sufficient evidence to demonstrate that the market as a whole is distorted, and that a PMS exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the COP within the normal course of business. Companies do not operate in a vacuum, but, rather, purchase their inputs in a market. If a particular market is distorted as a whole, it would be illogical to conclude that one company operating in that particular market is insulated from the market distortions with respect to costs.

We also disagree with SeAH’s contention that two of the PMS elements (*i.e.*, strategic alliances and government control over electricity costs) are irrelevant to SeAH. As noted above, SeAH was identified by the KFTC as one of several companies involved in price-fixing schemes dating back to the 1990s, lending support to the finding that strategic alliances exist in Korea, particularly with respect to SeAH.<sup>112</sup> We certainly do not share the respondents’ view that price fixing does not distort a market. Coupled with the fact that steel manufacturers in Korea are undergoing restructuring,<sup>113</sup> we find that the strategic-alliance factor, including the evidence of price fixing, is relevant to SeAH.

Concerning the electricity element, Hyundai Steel, NEXTEEL, and SeAH argue that Commerce has previously determined that Korean electricity prices do not confer a subsidy benefit. Although the provision of countervailable subsidies could be a relevant factor supporting the existence of PMS, it is not a prerequisite for finding market distortion. Electricity in Korea functions as a tool of the government’s industrial policy, and the largest Korean electricity supplier, KEPCO, is a government-controlled entity. We find here that a PMS may exist where there is government control over prices to such an extent that home market prices cannot be set on a competitive basis.<sup>114</sup> While the respondents argue that Commerce has determined that Korean electricity prices do not confer a subsidy benefit, there is extensive evidence of distortive and anti-competitive government control over electricity prices in the Korean industrial sector.<sup>115</sup>

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<sup>110</sup> See *Biodiesel from Argentina* IDM at Comment 3.

<sup>111</sup> See *2015-2016 Final Results* IDM at Comment 1.

<sup>112</sup> See PMS Allegation at Exhibit 33.

<sup>113</sup> *Id.* at Exhibits 44-46.

<sup>114</sup> See *2015-2016 Final Results*; see also *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 24085 (May 24, 2019) (*OCTG from Korea 2016-2017 Final Results*), and accompanying IDM at Comment 2.

<sup>115</sup> See PMS Allegation at Exhibit 24.

These distortions impact all Korean consumers, including steel manufacturers, who comprise some of the country's largest electricity consumers and, thus, serve as principal beneficiaries of the Korean government's involvement in the market.<sup>116</sup> That Commerce did not find in prior cases that the provision of electricity to industrial users in Korea constituted a countervailable subsidy does not mean that there can be no market distortion in Korean electricity costs.<sup>117</sup>

Finally, with respect to SeAH's contention that the Korean government did not make a formal finding that Chinese HRC is being dumped, we do not consider such a finding to be a prerequisite to reaching a PMS determination in this administrative review. Although a formal finding of dumping or subsidization could be evidence of the existence of unfair practices and possible distorted prices, such practices could exist even without a formal finding. In most proceedings, dumping investigations are initiated based on a petition or application by the domestic industry, which would require both demonstration of the existence of dumping and the existence or threat of material injury to the domestic industry. In this case, however, as discussed above, the record evidence shows subsidization of HRC producers by the Korean government, as well as purchases of HRC by the mandatory respondents from POSCO, which received such subsidies.

### **Comment 3: PMS Adjustment**

#### *NEXTEEL's Case Brief*

- There is no legal or factual basis for Commerce to apply POSCO's 58.68 percent AFA subsidy rate found in the original CVD investigation of *Hot-Rolled Steel from Korea*, nor should Commerce use the revised 41.57 percent subsidy rate stemming from the draft remand in the ongoing litigation before the CIT.<sup>118</sup>
- POSCO's rate in *Hot-Rolled Steel from Korea* is not based on actual and calculated subsidies concerning the HRC input, and the results are not contemporaneous with this POR. Further, use of information based on AFA must be corroborated in accordance with section 776(c)(1) of the Act, which Commerce has failed to do.
- NEXTEEL's analysis of POSCO's AFA rate from *Hot-Rolled Steel from Korea* would revise the rate from 58.68 percent to 6.22 percent after removing 34 programs that were found to provide no measurable benefit or not used in the first CVD review of the *Hot-Rolled Steel from Korea* CVD order, and an export subsidy, before taking into consideration the revisions Commerce made in the hot-rolled CVD investigation remand proceeding. Accordingly, Commerce should apply the same logic in this review to determine a PMS adjustment.<sup>119</sup>

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<sup>116</sup> *Id.* at Exhibit 24.

<sup>117</sup> *Id.*; see also *OCTG from Korea 2016-2017 Final Results* IDM at Comment 2.

<sup>118</sup> See NEXTEEL Case Brief at 37-38 (citing Final Results of Redetermination Pursuant to Court Remand, Consol. Court No. 16-00227, ECF No. 100, dated November 13, 2018 (POSCO Hot-Rolled Redetermination) at 24).

<sup>119</sup> *Id.* at 40-41 and Attachment 1 (citing *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 2016*, 83 FR 55517 (November 6, 2018) (*Hot-Rolled Steel Preliminary Results 2016*), and accompanying PDM at 15-33).

- The courts have found that applying an AFA rate to a cooperative respondent is impermissible and punitive in nature. NEXTEEL has not failed to cooperate in this review; thus, its behavior does not warrant the application of AFA, nor has Commerce afforded the procedural safeguards set forth under the law to apply a punitive rate where a respondent has not failed to comply with a request for information.<sup>120</sup>
- Should Commerce continue to make a PMS finding in this review, it should use the final calculated rates from the current hot-rolled steel CVD administrative review, or the rates from *CTL Plate from Korea*, rather than the rates from *Hot-Rolled Steel from Korea*.<sup>121</sup>
- Commerce should not apply a PMS adjustment based on HRC subsidies from the Korean government to NEXTEEL's HRC inputs from Chinese and Japanese suppliers. If Commerce relies on a PMS adjustment based on Korean CVD rates, the adjustment should only be applied to NEXTEEL's HRC inputs from Korean suppliers.<sup>122</sup>

### *SeAH's Case Brief*

- Commerce's application of an AFA rate for one company in a proceeding as a PMS adjustment (*i.e.*, POSCO's AFA rate in *Hot-Rolled Steel from Korea*) to a different, cooperative party's costs in a different proceeding (*i.e.*, SeAH's costs in the instant review) is contrary to law. At a minimum, Commerce must place the entire record of *Hot-Rolled Steel from Korea* on the record of the instant review in order to provide parties due process to submit rebuttal factual information in accordance with 19 CFR 351.301(c)(4).<sup>123</sup>
- Should Commerce make a PMS adjustment to SeAH's costs, it should not rely on the subsidy rates from *Hot-Rolled Steel from Korea*, but instead rely on the more contemporaneous non-AFA subsidy rates from *CTL Plate from Korea* or *Hot-Rolled Steel Preliminary Results 2016*, as those cases are more recent than *Hot-Rolled Steel from Korea*, covered a period more contemporaneous with the instant POR, and are not based entirely on AFA.<sup>124</sup>

<sup>120</sup> *Id.* at 42-43 (citing *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345,1358 (Fed. Cir. 2016) (*Albemarle Corp.*)).

<sup>121</sup> *Id.* at 37 and 43-44 (citing *Hot-Rolled Steel Preliminary Results 2016*; and *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 82 FR 16341 (April 4, 2017) (*CTL Plate from Korea*)).

<sup>122</sup> *Id.* at 44-45 (citing PDM at 22).

<sup>123</sup> See SeAH Case Brief at 24-26 (citing PDM at 15; *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167-68 (1999); RESTATEMENT (SECOND) OF JUDGMENTS §§ 28, 29 (1982); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); and *SKF*, 675 F. Supp. 2d at 1276).

<sup>124</sup> *Id.* at 26-29 (Citing PDM at 16-17; *CTL Plate from Korea*; *Hot-Rolled Steel Preliminary Results 2016*; Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Review – SeAH Steel Corporation," dated February 12, 2019 (SeAH Preliminary Cost Calculation Memorandum), at Attachment 2; *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F. 3d 1370, 1378 (Fed. Cir. 2013); *POSCO Hot-Rolled*; *POSCO Cold-Rolled 1*; and *POSCO v. United States*, 335 F. Supp. 3d 1283 (Fed. Cir. 2018)(*POSCO Cold-Rolled 2*)).



### *Hyundai Steel's Case Brief*

- There is no basis on the record to adjust HRC input costs based on alleged Korean government subsidization, nor to penalize cooperating respondents by basing a PMS adjustment on an uncooperative respondent's AFA rate from *Hot-Rolled Steel from Korea*.<sup>125</sup>
- If Commerce continues to rely on CVD rates for making a PMS adjustment, it should use more reliable, contemporaneous rates that do not include AFA, which contain an increase intended to deter non-compliance that is not appropriate for cooperating respondents.
- Should Commerce apply a PMS adjustment on any HRC purchases, it should use the rates calculated in *Hot-Rolled Steel Preliminary Results 2016*, which are more reflective of any actual HRC subsidies producers would have received during the POR.<sup>126</sup>
- Alternatively, if Commerce is concerned about relying on preliminary rates, it should extend the deadline of this review in order to consider the rates from the final results of the *Hot-Rolled Steel from Korea* review; otherwise, it should use the rates from *CTL Plate from Korea*, which addressed the same subsidies as in *Hot-Rolled Steel from Korea* and does not rely on AFA.<sup>127</sup>
- In addition, Commerce should not apply a PMS adjustment based on Korean government HRC subsidies to HRC inputs from non-Korean suppliers, as these suppliers do not receive any subsidies from the Korean government. Further, Commerce has failed to support its justification for this adjustment which is, that to remain competitive, imported HRC would sell at prices competitive with the domestically produced and subsidized HRC.<sup>128</sup>

### *Husteel's Case Brief*

- The continued use of the AFA subsidy rate from *Hot-Rolled Steel from Korea* as a basis for the PMS adjustment in this review ignores the fact that in subsequent CVD proceedings, reviews of that order, and in a more recent investigation of *CTL Plate from Korea*, Commerce determined that POSCO did not receive the subsidies to which it applied the AFA rate.<sup>129</sup>
- There is no legal basis to apply the AFA-based CVD rates from *Hot-Rolled Steel from Korea* to the cooperating respondents in this administrative review. Further, subsequent

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<sup>125</sup> See Hyundai Steel Case Brief at 10-11 (citing *Hot-Rolled Steel from Korea* IDM at Comment 5; SKF, 675 F. Supp. 2d at 1276; *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Preliminary Negative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 FR 63168 (September 14, 2016); and *CTL Plate from Korea*).

<sup>126</sup> *Id.* at 11-12 (citing *Hot-Rolled Steel Preliminary Results 2016*).

<sup>127</sup> *Id.* at 21-25 (citing *Hot-Rolled Steel Preliminary Results 2016*; *F.lli De Cecco De Filippo Fara S. Martino S.p.A. v. United States*, 216 F. 3d 1027,1032 (Fed. Cir. 2000); *CTL Plate from Korea* IDM at VII.A; *Anshan Iron & Steel Co., Ltd. v. United States*, 27 C.I.T. 1234, 1243 (2003); *CWP 2015-2016 Final Results* IDM at Comment 1; *POSCO Hot-Rolled*; *POSCO Cold-Rolled 1*; and *POSCO Cold-Rolled 2*).

<sup>128</sup> *Id.* at 25-26 (citing PDM at 17).

<sup>129</sup> See Husteel Case Brief at 16-19 (citing *New York Life Ins. Co. v. Gamer*, 303 U.S. 161, 171 (1938); *Asociacion Colombiana de Exportadores de Flores v. United States*, 704 F. Supp. 1114, 1117 (CIT 1989), *affirmed*, 901 F.2d 1089 (Fed. Cir. 1990); PDM at 16-17; *CTL Plate from Korea* IDM at 16-18; *Hot-Rolled Steel Preliminary Results*

to *Hot-Rolled Steel from Korea*, the CIT rejected the AFA-based rates calculated in that investigation as overinflated, resulting in Commerce’s recalculation of those rates on remand. If Commerce continues to rely on the *Hot-Rolled Steel from Korea* rates, it must use the rates from the remand redetermination.<sup>130</sup>

- Commerce also provided no reasoning or record evidence in the *Preliminary Results* to support applying the *Hot-Rolled Steel from Korea* rates to HRC inputs imported into Korea.<sup>131</sup>

#### *Domestic Interested Parties’ Rebuttal Brief*

- Commerce should continue to make a PMS adjustment based on the subsidy rates from *Hot-Rolled Steel from Korea*, which Commerce determined to be the best source for calculating a reasonable adjustment to HRC costs to account for the PMS.<sup>132</sup>
- Commerce should reject the alternatives proposed by the respondents, such as the subsidy rates from *Hot-Rolled Steel from Korea Preliminary Results* and *CTL Plate from Korea*. With respect to the former, the review is not complete and there is no legal basis for Commerce to postpone these final results to await the completion of that CVD administrative review.<sup>133</sup> With respect to the latter, Commerce repeatedly found in previous reviews that, as CTL plate is not normally used in the production of WLP, the subsidy rates from *CTL Plate from Korea* are inappropriate to apply as a PMS adjustment in a WLP review.<sup>134</sup>
- Commerce previously rejected respondents’ arguments concerning the use of an AFA subsidy rate. The AFA rate calculations largely account for distortions concealed by respondents and, as such, represent the subsidy rate that would apply if respondents had cooperated.<sup>135</sup>

**Commerce’s Position:** In the *Preliminary Results*, we quantified the impact of the PMS in Korea by making an upward adjustment to the respondents’ reported HRC costs, basing that adjustment on the subsidy rates, net of export subsidies, from *Hot-Rolled Steel from Korea*.<sup>136</sup> For these final results, we have continued to make an adjustment for the PMS by upwardly adjusting the respondents’ HRC costs based on the subsidy rates from *Hot-Rolled Steel from Korea*. However, because we revised the subsidy rate in *Hot-Rolled Steel from Korea* as the

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2016; Memorandum, “Countervailing Duty Investigation: Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Final Determination Calculation Memorandum for POSCO,” dated March 29, 2017; and Memorandum, “Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea: Preliminary Calculations for Hyundai Steel Company (“Hyundai Steel”),” dated February 28, 2017).

<sup>130</sup> *Id.* at 19 (citing POSCO Hot-Rolled Redetermination).

<sup>131</sup> *Id.* at 19-20 (citing *Alloy Piping 2009*, 33 C.I.T. at 349, 353-54).

<sup>132</sup> See Domestic Interested Parties Rebuttal Brief at 20-21 (citing section 773(e)(3) of the Act; PDM at 16; and *OCTG 2015-2016 Final Results*).

<sup>133</sup> *Id.* at 21-22 (citing NEXTEEL Case Brief at 37 and 44; and PDM at 17).

<sup>134</sup> *Id.* at 22 (citing SeAH Case Brief at 26-27; 2015-2016 *Final Results* IDM at Comment 1; and *OCTG 2015-2016 Final Results* IDM at Comment 1).

<sup>135</sup> *Id.* at 23 (citing NEXTEEL Case Brief at 38; Hyundai Steel Case Brief at 10-11; SeAH Case Brief at 25-26; Husteel Case Brief at 18; PDM at 16; and *CWP 2015-2016 Final Results* IDM at Comment 1).

<sup>136</sup> See PDM at 16-18.

result of litigation, we have used the revised rate for the PMS adjustment in the margin calculations for NEXTEEL and SeAH in these final results.<sup>137</sup>

The respondents contend that POSCO's subsidy rate from the *Hot-Rolled Steel from Korea* is irrelevant to the instant review because it covered calendar year 2014 (*i.e.*, it is not contemporaneous). We do not find the fact that the rates from *Hot-Rolled Steel from Korea* precede the POR in this review to be a disqualifying factor. We continue to find that it is appropriate to use the subsidy rates from *Hot-Rolled Steel from Korea* concerning the input used to produce WLP.

The respondents further contend that the AFA rate used as the basis for the PMS adjustment in this review is inappropriate and untenable. They argue that in other CVD proceedings, such as *CTL Plate from Korea*, which involved the same companies and similar subsidy programs, Commerce found that POSCO did not actually receive benefits from the subsidy programs for which it applied the AFA rates in *Hot-Rolled Steel from Korea*.<sup>138</sup> However, we find that this argument is misplaced, in that the PMS adjustment must take into account the HRC input consumed by the respondents in the production of the subject merchandise. We do not consider it appropriate to use a rate without considering whether the case is relevant to the input at issue. That is, the rate must be applicable to the input product whose price has been found to be distorted because of a PMS. Thus, we find that we cannot rely on the information developed on cut-to-length (CTL) plate subsidies determined in *CTL Plate from Korea* with respect to a PMS adjustment in this review, since CTL plate is not an input to WLP.

More specifically with respect to the argument that Commerce may not rely on a subsidy finding that was based entirely on AFA, we disagree that this should discredit the use of such a rate in making a PMS adjustment. The AFA rate assigned to POSCO in *Hot-Rolled Steel from Korea* was imposed because the respondent failed to cooperate to the best of its abilities; however, this does not mean that the rate is inaccurate or unreliable. In fact, this rate, as modified on remand, was recently affirmed by the CIT.<sup>139</sup> We find that the CVD rate from *Hot-Rolled Steel from Korea* represents an appropriate measure of the subsidies being received by the producers for the production of HRC. AFA rates are not punitive and are not a penalty being applied to respondents but, rather, are a reasonable basis for the adjustment being enacted by Commerce to support the PMS adjustment in this segment of this proceeding.<sup>140</sup>

As an alternative PMS adjustment, Hyundai Steel, NEXTEEL, and SeAH argue for the application of the CVD rate calculated in *Hot-Rolled Steel Preliminary Results 2016*. However, Commerce's practice is not to use rates from preliminary determinations or results because they are preliminary in nature and subject to change by the agency. Only final results and final

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<sup>137</sup> See *OCTG from Korea 2016-2017 Final Results* IDM at Comment 3, where we made the same revision to the POSCO CVD rate from *Hot-Rolled Steel Flat Products from Korea* for the PMS adjustment.

<sup>138</sup> See, *e.g.*, *Husteel Case Brief* at 18-19.

<sup>139</sup> See *POSCO v. United States*, Consol. Court No. 16-00227, Slip Op 19-52 (CIT May 1, 2019) at 9.

<sup>140</sup> See also *2015-2016 Final Results* at Comment 1.

determinations receive the benefit of Commerce's full analysis and consideration. The final rates from *Hot-Rolled Steel from Korea* remain in effect today.<sup>141</sup>

Hyundai Steel and NEXTEEL argue that Commerce should not make an upward adjustment in the amount of the U.S. CVD rate to the acquisition cost of imported HRC purchases, when those purchases never benefited from the subsidies by the Korean government. While those input purchases never directly benefited from the subsidies, we disagree with the respondents' contention that Korean subsidies on domestically-produced HRC had no effect on the price of HRC imported into Korea. In a market economy, where goods are competitively priced, domestic and imported prices will converge at an equilibrium. This is particularly true with a common and fungible commodity such as HRC. Thus, because domestic subsidies lower the COP and the price of HRC in Korea, it is logical that the price of imported HRC will be adjusted to remain competitive with the domestically-produced and subsidized HRC. In other words, domestic and imported prices of HRC converge to a lower market equilibrium price than if the domestically-produced Korean HRC did not benefit from Korean government subsidies.<sup>142</sup>

After consideration of interested parties' comments regarding the application of PMS adjustments, we continue to find that the subsidy rates from the *Hot-Rolled Steel from Korea* are the best information available on the record with which to make a PMS adjustment, and that the record of this review does not contain appropriate data with which to make further adjustments. With respect to HRC purchased from non-Korean suppliers, we have continued to make an adjustment for those inputs for the final results of this review. Therefore, we continued to make an adjustment for the PMS by upwardly adjusting NEXTEEL's and SeAH's imported and domestic HRC costs based on the subsidy rates from *Hot-Rolled Steel from Korea*, revised as the result of litigation.

#### **Comment 4: Source for CV Selling Expenses and Profit**

##### *NEXTEEL's Case Brief*

- Commerce should use NEXTEEL's own profit and loss information for standard pipe products – merchandise in the same general category as the WLP at issue in this case based on contemporaneous data.
- Commerce could use multiple contemporaneous alternative party financial data of other steel pipe companies as CV profit sources. In particular, NEXTEEL provided CV profit information from Indian line pipe producer Welspun Corp. Ltd. (Welspun) and global steel pipe producer PAO TMK (TMK). In addition, Commerce has information concerning a number of Korean line pipe producers and trading companies provided by SeAH in its CV profit submission.

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<sup>141</sup> See also *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2016-2017*, 84 FR 24471 (May 28, 2019), and accompanying IDM at Comment 2.

<sup>142</sup> See *OCTG 2015-2016 Final Results* IDM at Comment 1; see also *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 51927 (October 15, 2018), and accompanying IDM at Comment 3.

- While Commerce preliminarily stated that it was using Hyundai Steel’s CV profit information pursuant to option under 773(e)(2)(B)(ii) of the Act, using prior period information is not available under 773(e)(2)(B)(ii) of the Act, which envisions CV profit information based on “actual amounts incurred and realized by exporters or producers that are subject to the investigation or review.” CV profit option under 773(e)(2)(B)(ii) of the Act requires Commerce to use the information for other companies actually examined in the particular proceeding.
- Should Commerce seek to continue using Hyundai Steel’s prior CV profit information, the only available option under the statute is that under 773(e)(2)(B)(iii) of the Act as “any other reasonable method.” Pursuant to this option, the calculated CV profit amount “may not exceed the amount normally realized by exporters or producers” selling the foreign like product in Korea (*i.e.*, the profit cap).

#### *SeAH’s Case Brief*

- The Statute requires Commerce to calculate CV profit and selling expenses based on the third-country sales to Canada SeAH submitted.
- Commerce should not calculate CV profit based on Hyundai Steel’s reported home market sales in the first review since that information is not contemporaneous and bears no relation to the current profitability of WLP sales.
- The fiscal year 2017 financial statements submitted for the other 14 Korean pipe producers provide a more reasonable proxy for CV profit as they are more contemporaneous with the POR and reflect the profitability of companies selling in global markets.
- If Commerce continues to calculate CV profit under section 773(e)(2)(B)(iii) of the Act, a lack of information does not excuse Commerce from applying the statutorily imposed profit cap.

#### *Maverick’s Rebuttal Brief*

- Commerce’s approach in the *Preliminary Results* is consistent with past cases in which it has used CV profit information from prior periods. Commerce recognized that Hyundai Steel’s CV profit from the previous review is not contemporaneous with this POR, but concluded that it constitutes the best information for determining CV profit. In addition, Commerce stated that, “when combined with Hyundai Steel’s selling expenses from the 2015-2016 *Final Results*, the resulting ratio is public information.”<sup>143</sup>
- Commerce explained that it chose Hyundai Steel’s rate over NEXTEEL’s calculated profit on the production of standard pipe in Korea during the POR because the “recalculated profit resulted in a loss after including the selling expenses in the calculation.”<sup>144</sup> Notably, NEXTEEL does not address Commerce’s basis for rejecting its information when it argues that Commerce should use this rate in the *Final Results*.

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<sup>143</sup> See Maverick’s Case Rebuttal Brief at 5 (citing Memorandum, “Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – SeAH Steel Corporation,” dated February 7, 2019, at 2-3; Memorandum, “Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – NEXTEEL Co., Ltd.,” dated February 7, 2019, at 3-4; and *Preliminary Determination* at 25).

<sup>144</sup> *Id.* at 6.

- SeAH’s claims to base CV profit on its sales to Canada should be rejected. Commerce determined that Canada was not a representative market due to a final dumping finding by Canadian authorities.
- Commerce also properly considered and rejected the use of the financial statements of Welspun and TMK to calculate CV profit as not viable. Commerce determined that Welspun’s financial statements “lack sufficient detail to determine the portion of total sales revenues which were WLP products and {the} company is not a Korean producer,” and, for TMK, the “sales revenue of WLP is twenty five percent of the total sales and {the} company is not a Korean producer.”<sup>145</sup>
- With respect to the Korean line pipe producers for which SeAH submitted calculations, Commerce determined that they were “not viable sources for profit” because “the financial statements were not complete.”<sup>146</sup>
- If Commerce determines that it is appropriate to continue to apply a profit cap in the absence of usable data for Korean line pipe sales, it should follow the approach applied in the OCTG from Korea administrative reviews. In those reviews, Commerce used the CV profit data from the prior review both for the CV profit rate and as a facts available profit cap.

**Commerce’s Position:** For these final results, we have continued to use for NEXTEEL and SeAH, under section 773(e)(2)(B)(ii) of the Act, the CV profit ratio and selling expenses calculated for the mandatory respondent Hyundai Steel in the first administrative review of this proceeding. As explained below, after considering the record evidence and all the arguments in the parties’ case and rebuttal briefs, we continue to find that Hyundai Steel’s CV profit and selling expenses from the first administrative review constitute the best source of CV profit and selling expense data on the record of this proceeding.

### Background

Neither NEXTEEL nor SeAH have a viable home or third-country market during the POR. Thus, because they did not have home or third-country market sales to serve as a basis for NV, NV must be based on CV in accordance with section 773(a)(4) of the Act. Likewise, absent a viable home or third-country market, we are unable to calculate CV profit and selling expenses using the preferred method under section 773(e)(2)(A) of the Act (*i.e.*, based on the respondent’s own home market or third-country sales made in the ordinary course of trade). In situations where we cannot calculate CV profit under section 773(e)(2)(A) of the Act, section 773(e)(2)(B) of the Act sets forth three alternatives:

- (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review . . . for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise;

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<sup>145</sup> *Id.* at 24.

<sup>146</sup> See Maverick’s Case Rebuttal Brief at 8 (citing *Preliminary Determination* at 24; and SeAH’s Letter, “Administrative Review of the Antidumping Order on Welded Line Pipe from Korea for the 2016-17 Review Period – Response to Request for CV Profit and Selling Expense Comments and Information of SeAH Steel Corporation,” dated August 2, 2018, at Attachments 4-12, 14, 17-19, and 22).

- (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) . . . for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country; or
- (iii) the amounts incurred and realized . . . for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) 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 and selling expenses.<sup>147</sup> 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.”<sup>148</sup> Thus, Commerce has the discretion to select from any of the three alternative methods, depending on the information available on the record. In this case, Commerce is faced with choosing among several alternatives for CV profit based on available data that reflect at least one of the criteria noted above.<sup>149</sup> Therefore, we must weigh the pros and cons of the available data and determine which requirement is more relevant for this case based upon the record data before us. With each of the statutory alternatives in mind, we evaluated the data available in the instant review and weighed each of the statutory alternatives to determine which surrogate data source most closely fulfills the aim of the statute.

## NEXTEEL

We continue to find that Commerce cannot rely on alternative (i), that is, sales by the same company of a product in the same general category as WLP. The information submitted by NEXTEEL (*i.e.* merchandise not under consideration) is unusable. NEXTEEL argues that its own home market sales of standard pipe products constitute the best source of data from which to calculate CV profit and selling expenses under section 773(e)(2)(B)(i) of the Act. NEXTEEL argues that the standard pipe product is in the same general category as WLP and the data is contemporaneous. According to NEXTEEL, using non-contemporaneous data would generate distortive results.<sup>150</sup> However, while the information is contemporaneous, the sales information on standard pipe was found to represent below cost transactions as they resulted in aggregate loss. We therefore disagree with NEXTEEL concerning its own home market sales of standard pipes as they do not constitute a proper basis for CV profit and selling expenses when the actual results were a loss after including the selling expenses in the calculation.

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<sup>147</sup> 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.”).

<sup>148</sup> *Id.*

<sup>149</sup> See *OCTG 2014-2015 Final Results* IDM at Comment 1.

<sup>150</sup> See NEXTEEL Case Brief at 48.

## SeAH

SeAH argues that during the review period it made viable third-country market sales with respect to its line pipe sales to Canada. SeAH argues that the requirement of “representativeness” (*i.e.*, the reason these sales were rejected for price-to-price comparisons) under section 773(a)(1)(B)(ii)(I) of the Act does not apply to the calculation of selling, general, and administrative (SG&A) expenses and profit under section 773(e)(2)(A) of the Act. SeAH claims that, in fact, Commerce’s determination in the first and second OCTG reviews based the figures for SG&A and profit used in the CV calculation on SeAH’s reported third-country sales to Canada, even though those sales were also subject to a Canadian dumping finding. In addition, SeAH adds that the only requirement for using third-country sales in the calculation of the CV SG&A and profit is that the sales be “in the ordinary course of trade” and that information regarding those sales be “available.” Maverick however, rebuts SeAH’s argument stating that SeAH ignores important factual differences between the two cases. In *OCTG 2014-2015 Final Results*, Commerce determined that Canada was a viable third-country market for SeAH and that basing SeAH’s profit on its Canadian sales was superior.<sup>151</sup> In contrast, in this instant case, Commerce determined that Canada was not a viable comparison market for SeAH due to a final dumping finding. *See* Comment 10, below, for further discussion.

As noted above, in *OCTG 2014-2015 Final Results*, we found that basing CV profit on SeAH’s sales to Canada was the appropriate methodology for that review based on the specific facts of that case. In addition, SeAH’s Canadian sales were further subjected to the cost test, and only those sales that were above the cost of production (*i.e.*, made in the ordinary course of trade) were used in constructing the aggregate profit and selling expenses. In the instant case, we find that the final determination of dumping in Canada makes SeAH’s Canadian data unusable as the basis for a comparison market and CV profit. Moreover, we find unpersuasive SeAH’s argument concerning “representativeness” under section 773(a)(1)(B)(ii)(I) of the Act. Section 773(e)(2)(A) of the Act states that the “actual amounts” used for the calculation of SG&A expenses and profit shall be from sales that are “in the ordinary course of trade.”<sup>152</sup> Commerce considers transactions to be outside the ordinary course of trade if transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market.<sup>153</sup> Section 771(15) of the Act does not establish an exhaustive list of what conditions constitute or preclude “ordinary course of trade,” but the SAA states “that Commerce will interpret section 771(15) in a manner which will avoid basing normal value on sales which

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<sup>151</sup> *See* Maverick Case Brief at 6-7 (citing *OCTG 2014-2015 Final Results* IDM at Comment 12).

<sup>152</sup> Section 773(2)(A) of the Act states, “the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country.”

<sup>153</sup> Section 771(15) of the Act defines “ordinary course of trade” as “the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade: (A) Sales disregarded under section 773(b)(1). (B) Transactions disregarded under section 773(f)(2). (C) Situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price.”



are extraordinary for the market in question, particularly which the use of such sales would lead to irrational or unrepresentative results.”<sup>154</sup> Since the line pipe sales of SeAH to Canada appear to be subject to an antidumping duty order,<sup>155</sup> these sales were not “in the ordinary course of trade” as required under section 773(e)(2)(A) of the Act, because they were subject to a dumping order. Thus, these sales were priced lower than they should have been otherwise, strongly suggesting that a profit figure calculated from such sales would likewise be similarly understated. Therefore, for the reasons stated above, we cannot rely on SeAH’s line pipe sales to Canada as a source for the CV profit calculation.

#### Discussion of Profit Information Submitted by the Parties

On the record of this proceeding, we are faced with various alternative sources for calculating CV profit and selling expenses under various sections of the Act. The alternatives under section 773(e)(2)(B)(ii) of the Act are: 1) CV profit from the result of the investigation of WLP (*i.e.*, calculated CV profit and selling expenses of Hyundai HYSCO and SeAH Steel Corporation); 2) the first review (*i.e.*, CV profit and selling expenses of Hyundai Steel). The alternatives under 773(e)(2)(B)(iii) of the Act are: 1) financial statements from Korean pipe manufacturers and traders (*i.e.*, Hyundai Steel; Husteel; NEXTEEL; HiSteel Co. Ltd.; Miju Steel Manufacturing Co., Ltd; Steel Flower Co., Ltd.; Samkang M & T; Dong Yang Steel Pipe; EEW Korea; Dongbu Incheon Steel; Korea Cast Iron Pipe; MSTEEL Co., Ltd.; Poongsan Neotiss, TGS Pipe, Daewoo International (POSCO Daewoo); Keonwoo Metal; Kolon Global; Sing Sung Metal and Soon-Hong Trading); and 2) financial statements of non-Korean manufacturers (*i.e.*, Welspun, Borusan Mannesmann Boru Sanayi ve Ticaret A.S (Borusan), and TMK).

In conducting this analysis, we note that the specific language of both the preferred and alternative methods appear to show a preference that the profit and selling expenses reflect: 1) production and sales in the foreign country; and 2) 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. In addition, there may be varying degrees to which a potential profit source reflects the merchandise under consideration. Consequently, we must weigh the quality of the data against these factors. For example, we may have profit information that reflects production and sales in the foreign country of merchandise that is similar to the foreign like product, but also includes significant sales of completely different merchandise, or profit information that reflects production and sales of the merchandise under consideration but no sales in the foreign country. Determining how specialized the foreign like product is, what percentage of sales are of the foreign like product or general category of merchandise, what portion of sales are to which markets, *etc.*, judged against the above criteria, may help to determine which profit source to rely upon.

From the potential CV profit sources on the record, we consider the CV profit from the result of the investigation of WLP (*e.g.*, Hyundai HYSCO and SeAH) and from the first administrative

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<sup>154</sup> See SAA at 164.

<sup>155</sup> See Canadian International Trade Tribunal, *Dumping and Subsidizing; Finding And Reasons, Inquiry No. NQ-2017-002, Carbon and Alloy Steel Line Pipe*, issued January 19, 2018; submitted in Maverick May 24 Submission at Exhibit 3.

review (*e.g.*, Hyundai Steel)<sup>156</sup> to be the best sources of CV profit. They both reflect Korean producers and the merchandise under investigation. Since the results of the first review are more recent than that from the investigation, we find the CV profit rate determined in the first review for Hyundai Steel to be the best source for determining CV profit in the instant review for both NEXTEEL and SeAH.

NEXTEEL argues that Commerce should determine NEXTEEL's CV profit and selling expenses in the instant administrative review based on contemporaneous data for WLP it has submitted, because Korean pipe companies paid much higher prices for its major raw materials input, HRC, in 2017 in comparison to prior years. Therefore, NEXTEEL argues that the use of non-contemporaneous data would generate distortive results. SeAH argues that using the results of the first review bears no relation to the current profitability of WLP sales. In addition to the reasons stated above as to why this information cannot be used, we agree with Maverick that NEXTEEL offered mere speculation about the link between changes in raw material prices and the Korean line pipe producer's costs without citing any record evidence to support its claims. In fact, one of the financial statements submitted by SeAH (*i.e.*, Husteel Co., Ltd.) demonstrates an increase in net income in 2017 as compared to 2016.<sup>157</sup> Although we acknowledge that Hyundai Steel's CV profit is not contemporaneous with the current POR, on balance, it constitutes the best information for determining CV profit. We continue to find that, absent specific evidence of significant differences in market conditions during the two time periods, the specificity of the data outweighs concerns over contemporaneity. In fact, the courts have recognized that the issue of contemporaneity does not override the imperative that the information being used is the best available and most accurate.<sup>158</sup> Hyundai Steel's profit experience from the first review reflects the profit of a Korean WLP producer, on home market sales of the merchandise under consideration, in the ordinary course of trade. In addition, when combined with Hyundai Steel's selling expenses from the first review, the resulting ratio is public information.

We have found the remaining potential sources for CV profit suggested for use under 773(e)(2)(B)(iii) of the Act to be less reasonable for use as surrogate sources. All of the financial statements of Korean pipe producers such as Hyundai Steel; Husteel; NEXTEEL; HiSteel Co. Ltd.; Miju Steel Manufacturing Co., Ltd; Steel Flower Co., Ltd.; Samkang M & T; Dong Yang Steel Pipe; EEW Korea; Dongbu Incheon Steel; Korea Cast Iron Pipe; MSTEEL Co., Ltd.; Poongsan Neotiss; TGS Pipe, POSCO Daewoo, Keonwoo Metal; Kolon Global; Sing Sung

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<sup>156</sup> The Domestic Interested Parties initially submitted the CV profit from the preliminary results of the antidumping duty administrative review of WLP from the Republic of Korea. This information was superseded by their subsequent submission of the CV profit based on the final results. *See* Letter from Domestic Interested Parties' initial submission "Welded Line Pipe from the Republic of Korea: Comments and Factual Information on Constructed Value Profit, dated June 13, 2018" at Exhibits 1 and 2; *see also* the Domestic Interested Parties' subsequent submission "Welded Line Pipe from the Republic of Korea: Comments and Factual Information on CV Profit and Selling Expenses for SeAH," dated August 2, 2018, at Exhibit 1.

<sup>157</sup> *See* Letter from the Counsel for SeAH Steel Corporation on Administrative Review of the Antidumping Order on Welded Line Pipe from Korea for the 2016-17 Review Period – Response to Request for CV Profit and Selling Expenses Comments and Information, at Attachment 5.

<sup>158</sup> For example, in relation to the use of surrogate financial statements in non-market economy cases, the Court has found that "contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the {period of investigation}." *See, e.g., Hebei Metals & Minerals Import & Export Corp. v. United States*, 366 F. Supp. 2d 1264, 1275 (CIT 2005); and *Yantai Oriental Juice Co. v. United States*, 26 C.I.T. 605, 617 (2002).

Metal and Soon-Hong Trading, are incomplete. SeAH argues that there is no requirement in the statute or regulations that calculations of CV SG&A expenses and profit be supported by complete financial statements.<sup>159</sup> However, we agree with Maverick that the absence of entire footnotes or complete translations precludes Commerce from fully evaluating the financial information set forth in these financial statements. This approach is consistent with Commerce's normal practice not to base CV profit on incomplete financial statements.<sup>160</sup> In fact, in our letter requesting interested parties an opportunity to comment and submit new factual information on CV profit and selling expenses, we specifically indicate that "Each surrogate financial statement you submit must be complete (*i.e.*, including the auditor's report and all financial statement footnotes)."<sup>161</sup>

With respect to the financial statements of Welspun, Borusan, and TMK, we find that each of these data sources is less specific to WLP than that of Hyundai Steel in the first review. Welspun and Borusan are non-Korean producers and their financial statements lack sufficient detail to determine the portion of WLP in the total sales revenue. NEXTEEL argued that in the OCTG case, Commerce excluded the financial statements of Welspun "because there was no evidence suggesting that Welspun's financial ratios reflect the production of OCTG."<sup>162</sup> However, this concern is not relevant to this case, where the record indicates that Welspun produces WLP. We disagree with NEXTEEL that Welspun only produces pipes. In the notes to its financial statements, Welspun states that it is "engaged in the business of production and coating of high-grade submerged arc welded pipes, hot rolled steel plates and coils."<sup>163</sup> This company information shows that Welspun also produces products other than WLP. Thus, it is inappropriate to use Welspun's financial statements since its sales of WLP are combined together in one amount with other non-line pipe products and they do not show sales information on specific products. Likewise, Borusan's financial statements, in addition to lacking sufficient detail to determine the portion of WLP sales in the total sales revenue, show a high percentage of export sales to unspecified countries.<sup>164</sup> The financial statements of TMK, also a non-Korean producer, are not specific to the WLP industry as WLP represents 25 percent of the total sales.<sup>165</sup> Thus, it is also inappropriate to use TMK's financial statements that predominantly reflect significant sales of non-line pipe products.

Because there is no information on the record of the instant review concerning the profit on sales of WLP under section 773(e)(2)(A) of the Act, nor under section 773(e)(2)(B)(i) of the Act, we find that Hyundai Steel's calculated CV profit in the first review comports with the requirements

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<sup>159</sup> See SeAH Case Brief at 32.

<sup>160</sup> See *Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014) (*OCTG from Korea LTFV Final Determination*), and accompanying IDM at Comment 1.

<sup>161</sup> See Letter, "Antidumping Duty Administrative Review of Line Pipe from the Republic of Korea: Request for Constructed Value Profit and Selling Expense Comments and Information," dated July 19, 2018.

<sup>162</sup> See NEXTEEL Case Brief at 49 citing *OCTG 2015-2016 Final Results*.

<sup>163</sup> See Letter from NEXTEEL, "Welded Line Pipe from the Republic of Korea: NEXTEEL's Submission of Factual Information and Comments for CV Profit and Selling Expenses," dated June 14, 2018 (NEXTEEL CV Profit Submission), at Exhibit 2-B.

<sup>164</sup> See NEXTEEL CV Profit Submission at Exhibit 4.

<sup>165</sup> *Id.* at Exhibit 3.

under section 773(e)(2)(B)(ii) of the Act because it is, “the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) for selling, general, and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country.” We note that Hyundai Steel is subject to the order and the surrogate amounts are for the production and sale of the foreign like product, they were made in the ordinary course of trade, and were for consumption in the foreign country. NEXTEEL argues that using prior period information is not available under section 773(e)(2)(B)(ii) of the Act, which envisions CV profit information based on “actual amounts incurred and realized by exporters or producers that are subject to the investigation or review;”<sup>166</sup> however, there is no such contemporaneity requirement articulated under this section of the Act. We further note that Hyundai Steel continues to be subject to the duty rates calculated from this information in this administrative review.

NEXTEEL argues that the only option under the statute available, should Commerce continue using Hyundai Steel’s prior CV profit information, is option (iii), as “any other reasonable method,” and in this instance the amount “normally realized” is not the single outdated and aberrational rate calculated for Hyundai Steel in a prior review. Rather, the amount “normally realized” is the amount calculated for the Korean industry of 6.56 percent shown in SeAH’s CV profit submission and corroborated by NEXTEEL’s own data. SeAH agrees with NEXTEEL that its submission for the 14 Korean line-pipe producers represent the best, and only, evidence regarding the amount “normally realized by exporters or producers ... 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.” Commerce however rejects both NEXTEEL’s and SeAH’s arguments because the data they suggest for use under section 773(e)(2)(B)(iii) of the Act are not reliable, as discussed above (*e.g.*, the financial statements submitted were all excluded either because they are incomplete or lack sufficient detail to determine the portion of WLP in the total sales revenue).

Hyundai Steel’s information from the first review is the only “Korean market general category of products” profit information on the record of this proceeding, made in the ordinary course of trade; thus, if Commerce were to use section 773(e)(2)(B)(iii) of the Act, it would use this information and it would also serve as the only reasonable profit cap. Hyundai Steel’s prior CV profit information for sale of WLP in its home market is the best data to be used as a “facts available” profit cap, because it is specific to WLP and represents the production experience of a Korean WLP producer in Korea. As such, as facts available,<sup>167</sup> Commerce finds that Hyundai Steel’s profit data is the best suitable data to use as the basis for the calculation of the profit cap.

In summary, for the final results, after considering the record evidence and the arguments raised in the parties’ case and rebuttal briefs, we have continued to use Hyundai Steel’s CV profit and selling expense ratios from the first review to determine NEXTEEL’s and SeAH’s profit and selling expenses in the instant review.

#### **Comment 5: NEXTEEL’s Affiliation With POSCO**

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<sup>166</sup> See NEXTEEL Case Brief at 50 (citing section 773(e)(2)(B)(ii)).

<sup>167</sup> See SAA at 841.

### *NEXTEEL's Case Brief*

- Commerce's determination in the *Preliminary Results* that NEXTEEL is affiliated with POSCO and POSCO Daewoo through a close supplier relationship<sup>168</sup> is contrary to the evidence on the record, which demonstrates that NEXTEEL was not reliant on POSCO for NEXTEEL's sales of the subject merchandise to the United States.
- Commerce based its determination on *OCTG from Korea LTFV Final Determination* where it found a close supplier relationship based on POSCO's extensive involvement in both the production and sales of NEXTEEL's merchandise.<sup>169</sup> The facts of this review are distinguishable from the facts in that proceeding because the volume of NEXTEEL's sales to POSCO Daewoo during the POR is a small percentage of the total POR sales volume.<sup>170</sup>
- Commerce consistently applies a high standard for making a close supplier relationship decision, which requires demonstration that the supplier or buyer become reliant upon one another, and that the relationship must have the potential to impact production, pricing, or cost decisions.<sup>171</sup>
- In *OCTG from Korea LTFV Final Determination*, Commerce based its determination on the volume of inputs purchased from POSCO and the volume of sales to POSCO.<sup>172</sup> In this review, the facts are different because NEXTEEL's volume of sales to POSCO is so small that it does not demonstrate POSCO's ability to "exercise restraint or direction" over NEXTEEL.
- NEXTEEL demonstrated that it purchased HRC from suppliers other than POSCO during the POR; furthermore, the weight of one supply source is not sufficient to establish a close supplier relationship.<sup>173</sup>
- As NEXTEEL purchased a considerable amount of its HRC inputs from suppliers other than POSCO and sold almost all of subject merchandise directly to its U.S. customers, the facts in this review do not support a finding of reliance or control between NEXTEEL and POSCO. Thus, Commerce should find that NEXTEEL is not affiliated with POSCO or POSCO Daewoo.
- Commerce need not conduct an arm's-length analysis with respect to NEXTEEL's purchases of steel from POSCO, and Commerce should consider NEXTEEL's sales to POSCO Daewoo as unaffiliated U.S. sales for purposes of the margin calculation.

### *Maverick's Rebuttal Brief*

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<sup>168</sup> See NEXTEEL Case Brief at 51 (citing PDM at 5-7).

<sup>169</sup> *Id.* (citing *OCTG from Korea LTFV Final Determination* IDM at Comment 20).

<sup>170</sup> See NEXTEEL Case Brief at 51 (citing PDM at 5; and U.S. sales database submitted with NEXTEEL's July 16, 2018, First Supplemental Sections A and C Response (NEXTEEL SQRAC)).

<sup>171</sup> *Id.* at 52-54 (citing 19 CFR 351.102(b)(3); SAA at 838; *Husteel*, 98 F. Supp. 3d at 1315; *Notice of Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation*, 65 FR 1139, 1142-45 (January 7, 2000); and *Cold Rolled and CORE Steel from Korea* at Comment 2).

<sup>172</sup> *Id.* at 54-55 (citing *OCTG from Korea LTFV Final Determination*, at Comment 20).

<sup>173</sup> *Id.* at 56 (citing Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results - NEXTEEL Co., Ltd.," dated February 7, 2019 (NEXTEEL Cost Calculation Memo), at Attachment 2; and generally *Cold Rolled and CORE Steel from Korea*).

- Commerce properly determined that NEXTEEL is affiliated with POSCO and POSCO Daewoo based on its finding that POSCO is operationally in a position to exercise restraint or direction over NEXTEEL in a manner that affects the pricing, production, and sale of WLP, pursuant to section 771(33)(G) of the Act.<sup>174</sup>
- Commerce’s finding of affiliation was not based on the volume of NEXTEEL’s U.S. sales through POSCO Daewoo, but rather on POSCO’s involvement in both NEXTEEL’s production and sales of WLP.<sup>175</sup>
- The instant case is distinguishable from *Cold Rolled and CORE Steel from Korea*, where Commerce found that POSCO was a supplier of HRC to the respondent, but not otherwise involved in the production or sale of the subject merchandise. However, in this review, Commerce found affiliation through the combination of POSCO’s involvement in both the production of the subject merchandise, through its supply to NEXTEEL of the majority of its HRC inputs, and in NEXTEEL’s sales of the subject merchandise in the United States.<sup>176</sup>
- Contrary to NEXTEEL’s claims, Commerce did not rely on its affiliation findings in *OCTG from Korea LTFV Final Determination* to find affiliation between NEXTEEL and POSCO in this review. Rather, Commerce based its *Preliminary Results* finding based on the records of this review. The similarity in the fact patterns of the *OCTG from Korea 2016-2017 Preliminary Results* and the instant review noted in the *Preliminary Results* provided only an instructive precedent for Commerce in this review.<sup>177</sup>

**Commerce’s Position:** In accordance with section 771(33) of the Act, the following persons shall be considered affiliated: (A) members of a family, including brothers and sisters, spouse, ancestors, and lineal descendants; (B) any officer or director of an organization and such organization; (C) partners; (D) employer and employee; (E) any person directly or indirectly owning, controlling, controlled by, or holding with power to vote, five percent or more of the voting stock or shares of any organization and such organization; (F) two or more persons directly or indirectly controlling, controlled by, or under common control with, any person; and (G) any person who controls any other person and such other person. To find affiliation between two companies, at least one of the criteria above must be applicable.

Section 771(33) of the Act further provides that “{f}or purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.” Commerce’s regulations at 19 CFR 351.102(b)(3) state that, in finding affiliation based on control, Commerce will consider, among other factors: (i) corporate or family groupings; (ii) franchise or joint venture agreements; (iii) debt financing; and (iv) close supplier relationships.

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<sup>174</sup> See Maverick Rebuttal Brief at 31-32 (citing PDM at 6-7; and SAA at 838).

<sup>175</sup> *Id.* at 33 (citing POSCO Daewoo’s September 21, 2018 Section A Questionnaire Response at 1; and NEXTEEL August 3, 2018 SQR at 3-5).

<sup>176</sup> *Id.* at 33-34 (citing *Cold Rolled and CORE Steel from Korea* IDM at Comment 2).

<sup>177</sup> *Id.* at 35 (citing *OCTG from Korea LTFV Final Determination* at Comment 20; and PDM at 5-7).

Control between persons may exist in close supplier relationships in which either party becomes reliant on one another.<sup>178</sup> With respect to close supplier relationships, Commerce has determined that the threshold issue is whether either the buyer or seller has, in fact, become reliant on the other. Only if such reliance exists does Commerce then determine whether one of the parties is in a position to exercise restraint or direction over the other.<sup>179</sup> Commerce will not, however, find affiliation on the basis of this factor unless the relationship has the potential to affect decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.<sup>180</sup>

In establishing whether there is a close supplier relationship, Commerce normally looks to whether one of the parties has become reliant on the other. However, in this situation, the argument for affiliation has gone beyond a close supplier relationship. In the *OCTG from Korea LTFV Final Determination* and subsequent reviews, Commerce found that POSCO had been involved in both the production and sales sides of NEXTEEL's operations involving OCTG.<sup>181</sup> Commerce determined that the combination of POSCO's involvement in both production and sales activities created a unique situation where POSCO has been operationally in a position to potentially exercise restraint or direction over NEXTEEL in a manner that affected the pricing, production, and sale of OCTG within the meaning of section 771(33) of the Act.<sup>182</sup>

This review is the first segment of the WLP from Korea proceeding in which we have examined NEXTEEL's U.S. sales of WLP. Thus, unlike in the OCTG proceeding, there is no prior history of a close supplier relationship between NEXTEEL and POSCO with respect to WLP. We note that in this review, NEXTEEL purchased the majority of its HRC inputs from POSCO for the production of WLP.<sup>183</sup> Record information also shows that the percentage of NEXTEEL's U.S. sales of WLP sold through POSCO and POSCO Daewoo during the POR was not significant.<sup>184</sup>

Accordingly, we regard POSCO Daewoo's involvement in selling NEXTEEL's WLP as relatively minor and, thus, cannot conclude that POSCO was in a position to exercise restraint or control over NEXTEEL. Thus, we find that a "unique situation" created by the combination of POSCO's involvement in both the production and sales of WLP does not exist in this review period. Therefore, we have changed our finding from the *Preliminary Results* and determine for

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<sup>178</sup> See, e.g., SAA at 838.

<sup>179</sup> See, e.g., *Multilayered Wood Flooring from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (October 18, 2011) (*Wood Flooring from China*), and accompanying IDM at Comment 21.

<sup>180</sup> See 19 CFR 351.102(b)(3).

<sup>181</sup> See *OCTG from Korea LTFV Final Determination* IDM at 20; *OCTG 2014-2015 Final Results* IDM at Comment 36; and *Certain Oil Country Tubular Goods from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 46963 (October 10, 2017), and accompanying PDM at 6-8, unchanged in *OCTG 2015-2016 Final Results*.

<sup>182</sup> See *2016-2017 OCTG from Korea Final Results* at Comment 10.

<sup>183</sup> See NEXTEEL August 3, 2018 SQR at Exhibit SD 2-6-a.

<sup>184</sup> See U.S. Sales Database submitted with NEXTEEL SQRAC; see also Memorandum, "Preliminary Results Margin Calculation for NEXTEEL Co., Ltd.," dated February 7, 2019, at Attachment 1, SAS Margin Output at 16 ("SOURCE OF CUSTOMS ENTERED VALUE DATA, BY IMPORTER," which provides the quantity of CEP sales (i.e., NEXTEEL's sales through POSCO Daewoo), NEXTEEL's EP sales (i.e., all other NEXTEEL sales), and the total quantity of POR sales examined).

these final results that NEXTEEL is not affiliated with POSCO in the current POR. As a result, we revised our analysis of NEXTEEL's U.S. sales to include NEXTEEL's sales through POSCO in our calculation, rather than POSCO Daewoo's sales to unaffiliated U.S. customers. In addition, we are no longer applying a major input adjustment for the HRC NEXTEEL obtained from POSCO. *See* Comment 7 below.

#### **Comment 6: Importer-Specific Assessment Rate for NEXTEEL/POSCO**

- Commerce erred in its draft liquidation Customs instructions for NEXTEEL by setting forth two rates for NEXTEEL importers: "NEXTEEL Co., Ltd."; and "POSCO Daewoo/NEXTEEL Co., Ltd."<sup>185</sup>
- POSCO/Daewoo was not an importer of record during the POR. In the *Preliminary Results*, Commerce calculated the POSCO Daewoo/NEXTEEL Co., Ltd assessment rate based on a sale transaction imported prior to the POR.<sup>186</sup> Commerce should exclude this sale from its final results analysis, which would exclude this separate assessment rate.
- Should Commerce continue to include this sale in its analysis, it should calculate a single assessment rate applicable to importer NEXTEEL Co. Ltd., as the combination name "POSCO Daewoo/NEXTEEL Co., Ltd." does not exist as an entity that acted as an importer of record, and its use would cause confusion.

No other party commented on this issue.

**Commerce's Position:** As discussed in Comment 5, above, we no longer find NEXTEEL and POSCO Daewoo to be affiliated parties. Accordingly, in these final results, we are examining only NEXTEEL's EP sales made to unaffiliated parties. For all of these sales, NEXTEEL was the only importer of record. Therefore, in the final results, we calculated a single assessment rate applicable to NEXTEEL as the importer.

#### **Comment 7: Major Input Analysis for NEXTEEL**

##### *NEXTEEL's Case Brief*

- In the *Preliminary Results*, Commerce incorrectly adjusted NEXTEEL's HRC purchases from POSCO twice. Commerce should not first adjust the prices from POSCO based on a transactions disregarded theory and then adjust the prices again to account for the alleged subsidies POSCO receives, to avoid double adjusting through PMS.
- If a PMS indeed exists to the extent of POSCO's AFA subsidy rates, then Commerce's PMS adjustments account for it fully without separately adjusting POSCO's prices to NEXTEEL based on an alleged affiliated input adjustment.

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<sup>185</sup>See NEXTEEL Case Brief at 61 (citing Memorandum, "Draft Customs Instructions," dated March 1, 2019, at Attachment 1).

<sup>186</sup>*Id.*, at 61-63 (citing POSCO Daewoo's October 9, 2018, U.S. Sales Questionnaire Response at C-3, C-31, and C-45-46).



- In *OCTG 2014-2015 Final Results*, Commerce concluded that no major input adjustment was warranted because NEXTEEL's HRC costs had already been adjusted based on a PMS.<sup>187</sup>
- Commerce should not apply both a major input adjustment and a PMS adjustment; doing so unreasonably and doubly adjusts the same input costs for the same rationale.

**Commerce's Position:** As noted in Comment 5, above, for these final results, we find that NEXTEEL is not affiliated with POSCO in the current POR. Accordingly, the arguments concerning the major input analysis are moot as the provision governing major inputs applies to transactions between affiliated parties, and the transactions between NEXTEEL and POSCO were determined not to be transactions between affiliated parties.

### **Comment 8: Non-Prime Costs for NEXTEEL**

#### *NEXTEEL's Case Brief*

- In the *Preliminary Results*, Commerce reallocated costs for non-prime WLP based on the premise that non-prime pipe cannot be used for the same application as prime products.<sup>188</sup>
- Under similar circumstances in *OCTG from Ukraine*, Commerce held that non-prime line pipe is in fact subject merchandise.<sup>189</sup> There is no question that the products at issue were produced as WLP. Therefore, no adjustment to NEXTEEL's costs is justified.
- Even if Commerce continues to make an adjustment to reallocate the costs of non-prime product, Commerce should correct its clerical error; Commerce compared a single overall weighted-average COM derived from all products reported (prime and non-prime) to the average unit sales value of non-prime products to derive an average per-unit loss, which it then multiplied by the non-prime quantity to derive the total difference to allocate to prime products.<sup>190</sup>
- The appropriate quantification of the per-unit loss measures the difference between the revenue on non-prime products and the cost of non-prime products. Thus, this amount should be derived from the average COM of non-prime products only, not the combined average COM of all products.<sup>191</sup>

#### *Maverick's Rebuttal Brief*

- In the *Preliminary Results*, Commerce "revised the costs reported for non-prime WLP products that were not capable of being used for the same applications as prime WLP

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<sup>187</sup> See NEXTEEL Case Brief at 46 (citing *OCTG 2014-2015 Final Results* IDM at Comment 32).

<sup>188</sup> See NEXTEEL Case Brief at 57 (citing NEXTEEL's Preliminary Cost Calculation Memo at 2, Attachments 3A and 3B).

<sup>189</sup> See NEXTEEL Case Brief at 58 (citing *Certain Oil Country Tubular Goods from Ukraine: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 79 FR 41969 (July 18, 2014) (*OCTG from Ukraine*), and accompanying IDM at Comment 2.

<sup>190</sup> See NEXTEEL's Case Brief at 58 (citing NEXTEEL's Preliminary Cost Calculation Memo at Attachments 4A and 4B).

<sup>191</sup> *Id.*

products to reflect their lower market values and allocated the difference to price WLP products.”<sup>192</sup>

- The question here is not whether non-prime WLP is “subject merchandise,” but instead whether non-prime WLP can be used in the same applications as prime WLP. Commerce found they could not, and appropriately reallocated NEXTEEL’s costs for non-prime WLP on that basis. Thus, *OCTG from Ukraine* does not support NEXTEEL’s argument.<sup>193</sup>
- The programming language used in the *Preliminary Results* with respect to Commerce’s adjustments to NEXTEEL’s non-prime WLP products contains no clerical errors; instead, it is consistent with Commerce’s methodology to subtract the sales revenue of non-prime products from the total manufacturing costs, which is comprised of both prime and non-prime WLP products.<sup>194</sup> Therefore, Commerce should not revise its costs adjustments for NEXTEEL in the Final Results.

**Commerce’s Position:** Our practice with respect to non-prime products is to analyze the products sold as non-prime on a case-by-case basis to determine how such products are treated in the respondent’s normal books and records, whether they remain in scope, and likewise whether they can still be used in the same applications as the prime subject merchandise.<sup>195</sup> Sometimes the downgrading is minor and the product remains within a product group, while at other times the downgraded product differs so significantly that it no longer belongs to the same group and cannot be used for the same applications as the prime product. If the product is not capable of being used for the same applications, the product’s market value is typically significantly impaired, often to a point where its full cost cannot be recovered and assigning full costs to that product would not be reasonable.<sup>196</sup> Instead of attempting to judge the relative values and qualities between grades, we have adopted the reasonable practice of looking at whether the downgraded product can still be used in the same general applications as its prime counterparts.<sup>197</sup> With this distinction in mind, we reviewed the information on the record of this proceeding with regard to the non-prime merchandise.

We find that NEXTEEL’s reliance on *OCTG from Ukraine* is misplaced. In *OCTG from Ukraine*, the rejected OCTG merchandise that Commerce found was: 1) within the scope of the investigation; 2) products that entered the United States as OCTG; and 3) upon inspection in the United States, was deemed to be damaged or otherwise non-compliant with American Petroleum Institute (API) standards and could not be repaired in a way to make it meet these standards.<sup>198</sup>

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<sup>192</sup> See Maverick’s Rebuttal Brief at 24 (citing PDM at 22).

<sup>193</sup> *Id.* at 25 (citing *OCTG from Ukraine* IDM at Comment 2).

<sup>194</sup> *Id.* at 27 (citing *Welded Line Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015) (*WLP from Korea LTFV Final*), and accompanying IDM at Comment 9).

<sup>195</sup> See, e.g., *Steel Concrete Reinforcing Bar from Mexico: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 27233 (June 14, 2017), and accompanying IDM at Comment 3; *WLP from Korea LTFV Final* IDM at Comment 9; and *Steel Concrete Reinforcing Bar from Turkey: Final Negative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances*, 79 FR 21986 (September 15, 2014) (*Rebar from Turkey*), and accompanying IDM at Comment 15.

<sup>196</sup> See *Welded Line Pipe from Korea* IDM at Comment 9.

<sup>197</sup> *Id.*; see also *Rebar from Turkey* IDM at Comment 15.

<sup>198</sup> See *OCTG from Ukraine* IDM at Comment 2.

In this case, the WLP was downgraded to non-prime at the end of the production process and was never certified to be sold as WLP. NEXTEEL explained that non-prime WLP products do not meet specification API 5L, which governs WLP. NEXTEEL's non-prime WLP products do not have the same certifications as prime products and cannot be used for applications defined under API 5K because non-prime products do not satisfy this API standard. As a result, NEXTEEL does not issue a mill certificate for non-prime products.<sup>199</sup> Prime products are used in pipeline transportation systems in the petroleum and natural gas industries, as permitted by API 5L usage. Non-prime products are generally used for structural purposes such as a piling. As a practical matter, customers do not attempt to use non-prime line pipe in line pipe applications because of the potential liabilities and cost in the event of a pipe failure.<sup>200</sup> Accordingly, we find there is no evidence that NEXTEEL's non-prime merchandise can be used in the same general applications as its prime counterparts. Consequently, assigning full costs to these products does not reasonably reflect the costs associated with the production and sale of the merchandise. Therefore, for these final results, we have continued to adjust NEXTEEL's reported costs to value the downgraded non-prime products at their sales price, while allocating the difference between the full production cost and market value of the non-prime products to the production costs of prime-quality WLP.<sup>201</sup>

Finally, because we agree with NEXTEEL that the quantification of the per unit adjustment could also be derived from the average cost of the non-prime products, we have adjusted our calculations accordingly.<sup>202</sup>

## **Comment 9: Suspended Production Loss for NEXTEEL**

### *NEXTEEL's Case Brief*

- During the POR, NEXTEEL suspended production on certain OCTG threading lines in one of its facilities. In its *Preliminary Results*, Commerce determined that the costs relate to the company as a whole because the shutdowns were for an "extended period of time."<sup>203</sup> Consequently, Commerce revised NEXTEEL's G&A expense ratio to include the suspended loss amount in the numerator of G&A, and at the same time deducted the suspended loss amount from the cost of goods sold (COGS) denominator.<sup>204</sup>
- This suspended loss was not included in NEXTEEL's reported costs because they were not recognized as a cost of manufacturing, but rather as a cost of goods sold, in accordance with Korean International Financial Reporting Standards (K-IFRS).
- Suspended losses are not related to the company's overall management of its operations, but rather consisted of maintenance expenses NEXTEEL incurred on specific production lines that were temporarily suspended. The expenses in question here are clearly

<sup>199</sup> See NEXTEEL's July 3, 2018 Supplemental Section D Questionnaire Response, at 5.

<sup>200</sup> *Id.*

<sup>201</sup> See NEXTEEL Final COP Memo at 2.

<sup>202</sup> *Id.*

<sup>203</sup> See NEXTEEL's Case Brief at 59 (citing NEXTEEL's Preliminary Cost Calculation Memo at 2).

<sup>204</sup> *Id.*

manufacturing related expenses.<sup>205</sup> Commerce erred in recategorizing these costs as a “general” cost that should be borne by the company as a whole.

- Even if Commerce determined that these temporary shut-down costs should be allocated to all products and not just the products of the affected lines, given that these costs were appropriately categorized as COGS; the appropriate adjustment would be to apply an adjustment factor to COM. This adjustment factor should be calculated as the total suspended cost divided by the total cost of manufacturing for the POR, rather than recategorizing the expenses as G&A.

#### *Maverick’s Rebuttal Brief*

- Commerce’s practice is to consider the costs for non-routine shutdowns to be related to the general operations of the company as a whole, rather than to be specific to products associated with the suspended production lines.<sup>206</sup>
- The record demonstrates that NEXTEEL’s OCTG threading line shutdown was not a routine or maintenance shutdown.
- Commerce’s revisions of NEXTEEL’s G&A and financial expense ratios is consistent with its practice and should not be revised.

**Commerce’s Position:** We disagree with NEXTEEL and have continued to classify the suspended losses as G&A expenses and deducted the loss from the COGS denominator. In this case, NEXTEEL recognized certain losses associated with suspended production lines related to non-WLP products.<sup>207</sup> It is Commerce’s normal practice to include routine shutdown expenses (*i.e.*, maintenance shutdowns) in a respondent’s reported costs and to associate them to the products produced on those lines.<sup>208</sup> However, in this review, the suspended loss is not related to a routine shutdown; rather, it relates to NEXTEEL’s suspension of production on certain lines for an extended period of time.<sup>209</sup> As explained in *OCTG 2014-2015 Final Results*, unlike a routine maintenance shutdown, once a production line is suspended, it no longer relates to ongoing production. A company can suspend production lines for numerous reasons, for example a company may decide to suspend a production line while the company assesses whether it should permanently close the production line, or the company has no current sales or necessity to inventory the product produced on those production lines. Regardless of the reason for the extended suspension of production activity, in contrast to the routine maintenance shutdowns, products are not produced on those production lines to recover the costs associated with those production lines.<sup>210</sup> As such, because NEXTEEL suspended the production line for

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<sup>205</sup> See NEXTEEL’s Case Brief at 60 (citing NEXTEEL August 3, 2018 SQR at SD-7).

<sup>206</sup> See Maverick’s Rebuttal Brief at 27 and 28 (citing *e.g.*, *OCTG 2014-2015 Final Results IDM* at 122 (citing *Gray Portland Cement and Clinker from Mexico: Final Results of Antidumping Duty Administrative Review*, 62 FR 17148 (Apr. 9, 1997), and accompanying IDM (Gray Portland Cement and Clinker from Mexico) at Comment 9).

<sup>207</sup> See NEXTEEL Section D Questionnaire Response, dated May 15, 2018 at 10.

<sup>208</sup> See, *e.g.*, *Gray Portland Cement and Clinker from Mexico IDM* at Comment 9.

<sup>209</sup> See Memorandum, “Verification of the Cost Response of NEXTEEL Co., Ltd. in the Antidumping Duty Administrative Review of Welded Line Pipe from the Republic of Korea,” dated December 11, 2018, (NEXTEEL COP Verification Report) NEXTEEL’s Cost Verification Report at Exhibit 6.

<sup>210</sup> See *OCTG 2014-2015 Final Results IDM* at Comment 34.

an extended period of time during the POR,<sup>211</sup> we consider the associated costs to be related to the general operations of the company as a whole, and not specific to products associated with that production line. Therefore, for the final results, we have continued to include NEXTEEL's suspended losses as a part of its G&A expenses. In addition, we have continued to exclude from the COGS denominator the reclassified suspended loss in calculation of the G&A and financial expense ratios.<sup>212</sup>

## Comment 10: Canada as Comparison Market for SeAH

### *SeAH Case Brief*

- For these final results, Commerce should base NV on SeAH's third-country sales to Canada. In the *Final Results* of the first review, as well as in the *Preliminary Results* of the current review, Commerce adopted a *per se* rule that dumped third-country sales are unrepresentative and cannot be used as the basis for NV.<sup>213</sup> These decisions are contrary not only to Commerce's determinations made in *OCTG 2014-2015 Final Results*, but also to representations Commerce has made to the CIT.
- In *OCTG 2014-2015 Final Results*, Commerce based SeAH's NV on the company's Canadian sales, even though Commerce was fully aware that Canada made a finding that these sales were dumped in the Canadian market.<sup>214</sup> Commerce also based respondent NEXTEEL's CV profit on the profit calculated for SeAH's Canadian sales in that review.<sup>215</sup> In its response brief to NEXTEEL's appeal of *OCTG 2014-2015 Final Results*, although Commerce acknowledged that Canada had imposed an antidumping duty measure to counteract dumping by Korean producers of merchandise under consideration in that proceeding, it nonetheless stated that it could find that third-country sales were dumped only if "the information normally required in a dumping investigation to perform the necessary dumping calculations" was part of the record. That statement is irreconcilable with Commerce's position in the instant review and *2015-2016 Final Results*.<sup>216</sup>
- In *OCTG 2014-2015 Final Results*, Commerce also stated that, with regard to Canada's imposition of antidumping duties to counteract dumping by Korean OCTG producers, there was no "evidence that SeAH made {those} particular sales at less than fair value, particularly given that SeAH realized a healthy profit on those sales."<sup>217</sup>
- Commerce is required by U.S. law to make determinations based on the facts before it.<sup>218</sup> Commerce may not outsource its investigative role to any third parties, and particularly

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<sup>211</sup> See NEXTEEL COP Verification Report at Exhibit 6.

<sup>212</sup> See NEXTEEL Final COP Memo at 1 and 2.

<sup>213</sup> See SeAH Case Brief at 2 (citing *2015-2016 Final Results* IDM at Comment 12).

<sup>214</sup> *Id.* at 2 (citing *OCTG 2014-2015 Final Results* IDM at Comment 1).

<sup>215</sup> *Id.* (SeAH notes that Commerce continued to use the calculated profit from SeAH's sales in *OCTG 2014-2015 Final Results* as the basis for CV profit in the second OCTG antidumping duty administrative review, citing *OCTG 2015-2016 Final Results* IDM at Comment 7).

<sup>216</sup> *Id.* at 3 (citing *OCTG 2014-2015 Final Results* at Comment 1; and Commerce's December 21, 2018 Response Brief, NEXTEEL Co., Ltd. v. U.S. Consol. Court No. 18-00083, at 43-44).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 4 (citing sections 771(1) and 736(d) of the Act).

not to foreign government agencies. Commerce's reliance on a foreign government's findings preclude judicial review under the "substantial evidence standard."<sup>219</sup>

- Although documents establishing Canada's findings are on the record of this review, the evidence on which those findings were based is not before Commerce. Therefore, Commerce has not reviewed or analyzed the cost and price information upon which the Canada Border Services Agency (CBSA) relied for its determination, nor has it evaluated whether the CBSA's conclusions were correct as a matter of U.S. or Canadian law. As a result, Commerce is not permitted to rely on the CBSA's conclusions.<sup>220</sup>
- Similar to *OCTG 2014-2015 Final Results*, because there is no evidence that SeAH made the particular WLP sales to its Canadian customers at less than fair value, there is no basis for rejecting those sales as the basis for calculating NV in this review.
- The CBSA's finding that SeAH dumped WLP in Canada was based on methodologies inconsistent with U.S. law. In making its determination that SeAH dumped WLP into the Canadian market, the CBSA applied AFA to SeAH for not reporting its Korean sales of WLP purchased from other Korean manufacturers.<sup>221</sup> However, under U.S. law, only sales of products that were made by the same producer that exported to the United States may be used to calculate NV.<sup>222</sup> It is absurd to punish SeAH under U.S. law for mistakenly following U.S. reporting requirements in a Canadian investigation.
- Moreover, the CBSA's dumping calculations were inconsistent with U.S. law. Even though the CBSA found SeAH's home market sales inadequate, it used those sales to calculate the profit component of CV.<sup>223</sup> This is inconsistent with Commerce's longstanding practice, which would not use such sales in calculating CV profit.<sup>224</sup> Additionally, the CBSA's calculation of CV profit included the profit on SeAH's Korean market sales of WLP produced by other Korean manufacturers. However, under U.S. law, a foreign producer's home market sales of merchandise produced by other manufacturers cannot be used in the calculation of CV profit.<sup>225</sup>
- Even if the CBSA followed U.S. AD methodologies, Commerce's reliance on the CBSA's findings would cause results fundamentally inconsistent with U.S. law. For example, U.S. AD law and the CBSA may apply different standards in determining home market viability, which, in turn, could lead to a result that Commerce may rely on a foreign authority's use of Korean home-market sales which do not pass the five-percent "viability" test when compared to U.S. sales. Such a result would be inconsistent with the clear statutory instruction that home-market sales that do not meet the five-percent "viability" test do not provide a proper basis for comparison.

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<sup>219</sup> *Id.* at 5 (citing section 516A(b)(1) of the Act).

<sup>220</sup> *Id.* at 5, (citing, *e.g.*, RESTATEMENT THIRD OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Section 483 (1986), arguing that "it is well-settled that administrative determinations by foreign government agencies that related to taxes, fines, or penalties are not entitled to 'recognition in U.S. legal proceedings.'").

<sup>221</sup> *Id.* at 6 (citing SeAH's letter, "Administrative Review of the Antidumping Order on Welded Line Pipe from Korea – Rebuttal CV Profit Comments," dated August 9, 2018 (SeAH Rebuttal CV Profit Comments) at 2 and Attachment 1).

<sup>222</sup> *Id.* (citing section 771(16) of the Act).

<sup>223</sup> *Id.* at 7 (citing SeAH Rebuttal CV Profit Comments at Attachment 1 and Appendix 2 at 1-2).

<sup>224</sup> *Id.* (citing, *e.g.*, *Certain Preserved Mushrooms from India: Final Results of Antidumping Duty Administrative Review*, 67 FR 46172 (July 12, 2002), and accompanying IDM at Comment 1).

<sup>225</sup> *Id.* at 7 (citing section 773(e)(2)(A) of the Act).

- Similarly, reliance on a third-country dumping determination may result in the third-country sales being disregarded simply because they are lower-priced than U.S. sales.
- Specifically, if foreign investigators followed U.S. methodology in calculating NV based on sales to the largest third country market in instances where an exporter's home market was not viable, and if the United States was that third-country market, the foreign investigators would base NV on sales to the United States. If the exporter's prices in the United States were higher than in the foreign market, the foreign investigators would find dumping. Then, if Commerce were to disregard such sales in the foreign country because they were dumped, it may find dumping based on an alternate calculation inconsistent with the clear preference for third-country sales established under Commerce's regulations. However, the third country's dumping finding in such a case would simply reflect that U.S. prices were higher than third-country prices. Under the U.S. statute, a finding that U.S. prices were higher than the third-country prices (where the home market is not viable but the third-country market is viable) should mean that the U.S. sales were not dumped. To find dumping in the United States in such circumstances would be fundamentally inconsistent with the provisions of the U.S. statute and regulations.
- Under U.S. law, a determination that SeAH was dumping WLP in Canada would have to be based on a comparison of those sales to a U.S.-based NV. Therefore, the conditions that would exist for Canada to find dumping under a third-country market comparison using the U.S. methodology would require finding that SeAH was not dumping in the United States.
- Commerce's regulations allow for the disregarding of third-country sales that are made at prices below the COP. However, Commerce did not apply these rules in the *Preliminary Results*. Rather, Commerce relied on Canada's finding that SeAH's Canadian sales of WLP were made, on average, below CV. Regardless, the CV used by Canada applied an AFA profit figure. Thus, Commerce's reliance on Canada's dumping finding replaced the statutory sales-below-cost test with an unlawful sales-below-cost-plus-profit test.

#### *Maverick Rebuttal Brief*

- Commerce properly found that Canada is not an appropriate third-country market in the *Preliminary Results*. Commerce's finding that SeAH's sales to Canada were "not representative" was consistent with Commerce's findings in prior cases.<sup>226</sup> Moreover, the CIT has recognized that "the goal of accuracy cannot be achieved if Commerce relies upon dumped third-country prices to calculate NV."<sup>227</sup>
- Contrary to SeAH's claims, Commerce did not unlawfully outsource its investigative role in this proceeding. Rather, consistent with its practice, as evidenced in *PSF from Korea*, Commerce properly relied on the Canadian International Trade Tribunal's (CITT's)

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<sup>226</sup> See *Maverick Rebuttal Brief* at 12 (citing *Certain Polyester Staple Fiber from Korea: Final Results of Antidumping Duty Administrative Review*, 68 FR 59366 (October 15, 2003) (*PSF from Korea*), and accompanying IDM at Comment 9).

<sup>227</sup> *Id.* (citing *Alloy Piping Products, Inc. v. United States*, 201 F. Supp. 2d 1276, 1277 (CIT 2002) (*Alloy Piping 2002*)).

formal dumping finding concerning WLP from Korea to decline to accept Canada as a third-country market.<sup>228</sup>

- Commerce has, in its prior review of this proceeding, rejected SeAH's argument concerning the Canadian antidumping laws' supposed inconsistency with U.S. law, stating, "the fact that Commerce's methodology may differ from that of the CBSA does not negate Canada's finding of dumping."<sup>229</sup> Commerce's finding in this past review is equally valid in the instant review.
- SeAH's contention that Commerce's actions in the *Preliminary Results* are inconsistent with its actions in *OCTG 2014-2015 Final Results* is also without merit. In *OCTG 2014-2015 Final Results*, Commerce determined that Canada was a viable comparison market for SeAH.<sup>230</sup> Here, however, Commerce has preliminarily determined that Canada is not a viable comparison market.<sup>231</sup>
- Finally, SeAH's argument that Commerce's actions in this review are inconsistent with *NEXTEEL* is misplaced. In that proceeding, Commerce's arguments pertained to its discretion in the selection of data for the calculation of CV profit rates, rather than Canada's viability as a third-country market.<sup>232</sup> Consistent with the previous review of this proceeding, Commerce properly used CV as the basis for calculating NV.

**Commerce's Position:** We agree with Maverick that SeAH's sales to Canada do not constitute an appropriate third-country comparison market. In the *Preliminary Results*, we found that SeAH did not have a viable home market. While we did find that SeAH had sufficient sales volume in Canada for it to potentially serve as a comparison market, information on the record of this review demonstrates that Korean sales of the foreign like product were found to have been dumped in Canada,<sup>233</sup> thereby disqualifying such sales for purposes of establishing a representative comparison market and calculating SeAH's NV.

We disagree with SeAH's argument that Commerce's *Preliminary Results* run counter to our findings in *OCTG 2014-2015 Final Results*, as well as the representations Commerce made to the CIT about such findings.<sup>234</sup> Commerce bases its determinations on the specific facts presented in the investigation or review before it. Given the facts here, Commerce continues to find it inappropriate to use Canada as a comparison market because of the finding of Korean WLP dumping in Canada.

The prices of dumped goods are distorted, and therefore not "representative" under the statute.<sup>235</sup> The CIT has held that, in such circumstances, comparisons to dumped prices are inaccurate.<sup>236</sup>

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<sup>228</sup> *Id.* at 13.

<sup>229</sup> *Id.* at 14 (citing *2015-2016 Final Results* IDM at Comment 12).

<sup>230</sup> *Id.* (citing *OCTG 2014-2015 Final Results* IDM at Comment 1).

<sup>231</sup> *Id.* (citing PDM at 19).

<sup>232</sup> *Id.* at 15 (citing Nexteel's December 21, 2018 Response Brief, *NEXTEEL Co., Ltd. v. U.S.*, Consol. Court No. 18-00083 at 38-45).

<sup>233</sup> See Maverick May 24 Submission.

<sup>234</sup> See PDM at 18-19.

<sup>235</sup> See section 773(a)(1)(B)(ii)(I) of the Act (Sales prices must be "representative").

<sup>236</sup> See *Alloy Piping 2002*, 201 F. Supp. 2d at 1277 (stating "the Court agrees that the goal of accuracy cannot be achieved if Commerce relies upon dumped third-country prices to calculate NV.").



The statute and the SAA are silent as to the definition of the term “representative,” but because comparison market sale prices can be reasonably interpreted in these circumstances as a proxy for the home market sale prices that they replace, such comparison market sale prices must accurately reflect, or be representative of, home market sale prices.<sup>237</sup> We interpret the statute to require that third-country comparison market sales be representative of a respondent’s home market sales because such comparison market sales are used only where there is no viable home market. Here, SeAH’s Canadian sales have been found to be dumped, and thus, inaccurate by their nature, for purposes of representing NV. Therefore, they cannot be representative of viable home market sales.

Further, regarding representations Commerce made to the CIT in *NEXTEEL*, we find that SeAH’s reliance on that case is misplaced. Commerce’s arguments in that proceeding pertained to Commerce’s discretion in selecting data to calculate CV profit rates and selling expenses, rather than the viability of Canada as a third-country market.<sup>238</sup> As explained in *OCTG 2014-2015 Final Results*, as well as in Comment 4, above, Commerce relied on Canadian sales data for CV profit rates and selling expenses because, in both *OCTG 2014-2015 Final Results* as well as the present proceeding, this data represents the best information available for valuing SeAH’s CV profit and selling expenses.<sup>239</sup>

Moreover, we disagree with SeAH that, in relying on Canada’s finding of dumping, Commerce impermissibly outsources its investigative duties. Commerce has the discretion to consider the dumping finding of a foreign authority in its assessment of third-country market viability. In *PSF from Korea*, for instance, Commerce considered the United Kingdom’s finding of dumping to be a relevant factor in declining to use a particular market as the basis for determining NV, finding that “{Commerce} cannot rely on dumped third-country prices in calculating an accurate NV....”<sup>240</sup> Additionally, the CIT has similarly echoed Commerce’s concerns in relying on dumped third-country prices in calculating NV. In *Alloy Piping*, for instance, the CIT held, “the goal of accuracy cannot be achieved if Commerce relied upon dumped third-country prices to calculate NV.”<sup>241</sup>

We also disagree with SeAH’s argument that we should not rely on Canada’s determination of dumping because different countries have their own practices in implementing the WTO Antidumping Agreement, and that we should consider how such sales would be analyzed under U.S. law. The fact that Commerce’s methodology may differ from that of the CBSA does not negate Canada’s finding of dumping.

Therefore, for these final results, and consistent with our *Preliminary Results*, because there is neither a viable home market nor a comparison market for SeAH during this POR, we continue find that Canada is not a viable third-country market. Therefore, for these final results, and consistent with our *Preliminary Results*, because there is neither a viable home market nor a

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<sup>237</sup> *Id.*

<sup>238</sup> See *NEXTEEL* at 19-21.

<sup>239</sup> See *OCTG 2014-2015 Final Results* IDM at Comment 1.

<sup>240</sup> See *PSF from Korea* IDM at Comment 9.

<sup>241</sup> See *Alloy Piping 2002*, 201 F. Supp. 2d. at 1277.

viable comparison market during the POR for SeAH, we continue find that Canada is not a viable third-country market. Additionally, we have continued to calculate SeAH's margin using CV as the basis for NV, as provided by the statute.<sup>242</sup>

## Comment 11: Capping of Freight Revenue for SeAH

### *SeAH's Case Brief*

- Commerce cannot lawfully cap freight revenue that exceeds freight costs.
- In past proceedings, Commerce justified the capping of freight revenue by stating that freight revenue is a service, and not a part of the sale of merchandise under consideration.<sup>243</sup> However, because neither SeAH nor its U.S. affiliates provide freight services themselves, the freight charges in question simply represent the disaggregation of a delivered price into arbitrary amounts for merchandise and freight.<sup>244</sup>
- Capping freight revenue could lead to the calculation of different dumping margins based solely on how respondents charge their customers (*i.e.*, whether the price is freight-inclusive or not).<sup>245</sup>
- Although Commerce has the discretion to consider separately-invoiced freight revenue as separate from the U.S. price, Commerce did not completely do so in the *Preliminary Results*, because Commerce included some or all of the separately-invoiced freight revenue in the starting U.S. price, and then deducted the actual freight cost in its calculations.<sup>246</sup>
- By deducting actual freight costs for sales with separately-invoiced freight charges, Commerce necessarily made a finding under the Act that those costs were included in the price used to establish EP and CEP.<sup>247</sup> Furthermore, by making a capped upward adjustment for separately-invoiced freight revenue, Commerce also necessarily made a finding that at least a portion of that revenue was part of the starting price used to establish EP and CEP.<sup>248</sup>
- In the *Preliminary Results*, Commerce did not reasonably conclude that separately-invoiced freight revenue is a price for a service, and not part of the price of the merchandise that should be used as the starting point for the calculation of export price and constructed export price. Commerce also failed to explain why profits from the sale of a service should be disregarded in its calculations, while losses on the sales of that same service should be included in such calculations. If freight revenue represents the sale of a service, Commerce cannot make any adjustments for freight costs when a seller

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<sup>242</sup> See section 773(a)(4) of the Act (“If the administering authority determines that the NV of the subject merchandise cannot be determined under paragraph (1)(B)(i), then, notwithstanding paragraph (1)(B)(ii), the NV of the subject merchandise may be the CV of that merchandise, as determined under subsection (e).”).

<sup>243</sup> See SeAH Case Brief at 35 (citing, *e.g.*, *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 64170 (October 28, 2014) (*Circular Welded Pipe from Thailand*), and accompanying IDM at Comment 4).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 36.

<sup>246</sup> *Id.* at 37.

<sup>247</sup> *Id.* (citing section 772(c)(2)(A) of the Act).

<sup>248</sup> *Id.* at 38.

charges separately for freight. Freight revenue cannot represent a sale of services when a seller makes a profit on freight but constitute a part of the sale when a seller experiences a loss on freight. Therefore, Commerce must either ignore both profits and losses on separately-invoiced freight, or it must include both in its calculations.<sup>249</sup>

### *Maverick's Rebuttal Brief*

- It is Commerce's longstanding practice to cap freight revenue at the amount of the underlying freight expense when making adjustments to U.S. price. This practice accords with U.S. statutory requirements and has recently been upheld by the CIT.<sup>250</sup>
- The court has rejected SeAH's argument that the Act precludes Commerce from using freight costs in the adjustment where that cost has been invoiced separately as "an incorrect reading of the {Act}," and held that a "proper comparison between the U.S. price and foreign market value would not include a profit earned from freight rather than from the sale of subject merchandise."<sup>251</sup>
- The invoicing decision of an exporter (*i.e.*, whether freight is separately invoiced) does not alter Commerce's statutory mandate requiring it to make requisite adjustments to U.S. price; therefore, it is immaterial as to whether freight is separately invoiced or not.
- SeAH's argument that Commerce must either ignore or include both profits and losses on separately-invoiced freight revenue is inconsistent with the CIT's finding that "{i}f Commerce were to alter its methodology...and not cap freight-related revenue by the amount of freight-related expenses, adjustments under {section 772(c)(2)(A) of the Act} could potentially increase the export price or constructed export price (*i.e.*, Commerce would 'reduce' export price by subtracting a negative number). This would contradict the plain import of the statute."<sup>252</sup>
- Commerce has previously rejected SeAH's argument, stating that "the statute requires only that freight expenses be deducted from the price charged to the customer to establish the price of the subject merchandise."<sup>253</sup>
- The CIT has upheld Commerce's practice of capping freight revenue.<sup>254</sup> As such, SeAH's arguments should be rejected in the final results.

**Commerce's Position:** We agree with the petitioner and have continued to apply the freight revenue cap for SeAH's sales for the purposes of these final results.

Commerce adjusts for U.S. movement expenses under section 772(c)(1) of the Act. Further, Commerce's regulations at 19 CFR 351.401(c) direct Commerce to use, in calculating U.S. price, a price which is net of any price adjustment that is reasonably attributable to the subject

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<sup>249</sup> *Id.* at 38-39.

<sup>250</sup> See *Maverick Case Brief* at 15 (citing *NEXTEEL*, 355 F. Supp. 3d at 1358 (The CIT explained that such adjustments "prevent exporters from improperly inflating the export price of a good by charging a customer for freight more than the exporter's actual freight expenses") and 1359 ("The court concludes that Commerce's treatment of freight revenue is in accordance with the law."); and *Dongguan Sunrise Furniture Co., Ltd. v. United States*, 865 F. Supp. 2d 1216, 1249 (CIT 2012) (*Dongguan Sunrise*)).

<sup>251</sup> *Id.* (citing *NEXTEEL*, 355 F. Supp. 3d at 1359).

<sup>252</sup> *Id.* at 18 (citing *Dongguan Sunrise*, 865 F. Supp. 2d at 1249).

<sup>253</sup> *Id.* at 19 (citing *OCTG 2015-2016 Final Results* IDM at Comment 12).

<sup>254</sup> *Id.* (citing, *e.g.*, *Dongguan Sunrise*, 865 F. Supp. 2d at 1249-1250).

merchandise. The term “price adjustment” is defined under 19 CFR 351.102(b)(38) as “any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and or other adjustments, including, under certain circumstances, a change that is made after the time of sale that is reflected in the purchaser’s net outlay.” Thus, it would be inappropriate to treat the revenues associated with SeAH’s freight expenses as price adjustments under 19 CFR 351.401(c) because these revenues do not represent “changes in the price for subject merchandise,” such as discounts, rebates, and post-sale price adjustments.

In past decisions, Commerce has declined to treat freight-related revenues as additions to U.S. price under section 772(c) of the Act or as price adjustments under 19 CFR 351.102(b). Rather, we have incorporated freight-related revenues as offsets to movement expenses because they relate to the movement and transportation of subject merchandise.<sup>255</sup> Moreover, we find that it would be inappropriate to increase the gross unit price for subject merchandise because of profits earned on the provision or sale of freight; such profits should be attributable to the sale of the freight service, not to the subject merchandise. Therefore, we have continued to treat SeAH’s freight revenue as an offset to the underlying freight expenses.

We disagree with SeAH’s argument that Commerce’s application of the freight revenue cap in the *Preliminary Results* was inappropriate because the additional charge for freight is a disaggregation of the delivered price into one amount for the goods and another for freight, not a charge for a service rendered by SeAH. We continue to find here, as we have found in other proceedings, that it is inappropriate to increase the gross unit price for merchandise under consideration as a result of any profit earned by SeAH on the sale of freight.<sup>256</sup> It is Commerce’s normal practice to cap freight revenue at the corresponding amount of freight charges incurred because it is inappropriate to increase the gross unit price as a result of profit earned on the sale of services (*i.e.*, freight). This methodology prevents an exporter from improperly inflating its CEP or EP of a good by charging a customer more for freight than the exporter’s actual freight expenses.

We also disagree with SeAH’s argument that different dumping margins may result depending on the manner in which an exporter presents its prices. SeAH’s argument does not take into account that Commerce’s freight revenue cap is applied when the customer agrees to pay for delivery and the exporter charges that customer more than the costs incurred, but is not applied when that exporter pays for delivery.<sup>257</sup>

SeAH argues that, given the plain text of the Act, in making an adjustment to CEP or EP under section 772(c)(2)(A) of the Act, Commerce also necessarily makes a finding that the adjusted costs were included in the “price used to established export price and constructed export

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<sup>255</sup> See, e.g., *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Federal Republic of Germany: Final Determination of Sales at Less Than Fair Value*, 82 FR 16360 (April 4, 2017), (*CTL Plate from Germany*) and accompanying IDM at Comment 6.

<sup>256</sup> See, e.g., *Circular Welded Pipe from Thailand* IDM at Comment 12; *Wood Flooring from China* IDM at Comment 39; and *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010), and accompanying IDM at Comment 2.

<sup>257</sup> See, e.g., *CTL Plate from Germany* IDM at Comment 6.

price.”<sup>258</sup> SeAH previously raised this argument in *NEXTEEL*, and the CIT patently rejected it.<sup>259</sup> Specifically, the court found that SeAH’s argument is based on “an incorrect reading of the {Act},” and further held that “a proper comparison between the U.S. price and foreign market value would not include a profit earned from freight rather than from the sale of the subject merchandise.”<sup>260</sup> Consequently, the Court concluded that Commerce’s treatment of freight revenue was in accordance with the law.

Finally, we disagree with SeAH’s claim that Commerce must either include both profits and losses on separately invoiced freight revenue in its calculations or exclude both. Section 772(c)(2)(A) of the Act requires only that freight expenses be deducted from the price charged to the customer to establish the price of the subject merchandise. As the CIT held in *Dongguan Sunrise*, the “plain language of {section 772(c)(2) of the Act} deals exclusively with downward adjustments to U.S. price.”<sup>261</sup> The CIT explained that “adjustments are necessary because the reported prices ‘represent prices in different markets affected by a variety of differences in the chain of commerce’ and must be adjusted ‘to reconstruct the price at a specific ‘common’ point... so that value can be fairly compared on an equivalent basis.’”<sup>262</sup>

This allows Commerce to achieve an “apples-to-apples” comparison between the CEP or EP and NV. Commerce does not apply the freight revenue cap when the exporter pays for delivery; rather it deducts from the starting price the freight expenses that the exporter incurred in delivering goods to bring the price to the *ex factory* level (*i.e.*, price of goods alone without any additional charges). Ultimately, the freight costs would not be included in the CEP. When a customer pays for delivery and the exporter charges more for freight services than the cost it incurred in delivering goods, the freight expense is likewise excluded from the CEP of the subject merchandise. In both scenarios, Commerce would bring the price to the *ex factory* level (*i.e.*, the price of goods alone) and would not artificially inflate the price of subject merchandise (a good) by the profit from selling freight (a service).<sup>263</sup> Accordingly, find that it is appropriate to apply the freight revenue cap to SeAH’s sales, and continue to apply this cap to SeAH’s sales for the purposes of these final results.

## **Comment 12: Application of Quarterly Costs to SeAH**

### *SeAH’s Case Brief*

- Commerce should calculate the COP and CV in this review using quarterly, not POR, weighted-average costs.
- SeAH submitted quarterly COP data, because the evidence demonstrated that there were significant changes in its costs over the course of the period.

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<sup>258</sup> See SeAH Case Brief at 37 (citing section 772(c)(2)(A) of the Act).

<sup>259</sup> See *NEXTEEL*, 355 F. Supp. 3d at 1358-1359.

<sup>260</sup> *Id.* (citing *Florida Citrus Mut. v. United States*, 550 F. 3d 1105, 1110 (Fed. Cir. 2008)).

<sup>261</sup> See *Dongguan Sunrise Furniture*, 865 F. Supp. 2d at 1249-50.

<sup>262</sup> *Id.*, 865 F. Supp. 2d at 1249.

<sup>263</sup> *Id.* (“Thus, it was reasonable for Commerce not to consider freight revenue as part of the price of the subject merchandise.”).

- In the *Preliminary Results*, Commerce concluded that the differences in quarterly costs were not “significant” because, for three of the five control numbers (CONNUMs) with the largest volume of U.S. sales during the period, the differences between the highest and lowest quarterly costs were less than 25 percent.<sup>264</sup>
- Commerce’s reliance on an analysis of the costs for the five CONNUMs with the largest volume of sales is distortive because: 1) two of these CONNUMs were produced only in very narrow periods; and 2) the CONNUM with the third largest volume of U.S. sales was produced only during the first and third three-month segments of the POR. Thus, this analysis does not properly reflect the clear evidence of significant cost differences during the review period.
- To avoid such distortions, SeAH supplied the quarterly-cost differences for the five CONNUMs with the largest production quantity that were produced in each three-month segment of the POR. Four of those five CONNUMs had differences between the highest and lowest quarterly costs of more than 25 percent.<sup>265</sup>
- This conclusion is also supported by the quarterly cost data submitted by SeAH in its initial questionnaire response. While that data provided costs using calendar quarters (January to March, April to June, July to September, and October to December), rather than three-month segments of the review period, it confirms that there were consistent and significant cost differences over the course of the review period.<sup>266</sup> Therefore, Commerce’s quarterly cost methodology should be used for the final results.

#### *Maverick’s Rebuttal Brief*

- Commerce should continue to calculate SeAH’s COP and CV using the POR annual weighted-average cost, consistent with its normal methodology.
- To determine whether SeAH’s changes in the cost of manufacture (COM) were “significant” in this review, Commerce used its standard approach and analyzed the cost changes using the five highest sales volume CONNUMs sold in the United States.
- This approach allows Commerce to analyze the CONNUM-specific costs for the respondent’s most significant sales.
- Commerce should reject SeAH’s argument that because SeAH did not sell two of these CONNUMs in all quarters, Commerce should analyze the five largest CONNUMs which were sold in all quarters of the POR. Indeed, Commerce rejected the argument advanced by SeAH in other reviews. Specifically, Commerce has explained that its standard approach allows the agency to “focus its analysis on the CONNUM-specific costs for the sales that are most significant to respondent’s operations.”<sup>267</sup>
- Commerce also rejected the approach proposed by SeAH, explaining that “such an approach would have Commerce disregard critical, high-volume CONNUMs simply because production of that merchandise was concentrated in a single time period (or a

<sup>264</sup> See SeAH Case Brief at 14 (citing SeAH Preliminary Cost Calculation Memorandum, at 1 and Attachment 1).

<sup>265</sup> *Id.* at 15.

<sup>266</sup> *Id.* at 16-17 (citing SeAH BCDEQR at Appendix D-1).

<sup>267</sup> See Maverick’s Rebuttal Brief at 22 (citing *Certain Steel Nails from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2016*, 83 FR 4028 (January 29, 2018), and accompanying IDM at Comment 5).

small number of time periods), and not spread out across four or more quarters.”<sup>268</sup> The CIT reviewed and sustained Commerce’s methodology.<sup>269</sup>

- Commerce specifically issued a request for public comments on the standards applicable to its cost averaging methodology for periods of less than one year.<sup>270</sup> Moreover, Commerce has explained each step of its alternative quarterly cost methodology in prior cases.<sup>271</sup>

**Commerce’s Position:** We disagree with SeAH that the use of quarterly cost averaging periods is warranted in this review. Consistent with the *Preliminary Results*, Commerce continues to use its normal methodology of calculating an annual weight-average cost for SeAH. While at the *Preliminary Results*, we determined that SeAH’s reported data did not meet the established significant change in cost threshold, for the final results we reexamined the record evidence and found that SeAH did meet the first criteria for the significant change in cost threshold. The difference in the reported COM between the high and low cost quarters for a majority of the largest CONNUMs sold in the United States within the POR was greater than 25 percent. However, the second criteria for resorting to an alternative cost methodology was not met because we found that there was no linkage (*i.e.*, reasonable correlation) between the costs and the sales prices during the shorter averaging periods.<sup>272</sup>

Our normal practice is to calculate weighted-average costs for the POI or POR.<sup>273</sup> However, Commerce recognizes that possible distortions may result if our normal POR or POI-average cost methodology is used during a period of significant cost changes. In determining whether it is appropriate to deviate from our normal methodology and rely on shorter cost averaging periods, Commerce has established two criteria that must be met, *i.e.*, significance of cost changes, and linkage between the costs and sales prices during the shorter averaging periods.<sup>274</sup> A significant change in cost for this purpose is defined as a greater than 25 percent change in the COM between the high and low quarters during a 12-month POI or POR.<sup>275</sup> This approach is consistent with International Accounting Standard 29 (defining high inflation of 100 percent over a three-year period as approximately 25 percent inflation per year) from which Commerce drew

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<sup>268</sup> *Id.* at 22-23.

<sup>269</sup> *Id.* at 21-22 (citing *Habas Sinai v. United States*, 33 C.I.T. 1721 (2009) (upholding the final remand decision in which Commerce applied and explained its two-step test to determine whether to deviate from its normal average cost methodology)).

<sup>270</sup> *Id.* at 23 (citing *Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods; Request for Comment*, 73 FR 26364 (May 9, 2008)).

<sup>271</sup> See, e.g., *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 78 FR 35248 (June 12, 2013) (*Pipe from Korea*), and accompanying IDM at Comment 6.

<sup>272</sup> See SeAH August 3, 2018 Supplemental Questionnaire response (SeAH August 3, 2018 SQR) at Exhibit SD-5.

<sup>273</sup> See, e.g., *Notice of Final Results of Antidumping Duty Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006), and accompanying IDM at Comment 5 (explaining Commerce’s practice of computing a single weighted-average cost for the entire period); see also *Pipe from Korea* IDM at Comment 6.

<sup>274</sup> See, e.g., *Rebar from Taiwan* IDM at Comment 2.

<sup>275</sup> *Id.*

guidance in establishing its 25 percent significance threshold for cost changes within a 12-month period.<sup>276</sup>

SeAH submitted two sets of COP databases in this review: 1) one based on Commerce's normal POR annual weighted-average cost methodology; and 2) the other based on an alternative cost methodology (*i.e.*, quarterly cost). Because we determined in the *Preliminary Results* that SeAH did not have a viable home or third-country market during the POR, we limited our analysis of the significant change in costs over the POR to the five largest volume U.S. CONNUMs, as opposed to applying our established practice of analyzing the five largest volume comparison market and U.S. CONNUMs. Based on this limited CONNUM analysis, we found at the *Preliminary Results* that the change in quarterly costs did not meet our 25 percent threshold. However, for the final results, because we continued to determine that SeAH did not have a viable home or third-country market during the POR, we expanded the number of largest U.S. volume CONNUMs sold that we analyzed in determining the significance changes in cost. We limited this examination to a number of CONNUMs that did not exceed our practice of analyzing the ten largest volume CONNUMs. In performing this expanded analysis, we found that a majority of the CONNUMs we analyzed did meet the 25 percent significant change in quarterly cost threshold.<sup>277</sup>

Because the cost changes for the expanded number of CONNUMs tested met the significance threshold, we evaluated whether there is reasonable linkage between the quarterly weighted average per-unit costs and the sales prices of WLP during the shorter cost periods.<sup>278</sup> In establishing linkage, we may look at evidence, such as the existence of a surcharge or pricing mechanism that provides for a link between prices and costs.<sup>279</sup> Absent a surcharge or other pricing mechanism, Commerce will look for evidence that changes in selling prices reasonably correlate to changes in unit costs. In performing this analysis in the instant case, we analyzed the cost and price trends for the same largest volume U.S. CONNUMs examined in the significance of cost changes test. For each of the CONNUMs, we compared the quarterly average prices and costs over the POR. As part of our analysis, we looked at the relative magnitude of changes in the prices and costs and whether, from quarter to quarter, the prices and costs moved in the same direction. Our analysis revealed that the magnitude of the changes in the quarterly costs and sales prices of WLP were not comparable and the quarterly prices and costs did not trend consistently for all the CONNUMs tested.<sup>280</sup> As such, we find that the quarterly prices and costs of WLP do not appear to be reasonably correlated and that linkage does not exist. Accordingly, SeAH did not meet the linkage part of the two-prong test on whether to use quarterly average costs. Therefore, the use of Commerce's quarterly cost methodology is not warranted.

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<sup>276</sup> See *Certain Corrosion-Resistant Steel Products from India: Preliminary Results of Antidumping Duty Administrative Review*, 83 FR 39683 (August 10, 2018), unchanged in *Certain Corrosion-Resistant Steel Products from India: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 64326 (December 14, 2018).

<sup>277</sup> See SeAH August 3, 2018 SQR at Exhibit SD-5.

<sup>278</sup> See *Final Results of the Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 76 FR 76939 (December 2, 2011), and accompanying IDM at Comment 1.

<sup>279</sup> *Id.*

<sup>280</sup> See SeAH August 3, 2018 SQR at Appendix SD-5.



SeAH reported quarterly COM comparisons for CONNUMs using calendar year quarters (*i.e.*, December, January to March, April to June, July to September, and October to November) as opposed to quarters which correspond to the POR.<sup>281</sup> While SeAH remedied this issue, and upon request provided a comparison of the COM for the CONNUMs during each quarter that corresponds to the POR,<sup>282</sup> we emphasize here that Commerce defines the POR quarters starting with the first three months of the POR comprising the first quarter, and every three months thereafter comprises the next quarter, regardless of whether the POR quarters conform to the calendar year quarters or the respondents' fiscal year quarters.<sup>283</sup> Defining the quarters in this manner provides a predictable and consistent approach for evaluating whether it is appropriate to depart from the normal methodology of relying on annual average costs. Further, it discourages parties from carving out the POR quarters in a manner that is most beneficial to them.<sup>284</sup>

### **Comment 13: Adjustment for G&A Expenses for SeAH's U.S. Affiliates**

#### *Maverick's Case Brief*

- Commerce should allocate the G&A expenses of PPA and SPS to imported pipe from SeAH, whether further manufactured or not, that was sold in the United States.
- Commerce made the same adjustment for G&A expenses in the separate proceeding involving OCTG from Korea, which also involves SeAH as a respondent and PPA as its affiliated U.S. importer and reseller.<sup>285</sup>
- Such an allocation would be in accordance with the statutory requirement to make adjustments when calculating CEP and consistent with Commerce's past practice, including in the investigation segment of this proceeding.<sup>286</sup>

#### *SeAH's Rebuttal Brief*

- Commerce should not apply PPA's G&A expense ratio to the cost of the imported pipe that has not been further manufactured.
- When a company is only engaged in sales activities, Commerce's long-standing practice is to treat all G&A expenses as selling expenses and, inversely, when a company is engaged in both selling and manufacturing activities, Commerce only applies the company-wide G&A expense ratio to further manufacturing costs and does not classify any G&A expenses as selling expenses.<sup>287</sup>

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<sup>281</sup> See SeAH BCDEQR at Exhibit D-4-C.

<sup>282</sup> See SeAH August 3, 2018 SQR at Exhibit SD-4-A.

<sup>283</sup> See, e.g., *Certain Corrosion-Resistant Steel Products from Taiwan: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR 64527 (December 17, 2018), and accompanying IDM at Comment 1.

<sup>284</sup> *Id.*

<sup>285</sup> See Maverick's Case Brief at 4 (citing *Preliminary Determination* at 14).

<sup>286</sup> *Id.* at 2 (citing *WLP from Korea LTFV Final IDM* at Comment 20).

<sup>287</sup> See SeAH Case Brief at 2-3 (citing Commerce Policy Paper #H "Definition of 'Selling Expenses' in the Context of the Exporter's Sales Price Provisions," Potts/Eiss (undated) (Policy Paper #H); *Final Determinations of Sales at Less Than Fair Value: Calcium Aluminate Cement, Cement Clinker and Flux from France*, 59 FR 14136, 14146-47 (March 25, 1994) (*Cement from France*); *First Administrative Review of Certain Activated Carbon from the Peoples*

- Section 772(d) of the Act does not direct Commerce to deduct all administrative expenses from CEP. Rather, the statute specifically limits CEP adjustments to selling expenses and further manufacturing costs; therefore, because G&A expenses are not selling expenses, Commerce's recent decision<sup>288</sup> to deduct from CEP the G&A expenses related to non-further manufactured products is contrary to the statute.
- This new practice creates an imbalance in Commerce's calculations since SeAH engages in both manufacturing and sales operations in Korea; however, Commerce does not include any portion of SeAH's G&A expenses as a home market indirect selling expense for which a "CEP offset" might be allowed.
- Consistent with well-established practice and section 772(d)(2) of the Act, Commerce should only deduct from CEP the G&A expenses attributable to PPA's and SPS's further manufacturing activities.<sup>289</sup>

**Commerce's Position:** We agree with the petitioners that PPA and SPS's G&A expenses should be allocated to all products sold in the United States (*i.e.*, the imported pipe, whether further manufactured or not). When calculating CEP, section 772(d)(2) of the Act directs Commerce to deduct "the cost of any further manufacture or assembly." Further, "in calculating U.S. prices using the CEP price methodology, Commerce is to deduct any expenses generally incurred by or for the account of... the affiliated seller in the United States, in selling subject merchandise."<sup>290</sup>

While the calculation of the G&A expense ratio is not at question here, it is instructive to review Commerce's calculation methodology. In calculating a G&A expense ratio, Commerce normally includes certain expenses and revenues that relate to the general operations of the company as a whole and to the accounting period, as opposed to including only those expenses that directly relate to manufacturing merchandise. The CIT has agreed with Commerce that G&A expenses are those expenses which relate to the general operations of the company as a whole rather than to the production process.<sup>291</sup> Consequently, Commerce has long recognized that a company's general activities benefit both products that have been manufactured and those that were merely traded (*i.e.*, products purchased and resold without processing).<sup>292</sup> As part of its normal operations, a company may purchase merchandise for resale to satisfy customer needs and Commerce considers any ancillary expenses associated with arranging such purchases to be related to the general operations of the company. As such, Commerce accounts for both the ancillary expenses (numerator) and the purchase price (denominator) of resold merchandise in a respondent's G&A expense ratio calculation even though the respondent did not produce the merchandise. Therefore, under Commerce's normal methodology, the numerator to the G&A

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*Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 57995 (November 10, 2009) (*Activated Carbon from China*), and accompanying IDM at Comment 5(b)).

<sup>288</sup> *Id.* at 4 (citing *OCTG 2014-2015 Final Results* IDM at 87-88).

<sup>289</sup> *Id.* at 3-5 (citing section 772(d) of the Act).

<sup>290</sup> See *U.S. Steel Corp. v. United States*, 712 F. Supp. 2d 1330, 1336 (CIT 2010) (*U.S. Steel Corp.*); see also section 772(d)(1) of the Act.

<sup>291</sup> See *U.S. Steel Group-A Unit of USX Corp. v. United States*, 998 F. Supp 1151, 1154 (CIT 1998) (citing *Oy v. United States*, 19 CIT 438, 444 (1995)).

<sup>292</sup> See *OCTG from Korea 2016-2017 Final Results* IDM at 6.

expense ratio includes company-wide G&A expenses and the denominator includes both the cost of merchandise that has been manufactured and the cost of merchandise purchased for resale.<sup>293</sup>

In this case, SeAH does not dispute that PPA and SPS, its affiliated resellers in the United States, employ individuals responsible for overseeing, coordinating and supporting the purchases and sales of both further and non-further manufactured products.<sup>294</sup> Thus, PPA and State Pipe's G&A activities support the general activities of each company, encompassing the sale and further manufacture of products, and the sale of non-further manufactured products. Yet, SeAH incorrectly contends that Commerce's practice with regard to a further manufacturer is to apply the company-wide G&A expense ratio only to further manufacturing costs, and not to the full cost of the further manufactured products (*i.e.*, purchased pipe costs plus further manufacturing costs) or to the WLP costs of the directly resold products. In misstating Commerce's practice, SeAH cites a 1995 policy paper. However, Policy Paper #H is inapposite because the topic of the policy paper (*i.e.*, the question of the proper allocation of selling expenses between direct and indirect expenses) is separate and distinguishable from the issue here — how to properly account for the G&A expenses that have been allocated over the full cost of the products sold (*i.e.*, the imported pipe, whether further processed or not, and the further manufacturing costs, which form the denominator to the G&A expense ratio calculation). More importantly, SeAH does not provide any cites where a U.S. reseller both directly resold and further manufactured products before reselling them. Instead, SeAH cites only *Activated Carbon from China* and *Cement from France*, neither of which directly address the issue at hand of how to account for a U.S. affiliate's G&A expenses where the company both resells and further processes products. Rather, both cases address the classification of expenses as selling or G&A for purposes of calculating the ISE and G&A expense ratios. In *Activated Carbon from China*, Commerce allowed a respondent's allocation methodology used in its normal records to classify certain expenses as indirect selling or G&A related activities.<sup>295</sup> In *Cement from France*, Commerce stated that because "these expenses are more appropriately characteristic of G&A expenses, we have reclassified them from indirect selling to G&A expenses based on verified data on the record."<sup>296</sup> Again, neither of these cases are representative of Commerce's practice nor address the issue of how to treat the expenses classified as G&A related activities when a U.S. reseller both directly resells and further manufactures products before reselling them.

Contrary to SeAH's contentions, Commerce has specifically noted that, where a company engages in both further manufacturing and reselling activities, it is appropriate to allocate G&A expenses to all company activities.<sup>297</sup> For example, in *CTL Plate from France*, Commerce

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<sup>293</sup> See, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413 (March 26, 2012), and accompanying IDM at Comment 33; and *Metal Calendar Slides from Japan: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 71 FR 36063 (June 23, 2006), and accompanying IDM at Comment 10.

<sup>294</sup> See, *e.g.*, SeAH Case Brief at 7.

<sup>295</sup> See *Activated Carbon from China* IDM at Comment 5b.

<sup>296</sup> See *Cement from France* IDM at Comment 18.

<sup>297</sup> See, *e.g.*, *Certain Hot-Rolled Steel Flat Products from Brazil: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 81 FR 53424 (August 12, 2016) (*Hot-Rolled Steel from Brazil*), and accompanying IDM at Comment 5; and *Certain Carbon and Alloy Steel Cut-to-*

addressed the issue, stating that “we agree that G&A activities support the general activities of a company as a whole, including its sales and manufacturing functions. Therefore, consistent with our decision in *WLP from Korea*<sup>298</sup> *LTFV Final*,<sup>299</sup> we find it is appropriate to allocate G&A expenses to all company activities where the company engages in both further manufacturing and reselling activities.”<sup>300</sup> Thus, SeAH errs in contending that Commerce’s practice is to calculate a company-wide G&A expense ratio, but only apply the ratio to the further manufacturing costs, not to the full cost of the further manufactured products or to the WLP costs of the directly resold products, despite the fact that both are represented in the denominator of the G&A expense ratio calculation.

In fact, because the denominator of the G&A expense ratio as calculated by SeAH (*i.e.*, the COGS from the financial statements) includes both directly resold and further manufactured WLP (*i.e.*, the cost of the imported pipe plus the further manufacturing costs),<sup>301</sup> Commerce’s approach is balanced and reasonable. Commerce’s application of PPA and SPS’s G&A expense ratio does not over or under apply G&A expenses, but rather properly assigns the reseller’s G&A expenses proportionally to both groups of products. Applying such a ratio to only the cost of further manufacturing would result in a mismatch between the figures used in the G&A expense ratio calculation (imported pipe costs, whether further manufactured or not, plus further manufacturing costs) and the basis on which the ratio is applied (further manufacturing costs only). Thus, it is appropriate to assign PPA and SPS’s G&A expenses to both imported and resold products and to further manufactured products. Accordingly, for further manufactured products, Commerce should apply PPA and SPS’s G&A expense ratio to the total cost of the further manufacturing plus the COP of the imported WLP and include the amount as further manufacturing under section 772(d)(2) of the Act. Additionally, for products not further manufactured, Commerce should apply PPA and SPS’s G&A expense ratio to the COP of the imported WLP and include the amount as an adjustment under section 772(d)(1)(D) of the Act.

While SeAH contends that, under section 772(d) of the Act, G&A expenses can only be deducted from CEP to the extent that they are part of the cost of further manufacturing, we disagree. The Court has recognized that “in calculating net U.S. prices using the {constructed export price} methodology, Commerce is to deduct ‘any... expenses generally incurred by or for the account of... the affiliated seller in the United States, in selling subject merchandise.’”<sup>302</sup> In fact, SeAH acknowledges that it is permissible for Commerce to treat all of an affiliated reseller’s G&A expenses as an indirect selling adjustment to CEP where the company only engages in selling activities.<sup>303</sup> However, when a company engages in both selling and manufacturing activities, SeAH illogically presumes that any G&A expenses allocated to the cost of the imported pipe must be disregarded and only the G&A expenses relative to further manufacturing costs may be accounted for in the calculation of CEP. SeAH believes that once a

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*Length Plate from France: Final Determination of Sales at Less Than Fair Value*, 82 FR 16363 (April 4, 2017) (*CTL Plate from France*), and accompanying IDM at Comment 17.

<sup>298</sup> See *WLP from Korea LTFV Final* IDM at Comment 22.

<sup>299</sup> *Id.*

<sup>300</sup> See *CTL Plate from France* IDM at Comment 17.

<sup>301</sup> See SeAH August 3, 2018 SQR at Appendices S2E-5 and S2E-6.

<sup>302</sup> See *U.S. Steel Corp.*, 712 F. Supp. 2d at 1336 (citing 772(d)); see also section 772(d)(1) of the Act.

<sup>303</sup> See SeAH Rebuttal Brief at 2.

label is affixed to G&A or selling expenses, these categories become exclusive.<sup>304</sup> However, if all G&A expenses can be treated as indirect selling expenses when only reselling activities occur, and all G&A expenses can be treated as further manufacturing expenses when further manufacturing activities occur, Commerce clearly has the discretion to allocate G&A expenses to both resold and further manufactured products when both activities occur. Thus, we find that SeAH's argument that PPA and SPS's G&A expenses can only be deducted from CEP to the extent that they are part of the cost of further manufacturing is without merit.

Finally, SeAH argues that, because it engages in both manufacturing and sales operations in Korea "there is an imbalance in Commerce's calculations — since it would deduct U.S. G&A expenses as an indirect selling expense but would not include Korean G&A expenses as a home market indirect selling expense for which a 'CEP offset' might be allowed."<sup>305</sup> Record evidence fails to support SeAH's position. SeAH's reported G&A expenses are included as part of the COP as directed under section 773(b)(3)(B) of the Act, and the calculation of that ratio used a COGS denominator which included the cost of all products sold, whether or not they were simply purchased and resold or were manufactured by SeAH.<sup>306</sup> However, SeAH's purchased and resold products may or may not be considered reportable merchandise, depending on whether SeAH's supplier had knowledge of destination. If such sales were attributed to SeAH we would likely add G&A expenses to such products. Nevertheless, here SeAH's NV is based on CV not home market sales. Accordingly, SeAH has not reported home market sales or any potential price adjustments to such sales prices. The Court has recognized that "in calculating net U.S. prices using the {constructed export price} methodology, Commerce is to deduct 'any... expenses generally incurred by or for the account of... the affiliated seller in the United States, in selling subject merchandise.'"<sup>307</sup> In fact, SeAH acknowledges<sup>308</sup> that it is permissible for Commerce to treat all of an affiliated reseller's G&A expenses as an indirect selling adjustment to CEP where the company only engages in selling activities. Hence, it would have been inappropriate for Commerce to include SeAH's G&A expenses in selling expenses as suggested, and Commerce did not do so.

Commerce's methodology is consistent with prior decisions in which we found that it was appropriate to allocate G&A expenses to all company activities where the company engaged in both further manufacturing and reselling activities.<sup>309</sup> Therefore, in addition to applying the G&A expense ratio to the further manufacturing costs, we have also calculated the G&A expenses related to the WLP products sold in the United States (*i.e.*, the imported pipe, whether further manufactured or not) by applying PPA and SPS's G&A expense ratio to the COP of imported WLP. Thus, for these final results, we recalculated the further manufacturing costs of PPA and SPS. In doing so, we applied PPA's and SPS's G&A expense ratios to the total cost of the further manufactured products and to the cost of products which were resold without further processing. For products that were further manufactured, we applied the G&A rates to the cost of the imported WLP plus the cost to further manufacture the WLP.<sup>310</sup>

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<sup>304</sup> *Id.* at 4.

<sup>305</sup> *Id.*

<sup>306</sup> See SeAH BCDEQR at Exhibit D-14.

<sup>307</sup> See *U.S. Steel Corp.*, 712 F. Supp. 2d at 1336 (citing 772(d)); see also section 772(d)(1) of the Act.

<sup>308</sup> See SeAH Rebuttal Brief at 2.

<sup>309</sup> See, e.g., *Hot-Rolled Steel from Brazil* IDM at Comment 5.

<sup>310</sup> See SeAH Final COP Memo.

## V. RECOMMENDATION

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



\_\_\_\_\_  
Agree



\_\_\_\_\_  
Disagree

6/7/2019

**X** 

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Signed by: JEFFREY KESSLER

Jeffrey I. Kessler  
Assistant Secretary  
for Enforcement and Compliance