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NEXTEEL Co. v. United States
CAFC Case 21-1334 (Fed. Cir. March 11, 2022)
Oil Country Tubular Goods from the Republic of Korea

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

I. SUMMARY

The U.S. Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the opinion of the U.S. Court of Appeals for the Federal Circuit (CAFC) in *NEXTEEL v. United States*, 28 F.4th 1226 (Fed. Cir. 2022) (*NEXTEEL III*), and the subsequent *Remand Order* issued by the U.S. Court of International Trade (CIT).[1] These final results of redetermination concern the *Final Results* of the 2015-16 administrative review of the antidumping duty (AD) order on certain oil country tubular goods (OCTG) from the Republic of Korea (Korea).[2]

In *NEXTEEL III*, the CAFC sustained the CIT's previous holding on: (1) the freight revenue cap; and (2) the profit cap.[3] While the CAFC agreed with the CIT that Commerce did not support with substantial evidence the existence of a particular market situation (PMS) created by the five circumstances discussed in Commerce's decision, the CAFC left open the possibility

[1] *See NEXTEEL Co., Ltd., v. United States*, Consol. Court No. 18-00083, Case 1:18-cv-00083-JCG, (CIT June 3, 2022) (*Remand Order*). On September 30, 2022, the CIT issued an order that extended the time for filing this remand redetermination to be filed on or before October 21, 2022. *Nexteel Co., Ltd., v. United States*, Consol. Court No. 18-00083, Case 1:18-cv-00083-JCG, (CIT Sept. 30, 2022) (Dkt. Entry 118).
[2] *See Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 17146 (April 18, 2018) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).
[3] *See NEXTEEL III*, 28 F.4th at 1240-41.

that Commerce could justify a PMS finding if, on remand, it provided an analysis based on any subset of the factors or other reasoning, and if that analysis was in accordance with the CAFC's opinion and supported by sufficient record evidence.[4] Further, the CAFC vacated the CIT's previous opinion to the extent that the CIT exceeded its authority by directing Commerce to reach a particular outcome.[5] Lastly, the CAFC vacated the CIT's previous opinion upholding Commerce's Cohen's *d* test, which is part of its differential pricing analysis, for the reasons stated in the CAFC's decision in *Stupp*, and remanded for further consideration consistent with that decision.[6] The CIT ordered Commerce to file a third redetermination in conformity with *NEXTEEL III*.[7] Accordingly, these final results of redetermination cover two issues: (1) the existence of a PMS; and (2) Commerce's use of the Cohen's *d* test, as part of the differential pricing analysis.

On August 22, 2022, we released our Draft Results of Redetermination to interested parties.[8] On September 12, 2022, we received comments from United States Steel Corporation (U.S. Steel),[9] SeAH Steel Corporation (SeAH),[10] and NEXTEEL Co., Ltd. (NEXTEEL).[11] Pursuant to 19 CFR 351.302(d)(1)(i), on September 30, 2022, we rejected SeAH's September 12, 2022, submission because it contained unsolicited and untimely new factual information (NFI).[12]

[4] *Id.*, 28 F.4th at 1237-38 and 1241.
[5] *Id.*, 28 F.4th at 1238 and 1241.
[6] *Id.*, 28 F.4th at 1238-39 and 1241; *see also Stupp Corp. v. United States,* 5 F.4th 1341 (CAFC 2021) (*Stupp*).
[7] *See Remand Order*.
[8] *See* Draft Results of Remand Redetermination, *NEXTEEL Co. v. United States*, CAFC Case 21-1334 (Fed. Cir. March 11, 2022), dated August 22, 2022 (Draft Results of Redetermination).
[9] *See* U.S. Steel's Letter, "Oil Country Tubular Goods from the Republic of Korea: United States Steel Corporation's Comments on Draft Remand Results," dated September 12, 2022 (U.S. Steel's Draft Remand Comments.
[10] *See* SeAH's Letter, "Court-Ordered Remand of the Administrative Review of the Antidumping Order on Oil Country Tubular Goods from Korea – Comments on Draft Redetermination on Remand," dated September 12, 2022.
[11] *See* NEXTEEL's Letter, "Oil Country Tubular Goods from the Republic of Korea: NEXTEEL's Comments on Draft Results of Redetermination Pursuant to Court Remand," dated September 12, 2022 (NEXTEEL's Draft Remand Comments).
[12] *See* Commerce's Letter, "CAFC 21-1334, Oil Country Tubular Goods from the Republic of Korea 2015-2016: Rejection of SeAH's Comments on Draft Results of Redetermination," dated September 30, 2022.

On October 4, 2022, SeAH resubmitted its comments on the Draft Results of Redetermination without the unsolicited and untimely NFI.[13] After considering these comments and analyzing the record, we have provided further clarification to our analysis employed in the Draft Results of Redetermination; however, we have not changed our calculation of the respondents' weighted-average dumping margins. Accordingly, consistent with the Draft Results of Redetermination, the weighted-average dumping margins calculated in the *Second Redetermination* remain unchanged.[14]

II. BACKGROUND

On October 10, 2017, Commerce published the *Preliminary Results*,[15] in which Commerce preliminarily found that a PMS existed in Korea based on the collective impact of: (1) Korean hot rolled coil (HRC) subsidies; (2) Korean imports of HRC from the People's Republic of China (China); (3) strategic alliances between Korean HRC suppliers and Korean OCTG producers; and (4) government involvement in the Korean electricity market.[16] Additionally, Commerce applied its differential pricing analysis and found that, for SeAH, there existed a pattern of prices that differed significantly among purchasers, regions, or time periods. Further, Commerce found that there was a meaningful difference between the weighted-average dumping margin calculated using the average-to-average method and the weighted-average dumping margin calculated using an alternative method based on applying the average-to-

[13] *See* SeAH's Letter, "Court-Ordered Remand of the Administrative Review of the Antidumping Order on Oil Country Tubular Goods from Korea — Redacted Comments on Draft Redetermination on Remand," dated October 4, 2022 (SeAH's Draft Remand Comments).
[14] *See* "Final Results of Redetermination Pursuant to Court Remand, Oil Country Tubular Goods from the Republic of Korea, *NEXTEEL Co. v. United States*, Consol. Court No. 18-00083, Slip Op. 20-69 (CIT May 18, 2020)," issued August 3, 2020 (*Second Redetermination*).
[15] *See 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) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).
[16] *Id.* at 17-20.

transaction method to all U.S. sales. Thus, Commerce applied the average-to-transaction comparison method for all U.S. sales to calculate the weighted-average dumping margin for SeAH.

On April 18, 2018, Commerce published its *Final Results*, in which Commerce continued to find that a PMS existed in Korea based on the collective impact of the four factors enumerated above.[17] Additionally, Commerce continued to rely on its differential pricing methodology and applied the average-to-transaction comparison for all U.S. sales to calculate the weighted-average dumping margin for SeAH.[18] Several interested parties filed complaints seeking judicial review of the *Final Results* at the CIT, and the CIT consolidated all challenges under Consol. Court No. 18-00083.

On June 17, 2019, the CIT sustained, in part, and remanded, in part, the *Final Results*.[19] The CIT affirmed Commerce's calculation of the profit cap, calculation of the freight revenue cap, and its differential pricing analysis.[20] Further, the CIT concluded that Commerce's PMS analysis was unsupported by substantial evidence and contrary to law.[21] Accordingly, the CIT ordered that the *Final Results* be remanded to Commerce for further proceedings. On remand, Commerce found that a PMS existed in Korea based on the collective impact of the four factors enumerated above and an additional fifth factor, (5) steel industry restructuring by the Government of Korea (GOK).[22] On May 18, 2020, the CIT concluded that Commerce's PMS analysis in the *First Redetermination* was not supported by substantial evidence.[23] Further, the

[17] *See Final Results*.
[18] *See Final Results* IDM at Comment 8.
[19] *See NEXTEEL Co., Ltd., v. United States*, 392 F. Supp. 3d 1276 (CIT 2019) (*NEXTEEL I*).
[20] *Id.*, 392 F. Supp. 3d. at 1288-90, 1292-93, and 1294-97.
[21] *Id.*, 392 F. Supp. 3d. at 1286-88.
[22] *See* "Final Results of Redetermination Pursuant to Court Remand, Oil Country Tubular Goods from the Republic of Korea, *NEXTEEL Co. v. United States*, Consolidated Court No. 18-00083, Slip. Op. 19-72 (CIT June 17, 2019)," issued November 5, 2019 (*First Redetermination*), at 18-29.
[23] *See NEXTEEL Co. v. United States*, 450 F. Supp. 3d 1333, 1337-43 (CIT 2020) (*NEXTEEL II*).

CIT directed Commerce to reverse its PMS finding.[24] Under respectful protest, Commerce filed its *Second Redetermination* where, as ordered by the CIT, it did not find that a PMS existed in Korea during the period of review (POR).[25]

Although the CAFC agreed with the CIT's ultimate decision in *NEXTEEL II*, where the CIT ruled that Commerce's analysis of the existence of a PMS based on five factors was not supported by substantial evidence, the CAFC left open the possibility that a PMS could be found based on any subset of the factors or other reasoning.[26] The CAFC held that Commerce's analysis of the record in this review that the following three factors contributed to a PMS finding was not supported by substantial evidence: (1) Korean HRC subsidies; (2) strategic alliances between Korean HRC suppliers and Korean OCTG producers; and (3) steel industry restructuring by the GOK.[27] The CAFC also held that low-priced Chinese steel could contribute to a PMS, but Commerce's analysis of the record in this review did not show sufficient particularity for this factor to create a PMS on its own.[28] Further, the CAFC held that the evidence was mixed on whether the GOK was involved to such an extent that electricity prices could not be considered competitively set or were otherwise any different from what the prices would be in the ordinary course of trade and Commerce's analysis failed to justify its departure from prior analysis of Korean electricity prices in the context of countervailing duty determinations.[29] Furthermore, the CAFC vacated the CIT's decision in *NEXTEEL II* to the extent that the CIT directed Commerce to reach a certain outcome regarding the existence of a

[24] *Id.*, 450 F. Supp. 3d at 1343.
[25] *See Second Redetermination*; *see also Certain Oil Country Tubular Goods from the Republic of Korea: Notice of Court Decision Not in Harmony with the Final Results in the Antidumping Duty Administrative Review and Notice of Amended Final Results*, 85 FR 71052 (November 6, 2020).
[26] *See NEXTEEL III*, 28 F.4th at 1241.
[27] *Id.*, 28 F.4th at 1237.
[28] *Id.*
[29] *Id.*, 28 F.4th at 1237-38.

PMS.[30] The CAFC stated, on remand, that Commerce may seek to justify the PMS in accordance with *NEXTEEL III*.[31]

Lastly, the CAFC held that Commerce's differential pricing analysis in the *Final Results* raised identical concerns addressed in *Stupp* regarding Commerce's use of statistical criteria when certain preconditions were not met for which the *Stupp* court remanded the issue to the agency for further explanation.[32] The CAFC vacated the CIT's decision in *NEXTEEL I*, where the CIT upheld Commerce's Cohen's *d* test as part of its differential pricing analysis.[33] The CAFC remanded Commerce's use of the Cohen's *d* test for further consideration in view of *Stupp.*[34]

III. ANALYSIS

(1) Particular Market Situation

In *NEXTEEL III*, the CAFC found that Commerce's finding that the following three factors could contribute to a PMS was not supported by substantial evidence on this record: (1) Korean HRC subsidies; (2) strategic alliances between Korean HRC suppliers and Korean OCTG producers; and (3) steel industry restructuring by the GOK, and, thus, Commerce's finding of a PMS based on the combined effects of all five PMS factors discussed in the *First Redetermination* was not supported by substantial evidence.[35] However, the CAFC left open the possibility that a PMS could be found based on an analysis of any subset of the factors or other reasoning.[36] Thus, the CAFC ruled that Commerce may seek to justify a PMS finding on

[30] *Id.*, 28 F.4th at 1238 and 1241.
[31] *Id.*, 28 F.4th at 1238.
[32] *Id.*, at 1231 and 1239.
[33] *Id.*, 28 F.4th at 1231.
[34] *Id.*
[35] *Id.*, 28 F.4th at 1237.
[36] *Id.*, 28 F.4th at 1241.

remand.[37] Because the CAFC found that Commerce's analysis of three factors in the *First Redetermination* (Korean HRC subsidies, strategic alliances between Korean HRC suppliers and Korean OCTG producers, and steel industry restructuring by the GOK) was unsupported by substantial evidence on the record of this review, we are not conducting further analysis of whether these factors contribute to the existence of a PMS in this period of review. Accordingly, these final results of redetermination focus on the two remaining considerations on the record of this case, GOK involvement in the electricity market and Korean imports of HRC from China.

GOK Involvement in the Electricity Market

In the *Final Results,* Commerce found, consistent with the SAA,[38] that 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.[39] Further, Commerce found that electricity in Korea functioned as a tool of the GOK's industrial policy and that the largest electricity supplier, Korean Electric Power Corporation (KEPCO), was a government-controlled entity.[40] In the *First Redetermination*, Commerce found that the GOK heavily regulated the rates KEPCO charged for electricity and that KEPCO's ability to pass on cost increases to its customers was limited.[41] Further, Commerce found that Korea's annual industrial electricity prices were approximately 43 percent lower than electricity prices in Japan, and this type of price discrepancy was implausible without GOK control of Korean electricity rates.[42] Evidence on the record demonstrated that electricity accounted for at least five percent of the cost of manufacturing (COM) for OCTG.[43]

[37] *Id.*, 28 F.4th at 1238.
[38] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, Vol. 1 (1994) (SAA)
[39] *See Preliminary Results* PDM at 18 (citing SAA at 822).
[40] *Id.*
[41] *See First Redetermination* at 23.
[42] *Id.* at 24.
[43] *Id.* at 25.

Based on the evidence above, Commerce found that GOK involvement in the electricity market placed downward pressure on the price of electricity in Korea and distorted the COM for OCTG producers.[44] Therefore, in the *First Redetermination*, Commerce continued to find this factor contributed to the existence of a PMS in Korea during the POR.[45]

After consideration of *NEXTEEL III* and reexamination of the record, we find that evidence on the record is insufficient to establish that the GOK involvement in the electricity market contributed to a PMS in Korea during the POR. The CAFC observed that the evidence was mixed on whether the GOK was involved in the electricity market to the extent that home market prices could not be considered competitively set.[46] Further, the CAFC held that Commerce had not justified its departure from countervailing duty determinations which have consistently found that Korean steel producers did not receive a countervailable benefit from GOK involvement in the setting of Korean electricity prices.[47] In prior determinations, Commerce has found, "{a} PMS inquiry is not meant to determine whether a particular form of government assistance constitutes a countervailable subsidy; rather, we evaluate whether government interference in the market through assistance or otherwise has caused a distortion that contributes to particular market situation."[48] We continue to recognize that market distortions could exist under certain circumstances when there is no countervailable subsidy provided. In this proceeding, we find that there is not sufficient evidence on this record to demonstrate that GOK intervention has caused distortions in the electricity market that would render costs outside the ordinary course of trade.

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[44] *Id.*
[45] *Id.* at 23-25.
[46] *See NEXTEEL III*, 28 F.4th at 1237-38.
[47] *Id.*
[48] *See Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 41949 (July 13, 2020) (*OCTG Korea 2017-18 Final Results*), and accompanying IDM at 33.

We continue to find that the evidence on the record demonstrates that government policy controls Korean electricity prices. Evidence on the record demonstrates that the GOK heavily monitors and regulates the electricity rates KEPCO charges:

> KEPCO submits to the Ministry of Trade, Industry and Energy a report containing the facts and basis of the calculation of the electricity tariff and the basic accounting documents including the statement on profit and loss and the financial statement. The GOK may request data on KEPCO's investment plan, administrative and operational expense and KEPCO's transaction with an interested party. The costs for providing service to each applicable KEPCO's tariff class are generally submitted in order to discuss and set the electricity rate for each class.[49]

Further, the evidence on the record indicates that, under certain circumstances, the GOK may intervene in the electricity market and distort electricity prices in order to achieve policy goals such as controlling inflation:

> {i}f fuel prices substantially increase and the Government, out of concern for inflation or for other reasons, maintains the current level of electricity tariff and does not increase it to a level to sufficiently offset the impact of rising fuel prices or prolongs the hold-order on the fuel cost pass-through adjustment system or amend or modify it to the effect that we are prevented from billing and collection of the fuel cost pass-through adjustment amount on a timely basis or at all, the price increases will negatively affect our profit margins or even cause us to suffer net losses and our business, financial condition, results of operations and cash flows would suffer.[50]

Evidence on the record demonstrates that the GOK can intervene in the electricity market and set prices to achieve government policy goals; this could cause Korean electricity prices to be outside the ordinary course of trade and establish a PMS. However, while we agree, in principle, that electricity rates could be distorted as a result of government policy, evidence on the record

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[49] *See* GOK's Letter, "Response of the Government of Korea to the Department of Commerce's Questionnaire January 21, 2015 Welded Line Pipe from the Republic of Korea CVD Original Investigation," dated January 21, 2015, at I-34); Maverick Tube Corporation (Maverick)'s Letter, "Certain Oil Country Tubular Goods from the Republic of Korea: Other Factual Information Submission for Valuing the Particular Market Situation in Korea," dated May 4, 2017 (PMS Allegation); *see also* PMS Allegation at Exhibit 5 (Electricity PMS Allegation Letter) at Exhibit 4.

[50] *See* the Korea Electric Power Corporation Form 20-F, included in Electricity PMS Allegation Letter at Exhibit 2 at 82.

must also demonstrate such a distortion occurred during the POR and that the GOK was involved to the extent that prices cannot be considered competitively set.

After reviewing the evidence on the record, we find there is insufficient evidence to demonstrate that Korean electricity prices were distorted during the POR. In the *First Redetermination*, in order to establish that the Korean electricity market was distorted, Commerce relied on a report from the International Energy Agency (IEA) that showed Korea's annual industrial electricity prices were approximately 43 percent lower than electricity prices in Japan.[51] However, the same IEA report shows that in 2016 the median industrial electricity price including taxes among IEA members was 6.97 British pence (pence) per kilowatt hour (kWh).[52] In 2016, the Korean industrial electricity price including taxes was 6.965 pence per kWh, nearly identical to the median IEA electricity rate.[53] Accordingly, we find that in 2016, Korean industrial electricity prices (including taxes) were, on average, in line with the median of electricity rates in other countries.

In the First Redetermination, Commerce found that Japanese electricity prices were the best comparison for Korean electricity prices, because they are the only two countries located in Asia included in the IEA study.[54] However, upon reexamination, we find that there are variables other than geographic location that factor into identifying an appropriate comparison. The record does not contain evidence demonstrating that geography is the predominant factor that affects electricity prices. For example, the evidence demonstrates that shortly before the relevant period, Japan changed its energy consumption make-up by transitioning from nuclear energy to

[51] *See First Redetermination* at 24-25.
[52] *See* NEXTEEL Co., Ltd.'s Letter, "Oil Country Tubular Goods from the Republic of Korea: Particular Market Situation Rebuttal Comments and Factual Information," dated August 15, 2017 (NEXTEEL PMS Rebuttal), at Exhibit 10.
[53] *Id.*
[54] *See First Redetermination* at 65.

liquid natural gas, which could explain why Japan's prices were significantly higher than the median electricity prices of all countries in the IEA study.[55]

Absent sufficient evidence on the record of this review demonstrating that Japanese electricity rates are the most appropriate comparison for Korean electricity rates, we find the median industrial electricity rate among IEA members is a better comparison for Korea's electricity rates. This comparison, which uses a median of the broader scope of electricity price data, is less likely to have results affected by market peculiarities or distortions in any single country. As explained above, we found Korea's industrial electricity price to be nearly identical to the median IEA members' industrial electricity price. Accordingly, we find the IEA study does not demonstrate that Korean electricity prices were distorted during the POR. Based on our review of evidence on the record, we find that evidence on the record is insufficient to establish that GOK involvement in the electricity market contributed to a PMS in Korea during the POR.

We continue to find that the evidence on the record demonstrates that government policy controls Korean electricity prices. Therefore, the potential for a PMS exists if the GOK intervenes in the electricity market to such an extent prices cannot be considered competitively set. However, we find in this review the evidence on the record was insufficient to demonstrate a distortion exists such that Korean electricity prices cannot be considered competitively set. Nonetheless, in future determinations it remains possible that Commerce may find a PMS based on this factor if interested parties submit evidence that GOK involvement in the Korean electricity market during a particular period created distortions to the extent prices could not be considered competitively set. For example, in past determinations Commerce has found large

[55] *See* PMS Allegation at Exhibit 3 (Petition for the Imposition of CVD, Certain Hot-Rolled Steel Flat Products from the Republic of Korea); *see also* Petition for the Imposition of CVD, Certain Hot-Rolled Steel Flat Products From the Republic of Korea at Exhibit X-6.

operating losses by electricity suppliers are indicative of a distortion occurring in the marketplace caused by government intervention.[56]

Korean Imports of HRC from China

In the *Final Results*, Commerce found that 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 domestic Korean steel prices.[57] In the *First Redetermination*, Commerce continued to find that, as a result of significant overcapacity in Chinese steel production, the Korean steel market has been inundated with imports of cheap Chinese steel products, placing downward pressure on Korean domestic steel prices.[58] Additionally, Commerce found that the GOK's Proposal for Strengthening the Competitiveness of the Steel Industry indicates that Chinese excess steel supply is "especially targeted" toward Korea, and that Korea was one of China's largest export destinations for flat-rolled steel products.[59]

After consideration of *NEXTEEL III* and careful reexamination of the record, we find that the evidence placed on the record by Maverick and U.S. Steel demonstrates that imports of low-priced Chinese steel could contribute to the existence of a PMS.[60] Evidence on the record

[56] *See OCTG Korea 2017-18 Final Results* IDM at 34; *see also Urea Ammonium Nitrate Solutions from the Republic of Trinidad and Tobago: Final Affirmative Determination of Sales at Less than Fair Value*, 87 FR 37824 (June 24, 2022) and accompanying IDM, at Comment 1-B.
[57] *See Final Results* IDM at 17.
[58] *See First Redetermination* at 21.
[59] *Id.* at 22; *see also* Maverick's Letter, "Certain Oil Country Tubular Goods from the Republic of Korea: Submission of Factual Information Relating to Particular Market Situation Allegations," dated August 7, 2017 (Maverick PMS Supporting Information), at Exhibit 5.
[60] *See* PMS Allegation; *see also* Maverick PMS Supporting Information; and U.S. Steel's Letter, "Oil Country Tubular Goods from the Republic of Korea," dated August 7, 2017 (U.S. Steel PMS Supporting Information).

demonstrates that the Chinese government highly subsidized steel products.[61] In turn, evidence on the record demonstrates that distortions in the Chinese economy resulted in significant overcapacity. The Official Journal of the European Union estimated that in 2015 China accounted for 50.3 percent of the world's actual crude steel production and that China's steel production overcapacity was estimated at 350 million metric tons.[62] Similarly the GOK estimated that China's steel production overcapacity was 450 million metric tons in 2015 and accounted for 60 percent of global steel production overcapacity.[63] Therefore, there is sufficient evidence to demonstrate distortions in the Chinese steel market resulted in significant steel production overcapacity.

In recent determinations where Commerce has analyzed the existence of a PMS, Commerce has evaluated the data submitted, generally using a period of five years that covers the POR and the four years prior to the POR.[64] Accordingly, our preferred time period to analyze data trends would be the five-year period from 2012 through 2016. However, where 2016 data are unavailable on the record of this review, we analyzed data trends from 2011 through 2015.

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[61] During the period of investigation (POI) of January 1, 2014, through December 31, 2014, Commerce determined a subsidy rate of 256.44 percent on cold-rolled steel flat products from China, and during the same POI, Commerce determined a 241.07 percent subsidy rate on certain corrosion-resistant steel products from China. As no subsequent administrative reviews were conducted, these rates remained effective for subject merchandise entered during the POR of this proceeding. *See* U.S. Steel PMS Supporting Information at Exhibits 15 and 16; *see also Certain Cold-Rolled Steel Flat Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final partial Affirmative Critical Circumstances Determination*, 81 FR 32729 (May 24, 2016), and accompanying IDM; and *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products from the People's Republic of China: Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35308 (June 2, 2016), and accompanying IDM.

[62] *See* Maverick PMS Supporting Information at Exhibit 8 (page 146/98).

[63] *Id.* at Exhibit 5.

[64] *See, e.g., Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019-2020*, 87 FR 20815 (April 8, 2022), and accompanying IDM, at 21 (*OCTG Korea 2019-20 Final Results*); *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2018-2019*, 86 FR 41015 (June 30, 2021), and accompanying IDM, at 28; and *Circular Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2019-2020*, 87 FR 8785 (February 16, 2022), and accompanying IDM, at 6.

Data submitted on the record of this review demonstrate that an increase in Chinese exports of steel products may have created downward pressure on steel prices in Korea. Data from the Korean Iron & Steel Association show that from 2011 to 2015 Korean imports of Chinese steel products rose from 10,200,000 metric tons (mt) to 13,740,000 mt, representing a 35 percent increase.[65] Over the same time period, steel imports from China increased their Korean market share from 18 percent to 25 percent.[66] In 2015, the price differential between Korean-produced hot-rolled steel and Chinese-produced hot-rolled steel was U.S. dollars (USD) 118 per mt; as a result, Korean producers of hot-rolled steel found it increasingly difficult to operate profitably.[67]

Data from the Global Trade Atlas (GTA) show that Chinese exports of hot-rolled carbon and alloy steel products to Korea increased from 3,156,607,961 kilograms (kg) in 2012 to 3,820,686,369 kg in 2016, representing a 21 percent increase.[68] Over the same time period, the average unit value of Chinese exports of hot-rolled carbon and alloy steel products to Korea fell from USD 544.34 per mt to USD 313.08 per mt, representing a 43 percent decrease.[69] Based on the data above, we find that Chinese steel production overcapacity resulted in an increase in Chinese steel exports to Korea and a drastic decline in average unit values from China. Therefore, consistent with *NEXTEEL III*, we find the evidence demonstrates that imports of low-priced Chinese steel could potentially contribute to a PMS.[70]

While the CAFC has found that low-priced imports of Chinese steel could contribute to a PMS, it also found that in order for this factor to establish a PMS on its own there must be

[65] *See* Maverick PMS Supporting Information at Exhibit 5
[66] *Id.*
[67] *Id.*; *see also* U.S. Steel PMS Supporting Information at Exhibit 4.
[68] *See* U.S. Steel PMS Supporting Information at Exhibit 1.
[69] *Id.*
[70] *See NEXTEEL III*, 28 F.4th at 1237.

evidence that shows sufficient particularity.[71] Further the CAFC held that the record does not show sufficient particularity for this factor to establish a PMS on its own because data show that many countries imported large quantities of Chinese steel.[72]

Recognizing that there is no statutory or regulatory definition of "particularity" or any statutory or regulatory test or standards in place for determining if a market situation is particular or not particular, we respectfully disagree with the CAFC that there is not sufficient evidence on the record to show that this market situation, overcapacity of HRC exported to Korea, is adequately particular to establish a PMS. An *Asian Steel Watch* article demonstrates Korea was the top export destination for Chinese steel, and Korea imported twice the quantity of Chinese steel as Vietnam (China's second largest export destination for steel).[73] Additionally, import data demonstrate that, during the POR, the average unit value of Korea's imports of HRC was USD 337 per mt, while the average unit value of Western Europe's imports of HRC was USD 410 per mt.[74] Further, evidence on the record demonstrates that Chinese exports of steel products were targeted at Korea, the European Union (EU), and members of the Association for Southeast Asian Nations (ASEAN).[75] While the CAFC is correct in recognizing that several countries imported large quantities of Chinese steel, the distortive effects of global steel overcapacity will manifest differently in different, particular markets. In Commerce's interpretation of the statutory term "particular," as applied to the evidence on this record, we believe that the record above shows sufficient particularity to establish a PMS on its own because it demonstrates that the impact of these distortions is more acute in Korea than in other

[71] *Id.*
[72] *Id.*
[73] *See* U.S. Steel PMS Supporting Information at Exhibit 2.
[74] *See* NEXTEEL PMS Rebuttal at 9.
[75] *See* Maverick PMS Supporting Information at Exhibit 5.

countries, and that the distortions have resulted in lower price levels than what would have prevailed absent the distortions.

However, while Commerce may disagree with certain aspects of the CAFC's decision, as we do here, the CAFC's holding in this case is binding on the agency and the opinion appears conclusive on this issue. Therefore, while Commerce provided further analysis regarding the particularity of Korean imports of Chinese steel products, we cannot rely on this further analysis to make a finding contrary to the CAFC's ultimate holding.

Finally, as the CAFC held, low-priced imports of Chinese steel could contribute to a PMS and, in principle, the CAFC could find that there is evidence that shows sufficient particularity to establish the existence of a PMS based on this factor alone.[76] Accordingly, although we are concluding on remand that a PMS is not supported by substantial evidence for this particular POR on this record, we also acknowledge that in a future determination Commerce may find a PMS based on this factor if the evidence demonstrates sufficient particularity.

(2) Differential Pricing

The CAFC held that Commerce's differential pricing analysis in the *Final Results* raised identical concerns as addressed in *Stupp* regarding Commerce's Cohen's *d* test.[77] The CAFC considered SeAH's argument that Commerce's differential pricing methodology "was flawed because Commerce relied on a Cohen's *d* analysis even though the express conditions for the application for a Cohen's *d* test were not satisfied: that the data sets being compared be normally distributed, have at least 20 or more data points, and have roughly equal variances."[78] The CAFC vacated the CIT decision affirming Commerce's analysis "for the reasons stated in {its}

[76] *See NEXTEEL III*, 28 F.4th at 1237.
[77] *Id.*, 28 F.4th at 1239.
[78] *Id.* (internal citations omitted).

recent decision in *Stupp*" and remanded "for proceedings consistent with that decision."[79] In *Stupp*, the CACF stated:

> SeAH next challenges Commerce's use of the 0.8 cutoff for determining whether particular results "pass" the Cohen's *d* test. SeAH has two arguments: First, SeAH argues that Commerce's selection of the 0.8 cutoff was arbitrary. Second, SeAH argues that Commerce's application of the 0.8 cutoff in this case was unsupported by evidence because Professor Cohen's suggestion that "0.8 could be considered a 'large' effect size" was limited to comparisons involving data that met certain restrictive conditions —" in particular, that the datasets being compared had roughly the same number of data points, were drawn from normal distributions, and had approximately equal variances.[80]

Relying on its earlier decision in *Mid Continent 2019*,[81] the CAFC rejected the first argument and held that "the 0.8 standard is 'widely adopted' as part of a 'commonly used measure' of the difference relative to such overall price dispersion . . . . {I}t is reasonable to adopt that measure when there is no better, objective measure of the effect size."[82] With respect to the second argument, the CAFC found that it was not addressed in *Mid Continent 2019* and construed that argument as part of SeAH's challenge to Commerce's use of Cohen's *d* test.[83]

In *Stupp*, the CAFC found that "the evidence and arguments before us call into question whether Commerce's application of the Cohen's *d* test to the data in this case violated the assumptions of normality, sufficient observation size, and roughly equal variances associated with that test."[84] Because the CAFC found that Commerce's use of the Cohen's *d* test in this review presents identical issues to those in *Stupp*, the CAFC vacated the same issue in *NEXTEEL I*, and remanded the issue for Commerce to reconsider in view of *Stupp*.[85]

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[79] *Id.*, 28 F.4th at 1241 (internal citations omitted).
[80] *See Stupp*, 5 F.4th at 1356 (internal citations omitted).
[81] *Mid Continent Steel & Wire, Inc. v. United States*, 940 F.3d 662, 673 (Fed. Cir. 2019) (*Mid Continent 2019*).
[82] *See Stupp*, 5 F.4th at 1357 (internal citations omitted).
[83] *Id.* at 1357.
[84] *Id.* at 1360.
[85] *See NEXTEEL III*, 28 F.4th at 1239.

Section 777A(d)(1)(B)(i) of the Tariff Act of 1930, as amended (the Act) requires that Commerce find that there exists a pattern of prices that differ significantly for comparable merchandise among purchasers, regions, and time periods. As part of Commerce's "differential pricing analysis," the "Cohen's *d* test" examines whether, for comparable merchandise, the prices to a particular purchaser, region, or time period differ significantly from all other prices. The Cohen's *d* test is based on the concept of "effect size" which measures the difference in the means of some measurement between two groups relative to the variance in that measurement within each of the two groups.[86] In effect, the denominator of this ratio is the "yardstick" by which the difference in the means is measured.[87] When this difference in the means relative to the variances within the underlying data, *i.e.*, the effect size or the "Cohen's *d* coefficient," is found to be "large," *i.e.*, 0.8 or larger, then the difference in the prices is found to be "significant."

In *Stupp*, the CAFC did not invalidate the application of Cohen's *d* test but, rather, provided Commerce with an opportunity to further explain its approach. The CAFC held that "there is no statutory language telling Commerce how to detect patterns of significantly differing export prices" and "Commerce therefore has discretion to determine a reasonable methodology to implement the statutory directive."[88] The CAFC affirmed the specific components of Commerce's differential pricing analysis (*i.e.*, the ratio test and the meaningful difference test) as a reasonable methodological choice for administering the AD law and assessing when the statutory requirements, which would permit Commerce to calculate a weighted-average dumping

[86] *See Stupp*, 5 F.4th at 1346; and *Mid Continent Steel & Wire Inc. v. United States*, 31 F.4th 1367, 1371-72 (Fed. Cir. 2022) (*Mid Continent 2022*).
[87] *See Mid Continent 2022*, 31 F.4th at 1377 ("The central purpose of using the Cohen's *d* ratio is to provide the missing basis of comparison—the "yardstick." Cohen's *d* relates, by division, the difference in mean prices of the two particular groups to a figure representing the magnitude of differences in (dispersion of) the prices in the data pool more generally." (citing *Mid Continent 2019*, 940 F.3d at 671).
[88] *See Stupp*, 5 F.4th at 1354.

margin using an alternative comparison method under section 777A(d)(1)(B) of the Act, are satisfied.[89] However, the CAFC stated that SeAH's arguments and certain academic literature raise concerns "relating to Commerce's application of the Cohen's *d* test in this case and, more generally, in adjudications in which the data groups being compared are small, are not normally distributed, and have disparate variances."[90] Accordingly, the CAFC remanded a narrow issue of explaining whether certain statistical assumptions (such as normality, sufficient observation size, and roughly equal variances) are relevant to the application of Cohen's *d* test in the context of differential pricing analysis.

In *Stupp*, as here, the plaintiff argued that Commerce must consider certain statistical criteria (*i.e.*, the normality of the distribution, homoscedasticity, and number of observations (sample size)) and the usefulness of the large, 0.8, threshold for determining whether the difference in prices is significant. In *Stupp*, the CAFC stated:

> {w}e therefore remand to give Commerce an opportunity to explain whether the limits on the use of the Cohen's *d* test prescribed by Professor Cohen and other authorities were satisfied in this case or whether those limits need not be observed when Commerce uses the Cohen's *d* test in less-than-fair-value adjudications. In that regard, we invite Commerce to clarify its argument that having the entire universe of data rather than a sample makes it permissible to disregard the otherwise applicable limitations on the use of the Cohen's *d* test.[91]

In other words, the CAFC provided Commerce with the opportunity to further explain its approach in a redetermination pursuant to its remand order.

Moreover, the CAFC has already affirmed as reasonable Commerce's application of the large, 0.8, threshold for a Cohen's *d* coefficient to demonstrate that the difference in the mean prices is significant. The CAFC stated that,

[89] *Id.* at 1351-57.
[90] *Id.* at 1357.
[91] *Id.* at 1360

> {t}he Trade Court described Commerce's rationale for adhering to the 0.8 line and explained why that rationale is reasonable {(citing *Mid Continent Steel & Wire, Inc. v. United States*, 219 F. Supp. 3d 1326, 1337-40 (CIT 2017))}. In particular, Commerce reasoned that even a small absolute difference in the means of the two groups can be significant (for the present statutory purpose) if there is a small enough dispersion of prices within the overall pool as measured by a proper pooled variance or standard deviation; the 0.8 standard is "widely adopted" as part of a "commonly used measure" of the difference relative to such overall price dispersion; and it is reasonable to adopt that measure where there is no better, objective measure of effect size. Issues & Decision Mem. at 25-26 (internal quotation marks omitted). We agree with the Trade Court that this rationale adequately supports Commerce's exercise of the wide discretion left to it under 19 U.S.C. § 1677f-1(d)(1)(B). We therefore reject PT's challenge.[92]

Therefore, the CAFC has already affirmed as reasonable Commerce's use of the large, 0.8, threshold to determine that the price differences are significant.

Commerce finds that the statistical criteria identified by SeAH are not relevant to Commerce's application of the Cohen's *d* test to SeAH's U.S. price data. Such criteria, *i.e.*, the normality of the distribution, equal variances and the number of observations (*i.e.*, the sample size), are relevant to determine whether the results of an analysis based on a sample are representative of the full population as a whole. The results of an analysis based on sampled data are *estimates* of the actual values of the parameters for the full population, and using statistical inference based on these statistical characteristics of the sampled data will determine, with predefined criteria, whether the estimates in the analysis results represent the actual values of the parameters for the full population of data.

In contrast, in Commerce's application of its Cohen's *d* test, the results are based on the full population of sale prices in the test group and in the comparison group.[93] As such, Commerce calculates the *actual* parameters of data, *not estimates* of those parameters based on

[92] *See Mid Continent 2019*, 940 F.3d at 673.
[93] *See Mid Continent 2022*, 31 F.4th at 1380 ("Commerce observes that the cited literature discusses 'sampling' from a population, whereas Commerce has the entire population data and each of its test-comparison group pairs involves the entire population.")

sampled data. Accordingly, statistical inferences, which are utilized when samples are used and depend upon SeAH's statistical criteria, are not pertinent to Commerce's application of the Cohen's *d* test in its differential pricing analysis, because the analysis does not rely upon sampled data and estimated values of the population parameters.

On April 4, 2022, pursuant to the remand order in *Stupp*, Commerce submitted to the CIT a redetermination that provided such explanation that is consistent with the above explanation. [94] It is important to note that there are differences between the records in the *Stupp* litigation and this review. Specifically, on the record of the *Stupp* remand proceeding there is academic literature that the CAFC believed may have potentially undermined Commerce's application of the Cohen's *d* test without additional explanation from the agency regarding applicability of certain statistical criteria. No such literature is on the record of this proceeding. Further, although we understand the concerns expressed by the CAFC in *Stupp* with respect to the use of the statistical criteria, the CAFC did not hold that such statistical criteria must be used in Commerce's analysis but, rather, remanded the issue for further consideration and explanation, inviting Commerce to explain whether such statistical criteria apply when the full population of sale prices (as opposed to samples) is used. As we explained above, such statistical criteria are not pertinent outside of the context of sampling. Accordingly, Commerce has concluded that these statistical criteria are not relevant, because Commerce's analysis is based on the full population of sale prices and not on a sample of such data.

[94] *See Final Results of Redetermination Pursuant to Court Remand, Stupp Corp. v. United States*, Consol. Case No. 15-00034 (CIT October 8, 2021), dated April 4, 2022 (*Stupp Redetermination*), available at https://access.trade.gov/Resources/remands/15-00334.pdf.

IV. INTERESTED PARTY COMMENTS

We have analyzed and addressed the comments received in U.S. Steel's Draft Remand Comments, SeAH's Draft Remand Comments, and NEXTEEL's Draft Remand Comments, below.

Issue 1: Particular Market Situation

U.S. Steel's Comments[95]

- U.S. Steel disagrees with Commerce's Draft Results of Redetermination and the legal and analytical framework set forth regarding the existence of a PMS in Korea.
- The CAFC vacated the CIT's opinion, declined to decide whether a PMS could be found based on any subset of the factors, and invited Commerce to justify the PMS in accordance with the *NEXTEEL III* decision.[96] The Draft Results of Redetermination incorrectly presume the CAFC has tied Commerce's hands, whereas the CAFC has actually provided a clear path for Commerce to adjust for a PMS.[97]
- Commerce can reframe its pre-appeal analysis within *NEXTEEL III's* "modified reasoning," leading to a conclusion – which is supported by substantial evidence and in accordance with the law – that a PMS exists in Korea.[98]
- A PMS is not predicated on any particular number of factors. Even one distortion could constitute a PMS with respect to the affected input(s) into OCTG production. Commerce should reject the formulation that a PMS must be particular based on a country-level analysis. Rather there are other ways a PMS may be particular.[99]

[95] *See* U.S. Steel's Draft Remand Comments.
[96] *Id.* at 2 (citing *NEXTEEL III*, 28. F. 4th at 1226, 1238, 1241).
[97] *Id.* at 2 and at 5-6.
[98] *Id.* at 8.
[99] *Id.* at 9-10.

- Commerce should not rely on *dicta* in *NEXTEEL III* with respect to the particularity of HRC imports.[100]
- U.S. Steel concurs with Commerce's conclusion regarding the existence of a distortion due to low-priced HRC imports.[101]
- The administrative record demonstrates Korea's experience with low-priced HRC imports over the POR was "particular" within the meaning of the statute.[102]
- The CAFC's observations with respect to HRC imports are concluding *dicta*. The CAFC did not make a substantive evidence "holding"; rather, the CAFC expressly stated that it "need not reach the issue of whether substantial evidence supports Commerce's finding that each of the remaining circumstances contributed to a {PMS}."[103]
- The CAFC did not make a "conclusive" holding on the issue of the particularity of HRC imports. Rather, the CAFC highlighted an area where Commerce should focus its analysis.[104]
- Record evidence demonstrates that low-priced HRC imports affected the Korean market during the POR to a "particular" degree.[105]
- Very few, if any, market distortions cannot be found elsewhere, to at least some extent. For example, export taxes are not unique to Argentina, yet the CIT readily sustained Commerce's PMS finding on Argentina's export tax on soybeans. "Particularity" does not require that a market be "the most" or "the best" example of a given distortion.[106]

[100] *Id.* at 3.
[101] *Id.* at 10.
[102] *Id.* at 11.
[103] *Id.* at 11-12 (citing *NEXTEEL III*, 28 F. 4th at 1237).
[104] *Id.* at 12-13.
[105] *Id.* at 15-18.
[106] *Id.* at 14-17 (citing *Vicentin S.A.I.C. v. United States*, 404 F. Supp. 3d 1323, 1341 (CIT 2019) (*Vicentin)*).

- Commerce should abandon its *sua-sponte* flip-flop concerning the weight of the record evidence regarding distortions in the electricity market.[107]
- Commerce recognized the CAFC did not rule out making a PMS finding based on GOK's electricity pricing. Rather, the CAFC required Commerce to justify an affirmative PMS determination in light of a countervailing duty (CVD) finding that the GOK did not confer a countervailable subsidy.[108]
- Commerce can, on remand, distinguish the legal framework it applies in CVD proceedings from the framework it applies in PMS determinations.[109]
- Rather than differentiating between the legal analyses required for CVD proceedings and PMS determinations, Commerce analyzes if an electricity distortion exists and arbitrarily reaches the opposite conclusion based on the same evidence.[110]
- The CAFC found the evidence regarding electricity distortion is mixed and mixed evidence is substantial evidence. Therefore, there was no need for Commerce to backtrack its substantive findings.[111]
- If Commerce insists on reassessing the record, the evidence demonstrates that distortion exists in the Korean electricity market.[112]
- There is nothing inherently more probative about an "average" figure, as opposed to single figure derived from a similar market. Therefore, Commerce erred when it selected

[107] *Id.* at 3.
[108] *Id.* at 18-19.
[109] *Id.* at 19-20.
[110] *Id.* at 20-21.
[111] *Id.* at 21 (citing *NEXTEEL III*, 28 F. 4th at 1236).
[112] *Id.* at 22.

the IEA median members' electricity price instead of Japan's electricity price as a benchmark for Korea's electricity price.[113]

- Commerce provides no rationale for why it included taxes in its electricity price analysis.[114]
- It is nonsensical to use an electricity benchmark that includes Korea itself.[115]
- Japan is the most analogous country to Korea in the IEA study because Japan and Korea are both comparable East Asian Island market economy nations.[116]
- Commerce relies on unsupported speculation to find that the IEA average is a better benchmark than Japan's electricity price.[117]
- Commerce need not rely on third country prices. Other evidence on the record demonstrates that KEPCO is state-owned and state-controlled. Further evidence demonstrates KEPCO charged prices significantly lower rates than it should.[118]
- Commerce must examine all five alleged PMS factors.[119]
- Failure to further analyze three of the PMS factors would be a basis for further remand. The CAFC never found the record was insufficient to support the conclusion that these factors contributed to a PMS. Rather, the CAFC's ruling was limited to Commerce's stated reasoning. Commerce is free to explore these factors with other reasoning.[120]

[113] *Id.* at 22.
[114] *Id.*
[115] *Id.* at 23.
[116] *Id.*
[117] *Id.* at 23-24.
[118] *Id.* at 24-27.
[119] *Id.* at 3.
[120] *Id.* at 27-28.

- When an injured domestic industry makes a PMS allegation, the least Commerce can do is analyze it.[121]
- Consistent with *NEXTEEL III*, evidence exists such that Commerce can find a PMS based on GOK HRC subsidization.[122]
- There are multiple pathways for Commerce to find a PMS based on GOK restructuring of the steel industry.[123]
- Although the current record likely does not contain evidence relating to strategic alliances such that the CAFC could sustain a PMS finding on this factor, such evidence exists and could be placed on the record.[124]
- Commerce should fully recognize the analytical flexibility that *NEXTEEL III* reinstated.[125]
- Information exists on the record to quantify the appropriate PMS adjustment.[126]
- Commerce should exercise its discretion to reopen the administrative record if it is not inclined to find any PMS.[127]
- *NEXTEEL III* focuses on facts that could support an affirmative determination, therefore fairness compels that any new evidentiary pathway highlighted by *NEXTEEL* be opened for record development.[128]

[121] *Id.* at 29.
[122] *Id.* at 29-32.
[123] *Id.* at 32-35.
[124] *Id.* at 35.
[125] *Id.* at 35-39.
[126] *Id.* at 3 and 39-41.
[127] *Id.* at 3.
[128] *Id.* at 6-7 and 41-43.

- The CIT's recent opinions with respect to the OCTG Korea 2016-17 redetermination and OCTG Korea 2017-18 redetermination do not compel a negative PMS finding here nor are they instructive.[129]

SeAH's Comments[130]

- SeAH agrees, based on either the interplay of factors or a single factor, the evidence does not support a PMS finding in this review. The Draft Results of Redetermination should be made final on that basis.[131]
- Commerce's finding that low-priced Chinese steel could contribute to the existence of a PMS in Korea is fundamentally flawed.[132]
- Commerce failed to meet its statutory burden that HRC prices did not reflect sales made in the ordinary course of trade.[133]
- Commerce failed to consider evidence SeAH submitted regarding a price analysis of its Japanese, Korean, and Chinese HRC suppliers.[134]
- Commerce's "further analysis" regarding the effect of Chinese coils relied on essentially the same evidence that was already considered by the CAFC and CIT.[135]
- The CAFC already concluded that "the record evidence does not show sufficient particularity for {low-priced Chinese coil} to create a {PMS} on its own." Therefore, there is no basis to depart from the CAFC's finding in this redetermination. [136]

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[129] *Id.* at 43-45 (citing *SeAH Steel Corp. v. United States,* CIT Consol. Ct. No. 19-68, Slip Op. 22-100 (CIT Sustaining OCTG Korea 2016-17 Redetermination), *SeAH Steel Corp. v. United States*, CIT Ct. No. 20-150, Slip Op. 22-101 (CIT Sustaining OCTG Korea 2017-18 Redetermination)).
[130] *See* SeAH's Draft Remand Comments.
[131] *Id.* at 2-3.
[132] *Id.* at 3.
[133] *Id.*
[134] *Id.* at 3-4.
[135] *Id.* at 4.
[136] *Id.* (citing *NEXTEEL III*, 28 F. 4th at 1237).

NEXTEEL's Comments[137]

- Commerce should affirm its decision that no PMS existed but should revise certain aspects of its analysis in reaching that decision.[138]
- Commerce's Draft Results of Redetermination are correct to not further analyze the three PMS factors that the CAFC found were unsupported by substantial evidence.[139]
- Commerce should reject U.S. Steel's suggestion that Commerce reopen the record. There is a mountain of information already on the record.[140]
- If Commerce attempts to make a PMS adjustment, Commerce cannot rely on adverse facts available CVD rates.[141]
- Because Commerce has not shown that HRC subsidies have been passed on to the purchaser, Commerce cannot quantify a PMS.[142]
- The CAFC in fact relies on prior CIT opinions, thus U.S. Steel's claim that the CAFC has swept aside prior CIT rulings is meritless.[143]
- As a threshold matter, Commerce must find that prices are outside the ordinary course of trade to find a PMS exists. Because the record does not support finding a distortion in the Korean electricity market, Commerce should continue to make a negative PMS determination.[144]

[137] *See* NEXTEEL's Draft Remand Comments.
[138] *Id.* at 2 and 5.
[139] *Id.* at 3-4.
[140] *Id.* at 5.
[141] *Id.* at 6 and 22-23.
[142] *Id.* at 7-8.
[143] *Id.* at 8-9.
[144] *Id.* at 9.

- Commerce's conclusion that imports of low-priced Chinese steel could contribute to the existence of a PMS is speculative and unsupported.[145]
- Any impact of low-priced Chinese steel that could contribute to a PMS would not be relevant to NEXTEEL. Commerce must find a link between Chinese imports and "the price of the input" used by NEXTEEL to produce the subject merchandise.[146]
- The miniscule quantity of hot rolled steel NEXTEEL purchased from Chinese producers could not possibly distort NEXTEEL's overall input cost.[147]
- Any claim that imports from China affected the prices NEXTEEL paid for Korean steel inputs is unsupported. If the alleged distortions have resulted in lower prices there should be at least a quantitate comparison showing a difference between costs incurred and costs in the ordinary course of trade.[148]
- The Draft Results of Redetermination lack any quantitative analysis showing how the alleged low-priced HRC from China affected the price of HRC input in NEXTEEL's production of OCTG during the POR.[149]
- Commerce does not explain why it used 2012 data or why it is meaningful.[150]
- Commerce's finding is purely speculative because it merely finds that Chinese exports of steel products *may* have created downward price pressure on steel prices from China.[151]

[145] *Id.* at 10.
[146] *Id.* at 11.
[147] *Id.* at 12.
[148] *Id.*
[149] *Id.* at 12-13.
[150] *Id.* at 13.
[151] *Id.* (citing Draft Results of Redetermination at 13 (NEXTEEL's emphasis)).

- Commerce overlooks other market dynamics such as steel production and imports from other countries. The data demonstrate that there was nothing "particular" about the presence of Chinese imports of steel products during the POR.[152]
- Relevant benchmarks exist that demonstrate there is no distortion in NEXTEEL's reported average HRC cost. U.S. Steel's reading of *NEXTEEL III* that concludes Commerce need not conduct a benchmark analysis is misguided. Commerce must consider the record as a whole.[153]
- NEXTEEL's cost data demonstrate that it sourced some of its HRC from the Korean producer POSCO. By definition POSCO's costs are not impacted by any PMS based on imported steel from China because POSCO itself produces its own raw steel in Korea.[154]
- U.S. Steel tries to mislead Commerce with its own interpretation of the CAFC's holdings by suggesting that the term "particular" does not suggest that a distortion must be wholly unique.[155]
- U.S. Steel provides no link between Chinese imports and the price of the input used by NEXTEEL.[156]
- Commerce's negative PMS finding regarding electricity is consistent with the statutory framework that a distortion must exist such that prices cannot be considered competitively set.[157]

[152] *Id.* at 14-15.
[153] *Id.* at 15-16.
[154] *Id.* at 16.
[155] *Id.* at 16-17.
[156] *Id.* at 17.
[157] *Id.* at 18.

- Because Commerce found that the evidence was insufficient to demonstrate that a distortion exists such that Korean electricity prices cannot be considered competitively set, the issue of justifying a PMS determination in light of CVD findings is rendered moot.[158]
- Commerce's CVD determinations confirm that Korean steel producers received no financial benefit from the GOK's involvement in the Korean electricity market and that the prices in the market are consistent with prevailing market conditions. This essentially confirms this factor does not contribute to a PMS.[159]
- Even if Commerce found that a distortion exists in the Korean electricity market, the data show that Korean electricity prices were not made outside the ordinary course of trade.[160]
- Japanese electricity prices were an outlier and Commerce was correct to use the IEA median electricity price as a benchmark.[161]
- It was U.S. Steel's burden to sufficiently substantiate the PMS. U.S. Steel submitted a mountain of materials and Commerce and the Courts have been analyzing this issue for over five years. Accordingly, Commerce should not reopen the record.[162]

Commerce's Position:

A. The CAFC has Confirmed Commerce's Flexibility in Conducting PMS Analysis

As an initial matter, we will respond to U.S. Steel's comments, which contend that the CAFC has liberalized Commerce's PMS Analysis. In the *Second Redetermination*, Commerce explained that it respectfully disagreed with the CIT directing Commerce "to reverse its finding of a particular market situation and to recalculate the mandatory respondents' and non-examined

[158] *Id.* at 19.
[159] *Id.* at 20.
[160] *Id.* at 20-21.
[161] *Id.* at 21.
[162] *Id.* at 21-22.

companies' dumping margins,"[163] because "the court concludes that Commerce's analysis and explanation of the five factors supporting a particular market situation in Korea are unsupported by substantial record evidence."[164] In *NEXTEEL III*, the CAFC found that CIT exceeded its authority by directing Commerce to reach a particular outcome. Further, the CAFC left open the possibility that a PMS could potentially exist based on GOK involvement in the electricity market and Korean imports of HRC from China.[165]

U.S. Steel argues that the CIT discarded evidence that predated the POR.[166] We clarify, as explained by the CIT itself, that the CIT does not reject or discard information of record, but rather, it examines whether the evidence is sufficient to support the agency's determinations.[167] While the CIT did not reject or discard evidence, the CAFC held that the CIT erred when the CIT "reversed Commerce based on its weighing of the evidence, *e.g.*, discounting evidence that predated the period of review, and not because the record supports only one outcome."[168]

The Supreme Court of the United States (Supreme Court) has held that Congress was deliberate in establishing a standard of review that "frees the reviewing courts of the time consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal."[169] Further, the Supreme Court explained that, "agency determinations frequently rest upon a complex and hard-to-review mix of considerations," and that, "by giving the agency discretionary power to fashion remedies, Congress places a premium upon agency expertise."[170] Accordingly, as the administering authority and therefore the agency

[163] *See NEXTEEL II*, 450 F. Supp. 3d at 1343.
[164] *Id.*
[165] *See NEXTEEL III* 28 F. 4th at 1237 – 1238.
[166] *See* U.S. Steel's Draft Remand Comments at 36.
[167] *See* CIT Sustaining OCTG Korea 16-17 Redetermination at 17-18.
[168] *See NEXTEEL III*, 28 F. 4th at 1238.
[169] *See Consolo v. Federal Maritime Commission*, 467 U.S. 837 at 620-21 (1966).
[170] *Id.*

with expertise conducting PMS analysis, Commerce has discretion on how to weigh non-contemporaneous evidence. As explained in the *2017-18 OCTG Korea Redetermination*, each document should be evaluated as it *relates* to the POR at issue.[171] Therefore, while Commerce may give the most weight to contemporaneous information, it may also make a reasonable inference based on sufficient non-contemporaneous information.[172] As we understand the CAFC's holding, the CAFC found that the CIT erred when it "reversed Commerce based on its weighing of the evidence, *e.g.*, discounting evidence that predated the period of review, and not because the record supports only one outcome."[173] Accordingly, *NEXTEEL III* confirms Commerce's flexibility to make determinations on how to weigh and select among competing evidence.

We agree with U.S. Steel that the CAFC left open the possibility that Commerce could make an affirmative PMS finding regarding GOK involvement in the electricity market, despite Commerce's previous negative CVD findings regarding Korean electricity, if Commerce justified its departure from CVD findings.[174] However, given that the CIT's order directing Commerce to reach a particular outcome was reversed by the CAFC, we disagree with U.S. Steel that, as an analytical matter, the CIT held that affirmative CVD determinations are a prerequisite to Commerce making an affirmative PMS determination. In *NEXTEEL II*, the CIT held:

> On remand, Commerce noted the Korean Government's "tight control" of pricing in the electricity market, discussed the impact of electricity prices on the OCTG manufacturing process, and made the inferential leap that Korean electricity prices to OCTG producers distort the prices for HRC in Korea. Even recognizing the Korean Government's hands-on approach to regulating the electricity market,

[171] *See 2017-18 OCTG Korea Redetermination* at 7.
[172] *See, e.g., Coal. of Am. Flange Prods. v. United States*, (CIT 2021). Trade LEXIS 58 at *16 (May 13, 2021) ("the court defers to Commerce's reasonable inference that Chandan was familiar with the behavior of its customer in light of the negotiation history"); *Vicentin S.A.I.C. v. United States*, 466 F. Supp. 3d 1227, 1242 (CIT 2020) ("Commerce draws reasonable inferences from the information available explaining that spot prices demonstrate what buyers must pay….").
[173] *See NEXTEEL III*, 28 F. 4th at 1238.
[174] *See* U.S. Steel's Draft Remand Comments at 36-37; *see also NEXTEEL III*, 28 F. 4th at 1238.

> Commerce has found in prior CVD investigations, more than once, no evidence that Korean steel producers received countervailable subsidies as to electricity. The court concludes that Commerce's determination that the Korean Government's regulation of the Korean electricity market contributes to a particular market situation is not supported by substantial evidence.[175]

We disagree with U.S. Steel's interpretation that the CIT barred Commerce from making an affirmative PMS determination because Commerce had previously found that countervailable subsidies were not conferred. Rather, we find that the CIT identified two circumstances that could potentially establish the existence of a PMS: (1) evidence that electricity prices are distorted; and (2) evidence of countervailable subsidies. This interpretation is consistent with the *2017-18 OCTG Korea Redetermination*, where Commerce found similar language from the CIT should be interpreted as identifying "three circumstances that could potentially establish the existence of particular market situation: (1) evidence of countervailable subsidies; (2) evidence of subsidies (of any kind); and (3) evidence that prices are not competitively set."[176] While we disagree with U.S. Steel that the CIT previously restricted Commerce from making an affirmative PMS determination based on Korean electricity, we agree with U.S. Steel that the CAFC clarified that Commerce may make an affirmative PMS determination based on Korean electricity if Commerce justifies the departure from CVD findings.

Next, we agree with U.S. Steel that the CAFC clarified that Commerce is not required to quantify a distortion precisely.[177] However, the CAFC further explained that a quantitative comparison that shows a difference between costs incurred and costs in the ordinary course of trade could be substantial evidence.[178] Similarly, evidence that costs do not differ at all from what they would have been in the ordinary course of trade detracts substantially from the

[175] *See NEXTEEL II*, 450 F. Supp. 3d at 1342-43.
[176] *See 2017-18 OCTG Korea Redetermination* at 21.
[177] *See* U.S. Steel's Draft Remand Comments at 37; *see also NEXTEEL III*, 28 F. 4th at 1234.
[178] *See NEXTEEL III*, 28 F. 4th at 1234.

evidence.[179] Further, we disagree with U.S. Steel that the quotations it cites demonstrate that the CIT previously required Commerce to quantify a PMS precisely. More importantly, regardless of these quotations, the CAFC made it clear that nothing in the statute requires Commerce to quantify a distortion precisely.[180] Nor do we interpret the CIT's latest *Remand Order* as imposing such requirement in contravention of the CAFC's decision.

Further, U.S. Steel argues that the CAFC clarifies there is not an additional quantitative hurdle when conducting a PMS analysis (*e.g.*, that Commerce must compare the input price in the distorted market against some "ordinary course of trade" benchmark).[181] We agree with U.S. Steel that the CAFC clarified that Commerce must find that the cost incurred to produce the subject merchandise "does not accurately reflect the cost of production in the ordinary course of trade."[182] While the CAFC held that Commerce is not required to perform a quantitative analysis to quantify a distortion precisely, the CAFC also held that quantitative comparisons could be informative, as they can either support or detract from the substantiality of the evidence supporting the existence of particular market situation.[183]

Lastly, U.S. Steel argues that Commerce should not consider the CIT's recent opinions and judgements with respect to the *2016-2017 OCTG Korea Redetermination* and *2017-18 OCTG Korea Redetermination*.[184] While we agree with U.S. Steel that that the CIT's case-specific findings pertaining to PMS do not dictate whether a PMS exists in Korea during this period of review, we continue to find that the CIT's holdings in other cases could be informative (and even persuasive), and that we may consider them in this proceeding. In fact, the CAFC

[179] *Id.*
[180] *See* U.S. Steel's Draft Remand Comments at 37; *see also NEXTEEL III*, 28 F. 4th at 1234.
[181] *See* U.S. Steel's Draft Remand Comments at 37.
[182] *See NEXTEEL III*, 28 F. 4th at 1234.
[183] *Id.*
[184] *See* U.S. Steel's Draft Remand Comments at 43-45; *see also* CIT Sustaining OCTG Korea 2016-17 Redetermination; and CIT Sustaining OCTG Korea 2017-18 Redetermination.

itself cited the CIT's opinion in *SeAH* when analyzing the Korean HRC subsidies PMS factor.[185] Accordingly, we have prepared these final results of redetermination consistent with *NEXTEEL III*, but we have considered previous CIT opinions where appropriate.

B. Commerce has Discretion Not to Reopen the Record

U.S. Steel argues that Commerce should reopen the administrative record on remand if Commerce is not inclined to find a PMS exists.[186] U.S. Steel cites court cases that hold that it is within Commerce's discretion to open the administrative record on remand.[187] U.S. Steel states that it has additional evidence that it would have placed on the record if it had existed at the time the PMS Allegation was filed.[188] Further, U.S. Steel contends that Commerce could request potentially probative evidence that is solely in possession of the mandatory respondents.[189] Finally, U.S. Steel argues that it is in the interest of fairness and good governance to reopen the administrative record.[190]

We agree with U.S. Steel that Commerce has the discretion to open the administrative record on remand. However, we disagree with U.S. Steel that it would be appropriate or is necessary to reopen the administrative record during this remand proceeding. We are able to complete these final results of redetermination consistent with *NEXTEEL III* based on the information already on the record of the administrative proceeding. The burden of creating an adequate record lies with interested parties and not with Commerce.[191] Therefore, the burden to substantiate the PMS Allegation rested with the party making the allegation, *i.e.*, Maverick, at

[185] *See NEXTEEL III*, 28 F. 4th at 1235-36 (citing *SeAH Steel Corporation v. United States* 513 F. 3d 1367 (CIT 2021) (*SeAH*)).
[186] *See* U.S. Steel Draft Remand Comments at 41-43.
[187] *Id.* (citing, *e.g.*, *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F. 3d 1379, 1382 (Fed. Cir. 2003) (*Nippon*)).
[188] *Id.* at 43.
[189] *Id.*
[190] *Id.*
[191] *See QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011).

the time the allegation was made. U.S. Steel availed itself of an opportunity to provide clarifying information to Maverick's PMS Allegation.[192] Because Commerce is able to make a final redetermination consistent with *NEXTEEL III* based on the current administrative record, and because all interested parties were given opportunities to submit information to support or rebut the PMS Allegation during the administrative review, we disagree that fairness requires Commerce to reopen the record of the administrative proceeding. Accordingly, we are using our discretion not to reopen the administrative record.

With respect to U.S. Steel's argument that additional new evidence may exist now that did not exist at the time the allegation was made, the deadline for submitting the PMS allegation in this case was September 4, 2017.[193] Although we recognize that the passage of time could lead to discovery of new evidence after the administrative proceeding has been completed, Commerce conducts its proceedings under statutory and regulatory deadlines, and all allegations and supporting evidence must be submitted by the deadlines that the agency establishes. Absent narrow exceptions, not applicable here (*e.g.*, fraud), the agency will make its remand determination based on the existing administrative record.[194]

C. Korean HRC Subsidies, Strategic Alliances Between Korean HRC Suppliers and Korean OCTG Producers, and Steel Industry Restructuring by the GOK

As explained above, because the CAFC found that Commerce's analysis of three factors in the *First Redetermination* (*i.e.*, Korean HRC subsidies, strategic alliances between Korean HRC suppliers and Korean OCTG producers, and steel industry restructuring by the GOK) was unsupported by substantial evidence on the record of this review, we did not conduct further

[192] *See* U.S. Steel PMS Supporting Information.
[193] *See* 19 CFR 351.301(c)(5).
[194] *See Home Prods. Int'l Inc. v. United States*, 633 F.3d 1369, 1379 (Fed. Cir. 2011) ("Where there is new evidence indicating that the original record was tainted by fraud, reopening may be appropriate.").

analysis of these factors.[195] U.S. Steel argues that Commerce is free to reconsider all PMS factors on remand, and that the CAFC highlighted examples of findings that Commerce might make or weaknesses it might address to support these three factors.[196] Further, U.S. Steel argues that declining to analyze these factors is itself a basis for further remand.[197] Finally, U.S. Steel argues that when an injured domestic industry files an allegation of a PMS with Commerce, the very least Commerce can do is analyze it.[198]

First, we disagree with U.S. Steel's contention that the Commerce has failed to fully analyze a PMS allegation submitted by an injured domestic industry. Commerce not only fully analyzed the PMS Allegation in the *Final Results*, but also in the *First Redetermination*. As explained above, Commerce did not conduct a further analysis of these three PMS factors (*i.e.*, Korean HRC subsidies, strategic alliances between Korean HRC suppliers and Korean OCTG producers, and steel industry restructuring by the GOK), because the CAFC found Commerce's reasoning in the *First Determination* was unsupported by substantial evidence. We agree with U.S. Steel that because the CAFC was limited to reviewing Commerce's reasoning, it did not decide whether a PMS could be found based on any subset of factors or other reasoning. However, we disagree that the CAFC required Commerce to reach the same outcome on remand as in the original determination. Further, we disagree that the CAFC required Commerce to provide alternative reasoning and analysis for the PMS factors of Korean HRC subsidies,

[195] *See* pages 6-7, *supra*.
[196] *See* U.S. Steel's Draft Remand Comments at 27-29.
[197] *Id.* at 29.
[198] *Id.*

strategic alliances, and steel industry restructuring by the GOK. We will address U.S. Steel's arguments with respect to each of these three factors below.

Korean HRC Subsidies

U.S. Steel argues that it has identified other reasoning regarding the Korean HRC subsidies that can be sustained by the CAFC.[199] According to U.S. Steel, the CAFC noted the evidence of subsidization during the POR was mixed, and because mixed evidence is substantial evidence, the record evidence is sufficient to support Commerce's conclusion in the *First Redetermination* that meaningful subsidization existed.[200] Next, U.S. Steel argues that while the CAFC faulted Commerce for not making a finding that subsidies were passed through, the record contains evidence and rationale to support finding that subsidies were passed through from HRC producers to OCTG producers.[201]

We disagree with U.S. Steel's "reasoning" and its characterization of *NEXTEEL III* and the evidence on the record. The CAFC did not hold that Commerce's determinations regarding subsidization in the *First Redetermination* was supported by substantial evidence; rather, the CAFC held that "the record evidence is at best mixed on whether significant Korean government subsidies existed during the {POR}."[202] The phrase "*at best*" indicates that only the most favorable interpretation would lead to a finding that the evidence is mixed on whether Korean HRC subsidies existed. Further, ultimately the CAFC held that "substantial evidence does not support Commerce's finding that Korean HRC subsidies contribute to a particular market situation."[203] Therefore, the statement regarding "the record evidence is at best mixed" should

[199] *See* U.S. Steel's Draft Remand Comments at 29-32.
[200] *Id*.
[201] *Id.* at 30-32.
[202] *See NEXTEEL III*, 28 F. 4th at 1235-1236.
[203] *Id.*

be understood in light of the overall holding that substantial evidence did not support this PMS factor. In *Hot-Rolled Steel Flat Products from Korea Final CVD Determination*, Commerce determined a 57.04 percent subsidy rate for the respondent POSCO.[204] However, the CAFC observed that the *Hot-Rolled Steel Flat Products from Korea Final CVD Determination* covered a period that ended prior to the POR of this proceeding.[205] Further, the *Hot-Rolled Steel Flat Products from Korea 2016 Final CVD Results*, in which Commerce found near *de minimis* subsidy rates,[206] cover a period that has an eight month overlap with the POR of this proceeding.[207] As explained above, *NEXTEEL III* confirms that Commerce has the discretion to weigh evidence (*e.g.*, contemporaneous evidence vs. non-contemporaneous evidence). We find that in determining if Korean HRC subsidies contributed to a PMS, a greater weight should be given to the *Hot-Rolled Steel Flat Products from Korea 2016 Final CVD Results* (which is contemporaneous with eight months of this proceeding) than the *Hot-Rolled Steel Flat Products from Korea Final CVD Determination* (which is not contemporaneous with this proceeding). Thus, upon review of the record, we find the evidence is insufficient to demonstrate that HRC

[204] *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) (*Hot-Rolled Steel Flat Products from Korea Final CVD Determination*).
[205] *See NEXTEEL III*, 28 F. 4th at 1235-1236 (citing *Hot-Rolled Steel Flat Products from Korea Final CVD Determination*).
[206] While the CAFC describes these subsidy rates as *de minimis* in *NEXTEEL III*, 28 F. 4th at 1235, Commerce found the subsidy rates to be slightly above *de minimis*. While the *de minimis* rate is 0.5 percent, Commerce found subsidy rates ranging from 0.54 percent to 0.58 percent.
[207] *See Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 2016*, 84 FR 28461 (June 19, 2019) (*Hot-Rolled Steel Flat Products from Korea 2016 Final CVD Results*); *see also Countervailing Duty Order on Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Amended Final Results of the First Administrative Review*, 84 FR 35604 (July 24, 2019) (*Hot-Rolled Steel Flat Products Korea 2016 Amended Final CVD Results*).

producers received countervailable subsidies to a degree that could contribute to a PMS in Korea during the POR.

Further, we disagree with U.S. Steel that the record contains sufficient evidence for a finding that subsidies were passed-through from HRC producers to OCTG producers.[208] U.S. Steel argues that it would be economically illogical for POSCO not to pass-through subsidies in the form of lower HRC prices: POSCO received government subsidies, and POSCO admitted to "struggling mostly because China is flooding the market with extremely cheap products."[209] U.S. Steel also argues that there is no evidence that demonstrates POSCO refused to pass-on government subsidies through lowering its HRC prices.[210] However, as explained above, we find that the record is insufficient to demonstrate that HRC producers received countervailable subsidies to a degree that could contribute to a PMS in Korea during the POR. Further, while U.S. Steel notes that there is no evidence on the record that contradicts the notion that POSCO passed on HRC subsidies to OCTG producers, U.S. Steel did not identify any affirmative evidence that demonstrates subsidies were passed on to OCTG producers. Accordingly, we find that the evidence and reasoning advanced by U.S. Steel is insufficient to demonstrate that HRC subsidies were passed through to OCTG producers.

GOK's Steel Industry Restructuring

In *NEXTEEL III*, the CAFC held that substantial evidence does not support Commerce's finding that steel industry restructuring efforts contributed to a PMS because announcement and other publications discussing future restructuring efforts provide no evidence of actual government financial assistance to support restructuring during the POR.[211] U.S. Steel argues

[208] *See* U.S. Steel's Draft Remand Comments at 30-32.
[209] *Id.*
[210] *Id.*
[211] *See NEXTEEL III*, 28 F. 4th at 1236-1237.

that it identified evidence that is sufficient to demonstrate steel industry restructuring efforts contributed to a PMS.[212] First U.S. Steel argues that the GOK's "2017 Action Plan for Industrial Restructuring" itself refers to government "work on approving the six business restructuring plans," demonstrating that restructuring plans were submitted for approval at some point beforehand. Next, U.S. Steel identifies a May 2016 article in the *Korean Herald* that quotes a government spokesperson stating "{w}hen the restructuring plans gain approval from the committee in August {2016}, we will introduce diverse measures such as tax *breaks* to support the ailing {steel} industry."[213] Similarly, U.S. Steel identified an article in *Steel Orbis*, where Korea's Minister of Trade, Industry, and Energy pledged to the Korean Iron and Steel Association that "the government will also actively help the South Korean steel industry to spontaneously accelerate its business reorganization through simplifying administrative procedures, relaxing regulations, and providing taxation support according to the Corporate Vitality Enhancement Act that will take effect from August {2016}."[214]

We disagree that the information U.S. Steel identified is sufficient to demonstrate that the GOK's steel industry restructuring contributed to a PMS in Korea during the POR. In the *First Redetermination*, Commerce relied on the "2017 Action Plan for Industry Restructuring" as support for its determination that the GOK's steel industry restructuring contributed to a PMS in Korea, but the CAFC held that the announcement and other publications discussing future restructuring efforts provide no evidence of actual government interference during the POR.[215] Commerce has no authority to overrule the CAFC's holding. Similarly, the additional articles in *Korean Herald* and *Steel Orbis* discuss the GOK's future plans to restructure the steel industry.

[212] *See* U.S. Steel's Draft Remand Comments at 33.
[213] *Id.* (citing U.S. Steel PMS Supporting Information at Exhibit 5).
[214] *See* U.S. Steel's Draft Remand Comments at 33 (citing U.S. Steel PMS Supporting Information at Exhibit 6).
[215] *See NEXTEEL III*, 28 F. 4th at 1236-37.

While the articles discuss restructuring that the GOK was planning to conduct in August 2016, which is within the POR, U.S. Steel has not identified evidence that the GOK actually carried out its restructuring plans. Accordingly, we reconsidered the entire record, in light of the remand order and the CAFC's opinion, and determine the additional evidence identified in U.S. Steel's Draft Remand Comments is insufficient to demonstrate GOK steel industry restructuring contributed to a PMS in Korea during the POR.

U.S. Steel also argues that Commerce can rely on other reasoning to find that the GOK steel industry restructuring supports finding a PMS existed in Korea during the POR.[216] Specifically, U.S. Steel contends that, although the steel industry restructuring efforts themselves may not have created a distortion that created a PMS, steel industry restructuring efforts reflect dire market conditions that necessitated the GOK to initiate steel industry restructuring. In order for Commerce to make an affirmative PMS determination, a party must demonstrate a PMS factor is distorting the cost of production (COP) such that it no longer reflects the COP in the ordinary course of trade.[217] Therefore, we find that GOK steel industry restructuring occurring outside the POR would not distort the COP such that it no longer reflects the COP in the ordinary course of trade. Accordingly, we disagree with U.S. Steel that this "other reasoning" can be used to find GOK steel industry restructuring supported a PMS finding during the POR. While we find that there is not sufficient evidence to demonstrate that actual industry restructuring occurred within the POR that could have distorted OCTG producers' COP, explained further

[216] *See* U.S. Steel's Draft Remand Comments at 34.
[217] *See* section 771(e) of the Act.

below, we agree with U.S. Steel that the GOK's restructuring plans are a reaction to distortion occurring in the steel market due to HRC imports from China.

Next U.S. Steel argues that the GOK steel industry restructuring plans further demonstrate the particularity of the low-priced HRC imports from China. Reviewing the article in the *Korean Herald*, we find that the GOK-planned Corporate Vitality Enhancement Act was in part a reaction to oversupply in the steel industry.[218] Reviewing the article in the *Steel Orbis*, we find that planned structural reforms were in part a reaction to protect the domestic market from low-priced, defective, and unfairly imported products. We find that these articles are not sufficient evidence to demonstrate that actual GOK steel industry restructuring supported a PMS in Korea during the POR. Further, we find that the two articles identified by U.S. Steel, on their own, are insufficient to demonstrate that low-priced HRC imports from China contributed to a PMS in Korea during the POR because the articles only discuss future restructuring plans and do not demonstrate actual restructuring took place. However, we agree with U.S. Steel that the articles identified demonstrate that the steel industry restructuring plans were, at least in part, the GOK's reaction to unfairly imported products. Therefore, the articles identified by U.S. Steel support Commerce's determination above that Korea had low-priced HRC imports from China during the period of review.

Strategic Alliances

U.S. Steel concedes that "on the administrative record as it stands, the CAFC's reasoning likely rules out a PMS finding based on strategic alliances."[219] We agree. Further, U.S. Steel did not identify any evidence that could be further analyzed to support this PMS factor.

[218] *See* U.S. Steel's PMS Supporting Information at Exhibit 5.
[219] *See* U.S. Steel's Draft Remand Comments at 35.

Accordingly, we find in light of *NEXTEEL III*, the evidence on the record is insufficient to demonstrate strategic alliances contributed to the existence of PMS in Korea during the POR.

D. GOK Involvement in the Electricity Market

As explained above, when we reexamined the record, we found that the evidence was insufficient to establish that GOK involvement in the electricity market contributed to a PMS in Korea during the POR. U.S. Steel argues that Commerce's reexamination of the record was beyond the scope of *NEXTEEL III*, and that Commerce arbitrarily reached the opposite conclusion based on the same evidence.[220] U.S. Steel argues that Commerce distorted the CAFC's inquiry from "why a PMS can exist where a countervailable subsidy does not," into "whether distortion indicative of a PMS actually exists."[221] We disagree with U.S. Steel. When the CAFC held that the CIT exceeded its authority by directing Commerce to reach a particular outcome, the CAFC cited *Nippon*, "even if {the record} is not {enlarged}, new findings and explanations by the Commission can be expected."[222] Therefore not only is Commerce permitted to make new findings and explanations when the record is not expanded, such an outcome is an expected result when a proceeding is remanded for further consideration consistent with a court decision. In *NEXTEEL III*, the CAFC itself identifies the fact Korean electricity prices are comparable to the median IEA member's electricity price as evidence that contradicts Commece's findings in the *First Redetermination*.[223] Accordingly, it is within the

[220] *Id.* at 20.
[221] *Id.*
[222] *See NEXTEEL III*, 28 F. 4th at 1238 (citing *Nippon*, 345 F. 3d at 1381).
[223] *See NEXTEEL III*, 28 F. 4th at 1237.

scope of *NEXTEEL III* for Commerce to reexamine the IEA report on members' electricity prices in light of the statements regarding such report that the CAFC made in that decision.

U.S. Steel argues that Commerce erred when it included taxes in its analysis of electricity prices.[224] Excluding taxes, we find that the 2016 Korean electricity price was 6.72 pence per kWh,[225] and the 2016 IEA median electricity price was 6.30 pence per kWh.[226] Thus, a comparison of electricity prices excluding taxes shows that Korea's electricity price in 2016 was approximately seven percent higher than the IEA median electricity price. In our view, Korea's electricity price in 2016 was slightly higher, but generally in line with the median electricity price in the IEA report. To the extent that electricity prices differed from the IEA median electricity prices, electricity prices in Korea were *higher* not *lower*. In *NEXTEEL III*, the CAFC held that evidence that costs do not differ at all from what they would have been in ordinary course of trade detracts from substantiality of the evidence.[227] Accordingly, we find that an analysis of the 2016 Korean electricity price compared to the 2016 IEA median electricity price detracts from the evidence regarding GOK intervention in the electricity market contributing to PMS.

Next U.S. Steel argues that Commerce "missed the mark" when it compared Korean electricity prices to the IEA median electricity prices.[228] U.S. Steel argues that there is nothing inherently more probative about an "average" figure, as compared with a single figure derived from a similar market.[229] U.S. Steel argues that Japan is the most appropriate comparison because it is the only other country included in the IEA report located in East Asia and that

[224] *See* U.S. Steel's Draft Remand Comments at 22.
[225] *See* NEXTEEL PMS Rebuttal at Exhibit 10.
[226] *Id.*
[227] *See NEXTEEL III*, 28 F. 4th at 1234.
[228] *See* U.S. Steel's Draft Remand Comments at 22.
[229] *Id.*

Korea and Japan are the world's two largest importers of liquified natural gas (LNG).[230] Further, U.S. Steel argues that Commerce relied on speculation and dated information discussing the aftermath of the March 11, 2022, Tohoku Earthquake and Tsunami in Japan.[231] Next, U.S. Steel argues it is inappropriate to compare Korean electricity prices to the IEA median member's electricity price because Korea itself is included in the calculation of the IEA median price.[232] Lastly, U.S. Steel argues that if Commerce was interested in finding the most appropriate comparison for Korean electricity prices, Commerce could open the record to NFI.[233]

We disagree with U.S. Steel on each of its arguments above. In our view, a median figure that encompasses multiple datapoints (countries) provides a better benchmark that represents the prevailing electricity prices in multiple markets than a single data point derived from a single country. We recognize that prices in various countries are either below or above the median price of all countries included in the report and we do not suggest that Korean prices must match the median price or that it cannot deviate from the median. However, in our view, the fact that Korean prices approximate the median of all prices included in the report suggests that Korea's electricity price is generally in line with the median of country-wide prices included in the report. As explained on page 11 above, we find, absent evidence on the record of this review demonstrating that Japanese electricity rates are the most appropriate comparison for Korean electricity rates, the median industrial electricity rate among IEA members is a better comparison for Korea's electricity rates. This comparison, which uses a median of the broader scope of electricity price data, is less likely to have results affected by market peculiarities or distortions in any single country. If the record contained sufficient evidence that demonstrated

[230] *Id.* at 23.
[231] *Id.*
[232] *Id.* at 22-23.
[233] *Id.* at 24.

Japanese electricity prices are a more appropriate comparison for Korean electricity rates, Commerce may have used the Japanese electricity price as the comparison. However, absent sufficient evidence demonstrating that Japanese electricity prices are a more appropriate comparison for Korean electricity prices, we find that the IEA median member electricity price is the best available comparison because it avoids potentially skewed results from peculiarities or distortions in a single country.

Next, we disagree with U.S. Steel that the record demonstrates that Japan is the most appropriate comparison market to gauge Korean electricity prices. As explained above, the record does not contain evidence demonstrating that geography is the predominant factor that affects electricity prices. While U.S. Steel observes that both Korea and Japan are large importers of LNG, as explained above, we find that Japan changed its energy consumption from nuclear energy to LNG shortly before the relevant period. We are not aware of any evidence on the record that during the corresponding period Korea similarly transitioned its energy consumption from nuclear energy to LNG and, thus, experienced a similar transition and corresponding costs in its energy sector. While U.S. Steel argues that Commerce is speculating, we disagree. We are evaluating the existing record, which indicates certain potential peculiarities existing in the Japanese market. We disagree with U.S. Steel that it is inappropriate to rely on the IEA median electricity price because Korea was included in the calculation of the median. Korea was one of 27 countries included in the calculation of the IEA median; thus, it would have a minimal impact on the final calculation of the IEA median electricity price, particularly in light of the fact that the difference between Korea's price and the median price is small. Lastly, U.S. Steel argues that if Commerce wanted to find out the most appropriate comparison for Korea's electricity price, it could open up the record for NFI. However, the

burden of creating an adequate record lies with interested parties and not with Commerce.[234] In addition to the opportunity to submit a PMS allegation of its own, U.S. Steel was given two opportunities during the administrative proceeding, on August 7, 2017, and August 15, 2017, to submit information regarding Maverick's PMS Allegation.[235] Therefore, to the extent that U.S. Steel believes additional factual information was necessary to demonstrate which country was the best comparison for Korean electricity prices, it had ample opportunity to provide such information during the administrative proceeding.

Next, U.S. Steel argues that the record contains evidence demonstrating that Korean electricity prices were distorted that does not require a quantitative analysis comparing Korean electricity prices to other markets.[236] We disagree. U.S. Steel identifies a U.S. Energy Information Administration article, a report written by the former chairman of the Korean Electricity Commission, a report from the Korean Board of Audit, and other evidence that demonstrates KEPCO charged industrial users of electricity below-cost prices.[237] However, all of the evidence U.S. Steel identified predates the POR.[238] As explained above, Commerce may make a determination based on sufficient non-contemporaneous information; however, record evidence demonstrates it is common for electricity prices and electricity COP to fluctuate from year to year.[239] Therefore, we find that the non-contemporaneous information on the record is insufficient to demonstrate that electricity prices were distorted during the POR to such an extent that they cannot be considered competitively set. Further, evidence contemporaneous with the

[234] *See QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011).
[235] *See* U.S. Steel PMS Supporting Information; *see also* U.S. Steel's Letter, "Oil Country Tubular Goods from the Republic of Korea," dated August 15, 2017.
[236] *See* U.S. Steel's Draft Remand Comments at 24-27.
[237] *Id.* at 24-26.
[238] *Id.*
[239] *See, e.g.*, NEXTEEL PMS Rebuttal at Exhibit 10 (showing fluctuating electricity prices); and PMS Allegation at Exhibit 3 at sub-exhibit x-16 (discussing fluctuating electricity COP, *e.g.*, falling electricity costs due to the decline in the price of oil).

POR demonstrates that Korea's electricity price was in line with the median IEA member's electricity price.[240] Accordingly, we reconsidered the entire record, in light of the remand order, and determine the additional evidence identified in U.S. Steel's Draft Remand Comments is insufficient to demonstrate GOK intervention in the electricity market created a distortion such that Korean electricity prices cannot be considered competitively set.

E. Hot-Rolled Coil Imports from China

NEXTEEL argues that Commerce's findings in its Draft Results of Redetermination regarding HRC imports from China are at odds with the CAFC's opinion,[241] and that the CAFC required Commerce find a link between HRC imports from China and the "the price of the input" used by NEXTEEL.[242] NEXTEEL also contends that because it only purchased a miniscule quantity of HRC produced in China, its costs were not distorted.[243] Further, NEXTEEL argues that Commerce erred when it conducted a market-wide quantitative analysis, and that Commerce should have at least shown a quantitative analysis comparing NEXTEEL's HRC costs to costs in the ordinary course of trade.[244] Similarly, SeAH relied on a price analysis comparing its HRC suppliers to one another and the fact that its largest supplier of HRC was Japanese to argue that Commerce's finding regarding HRC imports from China is unsupported by substantial evidence.[245]

We disagree with both NEXTEEL and SeAH. In the *Final Results*, Commerce explained that company-specific analysis is not necessary when there is sufficient evidence that the market as a whole is distorted.[246] In *Biodiesel from Argentina*, Commerce explained that, "in certain

[240] *See* NEXTEEL PMS Rebuttal at Exhibit 10
[241] *See* NEXTEEL's Draft Remand Comments at 11.
[242] *Id.*
[243] *Id.* at 12.
[244] *Id.* 12-13.
[245] *See* SeAH's Draft Remand Comments at 3-4.
[246] *See Final Results* at Comment 1.

contexts, an ordinary course of trade analysis may involve a comparison of specific sales and transactions to the general market," but also stated that "a PMS analysis is, by definition, concerned with distortions in the overall 'market,' rather than distortions in particular sales or transactions in relation to the general market."[247] In neither *NEXTEEL I* nor *NEXTEEL II* did the CIT reach the issue of whether Commerce is required to make a specific finding regarding a respondent's cost of production.[248] Similarly, the CAFC did not make a finding of whether Commerce is required to make a specific finding regarding a respondent's costs.[249] Therefore, Commerce continues to conduct a PMS analysis based on a market-wide analysis. Nevertheless, because the PMS allegation in this case was made on a market-wide basis and we analyzed that allegation on a market-wide basis, it is unnecessary for us to consider NEXTEEL's and SeAH's arguments regarding particularities of their companies' business arrangements.

SeAH argues that because the statute permits adjustments only to constructed value when "a particular market situation exists such that the cost of materials and fabrications or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade," Commerce is not permitted to make adjustments for distorted input prices that remain above costs.[250] Similarly, NEXTEEL argues that because POSCO is a Korean HRC producer, by definition, POSCO's COP was not impacted by imported steel from China.[251] Further, NEXTEEL argues that because POSCO sold its HRC to NEXTEEL at above POSCO's COP,

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[247] *See 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.
[248] *See NEXTEEL I*, 392 F. Supp. 3d at footnote 4; *see also NEXTEEL II*, 450 F. Supp. 3d at footnote 11.
[249] *See NEXTEEL III*, 28 F 4th at 1236 ("Although the parties dispute whether a cost-based particular market situation adjustment must be supported by a showing of a market-wide distortion or a respondent-specific distortion, Commerce has shown neither.").
[250] *See* SeAH Draft Remand Comments at 3 (citing Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015) (TPEA)).
[251] *See* NEXTEEL's Draft Remand Comments at 16.

NEXTEEL's costs were not impacted by Chinese imports.[252] It is unnecessary for us to reach these arguments, because we found that existence of a PMS in Korea is not supported by record evidence in this administrative review and, thus, we are not making any PMS adjustment in this case. We emphasize, however, that as a general matter, unprofitability is not a prerequisite to distortion.[253]

We disagree with NEXTEEL that Commerce's analysis regarding HRC imports from China in the Draft Results of Redetermination is speculative because Commerce began its analysis in the Draft Results of Redetermination stating that that imports of Chinese steel products *may* have created downward pressure on steel prices in Korea.[254] NEXTEEL appears to have ignored the subsequent analysis conducted by Commerce. Specifically, in addition to analyzing data trends concerning Chinese exports of HRC to Korea and the average unit value (AUV) of these exports, we also analyzed the price differential between Korean-produced and Chinese-produced hot-rolled steel and found Chinese-produced hot-rolled steel was priced USD 118 per mt lower than Korean-produced hot-rolled steel. Then, as shown on page 15 above, we analyzed the benchmark information that NEXTEEL placed on the record and found that, during the POR, the average unit value of Korea's imports of HRC was USD 337 per mt, while the average unit value of Western Europe's imports of HRC was USD 410 per mt. After this

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[252] *Id.*

[253] *See Cf. Carbon Activated Tianjin Co. v. United States*, 586 F. Supp. 3d 1360 (CIT 2022) ("Commerce emphasized its preference for using contemporaneous statements from profitable companies *that are not distorted or otherwise unreliable, and that do not indicate that the company received subsidies*.") (emphasis added); *see also Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2016-2017*, 83 FR, 63619 (December 11, 2018), and accompanying IDM, at Comment IX.A.3 ("We do not disagree with Husteel that the record reflects that some steel manufacturers in Korea have realized a profit over the POR. We also do not disagree that the prices, overall, of imported steel into Korea have increased as well. However, there is no data on the record which indicates that Chinese imported steel prices have increased to such an extent that market distortion or price suppression caused by Chinese overcapacity did not exist during the POR."), unchanged in *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 26401 (June 6, 2019).

[254] *See* NEXTEEL's Draft Remand Comments at 14.

analysis, we concluded above, on pages 15 and 16, that "distortions have resulted in lower price levels than what would have prevailed absent the distortions." There is nothing speculative about our analysis of the data that interested parties, including NEXTEEL, placed on the record.

Next, NEXTEEL argues that imports of HRC from China are not particular or significant to China because Korea imported hot-rolled steel from a number of countries and in 2016 Korean steel producers produced 17,604,000 mt of hot-rolled steel.[255] To the extent that NEXTEEL is arguing that imports of HRC from China are not significant enough to create downward price pressure, we disagree. In 2016, Chinese hot-rolled steel accounted for approximately 20 percent of total hot-rolled imports into Korea, and Korea imported 4,903,387 mt of Chinese HRC.[256] As explained in the *Final Results*, we do not consider 4,903,387 mt of HRC and 20 percent of total hot-rolled steel imports to be insignificant.[257] Further, these data show that Korean imports of HRC from China represent nearly 28 percent of Korea's entire domestic production of hot-rolled steel.[258] We find that 28 percent is not an insignificant percentage.

NEXTEEL concedes that Korea is a functioning economy driven by market forces.[259] Accordingly, market principles of supply and demand lead to the conclusion that supply-shock caused by Chinese steel overcapacity and a spike in low-priced HRC imports would create downward price pressure.

Furthermore, to the extent that NEXTEEL is arguing that imports of China are not particular because Korea imported hot-rolled steel from a number of countries, we also disagree.

[255] *See* NEXTEEL's Draft Remand Comments at 14 (citing NEXTEEL PMS Rebuttal at Exhibit 1).
[256] *See* Maverick PMS Supporting Information at Exhibit 10; *see also* NEXTEEL PMS Rebuttal at Exhibit 7.
[257] *See Final Results,* IDM at Comment 1.
[258] *See* NEXTEEL PMS Rebuttal at Exhibit 1; *see also* Maverick PMS Supporting Information at Exhibit 10.
[259] *See* NEXTEEL Draft Remand Comments at 15.

A large volume of imports from China can have a particularly distortive effect on the Korean market, and in this case, we have concluded that such a distortion occurred. As explained above, on pages 12 through 16, the Chinese government highly subsidized steel products. The Chinese government subsidization led to steel overproduction, an increase in Chinese steel exports to Korea, and downward price pressure in the domestic Korean steel market. POSCO CEO Kwon Oh Joon confirmed this analysis when he explained, "We're struggling mostly because China is flooding the market with extremely cheap products with the support from the government. We cannot help but complain about their low prices as it's impossible for us to produce at the same level and be competitive."[260]

NEXTEEL next argues that the CAFC's opinion suggests that a distortion must be "wholly unique" to be considered "particular."[261] We disagree with the premise of NEXTEEL's argument. The CAFC found that the statute does not define "particular market situation."[262] Further, the statute does not define the terms "particular" or "market situation" either, nor do regulations address any of these terms. As the Supreme Court held in *Chevron* "{w}ith regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[263] Accordingly, the CAFC and the CIT review whether Commerce's interpretation of "particular" is permissible. Commerce has not interpreted "particular" to mean wholly unique. For example, the SAA lists different holiday periods as an example of PMS, despite the fact that differing holiday periods exist in many markets worldwide. The CAFC did not hold that Commerce's interpretation of the

[260] *See* U.S. Steel PMS Supporting Information at Exhibit 4.
[261] *See* NEXTEEL's Draft Remand Comments at 16-17.
[262] *See NEXTEEL III*, 28 F.4th at 1234.
[263] *See Chevron U.S.A., Inc., v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 at 843 (1984).

term "particular" is unlawful. Rather, the CAFC held that Commerce's finding of the particular market situation, which was based on the interplay of the five factors, was not supported by substantial evidence.

Similarly, as explained above, Commerce has consistently found that a global phenomenon can have distortive effects which manifest differently in different markets.[264] The CAFC cites the CIT stating, "an ongoing global phenomenon would not alone constitute a deviation from the 'ordinary course of trade.'"[265] However, this holding is not at odds with Commerce's understanding of the term "particular." As explained above, there may be sufficient evidence that demonstrates the effect of the global phenomenon manifested differently in different markets. Therefore, depending on the circumstances, a global phenomenon may affect all markets, equally, so that market principles simply do not apply to the value of a particular product globally, OR the phenomenon may affect one geographic market particularly acutely and create a PMS limited to a single country, OR the phenomenon may affect different countries differently and render several geographic markets outside the ordinary course of trade and create several particular market situations of differing degrees of distortions. Although the CAFC did not sustain Commerce's affirmative PMS determination in the *First Redetermination*, the CAFC did not make a ruling regarding the permissibility of Commerce's interpretation of "particular."[266] Accordingly, we disagree with NEXTEEL that a distortion must be wholly unique to be considered particular.

Regardless of whether the PMS factor of low-priced HRC imports from China affects the market for HRC solely in Korea, this does not affect Commerce's ability to make a

[264] *See, e.g.*, *OCTG Korea 2017-18 Final Results* IDM at Comment 1-B.
[265] *See NEXTEEL III*, 28 F.4th at 1234 (citing *SeAH* at 1393).
[266] *See NEXTEEL III*, 28 F. 4th at 1233-38.

determination that this factor could contribute to a PMS. In *OCTG Korea 2017-18 Final Results*, Commerce found that HRC imports from China contributed to a PMS not solely based on the individual factor, but also because of the other PMS factors present, stating, "In the Korean market particularly, the government provided subsidization to major producers of HRC aimed at supporting domestic steel producers and their ambitions for capacity expansions, a scenario of further distortions that is unique to Korea."[267] Accordingly, each individual PMS factor does not need to be confined to a specific country to contribute to an overall PMS determination based on the totality of circumstances. *In NEXTEEL III*, the CAFC held "{a}lthough low-priced Chinese steel could contribute to a particular market situation, the record does not show sufficient particularity for this circumstance to create a particular market situation on its own."[268] However, the phrase "on its own" demonstrates that the CAFC left open the possibility that a PMS factor that lacks particularity can still contribute to a PMS determination if combined with other PMS factors.

U.S. Steel reiterates the evidence Commerce analyzed above concerning trends of import quantities, trends of AUVs of Chinese steel exports to Korea, general observations of China's steel export destinations in *Asian Steel Watch*, the cost differential between imported Chinese HRC and domestically produced Korean HRC, and statements from POSCO's CEO regarding how POSCO is struggling due to the flood of imports from China.[269] U.S. Steel identifies further evidence that supports the conclusion that HRC imports from China created a distortion particular to Korea. For example, U.S. Steel identified evidence that just prior to the POR

[267] *See OCTG Korea 2017-18 Final Results* IDM at Comment 1-B.
[268] *See NEXTEEL III*, 28 F.4th at 1237 ("Although low-priced Chinese steel could contribute to a particular market situation, the record does not show sufficient particularity for this circumstance to create a particular market situation on its own.")
[269] *See* U.S. Steel's Draft Remand Comments at 15-17.

domestic Korean HRC prices plummeted showing a decline from USD 673 per mt to USD 470 per mt from the third quarter of 2014 to the third quarter of 2015, and how a Korean government report specifically identified SeAH as an example of a Korean pipe manufacturer importing hot-rolled steel from China.[270] U.S. Steel argues this evidence demonstrates that Korean HRC imports from China created a distortion particular to the HRC market in Korea.[271] *In NEXTEEL III*, however, the CAFC held "{a}lthough low-priced Chinese steel could contribute to a particular market situation, the record does not show sufficient particularity for this circumstance to create a particular market situation on its own."[272] While we respectfully disagree with the CAFC that the evidence does not show sufficient particularity for this factor to establish a PMS on its own, the CAFC's holding is binding in this case.

Issue 2: Differential Pricing

Stupp and the *Remand Order*

SeAH's Comments[273]

- There is no difference between this remand segment and the *Stupp* remand segment, yet Commerce claims that there is a difference because the records differ. Accordingly, Commerce asserts that the concerns raised by the court in *Stupp* do not apply here.
- Commerce's claim that the academic literature from the *Stupp* remand segment is not on the record of this remand segment perhaps indicates that the academic literature may not support Commerce's application of the Cohen's *d* test in this review.

[270] *Id.* (citing PMS Allegation at Exhibit 4 (sub-attachment 24, PDF p. 1260); and Maverick PMS Supporting Information at Exhibit 5).
[271] *Id.*
[272] *See NEXTEEL III*, 28 F.4th at 1237 ("Although low-priced Chinese steel could contribute to a particular market situation, the record does not show sufficient particularity for this circumstance to create a particular market situation on its own.")
[273] *See* SeAH's Draft Remand Comments at 5-7.

- The CAFC's *Stupp* opinion was not based on the record of the underlying investigation in that proceeding because Commerce forced SeAH to resubmit its case brief to exclude the academic literature as NFI.[274]
- In its case brief in the 2015-16 administrative review of this proceeding, SeAH also referenced some of the same academic literature, which must require that Commerce address the issues raised by the CAFC in the *Stupp* opinion whether or not the academic literature itself is on the record of this remand segment.

U.S. Steel's Comments[275]

- In the Draft Results of Redetermination, Commerce adequately addressed the CAFC's concerns of whether the statistical criteria are relevant to the Cohen's *d* test, concluding that they "are not pertinent outside of the context of sampling."[276]
- Further, the academic literature which supported the plaintiff's complaints in the *Stupp* proceeding are not part of the record in this proceeding. The distinction between differing administrative records has been established by the CAFC, which has stated that "each administrative review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the records."[277]

Commerce's Position:

Commerce addressed above the CAFC's concerns of whether certain statistical criteria must be observed when the Cohen's *d* test is applied in the context of differential pricing to the pricing data of a respondent. Commerce explained that the statistical criteria identified by SeAH

[274] *Id.* at 6-7 (citing to *Stupp v. United States*, 359 F. Supp. 3d 1293, 1300-01 (CIT 2019), *aff'd Stupp*, 5 F.4th at 1350-51).
[275] *See* U.S. Steel's Draft Remand Comments at 45-46.
[276] *Id.* at 45 (quoting Draft Results of Redetermination at 19-20).
[277] *Id.* at 46 (quoting *Hyundai Elec. & Energy Sys. v. United States*, 2022 U.S. App. LEXIS 22235, at *7 (Fed. Cir. 2022) (quoting *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014)).

are not relevant to Commerce's application of the Cohen's *d* test to SeAH's U.S. price data. Such criteria, *i.e.*, the normality of the distribution, equal variances and the number of observations (*i.e.*, the sample size), are relevant to determine whether the results of an analysis based on a sample are representative of the full population as a whole. The results of an analysis based on sampled data are *estimates* of the actual values of the parameters for the full population, and using statistical inference based on these statistical characteristics of the sampled data will determine, with predefined criteria, whether the estimates in the analysis results represent the actual values of the parameters for the full population of data. Further, each time that a sample is taken of a population, the calculated results, *i.e.*, the estimates of the population values, will differ as will the analysis whether these estimates represent the actual population values based on statistical inferences.

In contrast, the results of Commerce's application of the Cohen's *d* test are based on the full populations of sale prices in the test group and in the comparison group.[278] As such, in determining whether two groups of prices differ significantly, Commerce calculates the *actual* parameters of data, *not estimates* of those parameters based on sampled data. For example, when all relevant observations are considered, the average price for each group of prices would be mathematically accurate regardless of whether each group consists of two observations, two hundred observations or two thousand observations. The average price is the actual value of the population, and this value will not change unlike an estimated average price calculated with each sample which could be selected from the population. When the entire population of the relevant prices is considered, as Commerce does in its differential pricing analysis, the actual parameters

[278] *See Mid Continent 2022*, 31 F.4th at 1380 ("Commerce observes that the cited literature discusses 'sampling' from a population, whereas Commerce has the entire population data and each of its test-comparison group pairs involves the entire population.")

(mean, standard deviation, and effect size) are mathematically accurate and constant and are not dependent on any statistical criteria.

Accordingly, statistical inferences, which are utilized when samples are used and depend upon SeAH's statistical criteria, are not pertinent to Commerce's application of the Cohen's *d* test in its differential pricing analysis, because the analysis does not rely upon sampled data or estimated values of the entire population's parameters.

With regard to the interested parties' contentions concerning the differences between this administrative record and that in *Stupp* remand, the administrative record in this remand segment and the administrative record in the *Stupp* remand segment differ. Specifically, the academic literature that the *Stupp* opinion references is on the record of the *Stupp* remand segment, but that same academic literature is not on the record of this remand segment.[279] Commerce disagrees with SeAH's claim that, notwithstanding these differences, Commerce must rely on that academic literature as part of this redetermination even when those resources are not actually found on this administrative record. Section 351.104 of Commerce's regulations require Commerce to maintain an official administrative record of each AD or CVD proceeding which serves as the basis for its determination. The administrative record provides each party to the proceeding – domestic interested parties, foreign interested parties, Commerce itself as well as the courts – a common factual foundation on which base its arguments, reasoning, and conclusions. Accordingly, Commerce is obligated to maintain orderly boundaries of the administrative record, and generally does not consider documents that are not part of the administrative record of the relevant segment of the administrative proceeding. Without respect for the integrity of the boundaries of the administrative record, the ability of Commerce to

[279] *See* page 21, *supra*.

effectively administer the statute and for interested parties to meaningfully defend their individual interests in the proceeding is diminished.

In the less-than-fair-value investigation underlying the *Stupp* litigation, SeAH had inserted references to the academic literature in its case brief before the agency which constituted NFI.[280] Commerce directed SeAH to remove such NFI from its case brief, which the CAFC found was consistent with Commerce's regulations and within the "broad discretion regarding the manner in which it develops the record in an antidumping investigation."[281] Nonetheless, SeAH reinserted its citations to various academic texts in its comments to the CAFC, which the CAFC discussed in the *Stupp* opinion, concluding that Commerce properly rejected such information. Commerce's refusal to consider information not on the administrative record was clearly correct, as Commerce's regulations expressly preclude Commerce from considering factual information outside of the administrative record.[282]

Nonetheless, the CAFC concluded Commerce should provide further explanation as to "whether the limits on the use of the Cohen's *d* test prescribed by Professor Cohen and other authorities were satisfied in this case or whether those limits need not be observed when Commerce uses the Cohen's *d* test in less-than-fair-value adjudications."[283] In light of that holding, on remand, Commerce reopened the administrative record for the limited purpose of

[280] *See generally Stupp*, 5 F.4th at 1348-51.
[281] *See Stupp*, 5 F.4th at 1350 (citing *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 760 (Fed. Cir. 2012) ("{C}ourts will defer to the judgment of an agency regarding the development of the agency record."); *Micron Tech.*, 117 F.3d at 1396 ("Congress has implicitly delegated to Commerce the latitude to derive verification procedures ad hoc."); and *Am. Alloys, Inc. v. United States*, 30 F.3d 1469, 1475 (Fed. Cir. 1994) ("{T}he statute gives Commerce wide latitude in its verification procedures.").
[282] *See* 19 CFR 351.302(d) ("{T}he Secretary will not consider or retain in the official record of the proceeding … untimely filed factual information, written argument or another material that the Secretary rejects, except as provided under § 351.104(a)(2); … {and further} … will reject such information, argument, or other material …").
[283] *See generally Stupp*, 5 F.4th at 1360.

placing these academic texts on the administrative record of the *Stupp* remand segment and addressed the CAFC's expressed concerns.

In the administrative review underlying this remand, SeAH again inserted citations to certain academic texts; however, in this review, Commerce did not initially notice that SeAH referenced non-record documents in its brief and did not require SeAH to remove these citations from its case brief.[284] Such an oversight by Commerce does not negate either Commerce's need to maintain the boundaries of an administrative record or to enforce the time limits for the submission of NFI consistent with 19 CFR 351.301. Further, contrary to SeAH's assertion, it does not mean that the broader academic texts to which SeAH cited in its case brief are, by default, part of the administrative record of this remand segment. When an interested party references non-record evidence in its case brief, in support of an argument, this does not make such documents part of an administrative record.[285] Although SeAH's case brief submitted in the underlying administrative review is part of this administrative record, the arguments made in the case brief are unsupported to the extent that they rely on non-record information, such as the academic texts which SeAH quotes in its case brief.

Finally, SeAH asserts that the academic literature "may undermine" Commerce's

[284] As noted by SeAH, Commerce also addressed SeAH arguments in the *Final Results* of the underlying administrative review based on these same academic texts. *See* SeAH's Draft Remand Comments at 7 (footnote 19). It appears that Commerce's oversight may have resulted from the discussion and analysis of such texts in the final results of the preceding first administrative review of this AD order, where the academic texts were part of the record of the first review. The response in the *Final Results* had been simply copied from the final results of the first review. However, the administrative record here is different from the administrative review of the first review because no interested party has placed these academic texts on the administrative record of this administrative review or of this or the preceding remand segments. Commerce is clarifying this oversight from the *Final Results* in this redetermination.

[285] *See Linyi City Kangfa Foodstaff Drinkable Co. v. United States*, 2016 CIT LEXIS 89, Slip. Op. 2016-0089, at *14 (CIT September 21, 2016) ("Commerce responds, and the court must agree, that the plaintiff's statements in their case brief appear unsupported by record evidence, and Commerce must make its determinations based on the record before it.") (Harmonized Tariff Schedules from various countries were referenced in the case brief but not placed on the record); *see also Jacobi Carbons AB v. United States*, 619 Fed. Appx. 992, 1002 (Fed. Cir. 2015) ("Commerce selects the best available information based on the record before it at the time of the decision, not a hypothetical record or the record created for other periods of review.").

arguments in this redetermination. Commerce does not need to speculate regarding non-record information, because Commerce makes its determinations based on the administrative record before it and such academic literature is not part of the existing administrative record in this administrative review. Moreover, Commerce's conclusion in the *Stupp redetermination*, in which Commerce considered academic literature on the record of *that* remand segment, is that the statistical criteria are not relevant to the use of the Cohen's *d* test because the data on which the results of the Cohen's *d* test (*i.e.*, the calculated effect size, the Cohen's *d* coefficient) are based include the complete, full population of U.S. sale prices for each test and comparison group. The calculated means, standard deviations, and Cohen's *d* coefficient are not *estimated* values based on sampled data, but are the *actual* values of the population parameters.

Relevance of the Statistical Criteria

SeAH's Comments[286]

- Commerce's argument in the Draft Results of Redetermination was already rejected by the CAFC in its *Stupp* opinion. Specifically, the CAFC was not convinced that the statistical criteria were not relevant simply because Commerce's Cohen's *d* test was based on the full population of data and not on sampled data.
- Commerce simply claims that "normal mathematical principles do not apply when a full population, and not just a sample, is being analyzed."[287] Commerce's assertion is without support from the academic literature.
- The burden of proof that there exists a pattern of prices that differ significantly lies with Commerce, and failing to meet that standard Commerce must use the average-to-average method to calculate SeAH's weighted-average dumping margin.

[286] *See* SeAH's Draft Remand Comments at 7-10.
[287] *Id.* at 9.

U.S. Steel's Comments[288]

- Given the administrative record in this remand segment, Commerce has adequately explained that the statistical criteria are not relevant to Commerce's use of the Cohen's *d* test because its analysis is based on the complete population of sale prices rather than on a sample of those sale prices.

Commerce's Position:

Commerce disagrees with SeAH that the Draft Results of Redetermination simply repeat the same arguments that have been rejected by the CAFC in *Stupp*. The administrative determination that was remanded for further explanation in *Stupp* did not contain the explanation that Commerce has provided here.[289] In the *Stupp* opinion, the CAFC questioned whether the statistical criteria were necessary for Commerce's use of the Cohen's *d* test based on certain quotations from the academic literature, which SeAH had inserted into the CAFC proceeding, and as a result the CAFC remanded the issue to Commerce for further explanation. In the *Stupp Redetermination*, Commerce further explained why these citations to the academic literature did not disturb Commerce use of the Cohen's *d* test because it was based on the full population of the respondent's (*i.e.*, SeAH's) U.S. prices in each of the test and comparison groups, that the analysis was not based on a sample of these U.S. price data.

In remanding the issue, the CAFC stated:

> We therefore remand to give Commerce an opportunity to explain whether the limits on the use of the Cohen's *d* test prescribed by Professor Cohen and other authorities were satisfied in this case or whether those limits need not be observed when Commerce uses the Cohen's *d* test in less-than-fair-value adjudications. In that regard, we invite Commerce to clarify its argument that

[288] *See* U.S. Steel's Draft Remand Comments at 45-47.
[289] *See Welded Line Pipe from the Republic of Korea*: *Final Determination*, 80 FR 61366, and accompanying Issues and Decision Memorandum, at 19-22, available at https://enforcement.trade.gov/frn/summary/korea-south/2015-25980-1.pdf.

> having the entire universe of data rather than a sample makes it permissible to disregard the otherwise-applicable limitations on the use of the Cohen's *d* test.[290]

The explanation that Commerce provided here as well as the explanation that Commerce provided in the *Stupp Redetermination* is fully consistent with the CAFC's opinion and addresses concerns expressed by the CAFC.

However, although explanations are similar, as also noted in the Draft Results of Redetermination, the record of this remand segment differs from the administrative record in the *Stupp* remand segment. The administrative record of each segment is distinct and independent of the administrative record of each and every other segment of a proceeding. As the determination in each segment in each proceeding must be based on the administrative record of *that* segment, the reasoning and support for the determination in each segment may necessarily differ. In this situation, this redetermination is based on the record for the 2015-16 administrative review of the AD order on OCTG from Korea, and the *Stupp Redetermination* is based on the administrative record of the less-than-fair-value investigation which results in the AD order on welded line pipe from Korea as well as all remand segments for that investigation; two separate segments of two distinct proceedings. Accordingly, the explanation provided in the Draft Results of Redetermination does not conflict with, and is not rendered irrelevant because of, the arguments and conclusions in the *Stupp* remand segment, and, conversely, the *Stupp* R*edetermination* does not conflict with and is not rendered irrelevant because of the arguments and conclusions in this remand segment.

[290] *See Stupp*, 5 F.4th at 1360.

SeAH's Comments Regarding Commerce's *Stupp Redetermination*

SeAH's Comments[291]

- In the *Stupp Redetermination* itself, Commerce failed to address the questions posed by the CAFC, including the CAFC's concern that Commerce's Cohen's *d* test inflates insignificant differences which results in an improper finding of dumping. Commerce's *Stupp Redetermination* identified no academic text or "logical or mathematical justification" which supports using the Cohen's *d* coefficient where SeAH's statistical criteria have not been satisfied. The Cohen's *d* coefficient was meant to be used in conjunction with the t-test where the two sets of data being compared exhibit a normal distribution, roughly equal variances and with sufficient sample sizes. Commerce's purported use of the Cohen's *d* test to measure the effect size of a complete population "has no relationship to the use of Cohen's *d* in statistical practice."[292]
- Dr. Cohen does not suggest that "the thresholds provide universal yardsticks for judging whether an observed difference has a practical, real-world impact on real-world outcomes."[293] SeAH presents a hypothetical example involving the length of shrimp and the height of NBA centers.[294] SeAH posits that the size difference between "tiny" and "jumbo"/"colossal" shrimp is 1½ inches (length), which has a "real impact" on the use of the shrimp in a recipe. However, a same 1½ inch difference in the size of two groups of NBA centers is "probably not even noticeable" "for their scoring and shot-blocking abilities." SeAH further assumes that "the standard deviation for both populations" is 2 inches. Consequently, SeAH calculates a Cohen's *d* coefficient of 0.75 for both the

[291] *See* SeAH's Draft Remand Comments at 10-29.
[292] *Id.* at 13.
[293] *Id.* at 17.
[294] *Id.* at footnote 46.

shrimp and the NBA centers which does not recognize the differences in "the real-world impact" of the size differences in these two situations.

- Based on the academic literature, the logic of mathematics dictates that for the results of the Cohen's *d* test to be reasonable the underlying data must be normally distributed.
- Commerce must ensure that its determination that a pattern of prices that differ significantly is not the result of chance. Based on economics and facts on the record, there are numerous elements of chance which impact SeAH U.S. prices, including the "interplay of supply and demand," overall U.S. economic activity, oil prices, production costs, exchange rates, "natural catastrophes and acts of war," imperfect market knowledge and "other random errors."[295]
- In *Stupp*, the CAFC presented a hypothetical example which demonstrates how a "false-positive 'passing' results" occurs under Commerce's Cohen's *d* test.[296] SeAH further provided a hypothetical example that demonstrated that Commerce's approach would lead to an increase in the weighted-average dumping margin. Further, it is "a simple matter to modify our example to show how Commerce's improper use of Cohen's *d* could increase a dumping margin from a *de minimis* 0.49 percent under the average-to-average methodology to an above *de minimis* rate under an alternative methodology."[297] These examples demonstrate that Commerce's differential pricing analysis, including the meaningful difference test, will prevent the unfair creation of dumping margins and the CAFC was correct to question whether Commerce's approach would improperly create an unfair affirmative dumping determination.

[295] *Id.* at 23-24.
[296] *Id.* at 25.
[297] *Id.*

U.S. Steel's Comments[298]

- SeAH has identified nothing on the administrative record which contradicts Commerce's conclusions that the statistical criteria are not relevant in its use of the Cohen's *d* test in its redetermination.

Commerce's Position:

SeAH offers several criticisms of the *Stupp Redetermination*, many of which are based on the academic literature which is on the administrative record for the *Stupp* remand segment but not on the record of this remand segment. As discussed above, those academic texts are not on this administrative record, notwithstanding SeAH inappropriate inclusion of some citations to academic text in its case brief in the underlying administrative review.

Commerce provided parties with an opportunity to comments on the Draft Results of Redetermination for this remand segment, not Commerce's redetermination in the *Stupp* litigation. Challenges to that redetermination must be brought in the context of that litigation. The *Stupp* litigation will be resolved based on arguments and evidence in the context of that proceeding, and it would be inappropriate for Commerce to address such arguments in this remand segment. However, for purposes of responding to SeAH's comments, Commerce has endeavored to construe SeAH's arguments as if they relate to this proceeding when reasonably possible to do so.

SeAH argues that Commerce's approach produces unreasonable results such as when the hypothetical Cohen's *d* coefficients calculated for the differences in the length of shrimp and the differences in the height of basketball centers do not represent the "real-world impact" of the observed differences. SeAH's logic based on these hypothetical examples, however, is

[298] *See* U.S. Steel's Draft Remand Comments at 47.

misplaced and there is no evidential support that the values used for SeAH's hypothetical examples in any way reflect "real-world" facts. There is no evidence that the results of SeAH's calculation, or the conclusions of its analysis, in anyway represents a "real-world impact."

In the hypothetical, SeAH contends that a 1½ inch difference is enormous for the size of shrimp, but that a 1½ inch difference is negligible for the height of NBA centers, who are evaluated for shot blocking and scoring abilities. This perspective evaluates the "real-world impact" of the difference in the size of shrimp relative to the overall size of shrimp and the "real-world impact" of the difference in the height of NBA centers relative to the overall height of NBA centers. The measure of effect size gauges the difference in the means, *i.e.*, the "yardstick," based on the variances in the underlying data. SeAH would simply replace this definition of the yardstick with one based on the magnitude of the size/length/height of the data. However, the CAFC has found that Commerce's reliance on the yardstick based on variance of the underlying data is reasonable as this approach is widely accepted.[299] Moreover, SeAH suggests in its hypothetical that NBA centers are "evaluated for their scoring or shot blocking abilities."[300] Of course, there is no direct correlation between the height of an NBA center and his or her ability to shoot the ball accurately or ability to score. A tall player could be a terrible scorer and a shorter player could be a prolific scorer. Similarly, shot blocking ability is highly dependent on other factors such as defensive intensity, aggressiveness, anticipation and ability to time the jump, explosiveness and athleticism, *etc*. Certainly, height may be an important element in the overall abilities of an NBA center, but it is inaccurate to claim that a player's value is based solely on his or her height. Thus, comparing the difference in size between shrimp used in

[299] *See Mid Continent Steel & Wire, Inc. v. United States*, 31 F.4th 1367, 1379 (Fed. Cir. 2022) ("the undisputed purpose of the denominator figure—to provide a dispersion figure for the more general pool that serves as a yardstick for deciding on the significance of the difference in mean prices of the two groups.")
[300] *See* SeAH Comments at 17 (footnote 46).

a recipe and basketball player abilities is simply not an accurate or rational comparison. In other words, SeAH's hypothetical is flawed from its inception.

Commerce finds that SeAH's arguments that the element of chance must be accounted for in its U.S. prices is without merit. In *JBF RAK*, the CAFC found that Commerce is not required to determine the reasons behind the observed differences in U.S. prices, but only establish that such differences exist.[301] SeAH identifies the "interplay of supply and demand," overall U.S. economic activity, oil prices, production costs, exchange rates, "natural catastrophes and acts of war," imperfect market knowledge and "other random errors" as examples which introduce chance into Commerce's determination that SeAH's prices differ significant or that a pattern of such prices exists. The conditions presented by SeAH are not the result of chance in Commerce's analysis, unlike the results of a roll of the dice, but are factors that to some extent are outside of the control of SeAH. Further, these and other factors are inputs into SeAH's pricing decisions by which it can take them into account when setting its U.S. prices. SeAH's response to these factors and the setting of its U.S. prices are not reliant on chance but the result of SeAH's deliberative and rational pricing behavior.

SeAH's hypothetical examples are unpersuasive to demonstrate that Commerce's use of the Cohen's *d* test is unreasonable. As an initial matter, arguments based primarily or exclusively on hypothetical examples, which, by their very nature, are not particularly helpful for evaluating whether Commerce's methodology is reasonable and in accordance with law. Where, as here, a party repeatedly attempts to imagine an extreme set of facts, which have nothing to do with its own data to which the relevant methodology was applied, hoping to obtain an unusual

[301] *See JBF RAK LLC v. United States*, 790 F.3d 1358, 1368 (Fed. Cir. 2015) (*JBF RAK*) ("{19 U.S.C. § 1677f-1(d)(1)(B)} does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods").

outcome that is at odds with normal outcomes of methodology, it only demonstrates that the methodology is unlikely to lead to an unreasonable or problematic outcome.[302] Even if SeAH could demonstrate that there might be a rare situation with unusual, cherry-picked, hypothetical facts that could lead to an unusual outcome that differs from the normal outcome under the methodology, it would not be sufficient to demonstrate that the methodology, as a whole, is unreasonable. Having reviewed SeAH's comments on the Draft Results of Redetermination, we find it significant that SeAH has failed to demonstrate, based on the application of Commerce's methodology to its own data, that the methodology is unreasonable.

Second, SeAH's argument that the hypothetical examples support its arguments is illogical when one can "simply modify" such examples to create the desired results. A party could modify a hypothetical to fit its desired narrative, while another party could also modify a hypothetical to fit the opposite narrative. In Commerce's view, the relevant question is not whether a party can come up with an unusual set of circumstances that would produce the desired results, but rather whether the concepts undergirding a methodology are reasonable overall. Even if a company's data results in an unusual outcome in certain rare scenarios, any concerns about such an outcome could be addressed on a case-by-case basis by examining the relevant data and determining whether the actual application of a methodology to such data could warrant an exception. Accordingly, the significance of unusual, cherry-picked hypothetical scenarios is marginal. Of importance is whether the test used by Commerce is based on sound analytical principles, here as discussed in the academic literature, and otherwise is reasonable in application. To conclude that the results of any particular hypothetical example determine that

[302] *See Rita v. United States*, 511 U.S. 338, 353 (2005) ("Justice Scalia concedes that the Sixth Amendment concerns he foresees are not presented in this case. And his need to rely on *hypotheticals* to make his points is consistent with our view that the approach adopted here will not 'raise a multitude of constitutional problems.'") (emphasis in the original).

the analysis is reasonable in all circumstances or even in most circumstances beyond the specific circumstances described in the hypothetical is analytically unsound.

Third, Commerce addressed in the *Stupp Redetermination* the concerns embodied in the CAFC's hypothetical example, namely in a situation where the variances of the prices in the test and comparison groups trend to zero and the calculated Cohen's *d* coefficient trends to infinity (and beyond). In this situation, for even small differences in the means, the difference may be found to be significant. Given that the accepted definition of significance is based on effect size the variance of the data which serves as the yardstick by which significance is measured, this outcome is expected and reasonable. As noted above, SeAH would like to replace this yardstick with another definition of significance based on the absolute magnitude of the data (its shrimp and basketball player example) where small differences in U.S. prices are diminished when the magnitude of the U.S. prices is large.[303] However, Commerce's definition of significance based on the variances in the data is reasonable, and reflects the guidance presented in the SAA[304] where "Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."[305]

Moreover, in the *Stupp Redetermination*, Commerce specifically addressed the CAFC's hypothetical example and demonstrated that when the differential pricing analysis is applied to the hypothetical facts, the hypothetical described by the CAFC does not result in the application of the alternative methodology and that a standard calculation methodology would apply.[306] It is important to understand that Commerce's differential pricing analysis, of which the Cohen's *d* test is a component, operates as a switch that determines whether the alternative calculation

[303] *See* SeAH's Draft Remand Comments at 17.
[304] *See* SAA.
[305] *Id.* at 843.
[306] *See Stupp Redetermination* at 55-58.

methodology applies instead of the standard methodology. In the hypothetical example discussed by the CAFC, the application of Commerce's differential pricing methodology results in margin calculations that are based on the standard comparison methodology.[307]

Lastly, Commerce disagrees that the results of the Cohen's *d* test, the purpose of which is only to determine whether the observed price differences are significant, creates dumping margins. Dumping is ultimately the result of the pricing behavior of the foreign company in the U.S. market. The purpose of the differential pricing analysis, of which the Cohen's *d* test is one part, is to examine and uncover the potential for masked dumping, where lower U.S. prices are offset by higher U.S. prices.[308] The expected outcome of a differential pricing analysis, and the application of an alternative comparison methodology, would be to increase the amount of dumping by exposing some portion of the masked dumping, as appropriate. Thus, SeAH's amazement that the results of the differential pricing analysis might lead to a larger weighted-average dumping margin than under the standard comparison methodology ignores that the standard comparison methodology may fail to adequately identify and address masked dumping. The purpose of the antidumping statute is to uncover, and if necessary remedy, dumping, including masked dumping, which results from the pricing behavior of a foreign company in the U.S. market.[309] As the CAFC has held, Commerce's use of the differential pricing analysis, including the Cohen's *d* test, is a reasonable approach to effectuate Congressional intent to provide this remedy for unfair trade.[310]

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[307] *Id.* at 58 ("The conclusion for SeAH's hypothetical example, when the Differential Pricing Analysis is applied properly, *is the same as for the CAFC's hypothetical example* and for Commerce's "extreme" example, *i.e., it does not result in the application of the alternative calculation methodology.*") (emphasis added).
[308] *See generally* SAA at 842-43.
[309] *See Apex Frozen Foods v. United States*, 862 F. 3d 1322, 1326 (Fed. Cir. 2017).
[310] *Id.*, 862 F. 3d at 1334-35.

V. FINAL RESULTS OF REDETERMINATION

Pursuant to the *Remand Order*, we have reconsidered our PMS determination and differential pricing analysis in light of *NEXTEEL III*. We have determined that the evidence on the record is insufficient to establish that a PMS existed in Korea during the POR. Further, we provided explanation regarding Commerce's application of Cohen's *d* test to SeAH's U.S. sales. Based on the results of our analysis, the weighted-average dumping margins calculated in the *Second Redetermination* remain unchanged.

10/21/2022

X 

Signed by: LISA WANG

Lisa W. Wang
Assistant Secretary
for Enforcement and Compliance