A-580-870
Remand - Investigation
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FINAL REDETERMINATION PURSUANT TO COURT REMAND
Husteel Co., Ltd., et al., v. United States
Consol. Court No. 14-00215

SUMMARY

The Department of Commerce (the Department) prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT or the Court), issued on September 2, 2015, in *Husteel Co., Ltd., et al., v. United States*, Consol. Court No. 14-00215, Slip. Op. 15-100 (Ct. Int'l Trade Sept. 2, 2015) (*Husteel*). These remand results concern *Certain Oil Country Tubular Goods From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances,* 79 FR 41983 (July 18, 2014) (*Final Determination*).

In *Husteel*, the Court directed the Department to reconsider certain aspects of the constructed value (CV) profit rate calculation used in the dumping margin analysis. Specifically, the Court instructed the Department to: 1) either remove the financial statements of Tenaris, S.A. (Tenaris) from the record and not use them in the CV profit calculation, or, alternatively, rectify the alleged prejudice from acceptance of such statements; 2) either exclude from consideration or, alternatively, explain the relevance of market conditions and testing and certification requirements to the determination of which products are in the same general category of merchandise as oil country tubular goods (OCTG); and, 3) either calculate and apply a profit cap or, alternatively, explain why the data on the record cannot be used to calculate a "facts available" profit cap under 19 U.S.C. 1677b(e)(2)(B)(iii). In addition, the Court found

that the Department did not provide sufficient reasoning for declining to select ILJIN Steel Corporation (ILJIN) as a mandatory respondent, and thus ordered the Department to reconsider the issue of whether the two selected respondents, which produce only welded OCTG, were representative of the Korean industry. As part of this remand, the Court directed the Department to consider information on the record that is probative of the difference between welded and seamless OCTG, including costs and pricing.

On September 18, 2015, the Department re-opened the record to allow all interested parties to submit new factual information and comment on the issue of CV profit (including the application of the profit cap) in the event the Department relies upon the alternative CV profit methodology as provided for under 19 U.S.C. 1677b(e)(2)(B)(iii).[1] On October 2, 2015, Husteel Co., Ltd. (Husteel), the mandatory respondents, NEXTEEL Co., Ltd. (NEXTEEL) and Hyundai Steel Company[2] (HYSCO), and two of the Petitioners (U.S. Steel and Maverick),[3] filed new factual information concerning CV profit and comments.[4] On October 9, 2015, U.S. Steel, Maverick, Husteel, NEXTEEL and HYSCO submitted rebuttal comments.[5]

[1] *See* Letter from the Department to All Interested Parties, dated September 18, 2015.
[2] On July 1, 2015, Hyundai HYSCO (the respondent in the investigation) merged into Hyundai Steel Company.
[3] Petitioners are United States Steel Corporation (U.S. Steel), Maverick Tube Corporation (Maverick), and Boomerang Tube, Energex Tube, a division of JMC Steel Group, Northwest Pipe Company, Tejas Tubular Products, TMK IPSCO, Vallourec Star, L. P., and Welded Tube USA Inc. (Boomerang Tube, *et al.*).
[4] *See* Letter from U.S. Steel to the Department, "Oil Country Tubular Goods from the Republic of Korea" (U.S. Steel Factual Information Submission); Letter from Maverick to the Department, "Oil Country Tubular Goods from South Korea: CV Profit Comments" (Maverick Factual Information Submission); Letter from Husteel to the Department, "Oil Country Tubular Goods from the Republic of Korea, Remand of Case No. A-580-870: Comments on Constructed Value Profit" (Husteel Factual Information Submission); and Letter from NEXTEEL and HYSCO to the Department, "OCTG from Korea LTFV Remand: Submission of CV Profit Information and Comments" (NEXTEEL and HYSCO Factual Information Submission), all dated October 2, 2015.
[5] *See* Letter from U.S. Steel to the Department, "Certain Oil Country Tubular Goods from the Republic of Korea" (U.S. Steel Factual Information Rebuttal); Letter from Maverick to the Department, "Oil Country Tubular Goods from South Korea: Rebuttal CV Profit Comments" (Maverick Factual Information Rebuttal); Letter from Husteel to the Department, "Oil Country Tubular Goods from the Republic of Korea, Remand of Case No. A-580-870: Rebuttal Comments on Constructed Value Profit" (Husteel Factual Information Rebuttal); and Letter from NEXTEEL and HYSCO to the Department, "OCTG from Korea LTFV Remand: Submission of Rebuttal CV Profit Information and Comments" (NEXTEEL and HYSCO Factual Information Rebuttal), all dated October 9, 2015.

In this redetermination, the Department responds to the Court's request for further explanation of which products are in the same general category of merchandise as OCTG and why the revised calculated CV profit rate in this redetermination is also appropriately applied as the profit cap based upon the available facts. With respect to the calculation of the CV profit rate, the Department has revised the calculation. The Department calculated the CV profit rates as an average of profit rates in the 2012 financial statements of Tenaris and OAO TMK (TMK), a Russian producer/exporter of OCTG. As a result, the Department has adjusted the CV profit rate from 26.11 percent to 16.24 percent. Lastly, the Department explains the basis for exercising its discretion to select mandatory respondents using the largest volume method, including the requisite analysis of record evidence, and therefore why it was appropriate not to select ILJIN as a mandatory respondent in this investigation.

On February 9, 2016, the Department released its draft results of redetermination pursuant to court remand (Draft Redetermination) to interested parties and provided interested parties with an opportunity to submit comments to the Department on the draft results of redetermination. On February 16, 2016, NEXTEEL, HYSCO, Husteel, U.S. Steel, Maverick, and AJU Besteel Co., Ltd. (AJU Besteel) filed comments.[6] No other interested parties submitted comments.

[6] *See* Letter from NEXTEEL and HYSCO to the Department, "Oil Country Tubular Goods from the Republic of Korea: Comments on the Department's Draft Remand Redetermination" (NEXTEEL and HYSCO's Comments on Draft Redetermination); Letter from Husteel to the Department, "*Husteel Co., Ltd., et. al., v. Uníted States*, CIT Consol. Court No. 14-00215, Oil Country Tubular Goods from the Republic of Korea, Case No. A-580-870: Comments on Draft Redetermination Pursuant to Court Remand" (Husteel's Comments on Draft Redetermination); Letter from Maverick and U.S. Steel to the Department, "Oil Country Tubular Goods from Korea: Comments on Draft Remand" (Maverick and U.S. Steel's Comments on Draft Redetermination); and Letter from AJU Besteel to the Department, "Certain Oil Country Tubular Goods from the Republic of Korea: Comments on Draft Results of Redetermination Pursuant to Slip Op. 15-100" (AJU Besteel's Comments on Draft Redetermination), all dated February 16, 2016.

REMANDED ISSUES

A. CV PROFIT

Background

For the February 2014 *Preliminary Determination* in the original investigation,[7] the Department considered three options for CV profit: 1) the profit reflected in the financial statements of seven Korean OCTG producers; 2) the profit earned by HYSCO on its home market sales of non-OCTG pipe products; and, 3) the profit for Tenaris, an Argentine global producer and seller of OCTG as procured from a research paper. Each option had limitations. Options 1 and 2, *i.e.*, the profit from the various Korean producers, reflected non-OCTG pipe products typically used in the construction industry rather than the oil and gas industry and OCTG pipe products which are the subject of this investigation and were allegedly dumped in the U.S. market. Although option 1 did include some profit on OCTG products, these sales were predominantly made in the United States. In contrast, the profit information of Tenaris, an OCTG producer and exporter, featured predominantly OCTG sales in markets outside the U.S. market, but not in the market under consideration (*i.e.*, Korea). Further, at the time, the Tenaris profit information was based on a research paper which had a disclaimer concerning its accuracy, and not based on complete financial statements.[8] Weighing these competing options for the

[7] *See Certain Oil Country Tubular Goods From the Republic of Korea: Negative Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination*, 79 FR 10480 (February 25, 2014) (*Preliminary Determination*).

[8] Incomplete financial statements preclude the Department from fully evaluating the appropriateness of the potential source financial information. Consequently, the Department's practice has been to exclude incomplete financial statements from consideration in the calculation of financial ratios (*i.e.*, overhead, general and administrative, financial, and CV profit ratios). *See, e.g.*, *Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33350 (June 4, 2013) (*Xanthan Gum*) and accompanying Issues and Decision Memorandum at Comment 2; and *Certain Steel Nails from the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 78051 (December 29, 2014) and accompanying Decision Memorandum at XIV.B (we note that the Department obtained a complete copy of one of the financial statements in question subsequent to the preliminary decision and, consequently, based the CV profit calculation on these complete financial statements in the final determination; *see*

Preliminary Determination, on balance, the Department calculated HYSCO's CV profit in accordance with section 773(e)(2)(B)(i) of the Tariff Act of 1930, as amended (the Act), using the profit from HYSCO's non-OCTG pipe products; for NEXTEEL under section 773(e)(2)(B)(iii) of the Act, the Department calculated CV profit based the 2012 fiscal year audited financial statements for six Korean OCTG producers. However, recognizing there were limitations in these sources (namely, that they reflected profits on non-OCTG profits and profits on allegedly dumped merchandise in the United States), the Department stated that it would continue to explore other possible options for CV profit.[9]

Following the *Preliminary Determination*, the Department issued a supplemental questionnaire to NEXTEEL requesting country- and product-specific sales and cost figures. Such information could have been used to calculate profit. U.S. Steel subsequently submitted comments intended to "rebut, clarify, or correct" evidence submitted by NEXTEEL. Included in U.S. Steel's submission were numerous exhibits, including Tenaris's 2012 audited consolidated financial statements. Although the profit information of Tenaris was already on the record and available to the interested parties, the financial statements, which recorded the profit, were not. In response, NEXTEEL requested that the Department reject the filing as untimely new factual information which is due 30 days prior to the preliminary determination. However, the Department accepted the filing (including the financial statements) as rebuttal evidence.

For the July 2014 *Final Determination*, the Department recalculated CV profit for both HYSCO and NEXTEEL under section 773(e)(2)(B)(iii) of the Act using the 2012 audited

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Certain Steel Nails from the Republic of Korea: Final Determination of Sales at Less Than Fair Value, 80 FR 28955 (May 20, 2015) and accompanying Issues and Decision Memorandum at Comment 4).

[9] *See Preliminary Determination* and accompanying Memorandum from Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Decision Memorandum for the Negative Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination in the Less-Than-Fair-Value Investigation of Certain Oil Country Tubular Goods from the Republic of Korea," dated February 14, 2014 (Preliminary Decision Memorandum) at 22.

consolidated financial statements of Tenaris.[10] The Department explained that because neither HYSCO nor NEXTEEL had a viable home or third country market during the POI, the Department was unable to calculate a CV profit using the preferred method under section 773(e)(2)(A) of the Act.[11] When the preferred method is unavailable, section 773(e)(2)(B) of the Act establishes three alternatives for determining CV profit. They are:

> (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review . . . for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,
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> (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) . . . for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or
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> (iii) the amounts incurred and realized . . . for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise {*i.e.*, the "profit cap"}.

While the specific language of both the preferred and alternative methods appears to show a preference that the profit and selling expenses reflect (1) production and sales in the foreign country and (2) the foreign like product, *i.e.*, the merchandise under consideration, as discussed below, none of the sources on the record of this investigation satisfied both of these factors. Consequently, in selecting among these imperfect alternatives, the Department had to

[10] *See Final Determination* and accompanying Memorandum from Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, "Issues and Decision Memorandum for the Final Affirmative Determination in the Less Than Fair Value Investigation of Certain Oil Country Tubular Goods from the Republic of Korea," dated July 10, 2014 (Issues and Decision Memorandum) at Comment 1.

[11] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act as reprinted in 1994 U.S.C.C.A.N. at 4177 (SAA) at 840 ("where the method described in section 773(e)(2)(A) cannot be used . . . because there are no home market sales of the foreign like product . . . ").

determine which surrogate data source most closely fulfilled the aim of the statute. Alternative method (iii), subject to the profit cap requirement, does not mandate that the profit source must be in the foreign country or that profit must be derived from a foreign like product.

In the *Final Determination*, the Department concluded that it could not rely on the profit from HYSCO's or the other Korean respondents' non-OCTG sales under alternative (i), *i.e.*, profit for the same general category of products as the subject merchandise, because their home market sales were not in the same general category as OCTG. Alternative (ii), *i.e.*, profit for other exporters or producers subject to the investigation, was also unavailable as an option because the four remaining Korean producers that provided data as voluntary respondents likewise do not have home market sales of merchandise that is in the same general category as OCTG. Therefore, the Department resorted to alternatives under subsection (iii) *i.e.*, any other reasonable method, to determine the appropriate data to use to calculate CV profit.

In applying alternative (iii), the Department considered three potential sources on the record of the case: (1) Tenaris, a multinational company that produces and sells OCTG worldwide whose financial statements were placed on the record after the *Preliminary Determination*; (2) the six Korean pipe companies used for NEXTEEL's CV profit calculation in the *Preliminary Determination*, all of which produce and sell line and standard pipes in addition to OCTG which is sold primarily in the United States; and (3) four Indian pipe companies, three of which primarily produce line and standard pipe, but may also produce OCTG, and the fourth that is a processor of OCTG. The Department found that the Korean producers' OCTG sales were almost exclusively to the United States, thus their results would reflect the allegedly dumped sales that were under investigation, while the Indian financial statements were incomplete and the Department was unable to discern what percentage of sales were related to

OCTG products.[12] In contrast, the Tenaris financial statements were complete, its sales were predominantly of OCTG, and more than half of its OCTG sales were to non-U.S. markets. Based on these facts, the Department found the Tenaris financial statements to be the best available option for determining CV profit in the *Final Determination*.

Korean producers NEXTEEL, HYSCO, Husteel, SeAH Steel Corporation (SeAH), AJU Besteel, and ILJIN, and domestic producers U.S. Steel and Maverick appealed the Department's final determination. The Court then remanded the case to the Department. Specifically, the Court held that the Department's acceptance of the Tenaris financial statements as rebuttal evidence "does not accord with the general understanding of 'rebuttal evidence'" and, thus, was unreasonable. Additionally, the Court suggested that because the Department "failed to rule on the request to reject" the Tenaris statements, the respondents may have been substantially prejudiced by the Department's acceptance of it.[13] The Court explained that the respondents "did not have a sufficient opportunity to submit evidence that would have either undermined the information contained in U.S. Steel's submission or acted as an alternative CV profit source" and, thus, the "arguments that plaintiffs could make in their case briefs thus were limited."[14] The Court further suggested that if the agency provided "a proper notice and opportunity to respond to the information, plaintiffs could have conducted a more robust attack on its suitability to serve as the CV profit source in this case."[15]

Accordingly, the Court directed the Department to either remove the information concerning Tenaris's profit from the record or to rectify the alleged prejudice caused by the acceptance of the Tenaris financial statements. On remand, the Court also directed the

[12] *See Final Determination* and accompanying Issues and Decision Memorandum at Comment 1.
[13] *See Husteel* at 45-46.
[14] *Id*., at 46.
[15] *Id.*

Department to explain the relevance of market conditions as well as testing and certification requirements to the determination of which products are in the same general category of merchandise as OCTG and to address why the data on the record cannot be used to calculate a "facts available" profit cap.

On September 18, 2015, the Department re-opened the record to allow interested parties to submit new factual information and commentary on the issue of CV profit. On October 2, 2015, U.S. Steel, Maverick, Husteel, NEXTEEL and HYSCO submitted CV profit information, and on October 9, 2015, the same parties submitted rebuttal comments.

CV Profit Rate Calculation

On September 18, 2015, the Department re-opened the record to allow all interested parties to submit new factual information and comment on the issue of CV profit (including the application of the profit cap).[16] On October 2, 2015, Husteel, the mandatory respondents, NEXTEEL and HYSCO, and two of the Petitioners (U.S. Steel and Maverick) filed new factual information concerning CV profit and comments.[17] On October 9, 2015, U.S. Steel, Maverick, Husteel, NEXTEEL and HYSCO submitted rebuttal comments.[18] At this point in the redetermination, all interested parties have been provided an opportunity to submit evidence that would either undermine the information contained in Tenaris's financial statements or act as an alternative CV profit source.

In their comments to the Department, NEXTEEL and HYSCO argue that the Korean OCTG producers provide the best information for the CV profit calculation and that the Department does not need to seek profit information with respect to products that more closely

[16] *See* Letter from the Department to All Interested Parties, dated September 18, 2015.
[17] *See* U.S. Steel Factual Information Submission; Maverick Factual Information Submission; Husteel Factual Information Submission; and NEXTEEL and HYSCO Factual Information Submission.
[18] *See* U.S. Steel Factual Information Rebuttal; Maverick Factual Information Rebuttal; Husteel Factual Information Rebuttal; and, NEXTEEL and HYSCO Factual Information Rebuttal.

correspond to the product under investigation. This argument notwithstanding, NEXTEEL and HYSCO submitted alternative profit information for OCTG producers outside Korea. These sources include the financial statements of: 1) Indian pipe producer Welspun Corporation Limited (Welspun), which were used by the Department to calculate the surrogate financial ratios for the final determination in the less-than-fair-value (LTFV) investigation of OCTG from Vietnam; 2) Ukrainian OCTG producer Interpipe Limited (Interpipe), a respondent in the LTFV investigation of OCTG from Ukraine; 3) Spanish pipe and tube producer Grupo Tubos Reunidos (Tubos Reunidos); and 4) Saudi pipe and tube company Arabian Pipes Company (APC).

According to NEXTEEL and HYSCO, these companies would serve as more appropriate representations of profit for the Korean OCTG market than Tenaris, whose operations, products, and market positions are drastically different than the Korean respondents. Consequently, NEXTEEL and HYSCO contend that Tenaris's profit reflects premium grade OCTG and proprietary connections rather than API grade OCTG products.

Husteel contends that the Tenaris 2012 financial statements should be abandoned as the surrogate for CV profit as they operate in the specialty OCTG segment that commands aberrationally high profits. Husteel submitted the financial statements for Borusan Mannesmann Boru Sanayi ve Ticaret (Borusan), a respondent in the LTFV investigation of OCTG from Turkey, and for OAO TMK (TMK), a world leading producer of steel pipes for the oil and gas industry from Russia.

U.S. Steel and Maverick argue that Tenaris's 2012 financial statements continue to be the most appropriate surrogate for the CV profit calculation. According to U.S. Steel and Maverick, Tenaris provides the best representation of a viable OCTG market outside the United States. Further, the Tenaris financial statements include the results from its Korean sales office which

markets products for offshore drilling and would be representative of the profit earned in a viable Korean OCTG market. To refute the contentions that Tenaris's 2012 profit of 26.11 percent is aberrational, U.S. Steel also placed the financial statements of three Indian producers on the record, *i.e.*, Ratnamani Metal and Tubes Ltd. (Ratnamani), Maharashtra Seamless Limited (MSL), and National Oilwell Varco – Grant Prideco (NOV), along with Tenaris's 2006-2011 financial statements, which show profits ranging from 12.41 percent to 59.48 percent.

Regarding the financial statements submitted by the respondents for consideration as CV profit surrogates, U.S. Steel and Maverick argue that all of them are deficient. First, U.S. Steel and Maverick contend that Welspun's 2012 results were an outlier as the company's profits were abnormally low when compared to the other Indian OCTG producers. They also argue that Welspun's financial statements were used in an NME methodology with respect to Vietnam; hence, unlike Tenaris, Welspun's operations took place in a country that is not at the same level of economic development as Korea. Next, U.S. Steel and Maverick argue that Interpipe is not appropriate because it had significant non-OCTG product sales and, most importantly, Interpipe's financial statements show a net loss, which, in keeping with the Department's practice, eliminates the company as a viable source. Finally, U.S. Steel and Maverick argue that the financial statements of Tubos Reunidos, APC, Borusan, and TMK should be rejected because their sales are concentrated in non-OCTG steel products that are unrepresentative of the OCTG market.

Analysis of the General Category of Products

The Court has ordered the Department to readdress the '"same general category of products determination' on remand."[19] Specifically, the Court ordered the Department to address (1) the relevance of the difference in demand in oil exploration and construction markets

[19] *See Husteel* at 49.

in light of the temporary nature of such a factor, and (2) the relevance of testing and certification requirements for OCTG. The Department will address these issues here.

First, we agree with the Court that the differing temporal market conditions of the construction and the oil and gas exploration industries is not in and of itself the determining factor for making a "same general category of products" determination. As such, the Department did not rest its conclusion of what constitutes the general category of products on market conditions that may potentially change with the passage of time. It is important, however, that the products under investigation (OCTG) and the standard and line pipes, which Korean producers sold to the Korean construction industry, were sold to two very different industries and were used for two very different purposes (oil drilling and exploration vs. construction of housing). The dramatic difference in market conditions (*i.e.*, the booming demand in the oil exploration industry and the depressed market in the Korean construction industry) simply underscored the dissimilarity between these industries, which is not temporal in nature (*e.g.*, the difference in what the industries do and the difference in the uses and applications of the products). The Department's analysis of the differing market demands between the oil and gas exploration industry vis-à-vis the construction industry demonstrates that having products sold and used in the same industry (*i.e.*, the oil and gas exploration industry) is an important factor for determining whether products are in the same general category of merchandise because both uses and profit rates can vary significantly across industries.

Second, regarding the Department's emphasis on the rigorous testing requirements and quality standards for OCTG, this factor was not intended to imply that all products in the same general category must exactly meet the subject OCTG specifications and no other pipe products can be in the same general category as OCTG. The Court correctly noted that products that meet

OCTG testing and certification requirements are likely to be classified as OCTG.[20] To be clear, the Department did not intend to suggest that the general category of products is limited to the subject merchandise by virtue of meeting the same exact specifications. Accordingly, a clarification of the relevance of a reference to the strict quality and specifications requirements of OCTG is necessary.

Products in the same general category as subject OCTG should be of sufficient quality to be used in "down hole" applications, which is the general application in which OCTG are used. The product in the same general category does not have to have identical specifications with OCTG; in fact, some degree of differences in specifications may be acceptable. However, products in the same general category of products with OCTG must meet sufficient quality standards to be usable in the "down hole" applications (*e.g.*, non-scope OCTG such as stainless OCTG or drill pipe). Specifically, the Department explained that because OCTG is used for "down hole" operations in vertical wells, OCTG pipes are subjected to extreme external collapse pressures, internal pressures, and tension strength requirements, whereas standard and line pipes are primarily intended for the conveyance of fluids and gases on the surface and are subject to far less rigorous quality standards.[21] As a practical matter, customers would not attempt to use unsuitable products in OCTG applications because of the potential liability and cost in the event of a pipe failure.[22] Thus, it is neither illogical nor unreasonable to consider a product that is likely to collapse in the well under external or internal pressure as a product that is not within the same general category as OCTG. Rather, we believe the more accurate dividing line is to recognize that products in the same general category share the same fundamental characteristics that make them suitable for their primary application (here, "down hole" application), although

[20] *Id*., at 50.
[21] *See Final Determination* and accompanying Issues and Decision Memorandum at Comment 1.
[22] *See* HYSCO's January 6, 2014 section D supplemental questionnaire response at 13.

the exact specifications may differ.

Analysis of the Available Sources of Profit

As previously noted, neither HYSCO nor NEXTEEL had a viable home or third country market during the POI; therefore, the Department is unable to calculate a CV profit using the preferred method under section 773(e)(2)(A) of the Act.[23] Thus, for calculating CV profit, we are left with the three alternatives established by section 773(e)(2)(B) of the Act, which, briefly, are: i) the respondents' profits on the same general category of merchandise; ii) the weighted-average profits of other respondents in the investigation; or, iii) profits calculated under any reasonable method.

The Department continues to find that alternatives (i), *i.e.*, profit for the same general category of products as subject merchandise, and (ii), *i.e.*, profit for other exporters or producers subject to the investigation, are not viable options for the calculation of CV profit because HYSCO's and NEXTEEL's home market sales were not sales of merchandise in the same general category as OCTG, and because the four remaining Korean producers that provided data as voluntary respondents likewise did not have home market sales of merchandise that were in the same general category as OCTG.[24] Thus, under subsections (i) and (ii), we do not have CV profit information on the record pertaining to the foreign like product or any of the products that would be considered the same general category of product.[25] Therefore, the Department again is resorting to alternatives under subsection (iii) *i.e.*, any other reasonable method to determine the appropriate data to use to calculate CV profit.

In analyzing the CV profit sources now available (including the sources that have been

[23] *See* SAA at 840 ("where the method described in section 773(e)(2)(A) cannot be used . . . because there are no home market sales of the foreign like product . . . ").
[24] *See Final Determination* and accompanying Issues and Decision Memorandum at Comment 1.
[25] *Id.*

submitted on the record during the remand), we have considered that the specific language of both the preferred and alternative methods appears to show a preference that the profit and selling expenses reflect (1) production and sales in the foreign country and (2) the foreign like product, *i.e.*, the merchandise under consideration. However, as discussed below, none of the sources on the record of this investigation satisfies both of these factors. Consequently, in selecting among these alternatives, the Department must determine which surrogate data source most closely fulfills the aim of the statute. While alternative method (iii), subject to the profit cap requirement, does not mandate that the profit source must be in the foreign country or that profit must be derived from a foreign like product, we nevertheless consider it important to select a data source that most closely reflects the statutory preferences.

After re-opening the record, the Department has available 10 potential CV profit options to consider under section 773(e)(2)(B)(iii) of the Act. These include the financial statements of: 1) Tenaris; 2) six Korean pipe companies; 3) four Indian pipe companies; 4) NOV; 5) Welspun; 6) Interpipe; 7) Tubos Reunidos; 8) APC; 9) Borusan; and 10) TMK.[26]

With regard to the six Korean pipe companies, as the Department explained in the *Final Determination*, "while all six are Korean producers of OCTG, their financial statements reflect the profit earned on U.S. sales of OCTG (*i.e.*, alleged dumped sales under investigation) and the profit earned on sales of products determined not in the same general category of product as OCTG."[27]

The Department also continues to find that the financial statements for two of the four Indian companies, *i.e.*, Oil Country Tubular Ltd. (OCTL) and Bhushan Steel Limited (Bhushan), are unusable. OCTL is a processor rather than a manufacturer which also does not sell its

[26] We note that, although placed on the record, Tenaris's 2006 to 2011 financial statements have not been considered as an option as they are not contemporaneous with the period under investigation.
[27] *See Final Determination* and accompanying Issues and Decision Memorandum at Comment 1.

products in Korea, while Bhushan's financial statements are incomplete and do not allow for the necessary analysis of product mix and market.[28] Although the remaining two Indian producers, *i.e.*, Ratnamani and MSL, were also eliminated as options in the *Final Determination* due to incomplete financial statements, U.S. Steel rectified this problem by including complete copies of Ratnamani's and MSL's financial statements in their October 2, 2015, submission. Hence, we will address the merits of these complete financial statements for the purposes of the CV profit calculation.

We have evaluated the remaining alternatives using the criteria outlined in *CTVs from Malaysia*, *i.e.*, 1) the similarity of the potential surrogate companies' business operations and products to the respondent's business operations and products; 2) the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States; 3) the contemporaneity of the data to the POI; and, 4) the extent to which the customer base of the surrogate and the respondent were similar (*e.g.*, original equipment manufacturers versus retailers).[29] In doing so, we have again analyzed how each potential surrogate conforms with the statute's preference for profit and selling expense data that reflect production and sales in the foreign country and the foreign like product, *i.e.*, the merchandise under consideration.[30] Regarding these criteria, we initially note that all of the remaining financial statements provide data that is contemporaneous with the POI. The following commentary measures against these criteria the details we are able to glean from the record evidence submitted for each of the remaining alternatives.

As noted in the *Final Determination*, the Tenaris consolidated 2012 financial statements

[28] *Id.*
[29] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Color Television Receivers from Malaysia*, 69 FR 20592 (April 16, 2004) (*CTVs from Malaysia*) and accompanying Issues and Decision Memorandum (CTVs from Malaysia Decision Memo) at Comment 26.
[30] *See* section 773(e)(2)(B) of the Act.

predominantly reflect production and sales of OCTG.[31] They also indicate that Tenaris's sales are generally made to end users and that over 50 percent of its sales are made to non-U.S. customers. In fact, a portion of the company's activities may reflect sales to the Korean market as Tenaris operates a Korean sales office dedicated to the hydrocarbon processing, power generation and OCTG markets.[32] As Tenaris sells OCTG in significant quantities, and in virtually every market in which OCTG is sold, we find its average profit experience is representative of sales of OCTG across a broad range of different geographic markets. We also found that Tenaris's 2012 profits are consistent with its historic profit rates (*i.e.*, 24.24 percent to 59.48 percent for 2006 to 2011), including the 2006 results which predate the 2007 addition of the company's premium connection division.[33] Further, as the profit from its financial statements is predominantly OCTG, it reflects more precisely the profit on products identical to the subject merchandise.

Ratnamani manufactures stainless steel tubes and pipes and carbon steel pipes for various industries which include oil and gas applications.[34] While the annual report discloses that the company produces pipe to the API 5CT specification,[35] *i.e.*, the relevant standard for OCTG, we are unable to determine what portion of Ratnamani's sales reflects OCTG versus other non-OCTG products. Hence, Ratnamani is not a viable option given the availability of more specific information on the record.

MSL manufactures seamless and electric resistance welded (ERW) pipes and tubes.[36] While the company produces OCTG and drill pipe,[37] *i.e.*, merchandise in the same general

[31] *See Final Determination* and accompanying Issues and Decision Memorandum at Comment 1.
[32] *See* U.S. Steel Factual Information Submission, Exhibit 1.
[33] *Id.*, at Exhibits 12(A)-(F) and 13.
[34] *See* U.S. Steel Factual Information Submission, Exhibit 8, Ratnamani Annual Report, at 23.
[35] *Id.*, at 3.
[36] *See* U.S. Steel Factual Information Submission, Exhibit 9(A), MSL Annual Report, at 1.
[37] *See* U.S. Steel Factual Information Submission, Exhibit 9(B).

category as OCTG, we are unable to approximate what percentage such activity represents of MSL's total sales. Hence, MSL is not a viable option given the availability of more specific information on the record.

NOV, the first of the new alternatives that were placed on the record in October 2015, describes itself as a "worldwide provider in the design, manufacture and sale of equipment and components used in oil and gas drilling, completion and production operations, and the provision of oilfield services to the upstream oil and gas industry."[38] While the narrative describing NOV's Wellbore Technologies segment suggests that the company may manufacture premium drill pipe, among other oil and gas equipment, such production does not appear to represent a significant focus or income stream for the company. Rather, NOV's operations encompass designing, manufacturing, and servicing entire rig systems, both on land and offshore.[39] This, for example, includes offshore drilling equipment packages, installation and commissioning services, and drilling rig components. Thus, while the production of pipes may fall within the company's purview, the profit on any such activity would be eclipsed by the vast array of NOV's operations.

With respect to Petitioners' argument that Welspun's 2012 results were an outlier as the company's profits were abnormally low when compared to the other Indian OCTG producers, we disagree. Simply because a company's profits happen to be on the lowest or the highest end of the spectrum of available sources does not by itself necessarily make it an outlier or aberrational; in fact, Welspun's financial statements were used to calculate the surrogate

[38] *See* U.S. Steel Factual Information Submission, Exhibit 11, Form 10-K, at 1.
[39] *Id*., at 1-2.

financial ratios in the companion case, *OCTG from Vietnam*.[40] However, we decline to use Welspun's statements for different reasons.

A closer inspection of the company's annual report on the record of this redetermination fails to support the conclusion that Welspun is in fact a producer of OCTG. Rather, Welspun markets itself as a producer of line pipe.[41] Thus, in accordance with our analysis of line pipe in the *Final Determination*, we find that Welspun does not produce merchandise that is in the same general category as OCTG. While these financial statements were used in *OCTG from Vietnam* as the best available surrogate value information in that specific non-market economy case, we note that the Department's selection of a surrogate company was limited to companies operating in India.[42] Given this limitation, the Department compared the Indian financial statements with the criteria for selecting a surrogate in NME cases and found Welspun to be the most suitable. Conversely, here we are not limited to Indian sources only, but are able to examine a larger pool of financial statements for more suitable options.

Interpipe's financial statements for the fiscal year ended December 31, 2012, show a net loss on operations.[43] Because it is the Department's long-established practice when calculating CV profit to exclude from the list of surrogate candidates financial statements that show a net loss, we find that Interpipe's financial statements are not a viable option.[44] Consequently, consistent with our long-standing practice, we decline to use Interpipe's financial statements.

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[40] *See Certain Oil Country Tubular Goods from the Socialist Republic of Vietnam: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 79 FR 41973 (July 18, 2014) (*OCTG from Vietnam*) and accompanying Issues and Decision Memorandum at Comment 2.
[41] *See* NEXTEEL and HYSCO Factual Information Submission at Exhibit 1A.
[42] *See* 19 U.S.C. 1677b(c)(2) (2012) (requiring that the Department value factors of production in NME cases using a market economy country that is "at a level of economic development comparable to that of the nonmarket economy country").
[43] *See* NEXTEEL and HYSCO Factual Information Submission, Attachment 2A, Interpipe 2012 Financial Statements, at 10.
[44] *See, e.g.*, *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 76 FR 56396 (September 13, 2011) and accompanying Issues and Decision Memorandum at Comment 1.B. (employing an alternative method to calculate the profit ratio because the respondent's financial statements did not

Tubos Reunidos's financial statements on the record are incomplete as they fail to include either the notes to the financial statements or the auditor's letter.[45] Therefore, consistent with our practice with regard to incomplete financial statement submissions, we have excluded this company as a potential surrogate for the CV profit calculation.[46]

APC's financial statements for the fiscal year ended December 31, 2012, show a net loss on operations.[47] Because it is the Department's long-established practice when calculating CV profit to exclude financial statements that show a net loss, we find that APC's financial statements are not a viable option.[48] While APC's December 31, 2013, financial statements also overlap the POI and show a net profit, we find that, as the Department found in the companion case, *OCTG from Saudi Arabia*, we are unable to establish whether the company's activities are predominantly related to OCTG products.[49] Because the facts here have not changed from the companion case, we have likewise excluded this company as a potential surrogate for the CV profit calculation.

Borusan's financial statements for the fiscal year ended December 31, 2012, were rejected as a suitable surrogate for the calculation of CV profit in the companion case, *OCTG*

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reflect a positive profit value); and *Certain Fresh Cut Flowers from Ecuador: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 64 FR 18878, 18883 (April 16, 1999) ("In order to calculate a positive amount for profit ... we disregarded financial statements of producers that incurred losses.")

[45] *See* NEXTEEL and HYSCO Factual Information Submission, Attachment 3.

[46] *See, e.g.*, *Xanthan Gum* and accompanying Issues and Decision Memorandum at Comment 2, which states, "the Department's practice has been to exclude incomplete financial statements from consideration in the calculation of the financial ratios."

[47] *See* NEXTEEL and HYSCO Factual Information Submission, Attachment 4.

[48] *See, e.g.*, *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 76 FR 56396 (September 13, 2011) and accompanying Issues and Decision Memorandum at Comment 1.B. (employing an alternative method to calculate the profit ratio because the respondent's financial statements did not reflect a positive profit value); and, *Certain Fresh Cut Flowers from Ecuador: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 64 FR 18878, 18883 (April 16, 1999) ("In order to calculate a positive amount for profit ... we disregarded financial statements of producers that incurred losses.").

[49] *See Certain Oil Country Tubular Goods from Saudi Arabia: Final Determination of Sales at Less Than Fair Value*, 79 FR 41986 (July 18, 2014) (*OCTG from Saudi Arabia*) and accompanying Issues and Decision Memorandum at Comment 5.

from Turkey.[50] Specifically, the Department stated that "it would not be appropriate to use Borusan's public consolidated financial statements because of the fact that the statements primarily reflect the results of operations for products other than OCTG." These facts have not changed; consequently, we likewise find here that it would not be appropriate to use Borusan's financial statements for the CV profit calculation for Korean OCTG.

TMK is a producer of seamless and welded pipes, including pipes with the entire range of premium connections.[51] The company's technical catalog lists a range of tube and pipe products that include both OCTG and drill pipe, *i.e.*, merchandise that is in the same general category as OCTG.[52] The company's consolidated financial statements describe TMK as "one of the world's leading producers of steel pipes for the oil and gas industry" and state that the "principal activities of the Group are the production and distribution of seamless and welded pipes with the entire range of premium connections."[53] Furthermore, for the fiscal year ended December 31, 2012, greater than 75 percent of TMK's sales were to non-U.S. markets.[54] We are also able to determine that TMK sells predominantly to end users.[55]

Based on this analysis, the record now contains two viable options for the calculation of CV profit – Tenaris and TMK. As the parties have noted in their factual information submissions, there are still rationales for excluding each of these remaining producers. However, we find that these arguments are outweighed by the criteria which each potential surrogate has been found to possess. Tenaris and TMK produce not only OCTG but other products that are in

[50] *See Certain Oil Country Tubular Goods from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances, in Part*, 79 FR 41971, (July 18, 2014) (*OCTG from Turkey*) and accompanying Issues and Decision Memorandum at Comment 3.
[51] *See* Husteel Factual Information Submission, Exhibit 3, OAO TMK Consolidated Financial Statements, at 8.
[52] *See* U.S. Steel Factual Information Rebuttal, Exhibit 5.
[53] *See* Husteel Factual Information Submission, Exhibit 3, OAO TMK Consolidated Financial Statements, at 8.
[54] *Id.*, at 32.
[55] *See* U.S. Steel Factual Information Rebuttal, Exhibit 5.

the same general category of merchandise as OCTG, *e.g.*, drill pipes.[56] While some dissimilarities between the surrogates and the respondents can be found, such as with the specific mix of the OCTG products sold and in the particular production methodologies employed (*i.e.*, welded versus seamless, *etc.*), we consider it important in this investigation to have a profit reflective of the specialized nature of OCTG products.[57]

Moreover, it is neither necessary nor practical to perfectly replicate the particular mix of OCTG products that the respondents and the surrogates produce and sell. Rather, we find it reasonable to base CV profit on surrogate financial statements that reflect significant sales of OCTG and other products in the same general category of merchandise as OCTG. Similarly, regarding production methodologies, while the Department considers how closely the surrogate producers approximate the producers' experience, the Courts have held that the Department is not required to duplicate the exact production experience of the respondents.[58] Here, the use of multiple financial statements allows the Department to capture a broader range of industry experience. Thus, the Department finds that using multiple financial statements prevails over any reservations that the surrogate companies do not have the identical production experience and the identical OCTG product mix as the respondents.

Analysis of the CV Profit Cap

Finally, we continue to find that there is no information available to calculate a profit cap for Korea as set forth under subsection (iii) because we do not have home market profit data for other exporters and producers in Korea of the same general category of products. However, the

[56] *Id.* and Letter from U.S. Steel to the Department, "Oil Country Tubular Goods from Korea" (U.S. Steel's March 21, 2014 Comments on NEXTEEL's March 6, 2014 section D SQR), dated March 21, 2014 at Exhibit P, the 2012 Fiscal Year Annual Report of Tenaris, page 12, where Tenaris states that for the oil and gas industry, particularly OCTG drilling, it manufactures a wide range of pipe specifications, which vary in diameter, length, thickness, finishing, steel grades, threading and coupling.
[57] *See Final Determination* and accompanying Issues and Decision Memorandum at 1.
[58] *See Nation Ford Chemical Company v. United States*, 166 F.3d 1373, 1377 (CAFC 1999).

SAA makes clear that the Department might have to apply alternative (iii) on the basis of facts available. In this case, the record evidence demonstrates that there is no domestic market in the exporting country for merchandise that is in the same general category of products as the subject merchandise.[59] Accordingly, we have examined all available data in this case and conclude that as facts available, a reasonable profit cap is the average of the profits in the global market (which includes Korea) earned by Tenaris and TMK.

In determining the appropriate data source to use in calculating CV profit we examined all data on the record and selected the best available information to calculate CV profit. Specifically, the vast majority of sources on the record do not reflect sales of OCTG or products in the same general category in the foreign country. Accordingly, the record does not contain sufficient information to calculate the profit cap on that basis.

Based on our analysis, we found that Tenaris's and TMK's 2012 financial statements meet these criteria and represent the best information available on the record to calculate CV profit in accordance with the intent of the statute. The remaining options fail to meet these minimum requirements and have been rejected as viable options for CV profit. Likewise, we find that the options rejected as unsuitable for the calculation of CV profit fail to provide a reasonable basis for a facts available CV profit cap. Therefore, because there is no Korean market general category profit information on the record in this proceeding, the Department is unable to calculate a profit cap in accordance with section 773(e)(2)(B)(iii) of the Act, *i.e.*, "the amount normally realized by exporters or producers . . . in connection with the sale, for

[59] *See* NEXTEEL's September 17, 2013 section A questionnaire response at 2 and HYSCO's September 17, 2013 section A questionnaire response at 2, and for the voluntary respondents, *see* Husteel's September 17, 2013 section A questionnaire response at 2, AJU Besteel's September 17, 2013 section A questionnaire response at 2, SEAH's September 17, 2013 section A questionnaire response at 2, and ILJIN's September 17, 2013 section A questionnaire response at 2.

consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise."

B. RESPONDENT SELECTION

Background

In considering the Department's selection of mandatory respondents, the Court upheld the Department's determination in a number of regards, specifically by (1) accepting the Department's reference to its heavy workload in making the determination that it would not be practicable to review all known exporters and producers; (2) finding the Department's determination that the known number of exporters and producers in this investigation was "large" to be reasonable; and (3) rejecting ILJIN's argument that two was not a reasonable number of mandatory respondents in this investigation. However, the Court found that the Department did not provide sufficient reasoning for declining to examine ILJIN as a mandatory respondent.[60] The Court thus remanded this issue to the Department, ordering it to reconsider the issue of whether the two selected respondents, HYSCO and NEXTEEL, which produce only welded OCTG, were representative of the Korean industry. As part of this remand, the Court also stated that "Commerce must consider record evidence that is probative of the difference between welded and seamless OCTG, including costs and pricing."[61] Accordingly, although the Department respectfully disagrees with the Court, the Department has reconsidered this issue and provides the following explanation as to why it is appropriate not to select ILJIN as a mandatory respondent in this investigation, along with the requisite analysis of record evidence.

Section 777A(c)(1) of the Act directs the Department to calculate individual dumping margins for each known exporter or producer of the subject merchandise. However, section

[60] *See Husteel* at 21-23.
[61] *Id*., at 23.

777A(c)(2) of the Act gives the Department discretion, when faced with a large number of exporters or producers in an investigation or administrative review, to limit its examination to a reasonable number of exporters or producers if it is not practicable to examine all such companies. Specifically, section 777A(c)(2) of the Act authorizes the Department to determine the weighted-average dumping margins for a reasonable number of exporters or producers by limiting its examination to (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the Department at the time of selection; or (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

In our Respondent Selection Memorandum, the Department stated that because of the large number of known exporters and producers involved in this antidumping duty investigation, as well as resource considerations, it was not practicable to examine all known exporters and producers.[62] Therefore, we stated that we would limit the number of respondents examined, consistent with section 777A(c)(2) of the Act. In selecting respondents in this investigation, the Department stated that, given our limited resources, it was most appropriate to select the exporters or producers accounting for the largest volume of the subject merchandise that could reasonably be examined, pursuant to section 777A(c)(2)(B) of the Act.[63] We thus selected HYSCO and NEXTEEL as mandatory respondents, since these two companies accounted for the largest volume of U.S. imports of subject merchandise during the POI.[64]

[62] *See* Memorandum from Richard Weible, Director, Antidumping and Countervailing Duty Operations, Office 7, to Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, "Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Korea: Respondent Selection Memorandum," dated August 26, 2013 (Respondent Selection Memorandum) at 6-7.
[63] *Id*., at 7.
[64] *Id*., at 8.

Representativeness

As noted, section 777A(c)(2) of the Act authorizes the Department to determine the weighted-average dumping margins for a reasonable number of exporters or producers by limiting its examination to (A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the Department at the time of selection; or (B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined. The provision establishes no hierarchy in choosing the respondent selection method, nor is there a preference for the sampling method over selecting respondents that account for the largest volume of subject merchandise. Importantly, the decision to select mandatory respondents occurs at the earliest stages of an investigation, and the administrative record at the time the decision is made is limited when compared with the administrative record available at the conclusion of the investigation. In determining whether to apply the sampling method under subsection 777A(c)(2)(A), or the largest volume method under subsection (c)(2)(B), we recognize that because any sample must be based on "information available to the administering authority at the time of selection," so too any decision to apply one method over the other must also be based on information available to the Department at the time of its decision on which method should be applied. Accordingly, the agency can only consider information that is on the administrative record at the time it makes its decisions concerning the particular method. Information that may be subsequently submitted at later stages of an investigation, therefore, is not available to the Department at the time it chooses the particular method and therefore is not pertinent to the decision-making for that specific issue.

At the time of the respondent selection process, information on the record of this proceeding indicated that ILJIN was the only Korean producer of seamless OCTG.[65] The record evidence also showed that ILJIN's imports during the POI amounted to less than [ ] percent of total imports of OCTG from Korea during the POI.[66] As such, the remaining [ ] percent of imports of OCTG from Korea during the POI consisted of welded OCTG. According to the U.S. Customs and Border Protection (CBP) data, HYSCO and NEXTEEL were the two largest exporters or producers of the subject merchandise, with combined imports accounting for over [ ] percent of total U.S. imports of subject merchandise during the POI.[67] Thus, in choosing the respondent selection method based on the largest volume, and in selecting HYSCO and NEXTEEL as mandatory respondents, the Department examined nearly [ ] percent of the Korean industry's imports. Even though ILJIN claimed to be the only Korean producer and exporter of seamless OCTG during the POI, its U.S. imports, at less than [ ] percent of the total, were relatively small in comparison to those from other Korean producers and exporters during the POI. Therefore, the Department concluded that it was reasonable to select mandatory respondents based on largest export volume under section 777A(c)(2)(B) of the Act, because HYSCO and NEXTEEL, whose exports accounted for nearly [ ] percent of total U.S. imports of Korean OCTG during the POI, were representative of the Korean OCTG industry, which predominantly sold welded OCTG in the United States. Put another way, as ILJIN's imports of

[65] *See* Letter from ILJIN to the Department, "Oil Country Tubular Goods from South Korea: Comments of ILJIN Steel Corporation on Respondent Selection," dated August 5, 2013 (ILJIN's August 5, 2013 Letter) at 2, citing testimony of Dong-Heui Pi, Manager, Marketing Strategy Team, HYSCO, at the USITC Preliminary Hearing, at page 178 (attached thereto as Appendix 2); *see also* Letter from Petitioners to the Department, "Certain Oil Country Tubular Goods from the Republic of Korea," dated August 5, 2013 (Petitioners' August 5, 2013 Letter) at 4, citing *Korea Metal Journal*, "Iljin Steel, Shipping First 2,000 Tons of Seamless Pipes to Overseas Market," August 27, 2012 (attached thereto as Attachment 1).

[66] *See* Respondent Selection Memorandum at Attachment 1 and ILJIN's August 5, 2013 Letter at Appendix 1.

[67] *See* Respondent Selection Memorandum at 8 and Attachment 1. When ILJIN's imports, which were not reflected in the CBP data, are added to the total imports reflected in the CBP data, HYSCO and NEXTEEL's imports constituted [ ] percent of the total.

OCTG equaled less than [ ] percent of the total imports of OCTG from Korea during the POI, the Department found that ILJIN accounts for a very small portion of the overall exports, which were alleged to be dumped, and thus it is appropriate to choose the largest volume method, and not to select ILJIN as a mandatory respondent.

With respect to the Court's reasoning that "{i}t is not unreasonable to assume that the goals of these {respondent selection} provisions are to capture a broadly representative sample of the export market,"[68] we understand the Court to suggest that in selecting whether to use the sampling method or select respondents accounting for the largest volume of the subject merchandise, the agency may consider whether the selected respondents under each of the methods are broadly representative of the industry as a whole.

Apart from that, the Department submits that this is not the only reasonable interpretation of these statutory provisions. The Department did not interpret the provision that permits it to select mandatory respondents as requiring an additional step of ensuring that the selected exporters and producers employ identical production processes, incur the same production costs, and set the same pricing on the finished product as exporters and producers that are not selected for individual examination. As the Court appears to have accepted, mandatory respondents are unlikely, as a factual matter, to match non-examined companies in all respects, but it does not render their selection unreasonable or contrary to the statute.

In *Mid Continent Nail*, the court acknowledged that representativeness may be a concern in selecting respondents through sampling, but rejected the idea that a representativeness analysis is required when selecting the largest exporters/producers: "Nothing in the language of {19 U.S.C. 1677f-1 (C)(2)(B)} even hints that the exporters and producers selected for individual

[68] *See Husteel* at 19.

review must be 'representative.'"[69] Moreover, nothing in the SAA suggests that when the respondent selection is based on the volume of exports an additional "representativeness" analysis must be conducted. While this Court characterized this interpretation as "dicta" in the instant case, it did not find the interpretation by the *Mid Continent Nail* Court to be unreasonable.

In our view, the interpretation articulated by the *Mid Continent Nail* Court is reasonable and consistent with how the Department interpreted these statutory provisions. As a practical matter, when the Department selects the largest exporters or producers for individual examination, such exporters/producers account for the largest volume of the imports of the subject merchandise that can reasonably be examined, and thus, are inherently representative of the exporting industry because as the largest volume of imports that can reasonably be examined they generally reflect a significant portion of the imports subject to investigation. In this case, as explained above, the largest two producers accounted for almost [ ] percent of total exports and, ILJIN's suggestion that they are not representative of the total exports of subject merchandise to the United States is difficult to accept.

The above notwithstanding, the Department interprets section 777A(c)(2)(B) to mean that where the Department reasonably exercises its authority to select exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined, the Department need not examine, in the application of that methodology, whether a particular respondent must also be individually examined in order for the Department's application to be "representative" of the unexamined exporters and producers, and thus be in accordance with section 777A(c)(2)(B). Under the largest volume method, the Department finds it reasonable to conclude that the provision allows the Department to select the

[69] *See Mid Continent Nail Corporation v. United States*, 949 F. Supp. 2d 1247, 1271 (CIT 2013) (*Mid Continent Nail*).

respondents for individual examination based on exporters and producers "accounting for the largest volume" and that the provision imposes no additional or separate duty to conduct a representativeness test. To impose such a test, where smaller volume exporters, such as ILJIN, believe they are not fairly represented by the largest volume would mean selecting smaller volume exporters or producers for individual examination who are not the largest by volume. Such a selection would be contrary to the terms of the provision to "select exporters and producers accounting for the largest volume . . . that can reasonably be examined." Rather, we interpret section 777A(c)(2)(B) to mean that it fulfills the intent of Congress to subject as much of the subject imports to individual examination as possible. This does not mean, however, that the Department does not consider arguments on "representativeness." To the contrary, such arguments are relevant, but only for purposes of choosing the particular statutory method for respondent selection.

In addition, we recognize that ILJIN's argument at bottom is whether the rate determined by selecting the two mandatories is representative of ILJIN's margin of dumping. ILJIN's argument is flawed, however, because the all-others rate determined based on the mandatory respondents selected is not aimed at representing ILJIN's imports alone, but is instead to represent all unexamined imports of exporters and producers of OCTG during the period of the investigation. Thus, regardless of whether the Department selected respondents based on the largest volume or sampling, the Department would not have found ILJIN to be "broadly representative" of the industry, as its exports of OCTG were less than [ ] percent of the total. Even if the record evidence were viewed in the light most favorable to ILJIN's position and we were to conclude that welded and seamless products were dramatically different (which

we do not), we find that the two mandatory respondents, which we selected, are broadly representative of the exporting industry.

In addition to ILJIN's U.S. imports of OCTG accounting for a relatively small, if not miniscule, portion of the total, the Department found, and continues to find, unpersuasive ILJIN's argument that it should be selected for individual examination because it is the only Korean producer of seamless OCTG. ILJIN argued that the different production process required to make seamless OCTG represented a difference that needed to be accounted for in Department's margin calculations.[70] However, the Department regards welded and seamless OCTG to be the same class or kind of merchandise. The scope of this investigation stated that:

> The merchandise covered by the investigation is certain oil country tubular goods (OCTG), which are hollow steel products of circular cross-section, including oil well casing and tubing, of iron (other than cast iron) or steel (both carbon and alloy), **whether seamless or welded**, regardless of end finish (*e.g.*, whether or not plain end, threaded, or threaded and coupled) whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished (including limited service OCTG products) or unfinished (including green tubes and limited service OCTG products), whether or not thread protectors are attached. The scope of the investigation also covers OCTG coupling stock.

(emphasis added).[71]

The Department notes that ILJIN presented similar arguments regarding the differences between welded and seamless OCTG to the U.S. International Trade Commission (ITC) during the course of this investigation, going so far as to argue that seamless OCTG should be considered a separate domestic like product. However, the ITC found that there was a large degree of interchangeability between seamless and welded OCTG, and that the prices and costs

[70] *See*, *e.g.*, ILJIN's August 5, 2013 Letter at 2-5.
[71] *See*, *e.g.*, *Certain Oil Country Tubular Goods from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 78 FR 45505, 45512 (July 29, 2013) and *Final Determination*, 79 FR at 41985.

of welded and seamless OCTG were not sufficient to consider them separate like products.[72] ILJIN's arguments regarding welded and seamless OCTG do not compel us to ignore the ITC's findings that seamless and welded OCTG are not separate like products.

Further, the Department disagrees with ILJIN's argument that, as the only Korean producer of seamless OCTG, the Department could have selected ILJIN as a mandatory respondent under subsection (A) of the statute, and the largest producer under subsection (B) of the statute (*i.e.*, the Department should have used both subsections of section 777A(c)(2) of the Act to make a determination regarding respondent selection).[73] A plain reading of the statute does not reveal a requirement to use both methods simultaneously, and the Department has not used this "hybrid" method in investigations. Further, even if the Department had relied on sampling to select mandatory respondents, ILJIN incorrectly assumes, and thus has not demonstrated, that the Department would have sampled based on types of products, and therefore that the Department would have selected ILJIN as a mandatory respondent.

We also find that ILJIN's continued reference to Petitioners' initial request that the Department select ILJIN as a mandatory respondent is misplaced. Granted, Petitioners, in their initial comments on respondent selection, asserted that the Department should select [

] as mandatory respondents, because they accounted for a significant volume of shipments of OCTG, as well as ILJIN, the only Korean producer of seamless OCTG, to ensure a "representative" sample of the Korean OCTG industry.[74] However,

[72] *See Certain Oil Country Tubular Goods from India, Korea, The Philippines, Saudi Arabia, Taiwan, Thailand, Turkey, Ukraine, and Vietnam* (Investigation Nos. 701-TA-499-500 and 731-TA-1215-1223 (Preliminary), USITC Publication 4422, August 2013) at 10.
[73] *See* Letter from ILJIN to the Department, "Oil Country Tubular Goods from South Korea: ILJIN Steel Corporation Request for Reconsideration on Respondent Selection," dated September 12, 2013 at 4 and Letter from ILJIN to the Department, "Antidumping Duty Investigation on Oil Country Tubular Goods from the Republic of Korea: Case Brief," dated June 18, 2014 at 7; *see also* ILJIN's Brief in Support of Its Motion for Judgment on the Agency Record, dated February 13, 2015 (ILJIN MJAR) at 30.
[74] *See* Petitioners' August 5, 2013 Letter at 3-4.

simply because an interested party makes an argument to the Department, the Department is not required to accept the argument. Moreover, Petitioners abandoned this argument after the Department selected HYSCO and NEXTEEL as mandatory respondents. In fact, in its rebuttal brief prior to the final determination, Petitioner U.S. Steel argued that the Department "fully adhered to its statutory obligations" in selecting the two largest exporters, HYSCO and NEXTEEL, as mandatory respondents.[75]

Based on the foregoing, and the full explanation of the particular method for selecting respondents for individual examination, we believe the Department properly exercised its discretion in selecting respondents based on the largest export volume as provided by section 777A(c)(2)(B) of the Act. Given the Department's limited resources in this investigation, it was reasonable for the Department to select HYSCO and NEXTEEL as mandatory respondents, because it enabled us to base our investigation on nearly [ ] percent of total POI imports of the subject merchandise by examining the companies accounting for the largest volume of the subject merchandise from Korea. Further, to the extent that there are any differences between seamless and welded OCTG, the Department finds that HYSCO and NEXTEEL, as producers of welded OCTG, were representative of the Korean OCTG industry as a whole, as welded OCTG accounted for over [ ] percent of imports during the POI. We note that, in selecting the two largest exporters as mandatory respondents in this investigation, we examined a representative portion of the Korean OCTG industry; hence, the all-other's rate is also based on a representative portion of the Korean OCTG industry, and is not marked by distortions.

With respect to the Court's directive that "Commerce must consider record evidence that is probative of the difference between welded and seamless OCTG, including costs and

[75] *See* Letter from U.S. Steel to the Department, "Oil Country Tubular Goods from Korea," dated June 23, 2014 at 3.

pricing,"[76] we consider this data in the context of choosing between the respondent selection methods. The Court indicated that ILJIN submitted information regarding costs and prices differences between welded and seamless OCTG and ordered the Department to consider this information.[77] In its brief before the Court, ILJIN argued that seamless OCTG is "a product whose costs and prices are dramatically different from those of welded OCTG – [ ] percent higher as compared to the average unit values of welded OCTG."[78] However, we find this argument unsupported by the record evidence.

With respect to alleged cost differences between welded and seamless OCTG, the Department notes that, at the time of respondent selection, ILJIN had not submitted any quantitative information. Rather, ILJIN merely asserted that "{t}he production process for seamless OCTG differs extensively from that of welded OCTG," and, in support of this assertion, provided an excerpt from the ITC's final hearing in the 2010 investigation of OCTG from China, a different proceeding.[79] The only reference in that excerpt to costs is the following sentence: "OCTG mills manufacture casing and tubing either by the seamless process or by the electric resistance-welding ("ERW") process, a lower cost method than the seamless process, depending on the service requirements."[80] While the ITC report cited by ILJIN may be informative, it offers no quantitative analysis regarding cost differences between welded and seamless OCTG production. That the production process for welded OCTG requires a "lower cost method" is not specific as to the degree or significance of such difference. This singular statement is certainly not support for ILJIN's claim that the costs of seamless OCTG are [ ]

[76] *See Husteel* at 23.
[77] *Id*., at 18 and n. 10. We also note that increases in costs and prices may potentially offset each other. At the time the decision was made, ILJIN had failed to demonstrate how any alleged increases affect dumping calculations.
[78] *See* ILJIN MJAR at 14.
[79] *See* ILJIN's August 5, 2013 Letter at 2-3 and Appendix 3 (*Certain Oil Country Tubular Goods from China* (Investigation No. 701-TA-463 (Final), USITC Publication 4124, January 2010), pages I-14 through I-20).
[80] *Id*., at Appendix 3 (*Certain Oil Country Tubular Goods from China* (Investigation No. 701-TA-463 (Final), USITC Publication 4124, January 2010), page I-14).

percent higher than those of welded OCTG,[81] particularly when viewed in light of ITC's ultimate finding that welded and seamless OCTG are not separate like products. Thus, we find that ILJIN's claim with respect to the [ ] percent cost difference between welded and seamless OCTG is unsubstantiated.

Regarding price differences between welded and seamless OCTG, the only quantitative information on the record at the time of respondent selection was the information that ILJIN provided to the Department in its respondent selection comments. Specifically, ILJIN argued the following:

> The most obvious evidence of the substantially higher prices commanded by seamless OCTG can be found in a comparison of the average unit values of ILJIN's imports during the POI (reported in the attached Appendix 1) to the average unit values for all Korean welded OCTG imports in the first quarter of 2013. For 1Q2013, Customs data indicates an AUV from Korea of $862.09. See Petition Exhibit I-6. For the POI, the AUV of ILJIN's imports was $[ ].[82]

Because ILJIN did not place any quantitative information on the record related to alleged price differences other than the AUV information cited above, ILJIN's claim that the prices (and costs) of seamless OCTG are [ ] higher than those of welded OCTG is based entirely on the sparse AUV information in ILJIN's respondent selection comments. We find this information to be insufficient to support a requirement that the Department choose respondents by the sample method under section 777A(c)(2)(A), and to require sampling by product type, and therefore to select ILJIN as a mandatory respondent. First, ILJIN's "analysis" is based on a comparison of two numbers which are derived from two different time periods – the first quarter of 2013 for other producers, and the POI for ILJIN. Thus, ILJIN compares numbers from two different time periods, making the information insufficient to support ILJIN's claim.

[81] *See* ILJIN MJAR at 14.
[82] *See* ILJIN's August 5, 2013 Letter at 3.

Second, the record contains no information that would enable the Department to determine whether the difference in the two AUVs was due to differences between the production processes for welded and seamless OCTG as opposed to other factors, such as circumstances of sale, steel grades used, models sold, *etc*. As the party making the argument that seamless OCTG prices and costs were "dramatically different" from those of welded OCTG, ILJIN had the burden to provide a meaningful, quantitative analysis to support its claim. ILJIN's rudimentary "analysis" is flawed and uninformative. It fails to demonstrate that the difference between two AUV numbers is primarily attributable to price differences between welded and seamless OCTG, rather than other factors such as time periods, circumstances of sale, models, *etc*.

Third, as ILJIN noted in its respondent selection comments, its imports of seamless OCTG were not reflected in the CBP data.[83] Thus, it is unclear whether the two AUVs forming the basis of ILJIN's "analysis" were reported on the same basis. The Korean AUV is based on import data for the HTS numbers for casing and tubing as reflected in IM-145 data from the U.S. Department of Commerce, Bureau of the Census.[84] The IM-145 data are based on customs values. ILJIN's AUV, in turn, is based on its self-reported "imports,"[85] but ILJIN did not explain how it calculated the values underlying this figure, nor did it provide any support documentation for these values.

As we stated above, at the time the Department selected mandatory respondents in this investigation, the only information on the record regarding the alleged price and cost differences between welded and seamless OCTG was the AUV information cited above that ILJIN provided

[83] *See* ILJIN's August 5, 2013 Letter at 2.
[84] *See* Petitions for the Imposition of Antidumping and Countervailing Duties: Certain Oil Country Tubular Goods from India, the Republic of Korea, the Republic of the Philippines, Saudi Arabia, Taiwan, Thailand, the Republic of Turkey, Ukraine, and the Socialist Republic of Vietnam, dated July 2, 2013, at 16 and Exhibit I-6.
[85] *See* ILJIN's August 5, 2013 Letter at 3 and Appendix 1.

in its comments on respondent selection. During the course of this investigation, ILJIN did not provide any additional information to support its assertion, nor did any other interested party provide information regarding price and cost differences between welded and seamless OCTG. Nonetheless, because the Court ordered us to consider record evidence that is probative of the difference between welded and seamless OCTG, including costs and pricing, under protest, we have compared the price and cost data which ILJIN voluntarily submitted in response to the Department's original questionnaire to the price and cost data submitted by one of the mandatory respondents, HYSCO.[86] Because none of these data were on the record at the time we selected mandatory respondents in this investigation, the Department respectfully submits that the comparison with this particular information should not be considered relevant because it involves information which was not before the Department when it made its original determination. To comply with the Court's order, we conducted an analysis of price and cost data on the record.

For both HYSCO and ILJIN, we examined the range of gross unit prices, net prices, and total production costs reported by each respondent, as shown below.[87]

Data Source	HYSCO (in USD)	ILJIN (in USD)
Range of Gross Unit Prices	[ ] to [ ]	[ ] to [ ]
Range of Net Prices	[ ] to [ ]	[ ] to [ ]
Range of Total Production Costs	[ ] to [ ]	[ ] to [ ]

The information on the record does not permit control number (CONNUM)-specific comparisons, and for that reason alone we consider the information on the record to be not

[86] The Department did not compare ILJIN's data to that of the other mandatory respondent, NEXTEEL, because NEXTEEL made sales through an affiliated reseller, making it difficult to perform a comparative analysis.
[87] For the calculation of these figures, *see* Memorandum from Deborah Scott, International Trade Compliance Analyst, to the File, "Hyundai HYSCO – Data Comparison; Draft Redetermination Pursuant to Court Remand (Consol. Court No. 14-00215) in the Less-Than-Fair-Value Investigation of Certain Oil Country Tubular Goods from the Republic of Korea," dated February 8, 2016 and Memorandum from Deborah Scott, International Trade Compliance Analyst, to the File, "ILJIN Steel Corporation – Data Comparison; Draft Redetermination Pursuant to Court Remand (Consol. Court No. 14-00215) in the Less-Than-Fair-Value Investigation of Certain Oil Country Tubular Goods from the Republic of Korea," dated February 8, 2016.

probative of the difference in costs and prices between welded and seamless OCTG. In any case, the above comparison of the available information on the record shows there is considerable overlap in prices and costs between welded and seamless OCTG sales and costs, and therefore such information does not support the significant differences in welded and seamless OCTG asserted by ILJIN. Thus, we find that ILJIN's argument is not substantiated.

Based on the foregoing, the Department finds that ILJIN failed to provide sufficient information to support its allegation that the prices and costs of seamless OCTG are [ ] percent higher than those of welded OCTG. As explained above, at the time of respondent selection, the record did not contain any quantitative analysis related to cost differences between welded and seamless OCTG, and the very minimal information on the record with respect to price differences was flawed for several reasons.[88] Therefore, the Department finds that ILJIN has failed to demonstrate that the alleged difference between welded and seamless OCTG compel the Department to use the sampling method over the largest volume method in this investigation, or otherwise render unreasonable the Department's selection of mandatory respondents for individual examination based upon exporters or producers accounting for the largest volume of the subject merchandise in this investigation.

SUMMARY AND ANALYSIS OF INTERESTED PARTIES' COMMENTS ON DRAFT REDETERMINATION

As explained above, NEXTEEL, HYSCO, Husteel, U.S. Steel, Maverick, and AJU Besteel submitted comments on the Department's Draft Redetermination on February 16, 2016. These interested parties filed comments on various aspects of the issue of CV profit, both substantive and procedural. However, no interested party submitted comments on the issue of

[88] Although it is not directly relevant to our analysis, we note that, subsequent to the respondent selection process, it does not appear that ILJIN provided any additional information to support its assertion regarding price and cost differences between welded and seamless OCTG.

respondent selection; thus, the Department continues not to select ILJIN as a mandatory respondent.

Below we address interested parties' comments on the Draft Redetermination and provide our analysis. As explained below, the Department continues to reach the same conclusions that we reached in the Draft Redetermination.

A. SUBSTANTIVE ISSUES RELATED TO CV PROFIT

Issue 1: Interpretation of "Same General Category of Products"

Summary of Parties' Comments

Petitioners note that the phrase "same general category of products" is not defined in the statute. Petitioners submit that the Department reasonably interpreted that steel of sufficient quality to be used in "downhole" applications is in the same general category of products as OCTG. At the Court's request, the Department in the Draft Redetermination clarified that its consideration of the difference in demand between the oil exploration and construction markets and the relevance of testing and certification requirements served only to underscore the fundamental differences between the pipes sold in each market. Moreover, Petitioners proffer that such factors are not unique to this case, but are inherently relevant to determining the similarity of the products, especially with respect to their profitability. Further, Petitioners argue that the Department's conclusion that products in the same general category should share the same fundamental characteristics that make them suitable for their primary application (*i.e.*, underground oil and gas applications) is a reasonable interpretation of the statute and is supported by record evidence.[89]

NEXTEEL and HYSCO contend that the Department's determination that only steel pipes used in "downhole" applications can be considered in the same general category of

[89] *See* Maverick and U.S. Steel's Comments on Draft Redetermination at pages 4-7.

merchandise is an unlawful and stark departure from the Department's prior interpretation that the "same general category" can include similar products in different applications. Moreover, this interpretation is unreasonably narrow, in light of the SAA's explanation that the "same general category" cannot be interpreted narrower than the scope of the investigation. Further, it is in conflict with the Department's determination that non-prime OCTG, which do not meet the required specifications and are unsuitable for downhole applications, are regardless within the scope of the investigation.[90] Consequently, NEXTEEL and HYSCO reiterate their position that the Department's general category determination should be expanded to include line and standard pipes as these products are produced using the same inputs and the same production facilities as OCTG.[91]

Husteel contends that in the Draft Redetermination the Department's same general category of merchandise determination continues to be impermissibly narrow and fails to address the Court's express concerns regarding this narrow interpretation. According to Husteel, the statute's use of the term "general" and the SAA's instructions that this is a category of products broader than the subject merchandise imply that the focus is on the nature of the products and not on the factors related to the sale of the products being considered, such as demand and supply trends or other conditions of competition. However, Husteel argues that despite the Court's concerns regarding such temporal factors, the Department has continued to rely on differing market conditions and testing and certification requirements in rendering its decision.

Husteel asserts that a product is either in the same general category or not, this is not a determination that should vary with the demand it commands in the marketplace. With regard to

[90] *See Notice of Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Ukraine*, 79 FR 41969 (July 18, 2014) (*OCTG from Ukraine*), and accompanying Issues and Decision Memorandum at Comment 2.
[91] *See* NEXTEEL and HYSCO's Comments on Draft Redetermination at 14-15.

testing and certification requirements, Husteel argues that the Department has effectively limited the same general category to finished OCTG products, which is in fact, a narrower definition than the scope of the investigation. If only "downhole" suitable products are in the same general category of products as OCTG, then the Department's determination is in conflict with the scope of the investigation which covers limited service and unfinished OCTG that cannot be used in downhole applications. Furthermore, the Department in *OCTG from Ukraine* has determined that rejected OCTG, which also cannot be used in downhole applications, are within the scope of investigation.[92]

AJU Besteel states that it concurs with the comments filed by the mandatory respondents, NEXTEEL and HYSCO, regarding the Draft Redetermination.[93]

Department's Position:

A. Defining the Same General Category of Products

The statute and regulations do not define the phrase "same general category of products as the subject merchandise." In addition, we agree that the SAA provides that the same general category encompasses a category of merchandise broader than the foreign like product.[94] We also recognize that the SAA, in addressing the same general category as the subject merchandise, expressly provided that, as under existing practice at the time the URAA was enacted, Commerce "will establish appropriate categories on a case-by-case basis."[95] Moreover, the SAA expressly equated the new terminology of "general category of products as the subject merchandise" with "products in the same general class or kind of merchandise."[96] In this case we defined the same general category of products broader than the foreign like product. The fact

[92] *See* Husteel's Comments on Draft Redetermination at 3-13.
[93] *See* AJU Besteel's Comments on Draft Redetermination at 1.
[94] *See* SAA at 840.
[95] *Id.*
[96] *Id.*

that we limited the population of products that fall within the same general category of merchandise to those product groups used in the oil and gas exploration, i.e., the same industry as OCTG, is reasonable, and consistent with the statute and SAA.

We disagree with the respondents that we should have defined the same general category more broadly than we did. The preferred methodology under 19 U.S.C. 1677b(e) is to use the actual amounts incurred and realized "in connection with the production and sale of a *foreign like product*." (emphasis added). The three alternatives to the preferred method, while not always requiring the use of data for the foreign like product, concern the establishment of an appropriate proxy for the amounts incurred and realized "in connection with the production and sale of a foreign like product." Our intent is, to approximate as closely as possible the profit realized from sale of the foreign like product, while defining the same general category more broadly than the foreign like product (as we have done here). We recognize that the more broadly the same general category of products is defined, the more products other than the like product will be included, and thus greater potential exists for the constructed normal value to be unrepresentative of the price of the like product. In this case, we struck a reasonable balance by defining the same general category more broadly than the foreign like product, but also eliminating dissimilar products that would not be used in oil and gas exploration. As profit is the result of both production costs and price, operating in the same general industry is an important consideration for a profit surrogate, particularly in an industry as specialized as oil and gas drilling.

As we stated in the Draft Redetermination, our goal is to try to find a profit that reasonably reflects the product under investigation. We recognize that OCTG is a specialized

premium product, which commands higher prices than many other products.[97] As such it is important that we use a profit source that likewise reasonably reflects the profit one would expect from the product under consideration rather than standard and line pipe products which are lower end pipe products that are priced lower and used in different industries.[98]

The law does not restrict our analysis in determining which products reasonably fall within the same general category of products as the subject merchandise for purposes of determining a CV profit. In particular, as noted above, the SAA at 840, expressly provides that "[a]s under existing practice, the Administration intends that, if Commerce uses alternative (i), it will establish appropriate categories on a case-by-case basis." Therefore, we disagree that our decision to limit the general category of merchandise to those product groups that can be used in "down hole" applications is an unlawfully narrow definition. The law does not define the same general category of products as subject merchandise and such determinations are based on a case-by-case analysis in light of particular record of each case. Based on record evidence before us, we identified clear and important factors in determining whether other products qualify as within the same general category of products as OCTG. We analyzed the pipe products sold by the Korean respondents in the home market using these factors and determined those products to not be in the same general category of products as the subject merchandise. In the instant case, OCTG are specialized, high end premium pipe products that are used in a specific application and industry, along with certain other products that are not subject to this investigation. To limit the general category to those other products that are used in the same industry and same general application is not only lawful, it is reasonable.

[97] *See* U.S. Steel's March 21, 2014 Comments on NEXTEEL's March 6, 2014 section D SQR at Exhibit Q.

[98] *Id.*

Based upon the information on the record, we found that standard and line pipe products differ significantly in chemical, physical and mechanical characteristics from OCTG products.[99] OCTG pipes are subjected to external collapse pressures, internal pressures, and tension strength requirements when used in oil or gas wells, whereas, standard pipe and line pipe products are primarily intended for the conveyance of fluids and gas.[100] Moreover, casing, which is the overwhelming majority of OCTG consumed, is used as a structural support in an oil or gas well to protect the hole that has been drilled.[101] It must be sufficiently strong in collapse strength to resist pressures from the outside well, and also must resist pressures that can exist inside the well.[102] In addition, it must have sufficient joint strength to support its own weight and threading sufficient to resist well pressures.[103] Line pipes are connected by welding pipes together and stand pipe is generally used for structural purposes.[104] Accordingly, the performance measures, production processes, alloys, and physical and mechanical characteristics of OCTG casing and tubing products differ in such significant ways from those of standard and line pipe that these products should not be considered to be of the same general category of products as OCTG.

Additionally, we disagree that the products we consider to be a part of the same general category of merchandise constitutes a narrower population than the scope of the investigation. The investigation covers all OCTG, with the exception of that containing 10.5 percent or more by weight of chromium, and drill pipe. Our interpretation of the general category of merchandise includes the covered OCTG, drill pipe, and the OCTG covering 10.5 percent or

[99] *See Specification for Casing and Tubing – API SPECIFICATION 5CT,* Ninth Edition, Copyright American Petroleum Institute. *See* excerpts placed on the record in petitioner's rebuttal comments on product characteristics and product matching dated August 12, 2013. *See also Steel Products Manual – Carbon Steel Pipe, Structural Tubing, Line Pipe, Oil Country Tubular Goods,* April 1982, Published by the American Iron and Steel Institute; *see also* U.S. Steel's March 21, 2014 Comments on NEXTEEL's March 6, 2014 section D SQR at Exhibit Q.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*

more chromium. The OCTG covering 10.5 percent or more chromium and drill pipe are outside the scope of this investigation, but are within the same general category of products with the subject OCTG.

Regarding the dictionary definition of "general," we disagree that it changes our determination that standard and line pipe are not within the same general category of products as OCTG. For example, in line with the American Heritage College Dictionary (3rd Ed. 1993) noted by respondent, "concerned with, applicable to, or affecting the whole or every member of a class or category," we consider our limitation to those category of products used in the oil and gas drilling industry to reasonably fall within this definition.[105]

With respect to OCTG Ukraine, the defective pipe at issue in that investigation entered the United States as OCTG and was subject to inspection. Upon inspection in the United States, the OCTG was deemed to be damaged or non-compliant with API standards and could not be repaired to meet such requirements.[106] This merchandise however was produced as OCTG, entered and sold as OCTG and is OCTG.[107] It was after it entered the United States that it failed inspection and was subsequently downgraded.[108] As a general matter, there may be various remedies available to customers who purchased OCTG products, but the products failed inspection after importation (*e.g.*, warranty claims, *etc*). In contrast, the record evidence in this case demonstrates that the respondent's downgraded and defective products were marketed and sold in Korea as non-OCTG products, such as standard pipe. HYSCO Sales Verification Report (June 6, 2014), at 24-25 (explaining that the so-called non-prime OCTG "were OCTG in name only" and "HYSCO acknowledged the non-prime products listed on the invoice did not meet the

[105] We note that while the dictionaries could provide helpful guidance, they do not have the force of law.
[106] *See OCTG from Ukraine* and accompanying Issues and Decision Memorandum at Comment 2.
[107] *Id.*
[108] *Id.*

API 5CT specification and were not marketed to the customer as OCTG."); HYSCO Suppl. Sec. A, C, D QR- part 3 (January 8, 2014) at SD-13; HYSCO Cost Verification Report (May 20, 2014) at 16 (explaining that the so-called "non-prime OCTG cannot be used for drilling applications relevant to the API standards and is generally used for structural purposes."); NEXTEEL Sales Verification Report (May 20, 2014), at 16 (explaining that NEXTEEL stated that it attempted to produce OCTG, but the resulting product did not meet all the specification requirements and that the company "typically would sell it as standard pipe.").

The general category of products analysis and determination must be performed on a product by product basis (*i.e.*, line pipe, standard pipe, drill pipe, etc.), not on the basis of individual sales within the product groups. Unusual facts surrounding a handful of individual sales of the subject merchandise in the Ukrainian OCTG investigation, which were sold as OCTG but subsequently determined to be defective, do not lead us to believe that we should adopt a different definition of the general category of products in this investigation. We find that it is illogical and unreasonable to base the profit of OCTG products, which command premium pricing, on defective products that the respondents sold in their home market as standard pipe.

B. Reliance on Market Conditions in Determining the CV Profit Source

As we clarified in the Draft Redetermination, we pointed to the significant differing market conditions between the oil exploration and construction sectors as support for why it is important for the same general category of products to be in the same general industry.

We agree with the respondents that the antidumping statute permits the Department to base CV profit on sales of the same general category of products. We disagree, however, that we define the same general category of products so broadly that the resulting profit fails to reasonably reflect that of the subject merchandise. The end result of the CV calculation is a

constructed price to be used as normal value. Normal value here is cost plus profit. If the Department were required to use the profit for a standard low end pipe product used in the construction industry, as respondents suggest, the resulting CV will more closely resemble a standard low end pipe product used in the construction industry as opposed to a premium pipe product used in the oil exploration industry. Likewise, although we do not suggest that temporal conditions in the market control our analysis, it is significant that the products are used in two different and unrelated markets and reflect different levels of profit realized in these markets. Even if, hypothetically, the market in the construction industry were booming and the market in oil and gas exploration industry were on a downturn, it would not be appropriate to use a profit based on products sold in the construction industry as a proxy for a profit in the oil and gas exploration industry. In other words, it would not be appropriate to assess margins on products used in different industries when the normal value should, and the U.S. prices will, reflect the prices in the industry being examined.

To the extent that respondents argue that the statute says nothing about the actual profit rate selected needing to reasonably reflect the merchandise under consideration, we note that the statutory provisions that govern constructed value (both the preferred method and alternative methods) endeavor to reasonably approximate the profit realized from foreign like product. The statute does not prohibit the agency from using a calculation methodology that approximates the profit from the foreign like product. As a matter of common sense and reason, the profit rate selected should reasonably reflect the merchandise under consideration. The very purpose of calculating constructed value is to create a proxy for the price of the like product (when such price is not available) and compare it to the export price of the subject merchandise in the United States.

C. Reliance on Testing and Certification Requirements in Determining the CV Profit Source

The respondents' claim that continuing to consider testing and certification requirements as part of its same general category analysis runs afoul of the SAA's instruction that the same general category of products encompass a category of merchandise broader than the foreign like product. The respondents base this claim on the assertion that the Department is effectively limiting the same general category of products to finished OCTG products because, by definition, only finished OCTG products are going to be subject to all of the testing and certification requirements for OCTG identified by the Department. Respondents continue that since unfinished OCTG cannot be used down-hole "as is," they are not a part of the general category of products while they are a part of the subject merchandise. As a result, they claim the general category of products is narrower than the subject merchandise, which is contrary to law.

In addressing the respondents' points, we believe it is best to break them down into two different issues. First, we will explain how the testing and certification factor makes sense when part of the scope does not require full testing and certifications (*e.g.*, unfinished OCTG) while the remainder does. Second, we will address the respondent's argument that it is unlawful to have a down-hole requirement for general category of products because the end result is that unfinished OCTG will be considered subject merchandise, but not general category of product.

The testing and certification factor is but one of numerous factors we considered in making the determination that line, structural and standard pipe are not in the same general category as OCTG. Testing and certification requirements are a way to gauge the relative premium nature of different product groups being compared. Relative quality standards and the extent to which OCTG pipes are tested and certified versus drill, standard, structural and line pipe can provide valuable information into the premium nature of the different product groups.

While OCTG and products in the same general category are used in some of the most demanding applications (and subjected to extraordinary pressure requirements), the products that the respondents consider to be comparable compete with plastic pipe in certain low pressure applications. While we do not consider this factor in and of itself to be determinative of whether specific products are within the same general category of products, it does provide important insight into the relative qualities of each. It is important to note that neither of the Korean respondents to this investigation had sales of unfinished OCTG. That is, all of their sales were of finished OCTG that were tested and certified. While we acknowledge that full OCTG testing and certification requirements may not be applicable to unfinished OCTG, it is still required for finished OCTG and the differences in testing and certification requirements between the finished OCTG and line and standard pipe is still deemed relevant. Moreover, the unfinished OCTG would be capable for use in the well, once finished and tested, whereas the products like standard pipe or line pipe would not meet the requirements for such use, even if one were to apply finishing. They will simply be finished line and standard pipe. If a respondent had significant sales of unfinished OCTG, the testing and certification requirements related to those products could potentially be a relevant factor in the general category of products analysis, but we are not presented with this factual situation here.

With regard to the second issue, whether it is unlawful to have a down-hole requirement for general category of merchandise, it is important to clarify what we said in the Draft Redetermination. At page 13 of the Draft Redetermination, we stated that "we believe the more accurate dividing line is to recognize that products in the same general category share the same fundamental characteristics that make them suitable for their primary application (here, "down hole" application), although the exact specifications may differ." While the exact specifications

of unfinished OCTG may differ from that of finished OCTG, the unfinished OCTG still meet the fundamental characteristics of OCTG and, once finishing is applied, are suitable for their primary application. As such, the unfinished OCTG is still subject merchandise and it is still within the same general category of products.

Issue 2: Evaluation of Available Sources of Profit

Summary of Parties' Comments

Petitioners argue that there are no Korean manufacturers that sell subject merchandise (*i.e.*, foreign like product) or merchandise of the same general category either in Korea or in third country markets, therefore, the Department's CV profit calculation must rely on "any other reasonable method" under section 773(e)(2)(B)(iii) of the Act. As such, Petitioners contend that using the criteria outlined in *CTVs from Malaysia*, the Department in the Draft Redetermination evaluated the various financial statements on the record and reasonably settled on two viable options for the calculation of CV profit. Thus, Petitioners argue that the Department should select Tenaris and, if determined to be properly part of the record, TMK, as these companies actually produce and sell comparable merchandise primarily to countries other than the United States.[109]

NEXTEEL and HYSCO argue that the Korean respondents' own data should be used for the CV profit calculation. According to NEXTEEL and HYSCO, the Korean respondents' own data satisfies the *CTVs from Malaysia* criteria as the data represents Korean production of subject merchandise, and the Korean respondents' own operations and business practices are the best approximation of their own experience. NEXTEEL and HYSCO contend that this option would satisfy the need for CV profit to reflect the respondents' home market experience. As such,

[109] *See* Maverick and U.S. Steel's Comments on Draft Redetermination at 7-8.

NEXTEEL and HYSCO propose that this data is a viable option under alternative (i) since the statute does not require that the home market be viable or that it satisfies a profit threshold.

However, if the Department continues to rely on third country data for the CV profit calculation, NEXTEEL and HYSCO maintain that the Department's use of the Tenaris financial statements suffers from fatal errors because they are not representative of the profit earned or expected to be earned by the Korean respondents. Specifically, NEXTEEL and HYSCO reiterate that: (1) Tenaris has no meaningful Korean operations; (2) Tenaris has sky-high profits due to operating in protected markets and due to pairing its OCTG with high-end proprietary and specialized coupling products; (3) Korean respondents focus on base-level standard product offerings rather than the high-end products offered by Tenaris; and, (4) Tenaris predominantly produces seamless OCTG while NEXTEEL and HYSCO produce welded OCTG. Furthermore, Tenaris is the parent company of Maverick, a petitioner in this investigation; thus, NEXTEEL and HYSCO argue that Maverick has provided self-serving affidavits and non-public information to prove that the Tenaris financial statements are the best information available to calculate CV profit.

NEXTEEL and HYSCO also contend that if the Department relies on third country data, then the profits of Welspun and Interpipe should be included in the CV profit calculation. NEXTEEL and HYSCO point out that the Department's decision not to use Welspun's financial statements because it is a line pipe producer is in conflict with *OCTG from Vietnam*, where the Department determined that Welspun was an OCTG producer and the company's financial statements were used to calculate CV profit.[110] NEXTEEL and HYSCO also contend that the

[110] *See OCTG from Vietnam* and accompanying Issues and Decision Memorandum at Comment 2.

decision not to use Interpipe's financial statements because the company incurred a loss creates an impermissible CV profit floor.[111]

Husteel argues that the Tenaris financial statements do not represent the best available information because: (1) there is no evidence on the record that Tenaris had any sales in the Korean market; (2) the claimed sales resulted from a newspaper article indicating Tenaris has a sales office in Korea; and, (3) the Tenaris global marketing director placed the information mentioning the Korean sales office on the record because of a vested interest to pursue the Department's use of Tenaris for CV profit. Thus, Husteel argues that the use of the Tenaris financial statements is neither lawful nor appropriate. However, Husteel maintains that there are numerous other profit sources on the record that do not have the same issues as the Tenaris data that can serve as a lawful CV profit rate, including the data from the six Korean companies relied on the *Preliminary Determination*.

Finally, Husteel argues that the Department's continued use of the Tenaris profit rate is tantamount to an application of adverse facts available (AFA). The Department cannot make an adverse inference unless the company in question withheld information requested by the Department. By any reasonable measure, the average CV profit rate of 16.24 percent used by the Department in the Draft Redetermination, and the continued use of this rate as the profit cap is tantamount to an AFA profit rate because: (1) it includes the anomalous results of Tenaris; (2) it is three times higher than the average profit rate of 5.30 percent which was earned by the six Korean OCTG producers; (3) it is two and half times more than the profit rate earned by TMK;

[111] *See* NEXTEEL and HYSCO's Comments on Draft Redetermination at 16-23.

and, (4) it is more than the double the 7.10 percent to 7.22 percent profit rate calculated in the AD petition.[112]

AJU Besteel states that it concurs with the comments filed by the mandatory respondents, NEXTEEL and HYSCO, regarding the Draft Redetermination.[113]

Department's Position:

In the *Final Determination* we discussed the situation in this case, namely that there is no perfect CV profit source on the record in this investigation. While we have Korean market pipe production and sales information, it relates to lower quality pipe products that are used in industries different from that of the subject merchandise. We also have information specific to OCTG (the subject merchandise); however, it reflects production and sales in global markets and is not necessarily specific to Korea. In weighing the two important factors, we determined it more important to use a source that reflects the high end premium nature of the subject merchandise rather than a source that is specific to Korea. In the *Final Determination*, we laid out in great detail how we analyzed the possible sources for CV profit.[114] After discussing the factors we considered important in analyzing the different CV profit sources, we gave parties an additional opportunity to provide other possible CV profit sources. Interested parties provided numerous additional financial statements to consider, one of which was for another profitable OCTG producer located outside of Korea which was used along with the Tenaris financial statement, in the Draft Redetermination.

Tenaris produces and sells OCTG products. It sells to markets all over the world. Relying on a financial statement for a company that predominantly produces and sells OCTG, the subject merchandise, is reasonable when trying to construct a price for OCTG, given the

[112] *See* Husteel's Comments on Draft Redetermination at 11-13.
[113] *See* AJU Besteel's Comments on Draft Redetermination at 1.
[114] *See Final Determination* and accompanying Issues and Decision Memorandum at Comment 1.

limited sources available in this case. Like most any product, there is a range in the cost and values associated with the full spectrum of OCTG products that fall within the scope of the case. We do not dispute respondents' point that Tenaris produces and sells some high end OCTG products. However, there is no reason to believe that it only sells the high end OCTG products, or even primarily high end products.[115] The respondents did not provide any breakdown analysis that would reflect percentages of each type of product that Tenaris produces. Although Tenaris does have sales in the niche, high end, products market, it is one of the world's largest OCTG producers and, absent evidence to the contrary, we will not assume that the bulk of its operations is devoted to a niche high end market. Moreover, the antidumping duty statute does not discuss calculating CV profit based on subsets of the foreign like product. The fact that a particular producer sells a wide range of products (including some high end products), in our view does not disqualify its profit recorded in its audited financial statements.

In most cases, when calculating CV profit, the Department is constrained by the limited information that is provided in a financial statement. While the financial statement may generally indicate various types of products a company sells and its markets, the percentage of such sales that relate to different subsets of different product groups are generally not available (and is not available in this specific case). The respondents, for example, argue that Tenaris sells high end products; however, they do not provide any evidence or analysis that demonstrates what portion of Tenaris's sales revenue and profit that relate to low end OCTG products versus high end OCTG products. This is precisely why we normally consider it reasonable to rely on a company that produces subject merchandise to be a reasonable surrogate for CV profit. In this

[115] *See* U.S. Steel's March 21, 2014 Comments on NEXTEEL's March 6, 2014 section D SQR at Exhibit P, the 2012 Fiscal Year Annual Report of Tenaris, page 12, where Tenaris states that it manufactures steel pipe products in a wide range of specifications, which vary by diameter, length, thickness, finishing, steel grades, threading and coupling.

case, the record evidence demonstrates that Tenaris produces and sells the full range of OCTG products.[116] Tenaris is a producer and seller of OCTG, which is precisely the same as the subject merchandise sold in this case.

The record evidence demonstrates that Tenaris's Korean sales office was set up to address needs of various customers, including those in the OCTG market.[117] Moreover, petitioners provided information that describes oil and gas exploration activity off the coast of Korea.[118] Although Husteel suggested that the sales of products in the same general category may have been made from the Korean sales office, but not necessarily to customers in Korea, it referenced no evidence of such arrangement. The record evidence indicates that Tenaris established its office in Seoul with the hope to "strengthen our ties with local customers."[119] A reasonable inference can be made that the Seoul office operated as intended, *i.e.*, serving "local" customers. Husteel also suggested that Tenaris would have placed evidence of its sale on the record of this proceeding if it made sales of products from its Korean sales office. We will not speculate what, if anything, Tenaris would have done, and interested parties decide regarding the breadth of their commercial information they are willing to share, we can only evaluate the evidence that is before us. The record evidence demonstrates that Tenaris established an office in Korea's capital to strengthen ties with local customers, in various markets, including OCTG markets. We have no reason to question the accuracy of a company's announcement regarding its Seoul office or the information regarding its Korean sales office from its audited financial statement.

[116] *Id.*
[117] *See* U.S. Steel Factual Information Submission at Exhibit 1.
[118] *Id.*, at Exhibits 3-5.
[119] *Id.*, at Exhibit 1.

While record evidence supports the conclusion that the Tenaris financial statement is likely to reflect some Korean market activity, it is not the only factor in our decision to use the Tenaris financial statement. As we have noted throughout this proceeding, based on the record facts before us, we consider the product to be of greater importance than the market in determining the best source for CV profit. Moreover, the record evidence indicates that Tenaris has operations in Korea, the exporting country.

We disagree with the respondents' unsupported conclusion that the Tenaris profit figures are aberrational because they exceed the profits experienced by the Korean respondents and the other companies the Department considered for inclusion in its CV profit calculation. An important factor for not using the Korean respondents or the other companies' financial statements for profit was that they primarily reflect lower quality pipe products that are used in industries different from those that use OCTG. The fact that the OCTG profits are higher supports our conclusion that the other non-OCTG pipe products command significantly lower profits and are not a good surrogate for OCTG products in constructing a value.

We disagree that the Department should include additional companies in its CV profit calculation, particularly Welspun and Interpipe. Welspun is not an OCTG producer, thus it does not reflect the product under investigation.[120] The respondent's analogy with the Vietnam investigation is misplaced. This is a market-economy investigation and we are not applying non-market economy methodology to determine normal value. We used information from Welspun in the Vietnam investigation to value the factors of production, because the companies were located in the country that was at a comparable level of economic development to that of Vietnam and the country was a significant producer of comparable merchandise. The use of the information to value factors of production in a non-market economy case only shows that the

[120] *See* NEXTEEL and HYSCO Factual Information Submission at Exhibit 1A.

information may have been the best option available on the record of that investigation. In this case, we have financial statements for companies that produce OCTG, the exact same product as subject merchandise, and we have no basis to, nor do we calculate normal value on the basis of non-market economy methodology.

Likewise, regarding Interpipe, we disagree that using a company that operated at a loss is an option for determining profit. By definition, a loss is not a profit.[121] Because we do not consider a loss to be profit, we do not consider relying on a financial statement that reflects a loss to be a reasonable method. While we agree that we have a preference for including multiple companies in any average calculation, each of the companies included in the calculation must meet certain criteria. We do not include more companies for the sake of having more sources in the average calculation, regardless of the quality of the sources. In this remand, we included two sources (coincidentally, one submitted by petitioners and one submitted by a respondent) in our calculation of CV profit, because both sources met our criteria.

Further, as set forth in the *Final Determination* and above, line, structural and standard and downgraded pipe products are not in the same general category of products as OCTG. As such, using the Korean respondent's own data fails to reasonably reflect the merchandise under investigation. As summarized in the *Final Determination*, the record shows that OCTG and line, standard and structural pipe are sold to different end users for use in different applications, and these different end users have distinct forces which drive prices, demand and profitability. Further, the *Final Determination* notes how the performance measures, production processes, alloys, and physical and mechanical characteristics of OCTG casing and tubing products differ in such significant ways from those of standard pipe, structural and line pipe that these products are

[121] *See* Barrons Financial Guides: Dictionary of Finance and Investment Terms (Seventh Edition) (2006); profit is defined as a positive difference that results from selling products and services for more than the cost of producing these goods.

not considered to be in the same general category of products as OCTG for purposes of section 772(e)(2)(B) of the Act.

With regard to using the other Korean producers' financial statements to calculate CV profit, the profit in these financial statements reflect predominantly products that are not in the same general category of merchandise as OCTG and include profit earned on U.S. sales which are allegedly dumped sales subject to this investigation. With respect to respondents' assertion that Tenaris predominantly produces seamless OCTG, even if this assertion were to prove correct, we would not consider this distinction dispositive. Record evidence supports the fact that Tenaris's produces and sells a full range of products, including welded products, in the same general category of products as OCTG.[122] Moreover, whatever distinction may exist between welded and seamless OCTG, it is not so significant as to remove one of these types of OCTG from the OCTG category, whereas the respondents' suggested alternative is to use profit from non-OCTG products, which do not qualify as products in the same general category, let alone OCTG.

Issue 3: Constructed Value Profit Cap

Summary of Parties' Comments

Petitioners argue that if the same general category of products is defined as pipe used in "downhole" applications, then the Department properly concluded that a profit cap cannot be derived as intended by the statute because there are no companies that produce and sell the same general category of products in Korea. Petitioners reason that had there been third country OCTG profits available, the Department would not have capped those profits with Korean

[122] *See* U.S. Steel's March 21, 2014 Comments on NEXTEEL's March 6, 2014 section D SQR at Exhibit P, the 2012 Fiscal Year Annual Report of Tenaris, page 12, where Tenaris states that "{T}he Tubes segment includes the production and sale of both seamless and welded steel tubular products and related services mainly for the oil and gas industry, particularly oil country tubular goods (OCTG) used in drilling operations..".

market profits. Thus, Petitioners conclude that there were no sales in the "same general category" in the Korean home market therefore there should be no profit cap. Further, Petitioners point out that if the Korean market, which does not include any sales of "downhole" pipes, is used for the profit cap, the Department would then be defining the same general category of products differently in two sections of the same statutory section. Finally, Petitioners contend that while there is no reason for a "facts available" profit cap, the Tenaris or the average of the Tenaris and TMK profit rates could serve as reasonable profit caps. In support, Petitioners argue that Tenaris and TMK are the only companies with acceptable financial statements on the record that produce merchandise used in "downhole" applications; therefore, they are the best and only sources of information available for the calculation of a CV profit cap.[123]

NEXTEEL and HYSCO contend that the Department cannot rely on the same CV profit data to calculate the profit cap. Instead, NEXTEEL and HYSCO argue that the financial data from the six Korean OCTG producers should be used as a profit cap, or, alternatively, the financial data from TMK, which NEXTEEL and HYSCO suggest is consistent with the profits that Korean producers could expect in the Korean market.[124]

Husteel argues that the Department has failed to lawfully apply the CV profit cap in the Draft Redetermination. Husteel maintains that the Department cannot lawfully rely on the same data to calculate both the CV profit and the profit cap because the profit cap is a distinct requirement in the statute, the purpose of which is to act as a check on the reasonableness of the CV profit rate. Thus, Husteel asserts that the Department, by using the CV profit rate as the profit cap, has now rendered a nullity in the statutorily mandated profit cap.

[123] *See* Maverick and U.S. Steel's Comments on Draft Redetermination at 9-10.
[124] *See* NEXTEEL and HYSCO's Comments on Draft Redetermination at 23-24.

Husteel reiterates that there are ample data on the record that could be used to calculate a profit cap that satisfies the statutory requirements, the most appropriate of which is the CV profit rate used by the Department in the *Preliminary Determination.* Specifically, Husteel argues that the average of the six Korean OCTG producers profit rates should be used as the profit cap. While Husteel argues that these profits were earned from home market sales of products in the same general category of products as OCTG, Husteel also contends that there is no statutory requirement that the CV profit cap has to be from the same general category of products. However, if the Department refuses to use the profit rate of the six Korean producers, Husteel suggests that TMK's profit rate should be used as the CV profit cap. Husteel argues that in addition to reflecting sales in the same general category, TMK's 6.24 percent profit rate is consistent with the average 5.30 percent profit rate realized by the six Korean OCTG producers, and would fulfill the purpose of the profit cap by preventing the use of calculations that yield anomalous or unreasonably high results. Additionally, Husteel proffers that, unlike Tenaris, TMK does not sell substantial quantities of high-end OCTG products, but rather OCTG similar to that produced and sold by the respondents in Korea. Finally, as stated with regard to CV profit, Husteel argues that the use of the Tenaris profit rate in the calculation of the profit cap is tantamount to an AFA profit rate.[125]

AJU Besteel states that it concurs with the comments filed by the mandatory respondents, NEXTEEL and HYSCO, regarding the Draft Redetermination.[126]

[125] *See* Husteel's Comments on Draft Redetermination at s 13-21.
[126] *See* AJU Besteel's Comments on Draft Redetermination at 1.

Department's Position:

The Court ordered the Department to either calculate and apply a profit cap or, alternatively, explain why the data on the record cannot be used to calculate a "facts available" profit cap under 19 U.S.C. 1677b(e)(2)(B)(iii).

As stated in the Draft Redetermination, we continue to find that there is no information available on the record to calculate a profit cap for Korea as set forth under subsection (iii) because we do not have home market profit data for other exporters and producers in Korea of the same general category of products. However, the SAA makes clear that the Department might have to apply alternative (iii) on the basis of facts available. In this case, the record evidence demonstrates that there is no domestic market in the exporting country for merchandise that is in the same general category of products as the subject merchandise.[127] Accordingly, we have examined all available data in this case and conclude that as facts available, a reasonable profit cap is the average of the profits in the global market (which includes Korea) earned by Tenaris and TMK.

The respondents argue that even if there is no information on the record to enable the Department to calculate a profit cap without resorting to facts available, the law requires that whatever is used as a facts available cap must reflect profit data specific to the home market. We disagree. The antidumping duty statute does not specify what information the Department may rely upon when applying facts available to determine the profit cap. As the Department discussed at length above, we consider finding a profit for products that reasonably reflect the subject merchandise to be the most important factor in calculating CV profit. Likewise, the CV

[127] *See* NEXTEEL's September 17, 2013 section A questionnaire response at 2 and HYSCO's September 17, 2013 section A questionnaire response at 2, and for the voluntary respondents, *see* Husteel's September 17, 2013 section A questionnaire response at 2, AJU Besteel's September 17, 2013 section A questionnaire response at 2, SEAH's September 17, 2013 section A questionnaire response at 2, and ILJIN's September 17, 2013 section A questionnaire response at 2.

profit cap should focus on finding a profit for products that reasonably reflect the same general category of products. In any event, the record evidence demonstrates that Tenaris has an office in Korea, which was opened to serve the needs of local customers in various markets, including the OCTG market. In other words, Tenaris' consolidated profit is likely to include profit derived from its operations in Korea.

As discussed at length in the *Final Determination*, the profit on the financial statements of the six Korean producers proffered by respondents as a proxy to calculate the CV profit, reflect primarily sales of non-OCTG pipe products (products that are not in the same general category of product as OCTG) and U.S. sales of OCTG (*i.e.*, alleged dumped sales under investigation). For the final determination of this case we analyzed in great detail the Korean producers' financial statements as an option for CV profit under (iii), any other reasonable method, and determined that it was not a reasonable alternative in light of the other options on the record. To now use this information as the profit cap would result in using information we found to not represent the best available information to serve as CV profit, simply because it reflects Korean sales of products that are not in the same general category of products as the subject merchandise. In so doing, we would resort to a facts available CV profit cap that itself is not in accordance with the specific language of the statute concerning profit cap, *i.e.*, "amount normally realized . . . .in connection with the sale ….of merchandise that is in the same general category of products as the subject merchandise."

We disagree with the respondents' argument that the profit rate for the any other reasonable method and the profit cap rate cannot be the same, and that having the same rate in effect makes the profit cap a nullity. There are instances where profit cap information may be on the record. In this case it is not. We are therefore left with determining a profit cap using the

best available information as facts available. And as the best available information, we relied on the detailed analysis performed on all of the different options that are on the record for calculating CV profit. And based on the detailed analysis, we determined that the Tenaris and TMK financial statements, which reflect substantial sales of OCTG and other general category of products to markets all over the world, was the best option for any other reasonable method. We likewise determined that this information reflected the best information available on what a profit cap should be for the same general category of products. While it may not necessarily reflect significant production and sales in Korea, it does reflect production and sales of the general category of products and at least one of these companies, Tenaris, has operations in Korea.

Likewise any attempt at distinguishing the differences between TMK's and Tenaris' financial statements, so that TMK's profit serves as the profit cap, is without merit. The fact is that both companies represent profits earned on products that are in the same general category as OCTG. Both companies produce and sell products in the same general category of products as OCTG and sell those products to markets all over the world. There is no factual information on the record to support respondents' claim that TMK's sales better reflect the range of products sold by the Korean respondents. In fact, the record evidence demonstrates that Tenaris has operations in Korea and has an office in Seoul that was opened to serve its local clients in various markets, including the OCTG market.

Further, as noted above, we disagree with the respondents' unsupported conclusion that the Tenaris profit figures are aberrational simply because they exceed profits experienced by the Korean respondents. This argument is based solely upon the treatment of Korean profits as the benchmark or yardstick against which profit must be measured, absent any support from

respondents. This argument also fails to take into account that the lower Korean profits reflect the fact that they primarily relate to sales of non-OCTG lower quality pipe products and allegedly dumped products in the United States.

To the extent that respondents argue that TMK's profit rate is superior, because it is similar to that of the tainted Korean producers' data, this argument fails for the same reason as discussed above, and in any case is not in and of itself a reason to reject the use of Tenaris' profit rate, and deem TMK's profit rate as the profit cap. Tenaris and TMK represent producers of the same general category of products as OCTG and should equally serve as the facts available profit cap. Simply because TMK and Tenaris are the lowest and the highest points in the range of data that satisfies the Department's criteria[128] does not mean that we should arbitrarily reject either the highest or the lowest point. Likewise, simply because Tenaris's profit rate is higher than that of TMK does not mean its use in the CV profit cap calculation amounts to the application of AFA. As we noted above, Tenaris produces and sells a significant amount of the general category of merchandise, to markets all over the world. As such, there is nothing adverse about its inclusion in the average profit cap rate calculation.

Lastly, we disagree with Husteel that the record shows that TMK sells substantial quantities of OCTG that is more comparable to that produced and sold by the Koreans as compared to Tenaris. As we are unable to obtain the details behind the TMK and Tenaris financial statements, it is pure speculation by the respondents that the range of products produced and sold by TMK better reflects that of the Korean respondents.

[128] *See Camau Frozen Seafood Processing Import Export Corporation v. United States*, 929 F. Supp. 2d 1352, 1356 (CIT 2013); *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 77 FR 55800 (September 11, 2012) and accompanying Issues and Decision Memorandum at Comment 2C.

B. PROCEDURAL ISSUES RELATED TO CV PROFIT

Issue 1: Alleged Prejudice

A. *Ex Parte* Meeting

Summary of Parties' Comments

NEXTEEL and HYSCO note that on September 17, 2015, the Department met with officials from Maverick and its parent company, Tenaris, to discuss the Court's opinion and remand order.[129] NEXTEEL and HYSCO then note that on the very next day, September 18, 2015, the Department announced it "has decided not to remove Tenaris' financial statement{s} from the record, but has instead decided to open the record to obtain additional factual information related to CV profit for all respondent parties in addition to the information currently on the record of the investigation."[130] NEXTEEL and HYSCO assert the Department decided to keep the Tenaris financial statements on the record without asking for comments from interested parties or addressing the Court's concerns with respect to the timeliness of the financial statements.[131]

Moreover, NEXTEEL and HYSCO contend, at this *ex parte* meeting, the Department met with high-level officials from Tenaris who not only have access to relevant CV profit information but also have an interest in obtaining the highest possible margins for the respondents.[132] According to NEXTEEL and HYSCO, "the Department's conduct both procedurally and substantively advanced the prejudice imposed against respondents in this

[129] *See* NEXTEEL and HYSCO's Comments on Draft Redetermination at 4-5, citing Memorandum from Scot Fullerton to the File, "Remands Concerning Scope Inquiry and Less-Than-Fair-Value Investigation on Oil Country Tubular Goods from the People's Republic of China and the Republic of Korea, Respectively: Department of Commerce Meeting with Outside Parties," dated September 17, 2015.
[130] *Id*., at 4, citing Letter from the Department to All Interested Parties, dated September 18, 2015 (Department's September 18, 2015 Letter Re-Opening the Record).
[131] *Id*., at 4.
[132] *Id*., at 5, citing Letter from HYSCO and NEXTEEL to the Department, "Certain Oil Country Tubular Goods from the Republic of Korea: Objection to Ex Parte Meeting," dated October 5, 2015 (HYSCO and NEXTEEL's October 5, 2015 Letter) at 4-5.

investigation and resulting remand."[133] NEXTEEL and HYSCO further argue that the *ex parte* memorandum placed on the record of this proceeding did not fulfill the legal requirement that it identify and describe, in a timely fashion, the factual issues discussed and presented at the meeting.[134] NEXTEEL and HYSCO maintain that in accordance with the Department's regulations, the Department should have placed the factual information discussed at the meeting on the record and given interested parties an opportunity to submit factual information to rebut, clarify, or correct the factual information.[135] In particular, NEXTEEL and HYSCO propose the Department could have released "a *verbatim* transcript of the meeting, any meeting notes generated by the participants, and any internal communications related to the meeting," and then provided interested parties with an opportunity to submit rebuttal comments and factual information in response to these items.[136] NEXTEEL and HYSCO argue the Department has not placed any of this information on the record and complain that the Department did not place the *ex parte* memorandum on the record until 12 days after the meeting took place.[137]

NEXTEEL and HYSCO claim the Department's *ex parte* meeting with Tenaris officials renders the Tenaris financial statements tainted, such that the Department cannot rely on the Tenaris financial statements to calculate CV profit and simultaneously rectify the prejudice caused to respondents. At this stage in the proceeding, NEXTEEL and HYSCO contend that the only way the Department can comply with the Court's order is to reconsider its Draft Redetermination and remove the Tenaris financial statements from the record, and rely on information on the record of the investigation to calculate CV profit.[138]

[133] *Id.*, citing HYSCO and NEXTEEL's October 5, 2015 Letter.
[134] *Id.*, at 5-6, citing *Nippon Steel Corp. v. United States*, 118 F.Supp.2d 1366, 1373-74 (Ct. Int'l Trade 2000).
[135] *Id.*, at 6, citing 19 CFR 351.301(c)(4).
[136] *Id.*, citing HYSCO and NEXTEEL's October 5, 2015 Letter.
[137] *Id.*, at 6-7.
[138] *Id.*, at 7.

Husteel also argues the Department's *ex parte* meeting with Tenaris officials prior to the decision to keep Tenaris' financial statements on the record has added to the prejudice caused to Husteel and the other respondents. Husteel states that it agrees with HYSCO and NEXTEEL's comments on this issue and hereby adopts and incorporates them by reference in their entirety.[139]

AJU Besteel states that it concurs with the comments submitted by NEXTEEL and HYSCO.[140]

Department's Position:

As interested parties are well aware, they may request a meeting with Department officials in any proceeding before the agency, and the Department routinely grants such requests. After the Court issued its opinion and remand order in this proceeding on September 2, 2015, one of the petitioners, Maverick, requested a meeting with the Department to discuss several proceedings, including this one. Neither the respondents nor any of the other petitioners requested a meeting with the Department in this remand proceeding. On September 17, 2015, more than two weeks after the Court issued its remand order, the Department met with counsel to Maverick and officials from Maverick and Tenaris, who discussed not only the Court's opinion and remand in this proceeding, but also the Court's recent opinion and order in two other proceedings, namely, a remand on a scope inquiry in the AD and CVD orders on OCTG from the People's Republic of China.

Respondents argue that in holding this *ex parte* meeting with petitioner and Tenaris officials, the Department's conduct was prejudicial toward respondents in this proceeding and tainted the Tenaris financial statements. The Department disagrees with respondents' contention. Certainly, any time after September 2, 2015, when the Court issued its opinion, any

[139] *See* Husteel's Comments on Draft Redetermination at 1-2, citing NEXTEEL and HYSCO's Comments at 4-7.
[140] *See* AJU Besteel's Comments on Draft Redetermination at 1.

interested party, including respondents, could have requested a meeting with the Department to discuss the Court's opinion and remand order just as one of the petitioners did, but chose not to do so. While there was a period of eight business days[141] between the time the meeting occurred and the time the *ex parte* memorandum was placed on the record of this proceeding, the memorandum related to three separate proceedings, which are handled by different teams, and in fact the memorandum was placed on the record of all three proceedings at the same time. Nevertheless, even though respondents were not aware that the meeting with petitioner had taken place until September 29, 2015, when the *ex parte* memorandum was placed on the record, upon learning of the meeting, respondents could have requested a meeting at that time. However, at no time during this proceeding did the respondents request a meeting with the Department.

Respondents also speculate that the Department may have discussed factual elements at the *ex parte* meeting with petitioner upon which respondents were never given an opportunity to comment.[142] However, the Department's meetings with outside parties are not forums in which the Department gathers new factual information or makes decisions, but, rather, opportunities for outside parties to raise a particular issue or issues and express their views. Such meetings are routine and there is nothing nefarious about an agency meeting with interested parties. Frequently, parties request a meeting with Department officials to amplify a particular position

[141] This is not unprecedented. In the original investigation, for example, there was a period of five business days between the Department's meeting with ILJIN, a respondent, and the Embassy of the Republic of Korea, and the time the *ex parte* memorandum was placed on the record. *See* Memorandum from Deborah Scott to the File, "Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Korea: *Ex Parte* Meeting with ILJIN Steel Corporation (ILJIN) and Embassy of the Republic of Korea," dated November 12, 2013. Similarly, there was a period of 18 business days between the Department's meeting with the Embassy of the Republic of Korea and the date the *ex parte* memorandum was placed on the record, and a period of 10 business days between the Department's meeting with petitioners and the date the *ex parte* memorandum was placed on the record. *See*, respectively, Memorandum from Victoria Cho through Gary Taverman to the File, "Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Korea: *Ex Parte* Meeting with Embassy of the Republic of Korea," dated August 8, 2013 (August 7, 2013 *Ex Parte* Meeting with the Korean Embassy) and Memorandum from Victoria Cho through Richard Weible to the File, "Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Korea: *Ex Parte* Meeting with the Petitioners," dated September 4, 2013.

[142] *See* HYSCO and NEXTEEL's October 5, 2015 Letter.

that was set forth in a prior submission, and the Department's *ex parte* memorandum would then reference that prior submission in its summary of the meeting. The Department discourages parties from presenting for the first time new factual information in a meeting with the Department, and instead encourages parties to submit new factual information in writing for the record of the proceeding in accordance with the Department's filing and certification requirements for new factual information under the Department's regulations.[143] On rare occasions, new factual information is presented to the Department for the first time in a meeting with Department officials, in which case the Department's practice is to place such information on the record through the *ex parte* memorandum, either by attaching the document or by summarizing the information presented. No new factual information was submitted at this *ex parte* meeting with respect to the two proceedings involving the Chinese OCTG and with respect to this proceeding.

We disagree with respondents that the Department should have released "a *verbatim* transcript of the meeting, any meeting notes generated by the participants, and any internal communications related to the meeting," and respondents cite no authority for such requirements. Respondents also propose that interested parties then be given an opportunity to file rebuttal comments and factual information in response to those materials. As a starting matter, the *ex parte* meeting at issue was not a hearing, and thus the Department was not required to record and issue a *verbatim* transcript of the meeting as is required for hearings under 19 CFR 351.310(g). Nor is the Department required to keep notes of the meeting and place such notes and internal communications on the record. This last proposal is highly unusual in that it goes above and beyond what would be compiled even for a hearing (*i.e.*, a *verbatim* transcript), in that it seeks meeting notes and internal communications of the Department that relate to the meeting. With

[143] *See* 19 CFR 351.303.

this proposal, respondents seek to impose the equivalent of a discovery requirement for purposes of an *ex parte* meeting where no such basis exists. The September 17, 2015 meeting was an *ex parte* meeting, like the numerous *ex parte* meetings held with various parties during the course of this investigation, including those held with respondents. As respondents are well aware, the Department held more than 20 *ex parte* meetings or telephone calls with respondents during the original investigation and there were no recordings for transcripts to be produced, nor were any notes or internal communications within the Department placed on the record of the proceeding or released to petitioners or any other interested parties for these meetings. Where *ex parte* meetings are requested and granted, the Department's requirements are governed by section 777(a)(3) of the Act. For the numerous *ex parte* meetings requested and granted during the course of this investigation, the Department followed the same requirements set forth in section 777(a)(3) for each *ex parte* meeting, as it did with respect to the September 17, 2015 *ex parte* meeting. Accordingly, we see no basis for treating *ex parte* meetings with petitioners and respondents differently, nor is there any authoritative support or basis for respondents' proposal to place the Department's notes and internal communications on the record of the redetermination.

Further, respondents cite to 19 CFR 351.301(c)(4) in support of their assertion that the Department should have placed factual information discussed at the meeting on the record of this proceeding. As noted above, there was no factual information provided at the September 17, 2015 meeting. In addition, 19 CFR 351.301(c)(4) contains no requirement that the Department place such information on the record. Rather, this provision states that the Department "**may** place factual information on the record of the proceeding at any time," at which point "{a}n interested party is permitted one opportunity to submit factual information to rebut, clarify, or

correct factual information placed on the record of the proceeding by the Department by a date specified by the Secretary" (emphasis added). As discussed earlier, *ex parte* meetings are not mechanisms for collecting new factual information, but rather an opportunity for parties to express their general views on a matter. In fact, an examination of other *ex parte* memoranda on the record of the underlying investigation reveals that the *ex parte* memorandum at issue here is not unusual and was generated consistent with the Department's practice.[144]

Finally, with respect to the timing of the Department's announcement, which occurred the day after the *ex parte* meeting, that it had determined to re-open the record to obtain additional factual information related to CV profit in addition to the information currently on the record of the investigation, we disagree with respondents that this constituted prejudice to the respondents. As discussed more fully below under the issue "Re-opening the Record," the Court provided the Department with two options in its remand order with respect to the Tenaris financial statements: either remove the Tenaris financial statements from the record and not use them in the CV profit calculation, or, alternatively, remedy the alleged prejudice from acceptance of such statements. In our judgment, the second option, which we selected, necessitated re-opening of the record. To be clear, as discussed below, although we respectfully conduct this remand under protest, we disagree with petitioners that the Court improperly ordered us to re-open the record, because in fact the Court did not order us to re-open the record. However, one of the two options given to us by the Court, as a practical matter, necessitated the re-opening of the record. We have re-opened the record, not because the Court ordered us to do so, but rather

[144] *See, e.g.*, August 7, 2013 *Ex Parte* Meeting with the Korean Embassy; *see also* Memorandum from Deborah Scott through Richard Weible to the File, "Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Korea: *Ex Parte* Meeting with Counsel for SeAH Steel Corporation," dated August 7, 2013 and Memorandum from Victoria Cho to the File, "Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of Korea: *Ex Parte* Meeting with Husteel Co. Ltd. (Husteel)," dated November 19, 2013.

to ensure that there is no substantial prejudice to any of the parties and that the record contain the best possible information for the CV profit calculation.

The re-opening of the record is within the Department's discretion.[145] In this remand, the Department did not need, nor request, a briefing or a hearing from interested parties to make its decision whether to remove Tenaris' financial statement from the record or to re-open the record. The Department was well aware that the respondents are opposed to the use of Tenaris' statement and that petitioners consider the use of the statement appropriate. However, after the Department decided to re-open the record, all parties had an opportunity to comment, and, in fact, most parties in fact did comment, on our decision to re-open the record to remedy what in the Court's view constituted prejudice and obtain the best possible data from parties.

Moreover, the respondents had an opportunity to comment, and in fact commented, on our *ex parte* meeting with petitioner.[146] Even though the respondents had every opportunity to request an *ex parte* meeting with the Department throughout this proceeding, at no point during this remand proceeding did the respondents request to meet with the Department. In examining the issue respondents raise, we find no basis to conclude that the Department's decision to re-open the record and not to reject the Tenaris financial statement was prejudicial to the respondents as a result of the September 17, 2015 meeting with Maverick that was held at Maverick's request.

B. Re-opening the Record

Summary of Parties' Comments

NEXTEEL and HYSCO assert that in re-opening the record, the Department did not comply with the Court's order to rectify the prejudice caused by acceptance of the Tenaris

[145] See *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (*Essar*).
[146] *See* HYSCO and NEXTEEL's October 5, 2015 Letter; *see also* NEXTEEL and HYSCO Factual Information Submission and NEXTEEL and HYSCO Factual Information Rebuttal.

financial statements. Noting the Department's statement that "{a}t this point in the redetermination, all interested parties have been provided an opportunity to submit evidence that would either undermine the information contained in Tenaris's financial statements or act as an alternative CV profit source," NEXTEEL and HYSCO claim the Department appears to misconstrue the prejudice found by the Court.[147]

NEXTEEL and HYSCO argue the Court found on remand that the Department unreasonably concluded Tenaris's financial statements constituted evidence rebutting, clarifying, or correcting information submitted in NEXTEEL's supplemental questionnaire response under 19 CFR 351.301(c)(1)(v).[148] Rather, NEXTEEL and HYSCO claim, the Court found the Tenaris financial statements constituted new factual information under 19 CFR 351.301(c)(5) and should have been filed at least thirty days before the *Preliminary Determination*; as such, the Court held these statements should have been rejected as untimely.[149] According to NEXTEEL and HYSCO, the prejudice to respondents resulted from the Department allowing the Tenaris financial statements to remain on the record rather than rejecting them as untimely filed, and not from respondents having insufficient opportunity to comment upon them.[150] Thus, NEXTEEL and HYSCO assert that merely re-opening the record does not resolve the fact that the factual information at issue was untimely filed under the appropriate regulation and should not have been considered.[151]

Furthermore, NEXTEEL and HYSCO contend that in re-opening the record, the Department incorrectly permitted all interested parties, including petitioners, to submit factual information related to CV profit and rebuttal information pertaining to CV profit information

[147] *See* NEXTEEL and HYSCO's Comments on Draft Redetermination at 7-8, citing Draft Redetermination at 9.
[148] *Id.*, at 8, citing *Husteel* at 39 and 43.
[149] *Id.*, at 8-9, citing *Husteel* at 43.
[150] *Id.*, at 9, citing *Husteel* at 46.
[151] *Id.*, at 9.

already on the record.[152] NEXTEEL and HYSCO argue that, as the Court indicated, the only way in which the Department could have accepted the new factual information submitted by U.S. Steel during the original investigation, including the Tenaris financial statements, would have been if, at the time of submission, U.S. Steel had requested an extension of time, the request had been granted, and the information had been submitted and accepted under 19 CFR 351.301(c)(5).[153] NEXTEEL and HYSCO assert that under this regulation, if the Department accepts the information in question, it must "issue a schedule providing deadlines for submission of factual information to rebut, clarify, or correct the factual information."[154] NEXTEEL and HYSCO maintain this suggests that all interested parties other than the submitter of the original information must be provided with an opportunity to rebut, clarify, or correct the submitted information. Thus, NEXTEEL and HYSCO claim, under the Department's regulations, U.S. Steel would not be permitted to rebut, clarify, or correct its own submission, and, hence, U.S. Steel's submissions and other petitioner submissions in response to the Department's September 18, 2015 Letter Re-Opening the Record were essentially sur-rebuttal submissions not envisioned by the regulations.[155]

Lastly, NEXTEEL and HYSCO argue the Department failed to meet the requirements of 19 CFR 351.301(c)(5). NEXTEEL and HYSCO assert that under this regulation, the Department may accept a submission if it: (1) clearly explains why the information contained therein does not meet the definition of factual information described in 351.102(b)(21)(i)-(iv); (2) provides a detailed narrative of exactly what information is contained in the submission, and (3) provides a detailed narrative of why it should be considered. NEXTEEL and HYSCO contend that by

[152] *Id.*, at 10, citing Department's September 18, 2015 Letter Re-Opening the Record.
[153] *Id.*, citing *Husteel* at 45.
[154] *Id.*, citing 19 CFR 351.301(c)(5)(ii).
[155] *Id.*, at 10-11, citing 19 CFR 351.301(c)(1) and 19 CFR 351.301(c)(5).

merely issuing a letter informing interested parties that it was not rejecting the Tenaris financial statements, the Department did not comply with the procedural requirements specified in the regulations. NEXTEEL and HYSCO maintain that if the Department does not remove the Tenaris financial statements from the record, it should reconsider its Draft Redetermination to make sure that, at a minimum, it satisfies the procedural requirements of the correct regulation under which the financial statements are submitted.[156]

Husteel also claims that in keeping the Tenaris financial statements on the record and re-opening the record to give parties the chance to submit rebuttal factual information, the Department has not rectified the prejudice identified by the Court. Husteel argues the prejudice to itself and the other respondents arose from the acceptance of the Tenaris financial statements despite the fact that they were untimely filed, not from a lack of opportunity to respond.[157] Thus, Husteel avers, the Department cannot use the Tenaris financial statements to calculate CV profit or as part of any CV profit cap.

AJU Besteel states that it concurs with the comments filed by NEXTEEL and HYSCO.[158]

Department's Position:

We disagree with respondents that it was improper to re-open the record in this case, and that in doing so the Department did not comply with the Court's order. Rather, by re-opening the record, we have fully complied with the Court's remand order.

In its opinion and remand order, the Court provided the Department with two options to address the Department's acceptance and use of the Tenaris financial statements. Specifically, the Court stated:

[156] *Id.*, at 11-12.
[157] *See* Husteel's Comments on Draft Redetermination at 2, citing NEXTEEL and HYSCO's Comments on Draft Redetermination at 7-12 and *Husteel* at 44.
[158] *See* AJU Besteel's Comments on Draft Redetermination at 1.

> On remand, Commerce may simply remove this information from the record and reconsider its CV profit determination based on the information that was submitted in accordance with the regulatory deadlines. Alternatively, Commerce must determine if and how, at this late date, the prejudice caused by accepting the Tenaris financial statement in violation of the regulations can be rectified.[159]

Faced with these two options, and given the limitations of the CV profit sources available, the Department chose to cure the prejudice found by the Court rather than to remove the Tenaris financial statements from the record. In our judgment, the best way to remedy the prejudice found by the Court was to re-open the record to give interested parties a full opportunity to submit additional factual information and rebuttal information for purposes of reconsidering the CV profit issue. In our view, allowing the parties to submit the best possible information for calculating CV profit not only remedies the prejudice, which the Court found needed to be remedied, but also enhances the accuracy of our CV profit determination by ensuring that it is based on the best data. Thus, on September 18, 2015, the Department issued a letter to interested parties in which it stated the following:

> For purposes of the redetermination on remand, therefore, the Department has decided not to remove Tenaris' financial statement from the record, but has instead decided to open the record to obtain additional factual information related to CV profit for all respondent parties in addition to the information currently on the record of the investigation. Parties may submit new factual information on CV profit, and also information on the CV profit cap in the event the Department decides an alternative CV profit methodology is necessary. Parties may also submit rebutting information pertaining to the CV profit information currently on the record, including Tenaris' financial statement.[160]

Respondents argue that they were prejudiced as a result of the Department retaining the Tenaris financial statements on the record rather than rejecting them as untimely filed, and that re-opening the record did not rectify the untimely filing of these financial statements. The respondents improperly conflate two distinct issues: untimeliness and substantial prejudice. We

[159] *See Husteel* at 48-49.
[160] *See* Department's September 18, 2015 Letter Re-Opening the Record.

recognize that the Court found the Tenaris financial statements were untimely filed. However, the prejudice identified by the Court was not the untimeliness of the Tenaris financial statements, in and of itself, but, rather, the fact that the untimeliness coupled with the Department's late decision as to whether it would reject or maintain such statements on the record did not allow respondents an appropriate opportunity to rebut those statements with rebutting factual information. In this remand, the Department has remedied the prejudice to the parties by fully reconsidering the CV profit issue, by clearly stating its intent to retain the statements on the record and the reason for retaining the information, by re-opening the record for additional and rebutting information, and by allowing all parties a full opportunity to comment on the CV profit issue and the information contained on the record relevant to that issue. For these reasons, the Department believes it has remedied the prejudice to the parties identified by the Court in its Opinion.

The Court did not instruct the Department to use any particular method for curing the prejudice it found. Thus, the Department exercised its judgment and determined that the best way to cure the prejudice found by the Court was to re-open the record. Although respondents argue that re-opening the record did not remedy the untimely filing of the Tenaris financial statements, untimeliness is distinct from the issue of substantial prejudice. The Court of Appeals for the Federal Circuit (Federal Circuit) has found that the Department has the discretion to relax requirements of its regulations if parties are not substantially prejudiced.[161] In the case addressed in *PAM, S.p.A. v. United States*, the petitioners did not comply with the procedural requirements of the Department's regulations by failing to serve a respondent with their request for review of such respondent at all (not just late). However, the Federal Circuit concluded that there was no prejudice to the respondent from the Department's decision to continue the review,

[161] *See PAM, S.p.A. v. United States*, 463 F.3d 1345, 1349 (CAFC 2006) (*PAM, S.p.A. v. United States*).

even though the request for review was never served on the respondent because in that case the respondent received notice of the review by the Department.

As such, even if the Tenaris financial statements were untimely filed during the original investigation, as the Court found, the Court provided the Department with an option to remedy the prejudice by permitting the respondents to submit, not only information rebutting the Tenaris' financial statement, but any information relevant to the issue of CV profit calculation. By re-opening the record, the Department ensured that all parties may submit information relevant to CV profit calculation and, in fact, used one of the new sources, which Husteel, a respondent, provided.

As a result of re-opening the record, all interested parties to this proceeding had an opportunity to submit new factual information related to CV profit or rebutting information pertaining to CV profit information already on the record. Several interested parties - HYSCO, NEXTEEL, Husteel, U.S. Steel, and Maverick - availed themselves of this opportunity. In fact, these interested parties submitted a combined total of 3,380 pages of comments and rebuttal comments. Accordingly, we find that all parties had an ample opportunity to submit relevant evidence and make their arguments to the Department.

Because the Department re-opened the record, we had a broader record on which to rely for the calculation of CV profit. The Department analyzed all of the information submitted by the parties in an effort to determine constructed value, and hence normal value, using the best information from the information on the record. As a result of the broader record, instead of relying solely on the Tenaris financial statements to calculate CV profit, the Department is also relying on the financial statements of an additional source, TMK, which was submitted by one of the respondents.

Because the Department reasonably exercised its discretion and re-opened the record to all parties, we disagree with respondents' contention that petitioners should not have been permitted to file information and comments. Recognizing the limitations of the CV profit sources on the record, the Department allowed all parties to submit relevant information on the issue of CV profit. As a procedural matter, one would expect that building a better and more complete record for a particular calculation, with input from all interested parties, would be a non-controversial step that would have been welcomed by all parties. Regrettably, the respondents in this case seek to remedy the prejudice identified by the Court by requiring that the Department deny other parties an opportunity to meaningfully participate in this proceeding. The bulk of information provided by the respondents is not responsive to Tenaris' financial statement under the standard for rebuttal information that the Court articulated in this case, but rather provides new sources for calculating CV profit. Yet respondents argue that petitioners should not have been given any opportunity to comment or provide information on the issue of CV profit in this remand. We do not believe taking steps to prejudice petitioners in this remand is what the Court had in mind when it referred to curing the prejudice of accepting Tenaris' financial statements in the original determination. Thus, we are not persuaded by the respondents' argument that allowing the respondents to provide information relevant to the issue of CV profit, while simultaneously denying the same opportunity to petitioners, advances procedural fairness.

Issue 2: Whether the Court Inappropriately Ordered the Department to Re-open the Record

Summary of Parties' Comments

Petitioners argue that the Court erroneously compelled the Department to re-open the record for parties to submit new factual information regarding CV profit. Thus, Petitioners urge

the Department to note its objection to re-opening the record and relying on additional financial statements placed on the record.[162] According to Petitioners, it is the Department's prerogative to determine whether it is appropriate to accept rebuttal information, and the Courts have rarely questioned the Department's decision to accept or reject information placed on the record.[163]

Petitioners contend that under the Department's new factual information regulations, respondents were afforded the same opportunity to submit CV profit alternatives in the original investigation as petitioners, but elected only to complain about the Department's acceptance of Tenaris' financial statements.[164] Petitioners maintain the Department's earlier decision to accept the Tenaris financial statements fully complied with the statute and the Department's regulations and practice on new factual information. Therefore, Petitioners claim, there was no basis for the Court to direct the Department to permit parties to submit additional CV profit information; instead, they argue, parties should have been allowed to submit rebuttal information only related to Tenaris.[165]

Petitioners assert the Court also erred because the record already contained all of the information necessary for the Department to make a determination regarding CV profit. They contend the Department used the same analysis in the Draft Redetermination as it used in the original investigation to calculate CV profit; thus, if the Department had not re-opened the record, the result of the Draft Redetermination would have been identical to that in the original investigation. As a result, Petitioners maintain the Department should continue to base CV profit exclusively on the Tenaris financial statement or, at a minimum, state that it was inappropriate

[162] *See* Maverick and U.S. Steel's Comments on Draft Redetermination at 2.
[163] *Id*., citing *Mid Continent Nail Corporation v. United States, et al.*, 999 F. Supp. 2d 1307, 1327-1328, Slip Op. 2014-72 at 54 (June 26, 2014); *Apex Frozen Foods et al., v. United States, et al.,* Ct. No. 14-00226, Slip Op. 16-9 (CIT Feb. 2, 2016) (Lexis) at 73-74; and *Foshan Nanhai et al. v. United States,* 920 F. Supp. 2d 1350, 1360 Slip Op. 13-86 at 25 (July 1,2013).
[164] *Id*., at 3, citing 19 CFR 351.301(c)(1)(5).
[165] *Id*., at 3.

for the Court to direct the Department to re-open the record and that it is using TMK's financial statements under protest.[166]

Department's Position:

We disagree with petitioners. In its remand order, the Court gave the Department two options with respect to the Tenaris financial statements: either remove them from the record and not use them to calculate CV profit, or remedy the prejudice caused by accepting the Tenaris financial statements.[167] Although we respectfully disagree with certain aspects of the Court's decision, as explained above under the issue "Re-opening the Record," we do not agree that the Court ordered us to re-open the record.[168] In this case, the Department chose the latter option (which as a practical matter necessitated a re-opening of the record), and sought to rectify the prejudice found by the Court by re-opening the record and allowing interested parties to submit factual information and argument. In complying with the Court's order by re-opening the record, we did not restrict parties to submitting rebuttal information only related to Tenaris. Rather, given the limitations of potential constructed value profit sources on the record, we provided all interested parties with an opportunity to submit new factual information related to CV profit or rebutting information pertaining to CV profit information already on the record. Because we elected to use this course of action based on the two options given to us by the Court, we do not construe the Court's order as improperly requiring us to re-open the record. Accordingly, we determined CV profit by relying, in part, on the additional financial statements of TMK, which one of the respondents properly placed on the record of this redetermination.

[166] *Id.*, at 3-4.
[167] *See Husteel* at 48-49.
[168] *See Essar*, 678 F.3d at 1276.

Issue 3: Cash Deposit Instructions

Summary of Parties' Comments

NEXTEEL and HYSCO argue the Draft Redetermination is devoid of any attempt to implement the Department's revised CV profit determination and the resulting lower margins. NEXTEEL and HYSCO claim that in order to comply with the Court's order to rectify the prejudice caused by the acceptance of the Tenaris financial statements, the Department should (1) revise the cash deposits required for future entries based on the results of this remand, and (2) instruct CBP to immediately refund to importers the difference between the cash deposits collected at the rates established in the investigation and the rates computed in this remand proceeding. NEXTEEL and HYSCO assert that although the Department has correctly reduced the margins as a result of this remand, the prejudice continues as long as the cash deposit rates from the original investigation remain in effect. NEXTEEL and HYSCO maintain that if the Department believes it does not have jurisdiction to amend the cash deposit rates at this time, at a minimum, the Department should revise its Draft Redetermination to expressly seek leave from the Court to issue revised cash deposit instructions and refund instructions reflective of the margins calculated in the Draft Redetermination. NEXTEEL and HYSCO state that while they believe it is appropriate to revise the cash deposit instructions, this does not mean they agree with the Draft Redetermination. Instead, NEXTEEL and HYSCO claim, the proper result is the removal of the Tenaris financial statements from the record, the recalculation of respondents' margins without these financial statements, and the rescission of the antidumping duty order.[169]

Husteel argues that if the Department continues to use the Tenaris financial statements to calculate CV profit, the Department must amend the cash deposit instructions and order CBP to

[169] *See* NEXTEEL and HYSCO's Comments on Draft Redetermination at 12-14.

refund the difference between the cash deposits established in the investigation and the rates calculated in the Draft Redetermination.[170]

AJU Besteel states that it concurs with the comments filed by NEXTEEL and HYSCO.[171]

Department's Position:

We disagree with respondents that we should, at the time of this redetermination on remand, revise the cash deposit rates required for future entries based on the results of this remand, and instruct CBP to immediately refund to importers the difference between the cash deposits collected at the rates established in the investigation and the rates calculated in this remand. Respondents have not cited to any legal authority under which the Department would issue such instructions at this time. Therefore, we find respondents' argument is without merit.

Pursuant to section 735(c)(1)(B)(ii) of the Act, the Department, upon reaching a final affirmative determination in a less-than-fair-value investigation, orders the posting of a cash deposit for each entry of the subject merchandise in an amount based on the estimated weighted-average dumping margin or the estimated all-others rate, whichever is appropriate. In accordance with section 736(a)(3) of the Act, upon being notified by the ITC of an affirmative determination under section 735(b) of the Act, the Department publishes an antidumping duty order which requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited.

It is not unusual for interested parties to file litigation challenging the final determination in an investigation, as was the case here. However, the filing of a lawsuit does not revise the cash deposit rates outside of the normal process. Because the Department's *Final*

[170] *See* Husteel's Comments on Draft Redetermination at 2, citing NEXTEEL and HYSCO's Comments on Draft Redetermination at 12-14.
[171] *See* AJU Besteel's Comments on Draft Redetermination at 1.

Determination is currently in litigation, if the dumping margins are amended as a result of this remand and the Court affirms the Department's remand redetermination, and, if there is no appeal or if the Court's decision is affirmed on appeal, the Department will publish an amended final determination. In the event the Department publishes an amended final determination, the Department will, at that time, issue the appropriate instructions to CBP informing them of the revised cash deposit rates to be collected.[172] Until such time, however, the cash deposit rates established in the *Final Determination* remain in effect.

[172] We note that the Department initiated an administrative review of this antidumping duty order for the period July 18, 2014 through August 31, 2015. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 80 FR 69193 (November 9, 2015). The assessment of antidumping duties for that period will be determined on the basis of the rates calculated in that administrative review. The collection of additional duties or the refunding of duties, if applicable, will occur upon completion of that administrative review in accordance with section 751(a)(2)(C) and 737(b) of the Act.

FINAL RESULTS OF REDETERMINATION

As explained above, the Department revised the CV profit rate for this remand redetermination based on the average of the profit rates in the 2012 financial statements of Tenaris and TMK. Those profit rates, respectively, are 26.11 percent and 6.36 percent.[173] As a result, the CV profit rate, which was 26.11 percent in the *Final Determination*, decreased to 16.24 percent. Using the revised CV profit rate, HYSCO's weighted-average dumping margin changed from 15.75 percent to 6.49 percent, and NEXTEEL's weighted-average dumping margin changed from 9.89 percent to 3.98 percent. Moreover, as a result of the change to HYSCO's and NEXTEEL's margins, the all-others rate changed from 12.82 percent to 5.24 percent. The Department disclosed to interested parties all materials related to its revised margin calculations on February 9, 2016, when it released the Draft Redetermination.

In addition, with respect to the respondent selection issue, as explained above, the Department continues not to select ILJIN as a mandatory respondent.

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

22 FEBRUARY 2016
Date

[173] For the calculation of TMK's profit rate, *see* Husteel Factual Information Submission at Exhibit 3.