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Final Results of Redetermination Pursuant to Court Remand
Circular Welded Non-Alloy Steel Pipe from the Republic of Korea

Hyundai Steel Company v. United States,
Consolidated Court No. 18-00154, Slip Op. 20-168 (CIT November 23, 2020)

A. Summary

The Department of Commerce (Commerce) prepared these final results of redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT or the Court) in *Hyundai Steel Company v. United States*, Court No. 18-00154, Slip Op. 19-148 (CIT November 23, 2020) (*Remand Order*). These final results of redetermination concern *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 27541 (June 13, 2018) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM) as modified by *Final Results of Redetermination Pursuant to Court Remand Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, dated February 26, 2020 (*First Redetermination*).

In the *Remand Order*, the Court remanded the *First Redetermination* to Commerce to explain the statutory authority to conduct a cost-based particular market situation (PMS) analysis when normal value is based on home market sales and to adjust the cost of production (COP) for purposes of the sales-below-cost test of section 773(b) of the Tariff Act of 1930, as amended (the Act), specifically within the context of relevant case law.[1]

[1] *See Remand Order* at 13.

B. Background

During the antidumping duty administrative review, Commerce received an allegation from Wheatland Tube (the petitioner) that a PMS existed in the Republic of Korea (Korea).[2] In the *Final Results*, after considering the arguments and comments submitted by interested parties on this issue, Commerce found that record evidence supported a finding that a PMS existed in Korea which distorted the costs of production of circular welded non-alloy steel pipe (CWP) due to the totality of circumstances.[3] Specifically, Commerce found that the "collective impact of Korean {hot-rolled coil (HRC)} subsidies, Korean imports of HRC from China, strategic alliances, and government involvement in the Korean electricity market, a {PMS} exists in Korea which distorts the cost of production for CWP."[4] Commerce further stated that "record evidence shows subsidization of HRC producers by the Korean government, as well as purchases of HRC by the mandatory respondents from Korean HRC producers, which received such subsidies."[5]

Subsequently, the Court found that Commerce's determination of the existence of a PMS in the *Final Results* is unsupported by substantial evidence and remanded the issue to Commerce "for further proceedings"[6] and, in response, Commerce issued the *First Redetermination*. During the course of the *First Redetermination*, Hyundai Steel Company (Hyundai Steel) argued for the first time that the PMS provisions in the statute are limited to constructed value (CV), and that Commerce's application of a PMS adjustment to the COP for purposes of the sales-below-cost test is contrary to law.[7] We declined to address this argument in the *First Redetermination*

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[2] *See* Petitioner's Letter, "Certain Circular Welded Non-Alloy Steel Pipe from Korea: Allegation of a Particular Market Situation," dated October 16, 2017.
[3] *See Final Results* IDM at Comment 1.
[4] *Id.*
[5] *Id*.
[6] *See Hyundai Steel Company v. United States*, 415 F. Supp. 3d 1293 (CIT 2019)
[7] *See First Redetermination* at 24.

because Hyundai Steel had not raised this argument previously and, therefore, was not considered by the Court as part of its holding.[8]

On December 7, 2020, we released the Draft Results to interested parties for comment.[9] We received comments from Wheatland Tube (the petitioner)[10] on December 14, 2020, and from Hyundai Steel[11] and SeAH Steel Corporation (SeAH)[12] on December 16, 2020.

C. Analysis

In the *Remand Order*, the Court remanded the *First Redetermination* to explain the statutory authority to conduct a cost-based PMS analysis when normal value is based on home market sales and to adjust the COP for purposes of the sales-below-cost test of section 773(b) of the Act, specifically within the context of relevant caselaw from the CIT.

Section 504 of the Trade Preferences Extension Act of 2015 (TPEA) added the concept of "particular market situation" in the definition of the term "ordinary course of trade," for purposes of CV under section 773(e) of the Act, and through these provisions for purposes of the COP under section 773(b)(3).[13] Section 773(e) of the Act states that "if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the COP in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology." Thus, under section 504 of the TPEA, Congress has given Commerce the

[8] *Id*. at 39.
[9] *See* Draft Results of Remand Redetermination, Hyundai Steel Company v. United States, Consolidated Court No. No. 18-00154, Slip Op. 20-168, dated December 4, 2020 (Draft Results).
[10] *See* Petitioner's Letter, "Certain Circular Welded Non-Alloy Steel Pipe from Korea: Comments on Draft Results of Remand Redetermination," dated December 14, 2020 (Petitioner Comments).
[11] *See* Hyundai Steel's Letter, "Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Comments on Draft Remand Redetermination," dated December 16, 2020 (Hyundai Steel Comments).
[12] *See* SeAH's Letter, "Circular Welded Non-Alloy Steel Pipe from Korea – Comments on Draft Redetermination on Remand in Response to Slip Op. 20-168," dated December 16, 2020 (SeAH Comments).
[13] *See* Trade Preferences Extension Act of 2015, Pub. L. No. 114-27, 129 Stat. 362 (2015) (TPEA).

authority to determine whether a PMS exists within the foreign market from which the subject merchandise is sourced, and to determine whether the cost of materials, fabrication, or processing of such merchandise fail to accurately reflect the COP in the ordinary course of trade.[14] Although the Act does not define "particular market situation," the SAA explains that examples where such a situation may exist include "where there is government control over pricing to such an extent that home market prices cannot be considered competitively set."[15]

Section 504 of the TPEA also amended the Act to provide Commerce with additional discretion when applying the "particular market situation" concept to determine normal value.[16] Specifically, in section 504 of the TPEA, Congress added the PMS concept to sales and transactions that Commerce will consider outside the "ordinary course of trade," and thus not usable in its antidumping calculations. Under section 771(15) of the Act, Commerce shall find "sales and transactions" to be "outside the ordinary course of trade" in situations in which it "determines that the particular market situation prevents a proper comparison with the export price or constructed export price."[17] Thus, where a PMS affects the COP of the foreign like product because it distorts the cost of inputs, it is reasonable to conclude that such a situation may prevent a proper comparison of the export price with normal value based on home market prices just as it would when normal value is based on CV. In our view, an examination of a PMS for purposes of the sales-below-cost test is consistent with the Act when considering that the provision at issue, section 773(e) of the Act, specifically includes the term "ordinary course of trade." The definition of that term, again, found in section 771(15) of the Act, is integral to that

[14] *See* section 773(e) of the Act.
[15] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) (SAA) at 822.
[16] *See* TPEA.
[17] *See* section 771(15) of the Act.

PMS provision. Accordingly, it is consistent with the Act for Commerce to analyze a PMS allegation in determining whether a company's comparison-market sale prices were below cost, and therefore, are outside the "ordinary course of trade." Indeed, in our view an interpretation that Commerce cannot analyze a PMS allegation to determine whether comparison-market sales prices were below cost would defeat the very purpose of an "ordinary course of trade" analysis under the PMS provision, which is to ensure that the distortions caused by a PMS do not prevent fair comparisons of normal value with U.S. price.

Additionally, the legislative history of the TPEA indicates that, through the PMS provision, Congress intended to provide Commerce with the ability to address price and cost distortions resulting from subsidization or dumping. The legislative history of the TPEA states that Commerce can disregard prices or costs of inputs that foreign producers purchase if Commerce has reason to believe or suspect that the inputs in question have been subsidized or dumped.[18] As discussed in response to comments section below, a Senate Report states that the amendments enacted in the TPEA "provide that where a particular market situation exists that distorts pricing or cost in a foreign producer's home market, {Commerce} has flexibility in calculating a duty that is not based on distorted pricing or costs."[19] The legislative history does not distinguish between calculating a duty based on sales prices or CV, but simply indicates that Congress sought to give Commerce flexibility not to base its calculations on either distorted pricing or costs. This lends support to Commerce's statutory interpretation that it was empowered with the flexibility to adjust for a cost-based PMS as it did in this case. Indeed, during the floor debates regarding the TPEA, Representative Patrick Meehan highlighted that the

[18] *See* Trade Facilitation and Trade Enforcement Act of 2015, S. Doc. No. 114-45 (2015) (Trade Enforcement Act) at 37.
[19] *Id.*; *see also NEXTEEL Co., Ltd. v. United States*, 355 F. Supp. 3d 1336, 1349 (CIT 2019).

legislation would empower Commerce "to disregard prices or costs of inputs that foreign producers purchase if {Commerce} has reason to believe or suspect that the inputs in question have been subsidized or dumped."[20]

Further, during the Senate debate on this bipartisan legislation, Senator Brown called the proposed legislation "one of the most important bills to come in front of the Senate" which would "guarantee that Americans can find a more level playing field as we compete in the world economy."[21] He also identified the Korean steel industry as an example of an industry that does not play by the rules, specifically referencing unfair subsidization of Korean oil country tubular goods (OCTG) (which, similar to CWP, is a downstream product of Korean HRC) by the Korean government:

> These {U.S. OCTG} producers increasingly lose business to foreign competitors that are not playing by the rules. Imports for OCTG {} have doubled since 2008. By some measures imports account for somewhat more than 50 percent of the pipes being used by companies drilling for oil and gas in the United States. Korea has one of the world's largest steel industries, but get this, not one of these pipes that Korea now dumps in the United States – illegally subsidized - is ever used in Korea for drilling because Korea has no domestic oil or gas production. In other words, Korea has created this industry only for exports and has been successful because they are not playing fair. So their producers are exporting large volumes to the United States, the most open and attractive market in the world, at below-market prices. This is clear evidence that our workers and manufacturers are

[20] *See* Congressional Record-House, H4666, H4690 (June 25, 2015); *see also* Congressional Record-Senate, S2899, S2900 (May 14, 2015).
[21] *See* 114 Cong. Rec. S2900 (daily ed. May 14, 2015) (statement of Sen. Brown).

being cheated and it should be unacceptable to the Members of this body. It hurts our workers, our communities, and our country. It is time to stop it.[22]

Thus, as a whole, we believe that the legislative history of TPEA supports Commerce's statutory interpretation that it may conduct a cost-based PMS analysis. Commerce was granted the discretion to use "any other calculation methodology"[23] if costs are distorted by a PMS, including for the purposes of COP under section 773(b)(3) of the Act. It would be illogical to conclude that Congress intended for Commerce not to rely on costs distorted by a PMS for CV, but still rely on those same distorted costs for purposes of COP and the sales-below-cost test. Thus, in Commerce's view, the TPEA amendments and their legislative history make clear Congress' intent to expand Commerce's discretion in administering the statute when a particular market situation exists, which includes making cost adjustments to normal value when a foreign producer's home market is distorted by the particular conditions of the market.

We are cognizant that the Court has disagreed with Commerce's interpretation above in the cases cited by the Court in the *Remand Order*.[24] However, for the reasons explained above, we respectfully disagree with the statutory interpretation enunciated in those cases. Moreover, we observe that these cases are not yet final and conclusive. Accordingly, we continue to find that our statutory interpretation best comports with the intent of Congress, and that it is in accordance with law.

[22] *Id*.
[23] *See* section 773(e) of the Act.
[24] *See Remand Order* at 9 (citing *Saha Thai Steel Pipe Pub. Co. v. United States*, 422 F. Supp. 3d 1363, 1368-70 (CIT 2019); *Husteel Co., Ltd. v. United States*, 426 F. Supp. 3d 1376, 1383-89 (CIT 2020); *Dong-A Steel Co. v. United States*, 475 F. Supp. 3d 1317 (CIT 2020); *Husteel Co., Ltd. v. United States*, 476 F. Supp. 3d 1363 (CIT 2020); and *Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 476 F. Supp. 3d 1378 (CIT 2020)).

D. Comments on Draft Results of Redetermination

Hyundai Steel Comments

- Commerce cannot legally apply a PMS adjustment to costs for purposes of the sales-below-cost test.[25]
    - Commerce omitted critical words at the beginning of the PMS provision of section 773(e) of the Act which indicates the bounds of the provision's application is for purposes of paragraph (1), which explicitly refers to the calculation of CV.[26]
    - Commerce must correct its verbal sleight of hand in the final remand redetermination and acknowledge that its statutory interpretation does not stand upon full review of the statutory scheme.[27]
    - The TPEA did not change the statutory provisions regarding the calculation of COP or application of the sales-below-cost test pursuant to section 773(b) of the Act.[28]
    - The statutory definition of "ordinary course of trade" within section 771(15) does not indicate that Congress intended the PMS provision to apply to section 773(b) of the Act.[29]
    - Commerce's reliance on the legislative history of the TPEA is unavailing.[30]
    - The statement quoted by Commerce is from one Senator, which cannot be read to be a reflect Congressional intent.[31]
    - The passage quoted by Commerce says nothing as to the PMS provisions at all. [32]

[25] *See* Hyundai Steel Comments at 3-11.
[26] *Id*. at 4.
[27] *Id*. at 5.
[28] *Id*.
[29] *Id*. at 6.
[30] *Id*. at 7.
[31] *Id*.
[32] *Id*. at 8.

- The passage quoted by Commerce does not address the specific question as to whether the PMS provision applies to section 773(b) of the Act.[33]
- The passage quoted by Commerce undermines Commerce's theory, because the Senator was expressing a concern about OCTG, which the Senator claimed was only for exports; thus, this passage indicates a concern about inequities in a CV context.[34]
- Commerce should provide more clarification as to how it views this passage as relevant to the specific statutory interpretation at hand and how the statements of one Senator are indicative of Congressional intent in interpreting the statute in light of existing caselaw.[35]
- Commerce's premise that there is some ambiguity in the statute that requires reading back to legislative history to determine the intent of Congress has already been rejected by the Court.[36]
- In seeking to resort to legislative history, Commerce is ignoring the Court's prior holdings on this question, contrary to the Court's instructions on remand.[37]

- The Draft Results do not comply with the *Remand Order*.[38]
  - Commerce cannot simply avoid the Court's express instruction to square its statutory interpretation with existing caselaw by stating its opposition to the multitude of court decisions on this specific question of law.[39]
  - Should Commerce continue to take this approach in the final redetermination in attempting to continue to apply the PMS provisions of section 773(e) of the Act for

[33] *Id*.
[34] *Id*. at 9.
[35] *Id*. at 9-10.
[36] *Id*. at 10 (citing *Husteel Co. v. United States*, 426 F. Supp. 3d 1376, 1383 (CIT 2020)).
[37] *Id*.
[38] *Id*. at 11-13.
[39] *Id*. at 12.

purposes of the sales-below-cost test of section 773(b) of the Act, Commerce should directly respond to the Court's instruction by properly acknowledging that its remand redetermination in fact does not comply with the Court's prior decisions on this question.[40]

- In its final redetermination Commerce should, instead, reverse its application of PMS adjustments to calculations under section 773(b) of the Act.[41]

SeAH Comments

- SeAH argues that the Draft Results fail to comply with the Court's instructions.[42]
- Commerce has not attempted to explain how its interpretation is consistent with the language of the statute, as the relevant provisions have been interpreted by the Court.[43]
- If Commerce's final redetermination continues on this course, it will cause unnecessary work by the parties and the Court that will only result in yet another remand, and may potentially lead to sanctions against Commerce officials who are willfully refusing to follow the Court's order.[44]
- The statute provides that home-market sales may be considered "outside the ordinary course of trade" as below-cost sales only if they fail the sales-below-cost test specified in the statute, and that test specifies that the sales must be compared to a cost that does not include any PMS adjustment.[45]

[40] *Id*.
[41] *Id*. at 12-13.
[42] *See* SeAH Comments at 2.
[43] *Id*.
[44] *Id*. at 3.
[45] *Id*. at 3-4.

Petitioner's Comments

- The petitioner argues that Commerce's Draft Results are consistent with the statute and Congressional intent.[46]

Commerce's Position: We disagree with the respondents' contention that we have not complied with the Court's *Remand Order*. Following a prior remand in this case, Hyundai Steel argued for the first time in its remand comments before Commerce that Commerce does not have the statutory authority to apply PMS to costs for purposes of the sales-below-cost test. In the *First Redetermination*, Commerce declined to respond to Hyundai Steel's argument because Hyundai Steel had not previously raised this issue before Commerce or the Court, and thus, it was not an issue considered by the Court, as part of the holding in its prior remand.[47] Following the *First Redetermination*, the Court issued the instant *Remand Order*, in which the Court found that "departure from the general rule of waiver is warranted," and ordered Commerce "to explain the statutory authority to conduct a cost-based particular market situation analysis when normal value is based on home market sales and to adjust the cost of production for purposes of the sales-below-cost test of 19 U.S.C. § 1677b(b), specifically within the context of relevant caselaw from the Court of International Trade."[48] In the Draft Results,[49] and as described above in these *Final Results*, in accordance with the *Remand Order*, we explained the statutory authority to conduct a cost-based particular market situation analysis when normal value is based on home market sales and to adjust the cost of production for purposes of the sales-below-cost test. We further acknowledged in the Draft Results,[50] and continue to acknowledge, that the Court has

[46] *See* Petitioner Comments at 2.
[47] *See First Redetermination* at 39.
[48] *See Remand Order* at 6, and 12-13.
[49] *See* Draft Results at 3-6.
[50] *Id.* at 6.

disagreed with Commerce's statutory interpretation in the cases cited by the Court in the *Remand Order*. However, we respectfully disagree with the statutory interpretation enunciated in those cases and reiterate that those cases are not yet final and conclusive. Although we recognize that the Court may disagree with Commerce's interpretation and we acknowledge that the Court has disagreed with our interpretation in other cases, Commerce has complied with the Court's *Remand Order*.

With respect to the legislative history, we believe that as a whole, the legislative history indicates that Congress intended to provide Commerce with the ability to address price and cost distortions resulting from subsidization or dumping. In the Draft Results, we quoted Senator Brown's statements that the proposed legislation was one of the most important bills to come before the Senate and would help to level the playing field to compete in the world economy.[51] Senator Brown identified the Korean steel industry as an example of an industry that does not play by the rules, and although he specifically referred to Korean subsidization of OCTG, the legislation being debated was not meant to apply to only one product. In addition, we clarify that there are other indications in the legislative history of the TPEA supporting Commerce's interpretation that the TPEA permits Commerce to adjust respondents' costs based upon a finding of a PMS. For example, a Senate Report states that the amendments enacted in the TPEA "provide that where a particular market situation exists that distorts pricing or cost in a foreign producer's home market, {Commerce} has flexibility in calculating a duty that is not based on distorted pricing or costs."[52] The legislative history does not distinguish between calculating a duty based on sales prices or CV, but simply indicates that Congress sought to give Commerce flexibility not to base its calculations on either distorted pricing or costs. This lends

[51] *Id.* at 5-6.
[52] *See* Trade Enforcement Act at 37; *see also NEXTEEL Co., Ltd.*, 355 F. Supp. 3d at 1349.

support to Commerce's statutory interpretation that it is empowered to adjust for a cost-based PMS as it did in this case. Indeed, during the floor debates regarding the TPEA, Representative Patrick Meehan highlighted that the legislation would empower Commerce "to disregard prices or costs of inputs that foreign producers purchase if {Commerce} has reason to believe or suspect that the inputs in question have been subsidized or dumped."[53] Thus, as a whole, the legislative history supports Commerce's interpretation that through the PMS provision, Congress intended to provide Commerce with the ability to address price and cost distortions resulting from subsidization or dumping.

Finally, we note that CV is meant to be a substitute for the price at which the foreign like product is first sold for consumption in the exporting country (*i.e.*, home-market price) in instances where the normal value of the subject merchandise cannot be determined under section 773(a)(1)(B)(i) of the Act.[54] The statutory interpretation in the cases cited by the Court in the *Remand Order*[55] necessarily creates a mismatch between home-market price and CV that is not supported by the legislative intent as described above. Specifically, a normal value based on home-market prices that are compared to costs which do not reflect a PMS adjustment will be lower than CV and the magnitude of the difference will be approximately the amount of the PMS adjustment. We see no indication in the legislative history that Congress intended the TPEA to protect American workers only in situations where home-market prices do not exist. Thus, we continue to find that the legislative history of TPEA supports Commerce's statutory interpretation that it may conduct a cost-based PMS analysis.

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[53] *See* Congressional Record-House, H4666, H4690 (June 25, 2015); *see also* Congressional Record-Senate, S2899, S2900 (May 14, 2015).
[54] *See* Section 773(a)(4) of the Act.
[55] *See Remand Order* at 9 (citing *Saha Thai Steel Pipe Pub. Co. v. United States*, 422 F. Supp. 3d 1363, 1368-70 (CIT 2019); *Husteel Co., Ltd. v. United States*, 426 F. Supp. 3d 1376, 1383-89 (CIT 2020); *Dong-A Steel Co. v. United States*, 475 F. Supp. 3d 1317 (CIT 2020); *Husteel Co., Ltd. v. United States*, 476 F. Supp. 3d 1363 (CIT 2020); and *Saha Thai Steel Pipe Pub. Co., Ltd. v. United States*, 476 F. Supp. 3d 1378 (CIT 2020)).

E. Final Results of Redetermination

Upon a final and conclusive decision in this litigation, Commerce will instruct U.S. Customs and Border Protection to liquidate appropriate entries for the November 1, 2015, through October 31, 2016, POR consistent with the *Final Results* and the *First Redetermination*.

2/2/2021

X

Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance