

Hyundai Steel Company v. United States,
Court No. 20-03799, Slip Op. 21-112 (CIT August 27, 2021)

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

I. 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), issued on August 27, 2021.¹ This action arises out of Commerce’s final results in the administrative review of the countervailing duty (CVD) order of certain hot-rolled steel flat products (hot-rolled steel) from the Republic of Korea (Korea) covering the period January 1, 2017, through December 31, 2017.² At Commerce’s request, the CIT remanded to Commerce its determination to apply facts available when calculating the benefit from the provision of port usage rights at the Port of Incheon program.

Pursuant to the *Remand Opinion and Order*, Commerce has reexamined its benefit analysis in the provision of port usage rights at the Port of Incheon program and amended our calculations regarding the benefit amount for the aforementioned program. Consequently, for the purposes of these final results of redetermination, Commerce has revised the program

¹ See *Hyundai Steel Company v. United States*, Court No. 20-03799, Slip Opinion 21-112 at 6-7 (CIT August 27, 2021) (*Remand Opinion and Order*).

² See *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 2017*, 85 FR 64122 (October 9, 2020) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM); see also Memorandum, “Response to Ministerial Error Allegations on the Final Results,” dated October 27, 2020.

subsidy rate for Hyundai Steel Company (Hyundai Steel) to be 0.01 percent *ad valorem* and the overall subsidy rate calculated to be 0.46 percent *ad valorem*.

II. BACKGROUND

On December 11, 2018, Commerce initiated a CVD administrative review concerning imports of hot-rolled steel from Korea covering the period January 1, 2017, through December 31, 2017.³ On February 6, 2019, Commerce determined to individually examine Hyundai Steel as the mandatory respondent in this administrative review.⁴ In the *Preliminary Results*, Hyundai Steel reported receiving benefits from the provision of port usage rights at the Port of Incheon program through the receipt of berthing income,⁵ and Commerce preliminarily determined that the net subsidy rate for this program was not measurable.⁶

In the *Final Results*, Commerce, after examining the information on the record, found that Hyundai Steel received additional benefits from certain other fees under this program (*i.e.*, harbor exclusive usage fee(s)) that are measurable.⁷ We found that Hyundai Steel received a financial contribution because these fees represent revenue forgone within the meaning of section 771(5)(D)(ii) of the Tariff Act of 1930, as amended (the Act). Further, we found that, because necessary information was not available on the record with respect to these fees, it was appropriate to calculate the benefit from them based on facts available, pursuant to section 776(a)(1) of the Act. As facts available, we determined that the benefit from the fees should be

³ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 63615 (December 11, 2018).

⁴ See Memorandum, “Respondent Selection,” dated February 6, 2019.

⁵ See *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 2017*, 84 FR 67927 (December 12, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

⁶ See *Preliminary Results* PDM at 17.

⁷ See *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 2017*, 85 FR 64122 (October 9, 2020), and accompanying IDM at Comment 6.

measured using information regarding various port fees reported by Hyundai Steel.⁸ We, therefore, applied this amount to the volume of cargo Hyundai Steel reported during the period of review (POR). When added to the other benefit Commerce had calculated under this program, namely the benefit from berthing income, we determined that Hyundai Steel had received a measurable benefit from this program. For the *Final Results*, Commerce computed a 0.06 percent *ad valorem* rate for the provision of port usage rights at the Port of Incheon program.

Hyundai Steel filed suit at the CIT regarding the *Final Results*, arguing that Commerce's application of facts available was not in accordance with the law because Commerce did not identify deficiencies in Hyundai Steel's submissions, as required by sections 782(d) and 776(a) of the Act, before applying facts available when determining the benefit to Hyundai Steel under the Port of Incheon program. The CIT granted Commerce's request for a voluntary remand to reconsider our application of facts available and, if appropriate, the rate assigned to Hyundai Steel.⁹

Commerce issued a supplemental questionnaire to Hyundai Steel regarding the benefit it received related to the harbor exclusive usage fee(s) because we did not collect this information during the underlying review.¹⁰ Hyundai Steel timely responded to Commerce's supplemental questionnaire.¹¹

⁸ *Id.*

⁹ See *Remand Opinion and Order* at 6-7.

¹⁰ See Commerce's Letter, "Supplemental Questionnaire," dated August 30, 2021 (Hyundai Steel Supplemental).

¹¹ See Hyundai Steel's Letter, "Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-884: Hyundai Steel's Remand Supplemental Questionnaire Response," dated September 7, 2021 (Hyundai Steel September 2, 2021 SQR).

III. REMANDED ISSUE

The question before the CIT was whether Commerce improperly applied facts available to determine the harbor exclusive usage fees, given that Commerce did not identify deficiencies in Hyundai Steel’s submissions before applying facts available. We have addressed this issue in our analysis below.

IV. ANALYSIS

A. Legal Framework

Under section 776(a) of the Act, Commerce shall use facts available, subject to section 782(d) of the Act, in reaching the appropriate determination if:

- (1) necessary information is not available on the record, or
- (2) an interested party or any other person—
 - (A) withholds information that has been requested by the administering authority or the Commission under this title,
 - (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
 - (C) significantly impedes a proceeding under this title, or
 - (D) provides such information but the information cannot be verified as provided in section 782(i).

If a party’s response is found to be deficient, section 782(d) of the Act directs Commerce to “promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title.”

B. Analysis

As a result of our analysis on remand, as explained below, we have recalculated the benefit Hyundai Steel received from the provision of port usage rights at the Port of Incheon program using the additional data Hyundai Steel provided in its supplemental questionnaire response.

As explained in the *Final Results*, Commerce relied on facts otherwise available to determine the benefit from this program, pursuant to section 776(a)(1) of the Act, because necessary information to determine the amount of the benefit was not on the record.¹² Upon the CIT's issuance of the voluntary remand, Commerce issued a supplemental questionnaire to Hyundai Steel identifying the deficiencies regarding the missing information necessary to determine the amount of benefit conferred from the provision of port usage rights at the Port of Incheon program, as it relates to harbor exclusive fees, as required under section 782(d) of the Act. Hyundai Steel provided the necessary information in response. Accordingly, there no longer is a need to apply facts otherwise available in determining the benefit received by Hyundai Steel from this program. Using Hyundai Steel's response, we have recalculated the *ad valorem* rate of the port usage rights at the Port of Incheon program.¹³ The revised program rate is 0.01 percent *ad valorem* and the net countervailable subsidy rate for Hyundai Steel for the POR is now 0.46 percent. Because this rate is less than 0.5 percent, it shall be disregarded as *de minimis*.¹⁴

¹² See *Final Results* IDM at 30.

¹³ See Memorandum, "Draft Remand Calculations for Hyundai Steel," dated September 17, 2021 (Draft Remand Calculations).

¹⁴ See 19 CFR 351.106(c)(1).

V. DRAFT REMAND COMMENTS

On September 17, 2021, Commerce issued its Draft Remand and invited interested parties to comment.¹⁵ On September 24, 2021, Nucor Corporation (Nucor) and Hyundai Steel filed timely comments on the draft remand redetermination.¹⁶

Comment 1: Commerce Should Continue to Apply Facts Available to Calculate the Benefit

Nucor Comments

- Commerce’s application of facts available in the final results of the underlying administrative review was entirely appropriate, consistent with the Act, and necessary based on the facts on the record of this proceeding.¹⁷
- Outside of circumstances where a party submits a deficient questionnaire response, Commerce is not required to solicit additional information under section 782 of the Act in order to apply facts available under section 776 of the Act. When reading sections 776 and 782 of the Act together, the ability of Commerce to apply facts available when necessary information is not on the record is only limited by section 782 of the Act when the submission is deficient. Outside a finding that a submission is deficient, Commerce is not required to follow the additional requirements of section 782(d) of the Act.¹⁸
- Commerce did not apply facts available to correct a deficiency in Hyundai Steel’s submitted information that could have been addressed in a supplemental questionnaire.¹⁹

¹⁵ See Draft Results of Redetermination Pursuant to Court Remand, *Hyundai Steel Company v. United States*, Court No. 20-03799, Slip Op. 21-112 (CIT August 27, 2021), issued on September 17, 2021 (Draft Remand).

¹⁶ See Nucor’s Letter, “Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Comments on Draft Results of Redetermination,” dated September 24, 2021 (Nucor Comments); see also Hyundai Steel’s Letter, “Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C580-884: Hyundai Steel’s Comments on Draft Remand Redetermination,” dated September 24, 2021 (Hyundai Steel Comments).

¹⁷ See Nucor Comments at 6.

¹⁸ *Id.* at 6-9.

¹⁹ *Id.* at 6-7.

The information was not requested because it was not necessary to do so. Commerce determined that it was more appropriate to quantify the amount of Hyundai Steel's uncollected income based on information already on the record.²⁰

- If there was no deficiency, Commerce cannot be compelled to solicit information to cure that deficiency. This interpretation is consistent with findings by the CIT²¹ and with the legislative history of the Act.²² Clearly, Congress envisioned facts available being applied in two general scenarios—first, as the result of deficient submissions and, second, due to other causes.

Commerce's Position:

We disagree with Nucor that Commerce should disregard information currently on the record of this redetermination when determining the benefit under the provision of port usage right at the Port of Incheon program. In the *Final Results*, we stated that we used facts available to determine the benefit Hyundai Steel received under this program “because necessary information is not available on the record with respect to {the} fees” Hyundai could have collected under this program.²³

Commerce requested that the CIT remand our *Final Results* for reconsideration of our findings with respect to the application of facts available with respect to program, which the CIT granted. This remand specifically directs Commerce to “reconsider {the} application of facts available and the rate assigned to {Hyundai Steel}.”²⁴ Under that direction, Commerce issued a

²⁰ *Id.* at 9 (citing *Final Results* IDM at 29; and Memorandum, “Final Results Calculations for Hyundai Steel Co., Ltd.,” dated September 28, 2020 at 2-4 (Hyundai Steel Final Calculation Memo)).

²¹ *Id.* at 9-10 (citing *Hung Vuong Corp. v. United States*, 483 F.Supp.3d 1321, 1337 (CIT 2020) (*Hung Vuong*); *JTEKT Corp. v. United States*, 675 F.Supp.2d 1206, 1249-50 (CIT 2009) (*JTEKT*); and *Rebar Trade Action Coal. v. United States*, 337 F.Supp.3d 1251, 1263 (CIT 2018) (*Rebar Trade Action*)).

²² *Id.* at 10 (citing Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) (SAA) at 4195 and 4198).

²³ See *Final Results* IDM at 30.

²⁴ See *Remand Opinion and Order* at 7.

supplemental questionnaire to Hyundai Steel and requested that Hyundai Steel provide an estimate of the fees it could have collected under this program.²⁵ Hyundai Steel timely responded to that supplemental questionnaire and provided the information as requested.²⁶

The information regarding the fees Hyundai Steel would have collected under this program is now on the record of this redetermination. The question of whether Commerce was required to ask for this additional information has been overtaken by the course of events in this redetermination. The information is now on the record and there is no rationale provided by Nucor for Commerce to ignore this information. Commerce properly used the requested information to calculate a more accurate benefit that Hyundai Steel received during the POR.

Nucor stated that Commerce can use facts available to rely on information already on the record to make necessary adjustments to the benefit calculation and referred to several CIT findings that support this interpretation.²⁷ However, we find these arguments moot because the missing fee information is now on the record. None of the cases cited by Nucor suggest ignoring or rejecting such requested information. Because there is no basis for Commerce to ignore or reject this record information, as discussed further below, we find the application of facts available is no longer needed, and we have instead relied on record information to calculate Hyundai Steel's benefit from this program.

²⁵ See Hyundai Steel Supplemental.

²⁶ See Hyundai Steel September 2, 2021 SQR.

²⁷ See Nucor Comments at 9-10 (citing *Hung Vuong*; *JTEKT*; and *Rebar Trade Action*).

Comment 2: Hyundai Steel Failed to Fully Respond to Commerce’s Supplemental Questionnaire

Nucor’s Comments

- Notwithstanding the above argument, the information provided by Hyundai Steel in its supplemental questionnaire response does not fully support the fees it could have collected under this program.²⁸ Although Hyundai Steel reported areas it used to calculate the fees that it could have collected under the Port of Incheon Harbor program,²⁹ Hyundai Steel fails to point to, nor can Nucor find, any record evidence to support the reported areas, despite Commerce directing Hyundai Steel to “{p}rovide detailed calculations and any supporting documentation.”³⁰ Without this information, the fees Hyundai Steel reported are entirely unsupported by the record and Commerce should not rely on them.
- Hyundai Steel had ample opportunity, both here and in the underlying review, to provide complete and corroborated information regarding the fees it could have collected under this program. Since Hyundai Steel failed to fully substantiate the fees it estimates it could have collected during the POR, Commerce should apply facts available in the final remand determination.³¹

²⁸ See Nucor Comments at 12-14.

²⁹ *Id.* at 12-13 (citing Hyundai Steel September 2, 2021 SQR at 3-6 and Exhibit REM-1; and Draft Remand Calculations).

³⁰ *Id.* at 13 (citing Hyundai Steel September 2, 2021 SQR at 6).

³¹ *Id.* at 13-15 (citing Hyundai Steel’s Letter, “Certain Hot-Rolled Steel Products from the Republic of Korea, Case No. C-580-884: Hyundai Steel New Subsidy Allegations Questionnaire Response,” dated August 26, 2019; and Hyundai Steel’s Letter, “Certain Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-884: New Subsidy Allegation Supplemental Questionnaire Response,” dated October 31, 2019 at 5-6 and Exhibit NSA2-2).

Commerce's Position:

We disagree with Nucor that the information Hyundai Steel provided is unsupported. In the *Final Results*, Commerce applied facts available to determine the benefit Hyundai Steel received from the “other” fees because the harbor exclusive usage fee was not on the record of the administrative review.³² In the supplemental questionnaire Commerce issued in this redetermination, we requested Hyundai Steel “{p}rovide a description of the harbor exclusive usage fee(s) that Hyundai Steel could have collected ... during the period of review (POR)” and “{p}rovide detailed calculations and any supporting documentation for the harbor exclusive usage fees that Hyundai Steel could have collected ... during the POR.”³³ In its response, Hyundai Steel provided an estimation of the other fees it could have collected under this program and documentation to support the fee rates.³⁴

We find that the calculations provided by Hyundai Steel are adequately supported and that there is nothing on the record to contradict the calculations provided, including the areas used in those calculations. We find that the areas provided in the calculations are reasonable for each fee (*i.e.*, the quay wall fee relies on the area of the quay wall length and apron area). Hyundai Steel properly answered Commerce's questions in the manner we requested of it. The information provided by Hyundai Steel is also similar to information Commerce has used to calculate the benefit under this program in the subsequent review.³⁵ Therefore, we find that Hyundai Steel's calculations of its benefit under this program are adequately supported by the

³² See Hyundai Steel Final Calculation Memo at 3.

³³ See Hyundai Steel Supplemental at 1.

³⁴ See Hyundai Steel September 2, 2021 SQR.

³⁵ See *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review; 2018*, 86 FR 10533 (February 22, 2021), and accompanying PDM at 17-81, unchanged in *Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review; 2018*, 86 FR 47621 (August 26, 2021), and accompanying IDM.

information on the record such that Commerce has relied on the information to determine the benefit from this program.

Comment 3: Commerce Should Reconsider its Determination that the Port of Incheon Harbor Program is Countervailable

Hyundai Steel Comments

- The provision of port usage rights at the Port of Incheon program provides no countervailable benefit to Hyundai Steel as it exists merely to provide reimbursements to Hyundai Steel for the significant costs it incurred in building the port prior to reverting ownership of the port to the Government of Korea (GOK).³⁶
- It is appropriate for Commerce to reconsider whether this program provides a countervailable benefit given that the *Remand Opinion and Order* states that the remand “may affect Commerce’s determination that the port usage rights constitute a countervailable benefit”³⁷

Commerce’s Position:

As noted above, we have calculated an overall subsidy rate for Hyundai Steel that is *de minimis*, and if sustained, Commerce will instruct U.S. Customs and Border Protection to liquidate Hyundai Steel’s entries without regard for countervailing duties. Consequently, we find this argument, which is, in effect, that no legally measurable subsidy exists, is “moot,” as the end result of our conclusion on remand is essentially the same, *albeit* based on a different legal finding. Nonetheless, it is important to stress that we disagree with Hyundai Steel that the provision of port usage rights at the Port of Incheon program provides no countervailable benefit to Hyundai Steel.

³⁶ See Hyundai Steel Comments at 2.

³⁷ *Id.* at 2-3 (citing *Remand Opinion and Order* at 6).

As we explained in the *Final Results*, Hyundai Steel received a financial contribution because certain fees represent revenue forgone within the meaning of section 771(5)(D)(ii) of the Act.³⁸ The sole reason the GOK forgoes this revenue is because of Hyundai Steel’s arrangement with the GOK to operate the port at North Incheon Harbor.³⁹ Although Hyundai Steel claims that the GOK is merely providing reimbursements for costs previously incurred by Hyundai Steel for building the port prior to reverting ownership to the GOK, the “provision” of such payments does not mean that no countervailable benefit was conferred to Hyundai Steel. The record is clear that the GOK is not collecting fees that it is entitled to collect because of Hyundai Steel’s arrangement with the GOK to operate the port,⁴⁰ and the record does not demonstrate that the main purpose of building the port was for public good or any governmental functions; rather, Hyundai Steel uses the port to transport for its own operations⁴¹ The record also shows that Hyundai Steel has the rights to operate and freely use the port for many years, with no other party using the harbor to date.⁴² We do not see a difference in substance between the program at issue and a program in which a government directly provides funding to a company to build a port for the company’s benefit.⁴³ In both instances, a company is able to receive assistance for building a port for its own use. Therefore, consistent with past practice, Commerce did not offset for the cost of constructing the port in its benefit analysis.⁴⁴

³⁸ See *Final Results* IDM at 29-30.

³⁹ See Hyundai Steel Final Calculation Memo at 3.

⁴⁰ See *Final Results* IDM at 30-31; see also Hyundai Steel Final Calculation Memo at 2-3; and Hyundai Steel’s Letter, “Certain Hot-Rolled Steel Flat Products from the Republic of Korea, Case No. C-580-884: Hyundai Steel New Subsidy Allegation Questionnaire Response,” dated August 23, 2019 (Hyundai Steel NSA QR) at Exhibit NSA-1 at Article 39.

⁴¹ See Hyundai Steel NSA QR at 2 and Exhibit NSA-1.

⁴² *Id.* at 2.

⁴³ See *Final Results* IDM at 30 (explaining that “the essence of this program is that the GOK helped Hyundai Steel build a port for its own use for a very long time”).

⁴⁴ *Id.* (citing *Notice of Final Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 72 FR 38565 (July 13, 2007), and accompanying IDM at 6-7 and Comment 1; *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Preliminary Results of*

Our treatment of this subsidy is consistent with our treatment of a similar program in *AK Steel*, where Commerce determined that a countervailable benefit was conferred on POSCO by the exemption from dockyard fees regardless of whether the port berths used by POSCO were built by the GOK or by POSCO.⁴⁵ Hyundai Steel argues now that the non-payment of port usage fees are repayment for the cost of construction of the port, which Hyundai Steel was required to cede back to the GOK by law.⁴⁶ Likewise, in *AK Steel* Commerce rejected similar arguments that an exemption was merely a reimbursement by the GOK for the costs POSCO incurred in building the berths and deeding them to the GOK.⁴⁷ In that case, we stated that, “even if we viewed the non-payment of dockyard fees as repayment by the government for POSCO’s assumption of the costs of constructing the berths, we should still find the exemption to be countervailable.”⁴⁸ The reason is that, if the GOK had built the port berths, instead of POSCO, Commerce would have “countervailed the construction funding as a specific infrastructure benefit.”⁴⁹ The Federal Court of Appeals for the Federal Circuit (CAFC) agreed and upheld Commerce’s determination that the exemption provided POSCO a countervailable benefit.⁵⁰

In both *AK Steel* and the instant case, the GOK provided a countervailable benefit to respondent companies for construction of the ports by forgoing fees it was entitled to receive.

Countervailing Duty Administrative Review; 2011, 78 FR 55241 (September 10, 2013), and accompanying PDM at 11, unchanged in *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review; 2011*, 79 FR 5378 (January 31, 2014); and *Notice of Final Affirmative Countervailing Duty Determination: Certain Cold-Rolled Carbon Steel Flat Products from the Republic of Korea*, 67 FR 62102 (October 3, 2002), and accompanying IDM at 20 and Comment 11).

⁴⁵ See *AK Steel Corp. v. United States*, 192 F.3d 1367, 1379 (CAFC 1999) (*AK Steel*).

⁴⁶ See Hyundai Steel Comments at 2.

⁴⁷ See *AK Steel*, 192 F.3d at 1379.

⁴⁸ See *Final Affirmative Countervailing Duty Determinations and Final Negative Critical Circumstances Determinations: Certain Steel Products from Korea*, 58 FR 37338 (July 9, 1993), and accompanying IDM at 16.

⁴⁹ See *AK Steel*, 192 F.3d at 1382.

⁵⁰ *Id.*

Hence, consistent with Commerce's analysis and conclusion upheld by the CAFC in *AK Steel*, we continue to find that non-payment of port usage fees constitutes a countervailable benefit.

VI. FINAL RESULTS OF REDETERMINATION

Pursuant to the *Remand Opinion and Order*, we have recalculated the benefit amount Hyundai Steel received under the provision of port usage rights at the Port of Incheon program. As a result of our final results of redetermination, we find that Hyundai Steel's subsidy rate for this program is 0.01 percent and its overall subsidy rate for this POR is *de minimis*.

10/20/2021

X



Signed by: RYAN MAJERUS

Ryan Majerus
Deputy Assistant Secretary
for Policy and Negotiations,
performing the non-exclusive functions and duties of the
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