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SeAH Steel Corp. v. United States
Consolidated Court No. 20-00150, Slip. Op. 21-146 (CIT October 19, 2021)

Final Results of Redetermination Pursuant to Court Remand
Oil Country Tubular Goods from the Republic of Korea

I. SUMMARY

The Department of Commerce (Commerce) has prepared this redetermination pursuant to the remand order of the U.S. Court of International Trade (CIT or the Court) in *SeAH Steel Corporation v. United States,* Consol. Court 20-00150, Slip. Op. 21-146 (October 19, 2021) (*Remand Order*). This redetermination concerns the final results of the administrative review of the antidumping duty order on certain oil country tubular goods (OCTG) from the Republic of Korea (Korea).[1]

In the *Remand Order*, the Court remanded two issues to Commerce pertaining to respondent SeAH Steel Corporation (SeAH): (1) particular market situation (PMS), finding that substantial record evidence does not support Commerce's cumulative determination that a PMS existed in Korea for the 2017-2018 period of review (POR), thus, the issue required further consideration or explanation;[2] and (2) the application of Cohen's *d* test, as part of the differential pricing analysis, for further explanation of whether potential limits on the applicability of the

[1] *See Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 41949 (July 13, 2020) (*Final Results*), and accompanying Issues and Decision Memorandum (IDM).
[2] *See Remand Order* at 15-32.

Cohen's *d* test as enumerated in *Stupp*[3] were satisfied or whether those limits need not be observed when Commerce uses the Cohen's *d* test.[4]

The Court sustained two issues: (1) Commerce's calculation of profit as included in SeAH's constructed export price;[5] and (2) Commerce's exclusion of freight revenue in calculating SeAH's constructed export price.[6]

On December 10, 2021, we released our Draft Results of Redetermination to interested parties.[7] On December 17, 2021, we received comments from United States Steel Corporation (U.S. Steel)[8] and SeAH.[9] After considering these comments and analyzing the record, we have further explained our methodology employed in the Draft Results of Redetermination; however, we have not changed our calculation of SeAH's weight-averaged dumping margin. Accordingly, consistent with the Draft Results of Redetermination, SeAH's calculated weighted-average dumping margin continues to be 0.00 percent.[10]

II. BACKGROUND

On November 18, 2019, Commerce published the *Preliminary Results*,[11] in which Commerce calculated preliminary weighted-average dumping margins for mandatory

[3] *See Stupp v. United States*, 5 F.4th 1341 (Fed. Cir. 2021).
[4] *Id.* at 10-15.
[5] *Id.* at 44-48.
[6] *Id.* at 48-51.
[7] *See* Draft Results of Remand Redetermination, *SeAH Steel Corporation v. United States*, Consolidated Court No. 20-00150, Slip. Op. 21-146, dated December 10, 2021 (Draft Results of Redetermination).
[8] *See* U.S. Steel's Letter, "Oil Country Tubular Goods from the Republic of Korea: United States Steel Corporation's Comments on Draft Remand Results," dated December 17, 2021 (U.S. Steel's Draft Remand Comments).
[9] *See* SeAH's Letter, "Court-Ordered Remand of the Administrative Review of the Antidumping Order on Oil Country Tubular Goods from Korea for the 2017-18 Review Period – Comments on Draft Redetermination," dated December 17, 2021 (SeAH's Draft Remand Comments).
[10] *See* Memorandum, "Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea: Draft Redetermination Calculation Memorandum – SeAH Steel Corporation," dated December 10, 2021 (Draft Redetermination Calculation Memorandum).
[11] *See Certain Oil Country Tubular Goods from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 63615 (November 18, 2019) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

respondents Hyundai Steel Company (Hyundai Steel) and SeAH, and based the dumping margin assigned to the non-examined companies on the weighted average of Hyundai Steel and SeAH's preliminary weighted-average dumping margins. On July 13, 2020, Commerce published its *Final Results*, in which Commerce calculated final weighted-average dumping margins for Hyundai Steel and SeAH, and based the non-examined companies' dumping margin on SeAH's calculated weighted-average dumping margin, *i.e.*, the only final rate for an individually examined respondent that was not *de minimis*.[12] On September 2, 2020, Commerce issued a memorandum correcting certain ministerial errors within the meaning of 19 CFR 351.224(f) and section 735(e) of the Tariff Act of 1930, as amended (the Act); however, Commerce did not amend the *Final Results* because the correction of such errors resulted in no changes to the final weighted-average dumping margins.[13] In the *Final Results*, Commerce applied its standard differential pricing analysis in calculating the weighted-average dumping margins for Hyundai Steel and SeAH and also found that a PMS existed in Korea during the POR which distorted the cost of production (COP) of OCTG, as explained in more detail below.[14]

The Court remanded two issues: (1) Commerce's finding that a PMS existed in Korea during the POR; and (2) Commerce's application of the Cohen's *d* test. In its *Remand Order*, the Court disagreed with Commerce's determination of a PMS, finding that Commerce's determination that a PMS existed in Korea during the POR was not supported by substantial evidence. In addressing the five factors on which Commerce relied to find that a PMS existed during the POR in its *Final Results*, the Court stated that the record documents regarding

[12] *See Final Results*.
[13] *See* Memorandum, "Response to Ministerial Error Allegations," dated September 2, 2020.
[14] *See Final Results* IDM at Comment 1-B; *see also* Memorandum, "Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea: Final Calculations Memorandum – SeAH Steel Corporation," dated July 6, 2020; and Memorandum, "Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea: Final Calculations Memorandum – Hyundai Steel Company," dated July 6, 2020.

subsidization of Korean hot-rolled coil (HRC) by the Korean government suffered from a temporal problem because the documents discussed programs and subsidy rates from either before or after the POR. Additionally, the Court found that the record documents did not show that OCTG producers actually received subsidies by taking advantage of the Government of Korea's (GOK's) restructuring programs. Therefore, the Court concluded that Commerce's determination about subsidized HRC was not supported by record evidence.[15] For the second PMS factor, the Court concluded that the record evidence did not show that Chinese steel overcapacity contributed to a PMS in Korea, because the record documents described a global influx that affected many other countries and was not unique to and therefore was not particular to Korea.[16] For the third PMS factor, the Court concluded that Commerce's determination that strategic alliances contributed to a PMS was purely speculative because the record evidence predated the POR.[17] For the fourth PMS factor, the Court concluded that the record evidence did not show that the GOK's regulation of the electricity market resulted in subsidies being granted to Korean steel manufacturers or that electricity prices were not competitively set.[18] For the fifth PMS factor, the Court concluded that the mere existence of restructuring efforts, absent evidence of actual restructuring and government interference during the POR, was insufficient to contribute to the existence of PMS.[19]

With respect to the application of the Cohen's *d* test, the Court questioned Commerce's application of the Cohen's *d* test in light of SeAH's arguments regarding the limits for the use of the Cohen's *d* test. Accordingly, the Court, referencing *Stupp*, remanded "for Commerce to

[15] *See Remand Order* at 17-22.
[16] *Id.* at 22-25.
[17] *Id.* at 26-28.
[18] *Id.* at 28-30.
[19] *Id.* at 30-32.

further explain whether the limits on the use of the Cohen's *d* test were satisfied or whether those limits need not be observed when Commerce uses the Cohen's *d* test."[20]

III. ANALYSIS

(1) Particular Market Situation

In the *Remand Order*, the Court considered Commerce's determination of a PMS adjustment and remanded the issue to Commerce for further explanation or reconsideration.[21] In its *Remand Order*, the Court considered Commerce's determination that a PMS in Korea distorted the COP of OCTG in Korea. In particular, the Court weighed whether Commerce's reliance upon the cumulative effect of the following five factors related to the production of OCTG in Korea was supported by substantial evidence on the administrative record: (1) subsidization of Korean HRC products by the GOK; (2) distortive pricing of unfairly-traded Chinese HRC; (3) "strategic alliances" between Korean HRC suppliers and Korean OCTG producers; (4) distortive government control over electricity prices in Korea; and (5) steel industry restructuring efforts by the GOK. Based on the record evidence, the Court determined that the administrative record did not support an affirmative PMS determination with respect to each of these five factors. Consequently, the Court remanded the PMS finding to Commerce, requesting that Commerce further explain or reconsider its affirmative PMS determination.

As an initial matter, we respectfully disagree with the Court's *Remand Order* regarding Commerce's affirmative PMS finding. In Commerce's view, the evidence on which Commerce relied in the underlying administrative review was sufficient to support its affirmative finding with respect to each of the five factors, and the findings with respect to each of these five factors

[20] *Id.* at 15.
[21] *See Remand Order* at 15.

had a cumulative effect on the Korean market for HRC used in the production of OCTG.[22] Notwithstanding Commerce's objections to the Court's position that the evidence on which Commerce relied in reaching its finding of an affirmative PMS determination was insufficient, Commerce is reversing its PMS finding and removing the adjustment to SeAH's COP for purposes of this redetermination pursuant to remand.[23]

In this administrative review, Commerce considered the components of the PMS allegation as a whole and evaluated their cumulative effect on the Korean market for HRC. Based on the totality of the conditions in the Korean HRC market, Commerce found that the factors described above represent aspects of a single PMS. As in prior administrative reviews of this order, our PMS analysis was based on a plethora of documents submitted on the underlying administrative record. In this administrative review, covering the 2017-2018 POR, the PMS allegation was supported by nearly 100 documents that covered the review period, as well as the time frame before and after the review period. Despite our detailed examination of information on the record of the underlying administrative review and our finding that a cost-based PMS concerning the cost of HRC as a component of the COP existed in Korea during the POR, the Court has taken issue with the evidence supporting each element that served as a contributing factor. That is, the Court determined that, with respect to each of the five factors that contributed to Commerce's affirmative PMS finding, the evidence on the record suffered from issues of contemporaneity and/or lack of sufficient evidence to support Commerce's affirmative PMS determination.

[22] *See Final Results* IDM at 24.

[23] This change does not impact the weighted-average margin Commerce calculated for Hyundai Steel. Hyundai Steel's dumping margin was 0.00 percent in the *Final Results*. We have revised the PMS adjustment only for SeAH, and not for Hyundai Steel, because Hyundai Steel is not party to this litigation.

We respectfully disagree with the Court's finding that the record evidence is insufficient to warrant an affirmative PMS determination in this administrative review. However, we have complied with the Court's ruling and reversed our finding of a PMS for SeAH to render it consistent with the Court's opinion. Based on the current evidentiary record and the constraints imposed on us by the Court's ruling, we find an insufficient evidentiary basis to sustain an affirmative PMS finding in this administrative review, consistent with the Court's opinion. To be clear, we believe that the Court's approach to this evidence is flawed – we believe, and our final results of review demonstrated, that each document should be evaluated as it *relates* to the POR at issue; we also believe that the record contains sufficient evidence to demonstrate the totality of circumstances sufficient to support Commerce's finding of a PMS in Korea. Although we are complying with the Court's finding, we respectfully disagree with the Court's evaluation of the evidence in this case. As a result, we have revised our calculations to remove the PMS adjustment.

(2) Differential Pricing

The elimination of the PMS adjustment from the calculation of COP and normal value in this redetermination has affected the results of the differential pricing analysis. Specifically, the results of the meaningful difference test are that the weighted-average dumping margins calculated using the expected average-to-average method and each of the alternative comparison methods are either zero or *de minimis*; therefore, there is no meaningful difference in the calculation of the dumping margin irrespective of the results of the Cohen's *d* and ratio tests (*i.e.*, whether there is a pattern of prices that differ significantly).[24] Thus, for these final results of

[24] *See* Memorandum, "Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea: Draft Redetermination Calculation Memorandum – SeAH Steel Corporation," dated concurrently with this memorandum (SeAH Draft Redetermination Calculation Memorandum).

redetermination, we have applied the average-to-average method for all U.S. sales to calculate the weighted-average dumping margin for SeAH. Therefore, we find that it is unnecessary to address the issue of applicability of Cohen's *d* test for purposes of this redetermination, because the selection of the comparison method has no material effect on the results of this redetermination.[25]

IV. INTERESTED PARTY COMMENTS ON DRAFT RESULTS OF REDETERMINATION

This section discusses the comments received in U.S. Steel's Draft Remand Comments and SeAH's Draft Remand Comments.

Issue 1: Particular Market Situation

U.S. Steel's Comments[26]

- In the second administrative review of this order, the CIT explicitly directed Commerce to reverse its PMS finding. However, in this case the Court did not direct Commerce to reverse its PMS finding, but instead to provide "further explanation or reconsideration."[27]
- Commerce's lack of vigor in defending its PMS determination has become a "problem" in recent U.S. Court of Appeals for the Federal Circuit (CAFC) arguments.[28]
- Abandonment of the cost-based PMS provision comes at the direct expense of President Biden's "Build Back Better" economic agenda.[29]

[25] *See, e.g.*, *Wheatland Tube Co. v. United States*, Slip. Op. 18-85, Ct. No. 17-00021, at 1 (Ct. Int'l Trade July 9, 2018) ("The court notes that it 'erred in remanding' the issue of Commerce's treatment of the cost of caps used by the mandatory respondent 'without ascertaining whether {the issue} had material effect on the less than fair value determination. As Commerce explains in remand results, {this issue does not}, and any error therefore was harmless. It was therefore waste of administrative resources for the court to require a remand in this case").
[26] *See* U.S. Steel's Draft Remand Comments.
[27] *Id.* at 2-5.
[28] *Id.* at 3 (citing *NEXTEEL Co., Ltd. v. United States*, CAFC Ct. No. 21-1334, Oral Argument Recording (Nov. 4, 2021) at 5:16-5:38, available at https://oralarguments.cafc.uscourts.gov/default.aspx?fl=21-1334_11042021.mp3).
[29] *Id.* at 3.

- Construing the Court's *Remand Order* as directing a particular finding is unlawful.[30]
- The Court ordered Commerce to provide "further explanation or reconsideration;" however, the Draft Results of Redetermination provide none.
- Commerce should fully explain how the CIT's narrow construction of section 773(e) of the Act is in violation of the deference owed to Commerce's interpretations under *Chevron* and has severely constrained Commerce's ability to weigh the record evidence as Congress intended.[31]
- The CIT has imposed a strict contemporaneity requirement with respect to distortion based on subsidization and government restructuring that completely discounts pre- and post-POR evidence. However, the presence of significant pre- and post-POR evidence supports the reasonable inference that such distortions continued during the POR.[32]
- The CIT's position that "if something else is distorted, then nothing is distorted," cannot be squared with Congress' intent that Commerce use the PMS provision.[33]
- The CIT appears to be precluding inferences altogether in contravention of the standard of review.[34]
- The CIT erected a requirement that government electricity price control be countervailable; however, the SAA specifically identified such government pricing as a distortion sufficient to establish a PMS regardless of countervailability.[35]

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[30] *Id.* at 3-5.
[31] *Id.* at 7 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-3 (1984) (*Chevron*)).
[32] *Id.* at 8.
[33] *Id.*
[34] *Id.* at 9.
[35] *Id.* (citing Statement of Administrative Action, H.R. Doc. 103-316, Vol. 1 (1994) at 822 (providing examples of what Congress considered to be a "particular market situation": (1) "government control over pricing to such an extent that home market prices cannot be considered to be competitively set" and (2) different holiday periods "which occur at different times of the year in the {home and U.S.} markets.")).

- The record contains many documents that the CIT never addressed, and there remains ample record support to establish that a PMS existed in Korea that distorted OCTG constructed value.[36]
- The CIT is open to finding a PMS with respect to electricity if "prices {are} not being competitively set." Evidence exists on the record that shows government regulation caused prices not to be competitively set.[37]
- The Court's *sua sponte* exploration and summation of the record constitutes unlawful *de novo* fact-finding and re-weighing of the record evidence. The Court's actions violate the "substantial evidence" standard of review.[38]
- The CIT misunderstood Commerce's IDM: Commerce did not focus on OCTG producers' direct participation in industry restructuring efforts, but reasonably considered "the overall restructuring effort by Korean government."[39]
- Evidence exists on the record of "actual restructuring," contemporaneous with the POR, affecting major inputs.[40]
- The CIT acknowledges that Korea was China's second-largest HRC export market in 2017 and 2018, by volume, and finds this alone insufficient to contribute to a PMS. However, additional facts not addressed by the CIT distinguish the impact of Chinese HRC on the Korean market from its impact upon other markets.[41]

[36] *Id.* at 10.
[37] *Id.* at 10 -11.
[38] *Id.* at 12.
[39] *Id.* at 13.
[40] *Id.*
[41] *Id.* at 14-15.

- With respect to strategic alliances, the Court failed to account for the record as a whole, which supports finding that strategic alliances distorted the Korean HRC market during the POR.[42]
- The statutory phrase "particular market situation" does not conceive of any particular number of distortions. Thus, any one of the foregoing distortions concerning electricity, government restructuring, HRC imports, and strategic alliances could support a renewed PMS finding on remand.[43]
- To the extent Commerce makes a negative PMS determination, it should continue to do so under protest.[44]

SeAH's Comments[45]

- The evidence does not support a PMS finding in this review, and the draft redetermination should be made final on that basis.[46]

Commerce's Position:

A. Commerce's PMS Analysis Is Restricted by the Court's Reasoning and Findings

As an initial matter, we will respond to U.S. Steel's comments, which address how the Court has restricted Commerce's PMS analysis. We clarify that Commerce's remand redetermination with respect to the issue of PMS was made under protest in the draft remand redetermination, which the agency normally does when it disagrees with the Court's decision and seeks to preserve its appeal rights, and we continue to make our determination under protest in the final redetermination. As explained above in the analysis section, in reaching its *Final*

[42] *Id.* at 15-16.
[43] *Id.* at 16.
[44] *Id.* at 16-17.
[45] *See* SeAH's Draft Remand Comments.
[46] *Id.* at 2.

Results, Commerce conducted a detailed examination of information on the record of the administrative review, including nearly 100 documents that covered the review period, as well as the time frame before and after the review period. However, the Court found that this evidence was insufficient to sustain Commerce's finding of the particular market situation in Korea. We continue to respectfully disagree with the Court's determination that the administrative record does not support an affirmative PMS determination with respect to each of the five factors examined.

We agree with U.S. Steel that the Court did not issue a directed verdict by expressly ordering Commerce to reverse its PMS finding. The Court ordered Commerce to "further explain or reconsider its particular market situation determination."[47] Our remand determination, including any explanation that we may provide, must be consistent with the Court's opinion, even though we disagree with the Court's reasoning and conclusions. If the agency is unable to provide such further explanation, the only option left to the agency is to reconsider its finding. As we explain below, our ability to weigh the evidence regarding the particular market situation issue has been severely constrained by the Court's reasoning in its opinion.

U.S. Steel contends that the Court "has narrowed the statutory term 'particular' to require that each individual distortion be wholly 'unique' to the market in question, apparently precluding Commerce from finding a particularity based on the combination of distortions found in the Korean market, or any single factor that might be present in other markets, even to a much lesser degree."[48] We agree with U.S. Steel on this point.

[47] *See Remand Order* at 51.
[48] *See* U.S. Steel's Draft Remand Comments.

Commerce stated in the IDM that "the allegations represent facets of a single PMS," and, thus, Commerce weighed whether the cumulative effects were "particular."[49] For example, in response to a respondent's argument that global steel overcapacity is not particular to Korea, Commerce stated, "in the Korean market *particularly*, the government provided subsidization to major producers of HRC aimed at supporting domestic steel producers and their ambitions for capacity expansions, a scenario of further distortions that is unique to Korea."[50] In contrast, the Court determined that "Commerce acknowledged that the 'global steel overcapacity crisis… {has} far-reaching effects world-wide,' undermining its determination that Chinese HRC imports contributed to a particular market situation in Korea."[51] Commerce respectfully disagrees with the Court on two counts. First, while Commerce acknowledged and stated in the IDM that steel overcapacity has far-reaching effects world-wide, these distortive effects manifest differently in different markets.[52] Second, while individual facets of a PMS may not be particular to the Korean market, their cumulative effect taken as a whole can be "particular." Here, as U.S. Steel contends, the effects of global overcapacity and steel imports are not equally distributed and manifest themselves differently in different countries. For purposes of this remand, however, we are constrained by the Court's reasoning and findings that the existence of global steel overcapacity crisis . . . {has} far reaching effects world-wide, undermining {Commerce's} determination that Chinese HRC imports contributed to a particular market situation in Korea."[53] Accordingly, it appears that the Court has taken the position that Commerce's determination that Chinese HRC imports contributed to a particular market situation cannot stand because the

[49] *See Final Results* IDM at 25.
[50] *Id.* at 31 (emphasis added).
[51] *See Remand Order* at 25.
[52] *See Final Results* IDM at 31.
[53] *See Remand Order* at 25.

global steel overcapacity crisis has far reaching global effects. While Commerce respectfully disagrees with the Court, we are not in a position to reverse the Court.

Next, we agree with U.S. Steel that the Court has restricted Commerce's ability to weigh the evidence. Specifically, U.S. Steel contends that the Court "has imposed a strict contemporaneity requirement with respect to distortion based on subsidization and government restructuring that completely discounts pre- and post-POR evidence.[54] For example, the Court determined that substantial evidence did not support Commerce's finding that the government subsidization of HRC contributed to a PMS because the evidence on which Commerce relied related to time periods before and after the POR.[55] Although we agree with U.S. Steel that if evidence from immediately before or after the POR demonstrates subsidization, this evidence supports a reasonable inference that subsidization was occurring during the POR, we are not in a position to reverse the Court.

Similarly, Commerce disagrees with the Court's analysis concerning distorted electricity prices. As explained in the IDM, after weighing the record evidence, Commerce determined that the GOK's involvement in the electricity market contributed to distortion of prices.[56] In finding Commerce's determination was not supported by substantial evidence, the Court offered its own explanation that Korea Electric Power Corporation (KEPCO)'s operating losses were due to increased environmental and renewable energy costs, warmer winter weather, and higher natural gas prices.[57] To be clear, Commerce did not make these factual findings. Moreover, even if KEPCO's operating losses resulted in whole or in part from increases in environmental and renewable energy costs, the Court does not explain why KEPCO did not change its pricing

[54] *Id.* at 8.
[55] *Remand Order* at 20-21.
[56] *See Final Results* IDM at 34-35.
[57] *See Remand Order* at 29.

scheme in light of increased environmental and renewable energy costs, warmer winter weather, and higher natural gas prices or any other factor affecting the cost or price as one would expect in a situation when prices are competitively set. While Commerce does not necessarily disagree with the Court's finding that those factors may have contributed to KEPCO's operating losses, in reaching the affirmative PMS finding in the *Final Results*, Commerce further analyzed why KEPCO did not raise prices to avoid operating losses. The record evidence demonstrates that "{n}o cross- sector {electricity} tariff increase has been implemented since November 2013,"[58] which calls into question the notion that KEPCO's prices have been competitively set. As discussed in the IDM, it is implausible that losses of this magnitude, associated with KEPCO's pricing, would have occurred without government intervention or control.[59] While Commerce respectfully disagrees with the Court's analysis of the record and its findings, we are not in a position to reverse the Court.

B. U.S. Steel's Other Contentions

U.S. Steel makes several contentions regarding matters that do not directly relate to this remand. U.S. Steel argues that Commerce's lack of vigor in defending its determination in the second administrative review has become a "problem" for U.S. Steel's counsel in the CAFC case *Nexteel Co., Ltd. v. United States,* CAFC ft No. 21-1334.[60] The United States' decision not to pursue an appeal of the Court decision regarding one of the prior administrative reviews of this antidumping duty order has no bearing on the resolution of issues in this remand. As a general matter, when a private litigant decides to pursue an appeal of a judicial decision, which the agency did not appeal, it is expected to weigh the benefits and risks of the appeal and, thus, it

[58] *See* U.S. Steel's Letter, "Oil Country Tubular Goods from the Republic of Korea: Particular Market Situation Allegation," dated August 5, 2019 (PMS Allegation) at Ex. 121 p.84.
[59] *See Final Results* IDM at 34.
[60] *See* U.S. Steel's Draft Remand Results at 3.

necessarily owns any "problem" or an adverse appellate decision that may result from its decision to pursue such an appeal.[61] We also disagree with U.S. Steel's erroneous assertion that Commerce lacked vigor in defending its determination in the second administrative review, in which Commerce conducted two separate remands and the United States made numerous submissions defending Commerce's determinations. In any event, this remand redetermination stands on its own and is made independently based on the administrative record of this review in a manner that is consistent with the Court's remand opinion and order.

Further, U.S. Steel argues that, in not finding that a PMS existed in Korea during the POR, Commerce has abandoned President Biden's "Build Back Better" economic agenda. Commerce supports President Biden's "Build Back Better" economic agenda and understands the importance to the domestic industry of countering cost-based particular market situations. However, by law, Commerce's antidumping and countervailing duty analysis is singularly focused on the level of dumping and countervailable subsidies associated with imports of foreign products, and we perform our analysis in an objective, transparent, and fact-based manner. Accordingly, Commerce's analysis of the existence of a PMS is made independently based on the administrative record of this review, and in a manner that is consistent both with the statute, and here, the Court's remand opinion and order.

In response to U.S. Steel's arguments that Commerce should find the existence of a PMS in Korea in this POR, or expand its analysis, we will address each of the five factors presented by U.S. Steel below.

[61] We do not endeavor to predict or speculate on how the Federal Circuit will resolve the U.S. Steel's appeal.

Subsidization

We agree with U.S. Steel that it is Commerce's role to weigh and select among competing evidence, as we have done in this proceeding, and we will continue to consider as material to our analysis of the evidence on the record that may or may not be strictly contemporaneous with a POR. However, the Court has found that the evidence of subsidization on the record is insufficient.[62] The Court made it clear that it was unreasonable for Commerce to rely on evidence that was not contemporaneous with the POR, such as the *Final CVD Results of the 2016 Administrative Review of Certain Hot-Rolled Steel Products from the Republic of Korea* or subsidy rates from 2019.[63] The Court also found that none of the evidence cited by Commerce showed that OCTG producers had availed themselves of subsidies during the POR.[64] Despite our respectful disagreement with the Court, consistent with the Court's analysis, we discounted all non-contemporaneous evidence as suffering from a temporal problem. We find no evidence on the record that the subsidies were terminated during the POR and that the flow of the benefits has ceased, but we also find no evidence that directly demonstrates OCTG producers took advantage of subsidies during the POR. Accordingly, under respectful protest, we find, consistent with the Court's decision, that there is not sufficient record evidence that subsidy programs were in effect and provided benefits to OCTG producers during the POR for Commerce to make an affirmative PMS determination based on this factor that can be sustained by the Court.

[62] *See Remand Order* at 20-22.
[63] *Id.*
[64] *Id.* at 21.

Distortive Pricing of Chinese Hot-Rolled Coil

We continue to find that the record contains data that demonstrate the acute and particular presence of overcapacity in the Korean market. However, a party alleging the existence of a PMS must demonstrate that this overcapacity has led to a situation in which, "the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade."[65] In other words, the overcapacity factor, which we consider to be a factor contributing to a PMS in this proceeding, is not sufficient to make an affirmative PMS determination unless a party demonstrates that overcapacity led to a situation in which, "the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade."[66] The statute requires a second step: to demonstrate that this overcapacity, or any other factor, is distorting the COP such that it no longer reflects the COP in the ordinary course of trade. We agree with U.S. Steel that the evidence concerning average unit value of HRC imported from China into Korea demonstrates that global steel overcapacity distorted the price of HRC in Korea.[67] However, Commerce relied on this evidence in the *Final Results*, and the Court found that the record evidence cited by Commerce does not support a conclusion that the global glut of Chinese HRC imports during the POR caused price distortions specific to the Korean steel market.[68] U.S. Steel has identified certain additional evidence that relates to the average unit value of Chinese HRC sold in Korea, which falls in the bottom 15 percent of 160 destinations for Chinese exports, as well as statements by the Korean Iron and Steel Association, which described the reasons behind the Korean government's decision not to counteract unfair trade practices by China out of fear of

[65] *See* section 771(e) of the Act.
[66] *See* section 771(e) of the Act.
[67] *See* U.S. Steel's Draft Remand Comments at 14.
[68] *See Final Results* IDM at 29; *see also Remand Order* at 25.

retaliation against Korean steel companies that have moved to China, as well as adjustment of prices by Korean steel cartels.[69] However, given the Court's reasoning that effects of Chinese steel imports are insufficient to establish the existence of a PMS in Korea because the effects of global overcapacity are world-wide, we have no choice but to find that this additional evidence is insufficient to establish the PMS in Korea that can be sustained by the Court. U.S. Steel has not identified any other record information or evidence that Commerce had not considered in its Preliminary PMS Memorandum or in the IDM that otherwise supports reaching a PMS determination pertaining to distorted HRC prices that can be sustained by the Court. After re-examining the administrative record of this review, consistent with evidentiary findings that this Court has already made, and despite our respectful disagreement with the Court's reasoning and findings, we find that the record evidence does not demonstrate that overcapacity of Chinese hot-rolled steel created a distortion that is particular to the Korean market. However as explained previously, even if an individual facet of a PMS may not be particular to a market, the cumulative effect of the interplay between the individual facets may be particular.

Strategic Alliances

As an initial matter, we respectfully disagree with the Court's characterization of Commerce's finding of the presence of strategic alliances as "speculative."[70] There is nothing speculative about bid rigging and price fixing by corporate cartels in Korea, which resulted in fines imposed by a Korean government agency. Factors present in any market, whether or not those factors contribute to a PMS, do not always fall neatly within periods of review. Rather, factors like strategic alliances can have effects which may stretch out for long periods of time – far beyond the periods of review in which the strategic alliances were first established or in

[69] *See* U.S. Steel's Draft Remand Comments at 14-15.
[70] *See Remand Order* at 28.

effect. Moreover, U.S. Steel contends that there is "a practical impossibility of uncovering POR-specific clandestine cartel activity within the statutory limits of Commerce's administrative review." U.S. Steel further highlights that the fact that the Korean government took fourteen years to uncover and investigate longstanding and recent cartel practices and the repeated involvement of four OCTG respondents therein demonstrates that it is practically impossible for the petitioners to produce evidence of such activities that is contemporaneous with the POR.[71] As we understand U.S. Steel's argument, it appears to contend that the Court has established a standard that is practically impossible to meet. We tend to agree that, as a practical matter, it would be difficult, if not impossible, to uncover the evidence of price fixing activity during the POR, because corporations involved in illegal price fixing schemes are likely to make efforts to conceal them and it may take years for such activity to be brought to light. However, even if we were to agree with U.S. Steel that the standard established by the Court is impossible to meet, Commerce has no authority to reverse the Court and establish a different standard. Accordingly, under respectful protest and consistent with the Court's decision, we find that the evidence supporting the factor of strategic alliances is not sufficient to demonstrate the existence of a PMS, whether alone or coupled with the other factors alleged in this proceeding.

Distortive Electricity Prices

As stated above, Commerce disagrees with the Court's reasoning and findings regarding electricity prices. However, we disagree with U.S. Steel that the Court "erected a requirement that government electricity price control to be countervailable," contrary to the SAA. It appears that U.S. Steel reached this conclusion based on the following statement by the Court: "{T}he record evidence cited by Commerce does not indicate that Korean steel manufacturers received

[71] *See* U.S. Steel's Draft Remand Comments at 15.

countervailable subsidies as to electricity."[72] However, as we understand the Court's opinion, while U.S. Steel's interpretation of this sentence may be plausible, it is most likely incorrect, particularly when viewed it in conjunction with the immediately following sentence, which refers to subsidies in general without using the term "countervailable."

In the *Remand Order*, the Court stated, "{t}he Court also notes that the record evidence cited by Commerce does not indicate that Korean Steel manufacturers received countervailable subsidies as to electricity. Because the record evidence cited by Commerce does not show that the Korean Government's regulation of the electricity market resulted in subsidies being granted to Korean manufacturers or prices not being competitively set. The Court holds that Commerce's determination… is not supported by substantial evidence."[73] As we understand the Court's opinion, the first sentence makes a factual finding that certain evidence cited by Commerce does not establish that Korean steel manufacturers received countervailable subsidies as to electricity. However, the next sentence indicates that "record evidence cited by Commerce does not show that the Korean Government's regulation of the electricity market resulted in subsidies being granted to Korean manufacturers or prices not being competitively set."[74] As we understand the Court's opinion, when reading these two sentences together, the Court identified three circumstances that could potentially establish the existence of particular market situation: (1) evidence of countervailable subsidies; (2) evidence of subsidies (of any kind); and (3) evidence that prices are not competitively set. If our understanding of this passage is correct, we do not agree that this aspect of the Court's decision is contrary to law. Of course, government financial support to a company or an industry does not necessarily need to meet the statutory definition of

[72] *Id.* at 9 and footnote 26 (quoting Remand Order at 30).
[73] *See Remand Order* at 29-30.
[74] *Id.*

a countervailable subsidy in order to contribute to a PMS. In providing the examples of a PMS, the SAA lists, "government control over pricing to such an extent that home market prices cannot be considered competitively set." Accordingly, Commerce's analysis did not address the countervailability of any electricity subsidies but, rather, was centered on whether government control over electricity pricing was preventing prices from being competitively set (and therefore, whether a significant component of cost of production supported or detracted from a conclusion that those costs reflected the ordinary course of trade, as required by the statute). Commerce determined that "the price of electricity is set by the GOK and that electricity in Korea functions as a tool of the government's industrial policy."[75]

While we agree with U.S. Steel that evidence exists on the record that demonstrates that electricity prices are not competitively set, the Court has found that Commerce's determination that Korean government regulation distorted electricity prices and affected prices in the Korean steel market is not supported by substantial evidence.[76] In its draft remand comments, U.S. Steel points to evidence in the form of statements from KEPCO's CEO that supports the determination that the GOK's control of the electricity market distorted pricing.[77] However, the Court has already determined that similar quotations from KEPCO's Form 20-F and several new articles do not support a determination that the Korean Government's regulation of the electricity market contributed to a PMS.[78] Commerce's disagreement with the Court's decision in this proceeding does not invalidate the CIT holding with respect to the electricity. Therefore, U.S. Steel has not identified any additional record evidence that Commerce did not cite in the Preliminary PMS

[75] *See Final Results* IDM at 34.
[76] *See Remand Order* at 30.
[77] *See* U.S. Steel's Draft Remand Comments at 11.
[78] *See* Memorandum, "2017-2018 Administrative Review of Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea: Decision on Particular Market Situation Allegations," dated November 8, 2019 (Preliminary PMS Memorandum) at 18; *see also Remand Order* at 29.

Memorandum or in the IDM that supports reaching a PMS determination pertaining to electricity that can be sustained by the Court. Therefore, after re-examining the administrative record of this review, consistent with evidentiary findings that this Court has already made, we find that the record evidence does not demonstrate that government intervention in the electricity market contributed to a PMS in Korea.

To the extent that U.S. Steel contends that "Commerce should address the foregoing legal and factual flaws in the CIT's re-weighing of the evidence, and continue to find an electricity PMS,"[79] Commerce's redetermination is not the appropriate forum for correcting alleged judicial errors.

Government Restructuring of the Steel Industry

As explained above, we continue to disagree with the Court's strict contemporaneity standard when it comes to weighing evidence of this nature. This contemporaneity standard is especially limiting in regard to subsidies and government restructuring programs, where the effects of such programs may materialize over time. For example, a foreign government could give a subsidy to a foreign exporter or producer shortly before the POR, but if the strict contemporaneity requirement is applied, this subsidy cannot contribute to the PMS during the POR. The Court, similar to its findings on the subsidization of HRC factor, found the evidence supporting government restructuring of the steel industry contributing to a PMS suffers from a temporal problem as well, because it covers restructuring efforts outside the POR.[80] Further, the Court concludes that the mere existence of restructuring efforts, absent evidence of actual restructuring and government interference during the POR, is insufficient to contribute to the

[79] *See* U.S. Steel's Draft Remand Comments at 12-13.
[80] *See Remand Order* at 31-32.

existence of a PMS.[81] We agree with U.S. Steel that there is evidence of actual restructuring efforts affecting major OCTG inputs mere months before the POR.[82] The nature of this restructuring—upgrading a blast furnace—would result in the effects of this restructuring being present during the POR, even if the initial restructuring (and any GOK assistance provided to support it) occurred slightly before the POR. However, the Court has already found that "the record does not indicate that Hyundai Steel actually took advantage of restructuring efforts during the period of review, and Hyundai Steel asserts that it did not take advantage of restructuring efforts."[83] As the Court further found, "the mere existence of restructuring efforts, absent evidence of actual restructuring and government interference *during the period of review*, is insufficient to contribute to the existence of a particular market situation."[84] While Commerce disagrees with the Court's finding that the substantial evidence does not support the determination that the Korean government's steel industry restructuring contributed to a PMS, we are not in position to reverse the Court based on this record. Therefore, after re-examining the administrative record of this review, consistent with evidentiary findings that this Court has already made, we find that the record evidence does not demonstrate that government restructuring of the steel industry contributed to a PMS in Korea.

Interplay Between the Factors

Although it is not necessary for any single factor to demonstrate the existence of a PMS on its own, a party should demonstrate both the existence of the factors and the resulting distortions on the COP, or other factors which have been shown to distort the COP, for the interplay of those factors to be considered as part of Commerce's analysis. As discussed above,

[81] *Id.* at 32.
[82] *See* U.S. Steel's Draft Remand Comments at 13.
[83] *See Remand Order* at 31.
[84] *Id.* at 32 (emphasis added).

consistent with the Court's opinion and under respectful protest, we find that the record evidence is insufficient to sustain an affirmative PMS finding. We have reached this finding because of the constraints that the Court's opinion imposed on us with which we respectfully disagree. Therefore, under protest, we find that any interplay of these factors also is not sufficient in this instance for Commerce to make an affirmative PMS determination and PMS adjustment.

To the extent that SeAH contends that the evidence on the record does not support a PMS finding, we clarify that we made this finding under respectful protest and consistent with the evidentiary and legal findings that the Court has already made.

Issue 2: Applicability of the Cohen's *d* Test

U.S. Steel's Comments[85]

- If the Cohen's *d* issue has any impact on the margin, Commerce must provide a full opportunity for comment upon its rationale.[86]
- The Draft Results of Redetermination do not address the substance of the differential pricing issue.[87]
- The Cohens *d* issue may be relevant to Commerce's final margin calculation if Commerce amends its PMS approach or the CAFC rules against certain of the CIT's analytical restrictions.[88]
- As long as the possibility remains that the Cohen's *d* issue may be relevant to Commerce's final margin calculation, Commerce should reserve the issue for appeal.[89]

[85] *See* U.S. Steel's Draft Remand Comments.
[86] *Id.* at 17-18.
[87] *Id.*
[88] *Id.* at 18.
[89] *Id.*

- If Commerce substantively addresses the Cohen's *d* issue, then the parties should be afforded the opportunity to comment on Commerce's rationale.[90]

SeAH's Comments[91]

- As long as the dumping margin for SeAH is *de minimis,* the issues concerning the differential pricing analysis have been rendered moot and it is not necessary for Commerce to address the issue further in this appeal.[92]

Commerce's Position:

For this redetermination, under protest, we continue to find no PMS existed in Korea during the POR, and we have removed the PMS adjustment from our calculation of normal value. As a result of the removal of the PMS adjustment, there is no longer a meaningful difference between the weighted-average dumping margin calculated using the average-to-average method or either of the alternative comparison methods.[93] Accordingly, we continue to determine that the application of the Cohen's *d* test has no material effect on the outcome of this redetermination. SeAH agrees with this approach. U.S. Steel does not object to this approach, but it argues that the issue could become relevant to Commerce's calculations again if the negative PMS determination is reversed in the future, at which point Commerce would have to address the issue and provide parties with an opportunity to comment. We agree that if this issue becomes relevant to the calculations in the future as a result of subsequent litigation

[90] *Id*.
[91] *See* SeAH's Draft Remand Comments.
[92] *Id.* at 2.
[93] *See* Draft Redetermination Calculation Memorandum.

developments, it would be appropriate to address it at that time and that parties should be provided with an opportunity to comment.

V. FINAL RESULTS OF REDETERMINATION

Pursuant to the Court's *Remand Order*, we have reconsidered and reversed our determination that a PMS existed during the POR with respect to SeAH, and, as a result of the elimination of the PMS adjustment from our calculations, there is no longer a meaningful difference between the weighted-average dumping margin calculated using the average-to-average method or either of the alternative comparison methods. Accordingly, we have determined that the application of the Cohen's *d* test has no material effect on the outcome of this redetermination. Based on the results of our analyses, we have recalculated the weighted-average dumping margin for SeAH, which has changed from 3.96 percent in the *Final Results* to 0.00 percent.[94] Upon a final and conclusive decision in this litigation, Commerce will instruct U.S. Customs and Border Protection to liquidate appropriate entries for the September 1, 2017, through August 31, 2018, POR consistent with these final results of redetermination.

1/24/2022

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Signed by: LISA WANG

Lisa W. Wang
Assistant Secretary
for Enforcement and Compliance

[94] *See* SeAH Draft Redetermination Calculation Memorandum, unchanged for this final redetermination. We have not revised the dumping margin assigned to the non-individually examined companies because none of those companies are party to this litigation.