U.S. Department of Commerce Employs New “Particular Market Situation” Approach to Calculate Dumping Margins

The U.S. Department of Commerce (DOC), for the first time under a recent amendment to the Tariff Act of 1930, has applied the concept of a “particular market situation” to depart from the foreign producers’ home market production costs in calculating the producers’ antidumping (AD) margins. The DOC was granted expanded authority under the Trade Preferences Extension Act of 2015 (TPEA) to deviate from foreign producers’ reported home market sales prices or production costs as “outside the ordinary course of trade” when determining whether exports to the United States have been sold at dumped prices.

The DOC invoked the statutory authority to make an upward adjustment to the reported costs of producers in the Republic of Korea to account for certain alleged distortions in the Korean market for oil country tubular goods (OCTG) — a type of steel product used in oil fields, which has been the subject of bruising AD disputes in the United States. This decision, in the final results of an administrative review of an AD order on imports of OCTG from Korea, abruptly reversed the DOC’s determination in February that the U.S. petitioners failed to support the allegation that the Korean market was subject to a “particular market situation.”

It also came on the heels of an unusual letter from the White House National Trade Council, after the DOC’s preliminary determination, urging the DOC to accept the petitioner’s allegation and requesting that the DOC impose a specific AD margin. Significantly, the decision opens the door to similar allegations against foreign producers in other market economy cases under U.S. law, particularly where structural conditions in an exporting country are alleged to create “distortions” in the foreign producers’ recorded costs or prices.

DOC Reverses Prior Findings

In the first administrative review of the AD order on OCTG from Korea, the U.S. petitioner alleged that several distortions in the Korean market created a “particular market situation” that should prevent the DOC from relying on the Korean respondents’ reported costs. The petitioners alleged four distortions: (i) subsidies from the Government of Korea (GOK) that benefit Korean producers of hot-rolled steel (HRS), the primary input in the production of OCTG; (ii) intervention by the GOK in the electricity market that distorts the cost of this energy input; (iii) a flood of low-priced HRS imports into Korea from China; and (iv) “strategic alliances” between the Korean producers of OCTG and their Korean suppliers of HRS. On Feb. 21, the DOC

1 Certain Oil Country Tubular Goods from the Republic of Korea, 82 Fed. Reg. 18105 (Dep’t of Commerce April 17, 2017) (final determ.).
2 Memorandum to the File, “Certain Oil Country Tubular Goods from the Republic of Korea” (Dep’t of Commerce Mar. 8, 2017) (placing email from Peter Navarro, Director, National Trade Council, on the public record of the OCTG AD review).
issued a memorandum determining that the petitioner failed to substantiate any of the four “particular market situation” allegations with record evidence. The decision followed extensive briefing and development of the factual record and much deliberation by the DOC over the course of the 15 months after the petitioner submitted the allegations.

Less than two months later, the DOC reversed itself, in a decision that appears to signal a shift in its consideration of “particular market situation” allegations. The DOC determined that the petitioner’s allegations of the distortions noted above amount to a “particular market situation” such that the Korean producers’ recorded costs lie “outside the ordinary course of trade.” Further, the DOC found that it could quantify and account for one of the four distortions that comprised the “particular market situation” through an upward adjustment to the Korean producers’ reported HRS costs. The DOC made this adjustment by using the subsidy rates calculated in the separate U.S. countervailing duty (CVD) investigation of HRS from Korea. Although the other three conditions were found to have contributed to the “particular market situation” in Korea, the DOC limited its adjustment to the subsidy rate for Korean-sourced HRS, which it could quantify. As a result of the adjustment to costs due to the finding of a “particular market situation,” the dumping margin of one affected Korean producer increased more than threefold, from 8 to 25 percent.

The DOC did not repudiate its earlier factual findings that the petitioner’s individual allegations lacked record support; nor did it cite any new record evidence. Rather, the DOC described its reappraisal as a “refocused analysis of the totality of the conditions in the Korean market” rather than “facets of a single particular market situation.” In other words, the individual allegations that independently lacked evidentiary support were now found in combination to form a valid allegation as to the existence of a distorted Korean market. By basing its determination on the combination of these factors, the DOC obscured the precise factors or group of factors that would suffice to support a “particular market situation” allegation.

**Impact on U.S. AD Law**

The DOC declined to define a standard for finding the existence of a “particular market situation” or a method for constructing “normal value” when a “particular market situation” is found to exist. Instead, it promised to “continue to develop the concepts and types of analysis that would be necessary to address future allegations.” The uncertainty means that future evaluations of allegations involving “particular market situations” will likely be case-specific and fact-intensive. Nonetheless, the DOC’s determination in OCTG from Korea highlights a few fact patterns that may be particularly susceptible to allegations — and findings — of a “particular market situation,” which the DOC will use to justify deviations from the foreign producers’ reported costs:

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4 *Certain Oil Country Tubular Goods from the Republic of Korea*, 82 Fed. Reg. 18105 (Dep’t of Commerce April 17, 2017) (final determ.) and attached Issues and Decision Memo at 40-44 (*OCTG IDM*).

5 *Certain Hot-Rolled Steel Flat Products from the Republic of Korea*, 81 Fed. Reg. 53439 (Dep’t of Commerce Aug. 12, 2016) (final determ.).

6 *OCTG IDM* at 40.

7 *OCTG IDM* at 44.
• The foreign government controls or heavily regulates the market for an input used to produce the
subject merchandise.

• The DOC, in a separate CVD proceeding, has found the existence of countervailable subsidies as to
inputs used in the production of the subject merchandise.

• Evidence exists that large quantities of an input used in the production of the subject merchandise
have been imported into the exporting country and that the exporting country has not attempted to
restrain those imports through the application of its own AD disciplines.

• The foreign producers benefit from strategic alliances with input providers, even if those
relationships fall short of the U.S. standard for treating the companies as affiliated.

In addition, the DOC identified one concrete condition necessary for it to account for the impact of a
“particular market situation” finding — namely, evidence that enables it to quantify that impact. This
condition suggests that where the DOC lacks a ready way to measure the distortion caused by a “particular
market situation” — as with three of the four conditions identified in the Korean OCTG case — it may decline
to act on an affirmative finding.

The DOC’s sudden change of position and its affirmative finding will certainly encourage U.S. petitioners to
 lodge allegations of “particular market situations” in future AD proceedings involving market economy
countries. In turn, those allegations may provide more opportunities for the DOC to disregard the foreign
producers’ reported costs in favor of “constructed value.” In this way, the DOC’s decision dovetails with a
proposed amendment to its regulations to place constructed value first in the hierarchy of approaches used
to calculate normal value when the exporting country is found not to be a “viable market.” The use of
constructed value gives the DOC considerable flexibility in calculating dumping margins.

**Intersection With WTO Dispute Settlement**

The DOC’s decision comes amid recent World Trade Organization (WTO) disputes regarding the
circumstances in which investigating authorities may depart from the recorded costs of exporters or
producers in calculating dumping margins. In *EU – Biodiesel (Argentina)*, Argentina challenged the EU’s
departure from the Argentinian respondents’ recorded costs because of Argentina’s imposition of an export
tax on soya, a biodiesel input, which was found to artificially reduce the domestic price for that input. The
Appellate Body found that the EU acted inconsistently with Article 2.2.1.1 of the *Anti-Dumping Agreement*,
reasoning that, if a respondent’s “costs are genuinely related to the production and sale of the product under
consideration in a particular anti-dumping investigation,” then the investigating authority may not apply “an
additional or abstract standard of ‘reasonableness’” to reject those reported costs.

The *EU – Biodiesel* report is likely to lead to close scrutiny of the DOC’s use of the “particular market
situation” concept in U.S. AD determinations. Similar to the EU’s investigating authority, the DOC, in *OCTG
from Korea*, relied on external conditions — alleged market distortions — to depart from the Korean

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10 *EU – Biodiesel* at para. 6.37.
producers’ recorded costs. The Appellate Body made clear, however, that the consideration of a “particular market situation” by an investigating authority remains subject to the disciplines imposed by Article 2.2.1.1 of the Anti-Dumping Agreement. Argentina’s success in challenging the EU’s application of the “particular market situation” concept in the Biodiesel dispute may encourage WTO challenges to DOC determinations in which it identifies a “particular market situation” and departs from the use of home market prices and costs on the basis of factors external to the production and sales activities of the foreign producer.

**Conclusion**

Although the DOC’s authority to depart from a foreign producer’s reported costs of production already existed prior to the TPEA’s 2015 enactment, the DOC now has signaled its willingness to act on allegations of “particular market situations.” That willingness may invite similar allegations in future DOC AD proceedings in which market distortions may exist. The specific conditions found in OCTG from Korea may end up being mere examples. Uncertainty will undoubtedly infect this topic until parameters are developed to define “particular market situations” — whether on the part of the DOC itself, the reviewing courts or the WTO.