



DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

[Docket No. 221115-0239]

RIN 0625-AB23

Determining the Existence of A Particular Market Situation that Distorts Costs of Production

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

ACTION: Advanced notice of proposed rulemaking.

SUMMARY: Enforcement and Compliance (E&C), of the Department of Commerce (Commerce), administers the antidumping duty (AD) and countervailing duty (CVD) AD/CVD trade remedy laws of the Tariff Act of 1930, as amended (the Act). Section 773(e) of the Act provides for Commerce to address, in its antidumping calculations, the existence of a particular market situation (PMS), such that the cost of materials and fabrication do not accurately reflect the cost of production in the ordinary course of trade. Commerce seeks public comments as it considers revisiting its PMS methodology and issuing a new regulation that would identify information that Commerce should take into consideration and should not take into consideration in determining whether a PMS exists that distorts the cost of production. Commerce also seeks comments as it considers adjustments to calculations when the amount of distortion in the cost of production caused by a PMS cannot be quantified based on the record before it.

DATES: Comments must be received no later than December 18, 2022.

ADDRESSES: Submit electronic comments only through the Federal eRulemaking Portal at <https://www.Regulations.gov>, Docket No. ITA-2022-0012. Comments may also be submitted by mail or hand delivery/courier, addressed to Lisa W. Wang, Assistant Secretary for Enforcement and Compliance, Room 18022, Department of Commerce, 1401 Constitution Ave., NW,

Washington, DC 20230. An appointment must be made in advance with the APO/Dockets Unit at (202) 482-4920 to submit comments in person by hand delivery or courier. All comments submitted during the comment period permitted by this document will be a matter of public record and will generally be available on the Federal eRulemaking Portal at <https://www.Regulations.gov>. Commerce will not accept comments accompanied by a request that part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. Therefore, do not submit confidential business information or otherwise sensitive or protected information.

Any questions concerning the process for submitting comments should be submitted to Enforcement & Compliance Communications office at (202) 482-0063 or ECCcommunications@trade.gov.

FOR FURTHER INFORMATION CONTACT: Scott McBride at (202) 482-6292 and Hendricks Valenzuela at (202) 482-4750.

SUPPLEMENTARY INFORMATION:

Background on Particular Market Situation

In 2015, pursuant to the Trade Preferences Extension Act (TPEA), section 771(15) of the Act was amended to provide that Commerce consider sales to be outside the “ordinary course of trade” when there are situations in which Commerce “determines that the particular market situation prevents a proper comparison with the export price or constructed export price.” Further, section 773(e) of the Act was amended to provide that in determining the “costs of material and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade,” for determining constructed value, “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 cost of production in the ordinary course of trade,” Commerce “may use another calculation methodology under this subtitle or any other calculation methodology.” The Act

does not (1) define a particular market situation (“PMS”), (2) identify the information which Commerce should consider in determining the existence of a PMS that “does not accurately reflect the costs of production in the ordinary course of trade,” or (3) provide Commerce with guidance as to the information which Commerce should consider in determining if a market situation is, or is not, “particular.”

The legislative history of the cost-based particular market situation reflects that Congress intended for Commerce to not only identify such situations, but to also effectively address them in its calculations. For example, in advocating for the TPEA language, one member of the House of Representatives argued that the legislation would “empower” Commerce “to be able to disregard prices or costs of inputs that foreign producers purchase if the Department of Commerce” determined that those input values were “subsidized” or otherwise outside the ordinary course of trade.¹ Likewise, on the United States Senate floor, a Senator explained that the proposed legislation would “guarantee that Americans can find a more level playing field as we compete in the world economy. . . .”² The Senator emphasized that this legislation would help stop United States workers and manufacturers from “being cheated” by foreign industries that were not playing fair and “illegally subsidizing” the production of certain products.³

Since the Act was amended, Commerce has in certain instances identified a PMS and adjusted its calculations in response, which has been challenged before both the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit (CAFC). One matter which has been at issue before the courts is the information Commerce should consider in determining the existence of a PMS. That matter came before the CAFC this past year in *Nexteel v. United States*, in which the CAFC held that Commerce’s finding that a PMS existed in Korea during the period of review was unsupported by substantial evidence.⁴ In analyzing Commerce’s

¹ See Congressional Record-House, H4666, H4690 (June 25, 2015).

² See Congressional Record-Senate, S2899, S2900 (May 14, 2015).

³ *Id.*

⁴ See *Nexteel Co. v. United States*, 28 F.4th 1226 (Fed. Cir. 2022).

PMS determination, the CAFC appeared to reach at least four conclusions. First, a PMS which distorts costs, as referenced in the Act, must cause costs to deviate from what they would have otherwise been in the ordinary course of trade.⁵ Second, a PMS must be particular to certain producers or exporters, inputs, or the market where the inputs are manufactured.⁶ Third, if there is a claim of a subsidy or government interference, there should be evidence that the producer or seller of the input at issue received, or should have received, that subsidy or government assistance, and that there is some form of impact on the price of the input as a result of that subsidy or government interference.⁷ Finally, Commerce is not required to quantify a distortion in costs by the PMS to find the existence of a PMS, but if Commerce is able to quantify the distortion, such a quantification may help support a finding of the existence of a PMS.⁸

In light of the CAFC's holding and analysis in *Nesteel*, as well as our experience in administering the PMS provision over the past several years, we have determined it is appropriate to revisit Commerce's approach in certain instances to analyzing and determining the existence of a PMS that distorts costs of production. In revisiting Commerce's approach, we have considered that the public and Commerce may benefit from the issuance of a regulation that addresses the information which Commerce should consider, or need not consider, in determining if a PMS exists that distorts costs of production. We also believe that a regulation that addresses the adjustments Commerce may make to its calculations if it determines the existence of a PMS that distorts costs of production might prove beneficial. We are therefore soliciting public comments on certain aspects of our PMS analysis pursuant to that exercise.

Request for Comments

We are issuing this advanced notice of proposed rulemaking to inform the public that Commerce is considering issuing a PMS regulation and to invite comments on that new

⁵ *Id.* at 1234.

⁶ *Id.* at 1234, 1236.

⁷ *Id.* at 1235-36.

⁸ *Id.* at 1234.

regulation. Specifically, Commerce is inviting parties to provide comments on three issues: (1) identify information which they believe Commerce should consider in determining if a PMS exists which distorts the costs of production if that information is reasonably available and relevant to the PMS allegation; (2) identify information which they believe Commerce should not be required to consider when determining if a PMS exists, regardless of the PMS allegation; and (3) provide comments on adjustments which Commerce may make to its calculations when it determines the existence of a PMS, but the record before it does not allow for the quantification of cost distortions.

Dated: November 15, 2022.

Lisa W. Wang,
Assistant Secretary
for Enforcement and Compliance.

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