U.S. Customs and Border Protection

19 CFR PART 177

MODIFICATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE COUNTRY OF ORIGIN OF AN ABSORBER CRASHBOX

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of modification of one ruling letter and proposed revocation of treatment relating to the country of origin of an Absorber Crashbox.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying one ruling letter concerning tariff classification of Absorber Crashbox under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 58, No. 12, on March 27, 2024. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after **[60 DAYS FROM PUBLICATION DATE].**

FOR FURTHER INFORMATION CONTACT: Reema R. Bogin, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade, at reema.bogin@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the

trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 58, No. 12, on March 27, 2024, proposing to modify one ruling letter pertaining to country of origin of an Absorber Crashbox. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N326445, CBP found that the country of origin of the Absorber Crashbox will be China for purposes of applying trade remedies under Section 301 of the Trade Act of 1974, as amended. It is now CBP's position that the country of origin of the Absorber Crashbox is Mexico for the purposes of applying trade remedies under Section 301 of the Trade Act of 1974.

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N326445 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H335139 set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H335139

May 1, 2024
OT:RR:CTF:VSP H335139 RRB
CATEGORY: Origin

MATTHEW D. LAPIN
PORTER WRIGHT MORRIS & ARTHUR LLP
2020 K STREET, NW
SUITE 600
WASHINGTON, D.D. 20006

RE: Modification of NY N326445; Country of origin of an Absorber Crashbox

DEAR MR. LAPIN:

This is in response to your submission, dated July 29, 2022, requesting U.S. Customs and Border Protection ("CBP") to reconsider New York Ruling Letter ("NY") N326445, dated June 30, 2022, which was issued to your client Waldasschaff Automotive Mexico S de R.L. de C.V. ("WAM" or "importer"). NY N326445 addressed the classification, trade preference under the United States-Mexico-Canada Agreement ("USMCA"), and the country of origin of an Absorber Crashbox.

In NY N326445, CBP found that the country of origin of the Absorber Crashbox will be China for purposes of applying trade remedies under Section 301 of the Trade Act of 1974, as amended. After reviewing the ruling in its entirety, along with the information in your reconsideration request, we find it to be incorrect only with respect to the country of origin of the Absorber Crashbox for purposes of applying Section 301 trade remedies. For the reasons set forth below, we are modifying NY N326445.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to modify NY N326445 was published on March 27, 2024, in Volume 58, No. 12 of the Customs Bulletin. No comments were received in response to the proposed action.

FACTS:

In NY N326445, the Absorber Crashbox was described as follows:

> The item under consideration is an Absorber Crashbox (Crashbox, crash box), which is designed to be used with passenger vehicles. The crash box is an important component designed exclusively to absorb energy in the event of a collision. It prevents the spread of kinetic energy, generating less damage to the vehicle structure. It is placed between the bumper and side rails before the chassis points.
>
> You state in your letter that the Crashboxes are manufactured and assembled in Mexico with certain imported components from China. These imported parts are referred to as "profiles", Part Number V1570 and Part Number V1571. There are two model profiles, each consisting of two pieces. One pair is for the left hand Crashbox and one set for the right hand Crashbox. The Crashboxes are manufactured in Mexico using these profiles imported from China with Mexican labor. The imported profiles are considered a raw material and are subject to various processes in WAM's plant in Mexico including sawing, stamping, washing and heat treatment until the good is finished.

NY N326445 further states:

> [a]ccording to the information supplied, none of the components from China undergo any substantial processing. The end-use of all components from China is pre-determined at the time of importation to Mexico. The assembly of the components into the Absorber Crashbox appears to be a minor one, and therefore, does not meet the substantial transformation requirements.
>
> As a result, it is the opinion of this office that no substantial transformation occurs in Mexico. Therefore, the country of origin of the Absorber Crashbox will be China for purposes of applying trade remedies under Section 301, of the Trade Act of 1974, as amended.

In its reconsideration request, the importer explains that the heat treatment applied to the profiles is more than a minor operation. The importer states that the heat treatment process changes the properties of the metal in the profiles in order to permit the crashboxes to meet the requirements of the Federal Motor Vehicle Safety Standards ("FMVSS"). In particular, the heat treatment process subjects the sawed, cut, formed and hole-punched profiles to a specified high temperature for a set amount of time under controlled environmental conditions, using precision measuring and test equipment. This process changes the structural properties of the aluminum used to construct the raw profiles. Items that do not meet specific parameters regarding tensile strength, yield strength and elongation are removed from processing and are not incorporated into final assembly.

The importer asserts that the heat treatment and artificial aging process in Mexico transforms the aluminum components from the imported "T4" component into the "T6" component that can be incorporated into the final assembly of the crashboxes. Moreover, the transformation of the aluminum components into "T6" components renders them with substantially higher strength and hardness compared to the "T4" components form China. This processing leads to an improvement in the material's mechanical properties, including its strength, hardness, and ductility.

The importer explains that these changes to the physical properties of the aluminum are required to effectively absorb energy in a crashbox in the event of a collision and to ensure that the passenger vehicles upon which the crashboxes are installed meet requirements for occupant safety under the FMVSS.

In an email dated August 11, 2023, Counsel for WAM sent to our office photographs of the incoming materials that are sent to Mexico, along with photographs of what happens to these materials at various stages of production of the Absorber Crashboxes in Mexico.

ISSUE:

What is the country of origin of an Absorber Crashbox manufactured and assembled in Mexico, using certain imported components from China, for purposes of applying of Section 301 trade remedies?

LAW AND ANALYSIS:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. § 1304), provides that, unless excepted, every article of foreign origin imported into the United Statess shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States

the English name of the country of origin of the article. Congressional intent enacting 19 U.S.C. § 1304 was that the ultimate purchaser should be able to know by an inspection of the markings on the imported goods the country of which the good is the product. "The evident purpose is to mark the goods so at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297 at 302 (1940).

The regulations implementing the requirements and exceptions to 19 U.S.C. § 1304 are set forth in Part 134, Customs and Border Protection Regulations (19 C.F.R. Part 134).

19 C.F.R. § 134.1(b) provides as follows:

> "Country of origin" means the country of manufacture, production, or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part; however, for a good of a NAFTA country, the NAFTA Marking Rules will determine the country of origin.

The United States Trade Representative ("USTR") has determined that an additional ad valorem duty of 25% will be imposed on certain Chinese imports pursuant to USTR's authority under Section 301(b) of the Trade Act of 1974 ("Section 301 measures"). The Section 301 measures apply to products of China enumerated in Section XXII, Chapter 99, Subchapter III, U.S. Note 20(f), HTSUS. Among the subheadings listed in U.S. Note 20(f) of Subchapter III, Chapter 99, HTSUS, is subheading 8708.10.60, HTSUS, in which the finished Absorber Crashboxes are classified.

When determining the country of origin for purposes of applying trade remedies under Section 301, the substantial transformation analysis is applicable. The test for determining whether a substantial transformation will occur is whether an article emerges from a process with a new name, character, or use, different from that possessed by the article prior to processing. *See Texas Instruments Inc. v. United States*, 69 C.C.P.A. 151 (1982). In order to determine whether a substantial transformation has occurred, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. CBP has stated that a new and different article of commerce is an article that has undergone a change in commercial designation or identity, fundamental character, or commercial use. A determinative issue is the extent of the operations performed and whether the materials lose their identity and become an integral part of the new article. This determination is based on the totality of the evidence. *See National Hand Tool Corp. v. United States*, 16 C.I.T. 308 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993).

In *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308 (2016), the Court of International Trade ("CIT") interpreted the meaning of "substantial transformation" as used in the Trade Agreements Act of 1979 ("TAA") for purposes of government procurement. *Energizer* involved the determination of the country of origin of a flashlight, referred to as the Generation II flashlight, under the TAA. All of the components of the Generation II flashlight were of Chinese origin, except for a white LED and a hydrogen getter. The components were imported into the United States where they were assembled into the finished Generation II flashlight.

The court reviewed the "name, character and use" test in determining whether a substantial transformation had occurred and reviewed various court decisions involving substantial transformation determinations. The court noted, citing *Uniroyal, Inc. v. United States*, 3 C.I.T. 220, 226, 542 F. Supp. 1026, 1031, *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983), that when "the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change." *Energizer* at 1318. In addition, the court noted that "when the end-use was pre-determined at the time of importation, courts have generally not found a change in use." *Energizer* at 1319, citing as an example, *National Hand Tool Corp. v. United States*, 16 C.I.T. 308, 310, *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993). Furthermore, courts have considered the nature of the assembly, i.e., whether it is a simple assembly or more complex, such that individual parts lose their separate identities and become integral parts of a new article.

Customs has generally held that a heat treatment will result in a substantial transformation only if it alters the article's mechanical properties to a significant extent. *See* Headquarters Ruling Letters ("HQ") 083236 dated May 16, 1989. The decision in *Ferrostaal Metals Corp. v. United States*, 664 F.Supp. 535, 11 C.I.T. 470 (1987), is also pertinent. That case concerned whether certain operations performed on cold-rolled steel sheet, described as a continuous hot-dip galvanizing process, substantially transformed the sheet. The process involved two steps: annealing, undertaken to restore the steel's ductility lost in a previous cold rolling, and galvanizing, or dipping the steel in a pot of molten zinc. The court held that the continuous hot-dip galvanizing process resulted in a substantial transformation, in part, because the process changed the character of the steel sheet by significantly altering its mechanical properties and chemical composition.

In *National Hand Tool Corp.*, sockets and flex handles were either cold formed or hot forged into their final shape, speeder handles were reshaped by a power press after importation, and the grip of the flex handles were knurled in the United States. The imported parts were then heat treated, which strengthened the surface of the steel, and cleaned by sandblasting, tumbling, and/or chemical vibration before being electroplated. In certain instances, various components were assembled together, which the court stated required some skill and dexterity. The court determined that the imported components were not substantially transformed by the strengthening, cleaning, and assembly performed in the United States; therefore, they remained products of Taiwan. In making its determination, the court focused on the fact that the components had been cold-formed or hot-forged "into their final shape before importation," and that "the form of the components remained the same" after the assembly and heat-treatment processes performed in the United States. Although the court stated that a predetermined use would not preclude the finding of a substantial transformation, the determination must be based on the totality of the evidence. No substantial change in name, character or use was found to have occurred as a result of the processing performed in the United States.

Regarding certain assembly operations, CBP has generally held that those which are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. Factors which may be relevant in this evaluation may include the nature of the operation (including the number of components assembled), the number of different operations

involved, and whether a significant period of time, skill, detail, and quality control are necessary for the assembly operation. If the manufacturing or combining process is a minor one which leaves the identity of the article intact, a substantial transformation has not occurred. *Uniroyal, Inc.* 3 C.I.T. at 224, 542 F. Supp. at 1029.

In NY N326445, CBP found that because sawing, stamping, washing and heat treatment are simple operations performed on the aluminum profiles in Mexico, no substantial transformation occurs. Accordingly, it determined that the country of origin of the Absorber Crashboxes is China. However, in the importer's reconsideration request, they explain the processing in further detail, particularly regarding the complexity of the heat treatment.

The aluminum profiles undergo various types of processing in Mexico as part of their manufacture into Absorber Crashboxes. One pair of aluminum profiles imported from China to Mexico is for the left hand crashbox and one pair is for the right hand crashbox. In order to manufacture these profiles into the final product, the profiles are sawed and then sent to a separate machining station where a U-shaped cutout is made in the individual profile. The profiles with cutouts are subject to two different hole-punching steps to allow for connecting to spacers and vehicle crossbeams. Then, they are washed followed by a specialized heat treatment and artificial aging process. In the final step of the manufacturing process, the profiles that have undergone processing are assembled with the spacers to form the Absorber Crashboxes.

In its reconsideration request, the importer explains that the heat treatment process changes the structural properties of the aluminum used to construct the profiles in order to permit the crashboxes to meet FMVSS requirements for passenger safety. According to the importer, this heat treatment and aging process results in a change to the grain structure of the aluminum components, based on the formation of precipitates within the aluminum alloy to strengthen the material, which leads to an improvement in the material's mechanical properties, including its strength and hardness. Without these increases in strength and hardness following heat treatment of the aluminum, the crashboxes would not be suitable for their intended use in absorbing sufficient energy as part of a vehicle's crash management system.

To better assess whether the heat treatment and aging processes performed on the aluminum profiles in Mexico result in a significant change to the structural and chemical properties of the aluminum profiles used in the manufacture of the Absorber Crashboxes, this office requested the assistance of CBP's Laboratories and Scientific Services Division ("LSSD"). In its Lab Report, LSSD confirmed that "the heat treatment changes the properties of the material to ensure proper safety. . ."

Because CBP did not have complete information regarding the processes performed in Mexico to manufacture the aluminum profiles into Absorber Crashboxes, it erroneously concluded in NY N326445 that the country of origin of the crashboxes was China. Upon receiving more fulsome details of the processing operations, as well as photographs of the imported aluminum profiles before and after processing, we conclude that unlike in *National Hand Tool Corp.*, the imported aluminum profiles were not in their final shape before importation. Based on the provided photographs, the aluminum profiles underwent sufficient cutting and shaping such that the form of the components after processing was no longer the same.

Other evidence presented with the reconsideration request provides further detail into how the heat treatment and artificial aging process changes

the character and use of the imported aluminum profiles. The importer avers that such processing transforms the aluminum profiles from the "T4" components received from China into the "T6" components that can be incorporated into the final assembly of the crashboxes. Specifically, we confirmed that the heat treatment applied to the aluminum profiles in Mexico changes the structural properties and character of the aluminum used to construct the raw profiles. In particular, the heat treatment notably alters the tensile strength, yield strength and elongation of the profiles used in the final assembly of the Absorber Crashboxes. The aluminum profiles that do not meet specific parameters regarding tensile strength, yield strength and elongation are removed from processing and not incorporated into final assembly, as they would not be suitable for their intended use in Absorber Crashboxes.

In determining whether a substantial transformation has occurred as a result of the various manufacturing processes performed in Mexico, we turn to the "name, character, and use test." *See National Hand Tool Corp.* Here, there is a change in name subsequent to processing because the imported articles are aluminum profiles whereas the finished product that integrates the processed aluminum profiles are Absorber Crashboxes. Additionally, even before the aluminum profiles are assembled into the Absorber Crashboxes, they undergo a name change from the "T4" to the "T6" as a result of the heat treatment applied to the aluminum. There is also a change in character as a result of the heat treatment and aging process applied to the profiles, which alters the grain structure of the aluminum components, based on the formation of precipitates within the aluminum alloy to strengthen the material. The heat treatment also alters the tensile strength, yield strength and elongation of the profiles. Without these increases in strength and hardness, the crashboxes would not be suitable for their intended use in absorbing sufficient energy as part of a vehicle's crash management system. Thus, the purpose of the heat treatment is to change the properties of the aluminum so that the final product, the Absorber Crashboxes, meets the requirements for occupant safety under FMVSS by absorbing energy in the event of a collision. In sum, it is our determination that the sawing, stamping, washing, heat treatment and aging processes performed on the aluminum profiles in Mexico as part of their manufacture into Absorber Crashboxes result in a substantial transformation. Accordingly, the country of origin will be Mexico.

HOLDING:

The country of origin of the Absorber Crashboxes for purposes of applying trade remedies under Section 301 of the Trade Act of 1974 is Mexico.

EFFECT ON OTHER RULINGS:

NY N326445, dated June 30, 2022, is hereby MODIFIED.

This ruling will become effective on July 15, 2024.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

AGENCY INFORMATION COLLECTION ACTIVITIES:

Revision; Regulations Relating to Copyrights and Trademarks

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than May 30, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Please submit written comments and/or suggestions in English. Find this particular information collection by selecting "Currently under Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (89 FR 14672) on February 28, 2024, allowing for a 60-day comment period. This notice allows for an additional

30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Regulations Relating to Copyrights and Trademarks.

OMB Number: 1651–0123.

Form Number: N/A.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Businesses.

Abstract: Title 19 of the United States Code section 1526(e) prohibits the importation of articles that bear a mark that is a counterfeit of a trademark that has been registered with the United States Patent and Trademark Office (USPTO) and subsequently recorded with U.S. Customs and Border Protection (CBP) through the e-Recordation Program. *https://iprr.cbp.gov/s/*. Pursuant to 15 U.S.C. 1124, the importation of articles that bear a mark that infringes a trademark or trade name that has been recorded with CBP is restricted pursuant to 19 U.S.C. 1595a(c)(2)(C). Likewise, under 17 U.S.C. 602 and 17 U.S.C. 603, the importation of articles that constitute a piratical copy of a registered copyrighted work that has subsequently been recorded with CBP is also prohibited. Both 15 U.S.C. 1124 and 17 U.S.C. 602 authorize the Secretary of the Treasury to prescribe by regulation the recordation of trademarks, trade names and copyrights with CBP. Additional rulemaking authority in this regard is conferred by CBP's general rulemaking authority as found in 19 U.S.C. 1624.

CBP officers enforce recorded trademarks, trade names and copyrights at all U.S. Ports of Entry. The information that respondents must submit in order to seek the assistance of CBP to protect against infringing imports is specified for trademarks under 19 CFR 133.2 and 133.3, and the information to be submitted for copyrights is specified under 19 CFR 133.32 and 133.33. Trademark, trade name, and copyright owners seeking border enforcement of their intellectual property rights provide information to CBP beyond that which they submitted to either the U.S. Patent and Trademark Office or the U.S. Copyright Office to obtain their registration. This revision adds the new e-Recordation online application, located at *https://iprr.cbp.gov/.*

E-Recordation applicants may provide as much additional information as they would like that would aid CBP in authenticating their genuine merchandise and distinguishing it from non-genuine merchandise, such as a Product Identification or Authentication Guides, lists of licensees and authorized manufacturers, and Applicants can supplement their application with additional information at any time by emailing the e-Recordation team at *IPRRQuestions@cbp.dhs.gov.* All information provided to CBP is housed in a secure database that can be viewed by CBP and Homeland Security Investigations personnel with a need to know. Limited information regarding the recorded trademark, trade name or copyright is published online to inform the public of which registrations are receiving border enforcement. *https://iprs.cbp.gov/s/.*

On December 15, 2017, CBP published a final rule in the **Federal Register** (82 FR 59511) regarding Donations of Technology and Related Support Services to Enforce Intellectual Property Rights. The final rule added 19 CFR 133.61 in a Subpart H to the CBP regulations which authorizes CBP to accept donations of hardware, software, equipment, and similar technologies, as well as related support services and training, from private sector entities, for the purpose of assisting CBP in enforcing intellectual property rights (IPR). A donation offer must be submitted to CBP either via email, to *dap@cbp.dhs.gov,* or mailed to the attention of the Executive Assistant Commissioner, Office of Field Operations, or his/her designee.

The donation offer must describe the proposed donation in sufficient detail to enable CBP to determine its compatibility with existing CBP technologies, networks, and facilities (*e.g.* operating system or similar requirements, power supply requirements, item size and weight, *etc.*). The donation offer must also include information pertaining to the donation's scope, purpose, expected benefits, intended use, costs, and attached conditions, as applicable, that is sufficient to enable CBP to evaluate the donation and make a determination as to whether to

accept it. CBP will notify the donor, in writing, if additional information is requested or if CBP has determined that it will not accept the donation. If CBP accepts a donation, CBP will enter into a signed, written agreement with an authorized representative of the donor. The agreement must contain all applicable terms and conditions of the donation.

The respondents to this information collection are members of the trade community who are familiar with CBP regulations.

Type of Information Collection: IPR Recordation Application.

Estimated Number of Respondents: 2,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 2,000.

Estimated Time per Response: 1 hours.

Estimated Total Annual Burden Hours: 2,000.

Type of Information Collection: IPR Donations of Authentication Technology.

Estimated Number of Respondents: 10.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 10.

Estimated Time per Response: 20 hours.

Estimated Total Annual Burden Hours: 200.

Type of Information Collection: Training Requests.

Estimated Number of Respondents: 20.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 20.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 40.

Type of Information Collection:

Estimated Number of Respondents:

Estimated Number of Annual Responses per Respondent:

Estimated Number of Total Annual Responses:

Estimated Time per Response:

Estimated Total Annual Burden Hours:

Dated: April 25, 2024.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

AGENCY INFORMATION COLLECTION ACTIVITIES:

Revision; Arrival and Departure Record and Electronic System for Travel Authorization (ESTA)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than May 30, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Please submit written comments and/or suggestions in English. Find this particular information collection by selecting "Currently under Review—Open for Public Comments" or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (89 FR 14083) on February 26, 2024, allowing for a 60-day comment period. This notice allows for an additional

30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Arrival and Departure Record (I–94/I–94W) and Electronic System for Travel Authorization (ESTA).

OMB Number: 1651–0111.

Form Number: I–94, I–94W.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Individuals.

Abstract: CBP is implementing a new capability within CBP One™ to allow nonimmigrants who are subject to Form I–94 ("I–94") requirements, and who are departing the United States, to voluntarily provide biographic data, facial images, and geolocation to provide evidence of that departure. This collection is a part of CBP's critical efforts in fulfilling DHS's mandate to collect biometric information from departing nonimmigrants and CBP's plans to fully automate I–94 information collection. This capability will close the information gap on nonimmigrant entries and exits by making it easier for nonimmigrants subject to I–94 requirements to report their exit to CBP after their departure from the United States. It will also create a biometrically confirmed, and thereby more accurate, exit record for such nonimmigrants leaving the United States.

Certain nonimmigrants subject to I–94 requirements may voluntarily submit their facial images using the CBP One™ mobile application (the app) in order to report their exit from the United States.

Nonimmigrants may use the app to voluntarily submit their biographic information from their passports, or other traveler documents after they have exited the United States.

Nonimmigrants will then use the app to take a “selfie” picture. CBP will utilize geolocation services to confirm that the nonimmigrant is outside the United States as well as run “liveness detection” software to determine that the selfie photo is a live photo, as opposed to a previously uploaded photo. The app will then compare the live photo to facial images for that person already retained by CBP to confirm the exit biometrically.

CBP will utilize this information to help reconcile a nonimmigrant’s exit with that person’s last arrival. The report of exit will be recorded as a biometrically confirmed departure in the Arrival and Departure Information System (ADIS) maintained by CBP. Nonimmigrants may utilize this information as proof of departure, which is most relevant in the land border environment, but may be utilized for departures via air and sea if desired.

As it pertains to the land environment, there is no requirement for nonimmigrants leaving the United States to report their departure to CBP. However, as described further below, CBP encourages nonimmigrants to report their departure to CBP when they exit, so that CBP can record their exit from the United States.

Although CBP routinely collects biometric data from nonimmigrants entering the United States, there currently is no comprehensive system in place to collect biometrics from nonimmigrants departing the country. Collecting biometrics at both arrival and departure will thus enable CBP and DHS to know with better accuracy whether nonimmigrants are departing the country when they are required to depart. Further, collecting biometric data will help to reduce visa or travel document fraud and improve CBP’s ability to identify criminals and known or suspected terrorists. CBP has been testing various options to collect biometrics at departure in the land and air environments since 2004.

At the same time, CBP is also now working to fully automate all I–94 processes. Currently CBP issues electronic I–94s to most nonimmigrants entering the United States at land border ports of entry.

Currently CBP does not routinely staff exit lanes at land border ports of entry, nor does CBP possess a single process for nonimmigrants subject to I–94 requirements to voluntarily report their departure. Nonimmigrants can currently report their departure by any one of the following means: (1) stopping at a land border port of entry and presenting a printed copy of their electronic I–94 to a CBP officer; (2) stopping at a land border port of entry and placing a printed copy of

their electronic I–94 in a drop box provided by the port where available; (3) if exiting by land on the northern U.S. border, by turning in a paper copy of their electronic I–94 to the Canadian Border Services Agency (CBSA) when entering Canada (CBSA will then return the form to CBP); or (4) mailing a copy of their electronic I–94 and other proof of departure to CBP.

The current options are burdensome and, in many cases, impractical or inconvenient due to the location and design of the ports. They also lead to haphazard record keeping and inaccurate data collection with respect to the nonimmigrants leaving the country. Most land border ports of entry provide limited access to the port for vehicles exiting the United States and have minimal parking available to the public. For this reason, most nonimmigrants do not report their departure when exiting at land border ports of entry. In those cases, CBP has no way to confirm that a nonimmigrant has exited the United States at the time of departure. CBP often discovers that a nonimmigrant has previously left the United States at a later date, when that same nonimmigrants attempts to re-enter the United States. Having proof of an exit via the CBP One™ app would provide nonimmigrants some information for CBP officers to consider in the event the officer is unsure whether a nonimmigrant complied with the I–94 requirements provided upon their previous entry.

In additonal, CBP intends to update the ESTA application website to require applicants to provide a photograph of their face, or “selfie”, in addition to the photo of the passport biographical page. These photos would be used to better ensure that the applicant is the rightful possessor of the document being used to obtain an ESTA authorization.

Currently, applicants are allowed to have a third party apply for ESTA on their behalf. While this update would not remove that option, third parties, such as travel agents or family members, would be required to provide a photograph of the ESTA applicant.

The ESTA Mobile application currently requires applicants to take a live photograph of their face, which is compared to the passport photo collected during the ESTA Mobile application process. This change will better align the application processes and requirements of ESTA website and ESTA Mobile applicants.

Type of Information Collection: Paper I–94.

Estimated Number of Respondents: 1,782,564.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,782,564.

Estimated Time per Response: 8 minutes.
Estimated Total Annual Burden Hours: 237,675.

Type of Information Collection: I–94 Website.

Estimated Number of Respondents: 91,411.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 91,411.
Estimated Time per Response: 4 minutes.
Estimated Total Annual Burden Hours: 6,094.

Type of Information Collection: ESTA Mobile Application.

Estimated Number of Respondents: 500,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 500,000.
Estimated Time per Response: 22 minutes.
Estimated Total Annual Burden Hours: 183,333.

Type of Information Collection: ESTA Website.

Estimated Number of Respondents: 15,000,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 15,000,000.
Estimated Time per Response: 13 minutes.
Estimated Total Annual Burden Hours: 3,250,000.

Type of Information Collection: CBP One Mobile Application.

Estimated Number of Respondents: 600,000.
Estimated Number of Annual Responses per Respondent: 1.
Estimated Number of Total Annual Responses: 600,000.
Estimated Time per Response: 2 minutes.
Estimated Total Annual Burden Hours: 20,000.

Dated: April 25, 2024.

SETH D RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

U.S. Court of International Trade

Slip Op. 24–49

NUCOR CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and POSCO, Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Court No. 21–00182
PUBLIC VERSION

[Remanding in part the U.S. Department of Commerce's second remand redetermination filed in connection with the 2018 administrative review of the countervailing duty order on certain carbon and alloy steel cut-to-length plate from the Republic of Korea.]

Dated: April 19, 2024

Alan H. Price, *Christopher B. Weld*, *Maureen E. Thorson*, and *Adam M. Teslik*, Wiley Rein LLP, of Washington, DC, for Plaintiff Nucor Corporation.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. Also on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *W. Mitch Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Brady W. Mills, *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Jordan L. Fleischer*, *Nicholas C. Duffy*, and *Ryan R. Migeed*, Morris, Manning & Martin, LLP, of Washington, DC, for Defendant-Intervenor POSCO.

OPINION AND ORDER

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") second redetermination upon remand. *See* Final Results of Redetermination Pursuant to Second Ct. Remand ("2nd Remand Results"), ECF No. 93–1.

Plaintiff Nucor Corporation ("Nucor") commenced this case challenging Commerce's final results in the 2018 administrative review of the countervailing duty order on certain carbon and alloy steel cut-to-length plate from the Republic of Korea ("Korea"). Compl., ECF No. 5; *Certain Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea*, 86 Fed. Reg. 15,184 (Dep't Commerce Mar. 22, 2021) (final results and partial rescission of countervailing duty admin. review, 2018) ("*Final Results*"), ECF No. 18–4, and accompanying

Issues and Decision Mem., C-580–888 (Mar. 16, 2021), ECF No. 18–5.[1] For the *Final Results*, Commerce calculated a 0.49 percent *ad valorem* subsidy rate for POSCO. 86 Fed. Reg. at 15,185. POSCO's rate is considered a *de minimis* rate. *Id.* Nucor challenged Commerce's determination not to initiate an investigation into the alleged provision of off-peak electricity for less than adequate remuneration (sometimes referred to as "LTAR") and Commerce's determination that mandatory respondent POSCO and its affiliate POSCO Plantec ("Plantec") do not meet the requirements necessary to find a cross-owned input supplier relationship. *See generally* Confid. Nucor Corp.'s Mem. in Supp. of its Rule 56.2 Mot. for J. on the Agency R., ECF No. 22.

In *Nucor Corp. v. United States* (*Nucor I*), 46 CIT __, 600 F. Supp. 3d 1225 (2022), the court remanded Commerce's determination not to initiate an investigation into off-peak electricity pricing and remanded in part Commerce's determination with respect to Plantec. Commerce had resolved the latter issue on the basis of its regulation, 19 C.F.R. § 351.525(b)(6)(iv) (2018),[2] after finding that the inputs Plantec supplied to POSCO[3] were not primarily dedicated to POSCO's steel production. *See Nucor I*, 600 F. Supp. 3d at 1235. The court sustained Commerce's determination with respect to certain services and equipment but remanded for reconsideration or further explanation in relation to scrap and a converter vessel. *Id.* at 1238, 1240–41.

On January 31, 2023, Commerce filed its redetermination. Confid. Final Results of Redetermination Pursuant to Ct. Remand ("1st Remand Results"), ECF No. 60–1. Therein, Commerce provided further explanation for its determinations and made no changes to POSCO's subsidy rate. *Id.* at 11–33, 38–52, 55–72.

---

[1] The administrative record for the 2nd Remand Results is contained in a Public Remand Record ("2PRR"), ECF No. 94–1, and a Confidential Remand Record, ECF No. 94–2. The administrative record for the *Final Results* is contained in a Public Administrative Record ("PR"), ECF No. 18–1, and a Confidential Administrative Record ("CR"), ECF No. 18–2. The parties submitted joint appendices containing record documents cited in their comments. [Confid. 2nd Remand] J.A. ("Confid. 2RJA"), ECF No. 102; [Public 2nd Remand] J.A., ECF No. 103. When necessary, the court cites to confidential record documents contained in the previously filed joint appendices. Confid. J.A. ("CJA"), ECF No. 43; [Confid. 1st Remand] J.A. ("Confid. 1RJA"), ECF No. 76.

[2] Section 351.525(b)(6)(iv) states that when

> there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, [Commerce] will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).

[3] The inputs consisted of steel scrap and various raw materials, fixed assets, and services.

The court sustained Commerce's 1st Remand Results in part and remanded in part. *Nucor Corp. v. United States* (*Nucor II*), 47 CIT __, 653 F. Supp. 3d 1295 (2023).[4] With respect to Commerce's determination not to investigate off-peak electricity pricing, the court found that Commerce was "[in]consistent in its statement of the applicable standard and its application of that standard." *Id.* at 1302–03. With respect to Plantec's supply of scrap, the court concluded that Commerce had identified factors relevant to the inquiry but failed to support its evaluation of certain of those factors with substantial evidence. *Id.* at 1307, 1310. The court also remanded Commerce's determination regarding the converter vessel for further explanation about the relevance of certain factors and, as necessary, further explanation of its findings with respect to those factors. *Id.* at 1311–13.

On December 19, 2023, Commerce filed the 2nd Remand Results. Therein, Commerce provided further explanation for its determination not to investigate off-peak electricity pricing. 2nd Remand Results at 5–15, 24–25. Commerce asserted a different basis for declining to attribute subsidies received by Plantec to POSCO, now finding that the companies were not cross-owned pursuant to 19 C.F.R. § 351.525(b)(6)(vi)[5] because POSCO did not control Plantec's assets during the 2018 period of review ("POR"). *Id.* at 18–22, 28–30.

Nucor filed comments opposing Commerce's 2nd Remand Results. Confid. Nucor Corp.'s Cmts. in Opp'n to Second Remand Results ("Nucor's Cmts."), ECF No. 96. Defendant United States ("the Government") and Defendant-Intervenor POSCO each filed comments in support of the 2nd Remand Results. Confid. Def.'s Resp. to Pl.'s Cmts. Regarding the Second Remand Redetermination ("Def.'s Cmts."), ECF No. 100; Confid. POSCO's Cmts. in Supp. of the Agency's Remand Redetermination ("POSCO's Cmts."), ECF No. 98. For the following reasons, the court again remands Commerce's determination not to investigate off-peak electricity pricing but sustains Commerce's determination not to attribute subsidies received by Plantec.

[4] *Nucor I* and *Nucor II* present background information, familiarity with which is presumed.

[5] Commerce's regulation states that

> [c]ross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. Normally, this standard will be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations.

19 C.F.R. § 351.525(b)(6)(vi).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[6] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Off-Peak Electricity Pricing

A. Additional Background

The requirements that an interested party must meet for Commerce to investigate an LTAR allegation are not onerous. *See* 19 U.S.C. § 1671a(b)(1). "[M]ost subsidy petitions are granted unless the allegations 'are clearly frivolous, not reasonably supported by the facts alleged or . . . omit important facts which are reasonably available to the petitioner.'" *RZBC Grp. Shareholding Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1288, 1295 (2015) (citation omitted). However, "[w]hen allegations concern a program previously held non-countervailable," Commerce may "require[ ] a petition to contain evidence of changed circumstances . . . before an investigation is initiated." *Delverde, SrL v. United States*, 21 CIT 1294, 1296–97, 989 F. Supp. 218, 222 (1997), *vacated on other grounds*, 202 F.3d 1360 (Fed. Cir. 2000).

In *Nucor II*, the court noted that Commerce, in the 1st Remand Results, claimed to apply the *RZBC Group* standard and not the *Delverde* standard because the agency "accepted Nucor's allegation to raise the existence of a subsidy program distinct from Commerce's prior examination of the provision of electricity for less than adequate remuneration." *Nucor II*, 653 F. Supp. 3d at 1302. The court concluded that Commerce "reasonably found that Nucor overlooked relevant information about the Korean electricity pricing system." *Id.* at 1303–04. The agency had failed, however, to address evidence concerning differences between KEPCO's[7] off-peak prices and KEPCO's cost of acquiring electricity from the lowest-cost generator, Korea Hydro and Nuclear Power Company Ltd. ("KHNP"), or explain why such information "constituted insufficient evidence of a benefit . . .

[6] All citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition unless otherwise stated.

[7] Korea Electric Power Corporation ("KEPCO") purchases electricity from generators though the Korea Power Exchange ("the KPX"), which "is the system operator[ ] and the supplier" of electricity to KEPCO. 2nd Remand Results at 8. The KPX sets the prices that KEPCO pays the generators for electricity. *Id.* at 9.

pursuant to the low standard of *RZBC Group.*" *Id.* at 1304.[8] The court remanded for Commerce to articulate more clearly the standard the agency sought to apply to Nucor's allegation and explain the "application of that standard to the entirety of the allegation made by Nucor." *Id.*

In the 2nd Remand Results, Commerce clarified its position on the appropriate standard for its review of Nucor's allegation. Commerce explained that, in the agency's view, "the initiation standard applied in *RZBC* and *Delverde* are one and the same." 2nd Remand Results at 9 n.39. That is because allegations concerning a program that "is a subset of a previously investigated program" implicates "more information [that is] reasonably available to the petitioner and the legal standard for initiation requires that the petitioner address or account for that additional information." *Id.* at 9. Commerce noted that addressing this information is particularly important when, as here, "the allegation implicates a market principles analysis" pursuant to 19 C.F.R. § 351.511(a)(2)(iii),"[9] because that analysis often requires Commerce to consider the entire market instead of specified transactions. *Id.*

Commerce further explained its position that Nucor failed to address all available information. Referencing the omission the court identified, Commerce explained that "Nucor's comparison" was not made "on an apples-to-apples basis." *Id.* at 7. The KHNP cost information that Nucor relied on was "not off-peak specific," and the price information contained only "the variable component of what POSCO paid" and did not account for all fixed and variable costs that Commerce would use to construct a benchmark. *Id.* at 7 n.33 (citing POSCO's Second Suppl. Questionnaire Resp. (Feb. 27, 2020) ("POSCO's 2SQR"), Ex. C-35, CR 242–45, PR 135, Confid. 2RJA Tab 7; New Subsidy Allegations Suppl. Questionnaire Resp (Dec. 31, 2019) ("Nucor's Suppl. Allegation"), Ex. 1 at 38, PR 94, Confid. 2RJA Tab 6); *see also id.* at 14 (referring to "Nucor's comparison of the average full cost of sale to the variable price").

---

[8] Specifically, the court observed that "KEPCO's weighted-average off-peak prices paid by POSCO [[ ]] KEPCO's cost of acquiring electricity from its lowest cost generator." Am. Confid. Slip Op. 23–119 at 16, ECF No. 88.

[9] Commerce first seeks to compare the government price to a market-based price for the good or service under investigation in the country in question. 19 C.F.R. § 351.511(a)(2)(i). When an in-country market-based price is unavailable, Commerce will compare the government price to a world market price, when the world market price is available to purchasers in the country in question. *Id.* § 351.511(a)(2)(ii). When, as here, both an in-country market-based price and a world market price are unavailable, Commerce examines "whether the government price is consistent with market principles." *Id.* § 351.511(a)(2)(iii).

Commerce also addressed Nucor's additional reasons for alleging a benefit from off-peak electricity pricing. In response to Nucor's allegation that KEPCO covers its costs only by charging higher rates during on-peak hours "that cross-subsidize large industrial companies (like respondent POSCO) who move production to off-peak hours," Commerce explained that "[t]he hours at which POSCO . . . chose to purchase electricity . . . are . . . immaterial unless the tariff schedule itself is found to be inconsistent with market principles." *Id.* at 10. Nucor offered insufficient evidence for Commerce to reconsider its prior determination that the Korean electricity market is consistent with market principles *or* to demonstrate that the off-peak pricing schedule is inconsistent with market principles. *Id.* at 10–11, 25.

Commerce also concluded that neither the off-peak system marginal price ("SMP")[10] nor KPX's annual average cost of sale provided sufficient evidence of a benefit to investigate off-peak electricity pricing. *Id.* at 11–15. Commerce explained "that a successful benefit allegation of off-peak electricity for LTAR required a reasonable proxy for determining" KEPCO's off-peak-specific costs. *Id.* at 14. According to Commerce, Nucor failed to "demonstrate how the average price of electricity reflected the price of electricity at off-peak hours, considering the potential differences in the generators in terms of operation, usage, etc." *Id.*

B. Analysis

Nucor does not dispute Commerce's characterization of the standard that applies to the agency's review of the underlying allegation. Nucor's Cmts. at 3. Nucor contends, however, that Commerce has again failed to identify the "reasonably available information" the agency asserts undermines Nucor's allegation. *Id.* Nucor also argues that Commerce failed to comply with the court's remand order. *Id.* at 4–8.

In the 2nd Remand Results, Commerce stated "that a successful benefit allegation of off-peak electricity for LTAR required a reasonable proxy for determining what the prices KEPCO paid might be at the specific point of off-peak hours, and not just an overall average price for electricity." 2nd Remand Results at 14. Commerce further stated that although this does not require Nucor to provide hourly electricity costs, it does "require[] an additional step or reasonable explanation to demonstrate how the average price of electricity re-

[10] The KPX sets electricity prices for each hour based "on estimated hourly power demand." *Nucor II*, 653 F. Supp. 3d at 1298 n.5 (quoting 1st Remand Results at 41). "[T]he KPX accepts bids from generators in ascending order of price 'until the projected demand for electricity for such hour is met.'" *Id.* (quoting same). The SMP represents "[t]he maximum bid value" for a given hour. *Id.* (quoting same).

flected the price of electricity at off-peak hours, considering potential differences in the generators in terms of operation, usage, etc. at different hours." *Id.*

Arguably, however, Nucor provided this explanation when it compared "KEPCO's cost of acquiring electricity from its lowest cost generator" to "KEPCO's weighted-average off-peak prices paid by POSCO." *Nucor II*, 653 F. Supp. 3d at 1304. That comparison demonstrated that POSCO's average off-peak unit price was [[ ]] than KEPCO's KHNP acquisition cost. *Id.* Nucor argues now, as it did previously, that this comparison suggests the existence of a benefit because the Korean government has claimed that "lower off-peak costs arise not from time-of-day variations in the prices KEPCO pays to individual generators, but from variations in the *mix of generators* supplying electricity over the course of a day." Nucor's Cmts. at 7 (citing previous Nucor submissions). Nucor identifies statements by the Korean government that "KEPCO's cost of supply purportedly decreases during off-peak hours because 'electricity could be generated by those using cheap fuels, e.g., nuclear power generators.'" *Id.* (quoting New Subsidy Allegations (Nov. 4, 2019) ("Nucor's Allegation") at 9, CR 182–84, PR 76–78, Confid. 1RJA Tab 5, Confid. 2RJA Tab 3).[11] While acknowledging that the court sustained Commerce's rejection of the SMP as a proxy benchmark for the cost of supplying off-peak electricity, Nucor argues that the apparent stability reflected in the "SMP over the course of a day also reflects stable prices paid to each individual generator." *Id.* That stability, Nucor argues, suggests minimal fluctuation in KEPCO's "costs for both on-peak and off-peak purchases." *Id.* at 8.

The court directed Commerce to address this information. *Nucor II*, 653 F. Supp. 3d at 1304. Commerce did so in a conclusory and confusing fashion. While Commerce faults Nucor for failing to place its LTAR allegation in the context of the broader market-principles analysis that Commerce has applied in prior segments or other proceedings involving the Korean electricity market, *see, e.g.*, 2nd Remand Results at 7–9, 11, it is Commerce that has failed to consider Nucor's allegation within that context.

With respect to Nucor's reliance on KEPCO's KHNP acquisition cost, Commerce summarily dismissed this information as "not off-peak specific" and "instead represent[ing] a power trading price

[11] Nucor's Allegation, in turn, quotes from a previous submission by the Korean government to Commerce. *See* Nucor's Allegation at 9 & n.34. That submission is appended to the copy of Nucor's Allegation provided in the joint appendix accompanying the 1st Remand Results. *See id.*, Ex. 6 at 8.

across all hours." *Id.* at 7 n.33. Commerce failed to engage with Nucor's reasons, discussed above, for relying specifically on KEPCO's KHNP acquisition cost in light of the apparent absence of publicly available time-period-specific data. *Cf. Nucor I*, 600 F. Supp. 3d at 1234 (noting that Commerce did not make any finding that "the time-period-specific data that Commerce preferred was 'reasonably available' to Nucor").

Nucor alleged, and Commerce appears to accept, that the SMP typically is not set by the lowest-cost generator but by the higher-price generators whose percentage share of the electricity KEPCO supplies varies throughout the day. *See* Decision Mem. on New Subsidy Allegations (Apr. 1, 2020) at 7 & n.57, PR 144, CJA Tab 12 (citing Nucor's Suppl. Allegation, Ex. 1 at 35). KEPCO's reliance on higher-cost generators throughout the day (albeit in varying quantities) is consistent with the notion that the lowest-price generator is a "base load" generator with full and consistent electricity production and output throughout the day. *See* Nucor's Suppl. Allegation, Ex. 1 at 35–36, 38. To that end, not only has Commerce not shown that any hourly price variation for KHNP is available to Nucor, but it is also not clear that much, if any, variation would exist.

Commerce also faulted Nucor for relying on "the variable component" of the price POSCO paid. 2nd Remand Results at 7 n.33 (citing POSCO's 2SQR, Ex. C-35). Commerce did not explain why this information constitutes a variable component of POSCO's price, and the basis for that statement is not otherwise discernible.[12] To the extent that Commerce intended to refer to the variable portion of the price paid by KEPCO, it would seem that any adjustments to that benchmark for costs in addition to the variable portion would only increase the benchmark and further support Nucor's allegation of subsidization. *See* Nucor's Cmts. at 8 (explaining that KEPCO's cost of acquiring electricity from KHNP represented only the variable cost to KEPCO because it did not include KEPCO's costs "incur[red] in transmission and distribution").

The Government argues that the flaws in Nucor's comparison are "evident from Commerce's established methodologies for determining benefit with respect to the overarching Korean electricity system." Def.'s Cmts. at 9. To that end, the Government argues that Nucor "failed to connect its reliance on the SMP to the remainder of the factors incorporated into the pricing formula that Commerce found

[12] The Government fails to shed light on Commerce's assertion, stating, without elaboration or citation, that the fixed and variable items that Nucor failed to consider "have been thoroughly addressed in numerous prior investigations." Def.'s Cmts. at 6.

insufficient." *Id.* These assertions are misplaced, however, because Nucor's comparison between KEPCO's KHNP acquisition cost and POSCO's off-peak prices sought to address Commerce's concerns with Nucor's reliance on the SMP. *See* Req. for Recons. of New Subsidy Allegation (Apr. 9, 2020) ("Req. for Recons.") at 7–8, CR 254, PR 148, Confid. 1RJA Tab 10.

POSCO contends that "Commerce did not base the [2nd Remand Results] on [Nucor's] inapt comparison alone." POSCO's Cmts. at 4. This assertion fails because the court remanded Commerce's 1st Remand Results precisely for Commerce to address this information that otherwise appears to detract from its conclusion. *See Nucor II*, 653 F. Supp. 3d at 1304. POSCO also contends that Commerce pointed to the information available to Nucor to support its allegation. POSCO's Cmts. at 4 (citing 2nd Remand Results at 12). While Commerce referenced generally the "financial disclosures and electricity power trading statistics" on the record, 2nd Remand Results at 12 & n.45 (citing Nucor's Suppl. Allegation, Ex. 1 at 38–40 and 44–47), Nucor relied on certain of this information to substantiate the cost side of its comparison, *see* Req. for Recons. at 7 & nn.25–26 (citing Nucor's Suppl. Allegation, Ex. 1 at 38). Moreover, Commerce discussed this information in connection with Nucor's reliance on the SMP as a benchmark, 2nd Remand Results at 12, which was not the issue the court directed Commerce to address, *see Nucor II*, 653 F. Supp. 3d at 1304.

Accordingly, the court will again remand this matter for Commerce to "respond to this particular aspect of the allegation" and either "explain why it constitute[s] insufficient evidence of a benefit for Commerce to investigate the off-peak pricing in particular pursuant to the low standard of *RZBC Group*," or otherwise reconsider its decision not to conduct such an investigation. *Id.*

II. Attribution of Plantec's Subsidies

A. Additional Background

On remand, Commerce concluded that "POSCO and Plantec were not cross-owned" for purposes of 19 C.F.R. § 351.525(b)(6)(vi) "during the POR." 2nd Remand Results at 19. Although POSCO retained its majority ownership of Plantec, Commerce based its decision on POSCO's inability to control Plantec by virtue of the debt workout program into which Plantec entered. *Id.* at 20. That program resulted in the creation of the POSCO Plantec Creditor Financial Institutions Committee ("PPCFIC") and the establishment of an agreement pursuant to which PPCFIC, not POSCO, controlled certain major deci-

sions regarding Plantec. *Id.* at 20–21.[13] POSCO's financial statements reflected this change, whereby POSCO reported losing its ability to control Plantec and thus treated "Plantec as a non-consolidated 'associate' rather than a consolidated entity." *Id.* at 21. Commerce explained that it considers cross-ownership to constitute "a binary analysis" such that if, as Commerce concluded, "PPCFIC controls Plantec, then POSCO cannot." *Id.* at 22. Commerce found that the absence of cross-ownership meant that any subsidies received by Plantec could not be attributed to POSCO. *Id.*

Before Commerce, Nucor argued that POSCO's majority ownership satisfied the cross-ownership requirement. Cmts. on Draft Remand Results (Nov. 29, 2023) ("Nucor's Cmts. on Draft") at 3, 2PRR 15, Confid. 2RJA Tab 15. Nucor further argued that "[t]o the extent that POSCO did in fact lose any controlling interest in [Plantec], it was only by virtue of the very subsidy that was being alleged." *Id.*

Commerce rejected Nucor's arguments. Commerce asserted that Nucor failed to address the record evidence on which Commerce had based its determination that POSCO did not control Plantec during the POR. 2nd Remand Results at 29. Regarding Nucor's second argument, Commerce stated that Nucor failed to develop the argument or explain why attribution would be appropriate when control is transferred to a new entity. *See id.*

B. Analysis

Before the court, Nucor again points to POSCO's majority ownership stake in Plantec. Nucor's Cmts. at 11. Nucor contends that Commerce's determination "turns on a Korean accounting technicality arising from participation by both POSCO and Plantec" in the alleged subsidy program. *Id.* Nucor characterizes POSCO's "partial loss of decision-making authority" as "a temporary granting of oversight authority" that "does not represent a transfer of 'control' over Plantec for the purpose of U.S. countervailing duty law." *Id.* at 12.

The Government contends that Nucor failed to develop before Commerce the arguments that Nucor now requests the court to consider; as such, those arguments are barred by the doctrine of administrative exhaustion. Def.'s Cmts. at 11–12. The Government further contends that Nucor's arguments fail on their merits. *See id.* at 13–14; *cf.* POSCO's Cmts. at 8–11 (advancing similar arguments on the merits).

---

[13] Pursuant to the agreement, the PPCFIC "has the right to, among other things, call shareholder meetings, call board meetings, appoint or replace directors, approve applications for recovery and bankruptcy procedures, dispose of property, approve new financing and investment, approve mergers and acquisitions, and provide borrowing guarantees." 2nd Remand Results at 20–21.

As previously stated, "[c]ross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets." 19 C.F.R. § 351.525(b)(6)(vi). While "[n]ormally, this standard will be met where there is a majority voting ownership interest between two corporations," *id.*, common ownership "is a fact-specific determination and calculating the percentage ownership of a company is not the end of the inquiry," *Nantong Uniphos Chems. Co. v. United States*, Slip Op. 18–78, 2018 WL 3134845, *3 (CIT June 25, 2018); *see also* 2nd Remand Results at 21 ("[C]ross-ownership assessments are to be performed on a case-by-case basis, and consistent with the facts on each record."). Ultimately, Commerce is concerned with examining whether "the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits)." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,401 (Dep't Commerce Nov. 25, 1998) (final rule). Thus, Commerce may find that evidence of majority ownership is outweighed by evidence demonstrating that the majority owner did not use or direct the assets of the owned entity. *See* Issues and Decision Mem. for Melamine from Trinidad and Tobago, C-247–807 (Oct. 30, 2015) at 15 (declining to find cross-ownership despite finding majority ownership); Issues and Decision Mem. for Stainless Steel Sheet and Strip in Coils from the Republic of Korea, C-580–835 (Mar. 10, 2003) at 19–20 (majority voting ownership insufficient when the owned entity was under court receivership).

Nucor recognizes the limitations of its reliance on POSCO's majority ownership when it asserts that "Plantec satisfies the requirement for *presumptive* cross-ownership under Commerce's rules." Nucor's Cmts. at 11 (emphasis added). Presumptions may be overcome, and, in this case, Commerce found that the "normal" manner in which cross-ownership is found is outweighed by evidence regarding the transfer of rights to the PPCFIC. *See* 2nd Remand Results at 20–21.

Nucor now seeks to challenge Commerce's interpretation of the record evidence. Nucor's Cmts. at 11–13. Nucor, however, had the opportunity to do just that when it submitted comments on Commerce's draft remand results. The doctrine of administrative exhaustion is well-settled and requires a party to raise issues *with specificity* and "at the time appropriate under [an agency's] practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36–37 (1952).[14] It

[14] "[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d).

is not enough for parties to "mak[e] cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seek[] to have that agency determination vacated." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 554 (1978).

Nucor's argument on this issue to the agency consisted of one obscure sentence: "To the extent that POSCO did in fact lose any controlling interest in [Plantec], it was only by virtue of the very subsidy that was being alleged." Nucor's Cmts. on Draft at 3. Commerce adequately addressed this assertion by explaining that Commerce may not attribute a subsidy received by Plantec to POSCO unless it first finds that the cross-ownership requirement is met. 2nd Remand Results at 29. The appropriate time for Nucor to further challenge Commerce's view of the record in the first instance has passed. Accordingly, Commerce's determination that Plantec did not meet the requirements for cross-ownership pursuant to 19 C.F.R. § 351.525(b)(6)(vi) for the POR, and, thus, did not qualify as a cross-owned input supplier pursuant to 19 C.F.R. § 351.525(b)(6)(iv) will be sustained.[15]

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's 2nd Remand Results are sustained in part and remanded in part; it is further

ORDERED that Commerce shall reconsider or further explain its determination not to investigate the off-peak sale of electricity allegedly for less than adequate remuneration; it is further

ORDERED that Commerce shall file its remand redetermination on or before July 18, 2024; it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 3,000 words.

Dated: April 19, 2024
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, CHIEF JUDGE

[15] In the event the court remanded this issue, Nucor requested the court to "reiterate its prior holdings regarding steel scrap and the converter vessel, and require Commerce to affirmatively address them if necessary based on any reconsideration of the cross-ownership issue." Nucor's Cmts. at 13. Because the court is sustaining Commerce's cross-ownership determination, the court need not further address Nucor's request.

Slip Op. 24–54

SAHAMITR PRESSURE CONTAINER PLC., Plaintiff, and WORLDWIDE DISTRIBUTION, LLLP, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and WORTHINGTON INDUSTRIES, Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 22–00107

[Sustaining the Department of Commerce's final determination.]

Dated: May 2, 2024

David E. Bond, *Ron Kendler*, and *Danica Harvey*, White & Case LLP of Washington, DC, on the briefs for Plaintiff.

Gregory S. Menegaz, *J. Kevin Horgan*, and *Alexandra H. Salzman*, deKieffer & Horgan, PLLC, of Washington, DC, on the briefs for Plaintiff-Intervenor.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Tara K. Hogan*, Assistant Director; and *Alison S. Vicks*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the brief for Defendant. Of counsel on the brief was *Spencer Neff*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Paul C. Rosenthal; *R. Alan Luberda*; *David C. Smith, Jr.*; and *Matthew G. Pereira*, Kelley Drye & Warren LLP of Washington, DC, on the brief for Defendant-Intervenor.

OPINION

***Baker*, Judge:**

In this antidumping case, a foreign producer of propane canisters and a domestic importer challenge the Department of Commerce's recalculation of the former's proffered sales expenses. Finding the agency's methodology supported by substantial evidence, the court sustains it.

I

This matter arises from a Commerce order imposing tariffs on propane canisters. *Steel Propane Cylinders from the People's Republic of China and Thailand: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Orders*, 84 Fed. Reg. 41,703 (Dep't Commerce Aug. 15, 2019). Sahamitr Pressure Container PLC, a Thai producer and exporter, and Worthington Industries, a domestic manufacturer, each requested an administrative review of that order as it pertains to Thailand. Appx1007; *see also Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 85 Fed. Reg. 47,167, 47,168 (Dep't Commerce Aug. 4, 2020).

The Department obliged and opened a review covering a 19-month period in 2019 and 2020. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 85 Fed. Reg. 63,081, 63,085 (Dep't Commerce Oct. 6, 2020). It selected Sahamitr as the sole respondent. Appx6013.

As relevant here, Commerce requested that Sahamitr report sales costs using a transaction-specific method and cautioned that providing such information on an "allocated basis (e.g., on an average basis)" was permissible only when those expenses could not "be tied to a specific sale." Appx6027. The Department further warned that allocated reporting would be acceptable only if the company could "demonstrate that the allocation is calculated on as specific a basis as is feasible (e.g., on a customer-specific basis, product-specific basis, and/or monthly-specific basis, etc.) *and* is not unreasonably distortive." *Id*. (emphasis added).

Sahamitr nonetheless reported its certification expenses[1] for U.S. sales on an allocated basis by applying a "certification-fee ratio" to "customers' gross unit prices to calculate the [reported] per-unit certification expense." Appx2352. The company did not explain why it couldn't disclose such costs using a transaction-specific system or why its method wasn't distortive.

At Worthington's prompting, Commerce directed Sahamitr to explain why it "cannot report the [certification] price adjustment or expense on a more specific basis" and why its "allocation methodology does not cause inaccuracies or distortions." Appx3450.

The company responded that it

> pays its certification fees to outside vendors after [its] production and sale of the merchandise under review, [and] the company cannot attribute individual certification-related expenses to individual sales invoices. The expense-allocation provided is the most accurate basis on which [the company] is able to report [period-of-review] certification expenses using the books and records the company maintains in the normal course of business . . . .

Appx3654. Sahamitr also observed that "the Department accepted this approach in the underlying . . . investigation." *Id*. The company again, however, failed to explain why its allocation method did not cause distortions.

Once again at Worthington's importuning, the Department then requested that Sahamitr "calculate a monthly, per unit, certification expense for the [period of review] for the U.S., and, separately, the

[1] Third parties test and certify the canisters as safe for use. *See* ECF 29–1, at 3.

home market." Appx5587. It responded with a calculation that showed wide fluctuations in costs from month to month. Appx5607.

In its preliminary determination, Commerce found that Sahamitr's (second) proffered allocation of its certification costs was distortive

> due to timing differences between when [the company] produces and sells cylinders and when it records the certification expenses associated with those sales. These timing differences create monthly fluctuations in [Sahamitr's] reported certification[] expenses (*e.g.*, two months of expenses allocated to a single month and no fee expenses allocated to other months).

Appx1025. Thus, the Department "calculated a [period-of-review]-wide certification expense ratio . . . rather than relying on [the company's] reported allocation methods." *Id*. Commerce carried over that analysis to its final determination, Appx1323–1324, which (combined with other unchallenged aspects of that decision) resulted in a dumping margin of 13.89%, Appx1630.

II

Invoking jurisdiction conferred by 28 U.S.C. § 1581(c), Sahamitr sued under 19 U.S.C. § 1516a(a)(2)(B)(iii) to challenge Commerce's final determination. ECF 2. Worldwide Distribution LLLP, a domestic importer of Sahamitr's propane canisters, intervened as a plaintiff, ECF 23, and Worthington intervened in support of the government, ECF 18.

Sahamitr (ECF 29) and Worldwide (ECF 30) both moved for judgment on the agency record. *See* USCIT R. 56.2. The government (ECF 31) and Worthington (ECF 33) opposed. Sahamitr (ECF 58) and Worldwide (ECF 60) replied. The court decides the motions on the papers.

In § 1516a(a)(2) actions such as this, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

III

To determine whether merchandise is being dumped in the U.S., the Tariff Act of 1930, as amended, requires Commerce to figure out the product's "normal value," 19 U.S.C. § 1677b(a)—the home market price, *see Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1334 n.6 (CIT 2020)—and then compare that figure to the "export price or constructed export price" at which the product is sold to the importer, *see id.* at 1334 n.34 (explaining "export price" and "constructed export price"). The Act further directs the Department to adjust the normal value of such goods by the amount of "any difference" between that figure and the export price that "is established to the satisfaction" of the agency "to be wholly or partly due to . . . differences in the circumstances of sale." *Id.* § 1677b(a)(6)(C)(iii).

As described above, Sahamitr sought such an adjustment for costs associated with obtaining the requisite safety certifications for its propane cylinders. The Department requires that expenses be reported on a transaction-specific basis except when doing so "is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions." 19 C.F.R. § 351.401(g)(1). When a respondent uses an allocated, rather than transaction-specific, method, that party has the burden of showing that the "allocation is calculated on as specific a basis as is feasible" and "explain[ing] why the allocation methodology used does not cause inaccuracies or distortions." *Id.* § 351.401(g)(2).

Sahamitr and Worldwide argue that the former's recalculation of its certification expenses (performed at Commerce's request) was as specific as feasible given the company's records. *See* ECF 29-1, at 10–11; ECF 30-1, at 4–5; *see also* 19 C.F.R. § 351.401(g)(3) (requiring the Department to evaluate the feasibility of transaction-specific reporting based on the "records maintained by the party in question in the ordinary course of its business"). They also contend that the company's recalculation of its expenses was more specific than the period-of-review-wide recalculation Commerce adopted, and that the agency violated 19 C.F.R. § 351.401(g)(1)–(2) by choosing a less-specific calculation methodology. ECF 29-1, at 10–11; ECF 30-1, at 4–5.[2]

[2] In its reply brief, Sahamitr argues for the first time that it was unreasonable for the Department to reject the company's initial expense calculation for this review as insufficiently specific when the agency previously accepted an identical methodology in its original investigation. ECF 58,at 5–6, 9–10. The court declines to entertain this new argument.

Sahamitr and Worldwide misapprehend the regulation, which requires the "*party* seeking to report an expense . . . on an allocated basis" to do so "on as specific a basis as is feasible." 19 C.F.R. § 351.401(g)(2) (emphasis added). Commerce, on the other hand, "is not required to accept [expense] adjustments on an allocated basis." *NSK Ltd. v. United States*, 510 F.3d 1375, 1382 (Fed. Cir. 2007) (citing 19 C.F.R. § 351.401(g)(1)). Instead, as the "master of antidumping law," the Department has wide discretion to "select[] and develop[] proper methodologies." *Thai Pine apple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) (quoting *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993)).

Here, the Department exercised that discretion by selecting an allocation method that provided Sahamitr the opportunity to obtain a price adjustment for certification expenses, while avoiding the distortions reflected in the company's recalculation. *See* Appx1324 (explaining that Sahamitr's recomputation "continues to fail to account for months in which certification expenses are overreported (*e.g.*, the revised method continues to allocate multiple months of expenses to a single month)").

That brings us to the elephant in the courtroom that neither Sahamitr's nor Worldwide's opening brief directly confronts—Commerce's finding that the former's recalculated reporting *was* distorted because it resulted in months with zeroed-out certification expenses. Appx1025. That unchallenged determination is supported by substantial evidence. As the record shows, there were significant fluctuations in Sahamitr's recalculated expenses from month to month, including some months with zero expenses. *See* Appx5607. The Department therefore reasonably applied a methodology that allowed Sahamitr's export price to be properly adjusted, but which did not feature those distortions. Appx1323–1324.

The closest Sahamitr's opening brief comes to challenging the finding that the company's monthly-based calculation was distortive is the plaintive assertion that it's "unclear why [Sahamitr's] certification expenses—reported per the Department's instructions—were so unreasonably inaccurate that an alternate allocation methodology was warranted." ECF 29-1, at 11. Commerce, however, explained precisely *why* it found that calculation distortive: The "timing differences between when [Sahamitr] produces and sells cylinders and when it records the certification expenses associated with those sales . . . create monthly fluctuations in [the company's] reported certification[] expenses (*e.g.*, two months of expenses allocated to a single month and no fee expenses allocated to other months)." Appx1025.

Sahamitr fails to articulate how or why that determination is unreasonable or otherwise not supported by substantial evidence.

The company's more thorough reply brief argues that the finding that its monthly-based calculations were distortive, Appx1025, is unreasonable because fluctuations are inherent in such computations. ECF 58, at 6–7. Similarly, it maintains that the Department unreasonably rejected "an alternative allocation that [Sahamitr] proposed in its case brief to address the purported concerns about 'timing differences.' " *Id.* at 8. The company further contends that "the antidumping questionnaire itself **presumes** differences based on timing when it directs respondents to 'demonstrate that the allocation is calculated on as specific a basis as is feasible (e.g., on a customer-specific basis, product-specific basis, **and/or monthly-specific basis**, etc.).' " *Id.* at 8–9 (boldface Sahamitr's) (quoting Appx6027).

The court rejects these new arguments, not only because they're untimely, but also because they're wrong on the merits. The regulation expressly authorizes Commerce to disregard a respondent's *allocated* expense reporting, even if it is as specific as possible, if the Department concludes that it "cause[s] inaccuracies or distortions." 19 C.F.R. § 351.401(g)(1). Contrary to Sahamitr's specificity–über alles reading, specificity in allocated reporting under the regulation is merely a means to an end, not an end in itself.

* * *

The court denies the motions for judgment on the agency record and sustains Commerce's final determination. A separate judgment will issue. *See* USCIT R. 58(a).

Dated: May 2, 2024
New York, NY

/s/ M. Miller Baker
M. MILLER BAKER, JUDGE

Slip Op. 24–55

HYUNDAI STEEL COMPANY, Plaintiff, v. UNITED STATES, Defendant, and NUCOR CORPORATION, Defendant-Intervenor.

Before: Mark A. Barnett, Chief Judge
Court No. 22–00170

[Sustaining in part and remanding in part the U.S. Department of Commerce's Remand Results regarding the 2019 administrative review of the countervailing duty order on hot-rolled steel flat products from the Republic of Korea.]

Dated: May 2, 2024

Brady W. Mills, *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Jordan L. Fleischer*, *Nicholas C. Duffey*, and *Ryan R. Migeed*, Morris, Manning & Martin, LLP, of Washington, DC, for Plaintiff Hyundai Steel Company.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant United States. On the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Hendricks Valenzuela*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Alan H. Price, *Christopher B. Weld*, *Derick G. Holt*, and *Theodore P. Brackemyre*, Wiley Rein LLP, of Washington, DC, for Defendant-Intervenor Nucor Corporation.

OPINION AND ORDER

Barnett, Chief Judge:

This matter is before the court following the U.S. Department of Commerce's ("Commerce" or "the agency") redetermination upon remand. Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), ECF No. 54-1. Plaintiff, Hyundai Steel Company ("Hyundai Steel"), commenced this action challenging Commerce's decision to countervail the Government of the Republic of Korea's ("Government of Korea" or "GOK") emissions trading program in the final results of the 2019 administrative review of the countervailing duty order on hot-rolled steel flat products from the Republic of Korea ("Korea").[1] Confid. Pl. Hyundai Steel Co.'s Mot. for J. on the Agency R., ECF No. 25; *see also Certain Hot-Rolled Steel Flat Prods. From the Republic of Korea*, 87 Fed. Reg. 27,570 (Dep't Commerce May 9, 2022) (final results of countervailing duty admin. review; 2019) ("*Final Results*"), ECF No. 20-4; and accompanying Issues and Decision Mem., C-580-884 (May 3, 2022) ("I&D Mem."), ECF No.

[1] A countervailable subsidy "exists when . . . a foreign government provides a financial contribution . . . to a specific industry" that confers "a benefit" to "a recipient within the industry." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014) (citing 19 U.S.C. § 1677(5)(B)).

20-5.[2] In *Hyundai Steel Co. v. United States* (*Hyundai Steel I*), 47 CIT __, 659 F. Supp. 3d 1327 (2023),[3] and as discussed in more detail below, the court remanded Commerce's financial contribution, benefit, and specificity findings. On remand, Commerce reconsidered those findings while continuing to countervail Korea's emissions trading program. Remand Results at 6–20, 28–36.

Hyundai Steel now challenges Commerce's Remand Results. Pl. Hyundai Steel Co.'s Cmts. on Commerce's Final Results Pursuant to Ct. Remand ("Pl.'s Cmts."), ECF No. 56. Defendant United States ("the Government") and Defendant-Intervenor Nucor Corporation ("Nucor") filed comments in support of Commerce's Remand Results. Def.'s Cmts. in Supp. of Remand Redetermination ("Def.'s Cmts."), ECF No. 58; Def.-Int.'s Cmts. in Supp. of the Final Results of Redetermination Pursuant to Ct. Remand ("Nucor's Cmts."), ECF No. 57. For the following reasons, the court sustains Commerce's financial contribution and benefit determinations and remands Commerce's specificity determination.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2018),[4] and 28 U.S.C. § 1581(c). The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

This case involves the Emissions Trading System of Korea ("K-ETS"), a program established by the GOK to reduce greenhouse gas ("GHG") emissions. *See Hyundai Steel I*, 659 F. Supp. 3d at 1330. The rules governing the K-ETS are contained in the Act on the Allocation and Trading of Greenhouse Gas Emissions Permits ("AAGEP") and its accompanying Enforcement Decree. *Id.*[5]

---

[2] The administrative record for the Remand Results is contained in a Public Remand Record ("PRR"), ECF No. 55-2. The administrative record accompanying the *Final Results* consists of a Public Administrative Record ("PR"), ECF No. 20-1, and a Confidential Administrative Record ("CR"), ECF No. 20-2. Hyundai Steel submitted joint appendices containing record documents cited in parties' remand comments. Confid. Remand J.A. ("CRJA"), ECF No. 59; Public Remand J.A., ECF No. 60. The court references the confidential record documents unless otherwise specified.

[3] *Hyundai Steel I* provides background information, familiarity with which is presumed.

[4] Citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code. All references to the U.S. Code are to the 2018 edition unless otherwise specified.

[5] For the AAGEP and the Enforcement Decree, see GOK's Carbon Emissions New Subsidy Allegation Questionnaire Resp. (May 17, 2021) ("GOK's Questionnaire Resp."), Ex. CEP-1, CR 77, PR 76, CRJA Tab 2.

Relevant to the issues addressed herein, for companies subject to the K-ETS, the GOK uses baseline emissions data from 2014 through 2016 to determine the number of emissions permits (also referred to as Korean Allowance Units, or "KAUs") to allocate each company for a given compliance year. *Id.* For 2019, the GOK provided all subject companies with a gratuitous allocation of 97 percent of their allotted permits ("the standard allocation"). *Id.* at 1330–31. The GOK also provided companies within subsectors meeting certain "international trade intensity" or "production cost" criteria with 100 percent of their permits ("the full allocation"). *Id.* at 1331. "International trade intensity measures exports plus imports against sales plus imports for the period of 2013 through 2015; production costs are measured as the cost of compliance (emissions multiplied by the market price of permits) measured against the value added during the period of 2013 through 2015." *Id.* Specifically, subsectors that can demonstrate either "an international trade intensity of at least 30 percent," "production costs of at least 30 percent," or "an international trade intensity of at least 10 percent and production costs of at least 5 percent" are eligible for the full allocation. *Id.* at 1331 n.10 (quoting I&D Mem. at 23).

At the end of each annual compliance year, subject companies "must surrender permits in an amount equal to their emissions during that compliance year or incur penalties for any shortfall." *Id.* at 1331. To avoid a penalty, companies may

> 1) carry forward unused permits from prior years, 2) borrow permits from future years, 3) earn credits by reducing greenhouse gas emissions through external projects (carbon offset programs), 4) purchase permits from nongovernmental parties either directly or through a trading exchange, or 5) purchase permits through a government-run auction.

Id.

For the *Final Results*, Commerce found that the additional three percent of KAUs ("the additional allocation") provided to recipients of the full allocation, such as Hyundai Steel, constitutes a countervailable subsidy. I&D Mem. at 17. The court remanded Commerce's determination. Commerce's Remand Results reflect the agency's reconsideration of those findings. The court addresses each element of a countervailable subsidy, Commerce's findings thereto, and Hyundai Steel's challenges to those findings, in turn.

I. Financial Contribution

Section 1677(5) defines a financial contribution to include, *inter alia*, "(i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees," or "(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income." 19 U.S.C. § 1677(5)(D)(i)–(ii).

For the *Final Results*, Commerce concluded that the additional allocation represents a financial contribution pursuant to 19 U.S.C. § 1677(5)(D)(ii) in the form of revenue forgone that would otherwise have been due. I&D Mem. at 20. Commerce based its decision on the rationale that "in lieu of giving these entities the additional KAUs for free, the GOK would have retained the ability to collect the three percent allocation from Hyundai Steel." *Id.* at 22.

The court first found that the requirement for an authority to forgo or not collect "revenue that is otherwise due" for purposes of 19 U.S.C. § 1677(5)(D)(ii) was not met when the authority forgoes "revenue that could, but not necessarily would, have otherwise been collected." *Hyundai Steel I*, 659 F. Supp. 3d at 1334. The court also found, "as a factual matter," that the additional allocation pursuant to the K-ETS "does not meet the plain language of the revenue forgone provision" because "the value embodied by those permits does not represent revenue that, but for the permits being given to Hyundai Steel gratis," would otherwise be due to the Government of Korea. *Id.* at 1336–37. That is because "[c]ompanies that receive the standard allocation might not incur any permit shortfall" and "if they do, [those companies] have various options to remedy the shortfall besides sending payment to the GOK." *Id.* at 1337. As such, the court found, companies "that receive the standard allocation do not automatically incur any enforceable debt or financial obligation that recipients of the full allocation avoid by reason of the additional allocation, all other things being equal." *Id.*

On remand, Commerce concluded that by virtue of the additional allocation, the Government of Korea "provides a financial contribution in the form of a direct transfer of funds, within the meaning of [19

U.S.C. § 1677(5)(D)(i)].” Remand Results at 6.[6] While recognizing that the additional KAUs “may not be a *traditional* transfer of ‘funds,’” Commerce rested its decision on “the fungibility and marketable nature of the KAUs.” *Id.* at 9–10. Commerce explained that emissions permits are “*akin* to a stock” because “they are tradable on private markets and can be transferred among private parties via contract.” *Id.* at 10. The agency analogized the additional allocation to its treatment of renewable energy credits (“RECs”) as a direct transfer of funds. *Id.* at 10–11 (discussing Forged Steel Fluid End Blocks From India, C-533-894 (Dec. 7, 2020) (“FEBs From India Mem.”) at Cmt. 8, and Granular Polytetrafluoroethylene Resin from India, C-533-900 (Jan. 18, 2022) (“PTFE From India Mem.”) at Cmt. 7, 87 ITADOC 3765).[7]

Hyundai Steel contends that although the statutory examples are not exhaustive, the additional allocation is not comparable to those examples and is not a transfer of funds. Pl.’s Cmts. at 2–4. The types of financial contributions listed in the statute, however, represent “broad” and “generic categories of government practices” and the examples that “fall[] under each of the categories are not intended to

[6] Commerce reconsidered the basis for its financial contribution determination “under respectful protest.” Remand Results at 2 & n.4 (citing *Viraj Group Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003)). Despite this reconsidered basis for finding a financial contribution, Commerce averred that it “continues to develop its theory of financial contribution in the examination of this, and other similar, schemes,” *id.* at 9, and expressed its concern with what it considers to be an “unduly restrict[ive]” interpretation of the revenue forgone provision, *id.* at 6–7. Commerce offered an interpretation of the revenue forgone provision that relies on “statutory implementation,” i.e., how the provision might be “applied in agency determinations, past or future,” and opined that, “as a matter of policy,” interpreting the phrase “is otherwise due” should include consideration of the specific “tax or other legal regime” at issue. *Id.* at 7–8. Commerce’s interpretation boils down to the assertion that in the closed universe of emissions permits, some payment “would have been otherwise due by some company, at some point” to the GOK. *Id.* at 9. Insofar as Commerce agrees with the court’s holding that the plain meaning of the revenue forgone provision requires the identification of revenue that *would*, not merely *could*, have been otherwise owed to the authority, Commerce fails to substantiate the scarcity premise underlying its assertion: that “but for the full allocation, additional private purchases by companies otherwise eligible for the full allocation would *require* other[] companies to purchase permits from the GOK to avoid a penalty or that other sources of permits (including those earned through offset projects) would be exhausted.” *Hyundai Steel I*, 659 F. Supp. 3d at 1337 n.24 (rejecting Nucor’s similar argument as lacking record evidence). Commerce also does not address whether the statute permits the agency to consider revenue that might ultimately be sent from a third party to the authority to fulfill the revenue forgone provision given that “[i]n order to conclude that a ‘person’ received a subsidy, Commerce must determine that a government provided *that person* with both a ‘financial contribution’ . . . and a ‘benefit.’” *Delverde, SrL v. United States*, 202 F.3d 1360, 1365 (Fed. Cir. 2000) (emphasis added). However, because Commerce did not rely on this explanation, the court need not further consider these issues.

[7] Many of Commerce’s decision memoranda are publicly available at https://access.trade.gov/public/FRNoticesListLayout.aspx, with separate links for pre- and post-June 2021 memoranda. For the PTFE From India Memorandum, the court includes an additional citation to an online legal database since that memorandum is not readily available at the aforementioned link.

be exhaustive." Uruguay Round Agreements Act ("URAA"), Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–316, vol. 1, at 927 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4240.[8] Instead, "determinations with respect to particular programs will have to be made on a case-by-case basis." *Id.* Commerce found the additional allocation to be sufficiently similar to the examples based on the fungible and marketable nature of the permits. Remand Results at 9. Hyundai Steel points to no evidence to undermine that finding.

With respect to the specific examples enumerated in the statute, Hyundai Steel argues that the KAUs are not like loan guarantees or grants. Pl.'s Cmts. at 3. These arguments also fail.

Commerce did not base its determination on similarities between the KAUs and loan guarantees. Instead, when addressing Hyundai Steel's argument that the transfer of funds "must necessarily relate to the transfer of money itself," Commerce noted that the statutory provision allows for the "potential direct transfer of funds or liabilities, such as loan guarantees," where guarantees "do not . . . constitute money." Remand Results at 29. Commerce observed that loan guarantees and KAUs are, however, similar to the extent that they each impact a company's financial bottom line. *See id.* at 29–30.[9]

Hyundai Steel also asserts that the additional allocation is not like a grant because it is not a "gift-like transfer." Pl.'s Cmts. at 3 (citing *Gov't of Sri Lanka v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1373, 1383 (2018) ("*GOSL*") (defining "grant")). Commerce addressed this argument when it explained that grants "are [not] limited to 'gifts' bestowed without consideration," and, moreover, that "a subsidy need not be a 'grant' to be considered a financial contribution in the form of a direct transfer of funds." Remand Results at 29. Additionally, the case on which Hyundai Steel relies does not require a different outcome. The *GOSL* court stated that "[g]rant" may "ordinarily" be defined as "something granted; esp: a gift (as of land or a sum of money) usu. for a particular purpose . . . 3a: a transfer of real or personal property by deed or writing." 308 F. Supp. 3d at 1383 (ellipsis in original) (quoting *Grant* (Noun), Webster's Third New Int'l Dictionary (unabridged 1981)). The *GOSL* court relied on that definition to conclude that the "payments" at issue in that case "did not constitute a gift-like transfer" but instead represented "the interest-

---

[8] The SAA is the authoritative interpretation of the statute. 19 U.S.C. § 3512(d).

[9] For loan guarantees, "a benefit exists to the extent that the total amount a firm pays for the loan with the government-provided guarantee is less than the total amount the firm would pay for a comparable commercial loan that the firm could actually obtain on the market absent the government-provided guarantee, including any difference in guarantee fees." 19 C.F.R. § 351.506(a)(1). In addition to the loan guarantee fee, the "total amount" includes "the effective interest paid on the loan." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,370 (Dep't Commerce Nov. 25, 1998) (final rule) ("*CVD Preamble*").

free repayment of a debt." *Id.* Here, however, "Hyundai Steel *was actually provided* the additional KAU allocation at no cost and without any exchange for consideration." Def.'s Cmts. at 5. Hyundai Steel attempts to obfuscate this point by asserting that "[t]he KAU allocation is not a gift-like transfer, but instead takes the total amount of carbon emissions permitted for Korea and allocates the permitted emission amounts to participants." Pl.'s Cmts. at 3. That attempt fails, however, because the additional allocation may reasonably be characterized as part of a system of allocating emissions permits *and* something of monetary value that Hyundai Steel was granted for the purpose of meeting their annual compliance requirements.[10]

Hyundai Steel next contends that the permits are not "akin to a stock." *Id.* Commerce addressed this point as well, stating that Hyundai Steel misrepresents Commerce's analogy. Remand Results at 30. Commerce stated that "KAUs constitute an instrument of monetary value, *akin* to a stock; they are tradable on private markets and can be transferred among private parties via contract." *Id.* at 10. Commerce further explained that it "used stocks as an example of a monetary instrument that represents an underlying value." *Id.* at 30.[11] Hyundai Steel merely reprises the argument it presented to the

[10] Hyundai Steel also relies on *GOSL* to support the proposition that Commerce's determination "ignores the overall context in which [the KAUs] are provided." Pl.'s Cmts. at 5 (citing *GOSL*, 308 F. Supp. 3d at 1380). The court has previously addressed, and rejected, Hyundai Steel's reliance on *GOSL* for that proposition. *See Hyundai Steel I*, 659 F. Supp. 3d at 1339–40. Hyundai Steel offers no new arguments requiring the court to revisit that analysis.

[11] Commerce refers to KAUs as "instrument[s] of monetary value," Remand Results at 10, and as "monetary instrument[s] with an underlying value," *id.* at 32. In one subchapter, the U.S. code defines "monetary instruments" as

> (A) United States coins and currency; (B) as the Secretary may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material; (C) as the Secretary of the Treasury shall provide by regulation for purposes of sections 5316 and 5331, checks, drafts, notes, money orders, and other similar instruments which are drawn on or by a foreign financial institution and are not in bearer form; and (D) as the Secretary shall provide by regulation, value that substitutes for any monetary instrument described in subparagraph (A), (B), or (C).

31 U.S.C. § 5312(a)(3). The court understands Commerce not to have meant that the KAUs functioned as monetary instruments within the meaning of 31 U.S.C. § 5312(a)(3), but rather that their value and transferability meant that they share similarities to monetary instruments. *Compare* Remand Results at 10 (referring to KAUs as "market instruments"), *with id.* at 9–10 (referring to KAUs as analogous to traditional transfers of funds), *and id.* at 32 (considering KAUs "akin to money").

agency without addressing the agency's reasons for dismissing that argument or pointing to evidence the agency failed to consider.[12]

Lastly, Hyundai Steel contends that subsidy programs involving RECs are distinct from the K-ETS. Pl.'s Cmts. at 4–5. In *FEBs From India*, Commerce found that the RECs "constitute[d] a financial contribution in the form of a direct transfer of funds" because "private entities [were] willing to compensate [the respondent] for RECs" such that the "RECs ha[d] monetary value." FEBs From India Mem. at 17. Commerce reached the same conclusion in *PTFE From India*. *See* PTFE From India Mem. at 27.[13]

In the Remand Results, Commerce acknowledged certain distinctions in the facts underlying these determinations, explaining that, "in the Indian context, the question focused on the treatment of earned credits, rather than the value of credits provided gratuitously." Remand Results at 10. Nevertheless, Commerce found these determinations analogous insofar as "the respective governments were providing instruments of monetary value to respondent companies." *Id.* at 11. Hyundai Steel challenges this finding on the basis that "the sole purpose" of the RECs "was for sale in the market to generate funds for the recipient." Pl.'s Cmts. at 5. However, as Commerce found, for purposes of finding a financial contribution, the additional permits "are market instruments with prices established for the purpose of trading KAUs both through the GOK-run auction and in private trading markets." Remand Results at 10 (citation omitted). Commerce thus adequately explained its reliance on the REC determinations.

In sum, Commerce's financial contribution determination is supported by substantial evidence and is otherwise in accordance with the law. Accordingly, it will be sustained.

II. Benefit

"A benefit shall normally be treated as conferred where there is a benefit to the recipient." 19 U.S.C. § 1677(5)(E). As a practical matter, the statute provides rules to guide Commerce's benefit determination in the case of an equity infusion, loan, loan guarantee, or the provi-

[12] Hyundai Steel also seeks to rely on a dictionary definition of "funds" as "an amount of money saved or made available for a particular purpose." Pl.'s Cmts. at 4 (quoting *Funds*, Oxford Learner's Dictionary, https://www.oxfordlearnersdictionaries.com/us/definition/english/fund_1?q=funds). Hyundai Steel fails to develop any argument that this definition is relevant to understanding the meaning of "funds" for purposes of section 1677(5A)(D)(i) in light of the broader examples listed in the statute.

[13] While Commerce's final determination in *PTFE From India* was contested before the U.S. Court of International Trade, no party challenged Commerce's financial contribution determination. *See Gujarat Fluorochemicals Ltd. v. United States*, 47 CIT __, 617 F. Supp. 3d 1328 (2023).

sion of a good or service, but these examples are not exhaustive. *See id.* § 1677(5)(E)(i)–(iv). Commerce's regulations also guide the agency's identification and measurement of a benefit. *See* 19 C.F.R. §§ 351.503–351.520. For subsidy programs not specifically covered by Commerce's regulations, Commerce "normally will consider a benefit to be conferred where a firm pays less for its inputs (*e.g.*, money, a good, or a service) than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn." *Id.* § 351.503(b)(1). When subsection (b)(1) does not apply, Commerce "will determine whether a benefit is conferred by examining whether the alleged program or practice has common or similar elements to the four illustrative examples in [19 U.S.C. § 1677(5)(E)(i)–(iv)]." *Id.* § 351.503(b)(2).

For the *Final Results*, Commerce found a benefit pursuant to 19 C.F.R. § 351.503(b)(2) and rejected Hyundai Steel's argument that the agency should account for the burdens imposed by the K-ETS when considering this element of a subsidy. I&D Mem. at 20. While the court disagreed with "Hyundai Steel's primary claim that Commerce impermissibly ignored the burdens imposed by the K-ETS program," the court stated that Commerce may reconsider its benefit finding, as necessary, consistent with the agency's reconsideration of its financial contribution determination. *Hyundai Steel I*, 659 F. Supp. 3d at 1338–39.

On remand, Commerce grounded its benefit determination in 19 C.F.R. § 351.503(b)(1) on the basis that "the GOK charged certain entities no cost for an additional KAU allocation that has a market value." Remand Results at 12 (footnote omitted). In response to Hyundai Steel's argument that the additional allocation "does not result in Hyundai Steel . . . receiving more revenue tha[n] it otherwise would earn," *id.* at 32 & n.105 (ellipsis in original) (quoting Cmts. on Draft Results of Redetermination Pursuant to Ct. Remand (Dec. 19, 2023) at 7, PRR 2, CRJA Tab 6), Commerce stated that "Hyundai Steel receives KAUs that relieve the company from additional purchases of necessary KAUs, they can be transferred or sold, and the company receives an allotment in excess of that received by other participating companies, through the preferential 100 percent allocation," *id.* at 32.[14] Commerce calculated the benefit using a "benchmark from the quantity and value of the private market purchases

[14] Commerce also noted that because the additional allocation "is analogous to a traditional grant," Commerce's benefit determination is "potentially subject to" 19 C.F.R. § 351.504(a) and, thus, Commerce may "conduct a similar analysis" by "determining the 'amount of the grant.'" Remand Results at 12–13. Section 351.504(a) states that, "[i]n the case of a grant, a benefit exists in the amount of the grant."

reported by Hyundai Steel for compliance year 2019 and then multiplied the number of [the additional three percent of the] KAUs by the calculated benchmark." *Id.* at 12 (alteration in original) (citation omitted).[15]

Hyundai Steel contends that the additional allocation "does not result in Hyundai Steel paying less for its inputs . . . or receiving more revenue than it otherwise would earn." Pl.'s Cmts. at 6. Insofar as 19 C.F.R. § 351.503(b)(1) posits two ways in which a benefit may be conferred, the court addresses each in turn.

With respect to Commerce's finding that Hyundai Steel paid less for its inputs by virtue of receiving the additional allocation as compared to entities that received the standard allocation, Hyundai Steel contends that "KAUs are '*emissions* permitted and allocated,'—a production output, not 'input,'" such that Commerce's treatment of KAUs as inputs "is inconsistent with the plain language of its regulations." Pl.'s Cmts. at 6 (citation omitted). In so arguing, Hyundai Steel conflates its actual GHG emissions with the emissions permits the GOK allocates to the company.

Hyundai Steel also seeks to rely on a narrow definition of "input" as "something that is put in." *Id.* (quoting *Input*, Merriam-Webster, https://www.merriam-webster.com/ dictionary/input). The regulation, however, sweeps more broadly, providing "money, a good, or a service" as examples of inputs as to which a benefit may be conferred. 19 C.F.R. § 351.503(b)(1). Commerce has explained that

> when [it] talk[s] about input costs in the context of the definition of benefit, [it is] not referring to cost of production in a strict accounting sense. Nor [is it] referring exclusively to inputs into subject merchandise. Instead, [the agency] intend[s] the term "input" to extend broadly to *any input into a firm* that produces subject merchandise.

CVD Preamble, 63 Fed. Reg. at 65,360 (emphasis added). For example, programs that are similar to either an "equity infusion" that reduces "a firm's cost of capital" or a "freight forwarding service" may confer benefits in the form of input cost reductions. *Id.*

Here, the record shows that Hyundai Steel exceeded its allocated KAUs. Hyundai Steel's Carbon Emissions New Subsidy Allegation Questionnaire Resp. (May 17, 2021) ("NSA Resp.") at 4, CR 74–75, PR 75, CRJA Tab 1. Hyundai Steel thus purchased additional permits and borrowed against its 2020 allocation to meet its 2019 compliance

[15] Commerce attributes this quotation to the Issues and Decision Memorandum. *See* Remand Results at 12 & n.48. However, the quoted passage does not appear in that memorandum and, thus, the citation appears to constitute a typographical error.

requirements. *Id.*[16] The additional allocation meant, however, that Hyundai Steel had to purchase fewer KAUs than it otherwise would have. As such, Commerce was within its discretion to find that KAUs with an ascertainable market value, as well as a value to Hyundai Steel as instruments that account for its greenhouse gas emissions by virtue of the AAGEP, fall within the regulation's ambit. Remand Results at 32.

Hyundai Steel's additional argument that KAUs are not like money, Pl.'s Cmts. at 7, is also unpersuasive. Hyundai Steel does not rebut Commerce's finding that the emissions permits have monetary value. Instead, Hyundai Steel argues that companies that receive the full allocation "simply have a higher cap [on emissions] than companies receiving [the standard allocation]." *Id.*[17] Again, Hyundai Steel misses the point that both things can be true.

As to the latter clause of the 19 C.F.R. § 351.503(b)(1), Hyundai Steel contends that "Commerce did not determine with substantial evidence that Hyundai Steel received more revenue than it would otherwise earn." *Id.* Commerce responded to Hyundai Steel's similar argument on remand, stating that the argument lacked clarity. *See* Remand Results at 32. The agency also noted that "Hyundai Steel receives KAUs that relieve the company from additional purchases of necessary KAUs, they can be transferred or sold, and the company receives an allotment in excess of that received by other participating companies, through the preferential 100 percent allocation." *Id.*

It may simply be the case that, with respect to KAUs, the additional allocation may result in either an input cost reduction or, in some circumstances, enhanced revenue. Because substantial evidence supports Commerce's finding of a benefit based on the fact that the

[16] Hyundai Steel's argument that the court should order Commerce to instead "calculate the benefit based on the value of the KAUs actually sold by Hyundai Steel in the review period," of which there were none, is misplaced. Pl.'s Cmts. at 8 (referencing 19 C.F.R. § 351.504(a) and the REC determinations and averring that any benefit arises when a company "sells any excess KAUs"). Hyundai Steel did not present this argument to Commerce, and this failure to exhaust administrative remedies generally precludes judicial review. *See, e.g.*, 28 U.S.C. § 2637(d); *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007); *see also* Def.'s Cmts. at 8 (arguing failure to exhaust). In any event, Hyundai Steel overlooks that Commerce permissibly based its determination on financial relief from KAU purchases. *See* Remand Results at 32. That Commerce relied on 19 C.F.R. § 351.504(a) to determine benefit in the REC determinations, *see id.* at 13, does not undermine Commerce's decision here to rely on 19 C.F.R. § 351.503(b)(1) and the value of the KAUs purchased to calculate Hyundai Steel's benefit. Commerce's use of 19 C.F.R. § 351.503(b)(1) to identify and measure the benefit instead of 19 C.F.R. § 351.504(a) simply reflects that KAUs are not *actual* money and that 19 C.F.R. § 351.503(b)(1) represents the most direct way to capture the value of the additional allocation in an analogous fashion.

[17] Notwithstanding Hyundai Steel's argument, the K-ETS system does not cap Hyundai Steel's emissions as illustrated by the fact that in 2019, Hyundai Steel's emissions exceeded its full allocation, such that the company purchased additional KAUs and borrowed against its 2020 allocation. NSA Resp. at 4.

additional allocation relieved Hyundai Steel from purchasing more permits than it otherwise would have, the court need not address whether the enhanced revenue provision constitutes an additional basis for sustaining Commerce's benefit determination.[18] Commerce's benefit determination will be sustained.

III. Specificity

Domestic subsidies[19] may be specific as a matter of law (*de jure* specific) or as a matter of fact (*de facto* specific). 19 U.S.C. § 1677(5A)(D). The statute provides "guidelines" for Commerce's specificity determination. *Id.* In particular, the statute states that a "subsidy is specific as a matter of law" when "the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry." *Id.* § 1677(5A)(D)(i).[20] Pursuant to subsection (ii), a subsidy is not *de jure* specific when "the authority providing the subsidy, or the legislation pursuant to which the authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy." *Id.* § 1677(5A)(D)(ii).[21] "[T]he term 'objective criteria or conditions' means criteria or conditions that are neutral and that do not favor one enterprise or industry over another." *Id.* § 1677(5A)(D). "Neutral in this context means 'economic in nature and horizontal in application, such as the number of employees or the size of the enterprise.'" *BGH Edelstahl Siegen GmbH v. United States* (*BGH II)*, 47 CIT __, __, 639 F. Supp. 3d 1237, 1243 (2023) (quoting SAA at 930, reprinted in 1994 U.S.C.C.A.N. at 4243).

A subsidy is *de facto* specific when "one or more" statutory factors exist:

[18] Hyundai Steel also reprises the argument that it did not receive any benefit because the K-ETS "limit[s] its production and increase[s] its costs, regardless of the relative allocation percentage." Pl.'s Cmts. at 8. The court previously "consider[ed]—and reject[ed]—Hyundai Steel's primary claim that Commerce impermissibly ignored the burdens imposed by the K-ETS program" when ascertaining the existence of a benefit and does so again here for the same reasons. *Hyundai Steel I*, 659 F. Supp. 3d at 1339.

[19] In addition to domestic subsidies, the statute defines import substitution subsidies and export subsidies as *per se* specific, neither of which are relevant here. 19 U.S.C. § 1677(5A)(B),(C).

[20] For purposes of subsection (5A), "any reference to an enterprise or industry is a reference to a foreign enterprise or foreign industry and includes a group of such enterprises or industries." *Id.* § 1677(5A).

[21] For a subsidy to be non-specific based on objective criteria or conditions, subsection (ii) further requires that "(I) eligibility is automatic, (II) the criteria or conditions for eligibility are strictly followed, and (III) the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification." *Id.* § 1677(5A)(D)(ii). These requirements are not at issue here.

> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number. (II) An enterprise or industry is a predominant user of the subsidy. (III) An enterprise or industry receives a disproportionately large amount of the subsidy. (IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

19 U.S.C. § 1677(5A)(D)(iii).[22] Subsections (i), (ii), and (iii) reflect Commerce's practice at the time of enactment. *See* SAA at 930–31, reprinted in 1994 U.S.C.C.A.N. at 4243.

For the *Final Results*, Commerce concluded that the K-ETS is *de jure* specific because the AAGEP and the Enforcement Decree "establish criteria" that "result in an express statutory limitation on which industries qualify for the additional allocation by setting thresholds that industries must meet." I&D Mem. at 23. Commerce further found that the enumerated criteria are "not objective" for purposes of 19 U.S.C. § 1677(5A)(D)(ii). *Id.*

The court found that Commerce had "not offer[ed] a convincing explanation for why the 'international trade intensity' or 'production cost' criteria governing the additional allocation establish *de jure* specificity." *Hyundai Steel I*, 659 F. Supp. 3d at 1342. Instead, the court explained, Commerce had "relied on the existence of the criteria *per se* to establish specificity" pursuant to 19 U.S.C. § 1677(5A)(D)(i) instead of making the findings necessary to establish "an explicit limitation *to an enterprise or industry* or group thereof." *Id.*[23] Commerce also failed to support its determination that the AAGEP and its implementing rules are not objective pursuant to 19 U.S.C. § 1677(5A)(D)(ii) with analysis or citations to the record. *See id.*

On remand, Commerce provided further explanation for its determination that the additional allocation is *de jure* specific. Remand Results at 13. Commerce first framed the question as "whether [the] eligibility criteria are neutral and do not favor a set of subsectors over others." *Id.* at 14. So framed, Commerce answered that question in

---

[22] Subsection (iv) states that "[w]here a subsidy is limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy, the subsidy is specific," and is not relevant here. *Id.* § 1677(5A)(D)(iv).

[23] The court has interpreted subsection (i) to require that "the authority providing the subsidy, or its operating legislation, directly, firmly, or explicitly assigns limits to or restricts the bounds of a particular subsidy to a given enterprise or industry." *Hyundai Steel I*, 659 F. Supp. 3d at 1342 (quoting *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, 45 CIT __, __, 523 F. Supp. 3d 1393, 1403 (2021)).

the negative. *Id.* at 14–15. Commerce explained that the "international trade intensity" and "production cost" criteria "are not horizontal in application" because they favor subsectors that are GHG-intensive or "more dependent on international markets for sales and/or sourcing." *Id.* at 15. According to Commerce, the criteria are "characteristic of certain types of subsectors" and not objective in the sense that they would "apply to subsectors across an economy." *Id.*

Commerce also examined the subsectors that the GOK found to be eligible for the full allocation. Commerce found that 37 of 63 total subsectors qualified for the full allocation, and "the vast majority are included because they satisfy the trade intensity criteria." *Id.* at 16. Commerce contrasted the "internationally-oriented manufacturing subsectors" that qualified for the full allocation with the "broader spectrum of manufacturing groups" that qualified for the standard allocation. *Id.* at 16; *see also id.* at 17 (referencing the "similar types" of subsectors eligible for the full allocation and explaining that the result is consistent with the GOK's intent in ensuring that K-ETS participants are not disadvantaged vis-à-vis competitors that are not subject to cap-andtrade programs). Commerce also pointed to the GOK's determination of the qualifying subsectors as evidence of an express limitation on access to the subsidy pursuant to section 1677(5A)(D)(i). *Id.* at 18, 33–34. On that basis the agency analogized the KETS to the European Union Emissions Trading Scheme ("EU ETS") at issue in *BGH Edelstahl Siegen GmbH v. United States* (*BGH I*), 46 CIT __, __, 600 F. Supp. 3d 1241, 1264 (2022), in which the court sustained Commerce's *de jure* specificity finding. *See* Remand Results at 18–19.

Hyundai Steel's first challenge to Commerce's determination presents an issue of statutory interpretation: Hyundai Steel contends that the statute required Commerce to establish *de jure* specificity pursuant to section 1677(5A)(D)(i) *before* assessing whether section 1677(5A)(D)(ii) applied. Pl.'s Cmts. at 9–10. In other words, according to Hyundai Steel, a subsidy that is specific pursuant to subsection (i) may ultimately be found non-specific pursuant to subsection (ii). The Government does not directly address Commerce's application of the statutory provisions. Nucor contends that Commerce correctly found that the full allocation is *de jure* specific pursuant to subsection (i) and, separately, that the requirements of subsection (ii) were not met. Nucor's Cmts. at 9.

It cannot be the case, as Hyundai Steel contends, that Commerce must reach an affirmative determination pursuant to subsection (i)

before turning to subsection (ii).[24] A subsidy bestowed pursuant to legislation that expressly limits access to an enterprise or industry clearly favors that enterprise or industry and, thus, cannot be rooted in objective criteria. Analyzing the requirements of subsection (ii) would be superfluous in such instances. *See United States v. Nordic Village Inc.*, 503 U.S. 30, 36 (1992) ("[S]tatute[s] must, if possible, be construed in such a fashion that every word has some operative effect."). Hyundai Steel fails to address this shortcoming in its interpretive approach. Accordingly, the court disagrees with Hyundai Steel that Commerce erred in considering the requirements of subsection (ii) without first reaching an affirmative determination pursuant to subsection (i).

The court next considers the reasons put forth by Commerce to justify its determination. Commerce found that the trade intensity and production cost criteria "are not horizontal in application" because the "favored subsectors, by their nature, have more GHG-intensive (i.e., heavy polluting) production processes" or "are more dependent on international markets for sales and/or sourcing." Remand Results at 15.[25] As such, Commerce found that the criteria "are characteristic of certain types of subsectors." *Id.* Hyundai Steel contends that Commerce disregards the possibility that "any sector could qualify if they meet the criteria." Pl.'s Cmts. at 12–13.

Commerce's rationale merely repackages the language of the criteria into a statement that certain subsectors are favored. *See* Remand Results at 15.[26] The court has rejected this reasoning: "Commerce's observation that 'some industries may benefit from the additional assistance in the form of the allocation of additional KAUs, while others do not,'" *Hyundai Steel I*, 659 F. Supp. 3d at 1342 (quoting I&D Mem. at 23), "merely reflects the truism that not all industries will 'qualif[y] under the criteria,'" *id.* (alteration in original) (quoting *BGH II*, 639 F. Supp. 3d at 1244). Even criteria recognized as objective

[24] Hyundai Steel relies, in part, on the court's prior holding. Pl.'s Cmts. at 9. The court found Commerce's prior explanation insufficient, however, insofar as Commerce appeared to find that the trade intensity and production cost criteria *per se* independently satisfied 19 U.S.C. § 1677(5)(D)(i). *Hyundai Steel I*, 659 F. Supp. 3d at 1342. The court remanded Commerce's determination pursuant to 19 U.S.C. § 1677(5)(D)(ii) because Commerce reached a legal conclusion without offering the requisite explanation for the court to understand the basis for those conclusions. *Id.* at 1342–43.

[25] Commerce bases its determination on the conclusion that the criteria are not horizontal in application. *See, e.g.*, Remand Results at 15. Commerce makes no finding that the criteria are not economic in nature and has therefore waived any such argument.

[26] Commerce points to the GOK's explanation that the trade intensity and production cost criteria are intended to aid K-ETS participants that are "disadvantaged from market competition" by their participation in the program. *Id.* at 17 & n.64 (quoting GOK's Questionnaire Resp. at 5). Be that as it may, this statement by the GOK does not demonstrate that the recipients of the additional allocation are limited by law to certain enterprises or industries within the Korean economy.

(such as the size or number of employees) "could exclude entire categories of enterprises and industries, but such criteria would not render the subsidy *de jure* specific because it is horizontal (operating throughout the economy)." *BGH Edelstahl Siegen GmbH v. United States* (*BGH III*), 47 CIT __, __, 663 F. Supp. 3d 1378, 1382 (2023). Converting the language of the criteria into subsector descriptors is insufficient to demonstrate that a subsidy may not operate throughout the economy. *See, e.g.*, Remand Results at 15 (describing the "favored subsectors" as "GHG-intensive" or "more dependent on international markets").

In addition to failing to support its finding that the K-ETS criteria are not objective, Commerce, without explanation, considered record evidence relevant to a *de facto* analysis. *See id.* at 15–17. As set forth above, "'objective criteria or conditions' means criteria or conditions that are neutral and that do not favor one enterprise or industry over another." 19 U.S.C. § 1677(5A)(D)(ii). Likewise, the SAA explains that neutrality requires the criteria or conditions to be "horizontal in application." SAA at 930, reprinted in 1994 U.S.C.C.A.N. at 4243. Consistent with a *de jure* analysis where the subsidy must be limited as a matter of law, Commerce's examination of the objectivity of the criteria should therefore be limited to the criteria used by the authority or, as in this case, set forth in the relevant law. Such examination may support a finding that the criteria operate vertically (rather than horizontally) to favor an enterprise or industry over another, or put differently, "to 'expressly limit' the program's application to specifically named enterprises or industries or group of enterprises or industries." *BGH II*, 639 F. Supp. 3d at 1244.

Instead of confining its examination to the K-ETS criteria, in an effort to further support its determination, Commerce relied on "the list of subsectors" that qualified for the full allocation. Remand Results at 15. Commerce considered the number of qualifying subsectors (37 out of 63 total subsectors subject to the K-ETS); the basis for qualification (most pursuant to the trade intensity criteria); and the types of qualifying subsectors (iron and steel and various other manufacturing subsectors). *Id.* at 16. Commerce then compared the subsectors that qualified for the full allocation to the "substantive breadth of subsectors that received the [standard] allocation." *Id.* at 17; *see also id.* at 35–36. These considerations are relevant to a *de facto* specificity analysis. *See* 19 U.S.C. § 1677(5A)(D)(iii) (listing such factors as the "limited" number of recipients or whether certain

enterprises or industries are "predominant user[s] of the subsidy").[27] Commerce offers no interpretation of the *de jure* provision of the statute to support the agency's consideration of the actual users of the subsidy in order to determine whether the subsidy is specific *as a matter of law*. Indeed, when explaining Commerce's implementation of subsection (i), the SAA states that when the authority "expressly limits access to a subsidy to a sufficiently small number of enterprises, industries or groups thereof, *further inquiry into actual use of the subsidy is unnecessary*." SAA at 930, reprinted in 1994 U.S.C.C.A.N. at 4243 (emphasis added).[28]

Lastly, Commerce's attempt to independently ground its determination in section 1677(5A)(D)(i) does not save its determination. Remand Results at 18, 33–34.[29] Commerce notes that the GOK "preselects" the subsectors "in advance of the distribution of the allocation . . . at the outset of each phase of the [K-ETS] program." *Id.* at 18. In a strained attempt to demonstrate that the K-ETS fulfills the requirements under subsection (i) for an express limitation, Commerce states both that the GOK "imposes" the criteria "in an explicit manner," *id.*, and that "the GOK applies explicit criteria," *id.* at 34. As Hyundai Steel notes, the GOK "simply applies the trade intensity and production cost criteria to determine what sectors qualify." Pl.'s Cmts. at 10. Any subsidy bestowed pursuant to eligibility criteria necessar-

[27] Commerce asserts that its specificity determination is consistent with prior determinations. Remand Results at 16 n.63. The cited determinations are either factually distinct or not persuasive insofar as Commerce relied on a similar rationale with which the court, for the reasons discussed, disagrees. *See id.*

[28] In referencing the Subsidies and Countervailing Measures Agreement underlying the specificity provisions of the URAA, the SAA explains that "a subsidy is specific not only when the subsidy is limited to certain enterprises by law (*de jure*) but also where, despite the existence of neutral and objective eligibility criteria, the subsidy is provided in fact (*de facto*) only to certain enterprises." SAA at 913, reprinted in 1994 U.S.C.C.A.N. at 4230 (emphasis added). The SAA thus contemplates Commerce conducting a *de facto* specificity analysis when subsidies are bestowed pursuant to objective criteria.

[29] Commerce seeks to persuade the court to follow the *BGH I* court's decision with respect to the EU ETS. Remand Results at 18–19, 34–35. There, the court held that "Commerce reasonably determined the ETS additional free allowances program is *de jure* specific because it is expressly limited to a group of companies . . . on the carbon leakage list." *BGH I*, 600 F. Supp. 3d at 1264. The record of that case and the means by which the carbon leakage list was established are not before the court and, as such, its areas of comparability and divergence may not be considered. Of greater import is the absence of an express limitation to an enterprise or industry here. While Commerce argues that reaching different conclusions in these cases "creates a potential loophole whereby a foreign government could . . . evade capture by the [countervailing duty] law through a simple rephrasing of the implementing legislation," Remand Results at 19, Commerce disregards its statutory authority to address the *de facto* specificity of any such program, *see supra* note 28. Thus, if legislation establishes criteria that are not objective, yet the legislation does not expressly limit access to an enterprise or industry, the subsidy may be specific, but it does not meet the criteria for *de jure* specificity. Instead, Commerce must undertake a *de facto* specificity analysis.

ily requires some identification of the recipients that meet those criteria. Commerce's rationale would appear to permit the agency to find almost any subsidy bestowed pursuant to eligibility criteria *de jure* specific pursuant to 19 U.S.C. § 1677(5A)(D)(i).[30] Neither Commerce nor the Government grapple with the consequences of Commerce's rationale.

On remand, Commerce must reconsider or reexplain its specificity finding. In order to find that the K-ETS program is *de jure* specific, Commerce must identify "[w]here the authority providing the subsidy, or the legislation pursuant to which the authority operates, *expressly limits access to the subsidy to an enterprise or industry*." 19 U.S.C. § 1677(5A)(D)(i) (emphasis added). Alternatively, Commerce may consider whether the record supports a finding that "there are reasons to believe that [the] subsidy may be specific as a matter of fact," consistent with the provisions of 19 U.S.C. § 1677(5A)(D)(iii). In either case, Commerce must explain the basis for its finding and identify substantial evidence on the record in support thereof.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's Remand Results are sustained in part with respect to the agency's financial contribution and benefit determinations and remanded in part with respect to the agency's specificity determination; it is further

ORDERED that Commerce shall file its remand redetermination on or before July 31, 2024; it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); and it is further

ORDERED that any comments or responsive comments must not exceed 3,000 words.

Dated: May 2, 2024
New York, New York

/s/ Mark A. Barnett
MARK A. BARNETT, CHIEF JUDGE

[30] According to Commerce, Hyundai Steel's arguments on this point would mean that "so long as the initial underlying legislation did not outright name the recipient companies or subsectors, there could be no *de jure* specificity." Remand Results at 34. That is not necessarily the case insofar as the statute does not require that degree of granularity but, rather, an express limitation on access to the subsidy by "an enterprise or industry" or groups thereof. 19 U.S.C. § 1677(5A)(D)(i). Moreover, a *de facto* specificity analysis is available when there is no such express limitation on access.

Index

Customs Bulletin and Decisions
Vol. 58, No. 19, May 15, 2024

U.S. Customs and Border Protection

General Notices

	Page
Modification of One Ruling Letter and Revocation of Treatment Relating to the Country of Origin of an Absorber Crashbox	1
Agency Information Collection Activities:	
Revision; Regulations Relating to Copyrights and Trademarks	9
Revision; Arrival and Departure Record and Electronic System for Travel Authorization (ESTA)	14

U.S. Court of International Trade
Slip Opinions

	Slip Op. No.	Page
Nucor Corporation, Plaintiff, v. United States, Defendant, and POSCO, Defendant-Intervenor.	24–49	21
Sahamitr Pressure Container PLC., Plaintiff, and Worldwide Distribution, LLLP, Plaintiff-Intervenor, v. United States, Defendant, and Worthington Industries, Defendant-Intervenor.	24–54	33
Hyundai Steel Company, Plaintiff, v. United States, Defendant, and Nucor Corporation, Defendant-Intervenor.	24–55	39

GPO U.S. G.P.O.: 2024—427-373/30075