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REGULATORY IMPLEMENTATION OF THE CENTERS OF EXCELLENCE AND EXPERTISE

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

ACTION: Final rule.

SUMMARY: This document adopts as final, without change, interim amendments made to the U.S. Customs and Border Protection (CBP) regulations by CBP Decision 16–26, as modified by a subsequent technical correction, CBP Decision 19–11. The interim amendments established the Centers of Excellence and Expertise (Centers) as a permanent organizational component of the agency. The interim amendments shifted certain trade functions to the Centers and identified other trade functions jointly carried out by port directors and Center directors. The interim amendments provided broad, centralized decision-making authority to the Centers to enable the Centers to facilitate trade, reduce transaction costs, increase compliance with applicable import laws, and achieve uniformity of treatment at ports of entry for identified industries.

DATES: This final rule is effective November 6, 2023.

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SUPPLEMENTARY INFORMATION:

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I. Background and Summary

A. Purpose of the Centers of Excellence and Expertise (Centers)

Prior to the implementation of the Centers of Excellence and Expertise (Centers), U.S. Customs and Border Protection (CBP) processed imports on a port-by-port basis. Due to CBP's port-by-port trade processing authority, importers claimed disparate processing treatment for similar goods entered at different ports of entry, causing trade disruptions, increased transaction costs, and information lapses. In response, CBP established 10 Centers with broad, centralized decision-making authority to facilitate trade, reduce transaction costs, increase compliance with applicable import laws, and achieve uniformity of treatment at the ports of entry for identified industry sectors. The Centers focus on nationwide entry summary processing and other trade oversight on a per-importer account basis through a single assigned Center, replacing traditional post-summary processing for each entry at each port of entry. The port directors continue to retain sole authority over the control, movement, and release of cargo.

The Centers are managed from strategic locations around the country, permitting CBP to focus its trade expertise on industry-specific issues and provide tailored support for importers. The Centers and the cities wherein each management office is located are as follows: (1) Agriculture & Prepared Products, Miami, Florida; (2) Apparel, Footwear & Textiles, San Francisco, California; (3) Automotive & Aerospace, Detroit, Michigan; (4) Base Metals, Chicago, Illinois; (5) Consumer Products & Mass Merchandising, Atlanta, Georgia; (6) Electronics, Long Beach, California; (7) Industrial & Manufacturing Materials, Buffalo, New York; (8) Machinery, Laredo, Texas; (9) Petroleum, Natural Gas & Minerals, Houston, Texas; and (10) Pharmaceuticals, Health & Chemicals, New York, New York. For a more detailed discussion of the scope of industries covered by each Center, please refer to the Interim Final Rule discussed in further detail in Sec. I.C below.

B. Test Program Developing the Centers

The Centers concept developed as a result of discussions between CBP and the Commercial Customs Operations Advisory Committee (COAC), which advises the Commissioner of CBP, the Secretary of the Department of Homeland Security (DHS), and the Secretary of the Department of the Treasury (Treasury) on the commercial operations of CBP and related DHS and Treasury functions. *See* Section 109, Public Law 114–125, 130 Stat. 122 (Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA)).

In 2012, CBP developed a test to incrementally transition the operational trade functions that traditionally resided with port directors to the Centers. The purpose of the test was to broaden the ability of the Centers to make decisions by waiving certain identified regulations to the extent necessary to provide the Center directors, who manage the Centers, with the authority to make the decisions normally reserved for the port directors. On August 28, 2012, CBP published the first of three General Notices in the **Federal Register** (Announcement of Test Providing Centralized Decision-Making Authority for Four CBP Centers of Excellence and Expertise, 77 FR 52048) announcing a general test (the Centers test) open to participants from industries covered by the Electronics Center, the Pharmaceuticals, Health & Chemicals Center, the Automotive & Aerospace Center, and the Petroleum, Natural Gas & Minerals Center. CBP modified the Centers test in two subsequent **Federal Register** notices published on April 4, 2013 (Modification and Expansion of CBP Centers of Excellence and Expertise Test to Include Six Additional Centers, 78 FR 20345) and March 10, 2014 (Centers of Excellence and Expertise Test; Modifications, 79 FR 13322).

Over the course of the Centers test, the decision-making authority of the Center directors was incrementally broadened. On September 11, 2014, the then-serving Commissioner of CBP, R. Gil Kerlikowske, signed Delegation Order 14–004, which expanded the Center directors' decision-making authority by delegating to the Center directors all functions, authorities, rights, privileges, powers, and duties vested in port directors by law, regulation, or otherwise. The delegation enabled these functions, authorities, rights, privileges, powers, and duties to be exercised concurrently by port directors and Center directors.

C. Interim Final Rule (IFR)

Section 110 of TFTEA required the development and implementation of the Centers. Accordingly, on December 20, 2016, CBP published an interim final rule, CBP Decision (CBP Dec.) 16–26 (Centers IFR), in the **Federal Register** (Regulatory Implementation of the Centers of Excellence and Expertise, 81 FR 92978), amending title 19 of the Code of Federal Regulations (19 CFR) and establishing the Centers as a permanent organizational component of the agency. Furthering the Centers' trade enhancement goals, the Centers IFR implemented the Centers' broad decision-making authority by amending parts of title 19 of the CFR to: (1) define the Centers and the Center directors; (2) modify the definition of the term "port director" in order to distinguish the port directors' functions from the Center directors' functions; (3) identify the Center management offices; (4) explain the process by which importers are assigned to the Centers based on the predominant Harmonized Tariff Schedule of the United States (HTSUS) tariff classification of the importer's goods; (5) establish an appeals process that allows an importer to contest its assignment to a specific Center; (6) identify the regulatory functions that have been transitioned from the port directors to the Center directors and those functions that the port directors and the Center directors carry out jointly; (7) clarify that certain payments and documents may continue to be submitted at the ports of entry and electronically; and (8) provide a list of industries covered by each of the Centers. A limited number of responsibilities and authorities that had been provided to the Center directors under the Centers test were not transitioned to the Centers as part of the interim amendments.[1]

[1] *See* 81 FR 92978 (December 20, 2016) for a detailed list of responsibilities and authorities that had been previously provided to the Center directors as part of the Centers test but were not transitioned to the Centers as part of the interim amendments.

D. Technical Correction

On September 5, 2019, CBP published a technical correction, CBP Dec. 19–11, (Technical Correction), in the **Federal Register** (84 FR 46676) to correct discrepancies in 19 CFR 12.73(j) and 141.113(b) to properly reflect the authority of the Center directors. Following the publication of an unrelated final rule in the **Federal Register** on December 27, 2016 (81 FR 94974), § 12.73(j) contained an inconsistency that was corrected to reflect that both the Center directors and port directors have the authority to collect certain U.S. Environmental Protection Agency (EPA) declarations, and the Center directors, rather than the port directors, have the authority to extend the submission deadline for such EPA declarations. Additionally, an inadvertent omission in the amendatory instructions to § 141.113(b) was corrected to replace the word "port director" with the word "Center director."

II. Discussion of Comments

A. Overview

Pursuant to the agency management or personnel exemption in 5 U.S.C. 553(a)(2), the agency organization, procedure, and practice exemption in 5 U.S.C. 553(b)(A), and the good cause exemption in 5 U.S.C. 553(b)(B), the interim regulatory amendments were promulgated without prior public notice and comment procedures. However, the Centers IFR provided for the submission of public comments that would be considered before adopting the interim amendments as a final rule. The prescribed 30-day public comment period closed on January 19, 2017.

One of the comments that CBP received during the initial 30-day public comment period requested a 60-day extension of the 30-day public comment period. In response to the comment and to allow for as much public participation as possible in the formulation of the final rule, on January 27, 2017, CBP extended the initial 30-day public comment period for another 60 days until March 20, 2017 (82 FR 8588). During the public comment period, CBP received eight comments, six of which were within the scope of the Centers IFR.[2] CBP has carefully considered all comments submitted in response to the Centers IFR.

[2] Eight public comments were submitted to the docket for the Centers IFR; however, two comments were not posted to *www.regulations.gov* as they were deemed out of scope. Neither of the two comments addressed the Centers and both comments were directed to other agencies regarding other programs. Accordingly, these two comments are not considered in this document.

All comments were supportive of the implementation of the Centers as a permanent organizational component of the agency. Nonetheless, several commenters had concerns or questions about specific aspects of the Centers' organization and operations. A description of these comments, together with CBP's analysis, is set forth below.

B. Responses to Comments

Comment: Two commenters expressed general approval of the Centers, with one commenter, a law firm, stating that the Centers constitute a vast improvement over the disjointed and inconsistent treatment of entries that resulted from the administration of imports on a port-by-port basis, reflecting the goals of increased administrative efficiencies noted in the Centers IFR cost-benefit analysis. The commenter especially highlighted its positive experience in working with various Centers.

Response: The Centers represent a new approach to trade processing that is more in line with the trade community's current business practices, and CBP is pleased to know that the trade community shares the view that the Centers enhance compliance, collaboration, and efficiency.

Comment: One commenter expressed concerns regarding coordination between the Centers and ports, as well as the procedures pertaining to the assignment of importers to the Centers. According to the commenter, the lack of procedures and policies that govern how the Centers and ports coordinate with each other creates difficulties in determining which component serves as the primary decision-maker and/or point of contact regarding these matters. While the commenter acknowledged that the assignment of importers to the Centers may provide clarification as to which component serves as the primary decision-maker and/or point of contact, the commenter also raised additional concerns and questions regarding the assignment of importers to the Centers.

First, the commenter noted that the assignment of importers to the Centers on an account basis rather than based on the predominant commodities of each entry constitutes a reversal of a policy that CBP announced in 2016 for entries requiring review, such that an importer could end up dealing with multiple Centers, for different entries. Second, the commenter inquired whether CBP is prepared to properly allocate importers to the Centers based on their account activity and business model. Specifically, the commenter inquired about the process by which CBP assigns importers with minimal account activity throughout the year to the Centers, and how the Centers coordinate with each other when an importer was assigned to one Center on an

account level but enters a small number of shipments with predominant HTSUS tariff classifications covered by a different Center.

Response: CBP disagrees with the commenter's assertion that a lack of coordination in the concurrent decision-making authority of port directors and Center directors creates uncertainty as to which component serves as the point of contact and primary decision-maker. Either the amended regulations or the corresponding CBP Form specifies which component should be contacted regarding these matters. In order to better enable the Centers to accomplish their trade mission (that is, to strategically enforce commercial import laws while also facilitating the flow of legitimate trade), the regulatory, permanent implementation of the Centers required CBP to make minor adjustments to the Centers' authorities and responsibilities, and CBP's internal policies and procedures. For example, in order to achieve full end-to-end processing of import activity, CBP updated its internal policies and procedures to provide for the required level of coordination and collaboration between the Centers and the ports, including creating instances of concurrent decision-making authority between the Center directors and port directors during the Centers implementation process. Additionally, the Centers IFR included minor modifications to the Centers' responsibilities and authorities, and the process by which importers are assigned to the Centers. Therefore, CBP recognizes that the regulatory implementation of the Centers as a permanent organizational component of the agency has required an adjustment period during which the trade community must become acquainted with the modified processes, including which component serves as the primary decision-maker for certain trade functions and the process by which importers are assigned to the Centers. CBP appreciates the comment as it provided CBP with an opportunity to guide the trade community through the adjustment process.

The Centers centralize and consolidate post-release activities of importers on an account basis. Generally, each importer is assigned to a Center based on the predominant HTSUS tariff classification of the importer's imported goods. Once an importer has been assigned to a specific Center, that Center will process all of the importer's entry summaries, regardless of the predominant HTSUS tariff classification of a specific entry. For example, an importer whose imports are 75 percent footwear and 25 percent miscellaneous items will be assigned to the Center for Apparel, Footwear and Textiles. Once the importer has been assigned to the Center for Apparel, Footwear and Textiles, all of the importer's activities will be processed by that

Center, regardless of whether the predominant HTSUS tariff classification of a specific entry relates to a different industry sector.

The processing of trade activity on an account basis does not prevent the Centers from providing tailored support to importers and handling industry-specific issues. When it is necessary to leverage another Center's expertise, the Centers coordinate with each other, and CBP has streamlined the coordination process over time. However, over time, the Centers have developed a more proficient level of knowledge of their accounts and import activities, which has enabled the Centers to administer trade activity more independently.

In order to ensure that an importer is assigned to the Center that corresponds with the importer's business model, the assignment process differs slightly in a limited number of circumstances. For example, CBP may assign an importer to a Center other than the Center reflecting the predominant HTSUS tariff classification of the importer's goods, if such deviation from the regular assignment process is supported by information such as: (1) the importer's associated business practice within an industry; (2) the intended use of the predominant number of goods imported; and (3) the high relative value of the imported goods. Additionally, since the business practices of brokers do not align within a particular industry sector, the import activities of brokers acting as Importers of Record (IORs) are processed on an entry-by-entry basis, meaning that each entry summary will be assigned to a specific Center based on the entry summary's predominant HTSUS tariff classification. Import activities of importers with minimal account activity throughout the year who have not yet been assigned to a specific Center are processed similarly. Furthermore, importers are permitted to appeal the assignment to a Center at any time and can seek re-assignment to a different Center. *See* 19 CFR 101.10(c). As a result, CBP finds that the current assignment process properly allocates importers to Centers based on the importers' account activity and business models.

Comment: One commenter requested that CBP assign entries filed by express courier brokers to the Centers on the basis of the overall post-release account activity of the ship-to party, or in the alternative, create a separate Center for express courier brokers. According to the commenter, the exclusion of express courier brokers from participation in the Centers model is anathema to the purpose of the Centers—that is, to focus CBP's trade expertise on industry-specific issues and tailored support for importers. The commenter explained that, although express courier brokers serve as IORs on entries, the predominant tariff classification of the entries is not driven by the express courier broker's business model but the business model of the ship-to

party (formerly known as consignee), who serves as the party causing the importation and often serves as an IOR itself on other (unrelated) entries. Accordingly, the commenter requested that CBP assign entries filed by express courier brokers to the Centers on the basis of the overall post-release account activity of the ship-to party, instead of the post-release account activity of the importer of record (that is, the express courier broker), or in the alternative, create a separate Center for express courier brokers.

Response: CBP appreciates the comment as it underscores the importance of the roles of filers and brokers in the importation process and agrees that express courier brokers do not squarely fit within one of the ten defined industry sectors because their business practices cross all industry sectors. Nonetheless, CBP finds that the Centers are well equipped to handle the activities of express courier brokers as they fit within the trade community's overall business practices.

The Centers process trade activity from a national perspective, at the IOR and ultimate consignee level, and, therefore, have full visibility into the trade community's normal business practices, including the activities of express courier brokers. Like the trade activities of other brokers acting as IORs, the import activities of express courier brokers are also processed on an entry-by-entry basis, meaning that each entry summary will be assigned to a specific Center based on the entry summary's predominant HTSUS tariff classification. As such, it is CBP's position that the Centers are well equipped to handle the activities of express courier brokers because the Centers' current operating model accounts for the fact that express courier brokers enter merchandise across all industry sectors.

Express courier brokers are not excluded from participation in the Centers model, as the commenter suggested. To the contrary, the Centers have gained experience on industry-specific issues, which has led to an improved level of service to express courier brokers. This includes the creation of cross-educational opportunities that will serve to inform express courier brokers on compliance issues and CBP on the trade community's current business practices, including the express courier brokers' processes. CBP is committed to ensuring that the business processes of all members of the trade community are accounted for in the Centers' operational approach and continues to strengthen relationships in a coordinated effort to secure the U.S. economy through lawful trade and travel.

Comment: One commenter commended CBP on the creation of the Centers but suggested several minor technical revisions to the language of the CBP regulations pertaining to the Centers (Centers regulations). For example, the commenter noted that several provi-

sions of the Centers regulations provide that certain documents or payments may be filed with CBP, "either at the port of entry or electronically." The commenter explained that the phrase "either at the port of entry or electronically" implies that the Centers only accept electronic submissions of these types of documents or payments. The commenter also noted that, in the context of paragraph (b) of section 174.12, the phrase conflicts with the regulatory language in paragraph (d), which permits but does not require electronic filing.

Additionally, the commenter pointed out that the fact that protests filed with the Centers can cover entries filed at multiple ports of entry constitutes a major change to CBP's protest procedures, and as such, should be highlighted in the regulatory text. Therefore, the commenter requested that CBP amend paragraph (d) of section 174.12 by adding the following sentence: "A protest filed with the Center director may include entries filed at multiple ports of entry."

Response: CBP understands that the implementation of the Centers led to an initial adjustment period during which members of the trade community had to become acquainted with the Centers' processes, including the submission process for documents and payments. While CBP believes that any uncertainty as to the submission process was resolved as part of the initial adjustment period, CBP appreciates the comment as it provides CBP with an opportunity to clear up any potentially remaining uncertainty.

The use of the phrase "either at the port of entry or electronically" does not imply that the Centers only accept electronic submissions of certain documents and payments, as suggested by the commenter. As part of the transition of certain trade functions from the ports of entry to the Centers, the Centers IFR shifted certain staff positions from the port directors' chain of command to the Center directors' chain of command. While the reallocated personnel now report to a Center director rather than a port director, the reallocated personnel continue to handle the same trade functions. In order to remain accessible to the trade community and to assist with enforcement and compliance issues as they arise, the reallocated personnel remain in their previous locations—primarily, at the ports of entry. The realignment was merely virtual. Thus, in the phrase "either at the port of entry or electronically," the use of the preposition "*at*" (rather than "with") establishes that hard copies of the documents or payments can be filed *at* the ports of entry (*with* staff of either the port of entry or the Centers). Like electronic submissions, the submissions will then be forwarded to and processed by the Center assigned to that particular submission.

Additionally, CBP disagrees that it is necessary to amend paragraph (d) of section 174.12 to further clarify that a single protest can now pertain to multiple entries filed at multiple ports of entry. CBP finds that the regulatory language in paragraph (b) of section 174.13 sufficiently establishes that a single protest can now pertain to multiple entries filed at multiple ports of entry.

III. Conclusion

Based on the analysis of the comments and further consideration, CBP adopts as final the interim rule (Centers IFR), CBP Dec. 16–26, published in the **Federal Register** (81 FR 92978) on December 20, 2016, as modified by the Technical Correction, CBP Dec. 19–11, published in the **Federal Register** (84 FR 46676) on September 5, 2019, without changes.

IV. Statutory and Regulatory Requirements

A. Executive Orders 13563 and 12866

Executive Orders 13563 (Improving Regulation and Regulatory Review) and 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), direct agencies to assess the costs and benefits of available regulatory alternatives, and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This rule has not been designated a "significant regulatory action," under section 3(f) of Executive Order 12866, as amended by Executive Order 14094. Accordingly, the rule has not been reviewed by the Office of Management and Budget (OMB).

1. Purpose of the Rule

Prior to the launch of the Centers test, CBP port directors overseeing imports were solely responsible for facilitating lawful importation; protecting U.S. revenue by assessing and collecting customs duties, taxes, and fees; and detecting, interdicting, and investigating illegal international trafficking in arms, munitions, counterfeit goods, currency, and acts of terrorism at their U.S. port of entry. Before the implementation of the Centers, when a shipment reached the United States, the IOR (*i.e.,* the owner, purchaser, or licensed customs broker designated by the owner, purchaser, or consignee) would file entry documents and a bond for the imported goods with the director of the

port where the merchandise was entered. If necessary, CBP staff working under the port director would then hold or examine the shipment or validate the entry documents to ensure the merchandise's safety, security, and customs compliance with U.S. importing guidelines, or its general admissibility. The port director would release the shipment from CBP's custody if no legal or regulatory violations occurred, allowing post-cargo release (hereafter, post-release) processing to commence. Within 10 working days of the merchandise's entry at a designated customhouse, CBP would require the importer to file entry summary documentation consisting of the entry package returned to the importer, broker, or authorized agent by CBP at the time the merchandise was released and an entry summary (CBP Form 7501), and to deposit any estimated duties on the shipment. In some cases, CBP would send a formal request for other invoices and documents (via CBP Form 28: Request for Information) to the importer to assess duties, collect statistics, or determine that import requirements have been satisfied prior to processing the entry summary. Before completing the importation process, CBP Import Specialists and Entry Specialists working under the port director would review and process all entry summary and related documentation; classify and appraise the merchandise; collect final duties, taxes, and fees on the goods entered; and liquidate entry summaries. If necessary, the CBP trade personnel would also review and process protests, perform importer interviews, and initiate monetary trade penalties and liquidated damages cases.

Due to CBP's port-by-port trade processing authority and scope, elements of the cargo entry and release process, such as holds, exams, document submission requirements, and final determinations regarding admissibility, varied widely among ports of entry and resulted in the length of the process varying greatly as well. Importers often claimed to receive disparate processing treatment for similar goods entered at different ports of entry, causing trade disruptions, increased transaction costs, and information lapses for not only the importer but also CBP. With an intent to facilitate trade, provide consistent import processing treatment, reduce transaction costs, and strengthen the agency's trade knowledge and enforcement posture, CBP began testing an organizational concept in 2011 that grouped agency trade expertise and operational responsibilities by industry and related import accounts into designated Centers.

Since the commencement of the Centers test, the Centers have successfully met their trade enhancement goals. Based on the Centers test's success, CBP published the Centers IFR in the **Federal Register** (81 FR 92978) on December 20, 2016, which discontinued the Centers test and established the Centers as permanent organi-

zational components of CBP through regulatory amendments. The Centers regulations were later modified by the Technical Correction published in the **Federal Register** (84 FR 46676) on September 5, 2019.

This rule adopts the Centers IFR, as modified by the Technical Correction, as a final rule, without changes, and finalizes the transition of certain trade enforcement responsibilities and the majority of post-release trade functions from the purview of port directors to Center directors.[3] Port directors continue to retain singular authority over matters pertaining to the control, movement, examination, and release of cargo. The Centers focus on nationwide entry summary processing and other trade oversight on a per-importer account basis through virtual means, which replaces traditional post-release import processing *per* entry at *each* port of entry with processing by a single assigned Center according to the importer account. To conduct such national, industry-focused processing, CBP has permanently staffed the Centers with personnel specializing in trade matters through an internal realignment, which imposed no costs on CBP. Centers personnel have generally remained at their previous locations, primarily at ports of entry, to stay accessible to the trade community and continue to assist with enforcement and compliance issues that arise at ports of entry with the physical importation of cargo. CBP remotely manages Centers employees through multidisciplinary teams located across the nation, thereby enabling CBP to extend the Centers' hours of service to trade members, maintain a high level of industry expertise in major port cities, and staff the Centers with industry experts from across the country.

2. Costs and Benefits of Rule

Since CBP received no comments critical of the economic impact analysis on the interim final rule, and one positive comment generally reflecting the analysis, and because CBP is not making any changes in the final rule, CBP largely adopts the Centers IFR's economic analysis, with updated data. CBP also made minor changes to the analysis to better reflect how the rule was implemented in practice. In this regulatory impact analysis, CBP discusses the costs and benefits that CBP and trade members experience with the regulatory implementation of the Centers in qualitative and, when possible, quantitative or monetary terms. CBP incurred sunk costs related to travel, equipment, and supplies and materials, as well as some other costs during the Centers test phase, related to establish-

[3] *See* 81 FR 92978, 92983–93003 (December 20, 2016) and 84 FR 46676, 46677 (September 5, 2019), for a detailed list of trade function transitions.

ing and transitioning to Centers, totaling approximately $760,000 from 2012 to February of 2014. The document "Program Assessment of the Centers of Excellence and Expertise," available in the docket, assesses the impacts of the Centers test phase in more detail. As in the analysis for the interim final rule, we do not include these costs as costs of the rule. We report them here to give the reader a more complete understanding of the costs for the entire lifecycle of the Centers, including the test period.

For the purpose of this analysis, the complete Centers rulemaking effort, including the Regulatory Implementation of the Centers of Excellence and Expertise interim final rule, the Technical Correction to Centers of Excellence and Expertise Regulations, and this final rule, are collectively referred to as "the Centers rule" or "this rule."

a. Costs

This rule introduces minimal costs to CBP and the trade community because it largely meets its objectives through low- to no-cost internal organization changes. The transition of post-release import processing and trade-related responsibilities from ports of entry to the Centers neither affects the duties, taxes, and fees payment and entry summary submission processes for importers, nor does it adversely affect other post-release activities (*e.g.,* processing duty refund claims, reviewing protests). Even with the Centers, importers may continue to file payments and paper entry summary documentation with CBP either at the port of entry or electronically. All payments from the trade community, whether submitted to a Center, at a port of entry, or electronically, continue to go directly to CBP's Office of Finance. If trade enforcement or post-release processing issues emerge, CBP continues to maintain its formal importer notification and remedy processes. Upholding these administrative processes generates no related costs to the agency.

At the time the Centers IFR was published, CBP anticipated that if an importer or broker submitted paper entry summary documentation at a port of entry without an appropriate Center representative on site, CBP staff at the port would reroute the documents internally by electronic means to the Center assigned to manage the importer's account. In practice, electronic rerouting has been found to be unnecessary due to the implementation of the Automated Commercial Environment (ACE); therefore, CBP incurs no cost for document rerouting as predicted in the Centers IFR.[4]

[4] Source: CBP's Office of Field Operations, February 18, 2020.

CBP does experience costs from processing (*i.e.,* reviewing and making a determination on) Center assignment appeals. Generally, CBP assigns each importer to a specific Center based on the HTSUS tariff classification and industry sector corresponding to the predominant number of goods the importer imports.[5] An importer that is displeased with its Center assignment may appeal the assignment at any time by submitting a written appeal to CBP by mail or email. Appeals must include the following information: (1) current Center assignment; (2) preferred Center assignment; (3) all affected IOR numbers and associated bond numbers; (4) written justification for the change in Center assignment; and (5) import data, as described in the "Finalization of the Centers of Excellence and Expertise Test" section of the Centers IFR. CBP data shows that importers file significantly fewer Center assignment appeals than what was predicted in the Centers IFR. CBP receives two Center assignment appeals each year compared to the 60 that was predicted in the Centers IFR.[6] Each appeal takes 30 minutes (0.5 hours), on average, for CBP Headquarters staff to process, which is half has long as predicted in the Centers IFR.[7] CBP generally notifies trade members of its Center appeal decisions by electronic means, thus imposing no additional cost on the agency.[8] Based on the number of Center appeals submitted annually and CBP's time burden to manage each appeal, CBP sustains an annual cost of $96.61 from the Centers rule's Center assignment appeals process.[9]

As outlined in this final rule, the responsibilities of the trade community remain largely unchanged with the Centers' regulatory implementation. Importers may continue to file cargo release documentation and payments where their merchandise is entered. Importers and brokers who file electronically can continue to use CBP's automated systems, such as the Automated Broker Interface, to submit required import data and payments to CBP. Meanwhile, CBP continues to maintain a consistent formal notification and remedy

[5] The list of HTSUS numbers that will be used by CBP for the importer's placement in a Center is the same list of HTSUS numbers that is referenced in the definition for Centers (*see* § 101.1). Factors that may cause CBP to place an importer in a Center not based on the HTSUS tariff classification of the predominant number of goods imported include the importer's associated business practices within an industry, the intended use of the predominant number of goods imported, or the high relative value of goods imported.

[6] Source: CBP's Office of Field Operations, February 18, 2020.

[7] Source: CBP's Office of Field Operations, February 18, 2020.

[8] Source: CBP's Office of Field Operations, January 15, 2015.

[9] This cost is monetized by multiplying one hour by the fully-loaded wage of a CBP Officer ($96.61). CBP bases this wage on the FY 2022 salary and benefits of the national average of CBP Agriculture Specialist positions, which is equal to a GS–12, Step 5. Source: CBP's Office of Finance, June 27, 2022.

process regarding post-release and other trade-related issues with the Centers' establishment. Trade members only incur costs from this rule when appealing a Center assignment.

Importers may choose to appeal their Center assignment for a number of reasons, including the expectation of better service or product knowledge at another Center. As previously discussed, if an importer chooses to appeal its Center assignment, it must submit a written appeal to CBP by mail or email that includes information about its current and preferred Center assignments (*see* "Finalization of the Centers of Excellence and Expertise Test" section of the Centers IFR for specific appeal requirements). CBP estimates that each appeal takes 45 minutes (0.75 hours) for an importer to complete.[10] The opportunity cost estimate is equal to the median hourly wage of an importer ($34.81) multiplied by the hourly time burden for an importer to complete and submit a Center assignment appeal (0.75 hour), and then rounded.[11] This results in an opportunity cost of $26.11 for a single appeal. Due to the relative affordability of submitting a Center assignment appeal via email rather than mail, CBP believes that the vast majority of importers file appeals electronically. Therefore, CBP does not consider the printing or mailing costs for an importer to submit a Center assignment appeal in this analysis. By applying the cost for importers to complete and submit a Center assignment appeal to the expected number of Center assignment appeals filed annually, CBP finds that this rule's appeals process generates $52.22 in yearly costs to the trade community.[12] This cost

[10] Source: CBP's Office of Field Operations, February 18, 2020.

[11] CBP calculated this loaded wage rate by first multiplying the Bureau of Labor Statistics' (BLS) 2021 median hourly wage rate for Cargo and Freight Agents ($22.55), which CBP assumes best represents the wage for importers, by the ratio of BLS' average 2021 total compensation to wages and salaries for Office and Administrative Support occupations (1.4819), the assumed occupational group for importers, to account for non-salary employee benefits. This figure is in 2021 U.S. dollars and CBP assumes an annual growth rate of 4.15 percent based on the prior year's change in the implicit price deflator, published by the Bureau of Economic Analysis. Source of median wage rate: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, "May 2021 National Occupational Employment and Wage Estimates United States." Updated March 31, 2022. Available at *https://www.bls.gov/oes/current/oes_nat.htm.* Accessed May 25, 2022. The total compensation to wages and salaries ratio is equal to the calculated average of the 2021 quarterly estimates (shown under Q01, Q02, Q03, Q04) of the total compensation cost per hour worked for Office and Administrative Support occupations ($29.6125) divided by the calculated average of the 2021 quarterly estimates (shown under Q01, Q02, Q03, Q04) of wages and salaries cost per hour worked for the same occupation category ($19.9825). Source of total compensation to wages and salaries ratio data: U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. "ECEC Civilian Workers—2004 to Present." March 2022. Available at *https://www.bls.gov/web/ecec.supp.toc.htm.* Accessed May 25, 2022.

[12] The annual opportunity cost to the trade industry is equal to the median hourly wage of an importer ($34.81) multiplied by the hourly time burden for an importer to complete and submit a Center assignment appeal (0.75 hours), multiplied by the number of Center assignment appeals (2), and then rounded.

is lower than the Centers IFR estimated annual cost to the trade community of $1,803 largely due to the difference in projected (60) and actual (2) Center appeals received.

Certain trade members, particularly CBP-accredited laboratories and CBP-approved gaugers, may incur added costs with this rule's amendments to their obligations outlined in 19 CFR 151.12(c)(5) and (6), and 19 CFR 151.13(b)(5) and (6).[13] As amended, CBP requires CBP-accredited laboratories to notify an additional CBP representative, the Center director, of "any circumstance which might affect the accuracy of work performed as an accredited laboratory, . . . their consequences, and any corrective action taken or that needs to be taken" and "of any attempt to impede, influence, or coerce laboratory personnel in the performance of their duties, or of any decision to terminate laboratory operations or accredited status."[14] Similarly, CBP requires CBP-approved gaugers to notify an additional CBP representative, the Center director, of "any circumstance which might affect the accuracy of work performed as an approved gauger, . . . their consequences, and any corrective action taken or that needs to be taken" and "of any attempt to impede, influence, or coerce gauger personnel in the performance of their duties, or of any decision to terminate gauger operations or approval status."[15] Under previous, pre-Centers regulations, CBP mandated CBP-accredited laboratories and CBP-approved gaugers to contact the port director and Executive Director, Laboratories and Scientific Services, on the matters described above. Given that CBP did not receive any notifications previously required under 19 CFR 151.12(c)(5) and (6) and 19 CFR 151.13(b)(5) and (6) in the past 20 years prior, CBP assumes that this rule's additional CBP notification step for CBP-accredited laboratories and CBP-approved gaugers will continue to not introduce any costs to these parties.[16]

In all, the Centers rule introduces annual costs of $96.61 to CBP and $52.22 to trade members for a total of $148.83.

b. Benefits

The Centers rule produces valuable benefits to CBP and the trade community. This section of the analysis largely discusses the benefits of the rule qualitatively due to quantitative data limitations. Based

[13] The text of 19 CFR 151.12 and 19 CFR 151.13 still refers to CBP as Customs.

[14] 19 CFR 151.12(c)(5) and 151.12(c)(6).

[15] 19 CFR 151.13(b)(5) and 151.13(b)(6).

[16] Based on the number of notifications received by CBP's Laboratories and Scientific Services as of February 2020. Source: CBP's Office of Field Operations, February 18, 2020, and October 26, 2022.

on the success of the Centers test and public comments on the Centers IFR, CBP believes that, as permanent organizational components, the Centers continue to provide uniform post-release processing and trade-related decision-making, strengthen critical agency knowledge of industry practices and products, heighten CBP's trade enforcement skills, and improve trade communication. CBP also believes this occurs on a much grander scale than observed during the test phase because CBP has since assigned all current eligible importers to a Center. CBP continues to assign new importers to Centers, if eligible, once the Center alignment can be determined based on their import history.

The Centers allow CBP to conduct uniform entry summary processing and trade-related decision-making nationwide on an industry-specific, importer account basis by transitioning the post-release processing of an importer's goods from a transactional level at each port of entry to one assigned Center. Public comments support this assessment. One comment from a law firm explained that their clients have seen benefits, including increased efficiency, consistency, and more accurate treatment in their interactions with Centers compared to the "disjointed and inconsistent treatment that resulted from having to deal with individual Ports of Entry."

As permanent CBP components, the Centers require fewer information requests and conduct better informed trade compliance actions than in the pre-Centers environment, leading to time and cost savings to CBP and trade members. Prior to the implementation of the Centers, when an importer entered similar merchandise at different U.S. ports of entry that required supplemental information for entry summary processing, CBP personnel at each port of entry generally submitted a CBP Form 28: Request for Information to the importer. In that case, the importer responded to each request, even if the responses were identical, and CBP personnel at each port of entry reviewed the duplicative information received from the importer. With the Centers, the importer receives only one CBP Form 28 for the merchandise's entry summary processing, requiring CBP personnel to review the importer's supplemental information only once. For each avoidance of a CBP Form 28, CBP saves 10 minutes (0.17 hours) of time in issuing the request and reviewing the requested information.[17] Importers save an estimated 120 minutes (2.0 hours)

[17] Source: U.S. Office of Management and Budget, Office of Information and Regulatory Affairs. *RegInfo.gov.*"Supporting Statement Request for Information 1651–0023." February 28, 2022. Available at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202112–1651–008.* Accessed October 28, 2022.

in preparation time for each avoided CBP Form 28 response[18] and $69.62 in averted opportunity costs.[19] Internal CBP data shows that there has been more than a 61 percent (14,958 submissions) decrease in CBP Form 28 submissions for 2022 compared to 2014 and more than a 55 percent (11,977 submissions) decrease since the Centers IFR was implemented in 2016.[20] However, due to regulatory changes the trade industry has seen since the Centers IFR, the limitations of CBP systems, trade remedies, and the fact that several importers still have not been assigned to a Center, it is not possible to determine how much the drop in CBP Form 28 submissions can be attributed to this rule. CBP and some importers may experience additional printing and mailing cost savings through reduced CBP Form 28 submissions, though the extent of these savings is unknown.

With a single Center conducting all post-release processing for a particular importer, determinations on protests, marking, and classification matters are now consistent rather than sometimes inconsistent as in the pre-Centers environment. In the pre-Centers environment, importers occasionally received different determinations on similar trade compliance issues depending on the port of entry where their merchandise was processed, which sometimes required duplicative action on behalf of CBP and the importer. The Centers' consistency may enhance importers' awareness of CBP's positions on trade compliance issues, possibly leading to improved compliance and an unknown amount of subsequent savings to both parties in the future. To the extent that the Centers' uniform processing and determinations also decrease post-summary corrections, exams, hold times, and other trade obstacles, the benefits of this rule will be higher.

In addition to creating uniform post-release processing and determinations, the Centers strengthen CBP trade personnel's industry knowledge by concentrating their expertise into a specific import industry set as opposed to the entire range of import industries. According to outreach conducted for this rule, such focused expertise has already enriched CBP relations with the trade community, as demonstrated through a Centers test participant's claim that Center account managers are very knowledgeable of their industry and are

[18] Source: U.S. Office of Management and Budget, Office of Information and Regulatory Affairs. *RegInfo.gov*."Supporting Statement Request for Information 1651–0023." February 28, 2022. Available at *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202112–1651–008*.

[19] The opportunity cost estimate is equal to the assumed median hourly wage of an importer ($34.81) multiplied by the hourly time burden for an importer to complete a CBP Form 28 response (2.0 hours), and then rounded.

[20] Source: CBP's Office of Field Operations, February 18, 2020, and October 26, 2022.

now more familiar with their imports and trade issues.[21] Several public commenters on the Centers IFR also expressed positive experiences with the Centers. Increasing Centers staff awareness of importers and their merchandise may also contribute to a decline in requests for information, exams, or holds, which provides time and cost savings to CBP and trade members.

The Centers' industry focus has also enriched trade enforcement. Using knowledge gathered through processing solely entry summaries for the electronics industry, Electronics Center employees uncovered a counterfeit electronic adapter import operation. Since discovering the counterfeiting operation, the Electronics Center has worked with the rights holder to add a trademark onto its electronic device to prevent future intellectual property rights (IPR) violations and subsequent economic losses.[22] Based on the benefits of enhanced industry knowledge gained during the Centers test phase and since the Centers IFR went into effect, CBP believes the permanent establishment of the Centers enhances CBP relations with the trade community, facilitates trade, and results in an improved ability to identify high-risk commercial importations that could enhance import safety, increase revenue protection, and reduce economic losses associated with trade violations.

Furthermore, the Centers streamline communication between CBP and the trade community by replacing communication with each port of entry with communication with one Center. The Centers serve as a single source of information and point of contact for trade members regarding importing requirements, IPR infringement or other trade violations, merchandise holds, and Partner Government Agencies (PGA) issues, eliminating the need for trade members to contact multiple CBP employees and for multiple CBP employees to share duplicative information with members of the trade. Such a decrease in redundant information requests and sharing produces time and cost savings to the trade community and CBP. The Centers also allow for enhanced communication with importers by offering extended hours of service compared to port of entry service hours, which may expedite trade. Without information on the amount of duplicative communication eliminated with the emergence of the Centers or the volume of trade expedited through the Centers' extended hours of service, the overall value of these communication benefits is unknown.

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[21] Source: Teleconference with CBP's Pharmaceuticals, Health & Chemicals Center test participant on December 19, 2013.

[22] Source: Teleconference with CBP's Electronics Center on December 3, 2013.

c. Net Impact of Rule

In summary, the Centers rule introduces both costs and benefits. CBP sustains $96.61 in added costs each year from reviewing Center assignment appeals, while trade members bear an annual cost of $52.22 attributable to Center assignment appeals. CBP and trade members also experience benefits from this rule's decreased import costs and time burdens, streamlined trade processing, broadened industry and trade compliance knowledge, enhanced trade enforcement posture, and improved communication, though the overall value of these benefits is unknown. Although not quantified, CBP believes this rule's benefits to CBP and the trade community are considerable, while its costs to these parties are relatively negligible. For these reasons, CBP asserts that the benefits of this rule outweigh its costs, thus providing an overall net benefit to the agency and members of the trade community.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business concern per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). CBP initially issued the Centers rule as an interim final rule under the agency management and personnel and procedural rule exceptions of the Administrative Procedure Act. Thus, a Regulatory Flexibility Act analysis was not required. *See* 5 U.S.C. 553. Nonetheless, CBP considered the economic impact of the Centers IFR on small entities. Since CBP did not receive any comments on the Centers IFR relating to the Regulatory Flexibility Act analysis, CBP adopts the Centers IFR's Regulatory Flexibility Act analysis with updated data, as presented next.

Through the Centers final rule, CBP finalizes the transition of certain trade enforcement responsibilities and the majority of post-release trade functions from the purview of port directors to Center directors.[23] Port directors continue to retain singular authority over regulations pertaining to the control, movement, examination, and release of cargo. Because the Centers introduce a new post-release processing method for all U.S. imports, this rule's regulatory changes affect all importers and brokers who enter goods into the United

[23] *See* 81 FR 92978, 92983–93003 (December 20, 2016) and 84 FR 46676, 46677 (September 5, 2019), for a detailed list of trade function transitions.

States, including those considered "small" under the Small Business Administration's (SBA) size standards.[24] Since the vast majority of importers are small businesses, this rule impacts a substantial number of small entities.[25]

This rule generates costs and benefits to importers and related members of the trade. As outlined throughout this rule, the responsibilities of the trade community remain largely unchanged due to the Centers rule. However, trade members experience costs when filing a Center assignment appeal and when notifying a Center under the requirements of amended 19 CFR 151.12(c)(5) and (6), and 19 CFR 151.13(b)(5) and (6).

As previously mentioned in the "Executive Orders 13563 and 12866" section, importers incur an opportunity cost of $26.11 per Center assignment appeal. With two appeals expected each year, the annual cost of Center assignment appeals to the entire trade community equals $52.22. It is likely that some small entities file Center assignment appeals, though the exact number is unknown. Regardless of the number of small entities impacted by this requirement, CBP does not believe that a cost of $26.11 to file a Center assignment appeal amounts to a "significant" level to these entities.

Under previous, pre-Centers regulations, CBP mandated CBP-accredited laboratories and CBP-approved gaugers to contact the port director and Executive Director of Laboratories and Scientific Services on the matters previously described in 19 CFR 151.12(c)(5) and (6), and 19 CFR 151.13(b)(5) and (6). Given that CBP did not receive any such notifications in the past 20 years, CBP assumes that this rule's added requirement to contact a Center director per amended 19 CFR 151.12(c)(5) and (6), and 19 CFR 151.13(b)(5) and (6), will continue to not impact a substantial number of small entities. In the event that a CBP-accredited laboratory or CBP-approved gauger considered "small" has to notify an additional CBP representative according to these regulatory changes, CBP does not believe that requiring one more telephone call, letter, or email will have a significant economic impact on the entity.

Besides costs, importers and brokers experience benefits from this rule, though the value of these benefits is unknown due to data limitations. The trade community likely benefits from the Centers rule's uniform post-release processing and decision-making, increased agency knowledge of industry practices and products, and improved communication with CBP, based on observations from the Centers test and Centers IFR. CBP expects the Centers' uniform

[24] *See* 13 CFR 121.101–121.201.

[25] Source: CBP Report: Importer SBA Analysis 2022, dated May 11, 2022.

post-release processing and trade-related determinations to decrease administrative burdens on the trade, resulting in time and cost savings. This uniformity may also enhance the trade community's awareness of CBP's position on trade compliance issues, which may improve compliance and generate an unknown amount of subsequent savings to trade members in the future. The Centers' strengthened industry focus likely enhances CBP relations with the trade community, facilitates trade, and results in an improved ability to identify high-risk commercial importations that could increase import safety, increase revenue protection, and reduce economic loss associated with trade violations. By replacing port-by-port communication with communication with one Center, the Centers serve as a single source of information for trade members regarding such subjects as importing requirements, IPR or other trade violation reports, merchandise holds, and PGA issues. This sole communication source eliminates the need for members of the trade community to contact multiple CBP resources, potentially producing additional time and cost savings. The Centers also allow for enhanced communication between CBP and the trade community by offering extended hours of service compared to port of entry service hours, which may expedite trade. Despite their unknown value, CBP notes that the economic impact of these changes on small entities, if any, is entirely beneficial. Although this rule affects a substantial number of small entities, CBP does not believe that the economic impact of this rule on small entities is significant. Accordingly, CBP certifies that this regulation does not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that CBP consider the impact of paperwork and other information collection burdens imposed on the public. As this document does not involve any collections of information under the Act, the provisions of the Act are inapplicable.

Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a), which provides that the authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of DHS pursuant to section 403(1) of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2178, 6 U.S.C. 203(1)). Accordingly, this final rule adopting the interim amendments to such regulations as final may be signed by the Secretary of DHS (or his delegate).

Amendments to the CBP Regulations

For the reasons given above, the Centers IFR amending parts 4, 7, 10, 11, 12, 24, 54, 101, 102, 103, 113, 132, 133, 134, 141, 142, 143, 144, 145, 146, 147, 151, 152, 158, 159, 161, 162, 163, 173, 174, 176, and 181 of title 19 of the Code of Federal Regulations (19 CFR parts 4, 7, 10–12, 24, 54, 101–103, 113, 132–134, 141–147, 151, 152, 158, 159, 161–163, 173, 174, 176, and 181), which was published in the **Federal Register** at 81 FR 92978 on December 20, 2016 (CBP Dec. 16–26), as amended by the technical correction published in the **Federal Register** at 84 FR 46676 on September 5, 2019 (CBP Dec. 19–11), is adopted as a final rule, without change.

ALEJANDRO N. MAYORKAS,
Secretary,
Department of Homeland Security.

[Published in the Federal Register, October 5, 2023 (88 FR 69026)]

U.S. Court of International Trade

Slip Op. 23–144

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

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

[Remanding the U.S. Department of Commerce's final results for the 2019 administrative review of the countervailing duty order on hot-rolled steel flat products from the Republic of Korea.]

Dated: September 29, 2023

Brady W. Mills and *Nicholas C. Duffey*, Morris, Manning & Martin, LLP, of Washington, DC, argued for Plaintiff. With them on the brief were *Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Mary S. Hodgins*, *Eugene Degnan*, *Edward J. Thomas III*, and *Jordan L. Fleischer*.

Sosun Bae, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her 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.

Derick G. Holt, Wiley Rein LLP, of Washington, DC, argued for Defendant-Intervenor. On the brief were *Alan H. Price*, *Christopher B. Weld*, and *Theodore P. Brackemyre*.

OPINION AND ORDER

Barnett, Chief Judge:

This matter is before the court on a motion for judgment on the agency record pursuant to U.S. Court of International Trade ("USCIT") Rule 56.2. Confid. Pl. Hyundai Steel Co.'s Mot. for J. on the Agency R., ECF No. 25, and accompanying Confid. Br. in Supp. of its Mot. for J. on the Agency R. ("Hyundai's Mem."), ECF No. 25–2; Confid. Pl. Hyundai Steel Co.'s Reply Br. in Supp. of its Mot. for J. on the Agency R. ("Hyundai's Reply"), ECF No. 42. Plaintiff Hyundai Steel Company ("Hyundai Steel") challenges the U.S. Department of Commerce's ("Commerce" or "the agency") 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"). Hyundai's Mem. at 2; *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. 20–5.[1]

Defendant United States ("the Government") and Defendant-Intervenor Nucor Corporation ("Nucor") urge the court to sustain Commerce's determination. Def.'s Resp. to Pls.' Mots. for J. on the Agency R. ("Def.'s Resp."), ECF No. 34;[2] Confid. Nucor Corp.'s Resp. to Hyundai Steel Co.'s Mot. for J. on the Agency R. ("Nucor's Resp."), ECF No. 38. For the following reasons, the court remands Commerce's *Final Results*.

BACKGROUND

In 2016, Commerce published the countervailing duty order covering hot-rolled steel flat products from Korea. *Certain Hot-Rolled Steel Flat Prods. From Brazil and the Republic of Korea*, 81 Fed. Reg. 67,960 (Dep't Commerce Oct. 3, 2016) (am. final affirmative countervailing duty determinations and countervailing duty orders). On December 8, 2020, Commerce initiated an administrative review of the underlying order for the 2019 period of review ("POR"). *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 85 Fed. Reg. 78,990, 78,994 (Dep't Commerce Dec. 8, 2020), PR 62, CJA Tab 4. Commerce selected Hyundai Steel as the sole mandatory respondent for the review. Resp't Selection Mem. (Jan. 12, 2021), CR 6, PR 21, CJA Tab 1.

On May 17, 2021, Hyundai Steel and the Government of Korea each responded to Commerce's carbon emissions questionnaire. Hyundai Steel's Carbon Emission New Subsidy Allegation Questionnaire Resp. (May 17, 2021) ("Hyundai Steel's NSA Resp."), CR 74–75, PR 75, CJA Tab 7; GOK's Carbon Emissions New Subsidy Allegation Questionnaire Resp. (May 17, 2021) ("GOK's NSA Resp."), CR 77, PR 76, CJA Tab 8.[3] The questionnaire responses explained that, to reduce greenhouse gas emissions, the Government of Korea established the Emis-

[1] The administrative record for the *Final Results* is contained in 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' briefs. Confid. J.A. ("CJA"), ECF No. 44; Public J.A., ECF No. 45. The court references the confidential record documents unless otherwise specified.

[2] At the time of filing the Government's response, this case was consolidated with another case commenced by Nucor such that two motions for judgment on the agency record were pending. The court subsequently granted Nucor's motion to sever its case to enable dismissal of that case. *See* Nucor Corp.'s Consent Mot. to Sever Ct. No. 22-00171 From Consol. Ct. No. 22–00170 at 1, ECF No. 40; Order (June 12, 2023), ECF No. 41.

[3] During the 2018 administrative review, Commerce determined to initiate an investigation into the Government of Korea's carbon emissions program but deferred the investigation until the 2019 review. *See* GOK Carbon Emissions Program Questionnaire (Apr. 26, 2021), Attach. 1 at 1, PR 63, CJA Tab 5.

sions Trading System of Korea ("K-ETS") in the Act on the Allocation and Trading of Greenhouse Gas Emissions Permits ("AAGEP"), with rules governing K-ETS implementation set forth in the AAGEP's accompanying Enforcement Decree. GOK's NSA Resp., Ex. SQA-1 at 1; *see also id.*, Ex. CEP-1 (reproducing the AAGEP and the Enforcement Decree).[4] The KETS applies to business entities that emit 125,000 tons or more of carbon dioxide or equivalents or have a single place of business that emits 25,000 tons or more of carbon dioxide or equivalents. AAGEP, art. 8(1).

Relevant to this case, for each annual compliance year, the Government of Korea uses emissions data from the 2014 to 2016 baseline period[5] to determine the number of emissions permits[6] entities will be allocated, subject also to the phase of the program, the number of permits available, and the number of K-ETS participants. *See* GOK's NSA Resp. at 3–4; Decision Mem. for the Prelim. Results of the Countervailing Duty Admin. Review (Oct. 29, 2021) ("Prelim. Mem.") at 17–18, PR 98, CJA Tab 15.[7] The 2019 POR fell within phase two of the K-ETS program,[8] during which time all KETS participants received a gratuitous allocation of 97 percent of their permits (referred to herein as "the standard allocation") with the remaining three percent held in reserve. Enforcement Decree, art. 13(2).[9] However, the "types of businesses" that met certain "international trade intensity" or "production cost" criteria received a gratuitous allocation of 100 percent of their permits (referred to as "the full allocation"). *Id.*, art. 14.[10] Hyundai Steel qualified for the full allocation. Hyundai Steel's NSA Resp., Ex. NSA-1 at 2.

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[4] For ease of reference, the court cites to the articles of the AAGEP and the Enforcement Decree, respectively.

[5] This method is called the "grandfathering method" and is the method the GOK applied to Hyundai Steel. GOK's NSA Resp. at 4.

[6] Permits are also called Korean Allowance Units ("KAUs"). *Id.*, Ex. SQA-1 at 5.

[7] Compliance years correspond to calendar years, Prelim. Mem. at 17 n.121, and are also referred to as "commitment periods," GOK's NSA Resp. at 7. Commerce explained that permits corresponding to compliance year 2019 "are allocated in late 2018." Prelim. Mem. at 17.

[8] Phase two ran from 2018 through 2020. *Id.* at 18.

[9] The GOK uses the permits held in reserve for new entrants and for market stabilization. AAGEP, art. 18.

[10] The "types of businesses" eligible for the full allocation are those that have 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." I&D Mem. at 23; *see also* Enforcement Decree, art. 14. 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. *See* GOK's NSA Resp. at 2.

Following the end of each compliance year, K-ETS participants must surrender permits in an amount equal to their emissions during that compliance year or incur penalties for any shortfall. GOK's NSA Resp. at 4, 7. Entities that require additional permits to cover their emissions have several options to avoid a penalty: 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. Prelim. Mem. at 19 & nn.130–31 (citing GOK's NSA Resp. at 4–5, Ex. CEP-1, then citing GOK's First Suppl. Questionnaire Resp. (Sept. 17, 2021) at 2–3, 7, Ex. CEP-7.1, CR 95, PR 93, CJA Tab 14). Companies that receive the full allocation may not participate in a government-run auction. GOK's NSA Resp. at 6. For compliance year 2019, Hyundai Steel purchased additional permits from private parties and borrowed against the company's compliance year 2020 allocation. Hyundai Steel's NSA Resp. at 4; *see also* GOK's NSA Resp. at 7.

Commerce issued its preliminary results on October 29, 2021. *Certain Hot-Rolled Steel Flat Prods. From the Republic of Korea*, 86 Fed. Reg. 60,797 (Dep't Commerce Nov. 4, 2021) (prelim. results of countervailing duty admin. review and rescission in part; 2019) ("*Prelim. Results*"), PR 100, CJA Tab 17. For the *Preliminary Results*, Commerce found that the additional three percent of permits provided to recipients of the full allocation constituted a countervailable benefit. Prelim. Mem. at 17–20. Commerce preliminarily calculated a subsidy rate of 0.56 percent *ad valorem* for Hyundai Steel, *Prelim. Results*, 86 Fed. Reg. at 60,798, inclusive of a 0.10 percent *ad valorem* subsidy rate based on the K-ETS, Prelim. Mem. at 21.

On May 4, 2022, Commerce issued the *Final Results*. 87 Fed. Reg. at 27,570. Commerce made no relevant changes to Hyundai Steel's subsidy rate. I&D Mem. at 17. This appeal followed, and the court heard oral argument on September 7, 2023. Docket Entry, ECF No. 51.[11]

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),[12] and 28 U.S.C. § 1581(c). The court will uphold an agency

[11] Subsequent citations to the Oral Argument include the time stamp from the recording, which is available at https://www.cit.uscourts.gov/node/288/.

[12] Further 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.

determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

To resolve questions concerning statutory interpretation, the court is guided by the two-part framework set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984). Pursuant to *Chevron*, the court must first determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If Congress's intent is clear, "that is the end of the matter," and the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. However, "if the statute is silent or ambiguous," the court must determine whether the agency's action "is based on a permissible construction of the statute." *Id.* at 843.

DISCUSSION

A countervailable subsidy "exists when . . . a foreign government provides a financial contribution . . . to a specific industry" that confers "a benefit" on "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)). Hyundai Steel challenges Commerce's determination with respect to the financial contribution, benefit, and specificity elements of a subsidy. Although a lay observer may consider it clear that the GOK makes a financial contribution to Hyundai Steel by providing the additional KAUs, confers a benefit by providing those KAUs at no cost, and, by limiting the additional distribution to certain industries, does so with specificity, it is incumbent upon the agency to ground its determinations in the statute and regulations, consistent with the various requirements and limitations contained therein. It is with this in mind that the court reviews and addresses each issue, in turn.

I. Financial Contribution

Section 1677(5) defines a financial contribution to include, *inter alia*, "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)(ii). Commerce determined that Hyundai Steel received a financial contribution pursuant to this provision. I&D Mem. at 21–22.

Referencing the agency's preliminary analysis, Commerce explained that "because companies receiving the standard 97 percent allocation were able to purchase KAUs via the GOK-run auction," the additional three percent allocated to other companies represented "something of value on which [the GOK] could collect revenue." *Id.* at 21–22 & n.113 (citing Prelim. Mem. at 20). Commerce rejected Hyundai Steel's argument that the Government of Korea did not forgo

revenue that was otherwise due. *Id.* at 22. The agency reasoned that "it is not a matter of what the GOK would have done with the KAUs had they not given them to qualifying entities like Hyundai Steel," but that "the key consideration is 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.* Commerce explained that because K-ETS participants must surrender the necessary permits at the end of each commitment period or incur a penalty, "through various means, the GOK has forgone revenue otherwise due – in the form of uncollected payments/fines, or through the non-collection of additional allocation from K-ETS participants (whether from Hyundai Steel or otherwise) – by providing the additional three percent allocation to certain industries." *Id.* at 22.

A. Parties' Contentions

Hyundai Steel contends that Commerce has misinterpreted the plain language of the "revenue forgone" provision of the statute. Hyundai's Mem. at 10. Focusing on the phrase "otherwise due," Hyundai Steel contends that the phrase plainly requires the authority to forgo revenue it otherwise has a "'right' to collect." *Id.* at 11. Hyundai Steel asserts that the GOK's provision of the full allocation to certain companies does not result in the GOK forgoing revenue otherwise due because companies that receive the standard allocation are not required to purchase additional permits from the GOK. *Id.* at 12–15.

The Government contends that, but for the provision of additional permits, "the [GOK] would have otherwise retained the ability to collect the three percent allocation." Def.'s Resp. at 16; *see also id.* at 17 (arguing that the revenue forgone provision is met when the relevant authority "provid[es] something of value for which it *could* otherwise *potentially* collect revenue") (emphasis added). The Government relies on *BGH Edelstahl Siegen GmbH v. United States* ("*BGH I*"), 46 CIT __, __, 600 F. Supp. 3d 1241, 1262–63 (2022), to support its position. *See id.* at 16–17.

Nucor contends that the statute does not require "the revenue [to] be due from the respondent in question." Nucor's Resp. at 16. Nucor thus posits that the GOK forgoes revenue because recipients of the full allocation are less likely to have to purchase additional permits on the private market, which, in turn, reduces the need for other companies to buy permits through the government-run auction. *Id.*

Nucor also identifies the penalty paid by companies with insufficient permits as "revenue the GOK could potentially collect." *Id.*[13]

In its reply brief, Hyundai Steel counters that *BGH I* is not persuasive because that opinion does not address arguments raised herein. Hyundai's Reply at 6–8. Hyundai Steel further asserts that Nucor's argument regarding the indirect impact on the number of permits purchased from the GOK is misplaced because "[t]here is no cap on the number of permits that can be sold on the private market." *Id.* at 9. Hyundai Steel argues that the GOK's authority to extract a penalty from companies with insufficient permits does not mean that revenue "is otherwise due" because such payments are not certain to occur. *Id.*

B. Commerce Must Reconsider the Legal Basis for its FinancialContribution Determination

Hyundai Steel contests Commerce's determination that the Government of Korea is forgoing revenue that "is otherwise due" when the GOK provides eligible entities with the full allocation of emissions permits. Hyundai's Mem. at 9. Commerce's financial contribution determination thus turns on the meaning of the phrase "is otherwise due."[14] Statutory interpretation requires the court to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842.[15] The court readily concludes that the plain meaning of the phrase does not encompass revenue that could, but not necessarily would, have otherwise been collected by the relevant authority.

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[13] Nucor also asserts that Hyundai Steel is wrong to focus "on the timing of when Hyundai Steel would have owed any revenue to the GOK." Nucor's Resp. at 15. Nucor's argument is not well-developed, but it appears to be rooted in Nucor's assertion that the permits themselves have value and, thus, the full allocation "placed [Hyundai Steel] in an *initial* advantageous position." *Id.* (quoting Def.'s Resp. at 17). Given that the initial permit allocation (whether full or standard) is gratuitous, AAGEP, art. 12(3)–(4); Enforcement Decree, art. 13, Nucor fails to support the argument that the GOK forgoes revenue that is otherwise due through the allocation process.

[14] Commerce did not take the position that the statutory term "revenue" is ambiguous and permissibly interpreted to cover the emissions permits *as a type of* monetary equivalent. Rather, Commerce tied the value of the KAUs to their value on the governmental or private markets. *See* I&D Mem. at 21 ("The record demonstrates that KAUs are market instruments with prices established for the purpose of trading KAUs both through the GOK-run auction and in private trading markets throughout the POR."). Thus, the revenue that is material to this case is the revenue associated with the sale of permits. Accordingly, and consistent with Commerce's further explanation on financial contribution and its benefit calculation, *see id.* at 22, 25, the question before the court is whether the additional three percent allocation resulted in the GOK forgoing revenue from the sale of additional allocations that was otherwise due.

[15] Commerce did not state whether the agency considered the statute plain or ambiguous. *See id.* at 21–22.

As set forth above, "[t]he term 'financial contribution' means-- . . . (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)(ii). Congress's use of the simple present tense "is" denotes an existent obligation that is due presently or would be due at some time in the future. *See, e.g.*, *Carr v. United States*, 560 U.S. 438, 448 (2010) (stating that, "[c]onsistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"); *see also* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise--. . . words used in the present tense include the future as well as the present[.]"). As such, the revenue that is forgone must be due either presently or on some future date, but it must, nevertheless, be "otherwise due."

The parties do not dispute that the adverb "otherwise" means, in effect, "in different circumstances," *see* Hyundai's Mem., Ex. B (appending a printout from an online dictionary), or as is relevant here, "but for the subsidy program."

Dispositive for purposes of this case, however, is the meaning of "due." The Oxford English Dictionary defines "due," when used as an adjective as it is in the statute, as something "[t]hat is owed or payable as an *enforceable obligation or debt*." *Due*, Oxford English Dictionary, https://www.oed.com/dictionary/due_adj (last visited Sept. 29, 2023) (emphasis added). Other dictionary definitions are in accord. *See Due*, Dictionary.com, https://www.dictionary.com/browse/due (last visited Sept. 29, 2023) (defining "due" as "owed at present; having reached the date for payment" or, "owing or owed, irrespective of whether the time of payment has arrived"); Hyundai's Mem., Ex. A (appending a printout from Merriam-Webster's online dictionary defining "due" as "owed or owing as a debt"). These definitions indicate that the statute requires the forgoing of revenue that the recipient of the financial contribution would—not merely could— otherwise *owe* the authority.

The statutory text and legislative history are consistent with this view. *See Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (directing the court to examine "the statute's text, structure, and legislative history," applying, if necessary, "the relevant canons of interpretation"). The statute and the Statement of Administrative Action accompanying the Uruguay Round Agreements Act provide nonexhaustive examples in the form of tax credits or deductions from

taxable income that operate to reduce the amount of tax revenue a recipient would owe the authority. *See* 19 U.S.C. § 1677(f)(D)(ii); Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–316, vol. 1, at 912 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4229.[16]

Neither Commerce nor the Government[17] offer a contrary interpretation of the phrase "is otherwise due" or specifically explain why the potential collection of revenue—either from permits or penalties—fulfills this statutory requirement. Commerce's brief discussion of its decision in *FEBs From Germany* involving the European Union Emissions Trading System ("EU ETS") does not illuminate Commerce's statutory interpretation.[18] *See* I&D Mem. at 22 & nn.114–17 (discussing Issues and Decision Mem. for Fluid End Blocks from Germany, C-428–848 (Dec. 7, 2020), Cmt. 10).[19]

At oral argument, the court asked the parties to provide examples of prior Commerce decisions, if they exist, in which the agency relied on the revenue forgone provision when the authority provided something of value to a recipient (i.e., something other than a tax credit or similar fiscal incentive). *See* Letter to Counsel (Aug. 31, 2023), ECF No. 50. The Government identified *Hyundai Steel Co. v. United States* ("*Hyundai Steel II*"), Slip Op. 23–121, 2023 WL 5352235, at *1 (CIT Aug. 1, 2023), as such an example. Oral Arg. 26:00–27:30. Nucor

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

[17] Cases cited by the Government for the statutory framework also do not suggest a different interpretation. *See* Def.'s Resp. at 15–16 (citing *Gov't of Québec v. United States*, 46 CIT __, __, 567 F. Supp. 3d 1273, 1278 (2022); *Essar Steel, Ltd. v. United States*, 29 CIT 1311, 1313, 395 F. Supp. 2d 1275, 1277 (2005)). Such cases address financial contribution determinations analogous to the statutory examples. *See Gov't of Québec*, 567 F. Supp. 3d at 1296 (revenue forgone when the authority provided "additional depreciation [thereby reducing the tax burden] for buildings used in manufacturing by comparison to the rate applicable if the additional depreciation were not claimed"); *Essar Steel*, 29 CIT at 1313, 395 F. Supp. 2d at 1277 (revenue forgone when the authority provided credits to be used "for the future payment of import duties").

[18] Commerce quoted from a portion of its *FEBs From Germany* decision in which the agency analogized the EU ETS to a tax rebate system. *See* I&D Mem. at 22 n.114. However, beyond declaring that in each situation "the government has forgone revenue that would otherwise have been due," Commerce does not explain precisely *why* the EU ETS is analogous to a tax rebate system. *See id.* While the *BGH I* court sustained Commerce's financial contribution determination with respect to the EU ETS, 600 F. Supp. at 1262–63, Hyundai Steel raises different arguments grounded in statutory interpretation that the *BGH I* court did not have occasion to address and, in any case, CIT opinions are not binding, *see Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989).

[19] 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.

identified a Commerce decision concerning silicon metal from Australia. *Id.* 32:00–34:03.[20]

While the relevant determinations were not subject to judicial review,[21] it appears that the revenue the respective authorities declined to collect in each case would otherwise have been due (owed) to the authority. In *Hyundai Steel II*, Commerce relied on the revenue forgone provision when, following Hyundai Steel's construction of port facilities and subsequent transfer of port ownership to the Government of Korea, the GOK assigned its right to collect port fees to Hyundai Steel. 2023 WL 5352235, at *3 (explaining that the port fees "would otherwise have been collected by the [Government of Korea] absent the agreement between the parties") (alteration in original). In *Silicon Metal From Australia*, Simcoa, an electricity retailer, obtained certificates exempting it from certain renewable energy liabilities and provided those certificates to Synergy, an electricity provider and "authority" pursuant to the statute, that functioned as a credit on Simcoa's electricity account. Silicon Metal Prelim. Mem. at 10–11. Commerce found a financial contribution in the form of reduced electricity payments from Simcoa to Synergy. *Id.* at 11 (unchallenged in the final decision memorandum). Commerce's determinations in these two instances are more clearly reconcilable with the above definitions of the term "due" in connection with enforceable payment obligations or debts.

Commerce's construction of the statute in this case *might* fare better if the statute provided for a financial contribution in the form of revenue forgone without further qualification, but by adding the phrase "that is otherwise due," Congress added a constraint for which Commerce must account. *See United States v. Nordic Vill. Inc.*, 503 U.S. 30, 36 (1992) (stating that courts must construe statutes "in such a fashion that every word has some operative effect"). Because Com-

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[20] Nucor did not provide a specific citation, but the court understands Nucor to refer to the agency's preliminary determination in the countervailing duty investigation concerning silicon metal from Australia. *See* Prelim. Decision Mem. for Silicon Metal from Australia, C-602–811 (Aug. 7, 2017) ("Silicon Metal Prelim. Mem.").

[21] The court's opinion ordering the remand determination reviewed in *Hyundai Steel II* made clear that Hyundai Steel's challenge was limited to the benefit determination and did not include the financial contribution or specificity determinations. *See Hyundai Steel Co. v. United States*, 47 CIT __, __, 615 F. Supp. 3d 1351, 1354 (2023). In another recent case involving the countervailability of port-usage fees, Hyundai Steel likewise challenged only Commerce's benefit determination. *See Hyundai Steel Co. v. United States*, Slip Op. 23–142, 2023 WL 6240149, at *3–4 (CIT Sept. 26, 2023) (ordering remand for further consideration of the issue). A review of the court's docket does not disclose litigation concerning *Silicon Metal From Australia*, nor did Nucor provide such a citation.

merce did not do so here, the agency's financial contribution determination is not in accordance with law.[22]

Additionally, as a factual matter,[23] the full allocation provided by the K-ETS as compared to the standard allocation does not meet the plain language of the revenue forgone provision. While "the three percent allocation represents a value that the GOK will no longer collect" because companies that receive the additional permits will not have to purchase those permits from the GOK to cover their annual emissions (or obtain them elsewhere), I&D Mem. at 22, the value embodied by those permits does not represent revenue that, but for the permits being given to Hyundai Steel gratis, "is otherwise due" to the GOK. K-ETS participants 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. Companies that receive the standard allocation might not incur any permit shortfall and, if they do, they have various options to remedy the shortfall besides sending payment to the GOK. *See, e.g.*, Prelim. Mem. at 19. That the GOK *might* obtain revenue from the sale of additional KAUs does not

[22] Commerce's interpretive approach (pursuant to which the potential forgoing of revenue suffices for purposes of section 1677(5)(D)(iii)) is problematic because it could subsume other provisions of the financial contribution statute. Because Commerce considers money to be fungible for purposes of administering the countervailing duty statute, *see, e.g.*, *Kiswok Indus. Pvt. v. United States*, 28 CIT 774, 787 (2004) ("A cash subsidy, regardless of its intended or actual use, frees up revenue, which in turn may be applied for other purposes, and thus entails general benefit."), Commerce could, in theory, find that a grant, which typically falls under a different statutory provision, constitutes revenue forgone to the extent that the grant money may be used to offset a recipient's tax liability. In such a case, the authority is forgoing revenue in an amount equal to the amount of the grant, and such amount is potentially due to the authority even if the grant is provided without regard to when (or if) the tax may be due. Given that Commerce considers the KAUs to be market instruments, *see* I&D Mem. at 21, the possibility that Commerce's determination conflates otherwise distinct statutory provisions bolsters the need for the agency to reconsider its interpretive approach.

[23] The overall thrust of Commerce's decision appears to rest on the agency's conclusion that the potential for collecting revenue fulfills the revenue forgone provision. *See id.* at 18 (recognizing that "the assistance provided by the additional three percent KAU allocation is intended to cover *potential liability* owed by, not to, the respondent under the K-ETS program") (emphasis added; other emphasis omitted); *id.* at 22 (noting that "the GOK is providing something of value on which it *could* collect revenue" and that without the additional allocation "the GOK would have *retained the ability* to collect the three percent allocation from Hyundai Steel") (emphasis added). However, after recounting these scenarios, Commerce concluded that "the GOK *has* forgone revenue otherwise due." *Id.* (emphasis added). As a result of this conclusory reasoning, and as discussed herein, the court is unable to find that substantial evidence supports Commerce's finding that the full allocation fulfills the plain meaning of the revenue forgone provision.

mean that the GOK has, in the case of companies like Hyundai Steel, forgone revenue that "is otherwise due."[24]

Accordingly, Commerce's determination with respect to financial contribution is not in accordance with the law to the extent that it rests on an incorrect interpretation of the statute and lacks substantial evidence to the extent that the full allocation does not result in revenue forgone that is otherwise due. Thus, Commerce's determination will be remanded for Commerce to reconsider whether the full allocation constitutes a financial contribution.

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 provision 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 . . . ." *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 *Preliminary Results*, Commerce relied on 19 C.F.R. § 351.503(b)(2) to find a benefit "to the extent that the recipient is relieved of the obligation to purchase additional allowances." Prelim. Mem. at 20. Hyundai Steel did not challenge Commerce's reliance on subsection (b)(2) but instead focused solely on Commerce's claimed failure to consider the burdens imposed by the K-ETS. *See* Hyundai Steel's Case Br. (Jan. 11, 2022) at 3–9, CR 120, PR 122, CJA Tab 19.

For the *Final Results*, Commerce found that the full allocation constituted a benefit despite the costs incurred by Hyundai Steel to comply with K-ETS requirements. I&D Mem. at 20. Commerce explained that "[a] subsidy that reduces a firm's cost of compliance

[24] Nucor's argument that the additional allocation indirectly reduces the number of permits that need to be purchased from the GOK because it relieves pressure on the private permit market, *see* Nucor's Resp. at 16, is not persuasive. Nucor identifies no record evidence demonstrating 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.

remains a subsidy . . . even though the overall effect of the two government actions, taken together, may leave the firm with higher costs." *Id.* at 18 & n.94 (quoting *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,361 (Dep't Commerce Nov. 25, 1998) (final rule) ("*Preamble*") (alterations in original). According to Commerce, "[t]he [*Preamble*] describes a relevant example" as when "a government implements new environmental restrictions that require a firm to purchase new equipment" and "[t]he government then provides that firm with subsidies to purchase the new equipment" but the subsidy "does not fully offset the cost of the equipment." *Id.* at 18 & n.96 (citing *Preamble*, 63 Fed. Reg. at 65,361).

A. Parties' Contentions

Hyundai Steel contends that Commerce's benefit determination is unlawful insofar as Commerce "ignore[d] the immense burden this program places on companies like Hyundai Steel" as compared to companies that are not subject to the K-ETS. Hyundai's Mem. at 20–21. Hyundai Steel cites *Gov't of Sri Lanka v. United States*, 42 CIT __, __, 308 F. Supp. 3d 1373, 1380 (2018) ("*GOSL*"), to support its position. *Id.* at 24, 27. Hyundai Steel also contends that Commerce failed to conduct the examination required by 19 C.F.R. § 351.503(b)(2). *Id.* at 22.

The Government contends that Commerce need not consider "any related 'burdens' imposed on a firm" in connection with the subsidy program, "such as those pertaining to compliance with certain environmental obligations." Def.'s Resp. at 18; *see also id.* at 19 (discussing *BGH I*, 600 F. Supp. 3d at 1264). Nucor contends that Commerce explained its benefit determination pursuant to 19 C.F.R. § 351.503(b)(2) when it concluded that "the recipient is relieved of the obligation to purchase additional allowances." Nucor's Resp. at 18 (quoting Prelim. Mem. at 20; I&D Mem. at 24).[25]

B. Commerce Must Reconsider Its Determination of Benefit Consistent with the Agency's Reconsideration of Financial Contribution

Because Commerce must reconsider the legal basis, if any, for its financial contribution determination, the agency may, if necessary,

[25] Nucor also argues that Hyundai Steel received the additional permits for less than adequate remuneration, Nucor's Resp. at 18, but Commerce did not make a benefit determination pursuant to 19 U.S.C. § 1677(5)(E)(iv).

reconsider the regulatory basis for its benefit determination.[26] For the sake of completeness, however, and insofar as it may remain relevant to the matters addressed on remand, the court considers—and rejects—Hyundai Steel's primary claim that Commerce impermissibly ignored the burdens imposed by the K-ETS program.

The statute addresses the circumstances in which environmental compliance is non-countervailable, and those circumstances are not present here nor does Hyundai Steel claim that they are present. *See* 19 U.S.C. § 1677(5B)(D)(i) (governing nonrecurring subsidies provided for "the adaptation of existing facilities to new environmental requirements" that "result in greater constraints and financial burdens on the recipient").[27] Further, as Commerce explained, the *Preamble* expressly contemplates the countervailability of subsidies that are intended to offset a firm's cost of complying with environmental restrictions. *See* I&D Mem. at 18 & n.93 (citing *Preamble*, 63 Fed. Reg. at 65,361).[28] Hyundai Steel identifies no legal requirement for Commerce to compare Hyundai Steel's experience to that of other companies, foreign or domestic, that do not incur similar compliance costs, nor is the court aware of any. *Cf. BGH I*, 600 F. Supp. 3d at 1255 (rejecting a similar argument with the observation that "[n]either the statute nor the regulations allow for such a comparison").

Hyundai Steel's reliance on *GOSL* to persuade the court otherwise is also misplaced. There, the court remanded Commerce's benefit determination when the agency countervailed payments made by the Government of Sri Lanka ("GSL") reimbursing tire manufacturers/

[26] Commerce's regulations contain specific rules for measuring the benefits conferred through various types of subsidy programs in addition to the catchall provision Commerce relied on here. *See* 19 C.F.R. § 351.503(a), (b)(2). Thus, any change in Commerce's basis for finding a financial contribution may alter Commerce's benefit analysis, requiring application of a different regulation. Accordingly, the court need not address Hyundai Steel's challenge to the adequacy of Commerce's explanation of its reliance on 19 C.F.R. § 351.503(b)(2) at this time. *See* Hyundai's Mem. at 22; Hyundai's Reply at 15.

[27] The statute also lists permissible offsets from Commerce's calculation of the gross countervailable subsidy, *see* 19 U.S.C. § 1677(6), though Hyundai Steel does not argue that any such offsets apply here, *see* Hyundai's Mem. at 27.

[28] Hyundai Steel argues that the *Preamble*'s discussion is inapposite because it relates to input cost reductions, which was not the basis for Commerce's decision here, and because the *Preamble* refers to the imposition and the subsidization of the requirements as "two separate actions," whereas the "emissions caps allocated in the form of permits here are the environmental restriction." Hyundai's Reply at 12. Those distinctions are immaterial. There is no indication in the *Preamble* that the agency intended to constrain its ability to find a benefit when a company ultimately incurs higher costs to only those situations involving input cost effects. In fact, the reference to "two separate actions" occurs with respect to an example in which a firm is required to purchase new equipment to adapt its facilities and receives a subsidy to purchase "that new equipment." *Preamble*, 63 Fed. Reg. at 65,361. Additionally, statutory *treatment* of an imposition and corresponding subsidization of compliance with that imposition "as two separate actions" does not mean that Commerce cannot consider one aspect of a larger government action to confer a benefit when other aspects of that same action may result in higher overall costs. *Id.*

rubber buyers for payments made to rubber smallholders. *GOSL*, 308 F. Supp. 3d at 1379–84. The program being examined in that case involved an above-market "guaranteed price" to smallholders that rubber buyers were required to pay, subject to reimbursement by the GSL for any difference between the "market price" and the "guaranteed price," i.e., the value of the guarantee to the smallholders. *Id.* at 1379–80. The court concluded that Commerce erred in ignoring evidence that the rubber buyers had effectively extended "interest-free loans" to the GSL such that the "reimbursement payments" at issue were not properly considered a benefit. *Id.* at 1382.

GOSL is inapposite. There, the court faulted Commerce for disregarding evidence demonstrating that the payments at issue did not meet the statutory or regulatory criteria for finding a benefit; the court was not concerned with whether related burdens from complying with a program that otherwise conferred a benefit undermined any such finding. *See id.* at 1381–84. Hyundai Steel's emphasis on contextualizing any benefit within a governmental action's overall burden stretches the *GOSL* court's holding too far and overlooks that Commerce routinely countervails benefits that reduce otherwise greater liabilities. *See, e.g.*, 19 C.F.R. § 351.509(a) (in the case of tax credits, stating that "a benefit exists to the extent that the *tax paid* by a firm as a result of the program *is less than* the tax the firm *would have paid* in the absence of the program") (emphases added). The absence of any limiting principle to Hyundai Steel's characterization of *GOSL* is another reason to reject the argument. Accordingly, the court will sustain this aspect of Commerce's benefit determination and will defer addressing any remaining benefit arguments pending the agency's redetermination on remand.

III. Specificity

Domestic subsidies[29] 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). Commerce concluded that the distribution of the full allocation of emissions permits pursuant to the K-ETS is *de jure* specific. I&D Mem. at 22.

The statute provides 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

[29] 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).

subsidy to an enterprise or industry." 19 U.S.C. § 1677(5A)(D)(i).[30] Pursuant to the statutory safe harbor provision, however, 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).[31] "[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 I*, 600 F. Supp. 3d at 1255 (citing SAA at 930, 1994 U.S.C.C.A.N. at 4243).

Commerce found that 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. While Commerce acknowledged that "the rules do not name specific industries," Commerce considered the governing documents sufficiently determinative for purposes of section 1677(5A)(D)(i) because they "establish that some industries may benefit from the additional assistance in the form of the allocation of additional KAUs, while others do not." *Id.* In addition to establishing "explicit limitations," Commerce found that the enumerated criteria are "not objective" for purposes of the safe harbor provision in section 1677(5A)(D)(ii). *Id.*

A. Parties' Contentions

Hyundai Steel contends that the relevant provisions of the AAGEP and the Enforcement Decree are not *de jure* specific because they do not "explicitly limit" the full allocation "to a specific enterprise or industry." Hyundai's Mem. at 29 (citing *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States*, 45 CIT __, __, 523 F. Supp. 3d 1393 (2021) ("*Asemesa*")). Hyundai Steel further contends that Commerce provided no explanation for its finding pursuant to section 1677(5A)(D)(ii). *Id.* at 34.

The Government contends that *Asemesa* is factually distinguishable. Def.'s Resp. at 21–22. For the Government, it is enough that the

[30] 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).

[31] For a subsidy to avoid a specificity finding, 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). Such requirements are not at issue here.

AAGEP and the Enforcement Decree "establish that specific types of industries may benefit from the additional assistance . . . while others do not." *Id.* at 22–23. The Government further contends that the safe harbor provision does not apply because the criteria "clearly favor industries in trade-intensive or high production cost sectors." *Id.* at 23. The Government analogizes Commerce's specificity finding to the agency's determination sustained in connection with the EU ETS in *BGH I*. *See id.* at 24. Nucor advances similar arguments. *See* Nucor's Resp. at 19.[32]

Hyundai Steel replies that the Government's attempt to distinguish the facts of *Asemesa* is misplaced because the court's holding nevertheless applies. Hyundai's Reply at 17. Hyundai Steel further asserts that the *BGH I* court's specificity holding with respect to the EU ETS program is distinguishable and that the court's holding with respect to a different subsidy program is more persuasive. *Id.* at 19–20.[33]

B. Commerce Must Reconsider or Further Explain the Agency's Specificity Finding

For a subsidy to be specific pursuant to section1677(5A)(D)(i), the authority or the implementing legislation must "expressly limit[] access to the subsidy to an enterprise or industry," 19 U.S.C. § 1677(5A)(D)(i), or a "a group of such enterprises or industries.," *id.* § 1677(5A). The court has interpreted the statute to mean "that a subsidy is *de jure* specific when 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," *Asemesa*, 523 F. Supp. 3d at 1403 (stating that "[t]here is no ambiguity in this reading"), or in other words, when the program is limited "to specifically named enterprises or industries or group of

[32] Nucor raises additional arguments concerning the subsectors that qualified for the full allocation in an effort to demonstrate specificity. Nucor's Resp. at 20 (discussing GOK's NSA Resp., Exs. CEP-7, CEP-8). Commerce did not explicitly rely on, or otherwise discuss, the facts contained in these exhibits and, therefore, the court need not further discuss Nucor's arguments. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (explaining that the court may only sustain Commerce's decision "on the same basis articulated in the order by the agency itself" and not on the basis of "counsel's post hoc rationalizations").

[33] Hyundai Steel relies on the *BGH I* court's discussion of the KAV program, pursuant to which benefits were limited "to special contract customers whose average price per [kilowatt hour ("kWh")] in the calendar year is lower than the average revenue per kWh from the supply of electricity to all special contract customers." 600 F. Supp. 3d at 1269. The court remanded Commerce's determination for further explanation or reconsideration. *Id.* Commerce subsequently provided additional explanation to support its specificity finding, and the court again remanded. *BGH Edelstahl Siegen GmbH v. United States* ("*BGH II*"), 47 CIT __, __, 639 F. Supp. 3d 1237, 1244 (2023). The *BGH II* court reasoned that the criteria governing the KAV program "do not expressly limit the program's application to specific enterprises or industries" and Commerce had not "explain[ed] how the program's criteria are neither economic in nature nor horizontal in application." *Id.*

enterprises or industries," *BGH II*, 639 F. Supp. 3d at 1244. Nonuniform treatment across the economy is not enough; instead, the authority or its implementation legislation must "explicit[ly] restrict[]" the "benefits to a specific enterprise or industry." *Asemesa*, 523 F. Supp. 3d at 1403.

Commerce does not offer a convincing explanation for why the "international trade intensity" or "production cost" criteria governing the full allocation establish *de jure* specificity pursuant to section 1677(5A)(D)(i). *See* I&D Mem. at 23 (expressing disagreement with Hyundai Steel's reliance on *Asemesa* without directly addressing the court's opinion).[34] 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," I&D Mem. at 23, merely reflects the truism that not all industries will "qualif[y] under the criteria," *BGH II*, 639 F. Supp. 3d at 1244. While the statute "does not attempt to provide a precise mathematical formula for determining when the number of enterprises or industries eligible for a subsidy is sufficiently small so as to properly be considered specific," SAA at 930, 1994 U.S.C.C.A.N. at 4243, Commerce did not make any findings regarding the nature of the eligibility criteria that supported the *de jure* specificity finding. Rather, Commerce relied on the existence of the criteria *per se* to establish specificity. *See* I&D Mem. at 23. *But cf. Taizhou United Imp. & Exp. Co. v. United States*, 44 CIT __, __, 475 F. Supp. 3d 1305, 1315 (2020) (sustaining Commerce's *de jure* specificity finding when "eight *specified* industries" qualified for a subsidy that was "limited as a matter of law to *certain* new and high technology companies") (emphases added). However, the existence of criteria alone, and absent any analysis of those criteria, is not enough to demonstrate an explicit limitation *to an enterprise or industry* or group thereof. *See* 19 U.S.C. § 1677(5A)(D)(i).[35]

Commerce's application of section 1677(5A)(D)(ii) does not save the agency's determination. Commerce merely declared that "the AAGEP and implementing rules . . . are not objective criteria or conditions," I&D Mem. at 23, but did not provide the explanation necessary to

[34] Commerce's determination suggests that a subsidy would be *de jure* specific pursuant to section 1677(5A)(D)(i) whenever an authority sets eligibility criteria that operate to exclude certain industries from receiving a benefit. *See* I&D Mem. at 23. Commerce does not explain why the statute plainly allows for such a broad interpretation or why the agency's interpretation represents a permissible construction of ambiguous language. *See id.*

[35] The *BGH I* court's decision with respect to the EU ETS is factually distinguishable to the extent that the court relied on Commerce's finding that eligibility for the EU ETS is "limited by law to the companies on the carbon leakage list." 600 F. Supp. 3d at 1264. Furthermore, Commerce did not analogize this aspect of its decision in *FEBs From Germany* to the facts underlying this case.

support its decision. Commerce did not explain why the criteria *inherently* favor a given enterprise or industry or address whether the criteria are economic in nature or horizontal in application. *See id.*; SAA at 930, 1994 U.S.C.C.A.N. at 4243; *cf., e.g.*, *NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("Commerce must explain the basis for its decisions; while its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court.").[36] Accordingly, Commerce must reconsider or further explain its finding of *de jure* specificity.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Results* are remanded for further explanation or reconsideration consistent with this opinion with respect to the agency's determination that the full allocation pursuant to the K-ETS constitutes a countervailable subsidy; it is further

ORDERED that Commerce shall file its remand redetermination on or before January 5, 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 4,000 words.

Dated: September 29, 2023
New York, New York

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

[36] During oral argument, Nucor averred that Commerce's rationale for finding *de jure* specificity is discernable through the agency's citations to record documents in footnotes 120 and 121 of the Issues and Decision Memorandum. Oral Arg. 2:07:00–2:08:20. Those footnotes contain citations to the AAGEP and the Enforcement Decree in their entirety and to specified pages of the GOK's case brief to the agency. *See* I&D Mem. at 23 nn.120–21 (citing GOK's NSA Resp., Ex. CEP-1, and Case Br. of the [GOK] (Jan. 11, 2022) at 8–9, CR 119, PR 121, CJA Tab 18). While these citations substantiate the fact that not all industries qualify for the full allocation (and the GOK's view that Commerce reached an incorrect preliminary determination on specificity), the court is unable to discern Commerce's rationale for connecting these facts found to the choice made. *See, e.g.*, *Burlington Truck Lines*, 371 U.S. at 168.

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FUSONG JINLONG WOODEN GROUP CO., LTD., et al., Plaintiffs, YIHUA LIFESTYLE TECHNOLOGY CO., LTD., et al., Consolidated Plaintiffs, and LUMBER LIQUIDATORS SERVICES, LLC, et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and AMERICAN MANUFACTURERS OF MULTILAYERED WOOD FLOORING, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Consol. Court No. 19–00144

ORDER

Before the court is the motion of Defendant United States, on behalf of the Department of Commerce ("Commerce" or the "Department"), for reconsideration, ECF No. 120. Defendant's motion follows the court's decision in *Fusong Jinlong Wooden Grp. Co. v. United States*, 46 CIT __, 617 F. Supp. 3d 1221 (2022) ("*Fusong I*"), which held that Commerce's use of Senmao's highest transaction-specific dumping margin as Sino-Maple's adverse facts available rate was not authorized by the statute. The court remanded the final results to Commerce with instructions to "reconsider the method used to select Sino-Maple's [adverse facts available] rate to comply with the statute, 19 U.S.C. § 1677e(d)." *Id.*, 46 CIT at __, 617 F. Supp. 3d at 1252. Defendant, by its motion, asks the court to find that Commerce's method for selecting an adverse facts available rate was lawful.

Upon consideration of Defendant's motion, and other papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that Defendant's motion is granted, and the court finds that Commerce's method for selecting an adverse facts available rate for Sino-Maple was lawful; it is further

ORDERED that *Fusong I* is hereby partially vacated, only to the extent the court held that Commerce was prohibited from using Senmao's highest transaction-specific dumping margin as Sino-Maple's adverse facts available rate; and it is further

ORDERED that, because the court remanded Commerce's final results solely on this point, the Department is relieved of the obligation to conduct a remand redetermination and file its results.

The court will issue a subsequent opinion deciding the issues upon which it previously reserved decision. *See id.*, 46 CIT at __, 617 F. Supp. 3d at 1227 n.8.

Dated: October 4, 2023
New York, New York

/s/ Richard K. Eaton
JUDGE

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