# U.S. Customs and Border Protection

**DEPARTMENT OF THE TREASURY**

**19 CFR PART 12**

**CBP DEC. 24–10**

**RIN 1515–AE89**

## IMPORT RESTRICTIONS IMPOSED ON ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIAL FROM ECUADOR; CORRECTION

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

**ACTION:** Final rule; correction.

**SUMMARY:** On February 14, 2020, U.S. Customs and Border Protection (CBP) published a final rule in the **Federal Register** (CBP Dec. 20–03) imposing import restrictions on certain archaeological and ethnological material from Ecuador, pursuant to a memorandum of understanding between the United States and Ecuador. This document corrects the expiration date of the import restrictions to February 11, 2025, to correspond with the date the import restrictions entered into force. The CBP regulations are being amended to reflect this correction. The Designated List of materials to which the restrictions apply remains unchanged.

**DATES:** The final rule is effective May 22, 2024.

**FOR FURTHER INFORMATION CONTACT:** For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch@cbp.dhs.gov.*

## SUPPLEMENTARY INFORMATION:

### Correction

The Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (the Convention), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under the CPIA and applicable U.S. Customs and Border Protection (CBP) regulations, found in section 12.104 of title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)).

On May 22, 2019, the United States concluded a memorandum of understanding ("the MOU") with the Republic of Ecuador, concerning the imposition of import restrictions on certain categories of archaeological and ethnological material of Ecuador. Pursuant to the terms of the MOU, the MOU entered into force upon the completion of the exchange of diplomatic notes on February 11, 2020. On February 14, 2020, CBP published a final rule, CBP Dec. 20–03, in the **Federal Register** (85 FR 8389) ("the final rule") amending title 19 of the Code of Federal Regulations (CFR) part 12, specifically § 12.104g(a), to reflect the imposition of restrictions on this material, including a list designating the types of archaeological and ethnological materials covered by the restrictions.

The final rule erroneously stated the import restrictions entered into force on May 22, 2019, citing to the date of the signing of the MOU by both parties, and would expire on May 22, 2024. However, in accordance with the terms of the MOU, the restrictions actually entered into force upon the completion of the exchange of diplomatic notes. The parties exchanged the diplomatic notes on February 11, 2020, and not May 22, 2019, as the final rule stated. Thus, consistent with the requirements of 19 U.S.C. 2602(b) and 19 CFR 12.104g, the import restrictions will expire on February 11, 2025, unless extended. Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the correction of the expiration date.

The Designated List remains unchanged and can be found in CBP Dec. 20–03, and at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions* by selecting the material for "Ecuador."

**Inapplicability of Notice and Delayed Effective Date**

This rule involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure under 5 U.S.C. 553(a)(1). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

**Executive Orders 12866 and 13563**

Executive Orders 12866 (as amended by Executive Order 14094) and 13563 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, of reducing costs, of harmonizing rules, and of promoting flexibility. CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Orders 12866 and 13563 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866 and, by extension, Executive Order 13563.

**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 an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

**Signing Authority**

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of the Secretary's delegate) to approve regulations related to customs revenue functions.

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

**List of Subjects in 19 CFR Part 12**

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, and Reporting and recordkeeping requirements.

**Amendment to the CBP Regulations**

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

**PART 12—SPECIAL CLASSES OF MERCHANDISE**

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

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■ 2. In § 12.104g, the table in paragraph (a) is amended by revising the entry for Ecuador to read as follows:

**§ 12.104g Specific items or categories designated by agreements or emergency actions.**

(a) * * *

| State party | Cultural property | Decision No. |
|---|---|---|
| | * * * * * * * | |
| Ecuador ... | Archaeological and ethnological material representing Ecuador's cultural heritage that is at least 250 years old, dating from the Pre-ceramic (approximately 12,000 B.C.), Formative, Regional development, Integration, Inka periods and into the Colonial period to A.D. 1769. | CBP Dec. 20–03, corrected by CBP Dec. 24–10. |
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EMILY K. RICK,
*Acting Director,*
*Regulations & Disclosure Law Division,*
*Regulations & Rulings, Office of Trade,*
*U.S. Customs and Border Protection.*

Approved:

AVIVA R. ARON-DINE,
*Acting Assistant*
*Secretary of the Treasury for Tax Policy.*

## AGENCY INFORMATION COLLECTION ACTIVITIES:

## Extension; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

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

**ACTION:** 30-Day notice and request for comments.

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

**DATES:** Comments are encouraged and must be submitted (no later than June 24, 2024) to be assured of consideration.

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

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other

CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/*.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (89 FR 5251) on January 26, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

**Overview of This Information Collection**

**Title:** Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

**OMB Number:** 1651–0136.

**Form Number:** N/A.

**Current Actions:** CBP proposes to extend the expiration date of this information collection with a change in burden hours.

**Type of Review:** Extension (with change).

**Affected Public:** Individuals and Businesses.

**Abstract:** Executive Order 12862, Setting Customer Service Standards, directs Federal agencies to provide service to the public that matches or exceeds the best service available in the private sector. Executive Order 14058, Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government, reiterates that Federal agencies should continually

improve their understanding of their customers and their customer experience challenges. In order to work continuously to ensure that our programs are effective and meet our customers' needs, CBP seeks to obtain OMB approval of a generic clearance to collect qualitative feedback on our service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of study.

This collection of information is necessary to enable CBP to garner customer and stakeholder feedback in an efficient, timely manner, in accordance with our commitment to improving service delivery. The information collected from our customers and stakeholders will help ensure that users have an effective, efficient, and satisfying experience with CBP's programs. This feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between CBP and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

*Type of Information Collection:* Customer Feedback.

**Estimated Number of Respondents:** 620,000.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 620,000.

**Estimated Time per Response:** 5 minutes.

**Estimated Total Annual Burden Hours:** 51,000.

Dated: May 20, 2024.

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

## AGENCY INFORMATION COLLECTION ACTIVITIES:

## Revision; Advance Travel Authorization (ATA)

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

**ACTION:** 30-Day notice and request for comments.

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

**DATES:** Comments are encouraged and must be submitted (no later than June 24, 2024) to be assured of consideration.

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

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

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (88 FR 62810) on September 13, 2023, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions

to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

**Overview of This Information Collection**

**Title:** Advance Travel Authorization (ATA).

**OMB Number:** 1651–0143.

**Form Number:** N/A.

**Current Actions:** Revision to an existing collection of information with an increase in total annual burden.

**Type of Review:** Revision.

**Affected Public:** Individuals.

*Abstract:* The Department of Homeland Security (DHS) established new parole processes to allow certain noncitizens from certain countries, and their qualifying immediate family members to request advance authorization to travel to the United States to seek a discretionary grant of parole, issued on a case-by-case basis. To support these processes, U.S. Customs and Border Protection (CBP) developed the Advance Travel Authorization (ATA) capability, which allows individuals to submit information within the CBP One™ application as part of the process. Through an emergency approval, CBP established the ATA collection. Initially, this capability was utilized by Venezuelan citizens and their qualifying immediate family members seeking authorization to travel to the United States under the DHS-established parole process for Venezuelans.[1] DHS later developed similar parole processes for citizens of Cuba,[2] Haiti,[3] and Nicaragua[4] and their qualifying immediate family members. The four processes are collectively known as the CHNV process. There is no numerical cap on the number of noncitizens from these four countries who may apply; however, there is a 30,000 limit on the number of travel authorizations DHS may issue each month across the CHNV process. Additionally, participation is limited in the ATA capability to those

[1] 87 FR 63507 (Oct. 19, 2022). *See also* 88 FR 1279 (Jan. 9, 2023) (updating the process announced in 2022).

[2] 88 FR 1266 (Jan. 9, 2023), as amended by 88 FR 26329 (Apr. 28, 2023).

[3] 88 FR 1243 (Jan. 9, 2023), as amended by 88 FR 26327 (Apr. 28, 2023).

[4] 88 FR 1255 (Jan. 9, 2023).

individuals who meet certain DHS-established criteria, including, but not limited to, possession of a valid, unexpired passport, as well as having an approved U.S.-based financial supporter.

ATA requires the collection of a facial photograph via CBP One™ from those noncitizens who voluntarily elect to participate in the CHNV process, in order to provide accurate identity information for completion of vetting in advance of issuance of a travel authorization.

**Advance Travel Authorization (ATA)**

The biographic information collected on the I–134A is passed to CBP systems to allow the individual to complete their CBP One submission. The information the individual enters in CBP One must match the I–134A. The facial biometrics collected from noncitizens for the CHNV process will be linked to biographic information provided by the individual to U.S. Citizenship and Immigration Services (USCIS). This information collection will facilitate the vetting of noncitizens seeking to obtain advance authorization to travel. This collection will also give air carriers that participate in CBP's Document Validation (DocVal) program the ability to validate an approved advance authorization to travel, facilitating generation of a noncitizen's boarding pass without having to use other manual validation processes.

CBP One™ allows the user to capture the required biometrics, currently limited to a live facial photograph, and confirm submission after viewing the captured image. If the user is not satisfied with the image captured, the user can retake the image. If the image capture is unsuccessful, CBP One™ will provide the user with an error message stating that the submission was unsuccessful and permitting the user to try again. If the user continues to experience technical difficulties, the CBP One™ application provides a help desk email to request assistance.

CBP conducts vetting to determine whether the individual poses a security risk to the United States, and to determine whether the individual is eligible to receive advance authorization to travel to the United States to seek a discretionary grant of parole at the port of entry (POE). In the event that an advance authorization to travel may be denied because of a facial photograph match found in criminal databases or if there is a mismatch that limits the ability to confirm identity, then the match or mismatch will be verified by a CBP officer before the advance travel authorization is officially denied.

If the advance travel authorization is denied, the individual will not be authorized to travel to the United States to seek parole under the CHNV process. In the event that the user is not authorized to travel under this process, the user may still seek entry to the United States

through another process, including by filing a request for consideration of parole with USCIS or applying with the Department of State (DOS) to obtain a visa. If travel authorization is approved, the approval establishes that the individual has obtained advance authorization to travel to the United States to seek a discretionary grant of parole, consistent with 8 CFR 212.5(f), but does not guarantee boarding or a specific processing disposition at a POE. Upon arrival at a U.S. POE, the traveler will be subject to inspection by a CBP officer, who will make a case-by-case processing disposition determination.

This collection of information is authorized by sections 103 and 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1103 and 1182(d)(5)), and 8 CFR 212.5(f). DHS has also publicly announced the CHNV process policy and accompanying collection on its website and has also published **Federal Register** notices for each of the named countries, as noted above.

CBP One™ collects the following information from the individual submitting a request for an advance authorization to travel to the United States to seek parole under the CHNV process:

1. Facial Photograph

2. Photo obtained from the passport or Chip on ePassport, where available

3. Alien Registration Number

4. First and Last Name

5. Date of Birth

6. Passport Number

Additionally, CBP further revised this collection through another emergency submission to include individuals seeking to travel to the United States as part of the Family Reunification Parole (FRP) processes using the existing ATA capability to submit information to CBP, as updated for certain nationals of Cuba[5] and Haiti,[6] and as implemented for certain nationals of Colombia,[7] Guatemala,[8] Hon-

[5] 88 FR 54639 (Aug. 11, 2023).

[6] 88 FR 54635 (Aug. 11, 2023).

[7] 88 FR 43591 (July 10, 2023).

[8] 88 FR 43581 (July 10, 2023).

duras,[9] El Salvador,[10] and Ecuador.[11] The FRP processes begin with an invitation being sent to a petitioner who previously received an approved Form I–130, *Petition for Alien Relative,* on behalf of the potential principal beneficiary, and if applicable, the beneficiary's accompanying derivative beneficiaries. The petitioner then submits a Form I–134A, *Online Request to be a Supporter and Declaration of Financial Support,* on behalf of the potential principal beneficiary, and if applicable, the beneficiary's accompanying derivative beneficiaries. For those petitioners whose Form I–134A is confirmed by USCIS, the beneficiaries will receive an email with instructions to create an online account with myUSCIS. There, the potential beneficiary will confirm their biographic information and complete attestations, and then receive instructions to download the CBP One™ mobile application to continue through the process. USCIS will send the biographic information to CBP. Additionally, once the beneficiary completes their CBP One™ submission, utilizing the ATA capability, CBP will conduct vetting, and if appropriate, issue an advance authorization to travel.

The information collected as part of these new FRP processes is the same as that which is already collected from other populations through ATA. This information collection will facilitate the vetting of noncitizens seeking to obtain advance authorization to travel and will give air carriers that participate in CBP's DocVal program the ability to validate an approved travel authorization, facilitating generation of a noncitizen's boarding pass without having to use other manual validation processes.

**New Changes**

*1. Adding Uniting for Ukraine (U4U) respondent group to collection:*

In response to the President's commitment to welcome 100,000 Ukrainian citizens and others fleeing Russia's aggression, DHS, in coordination with DOS, established the Uniting for Ukraine (U4U) parole process on April 25, 2022.[12] This process allows certain Ukrainian citizens and their qualifying family members to submit certain identifying information to USCIS and CBP to facilitate the issuance of an advance authorization to travel to the United States to seek parole. At the time U4U was implemented, full ATA capability was not yet developed and CBP uses different processes to screen and vet Ukrainians seeking parole. Currently, individuals seeking to travel

[9] 88 FR 43601 (July 10, 2023).

[10] 88 FR 43611 (July 10, 2023).

[11] 88 FR 78762 (Nov. 16, 2023).

[12] 87 FR 25040 (Apr. 27, 2022).

under U4U do not utilize CBP One™ or the ATA capability during their process. To align U4U with other DHS parole processes, including CHNV and FRP, the ATA capability will be implemented for those individuals requesting authorization to travel to the United States to seek a discretionary grant of parole. The ATA capability will be added as part of a step in the U4U process to facilitate the vetting of noncitizens seeking to obtain advance authorization to travel and will give air carriers that participate in CBP's DocVal program the ability to validate an approved travel authorization, facilitating generation of a noncitizen's boarding pass without having to use other manual validation processes.

*2. Adjusted Burden:*

Furthermore, in coordination with USCIS, CBP has added to the burden estimate for this collection, to account for any potential expansion(s) that align with new or revised policies or processing capacity over the next three years.

*3. New Data Element:*

This revision also adds a new data element to this collection: the physical location (longitude/latitude) of device utilizing ATA at the time of any biometric information submission. This data element will further secure the submission process and provide accurate identity information for completion of vetting in advance of issuance of a travel authorization.

CBP invites comments from the public on all changes established by previously approved emergency submissions and the new proposed revisions listed in this FRN.

*Type of Information Collection:* Advance Travel Authorization (ATA).

**Estimated Number of Respondents:** 562,000.

**Estimated Number of Annual Responses per Respondent:** 1.

**Estimated Number of Total Annual Responses:** 562,000.

**Estimated Time per Response:** 10 minutes.

**Estimated Total Annual Burden Hours:** 93,667.

Dated: May 20, 2024.

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

# U.S. Court of Appeals for the Federal Circuit

ASOCIACIÓN DE EXPORTADORES E INDUSTRIALES DE ACEITUNAS DE MESA, AGRO SEVILLA ACEITUNAS S. COOP. AND., ANGEL CAMACHO ALIMENTACIÓN, S.L., Plaintiffs-Appellants ACEITUNAS GUADALQUIVIR, S.L.U., Plaintiff v. UNITED STATES, COALITION FOR FAIR TRADE IN RIPE OLIVES, Defendants-Appellees

Appeal No. 2023–1162

Appeal from the United States Court of International Trade in No. 1:18-cv-00195-GSK, Judge Gary S. Katzmann.

Decided: May 20, 2023

MATTHEW P. MCCULLOUGH, Curtis, Mallet-Prevost, Colt & Mosle LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by JAMES BEATY, JAMES P. DURLING, DANIEL L. PORTER.

TARA K. HOGAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee United States. Also represented by BRIAN M. BOYNTON, PATRICIA M. MCCARTHY, SONIA W. MURPHY; ELIO GONZALEZ, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

RAYMOND PARETZKY, McDermott Will & Emery LLP, Washington, DC, argued for defendant-appellee Coalition for Fair Trade in Ripe Olives. Also represented by DAVID JOHN LEVINE.

Before PROST, BRYSON, and STARK, *Circuit Judges*.

BRYSON, *Circuit Judge*.

Appellants, three organizations of Spanish olive producers (collectively "Asemesa"), appeal from a decision of the Court of International Trade ("the Trade Court") regarding a countervailing duty imposed on olives imported from Spain. Asemesa argues that an order from the Department of Commerce imposing a countervailing duty on imported olives was contrary to law and that the Trade Court should have overturned the order. The United States and the Coalition for Fair Trade in Ripe Olives argue that Commerce's factual findings were supported by substantial evidence and that the Trade Court's decision should be upheld. We affirm.

I

1. Under the Tariff Act of 1930, Congress authorized the Department of Commerce to impose countervailing duties as needed to offset subsidies granted by foreign countries on goods exported to the

United States. *See Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012). If, after an investigation, Commerce finds that there was such a subsidy for particular imported products, the International Trade Commission is required to conduct a parallel investigation to determine whether a domestic industry is being injured, threatened with being injured, or kept from being established by the subsidized imports. If the two agencies both make affirmative findings, Commerce is required to impose "a countervailing duty . . . equal to the amount of the net countervailable subsidy." 19 U.S.C. § 1671(a).

A foreign government will sometimes subsidize the production of raw agricultural products, which are then processed into finished goods before they are imported into the United States. In such cases, it would be futile for Commerce to impose a duty on the subsidized raw product, which is not the product that is imported, so Commerce is authorized, in certain instances, to impose a duty on the finished product. In particular, Commerce is allowed to impose a countervailing duty on finished agricultural products with subsidized raw ingredients, but only if "the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and the processing operation adds only limited value to the raw commodity." 19 U.S.C. § 1677–2.

2. The European Union's Common Agricultural Policy includes subsidies for raw olives. Those subsidies are provided to Spanish farmers through the EU's "Basic Payment Scheme," which provides direct subsidies to Spanish olive growers who meet its eligibility requirements.

Olives are rarely sold to consumers in raw form. The majority of olives are processed into olive oil. Even table olives, however, require significant processing. Raw olives are extremely bitter and must be cured to remove that natural bitterness before being consumed as table olives.

Olive varietals can be divided into three biologically distinct categories. "Mill" varietals are those that naturally produce olives suitable for processing into olive oil. "Table" varietals yield olives suitable for eating. "Dual-use" varietals can produce olives suitable for either application, depending on the manner in which they are cultivated. Mill olives are cultivated according to practices that maximize oil production, whereas table olives are cultivated following practices that maximize size and flavor. Dual-use varietals are cultivated in different ways depending on whether they are intended to produce table olives or mill olives.

3. Following an investigation, Commerce published a preliminary determination in November 2017, in which it found that countervailable subsidies were being provided to producers and exporters of ripe olives from Spain. On July 25, 2018, the International Trade Commission notified Commerce that it had determined that the domestic olive industry was materially injured by the importation of subsidized table olives from Spain. Commerce then imposed a countervailing duty on imported Spanish table olives pursuant to its authority under 19 U.S.C. §§ 1671(a) and 1677–2. *Ripe Olives from Spain*, 83 Fed. Reg. 37469 (Dep't of Commerce Aug. 1, 2018).

4. Asemesa challenged Commerce's imposition of the duty on Spanish table olives. Asemesa argued that Commerce had failed to show that the market for raw olives was "substantially dependent" on the market for table olives, as required by 19 U.S.C. § 1677–2. At that time, Commerce had defined the prior stage product as all raw olives and had defined the latter stage product as table olives. Employing data from the Spanish government, Commerce found that 8 percent of all Spanish raw olives were ultimately sold as table olives. Based on the evidence before it, Commerce found that the demand for raw olives was substantially dependent on the demand for table olives.[1]

The Trade Court reversed Commerce. *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States* (*Asemesa I*), 429 F. Supp. 3d 1325 (Ct. Int'l Trade 2020). The court concluded that the evidence that table olives accounted for 8 percent of the demand for raw olives did not show that the demand for raw olives was "substantially dependent" on the demand for table olives. *Id.* at 1344. The court further held that "Commerce deviated from its past interpretation of 'substantially dependent,' which [Commerce] previously found to include most or at least half of the demand of the raw agricultural product." *Id.* at 1345. Accordingly, the court remanded the case to Commerce for further analysis. *Id.* at 1352.

5. On remand, Commerce redefined the market for the prior stage product as the raw olives that the olive industry considers principally suitable for use in the production of table olives, i.e., olives from table olive varietals and dual-use varietals that are cultivated for processing into table olives. Nearly all olives that are cultivated to produce table olives are ultimately processed into table olives. *See* J.A. 11241 (reporting that 96 percent of such olives were processed into table olives in 2016, the relevant year for purposes of this case).

Once again, the Trade Court rejected Commerce's analysis. The court reasoned that Commerce's market definition would "render the

[1] It is undisputed that the second requirement of section 1677–2, that "the processing operation adds only limited value to the raw commodity," was satisfied in this case.

requirements of Section 1677–2 largely self-fulfilling." *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States* (*Asemesa II*), 523 F. Supp. 3d 1393, 1407 (Ct. Int'l Trade 2021). Although the Trade Court rejected Commerce's definition of the relevant market, it agreed with Commerce that the relevant market for the prior stage product need not be all olives grown in Spain. Accordingly, the court remanded the case to Commerce for a second time to correctly define the relevant market for the prior stage product and analyze whether the demand for the prior stage product was substantially dependent on the demand for table olives.

6. Commerce again redefined the relevant market for the prior stage product, this time defining that market as consisting of the olives from varietals that the Spanish government considers suitable for processing into table olives, including dual-use varietals.[2] Those varietals include manzanilla, gordal, carrasqueña, and hojiblanca olives. Cacereña and "other" dual-use varietal olives also fit Commerce's new market definition; however, Commerce did not have reliable data on the processing of those varietals, so it excluded them from its analysis. The Spanish government considers manzanilla, gordal, and carrasqueña olives suitable only for processing into table olives. It considers hojiblanca and cacereña olives to be dual-use varietal olives, suitable for use as either table olives or in the production of olive oil.

Relying on data from the Spanish government and the Agencia de Información y Control Alimentarios (the Spanish Food Information and Control Agency, or "AICA"), Commerce calculated that 55.28 percent of all olives from varietals suitable for processing into table olives were indeed sold as table olives. J.A. 62. Commerce adopted the Trade Court's interpretation of the "substantially dependent" provision in section 1677–2 as requiring that more than half of the prior stage product be processed into the relevant finished good. Accordingly, Commerce determined that the demand for olive varietals suitable for processing into table olives was substantially dependent on the demand for table olives, and that a countervailing duty on table olives from Spain was warranted to offset the subsidies provided to Spanish olive growers.

This time, the Trade Court sustained Commerce's analysis. *Asociación de Exportadores e Industriales de Aceitunas de Mesa v. United States* (*Asemesa III*), 589 F. Supp. 3d 1346 (Ct. Int'l Trade 2022).

[2] That market definition differs from the market Commerce identified in *Asemesa II* because that market definition includes all olives from table and dual-use varietals. In *Asemesa II*, Commerce's market definition excluded olives from table and dual-use varietals that were cultivated for olive oil.

7. Asemesa now appeals the Trade Court's determination in *Asemesa III*. Asemesa argues that Commerce's interpretation of the statute was contrary to law, and that Commerce's factual analysis was not supported by substantial evidence. Although our interpretation of section 1677–2 and our analysis of the factual record in this case differ from the Trade Court's, we agree with that court's ultimate conclusion on both issues.

## II

### A

Section 1677–2 was designed to empower Commerce to address attempts to circumvent countervailing duty liability. Enacted as part of the Omnibus Trade and Competitiveness Act of 1988, section 1677–2 authorized Commerce to impose countervailing duties on processed agricultural goods that were not themselves subsidized but were made from subsidized raw products.

Senator Baucus, one of the proponents of section 1677–2, explained that its purpose was "to fix a glitch in the law." 133 Cong. Rec. 17,765 (1987). Under the statutory scheme in place prior to the enactment of section 1677–2, the Trade Court had held that Commerce lacked the power to impose countervailing duties on finished agricultural goods when the producers of those goods benefitted from subsidies received by producers of the raw agricultural products that were used to prepare those goods. *See Canadian Meat Council v. United States* (*Pork from Canada*), 661 F. Supp. 622 (Ct. Int'l Trade 1987).

In *Pork from Canada*, Canada subsidized live swine, but not processed pork meats, which were the products imported into the United States. Commerce imposed a countervailing duty on the processed pork in order to offset the Canadian subsidies on live swine.[3] Before the Trade Court, however, the Canadian pork producers successfully argued that Commerce lacked statutory authority to impose a countervailing duty on pork when the subsidy was only on swine.

Section 1677–2 empowered Commerce to combat the circumvention of existing countervailing duty law in that manner. 133 Cong. Rec. 17,765 (characterizing the outcome in *Pork from Canada* as "disturbing"); *see also Pork from Canada*, 661 F. Supp. at 629 (proposing that, "[i]f the statutory approach to upstream subsidies [was] inadequate," it was up to "Congress to remedy any deficiency").

[3] Commerce's theory was that, under the statutory scheme in place prior to the 1988 Act, swine was an input product used in the production of pork, making the subsidy on swine an "upstream subsidy" on pork subject to countervailing duty law. *See* 19 U.S.C. § 1671(g) (repealed 1988) (providing that Commerce may consider "upstream subsidies" for countervailing duty purposes).

Section 1677–2 prescribes the conditions under which Commerce may treat a subsidy on a raw agricultural product as a subsidy on the finished good for countervailing duty purposes. In full text, section 1677–2 provides:

> In the case of an agricultural product processed from a raw agricultural product in which—
>
> (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and
>
> (2) the processing operation adds only limited value to the raw commodity,
>
> countervailable subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product.

B

The central question in this case is what it means for the demand for a prior stage product to be "substantially dependent" on the demand for a latter stage product within the meaning of section 1677–2.

1

Asemesa argues that section 1677–2 was meant to codify Commerce's original approach in *Pork from Canada*, 50 Fed. Reg. 25097 (Dep't of Commerce June 17, 1985), and *Rice from Thailand*, 51 Fed. Reg. 12356–02 (Dep't of Commerce April 10, 1986), the two cases that led Congress to add section 1677–2 to the Tariff Act. Asemesa cites a statement by Senator Grassley, a proponent of section 1677–2, describing "the rule codified in the proposed amendment" as the rule Commerce applied in *Pork from Canada* and *Rice from Thailand*. 133 Cong. Rec. 17765; *see also* H.R. Rep. No. 100–576, 588 (1988) ("The Senate amendment codifies and clarifies Commerce['s] practice.").

In *Pork from Canada*, Commerce found that the demand for slaughtered and quartered swine is "by far the predominant determinant of the demand for live swine." 50 Fed. Reg. at 25099. In *Rice from Thailand*, Commerce stated that "an important criterion is the degree to which the demand for the prior stage product is dependent on the demand for the latter stage product." 51 Fed. Reg. at 12358. Commerce explained that "[a]lmost all of the raw agricultural product, paddy or unmilled rice, is dedicated to the production of milled rice," *id.*, which Commerce regarded as sufficient to justify imposing a countervailing duty on the imported milled rice.

Asemesa's position is that to be substantially dependent, "'all or substantially all' of the demand for the prior stage product must be driven by demand for the latter stage product." Asemesa Br. 40. Asemesa's position is essentially that section 1677–2 should be limited to cases in which the degree of dependence is identical to or more extreme than those in *Pork from Canada* or *Rice from Thailand*.

Asemesa is correct that those cases provided the incentive for Congress to add section 1677–2 to the Tariff Act. But there is no support for Asemesa's further proposition that the meaning of "substantially dependent" in the statute requires that the demand for the prior stage product must be, at a minimum, as dependent on the demand for the latter stage products as it was in those two cases.

Asemesa's position is contrary to the plain language of the statute. Had Congress intended the statute to track the facts of *Pork from Canada* and *Rice from Thailand*, it could have parroted the language of those decisions. Instead, Congress's choice of "substantially dependent" captures the rationale of those decisions while setting a more flexible standard for Commerce to meet.

Senator Grassley's comment that the statute "codified" *Pork from Canada* and *Rice from Thailand* does not mean that the reach of the statute was confined to the facts of those cases. To begin with, "floor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017). But even if we were to assign substantial weight to those statements, it is implausible to assume that Senator Grassley used the term "codify" to suggest that section 1677–2 should be limited to the exact circumstances of those cases, when the plain text suggests otherwise. A more reasonable interpretation of Senator Grassley's comments is that section 1677–2 was meant to create a statutory basis for Commerce to apply countervailing duty principles in cases such as *Pork from Canada* and *Rice from Thailand*, but not to confine the application of the statute to circumstances identical to, or more extreme than, in those cases.

2

The Trade Court interpreted section 1677–2, as applied to this case, to mean that the demand for raw olives would be substantially dependent on the demand for table olives only if table olives accounted for "at least half" of the market for raw olives from table and dual-use varietals. *Asemesa I*, 429 F. Supp. 3d at 1345. We do not agree with the Trade Court that the statute imposes a test requiring that at least 50 percent of the prior stage product be processed into the latter-stage product for section 1677–2 to apply.

The statutory term "substantially dependent" is general in nature, indicating that Congress intended to delegate the question of whether particular facts satisfy the statute's requirements to Commerce. "Congress . . . may confer substantial discretion on executive agencies to implement and enforce the laws." *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).[4] By using nonspecific statutory language, Congress invokes its "ability to delegate power under broad general directives." *Id.* Here, Congress's use of the term "substantially dependent," as opposed to specifying a minimum percentage, reflects "an expression of its well-considered judgment as to the degree of administrative authority which it was necessary to grant." *Lichter v. United States*, 334 U.S. 742, 784 (1948) (addressing a statute instructing agency to determine whether contracts resulted in "excessive profits," but not specifying what qualified as "excessive").[5]

In *United States v. Zenith Radio Corp.*, a leading case dealing with countervailing duties, our predecessor court adopted the same rationale. 562 F.2d 1209 (CCPA 1977), *aff'd*, 437 U.S 443 (1978). The court held that Congress's use of the terms "bounty" and "grant," which were "broad but not ambiguous," demonstrated "Congress'[s] intent to provide a wide latitude, within which the Secretary of the Treasury . . . may determine the existence or non-existence of a bounty or a grant." *Id.* at 1216 (crediting, in particular, Congress's "refusal to define the words 'bounty,' 'grant,' or 'net amount'"). The court added:

> Not without reason has Congress refrained from spelling out either the precise criteria for determining what shall constitute a bounty or grant and what shall not, or the calculations to be followed in determining net amount. . . . "In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative or policy spheres."

*Id.* at 1217 (quoting *United States v. Hammond Lead Prods., Inc.*, 440 F.2d 1024, 1030 (CCPA 1971)).

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[4] *Gundy* addressed a challenge to agency rulemaking under the nondelegation doctrine, whereas this case concerns agency adjudication. Statutory interpretation, however, is key to nondelegation cases, *Gundy*, 139 S. Ct. at 2123 ("[A] nondelegation inquiry always begins . . . with statutory interpretation."), a principle that applies whether the delegation is of rulemaking or adjudicative authority.

[5] Justice Scalia made the point succinctly in his dissenting opinion in *Mistretta v. United States,* 488 U.S. 361, 417 (1989) where he wrote that "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be."

Applying the same principle, we have held that similarly general language used in a related provision of the antidumping statute committed to Commerce's discretion the question of whether particular facts satisfy the statute. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) ("While § 1677b(c) provides guidelines to assist Commerce in this process, this section also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines."); *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999) (holding that the "broad statutory mandate" gave Commerce "broad discretion"); *accord Keller Trucking, Inc. v. United States*, 567 F.2d 147, 149 (D.C. Cir. 1977) (interpreting an adjudicative determination as being "within the realm of the expertise and discretion of the [agency]" due to "the imprecise terms of the statute" at issue).

As with the broad statutory mandate at issue in *Nation Ford* and *Magnesium Corp.*, Congress's use of the term "substantially dependent" in section 1677–2 gives Commerce considerable discretion in determining whether particular facts meet that standard. Congress's use of more general language indicates its understanding that assessing dependence, for purposes of section 1677–2, is a holistic determination. It further shows that Congress delegated the task of making that determination to Commerce, based on the circumstances of each case.

The government urges us to apply the *Chevron* doctrine in this case, *see generally Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984), and to defer to Commerce's interpretation of section 1677–2. Because we regard the term "substantially dependent" as general but not ambiguous, we believe this case is more properly viewed as one involving implied delegation of adjudicative authority to the agency rather than deference to the agency's interpretation of an ambiguous statute.[6]

3

The relevant dictionary definitions of "substantial" are "[i]mportant, essential, and material; of real worth and importance," Black's Law Dictionary 1728 (11th ed. 2019), and "something of moment: an important or material matter, thing, or part," Webster's Third New International Dictionary of the English Language 2280 (1998 ed.). Thus, the natural reading of the statutory text is that the demand for the prior stage product is "substantially dependent" on the demand

[6] This case also does not involve the situation, separately discussed by the Court in *Chevron*, in which Congress has made "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." 467 U.S. at 843–44; *see United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

for a latter stage product if the demand for the latter stage product has a real, material, or important effect on the demand for the prior stage product.

To be sure, the fact that a large percentage of a prior stage product is processed into a given latter stage product is strong evidence that the demand for the prior stage product substantially depends on the demand for the latter stage product. The Trade Court may be right that the fact that about 50 percent of the prior stage product was processed into the latter stage product is evidence of substantial dependence in this case, while 8 percent is not. Such a pure numerical test, however, is not what the statute calls for. The percentage of prior stage product processed into the latter stage product is just one factor in evaluating whether the demand for one product is "substantially dependent" on the demand for another. The principal task under the statute—and one that Congress has assigned to Commerce by use of the broad term "substantially dependent"—is to determine whether the demand for the latter stage product has a real, material, or important effect on the demand for the prior stage product.

Commerce adopted essentially that interpretation of the statute in its preliminary determination in this case. *Ripe Olives from Spain*, 82 Fed. Reg. 56218 (Dep't of Commerce November 28, 2017). In the Nov. 21, 2017, Issues and Decision Memorandum ("Preliminary Memo") accompanying that determination, Commerce explained that substantial dependence focuses on "the nature of the raw product and the market" rather than on "a specific minimum threshold." Preliminary Memo at 16. As an example, Commerce cited a past determination in which it found the demand for fresh shrimp to be substantially dependent on the demand for frozen shrimp because "one quarter of the fresh shrimp market would collapse" if frozen shrimp did not exist. *Id.* (citing *Shrimp from China*, 78 Fed. Reg. 50391–01 (Dep't of Commerce Aug. 19, 2013)).

Following the first remand from the Trade Court, Commerce complied with the Trade Court's construction of section 1677–2 but expressed its continuing disagreement with that construction. Commerce reaffirmed the position it took in its Preliminary Memo, explaining that "if the demand for table olives were to cease, a sizeable sector of the raw olives market . . . would be negatively impacted." J.A. 156. Although it ultimately applied the Trade Court's interpretation of the statute, Commerce maintained that the term "substantially dependent" does not contemplate a numerical "minimum threshold of demand." J.A. 157.

While we disagree with the Trade Court's "at least half" interpretation of section 1677–2, which Commerce applied under protest, our

disagreement does not affect the outcome of this case. The Trade Court's interpretation was more restrictive than Commerce's more flexible interpretation, which we consider to be correct. Commerce found that the demand for raw olives was substantially dependent on the demand for table olives under both interpretations of the statute. Commerce's findings therefore satisfy section 1677–2(1).

III

Aside from its statutory interpretation arguments, Asemesa raises three separate challenges to Commerce's factual analysis. First, it argues that Commerce misconstrued the raw olive market by failing to credit evidence showing the extent of the use of table varietal olives for olive oil production and mill varietal olives for table olive production. Second, it argues that Commerce committed various analytical mistakes in calculating the 55.28 percent figure underlying Commerce's "substantial dependence" finding. Third, it argues that Commerce should have relied on the varietal-specific data from the AICA, rather than data from the Government of Spain, which did not include a varietal-by-varietal breakdown. None of Asemesa's factual arguments renders Commerce's findings "unsupported by substantial evidence" or the product of prejudicial error. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002).

A

Asemesa's first factual argument relates to Commerce's definition of the market for the prior stage product. Commerce defined the prior stage product in this case as the "table and dual-use raw olive varietals that are biologically distinct from other raw olive varietals," i.e., those varietals the Government of Spain considers fit for table olive production. J.A. 55. Commerce defined the latter stage product as table olives. *Id.* The main olive varietals that satisfy Commerce's total market definition are manzanilla, gordal, carrasqueña, hojiblanca, and cacereña olives, which accounted for 95% of the entire table olive production during the 2015 to 2016 investigation period. J.A. 56. The remaining 5% are "other dual-use varietals."

Commerce's characterization of the market assumes that nearly all the pure table olive varietals (manzanilla, gordal, and carrasqueña) are processed into table olives, and that effectively all olives from the pure "mill olive" varietals are processed into olive oil. But the record contains at least anecdotal evidence that some mill olives were processed into table olives and that some olives grown for sale as table olives were used to make olive oil. J.A. 11721–22, 11241.

Asemesa's evidence does not "repudiate" Commerce's characterization of the market, as Asemesa argues. Asemesa Br. 47. The fact that

some olives from the mill varietals were processed for table use is not inconsistent with Commerce's characterization. Without evidence about how much cross-use existed between pure table and pure mill varietals, it was not unreasonable for Commerce to assume that such cross-use was negligible. Similarly, although the Spanish government's data showed that some olives grown for processing into oil were ultimately processed for table use and vice versa, Commerce reasonably assumed that such cross use was attributable to dual-use varietals. It is plausible that olives from dual-use varietals cultivated to produce mill olives could be repurposed into table olives, but that those olives from pure mill varietals ordinarily could not. The fact that the Government of Spain categorizes olive varietals as mill, table, and dual use is itself evidence that the Spanish olive market is divided accordingly.

B

Asemesa's second factual argument relates to Commerce's calculations. Commerce calculated the percentage of olives from table and dual-use varietals that are processed into table olives in what can be characterized as an exercise in estimation based on limited available data.

Asemesa challenges two aspects of Commerce's calculation. First, Asemesa argues that Commerce improperly counted as table olives those hojiblanca varietal olives that are grown for mill but are sold as table olives. Second, Asemesa challenges Commerce's treatment of cacereña and "other" dual-use varietal olives, arguing that Commerce should not have excluded those varietals from its analysis, and in any event that Commerce did not implement that exclusion correctly. Neither of those challenges warrants a remand.

1

Asemesa first argues that Commerce incorrectly counted 71,814 tons of hojiblanca olives as table olives, even though they were grown for processing into oil. Commerce counted them as it did because they were ultimately processed into table olives. Asemesa's argument is that the farmers' intentions are what matter, not how the olives are ultimately used. Accordingly, Asemesa argues that Commerce should have counted those 71,814 tons as mill olives.

Commerce found the ultimate use to which the olives were put to be the most probative indicator of demand in particular segments of the olive industry. Asemesa has not pointed to any reason to believe that the original intentions of Spanish olive farmers would provide a better measure of demand. We therefore conclude that Commerce

was not wrong to treat the relevant inquiry as focusing on what percentage of olives from suitable varietals were ultimately processed into table olives.

2

Asemesa's challenge to Commerce's treatment of cacereña olives is more complicated and requires more explanation. We ultimately conclude that Commerce's calculations were flawed, but not in a way that prejudiced Asemesa.

Commerce's analysis focused on the percentage of raw olives from table or dual-use varietals that depend on the market for table olives. That percentage is equal to the volume of table olives derived from the relevant varietals divided by the total volume of olives from those varietals, which is shown by the expression below:

$$\frac{m_{table} + g_{table} + q_{table} + h_{table} + c_{table} + o_{table}}{m + g + q + h + c + o}$$

The letters m, g, q, h, c, and o in that expression stand for the volumes of manzanillas, gordales, carrasqueñas ("q"), hojiblancas, cacereñas ("c"), and "other" dual-use olives, respectively.[7] The letters with "table" subscripts represent the amounts of those varietals that were used as table olives.

The Spanish government publishes data on the aggregate volume of olives grown for the purpose of producing table olives. It also publishes data on the aggregate volume of olives that are ultimately used as table olives across all varietals. J.A. 11241.[8] Using these aggregate values instead of individual varietal volumes and assuming that no pure table varietal olives were grown for mill, Commerce's expression can be simplified to:

$$\frac{T_{used\ as\ table}}{T_{grown\ for\ table} + h_{grown\ for\ mill} + c_{grown\ for\ mill} + o_{grown\ for\ mill}}$$

where $T$ represents the total volume across all varietals.

[7] All "volumes" in this case are measured in tons. Although "ton" is a unit of mass, "volume" is typically used to describe the amount of an agricultural product, even though the product may be measured by weight.

[8] The total volume of table olives, $T_{used\ as\ table}$, is the sum of two published values: (1) the olives grown for table and processed into table olives, and (2) the olives grown for mill but processed into table olives. In 2016, the relevant harvest year, those numbers were 492,244 and 90,404 tons respectively. $T_{used\ as\ table}$ therefore equals 582,648 tons.

Commerce assumed that effectively all olives grown for table were from the varietals the Government of Spain considers suitable for table olive production, and that effectively all olives grown for mill but processed into table olives were from dual-use varietals.

Commerce, however, lacked varietal-by-varietal data for the volumes of hojiblanca, cacereña and other dual-use olives grown for mill. Commerce had data on the total production volume and acreage of hojiblancas from which it could estimate the volume of hojiblancas grown for mill, but it lacked corresponding data for both cacereña and the "other" category of dual-use varietal olives. Commerce therefore sought to omit cacereña and other dual-use varietals from its calculation. J.A. 58. Modified by those omissions, Commerce's revised expression was:

$$\frac{T'_{used\ as\ table}}{T'_{grown\ for\ table} + h_{grown\ for\ mill}}$$

where $T'$ denotes the total volume of raw olives from relevant varietals processed as table olives, excluding cacereña and "other" dual-use varietal olives. Put differently, $T'$ is the volume of manzanilla, gordal, carrasqueña and hojiblanca olives. Based on various assumptions, Commerce calculated that the volume of $T'$ processed into table olives was 564,058 tons.[9] The Spanish government reports that the total volume of olives grown for table in 2016 was 511,122 tons. J.A. 11241. Lastly, Commerce estimated the volume of hojiblancas grown for mill to be 509,304 tons based on other available data regarding the yield rate and acreage of hojiblancas dedicated to each use.[10]

[9] The Government of Spain reports the total volume of olives sold as table olives, but that number includes cacereña and other dual-use varietal olives that Commerce intended to exclude from its analysis. Therefore, Commerce had to estimate the volume of cacereña and other dual-use varietal olives to subtract from the numerator. The Spanish government's data reports that the total volume of dual-use varietal olives grown for mill but used for table in 2016 was 90,404 tons. J.A. 11241. The AICA data reports the varietal-by-varietal breakdown of dual-use varietal olives grown for table use, J.A. 11643, which can be converted to a percentage breakdown of those varietals: 79.44% hojiblanca, 12.41% cacereña, and 8.16% other. By assuming that the same varietal breakdown applied to dual-use varietal olives grown for mill but used for table, Commerce calculated that 18,590 of the 90,404 tons of dual-use varietal olives grown for mill but used for table were cacereña or other dual-use varietal olives and that the remaining 71,814 tons were hojiblancas. Commerce therefore found that the volume of $T'$ processed into table olives is $T_{used\ as\ table}$ minus 18,590, or 582,648 minus 18,590, which equals 564,058 tons.

[10] Commerce had data on the total production and total hectares in cultivation for both table olives and mill olives. From the data, Commerce calculated industry average yield rates for both olives grown for table and olives grown for mill, which it assumed to be representative of the same yield rates for hojiblancas. For olives grown for table, Commerce calculated that 511,122 tons divided by 160,400 hectares equaled 3.19 tons per hectare; and for olives grown for mill, Commerce calculated that 6,571,428 tons divided by 2,243,700 hectares equaled 2.93 tons per hectare. J.A. 11892 (relying on the Spanish government's data). Dividing the total volume of hojiblancas as reported in the AICA data by the yield rate for table olives, Commerce found that there would have needed to be 91,176 acres of hojiblancas dedicated to table olive production to achieve that volume. Given that there was a total of 265,000 hectares of hojiblancas in cultivation, the remaining 173,824 hectares were dedicated to mill olive production. And at the calculated yield rate of 2.93 tons per hectare, those acres would yield 509,304 tons of olives.

Beginning with the above expression and substituting values yields the percentage that Commerce found to satisfy the "substantially dependent" requirement of section 1677–2:

$$\frac{564{,}058}{511{,}122 + 509{,}304} = 55.28\%$$

Asemesa takes issue with Commerce's 55.28 percent figure on two grounds. First, Asemesa argues that Commerce did not properly exclude cacereña and "other" dual-use olives from the numerator of the expression because the Spanish government's estimate of the total table olives, on which Commerce based its numerator, included olives from those varietals. Commerce did not exclude olives from those varietals grown for table. Second, Asemesa argues that Commerce could have and should have included cacereña and "other" dual-use varietal olives in its analysis. Commerce's decision not to do so skewed the results in Commerce's favor. Asemesa is correct on both issues; however, neither issue makes a material difference to the outcome of this case.

Although Commerce removed cacereña and other dual-use varietal olives grown for *mill* from its analysis, *see supra*, note 9, Commerce neglected to remove cacereña and other dual-use varietal olives grown for *table*. The Spanish government's data on total table olives considers olives to be "table olives" if they were grown with that intention. J.A. 10704. The table olive figures Commerce relied on, represented by $T$ or $T'$ in the above expressions, therefore include cacereña and other dual-use varietal olives grown for table. Commerce did not make any adjustment to remove cacereña and other dual-use olives grown for table from the numerator of its expression.

What Commerce should have done, instead, is to use the Spanish government's raw data for the numerator and estimate the additional volume of cacereñas grown for mill that must be included in the denominator. Doing so would have been a matter of arithmetic because Commerce had already assumed that all olives from table olive varietals are processed into table olives and that different dual-use varietals are processed into table olives and olive oil at the same rate. Including cacereña and other dual-use olives in its analysis would have required no new assumptions or factfinding and would have captured the entire market as Commerce defined it. Our analysis uses Commerce's data and assumptions and corrects its arithmetic.

Commerce had already calculated the varietal breakdown of dual-use varietal olives. *See supra*, note 9. It also had already assumed that dual-use varietal volume is proportionately allocated between table and mill on a varietal-by-varietal basis. J.A. 59–60. Applying

that proportionality assumption to the 509,304 tons of hojiblancas grown for mill would yield the following expression:

$$\frac{79.44\%}{509{,}304} = \frac{20.57\%}{c_{grown\ for\ mill} + o_{grown\ for\ mill}}$$

That expression can be solved for the volume of cacereña and other dual-use olives grown for mill, which is 131,877 tons.

Commerce's expression without the simplifying assumption excluding cacereña and "other" dual-use varietal olives was:

$$\frac{T_{used\ as\ table}}{T_{grown\ for\ table} + h_{grown\ for\ mill} + c_{grown\ for\ mill} + o_{grown\ for\ mill}}$$

The total volumes of table olives reported by the Government of Spain, $T$ in the expression above, already include cacereña and "other" dual-use varietal olives. Substituting values and simplifying the above expression yields:

$$\frac{564{,}058}{511{,}122 + 509{,}304 + 131{,}877} = 48.95\%$$

Although Commerce erred in its treatment of cacereña and "other" dual-use varietal olives, the error did not have a significant effect on the percentage calculation. Either way, roughly half of all olives from the relevant varietals are ultimately processed into table olives. Commerce's finding, that such a high percentage indicates that the demand for raw olives substantially depends on the demand for table olives, remains valid after correcting for this minor calculation error. Because, contrary to the Trade Court, we have construed the statute as *not* requiring "at least half" of the demand for raw olives to depend on demand for table olives, any error Commerce made by excluding cacereña and "other" dual-use varietal olives did not prejudice Asemesa and does not warrant a remand for further proceedings. *See* 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."); *Shinseki v. Sanders*, 556 U.S. 396, 406 (2009) (characterizing section 706 of the Administrative Procedure Act as an "administrative law harmless error rule.") (cleaned up).[11]

[11] Affirmance in this case does not run afoul of the rule in *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94 (1943), because it is clear that the agency would have reached the same result in this case absent the calculation errors we have identified. *See Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964); *Oracle Am., Inc. v. United States*, 975 F.3d 1279, 1290 (Fed. Cir. 2020); *In re Watts*, 354 F.3d 1362, 1370 (Fed. Cir. 2004).

C

Asemesa's third factual argument is that Commerce should have relied on the AICA data rather than the Spanish government's data, because only the AICA separated its findings by varietal. Commerce did rely on the AICA data for certain purposes, such as to calculate the portion of the market attributable to different varietals. *See supra*, note 9; J.A. 11892. Commerce chose to use the Spanish government's data over the AICA data for some applications because the Spanish government's analysis focused on how olives are used—not how olives are grown.

Even if we were to agree that Commerce should have relied on the AICA data in place of the Spanish government's data, Asemesa has not identified how doing so would have changed the result. In particular, Asemesa has not stated what the percentage of raw olives from the relevant varietals that are processed into table olives would have been if Commerce had credited the AICA data. Commerce chose to rely on the Spanish government's data instead of the AICA data for certain purposes, and that choice was a reasonable one. This court will not "reweigh" the evidence when Commerce makes a rational decision regarding which set of data to credit. *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376 (Fed. Cir. 2019).

* * * * *

Because Commerce's findings satisfy the statutory requirements of section 1677–2 and are supported by substantial evidence, we sustain the Trade Court's decision.

**AFFIRMED**

# U.S. Court of International Trade

Slip Op. 24–60

BGH Edelstahl Siegen GmbH, Plaintiff, v. United States, Defendant, and Ellwood City Forge Company, et al., Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 21–00080

[Remanding for further consideration Commerce's Third Remand Determination.]

Dated: May 22, 2024

*Marc E. Montalbine*, *Gregory S. Menegaz*, *Alexandra H. Salzman*, and *Merisa A. Horgan*, and *James K. Horgan*, DeKieffer & Horgan, PLLC, of Washington, D.C., for plaintiff BGH Edelstahl Siegen GmbH.

*Kelly M. Geddes*, Trial Attorney, and *Sarah E. Kramer*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington D.C., for defendant United States. Also on the brief were *Patricia M. McCarthy*, Director, and *Brian M. Boynton*, Principal Deputy Assistant Attorney General. Of Counsel were *Ayat Mujais*, Senior Attorney, and *Joseph Grossman-Trawick*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

*Thomas M. Beline*, *Nicole Brunda*, *Chase J. Dunn*, and *Myles S. Getlan*, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for defendant-intervenors Ellwood City Forge Company, Ellwood National Steel Company, Ellwood Quality Steels Company, and A. Finkl & Sons.

***OPINION AND ORDER***

**Kelly, Judge:**

Before the Court is the U.S. Department of Commerce's ("Commerce") remand redetermination pursuant to the Court's third remand order, *see BGH Edelstahl Siegen GmbH v. United States*, 663 F. Supp. 3d 1378 (Ct. Int'l Trade 2023) ("*BGH III*"), on Commerce's final determination in its countervailing duty ("CVD") investigation of forged steel fluid end blocks ("fluid end blocks" or "FEB") from the Federal Republic of Germany ("FRG" or "Germany" or "GOG"). *See* Final Results of Redetermination Pursuant to Court Remand at 1, Feb. 12, 2024, ECF No. 71–1 ("Third Remand Results"); *see generally [Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg. 7,535 (Dep't Commerce Jan. 29, 2021) ([CVD] orders and am. final determination) and accompanying issues and decision memo. ("Final Decision Memo."); *[Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg.

10,244 (Dep't Commerce Feb. 19, 2021) (correction to [CVD] orders). For the following reasons, the Court remands Commerce's redetermination.

## BACKGROUND

The Court presumes familiarity with the facts of this case as set out in its previous opinions ordering remand to Commerce, *see BGH Edelstahl Siegen GmbH v. United States*, 600 F. Supp. 3d 1241, 1248 (Ct. Int'l Trade 2022) ("*BGH I*"); *BGH Edelstahl Siegen GmbH v. United States*, 639 F. Supp. 3d 1237 (Ct. Int'l Trade 2023) ("BGH II"); *BGH III*, 663 F.Supp.3d 1378, and now recounts only those facts relevant to the Court's review of the Third Remand Results. On December 19, 2019, the FEB Fair Trade Coalition, Ellwood Group, and Finkl Steel (collectively "Ellwood")[1] filed a petition with Commerce seeking the imposition of CVDs on imports of FEBs from the People's Republic of China, the FRG, India, and Italy, as well as antidumping duties on dumped imports of FEBs from the FRG, India, and Italy. *See* Antidumping and [CVD] Pets. at 1, PD 1, bar code 3921764–01 (Dec. 19, 2019). Commerce selected BGH Edelstahl Siegen GmbH ("BGH") as a mandatory respondent[2] during its CVD investigation of FEBs from the FRG between the period of January 1, 2018 to December 31, 2018. Resp't Selection Memo. at 1, PD 55, bar code 3938855–01 (Feb. 4, 2020). The investigation concluded that the FRG offered countervailable subsidies through multiple programs, including the Konzessionsabgabenverordung Program ("KAV Program").[3] Final Decision Memo. at 6–8; *see also* Post-Prelim. Analysis [CVD] Investigation: [Fluid End Blocks] from [FRG] at 6–19, PD 271, bar code 4043279–01 (Oct. 21, 2020); Decision Mem. Prelim. Affirmative Determination [CVD] Investigation of [Fluid End Blocks] from [FRG] at 19–27, PD 220, bar code 3975458–01 (May 18, 2020). Specifically, Commerce concluded that the KAV program was specific as a matter of law. Final Decision Memo. at 37–39. BGH filed its complaint and sought judgment on the agency record, challenging Commerce's final determination. *See generally* Compl., Mar. 29, 2021,

[1] Petitioners are the Defendant-Intervenors in the matter but now challenge Commerce's latest redetermination.

[2] BGH is the Plaintiff in the matter but now supports Commerce's third redetermination.

[3] BGH challenged Commerce's determination that the following programs are countervailable: 1. Stromsteuergesetz ("Electricity Tax Act"), 2. Energiesteuergesetz ("the Energy Tax Act"), 3. Erneuerbare-Energien-Gesetz ("EEG Program"), 4. Kraft-Wärme-Kopplungsgesetz ("KWKG Program"), 5. The European Union's ("EU") Emissions Trading System ("ETS Program"), 6. The EU ETS Compensation of Indirect $CO_2$ Costs Program ("$CO_2$ Compensation Program"), and 7. the KAV Program. [BGH] Rule 56.2 Mem. Supp. Mot. J. Agency R. at 7, 21, 30, 39–40, Oct. 26, 2021, ECF No. 22.

ECF No. 7; *see also* [BGH] Mot. J. Agency R., Oct. 26, 2021, ECF No. 21. The Court sustained in part and remanded in part Commerce's final determination after briefing. *BGH I*, 600 F. Supp. 3d at 1269–70. The Court held that Commerce's finding of de jure specificity for the KAV Program was unsupported by the record because Commerce did not explain how the program limits usage to certain industries or enterprises and failed to consider its economic and horizontal properties and application. *Id.* at 1269. The Court also remanded Commerce's CVD rate calculation for the Electricity Tax Act and the Energy Tax Act. *Id.* at 1258.

Commerce filed its Remand Results in January 2023. *See* Final Results of Redetermination Pursuant to Court Remand at 1, Jan. 10, 2023, ECF No. 48–1. After briefing was complete, the Court sustained in part and remanded in part. *BGH II*, 639 F. Supp. 3d at 1239. The Court again concluded Commerce's determination that the KAV Program was specific as a matter of law was unsupported by the record. *Id.* at 1243. The Court remanded for further explanation or reconsideration as to the economic and horizontal nature of the subsidy. *Id.* at 1244. The Court sustained Commerce's redetermination for both the Electricity Tax Act and the Energy Tax Act. *Id.* at 1242.

Commerce filed its second redetermination results on August 7, 2023, again finding the KAV Program a de jure specific subsidy. Final Results of Redetermination Pursuant to Court Remand at 1, Aug. 7, 2023, ECF No. 60–1 ("Second Remand Results"). The Court remanded Commerce's redetermination, concluding that Commerce's position that "where the 'implementing legislation expressly limit[s] access to the "group" that the legislation itself created' the subsidy is de jure specific" was contrary to law.[4] *BGH III*, 663 F. Supp. 3d at 1384. The Court remanded to Commerce for further consideration or explanation. *Id.*

Commerce filed the Third Remand Results on February 12, 2024. *See generally* Third Remand Results. In the third redetermination, Commerce reconsidered its determination and, under respectful pro-

[4] More specifically, the Court explained that a subsidy may "be limited to fewer than all enterprises or industries in an economy" without being de jure specific so long as the limiting criteria is objective. *BGH III*, 663 F. Supp. 3d at 1384. The Court explained that criteria may create objective categories of industries or enterprises which may benefit from the subsidy to the exclusion of others. *Id.* (citing Statement of Administration Action for the Uruguay Round Agreements Act, H.R. Rep. No. 103–316 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4243 ("SAA")). "Objective" in this context means neutral, i.e., it "must not favor certain enterprises or industries over others, and must be economic in nature and horizontal in application, such as the number of employees or the size of the enterprise." *Id.* at 1382 (citing SAA at 4243). Therefore, "criteria based on size or the number of employees could exclude entire categories of enterprises and industries, but such criteria would not render the subsidy de jure specific because it is horizontal (operating throughout the economy), and is economic in nature." *Id.* at 1384 (citing the SAA at 4243).

test,[5] found that the KAV Program is not de jure specific. *Id.* at 2. Further, it found no basis to reconsider its past determination that "the KAV Program 'is de jure specific rather than de facto specific'" and thus found that KAV Program was not countervailable. *Id.*

Ellwood opposes Commerce's redetermination, arguing that Commerce failed to analyze whether the KAV Program was de facto specific. *See* Def.-Int. Cmts. Opp'n [Third Remand Results] at 1, Mar. 13, 2024, ECF No. 73 ("Ellwood Cmts."). BGH supports Commerce's redetermination. [BGH] Reply to [Ellwood Cmts.] at 1, Apr. 12, 2024, ECF No. 75 ("BGH Reply"). Defendant filed its response to Ellwood's comments on April 12, 2024. *See* Def. Resp. [Ellwood Cmts.] at 1, Apr. 12, 2024, ECF No. 74 ("Def. Resp.").

## JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to section 516A of the Tariff Act,[6] as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II), and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an administrative review of a CVD order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Trade 2014) (internal citations and quotations omitted).

## DISCUSSION

Ellwood challenges Commerce's determination that the KAV Program is not countervailable, arguing that Commerce acted contrary to law by refusing to analyze whether the program was de facto specific. Ellwood Cmts. at 6–10. Defendant argues that Commerce's third redetermination is supported by substantial evidence, in accordance with law, and complied with the third remand order. Def. Resp. at 1–2. Likewise, Plaintiff argues that Commerce complied with the remand order and "there is nothing in the structure or wording of the eligibility criteria that would give reasons to believe that the KAV [Program] may be specific as a matter of fact." BGH Reply at 3. For the reasons that follow, Commerce's third redetermination is remanded for further consideration.

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[5] Commerce files under respectful protest in order to preserve its right to appeal. *See Viraj Grp., Ltd. v. United States*, 343 F.3d 1371, 1376 (Fed. Cir. 2003).

[6] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

Section 1677 of Title 19 requires investigation of allegations of countervailable subsides. A petitioner may allege that a domestic subsidy is countervailable because it is specific as a matter of law (de jure specificity). 19 U.S.C. § 1677(5A)(D); *BGH III*, 663 F. Supp. 3d at 1381. Congress provided guidelines to identify de jure specific subsidies.[7] First, a de jure specific subsidy is one that "expressly limits access to the subsidy to an enterprise or industry."[8] 19 U.S.C. § 1677(5A)(D)(i); *see also* SAA at 4242.

The second guideline makes clear that the existence of eligibility criteria limiting access alone is insufficient to render a subsidy specific as a matter of law if the criteria is horizontal in application and economic in nature. *See* 19 U.S.C. § 1677(5A)(D)(ii); SAA at 4243. If objective criteria are publicly and clearly set forth, and those criteria provide for automatic eligibility and are strictly followed, a subsidy awarded pursuant to those criteria is not specific as a matter of law. 19 U.S.C. § 1677(5A)(D)(ii). The SAA's explication of permissible criteria makes clear that criteria may create objective categories of industries or enterprises which may benefit from the subsidy to the exclusion of others. SAA at 4243. The SAA provides:

> Finally, the objective criteria or conditions must be neutral, must not favor certain enterprises or industries over others, and must be economic in nature and horizontal in application, such as the number of employees or the size of the enterprise.

---

[7] Concerning de jure specificity, 19 U.S.C. § 1677(5A)(D) provides:

> In determining whether a subsidy . . . is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply:
>
> (i) Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry, the subsidy is specific as a matter of law.
>
> (ii) Where the authority providing the subsidy, or legislation pursuant to which the authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, the subsidy is not specific as a matter of law, if—
>
> (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 documents so as to be capable of verification
>
> For purposes of this clause, the term "objective criteria or conditions" means criteria or conditions that are neutral and that do not favor one enterprise or industry over another.

[8] An enterprise or industry may mean group of enterprises or industries. 19 U.S.C. § 1677 (5A)(D); SAA at 4242.

*Id.* "Criteria based on size or the number of employees could exclude entire categories of enterprises and industries, but such criteria would not render the subsidy de jure specific because it is horizontal (operating throughout the economy), and is economic in nature." *BGH III*, 663 F. Supp. 3d at 1382 (citing SAA at 4243).[9] As this Court previously explained:

> The SAA's rejection of a "precise mathematical formula" to determine de jure specificity "acknowledges that some limitations will result in a 'sufficiently small' number of beneficiaries such that the subsidy will be considered specific as a matter of law." That the SAA provides a subsidy is de jure specific when its availability is limited to a "sufficiently small" number of beneficiaries necessarily means that a subsidy will not be de jure specific when its availability is limited to a group that is not "sufficiently small."

*Id.*

A petitioner may also allege that a domestic subsidy is countervailable because it is specific as a matter of fact (de facto specificity). 19 U.S.C. § 1677(5A)(D)(iii); *BGH III*, 663 F. Supp. 3d at 1381. In its third guideline, Congress delineates de facto specific subsidies, providing that "[w]here there are reasons to believe that a subsidy may be specific as a matter of fact," Commerce must further consider whether:

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

[9] Moreover, the SAA reveals that a subsidy will not be deemed de jure specific simply because it is available to fewer than all enterprises or industries. SAA at 4242. Indeed, the SAA states there is no "precise mathematical formula" to determine when a number of enterprises or industries is "sufficiently small" to be specific as a matter of law. *Id.* A proposal for a mathematical formula to determine de jure specificity was explicitly rejected by the United States, instead providing that such determinations must be made on a case-by-case basis. *Id.* at 4242–43.

19 U.S.C. § 1677(5A)(D)(iii). When evaluating the above factors, Commerce shall "take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation." *Id.* Where Commerce receives a petition that "contain[s] 'information reasonably available to the petitioner supporting those allegations,'" it must investigate. *RZBC Group Shareholding Co., Ltd. v. U.S.*, 100 F. Supp. 3d 1288, 1292 (Ct. Int'l Trade 2015) (citing 19 U.S.C. § 1671a(b)(1)). "Commerce cannot refuse to investigate unless it 'is convinced that the petition and supporting information fail to state a claim upon which relief can be granted.'" *Id.* (citing S. Rep. No. 96–249, at 47 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 381, 433).

Here, the Court's order required that Commerce "either explain and support its determination that the criteria are not neutral, (i.e., are not economic in nature and horizontal in application) or conduct a de facto analysis or reconsider its determination." *BGH III*, 663 F. Supp. 3d at 1384. Although Commerce reconsidered its second redetermination, its third redetermination is not in accordance with law because Commerce failed to analyze whether the program was de facto specific.

The statute obligates Commerce to conduct a de facto specificity analysis where it has reasons to believe the program is de facto specific. 19 U.S.C. § 1677(5A)(D)(iii) (I–IV). The "reasons to believe" language directs Commerce to consider whether (I) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (II) one enterprise or industry is the predominant recipient; (III) one enterprise or industry obtains disproportionate benefits; and (IV) the administration of the program favors an enterprise or industry. 19 U.S.C. § 1677(5A)(D)(iii). Where legislation specifically limits the availability of a subsidy, it would seem that Commerce has reasons to believe the subsidy may be

specific and therefore must consider the factors provided by Congress in 19 U.S.C. § 1677(5A)(D)(iii) (I–IV).[10]

Here, Commerce noted in the post preliminary analysis memorandum that the KAV is limited by its terms to special contract customers. *See* Post Prelim. Analysis Memo. at 13, PD 271, bar code 4043279–01 (Oct. 21, 2020) ("Post Prelim. Analysis Memo."). It is unclear from the record whether the program is sufficiently limited to establish a finding of specificity under 19 U.S.C § 1677(5A)(D)(iii), but it is enough to create a reason to believe the program is de facto specific warranting further investigation by Commerce. Ultimately, record evidence might lead to the conclusion that the subsidy is not de facto specific, but in the absence of such evidence it is unclear to the Court why the provisions of the KAV Program, standing alone, did not give Commerce a reason to believe it may be specific as a matter of fact.

Indeed, Commerce initially concluded that "because recipients of the subsidy are limited in number," the program is de facto specific. Post Prelim. Analysis Mem. at 14. Although Commerce abandoned that determination in the Final Results, it did so not because it concluded that the recipients were not limited in number as a matter of fact, but because it believed the recipients were limited in number as a matter of law. Final Decision Memo. at 39.

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[10] Both Defendant and BGH attempt to limit the relevance of limiting criteria in the KAV program to a de jure analysis. Defendant argues:

> the fact that the KAV Program was limited by law to certain special contract customers goes to the question of de jure specificity; to assess whether the program was de facto specific, Commerce would need evidence concerning the KAV Program's actual use. Petitioners fail to identify any such evidence, and as Commerce explained in its [Third Remand Results], the government of Germany "reported that it does not collect, track, or maintain information on usage of the KAV Program in the ordinary course of business," and that "because no governmental authority is involved in administering the process towards the financial consumer established based on Section 2(4) of the KAV, the government of Germany does not have data on the concession fees paid by a specific company.

Def Resp. at 6 (citing [FRG] First. Suppl. Questionnaire: Resp. Certain Questions at Exh. KAV-02, PD 236, bar code 3983126–01 (June 5, 2020)). BGH likewise argues that nothing in the language of the KAV provision would lead to the belief that the recipients of the program will be limited in number. BGH Reply at 2–3. However, the very terms of the KAV program lead to the conclusion that the recipients of the program are limited in some way, which is sufficient to create a reason to believe that the program is de facto specific and thus requiring further investigation.

There is no dispute that Commerce did not conduct a de facto specificity analysis.[11] Ellwood Cmts. at 10 (arguing no analysis was conducted); Def. Resp. at 6–7 (arguing no analysis was needed). Defendant adds that "the record lacks sufficient evidence to conduct a de facto analysis, and attempting to obtain such evidence would likely be futile given that Germany does not collect evidence on use of the KAV Program." Def. Resp. at 7. Commerce faults Ellwood for failing to provide evidence of the claim that the KAV Program is de facto specific, thus finding "no basis to reconsider that finding." Third Remand Results at 8. However, Commerce's finding that the program is not de facto specific does not appear to be a finding at all, but a decision to abandon a de facto specificity analysis in light of its conclusion regarding de jure specificity. *Compare* Final Decision Memo. at 37–39 (finding the KAV Program de jure specific), *with* Post Prelim. Analysis Mem. at 14 (finding the KAV Program de facto specific). Moreover, Ellwood need not establish the existence of de facto specific subsidies at this stage, but only reasons to believe that the program is de facto specific. Therefore, Commerce's determination that it lacked a reasonable belief is not supported by this record, and thus its failure to further investigate is not in accordance with law.

BGH argues that a determination of de facto specificity requires more than a provision limiting the users of a program, but also requires evidence regarding actual use which BGH argues is missing from the record. BGH Reply at 5–6. It is unclear to the Court why the lack of this information on the record rebuts the reasons to believe the KAV Program is de facto specific created by the terms of the program itself, at least without further investigation. Commerce has tools to confront instances where information is missing from the record. *See* 19 U.S.C. § 1677e; *BGH III*, 663 F. Supp. 3d at 1383 n.9. That the record lacked further information to conclude that a reasonable belief was correct cannot be enough to satisfy the Section 1677(5A)(D)(iii). Although further investigation may ultimately yield a conclusion that Commerce could not reasonably determine the existence of a de facto

[11] Commerce and BGH both note that until now, Ellwood has failed to challenge Commerce's determination of "de jure rather than de facto" specificity. Third Remand Results at 8; BGH Reply at 3–4. And indeed, Ellwood, in its comments to the second redetermination defending Commerce's de jure determination, states "[c]learly, Commerce cannot assess whether the number of enterprises receiving the subsidy is limited in number under 19 U.S.C. § 1677(5A)(D)(iii) if the GOG is unable to provide an accurate accounting for the number of enterprises receiving benefits. This fact only reinforces the legitimacy of Commerce's circumvention concerns and its finding that the KAV program, which explicitly limits access to a defined group of enterprises, is de jure specific under 19 U.S.C. § 1677(5A)(D)(i)." [Ellwood's] Reply to [BGH's] Opp'n [Second] Final Results of Redetermination at 6–7, Oct. 6, 2023, ECF No. 66. Commerce and BGH do not appear to argue that Ellwood is precluded from arguing for a finding of de facto specificity because of exhaustion principles, and therefore the Court does not address that question.

specific subsidy, Commerce cannot summarily skirt the de facto specificity analysis required by the statute.

Likewise, BGH ignores the statutory distinctions between de jure and de facto specificity, under Sections 1677(5A)(D)(i) and 1677(5A)(D)(iii) respectively, to argue that Commerce need not further inquire into a de facto specificity analysis because of the Court's prior ruling. BGH Reply at 2 (criticizing Ellwood's reliance on KAV Program's limitation to "special contract customers" as rendering "the Court's previous opinions in this case a nullity"). Under 19 U.S.C. § 1677(5A)(D)(i), an inquiry as to whether a subsidy is specific as a matter of law requires a finding that the "authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry[.]" Conversely, Commerce need only be presented with "reasons to believe that a subsidy may be specific as a matter of fact" to trigger a de facto specificity analysis. 19 U.S.C. § 1677(5A)(D)(iii). This distinction is important, because a de jure specificity determination will focus on what is expressly provided for in enabling legislation, while a de facto specificity determination assesses how a subsidy is actually distributed. *See* 19 U.S.C. § 1677(5A)(D); SAA at 4242–43. Consequently, legislation that may not be de jure specific may nonetheless trigger an analysis of de facto specificity. Because Commerce failed to conduct a de facto specificity analysis despite there being reasons to believe the KAV Program is specific as a matter of fact, the Third Remand Results must be remanded for reconsideration or further explanation.

## CONCLUSION

When Commerce confronts facts giving reasons to believe that a subsidy may be specific as a matter of fact, it must further investigate whether that subsidy is de facto specific under 19 U.S.C. § 1677(5A)(D)(iii). Thus, Commerce's Third Remand Results are remanded for reconsideration or further explanation.

For the foregoing reasons, it is

**ORDERED** that Commerce's Third Remand Results, *see* ECF No. 71–1, are remanded for further explanation or reconsideration consistent with this opinion with respect to its determination that the KAV Program is not a specific subsidy; and it is further

**ORDERED** that Commerce shall file its fourth remand redetermination with the court within 120 days of this date; and it is further

**ORDERED** that the parties shall file any comments on the fourth remand redetermination within 30 days of the date of filing of the fourth remand redetermination; and it is further

**ORDERED** that the parties shall have 30 days to file their replies to the comments on the fourth remand redetermination; and it is further

**ORDERED** that the parties shall file the joint appendix within 14 days of the date of filing of responses to the comments on the fourth remand redetermination; and it is further

**ORDERED** that Commerce shall file the administrative record within 14 days of the date of filing of its fourth remand redetermination.

Dated: May 22, 2024
New York, New York

/*s*/ *Claire R. Kelly*
CLAIRE R. KELLY, JUDGE

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