

# U.S. Customs and Border Protection

CBP Dec. 22-01

**NOTICE OF FINDING THAT CERTAIN SEAFOOD  
HARVESTED BY THE TAIWANESE DA WANG FISHING  
VESSEL WITH THE USE OF CONVICT, FORCED OR  
INDENTURED LABOR IS BEING, OR IS LIKELY TO BE,  
IMPORTED INTO THE UNITED STATES IN VIOLATION OF  
19 U.S.C. i307**

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

**ACTION:** General notice of forced labor finding.

**SUMMARY:** This document notifies the public that U.S. Customs and Border Protection (CBP), with the approval of the Secretary of Homeland Security, has determined that certain seafood has been harvested by the *Da Wang* fishing vessel with the use of convict, forced or indentured labor, and is being, or is likely to be, imported into the United States.

**DATES:** This Finding applies to any merchandise described in Section II of this Notice that is imported on or after January 28, 2022. It also applies to merchandise which has already been imported and has not been released from CBP custody before January 28, 2022.

**FOR FURTHER INFORMATION CONTACT:** Ilissa Shefferman, Chief, Investigations Branch, Forced Labor Division, Trade Remedy Law Enforcement Directorate, Office of Trade, (202) 506-5663 or [forcedlabor@cbp.dhs.gov](mailto:forcedlabor@cbp.dhs.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

Pursuant to section 307 of the Tariff Act of 1930, as amended (19 U.S.C. 1307), “[a]ll goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited.” Under this section, “forced labor” includes “all work or service which

is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily” and includes forced or indentured child labor.

The Customs and Border Protection (CBP) regulations promulgated under the authority of 19 U.S.C. 1307 are found at sections 12.42 through 12.45 of title 19, Code of Federal Regulations (CFR) (19 CFR 12.42–12.45). Among other things, these regulations allow any person outside of CBP to communicate his or her belief that a certain “class of merchandise . . . is being, or is likely to be, imported into the United States [in violation of 19 U.S.C. 1307].” 19 CFR 12.42(a), (b). Upon receiving such information, the Commissioner of CBP will initiate an investigation if warranted by the circumstances. 19 CFR 12.42(d). CBP also has the authority to self-initiate an investigation. 19 CFR 12.42(a). If the Commissioner finds that the information available “reasonably but not conclusively” indicates that such merchandise “is being, or is likely to be, imported” into the United States, the Commissioner will order port directors to “withhold release of the merchandise pending [further] instructions.” 19 CFR 12.42(e). After issuance of a withhold release order, the covered merchandise will be detained by CBP for an admissibility determination and will be excluded unless the importer demonstrates that the merchandise was not made using forced labor in violation of 19 U.S.C. 1307. 19 CFR 12.43–12.44. Subject to certain conditions, the importer may also export the merchandise prior to seizure. 19 CFR 12.44(a).

These regulations also set forth the procedure for the Commissioner of CBP to issue a Finding when the Commissioner determines that the merchandise is subject to the provisions of 19 U.S.C. 1307. Pursuant to 19 CFR 12.42(f), if the Commissioner finds that merchandise within the purview of 19 U.S.C. 1307 is being, or is likely to be, imported into the United States, the Commissioner will, with the approval of the Secretary of the Department of Homeland Security (DHS), publish a Finding to that effect in the **Federal Register** and in the *Customs Bulletin and Decisions*.<sup>1</sup> Under the authority of 19 CFR 12.44(b), CBP may seize and forfeit imported merchandise covered by a Finding.

On July 31, 2020, CBP issued a withhold release order (made effective on August 18, 2021) on “seafood” with reasonable evidence

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<sup>1</sup> Although the regulation states that the Secretary of the Treasury must approve the issuance of a Finding, the Secretary of the Treasury delegated this authority to the Secretary of Homeland Security in Treasury Order No. 100–16 (68 FR 28322). See Appendix to 19 CFR part 0. Under Delegation Order 7010.3, Section II.A.3, the Secretary of Homeland Security delegated the authority to issue a Finding to the Commissioner of CBP, with the approval of the Secretary of Homeland Security. The Commissioner of CBP, in turn, delegated the authority to make a Finding regarding prohibited goods under 19 U.S.C. 1307 to the Executive Assistant Commissioner, Office of Trade.

demonstrating that the *Da Wang* fishing vessel, which flies a Vanuatu flag but has a Taiwanese beneficiary, harvested the seafood using forced or convict labor. Through its investigation, CBP has determined that there is sufficient information to support a Finding that the *Da Wang* vessel, owned by Yong Feng Fishery Ltd., is using forced labor in its fishing operations and that such seafood harvested by the vessel is likely being imported into the United States.

## II. Finding

### *A. General*

Pursuant to 19 U.S.C. 1307 and 19 CFR 12.42(f), it is hereby determined that certain articles described in paragraph II.B., that are harvested in whole or in part with the use of convict, forced, or indentured labor by the *Da Wang* fishing vessel, which is owned by Yong Feng Fishery Ltd., are being, or are likely to be, imported into the United States. Based upon this determination, the port director may seize the covered merchandise for violation of 19 U.S.C. 1307 and commence forfeiture proceedings pursuant to 19 CFR part 162, subpart E, unless the importer establishes by satisfactory evidence that the merchandise was not produced in any part with the use of prohibited labor specified in this Finding. 19 CFR 12.42(g).

### *B. Articles and Entities Covered by This Finding*

This Finding covers seafood, mainly tuna products, classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 0304.87.0000, 0304.99.1190, 1604.14.4000, 1604.14.3059, and any other relevant subheadings under Chapters 3 and 16, which are harvested wholly or in part by the *Da Wang* fishing vessel, which is owned and operated by Yong Feng Fishery Ltd.

The Secretary of Homeland Security has reviewed and approved this Finding.

Dated: January 25, 2022.

JOHN P. LEONARD,  
*Acting Executive Assistant Commissioner,  
Office of Trade.*

[Published in the Federal Register, January 28, 2022 (85 FR 04634)]

**CBP Dec. 22-02****NOTICE OF FINDING THAT CERTAIN PALM OIL AND DERIVATIVE PRODUCTS MADE WHOLLY OR IN PART WITH PALM OIL PRODUCED BY THE MALAYSIAN COMPANY SIME DARBY PLANTATION BERHAD ITS SUBSIDIARIES, AND JOINT VENTURES, WITH THE USE OF CONVICT, FORCED OR INDENTURED LABOR ARE BEING, OR ARE LIKELY TO BE, IMPORTED INTO THE UNITED STATES IN VIOLATION OF 19 U.S.C. 1307**

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

**ACTION:** General notice of forced labor finding.

**SUMMARY:** This document notifies the public that U.S. Customs and Border Protection (CBP), with the approval of the Secretary of Homeland Security, has determined that certain palm oil and derivative products made wholly or in part with palm oil produced by Sime Darby Plantation Berhad, its subsidiaries, and joint ventures with the use of convict, forced or indentured labor, are being, or are likely to be, imported into the United States.

**DATES:** This Finding applies to any merchandise described in Section II of this Notice that is imported on or after January 28, 2022. It also applies to merchandise which has already been imported and has not been released from CBP custody before January 28, 2022.

**FOR FURTHER INFORMATION CONTACT:** Ilissa Kabak Shefferman, Chief, Investigations Branch, Forced Labor Division, Trade Remedy Law Enforcement Directorate, Office of Trade, (202) 506-5663 or [forcedlabor@cbp.dhs.gov](mailto:forcedlabor@cbp.dhs.gov).

**SUPPLEMENTARY INFORMATION:****I. Background**

Pursuant to section 307 of the Tariff Act of 1930, as amended (19 U.S.C. 1307), “[a]ll goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited.” Under this section, “forced labor” includes “all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily” and includes forced or indentured child labor.

The U.S. Customs and Border Protection (CBP) regulations promulgated under the authority of 19 U.S.C. 1307 are found at sections 12.42 through 12.45 of title 19, Code of Federal Regulations (CFR) (19 CFR 12.42–12.45). Among other things, these regulations allow any person outside of CBP to communicate his or her belief that a certain “class of merchandise . . . is being, or is likely to be, imported into the United States [in violation of 19 U.S.C. 1307].” 19 CFR 12.42(a), (b). Upon receiving such information, the Commissioner of CBP will initiate an investigation if warranted by the circumstances. 19 CFR 12.42(d). CBP also has the authority to self-initiate an investigation. 19 CFR 12.42(a). If the Commissioner finds that the information available “reasonably but not conclusively” indicates that such merchandise “is being, or is likely to be, imported” into the United States, the Commissioner will order port directors to “withhold release of the merchandise pending [further] instructions.” 19 CFR 12.42(e). After issuance of such a withhold release order, the covered merchandise will be detained by CBP for an admissibility determination and will be excluded unless the importer demonstrates that the merchandise was not made using forced labor in violation of 19 U.S.C. 1307. 19 CFR 12.43–12.44. Subject to certain conditions, the importer may also export the merchandise prior to seizure. 19 CFR 12.44(a).

These regulations also set forth the procedure for the Commissioner of CBP to issue a Finding when the Commissioner determines that the merchandise is subject to the provisions of 19 U.S.C. 1307. Pursuant to 19 CFR 12.42(f), if the Commissioner finds that merchandise within the purview of 19 U.S.C. 1307 is being, or is likely to be, imported into the United States, the Commissioner will, with the approval of the Secretary of the Department of Homeland Security (DHS), publish a Finding to that effect in the **Federal Register** and in the *Customs Bulletin and Decisions*.<sup>1</sup> Under the authority of 19 CFR 12.44(b), CBP may seize and forfeit imported merchandise covered by a Finding.

On December 16, 2020, CBP issued a withhold release order (made effective on December 30, 2020) on “palm oil,” including all crude palm oil and palm kernel oil and derivative products, made wholly or in part with palm oil traceable to Sime Darby Plantation Berhad (“Sime Darby Plantation”), with reasonable evidence demonstrating

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<sup>1</sup> Although the regulation states that the Secretary of the Treasury must approve the issuance of a Finding, the Secretary of the Treasury delegated this authority to the Secretary of Homeland Security in Treasury Order No. 100–16 (68 FR 28322). See Appendix to 19 CFR part 0. Under Delegation Order 7010.3, Section II.A.3, the Secretary of Homeland Security delegated the authority to issue a Finding to the Commissioner of CBP, with the approval of the Secretary of Homeland Security. The Commissioner of CBP, in turn, delegated the authority to make a Finding regarding prohibited goods under 19 U.S.C. 1307 to the Executive Assistant Commissioner, Office of Trade.

that the Sime Darby Plantation, including its subsidiaries and joint ventures, primarily located in Malaysia, harvested the fruit and produced the palm oil using forced labor. Through its investigation, CBP has determined that there is sufficient information to support a Finding that Sime Darby Plantation and its subsidiaries are using forced labor on Sime Darby's plantations in Malaysia to harvest fresh fruit bunches, which are used to extract palm oil and produce derivative products, and that such palm oil and derivative products produced by the company are likely being imported into the United States.

## **II. Finding**

### *A. General*

Pursuant to 19 U.S.C. 1307 and 19 CFR 12.42(f), it is hereby determined that certain articles described in paragraph II.B., that are manufactured or produced in whole or in part with the use of convict, forced, or indentured labor by Sime Darby Plantation and its subsidiaries are being, or are likely to be, imported into the United States. Based upon this determination, the port director may seize the covered merchandise for violation of 19 U.S.C. 1307 and commence forfeiture proceedings pursuant to 19 CFR part 162, subpart E, unless the importer establishes by satisfactory evidence that the merchandise was not produced in any part with the use of prohibited labor specified in this Finding. 19 CFR 12.42(g).

### *B. Articles and Entities Covered by This Finding*

This Finding covers palm oil and derivative products made wholly or in part with palm oil classified under Harmonized Tariff Schedule of the United States (HTSUS) subheadings 12.07.10.0000, 1511.10.0000, 1511.90.0000, 1513.21.0000, 1513.29.0000, 1517, 3401.11, 3401.20.0000, 3401.19.0000, 3823.12.0000, 3823.19.2000, 3823.70.6000, 3823.70.4000, 3824.99.41 and any other relevant subheadings under Chapters 12, 15, 23, 29 and 38, which are produced or manufactured wholly or in part by Sime Darby Plantation, its subsidiaries and joint ventures.

The Secretary of Homeland Security has reviewed and approved this Finding.

Dated: January 25, 2022.

JOHN P. LEONARD,  
*Acting Executive Assistant Commissioner,  
Office of Trade.*

## 19 CFR PART 177

### REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF ENGINE MUFFLERS

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

**ACTION:** Notice of revocation of one ruling letter, and of revocation of treatment relating to the tariff classification of engine mufflers.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking one ruling letter concerning tariff classification of engine mufflers under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 50, on December 22, 2021. No comments were received in response to that notice.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 17, 2022.

**FOR FURTHER INFORMATION CONTACT:** Patricia Fogle, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0061.

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other

information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 50, on December 22, 2021, proposing to revoke one ruling letter pertaining to the tariff classification of engine mufflers. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In New York Ruling Letter ("NY") N239500, dated March 26, 2013, CBP classified engine mufflers in heading 8431, HTSUS, specifically in subheading 8431.49.90, HTSUS, which provides for "Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8426, 8429 or 8430: Other: Other." CBP has reviewed NY N239500 and has determined the ruling letter to be in error. It is now CBP's position that engine mufflers are properly classified, in heading 8431, HTSUS, specifically in subheading 8431.20.00, HTSUS, which provides for "Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8427."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N239500 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H321275, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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



Dated:

GREGORY CONNOR  
*for*  
CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

*Attachment*

HQ H321275

January 27, 2022

CLA-2 OT:RR:CTF:EMAIN H321275 PF

CATEGORY: Classification

TARIFF NO.: 8431.20

JANEL L. HUETHER,  
GLOBAL IMPORT/EXPORT COMPLIANCE ANALYST  
DOOSAN BOBCAT COMPANY  
210 1ST AVENUE NE  
GWINNER, ND 58040-4209

RE: Revocation of NY N239500, dated March 26, 2013; Tariff classification of an engine muffler for compact track loader or skid steer loader

DEAR JANEL L. HUETHER:

On March 26, 2013, U.S. Customs and Border Protection (“CBP”) issued to you New York Ruling Letter (“NY”) N239500. It concerned the tariff classification of an engine muffler under the Harmonized Tariff Schedule of the United States (“HTSUS”). We have reviewed NY N239500 and determined that it is incorrect. For the reasons set forth below, we are revoking that ruling.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 50, on December 22, 2021. No comments were received in response to this notice.

**FACTS:**

In NY N239500, the subject engine muffler was described as follows:

The item under consideration has been identified as “Mufflers”. You state that the “Mufflers” (1) are attached directly to the engine, (2) designed solely to reduce noise produced by the engine, (3) do not control emissions and (4) are constructed of steel. . . . You indicate that the subject mufflers are designed specifically for use with the Bobcat “Skid Steer” and the Bobcat “Compact Track Loaders” equipment.

In NY N239500, CBP classified the engine muffler in 8431.49.90, HTSUS, which provides for “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8426, 8429 or 8430: Other: Other.”

**ISSUE:**

Whether the engine mufflers are classified as parts of works trucks fitted with lifting or handling equipment of heading 8427, HTSUS, or as parts of self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers of heading 8429, HTSUS.

**LAW AND ANALYSIS:**

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (“GRIs”) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation (“AUSR”). The GRIs and the AUSR are part of the HTSUS, and are considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS headings under consideration are as follows:

- 8427 Fork-lift trucks; other works trucks fitted with lifting or handling equipment
- 8429 Self-propelled bulldozers, angledozers, graders, levelers, scrapers, mechanical shovels, excavators, shovel loaders, tamping machines and road rollers
- 8431 Parts suitable for use solely or principally with the machinery of headings 8425 to 8430
- 8431.20 Of machinery of heading 8427
- 8431.49 Of machinery of heading 8426, 8429 or 8430

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

EN 84.27 states in pertinent part:

[T]his heading covers works trucks fitted with lifting or handling equipment. Works trucks of this description include, for example:

**(A) FORK-LIFT AND OTHER ELEVATING OR STACKING TRUCKS**

\* \* \*

The lifting device of the above trucks is normally powered by the motive power unit of the vehicle, and is usually designed to be fitted with various special attachments (forks, jibs, buckets, grabs, etc.) according to the type of load to be handled.

\* \* \*

**(B) OTHER WORKS TRUCKS FITTED WITH LIFTING OR HANDLING EQUIPMENT**

This group includes:

\* \* \*

(2) **Other trucks** fitted with lifting or handling equipment including those specialised for use in particular industries (e.g., in the textile or ceramic industries, in dairies, etc.).

### PARTS

**Subject** to the general provisions regarding the classification of parts (see the General Explanatory Note to Section XVI), parts of the trucks of this heading are classified in **heading 84.31**.

EN 84.29 provides in relevant part:

The heading covers a number of earth digging, excavating or compacting machines which are explicitly cited in the heading and which have in common the fact that they are all self-propelled.

\* \* \*

In NY N239500, CBP correctly identified that the engine mufflers were parts of compact track and skid steer loaders and properly classified them under heading 8431, HTSUS. However, CBP has classified skid steer loaders and compact track loaders in heading 8427, HTSUS versus heading 8429, HTSUS. For example, in Headquarters Ruling (“HQ”) H296917, dated August 27, 2018, CBP held that Michelin Tweels, which were parts of skid steer loaders, were classified under the parts provision for machines of heading 8427, HTSUS (i.e., subheading 8431.20, HTSUS). In HQ H296917, CBP discussed the Court of International Trade (“CIT”) decision *Thomas Equipment Limited v. United States*, where the CIT determined that skid steer loaders were “work trucks” with lifting and handling equipment of heading 8427, HTSUS. *See* 881 F. Supp. 611, Slip Op. 95–29 (Ct. Int’l Trade 1995). The CIT rejected the classification of skid steer loaders in heading 8429, HTSUS, and noted that heading 8429, HTSUS, covered more specialized kinds of machines that manipulated the earth. The CIT noted that [s]ubheading 8427.20.00 of the HTSUS . . . refers to work trucks fitted with lifting or handling equipment, without limitation.”<sup>1</sup> The CIT determined that skid steer loaders remained classified in heading 8427, HTSUS, based on a finding of a uniform and established classification practice. Moreover, in NY J81427, dated March 7, 2003, CBP classified an all-surface loader that was designed for working in compact areas and used attachments such as buckets, pallet forks, power augers, snow blowers, among other attachments, was classified in heading 8427, HTSUS. Like the all-surface loader in NY J81427, compact track loaders have lifting, pushing, pulling and handling capabilities that are consistent with the term “works truck” of heading 8427, HTSUS. For example, compact track loaders have lift arms and a wide variety of attachments can be added to these arms, including pallet forks, augers, buckets, backhoes, snowblowers, landscape rakes, landplanes that can be used for lifting, pushing, and pulling. EN 84.27, HTSUS, also supports the classification of a compact track loader in heading 8427, HTSUS, because it is a work truck “designed to be fitted with various special attachments (forks, jibs, buckets, grabs, etc.) according to the type of load to be handled.” *See* EN 84.27(A)(1).

Because both skid steer loaders and compact track loaders are classified in heading 8427, HTSUS, their corresponding parts are classified in subheading 8431.20, HTSUS, as part of an “other truck fitted with lifting or handling

<sup>1</sup> *Thomas Equipment Limited, supra*, 881 F. Supp. at 615.

equipment” of heading 8427, HTSUS. Therefore, the engine mufflers in NY N239500, are classified in 8431.20, HTSUS.

**HOLDING:**

By application of GRIs 1 and 6, the engine mufflers are classified in heading 8431, HTSUS, specifically subheading 8431.20, HTSUS, which provides for “Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8427.” The 2021 column one, general rate of duty is free.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading.

For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at: <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china>

Duty rates are subject to change. The text of the most recent HTSUS and the accompany duty rates are provided at [www.usitc.gov](http://www.usitc.gov). A copy of this ruling letter should be attached to the entry documents filed at the time the goods are entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

**EFFECT ON OTHER RULINGS:**

NY N239500, dated March 26, 2013, is hereby REVOKED.

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

*Sincerely,*

GREGORY CONNOR

*for*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*



**PROPOSED REVOCATION OF ONE RULING LETTER  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE TARIFF CLASSIFICATION OF A  
COOKIE ASSORTMENT**

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

**ACTION:** Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of a cookie assortment.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of a cookie assortment under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before March 18, 2022.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

**FOR FURTHER INFORMATION CONTACT:** Tanya Secor, Food, Textiles and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325–0062.

#### **SUPPLEMENTARY INFORMATION:**

##### **BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke 1 ruling letter pertaining to the tariff classification of a cookie assortment. Although in this notice, CBP is specifically referring to New York Ruling Letter (“NY”) N303994, dated April 24, 2019 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY N303994, CBP classified a cookie assortment in heading 1905, HTSUS, specifically in subheading 1905.90.10, HTSUS, which provides for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Other: Bread, pastry, cakes, biscuits and similar baked products, and puddings, whether or not containing chocolate, fruit, nuts or confectionery.” CBP has reviewed NY N303994 and has determined the ruling letter to be in error. It is now CBP’s position that the sweet biscuits in the assortment are properly classified in subheading 1905.31.00, HTSUS, which provides for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Sweet biscuits” and the wafers in the assortment are properly classified in subheading 1905.32.00, HTSUS, which provides for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: waffles and wafers.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N303994 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H317110, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated:

CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

Attachments



HQ H317110  
OT:RR:CTF:FTM H317110 TJS  
CATEGORY: Classification  
TARIFF NO.: 1905.31.00; 1905.32.00

MR. PHILLIP ALLMENDINGER  
GRIESSON-DEBEUKELAER GMBH & Co.  
AUGUST-HORCH-STRABE 23  
POLCH 56751  
GERMANY

RE: Revocation of NY N303994; Tariff classification of a chocolate-covered cookie assortment from Germany

DEAR MR. ALLMENDINGER:

This is in reference to New York Ruling Letter (“NY”) N303994, dated April 24, 2019, concerning the tariff classification of a chocolate-covered cookie assortment under the Harmonized Tariff Schedule of the United States (“HTSUS”). In that ruling, U.S. Customs and Border Protection (“CBP”) classified the cookie assortment at issue under subheading 1905.90.1050, HTSUS, which provides for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Other: Bread, pastry, cakes, biscuits and similar baked products, and puddings, whether or not containing chocolate, fruit, nuts or confectionery: Other: Pastries, cakes and similar sweet baked products; puddings.” Upon additional review, we have found the classification of this product under subheading 1905.90.1050, HTSUS, to be incorrect. For the reasons set forth below, we hereby revoke NY N303994.

**FACTS:**

NY N303994 described the cookie assortment at issue as follows:

The product is a chocolate covered cookie assortment said to contain approximately 37 percent sugar, 21 percent wheat flour, 11 percent chocolate, 10 percent cocoa butter, 8 percent vegetable shortening, 5 percent skim milk, 2 percent butterfat, and 6 percent total including trace amounts of vegetable oils, butter, eggs, almonds, salt lemon, caramel, sugar, and citric acid among others. The assortment consists of fifteen different varieties of decorated chocolate covered cookies shaped in circles, squares, sticks and a heart. The product is said to be packaged for retail sale in tins printed and embossed as a seasonal item suitable for gifting, weighing 1 kilogram per tin, net packed.

According to the product information submitted with the ruling request, including a photo of the assortment, the cookies are organized by variety in a plastic tray with a plastic film in the tin box. The product information also describes three of the fifteen cookies as wafers with cream fillings. Specifically, the “Coca Wafer with Dark Chocolate” is described as a wafer with cocoa cream filling, covered with dark chocolate, and decor of milk chocolate. The “Coca Wafer with Milk Chocolate” is described as a wafer with cocoa cream filling, covered with milk chocolate, and decor of white chocolate. The “Dark Chocolate Cream Roll” is described as a wrapped crispy light brown wafer

with brown filling and a rough surface. According to the product specification, the target water content in the finished product is 2% with a maximum of 4%.

**ISSUE:**

What is the tariff classification of the chocolate-covered cookie assortment?

**LAW AND ANALYSIS:**

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI 2 through 6 may then be applied in order. GRI 6 provides that for legal purposes, classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes, and *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. GRI 6 thus incorporates GRIs 1 through 5 in classifying goods at the subheading level.

The HTSUS headings under consideration are as follows:

1905	Bread, pastry, cakes, biscuits and other bakers' wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers:
1905.31.00:	Sweet biscuits...
1905.32.00	Waffles and wafers...
1905.90:	Other:
1905.90.10:	Bread, pastry, cakes, biscuits and similar baked products, and puddings, whether or not containing chocolate, fruit, nuts or confectionery...
	* * *

GRI 3(a) and (b) provide as follows:

When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

- (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
- (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as

if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

\* \* \*

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While not legally binding, and therefore not dispositive, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. *See* T.D. 89–80, 54 Fed. Reg. 35127 (Aug. 23, 1989).

The EN to heading 1905, HTSUS, provides in pertinent part as follows:

The heading includes the following products:

...

(8) **Biscuits.** These are usually made from flour and fat to which may have been added sugar or certain of the substances mentioned in Item (10) below. They are baked for a long time to improve the keeping qualities and are generally put up in closed packages. There are various types of biscuits including:

- (a) **Plain biscuits** containing little or no sweetening matter but a relatively high proportion of fat; this type includes cream crackers and water biscuits.
- (b) **Sweet biscuits**, which are fine bakers' wares with long-keeping qualities and a base of flour, sugar or other sweetening matter and fat (these ingredients constituting at least 50% of the product by weight), whether or not containing added salt, almonds, hazelnuts, flavouring, chocolate, coffee, etc. The water content of the finished product must be 12 % or less by weight and the maximum fat content 35% by weight (fillings and coatings are not to be taken into consideration in determining these contents). Commercial biscuits are not usually filled, but they may sometimes contain a solid or other filling (sugar, vegetable fat, chocolate, etc.). They are almost always industrially manufactured products.
- (c) **Savoury and salted biscuits**, which usually have a low sucrose content.

(9) **Waffles and wafers**, which are light fine bakers' wares baked between patterned metal plates. This category also includes thin waffle products, which may be rolled, waffles consisting of a tasty filling sandwiched between two or more layers of thin waffle pastry, and products made by extruding waffle dough through a special machine (ice cream cornets, for example). Waffles may also be chocolate covered. Wafers are products similar to waffles.

\* \* \*

The EN to GRI 3(b) state in pertinent part:

(VI) This second method relates only to :

- (i) Mixtures.
- (ii) Composite goods consisting of different materials.

(iii) Composite goods consisting of different components.

(iv) Goods put up in sets for retail sales.

It applies only if Rule 3 (a) fails.

...

(IX) For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

...

(X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:

- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to end users without repacking (e.g., in boxes or cases or on boards).

“Retail sale” does not include sales of products which are intended to be re-sold after further manufacture, preparation, repacking or incorporation with or into other goods.

The term “goods put up in sets for retail sale” therefore only covers sets consisting of goods which are intended to be sold to the end user where the individual goods are intended to be used together. For example, different foodstuffs intended to be used together in the preparation of a ready-to-eat dish or meal, packaged together and intended for consumption by the purchaser would be a “set put up for retail sale”.

...

The Rule does not, however, cover selections of products put up together and consisting, for example, of:

- a can of shrimps (heading 16.05), a can of pâté de foie (heading 16.02), a can of cheese (heading 04.06), a can of sliced bacon (heading 16.02), and a can of cocktail sausages (heading 16.01); or
- a bottle of spirits of heading 22.08 and a bottle of wine of heading 22.04.

In the case of these two examples and similar selections of products, each item is to be classified separately in its own appropriate heading...

\* \* \*

In NY N303994, CBP classified the subject cookie assortment under subheading 1905.90.10, HTSUS, which provides, in pertinent part, for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa....: Other.” There is no dispute that the subject merchandise is classified in heading 1905, HTSUS. The present issue is resolved at the six-digit classification level. We note that the assortment contains both biscuits and wafers, which are classifiable in different subheadings. The wafers are classified under subheading 1905.32.00, HTSUS, which provides for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa....: Sweet biscuits; waffles and wafers: Waffles and wafers.” The term “biscuit” as used in the tariff refers to both the cookie, its sweetened form, and the cracker, its unsweetened form. *See* Headquarters Ruling Letter (“HQ”) 087386 (July 13, 1990). Subheading 1905.31.00, HTSUS, covers sweet biscuits and subheading 1905.90.10, HTSUS, covers crackers.

We find that the biscuits at issue meet the criteria of a sweet biscuit and are commonly recognizable as cookies. According to the EN to heading 1905, HTSUS, sweet biscuits must have (1) a base of flour, sugar or other sweetening matter, and fat, which altogether constitutes at least 50% of the product by weight; (2) water content 12% or less by weight; and (3) maximum fat content 35% by weight. Fillings and coatings are not taken into consideration when determining these contents. The biscuits at issue contain approximately 37% sugar, 21% wheat flour, 11% chocolate, 10% cocoa butter, 8% vegetable shortening, 5% skim milk, 2% butterfat, and trace amounts of other ingredients. The flour, sugar, and fat content of the cookies constitute over 50% of the product by weight, thereby meeting the first criteria. The biscuits also meet the second criteria since the water content of the finished product is at most 4%. Last, the total fat content, including the cocoa butter, shortening, and butterfat, is below the 35% threshold provided in the EN. Because the biscuits at issue meet the definition of sweet biscuits in the EN, they are classified as sweet biscuits in subheading 1905.31.00, HTSUS.

In considering the classification of the assortment containing sweet biscuits of subheading 1905.31.00 and wafers of subheading 1905.32.00, HTSUS, a GRI 3(b) analysis is appropriate as no single subheading describes all the products which are packaged and sold together. The assortment is not a mixture because the sweet biscuits and the wafers are not comingled in the package. Likewise, the assortment is not a composite good because the sweet biscuits and the wafers are not attached to each other to form a practically inseparable whole nor are they mutually complementary components that form a whole. The EN to GRI 3(b) provides that merchandise is a “set put up for retail sale” if it (1) is composed of at least two different articles which are, *prima facie*, classifiable in different headings; (2) contains products or articles put up together to meet a particular need or carry out a specific activity; and (3) is “put up in a manner suitable for sale directly to end users without repacking.” The EN further states that the rule does not cover certain selections of products put up together, and that each item in these selections is to be classified separately in its own appropriate heading or, by application of GRI 6, subheading. We find that the cookie assortment is a compartmentalized selection of discrete foods that does not meet the second requirement of a “set put up for retail sale” because the biscuits and wafers are not put up together to meet a particular need or carry out a specific activity. The biscuits and wafers individually carry out the activity of consuming a sweet treat and are not intended to be eaten in tandem. Rather, the assortment provides a

selection from which consumers can choose a certain flavor among the biscuits or wafers. Therefore, the biscuit and wafer assortment does not qualify as a set under GRI 3(b) for classification purposes and will be classified separately in subheading 1905.31.00, HTSUS, and 1905.32.00, HTSUS, respectively.

This conclusion is consistent with NY N053826, dated March 13, 2009, which concerned the tariff classification of a cookie assortment similar to the one at issue. The product in that ruling was an assortment of various cookies consisting of baked biscuits, wafers, or filled wafers wholly or partially covered with dark, milk, or white chocolate, or a combination of two different chocolates. The cookies were packaged in plastic trays in a rectangular metal tin. CBP classified the biscuits in subheading 1905.31.00, HTSUS, and the wafers and filled wafers in subheading 1905.32.00, HTSUS.

In view of the foregoing, we find the biscuits in the cookie assortment are classified under subheading 1905.31.00, HTSUS, which provides for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Sweet biscuits.” The wafers are classified under subheading 1905.32.00, HTSUS, which provides for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Waffles and wafers.”

#### **HOLDING:**

Based on the information provided, by application of GRI 1 and 6, the biscuits in the cookie assortment are classified under subheading 1905.31.00, HTSUS, which provides for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Sweet biscuits.” The wafers are classified under subheading 1905.32.00, HTSUS, which provides for “Bread, pastry, cakes, biscuits and other bakers’ wares, whether or not containing cocoa; communion wafers, empty capsules of a kind suitable for pharmaceutical use, sealing wafers, rice paper and similar products: Sweet biscuits; waffles and wafers: Waffles and wafers.” The 2021 column one, general rate of duty for both provisions is free.

#### **EFFECT ON OTHER RULINGS:**

NY N303994, dated April 24, 2019, is hereby REVOKED.

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

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*

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

CANADIAN SOLAR, INC., CANADIAN SOLAR INTERNATIONAL LIMITED, CANADIAN SOLAR MANUFACTURING (LUOYANG), INC., CANADIAN SOLAR MANUFACTURING (CHANGSHU), INC., CSI CELLS Co., LTD., CSI SOLAR POWER (CHINA) INC., CSI SOLARTRONICS (CHANGSHU) Co., LTD., CSI SOLAR TECHNOLOGIES INC., CSI SOLAR MANUFACTURE INC., CSI NEW ENERGY HOLDING Co., LTD., CSI-GCL SOLAR MANUFACTURING (YANCHENG) Co., LTD., CHANGSHU TEGU NEW MATERIALS TECHNOLOGY Co., LTD., CHANGSHU TLIAN Co., LTD., SUZHOU SANYSOLAR MATERIALS TECHNOLOGY Co., LTD., CANADIAN SOLAR (USA), INC., Plaintiffs-Appellants SUMEC HARDWARE & TOOLS Co., LTD., CHANGZHOU TRINA SOLAR ENERGY Co., LTD., TRINA SOLAR (CHANGZHOU) SCIENCE & TECHNOLOGY Co., LTD., YANCHENG TRINA SOLAR ENERGY TECHNOLOGY Co., LTD., CHANGZHOU TRINA SOLAR YABANG ENERGY Co., LTD., TURPAN TRINA SOLAR ENERGY Co., LTD., HUBEI TRINA SOLAR ENERGY Co., LTD., CHANGZHOU TRINA PV RIBBON MATERIALS Co., LTD., Plaintiffs v. UNITED STATES, Defendant-Appellee SOLARWORLD AMERICAS, INC., Defendant

Appeal No. 2021-1434

Appeal from the United States Court of International Trade in Nos. 1:18-cv-00184-JAR, 1:18-cv-00185-JAR, 1:18-cv-00186-JAR, 1:18-cv-00187-JAR, Senior Judge Jane A. Restani.

Decided: January 28, 2022

SARAH WYSS, Mowry & Grimson, PLLC, Washington, DC, argued for plaintiffs-appellants. Also represented by BRYAN CENKO, JILL CRAMER, JEFFREY S. GRIMSON, WENHUI JI, KRISTIN HEIM MOWRY.

JUSTIN REINHART MILLER, International Trade Field Office, Civil Division, United States Department of Justice, New York, NY, argued for defendant-appellee. Also represented by BRIAN M. BOYNTON, JEANNE DAVIDSON, TARA K. HOGAN; PAUL KEITH, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce, Washington, DC.

Before MOORE, *Chief Judge*, CLEVINGER and CHEN, *Circuit Judges*.

CHEN, *Circuit Judge*.

Appellants Canadian Solar, Inc. *et al.*<sup>1</sup> (collectively, Canadian Solar) are producers and exporters of certain crystalline silicon pho-

<sup>1</sup> In addition to Canadian Solar, Inc., Appellants include Canadian Solar International Ltd., Canadian Solar Manufacturing (Luoyang), Inc., Canadian Solar Manufacturing (Changshu), Inc., CSI Cells Co., Ltd., CSI Solar Power (China) Inc., CSI Solartronics (Changshu) Co., Ltd., CSI Solar Technologies Inc., CSI Solar Manufacture Inc., CSI New Energy Holding Co., Ltd., CSI-GCL Solar Manufacturing (Yancheng) Co., Ltd., Changshu Tegu New Materials Technology Co., Ltd., Changshu Tian Co., Ltd., Suzhou Sanysolar Materials Technology Co., Ltd., and Canadian Solar (USA), Inc.

tovoltaic cells. These photovoltaic cells were imported into the United States from the People's Republic of China, and the United States Department of Commerce (Commerce), after an investigation, issued an order imposing a duty to counteract subsidies Canadian Solar received from the government of China.

During its fourth administrative review of that countervailing duty order, Commerce determined on remand that Canadian Solar received regionally specific electricity subsidies subject to countervailing duties under 19 U.S.C. § 1677(5A)(D)(iv). Final Results of Redetermination Pursuant to Court Remand at 14–19, *Canadian Solar Inc. v. United States*, No. 18–00184 (Ct. Int'l Trade June 26, 2020), ECF No. 95–1 (*Remand Redetermination*). To reach this conclusion, Commerce identified electricity price variation across the different provinces and applied adverse facts available—due to the central government of China's failure to cooperate in Commerce's investigation—to conclude that the central government sets variable electricity pricing that is region-specific for development purposes. See *id.* at 19. The Court of International Trade (CIT) sustained Commerce's Remand Redetermination. *Canadian Solar Inc. v. United States*, No. 18–00184, slip op. 20–149, 2020 WL 6129754 (Ct. Int'l Trade Oct. 19, 2020) (*Canadian Solar II*). For the reasons stated herein, we affirm.

## BACKGROUND

### A

Commerce is required to impose a countervailing duty on imported merchandise when it “determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy.” 19 U.S.C. § 1671(a)(1). A subsidy is countervailable when it is “specific.” *Id.* § 1677(5)(A). One type of specific subsidy is a subsidy “limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy.” *Id.* § 1677(5A)(D)(iv). Such a subsidy is referred to as a regionally specific subsidy.

If, during investigation or review of a countervailing duty order, Commerce determines that (a) “necessary information is not available on the record” or (b) “an interested party or any other person . . . withholds information that has been requested by [Commerce],” “fails to provide such information by the deadlines . . . or in the form and manner requested,” “significantly impedes a proceeding,” or “provides such information but the information cannot be verified,” Com-



merce must use “facts otherwise available.” 19 U.S.C. § 1677e(a); *see also Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1327 (Fed. Cir. 2020). If Commerce further “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information,” then Commerce “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b). To reach an adverse inference, Commerce can rely on information from the petition, a final determination in the investigation, prior administrative reviews, or “any other information placed on the record.” 19 U.S.C. § 1677e(b)(2); *see also* 19 C.F.R. § 351.308(c); *Gal-lant Ocean (Thai.) Co. v. United States*, 602 F.3d 1319, 1321 (Fed. Cir. 2010).

## B

On February 13, 2017, Commerce initiated the fourth administrative review of the countervailing duty order at issue. *See* Initiation of Antidumping and Countervailing Duty Admin. Revs., 82 Fed. Reg. 10,457, 10,457, 10,462 (Dep’t Commerce Feb. 13, 2017). The order imposed duties on crystalline silicon photovoltaic cells manufactured in China and imported into the United States. As part of its review, Commerce initiated an investigation and selected Canadian Solar as one of the mandatory respondents. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From China: Preliminary Results of Countervailing Duty Admin. Rev., and Rescission of Rev., in Part; 2015, 83 Fed. Reg. 1235, 1236 (Dep’t Commerce Jan. 10, 2018), and accompanying Decision Memorandum for Preliminary Results at 2–3 (Dep’t Commerce Jan. 2, 2018) (*Preliminary Memo*). Of relevance to this case, Commerce sought to determine whether Canadian Solar benefitted from receiving electricity for less than adequate remuneration (LTAR). *Preliminary Memo*, at 25–26.

To understand whether Canadian Solar received electricity subsidies, Commerce sent questionnaires to the government of China. Among other things, Commerce requested provincial price proposals, descriptions of how the National Development and Reform Commission (NDRC) is involved in electricity price-setting, and an explanation of how electricity pricing is responsive to market variables. J.A. 157–65. The parties do not dispute that the government of China declined to provide complete responses to Commerce’s inquiries. Because, in Commerce’s view, the government of China “failed to cooperate by not acting to the best of its ability to comply” with Commerce’s request and because the requested information was “key to [Commerce’s] understanding of the [government of China’s] role in

establishing electricity prices at the local provincial level,” Commerce applied adverse facts available to conclude that Canadian Solar received a countervailable subsidy through below-market electricity prices. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From China: Final Results of Countervailing Duty Admin. Rev.; 2015, 83 Fed. Reg. 34,828, 34,829 (Dep’t Commerce July 23, 2018) (*Final Results*), and accompanying Decision Memorandum for the Final Results at 14–15 (Dep’t Commerce July 12, 2018) (*Final Memo*).<sup>2</sup> Commerce also applied adverse facts available to calculate the countervailing duty rate.<sup>3</sup> *Final Memo*, at 33–34.

Canadian Solar subsequently filed suit in the CIT challenging various components of the Final Results, including Commerce’s finding that Canadian Solar received a countervailable electricity subsidy. *Canadian Solar Inc. v. United States*, No. 18–00184, slip op. 20–23, 2020 WL 898557, at \*4 (Ct. Int’l Trade Feb. 25, 2020). Commerce requested a voluntary remand and the CIT granted the request. *Id.*

On remand, Commerce provided a revised determination that Canadian Solar received a regionally specific subsidy under 19 U.S.C. § 1677(5A)(D)(iv). *Remand Redetermination*, at 14. As support for this finding, Commerce noted that the parties did not dispute “that electricity prices vary from province to province in China.” *Id.* Because the government of China declined to provide certain “key information” as to the electricity price variation across the provinces, Commerce was unable to “confirm that market and commercial principles explain the variation in electricity prices on the record.” *Id.* at 15–16.

First, the government of China refused to provide “provincial price proposals for each of the relevant provinces,” which would have helped Commerce determine why the electricity prices varied by province, including by identifying “market- or cost-based reasons underlying the variation.” *Id.* at 15. Second, the government of China’s response lacked “a detailed description of the cost elements and price adjustments that were discussed between the provinces and the NDRC,” which would have helped Commerce ascertain whether the NDRC was involved in price setting as well as why prices varied by

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<sup>2</sup> Commerce later amended its Final Results to adjust the overall countervailing duty rate to account for an error unrelated to the electricity subsidy. Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From China: Amended Final Results of Countervailing Duty Admin. Rev.; 2015, 83 Fed. Reg. 54,566, 54,567 (Dep’t Commerce Oct. 30, 2018).

<sup>3</sup> On remand, Commerce assessed Canadian Solar a total countervailing duty rate of 5.02 percent. *Remand Redetermination*, at 59. This accounts for subsidies received for solar grade polysilicon, solar glass, electricity, and land, as well as export credits, development program benefits, preferential lending, and tax benefits. *Final Memo*, at 8–9; *Remand Redetermination*, at 59. The countervailing duty rate for subsidized electricity comprised 0.53 percent. *Remand Redetermination*, at 59. Only the electricity subsidy is on appeal and Canadian Solar does not challenge the rate calculation.

province. *Id.* at 15–16. Finally, the government of China’s response was devoid of any “province-specific explanations” for price variation, such as how costs inform provincial electricity prices. *Id.* at 16. This would have also helped Commerce determine “whether there is a market- or cost-based explanation for variation among provinces.” *Id.*

After finding that the government of China failed to cooperate to the best of its ability, Commerce applied adverse facts available to conclude that “the provision of electricity is a countervailable subsidy program whereby the central Chinese government, through the NDRC in Beijing, sets different prices in different regions under its authority (i.e., the provinces) without any commercial or market considerations, but instead for development purposes.” *Id.* at 19. Commerce then used the highest electricity prices from the province-by-province price list as its benchmarks for calculating Canadian Solar’s duty rate. *Id.*

Following the Remand Redetermination, Canadian Solar filed a second suit before the CIT challenging Commerce’s findings that Canadian Solar received countervailable electricity subsidies, as well as several other findings. *Canadian Solar II*, at \*1. The CIT sustained Commerce’s determination. *Id.* at \*7.

Canadian Solar appeals, arguing that Commerce’s application of adverse facts available to determine that the electricity program was a regionally specific subsidy was not supported by substantial evidence because Commerce allegedly ignored the provincial price schedules and failed to identify a single geographic region receiving subsidies. *See* Appellants’ Br. 15–16.

We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

## DISCUSSION

We review Commerce’s determinations under the same standard of review as the CIT and uphold those determinations if they are supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i); *SolarWorld Ams., Inc. v. United States*, 910 F.3d 1216, 1222 (Fed. Cir. 2018) (citing *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1371 (Fed. Cir. 2015)). “Substantial evidence is ‘more than a mere scintilla’; rather it is such ‘evidence that a reasonable mind might accept as adequate to support a conclusion.’” *Changzhou Trina*, 975 F.3d at 1326 (quoting *Downhole Pipe*, 776 F.3d at 1374). When assessing whether Commerce’s factual findings are supported by substantial evidence, “[w]e look to ‘the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.’” *SolarWorld*,

910 F.3d at 1222 (quoting *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1340 (Fed. Cir. 2011)). Although we review the CIT's decision de novo, "we give great weight" to the CIT's "informed opinion," which "is nearly always the starting point of our analysis." *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1341 (Fed. Cir. 2016) (quoting *Ningbo Dafa Chem. Fiber Co. v. United States*, 580 F.3d 1247, 1253 (Fed. Cir. 2009)).

The record here supports Commerce's conclusions. In its Remand Redetermination, Commerce sufficiently and reasonably explained that it lacked key information because the government of China failed to cooperate by not acting to the best of its ability to comply with requests for information. As a result, Commerce was forced to fill informational gaps and properly relied on adverse inferences to find that Canadian Solar received a regionally specific electricity subsidy that must be countervailed.

#### A. Electricity Subsidy

Commerce is entitled to apply adverse facts available where, as here, an interested party declines to provide requested information and fails to cooperate with an investigation. *See, e.g.*, 19 U.S.C. § 1677e(b); *Changzhou Trina*, 975 F.3d at 1327. This includes "when a government fails to respond to Commerce's questions." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1373 (Fed. Cir. 2014). This court has specifically upheld the application of adverse facts available where "the government of China refused to provide information as to how the electricity process and costs varied among the various provinces that supplied electricity to industries within their areas" and "did not provide the data sufficient to establish the benchmark price for electricity." *Id.* at 1372. Commerce identified comparable informational gaps in this case. *See Remand Redetermination*, at 14–19 ("[T]he [government of China] refused to provide key information that would allow Commerce to confirm its claims . . . . Without such information, Commerce cannot confirm that market and commercial principles explain the variation in electricity prices. . . .").

Canadian Solar argues that Commerce improperly ignored the provincial price schedules. Appellants' Br. 22. In its view, these price schedules "demonstrate that no region in China received subsidized electricity prices," and therefore Commerce did not need to fill any informational gaps with adverse inferences. *Id.*; *see also id.* at 31 ("[T]he price schedules clearly demonstrate on their face that no geographic region received an alleged electricity subsidy . . . ."). While

Canadian Solar is correct that Commerce may not rely on adverse facts available when the record is not missing information or otherwise deficient, *Zhejiang DunAn*, 652 F.3d at 1348, in this case Commerce expressly considered the price schedules and reached the opposite conclusion, *Remand Redetermination*, at 14. Commerce relied on adverse inferences to fill two critical informational gaps raised (not resolved) by the provincial price schedules: “why prices vary from province to province and who makes the decision—ultimately—to set or allow distinct prices in each province.” *Id.*

Commerce could not determine why prices vary because the government of China failed “to demonstrate that such variances are in accordance with market principles or cost differences.” *Id.* at 15. The government of China asserted that “[e]lectricity prices in China are based on market principles” but “refused to provide key information that would allow Commerce to confirm its claims.” *Id.* at 15. As described above, Commerce requested and the government of China declined to provide provincial price proposals, a description of cost and price discussions between the provinces and the NDRC, and province-specific cost and price considerations. *Id.* at 15–16. Without this specifically requested information, Commerce could not determine the root cause for the price disparities. *Id.* at 15–16. Commerce therefore inferred that the government of China provided electricity subsidies “for development purposes” by setting lower electricity prices for enterprises located in provinces such as the ones where Canadian Solar operates. *Id.* at 15, 19.

To determine the entity responsible for setting the electricity subsidies, Commerce relied on documents indicating that the NDRC set electricity prices at the national level. These documents include NDRC Notices indicating that, at least in years prior, the NDRC was entitled to, among other things, implement coal and electricity price bidding systems, adopt price intervention measures, adjust provincial price levels, and reduce electricity prices for industrial and commercial users. *Id.* at 17–18. Commerce credited this evidence over the government of China’s uncorroborated narrative responses claiming that the provinces set their own prices. *Id.* at 16–19; *id.* at 17 (“Based on our examination of the additional documentation, as well as the [government of China] questionnaire response, we concluded the following demonstrated that the NDRC was still ultimately in control of the price setting system and that the 2015 changes had not affected how the system operated in practice . . .”). In so finding, Commerce noted that the purported delegation of price setting authority to the provinces marked an unsubstantiated shift from the government of

China's position during all three prior administrative reviews of the same countervailing duty order. *Id.* at 16.

This case is distinguishable from *Diamond Sawblades Manufacturers' Coalition v. United States*, 986 F.3d 1351 (Fed. Cir. 2021). In *Diamond Sawblades*, we held that Commerce improperly disregarded all product origin information where "Commerce ha[d] not satisfactorily explained why substantial evidence supports its determination of unreliability." *Id.* at 1366. While Canadian Solar considers the provincial price schedules to be similarly disregarded evidence of provincial price-setting, in this case Commerce expressly considered the record evidence, including the provincial price schedules and NDRC Notices. Based on the record, Commerce reasonably determined it required additional information regarding the basis for and source of the price variation in order to assess whether Canadian Solar had received an electricity subsidy.

At most, Commerce and Canadian Solar reached inconsistent conclusions based on the same evidence. This does not, however, render Commerce's findings unsupported by substantial evidence. *Deacero S.A.P.I. de C.V. v. United States*, 996 F.3d 1283, 1297 (Fed. Cir. 2021) ("Commerce's finding may still be supported by substantial evidence even if two inconsistent conclusions can be drawn from the evidence." (quoting *SolarWorld*, 910 F.3d at 1222)).

We therefore agree with the CIT that Commerce's adverse inference that the government of China subsidized electricity is supported by substantial evidence.

### B. Regional Specificity

Canadian Solar also argues that instead of identifying a particular subsidized region, as it believes is required by statute, Commerce improperly "ascrib[ed] the supposedly regional subsidy program to every single region and province across China." Appellants' Br. 42–43. This, Canadian Solar argues, "is the antithesis of a reasonable specificity determination under 19 U.S.C. § 1677(5A)(D)(iv)," *id.* at 49, and, as a result, Commerce's regional specificity finding cannot be supported by substantial evidence, *id.* at 52. We disagree.

Section 1677(5A)(D)(iv) provides that a subsidy is regionally specific where it is "limited to an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy." We agree with the CIT that, where documents support the inference that the central government of China was involved in provincial electricity pricing that results in regional price variability, substantial evidence supports Commerce's finding that there is a countervailable regionally specific subsidy. *Canadian*

*Solar II*, at \*3; see also *Changzhou Trina Solar Energy Co. v. United States*, 466 F. Supp. 3d 1287, 1302 (Ct. Int'l Trade 2020) (holding that “Commerce’s determination that the subsidy is regionally specific” was sufficiently supported where “Commerce noted two factual bases for a determination of specificity: (1) unexplained regional price variability and (2) central government action via the NDRC”).

The CIT’s decision in *Royal Thai Government v. United States* is instructive. 441 F. Supp. 2d 1350 (Ct. Int'l Trade 2006). In *Royal Thai*, the CIT found that Commerce “reasonably determined” that an electricity subsidy provided by the Royal Thai Government “satisfied the requirements of regional specificity” where “[a]ccess to this relatively cheaper electricity was expressly contingent on only one factor: a company’s regional location within Thailand.” *Id.* at 1358. Accepting Commerce’s adverse inferences in the present case, the electricity subsidies provided by the government of China also depend only on a company’s regional location since the price of electricity varies by province. *Remand Redetermination*, at 19, 40.

This holds true even if, as Canadian Solar contends, electricity subsidies are available across different provinces. Appellants’ Br. 49. On this ground, we agree with the CIT’s reasoning in *Samsung Electronics Co. v. United States*, 973 F. Supp. 2d 1321 (Ct. Int'l Trade 2014). There, the CIT rejected an argument that “regional specificity should be limited to ‘administrative jurisdictions such as provinces or states,’” *id.* at 1328 (citation omitted), and upheld Commerce’s finding that a tax credit available anywhere in South Korea “outside the Seoul Metropolitan Area” was geographically specific, *id.* at 1328–29. In other words, even if a particular electricity subsidy is provided to more than one province, so long as it is provided to less than all regions or varies by region, that subsidy can be fairly regarded as regionally specific under the statute.

Canadian Solar also argues that the benchmark calculations render Commerce’s regional specificity findings unreasonable. Appellants’ Br. 45. To calculate the countervailing duty rate, Commerce compared each of Canadian Solar’s electricity rates to the highest provincial rate for the relevant category. *Remand Redetermination*, at 19 (“The amount of the subsidy we infer to be the difference between what the respondent is paying and the highest tariffs set for any province.”). As Commerce explained, this issue arises only because the government of China declined to provide information that would have permitted Commerce to identify an unsubsidized province or unsubsidized rates. *Id.* at 40–41. In the absence of that information, it was reasonable for Commerce to infer that the highest rate in each category was unsubsidized.

Canadian Solar argues that this approach “signifies that users in *all* regions are subsidized” instead of designating a single subsidized region. Appellants’ Br. 49. But Commerce’s rate calculation does not undermine the separate conclusion that the electricity subsidies are geographically specific because the rates depend on the province in which an enterprise is located. *Remand Redetermination*, at 19.

Accordingly, we agree with the CIT that Commerce’s regional specificity findings are supported by substantial evidence.

#### CONCLUSION

We have considered Appellants’ remaining arguments and do not find them persuasive. For the foregoing reasons, we affirm the Court of International Trade’s judgment.

**AFFIRMED**



# U.S. Court of International Trade

Slip Op. 22–4

POSCO, Plaintiff, NUCOR CORPORATION, Consolidated Plaintiff, and AK STEEL CORPORATION, et al., Consolidated Plaintiff-Intervenors, v. UNITED STATES, Defendant, and STEEL DYNAMICS, INC., et al., Defendant-Intervenors.

Before: Mark A. Barnett, Chief Judge  
Consol. Court No. 16–00225

**PUBLIC VERSION**

[Sustaining Commerce’s Second Remand Results.]

Dated: January 21, 2022

*Alan H. Price, Robert E. DeFrancesco, III, and Adam M. Teslik*, Wiley Rein LLP, of Washington, DC, for Consolidated Plaintiff Nucor Corporation. With them on the brief were *Timothy C. Brightbill* and *Laura El-Sabaawi*.

*Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General and *Jeanne E. Davidson*, Director. Of Counsel on the brief was *W. Mitchell Purdy*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

## **OPINION**

### **Barnett, Chief Judge:**

In this consolidated action, Plaintiff POSCO (“POSCO”), Consolidated Plaintiff Nucor Corporation (“Nucor”), and Consolidated Plaintiff–Intervenors ArcelorMittal USA LLC, AK Steel Corporation, and United States Steel Corporation (collectively, “Plaintiff-Intervenors”) challenged various aspects of the final determination of the U.S. Department of Commerce (“Commerce” or “the agency”) in its countervailing duty (“CVD”) investigation of cold-rolled steel products (“cold-rolled steel”) from the Republic of Korea (“Korea”). *See Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Republic of Korea*, 81 Fed. Reg. 49,943 (Dep’t Commerce July 29, 2016) (final aff. determination) (“*Final Determination*”), ECF No. 41–4, as amended by *Certain Cold-Rolled Steel Flat Products From Brazil, India, and the Republic of Korea*, 81 Fed. Reg. 64,436 (Dep’t Commerce Sept. 20, 2016) (am. final aff. countervailing duty determination and countervailing duty order) (“*Am. Final Determination*”), ECF No. 41–3, and accompanying Issues and

Decision Mem., C-580-882 (July 20, 2016) (“I&D Mem.”), ECF No. 41-5. The period of investigation (“POI”) ran from January 1, 2014, to December 31, 2014. *See Certain Cold-Rolled Steel Flat Products From Brazil, India, the People’s Republic of China, the Republic of Korea, and the Russian Federation*, 80 Fed. Reg. 51,206 (Dep’t Commerce Aug. 24, 2015) (initiation of countervailing duty investigations).

The court previously sustained Commerce’s determination that the Government of Korea (“GOK”) did not confer a benefit upon Korean producers of cold-rolled steel through the provision of electricity for less than adequate remuneration (“LTAR”) and, thus, denied the U.S. Court of International Trade (“CIT”) Rule 56.2 motion for judgment on the agency record filed by Nucor and Plaintiff-Intervenors. *See generally POSCO v. United States*, 42 CIT \_\_, \_\_, 296 F. Supp. 3d 1320, 1354-63 (2018) (“*POSCO CIT*”).<sup>1</sup> On appeal, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) vacated and remanded Commerce’s determination as “contrary to law and unsupported by substantial evidence.” *POSCO v. United States*, 977 F.3d 1369, 1371 (Fed. Cir. 2020) (“*POSCO CAFC*”).

Commerce has now filed its remand redetermination pursuant to *POSCO CAFC*. *See* Final Results of Redetermination Pursuant to Court Remand (“Second Remand Results”), ECF No. 135-1. In the Second Remand Results, Commerce further explained its LTAR determination and addressed the flaws in its analysis identified by the Federal Circuit, but otherwise made no changes to the CVD rates determined in the *Amended Final Determination*. *See id.* at 5-42.<sup>2</sup>

Nucor filed comments in opposition to the Second Remand Results. *See* Conf. Nucor Corp.’s Cmts. in Opp’n to Final Results of Redetermination Pursuant to Court Remand (“Nucor’s Opp’n Cmts.”), ECF

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<sup>1</sup> *POSCO CIT* also addressed, and remanded, certain challenges to the *Final Determination* raised by POSCO; those challenges are not at issue here. The court sustained Commerce’s first remand redetermination in *POSCO v. United States*, 42 CIT \_\_, 335 F. Supp. 3d 1283 (2018), and entered judgment accordingly.

<sup>2</sup> The administrative record associated with the *Final Determination* is divided into a Public Administrative Record (“PR”), ECF No. 41-1, and a Confidential Administrative Record (“CR”), ECF No. 41-2. Nucor submitted joint appendices containing all record documents cited in the Parties’ respective Rule 56.2 briefs. *See* Public J.A., ECF No. 80; Confidential J.A. (“CJA”), ECF Nos. 77 (Tabs 1-9), 78 (Tabs 10-19), 79 (Tabs 20-45); Suppl. Public J.A., ECF No. 88-1; Suppl. Confidential J.A., ECF No. 87-1. The administrative record associated with the Second Remand Results is also divided into a Public Remand Record, ECF No. 136-1, and a Confidential Remand Record, ECF No. 136-2. Nucor submitted joint appendices containing record documents cited in Parties’ respective comments on the Second Remand Results. *See* Public Remand J.A., ECF No. 142; Confidential Remand J.A. (“CRJA”), ECF No. 141. The Government submitted additional record documents pursuant to the court’s request. *See* Letter to the Court (Dec. 21, 2021), ECF No. 154; *see also* The Republic of Korea’s Resp. to [CVD] Suppl. Questionnaire (Nov. 20, 2015) (“GOK’s Suppl. Questionnaire Resp.”), PR 302, CR 371, ECF Nos. 154-1 through 154-9. The court references the confidential version of the relevant record documents, unless otherwise specified.

No. 137. Defendant United States (“the Government”) filed comments in support of the Second Remand Results. *See* Def.’s Resp. to Cmts. on Second Redetermination (“Def.’s Reply Cmts.”), ECF No. 139.<sup>3</sup>

For the following reasons, the court sustains Commerce’s Second Remand Results.

## BACKGROUND<sup>4</sup>

### A. CVD Overview

Commerce “impose[s] countervailing duties on merchandise that is produced with the benefit of government subsidies” when relevant statutory criteria are met. *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014); *see also* 19 U.S.C. § 1671(a) (2012).<sup>5</sup> A “[c]ountervailable subsidy” is one in which a foreign government provides “a financial contribution . . . to a specific industry” that confers “a benefit” on “a recipient within the industry.” *Fine Furniture (Shanghai)*, 748 F.3d at 1369 (citing 19 U.S.C. § 1677(5)(B)). A countervailable benefit includes the provision of goods or services “for less than adequate remuneration.” 19 U.S.C. § 1677(5)(E)(iv).

The statute directs Commerce to determine the adequacy of remuneration “in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the [subject] country” and explains that “[p]revailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.” *Id.* Commerce’s regulations prescribe a three-tiered approach for determining the adequacy of remuneration. *See* 19 C.F.R. § 351.511. When, as here, both an in-country market-based price and a world market price are unavailable, Commerce conducts a “Tier 3” analysis, which considers “whether the

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<sup>3</sup> Following briefing on the Second Remand Results, the court requested supplemental briefing on whether Nucor’s objections to the Second Remand Results have become moot based on intervening events. *See* Paperless Order (Oct. 26, 2021), ECF No. 146. The Parties agree, and the court concurs, that Nucor’s objections are not moot. While this litigation will not alter the rate applicable to POSCO or any other Korean producer/exporter that has been examined in a subsequent administrative review pursuant to the underlying CVD order, the litigation may alter the all-others rate assigned to any non-examined respondent that has not been reviewed. *See* Consol. Pl. Nucor Corp.’s Suppl. Br. Regarding Jurisdiction at 3–4, ECF No. 149; Def.’s Resp. to Consol. Pl.’s Suppl. Br. Regarding Jurisdiction at 3–4, ECF No. 152.

<sup>4</sup> While familiarity with *POSCO CIT* is presumed, relevant background is summarized herein.

<sup>5</sup> All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the United States Code are to the 2012 edition, unless otherwise stated.

government price is consistent with market principles.” *Id.* § 351.511(a)(2)(iii).<sup>6</sup>

## B. The Korean Electricity Market

Korea Electric Power Corporation (“KEPCO”) is “a state-owned entity” and “the exclusive supplier of electricity in Korea.” *POSCO CIT*, 296 F. Supp. 3d at 1331 (citations and footnote omitted). In Korea, “electricity is generated by [i]ndependent power generators, community energy systems, and KEPCO’s six subsidiaries.” *Id.* (citation omitted) (alteration in original). “By law, electricity must be bought and sold through the Korean Power Exchange (“KPX”), including by KEPCO.” *Id.* at 1332.<sup>7</sup> Accordingly, “[e]lectricity generators sell electricity to the KPX, and KEPCO purchases the electricity it distributes to its customers through the KPX.” I&D Mem. at 50.

The price of electricity is determined through a “cost-based pool system.” The Republic of Korea’s Resp. to CVD Questionnaire (Oct. 30, 2015) (“GOK’s Questionnaire Resp.”), Ex. E-3 at 31, CR 108–12, 114–27, PR 147–218, CJA Tab 9, CRJA Tab 2.<sup>8</sup> Under that system, the price of electricity has two principal components: (1) the marginal price (representing the variable cost of producing electricity, primarily, fuel costs), and (2) the capacity price (representing the fixed cost of producing electricity). *See id.* “The variable cost . . . and the capacity price are determined in advance of trading by the Cost Evaluation Committee.” *Id.* The Cost Evaluation Committee includes officials from the GOK, the KPX, KEPCO, and electricity generation companies, as well as “scholars and researchers.” *Id.* at 32. The “variable cost of each generation unit is determined . . . on a monthly basis and reflected in the following month based on the fuel costs two months prior to such determination.” *Id.*<sup>9</sup> “The capacity price is determined annually . . . based on the construction costs and maintenance costs of a standard generation unit” and “is applied equally to all generation units, regardless of fuel types used.” *Id.* at 33.

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<sup>6</sup> Commerce first seeks to compare the government price to a market-based price for the good or service under investigation in the country in question (a “Tier 1” analysis). 19 C.F.R. § 351.511(a)(2)(i). When an in-country market-based price is unavailable, Commerce will compare the government price to a world market price, when the world market price is available to purchasers in the country in question (a “Tier 2” analysis). *Id.* § 351.511(a)(2)(ii).

<sup>7</sup> “KEPCO and its subsidiaries own 100 percent of the KPX’s shares.” *POSCO CIT*, 296 F. Supp. 3d at 1332 n.17 (citation omitted).

<sup>8</sup> Exhibit E-3 consists of KEPCO’s Form 20-F covering fiscal year 2014 and filed with the U.S. Securities and Exchange Commission in April 2015.

<sup>9</sup> Each month, KEPCO’s generating subsidiaries submit fuel cost data to the KPX. *See* GOK’s Questionnaire Resp., Ex. KPX-1 (explaining submission requirements).

To sell electricity, generators submit bids to the KPX to supply electricity for a given hour one day in advance of trading. *Id.* at 31. “The generation unit with the lowest variable cost of producing electricity . . . for a given hour is first awarded a purchase order for electricity up to the available capacity of such unit.” *Id.* at 32. The KPX continues to award purchase orders, based on variable cost, “until the projected demand for electricity for such hour is met.” *Id.* “[T]he variable cost of the generation unit that is the last to receive the purchase order for such hour” is referred to “as the system marginal price.” *Id.*

### C. The Investigation

In the underlying proceeding, the petitioners, consisting of Nucor and other domestic steel producers, alleged that the GOK provided electricity for LTAR through “KEPCO’s artificially low electricity rates.” Petitions for the Imposition of Antidumping and Countervailing Duties (July 28, 2015) at 4–5, CR 1–20, PR 1–19, CJA Tab 1. Following an investigation, Commerce determined that the GOK’s provision of electricity was not for LTAR. I&D Mem. at 45.

In reaching its decision, Commerce applied a Tier 3 analysis that considered whether “the prices charged by KEPCO [were] set in accordance with market principles through an analysis of KEPCO’s price-setting method.” *Id.* Commerce explained that it would not find a countervailable benefit when “the rate charged” to the respondents<sup>10</sup> was “consistent with the standard pricing mechanism” and the respondents were, “in all other respects, essentially treated no differently than other companies and industries which purchase comparable amounts of electricity.” *Id.* at 46.

Upon review of the record, Commerce found that the GOK applied “a single tariff rate” to industrial users throughout the POI, including the respondents. *Id.* Commerce also noted the absence of evidence indicating that the respondents were “treated differently from other industrial users of electricity that purchase comparable amounts of electricity.” *Id.* With respect to costs, Commerce found that “KEPCO’s standard pricing mechanism used to develop its tariff schedule was based upon its costs” and, “[f]or the POI, KEPCO more than fully covered its cost for the industry tariff applicable to [the] respondents.” *Id.* at 50 & n.235 (citing GOK’s Questionnaire Resp., Ex. E-23). Commerce explained that it did not request cost information from KEPCO’s generation units because KEPCO’s costs “are determined

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<sup>10</sup> The mandatory respondents in the investigation consisted of POSCO and Hyundai Steel Co., Ltd., and are referred to herein as “the respondents.” Second Remand Results at 2.

by the KPX” and, thus, KEPCO’s “purchase price of electricity from the KPX” represented the relevant costs for purposes of understanding KEPCO’s industrial tariff schedule. *Id.* at 50.

#### **D. POSCO CIT**

The court sustained Commerce’s LTAR determination. *POSCO CIT*, 296 F. Supp. 3d at 1360–63. The court’s decision was consistent with CIT precedent addressing Commerce’s LTAR determinations in other CVD investigations. *See id.* at 1355 & nn.50–51 (citing *Maverick Tube Corp. v. United States*, 41 CIT \_\_, \_\_, 273 F. Supp. 3d 1293, 1296, 1308 (2017) (addressing Commerce’s final negative determination in the CVD investigation of welded line pipe from Korea), and *Nucor Corp. v. United States*, 42 CIT \_\_, \_\_, 286 F. Supp. 3d 1364, 1370–71 (2018) (“*Nucor CIT*”), *aff’d* 927 F.3d 1243 (Fed. Cir. 2019) (addressing Commerce’s final affirmative determination in the CVD investigation of corrosion-resistant steel products (“CORE”) from Korea)). Nucor appealed *POSCO CIT* to the Federal Circuit. *See* Notice of Appeal, ECF No. 122.

#### **E. Nucor CAFC**

While Nucor’s appeal of *POSCO CIT* was pending, the Federal Circuit addressed issues relevant to this case in its decision affirming *Nucor CIT*. *See Nucor Corp. v. United States*, 927 F.3d 1243 (Fed. Cir. 2019) (“*Nucor CAFC*”).

In the action underlying *Nucor CAFC*, as in this case, Nucor challenged Commerce’s method of examining the adequacy of remuneration and failure to investigate the “KPX’s prices in relation to [the] KPX’s own costs.” 927 F.3d at 1248 (citing *Nucor CIT*, 286 F. Supp. 3d at 1369–75, 1377–80). The CIT had sustained Commerce’s methodology and declined to consider Nucor’s arguments regarding the KPX based on Nucor’s failure to exhaust those arguments before Commerce. *See id.* (citing *Nucor CIT*, 286 F. Supp. 3d at 1375–77). On appeal, while the majority rejected the Government’s articulation of the legal standard for adequate remuneration,<sup>11</sup> the majority affirmed Commerce’s determination based on the agency’s finding that

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<sup>11</sup> The Government had argued that Commerce was within its discretion to find no benefit when the rate charged by the relevant authority was “set by a ‘consistent and discernible method’” and was non-preferential. *Nucor CAFC*, 927 F.3d at 1249. The majority instead concluded that the terms “remuneration,” “compensation,” and “adequate compensation” all “convey a familiar notion of payment that reflects the value of what is being paid for” and, “more pointedly, . . . do not suggest that nondiscrimination suffices for value equivalence.” *Id.* at 1250. Defining “market principles” in relation to “fair value,” the majority explained, harmonizes Commerce’s regulation because Tier 1 and Tier 2 “rely on competitive-market prices” that “are tied to ‘fair value.’” *Id.* at 1253–54 (citations omitted).

KEPCO had recovered its costs during the investigation period and Nucor's failure to exhaust its arguments regarding the KPX's costs and prices before the agency. *Id.* at 1249.

Judge Reyna authored a dissenting opinion in which he agreed with the majority's analysis of the legal standard for adequate remuneration, but disagreed with the majority's affirmance of Commerce's determination based on evidence of KEPCO's cost recovery and the conclusion that Nucor had failed to exhaust its administrative remedies. *See id.* at 1256, 1261–62 (Reyna, J., dissenting).

### **F. POSCO CAFC**

Judge Reyna subsequently authored the Federal Circuit opinion in *POSCO CAFC* remanding the instant matter for reconsideration of Commerce's LTAR determination. 977 F.3d at 1370–71. With respect to the LTAR standard, the appellate court relied on the majority's reasoning in *Nucor CAFC* to conclude that Commerce unlawfully relied “on price discrimination to the exclusion of a thorough evaluation of fair-market principles” when it found the absence of any “unlawful benefit.” *Id.* at 1376 (citing *Nucor CAFC*, 927 F.3d at 1251).

With respect to costs, the appellate court concluded that Commerce's cost-recovery analysis—limited to KEPCO's costs—was insufficient to support the agency's conclusion “that electricity prices paid to KEPCO by respondents are consistent with prevailing market conditions.” *Id.* at 1376. The appellate court stated that the “KPX's pricing accounts for upwards of 90 [percent] of KEPCO's total cost” and, thus, Commerce could not “adequately investigate[] Korea's prevailing market condition[s] for electricity without a thorough understanding of the costs associated with generating and acquiring that electricity.” *Id.* at 1377. Absent further investigation into such costs, the court explained, Commerce could not ascertain “whether a benefit was conferred by way of the price charged by [the] KPX to KEPCO.” *Id.*; *see also id.* at 1378 (explaining that “Commerce has an affirmative duty to investigate any appearance of subsidies related to the investigation that are discovered during an investigation”) (citing 19 U.S.C. § 1677d).<sup>12</sup> Accordingly, the appellate court remanded Commerce's *Final Determination* for further consideration of the KPX's role in the Korean electricity market. *See id.* at 1378.

### **G. Second Remand Results**

In the Second Remand Results, Commerce reconsidered and revised the benefit analysis underlying the *Final Determination*,

<sup>12</sup> Upon the discovery of the appearance of a subsidy that not was not alleged in the petition, section 1677d directs Commerce, *inter alia*, to investigate the potential subsidy if it is relevant “to the merchandise which is the subject of the proceeding.” 19 U.S.C. § 1677d(1).

addressing, in particular, the role of the KPX. Commerce acknowledged that the KPX constituted an “authority” for purposes of 19 U.S.C. § 1677(5)(B), Second Remand Results at 9, and found that the KPX’s price of electricity to KEPCO did not confer a countervailable benefit, *see id.* at 9, 16–18.

### 1. Legal Standard for Adequate Remuneration

Commerce addressed the issue of whether the agency had relied on a preferential price analysis for the *Final Determination*. *See id.* at 9–12. Commerce clarified that its analysis of KEPCO’s industrial tariff classifications and associated rates complied with the statutory requirement to examine the “prevailing market conditions” for purposes of section 1677(5)(E)(iv). *Id.* at 11–12. Commerce explained that “KEPCO differentiates its industrial tariff classifications by both contract demand for electricity and by low-voltage and high voltage,” and that “[c]ontract demand is further differentiated between customers with an electricity demand of between 4kW and 300kW and industrial customers with a contract demand of more than 300kW.” *Id.* at 12 & nn.45–46 (citations omitted). Commerce found that these delineations constitute the “prevailing market conditions” surrounding the sale of electricity in Korea. *Id.* at 15.

Commerce further analyzed the way KEPCO calculated and allocated its costs in order to set the prices that it charged during the POI and found that “KEPCO more than fully covered its cost for the industrial tariff applicable to the respondents.” *Id.* at 13 & nn.49–50 (citing, *inter alia*, I&D Mem. at 43–51). Commerce explained that this analysis, in conjunction with the agency’s finding that the prices the respondents paid KEPCO were consistent with the tariff schedules in effect during the POI, met the statutory standard for analyzing adequate remuneration. *Id.* at 14–16.

Commerce went on to analyze and reject Nucor’s assertion that the agency had continued to apply a preferential price analysis. *See id.* at 20, 27–35. Commerce explained that such an analysis would have focused on “whether the government is providing more favorable treatment to some within its jurisdiction than to others within that jurisdiction.” *Id.* at 25. Commerce also explained that its consideration of KEPCO’s “standard pricing mechanism” accounted for whether “the electricity tariffs charged to the respondent covers cost plus a return.” *Id.* at 30. Commerce also explained that a rate’s consistency “with the standard pricing mechanism” and the lack of differential treatment—meaning that “the rate charged to the respondent is from the correct tariff classification based on its contract demand for electricity and voltage for that electricity consumption”—



disfavors finding a countervailable benefit. *Id.* at 30–31. Commerce therefore concluded “that the methodology used in the *Final Determination* was consistent with the [statute].” *Id.* at 34–35.

## 2. The KPX’s Generating Costs

Consistent with the Federal Circuit’s opinion, Commerce considered the role of the KPX in providing electricity and the KPX’s costs. *See id.* at 16–18. In so doing, Commerce explained that the agency had investigated an upstream subsidy allegation involving the KPX and KEPCO in the 2017 administrative review of the CVD order on cold rolled steel from Korea and “determined that the electricity pricing system established by [the] KPX is consistent with market principles and that a benefit was not conferred.” *Id.* at 18 & n.61 (citing *Certain Cold-Rolled Steel Flat Products from the Republic of Korea*, 85 Fed. Reg. 38,361 (Dep’t Commerce June 26, 2020) (final results of CVD admin. review; 2017) (“2017 CRS Admin. Review”), and accompanying Issues and Decision Mem. for the Final Results of the 2017 Admin. Review, C-580–882 (June 22, 2020) (“2017 Decision Mem.”) at Cmt. 1, available at <https://access.trade.gov/Resources/frn/summary/korea-south/2020–13813–1.pdf> (last visited Jan. 21, 2022)). Commerce recognized that its decision in that segment of the proceeding “confirms the information on the [instant] record.” *Id.* at 18 (citing GOK’s Questionnaire Resp. at 32–33);<sup>13</sup> *see also id.* at 40–41.

With respect to such evidence on the instant record, Commerce explained that KEPCO’s Form 20-F shows that the annual average KPX unit price associated with each of KEPCO’s generating subsidiaries in 2014 exceeded their respective fuel costs during the same period. *See id.* at 39 & n.139 (citing GOK’s Questionnaire Resp., Ex. E-3) (listing prices and costs for each subsidiary). Commerce also identified evidence confirming that KEPCO and its generating subsidiaries were profitable during the POI and that the KPX more than covered its costs. *See id.* at 39 & nn.140–41 (citing GOK’s Questionnaire Resp., Ex. E-3 at F-9–F-10, F-41, F-68, F-75).<sup>14</sup> Based on the totality of this evidence, Commerce found that the KPX’s pricing did not provide a countervailable benefit. *See id.* at 39–40.

<sup>13</sup> In the cited portion of its response, the GOK states that, during the POI, “[

]].”

GOK’s Questionnaire Resp. at 32–33.

<sup>14</sup> Commerce explained that, “[f]or [the] KPX, the only revenue recorded is an electricity transaction and membership fee.” Second Remand Results at 39 & n.142 (citing GOK’s Suppl. Questionnaire Resp. (Part 2), Ex. SR1-KPX-1 at 10 (note 3), 49). Commerce noted, however, that the “KPX also recovered costs during the period.” *Id.* at 39 & n.143 (citing GOK’s Suppl. Questionnaire Resp. (Part 2), Ex. SR1-KPX-1 at 9).

## JURISDICTION AND STANDARD OF REVIEW

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

## DISCUSSION

### A. Parties' Contentions

Nucor contends that Commerce has articulated, but failed to properly apply, a standard for assessing adequate remuneration that complies with the statute. Nucor's Opp'n Cmts. at 4 (citing Second Remand Results at 31).<sup>15</sup> Nucor faults Commerce for failing to investigate "the actual costs" of electricity generation and supply and for basing the agency's cost analysis on KEPCO "as a whole and the broader tariff class applicable to the respondents" instead of whether "the prices actually paid by the respondents covered the cost of supply and an amount for profit." *Id.* at 5; *see also id.* at 17. Nucor faults Commerce for declining to request additional information regarding, or further investigating, the role of the Cost Evaluation Committee in the KPX's price-setting. *Id.* at 10–12. This information is relevant, Nucor contends, because the record indicates that "KEPCO's pricing structure creates *de facto* cross-subsidization" between different types of generators with different levels of fixed costs. *Id.* at 16 (citation omitted). Nucor further contends that Commerce's reliance on *2017 CRS Administrative Review* erroneously introduces an upstream subsidy issue instead of addressing whether the KPX's role in the Korean electricity market results in a benefit to the respondents through KEPCO's prices. *See id.* at 14–15 (citing Remand Results at 17–18).

The Government contends that Commerce's LTAR analysis is lawful and complies with *POSCO CAFC*. Def.'s Reply Cmts. at 5. The Government emphasizes Commerce's analysis of KEPCO's tariff classifications forming the basis for the prices paid by the respondents and KEPCO's profitability. *See id.* at 6–7. The Government also explains that Commerce's "step-by-step analysis of profitability" with respect to the generators, the KPX, and KEPCO "demonstrate[s] that

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<sup>15</sup> According to Nucor, "[a] government price that covers the cost of production and supply, plus an amount for profit, and that is not otherwise less than the respondent should be charged, would be consistent with market principles" and an appropriate "benchmark" pursuant to Commerce's Tier 3 regulatory analysis and the statute. Nucor's Opp'n Cmts. at 4.

KEPCO's prices to the respondents reflected adequate remuneration" and "there was no need for Commerce to request any . . . additional information." *Id.* at 9–10. The Government also contends that Commerce's determination in *2017 CRS Administrative Review* demonstrates the agency's verification of "the pricing structure between [the] KPX and KEPCO" and other aspects of the KPX's role in the Korean electricity market, thereby implying that Commerce's understanding of this record is consistent with, and confirmed by, its analysis in *2017 CRS Administrative Review*. *Id.* at 12 (citing Second Remand Results at 41 n.148).

## B. Analysis

As set forth above, Commerce determines the adequacy of remuneration "in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the [subject] country." 19 U.S.C. § 1677(5)(E)(iv). Pursuant to a Tier 3 analysis, Commerce meets the statutory requirement by considering "whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii). Commerce and Nucor broadly agree that the agency is within its discretion to find no countervailable benefit when the price of electricity covers the cost of production and provides for a return on investment and a respondent is not charged less than it should be charged. *See* Nucor's Opp'n Cmts. at 4 (citing Second Remand Results at 31).

While Commerce's analysis of KEPCO's standard pricing mechanism fulfills, in part, the statutory requirement to determine the adequacy of remuneration in relation to prevailing market conditions, *see* Second Remand Results at 12–16, 32, the Federal Circuit found such analysis insufficient, by itself, to fully "support [the] conclusion that electricity prices paid to KEPCO by respondents are consistent with prevailing market conditions," *POSCO CAFC*, 977 F.3d at 1376. *Cf. Nucor CAFC*, 927 F.3d at 1258 (Reyna, J., dissenting) (characterizing "Commerce's analysis . . . of how KEPCO distributed costs for the purpose of tariff rate proposals" as "limited," "technical," "cursory" and, ultimately, "insufficient to support the conclusion that the electricity prices paid by Korean CORE producers are consistent with prevailing market conditions and the full value of the assets received"). Instead, *POSCO CAFC* held that a thorough examination of the "prevailing market conditions" within the Korean electricity market must account for the "KPX's impact on the Korean electricity market" and "the costs associated with generating and acquiring electricity." 977 F.3d at 1376–77. Resolution of this case thus turns on whether the additional cost analysis supplied by

Commerce in the Second Remand Results is adequate to meet the guidance provided in *POSCO CAFC* and is supported by substantial evidence.

The court finds that Commerce's Second Remand Results must be sustained. Therein, Commerce fully addressed the prevailing market conditions, including the KPX's impact on the electricity market, and substantial evidence supports its determination that the KPX's prices to KEPCO do not provide a countervailable benefit. Nucor's arguments to the contrary are unpersuasive.

Nucor first argues that Commerce's failure to request or analyze data regarding the actual cost of electricity generation runs afoul of the Federal Circuit's holding in *POSCO CAFC*. Nucor's Opp'n Cmts. at 13. According to Nucor, the Federal Circuit held that Commerce's failure to request such information "constituted reversible error," *id.*, and, without the information, Commerce's analysis of the prevailing market conditions remains unlawfully limited to KEPCO's pricing mechanism, *id.* at 10.

While *POSCO CAFC* noted that "Commerce did not request information regarding the KPX's cost of electricity generation," 977 F.3d at 1377, the court did not direct Commerce to reopen the record in order to solicit that information. Indeed, "the decision of whether or not to reopen a record following an order remanding an agency decision is a matter within the agency's discretion." *Elkay Mfg. Co. v. United States*, 40 CIT \_\_, \_\_, 180 F. Supp. 3d 1245, 1260 (2016) (citing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012)); *see also Essar Steel*, 678 F.3d at 1278 (holding that the CIT erred by ordering Commerce to reopen the administrative record). Commerce's Second Remand Results are not, therefore, unlawful solely because Commerce declined to request additional information. Provided that Commerce based its Second Remand Results on substantial evidence, Commerce need not have reopened the administrative record on remand.

Nucor next argues that Commerce's analysis of the overall profitability of KEPCO and its subsidiaries fails to establish that "KEPCO's prices to the respondents reflect the full cost of generation and supply plus an amount for profit." Nucor's Opp'n Cmts. at 15.<sup>16</sup>

<sup>16</sup> Nucor also argues that Commerce failed to consider the KPX as part of the relevant authority and instead "attempt[s] to transform" the *POSCO CAFC* court's holding "into an upstream subsidy issue." Nucor's Opp'n Cmts. at 14. However, as Nucor concedes, *see id.* at 15, Commerce acknowledged that the KPX is an "authority" for purposes of 19 U.S.C. § 1677(5)(B), *see* Second Remand Results at 8–9. The question before the court is whether Commerce adequately examined the KPX's role in the Korean electricity market. *See* Nucor's Opp'n Cmts. at 15 ("The KPX is thus an integral part of the 'authority' under investigation, and its role in that authority's price-setting process must be thoroughly examined in accordance with . . . *POSCO CAFC*.").

According to Nucor, “KEPCO’s pricing structure ‘creates *de facto* cross-subsidization, [through] which the majority of society . . . pays the highest government-assigned prices in order to cover the fixed costs that are excluded from the government-assigned prices paid to generators supplying electricity to off-peak, industrial consumers’ like the mandatory respondents in the investigation.” *Id.* at 16 (citation omitted). To support this argument, Nucor compares the lowest off-peak unit prices to the annual average KPX unit price for the lowest cost generator. *See id.* (citing Initial Questionnaire Resp. (Oct. 23, 2015) (“POSCO’s Questionnaire Resp.”), Ex. A-2, CR 58–102, PR 120–138, CRJA Tab 1; Sec. III Initial Questionnaire Resp. (Oct. 30, 2015) (“Hyundai’s Questionnaire Resp.”), Ex. A-1, CR 218–55, PR 219–39, CRJA Tab 3); Second Remand Results at 39 n.139).<sup>17</sup>

Commerce, however, cites record evidence confirming that, for the POI, the KPX’s pricing enabled KEPCO’s generators to recover the cost of fuel to produce electricity. *See* Second Remand Results at 39 & n.139 (listing the respective prices and costs for each subsidiary in Korean Won per kilowatt hour (“kWh”)).<sup>18</sup> Nucor attempts to undermine this finding, arguing that the KPX’s prices are based on “costs assigned to the generators by the Cost Evaluation Committee” rather than “the actual costs of generating and supplying electricity.” Nucor’s Opp’n Cmts. at 16 n.1 (emphasis omitted). Even if correct, Nucor’s argument overlooks the fact that Commerce compared the KPX’s prices to the generators’ actual POI-average fuel costs. *See* Second Remand Results at 39 n.139 (citing GOK’s Questionnaire Resp., Ex. E-3 at 35, 40, 42–46).<sup>19</sup>

Additionally, Commerce accounted for the actual fixed costs of producing electricity when it further explained that both KEPCO and, crucially, its generating subsidiaries “were profitable in 2014” to the extent that most of the subsidiaries “paid out cash dividends.” Second Remand Results at 39 & nn.140–41 (citing GOK’s Questionnaire

<sup>17</sup> Nucor cites record evidence reporting monthly average [[ ] Korean Won/kWh. Nucor’s Opp’n Cmts. at 16 (citing, *inter alia*, POSCO’s Questionnaire Resp., Ex. A-2; Hyundai’s Questionnaire Resp., Ex. A-1. Such prices, Nucor contends, are [[ ] “the lowest cost generator” that “sold electricity through the KPX at a unit price of . . . 59.95” Korean Won per kWh. Nucor’s Opp’n Cmts. at 16 (citing Second Remand Results at 39 n.139).

<sup>18</sup> Commerce incorrectly stated the average fuel cost for Korea Southern Power Co., Ltd. as 81.43 Won/kWh when KEPCO reported the amount as 91.43 Won/kWh; however, this typographical error does not change the analysis because the KPX’s average unit price for that company—111.17 Won/kWh—still exceeds the average fuel price. *See* Second Remand Results at 39 n.139; GOK’s Questionnaire Resp., Ex. E-3 at 45.

<sup>19</sup> KEPCO’s Form 20-F contains the POI-average KPX price for each KEPCO subsidiary and independent generator. *See* GOK’s Questionnaire Resp., Ex. E-3 at 35. For nuclear generators, KEPCO reported the “average fuel cost per kilowatt for 2014.” *Id.* at 40. For non-nuclear generators, KEPCO reported an annual average fuel cost per kilowatt in 2014 based upon the net amount of electricity generated.” *Id.* at 42–46.

Resp., Ex. E-3 at F-9–F-10, F-41, F-68, F-75). In other words, Commerce found that the KPX's prices allowed the generators to more than cover both fixed and variable costs. *See id.*

Nucor's arguments regarding overall profitability focus on the respondents' off-peak electricity consumption. *See* Nucor's Opp'n Cmts. at 15–16. Although off-peak usage may be cheaper because electricity can be produced by nuclear generators that use cheaper fuels, *see* GOK's Questionnaire Resp. at 10 n.3, the respondents' electricity consumption was not limited to off-peak periods, *see* POSCO's Questionnaire Resp., Ex. A-2; Hyundai's Questionnaire Resp., Ex. A-1.<sup>20</sup> Accordingly, the respondents' consumption was not limited to particular generators or fuel sources and Nucor's argument is inapposite.

Nucor's price comparison also lacks merit. Nucor seeks to compare the lowest *monthly* average off-peak price paid by the respondents for certain months of the POI to the lowest *annual* average unit price paid to a KEPCO generator. Nucor's Opp'n Cmts. at 16; *see also* Second Remand Results at 39 n.139. Given that the KPX set prices on an hourly basis, *see* GOK's Questionnaire Resp., Ex. E-3 at 31–32, Nucor's inconsistent cherry-picking of data fails to demonstrate that the respondents paid less for their respective electricity consumption than was necessary to allow the generators to recover the costs of supplying that electricity and it does not call into question Commerce's analysis or conclusions.

In addition to the generators' demonstrated profitability, the KPX also recovered its costs during the POI. *See* Second Remand Results at 39 & n.143 (citing GOK's Suppl. Questionnaire Resp., Ex. SR1-KPX-1 at 9 (the KPX's comprehensive income statement)). While the KPX's costs appear to be administrative, *see* GOK's Suppl. Questionnaire Resp., Ex. SR1-KPX-1 at 9 (listing operating expenses), the KPX's revenue, consisting of transaction and membership fees, allowed the KPX to more than cover its costs for the POI, *see id.*, Ex. SR1-KPX-1 at 9–10, 49. Additionally, KEPCO was profitable overall and within the industrial tariff relevant to the respondents. *See* Second Remand Results at 11, 13, and 39; *see also* GOK's Questionnaire Resp., Ex. E-3 at F-9 (KEPCO's comprehensive income statement); *id.*, Ex. E-23 (KEPCO cost data for each tariff classification).

The additional cost recovery analysis Commerce conducted on remand fully addresses the Federal Circuit's instruction to further investigate the KPX's role in the Korean electricity market and the costs of electricity generation. 977 F.3d at 1378. While Nucor may

<sup>20</sup> For example, roughly [[ ]] percent of POSCO's electricity was consumed during [[ ]] hours, with the remaining electricity consumed during [[ ]] hours. POSCO's Questionnaire Resp., Ex. A-2 (POSCO's monthly electricity rates).

have preferred for Commerce to have used a different analytical model to consider the KPX's costs, Commerce's model permitted it to make the necessary statutory findings and otherwise address the deficiencies in its prior analysis identified in *POSCO CAF/C*. Within those broad parameters, it is Commerce, as the administering agency, that is to determine the analytical approach to establish whether a countervailable subsidy exists. Commerce's determination that the KPX's pricing of electricity to KEPCO does not provide a countervailable benefit is in accordance with law and supported by substantial evidence.<sup>21</sup>

### CONCLUSION

In accordance with the foregoing, Commerce's Second Remand Results will be sustained. Judgment will enter accordingly.

Dated: January 21, 2022

New York, New York

*/s/ Mark A. Barnett*

MARK A. BARNETT, CHIEF JUDGE

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<sup>21</sup> The court reaches this conclusion without resort to Commerce's determination in 2017 *CRS Administrative Review*. See Second Remand Results at 40 (stating that, "[b]ecause Commerce has already conducted a thorough investigation and verification related to this issue" for the 2017 *CRS Administrative Review*, "it is unnecessary to conduct a separate, additional, and duplicative investigation into the same issue for the purposes of this" remand proceeding). It is well settled that each segment of a proceeding stands on its own record and that record is limited to the relevant period of investigation or review. See, e.g., *Jiaxing Brother Fastener Co. v. United States*, 822 F.3d 1289, 1299 (Fed. Cir. 2016); *Tri Union Frozen Prods., Inc. v. United States*, 40 CIT \_\_, \_\_, 163 F. Supp. 3d 1255, 1292 (2016). Commerce did not place relevant documents from the 2017 administrative review on the current record for the court's review. Aspects of the Korean electricity market may have changed between this period of investigation and the period of review examined therein. See 2017 Decision Mem. at 25 (discussing the 2015 implementation of a regulation governing compensation for KEPCO's subsidiaries in the event KEPCO incurs a net loss); GOK's Questionnaire Resp., Ex. E-3 at 33–35 (discussing the phased implementation of a "vesting contract" system, beginning in 2015, to replace the cost-based pool system). Accordingly, Commerce could not rely solely on its verification of evidence on a separate record to meet the substantial evidence requirement in this segment of the proceeding.

## Slip Op. 22–7

NLMK PENNSYLVANIA, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Claire R. Kelly, Judge

Court No. 21–00507

[Granting in part and denying in part defendant United States’ motion for partial remand.]

Dated: February 1, 2022

*Sanford Litvack*, Chaffetz Lindsey LLP, of New York, NY, for plaintiff NLMK Pennsylvania, LLC. Also on the brief were *Andrew L. Poplinger*, and *R. Matthew Burke*.

*Tara K. Hogan*, Assistant Director, *Meen Geu Oh*, Senior Trial Counsel, and *Kyle S. Beckrich*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant United States. Also on the brief were *Brian Boynton*, Acting Assistant Attorney General, and *Patricia M. McCarthy*, Director. Of counsel on the brief was *Kenneth Kessler* and *Rachel Morris*, Office of Chief Counsel for Industry and Security, Department of Commerce.

**OPINION AND ORDER****Kelly, Judge:**

Before the court is Defendant’s motion for partial remand. Def.’s Mot. for Partial Voluntary Remand, Dec. 23, 2021, ECF No. 27 (“Def.’s Mot.”). Defendant asks the court to remand 15 of the 54 final determinations not to exclude imports of semi-finished stainless steel slab from Russia (the “Subject Exclusions”), currently before the court, to the U.S. Department of Commerce (“Commerce” or “Department”) for reconsideration and additional explanation. *Id.* at 1. Plaintiff NLMK Pennsylvania, LLC (“NLMK”) does not oppose Defendant’s request for a partial remand but argues that any remand should be conducted with certain parameters in place. Pl.’s Memo. of Law in Resp. to [Def.’s Mot.] 2, Jan. 13, 2022, ECF No. 34 (“Pl.’s Resp.”). Plaintiff further argues that the timeline for remand proposed by Commerce is inappropriate. *Id.* at 4, 10. For the following reasons, the court grants in part and denies in part Defendant’s motion for partial remand.

**BACKGROUND**

Plaintiff commenced this action challenging Commerce’s denial of Plaintiff’s requests for certain imports of steel products to be excluded from tariffs imposed on steel imports pursuant to Section 232 of the Trade Expansion Act of 1962, as amended (“Section 232”), Pub. L. 87–794, § 232, 76 Stat. 872, 877 (1962), codified in various sections of Titles 19 and 26 of the U.S. Code.<sup>1</sup> *See* Am. Compl., ¶ 1, Jan. 27, 2022,

<sup>1</sup> The court assumes familiarity with Commerce’s Section 232 exclusion review process as explained in its prior opinion denying motions to stay and intervene, *see NLMK*



ECF No. 38. From 2018–2019, officials from Commerce’s Bureau of Industry and Security (“BIS”) met with parties requesting and objecting to exclusions (“interested parties”). Def.’s Mot. at 3. BIS officials and the interested parties discussed the exclusion program and the exclusion process generally. *Id.* At the time, BIS lacked regulations or procedures to limit or contemporaneously document meetings with interested parties. *Id.* BIS policy changed following a management alert issued by Commerce’s Office of the Inspector General in late 2019, stating the lack of contemporaneous documentation of meetings with interested parties “gave the appearance that Department officials may not be impartial or transparent and are potentially making decisions based on evidence not contained in the official record for specific exclusion requests.”<sup>2</sup> Management Alert: Certain Communications by Department Officials Suggest Improper Influence in the Section 232 Exclusion Request Review Process Final Memorandum No. OIG-20–003-M (Oct. 28, 2019) (“OIG Management Alert”); *see also id.* at 3.

On December 23, 2021, Defendant filed a motion for partial remand to reconsider the Subject Exclusions.<sup>3</sup> Def.’s Mot. On January 7, 2022, Commerce filed its answer and the administrative record for the remaining 39 exclusion requests before the court. Answer, Jan. 7, 2022, ECF No. 30; Public Admin. R., Jan. 7, 2022, ECF No. 32; Confidential Admin. R., Jan. 7, 2022, ECF No. 33. On January 13, 2022, Plaintiff filed a response to Defendant’s motion. Pl.’s Resp. On January 27, 2022, Defendant filed an unopposed motion to file a reply or, in the alternative, request a status conference. Def.’s Mot. for Leave to File a Reply in Supp. of [Def.’s Mot.], Alternative Mot. for Status Conference, Jan. 27, 2022, ECF No. 35. The court granted Defendant’s motion, allowing it to file its reply brief. Order, Jan. 27, 2022, ECF No. 36; Def.’s Reply in Supp. [Def.’s Mot.], Jan. 27, 2022, ECF No. 37.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B) and (D) (2018) granting the court jurisdiction over a civil action arising out of any U.S. law providing for “tariffs, duties, fees, or other taxes Pennsylvania, LLC v. United States, No. 21–00507, 2021 WL 5755634, \*1, 2 (Ct. Int’l Trade Dec. 3, 2021), and now only recounts new information about the Section 232 exclusion review process necessary for this opinion.

<sup>2</sup> Plaintiff alleges that the 54 Section 232 exclusion determinations before the court were influenced by *ex parte* communications between domestic producers and Commerce. Am. Compl. ¶ 8.

<sup>3</sup> Defendant seeks to remand the following exclusion requests, identified by their Exclusion Request Identification Numbers: 111695, 111701, 111709, 111713, 111718, 111725, 111729, 111740, 111745, 111748, 111752, 111762, 111773, 111781, and 111782.

on the importation of merchandise for reasons other than the raising of revenue” and the administration and enforcement of such laws. 28 U.S.C. § 1581(i)(1)(B), (D).

When an “agency recognizes deficiencies in its decisions, explanations, or procedures . . . it may ask the court to remand the case back to the agency so that it may correct the deficiency.” 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 8:31(d) (3d ed. 2010); *see also SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001). The court has discretion in granting agency requests for remand, however, an agency’s request for remand is usually appropriate if its request is “substantial and legitimate.” *Id.* at 1029. An agency’s concern is substantial and legitimate where it provides a compelling justification for remand, the need for finality does not outweigh the justification for remand, and the scope of the remand is appropriate. *See Shakeproof Assembly Components Div. of Illinois Tool Works, Inc. v. United States*, 29 C.I.T. 1516, 1521–26 (2005).

## DISCUSSION

The parties do not dispute that there is a substantial and legitimate concern justifying remand, only the parameters of the needed remand.<sup>4</sup> Defendant explains Commerce will reconsider the Subject Exclusions and provide additional analysis “by engaging in a new and independent review of the record.”<sup>5</sup> *Id.* at 6. Defendant asserts that because Commerce will be essentially conducting a new review and needs to stagger its workload, Commerce needs 150 days to complete its review. Def.’s Mot. at 8. Plaintiff objects to the extended period of time and asks the court to direct Commerce as to how to conduct its remand.<sup>6</sup> Pl.’s Resp. at 7–11.

<sup>4</sup> The facts of this case ameliorate concerns about finality. Defendant states that Plaintiff seeks to overturn all of Commerce’s exclusion request denials, and, on remand, it is possible that Commerce will overturn some or all of the Subject Exclusions, expediting relief for Plaintiff. Def.’s Mot. at 6 (quoting *Borusan Mannesmann Pipe U.S. Inc. v. United States*, 2020 WL 3470104, \*1, 4 (Ct. Int’l Trade June 25, 2020)). Because each of the 54 exclusion determinations will be reviewed by the court individually, Commerce’s decision to remand the Subject Exclusions does not prevent the case for the remaining 39 exclusion determinations from proceeding in normal course.

<sup>5</sup> Defendant explains it has limited its remand request to the Subject Exclusions because the remaining 39 exclusion requests were made after Commerce implemented changes to the Section 232 exclusion review procedures including a new decision format and a procedure for limiting and documenting *ex parte* communications. Def.’s Br. at 7.

<sup>6</sup> Specifically, Plaintiff proposes:

“(a) . . . a new and independent review . . . on a record limited to: (1) the original exclusion requests; and (2) the parties’ original objections, rebuttals, and sur-rebuttals; (b) To the extent the Department wishes to consider any other information, the Department shall advise the Court and NLMK of the information it intends to consider and provide an explanation as to the basis for considering such new information;

Commerce has considerable latitude to conduct its proceedings when making determinations. *See Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945); *Stupp Corp. v. United States*, 5 F.4th 1341, 1350 (Fed. Cir. 2021). Further, in conducting its proceedings, Commerce’s decision-makers are presumed to be unbiased. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (rejecting the claim “that combination of investigative and adjudicative functions necessarily creates an un-constitutional risk of bias in administrative adjudication.”). The possibility that some individuals working on new determinations may have worked on prior determinations in the same case is not enough to overcome the presumption of a decision-maker’s honesty and integrity. *See FTC v. Cement Institute*, 333 U.S. 683, 700–03 (1948) (finding the Federal Trade Commission (“FTC”) properly refused to disqualify itself, where the FTC entertained negative opinions resulting from prior *ex parte* investigations because such entertainment did “not necessarily mean the minds of [the investigating officials] were irrevocably closed”).

Once Commerce makes its determination, this court reviews whether Commerce’s decision is in accordance with law and supported by substantial evidence based on the record. 5. U.S.C. § 706(2)(A) (2018); *see* 28 U.S.C. § 2640(e) (2018); *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985). If the determination is contrary to law or is not supported by the record, whether because it is tainted by *ex parte* communications, fails to account for evidence that detracts from the conclusion, is not reasonably supported by the record evidence, or any other reason, the appropriate action for the court is to remand the determination to Commerce. *See id.*; *see also Regal*, 324 U.S. at 13.

Here, Plaintiff asks the court to limit the information that will constitute the record because it believes no new information is needed beyond the exclusion requests, objections, rebuttals, and sur-rebuttals. Pl.’s Resp. at 9–10. The court will not do so. Commerce

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(c) . . . conducted by Department officials who were not involved in the original consideration and investigation of NLMK’s requests, and who did not participate in any *ex parte* communications with any interested parties, including NLMK or the Objectors or any representative thereof, concerning NLMK’s requests. The Department’s decisions on remand shall (1) identify the officials who conducted the new reviews; (2) specify the measures taken to ensure that the officials conducting the reviews have not participated in or otherwise considered any *ex parte* communications or other extra-record submissions; and (3) confirm that such officials did not engage in any *ex parte* communications with the Objectors, review any such prior *ex parte* communications, or discuss NLMK’s requests with any Department personnel involved in the original review and/or decision to deny NLMK’s requests; and

(d) The Department shall file its remand determinations with respect to each Subject Request within 90 days.” [Proposed] Order, Jan. 13, 2022, ECF No. 34; *see also* Pl.’s Resp. at 7–11.

“enjoys a presumption of regularity as to the record it prepares, because the agency, as the decision-maker, is generally in the best position to identify and compile those materials it considered.” *JSW Steel (USA) Inc. v. United States*, 466 F. Supp. 3d 1320, 1328 (Ct. Int’l Trade 2020) (citations omitted). Commerce will have to explain its determination, specifically, how the record supports its determination in light of the relevant law and considering what fairly detracts from its conclusion. See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). When it does so, if the court finds Commerce’s explanation lacking in light of the record, the court can remand the redetermination.<sup>7</sup> See *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44.

Plaintiff also fails to persuade the court that it should preemptively dictate Commerce’s procedure on remand. Plaintiff raises concerns that the new proceedings may be tainted by prior *ex parte* communications. Pl.’s Resp. at 7–9. Commerce itself seems to acknowledge this concern by committing to a new decision-maker for this remand. Def.’s Mot. at 5–6. However, Plaintiff wants more than a new decision-maker. It wants the court to order that Commerce:

- (1) identify the officials who conducted the new reviews;
- (2) specify the measures taken to ensure that the officials conducting the reviews have not participated in or otherwise considered any *ex parte* communications or other extra-record submissions;
- and (3) confirm that such officials did not engage in any *ex parte* communications with the Objectors, review any such prior *ex parte* communications, or discuss NLMK’s requests with any Department personnel involved in the original review and/or decision to deny NLMK’s requests

[Proposed] Order, Jan. 13, 2022, ECF No. 34; see also Pl.’s Resp. at 7–11. The court will not do so. First, Plaintiff fails to make a showing of bias or an irrevocably closed mind with respect to particular officials such that they should be purged from the determination. See *Withrow*, 421 U.S. at 47; see also *Cement Institute*, 333 U.S. at 700–03. Nor does Plaintiff cite any law in support of its request for additional limitations. See Pl.’s Resp. at 9–10. Second, Plaintiff asserts that the new decision-maker will not act in a vacuum and will rely on the work of others who may have been involved with the

<sup>7</sup> The court is somewhat baffled by the suggestion that “To the extent the Department wishes to consider any other information, the Department shall advise the Court and NLMK of the information it intends to consider and provide an explanation as to the basis for considering such new information.” *Id.* at (b); see also Pl.’s Resp. at 10. Plaintiff’s proposal seems to invite the court to supervise and thus co-author the determination with Commerce and then review that determination. The court declines the invitation.

previous Subject Exclusion determinations. *Id.* at 9. However, regardless of who is involved in the process, the decision-maker must rely on the information on the record and explain his or her conclusions in relation to the record. *State Farm*, 463 U.S. at 43. Further, in explaining those conclusions, the decision-maker must address any information that detracts from his or her conclusions. *Universal Camera*, 340 U.S. at 488. Commerce is aware of the concerns identified by its own inspector general, OIG Management Alert, concerns that might detract from a determination. Def’s Mot. at 5—See *JSW*, 466 F. Supp. 3d 1320. It will be up to Commerce to explain its determination in light of these concerns. If Plaintiff challenges Commerce’s remand redetermination as unsupported by substantial evidence or otherwise contrary to law, arguing that the determination was infected by *ex parte* communications, and the court determines that the redetermination is unsupported by substantial evidence or otherwise contrary to law, the court can remand the redetermination. See *Fla. Power & Light Co.*, 470 U.S. 729, 743–44. Thus, the court will not preemptively dictate to Commerce the contours of its proceeding other than to ensure that it follows the contours set by Congress.

Finally, the parties disagree as to the amount of time the court should allow for a remand, as the Defendant seeks 150 days in light of the need to conduct “a new and independent review of the record” and Plaintiff contends that typically the court orders remands to be conducted within 90 days.<sup>8</sup> Pl.’s Resp. at 10–11. Commerce’s own regulations provide that normally the review period for requested exclusions will be 106 days, a time period which includes the receipt of objections, rebuttals and sur-rebuttals. 15 C.F.R. § Pt. 705, Supp. 1(h)(3)(i). Both parties agree that the redetermination should be a new and independent review, and the regulations normally allow 106 days for review. Commerce will issue its remand redeterminations within 106 days.

## CONCLUSION

For the foregoing reasons, it is

**ORDERED** that Defendant’s motion for partial remand is granted in part and denied in part; and it is further

**ORDERED** that the Subject Exclusions are remanded back to the agency for reconsideration consistent with this Opinion and Order; and it is further

<sup>8</sup> See, e.g., *JSW*, 466 F. Supp. 3d at 1325, 1333 (granting Commerce 90 days to issue a decision on remand for 12 exclusion requests); Def.’s Unopposed Mot. for Voluntary Remand, *CPW America Co. v. United States*, Ct. No. 21–00335, Oct. 25, 2021, ECF No. 14 (requesting 90 days to issue a decision on remand) (“CPW Remand Motion”); Order, *CPW America Co. v. United States*, Ct. No. 21–00335, Oct. 26, 2021, ECF No. 15 (granting the CPW Remand Motion).

**ORDERED** that Commerce shall file its remand redetermination with the court within 106 days of the date of this Opinion and Order; and it is further

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

**ORDERED** that the parties shall have 30 days thereafter to file a reply to comments on the remand redetermination; and it is further

**ORDERED** that the parties shall have 14 days thereafter to file the Joint Appendix; and it is further

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

Dated: February 1, 2022

New York, New York

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



### Slip Op. 22–8

BONNEY FORGE CORPORATION and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING AND SERVICE WORKERS INTERNATIONAL UNION, Plaintiffs, v. UNITED STATES, Defendant, and SHAKTI FORGE INDUSTRIES PVT. LTD., Defendant-Intervenor.

Before: Stephen Alexander Vaden, Judge  
Court No. 1:20-cv-03837

[Granting Plaintiffs' Motion for Judgment on the Agency Record and remanding to Commerce with instructions to perform verification or respond on the record to Plaintiffs' argument.]

Dated: February 2, 2022

*William Fennell*, Schagrin Associates, of Washington, D.C., for Plaintiffs. With him on the brief was *Roger B. Schagrin*.

*Kara M. Westercamp*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, Commercial Litigation Branch, *Claudia Burke*, Assistant Director, Commercial Litigation Branch, and *JonZachary Forbes*, Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce.

*Matthew T. McGrath*, Barnes Richardson & Colburn LLP, of Washington, D.C., for Defendant-Intervenor.

## OPINION

### Vaden, Judge:

This is not a case about the Government's ability to respond with agility to the unique circumstances caused by the COVID-19 pandemic. It is instead a case about the requirement that the Govern-

ment respond to all arguments made in good faith by the contending parties before it and place those responses in the record to allow for meaningful judicial review. COVID did not suspend the general principles of administrative law. *Cf. Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam) (“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.”). Plaintiffs Bonney Forge Corporation (Bonney Forge) and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) asked the Government to conduct a virtual verification of the information submitted by foreign respondent and Defendant-Intervenor Shakti Forge Industries PVT. Ltd. (Shakti). The Government candidly admits it provided no response in the record to Bonney Forge’s written request. It also candidly admits that the Department of Commerce (Commerce) is currently still not conducting verification visits – virtual or otherwise – to India despite several senior political appointees’ having recently traveled to the subcontinent. Because the Government failed to provide any evidence in the record to support its decision to deny Bonney Forge’s request for virtual verification, the Court **GRANTS** Plaintiffs’ Motion for Judgment on the Agency Record and **REMANDS** this matter to Commerce with instructions. Should the Government maintain its position that verification remains impossible, the Government can explain in the record why it is safe for senior Department of Justice and Cabinet officials to travel to India in person on discretionary trips but not safe for civil servants with statutory responsibilities to perform to do the same, even if only virtually.

## BACKGROUND

The products at issue in this case are forged steel fittings produced in India for importation into the United States. A “fitting” is “a small often standardized part (as a coupling, valve, gauge) entering into the construction of a boiler, steam, water, or gas supply installation or other apparatus.” *Fitting*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 1986). The International Trade Administration described the types of steel fittings included in the scope of the investigation when it issued its final determination:

The merchandise covered by this investigation is carbon and alloy forged steel fittings, whether unfinished (commonly known as blanks or rough forgings) or finished. Such fittings are made in a variety of shapes including, but not limited to, elbows, tees, crosses, laterals, couplings, reducers, caps, plugs, bushings, unions (including hammer unions), and outlets. Forged steel fittings are covered regardless of end finish, whether threaded,

socket-weld or other end connections. The scope includes integrally reinforced forged branch outlet fittings, regardless of whether they have one or more ends that is a socket welding, threaded, butt welding end, or other end connections.

*Forged Steel Fittings from India: Final Affirmative Determination of Sales at Less Than Fair Value (Final Determination)*, 85 Fed. Reg. 66,306, 66,308 (Oct. 19, 2020), Joint Appendix (J.A.) at 14,188, ECF No. 46.

### I. The Antidumping Investigation

The investigation *sub judice* began on October 23, 2019, when Bonney Forge, a U.S. producer of forged steel fittings, and USW, a union whose members include workers at facilities where domestic steel fittings are produced, filed a petition alleging that steel fittings from India were being sold at less than fair market value in the United States. See Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Forged Steel Fittings from India (Final IDM) at 1, J.A. at 14,126, ECF No. 46. Commerce initiated an investigation on November 12, 2019, and published its Respondent Selection Memorandum identifying mandatory respondents on January 2, 2020. *Forged Steel Fittings from India and the Republic of Korea: Initiation of Less-Than-Fair-Value Investigations*, 84 Fed. Reg. 64,265 (Nov. 21, 2019); Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Forged Steel Fittings from India (PDM) at 2–3, J.A. at 11,666–67 ECF No. 46. Shakti was the only mandatory respondent selected by Commerce that did not withdraw from the investigation. See Antidumping Duty Investigation of Forged Steel Fittings from India: Selection of Respondents for Individual Examination, J.A. at 2,900–05, ECF No. 45. Commerce sent Shakti a standard initial questionnaire on January 2, 2020, requesting information about Shakti’s sales in the United States, sales in its home market, and its costs of production. Request for Information, J.A. at 2,909, ECF No. 45. Shakti cooperated fully with Commerce throughout the proceeding, submitting responses to the initial questionnaire on February 5, February 24, and March 2, 2020. J.A. at 3,411–5,748, ECF No. 45.

Just over a week after Commerce received Shakti’s final response to the initial questionnaire, the World Health Organization officially classified COVID-19 as a pandemic. *WHO Director-General’s opening remarks at the media briefing on COVID-19 - 11 March 2020*, WORLD HEALTH ORGANIZATION (Mar. 11, 2020) <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at->



the-media-briefing-on-covid-19---11-march-2020. On March 15, 2020, the Department of Commerce issued an agency-wide memo prohibiting all travel not “mission-critical and pre-approved by senior bureau leadership.” DEPT OF COMMERCE, *All Hands: Coronavirus Update (3-16-2020)* [https://www.commerce.gov/sites/default/files/2020-03/AllHandsCoronavirusUpdate 3-16-20.pdf](https://www.commerce.gov/sites/default/files/2020-03/AllHandsCoronavirusUpdate%203-16-20.pdf). The CDC issued a Level 4 travel advisory, urging all U.S. citizens to avoid international travel on March 31, 2020. CENTER FOR DISEASE CONTROL, *Global Level 4 Health Advisory: Do Not Travel (Mar. 31, 2020)*; J.A. at 13,909, ECF No. 46.

Amidst the unfolding pandemic and the resulting transition to “teleworking,” Commerce continued its investigation of steel fittings from India, sending Shakti four additional supplemental questionnaires on March 20, March 27, April 10, and April 16, 2020. J.A. at 6,022, 6,051, 8,108, 8,183, ECF No. 46. Shakti timely responded to those questionnaires on April 27 and May 4, 2020. J.A. at 8,817, 9,548, 9,557, ECF No. 46. Based on the initial information it had gathered from Shakti, Commerce issued a Preliminary Affirmative Determination of Sales at Less Than Fair Value (SLTFV) and Postponement of Final Determination, with those preliminary results indicating that Shakti was not selling its steel fittings in the United States at below fair market value.<sup>1</sup> J.A. at 11,746, ECF No. 46. Thereafter, Commerce sent Shakti two additional supplemental questionnaires on June 15 and July 2, 2020, to which Shakti fully replied on July 6 and July 23, 2020. J.A. at 11,761, 11,816, 11,871, 12,146, ECF No. 46.

Though Commerce “normally conducts verification” after having gathered relevant information from respondents, in light of the uncertain risks of and continuing restrictions on travel during the summer of 2020, Commerce instead issued a memo cancelling verification and setting forth the briefing schedule for the parties.<sup>2</sup> Def.’s Resp. to Pls.’ Mot. for J. on the Agency R. (Def.’s Resp.) at 12–13, ECF No. 35;

<sup>1</sup> Though Commerce “preliminarily determined that the estimated weighted-average dumping margin for Shakti is zero,” Commerce also “preliminarily determined the estimated weighted-average dumping margins for [non-compliant selected respondents] entirely on the basis of facts otherwise available (*i.e.*, 293.40 percent).” Thus, the overall preliminary determination still found that sales were being made at less than fair value from some Indian exporters despite Commerce’s not finding evidence that Shakti had engaged in dumping. *Forged Steel Fittings from India: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 85 Fed. Reg. 32,007, 32,008 (May 28, 2020), J.A. at 11,746 ECF No. 46.

<sup>2</sup> Verification is the process by which Commerce probes the information it collects in its investigations. It is “like an audit, the purpose of which is to test information provided by a party for accuracy and completeness.” *Bomont Indus. v. United States*, 733 F.Supp. 1507, 1508 (CIT 1990). Commerce generally undertakes “on site verifications,” but it is also entitled to “latitude to derive verification procedures.” *Id.* (referencing Commerce’s explanation of its on site verification); see *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997).

J.A. at 13,906 (memo cancelling verification), ECF No. 46. Plaintiffs Bonney Forge and USW timely submitted an administrative brief opposing Commerce’s decision not to verify on the basis that there were discrepancies in Shakti’s reported data that made the data unreliable absent verification. J.A. at 91,588, ECF No. 45. Plaintiffs “urge[d] Commerce to engage in virtual verification” or else rely on other facts available with adverse inferences rather than accept Shakti’s data without substantiation. J.A. at 91,588–89, ECF No. 45. Shakti submitted a rebuttal case brief, affirming the accuracy of the data it had provided and asserting that Commerce had all the information it needed to rely on Shakti’s reporting. J.A. at 91,766, ECF No. 45.

Commerce concluded that the information it had collected from Shakti was reliable without any verification, categorized the information it had collected as “facts available,” and issued its final determination in the investigation on October 13, 2020. Final IDM, J.A. at 14,126, 14,127, ECF No. 46. Commerce published its Final Affirmative Determination on October 19, 2020. *Id.*; *Final Determination*, J.A. at 14,186–89, ECF No. 46. Commerce failed to consider or even acknowledge Plaintiffs’ request for a virtual verification, providing no explanation for choosing to rely solely on post-preliminary questionnaires instead of entertaining the possibility of a virtual verification. Final IDM, J.A. at 14,126–48, ECF No. 46; Oral Arg. Tr. 25:7–8, ECF No. 53 (“There is no discussion [in the record] about why a virtual verification would not have been feasible.”).

In the final determination, Shakti received a dumping margin of zero percent. *Final Determination*, J.A. at 14,187, ECF No. 46. By contrast, Commerce calculated an All-Others dumping margin rate of 195.6% and used adverse inferences to calculate a rate of 293.4% for the non-cooperative respondents in the investigation. *Id.* Plaintiffs timely filed a Summons with this Court on November 17, 2020, initiating the current case.

## II. The Present Dispute

Plaintiffs sued the Department of Commerce, challenging its final determination with regard to Shakti. Compl., ECF No. 9. Shakti moved to intervene on January 14, 2021. ECF No. 12. Plaintiffs filed their Motion for Judgment on the Agency Record on April 26, 2021. Pls.’ Mot., ECF No. 23. It asks this Court to reverse Commerce’s final determination on the bases that (1) Commerce’s failure to verify Shakti’s information was contrary to law, and (2) Commerce’s reliance on Shakti’s reporting of processing costs was not supported by substantial evidence. Pls.’ Mot. at 8–25, ECF No. 23.

Commerce filed its response on July 2, 2021, asserting that (1) Plaintiffs waived their verification argument by failing to describe it with sufficient specificity in the administrative proceeding; (2) reliance on facts otherwise available was a suitable alternative to verification given the worldwide pandemic; and (3) Shakti's revised processing costs were consistent, and Commerce's reliance on them was thus supported by substantial evidence. Def.'s Resp. at 9–20, ECF No. 35. Defendant-Intervenor Shakti's July 2, 2021 response argued that (1) the extensive information gathered through the questionnaire process satisfied the statutory verification requirement, and (2) an examination of the entire record shows the consistency of Shakti's reported processing costs. Resp. Br. of Shakti Forge Industries PVT. Ltd. to Pls.' Rule 56.2 Mot. for J. on the Agency R. (Def. Intervenor's Resp.) at 1–22, ECF No. 37. Plaintiffs filed their reply brief on July 26, 2021. Pls.' Reply Br. in Supp. of Rule 56.2 Mot. for J. on the Agency R. (Pls.' Reply), ECF No. 41.

The Court held oral argument on November 5, 2021. ECF No. 51. In response to questions from the Court, counsel for Commerce acknowledged that nowhere in the record did Commerce address Plaintiffs' clear, written request for virtual verification, nor did it offer any reason why such a virtual verification could not occur. Oral Arg. Tr. 25:7–8. Counsel for Shakti confirmed that there was no discussion of a virtual verification on the record but expressed "doubts about how well virtual verification would work" and reiterated that, in Shakti's view, the vast amounts of data collected via questionnaires were "equivalent to verification." *Id.* at 52:2–3, 53:13, 56:11–12. Counsel for Plaintiffs noted, in support of their argument that Shakti would have been capable of participating in a virtual verification, that much of Shakti's leadership appeared at a teleconference hearing during the administrative investigation. *Id.* at 65:15–23.

Given the similarities between this dispute and that of *Ellwood City Forge*, No. 21–0007, in which Commerce recently requested a voluntary remand, the Court ordered Commerce to consult with relevant officials and file either a motion for voluntary remand or an explanation as to why Commerce would not seek a voluntary remand in this case. Oral Arg. Tr. 70:22–25, 71:1–4; see *Ellwood City v. United States*, No. 21–0007, ECF No. 28 (CIT Oct. 29, 2021) (order granting Government's Motion for Voluntary Remand). Commerce filed a letter respectfully declining to seek voluntary remand, arguing that sufficient differences exist between the present case and *Ellwood City Forge* to justify different treatment. Def.'s Resp. to the Question of Voluntary Remand (Def.'s Letter) at 5–6, ECF No. 52. Commerce invited the Court to "presume that Commerce considered" Plaintiffs'

virtual verification argument if the Court considered Plaintiffs' contention that "Commerce did not expressly address that argument in the final determination." *Id.* at 9.

### JURISDICTION AND STANDARD OF REVIEW

This Court has exclusive jurisdiction over Plaintiffs' challenge to Commerce's Final Determination under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final affirmative determinations, including any negative part of such determinations, in an antidumping order. The Court must sustain Commerce's "determination, finding, or conclusion" unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). If the determinations are neither supported by substantial evidence nor the law, the Court must "hold unlawful any determination, finding, or conclusion found." *Id.* This standard requires that Commerce thoroughly examine the record and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted); *accord Tianjin Magnesium Int'l Co. v. United States*, 722 F.Supp.2d 1322, 1328 (CIT 2010). "[T]he question is not whether the Court would have reached the same decision on the same record[;] rather, it is whether the administrative record as a whole permits Commerce's conclusion." *See New American Keg v. United States*, No. 20-0008, 2021 WL 1206153, at \*6 (CIT Mar. 23, 2021).

Reviewing agency determinations, findings, or conclusions for substantial evidence, the Court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). The Federal Circuit has described "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

## DISCUSSION

### I. Legal Framework

#### A. Substantial Evidence

“By law, Commerce is required to ‘verify all information relied upon in making ... a review and determination.’” *Rubberflex Sdn. Bhd. v. United States*, 59 F.Supp.2d 1338, 1344 (CIT 1999). But Congress does not provide specific guidance for how verification should be accomplished. Thus, “when reviewing the procedures Commerce uses at verification, the Court does not look to ‘previously-set standards’ . . . . Rather, it ‘review[s] verification procedures employed by Commerce in an investigation for abuse of discretion.’” *Id.* (quoting *Micron Tech.*, 117 F.3d at 1396). “The Court must be ever vigilant of abuse of discretion by the agency.” *Wheatland Tube Corp. v. United States*, 841 F.Supp. 1222, 1236 (CIT 1993).

Commerce has a statutory duty to “include in a final determination . . . an explanation of the basis for its determination that addresses relevant arguments, made by interested parties who are parties to the investigation or review . . . concerning the establishment of dumping or a countervailable subsidy.” 19 U.S.C. § 1677f(i)(3)(A). The Federal Circuit has thus found that the Court of International Trade properly remanded determinations when Commerce “fail[ed] to consider all relevant arguments” made by the parties. *Altx, Inc. v. United States*, 370 F.3d 1108, 1119–20 (Fed. Cir. 2004) (discussing how the CIT “reasonably was troubled by the failure” of Commerce to address the position of Japanese producers who were a party to the case). An agency decision is unsupported by substantial evidence when key issues “lack[] record support.” *Strand v. United States*, 951 F.3d 1347, 1349 (Fed. Cir.), *cert. denied*, 141 S. Ct. 894 (2020). A decision by Commerce cannot be supported by substantial evidence if there is no indication that Commerce considered essential arguments or evidence in making its final determination. Indeed, when “there is nothing in the administrative record showing that Commerce considered (much less addressed)” a party’s explanation or argument relating to an issue “essential to its analysis . . . the Court cannot sustain Commerce’s decision.” *Hung Vuong Corp. v. United States*, 483 F.Supp.3d 1321, 1367 (CIT 2020) (remanding a decision where Commerce failed to take into account a respondent’s explanation related to factors of production before assigning adverse facts available).

## B. Remand

“Administrative agencies have considerable latitude to shape their remedies within the scope of their statutory authority and, where the infirmity is inadequacy of findings to show appropriateness of the choice made in the particular case, are ordinarily entitled to have the case remanded for further consideration.” *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945). Remands serve “an important function—to ensure the adequacy of agency explanation that is crucial to judicial review, including review of whether substantial evidence exists for the premises of Commerce’s exercise of discretion.” *Diamond Sawblades Mfrs. Coal. v. United States*, 986 F.3d 1351, 1361 (Fed. Cir. 2021). Unless the Court limits the scope of the remand, Commerce has “broad discretion to fully consider the issues remanded.” *ABB, Inc. v. United States*, 273 F.Supp.3d 1186, 1199 n.14 (CIT 2017). In similar contexts, the Federal Circuit has found limited remands to be improper when their scope prevents Commerce “from undertaking a fully balanced examination that might have produced more accurate results.” *Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1039 (Fed. Cir. 2003).

Although the scope of issues Commerce may reconsider in its remand is typically broad, binding precedent limits the range of available actions it may undertake on remand. The Supreme Court recently clarified an agency’s options:

First, the agency can offer a fuller explanation of the agency’s reasoning *at the time of the agency action*. This route has important limitations. When an agency’s initial explanation “indicate[s] the determinative reason for the final action taken,” the agency may elaborate later on that reason (or reasons) but may not provide new ones. Alternatively, the agency can “deal with the problem afresh” by taking *new* agency action. An agency taking this route is not limited to its prior reasons but must comply with the procedural requirements for new agency action.

*Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1907–08 (2020) (emphasis in original) (internal citations omitted). Thus, while the scope of the remand may be unlimited, Commerce still only has two paths available to it: It can expand on the original explanations offered for the chosen action, or it may take new agency action consistent with procedural requirements. *Id.*

## II. Analysis

### A. Summary

The Court cannot uphold an antidumping order that is not supported by “substantial evidence *on the record*.” 19 U.S.C. § 1516a(b)(1)(B)(i) (emphasis added). If Commerce fails to provide an explanation for its actions, substantial evidence cannot exist to justify the Department’s action.

Plaintiffs here have raised a host of legal challenges, both procedural and substantive, to actions undertaken by Commerce in this investigation. The parties have argued at length about whether some of those challenges were adequately raised and preserved in the underlying administrative proceeding. But one argument was clearly raised, and Commerce has all but conceded that it cannot meet its burden of substantial evidence with regard to that argument. After the cancellation of verification and before the issuance of a final decision, Plaintiffs “urge[d] Commerce to engage in virtual verification.” J.A. at 91,588–89, ECF No. 45. Commerce confirmed that there is “no discussion” or response to that argument in the record. Oral Arg. Tr. 25:7.

Commerce has completely failed to address Plaintiffs’ request for virtual verification. As this Court has found before, here, “the absence of evidence is indeed evidence of absence.” *Saha Thai Steel Pipe Pub. Co. v. United States*, No. 20–133, \_\_\_ F.Supp.3d \_\_\_, 2021 WL 4593382 at \*16 (CIT Oct. 6, 2021). The Court thus cannot uphold Commerce’s decision and remands the case in full for a period of 150 days to allow Commerce to reconsider its previous decision and undertake new agency action consistent with this opinion.

### B. Failure to Provide Substantial Evidence

The substantial evidence standard requires that Commerce thoroughly examine the record and “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (internal quotation marks and citation omitted); accord *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 301–02 (2015); *Tianjin*, 722 F.Supp.2d at 1328. It stands to reason that no explanation cannot be “a satisfactory explanation.” Indeed, this Court has recently explained that a failure to address an essential argument in making a final decision is sufficient grounds for remand. See *Hung Vuong Corp.*, 483 F.Supp.3d at 1367. Nor can the Court consider the explanations offered by Government counsel after-the-fact: *Post hoc* rationaliza-

tions similarly do not satisfy the substantial evidence standard. *Regents of the Univ. of California*, 140 S. Ct. at 1908 (explaining that an agency decision cannot be “upheld on the basis of impermissible ‘post hoc rationalization.’”).

In this case, Plaintiffs raised, in writing, an argument relevant to an essential issue when they “urge[d] Commerce to engage in virtual verification.” J.A. at 91,588–89, ECF No. 45. Commerce must “address[] relevant arguments, made by interested parties who are parties to the investigation or review.” See 19 U.S.C. § 1677f(i)(3)(A). But, as counsel for the Government confirmed at oral argument, “[t]here is no discussion about why a virtual verification would not have been feasible.” Oral Arg. Tr. 25:7–8. Until recently, Commerce acknowledged that verification was a requirement imposed on it by Congressional enactment and its own regulations. See, e.g., 19 U.S.C. § 1677m(i)(1) (“The administering authority shall verify all information relied upon in making . . . a final determination in an investigation”); 19 C.F.R. § 351.307(b)(1)(i) (2021) (“[T]he Secretary will verify factual information upon which the Secretary relies in: . . . a final determination in a[n] . . . antidumping investigation.”). The lack of verification is at the heart of every legal argument Plaintiffs bring before the Court, see Compl. ¶¶ 13–27, ECF No. 9; Pls.’ Mot. at 7–13, ECF No. 23, yet there is no answer in the record as to why Commerce rejected Plaintiffs’ proffered verification method.

Commerce asks the Court to “presume that Commerce considered” Plaintiffs’ virtual verification argument. Def.’s Letter at 9. Even were that possible, the Court may not “presume” an answer for Commerce. The Court reviews answers Commerce actually gave for substantial evidentiary support. See 19 U.S.C. § 1516a(b)(1)(B)(i). It does not draft answers Commerce never gave from the available record information before the Department. *Accord State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43 (“We may not supply a reasoned basis for the agency’s action that the agency itself has not given.”).

Commerce has frankly acknowledged that it did not address Plaintiffs’ argument in the final determination. Oral Arg. Tr. 25:7–8 (“There is no discussion [in the record] about why a virtual verification would not have been feasible.”). Substantial evidence, therefore, does not exist to uphold Commerce’s decision to bypass verification, virtual or otherwise. See *Hung Vuong*, 483 F.Supp.3d at 1367 (remanding case to Commerce where there was “nothing in the administrative record showing that Commerce considered (much less addressed)” the issue raised); see also *Diamond Sawblades Mfrs. Coal.*, 986 F.3d at 1361 (sustaining the CIT’s remand order and explaining that remands “ensure the adequacy of agency explanation that is



crucial to judicial review, including review of whether substantial evidence exists for the premises of Commerce's exercise of discretion"). The Court must **REMAND** Commerce's determination for it either to explain why it believes even a virtual verification is impossible or to perform some form of verification.

### C. Options on Remand

As the *Regents* Court noted, Commerce has two options on remand. *See Regents of the Univ. of California*, 140 S. Ct. at 1907–08. It may offer a fuller explanation of its reasoning at the time of the action it defends, or it may take new agency action. *Id.* If Commerce chooses the latter course, it “is not limited to its prior reasons but must comply with the procedural requirements for new agency action.” *Id.* Because Commerce did not initially offer *any* explanation of its reasoning, the Court doubts very much whether Commerce can in fact provide a “fuller” explanation of its decision to forego virtual verification in this case. A new decision based on *current* conditions is most likely required. Nevertheless, the decision on how to proceed, consistent with this and the Supreme Court's opinion in *Regents*, remains with Commerce.

In any new decision, if Commerce wishes to maintain its position that verification of any type is impossible, it must explain why now, in 2022, Department representatives cannot travel in person to India or conduct some form of virtual verification. It would be relevant to consider recent policy changes and the travel of other U.S. officials in recent months. The Court notes that, since the period of the initial investigation, cross-border travel conditions have changed substantially. In October 2021, just before oral argument in this case, President Biden lifted travel restrictions on India, among other nations, and revoked country-specific limitations on entry for noncitizens effective November 8, 2021. Proclamation No. 10,294, 86 Fed. Reg. 59,603 (Oct. 25, 2021). The CDC's current advisory for India is “Level 3: COVID-19 High.” It therefore recommends full vaccination or regular testing for U.S. citizens visiting the subcontinent. INDIA COVID-19 TRAVEL INFORMATION, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://wwwnc.cdc.gov/travel/destinations/traveler/none/india?s\\_cid=ncezid-dgmq-travel-single-001](https://wwwnc.cdc.gov/travel/destinations/traveler/none/india?s_cid=ncezid-dgmq-travel-single-001) (last visited Feb. 2, 2022). Under President Biden's September 9, 2021 mandate, nearly all Department of Commerce employees are presumably fully vaccinated, precluding the necessity of onerous testing. *See* Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 14, 2021) (federal employee vaccination or testing mandate). *But see Feds for Medical Freedom v. Biden*, No. 3:21-cv-356, 2022 U.S. Dist. LEXIS 11145 (S.D. Tex. Jan. 21, 2022) (enjoining the Government's enforcement of the vaccine mandate on federal

employees). Despite these evolved conditions, as of November 2021, Commerce “is still . . . not conducting on site verifications.”<sup>3</sup> Oral Arg. Tr. 8:18–19. Circumstances are continuously changing, and travel possibilities have changed yet again since the time of oral argument; but that does not change the Government’s obligation to answer on the record Plaintiff’s request for a virtual verification. *Compare* Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019, 86 Fed. Reg. 68,385 (Dec. 1, 2021), *with* Revoking Proclamation 10,315, 87 Fed. Reg. 149 (Jan. 3, 2022).

Commerce asserts that it decides whether to verify the information in each investigation on a “case-by-case basis.” Def.’s Letter at 4, ECF No. 52 (emphasis omitted). Commerce’s continuing blockade on verification, despite its prior practice of verifying the information presented to it, seems curious in light of recent in-person trips to India by other senior administration officials. For example, Deputy Assistant Attorney General Arun G. Rao of the Department of Justice’s Civil Division — the same Department of Justice representing Commerce here — traveled to New Delhi in October to discuss consumer protection with Indian officials. Press Release, U.S. Dep’t of Justice, Readout of Meeting between Department of Justice and the Central Bureau of Investigation of Government of India (Oct. 21, 2021), <https://www.justice.gov/opa/pr/readout-meeting-between-department-justice-and-central-bureau-investigation-government-india>. His trip presents a strange contradiction, given that Department of Justice policy permits only “mission-critical” travel, which is the same standard applicable to the Department of Commerce. DEP’T OF COMMERCE, *All Hands: Coronavirus Update (3–16–2020)* <https://www.commerce.gov/sites/default/files/2020-03/AllHandsCoronavirusUpdate3-16-20.pdf> (detailing how travel is only permissible if it is “mission-critical and pre-approved by senior bureau leadership”). Under the Government’s explanation of this standard, it is “mission critical” for political appointees to take discretionary trips to India; but it is not “mission critical” for Commerce Department civil servants to travel to India, *virtually* or otherwise, to

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<sup>3</sup> Indeed, the conditions in India on the date of oral argument were *better* than they currently are. INDIA COVID-19 TRAVEL INFORMATION, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://web.archive.org/web/20211001150702/https://wwwnc.cdc.gov/travel/destinations/traveler/none/india?s\\_cid=ncezid-dgmq-travel-single-001](https://web.archive.org/web/20211001150702/https://wwwnc.cdc.gov/travel/destinations/traveler/none/india?s_cid=ncezid-dgmq-travel-single-001) (showing that between August 16, 2021 and November 15, 2021, the CDC’s travel advisory was “Level 2: COVID-19 Moderate”); INDIA COVID-19 TRAVEL INFORMATION, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://web.archive.org/web/20211126175706/https://wwwnc.cdc.gov/travel/destinations/traveler/none/india?s\\_cid=ncezid-dgmq-travel-single-001](https://web.archive.org/web/20211126175706/https://wwwnc.cdc.gov/travel/destinations/traveler/none/india?s_cid=ncezid-dgmq-travel-single-001) (showing that ten days after oral argument, on November 15, 2021, the CDC’s travel advisory for India dropped to “Level 1: COVID-19 Low”).

carry out their *statutory* responsibilities. *See* 19 U.S.C. § 1677m(i) (“The administering authority *shall* verify all information relied upon in making . . . a final determination in an investigation.”) (emphasis added); 19 C.F.R. § 351.307(b)(1)(i) (2021) (“[T]he Secretary *will* verify factual information upon which the Secretary relies in: . . . a final determination in a[n] . . . antidumping investigation.”) (emphasis added).

Even more relevant to the matter at hand, United States Trade Representative Katherine Tai held a November meeting with Indian leaders in person in New Delhi to discuss U.S.-India Trade Policy. Press Release, Office of the U.S. Trade Representative, Ambassador Tai to Travel to Japan, South Korea, and India (Oct. 29, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/october/ambassador-tai-travel-japan-south-korea-and-india>. Ambassador Tai’s responsibilities are to open new markets overseas for American products and to ensure that American corporations are not subjected to unfair trade practices. *See* 19 U.S.C. § 2171(c) (describing the responsibilities of the Trade Representative). It is Commerce’s job to enforce these guarantees through the antidumping and countervailing duty statutes. Their responsibilities are thus complimentary, but their travel standards clearly are not. It is apparently currently safe to conduct high-level negotiations but not safe to ensure the terms of those deals are actually enforced, despite the destinations<sup>4</sup> being the same. Verification procedures are fact-specific inquiries and will require fact-specific review by the Court as circumstances continue to change and new variants spread. But that is precisely why it is so critical for Commerce to articulate its reasons and for those reasons to be preserved in the record for the Court’s review.

The Court cannot review an explanation not given. And the summary of recent events above explains why courts may not “presume” an agency has considered an argument or allow for *post hoc* rational-

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<sup>4</sup> The Government declared at oral argument on November 5, 2021, that Commerce was “still . . . not conducting on site verifications.” Oral Arg. Tr. 8:18–19. Deputy Assistant Attorney General Rao’s in-person trip to India took place the week of October 17, 2021. *See* Press Release, U.S. Dep’t of Justice, Readout of Meeting between Department of Justice and the Central Bureau of Investigation of Government of India (Oct. 21, 2021) (describing the trip as occurring “this week”), <https://www.justice.gov/opa/pr/readout-meeting-between-department-justice-and-central-bureau-investigation-government-india>. Ambassador Tai’s in-person visit took place the week of November 21, 2021. *See* Press Release, Office of the U.S. Trade Representative, Comprehensive Trip Guidance and Week Ahead for November 22, 2021 – November 26, 2021 (Nov. 21, 2021), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/november/comprehensive-trip-guidance-and-week-ahead-november-22-2021-november-26-2021>.

izations to carry the day. *Cf.* Def.’s Letter at 9, ECF No. 52. The law requires agencies to explain their actions “on the record” to prevent inconsistency, hypocrisy, and irrationality from governing agency decision making. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (“The agency must make findings that support its decision, and those findings must be supported by substantial evidence” by demonstrating a “rational connection between the facts found and the choice made.”). The need to prevent inconsistency is especially strong where, as here, Commerce has previously demonstrated its ability to conduct verification in unique circumstances:

Commerce has, in the past, found a way to conduct verification, even under exceptional circumstances. *See, e.g., Polyethylene Terephthalate Resin From Pakistan: Final Determination of Sales at Less Than Fair Value*, 83 Fed. Reg. 48,281 (Sep. 24, 2018) (conducting a verification using “standard verification procedures, including an examination of relevant accounting and production records, and original source documents” with representatives of a Pakistani company in Washington, D.C. when Commerce determined that travel in Pakistan was not possible due to a State Department travel advisory); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Italy*, 67 Fed. Reg. 3,155 (Jan. 23, 2002) (tolling the final determination deadline in this and companion investigations of SSB from Germany, France, the United Kingdom, and Korea in order to conduct a modified verification that “met the {verification} standard” in the wake of “security concerns and logistical difficulties brought about by the events of September 11 {2001}”); *Brake Rotors From the People’s Republic of China: Rescission of Second New Shipper Review and Final Results and Partial Rescission of First Antidumping Duty Administrative Review*, 64 Fed. Reg. 61,581 (Nov. 12, 1999) (conducting an off-site verification at a Beijing hotel rather than on-site verification at the respondent’s production facilities due to security concerns associated with travel in China following a NATO bombing of the Chinese Embassy in Belgrade, Yugoslavia).

Plaintiff’s Rule 56.2 Mot. for J. on the Agency R. at 21–22, *Ellwood City v. United States*, No. 21–00007, ECF No. 21 (CIT July 19, 2021).

Under Commerce’s current theory of the case, the decision about whether and how to conduct verification is governed by the abuse of discretion standard. Oral Arg. Tr. 50:1–2; Def.’s Resp. at 8, ECF No. 35. On remand, Commerce may assess the current state of the COVID-19 pandemic, consider whether a virtual verification is pos-

sible, and act accordingly. Should Commerce determine that no verification method — virtual or otherwise — is possible, it must at a bare minimum explain on the record why it is not an abuse of discretion for the Government to determine that senior officials may galivant around the globe in-person but civil servants cannot even perform their statutory responsibilities virtually. *See Wheatland Tube Corp. v. United States*, 841 F. Supp. 1222, 1236 (CIT 1993) (explaining that this Court will remain “ever vigilant of abuse of discretion by the agency.”). Plaintiff and Defendant-Intervenor will have the appropriate opportunities to raise any and all arguments with specificity that arise from any new decision. And after remand, this Court will consider those issues that remain.

### CONCLUSION

Record review requires a record. Because Commerce has failed to make one concerning its decision not to engage in verification, virtual or otherwise, its decision may not stand. Commerce may either do its job and perform some type of verification or explain why its decision to fail to verify is both legal *and* not an abuse of discretion.

Accordingly, it is:

**ORDERED** that Plaintiffs’ Motion for Judgment on the Agency Record is **GRANTED**;

The Court **REMANDS** the case for up to 150 days initially for Commerce to reconsider its decision on verification, consistent with this opinion, and place its reasons supporting its decision on the record, and it is

**ORDERED** that at the conclusion of 150 days, Commerce should either file its remand results with the Court or file a motion for extension of time if a longer period is necessary. It is also

**ORDERED** that within 10 days of Commerce’s filing the remand redetermination, the parties shall confer and file a proposed briefing schedule with the Court on any remaining issues.

Dated: February 2, 2022

New York, New York

*/s/ Stephen Alexander Vaden*

STEPHEN ALEXANDER VADEN, JUDGE



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