U.S. Customs and Border Protection

8 CFR PART 214

CBP DEC. 22–18

RIN 1651–AB49

PERIOD OF ADMISSION AND EXTENSIONS OF STAY FOR REPRESENTATIVES OF FOREIGN INFORMATION MEDIA SEEKING TO ENTER THE UNITED STATES

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Final rule.

SUMMARY: This rule amends Department of Homeland Security (DHS) regulations to better facilitate the U.S. Government's ability to achieve greater reciprocity between the United States and the People's Republic of China (PRC) relative to the treatment of representatives of foreign information media of the respective countries seeking entry into the other country. For entry into the United States, such foreign nationals would seek to be admitted in I nonimmigrant status as bona fide representatives of foreign information media. Currently, foreign nationals who present a passport issued by the PRC, with the exception of Hong Kong Special Administrative Region (SAR) or Macau SAR passport holders, may be admitted in or otherwise granted I nonimmigrant status until the activities or assignments consistent with the I classification are completed, not to exceed 90 days. This rule amends the DHS regulations to remove the set period of stay of up to 90 days and to allow the Secretary of Homeland Security (Secretary) to determine the maximum period of stay, no longer than one year, for PRC I visa holders, taking into account certain factors. This rule also announces the Secretary has determined the maximum period of stay for which a noncitizen who presents a passport issued by the PRC (other than a Hong Kong SAR passport or a Macau SAR passport) may be admitted in or otherwise granted I nonimmigrant status is one year.

DATES: This rule is effective on October 13, 2022.

FOR FURTHER INFORMATION CONTACT: Mr. Paul Minton, Program Manager, Enforcement Programs, Office of Field Operations, U.S. Customs and Border Protection, at 202–344–1581 or *Paul.A.Minton@cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Legal Authority

The Secretary of Homeland Security (Secretary) has broad authority to administer and enforce the immigration and naturalization laws of the United States. *See* section 103(a)(1) of the Immigration and Nationality Act of 1952 (Pub. L. 82–414, 66 Stat. 163), as amended (8 U.S.C. 1103(a)(1)) (INA); *see also* 6 U.S.C. 202. The Secretary is authorized to establish such regulations as he or she deems necessary to carry out this authority under the immigration laws. *See* INA 103(a)(3) (8 U.S.C. 1103(a)(3)). Section 214(a)(1) of the INA specifically authorizes the Secretary to prescribe regulations specifying the period of admission, as well as any conditions, for the admission of nonimmigrants to the United States.[1] *See* 8 U.S.C. 1184(a)(1).

The Secretary has authorized the Commissioner of U.S. Customs and Border Protection (CBP) to enforce and administer the immigration laws relating to the inspection and admission of noncitizens[2] seeking admission to the United States, including the authority to make admissibility determinations and set the duration, terms, and conditions of admission. *See* Delegation Order 7010.3, II.B.5 (Revision No. 03.1, Incorporating Change 1) (Nov. 25, 2019). U.S. Citizenship and Immigration Services (USCIS) is authorized to consider applications for a change of nonimmigrant status under section 248 of the INA, 8 U.S.C. 1258, including establishing the authorized period of stay in the new nonimmigrant status. *See* 6 U.S.C. 271(b); 8 CFR part 248. USCIS also is authorized to consider applications for an extension of stay in nonimmigrant status. *See* 6 U.S.C. 271(b); 8 CFR 214.1(c).

Section 101(a)(15)(I) of the INA establishes the I nonimmigrant classification for noncitizens wishing to visit the United States tem-

[1] *See also* sections 402, 1512, and 1517 of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2142, 2187), as amended (6 U.S.C. 202, 552, and 557) (regarding transfer of authority to enforce immigration laws and prescribe regulations necessary to carry out that authority from the Attorney General to the Secretary).

[2] For purposes of this document, CBP uses terms such as "noncitizen" or "nonimmigrant" in place of the term "alien." However, the INA and Department of Homeland Security (DHS) regulations continue to use the term "alien," as defined by the INA.

porarily as representatives of foreign information media. The INA established the I visa category as: "a new class of nonimmigrants and is designed to facilitate, on a basis of reciprocity, the exchange of information among nations. It is intended that the class is to be limited to aliens who are accredited as members of the press, radio, film or other information media by their employer." S. Rep. No. 82–1137 at 21 (1952); H.R. Rep. No. 1365 at 45 (1952).

In order to qualify as a nonimmigrant under the I classification, a noncitizen must be a bona fide representative of foreign press, radio, film or other foreign information media that has its home office in a foreign country, and must seek to enter the United States solely to engage in such employment. *See* INA 101(a)(15)(I) (8 U.S.C. 1101(a)(15)(I)). In addition, the statute expressly requires that such a visa or status be provided "upon a basis of reciprocity." *Id.; see also* INA 214(a)(1) (providing that the admission of nonimmigrants to the United States "shall be for such time and under such conditions as the [Secretary] may by regulations prescribe") (8 U.S.C. 1184(a)(1)).

B. Current Admission Process for I Visa Holders

Foreign nationals visiting the United States temporarily as representatives of information media must possess a nonimmigrant I visa for admission. INA 101(a)(15)(I), 212(a)(7)(B)(i)(II) (8 U.S.C. 1101(a)(15)(I), 1182(a)(7)(B)(i)(II)). In order to obtain an I visa, foreign travelers must apply for a visa with the U.S. Department of State and obtain the visa prior to traveling to the United States. *Id.; see also* INA 221–222, 273(a) (8 U.S.C. 1201–1202, 1323(a)); 22 CFR 41.52, 41.101–41.122. An I visa holder seeking entry into the United States must appear at a port of entry and establish, to the satisfaction of the CBP officer, that he or she is admissible as an I nonimmigrant. *See* INA 235(a), (b)(2)(A), and 291 (8 U.S.C. 1225(a), (b)(2)(A), and 1361); 8 CFR 212.1, 235.1(f)(1); *see also* INA 221(h) (providing that issuance of a visa does not entitle the visa holder to admission to the United States). The noncitizen must also be otherwise admissible and not subject to other grounds of inadmissibility. *See generally* INA 212(a) (8 U.S.C. 1182(a)).

The CBP officer will inspect the noncitizen, including by reviewing the noncitizen's travel documents, collecting the noncitizen's biometric data (*i.e.,* fingerprints and photograph), interviewing the noncitizen, and collecting any applicable forms or fees. INA 235(a) (8 U.S.C. 1225(a)); 8 CFR 235.1(f) and (h). Unless otherwise exempted, each arriving nonimmigrant who is admitted to the United States will be

issued a Form I–94 as evidence of the terms of admission. *See* 8 CFR 1.4 and 235.1(h).[3] The period of time that the noncitizen is authorized to remain in the United States is referred to as the "period of admission" or the "period of stay."

C. Current Period of Admission and Extensions of Stay for I Visa Holders

Prior to May 2020, the DHS regulation at 8 CFR 214.2(i) specified that an I visa holder, regardless of country of nationality, "may" be authorized admission for the duration of his or her employment. DHS and its predecessor, the Immigration and Naturalization Service (INS), had long interpreted the regulation as providing that I visa holders are authorized admission for the duration of status for an indefinite period, rather than for a set period of time. *See generally* Memorandum, INS Office of the General Counsel, Genco Op. No. 94–23, 1994 WL 1753127, at *3 (May 9, 1994) ("[R]epresentatives of information media are not currently restricted by statutory language to any temporary period. The regulations authorize their admission for 'duration of status.' "). The term "duration of status" refers to the period of time in which a noncitizen continues to meet the terms and conditions of his or her admission, including that he or she remains employed with the same employer and uses the same information medium. 8 CFR 214.2(i)(1–1–20 Ed.). The regulation states that the admission requires that the noncitizen maintain the same information medium and employer until "he or she obtains permission" to change either. *Id.*

While an interpretation of the regulation requiring admission for an indefinite period of the duration of status is reasonable, it is also reasonable for DHS to interpret the regulation to allow DHS, in its discretion, to admit I visa holders for a set time period. In May 2020, DHS promulgated a final rule amending 8 CFR 214.2(i) to provide that the admission of I visa holders presenting passports issued by the People's Republic of China (PRC), with the exception of Hong Kong Special Administrative Region (SAR) and Macau SAR passport holders, would no longer be for an indefinite period, but would instead be for a period not to exceed 90 days. *See Period of Admission and Extensions of Stay for Representatives of Foreign Information Media Seeking To Enter the United States,* 85 FR 27645, May 11, 2020 (May 2020 rule). That rule also provides that such I visa holders are permitted to seek subsequent extensions of stay, each one limited to

[3] The term "issuance" includes the creation of an electronic record of admission, or arrival/departure by DHS following an inspection performed by an immigration officer. *See* 8 CFR 1.4. In most cases, CBP issues the Form I–94 electronically. The traveler may retrieve it through a CBP website, *https://i94.cbp.dhs.gov,* or via the CBP One™ mobile application.

no more than 90 days. The rule was promulgated by DHS, because DHS determined that admitting I visa holders from the PRC for an indefinite period was not sufficiently reciprocal to the PRC's treatment of U.S. journalists or in alignment with U.S. foreign policy at that time.

D. Purpose and Summary

Since the promulgation of the May 2020 rule, DHS has determined that it should be more fluid in its approach to I visa holders from the PRC. The preamble of the May 2020 rule detailed how information received from the Department of State, as well as open source information, demonstrated a suppression of independent journalism in the PRC, including an increasing lack of transparency and consistency in the admission periods granted to foreign journalists, including U.S. journalists. According to the Foreign Correspondents' Club of China (FCCC), the PRC has forced out at least 27 reporters since 2013, either through expulsion or by non-renewal of visas, including 18 foreign correspondents from U.S.-based news outlets, such as *The New York Times, The Wall Street Journal,* and *The Washington Post* in 2020.[4]

Further, concurrent with the May 2020 rule, the PRC Government publicly targeted foreign media, describing them as politically hostile and a threat to local stability. U.S. and other foreign journalists reported a series of online threats and uncensored amplification of their personal details on PRC social media platforms. Likewise, beginning in 2020, British and Australian journalists reported credible threats of targeted lawsuits and exit bans, forcing immediate and emergency moves to flee the PRC. In September 2020, the last two Australian reporters working for Australian media in the PRC left the country following an unprecedented diplomatic stand-off with PRC security forces. The PRC security forces had sought to impose a strict exit ban until the reporters answered questions about their ties to Cheng Lei, an Australian reporter working for PRC state media who was detained and held incommunicado since August 2020. Likewise, in March 2021, a BBC journalist fled the PRC amid intense, sustained, and targeted threats from the Chinese authorities. The BBC confirmed the reporter and his team "faced surveillance, threats of legal action, obstruction and intimidation wherever they tried to film."[5]

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[4] "Track, Trace, Expel: Reporting on China Amid a Pandemic: FCCC Report of Media Freedom in 2020," *available at https://fccchina.org/wp-content/uploads/2022/01/2020-FCCC-Report.pdf?x69980* (2020 FCCC Report).

[5] *https://www.bbc.com/news/world-asia-china-56586655.*

The 2020 FCCC Report further revealed that foreign journalists are receiving severely shortened visa admission periods and reporting credentials, one for just two and a half months. Moreover, the 2020 FCCC Report stated that foreign journalists applying for visa renewals face numerous challenges, with a record number of at least 12 correspondents receiving visas of six months or less. One out of six correspondents reported being forced to use a series of short visas of between one and three months in duration so that they could live and work in China; the typical duration of PRC-issued credentials is 12 months.

There remains little transparency on visa issuances and press credentials, as both are subject to change without notice and are often shortened or revoked in apparent retribution for journalists' or their colleagues' reporting efforts. In September 2020, the PRC issued new rules that confirmed that any reporter who left the PRC would have his or her visa immediately cancelled. Journalists would therefore be forced to reapply for new visas if they wanted to return.

Conditions for foreign journalists did not improve for most of 2021.[6] In May 2021, the PRC's Ministry of Foreign Affairs confirmed new visa rules for foreign correspondents, permitting all but U.S. reporters working for U.S. outlets to exit and return to China on their existing J visas, the PRC visa category for foreign journalists. U.S. citizens working for American media confirm that PRC Government authorities told them they would not be able to leave the PRC and expect to come back.

However, in November 2021, the PRC committed to a series of discrete actions that signal progress. The PRC committed to issue visas for a group of U.S. reporters, provided they are eligible under all applicable laws and regulations. The PRC also committed to increase visa validity for U.S. journalists to one year and to permit U.S. journalists already in the PRC to freely depart and return, which they had previously been unable to do. The United States also committed to increase visa validity for PRC journalists to one year and provide the same access and freedom of movement for PRC journalists in the United States. Both the PRC and the United States agreed to begin the process of extending duration of stay for each country's respective journalists.

Accordingly, DHS is issuing this rule to continue to address the actions of the PRC Government while seeking to enhance reciprocity in the treatment of U.S. journalists in the PRC. The current DHS

[6] "2021 Locked Down or Kicked Out Covering China: FCCC Report of Media Freedom in 2021," *available at https://fcchina.org/wp-content/uploads/2022/01/2021-FCCC-final.pdf?x69980* (2021 FCCC Report).

regulations limit PRC journalists to initial stays of up to 90 days. DHS seeks to enhance reciprocity in a flexible and fluid manner, so instead of amending the regulations with a new specific set period of stay, DHS is amending the regulations to allow the Secretary to make a determination, considering certain enumerated factors, to set the maximum period of stay for PRC I visa holders, up to one year.

II. Discussion of Regulatory Changes

In order to effect the changes described above, DHS is amending 8 CFR 214.2(i). Paragraph (i)(1)(ii) is revised to remove the set period of stay of 90 days for those noncitizens who present a passport issued by the PRC (other than a Hong Kong SAR passport or a Macau SAR passport) and replace it with a maximum period of stay as determined by the Secretary, not to exceed one year. Additionally, paragraph (i)(1)(ii) is amended to provide that the Secretary may determine the maximum period of stay when the Secretary determines an adjustment is needed, with such maximum period to be no longer than one year. The revisions set forth the framework for that determination. Namely, in determining the maximum period of stay and whether an adjustment is needed, the Secretary will consider factors including, but not limited to: the average authorized period of stay and press credential validity for U.S. journalists in the PRC; the treatment of U.S. journalists in the PRC; any input from the U.S. Department of State; and such other factors as may affect the U.S. interest. Such determination will be published as a notice in the **Federal Register** and will remain in effect until the Secretary publishes a new determination.

Consistent with the change regarding the initial period of stay for I nonimmigrants, this rule replaces the references to a set period of 90 days in the introductory text of paragraph (i)(2) regarding extension of stay and in paragraph (i)(3) addressing change of status with references to the maximum period of stay determined by the Secretary pursuant to paragraph (i)(1)(ii). DHS believes that the factors considered by the Secretary in setting the maximum period of stay for initial grants of I nonimmigrant status are also applicable to extensions, and that it is appropriate for the maximum extension period to match the maximum initial grant period in place at the time the extension request is adjudicated. The period of extensions thus reflects the most recent determination made by the Secretary, taking into account the most recent information available about reciprocity, treatment of U.S. journalists, and other relevant national interests.

In evaluating its approach to PRC I visa holders for this rule, DHS recognized that it should more clearly demonstrate how it is complying with international legal obligations regarding certain PRC I visa

holders. These obligations include, but are not limited to, the United Nations Headquarters Agreement (UNHQA) and Organization of American States Headquarters Agreement (OASHQA). Section 11 of the UNHQA requires that the United States not impede transit to or from the United Nations headquarters district for members of certain covered classes, including UN-accredited representatives of the press, or of radio, film or other information agencies (*i.e.,* I visa holders). Section 12 clarifies that such obligations apply irrespective of bilateral relations, and Section 13 states that U.S. laws and regulations regarding the entry and residence of noncitizens shall not be applied in such a manner as to interfere with Section 11 privileges. Section 13(a) states that visas required for those covered under Section 11 be issued without charge and as promptly as possible. Article XV, Section 1 of the OASHQA requires that the United States take appropriate steps to facilitate transit to or from the OAS Headquarters of OAS-accredited representatives of the press or of radio, film, or other information agencies (*i.e.,* I visa holders).

Thus, at the end of paragraph (i)(2)(ii), DHS adds that requests for extensions of stay will be adjudicated consistent with international legal obligations, including the UNHQA and OASHQA. DHS will continue to coordinate with the U.S. Department of State to ensure that USCIS has the discretion to grant extension requests for accredited journalists, consistent with international legal obligations, free of charge. In the event that assessment and vetting efforts identify serious concerns, DHS, prior to taking any action on extension applications for PRC I nonimmigrants covered under such agreements as the UNHQA and OASHQA, will coordinate with the Department of State in a timely manner over appropriate next steps.

Current paragraph (i)(4) provides for the transition from duration of status admission to a fixed admission period for noncitizens with I status who had presented a passport issued by the PRC (that is not a Hong Kong SAR passport or a Macau SAR passport) at the time of admission and who were present in the United States on May 8, 2020, when the May 2020 rule took effect. This provision is no longer necessary, and this rule replaces that provision in paragraph (i)(4) with a provision detailing the applicable maximum period of stay for those noncitizens who have pending applications for extension of stay or change in status when a change in the maximum period of stay occurs. Specifically, revised paragraph (i)(4) sets forth that any change in the maximum period of stay announced by a **Federal Register** notice pursuant to paragraph (i)(1)(ii) applies to applications for an extension of stay or a change of status, filed under paragraphs (i)(2) and (i)(3) respectively, which are pending with US-

CIS on the effective date of the **Federal Register** notice. In other words, the maximum period of stay that is in effect when an application for an extension of stay or a change of status is adjudicated is the maximum period of stay that will apply to said petition. For example, DHS would publish a **Federal Register** Notice saying that it is changing the maximum period of stay from 1 year to 6 months, and the effective date would be February 28, 2024. In such a case, when an application for extension of stay is filed on February 1, 2024, but that application is still pending on February 28, 2024, the maximum period of stay USCIS can give is 6 months if that extension of stay is approved on February 28, 2024 (or later).

This rule does not contain any substantive changes to the admission or duration of status period of stay provisions currently applicable to I visa holders from any country other than the PRC.

III. Maximum Period of Stay Determined by the Secretary

The PRC has taken positive action with respect to allowing U.S. media access since late 2021. PRC authorities have issued visas for all U.S. reporters for which the Department of State requested such documents in November 2021. These issuances will have a substantial impact on bolstering critical and independent news coverage in the PRC, and arrival of these individuals will represent a 30 percent increase in the total number of U.S. journalists in the country. In another sign of progress, the PRC has expedited the issuance of re-entry visas for U.S. reporters in China so that they may freely depart and return. These actions reflect a renewed effort on the part of the PRC to improve media reciprocity and working conditions for U.S. reporters in China. Although such conditions remain far from fully satisfactory, increasing the period of stay for PRC journalists in the United States from 90 days to a year through this rule will serve to maintain momentum on continuing efforts to improve U.S. media access to the PRC.

Accordingly, pursuant to 8 CFR 214.2(i)(1)(ii) as amended by this final rule, the Secretary of Homeland Security has determined that the maximum period of stay for which a noncitizen who presents a passport issued by the PRC (other than a Hong Kong SAR passport or a Macau SAR passport) may be admitted in or otherwise granted I nonimmigrant status is one year, effective on October 13, 2022.

IV. Statutory and Regulatory Review

A. Administrative Procedure Act

The Administrative Procedure Act (APA) generally requires agencies to publish notice of a proposed rulemaking in the **Federal Register** for a period of public comment and to delay the effective date of

the final rule. However, rules that involve a foreign affairs function of the United States are excluded from the rulemaking provisions of the APA. *See* 5 U.S.C. 553(a)(1). For the reasons discussed below, this rule involves a foreign affairs function of the United States. DHS, after consultation with the Department of State, is adopting this rule to respond more flexibly and fluidly to the actions of the PRC Government regarding the duration of admission for media representatives from the PRC, with the exception of Hong Kong SAR or Macau SAR passport holders.

In order to obtain an I visa and be admitted to the United States, a representative of foreign information media must be a national of a country that grants similar privileges to representatives of media from the United States. *See* 8 U.S.C. 1101(a)(15)(I) (providing that I nonimmigrant visas may be issued "upon a basis of reciprocity"). One such country is the PRC. Among other things, the PRC has committed to begin the process of extending duration of stay for U.S. journalists. Such acts demonstrate that the PRC is willing to grant similar privileges to U.S. media representatives as those granted to members of the Chinese media in the United States. Accordingly, this rule encompasses diplomatic relations with the PRC regarding the authorized terms and conditions of admission of representatives of radio, film or other information media as they perform such functions abroad. The U.S. Court of Appeals for the Second Circuit, in *City of New York v. Permanent Mission of India to United Nations*, made clear that regulation of the reciprocal treatment to be afforded to representatives of foreign nations in the United States "relates directly to, and has clear consequences for, foreign affairs." 618 F.3d 172, 201 (2d Cir. 2010). More recently, the United States District Court for the District of Columbia found that "to be covered by the foreign affairs function exception, a rule must clearly and directly involve activities or actions characteristic to the conduct of international relations." *E.B. et al. v. U.S. Dep't of State et al.*, Civ. Action No. 19–2856, Mem. Op. at 8 (D.D.C. Feb. 4, 2022), *available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv2856–50.* This rule clearly and directly involves the conduct of foreign affairs and the commitments that the United States and another specific nation-state, the PRC, have made or may make to each other regarding foreign media representatives.

Any diplomatic negotiations between the United States and the PRC as to the reciprocal treatment of foreign media representatives will be more effective in ensuring full and fair access for U.S. journalists and less disruptive to long-term relations the sooner this final rule is in place. *See Rajah v. Mukasey*, 544 F.3d 427, 438 (2d Cir. 2008) (finding that the notice and comment process can be "slow and cumbersome," which can negatively affect efforts to secure U.S. national

interests, thereby justifying application of the foreign affairs exemption). Furthermore, notice and comment procedures prior to the effective date of this rule would disrupt the Executive Branch's foreign policy with respect to the PRC and erode the sovereign authority of the United States to pursue the strategy it deems to be most appropriate as it engages with foreign nations. *See Am. Ass'n of Exps. & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985) (noting that the foreign affairs exception covers agency actions "linked intimately with the Government's overall political agenda concerning relations with another country")

B. Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Rules involving the foreign affairs function of the United States are exempt from the requirements of Executive Orders 12866 and 13563. This final rule advances the President's foreign policy goals, as they affect a specific bilateral relationship and as the rule has an expressed goal of enhancing parity in the relationship of the United States with a specific nation-state. The Office of Information and Regulatory Affairs has confirmed that this rule is not subject to the analytical requirements of Executive Orders 12866 and 13563, due to the foreign affairs exception described above. However, DHS has nevertheless reviewed this rule to ensure its consistency with the regulatory philosophy and principles set forth in those Executive Orders.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Public Law 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year. *See* 2 U.S.C. 1532(a). This rule will not result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

E. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3507(d)) requires that DHS consider the impact of paperwork and other information collection burdens imposed on the public. This rule does not impose any new requirements subject to the PRA.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens.

Regulatory Amendments

For the reasons stated in the preamble, DHS is amending 8 CFR part 214 as follows:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 is revised to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1356, 1357, and 1372; section 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Amend § 214.2 by:

■ a. Revising paragraph (i)(1)(ii);

■ b. In paragraph (i)(2) introductory text removing the text "90 days" and adding in its place the text "the maximum period of stay determined by the Secretary pursuant to paragraph (i)(1)(ii) of this section";

■ c. Adding a sentence at the end of paragraph (i)(2)(ii);

■ d. In paragraph (i)(3), removing the text "90 days" and adding in its place the text "the maximum period of stay determined by the Secretary pursuant to paragraph (i)(1)(ii) of this section"; and

■ e. Revising paragraph (i)(4).

The addition and revisions read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(i) * * *

(1) * * *

(ii) In the case of an alien who presents a passport issued by the People's Republic of China (PRC) (other than a Hong Kong Special Administrative Region passport or a Macau Special Administrative Region passport), until the activities or assignments consistent with the I classification are completed, not to exceed the maximum period of stay as determined by the Secretary. The Secretary of Homeland Security may determine the maximum period of stay when the Secretary determines an adjustment is needed, with such maximum period to be no longer than one year. In determining the maximum period of stay and whether an adjustment is needed, the Secretary will consider factors including, but not limited to, the average authorized period of stay and press credential validity for U.S. journalists in the PRC, the treatment of U.S. journalists in the PRC, any input from the U.S. Department of State, and such other factors as may affect the U.S. interest. Such determination will be published in the **Federal Register** as a notice and will remain in effect until the Secretary of Homeland Security publishes a new determination under this paragraph.

* * * * *

(2) * * *

(ii) * * * Requests for extensions of stay will be adjudicated consistent with international legal obligations, including the United Nations Headquarters Agreement and Organization of American States Headquarters Agreement.

* * * * *

(4) *Applicable maximum period of stay.* Any change in the maximum period of stay announced by a **Federal Register** notice pursuant to paragraph (i)(1)(ii) of this section applies to applications for an extension of stay or a change of status, filed under paragraphs (i)(2) and (3) of this section respectively, that are pending with USCIS on the effective date of the **Federal Register** notice.

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ALEJANDRO N. MAYORKAS,
Secretary of Homeland Security.

[Published in the Federal Register, October 13, 2022 (85 FR 61959)]

19 CFR CHAPTER I

ARRIVAL RESTRICTIONS APPLICABLE TO FLIGHTS CARRYING PERSONS WHO HAVE RECENTLY TRAVELED FROM OR WERE OTHERWISE PRESENT WITHIN UGANDA

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

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

SUMMARY: This document announces the decision of the Secretary of the Department of Homeland Security (DHS) to direct all flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda to arrive at one of the United States airports where the United States government is focusing public health resources to implement enhanced public health measures. For purposes of this document, a person has recently traveled from Uganda if that person departed from, or was otherwise present within, Uganda within 21 days of the date of the person's entry or attempted entry into the United States. Also, for purposes of this document, crew and flights carrying only cargo (*i.e.,* no passengers or non-crew), are excluded from the measures herein.

DATES: The arrival restrictions apply to flights departing after 11:59 p.m. Eastern Daylight Time on October 10, 2022. Arrival restrictions continue until cancelled or modified by the Secretary of DHS and notice of such cancellation or modification is published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations, U.S. Customs and Border Protection at 202–255–7018.

SUPPLEMENTARY INFORMATION:

Background

Ebola disease, caused by the virus genus *Ebolavirus,* is a severe and often fatal disease that can affect humans and non-human primates. Disease transmission occurs via direct contact with bodily fluids (*e.g.,* blood, mucus, vomit, urine). The first known Ebola disease outbreak occurred in 1976. From 2013–2016, the largest recorded Ebola disease outbreak occurred in West Africa, primarily affecting Guinea, Liberia, and Sierra Leone, with cases exported to seven additional countries across three continents, including the United States. The epidemic demonstrated the potential for Ebola disease to become an

international crisis in the absence of early intervention. Further, Ebola disease can have substantial medical, public health, and economic consequences if it spreads to densely populated areas. As such, Ebola disease may present a threat to United States health security given the unpredictable nature of outbreaks and the interconnectedness of countries through global travel.

On September 19, 2022, Uganda reported a single, fatal case of Ebola disease due to the Sudan virus (species *Sudan ebolavirus*). Earlier in September 2022, community reports had described occurrences of strange illness and sudden deaths in the affected area. Some of these unexplained deaths were in persons who had known contact with the index patient. As of October 4, 2022, a total of 43 confirmed cases with 10 confirmed deaths have been reported from five districts within Uganda Centers for Disease Control and Prevention (CDC) has issued an Alert—Level 2, Practice Enhanced Precautions advising against non-essential travel to several regions in Uganda where the Ministry of Health in Uganda has declared an Ebola virus outbreak.[1] The Centers for Disease Control and Prevention (CDC) is closely monitoring an outbreak of Ebola virus in five districts within Uganda. In order to assist in preventing or limiting the introduction and spread of this communicable disease into the United States, the Departments of Homeland Security and Health and Human Services, including CDC, and other agencies charged with protecting the homeland and the American public, are currently implementing enhanced public health measures at five United States. airports that receive the largest number of travelers originating from Uganda. To ensure that all travelers with recent presence in Uganda arrive at one of these airports, DHS is directing all flights to the United States carrying such persons to arrive at airports where enhanced public health measures are being implemented. While DHS, in coordination with other applicable federal agencies, anticipates working with the operators of aircraft in an endeavor to identify potential travelers who have recently traveled from, or were otherwise present within, Uganda prior to boarding, operators of aircraft will remain obligated to comply with the requirements of this notice. Department of Defense (DoD) flights, via either military aircraft or contract flights, will be managed by DoD in accordance with HHS guidelines.

[1] CDC, Ebola in Uganda Alert—Level 2, Practice Enhanced Precautions, CDC (Oct. 4, 2022), *https://wwwnc.cdc.gov/travel/notices/alert/ebola-in-uganda.*

Notice of Arrival Restrictions Applicable to All Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Uganda

Pursuant to 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, DHS has the authority to limit the locations where all flights entering the United States from abroad may land. Under this authority and effective for flights departing after 11:59 p.m. Eastern Daylight Time on October 10, 2022, I hereby direct all operators of aircraft to ensure that all flights (with the exception of those operated or contracted by DoD) carrying persons who have recently traveled from, or were otherwise present within, Uganda only land at one of the following airports:

- Hartsfield-Jackson Atlanta International Airport (ATL), Georgia;
- Chicago O'Hare International Airport (ORD), Illinois;
- Newark Liberty International Airport (EWR), New Jersey;
- John F. Kennedy International Airport (JFK), New York;
- Washington-Dulles International Airport (IAD), Virginia;

This direction considers a person to have recently traveled from Uganda if that person departed from, or was otherwise present within, Uganda within 21 days before the date of the person's entry or attempted entry into the United States. Also, for purposes of this document, crew and flights carrying only cargo (*i.e.,* no passengers or non-crew), are excluded from the applicable measures set forth in this notification. This direction is subject to any changes to the airport landing destination that may be required for aircraft and/or airspace safety, as directed by the Federal Aviation Administration.

This list of designated airports may be modified by the Secretary of Homeland Security in consultation with the Secretary of Health and Human Services and the Secretary of Transportation. This list of designated airports may be modified by an updated publication in the **Federal Register** or by posting an advisory to follow at *www.cbp.gov.* The restrictions will remain in effect until superseded, modified, or revoked by publication in the **Federal Register**.

For purposes of this **Federal Register** document, "United States" means the territory of the several States, the District of Columbia, and Puerto Rico.

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

[Published in the Federal Register, October 12, 2022 (85 FR 61488)]

PROPOSED REVOCATION OF TWO RULING LETTERSS AND PROPOSED REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF PAN MASALA BETEL NUT FOOD PRODUCT

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

ACTION: Notice of proposed revocation of two ruling letters and proposed revocation of treatment relating to the tariff classification of pan masala betel nut food product.

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 two ruling letters concerning tariff classification of pan masala betel nut food product 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 November 25, 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: John Rhea, Food, Textiles & Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0035.

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 two ruling letters pertaining to the tariff classification of pan masala betel nut food product. Although in this notice, CBP is specifically referring to New York Ruling Letters ("NY") 830068, dated June 9, 1988 (Attachment A), and DD H890859, dated October 22, 1993 (Attachment B), 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 two 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 830068 and DD H890859, CBP classified the pan masala betel nut food product in heading 2106, HTSUS, specifically in subheading 2106.90.6099, HTSUS Annotated (HTSUSA) (currently subheading 2106.90.99, HTSUS, under the 2022 HTSUS), which provides for "Food preparations not elsewhere specified or included:

Other: Other: Other: Other." CBP has reviewed both NY 830068 and DD H890859 and has determined the ruling letters to be in error. It is now CBP's position that pan masala betel nut food product is properly classified, in heading 2008, HTSUS, specifically in subheading 2008.19.9090, HTSUSA, which provides for "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures: Other, including mixtures: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY 830068 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letters ("HQ") H326009, set forth as Attachment C 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.

YULIYA A. GULIS
for
GREGORY CONNOR,
Acting Director
Commercial and Trade Facilitation Division

Attachments

NY 830068
CLA-2-21:S:N:N1E:228 830068
CATEGORY: Classification
TARIFF NO.: 2106.90.6099

MR. SURESH PATEL
L N K STORE
2828 KENNEDY BLVD.
JERSEY CITY, NJ 07306

RE: The tariff classification of Pan Masala from India.

DEAR MR. PATEL:

This is in response to your request for a tariff classification ruling, received May 12, 1988.

A sample accompanied your letter and has been retained by this office. The product consists of chopped betel nuts coated with flavors and spices. The stated ingredients are betel nuts, catechu, limes, cardamom, and flavors. The merchandise is packed with a small plastic spoon in a foil-sealed metal container, holding 100 grams, net weight. Pan Masala is consumed after meals, a small spoonful placed in the mouth and chewed, as a stimulant and digestive aid.

The Harmonized Tariff Schedule of the United States (HTS) is scheduled to replace the Tariff Schedules of the United States (TSUS) in 1988. Public Notice will be given of the exact date.

The applicable HTS subheading for the Pan Masala will be 2106.90.6099, which provides for food preparations not elsewhere specified or included...other. The rate of duty will be 10 percent ad valorem.

The classification represents the present position of the Customs Service regarding the dutiable status of the merchandise under the HTS. Until the HTS is implemented, the applicable TSUS item is 183.0530, which provides for edible preparations not specifically provided for...other. The rate of duty is 10 percent ad valorem.

This product may be subject to the regulations of the Food and Drug Administration.

You may contact them at 5600 Fishers Lane, Rockville, Maryland 20857, telephone number (202) 443-3380.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have already been filed, this ruling should be brought to the attention of the Customs officer handling the transaction.

Sincerely,

JEAN F. MAGUIRE
Acting Area Director
New York Seaport

DD H890859
October 22, 1993
CATEGORY: Classification
PORT: Nogales, AZ
CLA-2-21:9:N:N1:E11
TARIFF NO.: 2106.90.6599 ADD/CVD (EN)

S.L. SOMAYAJULA SS ENTERPRISES
250 CEDER RIDGE DRIVE #703
MONROEVILLE, PA 15146

RE: The tariff classification of Triveni Brand Betelnut Powder from India

DEAR MR. SOMOYAJULA:

This classification decision under the Harmonized Tariff Schedule of the United States (HTS) is being issued in accordance with the provisions of Section 177 of the Customs Regulations (19 CFR 177).

DATE OF INQUIRY: October 6, 1993 ON BEHALF OFSS Enterprises

DESCRIPTION OF MERCHANDISE: A food product made of betel nuts, cloves, cardamoms, nutmeg, cubebs, borneol, menthol, and licorice.

HTS PROVISION: Food preparation not elsewhere specified or included ... other..... other ... other...other...other... other...other ... other...other. HTS SUBHEADING 2106.90.6599 (EN)

RATE OF DUTY 10%

DUTY CONCESSION Articles classifiable under subheading 2101.90.6599 (EN), HTS, which are products of India, are entitled to duty free treatment under the Generalized system of Preference (GSP) upon compliance with all applicable regulations. This food product is subject to the Food and Drug Administration regulations. Questions regarding these regulations should be addressed to the following:

Food and Drug Administration Division of Regulatory Guidance
200 C Street S.W.
Washington, D.C. 20204

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Sincerely,

FREDERICK D. LAWRENCE,
District Director
Nogales, Arizona

HQ H326009
OT:RR:CTF:FTM H326009 JER
CATEGORY: Classification
TARIFF NO.: 2008.19.90

MR. SURESH PATEL
LNK STORE
2828 KENNEDY BLVD.
JERSEY CITY, NJ 07306

RE: Revocation of NY 830068 and DD H890859; Tariff Classification of Pan Masala Betel Nut Food Product

DEAR MR. PATEL:

On June 9, 1988, U.S. Customs and Border Protection ("CBP") issued New York Ruling Letter ("NY") 830068 to you, in response to your ruling request, dated May 12, 1988, regarding the classification under the Harmonized Tariff Schedule of the United States ("HTSUS") of a food product referred to as pan masala. In NY 830068, CBP classified the pan masala product under heading 2106, HTSUS, which provides for "Food preparations not elsewhere specified or included." Upon further review of that ruling, CBP has now determined that the decision in NY 830068 was incorrect. Accordingly, NY 830068 is hereby revoked for the reasons set forth below.

In addition, we are revoking DD H890859, dated October 22, 1993, in which CBP classified a food product referred to as betel nut powder made of betel nut, cloves, cardamon, nutmeg, cubes, borneol, menthol and licorice under heading 2106, HTSUS.

FACTS:

In NY 830068, CBP described the pan masala as follows:

> The product consists of chopped betel nuts coated with flavors and spices. The stated ingredients are betel nuts, catechu, lime, cardamon, and flavors. The merchandise is packaged with a small plastic spoon in a foil-sealed metal container holding 100 grams, net weight. Pan masala is consumed after meals, a small spoonful placed in the mouth and chewed as a stimulant and digestive aid.

ISSUE:

Whether the subject pan masala is classified under heading 2106, HTSUS, as a food preparation, or under heading 2008, HTSUS, as prepared nuts, fruits, and other edible parts of plants.

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 GRIs may then be applied.

The 2022 HTSUS provisions under consideration are as follows:

2008	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:
	Nuts, peanuts (ground-nuts) and other seeds, whether or not mixed together:
2008.19	Other, including mixtures:
2008.19.90	Other...
2008.19.9090	Other...
	* * * * *
2106	Food preparations not elsewhere specified or included:
21.06.90	Other:
	Other:
	Other:
	Other:
	Other:
2106.90.99	Other . . .
	* * * * *

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the HTSUS at the international level. While not legally binding or 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 (August 23, 1989).

The ENs to heading 2008, HTSUS, provided, in relevant part, as follows:

> This heading covers fruit, nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in preceding headings of this Chapter.

* * * * *

At issue is whether the merchandise described as "pan masala," is classified under heading 2008, HTSUS, or under heading 2106, HTSUS. Heading 2008, HTSUS, provides for "fruits, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included." The decision in NY 830068, classified the pan masala under heading 2106, HTSUS, which provides for "food preparations not elsewhere specified or included." Heading 2106, HTSUS, is a residual provision also known as a "basket provision" which provides for, "food preparations not elsewhere specified or included." It is well settled that classification in a basket provision is only appropriate if there is no tariff category that covers the merchandise

more specifically. *See E.M. Industries v. U.S.*, 999 F. Supp. 1473, 1480 (CIT 1998) ("'Basket' or residual provisions of HTSUS headings ... are intended as a broad catch-all to encompass the classification of articles for which there is no more specifically applicable subheading."). Hence, in order for the subject pan masala to be classified under heading 2106, HTSUS, it must first, be a food preparation, and secondly, it must not be more specifically described or included under another tariff provision.

Food preparations of heading 2106, HTSUS, are generally considered to be mixtures of food ingredients to be used in or with other foods. The terms "food," "preparation," and "food preparation" are not defined in the HTSUS. The ENs to heading 2106 explain that "Preparations for use, either directly or after processing ... for human consumption". *See* EN(A) 21.06. Similarly, in *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998), the United States Court of Appeals for the Federal Circuit ("CAFC") previously explained that the term "prepared" suggests, but does not require, the addition of incidental ingredients that do not affect the essential character of the product. The CAFC concluded that producing a preparation necessarily involves some degree of processing or addition of ingredients. *Id*. at 1442. The CAFC further noted that inherent in the term "preparation" is the notion that the object involved is destined for a specific use. *Id*. Moreover, the CAFC referred to The Oxford English Dictionary definition of "preparation" which is "'a substance specially prepared or made up for its appropriate use or application.'" *Id*. (citing The Oxford English Dictionary 374 (2d. ed. 1989)). It follows that a food substance which is subjected to a process or treatment to ready that substance for a specific use or consumption can be considered a "food preparation" or a prepared food product.

Pan masala is most often considered to be an item to aid digestion or used as a breath freshener for use after consuming highly spicy meals.[1] The subject pan masala is used for that purpose. It is prepared by means of chopping betel nuts, mixing, and coating the betel nuts with catechu, lime, cardamon and various flavors to prepare it for immediate consumption. In this regard, the subject pan masala is indeed a food preparation or said differently, edible ingredients, which have been prepared for immediate consumption. Accordingly, the subject pan masala is described by the terms of heading 2106, HTSUS, as it is a food preparation. However, when as the case is here, a more specific heading describes a particular product, classification under a basket provision is inapplicable.

In the instant case, the subject pan masala is more specifically provided for under heading 2008, HTSUS. Heading 2008, HTSUS, provides for "fruits, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included." Classification under heading 2008, HTSUS, requires that a product be 1) a fruit, nut or an edible part of a plant; 2) that has been otherwise prepared or preserved; and finally, 3) that it is not more specifically provided for elsewhere. Under our facts, the primary component ingredients of the subject pan masala consist of nuts, fruits and edible parts of plants (i.e., betel nut, catechu, lime and cardamon seed). Betel nut (Areca nut) is the seed of the fruit berry that grows on the areca palm tree. Thus, it is a nut which is specifically provided for under the terms of heading

[1] *What is Pan masala, Mary McMahon*, Delighted Cooking (February 15, 2022). (Last visited March 23, 2022).

2008, HTSUS. Similarly, catechu, another ingredient of the subject pan masala, is an extract of the Acacia tree and is therefore an edible part of plants described by the terms of heading 2008, HTSUS. Cardamon is a spice made from the seeds of the Elettaria Cardamomum plant and is therefore an edible part of a plant. Lime, of course, is a fruit. Accordingly, each one of the primary ingredients to the subject pan masala are described by the terms of heading 2008, HTSUS.

The production of pan masala fits squarely with the definition of food preparations which have been prepared for human consumption. The subject pan masala is produced by first skinning and cutting the betel nut which is then scanned and cleaned. Simultaneously the catechu is baked and blended with the lime and other spices. The lime and catechu are reduced to powder before being mixed and thereafter blended with the betel nut. Other spices are often added for flavor. Likewise, the betel nut powder of DD H890859 is produced in a similar manner and includes combined ingredients such as, betel nut, cloves, cardamon, nutmeg, cubes, borneol, menthol and licorice. These betel nut products are considered to be prepared for purposes of heading 2008, HTSUS, because the additional component ingredients have been mixed with the betel nut, with combined component ingredients being subjected to a production process in such a manner that the finished product is ready for consumption. Based on its manner of preparation and its specific use for human consumption, we conclude that the subject pan masala product is a preparation which is specifically described by the terms of heading 2008, HTSUS. This finding is consistent with other CBP rulings involving substantially similar merchandise. For example, in NY 891608, dated November 10, 1998, CBP classified a product which consisted of betel nut, catechu, lime, cardamom, and other flavors under heading 2008, HTSUS.

HOLDING:

By application of GRI 1, the subject pan masala betel nut food product is classified in heading 2008, HTSUS. Specifically, it is classified under subheading 2008.19.9090, HTSUSA, which provides for: "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Other, including mixtures: Other, including mixtures: Other: Other." The column one rate of duty is 17.9 % *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at https://hts.usitc.gov/current.

EFFECT ON OTHER RULINGS:

NY 830068, dated June 9, 1988, is hereby REVOKED. DD H890859, dated October 22, 1993, is hereby REVOKED.

Sincerely,

YULIYA A. GULIS
for

GREGORY CONNOR,
Acting Director
Commercial and Trade Facilitation Division

U.S. Court of International Trade

Slip Op. 22–116

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

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

[Sustaining in part and remanding in part the U.S. Department of Commerce's final results in the 2018 administrative review of the countervailing duty order on certain carbon and alloy steel cut-to-length plate from the Republic of Korea.]

Dated: October 5, 2022

Maureen E. Thorson, Wiley Rein LLP, of Washington, DC, argued for Plaintiff. On the brief were *Alan H. Price*, *Christopher B. Weld*, *Derick G. Holt*, *Adam M. Teslik*, and *Theodore P. Brackemyre*.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the brief was *Reza Karamloo*, Assistant Chief Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

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

Barnett, Chief Judge:

Plaintiff Nucor Corporation ("Nucor") challenges the U.S. Department of Commerce's ("Commerce" or "the agency") final results in the 2018 administrative review of the countervailing duty ("CVD") order on certain carbon and alloy steel cut-to-length plate ("CTL plate") from the Republic of Korea ("Korea"). Compl., ECF No. 5; *Certain Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea*, 86 Fed. Reg. 15,184 (Dep't Commerce Mar. 22, 2021) (final results and partial rescission of [CVD] admin. review, 2018) ("*Final Results*"), ECF No. 18–4, and accompanying Issues and Decision Mem., C-580–888 (Mar. 16, 2021) ("I&D Mem."), ECF No. 18–5.[1]

[1] The administrative record for the *Final Results* is contained in a Public Administrative Record ("PR"), ECF No. 18–1, and a Confidential Administrative Record ("CR"), ECF No. 18–2. The parties submitted joint appendices containing record documents cited in their briefs. *See* Confid. J.A. ("CJA"), ECF No. 43; Public J.A., ECF No. 44; Confid. Suppl. J.A., ECF No 50; Public Suppl. J.A., ECF No. 51. The court references the confidential record documents unless otherwise specified.

Nucor challenges Commerce's determination not to initiate an investigation into the alleged provision of off-peak electricity for less than adequate remuneration (sometimes referred to as "LTAR") and Commerce's determination that mandatory respondent POSCO and its affiliate POSCO Plantec ("Plantec") do not meet the requirements necessary to find a cross-owned input supplier relationship. Confid. [Nucor's] Rule 56.2 Mot. for J. on the Agency R. and accompanying Mem. in Supp. of its Rule 56.2 Mot. for J. on the Agency R. ("Nucor's Mem.") at 18–45, ECF No. 22; Confid. [Nucor's] Reply Br. ("Nucor's Reply") at 1–14, ECF No. 41. Defendant United States ("the Government") and Defendant-Intervenor POSCO urge the court to sustain the *Final Results*. Confid. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R. ("Def.'s Resp.") at 6–25, ECF No. 31; Confid. Def.-Int. POSCO's Br. in Resp. to Pl.'s Mot. for J. on the Agency R. ("POSCO's Resp.") at 8–23, ECF No. 36.

For the following reasons, the court sustains in part and remands in part Commerce's *Final Results.*

BACKGROUND

I. CVD Overview

A countervailable subsidy "exists when . . . a foreign government provides a financial contribution . . . to a specific industry" that confers "a benefit" on "a recipient within the industry." *Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365, 1369 (Fed. Cir. 2014) (citing 19 U.S.C. § 1677(5)(B)). A countervailable benefit includes the provision of goods or services "for less than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv) (2018).[2] 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 examines "whether the government price is consistent with market principles." *Id.*

[2] Further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, and all references to the U.S. Code are to the 2018 edition, unless otherwise specified.

§ 351.511(a)(2)(iii).[3] Commerce's analysis considers "such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,378 (Dep't Commerce Nov. 25, 1998) ("*CVD Preamble*"). Those factors are not "in any hierarchy," and Commerce "may rely on one or more of these factors in any particular case." *Id.*

II. Proceedings Before Commerce/b

On May 25, 2017, Commerce published the CVD order on CTL plate from Korea. *Certain Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea*, 82 Fed. Reg. 24,103 (Dep't Commerce May 25, 2017) ([CVD] order) ("*Korea CTL Order*"). On July 15, 2019, Commerce initiated the second administrative review of the *Korea CTL Order* for the 2018 period of review ("POR"). *Initiation of Antidumping and Countervailing Duty Admin. Reviews*, 84 Fed. Reg. 33,739, 33,749 (Dep't Commerce July 15, 2019), PR 4, CJA Tab 3. Commerce selected POSCO as the sole mandatory respondent for the review. Respondent Selection Mem. (Aug. 2, 2019) at 4, CR 3, PR 14, CJA Tab 4.

On November 4, 2019, Nucor submitted new subsidy allegations asking Commerce to initiate investigations into the debt restructuring program of Plantec, an alleged cross-owned input supplier to POSCO, and the Korean government's sale of off-peak electricity to POSCO for less than adequate remuneration. *See* New Subsidy Allegations (Nov. 4, 2019) ("Nucor's Allegation"), CR 182–84, PR 76–78, CJA Tab 7. On April 1, 2020, Commerce declined to initiate either investigation. Decision Mem. on New Subsidy Allegations (Apr. 1, 2020) ("New Subsidy Mem."), PR 144, CJA Tab 12. Commerce explained that, with respect to Plantec, it was unnecessary "to separately initiate an investigation of this allegation" because Commerce was "examining this alleged subsidy as a self-reported program in this review." *Id.* at 4. Commerce also declined to initiate an investigation into the sale of electricity, finding that Nucor failed to "adequately support[] its allegation with respect to the existence of a benefit." *Id.* at 7. On April 9, 2020, Nucor asked Commerce to reconsider its decision. Req. for Recons. of New Subsidy Allegation (Apr. 9, 2020) ("Req. for Recons."), CR 254, PR 148, CJA Tab 13.

[3] Commerce first seeks to compare the government price to a market-based price for the good or service under investigation in the country in question. 19 C.F.R. § 351.511(a)(2)(i). When an in-country market-based price is unavailable, Commerce will compare the government price to a world market price, when the world market price is available to purchasers in the country in question. *Id.* § 351.511(a)(2)(ii).

Commerce issued its preliminary results on July 27, 2020. *Certain Carbon and Alloy Steel Cut-to-Length Plate From the Republic of Korea*, 85 Fed. Reg. 45,185 (Dep't Commerce July 27, 2020) (prelim. results of [CVD] admin. review, and intent to rescind review, in part; 2018) ("*Prelim. Results*"), PR 170, CJA Tab 16, and accompanying Prelim. Decision Mem. ("Prelim. Mem."), PR 161, CJA Tab 15. Commerce preliminarily found that "the production of [Plantec's] input is not primarily dedicated to the production of the downstream product, including the subject merchandise." Prelim. Mem. at 12. Commerce also found that "POSCO's purchases of fixed assets and services from [Plantec] during the POR were for maintenance, repair and operation of pre-existing machinery" and the services were not "a part of steel production that is dedicated primarily to the production of a higher value-added product." *Id.* at 12–13. Commerce did not address Nucor's allegation regarding the off-peak sale of electricity. Commerce preliminarily calculated a net subsidy rate of 0.5 percent *ad valorem* for POSCO. *Prelim. Results*, 85 Fed. Reg. at 45,186.

Commerce published the *Final Results* on March 22, 2021. 86 Fed. Reg. at 15,184. For the *Final Results*, Commerce calculated a *de minimis* net subsidy rate of 0.49 percent *ad valorem* for POSCO. 86 Fed. Reg. at 15,185. Additional background regarding Commerce's findings for the *Final Results* is set forth in the sections below.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii), and 28 U.S.C. § 1581(c).

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

DISCUSSION

I. Commerce's Determination Not to Investigate the Alleged Sale of Off-Peak Electricity for Less Than Adequate Remuneration

A. Standard for Initiation

Commerce "shall" initiate a CVD investigation "whenever an interested party" files a petition[4] "on behalf of an industry" that "alleges the elements necessary for the imposition of the duty imposed by section 1671(a) of this title" and provides "information reasonably

[4] The statute also permits Commerce to self-initiate an investigation. 19 U.S.C. § 1671a(a).

available to the petitioner supporting those allegations." 19 U.S.C. § 1671a(b)(1). Commerce "examine[s] the accuracy and adequacy of the evidence provided in the petition" and, "on the basis of sources readily available to the [agency],"[5] decides "whether to initiate an investigation." 19 C.F.R. § 351.203(b)(1); *see also* 19 U.S.C. § 1671a(c)(1)(A). While these provisions are directed to the initial allegations of subsidization, Commerce applies these standards to any additional subsidy allegations brought after a CVD order is imposed, such as during an administrative review. *See* 19 C.F.R. § 351.301(c)(2)(iv)(B) (providing for the submission of new subsidy allegations in an administrative review); I&D Mem. at 25 (citing 19 U.S.C. § 1671a(b)(1)).

A petition or subsequent subsidy allegation functions "like a civil complaint" and is intended "to alert the agency to the possibility of a subsidy." *RZBC Grp. Shareholding Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1288, 1292 (2015). Thus, "most subsidy petitions are granted unless the allegations are clearly frivolous, not reasonably supported by the facts alleged or omit important facts which are reasonably available to the petitioner." *Id.* at 1295 (citation and ellipsis omitted); *see also SolarWorld Ams., Inc. v. United States*, 39 CIT __, __, 125 F. Supp. 3d 1318, 1330–31 (2015) (sustaining Commerce's determination not to investigate when the allegation lacked evidence of a benefit).

In some circumstances, a heightened standard may apply. "When allegations concern a program previously held non-countervailable," Commerce may "require[] a petition to contain evidence of changed circumstances . . . before an investigation is initiated." *Delverde, SrL v. United States*, 21 CIT 1294, 1296–97, 989 F. Supp. 218, 222 (1997), *vacated on diff't grounds by Delverde SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000); *see also Bethlehem Steel Corp. v. United States*, 25 CIT 307, 315, 140 F. Supp. 2d 1354, 1363 (2001) (applying this standard). Commerce did not invoke this heightened standard in its determination and, at the hearing, the Government confirmed that Commerce did not apply this standard to Nucor's allegation even though Commerce previously investigated the Korean government's sale of electricity. Oral Arg. 34:05–34:15 (time stamp from the recording on file with the court).

[5] Commerce may "seek information from sources other than the petitioner" when, *inter alia*, "[s]upport for a particular allegation is weak, but better information is unavailable to the petitioner." *Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7,308, 7,313 (Dep't Commerce Feb. 27, 1996) (proposed rule); *see also Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,307 (May 19, 1997) (final rule).

B. The Korean Electricity Market

The court previously summarized the characteristics of the Korean electricity market in an opinion addressing challenges to Commerce's determination that electricity was not subsidized in the CVD investigation covering certain cold-rolled steel products from Korea. *See generally POSCO v. United States*, 46 CIT __, __, 557 F. Supp. 3d 1290, 1293–94 (2022). Background that is also relevant to this administrative review is recounted here:

> Korea Electric Power Corporation ("KEPCO") is a state-owned entity and the exclusive supplier of electricity in Korea. In Korea, electricity is generated by independent power generators, community energy systems, and KEPCO's six subsidiaries. By law, electricity must be bought and sold through the Korean Power Exchange ("KPX"), including by KEPCO. Accordingly, electricity generators sell electricity to the KPX, and KEPCO purchases the electricity it distributes to its customers through the KPX.
>
> . . .
>
> 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). The variable cost and the capacity price are determined in advance of trading by the Cost Evaluation Committee.
>
> . . .
>
> To sell electricity, generators submit bids to the KPX to supply electricity for a given hour one day in advance of trading. 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. The KPX continues to award purchase orders, based on variable cost, until the projected demand for electricity for such hour is met. The 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. (internal quotation marks, citations, ellipses, and bracketing omitted). In the underlying proceeding, Commerce likewise understood the system marginal price ("SMP") to represent "the marginal price of electricity at a given hour at which the projected demand for electricity and the projected supply [of] electricity for such hour in-

tersect." New Subsidy Mem. at 7 & n.54 (citing New Subsidy Allegations Suppl. Questionnaire Resp. (Dec. 31, 2019) ("Nucor's Suppl. Allegation") at 4–5, PR 94, CJA Tab 11).

C. Nucor's Allegation and Commerce's Determination

Nucor alleged that the Korean government cross-subsidized "large industrial electricity consumers" that "shift consumption to the off-peak hours" by charging below-cost prices during that time while charging above-cost prices to on-peak consumers. Nucor's Allegation at 8. Nucor alleged that the difference between off-peak and on-peak pricing cannot be explained by differential consumption rates and supported the allegation with a statement by KEPCO's president and evidence demonstrating the absence of significant variation in the SMP throughout the day. *Id.* at 9–11; *see also id.*, Ex. 9 (SMP data by hour, day, and month). Nucor also submitted evidence that KEPCO was not profitable during the POR, *id.* at 12, and that "revisions to the off-peak industrial electricity pricing structure" were barred by the Korean government "because of complaints from industries," *id.* at 13. Nucor estimated the alleged benefit to the steel industry based on the average off-peak SMP, KPX cost-of-sale data, *id.* at 14–15, and unit prices paid to KEPCO's lowest-priced generator, Req. for Recons. at 7–8.

In the New Subsidy Memorandum, Commerce rejected the SMP as a benchmark. New Subsidy Mem. at 7–8. Commerce reasoned that "[t]he SMP reflects the generation unit with the highest variable cost that receives a purchase order at any given hour" and "does not reflect the average cost of electricity provision." *Id.* at 7 & n.57 (citing Nucor's Suppl. Allegation, Ex. 1 at 35). Commerce also faulted Nucor for "exclud[ing] . . . from its allegation" information regarding "the capacity price" and "adjusted coefficient factor" that KEPCO uses in conjunction with the SMP "to calculate amounts owed to electricity generators." *Id.* at 8. Commerce also found that although KEPCO "operat[ed] at a loss during the POR," it was profitable in the four previous years. *Id.* at 9. Commerce therefore declined to reexamine "KEPCO's cost recovery" as a basis for finding any benefit. *Id.* Lastly, Commerce questioned Nucor's focus on off-peak electricity, explaining that "the prevailing market condition in Korea is a [time-of-use] system" and that Nucor had not shown "that KEPCO's operations are outside of the prevailing market conditions of an electricity utility in Korea." *Id.*

For the *Final Results*, Commerce continued to find that Nucor failed to provide sufficient evidence for Commerce to initiate an investigation into off-peak electricity. I&D Mem. at 20. Commerce re-

jected both the average off-peak SMP and KPX's cost-of-sale data as benchmarks, reasoning that "neither . . . reflect the average price of off-peak electricity for [less than adequate remuneration]." *Id.* at 22. With respect to cost recovery, Commerce did not find "one year without cost recovery sufficient to demonstrate that a government-owned entity is not recovering its costs." *Id.* at 23. Citing *Nucor Corporation v. United States*, 42 CIT __, 286 F. Supp. 3d 1364 (2018), *aff'd Nucor Corp. v. United States*, 927 F.3d 1243 (Fed. Cir. 2019) ("*Nucor CAFC*"), Commerce further explained that preferentiality may be considered in conjunction with other measures, such as cost recovery, when "the marketplace is a government-controlled monopoly." I&D Mem. at 23; *see also id*. at 23–24 & nn.84–86, 88–89.[6] To that end, Commerce relied on Nucor's assertion that "POSCO paid for off-peak electricity at industrial tariff rates given to all industrial electricity buyers in Korea" to find no evidence of preferential treatment. *Id.* at 23–24 & n.87 (citing Nucor's Allegation at 14). Commerce rejected Nucor's argument that the agency had "set an unreasonably high standard for initiation" and instead faulted Nucor for failing to build the record necessary to support its allegation. *Id.* at 25 & nn.94–95 (citing *SolarWorld*, 125 F. Supp. 3d at 1330); *see also id.* at 26.

D. Parties' Contentions

Nucor contends that its allegation "met and exceeded the low evidentiary standard for initiation." Nucor's Mem. at 19. Nucor argues that Commerce impermissibly based its decision on the absence of information—such as actual electricity generation costs—that was not reasonably available to Nucor. *Id.* at 28–29. Noting that the regulation permits Commerce to seek information from sources other than the petitioner, Nucor's Reply at 6–7, Nucor faults Commerce for failing to request information from "the respondent parties" that "'normally . . . are in the best position to provide information'" concerning "an alleged subsidy program," *id.* at 5 (quoting *Fine Furniture*, 748 F.3d at 1369–70). Nucor also contends that Commerce effectively—and impermissibly—found that Nucor had failed to show

[6] In *Nucor CAFC*, the majority affirmed Commerce's determination that the sale of electricity was not for less than adequate remuneration in the investigation concerning certain corrosion-resistant steel products from Korea. 927 F.3d at 1249. The majority's affirmance was, however, based on the agency's finding that 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.* In a subsequent opinion, the appellate court remanded Commerce's determination that electricity was not sold for less than adequate remuneration in the investigation concerning cold-rolled steel after finding that Commerce failed to adequately investigate the role of the KPX in the Korean electricity market. *See POSCO v. United States*, 977 F.3d 1369 (Fed. Cir. 2020) ("*POSCO CAFC*"). Commerce's remand pursuant to *POSCO CAFC* is currently pending appellate review.

"that KEPCO's prices were inconsistent with KEPCO's standard pricing mechanism, i.e., with themselves." Nucor's Mem. at 33 (citing New Subsidy Mem. at 9); *see also* Nucor's Reply at 8–10.

The Government contends that Nucor merely disagrees with Commerce's weighing of the evidence and "it is not this [c]ourt's role to reweigh that evidence." Def.'s Resp. at 9. According to the Government, "[h]aving a low standard for initiation is not the same as having *no* standard at all," *id.* at 12, and Nucor failed to meet its burden of building a record adequate to support its allegation, *id.* at 12–13.

POSCO contends that the court must consider the issue within the context of Commerce's prior investigations into the alleged provision of electricity for less than adequate remuneration. POSCO's Resp. at 9. POSCO accuses Nucor of "ignor[ing] the [time-of-use] system" and "cherry pick[ing] a single time period during the 24-hour period to support the alleged existence of a benefit without regard to overall cost recovery." *Id.* at 11. POSCO contends that Commerce's determination is consistent with the court's decision in *TMK IPSCO v. United States*, 40 CIT __, 179 F. Supp. 3d 1328 (2016). *Id.* at 15.

E. Commerce Must Reconsider or Further Explain Its Decision Not to Investigate Off-Peak Electricity

Nucor's allegation centered on what it characterized as the cross-subsidization of the steel industry through the charging of below-cost prices during off-peak hours that are offset by above-cost prices charged to peak consumers. *See* Nucor's Allegation at 8. Nucor's allegation thus raised two questions: (1) whether the pricing of off-peak electricity could constitute a subsidy program distinct from Nucor's previous allegation regarding the sale of electricity for less than adequate remuneration; and (2) whether Nucor's allegation met the threshold for initiating an investigation into any such program.

Commerce's determination focused on the latter, that is, Nucor's asserted failure to provide a suitable benchmark to compare to the off-peak electricity prices POSCO paid. *See* I&D Mem. at 21–26. While Commerce appeared to question the propriety of examining a segment of a time-of-use system, its discussion in this regard is cursory. *See* New Subsidy Mem. at 9. Commerce explained that the "prevailing market condition in Korea is a [time-of-use] system" and Nucor had not shown that "KEPCO's operations are outside of the prevailing market conditions of an electricity utility in Korea." *Id.* On its face, Commerce's brief statement appears to fault Nucor for failing to demonstrate that KEPCO's prices were inconsistent with KEPCO's own tariff schedule. *See* Nucor's Reply at 8–9. During oral argument, the Government sought to explain that a time-of-use system is consistent with market principles and Nucor had not shown that KEP-

CO's off-peak industrial pricing conferred a benefit within the time-of-use system and was thus inconsistent with market principles. Oral Arg. 46:05–47:10. The Government acknowledged, however, that Commerce did not explicitly address whether the off-peak supply of electricity within such a system may constitute a distinct subsidy program. *Id.* at 36:30–37:45, 44:50–45:30.

It is well settled that the court may only sustain Commerce's decision "on the same basis articulated in the order by the agency itself" and not on the basis of "counsel's *post hoc* rationalizations." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962). Because the Government's assertions at oral argument are not readily discernible from Commerce's explanation, the court limits its consideration to the grounds advanced by Commerce, namely, Nucor's failure to meet the evidentiary threshold for initiating an investigation.

To that end, Commerce's reliance on *SolarWorld* to support its determination is misplaced. *See* I&D Mem. at 25.[7] Nucor's allegation was not, as in that case, "devoid of any evidentiary support." *SolarWorld*, 125 F. Supp. 3d at 1330–31. Rather, Commerce faulted Nucor for failing to provide better cost information without making the corresponding finding that such information was reasonably available to Nucor. *See* New Subsidy Mem. at 8 & n.62 (discussing the capacity price and adjusted coefficient factors); I&D Mem. at 22 (noting that the SMP does not "reflect[] a real-world average unit cost of providing electricity" or "the rates that KEPCO would pay electricity generators" or "the average value of . . . generation costs over the course of the day"); I&D Mem. at 26 (stating that "there was a substantial amount of information available to Nucor" without tying that information to the deficiencies Commerce identified).

At the hearing, the Government pointed to Commerce's rejection of KPX pricing data as a specific example of Nucor failing to support its allegation. Oral Arg. 43:00–43:45 (citing I&D Mem. at 22). Commerce stated: "Unless the average price KPX provided to KEPCO can be isolated to off-peak hours, this benchmark cannot make an equivalent comparison to the tariff schedules' off-peak prices POSCO paid . . . ." I&D Mem. at 22. While the KPX pricing data may not be a perfect

[7] POSCO's reliance on *TMK IPSCO* also is misplaced. In *TMK IPSCO*, the court sustained Commerce's application of a heightened standard to an allegation concerning export restraints based on Commerce's practice of requiring petitioners to present historical data supporting such allegations. 1789 F. Supp. 3d at 1339. The court explicitly rejected the plaintiff's reliance on *RZBC Group* to support a lower initiation standard because "that case did not involve an allegation of indirect subsidies, such as an export tax, where it is Commerce's practice to hold petitioners to a higher standard of proof before initiating an investigation." *Id.* at 1340 n.18. Just as *RZBC Group* was inapposite to the facts of *TMK IPSCO*, so is *TMK IPSCO* inapposite here.

benchmark, Commerce failed to address whether the time-period-specific data that Commerce preferred was "reasonably available" to Nucor. *See* 19 U.S.C. § 1671a(b)(1). Given the substantial amount of information Nucor provided and the typically "low" bar "for launching a CVD inquiry," Commerce's determination is unsupported by substantial evidence and lacking reasoned explanation. *See RZBC Grp.*, 100 F. Supp. 3d at 1292. Accordingly, the court remands Commerce's determination not to investigate off-peak electricity for further explanation or reconsideration.

II. Commerce's Determinations Regarding Plantec

A. Legal Framework for Subsidy Attribution

The provision of countervailable subsidies by a foreign government may be direct or indirect "with respect to the manufacture, production, or export" of subject merchandise to the United States. *See* 19 U.S.C. § 1671(a)(1). Commerce has promulgated rules addressing the attribution of subsidy benefits to a respondent based on corporate cross-ownership. 19 C.F.R. § 351.525(b)(6). With respect to inputs, when "there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, [Commerce] will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations)." *Id.* § 351.525(b)(6)(iv).

In the preamble to the final rule, Commerce explained that the regulation is intended to capture situations in which "a subsidy is provided to an input producer whose production is dedicated almost exclusively to the production of a higher value added product—the type of input product that is merely a link in the overall production chain." *CVD Preamble*, 63 Fed. Reg. at 65,401 (providing as examples "stumpage subsidies on timber that was primarily dedicated to lumber production and subsidies to semolina primarily dedicated to pasta production"). Conversely, when inputs "are not primarily dedicated to the downstream products," Commerce will not "assume that the purpose of a subsidy to the input product is to benefit the downstream product." *Id.* (noting, by way of example, that "it would not be appropriate to attribute subsidies to a plastics company to the production of cross-owned corporations producing appliances and automobiles").

B. Commerce's Determination

Commerce's determination is contained in both the I&D Memorandum and an accompanying confidential memorandum. I&D Mem. at

31–36; Business Proprietary Information Accompanying the [I&D Mem.] for the Final Results ("BPI Mem."), CR 302, PR 188, CJA Tab 20. Those memoranda together explain Commerce's decision not to attribute subsidies received by Plantec in connection with POSCO's purchase of steel scrap and other equipment and services. BPI Mem. at 1 (note 1).

In its analysis, Commerce considered "whether Plantec's production was primarily dedicated to the production of downstream product, and whether the inputs provided by Plantec were inputs primarily dedicated to the production of subject merchandise." I&D Mem. at 33. In response to Nucor's argument that agency precedent supported attribution, *id.* at 27,[8] Commerce found that "Plantec's production [was] not 'dedicated almost exclusively to the production of a higher value product' (i.e., POSCO's steel production)" and identified Plantec's "primary function" to be "the 'construction of industrial plant[s],'" *id.* at 33 & n.135 (quoting Prelim. Mem. at 12). Commerce also made specific findings in relation to scrap and other equipment and services, discussed more fully below.

C. Scrap

Commerce declined to attribute subsidies received by Plantec to POSCO because Plantec generated the scrap as a byproduct and sold the scrap to POSCO Daewoo Corporation ("PDC"), which, in turn, resold the scrap to POSCO. I&D Mem. at 34; BPI Mem. at 2 (note 4). Commerce thus distinguished decisions that did not involve an intermediary or that reflected "production" of scrap. I&D Mem. at 34 & nn.143, 144, 146 (citing *Rebar From Turkey 2017* Prelim. Mem. at 10–11; *OCTG From Turkey* Mem. at 8). Commerce noted that its determination was consistent with its findings in the 2017 administrative review of the CVD order on cold-rolled steel from Korea ("*CRS From Korea 2017*"). *Id.* at 34 & n.139 (citing Issues and Decision Mem. for the Final Results of the 2017 Admin. Review: Certain Cold-Rolled Steel Flat Products from the Republic of Korea,

[8] Nucor relied on: Decision Mem. for the Prelim. Results of CVD Admin. Review, and the Prelim. Intent to Rescind, in Part: Steel Concrete Reinforcing Bar from the Republic of Turkey; 2017, C-489–819 (Jan. 9, 2020) ("*Rebar From Turkey 2017* Prelim. Mem."), available at https://access.trade.gov/Resources/frn/summary/turkey/2020–00743–1.pdf (last visited Oct. 5, 2022); Issues and Decision Mem. for the Final Determination in the CVD Investigation of Certain Oil Country Tubular Goods from the Republic of Turkey, C489–817 (July 10, 2014) ("*OCTG From Turkey* Mem."), available at https://access. trade.gov/Resources/frn/summary/turkey/2014–16860–1.pdf (last visited Oct. 5, 2022); and Issues and Decision Mem. for the Final Determination in the CVD Investigation of Certain Cold-Rolled Steel Flat Prods. from Brazil, C-351–844 (July 20, 2016) ("*CRS From Brazil* Mem."), available at https://access.trade.gov/Resources/frn/summary /brazil/2016–17952–1.pdf (last visited Oct. 5, 2022).

C-580–882 (June 22, 2020) at Cmt. 2, available at https://access.trade.gov/Resources/frn/summary/korea-south/2020–13813–1.pdf (last visited Oct. 5, 2022)).

1. Parties Contentions

Nucor contends that Commerce's determination that Plantec did not supply steel scrap to POSCO is arbitrary and unlawful. Nucor's Mem. at 39; Nucor's Reply at 13–14. Nucor asserts that Commerce's reliance on the presence of an intermediary (PDC) reopens a loophole for vertically integrated businesses that the regulation was intended to close. Nucor's Mem. at 39 (citing *CVD Preamble*, 63 Fed. Reg. at 65,401); *see also* Nucor's Reply at 14. Nucor further contends that Commerce recently "disavowed the very 'primary function' standard that it defends" in this case. Nucor's Reply at 18 (citing Issues and Decision Mem. for the Final Results of the CVD Admin. Review of Steel Concrete Reinforcing Bar from the Republic of Turkey; 2018, C-489–819 (Sept. 21, 2021) ("*Rebar From Turkey 2018* Mem.") at 23, 26, available at https://access.trade.gov/Resources/frn/summary/turkey/2021–20906–1.pdf (last visited Oct. 5, 2022)).

The Government contends that Commerce's determination is supported by evidence regarding Plantec's "primary function" and evidence that the inputs provided by Plantec "were not primarily dedicated to the steel production process." Def.'s Resp. at 18. The Government further contends that "Plantec failed to satisfy the regulatory criteria of a cross-owned input supplier" because "it did not *supply* scrap to POSCO." *Id.* at 19 (citing I&D Mem. at 33); *see also id.* at 20–21; POSCO's Resp. at 23 (advancing similar arguments).

2. Commerce Must Reconsider Its Decision Regarding Scrap

Commerce began its analysis by noting that it examined (1) "whether Plantec's production was primarily dedicated to the production of downstream product," and (2) "whether the inputs provided by Plantec were inputs primarily dedicated to the production of subject merchandise." I&D Mem. at 33.

With respect to the first consideration, while not specific to scrap, Commerce found that because "Plantec's primary function is the 'construction of industrial plants,'" I&D Mem. at 33 & n.135 (citation omitted), "Plantec's production is not dedicated almost exclusively to . . . POSCO's steel production," *id.* at 33. Commerce's reliance on

Plantec's primary function was not, however, further explained.[9] This omission undermines Commerce's determination because Commerce has elsewhere stated "that [the] primary business activity of the affiliated company that is providing the input is [not] a relevant factor in . . . most cases." *Rebar From Turkey 2018* Mem. at 26 (finding scrap primarily dedicated to rebar production when it was generated as a by-product of the supplier's ship-building activities); *see also* Decision Mem. for the Prelim. Determination in the CVD Investigation of Certain Cold-Rolled Steel Flat Prods. from Brazil, C-351–844 (Dec. 15, 2015) ("*CRS From Brazil* Prelim. Mem.") at 18, available at https://access.trade.gov/Resources/frn/summary/brazil/2015–32221–1.pdf (last visited Oct. 5, 2022) (attributing subsidies received by a cross-owned supplier of steelmaking equipment when the affiliate's "activities encompass[ed] the production of capital goods and assemblies, steel structures, bridges, blanks and forgings and similar projects, as well as industrial maintenance) (unchanged in relevant respects in the final results).

At the hearing, the Government argued that Commerce declined to attribute subsidies based on Plantec's sale of scrap because the volume of such sales was small in relation to total sales by Plantec to POSCO. Oral Arg. 1:20:40–1:22:15. The Government's argument is impermissibly *post hoc*, *see Burlington Truck Lines*, 371 U.S. at 168–69, and appears to be unsupported by the agency's citations to the record.[10] Moreover, while Commerce has declined to attribute

[9] The *CVD Preamble* explains that Commerce's regulation is intended to address "the situation where a subsidy is provided to an input producer *whose production* is dedicated almost exclusively to the production of a higher value added product—the type of input product that is merely a link in the overall production chain." 63 Fed. Reg. at 65,401 (emphasis added). While this may be intended to refer to the overall production operation of the producer, the preamble subsequently refers to whether "the production of the *input* product is primarily dedicated to the production of the downstream product," *id.* (emphasis added), and it is this latter phrasing that is reflected in the regulation, 19 C.F.R. § 351.525(b)(6)(iv). The court does not suggest that Plantec's primary business activities are necessarily immaterial to Commerce's analysis; however, Commerce has not sufficiently explained the relevance of those findings to its determination.

[10] The Government pointed to note 2 of Commerce's confidential memorandum, which reflected, in Korean Won ("KRW"), Plantec's sale of "3,166 million KRW" in raw materials to POSCO. *Id.*; *see also* BPI Mem. at 2 (note 2). The Government argued that this figure reflected sales of scrap. Oral Arg. 1:20:40–1:22:15. That assertion is incorrect. Note 3 "identifie[s] the raw materials that Plantec provided as [[ ]]." BPI Mem. at 2 (note 3). Indeed, as Commerce further notes, "[t]he sale of scrap does not appear in POSCO's financial statements as a transaction with Plantec" but, consistent with the presence of an intermediary, "in PDC's raw material ledger that reconciles to Note 36 of POSCO's financial statements." *Id.* at 2 (note 4) (citing POSCO's Aff. QR, Ex. 5). Information contained therein reflects raw material sales from PDC in the amount of [[ ]] million KRW, a substantially higher value. POSCO's Aff. QR, Ex. 2 (note 37), Ex. 5. It is, however, for Commerce on remand to evaluate the significance, if any, of this value. (While Commerce cited Note 36 of POSCO's financial statements, the information regarding related party transactions appears in Note 37.)

subsidies when the volume of scrap sold to the respondent was small in comparison to the respondent's total production costs,[11] Commerce has attributed subsidies in other instances "[r]egardless of the amount of steel scrap manufactured by [an affiliate]," *Rebar From Turkey 2018* Mem. at 27; *Içdaş Celik Enerji Tersane ve Ulsim Sanayi A.S. v. United States*, 45 CIT __, __, 498 F. Supp. 3d 1345, 1364 (2021) (sustaining Commerce's determination to attribute subsidies received by a cross-owned scrap supplier when the volume of scrap provided was "low" and the Government argued that that "the quantity of scrap provided . . . is irrelevant to Commerce's analysis").

With respect to the second consideration, Commerce based its decision on a distinction between producing scrap and generating scrap as a byproduct and on the presence of an intermediary. *See* I&D Mem. at 34 & n.143 (stating that "Plantec generated the scrap, but neither produced nor provided the scrap to POSCO") (citing, by way of contrast, *Rebar From Turkey 2017* Prelim. Mem. at 10–11). Commerce's determination with respect to scrap cannot be sustained on these grounds.

First, Commerce has found steel scrap primarily dedicated to the production of rebar when "there [was] no question" that the input supplier generated steel scrap as a "byproduct." *Rebar From Turkey 2018* Mem. at 26; *see also OCTG From Turkey* Mem. at 7–8 (rejecting an argument against attribution when the input supplier did not "produce[]" the scrap). Thus, notwithstanding consistency with Commerce's determination in *CRS From Korea 2017*, without some basis for finding the distinction between producing scrap and generating scrap relevant here, Commerce's decision in this segment of the proceeding appears impermissibly arbitrary. *See SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]gency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.") (second alteration in original) (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)).

Second, Commerce's reliance on Plantec's supply of scrap to POSCO through PDC suggested that the agency did not interpret the attribution regulation to apply in these circumstances. *See* I&D Mem. at 34; BPI Mem. at 2 (notes 2, 4). At the hearing, however, the Government stated that the regulation can apply when inputs are sold through an intermediary and, thus, the inquiry does not necessarily

[11] By way of example, see Issues and Decision Mem. for the Final Aff. Determination of the [CVD] Investigation of Forged Steel Fluid End Blocks from the Federal Republic of Germany, C-428–848 (Dec. 7, 2020) at 58, available at https://access.trade.gov/Resources/frn/summary/germany/2020–27335–1.pdf (last visited Oct. 5, 2022).

end there. Oral Arg. 1:27:10–1:27:20. Without further explanation from Commerce, the court is unable to discern the relevance of PDC to Commerce's determination.[12]

The court recognizes that decisions regarding attribution are fact specific and Commerce may reach different conclusions in different cases in relation to the same input. *See* I&D Mem. at 33. Nevertheless, "Commerce must explain the basis for its decisions." *NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("[W]hile its explanations do not have to be perfect, the path of Commerce's decision must be reasonably discernable to a reviewing court."). In a case such as this, in which various prior Commerce determinations appear to support the arguments of both Plaintiff and Defendant-Intervenor, it is incumbent upon Commerce to go beyond simply identifying one set of prior decisions in support of its determination. Commerce must provide a clear rationale, supported by substantial evidence, for the agency's determination. Because Commerce has failed to provide such a rationale regarding Plantec's provision of scrap, this issue is remanded to Commerce for reconsideration or further explanation.

D. Equipment and Services

Plantec directly provided POSCO with raw materials,[13] "fixed assets,"[14] and services.[15] Commerce found that the raw materials and fixed assets are not "tied specifically to the production of any steel products" but are "used in a typical manufacturing process." BPI Mem. at 2 (note 3). Commerce stated that the raw materials and fixed assets are not "inputs dedicated almost exclusively to the production of downstream steel products" and are not "link[s] in the overall steel production chain." *Id.* at 3 (note 6); *see also* I&D Mem. at 33 (likening the inputs Plantec supplied to the example in the *CVD Preamble* of plastic used in the production of an automobile).

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[12] During oral argument, POSCO suggested that PDC is further processing the scrap before selling it to POSCO. Oral Arg. 1:32:20–1:32:40. Commerce, however, did not make that factual finding or indicate that such a finding was relevant to its determination.

[13] The raw materials consisted of [[
]]. BPI Mem. at 2 (note 3).

[14] The fixed assets consisted of: [[
]]. *Id.* (alteration in original). POSCO reported that "[n]one of these fixed assets are actual machinery or equipment used to produce the downstream product; they are instead related to repair and maintenance of pre-existing machinery." POSCO's Resp. to Nucor's New Subsidy Allegations (Nov. 21, 2019) ("POSCO's NSA Resp.") at 10, CR 185, PR 88, CJA Tab 9.

[15] POSCO purchased [[ ]]. BPI Mem. at 2–3 (note 5).

Commerce further found that Plantec's services are not "a type of input production primarily dedicated to POSCO's production of steel" because "they are not an actual part of POSCO's steel production process." BPI Mem. at 3 (note 5). Commerce noted that certain services are limited in nature.[16] *See id.* at 3 (note 6). Commerce found that Plantec did not produce the steelmaking equipment it provided to POSCO and instead "only provided services *related* to such equipment." I&D Mem. at 36.[17] Commerce distinguished *CRS From Brazil* as a proceeding in which Commerce attributed subsidies based on the supply of steel mill parts and equipment but not services. I&D Mem. at 36 & n.159 (citing *CRS From Brazil* Mem. at Cmt. 16).

1. Parties' Contentions

Nucor contends that Commerce's determination regarding steel mill equipment and services was unlawful and unsupported by record evidence. Nucor's Mem. at 41. Nucor argues that Commerce impermissibly considered the nature of Plantec's operations in relation to POSCO's steel production rather than "whether the input (steelmaking equipment and services) was dedicated to production of a downstream product (steel)." *Id.* at 43. Nucor also asserts that Commerce's analysis departs from its determination in *CRS From Brazil*, a proceeding in which the affiliate supplier operated in capital goods and services with customers in varying industries. *Id.* (citing *CRS From Brazil* Prelim. Mem. at 18). Lastly, Nucor points to evidence demonstrating that "Plantec manufactures steel making equipment and machinery" to question Commerce's finding that Plantec did not produce the equipment provided to POSCO. *Id.* at 45 (citing Resp. to Affiliated Cos. Sec. of the Initial Questionnaire (Aug. 19, 2019) ("POSCO's Aff. QR"), Ex. 8 at 3, CR 4–15, PR 20–23, CJA Tab 5); *see also* Nucor's Reply at 16 (asserting that Commerce overlooked evidence that Plantec supplied "actual" steelmaking equipment regarding one of the items characterized as a fixed asset).[18]

The Government contends that Commerce's decision is supported by evidence demonstrating that the parts and services Plantec provided were not "part of POSCO's steel production." Def.'s Resp. at 22–23 (citing BPI Mem. at 2–3). The Government further contends

[16] Commerce stated that "[[ ]] services . . . are limited to [[ ]] that belongs to POSCO." *Id.* at 3 (note 6).

[17] Commerce explained that "Plantec did not produce the parts and tools that were used to [[ ]], but [[ ]]." *Id.* at 3 (note 7).

[18] Specifically, Nucor points to evidence that Plantec supplied [[ ]] that Nucor asserts is used in steelmaking. Nucor's Reply at 16.

that Commerce properly distinguished *CRS From Brazil*. *Id.* at 23. POSCO likewise contends that the "products and services that [Plantec] provided to POSCO were tangentially 'related' to steelmaking equipment or machinery" but were not "step[s]" in the "production of the downstream product." POSCO's Resp. at 21.

2. Commerce's Determination is Sustained in Part and Remanded in Part

Nucor relies primarily on its attempt to analogize the facts of this case to those of *CRS From Brazil*. Nucor's Mem. at 44–45; Nucor's Reply at 16–17. In that proceeding, Usiminas Mechanica, S.A. ("UMSA") provided respondent Usinas Siderurgicas de Minas Gerais SA ("Usiminas") with "parts for Usiminas' plate rolling mill, new technology and structure maintenance." *CRS From Brazil* Mem. at 54; *see also id.* at 2, 5 (defining the company names). Commerce characterized those parts and services as "steelmaking equipment and services" and found that they constituted "inputs into the downstream production of steel." *Id.* at 55. Commerce "attribute[d] to Usiminas the subsidies received by UMSA" based on "UMSA's provision of equipment." *Id.* at 56. Thus, although Commerce found the services provided to constitute inputs, Commerce referenced only the provision of equipment in its final attribution decision. *Id*.

Beyond relying on *CRS From Brazil*, Nucor points to no record evidence to undermine Commerce's finding that the services at issue were not primarily dedicated to the production of the downstream product. Nucor simply asserts that it is enough that Plantec provided "services related to the construction or repair of POSCO's steel mills," Nucor's Mem. at 44, an argument that Commerce addressed and rejected, I&D Mem. at 36 (stating that Plantec "only provided services *related* to such equipment to POSCO"). Thus, the court sees no reason to disturb Commerce's finding with respect to services.

With one exception, discussed below, Nucor's challenge to Commerce's determination with respect to Plantec's provision of raw materials or fixed assets also fails. Nucor argues that Commerce did not adequately focus on whether the equipment was primarily dedicated to production of the downstream product. Nucor's Mem. at 43. Commerce, however, found that such equipment could not "be tied specifically to the production of any steel products" and was instead of a type "used in a typical manufacturing process." BPI Mem. at 2 (note 3). Furthermore, Nucor's reliance on record evidence purporting to demonstrate Plantec's production of steelmaking equipment and machinery is unavailing. Nucor's Mem. at 45 (citing POSCO's Aff. QR, Ex. 8 at 3). The exhibit on which Nucor relies constitutes POSCO's response to Commerce's second supplemental questionnaire in the

investigation underlying the *Korea CTL Order*. *See* POSCO's Aff. QR, Ex. 8 (cover page). The exhibit does not describe the "steel making equipment and machinery" that POSCO reported Plantec manufacturing, *see id.*, Ex. 8 at 3, such that Commerce, or the court, could ascertain its relevance to this administrative review.

For the foregoing reasons, the court finds that Commerce's determination is supported by substantial evidence regarding the nature of the equipment and its uses. The fact that Commerce reached a different conclusion in relation to different equipment in *CRS From Brazil* does not require a remand here.

As indicated above, there is one exception to the foregoing. In its reply brief, Nucor argued that one of the fixed assets in particular—[[ ]]—"under even the narrowest definition of steelmaking equipment, is 'actual steel mill equipment used to make steel products.'"[19] Nucor's Reply at 16 (citing Def.'s Resp. at 23).[20] Because POSCO's description of the product as something used "[[ ]]" suggests use in steelmaking, POSCO's NSA Resp. at 10, and in the absence of any explanation from Commerce why that is not the case, the court will remand this issue for reconsideration or further explanation.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Results* are sustained in part and remanded in part; it is further

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

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[19] The [[ ]] is described as "[[ ]]." BPI Mem. at 2 (note 3).

[20] At the hearing, the court asked the Parties to state their position on whether Nucor adequately preserved for judicial review any distinction concerning this product. Letter to Counsel (Sept. 8, 2022) at 3, ECF No. 48. The Government stated that it did not find Nucor's argument precluded. Oral Arg. 1:25:00–1:25–10. POSCO averred that Nucor never objected to POSCO's description of the fixed assets specifically in relation to the [[ ]] until it filed its reply brief. *Id.* at 1:36:50–1:37:05.

The court finds that Nucor adequately preserved this argument. Commerce was aware of POSCO's description of the [[ ]] and the potential inconsistency with POSCO's assertion that none of the fixed assets were used in steelmaking and were instead "related to repair and maintenance of pre-existing machinery." POSCO's NSA Resp. at 10. Nucor has consistently objected to Commerce's treatment of the fixed assets and argued that they constitute steelmaking equipment. *See, e.g.*, [Nucor's] Case Br. (Aug. 26, 2020) at 16, CR 300, PR 174, CJA Tab 17. Accordingly, the court would not be resolving an issue before the agency had the opportunity "to apply its expertise." *Vinh Hoan Corp. v. United States*, 40 CIT __, __, 179 F. Supp. 3d 1208, 1226 (2016).

ORDERED that, on remand, Commerce shall reconsider or further explain its determination not to treat Plantec as a cross-owned input supplier in connection with the supply of scrap and [[
]]; it is further

ORDERED that Commerce shall file its remand redetermination on or before January 3, 2023; it is further

ORDERED that subsequent proceedings shall be governed by USCIT Rule 56.2(h); if, however Commerce determines to investigate whether off-peak electricity is provided for less than adequate remuneration, the Parties may instead file a joint status report addressing the timing of any necessary further administrative proceedings; and it is further

ORDERED that any comments or responsive comments must not exceed 4,000 words.

Dated: October 5, 2022
New York, New York

/s/ MARK A. BARNETT
Mark A. Barnett, Chief Judge

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