U.S. Customs and Border Protection

REQUEST FOR APPLICANTS FOR APPOINTMENT TO THE COMMERCIAL CUSTOMS OPERATIONS ADVISORY COMMITTEE (COAC)

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

ACTION: Committee Management; request for applicants for appointment to the Commercial Customs Operations Advisory Committee (COAC).

SUMMARY: U.S. Customs and Border Protection (CBP) is requesting that individuals who are interested in serving on the Commercial Customs Operations Advisory Committee (COAC) apply for membership. The COAC provides advice and makes recommendations to the Secretaries of the Department of the Treasury (Treasury) and the Department of Homeland Security (DHS) on all matters involving the commercial operations of CBP and related functions.

DATES: Applications for membership should be submitted to CBP as indicated in the **ADDRESSES** section on or before June 5, 2023.

ADDRESSES: If you wish to apply for membership, your application should be submitted by one of the following means:

- *Email: latoria.p.martin@cbp.dhs.gov.*
- *Mail:* Ms. Latoria Martin, Office of Trade Relations, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Ms. Latoria Martin, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Room 3.5A, Washington, DC 20229. Email: *latoria.p.martin@cbp.dhs.gov;* telephone 202–344–1440.

SUPPLEMENTARY INFORMATION: Section 109 of the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114–125, 130 Stat. 122, February 24, 2016) established the Commercial Customs Operations Advisory Committee (COAC). The COAC is an advisory committee established in accordance with the provisions of

the Federal Advisory Committee Act, 5 U.S.C. chapter 10. The COAC advises the Secretaries of the Department of the Treasury (Treasury) and Department of Homeland Security (DHS) on the commercial operations of U.S. Customs and Border Protection (CBP) and related Treasury and DHS functions. In accordance with section 109 of the Trade Facilitation and Trade Enforcement Act, the COAC shall:

(1) advise the Secretaries of the Treasury and DHS on all matters involving the commercial operations of CBP, including advising with respect to significant changes that are proposed with respect to regulations, policies, or practices of CBP;

(2) provide recommendations to the Secretaries of the Treasury and DHS on improvements to the commercial operations of CBP;

(3) collaborate in developing the agenda for COAC meetings; and

(4) perform such other functions relating to the commercial operations of CBP as prescribed by law or as the Secretaries of the Treasury and DHS jointly direct.

Balanced Membership Plans

The COAC consists of 20 members who are selected from representatives of the trade or transportation communities served by CBP, or others who are directly affected by CBP commercial operations and related functions. The members shall represent the interests of individuals and firms affected by the commercial operations of CBP and shall be appointed without regard to political affiliation. The members will be appointed by the Secretaries of the Treasury and DHS from candidates recommended by the Commissioner of CBP. In addition, members will represent major regions of the country.

COAC Meetings

The COAC meets once each quarter, although additional meetings may be scheduled. The COAC meetings may be held in Washington, DC, or near a CBP port of entry. The members do not receive travel reimbursement or per diem.

COAC Membership

Membership on the COAC is specific to the appointee and a member may not send an alternate to represent him or her at a COAC meeting. The length of the member's term is determined by the Secretaries, not to exceed three years. Regular attendance is essential; a member who is absent for two public meetings within a calendar year, or does not participate in the committee's work, may be removed from the COAC.

Members who are currently serving on the COAC are eligible to re-apply for membership if they are not in their second consecutive term and if they have met the attendance requirements. A new application letter is required and may incorporate copies of previously filed application materials noted herein. Members will not be considered Special Government Employees and will not be paid compensation by the Federal Government for their representative services with respect to the COAC.

Application for COAC Appointment: Any interested person wishing to serve on the COAC must provide the following:

- Statement of interest and reasons for application;
- Complete professional resume;
- Home address and telephone number;
- Work address, telephone number, and email address;
- Statement of the industry you represent; and
- Statement agreeing to submit to pre-appointment mandatory background and tax checks.

A national security clearance is not required for the position. In order for Treasury and DHS to fully leverage broad-ranging experience and education, the COAC must be diverse with regard to professional and technical expertise. Treasury and DHS are committed to pursuing opportunities, consistent with applicable law, to compose a committee that reflects the diversity of the nation's people.

Signing Authority

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

Dated: May 1, 2023.

ROBERT F. ALTNEU,
Director, Regulations and Disclosure Law Division,
Regulations and Rulings,
Office of Trade, U.S. Customs and Border Protection.

[Published in the Federal Register, May 5, 2023 (88 FR 29142)]

19 CFR CHAPTER I

RIN 1601–ZA20

NOTIFICATION OF TERMINATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND CANADA

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

ACTION: Notification of termination of temporary travel restrictions.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security ("Secretary"), after consulting with interagency partners, to terminate temporary restrictions on travel by certain noncitizens into the United States at land ports of entry ("land POEs"), including ferry terminals, along the United States-Canada border. Under the latest (April 22 2022) notice of the temporary restrictions, which applied only to noncitizens who are neither U.S. nationals nor lawful permanent residents ("noncitizen non-LPRs"), DHS allowed the processing for entry into the United States of only those noncitizen non-LPRs who were fully vaccinated against COVID–19 and could provide proof of being fully vaccinated against COVID–19 upon request at arrival. DHS is terminating these restrictions.

DATES: The restrictions will cease to have effect as of 12:01 a.m. Eastern Daylight Time (EDT) on May 12, 2023.

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

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, the Department of Homeland Security ("DHS") published a Notification of its decision to temporarily limit the travel of certain noncitizen non-LPRs into the United States at land POEs along the United States-Canada border to "essential travel," as

further defined in that document.[1] From March 2020 through October 2021, in consultation with interagency partners, DHS reevaluated and ultimately extended the restrictions on non-essential travel each month.

On October 21, 2021, DHS extended the restrictions until 11:59 p.m. EST on January 21, 2022.[2] In that document, DHS acknowledged that notwithstanding the continuing threat to human life or national interests posed by COVID–19—as well as then-recent increases in case levels, hospitalizations, and deaths due to the Delta variant—COVID–19 vaccines are effective against Delta and other known COVID–19 variants. These vaccines protect people from becoming infected with, and severely ill from, COVID–19 and significantly reduce the likelihood of hospitalization and death. DHS also acknowledged the White House COVID–19 Response Coordinator's September 2021 announcement regarding the United States' plans to revise standards and procedures for incoming international air travel to enable the air travel of travelers fully vaccinated against COVID–19 beginning in early November 2021.[3] DHS further stated that the Secretary intended to do the same with respect to certain travelers seeking to enter the United States from Mexico and Canada at land POEs to align the treatment of different types of travel and allow those who are fully vaccinated against COVID–19 to travel to the United States, whether for essential or non-essential reasons.[4]

On October 29, 2021, following additional announcements regarding changes to the international air travel policy by the President of the United States and CDC,[5] DHS announced that beginning Novem-

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[1] 85 FR 16548 (Mar. 24, 2020) That same day, DHS also published a Notification of its decision to temporarily limit the travel of certain noncitizen non-LPR persons into the United States at land POEs along the United States-Mexico border to "essential travel," as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

[2] *See* 86 FR 58218 (Oct. 21, 2021) (extending restrictions for the United States-Canada border); 86 FR 58216 (Oct. 21, 2021) (extending restrictions for the United States-Mexico border).

[3] *See* Press Briefing by Press Secretary Jen Psaki (Sept. 20, 2021), *https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/20/press-briefing-by-press-secretary-jen-psaki-september-20–2021/* ("As was announced in a call earlier today . . . [w]e—starting in . . . early November [will] be putting in place strict protocols to prevent the spread of COVID–19 from passengers flying internationally into the United States by requiring that adult foreign nationals traveling to the United States be fully vaccinated.").

[4] *See* 86 FR 58218; 86 FR 58216.

[5] Changes to requirements for travel by air were implemented by, *inter alia,* Presidential Proclamation 10294 of October 25, 2021, 86 FR 59603 (Oct. 28, 2021) ("Presidential Proclamation 10294"), and a related CDC order, 86 FR 61224 (Nov. 5, 2021) ("CDC Order"). *See also* CDC, *Requirement for Proof of Negative COVID–19 Test or Recovery from COVID–19 for All Air Passengers Arriving in the United States, https://www.cdc.gov/quarantine/pdf/Global-Testing-Order-10–25–21-p.pdf* (Oct. 25, 2021); *Requirement for Airlines and Operators to Collect Contact Information for All Passengers Arriving into the United States,*

ber 8, 2021, non-essential travel of noncitizen non-LPRs would be permitted through land POEs, provided that the traveler is fully vaccinated against COVID–19 and can provide proof of full COVID–19 vaccination status upon request.[6] DHS also announced in October 2021 that beginning in January 2022, inbound noncitizen non-LPRs traveling to the United States via land POEs—whether for essential or non-essential reasons—would be required to be fully vaccinated against COVID–19 and provide proof of full COVID–19 vaccination status. In making this announcement, the Department provided fair notice of the anticipated changes, thereby allowing ample time for noncitizen non-LPR essential travelers to become fully vaccinated against COVID–19.[7]

On January 24, 2022, DHS announced the decision of the Secretary to temporarily restrict travel by noncitizen non-LPRs into the United States at land POEs along the United States borders with Mexico and Canada by requiring proof of COVID–19 vaccination upon request at arrival, largely consistent with the limited exceptions then available with respect to COVID–19 vaccination in the international air travel context.[8] On April 22, 2022, DHS announced the continuation of such restrictions until further notice.[9] DHS cautioned that the restrictions addressed temporary conditions and may be amended or rescinded at any time, including to conform these restrictions to any intervening changes with respect to Presidential Proclamation 10294 and implementing CDC orders and consistent with the requirements of 19 U.S.C. 1318.[10] DHS indicated that in conjunction with interagency partners, DHS will closely monitor the effect of the requirements

https://www.cdc.gov/quarantine/pdf/CDC-Global-Contact-Tracing-Order-10–25–2021-p.pdf (Oct. 25, 2021). CDC later amended its testing order following developments related to the Omicron variant. See CDC, Requirement for Proof of Negative COVID–19 Test Result or Recovery from COVID–19 for All Airline Passengers Arriving into the United States, https://www.cdc.gov/quarantine/pdf/Amended-Global-Testing-Order_12–02–2021-p.pdf (Dec. 2, 2021).

[6] *See* 86 FR 72842 (Dec. 23, 2021) (describing the announcement with respect to Canada); 86 FR 72843 (Dec. 23, 2021) (describing the announcement with respect to Mexico).

[7] *See* DHS, DHS Releases Details for Fully Vaccinated, Non-Citizen Travelers to Enter the U.S. at Land and Ferry Border Crossings, *https://www.dhs.gov/news/2021/10/29/dhs-releases-details-fully-vaccinated-non-citizen-travelers-enter-us-land-and-ferry* (Oct. 29, 2021); DHS, Fact Sheet: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals, *https://www.dhs.gov/news/2021/10/29/fact-sheet-guidance-travelers-enter-us-land-ports-entry-and-ferry-terminals* (updated Jan. 20, 2022); *see also* DHS, Frequently Asked Questions: Guidance for Travelers to Enter the U.S., *https://www.dhs.gov/news/2021/10/29/frequently-asked-questions-guidance-travelers-enter-us* (updated Jan. 20, 2022).

[8] *See* 87 FR 3429 (Jan. 24, 2022) (Canada notice); 87 FR 3425 (Jan. 24, 2022) (parallel Mexico notice).

[9] *See* 87 FR 24048 (Apr. 22, 2022) (Canada notice); 87 FR 24041 (Apr. 22, 2022) (parallel Mexico notice).

[10] *Id.*

discussed herein, and the Secretary will, as needed and warranted, exercise relevant authority in support of the U.S. national interest.[11]

On January 30, 2023, the Administration announced its intention to "extend the [COVID–19 national emergency and public health emergency] to May 11, [2023] and then end both emergencies on that date."[12] Consistent with the Administration announcement, DHS has continued to closely monitor the travel requirements at land POEs, and the Secretary has considered the appropriate termination of those travel requirements pursuant to 19 U.S.C. 1318 in light of intervening changes to related Presidential and interagency assessments of COVID–19.

Termination of the Public Health Emergency and Air Travel Restrictions

On February 10, 2023, the White House announced that "we are in a different phase" of the response to the COVID–19 pandemic precipitating an orderly transition to end the national emergency declared in March 2020.[13] While the spread of SARS–CoV–2, the virus that causes COVID–19, remains a public health priority, based on current COVID–19 trends, the Department of Health and Human Services is planning for the federal Public Health Emergency for COVID–19, declared under Section 319 of the Public Health Service Act, to expire at the end of the day on May 11, 2023.[14] On May 1, 2023, the White House announced the impending termination of COVID–19 air travel restrictions, effective at the end of the day on May 11, 2023.[15] This Notification ensures that applicable restrictions

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[11] *Id.*

[12] Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy (Jan. 30, 2023), *available at https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.*

[13] White House Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic (Feb. 10, 2023), *available at https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/10/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic-3/; see also* 88 FR 9385 (Feb. 14, 2023) (providing **Federal Register** notice of same).

[14] Fact Sheet: COVID–19 Public Health Emergency Transition Roadmap (Feb. 9, 2023), *available at https://www.hhs.gov/about/news/2023/02/09/fact-sheet-covid-19-public-health-emergency-transition-roadmap.html.*

[15] *See* The White House, Statements and Releases, The Biden-Harris Administration Will End COVID– 19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities (May 1, 2023), *available at https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/01/the-biden-administration-will-end-covid-19-vaccination-requirements-for-federal-employees-contractors-international-travelers-head-start-educators-and-cms-certified-facilities/* (last visited May 1, 2023).

at the land POEs terminate concurrent with the parallel air travel restrictions.

Notice of Action

In light of intervening changes in Presidential and interagency assessments of current trends in COVID–19, I have determined that it is no longer necessary to impose temporary restrictions on the processing of travelers to the United States at the United States-Canada border. I intend for this Notification to be given effect to the fullest extent allowed by law. In the event a court of competent jurisdiction stays, enjoins, or sets aside any aspect of this action, on its face or with respect to any person, entity, or class thereof, any portion of this action not determined by the court to be invalid or unenforceable should otherwise remain in effect.

This action is not a rule subject to notice and comment under the Administrative Procedure Act. In addition, it is exempt from notice and comment requirements because it concerns ongoing discussions with Canada and Mexico on how best to control COVID–19 transmission over our shared borders and therefore directly "involve[s] . . . a . . . foreign affairs function of the United States." 5 U.S.C. 553(a)(1).

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

[Published in the Federal Register, May 10, 2023 (88 FR 30033)]

19 CFR CHAPTER I

RIN 1601–ZA21

NOTIFICATION OF TERMINATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND MEXICO

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

ACTION: Notification of termination of temporary travel restrictions.

SUMMARY: This Notification announces the decision of the Secretary of Homeland Security ("Secretary"), after consulting with interagency partners, to terminate temporary restrictions on travel by certain noncitizens into the United States at land ports of entry ("land POEs"), including ferry terminals, along the United States-Mexico border. Under the latest (April 22 2022) notice of the temporary restrictions, which applied only to noncitizens who are neither U.S. nationals nor lawful permanent residents ("noncitizen non-LPRs"), DHS allowed the processing for entry into the United States of only those noncitizen non-LPRs who were fully vaccinated against COVID–19 and could provide proof of being fully vaccinated against COVID–19 upon request at arrival. DHS is terminating these restrictions.

DATES: The restrictions will cease to have effect as of 12:01 a.m. Eastern Daylight Time (EDT) on May 12, 2023.

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

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, the Department of Homeland Security ("DHS") published a Notification of its decision to temporarily limit the travel of certain noncitizen non-LPRs into the United States at land POEs along the United States-Mexico border to "essential travel," as

further defined in that document.[1] From March 2020 through October 2021, in consultation with interagency partners, DHS reevaluated and ultimately extended the restrictions on non-essential travel each month.

On October 21, 2021, DHS extended the restrictions until 11:59 p.m. EST on January 21, 2022.[2] In that document, DHS acknowledged that notwithstanding the continuing threat to human life or national interests posed by COVID–19—as well as then-recent increases in case levels, hospitalizations, and deaths due to the Delta variant—COVID–19 vaccines are effective against Delta and other known COVID–19 variants. These vaccines protect people from becoming infected with, and severely ill from, COVID–19 and significantly reduce the likelihood of hospitalization and death. DHS also acknowledged the White House COVID–19 Response Coordinator's September 2021 announcement regarding the United States' plans to revise standards and procedures for incoming international air travel to enable the air travel of travelers fully vaccinated against COVID–19 beginning in early November 2021.[3] DHS further stated that the Secretary intended to do the same with respect to certain travelers seeking to enter the United States from Mexico and Canada at land POEs to align the treatment of different types of travel and allow those who are fully vaccinated against COVID–19 to travel to the United States, whether for essential or non-essential reasons.[4]

On October 29, 2021, following additional announcements regarding changes to the international air travel policy by the President of

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[1] 85 FR 16547 (Mar. 24, 2020) That same day, DHS also published a Notification of its decision to temporarily limit the travel of certain noncitizen non-LPR persons into the United States at land POEs along the United States-Canada border to "essential travel," as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

[2] *See* 86 FR 58216 (Oct. 21, 2021) (extending restrictions for the United States-Mexico border); 86 FR 58218 (Oct. 21, 2021) (extending restrictions for the United States-Canada border).

[3] *See* Press Briefing by Press Secretary Jen Psaki (Sept. 20, 2021), *https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/20/press-briefing-by-press-secretary-jen-psaki-september-20–2021/* ("As was announced in a call earlier today . . . [w]e—starting in . . . early November [will] be putting in place strict protocols to prevent the spread of COVID–19 from passengers flying internationally into the United States by requiring that adult foreign nationals traveling to the United States be fully vaccinated.").

[4] *See* 86 FR 58218; 86 FR 58216.

the United States and CDC,[5] DHS announced that beginning November 8, 2021, non-essential travel of noncitizen non-LPRs would be permitted through land POEs, provided that the traveler is fully vaccinated against COVID–19 and can provide proof of full COVID–19 vaccination status upon request.[6] DHS also announced in October 2021 that beginning in January 2022, inbound noncitizen non-LPRs traveling to the United States via land POEs—whether for essential or non-essential reasons—would be required to be fully vaccinated against COVID–19 and provide proof of full COVID–19 vaccination status. In making this announcement, the Department provided fair notice of the anticipated changes, thereby allowing ample time for noncitizen non-LPR essential travelers to become fully vaccinated against COVID–19.[7]

On January 24, 2022, DHS announced the decision of the Secretary to temporarily restrict travel by noncitizen non-LPRs into the United States at land POEs along the United States borders with Mexico and Canada by requiring proof of COVID–19 vaccination upon request at arrival, largely consistent with the limited exceptions then available with respect to COVID–19 vaccination in the international air travel context.[8] On April 22, 2022, DHS announced the continuation of such restrictions until further notice.[9] DHS cautioned that the restrictions

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[5] Changes to requirements for travel by air were implemented by, *inter alia,* Presidential Proclamation 10294 of October 25, 2021, 86 FR 59603 (Oct. 28, 2021) ("Presidential Proclamation 10294"), and a related CDC order, 86 FR 61224 (Nov. 5, 2021) ("CDC Order"). *See also* CDC, *Requirement for Proof of Negative COVID–19 Test or Recovery from COVID–19 for All Air Passengers Arriving in the United States, https://www.cdc.gov/quarantine/pdf/Global-Testing-Order-10–25–21-p.pdf* (Oct. 25, 2021); *Requirement for Airlines and Operators to Collect Contact Information for All Passengers Arriving into the United States, https://www.cdc.gov/quarantine/pdf/CDC-Global-Contact-Tracing-Order-10–25–2021-p.pdf (Oct. 25, 2021). CDC later amended its testing order following developments related to the Omicron variant. See CDC, Requirement for Proof of Negative COVID–19 Test Result or Recovery from COVID–19 for All Airline Passengers Arriving into the United States, https://www.cdc.gov/quarantine/pdf/Amended-Global-Testing-Order_12–02–2021-p.pdf* (Dec. 2, 2021).

[6] *See* 86 FR 72843 (Dec. 23, 2021) (describing the announcement with respect to Mexico); 86 FR 72842 (Dec. 23, 2021) (describing the announcement with respect to Canada).

[7] *See* DHS, DHS Releases Details for Fully Vaccinated, Non-Citizen Travelers to Enter the U.S. at Land and Ferry Border Crossings, *https://www.dhs.gov/news/2021/10/29/dhs-releases-details-fully-vaccinated-non-citizen-travelers-enter-us-land-and-ferry* (Oct. 29, 2021); DHS, Fact Sheet: Guidance for Travelers to Enter the U.S. at Land Ports of Entry and Ferry Terminals, *https://www.dhs.gov/news/2021/10/29/fact-sheet-guidance-travelers-enter-us-land-ports-entry-and-ferry-terminals* (updated Jan. 20, 2022); *see also* DHS, Frequently Asked Questions: Guidance for Travelers to Enter the U.S., *https://www.dhs.gov/news/2021/10/29/frequently-asked-questions-guidance-travelers-enter-us* (updated Jan. 20, 2022).

[8] *See* 87 FR 3425 (Jan. 24, 2022) (Mexico notice); 87 FR 3429 (Jan. 24, 2022) (parallel Canada notice).

[9] *See* 87 FR 24041 (Apr. 22, 2022) (Mexico notice); 87 FR 24048 (Apr. 22, 2022) (parallel Canada notice).

addressed temporary conditions and may be amended or rescinded at any time, including to conform these restrictions to any intervening changes with respect to Presidential Proclamation 10294 and implementing CDC orders and consistent with the requirements of 19 U.S.C. 1318.[10] DHS indicated that in conjunction with interagency partners, DHS will closely monitor the effect of the requirements discussed herein, and the Secretary will, as needed and warranted, exercise relevant authority in support of the U.S. national interest.[11]

On January 30, 2023, the Administration announced its intention to "extend the [COVID–19 national emergency and public health emergency] to May 11, [2023] and then end both emergencies on that date."[12] Consistent with the Administration announcement, DHS has continued to closely monitor the travel requirements at land POEs, and the Secretary has considered the appropriate termination of those travel requirements pursuant to 19 U.S.C. 1318 in light of intervening changes to related Presidential and interagency assessments of COVID–19.

Termination of the Public Health Emergency and Air Travel Restrictions

On February 10, 2023, the White House announced that "we are in a different phase" of the response to the COVID–19 pandemic precipitating an orderly transition to end the national emergency declared in March 2020.[13] While the spread of SARS–CoV–2, the virus that causes COVID–19, remains a public health priority, based on current COVID–19 trends, the Department of Health and Human Services is planning for the federal Public Health Emergency for COVID–19, declared under Section 319 of the Public Health Service Act, to expire at the end of the day on May 11, 2023.[14] On May 1, 2023, the White House announced the impending termination of COVID–19 air travel restrictions, effective at the end of the day on

[10] *Id.*

[11] *Id.*

[12] Office of Mgmt. & Budget, Exec. Office of the President, Statement of Administration Policy (Jan. 30, 2023), *available at https://www.whitehouse.gov/wp-content/uploads/2023/01/SAP-H.R.-382-H.J.-Res.-7.pdf.*

[13] White House Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID–19) Pandemic (Feb. 10, 2023), *available at https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/10/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic-3/; see also* 88 FR 9385 (Feb. 14, 2023) (providing **Federal Register** notice of same).

[14] Fact Sheet: COVID–19 Public Health Emergency Transition Roadmap (Feb. 9, 2023), *available at https://www.hhs.gov/about/news/2023/02/09/fact-sheet-covid-19-public-health-emergency-transition-roadmap.html.*

May 11, 2023.[15] This Notification ensures that applicable restrictions at the land POEs terminate concurrent with the parallel air travel restrictions.

Notice of Action

In light of intervening changes in Presidential and interagency assessments of current trends in COVID–19, I have determined that it is no longer necessary to impose temporary restrictions on the processing of travelers to the United States at the United States-Mexico border. I intend for this Notification to be given effect to the fullest extent allowed by law. In the event that a court of competent jurisdiction stays, enjoins, or sets aside any aspect of this action, on its face or with respect to any person, entity, or class thereof, any portion of this action not determined by the court to be invalid or unenforceable should otherwise remain in effect.

This action is not a rule subject to notice and comment under the Administrative Procedure Act. In addition, it is exempt from notice and comment requirements because it concerns ongoing discussions with Canada and Mexico on how best to control COVID–19 transmission over our shared borders and therefore directly "involve[s] . . . a . . . foreign affairs function of the United States." 5 U.S.C. 553(a)(1).

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

[Published in the Federal Register, May 10, 2023 (88 FR 30035)]

[15] *See* The White House, Statements and Releases, The Biden-Harris Administration Will End COVID– 19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities (May 1, 2023), *available at https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/01/the-biden-administration-will-end-covid-19-vaccination-requirements-for-federal-employees-contractors-international-travelers-head-start-educators-and-cms-certified-facilities/* (last visited May 1, 2023).

U.S. Court of International Trade

Slip Op. 23–63

WIND TOWER TRADE COALITION, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy M. Reif, Judge
Court No. 20–03692
PUBLIC VERSION

[Sustaining Commerce's Remand Results.]

Dated: April 27, 2023

Derick G. Holt, Wiley Rein LLP, of Washington, D.C., argued for plaintiff Wind Tower Trade Coalition. On the brief were *Alan H. Price*, *Robert E. DeFrancesco, III*, *Maureen E. Thorson* and *Laura El-Sabaawi*.

Ashley Akers, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for defendant United States. On the brief were *Brian M. Boynton*, Principal Deputy Assistant Attorney General, *Patricia M. McCarthy*, Director, *Reginald T. Blades, Jr.*, Assistant Director, and *Joshua E. Kurland*, Senior Trial Counsel. Of counsel on the brief was *Mykhaylo Gryzlov*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION

Reif, Judge:

Before the court are the remand results of the U.S. Department of Commerce ("Commerce") pursuant to the court's order in *Wind Tower Trade Coalition v. United States* ("*Wind Tower I*"), 46 CIT __, __, 569 F. Supp. 3d 1221, 1260–61 (2022). *See* Final Results of Redetermination Pursuant to Ct. Remand, ECF Nos. 37–38 ("Remand Results"). In *Wind Tower I*, the court sustained in part and remanded in part Commerce's final determination in the countervailing duty ("CVD") investigation on utility scale wind towers from the Socialist Republic of Vietnam ("Vietnam") for the period of investigation ("POI") January 1, 2018, through December 31, 2018. *See* 46 CIT at __, 569 F. Supp. 3d at 1260; *see also Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination and Negative Determination of Critical Circumstances* ("*Final Determination*"), 85 Fed. Reg. 40,229 (Dep't of Commerce July 6, 2020) and accompanying Issues and Decision Memorandum ("IDM"), PR 215. The court ordered Commerce to discuss evidence and arguments that Wind Tower Trade Coalition ("WTTC" or "plaintiff") raised pertaining to potential manipulation. 46 CIT at __, 569 F. Supp. 3d at 1260. In addition, the court remanded for Commerce to "substantiate

its conclusion" as to the import status of the steel plate in question in light of certain evidence and arguments and to describe the significance, if any, of the most favored nation ("MFN") tariff rate listed to its determination. *Id.* at __, 569 F. Supp. 3d at 1260.

On remand, Commerce provided explanation and analysis as to potential manipulation related to the denominator in its subsidy calculation and provided additional explanation for its conclusion that the steel plate in question was sourced from within Vietnam. Remand Results at 2. For the following reasons, the court sustains Commerce's Remand Results.

BACKGROUND

The court presumes familiarity with the facts, as set out in *Wind Tower I*, and recounts only those facts relevant to the issues before the court on remand.

In its decision of March 24, 2022, the court addressed: (1) whether Commerce's use of the sales value of CS Wind Corporation ("CS Wind Korea") for wind towers produced by CS Wind Vietnam as the denominator for the subsidy rate calculation was supported by substantial evidence and was in accordance with law; and (2) whether "Commerce's acceptance of certain steel plate documentation" provided by CS Wind Vietnam Co., Ltd. ("CS Wind Vietnam") for the Import Duty Exemptions on Imports of Raw Materials for Exporting Goods program ("Import Duty Exemptions program") and determination not to apply adverse facts available ("AFA") as related to such documentation were supported by substantial evidence. *Wind Tower I*, 46 CIT at __, 569 F. Supp. 3d at 1225, 1232–59.

With respect to the sales value used for the denominator, the court in *Wind Tower I* held that the denominator was "not inconsistent with [Commerce's] regulations . . . or prior determinations." *Id.* at __, 569 F. Supp. 3d at 1259. However, the court also concluded that Commerce "did not discuss or address the evidence that WTTC presented or address the relevant argument on manipulation." *Id.* at __, 569 F. Supp. 3d at 1249–50. The court ordered Commerce to: "(1) discuss and address the evidence that WTTC presented as related to manipulation; (2) address WTTC's manipulation argument as to the denominator used in the benefit calculation; and (3) explain whether Commerce considered manipulation in reaching its determination, or if it did not, why it did not." *Id.* at __, 569 F. Supp. 3d at 1260.

With respect to the steel plate in question, the court concluded that Commerce did not "substantiate its conclusion that CS Wind Vietnam did not import the steel plate" considering the record as a whole.

Id. at __, 569 F. Supp. 3d at 1258. The court also concluded that Commerce "did not explain the salience, if any, of the MFN zero percent rate to its determination." *Id.* at __, 569 F. Supp. 3d at 1257–58 (citing Memorandum from Davina Friedmann, Senior Case Analyst, AD/CVD Operations, Off. VI, to Erin Kearney, Program Manager, AD/CVD Operations, Off. VI, re: *Final Determination of Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam: Calculation Memorandum for CS Wind Vietnam Co., Ltd.* (June 29, 2020) ("Calculation Mem.") at attach. II, tab "Raw Materials.Rev.ATT2.BPI," CR 120–121). However, the court concluded that "Commerce's decision not to apply AFA [for the Import Duty Exemptions program] [wa]s supported by substantial evidence." *Id.* at __, 569 F. Supp. 3d at 1258 (citing 19 U.S.C. § 1677e(a)(2)(A), (a)(2)(C)-(D)). Accordingly, the court ordered Commerce to address arguments and evidence pertaining to the origin of the steel plate and describe the significance of the MFN rate that appears in certain places on the record:

> (4) [S]ubstantiate [the] conclusion that CS Wind Vietnam did not import the steel plate in light of the evidence and arguments that detract from Commerce's conclusion that were presented by WTTC; (5) state the salience, if any, of the MFN rate to its determination that the raw material inputs in question came from Vietnam; and (6) explain why it has listed an MFN tariff rate in its calculations of the Import Duty Exemptions program for the line entries of the raw material inputs in question that also are listed as having a country of origin of Vietnam. In addressing these points, Commerce is to explain: (7)(a) if CS Wind Vietnam were the importer of record, would it be eligible to receive a benefit under the Import Duty Exemptions program; (7)(b) If CS Wind Korea were the importer of record and transferred the raw material inputs to CS Wind Vietnam, would either CS Wind Vietnam or CS Wind Korea be eligible to receive a benefit under that program; and (7)(c) if an unaffiliated third entity were the importer of record and sold the raw material inputs to CS Wind Korea for processing by CS Wind Vietnam, would CS Wind Vietnam be eligible to receive a benefit under that program.

Id. at __, 569 F. Supp. 3d at 1260.

On June 22, 2022, Commerce issued its draft redetermination ("Draft Remand Results"). Remand Results at 2 (citing Draft Results

of Redetermination Pursuant to Ct. Remand (June 22, 2022), *Wind Tower Trade Coal.*, Court No. 20–03692, 46 CIT __, Slip. Op. 22–27 (Mar. 24, 2022)). On June 29, 2022, WTTC provided comments on the Draft Remand Results. *Id.* (citing Pet'rs' Letter, re: Utility Scale Wind Towers from the Socialist Republic of Vietnam: Comments on Draft Results of Redetermination (June 29, 2022) ("Pet'rs' Cmts. on Draft Remand Results")).

On July 22, 2022, Commerce filed its final Remand Results, in which Commerce responded to the court's remand order, addressed WTTC's comments and continued to apply the same CVD rates as in the *Final Determination*. *See id.* On September 7, 2022, WTTC provided comments on the Remand Results wherein WTTC argues that the "Remand Results do not fully and adequately address the [c]ourt's remand requests and are inconsistent with both the facts and law." *See* Pl.'s Cmts. on Remand Determination ("Pl. Br.") at 1, ECF Nos. 42–43. On October 21, 2022, defendant United States (the "Government") responded to plaintiff's comments. *See* Def.'s Resp. to Pl.'s Cmts. on Remand Results ("Def. Br."), ECF Nos. 46–47.

On March 1, 2023, the court heard oral argument. *See* Oral Arg., Mar. 1, 2023, ECF No. 55.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to sections 516A(a)(2)(A)(i)(II) and (a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and (a)(2)(B)(i) (2018), and 28 U.S.C. § 1581(c).[1]

On remand, the court will sustain Commerce's determination if it is "in accordance with the remand order, . . . supported by substantial evidence[] and . . . otherwise in accordance with law." *MacLean-Fogg Co. v. United States*, 39 CIT __, __, 100 F. Supp. 3d 1349, 1355 (2015) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)); *see Prime Time Com. LLC v. United States*, 45 CIT __, __, 495 F. Supp. 3d 1308, 1313 (2021) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i); *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT 189, 190, 968 F. Supp. 2d 1255, 1259 (2014)), *aff'd*, No. 2021–1783, 2022 WL 2313968 (Fed. Cir. June 28, 2022); *see also Jiangsu Zhongji Lamination Materials Co., (HK) v. United States*, 44 CIT __, __, 435 F. Supp. 3d 1273, 1276 (2020) (quoting *Xinjiamei Furniture (Zhangzhou) Co.*, 38 CIT at 190, 968 F. Supp. 2d at 1259).

Substantial evidence constitutes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant portions of Title 19 of the U.S. Code, and references to the U.S. Code are to the 2018 edition.

Consol. Edison Co. of N.Y. v. NLRB, 305 U.S. 197, 229 (1938)). Substantial evidence requires "more than a mere scintilla" of evidence. *Id.* (quoting *Consol. Edison Co.*, 305 U.S. at 229). In addition, "[i]t is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (footnote omitted) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981)). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp.*, 340 U.S. at 488; *see Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) ("A reviewing court must consider the record as a whole, including that which 'fairly detracts from its weight', to determine whether there exists 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" (quoting *Universal Camera Corp.*, 340 U.S. at 477–78)).

However, "the Court will not disturb an agency determination if its factual findings are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusion." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 837, 159 F. Supp. 2d 714, 718 (2001) (citing *Heveafil Sdn. Bhd. v. United States*, 25 CIT 147, 149 (2001)), *aff'd sub nom. Shandong Huarong Gen. Grp. Corp. v. United States*, 60 F. App'x 797 (Fed. Cir. 2003). Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)).

LEGAL FRAMEWORK

Commerce imposes a countervailing duty if: (1) Commerce "determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold . . . for importation, into the United States"; and (2) the U.S. International Trade Commission determines that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of [subject] imports." 19 U.S.C. § 1671(a). A subsidy

is countervailable when it is specific and when "a government of a country or any public entity within the territory of the country" provides a financial contribution, which confers a benefit. *Id.* § 1677(5).

To calculate the "*ad valorem* subsidy rate" in a CVD investigation or review,

> [Commerce] will . . . divid[e] the amount of the benefit allocated to the [POI] . . . by the sales value during the same period of the product or products to which [Commerce] attributes the subsidy . . . . Normally, [Commerce] will determine the sales value of a product on an f.o.b. (port) basis (if the product is exported) . . . . However, if [Commerce] determines that countervailable subsidies are provided with respect to the movement of a product from the port . . . to the place of destination (*e.g.*, freight or insurance costs are subsidized), [Commerce] may make appropriate adjustments to the sales value used in the denominator.

19 C.F.R. § 351.525(a).

DISCUSSION

The court addresses whether Commerce's Remand Results as related to potential manipulation and the import status of the steel plate in question are supported by substantial evidence and in compliance with the remand order.

I. Potential manipulation of the CVD rate

A. Positions of the parties

Plaintiff argues that the Remand Results are "unsupported by substantial evidence" and unresponsive to the remand order. Pl. Br. at 3. Specifically, plaintiff claims that Commerce "fails to recognize how th[e] evidence, as a whole, demonstrates the potential for CS Wind to game U.S. [antidumping duty ("AD") and CVD] law and its interest in doing so" because, plaintiff alleges, Commerce reviewed the evidence of manipulation in a "piecemeal fashion." *Id.* at 3–4.[2] Instead, plaintiff insists: "Taken as a whole, this series of actions and

[2] For instance, plaintiff argues that Commerce's identification of certain tolling contracts is insufficient to show "the reason for the [[

]]." Pl. Br. at 4 (footnote omitted). Plaintiff states that there were "numerous other structural changes" and events around that time. *Id.* at 4–6. Plaintiff also raises similar arguments as it raised in its motion for judgment on the agency record ("motion") about the insufficiency of and lack of support for CS Wind Vietnam's statements as to the reasons that it used tolling agreements, such as to "better control costs," and Commerce's treatment of the response. *Id.* at 5 (quoting Remand Results at 12) (citing Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt

the time at which they occurred suggest that CS Wind was redesigning its operations to minimize the impact of new/renewed antidumping and countervailing duty investigations and orders." *Id.* at 4.[3]

By contrast, the Government argues that it was reasonable for Commerce to find that plaintiff's two arguments with respect to manipulation are unsupported by the record. Def. Br. at 3. The Government claims that plaintiff's first argument "lacks merit" because the court "has already rejected WTTC's contention that Commerce's use of CS Wind Korea's sales revenues in the denominator is inconsistent with Commerce's regulations and practice." *Id.* at 4 (citing *Wind Tower I*, 46 CIT at __, 569 F. Supp. 3d at 1232); *see* Remand Results at 26 (declining to consider consistency argument).

The Government also rejects plaintiff's second argument that Commerce "failed to consider the evidence [of potential manipulation] 'as a whole.'" Def. Br. at 4. Commerce examined the four circumstances relating to potential manipulation to conclude that the WTTC's claims were "unsubstantiated" and "unsupported" by the record, "whether the pieces of information are considered individually or collectively." Remand Results at 28; *see* Def. Br. at 4 (quoting Remand Results at 28). In addition, Commerce found that the evidence does not "have the potential to affect the denominator [Commerce] used to calculate the countervailable subsidy rate." Remand Results at 28; Def. Br. at 4–5 (quoting Remand Results at 28).

Regarding plaintiff's second argument, the Government claims that Commerce examined all four circumstances relating to potential manipulation and found plaintiff's claims to be "unsubstantiated." Def. Br. at 4–5 (quoting Remand Results at 28) (citing Remand Results at 5–16, 26–35). With respect to the first circumstance, the Government disagrees with plaintiff's claim that CS Wind Vietnam and its parent company "'suddenly' adopted the tolling arrangements [during the POI] to avoid payment of countervailing duties." Def. Br. at 5 (citing Remand Results at 7). Instead, Commerce found that CS Wind Vietnam and CS Wind Korea entering into tolling agreements was a "continuation of a preexisting business arrangement" since both companies had adopted tolling agreements with similar terms in past years. Remand Results at 8; *see* Def. Br. at 5–6. The Government adds that "disagreement with how Commerce weighted this evidence does

LLP to Sec'y Commerce, re: *CS Wind First Supplemental Questionnaire Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-522–826)* (Nov. 6, 2019) ("First SQR") at 3, CR 7682, PR 122–128); *see* WTTC's Mem. in Supp. of Rule 56.2 Mot. for J. upon Agency R. ("Pl. Mot.") at 22–23, ECF No. 13.

[3] Plaintiff also reprises its arguments that the denominator was "inconsistent with [Commerce's] regulations and past practice." Pl. Br. at 3. The court concluded in *Wind Tower Trade Coalition v. United States* ("*Wind Tower I*"), 46 CIT __, __, 569 F. Supp. 3d 1221, 1232–39 (2022), that these arguments were not persuasive.

not provide a basis for remand." Def. Br. at 6 (citing *Haixing Jingmei Chem. Prod. Sales Co. v. United States*, 42 CIT __, __, 335 F. Supp. 3d 1330, 1346 (2018); *Gov't of Arg. v. United States*, 45 CIT __, __, 542 F. Supp. 3d 1380, 1395 (2021)).

As to the second circumstance, the Government argues that Commerce's finding — that an affiliate serving as "importer of record" does not demonstrate manipulation of the sales value, Remand Results at 9 — was reasonable, Def. Br. at 6 (quoting Remand Results at 9). In addition, Commerce explained that its determination under 19 C.F.R. § 351.525(a) "would not include" the fee that WTTC raised. Remand Results at 9; *see* Def. Br. at 6 (quoting Remand Results at 9).

Regarding the third circumstance, the Government argues that Commerce reasonably found that CS Wind Korea "taking into account tax implications in structuring contracts is a legitimate commercial consideration." Remand Results at 11; Def. Br. at 7 (quoting Remand Results at 11). Further, the Government notes that WTTC "appears not to pursue its argument" as to the fee raised and "appears to have abandoned any specific arguments" as to the third factor. Def. Br. at 6–7.[4]

Last, with respect to the fourth circumstance, the Government recounts that Commerce found that WTTC "failed to 'cite affirmative evidence'" to support its claim that CS Wind Vietnam provided an "insufficient rationale for using toll processing arrangements." *Id.* at 7; *see* Remand Results at 11. To the contrary, the Government notes the evidence upon which Commerce based its conclusion that CS Wind Vietnam did answer sufficiently Commerce's question. Def. Br. at 7–8 (quoting Remand Results at 11–12, 33). Namely, CS Wind Vietnam explained the reason that it adopted tolling agreements and described "the method by which CS Wind Korea set its transfer pricing." Remand Results at 11–12 (quoting First SQR at 3–4); *see* Remand Results at 33 (quoting First SQR at 3); Def. Br. at 7–8 (quoting Remand Results at 11–12, 33).

B. Analysis

In *Wind Tower I*, the court concluded that Commerce "did not address petitioner's (now plaintiff's) argument that using CS Wind

[4] At oral argument on remand, plaintiff explained that it had not waived or abandoned its claims as to the fee raised and the third circumstance, both of which plaintiff asserted should be considered as a whole with the other circumstances raised. Remand Oral Arg. Tr. at 16:14–16, 17:6–10, 17:14–19, 17:23–18:2, 18:25–19:1, Mar. 1, 2023; *see* Pl. Br. at 4. The court acknowledges that plaintiff set out and continues to take issue with CS Wind's actions, as WTTC raised in its case brief before Commerce. *See* Pl. Br. at 2–3 (citation omitted) (noting the four considerations), 4 (citing Letter from Wiley Rein LLP to Sec'y Commerce, re: *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Case Brief* (Apr. 3, 2020) ("WTTC Case Br.") at 26–28, CR 107–108, PR 194).

Korea's sales value in the denominator could allow CS Wind Vietnam to manipulate the CVD rate." 46 CIT at __, 569 F. Supp. 3d at 1248. In accordance with the remand order, Commerce responded to each of the three remand instructions as to potential manipulation. *See id.* at __, 569 F. Supp. 3d at 1260; Remand Results at 5–16. Plaintiff argues on remand that Commerce did not consider "as a whole" the evidence that WTTC presented as to potential manipulation and that Commerce's Remand Results are not supported by substantial evidence. Pl. Br. at 3–4. The court is not persuaded by plaintiff's argument and concludes that Commerce's finding in the Remand Results that the evidence and arguments do not demonstrate manipulation is supported by substantial evidence. *See* Remand Results at 28.

Commerce addressed the evidence that plaintiff presented as to potential manipulation. *Id.* at 5–13; *see Wind Tower I*, 46 CIT at __, 569 F. Supp. 3d at 1240 (citing Pl. Mot. at 22–23) (describing the four issues that plaintiff raised). Commerce responded first to WTTC's claim that the nature and timing of the use of a tolling agreement between CS Wind Vietnam and CS Wind Korea during the POI constituted evidence of manipulation. Remand Results at 6–8. Specifically, Commerce cited evidence of tolling agreements between the two entities in other years. *Id.* at 7 (citing Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y Commerce, re: *CS Wind Verification Exhibits in the Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-552-826)* (Mar. 4, 2020) ("Verification Exs.") at VE-13, CR 101–104).

Commerce compared the tolling agreements for the POI with the tolling agreements from other years to conclude that there were "substantially similar terms." *Id.* at 7 (citing Verification Exs. at VE-13). Moreover, Commerce found that the tolling agreements during the POI "were not unusual in their terms regarding which party was responsible for providing raw materials." *Id.* (citing Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt LLP to Sec'y Commerce, re: *CS Wind Supplemental Affiliation Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-522–826)* (Sept. 20, 2019) at 2, CR 35, PR 76; Verification Exs. at VE-13); *see id.* at 29–30 (citing Draft Remand Results at 7). Commerce stated that the "history" of similar tolling agreements between CS Wind Vietnam and CS Wind Korea — agreements that Commerce considered to be "common business practices" — supports its conclusion that the tolling agreements are not "evidence of manipulation." *Id.* at 8 ("[W]e do not consider the continuation of a preexisting

business arrangement to be evidence of manipulation."); *see id.* at 27–29 (citing Draft Remand Results at 10), 29–30 (citing Draft Remand Results at 7–8).[5]

Due to the tolling agreement during the POI, CS Wind Vietnam did not purchase any inputs in 2018. *Id.* at 30 (citing Pet'rs' Cmts. on Draft Remand Results at 4–5). However, Commerce found that "the fact that CS Wind Vietnam [[ ]]" was not "evidence of manipulation." *Id.* at 32.[6] Commerce concluded reasonably that the change is "explained by the nature of tolling arrangements" and is supported by evidence that the tolling arrangement "is a commercial business arrangement that serves a legitimate purpose." *Id.* at 30–31.

Commerce analyzed next WTTC's claim that "CS Wind Korea [[ ]] and began [[ ]]" allegedly to [[ ]]. *Id.* at 8–10 (quoting WTTC Case Br. at 26–27); *see* Pl. Mot. at 22–23 (quoting Letter from Grunfeld, Desiderio, Lebowitz, Silverman and Klestadt LLP to Sec'y Commerce, re: *CS Wind Initial Questionnaire Response: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-522–826)* (Oct. 9, 2019) ("IQR") at Ex. 13.1, CR 55–67; WTTC Case Br. at 26–27). Commerce concluded that such facts are not evidence of "improper behavior" in the business relationship between CS Wind Korea and CS Wind Vietnam. Remand Results at 9; *see* Remand Results at 27 (citing Draft Remand Results at 15–16). Specifically, Commerce explained that the "existence of an affiliated company that serves as an importer of record does not inherently evince efforts to manipulate the value of sales." *Id.* at 9. In addition, Commerce stated that an [[ ]] — which Commerce could not identify in the exhibit that WTTC cites[7] — would not factor into Commerce's determination of the "sales value of a product on an f.o.b. basis" under 19

[5] Moreover, at oral argument on remand, plaintiff conceded that CS Wind Vietnam was not [[ ]]. *See* Remand Oral Arg. Tr. at 9:11–13.

[6] Commerce also noted that CS Wind Vietnam provided information in response to a question on a 2017 project that did not involve a tolling agreement. Remand Results at 34 (citing Memorandum from John McGowan and Julie Geiger, International Trade Analysts, Office VI, Antidumping and Countervailing Duty Operations, to The File, re: *Verification of the Questionnaire Responses of CS Wind Vietnam Co., Ltd., Countervailing Duty Investigation of Utility Scale Wind Towers from the Socialist Republic of Vietnam* (Mar. 18, 2020) ("Verification Mem.") at 10, CR 105, PR 186).

[7] At oral argument on remand, WTTC suggested that [[ ]] was not a line item and raised Verification Exhibit 4 as evidence of [[ ]]. *See* Remand Oral Arg. Tr. at 14:19–15:16. However, it does not appear that WTTC raised such arguments before Commerce. *See* Remand Results at 9.

C.F.R. § 351.525(a). *Id.* (alteration in original) (first quoting WTTC Case Br. at 26–27; and then quoting 19 C.F.R. § 351.525(a)). Commerce found "insufficient evidence" that CS Wind Korea "[[

]]." *Id.* at 10; *see id.* at 27–28. Further, Commerce concluded that neither fact would "affect calculation of a countervailing duty rate, let alone provide evidence of an effort to manipulate the CVD rate calculated." *Id.* at 10; *see id.* at 27–28 (footnote omitted).

Likewise, Commerce refuted WTTC's third consideration that the fact that CS Wind Korea "[[

]]" demonstrated manipulation. *Id.* at 10–11 (citing WTTC Case Br. at 27). Instead, Commerce stated: "In general, [Commerce] find[s] that taking into account tax implications in structuring contracts is a legitimate commercial consideration." *Id.* at 11. Moreover, Commerce found that the evidence does not demonstrate that the "[[

]] was designed to manipulate AD or CVD liability"; rather, Commerce concluded that the rationale "detracts from" plaintiff's earlier argument as to the reason that the entities used tolling agreements and shows that the "[[ ]] was driven by [[ ]]." *Id.* at 10–11 (citing Verification Exs. at VE-4 at 59); *see id.* at 27 (citing Draft Remand Results at 15–16).

In response to WTTC's fourth claim, Commerce reviewed CS Wind Vietnam's questionnaire response with its rationale as to the use of tolling agreements and transfer pricing. *Id.* at 11–13 (quoting First SQR at 3–4). Commerce found that CS Wind Vietnam's statements were sufficient: "The record evidence indicates that the parties entered into [sic] tolling arrangement to 'better control costs.'" *Id.* at 12 (quoting First SQR at 3); *see id.* at 33 ("[D]espite CS Wind Vietnam's initial objection, it went on to answer Commerce's question."). In addition, Commerce stated that WTTC did not "cite affirmative evidence" that CS Wind Vietnam and CS Wind Korea used tolling agreements to shift profits. *Id.* at 11 (citing Verification Mem. at 28); *see id.* at 26 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 Fed. Reg. 63,788 (Dep't of Commerce Oct. 17, 2012) and accompanying IDM (Dep't of Commerce Oct. 17, 2012) at cmt. 10) (noting that "Commerce does not have an obligation to perform research on behalf of the petitioners and fill in the blanks in the petitioners' allegations")), 27 (citing Draft Remand Results at 15–16).

Moreover, Commerce concluded that WTTC's concerns "related to items that would not have affected [Commerce's] subsidy rate calcu-

lation." *Id.* at 33 (citing Draft Remand Results at 13–14); *see id.* at 34 (describing as insufficient both the evidence and argument as to "how tolling agreements could distort the *sales value* . . . used as the denominator"). In fact, Commerce discredited the alleged impact of potential manipulation on the subsidy rate calculation. *See id.* at 13–15, 27. For instance, Commerce explained that WTTC did not indicate how the alleged profit shifting or [[ ]] would result in manipulation of the denominator used. *Id.* at 12 (on profit shifting), 15 (on [[ ]]); *see id.* at 26 (finding insufficient evidence to support WTTC's allegations). Commerce described the variables in its subsidy rate calculation and reiterated that Commerce did not apply an entered value adjustment ("EVA"). *Id.* at 13–14 (citing *Utility Scale Wind Towers From the Socialist Republic of Vietnam: Preliminary Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 Fed. Reg. 68,104 (Dep't of Commerce Dec. 13, 2019) and accompanying Preliminary Decision Memorandum at 13, PR 152; IDM at cmt. 6). Commerce then found that WTTC's unsupported argument was "not relevant to the CVD rate calculations because . . . the profit of either CS Wind Vietnam or CS Wind Korea is not one of the factors that can impact either the subsidy rate or CVD liability calculations." *Id.* at 14. Commerce also explained that the result of accepting WTTC's argument would have been a higher CVD liability had the denominator been decreased. *Id.* at 14–15; *see id.* at 27 (citing Draft Remand Results at 15–16).[8]

In addition, Commerce found that there was a lack of evidence to support WTTC's claim that the "overall reported cost" of the wind towers would have changed due to a tolling arrangement, let alone the relevance of such change in cost or the "[[ ]]" to the denominator. *Id.* at 31–32 (citing Pet'rs' Cmts. on Draft Remand Results at 5). Commerce explained: "Because neither the numerator nor the denominator of the subsidy rate calculation includes the reported cost of subject merchandise, the reported costs (including

[8] Commerce explained that WTTC's claim, if true, would not benefit CS Wind Vietnam in terms of its CVD liability:

> [I]f CS Wind Korea's [[ ]], the denominator in the subsidy rate calculation (*i.e.*, CS Wind Korea's sales value of subject merchandise produced by CS Wind Vietnam) would decrease, and in turn, result in a larger subsidy rate. Further, because CVD liability is calculated as the overall subsidy rate multiplied by entered value, artificially increasing entered value would result in a larger CVD liability. Because Commerce denied the [EVA], if we were to accept the petitioners' speculation as fact, the result would be *higher*, not *lower*, CVD liability. It would be illogical for a respondent to manipulate its CVD rate with its entered value in a manner that would *increase* its duty liability.

Id. at 14–15; *see id.* at 29.

the raw materials) do not affect the subsidy rate calculation." *Id.* at 32 (footnote omitted).

Last, Commerce demonstrated that it considered manipulation in reaching its determination. *Id.* at 15; *see id.* at 5–6. Namely, Commerce stated that WTTC raised manipulation to argue that Commerce should not make an EVA[9] — not to argue that Commerce should not use CS Wind Korea's sales value for wind towers produced by CS Wind Vietnam for the denominator. *Id.* at 5–6 (citing WTTC Case Br. at 25), 15–16. Commerce stated that it considered the manipulation arguments but that, due to its EVA denial, Commerce did not need to "specifically address every piece of evidence of potential manipulation." *Id.* at 15; *see id.* at 16.

Commerce's conclusion that the denominator in the subsidy rate calculation was not affected by potential manipulation is "reasonable and supported by the record as a whole." *Shandong Huarong Gen. Corp.*, 25 CIT at 837, 159 F. Supp. 2d at 718 (citing *Heveafil Sdn. Bhd.*, 25 CIT at 149), *aff'd sub nom. Shandong Huarong Gen. Grp. Corp.*, 60 F. App'x 797; *see* Remand Results at 16. Commerce concluded that in this case the manipulation claims were unfounded:

> Commerce takes manipulation concerns seriously; however, [Commerce] determined that the record evidence did not substantiate the petitioners' claims, that the petitioners failed to adequately explain how some of the alleged facts result in manipulation, and that in some instances the facts alleged by the petitioners as evidence of manipulation of [sic] CVD rate by the respondent would actually have increased the amount of countervailing duties due.

Remand Results at 16. In other words, Commerce explained that the claims of potential manipulation were unsubstantiated and would not "have the potential to affect the denominator" in the subsidy rate calculation. *Id.* at 28; *see id.* at 5–16, 24–35. Moreover, Commerce demonstrated that its CVD methodology was reasonable. *See id.* at 28; *see also id.* at 5–16, 24–35; *Wind Tower I*, 46 CIT at __, 569 F. Supp. 3d at 1249. In addition, Commerce reached its conclusion as to manipulation "regardless of whether the pieces of information are considered individually or collectively." Remand Results at 28 (citing *Nexteel Co. v. United States*, 43 CIT __, __, 355 F. Supp. 3d 1336, 1351 (2019)). As detailed in Commerce's explanation, the evidence on which Commerce relied is reasonable to support its conclusion that there was no manipulation based on plaintiff's claims. *See id.* Further, Commerce followed the remand instructions to address potential

[9] Commerce determined not to make an EVA. IDM at 30.

manipulation. *See id.* Accordingly, Commerce's Remand Results as to potential manipulation comply with the remand order, are supported by substantial evidence and are in accordance with law.

II. Import status of the steel plate in question

A. Positions of the parties

Plaintiff argues that Commerce relied on "speculative 'possibilities'" instead of substantial evidence to support its determination that the steel plate was sourced from Vietnam. Pl. Br. at 6 (quoting Remand Results at 19), 8–9 (quoting Remand Results at 19).[10] In addition, plaintiff alleges that Commerce's conclusion — that neither CS Wind Vietnam nor CS Wind Korea would be the importer even if the unaffiliated supplier imported the steel plate in question — is "sheer conjecture." *Id.* at 7–8 (citing Remand Results at 19). Instead, plaintiff insists that the record does not support Commerce's statement involving the hypothetical notion that the unaffiliated supplier could have imported the steel plate. *Id.* (citing Remand Results at 19; Verification Exs. at VE-15 at 71).[11] Plaintiff also maintains that Commerce did not address the evidence that the unaffiliated supplier "does not operate a plate mill in Vietnam." *Id.* at 8 (citing *Wind Tower I*, 46 CIT at __, Slip Op. 22–27 at 69–70 (Mar. 24, 2022)). Relatedly, plaintiff stresses that the real issue is "where the [steel plate] originated" or was produced based on the record as a whole, *id.* at 8–9 (citing *Wind Tower I*, 46 CIT at __, Slip Op. 22–27 at 70–71), not whether the steel plate was "sourced from within Vietnam," *id.* (quoting Remand Results at 20).

Plaintiff also takes issue with Commerce's hypothetical conclusion as to the duty rate had CS Wind Vietnam imported the steel plate in question. *See id.* at 9–10 (citing Remand Results at 21). Plaintiff states that the duty rate determination "is dependent upon the identification of the plate's country of origin, but Commerce failed to base its country-of-origin determination on substantial record evidence." *Id.* at 9.

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[10] Plaintiff repeats the argument in its motion that Commerce should apply AFA as related to the Import Duty Exemptions program due to CS Wind Vietnam's provision of "inaccurate and incomplete information." Pl. Br. at 6–7 (citing WTTC Case Br. at 21; 19 U.S.C. § 1677a(d) (2000)), 9–10 (citing WTTC Case Br. at 21); *see* Pl. Mot. at 15 n.3 (citing WTTC Case Br. at 14–21). *But see* Remand Results at 36 (noting that the court already sustained Commerce's decision not to apply AFA); Def. Br. at 15 (same). The court concluded in *Wind Tower I*, that plaintiff's argument was not persuasive. *See* 46 CIT at __, 569 F. Supp. 3d at 1258–59.

[11] Further, plaintiff claims that "[[

]]." Pl. Br. at 8 (citing Verification Exs. at VE-15 at 71).

In response, the Government argues that Commerce's determination was based on substantial evidence, that Commerce responded to each of the remand instructions and that WTTC "fail[s] to show that Commerce's determination was unreasonable" or that CS Wind Vietnam imported the steel plate in question. Def. Br. at 9 (citing Remand Results at 16–23, 36–40), 12–13. Commerce explained that the "central issue is whether CS Wind Vietnam received a benefit for this steel plate from the Import Duty Exemption program." Remand Results at 37; *see* Def. Br. at 10. Commerce supported its determination that the steel plate was sourced in Vietnam based on the evidence, "including invoices, packing lists, and examination of CS Wind Vietnam's purchases at verification." Remand Results at 38 (citing Draft Remand Results at 19–20; Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y Commerce, re: *CS Wind First Supplemental Questionnaire Response – Remaining Questions: Countervailing Duty Investigation of Utility Scale Wind Towers from Vietnam (C-552–826)* (Nov. 8, 2019) ("First SQR – Remaining Questions") at Ex. SQ2–6a, CR 83–84; First SQR at Ex. SQ2–18 at 18; Verification Exs. at VE-15); *see* Def. Br. at 11–12 (citing Verification Exs. at VE-15 at 68–75; First SQR at Ex. SQ2–18 at 18–19; First SQR – Remaining Questions at 1 & Ex. SQ2–6a). Commerce confirmed that CS Wind Vietnam was required to report purchases of raw materials that are sourced domestically when "the supplier is from outside of Vietnam." Remand Results at 19 (citing Verification Mem. at 16; IQR at Ex. C-3); *see* Def. Br. at 13 (quoting Verification Mem. at 16; IDM at 17 (quoting Verification Mem. at 16)) (citing Remand Results at 18–19).

Commerce also found that the evidence pertaining to the plate mill did not overcome its conclusion based on the record as a whole. Remand Results at 38; *see* Def. Br. at 10–12. Specifically, even if the unaffiliated Vietnamese supplier imported the steel plate, CS Wind Vietnam and its parent company would still not be the importer "liable for import duties." Remand Results at 19; *see* Def. Br. at 12–13.

Commerce disagreed further with plaintiff that the benefit determination relates to only the place of production or origin of the steel plate in question. Remand Results at 19 (citing Letter from Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP to Sec'y Commerce, re: *CS Wind Rebuttal Brief: Countervailing Duty Investigation on Utility Scale Wind Towers from Vietnam (C-552–826)* (Apr. 20, 2020) ("CS Wind Rebuttal Br.") at 17, CR 112, PR 200); Def. Br. at 14–15. Instead, Commerce determined that neither CS Wind Vietnam, Remand Results at 17–20 (citing Verification Mem. at 16; IQR at Ex. C-3), 38–39; *see* Def. Br. at 10 (citing Remand Results at 17–20, 37–40), 12 (quoting Remand Results at 38), nor CS Wind Korea

imported the steel plate in question, *see* Remand Results at 20, 38–39. Commerce explained that "the totality of the evidence supports the finding that the steel plate in question is sourced from within Vietnam, and therefore, import duties would not have been applicable to CS Wind Vietnam's purchases of steel plate such that CS Wind Vietnam could not have benefitted from import duty exemptions." Remand Results at 20; *see* Def. Br. at 15.

With respect to the MFN rate, Commerce found it "unnecessary" to address the MFN status issue because CS Wind Vietnam did not import the steel plate in question. Remand Results at 22; Def. Br. at 16 (citing Remand Results at 39–40). Still, Commerce described that even if the steel plate had been imported, it "would have been subject to a duty rate of zero, pursuant to MFN status." Remand Results at 21; Def. Br. at 15–16 (quoting Remand Results at 21).

B. Analysis

1. Steel plate documentation

The issue before the court is whether Commerce's conclusion that CS Wind Vietnam did not import the steel plate in question and, therefore, did not receive a benefit under the Import Duty Exemptions program is supported by substantial evidence. *See Wind Tower I*, 46 CIT at __, 569 F. Supp. 3d at 1259–60; *see also* Remand Results at 37 ("To answer the central question of whether CS Wind Vietnam received a benefit for this steel plate from the Import Duty Exemption program, Commerce needed to determine which inputs CS Wind Vietnam imported, and whether CS Wind Vietnam paid the appropriate corresponding duties on imported inputs."). In *Wind Tower I*, the court concluded that Commerce failed to "substantiate its conclusion that CS Wind Vietnam did not import the steel plate in light of the evidence and arguments that detract from Commerce's conclusion that were presented by WTTC." 46 CIT at __, 569 F. Supp. 3d at 1259–60. On remand, Commerce provided additional analysis. *See* Remand Results at 16–20, 22–23, 35–40. Commerce's conclusion on remand is supported by substantial evidence.

On remand, Commerce maintained its conclusion that CS Wind Vietnam did not import the steel plate in question. *Id.* at 17–18; *see* IDM at 17. Commerce weighed the evidence that WTTC presented as to the import status of the steel plate in question and the nonexistence of a [[ ]] plate mill in Vietnam. Remand Results at 17 (quoting *Wind Tower I*, 46 CIT at __, Slip Op. 22–27 at 56 (quoting IQR at 21)) (citing WTTC Case Br. at 15). For instance, Commerce examined further CS Wind Vietnam's questionnaire response about

the source of its raw materials.[12] *Id.* at 18–20. After reviewing the "lists of suppliers of raw materials, invoices, and packing lists," Commerce found that "CS Wind Vietnam's statement that 'most,' not all, of the raw materials are exported to Vietnam is accurate." *Id.* at 18 (citing First SQR – Remaining Questions at Ex. SQ2–6a; First SQR at Exs. SQ2–18 at 18–19, Ex. SQ2–20 (comparing lines 3948–51, 4002, 4073, 4075, 4104, 4105, 4107–09, 4136–37, 4139–40, 4144–47, 5520, 9826, 10288, 10394 with line 12922)); *see id.* at 18–20 (citing Verification Exs. at VE-15 at 68–75) (noting that Commerce considered at verification "purchase orders and invoices" that aligned with the questionnaire response).

Commerce found that "[r]ecord evidence demonstrates that [[ ]] purchased the steel plate from [Vietnamese supplier] [[ ]] for use by [[ ]]." *Id.* at 19; *see id.* at 20, 38–39 (concluding that "the record evidence demonstrates that CS Wind Vietnam's affiliate purchased the plate in Vietnam from an unaffiliated party" (citing Draft Remand Results at 19–20; First SQR – Remaining Questions at Ex. SQ2–6a; First SQR at Ex. SQ2–18 at 18; Verification Exs. at VE-15)). Commerce also reiterated that, as CS Wind Vietnam explained, it was still required to report to the Government of Vietnam raw materials sourced from Vietnam "if the supplier is from outside of Vietnam." *Id.* at 18–19 (citing Verification Mem. at 16; IQR at Ex. C-3). Commerce stated that CS Wind Vietnam engaged merely in "over-reporting" to Commerce on Vietnam-sourced materials "for which CS Wind Vietnam did not receive import duty exemptions." *Id.* at 19.

With respect to the plate mill, Commerce continued to find based on "the totality of the evidence" that neither CS Wind Vietnam nor CS Wind Korea imported the steel plate in question. *Id.* at 20; *see id.* at 38–39 (footnote omitted); *see also id.* at 40 (maintaining that "CS Wind Vietnam did not receive a benefit" for the steel plate in question). Specifically, Commerce relied on a [[ ]] that showed that "the steel plate was transported by [[ ]] from [[ ]] to [[ ]] and thus never left the country." *Id.* at 19 (citing Verification Exs. at VE-15 at 71). Commerce considered the evidence that WTTC presented that "[[ ]]," weighed that evidence and concluded that the steel plate was "not imported by an affiliate of CS Wind Korea," *id.* at 39 (first citing Pet'rs' Cmts. on Draft Remand Results at 8; and then citing Verification Exs. at VE-15 at 71); Commerce found that such

[12] CS Wind Vietnam had stated that CS Wind Korea "supplies all main materials – steel plate, flange, steel plate for door frame and internal mounting items – from outside of Vietnam for the production of the wind towers. Therefore, most of [sic] raw materials are exported to Vietnam by CS Wind [Korea]." IQR at 21.

evidence "does not preclude possibilities in which steel plate can be sourced from within Vietnam even if the mill where the plate was produced was located outside Vietnam," *id.* at 19 (citing CS Wind Rebuttal Br. at 17); *see id.* at 38 (noting the plate mill issue "is not dispositive" as to the import status of the steel plate). Commerce addressed plaintiff's hypothetical, adding that "if [[ ]] imported the steel plate, neither CS Wind Korea nor CS Wind Vietnam would be the importer and would not be liable for import duties, if such duties were applicable, and would not be the beneficiary of any exemptions of those duties." *Id.* at 19.

The court will not "disturb" Commerce's conclusion, as it is "reasonable and supported by the record as a whole." *Shandong Huarong Gen. Corp.*, 25 CIT at 837. It is irrelevant that Commerce could have drawn another conclusion from the documents because, as Commerce found, the record overall reflects that CS Wind Vietnam did not import the steel plate in question. *See* Remand Results at 17–18 ("[B]ecause CS Wind Vietnam did not import this steel plate, it did not receive benefits under the Import Duty Exemption program."), 20 ("[W]e find that the verified documentation showing steel plate purchase orders and invoices from a Vietnamese supplier outweighs the evidence cited by the petitioners."); *Altx, Inc.*, 370 F.3d at 1116 (quoting *Matsushita Elec. Indus. Co.*, 750 F.2d at 933).

In conclusion, Commerce's Remand Results as to the steel plate in question comply with the remand order, are reasonable and are supported by substantial evidence.

2. Salience to the determination of the duty rate listed

In *Wind Tower I*, the court instructed Commerce to explain "the salience, if any, of the MFN rate to its determination" and the reason that the rate is listed within Commerce's calculations as to the steel plate in question. 46 CIT at __, 569 F. Supp. 3d at 1260; *see* Calculation Mem. at attach. II, tab "Raw Materials.Rev.ATT2.BPI." Plaintiff argues that due to the alleged misidentification of the country of origin of the steel plate in question, Commerce's conclusion as to the salience of the duty rate is "not based on substantial evidence." Pl. Br. at 9–10. The court is unpersuaded by plaintiff's argument.

Commerce stated on remand that the "MFN rate was not salient to Commerce's consideration of the origin of the steel plate in the *Final Determination*." Remand Results at 20; *see* Remand Results at 39 ("[G]iven that the record evidence shows that the steel plate was sourced from within Vietnam rather than imported by CS Wind Vietnam, this point is not relevant."). In response to the remand instruction, Commerce also explained that the duty rate included in

the table in the final calculation memorandum was "irrelevant to the calculations" for the steel plate in question but was rather a result of CS Wind Vietnam's over-reporting, which is discussed *supra* Section II.B.1. *Id.* at 22.

In addition, Commerce noted that it "did not consider the MFN rate" in its determination as to the steel plate in question. *Id.* at 20. Commerce added that it would have needed to address whether a country is "subject to the MFN rate" only if CS Wind Vietnam had imported the steel plate, which Commerce found that CS Wind Vietnam did not. *Id.* at 39–40; Def. Br. at 16. Still, Commerce offered that even under the circumstances that WTTC raises (as to the alleged import of the steel plate in question), no benefit would have been conferred. Remand Results at 21. Namely, Commerce explained that "the imported steel plate would have been subject to a duty rate of zero, pursuant to MFN status." *Id.* Commerce added that there would be no import duties, and therefore no benefit, whether the steel plate was sourced domestically or imported due to the MFN duty rate for the steel plate from MFN countries. *Id.*

The court agrees with the Government. Commerce found that the MFN rate was not salient to its determination because CS Wind Vietnam did not import the steel plate in question. *See* Remand Results at 39–40; *see also* Def. Br. at 16. Commerce also explained the reason that the MFN rate appeared in its table despite its irrelevance to the calculation of the benefit as to the steel plate in question. *See* Remand Results at 22 (citing IQR at 23), 39–40. Therefore, Commerce did not need to determine further, as plaintiff insists, that the MFN rate applies as to any particular country or conduct further analysis into countries that might not have MFN status as to the steel plate in question. *See* Def. Br. at 16; Pl. Br. at 9. Accordingly, Commerce's determination not to consider the MFN rate that appears in Commerce's final calculation memorandum is supported by substantial evidence and complies with the remand instructions.

3. Importation scenarios in the remand order

The court also instructed Commerce to address the steel plate documentation and duty rate points by responding to three questions about whether the identity of the importer of record would impact the eligibility of CS Wind Korea or CS Wind Vietnam to receive a benefit. *Wind Tower I*, 46 CIT at __, 569 F. Supp. 3d at 1260. On remand, Commerce explained that the "importer of record is the party liable for payment of duties with respect to any particular entry." Remand Results at 23; *see* Remand Results at 38 ("[T]o receive the benefit under the program, a party has to be an importer of record, and has

to have imported steel plate and paid duties on the imported plate to which the exemption might apply."). Commerce added that there is "no record evidence that CS Wind Vietnam imported the steel plate at issue." *Id.* at 23; *see id.* at 38–39.

The court concludes that Commerce met its obligation to respond to the remand instruction pertaining to the scenarios that reflect concerns raised in WTTC's arguments, *see, e.g.*, Pl. Br. at 7–8: (1) Commerce explained that under the Import Duty Exemptions program only the importer of record would be liable for CVD duties, *see* Remand Results at 23; (2) Commerce explained that even if the unaffiliated Vietnamese supplier imported the steel plate in question, CS Wind Korea and CS Wind Vietnam would "not be liable for import duties, if such duties were applicable, and would not be the beneficiary of any exemptions on those duties", *id.* at 19; and (3) as described *supra* Section II.B.1, Commerce refuted the argument that CS Wind Vietnam imported the steel plate in question, *id.* at 17–18, 23; *see also id.* at 19 (finding that the steel plate in question "never left the country" (citing Verification Exs. at VE-15 at 71)).

In conclusion, Commerce's Remand Results pertaining to the steel plate in question being sourced from within Vietnam are supported by substantial evidence and are in compliance with the remand order.

CONCLUSION

"To dream the impossible dream . . . ."[13]

* * *

For the foregoing reasons, Commerce's Remand Results are supported by substantial evidence and comply with the court's instructions in *Wind Tower I*. The court sustains the Remand Results. Judgment will enter accordingly.

Dated: April 27, 2023
New York, New York

/s/ Timothy M. Reif
TIMOTHY M. REIF, JUDGE

[13] RICHARD KILEY, MITCH LEIGH (MUSIC) & JOE DARION (LYRICS), *The Impossible Dream (The Quest)*, *on* MAN OF LA MANCHA (Kapp Records, Inc. 1966) (BOOK BY DALE WASSERMAN).

Slip Op. 23–71

BGH EDELSTAHL SIEGEN GMBH, Plaintiff, v. UNITED STATES, Defendant, and ELLWOOD CITY FORGE COMPANY, et al., Defendant-Intervenors.

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

[Sustaining in part and remanding in part the U.S. Department of Commerce's remand redetermination in the 2018 investigation of the countervailing duty order covering forged steel fluid end blocks from the Federal Republic of Germany.]

Dated: May 9, 2023

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Sarah E. Kramer, Trial Attorney, and *Patricia M. McCarthy*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. Also on the brief was *Brian M. Boynton*, Principal Deputy Assistant Attorney General. Of counsel on the brief was *Ayat Mujais*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce.

Nicole Brunda, Cassidy Levy Kent (USA) LLP, of Washington, DC, for defendant-intervenors Ellwood City Forge Co., Ellwood National Steel Co., Ellwood Quality Steels Co., and A. Finkl & Sons. Also on the brief were *Thomas M. Beline*, *Jack A. Levy*, *Myles S. Getlan*, and *Chase J. Dunn*.

OPINION AND ORDER

Kelly, Judge:

Before the court is the U.S. Department of Commerce's ("Commerce") remand redetermination pursuant to the court's remand order, *see BGH Edelstahl Siegen GmbH v. United States*, 600 F. Supp. 3d 1241 (Ct. Int'l Trade 2022) ("*BGH I*"), on Commerce's final determination in its countervailing duty ("CVD") investigation of forged steel fluid end blocks ("fluid end blocks") from the Federal Republic of Germany ("FRG"). *See* Final Results of Redetermination Pursuant to Court Remand, C-428–848 (Jan. 9, 2023), ECF No. 48–1 ("Remand Results"); *see generally [Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg. 7,535 (Dep't Commerce Jan. 29, 2021) ([CVD] orders, and am. final affirmative [CVD] determination for the People's Republic of China) and accompanying Issues and Decision Mem., C-428–848, PD 293, bar code 4062827–01 (Dec. 7, 2020), ECF No. 15–2; *[Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy*, 86 Fed. Reg. 10,244 (Dep't Commerce Feb. 19, 2021) (correction to [CVD] orders). For the following reasons, the court sustains in part and remands in part Commerce's determinations on remand.

BACKGROUND

The court presumes familiarity with the facts of this case as set out in its previous opinion ordering remand to Commerce, *see BGH I*, 600 F. Supp. 3d 1241, and now recounts only those facts relevant to the court's review of the Remand Results. In the underlying CVD investigation of fluid end blocks from the FRG covering a period of January 1, 2018 to December 31, 2018, Commerce selected plaintiff BGH Edelstahl Siegen GmbH ("BGH") as a mandatory respondent. Resp't Selection Mem. at 1, C-428–848, PD 54, bar code 3938815–01 (Feb. 4, 2020). Commerce determined that the Government of Germany provided countervailable subsidies through several programs, including the Electricity Tax Act, the Energy Tax Act, and the KAV Program, *inter alia*.[1] Issues and Decision Mem. at 6–8, C-428–848, PD 293, bar code 4062827–01 (Dec. 7, 2020), ECF No. 15–2; *see also* Post-Prelim. Analysis [CVD] Investigation: [Fluid End Blocks] from [FRG] at 6–19, C-428–848, PD 271, bar code 4043279–01 (Oct. 21, 2020); Decision Mem. Prelim. Affirmative Determination [CVD] Investigation of [Fluid End Blocks] from [FRG] at 19–27, C-428–848, PD 220, bar code 3975458–01 (May 18, 2020). BGH filed its complaint and moved for judgment on the agency record, contesting Commerce's final determination. Compl., Mar. 29, 2021, ECF No. 7; [BGH] Mot. J. Agency R., Oct. 26, 2021, ECF No. 21. After briefing was complete, the court sustained in part and remanded in part Commerce's final determination. *BGH I*, 600 F. Supp. 3d at 1248, 1258, 1269. Specifically, the court remanded Commerce's determination: (i) with respect to its calculations of the CVD rates for the provisions of the Electricity Tax Act and the Energy Tax Act because Commerce failed to address BGH's costs of complying with those provisions, *id.* at 1258; and (ii) that the KAV Program constitutes a specific subsidy because Commerce failed to explain how that program favors certain industries over others and did not address whether the program criteria are economic in nature and horizontal in application, *id.* at 1269. The court sustained Commerce's determinations that the following programs constitute countervailable subsidies: (i) the Electricity Tax Act and the Energy Tax Act, *id.* at 1252–57; (ii) the EEG Program and KWKG Program reduced surcharges under the Special Equalization Scheme, *id.* at 1259–62; (iii) the ETS Program, *id.* at 1262–65; and

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

the (iv) the CO2 Compensation Program, *id.* at 1266–67. For those programs other than the Electricity Tax Act and the Energy Tax Act, the court also sustained Commerce's CVD rate calculations. *Id.* at 1259–67. Additionally, the court held that Commerce had properly initiated and developed its CVD investigation and that BGH failed to establish *ex parte* communications had occurred in the CVD investigation or that the record was incomplete. *Id.* at 1251–52.

Commerce filed its Remand Results on January 10, 2023. In its Remand Results, Commerce: (i) does not alter the final calculated subsidy rates for BGH's costs of compliance with the Electricity Tax Act and the Energy Tax Act and finds it unnecessary to reopen the record for the parties to submit further evidence, Remand Results at 4–8; and (ii) continues to find that the KAV Program constitutes a specific subsidy, *id.* at 8–10.

BGH argues that Commerce fails to comply with the court's instructions by not accounting for BGH's costs of compliance with the Electricity Tax Act and the Energy Tax Act and by not reasonably explaining its conclusion that the KAV Program constitutes a specific subsidy. [BGH] Comments Opp. [Remand Results] at 1–17, Feb. 23, 2023, ECF No. 53 ("BGH's Comments"). Defendant and Defendant-Intervenors argue that the court should sustain Commerce's remand redetermination because cost of compliance is not one of the permissible types of countervailable subsidy offsets and because the KAV Program is specific to a subset of special contract customers. Def.'s Resp. to Comments on [Remand Results] at 4–10, Mar. 27, 2023, ECF No. 54 ("Def. Resp."); Def.-Int.'s Reply to [BGH's Comments] at 2–8, Mar. 27, 2023, ECF No. 55 ("Def-Int. Reply").

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to section 516A of the Tariff Act of 1930,[2] as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) (2018), and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting the final determination in an administrative review of a CVD order. "The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "The results of a redetermination pursuant to court remand are also reviewed for compliance with the court's remand order." *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 968 F. Supp. 2d 1255, 1259 (Ct. Int'l Trade 2014) (quotation marks omitted).

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

DISCUSSION

I. Electricity and Energy Tax Acts

On remand, Commerce maintains the final calculated subsidy rates for the Electricity and Energy Tax Acts because Commerce concludes it is not required to incorporate offsets for costs of compliance into its subsidy rate calculations. Remand Results at 4–7. Additionally, Commerce finds it unnecessary to reopen the record for the parties to submit evidence on BGH's costs of compliance. *Id.* at 8. BGH argues that Commerce fails to comply with the court's instructions because it does not reasonably explain why BGH's costs of complying with the Electricity and Energy Tax Acts do not constitute a required offset.[3] BGH Comments at 1–8. For the following reasons, the court sustains Commerce's remand redetermination that BGH's costs of compliance with the Electricity and Energy Tax Acts do not constitute a permissible offset.

The court remanded Commerce's failure to address BGH's costs of compliance with the Electricity Tax Act and the Energy Tax Act for Commerce to consider these costs in the first instance. *BGH I*, 600 F. Supp. 3d at 1258. Section 1677(6) states the agency may offset "any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy . . . ." 19 U.S.C. § 1677(6)(A). The phrase "application fee or similar payment" can be interpreted narrowly or broadly. For example, Defendant argues that offsets are expressly limited to application fees, deposits, or similar payments. Def. Resp. at 7. Defendant-Intervenors further state that permissible offsets do not included expenses, which "are not even 'payments' at all." Def.-Int. Reply at 5. Conversely, BGH argues a tax or an energy management system constitutes a similar payment made in order to obtain a subsidy. BGH Comments at 3. Thus, Congress has delegated to Commerce the determination of which offsets are permissible under § 1677(6). *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984).

On remand, Commerce addresses BGH's cost of compliance, explaining that it interprets "any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy," 19 U.S.C. § 1677(6)(A), to exclude offsets for costs to comply with government laws and regulations such as climate change measures, including costs incurred to participate in

[3] BGH also argues, without citation, that Commerce fails to comply with the court's ruling by not reopening the record. BGH Comments at 1. The court does not reach BGH's argument regarding the record because the court determines Commerce's exclusion of BGH's costs of compliance is reasonable.

government programs under those measures. Remand Results at 4–5. The list of permissible offsets is "narrowly drawn and . . . all inclusive," *id.* at 5 n.21 (citing Trade Agreements Act of 1979, S. Rep. No. 96–249, at 85–86 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 381, 471–72), meaning BGH's costs of compliance with the Electricity Tax Act and Energy Tax Act would not be included. Commerce determines that "[o]ffsets for costs that a firm incurs to comply with a government's climate change measures or to participate in government programs under the measures do not fall within these three categories in the Act." Remand Results at 5. Because § 1677(6) specifies that "fees" and "deposits" may be offset, it is reasonable to interpret the subsequent phrase "or similar payment paid" as restricting offsets to payments of the same type—direct payments to the agency providing the benefit.

Commerce's narrow interpretation is also reasonable because Commerce views a subsidy as distinct from measures taken to qualify for the subsidy. *See* Remand Results at 7, 7 n.32. In support of its interpretation, Commerce cites the *1998 Final Preamble*'s example of new environmental restrictions requiring a firm to purchase new equipment to adapt its facilities and issuing subsidies to purchase the equipment, but which do not fully cover the total cost. *Remand Results* at 7. The Preamble states that receiving subsidies and acquiring the new equipment constitute separate actions for the purposes of offsets, despite leaving the firm with overall higher costs. *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,361 (Nov. 25, 1998) (final rule).

Commerce's interpretation conforms with its practice. In responding to BGH's remand comments, Commerce notes it previously rejected arguments to apply similar types of offsets as either application fees or similar payments.[4] *See* Remand Results at 10–12. Thus, Commerce states in past cases it evaluated subsidies without accounting for any burden such as compliance costs. *See id.* at 7, 7 n.32. For example, a logging tax was not an application fee or deposit because Commerce determined the logging tax, and the tax credit benefit

[4] *See, e.g.*, Issues and Decisions Mem. for Hot-Rolled Steel Flat Products from the Republic of Korea at 18, C-580–884, bar code 4238418–02 (May 3, 2022) (burdens such as environmental obligations do not qualify for offset); Decision Mem. for Cut-To-Length Carbon-Quality Steel Plate from the Republic of Korea at 11–12, C-580–837, bar code 4194857–02 (Dec. 23, 2021) (Commerce does not account for burden imposed on firm that is related to the granting of the subsidy); Issues and Decision Mem. for Softwood Lumber Products from Canada at 47, C-122–858, bar code 3855675–01 (June 28, 2019) (taxes are not offset because they are not an application fee or a deposit); Issues and Decision Mem. for Uncoated Groundwood Paper from Canada at 217–18, C-122–862, bar code 3738034–01 (Aug. 1, 2018) (costs from lost production is not one of the enumerated offsets); Issues and Decision Mem. for Large Residential Washers from the Republic of Korea at 47, C-580–869, bar code 3111550–01 (Dec. 18, 2012) (tax is not offset because it is a consequence of the benefit rather than a prerequisite).

resulting from paying the logging tax, were two separate actions. *Id.* at 11–12; *see Certain Softwood Lumber Products from Canada*, 84 Fed. Reg. 32121 (July 5, 2019) (final results of CVD expedited review), and accompanying Issues and Decision Mem. at 47–48, C-122–858, bar code 3855675–01 (June 28, 2019) (Commerce has only provided offsets in limited circumstances because the statute is "clearly limited to an application fee, deposit, or similar payment"). Thus, Commerce's interpretation is both reasonable in light of the authority delegated to it and consistent with past practice.

BGH cites Commerce's reasoning in *Washers from Korea* as support for BGH's argument that costs of compliance with climate change measures should be offset in Commerce's calculation of the CVD rate. BGH Comments at 3; *see* Issues and Decision Mem. for Large Residential Washers from the Republic of Korea at 47, C-580–869, bar code 3111550–01 (Dec. 18, 2012); *see also Large Residential Washers from the Republic of Korea*, 77 Fed. Reg. 75,975 (Dec. 26, 2012) (final affirm. CVD determination). BGH's argument is inapposite. Although Commerce determined that the tax in *Washers from Korea* was not a prerequisite to receiving a benefit the way an application fee might be and therefore the tax would not be offset, being a prerequisite by itself is insufficient to constitute an application fee or similar payment. At best, *Washers from Korea* supports the idea that a tax cannot be an application fee or similar payment unless it is a prerequisite, which is a necessary but not sufficient requirement to incorporate offsets for a tax in the CVD rate. Thus, Commerce's interpretation is reasonable and consistent with its past practice. Accordingly, Commerce's calculation is supported by substantial evidence.

II. KAV Program

On remand, Commerce continues to find the KAV Program specific as a matter of law. Remand Results at 8–10. BGH argues that Commerce again fails to reasonably explain its determination that the program is *de jure* specific in light of the record. BGH Comments at 8–17. For the following reasons, the court remands Commerce's remand redetermination for further explanation or reconsideration.

Where an authority or legislation expressly limits access to a subsidy to a sufficiently small number of enterprises, industries, or groups, the subsidy is specific as a matter of law.[5] 19 U.S.C. § 1677(5A)(D)(i); *see* Statement of Administration Action for the Uru-

[5] Any reference to an enterprise or industry includes a group of such enterprises or industries. 19 U.S.C. § 1677(5A).

guay Round Agreements Act, H.R. Rep. No. 103–316 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4242 ("SAA"). The statute provides no formula for determining when the number of enterprises, industries, or groups is so limited as to be *de jure* specific. SAA at 4242. However, the SAA explains that the specificity provision should be applied as an initial screening method to winnow out only those subsidies that truly are broadly available and widely used throughout an economy. *Id.* Moreover, the statute provides a safe harbor for subsidies that are "not specific as a matter of law." 19 U.S.C. § 1677(5A)(D)(ii).

Subsidies are not specific as a matter of law where the subsidy program provides: (1) "objective criteria or conditions governing the eligibility for, and the amount of," the subsidy; (2) "eligibility is automatic;" (3) "the criteria or conditions for eligibility are strictly followed;" and (4) "the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document." 19 U.S.C. § 1677(5A)(D)(ii). Objective criteria are criteria that are "neutral and that do not favor one enterprise or industry over another." *Id.*; *see* SAA at 4243.

Neutral in this context means "economic in nature and horizontal in application, such as the number of employees or the size of the enterprise." *See* SAA at 4243. "Economic" relates to the consumption of goods and services. *Economic*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/economic (last visited May 4, 2023) ("1 a : of, relating to, or based on the production, distribution, and consumption of goods and services"); *Economy*, Black's Law Dictionary (11th ed. 2019) ("1. The management or administration of the wealth and resources of a community (such as a city, state, or country)"). "Horizontal" in this context means applying to similar enterprises uniformly. *See Horizontal*, Oxford English Dictionary, www.oed.com/view/Entry/88460 (last visited May 4, 2023) ("3. a. Uniform; producing or based on uniformity. Chiefly *U.S.*"); *Horizontal*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/horizontal (last visited May 4, 2023) ("2 : relating to, directed toward, or consisting of individuals or entities of similar status or on the same level"). Thus, neutral criteria are those which are based upon factors relating to the consumption of goods or services and are uniformly available across industries.

Here, the issue is whether the KAV Program's criteria are economic in nature and horizontal in application. On remand, Commerce concludes the program criteria are not economic in nature and horizontal in application because they favor "a specific subset of special contract

customers based on their electricity prices." Remand Results at 10. Special contract customers are those who use large amounts of electricity.[6] *See BGH I*, 600 F. Supp. 3d at 1268. It would appear that Commerce concludes that the purchase of large amounts of electricity is neither economic (relating to the consumption of goods or services) nor horizontal (uniformly available across industries). The court does not understand the basis for Commerce's conclusion with respect to special contract customers. Commerce fails to explain how the amount of electricity consumed or the electricity prices paid by companies are not economic in nature. If economic in nature relates to the consumption of goods and services, prices paid and resources consumed seem to fit the plain meaning of economic in nature.

Further, Commerce fails to explain how criteria based solely on electricity consumption and pricing is not horizontal in application. It may be the case that there are a limited numbers of industries that consume large amounts of electricity, but such a fact would be relevant to the question of whether a subsidy was *de facto* specific, not whether it was specific as a matter of law. *See* 19 U.S.C. § 1677(5A)(D)(iii).

Commerce argues the KAV Program favors certain enterprises over others—those special contract customers with electricity prices below the marginal price agreed to by the network operator and the municipality. Remand Results at 9. Commerce's argument suggests that the KAV Program's criteria are vertical in application rather than horizontal. *See id.* at 9 ("we find that the FRG favors certain enterprises over others through the KAV Program"). Commerce's use of the word "favors" is misplaced. "Favors" in the *de jure* context would mean that the law itself singled out industries for special treatment. *See Taizhou United Imp. & Exp. Co. v. United States*, 475 F. Supp. 3d 1305, 1316 (Ct. Int'l Trade 2020) (sustaining Commerce's determination of *de jure* specificity where legislation expressly limited access to subsidies). That one industry received a benefit and another did not does not mean the first industry was favored. It only means that the industry qualified under the criteria. However, for the KAV Program's criteria to be vertical in application, the criteria would need to "expressly limit" the program's application to specifically named enterprises or industries or group of enterprises or industries. *See* 19 U.S.C. § 1677(5A)(D)(i). The program criteria here do not expressly limit the program's application to specific enterprises or industries.

[6] The Government of Germany defines the term "special contract customer" as "all customers, whose measured power exceeds 30 kilowatts in at least two months of the billing year and whose annual consumption is more than 30,000 kilowatt hours." *See* Resp. [FRG] and the Fed. Ministry for Economic Affairs and Energy of the [FRG] to the Suppl. Questionnaire at 2–3, C-428–848, PD 270, bar code 4030747–01 (Sept. 22, 2020).

For the subsidy program to be *de jure* specific in light of § 1677(5A)(D)(ii), Commerce must explain how the program's criteria are neither economic in nature nor horizontal in application. Commerce's remand redetermination that the KAV Program is *de jure* specific is remanded for further explanation or reconsideration.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Commerce's Remand Results are sustained with respect to its calculations of the CVD rates for the Electricity Tax Act and the Energy Tax Act; and it is further

ORDERED that Commerce's Remand Results are remanded for further explanation or reconsideration consistent with this opinion with respect to its determination that the KAV Program is a specific subsidy; and it is further

ORDERED that Commerce shall file its second remand redetermination with the court within 90 days of this date; and it is further

ORDERED that Commerce shall file the administrative record within 14 days of the date of filing of its second remand redetermination; and it is further

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

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

ORDERED that the parties shall file the joint appendix within 14 days of the date of filing of responses to the comments on the second remand redetermination.

Dated: May 9, 2023
New York, New York

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

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