C-557-822
Investigation
Public Document
E&C/V: NJ/KH

June 2, 2021

MEMORANDUM TO: Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Utility Scale Wind Towers from Malaysia

---

I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to producers and exporters of utility scale wind towers (wind towers) from Malaysia, as provided in section 705 of the Tariff Act of 1930, as amended (the Act). The mandatory respondent subject to this investigation is CS Wind Malaysia Sdn Bhd (CS Wind). The period of investigation is January 1, 2019, through December 31, 2019.

After analyzing the comments submitted by interested parties, we have made certain changes to the *Preliminary Determination*.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of issues in this investigation for which we received comments from interested parties:

General Issues

Comment 1: Whether Commerce Should Determine that the Government of Malaysia (GOM) Duty Exemption Program Is Specific on the Basis of Facts Available
Comment 2: Whether the GOM Has an Effective System in Place to Track Input Consumption Pursuant to 19 CFR 351.519
Comment 3: Whether Commerce Should Revise Its Analysis of the Electricity for Less than Adequate Remuneration (LTAR) Program
Comment 4: Whether Commerce Should Select a Different Tier-One Benchmark to Measure the Adequacy of Remuneration for CS Wind's Land

[1] *See Utility Scale Wind Towers from Malaysia: Preliminary Affirmative Countervailing Duty Determination*, 86 FR 15887 (March 25, 2021) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

Comment 5: Whether Commerce Should Modify the Denominator Used in its Benefit Calculations
Comment 6: Whether Commerce Incorrectly Declined to Initiate an Investigation into the Cut-to-Length (CTL) Plate for LTAR New Subsidy Allegation (NSA)

II. BACKGROUND

A. Case History

On March 25, 2021, Commerce published the *Preliminary Determination*.[2] Following the release of our *Preliminary Determination*, we issued an in-lieu-of-verification questionnaire to CS Wind.[3] On April 1, 2021, CS Wind timely responded to the in-lieu-of-verification questionnaire.[4] Interested parties submitted case[5] and rebuttal[6] briefs between April 12, 2021, and April 19, 2021.

On April 15, 2021, Commerce rejected the GOM's initial case brief because it included unsolicited new factual information (NFI).[7] On April 22, 2021, Commerce again rejected the GOM's case brief because it contained NFI.[8] On April 26, 2021, the GOM refiled its case brief for the third time.[9]

On May 6, 2021, Commerce held a public hearing, limited to the issues raised in the case and rebuttal briefs.[10]

B. Period of Investigation

The period of investigation (POI) is January 1, 2019, through December 31, 2019.[11]

---

[2] *Id.* Commerce released a memorandum addressing the petitioner's NSAs concurrently with the *Preliminary Determination*. *See* Memorandum, "Countervailing Duty Investigation of Utility Scale Wind Towers from Malaysia: New Subsidy Allegations," dated March 18, 2021 (NSA Memorandum).
[3] *See* Commerce's Letter, "Countervailing Duty Investigation of Utility Scale Wind Towers from Malaysia: In Lieu of Verification Questionnaire," dated March 25, 2021.
[4] *See* CS Wind's Letter, "Utility Scale Wind Towers from Malaysia: In-Lieu of On-Site Verification Questionnaire Response," dated April 1, 2021.
[5] *See* CS Wind's Letter, "Countervailing Duty Investigation of Utility Scale Wind Towers from Malaysia: CS Wind Case Brief," dated April 12, 2021 (CS Wind Case Brief); and Petitioner's Letter, "Utility Scale Wind Towers from Malaysia: Case Brief," dated April 12, 2021 (Petitioner Case Brief).
[6] *See* CS Wind's Letter, "Countervailing Duty Investigation of Utility Scale Wind Towers from Malaysia: CS Wind Rebuttal Brief," dated April 19, 2021 (CS Wind Rebuttal Brief); and Petitioner's Letters, "Utility Scale Wind Towers from Malaysia: Rebuttal Brief," dated April 19, 2021 (Petitioner Rebuttal Brief – CS Wind); and "Utility Scale Wind Towers from Malaysia: Rebuttal Brief to Government of Malaysia's Case Brief," dated April 19, 2021 (Petitioner Rebuttal Brief – GOM).
[7] *See* Commerce's Letter, "Utility Scale Wind Towers from Malaysia: Countervailing Duty Investigation – Rejection of Government of Malaysia Submission," dated April 15, 2021.
[8] *See* Commerce's Letter, "Utility Scale Wind Towers from Malaysia: Countervailing Duty Investigation – Rejection of Government of Malaysia Submission," dated April 22, 2021.
[9] *See* GOM's Letter, "Utility Scale Wind Towers from Malaysia – Revised Case Brief," dated April 26, 2021 (GOM Case Brief).
[10] *See* Hearing Transcript, "The Countervailing Duty Investigation of Utility Scale Wind Towers from Malaysia: Public Hearing," dated May 6, 2021.
[11] *See Preliminary Determination* PDM at 4.

III. SCOPE OF THE INVESTIGATION

The merchandise covered by this investigation consists of certain wind towers, whether or not tapered, and sections thereof. For a complete description of the scope of this investigation, *see* the *Federal Register* notice accompanying this memorandum at Appendix II.

IV. SUBSIDIES VALUATION

A. Allocation Period

Commerce made no changes to, and interested parties raised no issues in their case briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Determination*. For a description of the allocation period and methodology used for this final determination, *see* the *Preliminary Determination*.[12]

B. Attribution of Subsidies

Interested parties raised issues in their case briefs regarding the attribution of subsidies methodology used in the *Preliminary Determination*. However, we made no changes to the attribution of subsidies methodology, as explained in Comment 5. For a description of the methodology used for this final determination, *see* the *Preliminary Determination.*[13]

C. Denominators

Interested parties raised issues in their case briefs regarding the denominators used in the calculations performed for the *Preliminary Determination*. However, we made no changes to the denominators used in our calculations, as explained in Comment 5. For a description of the denominators used for all programs in the final determination, *see* the *Preliminary Determination.*[14]

D. Benchmarks and Interest Rates

Interested parties raised issues in their case briefs regarding the electricity and land benchmarks we used in the *Preliminary Determination*.[15] Commerce has made changes to the benchmarks, as discussed in Comments 3 and 4, respectively.

V. USE OF FACTS AVAILABLE

Commerce relied on "facts available" for our analysis regarding the provision of electricity for LTAR program in the *Preliminary Determination*. For a description of this decision, *see* the *Preliminary Determination* section titled "Application of Facts Available: Electricity for LTAR

[12] *Id*. at 8.
[13] *Id*. at 8-10.
[14] *Id*. at 10.
[15] *Id.* at 10-13.

– Benchmark." Commerce has not made any changes to its decision to use facts available in this final determination.

VI. ANALYSIS OF PROGRAMS

Commerce made no changes to its *Preliminary Determination* with regard to the methodology used to calculate the subsidy rates for the programs listed below, with the exceptions noted in the program-specific comments. For the remaining descriptions, analyses, and calculation methodologies for these programs, *see* the *Preliminary Determination*. The final program rates are identified below.

A. Programs Determined to be Countervailable

1. East Coast Economic Region (ECER)/Industrial Zone – Land for LTAR Program

As noted in Comment 4, we modified the calculation of a benefit for this program by averaging two private land transactions to construct the benchmark. The final subsidy rate for this program is 0.96 percent *ad valorem*.[16]

2. Exemption of Import Duties and Sales Taxes for Imported Raw Materials, Spare Parts/Accessories, and Machinery

We made no changes to our methodology for calculating a subsidy rate for this program. The final subsidy rate is 4.78 percent *ad valorem.*[17]

3. Provision of Electricity for LTAR[18]

As noted in Comment 3, we modified the calculation of a benefit for this program by relying on the 2019 electricity tariff rates for the applicable user class in Singapore. The final subsidy rate for this program is 0.68 percent *ad valorem*.[19]

B. Programs Determined Not to be Used During the POI

Commerce made no changes to its *Preliminary Determination* with regard to programs determined not to be used by CS Wind during the POI.[20]

1. Pioneer Status Direct Tax Incentives
2. Preferential Financing from the Malaysia Development Bank
3. High Impact Fund Grant

[16] *See* Memorandum, "Countervailing Duty Investigation of Utility Scale Wind Towers from Malaysia: CS Wind Final Determination Calculations," dated concurrently with this memorandum (CS Wind Final Calculation Memorandum).
[17] *Id.*
[18] In the *Preliminary Determination*, this program was referenced as the "ECER/Industrial Zone – Electricity for LTAR Program." *See Preliminary Determination* PDM at 9.
[19] *See* CS Wind Final Calculation Memorandum.
[20] *See Preliminary Determination* PDM at 19.

4. Upstream Subsidization of Malaysian CTL Plate Producers by the GOM

VII. DISCUSSION OF THE ISSUES

Comment 1: Whether Commerce Should Determine that the GOM Duty Exemption Program Is Specific on the Basis of Facts Available

In the *Preliminary Determination*, we found that the GOM's duty exemption program – *i.e.*, the "Exemption of Import Duties and Sales Taxes for Imported Raw Materials, Spare Parts/Accessories, and Machinery" – was specific as export-contingent.[21] Although we noted that certain statements in the GOM's narrative response were ambiguous on this point, record evidence demonstrated that the program was designed to impose an export requirement on any company seeking to obtain duty exemptions for imported raw materials to be processed in a licensed manufacturing warehouse (LMW). Accordingly, we found that the program was specific as an export-contingent subsidy and was properly analyzed under 19 CFR 351.519.

Petitioner's Comments:

- Although Commerce found the GOM duty exemption program to be specific as an export-contingent program, the GOM failed to provide necessary information for a full analysis of this program, and it failed to cooperate to the best of its ability to provide this information. The GOM provided conflicting information in response to Commerce's requests in some instances, and it refused to respond to Commerce's requests in other instances.[22]
- Commerce's analysis of the import duty exemption as an export program under 19 CFR 351.519, based on the limited and conflicting information that the GOM provided, will reward the GOM for its lack of cooperation and deny the petitioner necessary relief under the antidumping duty (AD) and countervailing duty (CVD) laws by permitting an export subsidy offset in the corresponding AD investigation.[23] Commerce should instead determine, based on adverse facts available (AFA), that the program is specific pursuant to the broad meaning of section 771(5A) of the Act.[24]
- In the *Preliminary Determination*, Commerce found that the GOM's import duty exemption program for raw materials "is designed to be an export program and, thus, is properly analyzed under 19 CFR 351.519."[25] Commerce cited Provision 65A of the Customs Law of 1967, which states the following with respect to the LMWs: "{I}f such goods are released from the {LMW} for home consumption the customs duty thereon shall be calculated on the basis as if such {goods had} been imported …"[26] Commerce also cited a statement by the GOM that "sales to the local market are subject to import

[21] *Id*. at 12.
[22] *See* Petitioner Case Brief at 3.
[23] *Id*. at 3.
[24] *Id*. at 3-4 (citing section 776(b) of the Act).
[25] *Id*. at 4 (citing *Preliminary Determination* PDM at 12).
[26] *Id*. (citing GOM's Letter, "Utility Scale Wind Towers from Malaysia – Resubmission of GOM Supplementary Questionnaire Response," dated February 3, 2021 (GOM February 3, 2021 SQR) at Exhibit CE).

duty payment{.}"[27] With this information, Commerce determined that the duty exemption for raw materials is intended to apply to goods that are exported.[28]

- The GOM failed to provide consistent responses and supporting information on this program. For example, in its original questionnaire response, the GOM stated that it provided import duty and sales tax exemptions to companies in LMWs "regardless of whether the finished products are meant for export or local market from the initial state of manufacture until the manufacture of finished products."[29] The GOM made this statement at least 10 separate times in its questionnaire responses, and it certified the accuracy of these responses.[30]
- The GOM's repeated statements belie CS Wind's assertion that the GOM's response contains "minor inaccuracies and drafting errors,"[31] because the GOM's explanation was not a one-off statement. The GOM's statements also contradict record information that Commerce cited in the *Preliminary Determination* to support an analysis of the duty exemption program as an export program under 19 CFR 351.519.[32]
- Additionally, Commerce cited Provision 65A that states: "{The Minister} may in any particular case exempt any person from payment of the whole or part of such duty which may be payable by such person on any such goods and in granting such exemption the Minister may impose such conditions as he may deem fit."[33] This provision indicates that the GOM does, in fact, grant duty exemptions on imported inputs to firms operating LMWs, regardless of whether the firms consume inputs to produce good for domestic consumption or for export, because it grants the Minister the authority to administer the program in this way. For these reasons, the program should be analyzed under 19 CFR 351.510, *i.e.*, as an exemption from import charges other than an export program.[34]
- Because of the GOM's failure to provide necessary information on the program, a full analysis of whether the program is properly classifiable under 19 CFR 351.510 or 19 CFR 351.519 is not possible.[35] Consequently, Commerce should find the program to be specific within the meaning of section 771(5A) of the Act on the basis of AFA or, at a minimum, facts otherwise available.[36]
- Commerce may apply AFA "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully," and it may consider "the extent to which a party may benefit from its own lack of cooperation."[37] Importantly, Commerce has made clear, and the courts have confirmed, that "Commerce, and not the respondents, determines what information is relevant and necessary, and must be

[27] *Id*. (citing *Preliminary Determination* PDM at 12).
[28] *Id*.
[29] *Id*. at 4-5 (citing GOM's Letter, "Utility Scale Wind Towers from Malaysia: Countervailing Duty Questionnaire Response," dated December 24, 2020 (GOM December 24, 2020 IQR) at 15-16.
[30] *Id*. at 5 (citing GOM December 24, 2020 IQR at 15-16 and GOM February 3, 2021 SQR at 45, 46, 57-60 and 63).
[31] *Id*. (citing CS Wind's Letter, "Utility Scale Wind Towers from Malaysia: Response to the Petitioner's Pre-Preliminary Determination Comments," dated March 10, 2021 (CS Wind Rebuttal Pre-Preliminary Comments) at 1-2).
[32] *Id*.
[33] *Id*. (citing *Preliminary Determination* PDM at 13).
[34] *Id*.
[35] *Id*. at 6.
[36] *Id*.
[37] *Id*. (citing Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1 at 870).

provided."[38] When information is missing from the record due to a respondent's failure to cooperate to the best of its ability—including its failure to provide information that Commerce requests—applying AFA is appropriate.[39]

- The GOM failed to provide necessary information for an analysis of the specificity of the program, despite having two opportunities. In its initial questionnaire response, the GOM responded "{n}ot applicable" to every question on program usage under subsections M and N of Commerce's Standard Questions Appendix.[40] Responses to these questions were necessary for an analysis of whether the program is *de facto* specific. When Commerce provided the GOM with a second opportunity, the GOM claimed that it could not provide the information "due to confidentiality of information under the Customs Act 1967."[41]
- The GOM did not promptly notify Commerce that it was "unable to submit the information requested in the requested form and manner," as required by section 782(c)(1) of the Act. The GOM also did not suggest any alternative forms in which it could have submitted the usage information.[42] The GOM, therefore, failed to provide necessary information on this program, and this failure has left a gap in the record.
- Moreover, Commerce's decision to analyze the program as an export program under 19 CFR 351.519, based on the incomplete information that the GOM provided, has indirectly rewarded the GOM.[43] Commerce is also conducting a parallel AD investigation of utility scale wind towers from Malaysia.[44] If Commerce does not address the GOM's failure to provide necessary information in the CVD investigation, then this will adversely affect the combined relief that the petitioner receives under the AD/CVD laws.[45]
- Section 772(c)(1)(C) of the Act directs Commerce to increase the prices used to establish export price and constructed export price in an AD proceeding by "the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy."[46] Accordingly, treating the program as an export subsidy impacts the petitioner's right to relief under the AD laws collaterally in this instance.
- When a respondent government fails to provide requested information concerning subsidy programs under investigation, Commerce typically finds as AFA that a financial contribution exists under the program and that the program is specific.[47] Commerce's practice of applying AFA when a respondent government fails to provide requested

[38] *Id*. (citing *Certain Oil Country Tubular Goods from the People's Republic of China*, 78 FR 49475 (August 14, 2013, and accompanying Issues and Decision Memorandum (IDM) at Comment 5; and *Ansaldo Componenti S.p.A. v. United States*, 628 F. Supp. 198, 205 (1986)).
[39] *Id*. at 7-8.
[40] *Id*. at 8 (citing GOM December 24, 2020 IQR at 22-24).
[41] *Id*. (citing GOM February 3, 2021 SQR at 62-63).
[42] *Id*. at 9.
[43] *Id*.
[44] *Id*. at 10 (citing *Utility Scale Wind Towers from India, Malaysia, and Spain: Initiation of Less-Than-Fair-Value Investigations*, 85 FR 73023 (November 16, 2020)).
[45] *Id*. at 10-11.
[46] *Id*. at 11 (citing section 772(c)(1)(C) of the Act).
[47] *Id*. at 12 (citing *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: Final Affirmative Countervailing Duty Determination*, 82 FR 58172 (December 11, 2017), and accompanying IDM at 27, and *Circular Welded Carbon-Quality Steel Pipe from India: Final Affirmative Countervailing Duty Determination*, 77 FR 64468 (October 22, 2013), and accompanying IDM at 10).

information is particularly applicable in this case, because the GOM failed to respond fully to Commerce's requests and provided repeated statements that were not consistent with other record information. Accordingly, for the final determination, Commerce should determine the following as AFA pursuant to section 776(b) of the Act: (1) the GOM's duty exemption program is classifiable under 19 CFR 351.510; and (2) the program is specific pursuant to section 771(5A) of the Act.[48]

- If Commerce does not apply AFA to determine that the program is generally specific under section 771(5A) of the Act, then Commerce should apply facts otherwise available to determine that the program is specific as a domestic subsidy under any of the subsections of section 771(5A)(D) of the Act.[49] Commerce acknowledged the program is *de jure* specific under section 771(5A)(D)(i) of the Act because the GOM limits eligibility to companies producing approved products.[50] The GOM also limits eligibility by law to specific enterprises (*i.e*. companies that apply for and meet the eligibility requirements to become LMWs under the Customs Act of 1967).[51] The record also indicates that the program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act, because recipients of the subsidy (*i.e.*, eligible LMWs) are limited in number on an enterprise or industry basis. Finally, the GOM explained that the LMWs "can be set up in Principal Customs Area (PCA)."[52] This indicates that the program is specific under section 771(5A)(D)(iv) of the Act, because the GOM limits eligibility to a specific geographical region under its jurisdiction.[53]
- Accordingly, if Commerce does not find the program to be generally specific pursuant to section 771(5A) of the Act on the basis of AFA, then Commerce should find the program to be specific as a domestic subsidy on the basis of facts otherwise available.[54]

CS Wind's Rebuttal:

- The Act does not permit Commerce to determine the duty exemption program to be specific based on AFA or neutral facts available. The petitioner's argument to the contrary is based on a misreading of questionnaire responses of the GOM and requires Commerce to ignore the balance of record evidence that clearly establishes that the LMW program allows participants to receive an exemption from import duties and indirect taxes on raw materials imported into an LMW facility only upon re-exportation of finished merchandise. Despite imprecise responses by the GOM, there is no gap in the record concerning the fact that the LMW program is export-contingent; therefore, there is no basis in law or fact to determine, based on AFA or facts otherwise available, that the LMW program is a domestic subsidy program.[55]

[48] *Id*. (citing *Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Investigation*, 86 FR 14071 (March 12, 2021), and accompanying IDM at Comment 3).
[49] *Id*.
[50] *Id*. at 13 (citing *Preliminary Determination* PDM at 11).
[51] *Id*. (citing GOM December 24, 2020 IQR at 15; and GOM February 3, 2021 SQR at 50-52).
[52] *Id.* (citing GOM February 3, 2021 SQR at 45).
[53] *Id.*
[54] *Id*. at 14.
[55] *See* CS Wind Rebuttal Brief at 4.

- The Act defines an export subsidy as "a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 or 2 or more conditions."[56] The Act states that a subsidy cannot be considered a "domestic subsidy" pursuant to section 771(5A)(D) if it meets the characteristics of an "export subsidy" or "import substitution subsidy" described in subparagraphs (B) or (C).[57] The Act goes on to list a number of guidelines for determining whether a domestic subsidy is specific if it is not an "export subsidy" or "import substitution subsidy" described in subparagraphs (B) or (C).[58]
- Section 771(5A)(A) does not provide a generalized basis to consider a subsidy countervailable; rather it states that a subsidy meets the specificity requirement of a countervailable subsidy if it meets any of the requirements described in the other subparagraphs of 771(5A). A subsidy is specific if it meets the requirements of: (1) an export subsidy articulated in section 771(5A)(B); (2) an import substitution subsidy articulated in section 771(5A)(C); or (3) a domestic subsidy articulated in section 771(5A)(D).[59]
- There is nothing in the Act, as written, that indicates that a subsidy may be generally specific if it does not meet the definitions of either an export subsidy, import subsidy, or domestic subsidy, as defined in the Act. Therefore, the petitioner's suggestion that section 771(5A) of the Act provides some "broad" and independent basis to consider the LMW program to be something other than an "export subsidy"—where the record facts unequivocally establish that the import duty exemptions on raw material inputs under LMW program are, in law and in fact, contingent upon export—is unsupported by the plain language of the Act.[60]
- In this case, Commerce lacks the authority to apply either facts available or AFA. Before Commerce may apply AFA pursuant to section 776, Commerce must find that necessary information is not available on the record or that a respondent: (1) withheld information that has been requested by Commerce; (2) failed to provide such information by Commerce's deadlines for submission of the information or in the form and manner requested; (3) significantly impeded the proceeding; or (4) provided information that cannot be verified.[61] If the necessary facts are available to make a determination, the Act does not permit Commerce to ignore them.
- While Commerce may apply AFA even if the collateral effect of finding that a foreign government failed to cooperate in a CVD case adversely impacts a cooperating party,[62] Commerce must "seek to avoid such impact if relevant information exists elsewhere on the record."[63]
- Commerce correctly determined that the necessary information is available on the record to establish that the LMW program is contingent on export,[64] and cited the following record evidence: (1) the text of Provision 65A of the Customs Law of 1967, which states

[56] *Id*.
[57] *Id*.
[58] *Id*. at 4-5
[59] *Id*. at 5
[60] *Id*.
[61] *Id*. at 5-6 (citing section 776 of the Act).
[62] *Id*. at 6 (citing *Archer Daniels Midland Co. v. United States*, 917 F. Supp. 2d 1331, 1342 (2013) (*Archer Daniels*)).
[63] *Id*. (citing *Archer Daniels*, 917 F. Supp. 2d at 1342).
[64] *Id*. at 6 (citing *Preliminary Determination* PDM).

that customs duties are owed by the LMW participant if merchandise incorporating imported inputs is released from the LMW for domestic consumption; and (2) statements by the GOM that "sales to the local market are subject to import duty payment."[65]

- CS Wind also provided documentation containing the Royal Malaysia Customs Department (RMCD)'s own description of the LMW program to clarify that: (1) in order to qualify for duty and tax exemptions for machines, equipment, spare parts, raw materials, components, or accessories, and packing materials, an LMW participant must export 80 percent or more of the finished merchandise (by value) produced in the warehouse; and (2) an LMW participant must pay all applicable import duties and taxes on material imported into an LMW that is not incorporated into exported merchandise or is otherwise sold domestically.[66] Additionally, the terms of the LMW license issued to CS Wind in effect during the POI required that, in the event any goods, including imported inputs or finished merchandise, were sold domestically, the goods would be subject to the relevant duty and tax at the time of sale.[67]
- Because record information establishes that the LMW program is contingent upon export performance, in law and in fact, Commerce lacks authority to apply facts otherwise available or AFA to determine that the LMW program is not a subsidy contingent on export.[68]
- In the alternative, the petitioner claims that Commerce should determine, on the basis of facts otherwise available, that the LMW program is specific as a domestic subsidy and is a general duty exemption to be analyzed under 19 CFR 351.510.[69]
- The petitioner suggests that Commerce should rely on a few misleading statements by the GOM—a government respondent, acting *pro se* in this investigation, which is unfamiliar with Commerce's practices and procedures in CVD investigations—that lack sufficient context, are drafted incorrectly, and/or are contradicted by more reliable record information. The petitioner's argument would require Commerce to ignore the evidence on the record and apply "other facts" that are contradicted by the most reliable record evidence.[70]
- While Commerce acknowledged that certain statements by the GOM may suggest the LMW program was not designed to be contingent on exportation,[71] Commerce correctly credited other record information that demonstrates that the LMW program is contingent upon export.[72] The petitioner contends that, in analyzing the program, Commerce should ignore the actual text of the applicable Malaysian law, information from the RMCD's own website describing the LMW program, and the actual licenses issued to CS Wind.[73]

---

[65] *Id*. at 6-7 (citing *Preliminary Determination* PDM at 12).
[66] *Id*. at 7 (citing CS Wind's Letter, "Utility Scale Wind Towers from Malaysia -Submission of Factual Information to Clarify or Correct the Government of Malaysia's February 4th Supplemental Questionnaire Response," dated February 16, 2021 at Attachment B-5) (CS Wind February 16, 2021 CFI) at 2 and Attachments A, B-1, B-2, B-3, and CS Wind's Letter, "Utility Scale Wind Towers from Malaysia: Section III Questionnaire Response," dated December 30, 2020 (CS Wind December 30, 2020 IQR) at 40, and 43-46).
[67] *Id*. (citing CS Wind December 30, 2020 IQR at Exhibit Program-C.7(a) and Program-C.7(b)).
[68] *Id*. at 8.
[69] *Id*. (citing Petitioner Case Brief at 12-14).
[70] *Id*.
[71] *Id*. (citing *Preliminary Determination* PDM at 11).
[72] *Id*. (citing *Preliminary Determination* PDM at 12).
[73] *Id*. at 8-9.

- Because the record facts clearly establish that the import duty exemptions on raw material inputs under the LMW program are contingent on export, Commerce should continue to analyze the program as an export subsidy under 19 CFR 351.519.[74]

Commerce Position: We continue to find that the record demonstrates that the GOM's duty exemption program for raw materials is designed to be export contingent. Accordingly, we continue to find this program to be properly analyzed under 19 CFR 351.519.

The petitioner emphasizes that the GOM failed to provide a complete and consistent response with respect to this program.[75] Although the GOM failed to provide details on certain aspects of this program, as discussed in Comment 2, and provided inconsistent statements in its narrative,[76] the record supports a finding that this program is contingent on export.[77] Indeed, any alternative finding would constitute dismissing the type of record evidence that we typically rely on as evidence that a program is export-specific, namely, the laws that govern the program.[78] Section 65A of the Customs Law of 1967 states that "if such goods are released from the licensed manufacturing warehouse for home consumption {*i.e.*, consumption within Malaysia} the customs duty thereon shall be calculated on the basis as if such goods had been imported."[79] Additionally, the GOM stated that "sales to the local market are subject to import duty payment."[80] These statements show that exported merchandise – *i.e.*, merchandise not consumed in Malaysia – would typically qualify for the duty exemption. Further, CS Wind provided documentation indicting that an LMW participant must export "80% of imported content, by value."[81] Although we rely on *the government respondent* to provide information relating to the financial contribution and specificity of a program, we find that the information provided by CS Wind is consistent with the GOM-provided materials, above.

The petitioner asserts that analyzing this program under 19 CFR 351.519, based on the incomplete information provided by the GOM, will reward the GOM and adversely affect the

[74] *Id*. at 9.
[75] *See* Petitioner Case Brief at 4-5.
[76] For example, the GOM stated that it had "no specific system in place" to track inputs under the program, while in other places it provided a short description of certain elements of its purportedly tracking system. similarly, the GOM stated that the program was not limited to certain types of enterprises, while elsewhere it described criteria required to qualify for the program. *See, e.g.*, GOM February 3, 2021 SQR at 45, 55, and 66. However, we find that certain of the GOM's statements – cited by the petitioner in its case brief as internally inconsistent -- were merely unclear. In particular, the GOM stated the following: "Exemption from customs duties and sales tax is given to all raw materials/components used directly in the manufacturing process of approved products regardless of whether the finished products are meant for export or local market from the initial stage of manufacture until the finished products." We interpret this statement to mean that the GOM deferred collection of import duties until a company produced the finished good (at which point the exemption continued for products which were exported and ended for products sold domestically). This interpretation is consistent with the requirements of the Malaysian Customs Act of 1967.
[77] *See* GOM February 3, 2021 SQR at 66 and Exhibit CE; and CS Wind December 30, 2020 IQR at 40, and 43-46.
[78] Accordingly, although our decision here does not represent the application of AFA, we note that our decision is in accordance with the principles laid out in *Archer Daniels*, because we have relied on record information in reaching our conclusion. *See Archer Daniels*, 917 F. Supp. 2d at 1342.
[79] *See* GOM February 3, 2021 SQR at Exhibit CE.
[80] *Id*. at 49.
[81] *See* CS Wind February 16, 2021 CFI at 2 and Attachments A, B-1, B-2, and B-3; and GOM February 3, 2021 SQR at Exhibit CE.

petitioner's relief under the AD/CVD laws.[82] However, we find that the above-cited documents (including the Malaysia customs law) demonstrate that the record is complete regarding the export nature of this program.

The petitioner also asserts that Commerce could, alternatively, apply facts available to determine that the program is specific as a domestic subsidy on the basis of *de jure*, *de facto*, or regional specificity pursuant to section 771(5A)(D) of the Act. We need not address these alternate bases of specificity because we find that record evidence supports our determination that the program is export-contingent.[83]

Finally, we note that, although the LMW program permits participation of firms that do not export all of the raw materials imported for processing, this, alone, does not detract from the fact that the program is export-contingent.[84] Export subsidies are programs that are "contingent upon export performance, alone or as 1 or 2 or more conditions."[85] Thus, while export "performance" is a requirement, it does not necessarily follow that such export programs must require participants to *exclusively* produce for exportation. Moreover, the language of the Act explicitly contemplates that such programs may combine an export performance requirement with other conditions; therefore, the fact that the LMW program has other restrictions on participation does not remove the program from the coverage of section 771(5A)(A)-(B) of the Act.

Comment 2: Whether the GOM Has an Effective System in Place to Track Input Consumption Pursuant to 19 CFR 351.519

In the *Preliminary Determination*, we analyzed the GOM's duty exemption program under 19 CFR 351.519.[86] We preliminarily found that the GOM does not have in place, and does not apply, a system that is reasonable and effective to confirm which inputs, and in what amounts, are consumed in the production of the exported product, making normal allowance for waste, in accordance with 19 CFR 351.519(a)(4). Moreover, we found that the GOM did not carry out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts. Thus, we preliminarily found that the entire amount of the import duty exemption provided to CS Wind constitutes a benefit under section 771(5)(E) of the Act.

CS Wind Comments:

- Commerce should modify its preliminary finding, because the GOM: (1) has a reasonable and effective system for confirming which inputs are consumed in the

[82] *See* Petitioner Case Brief at 10.
[83] The GOM summarily asserts that the program is generally available to all companies, and, hence, not countervailable. *See* GOM Case Brief at 11. As described above, however, there are multiple grounds on which to find this program specific.
[84] Although the petitioner notes that the GOM may at its discretion, exempt companies from the payment of import duties under the LMW program, there is no evidence on the record regarding the extent to which the GOM actually granted such exemptions during the POI. Given that the Malaysian Customs Act of 1967 explicitly requires exportation of the finished goods in order for companies to earn a benefit, we continue to find that the program functioned as an export-contingent program and it would be inappropriate to treat it otherwise.
[85] *See* section 771(5A)(B) of the Act.
[86] *See Preliminary Determination* PDM at 11-12.

production of exported products and in what amounts; and (2) physically examines which imported inputs are incorporated into exported products.[87] Additionally, the record demonstrates that CS Wind exported all of the inputs imported for the production of wind towers at its LMW facility.[88] Accordingly, in its final determination, Commerce should find that CS Wind received no benefit from this program because the import duty exemptions did not exceed the amount of import charges drawn back.[89]

- The *Preliminary Determination* overlooks the detailed record information that demonstrates that the RMCD's system reasonably and effectively tracks what inputs are incorporated into exported merchandise produced in an LMW facility.[90]
- First, the RMCD gathers detailed information from the LMW applicant concerning its production of exported merchandise, and the precise relationship between the quantities of imported inputs (*i.e.*, inputs) and the quantities of finished merchandise to be exported (*i.e.*, outputs).[91]
    - The LMW applicant must submit a detailed application form, listing the precise quantities, values, ports of importation, duty rates, and duty exemption amounts, and the RMCD limits any approved import duty exemptions to approved amounts.[92] If the inputs or quantities change, the applicant must file an additional application to obtain approval.[93] The information-gathering process gives the RMCD time to scrutinize the relationship between the reported input and output quantities in advance of approving any exemptions.[94]
    - A close comparison of CS Wind's application for the period between October 1, 2017, and September 30, 2019, and the application covering the period October 1, 2018, through September 30, 2021, confirms that the RMCD undertakes an examination of the quantity of inputs used in the production of approved export merchandise. CS Wind's application materials from the earlier period contain listings of the quantity and value of each input and each type of machinery to be used in producing exported wind towers.[95] The corresponding approval document includes an input/output ratio for each imported input raw material listed.[96] The logical conclusion that can be drawn from this is that this input/output information was generated after submission of the application based on further investigation by the RMCD.[97]
- Second, a local representative of the RMCD visits an LMW facility prior to license approval to observe the manufacturing process, verify that the reported quantity of imported inputs is required for the licensed exported product, ensure that all required

[87] *See* CS Wind Case Brief at 5.
[88] *Id*.
[89] *Id*.
[90] *Id*. at 6.
[91] *Id*. at 8.
[92] *Id*. (citing CS Wind December 30, 2020 IQR at Exhibit Program-C.6).
[93] *Id*. at 8-9.
[94] *Id.* at 9.
[95] *Id*. at 10 (citing CS Wind's December 30, 2020 IQR at Exhibit Program-C.7(a)).
[96] *Id*. (citing CS Wind's December 30, 2020 IQR at Exhibit Program-C.7(b)).
[97] *Id*.

compliance systems are in place, and confirm that the reported information matches the company's production experience.[98]

- Third, the RMCD requires LMW participants to maintain inventory control systems to trace imports, consumption, and exports of raw materials on a daily basis, each of which require verification and certification by the company's accountant or other officer with authority to monitor system compliance.[99] Additionally, license holders submit monthly and annual inventory reports to ensure that the minimum 80 percent of imported content, by value, is re-exported.[100]
    - The system is implemented in a manner that facilitates auditing and the GOM has effective penalties to ensure compliance.[101]
    - Malaysian law requires that a senior customs officer have access to any LMW facility at all times.[102] Any party that does not meet the LMW's strict re-exportation requirements is liable for duties owed on any merchandise that does not meet the requirement.[103]
    - The terms of CS Wind's license reflect the detailed restrictions in place under the LMW system.[104] The terms of the LMW license require that, in the event any goods, including imported inputs or finished merchandise, are sold domestically, the goods are subject to the relevant duty and tax at the time of sale.[105]
    - An annual statement is required by the terms of the license to be verified and signed by the company's accountant or other officer given authority to verify. In other words, RMCD requires an audit by the company's accountant or another authorized officer.[106]
    - The LMW program subjects any licensee to audit by the RMCD, and requires the LMW participant to submit materials to the RMCD that would facilitate such an audit, such as audited financial statements.[107]
    - The LMW program also carries significant consequences for non-compliance. Malaysian law requires that an LMW participant execute a bond to secure its compliance with the terms and conditions of the LMW program. Additionally, the license can be withdrawn for violations of the terms and conditions and violation is punishable by law, including compounded charges.[108]
- Fourth, for any domestic sales of merchandise produced, or waste generated that is not exported, the licensee must pay the applicable import duties and taxes at the time of sale.[109]
    - The RMCD monitors and collects information on the amount of scrap generated from production and sold domestically and collects any import duties owed on such

[98] *Id* at 6-7.
[99] *Id* at 7.
[100] *Id*.
[101] *Id*. at 11.
[102] *Id*. (citing CS Wind December 30, 2020 IQR at 40).
[103] *Id*. (citing CS Wind December 30, 2020 IQR at 41).
[104] *Id*.
[105] *Id*. at 13 (citing CS Wind December 30, 2020 IQR at Exhibit Program-C.7(a) (Attachment C at pg. 67 of the approval PDF), and Program C.7(b) (Attachment C at pg. 59 of the approval PDF)).
[106] *Id*. at 13-14.
[107] *Id.* at 14.
[108] *Id*. (citing CS Wind December 30, 2020 IQR at 44).
[109] *Id*.

scrap under the LMW program. Article 65AA of the Malaysian Customs Act requires that the LMW licensee pledge import duties/taxes based on the current market value of the waste where waste, scrap, packing materials, finished goods, or damaged raw materials/components are not exported.[110]

- Under Article 65A of the Malaysian Customs Act of 1967, where scrap is sold from waste generated on dutiable goods, the LMW licensee is liable for import duties and taxes based on the classification of the scrap material sold. Moreover, Malaysian law requires the seller to approve the sale of scrap in advance and the seller must declare the quantity and value of such material in its application. The declared amounts are subject to audit by the RMCD.[111]

- Fifth, an RMCD inspector resident physically inspects each piece of finished merchandise prior to exportation and cross-checks the imported inputs listed in the bill of materials to ensure they are attached to the finished merchandise prior to exportation.[112]
- Collectively, these measures reflect a reasonable and effective system for tracking imported inputs incorporated into exported merchandise, as required by Commerce's regulation.[113] Through this system, the RMCD ensures that import duty exemptions on imported inputs extend only to inputs consumed in the production of the exported product.[114]
- The GOM's system is akin to other tracking systems that Commerce found adequate in confirming that all duty-exempt inputs are consumed in the manufacture of exported merchandise. In *Cold-Rolled Steel from Brazil*, Commerce found that a "technical report" detailing the inputs and the amounts that are consumed in the production of the finished products, which becomes the basis for tracking the purchases of inputs and for determining whether a company has fulfilled its obligation to export finished products, meets the requirements for a duty drawback program.[115] Like the "technical report" in *Cold-Rolled Steel from Brazil*, the information provided to RMCD becomes the basis for limiting the quantity of duty-exempt inputs and for inspecting the facility to confirm the reported relationship between input and output quantities.[116]
- In *CFS Paper from Korea*, Commerce found a company-specific method effective to ensure that participants do not receive import duty refunds on materials that were not physically consumed in the production of exported products.[117] Like the company-specific method in *CFS Paper from Korea*, the RMCD collects detailed information specific to each company to confirm the quantity of imports used to produce the exported product, which is subject to verification. The detailed information stating the precise quantities of raw materials to be incorporated in a specified quantity of finished wind

[110] *Id*. (citing CS Wind December 30, 2020 IQR at 27-28).
[111] *Id*. (citing CS Wind December 30, 2020 IQR at Exhibit C.5(b)).
[112] *Id*.
[113] *Id*.
[114] *Id* at 8.
[115] *Id*. at 16 (citing *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from Brazil: Final Affirmative Determination*, 81 FR 49940 (July 29, 2016) (*Cold-Rolled Steel from Brazil*), and accompanying IDM at Comment 10).
[116] *Id*.
[117] *Id*. (citing *Coated Free Sheet Paper from the Republic of Korea: Notice of Final Affirmative Countervailing Duty Determination*, 72 FR 60639 (October 26, 2007), and accompanying IDM at 12-14) (*CFS Paper from Korea*)).

towers is analogous to the standard input-output norms (SIONs) Commerce has looked to as a hallmark of effectiveness and reliability in other proceedings.[118]

- The facts on the record relating to the LMW program collectively demonstrate that the GOM's system meets the requirements of 19 CFR 351.519(a)(4)(i).[119]
- Commerce should find that the LMW program conferred no benefit on CS Wind because CS Wind demonstrated that all imported inputs that were exempt from duty were actually consumed in the production of exported finished wind towers during the POI.[120]
- Despite the compelling record information, Commerce mostly overlooked and dismissed this information on the grounds that CS Wind could not "cure the GOM's deficient response by providing details about the GOM's program and CS Wind's operations."[121] Commerce must consider gap-filling information provided by respondents where available, and must minimize collateral harm to a cooperating party, in applying AFA. Although Commerce did not apply AFA here, Commerce must also consider the information provided by, and cooperation of, CS Wind in analyzing this program.[122]
- Commerce applies the rationale of a single decision of the U.S. Court of International Trade (CIT), in *Guizhou Tyre I*, much too broadly.[123]
- In *Guizhou Tyre I*, the Court did not broadly excuse Commerce from considering gap-filling information supplied by a company respondent concerning the effectiveness of a government's system of confirming which inputs, and in what amounts, are consumed in the production of exported products. Rather, the CIT simply held that the company respondent failed to effectively fill the gap left the by government's response concerning the consumption of inputs in the production of exported merchandise. The CIT considered that concern to be reasonable and Commerce's decision to be supported by the record.[124]
- Moreover, in *Guizhou Tyre I*, Commerce explicitly asked how the respondent determined the quantity of input material that was consumed in production. In contrast, here Commerce requested only: (1) a description of the system and procedures that the GOM had in place to confirm that imported inputs that are exempt from duties and taxes are consumed in the production of exported products and in what amounts; and (2) a description of the steps that the GOM takes to ensure that all imported raw materials are consumed in exported products.[125] Commerce must consider record evidence supplied by CS Wind that effectively addresses the questions that the GOM—a very inexperienced government respondent that responded *pro se*—did not respond to completely.[126] Commerce should find that the GOM's system meets the standard set forth in 19 CFR 351.519(a)(4)(i).

---

[118] *Id*. at 16-17 (citing *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 75 FR 16428 (April 1, 2010) (*Carrier Bags from Vietnam*), and accompanying IDM at 8-9).
[119] *Id*. at 17.
[120] *Id*.
[121] *Id*. (citing *Preliminary Determination* PDM at 14).
[122] *Id*. at 19, n.4.
[123] *Id*. at 17-18 (citing *Guizhou Tyre Co., Ltd. v. United States*, 348 F. Supp 3d 1261, 1279 (*Guizhou Tyre I*)).
[124] *Id*. at 18 (citing *Guizhou Tyre I*, 348 F. Supp 3d at 1279).
[125] *Id*. (citing Commerce's Letter, "Utility Scale Wind Towers from Malaysia: Countervailing Duty Questionnaire," at Section III, questions 4-5, dated November 13, 2020 (Initial Questionnaire)).
[126] *Id*. at 18-19.

- Alternatively, Commerce should find that the GOM's system meets the standard set forth in 19 CFR 351.519(a)(4)(ii). The RMCD installs agency personnel in each LMW facility in order to physically inspect finished merchandise and to ensure that the imported inputs a licensee declares as exported cannot be diverted and sold domestically. CS Wind stated that an inspector from the RMCD inspects each wind tower before it is exported to confirm that all imported inputs listed on the bill of materials are actually attached to the finished wind tower prior to exportation.[127]
- CS Wind cannot have received any benefit because CS Wind incorporated all raw material inputs into finished wind towers that were exported outside of Malaysia.[128]

GOM's Comments:

- The responsibility of an LMW participant is to comply with the law and regulations under the Malaysian Customs Act of 1967.[129] In the event of failure on the part of the participant to provide the information requested, the RMCD is allowed under the law to access any recorded information of the participant. The Malaysian Customs Act of 1967 also provides for a penalty in the event of non-compliance.[130]
- A LMW participant is subject to audit by the customs compliance and enforcement division throughout the licensing period and even after the license has been cancelled. Companies found in non-compliance of the Malaysian Customs Act of 1967, if found guilty, will be penalized and duty and sales tax will be collected.[131]
- The input tracking monitoring system exercised by the RMCD is sufficient, adequate, and effective. Duty exemptions on inputs used in the production of exported products are generally not countervailable, as long as the exemption extends only to inputs consumed in the production of the exported product, making normal allowances for waste.[132] This program should not be found countervailable in the final determination.[133]

Petitioner's Rebuttal of CS Wind:

- Contrary to CS Wind's claims, Commerce's decision was consistent with its regulations and prior determinations. Additionally, in light of the GOM's lack of response, Commerce is not required to rely on CS Wind's information about the program.[134]
- Pursuant to 19 CFR 351.519(a), if a government does not have a system in place to track input consumption, or that system is not reasonable and applied effectively, the government must demonstrate that it examined the actual inputs at issue.[135] If a government cannot make either of these showings, Commerce's regulations require that the entire amount of the exemption be considered a benefit. The GOM was unable to make such a showing in this case.[136]

---

[127] *Id*. at 20 (citing CS Wind December 30, 2020 IQR at 26).
[128] *Id.*
[129] *See* GOM Case Brief at 11 (citing GOM February 3, 2021 SQR at Exhibit CE).
[130] *Id*. at 14.
[131] *Id*. at 14-15 (citing GOM February 3, 2021 SQR at Exhibit CE).
[132] *Id*. at 15.
[133] *Id*.
[134] *See* Petitioner Rebuttal Brief – CS Wind at 3.
[135] *Id*. (citing 19 CFR 351.519(a)(4)(ii)).
[136] *Id.*

- While the GOM provided minimal information about the system it employs to track consumption of inputs, the statements it did include suggest this system is not effective or reasonable as required by 19 CFR 351.519(a)(4)(i). Most notably, the GOM stated that it has "no specific system in place" for tracing imports through production and confirming that imported raw material inputs are ultimately used in exported products.[137]
- Commerce requested that the GOM explain what allowances it makes for waste and scrap under any such system. The GOM responded by providing only two classifications of waste and no explanation of how it tracked inputs through the production process.[138]
- Where CS Wind attempted to justify the GOM's answers, it only further suggested that there was no reasonable or effective system to track waste. For example, CS Wind provided program guidelines from the RMCD that state the following: "For the disposal of non-dutiable/non-taxable waste and scraps by way of destruction, it need not be witnessed by a customs officer. The LMW company representative's confirmation is sufficient."[139] That is, the system is seemingly based on the "honor system," rather than government accountability, which further suggests the system is ineffective.[140]
- Additionally, the text of the applicable law allows the GOM to exercise discretion to exempt certain goods from the payment of import duties "as {it} may deem fit."[141] In sum, the GOM's description of its own system shows that the system does not meet the standard required by 19 CFR 351.519(a)(4)(i).[142]
- CS Wind claims that Commerce interpreted *Guizhou Tyre I* too broadly and "overlooked and dismissed {the record} information on the basis that CS Wind could not 'cure the GOM's deficient response by providing details about the GOM's program and CS Wind's operations.'"[143] However *Guizhou Tyre I*, as well as an appeal of Commerce's final results in the subsequent review of that same proceeding, involved a nearly identical set of factual circumstances as present in this case.[144]
    - In *Guizhou Tyre I*, the CIT found that Commerce's review of record evidence involving an input duty exemption program offered by the Government of China (GOC) was reasonable and the decision to countervail the program was supported by substantial evidence.[145] In the underlying review of both cases, Commerce countervailed a GOC import exemption program after it found that the GOC did not have an effective system or procedure pursuant to 19 CFR 351.519(a)(4)(i).[146]
    - The program in question involved the exemption of import duties for imports of raw materials,[147] as in the present case. Commerce found that the GOC "failed to

[137] *Id*. at 5 (citing GOM February 3, 2021 SQR at 65-66).
[138] *Id*. (citing GOM December 24, 2020 IQR at 25).
[139] *Id.* (citing CS Wind February 16, 2021 CFI).
[140] *Id*.
[141] *Id.* at 5-6 (citing GOM February 3, 2021 SQR at 66).
[142] *Id.* at 6.
[143] *Id*. (citing CS Wind Case Brief at 17).
[144] *Id.* (citing *Guizhou Tyre I*, 348 F. Supp. 3d at 1279, and *Guizhou Tyre Co., Ltd. v. United States*, 389 F. Supp 3d 1315, 1329 (*Guizhou Tyre II*)).
[145] *Id.* (citing *Guizhou Tyre I*, 348 F. Supp. 3d at 1279).
[146] *Id*.
[147] *Id*. at 7 (citing *Certain Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review; 2014*, 81 FR 71056 (October 14, 2016) (*OTR Tires from China 2014*), and accompanying PDM at 35; and *Certain Pneumatic Off-the-Road Tires from the People's Republic of*

respond to {its} questions regarding the operation and administration of this program," which were necessary to evaluate the government's system for confirming which inputs were consumed.[148] Specifically, Commerce asked the GOC to explain how it determined the quantity of material consumed, to which the GOC "stated that it determined the quantity of material consumed in the production process in accordance with the provisions" of the relevant customs measures.[149] The GOC also failed to support its claims with the requisite documentation.[150] Accordingly, Commerce upheld its preliminary decision to countervail the entire benefit of the program in the final determination, emphasizing the GOC's failure to provide information demonstrating that it maintained an effective system to confirm input consumption.[151]

- After the 2014 administrative review final results were issued, the respondent appealed, claiming that Commerce's decision to countervail this program was unreasonable and not supported by substantial evidence because "Commerce 'ignored all information submitted by {the respondent} in making its determination under 19 CFR 351.519(a)(4)…"[152] The CIT found this argument to be without merit.[153] The CIT ruled that Commerce "is entitled to focus on the GOC's responses in light of the fact that its regulations specifically require that Commerce determine that the '*government* in question has a system in place and applies' the appropriate procedure confirming which inputs are consumed in the production and in what amount."[154] This is because "the underlying concern is whether the government maintains and applies a consistent procedure in order to confirm the inputs consumed in the production" of exported merchandise, and the information provided by the respondents was "just business records listing the outputs of the system in question."[155]
- In the appeal of the subsequent review, the CIT noted that respondents "raise{d} largely the same claims."[156] Again, because the GOC simply referred Commerce back to the respondent's reporting, the CIT ruled that the GOC's "generic responses concerning consumed materials in the production falls short of demonstrating how the GOC determines the quantity of the inputs consumed in the production process."[157]

China: Preliminary Results of Countervailing Duty Administrative Review; 2015, 82 FR 46754 (October 6, 2017) (*OTR Tires from China* 2015), and accompanying PDM at 35.

[148] *Id*. (citing *OTR Tires from China 2014* PDM at 35 and *OTR Tires from China 2015* PDM at 35).

[149] *Id*. (citing *OTR Tires from China 2014* PDM at 36 and *OTR Tires from China 2015* PDM at 36).

[150] *Id*.

[151] *Id*. (citing *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2014*, 82 FR 18285 (April 18, 2017), and accompanying IDM at 19-20 and *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2015*, 83 FR 16055 (April 13, 2018), and accompanying IDM at 16-17).

[152] *Id*. (citing *Guizhou Tyre I*, 348 F. Supp. 3d at 1278).

[153] *Id*.

[154] *Id*. at 7-8 (citing *Guizhou Tyre I*, 348 F. Supp. 3d at 1278).

[155] *Id*. at 8 (citing *Guizhou Tyre I*, 348 F. Supp. 3d at 1279).

[156] *Id*. (citing *Guizhou Tyre II*, 389 F. Supp. 3d at 1328).

[157] *Id*.

- CS Wind references two Commerce decisions to support its claims about the reasonableness of the GOM's purported system to track import consumption, but it fails to recognize that Commerce relied on internal government documents and information provided by the government respondents to reach a decision in both cases.
- In *Cold-Rolled Steel from Brazil*, Commerce reviewed a "technical report" prepared by the Government of Brazil (GOB) that "detail{ed} the inputs and the amounts that are consumed in production of the finished products."[158] CS Wind attempts to draw parallels between the technical report in that case to the "pre-approval documentation required to be reported under the LMW program" for, *inter alia*, waste.[159]
- This comparison further highlights the issues caused by the GOM's failure to provide requested information. The text of the applicable law instructs that "the Director General shall direct the waste or refuse to be destroyed to such conditions as the Director General deems fit."[160] While CS Wind can provide documentation of its experience with the GOM's tracking system, only the GOM can provide information to explain how it exercises its discretion on a system-wide basis, such that its input tracking system could be considered reasonable or effective.[161] Unlike the government respondent in *Cold-Rolled Steel from Brazil*, the GOM did not provide the necessary information to satisfy the requirements of 19 CFR 351.519(a)(4)(i).[162]
- In *CFS Paper from Korea*, Commerce analyzed whether a duty drawback system met the requirement laid out in 19 CFR 351.519(a)(4)(i).[163] The Government of Korea (GOK) demonstrated that it applied a company-specific input-output formula and relied on a detailed system to track the amount of import duties paid and the amount of duty drawback received.[164] Commerce analyzed information from the GOK that traced the amounts of duties paid to the amount of drawback received for five companies under each company's specific methodology.[165] Not only is this a more complex and comprehensive action than merely "collecting detailed information specific to each company,"[166] the GOK was also able to provide that detailed documentation. The GOM has provided no such documentation. In contrast, in *CFS Paper from Korea*, Commerce relied on the government's internal reporting when analyzing 19 CFR 351.519(a)(4)(i), rather than information provided by a respondent.[167]
- CS Wind also attempts to blame the GOM's failure to provide the requested information on the GOM's inexperience.[168] CS Wind argues that, "{a}lthough the GOM did not provide the documentation prepared by the RMCD in this on-site visit, the GOM did offer to provide those documents to CS Wind Malaysia because of confidentiality concerns."[169] It was incumbent on the GOM to provide responses to Commerce's

[158] *Id*. at 8-9 (citing *Cold-Rolled Steel from Brazil* IDM at 42).
[159] *Id*. at 9 (citing CS Wind Case Brief at 15-16).
[160] *Id*. (citing CS Wind December 30, 2020 IQR at 28).
[161] *Id*.
[162] *Id.*
[163] *Id*. (citing *CFS from Korea* IDM at 13-14).
[164] *Id*. (citing *CFS from Korea* IDM at 13).
[165] *Id*. at 9-10 (citing *CFS from Korea* IDM at 13)
[166] *Id*. at 10 (citing CS Wind Case Brief at 16).
[167] *Id.*
[168] *Id*. (citing CS Wind Case Brief at 9-10).
[169] *Id*. (citing CS Wind Case Brief at 9).

requests for information because the GOM is the respondent that is most familiar with enforcement of the import duty exemption system and the party with access to related information. Additionally, the GOM has participated in two prior CVD proceedings.

- As in *Guizhou Tyre I*, a government's "generic" reference to a respondent's information does not establish that a government has a reasonable system in place to track input consumption. The documents CS Wind provided are merely "outputs of the system in question."[170] Therefore, Commerce appropriately found that "to merely point to an input tracking system is not enough to demonstrate that such a system exists in practice; that system must also be implemented and supported with documentation."[171]
- CS Wind is misguided when it likens Commerce's finding to AFA. Commerce's decision to countervail the import duty exemption program was based on the government's inability to overcome the requirements of 19 CFR 351.519 by establishing that it maintains a reasonable system for tracking inputs. There is no requirement under this regulation, or in either *Guizhou Tyre* case, that Commerce construe the record information in a way that avoids "collaterally impacting a cooperating party."[172]
- Moreover, this is not an instance where Commerce has determined whether a government respondent has "cooperated to the best of its ability."[173] Rather, this analysis applies a separate standard that is specifically identified in 19 CFR 351.519. A government could provide information to the best of its ability and still not have in place a system that reasonably and effectively confirms which inputs were consumed. Therefore, Commerce interpreted the GOM's cursory responses and lack of information consistent with the regulation.[174]

Petitioner's Rebuttal of the GOM:

- The GOM argues that participants are responsible for complying with the GOM's laws under the Malaysian Customs Act 1967. The GOM's reference to the responsibilities of companies, however, does not address the question of whether the GOM maintains adequate procedures to trace imported raw materials through production based on the standards found in 19 CFR 351.519(a)(4)(i)-(ii). The GOM did not address this threshold issue in its case brief.[175]
- Regarding specificity, the GOM claims that the program "is generally available to all companies, hence not countervailable."[176] Record evidence clearly shows, however, that the program is specific under section 771(5A) of the Act. Commerce determined that the program is specific within the meaning of various subsections of section 771(5A) of the Act.[177]

Commerce Position: For the reasons noted below, we continue to find that the record does not demonstrate that the GOM has in place, and applies, a system that is reasonable and effective to confirm which inputs, and in what amounts, are consumed in the production of the exported

[170] *Id*. at 10-11.
[171] *Id*. at 11 (citing *Preliminary Determination* PDM at 14).
[172] *Id*. (citing CS Wind Case Brief at 19).
[173] *Id*.
[174] *Id*.
[175] *See* Petitioner Rebuttal Brief – GOM at 5.
[176] *Id*. (citing GOM Case Brief at 15).
[177] *Id*. at 6-7.

product, making normal allowance for waste, in accordance with 19 CFR 351.519(a)(4)(i). Moreover, we find that the record does not support a finding that the GOM carries out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts, in accordance with 19 CFR 351.519(a)(4)(ii). Therefore, we continue to find the full value of the duty exemption program countervailable.

As noted in the *Preliminary Determination*, the GOM provided a sparse – and at times contradictory – response concerning its administration of an input tracking system for its duty exemption program.[178] We explained:

> As an initial matter, in its response to our question, the GOM stated that it had "No specific system in place."[179] Looking beyond this threshold statement, the GOM's remaining assertions do not demonstrate that the GOM applies an adequate input tracking system. These assertions simply reference a reporting requirement for participating companies, make a one sentence statement that the RMCD compares certain information, and then make a passing reference to input and output ratios. This response does not explain how the GOM confirms the quantity of a given input that is necessary for the production of the final exported good on a product-specific or industry-specific basis; nor does it provide documentation (*e.g.*, regulations, RMCD documents, audit results) to confirm that any such steps were taken with respect to CS Wind or the wind tower industry more generally.
> …
> Although CS Wind attempted to cure the GOM's deficient response by providing details about the GOM's program and CS Wind's operations, we specifically requested "a description of *how* the GOM confirms the quantity of a given input that is necessary for the production of the final exported good on a product-specific or industry-specific basis."[180] Our inquiry does not focus on CS Wind's self-reporting. The CIT has specifically explained that, for an analysis under 19 CFR 351.519, "business records" of a beneficiary company are insufficient for Commerce's analysis because "the underlying concern is whether the government maintains and applies a consistent procedure in order to confirm the inputs consumed in the production."[181] The GOM's response tells us nothing about the steps the government takes to confirm participating companies' reporting, and/or the application or derivation of input-output ratios, despite our request for a "step-by-step" explanation and supporting documentation. Commerce has consistently held that, to merely point to an input tracking system is not enough to demonstrate

[178] *See Preliminary Determination* PDM at 13-14.
[179] *See* GOM February 3, 2021 SQR at 66.
[180] *See* Commerce's Letter, dated January 15, 2021 (GOM Supplemental Questionnaire) (*emphasis added*).
[181] *See Guizhou Tyre I*, 348 F. Supp. 3d at 1279 (upholding Commerce's determination that an input tracking system was inadequate under 19 CFR 351.519(a)(4)(i) where the administering government "utterly neglect{ed} to provide specific details on how the {government} determined the quantity of rubber, nylon cord, and carbon black consumed in the production process"); *see also MTZ Polyfilms, Ltd. v. United States*, 659 F. Supp. 2d 1303, 1315 (CIT 2009) (noting that Commerce is required by the regulation to "make an independent assessment" with respect to "the adequacy of that government's procedure" as it pertains to input tracing). The CIT has noted that "Commerce is entitled to focus on the {administering government's} responses in light of the fact that its regulations specifically require that{Commerce} determine that the 'government in question has in place and applies' an adequate tracking system"). *Guizhou Tyre I*, 348 F. Supp. 3d at 1278-79.

that such a system exists in practice; that system must also be implemented and supported with documentation.[182]

CS Wind asserts that Commerce overlooked record information in its analysis and provides an explanation of the various steps the GOM purportedly takes to ensure that all raw material inputs are ultimately used in the production of exported merchandise. The facts and inferences relied on by CS Wind are either not dispositive as to whether the GOM maintains an adequate tracking system or are unsupported by the record.

First, CS Wind emphasizes the information solicited by the GOM and the reporting requirements imposed by the GOM. CS Wind states that an LMW applicant must submit a detailed application form, listing the precise quantities, values, ports of importation, duty rates, and duty exemption amounts, and any approved import duty exemptions are limited to approved amounts.[183] CS Wind also notes that companies are required to maintain inventory maintenance systems.[184] As an initial matter, it was critical that the GOM provide information on the extent to which such information is analyzed and verified. It did not. Although CS Wind highlights all the information it maintains and provides to the GOM, this does not demonstrate that the GOM applies an adequate tracking system. On numerous occasions we have emphasized that a company's self-reporting is insufficient to demonstrate that an administering government applies an effective tracking system under 19 CFR 351.519, because we must analyze whether *the government* has an independent mechanism in place to confirm the quantity of raw material inputs and the eventual outputs, *e.g.*, through the application of SIONs.[185]

For example, in *PET Film from India*, we found that the Government of India (GOI) did not have a reasonable and effective system or procedure in place to ensure that imports inputs were used in exported merchandise.[186] We explained that, because "the GOI failed to provide {Commerce} with its SION calculations for PET film... {Commerce} could not conclude that the system the GOI has in place with respect to the {duty exemption program} was reasonable or was applied in a manner effective for the purposes intended."[187] Similarly, in *Lined Paper Products from India*, we found that the GOI's tracking procedure was inadequate because "{t}he GOI is still unable to document how it developed the underlying SION in effect for the lined paper" and "was unable to provide source documents concerning the initial formation and subsequent revision of the SION used for the lined paper industry, including the SION in effect during the POI."[188] There, we explained that Commerce's verification team "reviewed how inputs and exports were tracked

---

[182] *See, e.g.*, *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review; 2016*, 84 FR 10789 (March 22, 2019), and accompanying IDM at Comment 4.
[183] *See* CS Wind Case Brief at 8.
[184] *Id*. at 11.
[185] *See, e.g.*, *Guizhou Tyre I*, 348 F. Supp. 3d at 1261, 1279.
[186] *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 71 FR 7534 (February 13, 2006) (*PET Film from India*), and accompanying IDM at 9.
[187] *Id.*
[188] *See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from India*, 71 FR 45034 (August 8, 2006) (*Lined Paper Products from India*), and accompanying IDM at 20-21; *see also Certain Frozen Warmwater Shrimp from Thailand: Final Negative Countervailing Duty Determination*, 78 FR 50379 (August 19, 2013), and accompanying IDM at 7 (finding a temporary import program countervailable where the government did not establish a mechanism to "accurately measure inputs consumed in the production" of subject merchandise).

by the GOI through its Directorate General for Foreign Trade" and how the GOI maintains "a customs database that it uses to track the inputs imported duty-free" under the program.[189] Despite our observations regarding these monitoring procedures, we nonetheless found that the GOI's system did not constitute a reasonable and effective input tracking system because the government did not demonstrate a reliable system for measuring/confirming the accuracy of the SIONs. Similarly, here, there is no evidence on the record concerning whether the GOM develops, verifies, or otherwise analyzes SIONs in administering its program. As discussed below, cases like *CFS Paper from Korea* are inapposite despite involving import duty programs ostensibly similar to that employed in Malaysia because, there, the record regarding the operation of the program was complete and allowed us to evaluate the government's role in verifying the information submitted by participants.

CS Wind urges Commerce to infer the existence of a GOM input/output analysis. CS Wind argues that, because the LMW application requests information regarding the raw material to be imported and the final product to be exported, this "gives the RMCD time to scrutinize the relationship between the reported input and output quantities in advance of approving any exemptions."[190] The fact that the GOM "could" scrutinize the input/output relationship is immaterial; our analysis centers on whether the GOM did, in fact, scrutinize the input/output relationship in administering its duty exemption program. CS Wind also asserts that a reference to an input-output relationship contained in an approval document demonstrates that the GOM must have scrutinized the applicable SION(s); CS Wind contends that "{t}he only logical conclusion that can be drawn from the fact that the input/output ratio is supplied in the approval documentation is that this information was generated after submission of the application based on further investigation by the RMCD."[191] We disagree. The SION referenced in the approval document could simply reflect an input-output relationship proffered by CS Wind, as the application for a license requests this information from the company.[192] The SION may never have been scrutinized by the GOM, or it could represent an outdated SION from a prior application, or it could simply provide a general estimate of the input/output relationship but fail to account for scrap generation.

Ultimately, CS Wind asks Commerce to speculate about the GOM's administration of the program – because the GOM itself did not provide the information. We asked the GOM to provide an explanation of how it tracks consumption of inputs through to exportation.[193] For

---

[189] *See Lined Paper Products from India* IDM at 20; *Carrier Bags from Vietnam* IDM at 9 (noting that, although the customs authorities "regularly check exports against imports and require regular reconciliation... they do not check on whether the yield factor accurately reflected actual consumption to produce one unit of the finished product"); and *Certain Steel Wire Garment Hangers from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 75973 (December 26, 2012), and accompanying IDM at 29 (noting that "{t}he GOV has not sufficiently demonstrated that its system ensures that the imported materials, against which import duty exemptions/reimbursements are claimed, are used in the production of the products exported and that the company properly accounts for scrap" because customs officials "did not corroborate that the reported per-unit amounts of raw materials and scrap were the amounts used in the production of the exported goods").

[190] *See* CS Wind Case Brief at 5.

[191] *Id*. at 10.

[192] *See* CS Wind February 16, 2021 CFI Submission at B-2. CS Wind also notes that a subsequent approval document did not require the submissions of input/output data. *See* CS Wind Case Brief at 5.

[193] *See* GOM Supplemental Questionnaire; and Initial Questionnaire at II-7.

instance, in our supplemental questionnaire, we asked for "a description of how the GOM confirms the quantity of a given input that is necessary for the production of the final exported good on a product-specific or industry-specific basis."[194] We also asked the GOM to "demonstrate how it confirms that raw material inputs imported under the program are ultimately used in merchandise destined for the domestic or export markets and provide supporting documentation."[195] As discussed in the *Preliminary Determination*, the GOM failed to provide an adequate response to these questions.[196] Moreover, even when the GOM made a cursory reference to a purported input tracking system, its response was ambiguous and incomplete. As the various cases described above illustrate, Commerce's practice requires that a government maintain a tracking system that accounts for input/output analysis, *e.g.*, SIONs, and that the government verifies or otherwise ensures the reliability of these measures.

Second, CS Wind argues that the GOM analyzes input/output relationships through on-site visits. CS Wind asserts that "a local representative of the RMCD visits an LMW licensee's facility prior to license approval to observe the manufacturing process, *verify that the reported quantity of imported inputs is required for the licensed exported product*, and ensure that all required compliance systems are in place."[197] This interpretation, proffered in CS Wind's brief, is not supported by the record. The first document cited, which was provided by CS Wind, simply states that a local RMCD official visits an applicant before approving an application.[198] This does not demonstrate that the customs official confirms that the reported quantity of inputs is required for the corresponding exported product. The second citation is to the narrative response of the GOM, which states: "Physical inspection at the premise will be done to confirm the activity and utilization of the exempted materials."[199] Neither of these citations demonstrate that the referenced "visit" or "inspection" bears any relationship to the preparation or confirming the accuracy of a SION. Verifying that a company is active and/or has the facilities necessary for production is not equivalent to auditing the input/output reporting of that company.

We note that – here too – the GOM did not provide information that would demonstrate that such visits took place for CS Wind and/or the substance of any such visit. We asked the GOM to provide a "step-by-step description of any on-site verification process, as supported by official verification documents relating to the respondent."[200] The GOM failed to provide any such documents, and cited concerns regarding the confidentiality of CS Wind's information.[201] CS Wind emphasizes that the "GOM is an inexperienced participant in {Commerce's} proceedings and is not represented by counsel. It is apparent that GOM did not understand the protections afforded to business proprietary documentation in countervailing duty proceedings."[202] This explanation does not relieve the GOM of its obligations to provide information explicitly requested of it, or to be aware of Commerce procedures and protections surrounding proprietary information. Moreover, the supplemental questionnaire at issue indicates: "Please note that, if

[194] *See* GOM Supplemental Questionnaire.
[195] *Id*.
[196] *See Preliminary Determination* PDM at 13.
[197] *See* CS Wind Brief at 6-7 (*emphasis added*).
[198] *See* CS Wind December 30, 2020 IQR at program C.6.
[199] *See* GOM February 3, 2021 SQR at 66.
[200] *See* GOM Supplemental Questionnaire.
[201] *See* GOM February 3, 2021 SQR at 66.
[202] *See* CS Wind Brief at 6-7.

supporting documentation is confidential or proprietary, the GOM may designate it as such. Such information is only released to parties subject to Commerce's administrative protective {sic} order."[203] Additionally, the GOM showed in other instances that it knew how to submit proprietary information; in more than one instance it did, in fact, designate information as proprietary.[204]

Additionally, our supplemental question requested "a step-by-step description of any on-site verification process."[205] Even if the GOM provided an adequate justification for not providing company-specific documents – which it did not – it still failed to answer this aspect of the question. Commerce's regulations identify "descriptions of the operations of the {subsidy} programs" as information that is not subject to proprietary treatment.[206]

Third, CS Wind emphasizes that, under the Malaysian customs law, an LMW participant must pay duties on merchandise that was imported but sold domestically. In the absence of accurate SIONs, however, there is no way for the GOM to confirm the amount of raw material that is utilized in exported merchandise or sold in the domestic market. Regardless, the record does not demonstrate that CS Wind's assertion is accurate in practice. As noted in the *Preliminary Determination*, the governing law explicitly provides that the Malaysian government may exercise discretion to exempt certain goods from the payment of import duties "as {it} may deem fit."[207] We have previously found that exceptions or carve outs can contribute to a finding that the government does not adequately trace inputs through the production process.[208]

Fourth, CS Wind asserts that the LMW program satisfied the criteria set forth in 19 CFR 351.519(a)(4)(ii) because a "RMCD inspector resident at CS Wind's facility physically inspects each piece of finished merchandise prior to exportation and cross-checks the imported inputs listed in the bill of materials to ensure they are attached to the finished merchandise prior to exportation."[209] As explained above, the record is devoid of evidence regarding the GOM's examination of CS Wind's facilities, because the GOM did not provide it.

---

[203] *See* GOM Supplemental Questionnaire (providing additional explanation of Commerce's treatment of proprietary information in response to the GOM's failure to provide requested documents relating to the electricity for LTAR program).
[204] *See* GOM December 24, 2020 IQR (designating information relating to the selling price of CS Wind's land as proprietary); and GOM February 3, 2021 SQR (designating information relating to a list of electricity providers in Malaysia as proprietary).
[205] *Id.*
[206] *See* 19 CFR 351.105(c)(8).
[207] *Id.* at 5-6 (citing GOM February 3, 2021 SQR at 66).
[208] *See, e.g.*, *Final Results of Countervailing Duty Administrative Review: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 73 FR 7708 (February 11, 2008), and accompanying IDM at Comment 3 (stating that Commerce's decision was based on "the GOI's lack of a system or procedure to confirm which inputs are consumed in the production of the exported products and in what amounts that is reasonable and effective for the purposes intended" and noting a "lack of evidence regarding the implementation of penalties for companies not meeting the export requirements" and an exemption that permitted "benefits for a broad category of 'deemed' exports"). CS Wind asserts that simply because a discretionary exemption exists does not mean that it is applied. In our initial questionnaire, we asked "If the government agency or authority has any discretion that goes beyond the criteria laid out in the law, regulation or other official document, please explain the nature and extent of that discretion." *See* Initial Questionnaire at 13. The GOM did not provide a response to this question, or otherwise discuss the use of its discretion.
[209] *See* CS Wind Case Brief at 7.

Finally, CS Wind's reference to other administrative proceedings – where Commerce found that the administering government applied an adequate input tracking system – are inapposite, here. In *CFS Paper from Korea*, Commerce was able to confirm that the GOK analyzed the proper amount of duty drawback received under its company-specific method.[210] As we explained, "Korean Customs examines the reasonableness and accuracy of the required quantity reported in the company's statement along with the company's duty drawback application, import permits, and export permits" and "{t}he company-specific formula is subject to verification by the local Customs authority if, for example, the ratio calculated by the company is higher than the ratio calculated by other companies in the same industry for the same product."[211] Thus, the record in C*FS Paper from Korea* demonstrated that the GOK conducted an independent assessment of the input/output reporting, unlike the current record. CS Wind also relies on *Cold-Rolled Steel from Brazil* to compare the GOB's required "technical report" in that case with the pre-approval documents it submitted to the GOM, claiming this reflects a similar requirement. Contrary to CS Wind's assertion, the record does not demonstrate that the GOB and the GOM duty exemption programs function in a similar manner, especially with regard to analysis of participants' data. The "Integrated Drawback Program" in Brazil appears to have government verification of the reported SION,[212] whereas the record does not contain such evidence in the context of the GOM program. Thus, the cases relied on by CS Wind do not support a different conclusion in this case.

In contrast, *Guizhou Tire*, cited in the *Preliminary Determination*, is directly on point. Although CS Wind dismisses it as "a single case," it is worth noting that the CIT addressed the same issue in litigation concerning two separate segments in that proceeding and came to the same conclusion in both instances. The facts are highly analogous to those here. The CIT explained:

> {Respondent} argues that it submitted detailed records as to unit consumption of raw materials, receipt of raw materials under the program, reexport of goods produced from those raw materials, and any entry of such materials into the domestic market. According to {Respondent}, {Commerce} ignored these submissions during its review when it countervailed duty exemptions on the premise that the Program failed to satisfy the requirements under 19 CFR 351.519(a)(4)(i). Second, {Respondent} argues in the alternative that the submitted records can also demonstrate that the GOC has "carried out an examination of actual inputs involved to confirm which inputs are consumed in the production of the exported product, and in what amounts," pursuant to section 351.519(a)(4)(ii).

[210] *See CFS Paper from Korea* IDM at 13-14.
[211] *Id*.
[212] *See Common Alloy Aluminum Sheet from Brazil: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 85 FR 49634 (August 14, 2020), and accompanying PDM at 21 ("Moreover, their system relies on technical reports to identify and account for the allowable waste. According to the {GOB}, companies must first apply for a 'Concession Act' before they can register the purchase of inputs that are eligible for a drawback under this program. *The Secretariat of Foreign Trade oversees compliance with this program's regulations and verifies a company's invoices and technical reports, which document the quantity of inputs required to produce a given quantity of a finished good for export*" (*emphasis added*) (internal citations omitted)), unchanged in *Common Alloy Aluminum Sheet from Brazil: Final Negative Countervailing Duty Determination*, 86 FR 13289 (March 8, 2021).

> …
> As before, when prompted to explain how the GOC determined the quantity of the materials consumed in the production process, the GOC first referred Commerce to the Customs Measure, attached as Exhibit E.7 to its questionnaire response. As to {Respondent} specifically, the GOC referred Commerce to "{Respondent's} response for a more comprehensive response and for sample documentation supporting its explanation." But again, as before, these generic responses concerning consumed materials in the production falls short of demonstrating *how the GOC determines the quantity of the inputs consumed in the production process*: rubber, nylon cord, and carbon black. And that is precisely what Commerce focused on in its *Final Results*: that the GOC failed to 'specifically explain or document how it determined the quantity of rubber, nylon cord or carbon black consumed in the production process.'"[213]

The facts here are highly analogous. CS Wind provided a variety of business records that purportedly demonstrate the efficacy of the GOM's input tracking system. The GOM provided a cursory and generic response that provided no insight into how the administering government applies the law and/or confirms the self-reporting of a participating company. Accordingly, the government failed to explain or document how it determined the quantity of the input consumed in the production process.

Commerce asked multiple questions about the operation of the GOM duty exemption program in this investigation, and granted the GOM an extension to respond to the initial questionnaire and three extensions relating to the supplemental questionnaire. Despite Commerce's efforts to solicit such information, as CS Wind concedes, the GOM's submissions relating to the duty exemption program were inconsistent, "incomplete" and "incorrect[]" and contained "error{s}."[214] Ultimately, the GOM failed to provide details on its input tracking system, and its administration thereof. Accordingly, we determine that the full value of the duty exemption realized by CS Wind is countervailable.

Comment 3: Whether Commerce Should Revise Its Analysis of the Electricity for LTAR Program

In the *Preliminary Determination*, we found that the GOM's electricity for LTAR program constituted a countervailable subsidy.[215] We found that the electricity provider, Tenaga Nasional Berhad (TNB), is an authority, and determined that the program is regionally specific, as the applicable electricity tariff rate covers entities operating in Peninsular Malaysia. We also found, based on facts available, that, because the GOM was unable to provide the underlying data for our tier-three analysis, we were unable to determine whether the electricity system was market-based. Therefore, we relied upon Singaporean prices as a facts available tier-three benchmark to determine that the electricity for LTAR program provided a benefit.[216]

[213] *See Guizhou Tyre I*, 348 F. Supp. 3d at 1261, 1279 (*emphasis added*).
[214] *See* CS Wind February 16, 2020 CFI Submission.
[215] *See Preliminary Determination* PDM at 6-8 and 15-18.
[216] *Id.*

CS Wind's Comments

- The record indicates that electricity prices in Malaysia are set in accordance with market principles, and that CS Wind does not pay preferential rates for electricity.[217] Commerce should modify its decision to apply facts available, and its reliance on Singapore electricity prices, to find no benefit. Alternatively, Commerce should modify its benefit calculation.
- With respect to Malaysian electricity pricing, Commerce's determination overlooked record evidence indicating that CS Wind pays the same rates for electricity, which are determined based on market-driven principles, as all other electricity consumers in Malaysia. Commerce should determine that there is no basis to find that CS Wind received any countervailable benefit.[218]
- Nothing in the GOM's response indicates that electricity prices are different in the ECER as compared with any other region of Malaysia. In fact, the electricity tariff schedule the GOM provided covers the tariff rates for industrial electricity consumers across Peninsular Malaysia.[219] CS Wind confirmed that it pays the rates applicable to its user category.[220]
- Malaysian electricity regulations provide that electricity providers must set tariffs to be reflective of costs of services to different customers, recover costs, and only charge different tariffs for electricity services where there are "significant differences in costs of services."[221] The regulations further require that electricity providers, including TNB, provide the estimated cost of service based on voltage level, and account for demand, customer, and energy-related costs that reflect internationally-accepted approaches, including long-run marginal cost estimates and embedded cost estimates.[222]
- The GOM submitted detailed tariff rate calculation methodologies for each component of the electricity tariffs, which broadly reflect market principles.[223] The only role of government authorities in the regulations is to review the proposed tariffs to ensure that they conform to the general principles listed above.[224]
- The additional Imbalance Cost Pass Through (ICPT) charge further adjusts electricity tariffs to pass along adjustments in fuel costs and electricity generation costs to electricity consumers in Peninsular Malaysia.[225] Any ICPT adjustment is based on actual cost data for the most recent two months and estimated data for the following four months.[226] Generally, GOM regulators approve any proposed ICPT adjustment that is less than or equal to seven percent higher than the sum of the average costs of generation and the base average electricity tariffs.[227]

---

[217] *See* CS Wind Case Brief at 23.
[218] *Id.* at 21-22.
[219] *Id.* at 23 (citing GOM February 4, 2021 SQR at Exhibit B.13 and CS Wind December 30, 2020 IQR at Exhibit Program-B.4).
[220] *Id.* at 23 (citing CS Wind December 30, 2020 IQR at 22 (Tariff E2 schedule (Medium Voltage Peak/Off-Peak Industrial Tariff)).
[221] *Id.* at 24 (citing GOM February 4, 2021 SQR at Exhibit B1A).
[222] *Id.* at 23-24 (citing GOM February 4, 2021 SQR at Exhibit B1A (page 50)).
[223] *Id.* at 24 (citing GOM February 4, 2021 SQR at Exhibit B1A (page 51-63)).
[224] *Id.* (citing GOM February 4, 2021 SQR at Exhibit B1A (page 63-65)).
[225] *Id.* (citing GOM February 4, 2021 SQR at 4 and Exhibit B1A (page 66)).
[226] *Id.*
[227] *Id.* (citing GOM February 4, 2021 SQR at 4 and Exhibit B1A (page 70)).

- TNB's financial statements demonstrate that it had an operating profit of 8,206.8 million Malaysian Ringgit (MYR) during the POI.[228] Commerce dismisses TNB's significant operating profit in 2019 by focusing on a statement in TNB's 2019 annual report that a government "Electricity Industry Fund (KWIE)" fund was used to avoid implementing an ICPT surcharge during 2019.[229] The record does not support any conclusion that the KWIE funds that TNB stated were used to avoid an ICPT-based price increase were simply a grant to TNB to substitute for a cost increase that would otherwise have been demanded by market conditions.[230] Even if Commerce's implicit conclusion was supported by the record – which it is not – the single disbursement from the GOM's KWIE fund does not change the fact that TNB still would have had a significant operating profit during 2019 even in the absence of this government funding.[231]
- TNB's electricity tariffs are set consistent with market principles because Malaysian law and the actual tariff setting mechanism require recovery of costs and non-discriminatory pricing, and TNB's financial statements reflected an operating profit during the POI. Therefore, Commerce should determine that CS Wind received no countervailable benefit from its electricity purchases during the POI.[232]
- With respect to the benchmark applied, Commerce improperly applied Singaporean electricity prices as a tier-three benchmark by which to measure the adequacy of remuneration for CS Wind's electricity purchases.[233] Commerce correctly concluded that Singapore prices are not available as a tier-two benchmark (*i.e.*, world market price) because the prices are not actually available to purchasers in the country under investigation.[234] Commerce's use of the Singapore electricity prices under a tier-three benchmark analysis is contrary to Commerce's regulations and practice.
- In the absence of either a usable market-determined price for electricity in Malaysia based on actual transactions, or a world market price, Commerce's regulations require that it measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.[235] In fact, Commerce has a longstanding practice of declining to use third country pricing to measure the adequacy of remuneration for the provision of electricity for LTAR.[236]
- Where Commerce has used a tier-three benchmark to measure the adequacy of remuneration for electricity prices, Commerce's practice has been to adjust the electricity tariff class prices that it determined were not set in accordance with market principles,

[228] *Id.* (citing GOM February 4, 2021 SQR at Exhibit B5ci (page 359)).
[229] *Id.* (citing *Preliminary Determination* PDM at 8).
[230] *Id.*
[231] *Id.* at 24.
[232] *Id.*
[233] *Id.* at 25-26 (citing *Preliminary Determination* PDM at 18).
[234] *Id.* at 26 (citing *Preliminary Determination* PDM at 17).
[235] *Id.* (citing 19 CFR 351.511(a)(2)(iii)).
[236] *Id.* at 26-27 (citing *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determination*, 81 FR 49943 (July 29, 2016) (*Cold-Rolled Steel from Korea*), and accompanying IDM at Comment 3 (declining to use electricity prices from other countries because there is no evidence that electricity prices in those other countries are available to electricity consumers in Korea) and *Welded Line Pipe from the Republic of Korea: Final Negative Countervailing Duty Determination*, 80 FR 61365 (October 13, 2015) (*Welded Line Pipe from Korea*), and accompanying IDM at Comment 1 (declining to use third country electricity pricing as a benchmark where the government is the only source available to consumers)).

rather than to rely on a third country price.[237] Commerce has not justified its departure from its practice or otherwise explained why it is reasonable to use Singapore electricity tariffs where there is no evidence to support the notion that Singapore electricity tariffs are representative of electricity prices that are based on market principles in Malaysia.[238]

- To the extent that Commerce continues to determine that TNB's electricity tariffs are not set in accordance with market principles, Commerce should construct a tier-three benchmark price on a per-unit basis from the 2019 costs of energy generation, transmission, and distribution of electricity reported by TNB in Note 6 to TNB's 2019 financial statements and the total electricity sold in 2019 as reported in TNB's integrated annual report.[239] Then, to add a reasonable ratio for profit, Commerce could place on the record publicly-available online data from CSIMarket.com, as it has in a prior case.
- Finally, if Commerce continues to calculate a benefit for this program using Singapore electricity rates, it should modify the calculation. In the *Preliminary Determination*, to calculate the benefit for this program, Commerce summed the reported "Unit Price," "Additional Rate," and "Basic Fee" to calculate CS Wind's full electricity charges for each month during the POI.[240] CS Wind reported two additional fees paid in addition to the basic electricity charges assessed on each tariff category (*i.e.*, the ICPT and the KWTBB fees).[241] However, Commerce's calculation captures only the ICPT fee. Assuming Commerce continues to calculate a benefit based on each tariff rate category, Commerce must incorporate the KWTBB charges into the calculation.[242]

The GOM's Comments

- The ICPT mechanism is not a subsidy provided by the GOM. The mechanism is a form of rebate or saving to reflect different than forecasted fuel costs, and the difference is passed on to all TNB consumers in the form of electricity tariff rebates.[243] Additionally, the alleged electricity program is not specific and, therefore, does not fall within the meaning of the Agreement on Subsidies and Countervailing Measures.
- TNB's electricity tariffs are regulated and approved by the GOM through the Energy Commission but no financial contribution in the form of a good or service is provided through the GOM's Incentive Based Regulation (IBR) to producers of subject

[237] *Id.* at 27 (citing *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015) (*SC Paper from Canada*), and accompanying IDM at Comment 12 (constructing a price from the provincial rate schedule and other available record information) and *Common Alloy Aluminum Sheet from Bahrain: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 85 FR 49636 (August 14, 2020) (*CAAS from Bahrain*), and accompanying PDM at Comment 3 (constructing a tier-three benchmark using costs for generation, transmission, and distribution of electricity to arrive at a per-unit cost of electricity during the POI and deriving a suitable rate of return for the electric utility center from an online service that reports return on earnings information for electric utilities on a quarterly basis).
[238] *Id.* at 27-28.
[239] *Id.* at 28 (citing GOM February 4, 2021 SQR at Exhibits B5ci (pages 90–91) and B5cii (page 5)).
[240] *Id.* at 29 (citing Memorandum, "Countervailing Duty Investigation of Utility Scale Wind Towers from Malaysia: CS Wind Preliminary Determination Calculations," dated March 19, 2021 (CS Wind Preliminary Calculation Memorandum) at 4 and Attachment II).
[241] *Id.* (citing CS Wind December 30, 2020 at Exhibit Program-B.2).
[242] *Id.*
[243] GOM Case Brief at 9 (citing GOM February 3, 2021 SQR at Exhibit B1A – Guidelines on Electricity Tariff Determination Under Incentive Based Regulation (IBR) for Peninsular Malaysia 2018).

merchandise.[244] Pursuant to the Electricity Supply Act (Act 447) the GOM provides for the regulation of the electricity supply industry, the supply of electricity at reasonable prices, the licensing of any electrical installation, and the control of any electrical installation, plant and equipment with respect to matters relating to the safe and efficient use of electricity.[245] The electricity tariff rates determined by the GOM are consistent with market principles as the tariff is determined based on the principal of cost of service for each customer class and category; the established industrial tariffs recover costs and also include a fair rate of return.[246]

- No preferential rates are given to CS Wind.[247] The facilities provided by TNB are not limited to certain company (*i.e.*, CS Wind) but are available to all consumers in Peninsular Malaysia and not limited to consumers located within a designated geographical region, such as the ECER. Additionally, the electricity tariff in Malaysia does not exclusively apply to certain enterprises or industries, or group of enterprises or industries. Thus, the alleged subsidy is not specific.[248]
- Relying on the Singapore electricity tariff rate as a benchmark is also inappropriate, as Singapore did not exercise the IBR and ICPT mechanism.[249]
- Commerce did not separately identify the financial contribution and benefit elements for this program.[250]
- Commerce itself stated that the countervailable duty for this program is below the *de minimis* threshold and, thus, the program is not countervailable.

Petitioner's Rebuttal

- The GOM failed to provide the following information, despite having two opportunities to do so: (1) data on the GOM's allocation of costs in its electricity price-setting mechanism; and (2) data necessary to demonstrate that the GOM's industrial electricity tariffs recover costs and include a fair rate of return.[251] As a result, Commerce was unable to determine whether electricity rates that the GOM charged to CS Wind were based on market principles.[252]
- First, with respect to the market principles analysis, CS Wind argues that record information demonstrates the GOM determines electricity prices in accordance with market principles.[253] However, the record documentation that CS Wind cites does not contain the key necessary information that Commerce requested and the GOM failed to provide: (1) TNB's operating costs and expenses during the POI, and the return on capital, with respect to each of TNB's tariff classes and subclasses; and (2) TNB's earned revenue during the POI for each of its tariff classes and subclasses.[254]

[244] *Id.*
[245] *Id.* (citing GOM February 3, 2021 SQR at Exhibit B1Ei (Electricity Supply Act 1990 (Act 447))).
[246] *Id.*
[247] *Id.* at 10.
[248] *Id.* at 11 (citing Panel Report, US – Upland Cotton, para 7.1142).
[249] *Id.* at 10-11.
[250] *See* GOM Case Brief at 9.
[251] *See* Petitioner Rebuttal Brief – CS Wind at 12 (citing *Preliminary Determination* PDM at 7-8 and 18).
[252] *Id.* (citing *Preliminary Determination* PDM at 8 and 18).
[253] *Id.* (citing CS Wind Case Brief at 22-25).
[254] *Id.* at 13 (citing *Preliminary Determination* PDM at 7-8).

- Although CS Wind states that "{t}he GOM also submitted detailed tariff rate calculation methodologies for each component of the electricity tariffs, which broadly reflect market principles,"[255] the documentation cited from the GOM's supplemental questionnaire response does not contain TNB's actual operating costs, expenses, return on capital, and earned revenue for each of TNB's tariff classes and subclasses during the POI. The GOM's standard formulas and guidelines are not a substitute for TNB's actual POI financial data that Commerce requested. On this basis, Commerce appropriately determined that the GOM failed to provide necessary information for a market principles analysis.[256]
- CS Wind argues that TNB's recording of a significant operating profit during the POI establishes that the prices CS Wind paid to TNB are market-determined.[257] CS Wind claims Commerce dismissed this evidence by citing a statement in TNB's 2019 annual report that TNB used government funds to avoid implementing an electricity rate surcharge during 2019.[258] Commerce did not, however, cite TNB's use of government funds as dispositive evidence that the GOM's electricity prices were not in accordance with market principles. Rather, Commerce only noted that "the GOM's partial response indicates that TNB appears to be, overall, a profitable enterprise," and it cited record evidence of the GOM's provision of funds to TNB as contradictory evidence.[259]
- Regardless of whether TNB was a profitable enterprise overall during the POI, general evidence on TNB's profitability is no substitute for the specific information that Commerce requested on TNB's cost recovery and rate of return with respect to industrial tariffs. The evidence that CS Wind cites does not demonstrate that the GOM's electricity prices were set in accordance with market principles.[260]
- Second, with respect to Commerce's benchmark selection, CS Wind claims that Commerce's regulations do not provide for using a third-country benchmark price to determine the adequacy of remuneration for a good.[261]
- CS Wind's claim is inconsistent with Commerce's longstanding practice in cases where Commerce determines a government's price is not consistent with market principles. Commerce regularly uses third-country prices as tier-three benchmarks to measure the adequacy of remuneration for the provision of land-use rights in China, for example, when those third-country prices are the best available information on the record.[262]
- CS Wind also claims that Commerce's practice is not to use third country pricing to measure the benefit for programs involving the provision of electricity for LTAR. CS Wind cites *Cold-Rolled Steel from Korea* and *Welded Line Pipe from Korea*, but neither

[255] *Id.*(citing CS Wind Case Brief at 24).
[256] *Id.* (citing *Preliminary Determination* PDM at 8 and 18).
[257] *Id.* (citing CS Wind Case Brief at 24).
[258] *Id.* at 14 (citing *Preliminary Determination* PDM at 8).
[259] *Id.* (citing *Preliminary Determination* PDM at 8).
[260] *Id.*
[261] *Id.* at 15 (citing CS Wind Case Brief at 26).
[262] *Id.* (citing *Certain Chassis and Subassemblies Thereof from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination*, 86 FR 56 (January 4, 2021) (*Chassis from China Prelim*), and accompanying PDM at 24-25 and *Certain Chassis and Subassemblies Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 86 FR 15186 (March 22, 2021) (*Chassis from China Final*), and accompanying IDM at Comment 7).

case supports its assertion.[263] Commerce found, in both cases, that the responding government provided necessary information for an analysis of whether the government's prices were in accordance with market principles.[264] Under this analysis of the government's prices, Commerce found that respondents received no benefit.[265] Commerce only found that third country prices were inappropriate to use *as world market prices*, which is what led it to undertake analyses of whether the government's prices were in accordance with market principles.[266]

- Commerce made no determination that third-country prices were not usable in either of the following cases: (a) where Commerce determines that a government's prices are not in accordance with market principles based on record information; or (b) a responding government fails to provide information necessary to undertake a tier-three analysis, as was the case with the GOM here.[267]
- In *Welded Line Pipe from Korea*, Commerce acknowledged the possibility of using out-of-country benchmarks under a tier-three analysis. However, Commerce never reached this decision because it determined that the government's prices were set in accordance with market principles based on record information. In this case, the GOM did not provide information necessary for a market principles analysis, which forced Commerce to resort to a facts available benchmark.[268]
- CS Wind further claims that Commerce's practice has been to adjust electricity tariff classes instead of using third-country prices in cases where governments have not set electricity prices in accordance with market principles.[269] Neither case that CS Wind cites supports a conclusion that Commerce rejected third country prices. In *Common Alloy Aluminum Sheet from Bahrain*, Commerce determined that it had to "determine an appropriate proxy for a market based electricity benchmark" under a tier-three analysis.[270] Commerce did not state that it was rejecting any third country prices on the record in favor of a constructed tier-three benchmark.[271] Similarly, CS Wind cites no evidence from Commerce's determination in *SC Paper from Canada* to indicate that Commerce considered and rejected other potential benchmark prices in favor of a constructed tier-three benchmark.[272]
- In the current investigation, Commerce did not state that it was rejecting a constructed tier-three price on the record in favor of the Singapore prices. Rather, Commerce determined that the GOM failed to provide necessary information for an analysis of whether the GOM's electricity prices are based on market principles, and it determined,

[263] *Id.* (citing CS Wind Case Brief at 26-27).
[264] *Id.* at 15-16 (citing *Cold-Rolled Steel from Korea* IDM at Comment 3 and *Welded Line Pipe from Korea* IDM at Comment 1).
[265] *Id.* at 16 (citing *Cold-Rolled Steel from Korea* IDM at Comments 1-3 and *Welded Line Pipe from Korea* at Comment 1).
[266] *Id.* (citing *Cold-Rolled Steel from Korea* IDM at Comment 3 and *Welded Line Pipe from Korea* IDM at Comment 1.E).
[267] *Id.*
[268] *Id.* at 17.
[269] *Id.* (citing CS Wind Case Brief at 27-28).
[270] *Id.* (citing *CAAS from Bahrain* PDM at 14-15).
[271] *Id.*
[272] *Id.* at 18 (citing *SC Paper from Canada* at Comment 12).

as facts available, that the Singapore electricity rates were the best data on the record to use as a benchmark.[273]

- CS Wind states that Commerce "could place on the record publicly available online data" that would allow Commerce to add an amount for profit to CS Wind's proposed tier-three constructed benchmark.[274] The deadline to submit factual information to measure the adequacy of remuneration was thirty days prior to Commerce's March 19, 2021, *Preliminary Determination*.[275] CS Wind had the opportunity to submit information for Commerce's consideration of a constructed tier-three benchmark by this deadline.[276]
- CS Wind's suggestion that Commerce place new data on the record at this stage of the proceeding undermines the due process and procedural fairness intended by Commerce's factual information deadlines. Additionally, this is not a case where Commerce cannot calculate a subsidy rate because of missing information – Commerce already determined that the Singapore price schedules on the record provide a reasonable benchmark as facts available under section 776(a) of the Act.[277] CS Wind is asking Commerce to correct CS Wind's failure to provide information by the relevant deadline in order to support an argument by CS Wind.
- With respect to Commerce's calculation of a benefit for this program, CS Wind argues that Commerce should include KWTBB fees that CS Wind paid in the benefit calculation.[278] However, CS Wind has not demonstrated that the benchmark rates in the Singapore electricity schedule on the record include any fees similar to the KWTBB fee.[279] Commerce's practice is to exclude fees from a respondent's electricity purchase prices if the benchmark prices do not include these same fees.[280] This method accounts for "factors affecting comparability," and ensures that benchmark price and a respondent's purchase price are on the same basis.[281] Accordingly, Commerce should not include these KWTBB fees in CS Wind's electricity purchase prices.
- Finally, regarding Commerce's calculation, Commerce stated that it was using 2019 electricity tariffs, which cover the POI.[282] However, Commerce used the incorrect year from the Singapore electricity schedule.[283] For the final determination, Commerce should use the correct (*i.e.*, 2019) rates in the Singapore schedule.

Commerce Position: Consistent with the *Preliminary Determination*, we continue to find the GOM's electricity for LTAR program to be countervailable, and we continue to rely on

[273] *Id.* (citing *Preliminary Determination* PDM at 8).
[274] *Id.* (citing CS Wind Case Brief at 28).
[275] *Id.* at 19 (citing *Preliminary Determination* PDM at 1).
[276] *Id.*
[277] *Id.* (citing *Preliminary Determination* PDM at 8).
[278] *Id.* (citing CS Wind Case Brief at 28-29).
[279] *Id.* at 19-20 (citing CS Wind December 30, 2020 IQR at Exhibit Program-B.2. and Petitioner's Letter, "Utility Scale Wind Towers from Malaysia: Submission of Benchmark Information," dated February 17, 2021 (Petitioner February 17, 2021 Benchmark Submission) at Exhibit 4).
[280] *Id.* at 20 (citing *Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 75 FR 57444 (September 21, 2010) at Comment 25).
[281] *Id.* at 20 (citing 19 CFR 351.511(a)(2)(i)).
[282] *See* Petitioner Case Brief at 34 (citing *Preliminary Determination* PDM at 6).
[283] *Id*. at 34 (citing CS Wind Preliminary Calculation Memorandum at Attachment 2).

Singapore electricity prices as a tier-three benchmark. However, we have revised our calculations to rely on 2019 electricity rates.

Prior to the *Preliminary Determination*, we requested a variety of data regarding the operations of TNB,[284] including a request that the GOM provide data to permit an analysis of whether TNB recovers its costs in the context of electricity distribution.[285] In its initial questionnaire response, the GOM summarily stated that CS Wind did not receive a preferential electricity rate, and it declined to respond to the vast majority of Commerce's questions regarding the provision of electricity.[286] We again requested information regarding the operation of the Malaysian electricity system, and TNB in particular, in a supplemental questionnaire.[287] The GOM provided a partial response to these questions, and it submitted a variety of electricity laws as well as corporate governance/financial documents for TNB.[288] However, with respect to our question regarding TNB's operating costs and its return on capital for the tariff classes, the GOM stated that "TNB is unable to provide the information in view of TNB's Confidentiality Policy."[289] With respect to our question regarding TNB's earned revenue for the electricity tariff classes, the GOM stated that "the information on sub-categories is confidential and TNB is unable to provide the information in view of TNB's Confidentiality Policy."[290]

The requested information, especially the underlying data, is essential to Commerce's analysis of whether TNB's pricing reflects market principles. In particular, there are no data on the record demonstrating that the rates determined pursuant to the GOM's pricing methodology result in TNB recovering costs and making a fair rate of return in relation to its industrial electricity tariffs, as envisioned in 19 CFR 351.511(a)(2)(iii). Therefore, we continue to find that the record is incomplete.

CS Wind asserts that the record supports a finding that TNB's prices were set in accordance with market principles because TNB was profitable and applied a cost pass through mechanism. As explained in the *Preliminary Determination*, however, the record is incomplete with respect to costs/profits at the particular tariff classes in question and, thus, it does not support such a conclusion.[291] CS Wind also asserts that Commerce dismissed evidence regarding TNB's profitability by placing too much emphasis on a statement in TNB's financial statement that the GOM provided funding to TNB. This is incorrect; we explained that "the GOM's partial response indicates that TNB appears to be, overall, a profitable enterprise."[292] Even so, we referenced the GOM's provision of funds to TNB as one example of how the existence of a pass-through mechanism does not necessarily demonstrate that the electricity pricing reflects market principles.[293] In any case, the existence of a pass-through pricing methodology, in the absence of

[284] *See* Initial Questionnaire at II-6.
[285] *Id*.
[286] *See* GOM December 24, 2020 IQR at 15.
[287] *See* GOM Supplemental Questionnaire.
[288] *See generally* GOM February 4, 2021 SQR.
[289] *See* GOM February 4, 2021 SQR at 24.
[290] *Id*.
[291] *See Preliminary Determination* PDM at 8.
[292] *Id.*
[293] *Id.* (*see* footnote 47).

the cost and rate of return information that Commerce requested, cannot establish that industrial electricity prices were set in accordance with market principles under 19 CFR 351.519(a)(2)(iii).

Regarding our reliance on Singapore electricity rates, CS Wind asserts that it is Commerce's practice not to rely on third country pricing as a benchmark and emphasizes that Singapore prices are not available to electricity users in Malaysia. As an initial matter, the "availability" of prices is a significant concern in the context of *tier-two* pricing.[294] However, we are relying on the Singapore prices as a facts available *tier-three* benchmark. Importantly, given that information is missing from the record due to the GOM's partial response to our questions, we rely on these Singapore prices, as facts available, as the best available benchmark on the record.

CS Wind also mischaracterizes Commerce's practice regarding tier-three benchmarks, asserting that Commerce's purported practice is to construct a tier-three benchmark by adjusting in-country prices. While we recognize that we have constructed tier-three benchmarks in the past by adjusting in-country prices,[295] our tier-three practice is case-specific and Commerce has also relied on third-country pricing for tier-three benchmarks in numerous cases.[296] Second, Commerce has relied on third country pricing in the particular context of energy-related LTAR analysis, and this approach has been upheld by the CIT.[297] Thus, while we agree with CS Wind that an adjusted in-country price *may* be used in a tier-three analysis, there is no basis for the assertion that we *must* use such an approach or that doing so is a Commerce "practice."

The GOM and CS Wind also assert that Commerce should revisit its finding regarding the specificity of this program. The respondents argue that nothing in the GOM's response indicates that electricity prices in the ECER are different from prices in any other region of Malaysia and that nothing on the record indicates the electricity prices provided are specific to CS Wind. However, the record shows that the applicable TNB tariff rates apply to industrial electricity to consumers in Peninsular Malaysia, and not the entire country (*e.g.*, not covering Sabah and Sarawak).[298] The Energy Commission, the GOM regulatory body that regulates the energy sector in Peninsula Malaysia and Sabah, has applied this pricing methodology (*i.e.*, IBR) exclusively to the area of Peninsular Malaysia.[299] Accordingly, we continue to find the program to be regionally specific.

The GOM further asserts that Commerce preliminarily found that the subsidy rate under this program was 0.55 percent and is, thus, *de minimis*. However, Commerce conducts its analysis of whether a respondent's subsidy rate is *de minimis* on an aggregate basis (*i.e*., after summing the program-specific subsidy rates).[300] Accordingly, the fact that the rate for a *single* program is *de*

[294] *See* 19 CFR 351.511(a)(2) (stating that, in the absence of a tier-one benchmark, Commerce "will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question").
[295] *See, e.g.*, *Cold-Rolled Steel from Korea* IDM at Comment 3.
[296] *See, e.g.*, *Chassis from China Prelim* PDM at 24-25, unchanged in *Chassis from China Final* IDM at Comment 7.
[297] *See Habaş Sinai Ve Tibbi Gazlar Istihsal Endüstrisi A.Ş. v. United States*, 459 F. Supp. 3d 1341 (CIT 2020).
[298] *See generally* GOM February 4, 2021 SQR.
[299] *Id.*
[300] *See* section 703(b)(4)(A) ("… a countervailable subsidy is *de minimis* if the administering authority determines that the aggregate of the net countervailable subsidies is less than 1 percent ad valorem …"). We also note that the program provided a measurable benefit to CS Wind, *i.e.*, it yielded a benefit of at least.005 percent.

minimis does not warrant disregarding that program-specific rate. Indeed, CS Wind's total rate is above *de minimis*.[301]

Regarding our calculation of the subsidy rate for this program, we agree with the petitioner that Commerce used the incorrect year from the Singapore electricity schedule in calculating the benefit.[302] Accordingly, for purposes of this final determination, we are using the 2019 electricity rates as found in the Singapore schedule.[303]

Finally, CS Wind asserts that we should incorporate the KWTBB fees into the electricity for LTAR benefit calculation. We disagree. There is no record evidence indicating that the Singapore benchmark prices incorporate these same fees. In selecting a benchmark, Commerce's methodology accounts for "factors affecting comparability," and ensures that benchmark prices and a respondent's purchase price are on the same basis.[304] Accordingly, we have not included the KWTBB fees in the electricity for LTAR benefit calculation.

Comment 4: Whether Commerce Should Select a Different Tier-One Benchmark to Measure the Adequacy of Remuneration for CS Wind's Land

In the *Preliminary Determination*, we found the GOM land for LTAR program countervailable.[305] To measure the benefit from the program, Commerce used a price for an industrial land transaction between private parties from the "Real Estate Market Outlook 2020 Malaysia" publication from C.B. Richard Ellis (CBRE).[306] Specifically, Commerce relied on a sales price between two private parties for raw industrial land in Melaka, and found that the land was comparable in nature (*i.e.*, raw industrial) and size to CS Wind's parcel.[307]

CS Wind's Comments

- An alternative benchmark price for industrial land that is more comparable in size and in a more similar location to CS Wind's land exists in the same publication. For the final determination, Commerce should calculate a per-unit land benchmark price using the 48.24 acre parcel of industrial land in the Gebeng Industrial Area purchased by Top Glass Sdn Bhd & APi Trengganu SB (Top Glass).[308]
- When evaluating potential tier-one benchmarks, Commerce's regulations require that it consider product similarity; the quantities sold, imported, or auctioned; and other factors

[301] The GOM also summarily asserts that Commerce did not separately identify the financial contribution and benefit elements for this program, asserting that "no economic value proven to exist … was transferred by the GOM to CS Wind." *See* GOM Case Brief at 9. However, as explained in the *Preliminary Determination*, we identified a financial contribution because the electricity was provided by TNB, an "authority," and we assessed whether CS Wind received a benefit based on our comparison of the price paid by CS Wind to a tier-three benchmark. *See Preliminary Determination* PDM at 10-16.
[302] *See* CS Wind Preliminary Calculation Memorandum at Attachment 2.
[303] *See* CS Wind Final Calculation Memorandum.
[304] *See* 19 CFR 351.511(a)(2)(i). Similarly, we omitted the ICPT fee from the calculations to ensure comparability with the Singapore rates.
[305] *See Preliminary Determination* PDM at 9-10.
[306] *See* CS Wind Case Brief at 30 (citing CS Wind Preliminary Calculation Memorandum at 6).
[307] *Id.* (citing CS Wind Preliminary Calculation Memorandum at 6 and Attachment 2).
[308] *Id.* (citing Petitioner February 17, 2021 Benchmark Submission at Exhibit 2 (page 90)).

affecting comparability in choosing transactions or sales to generate the potential benchmark.[309]

- The industrial land purchased by Top Glass is summarized in the same source Commerce already found to be reliable, but is in a much more similar location, and is of more comparable size, to CS Wind's land as compared with the land subject to the transaction preliminarily used for Commerce's land benchmark.[310] Importantly, the benchmark land used in the *Preliminary Determination* is located in a different state (*i.e.*, Melaka), on the much more developed west coast of the Malaysian peninsula.[311]
- In the final determination, Commerce should use the cost per square meter of the Gebeng Industrial Area land purchased by Top Glass and should adjust that value for inflation to measure the adequacy of remuneration for CS Wind's land located in Pahang state.[312]

The GOM's Comments

- The purchase of land in 2009 by CS Wind's predecessor, through a government authority, was done for business purposes and reflects a market price in Malaysia at the time of purchase.[313]
- Commerce should reconsider using a 2019 price, because a 12-year difference will affect the calculations. Therefore, Commerce should consider referring to the land prices provided by the GOM.[314]
- World economies are ranked according to their ease of doing business by the World Bank, based on their performance in 12 business regulatory areas.[315] A high ranking means the regulatory environment is conducive to the starting and operation of a firm. The assistance/facilities provided by GOM agencies are available to all business communities including foreign investors who are interested in investing in Pahang and cannot be singled out for CS Wind. Therefore, the allegation that CS Wind has benefited from special assistance is misleading.[316]
- Commerce did not separately identify the financial contribution and benefit elements for this program.[317]
- Commerce calculated a rate below *de minimis* for this program, and Commerce should revisit its preliminary finding.[318]

Petitioner's Rebuttal

- CS Wind argues that Commerce should use a purchase price from the CBRE report for land in the Gebeng Industrial Area as the benchmark.[319] However, unlike the purchase

[309] *Id.* (citing 19 CFR 351.511(a)(2)(i)).
[310] *Id.* at 30-31 (citing Petitioner February 17, 2021 Benchmark Submission at Exhibit 2 (page 90)).
[311] *Id.* at 31 (citing Petitioner February 17, 2021 Benchmark Submission at Exhibit 2 (page 90)).
[312] *Id*.
[313] *See* GOM Case Brief at 8 (citing GOM February 3, 2021 SQR at 12-13).
[314] *Id.*
[315] *Id.* at 9 (citing GOM's Letter, "Consultation in Accordance with Article 13.1 of WTO Subsidies and Countervailing Measures Agreement on the Petition Concerning Imports of Utility Scale Wind Towers from Malaysia," dated October 16, 2020).
[316] *Id.*
[317] *Id.* at 8.
[318] *Id.* at 9.
[319] *See* Petitioner Case Brief at 20 (citing CS Wind Case Brief at 30-31).

used in the *Preliminary Determination*, the Gebeng transaction was not a purchase of raw industrial land. Accordingly, Commerce should continue to use only the Melaka purchase price from CBRE as the benchmark.

- The Melaka parcel was undeveloped industrial land and did not have a factory or other building(s) on it. The parcel in the Gebeng Industrial Area that CS Wind proposes, however, is not raw industrial land. The CBRE report describes this parcel as "48.24 acres industrial land with factories," comprising "lands, plants{, } machinery{, } and buildings."[320] In contrast, CS Wind's land purchase, for which Commerce is measuring a benefit, and the Melaka purchase, are more comparable transactions.[321]
- The presence of buildings and equipment on the land do not make the benchmark a conservative one (*i.e.*, a higher price), because such improvements do not necessarily add value to the underlying land. In fact, the buildings and equipment can even lower the value of the land for a prospective buyer, particularly for manufacturers of unrelated products; if the buildings and equipment are not suitable for the buyer's needs, then the buyer would need to incur additional costs (*e.g.*, demolition of buildings, site remediation) for the land to be usable. Accordingly, Commerce should not view the Gebeng land parcel as a usable or conservative benchmark. Commerce should continue to use the 2019 purchase price for industrial land in Melaka from the CBRE report in the final determination.

Commerce Position:

We agree, in part, with arguments made by both CS Wind and the petitioner. In constructing our final benchmark, we are averaging the price of the land purchase in Gebeng by Top Glass with the industrial land purchase price for the parcel in Melaka bought by Xepa-Soul Pattinson (Malaysia) SB.

In the *Preliminary Determination*, Commerce relied on a tier-one benchmark and based our analysis on an observed Malaysian market price for a transaction involving a private supplier. When selecting benchmarks, as provided in 19 CFR 351.511(a)(2)(i), we take into consideration product similarity; the quantity sold, imported, or auctioned; and other factors affecting comparability. We find that our original benchmark used in the *Preliminary Determination*, a land purchase in Melaka, was appropriate because the land parcel was of undeveloped industrial land and roughly comparable in size to the CS Wind parcel. However, we also agree with CS Wind that a benchmark of a more comparable size, and located in a more similar region to the land purchased by CS Wind's predecessor, would also be appropriate. Accordingly, although both of the potential land benchmark transactions have factors that distinguish them from the CS Wind transaction, we find them to be equally suitable for use as a benchmark. Therefore, for our final determination, we are using an average of the price of our preliminary benchmark and the industrial land transaction in the Gebeng Industrial Area.

The GOM presents a number of arguments regarding our decision, but none undermine our conclusion here. Malaysia's score on an "ease of doing business" scale, and the GOM's statements regarding the range of opportunities available to foreign investors, do not bear on the

[320] *Id.* (citing Petitioner Benchmark Submission at Exhibit 2 (pages 67 and 90)).
[321] *Id.* at 21-22.

countervailability of this program. As explained in the *Preliminary Determination*, we found the program to be regionally specific.[322] Whether such incentives are available to international investors or exclusively to domestic companies does not implicate our regional specificity finding, *i.e*., that the program targets a region within the governing jurisdiction, and is administered by regional and state-level government entities.

With respect to the benefit calculation, the fact that the benchmark is from a subsequent year does not render the calculation inappropriate; Commerce regularly adjusts benchmarks to account for inflation.[323] With respect to the GOM's proposed land benchmark (*i.e*., 2019 land pricing data for land in Pahang), as noted in the *Preliminary Determination*, we cannot determine whether the prices represent private transactions; accordingly, we continue to find these prices unusable.[324] Finally, as explained in Comment 3 above,[325] the fact that this program – alone – is not above the *de minimis* threshold does not warrant a finding that the program is not countervailable or that it did not provide a benefit to CS Wind during the POI.[326] Our calculations show that the program provided a measurable benefit to CS Wind during the POI, and, therefore, we have countervailed it for this final determination.

Comment 5: Whether Commerce Should Modify the Denominator Used in its Benefit Calculations

In the *Preliminary Determination*, as the denominator of the subsidy calculations, we used the reported POI sales value of CS Wind's wind towers which was recorded in the books and records of CS Wind Corporation (CS Wind Korea).[327] We found that, given the unique relationship between CS Wind Korea (*i.e.*, a parent company) and respondent CS Wind, this sales denominator reflects the value of subject merchandise that is entering the United States.[328]

[322] *See Preliminary Determination* PDM at 9-10.
[323] *See* CS Wind Preliminary Calculation Memorandum at 6.
[324] *See Preliminary Determination* PDM at 6.
[325] *See* Comment 4.
[326] As in the context of the electricity for LTAR program, the GOM again summarily asserts that Commerce did not separately identify the financial contribution and benefit elements for this program. *See* GOM Case Brief at 9. However, as explained in the *Preliminary Determination*, we identified a financial contribution because the land was provided by Perbadanan Kemajuan Negeri Pahang, *i.e*., the Pahang State Development Corporation, a government "authority," and we assessed whether CS Wind received a benefit based on our comparison of the price paid by CS Wind to a tier-one benchmark. *See Preliminary Determination* PDM at 10. These findings remain unchanged in this final determination.
[327] *See Preliminary Determination* PDM at 5.
[328] *Id.*

Petitioner's Comments

- Commerce should allocate the benefit that CS Wind received over its own sales figures. Commerce's regulations require that it attribute subsidies to the products produced by the corporation that received the subsidy – in this case, CS Wind.[329] Relying on a different company's sales of the merchandise likely results in the inclusion of revenue not tied to the Malaysian product.[330]
- Commerce's attribution regulations specifically address multinational firms: when a firm that receives a subsidy has production facilities in two or more countries, Commerce "will attribute the subsidy to products produced by the firm within the country of the government that granted the subsidy" (unless it is demonstrated that the subsidy was tied to more than domestic production).[331] This is consistent with the *CVD Preamble*.[332] CS Wind is a multinational firm with production facilities in multiple countries. Therefore, Commerce's regulations require it to attribute the subsidies provided by the GOM to the Malaysian division of CS Wind.[333]
- Using CS Wind's sales as the denominator is consistent with Commerce's practice in prior cases. In *Ribbons from China*, the Chinese respondent argued that Commerce should rely on a consolidated sales value, including sales data from a Hong Kong affiliate, as the denominator. The Chinese respondent argued that its unconsolidated sales reflected an artificial intra-company transfer price that did not fully reflect the total sales value, as billed to the U.S. customer.[334] Ultimately, Commerce did not include the Hong Kong affiliate's sales of Chinese merchandise, citing its regulations.[335] Commerce relied only on the Chinese respondent's sales because it was the corporation that actually received the subsidies.[336]
- In *Circular Welded Pipe from China*, Commerce again highlighted 19 CFR 351.525(b)(6)(i) to attribute subsidies received under certain programs only to the Chinese respondent's standalone sales value.[337] Despite the fact that the respondent's Hong Kong affiliate was responsible for making the sale, the agency did not use that company's sales value for this affiliate in the denominator.[338] Commerce reasoned that it normally attributes a subsidy to the products produced by the corporation that received

[329] Petitioner Case Brief at 15 (citing 19 CFR 351.525(b)(6)(ii)-(v) and 19 CFR 351.525(b)(6)(i)).
[330] *Id.*
[331] *Id.* (citing 19 CFR 351.525(b)(7)).
[332] *Id.* at 15-16 (*Countervailing Duties; Final Rule*, 63 FR 65348, 65403 (November 25, 1998) (*CVD Preamble*) (noting that the government of a country normally provides subsidies for the general purpose of promoting the economic and social health of that country and its people, and for the specific purposes of supporting, assisting or encouraging domestic manufacturing or production and related activities (including, for example, social policy activities such as the employment of its people))).
[333] *Id.*
[334] *Id.* at 16 (*Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 75 FR 41801 (July 19, 2010) (*Ribbons from China*), and accompanying IDM at Comment 4).
[335] *See* Petitioner Case Brief at 16-17 (citing 19 CFR 351.525(b)(6)(i)).
[336] *Id.* at 17.
[337] *See* Petitioner Case Brief at 17 (citing *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 4936 (January 28, 2009) (*Circular Welded Pipe from China*), and accompanying IDM at Comment 3).
[338] *Id.* at 17 (citing *Circular Welded Pipe* IDM at 11 (noting that the Hong Kong affiliate "consigned {stainless steel coil} to {the Chinese respondent} and {the Chinese respondent's affiliate} for manufacturing into subject merchandise that {the Chinese respondent} returned to {the Hong Kong affiliate} for sale")).

the subsidy, that the relevant Chinese respondent was the only one of its cross-owned companies that received benefits under the income tax reduction program, and, as a result, only the Chinese respondent's sales value was used as the denominator.[339]

- *Tool Chests from China* also involved a respondent's request to use sales from a cross-owned reseller as the subsidy calculation denominator.[340] Commerce denied this request and instead used the sales value of the Chinese respondent's sales to the Macau affiliate because the respondent was the company receiving the subsidy. This is analogous to the present case because Malaysian subsidization results in a direct benefit to Malaysian production and sales, not a benefit to the affiliated Korean parent that ultimately makes the sale.[341]
- It is "eminently reasonable" for Commerce to only include sales by the firm receiving the subsidy and to disregard a respondent's claim that it is merely participating in a services agreement. The Supreme Court (the Court) has previously warned that categorizing sales as "services" may result in manipulation of U.S. trade laws.[342]
- In *Eurodif*, the Court reviewed an appeal of an AD case involving low enriched uranium from France, allegedly sold at less-than-fair-value in the United States.[343] This product was sold under a service contract that made it impossible to trace low enriched uranium back to the particular unenriched uranium the utility provided.[344] At the agency level, Commerce determined that these transactions were sales of goods, rather than services, and the Court agreed with the decision.[345] Specifically, the Court found that it was acceptable to consider the conversion transactions "within the ambit of sale of goods," and reasoned that Commerce's decision is "reinforced by practical reasons aimed at preserving the effectiveness of antidumping duties."[346] In particular, the Court held that "the restructuring {of transactions as services transactions} would not stop with uranium; contracts for imported pasta would be replaced by separate contracts for wheat and wheat processing services, sweater imports would give way to separate contracts for wool and knitting services, and antidumping duties would primarily chastise the uncreative."[347] As a result, the Court found that Commerce's "attempt to foreclose this absurd result by treating {such transactions} as sales of goods is eminently reasonable."[348]
- CS Wind attempts to narrow the general principles set out in *Eurodif* by claiming that it was set only in the AD context.[349] This misses the Court's point; in *Eurodif*, the Court was concerned with the general ability of foreign producers to evade U.S. trade law with service contracts. Indeed, CS Wind's gamesmanship is apparent in this case where CS Wind publicly holds itself out as a producer of wind towers but describes itself as a

[339] *See* Petitioner Case Brief at 17 (citing *Circular Welded Pipe* IDM at Comment 3).
[340] *Id.* at 17-18 (citing *Certain Tool Chests and Cabinets from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 82 FR 56582 (November 29, 2017) (*Tool Chests from China*), and accompanying IDM at Comment 14).
[341] *Id.* (citing *Certain Fabricated Structural Steel from Canada: Final Negative Countervailing Duty Determination*, 85 FR 5387 (January 30, 2020), and accompanying IDM at Comment 3).
[342] *Id.* at 18.
[343] *Id.* (citing *United States v. Eurodif S.A.*, 555 U.S. 305, 308 (2009) (*Eurodif*)).
[344] *Id*. (citing *Eurodif*, 555 U.S. at 309-10).
[345] *Id.* (citing *Eurodif*, 555 U.S. at 308).
[346] *Id.* at 19 (citing *Eurodif*, 555 U.S. at 321).
[347] *Id.* (citing *Eurodif*, 555 U.S. at 321-322).
[348] *Id.* (citing *Eurodif*, 555 U.S. at 322).
[349] *Id.* (citing CS Wind Rebuttal Pre-Preliminary Comments at 16-17).

subcontractor/toller for CS Wind Korea where expedient, in order to engineer a lower subsidy rate.[350]

- The structure of CS Wind as a service provider gives it an artificial advantage in this (and any future) CVD proceedings. For example, the subsidy rate is allocated over a Korean sales value that includes additional sales activities – simply because it sold this merchandise through its Korean parent. This creates an unusual comparison where Malaysian subsidies are being allocated over Korean sales activities. Attributing the subsidy only to the respondent's sales is consistent with Commerce's regulations and prior practice, and is necessary to ensure the effectiveness of U.S. CVD law.

CS Wind's Rebuttal

- The petitioner posits that relying on CS Wind Korea's sales of wind towers produced in Malaysia "likely results in the inclusion of revenue not tied to the Malaysian product."[351] The petitioner's arguments are contrary to Commerce's regulations and practice and are contradicted by the record evidence.
- Commerce's regulations provide that it will calculate an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the POI "by the *sales value* during the same period *of the product or products* to which the Secretary attributes the subsidy."[352]
- The petitioner does not challenge the baseline record facts that: (1) all of CS Wind's sales revenue is service revenue and is not the value of finished products (*i.e.*, wind towers) to which any alleged subsidy is attributed; (2) the processing revenue is recorded in CS Wind Korea's cost of goods sold; and (3) the actual sales value for the wind towers produced in Malaysia by CS Wind is recorded by CS Wind Korea. CS Wind made all export sales of the product through CS Wind Korea.[353]
- CS Wind's sales revenue is not based on the invoice prices or value of the wind towers (*i.e.*, the product or products) sold to unaffiliated U.S. customers, and instead relates to subcontracted processing.[354] In contrast, the free on board (FOB) sales value of export sales of the product is reflected by CS Wind Korea's sales to unaffiliated U.S. customers. The petitioner's suggestion that any countervailable benefits should be allocated over CS Wind's sales of wind towers ignores the fact that CS Wind had no sales of wind towers.[355]
- The petitioner argues that, when a respondent has no cross-owned companies, Commerce's attribution regulation "requires attributing subsidies to the products produced by the corporation that received the subsidy; in this case, CS Wind Malaysia."[356] The petitioner's reliance on 19 CFR 351.525(b)(6)(i) to support this argument is misplaced. Commerce's regulation makes clear that the correct denominator

[350] *Id.* (*compare* CS Wind December 30, 2020 IQR at Exhibit 2(c) ("{CS Wind Malaysia} is principally engaged as manufacturer and dealer in wind turbine tower …"), *with* CS Wind Rebuttal Pre-Preliminary Comments at 16 and 18).
[351] *See* CS Wind Rebuttal Brief at 9 (citing Petitioner Case Brief at 15).
[352] *Id.* (citing 19 CFR 351.525(a) (*emphasis added*)).
[353] *Id.* at 10 (citing CS Wind December 30, 2020 IQR at 10).
[354] *Id.* (citing CS Wind December 30, 2020 IQR at 10).
[355] *Id.* (citing CS Wind December 30, 2020 IQR at 10).
[356] *Id.* at 11 (citing Petitioner Case Brief at 15).

represents sales of products exported by a firm, not services.[357] Commerce's attribution regulations also refer to "products" elsewhere, stating that Commerce will normally "attribute a subsidy to the products produced by the corporation that received the subsidy."[358]

- The record makes clear that wind towers are produced by CS Wind Korea under a contract with CS Wind.[359] Accordingly, the producer of the products to which Commerce attributes any benefits is CS Wind Korea.
- Commerce's regulation is also clear that, even where a firm receiving a subsidy has production facilities in two or more countries, Commerce should attribute the subsidy to the product produced by the firm within the country of the government that granted the subsidy.[360] Commerce's regulation thus instructs that any subsidy granted by the GOM should be attributed to the products produced within Malaysia by CS Wind. The fact that CS Wind's sales of wind towers produced in Malaysia are recorded for CS Wind Korea's account does not change the fact that it is CS Wind Korea's sales of wind towers produced in Malaysia that reflect the ultimate value of the products produced by CS Wind in Malaysia.
- The petitioner's concern that relying on CS Wind Korea's sales "likely results in the inclusion of revenue not tied to the Malaysian product,"[361] is not supported by the record. CS Wind separately reported the following POI sales values, as requested by Commerce: (1) the value of transactions between CS Wind and its parent company, CS Wind Korea; (2) the quantity of wind towers processed by CS Wind that was exported by CS Wind Korea during the POI; and (3) the value of sales of wind towers sold by CS Wind Korea that were produced by CS Wind in Malaysia.[362] CS Wind reconciled those sales quantities and values to the accounting records of CS Wind Korea and CS Wind, and demonstrated that the sales values reflected export sales only of wind towers produced at the plant of CS Wind.[363]
- Commerce correctly concluded that using CS Wind Korea's sales of wind towers produced in Malaysia reflected the value of subject merchandise that entered the United States, as required by Commerce's attribution regulation.[364] This is further supported by Commerce's general practice and in its specific practice with respect to CS Wind.
- In *Wind Towers from Vietnam*, Commerce determined that it should rely on the sales value of wind towers produced by CS Wind, rather than CS Wind Vietnam's tolling revenue, as the appropriate denominator in its subsidy calculations.[365] Commerce reasoned that the use of CS Wind's Vietnamese toller's sales as the denominator would

[357] *Id.* (citing 19 CFR 351.525(a) (providing the benefit should be calculated by dividing the benefits over the "sales value of the product or products"), and 19 CFR 351.525(b)(3) (providing that domestic subsidies are attributed to all products sold by a firm)).
[358] *Id.* (19 CFR 351.525(b)(6)(i)).
[359] *Id.* (citing CS Wind December 30, 2020 IQR at 10).
[360] *Id.* at 12 (citing 19 CFR 351.525(b)(7)).
[361] *Id.* (citing Petitioner Case Brief at 15).
[362] *Id.* (citing CS Wind February 10, 2021 SQR at Exhibit S-2(a)).
[363] *Id.* (citing CS Wind February 10, 2021 SQR at Exhibit S-2(b)).
[364] *Id.* at 13 (citing *Preliminary Decision* PDM at 5 and CS Wind Preliminary Calculation Memorandum at 2).
[365] *Id.* (citing *Utility Scale Wind Towers from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination and Negative Determination of Critical Circumstances*, 85 FR 40229 (July 6, 2020) (*Wind Towers from Vietnam*), and accompanying IDM at Comment 6).

reflect toll processing fees, or revenue, rather than the value of the sales of the exported merchandise.[366] The same facts exist in the current Malaysian case, and the petitioner makes no effort to distinguish them.

- The petitioner's citation to Commerce precedent is restricted to situations where Commerce excluded sales by an affiliated reseller from the respondent's sales denominator.[367] Such an argument is inapplicable here because CS Wind Korea is the seller of wind towers produced in Malaysia by CS Wind. CS Wind Korea is not a cross-owned reseller of merchandise produced by CS Wind, but, rather, the original seller of that merchandise.[368] Accordingly, Commerce's regulations require that Commerce attribute any countervailable benefits to sales of the products (*i.e.*, wind towers) produced in Malaysia, which are all sold by CS Wind Korea, not CS Wind.
- The petitioner's reliance on *Eurodif*[369] is misplaced. The Court's holding in *Eurodif* does not address the CVD law at all, and it has no bearing on the selection of a proper sales denominator for calculating *ad valorem* subsidy rates. Rather, in *Eurodif*, the Court considered whether Commerce reasonably considered sales of uranium processed into low-enriched uranium by U.S. affiliates to be sales of low enriched uranium from France in an AD context.[370]
- The Court held that the section of Act in question was sufficiently ambiguous to permit Commerce to consider that the law applies to contracts for services to enrich uranium, as well as to the uranium transformed through those services.[371] Given the ambiguity, Commerce was entitled to find the transactions at issue subject to AD law, and the Court determined that Commerce had good analytical reasons to arrive at such a conclusion.[372]
- In contrast, 19 CFR 351.525(a) requires that Commerce calculate subsidy rates by dividing the benefit over the sales value of the product(s) that benefited from the countervailable subsidy (*e.g.*, wind towers produced in Malaysia) granted by the government of the country in which the goods are manufactured (*e.g.*, the GOM). There is no ambiguity here as to whether the service revenues earned by CS Wind constitute sales of wind towers subject to this CVD investigation. Clearly, they do not.
- The policy concerns at issue in *Eurodif* are not present in this case. In *Eurodif*, the Court was concerned that, were sales of uranium feedstock processed into low enriched uranium not considered to be sales of goods, foreign enrichers could avoid being subject to the AD laws entirely.[373] Here, CS Wind does not argue that sales of wind towers produced in Malaysia are not covered by the CVD law. Rather, it argues that the full value of the sales of product (*i.e.*, wind towers) produced in Malaysia is reflected only in the export sale made by CS Wind Korea.
- Because CS Wind's sales revenue is limited to income from processing services, rather than from the sales value of the finished wind towers, Commerce can only compute the proper *ad valorem* rate– as required by the Act and Commerce's regulations – by dividing any benefits by the complete sales value of the products sold.

[366] *Id.* (citing *Wind Towers from Vietnam* IDM at Comment 6).
[367] *Id.* (citing Petitioner Case Brief at 16-18).
[368] *Id.* at 13-14 (citing CS Wind December 30, 2020 IQR at 10).
[369] *Id.* at 14 (citing Petitioner Case Brief 18-20).
[370] *Id.* (citing *Eurodif*, 555 U.S. at 317-18).
[371] *Id.* at 15 (citing *Eurodif*, 555 U.S. at 319-320).
[372] *Id*. (citing *Eurodif*, 555 U.S. at 322).
[373] *Id.* at 15 (citing *Eurodif*, 555 U.S. at 321).

Commerce Position: We disagree with the petitioner that we should modify the denominator of our benefit calculations. Accordingly, we continue to rely on the POI sales value of CS Wind Korea's sales of merchandise produced by CS Wind in Malaysia, which includes sales of subject merchandise, as the denominator of the subsidy calculations.

The tolling arrangement between CS Wind and its parent company, CS Wind Korea, does not lend itself to the typical situation in which the respondent sells subject merchandise to the United States. Section 351.525(a) of Commerce's regulations states that Commerce will "determine the sales value of a product" to identify a sales denominator in its subsidy rate calculations. Thus, Commerce's normal methodology is to calculate a subsidy by dividing the benefit amount by an FOB sales value. In the instant investigation, under the petitioner's proposal, CS Wind's denominator would reflect service revenue related to transactions between CS Wind Malaysia and CS Wind Korea, rather than the value of the ultimate sale. Consistent with the intent of Commerce's regulations, and our normal subsidy calculation methodology, we determine that it is appropriate to use CS Wind Korea's FOB sales value of the merchandise produced by CS Wind, as it is the company that sold the merchandise to the United States.

The sales value used in the denominator of our subsidy calculations is limited to sales of merchandise produced by CS Wind and sold by its parent company, CS Wind Korea, in the United States. That is, there was no mark-up by an affiliated company, for instance a reseller, that would distort the value or the merchandise or otherwise require an entered value adjustment to the sales of merchandise under investigation.

Furthermore, while the petitioner cites to 19 CFR 351.525(b)(7), we find this section of Commerce's regulations to be inapplicable. That regulation pertains to multinational firms in which the "firm that received a subsidy has production facilities in two or more countries" and states that "the Secretary will attribute the subsidy to products produced by the firm within the country of the government that granted the subsidy." The mandatory respondent in this investigation which received subsidies is CS Wind, located in Malaysia. CS Wind is a subsidiary of the parent company, CS Wind Korea. As CS Wind is a subsidiary, and not a multinational company, it does not have operations, such as production facilities, in any countries other than in Malaysia. Because respondent CS Wind is not a multinational company with facilities in two or more countries, 19 CFR 351.525(b)(7) is inapplicable.

In this case, sales of the subject merchandise did not go through any trading companies; the merchandise was sold directly by CS Wind Korea in the first instance.[374] Therefore, there was no "mark-up" on the subject merchandise after the initial sale was made. Accordingly, we find that CS Wind Korea's sales values are consistent with the entered value of the subject merchandise upon entry into the United States. Our approach in this regard is consistent with *Wind Towers from Vietnam*, as the facts presented in that case were directly analogous to those

[374] *See* CS Wind December 30, 2020 IQR at 10.

here regarding the relationship between CS Wind Korea and its affiliated company in the country under investigation.[375]

The petitioner cites several other cases for the proposition that we should rely on CS Wind's sales revenue as a denominator; however, each of those cases is distinguishable because they relate to situations involving an affiliated reseller's sales (and Commerce's attendant adjustment to the resulting subsidy rate to account for the potential overcollection of duties).[376] Unlike in those cases, here, CS Wind Korea is the producer and original seller of wind towers produced in Malaysia. Specifically, the record shows that all original sales of the finished wind towers produced in Malaysia by CS Wind were made by CS Wind Korea.[377] There is no record evidence to suggest that the reported sales values reflect more than the value of CS Wind Korea's sales of merchandise produced by CS Wind.

The petitioner also asserts that the *Eurodif* precedent warrants a different conclusion, because Commerce must construe the law so as to prevent attempts by foreign producers to avoid duties simply by restructuring transactions as services transactions. The petitioner emphasizes that the Court found that Commerce's "attempt to foreclose this absurd result by treating {such transactions} as sales of goods is eminently reasonable."[378] However, we find that *Eurodif* does not govern our decision here. First, in *Eurodif*, adopting a different construction of the law in question would have resulted in respondents removing transactions from the ambit of trade laws altogether. In this investigation, CS Wind does not insulate itself from U.S. CVD law by virtue of its tolling arrangement. Second, having determined that CS Wind is properly subject to the CVD law, our goal is to accurately determine the amount duties to be imposed based on the subsidy received. In this instance, Commerce must consider how to identify the appropriate denominator to accurately reflect the rate of subsidization. Commerce must assign a subsidy rate proportional to the value of applicable transactions in question, *e.g.*, domestic or export sales,[379] and then this rate must be reflected in the CVD duty that is applied upon importation into the United States. Here, the figure that corresponds with the sales value upon importation is the transaction between CS Wind Korea and the unaffiliated purchasers in the United States. Relying on such figures, is "{c}onsistent with the intent of Commerce's regulations and the normal subsidy calculation methodology."[380]

Therefore, consistent with Commerce practice under analogous circumstances[381] – and in consideration of the unique arrangement between CS Wind and its parent company – we continue to rely on CS Wind Korea's sales of CS Wind's merchandise as our denominator in the subsidy rate calculations.

---

[375] *See Wind Towers from Vietnam* IDM at Comment 6 ("Because CS Wind served as a toller of the subject merchandise, we relied upon CS Wind Korea's sales value of subject merchandise produced by CS Wind, rather than CS Wind's tolling revenue, as the appropriate denominator in our subsidy calculations for the final determination").
[376] *See Ribbons from China* IDM at Comment 4 and *Circular Welded Pipe* IDM at Comment 3.
[377] *Id.*
[378] *See* Petitioner Case Brief at 19.
[379] *See* 19 CFR 351.525(a).
[380] *See Wind Towers from Vietnam* IDM at Comment 6.
[381] *Id*.

Comment 6: Whether Commerce Incorrectly Declined to Initiate an Investigation into the CTL Plate for LTAR NSA

On March 18, 2021, we issued an NSA Memorandum in which we declined to initiate on the petitioner's NSA concerning the provision of CTL Plate for LTAR through an international consortium.[382] We determined that the petitioner did not support its allegation that CS Wind is a member of an international consortium engaged in the production of subject merchandise, within the meaning of section 701(d) of the Act.[383]

Petitioner's Comments:

- Commerce's decision to not initiate on the petitioner's NSA was inconsistent with the Act and was based on an impermissibly narrow reading of the law.[384]
- Commerce relied on its transnational subsidy regulation, *i.e.*, 19 CFR 351.527, to support the claim that countervailable subsidies typically do not exist where a subsidy was funded by the government of a country other than the country in which the recipient firm is located.[385] This conclusion is contrary to the Act's directive to countervail government subsidies and prevents Commerce from addressing the full extent of the benefits that the foreign respondent has received.[386]
- Commerce's decision to not initiate an investigation into this program was incorrect and will enable further subsidization under the one belt one road (OBOR) initiative in the future.[387] The petitioner provided evidence that the GOC and GOM were involved in a consortium used to channel government subsidies to beneficiaries in Malaysia as part of the OBOR initiative.[388] The petitioner emphasized that CS Wind is a participant in the international consortium and benefits from subsidies to support the consortium's common project.[389]
- Commerce's narrow interpretation of the Act– and the agency's regulations more generally– prevents Commerce from adapting to new subsidization schemes that Congress intended the Act to address.[390]
- Under Commerce's current interpretation and application of its transnational subsidy regulation, domestic producers will have no recourse against subsidization that the GOC provides through partnerships under the OBOR initiative.[391]
- The interpretation of a statutory regime is not static. An interpretation that once served a statute's purposes may need to be revisited when intervening circumstances arise.[392] The

[382] *See* NSA Memorandum at 2.
[383] *Id*.
[384] *See* Petitioner Case Brief at 20.
[385] *Id*. at 20 (citing NSA Memorandum at 2-3).
[386] *Id*.
[387] *Id*.
[388] *Id*. at 20-21.
[389] *Id*. at 21 (citing Petitioner's Letter, "Utility Scale Wind Towers from Malaysia: New Subsidy Allegations," dated February 8, 2021 (Petitioner NSA) at 2).
[390] *Id*.
[391] *Id*.
[392] *Id*. (citing *Shelby Cnty., Ala. V. Holder*, 570 U.S. 529, 550-51 (2013)).

nature of transnational subsidies has developed in ways that render Commerce's regulations inconsistent with the aims of the Act.[393]

- The Act empowers Commerce to investigate all countervailable subsidies provided by the "government of a country."[394]
- The international consortium provision in section 701(d) of the Act was "designed to make sure that {Commerce does} not let slip through the cracks an unfair trade practice which is becoming increasingly significant in international trade."[395] Unlike Commerce's regulation, the Act does not place a limitation on transnational subsidies or even mention transnational subsidies at all.[396]
- Commerce's application of its regulation fails to effectuate the purposes of the CVD law. The result is an end-run around the law, where one country and its favored industries can benefit from the subsidies another country has agreed to provide.[397]
- Commerce has stated that "19 CFR 351.527 does not preclude Commerce from conducting an upstream analysis" because "the international consortia provision of the statute" allows Commerce to "countervail such subsidies where both countries are 'members (or other participating entities)' in an international consortium and the subsidy on the input product 'assisted, permitted, or otherwise enabled' the participation of that producer in the consortium."[398]
- Commerce's strict interpretation of this regulation here creates a loophole that allows foreign companies to benefit from subsidies that remain out of Commerce's reach. Here, the GOC is not merely exporting a subsidized input to another country for incorporation into the finished product. Instead, the GOC has established a joint development project in Malaysia with the GOM to fulfill policy goals of both countries. The subsidies that the GOC provides to participants in this project support the success of the project and the GOC's strategic policy goals.[399]
- As explained in the Petitioner NSA, the Kuantan Port, Gebeng Industrial Estate, and Malaysia-China Kuantan Industrial Park (MCKIP) are all part of a common project between the GOM-GOC to promote each country's policy and development objectives and benefit the companies within the common project (*e.g.*, CS Wind).[400]
- The observed subsidy structure is a key feature of GOC policy under the OBOR initiative where the GOC is "facilitating trade and investment, and thereby development of neighboring countries, as well as strategically shoring up its own security of energy, resources and food by taking a regional leadership role with its most important neighbors."[401] To this end, the GOC provides subsidies to companies located outside of China, which further its policy goals under the OBOR initiative. Importantly, the European Commission recently countervailed subsidies in a nearly identical situation

[393] *Id*. at 21-22.
[394] *Id*. (citing section 701(a)(1) of the Act).
[395] *Id*. (citing 133 Cong. Rec. H17, 371, 17,525 (June 25, 1987)).
[396] *Id.*
[397] *Id*. at 22-23.
[398] *Id*. at 23 (citing *CVD Preamble*, 63 FR at 65404-05).
[399] *Id*.
[400] *Id*.
[401] *Id*. (citing Petitioner's Letter, "Utility Scale Wind Towers from India, Malaysia and Spain: Petitions for the Imposition of Antidumping and Countervailing Duties," dated September 30, 2020 at 34-35, Exhibit VI-7).

after finding that the GOC provided subsidies to companies operating in a GOC-supported industrial zone in Egypt.[402]

- Here, Commerce applied its own regulation in a manner that imposes limitations above and beyond any provided in the Act; this approach prevents a just result in this case. As a result, U.S. producers are the losers in the GOM-GOC subsidization scheme because they must continue to compete against subsidized Malaysian wind towers.[403]
- Commerce should revise its regulations regarding transnational subsidies to address the increasingly common scenario in which foreign governments pass subsidies through third countries and to effectuate the clear purposes of the CVD law.[404] Twice, in the Initiation Checklist and in the NSA Memorandum, Commerce has acted as though the Act is subservient to its regulations, resulting in Commerce's improper rejection of the petitioner's NSA.[405]
- Commerce described section 701(d) of the Act, the consortium provision, as an exception to Commerce's regulation.[406] As such, Commerce's discussion of its transnational subsidy regulation demonstrates that it functions to impermissibly limit the Act.[407] Commerce may not interpret the Act in a way that deviates from Congress's intent. This includes situations where Commerce is complying with its own promulgated regulation that is inconsistent with the intent of the governing statute.[408]
- The broad language of sections 701(a) and 702(a) of the Act do not limit the CVD law to subsidies provided by only the home country of the respondent. If Congress had intended for qualifying government subsidies to be limited to only the country that is subject to the investigation or review, it would have said so.[409]
- It is not clear that Commerce was authorized to implement this regulation in the first place. When implementing the transnational subsidy regulation, Commerce grounded its alleged authority in "prior section 303(a)(1) of the Act" which had been repealed.[410] The U.S. Court of Appeals for the Federal Circuit (CAFC) has emphasized that "Commerce may not rely on statutory silence as a source of authority."[411] Where Congress has not authorized Commerce to act, "under settled principles of statutory construction" Commerce may not act.[412]
- In support of the transnational subsidy regulation, Commerce stated that "{i}n our view, neither the successorship of section 701 for Subsidies Code members, nor the repeal of section 303 by the Uruguay Round Agreements Act (URAA), eliminated the transnational subsidies rule, and there is no other indication that Congress intended to eliminate this rule."[413]

---

[402] *Id*. at 25-26 (citing Petitioner NSA at 9).
[403] *Id*. at 26.
[404] *Id*.
[405] *Id*. at 26-27.
[406] *Id*. at 27 (citing NSA Memorandum at 2-3).
[407] *Id*.
[408] *Id*. (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1371 (Fed. Cir. 2010) (*Dorbest*)).
[409] *Id*. at 27-28.
[410] *Id*. at 28 (citing *CVD Preamble*, 63 FR at 65405).
[411] *Id*. (citing *Comm. Overseeing Action of Lumber International Trade Investigations or Negots. v. United States*, 483 F. Supp. 3d 1253, 1265 (CIT 2020) (*COALITION*)).
[412] *Id*. (citing *COALITION*, 483 F. Supp. 3d at 1265).
[413] *Id*. at 28-29 (citing *CVD Preamble*, 63 FR at 65405).

- Congress need not eliminate Commerce's regulations piecemeal. Instead, it is Commerce that must ensure that its actions are consistent with Congress's grant of authority. Here, Commerce did not identify a valid statutory basis for the regulation. Nor is there one.[414]
- The Act intends a wide variety of subsidies, including transnational subsidies, to be remedied where they are provided by "the government of a country."
- Section 701(d) of the Act requires Commerce to cumulate subsidies that the members of an international consortium receive when producing subject merchandise. The legislative history and plain language of the Act demonstrate that the Act was intended to be applied broadly to government support that contributes to the production of subject merchandise.[415]
- While injured petitioners could allege an upstream subsidy, Commerce traditionally understood a subsidy to exist only where it was bestowed by the government of the country that produced the finished product. To close this loophole, the international consortium provision was introduced as an amendment to the Act.[416]
- The legislative history of the international consortium provision demonstrates that Congress intended section 701(d) of the Act to have expansive reach in order to capture subsidies provided through government-led consortia, such as the partnership that exists between the GOC and GOM.[417] According to the bill's co-sponsors, the new international consortium provision was a clarification of existing law aimed at giving Commerce "the explicit authority to investigate subsidies provided at each stage of the production process by all participating countries in an international consortium, and to cumulate the amounts of subsidies from all such countries in determining the countervailing duty appliable to the end product under investigation."[418]
- In the Joint Conference Statement, the conferees agreed that "U.S. manufacturers are increasingly confronting unfair competition from international consortia receiving subsidies from multiple foreign governments" and that the amendment would make CVD law "explicitly applicable to cases in which foreign governments provide subsidized assistance or participation in international production and marketing ventures both within and beyond traditional customs union frameworks."[419]
- Commerce's interpretation of section 701(d) of the Act in the Initiation Checklist and NSA Memo was much narrower than in previous determinations. In *Aircraft from Canada*, Commerce rightly recognized that a "clearly defined legal relationship" was particular to the facts of that case, but it was only one of many possible arrangements.[420] Commerce also recognized that Congress intentionally did not limit this definition of "consortium" to specific arrangements because doing so could "potentially induce companies to utilize legal relationships outside of the scope of the provision …"[421]

---

[414] *Id*.
[415] *Id*.
[416] *Id*. at 30 (citing Omnibus Trade and Competitiveness Act of 1988, Pub. L No. 100-418, 102 Stat 1107 § 1315).
[417] *Id*.
[418] *Id*. (citing 133 Congress Rec H17371 17525 (June 25, 1987)).
[419] *Id*. at 31 (citing *Joint Explanatory Statement of the Committee of Conference*, 133 Cong. Rec. S7537 7841 (April 20, 1988) (*Joint Statement*)).
[420] *Id*. (citing *100 to 150-Seat Large Civil Aircraft from Canada: Final Affirmative Countervailing Duty Determination*, 82 FR 61252 (December 27, 2017) (*Aircraft from Canada*), and accompanying IDM at Comment 6)).
[421] *Id*. at 31-32 (citing *Aircraft from Canada* IDM at Comment 6).

- Commerce relied on a narrow reading of *Aircraft from Canada* to limit the ambit of section 701(d) of the Act. Commerce claims that "there is no basis to find that CS Wind and other members of the alleged consortium share common ownership, as CS Wind is not owned by Malaysian or Chinese entities."[422] However, there is no requirement in section 701(d) of the Act that the relationship between members of the consortium include common ownership, as Commerce has previously recognized. Limiting the provision in this manner directly contradicts Commerce's decision that "there is nothing in the text of the statute or the legislative history of the Act that requires the existence of an independent legal entity in order for Commerce to countervail subsidies that are provided to distinct members or participating entities of an international consortium."[423]
- Similarly, section 701(d) of the Act refers to international consortia "engaged in the production of subject merchandise." The petitioner alleged that CS Wind, a subject merchandise producer, is a "participating entity" in the international consortium because of its location in the Kuantan Port City, meaning the consortium is engaged in the production of subject merchandise.[424]
- In the NSA Memorandum, Commerce stated that the petitioner's construction of the phrase 'consortium that is engaged in the production of subject merchandise' improperly suggests "that every entity in the zone(s) referenced above is a member of a consortium engaged in the production of subject merchandise …"[425] Commerce did not cite any part of the petitioner's allegation to support this claim, and the petitioner made no such suggestion that every entity located in the GOC-GOM development project is engaged in the production of subject merchandise. Rather, the petitioner provided evidence of the existence of an international consortium between the GOC and GOM, and the evidence demonstrated that the consortium is "engaged in the production of subject merchandise" within the plain language of section 701(d) of the Act.[426]
- Commerce's interpretation of section 701(d) of the Act is, therefore, inconsistent with the language of the Act, its legislative history, Commerce's stated understanding of section 701(d) of the Act when enacting the transnational subsidy regulation, and Commerce's own analysis of section 701(d) of the Act in the limited cases where this provision was at issue. Therefore, Commerce's decision not to initiate an investigation into the petitioner's NSA for provision of CTL plate for LTAR was incorrect.[427]

CS Wind's Rebuttal:

- Rather than arguing that Commerce misapplied its regulation, the petitioner argues that Commerce must revise its regulation because it is inconsistent with the aims of the Act.[428] The petitioner ignores the text of the Act and Commerce's regulations and posits that any competitive advantage provided to a company by any government must be

[422] *Id*. (citing NSA Memorandum at 3).
[423] *Id*. at 32-33 (citing *Aircraft from Canada* IDM at Comment 6).
[424] *Id*. at 33 (citing Petitioner NSA at 3 and 8 and Petitioner's Letter, "Utility Scale Wind Towers from Malaysia: Pre-Preliminary Determination Comments," dated March 2, 2021 at 13-14).
[425] *Id*. (citing NSA Memorandum at 3).
[426] *Id*.
[427] *Id*.
[428] *See* CS Wind Rebuttal Brief at 17 (citing Petitioner Case Brief at 22-23).

counteracted by the CVD law. The petitioner ignores that only a relatively narrow set of subsidies are considered countervailable under the U.S. CVD law.[429]

- Section 701(d) of the Act requires Commerce to cumulate all countervailable subsidies provided to "members (or other participating entities) of an international consortium *engaged in the production of subject merchandise*" by each of their respective home countries, and those provided directly to the international consortium, in determining any CVD duty on subject merchandise.[430] Commerce's regulation provides that, except for the international consortium provision embodied in section 705, and the upstream subsidy provision embodied in section 771A, of the Act, Commerce will not recognize a subsidy funded by a government of a country other than a country in which the recipient firm is located.[431]
- Commerce correctly concluded that the statutory phrase "consortium that is engaged in the production of subject merchandise" suggests that an entity cannot be a member of such a consortium merely because it is engaged in operations unrelated to the production of subject merchandise and happens to be located in an economic development zone.[432]
- The petitioner's argument suggests that any government support provided to any entity located in an economic zone that produces an input that could be used in the production of subject merchandise should be cumulated with any countervailable subsidies provided to the producer of subject merchandise simply because the two entities are located in the same economic development zone.[433] This reading ignores the fact that the Act refers to "members of an international consortium engaged in the production of subject merchandise."[434]
- The petitioner's reading of the phrase "engaged in the production of subject merchandise" treats this statutory phrase as interchangeable with the phrase "contributes to the production of subject merchandise." The Act requires much more active participation by members of the consortium. The phrase "engaged in the production of subject merchandise" requires that all members of an alleged consortium actively undertake activities with production of subject merchandise as their end goal.[435]
- Moreover, a "consortium" is defined as "an agreement, combination, or group (as of companies) formed to undertake an enterprise beyond the resources of any other member."[436] The petitioner's suggested reading would give no effect to the use of the plural word "members" or to the term "consortium" because it would require cumulation of benefits between one party engaged in the production of subject merchandise and another engaged in the production of unrelated merchandise without any evidence that the two entities are engaged in any grouping formed to undertake a common goal to produce subject merchandise. Therefore, the petitioner's suggested reading conflicts with the plain language of section 705 of the Act.[437]

[429] *Id*.
[430] *Id*. at 18 (citing section 705 of the Act (*emphasis added*)).
[431] *Id*. (citing 19 CFR 351.527).
[432] *Id*. (citing NSA Memorandum at 3).
[433] *Id*. (citing Petitioner Case Brief at 29).
[434] *Id*. (citing section 701 of the Act).
[435] *Id*. at 19.
[436] *Id*. (citing *Merriam-Webster Online Dictionary*, (April 16, 2021, 3:14 PM), https://www.meriam-webster.com/dictionary/consortium).
[437] *Id*.

- The petitioner does not allege any facts in its NSA, or cite any facts in its case brief, that support the notion that Chinese producers of CTL plate are engaged in the production of wind towers with CS Wind. Instead, the petitioner alleges that a consortium exists between the GOC and GOM to achieve economic development goals, not a consortium between CS Wind and alleged GOC-owned producers of CTL plate to produce wind towers, as required by the Act.[438]
- The petitioner appears to suggest that Commerce should change its regulation, but the petitioner does not argue that Commerce misapplied that regulation.[439] Commerce correctly concluded that the petitioner's construction of the phrase "consortium that is engaged in the production of subject merchandise" improperly suggests that every entity in the zone is a member of a consortium engaged in the production of subject merchandise, including numerous entities that are engaged in operations entirely unrelated to subject merchandise that happen to be located in the zone.[440]
- The petitioner argues that Commerce impermissibly limited its investigation to government subsidies provided by the GOM because, it claims, the Act requires Commerce to investigate any countervailable subsidy regardless of the country that is subject to the investigation or review.[441] While failing to point to any provision of CVD law that requires Commerce to investigate subsidies bestowed by a country other than that which is subject to the investigation, the petitioner claims that Congress made no such limitation.[442]
- Pursuant to section 771 of the Act, a countervailable subsidy is defined as an instance when an authority – defined as "a government of a country or any public entity with the territory of the country" – provides a benefit that is specific.[443] Likewise, the Act provides that Commerce generally shall impose CVD duties if Commerce determines "the government of a country or any public entity within the territory of a country" is providing a countervailable subsidy and the U.S. International Trade Commission (ITC) makes an affirmative injury determination.[444]
- Subsections (d) and (e), involving international consortia and upstream subsidies, articulate exceptions to the general rule (*i.e.*, that Commerce looks to countervailable subsides provided by a single country to a recipient located in that country) in section 771(a) of the Act.[445]
- Commerce expressed an identical reading of the statutory scheme in the *CVD Preamble*, which reaffirmed Commerce's view that the transnational subsidies rule continues to exist in U.S. CVD law.[446] Therefore, contrary to the petitioner's suggestion, Congress did intend for qualifying government subsidies to be limited only to a country that is subject to the investigation or review except in these limited circumstances.[447]

[438] *Id*. at 19-20.
[439] *Id*. at 20 (citing Petitioner Case Brief at 22-23).
[440] *Id*. (citing NSA Memorandum at 3).
[441] *Id*. (citing Petitioner Case Brief at 28).
[442] *Id*.
[443] *Id*. at 21 (citing section 771 of the Act).
[444] *Id*. (citing section 702 of the Act).
[445] *Id*. (citing sections 705 and 706 of the Act).
[446] *Id*. (citing *CVD Preamble*, 63 FR at 65348, 65405).
[447] *Id*. at 21-22.

- The petitioner emphasizes broad statements in Commerce's determination in *Aircraft from Canada* to the effect that an international consortium is not restricted to a specific set of relationships.[448] However, Commerce's past application of the international consortia provision requires evidence of cooperation between members of an alleged consortium to produce subject merchandise, as required by section 705 of the Act.[449]
- Commerce correctly concluded that the record does not support cumulation under its past practice because the record shows no: (1) common ownership between CS Wind and alleged GOC-owned producers of CTL plate; or (2) cooperation between CS Wind and alleged GOC-owned producers of CTL plate to produce wind towers and/or wind tower inputs.[450]
- In *Low Enriched Uranium*, Commerce found the respondent group of companies operated as an international consortium *to produce subject merchandise* because the individual companies and the governments had entered into a treaty to share the production and marketing of subject merchandise and to collaborate and promote integration of their research and development (R&D) efforts with a view to creating an integrated program to produce and sell subject merchandise.[451]
- The petitioner points to no evidence of joint plans to integrate various functions of producing or selling wind towers between Chinese-owned CTL plate producers and CS Wind, l*et al*one that the producers engaged in integrated sales and production planning or R&D.[452]
- In *Aircraft from Canada*, Commerce focused on common ownership and cited the companies' cooperation in a common project in producing C series aircraft in support of its determination to cumulate subsidies under the international consortium provision of section 705 of the Act.[453] While Commerce noted that no formal agreement, or the formation of a separate legal entity, was required to find cooperation in a common project across a consortium, Commerce did require that the entities act in concert to *produce subject merchandise*.[454] Furthermore, Commerce's determination indicated that, even if a "subcontractor" relationship existed, thereby requiring much greater coordination and cooperation than a typical supplier relationship, that would be insufficient to cumulate subsidies received by members of an international consortium under section 705 of the Act.[455]
- Commerce concluded that this case is distinguishable from the situation presented in *Aircraft from Canada* because the petitioner presented no basis to conclude that CS Wind and other members of the alleged consortium share common ownership.[456] Moreover, Commerce correctly did not find that CS Wind and other members of the MCKIP industrial area and linked areas in Kuantan Port City participated in a common project to

[448] *Id*. at 22 (citing Petitioner Case Brief at 31-32).
[449] *Id*.
[450] *Id*. (citing NSA Memorandum at 3).
[451] *Id*. (citing *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom: Final Affirmative Countervailing Duty Determinations*, 66 FR 65903 (December 21, 2001) (*Low Enriched Uranium*), and accompanying IDM at Comment 2).
[452] *Id*. at 23.
[453] *Id*. (citing *Aircraft from Canada* IDM at Comment 6).
[454] *Id.*
[455] *Id.*
[456] *Id*. (citing NSA Memorandum at 3).

produce wind towers because Commerce noted that "the participating entities engaged in a broad range of activities clearly beyond the production of wind towers and/or wind tower inputs."[457] The petitioners cite no evidence to the contrary.[458]

- Commerce correctly concluded that the petitioner failed to allege facts to support an initiation of an investigation under section 705 of the Act. Moreover, Commerce correctly applied section 705 of the Act, its transnational subsidies regulation, and its practice. Therefore, there is no basis for Commerce to change its determination not to initiate an investigation into the NSA.[459]

Commerce Position: We disagree with the petitioner that our decision not to initiate on its NSA relating to the provision of CTL plate for LTAR through an international consortium was improper. Section 701(d) of the Act, the international consortium provision pertains to "members (or other participating entities) of an international consortium that is engaged in the production of subject merchandise" which "receive countervailable subsidies from their respective home countries to assist, permit, or otherwise enable their participation in that consortium through production or manufacturing operations in their respective home countries." The petitioner failed to support its allegation that CS Wind is a member of an international consortium engaged in the production of subject merchandise, and, therefore, it failed to satisfy the criteria enumerated in section 701(d) of the Act.

As an initial matter, we disagree with the petitioner that we improperly applied the transnational subsidy regulation in a manner that contravenes the statutory directive. We also disagree with the petitioner that it is necessary to modify the regulation itself in order to comply with the statutory directive. Under 19 CFR 351.527, transnational subsidies are generally not countervailable. This regulation states:

> Except as otherwise provided in section 701(d) of the Act (subsidies provided to international consortia) and section 771A of the Act (upstream subsidies), a subsidy does not exist if the Secretary determines that the funding for the subsidy is supplied in accordance with, and as part of, a program or project funded …{b}y a government of a country other than the country in which the recipient firm is located …

Because we find that CS Wind was not part of an international consortium, we properly did not initiate an investigation pursuant to the petitioner's NSA.

Specifically, the petitioner asserts that the transnational subsidy rule contained in 19 CFR 351.527 conflicts with the statutory directive to broadly address "government support that contributes to the production of subject merchandise."[460] We do not view the regulatory provision to be narrower than the Act. Rather, the language/structure of the Act suggests that the general rule is consistent with the proposition expressed in 19 CFR 351.527.

[457] *Id*. at 24 (citing NSA Memorandum at 3).
[458] *Id*.
[459] *Id*.
[460] *See* Petitioner Case Brief at 29.

Section 701(a)(1) of the Act states that Commerce will impose CVD duties when "*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 (or likely to be sold) for importation, into the United States."[461] This language indicates that the general rule is that Commerce's CVD analysis is focused on a particular (*i.e.*, "the") government of a country. To interpret the Act in a different manner – *i.e.*, to allow Commerce to inherently address subsidies from governments outside the country under investigation without evidence of the responding companies participation in an international consortium engaged in the production of subject merchandise – would render the international consortium provision superfluous.

Similarly, section 771A of the Act, which covers upstream subsidies, states that the provision covers a subsidy "paid or bestowed by an authority … that is used in the same country as the authority in the manufacture or production of merchandise which is the subject of a countervailing duty proceeding." This provision indicates that the relevant "authorities" for Commerce's analysis are, typically, in the country subject to the investigation/review. This provision also contains an explicit, but limited, expansion: "in applying this subsection, an association of two or more foreign countries, political subdivisions, dependent territories, or possessions of foreign countries organized into a customs union outside the United States shall be treated as being one country if the countervailable subsidy is provided by the customs union." The fact that section 771A of the Act identifies a narrow set of circumstances under which benefits from an authority operating outside of the country in question, or in the form of a supranational entity, may be countervailed, suggests that the general rule is that countervailable subsidies are limited to those provided by the country under investigation.

Therefore, while the petitioner asserts that, "{i}f Congress had intended for qualifying government subsidies to be limited to only the country that is subject to the investigation or review, it would have said so,"[462] we find the statutory construct imposes limitations that are consistent with the transnational subsidy rule. Accordingly, we disagree that 19 CFR 351.527 violates the statutory framework, and we disagree that Commerce's promulgation of the regulation was improper or lacking foundation in law.[463]

We also disagree with the petitioner's interpretation of the statutory provision. The petitioner argues that the MCKIP industrial area – and linked areas in Kuantan Port City – is an international consortium because it is a common project between the GOM-GOC aimed at promoting the policy and development objectives of both countries, and that alleged subsides to this consortium would benefit CS Wind's downstream production of wind towers. As explained in the NSA Memorandum, the alleged consortium does not satisfy the criteria enumerated in section 701(d) of the Act because it is not engaged in the production of subject merchandise.[464] Indeed, the petitioner concedes that the GOM-GOC collaboration highlighted here is broadly

[461] *See* section 701(a)(1) of the Act (*emphasis added*).
[462] *Id*. at 28.
[463] Accordingly, we find that the CAFC's holding in *Dorbest*, relating to an instance in which Commerce's regulation was found to be in conflict with the Act, does not apply. *See Dorbest*, 604 F.3d at 1371-72.
[464] *See* NSA Memorandum at 3.

designed to achieve economic development goals, and the purview of the collaboration (*i.e.*, the jointly-established industrial area) extends beyond the production or sale of subject merchandise.

The petitioner highlights the phrasing "international production and marketing ventures," from the legislative history to argue for a broad interpretation of the scope of our international consortium provision.[465] However, we note that elsewhere within the *Joint Statement* cited by the petitioner, the language indicates that the intent behind the legislation was to allow Commerce to "administer the provision by collapsing its subsidy analysis so that the consortium members would be treated as one company for purposes of determining the level of multi-country subsidization attributable to *the final product manufactured and exported by the consortium*" and to make it "clear that the U.S. {CVD} law may be applied to remedy subsidies provided by multiple governments to an international consortium which exports *its product* to the United States."[466] Even this source, which is cited by the petitioner, suggests that a "consortium" represents a relationship that involves the production/sale of a particular type of product.[467] Accordingly, this legislative history supports our finding in this case, and in the prior cases discussed below.

Moreover, we disagree with the petitioner's assertion that Commerce has an obligation to revise its interpretation of the Act in this context. The structure of the Act, and the legislative history surrounding the consortium provision, do not suggest that Congress intended Commerce to prospectively revise its interpretation of the Act – beyond the addition in the form of 701(d) – in its treatment of transnational subsidies. For these reasons, we continue to find that the collaboration is not a consortium within the meaning of the Act.

Our construction of the term consortium here is consistent with our use of this term in past decisions. In *Aircraft from Canada*, Commerce determined that a consortium "may encompass a broad set of relationships … including a clearly defined legal relationship in which the companies in question have common ownership and a common project …"[468] The petitioner argues that, in that case, Commerce purposely did not limit the definition of a consortium to specific arrangements, and that Commerce's intent was to enable it to cover situations like the one the petitioner has presented in this case. However, our discussion of the consortium provision in *Aircraft from Canada* did not suggest that the provision had no limitations. There, the record supported the common ownership and common purpose of the members of the consortium in question. Here, in contrast, the record does not demonstrate that CS Wind and the other companies in the MCKIP industrial area (or entities in China) are participating in a common project or share common ownership.[469] Although such criteria, including common ownership, are not mandatory requirements that must be met in order to invoke the international consortium provision, a comparison of the two cases reveals that the relationship between the alleged GOM-GOC consortium, Chinese entities, and CS Wind is far less defined/directed than that in *Aircraft from Canada*.

---

[465] *See Joint Statement*, 133 Cong. Rec. S7537 7841.
[466] *Id*. (*emphasis added*).
[467] Similarly, the language contemplates multiple companies acting in concert to produce subject products, rather than a single entity. Thus, where only one company is engaged in the production/sale of subject merchandise, that does not represent the type of relationship that is properly considered a "consortium" under the provision.
[468] *See Aircraft from Canada* IDM at Comment 6.
[469] *See* NSA Memorandum at 3.

Similarly, in *Low Enriched Uranium*, Commerce found the respondents operated as an international consortium because the individual companies and the governments in question had entered into a treaty to coordinate their production and marketing of subject merchandise, as well as to share R&D efforts and other production functions.[470] The record in this case does not suggest any similar type of integration or coordination between the GOM-GOC collaboration and Chinese-owned CTL plate producers and CS Wind for purposes of the production or sale of wind towers.

Additionally, as elaborated in the NSA Memorandum, the consortium provision applies where consortium members "receive countervailable subsidies from *their respective home countries* to assist, permit, or otherwise enable their participation in that consortium through production or manufacturing operations in their respective home countries."[471] The alleged subsidies, conferred from government-owned/direct companies located *in China*, do not fall under the statutory provision for the treatment of international consortia.

Accordingly, we continue to find that there is no evidence that CS Wind is a member of an international consortium under 701(d) of the Act, and, thus, we properly did not initiate an investigation into this alleged program.

VIII. RECOMMENDATION

We recommend approving all of the above positions. If these positions are accepted, we will publish the final determination in the *Federal Register* and will notify the ITC of our determination.

☒ ☐

Agree Disagree

6/2/2021

X

Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

[470] *See Low Enriched Uranium* IDM at Comment 2.
[471] *See* NSA Memorandum at 3 (citing section 701(d) of the Act (*emphasis added*)).