UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: The Honorable Claire R. Kelly, Judge

BGH EDELSTAHL SIEGEN GMBH,	
Plaintiff,	
v.	
UNITED STATES,	Ct. No. 21-00080
Defendant,	
and	**PUBLIC VERSION**
ELLWOOD CITY FORGE COMPANY, *et. al.*,	Confidential information deleted on pages 8-10, 12, 22, 25, 29, 31, 32, 36, 38, 41, 42.
Defendant-Intervenors.	

BGH EDELSTAHL SIEGEN GMBH
RULE 56.2 MEMORANDUM IN SUPPORT OF
MOTION FOR JUDGMENT UPON THE AGENCY RECORD

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Dated: October 26, 2021

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I. RULE 56.2 STATEMENT

Pursuant to Rule 56.2(c)(1) of the Rules of this Court, Plaintiff, BGH Edelstahl Siegen GmbH ("BGH" or "BGH Siegen"), hereby states the administrative decision sought to be reviewed and the issues of law presented:

A. Administrative Determinations Sought to be Reviewed

The U.S. Department of Commerce ("Commerce") published its contested final determination in the *Federal Register* on December 11, 2020. Forged Steel Fluid End Blocks from the Federal Republic of Germany: Final Affirmative Countervailing Duty Determination, 85 Fed. Reg. 80011 (Dec. 11, 2020) ("Final Determination"); *see also* accompanying Issues and Decision Memorandum (Dec. 7, 2020) ("Final IDM"). Commerce's final affirmative determination resulted in the publication of a countervailing duty order on January 29, 2021 that subjects fluid end blocks produced by BGH in Germany to countervailing duty deposits and to potential assessments of countervailing duties. *See* Forged Steel Fluid End Blocks from the People's Republic of China, the Federal Republic of Germany, India, and Italy: Countervailing Duty Orders, and Amended Final Affirmative Countervailing Duty Determination for the People's Republic of China, 86 Fed. Reg. 7535 (Jan. 29, 2021) ("Orders"); *see also* Forged Steel Fluid End Blocks from the People's Republic of China, the Federal Republic of Germany, India, and Italy: Correction to Countervailing Duty Orders, 86 Fed. Reg. 10244 (Feb. 19, 2021). The net countervailable subsidy rate assigned to BGH was 5.86%

B. Issues Presented

1. Issue One: Whether Commerce's determination that the climate change measures established by the German Government and the European Union provide countervailable subsidies is supported by substantial evidence on the administrative record and otherwise in accordance with law.

2. Issue Two: Whether Commerce's decision to initiate this countervailing duty investigation is supported by substantial evidence on the administrative record and otherwise in accordance with law.

3. Issue Three: Whether Commerce properly complied with the statutory requirements to maintain a record of any *ex parte* meetings.

II. STATEMENT OF FACTS

On January 15, 2020, Commerce published a notice of initiation of countervailing duty investigations on forged steel fluid end blocks from China, Germany, India, and Italy in the *Federal Register*. 85 Fed. Reg. 2385 (Jan. 15, 2020). The petitioners included a small group of forging companies and the Forging Industry Association. Fluid End Blocks from China, Germany, India and Italy, Inv. Nos. 701-TA-632-635, 731-TA-1466 & 731-TA-1468 (Final), USITC Pub. 5152 at 3 (Jan. 2021). The petitioners produce forged steel fluid end blocks ("FEBs") as components in hydraulic pumps used for drilling or hydraulic fracturing (*i.e.*, "fracking") in the oil and gas industry. *See* id. at 10.

In the investigation concerning Germany, BGH was chosen as one of two mandatory respondents and was sent a questionnaire dated February 4, 2020. BGH provided full, accurate and timely responses to all of Commerce's requests for information, submitting several thousand pages of responses, documents and English translations.

On May 26, 2020, Commerce published notice of its preliminary determination in the *Federal Register*. 85 Fed. Reg. 31454 (May 26, 2020). In this preliminary determination, BGH was assigned a subsidy rate of 5.25% *ad valorem*.

On September 14, 2020, numerous Senior Commerce Officials, including Jeffrey I. Kessler, Assistant Secretary for Enforcement and Compliance, had a telephone conference with Representative Mike Kelly. A memorandum concerning this *ex-parte* telephone conference was

placed on the administrative record in the related antidumping duty investigation but not in this countervailing duty investigation. The memorandum includes a letter from Representative Kelly to the Secretary of Commerce indicating additional discussions with Dr. Peter Navarro, Director of the Office of Trade and Manufacturing Policy (OTMP).

On October 21, 2020, Commerce released a post-preliminary determination. As a result of this post-preliminary determination, BGH's subsidy rate was increased by 0.52%, from 5.25% to 5.77% *ad valorem*.

Despite the very late amendment to the preliminary determination, Commerce required case briefs to be filed just 11 days after release of the post-preliminary determination. Interested parties, including BGH, timely submitted case briefs on November 2, 2020. On November 9, 2020, BGH also submitted a rebuttal brief.

On December 11, 2020, Commerce published notice of its final determination in the *Federal Register*. 85 Fed. Reg. 80011 (Dec. 11, 2020). In this final determination, BGH was assigned a subsidy rate of 5.86% *ad valorem*. In its final determination, Commerce found the following legal provisions to be countervailable:

Legal Provisions	***Ad Valorem* Rate**
EU Emissions Trading System	0.05%
Section 9a Taxes under the Electricity Tax Act	0.81%
Section 9b Taxes under the Electricity Tax Act	0.07%
Section 10 Taxes under the Electricity Tax Act	0.19%
Section 51 Taxes under the Energy Tax Act	0.57%
Section 55 Taxes under the Energy Tax Act	0.01%
Special Equalization Scheme (EEG Surcharge)	3.82%
Special Equalization Scheme (KWKG Surcharge)	0.17%
Concession Fee Ordinance	0.05%
European Emission Trading System – Compensation of Indirect CO_2 Costs	0.12%

Total	**5.86%**

All of these legal provisions (hereinafter collectively referred to as the "Climate Change Measures") were established by the German Government or the European Union in order to meet their international obligations under the Paris Agreement and predecessor Kyoto Protocol. These measures are not designed to raise government revenue. Rather they are designed to reduce greenhouse gas emissions and encourage the development of renewable forms of energy. None of these measures provide a benefit or financial contribution to German producers of subject merchandise. Rather, these measures resulted in a direct and substantial increase in BGH's energy costs and imposed financial costs and obligations upon German producers that are not borne by the U.S. domestic industry.

On January 29, 2021, Commerce published countervailing duty orders for China, Germany, India and Italy as well as an amended final countervailing duty determination for China in the *Federal Register*. 86 Fed. Reg. 7535 (Jan. 29, 2021). On February 19, 2021, Commerce published a correction to the countervailing duty orders in the *Federal Register*, reflecting that the net countervailable subsidy rates in the orders are also applicable to the cross-owned companies of certain companies. 86 Fed. Reg. 10244 (Feb. 19, 2021).

III. SUMMARY OF ARGUMENT

What Commerce characterizes as "subsidy programs" are actually additional taxes, surcharges and fees established by the German Government and the European Union as climate change measures in order to meet their international obligations under the Paris Agreement and predecessor Kyoto Protocol. These measures in no way provide a benefit or financial contribution to German producers of subject merchandise. Quite to the contrary, these measures result in the direct and substantial increase in BGH's energy costs and impose financial costs and

obligations upon German producers that are not borne by the U.S. domestic industry. Therefore, these measures do not meet any of the statutory requirements for a countervailable subsidy under U.S. law or U.S. treaty obligations pursuant to the WTO Agreement on Subsidies and Countervailing Measures.

The countervailing duty petition filed by petitioners did not meet the minimum statutory and regulatory requirements for the initiation of a countervailing duty investigation against Germany. The petition contained only the most rudimentary data from the internet and failed to demonstrate that any of the climate change measures established by the German Government and the European Union met the elements necessary for the imposition of countervailing duties. Accordingly, Commerce should not have initiated a countervailing duty investigation against Germany based upon such deficient information. Moreover, Commerce should not have expanded the investigation to include subsidy allegations on legal provisions that could have been raised in the petition.

Pursuant to statute, Commerce must maintain a record of any *ex parte* meeting. The administrative record in the related antidumping duty investigation indicates that a large number of Senior Commerce Officials, including officials responsible for decision-making in this investigation, had an *ex-parte* telephone conference with Representative Mike Kelly. The letter from Representative Kelly to the Commerce Secretary also indicates that other *ex parte* discussions with Dr. Peter Navarro, Director of the Office of Trade and Manufacturing Policy (OTMP), also took place. Given this evidence of *ex parte* discussions submitted in the antidumping duty investigation, this matter should be remanded back to Commerce for an affirmative determination with respect to any *ex parte* meetings involving this countervailing duty investigation.

IV. ARGUMENT

A. The Climate Change Measures Established by the German Government and the European Union Provide No Countervailable Subsidies

What Commerce characterizes as "subsidy programs" are actually additional taxes, surcharges and fees established by the German Government and the European Union as climate change measures in order to meet their international obligations under the Paris Agreement and predecessor Kyoto Protocol. These measures in no way provide a benefit or financial contribution to German producers of subject merchandise. Quite to the contrary, these measures result in the direct and substantial increase in BGH's energy costs and impose financial costs and obligations upon German producers that are not borne by the U.S. domestic industry.

Therefore, these measures do not meet any of the statutory requirements for a countervailable subsidy under U.S. law or U.S. treaty obligations pursuant to the WTO Agreement on Subsidies and Countervailing Measures (hereinafter "WTO Subsidies Agreement"). A countervailable subsidy can only exist as a matter of law when:

> (1) a government or public authority provides a financial contribution to a company,
>
> (2) a benefit is conferred and
>
> (3) the subsidy is specific to an enterprise or industry.

19 U.S.C. § 1677(5) & (5A); *see also* WTO Subsidies Agreement, art. 1. These three factors must all be present for Commerce to properly treat an item as a countervailable subsidy. If any one of these three factors is missing, there can be no finding of a countervailable subsidy.

None of the Climate Change Measures examined by Commerce satisfy these statutory requirements. Far from providing any financial contribution or benefit, these environmental measures substantially increase a company's production costs. For example, the electricity tax and various other surcharges imposed upon BGH increased BGH's electricity costs during the

period of investigation ("POI") by nearly one million Euros, an increase of almost 12%. BGH Response to Petitioner Comments in Advance of Preliminary Determination, 1-2 & App. 1 (May 11, 2020) (hereinafter "BGH Pre-Preliminary Comments"); P.R. 213, C.R. 151.[1] Similarly, the energy tax increased BGH's natural gas costs during the POI by nearly 20,000 Euros. Id. In addition, under the emissions trading system imposed in the European Union, BGH Siegen spent nearly 300,000 Euros during the POI on EU allowance certificates. *See* Second Supplemental Questionnaire Response (Questions 4c, 4d, 9b, 15-23 & 26-28), at App. S-33 (May 8, 2020) (hereinafter "BGH SQR Part 2"); P.R. 214, C.R. 152. Accordingly, BGH had additional costs of well over 1.25 million Euros during the POI due to these environmental measures alone.

By contrast, the U.S. industry pays no electricity tax. *See* id. at App. S-31; P.R. 214. It pays no additional surcharges for renewable energy. Id. It pays no energy tax on natural gas. And it does not have any costs in purchasing CO_2 emission certificates. Id. It is therefore disingenuous at best to somehow claim that German companies do not pay enough in energy taxes or emission certificates, when the U.S. industry has none of these costs. Any claim that the U.S. industry is placed at an unfair disadvantage due to the Climate Change Measures imposed by Germany and the European Union is simply a fiction.

An objective analysis of each of the Climate Change Measures examined by Commerce confirms that no countervailable benefit was conferred on BGH.

1. Electricity Tax Act and Energy Tax Act

The Electricity Tax Act ("*Stromsteuergesetz (StromStG)*") and the Energy Tax Act ("*Energiesteuergesetz (EnergieStG)*") are not programs providing benefits. Rather, the

[1] In accordance with the Chambers Procedures of this Court, citations to the confidential record are designated as "C.R." and citations to the public record are designated as "P.R."

Electricity Tax Act law imposes an excise tax on the use of electricity and the Energy Tax Act imposes an excise tax on the use of other energy products such as oil, coal and natural gas. *See* German Government Questionnaire Response, Ex. ETA(9b)-4 & Ex. ETA(37)-4 (Apr. 6, 2020) (hereinafter "FRG IQR Part 1");[2] P.R. 158.

The Electricity Tax Act applies to all users of electricity from household customers to commercial and industrial customers. Therefore, the Act applies a base rate of 20.50 Euro per megawatt-hour (MWh) (*i.e.*, 0.0205 per kilowatt-hour (kWh)) and this rate is then adjusted through various provisions of the Act to account for the differing amounts of electricity used by different users. Id. at Ex. ETA(9b)-4; P.R. 158. For example, household customers have an annual consumption of 2,500 kWh to 5,000 kWh, while commercial customers have an annual consumption of 50,000 kWh (*i.e.*, 50 MWh) and industrial customers have an annual consumption of 24,000,000 kWh (*i.e.*, 24 gigawatt-hour (GWh)). Id. at Ex. GOG-05 at p. 146; P.R. 153. By comparison, BGH Siegen consumed [ ] of electricity in 2018, more than five times the annual consumption level for industrial customers. BGH Response to Section III of the Countervailing Duty Questionnaire (Program-Specific Questions Sections A-C), App. CVD-79 (April 2, 2020) (hereinafter "BGH IQR Part 2"); C.R. 80.

The Energy Tax Act has a similar structure and coverage as the Electricity Tax Act, only applied to energy products other than electricity. Section 51 of the Energy Tax Act corresponds to section 9a of the Electricity Tax Act and Section 55 of the Energy Tax Act corresponds to section 10 of the Electricity Tax Act.

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[2] "FRG" refers to the Federal Republic of Germany.

a. No Financial Contribution

As explained above, the first element that needs to be fulfilled for a countervailable subsidy is that a government or public authority provides a financial contribution to the company. 19 U.S.C. § 1677(5)(B)(i). Here, it is undisputed that BGH received no transfer of funds from the German Government. Rather, the record evidence clearly shows that BGH paid net combined electricity and energy taxes of over [ ] Euros in 2018. BGH Second Supplemental Questionnaire Response (Questions 1-4b, 5-9a, 10-14 & 24-25), App. S-14 & S-24 (Apr. 29, 2020) (hereinafter "BGH SQR Part 1"); C.R. 144.

Despite the substantial electricity and energy taxes paid by BGH, Commerce claims that the adjustments in the calculation of the electricity tax provided for in sections 9a, 9b and 10 of the Electricity Tax Act and in the energy tax provided for in sections 51 and 55 the Energy Tax Act represent "a financial contribution in the form of revenue forgone" by the German Government. *See, e.g.*, Decision Memorandum for Preliminary Affirmative Determination, 21 (May 19, 2020) (hereinafter "Preliminary IDM"); P.R. 220; Post-Preliminary Analysis Memorandum, 7-9 (Oct. 22, 2020) (hereinafter "Post-Preliminary Determination"); P.R. 271. While Commerce cites to section 771(5)(D)(ii) of the Tariff Act (19 U.S.C. § 1677(5)(D)(ii)) in support of its statement, this is not a complete quote of the statutory provision. Rather, section 1677(5)(D)(ii) states in full: "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income." Id. (emphasis added). The phrase "that is otherwise due" is crucial to understanding whether a financial contribution is present. Nevertheless, almost every time Commerce discusses individual programs in its determinations and analysis, it references "revenue forgone" without the determinative clause "that is otherwise due." *See, e.g.*, Post-Preliminary Determination, 7-14; P.R. 271; Final IDM, 22-24; P.R. 293.

The Electricity Tax Act is one integrated law and all of its provisions are integrally linked together and have been since the inception of the Act. The same is true for the Energy Tax Act. BGH fully paid all taxes due under the Electricity Tax Act and the Energy Tax Act, and there is no revenue forgone by the German Government that is otherwise due under these Acts. The fact that the Acts may provide for a digressive rate structure as the level of use increases does not mean that revenues that would otherwise be due are being forgone or not collected. Rather, these revenues are simply not due under the Acts. As the WTO Appellate Body stated in the report on *United States – Tax Treatment for Foreign Sales Corporations*, a determination as to "whether revenue foregone is otherwise due must allow a comparison of the fiscal treatment of comparable income, in the hands of taxpayers in similar situations." Appellate Body Report, United States – Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities, para. 98, WTO Doc. WT/DS108/AB/RW (Jan. 14, 2002).

In any event, large energy users such as BGH are paying far more electricity and energy taxes in absolute terms than smaller energy users, even if the rate per unit of consumption (*e.g.*, kilowatt-hour) may be less. It is also important to understand that this law is not designed to increase government revenue, but is rather designed to decrease greenhouse gas emissions by causing greater efficiency in the use of electricity. The Electricity Tax Act and Energy Tax Act are part of Germany's efforts to comply with its international obligations under the Paris Agreement and predecessor Kyoto Protocol.

Commerce attempts to create a financial contribution out of a situation where BGH is paying the German Government over [ ] Euros in additional electricity/energy taxes each year. Commerce performs this sleight of hand by artificially separating certain provisions out of the Electricity Tax Act and Energy Tax Act and then claiming that the German Government is

foregoing revenue. However, when the Electricity Tax Act and Energy Tax Act are each properly seen as an integral whole, BGH has fully paid all taxes due under each Act and the German Government is not foregoing any revenue that is otherwise due under the Acts.

b. No Benefit Conferred

Any common sense consideration of the Electricity Tax Act and Energy Tax Act would certainly conclude that BGH is receiving no benefit under the Acts but is rather paying additional taxes, significantly increasing its energy costs. Such excise taxes on electricity and energy are not traditional taxes to raise government revenues, like an income tax, but are rather excise taxes designed to decrease greenhouse gas emissions by causing greater efficiency in the use of energy.

The irony of the Trump Administration claiming that increased electricity/energy taxes imposed to decrease greenhouse gas emissions provides an unfair benefit to foreign company's *vis-à-vis* American producers is made clear by the President's words upon the United States' withdrawal from the Paris Climate Accord in 2017. In his statement on the U.S. withdrawal from the Paris Climate Accord, President Trump stated:

> Compliance with the terms of the Paris Accord and the onerous energy restrictions it has placed on the United States could cost America as much as 2.7 million lost jobs by 2025 according to the National Economic Research Associates. This includes 440,000 fewer manufacturing jobs — not what we need — believe me, this is not what we need — including automobile jobs, and the further decimation of vital American industries on which countless communities rely. They rely for so much, and we would be giving them so little.
>
> According to this same study, by 2040, compliance with the commitments put into place by the previous administration would cut production for the following sectors: paper down 12 percent; cement down 23 percent; iron and steel down 38 percent; coal — and I happen to love the coal miners — down 86 percent; natural gas down 31 percent. The cost to the economy at this time would be close to $3 trillion in lost GDP and 6.5 million industrial jobs, while households would have $7,000 less income and, in many cases, much worse than that.

See BGH Case Brief, 5-6 (Nov. 2, 2020); P.R. 283 (citing *Statement by President Trump on the Paris Climate Accord* (June 1, 2017)).[3]

Thus, the United States withdrew from the Paris Climate Accord with the stated objective of conferring a benefit upon U.S. manufacturers, including specifically the U.S. iron and steel industry. Conversely, because Germany has remained in the Paris Climate Accord and is conscientiously pursuing its pledged commitments, manufacturers in Germany face economic burdens like those outlined by President Trump above.

No previous administration has found such climate change measures to confer a countervailable benefit. In fact, when the Bush Administration examined the predecessors to the Electricity Tax Act and Energy Tax Act (*i.e.*, the Act Introducing the Ecological Tax Reform, dated March 24, 1999, and the Act on Continuation of the Ecological Tax Reform, dated December 16, 1999) in the countervailing duty investigation of *Carbon and Certain Alloy Steel Wire Rod from Germany*, it found that "the ecological tax scheme is not countervailable." *See* Preliminary Affirmative Countervailing Duty Determination and Preliminary Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Germany, 67 Fed. Reg. 5991, 5999 (Feb. 8, 2002) (hereinafter "Steel Wire Rod from Germany"). This determination of non-countervailability was maintained in the final determination. *See* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Carbon and Certain Alloy Steel Wire Rod from Germany, 13 (Aug. 23, 2002).

Again, as explained above, Commerce attempts the sleight of hand of turning a [ ] Euro annual tax payment into a benefit by artificially separating certain provisions out of the

[3] https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-trump-paris-climate-accord/.

respective Acts and then claiming that the German Government is foregoing revenue. However, when the Electricity Tax Act and Energy Tax Act are each properly seen as an integral whole, BGH has fully paid all taxes due under the Acts and the German Government is not foregoing any revenue that is otherwise due. This obligation to pay additional taxes on electricity/energy, taxes that are not paid by U.S. producers, can in no way be seen as a benefit to BGH.

c. No Specificity

As explained above, all three statutory factors must be present for Commerce to treat an item as a countervailable subsidy. Therefore, because the Electricity Tax Act and Energy Tax Act have provided BGH with no financial contribution and no benefit, the Court need not examine the question of specificity. Nevertheless, an examination of the record shows that the Electricity Tax Act and Energy Tax Act have not provided BGH with any subsidy that is specific as defined by statute.

Under section 1677(5A)(D)(i), a subsidy is specific as a matter of law (*de jure* specific) if access to the subsidy is expressly limited to "an enterprise or industry." 19 U.S.C. § 1677(5A)(D)(i). The last sentence of section 1677(5A)(D) also states that "any reference to an enterprise or industry is a reference to a foreign enterprise or foreign industry and includes a group of such enterprises or industries." 19 U.S.C. § 1677(5A)(D). Accordingly, under section 1677(5A)(D)(i), a subsidy can only be found to be *de jure* specific if it is expressly limited to an "industry" or "group" of industries. The statute does not require the provision to be "broadly available to all industries" as has been imposed by Commerce in this investigation. *See* Final IDM, 41; P.R. 293.

The terms "industry" and "industry group" are found in the North American Industry Classification System (NAICS) used by the United States Government. *See* BGH IQR Part 2,

App. CVD-47 at p. 26; P.R. 147. This is comparable to the German Classification of Economic Activities ("*Klassifikation der Wirtschaftszweige*") and the NACE Statistical Classification of Economic Activities used by the European Union. *See* id. at App. CVD-46 & CVD-48; P.R. 147.

The clear record evidence in this case confirms that the Electricity Tax Act and Energy Tax Act are not limited to a foreign industry or group of industries. First, the Electricity Tax Act, as a whole, applies generally to all electricity consumers from household customers to commercial and industrial customers. The base rate per megawatt-hour (MWh) in section 3 of the Act is then adjusted for various processes and economic sectors using large amounts of electricity so that the absolute amount of electricity tax will not be prohibitive. *Electricity Tax Act* § 3; FRG IQR Part 1, Ex. ETA(9b)-4; P.R. 158. The Energy Tax Act follows a similar structure, applying base rates for various energy products such as oil, coal and natural gas in section 2 of the Act and then adjusting the amount paid for various processes and economic sectors using large amounts of energy so that the absolute amount of energy tax will not be prohibitive. *Energy Tax Act* § 2; FRG IQR Part 1, Ex. ETA(37)-4; P.R. 158.

For example, the rate reductions provided in sections 9a, 9b and 10 of the Electricity Tax Act are open to all "companies in the manufacturing sector." Id. at Ex. ETA(9b)-4; P.R. 158. The term "companies in the manufacturing sector" is defined as companies falling under Section C (Mining and quarrying), Section D (Manufacturing), Section E (Energy and water supply) and Section F (Construction) of the German Classification of Economic Activities. *Electricity Tax Act* § 2a; FRG IQR Part 1, Ex. ETA(9b)-4; P.R. 158. Also included are approved workshops for the disabled if their primary economic activity can be attributed to these sections of the German Classification of Economic Activities. Id.

Sections C- F of the German Classification of Economic Activities correspond to Sectors 21, 22, 23 and 31-33 of the North American Industry Classification System (NAICS) used by the United States Government. *See* BGH IQR Part 2, App. CVD-46 & CVD-47 at p. 26; P.R. 147. In total, these sectors cover 225 different industries and 104 different industry groups, industries as varied as Crude Petroleum Extraction (industry 21112), Sewage Treatment Facilities (industry 221320), Industrial Building Construction (industry 236210), Soft Drink Manufacturing (industry 312111), Paper Mills (industry 32212), Plastics Material and Resin Manufacturing (industry 325211) and Iron and Steel Forging (industry 332111). Id.; P.R. 147.

The rate reductions provided in sections 51 and 55 of the Energy Tax Act have precisely the same coverage as the comparable provisions of the Electricity Tax Act, and the Energy Tax Act expressly incorporates the same definition of "companies in the manufacturing sector" set out in section 2 of the Electricity Tax Act. *See Energy Tax Act* §§ 51 & 55 (referring to definition of "companies in the manufacturing sector" in Electricity Tax Act § 2); FRG IQR Part 1, Ex. ETA(9b)-4 & ETA(37)-4; P.R. 158.

Accordingly, even taken in isolation, access to sections 9a, 9b and 10 of the Electricity Tax Act and sections 51 and 55 of the Energy Tax Act is not limited to a foreign industry or group of industries. Rather, access to these sections is broadly available to over 100 different industry groups spread throughout the German economy, covering 225 diverse industries. These provisions therefore do not meet the requirements for *de jure* specificity under section 1677(5A)(D)(i).[4]

[4] In addition, sections 9a, 9b and 10 of the Electricity Tax Act and sections 51 and 55 of the Energy Tax Act also meet the requirements of section 1677(5A)(D)(ii) for being not specific as a matter of law. These sections all establish objective criteria governing the eligibility for, and the amount of the rate adjustment, eligibility is automatic, the criteria for eligibility are strictly followed, and the criteria are clearly set forth in the Act. *See* 19 U.S.C. § 1677(5A)(D)(ii).

Commerce, however, simply ignores these facts in its final determination and imposes an unlawful standard of universal availability. In its final determination, Commerce states:

> While the parties contend that these provisions include a variety of industries, the facts on the record demonstrate that tax relief under these provisions is not broadly available to all industries; only to those industries identified in the text of each law.

Final IDM, 41 (emphasis added); P.R. 293. Such a standard of universal availability to all industries is contrary to the clear wording of section 1677(5A)(D)(i). It also runs counter to the Statement of Administrative Action to the Uruguay Round Agreements Act ("SAA"), which cites this Court's decision in Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834, 836-39 (CIT 1983) as a "leading case" on the specificity of domestic subsidies. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 929 (1994), reprinted in 1994 U.S.C.C.A.N. 4040 (hereinafter "SAA"). The SAA states:

> Judge Maletz explained that all governments, including the United States, intervene in their economies to one extent or another, and to regard all such interventions as countervailable subsidies would produce absurd results.

Id. The SAA concludes that the specificity test is meant only to address "narrowly focused subsidies" to "discrete segments of an economy." Id. at 930.

Commerce properly applied this narrow standard of specificity when it examined the predecessors to the Electricity Tax Act and Energy Tax Act (*i.e.*, the Act Introducing the Ecological Tax Reform and the Act on Continuation of the Ecological Tax Reform) in the countervailing duty investigation of *Carbon and Certain Alloy Steel Wire Rod from Germany*. In that investigation, Commerce specifically found that "the ecological tax scheme is not countervailable because it does not meet the specificity criteria in section 771(5A)(D) of the Act"

Commerce does not seem to dispute that the requirements of section 1677(5A)(D)(ii) are met in this case.

(*i.e.*, 19 U.S.C. § 1677(5A)(D)). Steel Wire Rod from Germany, 67 Fed. Reg. 5991, 5999 (Feb. 8, 2002); s*ee also*, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Carbon and Certain Alloy Steel Wire Rod from Germany, 13 (Aug. 23, 2002).

In *Steel Wire Rod from Germany*, Commerce noted that the rate reductions under the predecessor tax act applied to companies in the manufacturing, agricultural, and forestry sectors. Steel Wire Rod from Germany, 67 Fed. Reg. at 5999. By comparison, in this investigation, there is even broader availability, with access to sections 9a, 9b and 10 of the Electricity Tax Act and sections 51 and 55 of the Energy Tax Act being available to all companies in the manufacturing, mining, quarrying, oil and gas extraction, utilities and construction sectors. *Electricity Tax Act* § 2; FRG IQR Part 1, Ex. ETA(9b)-4; P.R. 158.[5] Similarly, in *Steel Wire Rod from Germany*, Commerce found that 2,500 companies received rate reductions under the predecessor tax act. Steel Wire Rod from Germany, 67 Fed. Reg. at 5999. By comparison, in this investigation, there is even broader use with respect to the Electricity Tax Act and Energy Tax Act. For example, Commerce found that 33,192 companies used section 9b of the Electricity Tax Act, 9,409 companies used section 10 of the Electricity Tax Act and 5,448 companies used section 55 of the Energy Tax Act.[6] Final IDM, 43-44; P.R. 293.

In its final determination in this present investigation, Commerce makes no serious attempt to distinguish its earlier determination in *Steel Wire Rod from Germany* from the facts

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[5] In addition, section 9b of Electricity Tax Act is also additionally available to companies in the agriculture and forestry sector. *Electricity Tax Act* § 9b; *see* FRG IQR Part 1, Ex. ETA(9b)-4; P.R. 158.

[6] Commerce made no findings with respect to use of section 9a of the Electricity Tax Act or section 51 of the Energy Tax Act. Similarly, Commerce made no determination of *de facto* specificity with respect to section 9a of the Electricity Tax Act or section 51 of the Energy Tax Act.

relating to the Electricity Tax Act and Energy Tax Act. Rather, Commerce states only that the predecessor tax act is "no longer under investigation by Commerce" and that Commerce found that earlier act to be "not specific because it was broadly available." Final IDM, 42; P.R. 293. Commerce also failed to properly consider the Electricity Tax Act and Energy Tax Act each as an integral whole and ignored the fact that additional provisions of each Act provide rate adjustments and exemptions to other industries. *See, e.g., Electricity Tax Act* §§ 9 & 9c; *Energy Tax Act* §§ 45-60; FRG IQR Part 1, Ex. ETA(9b)-4 & ETA(37)-4; P.R. 158.

Commerce's conclusion that sections 9b and 10 of the Electricity Tax Act and section 55 of the Energy Tax Act are *de facto* specific similarly lacks legal and factual support. First, it must be noted that Commerce made no determination of *de facto* specificity with respect to Section 9a of the Electricity Tax Act and section 51 of the Energy Tax Act. Second, the statute sets out four factors that Commerce must review in making a determination of *de facto* specificity:

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

19 U.S.C. § 1677(5A)(D)(iii).

It is undisputed that the last three of these factors are not present in this case. There is no evidence that a certain enterprise or industry is a predominant user of sections 9b and 10 of the Electricity Tax Act or section 55 of the Energy Tax Act. The decision whether to use these sections of the Acts is entirely that of the individual customer and the German Government takes

no action to limit the number of customers using these provisions. German Government Case Brief, 29 (Nov. 2, 2020) (hereinafter "FRG Case Brief"); P.R. 285.

Commerce's entire decision on the *de facto* specificity of sections 9b and 10 of the Electricity Tax Act and section 55 of the Energy Tax Act is based upon the first factor. Commerce simply asserts that the number of companies using sections 9b and 10 of the Electricity Tax Act and section 55 of the Energy Tax Act was "limited in number" even though the record shows that 33,192 companies used section 9b of the Electricity Tax Act, 9,409 companies used section 10 of the Electricity Tax Act and 5,448 companies used section 55 of the Energy Tax Act. Final IDM, 43-44; P.R. 293. As explained above, the number of companies using these provisions is far above the number of companies using the predecessor tax acts reviewed by Commerce in *Steel Wire Rod from Germany*, where Commerce found that the specificity criteria in 19 U.S.C. § 1677(5A)(D) had not been meet. Steel Wire Rod from Germany, 67 Fed. Reg. at 5999 (noting that 2,500 companies received rate reductions under the predecessor tax act). Similarly, in *Certain Hot-Rolled Flats from Thailand*, Commerce found that 351 recipients of a subsidy did not constitute a limited number on either an industry or enterprise basis. Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 66 Fed. Reg. 50410 (Oct. 3, 2001), accompanying Issues & Dec. Mem. at Cmt. 15.

In *Steel Wire Rod from Germany*, Commerce also compared the total number of steel companies in Germany (*i.e.*, at that time 37) with the "very large number" of users of the tax program and the total size of the tax reductions and concluded that the tax program was "not *de facto* specific to an industry or enterprise, or to a specific group of industries or enterprises." Id. During this current investigation, there were only 39 German steel producers (statistical no.

24.10) having 250 or more employees. German Government Second Supplemental Questionnaire Response, Ex. GOG-2ND SUPP-01 (July 28, 2020) (hereinafter "FRG SQR 7.28"); P.R. 262. As in *Steel Wire Rod from Germany*, this is a very small number in comparison to the very large number of companies using sections 9b and 10 of the Electricity Tax Act and section 55 of the Energy Tax Act, thereby supporting the same determination that these provisions are "not *de facto* specific to an industry or enterprise, or to a specific group of industries or enterprises." *See* Steel Wire Rod from Germany, 67 Fed. Reg. at 5999.

d. Erroneous Subsidy Rate Calculation

Commerce's subsidy rate calculations are incorrect, not supported by substantial evidence on the administrative record and otherwise not in accordance with law.

Commerce miscalculated the benefit under each section of the Electricity Tax Act and Energy Tax Act. Commerce simply applied the base rate under the Acts to BGH's full energy usage and disregarded the fact that BGH was already paying on an absolute basis electricity/energy taxes that were far higher than the vast majority of other energy customers. Any calculation of a countervailable benefit received during the period of investigation must consider the absolute amount of tax paid in comparison to other customers. *See* Appellate Body Report, United States – Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities, para. 98, WTO Doc. WT/DS108/AB/RW (Jan. 14, 2002) (stating that "whether revenue foregone is otherwise due must allow a comparison of the fiscal treatment of comparable income, in the hands of taxpayers in similar situations").

In addition, Commerce did not consider the costs associated with complying with the provisions of the Electricity Tax Act and Energy Tax Act in its subsidy calculations. For example, to qualify for section 10 of the Electricity Tax Act and section 55 of the Energy Tax

Act, the company must operate "an energy management system which corresponds to the requirements of DIN EN ISO 50001." *Electricity Tax Act* § 10(3); *Energy Tax Act* § 55(4); FRG IQR Part 1, Ex. ETA(9b)-4 & ETA(37)-4; P.R. 158.

2. EEG and KWKG Surcharges

The EEG and KWKG surcharges are not programs providing benefits. Rather, they are additional surcharges paid by electricity customers to offset the costs of developing renewable and energy efficient electricity supplies. *See* FRG IQR Part 1, Ex. EEG(SCS)-1 & EEG(SCS)-3; P.R. 159; German Government First Supplemental Questionnaire Response, Ex. KWKG-02 & KWKG-03 (June 5, 2020) (hereinafter "FRG SQR 6.5"); P.R. 236.

"EEG" stands for Renewable Energy Resources Act in German ("*Erneuerbare-Energien-Gesetz*"). The purpose of the Renewable Energy Resources Act is to promote the sustainable development of renewable energy sources such as photovoltaic, wind power, hydropower and biogas/biomass installations. *Renewable Energy Resources Act*, § 1; FRG IQR Part 1, Ex. EEG(SCS)-1 & EEG(SCS)-3; P.R. 159. Payments for renewable energy fed into the electricity grid are made by the private operators to whose network the generating installations are connected in accordance with technology-specific rates as defined in the Renewable Energy Resources Act. *Monitoring Report 2018*, 82; FRG IQR Part 1, Ex. GOG-5; P.R. 153. The additional costs of using this renewable energy is passed on to customers by the private network operators in the form of an EEG surcharge. The four private transmission system operators in Germany determine and publish the EEG surcharge for the following year by October 15th of each year on the basis of projected revenues and expenditures. Id. at 85; P.R. 153.

"KWKG" stands for Combined Heat and Power Act in German ("*Kraft-Wärme-Kopplungsgesetz*"). The purpose of the Combined Heat and Power Act is to promote the

modernization and development of combined heat and power ("CHP"), also known as "cogeneration." *Combined Heat and Power Act*, § 1; FRG SQR 6.5, Ex. KWKG-03; P.R. 236. Cogeneration is a more efficient use of energy, because combined heat and power (CHP) plants recover otherwise wasted thermal energy in the production of electricity for heating purposes. Payments for CHP energy fed into the electricity grid are made by the private operators to whose network the generating installations are connected in accordance with rates as defined in the Combined Heat and Power Act. *Monitoring Report 2018*, 279; FRG IQR Part 1, Ex. GOG-5; P.R. 153. The additional costs of using this CHP energy is passed on to customers by the private network operators in the form of a KWKG surcharge. The four private transmission system operators in Germany determine and publish the KWKG surcharge for the following year by October 25th of each year on the basis of projected revenues and expenditures. Id.; P.R. 153.

Electricity-intensive undertakings ("EIUs") receive a reduction in the EEG and KWKG surcharges for electricity consumption exceeding 1,000,000 kilowatt-hours (kWh) (*i.e.*, 1 gigawatt-hour (GWh)) per year so that these customers do not bear a disproportionate amount of the total costs. *See* FRG IQR Part 1, Ex. EEG(SCS)-1; P.R. 159; FRG SQR 6.5, Ex. KWKG-02; P.R. 236. This rate adjustment is referred to as the "Special Equalization Rule" ("*Besondere Ausgleichsregelung*") or "Special Equalization Scheme" ("SES"). Id.

a. No Financial Contribution

It is undisputed that BGH received no transfer of funds under either the Renewable Energy Resources Act or the Combined Heat and Power Act. Rather, the record evidence clearly shows that BGH paid net combined EEG and KWKG surcharges of over [ ] Euros in 2018. BGH SQR Part 2, App. S-30 & S-39; C.R. 152.

In fact, Commerce concedes that "the record does not support a finding that the FRG itself is providing a financial contribution pursuant to the SES." Preliminary IDM, 24; P.R. 220. Commerce, however, attempts to argue that the private network operators are providing a financial contribution in the form of revenue forgone and that the German Government "entrusts or directs" the private network operators to provide this alleged financial contribution. *See* id. Commerce's contention lacks legal and factual support.

First, Commerce fails to explain how the private network operators are foregoing any revenue. The EEG and KWKG surcharges are calculated to reimburse the private network operators for the additional costs of using renewable and CHP energy. The four private transmission system operators in Germany determine and publish the EEG and KWKG surcharges in October of each year for the following year on the basis of projected revenues and expenditures taking into account the rate adjustment under the Special Equalization Scheme. *See* FRG SQR 6.5, Ex. EEG(SCS)-20; P.R. 235; FRG Case Brief, 13-14; P.R. 285. Thus, the full amount of the additional costs of using renewable and CHP energy are collected each year by the private network operators. There is therefore no revenue forgone by the private network operators.

Second, as explained above, the statutory language concerning when the foregoing of revenue can be treated as a financial contribution states in full: "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income." 19 U.S.C. § 1677(5)(D)(ii) (emphasis added). The phrase "that is otherwise due" is crucial to understanding whether a financial contribution is present. The Renewable Energy Resources Act is one integrated law and all of its provisions are integrally linked together and have been since the inception of the Act. The same is true for the Combined Heat and Power Act. BGH fully

paid all EEG and KWKG surcharges due under these Acts, and there is no revenue forgone by the private network operators that is otherwise due. The fact that the Acts may provide for a digressive rate structure as the level of use increases does not mean that revenues that would otherwise be due are being forgone or not collected. Rather, these revenues are simply not due under the Acts. In any event, large electricity users such as BGH are paying far greater EEG and KWKG surcharges in absolute terms than smaller electricity users, even if the rate per kilowatt-hour may be less.

Third, under the statute, the actions of private parties can only be imputed to the foreign government when the government:

> entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments.

19 U.S.C. § 1677(5)(B)(iii). Commerce has failed to establish the fulfillment of any of these requirements. Commerce admits that the relevant Acts do not require the private transmission system operators to pass the surcharges on to the final customer. Final IDM, 22; P.R. 293. Commerce simply states that it is the "normative practice" for the private transmission system operators to pass the surcharges on to the final customer. Id.

Moreover, Commerce is incorrect that there is a government-imposed obligation for private transmission system operators to provide "rebates of the EEG surcharge to qualified EIUs {electricity-intensive undertakings}." *See* id. at 23; P.R. 293. As stated above there is no obligation for private transmission system operators to even collect EEG or KWKG surcharges and any surcharges collected are not rebated. Rather, the surcharges are calculated and collected using the surcharge rate applicable to the customer based on their energy consumption and qualification as an electricity-intensive undertaking. *See Transmission System Operator (TSO) Invoices*; BGH IQR Part 2, CVD-79; C.R. 81.

It must also be remembered that the total amount of the EEG and KWKG surcharges are calculated each year by the four private transmission system operators on the basis of projected revenues and expenditures in order to offset the additional costs these private operators have in using renewable and CHP energy. Therefore, calculating and recuperating these costs is not an activity that "would normally be vested in the government" as required by section 1677(5)(B)(iii). This is not altered by the fact that the German Federal Office for Economic Affairs and Export Control ("BAFA") decides on applications for the reduced surcharge. The BAFA application process is merely a formal review as to whether the company meets the statutory requirements of a qualified electricity-intensive undertaking.

Accordingly, Commerce's attempt to create a financial contribution out of a situation where BGH is paying over [ ] Euros in additional EEG and KWKG surcharges each year must be rejected.

b. No Benefit Conferred

Any common sense consideration of the Renewable Energy Resources Act and Combined Heat and Power Act would certainly conclude that BGH is receiving no benefit under these Acts but is rather paying additional surcharges, significantly increasing its electricity costs. The obligation to pay additional surcharges on electricity, surcharges that are not paid by U.S. producers, can in no way be seen as a benefit to BGH.

c. No Specificity

A detailed discussion of the statutory requirements and legal precedent concerning specificity is provided above with respect to the Electricity Tax Act and Energy Tax Act. As with its analysis of the Electricity Tax Act and Energy Tax Act, Commerce imposes an unlawful

standard of universal availability when reviewing the specificity of the rates reductions under the EEG and KWKG surcharges. In its final determination, Commerce states:

> we continue to find that access to the SES EEG surcharge reduction subsidy is expressly limited by law to certain enterprises conducting energy intensive activities and that the subsidy is therefore *de jure* specific under section 771(5A)(D)(i) of the Act.

Final IDM, 28-29; P.R. 293. Commerce simply ignores the fact that the rate reduction is broadly available to all enterprises, having an annual electricity consumption exceeding 1,000,000 kilowatt-hours (kWh) (*i.e.*, 1 gigawatt-hour (GWh)), in a broad range of 221 industrial sectors as well as railways undertakings. *See* FRG IQR Part 1, Ex. EEG(SCS)-1; P.R. 159. These industrial sectors cover a broad range of industries from mining of hard coal, to production of meat products, to manufacture of textiles, to casting of steel, to manufacture of electronic components. Id. at Ex. EEG(SCS)-3, Annex 4; P.R. 159.

As explained above with respect to the Electricity Tax Act and Energy Tax Act, provisions having such broad availability throughout the economy do not meet the statutory requirements of either *de jure* or *de facto* specificity under 19 U.S.C. § 1677(5A)(D). *See, e.g.*, SAA, H.R. Doc. No. 103-316, vol. 1, at 929-30; Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834, 836-39 (CIT 1983).

Commerce's statement that the criteria used for applying the reduced surcharge rate is "not neutral because the criteria favor enterprises or industries that 'require very large amounts of electricity,' which are exposed to international competition" is curious. *See* Final IDM, 29; P.R. 293. First, section 1677(5A)(D)(ii) does not use the term "neutral" but rather the term "objective" when referring to the criteria or conditions governing eligibility. *See* 19 U.S.C. § 1677(5A)(D)(ii). These two terms are not synonyms. "Neutral" means "being neither one thing nor the other : belonging to neither of two usually opposed or contrasted classes : not

decided or pronounced as to characteristics." *Neutral*, Webster's Third New International Dictionary, Unabridged, https://unabridged.merriam-webster.com/unabridged/neutral. Whereas, "objective" means "expressing or involving the use of facts without distortion by personal feelings or prejudices." *Objective*, Webster's Third New International Dictionary, Unabridged, https://unabridged.merriam-webster.com/unabridged/objective.

Therefore, when section 1677(5A)(D)(ii) uses the term "objective criteria" governing eligibility, it means factual criteria on which eligibility is based rather than government discretion. The statute does not use the term "neutral criteria" and therefore does not prohibit the use of "objective criteria" that draw distinctions based upon factual differences. By definition, any criteria that limit eligibility to certain factual characteristics will not be "neutral" because companies not having these characteristics will not be eligible.

Second, a reasonable objective criterion for applying a rate reduction for industries that use large amounts of electricity and cannot drastically reduce their consumption, is to factually identify those industries that require very large amounts of electricity. The fact that the EEG and KWKG surcharges may provide for a digressive rate structure as the level of electricity consumption increases does not mean that the rate adjustments are *de jure* specific.[7] Rather, the rate adjustments are broadly available to electricity-intensive undertakings throughout the German economy.

Third, the eligibility criteria for the reduced surcharge rates satisfy all the requirements for being not specific as a matter of law (*de jure*) under section 1677(5A)(D)(ii). The eligibility criteria are objective, they are clearly set forth in the relevant statutes, they are strictly followed

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[7] The reduced surcharge rate only applies to electricity consumption in excess of 1,000,000 kilowatt-hours (kWh) (*i.e.*, 1 gigawatt-hour (GWh)) per year.

and eligibility is automatic. *See* 19 U.S.C. § 1677(5A)(D)(ii). Accordingly, Commerce erred in finding application of the reduced EEG and KWKG surcharge rates to be *de jure* specific.

In its final determination, Commerce specifically declined to address the parties arguments related to *de facto* specificity with respect to the reduced EEG and KWKG surcharge rates. Final IDM, 29 & 33; P.R. 293. Rather, Commerce based its final determination of specificity on *de jure* specificity alone. Id. In doing so, Commerce did not consider the arguments made by the German Government and the German respondents against *de facto* specificity. *See, e.g.*, FRG Case Brief, 11-12 & 15-16; P.R. 285.

The record is clear that none of the statutory criteria for *de facto* specificity are met with respect to the reduced EEG and KWKG surcharge rates. *See* 19 U.S.C. § 1677(5A)(D)(iii). Use of the reduced EEG and KWKG surcharge rates is widely distributed throughout a broad spectrum of industrial sectors and no enterprise or industry is a predominant user of the reduced surcharge rates. *See* FRG Case Brief, 11-12 & 15-16; P.R. 285. Similarly, no enterprise or industry receives a disproportionately large amount of the reduced surcharge rates. Id. The decision whether to use the reduced EEG and KWKG surcharge rates is entirely that of the individual customer and the German Government takes no action to limit the number of customers using these provisions and exercises no discretion as to which companies qualify for their use. Id.

The actual number of companies using the reduced EEG and KWKG surcharge rates is in the thousands, with 2,840 consumption points qualifying for the reduced EEG surcharge rates in 2018. Preliminary IDM, 25; P.R. 220. By comparison, in *Steel Wire Rod from Germany*, Commerce found that the specificity criteria in section 1677(5A)(D) had not been meet when 2,500 companies received rate reductions under the relevant ecological tax act. Steel Wire Rod

from Germany, 67 Fed. Reg. at 5999. Similarly, in *Certain Hot-Rolled Flats from Thailand*, Commerce found that 351 recipients of a subsidy did not constitute a limited number on either an industry or enterprise basis in order to qualify as specific under section 1677(5A)(D). Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 66 Fed. Reg. 50410 (Oct. 3, 2001), accompanying Issues & Dec. Mem. at Cmt. 15.

Accordingly, application of the reduced EEG and KWKG surcharge rates is neither *de jure* nor *de facto* specific under 19 U.S.C. § 1677(5A)(D).

d. Erroneous Subsidy Rate Calculation

The absurdity of Commerce's subsidy determination and its insistence that all electricity customers must pay the same surcharge rate per kilowatt-hour (kWh) regardless of actual consumption is shown by its calculation of the alleged benefit to BGH from the reduced EEG and KWKG surcharge rates. According to Commerce's subsidy program calculations, BGH Siegen should have paid a combined EEG and KWKG surcharge of over [ ] Euros. BGH Subsidy Program Calculations, EEG & KWKG sheets (Dec. 7, 2020); C.R. 221. Seeing that BGH Siegen's total electricity costs in 2018 before taxes and surcharges was only [ ] Euros, Commerce's benefit calculation means that BGH Siegen would be subject to an EEG/KWKG surcharge rate of 115%, more than doubling BGH Siegen's electricity costs. *See* BGH IQR Part 2, App. CVD-79; C.R. 80.

Given the fact that German electricity rates are already some of the highest in the world and that the U.S. industry is not subject to comparable surcharges, such an exorbitant surcharge rate is absurd. This absurd surcharge rate also demonstrates the fallacy in Commerce's holding that the absolute amount of electricity consumption cannot properly be used as a criteria in

adjusting surcharge rates. Commerce simply cannot properly apply the base surcharge rates to BGH's full electricity usage and disregard the fact that BGH has a much higher electricity consumption than the vast majority of other electricity customers and is therefore already paying on an absolute basis far higher EEG and KWKG surcharges.

In addition, Commerce did not consider the costs associated with complying with the requirements for the reduced surcharge rates in its subsidy calculations. For example, in order to qualify for the reduced surcharge rates, companies must provide evidence that they operate an energy management system which corresponds to the requirements of DIN EN ISO 50001 or the Eco-Management and Audit Scheme ("EMAS") registration authority. FRG IQR Part 1, Ex. EEG(SCS)-1; P.R. 159.

3. EU Emissions Trading System

The EU Emissions Trading System ("ETS") is not a program providing benefits. Rather, the ETS is a climate policy instrument implemented by the European Union to ensure reductions in the emissions of greenhouse gases. The ETS contributes to implementing the EU's commitments under the Paris Agreement and its objective of limiting increases of global temperature. EU Initial Questionnaire Response, 2 (March 26, 2020); P.R. 115.

The ETS establishes a "cap and trade" system. *See* BGH IQR Part 2, App. CVD-84; P.R. 148. Under this system, the European Union sets an overall limit of emissions of greenhouse gases for the economic sectors subject to the law, and this limit is reduced annually at a rate established in the legislation. EU Initial Questionnaire Response, 2; P.R. 115. The limit on emissions is enforced by requiring economic operators to surrender "emission permits" (*i.e.*, "allowances") corresponding to their emissions in the previous year. Each allowance corresponds to one ton of CO_2 emissions. Id. By putting a price on emissions, the ETS allows

for the internalization of externalities, and incentivizes investment decisions towards cleaner technologies so as to reduce the operators' regulatory costs.

a. No Financial Contribution

As explained above, the first element that needs to be fulfilled for a countervailable subsidy is that a government or public authority provides a financial contribution to the company. 19 U.S.C. § 1677(5)(B)(i). Here, it is undisputed that BGH Siegen received no transfer of funds from the European Union or the German Government. Rather, the record evidence clearly shows that BGH Siegen paid [ ] Euros for ETS allowances in 2018. BGH Siegen IQR Part 2, App. CVD-77; C.R. 79.

Despite the substantial amount paid by BGH Siegen in 2018 for ETS allowances, Commerce claims that the provision of a certain amount of free allowances under the ETS constitutes "a financial contribution in the form of revenue forgone." Final IDM, 50; P.R. 293. Commerce's determination is based upon a fundamental misunderstanding of the ETS. BGH received no financial contribution under the ETS but instead was required to spend over [ ] Euros for ETS allowances that would not otherwise be due if the ETS did not exist.

The current target set for the ETS is an overall emission reduction of 43% by 2030 compared to 2005 levels. EU Initial Questionnaire Response, 4; P.R. 115. In order to reach this target by 2030, the European Commission calculates the overall emission cap for the entire European Union, and this cap is reduced each year according to a linear reduction factor set out in the legislation. Id. These yearly caps constitute the maximum level of emissions that all installations subject to the ETS in the European Union have the right to emit within a calendar year.

In order to ensure that these yearly caps are respected and to monitor the situation, the total number of allowances available in any given year corresponds to these caps. Id.; P.R. 115. There are no individual emission caps applicable to individual operators. Rather, each operator is obliged to surrender, every year, as many allowances as its installations produced emissions in the preceding year. Id. By limiting the total number of allowances available each year, the ETS effectively ensures that the total level of emissions is respected in each year.

Articles 10 and 10a of the ETS Directive establish that such allowances should be issued to operators according to specific criteria: part of the allowances (approximately 43% of the annual ETS cap) are allocated to individual operators by "free allocation of allowances," and the remaining allowances (approximately 57% of the annual ETS cap) are auctioned using the private trading platform European Energy Exchange AG (EEX). Id. at 4-5; P.R. 115.

The allocation of free allowances is based upon harmonized allocation rules and benchmarks set by law at the European level, and no individual Member State can modify these quantities. Id. at 5; P.R. 115. The total amount of free allowances is limited to approximately 43% of the annual ETS cap and, if due to capacity changes the allotted free allowances will exceed this amount, an across-the-board reduction in the number of free allowances is made by way of a "cross-sectoral correction factor" ("CSCF"). *See* id.; EU Supplemental Questionnaire Response, 16 (Apr. 28, 2020); P.R. 184. For example, the free allowances provided to BGH Siegen in 2018 were reduced by approximately [ ]% due to this cross-sectoral correction factor. Id. at Ex. ETS SQ DE 2; C.R. 140.

The upfront allocation of free allotments is an integral part of a system that aims at regulating the level of emissions that operators can make. The free allocation of allowances does not relieve companies of any costs, but simply establishes a threshold of emissions beyond which

operators have to make pollution abatement investments or pay for the excess allowances. EU Pre-Preliminary Comments, 2 (May 8, 2020); P.R. 211. Because free allowances decrease gradually but constantly, they are a transitional element in order to achieve the final environmental aim of climate neutrality by 2050. It is simply not possible to achieve climate neutrality in one single step, as this would render vast parts of the economy unsustainable. Accordingly, a transitory mechanism is necessary that achieves a gradual transformation of the economy towards climate neutrality. EU Initial Questionnaire Response, 5-6; P.R. 115.

As a factual matter, the two groups of allowances are totally separate. The 43% of free allowances cannot be actioned by the European Union or its Member States and the 57% auctioned allowances cannot be allocated for free. *See* EU Pre-Preliminary Comments, 2-4; P.R. 211. Therefore, Commerce is incorrect in claiming that the allocation of free allowances constitutes a financial contribution in the form of revenue forgone that is otherwise due. By law, neither the European Union nor any Member State may collect revenues on the 43% of free allowances and none of the 57% auctioned allowances can be allocated for free. Accordingly, the ETS never provides for the allocation of allowances where a government is foregoing revenue that is otherwise due.

The allocation of free allowances under the ETS therefore does not constitute a financial contribution under 19 U.S.C. § 1677(5A)(D).

b. No Benefit Conferred

Any common sense consideration of the EU Emissions Trading System ("ETS") would certainly conclude that BGH is receiving no benefit under the system but is rather incurring additional costs in procuring emission allowances, significantly increasing its energy costs. Such emission allowances are not comparable to traditional taxes to raise government revenues, like

an income tax, but are charges designed to decrease greenhouse gas emissions by causing greater efficiency in the use of energy. The obligation to purchase emission allowances, an obligation to which U.S. producers are not subject, can in no way be seen as a benefit to BGH.

c. No Specificity

A detailed discussion of the statutory requirements and legal precedent concerning specificity is provided above with respect to the Electricity Tax Act and Energy Tax Act. As with its analysis of the Electricity Tax Act and Energy Tax Act, Commerce imposes an unlawful standard of universal availability when reviewing the specificity of the allocation of free allowances under the ETS. In its final determination, Commerce states:

> we find this program is *de jure* specific under section 771(5A)(D)(i) of the Act because eligibility for this subsidy is limited by law to companies on the carbon leakage list.

Final IDM, 50; P.R. 293. Thereby, Commerce refuses to review whether the allocation of free allowances is broadly available but rather imposes a rule of universal availability. In fact, while Commerce acknowledges that "operators on the carbon leakage list account for 97 percent of emissions of the industrial sector in the EU, covering more than 150 sectors and thousands of enterprises," it dismisses this information as irrelevant to the analysis of *de jure* specificity. Id. Commerce's interpretation is contrary to statute and prior precedent.

Under section 1677(5A)(D)(i), a subsidy is only specific as a matter of law (*de jure* specific) if access to the subsidy is expressly limited to "an enterprise or industry" or "group of such enterprises or industries." 19 U.S.C. § 1677(5A)(D) & (i). As explained above with respect to the Electricity Tax Act and Energy Tax Act, the SAA makes clear that the specificity test is meant only to address "narrowly focused subsidies" to "discrete segments of an economy." *See, e.g.*, SAA, H.R. Doc. No. 103-316, vol. 1, at 929-30 (citing Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834, 836-39 (CIT 1983)).

The ETS allocates free allowances to enterprises based upon objective criteria analyzing each industry's risk of "carbon leakage." EU Initial Questionnaire Response, 8; P.R. 115. "Carbon leakage" is the risk that EU companies would transfer production to non-EU countries with laxer emission requirements or that imports from such non-EU countries would replace EU production subject to the more stringent emission requirements and related costs imposed by the ETS system. Id. The absence of carbon leakage provisions would lead to the perverse effect of an overall increase in the worldwide emission levels, because countries with less strict environmental regulations would take production away from those countries imposing ambitious regulations to reduce greenhouse gas emissions. Id. at 9; P.R. 115. Accordingly, provisions addressing carbon leakage are crucial to ensuring sustainability of the emissions-reduction system.

The determination of an industry's risk of carbon leakage is based upon an objective analysis of factors including the increase in production costs induced by implementation of the ETS and the industry's trade intensity with non-EU countries. Id. at 9 & Annex 1, p 9; P.R. 115 & 117. Based upon the results of this analysis, the ETS distinguishes among four types of economic activities, depending upon the level of exposure to the risk of carbon leakage. Each type of economic activity has different levels of upfront allocation of free allowances:

- Electricity production is not deemed to be exposed to the risk of carbon leakage, and electricity production is therefore not eligible in general for free allocation.

- Aviation receives an allocation of free allowances of 85% of the quantity determined based upon the efficiency-related benchmark.

- Industrial activities deemed to be exposed to a significant risk of carbon leakage (*i.e.*, identified in the "carbon-leakage list") receive an allocation of free allowance of 100% of the quantity determined based upon the efficiency-related benchmark (*i.e.*, the emission level of the 10% most efficient installations).

- Other industrial activities receive a lower level of free allocations (*i.e.*, annually decreasing from 80% of the efficiency-related benchmark in 2013 to 30% in 2020), since they are assumed to be able to pass through some carbon costs and therefore be exposed to a lower risk of carbon leakage.

Id. It is important to note that most companies in industries exposed to a significant risk of carbon leakage will still be required to reduce emissions and purchase additional allowances because the benchmark on which the number of free allowances is calculated is based upon the emission level of the 10% most efficient installations. Id. at Annex 1, p 9; P.R. 117. For example, BGH Siegen purchased [ ] emission allowances in 2018 over and above the free allowances it had received. BGH IQR Part 2, App. CVD-77; C.R. 79.

The industrial activities deemed to be exposed to a significant risk of carbon leakage are listed in a decision of the European Commission. *See* EU Initial Questionnaire Response, ETS Ex. 4; P.R. 118. The annex to this decision has been referred to as the "carbon-leakage list." This list covers over 160 classes of industry falling into 90 different industry groups under the NACE Statistical Classification of Economic Activities used by the European Union. *Compare* id. *with* BGH IQR Part 2, App. CVD-48; P.R. 147. The NACE classification system is comparable to the North American Industry Classification System used in the United States. *See* id. at App. CVD-47; P.R. 147. Accordingly, access to the allocation of free allowances based upon a significant risk of carbon leakage is not expressly limited to "an industry" or even a "group of industries." Rather access is available to over 160 NACE Code industry classes in nearly 100 different industry groups and covering a broad range of individual industries and economic activities from mining of hard coal, to manufacturing wine, industrial textiles, paper, steel and toys. *See* EU Initial Questionnaire Response, ETS Ex. 4; P.R. 118. It is also important to understand that allocation of free allowances is not limited to industries on the carbon leakage

list. Rather, as detailed above, all industries except electricity production receive various levels of free allowances.

Accordingly, the allocation of free allowances based upon a significant risk of carbon leakage is not specific as a matter of law under 19 U.S.C. § 1677(5A)(D)(i).

In addition, the ETS and its rules for allocating free allowances meet the requirements of section 1677(5A)(D)(ii) for being not specific as a matter of law. The ETS establishes objective criteria governing the eligibility for and the amount of the free allowances, eligibility is automatic, the criteria for eligibility are strictly followed, and the criteria are clearly set forth in the applicable legislation. *See* 19 U.S.C. § 1677(5A)(D)(ii). In fact, in its final determination, Commerce does not dispute that the requirements of section 1677(5A)(D)(ii) are met in this case.

In its final determination, Commerce made no finding as to *de facto* specificity and based its final determination of specificity upon *de jure* specificity alone. Final IDM, 50; P.R. 293. However, the record is clear that none of the statutory criteria for *de facto* specificity are met with respect to the allocation of free emission allowances. *See* 19 U.S.C. § 1677(5A)(D)(iii). Allocation of free emission allowances is widely distributed throughout a broad spectrum of industrial sectors and no enterprise or industry is a predominant user of the reduced surcharge rates. EU Initial Questionnaire Response, 9-11; P.R. 115. Some 11,000 installations reported verified emissions under the ETS in 2018. Id. at Annex 1, p. 13; P.R. 115. Of these installations, more than 9,300 received an allocation of free allowances. Id. Similarly, no enterprise or industry receives a disproportionately large amount of the free allowances. Id. at 9-10.

The European Commission also takes no action to limit the number of installations receiving free allowances and exercises no discretion as to which companies receive an

allocation of free allowances. Rather, all installations meeting the legal requirements for the allocation of free emission allowances are allocated allowances, and an across-the-board reduction in the number of free allowances is made by way of a "cross-sectoral correction factor" ("CSCF") so that the total EU emissions covered by the free allowances do not exceed the total limit of approximately 43% of the annual ETS cap. *See* id.; P.R. 115; EU Supplemental Questionnaire Response, 16; P.R. 184. In fact, an overwhelming number of operators responsible for about 97% of total industrial emissions covered by the ETS receive upfront allotments at 100% of the benchmark level. EU Initial Questionnaire Response, 10; P.R. 115.

Accordingly, the evidence on the administrative record demonstrates that the allocation of free emission allowances is neither *de jure* nor *de facto* specific under 19 U.S.C. § 1677(5A)(D).

d. Erroneous Subsidy Rate Calculation

Commerce's subsidy rate calculations are also incorrect. In its subsidy rate calculation for the ETS allowances, Commerce bases the benefit on [ ] free allowances. BGH Subsidy Program Calculations, ETS sheet; C.R. 221. However, the amount of free allowances used by BGH Siegen in 2018 to cover emissions was only [ ]. BGH Siegen had purchased ETS allowances and CER ("Certified Emission Reductions") certificates issued under the rules of the Kyoto Protocol in 2018 totaling [ ] and it required allowances of [ ] to cover its 2018 emissions, leaving a balance of only [ ] to be covered by free allowances. BGH Siegen IQR Part 2, App. CVD-77; C.R. 79. Applying the [ ] adjustment factor used by Commerce in its calculations, this would result in free allowances of only [ ]. *See* BGH Subsidy Program Calculations, ETS sheet; C.R. 221.

4. ETS Compensation of Indirect CO_2 Costs

The EU Emissions Trading System ("ETS") Compensation of Indirect CO_2 Costs is not a program providing benefits. Rather, it is part of the ETS system discussed above, which the European Union implemented as a climate policy instrument to ensure reductions in the emissions of greenhouse gases. As discussed above, electricity production is not entitled to the allocation of any free allowances under the ETS system. This means that electricity companies must purchase emission allowances for 100% of their emissions and these costs are passed on in full to electricity customers, even customers in industries that would otherwise be entitled to free emission allowances based upon a significant risk of carbon leakage. To remedy this problem, the ETS system sets out clear and objective criteria for offsetting a portion of the emission allowance costs indirectly paid by customers in industries having a significant risk of carbon leakage. FRG Case Brief, 39-40; P.R. 285.

The ETS Compensation of Indirect CO_2 Costs does not provide a countervailable benefit but only offsets part of the burden imposed by the ETS. The ETS imposes a burden on electricity providers (and thus indirectly imposes a burden on purchasers of electricity) that would not exist but for the ETS.

As it had done with respect to the ETS allocation of free allowances, Commerce treated the ETS Compensation of Indirect CO_2 Costs as *de jure* specific under section 1677(5A)(D)(i) because "the law limits eligibility to only those companies on the carbon leakage list." Final IDM, 51; P.R. 293. A detailed discussion of the list of industries having a significant risk of carbon leakage is provided above with respect to the ETS allocation of free allowances. It is undisputed that "operators on the carbon leakage list account for 97 percent of emissions of the industrial sector in the EU, covering more than 150 sectors and thousands of enterprises." Id. at

50. For the reasons stated above, the provision of ETS allowances or Compensation of Indirect CO_2 Costs to companies in industries having a significant risk of carbon leakage is neither *de jure* nor *de facto* specific under 19 U.S.C. § 1677(5A)(D).

5. Concession Fee Ordinance

The Concession Fee Ordinance ("*Konzessionsabgabenverordung (KAV)*") is not a program providing benefits. Rather, concession fees are additional fees paid by private network operators to counties and municipalities for the right to lay electricity and gas lines above or below public roads and paths. FRG SQR 6.5, Ex. KAV-02; P.R. 236; BGH SQR Part 2, App. S-40; P.R. 214. In the concessions agreement between a private network operator and a county or municipality, the parties are free to set the level of the concessions fee that the private network operator is required to pay to the county/municipality. However, the Concession Fee Ordinance sets maximum limits on the amount of the concessions fee per kilowatt-hour (kWh). FRG SQR 6.5, Ex. KAV-02; P.R. 236. A private network operator has no legal obligation to pass the cost of the concession fees on to its customers. FRG Case Brief, 18-20; P.R. 285.

The concession fee rate limits established by the Concession Fee Ordinance differentiate between electricity supplied to tariff customers (generally households) and special contract customers (generally commercial/industrial customers). FRG SQR 6.5, Ex. KAV-02; P.R. 236. No concession fee may be agreed to or charged with respect to electricity supplied to special contract customers whose annual average electricity price per kilowatt-hour (kWh) is lower than the average revenue per kilowatt-hour (kWh) in Germany for the supply of electricity to all special contract customers in the previous calendar year ("Marginal Price"). Id.

a. No Financial Contribution or Benefit Conferred

It is undisputed that BGH received no transfer of funds under the Concession Fee Ordinance. Rather, the record evidence clearly shows that BGH Siegen paid net concession fees of almost [ ] Euros in 2018. BGH SQR Part 2, App. S-41; C.R. 152.

Nevertheless, as discussed above with respect to the EEG and KWKG surcharges, Commerce attempts to argue that the private network operators are providing a financial contribution in the form of revenue forgone and that the German Government "entrusts or directs" the private network operators to provide this alleged financial contribution. *See* Final IDM, 38-39; P.R. 293. Commerce's contention lacks legal and factual support.

First, Commerce fails to explain how the private network operators or the German Government are foregoing any revenue that is otherwise due. The Concession Fee Ordinance clearly sets out that counties/municipalities may not charge private network operators concession fees on electricity supplied to special contract customers with below Marginal Price electricity prices. There is therefore simply no concession fee otherwise due by private network operators in these situations and no fee to be passed on to the final customer.

Second, Commerce has failed to establish the fulfillment of any of the requirements of 19 U.S.C. § 1677(5)(B)(iii) for the actions of private network operators to be imputed to the German Government. The German Government has in no way entrusted or directed private network operators to make a financial contribution to their electricity customers. The payment of concession fees is a matter of private contract between the network operators and the counties/municipalities, and the Concession Fee Ordinance simply sets maximum limits that can be charged by the counties/municipalities. A private network operator has no legal obligation to pass the cost of the concession fees on to its customers.

Moreover, in the absence of any financial contribution, there can be no benefit conferred upon BGH. To the contrary, BGH is paying net concession fees of almost [ ] Euros, which increases its electricity costs. BGH SQR Part 2, App. S-41; C.R. 152.

b. No Specificity

As with its analysis of the Electricity Tax Act and Energy Tax Act, Commerce imposes an unlawful standard of universal availability when reviewing the specificity of the fee limits under the Concession Fee Ordinance. *See* Final IDM, 39; P.R. 293 (basing determination of *de jure* specificity solely on finding that "the FRG expressly limited access to the subsidy by providing relief to only those companies whose average price per kilowatt-hour in the calendar year is lower than the average revenue per kWh from the supply of electricity to all special contract customers"). Commerce expressly limited its determination to *de jure* specificity stating that the alleged program was "*de jure* specific rather than *de facto* specific." Id.

Under section 1677(5A)(D)(i), a subsidy is only specific as a matter of law (*de jure* specific) if access to the subsidy is expressly limited to "an enterprise or industry" or "group of such enterprises or industries." 19 U.S.C. § 1677(5A)(D) & (i). As explained above with respect to the Electricity Tax Act and Energy Tax Act, the SAA makes clear that the specificity test is meant only to address "narrowly focused subsidies" to "discrete segments of an economy." *See, e.g.*, SAA, H.R. Doc. No. 103-316, vol. 1, at 929-30 (citing Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834, 836-39 (CIT 1983)).

There is no evidence on the administrative record showing that this concession fee rate limit is any way narrowly focused on discrete segments of the German economy. Rather, any commercial/industrial enterprise can enter into a special contract with a private network operator,

the tariff rate customers being essentially households. There is also no evidence that the Marginal Price comparison favors any industries or groups of industries.

Accordingly, the evidence on the administrative record demonstrates that the concession fee rate limit is neither *de jure* nor *de facto* specific under 19 U.S.C. § 1677(5A)(D).

B. Commerce Improperly Initiated This Countervailing Duty Investigation

The countervailing duty petition filed by petitioners did not meet the minimum statutory and regulatory requirements for the initiation of a countervailing duty investigation against Germany. Section 1671a(b)(1) requires a petition to allege the elements necessary for the imposition of countervailing duties under the statute and to be accompanied by information reasonably available to the petitioner supporting those allegations. 19 U.S.C. § 1671a(b)(1). Similarly, 19 C.F.R. § 351.202 requires the petition to contain information concerning the "alleged countervailable subsidy and factual information (particularly documentary evidence) relevant to the alleged countervailable subsidy." 19 C.F.R. § 351.202(b)(7)(ii)(B).

The countervailing duty petition petition contained only the most rudimentary data from the internet and failed to demonstrate that any of the climate change measures established by the German Government and the European Union met the elements necessary for the imposition of countervailing duties.

The petition had to be amended three times and still it was deficient. *See*, Antidumping & Countervailing Duty Petitions (Dec. 19, 2019); P.R. 1; Amendment of Petitions and Response to Commerce's Supplemental Questions (Dec. 30, 2019); P.R. 15; Second Amendment of Petitions (Jan. 3, 2020); P.R. 21; Third Amendment of Petitions (Jan. 6, 2020); P.R. 22. Petitioners expressly limited their allegations to certain specified statutory provisions with the exclusion of other provisions within the exact same statute. For example, the petition raised

allegations concerning Section 9a of the Electricity Tax Act but did not raise any allegations concerning Sections 9b and 10 of that same act. Detailed information concerning all of the climate change measures established by the German government are readily available by internet. Rather than making a reasonable search for this information or even reviewing copies of the legal texts that were already made exhibits to the petition, petitioners simply made very cursory and limited subsidy allegations. Commerce's response to this deficiency is simply to state that it is "outside of Commerce's knowledge as to why the petitioner, for example, alleged Section 9a of the Electricity Act but not also sections 9b and 10." Final IDM, 10; P.R. 293.

The petition was so deficient that the European Commission took the unprecedented step of filing comments with Commerce stating that the standard of initiation had not been met. *See* EU Submission Concerning Initiation of the Investigations, 1 (March 26, 2020); P.R. 115.

Because of the lack of information in the petition, the investigation turned into an unlimited fishing expedition with multiple rounds of supplemental questionnaires seeking to obtain information on programs far outside of the scope of the petition. This, in turn, led to Commerce taking the unprecedented step of issuing a post-preliminary determination, countervailing additional programs, some five months after the date of the preliminary determination and then requiring case briefs to be submitted just 11 days after issuance of the post-preliminary determination. *See* BGH Case Brief, 1-2; P.R. 283. This severely affected BGH's procedural and due process rights by giving it no meaningful time to review the changes made in Commerce's preliminary determination and prepare its case brief.

Commerce should not have initiated a countervailing duty investigation against Germany based upon such deficient information. Moreover, Commerce should not have expanded the

investigation to include subsidy allegations on legal provisions that could have been raised in the petition.

C. *Ex parte* Communications

Pursuant to 19 U.S.C. § 1677f(a)(3), Commerce must maintain a record of any *ex parte* meeting. The administrative record in the related antidumping duty investigation indicates that Commerce had an *ex-parte* telephone conference with Representative Mike Kelly. *See* BGH Case Brief, 11 (citing Memorandum on Teleconference with Rep. Mike Kelly (R-PA-16) (Sept. 24, 2020) (Barcode: 4032654-01)); P.R. 283. The *ex parte* telephone conference occurred on September 14, 2020, approximately one month before Commerce released its post-preliminary determination in this investigation.

Given the large number of Senior Commerce Officials participating in this *ex parte* telephone conference, including officials responsible for decision-making in this investigation, such as Assistant Secretary Kessler and Deputy Assistant Secretary Maeder, the *ex parte* meeting is relevant to this countervailing duty investigation. The letter from Representative Kelly to the Commerce Secretary also indicates that other *ex parte* discussions with Dr. Peter Navarro, Director of the Office of Trade and Manufacturing Policy (OTMP), also took place.

In its case brief, BGH requested that Commerce "disclose on the administrative record whether any *ex-parte* communications were made with individuals outside of the Department of Commerce concerning this countervailing duty investigation." BGH Case Brief, 11; P.R. 283. In its final determination, Commerce failed to make any affirmative disclosure as to whether the September 14, 2020 *ex parte* telephone conference with Senior Commerce Officials also concerned the countervailing duty investigation or whether there were any other *ex parte*

discussions such as those with Dr. Navarro referenced in Representative Kelly's letter.

Commerce stated simply that:

> we do not find that the administrative record of this investigation is incomplete simply because there are *ex parte* communications on the record of the companion AD investigation which are not also included on the record of this investigation.

Final IDM, 11; P.R. 293.

This matter should be remanded back to Commerce for an affirmative determination regarding its compliance with 19 U.S.C. § 1677f(a)(3), requiring Commerce to maintain a record of any *ex parte* meeting.

V. Conclusion and Prayer for Relief

For the reasons stated above, Commerce's Final Determination is not supported by substantial evidence on the administrative record or in accordance with the law or other applicable legal standards. We therefore respectfully request that the Court remand this case to Commerce for redetermination with instructions consistent with the arguments set forth above and grant BGH such other further relief as the Court may deem appropriate.

Respectfully submitted,

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