Slip Op. 22-117

**UNITED STATES COURT OF INTERNATIONAL TRADE**

**BGH EDELSTAHL SIEGEN GMBH,**

**Plaintiff,**

**v.**

**UNITED STATES,**

**Defendant,**

**and**

**ELLWOOD CITY FORGE COMPANY, ET AL.,**

**Defendant-Intervenors.**

**Before: Claire R. Kelly, Judge**

**Court No. 21-00080**
**PUBLIC VERSION**

## OPINION AND ORDER

[Sustaining in part and remanding in part the U.S. Department of Commerce's final affirmative determination in the countervailing duty investigation of forged steel fluid end blocks from the Federal Republic of Germany.]

Dated: October 12, 2022

James K. Horgan, Alexandra H. Salzman, Gregory S. Menegaz, Marc E. Montalbine, and Merisa A. Horgan, deKieffer & Horgan, PLLC, of Washington, D.C., for plaintiff BGH Edelstahl Siegen GmbH.

Sarah E. Kramer, U.S. Department of Justice, Commercial Litigation Branch – Civil Division, and Ayat Mujais and Paul K. Keith, Of Counsel, U.S. Department of Commerce, Office of Chief Counsel for Trade Enforcement and Compliance, for defendant United States.

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

Kelly, Judge: Before the court is BGH Edelstahl Siegen GmbH's ("BGH") Rule 56.2 motion for judgment on the agency record challenging various aspects of the U.S. Department of Commerce's ("Commerce") final determination in its countervailing duty ("CVD") investigation of forged steel fluid end blocks ("Fluid End Blocks") from the Federal Republic of Germany ("FRG"). [BGH] Mot. J. Agency R., Oct. 26, 2021, ECF No. 21; [BGH] Rule 56.2 Memo. Supp. Mot. J. Agency R., Oct. 26, 2021, ECF No. 22 ("Pl. Br."); see generally [Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy, 86 Fed. Reg. 7,535 (Dep't Commerce Jan. 29, 2021) ([CVD] orders, and am. final affirmative [CVD] determination for the People's Republic of China) ("Final Results") and accompanying Issues and Decision Memo., C-428-848, PD 293, bar code 4062827-01 (Dec. 7, 2020), ECF No. 15-2 ("Final Decision Memo.");[1] [Fluid End Blocks] from the People's Republic of China, [FRG], India, and Italy, 86 Fed. Reg. 10,244 (Dep't Commerce Feb. 19, 2021) (correction to [CVD] orders). BGH challenges Commerce's Final Results on three grounds, arguing (1) that Commerce improperly initiated its CVD investigation and impermissibly expanded the CVD investigation to include new subsidy programs, Pl. Br. at 43–45, (2) failed to include ex-parte communications in the record, id. at 45–46, and (3) incorrectly determined

[1] On May 10, 2021, Defendant filed amended indices to the public and confidential administrative record underlying Commerce's final determination. See Reports, May 3, 2021, ECF Nos. 16-6–7. Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices, and all references to such documents are preceded by "PD" or "CD" to denote public or confidential documents.

that seven programs used by BGH during the period of investigation were countervailable subsidies.[2] Id. at 7–43.

Defendant United States and defendant-intervenors Ellwood City Forge Company, Ellwood National Steel Company, Ellwood Quality Steels Company, and A. Finkl & Sons ("Defendant-Intervenors") argue that Commerce's decisions to initiate and expand its CVD investigations were in accordance with law because the petition to initiate the CVD investigation "included the relevant laws and policies that provided the countervailable subsidies, tied those facts to the legal framework, and established a reasoned basis to conclude that BGH received subsidy benefits[,]" and that Commerce may consider new subsidy programs uncovered during its investigation. Rebuttal Br. of Def.-Intervenors Opp'n to Pl.'s Rule 56.2. Mot. J. Agency R. at 6, Mar. 22, 2022, ECF No. 31 ("Def.-Inter. Br."); see Def.'s Resp. to Pl.'s Rule 56.2 Mot. J. Agency R. at 41–45, Mar. 21, 2022, ECF No. 28 ("Def. Br."). Defendant and Defendant-Intervenors further argue that the record for the CVD investigation is complete because the ex parte communication that BGH asserts is

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[2] BGH challenges Commerce's determination that the following programs are countervailable: 1. Stromsteuergesetz ("StromStG" or "the Electricity Tax Act"), 2. Energiesteuergesetz ("EnergieStG" or "the Energy Tax Act"), 3. Erneuerbare-Energien-Gesetz's Reduced Surcharge Program (the "Reduced EEG Surcharge Program" or "EEG Program"), 4. Kraft-Wärme-Kopplungsgesetz Reduced Surcharge Program ("Reduced KWKG Surcharge Program" or "KWKG Program"), 5. The European Union's ("EU") Emissions Trading System ("ETS Program"), 6. The EU ETS Compensation of Indirect $CO_2$ Costs Program ("$CO_2$ Compensation Program"), and 7. Konzessionsabgabenverordung (the "KAV Program" or the "Concession Fee Ordinance Program") (collectively "Contested Programs"). Pl. Br. at 7, 21, 30, 39–40.

missing from the record pertained to the antidumping investigation, not the CVD investigation, and therefore need not be included in the record. Def.-Inter. Br. at 38–39; Def. Br. at 45–46. Finally, Defendant and Defendant-Intervenors argue that Commerce correctly determined the Contested Programs are countervailable. Def.-Inter. Br. at 11–35; Def. Br. at 12–41. For the following reasons, the court sustains in part and remands in part Commerce's Final Results.

## BACKGROUND

On December 18, 2018, the FEB Fair Trade Coalition and Defendant-Intervenors ("Petitioners") filed a petition with Commerce requesting that Commerce impose countervailing duties on Fluid End Blocks from the FRG. Fluid End Blocks from China, Germany, India, and Italy: Antidumping and [CVD] Pets., C-428-848, PDs 1–7, CDs 1–9, bar codes 3921764-01–07, 3921755-01–09 (Dec. 18, 2019) ("Petition"); see also [Fluid End Blocks] from the [FRG], India, Italy, and the People's Republic of China, 85 Fed. Reg. 2,385, 2,385 nn.1–2 (Dep't Commerce Jan. 15, 2020) (initiation of [CVD] investigations) ("Initiation Notice"). On December 23, 2019, Commerce issued a supplemental questionnaire to Petitioners requesting clarification for several programs Petitioners alleged constitute countervailable subsidies. Suppl. Questions, C-428-848, PD 11, bar code 3923818-01 (Dec. 23, 2019). On December 29, 2019, Petitioners filed an amended petition. Amend. of Pets. & Resp. to Commerce's Suppl. Questions, C-428-848, PDs 15–19, CDs 10–15, bar codes 3924916-01–05, 3924910-01–06 (Dec. 29, 2019) ("Am. Petition"). In response,

Commerce requested further information from Petitioners regarding "issues pertaining to the proposed scope, industry support, and import statistics in the Petitions." Memo. on Phone Call with Counsel to Pet'rs at 1, C-428-848, PD 20, bar code 3926026-01 (Jan. 2, 2020). Petitioners filed two additional amended petitions in January 2020. Second Amend. of Pets., C-428-848, PD 21, bar code 3926213-01 (Jan. 3, 2020); Third Amend. of Pets., C-428-848, PD 22, bar code 3926682-01 (Jan. 6, 2020).

On January 8, 2020, Commerce initiated a CVD investigation into Fluid End Blocks from the FRG covering a period of January 1, 2018, through December 31, 2018. Initiation Notice, 85 Fed. Reg. 2,385, 2,385–86 (issued January 8, 2020). On February 4, 2020, Commerce selected Schmiedewerke Gröditz GmbH ("SWG") and BGH as mandatory respondents and sent an initial questionnaire to the Government of the Federal Republic of Germany ("GOG"). Resp't Selection Memo., C-428-848, PD 54, bar code 3938815-01 (Feb. 4, 2020); [CVD] Questionnaire, C-428-848, PD 55, bar code 3938855-01 (Feb. 4, 2020). Between February 4, 2020, and May 8, 2020, Commerce issued questionnaires and supplemental questionnaires to BGH, the GOG, and the EU;[3] and received responses and pre-preliminary comments from BGH,

[3] On behalf of the European Commission ("EC"), the Delegation of the European Union ("EU") to the United States requested a separate CVD questionnaire for the EC pertaining to the EU Emission Trading System and EU Research Fund for Coal and Steel, two programs that are "enforced and managed by the [EC]." Req. for Separate EU Questionnaire, C-428-848, PD 61, bar code 3940491-01 (Feb. 7, 2020).

(footnote continued)

the GOG, and the European Commission. See Decision Memo. Prelim. Affirmative Determination [CVD] Investigation of [Fluid End Blocks] from [FRG] at 2–3 & nn.9–10, C-428-848, PD 220, bar code 3975458-01 (May 18, 2020) ("Prelim. Decision Memo.") (listing responses and pre-preliminary comments).

On May 18, 2020, Commerce issued its preliminary results, determining that the GOG was providing countervailable subsidies through, inter alia, section 9a of the Electricity Tax Act, section 51 of the Energy Tax Act, the Reduced EEG Surcharge Program, and the EU ETS Program. Prelim. Decision Memo. at 20–27. Commerce requested additional information regarding the Reduced KWKG Surcharge Program, the $CO_2$ Compensation Program, the Concession Fee Ordinance Program, sections 9b and 10 of the Electricity Tax Act, and section 55 of the Energy Tax Act. Id. at 29. On October 21, 2020, Commerce issued its post-preliminary decision memorandum, determining that the GOG was providing countervailable subsidies through these additional programs. Post-Prelim. Analysis [CVD] Investigation: [Fluid End Blocks] from [FRG] at 6–14, C-428-848, PD 271, bar code 4043279-01 (Oct. 21, 2020) ("Post-Prelim. Decision Memo.").

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Commerce issued a questionnaire to the EU on March 5, 2020. See Letter from [Commerce] to Delegation of the [EU] Pertaining to [EU] Questionnaire, C-428-848, PD 95, bar code 3950675-01 (Mar. 5, 2020). The EC responded to the questionnaire on behalf of the EU. See Submission by the [EC] concerning the initiation of the investigations at 1, C-428-848, PD 115, bar code 3958462-03 (Mar. 26, 2020).

On November 2, 2020, the GOG, the EC, the Petitioners, and BGH submitted case briefs to Commerce. Final Decision Memo. at 3 & n.11; see [EC] Case Br., C-428-848, PD 281, bar code 4047621-01 (Nov. 2, 2020); Case Br. [BGH], C-428-848, PD 283, bar code 4047998-01 (Nov. 2, 2020) ("BGH Agency Br."); Case Br. [FRG] and Federal Ministry Economic Affairs & Energy of [FRG], C-428-848, PD 285, bar code 4048444-01 (Nov. 2, 2020); Pet'rs' Case Br., C-428-848, PD 282, bar code 4047815-01 (Nov. 2, 2020). Petitioners and BGH submitted rebuttal case briefs to Commerce on November 7, 2020. Final Decision Memo. at 3; see Rebuttal Br. [BGH], C-428-848, PD 286, bar code 4051243-01 (Nov. 9, 2020); Pet'r's Rebuttal Br., C-428-848, PD 287, bar code 4051590-01 (Nov. 9, 2020). Between November 20–23, 2020, the parties withdrew their requests for a hearing before Commerce. Final Decision Memo. at 3; see Letter, C-428-848, PD 289, bar code 4055922-01 (Nov. 20, 2020) (withdrawal of BGH's hearing request); Letter, C-428-848, PD 290, bar code 4056121-01 (Nov. 20, 2020) (withdrawal of Petitioners' hearing request); Letter, C-428-848, PD 291, bar code 4056463-01 (Nov. 23, 2020) (withdrawal of GOG's hearing request). Commerce issued the Final Decision Memorandum on December 7, 2020. Final Decision Memo. at 1. On March 29, 2021, BGH filed its complaint under section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(II) and (B)(i) (2018),[4] contesting Commerce's final determination under section 705 of the Tariff Act of 1930, as

[4] Further citations to the Tariff Act of 1930, as amended, are to relevant provisions of Title 19 of the U.S. Code, 2018 Edition ("the Act").

amended, 19 U.S.C. § 1671d. Compl. at 1–2, Mar. 29, 2021, ECF No. 7; see Final Results. BGH filed this motion on October 26, 2021. [BGH]'s Mot. J. Agency R., Oct. 26, 2021, ECF No. 21.

## JURISDICTION AND STANDARD OF REVIEW

The court exercises jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II) (2018) and 28 U.S.C. § 1581(c), which grant the court authority to review actions contesting the final determination of a CVD investigation. The court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

## DISCUSSION

### I. Initiation of the CVD Investigation

BGH alleges Petitioners' CVD petition failed the legal standard for initiation of a CVD investigation. Pl. Br. at 43. Commerce initiates a CVD investigation "after examining, on the basis of sources readily available to the administering authority, the accuracy and adequacy of the evidence provided in the petition" and determining "whether the petition alleges the elements necessary for the imposition of a [CVD] and contains information reasonably available to the petitioner supporting the allegations." 19 U.S.C. § 1671a(c)(1)(A). Commerce includes in its investigation any practice, subsidy, or subsidy program that appears to be a countervailable subsidy. 19 U.S.C. § 1677d(1). Commerce may also include any practice it discovers during

the investigation appearing to provide a countervailable subsidy if sufficient time remains. 19 C.F.R. § 351.311(a)–(b).

Here, Commerce fulfilled its obligations under the statute and regulations in initiating and developing its investigation. Commerce reported using its initiation checklist to analyze the Petitioners' claims for the necessary elements prior to initiating the investigation. Final Decision Memo. at 9; see Enforcement & Compliance Office AD/CVD Operations [CVD] Investigation Initiation Checklist, C-428-848, PD 28, bar code 3928814-01 (Jan. 8, 2020). Although Commerce permitted the Petitioners to amend their petition three times, Pl. Br. at 43–44, Commerce has the discretion to permit amendments to the petition at any time. 19 U.S.C. § 1671a(b)(1); see Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1083 (Ct. Int'l Trade 1988) (stating that a petition "may be amended at such time and upon such conditions as Commerce" may permit). Further, Commerce has an affirmative obligation to seek additional information on any countervailable programs it discovers. See Changzhou Trina Solar Energy Co. v. United States, 195 F. Supp. 3d 1334, 1341–42 (Ct. Int'l Trade 2016); SolarWorld Americas, Inc. v. United States, 125 F. Supp. 3d 1318, 1326–27 (Ct. Int'l Trade 2015).

## II. Ex parte Communications

BGH argues the court should remand Commerce's determination to supplement the record because of ex parte communications between Commerce and several senior officials relating to this case. Pl. Br. at 45–46. Commerce must

maintain a record of any ex parte meeting (i) between "persons providing factual information in connection with a proceeding . . . and the person charged with making the determination" and (ii) "information relating to that proceeding [must be] presented or discussed at such [a] meeting." 19 U.S.C. § 1677f(a)(3). Official government acts are entitled to a "presumption of regularity," which presumes that public officers have properly discharged their duties in the absence of clear contrary evidence. Butler v. Principi, 244 F.3d 1337, 1340 (Fed. Cir. 2001) ("courts . . . presume that what appears regular is regular [and shifts the burden] to the attacker to show the contrary." (citing United States v. Chemical Found., Inc., 272 U.S. 1, 14–15 (1926))). Parties must do more than speculate that ex parte communications occurred; they must establish that a reasonable basis exists to believe that the administrative record is incomplete. Soc Trang Seafood Joint Stock Co. v. United States, 321 F. Supp. 3d 1329, 1342–43 (Ct. Int'l Trade 2018); see Sachs Auto. Prod. Co. v. United States, 17 C.I.T. 290, 292–93, 1993 WL 135845 (1993) (holding that plaintiff failed to meet burden showing a reasonable basis exists to believe ex parte communications had to be included in the record); Saha Thai Steel Pipe Co. v. United States, 661 F. Supp. 1198, 1202–03 (Ct. Int'l Trade 1987) (holding that plaintiffs' allegations of ex parte communications lacked facts demonstrating the reasonable basis test had been met); see also CSC Sugar LLC v. United States, 317 F. Supp. 3d 1322, 1327 (Ct. Int'l Trade 2018) (taking judicial notice of a newspaper article to find a "reasonable basis to believe [that] the record [wa]s incomplete").

BGH fails to establish a reasonable basis to believe ex parte communications occurred in this CVD investigation or that the record is incomplete. Commerce asserts that the record is complete, see Final Decision Memo. at 11, and Commerce is entitled to a presumption of regularity. See Butler, 244 F.3d at 1340. The burden is on BGH to provide evidence that facts relating to the CVD investigation were presented or discussed. See 19 U.S.C. § 1677f(a)(3); Butler, 244 F.3d at 1340. BGH alleges U.S. Representative Mike Kelly participated in an ex parte communication with Commerce regarding this case. See Pl. Br. at 45; BGH Agency Br. at 11. BGH itself asserts, "[t]he administrative record in the related antidumping investigation" contains ex parte communication. Pl. Br. at 45. BGH does not provide specific facts demonstrating this teleconference concerned the CVD investigation. In its briefs, BGH refers to a letter from Rep. Kelly to the Secretary of Commerce, which is not on the record, to argue there was also an ex parte meeting with Dr. Peter Navarro, then-Director of the Office of Trade and Manufacturing Policy, which might relate to the CVD investigation. Pl. Br. at 45–46. BGH only speculates that "[g]iven the large number of Senior Commerce Officials participating in this ex parte telephone conference, including officials responsible for decision-making in this investigation . . . the ex parte meeting is relevant to this [CVD] investigation." See Pl. Br. at 45. Such speculation is inadequate to establish a reasonable basis to believe that the record before the court is incomplete.

## III. The Contested Programs

### A. The Electricity and Energy Tax Acts

BGH argues that provisions in the GOG's Electricity Tax Act and Energy Tax Act are not countervailable because the GOG does not provide a financial contribution, BGH is not receiving a benefit, and the provisions are not specific. See Pl. Br. at 6–20; see also Pl. Reply Br. at 1–13, 16–21. BGH also argues Commerce erroneously calculated the CVD rates under each section of the Electricity Tax Act and the Energy Tax Act. See Pl. Br. at 20–21. The Defendant and the Defendant-Intervenors respond that Commerce's determination that the GOG provided BGH countervailable subsidies under the Electricity and Energy Tax Acts is supported by substantial evidence and is in accordance with law. See Def. Br. at 9, 12–21; Def.-Inter. Br. at 8, 11–19. Defendant and Defendant-Intervenors further argue Commerce appropriately calculated the subsidy rates. See Def.'s Br. at 21–22; Def.-Inter. Br. at 19–20. For the following reasons, Commerce's determination that the challenged provisions of the Electricity and Energy Tax Acts constitute countervailable subsidies is supported by substantial evidence and in accordance with law. However, Commerce failed to support with substantial evidence its calculations of the CVD rate for the provisions of the Electricity Tax Act and the Energy Tax Act.

### 1. Financial Contribution

In order for a subsidy to be countervailable, a foreign government must provide a financial contribution. 19 U.S.C. § 1677(5)(A)–(B). A government makes a financial contribution, inter alia, when it forgoes revenue that is otherwise due. 19 U.S.C. § 1677(5)(D)(ii). The statute does not explicate the phrase "otherwise due," however it is reasonably discernible that Commerce interprets the phrase as a type of "but for" requirement. See Post-Prelim Decision Memo. at 7–9 (noting that because of the specific provisions the government does not collect the full tax); see also Final Decision Memo. at 48–49 (explaining that if the specific provisions relieve a company from having to pay revenue to the government the government forgoes revenue otherwise due). Further, Commerce's interpretation of "otherwise due" makes no distinction between the tax exemption arising from the measure imposing a financial obligation or arising from a separate measure. See, e.g., Countervailing Duties, 63 Fed. Reg. 65348, 65,361 (Dep't Commerce Nov. 25, 1998) (explaining for example that a subsidy given to offset the cost of new environmental requirements is nonetheless a countervailable subsidy assuming it is also specific).

Commerce's interpretation is reasonable. The word "otherwise" means "in different circumstances." Otherwise at Entry 2 of 3, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/otherwise (last visited Sept. 13, 2022). Thus, the word suggests that if the government carves out circumstances where money is not due, it makes a financial contribution. BGH argues that the reduction

in tax liability cannot arise from the same act imposing tax liability. See Pl. Br. at 9–11; see also Pl. Reply Br. at 12–13. Thus, BGH argues that a digressive tax rate provided in a single integrated statute does not reduce taxes because no tax is due under the digressive rate.[5] Pl. Br. at 10. Even if BGH's interpretation were reasonable, BGH fails to demonstrate that Commerce's interpretation is unreasonable. Thus, Commerce's interpretation must be accepted. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843–44 (1984) (holding the court must accept the agency's reasonable interpretation of ambiguous statutory language).

Given Commerce's interpretation of the phrase "otherwise due," it properly determined that the GOG provided a financial contribution to BGH under the provisions of the Electricity and Energy Tax Acts. The Electricity and Energy Tax Acts impose taxes on electricity and energy as well as specific exemptions from those taxes. See Prelim. Decision Memo. at 20–21; Post-Prelim Decision Memo. at 7–9. Sections 9a, 9b, and 10 of the Electricity Tax Act and Sections 51 and 55 of the Energy

[5] BGH invokes the WTO Appellate Body Report in United States –Tax Treatment for Foreign Sales Corporations by quoting, "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." Pl. Br. at 10 (quoting Appellate Body Report, United States – Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities, ¶ 98, WTO Doc. WT/DS108/AB/RW (Jan. 14, 2002)). Appellate Body Reports bind neither the United States nor this court. Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1348–49 (Fed. Cir. 2005); see also Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004).

Tax Act grant tax relief to companies engaged in specific manufacturing processes.[6] See Prelim. Decision Memo. at 20–21; Post-Prelim Decision Memo. at 7–9. To receive tax relief, a company must apply for an exemption under the acts. See Prelim. Decision Memo. at 20–21; Post-Prelim Decision Memo. at 7–9. To qualify for tax relief under Section 10 of the Electricity Tax Act and Section 55 of the Energy Tax Act a company must prove it operates an energy management system or was a registered organization pursuant to Article 13 of Regulation (EC) No 1221/2009 for the application year and met requirements improving energy efficiency.[7] Post-Prelim. Decision Memo. at 8–9.

BGH applied under sections 9a, 9b, and 10 of the Electricity Tax Act and sections 51 and 55 of the Energy Tax Act for reductions of the taxes it would otherwise have to pay. See Prelim. Decision Memo. at 21–22; Post-Prelim. Decision Memo. at

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[6] For example, section 9b provides tax relief of 5.13 Euro per megawatt-hour for electricity used in the manufacturing sector to companies engaged in specific manufacturing processes, Post-Prelim. Decision Memo. at 7, and section 10 of the Electricity Tax Act provides tax relief for companies in the manufacturing sector of up to ninety percent of the electricity tax, where the amount of tax in a calendar year exceeds 1000 Euros. Id. at 8.

[7] Section 51 of the Energy Tax Act grants tax relief for energy used as heating fuel to manufacture and process metals. Prelim. Decision Memo. at 21. Section 55 of the Energy Tax Act permits companies in the manufacturing sector to apply for tax relief based on the amount of natural gas, liquefied petroleum gas, and heating oil. Post-Prelim. Decision Memo. at 9.

7–9.[8] If not for the tax exemption, BGH would owe more money to the GOG. Commerce's determination that these programs provided a financial contribution is in accordance with law and supported by substantial evidence.

**2. Benefit**

BGH challenges Commerce's determination that the Electricity Tax Act and Energy Tax Act relief provisions constitute a benefit to BGH. Where a provision provides an exemption or remission of a tax, or a reduction in the base used to calculate a tax, a benefit exists to the extent the tax paid as a result of the provision is less than the tax the firm would have paid in the absence of the provision. 19 C.F.R. § 351.509(a)(1). Commerce is not required to consider the effect of a subsidy in determining whether a benefit exists. See Statement of Administration Action for the Uruguay Round Agreements Act, H.R. Rep. No. 103-316 (1994), as reprinted in 1994 U.S.C.C.A.N. 4040, 4240 ("SAA") (noting the use of the word "normally" in 19 U.S.C. § 1677(5)(E) is not to suggest that Commerce should or must consider the effect of a subsidy in determining whether there is a benefit). BGH argues for a more narrow interpretation of benefit, arguing these taxes are imposed to decrease

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[8] The Electricity Tax Act imposed a tax of [[ ]] on BGH in 2018. See Data, C-428-848, CD 221, bar code 4062851-02 ("Conf. Data"). The Energy Tax Act imposed a tax of [[ ]] on BGH in 2018. See id. Without the tax rebates, BGH would have paid more in taxes—Commerce determined the total reduction in electricity tax to be [[ ]] and the reduction in energy tax to be [[ ]]. See Prelim. Decision Memo. at 20–22; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6; Conf. Data.

greenhouse gas emissions and not to raise government revenues. Pl. Br. at 11. This argument is unavailing because neither the statute nor the regulation considers the purpose of the tax. See 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.509(a)(1).

In this case, the Electricity and Energy Tax Acts provided BGH relief from taxes on its use of electricity and energy, respectively. See Prelim. Decision Memo. at 20–23; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6–7. Commerce determined the benefit to BGH provided by the Electricity and Energy Tax Acts is the difference in the amount of tax BGH would have paid absent the provisions and the amount BGH actually paid during the period of investigation. See Prelim. Decision Memo. at 21–22; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6–7. BGH argues that the absolute amount of tax it paid as a large energy user is far more than smaller energy users. See Pl. Reply Br. at 12–13. However, the amount of tax paid in absolute terms has no bearing on whether the GOG applied a provision to reduce the amount of tax liability to BGH. Given the record, Commerce reasonably concluded that the reduction of tax BGH would otherwise have paid confers a benefit to BGH. See Prelim. Decision Memo. at 20–22; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6–7; 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.509(a)(1)–(b)(1).

BGH complains that the United States' withdrawal from the Paris Climate Accords improves U.S. competitiveness while BGH is burdened by the GOG measures to comply with the climate accords. Pl. Br. at 11–12. BGH seems to suggest the relative burdens of U.S. manufacturers and German manufacturers should affect Commerce's benefit analysis. Neither the statute nor the regulations allow for such a comparison. Whether the United States has a tax scheme similar to the Electricity and Energy Tax Acts is not pertinent to the determination of benefit under U.S. law. See 19 U.S.C. § 1677(5)(C); 19 U.S.C. § 1677(5)(E) (not requiring evidence of intent to provide a benefit); SAA at 4242 ("it has long been established that intent to target benefits is not a prerequisite for a countervailable subsidy"). Thus, neither Commerce nor the court is at liberty to evaluate the environmental rationale of the GOG's measures or compare them with those of the United States. Requiring consideration or comparison of the measures is a task reserved for Congress. This court must accept the statute as written by Congress. Therefore, Commerce's determination here that the Electricity and Energy Tax Acts provide a benefit is in accordance with law and supported by the record.

**3. Specificity**

BGH contests Commerce's finding that these provisions are both de jure and de facto specific. Where an authority or legislation expressly limits access to a subsidy to a sufficiently small number of enterprises, industries, or groups, the

subsidy is specific as a matter of law.[9] 19 U.S.C. § 1677(5A)(D)(i); see SAA at 4242. The statute provides no precise mathematical formula for determining when the number of enterprises, industries, or groups is so limited as to be de jure specific. SAA at 4242. However, the SAA explains that the specificity provision should be applied as an initial screening method to winnow out only those subsidies that truly are broadly available and widely used throughout an economy. SAA at 4242. Moreover, the statute provides a safe harbor for subsidies that are "not specific as a matter of law." 19 U.S.C. § 1677(5A)(D)(ii). Subsidies are not specific as a matter of law where the legislation governing the provision of the subsidy provides: (1) "objective criteria or conditions governing the eligibility for, and the amount of," the subsidy; (2) "eligibility is automatic;" (3) "the criteria for eligibility are strictly followed;" and (4) "the criteria are clearly set forth in the relevant statute, regulation, or other official document." 19 U.S.C. § 1677(5A)(D)(ii). Objective criteria are criteria that are neutral and do not favor one enterprise or industry over another. Id.; see SAA at 4243. Neutral in this context means economic in nature and horizontal in application, such as the number of employees or the size of the enterprise. SAA at 4243.

[9] The scope of enterprise or industry includes a group of such enterprises or industries. 19 U.S.C. § 1677(5A).

A domestic subsidy is specific to an enterprise or industry as a matter of fact, if

> one or more of the following factors exists: (I) The actual recipients of the subsidy . . . are limited in number. (II) An enterprise or industry is a predominant user of the subsidy. (III) An enterprise or industry receives a disproportionately large amount of the subsidy. (IV) The manner in which the authority . . . exercised discretion in [granting] the subsidy . . . .

19 U.S.C. § 1677(5A)(D)(iii). The plain language of the statute empowers Commerce to rely upon only one factor. Id. ("if one or more of the following factors exists"). Although the SAA states, "the Administration intends that Commerce seek and consider information relevant to all of these factors," SAA at 4243, it acknowledges that each case will be unique, and Commerce will find de facto specificity should one or more factors exist. Id.; 19 U.S.C. § 1677(5A)(D)(iii). Moreover, Commerce's regulation explicitly states, "If a single factor warrants a finding of specificity, [Commerce] will not undertake further analysis." 19 C.F.R. § 351.502(a).

Here, Commerce determined that section 9a of the Electricity Tax Act and section 51 of the Energy Tax Act are specific as a matter of law because they are limited to specific products and manufacturing processes. Final Decision Memo. at 41. BGH claims that the rate reductions are open to "all companies in the manufacturing sector," spanning 225 diverse industries. Pl. Br. at 14, Commerce reasonably supported its determination by explaining that only those "industries

identified in the text of each law" were eligible for relief.[10] Final Decision Memo. at 41.

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[10] The tax in the Electricity Tax Act for

> demonstrably taxed electricity which a company in the manufacturing sector has withdrawn shall, upon application, be remitted, reimbursed or refunded
>
> 1. for electrolysis,
>
> 2. to produce glass and glassware, ceramic products, ceramic wall and floor tiles and panels, bricks, tiles and construction products in baked clay, cement, lime and burnt gypsum, products from concrete, cement and plaster, vitrified-bonded abrasives, mineral insulating materials and products from mineral insulating materials, mineral catalyst supports, goods made of asphalt and bituminous products, goods made of graphite or other carbon, and aerated concrete products for drying, firing, melting, heating, keeping warm, expanding, tempering or sintering the above-mentioned products or the semi-finished products used in their production,
>
> 3. to produce and work metals as well as, within the context of the production of metal products, to produce forging, pressing, drawing and stamping parts, roll forms and powder metallurgy products and for the treatment and coating of metals, and for heat treatment for melting, heating, keeping warm, expanding respectively or other forms of heat treatment, or
>
> 4. for chemical reduction purposes.

Electricity Tax Act, § 9a, at 9–10, C-428-848, PD 158, bar code 3962318-06. Upon application under the Energy Tax Act, tax relief shall be granted for taxes on coal, petroleum coke, gas oils, or other solid energy products

> which have been used as heating fuel
>
> 1. by a company in the manufacturing sector within the meaning of section 2 number 3 of the Electricity Tax Act . . .
>
> a) to produce glass and glassware, ceramic products, ceramic wall and floor tiles and panels, bricks, tiles and construction products in baked clay, cement, lime and burnt gypsum, products from

(footnote continued)

Commerce's determination of de facto specificity is also in accordance with law and supported by substantial evidence. Commerce found that sections 9b and 10 of the Electricity Tax Act and section 55 of the Energy Tax Act are de facto specific because actual use of the provisions was limited to a percentage of the economy as a whole. See Final Decision Memo. at 43–45; Post-Prelim. Determination at 7–9.[11] Specifically, Commerce noted that tax relief under section 9b was limited to 33,192 of the 231,063 companies in the manufacturing sector, or fourteen percent of users. Final Decision Memo. at 44–45; Post-Prelim. Determination at 7. Under section 10, tax relief was limited to 9,409 of the 231,063 companies in the manufacturing sector, or four percent of users. Final Decision Memo. at 44–45; Post-Prelim. Decision Memo.

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> concrete, cement and plaster, vitrified-bonded abrasives, mineral insulating materials and products from mineral insulating materials, mineral catalyst supports, goods made of asphalt and bituminous products, goods made of graphite or other carbon, and aerated concrete products for drying, firing, melting, heating, keeping warm, expanding, tempering or sintering the above-mentioned products or the semi-finished products used in their production,
>
> b) to manufacture and process metals as well as within the context of manufacturing metal products to manufacture forging, pressing, drawing and stamping parts, roll forms and powder metallurgy products and for surface refinement and heat treatment,
>
> c) for chemical reduction purposes,
>
> d) simultaneously for heating purposes and for purposes other than for use as heating fuel or motor fuel,
>
> 2. for the thermal treatment of waste or exhaust air.

Energy Tax Act, § 51, at 48, C-428-848, PD 158, bar code 3962318-06.

[11] As BGH notes, Commerce did not determine de facto specificity on section 9a. Pl. Br. at 17 n.6; see Prelim. Decision Memo. at 20–21; Final Decision Memo. at 41–42.

at 8. Under section 55 of the Energy Tax Act, Commerce found that 5,448 of 231,063 companies received tax relief. Post-Prelim. Decision Memo. at 9. That the actual number of users is greater than in previous cases where Commerce concluded no specificity, see Pl. Br. at 19–20 (discussing Preliminary Affirmative [CVD] Determination and Preliminary Negative Critical Circumstances Determination, 67 Fed. Reg. 5,991 (Dep't of Commerce Feb. 8, 2002) (carbon and certain alloy steel wire rod from [FRG]) ("Steel Wire Rod from Germany"), and accompanying Issues and Decision Memo. (Aug. 23, 2002) (final determination [CVD] investigation of carbon and certain alloy steel wire rod from [FRG]), is of no moment here. It is reasonably discernable from Commerce's consideration of the percentage of use for sections 9b and 10 of the Electricity Tax Act and section 55 of the Energy Tax Act that Commerce concludes whether the number of users is sufficiently small such that a program is de facto specific relates not only to the number of users in absolute terms, but also to the portion of the economy that number represents. See Final Decision Memo. at 43–44. Given the purpose of the specificity analysis, Commerce's determination is reasonable. See SAA at 4242 (the specificity test functions "as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy").

### 4. CVD Rate Calculation

BGH argues that Commerce's calculation is contrary to law and unsupported by substantial evidence because Commerce failed to consider the absolute value of the total energy taxes it paid and did not consider expenses it incurred to receive the subsidy. See Pl. Br. at 20. Defendant-Intervenors argue that BGH fails to support its claims with evidence as required by 19 U.S.C. § 1677(6). Def.-Inter. Br. at 20.

The benefit of a countervailable subsidy in the form of tax relief is equal to the difference in the tax amount the firm would have paid absent the provision and the amount it actually paid during the period of investigation. 19 C.F.R. § 351.509(a)(1) & (b)(1). Neither the statute nor the regulations require or allow Commerce to assess a taxpayer's total tax paid in comparison to other taxpayers. See 19 U.S.C. § 1677(5); 19 C.F.R. §§ 351.503, 351.509. Further, the statute allows Commerce to deduct from the gross countervailable subsidy the amount of any fee, deposit, or similar payment paid to qualify for the benefit of the countervailable subsidy. 19 U.S.C. § 1677(6)(A).

Here, Commerce determined the tax savings for the five provisions of the Electricity and Energy Tax Acts and treated them as a recurring benefit under 19 C.F.R. § 351.524(c)(1). Prelim. Decision Memo. at 21–22; Post-Prelim. Decision Memo. at 7–9; Final Decision Memo. at 6–7. For each provision, Commerce divided the benefit during the period of investigation by the total sales for BGH to arrive at the CVD rate. Prelim. Decision Memo. at 21–22; Post-Prelim. Decision Memo. at 7–

9; Final Decision Memo. at 6–7.[12] BGH argues Commerce, in its CVD rate calculation, should have accounted for the absolute value of the total energy taxes BGH paid in comparison to other customers. See Pl. Br. at 20. However, Commerce's regulations require Commerce to calculate the difference in tax BGH would have paid absent the countervailable provisions and do not require it to account for the absolute amount of tax paid in comparison to other customers. See 19 C.F.R. § 351.509(a)(1). Therefore, Commerce's determination that it need not consider the absolute value of the total energy taxes is reasonable.

BGH also argues that Commerce did not consider the costs of complying with the provisions of the Electricity and Energy Tax Acts in its subsidy calculations. Pl. Br. at 20-21. In its brief before the agency, BGH raised the cost of compliance, stating, "Commerce also failed to properly account for all the costs related to complying with the various climate change measures," providing as an example "an energy management system" under section 10 of the Electricity Tax Act.[13] BGH Agency Br.

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[12] For section 9a of the Electricity Tax Act, Commerce determined a rate of 0.81% ad valorem for BGH during the period of investigation. Prelim. Determination at 21; Final Decision Memo. at 6. Commerce determined a rate of 0.07% ad valorem under section 9b and 0.19% ad valorem under section 10. Post-Prelim. Determination at 7–8; Final Decision Memo. at 6. For section 51 of the Energy Tax Act, Commerce determined a rate of 0.57% ad valorem. Prelim. Determination at 22; Final Decision Memo. at 7. For section 55 of the Energy Tax Act, Commerce determined a rate of 0.01% ad valorem. Post-Prelim. Determination at 9; Final Decision Memo. at 7.

[13] Also as discussed above, Section 10 of the Electricity Tax Act and Section 55 of the

(footnote continued)

at 8–9. Commerce did not address BGH's argument in the Final Decision Memo. See Final Decision Memo. at 1–2, 39–45. Defendant-Intervenors argue BGH failed to support its claims with evidence, see Def.-Inter. Br. at 20; however, because Commerce did not address these costs, the court will not speculate what Commerce might have concluded.[14] The court remands this issue to Commerce for it to consider in the first instance. Commerce may consider whether it wishes to reopen the record to permit the parties to submit evidence on BGH's costs of compliance.

### B. The EEG and KWKG Reduced Surcharge Programs

BGH argues the reductions of the EEG and the KWKG surcharges under the Special Equalization Scheme ("SES") do not provide a financial contribution by the GOG or a benefit to BGH under the law. Pl. Br. at 22–25. BGH also argues Commerce misapplied the standard in finding de jure specificity. Id. at 25–29. Finally, BGH challenges Commerce's calculation of the subsidy rate for the SES' reduction of the EEG and KWKG surcharges. Id. at 29–30. In response, the

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Energy Tax Act require a company to prove it operates an energy management system or was a registered organization pursuant to Article 13 of Regulation (EC) No 1221/2009 for the application year and meet requirements for improving energy efficiency.

[14] Commerce notes that the GOG "states that tax relief is only granted if the applying company proves that it operated an energy management system or was a registered organization pursuant to Article 13 of the Regulation (EC) No 1221/2009 for the application year." Post-Prelim. Decision Memo. at 8. However, Commerce did not address operation of an energy management system as a cost of compliance in calculating the CVD rate. See Prelim. Decision Memo. at 22; Post-Prelim. Decision Memo. at 8; Final Decision Memo. at 6–7.

Defendant and the Defendant-Intervenors argue the SES constitutes a financial contribution by the GOG and benefit to BGH that is de jure specific. Def. Br. at 24–29; Def.-Inter. Br. at 21–24. The Defendant and Defendant-Intervenors also argue that Commerce properly calculated the CVD rate for this program. Def. Br. at 29–30; Def.-Inter. Br. at 24–25. For the following reasons, Commerce's determination of a countervailable subsidy and its calculation of the CVD rate under these provisions are supported by substantial evidence and are in accordance with law.

**1. Financial Contribution**

As previously discussed, a government makes a financial contribution when it forgoes revenue that is otherwise due. 19 U.S.C § 1677(5)(D)(ii). A government also makes a financial contribution where it 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). The SAA clarifies that a private entity "is not necessarily limited to a single entity, but can include a group of entities or persons," SAA at 4239, and "the 'entrusts or directs' standard shall be interpreted broadly" to avoid "the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry." Id.

Here, Commerce properly determined the GOG made a financial contribution to BGH. The EEG and KWKG surcharges are mechanisms to distribute among electricity consumers the cost of promoting renewable energy sources. Prelim.

Decision Memo. at 22; Post-Prelim. Decision Memo. at 10. Under the EEG, network operators of all voltage levels ("NOs") must connect to and prioritize installations producing EEG electricity. Prelim. Decision Memo. at 22. The GOG sets EEG electricity tariffs, which NOs must pay EEG installation operators. Id. The NOs sell EEG electricity at prices prevailing on the spot market, which is frequently less than the legally mandated price paid to the installation operators. Id. at 22–23. Final customers pay the difference in the form of the EEG surcharge. Id. at 23.[15] The scheme for distribution of CHP electricity under the KWKG program is identical to that for EEG electricity. See id.

The SES provides that the GOG can certify final customers as electricity-intensive undertakings ("EIUs") in the manufacturing sector, and those EIUs are entitled to a reduction in their EEG surcharge. Prelim. Decision Memo. at 22–23. The EIUs receiving a reduction of the EEG surcharge then also automatically qualify for a reduction of their payments of the KWKG surcharge. Post-Prelim. Decision Memo. at 10–11. The reduction in EEG surcharges for EIUs causes a higher EEG surcharge for other customers. Prelim. Decision Memo. at 23. Similar to its reduction and redistribution of the EEG surcharge, the GOG uses the KWKG surcharge to allocate the costs of expanding high efficiency combined heat and power ("CHP")

[15] The NOs are not required to pass along the EEG surcharge to the final customer, but the parties agree that they usually do. Oral Argument at 17:10–19:10, July 28, 2022.

plants among final customers. Post-Prelim. Decision Memo. at 10. Commerce determined, through this scheme, the GOG promotes production of EEG energy while relieving EIUs from the effect of the scheme's higher costs of energy. Prelim. Decision Memo. at 24. Promoting production of EEG energy while allocating costs of that production accomplishes public policy objectives—a function normally vested in the government. See 19 U.S.C. § 1677(5)(B)(iii). The SES constitutes a financial contribution in the form of revenue forgone because the GOG directed the private entities not to collect the surcharges for EEG and CHP energy to BGH based on its status as an EIU and permitted those private entities to reallocate the cost of granting reduced surcharges to other final customers.

BGH argues that Commerce fails to explain how the private entities are forgoing any revenue, noting that the entities fully recoup their costs. Pl. Br. at 23; Pl. Reply Br. at 13–14. A subsidy exists when an authority entrusts a private entity to "provide a financial contribution . . . to a person," 19 U.S.C. § 1677(5)(B)(iii), and therefore it is irrelevant whether an entity recoups that contribution from another person. See id.

BGH argues that Commerce failed to establish that calculating and recouping the additional costs of renewable energy would normally be vested in the government. Pl. Br. at 24; see 19 U.S.C. § 1677(5)(B)(iii). On the contrary, Commerce determined that, by implementing the SES, the GOG relieved EIUs from higher electricity costs associated with encouraging the production of renewable energy, which Commerce

reasonably determined are functions normally performed by the government. See Prelim. Decision Memo. at 24.[16] Commerce's determination that the SES provides a financial contribution is in accordance with law and on this record is reasonable.

**2. Benefit**

Commerce determined the SES provides a benefit to BGH under 19 C.F.R. § 351.503(b)(2). Prelim. Decision Memo. at 25; Post-Prelim. Decision Memo. at 12. When a benefit does not take the form of a reduction of input costs or an enhancement of revenues, Commerce will determine whether a benefit is conferred by examining whether the alleged program or practice has common or similar elements to the following examples: equity infusions, favorable loan terms, favorable loan guarantees, and goods and services provided for less than adequate remuneration. 19 C.F.R. § 351.503(b)(2); 19 U.S.C. § 1677(5)(E)(i)–(iv). Here, the EEG and KWKG surcharges increased the cost of energy BGH needed to buy. As an EIU, BGH qualified for a reduction of the EEG and KWKG surcharges. The reduction of the surcharges lowered BGH's energy costs. Because BGH was able to receive energy for a lesser cost, Commerce's determination that BGH received a benefit was reasonable.

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[16] As it did with the Electricity and Energy Tax Acts, BGH argues taxes cannot be "otherwise due" if an exemption is included in the same provision imposing the tax burden. See Pl. Br. at 23–24 (stating that the EEG "is one integrated law and all of its provisions are integrally linked together and have been since the inception of the Act," which is also true for the KWKG); 19 U.S.C. § 1677(5)(D)(ii). For the reasons discussed above, that argument fails here as well.

BGH argues it received no benefit under the EEG or the KWKG because the very existence of the surcharges significantly increased its electricity costs. Pl. Br. at 25; see Pl. Reply. Br. at 16–19. BGH cites no authority for its argument. See Pl. Br. at 25; see also 19 U.S.C. § 1677(5)(E); 19 C.F.R. § 351.503(b)(2). The program at issue here is the reduction of the surcharges, rather than the imposition of the surcharges in the first instance. Commerce reasonably determined BGH received a benefit in the form of reduced EEG and KWKG surcharges.

**3. Specificity**

Commerce's determination of de jure specificity for the SES' reductions of the EEG and KWKG surcharges is reasonable. Where the authority providing the subsidy expressly limits access to the subsidy to an enterprise or industry or group of enterprises or industries, the subsidy is specific as a matter of law. 19 U.S.C. § 1677(5A)(D)(i). If an authority providing the subsidy establishes objective criteria or conditions governing the eligibility for a subsidy, the subsidy is not specific as a matter of law, if eligibility is automatic and the criteria or conditions are strictly followed and clearly set forth in the relevant statute, regulation, or other official document. 19 U.S.C. § 1677(5A)(D)(ii). Objective criteria or conditions are criteria or conditions that are neutral and that do not favor one enterprise or industry over another. Id.

Commerce's determination that the GOG expressly limited access to the subsidy using non-objective criteria is supported by the record. See Final Decision Memo. at 29; see also Resp. [FRG] and the Fed. Ministry for Economic Affairs and Energy of the [FRG] to Section II of the Initial Questionnaire at Ex. EEG(SCS)-03, at Annex 4, at 161–71 (pdf 403–13), C-428-848, PD 159, bar code 3962318-07 (Apr. 6, 2020) ("IQR 4-6-20"). Commerce determined energy intensive criteria favored enterprises or industries requiring large amounts of electricity and exposed to international competition.[17] Final Decision Memo. at 29.

BGH argues that the SES' reductions are granted to companies based on objective criteria—the amount of each company's energy use. Pl. Br. at 26. In describing subsidies that may fall into the safe harbor of 19 U.S.C. § 1677(5A)(D)(ii), the SAA defines objective criteria as neutral criteria and neutral criteria as "economic in nature and horizontal in application, such as the number of employees or the size of the enterprise." SAA at 4243. Commerce does not address whether energy usage could be economic in nature and horizontal in application. Nonetheless, the SAA cautions that such criteria may not favor some enterprises or industries over others. See SAA at 4243. Here, Commerce determined, and the record supports, that the

[17] EIUs seeking a reduction in the surcharges are required to submit applications to the Federal Office for Economic Affairs and Export Control ("BAFA"), which reviews the application and either issues a notice declaring the surcharge is capped or rejects the application. Post-Prelim. Decision Memo. at 10–11; Final Decision Memo. at 22. BAFA is part of the GOG, specifically the Federal Ministry for Economic Affairs and Energy. IQR 4-6-20 at Ex. EEG(SCS)-01, at 5 (pdf 9).

criteria favored enterprises using large amounts of electricity, which are exposed to trade competition. See Final Decision Memo. at 29; see also IQR 4-6-20 at Ex. EEG(SCS)-03, at Annex 4, at 161–71 (pdf 403–13). Annex 4 lists specific industries eligible for the SES' reductions. Id. Therefore, Commerce's determination that the program is specific as a matter of law is reasonable on this record.

**4. CVD Rate Calculation**

BGH argues Commerce's calculation of the CVD rate for the benefit provided by the SES is contrary to law because Commerce cannot apply the base surcharge rates to BGH's full electricity usage and disregard BGH's high electricity consumption relative to other electricity customers. Pl. Br. at 30. BGH also argues Commerce must consider the cost BGH incurs to qualify for the subsidy. Id.

Neither the statute nor the regulations require or allow Commerce to assess a taxpayer's total tax paid in comparison to other taxpayers. See 19 U.S.C. § 1677(5); 19 C.F.R. §§ 351.503, 351.509. The statute allows Commerce to deduct from the gross countervailable subsidy the amount of any fee, deposit, or similar payment paid to qualify for the benefit of the countervailable subsidy. 19 U.S.C. § 1677(6)(A).

Here, Commerce determined how much the total EEG surcharge BGH should have paid by applying the cents per kilowatt-hour EEG surcharge to the total kilowatt-hour consumption during the period of investigation. Prelim. Decision Memo. at 25. To determine the benefit during the period of investigation, Commerce subtracted the amount of EEG surcharge BGH actually paid from the total EEG

surcharge. Id. Commerce divided the benefit by BGH's total sales for that period. Id. Commerce determined a rate of 3.82 ad valorem for BGH. Id.; see Final Decision Memo. at 30. Commerce likewise calculated the KWKG benefit by applying the cents per kilowatt-hour surcharge to the total kilowatt-hour consumption. Post-Prelim. Decision Memo. at 12. Commerce subtracted from this total the amount of KWKG surcharge BGH actually paid, and then divided that benefit by the total sales for BGH. Id. Commerce determined a rate of 0.17 ad valorem for the KWKG surcharge reduction. Id. Commerce's determination accords with the law and is reasonable.

### C. The EU ETS Additional Free Emissions Allowances

BGH argues that Commerce's determination that the allocation of additional free allowances for carbon emissions to BGH under the EU's Emissions Trading System ("ETS") are a financial contribution and a benefit to BGH is contrary to law. Pl. Br. at 30–34. BGH further argues that Commerce's determination that the program is de jure specific is contrary to law and that Commerce's CVD rate calculations are not supported by substantial evidence. Id. at 34–38. In response, Defendant and Defendant-Intervenors assert that Commerce's determination that the additional free allowances given to BGH constitute a countervailable subsidy is in accordance with the law, Def. Br. at 30–34; Def.-Inter. Br. at 25–29, and that Commerce's CVD rate calculation is supported by substantial evidence. Def. Br. at 34–35; Def.-Inter. Br. at 29–31. For the following reasons, Commerce's determination that the additional free emissions allowances given to BGH under the ETS is a

countervailable subsidy and its CVD rate calculation are supported by substantial evidence and in accordance with law.

### 1. Financial Contribution

A government makes a financial contribution when it forgoes revenue which is otherwise due. 19 U.S.C. § 1677(5)(D)(ii). Under this standard, Commerce reasonably determined the distribution of additional free carbon emissions allowances to companies on Germany's carbon leakage list, including BGH, to be a financial contribution.

Under the ETS, the EU requires companies emitting large amounts of greenhouse gas into the atmosphere to reduce their emissions and to surrender emissions allowances for the carbon they emitted in the previous year. Prelim. Decision Memo. at 25. These companies obtain allowances (1) freely from their government, (2) by purchasing allowances through an EU-regulated auction, or (3) by purchasing from private companies on a secondary market. Id. at 25–26. All companies other than power stations are given allowances to cover 44.2% of the emissions of the most efficient companies in each sector ("benchmark installations"). Id. at 26. States distribute free allowances according to a complex calculation based on the benchmark installations. Id. at 25–26. For certain large companies at significant risk of carbon leakage, i.e., being unable to cover the higher environmental costs of compliance under the ETS ("carbon leakage list" companies), the state provides additional free allowances to meet 100% of the allowances needed by the

benchmark installations. Id. at 26.[18] If an installation is not able to cover its emissions using only the freely allotted allowances, the installation must purchase additional allowances from the government auction or a private party or invest in technological improvements to reduce its emissions. Id. at 27.

Commerce determined BGH was relieved of having to purchase some number of additional allowances because of the additional free allowances. See Final Decision Memo. at 49; Prelim. Decision Memo. at 25–27. As a company on the carbon leakage list during the period of investigation, BGH received additional freely allocated emissions allowances beyond the standard rate of allocation. See Final Decision Memo. at 49; Prelim. Decision Memo. at 25–27. Specifically, BGH received allowances equaling 100% of the emissions of the benchmark installations. If BGH were not on the carbon leakage list, it would have only received 44.2% of the emissions of benchmark installations. See Final Decision Memo. at 48–49; Prelim. Decision Memo. at 25–27. The number of additional allowances BGH received as a result of being on the carbon leakage list is the number of the allowances BGH did not have to purchase and therefore revenue the government did not collect. Final Decision Memo. at 49–50 (finding that the companies on the carbon leakage list did not have to purchase additional allowances from the government, and thus the government

[18] Whether an industry is considered at significant risk of carbon leakage is determined by criteria tied to the increase in production cost induced by implementation of the ETS and to the sector's trade intensity with non-EU countries. Prelim. Decision Memo. at 26.

had given up its right to collect revenue); Prelim. Decision Memo. at 25–27. BGH erects a straw man to argue neither the EU nor any member state may collect revenues on the free allowances generally. See Pl. Br. at 33. The issue is not whether the GOG can sell the free allowances to companies, rather the issue is whether the GOG forgoes revenue when it gives additional free allowances to companies on the carbon leakage list like BGH, reducing the number of allowances BGH must purchase at the state-run auction or the secondary market.

**2. Benefit**

When a benefit does not take the form of a reduction of input costs or an enhancement of revenues, Commerce will determine whether a benefit is conferred by examining whether the alleged program or practice has common or similar elements to the following examples: equity infusions, favorable loan terms, favorable loan guarantees, and goods and services provided for less than adequate remuneration. 19 C.F.R. § 351.503(b)(2); 19 U.S.C. § 1677(5)(E)(i)–(iv). Here, Commerce found that BGH was relieved of the obligation to pay for the additional emissions allowances it was given because it was on the carbon leakage list. Final Decision Memo. at 49. Instead, the GOG provided them to BGH at no cost. BGH argues it is incurring additional costs because it is required to purchase emission allowances at all, which is an obligation significantly increasing its energy costs. Pl. Br. at 33. However, Commerce determines benefit by the reduction or elimination of the obligation, without regard to the source of that obligation. See, e.g.,

Countervailing Duties, 63 Fed. Reg. 65348, 65,361 (Dep't Commerce Nov. 25, 1998) (explaining for example that a subsidy given to offset the cost of new environmental requirements is nonetheless a countervailable subsidy assuming it is also specific). Due to receiving the additional free allowances, BGH received something for free—allowances BGH otherwise would have been required to pay to acquire at auction or on the private market.

**3. Specificity**

Commerce reasonably determined the ETS additional free allowances program is de jure specific because it is expressly limited to a group of companies. Commerce found eligibility for this subsidy to be limited by law to the companies on the carbon leakage list. Final Decision Memo. at 50; see 19 U.S.C. § 1677(5A)(D)(i); see also Prelim. Decision Memo. at 26–27. BGH characterizes Commerce's de jure specificity determination as an unlawful rule of universal availability. Pl. Br. at 34. However, the standard employed by Commerce is found in the statute. See 19 U.S.C. § 1677(5A)(D)(i) ("[T]he subsidy is specific as a matter of law . . . [w]here the authority [or legislation] providing the subsidy . . . expressly limits access to the subsidy to an enterprise or industry . . ." or to a group of enterprises or industries).

BGH also argues that free allowances are granted to companies based on objective criteria—each company's risk of carbon leakage. Pl. Br. at 35. However, not all companies subject to the ETS are eligible to be on the carbon leakage list. See Ex. ETS SQ 3 DE at Art. 10a ¶¶ 12–17, C-428-848, CD 134, barcode 3969270-02 (Apr.

28, 2020) (describing selection criteria to determine which sectors or subsectors subject to the ETS are at significant risk of carbon leakage); see also ETS Ex. 4 at Annex, C-428-848, PD 118, barcode 3958462-06 (Mar. 26, 2020) ("a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage for the period of 2015–2019"). The statute requires objective criteria to be neutral—the criteria must not favor certain industries over others. 19 U.S.C. § 1677(5A)(D)(ii); see SAA at 4243. It is reasonably discernible that Commerce determined the restrictions of the carbon leakage list to favor certain enterprises or industries or groups of certain industries or enterprises. See Final Decision Memo. at 49–50 ("we find this program is de jure specific under [the Act] because eligibility for this subsidy is limited by law to companies on the carbon leakage list"); see also Resp. from Delegation of [EU] to [Commerce] Pertaining to [EC] at ETS Questionnaire Reply at 9, C-428-848, PD 117, bar code 3958462-05 (Mar 26, 2020) ("Industrial installations covered under the EU ETS free allocation must belong to one of the following two categories: industrial installations . . . at significant risk of carbon leakage (which get 100% free allowances based on the average of the 10% most efficient installations) or industrial installation in other sectors (which get decreasing level of free allowances)").

**4. CVD Rate Calculation**

Commerce found that the allocation of additional free allowances is a financial contribution in the form of revenue forgone. Final Decision Memo. at 47–48. In contrast, Commerce found that the free allowances provided to all companies is not a

countervailable subsidy. See Prelim. Decision Memo. at 25–27. When calculating the benefit, Commerce only calculated the additional allowances each company received as a result of being on the carbon leakage list. Final Decision Memo. at 49. Commerce properly calculated the CVD rate based only on the additional free emissions allowances the GOG gave to BGH during the period of review by multiplying the total amount of additional free allowances given to BGH by the price BGH would have paid for those allowances had BGH been required to purchase them and then dividing that total by BGH's total sales value to reach a CVD rate of 0.05% ad valorem. See Prelim. Decision Memo. at 27.

BGH alleges Commerce miscalculated the free allowances BGH used to cover its emissions.[19] Pl. Br. at 38. BGH argues it purchased ETS allowances and

[19] The Defendant contends BGH failed to exhaust its argument that Commerce used the wrong number of allowances because BGH did not raise that argument in its administrative case brief or as a ministerial error after the final determination. Def. Br. at 34–35. The court has discretion whether to require the exhaustion of administrative remedies. See 28 U.S.C. § 2637(d) (the court "shall, where appropriate, require the exhaustion of administrative remedies"). See also Boomerang Tube LLC v United States, 856 F.3d 908, 912–13 (Fed. Cir. 2017); Corus Staal BV v. United States, 502 F.3d 1370, 1379 (Fed. Cir. 2007). Nonetheless, where a party does not have a fair opportunity to raise a claim at the administrative level, the exhaustion doctrine does not preclude the claim. See Qingdao Taifa Group Co., Ltd. v. United States, 637 F. Supp. 2d 1231, 1237 (Ct. Int'l Trade 2009) (holding that plaintiff lacked a fair opportunity to challenge issues because Commerce raised those issues after the deadline for case briefs had passed). Here, Commerce issued its Post-Preliminary Decision on October 22, 2020, over four months after its Preliminary Decision on May 19, 2020. Post-Prelim. Decision Memo. at 1; Prelim. Decision Memo. at 1. Commerce then set a one-week period for the parties to provide responsive case

(footnote continued)

certificates in 2018, and it only needed free allowances to cover a minimal amount of its emissions in 2018. See id.[20] That BGH purchased additional allowances during the period of investigation is irrelevant to Commerce's CVD rate calculation. Instead, it is the number of additional free allowances the GOG provided to BGH during the period of investigation that is relevant to Commerce's CVD rate calculation. See 19 U.S.C. § 1667(5)(E); 19 C.F.R. § 351.503(b)(2) (noting Commerce "will determine whether a benefit is conferred by examining whether the alleged program or practice has common or similar elements to the four illustrative examples in sections 771(5)(E)(i) through (iv) of the Act"). Because Commerce calculated BGH's benefit using the number of additional free allowances given to BGH by the GOG, see Prelim. Decision Memo. at 27; Final Decision Memo. at 49, Commerce's benefit calculation is supported by substantial evidence and is in accordance with law.

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briefs to the agency. At the same time, Commerce also issued a questionnaire in the related antidumping duty investigation on October 20, 2020. See Extension Req. at 1, C-428-848, PD 279, bar code 4047218-01 (Oct. 30, 2020). BGH requested a four-day extension, and Commerce denied it. See Denial of Extension Req. at 1, C-428-848, PD 280, bar code 4047409-01 (Oct. [30], 2022); see also BGH Agency Br. at 2. Commerce does not dispute BGH's account of the timeline. Under these circumstances, BGH had insufficient time to review changes to the Preliminary Decision prior to filing its brief. Given the timeline of events, which Defendant does not dispute, it would be inappropriate to require exhaustion for this issue.

[20] BGH states it purchased [[ ]] allowances in 2018. Confidential [BGH] Rule 56.2 Memo. Supp. Mot. J. Agency. R. at 38, Oct. 26, 2021 (ECF No. 23). BGH argues it needed [[ ]] allowances to cover its emissions in 2018, leaving a balance of only [[ ]] to be covered by free allowances. Id.

### D. $CO_2$ Compensation Program

BGH does not expressly argue the $CO_2$ Compensation Program provides a financial contribution but instead alleges the program does not provide a countervailable benefit and only offsets the burden imposed on BGH by the ETS. Pl. Br. at 39. BGH argues that in any case the program is neither de jure nor de facto specific. Id. BGH also argues Commerce miscalculated any benefit because it fails to account for BGH's significantly increased energy costs. Pl. Reply Br. at 18. In response, the Defendant and Defendant-Intervenors argue the program provides a countervailable benefit and is de jure specific. Def. Br. at 35–37; Def.-Inter. Br. at 31–32. For the following reasons, Commerce's determination that the program constitutes a countervailable subsidy and its calculation of the CVD rate are supported by substantial evidence and are in accordance with law.

#### 1. Financial Contribution

Commerce reasonably found the $CO_2$ Compensation Program provided a direct transfer of funds. See Post-Prelim. Decision Memo. at 6. A financial contribution under the Act can be provided by a direct transfer of funds, such as grants, loans, and equity infusions. 19 U.S.C. § 1677(5)(D)(i). Commerce determined that section 10a(6) of the ETS Directive and the 2012 Communications from the EC permit member states to compensate sectors at substantial risk for carbon leakage for their higher

electricity costs caused by the burden of the ETS on electricity producers.[21] Post-Prelim. Decision Memo. at 6. The German Emissions Trading Authority ("GETA") administers the $CO_2$ Compensation Program. Id. Under this program, companies on the carbon leakage list, like BGH, apply to GETA for compensation of its higher energy costs from the previous year, which approves companies and pays them directly.[22] Id. Here, Commerce determined the GOG directly transferred funds to BGH under this program. See Post-Prelim. Decision Memo. at 6. BGH does not dispute it received funds from the GOG. See id.; Pl. Br. at 39–40.

**2. Benefit**

Commerce determined the $CO_2$ Compensation Program is a grant in the form of a direct transfer of funds and the benefit is the amount of the grant. See Post-Prelim. Decision Memo. at 6; 19 U.S.C. § 1677(5)(D)(i); 19 C.F.R. § 351.504(a). Here, BGH received payment in compensation for higher electricity costs it would not have received without the $CO_2$ Compensation Program. BGH argues that the amount of the grant must be offset by the governmental burden imposed. Pl. Br. at 39. Commerce rejected BGH's argument because it analyzes each program independently

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[21] The ETS program prohibits electricity producers from receiving any free allowances, so the electricity producers must purchase allowances for all of their emissions, passing the cost on to final customers like BGH in the form of higher prices. Prelim. Decision Memo. at 26 & n.133; Post-Prelim. Decision Memo. at 6.

[22] After firms like BGH are approved by GETA, "funds are administered directly to the company's bank account." Id.

without considering what impact one program may have on another, Final Decision Memo. at 50–51, which is reasonable under the statute. See 19 U.S.C. § 1677(5)(B).

**3. Specificity**

Commerce reasonably determined the $CO_2$ Compensation Program subsidy to be de jure specific. See Post-Prelim. Decision Memo. at 6; Final Decision Memo. at 51. Similar to the ETS Additional Free Emissions Allowances program, Commerce found the eligibility for this subsidy to be limited by law to the companies on the carbon leakage list. Final Decision Memo. at 51; see 19 U.S.C. § 1677(5A)(D)(i). For the reasons discussed above concerning the ETS Additional Free Emissions Allowances program, the court concludes Commerce's determination is supported by substantial evidence here as well.

**4. CVD Rate Calculation**

BGH alleges Commerce "must consider the absolute amount of taxes/surcharges paid in comparison to other customers." Pl. Reply Br. at 18. BGH's argument is unavailing because companies on the carbon leakage list ultimately paid less for electricity than companies not on the list. See Final Decision Memo. at 50–51. BGH provides no authority for its argument that Commerce must consider the absolute amount of taxes/surcharges paid in comparison to other customers. Commerce determined that, under 19 C.F.R. § 351.504(a), the benefit of this program is equal to the amount provided to BGH. Post-Prelim. Decision Memo. at 7.

Commerce then divided this amount by BGH's total sales, determining its CVD rate to be 0.12% ad valorem. Id. Commerce's determination is reasonable.

### E. The KAV Program

BGH argues the KAV Program does not provide a financial contribution or benefit to BGH and that the KAV Program is not specific because, inter alia, any company can enter into a special contract with a private NO. See Pl. Br. at 40–43. In response, Defendant and Defendant-Intervenors argue Commerce lawfully determined the GOG entrusted and directed the NOs through the KAV Program to provide a financial contribution and benefit to BGH, and that the KAV Program is de jure specific because the KAV Program limited the benefit to "special contract customers." Def. Br. at 39–40; Def.-Inter. Br. at 33–35. For the reasons that follow, Commerce's determination regarding the existence of a financial contribution and a benefit is supported by substantial evidence and is in accordance with law; however, the court remands Commerce's finding of specificity for further explanation or reconsideration.

#### 1. Financial Contribution

Commerce's determination that the KAV Program constitutes a financial contribution by entrusting a private company to forgo collecting revenue for county and municipal governments is reasonable. As previously discussed, a government makes a financial contribution where it 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).

Under section 46(1) of the Energy Industry Act (Energiewirtschaftsgesetz or "EnWG"), municipalities must make their public transport routes available for the laying and operation of power and gas lines for supply of energy to final consumers. Post-Prelim. Decision Memo. at 12. The concession agreement between a municipality and the NO governs the terms, including a concession fee the NO must pay to the municipality for using the transport routes. Id. Section 2 of the KAV Program establishes upper limits for the concession fees the NOs pass on to their final customers. Id. Although NOs are not legally obligated to pass along the concession fee, "the NOs, in practice, pass the concession fee on to users of the network." Id.; see Resp. [FRG] and the Fed. Ministry for Economic Affairs and Energy of the [FRG] to the Suppl. Questions at 7, C-428-848, PD 270, bar code 4030747-01 (Sept. 22, 2020) ("SQR 9-22-20"). Commerce explains that under section 2(4) of the KAV, concession fees "to special contract customers 'may not be agreed to or paid' if the average price per kilowatt-hour (kWh) in the calendar year is lower than the average revenue per kWh from the supply of electricity to all special contract customers in the penultimate calendar year (Marginal Price)." Post-Prelim. Decision Memo. at 13; see Resp. [FRG] and the Fed. Ministry for Economic Affairs and Energy of the [FRG] to Certain Questions from the First Suppl. Questionnaire at Ex. KAV-02, at 7, C-428-848, PD 236, bar code 3983126-02 (June 5, 2020) ("SQR 6-5-20"). The

GOG defines the term "special contract customer" as all customers whose power consumption exceeds 30 kilowatts in at least two months of the billing year and whose annual consumption is more than 30,000 kilowatt hours. See SQR 9-22-20 at 7–8.[23] NOs and municipalities may agree on a higher or lower Marginal Price. Id. If the KAV Program applicant is a special contract customer and provides data demonstrating the average price per kWh in the calendar year is lower than the Marginal Price, the NO is not required to pay concession fees for that special contract customer, and no concession fees will be passed to the special contract customer. Id.

Commerce determined the KAV Program provides a financial contribution to BGH. Final Decision Memo. at 37. Commerce found that the NOs receive exemptions in the concession fees they pay to the municipality for certain special contract customers like BGH. See id. at 38–39; SQR 9-22-20 at 8. The act requires that concession fees for electricity supplied to special contract customers may not be

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[23] In response to Commerce's request to define "special contract customer," the GOG responded—

> Special contract customers are all customers, whose measured power exceeds 30 kilowatts in at least two months of the billing year and whose annual consumption is more than 30,000 kilowatt hours, as defined in section 2(7) of the KAV. Please see Exhibit KAV-03 of the Response of the Government of the Federal Republic of Germany and the Federal Ministry for Economic Affairs and Energy of the Federal Republic of Germany to the First Supplemental Questionnaire (C-428-848) (June 5, 2020) for a copy of the KAV.

SQR 9-22-20 at 7–8.

agreed to or paid when those customers meet specific criteria. SQR 6-5-22 at Ex. KAV-02, at 7. Commerce's determination that revenue is forgone is reasonable because, without the KAV Program, BGH would have paid concession fees to the NO and the NO in turn would have paid them to the municipal government, which was the practice. See Post-Prelim. Decision Memo. at 12–14; Final Decision Memo. 37–39. Commerce's determination that the GOG entrusted and directed the NOs to forgo collecting or paying revenue which would otherwise be due the municipal governments is reasonable because the KAV Program requires the NO to exempt BGH from paying the concession fee and in turn exempts the NO from paying the municipality. See Post-Prelim. Decision Memo. at 13–14; Final Decision Memo. at 38–39.

**2. Benefit**

BGH argues the KAV Program only imposes a burden, i.e., additional fees for the laying and operation of gas and power lines; thus, BGH receives no benefit. See Pl. Br. at 40. However, Commerce reasonably determined the KAV Program provides a benefit to BGH by reducing the amount of the concession fee BGH would have otherwise paid to the NO, which would then have been passed to the municipal government. See Post-Prelim. Decision Memo. at 14; 19 U.S.C. § 1677(5)(E)(i)–(iv); 19 C.F.R. § 351.503(b)(2). The amount of the concession fee BGH would have paid absent the KAV Program is a benefit to BGH. See 19 U.S.C. § 1677(5)(E)(i)–(iv); 19 C.F.R. § 351.503(b)(2).

**3. Specificity**

Commerce's specificity determination is unsupported by substantial evidence. Commerce determined that the KAV Program is de jure specific because the KAV Program specifically limits relief to special contract customers whose average price per kWh in the calendar year is lower than the average revenue per kWh from the supply of electricity to all special contract customers. Final Decision Memo. at 39. However, limiting the availability of a program may not be de jure specific if the criteria are neutral, i.e., do not favor some industries over others. 19 U.S.C. § 1677(5A)(D)(ii). The KAV Program sets forth specific criteria for companies to qualify as special contract customers. Special contract customers are those "whose measured power exceeds 30 kilowatts in at least two months of the billing year and whose annual consumption is more than 30,000 kilowatt hours, as defined in section 2(7) of the KAV." SQR 9-22-20 at 7–8; see SQR 6-5-20 at Ex. KAV-03, at 2 (containing section 2(7) of the KAV). Here, unlike the case with the Electricity Tax Act, Energy Tax Act, Reduced EEG and KWKG Surcharges, and the ETS Program, Commerce does not explain how this program favors certain industries over others or otherwise explicitly limits usage as to who may apply. Commerce does not address whether criteria based on energy usage is economic in nature and horizontal in application, such that the program may be considered not specific as a matter of law pursuant to 19 U.S.C. § 1677(5A)(D)(ii). See 19 U.S.C. § 1677(5A)(D)(ii); SAA at 4243.

## CONCLUSION

In accordance with the foregoing, it is

**ORDERED** that Commerce's Final Results are sustained with respect to the initiation of the CVD investigation, the determination that the administrative record is complete, the determination that the provisions of the Electricity Tax Act and the Energy Tax Act, the EEG and KWKG Reduced Surcharge Programs, the ETS Additional Free Emissions Allowances, and the $CO_2$ Compensation Program are countervailable subsidies, and the determination that Commerce's calculations for the EEG and KWKG Reduced Surcharge Programs, the ETS Additional Free Emissions Allowances, and the $CO_2$ Compensation Program are supported by substantial evidence; and it is further

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

**ORDERED** that Commerce's Final Results are remanded for further explanation or reconsideration consistent with this opinion with respect to its calculations of the CVD rates for the Electricity Tax Act and the Energy Tax Act; and it is further

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

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

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

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

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

/s/ Claire R. Kelly
Claire R. Kelly, Judge

Dated: October 12, 2022
New York, New York