

ARTICLE 10.12 BINATIONAL PANEL REVIEW

Pursuant to the

UNITED STATES–MEXICO–CANADA AGREEMENT*

**Certain Softwood Lumber
Products from Canada:**

Final Results of the Affirmative Countervailing Duty Administrative Review; 2017-2018

USA-CDA-2020-10.12-01

PANEL DECISION

Panelists*

Robert E. Ruggeri (Chairman)

Valerie Hughes

Gregory O. Somers

Mary T. Staley

Irving A. Williamson

*The Panel expresses its appreciation to Panel Assistants Mario R. Osorio Hernandez and Manuel Sanchez Miranda.

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LIST OF ABBREVIATIONS

<u>Abbreviation</u>	<u>Description</u>
AAC	Annual Allowable Cut
ABF	Alberta Bio Future Program
ACCA	Accelerated Capital Cost Allowance
AJCTC	Apprenticeship Job Creation Tax Credit
Alberta Parties	GOA, Canfor, West Fraser, and ASLTC
ASLTC	Alberta Softwood Lumber Trade Council
AUL	Average Useful Life
BC	British Columbia
BCAA	British Columbia Assessment Authority
BC Hydro	British Columbia Hydro & Power Authority
BCLTC	British Columbia Lumber Trade Council
BC Parties	GBC, BCLTC, Canfor, and West Fraser
BC Respondents	Canfor and West Fraser
BCTS	BC Timber Sales
BMMB	Québec Timber Marketing Board (Bureau de Mise en Marché des Bois)
BPP	Bioenergy Producer Program
CAD	Canadian Dollars
Canadian Parties	GOC, GOA, GBC, Government of Manitoba, GNB, GOO, GOQ, Government of Saskatchewan, ASLTC; BCLTC; Canfor, JDIL, Tolko Marketing and Sales Limited and Tolko Industries Limited, and West Fraser
CAFC	U.S. Court of Appeals for the Federal Circuit
Canfor	Canfor Corporation
CCA	Capital Cost Allowance
CHP	Combined Heat and Power
CIT	U.S. Court of International Trade

CNS	Chip-and-saw
COALITION	Committee Overseeing Action for Lumber International Trade Investigations or Negotiations
Commerce	U.S. Department of Commerce
CVD	Countervailing Duty
DBH	Diameter at Breast Height
Eastern Provinces	Alberta, New Brunswick, Ontario, and Québec
EDL	Electricity Discount Program
EPA	Energy Purchase Agreement
F2M	Forest2Market
FDRCMO	Workforce Skills Development and Recognition Fund (Fonds de Développement et de Reconnaissance de la Main-d'Œuvre)
FLNRORD	Ministry of Forests, Lands, Natural Resource Operations and Rural Development
FLTC	Federal Logging Tax Credit
FMP	Forest Management Plan
FMV	Fair Market Value
FRIAA	Forest Resource Improvement Association of Alberta
FSPF	Forest Sector Prosperity Fund
FRPA	Forest Range and Practices Act
G&A	General and Administrative
GBC	Government of the Province of British Columbia
GDP	Gestion de la Demande de Puissance
GHG	Greenhouse Gas
GNB	Government of the Province of New Brunswick
GNS	Government of the Province of Nova Scotia
GOA	Government of the Province of Alberta
GOC	Government of Canada
GOO	Government of the Province of Ontario

GOQ	Government of the Province of Québec
HHI	Herfindahl-Hirschman Index
IDM	Issues and Decision Memorandum
IEI	Industry Electricity Initiative
IEO	Interruptible Electricity Option
IESO	Independent Electricity System Operator
IQR	Initial Questionnaire Response
IRS	Internal Revenue Service
ISEE	Industrial Systems Energy Efficiency Program
JDIL	J.D. Irving, Limited
LEP Process	Log Export Permitting Process
LER	Log Export Restraint
LIREPP	Large Industrial Renewable Energy Purchase Program
LTAR	Less Than Adequate Remuneration
MBF	Thousands of Board Feet
MCRP	Multi-Resource Road Cost Reimbursement Program
MFFP	Ministry of Forest, Wildlife, and Parks (Ministère des Forêts, de la Faune et des Parcs)
MFOR	Manpower Training Measures
MTESS	Ministry of Work, Employment, and Social Solidarity (Ministère du Travail, de l'Emploi et de la Solidarité Sociale)
NAFTA	North American Free Trade Agreement
NBFPC	New Brunswick Forest Products Commission
OFRFP	Ontario Forest Roads Funding Program
OTCMP	Ontario Tax Credit for Manufacturing and Processing
Ontario Parties	GOO and Resolute
OPA	Ontario Power Authority
PAE	Purchase Power Program
PCIP	Partial Cut Investment Program

PDM	Preliminary Decision Memorandum
PIB	Wood Innovation Program
PLTC	Provincial Logging Tax Credit
POR	Period of Review
PPA	Purchase Power Agreement
QR	Questionnaire Response
Québec Parties	GOQ and Resolute
RDTC	Manitoba Research and Development Tax Credit
Resolute	Resolute FP Canada Incorporated and its Affiliates
Respondents	Canfor, JDIL, Resolute, and West Fraser
Rexforêt	Rexforêt Silviculture Works: Road Construction/Maintenance
SAA	Statement of Administrative Action for the URAA
SCM Agreement	WTO Agreement on Subsidies and Countervailing Measures
SDTC	Sustainable Development Technology Canada
SFDA	Sustainable Forest Development Act
SLA	Softwood Lumber Agreement
SPF	Spruce-Pine-Fir
SR&ED	Scientific Research and Experimental Development
TargetGHG	TargetGHG Industrial Demonstration
TDA	Timber Damage Assessment
TEFU	Tax Exempt Fuel Use
TEQ	Transition Énergétique Québec
TSG	Timber Supply Guarantee
URAA	Uruguay Round Agreements Act
U.S.	United States
USD	U.S. Dollars
USFS	U.S. Forest Service
USMCA	United States-Mexico-Canada Agreement

U.S. PNW	U.S. Pacific Northwest
WDNR	Washington Department of Natural Resources
West Fraser	West Fraser Mills Limited
WTO	World Trade Organization

I. INTRODUCTION

This Panel was constituted pursuant to Article 10.12 of the United States-Mexico-Canada Agreement (“USMCA”).¹ The Panel was appointed to review the Final Results issued by the U.S. Department of Commerce (“Commerce”) in the first administrative review of the countervailing duty (“CVD”) order of *Certain Softwood Lumber Products from Canada*.²

On January 3, 2018 Commerce published the CVD Order on *Certain Softwood Lumber Products from Canada*.³

On April 1, 2019, Commerce initiated the first administrative review of the CVD Order, covering the period of review (“POR”) from April 28, 2017, through December 31, 2018.⁴ Commerce published the Preliminary Results of its review on February 7, 2020, and determined that various provincial and federal stumpage and non-stumpage programs provided countervailable subsidies.⁵

After publishing post-preliminary memoranda addressing certain programs, on December 1, 2020, Commerce published its Final Results, in which it calculated several *ad valorem* countervailable subsidy rates.⁶

On December 10, 2020, pursuant to Article 10.12 of the USMCA, several Canadian parties, including the Government of Canada (“GOC”), filed a joint Request for Panel Review of the Final Results.⁷

¹ United States-Mexico-Canada Agreement art. 10.12, Nov. 30, 2018, 58 I.L.M. 1046 (2019).

² *Certain Softwood Lumber Products from Canada: Final Results of the Countervailing Duty Administrative Review, 2017-2018*, 85 Fed. Reg. 77,163 (Dep’t Commerce Dec. 1, 2020) (“Final Results”), P.R. 2030.

³ Following an affirmative determination by the International Trade Commission, Commerce issued the order. See *Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 Fed. Reg. 347 (Dep’t Commerce Jan. 3, 2018) (“CVD Order”).

⁴ *Certain Softwood Lumber Products from Canada: Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 84 Fed. Reg. 12,209 (Dep’t Commerce Apr. 1, 2019), P.R. 225.

⁵ *Certain Softwood Lumber Products from Canada: Preliminary Results of the Countervailing Duty Administrative Review, 2017-2018*, 85 Fed. Reg. 7,273 (Dep’t Commerce Feb. 7, 2020) (“Preliminary Results”), P.R. 1667, and accompanying Decision Memorandum for the Preliminary Results of Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada, 2017-2018, from Erin Begnal to James Maeder (Dep’t Commerce Jan. 31, 2020) (“Preliminary Decision Memorandum” or “PDM”), P.R. 1640.

⁶ See Final Results and accompanying Issues and Decision Memorandum for the Final Results of Administrative Review, 2017-2018, from James Maeder to Joseph A. Laroski Jr. (Dep’t Commerce Nov. 23, 2020) (“Issues and Decision Memorandum” or “IDM”), P.R. 2025.

⁷ Those parties were the Government of Canada (“GOC”); the Governments of Alberta, British Columbia, New Brunswick, Ontario, and Québec (“GOA”, “GBC”, “GNB”, “GOO”, “GOQ”);

Throughout this Decision, the term “Canadian Parties”⁸ refers to those specific Participants who jointly filed a Rule 61.1 Brief, a Rule 61.2 Brief, and a Rule 61.3 Brief. “Canadian parties” refers more generally to those Participants supporting the Canadian Complainants’ position.

This binational Panel review was subsequently initiated by the U.S. Section of the USMCA Secretariat on December 18, 2020.⁹

A Complaint was filed on January 11, 2021 by the GOC and several other Canadian participants. J. D. Irving, Limited (“JDIL”) and Resolute FP Canada Incorporated and its affiliates (“Resolute”) filed their own separate Complaints. The Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (“COALITION”), the U.S. petitioner below, filed its Complaint on behalf of the U.S. producers on January 6, 2021. Sierra Pacific, a U.S. producer, filed its own Complaint on January 11, 2021.

Overall, the Canadian parties essentially argued that Commerce erred in finding that the stumpage programs provided countervailable subsidies because the agency had used the wrong benchmarks under the statute to determine whether the sales were for less than adequate remuneration (“LTAR”). Similarly, they also argued that Commerce erred in rejecting in-province prices as the benchmark to calculate benefits under the log export restraint (“LER”) process. They also argued that Commerce erred in finding that certain tax programs and non-tax programs were *de jure* and *de facto* specific.

The Canadian parties also took issue with Commerce’s determination that various federal and provincial measures were countervailable, asserting that the programs were not tied to softwood lumber or its inputs. They challenged Commerce’s finding that certain provincial energy programs were countervailable as well as its calculations of benefits. They also disputed Commerce’s finding that certain provincial payments to Respondents¹⁰ were not grants and argued that the payments were for services rendered by Respondents and for value received by the provinces. Lastly, they also challenged Commerce’s determinations with regard to certain scope issues.¹¹

Alberta Softwood Lumber Trade Council (“ASLTC”); British Columbia Lumber Trade Council (“BCLTC”); Conseil de l’Industrie Forestiere du Québec; Ontario Forest Industries Assoc.; J.D. Irving, Ltd. (“JDIL”); Resolute FP Canada Inc. and its affiliates (“Resolute”); and West Fraser Mills Ltd. (“West Fraser”).

⁸ The “Canadian Parties” are the GOC, GOA, GBC, Government of Manitoba, GNB, GOO, GOQ, and Government of Saskatchewan; ASLTC; BCLTC; Canfor Corporation (“Canfor”); JDIL, Tolko Marketing and Sales Ltd. and Tolko Industries Ltd.; and West Fraser.

⁹ *United States-Mexico-Canada Agreement (USMCA), Article 10.12; Binational Panel Review: Notice of Request for Panel Review*, 85 Fed. Reg. 82,439 (Dep’t Commerce Dec. 18, 2020).

¹⁰ The mandatory respondents in this administrative review are Canfor, Resolute, and West Fraser. Commerce also accepted JDIL as a voluntary respondent.

¹¹ Other individual Canadian participants raised additional, specific objections to the Final Results based on other programs:

The COALITION also raised numerous objections to Commerce’s Final Results, including: Commerce erroneously considered LERs’ impact on Crown-origin log prices when determining that the LERs did not confer a financial contribution;

Commerce improperly excluded certain log price data from its calculation of the U.S. Pacific Northwest log price;

Commerce improperly calculated and made various adjustments to the benchmark price for stumpage in British Columbia (“BC”);

Commerce failed to include a difference in the terms of sale between the tier-one Nova Scotia benchmark and the prices paid by Respondents in Ontario and Québec; and

Commerce improperly made downward adjustments for certain costs incurred by the BC producers.¹²

The appointment of this Panel was completed in early December 2023. After granting several pending Consent Motions for time extensions and modifications to the briefing schedules, the Panel held a four-day public hearing in Washington, D.C. from September 10-13, 2024. At that hearing, the various Participants presented oral argument on the issues raised in the Complaints and addressed in the briefs.

For the reasons that follow, the Panel affirms in part, and remands in part, Commerce’s Final Results.

Resolute argued that the government’s purchase of electricity from pulp and paper mills was not comparable to those from cheaper sources, and should have been excluded anyway because it was irrelevant to lumber exports to the U.S. Resolute also contested the finding that Commerce ignored the value of services received by the government when making payments under non-stumpage programs, and challenged Commerce’s finding that certain tax programs were specific and countervailable.

JDIL, a New Brunswick producer, argued that it had received no countervailable benefits from: (1) GNB’s payment of silviculture reimbursements as license management fees; (2) the GNB energy repurchase program which was not tied to the merchandise under investigation; and (3) capital cost allowances for certain assets. It also appealed the exclusion of sales of downstream products made by “cross-owned” companies from Commerce’s subsidy calculations.

The GBC and its lumber producers argued that BC Hydro’s purchase of electricity from West Fraser provided adequate remuneration and that it was unrelated to the subject merchandise; that a BC Hydro program was not *de jure* specific; and that certain tax programs were neither *de jure* nor *de facto* specific and conferred no benefit.

¹² The COALITION also argued, among other things, that certain tax benefits were in fact specific; GBC’s payment to Canfor for aerial photography and LiDar were not entirely for services rendered; and payments to Canfor and West Fraser for cruising and block layout were in fact grants and not payment for services.

II. SCOPE OF REVIEW

The Panel's responsibility is to review the issues raised in the Complaints and briefed by the Participants.

On July 31, 2024 the Canadian Parties filed a Stipulation of Partial Dismissal signed by all Participants including Commerce and the COALITION. The Canadian Parties requested that three claims be dismissed from their Complaint and that the Panel issue an order confirming such dismissal.

The claims in question, BC Claims 1, 2, and 3 in the Canadian Parties' Complaint,¹³ addressed Commerce's determinations regarding the stumpage program in BC. In particular:

BC Claim 1 challenged Commerce's determination that log prices in the BC Interior were suppressed by government control of the majority of the market combined with the existence of the log export permitting ("LEP") process;

BC Claim 2 challenged Commerce's determination that auctions managed by BC Timber Sales ("BCTS") were not "competitively run government auctions" pursuant to 19 C.F.R. § 351.511(a)(2)(i) because of the "3 sale limit"; and

BC Claim 3 challenged Commerce's "failure" to account for BC's use of a "stand as a whole" stumpage pricing system by not comparing a single, weighted average "all species" benchmark with a single, weighted average "all species" stumpage price.

As requested, on August 7, 2024, the Panel issued its order dismissing the Canadian Parties' BC Claims 1, 2, and 3 from their Complaint.

The Panel further ordered that there should be no oral argument or further briefing on BC Claims 1, 2 and 3. Accordingly, and pursuant to Rule 12 of the Rules of Procedure for Article 10.12 (Binational Panel Reviews), the Panel's review of issues relating to stumpage in BC is limited to the allegations of error of fact or law raised in the Complaints filed by the COALITION and Sierra Pacific, as well as to the procedural and substantive defenses raised in response to those allegations throughout the course of this review.

The Panel notes that the Canadian Parties' Stumpage Benchmark Claim 1, also set forth in their Complaint, alleges that Commerce's determination that all provincial markets, including those in BC, are distorted, and that Commerce's rejection of in-market benchmarks, including through the use of BCTS auction prices, are unsupported by substantial evidence and are not in accordance with law.¹⁴ In light of the Stipulation of Partial Dismissal and the Panel's Order issued on August 7, 2024, such allegations with respect to the BC stumpage program have been dismissed and are, therefore, outside the scope of this review.

¹³ Canadian Parties Complaint at paras. 164-166.

¹⁴ *Id.* at para. 158.

III. STANDARD OF REVIEW

Article 10.12 of the Agreement provides generally that binational panels shall apply “the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.”

Article 10.12(3) in turn provides that binational panels shall apply the “standard of review ... that a court of the importing Party otherwise would apply.” Article 10.8 specifies that the standard of review set forth in 19 U.S.C. § 1516a(b)(1)(B) shall apply when the importing country is the United States.¹⁵

That section states that “{t}he Court shall hold unlawful any determination, finding, or conclusion, found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” Under this standard, the Panel does not engage in *de novo* review and must restrict its review to the administrative record.

“Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁶ Like a reviewing court, this Panel must consider the record as a whole, including evidence that fairly detracts from the weight of the evidence in support of the agency’s determination.¹⁷ However, the substantial evidence standard is “a high barrier to reversal.”¹⁸

Furthermore, the substantial evidence standard requires “more than mere assertion of ‘evidence which in and of itself justified {the determination}, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.’”¹⁹ However, the “fact that certain information is not discussed in {an agency} determination does not establish that the {agency} failed to consider that information because there is no statutory requirement that the {agency} must respond to each piece of evidence presented by the parties.”²⁰

Nonetheless, the Panel must “assure that the agency has given reasoned consideration to all the material facts and issues” and that Commerce has explained how its legal conclusions follow from the facts in the record.²¹ Commerce must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and

¹⁵ Section 516A(b)(1)(B) of the Tariff Act of 1930 (“Tariff Act”).

¹⁶ *Consolidated Edison Co. v. National Labor Relations Bd.*, 305 U.S. 197, 229 (1938) (“*Consolidated Edison*”).

¹⁷ *Nippon Steel Corp. v. United States*, 458 F.3d 1351 (Fed. Cir. 2006) (“*Nippon Steel*”).

¹⁸ *Mitsubishi Heavy Industries, Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001).

¹⁹ *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1998) (quoting *Universal Camera Corp. v. National Labor Relations Bd.*, 340 U.S. 474, 487 (1951) (“*Universal Camera*”)).

²⁰ *Torrington Co. v. United States*, 790 F. Supp. 1161, 1167-1168 (Ct. Int’l Trade 1992).

²¹ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

the choices made.”²² The reviewing court (or Panel) “must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’”²³

In reviewing Commerce’s interpretations of the governing statute, the two-stage approach adopted by the U.S. Supreme Court in *Chevron*²⁴ applied during the administrative review conducted by Commerce. When reviewing an agency’s construction of the statute which it administers, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”²⁵ Commerce’s statutory interpretations enunciated in an administrative determination are “entitled to deference under *Chevron*.”²⁶

However, subsequent to the issuance of the Final Results and the appointment of this Panel, the Supreme Court revisited the *Chevron* doctrine in its decision in *Loper Bright*.²⁷ The Court therein overruled *Chevron* and held that the Administrative Procedure Act (“APA”) requires courts to exercise their own independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.²⁸ As the Canadian Parties in their brief on subsequent authorities pointed out, “{t}he central holding of *Loper Bright* is that courts (and by extension, this Panel), not administrative agencies like Commerce, must decide what the law means and how it applies.”²⁹

The Court was clear that pre-existing precedent decided under, and relying upon, *Chevron* remains valid.³⁰ But cases that were pending in the appellate or the lower federal courts when

²² *Avesta AB v. United States*, 724 F. Supp. 974, 978 (Ct. Int’l Trade 1989) (quoting *Motor Vehicle Mfrs, Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983), *aff’d*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1308 (1991)) (“*Avesta*”).

²³ *Motor Vehicle Mfrs, Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983), 43 (quoting *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)).

²⁴ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”).

²⁵ *Id.* at 842-43.

²⁶ *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001).

²⁷ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (“*Loper Bright*”).

²⁸ “*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires But courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.” *See Id.* at 413.

²⁹ Canadian Parties Supplemental Brief Addressing Subsequent Authorities at 1.

³⁰ “[W]e do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a ‘special justification’ for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, ‘just an argument that the precedent was wrongly

Loper Bright came down must be decided on the basis of *Loper* and not *Chevron*.³¹ Our binational panel review in this regard is therefore similarly governed by *Loper Bright*. Article 10.12 directs USMCA Chapter 10 panels to apply the same standard of review that a U.S. court would apply, in this instance the *Loper Bright* standard.

We now turn to the issues raised by the Participants.

IV. STUMPAGE PROGRAMS

1. ANALYTICAL FRAMEWORK

The largest subsidies identified in the administrative review underlying this case stem from Commerce’s determination that Crown timber was sold for LTAR. The term “stumpage” denotes the prices paid for unharvested, standing timber.

Sections 771(5)(D)(iii) and 771(5)(E)(iv) of the Tariff Act, 19 U.S.C. §§ 1677(5)(D)(iii) and 1677(5)(E)(iv), together define what constitutes a countervailable subsidy in the context of goods provided for LTAR. The former stipulates that a “financial contribution” includes the provision of goods or services, excluding general infrastructure. The latter further provides that:

A benefit shall normally be treated as conferred where there is a benefit to the recipient, including—

(iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.

For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

The primary purpose of a CVD proceeding is thus to determine whether a foreign government has provided a financial contribution to a producer and, if so, whether that contribution has conferred a benefit, thereby creating a countervailable subsidy. The purpose of a CVD is to offset the unfair competitive advantage conferred by such subsidies by imposing a duty on the imported goods equivalent to the net amount of the subsidization identified.

decided.’ That is not enough to justify overruling a statutory precedent.” *Loper Bright*, 144 S. Ct. at 412 (citations omitted).

³¹ See, e.g., *Lake Region Healthcare Corp. v. Becerra*, 113 F.4th 1002 (D.C. Cir. 2024) where the Supreme Court had decided *Loper Bright* after the district court decision but before the circuit court’s. “But *Chevron* has now been overruled, so we must ‘exercise independent judgment’ in construing the Medicare statute. *Loper Bright*, 144 S. Ct. at 2262.”

The central question with respect to the issue of stumpage is an allegation that various Canadian provincial governments conferred such a financial contribution through the provision of standing timber (stumpage) from Crown lands.

This analytical framework involves a sequential analysis to determine, first, the existence of a financial contribution; second, whether that contribution confers a benefit; and third, whether the contribution is specific to an enterprise or industry within the jurisdiction of the authority providing the subsidy.

A. Determining the Existence of a Financial Contribution

The initial step in the analysis is to determine whether a "financial contribution" by a government or public body even exists. 19 U.S.C. § 1677(5)(D) enumerates the specific actions that constitute a financial contribution. These actions include direct financial transfers, such as grants or loans; the forgoing of revenue that is otherwise due, such as through tax credits or exemptions; the provision of loan guarantees; and the provision of goods or services other than general infrastructure.

In the context of the provincial stumpage programs at issue, the COALITION alleges that the necessary financial contribution takes the form of the provision of a good, an action explicitly defined as a financial contribution under section 771(5)(D)(iii) of the Tariff Act, 19 U.S.C. §1677(5)(D)(iii). The record shows that the provincial governments, as public bodies, hold title to Crown lands and grant private producers the right to harvest standing timber from these lands in exchange for remuneration. In the view of the COALITION, this granting of harvesting rights for standing timber by a government authority to producers constitutes the provision of a good within the meaning of the statute.

The concept of a financial contribution is broad and also encompasses situations where the government does not act directly, but rather operates through a private entity. Under section 771(5)(B)(iii) of the Tariff Act, 19 U.S.C. §1677(5)(B)(iii), a financial contribution is also deemed to exist when a government "entrusts or directs" a private body to carry out one of the functions that would constitute a financial contribution if performed directly by the government. This standard of entrustment or direction requires a demonstrable link between a formal, enforceable government action—such as a statute, regulation, or administrative order—and the conduct of the private party. The government measure must effectively compel or induce the private entity to provide a good or service that it would not otherwise provide, thereby causing the private body to function as a proxy for the government. While the direct provision of stumpage by the provinces is the primary financial contribution alleged here, the legal framework is sufficiently broad to capture both direct government action and indirect government action conducted through entrustment to private entities.

B. Whether the Contribution Confers a Benefit

The second step is to determine whether the contribution confers a benefit. Section 771(5)(E)(iv), 19 U.S.C. §1677(5)(E)(iv), prescribes that, in cases involving the provision of a good, there is no benefit unless the good is provided for LTAR. The determination of adequacy is

not a subjective judgment but, rather, it requires a comparison against an objective, market-based benchmark.

Regardless, Congress delegated to Commerce how to calculate LTAR. The statutory requirements are that LTAR be determined in relation to prevailing market conditions in the country which is subject to the investigation or review, and that prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

Commerce explained the calculation of LTAR in section 351.511 of its regulations,³² setting out how to determine a benchmark to compare to the price actually paid for the goods or services provided.

(2)“*Adequate Remuneration*” defined—(i) In general. The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.

(ii) *Actual market-determined price unavailable*. If there is no useable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

(iii) *World market price unavailable*. If there is no world market price available to purchasers in the country in question, the Secretary will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.

(iv) *Use of delivered prices*. In measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii) of this section, the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.

Commerce is required by law to measure the adequacy of remuneration by reference to “prevailing market conditions” in the country of provision. To do so in a consistent and predictable manner, Commerce employs a hierarchical framework, or “benchmark hierarchy”, as codified in

³² 19 C.F.R. § 351.511.

its regulation. The regulation establishes a three-tiered hierarchy to select an appropriate market-based benchmark for measuring the adequacy of the price paid for a government-provided good or service. The system is designed with a clear order of preference, prioritizing in-country prices before resorting to external prices.

To summarize, these are the three “tiers” of suitability of benchmark prices for comparison to the price paid for the good or service. A “tier-two” benchmark (*i.e.*, world market price) can only be used if there is no useable “tier-one” benchmark (*i.e.*, a market-determined price in country) available. And a “tier-three” benchmark (*i.e.*, whether the government price is consistent with market principles) can only be used if there is no useable tier-one or tier-two benchmark available.

The preferred, or “tier-one”, benchmark for measuring adequacy is a market-determined price for the identical good resulting from actual transactions within the country under investigation. Such prices may be derived from private transactions between unaffiliated parties or, in certain circumstances, from sales made through competitively run government auctions. In evaluating the suitability of a potential benchmark, Commerce must also consider factors affecting price comparability, including the quality, availability, marketability, and transportation costs associated with the good. The use of an in-country, private market price is preferred because it is considered the most accurate measure of the market-based value of the good within that country's specific economic environment.

A potential tier-one benchmark may only be used, however, if the prices are determined to be the result of fair and open market forces. Commerce will decline to use in-country prices as a benchmark if it finds that the market is “significantly distorted” by the government’s own role and presence. The predominant factor in assessing market distortion is the extent of government involvement. Where the government is the majority or substantial supplier of the good, its pricing decisions may influence all market prices, including those in the private market. In such a scenario, government prices may not be established by the normal interplay of supply and demand, and as a consequence, they may suppress private prices, rendering them an unreliable and distorted reflection of what a true market price would be.

Furthermore, even when a government attempts to use a market mechanism like an auction, Commerce must scrutinize the auction's design and operation to ensure it is genuinely competitive. For an auction price to serve as a valid benchmark, the auction must be open and accessible to all potential participants. Rules that limit participation, such as placing a cap on the number of sales a single company can hold, may constitute artificial barriers because such restrictions may prevent an auction from being fully open and competitive, thereby disqualifying its prices from serving as a valid tier-one benchmark.

If Commerce determines that the in-province market for stumpage is distorted and that no viable tier-one benchmark exists, its regulations direct it to seek an alternative. The hierarchy provides for the use of a benchmark from another, undistorted market.

In order of preference, the potential alternative benchmarks are as follows: (1) world market prices that would be available to purchasers in the country under investigation (tier-two

benchmarks); or, (2) prices consistent with market principles based on an assessment by Commerce of the government-set price (tier-three benchmarks).

In the context of this case, from the perspective of Commerce, choosing a tier-one benchmark has involved looking to unsubsidized, market-based benchmarks from other provinces within Canada to measure the adequacy of remuneration for stumpage provided in provinces where the markets have been found to be distorted by government action. The Tariff Act provision is clear on its face that the benchmark is to be determined “in relation to prevailing market conditions for the good or service being provided ... in the *country which is subject to the investigation or review*” (emphasis added). 19 U.S.C. § 1677(3) provides that, for purposes of this subtitle, “the term ‘country’ means a foreign country, a political subdivision, dependent territory, or possession of a foreign country.” The Participants have raised the issue of whether “country” refers to the province where the subsidy is being provided or Canada itself. In light of its determinations below, the Panel does not need to rule on this issue.

Two key contentions in this case revolve around whether Commerce’s decisions to disregard stumpage prices from certain provinces on the basis that these were allegedly significantly distorted were justified, and, if so, whether Commerce’s selection of another province’s stumpage prices as benchmark to measure adequacy of remuneration, was justified.

Commerce has developed and applied its distortion analysis in various cases over the years within the context of the statute and regulations. A few guidelines have emerged.

Distortion cannot be determined *solely* because the exporting country controls “a substantial portion” of the relevant market. For example, in *Oil Country Tubular Goods (“OCTG”) from the Republic of Turkey*,³³ Commerce investigated whether hot-rolled steel (“HRS”) was provided to OCTG producers at LTAR. It determined that a proposed tier-one benchmark of producers’ purchases of HRS from domestic and imported suppliers could not be used because the level of government involvement in the Turkish HRS market was so significant that the price of HRS sold in Turkey was significantly distorted.

Upon appeal, the U.S. Court of International Trade (“CIT”) held that Commerce’s determination of distortion was not supported by substantial evidence.³⁴ The court determined that “Commerce’s finding that the Turkish HRS market is significantly distorted, based solely on its finding that the Turkish government provided a ‘substantial portion’ of it, amounts ... to application of a *per se* rule.”³⁵ Upon appeal, the Federal Circuit agreed that “Commerce applied

³³ *Oil Country Tubular Goods (“OCTG”) from the Republic of Turkey*, 79 Fed. Reg. 41,964 (Dep’t Commerce Jul. 18, 2014).

³⁴ *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 61 F.Supp.3d 1306, 1327-1331. (Ct. Int’l Trade 2015) (“*Borusan*”).

³⁵ *Id.* at 1328-1329.

what amounted to a *per se* rule of market distortion after finding {the Turkish government} controlled a substantial portion of the market, despite the *Preamble*'s language to the contrary.”³⁶

In *Certain Uncoated Paper from Indonesia*,³⁷ Commerce found that Indonesia's Log Export Ban distorted stumpage prices in the Indonesian market. It pointed to a study commissioned by the Indonesian government in the ordinary course of business that found that repealing the Export Ban would increase the domestic log price.³⁸

In *Supercalendered Paper from Canada*,³⁹ Commerce found that because the participation of the Government of Nova Scotia (“GNS”) in the stumpage market was small and was well below a majority, there was not “a distortive impact on the private stumpage market or the stumpage prices therein.”⁴⁰

C. Whether the Subsidy is Specific to an Enterprise or Industry within the Subsidizing Country

The third element of a countervailable subsidy requires that the contribution at hand be either *de jure* or *de facto* specific within the meaning of section 771(5A) of the Tariff Act, 19 U.S.C. § 1677(5A).

A subsidy is deemed specific as a matter of law if the authority providing it, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to a particular enterprise or industry.⁴¹

However, a subsidy is not specific if its availability is governed by objective criteria or conditions, *i.e.*, criteria that are neutral and do not favor one enterprise or industry over another. This exception requires that eligibility is automatic for those who meet the criteria, that the criteria are strictly followed, and that they are clearly set forth in a relevant statute, regulation, or other official document so as to be capable of verification.⁴²

Even in the absence of such express limitations, a subsidy may be specific in fact. *De facto* specificity exists where one or more of the following conditions are met: the actual recipients of the subsidy are limited in number; a particular enterprise or industry is a predominant user of the subsidy; a particular enterprise or industry receives a disproportionately large share of the subsidy; or the manner in which the granting authority exercises discretion in awarding the subsidy

³⁶ *Maverick Tube Corp. v. United States*, 857 F.3d 1353, 1362 (Fed. Cir. 2017) (“*Maverik Tube*”).

³⁷ *Certain Uncoated Paper from Indonesia*, 81 Fed. Reg. 3104 (Dep't Commerce Jan. 20, 2016) (“*CUP*”).

³⁸ *CUP* IDM at 35.

³⁹ *Supercalendered Paper from Canada*, 80 Fed. Reg. 63,535 (Dep't Commerce Oct. 20, 2015) (“*SC Paper*”).

⁴⁰ *SC Paper* IDM at 51.

⁴¹ 19 U.S.C. § 1677(5A)(D)(i).

⁴² 19 U.S.C. § 1677(5A)(D)(ii).

indicates that certain enterprises or industries are favored over others. In assessing these factors, Commerce must take into account the extent of economic diversification within the jurisdiction of the granting authority as well as the duration of the subsidy program.⁴³

Moreover, a subsidy is also deemed specific if it is limited to an enterprise or industry located within a designated geographical region under the jurisdiction of the granting authority.⁴⁴

D. Determining Provincial Benchmarks

In applying the above legal framework to the provincial stumpage programs at issue, the Panel adopted a structured, sequential approach to its review. Our analysis proceeded on a province-by-province basis, evaluating at each stage whether Commerce's determinations are supported by substantial evidence and are otherwise in accordance with law.

The initial phase of our review for each province examined the threshold question of the benchmark. First, the Panel analyzed whether substantial evidence and the law supported Commerce's determination that the proposed benchmark for a province was not usable such as due to market distortion. If the Panel found that Commerce's determination was not supported by substantial evidence and/or not in accordance with law, the analysis for that province ends and we remanded to Commerce for action consistent with our determination.

Second, if the Panel found that substantial evidence and the law *do* support Commerce's determination that the proposed benchmark was not usable, the Panel advanced to the second part of its analysis. The Panel then analyzed whether Commerce's selection of a different benchmark for use in that province was supported by substantial evidence and in accordance with law.

If the Panel found that Commerce's choice of benchmark was not supported by substantial evidence and/or not in accordance with law, the analysis for that province ended, and we remanded to Commerce for action consistent with our determination.

Third, if the Panel determined that Commerce's choice of a benchmark was supported by substantial evidence and in accordance with law, the Panel advanced to the third part of its analysis. Here, our analysis focused on whether Commerce's adjustments—or its decision *not* to make adjustments—were justified and reasonably calculated based on the evidence on record. If Commerce's adjustments or failure to make adjustments were not supported by substantial evidence or in accordance with law, the analysis for that province ended, and we remanded to Commerce for action consistent with our decision. If Commerce's adjustments or failure to make adjustments were supported by substantial evidence and in accordance with law, its determination regarding the stumpage benchmark for that province was affirmed.

Only if Commerce's determinations at all three stages—the rejection of the in-province benchmark, the selection of an alternative benchmark, and the application/non-application of

⁴³ 19 U.S.C. § 1677(5A)(D)(iii).

⁴⁴ 19 U.S.C. § 1677(5A)(D)(iv).

adjustments—were found to be supported by substantial evidence and in accordance with law, will its final determination regarding stumpage for that province be sustained.

2. ONTARIO

The Panel now turns to the specific challenges raised concerning the CVD determination for stumpage programs administered by the Government of Ontario (“GOO”). The Panel is guided by the fundamental standard of whether Commerce’s findings are consistent with the governing statutory and regulatory framework and are supported by substantial evidence on the administrative record. The central question before us is whether Commerce correctly determined that the provision of Crown stumpage in Ontario conferred a countervailable subsidy to the producers of subject merchandise. This inquiry requires an examination of the key components of Commerce’s determination, including its decision to reject an in-province benchmark, its selection of an alternative benchmark from Nova Scotia, and the propriety of the adjustments made in its benefit calculation methodology.

A. Commerce’s Benchmark Determination

In its Final Results, Commerce determined that it could not use private stumpage market prices from within Ontario as a tier-one benchmark, as proposed by Respondents, to measure the adequacy of remuneration for Crown stumpage. This conclusion was predicated on its finding that the Ontario stumpage market was significantly distorted by the pervasive role of the provincial government. Commerce’s finding of distortion rested on several points:

- First, that Crown-origin timber accounted for approximately 95 percent of the total harvest volume in the province, establishing the government as the overwhelmingly dominant supplier. According to Commerce, the price of this 95 percent of timber in Ontario does not increase in response to demand;⁴⁵
- Second, that the prices for this Crown timber were not set by market forces but were administratively determined, with only one of four stumpage components taking market conditions into account;
- Third, that a significant overlap existed between the companies harvesting Crown timber and those purchasing private timber, with tenure holders consuming the vast majority of private timber; and
- Lastly, that the flexibility of the Crown tenure system, including the ability to trade Crown timber, diminished the need for tenure holders to compete for private timber, thereby suppressing private prices.

Commerce rejected the use of data from the MNP Ontario survey of private timber prices and the Hendricks Report, and also declined to use Ontario log prices as an alternative benchmark.

⁴⁵ IDM at 106.

B. Whether Ontario Private Stumpage Prices are Market-Determined

To determine whether the Ontario private stumpage market prices are distorted by the government's overwhelming share of the stumpage market, Commerce first examined four components of the Crown stumpage price: 1) the "minimum charge;" 2) a "residual value" charge, assessed on the difference between the price of a basket of end-products and a measure of the cost of producing and delivering those end-products; 3) a forest renewal charge, based on estimated forest renewal costs and the projected harvest volume for each species; and 4) a "forestry futures" charge, which is uniform across all Forest Management Units and tree species groups. Of the four, Commerce found that only the forest renewal charge took into account market conditions.⁴⁶

Next, Commerce examined the supply of Ontario standing timber from both the Crown and private sources. It found that, while the GOO allocates harvest areas to a tenure-holder over the ten-year term of a Forest Management Plan ("FMP"), that area can be adjusted in any given year. "The Crown supply of timber is flexible on a yearly basis, such that in years when the demand for lumber products is high, tenure holders can consume more than their annual target of public timber at an administered price before turning to the private market for additional supply."⁴⁷

Commerce also noted that since the GOO does not regulate the transfer or sale of timber between sawmills or to third parties, this gives companies the ability to trade between mills, allowing tenure holders "to harvest more extensively from Crown land before turning to the private market."⁴⁸ Commerce concluded that this ability to harvest Crown timber at levels greater than the non-binding annual targets and the option to transfer timber between mills "expands the market for Crown timber, which has the effect of depressing demand—and, therefore, prices—in the private market."⁴⁹

Commerce also found that private market timber prices were likely to track the Crown prices, thereby distorting the private market. This, according to Commerce, is because the universe of firms consuming timber from private sources in Ontario is heavily concentrated and is dominated by a small number of tenure-holders.⁵⁰

⁴⁶ PDM at 17; Commerce Vol. II 61.2 Brief at 74. Commerce has maintained that the "minimum charge" was administratively set, regardless of market conditions, twenty years before the POR. *See Certain Softwood Lumber Products from Canada*, USA-CDA-2017-1904-02, Panel Decision (May 5, 2024) at 12 n. 61 (citing Commerce's IDM in that investigation).

⁴⁷ PDM at 17.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*; *See Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 Fed. Reg. 51,814 (Dep't Commerce Nov. 8, 2017) ("Lumber V Final Determination") and accompanying Issues and Decision Memorandum for the Final Determination (Dep't Commerce Nov. 1, 2017) at 94; Commerce Vol. II 61.2 Brief at 74.

It was on these bases that Commerce determined that Ontario's private stumpage market prices were distorted and could not be used as a first-tier benchmark. To do so, Commerce also had to consider—and reject—the data and expert report submitted by the GOO.

As in past investigations, GOO provided private timber market data for the relevant period set out in the MNP Private Market Survey.⁵¹ It also again submitted an economic study by Dr. Kenneth Hendricks of the University of Wisconsin analyzing the two timber markets.⁵²

Dr. Hendricks concluded that, based on the data, the Ontario private market is competitive and a valid benchmark for assessing remuneration for the Crown standing timber. He found that private stumpage prices are driven by prices for lumber end-products, that market participants are well-informed, that private timber owners have multiple buyers, and that private timber prices are consistent with a competitive market and are a valid benchmark for Crown stumpage for spruce-pine-fir (“SPF”) timber.

Hendricks based this partly on the fact that Ontario harvesters of both Ontario Crown and private timber stands are “price takers”, *i.e.*, regardless of the numbers of buyers or sellers, they are unable to influence the price by withholding their supply from the market.⁵³ “Neither source of supply can affect the revenues from harvesting softwood timber and processing it into softwood lumber.”⁵⁴ Similarly, the MNP survey observed that the private market is comprised of large loggers and purchasers seeking out timber “on an opportunistic basis” since prices there are high and they purchase only when the price makes it profitable.⁵⁵

Hendricks also found that buyers and sellers in a competitive market must have alternatives that they are aware of. This assures that the market is actually competitive. He found that the data indicated that private landowners in northeast and northwest Ontario had multiple potential end-buyers of private timber. This was confirmed by MNP survey interviews with 22 loggers who purchased private timber during the POR. They confirmed that they can buy when the landowners are willing to sell at a price that permits the logger/harvester to make a profit from the mills where the timber is ultimately sold.

Hendricks also found that the price for timber, both Crown and private, is ultimately determined by prices for lumber end-products. Lastly, the GOO argued that because Ontario

⁵¹ An Economic Analysis of the Ontario Timber Market and an Examination of Private Market Prices in that Competitive Market of Dr. Kenneth Hendricks (Jul. 12, 2019) (“Dr. Hendricks Economic Analysis”), Prop R. 135

⁵² A Survey of the Ontario Private Timber Market of MNP LLP (Mar. 3, 2017) (“MNP Private Market Survey”), Prop R. 135.

⁵³ Dr. Hendricks Economic Analysis at 23; GOO Vol. I 61.1 Brief at 18. *See also* Commerce Vol. II 61.2 Brief at 79.

⁵⁴ Dr. Hendricks Economic Analysis at 23.

⁵⁵ MNP Private Market Survey at 3.

sawmills operated at levels below capacity during the POR, “all Crown timber in Ontario that was profitable to harvest during the POR was harvested.”

Commerce responded that it did “reasonably evaluate” the MNP data and the Hendricks Report, but determined notwithstanding that private market stumpage prices were still not market determined.⁵⁶

Commerce discounted the MNP survey since it was based on a relatively low number of respondents. Only 22 loggers responded to the survey, although Hendricks calculated them to be at least 70 percent of the Ontario private timber harvest. Commerce also did not rely on the survey since the private market represented such a small fraction (7 percent) of the Ontario timber market overall.

Commerce expressed a general, unspecified concern that expert reports and data prepared for the purpose of this review “may be tailored to achieve specific results.”⁵⁷ Commerce claimed that other factors “informed the reliability of those reports.”⁵⁸

Commerce was also concerned that the Hendricks Report did not address that GOO controlled over 94 percent of the Ontario timber market during the POR and “set administered prices *that affect the Ontario timber market.*”⁵⁹ Based on this, Commerce found that the Hendricks Report had failed to “fully consider the market conditions of the Ontario timber market.”⁶⁰

Commerce also concluded that the price of Crown timber impacts not only the price of private timber but also the supply of Crown timber. In addition, Commerce asserted that Ontario’s “Crown {s}tumpage charge ‘is not responsive to the amount of Ontario Crown stumpage demanded,’”⁶¹ which it considers a “fundamental element of competitive markets.”

Drawing from GOO’s data, Commerce found that a small number of tenure holders “dominated” the private market as well as the Crown market. “The 10 largest harvesters of timber from Crown and other sources during the POR consumed more than half of the private market.” Commerce concluded that “domination of the private market by a small number of tenure holders,” and “overlap in buyers between the private and Crown timber markets” demonstrated that the Ontario private timber market prices are distorted as a result of the GOO’s involvement in the market.⁶²

The question before the Panel is whether Commerce’s determination, that the private timber market was distorted, was based upon substantial evidence. That means, as the CIT has held, that

⁵⁶ Commerce Vol. II 61.2 Brief at 80.

⁵⁷ *Id.*

⁵⁸ IDM at Cmt. 2.

⁵⁹ *Id.* at 106; Commerce Vol. II 61.2 Brief at 80 (emphasis added).

⁶⁰ Commerce Vol. II 61.2 Brief at 80.

⁶¹ *Id.*

⁶² PDM at 18; Commerce Vol. II 61.2 Brief at 80.

the agency cannot reach a conclusion unless it is supported by “evidence as a reasonable mind might accept as adequate to support a conclusion.”⁶³

The centerpiece of Commerce’s determination is that Crown timber accounted for some 95 percent of the Ontario timber harvest volume during the POR.⁶⁴ It is clear that Commerce cannot legally rely solely upon that level—or any level—of governmental market domination to find that the private market is distorted.⁶⁵ However, the record is clear that Commerce *did* in fact take the additional step to consider whether it was “reasonable to conclude” that distortion exists when it reviewed the four features of the market. That said, as we explain below, we agree with GOO that Commerce’s conclusion ultimately was not reasonable or supported by substantial evidence.

Commerce has indeed raised other evidence besides the Crown’s market share. The question before us is whether Commerce has identified enough *other* evidence and whether it supports a reasonable conclusion by Commerce.

Commerce actually had more to say about the Crown market than the private one.⁶⁶ It established that of the four components of the Crown stumpage price, only one is based on market conditions. It found that Crown tenure-holders were allowed, if they wished, to harvest above existing annual targets. It found that the tenure holders “were able to ... transfer timber between mills.”⁶⁷ Commerce also found that the private market was dominated by a small number of tenure-holders.

⁶³ *Georgetown Steel Corp. v. United States*, 810 F. Supp. 318, 320 (Ct. Int’l Trade 1992) (quoting *Universal Camera*, 340 U.S. at 477).

⁶⁴ To little effect, Ontario challenged that number as actually being 93 percent. GOO Vol. I 61.1 Brief at 31 n. 100.

⁶⁵ The GOO challenged at some length Commerce’s reliance on *Countervailing Duties: Final Rule*, 63 Fed. Reg. 65,348 (Dep’t Commerce Nov. 25, 1998) (“*CVD Preamble*”) and asserted that, in effect, Commerce had relied solely and improperly on the province’s share of the market. See GOO Vol. I 61.1 Brief at 37. The *CVD Preamble*, regardless of its status under the law and whether Commerce’s interpretation of it is entitled to any deference, merely states that:

While we recognize that government involvement in a market may have some impact on the price of the good or service in that market, such distortion normally will be minimal *unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market*. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government’s involvement in the market, we will resort to the next alternative in the hierarchy. (emphasis added).

GOO claimed that Commerce had effectively used the province’s “majority” share of the market to summarily conclude that there was distortion. Commerce added to the confusion by asserting that “Because the GOO constituted an overwhelming majority of the market for stumpage in the province during the relevant period, pursuant to the *CVD Preamble*, distortion would not ‘normally be minimal’—that is, distortion would be significant.” See Commerce Vol. II 61.2. Brief at 83.

⁶⁶ IDM at 104.

⁶⁷ *Id.*

Based upon these four factors alone, Commerce stated in its Final Results that “We then found it reasonable to conclude that private market prices in Ontario were distorted by government involvement in the timber market, such as to prevent there from being any viable standing timber prices within Ontario usable as a benchmark.”⁶⁸

The issue then is whether Commerce’s conclusion of market distortion is reasonably based upon these four factors cited in its Final Results. We take them in order.

The fact that the Crown price is only partly set by market forces is relevant only to the extent that Commerce can reasonably conclude that the Crown price somehow has affected or distorted the *private* market.

Tenure-holders are allowed to harvest Crown timber above their annual targets, which Commerce believes gives them the flexibility to potentially consume more timber at the guaranteed price before turning to the private market to purchase additional timber if needed. They also have the potential to transfer timber between mills, which Commerce concludes “expands the market for Crown timber, which has the effect of reducing demand—and, therefore, prices—for timber from the private market.”⁶⁹

Both the Crown and private timber markets in Ontario are dominated by a small number of tenure holders.⁷⁰ Commerce therefore concludes that “This results in a private market that is *subject to influence* by the Crown timber market.”⁷¹

Our concern is that Commerce has not really relied upon substantial evidence of what actually occurred in the private market—much less any distortion—during the POR. It has not found or identified any actual distortion in the private market. Instead, it deduces only *possible* or *potential* distortion in a private market that is merely, according to Commerce, “subject to” influence by the Crown market.

The agency must find that the government’s role has resulted in actual (not potential) price distortion. Here Commerce has focused only on possible developments and arrangements: the *potential* of increased Crown harvesting; the *permitted* transfer between mills; and domination by a few tenure-holders. Without ever addressing what actually happened in the private market during the POR, Commerce concludes with no evidence that these arrangements in fact actually distorted the private market.

Commerce made a sweeping characterization that “‘domination of the private market by a small number of tenure holders’ and ‘overlap in buyers between the private and Crown timber

⁶⁸ *Id.*

⁶⁹ PDM at 17-18.

⁷⁰ The 10 largest firms that source both Crown and private timber accounted for more than half of the private market consumption during the POR. Similarly, the top five firms in the Crown market accounted for over 89 percent of all Crown softwood. See Commerce Vol. II 61.2 Brief at 75 (citing PDM at 18, GOO eFAR system data, and the Ontario Market Memorandum).

⁷¹ IDM at 105 (emphasis added).

markets’ demonstrated that the Ontario private timber market prices are distorted as a result of the GOO’s involvement in the market.”⁷²

Commerce also asserted that it “evaluated record evidence provided by the GOO and concluded that it was reasonable to find that *actual transaction prices* for private purchases of stumpage in Ontario were significantly distorted as a result of the GOO’s involvement in the stumpage market.”⁷³ Yet there is no reference to any such “actual prices” in the record. Commerce also acknowledged that the *CVD Preamble* expects that where “*actual transaction prices* are significantly distorted as a result of the government’s involvement in the market, we will resort to the next alternative in the hierarchy.”⁷⁴ But the Panel has not been presented with evidence that “actual transaction prices” in the private market are being distorted—much less “significantly”.

As the Federal Circuit has explained, the substantial evidence standard “requires Commerce to examine the record and articulate a satisfactory explanation for its action.”⁷⁵ More to the point, Commerce may not base that determination “on the basis of mere conjecture or supposition.”⁷⁶

In *Borusan* the CIT required Commerce to show more, characterizing its market distortion test as a “*per se* rule ... based on no actual record evidence of distortion.”⁷⁷ In the instant case, we, too, have seen “no actual record evidence of distortion.”⁷⁸

Commerce must also explain how its legal conclusions follow from the facts in the record.⁷⁹ Commerce must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.”⁸⁰ This Commerce has not done: there is no cogent explanation of how the cited four features of the Crown market affect, much less distort, the private market. Commerce has not even presented the Panel with a theory of how those features would affect the private market, much less support it with evidence.

⁷² Commerce Vol. II 61.2 Brief at 83 (quoting PDM at 18).

⁷³ *Id.* at 86 (emphasis added).

⁷⁴ *Id.* at 85 (emphasis added).

⁷⁵ *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) (“*Yangzhou Bestpak*”); *See also Amanda Foods (Vietnam) Ltd. v. United States*, 647 F. Supp. 2d 1368, 1379 (Ct. Int’l Trade 2009).

⁷⁶ *Yangzhou Bestpak* 716 F.3d at 1378.

⁷⁷ *Borusan* 61 F.Supp.3d at 1329; *aff’d in Maverick Tube*, 857 F.3d at 1362.

⁷⁸ GOO itself pointed to a lack of evidence of “actual price distortion,” but Commerce responded that the four features are themselves evidence of “significant distortion.” *See* Commerce Vol. II 61.2 Brief at 87 (citing GOO Vol. I 61.1 Brief at 39).

⁷⁹ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

⁸⁰ *Avesta*, 724 F. Supp. at 978.

Commerce frequently stated that these four features “demonstrate” distortion,⁸¹ but never explained how.

As noted, Commerce may not rely solely on a government’s share of the market, and it is also required to consider any other evidence placed on the record by Respondents. And aside from its own assessment of the market, Commerce did indeed spend much time responding to GOO’s survey data, expert report, and conclusions about the market.⁸²

But there is no rebuttable presumption here: even if GOO had submitted no analysis, survey, or expert report of its own, Commerce is still required to base its determination on substantial evidence placed in the record. Put another way: GOO is not required to supply the evidence for Commerce. Therefore, even if Commerce were correct in all of its rebuttals of GOO’s data and arguments, that does not add anything to the weight of substantial evidence that Commerce is still required to rely upon.

The Panel is mindful that its job is merely to assess whether the conclusion proffered by Commerce is supported by substantial evidence. The Panel may not substitute its judgment for Commerce’s, nor find an alternative determination that it feels is also supported by substantial evidence, nor select another conclusion that it feels is more persuasive as if it were reviewing the matter *de novo*.

Since we are unable to conclude that substantial evidence supports Commerce’s determination that prices in the Ontario private timber market are distorted by governmental influence, we must remand. We therefore direct Commerce to identify and explain, with reference to substantial evidence of record, how prices in the private market actually were in fact distorted by governmental interference or influence. At this point, it is not necessary for the Panel to address the other issues raised regarding Ontario stumpage (*i.e.*, Commerce’s use of a Nova Scotia benchmark rather than an in-province log price benchmark, and its determination not to account for substantial in-kind costs incurred by harvesters of Ontario Crown timber). Depending on Commerce’s remand determination on the distortion issue, the Panel may take those issues up following the remand determination.

3. ALBERTA

The Panel turns now to consider Commerce’s determinations that:

⁸¹ See Commerce Vol. II 61.2 Brief at 87.

⁸² For example, Commerce dismissed the Hendricks Report since it does not focus on the government’s 95 percent share of the market. It dismissed the MNP survey which only had 22 respondents. It rejected the GOO’s claim that timber prices are effectively set by downstream products, because the Crown price is admittedly mostly set by non-market factors. See Commerce Vol. II 61.2 Brief at 87-88.

- (i) the Timber Damage Assessment (“TDA”) survey prices are not an appropriate benchmark to measure the adequacy of remuneration provided for Alberta stumpage;⁸³ and
- (ii) the Alberta stumpage market is distorted.⁸⁴

These determinations led Commerce to conclude that there were no usable tier-one prices within Alberta and, therefore, it was reasonable for Commerce to use private stumpage prices in Nova Scotia as a tier-one benchmark to measure the adequacy of remuneration provided for Alberta stumpage.

The Government of Alberta (“GOA”), Canfor Corporation (“Canfor”), West Fraser Mills Limited (“West Fraser”), and the Alberta Softwood Lumber Trade Council (“ASLTC”) (jointly, “Alberta Parties”) rejected Commerce’s determinations and its use of Nova Scotia private stumpage prices as a tier-one benchmark. They argued that the TDA survey data “provide the only available basis for a tier-one, in-jurisdiction benchmark for Alberta standing timber reflecting ... Alberta’s prevailing market conditions” and that “Commerce’s rejection of this benchmark was unsupported by substantial evidence on the record and was not in accordance with law.”⁸⁵ The Alberta Parties also maintained that Commerce’s determination that the Alberta stumpage market is distorted was “flawed on multiple levels” and “not supported by the record of this review.”⁸⁶

A. The TDA Survey Data as the Source of a Tier-One Benchmark for Alberta Stumpage Prices

i) The TDA Private Log Sales Transaction Prices

The Alberta Parties asserted that the statute and regulations “require the use of an in-jurisdiction benchmark when available” to assess whether goods have been provided for LTAR.⁸⁷ They argued that the “GOA provided Commerce with an internal, market-determined benchmark that satisfies the statutory and regulatory requirements for an in-jurisdiction benchmark: the log sale transaction prices collected as part of the annual {TDA} survey.”⁸⁸

The Alberta Parties explained that the TDA survey is “administered annually in the ordinary course of business by the Alberta Energy/Utility Forest Products Industry Joint Management Committee.”⁸⁹ The survey “collects prices paid by private parties in actual, arm’s-length

⁸³ IDM at 70-71.

⁸⁴ *Id.* at 69-70.

⁸⁵ GOA Vol. I 61.3 Brief at AB-I-25.

⁸⁶ GOA Vol. I 61.1 Brief at AB-I-62.

⁸⁷ *Id.* at 48.

⁸⁸ *Id.* at 56.

⁸⁹ GOA Vol. I 61.3 Brief at AB-I-25.

transactions for logs in Alberta.”⁹⁰ There is a “minor volume”⁹¹ of private stumpage prices contained in the survey data but the “majority of transactions reported ... are log sales.”⁹² The survey prices are used to “determine appropriate compensation for standing timber removed from a forestry company’s timber disposition due to industrial activity” by the energy and utilities industries.⁹³ More specifically, the standing timber prices are “derived” from the log transaction prices: the log prices are “adjusted to remove logging, hauling and direct overhead costs, thereby ‘determining an average annual province-wide value for standing Crown timber.’”⁹⁴ In sum, for the Alberta Parties, the TDA Survey data “meet all the regulatory criteria for a tier-one benchmark: they are market-determined; yield a standing timber value; reflect a price resulting from actual transactions; reflect the ‘conditions of competition’ in the political jurisdiction in question; and avoid the insuperable challenges involved in Commerce’s use of a Nova Scotia benchmark for its Alberta LTAR analysis”⁹⁵

Commerce determined that the TDA survey data “cannot be used”⁹⁶ to assess whether Alberta stumpage had been provided by the GOA for LTAR. It asserted that the survey data “did not satisfy the criteria”⁹⁷ under the regulation to serve as a tier-one benchmark on two counts. First, the “overwhelming majority of the timber prices in the TDA data are for harvested logs, a downstream product from stumpage.”⁹⁸ Second, the “small volume of private stumpage prices from the TDA data are not market-determined.”⁹⁹

Commerce explained that under the benchmark hierarchy set forth in 19 C.F.R. § 351.511(a)(2), the “first preference for determining the adequacy of remuneration is to compare the government price to a market-determined price ‘for the good or service resulting from actual transactions in the country in question.’”¹⁰⁰ Commerce observed that the good in question in this administrative review is stumpage and, therefore, a market-determined stumpage price is the preferred benchmark under Commerce’s regulatory hierarchy. Commerce noted that its regulations

⁹⁰ *Id.*

⁹¹ *Id.* at AB-I-37.

⁹² *Id.* at AB-I-25.

⁹³ *Id.* The annual TDA surveys began 1994 when the Alberta forest industry and the energy/utilities industries negotiated a “basis for quantifying the financial loss arising from” the removal by the energy/utilities industries of timber and public lands from forest production. See Exh. AB-AR1-S-41 (Overview of the Timber Damage Assessment (TDA) Process and the Historic Survey of Alberta Softwood and Hardwood Log Transactions) (“Overview of the TDA Process”) at 1, P.R. 752.

⁹⁴ GOA Vol. I 61.1 Brief at AB-I-58 (quoting Overview of the TDA Process at 4).

⁹⁵ GOA Vol. I 61.3 Brief at AB-I-26.

⁹⁶ IDM at 71.

⁹⁷ Commerce Vol. II 61.2 Brief at 7.

⁹⁸ *Id.* at 8.

⁹⁹ *Id.* at 7.

¹⁰⁰ IDM at 71 (quoting 19 C.F.R. § 351.511(a)(2)(i)).

“do not authorize selecting a tier-one benchmark based on prices for a good that is different from the government-provided good under investigation.”¹⁰¹

The COALITION argued that the TDA survey prices cannot be used as a tier-one benchmark because they are primarily for logs, which are “not ‘for the good or service’ under review.”¹⁰² The COALITION asserted that the log market is distinct from the stumpage market. Moreover, the COALITION maintained that the survey prices are not market-determined as required by the regulations because the lumber market in Alberta is distorted.¹⁰³

The Alberta Parties maintained that the TDA survey “yields a standing timber value, thus it is for the good in question.”¹⁰⁴ They explained that “Commerce has repeatedly recognized that the prices for standing timber are residual values driven by market demand for logs, and ultimately for timber” and argued that the “use of log sale transaction prices as a benchmark for Alberta Crown standing timber does not require any complex adjustments.”¹⁰⁵ The Alberta Parties also pointed out that Commerce used log prices to “derive a stumpage benchmark” for BC in the Final Results and noted that Commerce used the TDA survey data to “derive a benchmark for Alberta stumpage” in the *Lumber IV* investigation,¹⁰⁶ thus demonstrating that Commerce “has recognized that prices for standing timber are residual values driven by market demand for logs.”¹⁰⁷

The Alberta Parties also insisted that “Commerce is required to select a benchmark reflecting prevailing market conditions for the good in question over one that does not meet this statutory requirement, as is the case for the Nova Scotia benchmark.”¹⁰⁸ They also argued that it is “simply unreasonable to use as a benchmark for Alberta stumpage a Nova Scotia benchmark that reflects the extremely different market conditions in a jurisdiction thousands of kilometers away, which yield dramatically different standing timber characteristics.”¹⁰⁹ The Alberta Parties observed that the language of section 771(5)(E)(iv) of the Tariff Act stipulates that the benchmark price “must reflect the ‘prevailing market conditions for the good or service being provided ... in the country which is subject to the ... review.’”¹¹⁰ In discussing the term “country,” they quoted jurisprudence recognizing that Commerce has the “latitude to choose among several levels of political jurisdiction in identifying an appropriate benchmark rate,”¹¹¹ but contended that Commerce’s

¹⁰¹ Commerce Vol. II 61.2 Brief at 8.

¹⁰² COALITION 61.2 Brief at 56 (quoting section 771(5)(E)(iv) of the Tariff Act).

¹⁰³ *Id.* at 57-61.

¹⁰⁴ GOA Vol. I 61.1 Brief at AB-I-59.

¹⁰⁵ *Id.* at AB-I-59–AB-I-60.

¹⁰⁶ GOA Vol. I 61.3 Brief at AB-I-31–AB-I-32.

¹⁰⁷ *Id.* at AB-I-35 (italics in original).

¹⁰⁸ *Id.* at AB-I-28.

¹⁰⁹ *Id.* at AB-I-30.

¹¹⁰ GOA Vol. I 61.1 Brief at AB-I-48.

¹¹¹ *Id.* at AB-I-49, n. 117.

choice was “bound necessarily” by the statutory requirement that “the prevailing market conditions in the benchmark jurisdiction reflect the market conditions prevailing in the jurisdiction in which the government provided the good under review.”¹¹² For the Alberta Parties, the “statute therefore requires that any benchmark price reflect market conditions of standing timber in Alberta.”¹¹³ Under the circumstances, argued the Alberta Parties, “even if the TDA prices did not satisfy the criteria for a tier-one benchmark, Commerce’s obligation to select a benchmark that reflects prevailing market conditions for the good in question would nevertheless mandate selection of an in-jurisdiction benchmark over a benchmark based on transactions in a distant jurisdiction with very different market conditions.”¹¹⁴

Commerce was not persuaded by the Alberta Parties’ argument that because log transaction prices are used to yield a standing timber value, they are in fact prices for the good provided by the GOA. For Commerce, logs are a downstream product from stumpage and are a “different category” of goods.¹¹⁵ Commerce acknowledged that the log transactions from the TDA survey were used as a benchmark for stumpage in *Lumber IV*. However, it clarified that its reliance on the TDA survey data in that proceeding was for a tier-three analysis, as they were used “as a starting point for determining whether the government price was consistent with market principles.”¹¹⁶ Thus Commerce’s reliance on the TDA survey in that investigation is not relevant for the tier-one analysis conducted in this review. Moreover, said Commerce, it used log prices to derive a benchmark for BC stumpage “because the record contained no usable tier-one or tier-two benchmark prices for BC stumpage.”¹¹⁷ This was not the case for Alberta stumpage, for which purchases of private stumpage in Nova Scotia provided an appropriate benchmark.

Commerce asserted that tier-one prices must meet all of the statutory requirements set forth in 19 C.F.R. § 351.511(a)(2)(i), namely: prices must be (i) market determined; (ii) for the good provided by the government; (iii) based on actual transactions; and (iv) from within the country under investigation. Failure to satisfy any one of them “is a sufficient basis to reject the prices as tier-one benchmarks.”¹¹⁸ Because Commerce found that the TDA log prices are not prices for the good under investigation (stumpage), the TDA log prices did not meet the requirements to serve as a tier-one benchmark for Alberta stumpage.

In the Panel’s view, Commerce adopted a reasonable interpretation of the law in rejecting the use of TDA log prices as a tier-one benchmark for Alberta stumpage. Section 771(5)(E)(iv) of the Tariff Act stipulates that the benchmark price “shall be determined in relation to prevailing market conditions for the good or service being provided ... in the country which is subject to ... review.”

¹¹² *Id.* at AB-I-49.

¹¹³ *Id.* at AB-I-51.

¹¹⁴ *Id.* at AB-I-61.

¹¹⁵ Commerce Vol. II 61.2 Brief at 11.

¹¹⁶ *Id.* at 12.

¹¹⁷ *Id.* at 13.

¹¹⁸ *Id.*

The government-provided good at issue here is stumpage, not logs. Although the Alberta Parties maintained that market-based standing timber values are derived from these transactions for logs and that the survey is conducted to allow the industry to assess the fair market value for standing timber prices, the Alberta Parties also observed that “the private Alberta log market ... {is} distinct from the stumpage market.”¹¹⁹ The Panel disagrees with the Alberta Parties that Commerce was legally required to select the TDA log price survey data as a tier-one benchmark for Alberta stumpage. In the light of these conclusions, the Panel affirms Commerce’s rejection of the TDA log prices data as a tier-one benchmark.

As mentioned at the outset of this section, Commerce rejected the TDA survey for use as a tier-one benchmark on two counts: (i) the overwhelming majority of prices in the data were for harvested logs rather than stumpage, the product under review; and (ii) the “the private stumpage prices in Alberta, including the small volume of private stumpage prices from the TDA data, are not market-determined.”¹²⁰ We have affirmed Commerce’s finding in respect of the first count. We turn now to consider the second count.

ii) The TDA Private Stumpage Prices

Commerce determined in the IDM that “the small amount of standing timber prices contained in the TDA survey are distorted ... and unusable as a tier-one benchmark.”¹²¹ In the PDM, Commerce observed that where it finds that the government provides a “substantial portion of the market” for a good, it may consider prices for those goods to be “significantly distorted and not an appropriate basis of comparison for determining whether there is a benefit.”¹²² It explained that “where the government’s role as provider of the good ... is so predominant, it, in effect, determines the prices for private sellers of the same or similar goods ... such that comparing the government prices to private prices would amount to comparing the financial contribution to itself.”¹²³

Commerce’s position was that the Alberta stumpage market was distorted as a result of the “overall and cumulative effect of multiple distorting elements,”¹²⁴ including the government’s predominant role in the market. It concluded that the private stumpage prices were “‘effectively determined’ by Crown stumpage prices” and “would mirror the administratively-set prices charged by the GOA on Crown lands.”¹²⁵ As such, the private prices would be “circularly related to the government price” and any “analysis would become circular because the benchmark price would reflect the very market distortion which the comparison is designed to detect.”¹²⁶ Thus, the private

¹¹⁹ GOA Vol. I 61.1 Brief at AB-I-68.

¹²⁰ Commerce Vol. II 61.2 Brief at 7.

¹²¹ IDM at 71.

¹²² PDM at 15.

¹²³ *Id.*

¹²⁴ IDM at 69.

¹²⁵ IDM at 70 (quoting from *Lumber V* Final Determination IDM at 46).

¹²⁶ IDM at 70.

stumpage prices would not constitute an appropriate tier-one benchmark to determine if GOA provided stumpage for LTAR.

The Alberta Parties described Commerce’s argument as a “red herring” because they were “not contending that Commerce should use the minor volume of private stumpage prices contained in the TDA Survey as the basis for an Alberta benchmark price;”¹²⁷ as explained, they advocated using the private log prices to derive a market-determined benchmark. They argued further, however, that Commerce’s findings of market distortion in the Alberta stumpage market were “unsupported by record evidence.”¹²⁸

The Panel will now consider the parties’ arguments on market distortion in the Alberta stumpage market and its effect on private stumpage prices included in the TDA survey.

B. Commerce’s Finding that the Alberta Stumpage Market was Distorted

In the PDM, Commerce recalled its findings in the original investigation that the Alberta stumpage market was distorted because of:

- (1) government control: Crown-origin timber accounted for the vast majority of the harvest volume in the province;
- (2) market concentration: a small number of tenure-holding companies dominated the Crown-origin standing timber harvests, “ensuring that private-origin standing timber prices track the prices of Crown-origin timber”; and
- (3) supply “overhang”: a difference existed between the volume of Crown-origin standing timber allocated and the volume harvested, which “indicates that the willingness of tenure-holding sawmills to pay for private-origin standing timber will be limited by their costs for obtaining standing timber {from} their own tenures”.¹²⁹

Commerce affirmed in the PDM that “the record of this review indicates that the Alberta stumpage market is distorted for the same reasons.”¹³⁰ Commerce added that in assessing whether the Alberta stumpage market produced market-determined prices, it considered “the effect of multiple related factors for which none is singularly determinative of whether the market is or is not distorted.”¹³¹ It explained further that it “relies on the overall and cumulative effect of multiple distorting elements, including government control of the market, combined with market concentration and supply overhang.”¹³²

¹²⁷ GOA Vol. I 61.3 Brief at AB-I-37.

¹²⁸ *Id.* at AB-I-38.

¹²⁹ PDM at 16.

¹³⁰ *Id.*

¹³¹ IDM at 69.

¹³² *Id.*

Commerce noted first that Crown-origin timber “accounted for about 98 percent of the total harvest volume”, which “illustrates the GOA’s control” of the standing timber market in the province.¹³³ This government control “concern{ed}” Commerce because it meant that private prices were “effectively determined” by Crown stumpage prices and that private prices “cannot be considered to be independent of the government price.”¹³⁴ As a result, said Commerce, any LTAR “analysis would become circular because the benchmark price would reflect the very market distortion which the comparison is designed to detect.”¹³⁵

The Alberta Parties argued that Commerce’s conclusion that “the Alberta stumpage market was distorted because Crown-origin timber accounted for a majority of the harvest”¹³⁶ was “not supported by any form of analysis or explanation.”¹³⁷ The Alberta Parties claimed that “government control over the majority of the harvest does not necessarily result in market distortion” and said that Commerce “simply assumes this conclusion” while failing to offer any explanation to support this view.¹³⁸ The Alberta Parties maintained that Commerce “ignores contrary evidence”¹³⁹ found in the economic analysis carried out by Alberta’s economic expert (the Brattle Report),¹⁴⁰ which establishes that the Alberta stumpage market is of “moderate” concentration and would therefore “be considered to ‘function freely and generate market-determined prices.’”¹⁴¹ The Alberta Parties also point to the analysis by Professor Joseph P. Kalt that considers a hypothetical scenario in which a government sets stumpage rates for “the vast majority of the harvest” and concludes that the government-set stumpage rates would not distort the market-determined price.¹⁴²

The second distortion element relied on by Commerce in the IDM was market concentration. Commerce explained that the ten largest tenure-holding companies accounted for approximately 91 percent of the harvested Crown-origin standing timber volume and that the same ten companies received a majority of the private origin timber harvest in Alberta.¹⁴³ Commerce asserted that the record evidence “demonstrates that a small number of tenure-holding firms dominate the stumpage

¹³³ Commerce Vol. I 61.2 Brief at 16-17.

¹³⁴ IDM at 70; Commerce Vol. I 61.2 Brief at 17.

¹³⁵ IDM at 70.

¹³⁶ *Id.* at 69.

¹³⁷ GOA Vol. I 61.3 Brief at AB-I-39–AB-I-40.

¹³⁸ *Id.* at AB-I-40.

¹³⁹ GOA Vol. I 61.1 Brief at AB-I-67.

¹⁴⁰ See Exh. AB-AR1-S-24 (Brattle Group Assessment of an Internal Benchmark for Alberta Crown Timber or “Brattle Report”), P.R. 746.

¹⁴¹ GOA Vol. I 61.1 Brief at AB-I-64 (quoting Brattle Report at 41-42).

¹⁴² *Id.* at AB-I-67 (citing to Exh. GOC-AR1-STUMP-42 (Kalt Report) at 33-36), P.R. 957.

¹⁴³ Commerce Vol. I 61.2 Brief at 17.

market and distort stumpage prices.”¹⁴⁴ It also maintained that the record evidence supported its conclusion in the IDM that “because ‘the same companies are active in both the Crown stumpage and private stumpage markets ... prices for standing timber from non-Crown sources would mirror the administratively-set prices charged by the GOA on Crown lands.’”¹⁴⁵ Commerce claimed that it is “readily discernible from Commerce’s analysis that the concentration ratios indicate that prices of private-origin standing timber track the prices of Crown-origin standing timber and are not market-determined because the market is concentrated among a small number of tenure-holding companies.”¹⁴⁶ Commerce maintained that, “{b}ased on this record evidence, {it} reasonably concluded that the concentration of tenure-holding companies in the market indicates that the prices for private-origin standing timber are driven by the administratively-set prices for Crown-origin standing timber.”¹⁴⁷

The Alberta Parties challenged Commerce’s conclusion that the Alberta stumpage market was distorted as a result of a small number of companies dominating the stumpage market, saying that the conclusion was “unsubstantiated, and its basis for finding market concentration is flawed.”¹⁴⁸ They claimed that Commerce “cites no economic literature or independent support for the conclusion that a ten-firm buyer concentration ratio of 80% reflects excessive buyer concentration.”¹⁴⁹ Nor did Commerce provide an “evaluation of the relative shares of the ten buyers or the market effect of competition between those buyers.”¹⁵⁰ The Alberta Parties affirmed that Commerce’s assessment was “a less accurate and less economically relevant metric for measuring market concentration than the Herfindahl-Hirschman Index”¹⁵¹ (“HHI”), which is the “preferred measure of market concentration.”¹⁵² The Alberta Parties pointed out that “{a}pplying the HHI to the Alberta stumpage market, the Brattle Report establishes that the Alberta stumpage market would be considered a market of ‘moderate’ concentration” and thus “would be considered to ‘function freely and generate market-determined prices’.”¹⁵³ In sum, the Alberta Parties asserted that Commerce’s market concentration argument “cannot be evidence of market distortion.”¹⁵⁴

The third reason cited in the IDM in support of Commerce’s conclusion that the Alberta stumpage market was distorted was the existence of a “supply overhang”, described by Commerce

¹⁴⁴ *Id.* at 18.

¹⁴⁵ *Id.* (quoting IDM at 70).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ GOA Vol. I 61.1 Brief at AB-I-63.

¹⁴⁹ *Id.* at AB-I-65.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at AB-I-63–AB-I-64.

¹⁵² *Id.* at AB-I-64 (quoting Brattle Report at 39).

¹⁵³ *Id.* at AB-I-64 (quoting Brattle Report at 42).

¹⁵⁴ *Id.* at AB-I-65.

as “the difference between the volume of Crown-origin standing timber allocated and the volume of Crown-origin standing timber harvested.”¹⁵⁵ According to Commerce, tenure-holding companies in Alberta harvested about 80 percent of their allocation of Crown-standing timber. For Commerce, this failure to fully consume allocations of Crown stumpage “indicates that ‘the willingness of tenure-holding sawmills to pay for private origin standing timber will be limited by their costs for obtaining standing timber from their own tenures ...’”.¹⁵⁶ Commerce claimed that this supply overhang, together with the market concentration that exists in the Alberta stumpage market, “supports Commerce’s determination that private stumpage prices would track the administratively-set process on Crown-lands.”¹⁵⁷ Commerce also concluded that “{w}hen combined with the fact that the same companies are active in both the Crown stumpage and private stumpage markets, this is further evidence that prices for standing timber from non-Crown sources would mirror the administratively-set prices charged by the GOA on Crown lands.”¹⁵⁸

The Alberta Parties contended that Commerce’s reliance on “a so-called”¹⁵⁹ supply overhang is unfounded and they argued that Commerce “gloss{ed} over” the evidence on the record demonstrating that the so-called overhang is “not practically available” to tenure holders.¹⁶⁰ The Alberta Parties pointed to the affidavit of Dan Wilkinson of the Alberta Forest Products Association addressing the unused annual allowable cut (“AAC”) in certain forest management areas. Mr. Wilkinson confirmed that the AAC is “not practically available to the FMA holders” for the following reasons: (i) the trees in many stands are “so far away from the mill that they cannot be harvested and hauled on an economic basis”; (ii) the area “contains important caribou populations considered to be at immediate risk of extirpation” such that harvest was deferred due to a government-imposed moratorium; and (iii) approximately one-half of one of the forest management units “had been subject to an unresolved land claim by the Lubicon Lake Cree Nation.”¹⁶¹ For the Alberta Parties, this evidence refutes Commerce’s argument that a supply overhang exists and is evidence of market distortion.¹⁶²

The Alberta Parties concluded that none of the individual elements relied upon by Commerce in support of its conclusion that the Alberta stumpage market is distorted finds any support in the record. They pointed out that while Commerce purported to rely on the cumulative effect of these supposed distorting elements to support its finding of market distortion, cumulation did not help

¹⁵⁵ Commerce Vol. I 61.2 Brief at 19-20.

¹⁵⁶ *Id.* at 20 (quoting IDM at 70).

¹⁵⁷ *Id.*

¹⁵⁸ IDM at 70.

¹⁵⁹ GOA Vol. I 61.1 Brief at AB-I-65.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at AB-I-66; *See also* Exh. AB-AR1-S-82 (Affidavit of Dan Wilkinson, Director of Markets for the Alberta Forest Products Association) at paras. 19, 21, 23, 26, P.R. 755.

¹⁶² *Id.* at AB-I-66–AB-I-67.

because “the sum of three zeros is still zero.”¹⁶³ The Alberta Parties also said that none of the distortion elements relied upon by Commerce “relating to the TDA Survey data are reasonably supported in the record.”¹⁶⁴

C. The Panel’s Conclusion on Commerce’s Findings of Distortion in the Alberta Stumpage Market

As noted above,¹⁶⁵ Commerce determined that “the small amount of standing timber prices contained in the TDA survey are distorted ... and unusable as a tier-one benchmark.”¹⁶⁶ The Alberta Parties rejected these findings as unsupported by the record evidence. The Panel is not persuaded that Commerce’s findings about market distortion and the effect on private prices are supported by substantial evidence on the record.

The Panel agrees with the Alberta Parties that Commerce failed to demonstrate how government control over the majority of the harvest resulted in market distortion. Commerce refers to but offers no “distortion analysis”¹⁶⁷ in this respect. Nor does Commerce demonstrate how the private stumpage prices are “effectively determined”¹⁶⁸ by Crown stumpage prices. It points to no price comparisons between private and Crown stumpage to illustrate its claim; it cites to no evidence in the record demonstrating the effective determination of prices.

Commerce purports to rely on its regulations in asserting that because the market is so dominated by the government, “the remaining private prices ... cannot be considered to be independent.”¹⁶⁹ In the Panel’s view, however, the regulations do not offer the support Commerce claims to find. The CVD Preamble states that “{w}here it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government’s involvement in the market, we will resort to the next alternative in the hierarchy.”¹⁷⁰ In our view, this language does not suggest automaticity between substantial government involvement and distortion of actual transaction prices; rather, the language suggests that it is necessary to carry out an assessment of the effect of the government involvement and come to a reasonable conclusion that the prices are significantly distorted as a result of such involvement. The courts agree.¹⁷¹ The Panel finds no such assessment in Commerce’s findings.

¹⁶³ *Id.* at AB-I-68.

¹⁶⁴ GOA Vol. I 61.3 Brief at AB-I-43.

¹⁶⁵ *See supra* at 26.

¹⁶⁶ IDM at 71.

¹⁶⁷ *Id.* at 70; Commerce Vol. I 61.2 Brief at 17.

¹⁶⁸ IDM at 70.

¹⁶⁹ *Id.*

¹⁷⁰ CVD Preamble. at 65,377.

¹⁷¹ *See, e.g., Borusan* 61 F.Supp.3d at 1328-1329, where the CIT held that “Commerce’s finding that the Turkish HRS market is significantly distorted, based solely on its finding that the Turkish government provided a ‘substantial portion’ of it, amounts ... to application of a *per se* rule.” The CAFC upheld

Turning to the element of market concentration, once again we find that Commerce did not point to evidence on the record to substantiate its claims about the effect of market concentration. Commerce did not refer to economic literature to support its approach. Although Commerce stated that the record evidence “demonstrates that a small number of tenure-holding firms dominate the stumpage market and distort stumpage prices”,¹⁷² the evidence it cited to was provided by GOA and concerned volumes of harvested timber consumed by lumber companies; the GOA evidence does not demonstrate distortion of prices. While Commerce claimed that it was “readily discernible” from its analysis that the “concentration ratios indicate that prices of private-origin standing timber track the prices of Crown-origin standing timber and are not market-determined,”¹⁷³ the Panel discerned no such tracking. Nor did Commerce illustrate any tracking of private-origin standing timber prices and Crown-origin standing timber prices.

The Panel takes note that Commerce questioned the relevance of the HHI relied upon in the Brattle Report and stated that it was not required to use that metric. Commerce insisted that it “has wide discretion in selecting a methodology for determining whether prices are market determined” and asserted that its “chosen methodology is presumptively correct.”¹⁷⁴ The Panel has no issue with Commerce relying on its chosen methodology. However, Commerce has not made clear in its ruling which methodology it followed and how it led to Commerce’s conclusion that the market was distorted.

Turning to “supply overhang,” the Panel agrees with the Alberta Parties that Commerce “glossed over”¹⁷⁵ the evidence on the record in concluding that a supply overhang existed and that it affected the willingness of tenure-holding sawmills to pay for private origin timber. Commerce referred to the “Canadian Parties’ concerns, which include a variety of issues such as the impracticability of harvesting certain stands of lumber ..., environmental considerations ... and ongoing negotiations with First Nations,” but concluded that this does “not change the fact that, on the margin, the tenure holder has access to additional supply from Crown lands that it can harvest rather than going to the private market, ... because there is unused volume allocation ... {and} because mills are awarded periodic allotments that span five years.”¹⁷⁶ In the Panel’s view, Commerce failed to address or explain the effect (or lack thereof) on overall supply of the impracticability of harvesting in certain areas. Moreover, Commerce did not demonstrate or explain how supply (even if practically available for harvest) would affect market prices such that private stumpage prices would track administratively-set prices on Crown land.

the CIT’s reversal of Commerce’s decision on distortion: “Commerce applied what amounted to a *per se* rule of market distortion after finding {the Turkish government} controlled a substantial portion of the market, despite the *Preamble*’s language to the contrary.” *Maverick Tube* 857 F.3d at 1362.

¹⁷² Commerce Vol. I 61.2 Brief at 18.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 19.

¹⁷⁵ GOA Vol. I 61.1 Brief at AB-I-65.

¹⁷⁶ IDM at 70.

We are mindful that the Panel’s task is not to engage in *de novo* review but, rather, to “merely vet the determination”¹⁷⁷ and assure that Commerce has “examine{d} the relevant data and articulate{d} a satisfactory explanation for its action including a rational connection between the facts found and the choices made.”¹⁷⁸ It is not for the Panel to reassess the evidence or even to agree with Commerce’s assessment of it. We need only consider whether Commerce examined the evidence and explained how it came to its conclusion in respect of that evidence.

As detailed above, the Panel does not consider Commerce’s finding that Alberta stumpage is distorted as a result of government control, market concentration and supply overhang – be they taken singularly or cumulatively – to be supported by substantial evidence on the record. The Panel holds the same view in respect of Commerce’s conclusion that the private stumpage prices were effectively determined by Crown stumpage prices and would mirror the administratively-set prices charged by GOA on Crown lands. For the Panel, while Commerce made several assertions about these matters, assertion, without more, is not evidence. Commerce appeared to suggest that significant presence of the government in the market automatically establishes distortion; however, it did not demonstrate this to be so. Commerce failed to explain which analytical approach it followed to arrive at its conclusion that market concentration caused distortion; it only dismissed the approach proffered by the Alberta Parties and provided no evidence of the distortion it claimed to exist. Commerce maintained its view that there was a supply overhang that caused distortion and that the unused volume meant that tenure-holders did not have to go to the private market for timber, but it did not explain why the acknowledged impracticalities in harvesting did not undermine this position. And it provided no concrete data to support its claim that private stumpage prices were “effectively determined” by Crown stumpage prices, or that private prices “mirrored” or “tracked” Crown-origin stumpage prices.

In the light of these conclusions, the Panel remands Commerce’s determinations that:

- (i) Alberta stumpage prices are distorted as a result of government control, market concentration and supply overhang; and
- (ii) the private stumpage prices from the TDA survey data are not market-determined and cannot serve as a tier-one benchmark for assessing whether GOA provided stumpage for LTAR.

D. Other Alberta Stumpage Issues

In the light of our decisions above, the Panel need not proceed to address arguments related to Commerce’s selection of private prices in Nova Scotia as a tier-one benchmark for measuring adequacy of remuneration for Alberta Crown stumpage, including arguments related to comparability of forests, tree size and tree species. Nor does the Panel see a need under the circumstances to address arguments about the adequacy of remuneration paid to harvest lumber from Crown land in Alberta, including whether Forest Resource Improvement Association of

¹⁷⁷ *Nippon Steel*, 458 F.3d at 1352.

¹⁷⁸ *Avesta*, 724 F. Supp. at 978.

Alberta (“FRIAA”) dues, in-kind costs and holding and protection charges should be excluded from the calculation of remuneration provided by the Respondents. The Panel also finds it unnecessary to address the Alberta Parties’ argument that Commerce erred in respect of product comparisons in evaluating stumpage pricing, or their argument in respect of including Code 20 fuelwood in the benefit calculation. Finally, the Panel also declines under the circumstances to address arguments about potential adjustments to the benchmark in relation to haul costs, transportation costs, and conversion factors. The Panel can address these arguments depending on Commerce’s remand determination regarding distortion of Alberta’s stumpage market.

4. BRITISH COLUMBIA

A. Commerce’s Use of WDNR Data Rather Than F2M Data

The Panel next considered the COALITION’s and Sierra Pacific’s complaints regarding Commerce’s decision to use U.S. Pacific Northwest (“PNW”) log prices published by the Washington Department of Natural Resources (“WDNR”) as the appropriate benchmark to measure the adequacy of remuneration for stumpage in BC. The COALITION and Sierra Pacific contended that the appropriate benchmark should be U.S. PNW delivered log prices published by Forest2Market (“F2M”), an independent commercial provider of market intelligence for the forest industry. The COALITION and Sierra Pacific argued that Commerce’s preference for WDNR data over F2M data was inconsistent with its established practice and that the decision was not supported by substantial evidence and was otherwise not in accordance with law. In contrast, Commerce claimed that it reasonably selected the WDNR data as the most reliable tier-three data on the record and that its decision was based on substantial evidence and in accordance with law.

In this administrative review as in the original investigation, Commerce found that private log prices in BC and in other Canadian provinces were not appropriate tier-one benchmarks for prices in BC and that no world market tier-two benchmark existed. Commerce further found that delivered U.S. PNW log prices were an appropriate tier-three benchmark. It determined that timber from the U.S. PNW and BC was comparable given that both areas fall within the same forest region and share similar growing conditions and species composition, with the species harvested by the BC Respondents closely corresponding to those grown in the U.S. PNW.¹⁷⁹ Commerce also concluded that U.S. log prices constituted an appropriate tier-three benchmark for BC stumpage because the value of standing timber is largely derived from demand for the logs produced from a given tree, and U.S. log prices reflect market-determined values arising from arm’s-length transactions for logs harvested from private lands.¹⁸⁰

However, unlike in the original investigation, Commerce’s selection of U.S. PNW log prices as a tier-three benchmark over in-market and world-market benchmarks for BC stumpage pursuant to 19 C.F.R. § 351.511(a) is not within the scope of issues before this Panel for review.¹⁸¹ The

¹⁷⁹ Commerce Vol. IV 61.2 Brief at 29.

¹⁸⁰ *Id.*

¹⁸¹ See Section II *supra* at 4, which explains that BC Claims 1, 2, and 3 from the Canadian Parties’ Complaint were dismissed by this Panel on August 7, 2024.

COALITION and Sierra Pacific challenged on several grounds Commerce's selection of the WDNR over the F2M benchmark as the basis for the PNW log price.¹⁸²

First, the COALITION and Sierra Pacific contended that Commerce's selection of the WDNR pricing information over the F2M data represented a departure from its practice of favoring actual transaction prices over price quotes and was inconsistent with 19 C.F.R. § 351.511(a)(2)(i), which expresses a preference for a benchmark based on market-determined prices derived from actual transactions.¹⁸³

Commerce replied that while 19 C.F.R. § 351.511(a)(2)(i), which defines a tier-one benchmark, provides that Commerce will normally rely on prices "resulting from actual transactions," 19 C.F.R. § 351.511(a)(2)(iii), which defines a tier-three benchmark, contains no express preference for actual transaction prices.¹⁸⁴ Commerce further argued that although its regulations and practice generally favor actual transaction prices over price quotes in benchmark selection, it is not required to use transaction prices where it has substantial concerns regarding such prices, finds defects in the data, or identifies superior data sources on the record.¹⁸⁵ The COALITION acknowledged that Commerce sometimes selects price quotes as a benchmark, but contended that a previous panel determined that offer prices should only be used when actual transaction price quotes are unavailable.¹⁸⁶

Second, the COALITION and Sierra Pacific also disagreed with Commerce's finding that the WDNR data were more reliable than the F2M data. Commerce had argued that its practice does not limit its consideration of potential benchmarks solely to whether the data reflect actual transaction prices, but instead it considers more broadly whether the benchmark data constitute the best available evidence on the record.¹⁸⁷ In this review, Commerce contended that, after an

¹⁸² The WDNR benchmark is based on WDNR survey data that were placed on the record by the GBC and consist of species-specific, monthly per unit price quotes for delivered logs in the interior of Washington state and collected by the WDNR. The F2M benchmark, placed on the record by the COALITION, is monthly average log pricing data from the U.S. PNW reflecting actual transaction prices compiled by F2M. The information from F2M contains two datasets: pricing tables prepared for the purposes of this review, and Market Guides compiled in the ordinary course of business and sourced from confidential transactional data.

¹⁸³ COALITION 61.1 Brief at 21, 23, 26-28; Sierra Pacific 61.1 Brief at 11-18, 26 (also noting that 19 C.F.R. § 351.511(a)(2)(iv) directs Commerce to calculate "the price that a firm actually paid or would pay if it imported" the product at issue for purposes of measuring the adequacy of remuneration).

¹⁸⁴ IDM at 85; Commerce Vol. IV 61.2 Brief at 36.

¹⁸⁵ *Id.*

¹⁸⁶ COALITION 61.1 Brief at 27-28.

¹⁸⁷ Commerce Vol. IV 61.2 Brief at 36-37 (supported by *PET Resin from Oman*, IDM at Cmt. 3; *Changzhou Trina Solar Energy Co., Ltd. v. United States*, 255 F. Supp. 3d 1312, 1319 (Ct. of Int'l Trade 2017) (noting that Commerce considers factors such as contemporaneity, specificity, and tax exclusivity in evaluating benchmark information)).

exhaustive analysis of record evidence, it determined that the F2M data contain defects that make the WDNR data a more reliable benchmark than both the F2M pricing tables and Market Guides.¹⁸⁸

Commerce found the WDNR data to be reliable, in part, because they contain private, market-determined prices that were collected and maintained by a government agency in the ordinary course of business, whereas the first component of the F2M data, the pricing tables, was commissioned by the COALITION for the purposes of this review. Specifically, Commerce found the F2M pricing tables to be unverifiable, noting that the underlying data and search parameters used to generate the species-specific prices are not part of the record.¹⁸⁹ Commerce added that the F2M pricing tables had been created solely for the purposes of this review, emphasizing that it was impossible to assess whether the prices are “complete, representative, or reliable.”¹⁹⁰

The COALITION challenged Commerce’s rejection of the F2M pricing tables as unverifiable, arguing that they are sourced from the same data sources as the Market Guides, which are compiled in the ordinary course of business, and that F2M’s on-the-record description of its data collection and reporting methods is clear.¹⁹¹ The COALITION asserted that F2M simply applied a weight-averaging method to the same underlying data in order to generate prices for all species-specific transactions to provide Commerce with a single, region- and species-specific benchmark.¹⁹² Commerce replied that, as an initial matter, the platforms through which data are reported (*i.e.*, SilvaStat360 or Market Guide Summaries) provide no information on how that reported data were collected.¹⁹³ Moreover, Commerce contended that F2M’s description of the pricing table data does not state that the pricing tables and Market Guides used the same underlying data sources.¹⁹⁴ On this basis, Commerce asserted that it was reasonable to determine that the data and search parameters used by F2M to construct the prices were neither on the record nor verifiable, and thus to reject the F2M pricing tables as a benchmark for BC stumpage.¹⁹⁵ The BC Parties concurred with Commerce’s position.¹⁹⁶ In response, the COALITION also noted that the F2M pricing tables are similar to other “commercially published independent sources” that

¹⁸⁸ *Id.* at 37.

¹⁸⁹ IDM at 84; Commerce Vol. IV 61.2 Brief at 37-38.

¹⁹⁰ Commerce Vol. IV 61.2 Brief at 37-39.

¹⁹¹ COALITION 61.1 Brief at 32-33; *See* COALITION 61.3 Brief at 4-5 (reiterating that “the record does demonstrate that both the Pricing Tables and the Market Guides reflect the same underlying data”).

¹⁹² COALITION 61.1 Brief at 32-33.

¹⁹³ Commerce Vol. IV 61.2 Brief at 38.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ BC Parties Vol. II 61.2 Brief at 8-9.

Commerce has previously accepted as benchmark data sources, even where it did not have access to the underlying data.¹⁹⁷

Commerce also determined that the second component of the F2M pricing data, the monthly F2M Market Guides, could not serve as a reliable benchmark for BC stumpage even though they had been produced in the ordinary course of business. Commerce cited three main reasons.

First, the Market Guides present the data in categories that only include logs above a certain size and exclude a portion of logs used in the production of softwood lumber in both the U.S. PNW and BC interior.¹⁹⁸ For example, Commerce argued that the WDNR data captured smaller diameter logs, and are therefore more comparable to the good in question.¹⁹⁹ In contrast to the F2M data, the WDNR data clearly include species-specific pricing not only for camprun logs but also for smaller chip-and-saw (“CNS”) logs which are usually five to seven inches in diameter at the small end.²⁰⁰ Commerce further noted that the WDNR data include lower value utility logs, which are also used to produce lumber.²⁰¹ However, Commerce was unable to construct a benchmark that includes pricing for these utility grade logs.²⁰² Commerce acknowledged that it excluded utility grade prices in the WDNR benchmark not because the WDNR data lack utility grade prices, but because limitations in the record evidence made it difficult to incorporate those prices in the benchmark without potential inaccuracies.²⁰³ Commerce nevertheless contended that the inclusion of CNS and utility grade prices in the WDNR data showed that the WDNR dataset is more comprehensive with respect to log size and grade.²⁰⁴

The COALITION countered that the fact that the WDNR dataset was more inclusive than the F2M data set did not matter if Commerce could not use this more comprehensive data to construct a benchmark.²⁰⁵ It further argued that the WDNR data could not be considered more comprehensive or representative than the F2M data simply by virtue of being collected.²⁰⁶ Sierra Pacific claimed that Commerce was only required to select a benchmark price for products that are

¹⁹⁷ COALITION 61.1 Brief at 34-35 (citing to *Certain Tool Chests and Cabinets from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 56,582 (Dep’t Commerce, Nov. 29, 2017) IDM at Cmt. 5).

¹⁹⁸ IDM at 84; See Commerce Vol. IV 61.2 Brief at 39-41.

¹⁹⁹ Commerce Vol. IV 61.2 Brief at 39-41.

²⁰⁰ *Id.* at 41.

²⁰¹ IDM at 85.

²⁰² *Id.* at 86; Commerce Vol. IV 61.2 Brief at 42-43; COALITION 61.1 Brief at 37-38; Sierra Pacific 61.1 Brief at 21.

²⁰³ IDM at 86-88; Commerce Vol. IV 61.2 Brief at 42-43.

²⁰⁴ Commerce Vol. IV 61.2 Brief at 44.

²⁰⁵ COALITION 61.3 Brief at 13.

²⁰⁶ *Id.*

comparable, but not identical, to Canfor's and West Fraser's purchases.²⁰⁷ To this, Commerce responded that it selected the WDNR data in part because they were more inclusive of the range of logs purchased by Canfor and West Fraser, rendering them a more appropriate source for comparable benchmark prices than the F2M data.²⁰⁸

Second, Commerce had concerns with the Market Guides because the F2M prices skewed significantly higher than the other three sources of U.S. PNW log price on the record during the POR. In addition to WDNR survey data, the record contains pricing data from both the Montana Bureau of Business and Economic Research covering Western Montana and from Northwest Management Inc. covering Western Montana, Northern Idaho, and Eastern Washington. Commerce compared quarterly species-specific prices for all sources and found that the F2M prices skewed significantly higher for every species during each quarter of the POR.²⁰⁹ Commerce argued that these divergences, when considered in conjunction with the F2M data's exclusion of lower-value, smaller logs, supported its conclusion that the F2M data were not as representative of Canfor's and West Fraser's purchases as the WDNR data.²¹⁰

Sierra Pacific challenged Commerce's comparison with these other sources by noting that the F2M data are based on weighted averages, while the other pricing data are based on simple averages.²¹¹ Commerce explained that, although it generally prefers weighted averages to simple averages, this was not possible for some of the price data in this review, so it made reasonable average calculations based on the available record evidence.²¹²

Sierra Pacific also contended that the WDNR data are missing prices for CNS logs in a significant number of months and that the prices that are included show that the price quotes reported for smaller CNS logs were higher than or equal to quotes for camprun logs for various species in a significant number of months.²¹³ As a result, Sierra Pacific argued that record evidence does not support Commerce's findings that these smaller logs are less valuable than camprun logs and that their absence from the Market Guides therefore skewed F2M prices higher.²¹⁴ Both Sierra Pacific and the COALITION asserted that the likely reason the F2M Market Guide prices are

²⁰⁷ Sierra Pacific 61.1 Brief at 13-16.

²⁰⁸ Commerce Vol. IV 61.2 Brief at 41-42.

²⁰⁹ IDM at 85.

²¹⁰ Commerce Vol. IV 61.2 Brief at 47-48.

²¹¹ Sierra Pacific 61.1 Brief at 26-27.

²¹² Commerce Vol. IV 61.2 Brief at 46-47.

²¹³ Sierra Pacific 61.1 Brief at 22-26.

²¹⁴ Sierra Pacific 61.1 Brief at 20-22. Commerce contended that the data Sierra Pacific identified were "cherry picked" and failed to outweigh the totality of the record evidence, which supports the conclusion that the WDNR data are more inclusive of the lower valued, smaller logs. See Commerce Vol. IV 61.2 Brief at 45.

generally higher than the WDNR survey prices is that the latter are based entirely on purchasers' price quotes, and may not reflect the final price.²¹⁵

Third, Commerce said the Market Guides do not clearly state if and how they applied the ton to board feet conversion factor used in the pricing tables.²¹⁶ It also noted that the record lacked sufficient information to determine whether F2M's proprietary conversion factor is disproportionately high compared to other conversion factors on the record, or whether the Market Guides exclude ton logs.²¹⁷ However, the COALITION affirmed that ton wood was included in its calculations.²¹⁸ While the COALITION argued that there was nothing in the record that would cast doubt as to when the conversion factor was used,²¹⁹ Commerce maintained that there remained a general lack of detail and explanation, as well as uncertainty regarding the F2M data, and that these issues further called into question the accuracy, reliability, and completeness of its prices, reasonably leading Commerce to prefer the WDNR data over the F2M data.

The Panel recognizes that Commerce's regulations give it some discretion in selecting a benchmark. In effect, in cases where there are no usable in-market and world-market prices available with which to determine whether goods or services are provided for LTAR, 19 C.F.R. § 351.511(a)(2)(iii) instructs Commerce to "normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles." Nowhere in this provision (or in 19 U.S.C. § 1677(5)(E)(iv), which instructs Commerce to determine the adequacy of remuneration "in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review") is Commerce required to select a perfect benchmark. For purposes of this review, Commerce's selection of a benchmark is also governed by the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, which requires a court to find unlawful any of Commerce's determinations, findings, or conclusions that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law."²²⁰ "Substantial evidence" has been interpreted as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²²¹ This term further indicates that Commerce is not required to support its benchmark choice with perfect evidence. Instead, Commerce is directed to select the most preferable option that is reasonably supported by the evidence on record. As the CIT has explained, "{g}enerally, when faced with a

²¹⁵ Sierra Pacific 61.1 Brief at 22-26; COALITION 61.1 Brief at 23, 27-29.

²¹⁶ IDM at 85.

²¹⁷ Commerce Vol. IV 61.2 Brief at 48-49.

²¹⁸ See COALITION 61.1 Brief at 32 (citing the F2M Overview, P.R. 1569, which states that ton wood delivered was converted to MBF using a proprietary conversion rate).

²¹⁹ COALITION 61.1 Brief at 41-43.

²²⁰ 19 U.S.C. § 1516A(b)(1)(B).

²²¹ See *Consolidated Edison*, 305 U.S. at 229.

choice between two imperfect options, it is within Commerce's discretion to determine which choice represents the best available information."²²²

The CIT has also stated that it "grants Commerce wide latitude to choose ... an appropriate benchmark rate" and that the "selection of benchmark prices" is a "factual determination," to which the CIT grants Commerce deference, as long as the agency's selection "is supported by substantial evidence."²²³

Given the information on the record, the Panel finds that the issue of whether the WDNR benchmark rather than the F2M benchmark is a more appropriate and preferable option is a close call. In light of the evidence presented by Sierra Pacific and the COALITION, the Panel is not satisfied with Commerce's contentions that the F2M benchmark was inappropriate because the data and search parameters F2M used to construct its pricing tables and Market Guides are unverifiable and that the data and search parameters were not on the record. The basis for Commerce's contentions that this information was not on the record and was not verifiable is not clear. As noted above, the COALITION stressed that the pricing tables were constructed from the same underlying data as the Market Guides and that it had provided a description of its data collection and reporting methods. The COALITION also said that F2M's on-the-record description of its data collection and reporting methods is clear. Commerce also does not say that it tried to clarify or correct information that it found unsatisfactory. In addition, Commerce's contention that the pricing tables are not useable because they were prepared for this review is not persuasive given the data on which they were based is the same data that were the basis for the Market Guides which were prepared in the normal course of business.

Nevertheless, the choice of the benchmark was within Commerce's discretion, and Commerce did present substantial evidence supporting its preference for the WDNR benchmark. It devoted several pages in the IDM to explaining its rejection of the F2M benchmark and even issued a separate memorandum elaborating on its reasoning.²²⁴ Moreover, throughout this proceeding, Commerce consistently explained why it found the WDNR data to be more inclusive than the F2M data, while also acknowledging that a benchmark based on actual transaction prices would have been in general preferable to one based on offer quotes. Therefore, the Panel sustains Commerce's decision to use the WDNR benchmark data for determining the LTAR of BCTS auction prices.

B. Adjustments to the BC Stumpage Benchmark

The Panel turns now to the COALITION's complaint that Commerce's adjustments to the WDNR benchmark and calculation of the stumpage benefit to Canfor and West Fraser were not

²²² See *CS Wind Vietnam Co., Ltd. v. United States*, 971 F. Supp. 2d 1271, 1288 (Ct. Int'l Trade 2014) (quoting *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1277 (Ct. Int'l Trade 2006)); *GPX Int'l Tire Corp. v. United States*, 942 F. Supp. 2d 1343, 1360 (Ct. Int'l Trade 2013).

²²³ See *Al Tech Specialty Steel Corp. v. United States*, 28 CIT 1468, 1489 (Ct. Int'l Trade 2004); *Archer Daniels Midland Co. v. United States*, 968 F. Supp. 2d 1269, 1279 (Ct. Int'l Trade 2014).

²²⁴ IDM at 84-87.

based on substantial evidence and were otherwise not in accordance with law. At issue are several aspects of Commerce’s methodology: (i) its use of a separate benchmark for beetle-killed logs; (ii) its conversion of the BC stumpage benchmark log prices from U.S. dollars (“USD”) per thousand board (“MBF”) feet to USD per cubic meter using a conversion factor of 5.93 USD/cubic meter with an additional “Fonseca adjustment” to reflect differences in log volume measurement between the USFS Cubic Scale and the BC Metric Scale; (iii) its adjustment to the BC stumpage benchmark by subtracting scaling and general and administrative (“G&A”) costs; and (iv) its decision not to adjust the BC stumpage benchmark to account for the alleged value of tenure security. The Panel will consider each of these issues in turn.

i) Beetle-killed Logs

In contrast to the original investigation, Commerce in this review calculated a beetle-killed benchmark to account for the prevalence of mountain pine beetle infestations in BC during the POR, as the WDNR survey did not capture this in its pricing data.²²⁵ In measuring the adequacy of remuneration of the BC Respondents’ stumpage purchases, Commerce applied the WDNR benchmark prices to the volume of green logs (non-beetle-killed) logs, and used the beetle-killed benchmark for the volume of beetle-killed logs, which it also referred to as “blue stained” logs.²²⁶ In applying a benchmark that accounted for the prevalence of the pine beetle in BC, Commerce said it was following the requirement of 19 U.S.C. § 1677(5)(E)(iv) to determine the adequacy of remuneration in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review.²²⁷

The COALITION challenged Commerce’s use of the beetle-killed benchmark on the grounds that it “egregiously” overstated the loss in value of beetle-killed logs and, consequently, the rate of subsidization of the respondent’s log purchases. The COALITION also said that using the benchmark was inconsistent with Commerce’s long-standing assertion that, in the case of BC stumpage, the market value of timber is derivative of the downstream demand for the product. The COALITION said as a consequence Commerce’s use of the beetle-killed benchmark was unsupported by substantial evidence and otherwise not in accordance with law.²²⁸

In constructing the beetle-killed benchmark, Commerce defined “blue stained” logs as beetle-killed lodgepole pine and spruce and included blue-stained ponderosa pine when the price offered for it was the same as for the first two.²²⁹ The data used to construct the beetle-killed benchmark came from beetle-killed/blue stained pricing, in the form of mill price offer sheets, for eleven mills in the U.S. PNW during 2018.²³⁰ Commerce used the BC Respondents’ log conditions

²²⁵ IDM at 125-133; Commerce Vol. IV 61.2 Brief at 52.

²²⁶ IDM at 125-131.

²²⁷ Commerce Vol. IV 61.2 Brief at 50-51, 67-68.

²²⁸ COALITION 61.1 Brief at 47-51, 54-57.

²²⁹ IDM at 131.

²³⁰ *Id.* at 129.

and diameter tables to calculate a green/dead ratio.²³¹ The COALITION defined “beetle-killed” timber as lodgepole pine and spruce trees killed by the mountain pine beetle or spruce beetle,²³² and said that Commerce applied the “beetle-killed” benchmark to the proportion of “dead” or “dry” lodgepole pine and spruce purchased by the Respondents as reported in the log usage tables.²³³ It also indicated that the BC Respondents reported these logs as “dead” or “dry”.²³⁴

The COALITION raised a number of objections to the use of a beetle-killed benchmark. It noted that in the original investigation, Commerce rejected the requests of the BC Respondents for a separate beetle-killed benchmark on the grounds that it did not have reliable data to do so and that, even without a beetle-killed adjustment, the WDNR data had adequately adjusted for BC market conditions to the extent the record allowed.²³⁵

The COALITION said that, when in the current review, Commerce changed its position and allowed the use of a beetle-killed benchmark, the results were “dramatic” and “egregiously” overstated the loss in value of beetle-killed logs.²³⁶ The COALITION noted that when the Respondents submitted U.S. PNW offer prices for “blue-stain” logs compiled by Jendro & Hart, the offer prices averaged just one-third of the average offer prices for “green” or non-beetle-killed logs.²³⁷ The COALITION argued that the record of this review demonstrates that offer prices for “blue-stained” logs from the U.S. PNW mills surveyed by Jendro & Hart for the purposes of this litigation largely represented specific purchaser preferences related to those mills’ focus on producing appearance grade lumber.²³⁸ It added that Commerce’s determination to rely on such offer prices was therefore not supported by substantial evidence because the agency effectively valued all of the Respondents’ beetle-killed log purchases as if the Respondents specialized in appearance-grade lumber.²³⁹

The COALITION added that beetle-killed benchmark results no longer reflected market conditions because they ignored the fact that the BC Respondents produce significant volumes of structural, non-appearance grade lumber and a significant percentage of blue stained logs were being used in non-appearance grade structural uses where the value of such wood was not adversely affected by the blue staining.²⁴⁰ It explained that all of Canfor’s BC sawmills produce #2, #3, and Economy grade lumber and that West Fraser produces what it characterized as “regular

²³¹ *Id.* at 132.

²³² COALITION 61.1 Brief at 21-22, 44.

²³³ *Id.* at 46-47.

²³⁴ *Id.* at 46.

²³⁵ *Id.* at 45-46 (citing to *Lumber V Final Determination* IDM at 64, 76).

²³⁶ *Id.* at 47.

²³⁷ *Id.* at 46.

²³⁸ *Id.* at 51.

²³⁹ *Id.*

²⁴⁰ *Id.* at 51-54.

boards” and “less attractive lumber.”²⁴¹ The COALITION added that the record shows that blue stain itself is purely cosmetic; it can appear in logs harvested from both “green” and “dead” trees and “does not degrade the quality of the timber, but does stain the wood blue.”²⁴² The COALITION contended that if the demand for blue-stained wood for non-appearance uses is not affected by the staining, then applying a beetle-killed adjustment to logs purchased and used to make non-appearance grade lumber would be inconsistent with the market-demand derived approach and that decision would be unlawful.²⁴³

The COALITION also argued that because of advances in mill processing technology the gap in the value of green logs over beetle-stained logs is no longer as large as it used to be. It pointed to three articles it submitted describing investments and upgrades to enable BC mills to more profitably and efficiently process beetle-killed logs and said Commerce did not discuss them.²⁴⁴ The COALITION also cited three studies it had submitted supporting its contention that technology was reducing the gap between processed green and beetle-stained wood (the 2010 Wood Market report and accompanying affidavit by Russell Taylor commenting on the COALITION’s use of that report, the 2009 Forestry Innovation Investment Report, and a 2016 report by the University of Montana on the impact of the Mountain Pine Beetle).²⁴⁵ The COALITION contended that Commerce also failed to address these studies.²⁴⁶

In regard to why it adopted a beetle-killed adjustment in the review, but not in the initial investigation, Commerce said that the record in this review was substantially different. It now had an email from a WDNR official stating that the WDNR survey prices do not include prices for beetle-killed timber, and it had no information to contradict this email. In addition, Commerce had in this review explanations and updates from Jendro & Hart regarding the mill price quotes that allowed Commerce to determine that the quotes were representative and reliable.²⁴⁷

Commerce addressed explicitly, and sometimes implicitly, the complaints raised by the COALITION regarding the use of the beetle-killed benchmark. Without explicitly discussing whether blue-stained logs in the Jendro & Hart survey were used for structural, non-appearance use rather than appearance use, Commerce contended that, contrary to the COALITION’s assertion,²⁴⁸ it did not use mill price quotes to value all of the BC Respondents’ beetle-killed log purchases as though they were used for appearance-oriented lumber.²⁴⁹ Commerce instead said

²⁴¹ *Id.* at 51.

²⁴² *Id.* at 51-52.

²⁴³ *Id.* at 54.

²⁴⁴ *Id.* at 61-62.

²⁴⁵ *Id.* at 58-59.

²⁴⁶ *Id.* at 58-65.

²⁴⁷ Commerce Vol. IV 61.2 Brief at 53-55.

²⁴⁸ *See* COALITION 61.1 Brief at 51-54.

²⁴⁹ Commerce Vol. IV 61.2 Brief at 65.

that when a mill price quote sheet listed blued lodgepole and/or spruce (representing beetle-killed logs) on a separate line as blued ponderosa pine, it only used the lodgepole/spruce pricing to construct the beetle-killed benchmark. Because one price quote sheet referred only to “Blue Stain PP/WP,” with no indication of whether it contains pricing for lodgepole or spruce, Commerce did not include that price quote sheet in its calculations.²⁵⁰ When other prices quote sheets refer to “blued pine,” “all blued pine,” or “blue stain,” Commerce determined it was appropriate to include these prices in the beetle-killed benchmark because, for these mill offer prices, “there is not a discrepancy between beetle-killed and ponderosa prices,” but rather “the mill is offering the same price for both beetle-killed and ponderosa logs.”²⁵¹ Commerce said that offer prices were market determined prices because they reflected what mills were willing to pay for beetle-killed lumber.²⁵²

The COALITION pointed to the statement of Alan Harper of Idaho Forest Group, a company that had offer prices in the Jendro & Hart survey, to the effect that the value of beetle-killed logs to his mill depended on the type of product being produced by the mill.²⁵³ Commerce also cited the testimony of Alan Harper as to the fact that mills that produced appearance-grade lumber would pay a different price for beetle-killed lumber than mills that produced non-appearance grade lumber.²⁵⁴ Harper’s testimony appears to confirm Commerce’s contention that the prices in the beetle-killed benchmark were not just from mills that produced appearance grade lumber as the COALITION contended, but also included firms that produced non-appearance grade lumber.

Commerce acknowledged the COALITION’s argument that Grade Two Sawlogs in BC might only be classified as utility grade logs in the U.S. under the U.S. Scribner system, but still had a market value in Canada. Commerce countered that the COALITION’s argument does not undermine its determination that beetle-killed logs, even those classified as Grade Two Sawlogs in the BC system, are of lower value than green logs.²⁵⁵

Regarding whether advances in mill processing technology reduced the gap in the value of green logs over beetle-stained logs and the articles cited by the COALITION, Commerce said that the record evidence showed that the severity of beetle-killed infection had a much greater impact on the price gap than differences in technology improvements between different mills.²⁵⁶ Commerce replied that even though its response did not explicitly address the articles, that does not mean that Commerce did not consider them, and added that the substantial evidence standard does not require Commerce to explicitly discuss every piece of evidence it considers.²⁵⁷ It added

²⁵⁰ IDM at 130-131; Commerce Vol. IV 61.2 Brief at 65.

²⁵¹ IDM at 131.

²⁵² Commerce Vol. IV 61.2 Brief at 61.

²⁵³ COALITION 61.1 Brief at 52-53.

²⁵⁴ Commerce Vol. IV 61.2 Brief at 66.

²⁵⁵ *Id.* at 56-57.

²⁵⁶ IDM at 128; Commerce Vol. IV 61.2 Brief at 61.

²⁵⁷ Commerce Vol. IV 61.2 Brief at 58.

that its *Final Results* addressed the overarching arguments for which the COALITION presented the articles.²⁵⁸ Commerce also noted in passing that the COALITION's brief before the panel discussed more thoroughly the articles than its briefs to Commerce during the Administrative Review.²⁵⁹

Commerce went through a detailed analysis of the three studies cited by the COALITION and explained why, in its opinion, the studies actually showed that the value of blue stained logs was less than the value of green timber and that the record indicates that the severity of beetle infestation has a greater impact on the value of lumber than technological upgrades to milling equipment.²⁶⁰

While the COALITION presents a number of arguments on why Commerce should not adopt a beetle-killed benchmark and on why such benchmark should take into account the differences in how mills can process beetle-killed logs and the products that they make from them, the Panel does not find that they are so persuasive as to warrant a finding that the Commerce decision to adopt a beetle-killed benchmark was not based on substantial evidence. Further, the COALITION does not substantiate its claim that the data in the benchmark were based only on mills that sold lumber for appearance use and that Commerce in using the benchmark is valuing all of the Respondents purchases as if Respondents specialized in appearance grade lumber. In fact, Commerce produced sufficient evidence in regard to each of the questions addressing whether a beetle-killed benchmark was appropriate to warrant a finding that its decision to use the benchmark was based on substantial evidence. While the Panel might have appreciated more extensive discussion on how Commerce ensured that the benchmark took into account how some beetle-killed lumber from BC Respondents was of more value because it could be used in non-appearance grade uses whereas other beetle-killed lumber could not be, the Panel found that Commerce produced substantial evidence that the application of the beetle-killed benchmark reflected market prices.

ii) Volumetric Conversion Factor

The delivered log prices used by Commerce for its chosen benchmark are expressed in USD per MBF under the Scribner Decimal scale, while BC stumpage prices are stated in USD per cubic meter under the BC Metric Scale.²⁶¹ Because these measurements differ, Commerce had to apply a volumetric conversion factor when conducting its benefit calculation.

As in the underlying investigation, Commerce determined that the most appropriate conversion factor on the record was 5.93 cubic meters per MBF, derived from a 2002 U.S. Forest Service ("USFS") study.²⁶² It maintained that the record contained an explanation of the

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 57-58.

²⁶⁰ *Id.* at 57-67.

²⁶¹ IDM at 140.

²⁶² *Id.* at 138; PDM at 30-31.

methodology used in that study (and the 1984 Cahill Study on which it was based), and that the study had undergone peer review and was not prepared for purposes of the proceeding but produced by a government agency that was not involved.²⁶³ Commerce viewed the 5.93 cubic meters per MBF factor as the only unbiased conversion factor in the record that directly corresponded to the measurement scales used for the benchmark data, and therefore selected it over alternative conversion factors submitted by the Government of British Columbia (“GBC”) and the COALITION.²⁶⁴

One of the other conversion factors on the record was an updated Dual Scale Study, which Commerce found unusable because it lacked methodological detail and was prepared specifically for the proceeding.²⁶⁵ The COALITION also submitted several other “standard” conversion factors for consideration and contended that Commerce should have applied a conversion factor of 4.525 cubic meters per MBF. The COALITION said the 4.525 conversion factor has been adopted by multiple U.S. government agencies, is cited in industry publications, and offers in accordance with Commerce’s objectives, greater “consistency, predictability, and simplicity.”²⁶⁶ Commerce rejected this option, noting that there was lack of clarity and information on the origin of the methodology, its embedded assumptions, or the type of scales underlying that conversion factor. Because there was no evidence in the record as to whether that factor related to either the Scribner Decimal or BC Metric scales, Commerce found it inappropriate for this review.²⁶⁷ Commerce emphasized that while consistency and simplicity can be useful for some purposes, such as tracking trade flows in large quantities, this review required a case-specific approach emphasizing precision and impartiality.²⁶⁸ The COALITION contended that U.S. agencies and industry publications use the 4.525 conversion factor for purposes in which precision and impartiality are key,²⁶⁹ but Commerce reiterated that a standard factor was inappropriate for converting the Scribner Decimal System-scaled benchmark to the BC Metric Scale in this specific review.²⁷⁰

The COALITION also argued that Commerce’s case-specific selection was inconsistent with its reliance on standard Internal Revenue Service (“IRS”) schedules to determine average useful life (“AUL”) for nonrecurring subsidies.²⁷¹ Commerce distinguished AUL determinations, which

²⁶³ Commerce Vol. IV 61.2 Brief at 72-73.

²⁶⁴ IDM at 145.

²⁶⁵ *Id.* at 138-140.

²⁶⁶ *Id.* at 140; COALITION 61.1 Brief at 74.

²⁶⁷ IDM at 140-144.

²⁶⁸ *Id.* at 141.

²⁶⁹ COALITION 61.1 Brief at 76-80.

²⁷⁰ Commerce Vol. IV 61.2 Brief at 74.

²⁷¹ COALITION 61.1 Brief at 80-81.

are meant to be consistent across all proceedings regardless of the industry or country involved, from conversion factors, which must reflect the specific scales at issue.²⁷²

The 2002 USFS Study developed formulas to convert between the Scribner Scale and the U.S. Cubic Scale, while in this review Commerce needed to convert between the Scribner Scale and BC Metric Scale. For this reason, Commerce determined it would be appropriate to adjust the 5.93 conversion factor in the 2002 USFS Study by applying ratio factors from a 2005 publication by the United Nations data scientist Matthew Fonseca, which provides conversion ratios between the BC Metric Scale and 15 other systems, including the U.S. Cubic Scale.²⁷³ Applying these ratios (the “Fonseca adjustment”), Commerce derived company- and species-specific factors that convert WDNR benchmark prices, which are expressed in USD per MBF, into prices that are stated in USD per cubic meter.²⁷⁴ Because the record lacked usable data on log lengths for all logs purchased, Commerce relied on Fonseca’s “Total All Lengths” category, which aggregates across all log lengths.²⁷⁵

The COALITION alleged that Commerce’s adjustment relied on consultants Jendro & Hart, who worked for the GBC.²⁷⁶ Commerce rejected this claim, explaining that while Jendro & Hart advocated for using Fonseca’s data, Commerce did not rely on their analysis or tables.²⁷⁷ Rather, Commerce directly applied Respondent-reported diameter data (from Canfor and West Fraser) to the ratios in Fonseca’s publication to calculate company- and species-specific adjustments.²⁷⁸ Commerce also noted that its calculated ratios differed from those proposed by Jendro & Hart, further showing that Commerce used Fonseca’s data directly.²⁷⁹

Finally, the COALITION argued that Commerce failed to account for log characteristics such as taper, defect, and gross volume impacting the conversion factor.²⁸⁰ Commerce responded that Fonseca’s ratios are based solely on length and small-end diameter and that no record evidence permitted incorporating additional characteristics.²⁸¹

While the COALITION raised valid arguments in support of using the standard conversion factor of 4.525 cubic meters per MBF and in questioning the reliability of the Fonseca adjustment, the Panel, applying the applicable standard of review, does not find these arguments sufficiently

²⁷² Commerce Vol. IV 61.2 Brief at 75; *See also* IDM at 141.

²⁷³ Commerce Vol. IV 61.2 Brief at 77; *See also* IDM at 145; PDM at 31-32.

²⁷⁴ IDM at 146; PDM at 32.

²⁷⁵ IDM at 146-147.

²⁷⁶ COALITION 61.1 Brief at 74-75, 81-83.

²⁷⁷ IDM at 145-146; *See also* Commerce Vol. IV 61.2 Brief at 78-79.

²⁷⁸ IDM at 146.

²⁷⁹ *Id.*

²⁸⁰ COALITION 61.1 Brief at 81-84.

²⁸¹ Commerce Vol. IV 61.2 Brief at 79-80; IDM at 146.

compelling to conclude that Commerce's determination was unsupported by substantial evidence. Commerce determined that the most appropriate conversion factor on the record was 5.93 cubic meters per MBF, as derived from the 2002 USFS Study and adjusted the results using ratios from Fonseca's publication. The Panel finds that Commerce adequately supported its choice of this conversion factor. Therefore, the Panel concludes that its selection was based on substantial evidence and upholds Commerce's determination.

iii) Scaling and General and Administrative Costs

Commerce made adjustments to the WDNR benchmark for scaling and G&A costs, including expenses related to accessing, harvesting, and hauling timber to the mills, and costs tied to the Respondents' tenure obligations.²⁸² Commerce adjusted the WDNR benchmark for the BC Respondents' scaling costs for non-cruised-based timber because Commerce concluded that such costs were a legally obligated condition for accessing and harvesting Crown-origin timber.²⁸³ However, Commerce did not make an adjustment for scaling on cruised-based stands because it had no record evidence indicating that such activities are legally mandated as part of the Respondents' tenures.²⁸⁴ Commerce also made adjustments for certain G&A costs, because the record indicated that there were expenses related to accessing, harvesting, and hauling timber to the mills and costs tied to the Respondents' tenure obligations. Commerce made additional adjustments associated with the BC Respondents' Crown tenure obligations.²⁸⁵

The COALITION argued that Commerce should not have allowed for these costs because doing so contradicts its established practice regarding adjustments to benchmark prices; specifically, Commerce does not adjust for costs that are already reflected in the benchmark price.²⁸⁶ The COALITION noted that Commerce evaluates requests based on its statutory obligation to ensure that the benchmark price reflects the "prevailing market conditions" in the country under investigation, which "include price, quality, availability, marketability, transportation, and other conditions of purchase or sale."²⁸⁷ According to the COALITION, in the past, Commerce has granted adjustments to reflect prevailing market conditions only when the adjustment is reflected in one comparison point but not the other.²⁸⁸

Commerce contended that the benchmark price in question is for government-provided stumpage, derived from the WDNR tier-three benchmark that is based on delivered log prices, and that construction of the derived stumpage benchmark price was done on the basis of Commerce's derived demand methodology, which incorporates the concept that "the market value of timber is

²⁸² IDM at 149-151.

²⁸³ *Id.* at 150-151.

²⁸⁴ *Id.* at 151.

²⁸⁵ *Id.* at 149-150.

²⁸⁶ COALITION 61.1 Brief at 65-68.

²⁸⁷ 19 U.S.C. § 1677(5)(E)(iv).

²⁸⁸ COALITION 61.1 Brief at 67.

derivative of the value of the downstream products.”²⁸⁹ Commerce said that it appropriately deducted certain scaling and G&A costs from the delivered log benchmark price to derive a stumpage benchmark with which to compare the Respondents’ stumpage purchase prices.²⁹⁰ Commerce noted that in the benchmark used in the other Canadian province there was a stumpage based price that did not include post-harvest activities such as scaling.²⁹¹

The BC Parties concurred, noting that the adjustments were required given the differences in compared prices resulting from Commerce’s selected benchmark: log prices at the mill-gate versus the stumpage amounts paid or incurred by Respondents for standing timber.²⁹² According to the BC Parties, Respondents must incur significant expenses above the basic amount they pay for stumpage to deliver Crown logs to their sawmills in BC and these expenses had to be reflected through adjustments to the benchmark.²⁹³ Because Commerce’s benchmark was based on delivered log prices (a product that is “downstream” from Respondents’ stumpage purchases), Commerce, as required by its derived demand methodology, could only reasonably apply its selected benchmark prices by adjusting these prices for all costs that Respondents incurred to have harvested timber delivered to their sawmills, including the related scaling and G&A costs.²⁹⁴

The COALITION argued that the costs incurred by the BC Respondents are also included in the benchmark price.²⁹⁵ The COALITION submitted two affidavits from U.S. companies that it said showed that “scaling and G&A costs are included in U.S. log prices and therefore, any adjustment to the benchmark for these costs constituted double counting.”²⁹⁶ It reiterated that Commerce refused to address the substantial evidence provided by the affidavits and this refusal required that the Panel remand this issue back to Commerce for further consideration.²⁹⁷ The BC Parties responded that the COALITION’s assertions regarding these costs are “far too vague to permit any informed adjustment to the benchmark, particularly because they fail to demonstrate that these two U.S. producers’ costs are ‘comparable’ in kind or scope to the scaling and G&A costs incurred by respondents operating in British Columbia.”²⁹⁸ They also contended that the COALITION failed to “specify whether many of the costs it contended the two U.S. producers incurred were mandated or incurred voluntarily.”²⁹⁹

²⁸⁹ IDM at 126; See also Commerce Vol. IV 61.2 Brief at 70-71.

²⁹⁰ Commerce Vol. IV 61.2 Brief at 70-72.

²⁹¹ IDM at 150.

²⁹² BC Parties Vol. II 61.2 Brief at 29-30.

²⁹³ *Id.* at 29.

²⁹⁴ *Id.* at 30-31.

²⁹⁵ COALITION 61.1 Brief at 69-73.

²⁹⁶ COALITION 61.3 Brief at 18.

²⁹⁷ *Id.*

²⁹⁸ BC Parties Vol. II 61.2 Brief at 34.

²⁹⁹ *Id.* at 35.

The Panel finds that Commerce's decision to adjust the WDNR benchmark for scaling and G&A costs to be supported by substantial evidence and consistent with Commerce's derived demand methodology. Commerce justified its decision to include the scaling and G&A costs on the grounds that they were obligatory or that the G&A costs were tied to expenses incurred in accessing, harvesting, or hauling timber to mills.³⁰⁰ Commerce also emphasized that it adjusted the benchmark only for non-cruised-based timber since BC required scaling for such timber but not for cruised-based timber.³⁰¹ In contrast, as the BC Parties explained, the evidence presented by the COALITION did not address whether the costs it cited were obligatory or voluntary. The COALITION also did not address the fact that the scaling and G&A costs were incurred only for timber from non-cruised based lands.

iv) Tenure Security

Canadian producers use a tenure contract system, which provides long-term leases of government land for harvesting purposes, whereas U.S. producers purchase timber using a spot price system, which provides short-term, monthly prices. The COALITION contended that the tenure security system assists lumber producers in obtaining financing for capital investments and license holders enjoy protection from market fluctuations and security of input supply. The COALITION added that the fact that Canadian companies can and do sell their tenure rights for millions of dollars shows the value of tenure contracts.³⁰²

The COALITION requested that Commerce adjust the U.S. benchmark prices to account for the value of the tenure rights. It proposed using a Net Present Value methodology to capture the value of the tenures it had identified.³⁰³

The COALITION contended that because the U.S. benchmark price does not include the value of tenure security innate to the Canadian pricing system, the comparison between the government stumpage price and the U.S. benchmark price is not the "apples-to-apples" comparison required by section 351.511 of Commerce's regulations.³⁰⁴

In the original investigation, Commerce acknowledged that in theory tenure security is inherently a subset of the overall value of the tenure. However, in the Final Results, as in the original investigation, Commerce concluded that it would not make an adjustment to the benchmark to account for tenure security. Commerce contended that because the valuations on the record are for specific tenures and stands and therefore "reflect the myriad characteristics specific to that stand," the data on the record regarding the tenure transactions involving Canfor and West Fraser cannot "result{} in a broadly applicable adjustment."³⁰⁵ Commerce also noted

³⁰⁰ IDM at 150-151; Commerce Vol. IV 61.2 Brief at 71-72.

³⁰¹ *Id.*

³⁰² COALITION 61.1 Brief at 84-85.

³⁰³ *Id.* at 86-88.

³⁰⁴ *Id.* at 88-89.

³⁰⁵ Commerce Vol. IV 61.2 Brief at 69.

that the valuations do not necessarily reflect only the value of the tenure security, but also shifting commercial and operational concerns of the companies, such as companies closing mills and seeking to reposition their tenure holdings close to existing mills. Commerce concluded that the valuations of the Canfor and West Fraser tenures “could have more to do with operational concerns than the value of the tenure security provided by the tenures.”³⁰⁶

The BC Parties supported Commerce’s decision not to make an adjustment for tenure security and added that, in addition to the reasons cited by Commerce, the COALITION’s tenure security argument ignores the circumstance that long-term tenures in BC constitute a bundle of offsetting rights and obligations, and include material risks of significant tenure reductions from beetle infestation, forest fires, legal disputes, and other factors. Further, Canfor and West Fraser acquired the vast majority of their BC tenures through arm’s-length transactions with third parties and not from purchases from the government.³⁰⁷ Accordingly, even if tenure security had any independent value (which it does not), Canfor and West Fraser paid for this when they purchased the tenures in these private-party transactions. The BC Parties point out that the COALITION does not try to justify its proposed tenure security adjustment in light of these additional complications.³⁰⁸

The Panel finds that Commerce presented reasonable and substantial evidence to support its decision not to adjust the benchmark to account for tenure security. The COALITION tried to overcome previous objections to making an adjustment for tenure security by proposing a Net Present Value method for capturing the value of the tenures it identified, but the Panel finds that Commerce presented substantial evidence for why such a method would not result in a broadly applicable adjustment. The Panel therefore sustains Commerce’s decision not to make an adjustment for tenure security.

5. NEW BRUNSWICK

The Panel then considered the Government of New Brunswick (“GNB”) and JDIL’s complaint regarding Commerce’s use of JDIL’s purchases of stumpage from private lands in Nova Scotia as a benchmark to measure the adequacy of remuneration for JDIL’s purchases of stumpage in New Brunswick. The GNB and JDIL contended that Commerce should have used in-province private stumpage prices in New Brunswick as the benchmark, and that its determination to use a Nova Scotia benchmark is unsupported by substantial evidence and otherwise not in accordance with law.³⁰⁹

The GNB argued that Commerce failed to articulate how significant distortion occurred in light of the facts on which it relied. The GNB also asserted that Commerce failed to identify any evidence analyzing the POR that showed that the existence of Crown stumpage or the “small”

³⁰⁶ *Id.* at 69-70.

³⁰⁷ BC Parties Vol. II 61.2 Brief at 47.

³⁰⁸ *Id.* at 47-48.

³⁰⁹ GNB 61.1 Brief at 1, 21; JDIL 61.1 Brief at 10.

number of competing mills lowered or distorted private market prices.³¹⁰ Instead, the GNB contended that the market for private woodlot stumpage was very competitive as there were 42,000 private woodlot owners and hundreds of different purchasers, including over 200 private forestry contractors, and many competing wood processing facilities. In sum, private sources of stumpage in New Brunswick were substantial.³¹¹ The GNB also asserted that the private stumpage market was competitive because wood in New Brunswick can freely be bought or sold and exported or imported.³¹² It also argued that private woodlot supply was essential for the New Brunswick mills because New Brunswick was a net importer of logs.³¹³

The GNB and JDIL both said that Commerce's contention that the market distortion was caused by the "oligopsony effect" of a dominant seller (the GNB) and only a few dominant mill purchasers was based on 2008 and 2012 studies issued by the New Brunswick Auditor General that relied on data predating the POR by seven to twelve years and not on economic evidence concerning market conditions during the POR.³¹⁴ JDIL contended that the Auditor General's studies did not contain empirical data or analysis showing that the large mills had the power to extract below market prices from private woodlot owners and only assumed that to be true.³¹⁵ In contrast, JDIL maintained that surveys submitted by the GNB conducted by the New Brunswick Forest Products Commission ("NBFPC") in 2017 and 2018, and audited by an independent consulting firm showed that private woodlot stumpage was mostly purchased by independent contractors rather than large mills and that the participation of these mills increased, rather than suppressed, stumpage prices.³¹⁶

For its part, the GNB argued that the 2008 and 2015 Auditor General's reports reflected conditions during a period when the market was under stress and recovering from the 2008 financial crisis, while the 2017 and 2018 NBFPC surveys, together with Professor Kelly's analysis of those surveys, confirmed the reliability of the data and showed that private-market prices in New Brunswick could serve as a benchmark for Crown stumpage. The GNB further contended that neither Commerce nor the COALITION presented any report, economic analysis, or other evidence examining the current post-2013 market conditions.³¹⁷

The GNB and JDIL further challenged Commerce's conclusion that large mills could use unharvested allocations of Crown-origin stumpage to suppress private woodlot owners' prices

³¹⁰ GNB 61.1 Brief at 30, 33.

³¹¹ *Id.* at 35-36.

³¹² *Id.* at 37-38.

³¹³ *Id.* at 38-41.

³¹⁴ *Id.* at 34; JDIL 61.1. Brief at 15-16.

³¹⁵ JDIL 61.1 Brief at 16.

³¹⁶ JDIL 61.1 Brief at 16-18.

³¹⁷ GNB 61.1 Brief at 46-48

below market levels.³¹⁸ The GNB offered certified evidence as to why there was only a minimal overhang.³¹⁹ Finally, the GNB and JDIL also contended that Commerce could reject private-party transactions as a tier-one benchmark only where they are “significantly distorted” as a result of the government’s involvement in the market, rather than the actions of private parties in the marketplace.³²⁰

In determining that the New Brunswick stumpage market was distorted, Commerce first found that, during fiscal year 2017-2018, Crown-origin timber accounted for a majority of the softwood lumber volume in New Brunswick. Commerce acknowledged that it still had to find that actual transaction prices were significantly distorted before eliminating them as a tier-one benchmark.³²¹

Commerce next turned to the demand side of the market where it found that a small subset of sawmills, which were the main consumers of Crown-origin standing timber, also dominated the market for private-origin stumpage within the province.³²² According to Commerce, the GNB’s predominant role as supplier of stumpage, coupled with the limited number of sawmills purchasing stumpage, created oligopsonistic conditions in New Brunswick during the POR.³²³ Commerce added that studies showed that the dominant mills actually purchased a higher percentage of private-origin standing timber than the GNB claimed and that, regardless of the percentage of private woodlot owners’ production purchased by independent contractors, the dominant mills were the ultimate purchasers of this timber and therefore dominated its demand.³²⁴ Commerce rejected the contention of the GNB and JDIL that the NBFPC market studies for the 2016/2017 and 2017/2018 periods (the “FMV” studies) showed that independent harvesters accounted for 90 percent of private-origin standing timber consumption. It found that this estimate was not supported by the actual market survey results, which indicated mills accounted for a significant share of the purchase of private standing timber.³²⁵ Commerce further noted that the FMV studies indicated that approximately 82 percent of the forest products produced from private woodlots were processed by mills in New Brunswick, who are the dominant consumers.³²⁶ Commerce also pointed to detailed consumption data on the record for this review that showed that a small subset

³¹⁸ *Id.* at 34-41; JDIL 61.1 Brief at 24-26.

³¹⁹ GNB 61.1 Brief at 42-46.

³²⁰ *Id.* at 24-26; JDIL 61.1 Brief at 12-14.

³²¹ Commerce Vol. II 61.2 Brief at 34.

³²² *Id.* at 35.

³²³ *Id.* at 34.

³²⁴ *Id.* at 43-44.

³²⁵ *Id.*

³²⁶ *Id.* at 44.

of sawmills dominated the consumption of both Crown-origin and private-origin stumpage timber in New Brunswick.³²⁷

Commerce further found that there was a supply “overhang” in the province, reinforcing its finding of price-setting dominance of a small number of sawmills.³²⁸ It found that tenure-holding corporations in New Brunswick did not consume all of their allocated Crown timber volumes during the POR and that this unharvested tenure-allocated timber depressed the need for dominant mills to obtain private-origin standing timber in New Brunswick and also depressed the price that the owners of private-origin standing timber could obtain.³²⁹ Commerce contended that JDIL, the largest consumer of standing timber and logs in New Brunswick, also had ready access to imported logs through “non-arm’s length transactions”, adding to the market power it can exert in the province.³³⁰

Additionally, Commerce said that it relied on independent reports prepared by the GNB in the ordinary course of business to corroborate its findings.³³¹ In particular, a 2008 report of New Brunswick’s Auditor General found that private mills are “dominant consumers” that “suppress{} prices from private woodlots, and ... those suppressed private prices lead to an artificially low ‘market-based’ price for Crown stumpage.”³³² A 2012 Private Forest Task Force Report published by the GNB also concurred with the Auditor General’s finding.³³³ The 2015 Auditor General’s report also found that New Brunswick’s private stumpage prices were not yet fair, market-determined prices.³³⁴

Commerce also said that it gave limited evidentiary weight to the Kelly report and its contention that the New Brunswick prices were not distorted for a number of reasons, including because its findings were not supported by corroborating documentary evidence.³³⁵

Commerce concluded that the combination of a dominant seller (the GNB) and a small number of dominant buyers created “oligopsonistic conditions in which private woodlot owners and the Crown are responsive to price-setting behavior by the dominant mill.”³³⁶ In sum,

³²⁷ *Id.* at 35.

³²⁸ IDM at 97.

³²⁹ Commerce Vol. II 61.2 Brief at 36.

³³⁰ IDM at 95-96, Commerce Vol. II 61.2 Brief at 36.

³³¹ IDM at 97-99; PDM at 18-19; Commerce Vol. II 61.2 Brief at 37-38.

³³² *See* PDM at 18-19 (citing COALITION Cmts. on IQRs at Exh. 52 (2008 Report of the Auditor General)).

³³³ *See* PDM at 18-19 (citing COALITION Cmts. on IQRs at Exh. 53 (2012 Private Forest Task Force Report)).

³³⁴ *See* PDM at 18-19 (citing COALITION Cmts. on IQRs at Exh. 54 (2015 Report of the Auditor General)).

³³⁵ Commerce Vol. II 61.2 Brief at 45-46.

³³⁶ *Id.* at 35; IDM at 94.

Commerce said:

{T}he proportion of the stumpage market controlled by the GNB, the concentration of stumpage purchases among a small number of buyers (sawmills), data demonstrating the dominance of a small number of corporations in both the Crown and private stumpage markets, “overhang” of allocated-but-unharvested timber, the ability of certain companies to import logs on favorable terms, and three reports prepared by the GNB spanning from 2008 to 2015—all led Commerce to continue to determine, as it did in *SC Paper from Canada – Expedited Review* and underlying investigation, that the stumpage market in New Brunswick was significantly distorted.³³⁷

Commerce also rejected the GNB’s and JDIL’s argument that private transaction prices cannot serve as the basis for a market distortion unless that distortion was caused by government action rather than by private market forces. Commerce stated that neither the *CVD Preamble* nor CVD law compelled such an interpretation.³³⁸ Commerce further stated that 19 C.F.R. § 351.511(a)(2) requires the identification of a market determined price, but that private transaction prices cannot be a tier-one price where they are significantly distorted by private market forces operating in conjunction with the government’s predominant share of the market. According to Commerce, such private transaction prices are not market determined.³³⁹ Commerce concluded that the dominant mills could suppress stumpage prices through both their direct purchases of stumpage from private woodlots and their indirect purchases of stumpage.³⁴⁰

The Panel’s job is not to determine whether Commerce and the COALITION or the Canadian Parties are right as to whether the New Brunswick private stumpage market is sufficiently free from distortion to permit the use of in-province private prices as a tier-one benchmark. Rather, the Panel must determine whether Commerce’s decision to reject New Brunswick private stumpage prices as a benchmark and instead rely on JDIL’s purchases of stumpage from private lands in Nova Scotia is supported by substantial evidence and otherwise in accordance with law.

The Panel finds that Commerce’s interpretation of the *CVD Preamble* as permitting it to find that a market is distorted not just from action directly attributable to the government, but also from private market conditions that contributed to the market distortion, was reasonable and according to law.

The GNB and JDIL submitted evidence challenging Commerce’s conclusion that market overhang contributed to the distortion in the New Brunswick stumpage market and that any overhang that existed was limited in scope. Although Commerce rejected these arguments and continued to rely on market overhang as evidence of distortion, it also acknowledged from the

³³⁷ Commerce Vol. II 61.2 Brief at 38-39.

³³⁸ *Id.* at 41.

³³⁹ *Id.*

³⁴⁰ *Id.* at 44.

beginning that the magnitude of the overhang was not “at the core of” of its distortion finding.³⁴¹ The Panel finds that Commerce did not present substantial evidence as to the size of the overhang and did not adequately address JDIL and GNB arguments regarding alleged mathematical errors, the limited size of possible overhangs, and explanations as to why companies did not use all of their allocation.

Commerce also placed evidence on the record supporting its determination that the New Brunswick stumpage market was distorted, including studies prepared for the GNB in the normal course of business. Commerce also relied on evidence concerning the GNB’s predominant role as a supplier of standing timber and the concentrated nature of the market for purchasers of that timber. The Panel agrees that these are relevant considerations. However, Commerce did not adequately explain how the GNB’s predominant position as a supplier, together with the concentration among purchasers (termed by Commerce as the “oligopsony effect”), resulted in distortion of the private stumpage market.

The 2008 and 2015 Auditor General reports and the 2012 Private Task Force study each expressed the view that the stumpage market was distorted because of the dominance of a limited number of mills and the dominance of the GNB. However, those reports did not explain the causal mechanism by which market concentration suppressed private stumpage prices, nor did they provide empirical analysis demonstrating that the concentration of purchasers caused prices in the private market to be lower than they otherwise would have been. As JDIL pointed out, these reports largely assumed, rather than demonstrated, that purchaser concentration depressed private stumpage prices.

While Commerce presented valid reasons for rejecting the findings of the Kelly report and the NBFCP and FMV studies concluding that the market stumpage was competitive, Commerce nevertheless bore the burden of supporting its determination with substantial evidence that the concentration in the New Brunswick market drove prices down, not up. Because Commerce did not adequately explain the causal relationship between market concentration and price distortion, its determination that the New Brunswick private stumpage market was distorted and therefore unsuitable as a tier-one benchmark was unsupported by substantial evidence. The Panel therefore remands this issue to Commerce and directs it to reconsider its determination and, if it continues to conclude that the New Brunswick private stumpage market is distorted, to identify and explain with substantial record evidence supporting that conclusion.

Given that the Panel remands Commerce’s determination that the New Brunswick private stumpage market was distorted, the Panel has not addressed the arguments raised by the parties regarding the adjustment for differences in product- and treelength-based prices.

³⁴¹ IDM at 96; Commerce Vol. II 61.2 Brief at 54.

6. QUÉBEC

A. The Québec Forestry Regime

The Panel then turned to Commerce's consideration of Québec's auction prices' suitability as a tier-one benchmark. Québec's public forest regime was substantially reformed in 2010 by the adoption of the Sustainable Forest Development Act ("SFDA"), which went into effect on April 1, 2013.³⁴² The 2013 reform represented a fundamental restructuring of Québec's timber allocation system. Under the prior regime, Crown timber was allocated entirely through administrative allocation at government-determined prices. Under the SFDA, all forest tenures that existed under the previous legislation were cancelled. The Government of Québec ("GOQ") established the Timber Marketing Board (Bureau de mise en marché des bois or "BMMB") to administer a system of public timber auctions. Under the SFDA, approximately 25 percent of the available public timber is sold through BMMB public auctions. The remaining available public timber is primarily allocated to sawmills through Timber Supply Guarantees ("TSGs"). The GOQ uses the market-determined auction prices generated by the BMMB to establish the prices charged for the remaining portion of the harvest sold through TSGs via a "transposition equation".

The GOQ's Initial Questionnaire Response describes the "transposition equation" as the statistical mechanism used by the BMMB to determine the stumpage price for standing timber allocated on public lands, such as TSGs.³⁴³ As described by Québec, the transposition equation deriving TSG prices from auction prices operates as follows.

The transposition equation uses the winning prices obtained from the BMMB's public timber auctions as its starting reference base to establish the market value of standing timber on April 1st of each year.³⁴⁴ The BMMB determines the volume of timber offered at auction based specifically on the number of auctions needed to produce a statistically valid transposition equation.³⁴⁵ Auctioning approximately 25 percent of the annual volume available from public forests generates a sufficiently large input sample from a statistical viewpoint to serve as the basis for calculating these TSG stumpage rates.³⁴⁶ These competitive auction prices are then "transposed" onto the remaining non-auctioned public timber.³⁴⁷

The transposition equation applies adjustments to account for the operating costs and revenue differences associated with the specific biophysical characteristics of the timber stands.³⁴⁸ The

³⁴² GOQ Vol. I 61.1 Brief at 19; GOQ Vol. I Initial Questionnaire Response ("IQR") at QC-S-1.

³⁴³ GOQ Vol. I IQR at QC-S-2.

³⁴⁴ *Id.* at QC-S-44.

³⁴⁵ *Id.* at QC-S-111.

³⁴⁶ Expert Report of Robert C. Marshall, Ph.D., (Jul. 11, 2019) ("Marshall Report") at 33, 68-69, P.R. 454, and accompanying data sets, P.R. 455-676.

³⁴⁷ GOQ Vol. I IQR at QC-S-2.

³⁴⁸ *Id.* at QC-S-1.

choice of variables and the value of their coefficients is based on statistical analysis.³⁴⁹ It accounts for material factors that affect stumpage value, such as:

- Wood quality and species³⁵⁰
- Tree size³⁵¹
- Distance to the mills³⁵²
- Operating and terrain conditions³⁵³

For example, smaller timber located on rugged terrain in outlying areas will yield a lower market value than larger timber located on easily accessed terrain.³⁵⁴

Certain variables within the transposition equation are derived from industry cost surveys and other studies.³⁵⁵ For example, the equation uses specific coefficients for a “Harvesting difficulty index” (coefficient -0.546) and “Road costs” (coefficient -0.271) to properly adjust the final stumpage rates.³⁵⁶

The transposition equation is applied to the particular characteristics of each of Québec's 187 tariffing zones to generate specific, localized stumpage prices for guarantee holders depending on where the timber is harvested.³⁵⁷

B. Commerce’s Rejection of Québec’s Auction Prices as a Tier-One Benchmark

In the Final Results, Commerce rejected the BMMB auction prices as a tier-one benchmark. Consistent with its findings in the underlying investigation, Commerce determined that the Québec timber market as a whole is substantially distorted by government intervention. Commerce based this distortion finding on an analysis of five distinct findings:

1. Non-auction Crown timber is large relative to other sources;
2. A small number of TSG-holding corporations dominate the market;
3. Domestic processing requirements limit number of auction bidders, lead to oversupply, and lower prices;³⁵⁸

³⁴⁹ *Id.* at QC-S-44.

³⁵⁰ *Id.* at QC-S-45.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* at QC-S-135.

³⁵⁶ *Id.*

³⁵⁷ *Id.* at QC-S-42.

³⁵⁸ IDM at 111-119.

4. TSG-holders have the ability to transfer allocations, which reduces competition in competition in auctions; and
5. The disclosure of estimated prices impedes price discovery at auction.

The GOQ and Resolute challenged each of these five findings as unsupported by substantial evidence and reliant on conjecture rather than empirical data. The Panel reviews each of Commerce's findings, and the parties' specific arguments below.

i) The Volume of Non-Auction Crown Timber

Commerce found that TSG-allocated timber accounted for approximately 50 percent of the total softwood harvest during the POR. TSG-holding sawmills are legally permitted to source up to 75 percent of their residual supply needs at a government-set price under a TSG. Because TSG-allocated timber is the primary source of wood for sawmills, Commerce concluded that non-auction Crown timber is “large relative to other sources,” which reduces the sawmills’ need to resort to the BMMB auctions.³⁵⁹

The GOQ argued that Commerce’s characterization was misleading in relation to a mill’s various sources of timber. According to the GOQ’s data, while TSG timber constituted 50 percent of the market, the aggregate of all “competitive sources (public auctions, private land harvests, and imports) constituted the other 50 percent:³⁶⁰

Year	Public non-auction (TSG)	Public auction	Private	Imports	Total consumption
2017	49%	22%	17%	12%	100%
2018	52%	19%	19%	10%	100% ³⁶¹

Because the market was split in half between TSG allocations and competitive sources, the GOQ contended that it was wrong for Commerce to conclude that the TSG portion was disproportionately “large” relative to the aggregate competitive market.

The COALITION and Commerce responded that the GOQ’s argument relied on an artificial aggregation of different timber sources. When the market is properly disaggregated, non-auction

³⁵⁹ IDM at 114-115; Commerce Vol. II 61.2 Brief at 98; COALITION 61.2 Brief at 39-40.

³⁶⁰ GOQ Vol. I 61.1 Brief at 28.

³⁶¹ GOQ Vol. I IQR at Exh. QC-STUMP-004; PDM on Québec Private Stumpage Market Distortion from Johnathan Hall-Eastman to The File at attachments 1, 2.

Crown timber (50 percent) is significantly larger than any single alternative source (auctions at ~20 percent, private lands, and imports).³⁶²

The Panel must determine whether Commerce's conclusion is based on substantial evidence given the record as a whole. A single, guaranteed source providing 50 percent of producers' timber needs at a fixed price could exert pressure on the market with an effect on auction sales. The Panel finds that Commerce's decision to view the timber sources individually, rather than accepting the GOQ's aggregated "50/50" framing, if taken alone, would be insufficient to base a conclusion that the market is distorted. The Panel understands that Commerce based its decision to reject auction prices as a tier-one benchmark on the cumulative effect of the several factors enumerated above. The Panel therefore turns to Commerce's consideration of the Marshall Report, and then to a consideration of these additional factors.

(1) The 75 percent Residual Need Cap

Commerce maintained that a sawmill possessing a guaranteed right to fulfill 75 percent of its supply needs through a TSG allocation is by that fact insulated from competitive pressures, which in turn affects its bidding behavior in the auction market.

In its brief, the GOQ argued that Commerce had improperly rejected evidence on the record demonstrating that its auction prices were not distorted.³⁶³ A central dispute in Commerce's finding of market distortion, and specifically its conclusion that non-auction Crown timber is "large relative to other sources" (Point i) above), concerns the GOQ's policy of capping TSGs. Under the SFDA, the GOQ limits a sawmill's TSG allocation to a maximum of 75 percent of its "residual need" (the mill's total capacity minus its historical sourcing from private lands and imports).³⁶⁴ The GOQ established a 75 percent ceiling to ensure that sawmills are forced to fulfill the remainder of their fiber requirements in the open market. This was intended to create an incentive for mills to participate in the BMMB public auctions.

Québec's submissions in the administrative record describe the principle of "residual need" and its effects. The principle of residuality in Québec's forestry regime provides that standing timber allocated from public Crown lands through TSG is intended to serve only as a supplemental or "residual" source of timber for sawmills.³⁶⁵ Under this principle, the government requires mills to obtain timber from competitive, open-market sources before relying on government-allocated timber.³⁶⁶

By law, other available supply sources must be exhausted first, including timber from private forests, wood imported from outside of Québec, sawmill byproducts like chips and sawdust, and

³⁶² Commerce Vol. II 61.2 Brief at 99-100; PDM at 21; IDM at 110-112; COALITION 61.2 Brief at 39.

³⁶³ GOQ 61.1 Brief at 23, 67 and following.

³⁶⁴ GOQ Vol. I IQR at QC-S-42; Exh. QC-STUMP-042 at 9; Hearing Tr. Day 2 at 178.

³⁶⁵ GOQ Vol. I IQR at QC-S-37–QC-S-38; Sustainable Forest Development Act ("SFDA") section 91.

³⁶⁶ *Id.*

timber purchased competitively at public auctions.³⁶⁷ The Ministry of Forests, Wildlife and Parks (“MFFP”) calculates a specific “residual need” for each mill using a five-year historical estimate. The process works as follows:

- a. The MFFP determines a mill’s total operational requirements based on its actual capacity and historical consumption.³⁶⁸
- b. The MFFP then identifies all the timber volumes the mill has historically sourced from private lands, imports, and auctions.³⁶⁹
- c. By subtracting the volume of these other available supply sources from the mill’s total capacity, the MFFP arrives at the mill’s “preliminary residual need.”³⁷⁰

The TSG volume is then granted to fill all or part of this remaining gap between the plant's total need and the volume it can acquire from alternative sources.³⁷¹

To enforce the principle of residuality and ensure mills do not become dependent on government allocations, Québec law caps a mill's TSG allocation at 75 percent of its calculated residual need.³⁷²

According to Québec, the goal of the residuality concept is to push sawmill demand into competitive markets.³⁷³ By limiting the amount of public timber guaranteed to the mills and elevating private forests as an important supply source, the government ensures that mills have an incentive to actively participate and bid in the BMMB public auctions. Mills will also be motivated to seek out private timber transactions in order to fulfill their total operational capacity.³⁷⁴

The GOQ, relying extensively on the Marshall Report, argued that the 75 percent cap in this way insulates the BMMB auctions from market distortion.³⁷⁵

The Marshall Report empirically analyzed the bidding data and found that because sawmills must satisfy the remaining 25 percent of their residual capacity to maintain operations, they are “overwhelmingly active participants in government auctions.”³⁷⁶ By cross-referencing TSG holders with auction bidders, Professor Marshall showed that the vast majority of TSG-holding

³⁶⁷ *Id.*; Exh. QC-STUMP-26.

³⁶⁸ GOQ Vol. I IQR at QC-S-56; Exh. QC-STUMP-82.

³⁶⁹ *Id.*

³⁷⁰ *Id.*; Exh. QC-STUMP-26.

³⁷¹ GOQ Vol. I IQR at QC-S-56; Exh. QC-STUMP-49.

³⁷² Hearing Tr. Day 2 at 178.

³⁷³ Marshall Report at 27-31.

³⁷⁴ *Id.* at 31; GOQ Vol. I 61.1 Brief at 72-73.

³⁷⁵ Marshall Report at 27. Commerce’s treatment of the Marshall Report is discussed in more detail below.

³⁷⁶ *Id.* at 31.

sawmills actively bid in the BMMB auctions, either directly or through affiliates.³⁷⁷ The GOQ argued that Commerce unlawfully ignored this record evidence. According to the GOQ, if the TSG system truly insulated sawmills from competition, they would not be participating in the auctions at such high rates.³⁷⁸

Commerce and the COALITION disputed the point that the 75 percent cap guarantees a highly competitive, undistorted auction environment. They advanced two arguments against the GOQ's reliance on the residual need cap.

First, Commerce argued that the Marshall Report relied on an unsupported economic assumption. Commerce noted that the Marshall Report assumed that a sawmill must operate at 100 percent of its residual capacity in order to be profitable, which would theoretically force the mill to bid aggressively for the final 25 percent of its wood.³⁷⁹ However, Commerce pointed out that there is no evidence on the record establishing that sawmills actually require 100 percent capacity utilization to maintain profitability. If a mill can operate profitably at 75 or 80 percent capacity, its fixed TSG allocation satisfies nearly all of its operational needs, giving it the space to bid conservatively at auction.³⁸⁰

Second, the COALITION submitted that the "75 percent" figure is an artificial figure that does not reflect a mill's actual situation at any given period. The MFFP calculates a mill's residual need based on a five-year historical estimate, not on the mill's actual, real-time consumption in a given year.³⁸¹ As the COALITION explained during the hearing, if a mill's actual production needs fall below the government's five-year estimate in a specific year, the mill's fixed TSG volume does not automatically decrease. Consequently, in a given year, a sawmill's fixed TSG allocation can actually satisfy far more than 75 percent of its actual operating needs.³⁸² The COALITION pointed to record evidence showing that significant volumes of TSG timber were "waived" (unharvested) during the POR, proving that mills had access to more TSG timber than they actually needed, thereby negating their need to compete in the auctions.³⁸³

Commerce's evaluation of the 75 percent residual need cap must meet the substantial evidence standard the Panel applies. The Panel's role is to determine whether Commerce's evaluation of the record is reasonable and supported by more than a mere scintilla of evidence.³⁸⁴

³⁷⁷ *Id.* at Figure 15.

³⁷⁸ GOQ Vol. I 61.1 Brief at 72-73.

³⁷⁹ IDM at 112; Commerce Vol. II 61.2 Brief at 118.

³⁸⁰ *See* Commerce Vol. II 61.2 Brief at 118.

³⁸¹ COALITION 61.2 Brief at 24; Hearing Tr. Day 2 at 154-155.

³⁸² Hearing Tr. Day 2 at 154-155.

³⁸³ *Id.* at 155.

³⁸⁴ *See Universal Camera*, 340 U.S. at 477.

The Panel finds Commerce’s analysis of the 75 percent cap to be persuasive and based on the record. The GOQ’s defense relies on its argument that the 75 percent ceiling acts as a fixed limit that forces mills to bid aggressively for the remainder of their requirements at auction. However, the record evidence regarding the MFFP’s calculation of mills’ total needs weakens this argument. Because the 75 percent limit is based on a trailing five-year estimate, it is not an actual limit on a mill’s actual annual consumption. Commerce and the COALITION presented evidence that in years of lower production, the fixed TSG allocation can cover a much higher percentage of a mill’s actual needs, insulating the mill from the necessity of acquiring (as much) auction timber. The fact that TSG holders had unused volumes during the POR supports Commerce’s conclusion that the sawmills were not driven to auctions by lack of timber supply.

In the Panel’s view, Commerce was correct to distinguish between “active participation” and “competitive bidding.” A mill that has available enough guaranteed TSG timber to run profitably may participate in an auction to optimize its log sizes or obtain higher quality timber. However, such a mill acts from a position of security, not necessity. It can afford to bid conservatively, dropping out of the auction if prices rise. This fact, ensured by the TSG guarantee, can only reduce the competitive nature of the auction market.

The Panel concludes that Commerce provided a reasoned explanation, supported by substantial evidence, for why the GOQ’s 75 percent residual needs cap fails to prevent market distortion. The Panel affirms Commerce’s determination that the ability of sawmills to source the vast majority of their actual supply needs at government-set TSG prices suppresses competitive bidding in the BMMB auctions.

(2) The Marshall Report

The Marshall Report was a central aspect of the GOQ’s defense of its timber auction system.³⁸⁵ The GOQ commissioned the Marshall Report to empirically analyze whether the BMMB auctions function competitively.³⁸⁶

Using BMMB bidding data, the Marshall Report concluded that the auctions are inclusive, impose no artificial barriers to entry, and evaluate all bids on objective criteria where the highest bidder wins.³⁸⁷ Professor Marshall concluded that the prices that emerge from BMMB auctions are valid market prices free of government-induced distortions.³⁸⁸

In its Final Results, Commerce gave the Marshall Report limited weight and declined to accept its conclusions.³⁸⁹ Commerce’s dismissal rested on several concerns:

³⁸⁵ GOQ Vol. I IQR at QC-S-114.

³⁸⁶ Marshall Report at 3.

³⁸⁷ *Id.* at 37, 81.

³⁸⁸ *Id.* at 36, 81.

³⁸⁹ IDM at 111-120.

- **Dated Data:** Commerce noted that the Marshall Report was originally prepared for the underlying investigation and therefore relied on data from 2015, not the 2017-2018 POR for this first administrative review.³⁹⁰
- **Litigation Bias:** Commerce observed that the report was commissioned specifically for the CVD proceeding, raising concerns of a lack of independence and the potential for findings that were designed to reach specific results.³⁹¹
- **The “Feedback Loop” Assumption:** Commerce identified a concern that a “feedback loop” exists wherein TSG-holding sawmills intentionally suppress their auction bids because they know that those auction prices will be transposed by the government to set the prices for their guaranteed TSG volumes. “The distortive nature of the feedback loop is among the most significant concerns Commerce has with Québec’s timber pricing system.”³⁹² While Professor Marshall empirically tested for a feedback loop and found no evidence of one, Commerce concluded his methodology was flawed because it failed to account for the fact that the entire market might already be artificially depressed.³⁹³

The GOQ and Resolute contested Commerce’s dismissal of the Marshall Report, arguing that Commerce ignored empirical proof in favor of baseless conjecture.³⁹⁴

First, regarding the “dated data,” the GOQ argued that Commerce’s own questionnaire explicitly directed Québec to place the original Marshall Report on the administrative review record.³⁹⁵ The GOQ provided Commerce with the exact same kind and quality of data sets (including SAS scripts) for the 2017-2018 POR so that Commerce could easily replicate the regressions for the current review.³⁹⁶ The GOQ argued there was no evidence on the current record that Commerce ever attempted to replicate the analysis with the updated POR data before dismissing it.

Second, regarding the “feedback loop,” the GOQ argued that Professor Marshall actively tested for this phenomenon and proved that a sawmill reducing its bids to manipulate the TSG price would lose far more money in forfeited timber volume than it would ever save on its TSG rates.³⁹⁷ The GOQ argued that Commerce’s finding of a feedback loop was a purely theoretical

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.* at 112.

³⁹³ *Id.* at 111-120.

³⁹⁴ GOQ Vol. II 61.1 Brief at 87.

³⁹⁵ GOQ Vol. I IQR at QC-S-115.

³⁹⁶ *Id.* at QC-S-115-16; Marshall Report at 68-73.

³⁹⁷ Marshall Report at 59-62.

construct devoid of any analysis or examination of evidence, relying instead on “supposition and imagination, neither of which are substantial evidence on the record.”³⁹⁸

The COALITION and Commerce defended the agency’s treatment of the Marshall Report as a lawful exercise of its discretion.³⁹⁹ Commerce stated that it did not reject the report outright, but weighed all available information and found the report less persuasive than other system characteristics indicating market distortion. It noted that the agency is not required to accept expert opinions prepared for purposes of litigation.⁴⁰⁰

At the outset, the Panel notes that it is aware of the previous binational panel’s original decision, and its subsequent decision on remand, addressing these same issues in the underlying investigation.⁴⁰¹ However, as acknowledged by the parties during the hearing, decisions of prior binational panels have no precedent value and are not binding on this Panel.⁴⁰² The Panel conducts its review of the First Administrative Review on a completely separate administrative record, featuring with different facts, updated data for the 2017-2018 POR, and new arguments.⁴⁰³ The Panel arrives at its conclusions based on the record evidence and pleadings presented in this first administrative review.

The Panel reviews Commerce’s evaluation of expert reports under the substantial evidence standard 19 U.S.C. § 1516a(b)(B)(i). While the Panel does not necessarily agree that Commerce has the discretion to accord less weight to reports simply because they were commissioned specifically for litigation, Commerce may not do so as a pretext to ignore substantial, uncontroverted data that fairly detracts from its conclusions.⁴⁰⁴ As the GOQ noted, guesswork and supposition are no substitute for substantial evidence in justifying decisions.⁴⁰⁵

Commerce's rejection of the Marshall Report, and its conclusion regarding market distortion, rests on the finding that a “feedback loop” exists between auction prices and administratively-set TSG prices. However, looking strictly at the administrative record for this 2017-2018 review period, Commerce failed to provide any analysis showing that auction prices actually track TSG prices.

³⁹⁸ GOQ Vol. I 61.1 Brief at 86.

³⁹⁹ COALITION 61.2 Brief at 26.

⁴⁰⁰ IDM at 111-120; COALITION 61.3 Brief at 125-128.

⁴⁰¹ See *Certain Softwood Lumber Products from Canada*, USA-CDA-2017-1904-02, Panel Decision (May 5, 2024); *Certain Softwood Lumber Products from Canada*, USA-CDA-2017-1904-02, Decision on the Redetermination on Remand (March 6, 2026).

⁴⁰² Hearing Tr. Day 1 at 8-10, 46-47.

⁴⁰³ *Id.* at 46-47.

⁴⁰⁴ *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*Motor Vehicle Mfrs. Ass’n*”).

⁴⁰⁵ *China Nat’l Mach. Imp. & Exp. Corp. v. United States*, 264 F. Supp. 2d 1229, 1240 (Ct. Int’l Trade 2003).

The GOQ placed POR-specific data on the current record specifically so Commerce could replicate the Marshall Report's regressions and test the feedback loop hypothesis for the 2017-2018 timeframe.⁴⁰⁶ Commerce concluded that the auction prices track the TSG prices without actually conducting a verifiable price-to-price comparison using this POR data to see if that conclusion was borne out by the data. Commerce cannot rely on general observations or concerns about litigation bias to reject an auction system when the actual transactional data required to test its "feedback" hypothesis for the POR, although available on the record, has not been analyzed to determine whether tracking occurs.

The Panel concludes that Commerce's determination that the Québec timber auctions are distorted by a feedback loop is based on an assumption of price "tracking" that Commerce failed to base in substantial evidence using the adequate POR data available on the current record.

The Panel remands this issue to Commerce. Commerce should use the 2017-2018 POR data placed on the record during this administrative review to analyze the extent to which auction prices actually track TSG-allocated prices. If Commerce continues to find after conducting an analysis that the auction prices are distorted and cannot serve as a tier-one benchmark, it should provide a reasoned explanation based on empirical data on the record.

ii) Market Dominance by a Small Number of TSG-Holding Corporations

Commerce determined that the ten largest TSG-holding corporations dominated both the allocation of TSG timber and the consumption of auctioned Crown timber. Commerce concluded that this concentration of market power allowed these large sawmills to obtain timber at lower prices than they would in a fully competitive market.⁴⁰⁷

The GOQ challenged this finding by pointing to specific bidding data that detracted from Commerce's conclusion. First, the GOQ argued that the selection of the "Top Ten" mills was arbitrary; when measured against the total auction volume sold historically, the Top Ten accounted for a minority share of that volume. The GOQ also pointed to record evidence establishing that independent harvesters (non-mills) won slightly more than 50 percent of the auctions conducted during the two fiscal years encompassing the POR.⁴⁰⁸ The GOQ argued that if a small cartel of sawmills truly dominated the market and suppressed prices, independent harvesters would not be successfully outbidding the sawmills and winning a majority of the BMMB auctions.

The COALITION argued that "non-TSG holders such as independent contractors are not the final customer for auctioned timber, TSG holding sawmills are," and quoted the Marshall Report⁴⁰⁹ to note that "some {sawmills} are linked to affiliates or corporate representatives potentially

⁴⁰⁶ GOQ Vol. I 61.1 Brief at 73; GOQ Vol. I IQR at Exhs. QC-STUMP-001, QCSTUMP-002, QC-STUMP-003, QC-STUMP-009.

⁴⁰⁷ See IDM at 110, 114.

⁴⁰⁸ GOQ Vol. I 61.1 Brief at 20 (citing Exh. QC-STUMP-008).

⁴⁰⁹ Marshall Report and accompanying data sets.

bidding on their behalf.”⁴¹⁰ Commerce adopted this reasoning in its Final IDM, noting that independent contractors will “in-turn, sell private origin standing stumpage to the mills”⁴¹¹ and that their bidding behavior is therefore responsive to the dominant sawmills. Commerce and the COALITION did not dispute the fact that independent contractors won over 50 percent of the auctions. Instead, they argued that this statistic does not negate sawmill dominance because of the market’s structure. As the COALITION pointed out, some contractors bid explicitly on behalf of affiliated sawmills.⁴¹²

Commerce and the COALITION further argued that even when independent harvesters bid independently, they are captive to the domestic sawmills. Because the GOQ’s domestic processing requirement (SFDA section 117) mandates that timber harvested from public lands be completely processed in Québec, independent harvesters cannot export their logs. Therefore, they must sell their harvested timber to the very same TSG-holding sawmills.⁴¹³ Knowing that they are captive to domestic mills that already possess cheap TSG timber, independent harvesters have no incentive to bid aggressively at auction. Thus, the TSG-holding mills’ dominance dictates the bidding behavior of the independent harvesters.

The GOQ argued that the 50 percent win-rate of independent harvesters is on its face inconsistent with a market dominated by a few large sawmills, which was evidence that Commerce had to consider, and address.⁴¹⁴ Commerce addressed this detracting evidence by linking the behavior of the independent harvesters to the captive nature of the market created by the domestic processing requirement. The Panel finds that Commerce’s economic logic, that an independent harvester will not bid aggressively if its only available customers are domestic sawmills armed with fixed-price TSG guarantees, is rational and supported by the structure of the SFDA. Commerce’s finding that the large TSG-holders exert market dominance over the ultimate consumption of the timber, regardless of who initially wins the auction block, is supported by substantial evidence.

iii) The Domestic Processing Requirement

Commerce also relied on the domestic processing requirement as a factor supporting its distortion finding. Section 117 of the SFDA requires that all timber harvested from public forests in Québec be processed within the province.⁴¹⁵ Commerce found that this legal restriction “effectively excludes potential bidders that would mill the timber outside of Québec” and that

⁴¹⁰ COALITION 61.2 Brief at 43-44.

⁴¹¹ IDM at 95, 114.

⁴¹² COALITION 61.2 Brief at 44-45.

⁴¹³ COALITION 61.2 Brief at 44-45; Commerce Vol. II 61.2 Brief at 108-109; IDM at 114, 116.

⁴¹⁴ *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

⁴¹⁵ GOQ LER QR at 4; Commerce Vol. II 61.2 Brief at 108; IDM at 111.

“limiting bidders suppresses auction bids, because bidders understand that there are fewer parties against which their bid will compete.”⁴¹⁶

Commerce and the COALITION considered this restriction as reinforcing the limitations of the captive-market described above. Because independent harvesters cannot export their logs, they must resell their harvested timber to Québec sawmills. The COALITION argued that these harvesters therefore “compete with timber available to sawmills at the TSG price” and have “little motivation to bid for timber at a price above which they can sell the wood to the sawmills.”⁴¹⁷

The GOQ argued that the domestic processing requirement has no effect on auction prices because there is no export demand for Québec-origin Crown timber. The GOQ also argued that geography, distance to competing markets, and the costs of log transportation mean that no bidder would in fact export Québec logs even in the absence of section 117.⁴¹⁸

Commerce rejected this argument on the ground that “there was no way to know what the trade flows would look like absent the export restraint.”⁴¹⁹ The COALITION cited the example of Resolute shipping Crown-origin softwood harvested in Ontario a distance of 353 kilometers as evidence that distance alone does not preclude cross-border trade.⁴²⁰ The COALITION also argued that the burden of proof rests on the GOQ, which “has not, nor can they, provide any supporting evidence to show that the absence of log exports from Québec was not the result of the log export restraint.”⁴²¹

In summary, the Panel understands Commerce’s argument to be the following: (1) section 117 exists as a matter of law; (2) it excludes potential out-of-province bidders; (3) fewer bidders and a captive resale market suppress auction prices; and (4) therefore, auction prices are distorted downward.

Commerce did not cite any econometric study, price comparison between regions with and without domestic processing requirements, regression analysis, or expert report quantifying or even estimating the price effect of the domestic processing requirement on BMMB auctions. The bidding data showing that contractor bids closely track sawmill bids⁴²² do not isolate the domestic processing requirement as either one of, or the cause of that tracking. Commerce and the COALITION attributed the tracking pattern to multiple factors simultaneously, and no party attempted to separate the effect of section 117 from other aspects of the market.

⁴¹⁶ IDM at 102; Commerce Vol. II 61.2 Brief at 108.

⁴¹⁷ COALITION 61.2 Brief at 47-48; IDM at 101, 111.

⁴¹⁸ GOQ Vol. I 61.1 Brief at 27-28.

⁴¹⁹ IDM at 141.

⁴²⁰ COALITION 61.2 Brief at 48-49.

⁴²¹ COALITION 61.2 Brief at 49.

⁴²² PDM at 21; IDM at 115.

A domestic processing requirement could reduce the number of potential bidders and suppress competition pressure at auction. But when Commerce rests a finding on a causal proposition, the proposition must be supported by some evidentiary basis in the record for the conclusion that the asserted cause actually produced the asserted effect.⁴²³

Accordingly, the Panel remands this issue to Commerce. On remand, Commerce should indicate record evidence showing that the domestic processing requirement in fact exerted downward pressure on prices at BMMB auctions during the POR. If no such evidence exists on the record, Commerce should explain why the absence of evidentiary support does not undermine this element of its distortion finding. Alternatively, Commerce should reconsider its distortion determination in light of the absence of this factor exerting any material downward pressure on prices.

iv) TSG Allocations

Commerce found that sections 92 and 93 of the SFDA permit TSG-holders to transfer up to 10 percent of their total allocated volumes among affiliated sawmills and between unaffiliated corporations without prior government approval. Commerce concluded that this legal flexibility allows mills to shift their volumes to meet specific needs, thereby reducing their individual necessity to resort to the competitive auction system.⁴²⁴

The GOQ disputed this finding as mathematically wrong. The GOQ demonstrated that TSG transfers are zero-sum: when one mill transfers volume to another, the transferring mill's available TSG volume is reduced by the amount of the transfer. The aggregate volume of TSG timber available in the province is limited by the Chief Forester's AAC and is not increased by these transfers.⁴²⁵ The GOQ provided evidence showing that these transfers are mainly used by mills to obtain preferred log sizes more suitable for their equipment, transferring large diameter logs away from mills that cannot process them to mills which can. The GOQ argued that because the overall amount of TSG timber is not increased, transfers do not reduce the aggregate demand that sawmills place on the auction market.

Commerce acknowledged that transfers do not increase the total Crown-origin timber available province-wide. However, Commerce argued that while the transfers may be zero-sum at a macro level, this misses the micro-economic effect on individual participants, because the transfers "increase consumption by allowing {individual} mills to obtain more."⁴²⁶ The ability to transfer allows an individual mill to obtain more non-auction timber than it otherwise would have been able to process, or to optimize its supply chain. This flexibility reduces the necessity for that specific mill to bid aggressively in the BMMB auctions to fulfill its specific need for timber.

⁴²³ *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Universal Camera Corp*, 340 U.S. at 488.

⁴²⁴ IDM at 115, 132; Commerce Vol. II 61.2 Brief at 102-104.

⁴²⁵ GOQ Vol. I 61.1 Brief at 21-22, 38-40, 44; GOQ Vol. I 61.3 Brief at 15-16.

⁴²⁶ IDM at 115-116; Commerce Vol. II 61.2 Brief at 102-103; GOQ Vol. I 61.3 Brief at 39-40.

The Panel finds that the GOQ is factually correct that TSG transfers are a zero-sum redistribution of a fixed total volume. However, the Panel finds that Commerce's inferences regarding market behavior are reasonable. Commerce did not claim that transfers expand the total supply of timber. Commerce instead concluded that the flexibility inherent in the transfer system reduces pressure to participate for individual mills. If a mill faces a shortfall of a desired log size, it can exchange with another mill rather than having to bid competitively in the open auction market for a block containing that log size. This sourcing flexibility could reduce the competitive nature of auctions that would exist in an allocation system in which transfers were restricted.

However, the Panel finds that Commerce's determination that the mere ability to shift allocations without evidence that some material degree of such shifting actually contributed to overall market distortion is not supported by substantial evidence. On remand, Commerce should identify record evidence demonstrating that the shifting suppressed prices. If no such evidence exists on the record, Commerce should explain why the absence of evidentiary support does not undermine this element of its distortion finding. Alternatively, Commerce should reconsider its distortion determination in light of the absence of this factor exerting meaningful downward pressure on prices.

v) The Disclosure of Estimated Prices Effect on Price Discovery

As the fifth and final point supporting its finding of market distortion in Québec, Commerce determined that the BMMB practice of disclosing administratively-determined "estimated prices" prior to 86 percent of its auctions impeded true price discovery.⁴²⁷ In the IDM, Commerce determined that "estimated price disclosure alters bidding behavior in a way that impedes price discovery."⁴²⁸

Commerce arrived at this determination by performing a comparative statistical analysis using the BMMB auction dataset for the POR. Commerce separated the auction data into two categories: auctions where the estimated price was disclosed to bidders in advance, and auctions where the estimated price remained hidden. Commerce observed that when the estimated price was disclosed, both winning and losing bids were clustered around the disclosed price estimate:

An additional issue with the auction system is that the bids hew closely to the GOQ's estimated price. For auctions where the estimated price is known, bids cluster tightly around the estimated price, while for auctions where the estimated price is unknown, the bid distribution is more evenly spread. This suggests that the estimated price—an administratively determined value calculated by the BMMB—is playing a significant role in determining the final prices of timber sold at auction. The data further indicate that in auctions where the GOQ's estimated price is public, the winning bid is lower as a percentage of the estimated price than in auctions where the GOQ's estimated price is not public, suggesting that the estimated price, as implemented by the GOQ, results

⁴²⁷ PDM at 22; Marshall Report at 42 n. 81; COALITION 61.2 Brief at 50-51.

⁴²⁸ IDM at 118.

in auction bids that are lower than they otherwise would be absent the BMMB-set estimated price.⁴²⁹

Conversely, in the minority of auctions where the estimated price was hidden, the bid distribution was spread more evenly across a wider range.⁴³⁰ Commerce concluded that this clustering effect demonstrated that bidders were using the disclosed estimated price, which record evidence described as an “anchor” from which bidders created their prices,⁴³¹ in a way that suppressed their independent evaluation of the timber’s true value. In the result, Commerce determined that this artificially drove down the final winning bids, and prevented the auction system from generating true price discovery.⁴³²

The GOQ disputed Commerce’s methodology on several bases, arguing that the “clustering” conclusion was the product of fundamental mathematical errors. It also failed to account for timber block heterogeneity, and for the distortive effect of isolated statistical anomalies.⁴³³ The GOQ also argued that its auction system complies with Commerce’s 2003 Policy Bulletin, a proposal that set out criteria for evaluating market-based timber sales systems.⁴³⁴ Commerce rejected the Bulletin because it never completed the notice-and-comment process and was never finalized. On the issue of the Policy Bulletin, the Panel affirms. A draft agency proposal carries no legal weight and does not bind Commerce’s exercise of discretion. The Bulletin’s criteria address how an auction system should be structured, but they do not answer the empirical question asked by the regulation: *i.e.* whether actual auction prices are distorted by the government’s market participation under 19 C.F.R. § 351.511(a)(2)(i). Commerce therefore acted within its discretion in applying the existing regulatory framework without regard to the Bulletin.

The GOQ disputed Commerce’s conclusion that estimated price disclosure suppressed bid prices, arguing that Commerce wrongly considered the “estimated price” as uniform across the entire province. The GOQ argued that estimated prices are timber-block-specific assessments calculated differently across the 17 regional offices of the BMMB, which reflected highly localized stand conditions, harvesting difficulty, transportation costs and other factors.⁴³⁵ The GOQ also demonstrated that the BMMB deliberately chose to hide estimated prices for higher-quality, highly desirable timber blocks. Therefore, comparing bids on lower-quality blocks (where prices were

⁴²⁹ PDM at 22.

⁴³⁰ Commerce Vol. II 61.2 Brief at 104-105; PDM at 22.

⁴³¹ “The role of the ‘estimated price’ is not negligible since it acts as an anchor from which the bidder creates his price. In addition, it is also the best estimate of a competitor’s price.” See GOQ Vol. I IQR at Exh. QC-STUMP-037 (Economic Evaluation of the New Forestry Regime of Québec) at 22.

⁴³² IDM 117-119; Commerce Vol. II 61.2 Brief at 105.

⁴³³ GOQ Vol. I 61.1 Brief at 54-67; GOQ Vol. V Stumpage and LER Case Brief at 32-44, P.R. 1994.

⁴³⁴ Commerce Vol. II 61.2 Brief at 111-112 (referring to *Proposed Policies Regarding the Conduct of Changed Circumstance Reviews of the Countervailing Duty Order on Softwood Lumber from Canada*, 68 Fed. Reg. 37,456 (Dep’t Commerce Jun. 24, 2003)); Hearing Tr. Day 2 at 132-133.

⁴³⁵ GOQ Vol. I 61.1 Brief at 55-58; Hearing Tr. Day 2 at 115.

disclosed) to bids on higher-quality blocks (where prices were hidden) inherently captured differences in timber quality and demand, rather than capturing the behavioral effect of disclosure.⁴³⁶

Second, the GOQ identified errors in the data Commerce used to run its calculation. The GOQ pointed out that Commerce improperly included bids from withdrawn or non-compliant auctions, as well as auctions for non-softwood blocks (*i.e.*, stands with less than 75 percent softwood), as well as omitting data from the final nine months of the POR.⁴³⁷

Third, the GOQ argued that the “alleged clustering” effect in Commerce’s analysis was driven almost entirely by two extreme outlier bids in single-bidder auctions where the estimated price was hidden. According to the GOQ’s analysis of the record data, Commerce’s finding rested on an apparent difference of 68 percentage points between the bid-to-estimated-price ratios of hidden versus disclosed auctions. However, the GOQ demonstrated that in one hidden-price auction, the winning bid was double the estimated price, and in another, the winning bid was more than four times (400 percent) the estimated price.⁴³⁸ When those two extreme anomalies were removed from the dataset, the 68-percentage-point difference shrank to less than 10 percentage points. The GOQ argued that Commerce was wrong to base a finding of market-wide price suppression on a statistic driven by two isolated, unrepresentative bids.

Commerce and the COALITION defended Commerce’s statistical analysis as a reasonable interpretation of the auction data. Regarding the treatment of the estimated price, Commerce cited Québec’s own October 2017 Wood Marketing Manual, which states that the estimated price is the BMMB’s best estimate of the price it expects to get and that “the principle and the usefulness of the prices do not change, even if the method of calculation differs.”⁴³⁹ Because the estimated price serves the same purpose for bidders across all regions, Commerce argued it was appropriate to isolate “disclosure” as the distinguishing fact between auctions where it is, and is not, disclosed.

Regarding the data anomalies, Commerce and the COALITION objected to the GOQ’s attempt to remove the two extreme bids. During the Panel hearing, counsel for the COALITION argued that “those two high bids are real transactions. I mean, it could be that in those two scenarios ... the buyers really, really needed the fiber. And so those are two transactions that ... they actually bid aggressively to get the fiber. That’s a normal situation in the market-based system.”⁴⁴⁰ Commerce stressed in its brief that removing unfavorable data that the GOQ subjectively deems “outliers” is manipulative and results in an incomplete dataset.⁴⁴¹ Commerce also noted that even

⁴³⁶ GOQ Vol. V Stumpage and LER Case Brief at 34-36.

⁴³⁷ *Id.* at 42-43; GOQ Vol. I 61.1 Brief at 59-60.

⁴³⁸ GOQ Vol. I 61.1 Brief at 63-64.

⁴³⁹ IDM at 117; Commerce Vol. II 61.2 Brief at 104-105.

⁴⁴⁰ Hearing Tr. Day 2 at 168-169.

⁴⁴¹ Commerce Vol. II 61.2 Brief at 105-106.

under the GOQ's disaggregated approach, a non-trivial difference in the bid-to-estimated-price ratio remained for 2-bidder auctions when the estimated price was disclosed versus hidden.⁴⁴²

Finally, Commerce argued that the GOQ failed to exhaust its administrative remedies regarding the outlier argument, asserting that the GOQ did not present this specific statistical argument in its administrative case brief before the agency.⁴⁴³

The Panel reviews Commerce's statistical analysis with deference.⁴⁴⁴ However, under the substantial evidence standard, when an interested party presents evidence demonstrating a significant mathematical or statistical error that undermines or detracts from the agency's conclusion, the agency must provide a reasoned explanation addressing that detracting evidence.⁴⁴⁵

As an initial matter, the Panel does not accept Commerce's argument that the GOQ failed to exhaust its administrative remedies. The record shows that the GOQ challenged the validity of Commerce's estimated price analysis in its administrative case brief, arguing that the analysis was "fundamentally flawed," based on "simple averages," and failed to account for block quality.⁴⁴⁶ That the GOQ chose to further explain the same dataset in more detail before this Panel to illustrate why Commerce's simple average was mathematically distorted does not constitute a failure to exhaust. The agency was fully aware of the GOQ's position that the statistical comparison was misleading and had the opportunity to defend its mathematics.

Next, the Panel finds that Commerce's decision to treat "disclosure" as a binary variable, despite regional variations in how estimated prices are calculated, survives the highly deferential standard of review. It was reasonable for Commerce to rely on the GOQ's own Wood Marketing Manual, which confirms the purpose of the estimated price as a baseline reference. While the GOQ is correct that block variation exists, Commerce is permitted to construct an analysis to test the effect of price disclosure on bids.

However, Commerce's analysis fails the substantial evidence test by not considering the distorting effect of the outlier bids and by the inclusion of non-compliant and withdrawn bids in its analysis.

Commerce's task was to base an observable, market-wide pattern of bid suppression caused by the anchoring effect of price disclosure on substantial evidence. The GOQ demonstrated using Commerce's own dataset that the 68-percentage-point difference in Commerce's average was driven almost entirely by one hidden-price auction where a bidder paid 200 percent of the estimate, and another where a bidder paid 400 percent of the estimate.

⁴⁴² *Id.* at 106; COALITION 61.2 Brief at 53-54.

⁴⁴³ *See* Commerce Vol. II 61.2 Brief at 106.

⁴⁴⁴ *Essar Steel, Ltd. v. United States*, 678 F.3d 1268, 1273-74 (Fed. Cir. 2012).

⁴⁴⁵ *Universal Camera*, 340 U.S. at 488.

⁴⁴⁶ GOQ Vol. V Stumpage and LER Case Brief at 32-44.

The COALITION's defense, that these are "real transactions" where buyers "really needed the fiber," tends to support the GOQ's rather than Commerce's point. If a buyer needed fiber and bid 400 percent of the estimated value, that isolated act in a hidden-price auction does not prove that the disclosure of prices in other auctions actively suppresses the market. It does not logically follow that "bidders market-wide use the estimated price as an anchor to suppress bids" based on the presence of a single bidder paying four times the estimated price in a single-bidder auction. In other words, Commerce's general conclusion of market distortion relies primarily on two isolated, anomalous bids to generate its statistical conclusion. Commerce's refusal to drop the outliers because they were "real," fails to consider the underlying fact that the outliers are exceptions to the norm.

The Panel also finds Commerce's inclusion of non-compliant/withdrawn bids, non-softwood blocks, and the omission of the last nine months of the POR to be reasonable objections. A dataset intended to test the competitiveness of softwood lumber prices should be restricted to valid softwood lumber bids within the entire POR.

Because Commerce's conclusion regarding the disclosure of estimated prices relies on a flawed statistical analysis (the outsized effect of two anomalous outlier bids, and the inclusion of non-compliant/non-softwood data), the Panel does not find this determination to be supported by substantial evidence.

On remand, Commerce should perform its analysis to remove the effect of non-compliant/non-softwood bids and to remove the distortive effect of the two extreme bids. Alternatively, Commerce should provide an explanation for how a much smaller percentage difference (absent the outliers) is adequate to prove market-wide price suppression through estimated price disclosure.

Because the Panel remands Commerce's distortion finding, the Panel does not consider at this time the parties' arguments regarding the statutory definition of "country," the selection of Nova Scotia as an alternative tier-one benchmark, or the comparability of that benchmark and the adjustments to it (including the spruce budworm adjustment, silviculture costs, and Commerce's "pure stumpage" methodology). Those issues only arise if Commerce establishes on remand that the Québec auction prices were distorted by government intervention.

The Panel also does not reach the parties' dispute over whether Commerce lawfully restricted the sales denominator for Resolute's stumpage benefit to sawmill products only, or the question whether Commerce must account for in-kind remuneration costs such as annual royalties, road-building obligations, and forest protection contributions. To the extent that those issues depend on which benchmark Commerce applies and the benefit calculation itself, they are premature pending the outcome of the remand.

7. BENEFITS CALCULATION

In calculating the benefit conferred by the provision of stumpage, Commerce compared individual Crown stumpage transaction prices to monthly transaction average benchmark prices and assigned a value of zero to any transactions in which the transaction price exceeded the

benchmark price.⁴⁴⁷ The Canadian Parties, the GNB, and JDIL argued that this methodology distorted and inflated the alleged benefit finding and therefore was contrary to law and unsupported by substantial evidence.⁴⁴⁸ The Canadian Parties further observed that a binational panel convened under the North American Free Trade Agreement (“NAFTA”) in *Lumber IV* reached the same conclusion,⁴⁴⁹ as did a World Trade Organization (“WTO”) panel interpreting U.S. international obligations, which had been implemented under U.S. law.⁴⁵⁰

The Canadian Parties contended that correcting Commerce’s methodology by calculating the benefit based on all transactions under the stumpage program would not entail an impermissible offset.⁴⁵¹ Rather, they argued, such an approach would permit Commerce to calculate any countervailable benefit in a manner that properly reflects prevailing market conditions, consistent with Commerce’s statutory obligations.⁴⁵²

Commerce and the COALITION disagreed, asserting that the inclusion of transactions priced above the benchmark would amount to an unlawful offset of negative benefits.⁴⁵³ Commerce relied on 19 U.S.C. § 1677(6), which enumerates the costs that may be subtracted from a gross countervailable subsidy to arrive at a net countervailable subsidy, and argued that transactions priced above the benchmark are not among the statutorily permitted offsets.⁴⁵⁴

The Canadian Parties, the GNB, and JDIL for their part contended that Commerce had misread the statute.⁴⁵⁵ The Canadian Parties, in particular, noted that section 19 U.S.C. § 1677(5)(E) discusses providing a benefit (*i.e.*, singular) whereas subsection (4) talks about the provision of “goods and services” (plural). In other words, in determining the gross subsidy one is calculating the benefit provided by the whole program, not just some of the transactions.⁴⁵⁶ They added that the regulations are also consistent with this interpretation of the statute.⁴⁵⁷ They further

⁴⁴⁷ IDM at 67-69, 89-90.

⁴⁴⁸ Canadian Parties Vol. I 61.1 Brief at 107-17; GNB 61.1 Brief at 89; JDIL 61.1 Brief at 37-39.

⁴⁴⁹ *Certain Softwood Lumber Products from Canada*, USA-CDA-2002-1904-03, Panel Decision on Remand Determination (June 7, 2004) at 18-19. This Panel also notes that a more recent NAFTA binational panel reached a similar conclusion: *Certain Softwood Lumber Products from Canada*, USA-CDA-2017-1904-02, Panel Decision (May 5, 2024) at 70-71.

⁴⁵⁰ Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R (Aug. 24, 2020) (“DS533 Panel Report”) at paras. 7.563, 7.571, 7.584.

⁴⁵¹ Canadian Parties Vol. I 61.1 Brief at 109-10.

⁴⁵² *Id.* at 112-17. See also JDIL 61.1 Brief at 37-39.

⁴⁵³ Commerce Vol. II 61.2 Brief at 70-71; Commerce Vol. IV 61.2 Brief at 81-85; COALITION 61.2 Brief at 160, 188-94.

⁴⁵⁴ Commerce Vol. II 61.2 Brief at 70-71; Commerce Vol. IV 61.2 Brief at 81-85.

⁴⁵⁵ Canadian Parties Vol. I 61.1 Brief at 108-10; GND 61.1 Brief at 89; JDIL 61.1 Brief at 37-39.

⁴⁵⁶ Canadian Parties Vol. I 61.1 Brief at 108-09.

⁴⁵⁷ *Id.* at 109 (referring to 19 C.F.R. § 351.511(a)(1)).

countered that 19 U.S.C. § 1677(6) governs the calculation of the net countervailable subsidy and does not address how the gross subsidy amount is to be determined in the first place.⁴⁵⁸ According to the Canadian Parties, accounting for transactions that are priced higher than the benchmark is a requisite part of calculating the gross subsidy itself, not an offset applied at the netting stage.⁴⁵⁹

The Panel agrees that the Canadian Parties' interpretation accords with the plain meaning of the statute that in calculating the benefit of a gross subsidy program all transactions are counted, not just those where the price was less than the benchmark price. The Panel further agrees that the appearance of "negative benefits" requiring offset is an artifact of Commerce's chosen calculation methodology. Although Commerce elected to calculate stumpage benefits largely on a transaction-specific basis, it is not statutorily required to do so. As discussed above, while Commerce emphasizes its longstanding preference for transaction-specific data, it does not adequately explain why adherence to that preference is reasonable in this case, particularly given the absence on the record of actual species-specific stumpage values in, for example, BC, as the BC Parties argued.⁴⁶⁰ Furthermore, in *Lumber IV*, the Panel directed Commerce to remove from the formulas the result where the transaction price exceeds the benchmark price and the benefit is set to zero, and Commerce complied with that instruction on remand.⁴⁶¹

Finally, the Panel agrees that the Canadian Parties' and JDIL's interpretations⁴⁶² are consistent with Commerce's obligation to ensure that the benefit calculation reflects "prevailing market conditions for the good."⁴⁶³ Where the value of a good, such as standing timber, fluctuates with market conditions, the benefit conferred by a government program cannot be accurately measured without accounting for transactions in which the price paid exceeds the benchmark.

Accordingly, the Panel finds that Commerce's practice of assigning a zero benefit to transactions in which individual Crown stumpage prices exceed the monthly transaction average benchmark prices is not in accordance with law. This matter is therefore remanded to Commerce to ensure its stumpage benefit calculations are consistent with prevailing market conditions as discussed above.

⁴⁵⁸ Canadian Parties Vol. I 61.3 Brief at 56.

⁴⁵⁹ Canadian Parties Vol. I 61.3 Brief at 57.

⁴⁶⁰ BC Parties Vol. I 61.3 Brief at 21-24.

⁴⁶¹ See *Certain Softwood Lumber Products from Canada*, USA-CDA-2017-1904-02, Panel Decision (May 5, 2024) at 70-71; *Certain Softwood Lumber Products from Canada*, USA-CDA-2017-1904-02, Decision on the Redetermination on Remand (March 6, 2026) at 25.

⁴⁶² Canadian Parties Vol. I 61.1 Brief at 112-17; JDIL 61.1 Brief at 37-39.

⁴⁶³ 19 U.S.C. § 1677(5)(E)(iv).

V. LOG EXPORT RESTRAINT PROGRAMS

1. BRITISH COLUMBIA

Commerce determined that the LER program which applied to log exports from BC, was countervailable.⁴⁶⁴ In its Preliminary Decision Memorandum (“PDM”), Commerce noted that it had found the BC LER program countervailable in the original investigation.⁴⁶⁵ It noted that there were no new facts in this review regarding the manner in which the LER program operated and thus it continued to countervail the program as it had in the original investigation.⁴⁶⁶

A. Description of the LER Program

Commerce described the program in its preliminary determination:

{T}he laws and regulations that govern the provision of logs within British Columbia compel suppliers of BC logs to supply to BC consumers, including mill operators. As Commerce detailed during the investigation, the Forest Act explicitly states that all timber harvested in British Columbia is required to be used in British Columbia or manufactured in British Columbia into wood products. These logs cannot be exported unless they meet certain criteria, the most common of which is that they are surplus to the needs of the timber processing industry in British Columbia. Therefore, the GBC requires private log suppliers to offer logs to mill operators in British Columbia and may export the logs only if there are no customers in British Columbia that want to purchase the logs. Thus, the nature of the actions undertaken by the GBC require private suppliers of BC logs to sell to, and satisfy the demands of, BC consumers, including mill operators.⁴⁶⁷

Based on this analysis, Commerce concluded that, through the BC LERs, the GBC entrusts or directs private log suppliers to provide logs to mill operators within the meaning of section 771(5)(B)(iii) of the Act, and provides a financial contribution of logs, in accordance with section 771(5)(D)(iii) of the Act.⁴⁶⁸

The Canadian parties argued that Commerce’s determination that the LER program constituted a financial contribution is unsupported by substantial evidence and otherwise not in accordance with law.⁴⁶⁹

B. Whether the LER Program is a Financial Contribution as a Matter of Law

The statutory basis for Commerce’s determination that the LERs provide a “financial

⁴⁶⁴ IDM at 214-221.

⁴⁶⁵ PDM at 36.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* 36-37.

⁴⁶⁸ *Id.*

⁴⁶⁹ GOC/BC Parties 61.1 Vol. IV Brief at 18.

contribution of the provision of logs” as a matter of law derives from two provisions.

Section 771(5)(B)(iii) of the Act reads:

... {A}n authority... makes a payment to a funding mechanism to provide a financial contribution, or 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.⁴⁷⁰

Section 771(5)(D)(iii) of the Act reads:

The term “financial contribution” means... (iii) providing goods or services, other than general infrastructure.⁴⁷¹

The Canadian parties put forth a lengthy argument to contest Commerce’s legal analysis of the LERs. They contended that a finding of entrustment or direction “requires (1) a government action that affirmatively causes or gives responsibility to a private entity to carry out a governmental subsidy function; and (2) a demonstrable link between the government action and the conduct of the private party.”⁴⁷² They argued that neither of these requirements were met in this case.⁴⁷³ The Canadian parties went on to argue that an indirect subsidy can only exist if the function carried out by a private party is the type of function that “would normally be vested in the government” and the private sale of logs does not meet that qualification.⁴⁷⁴

In response, Commerce argued that the government need not “affirmatively” compel a private party to act, and the phrase entrustment or direction “could encompass a broad range of meanings,” including restraining exports through in-province use requirements, citing the *CVD Preamble*.⁴⁷⁵ Commerce also disagreed with the Canadian parties’ argument that the private sale of logs is not a function that would normally be vested in the government. Commerce noted that it was not required to find that the GBC and GOC actually sell logs because the inextricable relationship between control over standing timber and control over logs demonstrates that the provision of logs is the type of function that “would normally be vested in the government” in BC.⁴⁷⁶

In the context of entrustment or direction, the Statement of Administrative Action for the Uruguay Round Agreements Act (“SAA”) refers to Commerce finding “a countervailable subsidy to exist where the government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to

⁴⁷⁰ 19 U.S.C. § 1677(5)(B)(iii).

⁴⁷¹ 19 U.S.C. § 1677(5)(D)(iii).

⁴⁷² GOC/BC Parties Vol. IV 61.1 Brief at 19-20

⁴⁷³ *Id.* at 20-38.

⁴⁷⁴ *Id.* at 38-41.

⁴⁷⁵ Commerce Vol. V 61.2 Brief at 18 (citing *CVD Preamble*).

⁴⁷⁶ *Id.* at 14.

the industry under investigation” and “involved export restraints that led directly to a discernible lowering of input costs.”⁴⁷⁷ Consistent with the statement in the SAA that the “entrusts or directs” standard will be interpreted by Commerce broadly to capture the indirect provision of subsidies, the statute does not limit how the “entrustment or direction” can be implemented by a government. As the SAA makes clear, the law anticipates that the entrustment or direction can include restricting the export of an input product (goods) such that the purchaser of the input could secure an ample supply of the good at a low price. As a matter of law, the Panel finds that the “entrustment or direction” provision is met in this case.

The Panel disagrees with the Canadian parties’ argument that selling logs is not a function “normally vested in the government” and therefore the statutory requirements are not met.⁴⁷⁸ When it imposes an export restriction, a government is effectively causing a private entity to offer goods at LTAR to a potential beneficiary. Instead of the government offering goods for LTAR (such as selling Crown logs at low prices), by imposing export restrictions, the government is effectively transferring this role to a seller who may have to sell goods at prices that may not reflect pure market conditions. As a matter of law, the Panel finds that the “normally vested in the government” test is satisfied.

As described below, intermixed in its legal arguments, the Canadian parties have raised serious concerns as to whether a factual linkage exists between the action taken by the government and a benefit to the specific recipients in this case. Notwithstanding these factual issues, the legal requirements are met in this case. Accordingly, the Panel rejects the arguments of the Canadian parties that Commerce erred in its legal interpretations of the statutory provisions and its assertion that the LERs are not a financial contribution as a matter of law and finds that Commerce’s interpretation was in accordance with law.

C. Whether the LERs are a Financial Contribution as a Matter of Fact

The Canadian parties argued that the LERs are not a financial contribution as a matter of fact and that Commerce’s determination that they amounted to a financial contribution was unsupported by substantial evidence.⁴⁷⁹ The Canadian parties argued that, as a factual matter, the LERs did not meaningfully restrain log exports from the BC interior. Instead, the Canadian parties argued that physical, economic and logistic factors (not the LERs) resulted in the relatively small number of exports from the interior. For example, the species mix in the BC interior is different from the Pacific Maritime Ecozone.⁴⁸⁰ The mountains add distance and transportation impediments.⁴⁸¹ According to the Canadian parties, these factors, rather than the LERS, explain

⁴⁷⁷ *Statement of Administrative Action*, H.R. Doc. No. 103-316 Vol I (1994) reprinted in 1994 U.S.C.C.A.N. 4040 (“SAA”) at 926.

⁴⁷⁸ GOC/BC Parties Vol. IV 61.1 Brief at 38-41.

⁴⁷⁹ GOC/BC Parties Vol. IV 61.1 Brief at 59-74.

⁴⁸⁰ *Id.* at 60-61.

⁴⁸¹ *Id.* at 61-62.

why the export of logs from the interior region are minimal when compared to other regions.⁴⁸²

By contrast, Commerce found that the LER program impacted the entirety of British Columbia, including the interior.⁴⁸³ While noting that the Canadian parties had highlighted that virtually all log export requests were approved and that a significant number of export authorizations were never used, Commerce contended that this did not demonstrate that the LERs had no restraining effect because there was no way to know how many more logs would have been exported in the absence of the LERs.⁴⁸⁴ Commerce found that log exports would have been higher but for numerous export obstacles, including blocking and in-lieu of manufacturing fees.⁴⁸⁵ The Panel assesses below these factual elements of Commerce's determination.

i) Blocking and Ability to Enter into Long-term Agreements with Foreign Purchasers

Commerce first noted that a “blocking system” operated in the province. As described by Commerce, under the blocking system, processors in British Columbia block a harvester's export application to force the harvester to provide logs to the processor at lower prices. Once the harvester and processor reach an informal agreement by which the processor will receive logs at a lower price – sometimes below market rate – the processor agrees not to block the export application.⁴⁸⁶ According to Commerce, this practice created an environment in which log sellers were forced into informal agreements that lowered export volumes and domestic prices. Commerce contended that the practice was widespread throughout the province, it covered most potential exports, and almost every timber harvester had negotiated these agreements.⁴⁸⁷ In Commerce's view, these impediments lowered the prices of logs sold in the province and limited the ability of log harvesters to enter into long-term agreements with foreign purchasers.⁴⁸⁸

The Canadian parties made the following points regarding blocking: (1) the evidence of blocking pertained only to the BC coast (not to the interior where the mandatory Respondents operated sawmills for which logs were obtained within close proximity); (2) there was no concrete evidence of blocking nor of the impediments to entering into long-term supply agreements; (3) the effective threat of blocking could not have been substantial when the number and share of logs that were precluded from export through the LER process were so small; and (4) affidavits and evidence from interior log suppliers suggested that offers were rarely

⁴⁸² *Id.* at 59-62.

⁴⁸³ Commerce Vol. V 61.2 Brief at 31.

⁴⁸⁴ *Id.* at 39.

⁴⁸⁵ *Id.* at 31-41.

⁴⁸⁶ *Id.* at 35.

⁴⁸⁷ *Id.* at 37.

⁴⁸⁸ *Id.* at 33.

if at all received on the logs advertised for potential export or were ignored.⁴⁸⁹

To support its findings Commerce relied on the following evidence: Fraser Report;⁴⁹⁰ Wilson Center Report;⁴⁹¹ Presentation by the CEO of TimberWest;⁴⁹² Merrill & Ring Notice of Arbitration and Statement of Claim;⁴⁹³ Merrill & Ring Affidavit;⁴⁹⁴ a 2006 Report for the British Columbia Minister of Forests and Range;⁴⁹⁵ and a 2002 Report prepared by David Haley.⁴⁹⁶

Careful examination of these sources reveals that they are primarily referring to the BC coast region while making only passing, if any, reference to the BC interior region:

- The Fraser Report concerned log exports from the BC coastal region.⁴⁹⁷ On the same page referenced by Commerce to support its argument, the report stated: “The analysis in this paper focuses on the BC Coastal region where the overwhelming majority of log exports originate.”⁴⁹⁸ Indeed, the only reference to logs from the interior is a passing reference to the 2002 paper by David Haley, containing data that were over a decade old at the time of the administrative review in question.⁴⁹⁹
- The Wilson Center Report presented comments of E. Miller concerning a reform process to resolve the softwood lumber dispute and thus appeared to be more of a position paper rather than an analysis of the impact of the LERs.⁵⁰⁰ To that end, the report was relatively generic, with no detailed reference to evidence, data, or analyses. The single exception was a pricing analysis that compared BC “Hembal” prices (a known British Coastal

⁴⁸⁹ GOC/BC Parties Vol. IV 61.1 Brief at 64-68.

⁴⁹⁰ Commerce Vol. V 61.2 Brief at 33 (citing IDM at 224 referencing the Fraser Institute Report (2014) (“Fraser Report”) at 29, P.R. 1296).

⁴⁹¹ *Id.* at 34 (citing IDM at 225 referencing the Wilson Center Report (Nov. 2016) (“Wilson Center Report”), P.R. 1296).

⁴⁹² *Id.* at 34 (citing IDM at 225 referencing the presentation of TimberWest’s CEO (2014) (“TimberWest Presentation”), P.R. 1296).

⁴⁹³ *Id.* at 35 (citing IDM at 226 referencing the notice of arbitration and statement of claim filed by Merrill & Ring (2006) (“Merrill & Ring Statement of Claim”), P.R. 1295).

⁴⁹⁴ *Id.* at 36 (citing IDM at 226 referencing the affidavit from a Merrill & Ring employee (2017) (“Merrill & Ring Affidavit”), P.R. 1295).

⁴⁹⁵ *Id.* at 36 (citing IDM at 226 citing a report for the British Columbia Minister of Forests and Range (Dec. 2006) (“Minister of Forests and Range Report”) at 5, P.R. 1296),

⁴⁹⁶ *Id.* at 36 (citing IDM at 226 referencing a report from Dr. David Haley of the Faculty of Forestry at the University of British Columbia (2002) (“Haley Report”), P.R. 1296).

⁴⁹⁷ Fraser Report at iii-iv (referencing log prices in the “Coastal region,” “Vancouver Log Market,” and “BC Coastal log market”).

⁴⁹⁸ Fraser Report at 29.

⁴⁹⁹ *Id.* at 10.

⁵⁰⁰ Wilson Center Report at 3.

region log)⁵⁰¹ to the U.S. hemlock.⁵⁰² No other analysis was provided that would apply to log prices in the interior. While the report does not specifically distinguish between interior or coastal logs, the author’s comments appear to relate to exports of coastal logs. For example, the report noted; “{n}or can they take long positions on *ocean freight* transport”⁵⁰³ (ocean shipping appears to be a coastal log export phenomenon); “domestic discount of over 28 percent relative to export prices” citing endnote 20 which is data for the “multiplication factor *for coast*.”⁵⁰⁴ The report otherwise referenced industry players who “spoke on the condition of anonymity” to support the comments on blocking and long-term agreements.⁵⁰⁵ Nothing in the report indicates where these industry players were located.

- Commerce relied on statements about blocking made by the CEO of TimberWest whose operations are located in the BC coastal region and do not otherwise appear to reflect the experience of operators in the interior.⁵⁰⁶
- Commerce relied on statements about blocking from Merrill & Ring, both in a notice of arbitration and an affidavit.⁵⁰⁷ The Merrill & Ring Statement of Claim, however, states “Merrill & Ring owns 10,347 acres of land in the coastal region of British Columbia.”⁵⁰⁸ Thus, Merrill & Ring’s experience is based on its operations in the coastal region and does not appear to reflect operations in the interior region.
- Commerce also relied on a statement from the December 2006 report to the British Columbia Minister of Forests and Range about blocking.⁵⁰⁹ Further review of that report states only that “{w}e *heard* from interior log producers about sawmills that block the producers’ exports even when that sawmill does not utilize the grades or species in question.”⁵¹⁰ No data were referenced. By contrast, the report also noted: “Log exports from British Columbia are largely *coastal in origin*. As pointed out in Section 4.2, this is largely due to the uniqueness of the coastal forest in North America, but also due to the proximity to water transportation—by ship to Asia, and by boom and barge to the United

⁵⁰¹ See GOC/BC Parties Vol. IV 61.1 Brief at 60-61 (discussing the difference in species mix in the coastal region as compared to the interior region).

⁵⁰² Wilson Center Report at 10-11.

⁵⁰³ *Id.* at 9 (emphasis added).

⁵⁰⁴ *Id.* at 9, n. 20 (emphasis added).

⁵⁰⁵ *Id.* at 8 (“According to a number of industry players that spoke on the condition of anonymity, some harvest operations are forced to sell logs at or below their cost of production to the domestic processors.”).

⁵⁰⁶ Commerce Vol. V 61.2 Brief at 34 (citing IDM at 225).

⁵⁰⁷ *Id.* at 35-36 (citing IDM at 226).

⁵⁰⁸ Merrill & Ring Statement of Claim at 3, para. 16.

⁵⁰⁹ Commerce Vol. V 61.2 Brief at 36 (citing IDM at 226 citing to the Minister of Forests and Range Report).

⁵¹⁰ Minister of Forests and Range Report at 5 (emphasis added).

States. Aside from specialty items (e.g., dry house logs) or peculiar market conditions, *export logs are infrequently transported more than 200 km by truck.*⁵¹¹

- Commerce finally relied on a 2002 report by David Haley quoting the following from the report: “the ‘surplus’ criterion, by its very nature, also facilitates the troublesome practice of blocking. This takes place when a wood processor who does not need the logs being advertised nevertheless puts in a bid for them simply to prevent, or block, their export. This practice is *said to be* particularly pervasive in the Interior.”⁵¹² This report was prepared more than a decade before the review and no data supported the statement.

It is clear from the record that the sawmills of the mandatory Respondents were situated in the BC interior. As reviewed above, virtually all of Commerce’s sources related to blocking and exports from the BC coast with only passing references to the interior. Commerce did not cite to any evidence that log prices in the interior were below market price or any evidence that export volumes were suppressed. The key to Commerce’s decision does not appear to be based on actual pricing data but on the premise that blocking existed such that this practice caused prices to be low and export volumes to be suppressed. Even assuming that this was true for the BC coast based on the sources cited earlier, Commerce has failed to explain how information about activity in the BC coastal region provided substantial evidence for its findings related to prices and export volumes in the BC interior during the POR.⁵¹³ Moreover, Commerce did not explain how the evidence supported its findings regarding widespread blocking in the interior given that it does not contest that (1) over 99 percent of all applications to export are authorized;⁵¹⁴ (2) the vast majority of the logs authorized for export under the surplus test and blanket Orders in Council were not actually exported⁵¹⁵ indicating that export demand was satisfied; and (3) interior export volumes were small,⁵¹⁶ potentially indicating that export volumes were too small to instigate blocking agreements across the interior.

The Panel therefore remands this action to Commerce with the instructions to provide reasoned explanations of how the evidence, including that identified in the previous paragraph, supported its findings regarding blocking and limitations on the ability of log harvesters to enter into long-term agreements with foreigners with respect to log exports from the BC interior during the review period, and how such findings supported its conclusion that the LERs restrained log exports from the BC interior to a meaningful degree such that it caused log suppliers to provide logs to BC log consumers at low prices.

⁵¹¹ *Id.* at 14 (emphasis added).

⁵¹² Commerce Vol. V 61.2 Brief at 36-37 (citing IDM at 226 (emphasis added) citing to the Haley Report).

⁵¹³ *Id.* at 37.

⁵¹⁴ GOC/BC Parties Vol. IV 61.1 Brief at 2.

⁵¹⁵ *Id.* at 15.

⁵¹⁶ *Id.* at 64.

ii) In-Lieu-of-Manufacturing and Export Fees

Commerce found that the fees in-lieu-of-manufacturing and export fees increased the cost of exporting, as compared to producing domestically, and represented another impediment to the export of logs.⁵¹⁷ While acknowledging that the fees for exports from the BC interior were lower than for exports from the coast, Commerce found that the fact that any fee was required at all was significant.⁵¹⁸

The Canadian parties argued that the fees were so small as to have no impact.⁵¹⁹ According to the Canadian parties, these fees were so insignificant that interior log exporters paid the fee but opted not to export.⁵²⁰

The imposition of fees is not determinative of their significance to an export sales transaction. Relevant facts in assessing their significance might include their relative proportion to export selling prices, their prevalence in export transactions, and their effect on decisions to export.⁵²¹ The IDM did not explain in light of these or other relevant facts how Commerce determined that there was substantial evidence that the fees were “significant” in respect of export sales.

The Panel therefore remands this action to Commerce with the instructions to provide a reasoned explanation of how the evidence, including that referred to in the previous paragraph, supported its findings regarding the significance of the in-lieu-of-manufacturing fees relating to exports during the review period from the BC coast and interior, and how such findings supported its conclusion that the LERs restrained log exports from the BC interior to a meaningful degree such that it caused log suppliers to provide logs to BC log consumers at low prices.

iii) Commerce’s Consideration of the Contested Elements in their Totality

Commerce also contended that, while some of the elements of the LER measures may only have a minimal impact in restraining log exports from BC, the totality of the record evidence supports finding that LERs impact the log market in British Columbia.⁵²² To the extent that the above-noted contested factors viewed individually do not support Commerce’s conclusion that the LERs restrained log exports from the BC interior to a meaningful degree such that they caused log suppliers to provide logs to BC log consumers at low prices, the Panel remands this action to Commerce to explain how, in their totality, they support Commerce’s conclusion.

⁵¹⁷ Commerce Vol. V 61.2 Brief at 40.

⁵¹⁸ *Id.*

⁵¹⁹ GOC/BC Parties Vol. IV 61.1 Brief at 70.

⁵²⁰ *Id.*

⁵²¹ For example, a fixed fee might be considered less significant for a high-priced item but more significant for a low-priced item.

⁵²² Commerce Vol. V 61.2 Brief at 40-41 (citing IDM at 228-229).

D. Benchmark Calculation

Given the Panel's determination regarding Commerce's financial contribution finding, the Panel exercises judicial economy and does not address the arguments of the Canadian parties concerning the benchmark calculation. In the event that the Final Results of the remand lead to a determination that Commerce's finding that the LER program did confer a financial contribution is supported by the substantial evidence on the record, we will reconsider the impact of such results on the Panel's determination here.

2. EASTERN PROVINCES

In the administrative review, Commerce investigated whether the provincial governments of Alberta, Ontario, Québec, and New Brunswick maintained LERs that entrusted or directed private log suppliers to provide logs to domestic softwood lumber producers for LTAR. In its Final Results, Commerce determined that the LERs in these four provinces did not constitute countervailable subsidies. The COALITION challenged this non-countervailability determination, while the Canadian Parties urged the Panel to affirm it.

To determine whether an indirect subsidy exists under 19 U.S.C. § 1677(5)(B)(iii), Commerce must evaluate whether a government "entrusts or directs" a private entity to provide a financial contribution. Relying on the SAA, Commerce concluded that its entrustment or direction analysis must consider whether the market for the good was actually influenced by the alleged restraints.⁵²³ After reviewing the record, Commerce found "no record evidence demonstrating that the alleged export restraints in Alberta, New Brunswick, Ontario, or Québec have affected the prices of Crown-origin logs during the POR."⁵²⁴ Commerce concluded that the elements necessary to establish a financial contribution via entrustment or direction were not satisfied.

The COALITION argued that Commerce unlawfully added a "price effect" or "market suppression" requirement to the statutory definition of a financial contribution. The COALITION argued that 19 U.S.C. § 1677(5)(D)(iii) defines a financial contribution simply as the "provision of a good," and neither the statute nor the regulations require a demonstration that the government's action actually suppressed prices in the market to prove that a financial contribution occurred. The COALITION argued that issues of price suppression relate to the "benefit" in the subsidy analysis, not the "financial contribution."

The COALITION also argued that even if a price effect analysis were required, the record contains evidence demonstrating that the LERs successfully suppressed domestic prices. The COALITION pointed to data showing a price differential between the Respondents' domestic log purchase prices and higher global export prices, arguing that logs are a commodity and, absent the LERs, domestic logs would have been exported.

⁵²³ IDM at 213.

⁵²⁴ *Id.* at 214.

The Canadian Parties argued that Commerce’s focus on the lack of linkage between the log export processes and log prices was in accordance with law and the SAA.⁵²⁵ They argued that the SAA directs Commerce to evaluate indirect subsidies involving export restraints by determining whether the government imposed a formal measure “which directly led to a discernible benefit” or a “discernible lowering of input costs.”⁵²⁶ Therefore, if a purported LER does not result in a discernible lowering of input costs, it has not entrusted or directed the provision of a good.

The Canadian Parties argued that the record demonstrates that the LERs in these four provinces do not constrain exports and therefore cannot entrust or direct log suppliers to flood the domestic market. For example, Québec pointed to evidence that it is a massive net *importer* of logs, importing over 3.8 million cubic meters during the POR while exporting a negligible 20,450 cubic meters, proving that domestic demand far exceeds supply and no export demand exists to be restrained.⁵²⁷ Similarly, Alberta and Ontario demonstrated that their export authorization processes were simple, free of charge, and that applications for export are routinely and automatically granted.⁵²⁸

The Canadian Parties relied on the expert economic analysis of Dr. David Reishus. Dr. Reishus stated that “log export premia,” the phenomenon whereby exported logs command higher average prices than domestically consumed logs, are standard outcomes in unrestricted markets because high transportation costs dictate that only the highest-quality, highest-value logs are economically viable to export.⁵²⁹ Thus, a price difference between export markets and domestic markets does not prove the LERs caused price suppression.

The Panel must determine whether Commerce’s decision to require evidence of market influence (price effects) to find a financial contribution via entrustment or direction is contrary to law, and whether its ultimate factual finding of no market influence is supported by substantial evidence.

First, the Panel affirms Commerce’s legal framework. The COALITION’s argument that Commerce unlawfully conflated the “financial contribution” and “benefit” tests misinterprets the mechanics of an indirect subsidy under 19 U.S.C. § 1677(5)(B)(iii). When a government does not directly provide a good, but instead allegedly entrusts or directs a private party to do so via an export restraint, Commerce must establish a causal linkage between the government’s restraint and the private party’s provision of the good. The SAA provides guidance on this situation, where it

⁵²⁵ Canadian Parties Vol. I 61.2 Brief at 19-21.

⁵²⁶ *Id.* at 21-22 (citing IDM at 213 and SAA at 926).

⁵²⁷ GOQ Vol. I 61.1 Brief at 48-50; Hearing Tr. Day 2 at 120-121.

⁵²⁸ Canadian Parties Vol. I 61.2 Brief at 38-41.

⁵²⁹ *Id.* at 33-34; Exh. FED. APP. LEP-6 (Government of Canada’s Federal Appendix to the Department of Commerce’s Log Export Restraint Questionnaire at 5) at Economic Analysis of Log Export Regulations from Four Provinces Prepared by Dr. David Reishus (“Dr. Reishus’s Report”), at 2.

states that Commerce has found countervailable subsidies to exist where an export restraint “led directly to a discernible lowering of input costs.”⁵³⁰

It is reasonable and lawful for Commerce to require evidence that an export restraint meaningfully impacted the domestic market (*i.e.*, by retaining logs that otherwise would have been exported, thereby increasing domestic supply and lowering prices) to establish that the government action effectively compelled the private provision of the good. Without such a linkage, there is no entrustment or direction.

Second, the Panel finds that Commerce’s factual determination that the LERs in Alberta, Ontario, Québec, and New Brunswick did not affect prices for Crown-origin logs is supported by substantial evidence. The administrative record contains extensive evidence that the export authorization processes in these provinces do not restrain the ability of a log supplier to export logs. The record demonstrates that export authorizations were routinely granted without penalty or significant delay, and that blanket export decrees frequently went underused by harvesters.

In addition, the record supports the conclusion that the lack of log exports from these provinces is driven by geography and cost, not by the provincial LERs. The evidence shows that these provinces are net importers of logs and that the immense distances to viable export markets make log exportation too costly for all but the highest-value timber. Commerce reasonably declined to consider the COALITION’s comparison of domestic log prices to global export prices as proof of causation, given the expert economic evidence demonstrating that log export premiums naturally exist in unrestrained markets due to quality differences and transportation costs.

Because the record lacks contrary evidence that the provincial export processes restrained log exports or led to a discernible lowering of input costs, Commerce’s conclusion that the provincial governments did not entrust or direct the provision of logs is rational and supported by substantial evidence. The Panel affirms Commerce’s determination that the LERs in Alberta, Ontario, Québec, and New Brunswick do not constitute countervailable subsidies.

VI. TAX PROGRAMS

The Panel turns now to reviewing the challenges raised by the Parties to Commerce’s decisions to countervail multiple tax programs.

1. APPRENTICESHIP JOB CREATION TAX CREDIT

The Apprenticeship Job Creation Tax Credit (“AJCTC”) permits employers to claim a tax credit on up to 10 percent of the wages paid to qualifying apprentices that are working in a

⁵³⁰ SAA at 926.

prescribed so-called “Red Seal” trade during the first two years of their contracts, for a maximum of 2,000 Canadian dollars (“CAD”) per apprentice per year.⁵³¹

The Canadian parties argued that Commerce improperly found that the AJCTC was *de jure* specific.⁵³² According to the GOC, the program is not limited to particular enterprises or industries because any enterprise or industry can employ a “Red Seal” apprentice.⁵³³ Commerce argued that the program is specific by law because the program limits access to enterprises or industries engaged in one of the 56 Red Seal trades.⁵³⁴

In discussing *de jure* specificity, the SAA states:

Under clause (ii), a subsidy would not be deemed to be *de jure* specific merely because it was bestowed pursuant to certain eligibility criteria. However, the eligibility criteria or conditions must be objective, clearly documented, capable of verification and strictly followed. In addition, eligibility for the subsidy must be automatic where the criteria are satisfied. Finally, the objective criteria or conditions must be neutral, must not favor certain enterprises or industries over others, and must be economic in nature and horizontal in application, such as the number of employees or the size of the enterprise.⁵³⁵

Thus, to overcome a finding of *de jure* specificity, the eligibility criteria must be objective, clearly documented, capable of verification and strictly followed. Eligibility for the subsidy must be automatic, and the objective criteria or conditions must be neutral, must not favor certain enterprises or industries over others, and must be economic in nature and horizontal in application.⁵³⁶ The CIT has examined these *de jure* factors in the context of an electricity program (the “KAV Program”) whereby companies were eligible to forego paying certain concession fees depending on energy usage.⁵³⁷ In that case, *BGH Edelstahl Siegen GMBH v. United States*, the court noted:

{C}ommerce fails to explain how criteria based solely on electricity consumption and pricing is not horizontal in application. It may be the case that there are a limited numbers of industries that consume large amounts of electricity, but such a fact would

⁵³¹ Exh. GOC-AR1-CRA-AJCTC-2 (GOC Vol. II Questionnaire Response (“QR”) at GOC-II-31, P.R. 941-43).

⁵³² GOC Vol. III 61.1 Brief at 49-54.

⁵³³ *Id.*

⁵³⁴ Commerce Vol. VI 61.2 Brief at 38-42.

⁵³⁵ SAA at 930.

⁵³⁶ *Id.*

⁵³⁷ *BGH Edelstahl Siegen GMBH v. United States*, 639 F. Supp. 1237, 1244 (Ct. Int’l Trade 2023) (“BGH”).

be relevant to the question of whether a subsidy was *de facto* specific, not whether it was specific as a matter of law. See 19 U.S.C. § 1677(5A)(D)(iii).

...

Commerce argues the KAV Program favors certain enterprises over others— those special contract customers with electricity prices below the marginal price agreed to by the network operator and the municipality. Remand Results at 9. Commerce’s argument suggests that the KAV Program’s criteria are vertical in application rather than horizontal. See *id.* at 9 (“we find that the FRG favors certain enterprises over others through the KAV Program”). Commerce’s use of the word “favors” is misplaced. “Favors” in the *de jure* context would mean that the law itself singled out industries for special treatment. See *Taizhou United Imp. & Exp. Co. v. United States*, 475 F. Supp. 3d 1305, 1316 (Ct. Int’l Trade 2020) (sustaining Commerce’s determination of *de jure* specificity where legislation expressly limited access to subsidies). That one industry received a benefit and another did not does not mean the first industry was favored. It only means that the industry qualified under the criteria. However, for the KAV Program’s criteria to be vertical in application, the criteria would need to “expressly limit” the program’s application to specifically named enterprises or industries or group of enterprises or industries. See 19 U.S.C. § 1677(5A)(D)(i). The program criteria here do not expressly limit the program’s application to specific enterprises or industries.⁵³⁸

In this case, the AJCTC program provides a tax credit for companies employing Red Seal apprentices. Yet, as in *BGH*, Commerce has not shown that the program “expressly limits” any company from accessing the program. Any industry could potentially employ a Red Seal Trade worker. Thus, the law does not expressly limit access to certain industries

Like the KAV Program in the *BGH* case, the terms of the AJCTC program do not *expressly* limit access to the subsidy. Moreover, as the court also explained in *BGH*, simply because some industries use this program while others do not goes to the question of whether the program is *de facto* specific rather than *de jure* specific. Accordingly, the Panel remands this matter for further explanation or reconsideration consistent with this decision with respect to its determination that the AJCTC Program is a *de jure* specific subsidy.⁵³⁹

2. CCA FOR CLASS 1A AND CLASS 1B ASSETS

The Canadian tax regulations provide property depreciation deductions from taxable income, known as the Capital Cost Allowance (“CCA”).⁵⁴⁰ Under the CCA program, assets are divided

⁵³⁸ *Id.*

⁵³⁹ The Panel notes that in the prior proceeding on remand, Commerce found that this program was not *de jure* specific. See *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination; Final Results of Redetermination Pursuant to Binational Panel Order* (Dep’t Commerce Dec. 17, 2024) at 80.

⁵⁴⁰ Exh. GOC-NSA2-CRACCLASS1-7 (GOC 2nd New Subsidies Allegation Questionnaire Response) at 404.

into different classes, each assigned a respective depreciation rate. For Class 1 assets, a generally applicable CCA rate is 4 percent, but taxpayers can claim a higher rate for certain subsets of Class 1 assets acquired after March 2007. Taxpayers can claim an additional 6 percent (for a total of 10 percent) if at least 90 percent of an eligible building's floor space is used for manufacturing. Similarly, an additional 2 percent (for a total of 6 percent) may be claimed for other non-residential buildings.⁵⁴¹ The additional allowances are intended to reflect the shorter useful life of buildings used for manufacturing or other non-residential purposes.⁵⁴²

A. Specificity

The GOC objects to Commerce's finding that the program is *de facto* specific, arguing that the program is used by tens of thousands of companies and such a widely used program cannot be considered limited within the meaning of 19 U.S.C. § 1677(5A)(D)(iii)(I).⁵⁴³

Commerce responded that it properly determined that the program was limited in use. It determined that these programs are *de facto* specific by comparing the number of tax credit recipients to the total number of corporate tax filers in Canada.⁵⁴⁴ Specifically, in analyzing whether the recipients were limited in number, Commerce found that 31,950 companies claimed this deduction in 2017, and 33,420 companies claimed it in 2018, out of about 2.2 million tax filers.⁵⁴⁵

The CAFC has decided this issue.⁵⁴⁶ In its decision, *Government of Quebec v. United States*, the court noted:

Commerce did not err in using the total corporate tax filers as a comparator in assessing whether the credit recipients are limited in number. The governing statute and the implementing regulations do not prescribe any mandatory method that Commerce must employ in assessing *de facto* specificity or analyzing the listed factors. See 19 U.S.C. § 1677(5A)(D)(iii); 19 C.F.R. § 351.502. Rather, it is a fact-intensive and case-specific inquiry, where the factors involved and the weight accorded to them vary from case to case. *Royal Thai Gov't v. United States*, 436 F.3d 1330, 1335–36 (Fed. Cir. 2006); see SAA, H.R. Doc. No. 103-316, at 929. In conducting this inquiry, Commerce exercises the necessary latitude afforded it in choosing the appropriate approach.

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ GOC Vol. III 61.2 Brief at 93; Resolute's argument concerning Commerce's treatment of the capital cost allowance ("CCA") programs for Class 1a and 1b assets is discussed in the following section because it overlaps with its arguments related to the accelerated capital cost allowance ("ACCA") program for Class 29 and 53 assets. See Resolute 61.1 Brief at 149-158.

⁵⁴⁴ Commerce Vol. VI 61.2 Brief at 16 (citing IDM at 344-345).

⁵⁴⁵ *Id.*

⁵⁴⁶ *Government of Quebec v. United States*, 105 F.4th 1359 (Fed. Cir. 2024) ("*Government of Quebec*")

We agree with the Court of International Trade that Commerce did not exceed that latitude here. In assessing specificity, Commerce considered that the on-the-job training program is to encourage businesses to take on trainees. J.A. 8400. Both corporations and individuals engaging in business activities can avail themselves of this program and claim the tax credit. *Id.* The Government of Québec reported that during the 2018 period of investigation, 4,930 of 387,949 corporate entities, roughly 1.27%,⁹ received the on-the-job training credit. J.A. 1982; J.A. 2173. Commerce thus concluded that the credit recipients were “limited in number” on an “enterprise” basis. J.A. 129. As the Court of International Trade pointed out, Commerce has taken similar comparison approaches to assess specificity of tax credit programs in past investigations. *CIT Decision*, 567 F. Supp. 3d at 1291–92; *see also* United States Br. 76–77. While the facts in other cases may call for different approaches or considerations, the nature of the program and the small percentage of recipients here support Commerce’s “limited in number” assessment.^{10/} *See CIT Decision*, 567 F. Supp. 3d at 1292.

Contrary to Appellants’ assertion, Commerce’s approach does not conflict with the SAA’s directive regarding the purpose of the specificity determination. *See, e.g.*, Appellants Br. 72, 74. As stated in the SAA, the specificity determination serves to “winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy.” SAA, H.R. Doc. No. 103-316, at 929. It ensures that countervailing duties are not improperly levied against subsidies that are generally available and widely used across the economy, such as certain public infrastructure-related programs. *Id.* at 929–30. Commerce’s comparison of the on-the-job training credit recipients to corporate tax filers aligns with this intended purpose of the specificity determination. As the Court of International Trade noted, Commerce’s comparison is “instructive in determining whether the subsidy is widely spread throughout the economy.” *CIT Decision*, 567 F. Supp. 3d at 1291. Given the nature of the program, the limited number of recipients (about 1.27% of corporate entities) demonstrates that the on-the-job credit is not one of widespread availability and use throughout the economy.

Accordingly, we agree with the Court of International Trade that Commerce’s de facto specificity determination of the on-the-job training credit is supported by substantial evidence and is otherwise in accordance with law.⁵⁴⁷

^{10/} For similar reasons, we find unpersuasive Appellants’ reliance on *Mosaic Co. v. United States*, 659 F. Supp. 3d 1285 (Ct. Int’l Trade 2023), which Appellants submitted as a supplemental authority. In *Mosaic*, the Court of International Trade rejected Commerce’s de facto specificity analysis concerning a different and unrelated penalty relief program. *Mosaic*, 659 F. Supp. 3d at 1314. As the Court of International Trade itself

⁵⁴⁷ *Government of Quebec*, 105 F.4th at 1374-1375 (footnote 9 omitted).

explained in *Mosaic*, the program at issue there was "distinguishable" from the on-the-job training program we are evaluating in this case. *Id.* at 1315 n.10.

As discussed by the court, the SAA specifically authorized Commerce to use the total number of industries in the economy in question as the comparator group when evaluating whether a program was limited in use. Nothing in the statute suggests that Commerce was required to examine whether the intent was to limit use of the program. Also, as the court noted, Commerce has regularly used this methodology in its *de facto* analysis in recent cases. Finally, as in *Quebec*, the facts also show, whether evaluated on a pure numeric or percentage basis, the program was not widely used in comparison to total corporate tax filers. Accordingly, the Panel finds that Commerce's specificity analysis was supported by substantial evidence and in accordance with law.⁵⁴⁸

⁵⁴⁸ Panelist Williamson would remand this issue to Commerce with instructions to comply with the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii). Commerce contended that 19 U.S.C. § 1677 (5A)(D)(iii)(I) permits it to find that a subsidy is *de facto* specific if it finds the number of users of a subsidy on an enterprise basis is limited and that no further enquiry is required. However, this permission does not relieve Commerce of the obligation to take into account the mandatory requirements in the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii), which provides:

In evaluating the factors set forth in subclauses (I), (II), (III), and (IV), *the administering authority shall take into account the extent of diversification of economic activities* within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation. (emphasis added).

Commerce contended that the SAA permits it to base a *de facto* specificity finding on a comparison of the number of enterprises using a program with the total number of enterprises in the jurisdiction (IDM at 326). However, as the Canadian parties noted, in making this claim Commerce fails to take into account the relevant part of the sentence of the SAA that says, "with respect to economic diversification, in determining whether the number of industries using a subsidy is small or large," Commerce could take account of the number of industries in the economy in question (GOC Vol. III 61.1 Brief at 68). In other words, the SAA does not support Commerce using the number of enterprises in an economy without taking into account the economic diversification of the economy in question.

Commerce said that it "reasonably takes into account the number of enterprises in the economy in question to determine whether the number of enterprises using a subsidy is actually large or small" and maintained that this shows it followed the instructions in the SAA in determining whether a program was *de facto* specific (Commerce Vol. VI 61.2 Brief at 18 and IDM at 326). However, the diversity requirement is much broader than the question of number of enterprises in the economy; it requires a consideration of "the extent of diversification of economic activities" in an economy. When Commerce looks only at the number of enterprises in an economy and ignores the number of industries or other indicia of a diverse economy, it is following neither the statute nor the SAA.

Panelist Williamson acknowledges that the CAFC in *Quebec* affirmed that Commerce could find *de facto* specificity by comparing the number of tax credit recipients to the total number of corporate tax filers in Canada or more generally the number of enterprises using a program with the total number of enterprises in the jurisdiction. However, neither the CIT nor the CAFC referred in their decisions to the requirements set forth in the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii), quoted above. In fact,

B. Financial Contribution and Benefit

Both the GOC and JDIL argued that Commerce improperly determined that the CCA for Class 1a and 1b assets provided a benefit or a financial contribution as revenue forgone.⁵⁴⁹ They argued that there is no benefit to the recipient of the higher depreciation rate because this rate reflects the economic reality of the useful life of these assets. Similarly, given that the depreciation rate reflects the shorter useful life of the asset, the government is not foregoing revenue because it was allowing the appropriate depreciation rate for these assets as every country does based on established useful life of the asset and thus would not have otherwise collected any additional revenue.⁵⁵⁰ In other words, the different depreciation rates reflected economic reality rather than offering preferential rates and thus provided no benefit to the recipient and no revenue was forgone by the government.⁵⁵¹

Commerce responded that the CCA for Class 1a and 1b assets provided a financial contribution under this provision because whenever a company pays less taxes than it otherwise would be required to pay, the GOC forgoes tax revenue that it would otherwise receive.⁵⁵² Specifically, Commerce determined that the Respondents would have paid more because buildings classified under Class 1 are usually depreciated at the CCA rate of 4 percent, but those with at least 90 percent of the floor space used for the manufacturing or processing of goods for sale or lease may apply for an additional 6 percent deduction.⁵⁵³ Commerce further determined that this deduction provides a benefit under 19 U.S.C. § 1677(5)(E) in the amount of the difference between the tax the company paid and the tax the company would have paid absent the tax program, as provided in 19 C.F.R. § 351.509(a)(1).⁵⁵⁴

when the CAFC and the CIT reproduced the text of section 1677(5A)(D)(iii) in their decisions, they omitted that paragraph. Commerce also failed to refer to this crucial paragraph in the IDM.

Loper Bright is relevant to Panelist Williamson’s decision to remand. Commerce acknowledged in its supplemental brief on subsequent authorities in respect of *Loper Bright* that the case requires courts to “exercise their independent judgment in deciding whether an agency has acted within its statutory authority” (Commerce Supplemental Brief on Subsequent Authorities at 4). The Canadian Parties in their brief on subsequent authorities pointed out that “{t}he central holding of *Loper Bright* is that courts (and by extension, this Panel), not administrative agencies like Commerce, must decide what the law means and how it applies” (Canadian Parties Supplemental Brief Addressing Subsequent Authorities at 1).

Panelist Williamson would remand Commerce’s decisions finding *de facto* specificity with instructions to comply with the last paragraph of 1677 USC (5A)(D)(iii) and show that it has done so.

⁵⁴⁹ GOC Vol. III 61.1 Brief at 83, 88; JDIL 61.1 Brief at 54, 57.

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² Commerce Vol. VI 61.2 Brief at 14 (citing IDM at 347).

⁵⁵³ *Id.*

⁵⁵⁴ *Id.* (citing IDM at 346-47).

The CAFC has also decided this issue:

In accordance with the governing statute and regulations, Commerce reached a determination that is supported by substantial evidence in the record, including the Canadian tax regulations themselves. Before the Canadian tax regulations implemented additional allowances for certain subsets of Class 1 assets, a single standard or default 4% rate applied for all Class 1 assets. J.A. 2514. Around 2007, the Canadian tax regulations added additional allowances for two subsets of Class 1 assets, including as relevant here, “an additional allowance of 6% (total 10%)” for certain eligible buildings acquired after March 2007 and used for manufacturing. Id. To be eligible for this additional allowance, “a building will be required to be placed into a separate class,” and “elections have to be filed.” Id.; J.A. 9539; see also J.A. 9548 (“If you do not file an election to put it in a separate class, the 4% rate will apply.”). Marmen filed its election to claim this additional allowance (of 6%) and thereby further reduced its taxable income during the 2018 period of investigation.

Absent the additional allowance, the generally applicable 4% standard rate would have applied. Marmen would have paid more taxes and the Canadian governments would have collected more revenue. The additional 6% allowance claimed and received by Marmen thus represents revenue that the Canadian governments could have collected but forewent, which constitutes a “financial contribution.” 19 U.S.C. § 1677(5)(D)(ii); see J.A. 99. And because of this additional 6% allowance, “a benefit exists” as “the tax paid by {Marmen} as a result of the program is less than the tax {Marmen} would have paid in the absence of the program.” 19 C.F.R. § 351.509(a)(1); see J.A. 97–99.

We find unpersuasive Appellants’ contention that Commerce committed a “fundamental error” by failing to consider that “the depreciation rate is based on the average useful life of a particular asset.” Appellants Br. 47, 49. Commerce based its determination on how the Canadian tax regulations explicitly structured the additional depreciation allowance, applying the explicit definitions of “benefit” and “financial contribution” provided in the governing statute and regulations. See J.A. 97–99. The governing statutory and regulatory provisions do not require Commerce to base its determination on whether a program at issue accurately aligns with the economic reality of building depreciation. 19 U.S.C. § 1677(5)(D)(ii); 19 C.F.R. § 351.509(a)(1); see *CIT Decision*, 567 F. Supp. 3d at 1295. We thus agree with the Court of International Trade that Commerce’s determinations are in accordance with law and supported by the tax regulations themselves. See *CIT Decision*, 567 F. Supp. 3d at 1294–96.⁵⁵⁵

For the same reasons given by the CAFC, the Panel also determines that absent this program, the parties would have paid more taxes and the government would have received more revenue. Thus, a benefit was received, and revenue was forgone; the statutory requirements are met.

⁵⁵⁵ *Government of Quebec*, 105 F. 4th at 1372. For the same reasons given by the court in *Government of Quebec*, the Panel also rejects the similar argument raised here concerning the *StatCan* Study.

Moreover, the statute and regulations do not require Commerce to base its determination on whether the program aligns with economic realities. Accordingly, the Panel upholds Commerce's decision to countervail this program.

3. CLASS 29 AND CLASS 53 ASSETS AND ONTARIO TAX CREDIT FOR MANUFACTURING AND PROCESSING

The Canadian tax regulations define Class 29 and Class 53 assets as machinery used for manufacturing or processing operations.⁵⁵⁶ Under the Accelerated Capital Cost Allowance ("ACCA"), any taxpayer may claim a tax deduction that allows full depreciation of a Class 29 or Class 53 asset at an accelerated rate over three years.⁵⁵⁷ The ACCA specifically excludes 11 activities from the definition of manufacturing and processing (e.g., farming, fishing, logging, construction, mineral extraction, mineral processing, natural gas processing, oil processing).⁵⁵⁸ Ontario operates a similar program.

Under the Ontario Tax Credit for Manufacturing and Processing ("OTCMP"), a corporation can claim a tax credit if it had taxable income during the tax year and eligible Canadian profits from any of the following activities: manufacturing and processing, farming, fishing, logging, mining, the generation of electrical energy for sale, or the production of steam for sale.⁵⁵⁹

A. Specificity

The GOC argued that Commerce improperly found that the ACCA program was *de jure* specific.⁵⁶⁰ First, the GOC argued that *de jure* specificity can only be based on the exclusion of certain enterprises or industries from eligibility, and cannot be based on activity-based exclusions.⁵⁶¹ Based on this interpretation of the statute, the GOC contended that *de jure* specificity does not exist in this case because any industry can use the ACCA, with the only limitation being that the machinery or equipment must be used in manufacturing or processing. The GOC cited *Cold-Rolled Steel Products from the Russian Federation* to support its position.⁵⁶² In that case, the program allowed tax deductions for expenses related to the development of natural resources. Although the deduction was allowed for one activity (natural resource exploration), any company could claim the deduction, demonstrating that an activity-based restriction does not support a finding of *de jure* specificity, according to the GOC. The GOC also cited *PPG Industries*⁵⁶³ for the

⁵⁵⁶ Exh. GOC-AR1-CRA-ACCA-1 (GOC Vol. II QR at GOC-II-1). Class 29 applies to assets acquired from March 18, 2007 to December 31, 2015; Class 53 applies to assets acquired from January 1, 2016 through December 31, 2025.

⁵⁵⁷ *Id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ GOO Supplemental Questionnaire Response ("SQR") at OTCMP-1.

⁵⁶⁰ GOC Vol. III 61.1 Brief at 18-40.

⁵⁶¹ *Id.* at 20.

⁵⁶² *Id.* at 24.

⁵⁶³ *Id.* at 22, 31.

proposition that something more must be shown than eligibility requirements to demonstrate that a program benefits specific industries.⁵⁶⁴

Following a similar line of argument, the GOO argued that Commerce improperly found that the OTCMP program was *de jure* specific. Using essentially the same legal reasoning given by the GOC with respect to Class 58 and Class 29 assets, the GOO argued that Commerce cannot base its specificity argument on activity-based eligibility requirements.⁵⁶⁵

In response, Commerce contended that the GOC has misconstrued the statutory requirements. Further, Commerce noted that its practice supported its decision.⁵⁶⁶ Commerce referenced several cases in which it found that an activity-based limitation was sufficient to justify *de jure* specificity because these activity-based requirements excluded enterprises who did not qualify for the program.⁵⁶⁷ For example, in *Circular Welded Carbon Quality Steel Pipe from Oman* and *Steel Nails from Oman*, Commerce countervailed a program that granted tariff exemptions to companies that held an industrial license. Companies were not eligible for the industrial license if they engaged in certain activities, such as oil exploration or extraction.⁵⁶⁸ In those cases, like the situation here, Commerce found that an activity-based restriction created *de jure* specificity. The COALITION made similar arguments in support of Commerce's practice.⁵⁶⁹

The Panel finds that the GOC and the GOO have attempted to create a distinction in the statute that does not exist. The statute does not state that activity-based subsidies are not countervailable. Rather, as the SAA itself makes clear, and in contrast to the GOC claims, the focus of the specificity provision is precisely on "eligibility" requirements. The SAA elaborates on the "eligibility" requirements as quoted in full earlier.⁵⁷⁰ That passage does not state that eligibility requirements must be industry-based. Instead, Commerce is instructed to examine the eligibility criteria of the subsidy in question to determine if the criteria are, among other things, objective, neutral and do "not favor certain enterprises or industries over others."⁵⁷¹ In this case, only those enterprises that use equipment for manufacturing or processing can use the ACCA depreciation methodology. The eligibility requirement in this case is that the enterprise must use the equipment for manufacturing or processing. The eligibility criterion is not objective, neutral, or automatic because the program favors those enterprises or industries that use their equipment for manufacturing or processing and excludes those enterprises or industries that use their equipment for a wide array of other purposes, such as farming, logging, and fishing.

⁵⁶⁴ *Id.* at 23.

⁵⁶⁵ GOO Vol. II 61.1 Brief at 67-68.

⁵⁶⁶ Commerce Vol. VI 61.2 Brief. at 20-28.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*

⁵⁶⁹ COALITION 61.2 Brief at 212-219.

⁵⁷⁰ SAA at 930.

⁵⁷¹ *Id.*

Moreover, the facts of this case contrast with those in *Cold-Rolled Steel Flat Products from the Russian Federation*, relied on by the GOC. In the first instance, Commerce did not state in that case (nor in any other case) that it determined that *de jure* specificity did not exist because the program in question must be limited on an industry-basis rather than an activity-basis. Additionally, in contrast to this case, the Russian tax code did not stipulate any limitation on eligibility. Here, the ACCA specified a limitation on eligibility. The depreciation method could only be used on equipment that was used for manufacturing and processing.⁵⁷² Thus, Commerce's analysis was properly placed on the eligibility requirements of the subsidy itself, not specifically on whether a subsidy is limited to an industry, enterprise, or group of industries.⁵⁷³

The GOC next argued that the ACCA program is not limited to "certain" enterprises or industries but is available to a wide range of industries.⁵⁷⁴ The GOC cited to a number of cases in which Commerce found that a program was not *de jure* specific where the number of industries that could use a program was smaller than the number of industries that can use the ACCA.⁵⁷⁵ Commerce distinguished these cases, noting that the SAA makes clear that the law "does not attempt to provide a precise mathematical formula for determining when the number of enterprises or industries eligible for a subsidy is sufficiently small so as to be properly be considered {*de jure*} specific."⁵⁷⁶ The COALITION similarly distinguished each of the cases cited by the GOC.⁵⁷⁷

In a recent case, the court found that Commerce's *de jure* determination was supported in a factually similar situation.

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. Final Decision Memo. at 41.⁵⁷⁸

⁵⁷² GOC Vol. II QR at GOC-II-1, Exh. GOC-AR1-CRA-ACCA-1.

⁵⁷³ The GOC relies on the CAFC's decision in *PPG Indus. Inc. v. United States*, 978 F.2d at 1240-41 (Fed. Cir. 1992) to support its claims. See GOC Vol. III 61.1 Brief at 22, 30. In that case, the CAFC noted that eligibility requirements alone are not enough to establish specificity; All parties no doubt agree to this general proposition and indeed the SAA confirms this position. See SAA at 930. The point is that if the eligibility criteria are not neutral and if access to the benefit is limited and favors some groups over others, then the *de jure* test is met. The eligibility requirements here are not neutral but were limited to those companies engaging in manufacturing and processing.

⁵⁷⁴ GOC Vol. III 61.1 Brief at 31.

⁵⁷⁵ *Id.* at 43-45.

⁵⁷⁶ Commerce Vol. VI 61.2 Brief at 28.

⁵⁷⁷ COALITION 61.2 Brief 216-219.

⁵⁷⁸ *BGH Edelstahl Siegen GMBH v. United States*, 600 F. Supp.3d 1241, 1257 (2022) ("*BGH II*").

The court in *BGH II* found that Commerce’s *de jure* finding was reasonable even though a large number of companies were eligible for the program. As in this case, in *BGH II*, the court ruled that Commerce’s *de jure* finding was reasonable because the program was limited to specific products and manufacturing processes. Thus, as in *BGH II*, the absolute number of industries eligible for tax relief was not dispositive. Rather, the issue is whether the program in question limited eligibility. In this case, Commerce properly noted that the program limited eligibility to companies that use the equipment for manufacturing and processing, to the exclusion of 11 other activities. Accordingly, the Panel finds that Commerce’s decision with respect to the Class 29 and Class 53 products was reasonable.

With respect to the OTCMP, the GOO’s arguments are similarly not persuasive. The court in *BGH II* found that, even though a large number of companies were eligible for the program, Commerce’s *de jure* finding was reasonable because the program was limited to specific products and manufacturing processes. Thus, as in *BGH II*, the absolute number of industries eligible for tax relief was not dispositive. Rather, the issue is whether the program in question limited eligibility. In this case, Commerce properly noted that the program limited eligibility to companies that engage in specific activities to the exclusion of other activities. Accordingly, the Panel finds that Commerce’s decision with respect to the OTCMP was reasonable.

**B. Treatment of the ACCA Class 29 and 53 Assets Program as a Single Program;
Treatment of CCA Class 1a and 1b Assets as a Single Program**

Resolute contended that Commerce erred in treating the ACCA for Class 29 and Class 53 Assets Program as a single program and the CCA for Class 1a and 1b Assets Program as a single program. Resolute argued that Commerce should have treated the programs, including related provincial programs, as individual, separate programs because of operational differences. According to Resolute, the program covering Class 29 and Class 53 was enacted under different legislation, has different eligibility criteria, provided different benefits, and was administered by different agencies.⁵⁷⁹ Resolute also argued that Commerce erred because it should have treated the federal and provincial programs as separate programs.⁵⁸⁰ Resolute further argued that Commerce’s practice provides “that each program involving a contribution or conferring a benefit must be counted on its own, not added up together to get over a *de minimis* threshold, unless the programs are ‘integrally linked.’”⁵⁸¹ Resolute then argued that the programs were not linked at inception and therefore were not “integrally linked” as required by the regulations.⁵⁸²

Commerce responded that its analysis of these programs was proper. Commerce noted that the ACCA for Class 53 assets is the successor provision to ACCA for Class 29 assets, as stated by

⁵⁷⁹ Resolute 61.1 Brief at 155.

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* at 149.

⁵⁸² *Id.* at 150.

the GOC and Canfor.⁵⁸³ Commerce pointed out that the GOC also refers to the introduction of Class 53 as an “amendment.”⁵⁸⁴ Commerce found that the commonality of the assets eligible for the program and the relatively small difference between the new and old depreciation formulas supported a determination to treat them as the same program. As to the argument pertaining to the differences between the federal and provincial programs, Commerce noted that the basic intent of the program, to provide accelerated depreciation for a group of assets, remains the same between the provincial programs and the federal ACCAs.⁵⁸⁵ Further, changes in the federal program have been shown to necessitate the same changes in the provincial programs, and Resolute reported that Québec and Ontario Class 29 and 53 assets are “fully harmonized” with the federal Capital Cost.⁵⁸⁶ Additionally, as to Resolute’s argument that the Class 1 additional capital cost allowance should be separated into two programs, Commerce noted that the two provisions both provide increased depreciation over standard Class 1 assets to the same type of asset—nonresidential buildings.⁵⁸⁷ Therefore, Commerce reasonably treated the additional capital cost allowance of these assets as the same program. Commerce finally noted that Resolute failed to exhaust its administrative remedies when arguing that Commerce failed to find that the programs were linked at inception and therefore were not integrally linked.⁵⁸⁸

The Panel finds that Commerce properly treated the ACCA Program related to Class 29 and 53 Assets as a single program and the CCA Program related to Class 1a and 1b Assets as a single program. The record shows that the parties viewed the ACCA Program as the same program, with Class 53 being the successor to Class 29. Furthermore, the record also shows that the federal and provincial programs were harmonized to act together. Similarly, Class 1a and 1b assets pertain to the same overall class of assets, that is Class 1 assets, nonresidential buildings. While the terminology refers to Class 1a and Class 1b assets, the larger united category is all Class 1 assets with Class 1a and Class 1b simply subsets of the larger Class 1. Accordingly, the Panel finds that Commerce’s decision was supported by substantial evidence and in accordance with law.

With respect to Resolute’s argument that Commerce failed to evaluate whether the programs were “integrally linked,” the Panel notes that the “integrally linked” provision is found in the regulations pertaining to specificity. As Commerce has explained in a different context, this regulatory provision was intended to allow Commerce to “expand its analysis of whether a particular investigated subsidy program is specific under section 771(5A)(D) of the Act by expanding its specificity analysis to programs other than that particular investigated subsidy program if the investigated subsidy program is ‘integrally linked’ to other subsidy programs under

⁵⁸³ Commerce Vol. VI 61.2 Brief at 32-33(citing Canadian Parties Vol. II Case Brief at II-3, n. 1: “Class 53 is the successor provision to Class 29; the physical assets covered are the same”); *See also* Canfor QR at NS-19 (“Class 53 is the successor to Class 29”).

⁵⁸⁴ Commerce Vol. VI 61.2 Brief at 33 (citing GOC Vol. II QR at GOC-II-1).

⁵⁸⁵ *Id.* at 34 (citing IDM at 342).

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.*; GOC New Subsidies Allegation Questionnaire Response at 3-4, P.R. 1529.

⁵⁸⁸ *Id.* at 35.

investigation.”⁵⁸⁹ On its face, Resolute’s argument does not appear to be related to a specificity argument. In fact, the short argument raised for the first time in its brief to the Panel and not before the agency does not explain why the regulatory provision on specificity is relevant to Commerce’s decision to treat these as the same programs. If Resolute had raised a more detailed argument during the administrative proceeding, Commerce could have addressed Resolute’s concerns. Given that Resolute did not raise this issue during the administrative proceeding, the Panel finds that Resolute failed to exhaust its administrative remedies with respect to its claim that the programs were not “integrally linked” and therefore will not address this claim.

4. FUEL PROGRAMS IN CERTAIN PROVINCES

Four provinces offer tax exemptions or lower tax rates for fuel used for qualifying off-road activities. For example, Alberta’s Tax Exempt Fuel Use (“TEFU”) program provides eligible companies and municipalities a tax exemption of nine cents per liter for fuel used in unlicensed vehicles, machinery, and equipment engaged in certain off-road activities.⁵⁹⁰ Alberta’s Fuel Tax Regulation limits eligibility for the program to entities that possess a fuel tax exemption certificate, which is available only to those entities that purchase marked fuel for certain purposes or uses enumerated in section 8(3) of the Fuel Tax Regulation.⁵⁹¹ Pursuant to the Motor Fuel Tax Act, the GBC taxes colored fuel, *i.e.*, gasoline to which a specific dye has been added, at a lower rate than clear fuel, *i.e.*, standard gasoline and diesel, where the colored fuel is used for limited authorized purposes.⁵⁹² A New Brunswick gas and fuel program also provided an exemption or refund of the fuel tax if the fuel was for vehicles that were not operated on public roads and highways or was used for stationary machinery or equipment.⁵⁹³ A Québec program provides a refund of fuel tax paid on gasoline or fuel oil used to supply a stationary engine.⁵⁹⁴

A. Specificity

The Canadian parties argued that Commerce erred by finding that these programs were *de jure* specific. The GOA argued that Commerce incorrectly focused on whether eligibility to use the program was limited to holders of the TEFU certificate rather than examining the totality of the program. The GOA also argued that the program is widely used by consumers in Alberta and that the program is therefore not specific.⁵⁹⁵ The GBC argued that the record and the Motor Fuel Tax Act do not support a *de jure* determination because neither the specific identity of the fuel user

⁵⁸⁹ *Regulations Enhancing the Administration of the Antidumping and Countervailing Duty Trade Remedy Laws*, 89 Fed. Reg. 101,694 (Dep’t Commerce Dec. 16, 2024).

⁵⁹⁰ GOA Vol. I QR at Exh. AB-AR1-TEFU-4 (Alberta Fuel Tax Regulation at 8(3)(f)), P.R.743.

⁵⁹¹ *Id.*

⁵⁹² GBC Vol. III QR at BC-III-1, P.R. 905.

⁵⁹³ GNB Vol. I QR at Exh. NB-AR1-GFT-1, P.R.1075.

⁵⁹⁴ GOQ Vol. V QR at Exhs. QC-FTR-A at 1, QC-FTR-4 at Section 10(a)(iii), P.R. 850, 853-856, 858-859.

⁵⁹⁵ GOA Vol. II 61.1 Brief at 28.

nor the industry in which it operates is relevant to eligibility for the lower tax rate on colored fuel, and that the only eligibility criterion is the use of the fuel itself.⁵⁹⁶ The GNB argued that Commerce improperly found that the similar New Brunswick gas and fuel program was *de jure* specific, arguing that the policy is specific to behavior (*i.e.*, driving on public highways) and not specific to an industry, enterprise or group thereof.⁵⁹⁷ Finally, the GOQ argued that its refund of fuel tax paid on fuel used for stationary purposes was not *de jure* specific because the program is only limited to fuel used for stationary engines but does not limit the refund to any enterprise or industry or any groups thereof. Thus, the GOQ argued, any enterprise or industry that uses fuel in qualified equipment for stationary purposes is eligible for the refund.⁵⁹⁸

Commerce responded first that usage of the program is not a factor in Commerce's *de jure* analysis so it did not consider this element.⁵⁹⁹ Commerce then noted that all the programs are explicitly limited to companies that purchase fuel for a specific purpose or use as identified in the tax regulation, thereby satisfying the basic *de jure* requirement.⁶⁰⁰ With respect to the New Brunswick program, Commerce noted also that the program was limited to enumerated categories of consumers and therefore was *de jure* specific.⁶⁰¹

The Panel finds that record evidence supports Commerce's finding that the regulations in question explicitly limit the tax credit to those companies that use marked or colored fuel for off-road activities. If a company does not use fuel for off-road activities, it is not eligible for the tax credit. Thus, it is not the case that any company can apply for these tax benefits. Only those companies that use fuel for off-road purposes are eligible. Accordingly, the Panel finds that Commerce's finding of *de jure* specificity was supported by substantial evidence.

B. Benefit and Financial Contribution

Two of the Canadian parties also argued that these programs do not confer a benefit and are not financial contributions within the meaning of the statute. For the TEFU program, the GOA argued that it previously did not tax marked fuel and only recently began taxing this fuel, albeit at a lower rate than other types of fuel. Thus, it argued that the government was not forgoing revenue that was otherwise due because it had never previously collected that revenue.⁶⁰² The GNB argued that there can be no revenue forgone in this case because the GNB simply chose not to tax a particular activity.⁶⁰³

⁵⁹⁶ GBC Vol. II 61.1 Brief at 59.

⁵⁹⁷ GNB 61.1 Brief at 128.

⁵⁹⁸ GOQ Vol. II 61.1 Brief at 128-9.

⁵⁹⁹ Commerce Vol. VI 61.2 Brief at 66.

⁶⁰⁰ *Id.* at 66-81.

⁶⁰¹ *Id.* at 77.

⁶⁰² GOA Vol. II 61.1 Brief at 34-35.

⁶⁰³ GNB 61.1 Brief at 127.

Commerce responded that the facts showed that the governments were currently taxing fuel at a lower rate for certain companies than would otherwise have been collected on fuel.⁶⁰⁴ According to Commerce, the Respondents did receive a benefit through tax credits and exemptions. By the explicit terms of the law, companies have to pay a tax for their fuel purchases.⁶⁰⁵ By providing a credit or exemption from taxes to companies that met certain criteria, the Canadian provincial governments did not collect money that would otherwise have been owed.

The Panel finds that Commerce properly viewed this as a benefit to the recipient and a financial contribution by the government. By the express terms of the laws, all consumers and users of gasoline must pay a fuel tax unless they are otherwise exempted or allowed a credit. In each case involving this special fuel, users of the program do not pay as much tax as they would have for their fuel and thus the users receive a benefit by paying lower or no taxes. Similarly, the government is not collecting as much tax on this fuel and therefore is forgoing revenue. The fact that the government previously chose not to collect tax on marked fuel does not stand for the proposition that no subsidy was received. Rather, it simply stands for the fact that the subsidy being provided may be smaller now than in prior time periods. While the government may have “chosen” not to impose a tax on these users, the fact that it is now collecting a smaller amount of tax (rather than no tax) is nevertheless revenue that it is giving up.

The statute provides that a financial contribution includes “foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income.”⁶⁰⁶ Tax credits and exemptions are specifically identified by the statute as constituting a financial contribution. As a result of the provision specifically excusing them from paying a fuel tax of any kind, the Respondents received a benefit because they otherwise would have had to pay the tax and the government did not collect taxes that were otherwise due. The intent or government objective behind a tax credit or exemption does not change this basic fact. The Panel therefore finds that Commerce’s decision was supported by substantial evidence and was in accordance with law.

5. FEDERAL AND PROVINCIAL SR&ED TAX CREDITS

The Federal Scientific Research and Experimental Development (“SR&ED”) Tax Credit, the Alberta Scientific Research and Experimental Development Tax Credit, the BC SR&ED Tax Credit, the Manitoba Research and Development Tax Credit (“RDTC”), the New Brunswick Research and Development Tax, the Ontario Research and Development Tax Credit, and the Québec SR&ED Tax Credit Program and Credit for Fees and Dues Paid to a Research Consortium (jointly also referred to as SR&ED programs or tax credits) are all similar for purposes of the

⁶⁰⁴ Commerce Vol. VI 61.2 Brief at 70.

⁶⁰⁵ *Id.*

⁶⁰⁶ 19 U.S.C. § 1677(5)(D)(ii).

Panel's analysis. The federal government and the provincial governments give a tax credit for expenditures related to research and development undertaken in a field of science or technology.⁶⁰⁷

A. Specificity

In making its specificity analysis with respect to these programs, Commerce measured whether the actual recipients were limited in number by comparing the number of actual users to potential users, in this case corporate tax filers.⁶⁰⁸

In contending that these programs were not *de facto* specific, the Canadian parties all made similar legal arguments. The Canadian parties first noted that Commerce had previously concluded that the SR&ED programs in question were not *de jure* or *de facto* specific.⁶⁰⁹ The Canadian parties next argued that as a matter of law the comparison of the actual number of users to the total number of corporate tax filers was impermissible. The Canadian parties argued that Commerce should instead have looked at the number of enterprises, taking into account all relevant circumstances, such as the representativeness of the industries represented by these users in the economy.⁶¹⁰ If this analysis had been followed, according to the Canadian parties, Commerce would have found that the program was not *de facto* specific because the number of enterprises was large and represented every sector of the Canadian economy. The Canadian parties then discussed several court decisions in which the court upheld Commerce's findings that programs were not *de facto* specific.⁶¹¹ The Canadian parties argued that Commerce should not rely on its recent past precedent where Commerce used the same methodology as it used in this case, but should have instead ensured that each decision complies with the statute.⁶¹² The Canadian parties also argued that Commerce cannot rely on a "percentage" to evaluate whether a program is limited but must look to the overall "number" of eligible enterprises using a program.⁶¹³ Finally, the Canadian parties proposed that as a factual matter Commerce should have adjusted the numerator and the

⁶⁰⁷ See, e.g., GOC Vol. II QR at GOC-II- 64–65, 71–74, Exh. GOC-AR1-CRA-SRED-1; GOQ Vol. V QR at Exh. QC-C02-A at 1; GOO SQR at ORDT-1.

⁶⁰⁸ IDM at 325.

⁶⁰⁹ GOC Vol. III 61.1 Brief at 57 (citing *Oil Country Tubular Goods from Canada: Final Determination*, 51 Fed. Reg. 15,037, 15,039 (Dep't Commerce Apr. 22, 1986); *Certain Softwood Lumber Products from Canada: Preliminary Determination*, 51 Fed. Reg. 37,453, 37,458 (Dep't Commerce Oct. 22, 1986) (petition withdrawn prior to the final determination)).

⁶¹⁰ *Id.* at 58.

⁶¹¹ *Id.* at 59-60 (citing *Royal Thai Government v. United States*, 341 F. Supp. 2d 1315, 1319 (Ct. Int'l Trade 2004), *aff'd in part, rev'd in part & remanded*, 436 F.3d 1330 (Fed. Cir. 2006); *Bethlehem Steel Corp. v. United States*, 140 F. Supp. 2d 1354, 1368-70 (Ct. Int'l Trade 2001) ("*Bethlehem Steel II*"); *AK Steel Corp. v. United States*, 192 F.3d 1367, 1382 (Fed. Cir. 1999)).

⁶¹² *Id.* at 66.

⁶¹³ *Id.* at 67.

denominator used in its calculations.⁶¹⁴ Each of the provinces raised substantively the same arguments.⁶¹⁵

The responses by Commerce to these arguments were similar and overlap. First, Commerce responded that use of all corporate tax filers as the comparator group is consistent with the statute.⁶¹⁶ Commerce noted that the SAA provides that “in determining whether the number of industries using a subsidy is small or large, Commerce {can} take account of the number of industries in the economy in question.”⁶¹⁷ Citing several cases, Commerce noted that it regularly uses this methodology in determining whether a program is *de facto* specific.⁶¹⁸ Commerce also noted that the statute does not require that the foreign administering authority actively limit the program. Instead, the statute provides that a program is specific if the actual recipients are limited.⁶¹⁹ Commerce also explained that once it had found *de facto* specificity under the first statutory criteria, it was not required to examine the other three statutory factors.⁶²⁰ Finally, Commerce responded that its two prior decisions finding the research and development programs were not specific predate the enactment of the Uruguay Round Agreements Act (“URAA”) in 1994. Given the changes in the law, not all earlier case law and agency determinations are relevant or applicable and therefore Commerce was not bound by decisions made years ago under a previous version of the statute.⁶²¹

As discussed earlier with respect to Class 1a and 1b assets, the Panel finds that the CAFC’s decision in the *Government of Quebec* is dispositive. As the CAFC noted: “Commerce did not err in using the total corporate tax filers as a comparator in assessing whether the credit recipients are limited in number.”⁶²²

As the CAFC found in *Government of Quebec*, the Panel finds that the Canadian parties have offered weak evidence that the Panel here should overturn Commerce’s *de facto* specificity determination. Indeed, in this case, Commerce found that only 1 percent of potential corporate tax filers in Canada, 0.48 percent in Alberta, 0.48 percent in New Brunswick and a similarly small

⁶¹⁴ *Id.* at 72-78.

⁶¹⁵ See GOA Vol. II 61.1 Brief at 35, 73; GBC Vol. II 61.1 Brief at 49; GNB 61.1 Brief at 131; GOQ Vol. II 61.1 Brief at 122; Resolute 61.1 Brief at 166.

⁶¹⁶ Commerce Vol. VI 61.2 Brief at 43.

⁶¹⁷ *Id.* at 43-44 (citing SAA at 931).

⁶¹⁸ *Id.* at 44.

⁶¹⁹ 19 U.S.C. § 1677(5A)(D)(iii)(1).

⁶²⁰ Commerce Vol. VI 61.1 Brief at 45. This position is supported by the CIT’s decision in *Bethlehem Steel II* in which the court noted: “[t]he *de facto* specificity test is concerned with the effect of benefits provided to individual recipients rather than on the nominal availability of benefits and, therefore, the presence of a single factor mandates a finding of *de facto* specificity.” 140 F. Supp. 2d at 1368.

⁶²¹ *Id.* at 53.

⁶²² *Government of Quebec*, 105 F. 4th at 1374-1375.

amount of Manitoban, Ontarian, and Québécois.⁶²³ tax filers received the disputed benefit thereby showing the benefit was limited in application.⁶²⁴

In sum, the SAA specifically authorized Commerce to use the total number of industries in the economy in question as the comparator group when evaluating whether a program was limited in use. Nothing in the statute suggests that Commerce was required to examine whether the intent was to limit use of the program. Also, Commerce has regularly used this methodology in its *de facto* analysis in recent cases. As the facts also show, whether evaluated on a pure numeric or percentage basis, the program was not widely used in comparison to total corporate tax filers. Accordingly, the Panel finds that Commerce's specificity analysis was supported by substantial evidence and in accordance with law.⁶²⁵

B. Resolute's Claim for SR&ED Tax Credits

Resolute raised an independent challenge regarding the treatment of certain SR&ED tax credits. Resolute's predecessor company, AbitibiBowater, accrued Federal SR&ED tax credits in 2002 and 2003, and Ontario SR&ED tax credits for the 2009-2011 period, based on eligible research and development activities conducted before the company entered bankruptcy proceedings.⁶²⁶

AbitibiBowater filed for bankruptcy protection and emerged from reorganization on December 9, 2010, through a court-supervised plan of arrangement approved by both United States and Canadian bankruptcy courts. The emergent company was sold at arm's length for FMV. In 2012, the company changed its name to Resolute Forest Products. All pre-bankruptcy assets, including the accrued but unused SR&ED tax credits, were valued as part of the arm's-length sale.⁶²⁷

During the POR (2017-2018 tax years), Resolute used the carried-forward SR&ED credits on its Federal and Ontario tax returns to reduce its tax liability.⁶²⁸

Resolute argued that the SR&ED tax credits conferred no countervailable benefit during the POR because the underlying subsidies were permanently extinguished when AbitibiBowater was sold at arm's length for FMV in the court-supervised bankruptcy.⁶²⁹ Resolute relied on

⁶²³ IDM at 190-191.

⁶²⁴ The Panel is not persuaded that Commerce cannot use percentages rather than absolute numbers to find that the benefit was "limited." The results are the same whether considered on a percentage or number basis; the number of users is small in comparison to the comparator group.

⁶²⁵ As more fully explained *supra* at n. 548, Panelist Williamson would remand this issue to Commerce with instructions to comply with the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii) and take into account the criteria set forth therein.

⁶²⁶ Resolute 61.1 Brief at 158-160.

⁶²⁷ *Id.* at 158-162.

⁶²⁸ IDM at 386-387.

⁶²⁹ Resolute 61.1 Brief at 158-162.

Commerce's prior practice in *Uncoated Groundwood Paper from Canada* in which Commerce itself found that all pre-December 9, 2010 subsidies received by AbitibiBowater were extinguished by the arm's-length sale at FMV. Commerce in that proceeding followed its reasoning from *Certain Pasta from Italy*, under which arm's-length private-party sales extinguished pre-sale subsidies.⁶³⁰ Resolute's theory was that because the value of the carried-forward tax credits was included in the overall valuation of AbitibiBowater's assets at the time of the arm's-length sale, Resolute paid fair market value for those tax assets as part of the purchase price. Using a 100 CAD tax credit that was purchased for 100 CAD yields no net benefit to the recipient.⁶³¹

In its Final Results, Commerce rejected Resolute's argument, determining that under 19 C.F.R. Section § 351.509(b)(1), a benefit from an income tax program is considered received in the year the taxpayer files its tax return. Because Resolute filed returns during the POR and claimed the carried-forward SR&ED credits to reduce its tax liability, the benefit was received during the POR.⁶³² The COALITION argued that the timing of receipt governs, not the timing of accrual. The COALITION cited the regulations for the principle that recurring benefits are allocated to the year received.⁶³³ The COALITION also relied on the statutory provision which provides that a change in ownership does not, by itself, require a finding that a past countervailable subsidy is no longer countervailable, even when accomplished through an arm's-length transaction.⁶³⁴

The Panel affirms Commerce's determination. The regulatory framework is clear. Under 19 C.F.R. § 351.509(b)(1), a tax benefit is considered "received" in the year the taxpayer files its tax return claiming the benefit. Resolute filed its Federal and Ontario tax returns during the POR and used the carried-forward SR&ED credits to reduce its payable taxes. The regulatory text does not distinguish between credits that a company accrued itself and credits that were part of a purchased asset portfolio.

Resolute's argument that Commerce's decision in *Uncoated Groundwood Paper* compels a different result is unpersuasive. Commerce's prior administrative determinations do not bind the agency in subsequent proceedings involving different factual records and different legal questions. The *Uncoated Groundwood Paper* determination addressed whether pre-bankruptcy subsidies should be attributed to the post-bankruptcy entity for purposes of calculating ad valorem subsidy rates on a different set of programs. The question here is narrower: when is a tax benefit "received" under the regulation? The regulation answers that question on its face.

The statute reinforces this conclusion. The statute provides that a change in ownership, even at arm's length, does not by itself require Commerce to treat a prior subsidy as extinguished.⁶³⁵

⁶³⁰ *Id.* at 162, n. 420.

⁶³¹ *Id.* at 161.

⁶³² IDM at 386-387.

⁶³³ COALITION 61.2 Brief at 296 (citing 19 C.F.R. § 351.524(a)).

⁶³⁴ *Id.* (citing 19 U.S.C. § 1677(4)(F)).

⁶³⁵ 19 U.S.C. § 1677(4)(F).

Congress specifically addressed the question of what happens to subsidies when a company changes hands, and it chose not to create an automatic extinguishment rule. Resolute's argument that the arm's-length bankruptcy sale necessarily eliminated the benefit of the SR&ED tax credits is inconsistent with this statutory provision.

The Panel recognizes the logical force of Resolute's economic argument: if a buyer pays FMV for a tax asset, the buyer has already "paid for" the benefit and receives no windfall from using it. But the statute and regulations do not adopt a fair-market-value offset methodology for tax credits. The regulatory framework treats the filing of a tax return as the event that triggers receipt of the benefit, and Commerce applied that framework here. The Panel finds no basis to, and indeed may not, override the plain regulatory text on equitable grounds.

6. FEDERAL AND PROVINCIAL LOGGING TAX CREDITS

The GBC levies a normal income tax of 11 percent, and then levies an additional 10 percent tax on logging income earned by logging companies in the province.⁶³⁶ Eligible logging companies may receive a tax credit under the Provincial Logging Tax Credit ("PLTC") for one-third of the provincial tax imposed on logging income.⁶³⁷ In addition, eligible companies may also receive a tax credit via the Federal Logging Tax Credit ("FLTC"), on a company's federal income tax return equal to two-thirds of the provincial tax that the company has paid for logging on its provincial tax return.⁶³⁸

A. Specificity

Although not cast precisely as a specificity argument, the Canadian parties relied on one of the first cases involving the nascent specificity doctrine⁶³⁹ and argued that the FLTC and PLTC operate—by design and in effect—as a "reduction {or a} repeal of the {logging tax}," and the logging tax credits are not "selective" as they apply to all entities impacted by BC's logging tax. As the Canadian parties noted, in *Bethlehem Steel*, the court ruled that allowing deductions from taxes generally are not a subsidy, unless they are done "selectively."⁶⁴⁰ According to the Canadian parties, these credits are not selective and therefore should not have been countervailed.

In response, Commerce first quoted the current statutory language noting that "{w}here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry, the subsidy is specific as a matter of law."⁶⁴¹ Commerce argued that Commerce determined the FLTC and PLTC are *de jure* specific

⁶³⁶ See GOC Vol. II QR at GOC-II-90. The BC provincial tax rate changed to 12 percent beginning as of January 1, 2018. See *Id.* at Exh. GOC-AR1-CRA-ACCA-3.

⁶³⁷ See GOC Vol. II QR at GOC-II-88-GOC-II-90.

⁶³⁸ *Id.*

⁶³⁹ *Bethlehem Steel Corp v. United States*, 590 F. Supp at 1237, 1245-1246 (Ct Int'l Trade 1984) ("*Bethlehem Steel I*").

⁶⁴⁰ *Bethlehem Steel I*, 590 F Supp. at 1245.

⁶⁴¹ 19 U.S.C. § 1677(5A)(D)(i).

because eligibility for the FLTC and PLTC tax rebate is expressly limited by law to corporations that are part of the forestry industry. Commerce also noted that having found that the law was *de jure* specific, it did not need to address whether the provision was also *de facto* specific.⁶⁴² Thus, Commerce concluded that the specificity provision had been met.

The Panel first notes that *Bethlehem Steel* was an important step forward in interpreting the newly enacted Trade Agreements Act of 1979.⁶⁴³ The relevant statutory provision at the time of *Bethlehem Steel* was Section 771(5)(B) which stated:

(5) Subsidy. The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 303 of this Act {19 U.S.C. § 1303}, and includes, but is not limited to, the following:

...

(B) The following domestic subsidies, if provided or required by government action to a *specific enterprise or industry, or group of enterprises or industries*, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:⁶⁴⁴

The definition of “bounty and grant” and whether programs were “specific” were subject to much initial litigation.⁶⁴⁵ As noted by the SAA, the law was amended in 1994 by replacing Section 771(5A)(D) with 771(5)(B).⁶⁴⁶ As the SAA explained: “{t}he issue of whether a subsidy is specific has been one of the most heavily litigated issues under the CVD law. To clarify future application, this Statement describes in some detail how the Administration intends to administer section 771(5)(D).”⁶⁴⁷ The SAA goes on to explain the distinctions between *de jure* specificity and *de facto* specificity. Under the *de jure* provision, “specificity exists where a government expressly limits eligibility for a subsidy to an enterprise, industry, or group thereof.”⁶⁴⁸ While the term “selective” is not used in the statute, in the Panel’s view, the application of the tax and the rebate is in fact selective (as discussed in *Bethlehem*) and is expressly limited by law (as defined by the current statutory provision (19 U.S.C. § 1677(5A)(D))) because it only applies to those companies that are part of the forestry industry. Thus, the Panel upholds Commerce’s finding that the program was *de jure* specific.

⁶⁴² Commerce Vol. VI 61.2 Brief at 65.

⁶⁴³ *Bethlehem Steel I*, 590 F. Supp. at 1245.

⁶⁴⁴ *Bethlehem Steel I*, 590 F. Supp. at 1240 (citing 19 U.S.C. 1677(5)(B)) (emphasis added).

⁶⁴⁵ See e.g., *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834, 838 (1983); *Cabot Corp. v. United States*, 620 F. Supp. 722, 732 (1985).

⁶⁴⁶ SAA at 929.

⁶⁴⁷ *Id.*

⁶⁴⁸ SAA at 930.

B. Benefit

The Canadian parties argued that there is no benefit to the recipient. The Canadian parties contended that the FLTC and PLTC must be considered together with the BC provincial logging tax because the combined effect of the FLTC and PLTC on the BC provincial logging tax results in no benefit conferred on the recipients.⁶⁴⁹ In support of their claim, the Canadian parties argued that *Hynix Semiconductor* requires that Commerce view the BC provincial logging tax, FLTC, and PLTC as a whole rather than as separate measures.⁶⁵⁰ On a similar thread, the Canadian parties argued that Commerce must evaluate the three programs consistent with *GOSL* and *Inland Steel*.⁶⁵¹ As in those two cases, the Canadian parties contended that when the programs are viewed as a whole, rather than separate programs, the logging companies did not receive a benefit because the joint programs simply facilitate the transfer of funds from the federal to provincial government.⁶⁵² The Canadian parties also argued that the FLTC and PLTC subsidy programs do not confer a benefit to the companies receiving the tax credits because such programs level the playing field between taxpayers in the forest industry and other sectors of the economy.⁶⁵³ The Canadian parties also claimed that even if these other arguments were discounted, Commerce should subtract the provincial tax from any alleged benefit by the FLTC and PLTC because the tax was a “payment paid in order to qualify for, or to receive, the benefit” of the FLTC and PLTC pursuant to 19 U.S.C. § 1677(6)(A).⁶⁵⁴ Thus, the Canadian parties argued that the taxes imposed and collected by the provincial government on loggers’ income in BC were similar to an application fee or deposit paid to qualify for, or to receive, the logging tax credit.⁶⁵⁵

In response, Commerce notes that in *Hynix Semiconductor* the court ruled that Commerce had the discretion to determine whether a program under review should be treated as a single program or as several programs.⁶⁵⁶ Commerce argued that this situation was distinct because the FLTC and PLTC constitute two distinct government actions at the federal and provincial levels that both act to absolve different percentages of the GBC’s imposition of the logging tax.⁶⁵⁷ In

⁶⁴⁹ GOC Vol. III 61.1 Brief at 94; GBC Vol. II 61.1 Brief at 45.

⁶⁵⁰ GOC Vol. III 61.1 Brief at 94, n. 22 (citing *Hynix Semiconductor Inc. v. United States*, 391 F. Supp. 2d 1337, 1345 (Ct. Int’l Trade 2005) (“*Hynix Semiconductor*”) (quoting *Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Determination*, 68 Fed. Reg. 37,122 (Dep’t Commerce Jun. 23, 2003), and accompanying mem. at 48, n.11)).

⁶⁵¹ *Id.* at 97-101; GBC Vol. II 61.1 Brief at 47, n.177 (citing *Government of Sri Lanka v. United States*, 308 F. Supp. 3d 1373 (Ct. Int’l Trade 2018) (“*GOSL*”); *Inland Steel Indus., Inc. v. United States*, 967 F. Supp. 1338 (Ct. Int’l Trade 1997) *aff’d* 188 F.3d 1349 (Fed. Cir. 1999) (“*Inland Steel*”)).

⁶⁵² GOC Vol. III 61.1 Brief at 99; GBC Vol. II 61.1 Brief at 47, n.177.

⁶⁵³ GOC Vol. III 61.1 Brief at 96, n.201; GBC Vol. II 61.1 Brief at 48.

⁶⁵⁴ GOC Vol. III 61.1 Brief at 105; GBC Vol. II 61.1 Brief at 48.

⁶⁵⁵ GOC Vol. III 61.1 Brief at 106; GBC Vol. II 61.1 Brief at 48-49.

⁶⁵⁶ Commerce Vol. VI 61.2 Brief at 58.

⁶⁵⁷ *Id.*

commenting on *GOSL* and *Inland Steel*, Commerce noted that in those cases the respondents were a conduit for government funds and did not ultimately receive the benefit. By contrast, in this case, the logging tax credits do not flow through an intermediary or to a third party but are, instead, received in the form of a tax credit directly by the respective company from the government, thereby alleviating the company from its financial obligation.⁶⁵⁸ Also, the logging companies are not receiving a “payment of a debt incurred,” like the parties in *GOSL*. Instead, the logging companies receive a direct tax credit applied to their tax return. Commerce pointed out that in *GOSL* the court determined that even though the rubber purchasers served as a conduit for the subsidization of rubber producers, Commerce could not countervail the program because the rubber producers never actually received the subsidy.⁶⁵⁹ The transaction in that case involved the payments that were an interest-free repayment of a debt rather than “a direct transfer of funds” and so did not benefit the tire producer. Commerce further distinguished *Inland Steel* by noting that the court found that the government funds that the recipient was obligated to forward to a third party did not provide a countervailable benefit to the intermediary.⁶⁶⁰ Commerce also rejected the Canadian parties’ arguments related to 19 U.S.C. § 1677(6)(A) because that provision is limited to an application fee, deposit, or similar payment paid to qualify for the benefit of the countervailable subsidy. As Commerce pointed out, Congress provided that, “{f}or purposes of determining the net subsidy, there is subtracted from the gross subsidy only the items specified in section {19 U.S.C. § 1677(6)(A)},” and “{t}he list is narrowly drawn and is all inclusive.”⁶⁶¹ Thus, although 19 U.S.C. § 1677(6)(A) permits that Commerce “may subtract from the gross countervailable subsidy the amount of any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy,” tax credits to offset income are not included.⁶⁶²

The Panel recognizes that, mathematically, the practical result of a tax credit of 1/3 for the logging tax provided by BC and a tax credit of 2/3 provided by the federal government means that a taxpayer paying the logging tax and then claiming the tax credit results in zero logging tax paid. Further, the Panel understands that these tax credits serve to benefit the GBC vis-a-vis the federal government because the province ultimately receives two thirds of the logging tax from the taxpayer while the Federal Government does not receive taxes that amount to two thirds of the logging tax. The Panel does not agree, however, that this action eliminates a “tax penalty” on logging income and is only a means of transferring money from the federal government to the provincial government. Rather, the GBC imposes a tax on logging income. The tax credits relieve these companies from paying a tax that is otherwise due. This situation is distinct from *Hynix*, *GOSL* and *Inland Steel*. In *Hynix Semiconductor*, the question before the court was whether Commerce was permitted to frame each transaction made by different financial institutions at issue

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.* at 59 (citing *GOSL*, 308 F. Supp. 3d at 1379-84).

⁶⁶⁰ *Id.* at 59 (citing *Inland Steel*, 967 F. Supp. at 1367-68).

⁶⁶¹ *Id.* (citing S. Rep. No. 249, 96th Cong., 1st Sess. 86 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 472).

⁶⁶² *Id.* at 64.

as a single government-directed program of financial contributions.⁶⁶³ The court in *Hynix Semiconductor* determined that Commerce has the discretion to determine whether a program under review should be treated as a single program or as several programs.⁶⁶⁴ Here, even if the two logging credits and the logging tax were viewed as a single program, the point remains that the taxpayer is excused from paying the full amount of the logging tax. That this credit comes from two entities does not change the fact that the taxpayer is excused from paying the full amount of the logging tax. Similar distinctions exist with respect to *GOSL* and *Inland Steel*. In *GOSL*, the transfer of funds involved a “repayment of a debt” and thus there was no benefit to the company. In *Inland Steel*, the court agreed that there was no benefit to the respondent because the contributions paid by the government were simply forwarded to a third party, thereby not resulting in a benefit. The program involved did not relieve the respondent of any legal obligation.⁶⁶⁵ Here, the taxpayer still had a legal obligation to pay the logging tax but, as with every tax credit, the tax obligation was mitigated by the allowance of a credit against that tax. In other words, just as the regulations anticipate, the granting of a tax credit on taxes that are otherwise due constitutes a subsidy. As the regulations state:

In the case of a program that provides for a full or partial exemption or remission of a direct tax (for example, an income tax), or a reduction in the base used to calculate a direct tax, a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program.⁶⁶⁶

The fact that these tax credits place the taxpayer on the same footing as other taxpayers who do not have logging income is not relevant to the question of whether a legal tax obligation otherwise owed is mitigated. The Panel also does not find 19 U.S.C. § 1677(6)(A) applicable. That provision identifies very specific and narrow reasons for a subtraction to the gross countervailable subsidy. By contrast, the regulations provide: Pursuant to 19 C.F.R. § 351.509(a), a benefit exists to the extent that the tax paid by a firm as a result of a program is less than the tax the firm would have paid in the absence of the program. As noted, this tax credit is plain on its face – it is a credit against a legal tax obligation otherwise owed. In sum, the Panel upholds Commerce’s decision to countervail these two tax credits.

7. GNB’S STATUTORY PROPERTY ASSESSMENT RULES REGARDING FREEHOLD TIMBERLAND

Landowners in New Brunswick pay property taxes based on the assessed value of the land in accordance with the Assessment Act. Section 15 of the Assessment Act provides that all real

⁶⁶³ *Hynix Semiconductor*, 391 F. Supp. 2d, 1337, 1344.

⁶⁶⁴ *Hynix Semiconductor*, 391 F. Supp. 2d, 1337, 1345, n.7 (citing *Live Swine from Canada: Final Results of Countervailing Duty Administrative Reviews*, 61 Fed. Reg. 52,408, 52,412 (Dep’t Commerce Oct. 7, 1996)).

⁶⁶⁵ *Inland Steel*, 967 F. Supp. 1349, 1367-1368.

⁶⁶⁶ 19 C.F.R. § 351.509(a).

property shall be assessed at its “real and true value.”⁶⁶⁷ This provision also stipulates that certain types of land are unique and therefore not subject to this standard assessment.⁶⁶⁸ One of these unique types of land, freehold timberland, is assessed at a rate of 100 CAD per hectare, as stipulated under Section 17(2) of the Assessment Act.⁶⁶⁹ Commerce determined that this program was *de jure* specific because, under the Assessment Act, eligibility for this tax program is expressly limited to owners of freehold timberland.⁶⁷⁰

A. Specificity

The GNB argued that because the Property Assessment Rules under the Assessment Act are broadly available and widely used by numerous industries, they are not *de jure* specific.⁶⁷¹ Additionally, the GNB asserted that the facts regarding ownership and uses of timberland properties in the province are pertinent for Commerce’s *de jure* specificity analysis.⁶⁷² In particular, the GNB stated that: (1) over 67 percent of all private land in the province is a recipient of this assessment policy subject to the 100 CAD per hectare assessment; (2) companies owned only 24 percent of the properties subject to the 100 CAD per hectare assessment rate; and (3) the companies that own land subject to the 100 CAD per hectare assessment rate operate in a variety of industries whose uses include a broad range of economic sectors.⁶⁷³

Commerce responded that the property assessment rules are *de jure* specific under 19 U.S.C § 1677(5A)(D)(i) because the tax benefit is limited to a specific type of timberland holders (*i.e.*, over 10 hectares and bona-fide use).⁶⁷⁴

The Panel finds that Commerce properly found that this program was *de jure* specific. As Commerce found, only certain farmers and timberlands are eligible for the subsidy.⁶⁷⁵ For example, for a land parcel to be classified as freehold timberland under section 17(2) of the Assessment Act, it must be 10 hectares or more, and must be for bona-fide use as freehold timberland (*i.e.*, land that is capable of being harvested).⁶⁷⁶ Thus, this special tax assessment is not

⁶⁶⁷ GNB Vol. I QR at Exh. NB-AR1-SNB-7.

⁶⁶⁸ *Id.*

⁶⁶⁹ *Id.*

⁶⁷⁰ IDM at 360.

⁶⁷¹ See GNB 61.1 Brief at 123; At the hearing, the GNB argued that Commerce had failed to address the particulars of its specificity argument and thus Commerce had waived its defense of this issue. See Day 4 Hearing Tr. at 112-113. Yet, in its brief and at the hearing, Commerce did address the issue of specificity. See Commerce Vol. VI 61.2 Brief at 74; Hearing Tr. Day 4 at 126-132. The Panel finds that this issue was not waived by Commerce.

⁶⁷² See GNB 61.1 Brief at 123.

⁶⁷³ *Id.*

⁶⁷⁴ IDM at 360.

⁶⁷⁵ *Id.* at 360-61.

⁶⁷⁶ *Id.* at 361 (citing GNB Vol. I QR at Exh. NB-AR1-SNB-8).

generally available to all landholders throughout the province, but only to a subset of the landholders who lease or own certain types of timberland and farmland. Commerce also determined that access to the benefit would be effectively limited to potential enterprises involving production of wood and wood-related merchandise because of the type of land at issue.⁶⁷⁷ This finding is further supported by information on the record of this review, which indicates that the GNB anticipates timberland to be used to grow trees used in the production of various wood products including lumber.⁶⁷⁸ Thus, the record indicates that the GNB provides this unique assessment with the knowledge that certain industries, including the lumber industry, will benefit from this program. As such, Commerce determined that this subsidy is expressly limited to a specific type of timberland holders (*i.e.*, over 10 hectares and bona-fide use) and further that the GNB provides this benefit to groups that it expressly expects to produce subject merchandise. Accordingly, the Panel upholds Commerce's finding on specificity.

B. Financial Contribution

The GNB argued that Commerce improperly found that this program constituted a financial contribution. As a main component of its argument GNB contended that the sections of the Assessment Act are not departures from the baseline policy of valuing property at its real and true value.⁶⁷⁹

Commerce disagreed, noting the Assessment Act contained express language that allowed explicit methods to qualify for a tax reduction that included the valuation of freehold timberland. In contrast to the "Valuation of Real Property" that establishes a baseline policy, the Assessment Act directly lists freehold timberland, at Section 17(2), to have a different assessment basis (*i.e.*, 100 CAD per hectare) than the "standard" real and true value of the property. On this basis, Commerce concluded that these exceptions represent departures from the standard policy to which "ordinary" property is subject. As such, Commerce determined that given that the GNB is not assessing timberland property using its standard valuation policy, it is forgoing revenue and thus providing a financial contribution.⁶⁸⁰

The record is clear that landowners in New Brunswick pay property taxes based on the assessed value of the land in accordance with the Assessment Act. Section 15 of the Assessment Act stipulates that all real property shall be assessed at its "real and true value."⁶⁸¹ The Act specifies that certain types of land are unique and subject to a different assessment rate, including freehold timberland. Thus, this section specifically stipulates certain types of land to be unique and not

⁶⁷⁷ *Id.* (citing *Expedited Review* IDM at Cmt. 20).

⁶⁷⁸ *Id.* (citing JDIL QR at Exh. NBPT-02, P.R. 912) (*The Minister of Municipal Affairs v. Robertson*, N.B.R. (2d) 60, 62 (1968) ("Timberland" refers to wild or unimproved land on which stand growing trees of species capable of being used in the production of lumber, pulpwood and other merchantable wood products.")).

⁶⁷⁹ GNB 61.1 Brief at 118.

⁶⁸⁰ Commerce Vol. VI 61.2 Brief at 76.

⁶⁸¹ GNB Vol. I QR at Exh. NB-AR1-SNB-7.

subject to the standard assessment.⁶⁸² One of these unique types of land, freehold timberland, is assessed at a rate of 100 CAD per hectare, as stipulated under Section 17(2) of the Assessment Act.⁶⁸³ Thus, these landowners are excused from paying taxes based on the assessed value of the land. These unique landowners pay lower taxes than otherwise due and the government forgoes revenue it would normally receive. This tax benefit qualifies as a financial contribution. Accordingly, the Panel upholds Commerce's decision in this regard.

8. PROPERTY TAX REFUND FOR FOREST PRODUCERS ON PRIVATE WOODLANDS

Under the GOQ's Property Tax Refund for Forest Producers on Private Woodlands, private forest producers are eligible for a property tax refund (equal to 85 percent of the amount of property taxes paid) to the extent that the development expenses incurred for investment in forest management are greater than or equal to the amount of property taxes paid.⁶⁸⁴ The property tax refund is a refundable tax credit and is claimed on a company's annual tax refund. Resolute reported that it received a property tax refund under this program in 2017 and 2018.⁶⁸⁵

Resolute argued that the Property Tax Refund confers no benefit because it is provided as a partial reimbursement for measures taken in support of the province's protection of the forest.⁶⁸⁶ Resolute argued that Québec pays forest producers a partial property tax refund in exchange for undertaking qualifying activities on private woodlands that preserve the health and sustainability of the forest ecosystem. Resolute also argued that participants still incur a net cost in property taxes on their private woodlands regardless of the amount of eligible activities undertaken.⁶⁸⁷

Commerce contended that private foresters are eligible for a refund of 85 percent of the amount of property taxes paid when development expenses incurred for investment in forest management are greater than or equal to the amount of property taxes paid.⁶⁸⁸ Citing the regulations, Commerce argued that because Resolute received a tax refund under the Property Tax Refund program, it had received a benefit in the amount of the tax refunds from the GOQ.⁶⁸⁹ In response to the argument that the measure was taken to protect the forest, Commerce also noted

⁶⁸² *Id.*

⁶⁸³ *Id.* (citing PDM at 80-81).

⁶⁸⁴ GOQ Vol. V IQR at Exh. QC-C07-A; Resolute NS IQR at Exh. RES-NS-PRIV-APP, P.R. 1177.

⁶⁸⁵ *Id.*

⁶⁸⁶ Resolute 61.1 Brief at 147.

⁶⁸⁷ *Id.* at 147-48.

⁶⁸⁸ Commerce Vol. VI 61.2 Brief at 82-83 (citing IDM at 375 (citing GOQ Vol. V Primary QR at Exh. QC-C07-A, P.R. 850).

⁶⁸⁹ *Id.* at 84 (citing IDM at 375; 19 C.F.R. § 351.509(a)(1) ("... a benefit exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program.")).

that it “is not required to consider the effect of the subsidy in determining whether a subsidy exists.”⁶⁹⁰

The Panel finds that the tax refund constituted a benefit to Resolute. The law required private parties to undertake costs in forest management. Thus, these were legal obligations required by the landowners. These are costs that would have occurred regardless of taxes owed. Separately, the GOQ provided a refund of taxes otherwise owed. The regulations are clear that a benefit exists when the taxes paid are less than they would have been if no program existed and in this case no question exists that Resolute paid lower taxes as a result of the refund. Further, the statute states clearly and unequivocally that Commerce “is not required to consider the effect of the subsidy in determining whether a subsidy exists under this paragraph.”⁶⁹¹ Accordingly, the Panel upholds Commerce’s decision that a benefit was given to Resolute.

9. CLASS 9 FARM PROPERTY ASSESSMENT RATES IN BC

The British Columbia Assessment Authority (“BCAA”) is responsible for classifying property and assessing property taxes throughout the province of BC.⁶⁹² The BCAA classifies land and buildings into a number of classes, in which each class has a different taxation rate and is governed by a different section of the Assessment Act.⁶⁹³ Owners of properties that are classified as Class 9, or Farm Property, automatically receive a tax credit for fifty percent of the school tax owed on that property. Commerce found that the lower tax rate for Class 9 properties is not *de jure* specific under 19 U.S.C. § 1677(5A)(D); the lower tax rate, although limited to the agricultural industry, is not limited to only certain agricultural products or activities.⁶⁹⁴

The COALITION challenged Commerce’s specificity determination for the Class 9 program claiming that the program is *de jure* specific because the lower tax rate is only available for certain agricultural products.⁶⁹⁵ According to the COALITION, the program was *de jure* specific because certain land uses are excluded from qualifying for the Class 9 Farm classification.⁶⁹⁶ The COALITION further argued that the Class 9 Farm Property Asset Program is *de jure* specific for the same reasons that Commerce found that the ACCA was *de jure* specific.⁶⁹⁷

Commerce responded that under Commerce’s regulations, “{t}he Secretary will not regard a subsidy as being specific under {19 U.S.C. § 1677(5A)(D)} solely because it is limited to the

⁶⁹⁰ 19 U.S.C. § 1677(5)(C).

⁶⁹¹ *Id.*

⁶⁹² GBC SQR at Exh. BC-FARM-1.

⁶⁹³ *Id.*

⁶⁹⁴ IDM at 359.

⁶⁹⁵ COALITION 61.1 Brief at 112-14.

⁶⁹⁶ *Id.* at 116.

⁶⁹⁷ *Id.* at 115.

agricultural sector (domestic subsidy).”⁶⁹⁸ For the Class 9 program to be *de jure* specific in accordance with 19 C.F.R. § 351.502(d), the program would have to be limited to certain agricultural activities. According to Commerce, the Class 9 program is not *de jure* specific because the tax benefits pertain to the agricultural industry and the tax benefits are not limited to certain agricultural activities.⁶⁹⁹ Commerce further noted that the exclusion list for the Class 9 designation is limited to agricultural activities such as the production of manufactured derivatives from agricultural raw materials, production of agricultural products for domestic consumption on the farm, the breeding of pets, and the cultivation of controlled substances.⁷⁰⁰ Finally, Commerce argued that, unlike the Class 9 Farm Property Assessment program, the Class 29 ACCA program, as discussed earlier, expressly limits access to the program by excluding numerous activities that cover a broad range of industries (*e.g.*, farming, logging, construction, petroleum extraction, mineral extraction, *etc.*).⁷⁰¹

The Panel finds that the record supports Commerce’s decision. The Class 9 program applies solely to the agricultural sector because the list of qualifying land uses and activities include the agricultural sector as a whole (*e.g.*, fruit, vegetable, and grain production; livestock raising; seed production; cultivation of trees). Further, because all Class 9 properties receive the same percentage tax deduction, the program does not appear to provide favorable treatment to certain agricultural products or activities. Therefore, the Panel finds that Commerce’s determination that the lower tax rate for Class 9 properties is not *de jure* specific under 19 U.S.C. § 1677(5A)(D) is in accordance with law and supported by substantial evidence.

VII. NON-ENERGY GRANT PROGRAMS

1. SUBSEQUENT AUTHORITY

On August 17, 2026, Resolute filed a notice of Subsequent Authority citing the court’s recent ruling in *Qatar Melamine Company v. United States*.⁷⁰² Resolute contended that the *Qatar Melamine* case should result in a finding by this Panel that Commerce’s multiple decisions that certain grants were countervailable were contrary to 19 U.S.C. § 1677(5)(D) and (E) regarding financial contribution and benefit. Resolute referenced the court’s ruling that states:

{T}he plain meaning of the term “benefit”—which Plaintiffs correctly note is “advantage, profit, good,” ... combined with the statutory command to make “distinct” findings as to the benefit and financial contribution ... suggests that the benefit may

⁶⁹⁸ Commerce Vol. VI 61.2 Brief at 203 (quoting 19 C.F.R. § 351.502(d)).

⁶⁹⁹ *Id.* at 203-204.

⁷⁰⁰ *Id.* at 204.

⁷⁰¹ *Id.* at 205.

⁷⁰² Resolute Notice of Subsequent Authority (citing *Qatar Melamine Company v. United States*, Slip Op. 26-81 (Ct. Int’l Trade 2026) (“*Qatar Melamine*”) (footnotes omitted))

not be equal to the financial contribution where the recipient has given up something of value to receive the contribution.⁷⁰³

Resolute noted that this decision supported its position on Commerce’s treatment of “Partial Cut/Paix des Braves, Québec/Ontario roads, Demand Response, Ontario FSPF Settlement, and other non-stumpage issues,” citing its main brief at pages 103-48 and its reply brief at pages 63-98.

On August 24, 2026, Commerce and the COALITION responded to Resolute’s filing. The COALITION noted that the court’s decision in *Qatar Melamine* was not applicable and was distinguishable from the situation in this case because, in *Qatar Melamine*, the question concerned a situation involving port fee revenues, while the programs identified by Resolute were grants that are governed by different statutory and regulatory criteria.⁷⁰⁴ For its part, Commerce noted that the *Qatar Melamine* decision was not final and was subject to reversal upon appeal.⁷⁰⁵ Commerce further noted that the decision conflicted with other court decisions, including *AK Steel Corp. v. United States*, where the Federal Circuit held that when a benefit was conferred via the waiving of harbor fees, that benefit should be measured without regard to costs the government “would have normally assumed” in harbor construction.⁷⁰⁶

Although Resolute did not specify every program that it believed was affected by the *Qatar Melamine* case, the Panel assumes that Resolute is referring primarily to grant programs, including the following programs: Ontario Forest Roads Funding Program and the Québec Multi-Use Path Cost Reimbursement Program; Partial Cut Investment Program; Paix des Brave Program; Investment Program in Public Forest Affected by Natural or Anthropogenic Disturbance; Contracts between Resolute and Rexforêt Silviculture Works: Road Construction/Maintenance (“Rexforêt”) for roadwork activities; and Ontario’s Independent Electricity System Operator Demand Response Curtailment Program.

The Panel finds that the court’s decision in *Qatar Melamine* does not apply to Commerce’s determination in this review. The Panel first references the court’s statement acknowledging the particular facts before the court in *Qatar Melamine*:

Commerce’s regulations outline how Commerce calculates the benefit for certain programs. See 19 C.F.R. § 351.503. Neither the statute nor Commerce’s regulations, however, specify how to calculate the benefit in the context of a financial contribution involving rental or port services revenue forgone.⁷⁰⁷

As the court makes clear, its decision in this case was based on the financial contribution involving rental or port services revenue forgone. As pointed out by the COALITION, the

⁷⁰³ *Qatar Melamine* at 28.

⁷⁰⁴ COALITION Response to Notice of Subsequent Authority.

⁷⁰⁵ Commerce Response to Notice of Subsequent Authority.

⁷⁰⁶ *Id.* (citing *AK Steel Corp. v. United States*, 192 F.3d 1367, 1382 (Fed. Cir. 1999)).

⁷⁰⁷ *Qatar Melamine* at 24.

programs at issue here are grants, which, generally speaking, are covered by different regulatory provisions.⁷⁰⁸

The court further distinguished the situation in its case from that involving government-required obligations:

Likewise, Commerce's reliance on 19 C.F.R. § 351.503(c) and the CVD Preamble is not convincing. In the CVD Preamble, Commerce stated "if there is a financial contribution and a firm . . . receives revenues beyond the amount it otherwise would earn{}", that is the end of the inquiry insofar as the benefit element is concerned," and provided two examples to illustrate the point. CVD Preamble at 65,361. In both examples, government regulation negatively affected a company, but the company nevertheless received subsidies for compliance with the new regulation. *Id.* The CVD Preamble confirms that, in such scenarios, Commerce does not need to consider the negative effects of the government regulation on the company in determining the benefit. See *id.* That principle, however, does not govern the present scenario, where Commerce is attributing the revenue QatarEnergy earned during the POI to the GOQ but is not considering the expenses that the GOQ also forwent.⁷⁰⁹

The facts of the *Qatar Melamine* case and the facts in this case are distinct. In *Qatar Melamine*, the plaintiff was not required to build the port or incur costs as part of government-imposed conditions. Instead, the plaintiff had been given certain land use rights. According to the court, Commerce should have taken into account the expenses it incurred related to those land use rights because they were part of the cost of doing business, but not otherwise required by government mandate. In this case, however, the government required the parties to carry out certain works in order to receive rights to harvest timber. As discussed in the Panel's decision at length, the parties were not providing a general public service or fulfilling an unrelated governmental function. The government gave the companies grants in return for carrying out the required works. As referenced by the court in *Qatar Melamine*, the *CVD Preamble* explains that expenses that are incurred as part of government mandates should not be considered when determining the benefit that is being received. As the regulations require, "{i}n the case of a grant, a benefit exists in the amount of the grant."⁷¹⁰ Accordingly, the situation in *Qatar Melamine* is distinct from the situation that exists in this case. Therefore, the Panel finds that the court's ruling in *Qatar Melamine* is not applicable to the facts of this case.

2. ALBERTA

A. Sustainable Development Technology Canada

During the POR, West Fraser received a grant from the Sustainable Development Technology Canada ("SDTC") program. Canada established the Canadian Foundation for Sustainable

⁷⁰⁸ 19 C.F.R. § 353.504.

⁷⁰⁹ *Qatar Melamine* at 29.

⁷¹⁰ 19 C.F.R. § 353.504(a)

Development Technology Canada in 2001 as a non-profit corporation to fund sustainable development technology demonstration projects in Canada.⁷¹¹ Eligible projects are primarily performed in Canada by an eligible recipient to develop and demonstrate new technologies to promote sustainable development, including technologies to address issues related to climate change and the quality of air, water, and soil.⁷¹² The SDTC receives funding from the GOC with the goal of supporting jobs and innovation in clean technology. West Fraser received SDTC funding, prior to the POR and in 2018, for a commercial-scale kraft lignin production facility constructed in Canada. Lignin is recovered from black liquor, a waste product from the pulping process at West Fraser's Hinton pulp mill.⁷¹³ Commerce determined that the source of the lignin is residual wood fiber harvested from West Fraser's Forest Management Areas, and the funds provided under the SDTC program were for the production of lignin, which can be used as a biofuel.⁷¹⁴

The Canadian parties argued that Commerce erred in finding that the program was *de jure* specific. According to the Canadian parties, Commerce failed to gather the necessary information to make a reasoned determination that the program was *de jure* specific because it never requested information from the Canadian Government about the program.⁷¹⁵

Commerce responded that it was provided with sufficient information in West Fraser's Questionnaire Response that indicated that the grant was provided to the "cleantech" industry and therefore was *de jure* specific.⁷¹⁶

As quoted earlier with respect to the AJCTC tax credit program, in discussing *de jure* specificity, the SAA states:

Under clause (ii), a subsidy would not be deemed to be *de jure* specific merely because it was bestowed pursuant to certain eligibility criteria. However, the eligibility criteria or conditions must be objective, clearly documented, capable of verification and strictly followed. In addition, eligibility for the subsidy must be automatic where the criteria are satisfied. Finally, the objective criteria or conditions must be neutral, must not favor certain enterprises or industries over others, and must be economic in nature and horizontal in application, such as the number of employees or the size of the enterprise.⁷¹⁷

In its PDM, Commerce identified the eligibility requirements for applying for an SDTC grant:

⁷¹¹ PDM at 39.

⁷¹² *Id.*

⁷¹³ *Id.*

⁷¹⁴ *Id.* at 40.

⁷¹⁵ GOC Vol. III 61.1 Brief at 115.

⁷¹⁶ Commerce Vol. VI 61.2 Brief at 90-91.

⁷¹⁷ SAA at 930.

Eligible recipient is defined as an entity that: (1) is established in Canada and carries on, or in the opinion of the SDTC Board of Directors is capable of carrying on, eligible projects; (2) meets the criteria of eligibility established in any agreements entered into between Her Majesty in right of Canada and the Foundation for provision of funding by Her Majesty to the Foundation; and (3) has legal capacity, or is composed of organizations each of which has legal capacity. Additional eligibility criteria are established in Funding Agreements. See West Fraser’s Volume II IQR Response at WF-II-90.⁷¹⁸

The eligibility criteria enumerated in this passage appear to be objective and do not appear to favor any industry over another. Commerce noted that these grants are intended to benefit the “cleantech” industry. Commerce did not, however, cite to any place in the record where the “cleantech” industry is specifically defined. Rather, judging from the eligibility criteria, the “cleantech” industry appears to be any company that seeks a grant related to climate change, air quality, or clean water and soil and does not otherwise appear to refer to a limited group of enterprises or industries. As discussed with respect to AJCTC and the court’s decision in *BGH*, Commerce has not shown that the program “expressly limits” any company from accessing the program. Again, any industry could potentially apply for a grant for a project that addresses issues related to climate change, air quality, or clean water and soil. Thus, on its face, the program does not expressly limit access to certain industries and no evidence on the record supports Commerce’s supposition that only certain industries are allowed to apply for this grant. Accordingly, the Panel remands this matter for further explanation or reconsideration consistent with this decision with respect to its determination that the SDTC program is a *de jure* specific subsidy.

In the light of our decision above, the Panel need not proceed to address arguments related to Commerce’s decision that SDTC payments were not tied to the production of lignin. The Panel can address these arguments depending on Commerce’s remand determination regarding specificity.⁷¹⁹

B. Bio Future Program

The Alberta Bio Future program (“ABF”) is administered by the provincial government corporation, Alberta Innovates.⁷²⁰ The ABF launched in March 2015 and provides funding in three strategic priority areas: (1) research and innovation, (2) product and technology commercialization, and (3) equipment utilization.⁷²¹ The program focuses on projects that enhance value to biomass in agriculture and forestry and create new bio-industrial products and bio-industrial technologies.⁷²² West Fraser received grants from the ABF program to implement a kraft

⁷¹⁸ PDM at 39, n. 209.

⁷¹⁹ Given that the Panel finds that Commerce has failed to demonstrate that this program is *de jure* specific, the Panel has not addressed the attribution arguments raised by the parties.

⁷²⁰ PDM at 44.

⁷²¹ *Id.*

⁷²² *Id.* 44-45.

lignin recovery plant at West Fraser's Hinton Pulp Mill, receiving grants in both 2016 and 2017. West Fraser stated that the ABF program provides one-time payments for approved projects, and West Fraser must submit a new application for each project.⁷²³ Lignin is recovered from black liquor, a waste product from the pulping process at West Fraser's Hinton pulp mill.⁷²⁴

The regulations specify that “{i}f a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product.”⁷²⁵ Although “tied” is not defined in the regulation, as Commerce stated in the IDM, “{t}o determine whether a subsidy is ‘tied,’ Commerce’s focus is on ‘the purpose of the subsidy based on information available at time of bestowal (*i.e.*, when the terms for the provision are set), and not on how a firm has actually used the subsidy.”⁷²⁶

Commerce determined that ABF funds are untied and thus attributable to all of West Fraser's sales. It explained that, unlike two Canadian government funding programs,⁷²⁷ there is no explicit restriction that costs associated with the production or export of softwood lumber cannot be funded by the program and asserted that the “relevant program documents ... outline a wide range of eligible activities that the company may carry out, contrary to the Canadian Parties’ claim that the funds can only be used for the production of lignin as an adhesive.”⁷²⁸ Commerce also dismissed the Canadian Parties’ argument that Commerce’s preliminary finding that lignin can be burned as a biofuel was speculative, claiming that “record evidence shows otherwise.”⁷²⁹

Before the Panel, Commerce asserted that it has “discretion in determining how to evaluate whether a subsidy is tied to the production or sale of a particular product because neither the statute nor Commerce’s regulation{s} defines when a subsidy is tied to the production or sale of a particular product.”⁷³⁰ Commerce argued that “the bestowal documents indicate that the subsidies under the ABF are not limited to the production of non-subject merchandise”⁷³¹ and maintained that the grant documents “indicate a wide range of eligible activities that the company may be engaged in ... contrary to the GOA’s claim that the funds can only be used for the production of

⁷²³ *Id.* at 45.

⁷²⁴ *Id.* at 39, n. 212.

⁷²⁵ 19 C.F.R. §351.525(b)(i).

⁷²⁶ IDM at 263 (quoting *CVD Preamble*).

⁷²⁷ Sustainable Development Technology Canada Program and Investment in Forest Industry Transformation Program.

⁷²⁸ IDM at 262.

⁷²⁹ *Id.*

⁷³⁰ Commerce Vol. VI 61.2 Brief at 94.

⁷³¹ *Id.* at 96-97.

lignin as an adhesive.”⁷³² Commerce also asserted that “the record supports Commerce’s determination that lignin can be used as a biofuel and input into softwood lumber.”⁷³³

The COALITION argued that Commerce correctly found this program to be untied and agreed with Commerce that “the relevant program documents ... outline a wide range of eligible activities that the company may carry out.”⁷³⁴ The COALITION also referred to the “lack of a limitation on the end-use of lignin” and considered that the “fact that the ABF did not place a limitation on the type of production necessary to qualify for the subsidy means that it can be used to offset costs in West Fraser’s production of the subject merchandise.”⁷³⁵

The Canadian Parties rejected Commerce’s tying decision in respect of the ABF and West Fraser’s lignin extraction plant, stating that Commerce “ignored the fact that the application documents indicated that the purpose of these funds was to develop a lignin recovery process at pulp mills.”⁷³⁶ They argued that Commerce’s suggestion that the funds were countervailable because lignin “*could* be burned as fuel to produce energy” is “an assumption contrary to the demonstrated purpose of the funding.”⁷³⁷

The Alberta Parties also rejected Commerce’s determination that the ABF funds were subsidies attributable to softwood lumber, claiming that the determination is unsupported by substantial evidence in the record and otherwise not in accordance with law. Addressing Commerce’s findings, the Alberta Parties argued, first, that there is no requirement in the regulations that the grant be expressly barred from being used for subject merchandise. Second, the Alberta Parties cited the record as demonstrating that the lignin recovered by the West Fraser plant was “only intended for use as a resin in the production of plywood” and that it “was in fact never used as a biofuel.”⁷³⁸

The Alberta Parties quoted the grant approval documents, arguing that they “explicitly and unequivocally indicated the grant’s exclusive purpose was to fund the construction of a lignin recovery plant,”⁷³⁹ pointing to the Contribution Agreement which states that “the objective of this Project is to implement a *kraft lignin recovery plant* at the Proponent’s mill in Hinton, Alberta”⁷⁴⁰ and that “{t}he production from this new commercial lignin recovery plant will be used to *displace*

⁷³² *Id.* at 96.

⁷³³ *Id.* at 97.

⁷³⁴ COALITION 61.2 Brief at 339 (citing IDM at 262).

⁷³⁵ COALITION 61.2 Brief at 339-340.

⁷³⁶ Canadian Parties Vol. I 61.1 Brief at 121.

⁷³⁷ *Id.* at 121, n. 361 (italics original).

⁷³⁸ Alberta Vol. II 61.1 Brief at AB-II-10–AB-II-11, n. 27 (quoting West Fraser 2nd NSA QR: “The objective of this Project is to implement a kraft lignin recovery plant at Proponent’s mill in Hinton, Alberta”, Exh. WF-AR1-ABF-1 at 20).

⁷³⁹ GOA Vol. II 61.1 Brief at AB-II-14.

⁷⁴⁰ *Id.* (italics in original).

components in commercial glues used for plywood, Oriented strand board (OSB), and laminated veneer lumber (LVL) manufacturing.”⁷⁴¹ As for Commerce’s contention that the record evidence shows that lignin generated by the plant can be burned as a biofuel, the Alberta Parties asserted that Commerce cited only to the Project Final Report as a whole and did not demonstrate how the Report supported this position.⁷⁴² Moreover, for the Alberta Parties, it was clear that, at the time of bestowal, the GOA intended the grant to permit the production of lignin for use as an adhesive in non-subject merchandise. In sum, the Alberta Parties concluded that the ABF grant to West Fraser’s lignin plant “was manifestly tied”⁷⁴³ to non-subject merchandise and was not countervailable.

The Panel finds that Commerce’s determination that the ABF funds are untied to subject merchandise and are thus attributable to all of West Fraser’s sales is not supported by substantial evidence. Commerce maintained that it has discretion in determining whether or not a grant is tied to subject merchandise because “tied” is not defined in the statute or the regulations. We note, however, that the regulation is clear that “{i}f a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product” and, further, that although there is no definition of “tied,” Commerce’s practice is to glean the purpose of the subsidy from the bestowal documents. Commerce’s reliance on the fact that the bestowal documents do not state explicitly that the funds are not to be used for softwood lumber production is not persuasive; there is no requirement for such language. Moreover, Commerce’s reading of the bestowal documents ignores clear language indicating that the purpose of the funds was to develop a lignin recovery process at West Fraser’s Hinton pulp mill.

The Panel further observes that the COALITION’s submissions on this point are speculative: they referred to the possibility that lignin production “can be” used to offset costs of West Fraser’s softwood lumber production.⁷⁴⁴ In the Panel’s view, the nature of the evidence relied upon by the COALITION does not assist in demonstrating that lignin production at West Fraser’s Hinton Pulp Mill is not tied to subject merchandise.

Accordingly, the Panel remands this matter with instructions to Commerce to point to evidence on the record that demonstrates that the grant is not tied to the production of lignin.

3. BRITISH COLUMBIA’S SECTION 108 PROGRAM

The Forest Range and Practices Act (“FRPA”) Section 108 payment program is administered by the BC Ministry of Forests, Lands, and Natural Resource Operations and Rural Development (“FLNRORD”).⁷⁴⁵ Pursuant to the FRPA, tenure holders are obligated to establish free-growing

⁷⁴¹ *Id.*

⁷⁴² *Id.* at AB-II-18.

⁷⁴³ *Id.* at AB-II-15.

⁷⁴⁴ COALITION 61.2 Brief at 340.

⁷⁴⁵ Commerce Vol. VI 61.2 Brief at 205.

stands.⁷⁴⁶ If an “eligible event” (such as a fire outside of the tenure holder’s control) as described under Section 96 of the Forest Planning and Practices Regulation causes damage to a stand prior to its achieving free-growing status, the GBC may either waive the tenure holder’s obligation or provide funds under strictly monitored conditions to redevelop the damaged stand.⁷⁴⁷ The GBC-provided funds do not relieve the tenure holders of their obligations towards the property, and they retain the obligation to achieve a free-growing stand.⁷⁴⁸ The GBC, through the Land-Based Investment Strategy, pays tenure holders to complete maintenance and regeneration activities that the GBC itself would otherwise perform. Relief of an obligation or provision of funding may only be granted if the obligation to establish a free-growing stand cannot be met without “significant extra expense than would have been the case if the damage had not occurred.”⁷⁴⁹ Unlike a “blow down” in which the GBC financially incentivizes a tenure holder to harvest a stand of damaged, merchantable trees before they rot, this program involves repairing preharvest stands or stands that are so damaged as not to be harvestable. Although tenure holders have an obligation to achieve a free-growing stand, this program involves payments for activities to repair damage from eligible unique events such as wildfires, landslides, floods, *etc.* The legislation notes that for these types of extraordinary events, the GBC may distribute funds to repair stands, and thus these repairs are not activities that the tenure harvester normally would be responsible for in the normal operations of cutting down a harvestable tree.⁷⁵⁰ Based on this record information, Commerce determined that payments for these repair activities do not constitute a financial contribution that confers a benefit under 19 U.S.C. §§ 1677(5)(D)(i) and 1677(5)(E).⁷⁵¹

The COALITION alleged that the Section 108 program is a countervailable grant because the funding under the Section 108 program is undertaken as part of a tenure holder’s obligations under the program.⁷⁵²

Commerce responded that it lawfully determined that the Section 108 program is not countervailable based on available record evidence.⁷⁵³ The COALITION’s claim that tenure holders are obligated to establish free growing stands at any cost, regardless of the magnitude of damage caused by unpredictable adverse events that are beyond the control of a tenure holder, is not supported by the record evidence.⁷⁵⁴ The GBC stated that, with regard to activities performed to repair damaged stands, “the {GBC} pays the tenure holders to complete maintenance and

⁷⁴⁶ *Id.*

⁷⁴⁷ *Id.* at 205-206.

⁷⁴⁸ *Id.* at 206.

⁷⁴⁹ *Id.*

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.*

⁷⁵² COALITION 61.1 Brief at 121.

⁷⁵³ Commerce Vol. VI 61.2 Brief at 207.

⁷⁵⁴ *Id.*

regeneration tasks that the Crown itself would otherwise perform.”⁷⁵⁵ If the GBC is responsible for the costs associated with repairing and restoring damage caused by adverse and extreme events such as wildfires, landslides, and floods on tenure holders’ lands, then it follows that such activities are not within tenure holders’ obligations to establish free growing stands. Moreover, the GBC may contract with service providers to perform such repair activities on Crown land, and in this review, the GBC paid Canfor for qualifying repair activities on its tenures. Commerce noted that the record does not contain information indicating that the GBC paid Canfor more than adequate remuneration if this were considered the government purchase of a good, an allegation the COALITION never made.⁷⁵⁶

The Panel finds that the GBC was paying Canfor for an independent service that was not required as part of its tenure obligations. Given that the government purchase of services is not countervailable,⁷⁵⁷ the Panel finds that Commerce’s decision not to treat these payments as a grant is supported by substantial evidence and in accordance with law.

4. NEW BRUNSWICK

A. Workforce Expansion Program

The New Brunswick Workforce Expansion Program provides financial assistance to eligible businesses in New Brunswick in the form of wage subsidy rebates for new hires that are recent post-secondary graduates.⁷⁵⁸

The GNB argued that in conducting a *de facto* analysis, Commerce must look at the number of enterprises using a program, taking into account all relevant circumstances, such as the range of industries in the economy represented by participating users.⁷⁵⁹ The GNB noted that it had submitted information demonstrating that a wide range of industries used the program. Given that Commerce failed to consider this evidence, Commerce’s decision failed to follow the “rule of reason” as dictated by the SAA.⁷⁶⁰

Commerce responded that it properly conducted a *de facto* specificity analysis by comparing the number of enterprises that received assistance to the total number of corporate tax filers in New Brunswick.⁷⁶¹ Noting that this analysis showed that the program was used by only a small number of companies, Commerce argued that its conclusion was supported by evidence and in accordance with law.

⁷⁵⁵ *Id.*

⁷⁵⁶ *Id.*

⁷⁵⁷ 19 U.S.C. § 1677(5)(D)(iv) (limiting the definition of “financial contribution” to “purchasing goods”).

⁷⁵⁸ PDM at 51-52 (referencing *Lumber V Final Determination* PDM at 69-70).

⁷⁵⁹ GNB 61.1 Brief at 129-130.

⁷⁶⁰ *Id.* at 130.

⁷⁶¹ Commerce Vol. VI 61.2 Brief at 109.

As with the CCA program discussed above, the Panel's decision is guided by the CAFC's decision in *Government of Quebec*.⁷⁶² As discussed by the court, the SAA specifically authorized Commerce to use the total number of industries in the economy in question as the comparator group when evaluating whether a program was limited in use. Also, as the court noted, Commerce has regularly used this methodology in its *de facto* analysis in recent cases. Finally, as in *Quebec*, the facts also show, whether evaluated on a pure numeric or percentage basis, the program was not widely used in comparison to total corporate tax filers. Accordingly, the Panel finds that Commerce's specificity analysis was supported by substantial evidence and in accordance with law.⁷⁶³

B. Grants for Silviculture and License Management

The GNB reimbursed JDIL for forest management services (license management and silviculture) operations undertaken by JDIL on crown land.⁷⁶⁴ Commerce found that the reimbursement to JDIL under this program constituted a grant and therefore a countervailable subsidy.⁷⁶⁵

The GNB and JDIL contended that this reimbursement was not a countervailable subsidy for a variety of reasons. First, the GNB and JDIL claimed that this was payment for a service and as such was not countervailable.⁷⁶⁶ Even if it was not payment for a service, the GNB and JDIL both argued that Commerce should not have countervailed this program because Commerce's decision was based on a misunderstanding of the nature of these payments and other unsupported assumptions.⁷⁶⁷ To this end, the GNB and JDIL argued that: 1) JDIL would not have performed this service for free; 2) other sublicensees also benefited from this program; and 3) the action taken by JDIL benefited the public good, not only JDIL.⁷⁶⁸

Commerce did not dispute that "purchasing services" is not a financial contribution but found that the reimbursement in question did not constitute "purchasing services."⁷⁶⁹ Rather, according to Commerce, the funds are payments for activities that JDIL would have performed absent

⁷⁶² *Government of Quebec*, 105 F.4th 1359, 1374-1375.

⁷⁶³ As more fully explained *supra* at n. 548, Panelist Williamson would remand this issue to Commerce with instructions to comply with the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii) and take into account the criteria set forth therein.

⁷⁶⁴ GNB 61.1 Brief at 89; JDIL 61.1 Brief at 40.

⁷⁶⁵ IDM at 281-282.

⁷⁶⁶ GNB 61.1 Brief at 91-93; JDIL 61.1 Brief at 40-44. The GNB cited to the *Eurodif* decision mainly for the undisputed proposition that purchasing services is not countervailable. The court in *Eurodif* found that uranium enrichment was a service, not a good, noting that the enrichers never obtained ownership of either the unenriched uranium feed or of the final low-enriched uranium product. *See Eurodif v. United States*, 411 F.3d 355, 1365 (Fed. Cir. *aff'd on reh'g*, 423 F.3d 1275 (Fed. Cir. 2005)).

⁷⁶⁷ GNB 61.1 Brief at 93-106; JDIL 61.1 Brief at 44-48.

⁷⁶⁸ *Id.*

⁷⁶⁹ Commerce Vol. VI 61.2 Brief at 118.

payments from the GNB, because silviculture and license management activities involve the renewal and maintenance of forestry land, *i.e.*, the management of JDIL's input and supply chain. Furthermore, the ultimate responsibility for performing these activities rests with JDIL pursuant to its agreement with the GNB. JDIL, which has held a license with the government for many years, has the mandate and ultimate responsibility to carry out basic silviculture and license management activities.⁷⁷⁰

In this case, the GNB is not paying an independent forest management company to perform certain services to maintain the forest. Rather, JDIL is required to incur certain silviculture and management expenses as a part of its license to harvest timber, and the GNB is reimbursing a part of those expenses. The Panel finds that the GNB is therefore not "purchasing services" as the Canadian parties allege.

With respect to the Canadian parties' other arguments, the *Preamble* to the 1998 CVD Regulations provides an example of a benefit that is like the situation here:

As we explained in the preamble to the 1997 Proposed Regulations, the determination of whether a benefit is conferred is completely separate and distinct from an examination of the "effect" of a subsidy. In other words, a determination of whether a firm's costs have been reduced or revenues have been enhanced bears no relation to the effect of those cost reductions or revenue enhancements on the firm's subsequent performance, such as its prices or output. In analyzing whether a benefit exists, we are concerned with what goes into a company, such as enhanced revenues and reduced-cost inputs in the broad sense that we have used the term, not with what the company does with the subsidy. Our emphasis on reduced-cost inputs and enhanced revenues is derived from elements contained in the examples of benefits in section 771(5)(E) of the Act and in Article 14 of the SCM Agreement. In contrast, the effect of government actions on a firm's subsequent performance, such as its prices or output, cannot be derived from any elements common to the examples in section 771(5)(E) of the Act or Article 14 of the SCM Agreement. For example, assume that a government puts in place new environmental restrictions that require a firm to purchase new equipment to adapt its facilities. Assume also that the government provides the firm with subsidies to purchase that new equipment, but the subsidies do not fully offset the total increase in the firm's costs—that is, the net effect of the new environmental requirements and the subsidies leaves the firm with costs that are higher than they previously were. In this situation, section 771(5B)(D) of the Act, which deals with one form of non-countervailable subsidy, makes clear that a subsidy exists. Section 771(5B)(D) of the Act treats the imposition of new environmental requirements and the subsidization of compliance with those requirements as two separate actions. A subsidy that reduces a firm's cost of compliance remains a subsidy (subject, of course, to the statute's remaining tests for countervailability), even though the overall effect of the two government actions, taken together, may leave the firm with higher costs. As another

⁷⁷⁰ *Id.* at 115-121.

example, if a government promulgated safety regulations requiring auto makers to install seat belts in back seats, and then gave the auto makers a subsidy to install the seat belts, we would draw the same conclusion. In the two examples, the government action that constitutes the benefit is the subsidy to install the equipment, because this action represents an input cost reduction. The government action represented by the requirement to install the equipment cannot be construed as an offset to the subsidy provided to reduce the costs of installing the equipment.⁷⁷¹

Likewise, here, the GNB has a requirement that JDIL must undertake silviculture and management operations. The GNB separately reimburses these costs. Similar to the two examples provided in the *Preamble*, the GNB is undertaking two separate actions. First, the government imposes a requirement related to silviculture and license management. Separately, the government provided a subsidy to pay for these expenses. As the *Preamble* makes clear, the imposition of the requirement and the subsidization of compliance with those requirements are two separate actions. The payment to the company remains a subsidy.

Moreover, JDIL's actions were primarily directed toward meeting obligations tied to its harvesting operations, rather than providing a general public service or fulfilling an unrelated governmental function. This distinction reinforces Commerce's approach, focusing on the benefit received by the company through cost reduction in its business operations. Accordingly, the reimbursements provided for silviculture and management expenses directly impacted JDIL's financial position, supporting the determination that a countervailable benefit was present.

In sum, under the *Preamble*,⁷⁷² this reimbursement is a countervailable benefit. The Panel therefore sustains Commerce's determination regarding the silviculture and license management program.

5. ONTARIO

A. Target Green House Gas Program

The TargetGHG Industrial Demonstration ("TargetGHG") program was developed to reduce greenhouse gas ("GHG") emissions, increase energy efficiency, and support local economic development by funding collaborative projects that partner large industrial emitters with smaller Ontario-based technology solution providers. To receive the grant, a TargetGHG applicant "must be an Ontario-based industrial emitter." Commerce treated these reimbursements as a countervailable grant.

The GOO and Resolute disputed Commerce's finding that the TargetGHG program is *de jure* specific. They argued that the program was not limited to any industries or enterprises and also

⁷⁷¹ *CVD Preamble* at 65,361.

⁷⁷² The court regularly cites to the *CVD Preamble* recognizing it as an appropriate tool for interpreting Commerce's regulations. See e.g., *Nucor Corp. v. United States*, 633 F. Supp. 3d 1302, 1312 (Ct Int'l Trade 2023); *Hyundai Steel Co. v. United States*, Slip Op. 24-55, at 9, n.9 (Ct. Int'l Trade May 2, 2024).

was not limited to assisting a distinct group of large industrial emitters.⁷⁷³ Commerce, however, determined that eligibility required participants to be Ontario-based industrial emitters, making the program exclusive to this group and thus creating a discrete class of beneficiaries.⁷⁷⁴

The Panel finds that the TargetGHG program is limited and not open to all industries. “The foremost eligibility criterion for a TargetGHG program applicant is that it must be an Ontario-based industrial emitter.”⁷⁷⁵ Further, the GOO confirmed that the TargetGHG program was available to companies in Ontario that were large emitters and explained that the “TargetGHG {Industrial Demonstration Program} encourages *large industrial* emitters to adopt and implement leading-edge technologies to reduce their emissions.”⁷⁷⁶ Commerce also reported that the program was not offered to the transportation, commercial or residential sectors.⁷⁷⁷ By limiting the program to only large industrial emitters, the TargetGHG program is not open to all industries, companies, or sectors in Ontario. Therefore, because of these explicit restrictions, the Panel finds that Commerce’s determination that the TargetGHG program is specific under 19 U.S.C. § 1677(5A)(D)(i) is supported by substantial evidence and in accordance with law.

B. Ontario Forest Roads Funding Program and the Québec Multi-Use Path Cost Reimbursement Program

In Ontario, harvesters of Crown timber are responsible for constructing and maintaining provincially owned public access roads in Crown forests. The Province of Ontario holds title to the roads constructed.⁷⁷⁸ Through the Ontario Forest Roads Funding Program (“OFRFP”) the GOO reimburses a share of the costs of building and maintaining the roads.⁷⁷⁹ Similarly, through the Multi-Use Path Cost Reimbursement Program (“MCRP”) the GOQ provides reimbursements of up to 90 percent of the costs of construction, improvement, and repairs of multi-use public access roads in the public forest to TSG-holders, buyers of timber on the open market, holders of a forestry permit stipulated in section 73 of the SFDA, Rexforêt, and holders of an over-the-counter contract for timber.⁷⁸⁰ Commerce treated these reimbursements as a countervailable grant.

The GOA, the GOQ, and Resolute objected to Commerce’s decision to countervail these programs. As a whole, the Canadian parties raised several arguments: 1) Commerce’s treatment of the “in-kind” costs when calculating stumpage is inconsistent with its treatment of these payments as grants; 2) Commerce should rely on its findings in *Lumber IV* as precedent for determining the countervailability of the OFRFP; 3) a grant is not countervailable because it is the

⁷⁷³ GOO Vol. II 61.1 Brief at 70; Resolute 61.1 Brief at 165.

⁷⁷⁴ Commerce Vol. VI 61.2 Brief at 129.

⁷⁷⁵ IDM at 287-288.

⁷⁷⁶ *Id.* at 288 (emphasis added).

⁷⁷⁷ *Id.*

⁷⁷⁸ GOO Vol. II 61.1 Brief at 3.

⁷⁷⁹ *Id.* at 3-4.

⁷⁸⁰ IDM at 298.

same as a gift, and the reimbursements provided pursuant to the MCRP and OFRFP are not a benefit; 4) Resolute is performing a service for the GOQ and GOO; 5) a benefit cannot exist if Resolute is only partially compensated.⁷⁸¹

Commerce argued that the GOQ's MCRP and the GOO's OFRFP conferred a benefit on Resolute as a grant in the amount of payments because the payments offset a portion of the legally required costs incurred by harvesters within their ordinary course of business.⁷⁸² Commerce also rebutted the other arguments raised by the Canadian parties.⁷⁸³

The situation here is similar to that described above with respect to the GNB's payment related to silviculture and license management. Similar to the program in New Brunswick, here, the GOO and the GOQ have a requirement that harvesters must undertake road construction activities. In this case, the GOO and the GOQ are not paying a road paving company to build roads. Resolute is required to incur certain expenses to harvest timber on crown land, and the GOO and GOQ are reimbursing a part of those expenses. Moreover, Resolute's actions were primarily directed toward meeting obligations tied to its harvesting operations, rather than providing a general public service or fulfilling an unrelated governmental function. This distinction reinforces Commerce's approach, focusing on the benefit received by the company through cost reduction in its business operations. Accordingly, the reimbursements provided for road building directly impacted Resolute's financial position, supporting the determination that a countervailable benefit was present. Whether the reimbursement is partial or comprehensive does not change the fact that a benefit was provided. Under the *Preamble*,⁷⁸⁴ the partial reimbursement is a countervailable benefit.

The Canadian parties contend that Commerce erred in its determination because the dictionary defines a "grant" as a gift for which no reciprocal obligation exists. Thus, Resolute argues that payments were not grants because "valuable consideration was exchanged" in contravention of the ordinary dictionary definition of a grant.⁷⁸⁵ The GOQ similarly argues: "{u}nlike a grant, which is 'given,' MCRP reimbursements are made for services rendered."⁷⁸⁶ These arguments concerning the definition of a grant overlap with the arguments that these payments were made for a service, and both arguments fail for the same reason. The fundamental error lies in their claim that the governments are paying Resolute for road building. It bears repeating that the government is not paying Resolute to build roads. Resolute is required to build the roads regardless of whether the government gives them a grant. Building the roads is a condition of being able to harvest the timber. Thus, the reimbursements are not payment for a service, but the transfer of funds for a particular purpose, that is, to reimburse Resolute for some

⁷⁸¹ GOO Vol. II 61.1 Brief at 31-46; GOQ Vol. II 61.1 Brief at 91-92; Resolute 61.1 Brief at 118-125.

⁷⁸² Commerce Vol. VI 61.2 Brief at 166 (citing IDM at 286, 298-99).

⁷⁸³ *Id.* at 166-170.

⁷⁸⁴ *CVD Preamble* at 65,361.

⁷⁸⁵ Resolute 61.1 Brief at 103, 119.

⁷⁸⁶ GOQ Vol. II 61.1 Brief at 91.

of the costs it is legally obligated to incur. As quoted by the Canadian parties, the dictionary definition of grant indicates that a grant is essentially a gift with a “particular purpose.”⁷⁸⁷ Here the particular purpose is to reimburse the companies for costs that they are otherwise legally required to incur. Furthermore, Resolute was not required to pay back this grant, thereby distinguishing it from other transfers of funds, such as a loan. Thus, the grants given to these parties fall within the dictionary definition of the term.

Additionally, the CVD law does not state that a grant must be given without consideration. The key statutory factors are that the grant is a financial contribution from a foreign government, that it is specific to a particular industry or company, and that it provides a benefit to producers, manufacturers, or exporters of goods that harms the domestic industry in the importing country. Similarly, the regulations state that Commerce will “measure the extent to which a financial contribution (or income or price support) confers a benefit” as provided for the specific type of benefit described under the regulations.⁷⁸⁸ Thereafter, the regulations expressly dictate that “{i}n the case of a grant, a benefit exists in the amount of the grant.”⁷⁸⁹ Here, Resolute is reimbursed for the construction and repair of roads in public forest areas while continuing to perform its harvesting activities. Thus, any reimbursement of the associated cost in the normal course of business is a benefit to Resolute. Commerce properly found that this amount of money was a financial contribution from the government, was specific, and provided a benefit to Resolute.

The Panel does not agree that Commerce was bound by a decision in a prior review. Each administrative record stands on its own, and the facts surrounding Commerce in different proceedings do not dictate whether Commerce will reach the same determination.⁷⁹⁰

Finally, the Panel does not agree that Commerce’s decision with respect to in-kind costs in establishing the benchmark contradicts its finding with respect to grants for road construction. In fact, the Panel finds that the Canadian parties’ arguments with respect to in-kind costs and the benchmark are at odds with its arguments regarding the countervailability of these grants. The Canadian parties argue that these in-kind costs should be added to the stumpage price because they had no choice but to incur these costs. In other words, these costs are a requirement for securing timber. Yet, for purposes of analyzing the grant of funds related to these costs, the Canadian parties argue that these costs are simply a service being provided, not a requirement for securing timber. For both of these issues, however, the Panel agrees with Commerce. These activities are required as part of securing long-term harvesting rights and therefore their reimbursement are grants within the meaning of the statute.

⁷⁸⁷ *Id.*; Resolute 61.1 Brief at 119, n.207.

⁷⁸⁸ 19 C.F.R. § 351.503.

⁷⁸⁹ 19 C.F.R. § 351.504.

⁷⁹⁰ *See Qingdao Sea-Line Trading Co., Ltd., v. United States*, 766 F.3d 1378, 1387 (Fed. Cir. 2014) (“{E}ach administrative {proceeding} is a separate exercise of Commerce’s authority that allows for different conclusions based on different facts in the record”); *See also Yama Ribbons and Bows Co., Ltd. v. United States*, 865 F. Supp. 2d 1294, 1298 (Ct. Int’l Trade 2012) (“Commerce must base its decisions on the record before it in each individual investigation”).

In sum, Commerce's determination was supported by substantial evidence and in accordance with law.

6. QUÉBEC

A. Partial Cut Investment Program

Under the Partial Cut Investment Program ("PCIP"), harvesters are compensated by the GOQ for the increased costs incurred by a mandated partial cut (removing less than 50 percent of the volume of stand) compared to the more common, efficient and cheaper clear-cut.⁷⁹¹ Commerce treated these reimbursements as a countervailable grant.

The GOQ and Resolute contended that the PCIP does not confer a benefit to Resolute.⁷⁹² As it argued with respect to the roadworks projects, the Canadian parties claimed that the payment was not a "gift" and therefore cannot be considered a grant, that Resolute was performing a service, and that Resolute was only partially compensated for its costs, and that Commerce's treatment of the constructed benchmark for stumpage and the countervailability of the PCIP are irreconcilable.⁷⁹³

As with its response to the arguments related to the GOQ's MCRP and the GOO's OFRFP, Commerce argued that the PCIP conferred a benefit on Resolute as a grant in the amount of payments because the payments offset a portion of the legally required costs incurred by harvesters within their ordinary course of business.⁷⁹⁴ Commerce also rebutted the other arguments raised by the Canadian parties.⁷⁹⁵

As with the GNB Silviculture program and the Ontario and Québec road construction programs, the GOQ has a requirement that harvesters must undertake only partial cuts of a stand of timber, rather than clear cut the stand which would incur lower costs per harvested log. The GOQ makes a partial reimbursement of the extra costs of partial cutting. The companies would not be allowed to harvest logs if they did not follow the government rules on partial cutting. Moreover, Resolute's actions were primarily directed toward meeting obligations tied to its harvesting operations, rather than providing a general public service or fulfilling an unrelated governmental function. This distinction reinforces Commerce's approach, focusing on the benefit received by the company through cost reduction in its business operations. Accordingly, the reimbursements provided directly impacted Resolute's financial position, supporting the determination that a countervailable benefit was present. Under the *Preamble*,⁷⁹⁶ the partial reimbursement is a countervailable benefit. Resolute's argument that a grant is synonymous with

⁷⁹¹ IDM at 294; GOQ Vol. II 61.1 Brief at 71-72; Resolute 61.1 Brief at 132.

⁷⁹² GOQ Vol. II 61.1 Brief at 74-78; Resolute 61.1 Brief at 129-136.

⁷⁹³ *Id.*

⁷⁹⁴ Commerce Vol. VI 61.2 Brief at 156-159.

⁷⁹⁵ *Id.*

⁷⁹⁶ *CVD Preamble* at 65,361.

a gift was addressed earlier with respect to the road construction reimbursements. Finally, as also discussed earlier, Commerce's treatment of in-kind costs with respect to the stumpage benchmark does not change the nature of this benefit provided to Resolute.

B. Paix des Braves Program

Under the Paix des Braves Program, the GOQ provides reimbursement to harvesters for the increased costs associated with harvesting restrictions pursuant to the Cree Nation Agreement.⁷⁹⁷ "Forestry companies are legally required to cut smaller blocks in a widely dispersed mosaic pattern and build additional roads."⁷⁹⁸ Commerce treated these reimbursements as a countervailable grant.

As with the PCIP program, the Canadian parties argued that the Paix des Braves payment was not a "gift" and therefore cannot be considered a grant, that Resolute was performing a service, and that Resolute was only partially compensated for its costs.⁷⁹⁹ The parties also argued that Commerce's treatment of the constructed benchmark for stumpage with respect to in-kind costs and the countervailability of the Paix des Brave program are irreconcilable.⁸⁰⁰

Commerce responded that the activities performed by Resolute under the Paix des Brave program are legally mandated and would have to be performed regardless of reimbursement. Thus, the payments provide a direct benefit to Resolute.⁸⁰¹ Commerce also responded that the issue regarding these in-kind costs related to the Nova Scotia benchmark are separate and unrelated to the fact that the harvesting restrictions under the Paix des Brave program are legally mandated.⁸⁰²

As with the other programs, including the PCIP program, the GOQ has a requirement that harvesters must follow certain restrictions when harvesting logs on Crown land. The GOQ makes a reimbursement for these costs. The companies would not be allowed to harvest logs if they did not follow the government rules. Under the *Preamble*, the partial reimbursement is a countervailable benefit.⁸⁰³ The Panel therefore sustains Commerce's determination regarding the Paix des Brave Program. Resolute's argument that a grant is synonymous with a gift and its argument related to in-kind costs was addressed earlier.

C. Investment Program in Public Forest Affected by Natural or Anthropogenic Disturbance

Under the Investment Program in Public Forests Affected by Natural or Anthropogenic Disturbance Program ("Investment Program"), the GOQ requires harvesters who hold TSGs, such

⁷⁹⁷ GOQ Vol. II 61.1 Brief at 80.

⁷⁹⁸ IDM at 296.

⁷⁹⁹ GOQ Vol. II 61.1 Brief at 82-85; Resolute 61.1 Brief at 129-136.

⁸⁰⁰ Resolute 61.1 Brief at 136.

⁸⁰¹ Commerce Vol. VI 61.2 Brief at 160-162.

⁸⁰² *Id.* at 162.

⁸⁰³ *CVD Preamble* at 65,361.

as Resolute, to perform reforestation and land stewardship activities to maintain the long-term health of the forest areas, including selective cutting of timber. Harvesters are compensated for the additional costs associated with performing salvage operations to preserve the health of the forest.⁸⁰⁴ Commerce treated these reimbursements as a countervailable grant.

As with the other programs, the GOQ and Resolute argued that these payments were for services rendered and that the payments conferred no benefit on Resolute.⁸⁰⁵

As with the other programs, Commerce responded that the activities performed by Resolute under this program are legally mandated and would have to be performed regardless of reimbursement. Thus, the payments provide a direct benefit to Resolute.⁸⁰⁶ Commerce also responded that the issue regarding these in-kind costs related to the Nova Scotia benchmark are separate and unrelated to the fact that the harvesting restrictions under this are legally mandated.⁸⁰⁷

As with the other programs, the GOQ has a requirement that harvesters must follow certain restrictions when harvesting logs on Crown land. The GOQ makes a reimbursement for these costs. The companies would not be allowed to harvest logs if they did not follow the government rules. Under the *Preamble*,⁸⁰⁸ the partial reimbursement is a countervailable benefit. For all the other reasons discussed with respect to the other similar programs, the Panel therefore sustains Commerce's determination regarding the Anthropogenic Disturbance Program.

D. Contracts between Resolute and Rexforêt for Roadwork Activities

Pursuant to two contracts, Rexforêt paid Resolute to perform various roadwork activities.⁸⁰⁹ Commerce treated these reimbursements as a countervailable grant.

The GOQ argued that these payments conferred no benefit and were payments for a service.⁸¹⁰ Canadian parties argued that neither project provided a benefit to Resolute, the contract was for the performance of services, and the roadwork performed was similar to the non-countervailable project maintenance for Project 17-0212, and those performed in Western Canada.⁸¹¹

As with the other programs, Commerce responded that the activities performed by Resolute under these contracts are legally mandated and would have to be performed regardless of

⁸⁰⁴ IDM at 300.

⁸⁰⁵ GOQ Vol. II 61.1 Brief at 94-98; Resolute Brief at 145-146.

⁸⁰⁶ Commerce Vol. VI 61.2 Brief at 160-162.

⁸⁰⁷ *Id.* at 162.

⁸⁰⁸ *CVD Preamble* at 65,361.

⁸⁰⁹ IDM at 384-385.

⁸¹⁰ GOQ Vol. II 61.1 Brief at 98-103; Resolute 61.1 Brief at 125-129.

⁸¹¹ GOQ Vol. II 61.1 Brief at 99, Resolute 61.1 Brief at 129.

reimbursement. Thus, the payments provide a direct benefit to Resolute.⁸¹² Further, with respect to Project 17-09-212, Commerce noted that it was to upgrade the type of road already planned in Resolute's normal course of operations. With respect to the activities performed in Western Canada, the road and bridge work provided by Canfor in BC are activities beyond the forest management obligations of existing tenure holders in the province.⁸¹³ As with the other programs, the GOQ has a requirement that harvesters must follow certain restrictions when harvesting logs on Crown land. The GOQ makes a reimbursement for these costs. The companies would not be allowed to harvest logs if they did not follow the government rules. Under the *Preamble*,⁸¹⁴ the partial reimbursement is a countervailable benefit. With respect to the other projects, Commerce properly distinguished between projects that a harvester is required to do from those that have been separately requested by the government. Indeed, this dichotomy explains why Commerce's decision to countervail certain grants that reflect operations that are required contrasts with payments for projects that are simply requested by the government and unrelated to obligations related to harvesting operations. The Panel therefore sustains Commerce's determination regarding the contracts between Resolute and Rexforêt.

E. Wood Innovation Program

The Wood Innovation Program ("PIB") provides grants to stimulate research, innovation, and product diversification in the forest products industry.⁸¹⁵ Commerce found that the program was both *de jure* and *de facto* specific. According to Commerce, the Normative Framework is explicit in that an eligible applicant must be "specializing in the forest products industry" and the GOQ expressly limits access to the subsidy to particular enterprises, *i.e.*, entities specializing in the forest products industry.⁸¹⁶ Commerce also noted that the PIB is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act. The proprietary usage data for the POR that were provided by the GOQ indicate that the actual recipients of PIB grants on an enterprise basis are limited in number. Commerce further found that the projects funded under PIB are to enhance the value of wood fiber, diversify the products offered, promote the competitiveness of the forest industry, and increase or maintain the consumption of low-quality wood (hardwood or softwood) without qualification such that eligibility for this subsidy is not tied to non-subject merchandise⁸¹⁷

i) Waiver

The Canadian parties argued at the hearing that because Commerce did not respond to two arguments raised by the GOQ in respect of Commerce's attribution determinations on the PIB

⁸¹² Commerce Vol. VI 61.2 Brief at 146-148.

⁸¹³ *Id.* at 148-149.

⁸¹⁴ *CVD Preamble* at 65,361.

⁸¹⁵ GOQ Vol. II 61.1 Brief at 104-107.

⁸¹⁶ IDM at 303.

⁸¹⁷ *Id.*

program and the Cote-Nord L Rate program, Commerce waived its defense of these issues.⁸¹⁸ To support its argument concerning waiver, the Canadian parties referenced *Calgon Carbon Corporation v. United States*.⁸¹⁹ In that case, the court found that Commerce had waived its right to defend an issue when it failed to brief the issue in its response brief and failed to raise the issue at oral argument, noting that “{f}urther, Commerce and petitioners do not seem to desire {the} opportunity” to defend their position on the issue in question.⁸²⁰ By contrast, at the hearing in this case, Commerce acknowledged that it had failed to address the issues in its brief but noted that this was an oversight and an inadvertent error, not intentional waiver. Commerce also stated that it stood by its decision in the IDM and defended its position at the hearing.⁸²¹ Commerce pointed to *Novosteel v. United States*,⁸²² for the general proposition that fairness and procedure should determine whether an issue is waived. The Panel finds that the inadvertent error by the government in this instance does not constitute waiver, especially in light of the vast number of affirmative issues raised by the parties in this proceeding. Furthermore, all parties had an opportunity to present their arguments at the hearing. Accordingly, the Panel will consider these issues.

ii) Specificity

The GOQ argued that the PIB is neither *de jure* nor *de facto* specific because it is not limited to any specific industry in Québec and there is a broad range of recipients.⁸²³

In the IDM, Commerce determined that the program is *de jure* specific because its Normative Framework explicitly limits eligibility to enterprises “specializing in the forest products industry.”⁸²⁴ Commerce also found that the program was *de facto* specific because the users were limited in number. In its brief, the COALITION supported Commerce’s specificity finding arguing that an express limitation on who may access the subsidy satisfies the statutory requirement for *de jure* specificity, regardless of how many subsectors might exist within the forestry industry.⁸²⁵

The Panel upholds Commerce’s determinations regarding the PIB. Commerce properly found the program to be *de jure* specific based on the express limitations in the program’s Normative Framework restricting applicants to entities “specializing in the forest products

⁸¹⁸ Hearing Tr. Day 3 at 155-156.

⁸¹⁹ *Calgon Carbon Corporation v. United States*, 145 F. Supp. 3d 1312, 1321 (Ct Int’l Trade 2016).

⁸²⁰ *Id.*

⁸²¹ Hearing Tr. Day 3 at 169-170.

⁸²² *Novosteel SA v. United States*, 284 F.3d 1261, 1273-1274 (Fed. Cir. 2002).

⁸²³ GOQ Vol. II 61.1 Brief at 104-106.

⁸²⁴ IDM at 302-303.

⁸²⁵ COALITION 61.2 Brief at 225.

industry.”⁸²⁶ The program is thereby limited by law and thus *de jure* specific. Furthermore, the program is limited in number and therefore *de facto* specific.⁸²⁷

iii) Attribution

Resolute and the GOQ argued that the PIB is not countervailable in this proceeding because it was explicitly tied to the creation of non-subject merchandise and conferred no benefit to the production of softwood lumber.⁸²⁸ Resolute provided record evidence demonstrating that its participation in the PIB was tied entirely to its Alma and Kénogami paper mills, which are only equipped to produce pulp and paper and cannot produce lumber.⁸²⁹ Resolute argued that its approved applications were strictly for the development of new pulp and paper-derived products, and that none of its softwood lumber mills participated in or received funding from the program.⁸³⁰ Therefore, under 19 C.F.R. § 351.525(b)(5), the Canadian parties argued that Commerce was legally required to attribute the subsidy solely to the non-subject pulp and paper products to which it was tied at the time of bestowal.

Commerce and the COALITION rejected this argument, determining that the subsidy was untied and thus attributable to Resolute’s total sales. In this regard also, Commerce based its decision on the PIB’s Normative Framework, which states the program’s purpose is to “stimulate the implementation of innovative projects in the forest products industry” and defines the forest industry broadly to include “pulp, paper and bioproducts, panels, sawmill, wood construction and bioenergy sectors.”⁸³¹ Relying on this framework, the COALITION argued that the PIB supports the forest products industry as a whole and was not statutorily restricted solely to non-subject merchandise, meaning that Commerce correctly concluded the funding was untied and attributable to all sales.⁸³²

Commerce’s decision to attribute the research grants to Resolute’s total sales is supported by substantial evidence. Under 19 C.F.R. § 351.525(b)(5), a subsidy is only tied to a particular product when the intended use is known and acknowledged prior to or concurrent with the bestowal. Commerce reasonably relied on the PIB’s Normative Framework, which defines the eligible industry broadly to include sawmills and wood construction. Because the program’s foundational architecture supports the “forest industry” as a whole, rather than being prescribed by the government for non-subject merchandise, Commerce reasonably determined that the grants

⁸²⁶ 19 U.S.C. § 1677(5A)(D)(i); IDM at 303.

⁸²⁷ As more fully explained *supra* at n. 548, Panelist Williamson would remand this issue to Commerce with instructions to comply with the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii) and take into account the criteria set forth therein.

⁸²⁸ Resolute 61.3 Brief at 61-63; GOQ Vol. II 61.1 Brief at 107.

⁸²⁹ Hearing Tr. Day 3 at 189-190; Resolute 61.3 Brief at 61-63.

⁸³⁰ Hearing Tr. Day 3 at 190; Resolute 61.3 Brief at 62.

⁸³¹ IDM at 303.

⁸³² COALITION 61.2 Brief at 332-333.

functioned as untied funding attributable to Resolute's total sales.⁸³³ Commerce's determination is sustained.

F. Workforce Skills Development and Recognition Fund and Manpower Training Measures

The Workforce Skills Development and Recognition Fund ("FDRCMO"), is administered by Emploi-Québec, which is a department within Québec's Ministry of Work, Employment, and Social Solidarity ("MTESS"). The FDRCMO targets training in the workplace, raising skill levels, and the improvement of a business' competitiveness. Resolute received payments under the FDRCMO in 2017 and 2018.⁸³⁴ Similar to the FDRCMO, the Manpower Training Measures ("MFOR") is a grant program administered by Emploi-Québec. The purpose of the MFOR is to support skills development for workers at risk of losing their jobs and to support low-skilled workers who want to improve basic training. Resolute and Mauricie, Resolute's cross-owned affiliate, received grants under the MFOR in 2017 and 2018.⁸³⁵ Commerce treated these payments as a countervailable grant, finding that the programs were *de facto* specific and that Resolute received a nonrecurring benefit from these payments.

i) Specificity

The GOQ and Resolute argued that Commerce erred in finding these programs *de facto* specific because evidence on the record demonstrated that the actual users of the FDRCMO and MFOR programs are not limited in number, are widely available, and that the sawmill industry is not a predominant user of the programs.⁸³⁶

Commerce responded that data submitted by the GOQ indicate that a small number of companies received grants under both the FDRCMO and MFOR program each year from 2014 through 2018, when compared to the total number of companies operating and/or established in Québec or to the total number of companies that filed an income tax return in Québec for the years 2014 through 2018.⁸³⁷

As with the programs discussed above, the Panel's decision is guided by the CAFC's decision in *Government of Quebec*.⁸³⁸ As discussed by the court, the SAA specifically authorized Commerce to use the total number of industries in the economy in question as the comparator group when evaluating whether a program was limited in use. Also, as the court noted, Commerce has regularly used this methodology in its *de facto* analysis in recent cases. Finally, as in *Québec*, the facts also show, whether evaluated on a pure numeric or percentage basis, the program was not

⁸³³ 19 C.F.R. § 351.525(b)(3); IDM at 303

⁸³⁴ PDM at 57.

⁸³⁵ *Id.* at 58.

⁸³⁶ GOQ Vol. II 61.1 Brief at 110; Resolute 61.1 Brief at 165.

⁸³⁷ Commerce Vol. VI 61.2 Brief at 152.

⁸³⁸ *Government of Quebec*, 105 F.4th 1359, 1374-1375.

widely used in comparison to total corporate tax filers. Accordingly, the Panel finds that Commerce's specificity analysis was supported by substantial evidence and in accordance with law.⁸³⁹

ii) Recurring Benefit

The GOQ also contended that Commerce erred in treating these programs as nonrecurring. The GOQ noted that FDRCMO and MFOR are worker training programs and the regulations note that these types of programs are presumptively recurring.⁸⁴⁰ The GOQ argued that Commerce does not have "unilateral authority" to override the regulatory presumption that a "work training" program is recurring unless a party raises an objection.⁸⁴¹

Commerce responded that it treated the program as non-recurring because assistance under these programs is not automatic; each grant must be applied for and receive separate government approval.⁸⁴²

Commerce's regulations discuss the distinction between recurring and nonrecurring programs. The regulations explain the circumstances under which a program would be deemed nonrecurring:

- (i) Whether the subsidy is exceptional in the sense that the recipient cannot expect to receive additional subsidies under the same program on an ongoing basis from year to year;
- (ii) Whether the subsidy required or received the government's express authorization for approval (*i.e.*, receipt of benefits is not automatic); or
- (iii) Whether the subsidy was provided for, or tied to, the capital structure or capital assets of the firm.⁸⁴³

While the Panel agrees that the third criterion does not apply, Commerce pointed to evidence in the record that showed that under the FDRCMO and MFOR programs, a company must submit a separate application for consideration of each worker training project, and that express approval by MTESS is required for each project to receive the grants.⁸⁴⁴ Once the application is approved,

⁸³⁹ As more fully explained *supra* at n. 548, Panelist Williamson would remand this issue to Commerce with instructions to comply with the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii) and take into account the criteria set forth therein.

⁸⁴⁰ GOQ Vol. II 61.1 Brief at 117-121.

⁸⁴¹ *Id.* at 119.

⁸⁴² Commerce Vol. VI 61.2 Brief at 154-155.

⁸⁴³ 19 C.F.R. § 351.524(c)(2).

⁸⁴⁴ IDM at 309.

the company and MTESS enter into an agreement of one to three years with terms to be discussed and negotiated between the company and the GOQ.⁸⁴⁵

The Panel agrees that these facts indicate that the recipient cannot expect to receive additional subsidies year after year, assistance under FDRCMO and MFOR is not automatic, and approval is required. The regulations themselves make clear that the list of recurring and nonrecurring subsidies is only intended to be illustrative and nonbinding. This point was also made clear in the CVD Preamble which discussed at length the process by which Commerce would decide whether a subsidy is recurring or nonrecurring.⁸⁴⁶ The recurring subsidies are typically those that would be renewed automatically. Once Commerce has determined that the subsidy is not automatic, the regulations provide that this subsidy should be treated as nonrecurring. Accordingly, the Panel upholds Commerce's finding that the FDRCMO and MFOR programs are non-recurring subsidies.

VIII. ENERGY GRANT PROGRAMS

All five provinces have energy programs related to the use, production and purchase of energy that Commerce found to provide countervailable subsidies.

1. ALBERTA BPP

The Alberta Parties alleged that Commerce erred in determining that the funding received by West Fraser under the Alberta Bioenergy Producer Program ("BPP"): (1) was not tied to any particular product; and that (2) the benefit should be attributed to West Fraser's overall production. The Alberta Parties maintained that the BPP funding was specifically tied to the production of non-subject merchandise (bioenergy products heat and electricity) and therefore should have been attributed only to production and sales of heat and electricity from bioenergy.⁸⁴⁷ In their Joint Brief, the Canadian Parties rejected Commerce's analysis for attributing BPP to all products produced by West Fraser, arguing that Commerce based its tying decision on "speculation" about potential use of inputs.⁸⁴⁸

The Alberta Parties pointed to 19 C.F.R. § 351.525(b)(i), which specifies that "{i}f a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product". They observed further, noting that Commerce correctly stated as much in the IDM, that in determining whether a subsidy is "tied", the "relevant inquiry is 'the purpose of the subsidy based on information available at the time of bestowal' (*i.e.*, when the terms for the provision are set), and not on how the firm has actually used the subsidy."⁸⁴⁹

⁸⁴⁵ *Id.*

⁸⁴⁶ *CVD Preamble* at 65,393.

⁸⁴⁷ GOA Vol. II 61.1 Brief at AB-II-21–AB-II-22.

⁸⁴⁸ Canadian Parties Vol. I 61.1 Brief at 123.

⁸⁴⁹ GOA Vol. II 61.1 Brief at AB-II-22.

The Alberta Parties asserted that the bestowal documents, including the program guidelines, application, and agreement between West Fraser and the GOA “expressly set forth the linkage between the purpose of the BPP—to ‘support bioenergy production that leads to greenhouse gas reduction when compared to a conventional alternative’—and the funding provided to West Fraser for exactly that kind of bioenergy production.”⁸⁵⁰ They referred to the Preamble of the agreement between Blue Ridge Lumber and the GOA, which provides that the BPP forms “part of its plan to support bioenergy production capacity in Alberta in order to reduce greenhouse gas emissions from the use of fossil fuel alternatives ...”.⁸⁵¹ The Alberta Parties also maintained that the agreement stipulates that funding is linked to “Eligible Production”, defined as “the quantity of ‘Eligible Bioenergy Product’ produced at the facility.”⁸⁵² Eligible Bioenergy Product is defined as the Bioenergy Product identified in Schedule A to the funding application; Schedule A indicates that for Blue Ridge Lumber, “heat” is the bioenergy product.⁸⁵³

Commerce stated in the IDM that it examined the documents relied upon by the Alberta Parties and found “no evidence in these documents indicating that BPP grants are tied to non-subject merchandise at the time of bestowal.”⁸⁵⁴ It also asserted that bestowal documents “do not indicate that approval is linked to any specific product” and that “the documents related to the BPP indicate that the program is intended for bioenergy producers, and there is no limitation on the type of production necessary to qualify, as bioenergy is a byproduct of the production process.”⁸⁵⁵ Commerce further claimed that West Fraser stated in its questionnaire that the funding application form “proposed to use burn biomass residuals from the sawmill process (hog fuel and sawdust) to produce heat”⁸⁵⁶ and it deduced therefrom that West Fraser’s lumber production “may generate”⁸⁵⁷ the relevant biofuels as a byproduct. Commerce concluded that the BPP funding “was not tied to the production or sale of a specific product” and instead was “intended to benefit West Fraser’s production of energy, which is used to power West Fraser’s operations.”⁸⁵⁸ Commerce ultimately determined “pursuant to 19 C.F.R. 351.525(b)(5)(ii)”⁸⁵⁹ that it would attribute the funding benefits to West Fraser’s overall production. Commerce did not elaborate on its reliance on 19 C.F.R. § 351.525(b)(5)(ii); the Panel notes that this provision is an “exception” to the “tied” rule providing

⁸⁵⁰ *Id.* at AB-II-23.

⁸⁵¹ *Id.*

⁸⁵² *Id.* at AB-II-23–AB-II-24.

⁸⁵³ *Id.* at AB-II-24.

⁸⁵⁴ IDM at 264.

⁸⁵⁵ *Id.*

⁸⁵⁶ *Id.* at 264, n. 1338.

⁸⁵⁷ *Id.* at 264.

⁸⁵⁸ *Id.*

⁸⁵⁹ *Id.*

that “if a subsidy is tied to production of an input product, then the Secretary will attribute the subsidy to both the input and downstream products produced by a corporation.”

Commerce submitted before the Panel that the Canadian Parties “provided insufficient information to support its assertion” that “the Final Results do not identify a valid basis for the application of the ‘input product’ exception.”⁸⁶⁰

The COALITION asserted that the argument of the Alberta Parties that payments under the BPP are tied to bioenergy production is “meritless”,⁸⁶¹ arguing that the funding was received “to carry out a project that would allow the sawmill to ‘burn biomass residuals from the sawmill process ...’”.⁸⁶² It relied on a statement in West Fraser’s application indicating that lumber is dried in kilns using bioenergy generated by burning residual biomass. The COALITION thus maintained that the evidence supports Commerce’s finding that the BPP funding “was not tied to the production or sale of a specific product, but rather was intended to benefit West Fraser’s production of energy, which is used to power West Fraser’s operations.”⁸⁶³

Having reviewed carefully the IDM, the relevant laws and regulations, and the arguments of the parties, the Panel remands Commerce’s determination in respect of whether the BPP funding is attributable to West Fraser’s overall production and whether the amounts received were not tied to the production of any particular product. Commerce acknowledged in the IDM that in determining whether funding is tied to the sale or production of a particular product, “the focus is on ‘the purpose of the subsidy based on information available at the time of bestowal’ ... and not on how a firm has actually used the subsidy”.⁸⁶⁴ Commerce claimed to have found no evidence in the bestowal documents indicating that the funds were tied to non-subject merchandise, yet Commerce recorded in the IDM that “the GOA required that the funding ... ‘only support bioenergy production that leads to greenhouse gas reduction when compared to a conventional alternative’ and that the ‘bioenergy product {must} lead {} to an emission reduction when compared to the conventional alternative’”.⁸⁶⁵

The Panel directs that Commerce explain how these statements support its conclusion that the bestowal documents do not support the argument that the funding was tied to the production of bioenergy products. The Panel also understands Commerce’s practice is not to base its tying determinations on events that occur after the subsidy is bestowed and thus the Panel requests Commerce to explain how it was relevant to its determination that West Fraser’s lumber production “may generate”⁸⁶⁶ the relevant biofuels as a byproduct.

⁸⁶⁰ Commerce Vol. VI 61.2 Brief at 102.

⁸⁶¹ COALITION 61.2 Brief at 336.

⁸⁶² *Id.* at 336-337.

⁸⁶³ *Id.* at 337 (quoting IDM at 264).

⁸⁶⁴ IDM at 263.

⁸⁶⁵ *Id.*

⁸⁶⁶ *Id.* at 264.

In addition, the Panel directs that Commerce elaborate on and explain its reliance on the “exception” set forth in 19 C.F.R. § 351.525(b)(5)(ii), which led Commerce to determine that it would attribute the funding benefits to West Fraser’s overall production. The Panel further directs that Commerce explain how funding the production of bioenergy products would fall under the exception and constitute funding tied to the production of an input.

2. BRITISH COLUMBIA’S EPAs

According to the PDM, pursuant to Energy Purchase Agreements (“EPAs”), the British Columbia Hydro & Power Authority (“BC Hydro”) purchased electricity from Independent Power Producers (“IPPs”). West Fraser reported that it had EPAs for its Fraser Lake and Chetwynd sawmills. Commerce found that the EPA program resulted in the purchase of goods for more than adequate remuneration (“MTAR”) and therefore constituted a subsidy.

A. Benchmark Used for MTAR Calculation

The GBC argued that Commerce used the wrong benchmark to measure the benefit received by West Fraser when it sold electricity to BC Hydro.⁸⁶⁷ Commerce explained that it applied the “benefit-to-the-recipient” standard, as outlined by the statute and the regulations, to determine which benchmark was appropriate to measure the benefit to the Respondents in this case.⁸⁶⁸ Commerce determined that the best measure of the benefit to the recipient standard “is the difference between the price at which BC Hydro provided the good (*i.e.*, the BC Hydro tariff rate), electricity, and the price at which BC Hydro purchased that same good.”⁸⁶⁹

In explaining its analysis in the IDM, Commerce noted that “the *CVD Preamble* for 19 C.F.R. § 351.512 does not address or reference the unusual situation before us with respect to the purchase of electricity for MTAR programs, where a government is both the provider and purchaser of the good.”⁸⁷⁰ Although the Panel agrees that the *CVD Preamble* did not identify this particular situation, it is not clear why the fact that BC Hydro both buys and sells electricity would result in a change to the usual MTAR analysis. In addressing the MTAR fact pattern, the *CVD Preamble* states that when a firm sells its goods to the government and “such goods are purchased for more than adequate remuneration, *the firm’s revenues are increased beyond what it would otherwise earn.*” Thus, the *CVD Preamble* states that the basic principle is that a benefit arises if the government pays more for the good than a respondent would otherwise earn in the absence of a government program. Thus, the transaction to be used for comparison must be based on the sale of the good by West Fraser. Using the price at which a governmental entity, BC Hydro, sells its electricity to West Fraser does not reflect a price that West Fraser would earn if it sold electricity outside the parameters of the government program. Accordingly, the Panel remands this matter to

⁸⁶⁷ GBC Vol. II 61.1 Brief at 19-29.

⁸⁶⁸ Commerce Vol. VI 61.2 Brief at 182.

⁸⁶⁹ *Id.*

⁸⁷⁰ IDM at 56.

Commerce to rely on a benchmark that reflects an appropriate measure of what West Fraser would otherwise earn on the sale in the absence of a government program.

B. Attribution

The GBC argued that Commerce wrongly attributed any subsidy to the production of softwood lumber because the payments were tied to the production of energy.⁸⁷¹ It cites to the regulation regarding the attribution of subsidies:

(b) *Attribution of subsidies*—(1) *In general*. In attributing a subsidy to one or more products, the Secretary will apply the rules set forth in paragraphs (b)(2) through (b)(7) of this section.

(2) *Export subsidies*. The Secretary will attribute an export subsidy only to products exported by a firm.

(3) *Domestic subsidies*. The Secretary will attribute a domestic subsidy to all products sold by a firm, including products that are exported.

(4) *Subsidies tied to a particular market*. If a subsidy is tied to sales to a particular market, the Secretary will attribute the subsidy only to products sold by the firm to that market.

(5) *Subsidies tied to a particular product*. (i) *In general*. If a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product.

(ii) *Exception*. If a subsidy is tied to production of an input product, then the Secretary will attribute the subsidy to both the input and downstream products produced by a corporation.⁸⁷²

The GBC argued that:

It would have been impossible for West Fraser to both sell the particular type of electricity sold to BC Hydro pursuant to the EPAs and use that same electricity as an input in its production of subject merchandise. In fact, once West Fraser sold the electricity under its EPAs to BC Hydro title to that electricity transferred to BC Hydro, which means that West Fraser needed to separately obtain electricity from the grid to power its facilities, including those involved in producing subject merchandise. These facts confirm that West Fraser could not have used the electricity generated at its Chetwynd and Fraser Lake facilities and sold to BC Hydro in the production of subject

⁸⁷¹ GBC Vol. II 61.1 Brief at 7.

⁸⁷² 19 C.F.R. § 351.525.

merchandise. Therefore, the exception for subsidies “tied to production of an input product” plainly does not apply.⁸⁷³

The Panel is not persuaded by the GBC’s argument. The statute explicitly provides that a benefit can be conferred “if such goods or services are provided for LTAR, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.”⁸⁷⁴ In the statute, “purchased” refers to goods being purchased from the recipient (*i.e.*, the softwood lumber producer), the equivalent to the GBC’s reference to electricity being “sold” by the recipient. Clearly, electricity that is “sold” by the recipient (*i.e.*, the softwood lumber producer) to an outside party cannot be itself used by the recipient, but its sale does not in itself remove it from potentially being a benefit conferred on the recipient. The fact that an input is produced at the facility can confer a benefit on the corporation as a whole.

Moreover, the input exception under the attribution rules is not expressly limited in the way GBC contends. Rather, the regulations state that if a subsidy is “tied” to an input product, Commerce will attribute the subsidy to both the input and downstream products produced by a corporation. Contrary to the GBC’s argument, the regulations do not specify that the exact input in question (the specific electricity sold to BC Hydro) must be directly used in the downstream product (softwood lumber). Rather, the subsidy tied to an input will be attributed to both the input and downstream product. Other parts of the *CVD Preamble* make clear that inputs are subject to different rules and are not subject to the strict interpretation proposed by the GBC.

As explained further below, when we talk about input costs in the context of the definition of benefit, we are not referring to cost of production in a strict accounting sense. Nor are we referring exclusively to inputs into subject merchandise. Instead, we intend the term “input” to extend broadly to any input into a firm that produces subject merchandise.⁸⁷⁵

As this discussion makes clear, a subsidy to an input, any input, benefits the firm as a whole. Therefore, the *CVD Preamble* makes clear that subsidies to inputs will generally be included in the company-wide CVD calculation.

For its part, Commerce responded that:

Instead, the GBC attempts to make a distinction that West Fraser is selling electricity to BC Hydro, and therefore, that sale is tied to the sale of electricity, and thus cannot be attributed to the production of subject merchandise. GBC Vol. II at 9. However, this argument ignores the relationship between West Fraser and BC Hydro here, and *the reason that Commerce found these EPAs countervailable: West Fraser is both buying electricity from, and selling electricity to, BC Hydro*. IDM at 52. West Fraser’s sawmills purchase electricity from BC Hydro at the BC Hydro rate, a tariff in effect during this

⁸⁷³ GBC Vol. II 61.1 Brief at 8-9.

⁸⁷⁴ 19 U.S.C. § 1677(5)(E)(iv).

⁸⁷⁵ *CVD Preamble* at 65,360.

period of review. *Id.* These mills then sell electricity back to BC Hydro under its EPAs at a non-market based price, as explained above. See PDM at 85. Commerce found that BC Hydro was purchasing electricity at more than adequate remuneration *because of the difference between the selling and purchase prices*, and that this revenue benefits the overall operations of the company. IDM at 55-57; 239-41.⁸⁷⁶

As quoted above, “Commerce found that BC Hydro was purchasing electricity at more than adequate remuneration *because of the difference between the selling and purchase prices, and that this revenue benefits the overall operations of the company.*”⁸⁷⁷ Further, Commerce indicated that the reason it attributed the sale of electricity to West Fraser’s overall operations is because “*West Fraser is both buying electricity from, and selling electricity to, BC Hydro here.*”⁸⁷⁸ As discussed earlier with respect to the MTAR calculation, the Panel does not agree that Commerce properly evaluated whether the GBC was purchasing electricity from West Fraser at MTAR by comparing that purchase price to the GBC’s own sales price. Similarly, the Panel finds that Commerce has failed to explain why the fact that West Fraser is buying electricity from and selling electricity to BC Hydro is relevant to its attribution analysis. While other reasons might exist for finding that the sale of electricity to the GBC should be attributed to the overall operations of West Fraser, the Panel finds that the reasons given by Commerce are not sustainable. Therefore, the Panel remands this matter to Commerce to explain whether West Fraser’s sale of electricity to BC Hydro should be attributed to its overall operations in light of the foregoing discussion.

3. NEW BRUNSWICK’S LIREPP

Commerce’s IDM described the Large Industrial Renewable Energy Purchase Program (“LIREPP”) in New Brunswick as follows:

The purpose of the LIREPP program is for New Brunswick to: (1) reach NB Power’s mandate to supply 40 percent of its electricity from renewable sources by 2020; and (2) *bring New Brunswick’s large industrial enterprises’ net electricity costs in line with the average cost of electricity in other Canadian provinces.* According to the GNB verification report in *SC Paper from Canada – Expedited Review*, GNB officials from NB Power, a Crown corporation, and from DERD, explained one of the reasons that the LIREPP program was implemented was for industries to get credit applied to their electricity bill for the renewable energy they generated.

The NB Power officials stated that “the purpose of LIREPP is that ‘you want to buy enough to get them {the program participants} to the target discount,’” adding that “we want to buy a certain amount of {electricity}, then we resell at firm rates, then the difference is the NET LIREPP Adjustment.” In other words, the NET LIREPP adjustment is the difference between the amount of renewable electricity that NB Power will purchase from the LIREPP participant (here, the participating Irving

⁸⁷⁶ Commerce Vol. VI 61.2 Brief at 179 (emphasis added).

⁸⁷⁷ *Id.* (emphasis added).

⁸⁷⁸ *Id.* (emphasis added).

companies), and the amount of electricity that NB Power will sell to the LIREPP participant (again, the participating Irving companies). The net LIREPP adjustment is provided to participating Irving companies, including JDIL, as *credits that are applied to their monthly electricity invoices*. Thus, while the program does encompass, *in part*, the purchase of a good or service, *the credits reduce the participating Irving Companies' monthly electricity bills*, and it is the amount of the monthly credits that we have determined is the countervailable benefit consistent with section 771(5)(E) of the Act. The volume of electricity that the participating Irving Companies “sell” to NB Power, most of which is not transmitted to or through the grid, is derived each month using the target discount and the C\$95/MWh rate. The C\$95/MWh rate is fixed in the Electricity Act. Thus, even if this rate varied, because NB Power works backwards from the target discount, the program guarantees that the target discount is reached each month by adjusting the volume of NB Power’s purchases of electricity from the participating Irving companies. In other words, NB Power has determined in advance the amount of credits it wishes to give the participating Irving companies. As such, we reaffirm our preliminary decision to treat the benefit from this program as the amount of Net LIREPP credits that are provided to participating Irving companies including JDIL to reduce their monthly electricity payments from NB Power, a Crown corporation.⁸⁷⁹

Commerce found that the LIREPP program constituted a financial contribution, was specific, and conferred a benefit.⁸⁸⁰

Both the GNB and JDIL argued that the benefits were tied to JDIL’s production of pulp and paper, and not to softwood lumber.⁸⁸¹ Commerce responded that the facts of this review were unchanged from the original investigation where it found that the LIREPP was not tied to a particular product at the time of bestowal.⁸⁸²

The Panel finds that Commerce’s determination that the LIREPP benefit was not tied specifically to the pulp and paper portion of JDIL’s business to be supported by substantial evidence. As Commerce had noted previously, the LIREPP program was available to large industrial companies in any industry that met the eligibility requirements and JDIL was eligible not because it was a pulp and paper producer but because it produced eligible renewable energy.⁸⁸³

The GNB and JDIL next argued that the LIREPP does not represent revenue forgone but instead is a program by which NB buys electricity and thus should have been treated using an

⁸⁷⁹ IDM at 368-369 (footnotes omitted) (emphasis added).

⁸⁸⁰ PDM at 79; IDM at 368.

⁸⁸¹ GNB 61.1 Brief at 110-111; JDIL 61.1 Brief at 48-51.

⁸⁸² Commerce Vol. VI 61.2 Brief at 108.

⁸⁸³ *Id.* at 108 (citing *Expedited Review* IDM at 215).

MTAR analysis.⁸⁸⁴ Commerce responded that it properly analyzed the program because the credit was used to reduce JDIL's electricity payment to NB Power.⁸⁸⁵

The Panel agrees with Commerce's treatment of this credit as revenue forgone. As quoted at length above, NB Power was not simply paying JDIL for electricity. Instead, the program involved a formula to create a target discount that was ultimately given to participants in the form of a credit. Thus, NB Power determined in advance the amount of credit it wanted to give to participating companies and then applied the credit on a monthly basis to reduce JDIL's electricity cost. The grant of this credit is the essence of a subsidy under the statutory criteria.⁸⁸⁶ This credit reduced JDIL's monthly electricity costs, thereby giving JDIL a benefit. This amount would have otherwise been paid to NB Power, thereby resulting in revenue forgone. The Panel finds that Commerce's analysis was supported by substantial evidence and in accordance with law.

4. ONTARIO'S ENERGY PROGRAMS

A. IESO Demand Response Curtailment Program

Under Ontario's Independent Electricity System Operator ("IESO") Demand Response program, participants that reduce their electricity consumption as directed by the IESO during peak times to maintain a reliable electricity system receive credits on their monthly invoices.⁸⁸⁷ During the POR, Resolute altered its electricity consumption patterns upon the IESO's request and received payments in return in the form of electricity credits.⁸⁸⁸

i) Specificity

The GOO reported that 19 participants received payments from 2014 through 2018 under the Demand Response program. Commerce determined that the program was *de facto* specific because the actual recipients of this program were limited in number.⁸⁸⁹

The GOO argued that the Demand Response program is not specific because there are neither industry prescriptions nor limitations for enterprises or industries to participate in the Demand Response Auction, and the program is used by a diverse set of industries.⁸⁹⁰ The GOO further argued that Commerce was wrong to focus on only the total number of participants when making its *de facto* specificity determination, and that Commerce should have also considered the thousands of contributors to the Demand Response program.⁸⁹¹ Finally, the GOO argued that

⁸⁸⁴ GNB 61.1 Brief at 111-114; JDIL 61.1 Brief at 51.

⁸⁸⁵ Commerce Vol. VI 61.2 Brief at 108.

⁸⁸⁶ 19 U.S.C. § 1677(5)(D)(ii).

⁸⁸⁷ PDM at 53.

⁸⁸⁸ PDM at 53; IDM at 289.

⁸⁸⁹ IDM at 291.

⁸⁹⁰ GOO Vol. II 61.1 Brief at 47.

⁸⁹¹ *Id.* at 59.

Commerce ignored prior specificity findings with respect to a similar demand response program in another administrative proceeding.⁸⁹²

Commerce responded that the record showed that the number of companies that received such electricity credits is limited to only 19.⁸⁹³ Further, it argued that whether the program is used by a diverse set of industries is not relevant to the *de facto* specificity analysis under 19 U.S.C. § 1677(5A)(D)(iii)(I). Commerce also noted that it was not required to consider the number of “contributors” rather than just the number of participants. Under 19 U.S.C. § 1677(5A)(D)(iii)(I), a subsidy is *de facto* specific if “the actual recipients of the subsidy ... are limited in number.” According to Commerce, the correct manner to conduct a *de facto* specificity analysis is to examine the actual number of recipients of the subsidy, here only 19, and not the contributors who are not actual recipients under the Demand Response program.⁸⁹⁴ In response to the argument that Commerce had previously found a demand response program not to be *de facto* specific, Commerce noted that it cannot apply a specificity finding in one case to another case which has its own separate and distinct facts. The record of this review of this particular product shows that the Demand Response program is *de facto* specific. It further noted that in *CTL Steel Plate from Korea*, based on the record in that review, it found *de facto* specificity under 19 U.S.C. § 1677(5A)(D)(iii)(II) and (III).⁸⁹⁵

The Panel finds that the subsidies that are provided by the GOO under the Demand Response program are limited in number. By any measure, 19 is a small number. Therefore, Commerce’s determination that the IESO program is *de facto* specific under section 19 U.S.C. § 1677(5A)(D)(iii)(I) is lawful and supported by substantial evidence.⁸⁹⁶

ii) Definition of Grant

Similar to the arguments raised with respect to the MCRP and the OFRFP, the GOO argues that the money paid was not a “gift” and therefore could not be a grant. For the reasons discussed earlier for these other programs, the CVD law does not state that a grant must be given without consideration. The key statutory factors are that the grant is a financial contribution from a foreign government and that it is specific to a particular industry or company and provides a benefit to producers, manufacturers, or exporters of goods that harms the domestic industry in the importing country. Similarly, the regulations state that Commerce will “measure the extent to which a

⁸⁹² *Id.* at 61 (noting that Commerce found that a demand response program in another case was not *de facto* specific (citing *Final Affirmative Countervailing Duty Determination: Certain Cut- to Length Carbon-Quality Steel Plate From the Republic of Korea*, 64 Fed. Reg. 73,176 (Dep’t Commerce Dec. 29, 1999)).

⁸⁹³ Commerce Vol. VI 61.2 Brief at 122.

⁸⁹⁴ *Id.* at 122-123.

⁸⁹⁵ *Id.* at 123.

⁸⁹⁶ As more fully explained *supra* at n. 548, Panelist Williamson would remand this issue to Commerce with instructions to comply with the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii) and take into account the criteria set forth therein.

financial contribution (or income or price support) confers a benefit” depending upon the particular type of contribution (*i.e.*, grant) as prescribed in the regulations. Thereafter, the regulation expressly dictates that “{i}n the case of a grant, a benefit exists in the amount of the grant.”⁸⁹⁷ Thus, any reimbursement in the normal course of business is a benefit to Resolute. The Panel finds that Commerce properly determined that this amount of money was a financial contribution from the government, was specific, and provided a benefit to Resolute.

iii) Electricity as a Service

The GOO argued that the Demand Response program does not constitute a “grant” because it is related to providing a service, claiming that reducing electricity consumption is a service and not a good.⁸⁹⁸ The GOO contends that the Demand Response program agreements are contracts for the purchase of a service by the IESO.⁸⁹⁹

Commerce first argued that whether the agreement is contractual in nature does not affect Commerce’s benefit analysis.⁹⁰⁰ Commerce also contended that record evidence showed that the IESO is not purchasing a service under this program.⁹⁰¹ Under the Demand Response program, the IESO is providing grants to participants such as Resolute to incentivize them to curtail their power usage on demand.⁹⁰² Thus, these electricity credits are properly treated as grants, not compensation or the purchase of a service.⁹⁰³

In *HRS From Thailand*, respondents argued that the provision of electricity to respondents constitutes general infrastructure and therefore does not provide a financial contribution. Commerce responded that “the electricity at issue here is not a service, as respondents argue, but a good that, as petitioners point out, has its own tariff schedule classification.”⁹⁰⁴ In *Wire Rod from Italy*, Commerce also stated that electricity constitutes a good rather than a service, in the context of an argument that electricity was general infrastructure.⁹⁰⁵

⁸⁹⁷ 19 C.F.R. § 351.504.

⁸⁹⁸ GOO Vol. II 61.1 Brief at 53-58.

⁸⁹⁹ *Id.* at 52.

⁹⁰⁰ Commerce Vol. VI 61.2 Brief at 124.

⁹⁰¹ *Id.*

⁹⁰² IDM at 290.

⁹⁰³ Commerce Vol. VI 61.2 Brief at 124-125.

⁹⁰⁴ *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 50,410 (Dep’t Commerce Oct. 3, 2001), IDM at 29.

⁹⁰⁵ *Carbon and Alloy Steel Wire Rod from Italy and the Republic of Turkey: Amended Final Affirmative Countervailing Duty Determination for the Republic of Turkey and Countervailing Duty Orders for Italy and the Republic of Turkey*, 83 Fed. Reg. 23,420 (Dep’t Commerce May 21, 2018), IDM at 13.

As was pointed out in the *HRS Thailand* decision, electricity has its own tariff classification. “Electrical energy” is tariff item 2716.00.00 in the Canadian Customs Tariff Schedule,⁹⁰⁶ thereby making it a good as far as the Canadian Government is concerned. Commerce has consistently found that electricity is a good.⁹⁰⁷ Commerce’s determination that electricity is a good rather than a service is reasonable. As noted above, the Panel finds that the credit constituted a benefit to Resolute. The Panel sustains Commerce’s determination.

B. IEI Program

Under Ontario’s IESO’s Industry Electricity Initiative (“IEI”) program, selected participants enter into commercial contracts with the IESO, pursuant to which eligible incremental electricity consumption is subject to energy use-based price adjustments.⁹⁰⁸ Resolute entered into two commercial contracts with the IESO under the IEI program relating to two sawmills owned by Resolute Growth.⁹⁰⁹ Resolute received payments under the program in 2016, 2017, and 2018.⁹¹⁰ Commerce determined that the IEI program was *de jure* specific because the “IEI program users were expressly limited to certain energy-consuming customers classified with specific{North American Industry Classification Codes (NAICS codes)}.”⁹¹¹

The GOO challenged Commerce’s specificity determination, arguing that the IEI program was not *de jure* specific. According to the GOO, Commerce unlawfully based its *de jure* determination on activity-based restrictions.⁹¹²

Commerce responded that its decision was lawful.⁹¹³ As Commerce noted, Resolute was eligible for assistance under the program because of its classification under NAICS code 321110: Sawmills and Wood Preservation.⁹¹⁴ Furthermore, Commerce noted that several of its prior determinations demonstrate that the agency has found that activity-based restrictions establish *de jure* specificity under 19 U.S.C. § 1677(5A)(D)(i).⁹¹⁵

⁹⁰⁶ Canada Border Services Agency (2026), Item No. 2716.00.00; The United States Harmonized Tariff Schedule has the same classification for electrical energy. See *Harmonized Tariff Schedule of the United States* (2026 Rev. 8), Chapter 27, Subheading 2716.00.00.

⁹⁰⁷ The CIT has recognized electricity as a good in the countervailing duty context. See *Jiangsu Zhongji Lamination Materials Co. v. United States*, 405 F. Supp. 3d 1317, 1336 (Ct. Int’l Trade 2019).

⁹⁰⁸ PDM at 54 (citing GOO Vol IV QR at IEI-11); Resolute Post-Preliminary Decision at 8 (description of IESO), P.R. 1902).

⁹⁰⁹ *Id.* (citing GOO Vol. IV QR at IEI-7).

⁹¹⁰ *Id.* (citing Resolute Primary Non-Stumpage QR at Exh. RES-NS-IEI-8; GOO Vol. IV QR at IEI-21).

⁹¹¹ IDM at 292.

⁹¹² GOO Vol. II 61.1 Brief 69-70.

⁹¹³ Commerce Vol. VI 61.2 Brief at 126-128.

⁹¹⁴ *Id.* at 128.

⁹¹⁵ *Id.* at 127.

The Panel finds that the subsidies that are provided by the GOO under the IEI program are expressly limited to certain energy-consuming customers classified within specific NAICS codes. The GOO established, by law, a limited group of enterprises that may receive grants under this program. Therefore, Commerce's determination that the IEI program is *de jure* specific under section 19 U.S.C. § 1677(5A)(D)(i) is lawful and supported by substantial evidence.

C. IESO CHP III Program

During the POR, Resolute's Thunder Bay pulp and paper mill sold biomass cogenerated electricity to the Ontario power grid through an open bid procurement process conducted by IESO, formerly known as the Ontario Power Authority ("OPA").⁹¹⁶ This open bid procurement process was only available to producers of biomass. Resolute's mill's electricity sales to IESO are governed by the 2011 Purchase Power Agreement ("PPA") between Resolute and OPA.⁹¹⁷ The PPA established the electricity prices paid by IESO to Resolute and the electricity prices were prescribed according to Resolute's bid during the Combined Heat and Power ("CHP") III procurement process.⁹¹⁸ Resolute further reported that during the POR its mill also purchased electricity from the Ontario power grid through IESO.⁹¹⁹ Commerce found that IESO's purchase of biomass-cogenerated electricity from Resolute was countervailable because it constituted a financial contribution and conferred a benefit. Further, Commerce found that the program was *de facto* specific.⁹²⁰

i) Specificity

Resolute argued that Commerce erroneously found the CHP III program to be *de facto* specific because Resolute had only one of IESO's 16 CHP contracts and only one of 20 contracts for natural gas and other fuels.⁹²¹ Resolute also argued that the CHP program was part of a wider initiative for green energy and the forestry industry does not benefit disproportionately from it.⁹²²

Commerce responded that record evidence indicates that the actual recipients of this subsidy are limited in number. Specifically, only two companies, including Resolute, had CHP III contracts during the POR. Based on this information, Commerce concluded that the program is *de facto* specific. Commerce further noted that the program under examination was only IESO's CHP III program, and not other programs that IESO may have implemented to encourage alternative energy supplies in Ontario.

⁹¹⁶ *Id.* at 188.

⁹¹⁷ *Id.*

⁹¹⁸ *Id.*

⁹¹⁹ *Id.*

⁹²⁰ IDM at 246.

⁹²¹ Resolute 61.1 Brief at 171.

⁹²² *Id.* at 172.

The Panel finds that Commerce properly found that the program was *de facto* specific.⁹²³ First, the Panel agrees with Commerce that past contracts are not relevant to Commerce's specificity analysis. Further, the fact that the CHP III program was open to all parties interested in developing new biomass cogeneration capacity does not negate the fact that the actual recipients of the subsidy are limited in number. Here, the recipients of the subsidy are limited in number to two. By any measure, that number falls within the statutory guidelines.

ii) Benchmark Used for MTAR Calculation

Similar to the GBC's claim with respect to its EPAs, the GOO argued that Commerce's application of the benefit to the recipient standard was erroneous because Commerce should have used a benchmark with a market-determined price from actual transactions of biomass cogenerated electricity.⁹²⁴ The GOO further argued that Commerce ignored the statutory requirement to account for prevailing market conditions because Commerce did not take into account that Resolute's selling of biomass cogenerated electricity was different from its purchase of electricity.⁹²⁵

Commerce responded that there was no record evidence that the prevailing market conditions for the provision of electricity by IESO are differentiated based upon the manner in which electricity is generated.⁹²⁶ Further, no record evidence indicates that the market conditions of electricity are affected by the source of the electricity, noting that the GOO reported that there were no laws or policies that specifically addressed the pricing of electricity generated from biomass.⁹²⁷ Commerce further contended that because there is no record evidence that prevailing market conditions affected the price of electricity, Commerce did not need to take this issue into consideration when selecting the benefit to Resolute.⁹²⁸

As discussed earlier, the *CVD Preamble* states that the basic principle is that a benefit arises if the government pays more for the good than a respondent would otherwise earn in the absence of a government program. Thus, the transaction to be used for comparison must be based on the sale of the good by Resolute. Using the price at which a governmental entity sells its electricity to Resolute does not reflect a price that Resolute would earn if it sold electricity outside the parameters of the government program. Accordingly, the Panel remands this matter to Commerce to rely on a benchmark that reflects an appropriate measure of what Resolute would otherwise earn on the sale in the absence of a government program.

⁹²³ As more fully explained *supra* at n. 548, Panelist Williamson would remand this issue to Commerce with instructions to comply with the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii) and take into account the criteria set forth therein.

⁹²⁴ GOO Vol. II 61.1 Brief at 65.

⁹²⁵ *Id.* at 66.

⁹²⁶ Commerce Vol. VI 61.2 Brief at 190.

⁹²⁷ *Id.* at 190-191.

⁹²⁸ *Id.* at 191.

iii) Attribution

The GOO argues that Commerce ignored the plain language of the regulation by attributing the CHP program to all products of a company because it is related to electricity.⁹²⁹ The GOO states that the project's aim is electricity generation, and thus the CHP program was tied to a particular product—electricity.⁹³⁰ Further, the GOO argues that Resolute's Thunder Bay mill does not produce softwood lumber.⁹³¹

Commerce responded that there is no record evidence that establishes that, at the time of approval or bestowal, the benefits from Resolute's sale of electricity under the CHP III program to IESO were tied to the production of pulp or paper, or any other product.⁹³² Specifically, the lack of any language or criteria in the request for a PPA tying the benefits of the CHP III to the production of a particular product at a participant's facility indicate that the CHP III is an untied subsidy.⁹³³ Further, Resolute has not contested the finding that electricity is consumed in the production of softwood lumber. Thus, Commerce determined that it would attribute the benefit to Resolute's sales.

The arguments raised here are similar to those raised with respect to BC EPAs. As the Panel discussed above, the Panel is not persuaded by the GOO's arguments. The statute explicitly provides that a benefit can be conferred "if such goods or services are provided for LTAR, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration." In the statute, "purchased" refers to goods being purchased from the recipient (*i.e.*, the softwood lumber producer), the equivalent to the GOO's reference to electricity being "sold" by the recipient. Clearly, electricity that is "sold" by the recipient (*i.e.*, the softwood lumber producer) to an outside party cannot be itself used by the recipient, but its sale does not in itself remove it from potentially being a benefit conferred on the recipient. The fact that an input is produced at the facility can confer a benefit on the corporation as a whole.

Moreover, the input exception under the attribution rules states that if a subsidy is "tied" to an input product, Commerce will attribute the subsidy to both the input and downstream products produced by a corporation. The regulations do not specify that the exact input in question (the specific electricity sold to IESO) must be directly used in the downstream product (softwood lumber). Rather, the subsidy tied to an input will be attributed to both the input and downstream product. Other parts of the *CVD Preamble* make clear that inputs are subject to different rules and are not subject to the strict interpretation proposed by the GOO.⁹³⁴

⁹²⁹ GOO Vol. II 61.1 Brief at 67.

⁹³⁰ *Id.*

⁹³¹ *Id.*

⁹³² Commerce Vol. VI 61.2 Brief at 192.

⁹³³ *Id.*

⁹³⁴ *CVD Preamble* at 65,360.

As this discussion makes clear, a subsidy to an input, any input, benefits the firm as a whole. Therefore, the *CVD Preamble* makes clear that subsidies to inputs will generally be included in the company-wide CVD calculation. Thus, the Panel does not agree with the arguments made by Resolute.

As with the prior discussion relating to the arguments raised by the GOA and GBC, the Panel also finds that Commerce has failed to explain fully its reasoning for attributing this program to all sales. The Panel therefore requests that Commerce elaborate on and explain its decision that it would attribute the funding benefits to Resolute's overall production including addressing whether the bestowal documents tie this program to the production of pulp and paper products produced at the mill in question.

5. QUÉBEC'S ENERGY PROGRAM

During the administrative review, Commerce investigated several energy-related programs administered by the GOQ through its wholly-owned utility Hydro-Québec, Finances Québec, and the paragovernmental agency Transition Énergétique Québec ("TEQ"). Commerce determined that these programs provided countervailable subsidies to the Respondents. The Canadian parties challenged Commerce's findings that these programs provided a financial contribution, were specific, and were lawfully attributed to softwood lumber.

A. Demand Response and Energy Efficiency Programs

Commerce countervailed five primary energy consumption programs used by Resolute:

- **Interruptible Electricity Option ("IEO") and Gestion de la Demande de Puissance ("GDP"):** These are demand response programs designed to help Hydro-Québec meet increased power requirements during the winter peak period. Participating commercial and industrial customers must curtail their power usage upon notice of interruption from Hydro-Québec. In exchange for this curtailment, participants receive fixed and variable credits on their electricity bills.⁹³⁵
- **Industrial Systems Energy Efficiency ("ISEE"):** This is a program intended to reduce the average amount of electricity used per unit of production. Hydro-Québec funds predefined, pre-approved energy efficiency projects based on confirmed electricity savings.⁹³⁶
- **Electricity Discount Program for Rate L Customers ("EDL"):** This is an initiative administered by Finances Québec and Hydro-Québec that provides reduced electricity costs (rebates up to 50 percent of eligible investment costs) to large industrial consumers who undertake growth-generating investments that enhance productivity or reduce greenhouse gas (GHG) emissions.⁹³⁷

⁹³⁵ GOQ Vol. II 61.1 Brief at 5-6, 58-62; GOQ Vol. II 61.3 Brief at 5-10; IDM at 310-313.

⁹³⁶ GOQ Vol. II 61.1 Brief at 4-5, 52, 63-66; GOQ Vol. II 61.3 Brief at 25.

⁹³⁷ GOQ Vol. II 61.1 Brief at 4, 7, 10; Commerce Vol. VI 61.2 Brief at 136-138.

- **ÉcoPerformance:** This is a program administered by TEQ that provides financial assistance to consumers who reduce their fossil fuel consumption and GHG emissions through specific, quantifiable projects. Funding is based on the number of tons of GHGs reduced annually.⁹³⁸

i) Electricity as a Service

Resolute and the GOQ argued that Commerce unlawfully treated these programs as countervailable grants. They argued that the IEO, GDP, ISEE, EDL, and ÉcoPerformance programs are contractual agreements under which the GOQ purchases valuable “services” from the participating companies.⁹³⁹

Regarding the demand response programs (IEO and GDP), the Canadian parties argued that Hydro-Québec is legally mandated to reliably supply electricity. By paying industrial customers to curtail their usage during peak winter hours, Hydro-Québec is purchasing the service of “demand reduction.” This allows the utility to avoid purchasing extremely expensive power on the wholesale market or building costly new generation facilities that would sit idle for most of the year.⁹⁴⁰ Because Hydro-Québec “does not give something for nothing,” the Canadian parties argued the bill credits are proper consideration for a service, not a grant.⁹⁴¹

Similarly, the Canadian parties argued the energy efficiency programs (ISEE, EDL, and ÉcoPerformance) benefit the GOQ by helping it meet its rigorous statutory and international environmental commitments to reduce GHG emissions and electricity loads.⁹⁴² Because financial assistance is strictly conditional on the verified achievement of GHG or electricity reductions, they argued the GOQ is effectively purchasing the service of environmental sustainability.⁹⁴³

Commerce and the COALITION rejected the “purchase of services” argument. Commerce determined that under 19 C.F.R. § 351.504(a), a direct transfer of funds, whether through a cash disbursement for equipment or a credit applied to an electricity bill, constitutes a grant.⁹⁴⁴

Commerce argued that its legal mandate is to measure the benefit conferred *on the recipient*, not to weigh the reciprocal advantages the government might receive from administering its public policy programs. Relying on 19 C.F.R. § 351.503(c), Commerce noted it “does not contemplate any advantages the government might receive by administering the program.” Therefore, whether Hydro-Québec was able to maintain the integrity of its grid or achieve its GHG reduction goals is

⁹³⁸ Resolute 61.1 Brief at 140; GOQ Vol. II 61.1 Brief at 54-56.

⁹³⁹ GOQ Vol. II 61.1 Brief at 40-42; Resolute 61.1 Brief at 140.

⁹⁴⁰ GOQ Vol. II 61.1 Brief at 58-62.

⁹⁴¹ *Id.* at 43-46.

⁹⁴² *Id.* at 63-66.

⁹⁴³ *Id.* at 56-58.

⁹⁴⁴ IDM at 316-318; COALITION 61.2 Brief at 266-268.

immaterial to the subsidy analysis.⁹⁴⁵ Because Resolute received direct financial assistance that offset its normal operational and capital investment costs, Commerce correctly countervailed the programs as grants.

The Panel upholds Commerce's determination that the IEO, GDP, ISEE, EDL, and ÉcoPerformance programs provide countervailable financial contributions in the form of grants. The Panel's analysis here mirrors its findings regarding the other non-stumpage forestry programs and Ontario's energy programs. The statutory framework focuses on the financial contribution provided to the respondent and the resulting benefit. The regulations explicitly state that Commerce is not to consider the broader policy advantages or incidental benefits the government derives when determining if a benefit exists.

While the GOQ undoubtedly uses these programs to manage its utility grid and meet its environmental goals, compensating a company for buying energy-efficient equipment or reducing its electricity usage constitutes a direct transfer of funds that relieves the company of costs it would otherwise bear. Calling an electricity bill credit or a rebate for a boiler a "purchase of a service" is a creative framing of the facts, but it does not override Commerce's reasonable and lawful application of its grant regulations under 19 C.F.R. § 351.504(a). Commerce's determinations on this issue are sustained.

ii) Specificity

(1) *De Jure* Specificity

The GOQ argued that the IEO, GDP and EDL programs were not *de jure* specific because they are widely available and the eligibility criteria did not limit access to any particular enterprises or industries.⁹⁴⁶

Commerce responded that the GOQ limited the subsidy provided by the IEO program to enterprises that meet particular energy generation and consumption requirements and have the technical capacity to curtail power on notice of interruption.⁹⁴⁷ Thus, as a matter of law the IEO program is available to only Medium-Power Customers, Large-Power Customers on Rate L, and Rate LG Customers.⁹⁴⁸ With respect to the GDP program, Commerce noted that the subsidies provided by Hydro-Québec through the GDP program are expressly limited to customers with a communicating meter whose electrical service contract is subject to Rate DM, G, G9, M, or LG.⁹⁴⁹ Similarly, Commerce determined that the Rate L Discount program was *de jure* specific because

⁹⁴⁵ IDM at 315-316; Commerce Vol. VI 61.2 Brief at 139-141.

⁹⁴⁶ GOQ 61.1 Brief at 7.

⁹⁴⁷ Commerce Vol. VI 61.2 Brief at 131.

⁹⁴⁸ *Id.*

⁹⁴⁹ *Id.* at 133.

Hydro-Québec expressly limited the subsidies by Decree 675-2016 to consumers billed at Rate L.⁹⁵⁰

The Panel finds that, like the energy subsidies provided in Ontario, the subsidies that are provided by the GOQ under the IEO, GDP and EDL program are expressly limited to a specific group of energy-consuming customers. Commerce's determination that the IEO, GDP, and EDL programs are *de jure* specific under section 19 U.S.C. § 1677(5A)(D)(i) is lawful and supported by substantial evidence.

(2) *De Facto* Specificity

The GOQ argued that the ISEE and EcoPerformance programs were not *de facto* specific because they are widely available, are not limited or partial to any particular enterprises or industries, and are automatically approved based on predetermined eligibility criteria.

Commerce determined that the programs were *de facto* specific under 19 U.S.C. § 1677(5A)(D)(iii)(I). Commerce based its finding on a comparison of the limited number of companies actually receiving assistance under the programs (*e.g.*, a few dozen or hundred enterprises) compared to the total number of corporations operating in Québec.⁹⁵¹

The Panel upholds Commerce's *de facto* specificity determinations. As described extensively above with respect to other similar programs, the CAFC has found that Commerce's methodology of comparing the actual number of recipients to the total number of enterprises in the jurisdiction is consistent with the statute and the SAA.⁹⁵² Because the record evidence demonstrates that the actual users of these programs were limited in number on an enterprise basis, Commerce's finding of specificity is supported by substantial evidence.⁹⁵³

B. Green Power Purchases of Electricity under the PAE and the Côte-Nord Rate L Program

Commerce's IDM described Québec's Green Power Purchases of Electricity under the Purchase Power Program ("PAE") 2011-01:

Resolute's pulp and paper mills purchase electricity from Hydro-Québec at the L rate, which is the tariff in effect during the POR. Those same mills sell electricity back to Hydro-Québec under the PAE 2011-01 program at an administratively-set price.⁹⁵⁴

⁹⁵⁰ *Id.* at 137.

⁹⁵¹ Commerce Vol. VI 61.2 Brief at 140, 142.

⁹⁵² *Government of Quebec*, 105 F. 4th 1359, 1374-1375; SAA at 929-931.

⁹⁵³ As more fully explained *supra* at 548, Panelist Williamson would remand this issue to Commerce with instructions to comply with the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii) and take into account the criteria set forth therein.

⁹⁵⁴ IDM at 251.

The Côte-Nord Rate L program provides a temporary discounted electricity rate to specific facilities as compensation for additional electricity costs incurred due to the spruce budworm epidemic in the Côte-Nord region.⁹⁵⁵

Commerce found that the purchases of electricity by Hydro-Québec under PAE 2011-01 were *de facto* specific, constituted a financial contribution and conferred a benefit.

The GOQ and Resolute argued that Commerce erred in finding that its electricity program was countervailable because: (1) the PAE program was not *de facto* specific; (2) electricity is a service not a good; (3) the benchmark for the MTAR analysis for the PAE was chosen in error; (4) the PAE and the Côte-Nord Rate L program were tied to non-subject merchandise; and (5) no benefit was conferred under the Côte-Nord Rate L Program.⁹⁵⁶

i) Waiver

As discussed earlier with respect to the PIB program, the Canadian parties argued at the hearing that because Commerce did not respond to two arguments raised by the GOQ in respect of Commerce's attribution determinations on the PIB program and the Côte-Nord L Rate program, Commerce waived its defense of these issues.⁹⁵⁷ To support its argument concerning waiver, the Canadian parties referenced *Calgon Carbon Corporation v. United States*.⁹⁵⁸ In that case, the court found that Commerce had waived its right to defend an issue when it failed to brief the issue in its response brief and failed to raise the issue at oral argument, noting that “{f}urther, Commerce and petitioners do not seem to desire {the} opportunity” to defend their position on the issue in question.⁹⁵⁹ By contrast, at the hearing in this case, Commerce acknowledged that it had failed to address the issues in its brief but noted that this was an oversight and an inadvertent error, not intentional waiver. Commerce also stated that it stood by its decision in the IDM and defended its position at the hearing.⁹⁶⁰ Commerce pointed to *Novosteel v. United States*,⁹⁶¹ for the general proposition that fairness and procedure should determine whether an issue is waived. The Panel finds that the inadvertent error by the government in this instance does not constitute waiver, especially in light of the vast number of affirmative issues raised by the parties in this proceeding. Furthermore, all parties had an opportunity to present their arguments at the hearing. Accordingly, the Panel will consider these issues.

⁹⁵⁵ GOQ Vol. II 61.1 Brief at 33.

⁹⁵⁶ *Id.* at 3-66; Resolute 61.1 Brief at 170.

⁹⁵⁷ Hearing Tr. Day 3 at 155-156.

⁹⁵⁸ *Calgon Carbon Corporation v. United States*, 145 F. Supp. 3d 1312, 1321 (Ct Int'l Trade 2016).

⁹⁵⁹ *Id.*

⁹⁶⁰ Hearing Tr. Day 3 at 169-170.

⁹⁶¹ *Novosteel SA v. United States*, 284 F.3d 1261, 1273-1274 (Fed. Cir. 2002)

ii) Specificity

The GOQ and Resolute argued that the PAE program was not *de facto* specific because it was widely available and not limited to particular enterprises or industries. Resolute also argued that Commerce should have considered that Hydro Québec has a wide variety of programs related to the purchase of other types of power.

The SAA states that the specificity test is designed to avoid the imposition of countervailing duties where a subsidy is broadly available.⁹⁶² The *de facto* portion of the specificity test requires Commerce to examine the number of enterprises that actually use the subsidy.⁹⁶³ Commerce determined that only 13 companies participated in the PAE program.⁹⁶⁴ Furthermore, as Commerce noted, the only program being examined is the PAE program. Thus, the fact that Hydro Québec may have implemented other programs is not relevant to the issue of whether the PAE program is specific. The Panel finds that the very limited use of this program satisfies the *de facto* criteria as set forth in the SAA.⁹⁶⁵

iii) Electricity as a Service or a Good

The GOQ argued that electricity generation is a service, not a good. The argument that electricity generation is a service is distinct from the argument raised earlier because while section 771(5)(E)(iv) states that a benefit shall be conferred “in the case where *goods or services* are provided, if such *goods or services* are provided for less than adequate remuneration,” it also states that “in the case where *goods* are purchased, if such *goods* are purchased for more than adequate remuneration.” Thus, goods or services can be provided for LTAR, but only goods, and not services, can be purchased for MTAR. This distinction thus matters for purchases of electricity by the government.

As discussed earlier, in *HRS From Thailand*, respondents argued that the provision of electricity to respondents constitutes general infrastructure and therefore does not provide a financial contribution. Commerce responded that “the electricity at issue here is not a service, as respondents argue, but a good that, as petitioners point out, has its own tariff schedule

⁹⁶² SAA at 929.

⁹⁶³ *Id.* at 931.

⁹⁶⁴ IDM at 255.

⁹⁶⁵ As more fully explained *supra* at 548, Panelist Williamson would remand this issue to Commerce with instructions to comply with the last paragraph of 19 U.S.C. § 1677(5A)(D)(iii) and take into account the criteria set forth therein.

classification.”⁹⁶⁶ In *Wire Rod from Italy*, Commerce also stated that electricity constitutes a good rather than a service, in the context of an argument that electricity was general infrastructure.⁹⁶⁷

As was pointed out in the *HRS Thailand* decision, electricity has its own tariff classification. “Electrical energy” is tariff item 2716.00.00 in the Canadian Customs Tariff Schedule,⁹⁶⁸ thereby making it a good as far as the Canadian Government is concerned. Commerce has consistently found that electricity is a good,⁹⁶⁹ and there is no reason that electricity would change from being a good to being a service in the MTAR context. Commerce’s determination that electricity is a good rather than a service is reasonable, and the Panel sustains that determination.

iv) Benchmark Used for the MTAR Calculation

In calculating the benefit using a MTAR analysis, Commerce relied on the Hydro-Québec Industrial L rate as a benchmark.⁹⁷⁰

The GOQ and Resolute argued that Commerce used the wrong benchmark when calculating the benefit.⁹⁷¹ The GOQ and Resolute both argued that Commerce’s decision was in error because the Hydro-Québec Industrial L Rate does not reflect the prevailing market conditions for the sale of biomass co-generated electricity by a private seller to the government and thus cannot be used as a suitable benchmark.⁹⁷² The GOQ argued that instead, Commerce should have used the Merrimack Group report as the benchmark for purchases of electricity from Respondents by Hydro-Québec.⁹⁷³ The GOQ explained that Hydro-Québec Distribution filed a 2010 benchmarking report by Merrimack Group as part of the application to the Régie for approval of the terms and conditions of the PAE 2011-01, so it was not generated for purposes of this proceeding but was information generated in the normal course of business.⁹⁷⁴

Commerce responded that it was faced with a unique set of facts where Resolute was both selling to and purchasing from the government, where typically it is one or the other. Further,

⁹⁶⁶ *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 50,410 (Dep’t Commerce Oct. 3, 2001), IDM at 29.

⁹⁶⁷ *Carbon and Alloy Steel Wire Rod from Italy and the Republic of Turkey: Amended Final Affirmative Countervailing Duty Determination for the Republic of Turkey and Countervailing Duty Orders for Italy and the Republic of Turkey*, 83 Fed. Reg. 23,420 (Dep’t Commerce May 21, 2018), IDM at 13.

⁹⁶⁸ Canada Border Services Agency (2026), Item No. 2716.00.00, The United States Harmonized Tariff Schedule has the same classification for electrical energy. *Harmonized Tariff Schedule of the United States* (2026 Rev. 8), Chapter 27, Subheading 2716.00.00.

⁹⁶⁹ The CIT has recognized electricity as a good in the countervailing duty context. See *Jiangsu Zhongji Lamination Materials Co. v. United States*, 405 F. Supp. 3d 1317, 1336 (Ct. Int’l Trade 2019).

⁹⁷⁰ IDM at 251.

⁹⁷¹ GOQ Vol. II 61.1 Brief at 41-45; Resolute 61.1 Brief at 53-61.

⁹⁷² GOQ Vol. II 61.1 Brief at 15, 33; Resolute 61.1 Brief at 54.

⁹⁷³ GOQ Vol. II 61.1 Brief at 41.

⁹⁷⁴ *Id.* at 26.

Commerce noted, the regulations do not expressly instruct the methodology Commerce should use to conduct an MTAR analysis and so it based its analysis on a “benefit-to-recipient” standard.⁹⁷⁵

As discussed above with respect to the BC Hydro program, when Respondents sell electricity that is generated from biomass sources, a benefit would arise if the government paid more for that electricity than a respondent would otherwise earn in the absence of the government program. The average price that Hydro-Québec sells electricity for is irrelevant to that analysis. Thus, as with the BC Hydro program, the Panel finds that Commerce’s benchmark was not appropriate. Accordingly, the Panel remands this matter to Commerce to rely on a benchmark that reflects an appropriate measure of what Resolute would otherwise earn on the sale in the absence of a government program.

The GOQ and Resolute also asked the Panel to identify the benchmark that Commerce should use in place of Rate L. The GOQ argued that the Merrimack Group report satisfies tier two of 19 C.F.R. § 351.511(a)(2). Alternatively, in Québec’s view, the decision of the Régie de l’énergie approving the terms of PAE 2011-01 and the Merrimack report were evidence that Hydro-Québec’s purchase prices were consistent with market principles, as required by tier-three. The GOQ also argued that the expert report of Mr. James Coyne could be an alternative tier-three benchmark.⁹⁷⁶ Commerce did not evaluate either report. Having concluded that Rate L was the appropriate benchmark, Commerce stated that it “need not address the respondent parties’ arguments that Commerce must use the Merrimack Study or Coyne Study as a benchmark under 19 CFR 351.511(a)(2).”⁹⁷⁷ There is therefore no finding by Commerce on the suitability of either report for the Panel to review. The selection of a benchmark that meets the standard set out above is for Commerce to decide. The question may also not arise. The Panel remands Commerce’s attribution finding below, and if Commerce determines that the PAE 2011-01 program is tied to the production of pulp and paper, no benchmark will be required. The Panel will address any remaining dispute over the benchmark in its review of Commerce’s determination on remand.

v) Benefit under the Côte-Nord Rate L Program

Through Order in Council 1147-2015, Hydro-Québec entered into special electricity rate contracts with Resolute for its Baie-Comeau and Clermont pulp and paper mills. The contracts, in effect from January 1, 2016 to December 31, 2020, gave a 20 percent discount from Rate L on the first 63.5 and 83.8 megawatts of the two mills, respectively. Resolute received the discount as credits on its electricity bills in 2017 and 2018.⁹⁷⁸ Commerce found that this conferred a benefit equal to the amount of the electricity credits received, and calculated subsidy rates for Resolute of 0.50 percent for 2017 and 0.46 percent for 2018.⁹⁷⁹

⁹⁷⁵ Commerce Vol. VI 61.2 Brief at 197.

⁹⁷⁶ GOQ Vol. II 61.1 Brief at 41-45; *See also* Resolute 61.1 Brief at 56-61.

⁹⁷⁷ IDM at 253.

⁹⁷⁸ PDM at 62.

⁹⁷⁹ *Id.* at 62-63; IDM at 21.

Resolute argued that, if the Panel affirms Commerce in finding the program to be an untied subsidy, the benefit cannot be measured against ordinary Rate L. According to Resolute, the spruce budworm infestation and the increased electricity costs at the Côte-Nord mills are the prevailing market conditions applicable to the assessment of the special L Rate. Resolute contended that “{w}ithout a special electricity rate, the mills would have closed,” and that “Commerce cannot use as a benchmark an electricity rate expressly intended for ‘normal’ conditions.”⁹⁸⁰ Resolute asked the Panel to remand for Commerce to find an appropriate benchmark for electricity provided in the circumstances of the infestation.⁹⁸¹ The GOQ argued that the program conferred no benefit because it only partially reimbursed the mills for the increased costs that the infestation imposed on them.⁹⁸²

Commerce found that partial reimbursement of a cost does not negate the benefit from the amounts received, and that, because the benefit was the amount of the credits applied to Resolute’s electric bills, there was “no need to measure the benefit of the Special L Rate to the L Rate” and the prevailing market conditions in the Côte-Nord region were “irrelevant to Commerce’s analysis.”⁹⁸³ Commerce did not address the program in its Rule 61.2 brief.⁹⁸⁴ The Panel does not consider that omission as a waiver, and it reviews the determination on the reasons Commerce gave in the IDM. The COALITION argued that the credits were financial assistance to Resolute and that Commerce correctly calculated the benefit as the amount of that assistance.⁹⁸⁵

In contrast to Resolute’s position, the GOQ’s arguments on benefit do not depend on the outcome of the attribution issue. As the Panel found with respect to the OFRFP and the MCRP, whether a reimbursement of a firm’s costs is partial or complete does not change the fact that a benefit was provided.⁹⁸⁶

The GOQ also argued that the Côte-Nord mills “provide an important service to the government by clearing hazardous timber and enabling new trees to be planted.” The discount compensates the mills for that service and is not a subsidy.⁹⁸⁷ The COALITION argued that no party argued before Commerce that the program was a purchase of services, and that the argument is therefore barred for failure to exhaust administrative remedies.⁹⁸⁸ The Panel disagrees with the exhaustion objection. The GOQ points to its administrative case brief, which stated that the mills “provide an important service to Québec” by harvesting infested timber and that the rate was

⁹⁸⁰ Resolute 61.1 Brief at 68-69.

⁹⁸¹ *Id.* at 69.

⁹⁸² GOQ Vol. II 61.1 Brief at 67-68.

⁹⁸³ IDM at 321-322.

⁹⁸⁴ Hearing Tr. Day 3 at 234.

⁹⁸⁵ COALITION 61.2 Brief at 316-320.

⁹⁸⁶ CVD Preamble at 65,361; IDM at 321.

⁹⁸⁷ GOQ Vol. II 61.1 Brief at 68.

⁹⁸⁸ COALITION 61.2 Brief at 317-320.

designed to compensate them for some of the costs they incur as a result.⁹⁸⁹ Commerce noted the GOQ's position in the IDM as being that the rate "compensates for the additional costs associated with performing salvage operations to preserve the health of the forest."⁹⁹⁰ As with the GOQ's challenge to Commerce's estimated price analysis, Commerce was aware of the position and had the opportunity to address it. There was therefore no failure to exhaust.

Under the special rate contracts, Hydro-Québec sells electricity to the two mills at a 20 percent discount on a fixed part of their demand.⁹⁹¹ Hydro-Québec is the provider of a good and not the purchaser of a service, and the amount of the discount is set by reference to the mills' electricity purchases. No account is taken of the actual amount of harvesting or salvage work carried out. Commerce found that the Order in Council's purpose was compensating forestry companies on the North Shore for the financial difficulties caused by the infestation.⁹⁹² The fact that harvesting infested timber also served a public purpose does not change the discount into a payment for services. As the Panel found with respect to Québec's demand response and energy efficiency programs, the advantages a government derives from a program do not bear on the question whether the recipient received a financial contribution and a benefit.

Commerce's determination that the Côte-Nord Rate L program conferred a benefit on Resolute is supported by substantial evidence and is in accordance with law.

Resolute made a different argument. Its argument concerns the measure of the benefit received. In its Brief, Resolute presented it as one the Panel should consider only if Commerce's treatment of the program as an untied subsidy is upheld. In Resolute's view, if the Panel found the program to be tied to the production of pulp and paper, "it need not reach the benefit question."⁹⁹³ For the reasons given below, the Panel remands the tying issue to Commerce for further explanation. If Commerce determines on remand that the program is tied to the production of pulp and paper, Resolute's argument will not arise. As with the arguments concerning the Nova Scotia benchmark, the Panel therefore does not consider Resolute's argument at this time. The Panel has addressed the benchmark for the PAE 2011-01 program because the challenge to that benchmark was not made conditional on attribution. The Panel's conclusion that the Côte-Nord Rate L program conferred a benefit is without prejudice to Resolute's argument on how that benefit is to be measured, which the Panel will address, if necessary, in its review of Commerce's determination on remand.

Whether the benefit may be attributed to Resolute's sales of softwood lumber is addressed below.

⁹⁸⁹ GOQ Vol. II 61.3 Brief at 47-48 (quoting GOQ Non-Stumpage Case Brief at 32-34).

⁹⁹⁰ IDM at 321.

⁹⁹¹ PDM at 62; COALITION 61.2 Brief at 154.

⁹⁹² IDM at 320.

⁹⁹³ Resolute 61.1 Brief at 69.

vi) Attribution

The GOQ also contended that Commerce unlawfully attributed to softwood lumber two subsidies despite the fact that the benefit was tied to the production and sale of electricity and that the programs were tied to Resolute's pulp and paper mills. Resolute made similar attribution arguments. The Canadian parties pointed to record evidence demonstrating that Resolute's participation in these programs was legally and physically restricted to its paper mills. Specifically, the PAE 2011-01 power purchase agreements executed with Hydro-Québec were exclusively for Resolute's Gatineau and Dolbeau facilities, which are pulp and paper mills. Similarly, the Côte-Nord Rate L discount was established by a specific GOQ decree (Order in Council 1147-2015) that explicitly limited the discount to Resolute's Baie-Comeau and Clermont pulp and paper mills. Because these mills do not and cannot produce softwood lumber, the Canadian parties argued Commerce violated its own regulations by attributing these benefits to Resolute's overall sales.

Commerce responded that “[A]lthough Resolute manufactures non-subject merchandise at the mills, the mills are part of the Resolute corporate group and not distinct corporate entities. Thus, Resolute is a single corporate entity, which includes the pulp and paper mills, filing the tax documents for its mills and consolidating the financial statements of all of its mills.”⁹⁹⁴ Commerce also noted that there is no record evidence that establishes that, at the time of approval or bestowal, the benefits from Resolute's sale of electricity under the PAE program to Hydro-Québec were tied to the production of pulp or paper, or any other product.⁹⁹⁵

As with the prior discussion relating to the arguments raised by the GOA, the GBC and the GOO, the Panel finds that Commerce has failed to explain fully its reasoning for attributing these programs to all sales. The Panel therefore requests that Commerce elaborate on and explain its decision that it would attribute the funding benefits to Resolute's overall production including addressing whether the bestowal documents tie this program to the production of pulp and paper products produced at the mills in question.

IX. OTHER COMPANY SPECIFIC ISSUES

1. BC HYDRO'S POWER SMART INCENTIVES SUBPROGRAM

BC Hydro provides electricity to residential, commercial, and industrial customers.⁹⁹⁶ BC Hydro administers the Power Smart Incentives Subprogram that funds capital projects that improve efficiency or displace load.⁹⁹⁷ The program establishes specific criteria that must be met

⁹⁹⁴ *Id.* at 200-201 (footnote omitted).

⁹⁹⁵ *Id.* at 201.

⁹⁹⁶ GBC Vol. II 61.1 Brief at 38.

⁹⁹⁷ *Id.* at 39.

to qualify for eligibility for the program.⁹⁹⁸ In the Final Results, Commerce determined that the subprogram was *de jure* specific.⁹⁹⁹

The GBC argued that Commerce improperly found that the Power Smart Incentives subprogram was *de jure* specific. The GBC contended that the program is broadly available and its eligibility criteria do not limit access to particular enterprises or industries.¹⁰⁰⁰ The GBC contended that the subprogram is available to 2.02 million BC Hydro customers and that Commerce misread the record because the information does not expressly limit access to a specific enterprise or industry.¹⁰⁰¹

Commerce responded that the GBC overstated the program's availability. The subprogram is limited to large industrial customers that use at least one gigawatt-hour annually and can achieve projected savings of at least 300 megawatt-hours annually.¹⁰⁰²

The Panel finds that Commerce has properly found this program to be *de jure* specific. As described earlier with respect to the ACCA program, the court in *BGH II* upheld Commerce's finding of *de jure* specificity in similar circumstances.¹⁰⁰³ As in *BGH II*, the absolute number of industries eligible for tax relief was not dispositive. Rather, the issue is whether the program in question limited eligibility by law. Here, eligibility is limited by law to a small subset of BC Hydro's industrial customers that can qualify for this program. The program is limited to applicants who can satisfy explicit criteria, including a hard-wired facility upgrade, a five-year expected lifespan, minimum annual energy savings, and at least six months of site operation before applying.¹⁰⁰⁴ In other words, this program has specific eligibility requirements and thus is limited by law. Commerce's decision is sustained.

2. QUÉBEC ROAD AND BRIDGE TAX CREDIT

The Road and Bridge Tax Credit was created in April 2006 to provide support for the development of the public road network in forest areas.¹⁰⁰⁵ The roads that were built were public roads belonging to Québec and built to Québec's specifications. Corporations that incurred expenses for construction or major repair of eligible roads or bridges in forest areas were allowed to claim a tax credit for their costs.¹⁰⁰⁶

⁹⁹⁸ *Id.* at 40; IDM at 274.

⁹⁹⁹ IDM at 274.

¹⁰⁰⁰ GBC Vol. II 61.1 Brief at 42-45.

¹⁰⁰¹ *Id.* at 43.

¹⁰⁰² Commerce Vol. VI 61.2 Brief at 208-212.

¹⁰⁰³ *BGH II*, 600 F. Supp. 3d at 1257.

¹⁰⁰⁴ IDM at 274.

¹⁰⁰⁵ GOQ Vol. II 61.1 Brief at 130-131.

¹⁰⁰⁶ *Id.*

Following arbitration related to the circumvention of the 2006 Softwood Lumber Agreement (“SLA”), a tribunal found that the tax credits given to the parties circumvented the SLA.¹⁰⁰⁷ At that time, Resolute, along with other companies, were required to make certain payments to account for this circumvention.¹⁰⁰⁸ Separately, the tax credits for the roadwork performed years before were claimed during the POR because of amendments made to Resolute’s tax returns but the tax credits related to costs incurred when the Road and Bridge Tax Credit Program was in effect.¹⁰⁰⁹

The GOQ and Resolute claimed that Commerce’s decision to countervail the tax credit constituted a double remedy given that Resolute was required to pay an export tax to cover the benefit received from the tax credit.¹⁰¹⁰

Commerce responded that the statute strictly limits the offsets that it can make to the subsidy. It contended that the Canadian parties failed to make the necessary link between the credits received and the payment made as a result of the tribunal’s ruling.¹⁰¹¹

The statute contemplates specific situations when payments made by a respondent can be used to offset the amount of subsidies received during a period of review. The statute provides:

Net countervailable subsidy. For the purpose of determining the net countervailable subsidy, the administering authority may subtract from the gross countervailable subsidy the amount of—

(A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy,

(B) any loss in the value of the countervailable subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and

(B) *export taxes*, duties, or other charges levied on the export of merchandise to the United States *specifically intended to offset the countervailable subsidy received*.¹⁰¹²

The Panel acknowledges that Congress and the courts have indicated that Commerce is limited in the offsets it can make pursuant to this statutory provision.¹⁰¹³ The statute specifically

¹⁰⁰⁷ *Id.* at 130-32; Resolute 61.1 Brief at 122-25.

¹⁰⁰⁸ *Id.*

¹⁰⁰⁹ *Id.*

¹⁰¹⁰ GOQ Vol. II 61.1 Brief at 131-137; Resolute 61.1 Brief at 122-125.

¹⁰¹¹ Commerce Vol. VI 61.2 Brief at 215-216.

¹⁰¹² 19 U.S.C. § 1677(6) (emphasis added).

¹⁰¹³ Trade Agreements Act of 1979, U.S. Senate Report No. 96-249 (1979) at 86 (“{t}he list is narrowly drawn and is all inclusive.”); *See also Kajaria Iron Castings v. United States*, 156 F.3d 1163, 1174 (Fed. Cir. 1998) (“{W}e agree that 19 U.S.C. § 1677(6) provides the exclusive list of permissible offsets”); *Geneva Steel v. United States*, 914 F. Supp. 563, 609 (Ct. Int’l Trade 1996) (explaining

states that Commerce may subtract from the gross subsidy the amount of “*export taxes ... specifically intended to offset the countervailable subsidy received.*”¹⁰¹⁴ In this case, no question exists that Resolute benefited from tax credits that it applied to its taxes during the POR. Yet, the record indicates that the tax credits that were applied related to costs incurred during the time period when Resolute was required to pay an export tax to offset these credits. The Panel remands this matter back to Commerce to explain why the export taxes Resolute paid did not offset the tax credit received.

3. JDIL’S SALES DENOMINATOR

JDIL argued that Commerce should have included downstream sales by its cross-owned companies in the sales denominators in the subsidy calculations.¹⁰¹⁵ JDIL supplied an input to cross-owned companies for the production of a downstream product. Specifically, “J.D. Irving supplied *wood chips* (a by-product of the sawmill process) to Irving Pulp & Paper, Limited (‘IPP’) and Irving Paper Limited (‘IPL’) for the production of *pulp*, and IPP supplied *pulp* to IPL and Irving Consumer Products Limited (‘Irving Tissue’) for the production of *paper* products.”¹⁰¹⁶ JDIL cited to the regulation, which provides:

(i) *In general.* The Secretary normally will attribute a subsidy to the products produced by the corporation that received the subsidy.

...

(iv) *Input suppliers.* If there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations).¹⁰¹⁷

In its Final Results, Commerce explained:

Commerce did not include as part of its calculations IPP, IPL, or Irving Tissue’s sales of pulp and paper products, pursuant to 19 C.F.R. 351.525(b)(6)(iv). Commerce adopted this approach because 19 C.F.R. 351.525(b)(6)(iv) is only applicable to subsidies received by suppliers who provide an input that is primarily dedicated to the production of subject merchandise to a cross-owned, downstream producer of subject merchandise. JDIL, the producer of subject merchandise, supplied non-subject inputs (wood chips) to cross-owned, downstream producers of non-subject merchandise (pulp

that U.S.C. § 1677(6) “provides an exclusive list of offsets that may be deducted from the amount of a gross subsidy....”).

¹⁰¹⁴ 19 U.S.C. § 1677(6)(C) (emphasis added).

¹⁰¹⁵ JDIL 61.1 Brief at 58-66.

¹⁰¹⁶ *Id.* at 59 (emphasis in original).

¹⁰¹⁷ 19 C.F.R. § 351.525(b)(6).

and paper producers). Furthermore, JDIL acknowledged that subsidies received by IPP, IPL, and Irving Tissue do not meet any of the four exceptions for attributing to the production of subject merchandise subsidies received by cross-owned corporations under 19 C.F.R. 351.525(b)(6)(ii) - (v), such that questionnaire responses were required from these companies. As none of these three companies fall under the exceptions provided in 19 C.F.R. 351.525(b)(6)(ii) – (v), we have not expanded the denominator to include their sales. Although JDIL attempts to argue that we should expand its denominator because it is an “input supplier” to IPL, IPP, and Irving Tissue under 19 C.F.R. 351.525(b)(6)(iv), the wood chips it supplies to these companies are not a primarily dedicated input to the production of subject merchandise, softwood lumber. As discussed above, 19 C.F.R. 351.525(b)(6)(iv) is inapplicable here given that we attributed the benefit from subsidies that JDIL received to its total sales, because JDIL is the sole subject merchandise producer. JDIL is not an input supplier in this case.¹⁰¹⁸

In response, JDIL argued:

The Supreme Court of the United States established that deference is owed to an agency’s interpretation of its own regulation only where the regulation is “genuinely ambiguous” and the agency’s interpretation is “reasonable.” Here, the regulation is not “genuinely ambiguous.” There is nothing in the language of 19 C.F.R. § 351.525(b)(6)(iv) that limits the meaning of “input supplier” to inputs for the production of subject merchandise, and likewise nothing that limits the meaning of “downstream products” to subject merchandise. The regulation “just means what it means” and the Panel must give effect to that meaning. Moreover, if the purpose of the regulation were to capture only subsidies received by upstream cross-owned input suppliers, the text would have included additional words or qualifiers. “When the regulation is unambiguous, ‘it is the duty of the {Panel} to enforce it according to its obvious terms and not to insert words and phrases so as to incorporate therein a new and distinct provision.’” Commerce’s interpretation of the regulation is impermissible because it adds terms to the text that change the provision’s meaning.¹⁰¹⁹

JDIL’s argument hinges on whether “input product” and “downstream product” referenced in the regulation apply to all input products and all downstream products, not just those related to subject merchandise. The cases that JDIL cited to support its interpretation of this regulatory provision, however, are not on point.¹⁰²⁰ In the *Line Pipe* determination, Toscelik had requested that Commerce “include the sales of Töşyalı Demir in the denominator for any subsidies that

¹⁰¹⁸ IDM at 380-381 (footnotes omitted).

¹⁰¹⁹ JDIL 61.1 Brief at 61-62 (footnotes omitted). However, this legal argument was submitted in this review some three years before *Loper Bright* overturned *Chevron*. Therefore, the Panel does not address the “ambiguity” of the regulation or consider what deference Commerce is to be accorded.

¹⁰²⁰ *Id.* at 60, n. 175 (citing *Welded Line Pipe from the Republic of Turkey*, 80 Fed. Reg. 61,371 (Dep’t Commerce Oct. 13, 2015); *Industrial Phosphoric Acid from Israel*, 63 Fed. Reg. 13,626, 13,633 (Dep’t Commerce Mar. 20, 1998)).

Toscelik Profil or Tosyali Dis received because Toscelik Profil supplies billets to Tosyali Demir.”¹⁰²¹ While that case was discussing whether the sales by a downstream producer should be included in the denominator, it does not stand for the proposition that the regulations unambiguously apply to all input products and all downstream products, not just those related to subject merchandise. Therefore, the case does not support JDIL’s argument.

The sentence that JDIL quotes from the *Acid* determination is not in that determination. Rather, the sentence is from the Final Results from the expedited review in *Softwood Lumber IV*,¹⁰²² referencing the *Acid* determination. In *Softwood Lumber IV*, the issue regarded the attribution of benefits under 19 C.F.R. § 351.525(b)(6)(ii) rather than (iv).¹⁰²³ That subsection provides: “If two (or more) corporations with cross-ownership produce the subject merchandise, the Secretary will attribute the subsidies received by either or both corporations to the products produced by both corporations.” That is different than the situation in subsection (iv), which concerns cross-owned companies, one of which produces an input and one of which produces a downstream product.

By contrast, Commerce explained that this particular regulatory provision must be considered in the context of the overall objective of the cross-ownership rules. Referencing the *CVD Preamble*’s discussion of input suppliers and downstream products, Commerce noted:

Commerce has explained that an input for purposes of 19 C.F.R. § 351.525(b)(6)(iv) must be an input for the production of subject merchandise or derived downstream products. See *CVD Preamble*, 63 Fed. Reg. at 65,402 (“{W}e do not intend to investigate subsidies to affiliated parties unless cross-ownership exists or other information, such as transfer of subsidies, indicates that such subsidies may in fact benefit the subject merchandise produced by the corporation under investigation.”). Therefore, 19 C.F.R. § 351.525(b)(6)(iv) would only apply to an input producer that supplied an input primarily dedicated to the production of subject merchandise to a cross-owned downstream producer of subject merchandise.¹⁰²⁴

Commerce further noted that this interpretation of these provisions follows its prior practice.¹⁰²⁵

The Panel finds that JDIL’s interpretation of the regulations is overly broad and is not reasonable when viewed in the overall context of the objectives of the cross-ownership rule. There is no clear indication that when the regulation says “inputs” or “downstream products” that all

¹⁰²¹ *Welded Line Pipe from the Republic of Turkey*, 80 Fed. Reg. 61,371 (Dep’t Commerce Oct. 13, 2015), IDM at 43-44.

¹⁰²² *Final Results and Partial Recission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 67,388 (Dep’t Commerce Nov. 5, 2002), IDM at 22.

¹⁰²³ *Id.* at 21-22.

¹⁰²⁴ Commerce Vol. VI 61.2 Brief at 218-219.

¹⁰²⁵ *Id.* at 219-220.

inputs or downstream products, regardless of whether they are related to the subject merchandise, should be considered in the benefit calculation. In the Panel's view, Commerce's interpretation of its regulation is consistent with the intent of the objective of the cross-ownership rules and therefore the Panel sustains Commerce's decision.

4. CANFOR'S SUBSIDY RATE CALCULATION

During the POR, Canfor submitted a request to be excused from submitting a response for unaffiliated producers whose subject merchandise Canfor exported during the POR.¹⁰²⁶ Commerce granted Canfor's request. Accordingly, in calculating Canfor's benefit, Commerce did not include subsidies provided to Canfor's unaffiliated producers. Although the numerator did not include subsidies provided to these unaffiliated producers, the denominator did include Canfor's sales of subject merchandise supplied by the unaffiliated producers.¹⁰²⁷

Commerce's decision to exclude subsidies provided to Canfor's unaffiliated producers was not contested by the COALITION. Instead, the COALITION argued that Commerce contravened the statute by not deducting sales of subject merchandise from unaffiliated producers from Canfor's denominator. The COALITION asserted that 19 U.S.C. § 1671(a)(1) and 19 U.S.C. § 1677(5)(C) require that Commerce countervail all subsidies provided directly or indirectly to Respondents.¹⁰²⁸

Commerce's principal response to the COALITION's argument was that it had discretion to decide not to include all subsidies provided to the unaffiliated producers in the benefit calculation. Commerce went on to explain that because Commerce did not require Canfor to submit a questionnaire response from unaffiliated suppliers whose subject merchandise Canfor sold during the POR, the record did not permit Commerce to deduct such sales from the denominator in Canfor's benefit calculation.¹⁰²⁹

While the Panel finds that Commerce had the authority to exclude from the numerator the subsidies received by unaffiliated producers, the Panel does not agree that Commerce was excused from ensuring that the numerator and denominator matched. It is axiomatic that the basic purpose of the statute is to calculate margins as accurately as possible.¹⁰³⁰ The CIT has made clear that matching the numerator and denominator is an essential premise of an accurate calculation.¹⁰³¹

¹⁰²⁶ IDM at 378.

¹⁰²⁷ *Id.* at 378-79.

¹⁰²⁸ COALITION 61.1 Brief at 126-127.

¹⁰²⁹ Commerce Vol. VI 61.2 Brief at 225.

¹⁰³⁰ *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1181, 1191 (Fed. Cir. 1990).

¹⁰³¹ *Mannesmann-Sumebank Boru Endustri T.A.S. v. United States*, 86 F. Supp.2 1266, 1277 (Ct. Int'l Trade 1999).

Further, Commerce's past practice has been to assure that the numerator and denominator match.¹⁰³² Accordingly, the Panel remands this matter to Commerce to recalculate Canfor's subsidy rate using a denominator that matches the numerator.

5. ONTARIO FSPF DEBT FORGIVENESS (RESOLUTE)

In 2007, Resolute's predecessor company, AbitibiBowater, received a 22.5 CAD million Forest Sector Prosperity Fund ("FSPF") grant from the GOO that explicitly provided for the construction of a biomass boiler at the Fort Frances pulp and paper mill.¹⁰³³ In 2014, Resolute permanently closed the Fort Frances mill, prompting the GOO to demand repayment of the grant because Resolute failed to meet the grant's operating conditions.¹⁰³⁴ Following a commercial dispute, Resolute and the GOO entered into a Settlement and Release Agreement in 2017 that officially forgave the outstanding debt.¹⁰³⁵ Commerce investigated this 2017 debt forgiveness as a NSA, determined it was a new countervailable subsidy in the form of revenue forgone and attributed the benefit untied to Resolute's total corporate sales.¹⁰³⁶

Resolute and the GOO argued this attribution was contrary to law. They argued that because the original 2007 FSPF grant was physically tied to a pulp and paper mill, and therefore tied to non-subject merchandise, the 2017 settlement forgiving the repayment of that exact same grant must legally remain tied to pulp and paper.¹⁰³⁷ Citing the Federal Circuit's decision in *Kajaria Iron Castings*, they argued that a tied subsidy cannot be converted into an untied subsidy by a subsequent event or settlement agreement.¹⁰³⁸ In addition, they pointed out that Commerce had repeatedly countervailed the original FSPF grant in other trade proceedings (like *Uncoated Groundwood Paper*) as explicitly tied to pulp and paper.¹⁰³⁹ By attributing the forgiven debt to the entire company (including softwood lumber), the Canadian parties argued Commerce unlawfully transformed a tied non-subject subsidy into an untied subsidy.¹⁰⁴⁰

Commerce and the COALITION countered that the 2017 settlement agreement constituted a distinct, *new* financial contribution in the form of revenue forgone (debt forgiveness) that

¹⁰³² See, e.g., *Drill Pipe from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 78 Fed. Reg. 47,275 (Dep't Commerce Aug. 5, 2013) and accompanying IDM; *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 2010, 77 Fed. Reg. 72,323 (Dep't Commerce Dec. 5, 2012) and accompanying IDM.

¹⁰³³ COALITION 61.2 Brief at Ex. 473; Hearing Tr. Day 3 at 191-192.

¹⁰³⁴ COALITION 61.2 Brief at Ex. 473.

¹⁰³⁵ Hearing Tr. Day 3 at 191-192; IDM at Cmt. 118.

¹⁰³⁶ Hearing Tr. Day 4 at 86-87; IDM at Cmt. 118.

¹⁰³⁷ Resolute 61.1 Brief at 95-101; Hearing Tr. Day 3 at 193-194.

¹⁰³⁸ Resolute 61.1 Brief at 99-100.

¹⁰³⁹ Hearing Tr. Day 3 at 193; Resolute 61.3 Brief at 58-61.

¹⁰⁴⁰ Hearing Tr. Day 3 at 193-194.

occurred during the POR.¹⁰⁴¹ Under 19 C.F.R. § 351.525(b)(5), Commerce evaluates whether a subsidy is tied based on the information available at the time of bestowal of *that specific subsidy*. At the time of this new bestowal in 2017, the Fort Frances mill was permanently closed and no longer producing paper.¹⁰⁴² Because the 2017 settlement agreement forgave a general corporate liability owed by Resolute to the GOO and contained no explicit language restricting the debt relief to the ongoing production of non-subject merchandise, Commerce maintained the benefit was untied. As money is fungible, the relief of a general corporate debt accrued to the entire corporate entity, including its softwood lumber operations.¹⁰⁴³

The Panel upholds Commerce's determination regarding the FSPF debt forgiveness. The 2017 Settlement and Release Agreement constituted a new, distinct government action, the forgiveness of debt, or revenue forgone, which occurred during the POR.¹⁰⁴⁴ Commerce's regulations require it to evaluate the purpose of a subsidy based on the bestowal documents at the time the specific subsidy under review is conferred.¹⁰⁴⁵

The Panel finds that Commerce reasonably distinguished the 2017 debt forgiveness from the original 2007 grant. At the time of the 2017 settlement, the Fort Frances mill was closed, and the settlement documents forgave a general corporate liability without expressly tying the financial relief exclusively to the active production of pulp and paper.¹⁰⁴⁶ Therefore, Commerce reasonably applied its default attribution rule under 19 C.F.R. § 351.525(b)(3) to attribute the benefit of the untied debt forgiveness to all of Resolute's sales.

Resolute and the GOO also challenged Commerce's determination on the grounds that the Settlement and Release Agreement was not a financial contribution within the meaning of 19 U.S.C. § 1677(5)(D) and that it conferred no benefit on Resolute.¹⁰⁴⁷

In its post-preliminary analysis, Commerce found that the GOO's release of Resolute from the obligation to repay the 22.5 million CAD conditional grant was a financial contribution under 19 U.S.C. § 1677(5)(D)(ii) "because the GOO forgave the collection of revenue that was otherwise owed to it."¹⁰⁴⁸ Commerce found the debt forgiveness to be *de jure* specific because the Settlement and Release Agreement was expressly limited to Resolute. Applying 19 C.F.R. § 351.508(a) and (c), Commerce treated the benefit as equal to the amount of the debt forgiven, treated the subsidy

¹⁰⁴¹ Hearing Tr. Day 4 at 86-87; IDM at Cmt. 118.

¹⁰⁴² COALITION 61.2 Brief at Ex. 473; IDM at Cmt. 118.

¹⁰⁴³ Hearing Tr. Day 3 at 193-194; IDM at Cmt. 118.

¹⁰⁴⁴ Hearing Tr. Day 4 at 86-87.

¹⁰⁴⁵ 19 C.F.R. § 351.525(b)(5); IDM at Cmt. 118.

¹⁰⁴⁶ IDM at Cmt. 118.

¹⁰⁴⁷ Resolute 61.1 Brief at 137-139; GOO Vol. II 61.1 Brief at 16-29; Resolute 61.3 Brief at 90-92.

¹⁰⁴⁸ Commerce Resolute Post-Preliminary Decision at 4, P.R. 1902.

as non-recurring, and allocated the benefit over the average useful life of 10 years.¹⁰⁴⁹ Commerce kept these findings in the Final Results. It rejected the contention that the Settlement and Release Agreement resolved a commercial dispute, and stated that the costs Resolute may have incurred “in searching for a buyer to operate the mill and negotiating the Settlement and Release Agreement” were “irrelevant to Commerce’s subsidy analysis.”¹⁰⁵⁰

The GOO argued that revenue forgone under 19 U.S.C. § 1677(5)(D)(ii) is “limited to tax measures,” relying on the reference in that provision to tax credits and deductions and on the SAA.¹⁰⁵¹ The GOO also argued that Commerce’s practice treats debt forgiveness as a direct transfer of funds, that no funds were transferred to Resolute under the settlement, and that there was no debt held by Resolute that Ontario forgave.¹⁰⁵² On benefit, the GOO relied on *GOSL* to argue that Commerce treated the financial contribution as the benefit. According to GOO, Resolute received nothing under the settlement. Relying on the Preamble, the GOO argued that the record and Commerce’s IDM, “demonstrate that Resolute received nothing prior to the Settlement, and the Settlement neither benefited Resolute’s post-bankruptcy capital structure nor reduced Resolute’s long-term liabilities...The settlement simply returned Resolute to “the original, post-bankruptcy status quo.”¹⁰⁵³ The GOO also argued that in *Uncoated Groundwood Paper from Canada*, the FSPF grants received before AbitibiBowater emerged from bankruptcy on December 9, 2010 were extinguished, and that Commerce could not countervail the same subsidy again.¹⁰⁵⁴

Resolute argued that Commerce was required to “look at the whole transaction” to determine what kind of financial contribution, if any, was made and if so, how benefit should be measured.¹⁰⁵⁵ If Ontario intended to forgive a debt, it “could have done so without the need of a Settlement and Release Agreement.” In Resolute’s view, the agreement recorded an exchange of consideration.¹⁰⁵⁶ Its release from repayment turned on its need to maintain the Fort Frances mill in hot idle status and to prepare it for sale as a going concern. In exchange, Resolute released its own claims against the Province.¹⁰⁵⁷ Resolute described the agreement as “a mutually bargained-for exchange of actions and commitments that is not a financial contribution and confers no benefit.”¹⁰⁵⁸ Resolute

¹⁰⁴⁹ Commerce calculated a net countervailable subsidy rate of 0.13 percent *ad valorem* for 2017 and 0.12 percent *ad valorem* for 2018. *Id.* at 4-5.

¹⁰⁵⁰ IDM at 389-390.

¹⁰⁵¹ GOO Vol. II 61.1 Brief at 21-22.

¹⁰⁵² *Id.* at 22-24.

¹⁰⁵³ *Id.* at 24-29 (citing *GOSL*, 308 F. Supp. 3d at 1380-82).

¹⁰⁵⁴ *Id.* at 19-20, 27-28; Resolute 61.3 Brief at 112.

¹⁰⁵⁵ Resolute 61.1 Brief at 137.

¹⁰⁵⁶ *Id.* at 138.

¹⁰⁵⁷ *Id.* at 137-139; Resolute 61.3 Brief at 91-92; Hearing Tr. Day 3 at 197-198; Hearing Tr. Day 4 at 110-111.

¹⁰⁵⁸ Resolute 61.3 Brief at 92.

also identified the FSPF settlement as one of Commerce's determinations affected by *Qatar Melamine*.¹⁰⁵⁹

Commerce responded that the subsidy under review is the 2017 debt forgiveness. The amount forgiven was revenue otherwise due to the GOO, and the benefit of debt forgiveness under its regulation is the amount forgiven.¹⁰⁶⁰ Resolute was the sole owner of the Fort Frances mill. The costs it incurred in seeking a buyer for its own mill and in negotiating the settlement were irrelevant to the subsidy analysis.¹⁰⁶¹ The COALITION argued that tax credits and deductions are listed in the statute as merely examples of revenue forgone. According to the COALITION the GOO could have enforced repayment of the 22.5 million CAD.¹⁰⁶² Commerce and the COALITION both distinguished *GOSL* as a situation where the respondent advanced funds on the government's behalf and received no financial contribution from the government.¹⁰⁶³

The statute defines a financial contribution to include "foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income."¹⁰⁶⁴ The panel agrees that the words "such as" indicate that the tax-related measures listed are meant as examples, contrary to the GOO's reading. Commerce's regulations provide elsewhere for the forgiveness of a firm's debt obligation. By implication, the regulation does not regard relief from a non-tax obligation owed to a government as not covered.¹⁰⁶⁵ In this case, Commerce determined that the debt forgiveness was revenue forgone, and the absence of a new payment to Resolute in 2017 is consistent with that finding.

The Panel next considered whether substantial evidence supports Commerce's finding that the amount released was "otherwise due." The Funding Agreement made the grant conditional on the continuous operation of the Fort Frances mill for at least three years after the final disbursement, which was made in March 2012.¹⁰⁶⁶ Resolute permanently closed the mill in May 2014. In October 2014, the Ontario Ministry of Natural Resources and Forestry directed Resolute to repay the full amount of the grant, a fact that Resolute reported in its filings with the U.S. Securities and Exchange Commission.¹⁰⁶⁷ On June 29, 2017, the Settlement and Release Agreement released Resolute from that repayment. Resolute's own brief describes the agreement as one that "conditioned Resolute's *release* from repaying the grant" on its undertakings.¹⁰⁶⁸ The

¹⁰⁵⁹ Resolute Notice of Subsequent Authority, note 702.

¹⁰⁶⁰ Commerce Vol. VI 61.2 Brief at 227-230; Hearing Tr. Day 3 at 216-218; Hearing Tr. Day 4 at 85-86.

¹⁰⁶¹ Commerce Vol. VI 61.2 Brief at 229-231.

¹⁰⁶² COALITION 61.2 Brief at 306-308.

¹⁰⁶³ Commerce Vol. VI 61.2 Brief at 231; COALITION 61.2 Brief at 309; IDM at 390.

¹⁰⁶⁴ 19 U.S.C. § 1677(5)(D)(ii).

¹⁰⁶⁵ 19 C.F.R. § 351.508.

¹⁰⁶⁶ Commerce Resolute Post-Preliminary Decision at 3; IDM at 388-389.

¹⁰⁶⁷ IDM at 389 & n.2030.

¹⁰⁶⁸ Resolute 61.1 Brief at 137 (emphasis added).

GOO characterizes these events as a disputed claim that the parties compromised and not as a debt. That is one plausible reading of the record documents. However, the Panel's task is to determine whether there is substantial evidence for Commerce's reading. The possibility of drawing two inconsistent conclusions from the evidence does not mean that Commerce's finding is not supported by substantial evidence.¹⁰⁶⁹ The Panel therefore sustains Commerce's determination that the GOO provided a financial contribution in the form of revenue forgone.

Commerce's finding in *Uncoated Groundwood Paper from Canada* was concerned with the benefit of FSPF payments received before December 9, 2010.¹⁰⁷⁰ The financial contribution in question here is about events after AbitibiBowater's emergence from bankruptcy, among which are the closure of the mill in 2014, the demand for repayment in October 2014, and the release in June 2017. The GOO acknowledged that a small (in its view *de minimis*) part of the grant was disbursed in March 2012, under the Conditional FSPF Grant Agreement.¹⁰⁷¹ The repayment obligation therefore arose under an agreement that continued to operate after the bankruptcy. Commerce reasonably concluded that the forgiveness of that obligation "could not have been extinguished through the bankruptcy proceeding."¹⁰⁷²

The Panel turns to benefit. Commerce applied 19 C.F.R. § 351.508(a), under which the benefit from the forgiveness of a firm's debt obligation is the amount forgiven. Neither Resolute nor the GOO challenged the validity of the regulation. Their argument is that Commerce could not apply it without accounting for what Resolute gave in return.

However, Commerce did not have to reduce the benefit by the value of Resolute's undertakings. The statute lists the amounts that Commerce can net from a gross subsidy, and the Federal Circuit has held that the list is exclusive.¹⁰⁷³ The costs of keeping a mill operational or looking for a buyer are not on the list. In addition, Commerce found that Resolute was the sole owner of the Fort Frances mill.¹⁰⁷⁴ The expenditures incurred by Resolute were made to preserve the value of Resolute's own asset, not payments for the GOO's benefit. Third, Commerce's measure of benefit is what the recipient received, without considering the effect of the subsidy.¹⁰⁷⁵ For that reason, the GOO's argument that Resolute's capital structure and liabilities were unchanged does not matter. On Commerce's finding, Resolute was subject to a demand for repayment of 22.5 million CAD before June 29, 2017 and was not subject to it afterward.

¹⁰⁶⁹ *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966).

¹⁰⁷⁰ IDM at 390.

¹⁰⁷¹ GOO Vol. II 61.1 Brief at 28, n.90.

¹⁰⁷² IDM at 390. In the Panel's view, that the post-bankruptcy amount was *de minimis* is not the issue. The post-bankruptcy grant indicates that the arrangement survived the bankruptcy.

¹⁰⁷³ 19 U.S.C. § 1677(6); *Kajaria Iron Castings v. United States*, 156 F.3d 1163, 1174 (Fed. Cir. 1998).

¹⁰⁷⁴ IDM at 389.

¹⁰⁷⁵ 19 U.S.C. § 1677(5)(C); CVD Preamble at 65,361.

In the *GOSL* case the respondent advanced funds on behalf of the government and was repaid without interest, resulting in a net loss to the respondent.¹⁰⁷⁶ Here the government released Resolute from a claim against it. The *Qatar Melamine* case similarly does not apply. The court there stated that “{n}either the statute nor Commerce’s regulations” specify how to calculate the benefit from the rental and port services revenue forgone in that case.¹⁰⁷⁷ Debt forgiveness is different, because 19 C.F.R. § 351.508(a) describes how the benefit is measured.

In the IDM Commerce stated that Resolute’s costs are “irrelevant” without discussing the terms of the Settlement and Release Agreement.¹⁰⁷⁸ The Panel has doubts whether that explanation is adequate. However, read with the Post-Preliminary Decision, the IDM identifies the financial contribution, the regulation that fixes the benefit, and the fact (which Commerce treated as decisive), that Resolute incurred the costs as owner of the mill. Commerce’s path, although very narrow, may reasonably be discerned.¹⁰⁷⁹ The Panel therefore finds that Commerce’s determination that the GOO’s debt forgiveness was a financial contribution that conferred a benefit on Resolute in the amount forgiven is supported by substantial evidence and is in accordance with law.

X. ORDER OF THE PANEL

For the reasons given above, the Panel hereby Orders as follows:

1. The Panel remands Commerce’s determination that prices in the Ontario private timber market are distorted by governmental influence and directs Commerce to identify and explain, with reference to specific and substantial evidence of record, how prices in the Ontario private market were in fact actually distorted by governmental interference or influence.
2. With regard to Alberta stumpage prices, the Panel remands Commerce’s determinations that Alberta stumpage prices are distorted as a result of government control, market concentration and supply overhang and that the stumpage prices from the TDA survey data are not market-determined and cannot serve as a tier-one benchmark for assessing whether GOA provided stumpage for LTAR. The Panel directs Commerce to identify and explain, with reference to specific and substantial evidence of record:
 - (i) How private-origin Alberta stumpage prices were effectively determined by Crown stumpage prices, and how the Alberta stumpage market was actually distorted as a result of government control over the majority of the harvest;

¹⁰⁷⁶ *GOSL*, 308 F. Supp. 3d at 1380-1381.

¹⁰⁷⁷ *Qatar Melamine* at 24.

¹⁰⁷⁸ IDM at 390.

¹⁰⁷⁹ *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

- (ii) How market concentration by a small number of tenure-holding firms actually resulted in stumpage price distortion, and how prices for private origin standing timber in fact tracked those of Crown-origin standing timber;
 - (iii) Which methodology Commerce used in determining whether stumpage prices were market determined and how that led to Commerce's conclusion that the Alberta stumpage market was distorted;
 - (iv) The effect (or lack thereof) on overall standing timber supply of the impracticability of harvesting in certain areas as a result of environmental considerations, ongoing negotiations with First Nations, and uneconomic harvesting conditions, and how standing timber supply (even if practically available for harvest) would affect market prices such that private stumpage prices would track administratively-set prices on Crown land; and
 - (v) Why the private stumpage prices from the TDA survey data are not market-determined and cannot serve as a tier-one benchmark for assessing whether GOA provided stumpage for LTAR.
3. Remands Commerce's determination that the New Brunswick private stumpage market is distorted and, if it continues to find distortion, directs Commerce to identify and explain with specific and substantial record evidence why the New Brunswick private stumpage market is distorted, and what is the causal relationship between market concentration and price distortion.
4. With regard to distortion in the Québec stumpage timber auctions, the Panel remands and directs Commerce to:
- (i) Employ the 2017-2018 POR data placed on the record during this administrative review to analyze the extent to which auction prices actually track TSG-allocated prices. If Commerce continues to find after conducting that analysis that the auction prices are distorted and cannot serve as a tier-one benchmark, the Panel directs Commerce to provide a reasoned explanation based on empirical data on the record;
 - (ii) With regard to the domestic processing requirement, the Panel directs Commerce to indicate specific and substantial evidence showing that the domestic processing requirement in fact exerted downward pressure on prices at BMMB auctions during the POR. If no such evidence exists on the record, the Panel directs Commerce to explain why the absence of evidentiary support does not negate this element of its distortion finding. Alternatively, Commerce is directed to reconsider its distortion determination in light of the absence of this factor exerting any material downward pressure on prices;
 - (iii) With regard to TSG allocations, remands and directs Commerce to identify specific and substantial evidence demonstrating that the shifting suppressed prices. If no such evidence exists on the record, Commerce is directed to explain why the absence of evidentiary support does not negate this element of its distortion finding.

Alternatively, Commerce is directed to reconsider its distortion determination in light of the absence of this factor exerting meaningful downward pressure on prices; and

- (iv) With regard to the disclosure of estimated prices effect on price discovery, on remand Commerce is directed to perform its analysis to remove the effect of non-compliant/non-softwood bids and to remove the distortive effect of the two outlier bids. Alternatively, Commerce is directed to provide an explanation for how a much smaller percentage difference (absent the outliers) is adequate to prove market-wide price suppression through estimated price disclosure.
- 5. With regard to calculation of subsidy benefits, Commerce is directed to calculate benefits reflecting “prevailing market conditions” by not assigning a zero benefit to transactions in which individual Crown stumpage prices exceed the monthly transaction average benchmark prices.
- 6. With regard to the BC LERs:
 - (i) The Panel remands and directs Commerce to provide reasoned explanations of: (a) how specific and substantial evidence supported its findings regarding blocking and limitations on the ability of log harvesters to enter into long-term agreements with foreigners with respect to log exports from the BC interior during the review period; and (b) how such findings supported its conclusion that the LERs restrained log exports from the BC interior to a meaningful degree such that it caused log suppliers to provide logs to BC log consumers at low prices;
 - (ii) The Panel remands and directs Commerce to provide a reasoned explanation of: (a) how specific and substantial evidence supported its findings regarding the significance of the in-lieu-of-manufacturing fees relating to exports during the review period from the BC coast and interior, and (b) how such findings supported its conclusion that the LERs restrained log exports from the BC interior to a meaningful degree such that it caused log suppliers to provide logs to BC log consumers at low prices; and
 - (iii) Regarding Commerce’s consideration of the contested elements of the LER measures in their totality, the Panel remands and directs Commerce to explain, to the extent that the LER measures viewed individually do not support Commerce’s conclusion that the LERs restrained log exports from the BC interior to a meaningful degree such that they caused log suppliers to provide logs to BC log consumers at low prices, how, in their totality, they support Commerce’s conclusion.
- 7. The Panel remands and directs Commerce to provide an explanation or reconsideration of its determination that the AJCTC Program “expressly limits” access to the program and is therefore a *de jure* specific subsidy if some industries use the program while others do not, or else identify additional evidence of record supporting its determination.

8. Regarding the Sustainable Development Technology Canada program in Alberta, the Panel remands and directs Commerce to provide further explanation or to reconsider its determination that the SDTC program is a *de jure* specific subsidy, including whether the program actually “expressly limits” access and to what extent any industry is free to apply.
9. Regarding the Bio Future Program in Alberta and whether ABF funds were “tied” to non-subject merchandise, the Panel remands and directs Commerce to point to specific and substantial evidence on the record that the grants were not tied to the production of lignin.
10. Regarding the Alberta BPP program, the Panel remands Commerce’s determination in respect of whether the BPP funding is attributable to West Fraser’s overall production and whether the amounts received were not tied to the production of any particular product:
 - (i) In particular, the Panel directs Commerce to explain how its statements in the IDM at 263 and 264 support its conclusion that the bestowal documents do not support the argument that the funding was tied to the production of bioenergy products;
 - (ii) The Panel also directs Commerce to explain how it was relevant to its determination that West Fraser’s lumber production “may generate” the relevant biofuels as a byproduct in light of Commerce’s practice not to base tying determinations on events that occur after the subsidy is bestowed;
 - (iii) The Panel directs that Commerce elaborate on and explain its reliance on the “exception” set forth in 19 C.F.R. § 351.525(b)(5)(ii), which led Commerce to determine that it would attribute the funding benefits to West Fraser’s overall production; and
 - (iv) The Panel further directs that Commerce explain how funding the production of bioenergy products would fall under the exception and constitute funding tied to the production of an input.
11. Regarding the BC EPA program, the Panel remands this matter and:
 - (i) With regard to the MTAR Benchmark, directs Commerce to rely on a benchmark, other than BC Hydro’s electricity price to West Fraser, that reflects an appropriate measure of what West Fraser would otherwise earn on the sale of electricity in the absence of a government program; and
 - (ii) With regard to the attribution of a subsidy to softwood lumber production where payments were tied to energy production, the Panel finds that Commerce has failed to explain why the fact that West Fraser is buying electricity from, and selling it to, BC Hydro is relevant to its attribution analysis. Accordingly, the Panel directs Commerce to explain whether West Fraser’s sale of electricity to BC Hydro should be attributed to its overall operations and, if so, why.
12. Concerning the IESO CHP III Program in Ontario, the Panel remands this matter and:

- (i) With regard to the MTAR Benchmark, the Panel directs Commerce to employ a benchmark that reflects an appropriate measure of what Resolute would otherwise earn on the sale of electricity in the absence of a government program, rather than what Resolute paid for electricity purchased from IESO; and
 - (ii) With regard to attribution of the program and because Commerce has failed to explain fully its reasoning for attributing this program to all of Resolute's sales, the Panel directs Commerce to explain its decision that it would attribute the funding benefits to Resolute's overall production, including addressing whether the bestowal documents tie this program to the production of pulp and paper products produced at the mill in question.
13. Concerning the Green Power Purchases of Electricity under the PAE and the Côte-Nord Rate L Program in Québec, the Panel remands as follows:
- (i) With regard to the MTAR Benchmark, the Panel directs Commerce to rely on a benchmark that reflects an appropriate measure of what Resolute would otherwise earn on the sale of electricity in the absence of a government program, rather than what Resolute pays Hydro-Québec for purchases of electricity; and
 - (ii) Because the Panel finds that Commerce has failed to explain fully its reasoning for attributing these programs to all of Resolute's sales, we direct Commerce to elaborate on and explain its decision that it would attribute the funding benefits to Resolute's overall production including addressing whether the bestowal documents tie this program to the production of pulp and paper products produced at the mills in question.
14. With regard to the Québec Road and Bridge Tax Credit, since the record indicates that the tax credits applied were related to costs incurred during the time period when Resolute was required to pay an export tax to offset these credits, the Panel remands this matter back to Commerce to explain why the export taxes Resolute paid did not offset the tax credit received.
15. With regard to Canfor's Subsidy Rate Calculation, since Commerce included in the subsidy rate denominator Canfor's sales by its unaffiliated producers, but did not include in the numerator subsidies provided to those unaffiliated producers, and Commerce's past practice has been to assure that the numerator and denominator match, the Panel remands this matter to Commerce to recalculate Canfor's subsidy rate using a denominator that matches the numerator.

The Panel affirms Commerce's Determination in all other respects.

The Panel orders Commerce to make a determination on remand consistent with the findings and instructions of this Decision. The remand determination shall be made within 90 days.

ORDERED.

Issued: October 8, 2026

SIGNED IN THE ORIGINAL BY:

/s/ Robert E. Ruggeri

ROBERT E. RUGGERI, CHAIRMAN

/s/ Valerie Hughes

VALERIE HUGHES

/s/ Gregory O. Somers

GREGORY O. SOMERS

/s/ Mary T. Staley

MARY T. STALEY

/s/ Irving A. Williamson

IRVING A. WILLIAMSON