ARTICLE 1904 BINATIONAL PANEL REVIEW

Pursuant to the

NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of:	)	
Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination	)	**Secretariat File No. USA-CDA-2017-1904-02**

Panelists*

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I. Introduction

This Panel has been constituted pursuant to Article 1904(2) of the North American Free Trade Agreement ("NAFTA").[1] The Panel was appointed to review the final affirmative determination issued by the U.S. Department of Commerce ("Commerce") in its countervailing duty ("CVD") investigation of *Certain Softwood Lumber Products from Canada*.[2]

The "Committee Overseeing Action for Lumber International Trade Investigations or Negotiations" ("COALITION"), on behalf of the U.S. softwood lumber industry, filed a petition with Commerce and the International Trade Commission on November 25, 2016.[3] The Petition alleged that the Canadian and provincial governments were subsidizing softwood lumber through various programs. Commerce initiated its investigation on December 15, 2016.[4]

On April 25, 2017, Commerce issued its Preliminary Determination in its CVD investigation.[5] The Preliminary Determination was accompanied by a Decision Memorandum ("PDM")[6] that explained in detail Commerce's reasoning behind its determination. Following verification, the submission of briefs by the parties, and a public hearing before the agency, Commerce issued its Final Determination on November 2, 2017.[7] The Final Determination was accompanied by an Issues and Decision Memorandum ("IDM")[8] that explained Commerce's changes from the Preliminary Determination and set out the arguments of the parties and Commerce's position on those arguments. On December 26, 2017, the International Trade Commission notified Commerce of its affirmative injury determination,[9] and Commerce issued its

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1 North American Free Trade Agreement, Can.-Mex.-U.S., art. 1904(2), Dec. 17, 1992, 32 I.L.M 289 (1993).

2 *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, 82 Fed. Reg. 51,814 (November 8, 2017) ("Final Determination").

3 *Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada* (November 25, 2016), C.R. 1 to C.R. 34, P.R. 1 to P.R. 34. References to the Business Proprietary Information ("BPI") documents in the indexes to the administrative record before Commerce are designated as "C.R." while references to the Public Documents are designated as "P.R." followed by the number in the indexes.

4 *Certain Softwood Lumber Products from Canada: Initiation of Countervailing Duty Investigation*, P.R. 93, published in the Federal Register on December 22, 2016, 81 Fed. Reg. 93,897.

5 *Certain Softwood Lumber Products from Canada: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, P.R. 1268, published in the Federal Register on April 28, 2017, 82 Fed. Reg. 19,657.

6 P.R. 1269.

7 *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, P.R. 1786, published in the Federal Register on November 8, 2017, 82 Fed. Reg. 51,814.

8 P.R. 1785.

9 P.R. 1814.

countervailing duty order, including amendments to the Final Determination for ministerial errors, on December 29, 2017.[10] It is that agency action that is the subject of this Panel's review.

Most of the countervailable subsidies found by Commerce were based on the sale for "less than adequate remuneration" ("LTAR") of the right to harvest standing timber from Crown lands in each applicable province ("the provincial stumpage systems"). Commerce also found that the Log Export Restraint process ("LER process") in British Columbia provided a countervailable subsidy to respondents there. Certain tax and electricity purchasing or sale programs were also found to provide countervailable subsidies. The CVD rates in the amended Final Determination ranged from 3.34% to 17.99% *ad valorem.*[11]

Several Canadian parties, including the Government of Canada ("GOC"), filed a joint Request for Panel Review of the Final Determination on November 14, 2017. This binational Panel review was subsequently initiated by the U.S. Section of the NAFTA Secretariat on November 21, 2017. (Throughout this Opinion, the term "Canadian Parties" refers to those specific entities[12] who filed a "Rule 57.1 Joint Brief of the Canadian Parties" as well as a Rule 57.2 Joint Brief, and a Rule 57.3 Joint Brief. "Canadian parties" refers generally to those supporting the Canadian Complainants' position.)

A Complaint was filed on December 14, 2017 by the GOC and various other Canadian participants. The Government of New Brunswick and the New Brunswick Lumber Producers filed their own separate Complaint as did J.D. Irving, Limited, a Canadian softwood lumber producer. A Complaint was also filed by the COALITION, the U.S. petitioner below.

In the main the GOC and the Canadian interests 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 LTAR. Similarly, they also argued that Commerce erred in rejecting in-province prices as the benchmark to calculate benefits under the LER process. They also argued that Commerce erred in finding that certain tax programs were *de jure* and *de facto* specific. Lastly, they challenged Commerce's determinations with regard to certain scope issues.[13]

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[10] *Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, P.R. 1815, published in the Federal Register on January 3, 2018, 83 Fed. Reg. 347.

[11] *Id.*

[12] Those parties are Government of Canada, Government of Alberta, Government of Manitoba, Government of Ontario, Government of Quebec, Government of Saskatchewan, Alberta Softwood Lumber Trade Council, Conseil de l'Industrie Forestiere du Quebec, Ontartio Forest Industries Assoc., Canfor Corp., Tolko Marketing and Sales Ltd, Tolko Industries Ltd., and West Fraser Mills Ltd.

[13] Other individual Canadian participants raised additional, specific objections to the Final Determination based on other programs:

The Government of Quebec separately argued, as did Conseil de l'Industrie Forestiere du Quebec; Ontario Forest Industries Assoc., and Resolute FP Canada, Inc. jointly, that sales of electricity to Hydro

The COALITION had its own objections to Commerce's determination.[14]

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

II. Standard of Review

This Panel's authority derives from Chapter 19 of the NAFTA. Article 1904(1) of the NAFTA provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Article 1904(2) directs the Panel to assess whether a final countervailing duty or antidumping duty determination is in accordance with the laws of the importing country, in this case, the United States. The laws consist of the "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority."[15]

Pursuant to Article 1904(3) and Annex 1911 of the NAFTA, the Panel is required to apply the standard of review specified in Section 516A(b)(1)(B) of the Tariff Act of 1930 ("the Act").[16] 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. "In short, we do not make the determination; we merely vet

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Quebec were not countervailable; countervailing the "Road Credits" payments is a double penalty; and that the PCIP was not a grant.

The Alberta Parties objected that the BPCP payments were not countervailable since they were tied to bioenergy, not softwood lumber.

The Government of New Brunswick and its lumber producers argued that the provincial government's purchases of License Management and Silviculture Services were not a "financial contribution." The purchase of renewable electricity from a lumber producer under the LIREPP was made at more than adequate remuneration, and three labor programs countervailed by Commerce were not *de facto* regionally specific.

J.D. Irving, Ltd. ("JDIL"), a New Brunswick producer, separately argued that it received no countervailable benefits under the AITC tax credit program or the gasoline and fuel tax exemption and refund program; the accelerated capital cost allowance program was not *de jure* specific; the R&D tax credits program was not *de facto* specific; and the ITA miscalculated the sales denominators for subsidies.

[14] It claimed that Commerce improperly excluded certain log price data from its calculation of the US Pacific Northwest log price; improperly made downward adjustments for certain costs incurred by the BC producers; failed to make an upward adjustment for a difference in terms of sale; and 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 Quebec. The COALITION also objected that Commerce did not consider three new subsidy allegations made in the course of the investigation.

[15] NAFTA, Chapter 19, Articles 1904(2) and (3).

[16] 19 U.S.C. § 1516a(b)(1)(B).

the determination."[17]

"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."[18] 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.[19] However, the substantial evidence standard is "a high barrier to reversal."[20]

In reviewing Commerce's interpretations of the governing statute, the Panel follows the two-stage approach adopted by the U.S. Supreme Court. When reviewing an agency's construction of the statute which it administers, court is confronted with two questions:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, 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."[21]

An agency's statutory interpretation is to be upheld if it is "sufficiently reasonable," even if it is not "the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding."[22] Commerce's statutory interpretations enunciated in an administrative determination are "entitled to deference under *Chevron*."[23] Commerce's regulations adopted after notice-and-comment rulemaking are also entitled to a high level of deference.[24] Additionally, "{w}e must give substantial deference to an agency's interpretation of its own regulations."[25]

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.[26] Commerce must "examine the relevant data and articulate a

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17 *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006).

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

19 *Nippon Steel*, 458 F.3d at 1351.

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

21 *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984).

22 *American Lamb Company v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986) (citing *Chevron*).

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

24 *See Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1347 (*Fed. Cir.* 2001).

25 *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994).

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

satisfactory explanation for its action including a rational connection between the facts found and the choices made.'"[27] 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."[28] 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.'"[29] 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."[30]

When an agency does need to fill gaps in a statute, it must act consistently with the underlying purpose of the law it is charged with administering. The Panel is to "reject administrative constructions, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement."[31]

In short, the Panel's job is not to compare what the Petitioner and the Canadian parties proposed to what Commerce did, and choose which the Panel likes more. Our job is to look at what Commerce did and determine whether it was supported by substantial evidence and was otherwise in accordance with law.

III. Sales for Less Than Adequate Remuneration: Stumpage

1. Analytical Framework

The largest subsidies calculated in the investigation subject to this Panel review arise from Commerce's findings of sales for less than adequate remuneration ("LTAR") of Crown timber. The term "stumpage" refers to the sales price of standing timber.

Section 771(5)(E)(iv) of the Act[32] defines the term countervailable subsidy as it pertains to LTAR:

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[27] *Avesta AB v. United States*, 724 F. Supp. 974, 978 (CIT 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)).

[28] *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)).

[29] *Gerald Metals, Inc. v. United States,* 132 F.3d 716, 720 (Fed. Cir. 1997) (*quoting Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)).

[30] *Torrington Co. v. United States*, 790 F. Supp. 1161, 1167-1168 (Ct. Int'l Trade 1992).

[31] *Hoechst Aktiengesellschaft v. Quigg,* 917 F.2d 522, 526 (Fed. Cir. 1990) (*quoting Ethicon, Inc. v. Quigg,* 849 F.2d 1422, 1425 (Fed Cir. 1988) and *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)).

[32] 19 U.S.C. § 1677(5)(E)(iv).

> 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.

Congress therefore delegated to Commerce the task of determining how to calculate LTAR, subject to the requirements that it 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 elaborated on the calculation of LTAR in section 351.511 of its regulations,[33] setting out how it is to develop 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.
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> (iii) *World market price unavailable*. If there is no world market price available to purchasers in the country in question, the Secretary will normally

[33] 19 C.F.R. § 351.511.

> measure the adequacy of remuneration by assessing whether the government price is consistent with market principles.
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> (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.

Thus, 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 statute quoted above 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*." The "country which is subject to the investigation" in this case is Canada. The regulations quoted above likewise refer to "the country in question," which again is unambiguously Canada.

The question therefore comes down to how Commerce chooses a benchmark when presented with multiple potential tier-one benchmarks.

Commerce issued its final countervailing duty regulations to conform to the Uruguay Round Agreements Act, which implemented the results of the Uruguay Round multilateral trade negotiations, in 1998.[34] The Preamble to these regulations set out comments on the proposed regulations submitted by interested parties, and Commerce's response to these comments. With regard to the analysis of the potential for distortion in benchmarks, the Preamble stated:

> Several commenters stressed the importance of basing the adequate remuneration benchmark on market prices that have not been distorted by the government's involvement in the market. According to these commenters, where government involvement has distorted prices, the Department should either adjust the price to account for the distortion or resort to the use of an alternative price. …
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> ***
>
> We normally do not intend to adjust such prices to account for government distortion of the market. 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 will normally 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

[34] 63 Fed. Reg. 65,348 (November 25, 1998).

> significantly distorted as a result of the government's involvement in the market, we will resort to the next alternative in the hierarchy.[35]

Since the issuance of these regulations, Commerce has had the opportunity to apply its distortion analysis in a number of factual situations with the following guidelines.

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*,[36] 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 import 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 Court of International Trade in *Borusan Mannesmann Boru Sanayi Ve Ticaret v. United States*[37] held that Commerce's determination of distortion was not supported by substantial evidence.[38] The court wrote: "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."[39] Upon appeal to the Federal Circuit, that court agreed that "Commerce applied what amounted to a *per se* rule of market distortion after finding GOT controlled a substantial portion of the market, despite the *Preamble's* language to the contrary."[40]

In *Certain Uncoated Paper from Indonesia*,[41] 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 concluded that repealing the Export Ban would increase the domestic log price.[42]

In *Supercalendered Paper from Canada*,[43] Commerce found that because the participation of the Government of Nova Scotia 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."[44]

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35 63 Fed. Reg. at 65,377 (November 25, 1998).

36 79 Fed. Reg. 41,964 (July 18, 2014).

37 61 F.Supp.3d 1306 (Ct. Int'l Trade 2015).

38 *Id.* at 1327-1331.

39 *Id.* at 1329.

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

41 81 Fed. Reg. 3104 (January 20, 2016) ("*CUP*").

42 *CUP* IDM at 35.

43 80 Fed. Reg. 63,535 (October 20, 2015) ("*SC Paper*").

44 *SC Paper* IDM at 51.

With this in mind, the Panel has therefore engaged in a three-part analysis, on a province-by-province basis, to determine whether Commerce's decision was supported by substantial evidence and/or was otherwise in accordance with law.

First, the Panel analyzed whether substantial evidence and/or the law supported Commerce's determination that the proposed benchmark for a province was not usable. 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 ended, and we remanded to Commerce for action consistent with our determination.[45]

Second, if the Panel found that substantial evidence and/or the law does 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/or 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. We analyzed whether substantial evidence supported Commerce's adjustments to the benchmark prices. If Commerce's adjustments were 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 this determination. If Commerce's adjustments were supported by substantial evidence and in accordance with law, its determination regarding stumpage for that province was sustained.

2. Ontario

A. Commerce's Finding Regarding Use of Ontario Benchmark

In its Final Determination, Commerce determined that the Ontario private stumpage market was distorted and therefore it rejected the Respondents' proposed benchmark of private sales to compare with Crown stumpage sales.[46]

In its initial questionnaire response filed on March 14, 2017, the Government of Ontario ("GOO") responded to Commerce's question regarding total log harvest in Ontario as follows:

> The Province of Ontario maintains some, but not all, of the data requested by the Department. For example, Ontario has only partial information on the volume of private timber harvested in Ontario and does not maintain data related to the value of private land timber sales in provincial systems. The Ontario Ministry of Natural

[45] In the case of British Columbia, the Panel remands on some issues with regard to whether the proposed benchmark was usable, but some portions were upheld. The Panel therefore continues to analyze Commerce's selection of a benchmark and adjustment issues with regard to British Columbia.

[46] IDM at 89-94.

> Resources and Forestry ("MNRF" or "Ministry") therefore commissioned a detailed survey of the Ontario private timber market by forestry experts at MNP LLP. Their survey and report is provided as **Exhibit ON-PRIV-1**.[47]

The MNP Report explained that MNP had been engaged by the law firm of Hogan Lovells in July 2016 (*i.e.*, shortly before the Petition had been filed in November 2016). The MNP Report further explained that a list of 392 potential candidates for a survey was compiled, contact was made with 211 potential respondents, out of which 35 "eligible respondents" were given the survey, primarily by telephone by MNP consultants.[48] The responses of the individual respondents attached to the report were business proprietary information ("BPI"), but the aggregated results were public. The report calculated a weighted average stumpage price, broken out by whether the timber was spruce-pine-fir ("SPF") or non-SPF, by whether harvested in the north or south of Ontario, and by year (2014/2015 or 2015/2016). The MNP Report noted:

> One of the most noticeable observations of the private timber market is the relatively low number of survey responses, despite a substantially larger pool of candidates contacted compared to previous surveys. This suggests an overall reduction in the number of loggers purchasing private timber compared to the situation ten or more years ago. In 2016, there were 35 loggers responding to the survey compared to 83 in 2006. The 35 loggers responding in 2016 accounted for 749,041 m3 of private timber purchases, whereas the 83 loggers responding in 2006 accounted for 805,530 m3 of purchased timber. This points to a nearly equal volume of private timber purchased by fewer than half the number of loggers in 2016, indicating a consolidation of buyers in the marketplace.[49]

Commerce requested Ontario to "identify any studies that Ontario has contracted with private parties for within the last three years that contain any information of private stumpage or log prices." The GOO's initial questionnaire response pointed to the MNP Report, and attached as Exhibit ON-PRIV-2 "an economic study by Dr. Ken Hendricks (University of Wisconsin) analyzing prevailing market conditions in the Ontario private market."[50]

The Hendricks Report[51] asserted that the facts that the licenses to harvest Ontario Crown timber allow license holders to harvest significantly more timber than they did during the period of investigation ("POI"), and that production of the larger sawmills in Ontario has not exceeded 65 percent of their total capacity. The report further asserted that this means that "the claim that Ontario Crown supply of softwood timber depresses the price of private softwood timber because sawmills can purchase additional supply at the administered price is not consistent with the

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47 GOO Response to Initial Questionnaire, March 13, 2017 (C.R. 429), at ON-2.

48 MNP Report on Ontario Private Timber Market ("MNP Report"), P.R. 473, at 1-2.

49 MNP Report at 4.

50 GOO Response to Initial Questionnaire, March 13, 2017 (C.R. 429), at ON-149.

51 "An Economic Analysis of the Ontario Timber Market and an Examination of Private Market Prices in that Competitive Market," Expert Report of Ken Hendricks, Ph.D., Prepared for Hogan Lovells US LLP, March 10, 2017 ("Hendricks Report") (C.R. 475).

facts."[52] Operating below capacity means that "there is no evidence that the supply of Ontario Crown timber reduced the value of private softwood timber stands by increasing the costs of manufacturing lumber from these stands."[53] Operating below capacity also means that "sawmills could have processed additional timber beyond the total of Ontario Crown and private timber that was harvested," from which Dr. Hendricks concluded that "the stumpage rate (price) for softwood timber on Ontario Crown stands cannot affect the price of softwood timber delivered to sawmills from private timber stands."[54] Further, "the volume of softwood lumber manufactured from Ontario Crown timber is too small to have a material impact on the prices of softwood lumber."[55]

From the number of sawmills in northern Ontario within 200 kilometers from private timber, ranging from three to seven sawmills for each stand of private timber, and the number of sawmills in southern Ontario, over 20 for each stand of private timber, Dr. Hendricks concluded that "the number of potential end-buyers for private softwood timber that can be processed into softwood lumber is sufficient for this market to be competitive."[56] Finally, looking at the MNP Report, Dr. Hendricks concluded that the fact that buyers of Ontario private timber paid more for premium hardwood and softwood timber, and that it is common for more than one buyer to participate in a private timber sale "are consistent with prices in the Ontario private timber market being the outcome of a competitive process." Dr. Henricks therefore concluded that "prices of softwood timber delivered to sawmills in the Ontario private market are a valid benchmark for Ontario Crown stumpage."[57]

The GOO argued that therefore the prices of softwood timber, as reported in the MNP Report, should be used as the benchmark for comparison to Ontario Crown stumpage.[58]

In both its preliminary and final determinations, Commerce found that the benchmark proposed by the GOO was not usable because the Ontario private stumpage market was distorted.[59] Commerce provided a number of reasons for its finding.

First, from information provided by the GOO, Commerce calculated that for fiscal year (FY) 2015-2016, Crown-origin timber accounted for 96.5 percent of the harvest volume in Ontario, while non-Crown-origin timber accounted for the remaining 3.5 percent.[60]

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52 Hendricks Report at 5.

53 *Id.* at 6.

54 *Id.*

55 *Id.* at 5.

56 *Id.* at 6.

57 *Id.* at 6-7.

58 Rule 57.1 Proprietary Brief of the Government of Ontario, March 23, 2018 ("GOO 57.1 Brief"), at ONT-20.

59 PDM at 30-31; IDM at 91-94.

60 Preliminary Market Memo, Ontario Data, C.R. 1234, tab ON-STATS-2; IDM at 92. The Hendricks Report (C.R. 479 at 31) had estimated that during the POI private timber harvested in Ontario was 8 percent of the total Crown harvest.

Commerce did not make a *per se* determination that the overwhelmingly vast majority of Ontario harvested timber being from Crown land meant that the private market was distorted, but proceeded to make other findings on this issue. First, to evaluate whether the Crown stumpage price took into account market conditions, Commerce noted that the stumpage charge for Crown-origin timber is composed of four components: 1) a minimum charge which was administratively set 20 years before the POI, regardless of market conditions; 2) a residual value ("RV")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 ("FMU") and tree species groups. Thus, Commerce concluded, only the forest renewal charge took into account market conditions.[61]

Second, Commerce examined the supply of standing timber in Ontario from the Crown and private sources. It found that the GOO allocates harvest areas to a tenure-holder over the ten-year term of a Forest Management Plan ("FMP"). "This arrangement ensures that 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."[62] 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."[63] Commerce found that "the ability to harvest at levels greater than the short-term targets set in the AWSs 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."[64]

To consider evidence that might fairly detract from its findings, Commerce then turned to the Hendricks Report. Commerce concluded that the Report ignored the fact that "there is one dominant price setter, the GOO, in the Ontario market," pointing to the 96.5 percent of the market supplied by the Crown, and to the finding that the set administered prices do not fully consider market conditions.[65] Commerce noted that it "examined data from the GOO's eFAR system, which indicates that the universe of firms consuming timber from private sources in Ontario is heavily concentrated and is dominated by tenure holders."[66] Commerce concluded that the fact that "a majority of private origin standing timber is sold to a small number of customers, who are dominant consumers of both private and Crown timber, demonstrates that the private market in

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61 IDM at 92-93.

62 IDM at 93.

63 *Id.*

64 *Id.*

65 *Id.* at 94.

66 *Id.* The Electronic Facility Annual Return ("eFAR") System printout is in a GOO verification exhibit. C.R. 1448.

Ontario is not as independent and free of influence from the Crown timber market as the Hendricks Report suggests."[67]

Commerce then stated that the Hendricks Report assumed that stumpage prices in southern Ontario would be higher than stumpage prices in northern Ontario because the distance between the timber and the sawmills is greater in the north than in the south (thereby depressing northern prices). It noted that the MNP Report actually shows *lower* prices in the south, thereby undercutting the Hendricks Report's theory of a competitive market.[68] The GOO's 57.3 Brief asserts that Dr. Hendricks made no such assumption,[69] and his Report in fact stated that prices for timber for pulpwood were lower in the south, and not significantly different from each other for sawmill timber.[70]

Commerce finally noted that the MNP Ontario survey is based on a small number of survey respondents (35), which it said "calls into question the representativeness of those responses." It noted the Report's comment quoted above regarding the reduction in respondents, which suggested there is diminished demand for private timber in Ontario.[71] The Panel notes that the Nova Scotia Report on Private Stumpage Prices used by Commerce for the tier-one benchmark for a number of provinces had 26 respondents.[72] This undercuts both Commerce's question whether the proposed benchmark for Ontario was based on a too small number of respondents, and the argument by Canadian Parties that the benchmark used by Commerce was based on a too small number of respondents,[73] since Canadian Parties proposed a benchmark based on a similar number of respondents.

Based on the record as a whole, the Panel finds that substantial evidence supports Commerce's finding that the private timber market in Ontario was distorted, and that substantial evidence supports Commerce's finding that the benchmark proposed by the GOO could not be used to calculate LTAR. Unlike in the *Borusan* case, discussed above, Commerce here did not rely solely on the fact that Crown timber accounted for an overwhelming 96.5 percent of timber harvested in Ontario during the POI. It also relied on the fact that only one of the four elements of the Crown stumpage price was "market determined" as required by the regulation. Commerce also examined other considerations, and it addressed evidence that might be contrary to its findings. While its examination may not have been perfect, any errors are not fatal to Commerce's overall findings which on balance are supported by substantial evidence.

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67 IDM at 94.

68 *Id.*

69 Rule 57.3 Brief of the Government of Ontario, November 2, 2018 ("GOO 57.3 Brief"), at GOO-16.

70 Hendricks Report (C.R. 479) at 38.

71 IDM at 94.

72 Report of Nova Scotia Private Stumpage Prices, March 10, 2017 (C.R. 805), at 2.

73 Rule 57.1 Joint Brief of the Canadian Parties, Volume II: Nova Scotia Benchmark, March 23, 2018 ("Canadian 57.1 Brief Vol. II"), at 63, fn. 196. Much of the discussion on this issue in the Canadian Brief is proprietary.

As discussed above, the GOO's Brief presented a number of reasons why the conclusions of the Hendricks Report should have been accepted,[74] which might have been persuasive in a *de novo* review. But the GOO Brief erroneously claims that Commerce made its distortion finding solely on the basis of the Crown's market share, without addressing the other reasons Commerce set out in its determination. And while Commerce is not allowed to rely *solely* on the Crown's 96.5% market share to find distortion, that also does not mean that the figure is to be given no weight among other factors. In any event, none of the objections overcome the basic conclusion that Commerce's finding was more than sufficient to pass the substantial evidence test.

The Panel therefore proceeds to consideration of whether Commerce's use of a benchmark from Nova Scotia to calculate LTAR for Ontario stumpage was supported by substantial evidence and was otherwise in accordance with law.

B. Commerce's Use of Nova Scotia Benchmark

As noted, Commerce will prefer using a tier-one benchmark if one is available. If a tier-one benchmark is found to be unsuitable, Commerce will consider another available tier-one benchmark before considering tier-two benchmarks.

On January 19, 2017, Commerce issued an initial questionnaire on stumpage for the provinces of Alberta, British Columbia, Ontario, and Québec.[75] On January 31, 2017, Commerce issued an addendum to that questionnaire, with stumpage questions for New Brunswick, Nova Scotia, Manitoba, and Saskatchewan.[76] Each of these provinces was given a separate Excel spreadsheet asking for data on stumpage.[77] On March 17, 2017, the Government of Nova Scotia ("GNS") submitted its response to this questionnaire.[78] The cover letter to this response stated:

> As an initial matter, we note that there have been other documents submitted on this administrative record, which purport to provide an overview of the Nova Scotia forestry system. While Nova Scotia is a political subdivision of Canada and a sister province to the other provincial governments that are responding to questionnaires in this investigation, ***the Government of Nova Scotia cannot endorse or confirm the accuracy of these filings insofar as they address Nova Scotia forestry policies or the circumstances regarding the Nova Scotia forestry system***. The enclosed questionnaire response and any future responses submitted by the Government of Nova Scotia should constitute the official position of the Government of Nova Scotia — and the definitive facts — regarding forestry in Nova Scotia.[79]

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74 GOO 57.1 Brief, at ON-21 – ON-47.

75 P.R. 175.

76 P.R. 203.

77 The spreadsheet for Nova Scotia was P.R. 205.

78 C.R. 805 – 809.

79 C.R. 805 (emphasis in original).

GNS's response noted:

> Unlike many other provinces within Canada, the Nova Scotia forestry system is predominated by private transactions without government oversight or involvement. In order to obtain the private party transaction prices needed to set forestry policy, including Crown stumpage rates, the Government of Nova Scotia has responded to its industry's concerns that any private information provided in a survey of private party prices be kept private and only aggregated information be made available to the Government. Accordingly, information underlying the NS Private Stumpage Survey is kept in strict confidence with Deloitte pursuant to the representations Deloitte made to the Registered Buyers that agreed to participate in the survey.[80]

GNS's response further explained:

> Nova Scotia's forestry industry is predominated by private landowners who command market-determined prices for their standing timber or harvested logs. Nova Scotia's forests are controlled by a plethora of market actors, with over 30,000 private forest owners. Small private woodlot owners account for approximately half of all of the forest area in Nova Scotia. In 2015, approximately 75% of all standing timber harvested was harvested from private or industrial tenure land, with only 25% of standing timber harvested from Crown and Federal land. *See* **Exhibit NS-6** (Registry of Buyers Report). The Registry of Buyers is a registry of individuals and businesses who acquire primary forest products for processing into secondary products, for export, for sale as firewood, or for production of energy. In 2015, there were 162 purchasers of primary forest products in Nova Scotia, including numerous sawmills. *Id*.[81]

In response to Commerce's request that the GNS provide "Quantity and Value of Softwood Standing Timber Sold in Private Forests" for each month of 2015, the GNS stated that "data cannot be generated in the exact same form and manner as the Department's template, given the terms of the SOW." Instead, the GNS provided "an updated report from Deloitte in **Exhibit NS-5** covering only 2015 private stumpage transactions originally collected in the survey."[82] "Report of Nova Scotia Private Stumpage Prices," ("Deloitte Report")[83]

The Panel notes that no party has contested Commerce's finding in the investigation that the Nova Scotia stumpage market was not distorted.[84] The Panel therefore accepts Commerce's finding on this issue.

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80 *Id.* at 2.

81 *Id.* at 4.

82 *Id.* at 3.

83 March 10, 2017, included in C.R. 805 as Exhibit NS-5.

84 PDM at 42.

1) Use of the Deloitte Report

Because the Canadian parties argued in favor of using the MNP Report as a benchmark for Ontario stumpage prices while arguing against the Deloitte Report as a benchmark, it is useful to compare the Deloitte Report with the MNP Report.

The Nova Scotia Department of Natural Resources ("NSDNR") contacted potential survey participants "to provide a brief overview of the process and to inform the potential survey participants that all information would be held by Deloitte in strict confidence and would be summarized for NSDNR on an aggregate basis only."[85] NSDNR thereupon provided Deloitte with contact information for 26 Registered Buyers of softwood products within Nova Scotia. Deloitte used an Excel spreadsheet for the survey, although some Registered Buyers supplied raw data instead, which Deloitte processed into a uniform format. The results were tested and reconciled by site visits, where Deloitte sought to validate several data elements.[86] As described above, MNP narrowed a list of 395 potential respondents down to a list of 35 eligible respondents, who were interviewed by phone, with follow-up by phone and occasionally email.[87]

The Deloitte Report broke out the tree species by spruce, pine and fir (SPF); eastern white pine (EWP), hemlock, and red pine.[88] The MNP Report broke out tree species by SPF and non-SPF, and deciduous timber.[89] The Deloitte Report broke out the areas by Western, Eastern, and Central Nova Scotia.[90] The MNP Report broke out the areas by North and South Ontario.[91] Commerce verified the Deloitte Report by interviewing Deloitte personnel to discuss the methodology and review the documents used in compiling the Report. Commerce reviewed sample survey documentation of the largest purchase, along with six pre-selected survey observations.[92] Commerce did not verify the MNP Report when it verified the GOO's responses,[93] although the MNP Report included the worksheets filled out by the MNP consultants that they used for the survey, but did not include any underlying raw data used for the compilation of the worksheets.[94]

The Deloitte Report provided unit stumpage prices for softwood sawlogs, softwood studwood & lathwood, and combined.[95] The MNP Report broke out separate unit stumpage prices

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85 Deloitte Report at 2.

86 *Id*. at 2-4.

87 MNP Report at 1.

88 Deloitte Report at 8.

89 MNP Report at 2.

90 Deloitte Report at 7.

91 MNP Report at 6.

92 Nova Scotia Verification Report, July 11, 2017 (C.R. 1788), Verification Exhibits 6 – 8 (C.R. 1696 – 1700).

93 Ontario Verification Report, July 14, 2017 (C.R. 1791).

94 MNP Report, BPI attachments (C.R. 479).

95 Deloitte Report at 10, Table 3.

for sawmill and pulpmill timber.[96] The GOO argued that the Crown price for timber destined for sawmills must be compared to the MNP Report's price for SPF timber destined for sawmills.[97]

The Deloitte Report assigned to each product category and species a confidence interval and included a table showing the confidence intervals. Deloitte calculated the confidence interval at 99 percent "due to the quality of detail afforded by the transaction-level data collected from Registered Buyers. The confidence interval represents a range of values within which we are 99% confident that the true mean resides. The size of the confidence interval is determined by the variation of the sample (standard deviation) and the size of the sample (number of transactions sampled)."[98] The MNP Report used a somewhat different formula to calculate the confidence intervals, and calculated the confidence interval at 95 percent.[99]

Based on the foregoing comparison, the Panel finds that the Deloitte Report and the MNP Report are similar in their methods, with perhaps the Deloitte Report being somewhat more rigorous than the MNP Report. In any event, given the similarities, the Panel finds that it is not reasonable for the Canadian parties to criticize the methodology of the Deloitte Report for use as a tier-one benchmark while at the same time arguing for use of the MNP Report as a tier-one benchmark.

The Canadian parties raised a number of objections to the Deloitte Report. First, they contended that the exclusion of pulpwood from the Nova Scotia survey renders its results inaccurate and unreliable.[100] However, as noted above, the MNP Report broke out sawmill timber and pulpmill timber, but the GOO argued that only the sawmill timber in the MNP Report should be compared to Crown sawmill timber.[101] Thus, under both reports, pulpwood was excluded from the comparison. In this light, the Panel finds that the exclusion of pulpwood from the Deloitte Report is irrelevant.

Second, the Canadian parties argued that the Deloitte Report was inaccurate and unreliable because it lacked a coherent definition of "transaction," and some participants may have reported a "piece rate" transaction and some may have reported a "lump sum" transaction.[102] The Panel notes that the survey in the MNP Report asked respondents: "Indicate the period of agreement between logger and timber owners for the right of cutting as: multiyear; one year; or on an individual transaction (e.g., the purchase of timber volume for a lump sum price)."[103] While the individual responses are BPI, it can be noted here that there is no indication that MNP differentiated

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96 MNP Report at 6, Exhibits 4 and 5.

97 GOO 57.1 Brief at ONT-43.

98 Deloitte Report at 9-10.

99 MNP Report at 4-7.

100 Canadian 57.1 Brief Vol. II at 53-58.

101 GOO 57.1 Brief at ONT-43.

102 Canadian 57.1 Brief Vol. II at 58-65.

103 MNP Report at 26.

between the types of transactions when aggregating the results. Regarding the Deloitte Report, Commerce noted:

> In addition, the survey data examined by the Department at verification contain volume and value information that permits the Department to calculate a benchmark stumpage price on a weighted-average basis. As the Court has previously noted, when calculating an LTAR benchmark weight-averaging assigns each price a weight proportional to the quantity shipped at that price, thereby ensuring that high values with corresponding low volumes do not skew the benchmark upward. Thus, even if there are abnormally low volume, high value transactions present in the NS Survey, a possibility that we find the Canadian Parties have failed to demonstrate, weight averaging the data ensures that such observations will not skew the benchmark. Further, Deloitte, the firm that conducted the NS Survey on behalf of the GNS, performed statistical analyses on the survey data to ensure that the data points did not substantially deviate from the mean.[104]

This appears to also be more or less what was done for the MNP Report, which did not differentiate for the size or volume of the transactions. In short, the Panel does not see a material difference in the definition of "transaction" in the MNP Report, which the Canadian parties argued was a valid source of benchmark prices, and the Deloitte Report, which the Canadian parties argued was not a valid source of benchmark prices. This argument does not detract from Commerce's use of the Deloitte Report as being supported by substantial evidence.

Third, the Canadian Parties argued that the Nova Scotia survey reported volume based on a flawed, "outdated" conversion factor.[105] The Deloitte Report used a conversion factor of 1.167 cubic meters per ton, as instructed by the NSDNR.[106] The Canadian Parties contended that this conversion factor was based on obsolete data from 1989 - 1994. Although the GNS reported that samplings taken between 2001-2009 confirmed the continued accuracy of the conversion factor, the Canadian Parties argued that it was "incredible" that the average weight of a cubic meter of changing species would have remained the same over that time. But the Canadian Parties did not offer what the proper conversion factor should have been.[107]

By comparison, the MNP Report simply states: "For the purposes of this survey, all volumes are converted to a cubic metre basis using conversion factors commonly used by the

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104 IDM at 119 (footnotes omitted).

105 Canadian 57.1 Brief, Vol. II at 65-69.

106 Deloitte Report, Appendix A at 11, and 4 at fn 4. The Canadian Parties assert that it was Deloitte who "elected" to use the conversion factor. Canadian 57.1 Brief, Vol. II at 66.

107 They cite J.D. Irving's conversion factors as well as the one submitted by Alberta (calculated by MNP based on Alberta's scaling program) as "improved conversion factors" that reflect "more current" conditions. Canadian 57.1 Brief, Vol. II at 68.

Ontario Ministry of Natural Resources and Forestry."[108] The actual conversion factors used by the MNP Report are not reported.

The Canadian Parties also objected that Commerce had not verified whether the conversion factor had actually been used in stumpage transactions in Nova Scotia, but Commerce did verify that the GNS itself applied the 1.167 factor as a "standard" in the ordinary normal course of its business and incorporated it into its own regulations.[109]

The Panel finds it persuasive that the conversion factor used in the Deloitte Report was the one that the Nova Scotia government agency responsible for stumpage instructed Deloitte to use and which itself used. (Similarly, the conversion factors used in the MNP Report advanced by the Canadian parties were those used by the relevant government agency in Ontario.) There is no other conversion factor for use in Nova Scotia in the record.

Fourth, the Canadian Parties argued that using the International Monetary Fund's ("IMF") producer price index ("PPI") to fill in missing first quarter 2015 data distorted the benchmark.[110] As Commerce pointed out, this adjustment only applied to Ontario, not Alberta and Québec, and only applied to Resolute's purchases of stumpage in Ontario.[111] The Canadian Parties argued that the first quarter data therefore are not based on "actual transactions" as required by the Commerce regulations.[112] But, as Commerce notes, the first quarter data used were April 2015 transaction prices indexed by the PPI and therefore were in fact "derived from 'actual transaction' prices."[113]

While the Canadian Parties provided the first quarter 2015 price data for a respondent,[114] they did not attempt to calculate the prices that they believed should have replaced the prices derived from applying the PPI to April 2015 prices. The Panel agrees with Commerce that use of the IMF PPI is consistent with its practice,[115] and the Canadian Parties have not presented evidence that persuasively detracts from finding that Commerce's use of the IMF PPI was supported by substantial evidence.

The Canadian Parties next argued that the Deloitte Report was not properly verified.[116] "The inability of the parties or the Department to examine this basic underlying data renders the

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108 MNP Report at 5.

109 Canadian 57.1 Brief, Vol. .II at 69; Commerce 57.2 Brief, Vol. II at 45.

110 Canadian 57.1 Brief, Vol. II at 70-73.

111 Commerce 57.2 Brief, Vol. II at 45-46.

112 Canadian 57.1 Brief, Vol. II at 70.

113 Commerce 57.2 Brief, Vol. II at 46.

114 Canadian 57.1 Brief, Vol. II at 72-73. The Panel notes that the data, which is BPI, presented in Table 4 of that brief, differ from the data in the same table on page Vol. I-65 of the Canadian Parties' Case Brief (C.R. 1825) submitted in the investigation. Presumably the Canadian Parties corrected calculation errors between the Case Brief and the 57.1 Brief.

115 Commerce 57.2 Brief, Vol. II at 48.

116 Canadian 57.1 Brief, Vol. II at 73-81.

survey unverifiable."[117] But Commerce *did* have access to, and verified, certain transactional data which did not contradict or cast doubt upon the Report.[118]

The Panel notes that the Canadian parties had argued that the MNP Report data should be used as the benchmark for Ontario stumpage, but the supporting data in that Report are simply the survey worksheets filled out by the MNP consultants, containing handwritten notes but no data directly from the survey respondents.[119] It is no more or less verifiable than the Deloitte Report, but Commerce at least sampled the underlying raw data used in the compilation of that Report.[120]

The Canadian Parties also argued that the "pervasive" errors found during verification render the Deloitte Report unreliable,[121] but as Commerce pointed out, nearly all respondents submitted revisions and corrections during verification, and "Commerce found nothing more suspect about the corrections presented by the GNS at the outset of verification than the corrections presented by other governments and respondents at the outset of verification in this investigation."[122] The Panel therefore finds that the verification of the Deloitte Report is supported by substantial evidence, and that contrary evidence does not detract from that finding.

Finally, the Canadian Parties argued that the record does not support the conclusion that that Deloitte Report survey was conducted in the ordinary course of business.[123] The Panel finds it unpersuasive that the Canadian parties simultaneously argue that the MNP Report, which was commissioned by a law firm a few months prior to the filing of the petitions,[124] is an appropriate source of benchmarks, while a report allegedly commissioned by the Government of Nova Scotia for the CVD investigation is not. More to the point, though, the Panel notes that the GNS has commissioned no less than five stumpage surveys, some of them occurring when there is no Commerce investigation underway. And, rather than serving to amass helpful evidence in a CVD investigation, there is evidence in the record that these periodic surveys such as Deloitte's are carried out to assist GNS's official policy on setting Crown stumpage to reflect private prices.[125] The Canadian Parties' claim[126] that the Report "departed" from the past practice of those prior surveys is not persuasive. The Panel therefore finds that Commerce's decision that the Deloitte

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117 *Id.* at 75.

118 C.R. 1788.

119 MNP Report at 39-479 (all BPI information).

120 Nova Scotia Verification Report (July 11, 2017), C.R. 1788, Verification Exhibits 6 – 8, C.R. 1696 – 1700.

121 Canadian 57.1 Brief, Vol. II at 75-81.

122 Commerce 57.2 Brief, Vol. II at 56.

123 Canadian 57.1 Brief, Vol. II at 82-86.

124 MNP Report at 1.

125 GNS Response to QR, March 17, 2017 (P.R. 675, C.R. 805), at 118.

126 Canadian 57.1 Brief, Vol. II at 83-85.

Report was reliably commissioned is supported by substantial evidence, and that contrary evidence does not detract from that finding.[127]

2) Use of a Nova Scotia benchmark as a benchmark for other provinces

With the finding that the Deloitte Report is a valid source of benchmark prices, the Panel next turns to the question of whether Commerce's determination that the Nova Scotia benchmark can be used as a benchmark for other provinces was supported by substantial evidence. For the foregoing reasons, the Panel finds that the determination in this regard is supported by substantial evidence.

The Canadian Parties argued that Nova Scotia stumpage does not reflect prevailing market conditions in other provinces.[128]

As discussed *supra* at 5-7, section 771(5)(E)(iv) of the Act[129] unambiguously states that "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" (emphasis added). Nevertheless, the Canadian Parties argued that when considering "prevailing market conditions," Commerce must look to the province in which the stumpage was located. They state their position most succinctly in their 57.3 Brief:

> To maintain the statutory purpose, the Department's definition of "country" in a particular case should align with: (1) the jurisdiction in which the good is purchased, (2) the government entity that sells the good, and (3) the market in which the relevant conditions prevail. Thus, in the context of the underlying investigation into alleged stumpage subsidies granted by individual provinces, it is unambiguous that "country" means "political subdivision" and, more specifically, "province," throughout the Department's analysis under section 771(5)(E). That is because the provinces (not the Canadian federal government) provide stumpage and thus the "adequacy of remuneration" vis-à-vis a particular province should be "determined in relation to prevailing market conditions" *in that province*.[130]

The Panel disagrees with the parties' position that there is any ambiguity in the statute that is entitled to Commerce deference under *Chevron*.[131] Rather, the plain language of the statute is that Commerce is to consider prevailing market conditions in "the country subject to investigation", which, here, is Canada, not a particular province.

The Canadian Parties argued that elsewhere section 771(3) of the Act[132] defines "country" as "a foreign country, a political subdivision, dependent territory, or possession of a foreign

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127 Commerce 57.2 Brief, Vol. II at 58-60.

128 Canadian Brief, Vol. II at 20-42.

129 19 U.S.C. § 1677(5)(E)(iv).

130 Canadian 57.3 Brief, Vol. II at 24 (footnotes omitted, emphasis in original).

131 *See* page 3 *supra*; Commerce 57.2 Brief, Vol. II at 11. Even if there were any ambiguity, the Panel would be persuaded by Commerce's interpretation.

132 19 U.S.C. § 1677(3).

country." The short answer is that section 771(3) does not *require* that Commerce designate the "country subject to investigation" as a province or other "political subdivision". In fact, Canada was already designated as the country under investigation when the Petition was filed and the case initiated.[133]

Moreover, as a matter of statutory construction, when the provision uses a term with a modifier ("which is subject to investigation"), Congress unambiguously intended that the term "country" does not include the other examples such as those in section 771(3).[134] And, as noted by Commerce, the alternate definitions of "country" in section 771(3) have been used – not to change the country under investigation – but to allow the International Trade Administration ("ITA") to investigate subsidies granted by political subdivisions.[135]

The Canadian Parties argued that Nova Scotia stumpage benchmarks cannot be used for other provinces because Nova Scotia stumpage does not reflect "prevailing market conditions" in other provinces.[136] Section 771(5)(E)(iv) of the Act provides: "Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale." The list of conditions is thus illustrative rather than comprehensive. "Aside from this list of conditions, the statute gives no guidance as to how the Department should interpret the adequacy of remuneration language."[137]

The Canadian Parties pointed to information supporting their arguments that the predominant and preferred softwood timber species and growing conditions in Nova Scotia differ from those in Ontario, Québec, and Alberta;[138] that the size of timber harvested in Nova Scotia differs from the size of timber harvested in other provinces[139] that the distribution and distance of sawmills and pulp mills relative to available timber in Nova Scotia differs from that in other

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[133] The Petition filed by the Coalition with the ITA sought an investigation of softwood lumber products imported from <u>*Canada*</u>. The ITA's initiation of its investigation, as well as its Final Determination, formally were limited to lumber from <u>*Canada*</u>. Similarly, the GOC and the Canadian parties themselves filed a Request for Panel Review of Commerce's final CVD determination concerning certain lumber <u>*from Canada,* not a province.</u>

[134] *See AK Steel Corp. v. United States*, 226 F.3d 1361, 1369 (Fed. Cir. 2000) ("When the EP definition is read in conjunction with the CEP definition, the alleged ambiguity in the EP definition disappears. The language of the CEP definition leaves no doubt that the modifier 'in the United States' relates to 'first sold.' The term 'outside the United States,' read in the context of both the CEP and the EP definitions, as it must be, applies to the locus of the transaction at issue, not the location of the company.")

[135] Commerce 57.2 Brief, Vol. II at 10.

[136] Canadian 57.1 Brief, Vol. II at 19-42.

[137] *Maverick Tube Corp. v. United States*, 273 F. Supp. 3d 1293, 1306 (Ct. Int'l Trade 2017).

[138] Canadian 57.1 Brief, Vol. II at 25-32. *See also* Alberta 57.1 Brief at 34-41; GOO 57.1 Brief at ONT-52 – ONT-60.

[139] Canadian 57.1 Brief, Vol. II at 33-38. *See also* Alberta 57.1 Brief at 41-48; GOO 57.1 Brief at ONT-60 – ONT-62.

provinces;[140] and that other factors unique to the Nova Scotia market exert upward pressure on prices and otherwise differentiate the Nova Scotia market from those in other provinces.[141]

Commerce responded that it had found that SPF remained the primary species that are harvested on private lands in Nova Scotia and on Crown lands in New Brunswick, Québec, Ontario, and Alberta;[142] that the diameter of timber at breast height in Nova Scotia continued to be comparable to the Eastern Provinces;[143] and that the Canadian parties had not demonstrated that the distribution of mills and standing timber, and other market factors in Nova Scotia differ from that in other provinces.[144] The Panel agrees that this constitutes substantial evidence to affirm Commerce's determination in this regard. Again, it is not this Panel's role to look at the positions on both sides and determine which position we prefer. This Panel is only to determine whether Commerce's decision was supported by substantial evidence, taking into account contradictory evidence. The Panel finds that Commerce's determination to use Nova Scotia benchmarks for Eastern Provinces stumpage is supported by substantial evidence, and that the arguments regarding any differences between prevailing market conditions in Nova Scotia and the other provinces do not reasonably detract from that determination.

The Panel also does not find persuasive the argument that the Nova Scotia benchmarks cannot be used for other provinces because Nova Scotia stumpage is not "available" in other provinces.[145] First, the regulations provide that, for a tier-one benchmark: "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."[146] The "transaction" is not the standing timber itself, it is the purchase of the right to harvest that timber and transport it to a mill for processing. The fact that the standing timber is in the ground in a particular province does not render it unavailable for purchase in other provinces. Second, there is no requirement that any respondent has actually purchased from a source of a tier-one benchmark in order for that source to be available in the "country subject to the investigation."

The Panel therefore finds that the Deloitte Report may be used as a tier-one benchmark for provinces, including Ontario, other than Nova Scotia.

3) Use of Ontario log prices as tier-three benchmark

The GOO argued that if Ontario's private stumpage prices cannot be used as the benchmark for Ontario's Crown stumpage prices, then Ontario's log prices should be used as a tier-three benchmark.[147] However, as noted above (at 7), a tier-two or tier-three benchmark can only be used

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140 Canadian 57.1 Brief, Vol. II at 38-40.

141 Canadian 57.1 Brief, Vol. II at 41-42.

142 Commerce 57.2 Brief, Vol. II at 20-26.

143 *Id*. at 21-22 and 26-29.

144 *Id.* at 29-32.

145 Canadian 57.1 Brief, Vol. II at 42-43.

146 19 C.F.R. § 351.511(a)(2)(i) (emphasis added).

147 GOO 57.1 Brief at ONT-76 – ONT-80.

if there is no tier-one benchmark available, and the Panel has found that the Nova Scotia tier-one benchmark may be used for Ontario. The Panel therefore finds that there is no basis for using the GOO's proposed tier-three benchmark.

C. Adjustments to Ontario Stumpage and Nova Scotia Benchmark

The GOO argued that Commerce needed to make adjustments to the amount harvesters paid for Ontario stumpage to account for the in-kind costs required of Ontario Crown harvesters.[148] The COALITION argued that Commerce needed to make adjustments to the Nova Scotia benchmark to account for mandatory silviculture fees.[149]

1) In-kind Costs Incurred by Ontario Harvesters

Commerce found that "no record evidence supports concluding that in-kind costs associated with harvesting Crown timber are included in the NS Survey private stumpage prices."[150] As Commerce concluded, because it determined that "the Nova Scotia benchmark is a stumpage price that does not reflect post-harvest activities, a proper stumpage-to-stumpage comparison must logically exclude the cost of such activities from the calculation."[151] The GOO argued that upward adjustments must be made to the price paid by Ontario harvesters for road construction and maintenance, forest management planning, forest protections, and First Nations and Métis relations.[152] However, the GOO admitted that "none of these Ontario-specific in-kind costs are incurred in Nova Scotia."[153]

The GOO pointed out that Commerce had made adjustments for in-kind costs in *Lumber IV*.[154] In the original investigation in *Lumber IV*, Commerce used cross-border stumpage for benchmark prices.[155] It used Michigan and Minnesota stumpage prices for Ontario.[156] It adjusted the Ontario price for "(1) Road construction and maintenance; (2) forest management planning; (3) forest protection (fire and insect protection costs); and (4) First Nations relations."[157] In the final determination of that investigation, Commerce continued to make these adjustments.[158]

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148 GOO 57.1 Brief at ONT-81 – ONT-87.

149 COALITION 57.1 Brief at 51-55.

150 IDM at 137.

151 IDM at 136.

152 GOO 57.1 Brief at ONT-86.

153 *Id.*

154 *Id.* at ONT-82.

155 *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 43,186, 43,197 (August 17, 2001) (prelim determination).

156 *Id.* at 43,205.

157 *Id.* at 43,204.

158 *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,545 (April 2, 2002) (final CVD Determination), accompanying Issues and Decision Memorandum at 91-93.

In the subsequent reviews, Commerce used stumpage prices in the Maritime Provinces, specifically New Brunswick and Nova Scotia, as the benchmark for comparison to Ontario stumpage prices. Reports prepared by AGFOR, Inc. Consulting for both of these provinces were used.[159] The Canadian parties argued that Commerce needed to be "accurately quantifying and adjusting for the differences between the provincial markets and the private Maritimes market in order to effectuate a more accurate 'apples to apples' comparison."[160] Commerce responded:

> In determining which cost adjustments to make, we have focused on those costs that are assumed under the timber contract (*e.g.*, the Crown tenure agreement) and those costs that are necessary to access the standing timber for harvesting, but that may differ substantially depending on the location of the timber. Where such costs are incurred by harvesters in either the Maritimes or the subject provinces, we have included them in our benefit calculations. We have not, however, made adjustments for costs which may be necessary to access the standing timber for harvesting, but that do not substantially differ depending on location of the timber, *e.g.*, costs for tertiary road construction and harvesting. Post-harvest activities such as scaling and delivering logs to mills or markets are also not included, because they are not necessary to access the standing timber for harvesting.[161]

In the second review, Commerce found that "harvesters in the Maritimes incur additional costs that must be paid in order to be able to acquire private timber. Specifically, we found that harvesters in New Brunswick are required to pay silviculture fees as well as administrative fees to the marketing board operating within the region. In Nova Scotia, in order to be able to acquire the standing timber, the registered buyer must either pay for or perform in-kind activities equal to C$3.00 for every cubic meter of private wood harvested."[162]

Commerce further explained:

> In making our adjustments, we focused on those costs that are assumed under the timber contract (*e.g.*, the Crown tenure agreement) and those costs that are necessary to access the standing timber for harvesting (but that may differ substantially depending on the location of the timber). Where such costs are incurred by harvesters in either the Maritimes or the subject provinces, we included them in our benefit calculations. We did not, however, make adjustments for costs that might be necessary to access the standing timber for harvesting but that do not differ substantially based on the location of the timber (*e.g.*, costs for tertiary road construction and harvesting). Because the Maritimes data reflect prices at the point of harvest, we also did not include post-harvest activities such as scaling and delivering logs to mills or market. In this manner, *we adjusted the unit stumpage*

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159 *Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,917 (December 20, 2004) (final results of first admin. review), accompanying Issues and Decision Memorandum at 100-102.

160 *Id.* at 105.

161 *Id.*

162 *Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 73,448 (December 12, 2005) (final results of second admin. review), accompanying Issues and Decision Memorandum at 11.

prices of the GOA, GOS, GOM, GOO, and GOQ such that they were on the same "level" as the private stumpage prices we obtained from the Maritimes.[163]

Under that methodology, Commerce continued to make the in-kind adjustments to the Ontario stumpage prices.[164]

This contrasts with the situation here. As Commerce found:

> With regard to the respondents' proposal that the Department add certain in-kind costs (*e.g.*, for silviculture, road construction, forest management and planning, etc.) to their Crown-origin stumpage purchase prices, we find that no record evidence supports concluding that in-kind costs associated with harvesting Crown timber are included in the NS Survey private stumpage prices. Thus, to make the comparison between the benchmark and the respondents' purchase price on the same cost basis, we decline to add those in-kind costs to respondents' Crown-origin stumpage purchase prices.[165]

As noted above, the GOO agreed that these costs are not included in the Nova Scotia benchmark in this investigation, which is a different situation than in *Lumber IV*, where the stumpage prices in Nova Scotia included extra costs. As the Canadian parties pointed out in the first review in *Lumber IV*, there needs to be an "apples to apples" comparison of what is included in the prices. And as Commerce noted in the second review in *Lumber IV*, the object is to make the comparison of Ontario stumpage prices at the same "level" as the private stumpage prices in Nova Scotia. "While a more substantial explanation from Commerce might have been helpful to us or preferable to {respondent} its absence here is not grounds for us not to affirm because we can nonetheless reasonably discern the path of Commerce's decision."[166] The Panel therefore finds that Commerce's decision not to include these costs in the calculation of the Ontario stumpage price was supported by substantial evidence and was in accordance with law.[167]

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163 *Id.* at 15 (citation and footnote omitted) (emphasis added).

164 *Id.* at fn. 11.

165 IDM at 137.

166 *NMB Singapore Ltd. v. U.S.*, 557 F.3d 1316, 1323 (Fed. Cir. 2009).

167 Panelist Ruggeri would remand this issue to Commerce for an explanation of its rationale.

First, Commerce has asserted here that its determinations in prior proceedings are not binding in this Panel Review since "each review is a separate exercise of Commerce's authority that allows for different conclusions based on different facts in the record." Commerce 57.2 Brief at 164. Regardless, the Panel largely relies on those prior proceedings in finding that Commerce's decision here is not inconsistent with that prior practice.

Nor is Commerce's past rationale in prior proceedings sufficient to discern the path of Commerce's decision-making here. But even if it were, Commerce had made it clear that costs incurred *in either* the subject province or the benchmark would be adjusted. There was never any requirement until now that the costs be incurred in both. In fact, for example, in *Lumber IV*, Commerce repeatedly adjusted the provincial prices upward for a variety of costs where there was no corresponding benchmark cost at all. *See, e.g.*, Lumber IV IDM at 89, 90-93, and 95.

2) Silviculture Fees

The COALITION claimed that Nova Scotia "Registered Buyers" of private timber are required by the Nova Scotia Sustainability Regulations to either make a cash payment to the Sustainable Forestry Fund or to carry out an equivalent silviculture program. The amount was C$3.00/$m^3$ for softwood primary forest products. The COALITION argued that this amount should be added to the Nova Scotia benchmark for comparison to Ontario and Québec stumpage prices.[168] The Canadian Parties pointed out that the record shows that virtually no purchaser of private stumpage actually paid such a fee—only C$9.00 in total for nearly two million cubic meters of softwood stumpage from private land.[169] On the Ontario side, Commerce found no evidence "to confirm that the so-called silviculture costs included in the stumpage rates charged by Ontario and Québec are actual silviculture expenditures as such or are market-based costs."[170] Thus, there is no cost on the Nova Scotia side to offset a cost on the Ontario side. The Panel finds that Commerce's determination to not include a silviculture fee in the calculation of the Nova Scotia benchmark was supported by substantial evidence.

Therefore, under the analysis framework discussed above (at III.1), the Panel sustains Commerce's determination regarding Ontario stumpage LTAR.

3. Alberta

A. Commerce's Finding Regarding Use of the Alberta Benchmark

In its Final Determination, Commerce determined that due to government predominance in the GOA's market for standing timber, private stumpage prices in Alberta could not be considered independent of the Crown stumpage prices, and therefore it rejected the Respondents' proposed benchmark of private sales to compare with Crown stumpage sales.[171]

The Commerce questionnaire sent to the Government of Alberta ("GOA") asked whether public timber is sold to companies that do not hold tenures and whether the GOA keeps records of

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Here Commerce has summarily held, with no real explanation, that simply because certain costs were not incurred in the Nova Scotia benchmark, they cannot be adjusted for in the provincial prices. To evaluate the full benefit received, Commerce has refused to include, and adjust for, various mandated "non stumpage" provincial costs required to access the stumpage. *See, e.g*., *Hyundai Steel v. U.S*., 658 F. Supp. 3d 1331, 1336 (Ct. Int'l Trade, 2023)(remanded where Commerce failed to adjust for all expenses incurred by a respondent).

He would remand this issue to Commerce for an explanation (1) why its prior practice was not followed here; (2) why the "pure stumpage" price in the benchmark should exclude the adjustment of any and all other provincially mandated costs; and (3) clarifying more precisely the dividing line for stumpage costs incurred in Ontario .

168 COALITION 57.1 Brief at 51-55.

169 Canadian 57.2 Brief at 5-6.

170 IDM at 137.

171 IDM at 46-54.

public timber sold to these companies. It also requested the volume and value of Crown softwood saw log sales made by these non-tenure holders to companies that own sawmills.

1) MNP's Timber Damage Assessment Survey ("TDA")

In its initial questionnaire response, filed on March 14, 2017, the GOA responded as follows:

> The Province does not track or keep records of provincial Crown timber sold to companies that do not hold tenure. There are no requirements prohibiting the private sale of provincial Crown timber to companies that do not hold tenures. However, since tenure agreements are a legal contract between the tenure holder and the Province, the tenure holder would remain ultimately liable for any outstanding obligations or charges to the Crown related to his or her tenure. Any sale transactions by the tenure holder would be considered private. The Province is aware that transactions of standing timber occur, as shown in an independent consultant's report on a survey of timber and log transaction prices and forest industry costs that are used to determine standing timber value for implementation of the annual Timber Damage Assessment Tables. Please refer to MNP TDA Log Transactions Overview (Exhibit AB-S-41) and TDA Table 2016 Update (Exhibit AB-S-42).[172]

The TDA[173] states that MNP had been asked by Alberta Agriculture and Forestry "to provide an overview of the origins of the current TDA process, and the data collected, particularly as it relates to the log or timber transactions reported."[174].

The TDA states:

> The large majority (96.9% in FY2015) of the transactions occur at the mill gate (2.8% involve decked timber and the balance was standing timber). In order to express these transactions as a timber stumpage value they are adjusted to remove the cost of logging and direct overhead (for decked timber) or logging, hauling and direct overhead (for timber at the mill gate). These costs are the average industry costs for all Crown timber harvested in 2015.[175]

The IDM (at 49) stated:

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[172] GOA Response to Initial Questionnaire, March 13, 2017 (C.R. 372), at ABIV-50. The GNB's 57.1 Brief (at 58) stated that "in Corrected Exhibit AB-S-41, MNP provided extensive detail on how the information reflected in the TDA Table 2016 Update was compiled." However, aside from the removal of the heading "privileged and confidential attorney-client communication attorney work product," there is no difference between Exhibit AB-S-41[172] and Corrected Exhibit AB-S-41. C.R. 377 (public exhibit).

[173] This MNP report will be referred to as the "TDA" (Timber Damage Assessment) to distinguish from the MNP Report submitted by the GOO, discussed above.

[174] TDA at 1.

[175] *Id.* at 3.

> Upon further evaluation, we find that the TDA data represent a survey of private log transactions, and include a very small volume of private stumpage transactions, and many TDA salvage transactions.[301] TDA salvage transactions occur when Alberta energy and utility companies receive concessions on Crown land that is under timber management by tenure holders, and these concessions result in the removal of land from timber management. The non-timber concession holders negotiate with the timber tenure holders to reimburse the latter for their sunk costs of timber management on the land base removed from timber management. In addition, the non-timber concession holders usually ask the tenure holder to "salvage" timber on the concession land.[302]

Footnote 301 of the IDM cites the Corrected Exhibit AB-S-41 language quoted above, which does not mention salvage transactions. Footnote 302 of the IDM cites to page 7 of that Exhibit, which, at least in that exhibit available to the Panel, does not exist in either the BPI or Public Version[176] of that submission.

The GOA 57.1 Brief (at 61) challenged the IDM's conclusion and asserted: "To begin with, only a small percentage of the timber volume reported in the TDA survey originates as salvage." Footnote 161 stated: "The percentage can be determined from the data in Exhibit AB-S-125 at 23. *See* Government of Alberta's May 30, 2017 Supplemental Questionnaire Response, May 30, 2017, at Alberta Exhibit AB-S-125, Prop.R. 1316." The GOA may have wanted to avoid having any BPI in its brief, but the Panel now does not know what that percentage is. It is possible that that the salvage volume can be calculated from page 12 of the MNP report in Exhibit 125, which may have been the page that the GOA brief was citing, but the percentage that could be calculated from that page is not particularly small.

2) The Brattle Report

In response to Commerce's question asking Alberta to "provide any studies, reports, or other publications concerning the timber and lumber industries," the GOA's initial questionnaire response pointed to the Brattle Assessment of an Internal Benchmark for Alberta Crown Timber (Exhibit AB-S-24) and the Backup Documentation for the Brattle Assessment of an Internal Benchmark for Alberta Crown Timber (Exhibit AB-S-106).[177] ."[178]

The Brattle Report presents arguments why TDA transaction data should be used to provide an "estimate" of the value of standing timber, although it does not present the actual data. The Backup Documentation in Exhibit AB-S-106[179] contains documents in connection with the arguments in the Brattle Report, but also presents no TDA transaction data or the calculation of the estimate of the value of standing timber.

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176 P.R. 733.

177 GOA Response to Initial Questionnaire, March 13, 2017 (C.R. 372), at ABIV-19 – ABIV-20.

178 Brattle Report at 3-4 (footnotes omitted).

179 P.R. 390.

The first issue is whether the benchmark data proposed by GOA constitute a tier-one or a tier-three benchmark. As discussed above in Section III.1., a tier-three benchmark can only be used if there is no useable tier-one or tier-two benchmark. Commerce found that "{t}he TDA survey prices that the GOA, Canfor, West Fraser, and Tolko propose using as a benchmark are, by their own recognition, primarily for a different product, *i.e.,* harvested logs, that is downstream from standing timber. As such, the TDA survey prices are not a tier-one benchmark 'for the good or service' we are investigating."[180]

The GOA's 57.1 Brief does not argue that the TDA survey prices constitute a tier-one benchmark, relying instead on an argument that the Nova Scotia benchmark data cannot be used for Alberta, and that therefore the TDA survey prices should be used. The use of the Nova Scotia benchmark prices for Alberta will be discussed below.

The Panel finds that Commerce's decision that the TDA survey prices did not constitute a tier-one benchmark is supported by substantial evidence.

B. Commerce's Use of Nova Scotia Benchmark

The GOA's 57.1 Brief (at 20-54) argued that Commerce's use of a Nova Scotia tier-one benchmark was unsupported by substantial evidence. Its arguments were of the same general nature as the arguments of the GOO discussed in III.2.B.2) above, focusing more on the applicability of a Nova Scotia benchmark to stumpage in Alberta rather than on flaws in the Deloitte Report.

The Panel finds that the same reasons that the Deloitte Report is a valid source of benchmark prices for Ontario stumpage and that these benchmark prices may be used for other provinces, apply to Alberta as well. Therefore, the Panel finds that Commerce's use of the Nova Scotia tier-one benchmark to calculate the benefit for stumpage in Alberta was supported by substantial evidence and was in accordance with law.

The GOA's 57.1 Brief (at 64-81) argued that the market for stumpage in Alberta is not distorted. On this issue, Commerce pointed out in its final determination:

> The GOA and West Fraser argue that the three points of our stumpage distortion analysis, as presented in the Preliminary Determination, are irrelevant to evaluating the log prices reflected in the TDA survey data. We have not made a determination concerning distortion in the Alberta log market. The GOA and West Fraser's arguments concerning distortion presupposed that we would consider TDA survey data as a tier one benchmark, however we have not done so. Therefore, these arguments are misplaced. As a result, we need not evaluate whether log prices are also distorted as a result of the dominance of the government in the market for stumpage.[181]

Likewise, the Panel finds that substantial evidence supports Commerce's determination that the TDA survey prices did not constitute a tier-one benchmark, and that there was a valid tier-one

[180] IDM at 48.

[181] IDM at 50.

benchmark to be used. The Panel does not find it necessary to reach conclusions on the issues of whether either the Alberta stumpage market or the Alberta log market were distorted.[182] The Panel likewise does not reach the issue of the merits of the Brattle Report.

C. Adjustments to Alberta Stumpage and Nova Scotia Benchmark

1) Remuneration for Right to Harvest

The GOA's 57.1 Brief (at 84-111) argued that Commerce should have adjusted the Alberta stumpage prices by "all the remuneration provided," which includes FRIAA Dues, Holding and Protection charges; and various in-kind costs. As with Ontario, discussed above (at III.2.0.1).), Commerce pointed out that because it determined that "the Nova Scotia benchmark is a stumpage price that does not reflect post-harvest activities, a proper stumpage-to-stumpage comparison must logically exclude the cost of such activities from the calculation."[183] The GOA argued that "the fact that Nova Scotia private standing timber purchasers do not pay FRIAA or holding and protection charges is a reason that *supports* adjusting for these fees. And whether or not Nova Scotia timber harvesters incur these specific charges in the precise form they are incurred in Alberta is beside the point; these charges are part of the remuneration paid for Crown standing timber in Alberta, and they therefore must be accounted for in the Department's Alberta LTAR analysis."[184]

As with Ontario, in a situation such as this, the calculation of the amount of benefit is similar to the calculation of the amount of dumping in an antidumping proceeding. The goal is to make (or not make) adjustments so that the prices being compared are at the same level and comparable. If these costs are not in the Nova Scotia benchmark, then it is inappropriate to include them in the Alberta stumpage prices.

The GOA added the argument that it was unclear whether Commerce was "suggesting that Nova Scotia purchasers of private-land standing timber do not pay these costs or if it is suggesting that respondents bore the burden of proving that Nova Scotia purchasers do not pay these costs."[185] However, Commerce cannot make an adjustment on one side of the comparison on the basis of a *possibility* that Nova Scotia purchasers of private-land standing timber pay these costs that are included in the benchmark prices. There must be evidence on the record that these costs were included in the benchmark prices, and there is not.

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[182] Commerce noted that if it were evaluating the TDA survey data under tier three, it would examine whether these data represent prices that were consistent with market principles,and concluded that they were not. IDM at 49-50. The GOA 57.1 Brief hangs its argument on this conclusion, which Commerce did not need to reach because it had concluded that because the TDA survey data were not a tier-one benchmark and that Commerce did have a suitable tier-one benchmark available.

[183] IDM at 136.

[184] GOA 57.1 Brief at 93.

[185] *Id.* at 103.

The Panel finds that Commerce's decision not to include these costs in the calculation of the Alberta stumpage price was supported by substantial evidence and was in accordance with law.[186]

2) Conversion Factors

The GOA argued that if the Panel accepts the Nova Scotia benchmark, Commerce failed to use more accurate conversion factors for weight to volume ratios "to account for the differences in the respective provincial timber profiles and scaling standards."[187] West Fraser had raised this argument in its case brief in the investigation.[188] Commerce acknowledged this argument in its final determination,[189] but for some reason did not address this argument in the "Department's Position" part of its IDM.[190] Likewise, in its 57.2 Brief, Commerce addressed the other issues raised by the GOA regarding adjustments to either the Nova Scotia benchmark or the Alberta stumpage prices,[191] but did not address this issue. The COALITION 57.2 Brief also did not address this issue. At the hearing, counsel for the GOA again raised this issue,[192] but neither Commerce nor the COALTION responded to this issue.

The Panel is therefore faced with an unrebutted issue. This action is remanded to Commerce with instructions to explain why Commerce's failure to make the adjustment to the conversion factor for Alberta stumpage prices was supported by substantial evidence and was in accordance with law.

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[186] Panelist Ruggeri notes that, as with the Ontario benchmark *supra* at 27, he would remand this issue to Commerce for further explanation of why only costs incurred in the benchmark can be adjusted.

Moreover, he believes that the Panel's analogy to an "apples-to-apples" comparison as in an anti-dumping case is wholly misplaced. A dumping case, of course, focuses on price discrimination. The whole point of ensuring that the two prices in a dumping case are stripped of various costs is so that they are both *ex-factory.* In a CVD case, on the other hand, we are concerned with determining whether the remuneration made by the respondent to the government is adequate. That remuneration is compared with a benchmark (in this instance, the Nova Scotia market). But, in calculating whether the respondent's remuneration is adequate, it makes little sense to ignore any and all remuneration required by the Alberta authorities which was not also incurred in Nova Scotia. Nova Scotia is only a benchmark of the adequacy of remuneration- *not a determinant of the remuneration itself* actually paid in Alberta. He would remand this issue to Commerce for an explanation why its determination is in accordance with law.

[187] *Id.* at 117-118.

[188] Opening Case Brief of West Fraser Mills Ltd. (July 27, 2017), at 24-25 (C.R. 1812).

[189] IDM at 134.

[190] Such a response would likely have appeared in IDM at 136 if it existed, as Commerce addresses on that page arguments that preceded and succeeded this argument.

[191] Commerce 57.2 Brief, Vol. II at 159-161, citing to the pages of the GOA 57.1 Brief in which this issue was raised.

[192] Hearing Transcript, Vol. II (September 28, 2023), at 282-283.

3) Haul Costs and Proximity to Market

The GOA argued that if the Panel accepts the Nova Scotia benchmark, Commerce failed to adjust for the differences between Nova Scotia and Alberta in terms of haul costs and proximity to market.[193] The GOA argued that Alberta sawmills face disadvantages in hauling costs due to the greater distance between the harvest area and sawmills, and due to greater distances between the sawmills and the U.S. market, which decreases the value of Alberta standing timber relative to Nova Scotia timber. The GOA referenced the MNP March 10, 2017 Cross-Border Report, which provided calculations of the amount of the proposed adjustment.[194]

Commerce's response was to dismiss the MNP data as an "estimate" or "based on assumptions made in the absence of data and without record support."[195] The COALITION emphasized that the cost of hauling was a post-harvest cost, which it argued should not be included in a calculation of stumpage prices.[196]

An examination of the MNP Cross-Border Report indicates that the data are not simply an "estimate," but are based on calculated weighted-average distances.[197] The Panel rejects Commerce's dismissal of the data as merely "estimates." With regard to whether the adjustment constitutes a post-harvest cost that should not be included in a calculation of stumpage prices, the Panel notes that a factor that decreases the value of Alberta standing timber is arguably a "factor affecting comparability" under 19 C.F.R. § 351.511(a)(2)(i). This action is remanded to Commerce with instructions to either adjust the Alberta price by the haul costs as presented by the GOA, or explain why these costs are not a factor affecting comparability under 19 C.F.R. § 351.511(a)(2)(i).

4. British Columbia

A. Commerce's Finding Regarding Use of British Columbia Benchmark

In its Final Determination, Commerce determined that the British Columbia Timber Sales ("BCTS") auction prices were distorted and it therefore rejected the Government of British Columbia's ("GBC") proposed benchmark of those prices to compare with Crown stumpage sales.[198]

Of the 95 million hectares in British Columbia, 94.1 percent is under Provincial Crown management. Only 4.7 percent is privately owned.[199] An estimated 21 million hectares is

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193 GOA 57.1 Brief, at 121-124.

194 GOA Initial Questionnaire Response (March13, 2017) (P.R. 383), Exhibit AB-S-23.

195 Commerce 57.2 Brief, Vol. II at 160-161.

196 COALITION 57.2 Brief, Vol. I at 86-88.

197 *E.g.,* Exhibit AB-S-23 (P.R. 383), at 26 and 39.

198 IDM at 54-58.

199 GBC Initial Questionnaire Response, March 14, 2017 (C.R. 403), at BC I-34.

harvestable forest land.[200] Over 90 percent of standing timber harvested in British Columbia was from Crown lands.[201]

The GBC explained:

> Section 12 of the *Forest Act*, provided as **Exhibit BC-S-16**,[202] authorizes the Ministry to grant rights to harvest Crown timber under twelve forms of agreement. Nine are licences and three are stand-alone permits. Most licences require an additional authorization to harvest timber in the form of a cutting permit, but some licences authorize harvesting without obtaining a further authorization. The permits authorize the harvest of Crown timber without a further authorization.[203]

Of these forms of agreement, the three main types of harvesting licenses are Tree Farm Licences ("TFL"), Forest Licences ("FL"), and Timber Sale Licences ("TSL").[204] The GBC proposed using the prices from the TSL sales as a benchmark for comparison to the prices from the TFL and FL sales,[205] thereby proposing that the benefit be calculated by comparing one of the three main ways that the GBC sells timber to the other two ways.

The GBC explained the setting of the prices under these types of harvesting licenses as follows:

> Approximately 20 percent of the annual public timber harvest is sold in open, competitive auctions; the winning bids on those auction sales are then used to establish the market value of the timber harvested by other licensees. This system applies to the vast majority of the timber harvest, including all timber harvested by the major forest companies under long-term tenure. There are some exceptions, discussed separately, for timber harvested under various minor tenure forms.
>
> British Columbia's timber auction program is managed by B.C. Timber Sales ("BCTS"), an independent organization within the Ministry of Forests, Lands and Natural Resource Operations ("the Ministry"). BCTS sells specified stands or tracts of timber to be harvested over a specified term, usually one to two years, in the form of what are called Timber Sale Licences ("TSL"). BCTS plans these sales in accordance with rigorous financial criteria. It then provides any necessary access to the site, and conducts a timber cruise to identify and appraise the timber to be harvested. The timber is sold in open and competitive sealed bid timber auctions to the highest cash bidder meeting or exceeding the minimum acceptable bid (reserve

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200 *Id.* at BC-I-35.

201 GBC Initial Questionnaire Response, March 14, 2017 (C.R. 404), at Exhibit BC-S-2.

202 *Id.* at Exhibit BC-S-16.

203 GBC Initial Questionnaire Response, March 14, 2017 (C.R. 403), at BC I-65.

204 *Id.* at BC I-68 to BC I-77.

205 Rule 57.1 Brief of the B.C. Parties ("GBC 57.1 Brief"), Vol. I at 11-20.

or upset price). That high bid is then paid for the timber as it is harvested. Once harvesting is complete, BCTS reforests the site.

The winning bids from these sales are then used as the basis for determining the market value of the timber harvested by licensees under long term tenures. This system is known as the Market Pricing System ("MPS"). Under MPS, the Ministry estimates what would have been bid for the timber harvested by licensees based on the winning bids for similar timber sold by BCTS. The Ministry then applies a tenure obligation adjustment ("TOAs"). The TOA is necessary because, under long term tenures, it is the licensees themselves who perform the BCTS functions summarized above – *e.g.*, planning, access development, cruising, and silviculture.[206]

1) Degree of Government Involvement in the Market

In its final determination, Commerce explained that when information on the record indicates that the government is involved in the market, before determining whether it is appropriate to use prices from within that market, the Department must determine whether that market is distorted due to the presence of the government.[207] Referring to its Preliminary Determination, it found that information on the record indicated that the British Columbia stumpage market was distorted because the majority of the market is controlled by the government.[208] The GBC claimed that Commerce made its determination that the BCTS auction prices were distorted "{o}n this basis alone," and that Commerce's rationale was based on an alleged statement from the preliminary determination that was never made— *i.e.*, the market was distorted because the majority of the market is controlled by the government.[209]

As discussed in Section III.1 of our decision, although a relevant factor to be considered, distortion cannot be determined solely because the exporting country controls "a substantial portion" of the relevant market. It is apparent from the IDM that Commerce considered this factor but did not base its distortion finding solely upon it. It provided additional reasons in both the PDM and IDM for its finding. In the IDM, the two reasons were: (i) a small number of large lumber companies dominated the BCTS auction market, thereby inhibiting competition; and (ii) the log export restrictions in place in British Columbia inhibited log exports from the province, preventing

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206 GBC Initial Questionnaire Response, March 14, 2017 (C.R. 403), at BC I-1 to BC I-2.

207 IDM at 55.

208 *Id*. Given that only 4.7 percent of the standing timber is privately owned, there is clearly a high degree of government control in the market. GBC Initial Questionnaire Response, March 14, 2017 (C.R. 403), at BC I-34.

209 GBC 57.1 Brief, Vol. I at 20. Contrary to the GBC argument, the preliminary determination did state that "where the Department has found that the government provides the majority or, in certain circumstance, a substantial portion of the market for a good or service, it has considered prices for such goods and services in the country to be significantly distorted and not an appropriate basis of comparison for determining whether there is a benefit."

log sellers from seeking the highest prices in all markets, and thus creating additional downward pressure on the log prices in the province.[210]

2) The Competitiveness of BCTS Auctions

Commerce found that a small number of large lumber companies dominated the BCTS auction market, thereby inhibiting competition, observing that five companies accounted for 64.8 percent of cruise-based auction volume and 43.6 percent of the scale-based auction volume.[211] It noted that the GBC recognized this large-company dominance to be a problem when it introduced the three-sale limit—restricting the number of active TSLs that a company may hold simultaneously to three—ostensibly to encourage competition by imposing a cap on the extent of participation by any one company and thus preventing the large companies from dominating all the auctions.[212] It found that, by so doing, the GBC imposed an artificial barrier to participation in the BCTS auctions; while no companies were *per se* excluded from the auction system as a whole, the three-sale quota meant that, to the extent some companies had already reached the quota, any given auction would find fewer bidders that could otherwise participate.[213] On this basis, Commerce found that the BCTS auctions were not the type of "competitively run government auctions" envisioned under 19 CFR 351.511(a)(2)(i) and, for this reason alone, the BCTS auctions could not provide a tier-one benchmark even if it were to find a non-distorted market overall such that the first tier methodology would apply.[214]

With respect to the three-sale limit, Commerce further found that the dominant firms managed to get around the three-sale rule by making "straw purchases" through proxy bidders, thus maintaining effective dominance in these auctions.[215] It observed that record information indicated that the three-sale limit had failed to significantly diversify the entities harvesting from TSLs won on the auction in the manner intended.[216] Instead, larger companies, including the mandatory respondents, continued to effectively manage and harvest more than three TSLs at a time by means of these "straw purchases" or by working with contract harvesters, effectively nullifying the three-sale limit.[217]

Commerce explained that the straw purchases introduced an additional source of market distortion, in the form of cutting rights fees necessitated by the purchases or by proxy bidding.[218] All three mandatory respondents with operations in British Columbia reported paying a cutting

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210 IDM at 57-58.

211 *Id*. at 57, fn 341.

212 *Id*. at 57.

213 *Id*.

214 *Id*.

215 *Id*.

216 *Id*.

217 *Id*.

218 *Id*. at 58.

rights fee when obtaining the right to harvest a TSL won by a third party at auction.[219] This was an additional cost that they would not have incurred had they bid for the TSL directly — a cost that was likely factored into the auction in the form of lower bids, as the bidder would expect the companies to discount their purchase price accordingly.[220] As Commerce noted in the Preliminary Determination, based on a study from the BCLTC, non-harvesting third-party bidders at auctions "base their auction bids on what the tenure-holding companies are willing to pay for auction-origin logs."[221] In such circumstances, the price paid by the BCTS auction winner would not reflect the full value of the timber.[222]

Based on the foregoing, Commerce's finding that the BCTS auctions were not competitively run government auctions was based on the following:

- A small number of large lumber companies dominated the BCTS auction market, thereby inhibiting competition which the GBC recognized as problematic when it introduced the three-sale limit.
- The three-sale limit meant that, to the extent some companies had already reached the limit, any given auction would find fewer bidders that could otherwise participate, further inhibiting competition.
- The three-sale quota was nullified by "straw purchases" and by working with contract harvesters which resulted in additional cutting rights fees being payable which would likely result in lower auction bids.

a) Whether a Small Number of Large Lumber Companies Dominated the BCTS Auction and Inhibited Competition

Commerce's finding that a small number of large companies that dominated the BCTS auction was based on the percentages of auction volumes they accounted for and on the recognition by the GBC that this was a problem which resulted in the introduction of the three-sale limit.

(i) Whether it was Necessary for Commerce to Demonstrate an Actual Impact on Competitiveness and Prices

The GBC argued that it was insufficient for Commerce to merely identify factors that could potentially influence the competitiveness of BCTS auctions.[223] In its view, Commerce assumed that the factors it identified "had an *actual* impact on the competitiveness of the BCTS auctions, *and* that this meant that the resulting auction prices were not market-determined."[224] This "render{ed} the Department's determination inconsistent with the substantial evidence standard

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219 *Id*.

220 *Id*.

221 *Id*.

222 *Id*.

223 GBC 57.1 Brief, Vol. I at 27.

224 *Id*.

because the Panel is left "unable to discern how the agency connected the dots between the facts on the record and the conclusions stated."[225]

With respect to the GBC's argument regarding actual effect, the situation is similar to that in the *Guandong Wireking* case:

> Plaintiffs also argue that Commerce's conclusion that export controls on wire rod contribute to market distortion is not supported by substantial evidence. … Specifically, Plaintiffs insist that Commerce ''offered no evidence as to how the referenced measures significantly affected either pricing or volume of domestic production, exports or imports.'' … In fact, Plaintiffs suggest that Commerce ignored evidence of the PRC's significant importation and exportation of wire rod in terms of volume, which indicated that the GOC does not distort market prices. … Therefore, Plaintiffs insist that it was erroneous for Commerce to conclude that the GOC's involvement in the wire rod market distorted prices. …
>
> Plaintiffs' claims concerning the sufficiency of Commerce's evidence are also unavailing. Plaintiffs' argument appears to be based on the mistaken belief that Commerce must demonstrate with substantial evidence the specific distortive effect of each government action on wire rod prices. … However, the regulations only require Commerce to determine whether the GOC constitutes a substantial portion of the wire rod market, such that Commerce may reasonably conclude that prices are distorted. See CVD Final Rule, 63 Fed. Reg. at 65,377. As described above, Commerce relied on a number of factors indicating the substantial influence the GOC held over the wire rod market, including the GOC's near-majority market share, the low market share of wire rod imports, and regulations on the exportation of wire rod. … Commerce reasonably concluded that the evidence, taken as a whole, demonstrated ''the GOC's predominant role and contributed to the distortion of the domestic market in the PRC for wire rod.''[226]

The Panel agrees with Commerce that it is not required under law to demonstrate that the market concentration of the BCTS auctions actually caused price suppression. The record evidence indicates that there would be no way to compare the BCTS auction prices to the prices that would have prevailed in the lack of such concentration. However, Commerce did have to explain how its reasoning regarding market concentration led to its conclusion of market distortion.

(ii) Whether Commerce Explained how its Finding of Concentration Led to Market Distortion

The GBC argued that Commerce failed to demonstrate a "rational connection" between concentration in the BCTS auction market and distortion and claimed that Commerce only

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[225] *Id*.

[226] *Guandong Wireking Housewares & Hardware Co. v. United States*, 900 F. Supp. 2d 1362, 1382 (Ct. Int'l Trade 2013) (citations omitted). The Panel is not persuaded by the GBC's attempt to distinguish this case. GBC 57.3 Brief, Vol. I at 37-39. The case stands for the proposition that Commerce does not need to demonstrate the specific distortive effect of a government action, which is applicable here.

assumed that the concentration inhibited competition.[227] It argued that the concentration reflected prevailing market conditions in British Columbia, not the operation of the BCTS, and would exist even if all of British Columbia's timberlands were owned by private landowners.[228] Commerce had relied on record evidence that five companies account for 64.8% of cruise-based auction volume and 43.6% of the scale-based auction volume.[229] The GBC argued that these percentages reflected the level of concentration in the mills that ultimately consumed the logs harvested pursuant to BCTS auction TSLs during the POI and not the concentration in the auctions themselves.[230] More than 1,000 companies were registered to bid on the BCTS actions and during the POI, TSLs were awarded to 280 distinct bidders.[231] The Department made no attempt to explain why alleged concentration in the mills consuming BCTS auction logs inhibited competition in the actual BCTS auctions.[232] Referring to Dr. Athey's Report (discussed below), the GBC argued that concentration is not itself an indicator of anti-competitive behavior, that the ability of large forest companies to reduce auction bids was limited, that a market does not have to be "perfectly competitive" for prices in that market to be market-determined, and that prices are market-determined if they are formed as the result of the free interplay among informed buyers and sellers, with opposing interests and acting independently and at arms-length.[233]

Commerce responded that the GBC oversimplified its market concentration analysis.[234] Referencing both the PDM and the IDM, it explained that its finding that BCTS auction prices were not market-determined did not rely merely on the fact that five firms consumed the majority of the harvest from BCTS-auctioned TSLs but also on the fact that those same five firms also had the majority of the comparatively much larger harvest from TFLs and FLs with prices derived from BCTS-winning bids.[235] The common identity of the dominant firms consuming TSL-harvested timber and harvesting timber from TFLs and FLs informed the analysis of whether the BCTS auction prices were competitive and open and independent, particularly in a market where the government was virtually the only seller of significance.[236] Although the participants in the BCTS auctions were primarily independent loggers, the prices paid by these loggers keyed off prices that the dominant tenure-holding sawmills were willing to pay, limiting BCTS prices to what those tenure holders pay for timber harvested from their tenures.[237] Commerce relied upon a study from the BCTLC submitted during the 2005 *Lumber IV* second administrative review that explained

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227 GBC 57.1 Brief, Vol. I at 26-27, 30-31.

228 *Id*. at 29-30.

229 *Id*. at 31.

230 *Id*.

231 *Id*.

232 *Id*. at 30.

233 *Id*. at 32-33.

234 Commerce 57.2 Brief, Vol. III. at 24.

235 *Id.* at 24-25 referencing PDM at 37-39 and IDM at 57-58.

236 *Id.* at 25.

237 *Id*. at 10, 27.

that the structure of the timber market provided leverage to the tenure-holding sawmills and the prices paid in BCTS auctions were limited to the prices that such sawmills would be willing to pay.[238] Given this market structure, Commerce found that BCTS prices did not reflect market-determined prices from competitively-run auctions.[239]

The GBC responded that Commerce was simply repeating an old argument from the second administrative review in *Lumber IV* that was no longer valid because the circumstances had changed.[240] At the time of that administrative review, the MPS system for determining stumpage for the non-actioned portion of the harvest had not yet been established and stumpage for long-term tenures was still administratively-set.[241] In the review, Commerce rejected the use of the BCTS auction prices because the volumes sold under the actions were not significant and the auction prices were effectively limited by Crown stumpage prices paid by Crown tenure-holding sawmills.[242] The way stumpage prices were determined fundamentally changed after the review and, in 2006, stumpage prices for long-term tenures were based on the auction prices and were not administratively-set.[243]

Commerce acknowledged that "where it is reasonable to conclude that prices in that market are significantly distorted *as a result of the government's involvement* in that market, the Department will not use the prices within that market."[244] The degree of market concentration is not "a result of the government's involvement." Although the concentration of stumpage sellers (*e.g.*, government agencies) could be a result of government involvement and thereby be directly relevant to a market distortion finding, this is not the case for the concentration of stumpage buyers, which is a reflection of market conditions rather than government involvement. The buyer concentration exhibited in the BC market would exist even in the absence of government ownership and stumpage program. Thus, viewed in isolation, the concentration of stumpage buyers could not support a finding of market distortion.

However, buyer concentration could be indirectly relevant when viewed in the context of a government measure. For example, a government measure may distort a market in some circumstances (*e.g.*, if buyers were highly concentrated) but not in others (*e.g.*, if buyers were significant in number and diversity). To the extent that Commerce took this approach,[245] it did not explain how the factors it referenced led to market distortion, including:

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238 *Id*. at 27.

239 *Id*.

240 GBC 57.3 Brief, Vol. I at 7, 9.

241 *Id*. at 9.

242 *Id*. at 9-10.

243 *Id*. at 10.

244 IDM at 55 (emphasis added).

245 For example, in its statements that the "common identity of the dominant firms consuming TSL-harvested timber and harvesting timber from TFLs and FLs informed the analysis of whether the BCTS auction prices were competitive and open and independent, particularly in a market where the

- How, if the TFL and FL prices are derived from BCTS-winning bids, how the TFL and FL prices flow back to affect BCTS prices.
- How concentration in the mills consuming BCTS auction logs inhibited competition in the actual BCTS auctions which involved more than 1,000 registered companies and TSL awards to 280 distinct bidders during the POI.
- How the study from the BCTLC submitted during the 2005 *Lumber IV* second administrative review was applicable to the circumstances existing during the POI.

The Panel therefore remands this action to Commerce with the instructions to provide reasoned explanations of how the market concentration factors it identified led to distortion in the BCTS auctions.

(iii) The Athey Report

The GBC argued[246] that Commerce failed to consider, or even mention, the report prepared by Dr. Susan Athey, which concluded:

> In this report I have shown that the British Columbia timber pricing system, in both its design and its operation, prices public timber at market value. BCTS auction prices are valid market prices; and the MPS system provides reliable estimates of the market value of the timber harvested by major licensees from their long term tenures based on those bids. I find the Petitioner's criticisms of the system to be without merit.[247]

As Commerce noted,[248] Dr. Athey was one of the lead designers of the BCTS auction system.[249] As Commerce put it, "Dr. Athey was essentially asked to grade her own work."[250] The date of the report, March 2017, included in the GBC's March 14, 2017 questionnaire response, indicates that it was prepared for the purposes of the litigation. A major section of the report is titled "The Petitioner's Criticisms of BCTS Bid Prices are Invalid."[251] Commerce noted that it "sought, and the GBC refused to provide, its correspondence with Dr. Athey and other paid experts

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government was virtually the only seller of significance" and that while the participants in the BCTS auctions were primarily independent loggers, "the prices paid by these loggers keyed off prices that the dominant tenure-holding sawmills were willing to pay, limiting BCTS prices to what those tenure holders pay for timber harvested from their tenures." Commerce 57.2 Brief, Vol. III. at 24-25 referencing PDM at 37-39 and IDM at 57-58.

246 *Id.* at 23-25.

247 Susan Athey, *British Columbia's Market- Athey Report Based Pricing System for Timber* (March 2017) in Response of the Government of British Columbia, March 14, 2017 (P.R. 415), BC Vol. I at Exhibit BC-S-182 ("Athey Report"), at 3.

248 Commerce 57.2 Brief, Vol. III at 43.

249 *See* GBC Verification Report (July 17, 2017) (C.R. 1802), at 12, *citing* GBC Verification Exhibit 12 (C.R. 1678), at 6.

250 Commerce 57.2 Brief, Vol. III at 43.

251 Athey Report at 42.

'with respect to the purpose, parameter, and/or conclusions of the study.' *See* GBC May 30, 2017 QR at BC-Supp3-1 (P.R. 1413). As such, the GBC declined to submit evidence that would have supported its expert reports' objectivity."[252] The GBC's 57.3 Brief did not respond to this point. Commerce concluded that "it was reasonable for Commerce to assign Dr. Athey's report, among other reports, less weight because of its potential bias."[253]

In *Mosaic Co. v. United States*,[254] the court discussed the use of an expert report (a Brattle Report, different from the Brattle Report submitted in the investigation below) in a countervailing duty proceeding:

> PhosAgro more specifically argues that Commerce should have accepted data about private Russian producers in the Brattle Report as a tier-one benchmark. Commerce, however, rejected the data in the Brattle Report and found it not "useable in the natural gas benchmark calculation" because PhosAgro had the report prepared for the investigation and it did not include the original documentation containing its sources, data, or methodology. Commerce reasonably declined to use the data in the Brattle Report based on these flaws. Further, the Brattle Report's data on Russia's independent gas suppliers included Rosneft, contrary to Commerce's authority finding based on this record. Additionally, Commerce found the entire Russian natural gas market to be distorted, which would affect the independent gas suppliers as well. Thus, Commerce's decision not to rely on the data in the Brattle Report was reasonable as its overall decision was not to use a tier-one benchmark.[255]

The Panel interprets *Mosaic* to mean that while the fact that an expert report was prepared for the investigation may be taken into account, other reasons must also be given for not accepting the information in such a report. Expert reports must be evaluated on a case-by-case basis.

The fact that the Athey Report was prepared by a lead designer of the subject matter brings into question the independence and objectivity of the opinions expressed in the Report.[256] The GBC's failure to provide Commerce with the requested information regarding communications on the purpose, parameter, and/or conclusions of the Report did nothing to resolve those questions about the objectivity of the opinions. In the absence of the requested information, it was not unreasonable for Commerce to remain concerned about the objectivity of the Athey opinions. Contrary to the GBC's argument, it is not clear that the Athey Report "on its face" provides significant support for an alternative conclusion to that made by Commerce.[257] As the *Mosaic I*

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252 Commerce 57.2 Brief, Vol. III at 42-43.

253 *Id.* at 43.

254 *Mosaic Co. v. United States*, 589 F. Supp. 3d 1298 (Ct. Int'l Trade 2022).

255 *Id.* at 1312-13 (citations omitted).

256 For example, this can be contrasted with an expert report assessing the BCTS auction system prepared by an independent expert who did not participate in the creation of the system.

257 For example, the report does not provide statistical or other objective quantitative analysis on whether 20% of the B.C. timber supply amounts to a "substantial proportion", "sufficient volume" and

court held, Commerce may reasonably give less weight to an expert's report which fails to include important relevant information such as "the original documentation containing its sources, data, or methodology." While a close question, the Panel agrees that the GBC's refusal to provide the requested contextual information for the Athey Report was sufficient grounds for Commerce to assign less weight to it.

For these reasons, Commerce's assignment of weight to the Athey Report was reasonable and supported by substantial evidence.

b) Three-Sale Limit

Commerce further reasoned that the "three-sale limit", which restricted the number of active TSLs that a company may hold simultaneously to three, imposed an artificial barrier to participation in the BCTS auctions in that to the extent fewer bidders would participate when companies reached this limit.[258] The GBC countered that Commerce was required "to demonstrate that the three-sale limit *in fact* affects the number of bidders in any given BCTS auction, much less that this alleged impact on auction behavior was such that BCTS auction prices during the POI could not be considered market-determined."[259] As with the market concentration issue, the record evidence indicates that there would be no way that Commerce could demonstrate an actual effect of the limit in the absence of having an auction market in British Columbia that did not have a limit. As the *Guandong Wireking* case, quoted above, holds, Commerce is not required to make such a demonstration.

However, this factor in Commerce's reasoning suffers from the same deficiency identified above in our remand on market concentration. How did it result in market distortion? The Panel therefore remands this action to Commerce with the instructions to provide reasoned explanations of how this factor, either individually or in combination with the above other factors, led to distortion in the BCTS auctions.

"representative sample" of the province's timber sales in an auction to demonstrate that the system was market based. The references to "representative sample" are assertions that are unsupported by data or analysis. These terms appear to be central to the Commerce Policy Bulletin upon which the reforms were based (Athey Report at 14-15). The report explains that the BCTS aims to sell at prices "which would be expected to at least cover their costs and make some contribution to fixed costs" but does not demonstrate that this minimum pricing threshold reflects sustainable pricing in a competitive market (Athey Report at 21-22). The report refers to a "net revenue margin" of 44 percent for the BCTS but does not demonstrate that it reflects margins in a competitive market (Athey Report at 34). The report also does not demonstrate how the "upset rate", the "estimated value" and the "MPS Equation" reflect pricing in a competitive market. Consequently, it is not apparent from the scatter chart in Chart 3 of the report that the data points above the "expected winning bid line" and the "70% upset rate line" reflect competitive market prices (Athey Report at 25-26, 36-37, Appendix 8). Although the report graphs average BCTS winning bids for timber against the US Random Lengths composite lumber price and, separately, BCTS rates against MPS rates and concludes that the bids and prices/rates track closely, it does not explain how this demonstrates that the BCTS and MPS rates reflect competitive rates (Athey Report at 37-41, Appendices 9 and 10).

[258] IDM at 57.

[259] GBC 57.1 Brief, Vol. I at 35.

c) Straw Purchases

As quoted above, Commerce pointed to the workaround of the three-sale limit by "straw purchasers" as something that strengthened its position. If, in fact, the three-sale limit was "effectively nullif{ied}," [260] that would mean that the limit was not a factor that prevented the BCTS auctions from being market-determined. Commerce also pointed to the largest companies having to pay straw purchasers "cutting rights fees," which would have the effect of inducing these companies to lower their bids. [261] However, the GBC effectively demonstrated that any such cutting fees had a very small effect. [262] The Panel concludes that the straw purchases did not negate the effect of the three-sale limit, and therefore that limit remains a factor in the analysis of the competitive nature of the BCTS auctions subject to the above remand.

3) Log Export Restraints

Commerce also cited to the Log Export Restraint (LER) program as a reason for finding that the British Columbia market for harvesting from Crown timber lands was distorted. As discussed in Part IV. below, the Panel finds that it cannot sustain Commerce's determination regarding the countervailability of the LER without further explanation or reconsideration from Commerce on its reasoning on certain material facts and issues. The Panel will reassess the countervailability of the LER and its relevance to Commerce's market distortion reasoning upon reviewing the results of the remand.

B. Use of U.S. PNW Log Prices as Benchmark

The GBC argued that Commerce's benchmark based on the conclusion that the BCTS auction prices were distorted was contrary to record evidence. [263] Commerce used as a tier-three benchmark log prices maintained by the Washington Department of Natural Resources ("WDNR"), finding that "{t}hese prices are maintained by the WDNR in the ordinary course of business, and the species reflected in the dataset correspond to the Crown-origin species purchased by the B.C.-based respondents. Further, we find the data from the WDNR reflect log prices paid for private-origin logs and, therefore, reflect a market-based price." [264]

Conspicuously absent from the GBC's argument is any suggestion of what Commerce should use as a benchmark were the Panel to find that the use of WDNR prices was unsupported by substantial evidence or not in accordance with law. There is nothing in the record for Commerce to fall back on were the Panel to rule in the GBC's favor on this issue, except perhaps for the COALITION's preference for the benchmark, discussed below. The bulk of the GBC's argument consists of detailing Commerce's "failure to make all necessary adjustments to reflect prevailing

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260 IDM at 57.

261 *Id.* at 58.

262 GBC 57.1 Brief, Vol. I at 38.

263 GBC 57.1 Brief, Vol. I at 57-70. The Report by Mark Rasmussen of Mason, Bruce & Girard, Inc., dated March 2017, was submitted by the COALITION on March 27, 2017. Benchmark Information, Exhibit 1 (P.R. 703).

264 PDM at 50.

market conditions in British Columbia when comparing British Columbia Crown stumpage prices to U.S. PNW log price benchmarks."[265]

Not being presented with any proposed remedy, in the interest of judicial economy the Panel declines to make a finding regarding the GBC's argument regarding the use of U.S. PNW log prices as the benchmark, and proceeds to an examination of the adjustments proposed for this benchmark (after first discussing the COALITION's preferred benchmark).

C. Use of Forest2Market data in place of WDNR data

The COALITION argued that Commerce should have used the prices in a report by Mason, Bruce & Girard, Inc., submitted by the COALITION, rather than the WDNR data used by Commerce as the benchmark for British Columbia Crown stumpage sales.[266] The Mason, Bruce & Girard report used data "collected and reported by Forest2Market, a private company that collects and publishes log pricing data," published on a subscription basis.[267] The COALITION contended that the Forest2Market pricing data was preferable to the WDNR data because the former was based on actual transaction prices, while the latter was based on price quotes, and "Commerce generally prefers to use actual transaction prices as benchmarks rather than offer prices or estimated prices, if actual transaction prices are available."[268]

Commerce countered that its "practice does not limit its consideration of potential benchmarks merely to whether the data reflect actual transaction prices, and … considers more broadly whether the benchmark data constitute the best available evidence on the record."[269] Commerce determined not to use the Forest2Market data for two reasons: "First, because the Forest2Market data and search parameters used to query that data are not on the record, Commerce cannot verify that the Forest2Market summary is complete or representative."[270] "Second, the Mason, Bruce & Girard study was commissioned specifically for this investigation."[271] Commerce concluded that although it "acknowledged that the WDNR data were imperfect because of the inclusion of price quotes, Commerce properly determined that the data were preferable to the nontransparent and unverifiable Forest2Market data."[272]

The time for the COALITION to win its argument regarding its preferred benchmark was before Commerce's final determination, at which point Commerce could have, in its discretion, decided to use the Forest2Market data as the benchmark for comparison to BCTS auction prices. Once Commerce made its final determination, the question changes from which benchmark is better to whether Commerce's determination to use the WDNR data was reasonable. In this light,

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265 GBC 57.1 Brief, Vol. I at 70-71.

266 COALITION 57.1 Brief at 17-25.

267 *Id.* at 18.

268 *Id.* at 19.

269 Commerce 57.2 Brief, Vol. III at 58.

270 *Id.* at 59.

271 *Id.* at 60.

272 *Id.*

the Panel cannot say that the use of the WDNR data was unreasonable. Its use was within Commerce's discretion, and substantial evidence supported its use. The Panel therefore sustains Commerce use of the WDNR data for the benchmark to comparison to BCTS auction prices.

D. Adjustments to BC Stumpage Benchmark

Both the GBC and the COALITION proposed various adjustments to the WDNR benchmark prices on the assumption that this data will be used as the benchmark.

1) Volumetric Conversion Factors

The WDNR prices are expressed in terms of thousands of board feet (MBF). The British Columbia Crown stumpage prices are expressed in terms of cubic meters (m^3). In order to compare the WDNR prices to the British Columbia prices, prices in MBF must be converted to prices in m^3.[273] The GBC submitted a report prepared by Jendro & Hart LLC, dated March 13, 2017.[274] The body of the report is titled "Critique of Petitioner's Proposed Cross-Border Subsidy Methodology," but Appendix A is a "Dual-Scale Study of the Principal Conifer Species of Interior British Columbia Applying the BC Metric and Scribner Short Log Measurement Rules," prepared in 2016.

In the preliminary determination, Commerce "converted these monthly prices into U.S. dollars per cubic meter using a conversion factor of 5.93, which is the same conversion factor for interior species used by the Department in *Lumber IV*," but indicated that it "will continue to evaluate the appropriate conversion factor to be used when converting from MBF to cubic meters."[275] The conversion factor was developed by the U.S. Forest Service, first in 1984 and then updated in 2002.[276]

For the final determination, the GBC argued for the use of the Dual-Scale Study for the conversion factor, but Commerce continued to use the 5.93 conversion factor. In its final determination, Commerce did not outright dismiss the report because it was commissioned by respondents in anticipation of an investigation, but merely concluded that this fact "diminishes its weight."[277] Rather, it focused on "the essential issue here is whether the BC Dual Scale Study produced conversion factors that were based upon a valid sampling methodology."[278]

The conclusions of an economist retained by a private party to advocate a particular position are rightly viewed on the basis of the strength of their arguments, but it is not assumed

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273 *See* GBC 57.1 Brief, Vol. I at 72.

274 Response of the Government of Canada and the Governments of Alberta, British Columbia, Manitoba, Ontario, Québec, and Saskatchewan to the Department's January 19, 2017 Initial Questionnaire and January 31, 2017 Addendum to CVD Initial Questionnaire, March 14, 2017 (P.R. 416), Exhibit BC-S-183 ("Jendro & Hart Report").

275 PDM at 53.

276 Commerce 57.2 Brief, Vol. III at 62, fn. 15.

277 IDM at 60.

278 *Id.* at 59.

whether their positions are correct on the basis of who they are.[279] With regard to a study like the Dual-Scale Study, that too was prepared in anticipation of litigation. In the normal course of business, the conversion factors for comparing British Columbia stumpage and Washington state logs are not something that would be normally calculated. The GBC retained Jendry & Hart with the expectation that it would produce an answer helpful to the GBC's position. It is appropriate for Commerce to keep that in mind as it evaluates the strength of the information in the Report.

In its 57.1 Brief, the GBC quoted at length from the key paragraph of the IDM regarding the question of a "valid sampling methodology," and dismissed it as "statistical gibberish."[280] But Commerce's 57.2 Brief continued to defend its analysis:

> First, the BC Dual Scale Study failed to identify any methodology for its site selection. Messrs. Jendro and Hart selected only twelve scaling sites for measurement, whereas record evidence indicates that there are well over 200 scaling sites in British Columbia. As Commerce explained, it was insufficient for Jendro & Hart to explain merely that they applied "historical knowledge" in selecting the twelve sites. IDM at 59. For the study to be reliable, the authors would need to devise and implement a valid statistical methodology. *Id*. Commerce did not suggest that only a single, particular methodology was acceptable, but rather that there be some widely-accepted methodology - *e.g*., random, stratified, or composite sampling-and not simply the authors' unfettered discretion. *Id*.[281]

Commerce concluded:

> The BC Parties' statements in their brief only serve to highlight the shortcomings of the BC Dual Scale Study's methodology. The BC Parties contend that "deliberate site selection" is a "virtue," and that "the twelve sample sites used in the BC Dual Scale Study were chosen to ensure that the logs included in the study were representative of the variety of log characteristics found in the B.C. Interior." BC Parties Br. Vol. I at 93, 95, 97. Again, left unexplained is what, if any, methodology was used to examine the universe of scaling sites and determine that a given site would be included, or excluded. That the authors chose the sites "deliberately," in the exercise of their judgment and without a recognized methodology, is precisely what Commerce feared could skew the results of the study.[282]

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279 The Jendro & Hart Report states (at 1): "Counsel to British Columbia and the British Columbia Lumber Trade Council engaged Jendro & Hart LLC to examine certain factual issues regarding the use of US log prices as benchmarks to value logs and stumpage in British Columbia (BC) as proposed by the Committee Overseeing Action For Lumber International Trade Investigations (Petitioner) in its Countervailing Duty (CVD) Petition, Volume III: Countervailing Duty Allegations, November 25, 2016; and as used by the US Department of Commerce (DOC) in prior countervailing duty investigations involving softwood lumber from BC."

280 GBC 57.1 Brief, Vol. I at 96. The paragraph it quoted at length was from IDM at 59-60.

281 Commerce 57.2 Brief, Vol. III at 64.

282 *Id.* at 66.

Finally, Commerce also noted that the Dual-Scale Study analyzed logs in the interior of British Columbia, while the WDNR prices were for Washington State. The GBC argued: "In order to develop accurate conversion factors, however, a dual-scale study must measure logs having the volumetric characteristics of the larger population of logs to be converted from one unit of measurement to the other. In the context of the Department's cross-border log price methodology, the log volumes that must be converted are the volumes of logs in the B.C Interior, not the U.S. PNW."[283] The Panel notes that in the spreadsheets calculating the benefit from BC stumpage, Commerce applies the conversion factor to the price in MBF for the Washington logs to arrive at a price for the Washington logs in M^3, which are compared to the price of the British Columbia stumpage in M^3.[284]

Even if the Panel might judge the Dual-Scale Study to be preferable if this were a *de novo* review, under the standard of review our task is to judge whether Commerce's decision to use the conversion factors that it did was supported by substantial evidence, taking into consideration facts that contradicted that evidence. While the GBC may disagree with Commerce's decision, Commerce did take into consideration and address the GBC's arguments and evidence in support of the GBS's preferred conversion factor. The Panel finds that Commerce's conversion factors were supported by substantial evidence and in accordance with law and we sustain Commerce's decision.

2) Differences in Log Quality

In both the preliminary and final determinations, Commerce used as the benchmarks the simple average of the average monthly prices by species as reported by the WDNR. Commerce only used the "Eastside" region, not the "Coastal Marketing Area," since the mandatory respondents only harvested British Columbia timber from the interior region.[285] The prices, in MBF, were as follows:[286]

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283 GBC 57.1 Brief, Vol. I at 88-89.

284 *See, e.g.,* Memorandum, West Fraser BC Stumpage Final Calculations (November 3, 2017) (C.R. 1859).

285 Memorandum, Washington Department of Natural Resources (WADNR) Delivered Log Price Information (April 25, 2017) (P.R. 1282), at 1.

286 Spreadsheet, Provision of Stumpage for Less Than Adequate Remuneration - British Columbia (C.R. 1859), tab "Benchmark."

Eastside												
	$/MBF Average	$/MBF Average	$/MBF Average	$/MBF Average	$/MBF Average	$/MBF Average	$/MBF Average	$/MBF Average	$/MBF Average	$/MBF Average	$/MBF Average	$/MBF Average
Species-Grade	Jan-15	Feb-15	Mar-15	Apr-15	May-15	Jun-15	Jul-15	Aug-15	Sep-15	Oct-15	Nov-15	Dec-15
Doug-Fir/Larch	421	417	373	453	447	382	391	403	415	338	398	375
Camprun	434	441	390	468	468	421	390	406	426	365	410	384
CNS	386	371	340	388	324	331	393	393	393	293	363	333
Utility					213	204						
White fir/hem	397	389	390	394	341	364	381	391	399	335	362	369
Camprun	403	401	440	394	382	377	386	393	396	335	361	382
CNS	375	371	340	395	324	364	366	385	402		362	335
Utility					213	204						
Cedar	800	590	800	713	448	816	747	768	638	1100	992	975
Camprun	863	396	900	683	480	850	747	769	613	1100	1013	1038
CNS	675	617	700	800	395	462		767	675		950	850
Poles						1150						
Lodgepole	391	388	373	393	352	365	384	392	397	323	349	350
Camprun	394	396	383	389	370	374	384	390	394	323	346	354
CNS	375	371	340	405	324	368	383	402	402		356	333
Utility					213	204						
White pine	370	287		338	268	336	338	310	267	239	327	334
Camprun	380	297		329	268	333	344	302	255	239	313	334
CNS	350	359		400		351	325	350	298		400	
Pine	360	287	370	344	303	307	337	301	316	281	298	301
Camprun						312				268		
Small saw	337	274	370	340	293	300	334	294	327	300	293	301
Large saw	395	323		355	385	335	350	331	288		305	300
Utility								247				
E Spruce	394	388	367	386	352	361	378	392	406	335	354	359
Camprun	400	394	380	380	376	374	379	389	408	335	353	366
CNS	375	376	340	408	324	361	374	403	403		358	333
Utility					213	204						
Conifer	281	281		258	337	336	267	259	278	250	256	278
CNS	341	341		324	337	336	336	324	360	322	317	336
Utility	191	191		208			198	215	196	196	225	191
Grand Total	408	391	423	398	373	405	387	399	412	321	363	378

The WNDR data reflect two sawlog grades, Camprun and Chip-N-Saw ("CNS"), and one non-sawlog grade, Utility. The calculations, when converted from U.S. dollars to Canadian dollars, and from MBF to cubic meters, resulted in the following benchmarks:[287]

[287] *Id.*

Species-Grade	Annual Average	% of average
Doug-Fir/Larch	85.48	
Camprun	88.83	100.00%
CNS	76.55	86.18%
Utility	86.84	97.75%
White fir/hem	80.19	
Camprun	82.60	100.00%
CNS	77.73	94.10%
Utility	43.45	52.61%
Cedar	167.63	
Camprun	168.87	100.00%
CNS	147.58	87.39%
Poles	239.48	
Lodgepole	79.18	
Camprun	79.86	100.00%
CNS	78.50	98.29%
Utility	43.45	54.41%
White pine	66.13	
Camprun	65.69	100.00%
CNS	75.00	114.16%
Pine	67.55	
Camprun	62.03	86.88%
Small saw	66.87	93.66%
Large saw	71.40	100.00%
Utility	53.89	75.48%
E Spruce	79.47	
Camprun	80.55	100.00%
CNS	78.42	97.36%
Utility	43.45	53.95%
Conifer	59.70	
CNS	71.29	100.00%
Utility	43.23	60.64%
Grand Total	82.74	

WF Species		
Balsam	White fir/hem	80.19
Cedar	Cedar	167.63
Douglas Fir	Doug-Fir/Larch	85.48
Hemlock	White fir/hem	80.19
Lodgepole Pine	Lodgepole	79.18
Spruce	E Spruce	79.47
W. Red Cedar	Cedar	167.63
White Pine	White Pine	66.13
YE	Pine	67.55

The numbers in the box in the upper right were the ones used the calculate the benefit from LTAR, after a number of costs incurred between the stumpage price and the price of harvested logs were deducted.[288]

Although the prices by grade were included in the benchmark table, they were not used in the calculation of the benchmark prices. Rather, the average price for that month, as reported by the WDNR, which was not the simple average of the reported prices for each of the different grades, was used.[289] The GBC argued vociferously in its 57.1 Brief that Commerce's benchmark

[288] *See, e.g., id.*, tab "TABLE A CALC." Commerce appears to have incorporated respondents' reporting of these costs into its own calculations without change.

[289] For example, in the table on the previous page, for Douglas Fir/Larch in January 2015, the average of the prices for Camprun and CNS would be 79.98, rather than the reported 82.12. In other words, the prices as reported by the WDNR are likely weighted average prices, taking into consideration the relative quantities, rather than simple averages of the prices.

calculations did not include the prices of Utility logs,[290] but Commerce's 57.2 Brief noted that "WDNR appears to have used a simple average of the quotes received for *all grades* to derive the species-specific price."[291] The GBC thereupon switched gears in its 57.3 Brief and argued that "{t}he logs included in the WDNR log price benchmarks overwhelmingly reflected only the highest quality logs in the U.S. PNW log grading system – sawlogs – and virtually none of the lower value 'Utility' grade logs."[292] It presented as Table 3 of its 57.3 Brief a showing that Utility grade logs were only reported for two months for four of the species.[293] A comparison of this table in the GBC 57.3 Brief with the table used by Commerce, reproduced on page 49 above, for its benchmark indicates that the GBC left off a number of species.

British Columbia has four grades: Grade 1, Premium Sawlog; Grade 2, Sawlog; Grade 4, Lumber Reject; and Grade 6, Undersized Log.[294] There is also a grade code Z, which are "Firmwood Reject logs with the majority of their volume determined to be unsuitable for the production of lumber."[295] Faced with the disparity of grade designations between Washington and British Columbia, Commerce decided:

> The log price data published by the WDNR reflect unit prices without corresponding volumes. Therefore, to calculate annual U.S. log prices, we simple-averaged the monthly unit prices by species. Lastly, the U.S. log data from the WDNR contain prices for various grades within each species category. We find that these grades do not correspond to the grades contained in the B.C. stumpage data provided by the mandatory respondents. Thus, due to the inability to match by grade and in order to calculate a benchmark that is representative of all grades, we have relied upon the overall unit price listed for each species, which we find is reflective of all grades of logs contained in the WDNR survey.[296]

The GBC did not ask for any changes in how Commerce matched grades in Washington with grades in British Columbia. Instead, it asked for an adjustment to the benchmark prices. Between its 57.1 Brief and its 57.3 Brief, the GBC changed from urging that Commerce adjust for "beetle-killed log prices"[297] to asking that Commerce "adjust the WDNR log price benchmarks used for the stumpage benefit calculations to take into account the 'Utility' grade ratios" it had presented.[298] In both cases, however, the GBC appeared to be asking for the same adjustment.

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290 GBC 57.1 Brief, Vol. I at 107-108, 116-119.

291 Commerce 57.2 Brief, Vol. III at 70, fn. 19 (emphasis added).

292 GBC 57.3 Brief, Vol. I at 62.

293 *Id.* at 65.

294 GBC 57.1 Brief, Vol. I at 107.

295 Canfor Initial Questionnaire Response, March 13, 2017 (C.R. 127), at 112.

296 PDM at 53.

297 GBC 57.1 Brief, Vol. I at 119-127.

298 GBC 57.3 Brief, Vol. I at 72.

The mandatory respondents that harvested British Columbia timber—Canfor, Tolko, and West Fraser—reported their log sales by the grades discussed above.[299] In the normal course of business they do not break out a separate grade for beetle-killed timber.[300] Therefore, the GBC relied on the Jendro & Hart Report, which in turn relied on the 2016 Dual-Scale Study which was used for the conversion factor argument (discussed above in Section III.4.D.1)), to work out estimates of the impact of beetle kill on timber yield.[301]

In the final determination, Commerce concluded that it "cannot confirm that the conversion factors generated by the BC Dual Scale Study were derived using a statistically valid sampling methodology. Because the ratios that the BC respondents propose using to differentiate sawlog and utility grades are derived from the underlying data generated by the BC Dual Scale Study, we are similarly unable to confirm their reliability. Therefore, we have not made the adjustment proposed by the BC respondents."[302]

Commerce continued:

> With respect to the blue stain log prices reported by Jendro & Hart, the report indicates only that 13 companies with 20 sawmills in Washington, Idaho, and Montana, including all "major" sawmills in the area, were surveyed; however, the study does not explain how the companies participating in the survey were selected for inclusion in the report or how they were requested to present prices. For example, we do not have the underlying request that was submitted to these companies on the record, so we cannot evaluate whether the request was tailored to generate a specific result, nor does the record reflect whether only certain of the reported prices were included in the report. Therefore, the Department finds these prices are not reliable and we have not incorporated them into the benchmark prices. Additionally, parties have not provided evidence that the U.S. PNW log prices published by the WDNR do not already include blue stained log prices. As such, including these prices risks overstating blue stained log prices in our benchmark.[303]

The GBC pointed out that "the tree species vulnerable to the mountain pine beetle (principally lodgepole pine) are much more prevalent in the B.C. Interior than in the U.S. PNW."[304] However, Commerce calculated the benefit on a species-to-species basis[305]—that is, benchmark

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299 *See, e.g.,* spreadsheet for West Fraser BC Stumpage Final Calculations, November 3, 2017 (C.R. 1859).

300 This may be due to British Columbia stumpage being purchased on a "stand-as-a-whole" basis, discussed below.

301 Jendro & Hart Report (P.R. 416, C.R. 413). The calculations of the impact of beetle kill are all BPI at 82-95 of the body of the Report.

302 IDM at 75.

303 *Id.* at 76 (footnote omitted).

304 GBC 57.1 Brief, Vol. I at 110.

305 *See, e.g.,* spreadsheet for West Fraser BC Stumpage Final Calculations, November 3, 2017 (C.R. 1859).

prices for lodgepole pine logs in the WDNR data were compared to stumpage prices in British Columbia for lodgepole pine. Therefore, the relative numbers of species in each area are irrelevant.

While the key parts of the Jendro & Hart Report on the quality or beetle kill issue are BPI, the Panel agrees with Commerce that the calculations involving the amount of the adjustment for beetle-killed logs are based on estimates that are not well-documented.[306] The Panel finds that Commerce's rejection of the GBC's proposed adjustment for quality was supported by substantial evidence and was in accordance with law.

3) "Stand-as-a-Whole" Basis

In British Columbia, the Crown stumpage prices are determined on a "stand" basis. That is, for a given stand of trees, the makeup of species, and other factors, are taken into consideration and a single price for that stand is charged.[307] Thus, for example, a stand that includes both Grade 1 and Grade 2 balsam, fir, hemlock, larch, lodge-pine, and spruce would be charged an invoice stumpage rate of C$29.00 per cubic meter.[308] In order to report a species- and grade-specific price to Commerce, the respondents needed to construct the prices by dividing the total value in a stand by the total volume in the stand.[309] The GBC had proposed two alternative methods to account for the stand-as-a-whole pricing system: "(1) developing a single, weighted average 'all species' benchmark to compare with a single, weighted average 'all species' stumpage price, or, (2) if using individual species-specific benchmarks, including in the ultimate benefit calculation any 'negative' benefits determined for any individual species."[310]

As discussed in Section III.7. below, the Panel is remanding to Commerce with instructions to revise the calculation spreadsheets for stumpage benefits to remove from the formulas setting the benefit to zero if the transaction price exceeds the benchmark price. This fulfills the second proposed alternative method for taking the stand-as-a-whole system into account.

4) Differences in Transportation Costs

The GBC argued that Commerce should have taken into account the differences between British Columbia and the Pacific Northwest of the United States in terms of lumber transportation costs, *i.e.,* the cost to transport lumber from the mills to the consumers.[311] The claim was that higher transportation costs in British Columbia meant that mills would have to charge less (pre-

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306 For example, the Jendro & Hart Report states (at 91):

> For spruce, beetle-killed volume is estimated at 15% of the species total sawmill log input volume, based upon the 2016 Dual-Scale Study and supported by BC MFLNRO analysis of timber resource information. For beetle-killed spruce, allocation to BC grade is based on grade proportions found for beetle-killed spruce in the 2016 Dual-Scale Study. Volumes by grade for green spruce are then calculated by subtracting beetle-killed grade volume estimates from the species total volumes by grade.

307 GBC 57.3 Brief, Vol. I at Attachment 5.

308 GBC 57.1 Brief, Vol. I at 129.

309 *Id.* at 129-130.

310 *Id.* at 131.

311 GBC 57.1 Brief, Vol. I at 137-141; GBC 57.3 Brief, Vol. I at 86-89.

freight costs) for lumber sales in British Columbia, which presumably implies that stumpage prices were suppressed.

The GBC pointed to Commerce's final determination, in which it said that it "made adjustments as warranted, *e.g.*, for transportation, to the U.S. PNW log price benchmarks to account for the commercial environment of the B.C. timber market,"[312] and claimed that Commerce failed to make the adjustment that it said it did. As the COALITION pointed out, "{r}ead in its entirety, however, Commerce's reference to 'transportation' related to the costs of 'road building' and 'hauling costs' associated with accessing timber for harvest and with acquiring timber."[313] This would include the "Roadside to Mill Costs" category, which, as West Fraser explained, "includes all of the costs West Fraser incurs in hauling harvested timber from the roadside to its mills. These costs are composed of payments made to hauling contractors."[314] These costs were deducted from the benchmark prices.[315]

Conspicuously lacking from the GBC's argument is any explanation of what exactly the adjustment should be. It documents that transportation costs in British Columbia are higher than such costs in the United States but does not provide a recommended adjustment amount. As the COALITION pointed out, "{t}he burden for an adjustment to the benchmark calculation is on the party requesting the adjustment."[316] The Panel declines to remand to Commerce with instructions to "come up with an adjustment amount on its own," and sustains Commerce's determination.

5) Cost Adjustments

As noted above, Commerce adjusted the WDNR benchmark prices for logs by subtracting the BC respondents' costs for turning BC stumpage into logs. These costs were reported by the respondents, and for the final determination Commerce used those costs without change.[317] The COALITION contested the inclusion of certain of these costs in the adjustment.

The purpose of the adjustments to the WDNR benchmark prices is to get as close as possible to an apples-to-apples comparison between the British Columbia stumpage price and what would have been the stumpage price in the Eastside of Washington. Costs will be incurred to get a tree in the ground delivered to a sawmill. It is reasonable to deduct all such costs. In addition, purchasers of BC Crown stumpage may incur costs that would not have been incurred by

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312 IDM at 64.

313 COALITION 57.2 Brief, Vol. I at 113.

314 West Fraser Initial Questionnaire Response (March 14, 2017) (C.R. 190), at 166.

315 *See, e.g.,* spreadsheet for West Fraser BC Stumpage Final Calculations (November 3, 2017) (C.R. 1859).

316 COALITION 57.2 Brief, Vol. I at 113. *See also* Commerce 57.2 Brief, Vol. III at 47-48. ("If interested parties want Commerce to consider certain benchmark information, it is their responsibility to submit that information to the record because 'the burden of creating an adequate record lies with {interested parties} and not with Commerce.' *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (brackets in original).").

317 For example, for the final calculation spreadsheet for West Fraser stumpage (C.R. 1859), Commerce used the spreadsheet submitted by West Fraser in its Second Supplemental Response, May 31, 2017 (C.R. 1359), with some minor formatting changes but keeping the same numbers.

harvesters of Washington timber, but it is reasonable to deduct such costs only if they were included in the stumpage price.

The COALITION first contended that General & Administrative expenses should not be adjusted for.[318] It pointed to Tolko's supplemental response, which reported expenses for Tolko's log purchasing department.[319] Commerce pointed out that this part of Tolko's response was in reference to the log export restraint program.[320] The Panel confirms that these expenses do not appear in the calculations of costs to be deducted from the benchmark. Therefore, the argument is irrelevant.

The COALITION next contended that the reported silviculture costs "are estimates of future liability and cannot be reasonably included as directly related to market based stumpage prices during the POI." [321] Commerce responded that it had verified respondents' spending on silviculture and found, for example, that these costs "are based on Canfor's actual spending on silviculture activities during the POI."[322]

The Commerce decisions relied on by the COALITION for the proposition that the cost adjustments must be "directly related"[323] to the government price, do not actually say that the cost adjustments must be directly related. Commerce pointed out that it has made adjustments for indirect costs in other cases.[324]

The Panel finds that Commerce's finding regarding silviculture costs is supported by substantial evidence and is in accordance with law.

Next, the COALITION argued that Forest Management costs are not directly related to the harvest of timber, and also that such costs would also have been incurred by U.S. harvesters.[325] Commerce responded that the fact that U.S. harvesters would also incur such fees "makes the existence of the fee in British Columbia no less relevant to Commerce's derived market stumpage price, which seeks to derive a stumpage price by accounting for such costs from the perspective of an independent logger in British Columbia."[326]

The Panel agrees with Commerce that such costs do not need to be "directly related" in order to be included in the adjustment, and that the fact that U.S. harvesters also incur fees related

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318 COALITION 57.1 Brief at 36-38.

319 Tolko Response to Supplemental Questionnaire, May 30, 2017 (P.R. 1469) at 26.

320 Commerce 57.2 Brief, Vol. III at 87.

321 COALITION 57.1 Brief at 40.

322 Canfor Verification Report, July 14, 2017 (C.R. 1795), at 19. *See also* West Fraser Verification Report, July 14, 2017 (C.R. 1794), at 10.

323 COALITION 57.1 Brief at 29-31.

324 Commerce 57.2 Brief, Vol. III at 85-87.

325 COALITION 57.1 Brief at 40-41.

326 Commerce 57.2 Brief, Vol. III at 88.

to forest management only strengthens the case that such costs need to be deducted from the benchmark price in order to get that price closer to a stumpage price.

Finally, in one short paragraph, the COALITION argues that adjustments for scaling, waste and cruising expenses are not directly related, and pointed to the second review in *Lumber IV* where Commerce declined to make the adjustment.[327] Commerce responded that such costs are legally obligated in British Columbia and as such need to be adjusted for, and that the scaling adjustment issue in the second review in *Lumber IV* is distinguishable.[328] The Panel agrees with Commerce that these adjustments need to be included to be able to compare prices between British Columbia and the Eastside of Washington, and that the *Lumber IV* determination is distinguishable regarding this issue.

In sum, the Panel sustains Commerce's determination regarding these cost adjustments.

6) Adjustment for Tenure Contracts

The COALITION argued that Commerce should have made an adjustment to the WDNR benchmark calculation to account for the security provided by the tenure contracts under which the British Columbia harvesters access timber, in contrast to the spot prices under which logs are sold in Washington.[329] The petitioners in *Lumber III* and *Lumber IV* had made the same argument, which Commerce rejected then, as it rejected it in this investigation. In *Lumber III*, Commerce stated:

> A secure administered supply, in and of itself, implies nothing without consideration of the price or other requirements necessary to procure that supply. Furthermore, given that the price of administered timber, as well as the concomitant obligations, can, and does, change, it is not evident that a secure supply is always advantageous. In fact, the Coalition admitted as much during the hearings: "Isn't it possible the {sic} through intervention in the market, the Government requires {major tenure holders} to harvest timber that {they} otherwise would not • • •" (See Hearings Transcript for April 29, 1992, p. 266.) In light of these uncertainties, the Department does not consider that a tenure security adjustment is warranted.[330]

In *Lumber IV*, Commerce stated:

> We recognize, at least in theory, the point that petitioners are making. Theoretically, there could be some value to having long-term tenure rights guaranteed. However, we did not make a determination as to whether a countervailable benefit is provided by secured tenure rights in this final

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327 COALITION 57.1 Brief at 41.

328 Commerce 57.2 Brief, Vol. III at 88 ("Petitioner's citation to *Lumber IV AR2* is inapposite, because Commerce refused to make the scaling adjustment Petitioner references in the context of comparing Alberta stumpage prices to private stumpage prices from the Maritime provinces under tier-one of Commerce's hierarchy.").

329 COALITION 57.1 Brief at 41-51.

330 *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22,570, 22,596 (May 28, 1992).

> determination. The information on the record did not contain the appropriate data necessary to make an accurate quantification of the alleged benefit conferred by the long-term harvesting rights held by the Provincial tenure holders. There was no need to analyze whether a countervailable subsidy is conferred through the holding of long-term tenure rights without the necessary data on the record with which to quantify this alleged benefit. Therefore, the Department has not made an adjustment to the Provincial stumpage prices to account for secure tenure rights as proposed by petitioners.[331]

The COALITION contended that in this investigation, unlike in *Lumber IV*, Commerce did have the appropriate data necessary to make an accurate quantification, namely that respondents "reported the valuation as part of their regular accounting and financial records."[332] In its case brief before Commerce, the COALITION used Canfor's, West Fraser's, and Tolko's reported tenure amortization, and calculated the "value of tenure security" in C$/m^3. It contended that this is the amount that should be included (presumably added) to the WDNR benchmark prices.[333]

In the final determination, Commerce responded to the COALTION's proposed adjustment amount:

> Specifically, while we recognize, in theory, that tenure security is inherently a subset of the overall value of the tenure, we find that the petitioner's proposed method of quantifying the alleged benefits is inaccurate and cannot serve as a basis for analyzing whether tenure security provides a benefit. In particular, the petitioner describes the alleged benefits from long-term Crown tenure agreements as the protection from risks from new competitors for inputs, increasing timber prices through market competition, or depriving a mill of its wood supply. To measure this benefit, the petitioner proposes calculating a per cubic meter ratio using each respondent's timber amortization, which is the amortized cost of purchasing the timber harvesting rights, e.g., the cost of the Forest License or the Tree Farm License, and applying the ratio to the U.S. benchmark prices for comparison to the respondents' stumpage purchases. However, the petitioner does not explain (nor can we discern) how these costs provide a reasonable measure of the intangible benefit allegedly conferred by the long-term harvesting rights held by the Crown tenure holders. Therefore, the Department has not made an adjustment to U.S. benchmark price to account for secure tenure rights as proposed by the petitioner.[334]

In its briefs here, the COALITION does not attempt to address the concerns about the value of tenure security being only a subset of the overall value of the tenure, but in effect doubles down on calling for an adjustment in the entire amount. The GBC responded that "those values do not represent the alleged *current* value during the POI of anything, much less tenure security, but rather

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331 *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15545 (April 2, 2002), accompanying Issues & Decision Memorandum at 139.

332 COALITION 57.1 Brief at 42.

333 COALITION Case Brief, July 27, 2017 (C.R. 1810), at 27.

334 IDM at 77-78 (footnotes omitted).

represent the entire value that the B.C. mandatory respondents paid to unaffiliated third parties when they purchased the tenures."[335]

The Panel is persuaded that while there may be some value to tenure security, the COALITION's proposed adjustment does not accurately capture what that amount might be. The Panel therefore sustains Commerce's determination not to make this adjustment.

5. New Brunswick

A. Commerce's Finding Regarding Use of New Brunswick Benchmark

In its final determination, Commerce determined that private stumpage prices in New Brunswick are distorted, and are not suitable for use as tier-one benchmarks.[336]

In its initial questionnaire response filed on March 14, 2017, the Government of New Brunswick ("GNB") responded to Commerce's question regarding total log harvest in New Brunswick as follows in part:

> {T}he New Brunswick Forest Products Commission did conduct and complete a more recent survey of wood originating from private woodlots that was harvested and sold as product specific and transaction based stumpage. … The survey period was October 1, 2014 to September 30, 2015, which substantially overlaps with the Department's POI. …
>
> In conducting 2014-15 survey, the Commission engaged PricewaterhouseCoopers, LLP (PwC) to assist in the development of specified procedures for the validation of data and the methodology for the statistical analysis to be applied. The survey results are provided at Exhibit **NB-STUMP-11**. A detailed discussion of the survey methodology is provided at **NB-STUMP-12**.[337]

The report "New Brunswick Private Woodlot Stumpage Values," ("NB Private Report")[338] explained that it received 13,089 data records from respondents regarding purchases from private woodlots.[339] Transactions below the 5th percentile and above the 95th percentile were excluded from the statistical calculations.[340] The confidence interval was 99 percent.[341] The Report presented prices by species and product group, presenting the mean, minimum and maximum prices, along with the response volume and total harvest volume in cubic meters.[342]

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335 GBC 57.2 Brief at 23-24.

336 IDM at 78.

337 GNB Response to Initial Questionnaire, March 17, 2017 (C.R. 766), at NBII-3 to NBII-4.

338 P.R. 663.

339 NB Private Report (P.R. 663) at 6.

340 *Id.* at 8.

341 *Id.*

342 *Id.* at 10.

The GNB argued that the prices presented in this Report should be used for the benchmark to compare to Crown sales in New Brunswick.[343] JDIL argued that its own private stumpage purchases in New Brunswick should be used for its benchmark.[344] JDIL was the only respondent to purchase Crown-origin timber in New Brunswick.

In its preliminary determination, Commerce found that private prices for standing timber in New Brunswick were not market based, and it would therefore not use them as a tier-one benchmark. Its finding relied heavily on its recent determination in the preliminary results of the expedited review of *Supercalendered Paper from Canada*, where it found that it was not appropriate to use New Brunswick observed market prices for stumpage as the tier-one benchmark.[345] Commerce used as the benchmark JDIL's purchase of private-origin standing timber in Nova Scotia.[346]

In its final determination, Commerce continued to find that private stumpage prices in New Brunswick are distorted, and not suitable for use as tier-one benchmarks.[347] While still citing to the *Supercalendered Paper from Canada* expedited review, which by the time of the final determination had reached the final results of the expedited review, Commerce's final determination focused more on the facts and arguments presented by the parties in this investigation.

For the final determination, Commerce calculated that Crown-origin timber accounted for 50.79 percent of the total harvest, a slight increase from the 49.9 percent calculated in the preliminary determination.[348] This is a smaller percentage than in any of the other provinces for which an LTAR analysis was undertaken.[349]

Commerce, however, stated that "while we have considered the share of GNB production as one factor in evaluating whether the New Brunswick market is distorted, we have also evaluated other record information in making this determination."[350] In particular, Commerce considered three documents prepared by or for the GNB in the ordinary course of business—the Report of the Auditor General of the New Brunswick Department of Natural Resources for 2008;[351] the Report

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343 GNB 57.1 Brief at 39-46.

344 JDIL 57.1 Brief at 28.

345 *Supercalendered Paper from Canada*, 81 Fed. Reg. 85,520 (November 28, 2016), accompanying decision memorandum at 26.

346 PDM at 53-54.

347 IDM at 78.

348 *Id.* at 80, fn 478.

349 The Crown-origin percentage for Alberta was 98.48 percent (IDM at 51), for Ontario it was 96.5 percent (IDM at 92—private standing timber was 3.5 percent), and for Quebec it was 73.88 percent (IDM at 99). The percent of Crown-origin timber for British Columbia was not an issue.

350 IDM at 81.

351 Petition Exhibit 228 (P.R. 20).

of the Auditor General of the New Brunswick Department of Natural Resources for 2015;[352] and the Private Forest Task Force Report in 2012.[353] The IDM gave an example of a quotation from the 2008 Report:

> The fact that the mills directly or indirectly control so much of the source of the timber supply in New Brunswick means that the market is not truly an open market. In such a situation it is not possible to be confident that the prices paid in the market are in fact fair market value.
>
> …{T}he royalty system provides an incentive for processing facilities to keep prices paid to private land owners low…[354]

The elided sentence reads in full: "If however the royalty system provides an incentive for processing facilities to keep prices paid to private land owners low, the result may be fewer private land owners who are willing to supply timber to New Brunswick mills." The full sentence is therefore less definitive than the elided sentence, as the GNB pointed out.[355] However, the GNB, in arguing that the 2008 Report "was merely raising a question," did not address the Report's paragraph preceding the elided sentence, which contradicts this assertion.

Furthermore, the 2012 Report states:

> Under the current system for Crown wood (approximately 56 percent of total market in 2010), a consultant hired by the Crown periodically surveys transactions between private woodlot owners and forest products purchasers in New Brunswick and Nova Scotia and adjusts them through a proprietary formula that is not available to the public. The reported private transactions occur in the context of already-established Crown prices and are used to set prices in the next administrative cycle. The approach was criticized in an Auditor General's Report (2008) {and then quotes the same language quoted by Commerce above}.
>
> Perfectly competitive markets are only theoretically possible; no market meets all the conditions required by economic theory. In a competitive market, with many players, no single buyer or seller has the power to affect prices, and auctions and private transactions between buyers and sellers determine price. New Brunswick's forest products market combines aspects of a bilateral monopoly (a single dominant seller, the Crown; and a single dominant buyer, J.D. Irving, Ltd.) and an oligopsony (many small sellers, the private woodlot owners; and a few buyers, the mills, which purchase from both private woodlot owners and the Crown). Two parties dominate the transactions, and prices for a large proportion of

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352 Petition Exhibit 224 (P.R. 20).

353 Petition Exhibit 234 (P.R. 20).

354 IDM at 81, quoting from Petition Exhibit 234 at paragraphs 5.36 and 5.37.

355 GNB 57.1 Brief at 23.

the total harvest are set administratively. Thus it is difficult to establish fair market value.[356]

In short, unlike for other provinces, Commerce relies on the GNB's own analysis in the normal course of business regarding distortions in New Brunswick's timber market. Commerce noted that "although the GNB has argued that the Department should not rely on statements from these reports, the GNB itself has relied upon facts and general statements from these reports in making arguments in its case brief."[357]

The IDM next discussed the report submitted by the GNB from Professor Brian Kelly, an economist at Seattle University.[358] The GNB argued that this study "dispelled the speculative concern that a small number of large New Brunswick mills do, or can, artificially suppress prices."[359] Commerce noted that the Kelly Report was commissioned by the GNB for the purpose of this investigation, and stated: "Although we consider all evidence on the record of a proceeding, in determining the weight to be accorded to a particular piece of evidence, we consider whether the evidence in question was prepared in the ordinary course of business, or for the express purpose of submission in the ongoing administrative proceeding."[360] Commerce also noted that "at verification, the GNB was unable to provide the Department with the guidelines or parameters that it provided to Mr. Kelly which would detail the goals or objectives of, and reveal the assumptions behind, the report."[361] Commerce therefore accorded greater weight to the three reports prepared by or for the GNB in the ordinary course of business.[362]

As discussed above (at 42), under *Mosaic* Commerce may consider the fact that the report was prepared for litigation, but also needs to provide additional reasons if Commerce decides not to accept the conclusions or information in the report. Here, the failure of the GNB to provide "the guidelines or parameters that it provided to Mr. Kelly which would detail the goals or objectives of, and reveal the assumptions behind, the report," along with the fact that it was prepared for the investigation, supports Commerce's decision to give the report less weight.

JDIL's 57.1 Brief made a different argument. JDIL argued that Commerce may make a finding of distortion only where it finds that the distortion is due to the *government's* involvement in the market, whereas in the case of New Brunswick Commerce found that the private stumpage market is distorted by *private forces*.[363] Commerce responded that first, JDIL had not raised this argument below, and therefore had failed to exhaust its remedies,[364] and second, that "Commerce

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356 Petition Exhibit 234 at 24-25.

357 IDM at 82, citing to GNB Case Brief (C.R. 1821) at 16, which cites to the 2012 Report at 8.

358 GNB Submission of Factual Information, March 28, 2017 (C.R. 850), Exhibit NB-STUMP-13.

359 GNB 57.1 Brief at 6.

360 IDM at 82.

361 *Id.*

362 *Id.* at 83.

363 JDIL 57.1 Brief at 14-18.

364 Commerce 57.2 Brief at 96-100.

may reject actual transaction prices significantly distorted because of market dominance by few consumers in conjunction with the government intervention in the market."[365] JDIL replied that it did raise the issue in its case brief for the investigation,[366] and disputed that Commerce could find distortion when the distortion involves private forces.[367]

With regard to the exhaustion requirement, in its case brief, JDIL wrote:

> The Department declines to use a Tier 1 benchmark only when "it is reasonable to conclude that actual transaction prices are ***significantly distorted*** as a result of the government's involvement in the market . . . ." Mere distortion is an insufficient basis to reject private market prices as a Tier 1 benchmark. Rather, the Department must find that government involvement in the market ***significantly distorted*** private market prices. Moreover, "the Department does not apply a *per se* rule that a government's majority market share equates to government distortion." Rather, the Department "consider{s} all relevant factors or measures that may distort a market." Here, GNB data indicate that Crown timber accounted for ***less than a majority*** ([ ]%) of the available softwood supply in the Province during the POI. Furthermore, as discussed below, the New Brunswick private stumpage market is open and dynamic. Thus, the record evidence demonstrates that private stumpage prices in New Brunswick are market-based.
>
> First, Section 59(1) of the Crown Lands and Forests Act mandates that the New Brunswick Department of Natural Resources ("NBDNR") sell Crown stumpage at "fair market value."27 NBDNR, in turn, determines fair market values based on a survey of private stumpage sales in the Province. ***Thus, private stumpage prices in the Province set the GNB's stumpage prices – not the reverse.***[368]

While JDIL did write that "the Department must find that government involvement in the market ***significantly distorted*** private market prices," unlike its 57.1 Brief JDIL did not emphasize that the distortion must have government involvement, and Commerce reasonably did not characterize JDIL's argument in those terms in the IDM. Nevertheless, despite Commerce's attempts to argue otherwise,[369] the circumstances here are very close to the circumstances in the *Agro Dutch* case, regarding whether Commerce was empowered to conduct a duty absorption inquiry under certain scenarios,[370] and JDIL here is raising a pure question of law. The Panel therefore finds that the "pure question of law" exception to exhaustion applies here.

Commerce argued, in the event its exhaustion argument was not persuasive:

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365 *Id.* at 100-102.

366 JDIL 57.3 Brief at 4-5.

367 *Id.* at 5-6.

368 JDIL Case Brief, July 27, 2017 (P.R. 1680), at 10-11. Footnotes omitted, emphasis in original.

369 Commerce 57.2 Brief, Vol. II at 99.

370 *Agro Dutch Indus. Ltd. v. United States,* 508 F.3d 1024, 1029 (Fed. Cir. 2007).

> Commerce may reject actual transaction prices significantly distorted because of market dominance by few consumers in conjunction with the government intervention in the market. … In this case, Commerce was faced with a market in which the government constitutes a majority, and other circumstances-including significant market power exercised by three dominant consumers-contributed to the significant distortion of the stumpage prices.[371]

However, as JDIL pointed out, the *CVD Preamble* states: "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."[372] Thus, the *CVD Preamble* expresses that the source of the distortion is a matter of government involvement, not a matter of private forces "in conjunction with" government involvement. Commerce did not find that it was deviating from the instructions in the *CVD Preamble* and provide reasons for its change.

The Panel therefore remands this action to Commerce to either find that there is no distortion in the New Brunswick stumpage market, or to explain in detail why there is distortion that necessitates using a different benchmark when the distortion stems from private forces.

B. Commerce's Use of Nova Scotia Benchmark and Adjustments

Because the Panel is remanding this action regarding whether the New Brunswick stumpage market is distorted, as explained above at Section III.1., we will not reach the issues of Commerce's use of a Nova Scotia benchmark and the issue of adjustments to the New Brunswick Crown stumpage prices.

6. Québec

A. Commerce's Finding Regarding Use of Québec Benchmark

In its final determination, Commerce determined that "Québec's auction prices are not market-based, and, therefore, are not suitable as a tier-one benchmark."[373]

The Government of Québec's ("GOQ") initial questionnaire response reported the volume of timber harvest sourced from Crown lands (excluding auctions), the total volume of timber harvest sourced from Crown lands via auction, the total volume of timber harvest sourced from private woodlots, and the total volume of logs sourced from the USA or other Canadian

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371 Commerce 57.2 Brief, Vol. II at 100-101.

372 *CVD Preamble,* 63 Fed. Reg. 65,348, 65,377 (November 25, 1998).

373 IDM at 104.

provinces.[374] Commerce used this information, as later slightly revised,[375] as the basis for calculating the Crown share of the total market in Québec:[376]

	Fiscal Year 2015-2016	Share	
Total Volume of Timber Harvest Sourced from Crown Land (Excluding Acutions) [3] (M^3)	12,256,700	51.75%	
Total Volume of Harvest Sourced from Crown Land Via Auctions [4] (M^3)	5,239,970	22.13%	73.88%
Total Volume of Timber Harvest Sourced from Private Woodlots [2] (M^3)	3,567,941	15.07%	
Total Volume of Logs Sourced from USA or Other Canadian Provinces [2] (M^3)	2,617,890	11.05%	
Total	23,682,501	100.00%	

The GOQ (and Resolute) did not argue that purchases of timber from private woodlots should be used as the benchmark to compare to purchases of timber from Crown land. In its initial questionnaire response, the GOQ simply said in a footnote that "Québec was not able to obtain private timber or log data."[377] Instead, the GOQ proposed that Commerce use the prices for Crown timber harvested via auctions as a benchmark to compare to prices for Crown timber harvested

374 GOQ Response to Initial Commerce Questionnaire (March 13, 2017)(C.R. 463)("GOQ IQR"), at Exhibit QC-STUMP-4.

375 GOQ Minor Corrections Presented at CVD Verification (June 21, 2017) (C.R. 1492), at Exhibit QC-STUMP-MC-2.

376 Quebec Market Memo – Table 7 (November 6, 2017) (C.R. 1875).

377 GOQ IQR at QC-S-10, n. 5. *See also id.* at QC-S-132, where, in response to question to "{e}xplain in detail process by which privately owned timber is sold in Québec and provide official documentation to support your response," the GOQ responded: "The GOQ does not gather or possess the information requested," and suggested that Commerce contact the Fédération des producteurs forestiers du Québec. It also explained: "Québec no longer uses private stumpage price as the reference base on which stumpage rates are established." *Id.* at QC-S-136.

through other means, mostly through a Timber Supply Guarantee ("TSG").[378] Resolute proposed that Commerce use Resolute's prices for Crown timber harvested via auctions as a benchmark to compare to Resolute's prices for Crown timber harvested through TSGs. Resolute was the only respondent to purchase Crown-origin stumpage in Québec.[379]

As the GOQ explained, "Québec's public forest regime was substantially reformed in 2010 by adoption of the Sustainable Forest Development Act ("SFDA")," which went into force on April 1, 2013.[380] Under the SFDA, all forest tenures that had existed under previous legislation were cancelled. Now, the GOQ sells a volume of standing timber on public land equal to 25 percent of the available timber via public auctions.[381]

As the table above shows, most Québec Crown land is sold other than by auctions. Most sales are to purchasers who have TSGs, with about 7 percent sold via forestry permits. Under the SFDA, tenure holding mills were given until January 1, 2012 to apply for a TSG.[382] The auctions are administered by the Wood Marketing Bureau ("Le Bureau de Misel en Marché des Bois" or "BMMB") within the Ministry of Forest, Wildlife and Parks ("Le Ministre des Forêts, de law Faune et des Parcs" or "MFFP"),[383] while the TSGs are administered by the MFFP itself.[384]

The regulations governing LTAR specify that under a tier-one benchmark, adequate remuneration can be measured 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 …, in certain circumstances, actual sales from *competitively run* government auctions."[385] So the main question is whether Commerce's determination that the auctions at issue here were not competitively run is supported by substantial evidence.

Commerce's final determination noted:

> In the *Preliminary Determination* we outlined five observations which led us to conclude that the Québec stumpage system is distorted and the auction prices cannot serve as a benchmark: (1) overall consumption of non-auction Crown timber is large relative to other sources; (2) the GOQ, through the BMMB, is not meeting its consumption goal for timber sold via auction; (3) a significant volume of timber offered at auction did not sell during the POI; (4) a small number of TSG-holding corporations dominate the consumption of Crown timber (both directly allocated via TSGs and sold via auction); and (5) TSG-holding corporations can shift their

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378 *E.g.,* GOQ 57.1 Brief, Vol. I at 11.

379 PDM at 55.

380 GOQ IQR at QC-S-1.

381 *Id.* at QC-S-1 – QC-S-2.

382 *Id.* at QC-S-30.

383 *Id.* at QC-S-2 – QC-S-3.

384 *Id.* at QC-S-32.

385 19 C.F.R. § 351.511(a)(2)(i) (emphasis added).

allocations of Crown timber, thereby reducing their need to acquire timber in the auction or from non-Crown sources.[386]

Commerce continued that some of these observations were "clarified" at verification, which changed some of the facts that Commerce had relied on in its preliminary determination, but Commerce stated that the observations remain "significant and informative." It concluded: "When taken in totality, those observations continue to illustrate that the auction prices are not market-based and, thus, cannot serve as a tier-one benchmark."[387] The Panel understands Commerce to be saying that no one particular observation by itself led to the conclusion that the auction market was distorted, but that the observations when "taken in totality" led to that conclusion. In its 57.2 Brief, Commerce dropped mention of the second observation (regarding meeting timber consumption goal),[388] considering that the IDM does not actually discuss this observation. The Panel therefore does not take this observation into consideration.

1) Consumption of non-auction crown timber

Commerce noted that the GOQ is the largest provider of stumpage in Québec, stating that 51.75 percent of consumption was sourced via administered TSGs.[389] Actually, as noted above, the 51.75 percent figure includes about 7 percent sold through forestry permits. Nevertheless, the share of the market sourced via TSGs is large and significant. The Panel finds that this observation is supported by substantial evidence.

2) Volume of timber not selling at auction

In the final determination, Commerce stated:

> Additionally, although the verified unsold volume of timber offered at auction was approximately 15 percent, and not 32.3 percent, as we preliminarily stated, we find that 15 percent is a significant amount of unsold timber. The unsold timber is an additional sign that TSG-holding corporations and non-sawmills may not be making aggressive bids above TSG prices.[390]

Earlier in the IDM, Commerce stated that "the totality of the evidence on the record leads us to conclude that the auction prices for Crown timber track the prices charged for Crown timber allocated to TSG-holding sawmills…."[391] The data in the record should have made it possible for Commerce to actually compare the auction prices to the TSG prices, and confirm whether the auction prices track the TSG prices, rather than make a conclusion from other data that there must have been such tracking.

The GOQ argued that Commerce has the data on the record to actually determine whether auction

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386 IDM at 99. In its 57.2 Brief, Vol. II, at 135, Commerce dropped mention of the second observation.

387 *Id.*

388 Commerce 57.2 Brief, Vol. II, at 135.

389 IDM at 99.

390 IDM at 101-102.

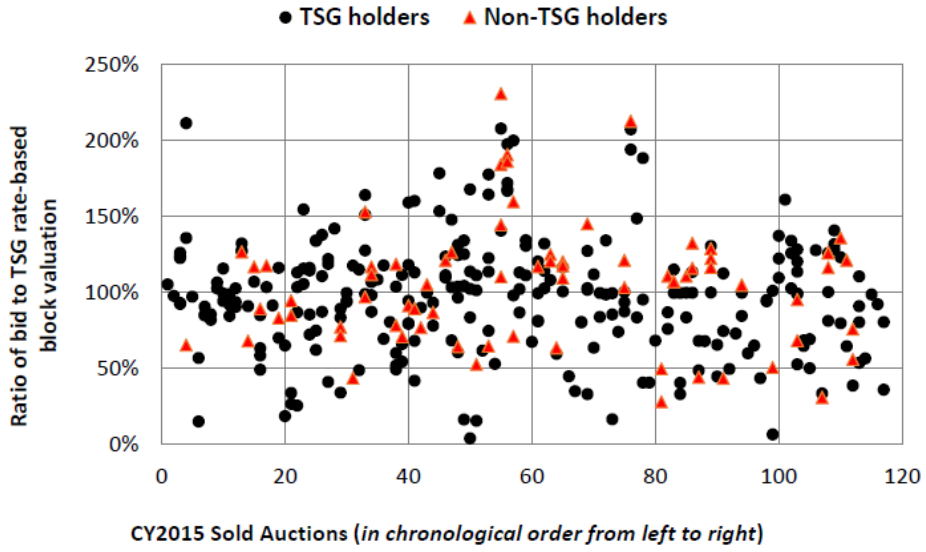
391 IDM at 99.

prices track TSG prices, and presented graphs and tables in support of its argument.[392] The data in these graphs and tables show that auction prices are both above and below TSG prices, and that there is no discernible difference between auction prices by TSG-holders and by non-TSG holders:

Table 2: Number of auction blocks above and below relevant tariffing zone prices (2015-2016) for TSG and non-TSG holding auction participants

Supply guarantee status	Relation with Tariffing Zone Price	Number of auction blocks	Average price (CAD/m3)	Average stumpage equivalent (CAD/m3)	Average gap (CAD/m3)	Average Gap(%)
Without supply guarantee	Over	62	14.29	11.20	3.08	28%
	Below	50	8.01	10.31	-2.30	-22%
	Total	**112**	**11.67**	**10.83**	**0.84**	**8%**
Supply guarantee holder	Over	54	16.53	12.18	4.35	36%
	Below	46	9.58	11.65	-2.07	-18%
	Total	**100**	**13.28**	**11.93**	**1.34**	**11%**
Total general	Over	116	15.40	11.69	3.71	32%
	Below	96	8.87	11.05	-2.17	-20%
	Total	**212**	**12.51**	**11.41**	**1.10**	**10%**

[393]



[394]

[392] GOQ 57.1 Brief, Vol. I, at 30-33; GOQ 57.3 Brief at 16.

[393] GOQ 57.1 Brief, Vol. I, at 33.

[394] GOQ 57.3 Brief at 16.

The Panel has no way to examine the underlying data in the tables and graph above, since we do not have access to SAS or other programs that can handle the .dta files that were submitted with the Marshall Report.[395] But on their face they contradict Commerce's conclusion that auction prices track TSG prices. On the other hand, the Panel ran sample pivot tables on the spreadsheet generated by Commerce to calculate Resolute's subsidy from Québec stumpage,[396] which indicated that on a species and grade-specific basis, average prices for Resolute's purchases from auctions were significantly lower than its average prices for purchases from TSGs.

3) Dominance of TSG-holding corporations

Commerce found: "Given that, under a TSG, a sawmill can source up to 75 percent of its supply need at a government-set price, there is strong motivation for a sawmill to treat its TSG-guaranteed volume as its primary source of supply and its auction volume as an additional or residual supply source."[397] Commerce analyzed sawmill data to determine the extent to which TSG-holding sawmills were not also active in the auction system. It concluded that "the same corporations dominate both the consumption of TSG-allocated Crown timber and the purchase of auctioned Crown timber."[398] The tables compiled by Commerce confirm this conclusion.[399]

The GOQ disputes how this conclusion ties to the finding of a strong motivation to treat TSG-guaranteed volume as the primary source and auction volume as a residual supply source, and how this ties to the determination that auctions are not competitively run.[400]

The overlap between the sawmills that use TSG-allocated Crown timber and purchased Crown timber via auctions does not in itself lead to the conclusion that the Québec timber auction is not competitively run, nor is that a part of a totality of observations that leads to that conclusion. Commerce had the data on hand to analyze the extent to which sawmills that used both paid more or less for timber purchased through auctions, rather than draw a conclusion simply from an overlap of purchasers.

4) Shifting of allocations

The IDM stated:

> TSG-holding corporations can bypass the auctions and shift allocations of Crown timber amongst themselves. Pursuant to sections 92 and 93 of the SFDA, TSG-holders in Québec are permitted to shift allocated Crown timber volumes among affiliated sawmills and between corporations.
>
> Based on the record at the Preliminary Determination, we found that, during the POI, under sections 92 and 93 of the SFDA, sawmills transferred approximately

395 Marshall Report at C.R. 481; data files at C.R. 880 to C.R. 912.

396 Resolute Final Calculation Memorandum Attachment 2A (C.R. 1878).

397 *Id.* (footnote omitted).

398 *Id.* at 100.

399 Québec Market Memorandum (November 8, 2017), Table 20 (C.R. 1879).

400 GOQ 57.1 Brief, Vol. I, at 27-29.

640,000 m^3 of TSG-allocated Crown timber, which amounted to 15.3 percent of the volume of softwood sawlogs sold via auctions. Based on data clarifications obtained at verification, these transfer volumes were reduced. However, notwithstanding these verification revisions, the fact remains that section 92 of the SFDA permits TSG-holders to annually transfer up to 10 percent of the total volume harvested under their TSGs without government approval. Given that just 22 percent of the stumpage harvested for FY 2015-2016 came from auctioned Crown timber, the ability of a TSG-holder to obtain an additional 10 percent of its TSG volume from another TSG-holder indicates that the auctions may not be a competitive source for wood. The ability of corporations to shift allocations among sawmills provides TSG-holding corporations flexibility in terms of their supply sources, and reduces their need to source timber from non-Crown sources.

Further, at the end of the year, any unharvested TSG volumes are returned to MFFP, which then decides whether to let the timber stand, sell it directly to a sawmill, or give the timber to the auctions. We verified that, during FY 2015-2016, 19.5 percent of unharvested timber was sold by MFFP to sawmills via one-year contracts with a TSG administered price. We further verified that the remaining timber was left standing. The ability of sawmills to purchase unharvested volumes at the government-set price further diminishes their need to source supply from the auctions or other competitive sources.[401]

This finding supports a finding that the Québec timber auctions are not competitively run. However, again, Commerce had the data to directly analyze the price difference between TSG-allocated timber and timber purchased via auction.

Commerce also found:

More importantly with respect to the Québec auction, under 19 CFR 351.511(a)(2)(i), the Department will only use actual sales prices from competitively run government auctions as a tier-one benchmark. The Department verified that timber purchased at the auctions must be milled within Québec. This is a substantial restriction that demonstrates that the Québec auction is not an open, competitively run auction. This restriction effectively excludes potential bidders that would mill the timber outside of Québec, and would exclude bidders that would want to sell the timber (either harvested, or the harvested logs) for milling outside of the province. Furthermore, limiting bidders suppresses auction bids, because bidders understand that there are fewer parties against which their bid will compete. Thus, instead of implementing an auction based solely on an open, market-based competitive process, the GOQ created an auction based upon a government-implemented policy to ensure that the timber is milled within the province. Therefore, even if the Québec stumpage market was not distorted, the Québec

[401] IDM at 101-102 (footnotes omitted).

> auction prices would not meet the regulatory criteria as an appropriate benchmark as set forth under 19 CFR 351.511(a)(2)(i).[402]

This conclusion supports a finding that the Québec timber auctions are not competitively run.

5) Conclusion

While Commerce posited several observations that support a finding that the Québec timber auctions are not competitively run, in the totality Commerce relied on conclusions that indicate that the auctions *might not* be competitively run, when it had the data to more directly analyze the competitiveness of the auctions. The Panel therefore remands this action to Commerce with the instructions to use the data in the record to analyze the extent to which auction prices actually track TSG-allocated prices. If the analysis shows that, everything else being equal, auction prices tend to be lower than, or track, TSG-allocated prices, a finding that the Québec timber auctions are not competitively run would be supported by the totality of the observations. If the analysis shows that auction prices are not lower than, or do not track, TSG-allocated prices, then a finding that the auction prices may be used as a tier-one benchmark would be in order.

B. Commerce's Use of Nova Scotia Benchmark and Adjustments

Because the Panel is remanding this action regarding whether the Québec stumpage market is distorted, as explained above at Section III.1., we will not reach the issues of Commerce's use of a Nova Scotia benchmark and the issue of adjustments to the Québec Crown stumpage prices.

7. Calculation of Stumpage Benefits

The Canadian Parties, the GBC, and JDIL argued that Commerce's calculation of stumpage benefits was not in accordance with law, because Commerce used a "transaction-to-average" comparison methodology,[403] and because Commerce considered all instances in which the Crown stumpage price was higher than the benchmark price to be a zero subsidy rather than a negative subsidy.[404] In its final determination, Commerce compared the stumpage price in each transaction to the average benchmark price by species, on either an annual or a monthly basis.[405] As Commerce stated, "{f}or purchases for which we calculated a negative benefit, (*i.e.*, the actual payment for Crown stumpage was higher than the private Nova Scotia stumpage price benchmark) we set the benefit to zero."[406]

In its final determination, Commerce concluded:

> In a subsidy analysis, a benefit is either conferred or not conferred, and a positive benefit from certain transactions cannot be masked or otherwise offset by

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402 IDM at 102-103 (footnotes omitted).

403 Canadian 57.1 Brief, Vol. I at 72; GBC Brief, Vol. I at 135-137; JDIL 57.1 Brief at 34-37.

404 Canadian 57.1 Brief, Vol. I at 72-75; JDIL 57.1 Brief at 37-39.

405 *See, e.g.,* Resolute Final Determination Calculations, November 1, 2017 (C.R. 1860) at 2-3; JDIL Final Calculations, November 1, 2017 (C.R. 1847) at 4-6.

406 JDIL Final Calculations, November 1, 2017 (C.R. 1847) at 6. *See* C.R. 1849 for a spreadsheet example of how the benefit was calculated.

> "negative benefits" from other transactions. The adjustment the GBC, Tolko and JDIL are seeking is essentially a credit for transactions that did not provide a benefit – this is an impermissible offset, contrary to the Act, and inconsistent with the Department's practice.[407]
>
> Section 771(5)(B) of the Act provides:
>
> A subsidy is described in this paragraph in the case in which an authority—
>
> (i) provides a financial contribution …
>
> to *a person* and a benefit is thereby conferred.[408]

Thus, a subsidy is provided to a person, not to a transaction. From the point of view of the person, the benefit from a particular program is provided to that person as a whole, not on a transaction-by-transaction basis.

The existence of perceived "negative benefits" is an artifact of how Commerce chose to calculate the benefit. In the case of stumpage, Commerce mostly chose to calculate the benefit on a transaction-by-transaction basis, but it is not statutorily required to. In other instances in this case involving a benchmark, Commerce chose to calculate the benefit on an average basis. For instance, for BC Hydro EPA's, Commerce "compared the monthly weighted-average unit sales price of electricity from West Fraser to BC Hydro to the monthly base unit price that West Fraser paid to BC Hydro for electricity."[409] Without disclosing BPI, an examination of the calculations spreadsheet for West Fraser confirms that Commerce used the same method in the final determination to calculate the monthly *weighted average* unit sales price rather than for each electricity sales transaction.[410] Furthermore, in the case of stumpage for Resolute, Commerce calculated the benefit on a transaction basis regarding Ontario, but on a mill basis regarding Québec.[411] When "negative benefits" are an artifact of how Commerce chose to calculate the benefit, whether there has been a statutorily permitted offset does not apply.

The Panel therefore finds that Commerce's use of "zeroing" negative benefits is not in accordance with law. This action is remanded to Commerce with the instructions to revise the calculation spreadsheets for stumpage benefits. Specifically, Commerce is directed to remove from the formulas the result that if transaction price exceeds the benchmark price the benefit is set to zero.[412]

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407 IDM at 45.

408 19 U.S.C. § 1677(5)(B) (emphasis added).

409 PDM at 85.

410 *See* West Fraser Final Calculations Memo (November 1, 2017) (C.R. 1852) at 6; calculations spreadsheet (C.R. 1854).

411 Compare C.R. 1861 to C.R. 1878.

412 Mathematically, this produces the same result as doing an average-to-average benefits calculation, so the Panel does not reach this issue.

IV. British Columbia Log Export Restraints (LERs)

Commerce determined that log export restraint programs ("LERs"), which apply to log exports from British Columbia, are countervailable.[413] It calculated final *ad valorem* subsidy rates for Canfor, Tolko and West Fraser of 0.00, 3.56 and 0.85 percent, respectively.[414]

The LERs are administered by the Government of British Columbia ("GBC LER"), which apply to logs subject to provincial jurisdiction, and the Government of Canada ("GOC LER"), which apply to logs subject to federal jurisdiction.[415] In its determination, Commerce assessed the GBC and GOC LERs together, describing them as establishing "a process that prohibits the export of logs without an export permit, and an export permitting process that authorizes the export of logs, in accordance with specified criteria."[416]

1. Financial Contribution

A. Commerce's Determination

Commerce described the program in its preliminary determination:

> As stipulated in the Forest Act, timber harvested in British Columbia from land under provincial jurisdiction must either be used in British Columbia or manufactured within the province into a wood product. However, the Forest Act allows for limited exemptions in certain instances for logs to be exported. Generally, there are three exemptions:
>
> (1) logs that are "surplus to requirements of timber processing facilities in British Columbia" (surplus criterion);
>
> (2) timber that "cannot be processed economically in the vicinity of the land on which it is cut or produced, and cannot be transported economically to a processing facility located elsewhere in British Columbia" (economic criterion); and
>
> (3) where an exemption "would prevent the waste of or improve the utilization of

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413 IDM at 10-11 and Comments 44-47. The GBC and GOC refer to the programs as the log export permitting process ("LEP"), arguing that the LEP is not a "restraint." Hearing Transcript, Vol. III (September 29, 2023) at 3-47, lines 9-10. In our analysis, we use the term that is used in the Commerce's final determination— LER program—recognizing that the "restraint" element is disputed by the parties.

414 IDM at 11.

415 Federal jurisdiction covers logs harvested from federal Crown or Indian reserve, treaty settlement or self-government land, or on private land granted by the federal Crown on or before March 12, 1906, other than private land in a Tree Farm License area. Provincial jurisdiction covers logs harvested from provincial Crown land, private land granted by the provincial Crown after March 12, 1906, or from private land granted by the provincial Crown on or before March 12, 1906, in a Tree Farm License. GOC-BC Parties Brief, Vol. II at 16. All log exporters in British Columbia are also required to obtain federal export permits. GOC-BC Parties Brief, Vol. II at 19. *See also* IDM at 149-150.

416 IDM at 153.

timber cut from Crown land" (utilization criterion).[417]

Commerce found: "During the POI, all but two of the applications for export were made under the surplus test. Under the surplus test, the GBC requires all log suppliers to first offer logs to B.C. mill operators before they can be exported."[418] It noted that it had previously found that "the purpose of the surplus test is to ensure that there is an adequate domestic supply of logs to satisfy the needs of domestic lumber before an export exemption is granted," and that "this requirement ensures that the timber processing and value-added wood product industry in British Columbia is assured of an abundant, low-cost source of supply."[419]

Commerce determined that the GBC and GOC LERs provide a "financial contribution of the provision of logs" within the meaning of sections 771(5)(B)(iii) and 771(5)(D)(iii) of the Act, because timber harvesters and processors in British Columbia are "limited… in to whom they can sell their logs" which result in "third-party timber harvesters and processors providing logs to B.C. processors of logs at the entrustment or direction of the GBC and the GOC."[420] This function would "normally be vested in the government and the practice does not differ in substance from practices normally followed by governments."[421]

The Canadian parties[422] argued that Commerce's determination that the LERs constitute a financial contribution is unsupported by substantial evidence and otherwise not in accordance with law.[423] They challenged Commerce's determination on several grounds.

B. Whether the LERs are a Financial Contribution as a Matter of Law

The Canadian parties argued that the LERs are not a financial contribution as a matter of law. The statutory basis for Commerce's determination that the LERs provide a "financial contribution of the provision of logs" derives from two provisions.

Section 771(5)(B)(iii) 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

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417 PDM at 58 (footnotes omitted).

418 *Id.* at 58-59 (footnote omitted).

419 *Id.* at 59 (footnotes omitted).

420 IDM at 152, 154.

421 IDM at 151-152, 155-156.

422 In this section, "Canadian parties" refers to parties on whose behalf the GOC-BC Parties 57.1 Brief Vol. II was submitted: the Government of Canada, the Government of British Columbia, the B.C. Lumber Trade Council, Canfor Corporation, Tolko Marketing and Sales Ltd. and Tolko Industries Ltd., and West Fraser Mills Ltd.

423 GOC-BC Parties Brief, Vol. II at 21.

followed by governments.[424]

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

> The term "financial contribution" means… "(iii) providing goods or services, other than general infrastructure."[425]

The statutory provisions do not define the key terms that we must examine: "entrusts or directs;" "normally be vested in the government;" "does not differ in substance from practices normally followed by governments;" and "providing goods." This silence combined with the potential breadth of their meanings creates ambiguity as to what they mean. As such, the Panel applies the *Chevron* standard of reasonableness when assessing Commerce's interpretation of the provisions.[426]

In its past practice, Commerce has found export restraints to constitute financial

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[424] 19 U.S.C. § 1677(5)(B)(iii).

[425] 19 U.S.C. § 1677(5)(D)(iii).

[426] The Canadian parties observed that the statutory provisions are identical to the provisions in Article 1.1(a)(1) of the WTO *Agreement on Subsidies and Countervailing Measure*. GOC-BC Parties Brief, Vol. II, at footnote 56 and GBC 57.3 Brief, Vol. II at 14-15. They argue that, when interpreting these WTO provisions, WTO panel decisions have repeatedly determined that alleged export restraints do not constitute government-entrusted or government-directed provision of a good under the WTO provisions. GOC-BC Parties Brief, Vol. II at 31-35. Although recognizing that WTO decisions do not bind this panel, they argued that such decisions are persuasive and that "what a WTO dispute panel says about the requirements of a particular WTO provision that is also embodied in the U.S. law is entitled to consideration by a NAFTA reviewing panel." GOC-BC Parties Brief, Vol. II, at footnote 56. Hearing Transcript, Vol. III (September 29, 2023) at 332. In addition to agreeing that WTO panel and Appellate Body reports have no binding effect under US law, Commerce submitted that "neither Congress nor the Administration have made any recommendations on whether to adopt any dispute settlement decisions or reports regarding the countervailability of such measures or implemented such findings as required by U.S. law." Commerce 57.2 Brief, Vol. III at 66. When interpreting WTO provisions, WTO panels apply the rules of treaty interpretation in the *Vienna Convention on the Law of Treaties*, which are different than the *Chevron* standard of reasonableness. The standard of review applied when interpreting provisions can affect the interpretative result even if the wording of the provisions is identical. As discussed in the above section on Standard of Review, an agency's statutory interpretation is to be upheld if it is "sufficiently reasonable," even if it is not "the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." In contrast, the General Rule of Interpretation in Article 31(1) of the *Vienna Convention* which is applied by WTO panels reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Canadian parties explained their view on the similarities between the WTO "objective assessment" and the *Chevron* "reasonableness" standards in the context of the assessment of evidence and factual findings but not in the context of the interpretation of statutory and WTO provisions. Hearing Transcript, Vol. III (September 29, 2023) at 331-335. Under Article 1904.2 of NAFTA, a binational panel, where the United States is the importing nation, essentially decides a case under the same standard that the U.S. Court of International Trade (or the Federal Circuit) would use. The Panel is therefore bound by the *Chevron* standard and applies it in our decision.

contributions in certain circumstances.[427] This practice demonstrates that measures purported to be export restraints exist in many different factual circumstances, ranging from prohibitions to partial restraints which have varying or even no restrictive effects on exports.[428] The determination of whether such a measure constitutes a financial contribution within the meaning of the statutory provisions must be determined on a case-by-case basis.[429] This inevitably requires an assessment of the nature of the measure at issue.[430] This, in turn, requires an assessment of all relevant facts surrounding the measure.

1) Entrustment or Direction

The Canadian parties argued that the "entrustment or direction" standard 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."[431] For these reasons, a "financial contribution determination cannot be based on the purported effects of the action."[432] The Canadian parties argued that "Commerce's analysis does not meet either of these requirements, and amounts to an unlawful effects-based test."[433]

a) Governmental Affirmative Action

The Canadian parties argued that the plain meaning of "entrust" or "direct" is to

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427 This is recognized in the SAA in the reference to pre-Uruguay Round CVD practice involving "export restraints that led directly to discernible lowering of input costs" and in Commerce's subsequent practices after the WTO Agreements entered into force as evidenced by, *inter alia*, the investigations referred to in the WTO panel reports in *US – Export Restraints* and *US - Countervailing Measures (China)* which were cited by Canada. GOC-BC Parties Brief, Vol. II at 31-35.

428 Another example of such practice in the context of a Chinese investigation is *China-GOES* cited by Canada. GOC-BC Parties Brief, Vol. II at 30-32. Commerce has recognized "a distinction between export restrictions that may allow for some exports and alternative sales outlets; and export ban which '. . . eliminates all such alternative sales outlets and would likely have a significant impact on the market dynamics of the product in question.'" *Certain Oil Country Tubular Goods from the People's Republic of China*: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination, 74 Fed. Reg. 64045 (December 7, 2009), accompanying Issues and Decision Memorandum at 112-113 referencing *Coated Free Sheet Paper from Indonesia*: Final Affirmative Countervailing Duty Determination, 72 Fed. Reg. 60642 (October 25, 2007), accompanying Issues and Decision Memorandum at 29, cited by Canada. GOC-BC Parties Brief, Vol. II at footnote 100. In *Coated Free Sheet from Indonesia* Commerce distinguished between a total export ban that has remained in effect for a long period and which stands out in terms of the extent of its likely impact on the market and partial restraints which, depending on their severity and other characteristics, may allow for alternative sales outlets (IDM, at 29).

429 SAA at 926.

430 The parties agreed that the nature of the measure is central to the determination of whether it constitutes a financial contribution. GOC-BC Parties Brief, Vol. II at 30-31; Commerce 57.2 Brief, Vol. III at 101, 111-112; GBC 57.3 Brief, Vol. II at 12, 20.

431 GOC-BC Parties Brief, Vol. II at 24. *See also* GBC 57.3 Brief, Vol. II at 5-6.

432 GOC-BC Parties Brief, Vol. II at 24.

433 *Id.* at 25.

commission or instruct someone to do something – an affirmative action.[434] There must be adequate evidence that the government gives responsibility to, or exercises authority over, an entity to carry out the function of providing a good to domestic users of that good and there was no such evidence in this case.[435]

Commerce interpreted the Canadian parties' argument regarding an "affirmative action" by government to mean "that such action must directly, as opposed to indirectly, compel, instruct, or require a private entity to make a financial contribution."[436] Commerce acknowledged that the GBC and GOC do not affirmatively enlist private entities to transact with specific parties but argues that "entrustment or direction" is not limited to situations in which the government affirmatively gives responsibility to a private entity to carry out a governmental subsidy function.[437] It found that there is no requirement to establish direct affirmative action.[438] Rather, it was sufficient that "Commerce identified the specific formal, enforceable measures that the GOC and GBC undertook," namely the "specific laws and processes that require log suppliers to fill the needs of timber processors in British Columbia."[439] The phrase "entrustment or direction" could encompass a broad range of meanings "including restraining exports through in-province use requirements."[440]

The Panel notes that, in the context of entrustment or direction, the 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 the industry under investigation" and "involved export restraints that led directly to a discernible lowering of input costs."[441] In *DRAMS from Korea*, Commerce stated the following:

> The Department interprets the "entrusts or directs" language to mean that, if a government affirmatively causes or gives responsibility to a private entity or group of private entities to carry out what might otherwise be a governmental subsidy function of the type listed in subparagraphs (i) to (iv) of section 771(5)(D), there would be a financial contribution. Thus, when the government executes a particular policy by operating through a private body or when a government affirmatively causes a private body to act, such that one or more of the type of functions referred to in subparagraph (iv) is carried out, there is entrustment or direction by the

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434 GOC-BC Parties Brief, Vol. II at 25. *See also* GBC 57.3 Brief, Vol. II, at. 7-9.

435 GOC-BC Parties Brief, Vol. II at 27.

436 Commerce 57.2 Brief, Vol. III at 103.

437 *Id.* at 102.

438 *Id.* at 104.

439 *Id.* at 104, 107 and 111.

440 *Id.* at 106.

441 SAA at 926.

government.[442]

The statutory language refers to "an authority… entrusts or directs a private entity… to make a financial contribution." Thus, the action that must be taken by a government (*i.e.*, authority) is entrusting or directing a private entity to make a financial contribution, in this case the provision of a good. The positions of the parties acknowledged this. 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, there is nothing in the statutory language that limits how the "entrustment or direction" is implemented by a government. A reasonable interpretation of the statutory language could encompass any of the meanings expressed by the parties. The Panel finds no fault in Commerce's legal interpretation.

However, irrespective of how the entrustment or direction is implemented by a government, it must cause a private body to carry out a function that amounts to a financial contribution, in this case the provision of goods.

b) Demonstrable Link Between Government and Private Body Conduct

The Canadian parties argued that there must be a clear linkage between the government action and private action and that Commerce failed to establish this linkage.[443] They further argued that entrustment or direction cannot be a by-product of government regulations nor can mere policy announcements or acts of encouragement, by themselves, meet this standard.[444] Entrustment or direction does not cover the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market.[445] More than mere encouragement is required, the Canadian parties argued.[446]

Commerce acknowledged that "'encouragement' alone does not constitute entrustment or direction" but that Commerce reasonably concluded that the log suppliers' provision of logs to in-province processors is not merely incidental to the laws constituting the GOC and GBC log export restraints, or merely encouraged by those laws.[447] Commerce found that " official government action compels suppliers of B.C. logs to supply to B.C. customers," that the "relevant laws expressly require logs to be used in British Columbia or further manufactured within the province" and that "the only way for an entity to obtain an exception is to demonstrate that its logs are surplus to the needs of processors in the province by advertising them through a GBC list."[448] Commerce argued that "that log suppliers sell within

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442 *Dynamic Random Access Memory Semiconductors from the Republic of Korea*: Final Affirmative Countervailing Duty Determination, 68 Fed. Reg. 37,122 (June 23, 2003), accompanying Issues and Decision Memorandum at 47-48.

443 GOC-BC Parties Brief, Vol. II at 28.

444 *Id.* at 27-29.

445 *Id.* at 29.

446 *Id.* at 28-29.

447 Commerce 57.2 Brief, Vol. III at 106, 107 and 109.

448 *Id.* at 109.

the province, whether they ever pursue an exemption or not, is not an unintended byproduct – it is the unambiguous purpose of {the LERs}" and "log suppliers are free to {negotiate prices or accept or reject offers from log purchasers} in the domestic market, to the exclusion of export markets."[449]

As the Panel observed in the previous section, the entrustment or direction action must cause a private body to carry out the provision of goods. In other words, there must be a linkage between the government action and the provision of goods by a private body. The statutory language is silent on how this linkage is to be established. Although their descriptions varied, the parties acknowledged that this linkage must be established. The Panel sees nothing unreasonable in Commerce's legal interpretation of the linkage between government and private body actions.

The parties' primary disagreement regarding the linkage was factual which we assess below in Section IV.1.C., "Whether the LERs are a Financial Contribution as a Matter of Fact".

c) Effects of the Alleged Measure

The Canadian parties argued that "Commerce's financial contribution finding in the Final Determination is based, in large part, on its determination that the LER process "'discourages' log suppliers from exporting and its assumption that this has a significant impact on the price of logs in the B.C. market."[450] The determination of a financial contribution, the Canadian parties argued, must be based on the nature of the government action— not the alleged effect of that action.[451]

Commerce responded that there was nothing in the statute preventing it from considering "effects" when determining whether a financial contribution existed.[452] The effects of a measure may help inform the understanding of the nature of the measure, particularly because subsidizing governments may develop programs that provide indirect subsidies while purporting to carry out other objectives.[453] Commerce's analysis in this investigation focused on the plain meaning of the log export restraints' in-province use requirements and surplus tests, and assessed the effects of the log export restraints specifically because the respondents contended that the GOC and GBC laws were of no effect.[454]

The statutory language is silent on how Commerce must establish the existence of the government action of entrustment and direction and of the linkage to the provision of goods by a private body. Accordingly, the Panel must assess the reasonableness of Commerce's consideration of "effects" in its financial contribution determination.

The Panel agrees with the parties that the "nature" of the government action is relevant to a financial contribution determination. Canada, the United States and a WTO panel have

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449 *Id.*

450 GOC-BC Parties Brief, Vol. II at 30.

451 *Id.* at 30-31; GBC 57.3 Brief, Vol. II at 12.

452 Commerce 57.2 Brief, Vol. III at 111.

453 *Id.* at 111-112.

454 *Id.* at 112-113.

acknowledged that an export restraint could result in a private body or bodies providing goods.[455] If the nature of the export restraint is reflected in an express requirement by a government that a private body provide goods, proving the existence of a financial contribution could be straightforward. However, if its nature is not reflected in an express requirement for a private body to provide goods, as is the case here, the exercise will be more complicated. It is further complicated where the establishment of the requisite linkage between the government and private body actions is dependent upon the prevailing facts which is also the case here.

The nature of export restraints can be illustrated by using a continuum that begins with export prohibitions and ends with automatic export licensing, containing "partial restraints" with varying natures in between. Establishing the requisite linkage between government and private body actions will become more complicated and more fact intensive the farther out the measure falls on the continuum. At some point on the continuum, the operative "effects" of an export restriction will likely be determinative of whether there is government action of entrustment and direction that causes the provision of goods by a private body. In this light, the Panel agrees with Commerce that the effects of a measure may help inform the understanding of the nature of the measure. We find nothing unreasonable in Commerce's legal interpretation of the statutory provisions insofar as it considered the effects of the LERs in the context of determining whether there was a financial contribution.

2) "Normally Be Vested in the Government"

The Canadian parties argued that Commerce's interpretation of "normally be vested in the government" renders the requirement meaningless, that Commerce ignored the fact that the alleged practice under the statute was the provision of logs (not the restraint of exports), that the BCG and GOC did not sell logs or determine or dictate to whom logs may be sold, and that Commerce failed to explain how the provision of logs is a practice that would normally be vested in government.[456] They also argued that Commerce's interpretation is grounded in circular reasoning such that the requirement would always be met because Commerce essentially cites to the existence of the alleged subsidy as proof that providing the good would normally be vested in the government.[457]

Commerce responded that it "properly interprets the government practice aspect of the statute by focusing on whether a 'governmental subsidy function' was performed because it 'appropriately narrows the reach of the countervailing duty statute to only those government actions which involve the delegation of a subsidy function to a private entity.'"[458] The government's right to manage the forest in British Columbia since 1867, the GBC's management of forest land for over 100 years, and the presence of log export restrictions at the provincial level since 1891 and the federal level since 1940 support the determination that the provision of logs "would normally be vested in the government" and "does not differ substantively from the normal

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455 *US – Export Restraints*, at 8.50.

456 GOC-BC Parties Brief, Vol. II at 35-36. GBC 57.3 Brief, Vol. II at 19, 36-37.

457 *Id*.; GBC 57.3 Brief, Vol. II at 36-37.

458 Commerce 57.2 Brief, Vol. III at 96.

practices of the government."[459]

Commerce disagreed with the Canadian parties' interpretation of *Hynix II*, which found "substantial evidence in support of Commerce's conclusion that the government subsidy function requirement was satisfied by the investigated financial contributions."[460] What was relevant was whether the government delegated a subsidy function to a private entity.[461] Commerce argued that the subsidy function that was delegated was the provision of logs to consumers.[462] In addition to the historic information it cited, Commerce explained that logs are harvested from standing timber in forests, that the GBC has near total control over the timber supply (controlling over 94 percent of all forest land), and that there is an inextricable relationship between control over standing timber and control over logs.[463] Commerce explained that the longevity of these measures, which entrust or direct log suppliers to provide logs, is evidence of what functions are "normally," *i.e.*, consistently over many decades, vested in the government in British Columbia.[464] Finally, it argued that there was no requirement that it prove that the government itself previously performed the subsidy function.[465]

The Panel finds that it was reasonable for Commerce to interpret the "normally invested in" language such that it narrowed the reach of the countervailing duty statute to only those actions that involve the delegation of a government subsidy function to a private entity. We understand the reference to "government subsidy function" to refer to one of the listed government functions that can amount to a financial contribution, in this case the provision of goods (*i.e.*, logs). Such a financial contribution can be provided by a government or by a private body that has been entrusted or directed by a government. Where it is provided by the latter, it must be established that the function at issue (*i.e.*, the provision of logs) would normally be vested in the government and the practice in no real sense differs from the practices normally followed by governments. By applying this interpretation, Commerce followed the structure of the statutory provisions. It did not render the "normally vested" requirement meaningless nor did it undertake circular reasoning.

With respect to whether the GBC and GOC had to have previously performed the provision of logs for it to be established that the function was normally vested in them, we find that Commerce's interpretation that it did not have to establish previous performance to be reasonable. A requirement that previous performance of the function had been proven would open the statutory provisions to circumvention where a government measure is originally implemented through entrustment and direction to a private body without first implementing it through the government.

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459 *Id.* at 101.

460 *Hynix Semiconductor Inc. v. United States*, 425 F.Supp.2d 1287, 1306 (Ct. Int'l Trade 2006).

461 Commerce 57.2 Brief, Vol. III at 113.

462 *Id.* at 113-114.

463 *Id.* at 114.

464 *Id.*

465 *Id.*

3) Prior Practice Regarding the "Direct and Discernible" Benefits Test

The Canadian parties argued that Commerce unlawfully departed from its past practice regarding the "direct and discernible" benefits test because it did not provide a reasoned explanation for that departure.[466] The practice consisted of proving that the export restraint at issue "led directly to a lowering of input costs" by demonstrating a clear link between the imposition of the restraint and the divergence of export and domestic prices using long-term historical price comparisons.[467] Instead of relying on this practice, Commerce took the position that "any hindrance on the free export of logs would be sufficient to find a financial contribution."[468] Under Commerce's new practice, the Canadian parties contended, any additional burden on exporters, no matter how small, would be sufficient to find a financial contribution to producers of the subject merchandise.[469] The Canadian parties claimed that Commerce articulated no threshold pursuant to which such administrative measures begin to have export-deterring effects, even though such measures are common to all areas of regulated economic activity.[470]

Commerce responded that in the three instances involving questions of entrustment or direction decided shortly before the *Final Determination,* Commerce did not apply the standard that a measure must "directly lead to a discernible benefit" to constitute a financial contribution.[471] Thus, there was no departure from practice to explain.[472] Commerce further argued that it has never characterized the financial contribution inquiry of whether a measure "directly led to a discernible benefit" as its exclusive practice.[473] The statutory provisions do not reference a "directly lead to a discernible benefit" standard.[474] It asserted that the SAA describes what Commerce "has found" in certain past determinations, rather than a test to be applied in the future, and it calls for a broad interpretation of the entrust or directs standard and to proceed on a case-by-case basis, which means that the appropriate analysis will vary based upon the type of government measure and the nature of the record evidence.[475] In Commerce's view, the position of the Canadian parties conflated the two distinct elements of the statute—financial contribution and benefit.[476] For these reasons, Commerce argued that it was not required to demonstrate a clear link between the imposition of the restraint and the divergence of export and domestic prices using

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466 GOC-BC Parties Brief, Vol. II at 38-45.

467 *Id.* at 40.

468 *Id.* at 41.

469 *Id.*

470 *Id.* at 42.

471 Commerce 57.2 Brief, Vol. III at 117.

472 *Id.* at 118.

473 *Id.* at 116.

474 *Id.* at 116-117.

475 *Id.* at 116.

476 *Id.* at 115.

long-term historical price comparisons.[477]

Commerce did not dispute that it must provide a reasonable explanation where it departs from a consistent past practice. As evidence of consistent past practice, the Canadian parties cited *Leather from Argentina*, *Softwood Lumber III*, the IDM in *OCTG from China* including the reference to the IDM in *CFS from Indonesia*, and the Court of International Trade opinion in *TMK IPSCO v. United States*.[478] These examples span the 1990-2016 period, both before and after the relevant statutory provisions entered into force. Over that period, they evidence a consistent practice of Commerce to require long-term historical price comparisons that demonstrate a clear link between the imposition of the export restraint and the divergence of prices.[479]

Commerce referred to three instances involving questions of entrustment or direction decided shortly before the *Final Determination* that, in its view, demonstrate either that the long-term historical price comparison practice ceased in respect of export restraints or was not the exclusive practice in respect of export restraints (*i.e.,* it was not a consistent practice). The cited instances do not appear to support these positions. *SC Paper from Canada-Investigation* dealt with the provision of electricity and not an export restraint. In *SC Paper from Canada-Expedited Review*, Commerce observed that "the record of this proceeding is replete with studies that demonstrate the log export ban is linked to the divergence between domestic and world market prices, as envisioned by OCTG from China", indicating that the practice was continuing not ceasing.[480] In *Certain Uncoated Paper from Indonesia*, Commerce found that the log export ban distorted prices in the Indonesian market by referring to record evidence that domestic log prices were below regional and international prices.[481] Although Commerce did not specify whether the comparison was based on long-term historical prices, the reference to comparative prices undermines this third instance as support for Commerce's position.

Finally, Commerce argued that the Canadian parties conflate the financial contribution and benefit elements of a subsidy. We do not agree. The practice of establishing a link between the imposition of the restraint and the divergence of export and domestic prices using long-term historical price comparisons originated from the determination of whether an export restriction could be considered a "domestic subsidy practice" at a time when the Act did not have a "financial contribution" requirement.[482] The "direct and discernible effect" standard attempted to determine whether the border measure, *i.e.,* an export embargo, had a direct effect on the price of the input

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477 *Id.* at 117.

478 GOC-BC Parties Brief, Vol. II at 39-41.

479 See for example, *TMK IPSCO v. United States*, 179 F. Supp. 3d 1328, 1340 (Ct. Int'l Trade 2016) which demonstrates that this practice, which started in 1990, was continuing in 2016.

480 *Supercalendered Paper from Canada Expedited Review*: Final Results Countervailing Duty Expedited Review, 82 Fed. Reg. 18,896 (April 24, 2017), accompanying Issues and Decision Memorandum, at 37.

481 *Certain Uncoated Paper from Indonesia*: Final Affirmative Countervailing Duty Determination, 81 Fed. Reg. 3,104 (January 20, 2016), accompanying Issues and Decision Memorandum, at 35.

482 *Certain Softwood Lumber Products from Canada,* 57 Fed. Reg. 22,570, 22,640 (May 28, 1992), Final Affirmative Countervailing Duty Determination, at 22609.

product.[483] Was the measure primarily responsible for or a cause of the price differential?[484] This assessment was separate from the measurement of the benefit.[485] This understanding of the standard is consistent with the practice in the examples cited by the Canadian parties and, at least in two instances, by those cited by Commerce to rebut those examples. In the context of the prevailing financial contribution requirement, this standard assists in determining whether an export restraint amounts to a government action of entrustment and direction that causes the provision of goods by a private body. This consideration is separate from determining whether the export restraint confers a benefit.

For these reasons, the Panel finds that the Canadian parties have established a consistent past practice that Commerce departed from without a reasoned explanation.

4) Conclusions

For the above reasons, 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 find that Commerce's interpretations were in accordance with law.

However, the Panel finds that Commerce departed from its past practice regarding the "direct and discernible" benefits test without providing a reasoned explanation for that departure. The Panel therefore remands this action to Commerce with the instructions to provide a reasoned explanation of why it departed from its past practice.

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.[486] They contested several elements of Commerce's factual findings that the LERs caused private bodies (*i.e.*, log suppliers) to carry out a function that amounted to a financial contribution (*i.e.*, the provision of logs to B.C. domestic log consumers).

1) The Factual Threshold for Establishing the Linkage between the LERs and the Provision of Goods

The contested elements of Commerce's determination related to whether there was substantial evidence of a linkage between the LERs and the provision of logs by log suppliers to British Columbia consumers. Although the parties appeared to have agreed that the linkage had to be something more than mere encouragement, could not be merely incidental and could not be an unintended byproduct, they disagreed on the factual threshold for establishing the linkage and whether the linkage was established on the facts before Commerce.

The Canadian parties argued that Commerce took the position that "any hindrance" on

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483 *Id*. at footnote 23.

484 *Id*. at 22610.

485 *Id*. at 22612.

486 GOC-BC Parties Brief, Vol. II at 45-48.

the free export of logs, no matter how small, would be sufficient to find a financial contribution and that Commerce did not articulate a threshold for establishing export-deterring effects.[487] Commerce responded that the statute imposed no significance or *de minimis* threshold as part of the financial contribution analysis.[488] The Panel recognizes that the statute does not explicitly impose such a threshold. However, in order for there to be a financial contribution, an export restraint must impact exports of the goods in question to a sufficient degree so as to cause a private body to carry out the provision of those goods to domestic consumers.

The Commerce determinations cited by the parties use expressions that provide guidance on the factual threshold for establishing the linkage between the export restraint and the provision of goods. Although these expressions refer to the linkage between the export restraint and "lower prices" rather than "the provision of goods," the reference to lower prices relates to the determination of whether the export restraint amounts to a "subsidy practice," a "subsidy function" or a "financial contribution," not to the existence of a "benefit".[489] This is sensible because only if an export restraint meaningfully diverts exports to the domestic market could it cause a private party to provide the otherwise exported goods to domestic consumers. This diversion will be reflected in an increase in domestic supply and a corresponding decrease in domestic prices. Commerce recognized this in its Preliminary Determination when it stated that the LERs "contribute to an overabundance of log supply that, in turn, depresses the prices that auction participants are willing to pay, as well as the log prices that loggers can charge tenure-holding companies in the province".[490]

The expressions include: cognizable, direct and discernible effect;[491] proximate causal

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487 GOC-BC Parties Brief, Vol. II at 41-42.

488 Commerce 57.2 Brief, Vol. III at 121, citing the definition of "financial contribution" in 19 U.S.C. § l 677(5)(D).

489 As explained below in the context of prior practice regarding the "direct and discernible" benefits test, the references to the linkage between the export restraint and lower domestic prices in the statements initially related to whether subsidies could be considered a "domestic subsidy practice" at a time when the Act did not have a "financial contribution" requirement. The "benefit" analysis, which was separate, followed an affirmative determination of the existence of a domestic subsidy practice. Following the entry into force of the "financial contribution" requirement in the statutory provisions, the same approach was continued with separate assessments of the linkage (in relation to the financial contribution) and of the existence of a benefit flowing from the financial contribution. This interpretation is consistent with Commerce's statement that "{w}hat was relevant was whether the government delegated a *subsidy function* to a private entity" {emphasis added}. Commerce 57.2 Brief, Vol. III at 96, 113.

490 PDM at 39.

491 *Leather from Argentina,* 55 Fed. Reg. 40,212 (Oct. 2, 1990) at 40213, 40214. *Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570, 22,640 (May 28, 1992),* Final Affirmative Countervailing Duty Determination at 22609. The COALITION describes how the linkage relates to the "financial contribution" in the following terms: "Congress intended that Commerce would continue to examine the relevant facts on the record and to consider a financial contribution to have been made indirectly where a government adopts a 'formal, enforceable measure' that *leads directly 'to a discernible benefit being provided*', such as 'a *discernible* lowering of input costs.'{emphasis added}" COALITION 57.1 Brief at 119.

relationship or correlation (*i.e.*, regression analysis);[492] relatively high or strong correlation;[493] high probability the restraints are primarily responsible;[494] clear linkage between the imposition of the embargo and the divergence of prices;[495] whether or not the linkage was supported by evidence such as independent studies or long-term pricing data;[496] a causal nexus between the program and the benefit;[497] and factors other than the export restraint that cannot be conclusively linked to the lowering of prices.[498] In the Panel's view, these terms describe a "meaningful" linkage which is more than insignificant or *de minimis.* (In this section of our decision, when we refer to a "meaningful" linkage, it is a linkage that can be described by one or more of these terms). For an export restraint to impact the domestic market such that it causes a private entity to provide otherwise exported goods to domestic consumers, it must restrain exports in a meaningful way.

The LERs are not export prohibitions (where meaningful restraint is a given) nor are they automatic export licensing measures (where *per se* there is no meaningful restraint). Rather, they are partial export restraints that fall in between these two endpoints on the export restraint continuum. Recognizing that Commerce relied on the totality of the evidence in making its determination,[499] to assess whether there was substantial evidence of a meaningful linkage between the LERs and the provision of logs by private entities, it is necessary to examine the evidence relied upon by Commerce to support each of the contested elements of its determination.

2) The Contested Elements of Commerce's Determination

The Canadian parties argued that the LERs did not meaningfully restrain log export activity because: B.C. log owners were virtually always able to export when they sought to do so; roughly 30 percent of the B.C. coastal harvest was exported— a significantly higher percentage than observed in the neighboring coastal regions of Oregon and Washington State; over 99 percent of applications to export logs yielded automatic export authorization;[500] and, many interior log exporters chose not to act on export authorizations or export permits that they had in hand, meaning

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492 *Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570, 22,640 (May 28, 1992),* Final Affirmative Countervailing Duty Determination at 22609.

493 *Id*. at 22,609-22,610.

494 *Id*.

495 *Certain Oil Country Tubular Goods from the People's Republic of China*: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination, 74 Fed. Reg. 64045 (December 7, 2009), accompanying Issues and Decision Memorandum at 113, 119.

496 *Id*.

497 *TMK IPSCO v. United States*, 179 F. Supp. 3d 1328, 1340 (Ct. Int'l Trade 2016) at 1340.

498 *Leather from Argentina,* 55 Fed. Reg. 40,212 (Oct. 2, 1990) at 40214.

499 IDM at 139 and 145.

500 Over 99 percent of all applications to export were approved without even going through the FTEAC/TEAC process as there were no offers. Hearing Transcript, Vol. III (September 29, 2023) at 3-47. GOC-BC Parties Brief, Vol. II at 17.

they did not even export the full volume that they could have exported.[501] They argued that only a very small volume was exported from the interior (1 percent of the interior harvest) in exceptional circumstances where the value of the logs was unusually high reflecting the economics of log transportation.[502] In their view, it was unreasonable for Commerce to set aside these facts and pose a speculative counterfactual that some unknown theoretical higher volume of log exports might have been feasible absent the LER process.[503]

Commerce found that the LERs impacted the entirety of British Columbia.[504] Commerce acknowledged that virtually all log export requests were approved, that substantial quantities of logs were exported from British Columbia, and that a significant number of export authorizations were never utilized.[505] However, it found this did not demonstrate that the LERs had no restraining effect because there was no way to know how many more logs would be exported in the absence of the LERs.[506] Commerce found that log exports would have been higher but for numerous export obstacles, including blocking, surplus tests, in-lieu of manufacturing fees, and a potentially lengthy process which, in their totality, restrained exports.[507]

The Panel assesses each of the elements of Commerce's determination contested by the Canadian parties to determine if they contributed to Commerce's conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.

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

Commerce found that a "blocking system" operated in the province that created an environment in which log sellers were forced into informal agreements that lowered export volumes and domestic prices.[508] The practice was widespread throughout the province, it covered most potential exports, and almost every timber harvester had negotiated these agreements."[509] 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

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501 GOC-BC Parties Brief, Vol. II at 49-50. During the POI, log sellers ultimately decided not to export over 40 percent of the interior log volume that was approved for export. *Id*. at 19 and Hearing Transcript, Vol. III (September 29, 2023) at 3-7.

502 Hearing Transcript, Vol. III (September 29, 2023) at 3-8 referencing Exhibit LEP 3 to Canada's questionnaire response. GOC-BC Parties Brief, Vol. II at 15, footnote 33.

503 *Id.* at 50.

504 IDM at 4175.

505 IDM at 141.

506 *Id*.

507 *Id.* at 139.

508 *Id*.

509 *Id*. at 140, 141 footnote 848.

foreign purchasers.[510] The Canadian parties argued that the evidence of blocking pertained only to the B.C. coast (not to the interior where the mandatory respondents operated sawmills for which logs were obtained within close proximity); that there was no concrete evidence of blocking and its extent nor of the impediments to entering into long-term supply agreements; that 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 that Commerce had ignored affidavits and evidence from interior log suppliers that offers were rarely if at all received on the logs advertised for potential export.[511]

To support its findings Commerce relied on the following evidence: J. Wood Paper;[512] Wilson Center Commentary;[513] Merrill & Ring NOI-SC;[514] Merrill & Ring RM;[515] and a Log Producer Affidavit.[516]

The J. Wood Paper concerned log exports from the B.C. coastal region.[517] The statements in the Paper concerning blocking, impediments to exports and limitations on entering into long-term agreements with foreign purchasers related to exports from the B.C. coast and were based on a 2002 paper by D. Haley.[518] The Wilson Center Commentary presented comments of E. Miller concerning a reform process to resolve the softwood lumber dispute.[519] With respect to the LERs,

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510 *Id*.

511 GBC 57.3 Brief, Vol. II at 25-26, 46, 51-53.

512 Fraser Institute, Joel Wood, *Log Export Policy for British Columbia* (June 2014) (Petition, Exhibit 244) ("J. Wood Paper"). Referenced in IDM at 139, footnote 837.

513 Wilson Centre, Canadian Institute Commentary by Eric Miller with a response by Colin Robertson, *From Log Export Restrictions to a Market-Based Future: Towards an Enduring Canada-US. Softwood Lumber Agreement* (Nov. 1, 2016) (Petitioner's Comments – Primary QNR Responses, Volume I, Exhibit 11) ("Wilson Center Commentary"). Referenced in IDM at 139-141, footnotes 837, 838-843, 848.

514 Notice of Arbitration and Statement of Claim, Merrill & Ring Forestry L.P and Government of Canada (December 27, 2006), pp. 132-141(Petitioner's Comments – Primary QNR Responses, Volume I, Exhibit 12) ("Merrill & Ring NOI-SC"). Referenced in IDM at 140-141, footnotes 844-846.

515 Investor's Reply Memorial, Merrill & Ring Forestry L.P and Government of Canada (December 15, 2008) (Petitioner's Comments – Primary QNR Responses, Volume I, Exhibit 13) ("Merrill & Ring RM"). Referenced in IDM at 141, footnote 846.

516 Public Version of Affidavit of { *** } (Mar. 24, 2017) (Petitioner's Comments – Primary QNR Responses, Volume I, Exhibit 32).

517 J. Wood Paper at 29.

518 *Id.* at 10.

519 Wilson Center Commentary at 3. Comments included: "{b}y limiting the sales of most logs to B.C. processors, the regime substantially reduces competition and depresses prices for those that grow and harvest timber in the province" (at 6); "British Columbia's timber processors have the ability to stop exports by objecting to the granting of export licenses for B.C. logs" (at 8); "a processor merely has to make an offer on an export application in order to bring the process to a halt; hence the application is blocked" (at 8); "timber harvesters… negotiate informal supply arrangements at discounted prices with key B.C. log processors in exchange for their agreement not to block exports" (at 8); "one of the key

the author's comments appear to have related to exports of coastal logs.[520] There were no references to evidence, data, analyses or to the proportion of industry players who spoke on the condition of anonymity to support the comments on blocking and long-term agreements.[521] The Merrill & Ring NOI-SC, Merrill & Ring RM and the public version of the Log Producer Affidavit showed that Merrill & Ring was subject to blocking measures for its exports from the B.C. coast in 2013-2016.[522] Among other things, Merrill & Ring had to rearrange or negotiate agreements to sell logs to domestic processors at below market prices (a portion of which were sold below the cost of production) and the uncertainty created by blocking affected its ability to enter into long-term supply agreements with foreign customers.[523]

It is clear from the record that the sawmills of the mandatory respondents were situated in the B.C. interior. The IDM did not explain how evidence relating to exports from the B.C. coast, evidence based on a 2002 paper, and evidence from a single coastal exporter during the 2015 POI, provided substantial evidence for its findings regarding the B.C. interior during the POI, in particular its findings that blocking was common/widespread throughout the province, that it covered most potential exports, and almost every timber harvester had negotiated blocking agreements.[524] Moreover, the IDM did not explain how the evidence supported its findings regarding widespread blocking in the interior given that export permits were not requested for approximately 40% of authorized export volumes from the interior, potentially indicating that

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impacts of the blocking threat is that B.C. timber harvesters cannot enter into long-term supply agreements with international customers.. {n}or can they take long positions on ocean freight transport" (at 9); "{a}lmost every timber harvester has negotiated side agreements to keep its exports from being blocked" (at 9); and "the net effect of B.C. policy is to force timber harvesters to make next to nothing (or worse) on the domestic side of their business in order to safeguard their profitable export operations" (at 8).

520 The Commentary does not explicitly mention interior logs. The Panel acknowledges Commerce's argument that none of Mr. Miller's comments "were geographically limited to the Coast region" (Commerce 57.2 Brief, Vol. III at 124); however, this appears not to be the case for the following references in the Commentary which appear to refer to the coast: "{n}or can they take long positions on ocean freight transport" (at 9) (Ocean shipping appears to be a coastal log export phenomenon.); "domestic discount of over 28% relative to export prices" (at 9) citing endnote 20 which is data for the "multiplication factor for coast"; "the gap between B.C. Hem{lock} Grade Logs and U.S. Hemlock #3 Sawlog" (at 10) (Hemlock appears to be mostly a coast species GBC 57.3 Brief, Vol. II at 6-7); "{m}any of the largest timber harvesters make a substantial share of their profits from exports for which they can receive world market price" (at 8) (Given that the record shows that a large proportion of coastal logs are exported, and a small proportion of interior logs are exported, it is likely that this comment relates to coastal logs); and the comment that "{a}lmost every timber harvester has negotiated side agreements to keep its exports from being blocked" and the reference to impediments to entering into long-term supply agreements appear to be the same impediments that were addressed in the J. Wood Paper and the 2002 paper by D. Haley in the context of coastal log exports which is listed as a source in the endnotes to the Commentary.

521 The Commentary appears to reflect the personal opinions of the author who is identified as a cross-border consultant on trade issues with no identified forest industry experience. *Id*. at 18.

522 Merrill & Ring NOI-SC at 8 (claim e), 15. Log Exporter Affidavit at 1-3.

523 *Id.*

524 IDM at 140, 141 footnote 848. Commerce 57.2 Brief, Vol. III at 39.

export demand was satisfied, and interior export volumes were small in comparison to total interior production (less than 2 percent), potentially indicating that export volumes were too small to instigate blocking agreements across the entire interior.

The Panel therefore remands this action to Commerce with the instructions to provide reasoned explanations of: (i) 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 B.C. interior during the POI; and (ii) how such findings supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.

b) In-Lieu-of-Manufacturing Fees

Commerce found that the fees in-lieu-of-manufacturing increased the cost of exporting, as compared to producing domestically, and represented another impediment to the export of logs.[525] It acknowledged that approximately 58 percent of provincial log exports were subject to the fees.[526] While fees for exports from the B.C. interior were lower, the fact that any fee was required at all was significant.[527]

The Canadian parties argued that the fees did not pose a meaningful obstacle to log exports and there were no fees payable on almost half of British Columbia log exports as a whole, and more than half in the Southern interior.[528] Many interior log exporters paid the fee but opted not to export, which was the case for almost 25 percent of the log export volumes in the Southern interior during the POI.[529]

The imposition of fees is not determinative of their significance to an export sales transaction. Relevant facts in assessing their significance could include their relative proportion to export selling prices, their prevalence in export transactions, and their effect on decisions to export.[530] 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. Moreover, the IDM did not explain how the evidence supported its findings regarding the significance of the fees on export transactions in the interior given that export permits were not requested for approximately 40% proportion of authorized export volumes from the interior, potentially indicating that export demand was satisfied even with the fees paid.

The Panel therefore remands this action to Commerce with the instructions to provide a

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525 IDM at 142.

526 *Id*.

527 *Id.*

528 GOC-BC Parties Brief, Vol. II at 55-56.

529 *Id*. at 56.

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

reasoned explanation of: (i) 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 POI from the B.C. coast and interior, and (ii) how such findings supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.

c) Duration of the Log Export Permit and Approval Process

Commerce found that the process to apply for and receive an export permit under a Ministerial Order could take between seven and thirteen weeks.[531] It acknowledged the position of the GBC that the entire process was frequently concluded in as little as two and a half weeks.[532] However, it found that the fact that an application for an export permit had to be filed at all introduced an additional burden on log sellers seeking to export, and the fact that the permit was not automatically approved rendered exports uncertain.[533] This hindered the free export of logs and discouraged log sellers from considering all market options and seeking the highest price for their logs.[534] Commerce argued that the potentially lengthy nature of the application process and the burden and uncertainty of the process, contributed to Commerce's finding that the LERs in fact restrained exports.[535]

The Canadian parties argued that evidence contradicted Commerce's contention that the uncertain timeframe for obtaining log export approval constituted an additional burden that log exporters had to bear that discouraged log sellers from considering all market options and seeking the highest price for their logs.[536] They referred to evidence that the process moved quickly and did not impede exports, that authorization was typically received within two-and-a-half weeks of an application, and that once authorization was received export permits were received essentially immediately.[537] They argued that the evidence did not support the proposition that the LER process burdened the mandatory respondents, much less to any meaningful degree.[538]

The imposition of an export permit and approval process is not determinative of whether it hinders exports and discourages exporters. The IDM did not explain how the process gave rise to

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531 IDM, footnote 851 referring to PDM at 54.

532 *Id*. at 142. The Canadian parties argued that the record demonstrated that the surplus test process moved quickly, with over 86 percent of all transactions during the POI reaching export authorization within 2.5 weeks of the date of advertising, and the bulk of the remaining applications receiving their authorizations in only one week more. GOC-BC Parties Brief, Vol. II at 18. Commerce responded that the process nevertheless prevented log suppliers from freely pursuing export sale opportunities. Commerce 57.2 Brief, Vol. III at 125.

533 *Id*.

534 *Id*.

535 Commerce 57.2 Brief, Vol. III at 124-125.

536 GOC-BC Parties Brief, Vol. II at 54.

537 *Id*.

538 *Id*. at 54-55.

the hinderance and discouragement of export sales from the interior nor did it respond to the contradictory record evidence. Moreover, the IDM did not explain how the evidence supported its findings regarding the hinderance and discouragement created by the process given that export permits were not requested for approximately 40% of authorized export volumes from the interior, potentially indicating that export demand was satisfied even with the operation of the process.

The Panel therefore remands this action to Commerce with the instructions to provide a reasoned explanation of: (i) how the evidence, including that referred to in the previous paragraph, supported its findings that the duration of the export permit and approval process hindered B.C. interior exports and discouraged B.C. interior exporters; and (ii) how such findings supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.

d) Export and Import Permits Act (EIPA)

Commerce affirmed the finding in its Preliminary Determination that all logs were included in the export control list under the Export and Import Permits Act (EIPA) and export violations were punishable and subject to penalties.[539] Through the combination of the surplus test and the legal penalties for exporting without a permit, the GOC entrusted and directed private log suppliers to provide logs to mill operators.[540] It acknowledged that there was no evidence that the penalties were ever applied to softwood lumber exports, but this did not change the fact that the penalty provisions applied.[541] Commerce argued that the presence of penalties, including severe fines and jail time, were probative of the GOC's and GBC's entrustment or direction, as it showed that the in-province log processing requirement bore the full force of law.[542] The EIPA requirements compelled log suppliers to divert to mill operators logs that could otherwise be exported.[543] Commerce argued that the reasonableness of this finding was supported by one of the purposes of the EIPA which was "to ensure that any action taken to promote the further processing in Canada of a natural resource that {was} produced in Canada {was} not rendered ineffective by reason of the unrestricted exportation of that natural resource."[544]

The Canadian parties argued that Commerce's assertion that EIPA was relevant to its analysis of restraints on B.C. log export activity was legally irrelevant, unreasoned, and unsupported by substantial evidence.[545] In their view, given that there was no evidence that penalties were applied to log exports, Commerce's conclusion regarding the EIPA penalties on softwood lumber was hypothetical.[546]

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539 IDM at 142.

540 *Id.*

541 *Id*. at 143.

542 *Id*.

543 *Id*. at 126-127.

544 *Id*.

545 GOC-BC Parties Brief, Vol. II at 59.

546 *Id.* at 59.

The record supports Commerce's finding that the EIPA provisions were formal and enforceable though penalties that bore the full force of law. However, Commerce did not explain how this enforceability compelled log suppliers to divert to mill operators logs that could otherwise be exported. The evidence indicates that once an export authorization was received, export permits were essentially immediate, potentially indicating that the authorization was the determinative action, not the permits and their enforcement.[547]

The Panel therefore remands this action to Commerce with the instructions to provide a reasoned explanation of how the evidence on the enforceability of the export permits, including that referred to in the previous paragraph, supported its findings that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.

e) Economic Feasibility of Exporting Logs from the B.C. Interior

Commerce found that the LERs directly impacted the B.C. interior and provided a financial contribution to companies operating in the interior because logs could be and were exported from the interior.[548] The Canadian parties argued that the substantial evidence did not support Commerce's conclusions, rather, it contradicted them and demonstrated that it was not economical to export logs from most of the interior due to geographic factors and high log transportation costs.[549] Commerce rejected the Canadian parties' arguments that the record established it was not economically feasible to export logs from much of the interior on several grounds. We address each argument in turn.

(i) Exports from the Tidewater, Southern Interior and the Rest of the Interior

Commerce found that log exports directly impacted the interior because logs could be and were exported from the B.C. interior.[550] The existence of substantial exports from various sections of the interior demonstrated exports were feasible.[551]

The Canadian parties argued that it was not economical to export logs from most of the interior due to geographic factors and high log transportation costs.[552] In Commerce's view, the Canadian parties' arguments were contradicted by evidence of significant log exports from the tidewater interior (approximately 8 percent of provincial exports) and the southern interior (approximately 2 percent of provincial exports) which indicated that it was feasible to export from the interior.[553] While these exports predominantly originated from a different area of the interior, record evidence reflected that the vast majority of mills in the interior overlapped within 100 miles

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547 See above and GOC-BC Parties Brief, Vol. II at 54.

548 IDM at 144, 145, 147.

549 GOC-BC Parties Brief, Vol. II at 59-60, 62, 64-65.

550 IDM at 147.

551 *Id*. at 148.

552 GOC-BC Parties Brief, Vol. II at 59-60, 62, 64-65.

553 IDM at 147-148, footnotes 884-885 citing GOC Primary QNR Response Part 1 at page LEP-5.

of one another and with potential export markets.[554]

The Canadian parties acknowledged these exports but argued that the province was divided into three distinct geographic regions—the tidewater, which had access to water-borne transportation, the southern interior, which adjoined the U.S. border, and the rest of the B.C. interior where the sawmills of the mandatory respondents were located.[555] With respect to the rest of the interior, the Canadian parties argued that it was geographically too far removed from either the Pacific Ocean or the U.S. border to overcome log transportation costs.[556] They acknowledged that there was a small amount of exports from the rest of the interior that occurred from exporters who were proximate to either the tidewater interior or to the southern interior along the U.S. border or from exporters and involved aberrational transactions or exceptionally high-value logs.[557]

The record indicates that there were exports from the three regions during the POI, as measured by export permits.[558] Accordingly, Commerce's finding that exports could and were exported from all three regions of the B.C. interior was supported by substantial evidence.

However, the IDM did not explain how the fact these exports occurred supported Commerce's finding that there was a financial contribution in the form of the provision of goods to companies operating in the interior. For such a financial contribution to exist, the LERs had to have restrained log exports from the interior to a meaningful degree such that they caused log suppliers to provide logs to interior log consumers. Commerce did not explain how these exports contributed to the existence of this linkage in light of their relative volumes compared to B.C. exports as a whole and their relative volumes compared to the different regions within the interior, including for "the rest of the interior" where the sawmills of the mandatory respondents were located.[559]

Commerce disagreed with the Canadian parties' argument that "the record establishes that it is not economically feasible to export logs from much of the interior" for two reasons.[560] First, their argument was based on the Kalt Report and Bustard report which were commissioned

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554 *Id*. at 148 and footnote 886.

555 GOC-BC Parties Brief, Vol. II at 4-5. GBC 57.3 Brief, Vol. II at 28-29.

556 *Id*.

557 GOC-BC Parties Brief, Vol. II at 12, footnote 165. Kalt Report #1, LEP-1 at 61. The IDM referred to "some requests to export B.C. logs to Alberta during the POI". This information was from Exhibit AB-S-3. Footnote 5 to Table 3 of that exhibit is consistent with Canada's description of these exports.

558 Exports from the Coast accounted for 88 percent of total exports when measured by export permits, with exports from the interior as a whole accounting for the remaining 12 percent. Exports from the interior were as follows: Southern interior (205,773 m^3); tidewater (437,170 m^3); rest of the interior (52,392 m^3); and total interior (695,335 m^3). Kalt Report #1, LEP-1 at 36 (coastal share of exports), 59 (Figure 25 – Total Volume for Interior), 69 (Figure 31- Total Volume for Southern Interior), 76 (Figure 35 – Total Volume for Tidewater). Rest of interior derived by subtracting from total interior permit volume those from tidewater and southern interior. The rest of the interior accounted for 7.5% of total interior export permit volumes.

559 *Id*.

560 IDM at 147.

specifically for purposes of the investigation and, as such, carried limited weight given their potential for bias and conclusions that were tailored to generate a desired result.[561] Second, the argument, and presumably the evidence upon which it was based, was contradicted by other record evidence that logs from different parts of the interior were exported (tidewater, southern interior and exports to Alberta).[562]

Although the fact that an expert report is prepared for an investigation is a factor that could be considered when assigning weight, it cannot be the sole factor upon which to assign limited weight.[563] In this instance, Commerce went further to explain that the argument, and presumably the evidence including the Kalt Report, were contradicted by the above record evidence of exports from the interior. While contradictory evidence is relevant to assigning weight to argument and evidence, the contradiction in this instance is not apparent. Both the Canadian parties and the Kalt Report acknowledged the exports from the tidewater, southern interior and to Alberta, but argued that it was not economically feasible to export logs from "much of" the interior which included the "rest of the interior" where the sawmills of the mandatory respondents were located.[564] There is no indication in the IDM that Commerce considered any of the data related to exports from the part of the interior in which the mandatory respondent's sawmills were located or the explanations of why those exports were lower than other B.C. regions.

Facts that were unaddressed in the IDM indicate that the exports that occurred might not have contributed to Commerce's finding that there was a financial contribution in the form of the provision of goods to companies operating in the interior. These facts include the following which pertain to the interior as a whole:

- 98.5 percent of exports advertised for export received no offer and were authorized for export.[565] This might indicate that any restraining effect of the authorization process was small, only 1.5 percent of advertised exports.

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561 *Id*.

562 *Id*. at 147 and footnote 884.

563 Commerce has discretion when assigning weight to expert reports. However, it must exercise this discretion in a manner that is reasonable and that avoids arbitrary action. If Commerce abuses its discretion or acts arbitrarily, its determination is not in accordance with law. *Pakfood Pub. Co. v. United States*, 724 F. Supp. 2d 1327, 1337 (Ct. Int'l Trade 2010) ("{W}here an agency is afforded a measure of discretion in administering a statute, the exercise of that discretion is not in accordance with law if it is arbitrary"). Expert reports commonly provide evidence of a specialized and/or technical nature, include opinion evidence of the authoring expert, introduce facts not otherwise on the record, and/or provide context for existing record evidence. If the sole fact they were prepared for an investigation justified assigning them limited weight, it could render the entire class of such evidence *inutile*, an outcome which would be arbitrary.

564 GOC-BC Parties Brief, Vol. II at 12, footnote 165. Kalt Report #1, LEP-1 at 61, 59 (Figure 25), 69 (Figure 31), 76 (Figure 35).

565 Kalt Report #1, LEP-1 at 59, Figure 25 – Authorized after no offer (% of advertised volumes). Where an expert report contains objective and verifiable facts which are separate from opinion and methodology, those facts form part of the factual record before Commerce and must be considered.

- Export permits were requested for only 58.9 percent of those authorized for export.[566] This might indicate that export demand was filled, further exports were not economically feasible, and log exports were not restrained.
- Requested export permits for exports amounted to only 1.4 percent of the interior harvest.[567] This might indicate that, to the extent there was a restraining effect on exports, it affected such a small portion of the interior harvest that it could not have meaningfully caused log suppliers to provide logs to interior log consumers.

The Panel therefore remands this action to Commerce with the instructions to (i) reconsider the data in the report pertaining to the exports; and (ii) provide a reasoned explanation of how the evidence concerning exports from the interior, including that referred to in the previous paragraph, supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.

(ii) MPB Killed Logs

Commerce found that even though MPB killed logs had not been exported, they could be exported from the BC interior which demonstrated that it was economically feasible to export from the interior.[568] Commerce relied upon a report prepared by R.E. Taylor & Associates ("Taylor Report") which was prepared for a GBC agency (and not for the investigation) which, for that reason, was considered to have more reliable data and conclusions than the report relied on by the Canadian parties.[569] Commerce noted that the report was gathered from extensive interviews with companies and organizations involved in utilizing MPB damaged logs, including the three mandatory respondents with BC operations in this investigation.[570] In addition to these considerations, Commerce assigned limited weight to the Bustard Rebuttal Report relied upon by the Canadian parties because it was commissioned for the purpose of the investigation and had the potential for bias and conclusions that were tailored to generate a desired result.[571] The Canadian parties argued that the report cited by Commerce explained that viable exports were quite limited with high transportation costs being a major factor and they criticized Commerce for ignoring the Bustard Rebuttal Report which explained that actual log transportation costs exceeded two-fold the costs estimated in the study on which Commerce relied.[572]

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566 *Id*. – Total permits requested as a percent of total authorized exports.

567 *Id*. – Total export authorizations requesting permits/harvest.

568 IDM at 148-149.

569 *Id*. referencing R.E. Taylor & Associates Limited, Mountain Pine Beetle Alternative Business and Market Options, Phase 2 Final Report, August 11, 2005 ("Taylor Report"), Petitioner's Comments on Initial Questionnaire Responses, Part 2, Exhibit 21.

570 IDM at 149.

571 *Id*. at 148 referencing the Bustard Rebuttal Report, Exhibit GOC/GBC-2. This does not appear to be a situation where the sole reason that the Taylor Report was chosen over the Bustard Rebuttal Report was that the latter was commissioned for the purpose of the investigation.

572 GBC 57.3 Reply Brief, Vol. II at 30-31.

The Taylor Report had the attributes of reliability identified by Commerce, including the numerous companies and individuals visited and interviewed. However, its conclusions were more nuanced than indicated by Commerce. The report concluded that "[a]lthough there may appear to be many potential opportunities for MPB affected timber, closer analysis indicates that the economically viable options for this wood are quite limited."[573] If there was "an opportunity for a positive return (market revenue greater than cost to market), then a business case for log exports [could] be made."[574] Transportation costs were the most significant cost component in delivering the MPB affected logs to market.[575] Thus, the potential for economically viable exports was contingent upon revenues exceeding costs, with transportation being the most significant cost.

Given that the Taylor Report was published in 2005, it could not be reasonably assumed that its revenue and cost data were relevant to the 2015 POI without first examining the data prevailing in 2015. There is no indication in the IDM that Commerce considered this. The Bustard Rebuttal Report indicates that transportation costs had almost doubled in 2015 compared to 2005.[576] Thus, there was record evidence that the 2005 costs in the Taylor Report were out of date.

The Panel therefore remands this action to Commerce with the instructions to: (i) reconsider the data in the report pertaining to transportation costs; and (ii) provide a reasoned explanation of how the evidence concerning potential exports of MPB killed logs from the interior supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.

(iii)100-Mile Radius Overlap of Sawmills

Commerce found that, while exports predominantly originated from a different area of the interior, a map in the record evidence reflected that the vast majority of mills in the interior overlapped within 100 miles of one another and with potential export markets.[577] The Canadian parties did not challenge the 100-mile overlapping circles on the map but argued that Commerce failed to account for geography and transportation economics and also the fact that during the POI the average distances logs travelled to reach processing were less than 100 miles.[578]

A review of the evidence cited by the Canadian parties indicates that, for the exporters that provided evidence, the distances travelled were less than 100 miles, although some distances were greater. There was no clear evidence that the average transportation distance for all log exporters located in the interior with the mandatory respondents, including those not providing evidence, was less than 100 miles. As cited in the IDM, the Bustard Report stated that "[i]n most interior areas it is economically feasible to truck export logs… approximately 228km (142 miles) each

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573 Taylor Report at 1.

574 *Id*. at 39.

575 *Id.* at 41.

576 Bustard Rebuttal Report, at 4, Table 1.

577 *Id*. at 148 and footnote 886. Citing Petitioner Comments – Primary QNR Responses at Exhibit 19 which was a map in which a 100-mile radius was drawn around the sawmills in the BC interior, which demonstrated that the BC interior sawmills all overlap with each other.

578 GBC 57.3 Reply Brief, Vol. II at 29-30.

way."[579] With respect to geography, the Bustard Report stated that "[l]og export movement in the Interior is restricted less by terrain and more by the cost of overland transport by truck."[580] The Report defined "Interior" to refer to the Northern/Central Interior and Southern Interior regions, excluding the tidewater from this statement.[581]

The Panel does not find fault with Commerce's finding regarding the 100-mile overlaps as they are apparent on the map. However, Commerce did not explain how this finding supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers. The Panel therefore remands this action to Commerce to provide such an explanation.

f) Log "Ripple" Effect

Commerce found that, even if the LERs only directly impacted logs from coastal regions, the restrictions on exports of those logs would influence the overall supply of logs available to domestic users, which would have a ripple effect on the volume and prices of logs throughout the entire province, including the interior of British Columbia.[582] The Canadian parties argued that the substantial evidence did not support Commerce's finding that the restriction on exports on the coast "rippled" throughout the interior, regardless of geography or the log haul costs required to reach an ocean port or sawmills south of the U.S. border.[583] Rather, the evidence demonstrated that log markets were local and that prices did not equilibrate between them.[584]

Commerce observed that the Canadian parties' arguments that log markets were inherently localized such that prices were not equalized across different markets (i.e., there was no ripple effect) were based on the Kalt and Leamer reports.[585] These reports were commissioned for the investigation and, as such, carried only limited weight given their potential for bias and data and conclusions that were tailored to generate a desired result.[586] In addition, these reports were contradicted by other record evidence.[587]

Commerce supported its finding by referring to four independent reports (i.e., they were not commissioned for the purposes of the investigation) that were filed by the Petitioner that contradicted the Kalt and Leamer reports and that indicated that log markets covering large areas

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579 IDM at 148 citing the Bustard Report, Exhibit LEP-2 at 10.

580 *Id*.

581 Bustard Report, Exhibit LEP-2 at 3.

582 IDM at 144.

583 GOC-BC Parties Brief, Vol. II at 65-66.

584 *Id*. at 73.

585 IDM at 145.

586 *Id*.

587 *Id*.

intersected by international borders could be integrated.[588] In Commerce's view, the reports identified areas where there was significant integration in a timber market over large areas covering multiple jurisdictions and instances where logs were following the "law of one price."[589] Acknowledging that logs in the B.C. coast and interior were not identical in their species composition, Commerce observed that the logs harvested in the two regions were interchangeable, and thus a government action (such as an export restraint) that directly impacted one type of log species would impact the market for other log species in the province.[590] Since the coastal and interior species were used to produce similar products including lumber, a restraint on either coastal hemlock or coastal fir would impact not only the supply of interior hemlock and fir supply, but also the availability of other interchangeable log species, including lodgepole pine.[591] In light of its finding that log markets were integrated, Commerce found that the existence or absence of transportation corridors between the BC interior and the BC coast did not impact its finding.[592]

Although Commerce was correct that the reports indicated that geographically separate markets could be integrated, the determination of whether such integration existed was affected by numerous factors. The Nordic Timber Market report, which focused on the spruce timber market in the Nordic countries, acknowledged that several factors could be relevant including transaction costs between the markets (e.g., transport and insurance costs), whether such costs were or were not passed on to suppliers, whether there was timber trade between the markets, and the level of competition between the markets.[593] The report found that because Sweden and Finland had larger timber consuming industries than Norway and Denmark, price changes in the former could affect prices in the latter but not *vice versa*.[594] The Finish Roundwood Market Integration report, which studied stumpage prices in four regions and four wood assortments (pine sawlogs, spruce sawlogs, pine pulpwood, spruce pulpwood), found long run market integration only in the case of pine sawlogs but not in the case of the other three products.[595] It also found that stumpage prices in the Finnish roundwood market were driven by prices in the main wood-using regions and the effects from smaller regions were of minor importance.[596] The Timber Price Dynamics Following a Natural Catastrophe report, which focused on two sub-markets in South Carolina, found cointegration for standing timber but

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588 *Id*. at footnote 896 referring to Petitioner Comments – Primary QNR Responses at Exhibit 3 ("Spatial Integration in the Nordic Timber Market: Long-run Equilibria and Short-run Dynamics"), Exhibit 4 ("Roundwood Market Integration in Finland: A Multivariate Cointegration Analysis"), Exhibit 5 ("Timber Price Dynamics Following a Natural Catastrophe") and Exhibit 8 ("Transmission of price changes in sawnwood and sawlog markets of the new and old EU member countries").

589 *Id*. at 146.

590 *Id*.

591 *Id.* at 147.

592 *Id*.

593 Petitioner Comments – Primary QNR Responses, Exhibit 3 at 488, 490, 495-496.

594 *Id*. at 490, 497.

595 Petitioner Comments – Primary QNR Responses, Exhibit 4 at 241, 252-256, 259.

596 *Id*. at 258.

observed that its finding was at variance with the existence of an aggregate pine sawtimber market for the entire South.[597] It observed that aggregate sawtimber markets may be responding to local markets, other input prices, and segmented product demand.[598] Finally, the EU Sawnwood and Sawlog report, which focused on sawnwood and sawlog prices in selected EU countries, found that a cointegration analysis of price transmission between prices at two market levels was not feasible.[599] This could have been because of differences in price transmission processes between countries, huge structural changes during the study period (e.g., increased production, internationalization, increased privatization), extreme weather conditions, steep downward trends in price margins for some countries, and fluctuations in production, demand and prices.[600]

Along with these four independent reports, the Petitioners filed five other independent market integration reports which were not referred to in the IDM. These reports indicated that integration and the law of one price in timber and log markets were not a certainty but were dependent on the markets' characteristics (in many examples market integration and the law of one price did not exist).[601]

In the IDM Commerce referred to the four reports to support its finding that the effect of the LERs on the coastal areas would "ripple" through to the B.C. interior without addressing the other independent reports on the record and without addressing any of the above factors.

The Panel therefore remands this action to Commerce with the instructions to:

(i) Explain whether and how it evaluated the factors identified in the above reports as they apply to the relevant facts in the B.C. coastal, tidewater, southern interior and rest of interior markets. Such factors include: transaction costs (e.g., transportation costs); whether or not such costs were passed on to suppliers; the level of log production and demand in each market; the existence and magnitude of trade and competition between the markets; and whether price effects were transmitted from

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597 Petitioner Comments – Primary QNR Responses, Exhibit 5 at 158.

598 *Id*.

599 Petitioner Comments – Primary QNR Responses, Exhibit 8 at 117.

600 *Id*. at 117-118.

601 Petitioner Comments – Primary QNR Responses at Exhibit 1, J.M. Daniels, USDA, Stumpage Market Integration in Western National Forests, March 2011, at Abstract ("Aside from… four forests, there is no evidence that the law of one price holds for national forest timber markets in the West"); *Id*., Exhibit 2 at Abstract ("southern timber regions are not fully integrated. Our results imply that a single market does not exist across the entire U.S. South"); Exhibit 6 at Abstract ("the law of one price is not applicable and markets are not fully integrated for any of these hardwood stumpage commodities {hardwood pulpwood, mixed hardwood sawtimber, oak sawtimber in six U.S. states}"); *Id*., Exhibit 7 at Abstract ("Cointegration test results offer limited support for the Law of One Price in the South for {pulpwood and sawlog markets}… The southern pine sawlog market can be divided into four or five submarkets…") and *Id*. Exhibit 9, Table 1 at 4619-4620 (this table summarizes literature on market integration of forest products. In some studies, including studies concerning Canada, market integration and/or the law of one price were not supported, in others they were supported.

the coast to the interior or *vice versa,* and how these factors affect the relevant tree species.

(ii) Following this reconsideration, provide a reasoned explanation of how the ripple effect supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.

D. Conclusion on Financial Contribution

The Panel finds that it cannot sustain Commerce's determination regarding the countervailability of the LER without further explanation or reconsideration from Commerce on its reasoning on certain material facts and issues. The Panel finds that Commerce did not consider the record as a whole, including evidence that fairly detracted from the weight of the evidence in support of Commerce's determination. The Panel will reassess the countervailability of the LER upon reviewing the results of the remand.

2. Benchmark Calculation

Given the Panel's determination regarding Commerce's financial contribution finding, the Panel exercises judicial economy regarding 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 or otherwise in accordance with law, we will reconsider the impact of such results on the Panel's determination here.

V. Specificity

1. Analytical Framework

Various Canadian parties contended that a number of subsidy programs subject to this Panel review were erroneously found by Commerce to be regionally specific, *de jure* specific or *de facto* specific within the meaning of Section 771(5A)(D) of the Act.[602]

For a subsidy to be countervailable, it must be specific under Section 771(5A).[603] Export and regional subsidies are considered to be automatically specific.[604] Domestic subsidies are specific only if they are provided in law (*de jure*) or in fact (*de facto*) to an enterprise or industry or a group of industries.[605] Given that the legal and factual standards are different for each form of specificity, the Panel has separately addressed the applicable legal and factual standards and case law for the three kinds of specificity.

If parties raised other issues related to the subsidy program apart from specificity (such as whether the subsidy was tied to subject merchandise), the Panel addressed those other issues where it determined that Commerce's finding of specificity was supported by substantial evidence and in

602 19 U.S.C. § 1677(5A)(D).

603 19 U.S.C. § 1677(5A).

604 19 U.S.C. § 1677(5A)(A), (5A)(D)(iv).

605 19 U.S.C. § 1677(5A)(D).

accordance with law. When the Panel determined that Commerce's finding of specificity was not supported by substantial evidence or in accordance with law, the Panel issued a remand order to address the specificity issue only because if Commerce found on remand that the program was not specific, the other issues would not need to be addressed.

Commerce's regulations that address the specificity requirements are limited and do not address the issues raised by the parties.[606] The Statement of Administrative Action for the Uruguay Rounds Agreements Act ("SAA")[607] contains guidelines on the intent underlying the statute's specificity requirements and how Commerce should implement them.[608] The U.S. Congress has said that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements Act in any judicial proceeding in which a question arises concerning such interpretation or application."[609] Accordingly, the Panel relied not only on the relevant statutory provisions, but also on the SAA and case law in reaching its decisions on specificity.

2. Regional Specificity: The Canada-New Brunswick Job Grant Program

The Government of New Brunswick and the New Brunswick Lumber Producers (collectively "GNB") objected to Commerce's decision to countervail the Canada-New Brunswick Job Grant Program. [610] The GNB argued that the program was not regionally specific within the meaning of 771(5A)(D)(iv). [611]

A regional subsidy exists "{w}here a subsidy is limited to an enterprise or industry located within a designated geographical region."[612] Once Commerce makes a finding of regional specificity, the specificity analysis ends there. This understanding of the statute is confirmed by the SAA which provides that "subsidies provided by a central government to particular regions (including a province or a state) are specific regardless of the degree of availability or use within the region." [613]

The GNB argued that the Canada-New Brunswick Job Grant Program is not specific to a geographical region because the program is part of the federal "Labour Market Agreements" whereby all provinces and territories are given federal funding to increase labor participation and to develop a skilled workforce.[614] The GNB argued that the goal of the program is the same throughout Canada and contends that the situation in this case is like that in *Live Cattle from*

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606 19 C.F.R. § 351.502.

607 H.R. Doc. No. 103-316, Vol I (1994) reprinted in 1994 U.S.C.C.A.N. 4040 ("SAA").

608 SAA at 929-932.

609 19 U.S.C. § 3512(d); 63 Fed. Reg. 65,348, 65,357 (November 25, 1998). *See also AK Steel Corp. v. United States*, 226 F. Sd 1361, 1368-69 (Fed. Cir. 2000).

610 GNB Rule 57.1 Brief at 60.

611 *Id*.

612 19 U.S.C. § 1677(5A)(D)(iv).

613 SAA at 932 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4244.

614 GNB 57.1 Brief at 60-62.

Canada[615] involving a federal program called the Net Income Stabilization Act ("NISA"). In *Live Cattle from Canada*, Commerce considered whether the NISA was regionally specific because certain commodities, including cattle, in certain provinces were not eligible commodities under that program. Commerce concluded that the program was not regionally specific because the producers elected not to participate at their own choice, not because the program was limited to an enterprise or industry located in a particular region.[616] The GNB argued that this case stands for the proposition that differences in the administration of a federal program among provinces does not create regional specificity.[617]

Commerce responded that the New Brunswick program is regionally specific.[618] Commerce noted that each province enters into separate, individual agreements with the GOC to develop a job program, such that the Canada-New Brunswick Job Grant Program does not "{represent} one aspect of a more comprehensive federal program."[619] Commerce further noted that the GNB had itself explained that "{u}nder the agreement, the Government of New Brunswick has the primary responsibility to design and deliver a Canada-New Brunswick Job Grant … program."[620] Commerce pointed out that the GNB also determines eligibility for the program and is responsible for distributing the funds. Although the Canada-New Brunswick Job Grant Program is similar to programs in other provinces, Commerce found that GNB has a unique role in developing and administering the program.[621] The COALITION similarly argued that Commerce found that the program was "specifically tailored to the province of New Brunswick, and it is not available in other provinces or territories within Canada."[622]

Although the GNB argued that this program is like the NISA, the facts surrounding the two programs are distinguishable. In *Live Cattle from Canada*, Commerce described the program as follows:

> The Net Income Stabilization Account ("NISA") was designed to stabilize an individual farm's overall financial performance through a voluntary savings plan. Participants enroll all eligible commodities grown on the farm. Farmers may then deposit a portion of the proceeds from their sales of eligible NISA commodities (up to three percent of net eligible sales) into individual savings accounts, receive matching government deposits, and make additional, non-

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615 *Final Negative Countervailing Duty Determination; Live Cattle from Canada*, 64 Fed. Reg. 57,040 57054 (October 22, 1999).

616 *Id.*

617 GNB 57.1 Brief at 61.

618 Commerce 57.2 Brief, Vol IV at 112.

619 *Id*. at 113, citing IDM at 174.

620 GNB Response to Initial Questionnaire (March 16, 2017) (P.R. 665) ("GNB QR"), Exhibit NB-CNBJG-1 at 1.

621 Commerce 57.2 Brief, Vol IV at 113.

622 COALITION 57.2 Brief, Vol II at 133-134.

> matchable deposits, up to 20 percent of net sales. The matching deposits come from both the federal and provincial governments.[623]

Nothing in the discussion of the NISA program, however, suggests that the program itself has unique features on a province-by-province basis. Rather, the description makes clear that the program itself was the same regardless of province. The individual provinces had no input into the design of the program. The NISA program is thus distinguishable from the Canada-New Brunswick Job Grant Program. Unlike NISA, which was the same throughout the provinces, by its own admission, the GNB has the "primary responsibility to design and deliver a Canada-New Brunswick Job Grant . . . program."[624] The NISA program was the same for producers throughout Canada. In contrast, the Canada-New Brunswick Job Grant was targeted at New Brunswick producers.

In another central case involving regional specificity, the court upheld Commerce's finding that a pricing differential in electricity by region constituted regional specificity. As the court noted:

> Commerce verified (and Plaintiffs do not contest) that the cost of distributing electricity in PEA's distribution area was higher than the cost of distributing electricity in MEA's distribution area. Nonetheless, PEA-serviced companies paid the same electricity rates as their MEA analogs. As a result, PEA-serviced companies had access to something MEA-serviced companies did not: relatively cheaper electricity than RTG's costs otherwise dictated. Access to this relatively cheaper electricity was expressly contingent upon only one factor: a company's regional location within Thailand. As such, it was regionally specific.[625]

As the court's discussion in *Royal Thai* makes clear, government-controlled electricity pricing was dependent on regional location. In this case, too, access to the terms and conditions of the Canada–New Brunswick Job Grant program was expressly contingent upon a company's regional location within New Brunswick. While producers in other provinces may have had access to their own job grant program, their programs were distinct from the unique New Brunswick program.

Given the unique features of the Canada-New Brunswick Job Grant program that distinguished it from the job grant programs in other provinces, Commerce determined that the program was specifically tailored to New Brunswick producers and so reasonably concluded that the program was regionally specific. Accordingly, the Panel finds that Commerce's decision to countervail this program was in accordance with law and supported by substantial evidence.

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623 *Live Cattle from Canada*, 64 Fed. Reg. at 57,054.

624 GNB QR, P.R. 665, Exhibit NB-CNBJG-1 at 1.

625 *Royal Thai Government v. United States*, 441 F. Supp. 2d 1350, 1358 (Ct. Int'l Trade 2006). *See also Large Residential Washers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 Fed. Reg. 75,975 (December 26, 2012) and accompanying Issues and Decision Memorandum at 46 (finding that the Government of Korea had established a designated geographical region for eligibility to receive a special tax credit).

3. De Jure Specificity

The Canadian parties argued that Commerce erred in finding that the following programs were *de jure* specific: (1) Accelerated Capital Cost Allowance ("ACCA");[626] (2) Saskatchewan Manufacturing and Processing Investment Tax Credit (M&P ITC) and the Manitoba Manufacturing Investment Tax Credit ("MITC");[627] (3) Apprenticeship Job Creation Tax Credit ("AJCTC");[628] (4) Alberta Tax-Exempt Fuel Marked Fuel Program ("TEFU");[629] and (5) New Brunswick Gas and Fuel Program.[630] For the ACCA and the AJCTC, the parties only challenged the *de jure* analysis and did not challenge other portions of Commerce's analysis. For the other provincial programs, the parties challenged not only Commerce's *de jure* analysis but also other aspects of Commerce's decision, including whether there was a financial contribution associated with the program and whether the program was tied to subject merchandise. Accordingly, the Panel addresses the *de jure* standard only for the ACCA and the AJCTC and will address both the *de jure* standard and the other issues for the other programs.

When the subsidy in question is a domestic subsidy[631] Commerce must find that the subsidy is specific either as a matter of law (*de jure*) or as a matter of fact (*de facto*).[632] A subsidy is *de jure* specific where the authority providing the subsidy, or its authorizing legislation, expressly limits eligibility to the subsidy to an enterprise or industry.[633] To avoid a designation of *de jure* specificity, the administering authority must ensure that access to the subsidy is governed by objective criteria resulting in automatic eligibility, and that the criteria for eligibility are both strictly followed and clearly set forth in the relevant official materials so as to be verifiable.[634]

A. Accelerated Capital Cost Allowance

The ACCA is a deduction available under Canadian federal tax law for the accelerated depreciation of machinery and equipment acquired after March 18, 2007, and before 2016, provided that the machinery and equipment are used for the manufacturing or processing of goods for sale or lease.[635] 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).[636]

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626 GOC 57.1 Brief, Vol. III at 5; JDIL 57.1 Brief at 59.

627 GOC 57.1 Brief, Vol. III at 22-36.

628 *Id*. at 20-22.

629 *Id*. at 34-42.

630 JDIL 57.1 Brief at 57.

631 Export and regional subsidies are automatically considered to be specific. 19 U.S.C. § 1677(5A)(B), (D)(iv).

632 19 U.S.C. § 1677(5A)(D).

633 19 U.S.C. § 1677(5A)(D)(i).

634 19 U.S.C.§ 1677(5A)(D)(ii); SAA at 930.

635 GOC Questionnaire Response, Vol. III (March 13, 2017) (P.R. 357) ("GOC QR"), at GOC-CRA-45.

636 *Id*.

The GOC and JDIL argued that Commerce improperly found that the ACCA program was *de jure* specific.[637] The GOC made three arguments to support its position. 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. The GOC contended that its argument is based on the statutory language that provides that a program is *de jure* specific if legislation "expressly limits access to the subsidy to an enterprise or industry."[638] 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.[639] 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*[640] for the proposition that something more must be shown than eligibility requirements to demonstrate that a program benefits specific industries. The GOC said that in this case, the activity-based restrictions "are nothing more than eligibility criteria for use of a program which is plainly not a basis to find *de jure* specificity."[641]

In response, Commerce contended that the GOC has misconstrued the statutory requirements. The specificity portion of the statute does not define "industry" and therefore Commerce argued that it is owed deference in its interpretation of this provision.[642] Commerce further noted that its practice supported its decision.[643] 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.[644] 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.[645] In those cases, similar to the situation here,

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637 GOC 57.1 Brief, Vol III at 5; JDIL 57.1 Brief at 59.

638 GOC 57.1 Brief, Vol III at 12, citing 19 U.S.C. § 1677(5A)(D)(i).

639 GOC 57.1 Brief, Vol III at 9, citing *Certain Cold-Rolled Steel Flat Products from the Russian Federation*, 81 Fed. Reg. 49,935 (July 29, 2016) (final determination), and accompanying Issues and Decision Memorandum ("Cold-Rolled Steel Flat Products I &D Memo") at 117.

640 *PPG Industries, Inc. v. United States*, 978 F.2d 1232, 1240 (Fed. Cir. 1992).

641 GOC 57.1 Brief, Vol III at 7.

642 Commerce 57.2 Brief, Vol. IV at 16.

643 Commerce has found that the ACCA program was *de jure* specific in *Supercalendered Paper from Canada*, 82 Fed. Reg. 18,896 (April 24, 2017) (final exped. countervailing duty review), and accompanying Issues and Decisions Memorandum (IDM) at comment 32.

644 *Circular Welded Carbon-Quality Steel Pipe from Oman*, 77 Fed. Reg. 64,473 (October 22, 2012); Steel Nails from Oman, 80 Fed. Reg. 28,958 (May 20, 2015); *Circular Welded Carbon-Quality Steel Pipe from the United Arab Emirates*, 77 Fed. Reg. 64,465 (October 22, 2012).

645 *Id*.

Commerce found that an activity-based restriction created *de jure* specificity. The COALITION made similar arguments in support of Commerce's practice. [646]

The Panel finds that the GOC has 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:

> Under clause (ii), a subsidy would not be deemed to be *de jure* specific merely because it was bestowed pursuant to a 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.[647]

This 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 industries over others. 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.

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 to 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.[648] 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.

The GOC also contended that the term "industry" is defined in section 771(4) of the statute as the "*producers* as a whole of a domestic like product."[649] GOC claims that this definition of

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646 COALITION 57.2 Brief, Vol II at 104-108.

647 SAA at 930.

648 GOC QR, at GOC-CRA-45.

649 GOC 57.1 Brief, Vol. III at 8-9, citing 19 U.S.C. 1677(4)(A) (emphasis added).

industry should apply also to the term industry in the specificity section of the statute.[650] Yet, the purpose of the definition of "industry" in 771(4) is to outline what companies can be included in the domestic industry. By contrast, the specificity provisions are not intended to limit their application only to the industry producing the like product in the foreign country.[651] The word "industry" is used for different purposes in the two statutory provisions and the definition of domestic industry in section 771(4) does not inform Commerce's interpretation of the term industry in the specificity section of the law.[652]

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.[653] 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.[654] 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."[655] The COALITION similarly distinguished each of the cases cited by the GOC noting in part that "the eligibility requirements in the other cases were neutral, inclusive and expansive, and did not exclude any limitation regarding activity, industry, or enterprise."[656]

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.[657]

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650 *Id*.

651 *See* SAA at 930.

652 The Panel finds that *PPG Industries* is not relevant to the facts of this case. The court in *PPG Industries* was examining an earlier version of the countervailing duty law and related to the previous *de facto* specificity rules, not the *de jure* test. 978 F.2d at 1240.

653 The GOC argued that Commerce should have considered the structure of the country's economy when considering whether the program is available to a "limited number" citing the SAA at 931-932. GOC 57.3 Brief at 10, n. 38. Yet, the GOC failed to note that the SAA was referencing the *de facto* analysis, not the *de jure* analysis. Accordingly, the GOC's argument is not persuasive.

654 GOC 57.1 Brief, Vol. III at 13-16.

655 Commerce 57.2 Brief, Vol II at 23, citing the SAA at 930.

656 COALITION 57.2 Brief at 109.

657 *BGH Edelstahl Siegen GMBH v. United States*, 600 F. Supp. 3d 1241, 1257 (Ct. Int'l Trade 2022) (footnote omitted, emphasis added).

The court in *BGH* 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*, 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*, 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 was reasonable.

Finally, the GOC argued that those industries who are not eligible to use the ACCA can use other, similar tax benefits.[658] While only those engaged in manufacturing or processing can use the ACCA's depreciation method on the qualifying equipment, other industries are eligible to receive similar tax benefits.[659] Commerce responded that the other tax programs were not the subject of this investigation and are not integrally linked to the ACCA.[660] The Panel finds that the fact that Canadian industries may have other tax provisions that may benefit them does not diminish the fact that this particular tax provision favors one industry over another.

For its part, JDIL argued that Commerce's decision was inconsistent with the court's decision in *Carlisle Tire*.[661] JDIL noted that in *Carlisle Tire*, the court affirmed Commerce's decision that two accelerated depreciation programs were "available to all manufacturers" and thus were "not preferential."[662]

While the *Carlisle Tire* case well preceded the changes to the countervailing duty law made by the Uruguay Round Agreements Act, the facts of that case are relevant and in fact distinguishable from the case at hand. In *Carlisle Tire*, the court noted:

> {T}he court concludes that the two accelerated depreciation programs under Articles 51-1-1 and -4 are not a bounty or grant within the meaning of section 303 of the Tariff Act of 1930 inasmuch as the benefits accorded under these programs *are not preferential but rather are generally available to the entire business community* of Korea.[663]

As the court noted, the depreciation programs were "generally available to the entire business community" and as such were not preferential. The simple existence of an accelerated depreciation methodology in a tax code by itself would not necessarily result in a *de jure* finding if it was not preferential. If any enterprise could choose to use the accelerated depreciation methodology rather than, for example, a straight-line depreciation methodology, then the tax

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658 GOC 57.1 Brief, Vol. III at 19.

659 *Id*.

660 Commerce 57.2 Brief, Vol. IV at 26; see also COALITION 57.2 Brief at 117.

661 JDIL 57.1 Brief at 61, citing *Carlisle Tire Rubber Co. v. United States*, 564 F. Supp. 834, 836-39 (Ct. Int'l Trade 1983).

662 *Id*.

663 *Carlisle Ture & Rubber Co. v. United States*, 564 F. Supp. 834, 836 (Ct. Int'l Trade 1983) (emphasis added).

program would not be *de jure* specific. But here, as Commerce found, the ACCA was not available to the entire business community. It was limited and preferential in nature, excluding 11 different types of operations, such as farming, fishing, and logging. Accordingly, the Panel finds that Commerce's decision was reasonable.

JDIL also argued that Commerce's decision was unsupported by substantial evidence because the ACCA was not limited to manufacturing enterprises and industries.[664] In a parallel argument to the GOC, JDIL noted that the ACCA did not any exclude enterprises and industries including those that may have also engaged in non-manufacturing activities, so long as they otherwise used equipment for manufacturing or processing.[665] As with its response to the GOC, Commerce argued that the ACCA does exclude several specific activities from the definition of manufacturing or processing, and thus does limit access to the subsidy.[666] JDIL argued that Commerce erred by failing to consider the evidence that the ACCA was used by hundreds of corporations in a wide range of industries apart from manufacturing and processing enterprises.[667] Yet, as Commerce responded, this argument would pertain to a *de facto* analysis but was not relevant to the *de jure* analysis and therefore Commerce's rejection of JDIL's argument was appropriate. Finally, JDIL contended that Commerce's decision failed to cite any facts to support its conclusion that the ACCA favors enterprises over others.[668] Yet, again, Commerce explained that the terms of the ACCA limit access to companies and industries engaged in manufacturing or processing. Companies that do not meet this criterion cannot benefit from the ACCA.[669] Thus, Commerce did cite facts to support its conclusion contrary to JDIL's assertion.

In sum, the Panel finds that Commerce's decision to countervail the ACCA was in accordance with law and supported by substantial evidence.

B. Apprenticeship Job Creation Tax Credit

The Canadian Parties argued that Commerce improperly found that the Apprenticeship Job Creation Tax Credit ("AJCTC") was *de jure* specific.[670] This program allows employers to claim a tax credit for qualifying apprentices that are working in a prescribed so-called "Red Seal" trade.[671] 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.[672] Commerce argued that

664 JDIL 57.1 Brief at 62.

665 *Id*.

666 Commerce 57.2 Brief, Vol. IV at 29.

667 JDIL 57.1 Brief at 62.

668 *Id*. at 63.

669 Commerce 57.2 Brief, Vol. IV at 30.

670 GOC 57.1 Brief, Vol III at 20.

671 *Id*.

672 *Id*. at 22.

the program is specific by law because the program limits access to enterprises or industries engaged in one of the 56 Red Seal Trades.[673]

As quoted above with respect to the ACCA program, the SAA explains that 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.[674] The court 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.[675] In that case, 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 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).
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> …
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> 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.[676]

In this case, the AJCTC program provides a tax credit for companies employing Red Seal apprentices. Yet, as in *BGH II*, Commerce has not shown that the program "expressly limits" any company from accessing the program. Any industry could potentially employ a Red Seal Trade

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673 Commerce 57.2 Brief, Vol IV at 61.

674 SAA at 930.

675 *BGH Edelstahl Siegen GMBH v. United States ("BGH II")*, 639 F. Supp. 1237, 1244 (Ct. Int'l Trade 2023).

676 *Id.*

worker. While Commerce supposes that only certain industries employ workers in the Red Seal Trades, the law itself does not expressly limit access to certain industries and no evidence on the record supports Commerce's supposition that only certain industries employ Red Seal Trade workers. By contrast, the ACCA program expressly limits the tax deduction to those enterprises that use equipment for manufacturing or processing. In other words, by its explicit and express terms, the ACCA program limits access to the program. In contrast to the ACCA program, and like the KAV Program in the *BGH II* case, the terms of the AJCTC program do not *expressly* limit access to the subsidy. Moreover, as the court also explained in *BGH II*, 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 specific subsidy.

C. Saskatchewan Manufacturing and Processing Investment Tax Credit and the Manitoba Manufacturing Investment Tax Credit

1) De Jure Analysis

The Canadian Parties argued that, like the ACCA, two similar provincial tax credit programs, the Saskatchewan Manufacturing and Processing Investment Tax Credit ("M&P ITC") and the Manitoba Manufacturing Investment Tax Credit ("MITC") are not *de jure* specific.[677] Like the ACCA, the M&P ITC is a tax credit used by corporate taxpayers acquiring machinery and equipment "for use in Saskatchewan primarily for the purpose of manufacturing and processing of goods for sale or lease."[678] Similarly, the MITC can be used by corporate taxpayers for acquiring equipment "for use in manufacturing and processing in Manitoba."[679] The Canadian Parties argued that the programs are broadly available, widely used, and contain objective criteria.[680] Commerce responded that, as with the ACCA, the two provincial programs do not contain objective criteria.[681] The SAA specifically notes that "objective criteria" must be neutral and not favor certain enterprises or industries over others.[682] Thus, eligibility criteria are not objective if they favor some enterprises or industries over others. Like the ACCA, these two programs expressly limit their application to those companies who acquire equipment or machinery to be used in manufacturing or processing, and specifically exclude certain industries. Therefore, these criteria are not objective as understood by the SAA. For purposes of the Panel's *de jure* analysis, the Panel finds that the ACCA and these two provincial programs are not substantively different. In both cases, Commerce properly noted that the programs limited eligibility to companies that use the

677 Canadian 57.1 Brief, Vol. III at 22.

678 Response of the Government of Saskatchewan to Commerce's Mar. 27, 2017 Supplemental Questionnaire (Apr. 7, 2017) (C.R.980), Exhibit SK_SUPP-MP-5 at 2.

679 GNB Questionnaire Response, Vol. I (April 7, 2017) (C.R. 945), at MBI-SUPP-12.

680 Canadian 57.1 Brief, Vol. III at 26-29.

681 Commerce 57.2 Brief, Vol. IV at 40.

682 SAA at 930.

equipment for manufacturing and processing, to the exclusion of other activities. Accordingly, as with the ACCA, the Panel finds that Commerce's decision was reasonable.

The Canadian Parties next relied on three cases for the proposition that Commerce has in the past found that programs were not *de jure* specific even though the programs had "specific limiting language."[683] In the first case, *CORE from Korea*, Commerce found a tax credit was not *de jure* specific that was given to companies who used a modern corporate bill/promissory note system to make purchases from small or medium enterprises. The Canadian Parties argued that only purchases from small or medium firms were eligible for that program, and within that group, only three methods of payment were eligible. In that case, Commerce did not consider these requirements to be specific limiting language. In another situation, Commerce found that a tax credit designed to encourage companies to invest in energy-saving facilities was not *de jure* specific, even though it was limited to energy-savings facilities.[684] The Canadian Parties argued that these cases are irreconcilable with Commerce's decision in this case with respect to M&P ITC and MITC.

Commerce responded first that *DRAMs from Korea* and *Refrigerators from Korea* involved Commerce's *de facto* specificity analysis and therefore are not relevant to this inquiry.[685] Commerce then noted it had found in *CORE from Korea* that the program in question did not have specific limiting language.[686] In this case, as with the ACCA, Commerce found that these programs have specific limiting language and therefore are *de jure* specific.[687] Thus, the difference between the two situations was the factual finding by Commerce that in *CORE from Korea* the program did not contain express limitations while, in this case, the programs did limit the application to companies acquiring equipment or machinery to be used in manufacturing or processing. As with the ACCA, the Panel finds that Commerce's decision was supported by substantial evidence.

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683 Canadian 57.1 Brief, Vol. III at 29.

684 Canadian 57.1 Brief, Vol. III at 30, citing *Corrosion-Resistant Carbon Steel Flat Products from the Republic Korea*, ("*CORE from Korea*") 71 Fed. Reg. 53,413, 53,420 (September 11, 2006)(preliminary results; *see also Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 72 Fed. Reg. 119 (January 3, 2007) (unchanged final results); *Dynamic Random Access Memory Semiconductors from the Republic of Korea ("DRAMs from Korea")*, 68 Fed. Reg. 37,122 (June 23, 2003) and accompanying Issues and Decision Memorandum at 33-34; *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea ("Refrigerators from Korea")*, 77 Fed. Reg. 2012 (March 26, 2012)(final determination), and accompanying Issues and Decision Memorandum ("*Bottom Mount Refrigerators I&D Memo*") at 33.

685 In response to this argument, the Canadian Parties noted that Commerce is required to make separate findings of specificity, such that Commerce would have had to find that the program at issue in *DRAMs from Korea* and *Refrigerators from Korea* was also not *de jure* specific as well as being not *de facto* specific. Canadian 57.3 Brief at 28. The difficulty with this argument is that the Issue and Decision Memoranda in those two cases do not discuss why Commerce did not find *de jure* specificity and thus it is not possible to evaluate whether the cases are factually similar and as such are not instructive for the Panel.

686 Commerce 57.2 Brief, Vol. IV at 41-42.

687 *Id*. at 43.

The Canadian Parties argued that Commerce failed to examine record evidence of the widespread use of these programs. According to the Canadian Parties, the widespread use of these programs demonstrated that the programs were broadly available and therefore not *de jure* specific.[688] In support of the argument that Commerce should have looked at the widespread use of the programs, the Canadian Parties cited to Commerce's decision in *Citric Acid*[689] where Commerce stated that "the large number and diverse array of industries identified does not support our preliminary finding that steam coal is provided to a limited number of industries"[690] and concluded that the program was not *de jure* specific. Commerce first responded that usage is a factor in its *de facto* analysis, but not its *de jure* analysis and therefore Commerce was not required to examine usage in this case.[691] With respect to *Citric Acid*, Commerce noted that the quoted discussion was in the broader context of whether the program was *de facto* specific as well as *de jure* specific.[692] The Panel notes that the *Citric Acid* discussion was based primarily on the respondent's own claim that the program was not *de facto* specific. Accordingly, the Panel finds that the *Citric Acid* case does not stand for the proposition that Commerce was required to examine usage in its *de jure* analysis in this case. Based on the facts of this case, Commerce explained that it found that the programs in question expressly limited the application to companies acquiring equipment "for use in manufacturing and processing." Accordingly, the Panel sustains the Department's finding of *de jure* specificity.

2) Attribution

The Canadian Parties argued that Commerce should not have countervailed these two programs because the tax credits were tied to investments at two provincial facilities that do not produce softwood lumber.[693] In particular, Tolko received benefits from these programs for its Oriented Strand Board facility in Saskatchewan and its kraft paper mill in Manitoba.[694] The Canadian Parties argued that where a benefit is tied to a particular product, Commerce's regulations regarding attribution of subsidies requires Commerce to attribute any subsidy only to that product.[695]

Commerce responded that the Canadian Parties, the GOM and the GSK never explicitly argued or presented affirmative evidence that the MITC and M&P ITC were tied to non-subject

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688 Canadian 57.1 Brief, Vol. III at 33.

689 *Citric Acid and Certain Citrate Salts from the People's Republic of China*, 76 Fed. Reg. 77,206 (December 12, 2011) (final results) and accompanying Issues and Decision Memorandum at 50.

690 *Id*.

691 Commerce 57.2 Brief, Vol. IV at 39.

692 *Id*. at 38. The Canadian Parties also noted that the court upheld Commerce's *Citric Acid* decision in *Archer Daniels Midland Co. v. United States*, 968 F. Supp. 2d 1969 (Ct. Int'l Trade 2014). The Panel notes that the court in *Archer Daniels* did not decide that usage should be a factor in Commerce's *de jure* specificity analysis and therefore the decision is not relevant to this matter.

693 Canadian 57.1 Brief, Vol. III at 32.

694 PDM at 79, 84.

695 19 C.F.R. § 351.525(b)(5).

merchandise.[696] Commerce acknowledged that none of the respondents produced softwood lumber in Saskatchewan or Manitoba during the period of investigation.[697] Commerce countervailed the program because the parties failed to argue or prove that the benefits were tied to non-subject merchandise given that Tolko was a respondent in the investigation.[698] In other words, even though the benefits were provided by other provincial governments, the benefits were received by a producer who was subject to investigation. Given that the respondents failed to argue affirmatively by discussing record evidence that would demonstrate that these benefits were specifically tied to non-subject merchandise, Commerce properly attributed the benefit to Tolko's operations as a whole.

The Federal Circuit has noted that the court takes a "'strict view' of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases."[699] The Canadian Parties proposed that Commerce should have intuited that they were arguing that the benefits from this particular program were tied to non-subject merchandise and claimed that the record evidence demonstrated this fact. Yet, the burden of proof was on the respondent to demonstrate specifically that the bestowal documents showed that these benefits were tied to non-subject merchandise.[700] Given that the Canadian Parties failed to argue and demonstrate explicitly that these particular benefits were tied to non-subject merchandise, the Panel finds that the Canadian Parties failed to exhaust their administrative remedies and therefore Commerce's decision to countervail these two programs was reasonable.

D. Alberta Tax-Exempt Fuel Marked Fuel Program and New Brunswick Gas and Fuel Program

1) De Jure Analysis

The Canadian Parties argued that Commerce erred by finding that Albert's Tax-Exempt Fuel Program ("TEFU") was *de jure* specific.[701] This program provided a partial fuel tax

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696 Commerce 57.2 Brief, Vol. IV at 45. The case brief submitted by the Government of Saskatchewan stated only "The Department should not have included any Saskatchewan provincial programs in its Preliminary Determination, as none provided any benefit to subject merchandise." GSK July 28, 2017 Case Brief at 1, C.R. 1834. The case brief submitted by the Government of Manitoba also stated only "The Department should not have included any Manitoba provincial programs in its Preliminary Determination, as none provided any benefit to subject merchandise The Department should not have included any Manitoba provincial programs in its Preliminary Determination, as none provided any benefit to subject merchandise." GMB July 28, 2017 Case Brief at 1, C.R. 1831. These generic statements fall short of raising the issue related to attribution of these particular programs.

697 Commerce 57.2 Brief, Vol. IV at 44.

698 *Id*.

699 *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007). In contrast to the exhaustion argument raised by JDIL regarding the New Brunswick benchmark that was solely a legal issue, this matter represents a factual issue related to whether the parties demonstrated with evidence on the record that the benefit was tied to non-subject merchandise.

700 *Guangzhou Jangho Curtain Wall System Engineering Co., Ltd. v. United States*, 181 F. Supp. 3d 1265, 1282-1283 (Ct. Int'l Trade 2016).

701 Canadian 57.1 Brief, Vol. III at 34.

exemption for fuel used for qualifying off-road activities. The GNB and JDIL also argued that Commerce improperly found that the similar New Brunswick Gas and Fuel program was *de jure* specific.[702] The New Brunswick 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.[703] The Canadian Parties 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 Canadian Parties argued that the program is widely used by consumers in Alberta and that the program is therefore not specific.[704] The Canadian Parties also noted that "any entity may apply for a TEFU certificate."[705] JDIL raised similar arguments, noting that a wide range of enterprises or industries can qualify for the fuel tax program.[706]

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.[707] Commerce then noted that both 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.[708] 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.[709] 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 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 this tax credit. Accordingly, the Panel finds that Commerce's finding of *de jure* specificity was supported by substantial evidence.

2) Financial Contribution

The Canadian Parties also argued that the Department incorrectly found that the TEFU program confers a "financial contribution."[710] The GNB and JDIL similarly argued that the Department improperly countervailed the Gas and Fuel program because "there is no revenue foregone and therefore no financial contribution."[711] The Canadian Parties argue that Commerce should have looked at the "purpose of the program" that was to provide fuel to unlicensed vehicles

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[702] GNB 57.1 Brief at 58, *see also* JDIL 57.1 Brief at 57.

[703] JDIL 57.1 Brief at 55.

[704] Canadian 57.1 Brief, Vol. III at 35.

[705] Declaration of Tax Exempt Fuel User Application (GOA Mar. 13, 2017 Questionnaire Response, GOA Vol. 11 at Exh. AB-TEFU-7), P.R. 381.

[706] JDIL 57.1 Brief at 58.

[707] Commerce 57.2 Brief, Vol. IV at 31.

[708] Commerce 57.2 Brief, Vol. IV at 33.

[709] Commerce 57.2 Brief, Vol. IV at 65.

[710] Canadian 57.1 Brief, Vol. III at 41.

[711] GNB 57.1 Brief at 58; JDIL 57.1 Brief at 54.

qualifying for off-road activities.[712] The GNB and JDIL similarly argued that Commerce should look to the "purpose" of the tax which was to finance public highway maintenance. By providing this tax credit, the government is only collecting a tax on those parties using the public highway system. They argued that the New Brunswick Gas and Fuel Program was designed to exempt users who operate vehicles on property and lands other than public highways. In sum, both parties claimed that the exemptions and rebates are not revenue foregone because the activity that is taxed is highway use, and the government never intended to tax those not using public highways. Citing *United States v. Eurodif S.A.*, JDIL claimed that Commerce should have considered the intent behind the law which was to raise revenue for the maintenance and construction of public roads.[713] The GNB also argued that Commerce erred when it did not conduct a verification of the program, which would have corroborated the GNB's intention to only tax users of public highways.[714]

Commerce responded that the respondents did receive a financial benefit through the tax credit and exemption. By the explicit terms of the law, these companies would have had to pay a tax of nine to thirteen cents per liter for their fuel purchases.[715] By providing the credit or exemption, the Canadian provincial governments did not collect money that would otherwise have been owed. Commerce argued that the express language of the tax provision, not the proffered intent of the law, directed its decision that a benefit was received by the respondents. Commerce distinguished the *Eurodif* case in which the court granted Commerce deference to interpret an ambiguous statutory term. Here, Commerce found no ambiguity: By its express terms, all consumers and users of gasoline must pay the tax unless they are otherwise exempted. Commerce found no evidence to support a conclusion that the consumers would not be required to pay the tax without the exemption.[716]

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."[717] Tax credits and exemptions are specifically identified by the statute as constituting a financial contribution. As a result of the provision specifically exempting them from a tax, 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 behind the law does not change this basic fact. The Panel therefore finds that the Department's decision was supported by substantial evidence and was in accordance with law.

With respect to the GNB's argument that its claims could have been proven at verification, it is well understood that Commerce's verification of questionnaire responses is based on evidence already on the record. Verification is not intended to provide a respondent with an opportunity to

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712 Canadian 57.1 Brief, Vol. III at 42.

713 JDIL 57.1 Brief at 56, *citing United States v. Eurodif, S.A.*, 555 U.S. 305 (2009).

714 GNB 57.1 Brief at 59.

715 Commerce 57.2 Brief, Vol. IV at 34.

716 Commerce 57.2 Brief, Vol. IV at 68.

717 19 U.S.C. § 1677(5)(D)(ii).

submit new evidence not otherwise on the record.[718] If the GNB had relevant evidence that proved the GNB's contention, then the information would already have been on the record and the burden was on the GNB to make this argument in its case brief. Verification could not otherwise have been relied upon as an opportunity to make its case. Accordingly, the Panel finds that Commerce did not err when it did not conduct a verification of the Gasoline and Fuel Program.

4. De Facto Specificity

A. Federal Scientific Research and Experimental Tax Credit, the Alberta Scientific Research and Experimental Development, the Manitoba Research and Development Tax Credit; the New Brunswick Research and Development Tax Credit

The Canadian Parties argued that Commerce erred when it found that one federal tax measure and two related provincial tax measures, the Federal Scientific Research and Experimental Tax Credit ("SR&ED"), the Alberta Scientific Research and Experimental Development ("Alberta SR&ED"), the Manitoba Research and Development Tax Credit ("RDTC"), were *de facto* specific.[719] JDIL also argued that the Federal and New Brunswick Research and Development ("NBR&D") programs were not *de facto* specific.[720]

As the Statute provides, a subsidy is specific as a matter of fact if the "actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number."[721] The four research and development tax credit programs were similar. The government gave a tax credit for expenditures related to research and development undertaken in a field of science or technology.[722] To make its specificity analysis for these programs, the Department measured whether the actual recipients were limited in number by dividing the actual users by the number of potential users of the programs.[723] The Department's basis for "potential users" in each case respectively were all corporate tax filers in Canada, Alberta, Manitoba and New Brunswick.[724]

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[718] Verification is intended to test the accuracy of data already submitted, rather than to provide a respondent with an opportunity to submit a new response. *See Acciai Speciali Terni S.P.A. v. United States*, 142 F.Supp.2d 969, 986 (Ct. Int'l Trade 2001). The purpose of verification is not to "continue the information-gathering stage of {Commerce's} investigation." *Borusan Mannesmann Boru Sanyi v. Ticaret A.S. v. United States*, 61 F.Supp.3d 1306, 1349 (Ct. Int'l Trade 2015) (quoting agency position), *aff'd*, *Maverick Tube Corp. v. United States*, 857 F.3d 1353 (Fed. Cir. 2017). "Verification is intended to test the accuracy of data already submitted, rather than to provide a respondent with an opportunity to submit a new response." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 353 F.Supp.2d 1294, 1304 (Ct. Int'l Trade 2004), *aff'd*, 146 Fed. Appx. 493 (Fed. Cir. 2005).

[719] Canadian 57.1 Brief, Vol. III at 42.

[720] JDIL 57.1 Brief at 64.

[721] 19 U.S.C. § 1677(5A)(D)(iii)(1).

[722] *See, e.g.*, GOC March 13, 2017 Questionnaire Response, GOC Vol. III at GOC-CRA-1 (P.R. 357).

[723] IDM at 190-91.

[724] IDM at 192.

In general, JDIL made primarily factual arguments contending that the use of all corporate tax filers was not reasonable because not all corporate tax filers are "potential users" of the program.[725] JDIL argued that only those companies that had taxable income, made qualifying expenditures, verified the work, and elected to receive the tax credit should have been considered potential users.[726] JDIL also noted that the GNB did not take any action to "limit" the users.[727]

For its part, the Canadian Parties made primarily legal arguments discussing Commerce's prior *de facto* specificity decisions. The Canadian Parties first noted that the Department had previously concluded that the SR&ED program in question was not *de jure* or *de facto* specific.[728] 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 the Department 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.[729] 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.[730] 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.[731] 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.[732] Finally, the Canadian Parties argued, the denominator should have been limited to companies that actually conduct research and development.[733]

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

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725 JDIL 57.1 Brief at 66; *see also* Canadian 57.1 Brief, Vol III at 51.

726 JDIL 57.1 Brief at 66.

727 JDIL 57.1 Brief at 67.

728 Canadian 57.1 Brief, Vol. III at 44, citing *Oil Country Tubular Goods from Canada*, 51 Fed. Reg. 15,037, 15,039 (April 22, 1986) (final determination); *Certain Softwood Lumber Products from Canada*, 51 Fed. Reg. 37,453, 37,458 (October 22, 1986) (preliminary determination) (petition withdrawn prior to the final determination).

729 *Id.* at 45.

730 Canadian 57.1 Brief, Vol. III at 46, 47, 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*"); *AK Steel Corp. v. United States*, 192 F.3d 1367, 1382 (Fed. Cir. 1999).

731 Canadian 57.1 Brief, Vol. III at 49.

732 *Id*.

733 *Id.* at 51.

statute.[734] 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."[735] Citing several cases, Commerce noted that it regularly uses this methodology in determining whether a program is *de facto* specific.[736] 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.[737] 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.[738] In response to the arguments that the denominator should only include companies that actually conduct research and development, Commerce noted that nothing in the statute or case law contains such a requirement.[739] Finally, Commerce responded that its two prior decisions finding the R&D programs were not specific predate the enactment of the 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.[740]

To support their position, in a subsequent authority submission, the Canadian Parties cited to a recent decision where the court ruled that Commerce erred by using all tax filers as the comparator group in deciding whether a program was *de facto* specific.[741] In its subsequent authority submission, Commerce cited another recent case in which the court upheld Commerce's use of all tax filers.[742]

The Panel finds that the court's decision in the *Government of Quebec* is analogous and instructive. Indeed, the Canadian Parties arguments in this case mirror the arguments raised by the Governments of Canada and Québec ("Canadian Governments") in the *Government of Quebec*. As in this case, the Canadian Governments made the identical argument that Commerce's determination was methodologically unsound because the comparison of tax credit recipients to total tax filers is an impermissible application of 19 U.S.C. § 1677(5A)(D)(iii)(I), and that

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734 Commerce 57.2 Brief, Vol. IV at 50.

735 *Id.*, citing SAA at 931.

736 *Id.* at 50-51.

737 19 U.S.C. § 1677(5A)(D)(iii)(1).

738 Commerce 57.2 Brief, Vol. IV at 52. This position is supported by the court's decision in *Bethlehem Steel* 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.

739 Commerce 57.2 Brief, Vol. IV at 56.

740 *Id.* at 58.

741 *Mosaic Co. v. United States ("Mosaic"),* Slip Op. 23-134, Court No. 21-00116, 2023 WL 5979829 (Ct. Int'l Trade Sept. 14, 2023).

742 *Government of Quebec v. United States* ("*Government of Quebec*"), 567 F. Supp.3d 1273, 1291-1292 (Ct. Int'l Trade 2022), appealed docketed on May 17, 2022 by the CAFC as appeal no. 2022-1807 (Oral Argument held on January 10, 2024).

Commerce's comparison deviates from past practice without explanation. In addressing the Canadian Governments' claim, the court stated:

> In applying 19 U.S.C. § 1677(5A)(D)(iii), Commerce found that "the actual number of recipients that benefited from the tax credit during the POI relative to the total number of tax filers during the POI are limited in number on an enterprise basis." IDM at 56. This comparison both assesses whether "the actual recipients of the subsidy," on an enterprise basis, "are limited in number," 19 U.S.C. § 1677(5A)(D)(iii)(I), as well as whether the subsidy in question is "truly ... broadly available and widely used throughout [the] economy," IDM at 56 (citing "{SAA}" at 929. Accordingly, Commerce's approach neither fails to comply with the statutory language nor contravenes the underlying aims set out in the SAA.[743]

The court also addressed the Canadian Governments' arguments that use of all corporate tax filers as the comparator group was contrary to law. The court noted:

> Nor did Commerce err by using all corporate tax filers as the comparator group when assessing subsidy specificity. The Plaintiffs' arguments urging comparison to entities that employ trainees would improperly convert this test into a standard for predominant use — a result which is particularly apparent when considering a limited-in-number analysis on an industry, rather than enterprise, basis. Neither the statute's text nor the SAA prohibit Commerce's approach, and it was reasonable to think that a comparison to corporate tax filers would be instructive in determining whether the subsidy is widely spread throughout the economy or limited to a small number of enterprises.[744]

The Canadian Governments relied on the same three court cases in *Government of Quebec* as the Canadian Parties relied on in this case to claim that Commerce deviated from its prior practice in finding that these programs were *de facto* specific. Again, the court noted:

> GoQ's attempts to argue otherwise by relying on the court's (and Federal Circuit's) prior decisions fail. *Bethlehem Steel Corp. v. United States*, 25 C.I.T. 307, 140 F. Supp. 2d. 1354 (2001) cannot provide the basis for determining Commerce's past practice with respect to the de facto specificity analysis relevant here, as the determination in that case employed an industry-rather than enterprise-level comparison, and further weighed all four rather than merely one of the factors required for a finding of specificity. Likewise, neither *Royal Thai Gov't v. United States*, 28 C.I.T. 1218, 341 F. Supp. 2d 1315 (2004), *aff'd in part, rev'd in part, and remanded* 436 F.3d 1330 (Fed. Cir. 2006) nor the Federal Circuit's decision in *AK Steel Corp. v. United States*, 192 F.3d 1367 (Fed. Cir. 1999) involve a finding of "limited in number" specificity alone. Moreover, in each of these three cases, Commerce's non-specificity determination was sustained, so they offer weak evidence that the court here should second-guess Commerce's exercise of its

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743 567 F. Supp. 3d at 1291 (footnotes omitted).

744 *Id.* at 1291.

> expertise. On the other hand, Commerce has previously employed similar comparator groups in its past investigations. See, e.g., Issues and Decision Mem. at Cmt. 17 accompanying Final Determ. in the *Countervailing Duty Investigation of 100- to 150-Seat Large Civil Aircraft from Canada*, 82 Fed. Reg. 61,252 (Dep't Commerce Dec. 27, 2017). In sum, the court finds that Commerce did not act contrary to law when considering corporate tax filers as the comparator group in its specificity analysis.[745]

Finally, the court concluded:

> {T}he court concludes that Commerce acted reasonably in determining that the actual recipients were limited in number. It is instructive that Congress provided this factor for Commerce to consider without specifying how Commerce should consider the factor. While {the Canadian Governments} are concerned that permitting Commerce to decide the scope of limited use would risk implicating any subsidy or benefit with less than (near) universal usage, the law itself permits Commerce to determine the appropriate reach of its specificity determinations. Although the court has the authority to consider the reasonableness of Commerce's determination, in this case, where only 2% of taxpayers received the disputed benefit, it cannot be said (without more) that Commerce's identification of a limited benefit, and thus of a de facto specific subsidy, is unreasonable. Accordingly, Commerce's determination is sustained.[746]

As the court 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% of potential corporate tax filers in Canada, 0.48% in Alberta, 0.48% in New Brunswick and a similarly small amount of Manitoba[747] tax filers received the disputed benefit thereby showing the benefit was limited in application.[748]

The Panel also finds that the facts underlying the court's decision in *Mosaic* are distinguishable from the facts of this case. In *Mosaic*, the benefit in question was a reduction in tax fines or penalties for taxpayers who had incurred penalties. Thus, in contrast to the SR&ED programs which did not expressly limit eligibility to certain tax filers, in *Mosaic*, not all tax filers were eligible for the relief offered by the program. As the court in *Mosaic* found, only those "corporate taxpayers who incurred penalties" were eligible for relief.[749] In that factual scenario,

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745 *Id.* at 1291-1292.

746 567 F. Supp. 3d at 1292.

747 IDM at 190-191.

748 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.

749 *Mosaic*, Slip Op. 23-134 at 58.

the court found that Commerce erred in using total corporate tax filers as the comparator group instead of those corporate taxpayers who incurred penalties.[750]

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 and this methodology was upheld by the Court of International Trade in a similar factual scenario. 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.

B. New Brunswick Workforce Expansion Program and New Brunswick Youth Employment Funds

The GNB argued that Commerce erred by finding that the New Brunswick Workforce Expansion Program and the New Brunswick Youth Employment Fund Program were *de facto* specific.[751] The Workforce Expansion Program provides wage rebates to encourage hiring of post-secondary graduates and other New Brunswick residents.[752] The Youth Employment Fund Program provides wage subsidies to employers who hire unemployed youth.[753] The GNB argued that it did not intend to limit the companies who could apply for these programs and the programs were available to all industries.[754] The GNB's position is that since it took no action to limit the users and that it was available to all enterprises, these programs should not be viewed as *de facto* specific.

Commerce responded that of all the companies eligible to receive the rebate or subsidy provided by the GNB, only a small number of enterprises took advantage of them.[755] As with the SR&ED programs, Commerce cited the SAA and its past use of all corporate tax filers as the comparator group to support its use of this number to evaluate whether the actual recipients of a benefit are limited in number.[756]

In its critique of Commerce's *de facto* analysis, the GNB argument centered around two points: (1) the GNB did not intend to limit the program; and (2) the programs were available to all industries. While these two factors could be relevant to a *de jure* analysis, they are not relevant to

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750 The court in *Mosaic* specifically noted that that the facts of that case were distinguishable from the *Government of Quebec* case. Slip Op. 23-134 at 60, n.10.

751 GNB 57.1 Brief at 62-65.

752 *Id.* at 62.

753 *Id.* at 64.

754 *Id.* at 63-64.

755 Commerce 57.2 Brief, Vol. IV at 115. The actual number of users is proprietary. *See* GNB Case Brief at 46. C.R. 1821.

756 Commerce 57.2 Brief, Vol. IV at 116, 118.

the *de facto* analysis at issue here which is whether the actual recipients are "limited in number." As discussed earlier with respect to the SR&ED programs, the SAA specifically contemplates that Commerce can evaluate whether the numbers are limited by taking "into account the number of enterprises in the economy in question."[757] Thus, Commerce's analysis was consistent with the instructions in the SAA. Furthermore, as discussed above, the court in *Government of Quebec* also found that the comparison of all corporate tax filers to the actual recipients of the benefit both assesses whether the recipients are limited in number as well as whether the benefit was widely used.[758] Commerce's analysis shows that the actual recipients were limited in number and the benefit was not widely used in New Brunswick. As with the SR&ED programs, the Panel finds that Commerce's analysis is supported by substantial evidence and is in accordance with law.

VI. Electricity and Bioenergy Programs

Four provinces have energy programs related to the production of renewable energy that Commerce found to provide countervailable subsidies.

1. Alberta Bioenergy Producer Credit Program

Commerce's PDM described Alberta's Bioenergy Producer Credit Program ("BPCP"):

> The BPCP encourages investment in bioenergy production capacity in Alberta to reduce reliance on fossil fuels, support Alberta's Renewable Fuels Standard, and create value-added opportunities with economic benefits. The program provides funding for production of various types of biofuels, including electricity and heat produced from biomass, such as hog fuel. The 2011-2016 BPCP commenced on April 1, 2011, and was terminated on March 31, 2016, and a similar short-term replacement program, BPP, was established on October 25, 2016. The BPP builds upon the previous BPCP and provides transitional support to the bioenergy sector.
>
> Provided the applicant applied during an open call for applications and met the program eligibility criteria, an applicant would be approved under BPCP 2011-2016. The payments under the BPCP were made on a quarterly basis and if a company initially met the guidelines to receive BPCP payments and continued to meet the guidelines going forward, then the company could continue to expect to receive payments under BPCP until the program ended in 2016. The GOA submitted a BPCP approved funding summary for West Fraser, Canfor, and Tolko.[759]

With regard to West Fraser, while the GOA notes that "a significant portion of the total BPCP payments West Fraser received in 2015 were made pursuant to a BPCP agreement between the Government of Alberta and West Fraser's Hinton Pulp facility,"[760] West Fraser's questionnaire

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[757] SAA at 930.

[758] 567 F. Supp. 3d. at 1291.

[759] PDM at 64-65 (footnotes omitted).

[760] GOA 57.1 Brief at 131.

response indicates that BPCP payments also went to "i) Blue Ridge (sawmill and Ranger MDF facility), (ii) Sundre Forest Products (sawmill and LVL facility at Rocky Mountain House), (iii) Hinton Wood Products sawmill, and (iv) High Prairie sawmill (after being acquired by West Fraser in 2014)."[761] "For Hinton Pulp & Paper, for example, the application form proposed to use hog fuel and black liquor generated from the pulping process to produce heat and electricity."[762]

Canfor reported that it produces bioenergy at its Green Energy Division in Grand Prairie, Alberta.[763] The extent of the affiliation of the Green Energy Division with Canfor is BPI.[764] "Canfor received funding based on its generation of electricity and heat by combustion of biomass. It earned $0.02 per Kilowatt hour (or $20,00 per Megawatt hour) of electricity and $0.50 per Gigajoule (GJ) of heat, with an annual maximum cap."[765] Commerce found that Tolko did not use the program.[766]

Neither West Fraser or Canfor provided electricity to a government purchaser, but rather generated electricity and heat for their own use, using biofuel, *e.g.*, wood pellets, which "are primarily used as wood fuel and are usually made from compacted sawdust. Wood pellets are predominantly produced from sawmill or wood product processing plant residues."[767] They are thus a byproduct of softwood lumber (and pulpwood) production. The BPCP guidelines provide that among the supported bioenergy products are: "Wood pellets, other biomass pellets or biocarbon with a high heating value of at least 16.5 megajoules per kilogram certified to meet fuel product specifications and standards accepted by Alberta Energy."[768]

Commerce found that this program was a grant that is *de jure* specific to bioenergy producers, and found that West Fraser (0.27 percent) and Canfor (0.10 percent) benefited from this program.[769]

2. British Columbia

BC Hydro is a regulated public utility that provides service throughout British Columbia. BC Hydro operates 30 hydroelectric facilities and 3 natural gas-fueled thermal power plants, totaling approximately 12,000 megawatts ("MW") of installed generation capacity. Over 95 percent of the electricity generated by BC Hydro comes from hydroelectric facilities, which mainly

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761 West Fraser's initial questionnaire response (public version), March 14, 2017 (P.R. 345), at 79 and Exhibit WF-1ALB-12.

762 West Fraser's initial questionnaire response (public version), March 14, 2017 (P.R. 345), at 79.

763 Canfor initial questionnaire response (public version), March 14, 2017 (P.R. 334), Exhibit B-6.

764 Canfor affiliated companies section questionnaire response (February 7, 2017) (C.R. 64), Exhibit 10.

765 Canfor initial questionnaire response (public version), March 14, 2017 (P.R. 334), Exhibit B-6.C.

766 PDM at 65.

767 "Major Primary Timber Processing Facilities in British Columbia: 2015," at 27, included as Exhibit BC-S-10 of the GBC's initial questionnaire response (March 14, 2017) (P.R. 407).

768 West Fraser's initial questionnaire response (public version), March 14, 2017 (P.R. 346), at Exhibit WF-1ALBOA-7.

769 PDM at 65; IDM at 175-177.

consist of large hydroelectric dams on the Columbia and Peace Rivers that were built between the 1960s and the 1980s. Beginning in the 21st Century, existing and forecasted load growth in the province outpaced BC Hydro's investment in new generation resources, and in 2007 British Columbia issued The BC Energy Plan: A Vision for Clean Energy Leadership ("2007 Energy Plan"). In 2008, implementing this plan, BC Hydro issued a first call for power proposals, seeking new or incremental clean power from biomass generation sources. BC Hydro received some 20 project proposals in response, negotiated with the lowest cost bidders, and ultimately concluded deals with four suppliers for a total of 579 GWh of firm power annually and 60 MW of dependable capacity. Although Tolko and West Fraser proposed projects, they were not selected because their proposed pricing was too high.[770]

BC Hydro launched a Standing Offer Program ("SOP") in April 2008, which provided a continuing opportunity for new or incremental generation capacity to sell green power to BC Hydro at pre-determined prices. Tolko obtained an Electricity Purchase Agreement ("EPA") under this program for its small generation facility in Kelowna.[771] In 2010, BC Hydro issued a second call for proposals. It selected four projects, including two projects submitted by West Fraser.[772]

As of October 2015, BC Hydro had entered into 128 EPAs with independent power producers ("IPPs"), 105 of which were with operating facilities and 23 of which were with facilities in development. During FY2016, these IPPs supplied approximately 14,300 GWh of energy to BC Hydro, or roughly one-quarter of BC Hydro's total energy requirement.[773]

Tolko has two plants that generate electricity using biomass (byproducts of the production of softwood lumber and other timber products) as fuel. One is connected to Tolko's Kelowna sawmill, which meets its sawmill's electricity needs first, and then sells its excess generation to BC Hydro. The other, the Armstrong power plant, is a stand-alone facility not connected electrically to any other mill, that sells its generated electricity to BC Hydro.[774]

West Fraser has an EPA for its Fraser Lake sawmill and an EPA for its Chetwynd sawmill. The powerplants use biomass as fuel.[775] The record is unclear whether the Fraser Lake and Chetwynd sawmills use the electricity generated by their associated power plants, or the entirety of that electricity goes to BC Hydro.

Commerce found that the EPA program constituted the purchase of goods for more than adequate remuneration ("MTAR"), and found a subsidy of 0.38 percent for Tolko and a subsidy of 0.21 percent for West Fraser.[776]

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770 GBC 57. 1 Brief, Vol. III at 5-8.

771 *Id.* at 8-9.

772 *Id.* at 9-10.

773 *Id.* at 10.

774 GBC 57.1 Brief, Vol. III at 11-16.

775 *Id.* at 16-19.

776 IDM at 18.

3. New Brunswick

Commerce's PDM described New Brunswick's Large Industrial Renewable Energy Purchase Program ("LIREPP"):

> The New Brunswick DERD and NB Power, a Crown corporation, administers the LIREPP pursuant to the Electricity from Renewable Resources Regulation and with authority under the Electricity Act. According to the GNB, the program has two main objectives: to (1) reach NB Power's mandate to supply 40 percent of its electricity from renewable sources by 2020 by buying energy from large industrial customers; and (2) bring large industrial enterprises' net electricity costs in line with the average cost of electricity in other provinces.
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> The LIREPP program is available to any large industrial company that produces renewable energy and owns and operates a facility that has an electrical energy requirement of not less than 50 GWh per year, that obtains all or a portion of its electricity on a firm basis (vs. interruptible basis) from NB Power, and that exports at least 50 percent of its primary products to another province or territory within Canada or outside the country. There is no formal application process. However, despite LIREPP participation being available to all large industrial users, the GNB has reported that the only industry that currently meets the technical specifications to use the program is the pulp and paper industry.
>
> Under the LIREPP program, NB Power first determines the credit it wants to give the large industrial customer, such as JDIL; NB Power then works backwards to build up to that credit through a series of renewable energy power purchases and sales and additional credits. This overall credit is known as "Net LIREPP" or the "Net LIREPP adjustment," and it appears on the participating customers' electricity bill as a credit applicable to their total electricity charges. JDIL reported that, through its Lake Utopia Paper Division, it received benefits under the LIREPP program during the POI. However, JDIL did not receive LIREPP benefits directly; rather, a company with which JDIL is cross-owned, IPL, received a Net LIREPP credit on each of its monthly electricity bills. IPL keeps Request-to-Pay internal invoices to pay credits to JDIL's Lake Utopia Paper Division, and banking information (payment registers & reports, bank activity reports & bank statements) to support the movement of these funds. JDIL's Lake Utopia Paper Division keeps cash receipt and banking information to support the movement of these funds from IPL ….
>
> According to the GNB, DERD performs a calculation to determine the Canadian average firm energy rate (in C$/MWh) for the relevant industries, and then calculates the difference between that rate and the average firm energy rate in New Brunswick. This differential is calculated annually as a percentage. This percentage, known as the Target Reduction Percent, is the amount by which NB Power reduces the total electricity costs for LIREPP participants. When the Target Reduction Percent is multiplied by the LIREPP participant's firm energy usage it

yields the Target Discount. The Target Discount is the amount by which NB Power reduces the electricity bill of the LIREPP participant.[777]

Commerce found that the LIREPP program is *de facto* specific, and provided a recurring subsidy to JDIL in the amount of 0.09 percent.[778]

4. Québec

Commerce's PDM described Québec's Green Power Purchases of Electricity under Purchase Power Program ("PAE") 2011-01:

> Hydro-Québec is engaged in the generation of power from hydroelectric sources and the transmission, distribution, and sale of such power to wholesale and retail customers in Québec. Hydro-Québec has two separate, independent divisions: Hydro-Québec Production, which generates electricity to supply to the market and buys and sells electricity for its own account; and Hydro-Québec Distribution, which is responsible for the supply of electricity to customers in Québec. Under the PAE 2011-01, Hydro-Québec Distribution purchases electricity generated from biomass at a set contractual price. Both the GOQ and Resolute reported that Hydro-Québec Distribution had PAE 2011-01 agreements with two of Resolute's pulp and paper mills for the purchase of electricity produced from forestry biomass during the POI.[779]

Commerce found that the purchases of electricity by Hydro-Québec under PAE 2011-01 was *de facto* specific, and constituted the purchase of goods for more than adequate remuneration for Resolute in the amount of 0.80 percent.[780]

These four provinces, along with Resolute and JDIL, have challenged Commerce's finding that the provincial energy programs provided a countervailable benefit. The provinces make a number of the same arguments to the extent the programs are similar.

5. Attribution

All provinces argued (Québec joining the arguments of the other Canadian parties) that Commerce wrongly attributed any subsidy to the production of softwood lumber because the payments were tied to the production of energy.[781] The parties cite 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.

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[777] PDM at 79-80 (footnotes omitted).

[778] PDM at 80; IDM at 213.

[779] PDM at 85.

[780] PDM at 86; IDM at 18.

[781] GOA 57.1 Brief at 125; GBC 57.1 Brief, Vol. III at 22; Resolute 57.1 Brief at 22; GNB 57.1 Brief at 54; GOQ 57.1 Brief, Vol. II at 7.

(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.[782]

The parties argued that the plain language of section 351.525(b)(5) means that if the subsidy is tied to the sale of electricity, Commerce may attribute the subsidy only to the sale of electricity and not to all products sold by a firm, and that the exception in section 351.525(b)(5)(ii) does not apply.[783]

The GBC argued that "whereas electricity that is *purchased* by a respondent can be used to operate softwood lumber facilities, electricity that is *sold* by a respondent to a utility *cannot* be used by that respondent to operate softwood lumber facilities."[784] However, the statute explicitly provides that a benefit can be conferred "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."[785] 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 GBC contended that the input exception to section 351.525(b)(5) does not apply here by arguing that the payments received pursuant to the EPAs were for providing and selling the electricity but not for producing the electricity.[786] However, one cannot provide and sell the electricity without producing it in the first place. This argument fails. The second reason given by the GBC as to why the input exception does not apply was that the Tolko Armstrong plant was a

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782 19 C.F.R. § 351.525.

783 *E.g.,* GBC 57.1 Brief, Vol. III at 26-27.

784 *Id.* at 28.

785 19 U.S.C. § 1677(5)(E)(iv).

786 GBC 57.1 Brief, Vol. III at 26.

standalone facility that is not electrically connected to any Tolko mill.[787] This argument pointedly leaves out Tolko's Kelowna sawmill, which as noted above meets its sawmill's electricity needs first, and then sells its excess generation to BC Hydro. It also leaves out the plants connected to West Fraser's Fraser Lake sawmill and its Chetwynd sawmill, which, as pointed out above, the record is unclear as to the connection between the power plants and the sawmills. If they are connected, electricity generated by those plants would be usable by the sawmills even if not all of the electricity is used, and that is all that is needed to be considered an input.[788]

In *Royal Thai Government v. United States*,[789] the Court of International Trade upheld Commerce's determination that the Thai Government's provision of electricity conferred a countervailable benefit to the Thai steel company respondent:

> Second, in calculating the ad valorem subsidy rate for the subject imports, Commerce also properly included in its calculation the subsidized electricity associated with the resales of electricity made by SSI. It is uncontested that SSI did resell some of its subsidized electricity to companies not involved in the production or sale of subject imports during the period of investigation. *Id*. at 41. Plaintiffs argue that the electricity associated with the resales was ''tied'' to non-subject merchandise and therefore, pursuant to Commerce's regulations, should have been excluded from the calculation of the ad valorem subsidy rate for the subject imports. 19 C.F.R. § 351.525(b)(5) (2006) (requiring Commerce to attribute subsidy tied to the production or sale of a particular product only to that product).
>
> However, Commerce has made clear that, in identifying a tied subsidy, the agency looks to ''the stated purpose of the subsidy or the purpose we evince from record evidence *at the time of bestowal*.'' *CVD Preamble*, 63 Fed.Reg. at 65403 (emphasis added). Here, Commerce found that ''*at the point of bestowal*, PEA {did} not direct or require SSI to sell {the electricity} or distribute {the electricity} to any other entities.'' *Id*. at 32 (emphasis added). Indeed, Commerce found that ''SSI {was} the only entity to which PEA {provided} the electricity,'' *id*., indicating that there was no way to know of SSI's intended use for the subsidized electricity at the point of bestowal. Although Plaintiffs counter that SSI had in place separate meters calibrated by PEA which showed how much electricity was ultimately resold, *see* Pls.' Br. at 45, there is no indication that this information was available at the time of the bestowal of the subsidized electricity. Commerce has indicated that the agency ''will not trace the use of subsidies through a firm's books and records.'' *CVD Preamble*, 63 Fed.Reg. at 65403. This position is sound not only as a matter of administrative economy, but also because it recognizes that ''a subsidy may

[787] *Id.* at 26-27.

[788] *Industrial Phosphoric Acid from Israel*, 63 Fed. Reg. 13,626, 13,630 (Mar. 20, 1998) (final results).

[789] 441 F.Supp.2d 1350 (Ct. Int'l Trade 2006).

provide benefits TTT not specifically named in a government program," *id*., including, for example, improved business relations with other companies.[790]

The *Royal Thai Government* decision supports Commerce's determination here. However, in *Certain Carbon and Alloy Steel Cut-To-Length Plate From the Republic of Korea,* Commerce distinguished a situation in which electricity went straight to a government utility without passing through the producer:

> The Department fully verified the information submitted in POSCO's questionnaire responses regarding transactions between POSCO Energy and POSCO. Information on the current record indicates that the electricity generated by POSCO Energy is sold to KPX prior to transmission to the POSCO substation. Further, the Department verified that KPX assumes and maintains title of the electricity it purchases from POSCO Energy at the point of sale, i.e. when the electricity reaches the KPX meter. POSCO Energy is prohibited by Article 31 of the Electricity Utility Act from selling electricity to another party. Because the electricity is sold to KPX, and not to POSCO directly, the cross-ownership attribution criteria have not been met, as set forth under 19 CFR 351.525(b)(6). Information on the record also shows that POSCO Energy does not fall under any other cross-ownership attribution criteria, as set forth under 19 CFR 351.525(b)(6). Thus, any benefits received by POSCO energy cannot be attributed to POSCO.[791]

This suggests a contradiction between how Commerce treated sales of electricity in *CTL Plate from Korea* and at least the Armstrong plant here. The Panel sustains Commerce's finding that the EPA payments to the plant connected to Tolko's Kelowna sawmill are attributable to Tolko's total production. However, the Panel remands this action to have Commerce explain why its treatment of the Armstrong plant here differed from the treatment of electricity sold to KPX by POSCO Energy, and to treat EPA payments received by the Armstrong plant as non-attributable if there is not a reasonable distinction. The Panel also remands this action to have Commerce determine whether the electricity plants related to West Fraser's were connected to the sawmills, and whether the sawmills use the electricity produced by those plants. If they are not, Commerce is to treat them the same way it treats Tolko's Armstrong plant upon remand. If they are connected to the sawmills, the EPA payments received by the West Fraser plants are considered to be attributable to West Fraser's total production.

With regard to the sale of electricity to Hydro Québec by two of Resolute's plants, neither the GOQ nor Resolute highlighted the attribution argument. The GOQ merely joined the attribution arguments by the GBC and Resolute,[792] while mentioning in passing that the electricity was purchased from Resolute's Gatineau and Dolbeau facilities, neither of which are sawmills.[793]

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790 441 F.Supp.2d at 1363-64.

791 *Certain Carbon and Alloy Steel Cut-To-Length Plate From the Republic of Korea: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 82 Fed. Reg. 16,341 (April 4, 2017), Issues and Decision Memorandum at 24 (footnotes omitted).

792 GOQ 57.1 Brief, Vol. II at 7.

793 *Id.* at 14.

Resolute devoted just one page to arguing that a subsidy on purchasing of electricity must be attributed to electricity.[794] Commerce responded:

> Resolute's Dolbeau and Gatineau pulp and paper mills sell electricity to HydroQuebec under the PAE-2011-01. Although Resolute manufactures non-subject merchandise at the Dolbeau and Gatineau mills, the mills are not distinct corporate entities. IDM at 169. Instead, Resolute is a single corporate entity, which includes Dolbeau and Gatineau, filing the tax documents for its mills and consolidating the financial statements of all of its mills. See IDM at 169.[795]

The Panel agrees with Commerce that for the purposes of attribution of subsidies, Resolute is a single corporate entity, and that electricity is an input into Resolute's total production. It is therefore appropriate to attribute the payments for electricity to Resolute's total production, and the Panel sustains Commerce's determination on this issue.

With regard to New Brunswick's LIREPP, both the GNB and JDIL argued that the benefits were tied to JDIL's production of pulp and paper, and not to softwood lumber.[796] The GNB argued that the LIREPP agreement "specifically highlights JDIL's Lake Utopia division," and then quotes from a provision at the beginning of the agreement.[797] That quote is BPI, but the Panel regards the quote as a weak tie to pulp and paper as the product that was specifically intended to have the benefit bestowed upon. Commerce's IDM sets out the reasons why Commerce did not regard the benefit as tied to pulp and paper rather than to JDIL as a company:

> {T}he LIREPP program is available to large industrial companies in any industry that meets the eligibility requirements. The program was not designed to assist specific products. The GNB does not link the bestowal of the LIREPP credit to any specific industry or products. Further, the LIREPP Agreements signed between the participating Irving companies and NB Power does not place any requirement on the Irving companies to effectuate a transfer of the credit between IPL and JDIL, nor does it speak to the Irving companies' use of the LIREPP credit once it is applied to IPL's electricity bill.[798]

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.

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794 Resolute 57.1 Brief at 49.

795 Commerce 57.2 Brief, Vol. IV at 155.

796 GNB 57.1 Brief at 53-57; JDIL Brief at 51-54.

797 GNB 57.1 Brief at 56.

798 IDM at 215.

With regard to Alberta's BPCP, the GOA did not argue that the BPCP's payments to Canfor were not countervailable, either in its 57.1 Brief or before Commerce in the investigation,[799] so the Panel sustains Commerce's determination regarding BPCP payments to Canfor.[800]

The GOA argued that the BPCP payments to West Fraser were tied to the production of bioenergy rather than the production of softwood lumber.[801] Although the COALITION pointed out that the bioenergy (heat and electricity) were used for West Fraser's production of products, including softwood lumber and pulp products, and was therefore an input for the purposes of the exception in 19 C.F.R. § 351.525(b)(5)(ii),[802] the GOA argued that since Commerce's final determination did not cite to this input exception, "it cannot rely on this provision now."[803]

The IDM comment on this issue noted: "The petitioner argues that, because the BPCP subsidy benefited the production of energy, an input to both subject and non-subject merchandise, the Department may appropriately attribute those benefits to the recipients' overall production pursuant to 19 CFR 351.525(b)(5)(ii)."[804] Commerce determined that "{b}ecause electricity is required to operate the production facilities of West Fraser, the benefit from the investigated program is attributed to all products produced by West Fraser under 19 CFR 351.525(a)."[805]

In response to the GOA's point, the COALITION argued:

> The Alberta Parties' arguments concerning "input products" are also misplaced. As an initial matter, Commerce's reliance on 19 C.F.R. § 351.525(a) instead of 19 C.F.R. § 351.525(b)(5)(ii) does not undermine its determination. Although Commerce could have relied on the latter regulation to attribute BPCP benefits to electricity and all downstream products, Commerce's reliance on the former was reasonable because a subsidy on electricity is, by definition, a subsidy that benefits all production. Moreover, Commerce's reasoning on this issue "may be reasonably discerned" from its repeated statements that "energy is used to power the company's operations," and the Panel may uphold its determination on that basis.[806]

The Panel agrees that this is a clear instance in which the input exception applies. The BPCP payments are a benefit to an input to subject and non-subject merchandise that lowers the

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799 *See* IDM at 175, describing the GOA's and West Fraser's arguments.

800 Because the GOA 57.1 Brief is actually on behalf of the Government of Alberta, the Alberta Softwood Lumber Trade Council, *Canfor Corporation*, Tolko Marketing and Sales Ltd. and Tolko Industries, Ltd., and West Fraser Mills Ltd., the Panel concludes that the exclusion of Canfor from this issue was deliberate.

801 GOA 57.1 Brief at 125-132.

802 COALITION 57.2 Brief, Vol. II at 78-81.

803 GOA 57.1 Brief at 130.

804 IDM at 175.

805 IDM at 176.

806 COALITION 57.2 Brief, Vol. II at 81 (footnotes omitted).

cost of production. Commerce's citation to 19 CFR § 351.525(a) rather than 19 CFR § 351.525(b)(5)(ii) does not negate its reference to electricity as an input nor its conclusion that "electricity is required to operate the production facilities of West Fraser, the benefit … is attributed to all products produced by West Fraser."[807] The Panel therefore sustains Commerce's determination on this issue.

6. Electricity as a Service or a Good

The GBC and Resolute argued (with the GOQ incorporating the argument by reference) that electricity generation is a service, not a good.[808] This distinction is relevant in this context 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."[809] 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 both BC Hydro's and Hydro-Québec's purchase of electricity.

In *HRS From Thailand*,[810] 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."[811] 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.[812] Thus, while these decisions state that electricity is a good rather than a service, it is so stated in the context of whether the provision of electricity by the government to the respondent is a good or is general infrastructure.

In previous instances in which the sale of electricity by respondents for MTAR arose, it apparently did not occur to respondents to raise the issue of whether electricity was a good or a service. Thus, in *Hot-Rolled Steel From Korea*,[813] the GOK purchased electricity from POSCO, which Commerce found to be a *de facto* specific countervailable subsidy,[814] so Commerce must

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807 IDM at 176.

808 GBC 57.1 Brief, Vol. III at 31; Resolute 57.1 Brief at 46; GOQ 57.1 Brief, Vol. II at 8.

809 19 U.S.C. § 1677(5)(E)(iv) (emphasis added).

810 *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 Fed. Reg. 50,410 (October 3, 2001), and accompanying Issues and Decision Memorandum.

811 *Id.*, Issues and Decision Memorandum at 29. The Panel notes that this is the decision that gave rise to the *Royal Thai Government v. United States* opinion quoted from above.

812 *Wire Rod from Italy*, 83 Fed. Reg. 23,420 (21, 2018), Issues and Decision Memorandum at 13.

813 *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products From the Republic of Korea: Final Affirmative Determination*, 81 Fed. Reg. 53,439 (August 12, 2016), and accompanying Issues and Decision Memorandum.

814 *Id.*, Issues and Decision Memorandum at 35-36.

have considered the purchase of electricity to be purchase of a good. The respondents did not contest this issue for the final determination. Likewise, in *Rebar From Turkey*,[815] the parties argued at length about whether the provision of electricity for MTAR was a countervailable subsidy without raising the question of whether electricity was a good or service.[816] Commerce clearly considered electricity to be a good in that proceeding.

This seems to be an issue of particular interest to Canadian companies producing softwood lumber or paper products. It was raised in the investigation of *Uncoated Groundwood Paper,*[817] where Commerce determined that the sale of electricity for MTAR was the sale of a good, and in the current investigation.

As was pointed out in the *HRS Thailand* decision, electricity has its own tariff classification. "Electrical energy," the quantity measured in megawatt hours, is tariff item 2716.00.00 00 in the Canadian Customs Tariff Schedule,[818] thereby making it a good as far as the Canadian Government is concerned. Despite the issue only being joined in the context of electricity as a good as opposed to a part of general infrastructure prior to the Canadian softwood lumber and uncoated groundwood paper cases, rather than in the context of the purchase of electricity for MTAR, Commerce has consistently found that electricity is a good, and there is no reason that electricity would change from being a good to being a service in the purchase for MTAR context. Commerce's determination that electricity is a good rather than a service is reasonable, and the Panel sustains that determination.

The Panel agrees with Resolute's argument that if electricity is considered a good, then its electricity sales should be included in the denominator in its subsidy calculation.[819] The Panel agrees that this is a purely legal argument, so that exhaustion does not apply. The Panel remands this action to Commerce with the instructions to include Resolute's electricity sales in the denominator in its subsidy rate calculation for Resolute.

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815 *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2014*, 82 Fed. Reg. 26,907 (June 12, 2017), and accompanying Issues and Decision Memorandum.

816 *Id.*, Issues and Decision Memorandum at 8-16.

817 *Certain Uncoated Groundwood Paper From Canada: Final Affirmative Countervailing Duty Determination*, 83 Fed. Reg. 39,414 (August 9, 2018), Issues and Decision Memorandum at 149-152.

818 Canada Border Services Agency, Departmental Consolidation of the Customs Tariff 2024. The United States Harmonized Tariff Schedule has the same classification for electrical energy. United States International Trade Commission, Harmonized Tariff Schedule of the United States (2024) Revision 1 (January 2024), USITC Publication 5491.

819 Resolute 57.3 Brief at 15-17.

7. Specificity

The GOQ and Resolute argued that the Department erred in finding that its electricity program, the Green Power Purchase Program (PAE 2011-11) was *de facto* specific.[820, 821] The GBC raised a similar argument with respect to its Hydro Electricity Purchase Agreements ("EPA").[822]

The GOQ argued that Hydro-Québec purchased the green power from a wide variety of sources and none of the recipients were sawmills.[823] Resolute argued that Hydro-Québec was not targeting or favoring any industry.[824] It also noted that none of the contracts involved sawmills.[825] Resolute also contended that the contracts were part of a larger and growing initiative, noting that use of the program should have been viewed in the context of the "universe" to be examined.[826] Resolute argued that the program had expanded from 6 to 12 producers over two years, demonstrating that the program was steadily expanding and growing.[827] Resolute also argued that the program was environmentally responsible and that this decision impedes socially responsible public policy.[828] For its part, the GBC argued that Commerce never explained why 105 users was not a large number. It also contended that the program involved a broad array of industries and was not limited to sawmills. The GBC next argued that Commerce should have taken into consideration the diversity of industries involved.[829] The GBC finally contended that Commerce was obligated, but failed, to examine the length of time a program has been in existence as directed by the statute and the SAA. [830]

Commerce responded that both programs involved a limited number of recipients.[831] With respect to the BC EPA, Commerce noted that it had found that the program was limited to 105 power producers and was not widely used throughout the provincial economy.[832] Commerce noted that it had properly found that the number of recipients was small given that the GOQ had provided the number of producers benefitting from the program: 6 in 2013; 9 in 2014; and 12 in 2015.[833] In

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820 GOQ 57.1 Brief, Vol. II at 27; Resolute 57.1 Brief at 54.

821 In a heading in its 57.1 brief, the GNB stated that "LIREPP is Not Specific to the Forestry Industry." GNB 57.1 Brief at 53. Commerce treated this as a specificity argument. Commerce 57.2 Brief at Vol. IV at 83. In its reply brief, the GNB argued this issue as an attribution argument and did not otherwise reference specificity. GNB 57.3 Brief at 54-56. Accordingly, the Panel addressed the GNB's argument as an attribution argument on page 75 above rather than as a specificity argument.

822 GBC 57.1 Brief, Vol. III 40.

823 GOQ 57.1 Brief, Vol. II at 27.

824 Resolute 57.1 Brief at 55-56.

825 *Id.* at 56.

826 *Id.* at 57.

827 Resolute 57.3 Brief at 18.

828 *Id.* at 20.

829 GBC 57.1 Brief, Vol. III at 44.

830 *Id.* at 45.

831 Commerce 57.2 Brief, Vol. IV at 135, 157.

832 *Id.* at 137.

833 *Id.* at 157.

addressing the GBC's argument that Commerce should have addressed the duration of the program, Commerce noted that the duration of the program is not intended to "be used to excuse *de facto* specificity."[834]

In their critique of Commerce's *de facto* analysis, the Canadian parties focused on the argument that the program involved a wide variety of industries. Under the statutory provision relied upon by Commerce, however, the main criterion is simply whether "the actual recipients … are limited in number."[835] With respect to this provision, the SAA states that Commerce is required to:

> take account of (1) the extent of diversification of economic activities within the economy in question; and (2) the length of time during which the subsidy program in question has been in operation. The Administration intends that these additional criteria serve to inform the application of, rather than supersede or substitute for, the enumerated specificity factors. (That is, while they are not additional indicators of whether specificity exists, these criteria may provide a clearer context within which the *de facto* factors would be analyzed). Thus, for example, with respect to economic diversification, in determining whether the number of industries using a subsidy is small or large, Commerce could take account of industries in the economy in question.
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> The Administration interprets the criterion concerning the duration of a subsidy program to mean that where a new subsidy program is recently introduced, it is unreasonable to expect that use of the subsidy will spread throughout the economy in question instantaneously. On the other hand, the Administration does not intend that the criterion be used to excuse *de facto* specificity.[836]

Here, Commerce looked at the actual number of recipients and determined that the number was limited. While Commerce could consider diversity, the Panel finds that neither the Statute nor the SAA required Commerce to consider whether the universe of industries receiving the benefit was diverse. Accordingly, Commerce's decision that the number of recipients was small was in accordance with law and supported by substantial evidence.

The parties also contended that Commerce should have looked at the historical use of the program. For example, as noted earlier, Resolute argued that the increase in recipients from 6 to 12 in two years demonstrated that the program was growing. While again, Commerce can consider whether the limited use of a new subsidy program informs its specificity analysis, the SAA makes clear that this criterion cannot be used to excuse *de facto* specificity. Accordingly, Commerce's decision not to consider this factor was within its discretion. Again, the Panel finds that Commerce's *de facto* analysis regarding the electricity programs is in accordance with law and supported by substantial evidence.

With respect to Resolute's argument that Commerce should not have countervailed an environmentally responsible program, the court has addressed similar arguments. In *BGH*, the court noted:

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834 *Id.* at 137, citing the SAA at 931-32.

835 19 U.S.C. § 1677(5A)(D)(iii)(I).

836 SAA at 931-932.

> BGH complains that the United States' withdrawal from the Paris Climate Accords improves U.S. competitiveness while BGH is burdened by the GOG measures to comply with the climate accords. Pl. Br. at 11-12. BGH seems to suggest the relative burdens of U.S. manufacturers and German manufacturers should affect Commerce's benefit analysis. Neither the statute nor the regulations allow for such a comparison. Whether the United States has a tax scheme similar to the Electricity and Energy Tax Acts is not pertinent to the determination of benefit under U.S. law. See 19 U.S.C. § 1677(5)(C); 19 U.S.C. § 1677(5)(E) (not requiring evidence of intent to provide a benefit); SAA at 4242 ("it has long been established that intent to target benefits is not a prerequisite for a countervailable subsidy"). Thus, neither Commerce nor the court is at liberty to evaluate the environmental rationale of the GOG's measures or compare them with those of the United States. Requiring consideration or comparison of the measures is a task reserved for Congress. This court must accept the statute as written by Congress. Therefore, Commerce's determination here that the Electricity and Energy Tax Acts provide a benefit is in accordance with law and supported by the record.[837]

The Panel similarly finds that Commerce was not at liberty to consider environmental rationales in making its specificity analysis.

The Canadian parties also argued that none of the recipients were sawmills. This argument relates directly to the attribution argument raised earlier.[838] As discussed there, Commerce properly found that the benefit was not tied to a particular product and therefore applied the benefit to respondents' entire operations, including the sawmills. Thus, the benefit was received by the overall corporate entity and the fact the sawmills only received the benefit indirectly does not invalidate the Department's *de facto* specificity analysis.

8. Benchmark Used by Commerce

The GBC, the GOQ, Resolute, and the GNB all argued that Commerce used the wrong benchmark to measure the benefit received by Tolko, West Fraser and Resolute when they sold electricity to government entities.[839] Commerce explained that it "applied the 'benefit-to-the-recipient' standard, as outlined by the statute and the regulations, to determine whether, and which, benchmark was appropriate to measure the benefit to respondents in this case."[840] For Tolko and West Fraser, "Commerce determined that the best measure of the benefit-to-the-recipients … is the difference between the price at which BC Hydro provided the good, electricity, and the price at which BC Hydro purchased that same good."[841] For Resolute, Commerce used "the Industrial L electricity rate that Resolute's pulp and paper mills paid to Hydro-Québec for electricity during the period of investigation as a benchmark."[842] The GBC responded that it agrees that the benefit-

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837 *BGH Edelstahl Siegen GMBH v. United States*, 600 F. Supp.3d 1241, 1255 (Ct. Int'l Trade 2022).

838 Section VI.5 above.

839 GBC 57.1 Brief, Vol III at 46; GOQ 57.1 Brief, Vol II at 16; Resolute 57.1 Brief at 50; GNB 57.1 Brief at 55.

840 Commerce 57.2 Brief, Vol. IV at 139.

841 *Id.* at 140.

842 *Id.* at 158.

to-the-recipient standard is appropriate, but disagreed on whether Commerce actually applied that standard.[843]

In its IDM, Commerce stated that "there is nothing in the CVD Preamble to suggest that the Department specifically contemplated the scenario presented here, where the government is both procuring and providing a good."[844] Commerce continued:

> While 19 CFR 351.512 relating to the purchase of a good is held in reserve, 19 CFR 351.503(b) outlines the principles that the Department will follow when dealing with alleged subsidies for which the regulations do not establish a specific rule. In such instances, we will normally consider a benefit to be conferred "where a firm pays less for its inputs . . . than it otherwise would pay in the absence of the government program, or receives more revenues than it otherwise would earn." We have adopted this definition in our regulations because it captures an underlying theme behind the definition of benefit contained in section 771(5)(E) of the Act. Specifically, section 771(5)(E) of the Act states that a "benefit shall normally be treated as conferred where there is a benefit to the recipient." Section 771(5)(E) of the Act provides the standard for determining the existence and amount of a benefit conferred through the provision of a subsidy and reflects the "benefit-to-the-recipient" standard, which "long has been a fundamental basis for identifying and measuring subsidies under U.S. CVD practice."[845]

It is not clear why the fact that BC Hydro (and Hydro-Québec) both buy and sell electricity is relevant to determining whether the amount that these government entities pay respondents for electricity confers a benefit to the recipient. 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 be paid if it sold that electricity on the open market. The average price that BC Hydro and Hydro-Québec sell electricity for is irrelevant to that analysis. To measure the benefit by looking at the difference between the price at which BC Hydro and Hydro-Québec provided electricity, and the price at which BC Hydro and Hydro-Québec purchased that same good is a "cost-to-provider" analysis rather than a "benefit-to-recipient" analysis. Given that it costs respondents significantly more to generate electricity from biomass sources than its costs BC Hydro and Hydro-Québec to generate electricity largely from hydroelectric sources, respondents would not sell electricity to anyone at Commerce's benchmark price.

The question is whether respondents have proffered benchmarks that satisfy a benefit-to-recipient analysis. For British Columbia, the GBC pointed to BC Hydro's call for bids for biomass-based electricity. West Fraser and Tolko were not winning bidders.[846] The Panel agrees with Commerce that it is not appropriate to select a benchmark from the program that is being

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843 GBC 57.3 Brief, Vol. III at 31-32.

844 IDM at 164.

845 IDM at 165 (footnotes omitted).

846 GBC 57.1 Brief, Vol. III at 59-60.

investigated.[847] But the GBC also pointed to an actual energy sales transaction by Tolko, where it sold electricity to an unaffiliated third party.[848] Tolko received a certain price, net of an additional charge for wheeling the power to the U.S. market.[849] This price, *not including* the additional charge for sending the power to the U.S. market, is an appropriate benchmark for measuring the benefit to the recipient of the amount paid to respondents by BC Hydro for electricity. The Panel therefore remands this action to Commerce to recalculate the benefit to Tolko and West Fraser, using the Tolko price for sale of electricity to a third party (not including the charge for sending the power to the U.S. market) as the benchmark.

The GOQ argued that Commerce should use the Merrimack Group report[850] as the benchmark for purchases of electricity from respondents by Hydro-Québec.[851] This report was issued in February 2010 to fulfill a requirement of the Régie de l'énergie (Québec's autonomous, independent energy regulator)[852] that Hydro-Québec undertake a comparative analysis of the cost of power from the bids selected from Hydro-Québec's Call for Tenders to the cost of power for similar products from neighboring Northeast markets,[853] so it constitutes information generated in the normal course of business. That analysis generated an average realized price level of C$108/MWh.[854] In its brief, Commerce's main objection to the Merrimack Group report was that it did "not capture the difference between the price at which Hydro-Québec sold electricity during 2015, *i.e*., the period of investigation, and the price at which Québec purchased electricity during 2015."[855] It also pointed out that the report is not contemporaneous with the period of investigation.[856] As discussed above, under a benefit-to-recipient analysis, the price at which Hydro-Québec sold electricity is not relevant. As for contemporaneity, the Merrimack Group report is from the same time period when Resolute received the contracts under PAE 2011-01 for selling electricity.[857] Otherwise, the information in the Merrimack Group report is at more or less the same level of comparability for benchmark purposes as the Washington Department of Natural Resources ("WDNR") log prices that Commerce used as the benchmark for comparison to British Columbia stumpage prices.[858]

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847 IDM at 167.

848 GBC 57.1 Brief, Vol. III at 65-66.

849 Tolko Initial Questionnaire Response (March 13, 2017) (C.R. 103) at TOLKO CVD-154.

850 GOQ Initial Questionnaire Response (March 13, 2017), Vol. III-a (P.R. 515), Exh. QC-BIO-18 ("Merrimack Group report").

851 GOQ 57.1 Brief, Vol. II at 24-27.

852 *Id.* at 11.

853 Merrimack Group report at 1.

854 *Id.* at 6.

855 Commerce 57.2 Brief, Vol. IV at 163.

856 *Id.* at 164.

857 GOQ 57.1 Brief, Vol. II at 14.

858 PDM at 50.

The Panel therefore remands this action to Commerce with the instruction to use the average realized price level reported in the Merrimack Group report as the benchmark for comparison to the prices paid for the purchase of electricity from Resolute.

With regard to the benchmark for the LIREPP, the Panel agrees with Commerce that the program constitutes revenue forgone rather than sales at MTAR,[859] so that there is no need to consider a different benchmark, and the Panel sustains Commerce's determination regarding the LIREPP.

VII. Other Provincial Programs

1. Québec

A. Partial Cut Investment Program

The GOQ and Resolute contended that the Partial Cut Investment Program ("PCIP") does not confer a benefit to Resolute and therefore should not have been countervailed.[860] Under this program, harvesters are compensated by the GOQ for the increased costs incurred by a mandated partial cut (removing less than 50% of the volume of stand) compared to the more common, efficient and cheaper clear-cut.[861] According to GOQ, the payment does not fully compensate harvesters for the costs associated with partial cuts, so that no benefit is received because the harvesters are being compensated for the extra costs they incurred not to clear cut.

The *Preamble* to the 1998 CVD Regulations provides an example of a benefit that is quite close to 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.
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> For example, assume that a government puts in place new environmental restrictions that require a firm to purchase new equipment to adapt its facilities.

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[859] Commerce 57.2 Brief, Vol. IV at 86-87.

[860] GOQ 57.1 Brief, Vol. II at 35; Resolute 57.1 Brief at 62-63.

[861] GOQ 57.1 Brief, Vol. II at 36.

> 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 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.[862]

Likewise, here, 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. Under the *Preamble*, the partial reimbursement is clearly a countervailable benefit.[863] No party has cited precedent that contradicts the *Preamble*. The Panel therefore sustains Commerce's determination regarding the Partial Cut Investment Program.

B. Road & 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. The roads that are built are public roads belonging to Québec and are 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."[864] The GOQ did not argue that the tax credit was not countervailable, but instead argued that, as a result of an arbitration proceeding, Resolute had already paid an export charge for this program, and to assess countervailing duties for this program amounted to a double remedy.[865]

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862 63 Fed. Reg. at 65,361.

863 As Commerce has explained, "because the CVD Preamble sets out Commerce's intent in promulgating those regulations, it also serves as a tool for interpreting those regulations." Commerce 57.2 Brief, Vol. II at 7.

864 GOQ 57.1 Brief, Vol. II at 29-30 (footnotes omitted).

865 GOQ 57.1 Brief, Vol. II at 28-35; Resolute 57.1 Brief at 58-62.

Under the 2006 Softwood Lumber Agreement ("SLA"), the parties were able to submit disputes to the London Court of International Arbitration ("LCIA").[866] On January 18, 2008, the United States submitted a Request for Arbitration to the LCIA regarding several issues, including Québec's Road Tax Credit.[867] The arbitrators issued their findings on January 20, 2011, determining an export tax rate of 2.35% only in connection with the increase in the tax credit from 40 percent to 90 percent.[868] The tax was to be collected by the GOC.[869]

Although the program was abolished in 2013, Resolute had not yet received all of the tax credits to which it was entitled. It received some of the tax credits in 2015, and this was the part that was countervailed.[870]

The Panel finds that the connection between the export tax collected by the GOC, as a result of an arbitration finding regarding part of Québec's Road & Bridge Tax Credit, and the amount of countervailing duties collected by the United States, as a result of a tax refund paid by the GOQ to Resolute, is very attenuated. There is nothing in the record indicating how much export tax was paid by Resolute to the GOC, to be compared to the exact amount of tax credits received from the GOQ in 2015.[871] The LCIA found a circumvention of the SLA for the increase in the Québec Roads & Bridges Tax Credit from 40 percent to 90 percent, while Commerce's finding of countervailable subsidies is for the entire amount of the tax credit. Countervailing duties are not paid by Resolute, but are paid by the importers of softwood lumber produced by Resolute. In short, the Panel finds that Commerce's determination that the countervailability of the Québec Roads & Bridges Tax Credit was not a double remedy is supported by substantial evidence and is in accordance with law.

Resolute also argued that the Road & Bridge Tax Credit is not countervailable "because the roadbuilding and maintenance activities for which Resolute received partial reimbursements were services Resolute provided to the government."[872] However, the situation is very similar to that regarding the Partial Cut Investment Program, discussed above. The GOQ requires harvesters to build and maintain roads and bridges in the areas in which they are harvesting. The GOQ partially reimburses harvesters by providing a tax credit. As with the example in the *CVD Preamble*, where the government puts in place new environmental restrictions that require a firm

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866 2006 Softwood Lumber Agreement between the Government of the United States of America and the Government of Canada, Sept. 12, 2006, Temp. State Dep't No. 07-222, Article XIV.

867 *The United States v. Canada*, LCIA No. 81010 Arbitration Decision, London Court of International Arbitration (Dec. 17, 2013), at 16.

868 *Id.* at 96-97. The 40 percent tax credit was announced on March 2006, and covered expenditures incurred up to January 1, 2011, while the increase in the tax credit to 90 percent was announced on October 20, 2006, and it applied to expenditures incurred up to January 2010. *Id.* at 68.

869 *Id.* at 93-94.

870 Resolute Verification Report (July 18, 2017) (C.R. 1805), at 18.

871 The GOQ simply asserted without citation to any source that it paid more in export fees than the expected amount of countervailing duties. Canadian Gov't Parties Joint Case Br. (Québec) (July 27, 2017) (P.R. 1695), at Vol. VIII-61.

872 Resolute 57.1 Brief at 60.

to purchase new equipment to adapt its facilities, and provides a subsidy to help purchase that equipment,[873] partial reimbursement for the cost of building and maintaining roads and bridges is clearly a subsidy. Trying to characterize this cost as a service does not avail.

The Panel therefore sustains Commerce's determination regarding the Road & Bridge Tax Credit.

2. New Brunswick

A. Atlantic Investment Tax Credit

JDIL argued that the Department improperly calculated the benefit it received under the Atlantic Investment Tax Credit ("AITC").[874] Under this program, taxpayers in the Atlantic Region (which includes New Brunswick) may take 10% of the cost of qualified property as a credit against taxes owed.[875] JDIL provided worksheets showing that in addition to the tax savings, it also paid additional taxes as a result of using the AITC in prior years. JDIL argued that the total tax benefit in any year should be the amount of tax savings less the amount of additional tax paid, relying on 19 C.F.R. § 351.509(a)(1), which provides:

> *Benefit*—(1) *Exemption or remission of taxes*. In the case of a program that provides for a full or partial exemption or remission of a direct tax (*e.g.*, 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.

Commerce responded that JDIL was seeking an "offset" to the benefit that was not permitted as a matter of law under 19 U.S.C. § 1677(6), which lists three narrow permissible offsets to the gross subsidy, and 19 C.F.R. § 351.503(e), which states that "{i}n calculating the amount of a benefit, the Secretary will not consider the tax consequences of the benefit."[876] JDIL countered that this was not an "offset" but an accounting of the gain and loss in tax savings arising from the program.[877]

JDIL cited no precedent for its interpretation of section 509(a)(1). On the other hand, Commerce has consistently treated the AITC when it has encountered the program in a countervailing duty case.[878] The provisions for an offset to a gross subsidy are narrow, and JDIL's argument that the tax loss is an accounting that falls outside the offset exceptions is not persuasive when compared to the deference that Commerce's reasonable interpretation of the statute and

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873 63 Fed. Reg. at 65,361.

874 JDIL 57.1 Brief at 46. The GNB did not raise this issue in its brief.

875 Id. at 47.

876 Commerce 57.2 Brief, Vol. IV at 77-81.

877 JDIL 57.3 Brief at 23-26.

878 Aside from the instant case, *Supercalendered Paper From Canada: Final Results of Countervailing Duty Expedited Review*, 82 Fed. Reg. 18,896 (April 24, 2017), IDM at Comment 33 (JDIL raised the same argument there as it did here. Like here, Commerce rejected JDIL's argument in *Supercalendered Paper*).

regulations is entitled to.[879] The Panel therefore sustains Commerce's determination regarding the Atlantic Investment Tax Credit.

B. New Brunswick's License Management and Silviculture Program

Under paragraph 38(2) of the New Brunswick Crown Lands and Forests Act:

> The Minister
>
> (a) shall reimburse the licensee for such expenses of forest management as are approved in and carried out in accordance with the operating plan, including expenses with respect to
>
> i. pre-commercial thinning, …
>
> iii. tree planting, ….
>
> subject to the regulations and the provisions of any agreement between the licensee and the Minister, and
>
> (b) shall compensate the licensee for other expenses of forest management in accordance with the regulations.[880]

Commerce found that the reimbursement to JDIL under this program constituted a grant and therefore a countervailable subsidy.[881]

The GNB argued that this reimbursement constituted the GNB "purchasing services" (rather than "purchasing goods"), and that therefore under section 771(5)(D)(iv) of the Act,[882] did not qualify as a "financial contribution."[883] Commerce did not dispute that "purchasing services" is not a financial contribution, but found that the reimbursement in question did not constitute "purchasing services."[884]

None of the parties provided much guidance on how to decide whether something is a good or a service. The GNB cited to the *Eurodif* decision[885] mainly for the undisputed proposition that purchasing services is not countervailable.[886] The court in *Eurodif* found that uranium enrichment was a service, not a good, noting that the enrichers never obtained ownership of either the

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879 *Chevron*, 467 U.S. 837, 843 (1984).

880 JDIL Initial Questionnaire Response (March 13, 2017), Exhibit STUMP-04 (C.R. 522).

881 PDM at 22 and 67-68; IDM at 183-186.

882 19 U.S.C. § 1677(5)(D).

883 GNB 57.1 Brief at 46-53.

884 Commerce 57.2 Brief, Vol. IV at 103-111.

885 *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005).

886 GNB 57.1 Brief at 48.

unenriched uranium feed or of the final low-enriched uranium product.[887] That finding is not particularly helpful to the Panel in making its decision here.

In an administrative review of *Certain Softwood Lumber Products From Canada*,[888] two issues concerned whether a program was "purchasing services." Regarding the Land Base Investment Program ("LBIP"), petitioners argued that Commerce incorrectly determined that the program involved purchasing services,[889] while regarding the Forestry Innovation Investment ("FII") program, respondents argued that Commerce incorrectly determined that the program did not involve purchasing services.[890] For the LBIP, Commerce found that "no new information or evidence was submitted that indicated that this program is different from the land-base activities of Forest Renewal B.C. or that it otherwise conferred a countervailable subsidy."[891] The Panel can only guess that Commerce meant to refer to the Forest Resources Improvement Program ("FRIP"), which it found not to be countervailable in the final determination in *Lumber IV*, rather than Forest Renewal B.C., which it found to be countervailable.[892] For the FRIP, Commerce found:

> We verified that FRIP funds cannot be used for activities that are the responsibility of tenure holders under legislation, regulation or tenure agreement. Funds also can not be used for facility construction, improvement of operations, product research and development or for the purchase of capital assets. Therefore, we determine that this program does not provide a benefit to producers of the subject merchandise under section 771(5)(E) of the Act. Thus, we determine that this program is not countervailable.[893]

Here, this is not a situation in which the GNB is paying a forest management company to undertake silviculture activities that are unrelated to the harvesting of timber by that company. JDIL is required to incur certain silviculture expense as a part of its license to harvest timber, and the GNB is reimbursing a part of those expenses. The situation is similar to the Québec Road and Bridge Tax Credit discussed above. The Panel finds that the GNB is not "purchasing services" within the meaning of section 771(5)(D)(iv) of the Act.

JDIL took a slightly different approach. JDIL essentially argued that it is pertinent that the GNB owns the land, and is responsible for its maintenance, and that it is pertinent that JDIL would not have silviculture and forest management activities even without GNB reimbursement.[894] Neither of these factors are pertinent. There is no question that the GNB owns the land, and there

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887 *Eurodif*, 411 F.3d at 1362.

888 69 Fed. Reg. 75,917 (December 20, 2004).

889 *Id.*, IDM at 124-125.

890 *Id.* at 125-128.

891 *Id.* at 125.

892 *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada,* 67 Fed. Reg. 15,545 (April 2, 2002), IDM at 127-128 and 131-132.

893 *Id.* at 132.

894 JDIL 57.1 Brief at 43-46.

is no question that it requires licensees who want to harvest timber to undertake silviculture and forest management activities. Governments offer subsidies when they want to incentivize persons to undertake certain activities. For example, a government wanting to increase the country's exports will offer subsidies to incentivize persons to increase their exports. A person may not have otherwise increased exports absent those incentives. Likewise, an incentive to engage in silviculture and forest management activities may encourage persons to engage in such activities when they otherwise would not have. That does not mean that the incentive is not a subsidy. It is in fact the essence of a subsidy.

The Panel therefore sustains Commerce's determination that New Brunswick's License Management and Silviculture Program is a countervailable subsidy.

VIII. Calculation of JDIL's Sales Denominator

JDIL argued that Commerce should have included downstream sales by its cross-owned companies from the sales denominators in the subsidy calculations.[895] "J.D. Irving 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."[896] 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).[897]

In its final determination, Commerce explained:

> When applying the attribution regulations at 19 CFR 351.525(b)(6)(i) – (v), the Department has recognized four exceptions to its normal rule of attributing a subsidy to the products produced by the corporation that received the subsidy. One of these exceptions is 19 CFR 351.525(b)(6)(iv) when there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to the production of the downstream product. Under those circumstances, the Department will attribute subsidies received by the input

[895] JDIL 57.1 Brief at 67-74.

[896] *Id.* at 69 (emphasis in original).

[897] 19 C.F.R. § 351.525(b)(6).

> supplier to the combined sales of the input and downstream products produced by both corporations, minus inter-company sales. However, because in crafting the appropriate numerator and denominator we focus on the impact of the subsidy on the production of subject merchandise, the input must, generally, be an input for the production of subject merchandise or derived downstream products.[898]
>
> JDIL argued:
>
> > Deference is owed to an agency's interpretation of its own regulation "only when the language of the regulation is ambiguous." Here, the Department's interpretation conflicts with the plain language of the regulation, 19 C.F.R. § 351.525(b)(6)(iv). Nothing in the regulation's text suggests that the term "input" is limited to inputs for the production of the subject merchandise (or a downstream product that includes the subject merchandise). The regulation simply refers to "input product" and "downstream product" without qualification. If the sole purpose of the regulation were to capture subsidies received by *upstream* cross-owned input suppliers, the text would have included additional words or qualifiers. For example, the "downstream product" could have been defined to include subject merchandise. The Department's interpretation of the regulation is impermissible because it adds terms to the text that change the provision's meaning.[899]

JDIL's argument hinges on whether "input product" and "downstream product" in the regulation are not limited to the subject merchandise. Wood chips are clearly not an input into softwood lumber. This in turn hinges on whether the language of the regulation is ambiguous. If the language of the regulation is ambiguous, JDIL's argument fails, because Commerce's interpretation of the regulation is reasonable and entitled to deference.

JDIL can point to no precedent where it is acknowledged that the language of the regulation, regarding whether an "input" refers to any input regardless of whether it is an input of the subject merchandise, is unambiguous. The only cases that JDIL cites[900] are *Welded Line Pipe from Turkey*[901] and *Industrial Phosphoric Acid from Israel*.[902] In the *Line Pipe* determination, Toscelik had requested that Commerce "include the sales of Tosyali Demir in the denominator for any subsidies that Toscelik Profil or Tosyali Dis received because Toscelik Profil supplies billets to Tosyali Demir." Commerce noted that Tosyali Demir produces non-subject merchandise (*i.e.*, not line pipe). Commerce attributed the benefit from the subsidies received from Toscelik Profil to that company's own sales, and attributed the benefit received by Tosyali Demir to that company

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898 IDM at 224 (footnotes omitted).

899 JDIL 57.1 Brief at 70-71 (emphasis in original, footnotes omitted).

900 *Id.* at 70, n. 223.

901 *Welded Line Pipe from the Republic of Turkey*, 80 Fed. Reg. 61,371 (Oct. 13, 2015).

902 *Industrial Phosphoric Acid from Israel*, 63 Fed. Reg. 13,626, 13,633 (Mar. 20, 1998).

plus the sales of Toscelik Profit (net of intercompany sales).[903] Thus, while the circumstances in that case are different from here, that case does not support JDIL's argument.

The sentence that JDIL quotes from the *Acid* determination is actually not in that determination at all. Rather, the sentence is from the final results from the expedited review in *Softwood Lumber IV,*[904] 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).[905] 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.

In short, far from being unambiguous, there is no clear indication that when the regulation says "inputs" or "downstream products" that any input or downstream product, regardless of whether related to the subject merchandise, is to be considered in the benefit calculation. The Panel therefore finds that Commerce's interpretation of its regulation is entitled to deference, and does not reach the questions of whether the decision only works in one direction or whether the decision results in over-collection of CVD duties.

IX. Deferring Petitioner's New Subsidy Allegation

In the investigation, the COALITION had filed three new subsidy allegations ("NSAs") on March 15, 2017, alleging (1) the provision of a loan by the Governments of Québec ("GOQ") and Ontario ("GOO") to Resolute FP Canada Inc. as part of the company's bankruptcy proceedings; (2) preferential treatment for maximum liability amounts guaranteed by Export Development Canada ("EDC"), a Crown corporation, for U.S. export sales as compared to maximum liability amounts guaranteed for Canadian domestic sales; and (3) tax incentives for private forest land property by the GNB.[906] The regulations provides that a new subsidy allegation must be submitted no later than 40 days before the scheduled date of the preliminary determination,[907] which was April 24, 2017 after postponement of the preliminary determination,[908] so the allegation was timely filed. In its preliminary determination, Commerce merely stated that it would "consider whether

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903 *Welded Line Pipe from the Republic of Turkey*, 80 Fed. Reg. 61,371 (Oct. 13, 2015), Issues and Decision Memorandum at 43-44.

904 *Final Results and Partial Recission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 67,388 (November 5, 2002), Issues and Decision Memorandum at 22.

905 *Id.* at 21-22.

906 COALITION Additional Subsidy Allegations, P.R. 527.

907 19 C.F.R. § 351.301(c)(2)(iv)(A).

908 *Certain Softwood Lumber Products From Canada: Postponement of Preliminary Determination in the Countervailing Duty Investigation*, 82 Fed. Reg. 9055 (February 2, 2017) (P.R. 213).

to initiate an investigation with respect to these alleged subsidies after this preliminary determination."[909]

There is no indication in the record that Commerce initiated an investigation with respect to these subsidies after the preliminary determination, and the IDM stated that "{a}lthough we stated that we would consider whether to initiate an investigation into these newly-alleged subsidies after the Preliminary Determination, we found that we were unable to develop a sufficiently complete investigative record of the complex programs alleged (i.e., analyze the information for initiation, issue questionnaires, review questionnaire responses, conduct verification, etc.), given the limited amount of time left in our investigation and the constraints on our resources, which were already devoted to investigating the numerous and complex subsidy programs alleged by the petitioner and on which we initiated, in addition to the many self-reported programs by the respondents."[910] Commerce stated that it was "deferring our examination of these NSAs until a subsequent administrative review, should this case go to order, pursuant to 19 CFR 351.311(c)(2)."[911] That regulation provides that if the Secretary concludes that there is insufficient time to examine a new subsidy, Commerce can defer consideration until a subsequent administrative review.

The COALITION argued that Commerce should have investigated these subsidies during the investigation.[912]

Following an investigation that results in a countervailing duty order, Commerce instructs Custom and Border Protection ("CBP") to suspend liquidation of entries of subject merchandise, and require cash deposits on entries equal to the subsidy rates found by Commerce in the investigation.[913] The first administrative review covers the period from the suspension of liquidation following the preliminary determination in the investigation, through the end of the year of the order, in this case from April 28, 2017 through December 31, 2018. At the conclusion of the final results of the first administrative review, Commerce instructs CBP to liquidate entries for the period of review.[914] Whatever the duty deposit rates were as a result of the investigation, the amount of duties to be finally paid is the amount of duties found in the administrative review. Thus, the amount of the subsidies in the investigation is only relevant to the extent that if the

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909 PDM at 8.

910 IDM at 35-36.

911 IDM at 36.

912 COALITION 57.1 Brief at 55-66.

913 *See* Customs Instructions, (January 5, 2018) (P.R. 1817), at 4. Liquidation is already suspended in the case of an affirmative preliminary determination, as was the case here. *See* Preliminary Determination, P.R. 1268, at 6.

914 *Certain Softwood Lumber Products From Canada: Final Results of the Countervailing Duty Administrative Review, 2017-2018*, 85 Fed. Reg. 77,163, 77,164 (December 1, 2020) ("SWL 1st Rev.").

amount of subsidies in the investigation for a particular respondent are *de minimis,* then that respondent is not subject to the order, or to subsequent reviews.[915] Otherwise, the issue is moot.

At the hearing, counsel for the COALITION suggested that "there's some important precedent here about Commerce's overall treatment of new subsidy allegations."[916] The Panel declines to make a finding merely for the sake of precedent, when it will have no effect on the amount of duties ultimately paid by the importers of softwood lumber from Canada. However, in the unlikely event that any of the remands here result in a respondent's subsidy margin changing to *de minimis*, and that the addition of the subsidies from the NSAs as found by Commerce in the first review would make that respondent's margin change back again to above *de minimis*, Commerce is directed to add the subsidies found for the NSAs in the first review to that respondent's margin. Otherwise, the Panel defers to Commerce's determination that it did not have the time or resources to pursue the NSAs in the original investigation.

X. Scope Issues

Various Canadian parties challenged aspects of Commerce's decision concerning the scope of the order. The Canadian Parties challenged the inclusion of four specific products within the scope of the order, as well as the inclusion of remanufactured products within the scope. The Canadian Parties also argued that Commerce erred by not requiring the collection of cash deposits for remanufacturers on a "first mill" basis.[917] The Government of Ontario also challenged Commerce's decision to include remanufactured products within the scope of the order.[918] The GNB challenged Commerce's decision to include New Brunswick softwood lumber in the scope.[919]

In its initiation of this investigation, Commerce published its initial scope language, based on modifications to the scope language submitted by the COALITION.[920] Initial scope comments were submitted by the parties in early January.[921] Based on comments received by the parties, Commerce issued a preliminary scope memorandum.[922] On July 28, 2017, Commerce invited

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915 At the hearing, counsel for the COALITION suggested that there could have been companies that were not subject to subsequent reviews, which would receive the cash deposit rate from the investigation as their liquidation rate. Hearing Transcript, Vol. III (September 29, 2023) at 259-260. However, in the final results of the first review, a very long list of "non-selected exporters/producers" were given separate all-others rates for 2017 and 2018. SWL 1st Rev. at 77,164.

916 Hearing Transcript, Vol. III (September 29, 2023) at 245.

917 Canadian 57.1 Brief, Vol. IV. A "first mill" value refers to the value of the lumber before it is remanufactured.

918 GOO 57.1 Brief at 87-89.

919 GNB 57.1 Brief at 65-68.

920 *Certain Softwood Lumber Products from Canada, Initiation of Countervailing Duty Investigation*, 81 Fed. Reg. 93,987, 93,898 (December 22, 2016) (P.R. 99).

921 *See e.g.*, GBC Scope Comments (January 9, 2017) (P.R. 132).

922 *Certain Softwood Lumber Products from Canada: Preliminary Scope Decision* (June 23, 2017) (P.R. 1596).

interested parties to submit briefs on scope issues.[923] Several parties submitted briefs and rebuttal briefs on scope issues in early August, 2017.[924] Parties were also allowed to address scope issues at a scope-only hearing.[925] Throughout the proceeding, Commerce encouraged the parties to come to agreements about products to be excluded from the scope. Commerce issued its final scope determination upon conclusion of the investigation.[926]

1. Inclusion of Four Specific Products within the Scope of the Order

The Canadian Parties argued that Commerce erred by including four specific products within the scope of the order: (1) picket fences; (2) truss kits; (3) pallet kits; and (4) notched stringers. In support of their claim, the Canadian Parties first argued that Commerce has the inherent power and the ultimate authority to establish the scope of an order but Commerce improperly abdicated this responsibility to the COALITION.[927]

The Canadian Parties argued that Commerce inconsistently included these products within the scope even though these products had been excluded from a prior lumber proceeding and the 2006 Softwood Lumber Agreement ("SLA").[928] To support its argument that Commerce should have relied on its prior exclusions of these products, the Canadian Parties pointed out instances where Commerce relied on its decision in the previous proceedings to justify its actions in this investigation.[929] The Canadian Parties also argued that these prior proceedings demonstrated that the exclusion of these products would not lead to circumvention or difficulty in administering the order and that the COALITION has not provided evidence that COALITION members produced these products, were injured by these four products, or that circumvention is occurring or might occur.[930] The Canadian Parties also highlighted that finished products were specifically excluded from the scope language while the four "finished" products in question were included. According to the Canadian Parties, these other exclusions point to the arbitrary and capricious nature of the Department's decision to include the four specific products within the scope of the order.[931]

The Canadian Parties then discussed each of the four products in turn. The Canadian Parties argued that fence pickets are distinguishable from subject merchandise and pose no circumvention risk, noting that the COALITION had not provided any evidence of circumvention in the prior

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923 Commerce Memorandum re Due Dates (July 28, 2017) (P.R. 1698).

924 *See e.g.*, GNB Scope Case Brief (August 7, 2017) (P.R. 1735); COALITION Scope Rebuttal Brief (August 14, 2017) (P.R. 1755).

925 Transcript of Hearing (August 17, 2017)(P.R. 1772).

926 *Certain Softwood Lumber Products from Canada; Final Determination*, 82 Fed. Reg. 51,814 (Dep't of Commerce Nov. 8, 2017) (P.R. 1802).

927 Canadian 57.1 Brief, Vol. IV at 6-9.

928 *Id.* at 7-8

929 *Id.* at 13.

930 *Id.* at 16.

931 *Id.* at 8-13.

proceeding or the 2016 SLA.[932] With respect to two other products, truss kits and pallet kits, the Canadian Parties argued that these kits are unassembled pieces dedicated solely for use in finished products that are themselves otherwise excluded from the order.[933] The Canadian Parties again referenced back to the prior proceedings in which Commerce excluded truss and pallet kits. The Canadian Parties argue that Commerce's "finished products analysis" of this issue is not supported by substantial evidence.[934] Finally, the Canadian Parties argued that Commerce's decision to deny an exclusion for notched stringers was based on an improper reading of the scope language. According to the Canadian Parties, the COALITION's scope language did not clearly cover notched stringers and therefore Commerce's statement that notched stringers was included in the scope is improper.[935]

Commerce responded that, as required by the statute and extensive case law, Commerce deferred to the COALITION which made clear throughout the investigation that it intended to include the four specific products at issue here within the scope.[936] According to Commerce, the COALITION had also stated that it was facing injury not only from dimensional lumber but also from semi-finished and finished lumber that could be interchanged with semi-finished or raw dimensional lumber. Recognizing that it has the ultimate authority to decide scope matters, Commerce referenced evidence on the record that inclusion of the four products within the scope of the order was reasonable and consistent with the effective enforcement of the scope of the order.[937] Commerce noted that it was under no statutory obligation to consider past product descriptions in making a scope determination in a new investigation.[938] Commerce also explained that the statute does not require petitioners to produce every permutation or model of the domestic like product.[939] Commerce further responded to the issues raised for each specific product. For example, although the Canadian Parties argued that fence pickets are 1 inch or less in thickness, Commerce found that the pickets were boards of lumber with no special markings or cuts that would make them distinguishable as excluded products.[940] With respect to truss and pallet kits, Commerce found that there was no evidence on the record that these kits had special markings or cuts that rendered them unsuitable for other uses. For notched stringers, Commerce found that the scope "explicitly covered {c}oniferous drilled and notched lumber and angle cut lumber,"[941] thereby finding that the scope explicitly covers notched lumber, contrary to the Canadian Parties' assertion.

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932 *Id.* at 20.

933 *Id.* at 22.

934 *Id.* at 24.

935 *Id.* at 27-28.

936 Commerce 57.2 Brief, Vol. V at 21.

937 *Id.* at 23.

938 *Id.* at 25.

939 *Id.* at 28.

940 *Id.* at 31.

941 *Id.* at 32.

The Panel recognizes the longstanding position frequently repeated by the courts that Commerce "owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition."[942] Commerce is "statutorily obliged to ensure that the proceedings are maintained in a form which corresponds to the petitioner's clearly evinced intent and purpose."[943] Moreover, the Panel also notes that the record shows that the record underlying Commerce's final scope determination is extensive. Commerce sought out comments, sought clarification of several scope issues, held a hearing, and encouraged the parties to come to an agreement on exclusions. The Panel also understands that Commerce, not the petitioner, is the ultimate authority on deciding scope matters. The Panel finds that Commerce did not abdicate its responsibility but made a reasoned decision based on the extensive evidence on the record. The Panel notes that Commerce considered the characteristics of each product and properly decided that on an individual basis these four products should be included within the scope of the order. For example, Commerce stated that it examined "industry descriptions of truss kits demonstrating that they consist primarily of dimension lumber."[944] Thus, the record shows that Commerce considered the evidence before it and made a reasonable finding that the product was not a "finished" product. By contrast, the Canadian Parties cited to no specific record evidence in the underlying investigation to support its own arguments that these products should not be included in the scope language but instead relied on prior proceedings that were based on events and facts that were several years old.[945]

The Panel also finds no merit in the Canadian Parties argument that the prior scope decisions on softwood lumber should have dictated the scope of this investigation. In the first instance, this case was a new investigation involving new facts and filed by new petitioners. Thus, Commerce properly deferred to the scope definition provided by these new petitioners in this new investigation. Moreover, while the Panel recognizes that Commerce should in general follow established policy decisions and its prior practice,[946] the Panel notes that defining the scope of an investigation in this case is a factual determination, not a policy or practice. As was the case here, circumstances in an industry can change over time warranting a fresh examination of the products to be covered when a new petition is filed. Commerce therefore properly examined the particular facts of this investigation to determine its scope. Moreover, even if it could be argued that the prior scope determinations were a policy or practice, the courts have also made clear that Commerce

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942 *Ad Hoc Shrimp Trade Action Comm. v. United States*, 637 F. Supp. 2d 1166, 1174 (Ct. Int'l Trade 2009)

943 *Mitsubishi Elec. Corp. v. United States*, 700 F. Supp. 538, 555 (Ct. Int'l Trade 1988), *aff'd* 898 F.2d 1577, 1579 (Fed. Cir. 1990)*; see also Minebea Co. v. United States*, 782 F. Supp. 117, 121 (Ct. Int'l Trade 1992).

944 IDM at Comment 91, P.R. 1785, citing the Preliminary Scope Memorandum at Comment 12.

945 Canadian 57.1 Brief, Vol. IV at 7.

946 *Citrosuco Paulista, S.A. v. United States,* 704 F. Supp. 1075, 1088 (Ct. Int'l Trade1988): "While the Commission is not obligated to follow prior decisions if new arguments or facts are presented that support a different conclusion, ... this does not permit the Commission to act arbitrarily. This is because it is also a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure. …This rule is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to insure consistency in an agency's administration of a statute." (Citations omitted.)

can deviate from prior practice and policy if it explains the reasons for doing so. For example, in *Canadian Solar*, the court found that Commerce had properly explained the reasons for deviating from its prior practice of establishing country of origin when defining the scope of the product under investigation.[947] Here, too, Commerce has fully explained the reasons for relying on the new scope language provided by the COALITION. As just one example, Commerce noted in the Issues and Decision Memorandum:

> Petitioner has cited, through this record, to instances of circumvention or administrability challenges posted by the products under discussion. For instance, the petitioner has cited to difficulties experienced by CBP in distinguishing truss components from general lumber (and) fence posts from general lumber.[948]

Commerce's Issues and Decision Memorandum addressed a wide variety of scope issues and explained its reasons for excluding or including numerous products.[949] Moreover, the Panel finds that Commerce did not arbitrarily accept the scope definition provided by the COALITION, but made a reasoned decision after allowing all parties multiple opportunities to explain their positions through written submissions and at a hearing. Accordingly, the Panel finds that Commerce's decision to include the four products was in accordance with law and supported by substantial evidence.[950]

2. Remanufactured Products

The Canadian Parties contended that remanufactured products constituted a separate class or kind of merchandise from the basic lumber products and requested that Commerce either exclude the merchandise or investigate them separately.[951] The GOO made similar arguments, focusing primarily on whether the Department should have examined the factors highlighted in the *Diversified Products* case.[952] While acknowledging that Commerce did not find remanufactured goods to be a separate class or kind of merchandise in prior proceedings, the Canadian Parties noted that Canada and the United States agreed to a definition of "remanufactured softwood

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947 *Canadian Solar Inc., v. United States*, 918 F. 3d 909, 917 (Fed. Cir. 2019), noting if "Commerce deviates from a previous policy or practice, it must provide an explanation for doing so," citing *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 46-49, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983); *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 516, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). The Panel notes that *Canadian Solar* involved a scope matter related to whether Commerce properly changed its method for determining the country of origin. The Federal Circuit affirmed the lower court's decision that Commerce had fully explained its reasons for changing its methodology.

948 IDM at Comment 92.

949 IDM at Comments 89-107.

950 The Panel notes that the Panel in the Article 1904 Binational Panel Review of *Certain Softwood Lumber Products From Canada: Final Affirmative Determination of Sales at Less than Fair Value*, USA-CDA-2017-1904-03 (October 5, 2023), at 7-17, came to the same conclusion regarding this scope issue.

951 Canadian 57.1 Brief, Vol. IV at 29.

952 GOO 57.1 Brief at 88, citing *Diversified Products Corp. v. United States*, 572 F. Supp. 883, 889 (Ct. Int'l Trade 1983).

lumber products" in the 2006 SLA.[953] The Canadian Parties argued that this definition could have been adopted by Commerce in this investigation and thus could have concluded that the product was a separate class or kind of merchandise. Alternatively, the Canadian Parties argue that Commerce could establish a separate "all others" deposit rate for independent remanufacturers on a "first mill" basis.[954]

Commerce responded that the record is clear that the COALITION intended to include remanufactured goods within the scope of the order.[955] Commerce also argued that the parties failed to undertake the required *Diversified Products* analysis that would allow Commerce to evaluate whether remanufactured goods were a separate class or kind of merchandise.[956] Commerce also noted that it would have no authority to establish a different cash deposit rate for subcategories of exporters and producers, particularly since it conducted this investigation on a company-specific rather than aggregate basis as was done in prior lumber proceedings.[957]

The Panel concludes that evidence on the record supports the finding that the COALITION intended to include remanufactured products within the scope of the investigation. Through numerous submissions, the COALITION made clear its intention regarding remanufactured products.[958] Stated differently, no ambiguity surrounds the COALITION's intent to include these products within the scope of the order. Therefore, as the courts have repeatedly instructed, Commerce properly included these products within the scope of the order in keeping with the intent of the petition.[959] With respect to the Canadian parties claims that Commerce should have itself conducted a *Diversified Product* analysis, the court has also made clear that the burden falls on the parties, not Commerce, to bring forward evidence to support their claims.[960] Despite having many opportunities to make its case, the Canadian parties failed to make a *Diversified Product* analysis by submitting evidence to support its claim that remanufactured products were a separate class or kind of merchandise. Instead, throughout the investigation, the Canadian parties simply

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953 Canadian 57.1 Brief, Vol. IV at 33.

954 Canadian 57.1 Brief, Vol. IV at 36. A "first mill" assessment of duties would be based on the value of the lumber prior to the value added by the remanufacturer.

955 Commerce's 57.2 Brief, Vol. V at 35, citing *NTN Bearing Corp. v United States*, 747 F. Supp. 726, 730 (Ct. Int'l Trade 1990).

956 *Id.*

957 *Id*. at 38.

958 *See e.g.*, COALITION Scope Rebuttal Comments, (August 17, 2017) (P.R. 1755); COALITION Letter, (April 11, 2017) (P.R. 1171).

959 *See NTN Bearing Corp. of Am. v. United States*, 747 F. Supp. 726, 730 (Ct. Int'l Trade 1990) ("If the petition is deemed sufficient, {Commerce} is statutorily obligated to ensure that the proceedings are maintained in a form which corresponds to the petitioner's clearly evinced intent and purpose.").

960 *Timken Co. v. United States,* 673 F. Supp. 495, 503 (Ct. Int'l Trade 1987). The Canadian Parties contended that it was incumbent upon Commerce to make a *Diversified Products* analysis once the general issue was raised by the Canadian Parties. GOC 57.3 Brief, Vol IV at 18. The Panel rejects this argument because it improperly switches the burden of proof on Commerce to itself conduct an analysis that should be made by the parties making the argument and made by the parties with access to the data.

repeated their position that remanufactured goods were a separate class or kind of product. The Canadian parties should have, but failed to, address each of the *Diversified Product* criteria and identify evidence on the record that would support the claim.[961] The Panel therefore finds that Commerce's decision to include remanufactured products is in accordance with law and supported by substantial evidence.

3. Assessing Duty Deposits on a "First Mill" Basis

The Canadian Parties argued that Commerce erred when it would not instruct CBP to collect deposits on a "first mill" basis.[962] The Canadian Parties argued that independent remanufacturers who use softwood lumber do not benefit from the alleged subsidies and so should not have to pay duties on the value they add. Accordingly, requiring duty deposits based on the entered value rather than the value of the lumber before remanufacturing penalizes the independent remanufacturers. The Canadian Parties noted that Commerce required deposits on a "first mill" basis in prior proceedings, including the 2006 SLA. The Canadian Parties noted that Commerce should calculate the duties as accurately as possible, and contended that Commerce should also ensure that the "all others" rate is not distortive.[963] The Canadian Parties also argued that nothing in the statute prevents Commerce from relying on an alternative method to establish an "all others" rate, thereby permitting use of a "first mill" basis cash deposit rate.[964]

Commerce responded that it determined the "all others" rate under the "General Rule" of 19 U.S.C. § 1671d(c)(5)(A)(i) and, based on this statutory provision, it had no discretion is use "any reasonable method" to calculate the "all others" rate because that language is specific to the "Exception" provision in 19 U.S.C. § 1671d(c)(5)(A)(ii).[965] Commerce also argued that the relevant statutory provision governing Commerce's obligation to instruct Customs about cash deposit rates is 19 U.S.C. § 1671d(c)(1)(B)(ii) and this required Commerce to "order the posting of a cash deposit, bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated individual countervailable subsidy rate, the estimated all-others rate, or the estimated country-wide subsidy rate, whichever is applicable."[966] Taken together, Commerce was required to order the posting of a cash deposit rate based on the "estimated all-others rate" that was established in accordance with 19 U.S.C. § 1671d(c)(5)(A)(i). Commerce further noted that remanufactured products are within the scope of the order and thus are subject to the same requirements as all other products and thus it properly applied the "all others" rate to the value of remanufactured products, not a "first mill" value. Commerce further pointed out that the case law referenced by the Canadian Parties involved adverse facts available which specifically allows Commerce to calculate the rates under the

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961 *See* Letter from the GOC to Commerce, (April 5, 2017) (P.R. 944).

962 Canadian 57.1 Brief, Vol. IV at 38.

963 *Id.* at 39.

964 *Id.* at 42.

965 Commerce 57.2 Brief, Vol. V at 41.

966 *Id*.

"Exception" provision found in 19 U.S.C. § 1671d(c)(5)(A)(ii) using "any reasonable method."[967] The margins calculated in this case were not based on adverse facts available but were based on actual data and so Commerce properly followed the "General Rule" to establish the "all others" rate.[968]

The Panel finds that the case law relied upon by the Canadian Parties is inapplicable to the case at hand. Unlike the situation in *MacLean-Fogg*,[969] Commerce's calculation of the "all others" rate did not involve adverse facts available. Thus, the statutory language allowing the use of "any reasonable method" to calculate the "all others" rate is not applicable to this case. Instead, the Panel finds that Commerce properly calculated the "all others" rate in accordance with the "General Rule" of 19 U.S.C. § 1671d(c)(5)(A)(i) and applied this rate properly in accordance with 19 U.S.C. § 1671d(c)(1)(B)(ii) to nonreviewed exporters, including remanufacturers. While it could be argued that Commerce might have discretion to use an alternative method under different circumstances, the Panel finds no error in Commerce's decision to rely on the clear statutory requirements that dictate the calculation of the "all others" rate and its application to all exporters whose products are subject to the order, including remanufacturers. The Panel also notes, as the COALITION pointed out, non-investigated parties are eligible to be part of an expedited review under procedures established under 19 C.F.R. § 351.214(k).[970] Alternatively, as the court pointed out in a remand of the *MacLean Fogg* case, parties who are subject to the "all others" rate can also ask to be reviewed as a voluntary respondent in an administrative review.[971] Thus, the statute anticipates a remedy for those parties who believe that "all others" rate does not accurately depict their level of subsidization. Accordingly, the Panel finds that Commerce's decision to reject the Canadian Parties' request to assess duties on a "first mill" basis did not constitute an abuse of discretion and therefore upholds Commerce's decision.

4. Inclusion of New Brunswick Softwood Lumber Products in the Scope of the Investigation

The GNB argued that Commerce unlawfully included softwood lumber products from New Brunswick within the scope of the investigation.[972] The GNB noted that in the prior softwood lumber decision, the Department had excluded softwood lumber from New Brunswick, as well as from Newfoundland and Labrador, Nova Scotia, and Prince Edward Island.[973] Recognizing that the Department need not always follow prior decisions, the GNB argued that Commerce must explain its reasons and must cite to substantial evidence to support those reasons. GNB's principal argument to support its claim was that once the underlying errors in Commerce's decision are

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967 Commerce 57.2 Brief, Vol. V at 40, referencing *MacLean-Fogg Co. v. United States*, 853 F. Supp. 2d 1336, 1340-41 (Ct. Int'l Trade 2012) ("*MacLean Fogg*") *rev'd on other grounds*, 753 F.3d 1237 (Fed. Cir. 2014).

968 Commerce 57.2 Brief, Vol. V at 41.

969 *MacLean Fogg*, 853 F. Supp. 2d at 1340-1341.

970 *See* COALITION 57.2 Brief at 184.

971 *MacLean Fogg Co. v. United States*, 885 F. Supp. 1337, 1342 (Ct. Int'l Trade 2012), *citing* 19 C.F.R. § 351.221.

972 GNB 57.1 Brief at 65.

973 *Id*.

corrected, the margin for JDIL will be *de minimis* and thus there will be no basis for including JDIL or any other New Brunswick producer in the scope. Additionally, the GNB noted that although JDIL's margin was 3.34%, the other New Brunswick producers were subject to the "all others" rate, a rate that is substantially greater than JDIL's rate, the only New Brunswick producer investigated.[974] Finally, the GNB argues that Commerce should not be constrained by the COALITION's scope language especially given the substantial evidence that producers in New Brunswick are not subsidized.[975]

Commerce responded by noting that JDIL received countervailable subsidies during the period of investigation and there is no basis for excluding it or other New Brunswick producers given this basic fact.[976] Commerce also noted that in establishing the scope, Commerce "strives to craft a scope that both includes the specific products for which the injured party, the petitioner, has requested relief, and excludes those products which would otherwise fall within the general scope physical description, but for which the petitioner does not seek relief."[977] Here, the COALITION had specifically intended to include New Brunswick producers within the scope of the order. Accordingly, Commerce found that no evidence supported excluding New Brunswick-origin product.[978]

The Panel notes that Commerce's decision to include New Brunswick within the scope of the investigation was based on two basic facts: 1) JDIL, a New Brunswick producer, was found to have received countervailable subsidies; 2) the COALITION purposely included New Brunswick products within the scope of this investigation. As noted earlier, the courts have regularly supported Commerce decision to follow the scope proposed by the petitioner absent overarching concerns related to circumvention, evasion or administrability.[979] In the first instance, the GNB's principal argument has no merit given that Commerce has found that a New Brunswick producer, JDIL, was receiving countervailable subsidies. Excluding parties who have received countervailable subsidies would increase circumvention, evasion and complicate administrability of the order. Similarly unpersuasive is the argument that New Brunswick producers should be excluded because they have been previously excluded. As discussed with respect to the Canadian Parties' argument concerning the four specific products highlighted earlier, the record in this case is based on different facts than prior proceedings. Here, the COALITION clearly intended to include New Brunswick producers within the scope of this proceeding based on its belief that New Brunswick producers had recently been receiving countervailable subsidies, a belief that was borne out by Commerce's final determination. The Panel also finds GNB's argument concerning the "all others" rate unavailing. As discussed above, Commerce properly calculated the "all others" rate using the

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974 *Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order,* 83 Fed. Reg. 347 (Dep't of Commerce January 3, 2018), P.R. 1816.

975 GNB 57.1 Brief at 68.

976 Commerce 57.1 Brief, Vol. V at 43-44.

977 *Id.* at 44.

978 *Id.*

979 *Mitsubishi*, 700 F. Supp. at 555; *Minebea Co.*, 782 F. Supp. at 121, *NTN Bearing*, 747 F. Supp. at 730.

"General Rule" of 19 U.S.C. § 1671d(c)(5)(A)(i). The same rule applied to New Brunswick producers as applied to remanufacturers. Furthermore, parties subject to the "all others" rate can seek an expedited review or can seek to be a voluntary respondent in a subsequent administrative review.[980] Thus, these parties have alternatives available to them.

The Panel accordingly finds that Commerce's decision to include New Brunswick products within the scope of the order was supported by substantial evidence and in accordance with law.

XI. Order of the Panel

For the reasons given above, the Panel hereby Orders as follows:

1. The Panel remands this action to Commerce with instructions to explain why Commerce's failure to make the adjustment to the conversion factor for Alberta stumpage prices was supported by substantial evidence and was in accordance with law.[981]

2. The Panel remands this action to Commerce with instructions to either adjust the Alberta price by the haul costs as presented by the GOA, or explain why these costs are not a factor affecting comparability under 19 C.F.R. § 351.511(a)(2)(i).[982]

3. With respect to Commerce's rejection of the BCTS auction prices as a benchmark on the basis that the auctions were not competitively run government auctions, the Panel remands to Commerce:

    a. Its analysis of market concentration with the instructions to provide reasoned explanations of how the market concentration factors it identified led to distortion in the BCTS auctions.[983]

    b. Its analysis of the three-sale limit on the number of active TSL's a company may hold simultaneously with the instructions to provide reasoned explanations of how the three-sale limit, either individually or in combination with the above other factors, led to distortion in the BCTS auctions.[984]

4. The Panel remands this action to Commerce with instructions to either find that there is no distortion in the New Brunswick stumpage market, or to explain in detail why there is distortion that necessitates using a different benchmark when the distortion stems from private forces.[985]

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980 19 C.F.R. § 353.214(k); 19 C.F.R. § 351.221.

981 *See* page 32.

982 *See* page 33.

983 *See* page 41.

984 *See* page 43.

985 *See* page 63.

5. The Panel remands this action to Commerce with instructions to use the data in the record to analyze the extent to which auction prices in Québec actually track TSG-allocated prices.[986]

6. The Panel remands this action to Commerce with instructions to revise the calculation spreadsheets for stumpage benefits to remove from the formulas the result that if transaction price exceeds the benchmark price the benefit is set to zero.[987]

7. With respect to Commerce's finding that the B.C. LERs constitute a financial contribution, the Panel remands to Commerce:

    a. Its entrustment or direction analysis with the instructions to provide a reasoned explanation of why it departed from its past practice regarding the "direct and discernible" benefits test without providing a reasoned explanation for that departure.[988]

    b. Its analysis of the "blocking system" with the instructions to provide reasoned explanations of: (i) how the 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 B.C. interior during the POI; and (ii) how such findings supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.[989]

    c. Its analysis of the in-lieu-of-manufacturing fees, with the instructions to provide a reasoned explanation of: (i) how the evidence supported its findings regarding the significance of the in-lieu-of-manufacturing fees relating to exports during the POI from the B.C. coast and interior, and (ii) how such findings supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.[990]

    d. Its analysis of export permit and approval process, with the instructions to provide a reasoned explanation of how:

        i. The evidence supported its findings that the duration of the export permit and approval process hindered B.C. interior exports and discouraged B.C. interior exporters; and how such findings supported its conclusion that the LERs restrained log exports from

[986] *See* page 70.

[987] *See* page 71.

[988] *See* page 83.

[989] *See* page 89.

[990] *See* page 89.

the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.[991]

ii. The evidence supported its findings that the formal and enforceable export permits supported its findings that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.[992]

e. Its analysis of exports from the B.C. interior with the instructions to: (i) reconsider the data in the report pertaining to the exports; and (ii) provide a reasoned explanation of how the evidence concerning exports from the interior supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.[993]

f. Its analysis of MPB killed logs, with the instructions to: (i) reconsider the data in the report pertaining to transportation costs; and (ii) provide a reasoned explanation of how the evidence concerning potential exports of MPB killed logs from the interior supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.[994]

g. Its analysis of the 100-mile radius overlap of sawmills with instructions to provide an explanation of how the 100-mile overlaps explain how this finding supported its conclusion that the LERs restrained log exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.[995]

h. Its analysis of the "log ripple effect", with the instructions to: (i) explain whether and how it evaluated the factors identified in the reports filed on the record as they apply to the relevant facts in the B.C. coastal, tidewater, southern interior and rest of interior markets. Such factors include: transaction costs (*e.g.*, transportation costs); whether or not such costs were passed on to suppliers; the level of log production and demand in each market; the existence and magnitude of trade and competition between the markets; and whether price effects were transmitted from the coast to the interior or *vice versa,* and how these factors affect the relevant tree species; and (ii) following this reconsideration, provide a reasoned explanation of how the ripple effect supported its conclusion that the LERs restrained log

991 *See* page 91.

992 *See* page 92.

993 *See* page 95.

994 *See* page 96.

995 *See* page 97.

exports from the B.C. interior to a meaningful degree such that it caused log suppliers to provide logs to B.C. log consumers.[996]

8. The Panel remands this action for further explanation or reconsideration consistent with this decision with respect to its determination that the AJCTC Program is a specific subsidy.[997]

9. The Panel remands this action with instructions to have Commerce explain why its treatment of the Armstrong plant here differed from the treatment of electricity sold to KPX by POSCO Energy, and to treat EPA payments received by the Armstrong plant as non-attributable if there is not a reasonable distinction.[998]

10. The Panel remands this action with instructions to have Commerce determine whether the electricity plants related to West Fraser's were connected to the sawmills, and whether the sawmills use the electricity produced by those plants. If they are not, Commerce is to treat them the same way it treats Tolko's Armstrong plant upon remand. [999]

11. The Panel remands this action to Commerce with instructions to include Resolute's electricity sales in the denominator in its subsidy rate calculation for Resolute.[1000]

12. The Panel remands this action to Commerce with instructions to recalculate the benefit to Tolko and West Fraser, using the Tolko price for sale of electricity to a third party (not including the charge for sending the power to the U.S. market) as the benchmark.[1001]

13. The Panel remands this action to Commerce with instructions to use the average realized price level reported in the Merrimack Group report as the benchmark for comparison to the prices paid for the purchase of electricity from Resolute.[1002]

14. If any of the remands here result in a respondent's subsidy margin changing to *de minimis*, and if the addition of the subsidies from the NSAs as found by Commerce in the first review would make that respondent's margin change back again to above *de minimis*, Commerce is directed to add the subsidies found for the NSAs in the first review to that respondent's margin.[1003]

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996 *See* page 99.

997 *See* page 111.

998 *See* page 130.

999 *See* page 130.

1000 *See* page 134.

1001 *See* page 139.

1002 *See* page 140.

1003 *See* page 150.

The Panel orders Commerce to make a determination on remand consistent with the findings and instructions of this opinion. The remand determination shall be made within 90 days.

The Panel affirms Commerce's final determination in all other respects.

So ORDERED.
Issued: May 6, 2024

SIGNED IN THE ORIGINAL BY:

/s/ Robert E. Ruggeri
ROBERT E. RUGGERI, CHAIRMAN

/s/ Calvin S. Goldman
CALVIN S. GOLDMAN

/s/ Paul W. Jameson
PAUL W. JAMESON

/s/ Mary T. Staley
MARY T. STALEY

/s/ Greg A. Tereposky
GREG A. TEREPOSKY