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**Certain Softwood Lumber Products from Canada:**
**Final Affirmative Countervailing Duty Determination**
**Secretariat File No. USA-CDA-2017-1904-02**

**FINAL RESULTS OF REDETERMINATION**
**PURSUANT TO BINATIONAL PANEL ORDER**

## I. SUMMARY

The U.S. Department of Commerce (Commerce) prepared these final results of redetermination pursuant Binational Panel Order[1] concerning Commerce's final affirmative countervailing duty (CVD) determination of certain softwood lumber products (lumber) from Canada.[2] In its decision, the Binational Panel (Panel) remanded, in part, the *Final Determination* to Commerce to: (1) explain why Commerce's determination not to make an adjustment to the conversion factor in the Nova Scotia (NS) benchmark in measuring the adequacy of remuneration of Alberta stumpage prices was supported by substantial evidence and in accordance with law; (2) either make an adjustment to the Alberta stumpage prices for haul costs from the MNP Cross-Border Report data submitted by the Government of Alberta (GOA), or explain why those haul costs are not a factor affecting comparability under 19 CFR 351.511(a)(2)(i); (3) provide further explanation of how its analyses regarding market concentration and the three-sale limit support finding that the British Columbia Timber Sales

[1] *See* "Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination," Secretariat File No. USA-CDA-2017-1904-02, dated May 6, 2024 (Binational Panel Order).
[2] *See Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, 82 FR 51814 (November 8, 2017) (*Final Determination*), and accompanying Issues and Decision Memorandum (IDM), as amended by *Certain Softwood Lumber Products from Canada: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 83 FR 347 (January 3, 2018) (*Order*).

(BCTS) auction prices were distorted and not an appropriate benchmark for British Columbia (BC) stumpage; (4) either find that the New Brunswick (NB) stumpage market is not distorted or explain why any distortion stemming from private sources requires use of a benchmark not from NB; (5) use certain record data to analyze the extent to which auction prices in Québec actually track Timber Sale Guarantee (TSG)-allocated prices; (6) revise stumpage benefit calculations so as not to set to a zero benefit any transaction price that exceeds the benchmark price; (7) provide further explanation and assessment of record evidence with respect to several aspects of Commerce's determination that the BC log export restraints (LER) constitutes a financial contribution, including its analysis regarding entrustment or direction, the "blocking" system, fees-in-lieu of manufacturing, export permit and approval process, exports from the BC interior, mountain pine beetle (MPB) logs, 100-mile radius overlap of sawmills, and the "log ripple effect;" (8) provide further explanation or reconsideration of its determination that the Apprentice Job Creation Tax Credit (AJCTC) program is a specific subsidy; (9) explain why Commerce's determination to attribute to Tolko Marketing and Sales Ltd. (Tolko) subsidies received by its Armstrong plant for electricity sales to the Government of British Columbia (GBC) differed from Commerce's determination in *CTL Plate from Korea*[3] that subsidies received by POSCO Energy for sales to the government were not attributable to respondent POSCO, and to treat payments received by the Armstrong plant as non-attributable if there is not a reasonable distinction between the two cases; (10) determine whether West Fraser Mills Ltd.'s (West Fraser) electricity plants were connected to its sawmills, whether the sawmills use the electricity produced by those plants, and if not, to treat them in the same manner as Tolko's

[3] *See Certain Carbon and Alloy Steel Cut-To-Length Plate from the Republic of Korea: Final Affirmative Countervailing Duty Determination,* 82 FR 16341 (April 4, 2017) (*CTL Plate from Korea*), and accompanying IDM at Comment 1.

Armstrong plant; (11) include Resolute FP Canada Inc.'s (Resolute) electricity sales in the denominator for Resolute's subsidy rate calculation; (12) recalculate the benefit to Tolko and West Fraser for payments they received under BC Hydro Electricity Purchase Agreements (EPAs), using as the benchmark the Tolko price for the sale of electricity to a third party (not including the charge for sending the power to the U.S. market); (13) use the average realized price level reported in the Merrimack Group report as the benchmark for payments Resolute received under Hydro Québec Purchase Power Program (PAE) 2011-01 agreements; and (14) to add the subsidies found for the new subsidy allegations (NSAs) deferred from the investigation to the first administrative review to a respondent's subsidy rate, if any of the remand determinations result in a respondent's subsidy rate changing to *de minimis*, and if the addition of the subsidies from the NSAs found by Commerce in the first administrative review would make that respondent's rate move back to above *de minimis*.[4]

In accordance with the Binational Panel Order, in these final results of redetermination, we: (1) provide further explanation as to why an adjustment to the conversion factor in the NS benchmark with respect to measuring the adequacy of remuneration of stumpage prices in Alberta is not appropriate according to the record evidence and Commerce's methodology; (2) explain why the record does not substantiate the need for an adjustment for haul costs to the Alberta respondents' stumpage purchases, why an adjustment for haul costs to the Alberta stumpage purchase prices would distort the comparison of Alberta stumpage prices to the "pure" stumpage NS benchmark, and that the MNP Cross-Border Report data contain flaws that would make them unusable even if Commerce were to determine that an adjustment for haul costs is appropriate; (3) provide further analysis on how the BC market concentration and features of the

[4] *See* Binational Panel Order at 159-163.

three-sale limit render the BCTS auction prices unusable as a tier-one benchmark; (4) explain why the analytical framework of the *CVD Preamble*[5] to Commerce's regulations at 19 CFR 351.511 and the relationship between the private and government-run stumpage markets in NB make it reasonable to continue to find that the NB stumpage market is distorted; (5) continue to find that the Québec auction prices are unusable as a tier-one benchmark because the relationship between the TSG-allocated market and Québec auctions distort the auction prices, and further that the record does not contain information to conduct the kind of price-to-price comparison between the TSG and auction prices requested by the Panel that would yield meaningful conclusions about whether the Québec auction prices are usable as a market-determined tier-one benchmark; (6) revise stumpage calculations so as to account for negative benefits; (7) explain that Commerce has not departed from its prior analytical framework in countervailing export restraints, and provide further analysis of the record evidence of factors of the LER that distort log prices in British Columbia, including the "blocking" system, fees-in-lieu of manufacturing, export permit and approval process, exports from the BC interior, MPB logs, and the 100-mile radius overlap of sawmills; (8) explain that a reconsideration of the record supports a finding that the AJCTC program is not *de jure* specific, but is *de facto* specific; (9) explain that the relationship between the entities at issue in *CTL Plate from Korea* was different than that of Tolko and its Armstrong plant, and that it is therefore appropriate to continue on remand to attribute to Tolko the subsidies the Armstrong plant received from its sales of electricity to the BC government pursuant to Commerce's regulations at 19 CFR 351.525(b); (10) explain that although the record does not clearly show whether West Fraser's sawmills are physically connected to and use the electricity generated from its electricity plants, Commerce's practice is

[5] *See Countervailing Duties*, 63 FR 65348 (November 25, 1998) (*CVD Preamble*).

not to tie subsidies on a plant or facility-specific basis, and thus it is appropriate to continue to attribute subsidies received by West Fraser's electricity plants to West Fraser; (11) include Resolute's electricity sales in the sales denominator for the company's non-stumpage subsidy calculations; (12) recalculate Tolko's benefit under the BC Hydro EPA using its third-party prices, and use that rate calculated for Tolko as West Fraser's benefit under the BC Hydro EPA, because Commerce cannot use Tolko's business proprietary prices to calculate a company-specific rate for West Fraser; and (13) recalculate Resolute's benefit for payments under its Hydro Québec PAE 2011-01 agreements using as the benchmark the prices from the Merrimack Group report.

## II. BACKGROUND

On December 15, 2016, Commerce initiated a CVD investigation of 33 programs alleged by the Committee Overseeing Action for Lumber International Trade Investigations or Negotiations (COALITION or Petitioner).[6] Commerce selected for individual examination four mandatory respondents: Canfor Corporation (Canfor), Resolute, Tolko, and West Fraser.[7] Shortly thereafter, on April 4, 2017, Commerce accepted J.D. Irving, Limited (JDIL) as a voluntary respondent.[8] Separately, on March 15, 2017, the COALITION submitted NSAs.[9]

[6] *See Certain Softwood Lumber Products from Canada: Initiation of Countervailing Duty Investigation*, 81 FR 93897 (December 22, 2016).

[7] *See* Memorandum, "Subsidy Rate Methodology and Respondent Selection," dated January 18, 2017. Commerce found the following companies to be cross-owned with Canfor: Canadian Forest Products, Ltd., and Canfor Wood Products Marketing, Ltd. Commerce found the following companies to be cross-owned with Resolute: Resolute Growth Canada Inc., Resolute Sales Inc., Abitibi-Bowater Canada Inc., Bowater Canadian Ltd., Resolute Forest Products Inc., Produits Forestiers Maurice S.E.C., and 9192-8515 Quebec Inc. Commerce found the following companies to be cross-owned with Tolko: Tolko Industries Ltd., and Meadow Lake OSB Limited Partnership. Finally, Commerce found the following companies to be cross-owned with West Fraser: West Fraser Timber Co., Ltd., West Fraser Alberta Holdings, Ltd., Blue Ridge Lumber Inc., Manning Forest Products, Ltd., Sunpine Inc., and Sundre Forest Products, Inc.

[8] *See* Memorandum, "Whether to Select a Voluntary Respondent," dated April 4, 2017. Commerce found the following companies to be cross-owned with JDIL: Miramichi Timber Holdings Limited, The New Brunswick Railway Company, Rothesay Paper Holdings Ltd., St. George Pulp & Paper Limited, and Irving Paper Limited.

[9] *See* COALITION's Letter, "Additional Subsidy Allegations," dated March 15, 2017 (New Subsidy Allegations).

On April 28, 2017, Commerce published its *Preliminary Determination*, in which it calculated above *de minimis* subsidy rates for Canfor, JDIIL, Resolute, Tolko, and West Fraser.[10] Commerce also explained that it had received NSAs submitted by the COALITION but stated its intent to "consider whether to initiate an investigation with respect to th{o}se alleged subsidies" after the *Preliminary Determination*.[11]

On November 8, 2017, Commerce published its *Final Determination*, in which it calculated *ad valorem* countervailable subsidy rates of 13.24 percent for Canfor, 3.34 percent for JDIL, 14.70 percent for Resolute, 14.85 percent for Tolko, 18.19 percent for West Fraser, and 14.25 percent for the all-others rate.[12] Commerce also continued to defer consideration of the NSAs filed by the COALITION.[13]

On December 26, 2017, the U.S. International Trade Commission (ITC) notified Commerce of its affirmative injury determination.[14] Accordingly, Commerce published a CVD *Order* on lumber from Canada, and amended the subsidy rate calculated for West Fraser to correct a ministerial error in the *Final Determination*.[15] Based on Commerce's correction, the *ad valorem* subsidy rate for West Fraser decreased from 18.19 percent to 17.99 percent, and the all-others rate decreased from 14.25 to 14.19 percent. All other CVD rates remained unchanged from the *Final Determination*.[16]

[10] *See Certain Softwood Lumber Products from Canada: Preliminary Affirmative Countervailing Duty Investigation,* 82 FR 19657 (April 28, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).
[11] *See Preliminary Determination* PDM at 8.
[12] *See Final Determination*, 82 FR at 51815.
[13] *See Final Determination* IDM at 7 and 20.
[14] *See* ITC's Letter, "Softwood Lumber from Canada USITC Investigation Nos. 701-TA-566 and 731-TA 1342, USITC Publication 4749," dated December 26, 2017.
[15] *See Order*.
[16] *Id.,* 83 FR at 348-349.

On December 14, 2017, certain parties requested a NAFTA Panel Review of the *Final Determination*. A Panel was formed, briefing took place between March 2018 and November 2018, and a hearing was held from September 27 to 29, 2023. On May 6, 2024, the Panel issued its decision and order in which it remanded to Commerce, in part, the *Final Determination*.[17]

## III. REMANDED ISSUES

### A. Conversion Factor for Alberta Stumpage Calculations

In the *Final Determination,* Commerce determined that the Timber Damage Assessment (TDA) survey prices submitted by the Alberta Parties did not constitute a usable tier-one benchmark and applied the NS benchmark in determining the adequacy of remuneration for respondents' purchases of stumpage in Alberta.[18] The volume data in the NS survey is calculated using a weight-to-cubic meter conversion factor that the Government of Nova Scotia (GNS) developed between 1989 and 1994.[19] In the underlying investigation, the Canadian Parties contended that the NS conversion factor is unreliable for several reasons, including that it is allegedly outdated because it was first developed over two decades prior to the period of investigation (POI), and does not contain all pertinent details of the trees sampled (*i.e.*, species, size, and time of year of the samples) in developing the conversion factor. The Canadian Parties also asserted that due to different weight-to-volume conversion factors used in Alberta and Nova Scotia, different volumes of wood are recorded for the same weight, resulting in overstated stumpage prices for the NS benchmark that distort a comparison with Alberta stumpage prices. Thus, the Canadian Parties argued that Commerce should use a different weight-to-volume conversion factor, or adjust the conversion factor in the NS benchmark, in comparing Alberta

[17] *See* Binational Panel Order at 159-163.
[18] *See Final Determination* IDM at Comment 16.
[19] *Id.* at 119-120; *see also* GNS Stumpage Initial Questionnaire Response (IQR) at Exhibit NS-5 at 4 and 13.

and NS stumpage prices.[20] In the *Final Determination*, Commerce continued to use the conversion factor from the NS survey.[21]

In the Binational Panel Order, the Panel upheld Commerce's determination that the TDA survey prices do not constitute a usable tier-one benchmark, as well as its use of the NS benchmark to measure the adequacy of remuneration for the Alberta respondents' stumpage purchases.[22] However, the Panel concluded that in the underlying investigation, and in briefing and argument before this Panel, Commerce had not addressed the Canadian Parties' assertion that Commerce should have adjusted the NS weight-to-volume conversion factor to account for differences in timber profiles and scaling standards between Alberta and Nova Scotia.[23] The Panel thus remanded the issue for Commerce to explain why its decision not to adjust the conversion factor in the NS benchmark was based on substantial evidence and in accordance with law.[24] Consistent with the Panel's Order, we provide further explanation below for Commerce's use of the NS survey conversion factor, without adjustments.[25]

[20] *See* Canadian Parties' Letter, "Canadian Government Parties' Joint Case Brief," dated July 28, 2017, at 55-58; *see also* GOA's Letter, "Case Brief of the Government of Alberta and the Alberta Softwood Lumber Trade Counsel," dated July 27, 2017 (GOA Case Brief), at 42-43; West Fraser's Letter, "Case Brief of West Fraser," dated July 27, 2017, at 24-25; Tolko's Letter, "Tolko CVD Affirmative Case Brief," dated July 27, 2017, at 34; and Canfor's Letter, "Case No. C-122-858: Case Brief," dated July 27, 2017, at 48.
[21] *See Final Determination* IDM at 119-120.
[22] *See* Binational Panel Order at 30-31.
[23] *Id.* at 32.
[24] *Id.*
[25] As an initial matter, we note that the Panel stated that Commerce did not address arguments raised in West Fraser's case brief in Comment 43 of the IDM. *See* Binational Panel Order at 32. We note that although Commerce did not directly respond to West Fraser's arguments in Comment 43, in Comment 41 Commerce responded to other arguments raised by the Canadian Parties on the reliability of the conversion factor in the NS survey that overlap with certain arguments made with respect to the conversion factor as applied to Alberta stumpage. These arguments included the allegations that the conversion factor was outdated, challenges to Commerce's determination that the GNS used the conversion factor in the ordinary course of business, and the assertion that the limited corrections offered at verification constituted pervasive errors undercutting the overall reliability of the NS survey. The Panel rejected these claims and determined that Commerce's reliance on the NS survey was based on substantial evidence. *See* Binational Panel Order at 18-21. The analysis in this redetermination focuses on the remaining claims of the Canadian Parties regarding adjustments to the conversion factor for Alberta stumpage.

**Analysis**

The Alberta Parties assert that the NS survey is unreliable because the mix of species, trees sizes, and time of year of the samples underlying the survey are unknown, and because Alberta and Nova Scotia have differing timber profiles.[26] As an initial matter, tree size, species, and overall forest conditions are integral to deriving conversion factors, and record evidence demonstrates that private-origin standing timber in Nova Scotia is comparable to Crown-origin standing timber in Alberta in terms of species, size, and forest conditions. Specifically, the spruce-pine-fir (SPF) species are the dominant species that grow and are harvested on private lands in Nova Scotia and Crown lands in Alberta, and constitute 99.98 percent of the Crown-origin standing timber harvest volumes in Alberta.[27] The diameter at breast height (DBH) of SPF standing timber that grows in Nova Scotia and Alberta is also similar. The GNS reports that the DBH for all softwood species on private land is 17.29 cm and 15.9 cm for SPF standing timber,[28] and the GOA reported that the DBH of SPF standing timber species in Alberta ranges from 18.2 cm for black spruce to 24.6 cm for white spruce.[29] Finally, record evidence does not indicate that there are fundamental differences between the Acadian forest of Nova Scotia and the boreal forest encompassing large areas of Alberta. Species and DBH are the two most critical elements in determining whether standing timber is comparable, and the Acadian and boreal forests are both dominated by SPF-based species that have a similar DBH. Moreover, the

[26] *See* Alberta Parties' Rule 57.1 Brief at 17-119.
[27] *See Preliminary Determination* PDM at 45 (citing GNBQR at Exhibit NB-STUMP-1 at Table 4, GQRGOQ at Exhibit QC-STUMP-12, GQRGOO at 4, 19, and Exhibit ON-STATS-1, and GQRGOA at AB-S-11), unchanged in *Final Determination* IDM at Comment 40.
[28] *See Preliminary Determination* PDM at 45 (citing GNS IQR at 8), unchanged in *Final Determination* IDM at Comment 40.
[29] *See Preliminary Determination* PDM at 45 (citing GQRGOA Volume IV, Exhibit AB-S-23 at 20), unchanged in *Final Determination* IDM at Comment 40.

Canadian Parties did not provide evidence demonstrating that the growing conditions between the two forests are so different that the timber in them are incomparable.[30]

Although the Canadian Parties contend that an adjustment to the NS benchmark is necessary to reflect the prevailing market conditions in Alberta, pursuant to section 771(5)(E)(iv) of the Tariff Act of 1930, as amended (the Act),[31] the legal requirements governing Commerce's selection of benchmarks do not demand that the selected benchmark be a perfect match to the subsidy under evaluation, but only that it is comparable.[32] Thus, even if there are minor differences in the timber profiles between Alberta and Nova Scotia, we do not find those differences render the NS survey unreliable or necessitate an adjustment to the conversion factor. Because Nova Scotia and Alberta standing timber are comparable in terms of size, species, and forest conditions – and these features are integral to deriving conversion factors – we find that the comparability of the standing timber in Nova Scotia and Alberta render it unnecessary to make an adjustment to the conversion factor.

With respect to the argument that Alberta and Nova Scotia have differing scaling standards that will lead to inaccuracies when using the NS survey conversion factor,[33] we find that each province develops scaling standards and conversion factors that result in volumetric measures in cubic meters. Thus, it is possible to compare timber in Alberta and Nova Scotia without any further volumetric conversions. Moreover, as explained above, we find that Nova Scotia and Alberta standing timber are comparable in terms of size, species, and forest

[30] *See Final Determination* IDM at 113.
[31] *See* Alberta Parties' 57.1 Brief at 111-112; *see also* Government of Canada's (GOC) Rule 57.1 Brief at 50.
[32] *See Archer Daniels Midland Co. v. United States*, 968 F. Supp. 2d 1269, 1278 (CIT 2014) (Commerce "is required only to select benchmarks that are comparable, not identical."); *see also Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1369 (CIT 2015) ("{A}lthough Commerce must use benchmark prices for merchandise that is *comparable* to a respondent's purchases to satisfy the regulation, there is nothing that requires that it use prices for merchandise that are identical to a respondent's purchases.") (emphasis in original).
[33] *See* Alberta Parties' Rule 57.1 Brief at 117-121.

conditions. Therefore, while the GNS and GOA have developed conversion factors for use in each province, because the timber in both provinces is comparable, and because both conversion factors produce volumes in the same unit of measurement (*i.e.,* cubic meters) we find that the respective conversion factors applied in Nova Scotia and Alberta result in volumetric measurements that are reasonably similar and do not warrant any further adjustments.

Thus, for the reasons described above, we continue to find for these final results of redetermination that it is unnecessary for Commerce to adjust the NS conversion factor as suggested by the Canadian Parties.

**B. Haul Costs and Alberta Stumpage Prices**

In the *Final Determination,* Commerce declined to adjust the stumpage benefit calculation for what the Canadian Parties alleged were greater distances in Alberta than in Nova Scotia between harvest areas and the mill or market, which in turn led to higher haul costs and lower stumpage values in Alberta than in Nova Scotia.[34] The Alberta Parties argued that Commerce should use data from the March 10, 2017 MNP Cross-Border Report to make an adjustment for differences between Alberta and Nova Scotia in haul costs and proximity to market.[35] In the Binational Panel Order, the Panel cited Commerce's Rule 57.2 brief, in which Commerce stated that any purported differences in market conditions between Alberta and Nova Scotia are merely "estimates" or "based on assumptions made in the absence of data and without record support."[36] Contrary to Commerce's assertion, the Panel found that the data in the MNP Cross-Border Report were based on calculated weighted-average distances, rather than

[34] *See Final Determination* IDM at 113-114.
[35] *See* GOA Case Brief at 42-43.
[36] *See* Binational Panel Order at 33 (citing Rule 57.2 Brief of the U.S. Department of Commerce, Volume II: Eastern Province Stumpage Issues, 160-161).

estimates.[37] With respect to the COALITION's argument that haul costs would be a post-harvest cost that should not be included in the calculation of stumpage prices, the Panel noted that a factor that decreases the value of standing timber may be a "factor affecting comparability" under 19 CFR 351.511(a)(2)(i).[38] Thus, the Panel remanded to Commerce to either adjust the Alberta stumpage price for the haul costs contained in the MNP Cross-Border Report, or explain why the costs are not a factor affecting comparability within the meaning of 19 CFR 351.511(a)(2)(i).[39]

**Analysis**

As an initial matter, the question of whether the data in the MNP Cross-Border Report were usable to make an adjustment for purported differences in haul costs between Nova Scotia and Alberta presumes that such an adjustment was necessary. Commerce did not make that threshold finding in the *Final Determination*. In asserting that tree stands are closer to mills in Nova Scotia than in other provinces, thus lowering transportation costs and increasing stumpage prices in Nova Scotia, the Canadian Parties cited the Asker Report and an estimate of average road construction costs from one NS logger.[40] However, Commerce determined that the Canadian Parties' arguments regarding hauling distances between Nova Scotia and other provinces, including Alberta, were based only on two assumptions and an estimate from one logger and, thus, the Asker Report conclusions were based on speculation, rather than on substantial evidence.[41] Thus, Commerce concluded that "to the extent such differences in hauling distance and infrastructure development exist, we find that the Canadian Parties have not

[37] *See* Binational Panel Order at 33.
[38] *Id.*
[39] *Id.*
[40] *See Final Determination* IDM at 113-114 (citing GOC Primary QNR Response at Exhibit GOC-Stumpage 6, *Economic Analysis of Factors Affecting Cross Jurisdictional Stumpage Price Comparisons,* by John Asker, Ph.D. at 52-53 (Asker Report)).
[41] *See Final Determination* IDM at 114.

adequately substantiated and quantified the extent of the purported difference or that any differences are reflected in Nova Scotia stumpage prices."[42] The Canadian Parties cite to the MNP March 10th Report, which purports to show that hauling costs are higher for harvesters in Alberta than in Nova Scotia due to differences in road density and the average distance from timber stand to sawmill, and from sawmill to regional markets in the two provinces. However, these costs are incurred after harvesting standing timber and after the purchase/sale of stumpage. Because we determine that the private prices in the Nova Scotia benchmark are stumpage prices, *i.e.*, prices charged to the purchaser for the right to harvest timber, which do not reflect any post-harvest costs such as hauling logs from a stand to a mill, or hauling lumber from a mill to a regional market, a proper stumpage-to-stumpage comparison must logically exclude the cost of such activities from the calculation.

With respect to the Panel's order to either make an adjustment for haul costs to the Alberta respondents' stumpage prices, or explain why these costs are not a factor affecting comparability under 19 CFR 351.511(a)(2)(i), we continue to find that the timber in Nova Scotia and Alberta is comparable and that no further adjustment for transportation or haul costs is necessary. Under its benchmark hierarchy under 19 CFR 351.511(a)(2)(i), Commerce will first seek to measure the adequacy of remuneration for a government-provided good "by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question" (*i.e.*, a tier-one benchmark). The regulations further provide that in choosing such transactions to serve as a tier-one benchmark, Commerce "will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability."[43] Thus, Commerce will consider all relevant factors in choosing the appropriate

[42] *Id.*
[43] *See* 19 CFR 351.511(a)(2)(i).

benchmark price. In the *Final Determination,* Commerce selected private-origin standing timber in Nova Scotia as the benchmark to compare to Alberta stumpage, because Commerce determined that the transactions for private-origin standing timber in Nova Scotia were sufficiently comparable to Alberta timber given that the size, species, and growing conditions were similar in both provinces.[44]

Transportation costs could potentially be one factor affecting comparability. However, in the underlying investigation, hauling costs were not a decisive factor in selecting the NS benchmark for measuring the adequacy of remuneration for stumpage. Rather, size, species and growing conditions were the primary factors Commerce considered in determining whether the timber in Nova Scotia and Alberta were comparable and, thus, whether selection of the NS benchmark for Alberta stumpage was appropriate. Moreover, as explained above, the record does not demonstrate that the transportation infrastructure is so different between Alberta and Nova Scotia as to warrant an adjustment for transportation and haul costs.

Furthermore, as explained in the *Final Determination,* the NS benchmark is a pure stumpage benchmark.[45] Thus, to ensure an apples-to-apples comparison between the pure stumpage prices in the NS benchmark and the respondents' stumpage purchase prices, it would be inappropriate to provide additional adjustments to the Alberta respondents' stumpage purchases for costs that are not already included in the NS benchmark, because that would distort the pure stumpage-to-stumpage benchmark comparison and yield an inaccurate benefit calculation. Thus, the fact that transportation costs may (or may not) be considered a factor "affecting comparability" in selecting the appropriate benchmark does not necessarily mean that an adjustment to the price paid for the good is also required or appropriate. In this case, it is not.

[44] *See Final Determination* IDM at 110-111.
[45] *Id.* at 138.

Finally, even if we were to find that an adjustment for haul and transportation costs is appropriate in this case, the data provided in the MNP Cross-Border Report would be unreliable for making any adjustments. As an initial matter, this report was commissioned for the purposes of the underlying investigation,[46] and, as such, there is a concern that the data and conclusions may be tailored to generate a desired result. This concern is highlighted upon a review of the report. Specifically, the report indicates that the weighted average haul costs for Alberta averaged $\$14.06/m^3$, whereas the haul costs for Nova Scotia are approximately $\$11.02/m^3$ or $\$3.03/m^3$ lower.[47] These figures are based upon the assertion that the weighted average distance from the cut block to mill in Alberta is 120 kilometers (km), whereas the weighted average distance in Nova Scotia is 65 km.[48] These totals are inputted into a specific equation that determines the weighted average haul costs.[49] As an initial matter, the report contains no explanation as to how this equation was calculated, and there is no source for the underlying hauling costs. Thus, we are unable to determine whether this is an accurate formula. Additionally, other record evidence indicates that the 65 km estimate for cut block to mill in Nova Scotia, made by the MNP Cross-Border Report, is inaccurate. Specifically, the FP Innovations Report,[50] which does not appear to have been commissioned for the purposes of the investigation, indicates that the average distance to sawmills in Nova Scotia is 146 km.[51] This significant discrepancy calls into question the reliability of the data used in the MNP Cross-Border Report that was specifically commissioned for the investigation. Thus, assuming

[46] *See* GOA Questionnaire Response, Volume IV at Exhibit AB-S-23 at page 1. ("{MNP}has been asked to examine the species, timber characteristics and other attributes of timber harvested in Alberta and in six other jurisdictions to explain the differences and to the extent that they exist, the commonalities.").
[47] *Id*. at 26.
[48] *Id*.
[49] *Id*. (Y = 0.0533x + 7.5604).
[50] *See* GNS Questionnaire Response at Exabit NS-16.
[51] *Id.* at 3.

*arguendo*, even if Commerce were to consider making any type of adjustment regarding the hauling costs suggested by the Canadian Parties, record information from the MNP Cross-Border Report would not be a suitable source. Further, if we were to apply this 146 km distance using the formula provided in the MNP Cross-Border Report, the average cost of hauling logs in Nova Scotia is 15.35/$m^3$, or 1.29/$m^3$ higher than in Alberta,[52] which undermines the Canadian Parties' argument that the hauling costs in Alberta are significantly higher than in Nova Scotia.

Thus, for all the reasons explained above, Commerce continues to find that alleged differences in haul costs between Alberta and Nova Scotia are not a factor affecting comparability that would require an adjustment to the Alberta respondents' stumpage purchase prices.

**C. BCTS Auction Prices as a Tier-One Benchmark for BC Stumpage**

In the *Final Determination,* Commerce determined that the BCTS auction prices were not market-determined and therefore could not serve as a tier-one benchmark for measuring the adequacy of remuneration of the respondents' Crown origin stumpage purchases.[53] As explained in the *Final Determination,* Commerce's regulations at 19 CFR 351.511 set forth a benchmark hierarchy under which Commerce's first preference is to use market-determined in-country prices, or tier-one benchmarks, for measuring the adequacy of remuneration for a government-provided good.[54] Such prices could include "prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions."[55] The *CVD Preamble* indicates that Commerce will normally consider

[52] 15.346 = 0.0533(146) + 7.5604.
[53] *See Final Determination* IDM at Comment 18.
[54] *Id.* at 55; *see also* section 771(5)(E)(iv) of the Act (providing that in the case of government-provided goods, a benefit shall be treated as conferred when such goods are provided for less than adequate remuneration).
[55] *See* 19 CFR 351.511(a)(2)(i).

government distortion of a market to be minimal "unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market."[56] If Commerce determines that actual transaction prices are significantly distorted by the government's involvement in the market, Commerce will not use prices from within that market and will seek a price from an alternative tier in its benchmark hierarchy under 19 CFR 351.511.[57]

In the *Final Determination,* Commerce determined that the BCTS auction prices were distorted due to the presence of a small number of large companies dominating the allocation and harvest of BC Crown timber, and the existence of an LER that suppressed log prices in British Columbia, and, in turn, the BCTS auction prices.[58] With respect to the number of companies dominating the auction market, the record demonstrates that just five large lumber companies accounted for 64.8 percent of the cruised-based auction volume and 43.6 percent of the scale-based auction volume.[59] Commerce's conclusion that large company dominance inhibited competition was underscored by the GBC's introduction of the three-sale limit, which capped at three the number of Timber Sale Licenses (TSLs) a company could hold at a time, thus in theory limiting the dominance of the large companies and ostensibly encouraging competition from other companies.[60] Commerce determined that the large companies were nevertheless able to get around this restriction by making "straw purchases" through proxy bidders, which both nullified the intent of the three-sale limit in diversifying competition, and introduced an additional distortion through the payment of cutting rights fees by the large companies that lowered auction bids.[61]

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[56] *See CVD Preamble,* 63 FR at 65377.
[57] *Id.*
[58] *See Final Determination* IDM at 56-58.
[59] *Id.* at 57 (citing Market Memorandum, British Columbia Attachment, Scale Based Auction Table 1.2 and Cruise Based Auction Table at 1.1).
[60] *Id.* at 57.
[61] *Id.* at 57-58.

In the Binational Panel Order, the Panel found that with respect to its market concentration finding, Commerce was not required to demonstrate that the dominance of large lumber companies in the BCTS market actually caused suppressed auction prices, and that Commerce reasonably accorded limited weight to the Athey Report.[62] However, the Panel remanded to Commerce to further explain how market distortion was caused by certain market concentration factors Commerce identified, including: (1) if the Tree Farm License (TFL) and Forest License (FL) prices are derived from the winning bids at the BCTS, how the TFL and FL prices flow back to impact BCTS prices; (2) how concentration of the mills using logs from the BCTS auction inhibited competition when the auctions involved more than 1,000 registered companies and resulted in TSLs being awarded to 280 different bidders during the POI; and (3) how the British Columbia Lumber Trade Council (BCLTC) study from the 2005 *Lumber IV* second administrative review was applicable to the circumstances during the 2015 investigation POI.[63]

The Panel similarly determined that Commerce was not required to demonstrate how the three-sale limit actually affected the number of BCTS auction participants and auction prices.[64] However, as with the market concentration factors listed above, the Panel held that Commerce was required to explain how the three-sale limit could result in market distortion.[65] Moreover, the Panel concluded that straw purchases through proxy bidding did not nullify the effect of the three-sale limit.[66] Thus, the Panel remanded to Commerce to further explain how the three-sale

[62] *See* Binational Panel Order at 37-38 and 41-43.
[63] *Id.* at 38-41.
[64] *Id.* at 43.
[65] *Id.*
[66] *Id.* at 44.

limit, either alone or in combination with the factors identified above, resulted in distortion of the BCTS auction.[67]

Finally, because the Panel remanded Commerce's determination regarding the countervailability of the LER, as addressed below, it reserved its opinion on the relevance of the LER to Commerce's market distortion finding pending a review of Commerce's remand redetermination.[68]

**Analysis**

1. Three-Sale Limit

As explained above, Commerce determined that the BCTS auctions do not produce market-determined prices, because, *inter alia,* the three-sale limit bars companies holding three TSLs from directly submitting bids in an auction.[69] At the outset, Commerce reiterates the significance of there being any limitation at all to parties participating in the BCTS auction. Commerce's regulations contemplate that a tier-one benchmark price may, in certain circumstances, include "actual sales from competitively run government auctions."[70] The *CVD Preamble* further explains the circumstances under which such government-run auctions would be an appropriate tier-one benchmark: when the government sells the goods through "competitive bid procedures that are *open to everyone*, that protect confidentiality, and that are based solely on price."[71] Because the three-sale limit imposes an artificial barrier to participation in the BCTS auctions, they are by definition not "open to everyone." In the *Final Determination,* Commerce explained that in introducing the three-sale limit, "the GBC imposes

[67] *Id.* at 43.
[68] *Id.* at 44.
[69] *See Final Determination* IDM at 57.
[70] *See* 19 CFR 351.511(a)(2)(i).
[71] *See CVD Preamble,* 63 FR at 65377 (emphasis added).

an artificial barrier to participation in the BCTS auctions; while no companies are *per se* excluded from the auction system as a whole, the three-sale quota means that, to the extent some companies have already reached the quota, any given auction will find fewer bidders that could otherwise participate."[72] Thus, the BCTS auctions are not the type of "competitively run government auctions" contemplated under 19 CFR 351.511(a)(2)(i), and Commerce reasonably determined that "{f}or this reason alone, the auctions could not provide a tier-one benchmark under our regulations even if we were to find a non-distorted market overall such that the first tier in our methodology would apply."[73]

We note that in its analysis of the Québec auction system, the Panel recognized the importance of limitations to auction participation in determining the competitiveness of a government-run auction. Specifically, the Panel upheld Commerce's conclusion that the Québec auctions are not open, competitively-run government auctions because, in part, the requirement that timber purchased at auctions must be milled within Québec excludes bidders who might want to mill the timber, or sell for milling, outside the province.[74] Thus, Commerce reiterates its conclusion that the limitation to BCTS auction participation through the three-sale limit is, in and of itself, a sufficient basis to support Commerce's determination that the BCTS auctions are not competitively run and thus do not generate market-determined prices suitable to serve as a tier-one benchmark.

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[72] *See Final Determination* IDM at 57.
[73] *Id.*
[74] *See* Binational Panel Order at 69-70; *see also*, *e.g.*, *Brass Rod from Israel: Final Affirmative Countervailing Duty Determination*, 89 FR 63410 (August 5, 2024), and accompanying IDM at Comment 1 (Finding that land auctions run by the Government of Israel were not "open to everyone" and therefore not usable as tier-one benchmarks because only Israeli citizens were eligible to participate.); and *Barium Chloride from India: Final Affirmative Countervailing Duty Determination*, 88 FR 1044 (January 6, 2023), and accompanying IDM at Comment 3 (finding that the APMDC's auctions are not "open to everyone" because they require participants to meet specific qualifications, many of which are out of reach of domestic consumers of barytes, and thus these auctions are limited to only exporters or Indian companies; thus, the auction tender prices are not a viable tier-one benchmark).

However, the Panel has ordered Commerce to provide further analysis as to how the three-sale limit leads to distortion of the BCTS auction. This request gets to the heart of why the *CVD Preamble* stipulates that any government-run auction be open to all parties, because the Panel request essentially asks Commerce to provide analysis of a scenario in which the GBC has placed a restriction on parties bidding on auctions, and for which the alternative outcome is not knowable or measurable for any party, whether it is the GBC, Dr. Athey, or Commerce. There are theoretical explanations of how this restriction could distort the BCTS auction results, but any analysis is simply record-based speculation on the part of all parties, as it is not possible to know the results of the hypothetical auctions if the large mills could bid without having to partner with straw purchasers. As noted above, if mills that had three purchases were not able to collaborate with third parties, either affiliated or unaffiliated, to submit straw bids, then the restriction would result in fewer bidders in an auction than without the restriction, which theoretically would suppress prices. While the record demonstrates that the large mills have worked with straw bidders to submit bids on their behalf after they have reached the three-sale limit,[75] it is unclear whether there were instances where the mills were unable to identify a partner to submit a proxy bid and thus simply did not bid on the auction. Similarly, in instances where the mills have partnered with market loggers (as opposed to a company employee) to submit a proxy bid, the restriction has suppressed the number of bidders that should be competing in the auction. In a competitively run auction, the mill would be bidding against the market logger and not partnering with it to submit what is essentially a joint bid. Joint bids suppress the theoretical winning price of an auction by suppressing the number of parties participating in that auction.

[75] *See Final Determination* IDM at 57 (citing Tolko Supp QNR 2 Response, Part 1 at 25; and West Fraser Primary QNR Response, Part 1 at 158).

The record also establishes that the mills have paid cutting rights fees to third parties.[76] There are two different scenarios involving these cutting rights fees that lead to different theoretical distortions in BCTS prices. First, in instances where an independent party wins a BCTS auction and did not have to bid against a large mill (or its straw bidder) because the large mill had reached its limit, the three-sale limit has removed a potential bidder who the record establishes has determined that a fair value for that timber is not just the stumpage value for the timber, but is also willing to pay a cutting rights fee in addition to the stumpage price to the auction winner. The Kalt report argues that "{i}n general, prices determined by competition among potential buyers turn on what the potential buyer with the second-highest valuation is willing to pay for a good."[77] In this instance, the three-sale limit has removed a party that values the timber at higher than the winning bid, removing a party that would have increased the second-highest valuation in the auction and, thus, reducing the winning auction bid (and as a consequence prices set by the Market Pricing System (MPS)). In this scenario, the three-sale limit has removed a bidder that had legitimate interest in obtaining the timber, as evidenced by the fact that it negotiated an agreement for the timber after the auction, and valued the timber at a higher price than the winning bidder (because the restricted party paid both the stumpage fee and an additional cutting rights fee). The restriction, in such an instance, has suppressed prices in the auction by removing a potential bidder.

Second, in instances where the restricted mill has partnered with a proxy to submit a winning bid on its behalf and then paid a cutting rights fee to the party, the winning auction bid does not reflect the full value at which the mill values the timber (*i.e.*, the stumpage fee plus the

[76] *Id.* at 58 (citing West Fraser Primary QNR Response, Part 1 at 158; Tolko Supp QNR 2 Response, Part 1 at 25; and Canfor Supp QNR 4 Response at 18).
[77] *See* GBC Primary QNR Response, Part 1 at Exhibit LEP-1 at 21.

cutting rights fee) because the cutting rights fee is not captured in the winning auction bid. Therefore, in this scenario the winning auction bid is again suppressed as a result of the three-sale limit and restrictions on participation.

Thus, although it is not possible to determine the precise impacts the absence of the three-sale limit would have on the BCTS auction prices, the preceding discussion demonstrates several possible distortive impacts the three-sale limit may have on the BCTS prices. These scenarios also underscore the logic underlying the explanation of the *CVD Preamble* that government-run auctions might be an appropriate tier-one benchmark only when they are based on "competitive bid procedures that are *open to everyone.*"[78] Thus, because the BCTS auction restricts participation and therefore limits competition through the three-sale limit, the auction prices are not usable as a tier-one benchmark.

2. Market Concentration Factors

Commerce clarifies at the outset that the more than 1,000 registered companies figure cited by the GBC significantly overstates the diversity of the bidders during the POI. First, the number of registered bidders does not equal the number of parties that actually submitted a bid during the POI, but rather the number of companies that at some point prior to and during the POI had registered with the GBC. During the POI, there were 325 entities/persons that submitted a bid in the BC interior, which indicates that a significant majority of registered bidders were not actively participating in auctions during the POI.[79] The record also demonstrates that the mandatory respondents partnered with parties to submit bids on their

[78] *See CVD Preamble,* 63 FR at 65377 (emphasis added).
[79] *See* GBC Primary QNR Response Part 1 at Vol. I at Exhibit BC-S-152 (this number of companies was calculated by filtering by "Interior" and then removing duplicates of entities that bid more than once during the POI).

behalf during the POI,[80] which indicates that the 325 bidders during the POI is also overstated as a number of these entities are simply the large mills in disguise. The data also contains multiple instances of bidders with the same surname during the POI, which likely indicates that these bidders represent one entity and are not in fact separate bidders.[81] The GBC (and, therefore, Dr. Athey who relied on data provided by the GBC) is not aware of which of these bidders are submitting proxy bids on behalf of another party or an affiliated party. Any analysis of the diversification of the bidders based on the GBC data without business proprietary information (BPI) that indicates which parties were actually submitting bids on behalf of another party does not accurately reflect what is actually happening in the auctions. Accordingly, the record of the investigation does not establish any baseline for diversification of bidders because the GBC's own rule, the three-sale limit, has led to a situation where the data do not allow for an accurate picture of diversification of bidders during the POI.

For similar reasons, the 280 winning bidders cited by the GBC is also an unreliable number. The record demonstrates that there were 229 winning bidders in the BC interior during the POI.[82] Similar to above, the surnames in this data also indicate that multiple persons who submitted winning bids were likely the same entity, so the number of winning bidders is almost certainly overstated.[83] In addition, the Table B purchases reported by the respondent companies,

[80] *See Final Determination* IDM at 57 (citing Tolko Supp QNR 2 Response, Part 1 at 25; and West Fraser Primary QNR Response, Part 1 at 158).
[81] *See* GBC Primary QNR Response Part 1 at Vol. I at Exhibit BC-S-152. For example, the bidders during the POI include a Wadlegger Logging and Construction LTD. and then two separate bidders with the surname Wadlegger. It is likely that, in reality, these are one entity and not three separate bidders. There are four bidders during the POI with the surname Posselt. While these are likely related parties, they are treated as separate bidders in the GBC data and in Dr. Athey's analysis that relies on the GBC data.
[82] *See* GBC Primary QNR Response Part 1 at Exhibit BC-S-152 (this number of companies is calculated by filtering by "Interior" and "Awarded to This Bid" columns and then removing duplicates of entities that bid more than once during the POI).
[83] *Id.* The Wadlegger company and two individuals with the surname Wadlegger all show up in the winning bid list. The four individuals with the last name Posselt are also present in the winning bidder list.

where they were asked to report their POI Crown stumpage purchases when the respondent was not the auction winner or tenure agreement holder, but where the respondent fulfilled all of the tenure obligations and paid the stumpage fee to the GBC, indicate that some of the 229 winning bidders were likely successful proxy bidders making straw auction purchasers on behalf of the respondents.[84] While the details of the extent to which there is overlap between the Table B and the POI winning auction bidders are BPI, the record demonstrates that the respondents reported auction stumpage purchases in Table B that overlap with the 229 winning bidders in the BC interior during the POI. The record is not definitive on which of these Table B purchases were proxy bids at the time of the auction or were an agreement that was negotiated following the auction, but this is an additional indication that the GBC's data (and Dr. Athey's analysis based on that data) does not present an accurate picture of which parties were actually winning auctions during the POI. The data on the record, however, does demonstrate that the large mills dominated the BCTS auction market during the POI, despite the fact that this data likely *understates* the volume associated with the large mills.[85]

The portion of the BCLTC study, originally submitted in the 2005 *Lumber IV* second administrative review, that was cited by Commerce in the *Final Determination*, still has relevance to the POI despite the fact that the system in the BC interior and the supply of timber to the mills changed between the *Lumber IV* proceeding and the investigation underlying this proceeding. The language excerpted in the *Preliminary Determination* concerning the GBC's three-sale limit, and the factors that loggers who anticipate selling harvested logs to mills must

[84] *See* Canfor Final Calculation Memorandum at Attachment IV at tab "BCSTablesABE" (Filter the data by "Y" in column "Crown Auction Purchase" and "Y" in column "Paid Stumpage." This will only leave Canfor's Table B auction purchases); *see also* Tolko Final Calculation Memorandum at Attachment IV at tabs "TableB1," "RevisedTableB2," and "TableB2Logs;" and West Fraser Final Calculation Memorandum at AttII.FINAL WF BC Stumpage Calc.BPI at tab "Table B."
[85] *See Final Determination* IDM at 57.

consider when determining their valuation before submitting bids in the auction, still exists during the POI. This BCLTC study concluded that loggers "will still take into account the mill's valuation for the logs" and that despite the three-sale limit being in place, "the mill's valuation for the logs is still reflected in the auction prices, even if it does not bid directly."[86] While Commerce acknowledged that the supply overhang that existed during *Lumber IV* did not continue to exist during the POI,[87] the fact that loggers submitting a bid still must consider what a mill would be willing to pay for the harvested logs has not changed. As discussed elsewhere, the province maintained a log exporting regime that meant that because only surplus logs could be exported out of the province, the large mills had to obtain logs from sources beyond their long-term tenures during the POI,[88] and the data on this record demonstrate that a few large mills still dominated the consumption of logs during the POI.[89] This all leads to a situation where independent loggers still must take into consideration what the large mills are willing to pay for the logs when submitting their bids as the large mills are the likely purchasers.

**D. Distortion of New Brunswick Stumpage Market**

In the *Final Determination*, Commerce determined that private stumpage prices in New Brunswick are not market-determined and thus could not serve as a tier-one benchmark for NB stumpage under 19 CFR 351.511(a)(2)(i).[90] Specifically, the record indicated that 50.79 percent – or a slight majority – of the total timber harvest during the POI was Crown-origin.[91] Commerce determined that the GNB's position as the dominant supplier of stumpage, and the

[86] *See Preliminary Determination* PDM at 36.
[87] *See Final Determination* IDM at 56.
[88] *See infra* Section G: Financial Contribution of the BC LER.
[89] Specifically, the five largest mills account for 65.23 percent of logs consumed during the POI, and the ten largest mills account for nearly 80 percent of the logs consumed. *See* Market Memorandum, British Columbia Attachment, Log Input Data for BC Sawmills, Calendar Year 2015.
[90] *See Final Determination* IDM at Comment 28.
[91] *Id.* at 80.

existence of a small number of companies as dominant consumers of stumpage in the province, created an oligopsony effect.[92] Commerce also concluded that the existence of a supply overhang in the amount of unharvested tenure-allocated timber, along with the dominance of certain mills (and JDIL in particular), indicated that the prices that the mills are willing to pay for private stumpage are limited by the availability of additional volume of Crown stumpage at prices set by the Crown.[93] Additionally, Commerce concluded that JDIL's ability to obtain timber from its private lands in Maine further indicated its ability to obtain timber from sources other than private woodlot owners in New Brunswick, if those owners do not sell at a sufficiently low price.[94] Finally, three reports prepared for, or by, the GNB in the ordinary course of business indicated that the private stumpage market in New Brunswick was distorted.[95] Accordingly, Commerce used JDIL's purchases of private-origin standing timber in Nova Scotia as a benchmark for its NB stumpage purchases.[96]

In the Binational Panel Order, the Panel underscored that Commerce's determination that private prices in New Brunswick were not market-determined was based in part on distortions Commerce found in the *private market*, rather than purely as a result of *government involvement* in the market.[97] The Panel cited the section of the *CVD Preamble* regarding tier-one benchmark selection that provides: "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

[92] *Id.* at 85.
[93] *Id.* at 83.
[94] *Id.* at 83-84.
[95] *Id.* at 81-82 (citing Auditor General of New Brunswick, "Report of the Auditor General – 2008, Chapter 5: Department of Natural Resources Timber Royalties" (2008) (*Report of the Auditor General – 2008*); Auditor General of New Brunswick, "*Report of the Auditor General – 2015*, Volume II, Chapter 4: Department of Natural Resources Private Wood Supply" (2015) (*Report of the Auditor General – 2015);* and Private Forest Task Force *Report*, "New Approaches for Private Woodlots – Reframing the Forest Policy Debate" (2012) *(2012 PFTF Report*)).
[96] *See Final Determination* IDM at 78.
[97] *See* Binational Panel Order at 61-63.

the next alternative in the hierarchy."[98] Thus, the Panel concluded that the *CVD Preamble* indicates that to reject a potential tier-one benchmark, government involvement must be the source of market distortion, and not government involvement "in conjunction with" private forces, and that Commerce did not provide an explanation for deviating from the instructions in the *CVD Preamble*.[99] Accordingly, the Panel remanded to Commerce to either find that the NB stumpage market is not distorted, or to explain why any distortion would require using a different benchmark than the ones proposed when the distortion is a result of private forces.[100]

**Analysis**

As an initial matter, we respectfully disagree with the Panel's premise. Neither the *CVD Preamble* nor the regulation at 19 CFR 351.511(a)(2)(i) preclude Commerce from considering a variety of potential market forces that could distort a market and render a proposed price unusable as a benchmark. To determine whether a benefit has been conferred for a government-provided good, Commerce examines whether such goods have been provided for less than adequate remuneration.[101] In determining the adequacy of remuneration of a good, the first tier in Commerce's benchmark hierarchy states that Commerce will "compare the government price to a *market-determined price* for the good… resulting from actual transactions in the country in question."[102] The *CVD Preamble* reiterates that Commerce's "preference is to compare the government price to *market-determined* prices…"[103] Thus, central to Commerce's determination of whether a government-provided good was sold for less than adequate remuneration is the

[98] *Id.* at 63 (citing *CVD Preamble,* 63 FR at 65377) (emphasis added).
[99] *See* Binational Panel Order at 63.
[100] *Id.*
[101] *See* section 771(5)(E)(iv) of the Act; *see also* 19 CFR 351.511(a)(1).
[102] *See* 19 CFR 351.511(a)(2)(i) (emphasis added).
[103] *See CVD Preamble,* 63 FR at 65377.

selection of a *market-determined* benchmark price to compare to the government price for a good. Such a tier-one benchmark can include transactions between private parties.[104]

The *CVD Preamble* further provides that Commerce will normally consider government involvement in the market to have a minimal impact on the price for a good, "unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market."[105] Commerce will not use proposed tier-one transaction prices "{w}here it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market."[106] Thus, the *CVD Preamble* sets a threshold for determining when Commerce might disregard a possible tier-one benchmark price when that price is affected by the government involvement in the market.

However, neither the regulation at 19 CFR 351.511(a)(2)(i) nor the *CVD Preamble* states that Commerce is precluded from examining other (*i.e.*, non-governmental) factors that may distort a given market. This is further underscored by the *CVD Preamble's* statement elsewhere that, in the context of tier-two benchmarks, "{i}f the most appropriate benchmarks are for products that are dumped or subsidized in the country where the subject merchandise is produced, we will adjust the benchmarks to reflect the dumping or subsidization."[107] Dumping is, by nature, a private pricing practice, and yet the *CVD Preamble* provides that Commerce may take such behavior into account in its benchmarking to measure the benefit provided by less than adequate remuneration programs. Further, one could imagine a variety of "private" market scenarios that are nevertheless not yielding market-based outcomes – *e.g.*, markets with antitrust violations, as just one example. To use such private prices, simply because a "private" force is to

[104] *See* 19 CFR 351.511(a)(2)(i); *see also CVD Preamble,* 63 FR at 65377.
[105] *See CVD Preamble,* 63 FR at 65377.
[106] *Id*.
[107] *Id.* 63 FR at 65377 and 65378.

blame for the non-market outcome, rather than government involvement in the market, would nullify the overarching directive of Commerce's regulation and the *CVD Preamble* to select a *market-determined* price for comparison with the price for the government-provided good. The use of such a price as a benchmark would also be uninformative for the primary purpose under section 771(5)(E)(iv) of the Act in determining whether a good was provided for less than adequate remuneration. If the benchmark price is distorted, then the comparison price against which the price for the government-provided good is measured tells Commerce very little about whether the good has actually been provided for adequate remuneration.

Thus, if Commerce is not precluded by the *CVD Preamble* and regulations from considering all relevant factors that may distort a given market and potential benchmark price, we also find it appropriate for Commerce to make a finding, as it did with respect to the private NB stumpage prices in the *Final Determination*, that a combination of factors, including government majority share of the market, may render a price not market-determined and thus unusable as a tier-one benchmark under 19 CFR 351.511(a)(2)(i). Nevertheless, in compliance with the Panel's Order, we will further explain our determination that the private prices in New Brunswick are distorted.

Record evidence indicates that the distortion in NB's private market is, in fact, the direct result of government involvement in the market. As noted above, Commerce found that the GNB's position as the dominant supplier of stumpage, combined with the existence of a small number of stumpage consumers, created an oligopsony effect.[108] First, the GNB accounts for slightly more than half of the timber provided in the market.[109] Thus, through this

[108] *See Final Determination* IDM at 85.
[109] *Id.* at 80.

ownership/control of a slight majority of the timber in the province, the GNB has created a situation where there is a dominant supplier – the GNB – of timber within the province.

Additionally, the record shows that the GNB has established a timber licensee system that has resulted in a small number of stumpage consumers dominating the market. The primary means for obtaining timber from Crown lands is through harvesting as a licensee or sub-licensee (in which licensees allow other wood processors to harvest on the license holder's Crown land).[110] Each Crown timber license is leased through a 25-year forest management agreement. Licenses to harvest on Crown lands are limited to an entity that "owns or operates a wood processing facility in the Province or who undertakes by agreement with the Minister to construct and operate a wood processing facility in the Province."[111] Although there are 10 timber licenses within the province, the GNB has allowed companies to take over multiple license areas (for example, licenses 6 and 7 are both maintained by JDIL). As a result, during the POI, there were only four license holders in the entire province. These crown-license holders are also usually holders of significant amounts of industrial freehold land. These freehold landowners will perform all the harvesting activities on their own lands, and will, in-turn, deliver this harvested timber directly to their mills.[112] In other words, the GNB has provided access to the majority of its Crown-lands to a handful of companies that already control a significant portion of the private lands in the province. Thus, the GNB has established a system in which the harvesting of Crown timber is effectively limited to a small group of powerful manufacturers

[110] Crown land may also be distributed via permits. However, record information indicates that timber received via permits makes up a very small percentage of total crown timber sold. *See, e.g.*, Submission of Factual Information by the Government of the Province of New Brunswick (March 28, 2017) (GNB Factual Submission) at Exhibit NB-STUMP-14 (FY 2015 and 2014 Timber Utilization Data Spreadsheet).
[111] *See* Questionnaire Response of the Government of the Province of New Brunswick (March 17, 2017) (GNB IQR) at Exhibit NB-SVC-2 (Crown Lands and Forests Act, S.N.B. 1980, c. C-38.1).
[112] For example, JDIL, AV Group, and Fornebu Lumber are both crown-license holders and industrial freehold landowners. *See, e.g.*, GNB Factual Submission at Exhibit NB-STUMP-17 (FY 2010 Timber Utilization Report).

that account for the majority of timber consumed within the province. This, combined with the GNB's dominance as supplier of timber, has created an oligopsony effect within the province.

The oligopsony system that the GNB has created has resulted in the "overhang" effect discussed above. Specifically, through the provision of these licenses that encompass large sections of Crown land, the GNB has created a system where the licensees may simply harvest timber from its Crown land when private stumpage prices are not sufficiently low. This creates a downward pressure on the private stumpage prices within the province.

Further, the record indicates that the GNB has the authority to exercise meaningful control over significant parts of the private stumpage supply within the province. Specifically, private stumpage in New Brunswick is generally sourced from three places: industrial freehold landowners, which accounts for about 22 percent of timber in New Brunswick; private woodlots (through marketing boards) which accounts for about 20 percent of timber in New Brunswick; and imports, which account for about seven percent of timber in New Brunswick.[113] There are seven marketing boards in New Brunswick through which private woodlot owners sell.[114] Record evidence indicates that these marketing boards have significant oversight and power regarding the timber being sold. This includes the ability to prohibit the production and/or marketing of timber, the ability to regulate the time and place when the timber can be produced, and to dictate to whom a party may sell the timber.[115] These marketing boards are controlled and regulated by the GNB through the New Brunswick Forest Products Commission. The

[113] *See* GNB's Letter, "Submission of Factual Information by the Government of the Province of New Brunswick," dated March 28, 2017, at Exhibit NB-STUMP-14.
[114] *Id*.
[115] *See Report of the Auditor General – 2015* ("Section 9 and 10 of regulation20l4-l details many specific powers of marketing boards. Among these are: to market the regulated product; to prohibit the marketing or the production and marketing, in whole or in part, of the regulated product; to regulate the time and place at which and to designate the body by or through which, the regulated product shall be marketed or produced and marketed; to require any person who produces the regulated product to offer to sell and to sell the regulated product to or through the Board; and to implement and administer forest management programs on private woodlots.").

Commission has "broad powers to address marketing board operations and enforce Orders and directives issued to marketing boards."[116] In other words, through the New Brunswick Forest Products Commission, the GNB is able to exercise significant control over almost an additional 20 percent of the stumpage market in New Brunswick, through its command over the marketing boards.

Thus, record evidence indicates that the GNB controls, directly or indirectly, over 70 percent of the timber within the province, including 40 percent (through the marketing boards) of the private timber in New Brunswick. The GNB's influence in the private market is even more pronounced when considering the fact that a significant amount of the remaining private timber comes from industrial freehold lands, whose timber would be consumed by the processing plant, and generally would not be available on the market. In other words, the GNB likely controls over half of the private stumpage that eventually goes to the market. Thus, as explained above, Commerce has considered a number of factors relevant to whether the NB stumpage market is distorted. Further, to the extent the Panel is concerned that Commerce analyzed distortions caused by ostensibly private market forces, we have demonstrated above that the GNB's involvement is the primary driver of distortions in the NB market. In sum, the GNB's involvement in the stumpage market is significant and renders the private stumpage market in the province unusable for tier-one benchmark purposes.

**E. Québec Auction Prices**

In the *Final Determination,* Commerce determined that the Québec stumpage system is distorted and therefore Québec auction prices cannot serve as a tier-one benchmark under 19 CFR 351.511(a)(2)(i). Specifically, Commerce found that: (1) the majority of the stumpage

[116] *Id*.

market is controlled by the government; (2) logs harvested in Québec must be processed in the province; (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 allocations of Crown timber, thereby reducing their need to acquire timber in the auction or from non-Crown sources.[117]

In the Binational Panel Order, the Panel upheld certain of Commerce's findings, including that the Government of Québec (GOQ) is the largest provider of stumpage in Québec and that the market share of timber sourced through TSGs is large and significant.[118] However, the Panel held that Commerce had not adequately supported its findings with respect to the volume of timber not selling at auction, the dominance of TSG-holding corporations in the auctions, and the ability of TSG holders to shift their timber allocations between themselves.[119] The Panel specifically highlighted Commerce's conclusion in the *Final Determination* 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 and, thus, the auction prices for Crown timber are not viable tier-one benchmarks."[120] The Panel took issue with Commerce's analysis, explaining that "{t}he 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."[121] This data cited by the Panel includes certain information

[117] *See Final Determination* IDM at Comment 35.
[118] *See* Binational Panel Order at 66.
[119] *Id.* at 66-70.
[120] *Id.* at 66 (citing *Final Determination* IDM at 99).
[121] *See* Binational Panel Order at 66.

submitted with the Marshall Report,[122] which the GOQ used to create graphs and tables showing that the average auction prices during the POI were both above and below the average TSG prices, and that there was no discernable difference between the prices bid at auction by TSG-holders and non-TSG holders.[123] Although, due to limitations in access to certain software, the Panel did not have the technical ability to examine the data underlying the table and graphs, it concluded that "on their face they contradict Commerce's conclusion that auction prices track TSG prices."[124]

With respect to the dominance of TSG-holding corporations in the auctions, the Panel held that record evidence supported Commerce's conclusion that "the same corporations dominate both the consumption of TSG-allocated Crown timber and the purchase of auctioned Crown timber."[125] However, the Panel concluded that this overlap of dominant mills consuming timber through both TSGs and 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."[126] Rather, the Panel noted that Commerce could have used the data submitted with the Marshall Report to examine the extent to which such mills that obtained timber from both the auctions and through TSGs paid more or less at auction than for their TSGs.[127]

The Panel also found that Commerce's conclusion that the Québec auctions are not competitively run was supported by record evidence regarding the ability of TSG holders to shift

[122] *See* GOQ IQR, dated January 19, 2017, at Exhibit QC-STUMP-78 (Marshall Report); *see also* GOQ's Letter "Refiling of back-up data sets and files to the expert report of Robert C. Marshall, Ph.D.," dated April 5, 2017 (GOQ Letter Re-Filing Robert Marshall Ph.D."), and accompanying data files at C.R. 880 to C.R. 912.
[123] *See* Binational Panel Order at 66-67 (citing GOQ Rule 57.1 Brief, Vol. I, at 30-33; and GOQ Rule 57.3 Brief at 16).
[124] *Id.* at 68.
[125] *Id.* (citing *Final Determination* IDM at 100; and Québec Market Memorandum (November 8, 2017), at Table 20).
[126] *See* Binational Panel Order at 68.
[127] *Id.*

up to 10 percent of their TSG timber allocations per year, the ability of sawmills to purchase unharvested volumes at a TSG-administered price, and the exclusion from the auction of potential bidders who may want to sell timber for milling outside of Québec.[128] However, the Panel again stated that the data submitted with the Marshall Report contained additional, direct evidence of price comparisons between TSG-allocated and auctioned timber that Commerce could have analyzed in its determination that the Québec auctions are not competitively run.[129]

Thus, the Panel concluded that Commerce made several observations that supported a conclusion that the Québec auctions *might not* be competitive, rather than engaging with the data in the Marshall Report that would permit a more direct analysis of the competitiveness of the auction prices.[130] Accordingly, the Panel remanded Commerce's decision "with the instructions to use the data in the record to analyze the extent to which auction prices actually track TSG-allocated prices." The Panel explained that "{i}f 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." Conversely, "{i}f the analysis shows that the 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."[131]

**Analysis**

As an initial matter, Commerce hereby provides further clarification as to what it meant when it stated that auction prices for Crown timber *track* the prices charged for Crown timber allocated to TSG-holding sawmills. By "track," Commerce did not intend to mean that its

[128] *Id.* at 68-70 (citing *Final Determination* IDM at 101-103).
[129] *See* Binational Panel Order at 69.
[130] *Id.* at 70.
[131] *Id.*

distortion analysis involves a pure price-to-price comparison whereby, if low auction prices correlate with lower TSG prices, Commerce may conclude that the auction prices are not market-determined. Indeed, for the reasons explained below, Commerce does not find that to be the appropriate analytical framework for determining whether in-country prices are distorted and thus unusable as a tier-one benchmark. Rather, "track" within the meaning of Commerce's analysis meant that the overall stumpage market is structured so that there is a relationship between the TSG-allocated timber market and the auction market, such that the auction prices are influenced by (*i.e.,* "track") the TSG prices, which themselves are distorted by several market factors, as explained below.

Commerce's benchmark analysis under 19 CFR 351.511(a)(2) begins with an examination as to whether there is a market-determined price for the good resulting from actual transactions in the country in question, *i.e.*, a tier-one benchmark. Useable market-determined prices may, in certain circumstances, include actual sales from competitively-run government auctions.[132] The *CVD Preamble* further explains that the circumstances under which it would be appropriate to use government-run auction prices as a tier-one benchmark include "where the government sells a significant portion of the goods or services through competitive bid procedures that are open to everyone, that protect confidentiality, and that are based solely on price."[133] Thus, the key inquiry in Commerce's *Final Determination* was whether the Québec government-run auction prices were market determined, or were distorted by the involvement of the government. The *CVD Preamble* states that Commerce normally will consider price distortion due to the government's involvement in the market to be minimal, "unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of

[132] *See* 19 CFR 351.511(a)(2)(i).
[133] *See CVD Preamble*, 63 FR at 65377.

the market."[134] A potential tier-one benchmark will not be used "{w}here it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market."[135]

Thus, in determining whether actual transaction prices from the country in question – including those from government-run auctions – are market determined and can be used as a tier-one benchmark, Commerce must necessarily examine the structure of the market as a whole, including the extent of government involvement in the market and whether that involvement distorts the proposed tier-one benchmark prices. In terms of auction prices, Commerce may therefore look not just to the structure of the auction itself, but other market factors that could affect the prices in the auction and render auction prices not market-determined and thus not usable as a tier-one benchmark.

Accordingly, in the underlying investigation Commerce examined the record evidence regarding the Québec market for standing timber as a whole, including the two areas of the provincial market for standing timber where the GOQ is directly involved – the auction market and the TSG-allocated market. After an examination of the interrelationship between these two parts of the standing timber market, Commerce determined that the auction market is distorted by government involvement such that the auctions do not provide "useable market-determined prices."[136]

First, the record shows that under a TSG, a sawmill can source up to 75 percent of its supply need at a government-set price.[137] Record evidence demonstrates that in FY 2015-2016,

[134] *Id.*
[135] *Id.*
[136] *See Final Determination* IDM at Comment 35.
[137] *Id.* at 99 (citing GOQ Verification Report at 9 and 12-13).

94 percent of TSG holders purchased all 75 percent of their allocated Crown timber.[138] Commerce also found that certain mills are able to source more than 75 percent of their supply needs via TSGs.[139] With respect to the actual amount of timber harvested, the record shows that approximately 51 percent of the stumpage harvest in FY 2015-2016 was through TSG-allocated timber.[140] Thus, the majority of timber available and harvested was obtained through the TSGs, which were sold at an administratively-set government price. Moreover, the record shows that TSG-holding corporations are able to shift tenure allocations among sawmills under sections 92 and 93 of Québec's Sustainable Forest Development Act (SFDA), which reduces their need to source from non-Crown sources such as the auction and private market.[141] Thus, Commerce found that there is strong motivation for a sawmill to treat its TSG-allocated volume as its primary source of supply, and its auction volume as an additional or residual supply source.[142] When these firms did turn to the auctions for additional timber, auction volumes during the POI, in the aggregate, accounted for only [ ] percent of these firms' total softwood log consumption, which is a relatively small percentage of these corporations' softwood log supply.[143]

The record also demonstrates that timber consumption was concentrated among a small number of corporations that dominate both the consumption of TSG-allocated Crown-origin standing timber and the purchase of auctioned Crown-origin standing timber.[144] Further, the record shows that the GOQ's Wood Marketing Bureau uses the auction prices as the basis for

[138] *Id.* at 99 (citing GOQ Primary QNR Response at Exhibit QC-STUMP-9 (Table 18)).
[139] *Id.* at 101.
[140] *Id.* at 99 (citing Québec Final Market Memorandum at Table 7.1).
[141] *See Preliminary Determination* PDM at 40.
[142] *See Final Determination* IDM at 99.
[143] *See* GQRGOQ at Exhibit QC-STUMP-10 at Table 20.
[144] *See Preliminary Determination* PDM at 40-41.

determining prices for the rest of the Crown-origin standing timber sold through TSGs.[145] The GOQ applies economic regressions to the auction results, after adjusting for operating conditions, standing timber quality, and distance to mills, to determine the stumpage prices charged under TSGs.[146] Commerce determined that based on the structure of the TSG-allocated market in which a small number of corporations that dominate the TSG-allocated market are also participating in the auction market, a market in which their bids in turn determine the prices set in the TSG-market, this system generates "little incentive for the TSG-holding corporations to bid for Crown timber above the TSG administered price when those corporations do participate in an auction."[147] Thus, this creates a dynamic in which auction prices are influenced by the government-administered TSG prices.

In addition, Commerce found that the GOQ's requirement that the timber purchased at the auctions be milled in Québec results in a situation where independent harvesters that do not have their own sawmills must be selling the timber they purchase at the auctions to the TSG-holding sawmills.[148] As a result, these independent harvesters are competing with the timber available to sawmills at the guaranteed government price via the TSGs.[149] Furthermore, the record showed that approximately 15 percent of timber offered at auction went unsold, which indicates that TSG-holding corporations and non-sawmills may not be aggressively bidding above TSG prices.[150]

Therefore, Commerce determined that several price-distortive features of the TSG-allocated timber market, and its relationship to the auction market, yielded auction prices that are

[145] *Id.* at 24.
[146] *Id.* (citing GQRGOQ at QC-S-2).
[147] *See Final Determination* IDM at 101.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 101-102.

not market-determined.[151] For this remand, Commerce continues to find that the overall structure of the stumpage market, and the interrelationship between the TSG-allocated market and the auction, is the appropriate analytical framework for determining whether the auction prices are market-determined and thus suitable to serve as a tier-one benchmark.

The Panel held that several of Commerce's findings regarding market distortion supported a conclusion that the Québec auctions *might not* be competitive, but failed to examine the data in the Marshall Report that would permit a more direct analysis of the competitiveness of the auction prices.[152] However, Commerce did not examine the market features of the TSG and auction systems as a proxy for a price comparison between the auctioned timber and TSG-allocated timber. Rather, as explained above, those market features of the auction and TSG-allocated timber, as well as their relationships, were themselves the central focus of what Commerce did, and still does, consider to be the appropriate analytical framework for examining market distortion. It is for these reasons that Commerce found that "auction prices for Crown-origin standing timber in Québec track {*i.e.*, are influenced by} the prices charged for Crown-origin standing timber that is allocated to TSG-holding sawmills and, thus, the auction prices for Crown-origin standing timber are not viable tier-one benchmarks."[153] Commerce finds this holistic analysis of market features to be the more appropriate framework for analyzing whether a price is market determined, rather than a pure price-to-price comparison.

However, the Panel instructed Commerce to examine the data contained in the Marshall Report "to analyze the extent to which auction prices actually track TSG prices."[154] The Panel concluded "that if, everything else being equal, auction prices tend to be lower than, or track,

[151] *Id.* at 101.
[152] *See* Binational Panel Order at 70.
[153] *See Final Determination* IDM at 102-104.
[154] *See* Binational Panel Order at 70.

TSG-allocated prices," that would support a finding that the auctions are not competitively run, and conversely concluded that "{i}f the analysis shows that the 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."[155] We understand this to mean that the Panel is asking for a direct price-to-price comparison of the TSG and auction prices to determine whether the auction prices are distorted. We respectfully highlight two limitations in that type of analysis that would prevent such a price-to-price comparison yielding useful conclusions for a distortion analysis.

First, as explained above, there are features of the TSG market that render the TSG prices not market-determined. Thus, comparing the auction prices to distorted TSG prices is uninformative for determining whether the auction prices are market-determined, because the comparison point for the auction prices (the TSG prices) are themselves not market-determined. In other words, even if the auction prices were routinely higher than non-market TSG prices, that would not automatically warrant a conclusion that the auction prices are now "market-based." It could also be true that both sets of prices are distorted and not market-based, though to varying degrees for any number of reasons. Thus, performing a simplistic comparison of the auction prices to a non-market-based TSG price has little utility in this analysis.

For example, the record shows that the average price that Resolute paid for Spruce/Pine/Fir/Larch (SPFL) standing timber obtained through auctions during the POI was [ ] the average price Resolute paid for SPFL timber obtained through TSGs during the POI.[156] In addition, the average price of SPFL sold via all auctions in FY 2015-2016 was [

[155] *Id.*

[156] *See* Resolute's Letter, "Resolute's Response to Section III of Initial Questionnaire on Stumpage Programs," dated March 15, 2017, at Exhibit RESB-16; *see also* Memorandum, "Final Determination Calculations for Resolute FP Canada Inc.," dated November 1, 2017, at Attachment 2a.

] the average price Resolute paid for SPFL timber obtained through TSGs during the POI.[157] However, we find that this price-to-price comparison simply reveals that the average price of all winning auctions is [ ] the average price Resolute paid for TSG-allocated timber, and that the average price Resolute paid for SPFL timber through auctions is [ ] the price the company paid for SPFL obtained through TSGs. This price-to-price comparison, however, does not indicate whether prices in one market are influencing or distorting the prices in the other market, or whether either market is competitively determined such that the price captures the underlying value of the standing the timber. A simple comparison only demonstrates that one market has a higher, lower, or equal price; however, this price difference may be due to a difference in the value of the underlying assets (*i.e.*, the timber stands that make up the TSG-allocated timber and the timber stands that make up the auction timber).

A second limitation to highlight is that, to conduct a price-to-price comparison of TSG-allocated stands to auction stands that can accurately determine the meaning of any price correlation or divergence between the TSG and auction prices, Commerce would need to conduct a regression analysis. Such an analysis would require information on the timber stands to control for all factors affecting the value of the stands, such as location, accessibility, tree size, and species, and the record does not contain this data. The price of the standing timber sold via auction may be lower than the standing timber sold via TSGs because it is less accessible, more difficult to harvest, or less desirable, or some combination thereof. Similarly, if an auction block is more desirable due to the accessibility, tree sizes and quality, ease of harvest, *etc.*, than a timber stand that falls under a TSG, the auction block would likely sell for a higher price than the TSG-allocated standing timber. The record does not contain the data to conduct such an analysis

[157] *See* Resolute's Letter, "Resolute's Response to Section III of Initial Questionnaire on Stumpage Programs," dated March 15, 2017, at Exhibit RESB-16.

that would allow Commerce to adjust for any differences in the many factors that affect the value of timber. Therefore, we are unable to determine whether, "everything else being equal," the price of the standing timber sold via auction is lower than the price of standing timber sold via TSGs. Even if the data on the record did allow us to do such a regression analysis, we find that such an analysis involving a price-to-price comparison is not the appropriate framework for analyzing whether the auction prices are market-determined such that they may serve as a tier-one benchmark under 19 CFR 351.511(a)(2)(i). As explained above, the relevant analysis is an examination of the Québec stumpage market as whole, including the structure and market factors within the auction and TSG markets, and whether the mechanisms linking these two markets result in distorted auction prices.

Accordingly, as explained above and in detail in the *Final Determination,* Commerce's analysis of the record evidence on the Québec stumpage market as a whole supports its conclusion that the Québec auction prices are not market-determined and thus cannot serve as a tier-one benchmark under 19 CFR 351.511(a)(2)(i). We respectfully ask that the Panel affirm Commerce's finding that the auctions do not provide useable market-determined prices.

**F. Stumpage benefit calculations**

In the *Final Determination,* in calculating the stumpage benefit for respondents' purchases of Crown stumpage in Ontario and New Brunswick, Commerce applied the average-to-transaction methodology by comparing transaction-specific stumpage prices to average benchmark prices on a monthly or annual basis.[158] When such a comparison yielded a negative benefit (*i.e.,* the Crown-stumpage purchase prices were higher than the benchmark price),

[158] *See Final Determination* IDM at 41; *see also* Memorandum, "Final Determination Calculations for Resolute FP Canada Inc.," dated November 1, 2017, at 3 and Attachment 2b; and Memorandum, "J.D. Irving Limited Final Calculations," dated November 1, 2017, at 5-6 and Attachments 4 and 5.

Commerce set the benefit to zero.[159] In explaining its decision to set negative benefits to zero, Commerce stated: "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 'negative benefits' from other transactions."[160] Commerce explained that to provide a credit for negative benefits in the stumpage calculations would amount to an offset that is not permitted by statute under section 771(6) of the Act.[161]

In the Binational Panel Order, the Panel found that Commerce's setting of negative benefits to zero is not in accordance with law.[162] Specifically, the Panel reasoned that because people, not transactions, are the recipients of subsidies, a benefit is provided to the whole person, rather than on a transaction-by-transaction basis.[163] The Panel further explained that because the concept of "negative benefits" is a result of how Commerce chose to calculate stumpage benefits, whether there has been an offset permitted under section 771(6) of the Act is inapplicable.[164] Accordingly, the Panel remanded to Commerce to recalculate the stumpage benefits by not setting to zero any transactions in which the purchase price exceeds the benchmark price.[165] In a separate section of the Binational Panel Order discussing the stumpage calculation in British Columbia, the Panel notes that it is remanding Commerce to revise the calculation, in accordance with the remand language discussed directly above, to remove from the formulas setting the benefit to zero if the transaction price exceeds the benchmark price.[166]

[159] *See Final Determination* IDM at 45-46.
[160] *Id.* at 45.
[161] *Id.*
[162] *See* Binational Panel Order at 71.
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.* at 53.

**Analysis**

As an initial matter, we respectfully disagree with the Panel's ruling. Section 771(5)(B) of the Act, as the Panel states, provides that "a subsidy is described in this paragraph in the case in which an authority… provides a financial contribution… to a *person* and a benefit is thereby conferred {emphasis added}." We wish to provide further context for this provision of the Act. Namely, section 701 of the Act sets forth Commerce's mandate as the administering authority to determine whether "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States." The inquiry is not simply whether a subsidy has been provided to a *person* as a whole, but whether a subsidy has been provided with respect to the manufacture, production, or export of subject merchandise, which requires a rigorous and fact-intensive analysis and subsidy calculations. The language of section 701 of the Act informs the basis of, for example, Commerce's tying regulations under 19 CFR 351.525, whereby Commerce may attribute export subsidies only to export sales, or find that subsidies are tied to particular markets or particular products. For example, in a CVD investigation on widgets to the United States, if Commerce determines that a given subsidy is tied to export activities in the Netherlands, we would not include that program in our analysis, because it is not provided with respect to the manufacture, production, or exportation of subject merchandise (*i.e.*, widgets to the United States). If Commerce were to consider that a subsidy is provided to a person as a whole, full stop, it is not clear whether Commerce would be concerned with the question of whether subsidies are tied at all (since a subsidy would have been provided to a person as a whole regardless), and there may remain little room for Commerce to execute its mandate within the

framework of section 701 of the Act and perform its subsidy analyses with an eye toward calculating benefits as accurately as possible on the subject merchandise. To that end, and the Panel's observation that Commerce does not always calculate subsidies on a transaction-specific basis, Commerce's calculation methodologies will naturally differ from program to program depending on the type of subsidy being examined, the regulations governing that program, and any factual circumstances that warrant particular approaches. For example, Commerce often utilizes a month-by-month analysis with respect to electricity programs because electricity is typically billed on a monthly basis. Such an approach does not necessarily invalidate Commerce's use of a transaction-by-transaction methodology with respect to another program, nor mandate that Commerce allow impermissible offsets for perceived "negative" benefits. Commerce maintains that 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 "negative" benefits from other transactions, and thus we respectfully disagree with the Panel's finding on this matter.

However, in accordance with the Panel's Order, we have recalculated the stumpage benefits for Canfor, JDIL, Tolko, and West Fraser by accounting for any negative benefits in the stumpage calculations.[167] Commerce does want to note for the Panel that the stumpage calculation in British Columbia does not involve the comparison of a transaction price to an

[167] *See* Memorandum, "Draft Results of Redetermination Calculations for Canfor Corporation and its cross-owned affiliates (collectively, Canfor)," dated September 23, 2024 (Canfor Draft Remand Calculation Memorandum); *see also* Memoranda, "Draft Results of Redetermination Calculations for J.D. Irving Limited (JDIL)," dated September 23, 2024 (JDIL Draft Remand Calculation Memorandum); "Draft Results of Redetermination Calculations for Tolko Marketing Sales Ltd. and Tolko Industries Ltd. (collectively, Tolko)," dated September 23, 2024 (Tolko Draft Remand Calculation Memorandum); and "Draft Results of Redetermination Calculations for West Fraser Mills, Ltd. and its cross-owned affiliates (collectively, West Fraser)," dated September 23, 2024 (West Fraser Draft Remand Calculation Memorandum).

average benchmark, but a comparison of an annualized price to an annualized benchmark.[168] However, in compliance with the Panel's order, we have recalculated the stumpage benefits for the respondents' purchases of BC stumpage to account for any negative benefits. There were no instances of negative benefits in Resolute's stumpage calculations, so no recalculation was necessary.[169]

**G. BC LER**

In the *Final Determination,* Commerce determined that the LERs imposed by the GOC and GBC provide countervailable subsidies to the mandatory respondents.[170] Commerce determined that the LERs provide a financial contribution through entrustment or direction, pursuant to section 771(5)(B)(iii) of the Act, because official government action compelled private companies to provide logs to BC consumers, which constituted the provision of a good (*i.e.,* logs), pursuant to section 771(5)(D)(iii) of the Act.[171]

In the Binational Panel Order, the Panel found that the LERs could provide a financial contribution as a matter of law, but that in this case Commerce departed from a past practice of determining that the entrusted or directed measure at issue provides a "direct and discernable" benefit.[172] Citing to several cases pre- and post-dating the URAA, the Panel concluded that Commerce has a longstanding practice of requiring "long-term historical price comparisons that

[168] The purchase price in the British Columbia stumpage calculations is an annualized roll-up of each respondent's various invoices by species and timbermark during the POI and not a transaction line price from a single invoice. *See*, *e.g.*, *Final Determination* IDM at 66 ("The Department used species-specific benchmarks and compared them to respondents' purchases of Crown-origin standing timber aggregated by timbermark and species.") We did discover in revising the calculations that one of the three calculation tables in West Fraser's final calculation did not fully annualize the purchase data. Since Commerce explicitly said that was our intention in the West Fraser Final Calculation Memorandum, we have resolved that error in our draft remand calculation. *See* West Fraser Draft Remand Calculation Memorandum for more detail.
[169] *See* Memorandum, "Final Determination Calculations for Resolute FP Canada Inc.," dated November 1, 2017.
[170] *See Preliminary Determination* PDM at 57-63; *see also Final Determination* IDM at Comment 46.
[171] *See Final Determination* IDM at Comment 46.
[172] *See* Binational Panel Order at 73-83.

demonstrate a clear link between the imposition of the export restraint and the divergence of prices."[173] Thus, the Panel remanded to Commerce for further explanation as to why it departed from its "direct and discernable" benefits test in countervailing the BC LERs in the underlying investigation.[174]

With respect to whether the LERs provide a financial contribution as a matter of fact, the Panel examined whether there was substantial evidence of a meaningful linkage between the LERs and the provision of logs by private BC log suppliers to purchasers in BC.[175] The Panel reasoned that although there is no statutory minimum threshold of the impact of an export restraint in determining the existence of a financial contribution through entrustment or direction, "in order for there to be a financial contribution, an export restraint must impact exports of the good in question to a sufficient degree so as to cause a private body to carry out the provision of those goods to domestic customers."[176] Thus, according to the Panel, an LER needed to meaningfully restrain exports such that log suppliers provided logs to domestic consumers rather than exporting them.[177] The Panel reasoned that indication of lower domestic prices resulting from an alleged restraint might provide evidence of a meaningful linkage between the restraint and the provision of a good.[178]

However, the Panel remanded to Commerce for further explanation as to how certain aspects of its decision demonstrate the LERs provided a meaningful restraint of exports of logs from the BC Interior, where the mandatory respondents are located.[179] Specifically, the Panel concluded that the record evidence Commerce cited in its *Final Determination* did not

[173] *Id.* at 81-83.
[174] *Id.* at 83.
[175] *Id.* at 83-85.
[176] *Id.* at 84.
[177] *Id.* at 85.
[178] *Id.* at 84-85.
[179] *Id.* at 85.

sufficiently explain how the practice of "blocking" impacted the market in the BC interior.[180] Thus, the Panel remanded to Commerce to explain how the record evidence supported Commerce's determination that the practice of blocking lowered domestic prices in the BC interior and prevented BC log harvesters in the interior from entering into long-term export agreements during the POI.[181] The Panel also stated that Commerce had not addressed certain record evidence or adequately explained its determination that the imposition of fees in-lieu-of-manufacturing constituted an obstacle to log exports.[182] Thus, the Panel remanded to Commerce to explain how the record evidence supports Commerce's conclusions regarding the significance of the fees in-lieu-of-manufacturing to exports from the BC coast and interior during the POI.[183] The Panel also found that Commerce had not explained how the export permit and approval process restrained exports from the interior, and had not engaged with certain contradictory evidence.[184] Thus, the Panel remanded to Commerce to explain how the record evidence supports Commerce's conclusion that the length of the export permit approval process hindered and discouraged exports from the interior of BC.[185] The Panel also found that Commerce's determination that the inclusion of logs on the export control list under the Export and Import Permits Act (EIPA), which provides for the imposition of penalties for violations, did not explain how the enforceability of the EIPA compelled log suppliers to provide logs, which would otherwise be exported, to domestic consumers.[186]

The Panel further found that Commerce did not sufficiently address certain record evidence relating to the economic feasibility of exporting logs from the BC interior, including

[180] *Id.* at 86-89.
[181] *Id.* at 89.
[182] *Id.*
[183] *Id.* at 89-90.
[184] *Id.* at 90-91.
[185] *Id.* at 91.
[186] *Id.* at 92.

data contained in the Kalt Report on exports from interior region where the mandatory respondents are located[187] and evidence in the Taylor Report and Bustard Rebuttal Report on the economic feasibility of transporting beetle-killed logs.[188] The Panel also stated that Commerce had not explained how the 100-mile radius overlap of sawmills and export markets in the BC interior supported Commerce's conclusion that the LER restrained exports of logs from the interior so that log suppliers were compelled to provide logs to BC interior consumers.[189] Thus, the Panel remand to Commerce to reconsider the data contained in the Kalt Report and the data on transportation costs of beetle-killed logs contained in the Taylor Report.[190]

The Panel also stated that in concluding that price impacts of the LER on the coast would ripple into the interior, Commerce had not sufficiently considered evidence in several reports regarding factors affecting market integration.[191] Thus, the Panel remanded to Commerce to explain whether and how it examined certain factors in the reports, as applied to the B.C. coast and tidewater, southern interior, and other interior markets.[192] These factors include: transaction costs, such as transportation costs; whether such costs were passed on to suppliers; the level of log production and demand in each market; the existence and extent of trade and competition

[187] *Id.* (citing GOC-BC Parties Brief, Vol. II, at 12 (referencing Joseph P. Kalt, *An Analysis of Certain Economic Issues Relating to Petitioner's Claims About the Operation of Stumpage and Log Markets in British Columbia,* (March 13, 2017)) (Kalt Report)).
[188] *See* Binational Panel Order at 95-96 (citing *Final Determination* IDM at 148-149 (referencing Brian Bustard, *The Business of Log Exports from British Columbia and Log Export Permitting Process* (March., 2017) (Bustard Report) and R.E. Taylor & Associates Limited, *Mountain Pine Beetle Alternative Business and Market Options, Phase 2 Final Report* (August 11, 2005) (Taylor Report)).
[189] *See* Binational Panel Order at 97.
[190] *Id.* at 95-96.
[191] *Id.* at 97-99 (citing *Spatial Integration in the Nordic Timber Market: Long-run Equilibria and Short-run Dynamics* (Nordic Timber Market Report); Roundwood Market Integration in Finland: A Multivariate Cointegration Analysis (Finish Roundwood Market Integration Report); *Timber Price Dynamics Following a Natural Catastrophe* (Timber Price Dynamics Report); *Transmission of price changes in sawnwood and sawlog markets of the new and old EU member countries* (EU Sawnwood and Sawlog Report); J.M. Daniels, USDA, *Stumpage Market Integration in Western National Forests*, March 2011, at Abstract; Petitioner Comments – Primary QNR Reponses at Exhibit 1, Exhibit 6 at Abstract, Exhibit 7 at Abstract, and Exhibit 9, Table 1, and 4619-4620).
[192] *See* Binational Panel Order at 99.

between the markets; and whether price effects flowed between the coast and interior, and how such factors impacted the relevant tree species.[193]

Finally, the Panel directed Commerce to explain how its remand findings on all the aforementioned issues – blocking, fees in-lieu-of manufacturing, export permits, EIPA penalties, the feasibility of exports from the interior, possible exports of beetle-killed logs from the interior, 100-mile radius overlap of interior mills with each other and export markets, and the ripple effect – supported Commerce's conclusion that "the LERs restrained log exports from the BC interior to a meaningful degree such that it caused log suppliers to provide logs to BC consumers."[194]

**Analysis**

a. "Direct and Discernable" Benefit Test

Section 771(5)(B)(iii) of the Act provides that a countervailable subsidy may exist when, *inter alia,* an authority "entrusts or directs a private entity to make a financial contribution." The SAA provides guidance for Commerce's evaluation of such indirect subsidies and states:

> In the past, {Commerce} has countervailed a variety of programs where the government has provided a benefit through private parties. (*See, e.g., Certain Softwood Lumber Products from Canada, Leather from Argentina, Lamb from New Zealand, Oil Country Tubular Goods from Korea, Carbon Steel Wire Rod from Spain, and Certain Steel Products from Korea*). The specific manner in which the government act led through the private party to provide the benefit varied widely in the above cases. Commerce has found 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.
>
> In cases where the government acts through a private party, such as in *Certain Softwood Lumber Products from Canada* and *Leather from Argentina* (which involved export restraints that ***led directly to a discernible lowering of input costs***),

[193] *Id.* at 99-100.
[194] *Id.* at 89-92, 95-97, and 100.

> the Administration intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph…[195]

The Panel states that Commerce made factually inaccurate statements in its brief when asserting that the three post-Uruguay Round Agreements Act (URAA) proceedings on export restraints directly preceding the *Final Determination* did not apply the requirement that a measure must "directly lead to a discernable benefit."[196] The following explanation provides further clarification to Commerce's prior statements and explains how Commerce has consistently applied an examination of how alleged exports restraints affect prices so that the analytical framework Commerce applied in the *Final Determination* is consistent with its analysis in prior proceedings regarding export restraints.

First, as indicated in the SAA, in certain pre-URAA cases, Commerce conducted an analysis of whether an alleged export restraint led to a "direct and discernable" lowering of costs for the good subject to the restraint. For example, in *Leather from Argentina,* in initiating an investigation into an alleged cattle hide embargo, Commerce required that the petitioners "substantiate their claim that the embargo had a *direct and discernable effect* on hide prices in Argentina."[197] As part of its final determination to countervail the cattle hide embargo, Commerce examined nearly 30 years of price comparison data from the United States and Argentina during times when the embargo was in effect or lifted, and concluded that "there is a cognizable and discernible link between the Argentine hide embargo" and average annual Argentine hide prices falling below the U.S. comparison price.[198] Similarly, in investigating

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[195] *See* Statement of Administrative Action, Uruguay Round Trade Agreements Act, Texts of Agreements, Implementing Bill, Statement of Administrative Action, and Required Supporting Statements, H.R. Doc. No. 301-316 (1994) (SAA), Vol. 1 at 926 (accompanying H.R. 5110, 103d Cong., 2d Sess. (1994) (emphasis added).
[196] *See Binational Panel Order* at 82 (citing Commerce's Rule 57.2 Brief at 116-117).
[197] *See Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Leather from Argentina*, 55 FR 40212, 40213 (October 2, 1990) (*Leather from Argentina*) (emphasis added).
[198] *Id.,* 55 FR at 40214.

alleged log restraints in *Lumber III,* Commerce analyzed several economic studies on export restraints, as well as a report by the BC legislature on the BC restraints, to conclude that "the BC log export restrictions have a *'direct and discernable effect'* upon the domestic price of BC logs."[199] Thus, in pre-URAA cases, Commerce used economic data, including long-term historical pricing data and economic studies, in determining whether there was a "direct and discernable" link between alleged export restraints and depressed domestic prices.

An examination of post-URAA cases indicates that in cases involving an alleged export restraint, Commerce also considered whether an alleged export restraint affected prices or influenced the market for the good subject to the restraints. In *CFS from Indonesia,* Commerce examined a complete ban on log exports that had been in place for most of a 20-year time span. After examining historical pricing data and several independent studies on the effects of the log ban, Commerce determined that the log ban "resulted in an abundant supply of logs at suppressed prices that benefited the downstream industries that use the logs," and that "the {Government of Indonesia's} log export ban in fact induced log suppliers to sell logs domestically at suppressed prices to benefit Indonesia's downstream wood processing industries."[200] Commerce subsequently continued to find the Indonesian log export ban countervailable in *Coated Paper from Indonesia*[201] and *Uncoated Paper from Indonesia.*[202]

In contrast, in *OCTG from China,* Commerce declined to countervail an alleged export restraint on coke because there was no record evidence, "such as independent studies,

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[199] *See Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada,* 57 FR 22570, 22609-10 (May 28, 1992) (*Lumber III*) (emphasis added).
[200] *See Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination,* 72 FR 60642 (October 25, 2007) (*CFS from Indonesia*), and accompanying IDM at 29-32.
[201] *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination,* 75 FR 59209 (September 27, 2010) (*Coated Paper from Indonesia*).
[202] *See Certain Uncoated Paper from Indonesia: Final Affirmative Countervailing Duty Determination,* 81 FR 3104 (January 20, 2016), and accompanying IDM at Comment 6.

demonstrating that {China's} export restraints could be linked to the divergence between Chinese domestic prices and world prices of coke over a period of time," or "long-term pricing data on the record demonstrating a clear link between the imposition of export restraints and the divergence of Chinese and world market prices of coke."[203] In *OCTG from China,* Commerce also declined to initiate an investigation of alleged export restraints on round billets because the petitioner had not included "an historical price trend comparison that would allow a review as to whether pricing differences during the POI are due to export restraints."[204] The U.S. Court of International Trade (CIT) affirmed Commerce's determinations in *OCTG from China*.[205]

In a subsequent proceeding, Commerce countervailed an export tax on soybeans in *Biodiesel from Argentina,* and in doing so examined historical pricing data and reports on the effect of the tax drafted by various government agencies and international organizations.[206] Commerce concluded that "{t}here is a *discernable benefit linked* to this {government} policy {of keeping domestic soybean prices low}, demonstrated clearly by a comparison of the 'differential' between Argentine and world market prices for soybeans."[207] Commerce further explained that the pricing data "demonstrate the *necessary linkage* between the application of the export tax and the extent of the price differential, lowering the price of soybeans consumed domestically by Argentine biodiesel producers."[208] In *Biodiesel from Indonesia,* Commerce

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[203] *See Certain Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 74 FR 64045 (December 7, 2009) (*OCTG from China*), and accompanying IDM at 119.
[204] *See OCTG from China* IDM at 113*; see also Notice of Initiation of Countervailing Duty Investigations: Certain Hot-Rolled Carbon Steel Flat Products from Argentina, India, Indonesia, South Africa, and Thailand,* 65 FR 77580, 77584 (December 12, 2000) (Commerce declined to initiate a countervailing duty investigation into a Thai export duty on scrap iron and steel, because the petitioners "did not provide sufficient information to support their allegation that the export restraints have 'led directly to a discernible lowering of input costs.'").
[205] *See TMK IPSCO v. United States,* 179 F. Supp. 3d 1328, 1338-1341 (CIT 2016).
[206] *See Biodiesel from the Republic of Argentina: Preliminary Affirmative Countervailing Duty Determination,* 82 FR 40748 (August 28, 2017) (*Biodiesel from Argentina*), and accompanying PDM at 25-30, unchanged in *Biodiesel from the Republic of Argentina: Final Affirmative Countervailing Duty Determination,* 82 FR 53477 (November 16, 2017), and accompanying IDM at Comment 1.
[207] *See Biodiesel from Argentina* PDM at 29 (emphasis added).
[208] *Id.* at 29-30 (emphasis added).

similarly examined pricing data for two years, including the POI, to conclude that an export levy on crude palm oil constituted a countervailable subsidy that provided "a discernible benefit, as demonstrated by a comparison of the 'differential' between Indonesian and world market prices for {crude palm oil} with and without the…levy in effect."[209] Commerce further explained that the pricing data provided "the *necessary linkage* between the application of the…levy and the extent of the differential, lowering the price of domestic {crude palm oil} consumed by Indonesian biodiesel producers and, thus, leading to a discernible benefit."[210] The CIT upheld Commerce's determination that the export levy in *Biodiesel from Indonesia* was a countervailable indirect subsidy.[211]

Finally, in *Supercalendared Paper from Canada,* Commerce examined the same LER in BC that is at issue in this investigation, including several independent studies and an opinion article from a large BC forest company that discussed the economic impact of the BC LER.[212] Based on this evidence, Commerce found that, unlike in *OCTG from China,* "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."[213]

Thus, a survey of cases in which Commerce has countervailed export restraints before and after the URAA leads to two observations with respect to Commerce's analysis. First, Commerce has considered information on how alleged export restraints have affected prices for the good subject to the restraints. As explained above, this price impact has been articulated in

[209] *See Biodiesel from the Republic of Indonesia: Preliminary Affirmative Countervailing Duty Determination,* 82 FR 40746 (August 28, 2017) (*Biodiesel from Indonesia Prelim*), and accompanying PDM at 12-16, unchanged in *Biodiesel from the Republic of Indonesia: Final Affirmative Countervailing Duty Determination,* 82 FR 53471 (November 16, 2017), and accompanying IDM at Comment 5.
[210] *See Biodiesel from Indonesia Prelim* PDM at 15 (emphasis added).
[211] *See Wilmar Trading Pte Ltd. v. United States,* 466 F.Supp.3d 1334, 1348-1355 (CIT 2020).
[212] *See Supercalendared Paper from Canada: Final Results of Countervailing Duty Expedited Review,* 82 FR 18896 (April 24, 2017) (*Supercalendared Paper from Canada*), and accompanying IDM at 37-38 and 50.
[213] *See Supercalendared Paper from Canada* IDM at 37.

various ways, including that a restraint has a "direct and discernable effect on prices," there is a "discernable link" between the restraint and prices, there is a "link" between the restraint and a "divergence" between domestic and world market prices, a "discernable benefit linked" to a restraint, a "linkage" between the restraint and lower prices, or just a general description of how the restraint lowered domestic prices. Nevertheless, however articulated, consideration of whether the market for the good subject to the alleged export restraint was somehow impacted by that restraint has been a part of Commerce's analysis of indirect subsidies in the form of an export restraint.

The second observation is that the evidence Commerce has examined to determine whether the alleged export restraint affected prices for the good in question has included a variety of sources, including long-term historical pricing data, pricing data that is more contemporaneous with the period of investigation or review, independent economic studies, government reports, and statements by industries affected by the alleged export restraint. In this respect, as indicated in Commerce's Rule 57.2 brief, long-term historical pricing data is not the exclusive source of evidence Commerce has examined in determining whether an alleged export restraint is countervailable, nor is there any legislative or regulatory requirement to do so.[214] As the SAA states, "the Administration intends that the 'entrusts or directs' standard shall be interpreted broadly" and "plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injury a U.S. industry."[215] Accordingly, the SAA provides that Commerce's decision of whether to countervail indirect subsidies will be made on a case-by-case basis.[216] Thus, it is appropriate that

[214] *See* Commerce's Rule 57.2 Brief at 116-117.
[215] *See* SAA at 926.
[216] *Id*.

Commerce's analysis on alleged export restraints could include various types of evidence, depending upon the facts of a particular case and the record evidence in that particular proceeding.

Therefore, *consistent* with these prior proceedings, Commerce's *Final Determination* included evidence that the BC LER lowered domestic prices for logs in the province. Specifically, Commerce considered several independent studies and an affidavit from a BC log exporter on the practice of "blocking."[217] Commerce also considered other record evidence, including independent studies, indicating that log prices were suppressed due to other market features related to the LER that discouraged exports, including fees-in-lieu of manufacturing, the length of the export permit and approval process, and penalties for export violations.[218]

As explained further below, the Panel has remanded to Commerce for further explanation regarding this factual evidence on how the BC LER suppressed log prices in the interior of BC. However, the analytical framework applied in the *Final Determination,* which considered how the BC LER lowered log prices, is entirely consistent with Commerce's analyses of export restraint programs in past proceedings in which it has determined whether the alleged restraints somehow impacted the prices for the goods subject to the restraint. Thus, Commerce respectfully concludes that its analysis of the BC LER is consistent with, and thus not a departure from, its prior analyses of export restraints.

[217] *See Final Determination* IDM at 139 (citing Petitioner Comments – Primary QNR Responses at Exhibits 11, 12, 13, and 32; *see also* Petition at Exhibit 244).
[218] *See Final Determination* IDM at Comments 44 and 45.

b. Restraint of the LER

1. Blocking

In the *Final Determination,* Commerce explained how the practice of blocking creates an environment in which log sellers are forced into informal agreements that lower export volumes and, consequently, domestic prices.[219] The LERs stipulate that before log harvesters can export logs to sellers outside of BC, they must first offer the logs to processors within the province.[220] Citing the Wilson Center Report, Commerce explained that under the blocking system, processors make bids on the logs offered for sale, which effectively "blocks" their exportation, and will not retract their offer until the log harvesters agree to sell the logs to the processors at discounted prices.[221] Thus, the blocking system forces harvesters in BC to frequently sell some of their logs to harvesters in the province at or below the cost of production to be able to release their remaining logs for export.[222] Commerce found that other documents on the record corroborate the Wilson Center Report and indicated that a BC log harvester had been subject to the blocking process.[223] Finally, Commerce explained that the fact that not all export authorizations were utilized does not mean that the "blocking" system was not restraining log exports.[224]

The Panel took issue with several pieces of evidence cited by Commerce. First, the Panel noted that the J. Wood Paper (which relied on a paper dating back to 2002), the Merrill & Ring documents, and the Wilson Center Commentary all similarly appeared to relate to coastal, not

[219] *See Final Determination* IDM at 139-141.
[220] *Id.* at 140 (citing GBC Primary QNR Response, Part 1 at LEP-20-21; GBC Primary QNR Response, Part 1 at LEP-10).
[221] *See Final Determination* IDM at 140 (citing Petitioner Comments – Primary QNR Responses at Exhibit 11, which includes "From Log Export Restrictions to a Market-Based Future: Towards an Enduring Canada-U.S. Softwood Agreement" (Wilson Report)).
[222] *See Final Determination* IDM at 140 (citing Wilson Report).
[223] *Id.* at 139-141 (citing Petitioner Comments – Primary QNR Responses at Exhibits 12, 13, and 32).
[224] *See Final Determination* IDM at 141.

interior, BC logs.[225] The Panel concluded that Commerce had not sufficiently explained how these documents provided substantial evidence for its conclusions that during the POI, blocking was common throughout the province, including the BC interior; pertained to most potential exports; and resulted in nearly every log harvester entering into blocking agreements.[226]

As an initial matter, Commerce's conclusion that blocking pertained to most potential exports from the province was not based on the Wilson Center Commentary, J. Wood Report, or Merrill & Ring documents. Rather, it was based on the fact that the Federal and BC laws, which require logs to be offered for sales domestically before they are approved for export, apply to the entire province – the coast and the interior.[227] Thus, because the laws requiring logs to be offered for sale domestically before an export permit is granted cover the entire geographic territory of the province, the laws subjected all potential exports to "blocking." Commerce accordingly cited the Federal and provincial laws to conclude the following in the *Final Determination*: "To export their logs from the province, most exporters in British Columbia are required to first offer their logs to processors in the province. As such, most potential exports are subject to this blocking process."[228] Thus, Commerce's determination that nearly all log exports from BC were subject to the "blocking" process was based on substantial evidence.

With respect to the process of blocking being widespread throughout the province, including the BC Interior, the J. Wood Report explains:

> Haley (2002) argues that in the {BC} interior the Surplus Test being applied to standing timber leads to "blocking."

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[225] *See* Binational Panel Order at 87-88.
[226] *Id.* at 88.
[227] *See Final Determination* IDM at 139-140; *see also* GBC Primary QNR Response, Part 1, at LEP-20-21; and GBC Primary QNR Response, Part 1, at LEP-10.
[228] *See Final Determination* IDM at 140, fn. 838 (citing GBC Primary QNR Response, Part 1 at LEP 10 and LEP 20-21); *see also Final Determination* IDM at 139 ("As an initial matter, by law, unless provided a specific exemption to export, logs in British Columbia are by default not allowed to be exported from the province…{I}n order to receive an exemption to export, potential exports are subject to…surplus tests.").

> This takes place when a wood processor who does not "need" the logs being advertised nevertheless puts in a bid for them simply to prevent, or block, their export...When logs are advertised for export as "standing green," the bidder is unlikely to be required to take delivery at the bid price since, in most cases, in the absence of an export permit, the stand in question is simply not harvested. Under these circumstances, frivolous bids bear no consequences and are difficult to detect. (Haley, 2002:6)[229]

Commerce acknowledges that the cited Haley Report[230] was written in 2002, thus predating the POI. However, the fact that the report comes from 2002 does not detract from Commerce's conclusion that blocking was widespread throughout the province, but rather provides a useful explanation of blocking and underscores that blocking was a well-established practice within BC that had been in operation for decades before the POI.[231] This is a conclusion that the Kalt Report affirms: "…{I}t is useful to understand that some form of permitting process for logs in B.C. has been in place for decades. The log export regulatory regime in BC has long been part of the prevailing regulatory and market background under which market participants have arranged investments and operations."[232] Dr. Athey explained that the regulatory changes to the B.C. stumpage system between the *Lumber IV* and *Lumber V* proceedings did "not include changes to the federal and provincial systems governing the export of logs."[233] The Haley analysis quoted in the J. Wood Report indicates that, as of 2002, "blocking" was occurring within the BC Interior. Haley also demonstrated that exports from the Southern Interior received a significantly higher price, approximately double, compared to the

[229] *See* Petition at Exhibit 244.
[230] The record establishes that Dr. Haley was a Professor, Faculty of Forestry at the University of British Columbia in 2002, so this was not merely speculative commentary, but the expert knowledge of a forestry expert in the province. *See* Petition at Exhibit 254.
[231] *See Preliminary Determination* PDM at 61 ("…{E}xport restrictions have been in place for logs under provincial jurisdiction since 1891, and for logs under federal jurisdiction since 1940." (internal citations omitted)).
[232] *See* GBC Primary QNR Response, Part 1 at Exhibit LEP-1 at 34.
[233] *Id.* at Exhibit BC-S-183 at 18.

price they would receive from domestic mills.[234] This indicates that parties looking to export likely also needed to negotiate side agreements to ensure that their exports were not blocked.

Similarly, a December 2006 report to the British Columbia Minister of Forests and Range discussed log producers' concerns with sawmills that were blocking the approval process for export proposals: "We heard from interior log producers about sawmills that block the producers' exports even when that sawmill does not utilize the grades or species in question. The blocking provisions do not require the blocker or the proposed exporter to consummate a sale of logs."[235]

The Wilson Center Commentary, which was published in 2016, similarly indicated that blocking was a practice that had been prevalent in BC since well before the POI. It explained:

> In 2002, Canada told the World Trade Organization that it granted 97% of applications to export from Crown land in British Columbia. This is hardly surprising. *Almost every timber harvester has negotiated side agreements to keep its exports from being blocked.* If not, this number would have been substantially lower…. Because blocking agreements between harvesters and processors are informal, one may never know precisely, but it is certainly much less than 97%.[236]

Commerce did not explicitly conclude in the *Final Determination* that nearly every harvester had entered into blocking agreements, but rather cited the statement from the Wilson Center Commentary that "{*a*}*lmost every timber harvester has negotiated side agreements to keep its exports from being blocked*" to support its conclusion that the practice of blocking (and the corresponding increase of domestic supply of logs and/or lowering of prices to enter into "side agreements" with domestic parties) is widespread throughout the province.[237] Even if it is not

[234] *See* Petition at Exhibit 254 ("Hemlock in the West Kootenays, which realizes only $50/m3 delivered to local mills, commands a delivered price of $100/m3 to mills in the United States within a similar hauling distance. Similarly, lodgepole pine that realizes $57/mt at local mills will fetch $110/m3 at mills in the United States. For some Kootenay landowners, mills in the United States not only offer much higher prices but have locational advantages over their Canadian counterparts.").
[235] *See* Petition at Exhibit 242.
[236] *See Final Determination* IDM at 141, fn. 848 (emphasis added).
[237] *Id.* at 140, fn. 842 (citing Petitioner Comments – Primary QNR Responses at Exhibit 11, at 9).

possible to determine the exact percentage of harvesters who were forced during the POI into agreements to offer logs at lower domestic prices as a result of blocking, record evidence demonstrates that blocking had occurred throughout the province for years. "Blocking," then, was not the exclusive experience of one coastal harvester, as described in the Merrill & Ring documents, but rather something that had occurred repeatedly for at least a decade before the POI. The Merrill and Ring documents simply corroborated the prevalent existence of blocking within BC.[238] Moreover, although the exports from the Tidewater and southern interior were not at as high a volume as from the coast, the same incentives that would lead to blocking on the coast would also, at a minimum, lead to blocking in those two areas.

The Panel also stated that Commerce did not explain how the record evidence supported its determination that blocking was widespread in the interior, when export permits were not requested for around 40 percent of the authorized export volumes.[239] The Panel reasoned that this lack of export permit requests might suggest that export demand was satisfied, and that export volumes were too small, relative to total production in the interior, to result in blocking agreements throughout the interior.[240]

The 40 percent of authorized exports for which parties did not seek an export permit in the interior referenced by the Panel is missing essential context. First, the actual volume of authorized, but not permitted, volume in the interior was actually less than on the coast despite the fact that the percentages differed, 10 percent on the coast and 40 percent in the interior.[241] While the Panel disputes that the information relating to blocking on the record applies to the

[238] *Id.* at 140-141 (citing Petitioner Comments – Primary QNR Responses at Exhibits 12, 13, and 32 to explain: "The existence of this 'blocking process' is corroborated by record evidence that a log exporter in British Columbia has been subject to this process.").
[239] *See* Binational Panel Order at 88.
[240] *Id.* at 88-89.
[241] *See* GBC Primary QNR Response, Part 1 at Exhibit LEP-1 at Figures 18 and 25.

inland interior, there is no question about whether that information applies to the coast. The record demonstrates that blocking is prevalent in coastal areas despite the volume of unpermitted logs that were approved for export. There is no reason to believe that this is any different in the interior – any other conclusion is simply speculation that is not supported by the record, especially when, as noted above, the record contains instances of independent reports specifically noting that blocking is an issue in the interior.

Second, the record demonstrates that the percentage of unpermitted volume in the interior is a consequence of the differences in the LER systems between the coast and interior and not simply an indication that blocking is less prevalent in the region. The GOC/GBC note in their initial response on the LER that evidence that they have placed on the record provides "detailed analysis and explanation as to why log sellers might opt not to export as much volume as authorized by their permits" citing to the Kalt and Bustard Reports and a pair of confidential affidavits.[242] However, this analysis ignores that the LER system in the interior differs from the coast in that parties in the interior can submit an advertisement for authorization for both standing timber, as well as for logs, while in the coast, an advertisement for authorization can only be submitted for logs.[243] As [

] explains in his affidavit:

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[242] *Id.* at LEP-29.

[243] *See* GBC Primary QNR Response, Part 1 at LEP-11 and Exhibit LEP-1 at 65 ("Under the surplus test in the Interior, lands under Federal jurisdiction are allowed to advertise standing timber, i.e., timber that has not been harvested. Under the Federal rules for the Southern Interior, standing timber can be advertised, and if, like nearly all timber in the Interior, it is found to be surplus, then the timber-rights holder has obtained the option to export prior to harvesting. More than two-thirds of the permitted exports in the POI are sourced from federal lands. In the case of lands under GBC jurisdiction, harvesting must have begun on the stand prior to advertising, but the full volume of logs advertised need not yet have been harvested." (internal citations omitted)).

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This affidavit underscores our finding that authorized volumes without corresponding requests for export permits were not an indication that export demand was satisfied, but simply a consequence of the LER regime itself. Thus, Commerce's conclusion that blocking lowered domestic prices of logs and interfered with the ability of log harvesters in the BC interior to enter into long-term agreements was based on substantial evidence.

2. Fees In-Lieu-of Manufacturing

In the *Final Determination*, Commerce determined that log exports were also restrained by fees in-lieu-of-manufacturing.[245] Specifically, Commerce found that although fees were due only on logs under provincial, and not federal, jurisdiction, 58 percent, and thus the majority, of logs exported from BC during the POI were under provincial jurisdiction.[246] Moreover, Commerce determined that these fees can be significant and substantially increase the final sales prices of logs.[247] The fact that the fees for exports from the BC interior were less than the fees imposed for exports from the BC coast did not, in Commerce's view, detract from the fact that any fees at all increase the cost to export compared to selling domestically and thus provide another impediment and disincentive to exporting logs.[248]

The Panel stated that the fact fees are imposed is not determinative of the fees' significance to export sales transactions.[249] Rather, the Panel explained that in determining that the fees were significant to export sales, Commerce's *Final Determination* did not take into

[244] *See* GBC Primary QNR Response, Part 1 at Exhibit LEP-42.
[245] *See Final Determination* IDM at 139 and 141-142.
[246] *Id.* at 142.
[247] *Id.*
[248] *Id.*
[249] *See* Binational Panel Order at 89.

consideration certain relevant factors, including the relative proportion of fees to the sales price, how common such fees were in export transactions, and the effect such fees had on export decisions.[250] The Panel also stated that Commerce had not adequately explained the significance of the fees to export transactions in the interior when there were no export requests for about 40 percent of the volume authorized for export from the interior, which, according to the Panel, might indicate that export demand was satisfied even with the existence of the fees.[251]

As noted above, Commerce's analysis considered the province as a whole in evaluating the impact of the LERs. The fees in-lieu-of manufacturing can be significant on the coast as they are tied to a percentage (10 to 15 percent) of the Vancouver Log Market price and also subject to a multiplier that increases the fee even further.[252] Commerce acknowledges that the flat fee of C$1/m3 for the interior may not be a significant fee in itself (and neither is the C$14 fee that the GOC charges for all export permits), but reiterates that these are yet more costs that the GBC and accompanying GOC export restraints impose on log suppliers that wish to export and should be taken into consideration in totality with all of the aspects of the LER that the GBC/GOC attempts to portray as minor inconveniences. Thus, Commerce's determination that the fees-in-lieu-of manufacturing constituted an impediment to exporting logs from BC, including from the interior.

3. Length of Export permit approval process

With respect to the export permit and approval process, the Panel stated that the existence of an export permit and approval process is not determinative of whether that process hinders and discourages exports and that Commerce had not explained or engaged with contradictory evidence related to its conclusion that the export permit and approval process provided obstacles

[250] *Id*.
[251] *Id.*
[252] *See* GBC Primary QNR Response, Part 1 at LEP-34-35.

to exports from the BC Interior.[253] The Panel also stated that Commerce had not adequately explained how exports from the interior were hindered and discouraged by the export permit and approval process when there were no export requests for about 40 percent of the volume authorized for export from the interior, which, according to the Panel, might indicate that export demand was satisfied even with the existence of the export permit and approval process.[254]

However, as Commerce explained in the *Final Determination*, Commerce found that the potentially lengthy time of the export permit approval process provided an additional barrier to exporting logs from BC.[255] Even notwithstanding the time it took during the POI to receive an export permit, Commerce found that the need to file an application for an export permit at all constituted an additional burden to export.[256] Moreover, the fact that the application approval is not automatic introduces an element of uncertainty that further hinders the export of logs and the ability of harvesters to consider all potential purchasers.[257]

4. EIPA Penalties

In the *Final Determination,* Commerce also cited EIPA penalties as a factor in its determination that the BC LER restrains log exports from the province.[258] Commerce explained that because logs are included on the Federal export control list, they required an export permit under the EIPA.[259] Moreover, any violation of the terms of the EIPA were punishable under the act.[260]

[253] *See* Binational Panel Order at 90-91.
[254] *Id.* at 91.
[255] *See Final Determination* IDM at 139, 142.
[256] *Id.* at 142.
[257] *Id.*
[258] *See Final Determination* IDM at 142-143.
[259] *Id.* at 142 (citing *Preliminary Determination* PDM at 60-61).
[260] *Id.*

Although the Panel affirmed Commerce's determination that the EIPA provisions were formal, enforceable legal measures that provided penalties for infractions, Commerce had not explained how this enforceability compelled log suppliers to sell to domestic consumers.[261] The Panel stated that, according to record evidence, export permits were essentially immediate after an export authorization was granted.[262] This, according to the Panel, suggested that the determinative action was the permit authorization, not the issuance and enforcement of the permits.[263]

However, the existence of penalties for export violations is part of an overarching framework established by the GBC and GOC to ensure that logs remain in the province. The threat of penalties for exporting logs without the necessary authorizations and permits evinces an intent to ensure that the export of logs is controlled and monitored by the government. Thus, Commerce determined that even if the penalties had never been imposed on violations for exporting laws, EIPA and its potential penalties for infraction was part of several measures indicating the entrustment or direction of private log suppliers.[264]

5. Economic Feasibility of Log Exports from the BC Interior

In the *Final Determination*, Commerce concluded that the LERs directly impacted the BC interior because logs could be and were exported from the region.[265] Commerce also determined that it was economically feasible to export logs from the BC interior by citing record evidence that logs were exported from the Tidewater interior and southern Interior,[266] there were requests to export BC logs to Alberta,[267] and logs were exported from the interior to the United

[261] *See* Binational Panel Order at 92.
[262] *Id.*
[263] *Id.*
[264] *See Final Determination* IDM at 142.
[265] *Id.* at 144-149.
[266] *Id.* at 147-148 (citing GOC Primary QNR Response Part 1 at page LEP-5).
[267] *Id.* at 147 (citing Alberta - GOA Primary QNR Response Part 1 at Exhibit AB-S-3, Table 3).

States.[268] Commerce also determined that many of the mills of the mandatory respondents are located near the border of BC, or near where logs are exported,[269] and that the vast majority of mills in the interior overlap with one another and with potential export markets.[270] In support of its conclusion on the overlap of mills, Commerce cited a map provided by the petitioner which demonstrated that mills in the BC interior overlapped within a 100-mile radius of one another.[271] Commerce found that this map was consistent with evidence from the Bustard Report, which indicated that the 100-mile radius was in fact a conservative estimate of the degree of overlap between BC interior mills.[272] Finally, based on an analysis of the Taylor Report, Commerce determined that beetle-killed logs can be exported economically from the BC Interior.[273]

The Panel addressed several grounds related to the economic feasibility of exporting logs from the BC interior.[274] First, the Panel determined that the record contained substantial evidence to support Commerce's determination that logs could be and were exported from the Tidewater region, southern interior, and other parts of the interior.[275] However, the Panel held that Commerce had not explained how the fact of these exports supported its determination that there was a financial contribution through the provision of goods (*i.e.,* logs). The Panel reiterated that for there to be a financial contribution, the LERs needed to restrain exports of logs from the Interior to such a meaningful degree that log suppliers were compelled to sell to domestic consumers in the BC Interior.[276] According to the Panel, "Commerce did not explain

[268] *Id.* at 145 (citing GOC Etal Primary QNR Response at LEP-6, Exhibits LEP-30 (Sample Ministerial Order Exemption: Southern Interior) and LEP-31 (Sample Ministerial Order Exemption: Tidewater Interior)).
[269] *Id.* at 145 (citing GOC Etal Primary QNR Response at LEP-6 (indicating that Canfor has a sawmill close to the US/Canadian border and West Fraser has a sawmill close to areas with high export permit volume)).
[270] *Id.* at 148.
[271] *Id.* at 148, fn. 886 (citing Petitioner Comments – Primary QNR Responses at Exhibit 19).
[272] *Id.* at 148, fn. 886 (citing GOC Primary QNR Response Part 1 at Exhibit LEP-2 at 10).
[273] *Id.* at 148-149 (citing Petitioner Comments – Primary QNR Responses at Exhibit 21).
[274] *See* Binational Panel Order at 92-97.
[275] *Id.* at 92-93.
[276] *Id.* at 93.

how these exports contributed to the existence of this linkage in light of their relative volumes compared to BC 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."[277]

The Panel also stated that in concluding that it was economically feasible to export logs from the BC interior, Commerce did not adequately address certain evidence from the Kalt Report indicating that it was not economically feasible to export logs from the parts of the interior where the mandatory respondents were located, and that exports from those regions were lower than in other parts of the Interior.[278] This evidence includes the fact that 98.5 of advertised exports did not receive an offer and obtained an export authorization, suggesting that any potential restraint of the authorization process only affected 1.5 percent of advertised exports;[279] export permits were requested for only 58.9 percent of the logs authorized for export, which might suggest that export demand was satisfied so that additional exports were not feasible and there was thus no restrains on log exports;[280] and export permits were requested for only about 1.4 percent of logs harvested in the interior, suggesting that any possible restraining effects on exports affected such a small amount of harvested interior logs that it could not have meaningfully caused log harvesters to sell logs to customers in the interior.[281]

As discussed elsewhere, the Kalt Report was produced for the purpose of this proceeding; accordingly, Commerce has provided this report less weight than independent analysis on the same topic. Although the Kalt report spends dozens of pages discussing and analyzing the

[277] *Id.*
[278] *Id.* at 93-94.
[279] *Id.* at 94 (citing GBC Primary QNR Response, Part 1 at LEP-1 at 59, Figure 25).
[280] *Id*.
[281] *Id*.

impact of the LERs in both the coast and the interior, not once does Kalt mention, never mind analyze, one of the most cited examples of potential distortion caused by the LERs – blocking. Even in the Kalt Rebuttal Report which discusses blocking, particularly on the coast,[282] the analysis mainly relies on the existence of unutilized export volumes, concluding that even if there was blocking there was no discernable impact on the coast. However, this analysis simply ignores the multiple independent sources on the record stating that blocking was prevalent, including specific examples of companies needing to enter into agreements with mills to sell logs domestically at prices that resulted in losses in order to be able to export.[283] Even if the Panel were to disagree that the record demonstrates that blocking is prevalent throughout the BC interior, Kalt does not even discuss blocking on the coast, when substantial record evidence from independent sources indicates that blocking exists on the coast. There is also no comparison of pricing between the export sales and U.S. sales in Kalt's analysis. Kalt's conclusion is simply that if export prices were higher than domestic prices then there would be more exports given unused export permits. This again ignores that the record establishes that blocking has led parties to negotiate agreements with the mills to prevent their exports from being blocked, artificially increasing the supply of logs in the province.

Because the mandatory respondents' mills are located in the inland interior, the Panel questions how, if the impacts of the LER are constrained to the Tidewater or Southern Interior, the LER impacts the mandatory respondents. However, the record clearly establishes that both Canfor and Tolko had multiple mills that are located in the Southern Interior within 100 miles of the U.S. border during the POI.[284] The record also shows that both Canfor and Tolko had mills

[282] *See* GOC Etal Comments Rebuttal to Petitioner Primary QNR Response Comments at Exhibit GOC/GBC-1.
[283] *See* Petition at Exhibit 252 at 5, 8, 9, 15 and 19.
[284] *See* GBC Primary QNR Response, Part 1 at Exhibit LEP-1 at 103 (Figure 41).

that were close to the Alberta border during the POI.[285] The record also indicates that Canfor, Tolko, and West Fraser obtained timber from a significant number of timbermarks that were near the Alberta or U.S. border during the POI.[286] Accordingly, even if the LERs were to have no impact on the inland portion of the interior from which it was not economically feasible to export (around 150 miles or 250 km based on Exhibit LEP-1 at 80 (Figure 36)), they would still have had an impact in the regions in which the respondents operated.

It should also be underscored that prices of BCTS auctions are used to set prices throughout the interior based on the MPS equation. There is no variable in the MPS equation to account for Southern Interior versus inland Interior. The Interior MPS equation does have a regional variable, but that variable is only for timbermarks in the Northeast.[287] Accordingly, even if the LERs only had an impact in the regions where it was economically viable to export from, the auction results from those regions would still be used as part of the auction prices for the entirety of the interior.

Second, the Panel stated that Commerce had not adequately addressed record evidence challenging Commerce's conclusion that it was economically feasible to export beetle-killed logs from the BC interior.[288] Specifically, the Panel stated that Commerce overlooked nuances in the Taylor Report, relied on by Commerce, that indicated the significance of transportation costs for the economic feasibility of transporting beetle-killed logs.[289] With respect to this, the Panel concluded that Commerce also did not consider that the Taylor Report, published in 2005, was

[285] *Id.*
[286] *Id.*
[287] *See* GBC Verification Exhibits at VE-12 at 11-12 ("ZONE_9 - Northeast - Isolation of the far Northeast leads to higher costs and lower bids.")
[288] *See* Binational Panel Order at 95-96.
[289] *Id.* at 96.

out of date, and that the Bustard Rebuttal Report contained more recent data on transportation costs during the 2015 POI.[290]

We acknowledge the Panel's citation to the Taylor Report's analysis that "economically viable options for this wood are quite limited,"[291] but reiterate that the report found that the limited options for beetle-killed timber from the central and northern Interior regions included exports to the U.S. (both coastal and inland) and China.[292] The Panel also notes that the applicability of the transportation costs that underlie the Taylor Report's conclusions were called into question through the Bustard Rebuttal Report, which claims that transportation costs significantly increased between 2005 and the POI. As Commerce previously explained, these Bustard reports were created specifically for the purpose of this proceeding and, accordingly Commerce provided them less weight. A key reason for why Commerce has accorded these reports less weight is that the claims in the report are not backed by data on the record that Commerce can evaluate, nor is the methodology that Bustard used to compile and verify the transportation data on the record of this investigation. The closest that we get to a methodology is the following explanation:

> The log exporting process and related transportation costs for the export of logs from the Interior of British Columbia during the calendar year 2015 are examined in LEP-2. The information presented is based on my experience as a log buyer and as a log exporter and on interviews with exporters in the area. All costs are based on actual operating costs incurred by log exporters during 2015 and have been vetted in conversations with log exporters.[293]

[290] *Id.* at 96.
[291] *Id.* at 96 (citing Petitioner Comments on IQR at Exhibit 21 at 1).
[292] *See* Petitioner Comments on IQR at Exhibit 21 at 2 (Phase 2 results illustrate that only two markets outside of BC, the US Pacific Northwest (Inland and coastal regions) and China, have a realistic market potential for MPB grey attack timber at today's market prices.).
[293] *See* GOC Etal Comments Rebuttal to Petitioner Primary QNR Response Comments at Exhibit GOC/GBC-2 at 3.

None of the underlying data, the methodology used to compile or perform calculations on the data nor the parameters of the "interviews" on which the data are based are on the record of this proceeding. As Commerce has demonstrated above, figures cited in these reports that are prepared for the purpose of the investigations can be misleading without proper context. In this instance, it is not possible for Commerce to evaluate the validity of Bustard's analysis. It should be noted that despite Bustard's claims, the record contains evidence that suggests that beetle-killed logs were exported from the Interior during the POI. The record contains data for Federal Permits granted for exports during the POI. Since these are export permits, they are more likely to represent actual export volume than the approvals for the reasons discussed. The data relating to the export permits show exports of [ ] during the POI. Specifically, the data relating to Export Permits from Federal jurisdiction contain volumes for [ ].[294] The data for the export permits from land under provincial jurisdiction contain volumes of [ ].[295]

Finally, the Panel affirmed Commerce's finding that record evidence shows that most of the interior mills overlapped within 100 miles of each other and possible export markets.[296] However, the Panel stated that Commerce had not sufficiently explained how that 100-mile overlap supports the conclusion that the LERs restrained log exports from the interior in a meaningful way such that log suppliers in the BC interior were compelled to sell logs to domestic consumers in BC.[297]

[294] *See* GBC Primary QNR Response at Exhibit LEP-39.
[295] *Id.* at Exhibit LEP-40.
[296] *See* Binational Panel Order at 96-97.
[297] *Id.* at 95-97.

The overlapping 100-mile range of the mills is a conservative approach for this analysis given that the Bustard Report stipulated "{i}n most Interior areas it is economically feasible to truck export logs for up to about a 7-hour return cycle from harvest sites. This represents approximately a 228 km (142 mile) each way."[298] The record also establishes that there were instances of hauling distances from the point of harvest to the scaling site in the interior during the POI that were longer than the economically feasible distance that the Bustard Report cites.[299] The overlapping circles, however, explain that mills in the inland interior that are not near mills close to export locations would compete with mills further inland for timber in the overlapping areas. To the extent that, absent the LERs and associated blocking agreements, exports would increase from areas near the borders and mills along the Southern Interior or near the border with Alberta and would need to seek timber elsewhere, they would be more likely to participate in auctions in areas that are further inland, thus, increasing the number of bidders in auctions in those regions. However, since loggers are essentially forced into agreements to supply domestic mills in order to not have their exports blocked, there is less need for these mills to attempt to obtain timber from timbermarks further into the inland interior. As discussed earlier, since the winning auction bids are used to set prices for long-term tenures, any measure that results in a decrease in competition in auctions not only decreases the winning bids in auctions, but also the administratively calculated price for tenures throughout the interior.

6. Ripple Effect

In the *Final Determination,* Commerce underscored that the LER applied to the entire province, but concluded that even if the LER only directly impacted coastal BC, there would be a

[298] *See* GBC Primary QNR Response at Exhibit LEP-2 at 10.
[299] *Id.* at Exhibit LEP-1 at 80 (Figure 36) (The 90th percentage hauling distance for the Skeena region was 254.3 km, which indicates that 10 percent of hauling distances from that region were even longer).

ripple effect of increased volume and depressed prices from the coast to the BC Interior.[300] In reaching its determination, Commerce cited several reports demonstrating that timber markets could be integrated, such that the "law of one price" meant that logs of the same species and grade will have the same price at different locations.[301] Commerce declined to rely on the Kalt and Leamer Reports because they were commissioned for the purpose of the investigation and were contradicted by the other evidence on the record cited by Commerce.[302] Commerce also concluded that although the species in the coast and interior are not identical, the logs harvested in each region are interchangeable such that a government action like the LER that directly impacted the market of log species in one provincial region would influence the volume and price for other species in the province.[303]

The Panel stated that there were several factors that affected the integration of log markets and law of one price, as indicated by the Nordic Timber Market Report, the Finish Roundwood Market Integration Report, the Timbe Price Dynamics Following a Natural Catastrophe Report, and EU Sawnwood and Sawlog Report, as well as five other market integration reports placed on the record by petitioner and not addressed in the *Final Determination*.[304] The Panel stated that Commerce had not considered these factors and additional reports in its conclusion that the effects of the LER on the coast would ripple to the interior.[305]

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[300] *See Final Determination* IDM at 144.
[301] *Id.* at 145-146 (citing 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").
[302] *Id.* at 145-146.
[303] *Id.* at 146-147.
[304] *See* Binational Panel Order at 98-99.
[305] *Id.* at 99.

In later segments of this proceeding, upon further evaluation of the record evidence, Commerce has no longer included this factor as part of our countervailability finding in relation to the LER. We do not contest the Panel's finding of conflicting evidence contained in the various studies placed on the record of this investigation.

7. Conclusion

Thus, substantial record evidence supports Commerce's conclusions that blocking lowered domestic prices of logs and interfered with the ability of log harvesters in the BC interior to enter into long-term agreements; fees-in-lieu-of manufacturing constituted an impediment to exporting logs from BC, including from the interior; the length of the export permit and approval process hindered and discouraged log exports from the BC interior; EIPA penalties were part of an overall legal framework that evinces the intent of the GOC and GBC to keep logs within the province; it was economically feasible to export logs from the BC interior; it was possible to export beetle-killed logs from the interior; and there was a 100-mile radius overlap of interior mills with each other and export markets. Finally, all of these features of the LER cumulatively demonstrate, as directed by the Panel, that "the LERs restrained log exports from the BC interior to a meaningful degree such that it caused log suppliers to provide logs to BC consumers."[306] Specifically, the record demonstrates that there is substantial evidence that blocking occurs in the Interior, that Interior exports from areas where the respondents' mills are located occurred during the POI, that mills from the primary Interior exporting regions have timber supply overlap with the more inland Interior mills, and that prices for auctions in the primary exporting areas of the Interior are used to set prices throughout the entirety of the Interior. All of these factors demonstrate that even if the LERs only directly increase the supply

[306] *Id.* at 89-92, 95-97, and 100.

of timber in the primary exporting areas of the Interior, that the LER process distorts competition for logs in the inland Interior and also suppresses prices in both auctions and in the resulting administratively determined prices throughout the Interior. We have also demonstrated that key factors relied on in the analysis by the Canadian parties is lacking key context or is not supported by data on the record of the investigation.

Thus, Commerce's determination is based on multiple factors. Accordingly, even if the Panel were to find that not all the factors discussed above demonstrate that the LER caused log suppliers to provide logs to BC consumers, Commerce's determination that the BC LER resulted in depressed log prices in the interior would still be based on substantial evidence.

**H. Specificity of the AJCTC Program**

In the *Final Determination,* Commerce found the AJCTC program to be *de jure* specific under section 771(5A)(D)(i) of the Act, which provides: "Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry, the subsidy is specific as a matter of law."[307] The AJCTC program enables employers to claim a tax credit on up to 10 percent of the wages paid to apprentices working in one of 56 prescribed Red Seal Trades.[308] Thus, Commerce determined that the AJCTC is *de jure* specific because "as a matter of law, the program expressly limits eligibility to certain activities, which by extension limits it to certain industries."[309] Because Commerce found the AJCTC to be *de jure* specific, it did not address arguments on whether the program is *de facto* specific.[310]

[307] *See Final Determination* IDM at Comment 70.
[308] *Id.* at 202 (citing GOC Etal Primary QNR Response at GOC-CRA-31 and Exhibit GOC-CRA-AJCTC-1).
[309] *See Final Determination* IDM at 202.
[310] *Id.*

In the Binational Panel Order, the Panel assessed Commerce's finding of *de jure* specificity against section 771(5A)(D)(ii) of the Act, which describes as follows conditions under which a program will not be *de jure* specific:

> Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, the subsidy is not specific as a matter of law, if (I) eligibility is automatic, (II) the criteria or conditions for eligibility are strictly followed, and (III) the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification.[311]

Further, for purposes of this provision, "objective criteria or conditions" means "criteria or conditions that are neutral and do not favor one enterprise or industry over another."[312] The SAA further explains that the objective criteria or conditions "must be economic in nature and horizontal in application, such as the number of employees or the size of the enterprise."[313]

Analyzing the AJCTC program against this framework, the Panel concluded that Commerce had not demonstrated that the program is expressly limited to any industry, because any industry could theoretically employ an individual engaged in a Red Seal Trade.[314] The Panel reasoned that although Commerce presumed that only certain industries employed workers engaged in Red Seal Trades, the law does not expressly limit access to the program to certain industries, and there is no record evidence indicating that only certain industries employ workers in Red Seal Trades.[315] The Panel further noted that the fact some industries use the program while others do not relates to an analysis of *de facto,* rather than *de jure,* specificity.[316]

[311] *See* section 771(5A)(D)(ii) of the Act.
[312] *Id.*
[313] *See* SAA at 930.
[314] *See* Binational Panel Order at 109-111.
[315] *Id.* at 110-111.
[316] *Id.* at 111.

Accordingly, the Panel remanded this determination for Commerce to further explain or reconsider "its determination that the AJCTC Program is a specific subsidy."[317]

**Analysis**

We have reexamined the record with respect to our determination that the AJCTC program is *de jure* specific. In these final results of redetermination, we conclude that the AJCTC program is not *de jure* specific, within the meaning of section 771(5A)(D)(i) of the Act. However, upon concluding that this program is not *de jure* specific, we next turn to an analysis of whether the AJCTC program is *de facto* specific within the meaning of section 771(5A)(D)(iii) of the Act. In reexamining our prior specificity determination, we identified record evidence demonstrating that the AJCTC program is *de facto* specific. The statute provides that a subsidy may be *de facto* specific when, *inter alia,* "{t}he actual recipients of a subsidy, whether considered on an enterprise or industry basis, are limited in number."[318] The GOC provided AJCTC usage data for tax years 2010 to 2014, showing that the following number of firms used the program: 10,090 (2010), 10,670 (2011), 11,160 (2012), 11,950 (2013), and 12,250 (2014).[319] The GOC also reported that there were 1,940,000 corporate tax filers for tax year 2014.[320] Thus, a mere 0.63 percent of corporate taxpayers within Canada claimed the AJCTC on their 2014 income tax returns, which were filed during the POI.[321] As the SAA makes clear, the purpose of the specificity test is "to function as a rule of reason and to avoid the

[317] *Id.* at 111 and 162.
[318] *See* section 771(5A)(D)(iii)(I) of the Act.
[319] *See* GOC IQR at Volume III, Exhibit GOC-CRA-AJCTC-5.
[320] *See* GOC's Letter, "Response of the Government of Canada and the Governments of Alberta and British Columbia to the Department's April 3, 2017 Supplemental Questionnaire," dated April 14, 2017, at GOC-SUPP2-1.
[321] Under 19 CFR 351.509(b)(1), Commerce will find benefits under income tax programs to have been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission. The regulation further states that Commerce will normally interpret this date to be the date on which the recipient firm filed its income tax return. Here, Canadian firms filed their fiscal year 2014 income tax returns during calendar year 2015, which is the POI.

imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is spread throughout an economy."[322] Less than one percent of corporate taxpayers utilizing this program does not indicate that this program is widely used throughout the Canadian economy. Because the actual recipients, relative to total corporate tax filers, are limited in number on an enterprise basis, we find that the AJCTC program is *de facto* specific in accordance with section 771(5A)(D)(iii)(I) of the Act.

Thus, in accordance with the Panel's Order, we have reconsidered our *de jure* specificity finding in the *Final Determination* and have concluded, on remand, that the AJCTC is *de facto* specific.

**I. Tolko's Armstrong Plant**

In the *Final Determination,* Commerce determined that sales of electricity Tolko made to BC Hydro under an EPA between Tolko's Armstrong power plant and BC Hydro constituted the countervailable purchase of a good for more than adequate remuneration, pursuant to sections 771(5)(D)(iv) and 771(5)(E)(iv) of the Act.[323] Commerce also determined that the payments Tolko received for the sale of electricity were not tied to non-subject merchandise (*i.e.,* electricity), and thus attributed the benefit received under the BC Hydro EPAs to all products produced by Tolko, pursuant to 19 CFR 351.525(a).[324] In the Binational Panel Order, the Panel upheld Commerce's determination that the payments Tolko received for the sale of electricity were attributable to all products sold by the firm.[325]

However, the Panel noted that Commerce's treatment of Tolko's Armstrong plant appeared to be inconsistent with Commerce's determination in *CTL Plate from Korea*, which

[322] *See SAA* at 930.
[323] *See Preliminary Determination* PDM at 84, unchanged in *Final Determination* IDM at 18 and 163.
[324] *See Final Determination* IDM at Comment 49.
[325] *See* Binational Panel Order at 127-130.

involved a situation in which electricity sold by POSCO Energy went directly to a government utility, KPX, without passing through the respondent producer, POSCO.[326] Commerce explained in *CTL Plate from Korea:*

> {Commerce} 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.[327]

According to the Panel, Commerce's treatment of the sales of electricity in *CTL Plate from Korea* may be in contradiction to Commerce's treatment of the sale of electricity by Tolko's Armstrong plant.[328] Thus, the Panel remanded 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."[329]

**Analysis**

Commerce's default attribution methodology is to attribute benefits of a subsidy to the company that receives the subsidy. Under 19 CFR 351.525(b)(3), Commerce will normally attribute a domestic subsidy to all products sold by a firm, including products that are exported. Likewise, with respect to cross-owned corporations that are affiliated with a respondent

[326] *Id.* at 130 (citing *CTL Plate from Korea*).
[327] *See CTL Plate from Korea* IDM at Comment 1 (footnote omitted).
[328] *See* Binational Panel Order at 130.
[329] *Id.*

company, in accordance with 19 CFR 351.525(b)(6)(i), Commerce normally attributes a subsidy to the products produced by the company that received the subsidy. Section 351.525(b)(6)(ii)-(v) of Commerce's regulations provides additional rules for the attribution of subsidies received by respondents with cross-owned affiliates. Subsidies to the following types of cross-owned affiliates are covered in these additional attribution rules: (ii) producers of the subject merchandise; (iii) holding companies or parent companies; (iv) producers of an input that is primarily dedicated to the production of the downstream product; or (v) an affiliate producing non-subject merchandise that otherwise transfers a subsidy to a respondent. There are, however, exceptions for attributing subsidies received by respondents and their cross-owned affiliates. Under 19 CFR 351.525(b)(5)(i), if Commerce finds that a subsidy is tied to the production or sale of a particular product, Commerce will attribute the subsidy only to that product. If Commerce does not determine that the subsidy is tied to the production or sale of a particular product, "then Commerce follows its default rule of attributing subsidies to all products exported by the firm {under section 351.525(b)(3)}."[330]

There are key differences between the circumstances concerning Tolko and its Armstrong facility and those in *CTL Plate from Korea*. The record demonstrates that the Armstrong power plant is owned by Tolko and is a facility within Tolko's own corporate structure; it is not a separate corporation or a cross-owned affiliate.[331] Thus, the regulations for cross-owned corporations set forth in 19 CFR 351.525(b)(6) are not applicable to Tolko and its Armstrong plant, because the recipient of the subsidies received from the Armstrong plant's electricity sales to BC Hydro under its EPA was, in fact, Tolko itself. Moreover, because Commerce found the

[330] *See TMK IPSCO v. United States*, 222 F. Supp. 3d 1306, 1324 (CIT 2017).
[331] *See* Tolko's Letter, "Response to the Department's CVD Supplemental Questionnaire," dated May 30, 2017 (Tolko May 30, 2017 SQR), at 17 ("Tolko's Armstrong generation facility"); *see also* Tolko's Letter, "CVD Verification Exhibits," dated June 23, 2017 (Tolko Verification Exhibits), at Verification Exhibit 2 (p. 4).

electricity subsidies were not tied to the production of electricity, it properly attributed the subsidy received by Tolko's Armstrong power plant to all products produced by Tolko, the company that received the subsidy, consistent with 19 CFR 351.525(b)(3).[332]

The relationship between Tolko and its Armstrong plant is distinguishable from the corporate entities at issue in *CTL Plate from Korea.* In *CTL Plate from Korea*, POSCO Energy was a *separate* corporate entity from the respondent, POSCO.[333] Thus, to determine whether any benefits received by POSCO Energy could be attributed to POSCO, Commerce applied its regulations at 19 CFR 351.525(b)(6), which govern the attribution of subsidies to corporations other than those that received the subsidy, and found that none of the bases for attribution under the regulations applied to the relationship between POSCO and POSCO Energy.[334] Commerce determined that POSCO Energy sold electricity directly to KPX, and not to POSCO.[335] Thus, POSCO Energy did not provide an input product (*i.e.*, electricity) to a downstream producer (*i.e.,* POSCO) and accordingly, POSCO Energy did not qualify as a cross-owned input supplier under 19 CFR 351.525(b)(6)(iv). Commerce determined that "{i}nformation 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, POSCO Energy's sale of electricity to KPX, and not POSCO, was only relevant for Commerce's analysis due to POSCO Energy's status as a separate cross-owned entity, as Commerce could only attribute subsidies received by POSCO Energy to POSCO under the cross-owned attribution regulations set forth in 19 CFR 351.525(b)(6). Since Commerce found that POSCO Energy did not sell electricity to POSCO, it did not meet the

[332] *See* Memorandum, "Final Determination Calculations for Tolko Marketing and Sales Ltd. and Tolko Industries Ltd.," dated November 1, 2017 (Tolko Final Determination Calculations), at 4.
[333] *See CTL Plate from Korea* IDM at Comment 1.
[334] *Id.*; *see also* 19 CFR 351.525(b)(6).
[335] *See CTL Plate from Korea* IDM at Comment 1.

definition of a cross-owned input supplier of respondent POSCO within the meaning of 19 CFR 351.525(b)(6)(iv). And since POSCO Energy did not meet any of the other attribution criteria under subparagraph (b)(6), Commerce determined that "any benefits received by POSCO Energy cannot be attributed to POSCO."[336]

In contrast, the underlying facts and issue in *CTL Plate* are completely different than those surrounding Tolko's Armstrong power plant, and the relevant regulatory provisions that apply when determining whether to attribute subsidies received by Tolko's Armstrong power plant to Tolko are distinguishable from the facts and regulations at issue in *CTL Plate from Korea*. Here, the question of whether Commerce can attribute subsidies received by a cross-owned entity is not relevant at all. Tolko's Armstrong power plant is not a separate corporate entity from Tolko, as was the case with POSCO and POSCO Energy.[337] Instead, the Armstrong plant is a facility within the respondent company, Tolko.[338] As explained above, POSCO Energy's sale of electricity to KPX, and not POSCO, was only relevant for Commerce's due to POSCO Energy's status as a separate cross-owned entity, as Commerce could only attribute subsidies received by POSCO Energy to POSCO under the cross-owned attribution regulations set forth in 19 CFR 351.525(b)(6). Here, Tolko received the electricity subsidy itself, not through a cross-owned affiliate. Thus, the cross-owned attribution regulations at 19 CFR 351.525(b)(6) are inapplicable to Tolko and its Armstrong plant. Rather, the applicable regulation is 19 CFR 351.525(b)(3), under which Commerce attributes domestic subsidies received by the respondent itself to the respondent company, and normally attributes the domestic subsidy to all products sold by a firm, including products that are exported.

[336] *Id*.
[337] *See* Tolko May 30, 2017 SQR at 17 ("Tolko's Armstrong generation facility"); *see also* Tolko Verification Exhibits at Verification Exhibit 2 (p. 4).
[338] *Id.*

Moreover, as explained above, because the payments to Tolko's Armstrong plant are not tied to a particular product, Commerce's regulations at 19 CFR 351.525(b)(5)(i) are inapplicable. That regulation states that "{i}f a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product." However, section 701(a) of the Act requires Commerce to countervail subsidies that are provided "directly or indirectly" to the manufacture or production of the subject merchandise. Furthermore, the *CVD Preamble* states that if subsidies allegedly tied to a particular product are, in fact, provided to the overall operations of the company, Commerce will attribute the subsidy to sales of all products produced by the company.[339] Because Tolko Armstrong's EPA with BC Hydro was not tied to the production or sale of a particular product, and instead benefitted the operations of Tolko as a whole under Commerce's tying practice, the benefit from the investigated program is attributed to all products produced by Tolko under 19 C.F.R. 351.525(b)(3). Furthermore, Commerce has consistently found that electricity subsidies are attributed to all products, not just to the production of electricity.[340]

The Panel has already upheld Commerce's determination that the EPA payments to the plant connected to Tolko's Kelowna sawmill are attributable to Tolko's total production, rather than tied to the production of electricity.[341] Furthermore, as the Panel explained in the Binational Panel Order, "{i}n *Royal Thai Government v. United States*, the CIT upheld Commerce's determination that the Thai Government's provision of electricity conferred a countervailable benefit to the Thai steel company respondent."[342] Like in *Royal Thai*, here, the EPA benefits are

[339] *See CVD Preamble*, 63 FR at 65400.
[340] *See Final Determination* IDM at Comment 49 (citing determinations in which Commerce attributed electricity subsidies to the sales of all products produced by the respondent).
[341] *See* Binational Panel Order at 130.
[342] *Id.* (citing *Royal Thai Government v. United States*, 441 F.Supp.2d 1350 (CIT 2006)).

being provided to Tolko itself, rather than a separate, cross-owned corporation as was the case in *CTL Plate from Korea*.[343] Based on this distinction, Commerce's decisions in the underlying *Final Determination* and in *CTL Plate from Korea* are not in contradiction with one another, but rather are the result of differing relationships between the entities at issue, and thus the different regulatory provisions on attribution applicable in each case. Because electricity subsidies are not tied to the production of a particular product, and the benefit for the program was received by Tolko directly via its Armstrong power plant, rather than a separate cross-owned corporation, Commerce appropriately attributed the subsidy to Tolko's overall production under 19 CFR 351.525(b)(3).

**J. West Fraser Electricity Plants**

In the *Final Determination,* Commerce attributed to West Fraser electricity subsidies received by West Fraser's Fraser Lake and Chetwynd sawmills through EPAs between West Fraser and BC Hydro.[344] In the Binational Panel Order, the Panel remanded for Commerce to explain whether West Fraser's electricity plants were connected to its sawmills, and whether the sawmills used the electricity produced by West Fraser's electricity plants.[345] If West Fraser's sawmills and electricity plants are not connected, the Panel ordered Commerce to treat them the same as it treats Tolko's Armstrong plant.[346] However, if they are connected, the Panel stated that Commerce could attribute the EPA payment West Fraser received to its total production.[347]

[343] *See* Tolko May 30, 2017 SQR at 17 ("Tolko's Armstrong generation facility"); *see also* Tolko Verification Exhibits at Verification Exhibit 2 (p. 4).
[344] *See Preliminary Determination* PDM at 84-85; *see also Final Determination* IDM at Comment 51.
[345] *See* Binational Panel Order at 130.
[346] *Id.*
[347] *Id.*

**Analysis**

West Fraser had two EPAs associated with its sawmills in place during the POI, one at Fraser Lake and one at Chetwynd.[348] West Fraser stated that the Fraser Lake bioenergy plant and Chetwynd bioenergy plant are "business units" and that the bioenergy plants "are in purpose-built buildings on the Fraser Lake Sawmill and Chetwynd Forest Industries grounds."[349] We verified that the electricity sales to BC Hydro under the EPAs are reported in West Fraser's accounting system.[350] Thus, like Tolko's Armstrong plant, the Fraser Lake and Chetwynd plants are not separate corporate entities, but rather are plants owned by West Fraser and within the West Fraser corporate structure.[351]

To the Panel's remand order, the record does not definitively indicate whether the Fraser Lake and Chetwynd electricity plants are physically connected to West Fraser's sawmills, and whether those mills use the electricity generated by the plants. With respect to the Fraser Lake plant, its EPA states, regarding a Transmission/Distribution Line, that [

].[352] Thus, record evidence seems to support the conclusion that the Fraser Lake bioenergy plant is connected to the Fraser Lake sawmill. However, it is not clear whether the Fraser Lake sawmill consumed electricity generated by the bioenergy plant during the POI. With respect to the Chetwynd plant, its EPA states, regarding a Transmission Line, that [

[348] *See* West Fraser's Letter, "Response to Department's January 19, 2017 Countervailing Duty Questionnaire," dated March 14, 2017 (West Fraser IQR), at 95 and Exhibit WF-GEN-1.
[349] *Id*. at 98.
[350] *See* Memorandum, "Verification of the Questionnaire Responses of West Fraser Mills, Ltd." dated June 14, 2017, at 14.
[351] *See* West Fraser IQR at 95, 98, and Exhibit WF-GEN-1.
[352] *See* West Fraser IQR at Exhibit WF-EPA-7 (Appendix 4, section 3).

].[353] Thus, the record does not provide enough evidence to conclude definitively whether the Chetwynd bioenergy plant is connected to the Chetwynd sawmill or whether the sawmill consumed any of the electricity generated by the bioenergy plant during the POI.

However, whether the electricity plants are connected to the sawmills, and whether the sawmills use the electricity, is not the pertinent inquiry in Commerce's determination to include subsidies received by those plants to West Fraser. Rather the issue is the fungibility of money within a corporate entity. Here, Fraser Lake and Chetwynd are plants within the West Fraser corporate entity.[354] Commerce has long recognized that, within a company, money is fungible and its use for one purpose may free up money to benefit another purpose. Subsidies provided to a "business unit" of a company, such as a bioenergy plant, will impact the overall production and sales of all other products of the company. Neither the statute nor Commerce's regulations provide for, or require, the attribution of a domestic subsidy to a specific entity within a firm. Additionally, Commerce does not tie subsidies to particular facilities within a firm because, "{o}nce a firm receives the funds, it does not matter whether the firmed used the government funds, *or some of its own funds that were freed up as a result of the subsidy*, for the stated purpose or the purpose that we evince."[355] The CIT has further upheld Commerce's methodology with respect to attributing subsidies, by default, to the overall operations of a company in *Kiswok*, explaining:

> Untied subsidies are not linked to any particular merchandise; they are presumed to benefit an exporter in general and are therefore allocated to its total business. The presumption is sensible. Money is fungible. A cash subsidy, regardless of its intended or actual use, frees up revenue, which in turn may be applied for other purposes, and thus entails general benefit.[356]

[353] *Id*. at Exhibit WF-EPA-8 (Appendix 4, section 3).
[354] *Id*. at 3-8.
[355] *See CVD Preamble*, 63 FR at 65403 (emphasis in original).
[356] *See Kiswok Indus. Pvt. Ltd. v. United States*, 28 C.I.T. 774, 787 (CIT 2004) (citations omitted) (*Kiswok*).

Consequently, Commerce's default attribution methodology is to attribute subsidies to the overall operations of a company because money is fungible within a single, integrated corporate entity (as opposed to a conglomeration of entities for which an analysis under 19 CFR 351.525(b)(6) may be required). Furthermore, whether the Fraser Lake and Chetwynd bioenergy plants are physically connected to West Fraser's sawmills, or whether those sawmills use the energy produced at those plants, does not impact Commerce's analysis. These are not separately incorporated corporate entities, but rather facilities within the corporate structure of West Fraser. Therefore, any money received by the Fraser Lake and Chetwynd plants is fungible and transferable to any other business unit within the West Fraser corporate entity, regardless of the physical connection between or electricity use by those units. In other words, West Fraser received the benefit under this program and any physical electricity connection or actual use of electricity is not germane to our analysis.

Thus, it is appropriate to attribute the benefits from the Fraser Lake and Chetwynd EPAs to West Fraser's total production, which is consistent with our treatment of Tolko's Armstong plant in this remand.[357] As explained above, Commerce's default attribution methodology is to attribute benefits of a subsidy to the company that receives the subsidy. Under 19 CFR 351.525(b)(3), the Secretary will normally attribute a domestic subsidy to all products sold by a firm, including products that are exported. The recipient of the subsidy was West Fraser itself, as Fraser Lake and Chetwynd plants are simply facilities owned by West Fraser and within its corporate structure. Thus, Commerce's regulations on attribution of subsidies for cross-owned companies under 19 CFR 351.525(b)(6) are inapplicable in this instance. Because West Fraser's bioenergy plants are owned by West Fraser, and are not separate corporations, Commerce

[357] *See* Tolko's Armstrong Plant section *supra*.

properly determined that the subsidy should be attributed to the products produced by the company that received the subsidy, West Fraser.[358] Moreover, because the payments received by the Fraser Lake and Chetwynd plants are not tied to the production of electricity, 19 CFR 351.525(b)(5) is inapplicable. As explained at "Tolko's Armstrong Plant," *supra*, because Tolko Armstrong's EPA with BC Hydro was not tied to the production or sale of a particular product, and instead benefitted the operations of Tolko as a whole under Commerce's tying practice, the benefit from the investigated program, is attributed to all products produced by Tolko under 19 C.F.R. 351.525(b)(3). Thus, because electricity subsidies are not tied to the production of a particular product, and the benefit for the BC Hydro EPAs program was received by West Fraser through its Fraser Lake and Chetwynd facilities, rather than a separate cross-owned corporation, Commerce appropriately attributed the subsidy to West Fraser's total production under 19 CFR 351.525(b)(3). [359]

**K. Resolute's electricity sales in the denominator**

In the *Final Determination*, Commerce found, consistent with its practice, that electricity is not a service but is a good that is bought and sold in the marketplace.[360] For Resolute's non-stumpage subsidy calculations, Commerce used, as the sales denominator, the FOB value of total sales of products produced in Canada, which are recorded the company's gross sales account.[361] In the Binational Panel Order, the Panel found that if electricity is considered a good, then Resolute's electricity sales should be included in the denominator in its subsidy rate calculations,

[358] *See* West Fraser IQR at 95, 98, and Exhibit WF-GEN-1.
[359] *Id.*; *see also Preliminary Determination* PDM at 84-85.
[360] *See Final Determination* IDM at Comment 48.
[361] *See* Resolute's Final Determination Calculations; *see also* Resolute's Letter, "Response to Section III of Initial Questionnaire on General Issues and Non-Stumpage Programs," dated March 15, 2017 at 9-10; and Memorandum, "Verification of the Questionnaire Responses of Resolute FP Canada Inc.," dated July 18, 2017 (Resolute Verification Report) 6.

and accordingly remanded to Commerce to include Resolute's electricity sales in the denominator for Resolute's subsidy rate calculations.[362]

**Analysis**

We verified that Resolute's sales of electricity are booked as direct revenue, which is part of the cost of sales and not part of gross sales.[363] We thus have included Resolute's 2015 electricity sales in the sales denominator used in the company's non-stumpage subsidy calculations.[364]

**L. Recalculation of the benefit to Tolko and West Fraser for Electricity Sales**

In the *Final Determination*, Commerce determined that BC Hydro's purchases of electricity from Tolko and West Fraser under EPAs are countervailable, finding that BC Hydro is an authority within the meaning of section 771(5)(B) of the Act, and that the program constitutes a financial contribution, confers a benefit, and is *de facto* specific under sections 771(5)(D)(iv), 771(5)(E)(iv), and 771(5A)(D)(iii)(I) of the Act.[365] Commerce also determined that the appropriate method for determining whether West Fraser and Tolko received a benefit under the unique factual scenario presented by this program, pursuant to section 771(5)(E) of the Act, is the "benefit-to-the-recipient" standard.[366] Specifically, during the POI, Tolko and West Fraser did not merely sell electricity to BC Hydro at an administratively set price, but also purchased electricity from BC Hydro.[367] For an MTAR program such as this one, where the government is acting on both sides of the transaction—*i.e.*, both selling a good to, and purchasing that good back from, a respondent—we determined that the benefit to the respondent is the difference

[362] *See* Binational Panel Order at 134.
[363] *See* Resolute Verification Report at 15-16.
[364] *See* Memorandum, "Draft Results of Redetermination Calculations for Resolute FP Canada Inc. (Resolute)," dated September 23, 2024 (Resolute Draft Remand Calculation Memorandum).
[365] *See Preliminary Determination* PDM at 84-85; *see also Final Determination* IDM at 18.
[366] *See Final Determination* IDM at Comment 51.
[367] *Id.*

between the price at which the government is selling the good to the company, and the price at which the government is purchasing that good back from the company.[368] As such, we determined that the appropriate benchmark rate to calculate the benefit that Tolko and West Fraser receive from the sale of electricity back to BC Hydro is the electricity tariff rates that BC Hydro charged Tolko and West Fraser for the electricity they purchased, and rejected the alternative benchmark prices proffered by the parties (*i.e.*, BC Hydro's Bioenergy Power Call Phase I, BC Hydro's long-run marginal cost, and FortisBC prices).[369]

To determine the benefit, we compared the unit price for electricity that Tolko and West Fraser paid to BC Hydro to the unit price of electricity that BC Hydro paid to Tolko and West Fraser for each month of 2015. We multiplied the difference by the total volume of electricity purchased by BC Hydro for each month and then summed those amounts. We divided the sum of the benefits by the total sales of Tolko and West Fraser for 2015.[370] On this basis, we determined that Tolko and West Fraser received a net countervailable subsidy rate of 0.38 percent *ad valorem* and 0.21 percent *ad valorem*, respectively.[371]

In the Binational Panel Order, the Panel found that under a "benefit-to-the-recipient" analysis, the price at which BC Hydro sold electricity is not relevant.[372] The Panel stated that to measure the benefit by looking at the difference between the price at which BC Hydro provided electricity, and the price at which BC Hydro purchased that same good is a "cost-to-provider" analysis rather than a "benefit-to-the-recipient" analysis.[373] Given that it costs respondents more

[368] *Id.*
[369] *Id.*
[370] *See Preliminary Determination* PDM at 84-85; *see also* Tolko Final Determination Calculations at 4, and Memorandum, "Final Determination Calculations for West Fraser Mills, Ltd. and its cross-owned affiliates," dated November 1, 2017 at 6.
[371] *See Final Determination* IDM at 18.
[372] *See* Binational Panel Order at 138.
[373] *Id.*

to generate electricity from biomass sources than it costs BC Hydro to generate electricity largely from hydroelectric sources, the Panel concluded that respondents would not sell electricity to anyone at Commerce's benchmark price.[374]

The Panel noted that the record contains prices from an actual energy sales transaction by Tolko, where it sold electricity to an unaffiliated third party, and found that this price, not including the additional charge for sending the power to the U.S. market, is an appropriate benchmark for measuring the benefit received by Tolko and West Fraser from BC Hydro's electricity purchases.[375] The Panel therefore remanded Commerce to recalculate the benefit to Tolko and West Fraser using the Tolko price for the sale of electricity to a third party (not including the charge for sending the power to the U.S. market) as the benchmark.[376]

**Analysis**

At the outset, we respectfully disagree with the Panel's characterization of Commerce's analysis of this issue as a "cost-to-provider" approach and the Panel's findings on this matter. However, as explained below, we have recalculated the benefit for this program in accordance with the Panel's order.

In its initial questionnaire response, Tolko reported that its Armstrong facility had contracted electricity for the period July 1, 2008 to March 31, 2009, for the sale of electricity brokered through Powerex, BC Hydro's electricity trading affiliate, for export into the U.S. market.[377] Using Tolko's price for the sale of electricity to this third party (not including the charge for sending the power to the U.S. market) as the benchmark, we recalculated the benefit

[374] *Id.*
[375] *Id*. at 139.
[376] *Id.*
[377] *See* Tolko's Letter, "Response to Section III of the Department's CVD Questionnaire," dated March 13, 2017 (Tolko IQR), at TOLKO-CVD-154.

that Tolko received under the BC Hydro EPAs program. We determine that Tolko received measurable benefits from BC Hydro's purchases of electricity from Tolko via the purchase agreements in place and calculate a net countervailable subsidy rate of 0.15 percent *ad valorem* for the POI.[378]

As noted above, the Panel remanded Commerce to recalculate the benefit to West Fraser using Tolko's price for the sale of electricity to a third party as the benchmark.[379] However, Tolko's price for the sale of electricity is the company's own BPI, which is not in the public domain.[380] Thus, if Commerce were to use this Tolko sale price for West Fraser's benefit calculations, it would be in potential violation of the Trade Secrets Act for an unlawful disclosure of Tolko's BPI.[381] Consequently, we are unable to apply that price as the benchmark electricity price in West Fraser's subsidy calculations for the BC Hydro EPAs program. However, in attempting to comply, as best we can, with the Panel's instruction to incorporate Tolko's price into West Fraser's electricity benefit calculations, we have instead determined to assign to West Fraser the subsidy rate calculated for Tolko under the BC Hydro EPAs program in this final results of redetermination, which is 0.15 percent *ad valorem*.[382]

**M. Merrimack Group benchmark for electricity Purchases from Resolute**

In the *Final Determination,* Commerce determined that Hydro-Québec's purchases of electricity from Resolute via purchase agreements under the PAE 2011-01 program is countervailable, finding that Hydro-Québec is an authority within the meaning of section 771(5)(B) of the Act, and that the program constitutes a financial contribution, confers a benefit,

[378] *See* Tolko Draft Remand Calculation Memorandum.
[379] *See* Binational Panel Order at 139.
[380] *See* Tolko IQR at TOLKO-CVD-154.
[381] *See* 18 U.S.C. 1905.
[382] *See* West Fraser's Draft Results of Redetermination Calculations.

and is *de facto* specific under sections 771(5)(D)(iv), 771(5)(E)(iv), and 771(5A)(D)(iii)(I) of the Act.[383] As with BC Hydro's purchases of electricity from Tolko and West Fraser, Commerce determined that the appropriate method for determining whether Resolute received a benefit under the PAE 2011-01 program, pursuant to section 771(5)(E) of the Act, is the "benefit-to-the-recipient" standard.[384] During the POI, Resolute did not merely sell electricity to Hydro-Québec at an administratively set price, but also purchased electricity from Hydro-Québec.[385] For an MTAR program such as this one, where the government is acting on both sides of the transaction—*i.e.*, both selling a good to, and purchasing that good back from, a respondent—we determined that the benefit to the respondent is the difference between the price at which the government is selling the good to the company, and the price at which the government is purchasing that good back from the company.[386] As such, we determined that the appropriate benchmark rate to calculate the benefit that Resolute receives from the sale of electricity back to Hydro-Québec is the Industrial L rate and not the electricity price contained in the Merrimack Group report, which the GOQ argued was the proper benchmark.[387]

To determine the benefit, we compared the unit price for electricity that Resolute paid to Hydro-Québec to the unit price of electricity that Hydro-Québec paid to Resolute for each month of 2015.[388] We multiplied the difference by the total volume of electricity purchased by Hydro-Québec for each month and then summed those amounts. We divided the sum of the benefits by Resolute's total sales for 2015. On this basis, we determined that Resolute received a net countervailable subsidy rate of 0.80 percent *ad valorem*.[389]

[383] *See Preliminary Determination* PDM at 85-86; *see also Final Determination* IDM at 18.
[384] *See Final Determination* IDM at Comment 54.
[385] *Id.*
[386] *Id.*
[387] *Id.*
[388] *See Preliminary Determination* PDM at 85-86.
[389] *See Final Determination* IDM at 18.

In the Binational Panel Order, the Panel found that under a "benefit-to-the-recipient" analysis, the price at which Hydro-Québec sold electricity is not relevant.[390] The Panel found that the Merrimack Group report is contemporaneous with Resolute's contracts under the PAE 2011-01 and is comparable for benchmarking purposes.[391] The Panel therefore remanded Commerce to use the average realized price level reported in the Merrimack Group report (C$108/MWh) as the benchmark for comparison to the prices paid for the purchase of electricity from Resolute.[392]

**Analysis**

As with the previous issue above, we respectfully disagree with the Panel's characterization of Commerce's analysis of this issue as a "cost-to-provider" approach and the Panel's findings on this matter. However, we have recalculated the benefit for this program in accordance with the Panel's order. Using the average realized price level of C$108/MWh contained in the Merrimack Group report as the benchmark price, we recalculated the benefit that Resolute received under the PAE 2011-01 program. We determine that Resolute did not receive any benefits from the Hydro-Québec's purchases of electricity from Resolute via the purchase agreements under the PAE 2011-01 program during the POI.[393]

**N. NSAs**

In the underlying investigation, the petitioner submitted NSAs for three programs: (1) the provision of a loan by the GOQ and GOO to Resolute as part of the company's bankruptcy proceedings (Resolute Bankruptcy Loans); (2) preferential treatment for maximum liability amounts guaranteed by Export Development Canada (EDC) for U.S. export sales (Account

[390] *See* Binational Panel Order at 138-139.
[391] *Id*. at 139.
[392] *Id*. at 139-140.
[393] *See* Resolute Draft Remand Calculation Memorandum.

Performance Security Guarantees); and (3) tax incentives for private forest land property by the GNB (GNB Land Tax Incentives).[394] Commerce determined that it did not have sufficient time to analyze these three alleged programs during the course of the investigation.[395] Therefore, in accordance with 19 CFR 351.311(c)(2), Commerce deferred its examination of the NSAs until any subsequent review.[396] In the first administrative review of the *Order*, Commerce examined and made final affirmative countervailable subsidy determinations on all three programs, and calculated above *de minimis* rates.[397]

In the Binational Panel Order, the Panel stated that 19 CFR 351.311(c)(2) permits Commerce to defer consideration of an NSA from an investigation to a subsequent administrative review.[398] The Panel further explained that because duties determined at the end of the first administrative review period supersede the rates calculated in the investigation, rates calculated in the final determination of an investigation are only relevant insofar as they are *de minimis* and lead to the exclusion of a company from an order.[399] Thus, the Panel directed that if, as a result of this remand proceeding, any of the respondent's subsidy rate changes to *de minimis,* and the inclusion of the subsidies calculated for the NSAs in the first administrative review would bring that respondent's rate back above *de minimis,* Commerce is to add the NSA subsidies calculated in the first review to that respondent's rate from the investigation.[400] If none of the respondents' rates change to *de minimis* as a result of this remand, the Panel indicated that

[394] *See* Petitioner NSA 1; Petitioner Case Brief at 60-68.
[395] *See Final Determination* IDM at Comment 7.
[396] *Id.* at 35-36 (citing 19 CFR 351.511(c)(2) (Providing that if Commerce concludes that insufficient time remains to examine an NSA before the final determination in an investigation, Commerce will "defer consideration of the newly discovered practice, subsidy, or subsidy program until a subsequent administrative review, if any.")).
[397] *See Certain Softwood Lumber Products from Canada: Countervailing Duty Administrative Review, 2017-2018*, 85 FR 77163 (December 1, 2020) (citing Memorandum, "Analysis of New Subsidy Allegations," dated November 6, 2019).
[398] *See* Binational Panel Order at 149.
[399] *Id.* at 149-150.
[400] *Id.* at 150 and 162.

it would defer to Commerce's decision in the *Final Determination* to defer examination of the NSAs.[401]

**Analysis**

As a result of this remand redetermination, none of the recalculations to the respondents' subsidy rates results in a *de minimis* subsidy for any of the respondents. Accordingly, Commerce is not adding the subsidies calculated for the NSAs in the first administrative review to any of the respondent's subsidy rates.

## IV. INTERESTED PARTY COMMENTS

We released the Draft Results to interested parties on September 23, 2024.[402] We received comments from the COALITION,[403] GOC,[404] GBC,[405] GNB,[406] GOQ,[407] Alberta

[401] *Id.* at 150.
[402] *See Draft Results of Redetermination Pursuant to Binational Panel Order*, *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination,* Secretariat File No. USA-CDA-2017-1904-02, dated September 23, 2024 (Draft Results).
[403] *See* COALITION's Letter, "Comments on Draft Results for Redetermination Pursuant to Binational Panel Order for Certain Softwood Lumber Product From Canada: Final Affirmative Countervailing Duty Determination," dated October 18, 2024 (COALITION Comments).
[404] *See* GOC's Letter, "Comments on the U.S. Department of Commerce's Draft Remand Results," dated October 18, 2024 (GOC Comments).
[405] *See* Letter from Government of British Columbia, the British Columbia Lumber Trade Council, Canfor, Tolko, and West Fraser, "B.C. Parties' Comments on the Department's Draft Results of Redetermination Pursuant to Binational Panel Order," dated October 18, 2024 (GBC Comments).
[406] *See* GNB's Letter, "Comments of the Government of New Brunswick On Draft Results Of Redetermination," dated October 18, 2024 (GNB Comments).
[407] *See* GOQ's Letter, "The Government of Québec's Comments on the Draft Results of Redetermination Pursuant to Binational Panel Order," dated October 18, 2024 (COQ Comments).

parties,[408] BCLTC,[409] Canfor,[410] Central Canadian parties,[411] JDIL,[412] and West Fraser. We summarize and address these arguments, in turn.

Within their comments, the Central Canadian parties state that, in the Draft Results, Commerce correctly included Resolute's electricity sales in the sales denominator for the company's non-stumpage subsidy calculations.[413] Because the Central Canadian parties made affirmative comments on Resolute's sales denominator, we do not address them below.

**Comment 1: Whether Commerce Should Consider Alternative Results for Issues Where Binational Panel Directed Action**

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALTITION (internal citations omitted). For further details, *see* COALITION Comments at 2-3.

> The Binational Panel Order includes three instances in which the Panel directed {Commerce} adopt a specific result. These directed remand instructions constitute an unlawful exercise of authority and, as detailed in relevant sections below, {Commerce} should consider other outcomes in its final remand results.

No other interested party commented on this issue.

**Commerce's Position:** The U. S. Court of Appeals for the Federal Circuit (Federal Circuit) precedent is clear that the CIT, and thus a NAFTA Panel which sits in its place, exceeds its statutory authority by directing certain outcomes on remand. Specifically, as the petitioner

[408] *See* Letter from Government of Alberta, the Alberta Softwood Lumber Trade Council and its members, Canfor, West Fraser, and Tolko (collectively, the Alberta parties), "Alberta Parties' Comments on Draft Remand Results," dated October 18, 2024 (GOA Comments).
[409] *See* Letter from GOC, GBC, and BCLTC, "Comments on the U.S. Department of Commerce's Draft Remand Redetermination," dated October 18, 2024 (Joint LER Comments).
[410] *See* Canfor's Letter, "Comments on Draft Results of Redetermination Pursuant to Binational Panel Order," dated October 18, 2024 (Canfor Comments).
[411] *See* Letter from Resolute FP Canada Inc. ("Resolute"), and the Conseil de l'industrie forestière du Québec, the Ontario Forest Industries Association and members of each association (collectively, Central Canadian parties), "Comments on Draft Results for Redetermination Pursuant to NAFTA Binational Panel's Order in Secretariat File No. USA-CDA-2017-1904-02," dated October 18, 2024 (Resolute and Central Canada Comments).
[412] *See* JDIL's Letter, "Comments on Draft Results of Redetermination pursuant to Binational Panel Order," dated October 18, 2024 (JDIL Comments).
[413] *See* Resolute and Central Canada Comments at 6.

argues, the Federal Circuit has explained that the CIT lacks the authority to reverse Commerce opinions by directing Commerce to reach a certain outcome.[414] Instead, the appropriate direction under the statute would be for the Panel to remand to the agency for further consideration consistent with its decision.[415]

Here, as the petitioner notes, the Panel directed several specific actions on remand. Although we respectfully disagree with the Panel that it is appropriate for the Panel to direct Commerce to take specific actions to reach certain outcomes on remand, Commerce complied with the Panel's Order. *See* Comments 9, 10 and 11.

**Comment 2: Whether Commerce Should Reconsider Its Decision to Use Two Different Conversion Factors in Comparing Nova Scotia Stumpage Prices to Alberta Stumpage Prices**

*GOA's Comments*

The following is a verbatim summary of the comments submitted by the GOA (internal citations omitted). For further details, *see* GOA Comments at 5-13.

> Commerce's draft remand does not support its reliance on Nova Scotia's conversion factor to convert per-metric ton prices into per-cubic meter prices. Alberta's stumpage prices are per-cubic meter prices. Alberta timber is converted from measured metric tons to cubic meters using a conversion based on sample loads scaled throughout the timber year. The Nova Scotia's prices collected in the survey of transactions relied on by {Commerce} for its benchmark are per-metric ton prices. Nova Scotia private parties do not convert weight to volume in the normal course or report prices in metric tonnes. Commerce's decision to convert Nova Scotia per-{metric ton (MT)} prices to per-{cubic meter ($M^3$) based on a 20 year old Nova Scotia conversion factor is not supported by substantial evidence. The conversion factor relied on by Commerce to convert the Nova Scotia prices is significantly different than that used by Alberta for its weight-to-volume conversion; the Nova Scotia conversion factor it results in significant fewer $M^3$ per MT, and therefore a significantly higher $M^3$ price. Differences in conversion factors across jurisdictions result from differences in scaling rules and different conventions for deducting defect volume, accounting for taper, trim allowances, rounding, and other decisions. Commerce fails to consider this evidence. Commerce's assertion that its decision to use Nova Scotia's conversion factor is

[414] *See NEXTEEL Co., Ltd. v. United States*, 28 F.4th 1226, 1231 (Fed. Cir. 2022) (*NEXTEEL*).
[415] *Id.*, 28 F.4th at 1238; *see also* 19 USC § 1516a(c)(3).

> supported by a finding that the forests in Alberta and Nova Scotia are "comparable" has no support in the record. Commerce provides no explanation why comparable forests would require different weight-to-volume conversion factors. Commerce provides no explanation as to why the appropriate conversion factor would not be the actual conversion factor relied on by Alberta in the POI for its weigh-to-volume conversions. Simply applying the Alberta conversion factor to Alberta's per-$M^3$ stumpage prices would provide a per-MT price that can be compared to the actual per-MT prices reported in Nova Scotia.

*Canfor's Comments*

Canfor adopts and incorporates by reference the comments on the Draft Results filed by the GOA. *See* Canfor Comments.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 4-7.

> {Commerce} correctly confirmed that it is unnecessary to adjust the Nova Scotia weight-to-cubic meter conversion factor. The Alberta Parties have previously asserted that an adjustment to the conversion factor is necessary because it does not reflect the "differences in the respective provincial timber profiles," *i.e.*, that standing timber in Nova Scotia is not comparable to Alberta and that the Nova Scotia conversion factor is not usable. However, {Commerce} has reasonably explained that the record supports a finding that factors such as species and tree size are sufficiently comparable in both provinces, which is consistent with the Panel's findings in the Binational Panel Order. The record also shows that the conversion factor is reliable because it is used in the ordinary course of business by the {GNS}. Thus, in the final remand redetermination, {Commerce} should continue to find that an adjustment to the Nova Scotia conversion factor is not necessary.

**Commerce's Position:** For the reasons put forth in the investigation, we continue to find that private-origin standing timber in Nova Scotia is sufficiently comparable to Alberta timber based on similar tree size, species, and growing conditions in both provinces.[416] The GOA argues that if Commerce finds that standing timber in these two provinces are comparable, then the Alberta

[416] *See Final Determination* IDM at 110-111.

weight-to-volume conversion factor must therefore be appropriate to use on Nova Scotia timber to calculate prices on a per metric ton basis. We disagree.

The Alberta weight-to-volume conversion factor and the Nova Scotia weight-to-volume conversion factor are both used by each government in the ordinary course of business. With respect to the 1.167 conversion factor used by the GNS in its ordinary course of business, the 1.167 conversion factor was developed in 1989 based on the Canadian Standards Association's (CSA) Scaling Roundwood Standard CAN3-0202.1-M86, which is a nation-wide standard.[417] From 1989 to 1994, the GNS surveyed delivered SPF timber to derive a tons to cubic meter conversion factor.[418] While the GOA claims that the Nova Scotia weight-to-volume conversion factor is a static conversion factor based on data from more than two decades ago, record evidence indicates that in 2000, the GNS's Department of Lands and Forestry established the Forest Sustainability Regulations, which included into the Registration and Statistical Returns Regulations the 1.167 conversion factor at issue for Registered Buyers to use when reporting harvest information for the Registry of Buyers and calculating their silviculture obligations pursuant to the Forest Sustainability Regulations.[419] Subsequently, between 2001 and 2005, the GNS conducted another sampling survey of its forests in accordance with CSA scaling standards to confirm the accuracy of the conversion factor at issue, and the results showed virtually no differences in the 1.167 conversion factor, which led the GNS to leave the factor unchanged.[420] Deloitte utilized the conversion factor at issue when soliciting private-origin standing timber prices as part of the 2015-2016 Private Market Survey.[421] Commerce verified the process and

[417] *See* GNS Initial Questionnaire Response at 14.
[418] *Id.*
[419] *Id.* at 14-15.
[420] *Id.* at 14.
[421] *See Final Determination* IDM at 126.

information that went into the GNS's development and continued evaluation of the conversion factor.[422] As a result, we find that the GOA's arguments that the 1.167 conversion factor is static and out-of-date to be meritless.

Regarding the conversion of sales quantities from one unit of measure to another, our preference is to follow the conversion methods used by respondent parties in the ordinary course of trade, unless there is evidence that those methods are distortive. For example, we followed the Washington Department of Natural Resources' (WDNR) conversion factor to convert WDNR log prices from thousand board feet to cubic meters.

There is no record evidence that the Alberta weight-to-volume conversion factor is more accurate than the Nova Scotia weight-to-volume conversion factor when used on Nova Scotia timber. In fact, using the Alberta weight-to-volume conversion factor would have a potentially distortive effect on the weight-to-volume calculations for Nova Scotia timber. The GOA demonstrates in its comments on the Draft Results how three different conversion factors developed by the GOA and the GNS, and a 0.618 tonne/cubic meter conversion factor developed by the U.S. Forestry Service,[423] each result in different per cubic meter prices when applied to the same volume of timber. This result is expected and unextraordinary because each conversion factor was developed using scaling samples from different regions. As the GOA stated, "{e}ach province employs a different system for assessing the volume of a log" and "{e}ach system employs its own conventions…"[424] For those same reasons we find that using the weight-to-volume conversion factor developed in Nova Scotia is the most appropriate and accurate conversion factor for converting the weight of *Nova Scotia* timber into cubic meters.

[422] *Id.*
[423] *See* GOA May 12, 2017 Supplemental Questionnaire Response at Exhibit AB-S-119 at 5.
[424] *See* GOA Comments on Draft Results at 8.

As we explained in the Draft Results, a conversion factor is a result of tree size, species, and forest conditions,[425] and while we find that the forests in Alberta and Nova Scotia are similar, that does not undercut Commerce's position that, ultimately, a Nova Scotia conversion factor is most appropriate in this instance for converting volumes of Nova Scotia timber, given the unique factors that can affect a conversion factor's value. The GOA's preferred method—to use a weight-to-volume conversion factor developed on timber in one province to calculate volumetric prices in another province—would be distortive. We find no evidence that the conversion factor the GNS uses in the ordinary course of business is distortive, out-of-date, or otherwise inappropriate to use to convert Nova Scotia timber from metric tons to cubic meters. As a result, we continue to use the 2015-2016 Private Market Survey prices based on the 1.167 conversion factor as a benchmark for measuring the adequacy of renumeration for the respondent companies purchases of Crown timber in Alberta, as we also do in Ontario, and Québec.

**Comment 3: Whether Commerce Should Reconsider Its Determination Not to Adjust the Alberta Stumpage Price for the Differences in Haul Costs**

*GOA's Comments*

The following is a verbatim summary of the comments submitted by the GOA (internal citations omitted). For further details, *see* GOA Comments at 13-18.

> Commerce's draft remand does not support its decision to dismiss the calculated per cubic meter advantage for Nova Scotia sawmills for loading and hauling, as compared to Alberta sawmills, nor its decision not to adjust the Alberta stumpage price to account for the difference. Record evidence demonstrates that "the weighted average haul distance for the Alberta lumber industry in the 2015 calendar was 120 kilometers (with some harvest blocks more than 400 kilometers away from mills). . . . In comparison, an estimate of the long term average haul distance in Nova Scotia for five large sawmills might be in the range of 65 kilometers." The Cross-Border Report also established the fact that less of Alberta's public road network exists in the forested region. The disadvantages faced by Alberta sawmills also extend to access to U.S. markets. As the Cross-Border Report explains, "{s}awmills in Nova Scotia are relatively close to softwood lumber markets in

[425] *See* Draft Results at 10.

> Bostonne, Massachusetts –approximately 700 kilometres (440 miles) 'as the crow flies.'" And "{t}he cost to ship a truckload of lumber from Nova Scotia to Bostonne is 42 percent of the cost to ship the equivalent amount of lumber from Alberta to the nearest major market in Chicago via rail." The magnitude of the hauling cost advantage for Nova Scotia sawmills is approximately C$3.92 per cubic metre for loading and hauling. Additionally, the report notes that "Alberta sawmills face a C$13.87/m3 disadvantage {in shipping lumber to the nearest and most accessible US market} (at average Alberta sawmill lumber conversions)" from moving lumber to market. Additional distance from the mill and additional hauling costs negatively impact the value of Alberta standing timber and therefore the price. Commerce must take this distinct difference into account when comparing Nova Scotia stumpage to Alberta stumpage. Commerce wrongly ignored this evidence, erroneously claiming that the Cross-Border Report does not explain the method by which it calculated the haul costs and that there is no source for the underlying data. The Cross-{Border} Report does explain its method and the underlying data. Commerce also claims that "other evidence" calls into question the reliability of the data used in the Cross-Border Report. Such "evidence" is results from the FP Innovations Report, which are neither real nor suitable for the purpose of describing the 2015 industry costs in Nova Scotia.

*Canfor's Comments*

Canfor adopts and incorporates by reference the comments on the Draft Results filed by the GOA. *See* Canfor Comments.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 8-10.

> {Commerce} correctly explained that standing timber in Nova Scotia and Alberta is comparable, and that it is not necessary to adjust Alberta stumpage prices to account for hauling costs. First, {Commerce's} finding regarding the comparability of prevailing market conditions such as species and tree size in Nova Scotia and Alberta continues to be reasonable and supported by the record. As noted by {Commerce}, the statute directs the agency to make an apples-to-apples comparison when assessing prevailing market conditions for the good being provided. Here, the good in question is stumpage and Nova Scotia's benchmark reflects "pure" stumpage prices. Hauling costs constitute post-harvest activities that are not included in the stumpage prices in Nova Scotia. Accordingly, {Commerce} has reasonably determined that adjusting the Alberta stumpage prices for hauling costs would only distort the analysis and would not provide an apples-to-apples comparison. Second, {Commerce} has adequately addressed the Panel's concerns regarding haul costs in Alberta and Nova Scotia. Specifically,

> {Commerce} reasonably determined that the costs estimated in the MNP Cross-Border Report commissioned by the {GOA} are unsubstantiated, and that other evidence on the record, *i.e.*, the FP Innovations report submitted by the GNS and published in the ordinary course of business, contradicts the costs estimated by the MNP Cross-Border Report commissioned by the GOA. Thus, the Alberta Parties' request for an adjustment based on hauling costs continues to lack a basis in the record.

**Commerce's Position:** When calculating the benefit that respondents received when purchasing Alberta Crown-origin standing timber for less than adequate remuneration, we compared the stumpage charges invoiced by the GOA at the time of harvest to the Nova Scotia benchmark. In selecting a tier-one benchmark, Commerce's regulation at 19 CFR 351.511(a)(2)(i) directs Commerce to consider "product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability." As explained in the Draft Results, transportation costs could in certain cases be a factor affecting comparability.[426] However, according to the record of this proceeding, Commerce determined that the most important factors for selecting a stumpage benchmark that was comparable to the respondents' stumpage purchases were species, size, and growing conditions. In the *Final Determination,* Commerce selected private-origin standing timber in Nova Scotia as the benchmark to compare to Alberta stumpage, because Commerce determined that the transactions for private-origin standing timber in Nova Scotia were sufficiently comparable to Alberta timber given that the size, species, and growing conditions were similar in both provinces.[427]

Furthermore, the fact that transportation costs may (or may not) be considered a factor "affecting comparability" in selecting the appropriate benchmark does not necessarily mean that an adjustment to the price paid for the good is also required or appropriate. In this case, as explained in the Draft Results, the record does not demonstrate that the transportation

[426] *See* Draft Results at 12.
[427] *See Final Determination* IDM at 110-111.

infrastructure is so different between Alberta and Nova Scotia as to warrant an adjustment for transportation and haul costs.[428] The GOA contends that Commerce ignored data in the MNP Cross-Border Report showing that transportation costs are higher for harvesters in Alberta sawmills as compared to harvesters in Nova Scotia.[429] As we explained above, log transportation costs are incurred after the purchase/sale of stumpage and after harvesting the timber. Because we determine that the private prices in the Nova Scotia benchmark are stumpage prices, *i.e.*, prices charged to the purchaser for the right to harvest timber, which do not reflect any post-harvest costs such as hauling logs from a stand to a mill, or hauling lumber from a mill to a regional market, a proper stumpage-to-stumpage comparison must logically exclude the cost of such activities from the calculation. Moreover, the transportation costs in the MNP Cross-Border Report are based upon the assertion that the weighted-average distance from the cut block to mill in Alberta is 120 km, whereas the weighted-average distance in Nova Scotia is 65 km.[430] Other record evidence indicates that the 65 km estimate for cut block to mill in Nova Scotia, made by the MNP Cross-Border Report, indicates that this underestimates the average hauling distance in Nova Scotia. The FP Innovations Report,[431] which does not appear to have been commissioned for the purposes of the investigation, indicates that the average distance to sawmills in Nova Scotia is 146 km and calls into question the reliability of the data used in the MNP Cross-Border Report that was specifically commissioned for the investigation.[432] Thus, we find that the assumptions regarding hauling distances that underly the haulage costs calculated in the MNP Cross-Border Report are not reliable.

[428] *See* Draft Results at 12.
[429] *See* GOA Comments at 16-18.
[430] *See* GOA Questionnaire Response, Volume IV at Exhibit AB-S-23 at 26.
[431] *See* GNS Questionnaire Response at Exhibit NS-16.
[432] *Id.* at Exhibit NS-16 at 3.

Furthermore, and importantly, the private prices in the 2015-2016 Private Market Survey are pure stumpage prices, *i.e.*, prices charged to the purchaser for the right to harvest private-origin standing timber, which therefore do not reflect any costs related to post-harvesting activities such as hauling logs from stand to mill.[433] Commerce verified the Nova Scotia private standing timber benchmark and the costs included in the private prices composing the Nova Scotia benchmark.[434] We found no record evidence indicating that any post-harvesting costs, such as the cost of hauling logs to the mill, are included in the Nova Scotia benchmark price. As a result, including harvesting costs in the respondents' purchases of Crown-origin Alberta timber would introduce a distortion to the stumpage-to-stumpage comparison and yield an in accurate benefit calculation. Thus, we find that a proper stumpage-to-stumpage comparison must exclude costs – in this case transportation costs – that are not part of the stumpage price.

While we find, for the reasons explained above, that an adjustment for purported differences in haul and transportation costs between Nova Scotia and Alberta is not appropriate, assuming, *arguendo*, that hauling costs should be included in the benefit analysis, the record evidence does not clearly support the GOA's claim that hauling costs are higher for harvesters in Alberta. The MNP Cross Border Report states that the weighted-average haul distance for the Alberta lumber industry in the 2015 calendar year was 120 km, the maximum log transport distance to any particular mill was 400 km, and the weighted average haul costs for Alberta averaged $14.06/m3.[435] In comparison, the FP Innovations Report found that the average log transport distance to sawmills in Nova Scotia was 146 km,[436] the maximum log transport distance to any particular mill was approximately 550 km, and that hauling costs in Nova Scotia

[433] *See Final Determination* IDM at 138; *see also* GNS Verification Report at 6-7.
[434] *See Final Determination* IDM at 136.
[435] *See* GOA Initial Questionnaire Response at Exhibit AB-S-23 at 30 (internal page 26) and 43 (internal page 39).
[436] *See* GNS Initial Questionnaire Response at Exhibit NS-16 at 5 (internal page 3).

are estimated C$24.57/m3.[437] Thus, information on the record indicates that average haul distances in Nova Scotia actually exceed the distances in Alberta, as reported by the MNP Cross Border Report.

The GOA argues that the models in the FP Innovations Report are not credible and are not representative of the actual situation in Nova Scotia.[438] However, the information for haul distance in the FP Innovations Report is specific to Nova Scotia and reflects haul distances for 39 sawmills in Nova Scotia from all three regions of the province. Therefore, we have continued to find that the average haul information in the FP Innovations Report is reliable information regarding hauling in Nova Scotia. The calculations regarding hauling costs that the GOA cites in the MNP Cross Border Report, which assumes that sawmills in Alberta will sell to buyers in Chicago and sawmills in Nova Scotia sell to buyers in Boston, are based on assumptions that are not necessarily reflective of the actual experiences of sawmills in Alberta and Nova Scotia.[439]

We also find that statements in other reports placed on the record undercut the GOA's claims concerning the significance of haulage costs in determining the value of standing timber and the profitability of sawmills. We note that the Marshall Report states the following as it regards the factors that impact standing timber prices:

> {e}ven though sawmills have strong incentives to keep harvesting, transport, and conversion costs as low as possible, they have limited influence over those costs as those costs are largely determined by fuel and energy prices, prevailing wages, etc. Differences in mill profitability are, therefore, largely due to factors within the influence of sawmills stumpage and efficiency in transforming timber into lumber (*i.e.*, wood conversion yield).[440]

[437] *Id.* at 20 and Exhibit NS-16 at 40 (internal page 38).
[438] *See* GOA Comments at 17-18.
[439] *Id.* at 3 (citing GOA Initial Questionnaire Response at Exhibit AB-S-23 at 39-40).
[440] *See* GOQ Initial Questionnaire Response at Exhibit QC-STUMP-78 at 10 (internal page 9).

In sum, hauling costs are not part of the Nova Scotia benchmark price and, therefore, including hauling costs in the benefit analysis would introduce a post-harvesting activity that would distort the benefit calculation. Moreover, even if one were to accept the unsupported assertion that hauling costs should be accounted for, the differences in the transportation infrastructure, average hauling distances, wages in the transportation sector, and hauling costs between Alberta and Nova Scotia are not significant such that it warrants an adjustment. To the extent any differences in hauling distance and infrastructure development exist, we find that the GOA has not adequately substantiated and quantified the extent of the purported differences.

**Comment 4: Whether Commerce Properly Determined that Auction Prices in Québec Are Distorted and Cannot Serve as a Tier-One Benchmark**

*GOQ's Comments*

The following is a verbatim summary of the comments submitted by the GOQ (internal citations omitted). For further details, *see* GOQ Comments at 4-19.

> The record lacks evidence supporting Commerce's determination that the auctions are not competitively run. First, auction prices do not track (*i.e.* are not influenced by) TSG prices. In effect, Commerce is alleging a feedback effect or even collusion without empirical evidence. No mill families operating in Québec, not even large mills like PF Resolute, have sufficient presence in the auctions and in the TSGs to find unilaterally depressing their bids to be economically worthwhile, especially when balance with the risk of losing needed logs. Table 20.1 of the Québec Market Memo shows the percentage difference between the tenth sawmill in the so-called dominant mills and the twentieth sawmill to be very small. Mills compete with each other in the market for logs.
>
> Second, the 15% no-sale percentage indicates well-chosen threshold prices, not a lack of aggressive bidding. Unsold volume shows the setting of aggressive threshold prices. The frequency of "no sales" is at levels expected in a well-functioning auction system. Empirical evidence based on actual TSG rates for the tariffing zone for the relevant time period in which the auction was held shows many of the winning bids from both TSG holders and non-TSG holders were above the comparable TSG price.
>
> Third, there is no evidence of a log export restriction ("LER") that suppresses competition in Québec's auctions. Many independent harvesters actively

> participate in {the Wood Marketing Bureau's (BMMB)} auctions and won auction blocks, which is evidence of the competitiveness of the auctions. Whether Québec independent harvesters face a government-imposed LER is immaterial because they cannot practically or profitably export auction logs due to the large hauling distances involved. Private landowners (*i.e.*, private forest) are not subject to the LER and can sell their logs to Québec mills, as well as to the United States. And yet log exports to the United States are virtually non-existent. Québec is a net importer of logs.
>
> Fourth, Commerce's so-called holistic approach also ignores that the permitted public volume is not enough to cover residual mill needs in aggregate. Mills rely on private forest and imports. Section 92 and 93 transfers do not change the aggregate TSG volume because they are mere swaps for the most part, and count against the sending mills TSG quantity.
>
> Fifth, Commerce's price-to-price comparison is flawed because it only reviewed PF Resolute's bidding behavior, and ignored the data on the record for all TSG-holding corporations.
>
> Sixth, Commerce's claim that it cannot perform a price-to-price comparison because of missing information on the factors that affect the value of stands contradicts its position on the comparability of the Nova Scotia Benchmark. If Commerce uses the Nova Scotia benchmark (which it should not), it must make the appropriate adjustments for a more accurate comparison.

*Resolute and Central Canada's Comments*

The following is a verbatim summary of the comments submitted by Resolute FP Canada Inc. (Resolute) and the Conseil de l'industrie forestière du Québec, the Ontario Forest Industries Association and members of each association (collectively, Central Canada) (internal citations omitted). For further details, *see* Resolute and Central Canada Comments at 2-6.

> In its May 6, 2024 Decision, the NAFTA Panel instructed {Commerce} to reexamine its finding that "the Québec timber auctions are not competitively run." {Commerce} continues to deny, in responding to this instruction, that the Québec timber auctions are competitively run. {Commerce's} continuing rejection is based on two essential factual errors. First, {Commerce} fails to realize that correlation between auction and non-auction prices is both intentional and appropriate. Second, {Commerce} misunderstands the effect of Article 92 and 93 transfers on the volumes of Timber Supply Guarantee ("TSG") wood available to a respondent.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 18-24.

> In reviewing {Commerce's} finding that auction prices in Québec are distorted and thus cannot serve as a tier-one benchmark, the Panel upheld the majority of {Commerce's} observations regarding the characteristics of Québec's timber market. The Panel nonetheless issued a remand to {Commerce}, instructing the agency to "use the data in the record to analyze the extent to which auction prices actually track TSG-allocated prices." In the Draft Remand Redetermination, {Commerce} properly explained that this comparison does not yield useful conclusions for a distortion analysis.
>
> However, substantial evidence continues to support {Commerce's} finding that auction prices are distorted by the Government of Québec's involvement in the timber market. In particular, record evidence shows that administratively-set price Crown timber is the primary source of fiber for Québec sawmills, who have ample ability to source such timber to satisfy their demand and thus are less motivated to bid aggressively at auctions. These mills dominate the Québec auctions and have significant influence on the auction results. Further, the same sawmills are also the buyers of logs that non-sawmill bidders won at the auctions because of the legal requirement that all Crown-origin timber, including that sold at the auctions, must be milled in Québec. This forces non-sawmills to compete with timber available to sawmills at the TSG price. {Commerce} reasonably found that this impacts auction participants' bidding behavior and therefore distorts the auction results. For these reasons, {Commerce} should maintain its findings in the final remand redetermination.

**Commerce's Position:** Commerce continues to find that the BMMB's auction prices in Québec are distorted and cannot serve as a tier-one benchmark. Commerce's distortion analysis is based on a holistic examination of the structure of the market, the concentration of the market, and the role and level of involvement of the government in the market. In the investigation,[441] we examined the market for standing timber in Québec as a whole, and we found that the BMMB auction prices are distorted for the following reasons: (1) the non-auction Crown market is large (*i.e.*, timber from TSGs make up 51 percent of all timber consumed in FY 2015-16, whereas

[441] *See Final Determination* IDM at Comment 35.

timber from auctions makes up 22 percent, timber from private land makes up 15 percent, and imports make up 11 percent);[442] (2) a small number of firms dominate both the TSG market and the auction market, and auction volumes account for a relatively small percentage of these firms' supply;[443] (3) a significant share of auctions did not receive bids above the threshold price and went unsold (*i.e.*, 15 percent were unsold);[444] (4) the SFDA allows TSG holders to transfer Crown timber to other sawmills (both affiliated and unaffiliated), which lessens their need to turn to the auction or non-Crown sources to meet their supply needs; and (5) the GOQ's requirement that logs harvested through auctions must be processed within Québec limits auction participation.[445] These factors, which lead to distorted prices in the BMMB's auctions, are carried through to the TSG market through the transposition equation, in which the BMMB uses past auction prices and characteristics of the timber in each tariffing zone to determine TSG rates.

In this final remand, we continue to find that the BMMB's auction prices are distorted and thus are not a suitable tier-one benchmark. Furthermore, we find that conducting a price-to-price comparison between auction prices and TSG prices is not the appropriate framework to determine whether the auction market for Crown-origin timber in Québec is distorted. A price-to-price comparison between a market-based price and the price that a respondent paid to purchase the good from a public body is done to calculate the benefit received by the respondent. However, our distortion analysis does not involve selecting a purportedly market-based benchmark price – which in this case the Canadian parties claim are the auction prices – and then

[442] *See* GOQ Initial Questionnaire Response at Table 7; *see also* Québec Market Memorandum (November 8, 2017) at Table 7.1.
[443] *See* GOQ Initial Questionnaire Response at Table 12 and Table 20; *see also* Québec Market Memorandum (November 8, 2017) at Table 12.1 and Table 20.2.
[444] *See* GOQ Verification Report at 20-21 and Exhibit QC-30.
[445] *See* GOQ Initial Questionnaire Response at QC-S-92.

comparing it to the government-set price. To compare an auction price to a government set price without first determining whether the market in question is distorted or the auction is for use as a benchmark could result in comparing two non-market-based prices to each other. Instead, our distortion analysis must begin with an examination of the market as a whole, the concentration and incentives of private market participants, and the involvement of the government in the market. Our analysis concludes that the BMMB's auction prices are distorted; therefore, we also do not find it appropriate to conduct a price-to-price comparison with distorted auction prices.

The GOQ makes several arguments in support of its contention that BMMB's auction prices are a suitable tier-one benchmark. First, the GOQ incorrectly alleges that Commerce's determination was based on the finding that a "feedback-effect," or even collusion or coordination among TSG-holders was present in the Québec auctions.[446] Commerce's determination, however, did not rely on collusion in the auction market; instead, we determined that the bidding behavior of TSG holders is influenced by the structure of the Québec Crown stumpage market, in which the majority of the timber is supplied through TSGs, and the BMMB's transposition equation, which links TSG prices to auction prices such that all TSG holders that participate in the auctions have little incentive to bid aggressively in the auctions.[447] The majority of auction winners were TSG holding mills (*i.e.*, 30 of the 42 unique auction winners were TSG holding mills), and, as we explained above, the TSG holding mills are concentrated among a small number of corporations that dominate both the consumption of TSG-allocated Crown-origin standing timber and the purchase of auctioned Crown-origin standing timber.[448] We note that 12 of the 42 auction winners during the POR were independent

[446] *See* GOQ Comments at 4-5 and 8-9.
[447] *See Final Determination* IDM at Comment 35.
[448] *See* Québec Market Memorandum (November 1, 2017) at Table 20.

harvesters, and, as we explained above, the independent harvesters that participate in auctions likely sell the majority of their harvest to TSG-holding sawmills due to the requirement that logs harvested in Québec must be processed in the province.[449] Given that TSG-holding sawmills source the majority of their timber through TSGs, and given that independent harvesters are largely reselling logs to TSG-holding sawmills, the TSG price serves as a reference price for the independent harvesters when bidding in auctions.

Second, the GOQ cites data on winning auction bids during the POR comparing winning auction bids to the implied TSG price for those auction blocks and alleges that Commerce mistakenly relies on evidence of a 'feedback loop.'[450] The GOQ also cites a conclusion in the Marshall Report that the average actual winning bid for auctions won by TSG holders was higher than average, not lower than average, and otherwise statistically indistinguishable from the winning bids of non-TSG holders, which purportedly shows that TSG holders' winning bids are not depressed relative to the winning bids of non-TSG holders who have nothing to gain from lower auction prices in terms of their non-auction timber.[451]

As an initial matter, Commerce's finding that the prices of Crown-origin standing timber sold through TSGs affects the bidding behavior of auction participants such that the auctions are not market-based is not invalidated by the GOQ's comparison of the prices of certain successful auctions data to the implied TSG rate for those auction blocks. While the GOQ points to several successful auctions where the winning auction bid was "substantially" higher than the implied TSG rate for the auction block,[452] the record evidence shows that there were numerous winning bids that fell below the implied TSG rate for the auction block. Just over 40 percent of auctions

[449] *Id.* at Table 12.
[450] *See* GOQ Comments at 6 (citing GOQ Letter Re-Filing Robert Marshall Ph.D.).
[451] *Id.* at 7 (citing Marshall Report at para. 122 to 124).
[452] *Id.* at 6 (citing GOQ Letter Re-Filing Robert Marshall Ph.D.).

had winning bids below the TSG price and this number likely understates the share of auctions that had bids below the TSG price because in 20.1 percent of auctions in FY 2014-2015 and 15.8 percent of auctions in FY 2015-2016, the highest bid was below the upset price (*i.e.*, the undisclosed, minimum price below which an auction block will not sell) and the auction block failed to sell.[453] The GOQ notes that the unsold auctions indicate that threshold prices were appropriately set. However, approximately 15 percent of the volume of timber put up for auction failed to sell.[454] We find that this unsold volume is a significant share of all auction volume and indicates that TSG-holding firms and non-sawmills are not aggressively bidding. Given that TSG holders source a majority of their timber from TSGs, TSG-holders are aware that auction prices are used to set future TSG prices through the BMMB's transposition equation, and non-TSG holders are selling a large proportion of their timber to TSG holders, there is little incentive for auction participants to bid above the administratively set TSG prices. The significant volume of unsold auctions demonstrates that TSG holders and non-TSG holders are frequently not bidding above TSG prices.

Next, the GOQ provides a scatter plot of data to support the claim that the threshold price of timber offered at auction is "appropriately aggressive" and that the "vast majority of public timber offered at auction was sold."[455] According to the GOQ, the provided scatter plot of data demonstrates the ratio of the auction sale price to the implied TSG rate of the block.[456] TSG holders won 89 auctions during the POR and 40 of those auctions (*i.e.*, 45 percent) were won with bids below the implied TSG rate for the block.[457] Yet, we find that the 45 percent of the

[453] *See* GOQ Letter Re-Filing Robert Marshall Ph.D. at "Data complete.xlsx."
[454] *See* GOQ Verification Report at 20-21 and Exhibit QC-30.
[455] *See* GOQ Comments at 9-11.
[456] *Id.* at 11.
[457] *See* GOQ Letter Re-Filing Robert Marshall Ph.D. at "Data complete.xlsx" and "Std bid data.dta."

successful auctions that were won with a bid below the TSG rate for the block indicates that TSG holders were often bidding and winning auctions with bids below the TSG rate. Despite the GOQ's contentions, these successful bids below the implied TSG rate demonstrate that TSG holders are able to obtain additional timber supply at rates below the rate that they would have paid if the timber were sold through a TSG at prices established by the transposition equation (*i.e.*, at prices below the implied TSG rate), and these winning bids at below the implied TSG rate effectively depress future TSG prices. Accordingly, the scatter plot of data is unavailing.

The GOQ further argues that Commerce's claim that it cannot perform a price-to-price comparison because of missing information on the factors that affect the value of timber stands in Québec contradicts Commerce's position on the comparability of the Nova Scotia benchmark. As we explained above, the record does not contain the necessary data to conduct a regression analysis to permit Commerce to adjust for any differences in the many factors that affect the value of timber. Moreover, a simplistic price-to-price comparison between two sources (each of which could be non-market-based), as proposed by the GOQ, is not the appropriate analytical framework for a distortion analysis of the Québec market or usability of the auction prices. Instead, the appropriate analytical framework for a distortion analysis is to examine the market as a whole and the government's involvement in the market. For the reasons stated above, we found that the GOQ's auction prices are not market-based, and therefore, are not suitable as a tier-one benchmark. We conducted a similar analysis of the Nova Scotia market for timber and found that stumpage prices for private-origin standing timber in Nova Scotia are not distorted and may serve as a tier-one benchmark. A price-to-price comparison of Nova Scotia private-origin timber to a market-based benchmark price would not yield useful conclusions for a distortion analysis regarding Nova Scotia timber. We noted above that a price-to-price

comparison of the average price that Resolute paid for TSG-allocated timber compared to the average price Resolute paid for SPFL timber through auctions does not in itself indicate whether prices in one market are influencing or distorting the prices in the other market. Similarly, conducting the same exercise for all TSG-holding corporations would be uninformative. Further, evaluating the factors affecting the comparability of a market-based benchmark to the respondent's purchases of a good from a public body is a separate exercise. To examine whether the forests in Québec and Nova Scotia are similar such that a Nova Scotia-based private benchmark is suitable to measure the provision of Québec Crown stumpage for LTAR requires evaluating information regarding species mix and harvesting conditions but does not require information on each timber stand in both provinces in order to control for each and every factor affecting the value of the timber stands. The legal requirements governing Commerce's selection of benchmarks do not demand that the selected benchmark be a perfect match to the subsidy under evaluation, but only that it is comparable.[458] Thus, we disagree with the GOQ's claim that Commerce's decision here with respect to the BMMB auction prices contradicts our decision addressing the comparability of the Nova Scotia benchmark to respondent's stumpage purchases in Québec, Ontario, and Alberta.

Moreover, the GOQ argues that all mills must compete with each other for logs, and no mill is dominant enough to find depressing its auction bids to be effective.[459] We disagree and continue to find that the overlap of a small number of dominant mills that consume timber through both TSGs and auctions is one of several factors that lead to a distorted market for

[458] *See Archer Daniels Midland Co. v. United States*, 968 F. Supp. 2d 1269, 1278 (CIT 2014) (Commerce "is required only to select benchmarks that are comparable, not identical."); *see also Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1369 (CIT 2015) ("{A}lthough Commerce must use benchmark prices for merchandise that is *comparable* to a respondent's purchases to satisfy the regulation, there is nothing that requires that it use prices for merchandise that are identical to a respondent's purchases.") (emphasis in original).
[459] *See* GOQ Comments at 7-8.

Crown timber.[460] The record evidence shows that a small number of TSG holders dominate the Crown market. Indeed, the ten largest processors of Crown timber account for nearly three-quarters of the market for Crown-origin timber and these firms purchased 62.4 percent of Crown-origin standing timber sold at auctions.[461] Four of these firms alone account for more than half of the market for auction timber in FY 2015-2016.[462] The GOQ argues that, according to the data in Table 20.1, the small absolute share of the total consumption of Crown timber between the tenth and twentieth largest mills, and the small differences in each firms share of the market, demonstrates that sawmills must compete with each other for logs. This characteristic of the Crown stumpage market–the fact that the firms outside of the ten largest firms each have a small share of the market–further supports our finding that the largest TSG holders dominate the auction market.

The GOQ also argues that TSG allocations cover at most 75 percent of a mill's residual SPFL capacity and that TSG-holders must turn to the auctions to meet their supply needs.[463] We continue to find that the record demonstrates that in FY 2015-2016, 94 percent of TSG holders purchased all 75 percent of their allocated Crown timber.[464] We also find that certain mills are able to source more than 75 percent of their supply needs via TSGs.[465] The record shows that approximately 51 percent of the stumpage harvest in FY 2015-2016 was through TSG-allocated timber.[466] Therefore, the majority of timber available and harvested was obtained through the TSGs, which were sold at an administratively-set government price. There is thus strong

[460] *See Final Determination* IDM at Comment 35.
[461] *See* Québec Market Memorandum (November 8, 2017) at Table 20.2.
[462] *Id.*
[463] *See* GOQ Comments at 13.
[464] *See Final Determination* IDM at 99 (citing GOQ Verification Report at 9 and 12-13).
[465] *Id.* at 99 (citing GOQ Primary QNR Response at Exhibit QC-STUMP-9 (Table 18)).
[466] *Id.* at 101.

motivation for a sawmill to treat its TSG-allocated volume as its primary source of supply, and its auction volume as an additional or residual supply source.[467]

Resolute and Central Canada cite an analysis in the Marshall Report regarding private auctions for used cars and aluminum, which are used to set market-based prices for the larger, non-auction portion of the used car and aluminum markets.[468] We find that the Québec stumpage market, in which the government accounts for nearly three-quarters of the volume of timber sold during the POI,[469] is distinct from the markets for used cars and aluminum cited in the Marshall Report, in which there is minimal government involvement. Accordingly, we do not find these privately-run auctions are analogous to the government-run BMMB auctions.

The GOQ notes that "Commerce does not point to any evidence on the record of independent harvesters only being able to sell to TSG-holding sawmills, and ignores the fact that there are non-TSG-holding sawmills in Québec."[470] However, record evidence demonstrates that TSG-holding sawmills hold such a dominant position in the market for Québec Crown timber that TSG-holding sawmills processed [ ] percent of the timber that was sold at auction and nearly [ ] percent of the private timber harvest.[471] We find that this dominant position in the market indicates that independent harvesters are likely selling the vast majority of the logs harvested via auctions to TSG-holding sawmills in Québec.

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[467] *See Preliminary Determination* PDM at 40.
[468] *See* Resolute and Central Canada's Letter, "Comments on Draft Results for Redetermination Pursuant to NAFTA Binational Panel's Order in Secretariat File No. USA-CDA-2017-1904-02," dated October 18, 2024 (Resolute and Central Canada's Comments) at 3 (citing Marshall Report at, provided at GOQ's Initial Questionnaire Response at Exhibit QC-Stump-78 at 69-76).
[469] During the POI, 51 percent of the total softwood harvest was from TSGs, 22 percent was from BMMB auctions, and the remaining 17 percent was non-Crown sources (private origin and log imports from the United States and other Canadian Provinces). *See* GOQ Initial Questionnaire Response at Table 7; *see also*, Québec Market Memorandum (November 8, 2017) at Table 7.1.
[470] *See* GOQ Comments on Remand at 12.
[471] *See* Québec Market Memorandum (November 8, 2017) at worksheet "Tbl20ProcessDataSMs20152016" (Table 20).

The GOQ also argues that the LER in Québec is immaterial because harvesters cannot practically or profitably export auction logs, and that Québec is a net importer of logs.[472] However, we continue to find that the GOQ's requirement that all Crown-origin timber, including the timber sold at auctions, must be processed in Québec is relevant because it effectively limits the firms and individuals that would participate in a BMMB auction to only those that have the capacity to process logs in Québec, or to the firm who sells to firms that can process logs in Québec.[473] Such limitations on participation are not reflective of an auction process that has "competitive bid procedures that are open to everyone."[474] This restriction also compels independent harvesters to sell much of the timber they purchase at the auctions to Québec sawmills which, in turn, forces independent harvesters to compete with timber available to sawmills at the TSG price. In effect, TSG-holding sawmills dominate the auctions and are the primary purchasers of logs that independent harvesters secure through auctions. Thus, we disagree with the GOQ's comments that the LER in Québec is immaterial.

Lastly, the GOQ, Resolute, and Central Canada argue that Commerce misunderstands the mechanism under Articles 92 and 93 of the SFDA, which allows TSG-holding sawmills to transfer timber between mills.[475] While transfers under Articles 92 and 93 of the SFDA do not expand the volume of TSG timber available to a sawmill, the transfers do make the supply of TSG timber more flexible. Such transfers allow a TSG-holding sawmill to access not only logs from its own TSG but also logs from other TSG-holding sawmills within the same corporate group. These transfers allow a TSG-holding corporation to redistribute logs across multiple sawmills due to weather conditions and sawmill processing capabilities. In FY 2015-2016, the

[472] *See* GOQ Comments on Remand at 3.
[473] *See Final Determination* IDM at Comment 35.
[474] *See CVD Preamble* at 65377.
[475] *See* GOQ Comments at 16-17; *see also* Resolute and Central Canada Comments at 4-6.

total softwood volume transferred under sections 92 and 93 was 599,380 $m^3$, which is equivalent to [ ] percent of the total volume allocated to TSG holders and [ ] percent of timber purchased through auctions in FY 2015-2016.[476] We continue to find that the volume of softwood logs transferred under Articles 92 and 93 of the SFDA is significant and allows sawmills to maximize their consumption of TSG-origin timber before turning to auctions or other sources of timber.[477] The ability of TSG holders to shift allocated Crown timber among affiliated sawmills and between corporations under Articles 92 and 93 of the SFDA creates additional flexibility for TSG allocations and allows TSG-holders to exploit their TSG allocations before turning to auctions, imports, or private sources. Moreover, TSG-origin timber is the primary source of logs for TSG-holding mills in Québec.[478] Given that TSG-holding mills are able to fulfill the majority of their demand for timber via administratively-priced TSG-origin timber, these sawmills turn to auctions as a secondary source and their bidding behavior in auctions is influenced by the fact that the majority of their timber comes from TSG and that the price of TSG timber is set by auction prices. Accordingly, we disagree with the GOQ and Resolute and Central Canada concerning Articles 92 and 93 of the SFDA.

In sum, we continue to find that the record evidence demonstrates that the BMMB auction prices are not an appropriate tier-one benchmark under 19 CFR 351.511(a)(2)(i). Our decision, as stated above, is supported by several conclusions demonstrating that the BMMB auction prices are influenced by GOQ's intervention in the auction system and thus are not market-determined.

[476] *See* GOQ Minor Corrections at Verification at 5-6 with GOQ Initial Questionnaire Response at Exhibit QC-Stump-09.
[477] *See Final Determination* IDM at Comment 35.
[478] *Id*.

**Comment 5: Whether the Record Supports Commerce's Finding that the Private Market for Stumpage in New Brunswick is Distorted Such That There Is No Market Determined Price to Serve as a Tier-One Benchmark**

*GNB's Comments*

The GNB did not comply with our request to provide an executive summary that did not exceed 450 words. *See* GNB Comments at 1-7 and 9-21.

*JDIL's Comments*

The following is a verbatim summary of the comments submitted by JDIL (internal citations omitted). For further details, *see* JDIL Comments at 6-12.

> ***The Panel correctly determined that Commerce's reliance on private forces to find purported distortion in the New Brunswick stumpage market was contrary to the regulatory standard.*** As set forth in 19 C.F.R. § 351.511(a)(2) and explained in the *CVD Preamble*, market distortion requires that "actual transaction prices are significantly distorted ***as a result of the government's involvement*** in the market." Commerce argues that the regulation allows it to consider private market forces as sources of distortion because, in the context of Tier 2 benchmarks, Commerce may adjust the benchmarks to reflect dumping. The *CVD Preamble*, however, qualifies that Commerce "will only make an adjustment to reflect ***a determination*** of dumping or subsidization made by the importing country . . . ." Here, neither the Government of Canada nor the Government of New Brunswick ("GNB") has determined that large mills in New Brunswick had the market power during the period of investigation ("POI") to extract artificially low stumpage prices from private woodlot owners, contrary to Commerce's unfounded assumption.
>
> ***The record lacks support for Commerce's finding that New Brunswick's private stumpage market is distorted as the direct result of government involvement.*** First, as Commerce admits, the GNB's share of the stumpage market is insufficient evidence of significant distortion. Second, Commerce's new finding that the province's timber licensing program gave market power to a small number of large mills as licensees is contradicted by record evidence demonstrating that licensees had no additional control over the land or sub-licensees. Furthermore, in this regard Commerce continues to rely on ***private*** market forces (specifically, an unsupported assumption that a small number of large mills have the power to leverage below-market prices from private woodlots in New Brunswick), contrary to the NAFTA Panel's remand instructions. Third, Commerce's new finding that the GNB exerts control over the New Brunswick marketing boards is also contradicted by record evidence demonstrating that the marketing boards represent the interests of the private woodlot owners, and that the GNB does not exercise regular oversight over the marketing boards.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 15-18.

> First, Petitioner agrees that "neither the regulation at 19 C.F.R. § 351.511(a)(2)(i) nor the *CVD Preamble* states that Commerce is precluded from examining other (*i.e.*, nongovernmental) factors that may distort a given market." The agency has accounted for distortions driven by private industry in its benchmark selection since the regulations—and the *Preamble* language—at issue were adopted.
>
> The Panel itself also hypothesized that "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)." The Department's findings that "a combination of factors, including government majority share of the market" and distortive private behavior "may render a price not market-determined" is consistent with this supposition.
>
> Second, Petitioner agrees that the record "indicates that the distortion in {New Brunswick's} private market is, in fact, the direct result of government involvement in the market." In evaluating "prevailing market conditions" as required by the statute, {Commerce}has appropriately considered the degree of overlap among purchasers of private and Crown timber in the province in determining whether the provision of Crown timber and the purchase of private timber are sufficiently independent.
>
> Here, {Commerce} confirmed that the GNB "accounts for slightly more than half of the timber provided in the market." In addition, the GNB "established a system in which the harvesting of Crown timber is effectively limited to a small group of powerful manufacturers that account for the majority of timber consumed within the province." That is, it is the GNB's forest management policy choices that are driving and perpetuating market distortions within the province, and it is those policy choices that have rendered private stumpage prices insufficiently independent of Crown prices to act as a benchmark.

**Commerce's Position:** For purposes of this final remand redetermination, we have continued to find that the record supports a conclusion that the private market for stumpage in New Brunswick is significantly distorted such that available in-province benchmarks are not market determined prices suitable to serve as a tier-one benchmark. In their respective comments on Commerce's Draft Results, both the GNB and JDIL have made numerous overlapping arguments

in which they contend that Commerce's regulation at 19 CFR 351.511(a)(2), and the accompanying language in the *CVD Preamble* precludes Commerce from considering private market forces in determining whether a proposed tier-one benchmark is distorted and thus unusable to calculate a benefit. The GNB and JDIL also argue that the record lacks evidence to demonstrate that New Brunswick's private stumpage market is distorted as the direct result of government involvement in the market. Specifically, they contend that: (1) Commerce has mischaracterized the New Brunswick Crown stumpage system; (2) the GNB's market share is an insufficient basis for market distortion; (3) Commerce's arguments regarding an "overhang" effect are incorrect; (4) the GNB did not exert control over the private stumpage market through oversight of marketing boards; and (5) Commerce has failed to support its argument that private market conditions, in combination with Crown supply, create an "oligopsony" effect and "dominance" within the Province. For the reasons discussed below, we find these arguments unpersuasive.

Before discussing each of these arguments, Commerce emphasizes that the comments submitted by the GNB and JDIL failed to rebut the multiple concerns regarding the New Brunswick stumpage market that Commerce raised. As discussed during this remand and in the underlying investigation,[479] the record establishes numerous conditions indicating a lack of market determined prices within the meaning of 19 CFR 351.511(a)(2)(i) that Commerce identified regarding the private New Brunswick stumpage market, including: the GNB accounted for half of the total supply during the POI; the position of the GNB as the dominant supplier and the existence of a small group of dominant customers created an "oligopsony" effect; the existence of overhang of unharvested timber; JDIL's ability to obtain timber from

[479] *See, e.g., Preliminary Determination* PDM at 31-35; *see also Final Determination* IDM at Comment 28.

other sources; the control of the GNB over the marketing boards; and information conveyed in multiple reports prepared by the GNB in the ordinary course of business.[480] The combination of these factors, in total, reasonably establishes that the private stumpage market in New Brunswick is distorted, and thus private stumpage prices are unusable to serve as tier-one benchmarks.

*Consideration of Private Market Forces in Commerce's Tier-One Benchmark Analysis*

We continue to disagree that Commerce's regulations at 19 CFR 351.511(a)(2)(i) and the *CVD Preamble* preclude Commerce from considering whether private market forces distort a market such that a proposed price is unusable as a tier-one benchmark. As explained in the Draft Results, the regulation and *CVD Preamble* indicate that Commerce's central inquiry in selecting a tier-one benchmark against which to compare the government price for a good is whether a proposed tier-one benchmark is *market-determined.*[481] Specifically, 19 CFR 351.511(a)(2)(i) states that Commerce will "compare the government price to a *market-determined price* for the good… resulting from actual transactions in the country in question" (emphasis added). The *CVD Preamble* reiterates that Commerce's "preference is to compare the government price to *market-determined* prices…"[482] Thus, neither the *CVD Preamble* nor the regulation at 19 CFR 351.511(a)(2)(i) preclude Commerce from considering a variety of potential market forces – including private forces – that could distort a market and render a proposed price unusable as a tier-one benchmark. Although the *CVD Preamble* provides that Commerce will not use proposed tier-one transaction prices "{w}here it is reasonable to conclude that actual transaction

[480] Specifically, the (1) *Report of the Auditor General – 2008*, (2) *Report of the Auditor General – 2015* and (3) *2012 PFTF Report* have all indicated the private stumpage market in New Brunswick to be distorted. For example, the *Report of the Auditor General – 2008*, states: "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…the royalty system provides an incentive for processing facilities to keep prices paid to private land owners low…". *See* Petition at Exhibit 228.
[481] *See* Draft Results at 28-30.
[482] *See CVD Preamble,* 63 FR at 65377 (emphasis added).

prices are significantly distorted as a result of the *government's involvement* in the market,"[483] that simply provides a threshold for determining when Commerce might disregard a possible tier-one benchmark price *when* that price is affected by government involvement in the market. However, neither the regulation at 19 CFR 351.511(a)(2)(i) nor the *CVD Preamble* states that Commerce is precluded from examining other (*i.e.*, non-governmental) factors that may distort a given market.

JDIL and the GNB object to Commerce's references in the Draft Results to anti-trust violations and dumping as examples of private forces that may distort a market. Specifically, they contend that Commerce never made a finding, and the record does not support, the existence of anti-competitive activities in New Brunswick.[484] JDIL and the GNB misapprehend the purpose of Commerce's examples. Commerce did not conclude that anti-trust violations exist in New Brunswick, but rather cited anti-trust violations as an example of a type of private market force that could distort a market. Similarly, in explaining that the *CVD Preamble* indicates Commerce may adjust tier-two benchmarks under 19 CFR 351.511(a)(2)(ii) when prices have been impacted by dumping, Commerce was making the point that the regulatory framework under 19 CFR 351.511(a)(2) contemplates that Commerce may take into account private forces in its benchmarking analyses.[485] This inclusion of dumping as a possible consideration in finding a market-determined price means that there could be factors other than direct government involvement, for example, that are relevant to Commerce's analysis. Indeed, JDIL does not claim that dumping is a purely governmental factor. Thus, these examples of anti-competitive behavior and dumping provide further support for Commerce's conclusion that a

[483] *Id*.
[484] *See* JDIL Comments at 4-5; GNB Comments at 8-9.
[485] *See* Draft Results at 29 (citing 19 CFR 351.511(a)(2)(ii); and *CVD Preamble,* 63 FR at 65377 and 65378).

variety of factors may be relevant in determining whether a benchmark is market-determined, and thus it is appropriate and consistent with Commerce's regulations and the *CVD Preamble* to consider whether private market forces distort prices such that they may not be considered *market-determined* prices that are usable as a tier-one benchmark under 19 CFR 351.511(a)(2)(i).

Thus, Commerce respectfully disagrees with an interpretation of 19 CFR 351.511(a)(2)(i) and the *CVD Preamble* that precludes Commerce from taking into account private factors in determining whether a proposed tier-one benchmark is market-determined. However, as explained in the Draft Results and below, Commerce has reviewed record evidence of market conditions in New Brunswick and determined that each of the factors and non-market distortions, at their root, stem from government involvement in the market.

*Commerce's Characterization of the New Brunswick Crown Stumpage System*

The GNB has taken issue with Commerce's characterization of the New Brunswick stumpage system. In particular, the GNB has noted the following four statements[486] from Commerce's Draft Results, that supposedly depict the private stumpage system incorrectly:

- *The primary means for obtaining timber from Crown lands is through harvesting as a licensee or sub-licensee (in which licensees allow other wood processors to harvest on the license holder's Crown land).*
- *Although there are 10 timber licenses within the province, the GNB has allowed companies to take over multiple license areas (for example, licenses 6 and 7 are both maintained by JDIL).*
- *{During} the POI, there were only four license holders in the entire province … Thus, the GNB has established a system in which the harvesting of Crown timber is effectively limited to a small group of powerful manufacturers.*
- *{T}he record shows that the GNB has established a timber licensee system that has resulted in a small number of stumpage consumers dominating the market.*

[486] *See* GNB Comments at Vol. I-9 to I-13.

We agree, in part, with the GNB regarding the first sentence excerpted above. In providing a general overview of how timber is obtained from Crown lands, we stated that the two main options were through licenses or sub-licenses.[487] When describing the sub-licensees, we inadvertently indicated that permission to harvest on these lands was provided by the licensees. This is incorrect, as sub-licensees receive Crown allocations from the GNB.[488] The sentence should have stated: "The primary means for obtaining timber from Crown lands is through harvesting as a licensee or sub-licensee (***in which sub-licensees are allocated timber by the GNB on land operated by licenses***)." However, this change does not alter the fundamental point of Commerce's original statement, which is that the primary methods of obtaining Crown timber in New Brunswick are either as a licensee or sub-licensee.[489]

However, we disagree with the GNB's assertions, referencing the latter three sentences listed above, that Commerce has mischaracterized the New Brunswick Crown stumpage system. These three sentences appropriately reflect Commerce's finding that based on the actions of the GNB, there are a limited number of Crown-licensees within the Province and, as a result, there are a small number of stumpage consumers dominating the market.

As an initial matter, the GNB's arguments do not address Commerce's main points. The GNB argues that the licensees do not "take over" the license or "{t}here is no concept of a 'license holder' in New Brunswick."[490] Further, they argue the existence of sub-licensees or other manufacturers indicates that the market is not dominated by a few large companies. Simply put, as demonstrated by the chart provided in the GNB's rebuttal comments,[491] the record

[487] *See* Draft Results at 31.
[488] *See, e.g.*, GNB IQR at NBII-20.
[489] *See, e.g.*, Petition at 97 ("Timber licenses and sub-licenses, however, cover the majority of GNB's productive forest land.").
[490] *See* GNB Comments at Vol. I-11 and I-12.
[491] *Id*. at Vol. I-11.

indicates only four companies within the Province have active licenses to harvest on crown land: (1) AV Group NB Inc.; (2) Fornebu Lumber Company Inc., (Fornebu); (3) JDIL; and (4) Twin Rivers Paper Company Inc. (Twin Rivers). These companies are responsible for managing the Crown-land assigned to them. Whether or not these companies "take over" the license or whether these companies should be referred to as "licensees," "license holders," or some other term, is immaterial; Crown-land management in New Brunswick is effectively left to four companies. Further, the record indicates that licensees are provided the largest allocation of timber within the Province. For example, the average allocation on crown land to licensees was [ ] during the POI, while the average allocation to sub-licensees was [ ].[492] In other words, while sub-licensees were allocated timber on these Crown lands, we find that they were very small compared to the allocation to the licensees who oversaw the operation of these Crown lands. Further, many of the timber allocations to sub-licensees were, in-fact, to companies that are also licensees. For example, during the POI, [

].[493] As a result, when accounting for timber to licensees and sub-licensees, [ ] of the timber allocated during the POI.[494] Therefore, the GNB's argument that the timber market is not dominated by a few companies is contradicted by record information. Thus, other than the one clarification noted above, Commerce disagrees with the GNB's assertion that we have mischaracterized the New Brunswick stumpage market in this remand.

[492] *See, e.g.*, Memorandum, "Provincial Market Preliminary Analysis Memorandum" dated April 24, 2017, New Brunswick Attachment at "Table1.SWMillsByAllocVol1516" at Column L (Total allocation of Crown Softwood Timber).
[493] *Id*.
[494] *Id*. at tab "Table1.1Pivot" at Column C (Sum of Total Allocation of Crown Softwood Timber).

*GNB's Market Share*

Both the GNB and JDIL have argued that Crown timber accounts for less than a majority of available softwood supply during the POI, specifically 47.7 percent. Commerce has calculated that 50.79 percent of the total timber harvest during the POI was Crown-origin.[495] As discussed in the underlying investigation, Commerce's 50.79 calculation is based on the supply that could be used in the production of subject merchandise.[496] In other words, our calculation is based upon the volume of logs from each source (*i.e.*, Crown, private, import) entering sawmills as these logs are used in the production of softwood lumber.[497] The 47.7 percent figure relied upon by the GNB and JDIL includes pulpwood, chips and other inputs that would not be used in the production of softwood lumber.[498] We found that inclusion of these other materials would skew the results of these calculations, and would not reflect the market conditions for the producers of subject merchandise. Neither the GNB nor JDIL have provided a reasonable explanation as to why their method for calculating market share is more appropriate than the method used by Commerce in the investigation. Thus, record evidence supports Commerce's finding that Crown-timber accounts for a majority of the softwood lumber supply within New Brunswick. To place this figure in the context of a distortion analysis for an LTAR program, more than half of the input under review is provided by the government. As discussed throughout this proceeding, Commerce's determination of distortion for the New Brunswick stumpage market is not based on any one single component; instead, the government's share of the stumpage market, in combination with myriad other factors that Commerce has identified,

[495] *See Final Determination* IDM at 80.
[496] *Id.* at 81.
[497] *Id.*
[498] *Id.*

supports Commerce's finding that the private stumpage market is distorted, and thus private prices are unsuitable as tier-one benchmarks.

*"Overhang" Effect in New Brunswick*

The GNB and JDIL have disputed Commerce's findings regarding an overhang effect. Specifically, they have argued: (1) the overhang percentage is smaller than what was calculated by Commerce; (2) the quantity of unused Crown allocation is insufficient to replace the private woodlot stumpage that the mills need to operate; and (3) there is no downward pressure on prices within the Province, as mills pay more on average than the large number of competing independent harvesters.[499] We disagree that these arguments are sufficient to disturb our finding that an overhang effect contributes to market distortion in New Brunswick.

First, both parties hold that the overhang calculation in the underlying investigation is incorrect. Commerce has agreed that the original 47 percent figure calculated in the investigation contained an error, and thus the correct figure for overhang in the province is 13.8 percent.[500] However, we continue to find that overhang does exist with regard to the unharvested Crown-timber, and in-turn, this continues to be a factor in our overall analysis as to whether the private stumpage market in the Province is distorted. Specifically, the existence of overhang indicates that the mills in New Brunswick have the ability to source additional Crown-origin standing timber from their tenures. In turn, this additional supply from Crown sources provides a readily available alternative to private woodlot owners, which also in turn enables tenure-holding mills to exercise leverage to keep prices on private woodlots low.

[499] *See* GNB Comments at Vol. I-15 to I-17; *see also* JDIL Comments at 7-9.
[500] *See e.g., Certain Softwood Lumber Products from Canada Countervailing Duty Investigation*, USA-CDA-2017-1904-02, NAFTA Panel Review: Oral Argument Transcript at 368–69 (September 27, 2023).

Second, the GNB and JDIL argue that unused Crown allocation was insufficient to replace the private woodlot stumpage that the mills need to operate, and in-turn, hold that Commerce's contention that "licensees may simply harvest timber from its Crown land when private stumpage prices are not sufficiently low" is inaccurate. [501] We disagree. The fact that the licensees have the option to acquire timber outside of the private stumpage market through their unharvested Crown-allocation (and in many instances through Industrial Freehold Land) demonstrates that licensees are able to procure timber from an alternative source should the prices in the private stumpage market not be low enough. We reasonably find that the harvesters selling their timber via a marketing board (*i.e.*, an organization which provides New Brunswick private woodlot owners the opportunity to market their timber throughout the Province) are aware that these purchasers have other options in securing their needed timber supply, and thus, will have significant pressure to keep their prices low. Further, record evidence shows that Crown stumpage accounts for the vast majority of the available softwood that goes to market, while marketing boards account for a relatively small percentage of the available softwood that goes to market.[502] In other words, private woodlot stumpage accounts for a small portion of the available softwood that goes to market, and thus we find that they do not have meaningful market power that could significantly influence the price of timber within the Province.

Finally, the GNB has cited its March 28, 2017, benchmark submission to support its assertion that mills, on average, paid more for private woodlot stumpage than the competing independent harvesters during the POI. The figures referenced in the benchmark submission are

[501] *See* GNB Comments at Vol. I-16.

[502] For example, Table 1A of Exhibit NB-STUMP-15 in the GNB's March 28, 2017, New Factual Submission indicates that 75 percent of all timber that goes to market is from crown land. 5,609,418$m^3$ (total softwood) minus 1,393,029 $m^3$ (softwood from Industrial Freehold land (*i.e.*, timber that does not go to market)) = 4,216,389$m^3$; 3,180,105$m^3$ (total softwood from Crown land) divided by 4,216,389$m^3$ equals 75.41 percent. 457,797$m^3$ (softwood from Marketing Boards) divided by 4,216,389$m^3$ equals 10.86 percent.

based on a PowerPoint presentation titled "New Brunswick Private Woodlot Stumpage Values: Study Methodology and Results."[503] The figures in this presentation were based on (and are identical) to the figures reported in the "New Brunswick Private Woodlot Stumpage Values: Stumpage Study Results- October 2014 to September 2015" report, a survey was that commission by the New Brunswick Forest Products Commission.[504] However, as discussed in the underlying investigation, Commerce has significant concerns about the accuracy of this survey.[505] Specifically, we noted: (1) the survey stated that it does not include the volume of timber harvested from primary forest produced by woodlot owners/operators or the volume of stumpage sold through lump-sum transactions; and (2) record evidence indicated that these two types of transactions represent approximately 50 percent of the total (private) harvest in the province.[506] Thus, in light of these omissions, we found the survey to be an incomplete representation of the market, and in-turn, found that the survey was not an accurate source against which to compare the Crown stumpage prices.[507] Neither the GNB nor JDIL have provided any arguments that would alleviate the concerns regarding the deficiencies in this survey. Thus, for purposes of this remand determination, we find that the figures cited by the GNB and JDIL in their rebuttal arguments to be unreliable, and thus, should not be considered when evaluating whether the New Brunswick private stumpage market is distorted.

*Whether GNB Exerts Control over the Private Stumpage Market through Marketing Boards*

Both the GNB and JDIL disputed Commerce's finding that the GNB exerted control over the private stumpage market through oversight of marketing boards.[508] Specifically, the GNB

[503] *See* GNB's March 28, 2017, Benchmark Submission at Exhibit NB-STUMP-26.
[504] *See* GNB IQR at Exhibit NB-STUMP-11.
[505] *See Final Determination* IDM at Comment 28.
[506] *Id*.
[507] *Id*.
[508] *See* GNB Comments at Vol. I-17 to I-20; *see also* JDIL Comments at 10-12.

argues the following: there is no obligation to belong to these boards; marketing boards do not act as agents of the GNB; there is no record evidence that any marketing board implemented control or otherwise intervened in any private stumpage transactions; and the marketing boards do not have the power to require a sale of woodlot stumpage.[509] We disagree.

While a woodlot owner does not have to belong to a marketing board, we find that it is reasonable to conclude that it is in a woodlot owner's best interest to be a member of one. The purpose of these marketing boards is to provide private woodlot owners with a "fair and orderly market system" for their timber and to ensure they are able to receive the best possible price for their product.[510] As discussed previously, the system of marketing boards has been established by the GNB, through the New Brunswick Forest Products Commission.[511] Thus, the argument that woodlot owners are not obligated to belong to these boards is misleading, as woodlot owners who decide not to join these boards are at a distinct disadvantage. In other words, the GNB has established a system in which private woodlot owners are incentivized to join a consortium of fellow woodlot owners that is ultimately overseen by government authorities.

Finally, we find the argument that neither the marketing boards nor the Forest Product Commission have the power to induce or impact sales decisions by woodlot owners, is directly contradicted by record information. Specifically, the record indicates that marketing boards have

[509] *See* GNB Comments at Vol. I-18 to I-20.
[510] *See, e.g.*, Petition at Exhibit 224 (*Report of the Auditor General – 2015*) ("Forest products marketing boards are intended to '*control and regulate the marketing of primary forest products, and to ensure that private woodlot owners have a fair and orderly market system for sale of their wood products*.'….The Marketing Board acts as the sole marketer for private wood in their area. It is an agent for the sale of its member's timber to the mills at the best price and highest volume."
[511] *Id*. ("Established in the *Forest Products Act* (FPA), the New Brunswick Forest Products Commission (Commission) takes much of its oversight and enforcement authority over forest products marketing boards from the *Natural Products Act* (NPA)".

the power to require timber to be sold through the marketing board.[512] Moreover, the argument that the GNB has not reported any instance of a marketing board directly intervening with private stumpage transactions is irrelevant. First, the fact that nothing was reported by the GNB does mean that a marketing board has not interfered with a sale during, or prior to, the POI. Second, woodlot owners are aware of the power the marketing boards hold over their activities, and thus will act in accordance with rules and practices established (directly or indirectly) by the board.

*Oligopsony Effect within NB*

The GNB argues that Commerce has not provided any support for its assertion that the private market conditions create an "oligopsony effect" and "dominance" by certain mills. However, this is inaccurate, as throughout this proceeding, Commerce has consistently shown that the New Brunswick stumpage market is dominated by a few buyers of timber; in other words, an oligopsony.

Further, both the GNB and JDIL have relied on a report on the record of this proceeding titled "An Analysis of the New Brunswick Private Woodlot Survey and the New Brunswick Private Timber Market" by Professor Brian Kelly.[513] The GNB and JDIL argue that the report presents the Bertrand theory of competition, which stated that two or more competing mills will bid against each other, in turn "destroying any putative market power held between them." Further, they add that Professor Kelly cites widely accepted models as discussed by Dr. Stephen

[512] *See Report of the Auditor General – 2015* ("Section 9 and 10 of regulation20l4-l details many specific powers of marketing boards. Among these are: to market the regulated product; …… to require any person who produces the regulated product to offer to sell and to sell the regulated product to or through the Board.").
[513] *See* GNB's March 28, 2017, Benchmark Submission at Exhibit NB-STUMP-13.

Martin.[514] The GNB and JDIL argue that Commerce must treat this economic theory and citation as controlling. We disagree.

As an initial matter, the report by Professor Kelly was commissioned by the GNB for the purposes of this investigation.[515] Further, during the investigation, the GNB was unable to provide Commerce with the guidelines or parameters that it provided to Professor Kelly which would detail the goals or objectives of, and reveal the assumptions behind, the report.[516] As such, and as is true with respect to other reports commissioned for the purposes of a given proceeding, Commerce has a reasonable concern that the data and conclusions could be tailored to generate a desired result. In the report, Professor Kelly provides a brief synopsis (*i.e.*, two paragraphs) of the Bertrand theory of competition.[517] In sum, Professor Kelly indicates that this theory states a small number of buyers competing for an input through price offers will repeatedly outbid each other and thus, destroy any putative market power held between these buyers. Additionally, in this report, Professor Kelly once references "Industrial Organization in Context (2010)" by Dr. Martin in a footnote, as an example of establishing that Bertrand's theory is "a widely known model treated in many textbooks." Commerce finds that neither Professor Kelly's brief interpretation of an economic theory, nor his reference to a textbook that is not on the record of this proceeding, ultimately disturb Commerce's analysis of this issue.

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[514] *Id*.
[515] *See, e.g.*, Memorandum, "Verification of the Questionnaire Responses of the Government of the Province of New Brunswick," dated July 17, 2017, at 10 ("In its FIS, the GNB provided a study conducted by Professor Brian Kelly commissioned on behalf of the GNB.{citation omitted} GNB officials stated that this study was commissioned in light of the arguments in the petition for this investigation.").
[516] *Id*. ("The Department asked the GNB officials to provide any correspondence the GNB and/or its counsel had with Mr. Kelly regarding the objectives or guidelines regarding this study. The Department was told that all communication between Mr. Kelly, the GNB, and the GNB's counsel was subject to attorney-client privilege. As such, the GNB did not provide the requested correspondence for our review.").
[517] *See* GNB's March 28, 2017, Benchmark Submission at Exhibit NB-STUMP-13 at 14-15.

As noted above, Professor Kelly has provided a concise summary of the Bertrand model based on his own interpretation of the theory. Given that Professor Kelly was commissioned to write this report for purposes of this investigation, it is possible that his description of this theory would be tailored to fit a particular narrative; in this instance, the view held by the GNB and JDIL. Further, there is no discussion of how other variables would play into this theory. Specifically, Professor Kelly states that this theory indicates that a small number of buyers competing will outbid each and thus, negate any market power held by these buyers;[518] however, there is no discussion as to whether such power would be impacted when such buyers are provided alternative means to procure the merchandise in question; in this instance, the mills can purchase source timber from Crown-land, industrial freehold land, and *via* imports.[519] Further, there is no discussion of how the existence of a supply overhang would impact this theory. Finally, we find the argument that we must address a footnote referencing a textbook that is not on the record of this proceeding to be absurd, as there is nothing on the record of the proceeding that Commerce can rebut or address.

Thus, for the reasons outlined above, we continue to find that the New Brunswick stumpage market is distorted and that private stumpage prices from New Brunswick are not usable as a tier-one benchmark.

**Comment 6: Whether the AJCTC Is *De Facto* Specific**

*GOC's Comments*

The following is a verbatim summary of the comments submitted by the GOC (internal citations omitted). For further details, *see* GOC Comments at 2-4.

> In its {Draft Results}, {Commerce} has now determined that the {GOC's} {AJCTC} is not *de jure* specific. The {GOC} agrees with that conclusion.

[518] *Id*.
[519] *Id*. at Exhibit NB-STUMP-14.

> However, {Commerce} goes on to propose finding that the AJCTC is *de facto* specific under {section 771(5A)(D)(iii)(I) of the Act}, based solely on the fact that the number of users of the AJCTC, expressed as a percentage of the total number of business entities that file tax returns in Canada, was small. This percentage of tax filers methodology (the "percentage methodology") is not in accordance with law, and {Commerce's} finding of *de facto* specificity is not supported by substantial evidence.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 33-35.

> The Panel directed {Commerce} to reconsider its final determination that the {AJCTC} is *de jure* specific. In its {Draft Results}, {Commerce} determined that the AJCTC is not *de jure* specific but is *de facto* specific. In doing so, {Commerce} compared the total number of corporate tax filers to the total number of AJCTC recipients and found that less than one percent of corporate tax filers claimed the credit. {Commerce} concluded that the small percentage of corporate use is indicative of a subsidy that is "limited in number on an enterprise basis" and is therefore *de facto* specific. {Commerce} has used this comparator methodology in previous reviews, and the Federal Circuit has upheld that practice, stating that "Commerce's comparison of the on-the-job training credit recipients to corporate tax filers aligns with th{e} intended purpose of the specificity determination."

**Commerce's Position:** We disagree with the GOC that the AJCTC is not *de facto* specific pursuant to section 771(5A)(D)(iii)(I) of the Act. Where Commerce finds that a program is not *de jure* specific under section 771(5A)(D)(i) of the Act, Commerce considers other bases of specificity under the statute, including *de facto* specificity under section 771(5A)(D)(iii) of the Act. Commerce determines whether a program is *de facto* specific under section 771(5A)(D)(iii) of the Act by analyzing the distribution of benefits among actual users to determine whether the provided benefits are specific as a matter of fact.

Contrary to the GOC's argument, the usage data for the AJCTC program provides substantial evidence for Commerce's conclusion that the program is *de facto* specific. The GOC reported that out of 1,940,000 corporate tax filers in Canada for tax year 2014, only 12,250

corporate taxpayers claimed the AJCTC.[520] Thus, a mere 0.63 percent of corporate taxpayers within Canada claimed the AJCTC in their 2014 income tax returns, which were filed during the POI. Because the actual recipients, relative to the total number of corporate tax filers, are limited in number on an enterprise basis, we find that the AJCTC program is *de facto* specific in accordance with section 771(5A)(D)(iii)(I) of the Act.

In making its arguments that the AJCTC is not *de facto* specific, the GOC asserts that the program is broadly available and widely used, stating that usage of the AJCTC spanned almost every sector of Canada's economy.[521] We disagree. The SAA explains that "{t}he specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is spread throughout an economy."[522] On the other hand, the SAA makes clear that "the specificity test was not intended to function as a loophole through which narrowly focused {sic} subsidies provided to or used by discrete segments of an economy could escape the purview of the CVD law."[523] Rather, the purpose of the specificity test is to serve "as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely *used* throughout an economy."[524] Therefore, government assistance to limited groups of industries satisfies the specificity test and may be countervailed where the other statutory criteria for finding a countervailable subsidy are met.

Although the *de jure* specificity analysis under section 771(5A)(D)(i) of the Act focuses on whether the "foreign government expressly limits access to a subsidy to a sufficiently small

[520] *See* Draft Results at 80-81.
[521] *See* GOC Comments at 2-3.
[522] *See* SAA at 930.
[523] *Id.*
[524] *Id.* at 929.

number of enterprises, industries or groups thereof,"[525] an analysis of *de facto* specificity seeks to answer whether a program, despite nominally widespread availability, is in fact specific based on the actual distribution of benefits. A specificity analysis under section 771(5A)(D)(iii)(I) of the Act does not require the administering authority to make a determination based on the number of industries that use a program, but instead states that a program is specific if the "actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number." Furthermore, section 771(5A)(D)(iii)(I) of the Act does not require Commerce to examine whether the government took action to limit the number of recipients of the tax credit. In this case, the fact that less than one percent of corporate taxpayers utilized the AJCTC plainly indicates that the program is not widely used throughout the Canadian economy.

The GOC also argues that Commerce's "percent methodology," using all corporate tax filers as the comparator group, is unreasonable and not in accordance with the law. In support of its argument, the GOC cites to *Mosaic*,[526] asserting the CIT held that Commerce may not find a tax program to be *de facto* specific by comparing the number of recipients who use a tax program to the total number of tax filers. First, we note that this litigation is ongoing; thus, the decision relied on by the GOC is not final and conclusive and remains subject to appeal at the Federal Circuit.[527] Second, the GOC mischaracterizes the CIT's ruling on this issue. The CIT did not wholesale reject Commerce's percentage methodology for assessing *de facto* specificity, but rather found that, with respect to the program at issue in *Mosaic*, Commerce's analysis was flawed because it did not consider whether the denominator used reflected the "universe or composition of the group of potential recipients."[528] Specifically, in *Mosaic*, the CIT found that

[525] *Id.* at 930.
[526] *See Mosaic Co. v. United States*, 659 F. Supp. 3d 1285 (CIT 2023) (*Mosaic*).
[527] *See Mosaic Final Results of Redetermination*, available at https://access.trade.gov/resources/remands/23-134.pdf.
[528] *See Mosaic*, 659 F. Supp. 3d at 1315.

the tax program was available to all Moroccan taxpayers, whether corporate, individual, or otherwise.[529] Therefore, for that tax program, the CIT found that Commerce's comparison methodology did not fully consider the fact that the program was available to all taxpayers, not only corporate taxpayers.

The AJCTC is factually a different program in which the eligible recipients are taxpayers in a business within Canada that hire a qualifying apprentice in a prescribed trade.[530] Therefore, Commerce's analysis of the AJCTC program is fully consistent with the CIT's holding that Commerce must consider the number of taxpayers which potentially could have actually used the program.[531] The denominator used in Commerce's specificity analysis for the AJCTC reflects the universe of potential recipients for the program. That is, because all business taxpayers in Canada comprise the universe of potential recipients of the subsidy, Commerce correctly used the total number of corporate tax filers in Canada as the denominator. Commerce's decision is consistent with the holding in *Gov't of Québec*, where the Federal Circuit upheld Commerce's determination that a Québec on-the-job training tax credit was *de facto* specific in accordance with section 771(5A)(D)(iii)(I) of the Act.[532] In *Gov't of Québec*, the Federal Circuit held that "Commerce did not err in using the total corporate tax filers as a comparator in assessing whether the credit recipients are limited in number" after finding that "{b}oth corporations and individuals engaging in business activities can avail themselves of this program and claim the tax credit."[533]

[529] *Id*. at 1314.
[530] *See* GOC IQR at Volume III, p. GOC-CRA-31 and CRA-33 and Exhibit GOC-CRA-AJCTC-3.
[531] *See Mosaic*, 659 F. Supp. 3d 1285.
[532] *See Government of Quebec v. United States,* 105 F.4th 1359, 1374 (Fed. Cir. 2024) (*Gov't of Québec)*.
[533] *Id.*

We note that, in the Binational Panel Order, the Panel upheld Commerce's application of the percentage methodology in its *de facto* specificity determination for the Scientific Research and Experimental Development (SR&ED) tax credit programs.[534] There, the Panel stated "Commerce has regularly used this {percentage} methodology in its *de facto* analysis in recent cases and this methodology was upheld by the {CIT} 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."[535]

Similarly, because the data show that the actual recipients of the AJCTC, relative to total corporate tax filers in Canada, are limited in number on an enterprise basis, the AJCTC program is *de facto* specific in accordance with section 771(5A)(D)(iii)(I) of the Act.

**Comment 7: Whether Commerce Should Attribute Payments Received by Tolko under the Armstrong EPA to Its Overall Production**

*BC Parties' Comments*

The following is a verbatim summary of the comments submitted by the GBC, BCLTC, Canfor, Tolko, and West Fraser (collectively, the BC Parties) (internal citations omitted). For further details, *see* GBC Comments at 5-12.

> {Commerce} should not attribute the payments received by Tolko under its Armstrong {EPA} … to {its} total production, but should instead attribute these payments solely to {the} respondent's electricity production unrelated to its production of softwood lumber. The record demonstrates that the Tolko Armstrong electricity plant … {is} connected directly to the BC Hydro grid and not electrically connected to{Tolko's} {sawmill}; that under the terms of the applicable {EPA} {Tolko's sawmill} therefore could not consume the electricity generated by the {Armstrong} electricity {plant}, and that, pursuant to {Commerce's} "attribution" regulation in 19 CFR 351.525(b)(5), any subsidy involved is "tied" to the production of electricity. Moreover, {Commerce} fails to reasonably respond to the Panel's express charge, that is {Commerce} explain how its attribution {determination} here differ{s} from the material facts at issue in {*CTL Plate from Korea*}. Finally, {Commerce} otherwise attempts to support its determinations by

[534] *See* Binational Panel Order at 117-122.
[535] *Id*. at 122.

> impermissibly raising new reasons for its decision to attribute the payments under the {EPA} to Tolko's … total production. {Commerce} may not rely on such *post hoc* rationalization at this stage.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 36-37.

> {Commerce's} treatment of Tolko's Armstrong plant is distinguishable from its determination in *CTL Plate from Korea*. {Commerce's} explanation in its {Draft Results} is consistent with its practice and supported by law and fact and should be maintained in the final remand results. Unlike the respondent in *CTL Plate from Korea*, the subsidy at issue was not bestowed upon a cross-owned affiliate. Rather, Tolko received the subsidy directly because the subsidy was granted to one of Tolko's facilities. {Commerce} appropriately recognized this distinction by applying 19 CFR 351.525(b)(3) to attribute an untied subsidy to all of Tolko's production rather than 19 CFR 351.525(b)(6).

**Commerce's Position:** The BC Parties assert that Commerce's analysis of *CTL Plate from Korea* misses the point of the Panel's remand.[536] Specifically, they state that because the record facts in *CTL Plate from Korea* did not meet the cross-ownership attribution criteria, Commerce's analysis of cross-ownership in the Draft Results is misplaced. The BC Parties also contend that the importance of *CTL Plate from Korea* is that POSCO Energy never sold electricity to POSCO, but rather sold the electricity directly to KPX. We disagree, and after considering the BC Parties' comments, find that they misinterpret the Panel's remand order and conflate the attribution of a subsidy received by a company itself and the attribution of a subsidy received by a cross-owned affiliate. Given that Tolko itself received the payments under the BC Hydro EPA program, Commerce is correct to attribute those payments to Tolko's overall production.

As an initial matter, the BC Parties assert that the Panel did not uphold Commerce's attribution determination as to electricity sold under Tolko's Armstrong EPA, but rather

[536] *See* GBC Comments at 7.

sustained Commerce's attribution determination as to Tolko's Kelowna EPA.[537] We do not disagree. However, there is no difference between Tolko Armstong and Tolko Kelowna as both electricity plants are facilities within Tolko's corporate structure; they are not separate corporations or cross-owned affiliates. Therefore, the Panel did, in fact, uphold Commerce's determination that the payments Tolko received for the sale of electricity under the BC Hydro EPAs were attributable to all products sold by the firm.[538]

The BC Parties argue that the Panel's instruction to Commerce focused on any electrical connection between Tolko's Armstrong power plant and its sawmill because, according to the BC Parties, Commerce based its attribution determination on the fact that "electricity is required to operate the production facilities of the softwood lumber producer," and concluded from this circumstance that the electricity generated at Tolko's Armstong facility is an "input product" within the meaning of 19 CFR 351.525(b)(5)(ii).[539] Thus, they claim that the Panel remanded to Commerce for an explanation of whether it had a reasonable basis to depart from its decision in *CTL Plate from Korea*, but it did not otherwise disturb the fact that the Tolko Armstrong plant is not electrically connected to any Tolko sawmill.

First, the BC Parties are mistaken about Commerce's attribution determination for the subsidies provided under the Armstrong EPA. Commerce did not attribute the benefits under the Armstong EPA as an input product under 19 CFR 351.525(b)(5)(ii) in the *Final Determination*, but rather attributed the benefits of the electricity subsidy to all products produced by Tolko under 19 CFR 351.525(a), and 19 CFR 351.525 more generally.[540] Second, whether or not there is any electrical connection between the Tolko power plant and the sawmill in Armstrong is

[537] *See* GBC Comments at 5 (citing Binational Panel Order at 128 and 130).
[538] *See* Binational Panel Order at 127-130.
[539] *See* GBC Comments at 5-6 (citing, *e.g.*, *Final Determination* IDM at 161).
[540] *See Final Determination* IDM at 161.

irrelevant to the Panel's instruction, which addresses attribution of the subsidy and not whether the plant did or could provide electricity to the sawmill. Therefore, the BC Parties' comments on the lack of an electrical connection between POSCO Energy and POSCO that "undergird {Commerce's} decision in *CTL Plate from Korea*"[541] are misplaced, as an "electrical connection" between the Armstrong plant and the sawmill was not the basis for the Panel's remand order.

In the Binational Panel Order, the Panel noted that Commerce's treatment of Tolko's Armstrong plant appeared to be inconsistent with Commerce's determination in *CTL Plate from Korea*, which involved a situation in which electricity sold by POSCO Energy went directly to KPX, without passing through POSCO.[542] The Panel thus remanded 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."[543] In response to the Panel's order, Commerce distinguished *CTL Plate from Korea* from the circumstances concerning the Tolko Armstrong plant and therein explained why the attribution of the Armstrong EPA benefits to Tolko was proper given the standard approach to attribute the benefits of a subsidy to all sales of the company that received the subsidy. The deviation from this standard is where the entity that receives the subsidy is not part of the respondent company's corporate structure, *i.e.*, is a cross-owned affiliate or a trading company, as outlined in 19 CFR 351.525(b)(6), as was the circumstances in *CTL Plate from Korea*.

As explained in the Draft Results, Commerce's default rule is to attribute benefits of a subsidy to the company that receives the subsidy. Under 19 CFR 351.525(b)(3), Commerce will

[541] *See* GBC Comments at 8.
[542] *See* Binational Panel Order at 130 (citing *CTL Plate from Korea*).
[543] *Id.*

normally attribute a domestic subsidy to all products sold by a firm, including products that are exported. Likewise, with respect to cross-owned corporations that are affiliated with a respondent company, in accordance with 19 CFR 351.525(b)(6)(i), Commerce normally attributes a subsidy to the products produced by the company that received the subsidy. Section 351.525(b)(6)(ii)-(v) of Commerce's regulations provides additional rules for the attribution of subsidies received by respondents with cross-owned affiliates.[544] There are, however, exceptions for attributing subsidies received by respondents and their cross-owned affiliates. Under 19 CFR 351.525(b)(5)(i), if Commerce finds that a subsidy is tied to the production or sale of a particular product, Commerce will attribute the subsidy only to that product. If Commerce does not determine that the subsidy is tied to the production or sale of a particular product, "then Commerce follows its default rule of attributing subsidies to all products exported by the firm {under section 351.525(b)(3)}."[545]

The record here demonstrates that the Armstrong power plant is owned by Tolko and is a facility within Tolko's own corporate structure; it is not a separate corporation or a cross-owned affiliate.[546] Thus, the regulations for cross-owned corporations, set forth in 19 CFR 351.525(b)(6), are not applicable to Tolko and its Armstrong plant, because the recipient of the subsidies received from the Armstrong plant's electricity sales to BC Hydro under its EPA was, in fact, Tolko itself. Moreover, because Commerce found the electricity subsidies were not tied to the production of electricity, it properly attributed the benefits provided under the Armstong

[544] Subsidies to the following types of cross-owned affiliates are covered in these additional attribution rules: (ii) producers of the subject merchandise; (iii) holding companies or parent companies; (iv) producers of an input that is primarily dedicated to the production of the downstream product; or (v) an affiliate producing non-subject merchandise that otherwise transfers a subsidy to a respondent.
[545] *See TMK IPSCO v. United States*, 222 F. Supp. 3d 1306, 1324 (CIT 2017).
[546] *See* Tolko May 30, 2017 SQR at 17 ("Tolko's Armstrong generation facility"); *see also* Tolko Verification Exhibits at Verification Exhibit 2 (p. 4).

EPA to all products produced by Tolko, the company that received the subsidy, consistent with 19 CFR 351.525(b)(3).[547]

The relationship between Tolko and its Armstrong plant is distinguishable from the corporate entities at issue in *CTL Plate from Korea*, where POSCO Energy was a *separate* corporate entity from POSCO.[548] Thus, to determine whether any benefits received by POSCO Energy could be attributed to POSCO, Commerce applied its regulations at 19 CFR 351.525(b)(6), attribution of subsidies to corporations other than those that received the subsidy, and found that none of the bases for attribution under the regulations applied to the relationship between the companies.[549] Commerce only examined the flow of electricity from POSCO Energy in an effort to ascertain whether POSCO Energy in fact provided electricity to POSCO such that it could be considered an input supplier for purposes of 19 CFR 525(b)(6)(iv). Because POSCO Energy did not meet any of the other cross-ownership attribution criteria, Commerce determined that "any benefits received by POSCO Energy cannot be attributed to POSCO."[550]

In contrast, here, the question of whether Commerce can attribute subsidies received by a cross-owned entity is not relevant. Tolko's Armstrong power plant is not a separate corporate entity from Tolko, as was the case with POSCO and POSCO Energy.[551] Instead, the Armstrong plant is a facility within the respondent company, Tolko.[552] Thus, Tolko received the electricity subsidy itself, not through a cross-owned affiliate, making the cross-owned attribution regulations (19 CFR 351.525(b)(6)) inapplicable to Tolko and its Armstrong plant. Rather, the applicable regulation is 19 CFR 351.525(b)(3), under which Commerce attributes domestic

[547] *See* Tolko Final Determination Calculations at 4.
[548] *See CTL Plate from Korea* IDM at Comment 1.
[549] *Id.*; *see also* 19 CFR 351.525(b)(6).
[550] *See CTL Plate from Korea* IDM at Comment 1.
[551] *See* Tolko May 30, 2017 SQR at 17 ("Tolko's Armstrong generation facility"); *see also* Tolko Verification Exhibits at Verification Exhibit 2 (p. 4).
[552] *Id.*

subsidies received by the respondent itself to the respondent company, and normally attributes the domestic subsidy to all products sold by a firm, including products that are exported. Further, because the payments to Tolko's Armstrong plant are not tied to a particular product, Commerce's regulations at 19 CFR 351.525(b)(5)(i) are inapplicable.

Contrary to the BC Parties' comments,[553] the *CVD Preamble* does instruct that if subsidies allegedly tied to a particular product are, in fact, provided to the overall operations of the company, Commerce will attribute the subsidy to sales of all products produced by the company as the default is to find a subsidy untied.[554] Because Tolko Armstrong's EPA with BC Hydro was not tied to the production or sale of a particular product, and instead benefitted the operations of Tolko as a whole under Commerce's tying practice, the benefit from the BC Hydro EPA program is attributed to all products produced by Tolko under 19 CFR 351.525(b)(3). Despite the BC Parties' arguments, Commerce did not act arbitrarily or capriciously in attributing the Armstrong EPA subsidies to Tolko's total sales.[555] Commerce has consistently found that electricity subsidies are untied, and thus, attributable to the production of all products, not just to the production of electricity.[556] The attribution approach, advocated by the BC Parties, where the EPA payments are tied to the production and sales of electricity would mean that the electricity subsidies would escape the remedies under the CVD law and arrive at an illogical result at odds with Commerce's long-standing practice.[557]

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[553] *See* GBC Comments at 10.
[554] *See CVD Preamble*, 63 FR at 65400 ("… there are various ways in which a subsidy can be tied. However, regardless of the method, we attribute a subsidy to sales of the product or products to which it is tied. In this regard, *one can view an 'untied' subsidy as a subsidy that is tied to sales of all products produced by a firm*." {emphasis added}).
[555] *See* GBC Comments at 11.
[556] *See Final Determination* IDM at Comment 49 (citing determinations in which Commerce attributed electricity subsidies to the sales of all products produced by the respondent).
[557] *Id*.

The BC Parties' confusion regarding the appropriate regulations that apply here is further highlighted by the references made to the *CVD Preamble* related to Commerce's input supplier regulation, 19 CFR 351.525(b)(6)(iv). In their comments, the BC Parties' reference to language from the *CVD Preamble* discussing whether "production is dedicated almost exclusively to the production of a higher value product" is exclusively related to Commerce's analysis regarding attribution of subsidies received by a cross-owned input supplier.[558] This analysis is only applicable in instances where Commerce is determining whether it is appropriate to attribute the subsidies of a cross-owned company that provides inputs to a respondent or other cross-owned company. This regulatory subsection is entirely irrelevant when determining whether a subsidy is tied under 19 CFR 351.525(b)(5), and furthermore has no relation to the attribution of subsidies received by the company *itself*, under 19 CFR 351.525(b)(3), as is the case with Tolko. This is not language that is in any way applicable to the "input rule exception" under 19 CFR 351.525, as the BC Parties appear to argue.

Thus, for the above stated reasons, Commerce's determinations in the *Final Determination* and *CTL Plate from Korea* are not in contradiction with one another, but rather are the result of differing relationships between the entities at issue, and thus the different regulatory provisions on attribution applicable in each case. Because electricity subsidies are not tied to the production of a particular product, and the benefits of the EPA were received by Tolko directly via its Armstrong power plant, rather than a separate cross-owned corporation, Commerce appropriately attributed the subsidy to Tolko's overall production under 19 CFR 351.525(b)(3).

[558] *See* GBC Comments at 10 (citing *CVD Preamble*, 63 FR at 65401).

Finally, the BC Parties argue that, in citing 19 CFR 351.525(b)(3), Commerce has impermissibly relied on a "new rationale" for its attribution determination, and further argue that Commerce cannot provide additional explanation beyond what was given in the underlying final determination.[559] This is a fundamentally incorrect assertion. In the underlying *Final Determination*, Commerce explained: "Because electricity is required to operate the production facilities of Tolko, the benefit from the investigated program is attributed to all products produced by Tolko under 19 CFR 351.525(a)."[560] Section 351.525(a) of Commerce's regulations explains that Commerce "will calculate an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the Secretary attributes the subsidy under paragraph (b) of this section." Paragraph (b) contains the applicable regulation, 19 CFR 351.525(b)(3), which states that Commerce "will normally attribute a domestic subsidy to all products sold by a firm." Thus, even if Commerce did not specifically cite to 19 CFR 351.525(b)(3) in its *Final Determination,* it explained its methodology, as laid out in that provision of the regulations, when it stated that it would attribute electricity subsidies to all products sold by Tolko.[561]

Commerce also explained in the *Final Determination* that "when {Commerce} developed our general rules of attribution that are set forth under 19 CFR 351.525, we were unable to consider purchase of good subsidies within these general attribution rules; however, it is clear from the case precedent…that benefits from electricity subsidies are attributed to all

[559] *Id.*
[560] *See Final Determination* IDM at 161.
[561] An agency's action is reasonable even where "the agency's decisional path" is merely "reasonably discernable." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)).

products."[562] This is the exact same rationale that Commerce has further explained in the Draft Results. The mere citation to a more specific subsection of the regulation in 19 CFR 351.525(b)(3) does not mean Commerce has provided a "manifestly new rationale," as argued by the BC Parties. Rather, as instructed by the Binational Panel, Commerce has provided additional explanation for the exact same rationale set forth in the underlying determination, and has provided a more specific regulatory citation for the attribution methodology Commerce applied in the *Final Determination*.

Under the misguided interpretation of *post hoc* rationalization argued for by the BC Parties, Commerce would never be able to provide further explanation on remand to continue to make the same finding it made in the underlying administrative decision. Instead, Commerce would be required to either continue to provide the exact same rationale it previously provided that was already remanded, or otherwise change its decision. As the Courts have explained, under the correct recitation of the *post-hoc* rationalization rule, "{T}he courts may not accept *appellate counsel's post hoc* rationalizations for agency action … It is well-established that an agency's action must be upheld, if at all, on the basis *articulated by the agency itself*."[563] Here, Commerce itself articulated its reasoning for its attribution finding in the Draft Results, and this reasoning is based on the same rationale provided in the underlying *Final Determination*. Under the rules of attribution set forth in 19 CFR 351.525 generally, and 19 CFR 351.525(b)(3) specifically, the benefits from electricity subsidies are attributed to all products, as they are not tied to the production or sale of any particular product. Commerce's further explanation is not a

[562] *See Final Determination* IDM at 161.
[563] *See Mitsubishi Heavy Indus., Ltd. v. United States*, 24 C.I.T. 275, 281 (2000), aff'd, 275 F.3d 1056 (Fed. Cir. 2001) (emphasis added) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983)).

*post hoc* rationalization. Rather, it is a fuller explanation of the agency's reasoning at the time of the agency action.

**Comment 8: Whether Commerce Should Attribute Payments Received by West Fraser under Its EPAs to Its Overall Production**

*BC Parties' Comments*

The following is a verbatim summary of the comments submitted by the GBC, BCLTC, Canfor, Tolko, and West Fraser (internal citations omitted). For further details, *see* GBC Comments at 12-16.

> {Commerce} should not attribute the payments received by … West Fraser under its EPAs to {its} total production, but should instead attribute these payments solely to {the} respondent's electricity production unrelated to its production of softwood lumber. The record demonstrates that … the West Fraser electricity plants in Fraser Lake and Chetwynd, are connected directly to the BC Hydro grid and not electrically connected to the {respondent's} sawmills; that under the terms of the applicable EPAs those sawmills therefore could not consume the electricity generated by the {respondent's} electricity plants; and that, pursuant to the {Commerce's} "attribution" regulation in 19 CFR 351.525(b)(5), any subsidy involved is "tied" to the production of electricity. Moreover, {Commerce} fails to reasonably respond to the Panel's express charge, that is, that {Commerce} explain how its attribution {determination} here differ{s} from the material facts at issue in {*CTL Plate from Korea*}. Finally, {Commerce} otherwise attempts to support its {determination} by impermissibly raising new reasons for its decision to attribute the payments under the EPAs to … West Fraser's total production. {Commerce} may not rely on such *post hoc* rationalization at this stage.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 37-38.

> Notwithstanding ambiguity in the administrative record with respect to a connection between West Fraser's electricity plants and its sawmills, {Commerce} has complied with the Panel's remand instructions by countervailing the company's sales of electricity in the same way it countervailed Tolko's sales of electricity produced by its Armstrong plant. Moreover, {Commerce} has provided a well-reasoned and lawful justification for doing so based on the fact that money is fungible within a corporate entity.

**Commerce's Position:** As discussed the Draft Results, the record is inconclusive on whether the Fraser Lake and Chetwynd bioenergy plants are physically connected to West Fraser's sawmills and whether those mills use the electricity generated by the plants.[564] However, even if the power plants are not connected to the sawmills, and neither sawmill uses electricity generated at the plants, any such "electrical connection" is not relevant to the Panel's directive for Commerce to treat West Fraser's power plants in the same way it treats Tolko's Armstrong power plant.[565] Commerce complied with the Panel's remand order by treating subsidies to the Fraser Lake and Chetwynd plants in the same way it treated subsidies to Tolko's Armstrong plant, by attributing subsidy benefits to West Fraser's total production pursuant to 19 CFR 351.525(b)(3).[566] As such, there was no need for Commerce to reopen the record to seek additional information on a physical connection between the West Fraser power plants and sawmills.

Fraser Lake and Chetwynd are bioenergy plants within the West Fraser corporate entity. Specifically, they are "business units" described as "in purpose-built buildings on the Fraser Lake Sawmill and Chetwynd Forest Industries grounds."[567] Thus, like Tolko's Armstrong plant, the Fraser Lake and Chetwynd plants are not separate corporate entities, but rather are facilities owned by West Fraser and within the West Fraser corporate structure.

As discussed in the Draft Results, Commerce has long recognized that, within a company, money is fungible and its use for one purpose may free up money to benefit another purpose.[568] Subsidies provided to a "business unit" of a company, such as a power plant, will impact the overall production and sales of all other products of the company. Neither the statute nor

[564] *See* Draft Results at 88-89.
[565] *See* Binational Panel Order at 130.
[566] *See* Draft Results at 88-91.
[567] *See* West Fraser IQR at 95, 98, and Exhibit WF-GEN-1.
[568] *See* Draft Results at 89-90.

Commerce's regulations provide for, or require, the attribution of a domestic subsidy to a specific entity within a firm. Additionally, Commerce does not tie subsidies to particular facilities within a firm because, "{o}nce a firm receives the funds, it does not matter whether the firm used the government funds, *or some of its own funds that were freed up as a result of the subsidy*, for the stated purpose or the purpose that we evince."[569] Consequently, Commerce's default attribution methodology is to attribute subsidies to the overall operations of a company because money is fungible within a single, integrated corporate entity (as opposed to a conglomeration of entities for which an analysis under 19 CFR 351.525(b)(6) may be required). This methodology was upheld by the CIT in *Kiswok*:

> Untied subsidies are not linked to any particular merchandise; they are presumed to benefit an exporter in general and are therefore allocated to its total business. The presumption is sensible. Money is fungible. A cash subsidy, regardless of its intended or actual use, frees up revenue, which in turn may be applied for other purposes, and thus entails general benefit.[570]

Any money received by the Fraser Lake and Chetwynd plants is fungible and transferable to any other business unit within the West Fraser corporate entity, regardless of a physical connection between or electricity use by those units. Thus, it is appropriate to attribute the benefits from the Fraser Lake and Chetwynd EPAs to West Fraser's total production, which is consistent with our treatment of Tolko's Armstong plant in the Draft Results.[571] As explained, Commerce's default attribution methodology is to attribute benefits of a subsidy to the company that receives the subsidy. Under 19 CFR 351.525(b)(3), the Secretary will normally attribute a domestic subsidy to all products sold by a firm, including products that are exported. The recipient of the subsidy under the BC Hydro EPA program was West Fraser itself, as the Fraser

[569] *See CVD Preamble*, 63 FR at 65403 (emphasis in original).
[570] *See Kiswok*, 28 C.I.T. 774, 787.
[571] *See* Draft Results at 83-87.

Lake and Chetwynd plants are simply facilities owned by West Fraser and within its corporate structure. Thus, Commerce's regulations on attribution of subsidies for cross-owned companies under 19 CFR 351.525(b)(6) are inapplicable. Additionally, because the payments received under the BC Hydro EPA program are not tied to the production of electricity, 19 CFR 351.525(b)(5) is inappropriate. Contrary to the assertions made by the BC Parties, Commerce never attributed the subsidies received by West Fraser's electricity plants as an input product under 19 CFR 351.525(b)(5)(ii) in the *Final Determination*, but rather attributed the benefits of the electricity subsidy to all products produced by West Fraser under 19 CFR 351.525(a), and 19 CFR 351.525 more generally.[572] Thus, their argument that Commerce cannot "invent an entirely new theory" is based on the assumption that Commerce based its *Final Determination* on a regulatory provision that never appeared in the *Final Determination*. Instead, as Commerce explained in the Draft Results, it properly attributed the subsidy to West Fraser's total production under 19 CFR 351.525(b)(3). The Panel instructed Commerce to attribute West Fraser's electricity subsidies received by the Fraser Lake and Chetwynd plants in the same way it attributed the electricity subsidies received by Tolko's Armstrong plant. Commerce has complied with the Panel's instructions.

Finally, the BC Parties find fault with Commerce's analysis, arguing that because Commerce did not base its attribution determination on the fungibility of money or attribute the EPA payments to West Fraser's total production pursuant to 19 CFR 351.525(b)(3) in the *Final Determination*, Commerce cannot now invent new theories to support its attribution determination.[573] The BC Parties argue that Commerce has impermissibly relied on a "new theory" for its attribution determination, and further argue that Commerce cannot provide

[572] *See Final Determination* IDM at 161.
[573] *See* GBC Comments at 15-16.

additional explanation beyond what was given in the underlying final determination.[574] This is a fundamentally incorrect assertion. As explained above, Commerce stated in the *Final Determination* that "{b}ecause electricity is required to operate the production facilities of Tolko, the benefit from the investigated program is attributed to all products produced by Tolko under 19 CFR 351.525(a)."[575] Section 351.525(a) of Commerce's regulations explains that Commerce "will calculate an *ad valorem* subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the Secretary attributes the subsidy under paragraph (b) of this section." Paragraph (b) contains the applicable regulation, 19 CFR 351.525(b)(3), which states that Commerce "will normally attribute a domestic subsidy to all products sold by a firm." Thus, even if Commerce did not specifically cite to 19 CFR 351.525(b)(3) in its *Final Determination,* it explained its methodology, as laid out in that provision of the regulations, when it stated that it would attribute electricity subsidies to all products sold by Tolko.[576]

Commerce also explained in the *Final Determination* that "when {Commerce} developed our general rules of attribution that are set forth under 19 CFR 351.525, we were unable to consider purchase of good subsidies within these general attribution rules; however, it is clear from the case precedent…that benefits from electricity subsidies are attributed to all products."[577] This is the exact same rationale that Commerce has further explained in the Draft Results. Commerce's discussion of the fungibility of money is not a *post hoc* rationalization, as argued by the BC Parties. Rather, as instructed by the Binational Panel, Commerce has provided

[574] *Id.*
[575] *See Final Determination* IDM at 161.
[576] An agency's action is reasonable even where "the agency's decisional path" is merely "reasonably discernable." *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1369–70 (Fed. Cir. 1998) (citing *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987)).
[577] *See Final Determination* IDM at 161.

additional explanation further expanding on the exact same rationale set forth in the underlying determination, and has provided a more specific regulatory citation for the attribution methodology Commerce applied in the *Final Determination*. The fungibility of money rationale comes directly from the *CVD Preamble*,[578] and Commerce's reference to the rationale discussed in the preamble for the exact same regulatory provisions cited to in the *Final Determination*, 19 CFR 351.525, does not constitute *post hoc* rationalization. Likewise, Commerce's reference to a more specific subsection of the same regulation relied upon in the *Final Determination*, based on the exact same rationale provided in the *Final Determination*, does not constitute inventing "an entirely new theory" as argued by the BC Parties.

Under the misguided interpretation of *post hoc* rationalization argued for by the BC Parties, Commerce would never be able to provide further explanation on remand to continue to make the same finding it made in the underlying administrative decision. Instead, Commerce would be required to either continue to provide the exact same rationale it previously provided that was already remanded, or otherwise change its decision. As the Courts have explained, under the correct recitation of the *post-hoc* rationalization rule, "{T}he courts may not accept *appellate counsel's post hoc* rationalizations for agency action … It is well-established that an agency's action must be upheld, if at all, on the basis *articulated by the agency itself*."[579] Here, Commerce itself articulated its reasoning for its attribution finding in the Draft Results, and this reasoning is based on the same rationale provided in the underlying *Final Determination*. Under the rules of attribution set forth in 19 CFR 351.525 generally, and 19 CFR 351.525(b)(3) specifically, the benefits from electricity subsidies are attributed to all products, as they are not

[578] *See CVD Preamble*, 63 FR at 65403 (emphasis in original).
[579] *See Mitsubishi Heavy Indus., Ltd. v. United States*, 24 C.I.T. 275, 281 (2000), aff'd, 275 F.3d 1056 (Fed. Cir. 2001) (emphasis added) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 50 (1983)).

tied to the production or sale of any particular product. Commerce's further explanation is not a *post hoc* rationalization. Rather, it is a fuller explanation of the agency's reasoning at the time of the agency action.

**Comment 9: Whether Commerce Correctly Recalculated the Benefit to Tolko under the BC Hydro EPA Program**

*BC Parties' Comments*

The following is a verbatim summary of the comments submitted by the GBC, BCLTC, Canfor, Tolko, and West Fraser (internal citations omitted). For further details, *see* GBC Comments at 17-18.

> {Commerce} erred in its calculation of the alleged benefit as to Tolko …. With respect to its calculation of the alleged benefits conferred on Tolko, {Commerce} erroneously includes turndown payments in the benefit amount for Tolko, but neither the law nor the facts support that decision.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 39-42.

> In the Binational Panel Order, the Panel directed {Commerce} to recalculate the benefit for BC Hydro … purchases of electricity from respondents using specific benchmark data. {Commerce} complied with these directives in its {Draft Results}. However, these instructions exceeded the Panel's authority under U.S. law, and {Commerce} should consider other benchmark alternatives in the final redetermination. Specifically, with respect to the benchmark for BC Hydro's electricity purchases from Tolko …, {Commerce} should consider alternatives because a single transaction price between Tolko and a third party is {not} reasonable as a general matter in light of other available information, ….

**Commerce's Position:** In the Draft Results, to comply with the Panel's order, Commerce applied the Tolko electricity price to a third party as the benchmark to measure the benefit received by Tolko under the BC Hydro EPA program.[580] Within its remand order, the Panel does

[580] *See* Drafts Results at 95.

not address Tolko's "turndown payments." In fact, the Panel did not consider the BC Parties' arguments that this generation capacity is a non-countervailable government purchase of a service, nor did the Panel address the BC Parties' claims that Commerce should have measured the adequacy of remuneration for these payments through the use of a benchmark.[581] However, the Panel did sustain Commerce's determination that electricity is a good rather than a service.[582] Thus, there is no justification for the BC Parties' argument that the "turndown" payments received by Tolko should be considered a service.

As discussed in the *Final Determination*, Tolko reported that the "turndown" payments are used to compensate the company for its investment in fixed generation assets that relate to its sales of electricity to BC Hydro.[583] Commerce therefore determined that these payments qualify as a financial contribution under section 771(5)(D) of the Act[584] and included the payments within Tolko's total benefit amount for the BC Hydro EPA program.[585] Because the Panel did not order Commerce to do otherwise, consistent with the *Final Determination*, we included the "turndown" payments in Tolko's Draft Results calculations for the BC Hydro EPA program[586] and continue to do so for this final remand.

In its comments, the petitioner argues that the Panel lacked the authority to issue its instruction for use of the Tolko sales price to a third party as the benchmark to calculate Tolko's benefit under the BC Hydro EPA program. The petitioner contends that the Tolko price may not be the best available alternative on the record and that Commerce should have the opportunity to consider the other benchmark data. The petitioner states that it submitted on the record

[581] *See* Binational Panel Order at 133–134 and 137–139.
[582] *Id*. at 134.
[583] *See Final Determination* IDM at 159.
[584] *Id*.
[585] *See* Tolko Final Determination Calculations.
[586] *See* Tolko Draft Remand Calculation Memorandum.

benchmark data sources, *i.e.*, the National Energy Board (NEB) 2015 Export Summary Report, NEB 2015 Import Summary Report, and BC Hydro's 2014-2015 and 2015-2016 annual reports.[587] The petitioner notes that the Tolko price is based on a contract negotiated in 2009, whereas the NEB Export Summary Report is contemporaneous with the POI and reflects publicly available data for each province.[588]

Commerce agrees with the petitioner's analysis of the relevant standard for remanding as discussed in Comment 1 above. The appropriate direction under the statute would have been for the Panel to remand to the agency for further consideration consistent with its decision.[589] Nonetheless, because the Panel directed a specific action as it relates to the benchmark for comparison to the prices paid by BC Hydro for the purchase of electricity from Tolko,[590] Commerce complied with the Panel's Order. Thus, for this final remand redetermination, we have continued to apply the Tolko electricity price to a third party as the benchmark to measure the benefit received by Tolko under the BC Hydro EPA program.

**Comment 10: Whether Commerce Correctly Recalculated the Benefit to West Fraser under the BC Hydro EPA Program**

*BC Parties' Comments*

The following is a verbatim summary of the comments submitted by the GBC, BCLTC, Canfor, Tolko, and West Fraser (internal citations omitted). For further details, *see* GBC Comments at 19-20.

> {Commerce} erred in its calculation of the alleged benefit as to … West Fraser. … {Commerce} compounds that error by arbitrarily assigning the subsidy rate calculated for Tolko to West Fraser without citing any legal or factual basis for its decision. Instead, {Commerce} should use a different benchmark to determine

[587] *See* COALITION Comments at 40 (fn. 167) (citing Petitioner's Letter, "Benchmark Submission," dated March 27, 2017 (Petitioner Benchmark Submission) at Exhibits 4, 5, and 6).
[588] *Id*. at Exhibit 5.
[589] *See NEXTEEL*, 28 F.4th 1226, 1238 (Fed. Cir. 2022); *see also* 19 USC § 1516a(c)(3).
[590] *See* Binational Panel Order at 139.

> whether West Fraser received more than adequate remuneration for its sales of electricity to BC Hydro.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 39-42.

> In the Binational Panel Order, the Panel directed {Commerce} to recalculate the benefit for BC Hydro … purchases of electricity from respondents using specific benchmark data. {Commerce} complied with these directives in its {Draft Results}. However, these instructions exceeded the Panel's authority under U.S. law, and {Commerce} should consider other benchmark alternatives in the final redetermination. Specifically, with respect to the benchmark for BC Hydro's electricity purchases from … West Fraser, {Commerce} should consider alternatives because a single transaction price between Tolko and a third party is neither reasonable as a general matter in light of other available information, nor is it useable for West Fraser.

**Commerce's Position:** We disagree with the BC Parties' argument that Commerce's decision to assign to West Fraser the subsidy rate calculated for Tolko under the BC Hydro EPA program in the Draft Results is legally or factually flawed. On the contrary, Commerce's action in the Draft Results is consistent with Panel's remand order.

The Panel remanded Commerce to recalculate the benefit to West Fraser using Tolko's price for the sale of electricity to a third party as the benchmark.[591] However, Tolko's sales price is the company's own proprietary information, and thus, not information in the public domain that can be applied as a benchmark price to calculate the benefit to West Fraser under the BC Hydro EPA program. As explained in the Draft Results, if Commerce were to use the Tolko sales price for West Fraser's benefit calculations, it would be in potential violation of the Trade Secrets Act for an unlawful disclosure of Tolko's BPI.[592] Consequently, Commerce was unable to apply the Tolko sales price as the benchmark electricity price in West Fraser's calculations for the BC

[591] *See* Binational Panel Order at 139.
[592] *See* Draft Results at 95 (citing 18 U.S.C. 1905).

Hydro EPA program. Because the Panel did not give Commerce the option to consider another benchmark price in the calculations, we determined that the most appropriate approach, to comply with the Panel's remand order, was to apply the Tolko subsidy rate for the BC Hydro EPA program as the subsidy rate for West Fraser under the program. This was the methodology that Commerce determined most closely complied with the Panel's order to recalculate West Fraser's benefit using Tolko's price for the sale of electricity to a third party as the benchmark, without resulting in a potential violation of the Trade Secrets Act.

Both the BC Parties and the petitioner argue that Commerce should use an alternative benchmark to recalculate West Fraser's benefit under the BC Hydro EPA program. Specifically, the BC Parties state that the average realized price level of C$108 contained within the Merrimack Group report, and used to determine the adequacy of remuneration for the Québec electricity program, could serve as a benchmark price in the benefit calculations for West Fraser.[593] The petitioner notes that it submitted data on the record from the NEB Export Summary Report, which is contemporaneous with the POI and reflects publicly available data for each province, and thus, could serve as a benchmark.[594]

As discussed in Comment 1 above, Commerce agrees with the petitioner that the appropriate direction under the statute would have been for the Panel to remand to the agency for further consideration consistent with its decision,[595] providing Commerce the opportunity to evaluate alternative benchmark data sources for West Fraser's electricity benefit calculations. However, the Panel directed a specific action as it relates to the benchmark for comparison to the prices paid by BC Hydro for the purchase of electricity from West Fraser.[596] In the Draft Results,

[593] *See* GBC Comments at 20.
[594] *See* COALITION Comments at 41 (citing Petitioner Benchmark Submission at Exhibit 5).
[595] *See NEXTEEL*, 28 F.4th 1226, 1238 (Fed. Cir. 2022); *see also* 19 USC § 1516a(c)(3).
[596] *See* Binational Panel Order at 139.

Commerce complied with the Panel's order as closely as possible by applying the subsidy rate calculated for Tolko under the BC Hydro EPA program to West Fraser. Given the directed action on remand, the application of Tolko's subsidy rate is the only approach that most closely aligns with the Panel's remand order to recalculate the benefit to West Fraser using Tolko's price for the sale of electricity to a third party as the benchmark. Thus, for this final remand redetermination, as West Fraser's subsidy rate under the BC Hydro EPA Program, we continue to assign to West Fraser the subsidy rate calculated for Tolko under the BC Hydro EPA program.

**Comment 11: Whether Commerce Correctly Recalculated the Benefit to Resolute under the Hydro-Québec PAE 2011-01 Program**

*Resolute and Central Canada's Comments*

The following is a verbatim summary of the comments submitted by Resolute and Central Canada (internal citations omitted). For further details, *see* Central Canadian parties Comments at 6-7.

> {Commerce} in the *Final Determination* had used an improper benchmark for measuring the alleged benefit from Resolute's sales of biomass electricity to Hydro-Québec under the PAE 2011-01. The Panel remanded for {Commerce} to use the proper benchmark in the Merrimack Report of the real levelized cost of electricity of $108/MWh. {Commerce} has appropriately applied the Merrimack Group Report benchmark for Hydro-Québec's purchases of biomass electricity from Resolute, showing that Resolute received no benefits under the program. These new findings are consistent with the Panel's Decision and Order.

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 42-43.

> In the Binational Panel Order, the Panel directed {Commerce} to recalculate the benefit for … Hydro-Quebec's purchases of electricity from {Resolute} using specific benchmark data. {Commerce} complied with these directives in its {Draft Results}. However, these instructions exceeded the Panel's authority under U.S. law, and {Commerce} should consider other benchmark alternatives in the final redetermination. {W}ith respect to Hydro-Quebec's electricity purchases from

> Resolute, {Commerce} should consider alternatives to the Merrimack Group report in light of the report's manifest deficiencies.

**Commerce's Position:** The petitioner asserts that the Panel exceeded its authority in issuing its instruction to use the average realized price level reported in the Merrimack Group report as the benchmark to calculate Resolute's benefit under the Hydro-Québec PAE 2011-01 program because the record contains other benchmark alternatives that Commerce should have an opportunity to consider. In particular, the petitioner notes that the NEB Export Summary Report, which is contemporaneous with the POI and representative of the average price of electricity in Québec, is on the record.[597]

As discussed above at Comment 1, Commerce agrees with the petitioner's analysis of the relevant standard for remanding. The appropriate direction under the statute would have been for the Panel to remand to the agency for further consideration consistent with its decision.[598] Nonetheless, because the Panel directed a specific action as it relates to the benchmark for comparison to the prices paid by Hydro-Québec for the purchase of electricity from Resolute,[599] Commerce complied with the Panel's Order. Thus, for this final remand redetermination, we continue to use the average realized price level reported in the Merrimack Group report as the benchmark to calculate Resolute's benefit under the Hydro-Québec PAE 2011-01 program.

**Comment 12: Whether Commerce Correctly Determined the BCTS Auction Prices were Distorted, and thus could not serve as a Tier-One Benchmark for BC Stumpage**

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 11-14.

[597] *See* Coalition's Comments at 43 (fn. 180).
[598] *See NEXTEEL*, 28 F.4th 1226, 1238 (Fed. Cir. 2022); *see also* 19 USC § 1516a(c)(3).
[599] *See* Binational Panel Order at 140.

> The Panel upheld certain aspects of {Commerce's} original findings concerning distortion in the British Columbia Timber Sales ("BCTS") auction system but remanded for further explanation with respect to the relevance of market concentration, the auction's three-sale limit, and straw purchases to that distortion analysis. {Commerce's} Draft Remand Redetermination provides ample justification for maintaining the agency's original distortion findings, and {Commerce} should affirm its analysis in the final remand redetermination.

*BC Parties' Comments*

The following is a verbatim summary of the comments submitted by the BC parties (internal citations omitted). For further details, *see* GBC Comments at 2-3.

> With respect to the first issue regarding the BCTS auction system, {Commerce} states that it has provided in the Draft Remand Redetermination the further explanation and analysis requested by the Panel. Although the B.C. Parties respectfully disagree with {Commerce's} further explanation and analysis in the Draft Remand Redetermination, in the interest of judicial efficiency, the B.C. Parties have decided to no longer contest {Commerce's} determination regarding the use of BCTS auction prices as a tier-one benchmark to measure the adequacy of remuneration for B.C. stumpage in this appeal.

**Commerce's Position:** Commerce agrees with the petitioner that it provided ample additional explanation in the Draft Results relating to the relevance of market concentration, the auction's three sale limit, and straw purchases to its distortion analysis of the BCTS Auction, in compliance with the Panel's remand order. Additionally, while the BC parties state that they disagree with Commerce's analysis of this issue in the Draft Results, they have decided to no longer challenge Commerce's determination that the BCTS auction prices cannot serve as a tier-one benchmark to measure the adequacy of remuneration for BC stumpage. Notably, they do not specifically challenge any aspect of Commerce's factual, legal, or methodological analysis concluding that the BCTS auction prices are distorted. Thus, for purposes of this final redetermination, for the reasons explained at length above, Commerce continues to find that the BCTS auction prices are distorted, such that they do not constitute a viable tier-one benchmark under 19 CFR 351.511(a)(2)(i) to measure the adequacy of remuneration for BC stumpage.

**Comment 13: Whether Commerce Should Revise the Stumpage Calculations for Negative Benefits**

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 24-29.

> In the Binational Panel Order, the Panel found that {Commerce's} practice of treating "all instances in which the Crown stumpage price was higher than the benchmark price to be a zero subsidy rather than a negative subsidy {(or termed 'negative benefits')}" is not in accordance with law. The Panel remanded the issue to Commerce "with the instructions to revise the calculation spreadsheets for stumpage benefits." The Panel specifically asked {Commerce} "to remove from the formulas the result that if transaction price exceeds the benchmark price the benefit is set to zero." Such a request, which directed {Commerce} to reach a particular outcome, exceeded the Panel's authority as it amounts to an impermissible directed remand. As such, {Commerce} should decline to follow the Panel's specific directive in the final remand redetermination.
>
> Further, {Commerce} may maintain its practice of disregarding "negative benefits" while remaining consistent with the Panel's statutory interpretation that the benefit should be viewed as "provided to {a} person as a whole." The statute defines "benefit" in the case of a government provision of a good or service when "such {a} good{} or service{} {is} provided for less than adequate remuneration." In other words, when the good or service is not provided for less than adequate remuneration, a benefit is not conferred. As such, from the perspective of "a person as a whole," the benefit for that person is the aggregation of all the instances and amounts where a benefit is conferred (*i.e.*, when the purchase price is lower than the benchmark price). This interpretation is consistent with the CIT's finding on the same exact issue in *Canadian Solar Inc. v. United States*. {Commerce} should therefore revise its Draft Remand Redetermination accordingly and disregard instances where the respondents' purchase prices were higher than the benchmark price in the benefit calculation like the agency did in the Final Determination.

*JDIL's Comments*

The following is a verbatim summary of the comments submitted by JDIL (emphasis and internal citations omitted). For further details, *see* JDIL Comments at 13-14.

> *Commerce properly accounted for negative benefits when calculating J.D. Irving's stumpage benefit calculation.* The NAFTA Panel correctly held, "Commerce's use of 'zeroing' negative benefits is not in accordance with law." Although the Draft Remand Redetermination properly accounts for negative benefits in the calculation

> of J.D. Irving's stumpage benefit, Commerce's interpretation of the law remains inconsistent with the plain language of the statute and regulation. Because the statute and regulation direct Commerce to determine whether the respondent received "a benefit" from the government's provision of "goods," Commerce must determine the overall benefit derived from all government sales of the goods. Consequently, consistent with the NAFTA Panel's holding, Commerce must not disregard Crown transactions that were priced higher than the benchmark.

**Commerce's Position:** As discussed in the Draft Results, Commerce respectfully disagrees with the Panel's order and reiterates that section 701 of the Act sets forth Commerce's mandate as the administering authority to determine whether "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States."[600] The inquiry is not simply whether a subsidy has been provided to a person as a whole, but whether a subsidy has been provided with respect to the manufacture, production, or export of subject merchandise, which requires a rigorous and fact-intensive analysis and subsidy calculations. Commerce's calculation methodologies will naturally differ from program to program depending on the type of subsidy being examined, the regulations governing that program, and any factual circumstances that warrant particular approaches. Commerce maintains that 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 "negative" benefits from other transactions. However, in compliance with the Panel's order, in this final remand redetermination we have not revised the stumpage benefits from the Draft Results for the respondents' purchases of stumpage to account for any negative benefits.

[600] *See* Draft Results at 46-48.

**Comment 14: Whether Commerce Should Continue to Find the BC LER Countervailable**

*COALITION's Comments*

The following is a verbatim summary of the comments submitted by the COALITION (internal citations omitted). For further details, *see* COALITION Comments at 29-33.

> {Commerce's} review of its practice with respect to analyzing the impact of an alleged export restraint is comprehensive and demonstrates that the Department's approach in this investigation is consistent with its longstanding practice. To the extent that the Department has varied that practice, however, the SAA makes clear that the agency enjoys significant discretion, and overwhelming record evidence demonstrating that British Columbia's LERs "lowered domestic prices for logs in the province" justified the case-specific analysis adopted here.
>
> {Commerce} has also sufficiently addressed the Panel's remand instructions with respect to "blocking," noting that blocking laws are generally applicable throughout the province as evinced by federal and provincial law. {Commerce's} review of supporting record evidence confirms this and substantiates its findings that blocking does, in fact, impact Interior loggers.
>
> The Draft Remand Redetermination also sufficiently addresses the Panel's instructions with respect to explaining the significance of the permitting process itself to the agency's financial contribution determination. As the draft redetermination articulates, "the need to file an application for an export permit at all constitute{s} an additional burden to export," and record evidence demonstrates that the "element of uncertainty" introduced by the application process "hinders the export of logs and the ability of harvesters to consider all potential purchasers."
>
> Similarly, {Commerce} has sufficiently explained why features of the LER system "evince{} an intent to ensure that the export of logs is controlled and monitored by the government." In other words, even if fees and penalties appear minimal on their face, these elements of the program are evidence that the GBC is entrusting and directing private actors to provide a good, which amounts to a financial contribution under the statute.
>
> Lastly, Petitioner agrees with {Commerce's} analysis of evidence regarding export demand conditions for Interior logs and the economic viability of exporting Interior logs, and further notes that the record confirms that {Commerce's} critique of Dr. Kalt's analysis is consistent with that of other factfinders who declined to rely on his unsupported opinions.

*BC LER Parties' Comments*

The following is a verbatim summary submitted as part of the GOC, GBC, and the British Columbia Trade Council's (collectively, BC LER Parties) joint filing (internal citation omitted). For further details, *see* Joint LER Comments at 3-22.

> …{T}he NAFTA Panel in its May 6, 2024, decision remanded to {Commerce} to provide further explanation and assessment of record evidence with respect to several aspects of Commerce's determination that the B.C. LEP process constitutes a financial contribution, including its analysis regarding:
>
> - the interpretation of the term "entrustment or direction"…; and
>
> - flaws the Panel identified in the Department's factual analysis of the impact of the LEP process in British Columbia, including with respect to: (1) the "blocking" system, (2) fees-in-lieu of manufacturing, (3) export permit and approval process, (4) EIPA penalties, (5) the economic feasibility of log exports from the B.C. Interior, and (6) the "ripple effect"….
>
> However, {Commerce} has failed to sufficiently address each issue and must therefore revise the Draft Remand Redetermination to accord with the instructions of the Panel.

**Commerce's Position:** In the Draft Results, Commerce restated its determination that the LERs provide a financial contribution through entrustment or direction, pursuant to section 771(5)(B)(iii) of the Act, because official government action compelled private companies to provide logs to BC consumers, which constituted the provision of a good (*i.e.*, logs), pursuant to section 771(5)(D)(iii) of the Act. In response to the Panel's finding that Commerce's *Final Determination* regarding the BC LER departed from a past practice of determining that the entrusted or directed measure at issue provides a "direct and discernable" benefit,[601] Commerce further explained in the Draft Results how the analytical framework Commerce applied in the *Final Determination* is consistent with its analysis in prior proceedings regarding export restraints. Specifically, Commerce outlined how Commerce's analysis of export restraints has

[601] *See* Binational Panel Order at 73-83.

considered whether the market for the good subject to the alleged export restraint was somehow impacted by that restraint, and has examined a variety of sources to determine whether the alleged export restraint affected prices for the good in question.[602] Commerce then explained how its methodology in the underlying investigation was consistent with prior proceedings, and further described record evidence that the BC LER lowered domestic prices for logs in the province.[603]

Both the BC LER Parties and the COALITION support the analytical framework Commerce articulated in the Draft Results for examining alleged export restraints.[604] However, the BC Parties continue to assert that Commerce's conclusion that the LER impacted the log market in the BC interior is not supported by record evidence on blocking, fees-in-lieu of manufacturing, the length of the export permit approval process, EIPA penalties, and the economic feasibility of log exports from the BC interior.[605] The COALITION supports Commerce's factual findings regarding the impact of the BC LER on the BC interior.[606] In this final remand redetermination, as explained in detail below, Commerce continues to find that the record evidence supports a finding that the BC LER resulted in depressed log prices in the BC interior.

With respect to blocking, the BC LER Parties raise concerns with Commerce's analysis relating to two pieces of evidence cited in the Draft Results. The BC LER Parties criticize Commerce's reliance on the Haley Report's findings due to the "staleness" of its data, as it was

[602] *See* Draft Results at 52-58.
[603] *Id.* at 58-78.
[604] *See* Joint LER Comments at 3-4; *see also* COALITION Comments at 30.
[605] *See* Joint LER Comments at 4-23. In the Draft Results, Commerce stated that it is no longer considering the "ripple effect" in its analysis of whether the BC LER depresses log prices in the BC interior. The BC Parties support this decision in their comments. *See* Joint LER Comments at 22. For this final remand, we continue not to include the "ripple effect" in our distortion analysis of the BC LER.
[606] *See* COALITION Comments at 30-33.

published in 2002, and assert that Commerce's reference to the fact that British Columbia has had an export restraint in place for decades is meaningless because blocking is a purported response to the LER process and not the process itself.[607] Commerce does not fully follow the BC LER Parties' argument, as they admit that blocking is a response to the LER process. Blocking has been an ongoing issue in the province for decades because the restraint has been in place for decades. As explained in the Draft Results, the restraint has not significantly changed since 2002. In fact, Haley specifically cites the surplus test, which is still in place today, as a reason that blocking exists in the interior.[608] There is no record evidence that indicates that Haley's conclusions in 2002 are not relevant to the POI.

The BC LER Parties also highlight Commerce's reliance on the Wilson Center Commentary, citing that the Panel questioned the relevance of the report to the interior and the expertise of the author, and asserted that Commerce did not rebut any of the Panel's concerns in the Draft Results.[609] In the Draft Results, Commerce cited to the Wilson Center Commentary's statement that "{a}lmost every timber harvester has negotiated side agreements to keep its exports from being blocked" as support for the fact that blocking was prevalent throughout the province.[610] Even if the Panel does not believe that the Wilson Center Commentary's statement applies to the coast, Commerce has cited to other independent pieces of evidence on the record, beyond the Wilson Center Commentary, indicating that blocking does occur in the interior.[611]

The Panel noted several instances where it interpreted the Wilson Center Commentary as focusing solely on the coast and not the province as a whole, which we now address.[612] First,

[607] *See* Joint LER Comments at 9.
[608] *See* Draft Results at 61-62.
[609] *See* Joint LER Comments at 9.
[610] *See* Draft Results at 63 (citing Petitioner Comments – Primary QNR Responses at Exhibit 11, at 9.
[611] *See* Draft Results at 61-62.
[612] *See* Binational Panel Order at 88 at fn. 520.

references to ocean freight transportation is not solely a coastal log export phenomenon, as the record demonstrates that there are exports from the tidewater portion of the Interior. As explained in the *Final Determination*,[613] Map 1 provided in the GOC's original questionnaire response for the log export restraints shows that the tidewater interior is connected directly with the coast with no apparent mountain range separating the two areas.[614] Further, the GBC has indicated that logs from the tidewater interior can easily be transported to ports located in the coastal region.[615]

Second, the Panel notes the citation in the Wilson Center Commentary in relation to a domestic discount of over 28 percent relative to export prices is to a weblink that contains the word "coast."[616] As that is a weblink to a source that is not on the record of this proceeding, it is not possible for Commerce to evaluate the source of that evidence. This is consistent with Commerce's prior practice, where Commerce has explained that "a hyperlink to a website… is not an acceptable response to {Commerce's} questions because a mere citation to a hyperlink does not constitute the provision of information on the record of a proceeding, because information accessible via a hyperlink is subject to change."[617]

Third, the Panel notes the reference to the gap between B.C. Hembal J Grade Logs and U.S. Hemlock #3 sawlogs is a reference to the coast as "Hemlock appears to be mostly a coast species."[618] The conclusion that hemlock is a mostly coast species is not supported by the record, as the respondents have reported non-insignificant purchases of both Hemlock and

[613] *See Final Determination* IDM at 147
[614] *Id.* (citing GBC Primary QNR Response at LEP-4).
[615] *Id.*
[616] *See* Binational Panel Order at 88 at fn. 520.
[617] *See Certain Pasta from Italy, Final Results of Countervailing Duty Review; 2012*, 80 FR 11172 (March 2015), and accompanying IDM at comment IV.B.
[618] *See* Binational Panel Order at 88 at fn. 520.

Balsam (*i.e.*, Hembal) during the POI.[619] A map in the Kalt report also demonstrates that Hemlock and Balsam are amongst the principal tree species in sections of the interior.[620] The Kalt report also demonstrates that while the percentage of Hembal harvested on the coast was higher than in the interior, the actual volume of Hembal harvested on the coast and interior were not dissimilar – *i.e.*, ~7.7 million $m^3$ on the coast to 5.7 million $m^3$ in the interior.[621]

Fourth, Commerce does not dispute that the majority of exports from British Columbia come from the coast, but the record does contain evidence of exports from the tidewater and southern interior. Fifth, as discussed above, the Haley report specifically discusses blocking in relation to the interior.

The BC LER Parties also contend that Commerce's assertion that unpermitted logs are not evidence that blocking does not incur in the interior is inconsistent with its own analysis that the LER process is different in the coast and the interior.[622] There is no inconsistency in Commerce's position. The record is clear that blocking takes place on the coast and that the coast also has unpermitted volumes. Commerce's argument is that there is no record evidence to support the contention that unpermitted volumes in the interior would somehow mitigate blocking in the interior in a way that they do not on the coast. The BC LER Parties claim Commerce's argument is inconsistent because Commerce then discusses how the LER process in

[619] *See, e.g.*, Canfor Final Calculation Memorandum at Attachment IV at tab "BCSTablesABE" and "BCSTablesBF"(Canfor's reported purchases in the combined Table ABE sheet (where the majority of Canfor's POI volumes are reported) has POI purchases of Balsam and Hemlock of [ ] m3 out of a total of [ ] m3 in the table as a whole, which is a bit over [ ] percent of the reported volume in this table); *see also* Tolko Final Calculation Memorandum at Attachment IV at tab "Combined Stump No Reject" (Hembal is approximately [ ] percent to the total volume) and West Fraser Final Calculation Memorandum at Attachment BC Stumpage Calculations at tab "Table A Calc" (this is the largest of West Fraser's purchase tables, Hembal comprises approximately [ ] percent of West Fraser's purchases in this table).
[620] *See* GBC Primary QNR Response at Exhibit LEP-1 at Figure 1.
[621] *Id.* at Figure 3.
[622] *See* Joint LER Comments at 10.

the interior is different than on the coast.[623] What the BC LER Parties overlook is that there is one aspect of the LER process in the interior that is different from the coast that makes the likelihood of unpermitted volumes in the interior *more* prevalent than on the coast. In the interior, parties can submit an advertisement for authorization for both standing timber and for logs, while on the coast advertisements can only be submitted for logs. An affidavit on the record from [

] explains that some unpermitted export volumes in the interior are a direct result of the interior LER process itself.[624] The Panel report raised the issue of unpermitted export volumes multiple times, but the record clearly establishes that unpermitted export volumes and blocking can both occur at the same time and that the LER process itself in the interior leads to higher unpermitted export volumes, by percentage, than on the coast. There are no inconsistencies in these record facts.

The next major issue raised by the BC LER Parties is the economic feasibility of exports from the interior. The BC LER Parties argue that Commerce did not properly address the Panel's instructions to engage with certain record evidence regarding the feasibility of exporting logs from the interior of BC.[625] However, the BC LER Parties do not adequately engage with Commerce's analysis in the Draft Results of the record evidence regarding the economic feasibility of exports from the interior.[626] First, the BC LER Parties fail to address in any detail Commerce's critique of Kalt's analysis when his analysis barely mentions, never mind analyzes, the potential impacts of blocking on exports from the province. Kalt's analysis is largely focused on the unused export permit volumes, but Commerce has explained that the record contains

[623] *Id.*
[624] *See* GBC Primary QNR Response, Part 1 at Exhibit LEP-42.
[625] *See* Joint LER Comments at 15.
[626] *See* Draft Results at 69-76.

evidence that both unused export permits and blocking existed on the coast at the same time; the existence of one did not preclude the other from occurring. There is no explanation on the record that precludes this from also being the case in the interior, in fact, as explained above, the interior LER process itself led directly to an additional source of unused export permits in the interior beyond what was occurring on the coast. This information directly contradicts Kalt's analysis, which does not even consider blocking in its analysis, an omission that calls into question the validity of Kalt's analysis.

Second, the BC LER Parties also contend that Commerce failed to address the Panel's concerns that the Taylor report, which demonstrated that it was economically viable to export from the province, was out of date because its data was from 2005. Commerce did not ignore the Panel's concerns, but demonstrated that the conflicting information placed on the record by the BC parties during the investigation, the Bustard Rebuttal Report, did not meet the evidentiary standards that would lead Commerce to provide that evidence as much weight as the Taylor Report.[627] The Bustard Rebuttal Report was prepared specifically for the purpose of the investigation, and as Commerce explained, reports prepared for the purposes of a proceeding may be accorded less weight given the potential that they were tailored to reach certain results. Moreover, none of the underlying data nor an adequate explanation of the methodology for the collection of that data in the Bustard Report are on the record. Commerce therefore afforded limited weight to the Bustard Report, which was prepared for the investigation and did not contain information that would make it possible for Commerce to evaluate any of the claims made by that report. As such, while the Taylor Report's data predates the Bustard Report, it is

[627] *Id.* at 73-74.

still the preferred source of transportation costs on the record, as Commerce has no ability to consider the validity of the Bustard Rebuttal Report's data.

Further, although in the Draft Results Commerce cited more contemporaneous evidence than in the *Final Determination* that beetle-killed logs were in fact exported out of the province during the POI,[628] the BC LER Parties argue that nothing in that data showed that these were beetle-killed logs.[629] While the data do not explicitly state that some of these volumes are beetle-killed logs, the export data show exports of the species and grades of logs that are specifically associated with beetle-killed logs that the BC LER Parties claim were so prevalent in the interior during the POI.[630]

The BC parties also claim that Commerce's explanation regarding the 100-mile radius of overlapping sawmills "does not take into account any geographical features, such as mountains, or whether there were any roads or other transportation options available between these sawmills."[631] However, Commerce's analysis cited a map included in the Kalt report that shows the locations of the mandatory respondents' mills and tenures during 2015-16. This map clearly shows that all of the mandatory respondents' mills are, logically, located on the highways that run throughout the interior.[632] The respondents' mills in the southern interior and on the Alberta border are on highways that lead directly to those export markets.[633] While Canfor's mills in the southeastern corner of British Columbia are located in a mountainous region, the mills are located in an area with other mills, and the mill south of Fernie in Elko is positioned close to the U.S. border.[634] Tolko's four mills in the southern interior are located in a non-mountainous

[628] *See* Draft Results at 74.
[629] *See* Joint LER Comments at 19.
[630] *Id.*
[631] *Id.* at 20.
[632] *See* GBC Primary QNR Response at Exhibit LEP-1 at 103.
[633] *Id.*
[634] *Id.* at LEP-6 and Exhibit LEP-1 at 16 and 103.

region with multiple highway connections both to the U.S. and to other parts of the interior, and are in a location with a number of large mills in the Okanagan region.[635] These maps also demonstrate that respondents have mills in the northern interior of British Columbia on highways that have direct links into Alberta.[636] Thus, contrary to the BC LER Parties' assertions, Commerce's Draft Results extensively engaged with record evidence demonstrating that it was economically feasible to export logs from the BC interior.

The BC LER Parties also challenge Commerce's inclusion of fees-in-lieu-of manufacturing, the length of the export permit and approval process, and EIPA penalties in its discussion of how the BC LER distorted log prices. While these are not factors that would necessarily lead to significant distortion on their own, these more minor impediments or portions of the overarching legal framework combine with the significant impacts of blocking and the economic feasibility of exports from the interior to form a policy that artificially increases the supply of logs in the province. Commerce continues to maintain that even if the Panel were to find that not all the factors discussed above demonstrate that the LER caused log suppliers to provide logs to BC consumers, Commerce's overall determination that the BC LER resulted in depressed log prices in the interior, which cites multiple factors, would still be based on substantial evidence.

Finally, the BC LER Parties argue that Commerce's analysis has focused on the province as a whole and has not addressed the Panel's instruction that its analysis must focus on the interior where the respondent companies are located.[637] Commerce disagrees with this contention, as Commerce has clearly demonstrated that record evidence supports a conclusion

[635] *Id.* at LEP-6 and Exhibit LEP-1 at 16 and 103.
[636] *Id.* at Exhibit LEP-1 at 103.
[637] *See* Joint LER Comments at 7 (citing Binational Panel Order at 88).

that blocking also occurs in the interior, that exports are viable from the interior, particularly from the tidewater and southern interior regions, that the respondents had multiple mills in the southern interior during the POI, and that the respondents all sourced timber during the POI from timbermarks from which it was economically feasible to export logs out of the province.[638]

In conclusion, the analytical framework Commerce employed in the *Final Determination* to determine the impact of the BC LER on the log market is consistent with, and thus not a departure from, its prior analyses of export restraints. Moreover, Commerce's analysis of the record evidence demonstrates that the BC LERs impacted log prices in the BC interior.

## V. FINAL RESULTS OF REDETERMINATION

Based on the analysis above, we have reconsidered our determination with respect to the mandatory respondents. We continue to find that because none of the respondents' overall subsidy rates moved to *de minimis*, it is not necessary for Commerce to incorporate the rates from the new subsidy allegations deferred to and examined in the first administrative review. As a result, we determine the countervailable subsidy rates to be:

| Producer/Exporter | Subsidy Rate (percent *ad valorem*) |
|---|---|
| Canfor | 12.49 |
| JDIL | 2.96 |
| Resolute | 13.90 |
| Tolko | 14.57 |
| West Fraser | 17.58 |
| All Others | 13.65 |

12/17/2024

X

Signed by: ABDELALI ELOUARADIA
Abdelali Elouaradia
Deputy Assistant Secretary
for Enforcement and Compliance

[638] *See* Draft Results at 72.