UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

C-122-854
Expedited Review
Public Document
E&C/OI: Team

DATE: April 17, 2017

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
For Enforcement and Compliance

FROM: Gary Taverman
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of Expedited Review of the Countervailing Duty Order on Supercalendered Paper from Canada

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I. SUMMARY

In this expedited review, the Department of Commerce (Department) determines that countervailable subsidies are being provided to Irving Paper Limited. The Department also determines that countervailable subsidies provided to Catalyst Paper Corporation are *de minimis.* Below is the complete list of issues in this expedited review for which we received comments from interested parties.

Issues:

Comment 1: The Correct *de minimis* Rate in an Expedited Review
Comment 2: Whether to Exclude or Revoke Catalyst from the Order
Comment 3: Whether the Powell River City Revitalization Area Tax Exemption Program Provided a Financial Contribution to Catalyst
Comment 4: Whether to Recognize the Change in Catalyst's Property Values in Calculating the Benefit of the Powell River City Revitalization Area Tax Exemption Program
Comment 5: Whether to use 2007-2009 or 2009 Alone to Measure the Benefit for the Powell River City Revitalization Area Tax Exemption Program
Comment 6: Whether to consider Catalyst's Former Properties as an Offset to the Benefit of the Powell River City Revitalization Area Tax Exemption Program
Comment 7: Whether to Consider Catalyst's One-Third Interest in the PRSC Limited Partnership in the Benefit Calculation of the Powell River City Revitalization Area Tax Exemption Program
Comment 8: Whether BC Hydro's Power Smart Industrial Energy Manager Program is *De Jure* or *De Facto* Specific

Comment 34: Sales Denominators for Benefits Received by Cross-owned Input Suppliers Must Include all Sales of the Downstream Product

II. BACKGROUND

A. Case History

On November 28, 2016, the Department published the *Preliminary Results* for this expedited review.[1] On November 28, 2016, the petitioner[2] requested a twelve-day extension to file case briefs and a fourteen-day extension to file rebuttal briefs.[3] On November 29, 2016, the Department granted a partial extension of 7 days of the deadlines to file case and rebuttal briefs.[4] The Department received timely case brief submissions from the Government of Canada (GOC); the Government of British Columbia (GBC); the Government of New Brunswick (GNB); Catalyst Paper Corporation, Catalyst Pulp and Paper Sales Inc. (CPPSI), Catalyst Paper (USA) Inc. and its affiliated companies (collectively, Catalyst); Irving Paper Limited (Irving), and the petitioner.[5] On January 6, 2017, the petitioner requested an extension of one week for the rebuttal brief deadline.[6] On January 9, 2017, the Department granted the extension request in full.[7] The Department received timely rebuttal briefs from the GOC, the GBC, the GNB, Catalyst, and the petitioner.[8] On January 18 and 19, 2017, Catalyst and Irving each claimed that the petitioner's rebuttal brief contained new affirmative arguments.[9] The petitioner responded to these claims on January 24, 2017.[10] The Department determined that the petitioner's rebuttal brief contained new affirmative arguments and requested that the petitioner re-submit their

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[1] *See Supercalendered Paper from Canada: Preliminary Results of Countervailing Duty Expedited Review*, 81 FR 85520 (November 28, 2016) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).
[2] Verso Corporation (the petitioner)
[3] *See* letter from the petitioner, "Expedited Review of Supercalendered Paper from Canada: Request for Extension to File Case and Rebuttal Briefs" (November 28, 2016).
[4] *See* letter from the Department, "Countervailing Duty Expedited Review: Supercalendered Paper from Canada" (November 29, 2016).
[5] *See* letter from the GOC, the GBC, and the GNB, "Supercalendered Paper from Canada: Joint Case Brief" (January 5, 2017) (Government Case Brief); *see also* letter from Catalyst, "Supercalendered Paper from Canada: Catalyst's Case Brief" (January 5, 2017) (Catalyst Case Brief); *see also* letter from Irving, "Supercalendered Paper from Canada: Case Brief" (January 5, 2017) (Irving Case Brief); *see also* letter from the petitioner, "Supercalendered Paper from Canada / Petitioner's Case Brief" (January 5, 2017) (Petitioner Case Brief).
[6] *See* letter from the petitioner, "Expedited Review of Supercalendered Paper from Canada: Request for Extension to File Rebuttal Brief" (January 6, 2017).
[7] *See* letter from the Department, "Supercalendered Paper from Canada: Requests for Extension of Time to File Rebuttal Briefs" (January 9, 2017).
[8] *See* letter from the GOC, the GBC, and the GNB, "Supercalendered Paper from Canada: Joint Rebuttal Brief" (January 17, 2017) (Government Rebuttal Brief); *see also* letter from Catalyst, "Supercalendered Paper from Canada: Catalyst's Rebuttal Brief" (January 17, 2017) (Catalyst Rebuttal Brief); *see also* memorandum to the file from the Department, "Countervailing Duty Expedited Review of Supercalendered Paper from Canada: Reject Document from ACCESS" (February 6, 2017).
[9] *See* letter from Catalyst, "Supercalendered Paper from Canada: Catalyst's Request to Reject Petitioner's Rebuttal Brief" (January 18, 2017); *see also* letter from Irving, "Supercalendered Paper from Canada: Request to Reject Petitioner's Rebuttal Brief" (January 19, 2017).
[10] *See* letter from the petitioner, "Expedited Review of Supercalendered Paper from Canada: Response To Requests from Irving and Catalyst to Reject Petitioner's Rebuttal Brief" (January 24, 2017).

rebuttal brief, with the new arguments redacted.[11] Accordingly, the petitioner re-submitted their rebuttal brief on February 8, 2017.[12]

The Department received timely requests for hearings from the GOC; the GBC; the GNB; Catalyst, Irving, and the petitioner.[13] On January 23, 2017, the petitioner withdrew their request for a hearing.[14] As the GOC; the GBC; the GNB; Catalyst, and Irving's request only stipulated participation in any requested hearing, the Department did not hold a public hearing.

On February 6, 2017, the Department extended the deadline for the final results of the expedited review from February 16, 2017, to April 17, 2017 as the review was extremely complicated and additional time was needed to fully analyze the issues raised by parties.[15]

B. Period of Review

The period of review (POR) is January 1, 2014, through December 31, 2014.

III. SCOPE OF THE ORDER

The merchandise covered by this order is supercalendered paper (SC paper). SC paper is uncoated paper that has undergone a calendering process in which the base sheet, made of pulp and filler (typically, but not limited to, clay, talc, or other mineral additive), is processed through a set of supercalenders, a supercalender, or a soft nip calender operation.[16]

The scope of this order covers all SC paper regardless of basis weight, brightness, opacity, smoothness, or grade, and whether in rolls or in sheets. Further, the scope covers all SC paper that meets the scope definition regardless of the type of pulp fiber or filler material used to produce the paper.

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[11] *See* memorandum to the file from the Department, "Countervailing Duty Expedited Review of Supercalendered Paper from Canada: Reject Document from ACCESS" (February 6, 2017); *see also* letter from the Department, "Countervailing Duty Expedited Review of Supercalendered Paper from Canada: Request to Reject Rebuttal Brief" (February 6, 2017).

[12] *See* letter from the petitioner, "Supercalendered Paper from Canada / Petitioner's Rebuttal Brief" (February 8, 2017) (Petitioner Rebuttal Brief).

[13] *See* letter from the GOC, the GBC and the GNB, "Supercalendered Paper from Canada Expedited Review of Countervailing Duty Order; Conditional Request for Hearing" (December 28, 2016); *see also* letter from Catalyst, "Supercalendered Paper from Canada: Catalyst's Hearing Request" (December 23, 2016); *see also* letter from Irving, "Supercalendered Paper from Canada: Request for Hearing" (December 23, 2016); *see also* letter from the petitioner, "Supercalendered Paper From Canada: Petitioner's Request For A Hearing" (December 28, 2016).

[14] *See* letter from the petitioner, "Supercalendered Paper from Canada: Petitioner's Withdrawal of Request for a Hearing" (January 23, 2017).

[15] *See* memorandum to Gary Taverman, "Supercalendered Paper from Canada: Extension of Deadline for Final Results of Countervailing Duty Expedited Review" (February 6, 2017).

[16] Supercalendering and soft nip calendering processing, in conjunction with the mineral filler contained in the base paper, are performed to enhance the surface characteristics of the paper by imparting a smooth and glossy printing surface. Supercalendering and soft nip calendering also increase the density of the base paper.

Specifically excluded from the scope are imports of paper printed with final content of printed text or graphics.

Subject merchandise primarily enters under Harmonized Tariff Schedule of the United States (HTSUS) subheading 4802.61.3035, but may also enter under subheadings 4802.61.3010, 4802.62.3000, 4802.62.6020, and 4802.69.3000. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

IV. SUBSIDIES VALUATION

A. Allocation Period

The Department has made no changes to, and interested parties raised no issues in their case briefs regarding, the allocation period or the allocation methodology used in the *Preliminary Results*. For a description of the allocation period and the methodology used for these final results, *see* the *Preliminary Results*.[17]

B. Attribution of Subsidies

Irving submitted comments on the attribution of subsidies to two cross-owned input suppliers J.D. Irving, Limited (JDIL) and Irving Pulp & Paper, Limited (IPP). As discussed in Comment 34, the Department has not changed its attribution methodology. Accordingly, the Department has made no changes to the attribution of subsidies with respect to Irving and its cross-owned input suppliers. For descriptions of the methodologies used for these final results, see the *Preliminary Results.*[18]

C. Denominators

In accordance with 19 CFR 351.525(b)(1)-(5), the Department considers the basis for the respondents' receipt of benefits under each program when attributing subsidies, *e.g.*, to the respondents' export or total sales. We have identified the denominator we used to calculate the countervailable subsidy rate for each program, as discussed below and in the calculation memoranda prepared for these final results.[19]

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[17] *See* PDM at 7 – 8.
[18] *Id*. at 4 – 6.
[19] *See* Department Memorandum, "Final Negative Countervailing Duty Expedited Review Results: Supercalendered Paper from Canada: Final Results Calculations for Catalyst Paper," (Catalyst Final Calculation Memorandum) dated concurrently with these final results; *see also* Department Memorandum, "Preliminary Affirmative Countervailing Duty Expedited Review Results: Supercalendered Paper from Canada: Final Results Calculations for Irving Paper Limited," (Irving Final Calculation Memorandum) dated concurrently with these final results.

D. Loan Interest Rate Benchmarks and Discount Rates

The Department has made no changes to, and interested parties raised no issues in their case briefs regarding, loan interest rate benchmarks and discount rates.[20] For a description of the loan benchmark rates and the discount rates used for these final results, *see* the *Preliminary Results* and applicable calculation memorandum.[21]

V. ANALYSIS OF PROGRAMS

A. Programs Determined To Be Countervailable

1. Financial Assistance to Industry Program

The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[22]

Irving: 0.07 percent *ad valorem*

2. The Federal Pulp and Paper Green Transformation Program

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[23] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[24]

Catalyst: 0.18 percent *ad valorem*
Irving: 0.58 percent *ad valorem*

3. Grants from the Total Development Fund to J.D. Irving

The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[25]

Irving: 0.10 percent *ad valorem*

4. Northern New Brunswick Economic Development and Innovation Fund

The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[26]

Irving: 0.04 percent *ad valorem*

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[20] *See* PDM at 10 – 11.
[21] *Id*. and Catalyst Final Calculation Memorandum and Irving Final Calculation Memorandum.
[22] *See* PDM at 11 – 12.
[23] *See* Comment 30.
[24] *See* PDM at 12 – 14.
[25] *See* PDM at 14 – 15.
[26] *See* PDM at 16 – 17.

5. Workforce Expansion – One Job Pledge

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[27] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[28]

Irving: 0.03 percent *ad valorem*

6. BC Hydro Power Smart Program

a. TMP Program

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[29] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[30]

Catalyst: 0.05 percent *ad valorem*

b. Industrial Energy Managers Program

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[31] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[32]

Catalyst: 0.02 percent *ad valorem*

7. Atlantic Investment Tax Credit

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[33] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[34]

Irving: 2.00 percent *ad valorem*

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[27] *See* Comment 28.
[28] *See* PDM at 17 – 18.
[29] *See* Comments 9 and 10.
[30] *See* PDM at 18 – 19.
[31] *See* Comment 8.
[32] *See* PDM at 19 – 21.
[33] *See* Comment 33.
[34] *See* PDM at 20.

8. New Brunswick Large Industrial Renewable Energy Purchase Program

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[35] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[36]

Irving: 1.58 percent *ad valorem*

9. New Brunswick Provision of Stumpage to Irving for Less than Adequate Remuneration

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[37] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[38]

Irving: 0.23 percent *ad valorem*

10. New Brunswick Provision of Silviculture Grants

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[39] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[40]

Irving: 0.35 percent *ad valorem*

11. License Management Fee

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[41] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[42]

Irving: 0.40 percent *ad valorem*

[35] *See* Comment 27.
[36] *See* PDM at 22 - 26.
[37] *See* Comments 23 – 26..
[38] *See* PDM at 12 – 14.
[39] *See* Comment 31.
[40] *See* PDM at 26 – 27.
[41] *See* Comment 31.
[42] *See* PDM at 27 – 28.

12. British Columbia Ban on Exports of Logs and Wood Residue

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[43] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[44]

Catalyst: 0.56 percent *ad valorem*

13. Powell River City Revitalization Tax Exemption Program

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[45] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[46]

Catalyst: 0.13 percent *ad valorem*

14. Accelerated Capital Cost Allowance for Class 29 Assets

Interested parties submitted comments in their case briefs regarding this program which are addressed below.[47] As discussed in Comment 34, the Department made changes to its *Preliminary Results* with regard to the specificity analysis and methodology used to calculate the subsidies rates for this program.

Irving: 0.40 percent *ad valorem*

15. New Brunswick Research and Development Tax Credit (NB R&D Tax Credit)

Interested parties submitted comments in their case briefs regarding this program, which are addressed below.[48] The Department has made no changes to its *Preliminary Results* with regard to the analysis and methodology used to calculate the subsidies rates for this program.[49]

Irving: 0.09 percent *ad valorem*

[43] *See* Comments 11 - 22.
[44] *See* PDM at 28 – 33.
[45] *See* Comments 3 - 7.
[46] *See* PDM at 33 – 34.
[47] *See* Comment 32.
[48] *See* Comment 29.
[49] *See* PDM at 35.

B. Programs Determined to Confer Non-measurable Benefits During the POR

The Department has made no changes to its preliminary determination that the following programs do not confer a measurable benefit. For the descriptions and analysis used for these programs, *see* the *Preliminary Results*.[50]

1. **ACOA – Atlantic Innovation Fund**
2. **ACOA – Business Development Program**
3. **GOC NSERC Industrial Undergraduate Student Research Awards (IUSRA)**
4. **SERG International**
5. **Canada Summer Jobs Program**
6. **Apprenticeship Job Creation Tax Credit**
7. **Grants to JDIL**
8. **British Columbia Municipality Payments to Catalyst**
9. **EcoEnergy Efficiency for Industry**

C. Programs Determined to be Not Used during the POR

The Department has made no changes to its preliminary determination that the following programs were not used. For the descriptions and analysis used for these programs, *see* the *Preliminary Results*.[51]

1. **GOC National Research Council NRC Industrial Research Assistance Program**
2. **GOC Natural Sciences and Engineering Research Council (NSERC) Industrial R&D Fellowship**
3. **Investment in Forest Industry Transformation Program (IFIT)**
4. **Forest Workforce Training Grants**
5. **New Brunswick Climate Action Fund Grants**
6. **Industrial Energy Efficiency Project Implementation Stimulus Program (IEEPIS)**
7. **Efficiency New Brunswick Industrial Program**
8. **Efficiency New Brunswick Commercial Energy Smart Program**
9. **Nova Scotia Manufacturing and Processing Investment Credit**
10. **Province of Nova Scotia: Efficiency Nova Scotia**
11. **BC Hydro Power Smart Program – Commercial Lighting Improvement**
12. **Environmental Testing at Crofton Mill**
13. **Port Alberni Property and Road Agreement**
14. **Transport Canada Marine Security Contribution Program**
15. **BC Hydro Power Smart Program – E-Points**
16. **BC Hydro Power Smart Program – Payments for Studies and Projects**
17. **BC Hydro Power Smart Program – Load Curtailment**

The respondent companies reported that they did not use the following programs during the POR or over the AUL period:

[50] *See* PDM at 35 – 38.
[51] *See* PDM at 39 – 43.

18. British Columbia Provision of Stumpage for LTAR
19. British Columbia Provision of Wood Products for LTAR
20. Scientific Research and Experimental Development Tax Credit (SR&ED)
21. NB Energy Rebate Fund/ NB High Energy Use Property Tax Rebate
22. Province of New Brunswick Forestry Industry Remission Program
23. New Brunswick Research and Development Subsidies
24. The Federal Transformative Technologies Pilot Scale Demonstrative Program
25. Retention of Accumulated Tax Loss to Carry Forward
26. BC Ministry of Forests, Mines and Land Program
27. BC Bioenergy Network Grants
28. British Columbia Training Tax Credits
29. GNS Grants from the Hot Idle and Forestry Infrastructure Fund
30. GNS Grants for the Promotion of Forest Management and Sustainable Harvesting
31. GNS Provision of Funds for Worker Training
32. GNS Loan for Working Capital
33. GNS Loan to Improve Productivity and Efficiency
34. Richmond County (NS) Promissory Note for Property Taxes
35. Pacific West Commercial Corporation (PWCC) Indemnity Loan
36. GNS Preferential Electricity Rate
37. GNS Subsidized Biomass Plant Supplying Steam
38. GNS Provision of Stumpage and Biomass Material for LTAR
39. GNS Provision of Land for MTAR
40. Richmond County (NS) Property Tax Reduction
41. Ontario Forest Sector Prosperity Fund
42. Ontario Northern Industrial Electricity Rate Program
43. Government of Ontario Loan Guarantee Program
44. Government of Quebec Support for the Forest Industry Program

D. Program Determined to be Not Countervailable

Foreign Business Income Tax Credit

The Department has made no changes in the analysis of this program from the *Preliminarily Results*.[52] We received no comments from interested parties on this program.

E. Program for Which the Decision is Being Deferred

Gasoline and Fuel Tax Exemptions and Refunds

As discussed in the *Preliminary Results*, insufficient time remained during this expedited review to consider this program.[53] In the *Preliminary Results,* we stated that under 19 CFR 351.311(c)(2), we are deferring consideration of this program until a subsequent administrative review, if any. No parties commented on the Department's decision to defer.

[52] *See* PDM at 44.
[53] *See* PDM at 44.

VI. ANALYSIS OF COMMENTS

Comment 1: The Correct *de minimis* Rate in an Expedited Review

The Petitioner's Arguments:

- According to 19 CFR 351.106(b), the one percent *de minimis* threshold applies only to preliminary or final countervailing duty determinations as provided for in sections 703(b)(4), and in 705(a)(3) of the Act. For reviews and other determinations, the applicable *de minimis* rate is 0.5 percent.

Catalyst's Rebuttal Arguments:

- The Department's application of a one percent *de minimis* threshold in an expedited review is in accordance with the statute and regulations, as well as the Department's practice.
- The regulations, at 19 CFR 351.204(e)(1), cite to sections 705(a) and 706(a) of the Act. Section 705(a) defines *de minimis* based on the threshold established under section 703(b)(4) of the Act, that is, one percent. The Department's authority to exclude an exporter from an order in an expedited review is tied to its authority to exclude exporters in an investigation, and thus the applicable *de minimis* threshold for both an investigation and an expedited review is one percent.
- The same procedural principles and standards are applied in an investigation and an expedited review. The periods of investigation and review are the same,[54] and the final determination and results are the basis only for determining cash deposit rates,[55] not for determining assessment rates. In effect, the purpose of an expedited review is to individually examine a respondent as if that respondent were being investigated in the original investigation. Given that the same standards apply in investigations and expedited reviews, the same *de minimis* threshold should also apply.
- The one percent *de minimis* threshold is in accordance with the Department's practice. In *Lumber IV*,[56] the Department excluded several companies from the CVD order after applying a one percent *de minimis* threshold in the expedited review.[57]
- The petitioner relies on 19 CFR 351.106, which simply restates the statutorily defined *de minimis* thresholds for investigations and reviews. The petitioner therefore argues that because an expedited review has the word "review" in the title, the *de minimis* threshold for review applies.

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[54] *See* 19 CFR 351.214(k)(3)(i).

[55] *See* 19 CFR 351.214(k)(3)(iii); 19 CFR 351.210(d) & 211(a).

[56] *Lumber IV* refers, generally, to the countervailing duty order on certain softwood lumber products and subsequent segments in softwood lumber proceedings (*Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber, 67 FR 36070 (May 22, 2002)).* This order was rescinded in 2006 *(Notice of Rescission of Countervailing Duty Reviews and Revocation of Countervailing Duty Order: Certain Softwood Lumber Products From Canada Products From Canada*, 71 FR 61714 (October 19, 2006)). Citations referring to *Lumber IV* in this memorandum are to the softwood lumber proceeding.

[57] *See Final Results of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products from Canada*, 68 FR 24436, 24438 (May 7, 2003) (*Lumber Expedited Review*); *see also Final Results, Reinstatement, Partial Rescission of Countervailing Duty Expedited Reviews, and Company Exclusions: Certain Softwood Lumber Products from Canada*, 69 FR 10982, 10984 (March 9, 2004).

Department's Position:

The Department is conducting this expedited review in accordance with 19 CFR 351.214(k), which is the starting point for determining the correct *de minimis* threshold. In 19 CFR 351.214(k)(3)(iv), the Department's regulations state that "{t}he Secretary may exclude from the countervailing duty order in question any exporter for which the Secretary determines an individual net countervailable subsidy rate of zero or *de minimis* (*see* §351.204(e)(1)) . . . ." This regulation directs us to 19 CFR 351.204(e)(1), which states the basis under which *de minimis* exclusion may be met. It states:

> {t}he Secretary will exclude from an affirmative final determination under section 705(a) . . . of the Act or an order under section 706(a) . . . of the Act, any exporter or producer for which the Secretary determines an . . . individual net countervailable subsidy rate of zero or *de minimis*.[58]

Section 705(a)(3) of the Act stipulates that "{i}n making a determination under this subsection, the administering authority shall disregard any countervailable subsidy that is *de minimis* as defined in section 703(b)(4)." Finally, section 703(b)(4)(A) of the Act states:

> {i}n making a determination under this subsection, the administering authority shall disregard any de minimis countervailable subsidy. For purposes of the preceding sentence, a countervailable subsidy is de minimis if the administering authority determines that the aggregate of the net countervailable subsidies is less than 1 percent ad valorem or the equivalent specific rate for the subject merchandise.

Therefore, we agree with Catalyst that section 703(b)(4)(A) of the Act establishes the *de minimis* threshold in an expedited review as one percent *ad valorem*. Moreover, in other expedited reviews, we have applied one percent as the *de minimis* threshold.[59]

Comment 2: Whether to Exclude or Revoke Catalyst from the Order

The Petitioner's Arguments:

- Section 751(d)(l) and (2) of the Act provides that revocation of an order or finding can be made in three specific circumstances: (1) an administrative review under section 751, (2) a changed circumstances review, or (3) a sunset review. An expedited review conducted under 19 CFR 351.214(k) does not fall into any of these three categories.
- The regulation, which purports to permit the revocation of a CVD order with respect to certain exporters following the imposition of an order, is beyond the scope of the statute and is inconsistent with Article 19.3 of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement).
- Because the statute enumerates specific instances when a revocation may occur, it therefore prohibits revocation in instances other than those explicitly enumerated. The

[58] *See* 19 CFR 351.204(e)(1).
[59] *See Lumber Expedited Review* at 24438; *Final Results of Countervailing Duty Expedited Review: Hard Red Spring Wheat from Canada*, 70 FR 3679-3680 (January 26, 2005) (*Spring Wheat Expedited Review*).

Federal Circuit has applied this canon, *expressio unius est exclusio alterius*, when interpreting the Department's regulations. For example, in *Archuleta v. Hopper*, the Court stated, "when Congress delineated the types of actions that are outside the scope of 7512, it did not include an exemption for suitability removals. Applying the canon of *expressio unius est exclusio alterius*, no exceptions should be read into § 7512 beyond the five that Congress specifically created."[60]

- Based on 19 CFR 351.222(c)(l), an order may be revoked based on the absence of a subsidy when specific criteria are fulfilled.
- The obligations established under Article 19.3 of the *SCM Agreement* require the Department only to set the cash deposit rate to zero for an exporter found to have received countervailable subsidies at a zero or *de minimis* rate exporter. The Department is not required to revoke the order for such companies.
- Even if the Department's regulation were consistent with the statute and SCM Agreement, it does not require the Department to revoke an order with respect to *de minimis* rate companies in expedited reviews; revocation is discretionary, not mandatory.
- At 19 CFR 351.204(e), the "exclusion" of an exporter from a CVD order can only occur immediately following the completion of a countervailing duty investigation, and 19 CFR 351.214(k)(1) states an exporter must request a review within 30 days of the date of publication in the *Federal Register* of the CVD Order. Once the CVD order is in effect and an exporter did not qualify for exclusion, the regulation cannot provide the authority to revoke the order with respect to such an exporter.
- Catalyst received benefits from the BC Hydro Power Smart Program for TMP producers that will continue to provide significant benefits beyond the period of review; the Department should not eliminate a company from an order knowing that the company had additional subsidies that would be forthcoming from the British Columbia government in the first administrative review period.

Catalyst's Rebuttal Arguments:

- The Department's regulations at 19 CFR 351.214(k)(3)(iv) provide that, in an expedited review, the Department may exclude from an order any exporter for which the Department calculates a zero or *de minimis* net countervailable subsidy rate.
- In 19 CFR 351.214(k)(3)(iv), there is a cross-reference to 19 CFR 351.204(e)(1), which authorizes the Department to exclude such an exporter in an investigation.
- Exclusion of Catalyst from the SC paper CVD order upon finding a *de minimis* final subsidy rate would be in accordance with the Department's past practice.[61]
- The petitioner confuses and conflates exclusion and revocation. In this instance, the Department is determining whether an exporter, namely Catalyst, should be excluded from the order.
- The regulations authorize the Department to exclude an exporter from an order even after an order is in effect, and they do not set a time limit for the Department to do so.[62]

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[60] *See Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015),

[61] *See Lumber Expedited Review* at 24438; *see also Final Results, Reinstatement, Partial Rescission of Countervailing Duty Expedited Reviews, and Company Exclusions: Certain Softwood Lumber Products from Canada*, 69 FR 10982, 10984 (March 9, 2004); *see also Spring Wheat Expedited Review,* at 3680.

[62] *See* 19 CFR 351.204(e)(1).

- Unverified alleged subsidy benefits subsequent to the POI or POR provide no basis for the Department to deviate from its practice of excluding *de minimis* rate exporters from a CVD order in an expedited review. The possibility of ongoing subsidy benefits did not prevent the Department from excluding *de minimis* rate exporters from CVD orders in previous expedited reviews.

The GBC's Rebuttal Arguments:

- Unlike an administrative review or a changed circumstances review, an expedited review is one in which the Department uses the same period as it used in the initial investigation and determines a cash deposit rate, not an assessment rate, just as it did for each respondent in the initial investigation.[63] It follows that the terms on which a company can be excluded from an order based on the results of an expedited review are the same as the terms for excluding a company in the underlying investigation.
- The regulations governing expedited reviews reinforce the connection between the investigation and expedited reviews. In particular, 19 CFR 351.214(k)(3)(iv) provides: "{t}he Secretary may exclude from the countervailing duty order in question any exporter for which the Secretary determines an individual net countervailable subsidy rate of zero or *de minimis* (see 19 CFR 351.204(e)(1)), provided that the Secretary has verified the information on which the exclusion is based." The section references the exclusions provision applicable to the initial investigation, not provisions applicable to other reviews.
- In the 2002 final affirmative determination of *Lumber IV*, the Department addressed expedited review exclusions and stated: "where we find in these {expedited} reviews that a company's rate during the period of investigation was zero or *de minimis*, we will exclude the company from the order."[64]
- In the *Spring Wheat Expedited Review*,[65] the Department excluded one company from the CVD order because the calculated individual subsidy rate for this company was zero.
- In the *Initiation Notice*, the Department made clear that "this expedited review is intended to establish individual cash deposit rates for Catalyst and Irving, or to exclude from the countervailing duty order a company for which the final results of review are zero or *de minimis*, as provided in 19 CFR 351.214(k)(3)(iv)."[66]
- The petitioner cites to 751(d)(1) and (2) of the Tariff Act and 19 CFR 351.222(c)(1) (entitled "Revocation or termination based on absence of countervailable subsidy") to argue that the criteria for revocation of an order have not been fulfilled.[67] However, a company-specific exclusion is not the same thing as a revocation of an order or finding.

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[63] *See* 19 CFR 351.214(k)(3)(i), (iii).

[64] *See Final Results and Partial Rescission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products from Canada*, 67 FR 67388 (November 5, 2002) (*Softwood Lumber from Canada Expedited Review Final Results*), and accompanying Issues and Decision Memorandum at 5.

[65] *See Spring Wheat Expedited Review,* at 3680.

[66] *See Supercalendered Paper from Canada: Initiation of Expedited Review of the Countervailing Duty Order*, 81 FR 6506, 6507 (February 8, 2016); *see also Certain Corrosion-Resistant Steel Products from the Republic of Korea: Initiation of Expedited Review of the Countervailing Duty Order*, 81 FR 68404 (October 4, 2016).

[67] *See* letter from the petitioner, "Supercalendered Paper from Canada / Petitioner's Case Brief" (January 5, 2017) at 44.

- Regarding the *Lumber IV* expedited review, the petitioner asserted that: "{e}xcluding a company from the CVD order is a final action equivalent to revocation of the order with respect to that company." The Department rejected this reasoning and stated, "the Department granted exclusions based upon findings of zero or *de minimis* subsidy rates: we continue to apply that principle to exporters subject to these reviews."[68]
- The petitioner's argument that 19 CFR 351.204(e) provides that the exclusion of an exporter from a CVD order can only occur immediately following the conclusion of a countervailing duty investigation is also irrelevant.[69] To reiterate, 19 CFR 351.214(k)(3)(iv), discussed above, explicitly contemplates that companies can be excluded after the order as a result of an expedited review. Thus, section 351.204(e) says nothing about the Department's authority to exclude companies as a result of an expedited review and is therefore of no consequence.
- The purported "intent" of a statutory or regulatory provision, or an article of the SCM Agreement, cannot override the clear language of the regulation. Section 351.214(k)(3)(iv) clearly directs the Department to exclude companies determined to have zero or *de minimis* rates in an expedited review from the scope of an order.
- The regulatory language of section 351.214(k)(3)(iv) in fact is not inconsistent with Article 19.3 of the SCM Agreement. The language was included in the regulations to implement Article 19.3.
- The petitioner ignores the provisions of Article 11.9 of the SCM Agreement, which requires immediate termination in cases where the amount of a subsidy is *de minimis*.
- When the Department has verified respondents, revocation of *de minimis* rate exporters is mandatory, not discretionary. The preamble to section 351.214(k)(3)(iv) states: "because the Department will be reviewing the original period of investigation, we have provided in paragraph (k)(3)(iv) for the exclusion from a CVD order of a firm for which the Secretary determines an individual countervailable subsidy rate of zero or *de minimis*. However, the Secretary will not exclude an exporter unless the information on which the exclusion is based has been verified."[70] Again, this language makes clear that the Department will exclude a company in an expedited review proceeding just as it would in an investigation, if, on verification of the information, the final results show a countervailable subsidy rate of zero or *de minimis*.
- The petitioner cites to 19 CFR 351.106, which covers both investigations and reviews, to support its position that an expedited review falls in the "reviews and other determinations" category rather than in the investigations category. In doing so, the petitioner ignores the fact that an expedited review covers the same time period as does an investigation and determines a cash deposit rate, not an assessment rate, unlike an administrative review.

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[68] *See Softwood Lumber from Canada Expedited Review Final Results*, at 5.
[69] *See* Petitioner Case Brief at 39.
[70] *See Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27322 (May 19, 1997) (*AD/CVD Preamble*) (Preamble to Section 351.214(k)).

- In *Lumber IV*, the Department excluded from the CVD order three exporters because their rates were "less than one percent *ad valorem*, which is *de minimis*."[71]
- Even if Catalyst received non-*de minimis* countervailable benefits after the POR, that would not be a basis for not excluding Catalyst from the CVD order. The petitioner's speculation as to post-POR benefits that Catalyst may have received,[72] and which the Department properly did not verify, is irrelevant as a matter of law.
- The Department explained in promulgating its CVD regulations: "{i}t has been our longstanding practice to impose (or not to impose) a CVD order based exclusively on the subsidy rate in effect during the period of investigation. In *Pipe and Tube from Malaysia*, where the {POI} rate was zero, we rendered a negative determination, even though we knew other benefits existed after the {POI}."[73]

Department's Position:

The petitioner misunderstands and conflates revocation and exclusion. For example, the petitioner relies on statutory and regulatory provisions regarding the circumstances under which the Department can revoke an order, and argues that these provisions do not include the final results of an expedited review in which the Department finds that an exporter received zero or *de minimis* subsidies.

The *AD/CVD Preamble* clearly states: "because the Department will be reviewing the original period of investigation, we have provided in paragraph {352.214}(k)(3)(iv) for the exclusion from a CVD order of a firm for which the Secretary determines an individual countervailable subsidy rate of zero or *de minimis*. However, the Secretary will not exclude an exporter unless the information on which the exclusion is based has been verified."[74] The purpose of the CVD expedited review is to allow an exporter that was not individually examined in a CVD investigation to have the opportunity to be individually examined for purposes of establishing a cash deposit rate based on that exporter's subsidy behavior. Thus, an expedited review is unlike an administrative review, the purpose of which is to calculate a countervailable subsidy rate for the final assessment of duties. The purpose of an expedited review is therefore identical to the purpose of an investigation: to establish a cash deposit rate.[75] In an investigation, when a company is found to have a zero or *de minimis* countervailable subsidy rate, that company is excluded from the order.[76] Under 19 CFR 351.214(k)(3)(iv), the Department may exclude "from the countervailing duty order in question any exporter for which the Secretary determines an

[71] *See Final Results, Reinstatement, Partial Rescission of Countervailing Duty Expedited Reviews, and Company Exclusions: Certain Softwood Lumber Products from Canada*, 69 FR 10982-10984 (March 9, 2004) (one of the excluded companies had a rate between 0.5 and 1 percent).
[72] *See* letter from the petitioner, "Supercalendered Paper from Canada / Petitioner's Case Brief" (January 5, 2017) at 42-44.
[73] *See Countervailing Duties: Final Rule*, 63 FR 65348, 65404 (November 28, 1998) (*Preamble*) (citing *Standard Pipe, Line Pipe, Light-Walled Rectangular Tubing and Heavy-Walled Rectangular Tubing from Malaysia*, 53 FR 46904, 46906 (November 21, 1988)).
[74] *See AD/CVD Preamble* 62 FR at 27321.
[75] *See Softwood Lumber from Canada Expedited Review Final Results*, at Comment 1.
[76] *See*, *e.g.*, *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products From the Republic of Korea: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 81 FR 35310 (June 2, 2016) and *Certain Corrosion-Resistant Steel Products From India, Italy, Republic of Korea and the People's Republic of China: Countervailing Duty Order*, 81 FR 48387 (July 25, 2016).

individual net countervailable subsidy rate of zero or *de minimis* (see §351.204(e)(1))." As discussed in Comment 1, under 19 CFR 351.204(e)(1), the *de minimis* threshold is one percent.

The petitioner claims that 19 CFR 351.204(e) permits the exclusion of an exporter from a CVD order to occur only immediately following the conclusion of a CVD investigation. However, this regulation does not specify a time limit for the exclusion of the exporter following the conclusion of a CVD investigation; therefore, there is no basis in the language of the regulation to support the petitioner's claim that exclusion must occur "immediately" following the conclusion of the CVD investigation. Additionally, the petitioner claims that 19 CFR 351.214(k)(1) – requiring an exporter to request a review within 30 days of the date of publication in the *Federal Register* of the CVD order –, cannot permit exclusion because the regulation cannot provide the authority to revoke the order. However, the petitioner starts from the incorrect premise, applying standards for revocation of an order once it is in effect to provisions of the regulation that clearly provide for the exclusion of a company from the order.[77] This CVD order on SC paper from Canada went into effect on December 9, 2015, and Catalyst and Irving requested an expedited review within the 30-day period specified by 19 CFR 351.214(k)(1).[78] Furthermore, 19 CFR 351.214(k)(3)(iv) conditions the exclusion of a company participating in an expedited review from the order on the conduct of verification of the information leading to the zero or *de minimis* finding.

Finally, we reject the petitioner's assertion that the Department cannot exclude Catalyst from the order because Catalyst purportedly received subsidy benefits after the period of review (POR). First, it has not been the Department's practice to speculate about subsidies after the POR.[79] It is not unusual, when the Department conducts an investigation (which an expedited review is designed to mirror), to receive allegations that a respondent company has received benefits prior to, during, and after the period of investigation.[80] Nevertheless, the Department's final determinations in investigations (and the final results in this expedited review) are appropriately based on a company's receipt or allocation of countervailable subsidies *during* the period of investigation. For example, on *Polyethylene Terephthalate Film, Sheet, and Strip from India*, the

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[77] *See* 19 CFR 351.214(k)(3)(iv).

[78] *See Supercalendered Paper from Canada: Countervailing Duty Order*, 80 FR 76668 (December 11, 2015); *see also* letter from Catalyst, "Supercalendered Paper from Canada: Catalyst's Request for Expedited Review" (December 15, 2015).

[79] *See Certain Steel Nails From the Sultanate of Oman: Final Negative Countervailing Duty Determination*, 80 FR 28958 (May 20, 2015) and accompanying Issues and Decision Memorandum at Comment 6 (citing *Preamble*, 63 FR at 65404 (citing *Final Negative Countervailing Duty Determinations; Standard Pipe, Line Pipe, Light-walled Rectangular Tubing and Heavy-walled Rectangular Tubing From Malaysia*, 53 FR 46904, 46906 (November 21, 1988) ("It has been our longstanding practice to impose (or not to impose) a CVD order based exclusively on the subsidy rate in effect during the period of investigation. In *Pipe and Tube from Malaysia*, where the period of investigation rate was zero, we rendered a negative determination, even though we knew other benefits existed after the period of investigation.").

[80] *See Final Results and Partial Recission of Countervailing Duty Expedited Reviews: Certain Softwood Lumber Products From Canada*, 67 FR 67388 (November 5, 2002) and accompanying Issues and Decision Memorandum at Comment 1.

Department verified that a company applied for and received a subsidy after the POR.[81] However, the Department did not calculate a subsidy rate because the program did not provide a benefit during, but rather after the POR. Regarding subsidies received after a POI or POR, the Department has stated:

> It has been our longstanding practice to impose (or not to impose) a CVD order based exclusively on the subsidy rate in effect during the period of investigation. In *Pipe and Tube from Malaysia*, where the period of investigation rate was zero, we rendered a negative determination, even though we knew other benefits existed after the period of investigation.[82]

In this expedited review, we do not find that the petitioner has provided information that compels the Department to exercise its discretion not to exclude a company for which we have calculated a countervailable subsidy rate that is zero or *de minimis*. Thus, because the final results of this expedited review indicate a countervailable subsidy rate for Catalyst that is 0.94 percent *ad valorem*, a rate that is *de minimis*, we have determined that it is appropriate to exclude Catalyst from the CVD order on supercalendered paper from Canada.

Comment 3: Whether the Powell River City Revitalization Area Tax Exemption Program Provided a Financial Contribution to Catalyst

The GBC's Arguments:

- There was no exemption of Catalyst's property tax liability during 2014, nor did the City of Powell River forego any property tax revenue because Catalyst was assessed (and paid) the full amount required by the City of Powell River's tax rate bylaw for 2014.
- The Department ignored precedent when it previously considered whether Port Hawkesbury Paper (Port Hawkesbury) received a countervailable subsidy when Richmond County, Nova Scotia, through a 2012 tax agreement with the company, reduced the annual amount of municipal property taxes to be paid by Port Hawkesbury from $2.5 million to $1.3 million for several years including 2014.

Catalyst's Arguments:

- The Department did not appropriately evaluate whether the City of Powell River forewent revenue that would have been "otherwise due" under section 771(5)(D)(ii) of the Act.

The Petitioner's Rebuttal Arguments:

- The provision of a tax exemption to Catalyst was a financial contribution. Catalyst received a reduction of its property taxes as a result of an Agreement in Principle (AIP), dated April 27, 2012, and amended on October 16, 2014, in which the city agreed to

[81] *See Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 7708 (February 11, 2008) and the accompanying Issues and Decision Memorandum at 18.

[82] *See Countervailing Duties: Final Rule*, 63 FR 65328, 65404 (November 25, 1998) (citing *Standard Pipe, Line Pipe, Light-Walled Rectangular Tubing and Heavy-Walled Rectangular Tubing from Malaysia*, 53 FR 46904, 46906 (November 21, 1988)).

reduce and maintain Catalyst's property taxes at $2.25 million annually for the period 2012-2014.

- All three bylaws refer to the program as a "tax exemption."
- That Catalyst paid the amount that was established by the tax exemption bylaw (which created the exemption and resulted in the city foregoing revenue that would otherwise have been due) does not negate the "financial contribution."
- The GBC and Catalyst point to a municipal tax program in the SC Paper investigation. However, the facts there are quite different from the facts here. The Department found that there was no revenue foregone or otherwise due, and thus no financial contribution, because the property tax that Port Hawkesbury paid during the POI under the amended tax agreement with Richmond County exceeded the property tax that Port Hawkesbury would otherwise have paid based on the normal assessment rate in effect in Richmond County.

The GBC's Rebuttal Arguments:

- There was no decision by the City of Powell River to relieve or reduce Catalyst's tax liability during the POR. The City of Powell River did not forego or fail to collect "revenue that is otherwise due." Therefore, there was no financial contribution. Rather, application of the City of Powell River's established property tax rates for the POR resulted in tax liability for Catalyst at a level consistent with the negotiated arrangement between the City and Catalyst, and Catalyst was assessed and paid full the amount of property tax it was required to pay during 2014.

Department's Position:

As described in the *Preliminary Results*,[83] the City of Powell River passed a bylaw in 2010 establishing "a revitalization tax exemption program" within a revitalization area that only involved Catalyst properties. The city and Catalyst signed agreements in 2010 and 2012 that set property tax ceilings for these properties from 2010 through 2014 and transferred certain Catalyst properties and other interests and rights to the city. To measure the benefit, we compared the property tax Catalyst paid prior to the agreement with the tax savings under the agreement, but also reduced the benefit by the one-fifth of the land and mortgage discharged by Catalyst in the above five-year agreement.[84]

The GBC contends that there was no exemption of Catalyst's property tax liability during 2014, nor did the City of Powell River forego any property tax revenue because Catalyst was assessed (and paid) the full amount required by the City of Powell River's tax rate bylaw for 2014. We disagree. At verification, Powell River City officials explained that the City sets its tax rates based on revenue requirements that are established annually.[85] These revenue requirements are allocated across all of the property classes. Using the assessed value of the property in each class, together with the revenue requirement, the City calculates the applicable tax rate for each

[83] *See* PDM at 33 – 34.
[84] *Id*.
[85] *See* Department memorandum, "Verification Report: Government of British Columbia" (November 18, 2016) (GBC Verification Report) at 4.

property class (*i.e.*, Revenue Requirement/Assessed Value = Tax Rate[86]). In this case, Catalyst is the only property holder in Class 4, Major Industrial Property, within the Revitalization Area.[87] Under the terms of the 2010 and 2012 Agreement in Principle (AIP), the City of Powell River set the revenue requirement for Class 4 property to the agreed-upon $2,250,000; then, using the assessed value, the City calculates the tax rate necessary to reach the agreed-upon revenue target.[88] By comparison with the total property tax paid by Catalyst in the years prior to the AIP,[89] it is evident that the City of Powell River forewent revenue otherwise due from Catalyst when it fixed the revenue requirement for Class 4 Major Industry property to $2,250,000.[90] The fact that Catalyst paid the amount that it was billed in 2014, as provided for in the tax exemption bylaw, does not eliminate the financial contribution in the amount by which Catalyst's property tax was reduced after the AIP was in place.

Finally, Catalyst's argument fails to recognize that the 2014 city bylaw refers to this program as a tax exemption.[91] This program is explicitly named a tax exemption program and the 2012 AIP states, under the "Property Tax Reduction" section, that "property taxes payable to the City by Catalyst for its real property in the City of Powell River currently classified as 'Class 4 Major Industrial' will not exceed a total of more than $2,250,000 for calendar years 2012 through 2014."[92] The relevant section of the 2012 AIP further discusses what Catalyst must do to "secure the revitalization tax exemption."[93]

Catalyst claims that the Department did not appropriately evaluate, under section 771(5)(D)(ii) of the Act, whether the City of Powell River forewent revenue that would have been "otherwise due." As discussed above, the 2012 AIP implemented a tax ceiling of $2,250,000 and exempted Catalyst from paying property tax on its Class 4 Major Industrial Property, in excess of that amount, under the normal mechanisms for its calculation. The amount of tax that Catalyst paid prior to the 2010 AIP, demonstrates that the City of Powell River forewent revenue.[94] Because municipal tax rates fluctuate, and assessed property values fluctuate, the Department compiled an average amount of tax paid by Catalyst for its Class 4 Major Industrial properties in 2007-2009 and compared it to the property tax that Catalyst paid during the POR.[95]

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[86] *Id.*, at 4.
[87] *See* letter from the GOC, the GBC, and the GNB, "Supercalendered Paper from Canada: Response of the Government of Canada, the Government of British Columbia and the Government of New Brunswick to the Department's August 2, 2016 Supplemental Questionnaire" (Government SQR) at Volume II, page 9.
[88] *See* letter from Catalyst, "Supercalendered Paper from Canada: Catalyst's First Supplemental Questionnaire Response" (August 25, 2016) at Exhibit 123; *see also* letter from Catalyst, "Supercalendered Paper from Canada: Catalyst's Questionnaire Response" (March 18, 2016) (Catalyst QR) at Exhibit 82; *see also* GBC Verification Report at 4.
[89] *See* letter from Catalyst, "Supercalendered Paper from Canada: Catalyst's First Supplemental Questionnaire Response" (August 25, 2016) (Catalyst 1SQR) at 19.
[90] *Id*.
[91] *See* Catalyst QR at Exhibit 95.
[92] *Id*. at Exhibit 82.
[93] *Id.*
[94] *See* Catalyst 1SQR at 19.
[95] *See* Department Memorandum, "Preliminary Results Calculations for Catalyst Paper" (November 18, 2016) at 3-4 and Attachment 2 and Catalyst Final Calculation Memorandum at Attachment 2.

The GBC and Catalyst claim that the Department ignored its own precedent from the SC Paper investigation, *i.e.*, the finding that Port Hawkesbury Paper (Port Hawkesbury) did not receive a countervailable subsidy when Richmond County, Nova Scotia, through a 2012 tax agreement with the company, reduced from $2.5 million to $1.3 million, the amount of municipal property taxes assessed on Port Hawkesbury. However, the facts examined in the investigation are different from the facts here. In the investigation, the record demonstrated that under Richmond Country's normal assessment rate, Port Hawkesbury would have paid less in property tax than it did pay during the POI under the agreement then in effect.[96] On that basis, the Department found that there was no revenue foregone or otherwise due, and thus no financial contribution. Here, on the other hand, under the normal assessment rate prior to the 2010 AIP, Catalyst would have paid more in property tax than it did under the 2012 AIP for 2014. Thus, the City of Powell River forewent revenue in accordance with section 771(5)(D)(ii) of the Act.

Comment 4: Whether to Recognize the Change in Catalyst's Property Values in Calculating the Benefit of the Powell River City Revitalization Area Tax Exemption Program

The GBC/Catalyst's Arguments:

- The Department's methodology from the *Preliminary Results* is problematic in that it does not account for changes in the aggregate property value due to changes, in 2014 as compared with the years 2007 through 2009, in Catalyst's property holdings and the assessed value of those holdings.
- The Department's methodology implicitly and inappropriately assumes that Catalyst's Powell River Class 4 Major Industry property holdings and valuations were the same in 2014 as they were in 2007-2009.
- The Department should compare the amount of property taxes paid by Catalyst during 2014 with the amount that would have been due had the historical tax rate at issue been applied to the 2014 value of Catalyst's applicable property.
- In both *Chlorinated Isocyanurates from China* and *Certain Kitchen Appliance Shelving and Racks from China*, to calculate the tax savings benefit from tax programs that the Department considered countervailable, the Department compared the amount of taxes paid by the respondents with the amount the respondents would have paid using the tax rate that would have applied in the absence of the program at issue and applying it to the tax base that existed during the period under consideration.[97]

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[96] *See* Department Memorandum, "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada" (October 13, 2015).

[97] *See Countervailing Duty Investigation of Chlorinated Isocyanurates from the People's Republic of China: Preliminary Determination and Alignment of Full Determination with Final Antidumping Determination*, 79 FR 10097 (February 24, 2014) and accompanying Preliminary Decision Memorandum at 15; *see also Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 FR 56560 (September 22, 2014); *see also Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2010*, 78 FR 21594 (April 11, 2013) and accompanying Issues and Decision Memorandum at 8.

Department's Position:

We disagree with Catalyst. The Department did not assume that Catalyst's Powell River Class 4 Major Industry property holdings and valuations were the same in 2014 as they were in 2007-2009. To best determine the revenue forgone in accordance with section 771(5)(D)(ii) of the Act, the Department looked at the total amount of Class 4 Major Industrial Property tax paid by Catalyst to the City of Powell River in 2014. In determining property tax amounts, a municipal official from the City of Powell River described their tax rate process and confirmed that municipal revenue requirements were established before the tax rates.[98] The tax rates were then adjusted to meet these municipal revenue goals.[99] Similarly, the 2010 AIP and then the 2012 AIP between the City of Powell River and Catalyst established a ceiling on Catalyst's Class 4 Major Industrial Property taxes, which thereby limited this municipal revenue source. The 2012 agreement stated that "property taxes payable to the City by Catalyst for its real property in the City of Powell River currently classified as 'Class 4 Major Industrial' will not exceed a total of more than $2,250,000 for calendar years 2012 through 2014."[100] Therefore the tax rates set for 2010 through 2014 did not play a role in setting Catalyst's Class 4 Major Industrial Property tax amounts in the POR, but rather after the 2010 and 2012 AIPs were in place, the Class 4 Major Industry Property tax rates were then annually adjusted so that Catalyst's property tax due in the years 2010 through 2014 never exceeded the tax ceiling of $2,250,000 regardless of the valuation of Catalyst's property holdings.[101] Therefore, the record shows that the holdings and valuations of Class 4 Major Industry property in 2014 did not influence the property tax amounts paid by Catalyst during the POR, and thus, the Department does not take them into account in calculating the benefit.

In addition, while Catalyst provided documentation[102] showing the change in the total assessed value of its Class 4 Major Industry property, it did not provide detailed information on the record that allows us to understand whether these changes in the assessed value of Catalyst's Class 4 Major Industry property were a result of changes in the assessed value of an unchanging pool of property from one year to the next, or whether they demonstrate changes in the actual property that Catalyst owns from one year to the next.

Moreover, the facts in both *Chlorinated Isocyanurates from China* and *Certain Kitchen Appliance Shelving and Racks from China* differ in important respects from this case. In *Chlorinated Isocyanurates from China*, the Department calculated the benefit Jiheng received "by {comparing} the tax rate paid on the tax return filed during the POI to the rate that would have been paid by Jiheng otherwise."[103] In *Certain Kitchen Appliance Shelving and Racks from China,* the Department calculated the tax savings by comparing "the income tax NKS would have paid in the absence of the program (*i.e.*, at the 25 percent rate) with the reduced rate applicable to NKS for taxes it paid in 2010."[104] These cases involved payment of income tax based on a specific rate, not property tax that was reduced for the respondent by the establishment of a tax ceiling. Thus,

[98] *See* GBC Verification Report at 4.
[99] *Id*. at 4.
[100] *See* Catalyst QR at Exhibit 82.
[101] *See* Catalyst 1SQR at 19 and Exhibit 122.
[102] *See* Catalyst 1SQR at 19 and Exhibit 122.
[103] *See Preliminary Results* at 15.
[104] *Id.* at 8.

in this case, it remains appropriate to calculate the benefit as the tax savings obtained through the tax exemption and tax ceiling. The tax savings were the difference between the property tax that Catalyst paid on average in the years 2007 through 2009, before the AIPs, and the property tax Catalyst paid during the POR.

Comment 5: Whether to use 2007-2009 or 2009 Alone to Measure the Benefit for the Powell River City Revitalization Area Tax Exemption Program

Catalyst's Arguments:

- The Department arbitrarily and inappropriately used the average of the property tax Catalyst paid during the years 2007 through 2009 as the historical base period for its calculation, rather than only 2009, which was the year immediately prior to the year in which Catalyst entered into an agreement with the City of Powell River to achieve tax certainty.
- Using only 2009 best reflects the circumstances prior to Catalyst's tax agreement with the City of Powell River.
- The Department's reliance on the payments made during the period 2007 through 2009, prior to the AIP is arbitrary, without foundation in the statutory definition of "financial contribution," and is irreconcilable with the Department's precedent in this very proceeding.

The Petitioner's Rebuttal Argument:

- The Department's decision to use an average of the preceding three years was reasonable and in keeping with the Department's practice of utilizing the average of several data points to establish the basis for measuring the benefit from a subsidy program. In this case, it would have been more arbitrary for the Department to rely on only a single year.
- Catalyst officials told the Department that "beginning in 2008-2009, Catalyst entered into discussions . . . regarding {City of} Powell River providing tax certainty to Catalyst on its Class 4 Major industrial Property taxes."[105] Thus, it would be inappropriate and arbitrary for the Department to use the assessment rate from only 2009.
- In 2009, Catalyst protested and appealed its municipal tax bill.[106] As a result of its appeal, Catalyst only paid a portion of the municipal tax due in 2009, and it did not pay the remainder until 2010.

Department's Position:

We disagree with Catalyst's claim that we should use only 2009, rather than the years 2007 through 2009, because 2009 purportedly best reflects the conditions prior to the establishment of the 2010 AIP. As Catalyst stated at verification, in 2008 and 2009, Catalyst entered negotiations to obtain property tax certainty on its Class 4 Major Industrial Property taxes.[107] Additionally,

[105] *See* Department Memorandum, "Verification Report: Catalyst Paper" (November 18, 2016) (Catalyst Verification Report) at 13.
[106] *See* Catalyst 1SQR at 17.
[107] *See* Catalyst Verification Report at 13.

Catalyst protested its 2009 tax assessment.[108] Payment of its 2009 property taxes was a condition of the 2010 AIP, which was negotiated in 2008 and 2009. Consequently, 2009 alone does not reflect normal conditions in existence before the 2010 AIP.

Moreover, at verification, Powell River officials explained how the tax rates are calculated, starting with the city's budgeting process that establishes a revenue requirement.[109] This revenue requirement is then allocated over the various property classes. The assessed value of the property is independently reported. Finally, the tax rates are calculated by dividing the revenue requirement allocated to each property class by the assessed value of property in that class. Because every variable in the calculation changes every year, and the amount of tax paid in the years prior to the AIP varied considerably, we preliminarily determined that it was appropriate to measure the benefit of the tax exemption against an average of the actual taxes paid during the years 2007 through 2009. Contrary to Catalyst's contention that 2007 through 2009 is an arbitrary collection of years, this period reflects all the evidence that we have on the record demonstrating the property taxes that Catalyst paid prior to the 2010 AIP. Thus, we used the years 2007 through 2009 to account for the varied conditions in existence prior to the 2010 AIP.[110]

Comment 6: Whether to consider Catalyst's Former Properties as an Offset to the Benefit of the Powell River City Revitalization Area Tax Exemption Program

The Petitioner's Arguments:

- The Department's downward adjustment to the amount of the benefit by the value of properties that Catalyst transferred to the City of Powell River and the amount of the mortgage owed to Catalyst by the PRSC Limited Partnership that Catalyst discharged under the AIP was not a permissible subsidy offset as narrowly defined in section 771(6) of the Act.
- In *Softwood Lumber from Canada*, the Department stated:

  > The statute defines the "net countervailable subsidy" as the gross amount of the subsidy less three narrow offsets: (1) the deduction of application fees, deposits or similar payments to qualify for or receive a subsidy, (2) accounting for losses due to deferred receipt of the subsidy, and (3) the subtraction of export taxes, duties or other charges intended to offset the countervailable subsidy. See section 771(6) of the Act; 19 U.S.C. Part 1677(6). Both Congress and the courts have confirmed that these are the only permissible offsets the Department is permitted to make. See S. Rep. No. 96-249, at 86 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 472 ("The list is narrowly drawn and is all inclusive."); Kajaria Iron Castings Pvt. Ltd. v. United States, 156 F.3d 1163, 1174 (Fed. Cir. 1998) ("{W}e agree that 19 U.S.C. Part 1677(6) provides the exclusive list of permissible offsets ...."); see also Geneva Steel v. United States, 914 F. Supp. 563, 609 (CIT 1996) (explaining that section 771(6) contains "an exclusive list of offsets that may be deducted from the amount of a gross subsidy").

[108] *See* Catalyst 1SQR at 17 - 18.
[109] *See* GBC Verification Report at 4.
[110] *See* Catalyst 1SQR at Exhibit 123.

- Moreover, it would be inappropriate to make the offsets in the final results, because the property transfer that the Department recognized as an offset did not occur until after the POR. The land transfer closed on July 15, 2015.

The GBC's Rebuttal Arguments:

- The Department properly did not see the benefit adjustment at issue as one of a permissible "offset" (and in fact nowhere used that term), but rather as the correct determination of the benefit in the first place. As the Department recognized in its *Preliminary Results*, the program at issue here involves a complex set of negotiated transfers between Catalyst and the City of Powell River, pursuant to which Catalyst transferred various properties and other assets to the City, in exchange for tax certainty for the period 2010 through 2014.
- The Department correctly considered the totality of the program circumstances, including the asset transfers to the City. Consistent with such a totality-of-the circumstances approach, the Department in *Stainless Steel Bar from Italy* reasoned that the correct calculation of benefits with respect to alleged tax programs required determination of "the actual amount of tax saved by the deduction," rather than the "total amount of the deduction."[111]
- The petitioner has provided no reasoned basis for the Department to exclude from its calculations the values of certain assets that were integral components of the negotiated arrangement between Catalyst and the City of Powell River.

Catalyst's Rebuttal Arguments:

- If the Department finds the alleged Powell River City Revitalization Tax Exemption Program to be countervailable then it made no error in deducting the value that Catalyst gave up from the estimated tax savings to determine the benefit to Catalyst from this alleged program.
- The calculation is not one of determining the "net countervailable subsidy" from the "gross countervailable subsidy"; rather, it is one of determining the "benefit" to Catalyst from the alleged Powell River City Revitalization Tax Exemption Program, and therefore the countervailable subsidy itself. Consequently, section 771(6) of the Act is inapplicable. The "benefit" calculation is governed by section 771(5)(E) of the Act and 19 CFR 351.503, which require the Department to determine the difference between what Catalyst received under the "government program" at issue and what it would have received "in the absence of the government program."
- Section 771(5)(E) of the Act and 19 CFR 351.503 requires the Department to subtract the value that Catalyst gave up under the AIP from any tax savings Catalyst received to determine the "benefit" to Catalyst.
- The date on which these land transfer transactions closed should be immaterial because, as Catalyst has explained, these land transfer transactions were part of the overall arrangement with the City to obtain tax certainty dating back to the original 2010 AIP.

[111] *See Final Affirmative Countervailing Duty Determination: Stainless Steel Bar from Italy*, 67 FR 3163 (January 23, 2002) (*Stainless Steel Bar from Italy)*, and accompanying Issues and Decision Memorandum at Comment 17.

The Petitioner's Rebuttal Arguments:

- The Department has consistently found that a benefit is either conferred or not conferred, and that a positive benefit from certain transactions cannot be masked by "negative benefits" from other transactions.[112] In *OCTG from China*, for example, the Department responded that: "{s}ection 351.503(b) requires the Department to determine and find a benefit when a firm pays less for its inputs than it otherwise would have paid absent the program. Thus, to be consistent with our regulations, we are required to calculate a benefit on a transaction-specific basis."

Department's Position:

As we noted in the *Preliminary Results*, Catalyst and the City of Powell River signed AIPs on April 8, 2010, and April 27, 2012, that established the parameters of this program.[113] Under these agreements, Catalyst would transfer to the City of Powell River certain of its properties, would transfer its limited partnership interest in the PRSC Limited Partnership (PRSC LP), a business venture it had with the City, as well as discharge the mortgage owed to Catalyst by the Partnership. In exchange for this transfer and mortgage discharge, the City of Powell River would provide Catalyst with a property tax ceiling for the 2010 to 2014 taxation years.

Therefore, the Department was required to determine whether Catalyst was provided with a benefit under these agreements within the definition of 19 CFR 351.503 and, thus, followed its prior practice as cited by the petitioner. Moreover, the analysis of both sides of this transaction between Catalyst and the City of Powell River to determine if Catalyst received a benefit under these agreements does not constitute an "offset" within the definition of section 771(6) of the Act. Rather, the "gross countervailable subsidy," as referenced under section 771(6) of the Act, for this program is the difference between what Catalyst received from the City of Powell River under this transaction (property tax ceiling) and the value of what it provided to the City of Powell River under this transaction (*e.g.*, transfer of property and the mortgage discharge). The Department did not make any subtractions from this gross countervailable subsidy to derive a net countervailable subsidy within the meaning of section 771(6) of the Act.

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[112] *See, e.g., Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Affirmative Determination and Final Determination of Critical Circumstances, in Part*, 82 FR 3282 (January 11, 2017) and accompanying Issues and Decision Memorandum at Comment 8; *see also Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part,* 80 FR 34888 (June 18, 2015) and accompanying Issues and Decision Memorandum at Comment 6; *see also Certain Oil Country Tubular Goods from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 2011, 78 FR 49475 (August 14, 2013) and accompanying Issues and Decision Memorandum at Comment 7 (*OCTG from China Review IDM*); *see also Drill Pipe From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2011*, 78 FR 47275 (August 5, 2013) and accompanying Issues and Decision Memorandum at Comment 3; *see also* Department Memorandum, "2nd Administrative Review of the Countervailing Duty Order on Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum: Final Results of Administrative Review" (December 5, 2005) at Comment 43; and *see also Final Results of Countervailing Duty New Shipper Review: Certain Softwood Lumber Products from Canada*, 70 FR 56640 (September 28, 2005), and accompanying Issues and Decision Memorandum at Comment 6.

[113] *See Preliminary Results,* at 33.

Comment 7: Whether to Consider Catalyst's One-Third Interest in the PRSC Limited Partnership in the Benefit Calculation of the Powell River City Revitalization Area Tax Exemption Program

Catalyst's Arguments:

- The Department accounted for the value that Catalyst gave up to receive tax certainty from the City of Powell River, "but it failed to account for the value of Catalyst's one-third interest in PRSC LP and one-third shareholding in PRSC LP's general partner, PRSC Land Developments Ltd.(PRSC Ltd.), that Catalyst also transferred for nominal consideration as part of the tax certainty arrangement with the City."
- The assessed value of the PRSC Ltd. properties transferred in 2014 quantifies the underlying value of the PRSC Ltd. partnership at the time Catalyst transferred its one-third partnership interest.
- The Department should account for the value of all the properties that Catalyst transferred to the City of Powell River as part of the tax agreement.
- The assessed value of these properties was $4,871,100, and the Department should have used this amount in the program's benefit calculation.[114]

The GBC's Rebuttal Argument:

- The Department's preliminary benefit adjustment should have – but did not – account for the value of Catalyst's one-third interests in two partnerships that Catalyst also transferred to the City as part of the negotiated deal.

Catalyst's Rebuttal Argument:

- To the extent the petitioner suggests that the Department should account for the value transferred by Catalyst only in the year that the transfers took place, then Catalyst highlights that both the discharge of the mortgage owed to Catalyst by PRSC LP and Catalyst's transfer of its interest in PRSC LP and PRSC Land Developments Ltd. took place on August 29, 2014 – *i.e.*, during the POR. Against the tax savings already calculated, the Department would conclude that Catalyst received no benefit.

Department's Position:

Although Catalyst has provided a value for the PRSC Ltd. partnership based on the value of the properties transferred in 2014,[115] and urges the Department to deduct this value from the value of the property tax savings provided to Catalyst, the information on the record regarding this value is not sufficient, because it does not adequately indicate how the property values alone tie to share values of the PRSC LP. Therefore, the Department is unable to make a reliable quantification that we can use in the benefit calculation. Section 2 of the PRSC Transfer Agreement, contrary to Catalyst's contention, indicates that share values differ from the property values.[116] In addition, the property values alone do not fully incorporate the value of other potential assets or liabilities of PRSC Ltd. in 2014.[117] Therefore, it is not appropriate to rely on

[114] *See* Catalyst Case Brief at 20.
[115] *See* Catalyst 1SQR at Exhibit 128.
[116] *See* Catalyst 1SQR at Exhibit 124.
[117] *See* Catalyst 1SQR at Exhibit 128.

the property values as a proxy for the value of Catalyst's one-third partnership interest in PRSC Ltd., for purposes of including this value in our calculation of the benefit enuring to Catalyst from the property tax exemption.

Comment 8: Whether BC Hydro's Power Smart Industrial Energy Manager Program is *De Jure* or *De Facto* Specific

The GBC's Arguments:

- Under section 771(5A)(D)(ii) of the Act, a program is not specific if it is governed by "objective criteria." Therefore, this program is not specific because it is available to all BC Hydro industrial customers with a load of 10 gigawatt hours (GwH) or more per year.
- The program is broadly utilized by a variety of industries and is therefore not *de facto* specific. The program supports 43 energy manager positions across 164 eligible industrial sites.
- The *SAA* provides that a subsidy must be specific to certain enterprises and not generally available to meet the specificity requirement.[118]
- In *Refrigerators from Korea*, the Department determined that grants received by local companies as an incentive to adopt energy saving technologies to reduce overall energy consumption were neither *de jure* nor *de facto* specific because the program was widely available and the goals promoted by the program were not specific to any industry or company.[119]

Catalyst's Arguments:

- The Department erred in finding the alleged BC Hydro Power Smart Industrial Energy Manager Program to be *de jure* specific under section 771(5A)(D)(i) of the Act because the sole criterion the Department cited for its conclusion, availability to industrial customers who use more than 10 GwH annually, is an "objective" criterion under section 771(5A)(D)(ii) of the Act which indicates a lack of specificity.

The Petitioner's Rebuttal Arguments:

- The GBC states that "BC Hydro Power Smart engineering staff review the details of the proposed project to determine if it will achieve the proposed energy efficiency and if the proposed cost is reasonable."[120] Therefore, contrary to Catalyst's assertion, eligibility under the Industrial Energy Managers does not involve "objective criteria," but involves a substantial amount of discretion on the part of BC Hydro.

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[118] *See* Uruguay Round Trade Agreement, *Statement of Administrative Action, Agreement on Subsidies and Countervailing Measures*, H.R. DOC. No. 103-316, 103rd Congress, 2nd Session, Volume 1, 911-923 (September 27, 1994) (CVD SAA) at 913.

[119] *See Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea; Preliminary Negative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Determination*, 76 FR 55044, 55052-53 (September 6, 2011) (*Refrigerators from Korea*); *see also Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 17410 (March 26, 2012).

[120] *See* letter from the GOC, "Response of the Government of British Columbia to the Department's February 10, 2016 Questionnaire" (March 18, 2016) (Government QR) at BC I-5.

- The Department correctly found the criteria make the program "available to a limited number of users…"[121] Section 771(5A)(D)(ii) of the Act does not support Catalyst's claim because the number of program users is limited and therefore the program favors one type of industry over another.
- Of the 1.9 million BC Hydro customers eligible for the various BC Hydro programs, the PSP-Transmission program is available to only 150 industrial customers. The number of customers that actually received assistance under the PSP-Transmission program in 2014 was only 57. The limited number of recipients also makes the program *de facto* specific consistent with section 771(5A)(D)(iii)(I) of the Act.

Department's Position:

In the *Preliminary Results*, the Department found the Industrial Energy Manager program to be *de jure* specific under section 771(5A)(D)(i) of the Act because, as a matter of law, the program expressly limited access to the subsidy to those industrial users that consume more than 10 GwH annually. The GBC and Catalyst contend that the Department erred in this *de jure* specificity finding and that the 10 GwH threshold is an "objective" criterion as contemplated by section 771(5A)(D)(ii) of the Act. As such, the GBC and Catalyst contend that the program is not *de jure* specific, nor can the program be found to be *de facto* specific.

Under section 771(5A)(D)(ii) of the Act, the term "objective criteria" mean criteria "that are neutral and that do not favor one enterprise or industry over another." Under this program, the eligibility criteria limits access to the subsidy to industrial users that consume more than 10 GwH of electricity. This eligibility criteria does not meet the statutory definition of an objective criteria because it favors certain enterprises, that is, those that consume large amounts of electricity, over those enterprises that consume less than 10 GwH of electricity.

The GBC's reliance on *Refrigerators from Korea* is misplaced. As stated in the *SAA*, the Department can make specificity determinations only on a case-by-case basis.[122] Thus, the mere fact that both programs involve incentives to adopt energy savings technologies is irrelevant for our purposes of investigating the alleged subsidy. The Department's evaluation of the program at issue in *Refrigerators from Korea* was neither *de jure* specific nor *de facto* specific based on the facts of the case. In this instance, however, the program was found to expressly limit eligibility of the subsidy to industrial companies that consume more than 10 GwH of electricity and determined to be *de jure* specific. As such, the remaining arguments regarding program usage or other *de facto* criteria are inapposite.

Comment 9: Whether the Thermo-Mechanical Pulp (TMP) Subprogram of the BC Hydro Power Smart Program is a Recurring Program

The Petitioner's Arguments:

- The Department should treat this as a recurring program in accordance with 19 CFR 351.524(c)(l), and thus expense the benefit in the year of receipt, because the GBC and

[121] *See* PDM at 19.
[122] *See* Uruguay round Trade Agreements, Statement of Administrative Action, H.R. DOC. No. 103-316, 103rd Cong., 2nd Sess. Vol. 1, (September 27, 1994) (*SAA*) at 930.

BC Hydro designed the program to provide discounted electricity to pulp and paper producers.

- The provision of funds for the G13 boiler allows Catalyst to convert "waste steam" to electricity, which it then sells under contract to BC Hydro.[123] In fact, the incentive amount paid by BC Hydro to Catalyst is based on a formula that provides "up to $45/MWh for the levelized energy savings."[124]
- BC Hydro raised the incentive cap on this program to $25 million to provide discounted electricity to pulp and paper producers. This is a recurring electricity discount program; therefore, Catalyst will continue to receive funds under this program.

Catalyst's Rebuttal Arguments:

- The alleged BC Hydro Power Smart TMP Program is not an "electricity discount Program." BC Hydro's July 2014 news release explains that this program funds "projects that can reduce the{} power consumption" of thermo-mechanical pulp and paper producers, and through such projects, help "reduce electricity consumption" and accordingly "reduce electricity costs for pulp and paper producers."[125] In portions of this news release not quoted by the petitioner, BC Hydro further explains that the TMP Program "support{s} investments in more energy efficient equipment."[126]
- The TMP Program funded Catalyst's installation of a generator to provide electricity to Catalyst's Powell River mill, thereby reducing Catalyst's demand for electricity from BC Hydro, and Catalyst's overall electricity cost, and leaving BC Hydro with more electricity to sell elsewhere.
- The ultimate agreement was a "Load Displacement Agreement."[127]
- Contrary to the petitioner's contention, the provision of funds for the G13 generator does not allow Catalyst to convert waste steam to electricity that Catalyst then sells back to BC Hydro. Catalyst's existing Electricity Purchase Agreement with BC Hydro was altered to ensure that Catalyst would use and not sell back the electricity produced by the G13 generator at its Powell River mill.[128]
- This is not an electricity discount program and Catalyst pays for the electricity it consumes from BC Hydro. Rather, the program provided a grant that funded plant and equipment, *i.e.* the G13 generator.
- Consideration of the three criteria under 19 CFR 351.524(c)(2) also demonstrates that the alleged BC Hydro Power Smart TMP Program provided a non-recurring subsidy.
    - The TMP subprogram was not ongoing but part of a specific program announced in 2014 for which TMP facilities qualified based on their installed refined motor horsepower.
    - Catalyst had to apply and enter agreements with BC Hydro for individual projects occurring from July 24, 2014, to October 31, 2015.
    - This subprogram was not automatic and each step required BC Hydro approval.

[123] *See* Catalyst QR at Exhibit 71.
[124] *See* Government QR at BC I-19.
[125] *See* Petition for the Imposition of Countervailing Duties in the Matter of Supercalendered Paper from Canada (February 26, 2015) at Exhibit II-97.
[126] *Id*. at Exhibit II-97.
[127] *See* Catalyst QR at Exhibit 72.
[128] *See* Catalyst QR at Exhibit 72, Preambles D, E, and G.

    - The TMP Program funded the installation of the G13 steam turbine generator at Powell River. The preamble of the CVD regulations defines "capital assets" as "the plant and equipment which produce other goods, and include industrial buildings, machinery and equipment." Therefore, the program funded capital assets and did not provide discounted electricity to Catalyst.
- The petitioner attempts to link the TMP Program funding with other BC Hydro Power Smart funding received by Catalyst, and characterizes all this funding as "part of an ongoing program." However, if the Department considers all BC Hydro Power Smart funding collectively as suggested by the petitioner, then it should find the BC Hydro Power Smart Program to be non-specific and therefore non-countervailable.

Department's Position:

We do not agree with the petitioner that this program is an electricity discount program providing a recurring benefit. Under this program, BC Hydro approved Catalyst to receive a grant to fund its installation of a new generator.[129] Such project-based funding meets the definition of a non-recurring program as described in 19 CFR 351.524(c)(2): the program is exceptional – in the sense that the recipient cannot expect to receive additional subsidies under the same program on an ongoing basis from year to year; the subsidy required or received the government's express authorization or approval (*i.e.*, receipt of benefits is not automatic); and the subsidy was provided for, or tied to, the capital structure or capital assets of the firm.

Although the petitioner argues that because BC Hydro allocated $45 million specifically to Catalyst under this program, Catalyst could expect support on an ongoing basis, such that the program should be considered recurring, the record belies this conclusion. The $45 million allocated for Catalyst under this program was the maximum amount that Catalyst could receive. However, the program's requirements indicate that funds drawn from the total allocated amount would be approved on a project-specific basis after extensive review by BC Hydro to ensure that the project would achieve the desired result – displacing a customer's load on the BC Hydro grid, and freeing up BC Hydro's generation capacity to provide power to other customers.[130] Thus, each instance of project approval is "exceptional," requires express authorization or approval, and in supporting the installation of a new generator, the assistance is tied to the capital assets of the firm.[131] In this instance, BC Hydro approved funding from the allocated $45 million to Catalyst for the G13 generator.[132] Thus, the criteria provided in 19 CFR 351.524(c)(2) are satisfied, and we continue to find that assistance under the TMP program is a non-recurring benefit.

We also disagree with the petitioner's characterization of this program as the provision of discounted electricity by BC Hydro to Catalyst. Rather, the installation of the new generator supported by funds from BC Hydro, which is the alleged program under investigation, was estimated to provide electricity cost savings to Catalyst when compared with its purchase of

[129] *See* Catalyst QR at Appendix II.B.1, 5.
[130] *Id*. at Exhibits 64 and 67.
[131] *Id*. at Exhibits 64 and 72, section 2.
[132] *Id.* at Appendix II.B.1, 3 – 5.

electricity from BC Hydro, in that Catalyst would be able to generate electricity that it would otherwise have purchased from BC Hydro.[133] This does not constitute a discount on Catalyst's electricity rates as the petitioner contends. Therefore, there is no basis for finding that the TMP Program provides benefits that are recurring.

Moreover, we find unavailing the petitioner's attempts to tie this TMP Program funding to other BC Hydro Power Smart programs to support a conclusion that funding is on-going. There are many subprograms and projects within BC Hydro's Power Smart program that target different customer segments, and each has its own eligibility criteria, requires a separate application, and provides assistance in a different form.[134] The TMP subprogram is itself limited to producers of TMP and TMP-related projects.[135]

The petitioner further claims that the incentive amount paid by BC Hydro to Catalyst is based on a formula that provides "up to $45/MWh for the levelized energy savings." This is a misreading of the formula that BC Hydro uses to determine the amount of funding for Transmission projects, which include the TMP subprogram. The funding is capped "at the lower of 75 percent of the capital cost or C$45 per MWh of conserved electricity."[136] In the case of the TMP subprogram, BC Hydro provided incentive funds at 75 percent of the capital cost.[137] The petitioner also argues that the incentive rate was raised to provide increased electricity discounts for pulp and paper producers. In the case of Catalyst, the funding was directly provided to a portion of the G13 project's capital costs. Moreover, record evidence demonstrates that the program was not designed as an electricity discount program but as a load displacement program that promotes increased electrical generation efficiency.[138] Catalyst noted a July 2014 BC Hydro news release that explained program funds were intended for "projects that can reduce… power consumption" for thermo-mechanical pulp and paper producers and thereby "reduce {their} electricity costs."[139] The installation of the G13 generator and its capacity, at Catalyst's Powell River mill was projected "to leverage the {TMP subprogram} by upgrading equipment to efficiently harness energy, reducing its energy waste and load on BC Hydro's system."[140]

The petitioner claims that the provision of funds for the G13 boiler allows Catalyst to convert "waste steam" to electricity, which it then sells for profit under contract to BC Hydro. Catalyst explained that as one of many independent power producers in British Columbia, it is subject to an electricity purchase agreement (EPA) with BC Hydro.[141] Under EPAs, BC Hydro utilizes a generator baseline (GBL) to ensure that only electricity produced beyond this baseline can be sold.[142] The generation and sale of such excess electricity is an ancillary effect of adding

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[133] *Id*. at Exhibit 67; *see also* Government QR at Exhibit BC-BCH-21, Conclusions.
[134] *See* Government QR at BC I-14 – 16.
[135] *See* Catalyst QR at Exhibit 65.
[136] *See* GB Verification Report at 15.
[137] *Id*. at 16.
[138] *See* Catalyst QR at Exhibits 64 and 72.
[139] *See* Petition for the Imposition of Countervailing Duties in the Matter of Supercalendered Paper from Canada (February 26, 2015) at Exhibit II-97.
[140] *See* Catalyst QR at Exhibit 71.
[141] *Id*. at Appendix II.B.1, footnote 1.
[142] *See* letter from Catalyst, "Supercalendered Paper from Canada: Catalyst's Rebuttal to Petitioner's New

generation capacity in the Province. Likewise, Catalyst's electricity purchase agreement was altered specifically for the TMP subprogram to decrease the likelihood that it could engage in arbitrage.[143]

Comment 10: Whether the Department Should Revise its Nonrecurring Subsidy Benefit Calculation of the BC Hydro Power Smart TMP Subprogram

The Petitioner's Arguments:

- If the Department continues to treat this program as providing nonrecurring benefits, it should use the subsidy amount received during the POR for purposes of conducting the 0.5 percent test required under 19 CFR 351.524(b)(l) & (2).
- There is conflicting record evidence regarding the "the total amount approved under the subsidy program" within the meaning of 19 CFR 351.524(b)(2).

Catalyst's Rebuttal Arguments:

- The amount approved for the TMP subprogram was clear. The figures from Catalyst's TMP application were estimates put forth in advance of the completion of the project. One estimate was for the total project cost and the other was the amount of the total project cost that BC Hydro would fund.
- The amount of funding discussed at verification was different because the actual project cost was less than the estimated cost and verification occurred two years after the project estimate.
- In any event, 19 CFR 351.524(b)(2) provides:
    - The Secretary will normally allocate (expense) non-recurring benefits provided under a subsidy program to the year in which the benefits are received if the total amount approved under the subsidy program is less than 0.5 percent of relevant sales (*e.g.*, total sales, export sales, the sales of a product, or the sales to a particular market) of the firm in question during the year in which the subsidy was approved.
    - In accordance with this regulation, the Department rightly divided the incentive amount for the G13 generator by Catalyst's 2014 total sales and correctly concluded that the TMP funding should not be expensed in the year of receipt but allocated over the AUL period.
    - If the Department conducted its expense test by dividing the $45 million that Catalyst qualified for by its 2014 total sales, the result would still indicate that the TMP funding would be allocated over the AUL period rather than expensed in the year of receipt.

Department Position:

We disagree that the record contains conflicting evidence regarding the "total amount approved under the subsidy program." Out of $100 million in total TMP funds, BC Hydro allocated a

Subsidy Allegations and Request for Meeting" (February 26, 2016) at 31-32.

[143] *See* Catalyst QR at Exhibit 72, preamble G.

potential of $45 million specifically to Catalyst.[144] Catalyst did not automatically qualify to receive these funds, but had to apply for funding for specific TMP-related projects.[145] Catalyst applied for funding for the project to install the G13 generator at its Powell River mill. The petitioner claims that the estimated project amounts that Catalyst provided in their application for the G13 generator cast doubt upon the approved and actual received amounts.[146] However, the estimates were provided early in the application process.[147] The GBC verification report states that the "G13 project's total cost was originally determined to be C$25.5 million, but the amount declined."[148] BC Hydro approved the project and agreed to fund it at 75 percent of the project cost.[149] When the G13 project amount declined, the amount that BC Hydro agreed to provide declined as well.[150] The actual funding provided to Catalyst was based upon costs that Catalyst incurred once the project was under way. The difference in estimated and the actual costs is described in the Catalyst Verification Report: "the actual total cost was below the original estimate."[151] Of the total actual project costs, Catalyst received only a portion of these funds during the POR, which the Department also verified.[152]

Because we continue to find the program to be non-recurring as we did in the *Preliminary Results*, we continue to conduct the 0.5 percent test in accordance with 19 CFR 351.524(b)(2). To conduct this test, we divided the amount that BC Hydro approved for the G13 project[153] by Catalyst's total sales in the year of approval (which was the POR). Because the result was above 0.5 percent, we allocated the benefit from the actual funding received during the POR over the AUL period.[154] We continue to find that this program is non-recurring and that the record clearly establishes the approved amount for the program.[155]

Comment 11: Whether the British Columbia (BC) Ban on Exports of Logs and Wood Residue is a Countervailable Subsidy

The GOC's Arguments:

- There is no ban on the exportation of logs or wood residue[156] from BC. Rather there is a process to export logs and wood residue, and both are routinely exported from BC in large quantities. The Department has differentiated between "bans" and "partial

[144] *Id*. at Appendix II.B.1, page 2-3.
[145] *See* Catalyst QR at Appendix II.B.1, page 3.
[146] *Id*. at Exhibit 70.
[147] *See* GBC Verification Report at 16.
[148] *Id*.
[149] *See* Department memorandum, "Verification Report: Catalyst Paper" (November 18, 2016) (Catalyst Verification Report) at 8.
[150] *See* GBC Verification Report at 16 and Catalyst Verification Report at 8.
[151] *See* Catalyst Verification Report at 8.
[152] *See* Catalyst QR at Appendix II.B.1, page 5.
[153] *See* Catalyst QR at Appendix, II.B.1, page 5; *see also* Catalyst Preliminary Results Calculation (November 18, 2016) at worksheet titled "ExpenseTests.ATT2.BPI."
[154] *See* Catalyst Preliminary Results Calculation at worksheet titled "ExpenseTests.ATT2.BPI."
[155] *See* Catalyst QR at Exhibit 72.
[156] *The Forest Act of British Columba* (*Forest Act*) defines wood residue as "wood chips, slabs, edgings, shavings, sawdust, and hog fuel." *See* Petitioners New Subsidy Allegations at 24 and Exhibit 23.

restraints" in *CFS from Indonesia* and *OCTG from China*.[157] Specifically, in *CFS from Indonesia*, the Department found that the export ban at issue was a complete ban that criminalized the export of logs.

The GBC's Arguments:

- The provincial and federal exporting process for wood products is not a ban, as demonstrated by the large quantities of wood residue and logs exported under both jurisdictions.
- The Department has found that while outright bans are countervailable, partial restraints are not.[158]

Catalyst's Arguments:

- The measures under review are not an export ban. The Department has found that logs and wood residue may be exported from the province. Even if these export measures are a partial restraint, such restraints are not countervailable.[159]

The Petitioner's Rebuttal Arguments:

- The record shows that very small amounts of logs harvested in BC are exported from the Province.
- The GOC, GBC and Catalyst have mischaracterized the Department's practice regarding export bans/restraints.

Department's Position:

For our final results, we continue to find that the British Columbia ban on exports of logs and wood residue is a countervailable subsidy. Citing *OCTG from* China[160] and *CFS from Indonesia*,[161] the respondents argue that the Department has distinguished between a partial export restraint and a complete export ban, and found that partial export restraints are not countervailable. However, the respondents have mischaracterized the Department's findings in those two cases, and thus their reliance on these determinations is misplaced.

While the Department did not find the export restraint at issue in *OCTG from China* to be countervailable, the Department highlighted that it had found export restraints to be countervailable in the past.[162] The Department determined that the export restraint at issue in that case was not countervailable because the information on the record did not support a finding

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[157] *See Certain Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination,* 74 FR 64045 (December 7, 2009) and accompanying Issues and Decision Memorandum (*OCTG from China*) at Comment 32; *see also Final Affirmative Countervailing Duty Determination; Coated Free Sheet Paper form Indonesia,* 72 FR 60642 (October 25, 2007) and accompanying Issues and Decision Memorandum (*CFS from Indonesia*) at 4 to 11.
[158] *Id.*
[159] *Id.*
[160] *See OCTG from China* at Comment 32.
[161] *See CFS from Indonesia* at 29.
[162] *See OCTG from China* at Comment 32.

of countervailability.[163] The Department explained that it reviews the length and severity of the restraints imposed in determining whether specific export restraints are countervailable. In *OCTG from China*, the Department found that there was no information on the record, in the form of independent studies or long-term pricing data, that demonstrated that the export restraint was linked to the divergence between Chinese domestic prices and world market prices.[164]

This is in contrast to the instant proceeding where the petitioner included such a study in its New Subsidy Allegation submission.[165] In our decision to initiate on the allegation we stated, "{i}n addition, information in the June 2014 paper, 'Log Export Policy for British Columbia' provided in Exhibit 31 demonstrates that because of the restrictions on exports, logs sell to domestic buyers on the Vancouver Log Market for substantially lower prices than logs sold to foreign buyers."[166] Thus, the divergence between Canadian and global market log prices was established at the initiation stage. Moreover, the Department explicitly asked the GOC/GBC in its initial questionnaire to provide government or private studies examining the effect of log export restrictions on domestic log price or production and neither the GOC nor GBC provided any such studies.[167] However, the petitioner did provide additional studies for the Department's consideration.[168] Thus, the record of this proceeding is replete with studies that demonstrate the log export ban is linked to the divergence between domestic and world market prices, as envisioned by *OCTG from China*.

The respondents also argue that in *CFS from Indonesia,* the Department determined that the export policy in place in Indonesia was a complete ban and, therefore, was countervailable. By comparison, according to the respondents, evidence on the record in this review shows that the majority of applications for export exemptions in British Columbia during the POR were approved, which demonstrates that the system in place in British Columbia is only a partial export restraint. The respondents contend that because the British Columbia export restraints are not a complete ban as in Indonesia, the Department has no basis for finding the British Columbia partial export restraints to be countervailable. The Department does not agree with the respondents' characterization of *CFS from Indonesia*. While the Department did compare the export restraint in Indonesia to other types of export restraints (export quotas, export duties, and certification requirements) in *CFS from Indonesia*, in concluding that the complete ban in Indonesia is countervailable, the Department did not state that only a complete export ban is countervailable or that "partial export restraints" are not countervailable.[169]

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[163] *Id.*
[164] *Id.*
[165] *See* Petitioner's New Subsidy Allegations Regarding Catalyst Paper and Irving Paper (Feb. 16. 2016) (Petitioner NSA) at Exhibit 31.
[166] *See* Letter from Department, "Countervailing Duty Expedited Review: Supercalendered Paper from Canada; Analysis of New Subsidy Allegations" (April 18, 2016) at 10.
[167] *See* Letter from the GOC, "Supercalendered Paper from Canada: Response of the Government of Canada and the Governments of British Columbia and New Brunswick to the Department's April 29, 2016 New Subsidy Allegations Questionnaires" (May 27, 2016) (Government NSA QR) at GOC-NS-7 – 8 and BCI-18 – 19..
[168] *See Petitioner's Submission of Rebuttal Factual Information Regarding the May 27, 2016 New Subsidy Allegation Questionnaire Responses of Catalyst and Irving Paper Limited* (Petitioner NSA Response Rebuttal) (June 13, 2016) at Exhibits NSA-FIS-9, NSA-FIS-11, NSA-FIS-12 and NSA-FIS 13
[169] *See CFS from Indonesia* at 29.

Moreover, in *CFS from Indonesia*, the Government of Indonesia's (GOI's) stated purpose for the log export ban was "to reduce environmental degradation and to manage the forest in a sustainable manner."[170] The Department, therefore, evaluated the record information, including three independent studies provided by the GOI, to determine whether there was a financial contribution.[171] The GOI's submitted studies did not corroborate the GOI's assertion, however, and the Department found the log export ban program to provide a financial contribution because the record evidence demonstrated that the supply of logs at suppressed prices benefitted the pulp and paper industry.[172]

In this proceeding, the GBC has stated, "{t}he program in question is an export permitting process that authorizes the export of wood residues and logs, including pulp logs, in accordance with specified criteria. The program operates as an oversight and coordinating mechanism to facilitate domestic and export sales to ensure the most effective utilization of the province's natural resources."[173] Thus, as in *CFS from Indonesia*, our analysis focused on this process, as asserted by the GBC as the rationale for the log ban, and the information submitted by the GOC and GBC. Based on our analysis of this information, we preliminarily determined the program provided a financial contribution.[174] As such, our analysis included recognizing the divergence of prices as illustrated by independent studies submitted by the petitioners, and, despite the GOC/GBC's claims of a different type of ban or none at all, we reached a conclusion through the information on the record that the program benefits downstream consumers similar to the analysis in *CFS in Indonesia*.

Comment 12: Whether the BC Ban on Exports of Logs and Wood Residue Provides a Financial Contribution

The GOC's Arguments:

- The log exporting process is not a financial contribution under any of the four categories under 771(5)(D) of the Act and thus cannot be a financial contribution. Specifically, the log exporting process is not a direct provision of "goods" to SC paper producers, because these logs are goods owned by the harvesters, and the export process is simply a procedure to export. Additionally, the export restraint does not meet the Department's standard for entrustment or direction of provision of a good as determined in *DRAMS from Korea,*[175] and as such, is not a financial contribution under 771(5)(B)(iii) of the Act.

[170] *Id.* at 27.
[171] *Id*. at 27 – 32.
[172] *Id.* at 32 ("Furthermore, the studies' conclusions have not been contradicted by any other record information. In imposing the log export ban, the GOI did not perform its own independent appraisal or assessment of whether it would be effective. Nor has the GOI conducted subsequent studies to evaluate whether the present ban has been effective in its stated purpose. Therefore, the GOI's purported purpose for the log export ban is not supported by evidence to substantiate its claim that imposing a ban would reduce the rate of deforestation and the occurrence of illegal logging. Accordingly, the benefits of the log export ban to the downstream consumers, as noted in the studies, cannot reasonably be considered inadvertent or a mere by-product of the ban.")
[173] *See* Government QR at BCI-18.
[174] *See* PDM at 28 – 31.
[175] *See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 FR 37122 (June 23, 2003) *(DRAMS from Korea)* and accompanying Issues and Decision Memorandum at 47.

- Specifically, for the Department to find entrustment or direction, it must find that the government is giving responsibility to a private entity or exercising its authority over the private body.
- The Department's finding of entrustment or direction is based on the fact that logs and wood residue must first be made available to customers in the province is inconsistent with the facts of the record. Specifically, record evidence shows that the majority of logs advertised were authorized for export under the surplus test. Further, logs in certain federal crown lands and logs subject to "blanket" approval and are not subject to the surplus test.
- The WTO has determined that export restraints do not constitute entrustment or direction.[176]
- Further, the WTO has stated that a financial contribution cannot be effects-based.[177] As such, the Department cannot rely on potential effects of the log export process on log prices to determine a countervailable subsidy.

The GBC's Arguments:

- The Department has failed to demonstrate that BC harvesters and sellers of wood products are instructed by government authorities to sell these products to domestic producers.
- The exporting process is not a financial contribution as a matter of law.
- The WTO has determined that export restraints do not constitute a government entrustment or direction.

Catalyst's Arguments:

- There is no evidence that the GBC or GOC have affirmatively given responsibility to BC timber harvesters to provide logs and wood residue to consumers in the Province, therefore there is no entrustment or direction as required by both the Department[178] and the WTO.[179]
- The Departments' finding of entrustment or direction is inconsistent with its precedent and the WTO.

The Petitioner's Rebuttal Arguments:

- The Department correctly found that the GOC and GBC entrusted and directed suppliers in BC to provide logs and wood residue for LTAR.
- The entrustment and direction provision in section 771(5)(B)(iii) of the Act is intentionally broad, and the Department's broad interpretation has been upheld by the CIT.[180]
- Further in *RZBC Group Shareholding Co. v. United States*, the CIT supported the Department's authority to countervail an indirect subsidy conveyed through an intermediary, instead of directly by the government itself.

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[176] *See US – Export Restraints* at paras 8.17, 8.44 and 8.75.
[177] *See US – Export Restraints*; *see also China – GOES*.
[178] *See* DS437 Section 129 Export Restraints Preliminary Determination at page 4.
[179] *See* Appellate Body Report, *DRAMS from Korea*, at paragraph 114.
[180] *See Hynix Semiconductor, Inc. v. United States*, 29 CIT 995, 1001 (CIT 2005).*S.*

- Evidence on the record shows that the GOC and GBC exercise authority over license holders and wood processers to provide logs and wood residue to domestic users.

Department's Position:

Under section 771(5)(B)(iii) of the Act, a subsidy is bestowed when an authority entrusts or directs a private entity to make a financial contribution, if providing the financial contribution would normally be vested in the government and the practice does not differ in substance from the practices normally followed by governments. Under section 771(5)(D) of the Act, the term "financial contribution" means (i) the direct transfer of funds; (ii) foregoing or not collecting revenue that is otherwise due; (iii) providing goods or services; or (iv) purchasing goods. Therefore, if an authority entrusts or directs a private entity to either (i) provide a direct transfer of funds such as a loan; (ii) forego revenue; (iii) provide a good or a service; or (iv) to purchase a good, then under section 771(5)(B)(iii) of the Act, a financial contribution has been made.

In evaluating financial contribution and benefit, as well as specificity, the Department conducts separate and distinct types of analyses. In determining whether a financial contribution has been provided under section 771(5)(B)(iii) of the Act, we do not comingle that determination with the consideration of whether that financial contribution has provided a benefit.

The *SAA* provides explicit guidance regarding circumstances in which the Department will find that a private party has been entrusted or directed and therefore provided made a financial contribution within the meaning of section 771(5)(B)(iii) of the Act. The *SAA* states:

> In the past, the Department . . . . 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 acted 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), the Administration intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph.[181]

Thus, there may be a number of ways in which an authority can act through a private party to provide a financial contribution. The *SAA* also establishes that the circumstances by which the government acts through a private party can vary widely, and that Commerce must examine

[181] *See SAA* at 926.

these circumstances, and the relevant evidence, on a case-by-case basis. The *SAA* also states that the "entrusts or directs" standard must be interpreted broadly.[182]

Catalyst's *2014 Sustainability Report* states that 97 percent of the fiber (essentially, the logs, woodchips, sawdust used as inputs to its paper production) that Catalyst uses originates in British Columbia.[183] Catalyst purchases this fiber from independent, private third-party timber harvesters and processors in British Columbia. These timber harvesters and processors are limited, by the provincial or federal restrictions on the export of logs and wood residue to which they are subject, in to whom they can sell their logs and wood residue. [184] As discussed in detail below, these limitations result in the third-party timber harvesters and processors providing logs and wood residue to BC processors of logs at the entrustment or direction of the GBC and the GOC. We find that this provision of logs and wood residue falls within the definition of a financial contribution under section 771(5)(D)(iii) of the Act because the provision of logs and wood residue is the provision of a good or service, other than general infrastructure.

While the provision of logs and wood residue is the provision of a good or service, the information on the record shows that these third-party timber harvesters are private companies. Because the timber harvesters are private companies, in order for their provision of logs and wood residue to Catalyst to potentially give rise to a countervailable subsidy to Catalyst, the Department must consider two factors under section 771(5)(D)(iii) of the Act: whether an authority entrusted or directed the timber harvesters to make a financial contribution to our respondent, Catalyst, and whether the provision of this financial contribution (provision of logs and wood residue) would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments. Again, the determination of whether a financial contribution has been provided (*i.e.*, the provision of logs and wood residue to Catalyst) is separate from the determination of whether that financial contribution has conferred a benefit to Catalyst under section 771(5)(E) of the Act (*i.e.,* whether the price of log and wood residue for Catalyst under the export restrictions is for less than adequate remuneration).

To analyze whether the timber harvesters have been entrusted or directed to provide a financial contribution to Catalyst within the meaning of section 771(5)(D)(iii) of the Act, we first reviewed the laws and regulations that govern the provision of logs and wood residue within British Columbia.

The vast majority of the timber harvested and all of the wood residue produced in British Columbia falls under provincial jurisdiction and is governed by the *Forest Act*.[185] British Columbia first introduced export restrictions on logs harvested in British Columbia in 1891 and they have remained in place since that time.[186] The *Forest Act* stipulates that "unless exempted," timber harvested and wood residue produced in British Columbia "must be (a) used in British

[182] *Id.*
[183] *See* Petitioner NSA at Exhibit 20 at 10.
[184] *See* GBC NSA Response at BCI-11.
[185] *See* GBC NSA Response at BCI-11.
[186] *See* Petitioner NSA Rebuttal at Exhibit NSA-FIS-11 at 8.

Columbia, or (b) manufactured in British Columbia into wood products to the extent of manufacture specified by the regulation."[187] For an exemption to be granted, and export authorized, the *Forest Act* requires one of three stipulations must be satisfied.[188] However, during the POR, only one of the stipulations was used to grant exemptions:[189] "the timber or wood residue will be surplus to requirements of timber processing facilities in British Columbia."[190]

Exceptions to the export ban and authorization to export are granted by the GBC either through a Ministerial Order or through an Order in Council (OIC)[191] - these exceptions are subject to an evaluation that the logs or wood residue are surplus to the requirements of timber processing facilities in British Columbia (*i.e.,* the logs and wood residue must be deemed to be surplus to processing facilities, including paper manufacturers like Catalyst, in British Columbia before they will be granted an exemption allowing exportation). The purpose of this evaluation is to ensure that there is an adequate domestic supply of logs or wood residue to satisfy the needs of domestic lumber and paper mills before an export exemption is granted.[192] This requirement ensures that the timber processing and value-added wood product industry in British Columbia are assured of an abundant, low-cost source of supply and operates as a *de facto* employment program for a sector that represents a significant share of employment in British Columbia.[193]

Parties seeking an exception to export logs and wood chips under a Ministerial Order must subject the logs or chips to a direct "surplus test."[194] Under this test, a company submits an application to the GBC and the logs or wood residue covered by the application are listed in a bi-weekly advertising list compiled by the GBC to publicize to British Columbia mill operators the availability of the logs or wood residue. Mill operators can bid on the listings.[195] If a bid is received on a listing, the bid is evaluated by the Timber Export Advisory Committee (TEAC) or the Chip Export Advisory Committee (CEAC)[196] to determine whether the submitted offer is fair.[197] According to the GBC, for exports from the Coast region where the majority of exports

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[187] *See* GBC NSA Response at Exhibits BC-EX-4 and BC-EX-5 at Section 127. The *Forest Act* export restrictions on logs and wood residue under provincial jurisdiction require an exemption to exports to other Canadian provinces, as well as exports to other countries.

[188] *Id.* at Exhibit BC-EX-4 at Section 128(3). "An exemption must not be given under this section unless the Lieutenant Governor in Council or the minister, as the case may be, is satisfied that (a) the timber or wood residue will be surplus to requirements of timber processing facilities in British Columbia, (b) the timber or wood residue cannot be processed economically in the vicinity of the land from which it is cut or produced, and cannot be transported economically to a processing facility located elsewhere in British Columbia, or (c) the exemption would prevent the waste of or improve the utilization of timber cut from Crown land."

[189] *See* GBC Verification Report at 5-6.

[190] *See* GBC NSA Response at Exhibits BC-EX-4 and BC-EX-5 at Section 128(3)(c).

[191] *Id.* at BCI - 8-9.

[192] *See* GBC Verification Report at 7.

[193] *See* Petitioner's Amended NSA Allegations at Exhibit NSA-FIS-10 at "The forest industry is also a significant contributor to employment in the province. In 2013, the industry employed 145, 800 full-time indirect and direct employees which translates to about 6.3% percent of jobs in BC."

[194] *See* GBC NSA Response at BCI – 15-16.

[195] *Id.*

[196] The TEAC and CEAC meet monthly and are comprised of "log market experts," including representatives of both purchasers and sellers. *See* GBC SQR at 27.

[197] *See* GBC NSA Response at BCI – 12 and BCI – 16.

originate, the committees rely on pricing data from the Vancouver Log Market (VLM)[198] "to evaluate the applicable log species, grades, and sorts to which each offer relates."[199] In other words, the committees use local-BC market prices, and not world prices that would be available to exporters, to evaluate whether an offer is fair. The TEAC/CEAC makes its recommendation to the GBC based on whether the committee determines that the price offered is fair.[200] If the offer is determined not to be fair, *i.e.*, to be below "market prices" as considered by the TEAC/CEAC, then the listing is determined to be surplus to the needs of domestic manufacturers.[201] On the basis of this recommendation, the GBC makes a determination regarding whether to grant a Ministerial Order for export or to deny the application.[202] If no bid is received for a particular listing, then the listing is considered to be surplus to the needs of domestic manufacturers and a Ministerial Order is granted.[203] If an offer is deemed to be fair, *i.e.*, to be consistent with prices in the market, by the CEAC/TEAC, the application for an export exemption is rejected.[204] While the company that makes the offer deemed fair is required to purchase the wood chips/logs for which it made a fair offer, the company that applied for an export exemption/advertised the logs is not required to sell the wood chips/logs to the bidder that made a fair offer.[205] The company that applied for an export exemption is not allowed to resubmit an application to export the same wood chips/logs if it decides to not sell the wood chips/logs to the company that made a fair offer.[206]

Exporters of logs and wood residue under provincial jurisdiction can also apply for an exemption to export under a blanket or company-specific OIC. Under a blanket OIC, the GBC permits a certain volume of logs or wood residue from a given area to be exported without the application of the surplus test required for Ministerial Orders. While the GOC is correct in stating that individual exports under a blanket OIC are not subject to the surplus test conducted for an exemption granted under a Ministerial Order, the approval of the blanket OIC itself is subject to the stipulation that logs and wood residue exported under the blanket OIC are surplus to the requirements of processing facilities in British Columbia.[207] GBC officials explained at verification that blanket OICs have been issued for areas where there are no log processing operations and applications for exemptions under Ministerial Orders from those areas had always been granted (*i.e.*, blanket OICs have been granted in areas where logs are have routinely been deemed to be surplus to the requirements of producers in British Columbia).[208] The GBC officials also explained that the volumes approved for export under the blanket OICs can be revised if circumstances in the areas covered by the blanket OICs change. For instance, GBC officials speculated at verification that, in one instance, the volume approved under a blanket

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[198] The VLM is neither a physical or virtual market place. Instead, the GBC explained at verification, the VLM represents prices for BC logs bought and sold along the coast of the province. *See* GBC Verification Report at 11.
[199] *See* Government SQR at 27.
[200] *See* GBC NSA Response at BCI – 12 and BCI – 16.
[201] *Id.* at BCI – 16.
[202] *Id.*
[203] *Id.*
[204] *See* GBC Verification Report at 7.
[205] *Id.*
[206] *Id.*
[207] *See* GBC NSA Response at BCI - 8.
[208] *See* GBC Verification Report at 8.

OIC was reduced because wood processing facilities became operational in the area covered by the blanket OIC.[209] The GBC also grants company-specific OICs which allow companies to apply for an export exemption for standing timber in the BC Interior region, but GBC officials stated that company-specific OICs are used very infrequently.[210] Thus, we disagree with the GOC's contention that there is no surplus test associated with logs/wood residue exported under Blanket OICs or company-specific OICs. We find that the historic results of the surplus test are being used as a proxy for a sale-by-sale application of the surplus test and the blanket authorization to export from these areas is contingent on the status of locally operational processing facilities, as demonstrated by the reduced volume under one blanket OIC when a processing facility became operational in that locality.

At verification, GBC officials stated that all species and grades of logs in the province are eligible to be exported,[211] but the evidence on the record indicates that there are certain species of logs and certain grades of other species of logs for which the GBC will not accept applications for an exemption to export. A January 17, 2013, notice to all log exporting and interested parties contained guidance from the GBC on the conditions of surplus test exemptions. This notice states that applications for the export of all grades of western red cedar and cyprus and "high-value timber" of douglas fir, hemlock and spruce "with grades higher than H will not be accepted."[212]

In addition, all exports of logs from British Columbia under provincial jurisdiction are subject to a "fee-in-lieu of manufacturing." These fees range from a set fee of C$1 per cubic meter to approximately 15 percent of the value of that log on the Vancouver Log Market. Exports of logs from certain coastal areas are subject to an additional multiplication factor of 1.3 or 1.4 applied to the fee.[213] The fees vary based on the log's location, species and grade. The evidence on the record and statements from GBC officials at verification indicate that the GBC uses the in-lieu of manufacturing fees to help fulfil the policy objective of the ensuring that timber harvested in British Columbia is further processed in the province.[214] GBC officials explained that the province began applying the multiplication factor in 2013 for exports from certain regions of the BC Coast in reaction to higher demand for BC logs from China.[215] Documentation on the record also shows that the GBC sets the multiplication factor higher in regions where GBC determines that there is a greater divergence between log prices in BC and global log prices.[216] Further, GBC officials stated that the most recent export policy change lowered the fee-in-lieu of manufacturing to C$1/m3 for all logs harvested from the North Coast OIC and certain logs

[209] *Id.* at 8.
[210] *Id.* at 7.
[211] *Id.* at 6.
[212] *See* GBC NSA Response at Exhibit BC-EX-8.
[213] *See* GBC Verification Report at 9.
[214] *Id.*; *see also* GBC NSA Response at Exhibit BC-EX-8.
[215] *See* GBC Verification Report at 9*Id.*
[216] *See* GBC NSA Response at Exhibit BC-EX-8. A backgrounder on the 2013 Coastal log export fee schedule states that "{t}he greater the difference between the export price and domestic price of a log, the higher the export fee will be." A table on the same page also shows that the multiplication factor is based upon the "difference between export and domestic prices."

harvested from the Mid Coast OIC, to try to incentivize harvesting in those regions.[217] These decisions by the GBC to increase or decrease the fees in order to slow or increase exports from certain regions strongly indicate that the GBC recognizes the correlation between the fees and the volume of logs that are exported or remain in British Columbia. Higher fees hinder exports, thus supporting local processing operations; fees are lowered when there are no local processors that can use the logs, and these lowered fees reduce the disincentive to export.

Logs harvested under federal jurisdiction, which are a small portion of the harvest in British Columbia, are subject to a similar process, including a direct surplus test, as described above, for provincial logs and wood residue seeking an exemption under a Ministerial Order from the GBC.[218] The exemption process for logs under federal jurisdiction is detailed in Global Affairs Canada's Notice to Exporters No. 102.[219] Applications for export are advertised on the GBC's bi-weekly advertising list and if an offer is made for the logs then the fairness of that offer is reviewed by the Federal Timber Export Advisory Committee (FTEAC).[220] The FTEAC's recommendation is sent to the GOC, who makes the final decision British Columbia is the only province in Canada where logs under federal jurisdiction are subject to a provincial export restriction process, and expressly require a provincial export permit. While all logs harvested in Canada are required to obtain an export permit from the GOC, logs harvested in provinces other than British Columbia are granted export permits automatically.[221]

Logs harvested under both provincial and federal jurisdictions in British Columbia, and all exports of logs throughout Canada, require an export permit under the federal Export and Import Permits Act (EIPA)[222] because logs and pulp logs of all species are included on the Export Control List.[223] Violations of the EIPA are punishable by the penalties described in section 19 of the EIPA.[224] We find that the log export restrictions are not a mere policy pronouncement or exhortation; log suppliers are required to comply with the export restrictions under threat of law, including criminal sanctions. The GOC therefore entrusts and directs these suppliers by imposing its legal authority to criminally prosecute any supplier who exports logs from Canada unless granted an export permit. The GOC also requires that any application for export that contains logs that originate in BC include an export exemption granted by the GBC; therefore, the GBC also entrusts and directs suppliers in British Columbia. The result is that log suppliers in British Columbia are limited to selling in the British Columbia market as directed by the government unless granted an exemption. This, as noted by the independent studies on the record, has resulted in an abundant supply of logs at suppressed prices that benefitted the

[217] *Id.*
[218] The Federal surplus test outlined in Notice to Exporters No. 102 is not a prerequisite for an export permit for logs harvested from Federal Crown land that is identified as Indian Reserves, Treaty Settlement Lands, and Self-Government Lands. *See* GOC Verification Report at 5.
[219] *See* "Response of the Government of Canada to the Department's April 29, 2016 New Subsidy Allegations Questionnaire" (May 28, 2016) (GOC NSA) at Exhibit GOC-LEP-4.
[220] *See* GOC Verification Report at 5. The membership of the FTEAC is identical to the membership of the TEAC, but with the addition of a Federal Representative.
[221] *Id.* at 6.
[222] *See* GOC NSA at Exhibit GOC-LEP-1.
[223] *See* GOC NSA at Exhibit GOC-LEP-2 at Group 5.
[224] *See* GOC NSA at Exhibit GOC-LEP-1 at Section 19.

downstream industries that use these logs, including the pulp and paper industry.[225] For example, a 2014 study by the Fraser Institute states that "{b}ecause of the restrictions on exports, logs sell for substantially less to domestic buyers…than those sold to foreign buyers."[226]

The export exemption process can take from seven to 13 weeks from filing an application for an exemption export under a Ministerial Order to receiving an export permit from the GOC.[227] The approval process for obtaining a blanket OIC takes longer than the approval process for an exemption under a Ministerial Order; however, a blanket OIC remains in place for a period of up to five years.[228] The timing relating to these exemption processes, however, does not account for the time it takes for the timber harvester to actually harvest the trees and have them scaled. An application for an exemption cannot be submitted until the logs are scaled as that information is required as part of the application.

The legal obligations described above do not exist in some other markets. In deregulated or totally open markets, sellers can choose to sell their products whenever and to whomever it makes economic sense to do so. Timber harvesters can choose to sell logs and wood residue wherever it makes economic sense to do so and they can approach buyers while the timber is still standing. However, as noted above, the studies on the record indicate that timber harvesters in British Columbia must ensure that demand for logs and wood residue in British Columbia is met before seeking a purchaser overseas and, therefore, they are forced to receive a lower price for their timber in British Columbia than they would if they were able to export free of the GBC and GOC export restrictions.

The legal requirements that logs and wood residue remain in British Columbia combined with the burdensome and lengthy process for obtaining an exception from those requirements to export and the fees charged by the GBC upon export result in a policy where the GBC has entrusted or directed timber harvesters to provide logs and wood residue to producers in British Columbia. The respondents have provided information on the record that shows that the vast majority of applications for an exemption to export are approved.[229] In their view, this demonstrates that approval is routine and can be anticipated; therefore, the export process does not hinder exports. However, the Department disagrees with a contention that these exempted exports are proof that there is no entrustment and direction. The lengthy and burdensome export exemption process discourages timber harvesters from considering the opportunities that may exist in the export market, and suppresses their applications for export exemptions if they have uncertainty that their volumes are likely not to be found to be surplus to the requirements of mills

[225] *See* Petitioner NSA Response Rebuttal at Exhibit NSA-FIS-11 ("Log export restrictions lower the demand for logs which reduces their domestic value. By paying less for logs than the export price, manufactures are essentially receiving a subsidy from the log producer."). Also *see* NSA Response Rebuttal at Exhibits NSA-FIS-9, NSA-FIS-12 and NSA FIS-13.
[226] *See* Petitioner NSA at Exhibit 31
[227] *See* GBC Verification Report at 7.
[228] *See* GBC Verification Report at 8.
[229] *See* GBC NSA response at BCI-16.

in British Columbia.[230] Moreover, this process restricts the ability of timber harvesters to enter into long-term supply contracts with foreign purchasers.[231] The cumulative impact of these legal restrictions on the export of timber has resulted in only a small volume of the log harvest in British Columbia being exported during the POR – indeed, exports represented 9.4 percent of the total stumpage harvest[232] and 3.2 percent of wood chip production during the POR.[233]

In determining whether there is entrustment or direction of a private party to provide a financial contribution, section 771(5)(B)(iii) of the Act requires that the provision of the financial contribution would normally be vested in the government and that the practice does not differ in substance from practices normally followed by the government. The provision of a good or service is defined as a financial contribution under section 771(5)(D)(iii) of the Act. Therefore, the provision of a good or service such as the provision of logs and wood residue is a type of financial contribution provided by a government.

The GBC has had the right to manage the forest in the province since 1867 and the province has had legislation in place since 1891 restricting log exports.[234] In 1906, the Timber Manufacture Act introduced provisions that distinguished private land granted by the Crown before and after March 12, 1906. Land that was granted by the Crown to private parties prior to 1906 remains under federal jurisdiction, while land granted after 1906 is under provincial jurisdiction. In 1907, OIC 901 was passed, which prohibited granting Crown land to the private sector. In fact, all of the Crown land that was held by the province in 1906 remains held by the province to this day[235] – Crown land under provincial jurisdiction represents approximately 94 percent of land in British Columbia.[236] Federal export restrictions were put into place in 1940.[237] There is a 150-year history of the government managing the forest in British Columbia and a 125-plus year history of the government restricting log exports. It is clear from the history of the timber market and the ownership of timber land by the Crown in British Columbia that the provision of logs and wood residue, which satisfies the definition of financial contribution under section 771(5)(D)(iii) of the Act, would normally be vested in the government, and that the provision does not differ substantively from the normal practices of the government.

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[230] *See* letter from the petitioner, "Expedited Review of the Countervailing Duty Order on Imports of Supercalendered Paper From Canada: New Subsidy Allegations Regarding Catalyst Paper and Irving Paper" at Exhibit 31.
[231] *See* Petitioner NSA at Exhibit 31 ("the current export approval process, and the Surplus Test in particular, add significant delays and uncertainty into the operations of logging companies. The current log export process prevents log owners from securing long-term contracts with foreign buyers…").
[232] There were exports of 6,263,741 cubic meters of logs from British Columbia in 2014 out of a total stumpage harvest of 66,504,099 cubic meters. *See* GOC NSA Response at Exhibit GOC-LEP-6; *see* also, Response of the Government of British Columbia and the Government of New Brunswick to the Department's August 2, 2016 Supplemental Questionnaire (August 20, 2016) (GBC 1SQ Response) at Exhibit BC-EX-24.
[233] There were exports of 200,000 BDUs of wood chips from British Columbia during the POR and production of 6.3 million BDUs of wood chip production in British Columbia during the POR. *See* GBC NSA Response at BCI-6 and at Exhibit BC-EX-18.
[234] *See* Petitioner NSA Rebuttal at Exhibit NSA-FIS-11 at 8.
[235] *Id.*
[236] *See* Petitioner NSA at Exhibit 21.
[237] *See* Petitioner NSA Rebuttal at Exhibit NSA-FIS-11 at 9.

For the reasons discussed above, the GBC and GOC direct timber harvesters by law to provide logs and wood residue to mill operators in British Columbia, including Catalyst. Therefore, the provision of logs and wood residue by timber harvesters satisfies the standard for entrustment or direction under section 771(5)(D)(iii) of the Act. As a result, we determine that Catalyst has received a financial contribution in the form of the provision of a good or service under section 7771(5)(D)(iii) of the Act.

Comment 13: Whether the Department Should Use Tier 1 Benchmarks in BC

The GOC's Arguments:

- The Department should have used a Tier 1 benchmark in BC. According to Section 771(5)(E) of the Act, the question of whether adequate remuneration was received must be determined on the basis of prevailing market conditions in the country of provision of the good.
- The Department dismissed use of a BC benchmark in one sentence by stating that the restriction of exports of logs distorted the market. The Department cannot assume that a market is distorted and use that assumption as a basis for skipping Tier 1 in the preferential hierarchy. Therefore, the Department should use Catalyst's arm's-length negotiated market-based prices with its domestic British Columbia fibre suppliers as benchmarks.

The GBC's Arguments:

- In the *Preliminary Results*, the Department cited no evidence whatsoever in concluding the BC domestic market for wood residues and pulp logs was distorted. The Department's theory of domestic market distortion fails in light of the absence of any supporting evidence. Moreover, the Department could not cite any evidence to support its theory of domestic market distortion even if it attempted to do so because Petitioner provided none.

The Department's Position:

In the *Preliminary Results*, the Department acknowledged the preference for Tier 1 benchmarks, but stated that there were no Tier 1 benchmarks that satisfied the Department's criteria because the provincial and federal government distorted the BC market for logs and wood residue by restricting the export of those products.[238] The respondents have argued that the Department should have used Catalyst's purchases in British Columbia as a benchmark because these purchases represent the prevailing market conditions in the country of provision. The respondents also argue that the Department has assumed that the market in British Columbia is distorted and has not cited to evidence on the record of such distortion. The Department disagrees with the respondents' arguments and for the reasons described below continues to determine that the market in BC is distorted and that there is not an appropriate Tier 1 benchmark on the record in this investigation.

[238] *See Preliminary Results* at 32.

The *Preamble* states that government involvement in the market "will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market."[239] However, the Department does not apply a *per se* rule that a government's majority market share equates to government distortion.[240] Rather, the Department will consider all relevant factors or measures that may distort a market.[241] The vast majority of British Columbia's land area (94%), forest land (98%), and timber harvesting land base is Crown land.[242] Further, the prices for stumpage rights on these Crown lands during the POR were administratively and uniformly set by the government.[243] In addition, as discussed in Comment 12, the government also restricts the export of logs and wood residue from British Columbia.[244] Contrary to the GBC's arguments that there is no evidence on the record that supports a finding that the market in British Columbia is distorted, as discussed in Comment 14, there are multiple independent academic studies on the record that state unequivocally that the market is distorted as a result of the government's export restrictions.[245] Additionally, the record also contains an opinion article written by the President and CEO of a major timber company located in British Columbia that states the export restrictions result in an "artificially depressed domestic market."[246]

The government's overwhelming share of the harvest in British Columbia combined with the record evidence indicates that the government's long-maintained export restrictions on log and wood residue have resulted in suppressing prices and distorting the market in British Columbia. Because the market in British Columbia is distorted it is not possible for the Department to use a Tier 1 benchmark based on Catalyst's (or any other) purchases in British Columbia. Therefore, in the absence of useable Tier 1 benchmarks on the record, the Department will continue to rely on Tier 2 benchmarks for its calculations.

Comment 14: Whether the Department Failed to Apply its Own Evidentiary Standards on the BC Ban on Exports of Logs and Wood Residue

The GBC's Arguments:

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[239] *See* Preamble, 63 FR at 65377.

[240] *See, e.g., Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935 (July 29, 2016) and accompanying IDM at 52-56; *see also Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada*, 69 FR 75917 (December. 20, 2004) (Softwood Lumber IV AR 1) and accompanying IDM at 94-96*; see also Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1331 (CIT 2015) (remanding for further explanation a finding of government distortion where Commerce relied on the government's market share without explaining why a substantial share of the market was necessarily substantively distortive).

[241] *See, e.g., Aluminum Extrusions from the People's Republic of China: Final Results of the Countervailing Duty Administrative Review; 2010 and 2011*, 79 FR 106 (January 2, 2014), and accompanying Issues and Decision Memorandum at 27.

[242] *See* Petitioner NSA Allegation at Exhibit 20 and Exhibit 22.

[243] *See* GBC Verification Report at 12.

[244] *See* Comment 12 for a detailed discussion of these export restraints.

[245] *Id.*

[246] *See* Petitioner NSA Rebuttal at Exhibit NSA-FIS-16.

- The Department ignored its normal requirement that a petitioner support an allegation with empirical evidence demonstrating a clear linkage between the supposed export restraint at issue and a divergence of prices in the domestic and world markets.[247] The *Preliminary Results* are silent as to the DOC's own evidentiary requirements.
- Petitioner has supplied none of the evidence that the Department has previously explained is required to establish that an alleged export restraint provides a benefit.

The Petitioner's Rebuttal Argument:

- There is significant information on the record of this review, including independent studies, that discuss the price effect of the restraints, and the long-term nature and impact of those restraints.

Department's Position:

We disagree with the GBC's argument that the petitioner has not fulfilled the evidentiary standard requiring empirical evidence demonstrating linking the supposed export restraint to a divergence in the domestic and world markets. In *OCTG from China*, the Department found that contrary to *CFS from Indonesia*, there were no independent studies or long-term pricing data on the record that demonstrated that the export restraint was linked to the divergence between Chinese domestic prices and world prices.[248] As discussed in detail above at Comment 11, that is not the case in this proceeding. The petitioner has submitted multiple independent studies on the record that explicitly link the BC's longstanding log export policy to lower prices for logs in BC compared to global prices.[249] The record also contains an opinion article from one of British Columbia's largest forestry companies that states that the export restraints result in an "artificially depressed domestic market."[250]

Comment 15: Whether the Department Needs to Conduct a Feedback Effect Analysis

The GBC's Arguments:

- GBC: In *Lumber III*, the Department found that, in analyzing the potential impact of the removal of the log export restrictions then in effect, it was necessary to account for "feedback effects" that included the impact of the removal on log prices in foreign markets for B.C.-origin logs.[251] The Department recognized any such impact would be to lower the observed log export premium.
- The economic logic adopted by the Department in *Lumber III* is no less applicable today. Thus, the Department's preliminary calculation of the alleged benefit from the export

[247] *See OCTG from China* Final IDM at Comment 32.
[248] *Id.*
[249] *See* Petitioner New Subsidy Allegation at Exhibit 31. ("{b}ecause of the restrictions on exports, logs sell for substantially less to domestic buyers…than those sold to foreign buyers."); *see also* Petitioner NSA Rebuttal at Exhibit NSA-FIS-11 ("Log export restrictions lower the demand for logs which reduces their domestic value. By paying less for logs than the export price, manufactures are essentially receiving a subsidy from the log producer."). The independent studies included in the Petitioner's NSA Rebuttal at Exhibits NSA-FIS-9, NSA-FIS-12 and NSA-FIS 13 also acknowledge a divergence in price between BC and world markets because of the export restraints.
[250] *See* Petitioner NSA Rebuttal at Exhibit NSA-FIS-16.
[251] *See Certain Softwood Lumber Products from Canada*, Redetermination Pursuant to Binational Panel Remand (September 17, 1993), at 137.

permitting processes at issue is also flawed for failure to account for the reduction in the alleged benefit that would, as a matter of economic logic, result from the removal of the export permitting process.

Department's Position:

The Department disagrees with the GBC's argument that the Department must conduct a feedback effect analysis to calculate the benefit in this review. In the CVD investigation of *Lumber III*, the Department calculated the benefit for log export restrictions in British Columbia by examining "the difference between the current domestic log price and the price that would exist if the restrictions were not in place."[252] This calculation required a feedback effect analysis in order to construct a price that would exist if the export restriction were not in place. However, in this instance, the Department followed 19 CFR 351.511(a)(2) to identify a comparative benchmark to measure the adequacy of remuneration for the log export ban. This is consistent with *CFS from Indonesia*.[253] We determined that the most appropriate benchmark would be a world market price, or Tier 2 benchmark, and we selected prices for logs and wood residue from the U.S. Pacific Northwest (PNW). Because we are comparing actual Catalyst purchases of logs and wood residue to world market prices to measure the amount of adequate remuneration, there is no need to make an adjustment to either price that would consider if there were no log ban in place, as that is not part of our benefit calculation methodology. Therefore, there is no need for the Department to conduct a feedback effect analysis.

Comment 16: Whether the Department Should Use a Transaction-By-Transaction Calculation Methodology for the BC Ban on Exports of Logs and Wood Residue

Catalyst's Arguments:

- The transaction-by-transaction approach used by the Department to calculate the benefit associated with this program resulted in a distorted benefit calculation. A transaction-by-transaction calculation is distortive because the benchmarks calculated by the Department represent averages for the full 12-month POR. Additionally, the benchmark for wood chips represents an average across all coniferous wood species. The more appropriate approach would be to use weighted average delivered prices for each of the products (logs, wood chips, hog fuel, sawdust) to compare to the weighted average annual delivered prices of the benchmarks.

The Petitioner's Rebuttal Arguments:

- Catalyst is not asking the Department to use more specific benchmarks, but to use annual purchase price averages.

[252] *See* Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 FR 22570 (May 28, 1992) (*Lumber III*).
[253] *See CFS from Indonesia* IDM at 33 ("Section 351.511(a)(2) of the Department's regulation's sets forth the basis for identifying comparative benchmarks for determining whether a good or service is provided for less than adequate remuneration.")

- The Department has consistently found that a benefit is either conferred or not conferred, and that a positive benefit from certain transactions cannot be masked by "negative benefits" from other transactions.
- The Department used a transaction-specific calculation in a "virtually identical situation" to this Expedited Review in an Administrative Review of *OCTG from China*.[254]
- Using an annual average for Catalyst's purchases of inputs would result in an offset of the net subsidy in the form of a credit for transactions that did not provide a benefit. This is not allowed under the statute and is inconsistent with Department practice.

Department's Position:

In this expedited review, Catalyst has argued that the Department should compare its annual benchmarks to annual purchase prices because the comparison of an annual benchmark to transaction-specific purchases is distortive. The petitioner argues that Catalyst's arguments are nearly identical to the respondent's arguments in the *OCTG from China Review*. In the *OCTG from China Review*, the respondent argued the monthly-average benchmarks used by the Department should not be compared to transaction prices because that would not result in an "appropriate apples-to-apples comparison."[255] While there is a difference between the Department's use of annual benchmarks in the *Preliminary Results* and the use of monthly benchmarks in the *OCTG from China Review*, the Department's analysis from the *OCTG from China Review* is applicable. Section 351.503(b) of the Department's regulations requires the Department to determine and find a benefit when a firm pays less for its inputs than it otherwise would have paid absent the program. Thus, in order to be consistent with our regulations, the Department's practice is to calculate a benefit on a transaction-specific basis.[256] Catalyst's proposed methodology of comparing annual average purchase prices to an annual benchmark would distort the benefit that Catalyst received from its inputs provided for LTAR. As the Department has previously held, the law does not contemplate that the Department will provide a respondent with a credit for instances in which the government does not provide a benefit (*i.e.*, instances where a respondent pays adequate remuneration for a good).[257]

It has been the Department's practice to compare monthly benchmarks to individual transactions where possible.[258] Therefore, for the final, we will continue to calculate the benefit for the inputs that Catalyst received for LTAR by comparing prices for individual transactions to a benchmark, but will move to a monthly, instead of an annual, benchmark where the data allow.

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[254] *See Certain Oil Country Tubular Goods From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2011*, 78 FR 49475 (August 14, 2013) (*OCTG from China Review*) and the accompanying Issues and Decision Memorandum at Comment 7.
[255] *Id.*
[256] *Id.*
[257] See *OCTG from China Review* IDM at Comment 7; *see also Certain Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009) and the accompanying Issues and Decision Memorandum at Comment 14.
[258] *See OCTG from China Review* IDM at Comment 7; *also see Drawn Stainless Steel Sinks From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 13017 (February 26, 2013) and the accompanying Issues and Decision Memorandum at Comment 21.

The benchmark data on the record for logs will allow us to construct a monthly benchmark, so we have used a monthly benchmark for that portion of the benefit calculation. The data on the record used to construct the benchmark for wood chips is presented on an annual basis; therefore, it is not possible to construct a monthly benchmark. In line with our calculations from the *Preliminary Results*,[259] the benchmarks for sawdust and hog fuel remain based on a ratio of prices applied to the wood chips benchmark; therefore, the hog fuel and sawdust benchmarks remain on an annual basis.[260]

Comment 17: Whether the Department Should Revise the Transportation Cost for Logs Purchased in BC by Catalyst

Catalyst's Arguments:

- For the logs that were processed at third-party BC contract chip plants, the Department included only the cost of transportation to the chip plants, and did not include the additional cost of transportation from the chip plants to Catalyst's mills. The true delivered costs of the logs should include both transportation legs.

The Petitioner's Rebuttal Arguments:

- Catalyst asks the Department to focus on the particular location at which the price comparisons for logs should be made - effectively arguing that the comparison should be made at its pulp mills, even though its purchased logs are converted at a different location and transported as chips to the pulp mills.
- If the Department decides to include transportation costs from the third-party chipper to Catalyst's mills on domestic purchases, then it must do the same for the benchmark since the benchmark logs would also need to be delivered to a third-party chipper. Whether or not the Department makes this adjustment to both sides of the equation, there is no change in the benefit.

Department's Position:

We agree with the petitioner. The log portion of the export ban calculation is measuring the difference between the delivered price for a log purchased by Catalyst in BC and the Tier 2 benchmark for a delivered log. Catalyst is asking the Department to include additional transportation costs in the calculation to move a further processed input (wood chips generated from its log purchases) from an unaffiliated processing facility to the company's mills. It is Catalyst's decision to determine where the logs it purchases are delivered (and converted into wood chips), and the calculation reflects this business practice.[261]

In reviewing the arguments relating to this issue, the Department became aware that it did not include a transportation cost from the Pacific North West (PNW) to British Columbia in its

[259] *See* PDM at 33.
[260] *See* Catalyst Final Calculation Memorandum.
[261] *See* Catalyst Verification Report at 19 ("After the purchase, Catalyst staff inspects the log booms at the FOB point before accepting delivery to ensure that the log boom matches the scale data Catalyst was provided for the boom and to inspect for any quality issues.")

world market benchmark. Section 351.511(a)(2)(iv) of the Department's regulations directs the Department to adjust the benchmark price "to reflect the price a firm actually paid or would pay if it imported the product."[262] The Department is aware that its preliminary benefit calculation for logs included benchmarks that only reflected delivered prices in the PNW, and were not reflective of the price that a firm in British Columbia would have paid if it *imported* the logs. Therefore, in accordance with 19 CFR 351.511(a)(2)(iv), for purposes of these final results, we are applying a transportation cost for barging logs from the PNW to British Columbia. Because the record of this proceeding does not contain information relating to international log barging costs, the Department is applying Catalyst's reported transportation costs for wood chips from the PNW to its mill in British Columbia as a surrogate for log transportation costs from the PNW to British Columbia. Although the freight is representative of log freight, it is the best and most reasonable data we have on the record to include in our benchmark and make it representative of a delivered price, as envisioned by 19 CFR 351.511(a)(2)(iv).[263] This is the same international transportation cost used in our wood chip benchmark; please see Comment 20 for further discussion of the appropriateness of this transportation cost.

Comment 18: Whether the Department Selected the Appropriate Log Benchmarks

The Petitioner's Arguments:

- The Department should calculate species-specific log benchmarks for the Final Results, as opposed to the species and grade-specific benchmarks that were used in the *Preliminary Results*. The benchmarks used in the Preliminary Results lead to a distorted benefit calculation.
- The Department has used species-specific benchmarks in recent proceedings involving logs and stumpage.
    - In the calculating the New Brunswick stumpage benefit in this review, the Department used a species-specific benchmark and did not take into account gradations of logs.
    - In the most recent administrative review in *Lumber IV*, the Department rejected respondents' arguments that it was required to construct individual benchmarks by grade for British Columbia.[264]
    - In the *Supercalendered Paper from Canada* investigation, the Department did not calculate benchmarks for the different grades of pulpwood purchased. Instead the

[262] *See, e.g., See Certain Oil Country Tubular Goods from the Republic of Turkey: Final Determination in the Countervailing Duty Determination and Final Affirmation Critical Circumstances Determination*, 79 FR 41964 (July 18, 2014) (*OCTG from Turkey*), and accompanying IDM at Comment 3; and *Welded Line Pipe From the Republic of Turkey: Final Affirmative Countervailing Duty Determination,* 80 FR 61371 (October 13, 2015) *(WLP from Turkey),* accompanying IDM at Comment 8.

[263] *See Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty Administrative Review; 2013*, 80 FR 77318 (December 14, 2015) and accompanying Issues and Decision Memorandum at Comment 4.

[264] *See Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73448 (Dec. 12, 2005) (*Lumber IV* 3rd Review) and accompanying Issues and Decision Memorandum at Comment 29.

Department accounted only for the distinction between softwood and hardwood species.[265]
    - In *Certain Coated Paper from Indonesia*, the calculation on the log export ban and stumpage programs were done on a species-specific basis.
- At verification, the Department found that there was no difference in the fiber quality produced based on the gradation of logs at issue in this Expedited Review, but did find that fiber from different species of logs resulted in differences in paper quality.[266] The Department found that while species is an important factor in the quality of the pulp used for paper production, the grade of the logs is not.

Catalyst's Rebuttal Arguments:

- The Department cannot ignore the grade information on the record, to do so would run afoul of the "substantial evidence" standard. Section 516a(b)(1)(B)(i) of the Act requires that the Department's determinations must be supported by "substantial evidence on the record." The "substantial evidence" standard means that the Department may not ignore relevant record evidence in making its determination.[267]
- The petitioner is incorrect that the Department has previously only used species-specific log benchmarks – to the extent that the record evidence allows, the Department does account for log species and grade.
    - In *Lumber IV's* third administrative review, the Department indicated that it was not undertaking a "precise matching of logs by species, size characteristics and grade distribution" because it was not "possible" as information was not on the record that would allow it to do so.[268]
    - In the *Supercalendered Paper from Canada* investigation, the Department distinguished between pulpwood and fuelwood in stumpage benefit calculation.
    - In *Coated Paper from Indonesia*, the Department made sure to exclude HTS categories from the benchmark that would not have included pulpwood.
    - In *Uncoated Paper from Indonesia*, DOC used a pulp log benchmark because it reflected the grade of acacia harvested by the respondent.
- During the POR, Catalyst purchased different grades of logs. The Department is trying to determine whether Catalyst paid below-market prices for those logs. There is no question that a log's grade affects its price.

The GOC and GBC's Rebuttal Arguments:

- The petitioner is arguing that DOC should ignore the distinction between pulp logs and higher quality (and therefore more expensive) saw logs. The record indicates that Catalyst purchased mostly pulp logs, but purchased higher-grade logs when there was less availability. The distinction between pulp logs and more expensive, higher quality logs is a fundamental component of market structure, and therefore also a "prevailing market condition."

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[265] *See Supercalendered Paper From Canada: Final Affirmative Countervailing Duty Determination,* 80 FR 63535 (Oct. 20, 2015), and the accompanying Issues and Decision Memorandum at 40.
[266] *See* Catalyst Verification Report at 17.
[267] *See, e.g., Vinh Hoan Corp v. United States*, 49 F. Supp. 3d 1285 (CIT 2015); *GPX Int'l Tire Corp v. United States*, 942 F. Supp. 2d 1343 (CIT 2013).
[268] *See Lumber IV 3rd Review* and accompanying Issues and Decision Memorandum at Comment 29.

- The Department does not hesitate to take log grade or quality into account, where the data permit, as a relevant prevailing market condition.
    - In the *Super Calendered Paper from Canada* investigation, the Department made a distinction between pulpwood and fuelwood. It also considered grade distinctions in the *Uncoated Paper from Indonesia* investigation – acacia pulpwood vs acacia logs.

The parties also made comments regarding adjustments to the benchmarks if the Department decides to continue to use benchmarks that are species- and grade-specific. It is not possible to summarize or discuss these comments without discussing business proprietary information; please see the *Final Calculation Memorandum for Catalyst* for a summary and discussion of these comments.[269]

Department's Position:

We disagree with the petitioner's contention that using a log benchmark that accounts for gradation "is at odds with the methodologies the Department has used for logs and stumpage for the other respondent in the instant review, as well as other forest-product and paper cases."[270] As the GOC and GBC have noted in their rebuttal briefs, the Department has taken grade/quality into account as a market condition where the data on the record have allowed. As discussed in Comment 18, the Department used species-only annual average benchmarks in the calculation of the benefit for Stumpage Provided for LTAR in New Brunswick in this review because Irving was not able to provide information requested by the Department that would have allowed for construction of more detailed benchmarks.

While the petitioner is correct that the Department has held that there is "no requirement in the statute or the Department's regulations that a benchmark price match precisely all of the characteristics of the subsidized price,"[271] the Department must adhere to section 771(5)(E)(iv) of the Act, which states, in part, that:

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

The petitioner argues that grade/quality is not an important condition of competition because Catalyst stated that there is no difference in the quality of pulp produced from differing grades of logs, but that the species of the log is what impacts the quality of the pulp produced.[272] We disagree with the petitioner because the record evidence demonstrates that Catalyst's purchases of logs are heavily influenced by the grade/quality of the log and, therefore, grade/quality is an important market condition. Specifically, at verification, Catalyst officials stated that species

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[270] *See* Petitioner's Case Brief at 17.

[271] *See Lumber IV 3rd Review* IDM at Comment 29.

[272] *See* Catalyst Verification Report at 17.

and grade/quality are the most important factors in its price negotiations with its log suppliers.[273] Catalyst officials went on to explain that the company "purchased close to 90 percent pulp logs due to lower pricing for pulp logs, but would purchase higher-grade logs when there was less availability and Catalyst needed logs to produce chips."[274] Therefore, because the grade of the logs is an important market condition in the British Columbia log market and because the benchmark data on the record makes it possible to construct benchmarks that take into account log grades, the Department will continue to use benchmarks that take into account both species and grade in its benefit calculation.

Please *see* Catalyst's Final Calculation Memorandum for further analysis containing business proprietary information relating to the parties' comments regarding the data used to construct the log benchmarks.[275]

Comment 19: Whether the Wood Chip Benchmark Dataset is Distortive

The Petitioner's Arguments:

- In the *Preliminary Results*, the Department used U.S. export data for wood chip exports from the PNW during the POR to construct a benchmark.[276] The benchmark data on the record used by the Department consisted of six lines of export transaction data during the POR; five data points from Washington state and one from Oregon.[277] The Oregon data point, which has significantly more volume and a significantly lower average unit value than the five Washington data points, distorts the benchmark calculation.
- The Department's regulations state that "{w}here there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability."[278] By weight-averaging the six data points the Department has failed to both create a world market price and measure the benefit of this program in light of the "prevailing market conditions" required by the statute.[279]
- The Department should exclude the Oregon data from the benchmark calculation because the transportation cost that the Department used in the Preliminary Results to account for transportation cost from the PNW to British Columbia only includes ocean freight from Washington state (and not Oregon) to British Columbia. The failure to capture the cost of ocean freight from Oregon to British Columbia is a glaring deficiency and is inconsistent with the requirements of 19 CFR 351(a)(2)(iv), which requires the Department to use the "delivered prices" a respondent "actually paid or would pay if it imported the product."

[273] *Id*. at 19.
[274] *See* Catalyst Verification Report at 19.
[275] *See* Catalyst Final Calculation Memorandum.
[276] *See* PDM at 32.
[277] *See* Catalyst Benchmark Submission at Exhibit 138.
[278] *See* 19 C.F.R. 351(a)(2)(ii).
[279] *See* Section 771(5)(E)(iv) of the Act.

- In *RZBC Group*, the CIT faulted the Department for failing to explain why it chose to use a simple average vs. a weighted average and DOC could not favor one method over another without saying why.[280]
- The Department has said that it uses simple averages in cases where "the available data set may not reflect the broader market's distribution of pricing factors, in which case weight-averaging would exacerbate the distorting effect of anomalous or exceptional samples."[281] There is no information on the record that Oregon is the overwhelmingly dominant producer of wood chips compared to Washington, as one might infer from its weight in the Department's benchmark calculation.
- In the *Preliminary Results*, Department simple averaged the log prices from Oregon with the prices from Washington to create log benchmarks that accurately represent prices throughout the PNW.
- If the Oregon data is not removed, the Department should either (1) calculate a simple average of the six data points or (2) use a hybrid weighted/simple average methodology.
    - Generally, the Department's averaging methodology-whether calculating a simple or weighted average or some combination thereof-has the overarching goal of limiting distortion given the available record data. Here using the weighted-average would increase distortion by creating a benchmark almost exclusively based on a single data point.

Catalyst's Rebuttal Arguments:

- The Department should not exclude Oregon data from its benchmark calculation. The U.S. export data used for the benchmark calculation summarize hundreds, if not thousands, of transactions. Therefore, the quantity and value data from Oregon are not a single line of data for an export transaction, but the sum of numerous lines of data for numerous export transactions from Oregon to Japan in 2014.
- The exports from Oregon to Japan in 2014 accounted for 45.1% of total U.S. exports of wood chips in 2014, while exports from Washington state represented 0.1% of total U.S. exports.[282] Therefore, if the Department was to remove the Oregon data, it would be constructing a benchmark based on a trivial sampling of low-volume export price data.
- Catalyst is high-volume repetitive wholesale wood chip purchaser, which means its pays lower prices than one-off purchasers. Therefore, the condition of Catalyst's purchase of wood chips in British Columbia is much more similar to the Oregon data than the one-off transactions represented by the Washington State data.
- The Oregon data represents exports from the Columbia-Snake River customs district. The Columbia River is the boundary between Washington state and Oregon, and a number of the ports represented in the Oregon data are from ports located in Washington state.[283] Therefore, there is no indication that by using the Oregon data that it is an

[280] *See RZBC Group Shareholding Co. v. United States*, 100 F. Supp. 3d 1288, 1308-10 (CIT 2015) (*RZBC Group*).
[281] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 79 FR 54963 (September 15, 2014) (*Rebar from Turkey*) and accompanying Issues and Decision Memorandum at n. 123.
[282] *See* Catalyst Benchmark Submission at Exhibit 138.
[283] *See* Annex C of the Harmonized Tariff Schedule of the United States (2014) (2014 USHTS).

Oregon-only benchmark because the Oregon data likely includes wood chips from both Oregon and Washington state.

- Consistent with its practice,[284] the Department should continue to utilize useable benchmark data from the entire PNW.
- The Department should not remove the Oregon data because the transportation costs used in the Preliminary Results only reflect transportation costs from Washington state to British Columbia. Rather, the appropriate solution would be to make adjustments to the delivery charge added to the PNW export price. However, no adjustment to the benchmark delivery charge is necessary.
- The Department did not err in weight-averaging Washington State and Oregon data because the Oregon data is not a single transaction from a single location. The petitioner's proposed averaging alternatives would give improper weight to the higher AUVs of the Washington state exports resulting in a benchmark that would be arbitrarily skewed upward. This methodology runs afoul of the very same court and Department precedent the petitioner cites in its arguments.[285]

The GOC and GBC's Rebuttal Arguments:

- The POR export volumes from Washington State were trivial by comparison to the Oregon values; therefore, it is no surprise that the low volume exports would have higher per unit values. To ignore the prominent position of Oregon exports during the POR would severely distort the Department's selected benchmark dataset.
- The law expresses a strong preference for weight-averaging. In *OCTG from Turkey*, the Department reasoned that weighted-average prices reduce potential distortion when there are small transactions.[286]

Department's Position:

The Department agrees with the respondents that no adjustment is necessary because the calculation of the wood chips benchmark creates a world market price that is not distortive and represents prevailing market conditions. The petitioner's contention that the Oregon data point is a single transaction is not correct. The volume and value data on the record represent the cumulative total of all export transactions from each U.S. customs district to each U.S. trading partner during the POR, not simply a single transaction from a customs district to each of those countries.[287] The Columbia-Snake, Oregon data point used in the benchmark calculation represents more than a single transaction from that customs district to Japan; rather, it represents the entirety of the exports from the Columbia-Snake, Oregon export district to Japan during the

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[284] *See* Petitioner Benchmark Submission at Exhibit 18.
[285] *See RZBC Group* at 1308-10 *(citing Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Affirmative Countervailing Duty Determination Final Affirmative Critical Circumstances Determination* (*Steel Rebar from Turkey*), 79 FR 54963 (September 15, 2014) and accompanying Issues and Decision Memorandum at Comment 1 and note 123; *Certain Oil Country Tubular Goods From the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination* (*OCTG from Turkey*), 79 FR 41964 (July 18, 2014) and accompanying Issues and Decision Memorandum at Comment 4)).
[286] *Id.*
[287] *See* Catalyst Benchmark Submission at Exhibit 138.

POR,[288] just as the data points from the Seattle, Washington export district used in the benchmark construction represent the cumulative total of the export transactions from the Seattle, Washington export district to five other countries during the POR.[289]

Exclusion of the Oregon data or adoption of the simple-average or hybrid-averaging approaches suggested by the petitioner would distort the actual prices of exports from the PNW during the POR. The averaging methodologies proposed by the petitioner all involve simple-averaging the Seattle, Washington data and the Columbia-Snake, Oregon data, which would result in the Seattle, Washington data having equal (or greater) weight as the Oregon data in the benchmark despite the much smaller volume exported from that customs district during the POR.[290] The petitioner argues that a simple average of the data is preferable because there is no evidence on the record that Oregon is a disproportionately larger producer of wood chips than Washington state, but that is the conclusion that would be drawn from the data used in the benchmark calculation. We disagree with this contention. As Catalyst discussed in its rebuttal brief, the Columbia-Snake, Oregon customs district is made up of ports in both Oregon and Washington state.[291] Thus, the wood chips exported from this customs district are produced in both states and, therefore, representative of the PNW and of the prevailing market conditions in British Columbia.

We consider that the petitioner's proposed approaches involving simple-averaging would be distortive because the actual export volumes from the Seattle, Washington customs district used in the benchmark calculation are a tiny fraction of both PNW and U.S. exports of wood chips during the POR.[292] The market reality of exports from the PNW during the POR is that the transactions represented in the Columbia-Snake, Oregon data are much more indicative of the actual volume and prices of exports from the PNW than the tiny volumes and prices represented in the Seattle, Washington data. The Department has a stated preference for weight-averaging data when it is reported on a uniform basis because weight-averaging "reduces the potential distortionary effect of any specific transactions (*e.g.,* extremely small transactions) in the data."[293] This is exactly the situation in this review. The Department has averaged the world market prices available pursuant to its regulations at 19 CFR 351(a)(2)(ii), and has given due consideration of the factors that allow comparability of these prices.

We disagree with the petitioner that a lack of freight cost from Oregon has resulted in a situation where the data from Oregon must be disregarded. As discussed above, the volume and value from the Columbia-Snake, Oregon customs district includes wood chips exported out of Washington state ports and is representative of wood chips from throughout the PNW. The

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[288] *Id*.
[289] *Id*.
[290] *Id.*
[291] *See* 2014 USHTS at Annex C.
[292] *Id*. The combined export volume from the five Seattle, WA data points was 3,200 BDT during the POR, while the exports from Columbia-Snake, OR was 1,262,601 BDT. The Seattle, WA export volume represent just 0.11 percent of total U.S. exports (2,806,327 BDT) of coniferous wood chips during the POR and 0.25 percent of exports from the PNW. Conversely, the Columbia-Snake, OR export volume represents 45.06 percent of total U.S. exports of coniferous wood chips and 99.75 percent from the PNW.
[293] *See OCTG from Turkey* IDM at Comment 4.

record contains Catalyst's actual transportation costs for shipping wood chips from the PNW to British Columbia.[294] Therefore, there is no basis for the rejection of the Columbia-Snake, Oregon wood chip volumes and values from the benchmark data set. Discussion of adjustments to the wood chip benchmark transportation cost are addressed below in Comment 20.
While it would have been the Department's preference to construct a monthly benchmark for wood chips using U.S. export data, the data submitted on the record only contains annual volumes and values. Therefore, due to the constraints of the data on the record, the Department will continue to utilize an annual benchmark for wood chips.

Comment 20: Whether the Department Should Revise the Wood Chip Benchmark Transportation Cost

The Petitioner's Arguments:

- In the *Preliminary Results*, the Department used Catalyst's actual transportation cost for shipping wood chips from Washington state to one if its mills in British Columbia. This transportation cost is not accurate because it did not take into account transportation costs to Catalyst's other two mills in British Columbia, as required by the statute and the Department's regulations.[295]
- Catalyst should adjust the wood chips transportation cost based on a ratio of the transportation costs reported for one of the other inputs on the record.
- The transportation cost used in the *Preliminary Results* also does not take into account shipping from Oregon to Catalyst's mills in British Columbia; it only accounts for transportation from Washington to Catalyst's mills. Therefore, the Department should adjust the transportation cost of the wood chips benchmark to account for the longer distance shipped from Oregon.
- The Department's regulations require that "{w}hen constructing a {T}ier-two benchmark, the reference to 'a firm' does not mean the respondent. Rather, it refers to a hypothetical firm. . . This is why the Department is directed, when calculating tier-two benchmarks, to determine 'price{s that} would be available to purchasers in the country in question.'"[296]

Catalyst's Rebuttal Arguments:

- The petitioner cites no evidence on the record that it would cost more to barge wood chips from Washington state to one of Catalyst's mills versus the cost to the other mills or that the barge rates have any direct relationship with distance. There is no evidence on the record that the barge rates for the other input that the petitioner would like to use as a proxy to construct an adjustment to the wood chips transportation cost is the same as the barge rates for wood chips. The Department's determination must be grounded in "substantial evidence on the record," not speculation.[297]

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[294] Catalyst Benchmark Submission at Exhibit 132
[295] See *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1274 (Fed. Cir. 2012) (citing to Section 771(5)(E) and 19 CFR 351.511(a)(2)(iv)); *see also Beijing Tianhai Indus. Co. v. United States*, 52 F. Supp. 3d 1351, 1373 (CIT 2015) (*Beijing Tianhai*).
[296] *See Beijing Tianhai*, 52 F. Supp. 3d at 1373.
[297] *See* section 516a(b)(1)(B)(i) of the Act.

- The barge rates for the other input that are on the record cannot be considered representative of barge rates relating to wood chips because the barge rates for the other input are elevated because it was for a small volume. Record evidence shows that it should cost less per unit to transport larger volumes by barge; therefore, using the barge rate for the other input is inappropriate.
- If the Department determines that it should undertake the adjustment proposed by the petitioner, then it should take into account that Catalyst consumes more wood chips at one mill and weight average a barge rate based on the delivered volume of wood chips delivered to each mill.
- The Department should not make an adjustment to increase transportation costs from Oregon as the petitioner argues. The Department is not required to apply precise transportation charges for every export price used in its benchmark calculation. Section 351.511(a)(2)(iv) of the Department's regulations requires the Department to "adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product." If a British Columbia firm, such as Catalyst, were to import chips from the PNW, it would do so from Washington or a nearby port due to the geographical proximity to British Columbia.
- There is no reason to assume that the PNW export price constructed by the Department is not representative of prices throughout the PNW given that the Columbia-Snake, Oregon customs district is on the border between Washington and Oregon.
- It is also not the Department's practice to apply precise transportation charges to every export price used in its benchmark calculation. In *Dry Containers from China*, the Department used representative ocean freight rates in construction of a benchmark.[298] The transportation rate from Washington to Catalyst's mill in British Columbia is representative of transportation rates from the PNW.
- There is no evidence on the record that the rate from the Columbia-Snake, Oregon customs district would be higher than the rate used in the *Preliminary Results* or that the suggested upward revision is in anyway an appropriate factor to scale up the barge rate from the Columbia-Snake, Oregon customs district. The petitioner's argument is pure speculation and does not meet the substantial evidence standard.

Department's Position:

The Department disagrees with the petitioner that the Department should revise the transportation cost for the wood chip benchmark. As the petitioner's argument states, the CIT has found that "{w}hen constructing a tier-two benchmark, the reference to 'a firm' does not mean the respondent. Rather, it refers to a hypothetical firm . . . . This is why the Department is directed, when calculating tier-two benchmarks, to determine 'price{s that} would be available to purchasers in the country in question.'"[299] The transportation cost for the wood chips benchmark used in the *Preliminary Results* represent actual transportation costs from Washington state to British Columbia. Contrary to petitioner's arguments that the Department

[298] *See 53-Foot Domestic Dry Containers From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 80 FR 21209 (April 17, 2015) (*Dry Containers from China*) and its accompanying Issues and Decisions Memorandum at 21.
[299] *See Beijing Tianhai*, 52 F. Supp. 3d at 1373.

must adjust the transportation cost to account of the cost of shipping to Catalyst's other mills, the Department's regulations do not require that a Tier 2 benchmark be representative of the respondent's exact circumstances.[300]

However, the Department can use the actual costs of a company in constructing a Tier 2 benchmark if those transportation costs are the only representative transportation costs on the record. In an almost identical situation, the Department used actual company costs in constructing a Tier 2 benchmark in *High Pressure Steel Cylinders From the People's Republic of China*.[301] This benchmark construction methodology was affirmed by the CIT:

> Although plaintiff claims that Commerce's inclusion of inland freight charges that were specific to BTIC's and Tianjin Tianhai's purchases of steel tube was at odds with the Department's refusal to use company-specific information for other components of the benchmark price (e.g., VAT and import duties), there is no inconsistency. This is the case even though Commerce did, in fact, determine the amount of inland freight costs using numbers based on BTIC's and Tianjin Tianhai's actual experience . . . . Here, however, BTIC's and Tianjin Tianhai's numbers were the only sets of inland freight data placed on the administrative record. Thus, despite its practice of ordinarily declining to rely upon delivery charge data that is specific to a particular respondent when using a tier-two benchmark, because, here, there was no other data available on the record, the Department was left with only the actual price data reported by BTIC and Tianjin Tianhai to calculate the benchmark for steel tube. The burden of building the administrative record lies with the interested parties.[302]

In this review, the only international barge costs on the record are Catalyst's actual costs of transporting wood chips from a port in Washington state to its mill in British Columbia. The petitioner failed to provide freight costs for wood chips (or any other input) in its benchmark submission.[303]

The petitioner also argues that the Department should adjust the benchmark transportation cost because the benchmark contains wood chips from Oregon, while the transportation cost only covers transportation from Washington state. However, as discussed above, we continue to find the transportation costs used in the *Preliminary Results* are representative of transportation costs from the PNW to British Columbia and would be available to purchasers in British Columbia. Moreover, these are the only transportation costs on the record and the Department's practice has been to use transportation costs on the record, when established to be reflective of market rates

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[300] *Id.* at 1374 ("Indeed, the Federal Circuit has upheld the Department's practice of ignoring a particular respondent's conditions of purchase when calculating tier-two benchmark prices, and found that adding these charges to a benchmark price, even where the respondent did not incur these costs, 'is consistent with the relevant statute and regulation.'" (citing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1274 (Fed. Cir. 2012))).
[301] *See High Pressure Steel Cylinders From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 26738 (May 7, 2012) and accompanying Issues and Decision Memorandum at 18.
[302] *See Beijing Tianhai*, 52 F. Supp. 3d at 1375.
[303] *See* Petitioner's Benchmark Submission; *see also Beijing Tianhai*, 52 F. Supp. 3d at 1375. ("The burden of building the administrative record lies with the interested parties.").

and representative of the rates an importer, not necessarily what the respondent would have paid.[304]

Comment 21: Whether the Department Should Revise the Transportation Cost Applied to Catalyst's Purchases of Wood Chips in British Columbia

Catalyst's Arguments:

- In the *Preliminary Results*, the Department constructed a per unit transportation cost based on a verification exhibit that included volume for wood chip purchases into inventory and the corresponding transportation costs. However, using these figures resulted in the Department creating a per unit transportation cost that had the exact problem it was looking to avoid – inclusion of costs associated with purchased logs that were then whole logged chipped (WLC) into wood chips.
- Catalyst provided (in Exhibit 130) a summary of delivered costs for wood chips, hog fuel and saw dust, but the Department did not use this information to calculate transportation costs because of concerns that the data includes volume and processing costs associated with logs that Catalyst purchased and had chipped.
- The data that the Department used in the *Preliminary Results* included wood chips that were a result of whole log chipping, so the Department still recorded transportation costs associated with chipped logs. Therefore, this data should not be used according to the Department's own reasoning.
- The residual chip volumes from Exhibit 130, wood chips that are a result of whole-log chipping are recorded in separate lines, would allow the Department to construct a per unit transportation cost that isolates the processing and transportation costs associated with chipped log purchases. The Department should sum all of the volumes and values associated with the residual lines to construct a weighted-average per unit delivered cost for wood chips. This delivered cost can then be subtracted from the reported per unit purchase price to construct a per unit transportation cost. This is a similar approach to what the Department did to construct saw dust and hog fuel transportation costs.

The Petitioner's Rebuttal Argument:

- The Department rejected the information in Exhibit 130 in its *Preliminary Results* and should continue to do so.

Department's Position:

The Department agrees with Catalyst and has revised the wood chip transportation cost used in construction of the benchmark for examining Catalyst's purchases of wood chips. Because our position relies on business proprietary information, please see the BPI Memorandum for a full discussion of the comment.[305]

[304] *See Dry Containers from China* at Comment 6D.
[305] *See* Department memorandum, "Expedited Review of the Countervailing Duty Order on Supercalendered Paper from Canada; Analysis of Business Proprietary Information for the Final Results" (BPI Memorandum).

For the final results, we constructed a per unit weighted-average delivered cost for all residual wood chips as reported in Exhibit 130.[306] We then constructed a per unit weighted-average annual purchase price for Catalyst's domestic purchases of wood chips as reported in Exhibit 106,[307] and subtracted the per unit weighted-average purchase price from the per unit weighted-average delivered price to arrive at a per unit weighted-average transportation cost for the POR. This per unit transportation cost was then added to each of Catalyst's BC purchases of wood chips in the POR to construct a delivered price.

Comment 22: Whether the Department Should Adjust the Sawdust and Hog Fuel Calculations Based Upon Changes to the Wood Chip Benchmark

All of the parties have argued that any changes that the Department makes to the wood chip benchmark must be reflected in a recalculation of the sawdust and hog fuel benchmarks, which are based on ratios applied to the wood chip benchmark.[308]

Department's Position:

We agree with the parties and we have applied any changes we made to the wood chip benchmark calculation to the the sawdust and hog fuel benchmarks for these final results. Please *see* Catalyst's Final Calculation Memorandum for further details.[309]

Comment 23: Whether the Government of New Brunswick Provided Stumpage to Irving for LTAR

The GOC's Arguments:

- In the *Preliminary Results,* the Department determined that New Brunswick stumpage purchases are not "market determined" or, in other words, are distorted by government involvement in the marketplace.[310] The Department did not have an adequate basis for disregarding private stumpage prices in New Brunswick as a benchmark.
- The Department's finding that New Brunswick's stumpage prices are distorted by government involvement in the marketplace is contrary to legal precedent and not supported by the facts.
- The Department's application of a *per se* rule to establish market distortion is contrary to domestic and WTO law.
    - The Department cannot make a determination that a market is distorted because of a *per se* test of government involvement in the market. In *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States (Borusan),* the Court of International Trade (CIT) held that the Department had not adequately supported its decision to

[306] *See* Catalyst Benchmark Submission at Exhibit 130 (Exhibit 130).
[307] *See* Catalyst QR at exhibit 106.
[308] See Catalyst Preliminary Calculation Memorandum at Attachment 2.
[309] *See* Catalyst Final Calculation Memorandum at Attachment 2.
[310] *See* PDM at 24-26.

disregard Tier 1 prices and remanded back to the Department to further explain its "significant" distortion finding.[311]
    - The NAFTA Panel reviewing the Department's *Lumber IV* CVD determination[312] and the WTO Appellate Body, in "a number of significant decisions"[313] have determined that market distortion must be demonstrated and not assumed.
- In the *Preliminary Results*, the Department applied a *per se* rule that a government's majority market share equates to government distortion. Three of the reasons given by the Department for its finding of distortion are based on government involvement in the marketplace: (1) the GNB sells a majority of the stumpage in New Brunswick; (2) the GNB restricts eligibility for Crown stumpage rights; and (3) private woodlot owners account for a much smaller share of the NB stumpage market than the government and cannot compete with the low prices set on Crown land.[314]
- The fourth reason provided by the government for a determination of distortion, private mills' status of the dominant consumers creates an oligopsony effect that results in artificially low "market-based" price for Crown stumpage users,[315] is based on an out-of-date report from 2008[316] and "pure speculation" and the "false" premise that the Department can disregard the Tier 1 benchmark if there is any distortion in the market. In accordance with the *Preamble* to the Department's CVD regulations, the Department is only authorized to disregard a Tier 1 benchmark if the government's role as the supplier of the good is the source of market distortion.[317]
- The evidence on the record "clearly" demonstrates a functioning market:
    - the GNB's data shows a smaller percentage of Crown ownership than found by the Department;
    - private stumpage prices in New Brunswick set the GNB's stumpage prices because Crown stumpage must be based on "fair market value," which is based on a survey of private stumpage sales in the Province;
    - the New Brunswick private stumpage market has over 40,000 private woodlot owners and 1,200 independent wood producers that purchase stumpage; and
    - the timber market is open to trade with Maine and bordering provinces.

The GNB's Arguments:

- Neither the statute nor the regulations specify how the Department is to determine whether there are useable market-determined prices to be used as a Tier 1 benchmark

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[311] *See Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*; 61 F. Supp. 3d 1306 (CIT 2015) (*Borusan*).
[312] *In the Matter of Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination*.
[313] The GOC cites to the "two most recent" decisions: *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products From India* and *United States – Countervailing Measures on Certain Products from China*.
[314] *See* PDM at 25.
[315] *Id.*
[316] The *Report of the Auditor General – 2008* (2008 AG Report). *See* Petitioner's Amended NSA Allegations at Exhibit 2.
[317] *See* "Explanation of the Final Rules" *Countervailing Duties, Final Rule;* 63 FR 65348, 65377 (November 25, 1998) (the *Preamble*).

when selecting a benchmark to measure the adequacy of remuneration. However, the CIT has found that the *Preamble* indicates that there may be instances in which the government supplier accounts for a majority or, in certain circumstances, a substantial portion of the market such that distortion may be found to exist, but that a market distortion finding should only be made when "it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market…."[318]

- It has been Department practice to evaluate the percentage of the market that is accounted for by the government supplier, and in certain cases other indicia of market distortion to determine whether a market is distorted.[319] In cases in which the government supplier accounts for a substantial portion, but not a majority of the market, the CIT has directed that the Department must identify the "certain circumstances" as referenced in the *Preamble* that support a market distortion determination.[320] In past cases, the "certain circumstances" the Department has examined include factors such as: (1) whether there are export restraints or restrictions, (2) whether imports account for an insignificant portion of the market, and (3) other government policies that may have a distortive impact on the market.[321]
- The Department's findings in the *Preliminary Results* do not support its conclusion that actual transaction prices are significantly distorted because of the government's involvement in the market. Even if the GNB accounts for more than 50% of the market, it would not be sufficient to find distortion. However, the GNB accounts for less than a majority of the stumpage market in New Brunswick, and there are no other "certain circumstances" on the record that support the Department's preliminary decision.
- In the *Preliminary Results*, the Department's calculation for GNB's share of the market was flawed because it did not include imports reported by the GNB and excluded the "other category, which includes biomass, bark/hog fuel, sawmill and pulpmill chips, and other residues." The methodology used by the Department is inconsistent with the Department's practice. In the absence of any explanation for disregarding its established practice of including imports in the market share calculation, the Department's decision to exclude imports is not supported by substantial evidence and is unlawful.
    - The "market" that is being analyzed is the market in New Brunswick for timber and other wood fiber that are used as inputs in the production of the subject merchandise. The market includes all available sources of supply of these inputs, which by definition includes domestic supply and imports into the New Brunswick market. Imports impact the supply and demand characteristics of the NB market just as much as domestically-supplied inputs as they are an available option for purchases of timber and wood fiber that is used to produce the subject merchandise.

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[318] *See Borusan* at 1328.
[319] *See, e.g.,* PDM at 25; *Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2013 and Rescission of Countervailing Duty Administrative Review, in Part*, 80 FR 61361 (October 13, 2015) (*Standard Pipe from Turkey*) and accompanying Issues and Decision Memorandum at 19.
[320] *See Borusan* at 1328, 1330-32.
[321] *See, e.g., Standard Pipe from Turkey* IDM at 19.

- If the Department continues to exclude imports on the theory that they are not "stumpage," then it must also remove the delivered wood transactions from its market share calculation because, like imports, these constitute purchases of delivered wood (and not stumpage).
- The Department's unexplained exclusion of the volumes reported in the "other category" is also unsupportable. Stumpage rates are set not only for sawlogs, studwood, and pulpwood, but also for fuelwoods, chips, biomass and other non-roundwood products. The Department's questionnaire requested that the GNB report all fees charged to Irving for stumpage rights regardless of the products that Irving produced using the timber harvested.
- Stumpage is the value of standing timber, which includes all parts of the tree including not only the biomass from the branches and tops of the trees, but also the by-products such as chips that are generated when the timber is cut and processed. Limiting the market share calculation to only roundwood (much of which is used to produce non-subject lumber products) makes little sense and does not capture an important part of the timber market that covers inputs used to produce the subject merchandise.
- If market share is calculated by including imports and the "other category," the GNB did not control a majority of the timber and wood fiber supply in New Brunswick during the POR.

- The other indicia of distortion relied upon by the Department to support its determination that the New Brunswick stumpage market is distorted are not supported by the record or economic theory. There is no basis to reject Irving's purchases of private stumpage in New Brunswick as a Tier 1 benchmark.
  - In the *Preliminary Results*, the Department discusses two additional factors that it claims further support its decision that the private stumpage market in New Brunswick is distorted : (1) the GNB restricts eligibility for Crown stumpage rights to companies that operate pulp and paper or lumber mills, and (2) private woodlot owners are small in relation to the Crown and "the private mills status as the dominant consumers of stumpage creates an oligopsony effect such that both private woodlot owners and the Crown are responsive to price-setting behavior by the private mills."[322] The first factor is factually incorrect, and the second is unsupported by facts on the record and is contrary to basic economic theory.
  - The Department'' statement in the *Preliminary Results* that the GNB restricts Crown stumpage rights to companies that operate in the pulp and paper or lumber mills[323] is factually incorrect. In addition to licensees and sub-licensees that own or operated pulp and paper or lumber mills, permit holders also have access to Crown lands for the harvesting of timber.[324]
  - The Department's claim that "the private mills status as the dominant consumers of stumpage creates an oligopsony effect such that private woodlot owners and the Crown are responsive to price-setting behavior by the private mills" has no basis and the Department has ignored substantial record evidence that undermines

[322] *See* PDM at 25.
[323] *Id.*
[324] *See* GNB NSA Response (8.12.16) at NB-18.

its findings. The Department's conclusions about a so-called "oligopsony effect" are based on mischaracterizations of the findings in the sources it cites.

- The Department cites to the 2008 AG Report in asserting that the leverage of private mills as dominant consumer suppresses prices and leads to an artificially low "market based" price for Crown stumpage.[325] However, the 2008 AG Report made no such finding, but only identified potential problems with the design of the system for determining royalties and with the implementation of that system.[326] While the 2008 AG Report speculated that the result of the system "could be a continual spiral down of prices and therefore royalties," there is no evidence provided that this alleged market power of the mills was actually exercised in the manner postulated.
- This speculation does not reflect an actual market situation, where changes in prices would affect supply. As prices in the market rise and fall, the supply of private stumpage would also rise or fall. Rather than providing conditions for a continual downward price spiral, private woodlot owners could choose not to sell until market conditions and prices improved.[327] The long maturation period for trees to reach harvestable sizes makes that choice feasible. This elasticity of supply of stumpage from private woodlot owners in response to price changes is a fundamental constraint on any effort or motivation of the large private mills to drive down prices for the private woodlot owners to unsustainable levels.
- The 2008 AG Report based its analysis on the period up through the 2006-07 fiscal year. Thus, on its face, the 2008 AG Report is not reflective of the situation during the 2014 POR.
- The Department cited to a description of the structure of the market for timber in New Brunswick from a 2012 Private Forest Task Force Report to support a claim that: "This market situation does not appear to have changed since the release of {the 2008 AG} report."[328] However, the Department has improperly conflated a condition of competition in the private segment of the timber market, oligopsony (many small sellers, a few large purchasers) with a particular market outcome, *i.e.,* that oligopsony inevitably leads to control of the market and market prices by the large purchasers such that prices are too low and do not reflect fair market value.
- There is no inevitable "oligopsony effect" created by the structure of the timber market in New Brunswick. Beyond the large private mills, the private stumpage market in New Brunswick includes hundreds of purchasers, including forest products processing facilities and over two hundred private forestry contractors. Timber from private woodlots is also shipped to, and imported from, neighboring Canadian provinces and the United States and the free inflow and outflow of wood products impact prices that private woodlot owners are paid for stumpage in New Brunswick. With such active competition among the numerous purchasers in the private stumpage market, woodlot owners would have many choices

[325] *See PDM* at 25.
[326] *See* Petitioner's Amended NSA Allegations at Exhibit 2.
[327] *See* Petitioner's Amended NSA Allegations at Exhibit 9 at 5.
[328] *See PDM* at 25.

regarding whom to sell to at the best available price, or not to sell at all if the price or timing is not right.

- The Department's theory assumes that large private mills such as Irving have market power in the stumpage market. This is not true because Irving's purchases of private stumpage in New Brunswick are only a small portion the total volume harvested from private woodlots. This level of purchases of private stumpage is far too low to give Irving the market power to drive down private stumpage prices.
- The Department cites two news articles to support the assertion that "according to the private Woodlot Owners Association, its members cannot compete with the low prices set on Crown land."[329] However, the claims in those articles are contradicted by the actual facts during the POR. Even if the private woodlot owners are not sufficiently large to impact prices, the seven regional marketing boards can and do act to provide small woodlot owners with market power. Additionally, the record indicates that supply from the private woodlots during 2014 was very close to the sustainable harvest level and the Crown prices Irving paid for stumpage were mostly higher than its private stumpage rates during the POR.

- The Department should determine that the market in New Brunswick is not distorted and use Irving's purchases from private sources should be used as a Tier 1 benchmark.
  - In *Line Pipe from Turkey*, the Department determined whether the market was distorted when the government suppliers accounted for less than a majority but still a substantial portion of the market by examining the record to see if there were other indicia of distortion (*i.e.,* export restraints, the level of imports and any government policies that may distort the market) that indicated that prices were distorted. The Department did not find any of these other indicia present and determined that the record did not support a finding that the Turkish market was distorted and a Tier 1 benchmark could be used.[330]
  - The record in this review contains no indicia of distortion that would support the conclusion that the private stumpage market in New Brunswick is distorted and that a Tier 1 benchmark cannot be used.
  - Given that there are no other indicia of distortion present on the record there is no basis for the Department to determine that New Brunswick is distorted even if the Department continues to conclude that the GNB accounts for a slight majority of the stumpage market in New Brunswick. A slight majority market share alone is not sufficient to disregard Tier 1 benchmark prices from New Brunswick.

[329] *Id.*

[330] *See Welded Line Pipe From the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 80 FR 61371 (October 13, 2015) (*Line Pipe from Turley*) and accompanying Issues and Decisions Memorandum at 16, 39-40; see also *Standard Pipe from Turkey* IDM at 18-20; *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Final Affirmative Countervailing Duty Determination*, 81 FR 47349 (July 21, 2016) (*Welded Pipe from Turkey*) and accompanying Issues and Decisions Memorandum at 13.

Irving's Arguments:

- The Department's preliminary finding is erroneous because the Department concluded that private prices for stumpage in New Brunswick are not market-determined based on speculation and conjecture that are contradicted by factual information on the record.
- The Department found that private stumpage prices in New Brunswick were not market-determined for three main reasons: (i) the GNB holds a "majority share" of the stumpage market; (ii) Crown stumpage prices suppress private prices; and (iii) large mills have the market power to leverage lower stumpage prices from private woodlot owners, an "oligopsony" effect. None of these findings is supported by the facts of record.
- Harvest and import data show that wood harvested from Crown lands in New Brunswick accounted for less than a majority of the available wood supply in the Province during the POR.
    - The Department's market share calculation in the *Preliminary Results* is inconsistent with the Department's calculation methodology in *Lumber IV*[331] and with the Department's current practice[332] because it omitted imports and excluded non-roundwood products from the calculation.
    - The Department's questionnaire asked Irving to report all purchases of stumpage and all fees relating to those purchases, not just purchases and fees relating to production of subject merchandise. In addition to prices for sawlogs, studwood, and pulpwood, stumpage rates are set for fuelwood, chips, biomass, and other non-roundwood products. Considering the Department's questionnaire instructions and approach in *Lumber IV*, the Department's market share calculation is unsupported by the record.
- In *Lumber IV*, the Department calculated the GNB's share of the wood market (i.e., wood delivered to sawmills). In the *Preliminary Results*, it appears the Department attempted to calculate the GNB's share of New Brunswick's stumpage market. The Department's stumpage market calculation is erroneous because it includes delivered wood. Whether calculated based on a wood-basis or a stumpage-basis, the market share data support the conclusion that the GNB's involvement did not distort private stumpage prices during the POR.
- In the *Preliminary Results*, the Department noted that "private woodlot owners accounted for less than one fourth of harvested timber in New Brunswick" during the POR,[333] but private woodlots accounted for less of the provincial supply in *Lumber IV* and the Department found that private stumpage prices were market-determined.[334]
- Section 59(1) of the Crown Lands and Forests Act mandates that the New Brunswick Department of Natural Resources (NBDNR) sell Crown stumpage at "fair market value."[335] NBDNR determines fair market values based on a survey of private stumpage sales in the Province; therefore, private stumpage prices set the GNB's stumpage prices.
- The record evidence refutes arguments that Crown stumpage prices suppress private stumpage prices. The pricing data on the record show that, overall, Crown stumpage

[331] *See Lumber IV 2002-2003 Review* IDM at 95.
[332] *See Welded Steel Pipe from Turkey* IDM at 13; *Line Pipe from Turkey* IDM at 16; *Standard Pipe from Turkey* IDM at 10.
[333] *See PDM* at 25.
[334] *See Lumber IV 2002-2003 Review* at 95.
[335] *See* Irving Supplemental Response (Aug. 12, 2016) at Exhibit STUMP-01.

prices in the Province exceeded private stumpage prices during the POR. Thus, to the extent Crown stumpage rates in the Province influenced private stumpage rates, the effect would have been to raise private prices – not depress them.

- The private stumpage transactions reported by Forest Products Marketing Boards and wood processing facilities to the New Brunswick Forest Products Commission for the fourth quarter of 2014 (the only period that overlapped with the POR)[336] have a lower average price paid for private stumpage in New Brunswick than the weighted-average price paid by JDIL for Crown stumpage during the same one-quarter period.
- The Department cites to a pair of new articles to note, "according to the Private Wood Owners Association, its members cannot compete with Crown land."[337] These unsupported claims do not constitute substantial evidence.

- The Department preliminarily found that private mills have the leverage to suppress private stumpage prices as "dominant consumers."[338] This finding of an oligopsony effect is based only on conjecture; reflects a misunderstanding of the stumpage market in New Brunswick; and is contradicted by other facts of record.
  - The 2008 AG Report and 2012 Private Forest Task Force Report only contain assumptions without citing any facts or data supporting those assumptions. Such assumptions do not satisfy the "substantial evidence" test.[339]
  - The 2008 AG Report predates the POR by six years, did not reflect market conditions during the POR, and is irrelevant to the current proceeding.
  - The 2012 Private Task Force Report refers to JDIL as a dominant buyer,[340] but it is difficult to see how the volume of JDIL's purchases in the New Brunswick private stumpage market during the POR make it a dominant buyer.
  - The 2008 AG Report and the 2012 Private Task Force Report suggest that only Crown timber licensees in the Province buy stumpage, but sub-licensees also buy stumpage.[341]
  - There is no evidence on the record demonstrating that licensees or sub-licensees have the power to dictate private stumpage prices. Licensees and sub-licensees may drive private prices up because they are all competing for a limited supply of private timber. Any attempt by private mills to artificially depress private stumpage prices would be negated by competitive bids offered by private wood producers.
  - The two reports also do not account for the fact that the New Brunswick market is open to trade with Maine and the bordering Canadian provinces.[342] The imports

[336] *See* GNB Factual Information Submission (Sept. 7, 2016) at 3 & Attachment 2
[337] *See* PDM at 25.
[338] *Id.*
[339] *See*, *e.g.*, *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) (explaining that the Department may not base its determinations on "mere conjecture or supposition"); *Jinan Yipin Corp. v. United States*, 526 F. Supp. 2d 1347, 1375 (CIT 2007) (remanding where the Department's decision was based on "mere assumptions, with no apparent support in record evidence"); *Elkem Metals Co. v. United States*, 276 F. Supp. 2d 1296, 1315 (CIT 2003) ("Guesswork is no substitute for substantial evidence in justifying decisions.").
[340] *See* Petitioner's Amended NSA Allegations at Exhibit 9 at 24.
[341] *See* GNB Stumpage Response (Aug. 12, 2016) at NB-12; GNB Verification Report at 13.
[342] *See* GNB Verification Exhibits at Exhibit 13.

into and exports out of New Brunswick demonstrate that private stumpage prices in New Brunswick are market determined.

- Private woodlot owners are under no obligation to harvest and sell their wood and a decrease in the market price may lead some to not harvest and wait for prices to rebound.[343] The long growth cycle of timber and hold forest lands for nonfinancial reasons[344] means that they are not easily pressured by buyers to sell at low prices.
- The volume of wood harvested from private woodlots in New Brunswick in 2014 was at the high end of the sustainable range recommended in the Private Forest Task Report.[345] The high volume of stumpage sold by private woodlot owners during the POR indicates that they were able to charge fair market prices and that private woodlot prices were not depressed.

The Petitioner's Rebuttal Arguments:

- The respondents argue that the Department's *Preliminary Results* are flawed because the Department did not undertake the same market share and distortion analysis that can be required when using a Tier 2 benchmark. In the *Preliminary Results*, the Department used Irving's actual purchases from private sellers in Nova Scotia, i.e., a transaction in the country in question consistent with the Department's Tier 1 regulation.
  - In *Borusan*,[346] the CIT made clear that a market share and distortion analysis is not required when using a Tier 1 benchmark. Unlike the cases cited by respondents, in this case, the Department is selecting between possible Tier 1 benchmarks, both of which represent Irving's own private stumpage purchases. Accordingly, the Department is not required to undertake the same market share and distortion analysis that might be required when the Department turns to world market prices under 19 CFR 351.51 l(a)(2)(ii). Instead, the Department is selecting between in-country private prices which most accurately serve as a benchmark for Irving's NB Crown purchases.
- The Department correctly calculated the GNB's share of the stumpage market. The Department should reject each of respondents' proposed modifications to the Department's market share calculations.
  - Irving and the GNB argue that the Department must exclude the amount included in the numerator and denominator of the market share calculation for delivered wood. Irving has not pointed to any record evidence establishing that this category should be excluded or identified where this category is otherwise accounted for as Crown harvests in the Department's market share analysis.
  - The respondents argue that the Department failed to include imports in its market share analysis. However, the program in question and the government-provided good that is subject to investigation, is stumpage. As the Department recognized in the first administrative review of *Lumber IV*, stumpage is, by its nature, a

[343] *See* Petitioner's Amended NSA Allegations at Exhibit 1 at 196.
[344] See Petitioner's Amended NSA Allegations at Exhibit 9 at 8.
[345] *Id.* at 38.
[346] *See Borusan*, 61 F. Supp. 3d at 1306 .

product that cannot be traded internationally.[347] Accordingly, the Department correctly did not include imports in its market share analysis.

- The respondents argue that the Department failed to include non-roundwood products in its market share analysis. This category includes non-roundwood biomass, bark/hogfuel, sawmill and pulp mill chips, and other residues. Woodchips and hogfuel (and likely unspecified "other residues") represent products that have undergone at least some processing, and thus do not represent stumpage. Nothing in the record indicates that Irving reported purchases of woodchips, hogfuel, or other types of residues its stumpage purchase database, or that this program covers such products. Accordingly, the Department must reject this argument.

- Even if the GNB holds less than a majority market share, the record establishes that the New Brunswick market is significantly distorted.[348]
  - In the first review of *Lumber IV*, the Department recognized the NAFTA Panel's decision that stumpage is, by its nature, a product that cannot be traded internationally.[349] Thus, there is a natural import and export restraint on stumpage markets that must be considered in any market distortion analysis, particularly when coupled with the fact that the Government of Nova Scotia (GNS) controls, at a minimum, a substantial portion of the NB stumpage market.
  - Irving argues that "private stumpage prices in the Province set the GNB's stumpage prices - not the reverse," and attempt to support this assertion by claiming that "Crown stumpage prices in the Province exceeded private stumpage prices during the POR." However, a careful analysis shows there to be little difference between Irving's NB Crown purchases and private stumpage prices throughout NB, establishing that the NB private prices do, in fact, closely mirror NB Crown stumpage prices.
  - Irving, one of only four Crown timber licensees in New Brunswick, is an oligopsony purchaser of Crown stumpage in New Brunswick. These licensees are able to decide how much stumpage is harvested from Crown lands. In *Lumber IV*, the Department found that the timber market "is so dominated by the presence of the government, the remaining private prices…cannot be considered independent of the government price. It is impossible to test the government price using another price that is entirely, or almost entirely, dependent on it."[350] By establishing the NB Crown stumpage rate, the GNB also establishes the price the small group of dominant purchasers such as Irving are willing to pay for private stumpage in the province.

- Even if the Department determines that the New Brunswick market is not distorted, it should average Irving's purchases of private stumpage in New Brunswick and Nova Scotia on a species- and type-specific basis. No party in this case has argued that the

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[347] *See Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada,* 69 FR 75917 (December 20, 2004) (*Lumber IV 2002-2003 Review)* and accompanying Issues and Decision Memorandum at 13-14.
[348] *See* Petitioner's Rebuttal Brief at 45 for BPI argument.
[349] *Id.*
[350] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada,* 67 FR 15545 (April 2, 2002) and accompanying Issues and Decision Memorandum at 24.

Nova Scotia private prices are in anyway distorted, and there is no basis to exclude them even if the Department determines that it should not exclude Irving's NB private prices.

Department's Position:

Based upon our analysis of all of the arguments submitted by the interested parties, we find no reason for changing the decisions made in the *Preliminary Results* with respect to this program. Thus, for all the reasons that are set forth in the *Preliminary Results* and as discussed below, we continue to find this program to be countervailable. Moreover, because portions of the parties' arguments and our discussion thereof are based upon BPI, see the BPI memo for further description of the data we have relied upon.

As noted in the *Preliminary Results*, 19 CFR 351.511(a)(2) sets forth the basis for identifying benchmarks to determine whether a government good or service is provided for less than adequate remuneration. These potential benchmarks are listed in hierarchical order by preference: (1) market prices from actual transactions within the country under investigation; (2) world market prices that would be available to purchasers in the country under investigation; or (3) an assessment of whether the government price is consistent with market principles. This hierarchy reflects a logical preference for achieving the objectives of the statute. In addition, as provided in 19 CFR 351.511(a)(2)(i), we have considered product similarity; quantity sold, imported or auctioned; and other factors affecting comparability.

The most direct means of determining whether the government received adequate remuneration is a comparison with private transactions for a comparable good or service in the country, *i.e.*, using a Tier 1 benchmark. We base this on an observed market price for the good, in the country under investigation, from a private supplier (or, in some cases, from a competitive government auction) located either within the country or outside the country (the latter transaction would be in the form of an import). Our preference for Tier 1 is based on the expectation that such prices would generally reflect most closely the commercial environment of the purchaser under investigation or review.[351]

The *Preamble* to the Regulations provides guidance on the use of market-determined prices stemming from actual transactions within the country.[352] For example, the *Preamble* states that "{w}hile we recognize that government involvement in the marketplace may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market, we will resort to next available hierarchy."[353]

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[351] *See* the *Preamble* at 65377.
[352] *Id.*
[353] *See* the *Preamble* at 65377-78; see *also Hot-Rolled Carbon Steel Flat Products from Thailand*; 66 FR 20259 April 20, 2001).

In the *Preliminary Results*, the Department determined that Irving's purchases of private stumpage in New Brunswick did not qualify as a Tier 1 benchmark because of the influence of the government's administratively-set prices of stumpage within that market, but that Irving's private purchases in Nova Scotia did qualify as a Tier 1 benchmark; we relied on our finding in the investigation of this proceeding and continued to find that the market in Nova Scotia was not distorted.[354] To consider whether these prices satisfy the criteria to be used as Tier 1 benchmarks, we analyzed the stumpage market in New Brunswick during the POR. The petitioner has argued, citing to the CIT's decision in *Borusan,* that the Department does not need to conduct this market share and distortion analysis because there is a qualifying Tier 1 benchmark on the record (*i.e.,* Irving's Nova Scotia private stumpage purchases). Specifically, the petitioner argues that because the Department is not resorting to the next available hierarchy (*i.e.*, Tier 2), but is choosing between Tier 1 benchmarks, there is no need to conduct a distortion analysis. The Department does not agree with the petitioner's reading of the CIT's *Borusan* decision. The CIT stated that, as indicated in the *Preamble*, in order for the Department to use a Tier 2 benchmark "the record must support reasonably concluding that the market is "significantly" distorted."[355] This holding applied to whether the Department needed to perform a distortion analysis when it moved to a Tier 2 benchmark, but it did not prohibit the Department from performing a market share and distortion analysis to determine whether any potential Tier 1 benchmarks are viable.. Therefore, here, in determining whether the Nova Scotia Tier 1 benchmark is viable, we have relied on our prior finding in the investigation of this proceeding, as no information on the record of this expedited review warranted our reconsideration, and we continued to find that Nova Scotia prices constitute observable market prices pursuant to 19 CFR 351.511(a)(2)(i).[356]

Market Share Calculation

In the *Preliminary Results*, the Department determined that timber harvested on Crown land in New Brunswick during the POR represented over 50 percent of the total timber harvest in New Brunswick during the POR.[357] The respondents argue that the Department made errors when calculating this percentage. First, the respondents contend that the Department should include imports of logs and wood products in examining whether the New Brunswick market is distorted. The Department, based on the information on the record, disagrees with respondents. The allegation under investigation is the provision of stumpage. Therefore, in determining whether the stumpage market in New Brunswick is distorted, the Department must analyze the provision of stumpage within the New Brunswick market. The Department has previously determined that stumpage cannot be traded internationally. [358] Furthermore, respondents have provided no evidence of stumpage imports into New Brunswick. The respondents have cited only to imports of logs into New Brunswick. While the Department has in previous instances used log prices for the purposes of deriving a Tier 3 benchmark to determine whether the provision of stumpage is in accord with market principles, here, we are not measuring whether

[354] *See* PDM at 24-26.
[355] *See Borusan*, 61 F. Supp. 3d 1306, 1327.
[356] *See* PDM at 26; *SC Paper Investigation* IDM at 51.
[357] *Id.* at 24.
[358] See *Lumber IV 2002-2003 Review* IDM at 13-14.

logs are provided at LTAR; in this prerequisite analysis, we are examining whether *stumpage* is provided at LTAR, which requires us to consider whether the stumpage market is distorted. In its own practice of developing its administratively-set stumpage prices, the Government of New Brunswick relies on private stumpage prices, not on log prices.[359] Therefore, the appropriate market for analysis is the stumpage market in New Brunswick, which does not include imports. Moreover, the Department will continue to include in its market distortion analysis the volume Crown Land Third Party (Delivered Wood) for purposes of deriving the total volume of timber harvested in New Brunswick. Unlike imports of delivered wood, the Crown Land Third Party (Delivered Wood) represents logs that were once part of the standing timber we are examining under this program and it is necessary for us to include this portion of the supply in our analysis of New Brunswick's stumpage market.

Second, the respondents claim that the Department erred in the *Preliminary Results* by leaving out of its analysis the volume represented by the "other" category. We recognize that the market share calculation should include more than roundwood, but the Department has concerns that the "other" category includes volumes that may be double counted. As noted in the *Preliminary Results*, this "other" category "includes biomass, bark/hog fuel, sawmill and pulpmill chips, and other residues."[360] Sawmill and pulpmill chips, and other residuals, are a processed product, and the Department is concerned that these items that are produced from logs whose volumes are captured in one of the roundwood categories are also included in the calculation. There is no information on the record that would allow the Department to identify the volume reported in the "other" category that is not already included in our calculation. We will revisit this issue in any subsequent administrative review if the respondents are able to provide data to demonstrate that the elements that are in the "other" category are not already included in one of the other roundwood categories However, we note, that even the calculation most advantageous to the respondents (*i.e.*, the inclusion of the "other" volumes in the calculation), results in Crown stumpage in New Brunswick comprising a "substantial portion of the market."[361]

Analysis of Other Indicia of Market Distortion

The GOC argues that in the *Preliminary Results* the Department applied a *per se* rule that the GNB's majority market share equates to government distortion. The GOC cites the CIT's decision in *Borusan*, which states that the Department must adequately support its decision to disregard a Tier 1 benchmark.[362] The GNB also argues that in cases where the government supplier accounts for a substantial majority, but not a majority of the market, the CIT has directed the Department to identify other indicia that support a market distortion determination.[363] Because the government accounts for less than a majority of market share in New Brunswick, the respondents contend that the Department must identify "certain circumstances" on the record that support a finding that the stumpage market in New Brunswick is distorted, but that we failed to do so in the *Preliminary Results*.

[359] *See* GNB Verification Report at 13.
[360] *See* GNB Verification Exhibits at Exhibit 13.
[361] *See* BPI Memo for discussion of the BPI data.
[362] *See Borusan.*
[363] *Id.*

The Department agrees with the respondents that it cannot determine that a market is distorted on the basis of a *per se* rule regarding the government share of the market. As the Department stated in the *Preliminary* Results, the *Preamble* states that government involvement in the market "will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market."[364] However, the Department does not apply a *per se* rule that a government's majority market share equates to government distortion.[365] Rather, the Department will consider all relevant factors or measures that may distort a market.[366] In the *Preliminary Results*, the Department stated that in addition to the government's majority share of the market there were other circumstances in the New Brunswick market that led to a distortion of the market:

> The record evidence in this review establishes that the GNB holds a majority share of the market for stumpage in New Brunswick, and that it restricts eligibility for Crown stumpage rights to companies that operate pulp and paper or lumber mills. Moreover, the evidence establishes that private woodlot owners account for a much smaller share of the New Brunswick stumpage market than the government. The record further indicates that the private mills' status as the dominant consumers of stumpage creates an oligopsony effect such that both private woodlot owners and the Crown are responsive to price-setting behavior by the private mills.[367]

The respondents argue that the record does not support the Department's findings regarding these other circumstances and that the evidence on the record demonstrates that there is a functioning market in New Brunswick. The respondents argue that the record does not support the Department's determination in the *Preliminary Results* that the private mills' status as the dominant consumers of stumpage creates an oligopsony effect such that both private woodlot owners and the Crown are responsive to price-setting behavior by the private mills.

At the outset, we note that all decisions made in a case must be based upon the facts that are present on the record of that case. Here, the respondents have questioned the Department's reliance on specific record evidence: the *Report of the Auditor General – 2008*; the *Report of the Auditor General – 2015 Volume II*; and *New Brunswick Private Forest Task Force Report – 2012*. Each of these documents was placed on the record by the petitioner on April 25, 2016,

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[364] *See Preamble*, 63 FR at 65377.

[365] *See*, *e.g.*, *Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935 (July 29, 2016) and accompanying IDM at 52-56; *see also Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada*, 69 FR 75917 (December. 20, 2004) (*Softwood Lumber IV AR 1*) and accompanying IDM at 94-96; *see also Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1331 (CIT 2015) (remanding for further explanation a finding of government distortion where Commerce relied on the government's market share without explaining why a substantial share of the market was necessarily substantively distortive).

[366] *See*, *e.g.*, *Aluminum Extrusions from the People's Republic of China: Final Results of the Countervailing Duty Administrative Review; 2010 and 2011*, 79 FR 106 (January 2, 2014), and accompanying Issues and Decision Memorandum at 27.

[367] *See PDM* at 25-26.

and under 19 CFR 351.301, all other parties to this proceeding were provided with an opportunity to submit factual information to rebut, clarify, or correct the factual information that was placed on the record by the petitioner on April 25, 2016.[368] While the respondents subsequently made arguments with respect to these documents, including the arguments made in their case and rebuttal briefs, they provided no factual reports or documents that contradict the essential facts and conclusions made in cited documents.

As discussed in the *Preliminary Results*, the Crown Lands and Forest Act requires that Crown stumpage rates in New Brunswick are established at "fair market value" (FMV).[369] In order to establish the stumpage rates in effect during 2014, the GNB relied on the results of private market surveys that provide product- and species-specific stumpage rates for the relevant time period. Because these surveys are conducted every three to four years, the GNB applies an index to the stumpage rates each year and publishes the new rates in Schedule A of the regulations for the relevant fiscal year.[370] These published rates are the basis for stumpage rates charged for the harvest through the GNB's e-scale system.[371] The rates established for the first three months of the POR covering the GNB's 2013-2014 fiscal year were based on the survey conducted in 2009 and 2010, while the rates for the remaining months of the POR were based on the results of the 2011 and 2012 survey.[372] At verification, GNB officials explained that, while the GNB normally relies on province-specific surveys, both the 2009/2010 and 2011/2012 surveys included private stumpage prices from New Brunswick, Nova Scotia, and Prince Edward Island (collectively, the Maritime provinces).[373]

Irving argues that, contrary to the Department's conclusion, there is no inevitable oligopsony effect and that the evidence on the record indicates the opposite -- that the private woodlot owners were able to charge fair market prices and that private woodlot prices were not suppressed during the POR. Irving points to the fact that the volume of wood harvested from private woodlots in 2014[374] was four times higher than it was in 2008,[375] and that the 2014 private woodlot harvest was at the high end of the sustainable range recommended in the 2012 Private Forest Task Force Report.[376] Irving contends that the private woodlot harvest volume combined with the long growth cycle of timber and the fact that the record shows that private woodlot owners do not count on their harvest as their primary source of income and hold forest lands for nonfinancial reasons[377] means that the private woodlot owners are not easily pressured

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[368] *See* Petitioner Letter "Supercalendered Paper form Canada: Petitioner's Amended New Subsidy Allegations" (April 25, 2016).
[369] *See e.g.*, GNB NSA2 at NB-STUMP-2 at 59(1) ("The royalty for each class shall be based on the fair market value of standing timber of that class.")
[370] *See* GNB Verification Report at 13.
[371] All timber harvested on Crown land must be entered into the GNB's e-scale system by the licensee of a License. The Licensee is responsible for submitting e-scale data to the GNB for its own harvest, and also for the harvested volume of all sub-licensees on it license. *See* GNB NSA2 at NB-14.
[372] VR
[373] *See* GNB Verification Report at 14.
[374] *See* GNB Verification Exhibits at 13.
[375] *See* Amended NSA Allegation at Exhibit 1 at 196.
[376] *See* Amended NSA Allegation at Exhibit 9 at 38.
[377] *Id.* at 8.

by buyers to sell at low prices.[378] The respondents argue that because the private woodlot owners do not have to accept low prices and can wait for prices to improve, the supply of timber available from private woodlot owners will shrink when prices are low, which will lead to increasing prices. Therefore, respondents argue, there is no inevitable oligopsony effect where prices continue to fall.

First, we disagree with Irving's contention concerning the 2012 Private Forest Task Force Report. The fact that the report states that a majority of woodlot owners have non-financial motives for owning forest land does not in itself create a direct link to its assertion that private woodlot owners are not easily pressured to sell at low prices. Indeed, further descriptions and harvesting practices of woodlot owners in the report demonstrates size also dictates activity in the market.[379] Thus, although a majority of woodlot owners may possess these characteristics, they also make-up a larger share of small and medium woodlot owners and reduced participation in the market for reasons other than those identified by Irving.

Second, Irving's reliance on the *Report of the Auditor General – 2015 Volume II* is misplaced. Irving references a portion of the report that discusses the decline of private woodlot consumption and posits a possible reason for the decline.[380] However, Irving has not provided information to supplement this possible explanation for the decline in private woodlot owners' contribution to mill consumption volume. Moreover, as discussed below, the overall conclusion of the *Report of the Auditor General – 2015* supports the Department's determination. Thus, respondents' argument that the dominance of a large supplier and a large purchaser does not impact private prices because private woodlot owners do not have to accept low prices and can wait for prices to improve is not supported by substantial record evidence. Private woodlot owners are not in a position to wait for prices to improve because they compete against prices that are administratively-set by the Government of New Brunswick, and the Government of New Brunswick has not provided any indication that it plans to stop setting prices, or to remove itself from the market.[381] This is clearly demonstrated by the fact that private woodlots share of consumption in New Brunswick decreased from 23% to 12%, while Crown timber share of consumption increased from 41% to 51% in the nine years prior to the POR.[382]

The respondents contend that the Department based its findings in the *Preliminary Results* on mischaracterizations of and speculation within reports and articles on the record. In the *Preliminary Results*, the Department cited to a pair of reports from the GNB in supporting its determination that the leverage of private mills as dominant consumers suppresses prices from private woodlots, and that it is those suppressed private prices that lead to an artificially low "market-based" price for Crown stumpage. The respondents argue that the 2008 AG Report and the 2012 Private Forest Task Force Report cited by the Department in the *Preliminary Results* contain only assumptions and speculation about what might happen in the market and that the record does not contain any evidence to demonstrate that the speculations about the market

[378] *See* Amended NSA Allegation at Exhibit 1 at 196.
[379] *See* Amended NSA Allegation at Exhibit 9 at 9.
[380] *See* Amended NSA Allegation at Exhibit 1 at 196 ("When market prices decline they **may** have decided not to harvest and wait for prices to rebound.")." (emphasis added))
[381] *See* Amended NSA Allegation at Exhibit 1 at 196.
[382] *See* Amended NSA Allegation at Exhibit 1 at 196.

actually occurred. The respondents contend that such assumptions and speculation do not satisfy the "substantial evidence" test. Additionally, Irving argues that the 2008 AG Report predates the POR by six years and cannot reflect market conditions during the POR, and, therefore, is irrelevant to the Department's analysis. The Department disagrees with the respondents that there is no evidence on the record to support the findings in the GNB reports and that the Department's decision is not supported by the record evidence.

The 2008 AG Report 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….[383]

In the *Preliminary Results*, the Department stated that this market situation does not appear to have changed since the release of the 2008 AG Report.[384] The Department but erred in citing only to the 2012 Private Task Force Report,[385] when we relied as well on a "2015 report by the GNB." The "2015 report by the GNB" referenced in the *Preliminary Results* is the *Report of the Auditor General – 2015*, which includes a chart detailing the annual percentages of each source of wood (*e.g.*, private wood lots, crown licenses, industrial freehold, and imports) consumed by processors in New Brunswick from 2004 through 2013 (the fiscal year prior to the POR).[386] This chart shows that not only has the market situation not changed (*i.e.*, that the mills directly or indirectly control so much of the source of the timber supply in New Brunswick), but that the amount of timber supply controlled by the mills has grown since the analysis presented in the 2008 AG Report.[387]

The Private Forest Task Force Report (2012 PFTF Report) on New Approaches for Private Woodlots, published by the GNB in 2012, evaluated the concerns cited in the 2008 AG Report and concurred with the findings:

> New Brunswick's forest products market combines aspects of a bilateral monopoly (a single dominant seller, the Crown; and a single dominant buyer, J.D. Irving, Ltd.) and an oligopsony (many small sellers, the private woodlot owners; and a few buyers, the mills, which purchase from both private woodlot owners and the Crown.) Two parties dominate the transactions, and prices for a large proportion of the total harvest are set administratively. Thus it is difficult to establish fair market value.[388]

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[383] *See* Amended NSA Allegation at Exhibit 2 at 151.
[384] *See* PDM at 25.
[385] *See PDM* at 25.
[386] *See* Amended NSA Allegation at Exhibit 1 at 196.
[387] *Id.* The percentage controlled by the mills (crown licenses plus industrial freehold) was 76 percent in 2012-13, while it was 71% in fiscal year 2006-07 (the last year analyzed in the 2008 AG Report).
[388] *Id.* at 24-25.

The record also demonstrates that private woodlots are a supplemental source of supply for the mills in New Brunswick. The mills purchase from private woodlots only if the prices are advantageous because the mills can source fiber from other sources. Specifically, the GNB not only sets an AAC for each licensee, but also allocates part of that license's ACC to sub-licensees each year.[389] The record contains New Brunswick's AAC schedule for each of the licenses for Fiscal Year 2014-15.[390] This record evidence indicates that the harvested volume reported for fiscal year 2014-15 is less than the AAC the GNB allocated for 2014-15. This overhang of volume means that the mills can harvest additional timber under their Crown license if needed. Because the mills have access to additional volume of Crown timber, private woodlot owners cannot expect to charge more than Crown stumpage prices because they are only a supplemental source of supply to the large mills.

Therefore, the record evidence demonstrates that the mill owners can source timber from their Crown land allocations, their industrial freehold land in New Brunswick, their private land in other provinces and Maine, and from other third parties in adjoining provinces or Maine if the prices there are more advantageous than the prices available from private woodlot owners in New Brunswick. The mills also have the incentive not to purchase timber from private woodlots unless the price is lower than the Crown prices because these private purchases form the basis of the New Brunswick Crown stumpage prices. The mills' ability to source timber from outside of the private woodlots means that mills possess the leverage to keep prices on private woodlots low, and they have an interest in doing so beyond their mere ability to source from private woodlot owners for low prices.

Irving argues that the mills do not actually have leverage over the private woodlot owners because in addition to the large mills there are 32 Crown-timber sub-licensees and 1,200 independent wood producers that also purchase stumpage. Irving contends that any attempts by private mills to artificially depress private stumpage prices would be negated by competitive bids offered by private wood producers. Irving has failed to include any data on the volume of stumpage purchased or consumed private wood producers. However, the record does contain the total fiber consumption by mills in New Brunswick annually for fiscal years 2010 through 2014.[391] These data show that consumption by mills in fiscal year 2014-15 (the same fiscal year used above to measure the timber market) was larger than the entirety of the fiber available in the New Brunswick market. The five licensees consume an overwhelming majority[392] of the wood fiber consumed in New Brunswick and have significant leverage over the private woodlot owners. In fact, the total volume of fiber consumed in New Brunswick by mills not affiliated with the large private mills was only slightly larger than the total volume of fiber harvested by private woodlots. The ability of those mills to purchase fiber from private woodlots is constrained by the fact that those small mills also purchase Crown stumpage.[393]

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[389] *Id.*
[390] *See* GNB Verification Exhibits at Exhibit 13.
[391] Consumption volumes are included in the GNB's *Timber Utilization Report for the Year 2014* at Table 2. *See* GNB Verification Exhibits at Exhibit 13.
[392] *See* BPI Memo for data,
[393] *See* GNB's August Stumpage Response at Exhibit-NB-STUMP-10.

The 2012 PFTF Report estimated that there were 42,000 private-woodlot owners in New Brunswick.[394] Given the private woodlot harvest data presented by the GNB,[395] this equates to only a very small annual harvest volume[396] for each of these private woodlots. The GNB argues that even if the private woodlot owners are not sufficiently large to impact prices, the seven regional marketing boards can and do act to provide small woodlot owners with market power. However, the record evidence does not support the argument that the marketing boards possess power to influence pricing. The 2015 AG Report provides evidence of the ineffectiveness of the marketing boards – as the private woodlots' share of consumption in New Brunswick "decreased from 23% to 12% while Crown timber consumption increased from 41% to 51%" in the nine years prior to the POR.[397] There is no evidence on the record that the marketing boards have had any ability to impact prices in New Brunswick. While the GNB cites to exhibit 7 of Petitioner's Amended NSA Allegation to support its argument,[398] it is relying upon informational materials prepared by the marketing board itself to explain the purpose of the marketing boards. However, there is nothing in these informational materials that demonstrates that the marketing boards have had an impact on price or any ability do so. Instead, as detailed below, the record evidence includes a government report that demonstrates a declining share for private woodlots, articles from private woodlot owners stating that they cannot compete with cheap Crown timber, and pricing data that show woodlot prices remain lower than Crown stumpage prices – all indications that the marketing boards have not been able to provide private woodlot owners market power to offset the power of the mills.

The 2015 AG report also concludes that the GNB has contributed to the ongoing divergence between private woodlot sales and Crown harvest. The report notes that the GNB has "potentially conflicting interests" and that "since the most significant source of departmental revenue is Crown timber royalties, any increase in Crown timber supports the Department's efforts to balance budgets."[399] In fact, the report argues that the GNB has been non-compliant with their responsibilities under the *Crown Lands and Forests Act* by not ensuring that private woodlots maintain their proportional supply of the market, as reuired by the *CFLA*.[400] The report goes on to say that the GNB has mechanisms available to it in order to address shortfalls in purchases of wood from private woodlots, but that the GNB has "never taken action under these sections of the Crown Lands and Forests Act."[401]

Irving argues that the 2012 PFTF Report's declaration that Irving is the market's dominant buyer is not supported by information on the record regarding the volume of Irving's private woodlot purchases. The Department does not find merit in Irving's argument. Irving is comparing Irving's purchases of private stumpage in New Brunswick during the POR to private woodlot harvest data during the fiscal year. Ignoring the fact that this comparison involves differing time periods, which distorts the results of the comparison, Irving's purchases of private stumpage do

[394] *See* Amended NSA Allegation at Exhibit 9.
[395] *See* GNB Verification Exhibits at Exhibit 13.
[396] *See* BPI Memo for data,
[397] *See* Amended NSA Allegation at Exhibit 1 at 196.
[398] *See* GNB Case Brief at NB-19.
[399] *Id.* at 197.
[400] *Id.* at 198.
[401] *Id.* at 199.

not include any of the non-stumpage timber purchases that Irving may have made from other private parties (*i.e.*, other holders of industrial freehold land) in New Brunswick during the POR. Thus, the figure calculated by Irving is less reliable than a report published by the GNB. Additionally, record evidence confirms the assertion in the 2012 PFTF Report that Irving is the market's dominant buyer. The timber utilization data provided by the GNB shows that during FY 2014-15 Irving's mills consumed some[402] of the fiber consumed in New Brunswick.[403]

Irving also argues that the government reports that discuss an oligopsony effect fail to account for imports from the bordering provinces and Maine. Irving contends that these import volumes combined with exports from New Brunswick provide further evidence that the private stumpage prices in New Brunswick are market determined. However, a significant portion of that import volume in 2014 is comprised of Irving's imports from its own privately held land in Maine.[404] In fact, Irving is the largest landowner in Maine.[405] Rather than demonstrating that imports are an indication of competition in the market, these imports are instead another indication that the large mills can obtain timber from several sources other than private woodlot owners in New Brunswick, and in Irving's case from its own private holdings, in other jurisdictions.

In the *Preliminary Results*, the Department cited to a pair of articles to support the assertion that private woodlot owners cannot compete with the low prices set on Crown land.[406] According to the first article, from April 2014, a member of the New Brunswick Federation of Woodlot Owners said private woodlot owners "can't compete with the cheap price of Crown wood."[407] Irving argues that the unsubstantiated claims in these articles do not constitute substantial evidence and that the record evidence described above does not support that conclusion. Additionally, the respondents argue that the pricing data on the record, which the respondents claim shows that Crown stumpage prices in New Brunswick were higher than private stumpage prices during the POR, demonstrate that private stumpage prices in the province are what set the Crown stumpage prices, not the reverse. However, this ignores the fact that this is the exact outcome expected in an oligopsony situation where the private woodlots serve as only a marginal supplementary source of supply to the large mills. As described above, the market composition in New Brunswick results in a situation where the mills will only purchase from the private woodlots when it is advantageous to do so (*i.e.*, when prices offered by the private woodlots are lower than prices on Crown land). The low private stumpage prices in New Brunswick do not constitute evidence that there is a functioning market in New Brunswick; nor do they establish that private prices are not suppressed by distortion in the market.

The respondents made a number of other arguments to suggest that the record evidence supports a finding that there is a functioning market in New Brunswick. The GNB contends that the Department was incorrect in stating in the *Preliminary Results* that the GNB restricts eligibility for Crown stumpage rights to companies that operate pulp and paper mills because permit

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[402] *See* BPI Memo for data.
[403] The volumes are included in The *Timber Utilization Report for the Year 2014* at Table 2. *See* GNB Verification Exhibits at Exhibit 13.
[404] *See* GNB Verification Exhibits at Exhibit 13.
[405] *See* Amended NSA Allegation at Exhibit 12.
[406] *See PDM* at 25.
[407] *See* Amended NSA Allegation at Exhibit 4.

holders also have access to Crown lands for the harvesting of timber. The Department agrees with the GNB and even noted, in the *Preliminary Results*,[408] that permit holders can acquire logs from Crown land As GNB officials stated at verification, these permit holders "are generally smaller individuals/groups who are either harvesting logs to clear the land for other uses, or are acquiring wood for personal use (*i.e.*, firewood)."[409] The volume data on the record show that such permits account for an extremely small portion[410] of the New Brunswick market.[411] This tiny volume in no way diminishes the fact that the large mills, which consume an overwhelming majority of the fiber in New Brunswick, are allocated the vast majority of Crown stumpage.[412]

Irving argues that the Department's finding that "private woodlot owners accounted for less than one fourth of harvested timber in New Brunswick" during the POR is not a circumstance that leads to distortion because in the *Lumber IV 2002-2003 Review*, the provincial share of the market was higher and the Department still found that private stumpage prices were market-determined.[413] While the Department agrees with Irving that the percentage of market share held by private wood lot owners by itself does not allow for a distortion finding, the Department does not agree with Irving's argument that evidence on the record in this review is similar to the situation in the *Lumber IV 2002-2003 Review*. In the *Lumber IV 2002-2003 Review*, the Department determined that there was no evidence on the record that justified a finding of distortion outside of the province's "bare majority market share."[414] In this review, however, as discussed above, the record evidence demonstrates that the market is distorted.

Comment 24: Whether the Department Should Grant an Adjustment to New Brunswick (NB) Stumpage Rates

Irving's Arguments:

- The Department should apply an upward adjustment to Irving's purchases of Crown stumpage to ensure valid comparisons with the benchmark rates. The upward adjustment is necessary to account for unreimbursed costs that Irving incurs for purchases of Crown stumpage, but does not incur for purchases of private stumpage.
    - In the *Lumber IV Investigation*, to ensure that the provincial stumpage rates in Quebec and benchmark rates were comparable, the Department granted upward adjustments to provincial stumpage rates to account for costs incurred by the purchasers of Crown stumpage for mandatory activities required as part of the Crown tenure agreement (forest management planning, environmental protections costs, and road construction and maintenance costs) that were not incurred by private purchasers.[415] If the cost was partially reimbursed by the government, the Department granted an upward adjustment for the uncredited amount.[416] The

[408] *Id.* at 22.
[409] *See* GNB Verification Report at 12.
[410] *See* BPI Memo for data.
[411] *See* GNB Verification Exhibits at Exhibit 13.
[412] The allocated volumes See GNB Verification Exhibits at Exhibit 13.
[413] *See Lumber IV 2002-2003 Review* IDM at 95.
[414] *Id.* at 94-96.
[415] *See Final Countervailing Duty Determination: Certain Softwood Lumber from Canada,* 67 FR 15545 (April 2, 2002) (*Lumber IV Investigation*) and accompanying Issues and Decision Memorandum at 43.
[416] *Id.*

Department must do the same in this review for the forest management activities that JDIL was required to perform under License 7.

- Implicit in the Department's analysis in the *Lumber IV Investigation* is the understanding that silviculture and forest management are landowner responsibilities. The government payments are compensation for services rendered by the tenure holder on the Province's behalf.
- JDIL performed mandatory forest management activities under its Crown timber license (License 7), but did not did not perform the same forest and license management activities with respect to its purchases of stumpage from private woodlots. JDIL received only partial reimbursement from NBDNR for the forest management activities it was required to perform under License 7.[417] In order to ensure a fair comparison between the Crown stumpage rates and the benchmark rates, JDIL's purchases of Crown stumpage under License 7 should be adjusted upwards.
    - The fact that JDIL conducted forest management for its freehold properties is irrelevant: The only relevant comparison is between JDIL's purchases of Crown stumpage and its purchases of stumpage from private woodlots, which are being used as the benchmark.
    - JDIL's responsibilities for private purchases were limited to baseline obligations – such as ensuring that contractors have sufficient insurance coverage and use established forestry practices – that are common to purchases of stumpage from the GNB and private woodlots.[418]
    - In the *Preliminary Results*, the Department did not apply an upward adjustment to JDIL's purchases of Crown stumpage under License 7 for unreimbursed license management expenses, but treated the reimbursements (license management fees) as a benefit. The Department converted what should have been a net cost to JDIL into a benefit.
- Similar to the Department's practice in *Lumber IV*, an adjustment is needed to account for expenses relating to fire prevention and land stewardship activities that JDIL incurred on License 7, but did not incur with respect to its purchases from private woodlots. Although JDIL was not obligated to perform these activities under License 7, and did not receive reimbursement from NBDNR for the associated costs through LMFs, the activities were necessary to ensure adequate care and protection of the forests covered by the license.
    - In *Lumber IV,* the Department made an upward adjustment to provincial government stumpage rates to account for "costs that are necessary to access the standing timber for harvesting, but that may differ substantially depending on the location of the timber."[419] For example, the Department granted an upward adjustment to British Columbia's Crown stumpage rates to account for the costs incurred by licensees to build and operate camps at remote logging sites.[420] The Department found that the adjustment was warranted to ensure a fair comparison with the benchmark

[417] *See* Irving Verification Exhibits at VE-46 at 4.
[418] *See* Irving Verification Report at 10; *see also* Irving Verification Exhibits at VE-12 at 13.
[419] *See Lumber IV 2002-2003 Review* at 105; *Lumber IV 2003-2004 Review* at 15.
[420] *See Lumber IV Investigation* at 61.

rate, because there was no evidence that harvesters in the benchmark region incurred logging camp expenses.

The Petitioner's Rebuttal:

- Irving argues in its case brief that the Department should adjust its reported NB Crown prices for License 7 upward for unreimbursed license obligations and other land management expenses, claiming that the Department made similar adjustments in the *Lumber IV* reviews.
    - A number of these expenses Irving lists as unreimbursed license obligations appear to actually be expenses associated with harvesting stumpage and should be disregarded.
    - Irving stated in its case brief that it was not obligated to perform the unreimbursed land management expenses under License 7; therefore, the Department should decline to adjust for these expenses.

Department's Position:

The Department disagrees with Irving. Unlike in *Lumber IV*, which was conducted on an aggregate basis, the record evidence in this review has led the Department to determine that Irving has received countervailable subsidies for reimbursements for silviculture and LMF – see Comment 24 for a full discussion. Accordingly, due to the record in this review, an adjustment to the administratively-set stumpage price for these silviculture and LMF activities, whether obligated or non-obligated under the Irving tenure licenses, is not appropriate because these activities are related to Irving's long-term tenure rights granted to it by the GNB.

Comment 25: Whether the Department Should Use a Transaction-By-Transaction Calculation Methodology for NB Stumpage

Irving's Arguments:

- The Department should compare weighted-average Crown prices to weighted-average private prices. The Department's comparison of Crown transactions to average private prices in the preliminary results was distortive because it compares transaction prices, which are product-specific, to average prices encompassing all products.
    - Irving reported each purchase of stumpage that it made during the POR from (i) Crown land in New Brunswick; (ii) private land in New Brunswick; and (iii) private land in Nova Scotia. Each reported purchase corresponds with a load (or "tally") of a particular species and product (*e.g.*, sawlog, studwood, pulpwood) harvested from a particular location. NBDNR sets prices for Crown stumpage by species and product. Accordingly, the fee reported for each tally in JDIL's "New Brunswick Crown" data file is specific to the combination of species and product that was purchased. However, the benchmark values are calculated using average prices for all products within a species, which means that JDIL's purchases of lower-value pulpwood and biomass are being compared to benchmark values that are heavily weighted by the higher-value saw material portion of the tree.

- In Certain Softwood Lumber Products from Canada *Lumber IV*, the Department eliminated this distortion by comparing weighted-average Crown stumpage prices (by species) to weighted-average benchmark prices (by species).[421]

The GNB's Arguments:

- The Department should compare the weighted-average Crown prices by species to the weighted-average benchmark price by species as it did in the *Lumber IV 2002-2003 Review*.[422]

The Petitioner's Rebuttal:

- The Department should reject arguments regarding the use of annual purchase prices.
  - Irving and Catalyst have not requested that the Department use benchmarks that are in any way more specific than those the Department used in the *Preliminary Results,* but instead ask the Department to average the prices they pay on an annual basis for each input.
    - By suggesting that the Department average their input purchase prices, respondents are essentially suggesting that the Department should offset any transaction-specific "negative benefits" against the actual benefit amounts that are calculated on transactions where the transaction price paid is lower than the benchmark. This has never been the Department's practice, and the suggestion should be rejected.
    - The Department has consistently found that a benefit is either conferred or not conferred, and that a positive benefit from certain transactions cannot be masked by "negative benefits" from other transactions.[423]
    - A list of permissible offsets is provided under section 771(6) of the Act. Offsetting the benefit calculated with a "negative" benefit is not one of the permissible offsets enumerated in the statute.

Department's Position:

The Department disagrees with the respondents. Irving argues that because the NBDNR sets Crown stumpage prices in New Brunswick according to both species and product, a comparison of Irving's individual Crown stumpage purchases in New Brunswick to a species-only annual average benchmark of Irving's private stumpage purchases in Nova Scotia would be distortive. As discussed in Comment 23, it has been the Department's practice to use benchmarks that reflect prevailing market conditions, as allowed by the data on the record. For instance, in this review, the Department has calculated the benefit related to the BC ban on the export of logs and

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[421] *See Lumber IV 2002-2003 Review* IDM at 20; *Certain Softwood Lumber Products from Canada*, 70 FR 73448 (December 12, 2005) (*Lumber IV 2003-2004 Review*), and accompanying Issues & Decision Memorandum at 15.
[422] *See Lumber IV 2002-2003 Review* IDM at 20.
[423] *See, e.g., Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Affirmative Determination and Final Determination of Critical Circumstances, in Part,* 82 FR 3282 (January 11, 2017) and accompanying Issues and Decision Memorandum at Comment 8; *Certain Passenger Vehicle and Light Truck Tires From the People's Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part,* 80 FR 34888 (June 18, 2015) and accompanying Issues and Decision Memorandum at Comment 6; *OCTG from China Review* IDM at Comment 7.

wood residue ban by using species- and grade-specific benchmarks where the data on the record allowed. Regarding stumpage in New Brunswick, the Department attempted to collect data from Irving that would have allowed for a more detailed comparison,[424] but Irving responded that it does not "measure or record" the requested information in the normal course of business.[425]

The respondents argue that the Department previously compared annual-average prices of Crown stumpage purchases to annual-average benchmark prices in *Lumber IV*, but this ignores the fact that *Lumber IV* was conducted on an aggregate basis and the Department did not have transaction-specific Crown stumpage purchase prices. Here, we are conducting a company-specific review and the Department has Irving's Crown stumpage purchases on a transaction-by transaction basis. The Department's regulations require the Department to determine and find a benefit when a firm pays less than it otherwise would have paid absent the program.[426] Thus, consistent with our regulations, it is the Department's practice to calculate a benefit on a transaction-specific basis.[427] The respondents' proposed methodology of comparing annual average Crown stumpage purchase prices to an annual benchmark would distort the benefit that Irving received from its Crown stumpage purchases provided for LTAR. As the petitioner notes, the Department has previously held that the law does not contemplate providing to the respondent with a credit for instances in which the government does not provide a benefit (*i.e.*, instances where a respondent pays the government for the provision of a good a price that is higher than the benchmark price, the definition of adequate remuneration).[428] *See* Comment 26 below for further discussion.

It has been the Department's preference to compare the prices of individual transactions with the government to monthly average benchmarks prices, where possible.[429] While it would be the Department's preference to calculate the benefit for purchases of Crown stumpage that Irving received for LTAR by comparing prices for individual transactions to monthly benchmarks, limitations in the data render this approach not possible. Irving did not make private stumpage purchases in Nova Scotia (which are the basis for our benchmark) in every month in which it made New Brunswick Crown stumpage purchases. Out of the 12 species of stumpage that Irving purchased on Crown land in New Brunswick, there are only full monthly data matches for two of the species. Even for those two species, there are some months where the Nova Scotia purchases are so limited that they do not allow for construction of a reliable benchmark for the relevant

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[424] *See* September 13 Supplemental Questionnaire. The Department asked Irving to provide grade and quality fields for its purchases of stumpage in New Brunswick and Nova Scotia.
[425] *See* September 23, 2016 Supplemental Questionnaire Response.
[426] *See* 19 CFR 351.503(b)
[427] *See Certain Oil Country Tubular Goods From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2011*, 78 FR 49475 (August 14, 2013) (*OCTG from China Review*) and the accompanying Issues and Decision Memorandum at Comment 7.
[428] See *OCTG from China Review* IDM at Comment 7; *see also Certain Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009) and the accompanying Issues and Decision Memorandum at Comment 14.
[429] *See OCTG from China Review* IDM at Comment 7; *also see Drawn Stainless Steel Sinks From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 78 FR 13017 (February 26, 2013) and the accompanying Issues and Decision Memorandum at Comment 21.

month.[430] Therefore, the Department will continue to calculate the benefit by comparing Irving's individual purchases of Crown stumpage in New Brunswick to annual weighted-average species-specific benchmarks based on Irving's purchases of private stumpage in Nova Scotia

Comment 26: Whether the Department Should Zero Comparisons That Generate Negative Benefits

Irving's Arguments:

- In summing the transaction-specific benefits to derive a total benefit, the Department set negative benefits to zero. The statute and regulation direct the Department to determine whether the respondent received "a benefit" from the government's provision of "goods."[431] The legal provisions' use of "benefit" in the singular and "goods" in the plural indicates that the Department must determine the overall benefit derived from all government sales of the goods. This requirement is violated if government sales that generate negative benefits are disregarded.
- The Department has discretion to depart from prior practice when it explains reasonable grounds for doing so. Here, refraining from zeroing is necessary to comply with the plain language of the statute and regulation, which require the Department to determine the benefit based on all government sales of the good in question. Refraining from zeroing is also warranted to prevent distortion of the benefit calculation.
- The Department's justifications for using zeroing in the prior cases involving the government provision of stumpage are unavailing. The Department reasoned that "a benefit is either conferred or not conferred, and a positive benefit from certain transactions cannot be masked by negative benefits from other transactions." In the *Preliminary Results*, however, the Department zeroed negative benefits in well over half of the 50,000+ comparisons examined. Here, zeroing is not "unmasking" a positive benefit: It is fabricating a positive benefit. Zeroing is particularly distortive in a stumpage context, because purchasers (like JDIL) do not buy only certain species and products from a given harvest block; rather, purchasers buy and harvest all species of standing timber on the harvest block, and all portions of the tree.
- The Department also defended its refusal to recognize negative benefits on the ground that such an "offset" is impermissible under section 771(6) of the Act. Irving, however, does not seek an offset; Irving "simply seek{s} to have the amount of the subsidies {it} received accurately valued." Zeroing the large majority of Crown stumpage transactions that were priced higher than the benchmark is distortive and prevents an accurate benefit calculation.

The GNB's Arguments:

- The Department should calculate the stumpage benefit without zeroing negative margins.

The Petitioner's Rebuttal Arguments:

[430] *See* letter from Irving, "Supercalendered Paper from Canada: Response to New Subsidy Allegation Questionnaire" (August 12, 2016) (Irving NSA2) at Exhibit STUMP-2.c.
[431] *See* Section 771(5)(E) of the Act.

- Irving argued that the Department has artificially inflated countervailing subsidy margins for stumpage by assigning a zero value to any benchmark comparison that yields a "negative benefit" and that this practice is a violation of the Department's statute and regulation.
    - Nothing citied in Irving's argument requires the Department to offset positive benefits with "negative benefits."
        - An item that is manufactured or produced for sale, even when represented on a single invoice or as a single item, can be, and typically is, referred to in the plural as "goods." Additionally, the General Rules of Interpretation to the Harmonized System uses the term "goods" throughout and does not use the singular version once.
        - Under Irving's logic, if one were investigating whether a respondent purchased logs and woodchips for LTAR, and it found that logs were purchased for LTAR but woodchips were not, it would be obligated to calculate "a" benefit (singular) that offset the "negative benefit" of the woodchips against the benefit from the logs because logs and woodchips (two items that are together plural) are "goods."
    - The Department has consistently found that for each purchase transaction subject to a LTAR investigation a benefit is either conferred or not conferred, and a positive benefit from certain transactions cannot be masked by "negative benefits" from other transactions.
    - The correction urged by Irving would result in an offset of the net subsidy in the form of a credit for transactions that did not provide a benefit. Such an offset is not intended or permitted under the statute and is inconsistent with the Department's practice.[432]

Department's Position:

The LTAR benefit methodology applied in this expedited review, which is to compare the actual input purchases made by Irving to the Tier 1 benchmark prices established, is consistent with the regulations and is the Department's practice.[433]

As Irving notes, the Department has held that in a subsidy analysis, a benefit is either conferred or not conferred, and a positive benefit from certain transactions cannot be masked by "negative benefits" from other transactions. As such, Irving is seeking an impermissible offset, as the petitioner argues (*i.e.*, a credit for transactions that did not provide a subsidy benefit). Such an adjustment is not permitted under the statute and is inconsistent with the Department's practice, no matter the number of transactions that generate a "positive benefit."[434] A list of permissible

[432] *See Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 70 FR 73448 (December 12, 2005) and accompanying Issues and Decision Memorandum at 98.
[433] *See* 19 CFR 351.511(a)(2)(i), *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Final Affirmative See, also Countervailing Duty Determination*, 81 FR 47349 (July 21, 2016) and accompanying Issues and Decision Memorandum at 13.
[434] *See Final Results of Countervailing Duty New Shipper Review: Certain Softwood Lumber Products from Canada*, 70 FR 56640 (September 28, 2005), and accompanying IDM at Comment 6; see *also Drill Pipe From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2011*, 78 FR 150 (August

offsets is provided under section 771(6) of the Act; however, offsetting a benefit calculated on some transactions, *i.e.*, those that represent the government provision of a good for LTAR, with the "negative" benefits that arise from transactions in which the government provision of the good is not at LTAR, is not one of the permissible offsets.[435] Therefore, we have made no modifications to the final results calculations regarding alleged "negative" benefits.

Comment 27: Whether the Large Industrial Renewable Energy Purchase Program (LIREPP) Confers a Benefit on the Irving Companies

Irving's Arguments:

- Any "benefit" under the Large Industrial Renewable Energy Purchase Program (LIREPP) must be determined using the verified benchmarks on the record, to calculate whether New Brunswick Power (NB Power) purchased renewable energy from the Irving companies for more than adequate remuneration (MTAR). The Department's determination that LIREPP conferred a benefit as "revenue foregone" is unsupported by the record evidence.
- Benchmarks on the record show that NB Power paid less than adequate remuneration, meaning the Irving companies did not receive a benefit.
- If the Department finds a benefit, the portion received by JDIL cannot be countervailed because it is tied to a non-subject paper product, not an input for the production of paper.
- Irving qualifies for LIREPP as a group of companies: Irving Paper, JDIL, IPP and St. George Power LP (SGP). Irving Paper and JDIL satisfy the consumption requirements while IPP and SGP satisfy the generation requirements. All four companies are parties to an LIREPP contract with NB Power.
- Each month NB Power purchased renewable energy from IPP and SGP at C$95/MWh and applied a portion of the money owed for those purchases as a credit to the monthly energy invoice issued to Irving. Thus, the "Net LIREPP credit" is the difference between the value of renewable electricity that NB Power purchases from IPP and SGP and the value of standard electricity that NB Power sells to IPP at the large industrial rate.
- The Net LIREPP credit is a portion of the money that NB Power owes IPP and SGP for the purchase of renewable energy under LIREPP at a rate of C$95/MWh. Because the credit is money owed to Irving and not an entitlement, NB Power did not forego any revenue otherwise due.
- The Department focused solely on the Irving entities that consumed electricity and ignored those that generated electricity, and thus disregarded the Eligible Large Industrial Enterprise that qualified for LIREPP.

5, 2013), and accompanying IDM at Comment 3; see also *Certain Oil Country Tubular Goods From the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009), and accompanying IDM at Comment 14.

[435] Section 771(6) of the Act provides that the three offsets permitted are:

> (A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive the benefit of the countervailable subsidy,
>
> (B) any loss in the value of the countervailable subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and
>
> (C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received.

- Section 771(5)(E)(iv) of the Act provides that the government's purchase of goods confers a benefit when it is made for MTAR. In this instance, benchmark prices for renewable energy exceed the weighted-average price that NB Power paid to the Irving companies and exceeded the C$95/MWh paid under LIREPP.
- After the GNB's *Climate Change Action Plan* (CCAP) of 2007 that required the province to supply the province's electricity needs with 40 percent renewable energy by 2020, renewable energy began to command premium prices.
- During the POR, Irving sold renewable energy under LIREPP and also sold renewable energy to NB Power at lower, cost-based prices under pre-LIREPP contracts executed in 1992 for IPP and 2004 for SGP. The cost-based prices do not reflect the premium on renewable electricity because of the CCAP. The Department should take all transactions into account to determine a weighted-average rate at which the Irving companies sold renewable energy to NB Power.
- The embedded generation rate, as discussed in the GNB's verification report, is the most representative benchmark and the one the Department should use. The electricity benchmark must be solely derived from renewable energy sources.[436] The petitioner's proposed benchmark rate of C$84/MWh for renewable energy is limited to wind energy and it is unclear whether this rate is contemporaneous with the POR.
- According to 19 CFR 351.525(b)(5)(i), the Department will attribute a subsidy to a particular product if the subsidy is tied to the production or sale of that particular product. The *Preamble* states that a subsidy is tied when "the intended use is known to the subsidy giver and so acknowledged prior to or concurrent with the bestowal of the subsidy."[437]
- The GNB knew at the time of bestowal that one objective of LIREPP was to bring the price of electricity for Irving and other pulp and paper producers in line with those of pulp and paper producers in other Canadian provinces. The GNB also knew at the time of bestowal that JDIL's use of LIREPP was for the company's non-subject paper production at Lake Utopia. Therefore, any LIREPP "benefit" to JDIL is tied to non-subject merchandise.
- JDIL is subject to examination in this case only because it is a cross-owned supplier of wood chips that are an input into pulp and then paper. However, under 19 CFR 351.525(b)(5)(ii) "if a subsidy is tied to the production of an input product, then the Secretary will attribute the subsidy to both the input and downstream products produced by a corporation." Because any "benefit" to JDIL is not tied wood chips but rather is tied to corrugated medium, it is not countervailable.

The GNB's Arguments:

- The *Preliminary Results* ignores the fact that the Irving companies sold renewable electricity to the GNB and that the credits received were for the net amount owed to Irving for the renewable electricity that NB Power purchased. There was no revenue foregone by NB Power, it simply purchased a good from the Irving companies. Any benefit would therefore only result if the GNB made its purchases for MTAR which it did not.

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[436] *See* Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* para. 5.204, WTO Doc. WT/DS412/AB/R (adopted May 24, 2014); *see also id.* at paras. 5.180-5.191, 5.197 and 5.199.

[437] *CVD Preamble*, 63 at 65403 (Nov. 25, 1998).

- The net revenue owed to Irving for the electricity purchased by NB Power to meet the Target Discount is the Net LIREPP adjustment. Instead of separately paying the Irving companies that sell electricity NB Power applies the Net LIEPP adjustment as a credit to the monthly electricity invoice sent by NB Power to Irving.
- NB Power's purchases of renewable electricity enable it to meet its requirement to supply 40 percent of its electricity from renewable sources by 2020.
- The fact that IPP's sales are not actually transmitted to the grid is immaterial and does not change the fact that NB Power purchases electricity from IPP. IPP uses the electricity it sells to NB Power to satisfy part of its electricity demand. The fact that it is more practical to conduct the transaction in this manner does not change the fact that NB Power is purchasing electricity.
- For LIREPP to constitute revenue foregone, the record would need to show that NB Power was, in the absence of LIREPP, entitled to receive the Net LIREPP adjustment amounts that were provided as credits to Irving on its monthly electricity invoices. The credits are money owed to Irving; the fact it is paid via credit and not direct payment does change the fact that it is compensation for sales of renewable electricity to NB Power. NB Power could have invoiced Irving for all electricity purchased from NB Power and separately paid Irving for the renewable energy that it purchased from Irving – the result would be the same.
- To the extent that there is a financial contribution, it is the government purchase of a good and it should be analyzed in terms of whether NB Power purchased renewable electricity for MTAR.
- The record contains verified market-determined prices for renewable energy in NB during the POR that should be used as a benchmark. The Department should use the 2014 Embedded Generation Rate because this program was in place in 2012 at the time that LIREPP was introduced; it was one of the benchmarks used to determine the LIREPP rate; it applies to multiple forms of renewable electricity; it is the average of the rates for various forms of renewable energy under third party contracts during the POR; and, it is corroborated.[438] The record also contains other renewable energy benchmarks that are approximately the same or higher.
- These rates are all higher than the rate that NB Power pays for renewable electricity under LIREPP because in setting the LIREPP rate NB Power looked to these rates and other information.

The Petitioner's Rebuttal Arguments:

- The Department was correct to treat LIREPP payments as revenue foregone under section 771(5)(D)(ii) of the Act rather than as the purchase of a good for more than adequate remuneration, because the LIREPP amounts are an offset to Irving's electricity costs.
- Alternatively, the financial contribution can be considered a direct transfer of funds in the form of a grant, bestowing a benefit in the amount of the grants within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act.

[438] *See e.g.*, Petitioner Benchmark Data Factual Information Submission (Oct. 11, 2016) at Exhibit 2B at 314-315 &337-338; GNB Verification Exhibit 5 at 2-4; GNB Verification Report at 21; GNB Aug. 26 Response at Exhibit NB-LIREPP-9, p.6; Petitioner October 11 Benchmark Submission at Exhibit 3B at 18-19.

- Respondents, by attempting to cast this as an MTAR program, ignore the fact that the renewable power generated by Irving "is not . . . transmitted to the grid,"[439] but is consumed internally by Irving companies.
- The "sale" and "purchase" between NB Power and Irving therefore are one in name only. To analyze the LIREPP program as the "purchase of electricity" is a subterfuge that actually permits the reduction in the cost of electricity for a select group of large industrial users in New Brunswick.
- The GNB also claims that LIREPP "purchases" allow NB Power to "meet the legal requirement that it supply 40 percent of its electricity from renewable sources by 2020."[440] Yet, this too is also a subterfuge. The record indicates that the LIREPP program had no effect on the amount of renewable energy produced in New Brunswick.
- Testimony by a current NB Power official at a rate schedule hearing of the New Brunswick Energy and Utility Board for fiscal year 15/16 stated that in 2014 less than 5MW of renewable energy was connected to the grid in New Brunswick even though the installed capacity for LIREPP participants between fiscal year 2012-2013 and fiscal year 2014-2015 remained unchanged at 133.4MW.[441] As such LIREPP did not increase renewable energy transmitted onto the power grid because Irving never transmitted the electricity it produced to NB Power.[442]
- Additionally, the LIREPP program cost NB Power C$18,321,000 in fiscal year 2014/2015 and C$16,964,000 in fiscal year 2013/2014.[443]
- The NB Power official further testified, "{t}he capacity that was on the system before the program started is the same capacity that's on the system after the program went in place."[444] At a subsequent hearing the Official went on to state "…they can sell us the energy up to the point where they hit a particular discount amount, which is mandated in the regulation. And the purpose of that….is to bring the participants in line with the national average for electricity costs in their industry,"[445] in order to put those companies on a competitive footing.[446] Therefore, the true purpose of this program is to provide a subsidy to large industrial users, it is not a government purchase for MTAR.
- No benchmark is needed to calculate the benefit of this program because the "purchase" of energy is a fiction.
- Although Irving and the GOC claim JDIL's LIREPP benefits are tied to the production of corrugated medium produced at its Lake Utopia facility, neither the GOC nor Irving contests the Department's finding that JDIL and Irving are cross-owned.

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[439] GNB Brief at NB-37.
[440] GNB Brief at NB-34.
[441] *See* Petitioner Benchmark Submission at Exhibit 2, NBEUB Matter 272, Under Taking Response No. 6, NBP Exhibit 13.02 (June 15, 2015 Request Date).
[442] *Id.* at Exhibit 2, NBEUB Matter 272, Day 1 Official Hearing Transcript at 112-116; *see also* Pet. Benchmark FIS, Exhibit 2J (stating "{t}he energy for LIREPP is produced at the site of the end use and therefore does not impact NB Power's capacity planning requirements, system losses or transmission system requirements. Because of this LIREPP sales are sometimes reported separately from the system energy requirements.")
[443] *Id.* at Exhibit 2, NBEUB Matter 272, Day 3 Official Hearing Transcript at 77-116.
[444] *Id.* at Exhibit 2, NBEUB Matter 272, Day 3 Official Hearing Transcript at 80.
[445] *Id.* at Exhibit 3, NBEUB Matter 307, Day 3 Official Hearing Transcript at 55.
[446] *Id.*

- Irving and the GOC also misstate the Department's attribution practice for cross-owned companies. Irving argues that LIREPP grants are tied to non-subject merchandise because JDIL produces corrugated medium and ignores the Department's finding that JDIL is cross-owned and produces and provides to Irving woodchips, an input into pulp and paper.
- The Department's attribution regulation at 19 CFR 351.525(b)(6)(iv) requires only that the input be primarily dedicated to the production of downstream products, not subject merchandise. Woodchips are an input to downstream products such as corrugated medium and supercalendered paper. Irving incorrectly argues that the Department may only attribute subsidies to inputs used in the production of subject merchandise.[447]
- Respondents' argument that inputs must be used in the production of subject merchandise is applicable only when companies are not cross-owned and the Department is conducting an upstream subsidy investigation.
- The Department has a clear practice that subsidized inputs need only be used in downstream products produced by a firm to be attributable to a firm where subsidies are provided to (1) the firm, (2) its subsidiaries, or (3) its cross-owned companies.
- In *CFS from China*, the Department reiterated this reasoning stating "the benefit flowed equally to all downstream products that could use the subsidized inputs, including IPA, even if some of the subsidized inputs were not actually used to produce IPA during the period of review. Thus, the Department attributed the input subsidies to all of the downstream products they could be used to produce, regardless of whether they were in fact used during any given proceeding."[448]
- In *Softwood Lumber*, the Department addressed the scenario where one mill produces subject merchandise for export to the United States but where subsidies are granted (1) to the company's other operations that do not make subject merchandise or (2) to inputs used to make non-subject merchandise. In that case the Department declined to narrow its investigation to exclude subsidies at other facilities making non-subject merchandise.[449] The Department should continue to reject respondents' "tying" arguments.

Department's Position:

In the *Preliminary Results*,[450] we determined that the credits received by Irving under the LIREPP constituted a benefit within the meaning of section 771(5)(E) of the Act because Irving received a credit from the GNB to offset its electricity costs. We also preliminarily determined that the LIREPP program provides a financial contribution in the form of revenue foregone, as

[447] *See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (Oct. 25, 2007) and accompanying issues and Decision memorandum at Comment 18, n.7 (noting that the term "input product" to mean an input into the "subject merchandise" is applicable only to the section of the regulations that addresses upstream subsidies.)
[448] *See* CFS from China IDM at Comment 18.
[449] *See Certain Softwood Lumber Products from Canada: Final Results and Partial Rescission of Countervailing Duty Expedited Review*s, (Nov. 5, 2002) and accompanying Issues and Decision Memorandum at Comment 8 (stating "{c}ontrary to respondents' assertions, the regulations do not require the Department to draw a distinction between sales of in-scope and sales of out-of-scope downstream products).
[450] *See Preliminary Results* at 21-22.

described under section 771(5)(D)(ii) of the Act. Irving argues that the Department ignored parts of the LIREPP program and chose to focus only on the Irving entities that consumed electricity, while ignoring those that generated electricity. We disagree with Irving. The Department extensively detailed the LIREPP program in the verification reports for both Irving[451] and the GNB,[452] in the *Preliminary Results*,[453] and in the calculation memorandum for Irving.[454] Rather, it is Irving's arguments that urge the Department to ignore important aspects of the LIREPP program.

As detailed in the verification reports and Irving's calculation memorandum, LIREPP is a multifaceted program. However, while the program does encompass, in part, the purchase of a good or service, the LIREPP adjustment is provided to the respondent company as a credit that is applied to Irving's monthly electricity invoice as explicitly acknowledged by both Irving and the GNB.[455] This is a credit that reduces the amount of the payment due from Irving to the state-owned utility company, NB Power. This credit reduces Irving's monthly electricity bill, and it is the amount of the monthly credit that we have determined is the countervailable benefit to the company consistent with section 771(5)(E) of the Act.

In the *Preliminary Results* we stated, "NB Power first determines the credit it wants to give the large industrial customer, such as Irving; NB Power then works backwards to build up to that credit."[456] As extensively detailed in the GNB verification report, the Department of Energy and Resource Development (DERD) first determines the Target Reduction Percent, the percentage the New Brunswick average electricity rate would have to be reduced in order for it to match the Canadian Average Rate.[457] The Target Discount is then calculated by summing the previous month's firm bills for participating companies, in this case both Irving and JDIL, and then multiplying the billed amount by the applicable Target Reduction Percent. This yields the Target Discount which becomes the Net LIREPP credit after existing benefits are deducted. As stated in the GNB verification report, NB Power officials explained that the purpose of LIREPP is that "you {NB Power} want to buy enough {electricity} to get them to the target discount," adding that "we want to buy a certain amount {of electricity}, then we resell at firm rates, then the difference is the Net LIREPP Adjustment."[458] But the LIREPP program does not merely stop at the sale of electricity as Irving argues. Rather, these sales to NB Power are compounded with purchases by Irving that eventually yield the Net LIREPP Adjustment and credit.

The Net LIREPP adjustment is the credit that is applied to Irving's electricity bill the following month. As stated in the GNB verification report, the Net LIREPP adjustment also represents the amount that IPP or the combination of both IPP and St. George Power LP (SGP) need to "sell" to NB Power in order to obtain the credit. NB Power "purchases" this electricity at a rate of C$95/Mwh, however, this rate is immaterial to the calculation of the Net LIREPP adjustment.

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[451] *See* Irving Verification Report at 11-12
[452] *See* GNB Verification Report at 19-22.
[453] *See* Preliminary Results at 21-22.
[454] *See* Irving's Preliminary Calculation Memorandum at 5-6.
[455] *See* letter from Catalyst, "Supercalendered Paper from Canada: Response to New Subsidy Allegations Questionnaire" (May 27, 2016) at LIREPP-06.
[456] *See* Preliminary Results at 21.
[457] *See* GNB Verification Report at 19 – 20.
[458] *See* GNB Verification Report at 20.

This is because Irving's "sales" of electricity to NB Power, most of which are not transmitted to or through the grid, are derived each month using the Target Discount and the $95/Mwh rate. Thus, even if this rate varied, because NB Power works backwards from the Target Discount, the program guarantees that the Target Discount is reached each month by adjusting NB Power's purchases of electricity from Irving. In other words, NB Power has determined in advance the amount of credit it wishes to give Irving. As such, we reaffirm our preliminary decision to treat the benefit from this program as the amount of credit that is provided to Irving to reduce its monthly electricity bill from NB Power. In addition, the credit is, in fact, used to reduce Irving's electricity payments to NB Power, a Crown corporation. This results in foregoing or not collecting revenue that is otherwise due.

Furthermore, Irving is incorrect in contending that because JDIL's participation in the LIREPP occurs at its Lake Utopia operating division, the benefits are tied to non-subject merchandise. In the *Preliminary Results*,[459] we determined that JDIL is cross-owned with Irving because it is owned by the same holding company that owns Irving. JDIL harvests timber and supplies woodchips to paper companies, including Irving and IPP. Because JDIL provides inputs to IPP and Irving, and the inputs (woodchips) are primarily dedicated to the production of downstream products, pulp and paper products, we attributed to Irving subsidies received by JDIL.[460] Neither Irving nor the GNB contest that JDIL is cross-owned with Irving.

The fact that JDIL has various operating divisions that have diversified operations and manufacture non-subject merchandise does not change the fact that JDIL is an input supplier. These operating divisions are not separate entities that themselves would require separate analysis under 19 CFR 351.525 (b)(6)(ii)-(v) to determine whether it is appropriate to attribute to Irving, the producer of subject merchandise, subsidies received by *divisions* of JDIL. JDIL is the corporate entity, registered in New Brunswick,[461] filing taxes as one corporate entity.[462] Furthermore, neither the statute nor the Department's regulations "provide for, or require, the attribution of a domestic subsidy to a specific entity within a firm."[463] We determined in the *Preliminary Results*, and we affirm that determination for these final results, that JDIL is a cross-owned input supplier. Therefore, under 19 CFR 351.525(6)(b)(iv), benefits received by JDIL are properly attributable to Irving.

Moreover, 19 CFR 351.525(b)(5)(i) states that generally, "(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." In making this determination, the Department analyzes the purpose of the subsidy based on information available at the time of bestowal.[464] A subsidy is tied only when the intended use is known to the subsidy provider and so acknowledged prior to, or concurrent with, the bestowal of the subsidy.[465] Irving contends that the credits that are earned by JDIL and are used to reduce

[459] *See* Preliminary Results, part B. Attribution of Subsidies.
[460] *See* Preliminary Results, part B. Attribution of Subsidies.
[461] *See* Irving IQR at Exhibit JDIL-03.
[462] *See* Irving IQR at Exhibit JDIL-02.
[463] *See* SC Paper Investigation IDM at 161 citing Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645, October 25, 2007 and accompanying Issues and Decision Memorandum at Comment 8.
[464] *See CVD Preamble*, 63 FR at 65403.
[465] *Id.*

Irving's electricity bill are tied to the production of non-subject merchandise because JDIL's use of LIREPP occurred at the Lake Utopia Paper Division facility that did not produce subject merchandise. However, there is no information on the record that establishes that, at the time of approval or bestowal, the benefits are tied to the production of a particular product. The fact that the JDIL facility which qualifies for the assistance does not produce subject merchandise is an insufficient basis to establish that the benefits are tied to non-subject merchandise, when the benefits are provided to JDIL, a cross-owned input supplier of Irving. In addition, the GNB has stated that the goals of the program are twofold: (1) to reach NB Power's mandate to supply 40 percent of its electricity from renewable sources by 2020; and (2) to bring large industrial enterprises' net electricity costs in line with the average cost of electricity in other provinces.[466] There is nothing that limits LIREPP use or participation solely to producers of non-subject merchandise.

Finally, Irving appears to be arguing that because JDIL's participation in the LIREPP occurs at its Lake Utopia operating division, the subsidy from that program is tied to the Lake Utopia operating division. However, the Department does not tie subsidies on a plant- or factory-specific basis.[467]

Thus, for purposes of these final results, we have made no modifications to the *Preliminary Results* with regard to our finding and our calculation methodology for this program.

Comment 28: The Workforce Expansion Program is Not Specific

Irving's Arguments:

- The Department was correct to find that this program is not *de jure* specific because the eligibility criteria are objective, and, generally, all applications that meet the eligibility criteria are approved. However, the Department erred in its finding that the program is *de facto* specific because this conclusion is not supported by the record evidence.
- The fact that a small portion of the 33,000 corporate tax filers in New Brunswick claimed the Workforce Expansion credit does not mean that the GNB's Department of Post-Secondary Education, Training and Labour (PETL) "limited" the number of recipients. It simply means that number of companies created a position to hire a recent post-secondary graduate.
- Not every corporate tax filer in the Province would need or choose to take on a new employee under this program. PETL took no action to "limit" the users of the program.
- According to section 771(5A)(D)(iii)(I) of the Act, the Department has discretion to evaluate whether the actual number of was limited on an "enterprise or industry basis." The Department verified that a wider array of companies and organizations in various industries participate in the Workforce Expansion program. Therefore, the actual number of recipients was not limited on an industry basis.
- The Workforce Expansion program is also not specific under the other prongs of section 771(5A)(D)(iii) of the Act – there is no predominant use by an enterprise or industry, no

[466] *See* GNB Verification Report at 19.
[467] *Id.* at 65404.

disproportionate share received by an enterprise or industry and no discriminatory approval by the administering authority.

The GNB's Arguments:

- The plain language of section 771(5A)(D)(iii)(I) of the Act provides that a subsidy is *de facto* specific under this section only if the recipients are limited in number. The *SAA* further elaborates on the topic, citing to the *Carlisle Tire* decision that states, "all governments, including the United States, intervene in their economies to one extent or another, and to regard all such interventions as countervailable subsidies would produce absurd results."[468]
- According to the *SAA*, the specificity test is meant 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."[469] The *SAA* notes that when examining *de facto* specificity, the Department should consider economic diversification and when determining if the number of industries using a subsidy is small or large, the Department could take into account the number of industries in the economy in question.[470]
- The *SAA* and *Preamble* clarify that benefits that are not limited to a small number of enterprises or industries, but that are instead widely available, are not specific and therefore not countervailable. The *Preamble* states that the "purpose of the specificity test is simply to ensure that subsidies that are distributed very widely throughout an economy are not countervailed."[471]
- Case law also supports this notion. In *Al Tech Specialty Steel Corp v. United States*, the CIT held "the purpose of the specificity provision is to distinguish between subsidies that provide generally available benefits to society (which have little trade distorting effect) from those subsidies that are aimed at specific companies, industries or sector and thus distort trade significantly."[472] And in *Indland Steel Indus. Inv. v. United States*, the CAFC stated "the concept of 'specificity' refers to the extent to which a potential subsidy benefits a particular enterprise or entity."[473] Here the Workforce Expansion program is not "aimed at specific companies, industries or sectors."
- The Workforce Expansion program is generally available to all companies, with the exception of certain businesses not in the public interest, and subject to budget restraints generally all applications are approved.
- Corporate tax filers that did not hire additional employees, however, would not be eligible for the program. Thus, comparing the number of companies approved to the 33,000 corporate tax filers is meaningless. There is also a wide variety of industries that use this program.

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[468] *See* Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. 103-316, Vol. 1 (1994) (SAA) at 929.
[469] Id.
[470] Id. at 931.
[471] *Preamble*, 63 FR at 65357.
[472] *See* Al Tech Specialty Steel Corp v. United States, 28 CIT 1468, 1512 (2004).
[473] *See Indland Steel Indus. Inv. v. United States, 188 F. 3d 1349, 1355 (Fed. Cir. 1999).*

The Petitioner's Rebuttal Arguments:

- The Department should reject Irving's argument that this program was not limited on an industry basis because section 771(5A)(D)(iii)(I) of the Act provides for a finding of specificity on either an industry or an enterprise basis; a finding of specificity is proper if either the industries or enterprises that received the subsidies are limited in number.
- In *Steel Plate from Korea*, the Department determined that a program that provided electricity discounts was specific based on the limited number of companies that benefitted from the discount.[474] Conversely, in that same case the Department did not find another electricity program specific when a large number of companies and industries received discounts.[475]

Department's Position:

As stated in the *SAA*, the specificity test is to function as an initial screening mechanism to winnow out only those foreign subsidies which are truly broadly available and widely use throughout an economy. The *SAA* also states that in determining whether the number of industries using a subsidy is large or small, the Department can take into account the number of industries in the economy in question.[476] Because under section 771(5A)(D)(iii)(I) of the Act, a program is *de facto* specific if the actual recipients of the subsidy on an enterprise basis are limited in number, the Department will similarly take into account the number of enterprises in the economy in question to determine whether the number of enterprises using a subsidy is large or small.[477] Thus, we have followed the instructions of the *SAA* in determining whether this program is *de facto* specific. The number of enterprises that received this tax credit program is limited to a small number of enterprises out of about 33,000 potential corporate tax filers.[478] In *Steel Plate from Korea,* the Department found an electricity discount program to be *de facto* specific when distributed to a small number of enterprises[479] and stated: "{g}iven the data with respect to the small number of companies which received… electricity discounts during the POI, we determine that the… program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act."[480] Therefore, in accordance with section 771(5A)(D)(iii)(I) of the Act and past Department practice, we continue to find this program *de facto* specific.[481]

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[474] *See* Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea, 64 FR 73176, 73182 (Dec. 29, 1999).
[475] Id. at 73186.
[476] *See Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act*, H.R. Doc. No. 316, 103d Cong., 2d Session (1994), at 929, 931.
[477] *See Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Affirmative Determinatio*n, 81 FR 49943 (July 29, 2016) (*CRS Korea*) and accompanying Issues and Decision memorandum at Comment 13.
[478] *See* Irving Case Brief at 53; *see also* GOC Verification Exhibit at GOC-11.
[479] The actual number of enterprises is business proprietary information. The number can be found in GNB IR at Exhibit NB-OJP-1 at 7 and 10.,
[480] *See Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 FR 73176, 73182 (December 29, 1999).
[481] *See, e.g., CRS Korea*; *Countervailing Duty Investigation of Certain Corrosion Resistant Steel Products from the Republic of Korea: Preliminary Affirmative Determination*, 80 FR 68842 (November 6, 2015) (*Corrosion-Resistant Steel Korea*) and accompanying Decision memorandum at 16.

In arguing the Workforce Expansion – One Job Pledge program is not *de facto* specific under section 771(5A)(D)(iii)(I) of the Act, both Irving and the GNB have made a number of incorrect statements with respect to both the statute and the analysis of *de facto* specificity. Irving argues that the Department has the discretion to limit the analysis of *de facto* specificity to either an industry or enterprise basis, and argues that the program is not specific because it is not limited on an industry basis. However, the fact that a program may not be limited on an industry basis does not mean that a program is not specific under section 771(5A)(D)(iii)(I) of the Act. In order to be not specific under section 771(5A)(D)(iii)(I) of the Act, the actual number of recipients must not be limited on both an industry and enterprise basis. If a program is not limited on an industry basis, but the number of recipients is limited on an enterprises basis, then the program is *de facto* specific.

The GNB also argues that the program is not specific because it is "generally available" to all companies in the province. Here, again, the respondents have misconstrued the statute. While "access" to a subsidy is a factor in the analysis of *de jure* specificity under section 771(5A)(D)(i) of the Act, under the *de facto* analysis required under section 771(5A)(D)(iii)(I) of the Act, the Department is to analyze the actual number of recipients of the investigated program. Furthermore, under the specificity test as set forth in the *SAA*, the Department is required to determine whether the subsidy program is "widely used throughout an economy."[482]

Irving and the GNB both claim that the number of enterprises, as represented by the 33,000 corporate filers is not the correct basis for evaluating whether the program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act. They contend the subsidy provided under this program is based upon the number of companies that had a need to hire of a post-secondary graduate student, and, therefore, to determine whether the program is *de facto* specific, the Department should consider only the number of companies that hired post-secondary graduate students. The respondents are in effect arguing that because they have created a program that, in fact, limits the number of potential users of the subsidy program, that instead of following our specificity test and examining the number of actual recipients "throughout an economy," we should only gauge whether the actual number of recipients is limited based on only the enterprises that have been targeted by the government as potential subsidy recipients.[483] The respondents have provided no legal or case support for such a departure from the specificity test. As previously stated, to determine whether a program is not specific, the *SAA* explicitly states that the Department must determine that the subsidy is broadly available and widely used throughout an economy.[484]

Finally, the GNB argues that the Workforce Expansion program is not "aimed at specific companies, industries or sectors." However, whether the Workforce Expansion program is "aimed" at specific companies or industries is irrelevant under a specificity analysis conducted under section 771(5A)(D)(iii) of the Act. As the *SAA* states: "As under existing law and Commerce practice, evidence of government intent to target or otherwise limit benefits would be irrelevant in *da facto* specificity analysis."

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[482] *See* SAA at 929.
[483] *See* PDM at 17, footnote 105.
[484] *See SAA* at 929.

Comment 29: The New Brunswick R&D Tax Credit is Not Specific

Irving's Arguments:

- Eligible R&D expenditures performed by any taxpayer in any sector or industry within New Brunswick that generate taxable income are eligible for the New Brunswick Research and Development (R&D) Tax Credit.
- Qualification is automatic and does not require approval of the Canada Revenue Agency (CRA). The Department was correct that this program is not *de jure* specific but erred in its conclusion that the actual number of recipients was "limited" under Section 771(5A)(D)(iii)(I) of the Act.
- That fact that 240 out of 33,000 corporate tax filers used this tax credit does not mean that this program is specific; it does not mean that the CRA "limited" the number of recipients. Any decision to use or not use the program was based upon the company's circumstances and decisions.
- The New Brunswick R&D Tax Credit program is also not specific under the other prongs of Section 771(5A)(D)(iii) – there is no predominant use by an enterprise or industry, no disproportionate share received by an enterprise or industry and no discriminatory approval by the administering authority.
- It is also not specific under Section 771(5A)(D)(iv) of the Act, because it is established under New Brunswick law and applies to provincial taxes.
- The GOC supports Irving's arguments.

The Petitioner's Rebuttal Arguments:

- The Department should reject Irving's argument that this program was not limited on an industry basis because section 771(5A)(D)(iii)(I) of the Act provides for a finding of specificity on either an industry basis or an enterprise basis. A finding of specificity is proper if either the industries or enterprises that received the subsidies are limited in number.
- In *Steel Plate from Korea*, the Department determined that a program that provided electricity discounts to the respondent was specific based on the limited number of companies that benefitted from the discount.[485] Conversely, in that same case the Department did not find another electricity program specific when a large number of companies and industries received discounts.[486]

Department's Position:

In the *Preliminary Results*, the Department found the New Brunswick R&D Tax Credit was *de facto* specific based upon section 771(5A)(D)(iii)(I) of the Act because the actual recipients were limited in number. As stated in the *SAA*, the specificity test is to function as an initial screening mechanism to winnow out only those foreign subsidies which are truly broadly available and widely use throughout an economy.[487] The *SAA* also states that in determining whether the

[485] *See Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 FR 73176, 73183 (December 29, 1999).
[486] Id. at 73186.
[487] *See* SAA at 929.

number of industries using a subsidy is large or small, the Department can take into account the number of industries in the economy in question.[488] Because under section 771(5A)(D)(iii)(I) of the Act, a program is *de facto* specific if the actual recipients of the subsidy on an enterprise basis are limited in number, the Department will similarly take into account the number of enterprises in the economy in question to determine whether the number of enterprises using a subsidy is large or small.[489] Thus, we have followed the instructions of the *SAA* in determining whether this program is *de facto* specific. Irving claims that the fact that only 240 companies out of about 33,000 corporate tax filers received this tax credits reflects the fact that these 240 companies conducted eligible research, not that the Canadian Revenue Agency limited the recipients. In addition, they maintain there was no predominant user of this tax credit. However, section 771(5A)(D)(iii)(I) of the Act does not require the administering authority to actively limit the program but rather states a program is specific if the "actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number."

In this case, the Department considered whether the recipients were limited in number on an enterprise basis. The number of enterprises that received this tax credit program is limited to 240 enterprises out of about 33,000, or about 0.73 percent of the potential corporate tax filers.[490] Additionally, it is Department practice to find *de facto* specificity when the actual number of enterprises is limited to a small number of participants.[491] In *Steel Plate from Korea,* the Department found an electricity discount program to be *de facto* specific when distributed to a small number of enterprises and stated: "Given the data with respect to the small number of companies which received… electricity discounts during the POI, we determine that the… program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act."[492] Therefore, in accordance with section 771(5A)(D)(iii)(I) of the Act and Department practice, we continue to find this program *de facto* specific.

Comment 30: Whether the Benefit to JDIL from the Federal Pulp and Paper Green Transformation Program (FPPGTP) is Countervailable

Irving's Arguments:

- According to 19 CFR 351.525(b)(5)(ii), "{i}f a subsidy is tied to the production of an input product, then the Secretary will attribute the subsidy to both the input and downstream products produced by a corporation."
- The Federal Pulp and Paper Green Transformation Program (FPPGTP) grants received by JDIL are not tied to an input product, but rather they are tied to corrugated medium, non-subject downstream paper products. Therefore, they are not countervailable.
- Although the Department correctly determined that the FPPGTP grants are tied to the production of pulp and paper products, they failed to realize that the grants received by JDIL are also tied to non-subject paper products.

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[488] *Id.* at 931.
[489] *See CRS Korea* and accompanying Issues and Decision memorandum at Comment 13.
[490] *See* GOC SQR at GOC-II-26; *see also* GOC Verification Exhibit at GOC-11.
[491] *See, e.g., CRS Korea* and accompanying Issues and Decision memorandum at Comment 13; *Corrosion-Resistant Steel Korea* and accompanying Decision memorandum at 16.
[492] *See Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 FR 73176, 73182 (December 29, 1999).

- JDIL qualified for funding under the FPPGTP to support a biomass boiler project at the company's corrugated medium production facility.

The GOC's Arguments:

- The record does not indicate that Irving received any grants under the FPPGTP program. The only entities that received funds were IPP and JDIL.
- The Department should not attribute JDIL's grants under the FPPGTP program to Irving. JDIL does not produce SC Paper. JDIL funding was tied to the purchase of equipment used to make a paper product known as corrugated medium.
- Because JDIL is cross owned with Irving, the Department can attribute the FPPGTP payments to Irving's production of SC Paper only if the allegedly subsidized JDIL product is an input product primarily dedicated to the production of the downstream product. Corrugated medium is not an input into SC Paper, and therefore there is no basis to attribute the FPPGTP payments to Irving.

The Petitioner's Rebuttal Arguments:

- Irving and the GOC claim that because JDIL does not produce subject merchandise the Department cannot attribute FPPGTP benefits to Irving because the benefits are tied to the production of corrugated medium produced at its Lake Utopia facility. Yet, neither the GOC nor Irving counter the Department's finding that JDIL and Irving are cross-owned.
- JDIL and Irving qualified for FPPGTP subsidies based on one application submitted to the GOC in 2009. Furthermore, benefits under this application were not dependent on JDIL's manufacture of corrugated medium. The benefits were based on the amount of black liquor that the company would produce in calendar year 2009 and the corresponding credits generated from its black liquor production."[493]
- Irving's questionnaire response also indicates that the amounts ultimately used at JDIL were approved in the unified application submitted to the GOC in 2009. Irving noted that the entire Irving group of companies was authorized to receive a total sum in credits.[494]
- The record shows that JDIL was approved based on Irving's initial application and any subsequent reports to the GOC were part of a claims process for receiving already approved funds, rather than part of the initial approval process. JDIL reported receiving multiple disbursements out of the total amount approved under Irving's application.[495]
- Irving and the GOC also misstate the Department's attribution practice for cross-owned companies. Irving argues that FPPGTP grants are tied to non-subject merchandise because JDIL produces corrugated medium, ignoring both the Department's cross-ownership finding and the fact that JDIL produces woodchips which are an input into pulp and paper. The GOC argument that because corrugated medium is not an input for SC paper, the Department cannot attribute JDIL subsidies to Irving ignores JDIL's production of woodchips.

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[493] *See* letter from Irving, "Supercalendered Paper from Canada: Response to Section III of the Questionnaire for Producers/Exporters," dated March 18, 2016 (Irving IQR) at Exhibit IPL-07.
[494] *See* Irving IQR at Exhibit IPL-07.
[495] *See* Irving IQR at Exhibit JDIL LU-07.

- The Department's attribution regulation at 19 CFR 351.525(b)(6)(iv) requires only that the input be primarily dedicated to the production of downstream products, not subject merchandise. Woodchips are an input to downstream products such as corrugated medium and supercalendered paper. Irving incorrectly argues that the Department may only attribute subsidies to inputs used in the production of subject merchandise.[496]
- Respondents argument that inputs must be used in the production of subject merchandise is only applicable when companies are affiliated and not cross-owned and where the Department is conducting an upstream subsidy investigation.
- The Department has a clear practice that subsidized inputs need only be used in downstream products produced by a firm to be attributable to a firm where subsidies are provided to (1) the firm, (2) its subsidiaries, or (3) its cross-owned companies.
- In *CFS from China*, the Department reiterated this reasoning stating "the benefit flowed equally to all downstream products that could use the subsidized inputs, including IPA, even if some of the subsidized inputs were not actually used to produce IPA during the period of review. Thus…the Department attributed the input subsidies to all of the downstream products they could be used to produce, regardless of whether they were in fact used during any given proceeding."[497]
- In *Softwood Lumber from Canada*, the Department addressed the scenario where one mill produces subject merchandise for export to the United States but where subsidies are granted (1) to the company's other operations that do not make subject merchandise or (2) to inputs used to make non-subject merchandise. In that case the Department declined to narrow its investigation to exclude subsidies at other facilities making non-subject merchandise.[498] The Department should continue to reject respondents' "tying' arguments.
- Additionally, in the SC Paper Investigation, the Department already addressed very similar arguments regarding the attribution of subsidies under the FPPGTP program and found that benefits to cross-owned input suppliers were appropriately included in subsidy calculations if the inputs were used to manufacture downstream products. The Department also found FPPGTP grants to be "tied to the production of pulp and paper products."[499]

Department's Position:

Under the FPPGTP, participant companies that register and submit the required application materials receive a credit in the amount C$0.16 per liter of black liquor (a by-product of pulp-making) produced during the period January 1, 2009, through December 31, 2009, up to a C$1

[496] *See Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (Oct. 25, 2007) and accompanying Iissues and Decision memorandum at Comment 18, n.7 (CFS from China) (noting that the term "input product" to mean an input into the "subject merchandise" is applicable only to the section of the regulations that addresses upstream subsidies.)
[497] *See CFS from China IDM* at Comment 18.
[498] *See Certain Softwood Lumber Products from Canada: Final Results and Partial Rescission of Countervailing Duty Expedited Review*s, (Nov. 5, 2002) and accompanying Issues and Decision Memorandum at Comment 8 (stating "{c}ontrary to respondents' assertions, the regulations do not require the Department to draw a distinction between sales of in-scope and sales of out-of-scope downstream products).
[499] *See SC Paper Final IDM* at Comment 19.

billion cap for the total program. Following the credit application process, companies receive a confirmation of the value of the credits generated, and the total credit value. Companies can then submit project proposals for funding consideration. Eligible projects must be capital investments in a Canadian pulp and paper mill that are directly related to the mill's industrial process and result in demonstrable improvements in environmental performance.

In the *Preliminary Results*,[500] we determined that grants from the GOC under the FPPGTP constitute a financial contribution in the form of a direct transfer of funds from the government, and bestow a benefit in the amount of the grant within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act and 19 CFR 351.504(a). We also preliminarily determined that this program is specific under section 771(5A)(D)(i) of the Act, because the grants provided under the program are limited to the pulp and paper industry. Furthermore, we found that these grants are tied to the production of pulp and paper products. Therefore, pursuant to 19 CFR 351.525(b)(5), we attributed the benefits from these grants to the sales of the specific products that benefit from the grant (*i.e.*, pulp and paper products), rather than to Catalyst's or Irving's total sales.

Contrary to the GOC's assertion that only IPP and JDIL received funds, Irving and the GOC reported that Irving, IPP, and JDIL received benefits under this program.[501] Irving also stated that the benefits all three companies received stemmed from an initial application made by IPP, based on black liquor produced by IPP, and approved for IPP.[502]

We disagree with Irving and the GOC that it is not appropriate for the Department to consider that subsidies received by JDIL benefit Irving. Irving and the GOC argue that because JDIL-Lake Utopia, the operating division which received the grant, does not produce SC paper or an input to SC paper, these grants cannot be considered to provide countervailable subsidies to Irving. Yet, neither Irving nor the GOC contest that JDIL is cross-owned by Irving, nor that it is an input supplier to Irving. As discussed in the *Preliminary Results*, we determined that JDIL and IPP are cross-owned with Irving because they are both owned by the same holding company that owns Irving.[503] JDIL harvests timber and supplies woodchips to paper companies, including Irving and IPP. IPP provides pulp to Irving. Because JDIL provides inputs to IPP and Irving, and IPP provides inputs to Irving, and the inputs (woodchips and pulp) are primarily dedicated to the production of the downstream product, pulp and paper, we attributed to Irving subsidies received by JDIL and IPP.[504]

The fact that JDIL is divided into various operating divisions does not change the fact that JDIL is an input supplier. These operating divisions are not separate entities. JDIL is the entity that is incorporated and registered in New Brunswick[505] and JDIL files its taxes as one corporate

[500] *See Preliminary Results* at 12-14.
[501] *See* Irving IQR at Exhibits IPL-07, IPP-06 and JDIL LU-01; *see also* GOC QR at Volume V p. GOC-4.
[502] *See* letter from Irving, "Supercalendered Paper from Canada: Response to Section III of the Questionnaire for Producers/Exporters at IPL-07.
[503] *See Preliminary Results* at 9-10.
[504] *See Preliminary Results*, part B. Attribution of Subsidies.
[505] *See* Irving IQR at Exhibit JDIL-03.

entity.[506] Furthermore, neither the statute nor the Department's regulations "provide for, or require, the attribution of a domestic subsidy to a specific entity within a firm."[507] Therefore for purposes of attribution the Department considers JDIL as the cross-owned company that provides inputs to Irving. Indeed, the *Preamble* explicitly rejected this type of tying methodology, disagreeing with a comment that the Department should enact regulations that would allow the Department to tie subsidies to an individual plant or factory of a respondent company. [508]

Irving further argues that the grants JDIL received under the FPPGTP are tied to non-subject merchandise because they are provided for a project at JDIL's Lake Utopia division, which produces corrugated medium, which is not an input to subject merchandise. Irving notes that the grants JDIL received under the program were used to construct a new biomass boiler. However, we disagree with Irving that these grants are tied to corrugated medium, and therefore tied to non-subject merchandise. Rather, as stated in the *Preliminary Results*, the FPPGTP program is tied to the production of pulp and paper products.[509] Irving is misguided in concluding that because subsidies were provided to a *division* of a cross-owned input supplier that itself does not produce subject merchandise or supply an input to the production of subject merchandise, the subsidies are tied to the production of non-subject merchandise as contemplated by 19 CFR 351.525(b)(5). Rather, in this instance, because JDIL has received subsidies, and JDIL supplies inputs to Irving that are primarily dedicated to the production of a downstream product, we are guided by 19 CFR 351.525(b)(6)(iv), which provides for the attribution, to the respondent producer of SC paper, of subsidies received by the cross-owned input supplier.[510] In the case of FPPGPT, because the subsidy is tied to the production of pulp and paper products, we attributed the benefits received by JDIL to the pulp and paper sales of JDIL and Irving, less intercompany sales.

Comment 31: Whether the GNB's Reimbursement of Silviculture and License Management Expenses is Countervailable

Irving's Arguments:

- In the *Preliminary Results*, the Department concluded that JDIL performs the same silviculture and forest management activities on its private freehold lands. However, the Department overlooked a key distinction between JDIL's freehold lands and its Crown land under license. JDIL is the landowner of its freehold lands; as a licensee of Crown land, it is not the landowner.
- JDIL received reimbursements from the New Brunswick Department of Natural Resources (NBDNR) in accordance with Section 38(2) *Crown Lands and Forests Act* and Irving's Forest Management Agreement.

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[506] *See* Irving IQR at Exhibit JDIL-02.
[507] *See* SC Paper Investigation IDM at 161, citing *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 72 FR 60645, October 25, 2007 and accompanying Issues and Decision Memorandum at Comment 8.
[508] *See Preamble* at 63 FR 65404
[509] *See*, *also*, SC Paper Investigation IDM at 26 – 27.
[510] *See Fabrique de Fer de Charleroi, SA v. United State*s, 166 F. Supp 2d 593, 577 (CIT 2001) ("T{t}here is no indication in the statute or in the legislative history that the legislature intended Commerce to look at the specific items and determine whether they actually benefitted from the subsidy).

- These reimbursements were for expenses that JDIL was required to perform on behalf of the Province for License 7. They are not grants but rather compensation for obligations rendered by the tenure holder on the Province's behalf.
- Silviculture and forest management are landowner responsibilities.
- By treating these reimbursements as grants, the Department has missed the point – JDIL conducts silviculture and forest management activities on its freehold properties because it owns these properties; when JDIL undertakes these responsibilities for the government or third party it is compensated for performing the services.
- If JDIL did not perform silviculture and forest management, the GNB would need to perform the operations itself of hire a third party.
- The Department recognized, in Lumber IV, that provincial governments may impose obligations on tenure holders with rights to purchase Crown stumpage, including silviculture.[511] Furthermore, where the provincial government reimbursed the tenure holder for the costs incurred to perform silviculture or forest management activities, the Department did not consider the government payments to be grants.[512]
- The GNB paid JDIL less than adequate remuneration for the performance of silviculture and forest management on License 7. The GNBs payments did not include an amount for profit as adequate remuneration should.
- The *Crown Lands and Forests Act*, only obligates NBDNR to reimburse licensees for the expenses incurred to perform silviculture and forest management obligations. Reimbursements are made at standard rates, developed by an independent consulting firm.
- Forest management expenses are reimbursed at fixed "license management service rates" or "license management fees (LMFs)." The LMFs were based on an independent cost study conducted by Ernst & Young in 2008 and have decreased over time.
- Because NBDNR purchased the silviculture and license management obligations at fixed reimbursement rates that covered costs, rather than at fair market rates, JDIL did not receive a benefit.
- The reimbursements that JDIL received did not cover its expenses.
- Additionally, neither the herbicide nor the seedlings provided by the GNB to JDIL provide a countervailable benefit, because JDIL is planting the Province's trees and is not assured it will have access to the timber when it is ready for harvest.
- The LMFs reimbursed were limited to overhead costs allocated to land management activities and they excluded overhead costs allocated to harvesting activities. Under its FMA, JDIL did not receive reimbursements from NBDNR for these primary and secondary road costs.
- The Department's decision regarding the "Outreach Agreement" in the original investigation is inapplicable here. There, Port Hawkesbury was performing silviculture

[511] *See Certain Softwood Lumber from Canada*, 67 FR 15545 (April 2, 2002) (final CVD determination), and accompanying Issues & Decision memorandum at 19 (*Lumber IV Investigation*); *Certain Softwood Lumber Products from Canada*, 69 FR 75917 (Dec. 20, 2004) (final results 2002-2003 review), and accompanying Issues & Decision Memorandum at 19, 105 (Lumber IV 2002-2003 Review); *Certain Softwood Lumber Products from Canada*, 70 FR 73448 (Dec. 12, 2005) (final results 2003-2004 review), and accompanying Issues & Decision Memorandum at 15 (*Lumber IV 2003-2004 Review*).

[512] *See* Lumber IV Investigation at 59, 73; *see also* Supercalendered Paper from Canada, 80 FR 63535 (Oct. 20, 2015).

on both private and Crown land and receiving payments to cover both the private and Crown land expenses.

The GOC's Arguments:

- The silviculture reimbursements and license management fees involve the purchase of a service and do not qualify as a financial contribution under the Act.
- The Act does not include the government purchase of a service in the definition of financial contribution. Furthermore, *Eurodif* confirmed that the purchase of a service is not a countervailable event under the Act.[513]
- Without the FMA there would be no obligation for JDIL to perform these services. Silviculture and license management activities would otherwise be done by the GNB as the landowner, not JDIL as a purchaser of stumpage.
- Finding that silviculure and license management activities are activities that JDIL would also undertake on its private freehold land in the regular course of business and for which it would not be reimbursed by the GNB is not a basis for finding the reimbursements to be anything other than the purchase of a service.
- JDIL performs these services on its private freehold land because it is the landowner; JDIL does not perform these tasks when it purchases stumpage from a private landowner.
- If the Department continues to find that there is a financial contribution, the Department should ultimately conclude that there is no benefit.
- There is no evidence that the GNB paid more than adequate remuneration for the services. JDIL reported that their costs are not fully covered and the Department has not provided evidence to support a contrary finding.
- Countervailing these reimbursements also runs contrary to the Department's practice involving Softwood Lumber.
- In Lumber IV, the Government of Quebec compensated tenure holders by applying the tenure holders' silviculture costs towards their stumpage dues and the Department adjusted the administered stumpage price upward to account for the uncredited costs that the GOQ imposes on tenure holders.[514]

The GNB's Arguments:

- The GNB's reimbursements paid to JDIL for silviculture and license management activities were for the purchase of services from Irving and do not constitute a financial contribution under the statute.
- The plain language of section 771(5)(D) of the Act provides that although the government's provision of goods or services can be a financial contribution, only the government's purchase of goods is a financial contribution. The statute also omits any reference to the government's purchase of services.
- The Department has even stated in the *Preamble* that if "purchases of services were intended to be treated as similarly to the governmental purchases of goods, the statute and

[513] *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005).

[514] *See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canad*a, 67 FR 15545 (Apr. 2, 2002) and accompanying Issues and Decision Memorandum at 73.

the SCM Agreement would specifically mention services as they do with the provision of goods and services."[515]

- In the first administrative review of Lumber IV, the Department found that the Land Base Investment Program did not provide a subsidy because it involved the government purchase of services.[516]
- In *Eurodif*, the Federal Circuit confirmed that governmental purchase of services does not constitute a financial contribution.[517]
- JDIL did not receive any grants from the GNB for silviculture, rather JDIL received reimbursements from the GNB for silviculture activities required pursuant to the FMA covering JDIL as a licensee on Crown land.
- In Lumber IV the Government of Ontario (GOO) reported basic silviculture was required to be performed on all harvested Crown land by the licensee.[518] The GOO reimbursed the licensee for eligible silviculture costs. The Department did not consider these payments to be a countervailable benefit from the government, and the Department previously addressed silvilculture in the context of stumpage. Moreover, the Department found that no adjustments to either the Crown stumpage prices or the benchmark prices used in the LTAR calculation were necessary.[519]
- Section 38(2) of the Crown Lands and Forests Act (CLFA) obligates the Minister of Natural Resources to reimburse the licensee for silviculture. There is no eligibility requirements or application that the licensee must comply with. The FMA identities a range of silviculture treatments that are required. Each year, the licensee sends proposals to the GNB based on the FMA plan and the GNB determines the maximum reimbursement amount for the licensee. Reimbursement rates are determined by a private consulting firm and vary by license due to the different land features.
- The GNB also rebates JDIL for herbicide treatments on its license because it is more efficient to have JDIL conduct these treatments on Crown lands.
- The GNB is ultimately responsible for silviculture and delegates these activities to the license holders because they are most familiar with the lands. In the absence of a licensee the Province would have to perform these activities itself or hire contractors.
- If the GNB reimbursed JDIL for any of the silviculture expenses it incurs on its private land, then this may be considered a grant, however, here, the land in question is Crown-owned. A grant would only exist if JDIL was getting something for nothing, which is not the case.[520]
- The reimbursements also did not exceed JDIL's costs, therefore in the *Final Results* the Department should not countervail these funds.

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[515] *Preamble*, 63 FR at 65379.
[516] Softwood Lumber from Canada AR at 124-128.
[517] *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005).
[518] *See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 FR 15545 (Apr. 2, 2002) and accompanying Issues and Decision Memorandum at 105.
[519] Id.
[520] The GNB argues the Department's decision in the SC Paper Investigation regarding the Outreach Agreement is not applicable here. Port Hawkesbury's reimbursements extended to both Crown and private land and were "activities that Port Hawkesbury would undertake even in the absence of the Outreach Agreement." SC Paper Investigation at 94.

- Paragraph 38(2)(b) of the CLFA authorizes the Minister of Natural Resources to compensate Crown Timber Licensees in exchange for the licensee's performance of forest management services. JDIL under its FMA must undertake certain responsibilities such as constructing and maintaining roads. All the duties are the responsibility of the landowner.
- Because LMF activities are services that JDIL is undertaking on behalf of the Crown there is no financial contribution. LMFs are analogous to silviculture expenses.

The Petitioner's Rebuttal Arguments:

- Irving's distinction that it is not the landowner on Crown lands where it performs silviculture under license is irrelevant because the benefit received by Irving is not a function of land ownership.
- The government relieved Irving of a financial burden that Irving would have otherwise incurred. When Irving performs these activities on its freehold lands it incurs a financial burden; when Irving performs these activities as a licensee of Crown land it is relieved from the financial burden.
- Even if the activities are the responsibility of the landowner, as Irving states, and the GNB performs the operation itself or hires a third party, Irving as a licensee is still relieved from the financial burden necessary to maintain the quality of its supply chain and inputs. Thus, in all scenarios, land ownership is irrelevant.
- By arguing that the payments are not grants but rather compensation for services rendered Irving mistakenly tries to shift the focus from the benefit it received to the benefit that the GNB gained.
- The Department rejected a similar argument in the *Supercalendered Paper from Canada* investigation. There, the Department countervailed a program that provided payments to the respondent for "certain services that the {Government of Nova Scotia} deemed beneficial for the province" including silviculture.[521] The Department countervailed the grants even though "the funding of ancillary forestry operations {was} considered directly beneficial to the province and provisional economy…"[522] The Department was correct to focus on the benefit to the recipient rather than the benefit to the Province.
- There, the Department stated, "the manner in which the payments were provided (as reimbursements for expenses incurred…) indicate that the payments were provided to alleviate the financial burden of continuing forestry activities for which {the respondent} itself would otherwise have been responsible."[523] Therefore, despite any benefit that the Province may receive, Irving also benefitted from the reimbursements.
- Irving's argument that the reimbursements received by the GNB did not cover its expenses is also irrelevant because the Department only countervailed the amount of benefit that the GNB bestowed on Irving.
- The GOC's argument that the statute does not include the purchase of services in the definition of "financial contribution" is misplaced. The Department rejected a similar argument in the investigation of Supercalendered paper from Canada where the

[521] SC Paper Final Investigation IDM at 20.
[522] *See* SC Paper Final Investigation IDM at 90.
[523] *See* SC Paper Final Investigation IDM at 92; *see also* Petitioner Rebuttal Brief at 53.

Department countervailed a forest management program under which the Government of Nova Scotia reimbursed the respondent for expenses incurred for performing forestry activities including silviculture activities.[524] The Department rejected the respondent's characterization of the program, stating it "misconstrues the nature of the assistance being provided."[525]

- The Department reasoned, "{b}ecause the {program} provides reimbursements to {the respondent} for costs it incurs in the course of managing its input and ensuring the efficient operation of its supply chain, *i.e.*, activities it was obligated to undertake as part of its operation, we continue to find that it provides a financial contribution in the form of a direct transfer of funds under section 771(5)(D)(i)."[526]
- Furthermore, the Department also stated that "the payments were provided to alleviate the financial burden of continuing forestry activities for which {the respondent} itself would otherwise have been responsible. As such {the program} constitutes a grant, and not the purchase of services by the government."[527]
- Irving's reimbursements are for costs that Irving would have incurred in the course of managing its input and ensuring the efficient operation of its supply chain. Thus, Irving's reimbursements are identical to the reimbursements in the original investigation. The Department should continue to find these payments countervailable.

Department's Position:

Irving, the GNB and the GOC argue that these payments represent a purchase, by the GNB, of services provided by Irving. Irving, the GNB, and the GOC cite to *Lumber IV* where the Department treated both silviculture and license management activities as services. The GOC cites to *Eurodif* to support its argument that the purchase of services is not countervailable. The GNB points to the *Preamble* and reiterates Irving's position that the statute does not include the purchase of services in the definition of "financial contribution." We find these arguments unpersuasive.

First, we agree with the GOC that a government's purchase of services is not countervailable.[528] However, beyond that holding, *Eurodif* is not applicable to the Department's analysis in this case because the facts in *Eurodif,* are different from the facts in this case. *Eurodif* addressed the issue of whether the delivery of both money and goods in exchange for a processed good constituted a purchase of goods or a purchase of services.[529] *Eurodif* did not discuss the difference between a grant and a purchase of services. *Lumber IV* is also inapplicable. In *Lumber IV*, silviculture was not a separately alleged subsidy program for which the Department initiated an investigation, as it is here. Thus, in *Lumber IV*, the Department did not make any determinations regarding silviculture or license management activities. Instead, in *Lumber IV*, the Department was examining stumpage prices paid, on an aggregate basis, and the Department determined it was

[524] *See* SC Paper Final Investigation IDM at 94.
[525] *See* SC Paper Final Investigation IDM at 94.
[526] *See* SC Paper Final Investigation IDM at 94-95; *see also* Petitioner Rebuttal Brief at 54.
[527] *See* SC Paper Final Investigation IDM at 92.
[528] *Eurodif*, 411 F.3d at 1365.
[529] *Eurodif*, 411 F.3d at 1364.

appropriate, depending on the province, to adjust these prices because the fees charged for stumpage either included silviculture activities performed by the tenure holder or were offset to account for the silviculture expenses borne by the tenure holder. However, the facts of this case demonstrate the New Brunswick stumpage price does not include an amount for silviculture.[530] Thus, we considered the silviculture and license management fees as a distinct program for this proceeding. Moreover, all decisions in an investigation must be based upon the information on the record of that investigation. Therefore, the decisions made within the instant case are based upon the record evidence of this SC Paper expedited review; not upon the information that might or might not have been on the record of *Lumber IV*.

JDIL is the licensee on Crown timber licenses #6 and #7 (collectively referred to as License #7). JDIL or another Irving cross-owned company have been the licensee for License 6 since 1962 and for License 7 since 1981, and thus an Irving company has been a long-term leaseholder of the Crown lands from which it sources part of its input supply[531] At present, JDIL is under a 25-year forest management agreement (FMA) with the province. Under the Crown Lands and Forests Act (*CLFA*), JDIL is obligated to perform basic silviculture and forest management activities. Specifically, paragraph 38(2) states:

> The Minister
> (a) shall reimburse the licensee for such expenses of forest management as are approved in and carried out in accordance with the operating plan, including expenses with respect to
> i. pre-commercial thinning, …
> iii. tree planting, ….
> subject to the regulations and the provisions of any agreement between the licensee and the Minister, and
> (b) shall compensate the licensee for other expenses of forest management in accordance with the regulations.[532]

In accordance with the *CFLA*, JDIL's FMA defines basic silviculture and further specifies JDIL's requirement for both basic silviculture and licensee silviculture.[533] In accordance with the FMA, basic silviculture is defined as the silvicultural activity required to produce the annual allowable harvest of timber as identified in paragraph 13.1.[534] Licensee silviculture is defined as silvicultural treatments carried out at the expense of the licensee.[535] Thus, the GNB is making a clear distinction between basic silviculture which is required and for which the GNB provides funds, and licensee silviculture, which is beyond the basic silviculture, as described in the CLFA, and is to be performed at the expense of the licensee.

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[530] *See* GNB Verification Report at 14-15; also see GNB Verification Exhibits at Exhibit 12.

[531] *See* letter from Irving, "Supercalendered Paper from Canada: Response to New Subsidy Allegation Questionnaire," dated August 12, 2016 (Irving NSA Response) at Exhibit STUMP-3.

[532] *Id.* at Exhibit STUMP-1.

[533] *Id.* at Exhibit SUMP-5

[534] *Id.* at Exhibit SUMP-5

[535] *Id.* at Exhibit SUMP-5.

In the *Preliminary Results*, the Department found that basic silviculture and forest management activities provide countervailable subsidies because the GNB relieved JDIL of expenses incurred. The FMA goes on to stipulate that JDIL "shall carry out basic silviculture,"[536] "the Minister will fund the basic silvicultural program"[537] and JDIL's "obligations…will correspond to the level of basic silviculture funding provided by the Minister."[538] Likewise the Forest Management Manual (FMM), which forms part of the FMA, further outlines the specific responsibilities of the licensee and the Crown and defines license management fees as the "reimbursement to licensees for specific requested management services undertaken at the request of, and on behalf of DNR."[539]

The assertion that JDIL was not fully reimbursed for either the silviculture or the forest management activities it performed is immaterial. This notion that the payments received by JDIL from the GNB do not cover JDIL's actual expenses for both silviculture and forest management activities does not negate the benefit from the payments received.[540] These are activities that involve the renewal and maintenance of forestry land, *i.e.*, the management of Irving's input and supply chain, and which Irving would undertake even in the absence of the reimbursements. As such, Irving, the GOC and the GNB mischaracterize the reimbursements and misconstrue the nature of the assistance being provided. Indeed, the manner in which the payments were provided, as reimbursements for obligatory expenses incurred, further indicates that the payments were provided to alleviate the financial burden to JDIL.

The GNB is providing Irving with long-term, 25 years or more, access to the required input that allows it to operate as a business concern; does not charge it a fee for this long-term supply access; and then both the GNB and Irving argue that, in addition to providing Irving with a rent-free 25 year-long lease, the GNB should also provide Irving with additional funding to help it maintain the quality of its input supply. As such, the assistance provided constitutes a direct transfer of funds from the GNB to JDIL, in the form of a grant, and not the purchase of services by the government. As discussed above, the respondents have provided no creditable information or argument that this government action does not provide a benefit under the CVD law to Irving. Therefore, because the GNB provides reimbursements to JDIL for costs it incurs in the course of managing its input and ensuring the efficient operation of its supply chain, *i.e.*, activities it was obligated to undertake as part of its operations, we continue to find that these programs provide a financial contribution in the form of a direct transfer of funds under section 771(5)(D)(i) of the Act.

[536] *Id.* at Exhibit STUMP-5 para. 13.1
[537] *Id.* at Exhibit STUMP-5 para 13.3.
[538] *Id.*
[539] *Id.* at Exhibit STUMP-6
[540] We note that JDIL's FMA para. 13.4 states that it "may, at its own expense ….carry out licensee silviculture in addition to basic silviculture and the Company…shall be the exclusive beneficiaries (on a prorated basis) of any immediate or future increase to the annual allowable harvest of timber as a result of such silvicultural treatments."

Finally, despite Irving's arguments regarding landownership, it remains that the GNB has an interest in maintaining the wood supply that goes beyond any ownership interest. To that end and in accordance with the *CLFA*, the GNB maintains and funds a silviculture program under which it provides financial support to private landowners who perform silviculture activities on their private lands.[541] Thus, regardless of whether the land is owned by the Crown or privately, the GNB is providing funding to alleviate the financial burden of conducting silviculture activities.

Comment 32: Whether the Accelerated Capital Cost Allowance (ACCA) for Class 29 Assets is Specific and Whether it is a Tax Credit

Irving's Arguments:

- In *Lumber*, the Department found that accelerated capital cost allowances under Canada's Income Tax Regulations were not specific because they were "not limited to a specific industry, group of industries or to companies in specific regions."[542]
- ACCA for Class 29 assets is not specific as a matter of law because the legal provisions do not "expressly limit" access to an enterprise or industry. ACCA for Class 29 are available to and used by "all taxpayers in all industries and sectors in Canada that acquire machinery and equipment primarily for use in Canada for the manufacturing or processing of goods for sale or lease."[543]
- ACCA for Class 29 assets is also not specific as a matter of law because the legislation clearly sets forth an "objective criteria" for eligibility, eligibility is automatic, and the eligibility criteria are strictly followed, as required by Section 771(5A)(D)(ii).
- Paragraph 20(1)(a) of the *Income Tax Act* and Schedule II of the *Income Tax Regulations* (Class 29) clearly and objectively set forth the criteria governing eligibility and the amount of the deduction. There is no separate application for the CCA; any taxpayer that acquires a Class 29 asset automatically qualifies for the deduction, as long as the taxpayer completes Schedule 8 to the T2 Corporate Income Tax Return, and claims the ACCA as a deduction to taxable income. The Canada Revenue Agency (CRA) can audit the taxpayer's claim.
- ACCA for Class 29 assets is also not *de facto* specific under the criteria set forth under section 771(5A)(D)(iii) of the Act.
- The ACCA for Class 29 assets was used by approximately 22,000 companies across various sectors and industries in 2014, therefore the actual number of recipients is not limited by either enterprise or industry. There is no evidence that an enterprise or industry is a predominant user or receives a disproportionate tax benefit under the ACCA for Class 29 assets. Finally, the CRA has no discretion to favor one enterprise or industry over another. It must accept the claim or any taxpayer that acquired a Class 29 asset and properly completed the required forms.

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[541] *See* letter from petitioners "Supercalendered Paper from Canada: Petitioner's Amended New Subsidy Allegations," dated April 25, 2016 at Exhibits 1 and 6.
[542] *Certain Softwood Products from Canada*, 48 FR 24159, 24168-24169 (May 31, 1983).
[543] *See* letter from the GOC, "Supercalendered Paper from Canada: Response of the Government of Canada, the Government of British Columbia and the Government of New Brunswick to the Department's August 2, 2016 Supplemental Questionnaire," dated August 29, 2016 (GOC SQR August 29, 2016) at GOC-II-42 & Exhibit GOC-SUPP1-ACCA-1.

- The Department found that the ACCA for Class 29 assets is *de facto* specific because the actual recipients are limited in number as there were only 22,000 recipients out of just over two million corporate tax filers. This does not mean that the CRA "limited" the number of recipients. What it does show is that for tax year 2013, 22,000 corporate tax filers (i) had taxable income; (ii) manufactured goods; (iii) on or after March 18, 2007, purchased a Class 29 asset for which they had not already fully claimed the ACCA before tax year 2013; and (iv) elected to deduct the ACCA from taxable income for tax year 2013. The decision to use or not use the program was on the taxpayers'.
- The Department incorrectly treated the ACCA for Class 29 as a tax credit rather than a tax deduction.
- The tax law clearly states that capital cost allowances are a deduction to taxable income. As a result, any tax savings are equivalent to the ACCA amount multiplied by the corporate tax rate. Therefore, the maximum "benefit" is the tax savings, not the amount of the tax deduction.
- Specifically, the benefit would be the difference between the tax savings under Class 29 and the tax savings under Class 43. According to 19 CFR 351.509(a)(1) a benefit for a tax deduction "exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in absence of the program."
- If the ACCA for Class 29 assets was not available the standard CCAs for Class 43 assets would have applied. Therefore, the "benefit" is, the difference between the tax savings under the ACCA for Class 29 assets and the tax savings otherwise available under the CCA for Class 43 assets.

The GOC's Arguments:

- The ACCA for Class 29 assets is available to all taxpayers engaged in manufacturing and processing in Canada, and is therefore not specific. The Department was correct to determine that it was not *de jure* specific and in the *Final Results* should conclude that it is also not *de facto* specific.
- The Department found this program specific due to its finding that the actual number of users was limited. However, 22,000 users *prima facie* cannot be considered a limited number.
- In *Carlisle Tire & Rubber Co. v. United States*, the court rejected the argument that the countervailing duty law should extend to generally available benefits, including "a tax credit for expenditures on capital investments even if available to all industries and sectors," noting this would lead to "absurd results."[544] Although the specificity provisions of section 777(5A) under the Act were added to the statute after Carlisle, the Statement of Administrative Action (*SAA*) makes clear that the statute was intended to implement the court's discussion of general availability.[545]
- Assuming that 22,000 is limited, for a capital expenditure allowance that is available to every Canadian manufacturer and processor of goods for sale is the kind of "absurd

[544] *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834 (CIT 1983).
[545] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, House Doc. 103-316, Vol. 1 at pp. 259-262, 103rd Cong., 1st Sess. (1994).

result" that the *Carlisle* court rejected. Alone, 22,000 should be sufficient to demonstrate that the number is not limited.

- Previous findings of *de facto* specificity have involved far fewer users of the program than the number of users in this case.[546] However, the Department has utilized this flawed approach before.[547]
- Using the total corporate tax base as a comparison almost ensures that the Department will always reach a finding of a limited number, even for programs that are intended to be widely available. This analysis makes any tax measure that is utilized by business threatened with a finding of specificity simply because it is quite likely that individual businesses will differ in when and how they use the measure, such that in any one period the number may only be a part of the corporate tax base.
- The corporate tax base of approximately two million may include many businesses that do not buy "eligible machinery and equipment used in Canada primarily for the manufacture and process of goods for sale or lease" because they are not "manufacturers or processers." The appropriate denominator would be corporate entities that are manufacturers or processors and that purchase machinery and equipment for manufacture and processing of goods. The Department, however, never requested this information and the GOC had no reason to believe that the Department would find 22,000 was a small number such that the GOC should have provided such data.
- Additionally, many entities that do buy such depreciable assets would not do so every year, so the Department should use a cumulative number over a period of greater than one year as the appropriate numerator.
- If the Department continues its conclusion that 22,000 is a "limited" number, Canada requests the Department reopen the record to allow Canada to present such information.
- As explained in the GOC's first supplemental questionnaire and at verification, the ACCA provides for an accelerated deduction through depreciation for the cost of acquiring machinery and equipment used by a taxpayer primarily in Canada for the

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[546] *See e.g., Royal Thai Government v. United State*s, 341 F. Supp.2d 1315 (CIT 2014) (upholding the Department's finding that in the context of the impact of the Asian financial crisis on the Thai economy, placing 351 company names on a priority list to receive government assistance, where 351 covered a wide spectrum of companies and industries, was sufficiently broad so as not to be specific); *Bethlehem Steel Corp. v. United States*, 140 F. Supp.2d 1354, (CIT 2001) (where the Court upheld the Department's determination that a program was not specific when 31 of the 190 customers participating in the program were in the iron and steel industry and the iron and steel industry was one of sixteen participating industries); *Certain Hot-Rolled Carbon Steel Flat Products from India: Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act*, 81 FR 27412 (May 6, 2016) and accompanying Final Affirmative Determination Memo at 24-25 (use of program by only two industries is limited); *Certain Oil Country Tubular Goods from the People's Republic of China: Final Results of Countervailing Duty Administrative Review*; 2012, 79 FR 52301 (Sept. 3, 2014) and accompanying Issues and Decision Memorandum at 59 (finding a limited number of users where only seven industries benefited); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 78 FR 50387 (Aug. 19, 2013) and accompanying Issues and Decision Memorandum at 12 (finding de facto specificity where a limited number of products were prioritized); *compare Chlorinated Isocyanurates from the People's Republic of China: Final Affirmative Countervailing Duty Determination; 2012*, 79 FR 56560, (Sept. 22, 2014) and accompanying Issues and Decision Memorandum at 39-40 (Department determined that a program was not limited in number because it was used by nine different industries).

[547] *See Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17410 (Mar. 26, 2012) and accompanying Issues and Decision Memorandum at 36.

manufacture or processing of goods for sale or lease.[548] The tax benefit is in the form a deduction from taxable income, the benefit would be the company's applicable tax rate times the amount of the deduction taken.

- The Department erred in assuming the ACCA was a credit and assessing the full amount of the deduction as a subsidy.
- The Department also overstated the benefit by not considering that any benefit from the ACCA can be no larger than the difference between the class 29 ACCA deduction and the deduction otherwise available under the non-accelerated class 43.[549] If the Department continues to countervail the ACCA, it must at a minimum correct its calculation.

The Petitioner's Rebuttal:

- The plain language of the applicable legal provisions provides *prima facie* evidence that the ACCA is *de jure* specific. The GOC's argument that "{t}here is no restriction on the kind of industries {that} can use the ACCA," is false.[550]
- The respondents have stated that the ACCA is available to all taxpayers involved in manufacturing and processing in Canada and applicable for the cost of acquiring machinery and equipment used primarily in Canada for the manufacture or processing of goods for sale or lease; however, the GOC, provided a much narrower definition of "manufacturing and processing."
- Canada's Income Tax Regulations (ITR) provides a very narrow definition of "manufacturing and processing" as applied to the ACCA for Class 29 assets that excludes broad portions of the Canadian economy.
- The GOC provided a description of ACCA for Class 29 assets that including the following: "{t}he deduction is available pursuant to paragraph 20(1)(a) of the Income Tax Act."[551]
- Paragraph 20(1)(a), the ACCA provision of the Income Tax Act, is clarified by several other regulations provided by the GOC, including: (1) Income Tax Regulations, C.R.C. 1977, c.945, paragraph 1100(1) (ITR Section 1100(1)) and (2) Income Tax Regulations, C.R.C. 1977, c.945 s. 1104 – Definitions (ITR Section 1104). These two sections are the regulatory authority that implements Income Tax Act paragraph 20(1)(a). The GOC also provided Schedule II, Class 29, referenced by ITR Section 1104, that defines Class 29 property as, in part, property "to be used directly or indirectly by {the taxpayer} in Canada primarily in the manufacturing or processing of goods for sale or lease."[552]
- Paragraph 20(1)(a), the ACCA provision of the Income Tax act is clarified by the other relevant regulations. ITR Section 1100 provides for Class 29 offsets to a taxpayer's income, ITR Section 1104 defines "manufacturing and process" for purposes of Section 1100 and Class 29 and ITR Schedule, Class 29 defines Class 29 property.
- ITR Section 1104 states "Manufacturing or Processing…(9)For the purposes of paragraph 1100(1)(a.1), subsection 1100(26), and Class 29 in Schedule II,

[548] *See* GOC SQR August 29, 2016, at Vol. II, pp. GOC-II-41-42, GOC-II-5-54.
[549] *See* letter from the GOC, "Supercalendered Paper from Canada: Verification Exhibits," dated October 18, 2016 (GOC Verification Exhibits) at Exhibit 9, p. 5.
[550] *See* Petitioner Rebuttal Brief at 55.
[551] *See* GOC SQR August 29, 2016, at Exhibit GOC-II-42.
[552] Id. at Exhibit GOC-SUPP1-ACCA-1 at Income Tax Regulations, C.R.C. 1977, c. 945, Sch.II, Class 29.

'manufacturing or processing' does not include (a) farming or fishing; (b) logging; (c) construction; (d) operating an oil or gas well or extracting petroleum or natural gas from a natural accumulation thereof; (e) extracting minerals from a mineral resource; (f) processing of (i) ore, other than iron ore or tar sands ore, from a mineral resource to any state that is not beyond the prime metal stage or its equivalent, (ii) iron ore from a mineral resource to any stage that is not beyond the pellet stage or its equivalent, or (iii) tar sands ore from a mineral resource to any stage that is not beyond the crude oil stage or its equivalent; (g) producing industrial minerals; (h) producing or processing electrical energy or steam, for sale; (i) processing natural gas as part of the business of selling or distributing gas in the course of operating a public utility; (j) processing heavy crude oil recovered from a natural reservoir in Canada to a stage that is not beyond the crude oil stage or its equivalent; or (k) Canadian field processing."[553]

- Therefore, the Department should reject the GOC's statement that there are no restrictions on the types of industries that can use the ACCA and that the ACCA is not *de-jure* specific. ITR Section 1104 expressly excludes groups of industries and thus limits access to the subsidy to a group of non-excluded industries. Thus, the Department must find that the ACCA for Class 29 assets is *de jure* specific.
- The Department has affirmed that where certain industries are excluded, then the subsidies provided to the non-excluded industries are de jure specific. For example, in *Pipe from the United Arab Emirates*, the Department stated "{w}here there is an explicit exclusion of certain industries in the law itself, as here, such an exclusion is sufficient under section {771(5A)(D)(i) of the Act} to support a finding that the law is expressly limited to a group of industries."[554]
- Should the Department decline to find the ACCA for Class 29 assets *de jure* specific, it should affirm its preliminary determination that the program is de facto specific according to section 771(5A)(D)(III)(I) of the Act, because the actual recipient are limited in number.
- The Department verified that only 22,000 corporate tax filers used this tax credit for tax year 2013; only 1.1 percent of corporate filers used this program.[555] The actual recipients of the subsidy are limited in number.

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[553] *See* id. at Exhibit GOC-SUPP1-ACCA-1 at Income Tax Regulations, C.R. C. 1977, c. 945, s. 1104; *see also* Petitioner Rebuttal Brief at 59.

[554] *See Circular Welded Carbon Quality Steel Pipe from the United Arab Emirates: Final Determination in the Countervailing Duty Investigation*, 77 FR 64465 (Oct. 22, 2012) (*Pipe from the UAE*) and accompanying Issues and Decision memorandum at Comment 1; *see also Certain Cold-Rolled Steel Flat Products from Brazil: Final Affirmative Determination*, 81 FR 49940,49941 (July 29, 2016) at "Exemption of Payroll Taxes" and Comment 15.

[555] *See e.g., Non-Oriented Electrical Steel from the Republic of Korea: Final negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 79 FR 61605, 61606 (Oct. 14, 2014) and accompanying Issues and Decision memorandum at "RSTA Article 7(2): Tax Credit for Improving Enterprise's Bill System" (stating, "{t}he SAA states that the specificity test should be applied 'in light of its original purposes, which is to function as an initial screening mechanism to winnow out only those subsidies which truly are broadly available and widely used throughout an economy.' We examined the number of companies that used this program, and the number of corporations that filed tax returns as listed in the Statistical Yearbook 2012. According to this NTS document, only 2,619 companies (*i.e.*, 0.57 percent of companies filing corporate tax returns in 2011) received benefits under this program. A corporate tax program that is used by less than one percent of corporate tax filers is not one that is widely used throughout an economy, the legal standard set forth in the SAA. Therefore, we

- The Department should affirm its preliminary benefit calculation for the ACCA. Respondents arguments are based on speculation. Although the GOC claims that as a tax deduction, the benefit would be the company's applicable tax rate times the amount of the deduction taken, it has not provided an applicable tax rate in its questionnaire response, case brief, of in the verification exhibit to which it cites.
- The tax guide provided by the GOC as part of GOC Verification Exhibit GOC-9 is inapplicable to the preparation of the Schedule 8 Form used by Irving to claim the ACCA. It states "{u}se this guide if you are a sole proprietor, an unincorporated individual or a partner in a partnership, that is a business person, or a professional."
- The discussion of the capital cost allowance in the guide provided by the GOC also does not apply to Irving's preparation of the lengthy Schedule 8 Forms provided by the GOC, but rather to a Form T2125.[556]
- Irving claims that the ACCA amount reported on Schedule 8 for Class 29 assets should be multiplied by the corporate income tax rate of 27 percent. For support and the tax rate, Irving cites to its supplemental questionnaire response exhibit Supp-20.[557] However, this exhibit is only Irving's proposed calculation worksheets for another subsidy program, the Atlantic Investment Tax Credit. Thus, this assertion is unsupported by record evidence.
- Also the forms supplied by Irving and the GOC indicate that another guide governs the calculation of the ACCA, not the T2125 provided at verification. Because there is no new record information since the *Preliminary Results*, the Department should continue to use the amounts from Schedule 8 Forms, filed during the POR, as the benefit amount.

Department's Position:

Class 29 assets are machinery used in manufacturing or processing operations. Any taxpayer that acquired these assets after March 18, 2007, and before 2016, can claim a tax deduction under the Accelerated Capital Cost Allowance. Under this allowance, class 29 assets can be fully depreciated at an accelerated rate, over three years, and the amount of depreciation can be claimed as a deduction to reduce the taxpayer's taxable income.

Canada's *Income Tax Act* provides for deductions from taxable income for the capital cost of property. Canada's *Income Tax Regulations* (ITR) further specifies and defines class 29 as an allowable deduction.[558] The ITR defines manufacturing and processing, noting "for the purpose of … Class 29… 'manufacturing or processing' does not include: (a) farming or fishing; (b) logging; (c) construction; (d) operating an oil or gas well or extracting petroleum or natural gas from a natural accumulation thereof; (e) extracting minerals from a mineral resource …."[559]

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determine that this program is de facto specific under section 19 U.S.C. § 1677(5A)(D)(iii)(I) because the actual recipients are limited in number.").

[556] *See* GOC Verification Exhibits at GOC-9.

[557] *See* Irving Case Brief at 39, n.128.

[558] *See* letter from the GOC, "Supercalendered Paper from Canada: Response of the Government of Canada, the Government of British Columbia and the Government of New Brunswick to the Department's August 2, 2016 Supplemental," dated August 29, 2016 (GOC SQR August 29, 2016) at Exhibit GOC-SUPP-ACCA-1.

[559] *Id.* Income Tax Regulations, C.R.C. 1977, c.945, s. 1104 – Definitions (9) Manufacturing or processing. Also excluding, "(f)processing of (i) ore, other than iron ore or tar sands ore, from a mineral resource to any stage that is

Therefore, the applicable tax laws for class 29 explicitly exclude certain industries from the definition of manufacturing and processing; these excluded industries are ineligible to use the class 29 assets program.

We therefore determine that ACCA Class 29 program is *de jure* specific within the meaning of section 771(5A)(D)(i) of the Act, because as a matter of law, eligibility for this tax program is expressly limited to certain industries. As a result of this finding, we need not address the respondents' arguments regarding *de facto* specificity.

In the *Preliminary Results* we mistakenly treated this tax program as a tax credit. However, after a review of the tax returns for Irving, JDIL and IPP,[560] we agree with respondents that ACCA for Class 29 assets permits taxpayers to deduct depreciation costs from taxable income.[561] Therefore the benefit is not the amount of the deduction, as we found for the *Preliminary Results*. Rather the benefit is the tax that would have been paid on the amount deducted from taxable income. Accordingly, for the final results we find it is appropriate to treat this program as a tax deduction.

Irving also argues that any benefit under this program should be the difference between the tax savings under ACCA Class 29 and the tax savings under the standard CCA for Class 43 assets. Recognizing that we are now treating this program as a tax deduction rather than a tax credit, we agree. Under 19 CFR 351.509(a)(1) "a benefit exists to the extent that the tax paid by a firm as result of the program is less than the tax the firm would have paid in the absence of the program." In the absence of the Class 29 provision, the manufacturing or processing assets acquired by Irving would otherwise have been included in Class 43, which is subject to normal, *i.e.*, nonaccelerated depreciation.[562]

Accordingly, the benefit to Irving is the tax savings of the difference between the deduction calculated using the Class 29 accelerated rate of depreciation and the deduction calculated using the Class 43 standard rate of depreciation. To calculate the tax savings on this difference, we multiplied the difference in the deductions by the applicable corporate tax rate. Although Irving contends that its corporate tax rate is 27 percent, it cites to a sample calculation it provided for another tax program in response to the Departments questionnaire. The sample calculation does

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not beyond the prime metal stage or its equivalent, (ii) iron ore from a mineral resource to any stage that is not beyond the pellet stage or its equivalent, or (iii) tar sands ore from a mineral resource to any stage that is not beyond the crude oil stage or its equivalent; (g) producing industrial minerals; (h) producing or processing electrical energy or steam, for sale; (i) processing natural gas as part of the business of selling or distributing gas in the course of operating a public utility; (j) processing heavy crude oil recovered from a natural reservoir in Canada to a stage that is not beyond crude oil stage or its equivalent; or (k) Canadian field processing.

[560] *See* letter from Irving, "Supercalendered Paper from Canada: Response to August 12, 2016, Supplemental Questionnaire for Irving," dated August 29, 2016 (Irving SQR August 29, 2016) at Exhibit SUPP-34, Attachment B. The capital cost allowance deduction shown in column 11 of schedule 8 flows a deduction to line 403 of schedule 1 of each company's tax return. *See* letter from Irving, "Supercalendered Paper from Canada: Response to Section III of the Questionnaire for Producers/Exporters," dated March 18, 2016 (Irving IQR) at Exhibits IPL-04. Ipp-02, JDIL-02.

[561] *See* letter from Irving, "Supercalendered Paper from Canada: Response to August 12, 2016, Supplemental Questionnaire for Irving," dated August 29, 2016 (Irving SQR August 29, 2016) at Exhibit SUPP-34.

[562] *See* GOC IQR at GOC Volume VII, GOC-18.

not indicate the origin for the 27 percent corporate rate.[563] On the other hand, we have on the record Irving's tax return form, which indicates a specific "corporation tax rate." Thus, in weighing the record evidence, we find that official tax return is more reliable than a sample calculation that Irving provided for another tax program. Therefore, we have applied the corporate tax rate on Irving's official tax form to the difference in the deductions available under Class 29 and Class 43 to calculate the benefit to Irving, JDIL and IPP.[564]

Comment 33: Whether the Benefit Calculation for the Atlantic Investment Tax Credit (AITC) Must be Adjusted for the Additional Taxes that were Paid as a Result of the Program

Irving's Arguments:

- According to 19 CFR 351.509(a)(1), a benefit for a tax credit "exists to the extent that the tax paid by a firm as a result of the program is less than the tax the firm would have paid in the absence of the program."
- In the *Preliminary Results*, the Department overstated the benefit to Irving because it failed to take into account the additional taxes Irving paid as a result of the AITC.
- AITC is a federal income tax credit available to taxpayers in the Atlantic Region in the amount of 10 percent of the cost of "qualified property." Qualified property includes machinery and equipment used for certain commercial purposes, for the manufacture or processing of goods for sale or lease. Thus, the coverage of AITC overlaps with equipment that is eligible for the ACCA Class 29 tax deductions. To account for this, Irving alleges that Canada's tax law requires that where a taxpayer has claimed a tax credit, such as AITC, with respect to a depreciable asset, the depreciable basis of the asset must be reduced by the amount of the credit taken, there by effectively reducing the value of the credit taken. The Department must account for this lower tax savings from AITCs utilized in prior years in calculating the benefit of the AITC to Irving.

The GOC's Arguments:

- The Department overstated the benefit to Irving of the AITC by failing to consider the tax programming costs to Irving to use the credit.
- The coverage of AITC overlaps substantially with the kinds of equipment that are eligible for the ACCA class 29 deduction.
- The GOC alleges that under Canada's tax law, where a taxpayer claims a tax credit with respect to a depreciable asset, the depreciable basis of the asset must be reduced by the amount of the credit taken, which reduces the value of the credit. The Department must account for this loss in value when calculating the benefit.

The Petitioner's Rebuttal:

- The Department should reject Irving's and the GOC's argument to offset the value of the credit with the additional taxes Irving paid as a result of the AITC.
- Irving is asking for an offset that is impermissible under the narrow definition of an offset under section 771(6).

[563] *See* Irving Case Brief at 39 n.128.
[564] *See* Irving Calculation Memorandum.

- The Department has ardently refused to permit offsets that fall outside the three categories. For example, in *Lumber*, the Department stated that "{b}oth Congress and the courts have confirmed that these are the only permissible offsets the Department is permitted to take."[565]
- Irving does not cite any authority to support the offset it is seeking.

Department's Position:

In the *Preliminary Results* we found the Atlantic Investment Tax Credit (AITC) to be a credit against federal income tax owed.[566] Irving argues that the Department must take into account additional taxes that Irving may have paid as a result of utilizing the AITC. Specifically, Irving asserts that in using the AITC, it was unable to fully capture all the benefits provided under the ACCA for Class 29, and therefore the Department must account for this loss of benefit as an offset to the AITC program.

We disagree with Irving that an offset is warranted. Section 771(6) of the Act, defines the net countervailable subsidy and provides for only three narrow offsets: (1) the deduction of application fees, deposits or similar payments to qualify for or receive a subsidy, (2) accounting for losses due to deferred receipt of the subsidy, if the deferral is mandated by the Government and (3) the subtraction of export taxes, duties or other charges intended to offset the countervailable subsidy. Thus, section 771(6) of the Act does not provide for the offset that Irving seeks.[567] Furthermore, 19 CFR 351.503(e) provides that, in calculating the amount of benefit under a tax program, the Department will not consider the tax consequences of the benefit.

Therefore, we have made no modifications to the calculation methodology for this program as discussed in the *Preliminary Results*[568] because the arguments presented by Irving and the GOC are contrary to law and are not supported by the record evidence.[569] Specifically, Irving and the GOC seek for the Department to consider a secondary effect of the AITC tax program not permitted by 19 CFR 351.503(e), and to make an adjustment that is also not a permissible offset under section 771(6) of the Act.[570]

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[565] *See Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73448 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 43.
[566] *See Preliminary Result*s at 20.
[567] *See Geneva Steel v. United States*, 914 F. Supp. 563, 609-610 (CIT 1996) (stating that the scope of the statute is clear from the legislative history: "{f}or purposes of determining the net subsidy, there is subtracted from the gross subsidy only the items specified in section 771(6). The list is narrowly drawn and is all inclusive." (citing S. Rep. No. 249, 96th Cong., 1st Sess. 96 (1979), (reprinted in 1979 U.S.C.C.A.N. 381, 472)).
[568] *See Preliminary Result*s at 20.
[569] We note Irving and the GOC reference subsection 13 (7.1) of the Canadian tax law in their arguments. However, the subsection only appears as a reference in their commentsand the full text of this provision is not on the record. *See, e.g.*, GOC Verification Report at GOC-5. Thus, although we have considered the argument, we did not consider this subsection as support in our decision.
[570] *See Final Affirmative Countervailing Duty Determination: Fresh and Chilled Atlantic Salmon From Norway*, 56 FR 7678, 7680 (February 25, 1991) (citing *Final Affirmative Countervailing Duty Determination; Certain Fresh Atlantic Groundfish From Canada*, 51 FR 10041 (March 24, 1986)).

Comment 34: Sales Denominators for Benefits Received by Cross-owned Input Suppliers Must Include all Sales of the Downstream Product

Irving's Arguments:

- In accordance with 19 CFR 351.525(b)(6)(iv), the Department attributes subsidies received by a cross-owned input producer "to the combined sales of the input and downstream products…."
- In the applying this regulation, the Department has previously stated that the "downstream product" is not limited to the merchandise under investigation and includes sales of all downstream products.
- In *Coated Free Sheet Paper from Indonesia*, for example, the Department determined that pulp was primarily dedicated to paper products, which included, but were not limited to coated free sheet paper, the subject merchandise, and attributed subsidies received by cross-owned pulp suppliers to the total sales of all paper products sold by the cross-owned downstream producers.[571]
- In this instance, the Department preliminarily determined that wood chips and pulp "are primarily dedicated to the production of the downstream product, pulp and paper…"[572] In the *Preliminary Results*, however, JDIL's and IPP's sales denominators excluded the downstream sales of tissue paper from Irving Tissue, another cross-owned company.
- The exclusion of Irving Tissue's downstream sales from JDIL's and IPP's sales dominators runs counter to 19 CFR 351.525(b)(6)(iv) and inflates the subsidies attributed to these cross-owned input suppliers.

The Petitioner's Rebuttal Arguments:

- The Department did not identify Irving Tissue as being cross-owned with Irving. Additionally, Irving did not report any subsidies to Irving Tissue that might have conferred a benefit on other Irving entities.
- Even if the Department should include Irving Tissue's sales, information on the record demonstrates the Department does not have the necessary information to make this adjustment.[573]

Department's Position:

As noted above, in the "Attribution of Subsidies" section, the Department continues to attribute to Irving subsidies received by JDIL and IPP's, pursuant to 19 CFR 351.525(b)(6)(iv), by dividing benefits provided to JDIL and IPP by a denominator that is the sum of the sales of the input and downstream products, minus inter-company sales, for the cross-owned input supplier and downstream producer.

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[571] *See*, *e.g.*, *Coated Free Sheet Paper from Indonesia*, 72 FR 17498, 17501 (Apr. 9, 2007), unchanged in final determination, 72 FR 60642, 60645 (Oct. 25, 2007) and accompanying Issues and Decision Memorandum at 89, *Certain Lined Paper Products from Indonesia*, 71 FR 47171 (Aug. 16, 2006) and accompanying Issues and Decision memorandum at 28 Comment 3, and *Certain Oil Country Tubular Goods from the Republic of Turkey*, 79 FR 41964 (July 18, 2014) and accompanying Issues and Decision Memorandum at 56 (*OCTG from Turkey)*.
[572] *See* PDM at 10.
[573] *See* Petitioner's Rebuttal Brief at 80 – 81.

When applying the attribution regulations at 19 CFR 351.525(b)(6)(i) – (v), the Department has recognized four exceptions to its normal rule of attributing a subsidy to the products produced by the corporation that received the subsidy.[574] One of these exceptions is 19 CFR 351.525(b)(6)(iv) when an input supplier and the downstream producer are cross-owned. Moreover, if the input produced by the supplier is primarily dedicated to the downstream products, then the Department will attribute subsidies received by the input supplier to the combined sales of the input and downstream products produced by both corporations, minus inter-company sales.[575]

In *Irving's Affiliation Response*, Irving provided a list of companies identified as meeting the criteria of a cross-owned input-supplier pursuant to the regulations.[576] JDIL and IPP were both identified as cross-owned companies that had produced inputs that were supplied to Irving during the POR, and thus provided their respective questionnaire responses.[577] In *Irving's SQR*, the company provided sales information for Irving Tissue and asserted the Department should include it in JDIL's and IPP's sales denominator calculations as its downstream products (*e.g.*, tissue paper) were produced from JDIL and IPP inputs.[578] However, Irving acknowledged that Irving Tissue did not meet any of the four exceptions for attributing to the production of subject merchandise subsidies received by cross-owned corporations under 19 CFR 351.525(b)(6)(ii) - (v) that required a questionnaire response from this company.[579] Specifically, Irving stated that during the POR and AUL period, Irving Tissue "did not supply an input product used in the production of pulp or paper."[580]

Although Irving argues that Irving Tissue sales should be included in the sales denominator the Department uses for purposes of attributing to Irving subsidies received by JDIL and IPP, it now highlights only the fact that Irving Tissue is cross-owned with either JDIL, IPP, Irving or all three. The *Preamble* is clear that the Department is attempting to measure the impact on the production of subject merchandise of subsidies provided to the supplier of the input.[581] Because the input is not tied only to the production of subject merchandise, and the Department does not trace subsidies, the Department allocates such the subsidies to the input producer over the sales

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[574] *See*, *also*, *Preamble*, 63 FR 65348 at 65402, "Paragraph (b)(6) begins by stating a general rule, which is followed by four exceptions to that rule …"
[575] *See* 19 CFR 351.525(b)(6)(iv).
[576] *See* Letter from Irving dated February 24, 2106, Re: Supercalendered Paper from Canada: Response to Section III Questions Identifying Affiliated Companies (*Affiliation Response*) at pages 11 – 13 ("Applying the legal standard for a cross-owned input supplier set forth above, the following cross-owned companies form the table were cross-owned input suppliers during the POR…".)
[577] *Id*. at page 13.
[578] *See* Letter from Irving dated August 29, 2016, Re: Supercalendered Paper from Canada: Response to August 12, 2016, Supplemental Questionnaire for Irving (*Irving's SQR*) at pages 2 – 4.
[579] *Id. at page 3, footnote 2.*
[580] *Id.*
[581] *See Preamble*, 63 FR 65348 at 565402, "However, we do not intend to investigate subsidies to affiliated parties unless cross-ownership exists or other information, such as transfer of subsidies, indicates that such subsidies may in fact benefit the subject merchandise produced by the corporation under investigation."

of the input and the downstream products produced by the respondent to reflect the added value of the input on all derived downstream products produced by the corporation.[582]

Indeed, even Irving's reliance on to *Coated Free Sheet Paper* supports the Department's methodology. In that instance, the Department did include all downstream products produced from the inputs, not just the subject merchandise, in the sales denominator used to calculate the rate from subsidies provided to the input supplier. However, the Department included only the sales of all downstream products by the actual producers of the subject merchandise.[583] The inclusion of CMI's total sales, rather than on CMI's subject merchandise sales in the sales denominator reflected a domestic trading company issue, not a determination concerning whether to include sales of additional downstream products by cross-owned producers of other downstream products.[584] Moreover, the cite to *OCTG from Turkey* does not support Irving's argument. Although we have stated in this expedited review that the downstream product is pulp and paper, unlike in *OCTG from Turkey*, we have not made a finding to include Irving Tissue's sales based on Irving's mere assertion that they are cross-owned, especially in light of the inapplicability of 19 CFR 352.525(6)(b)(ii)-(v) to Irving Tissue.

Finally, Irving does not cite to any statutory or regulatory authority in its claims the Department is distorting the subsides attributable to JDIL and IPP. The *Preamble* has noted a similar issue with affiliated companies.[585] Although this is a company, Irving Tissue, that may meet the general definition of cross-ownership, pursuant to 19 CFR 351.525(b)(6)(vi), the Department has promulgated its regulations to limit the scope of its investigation of subsidies to the respondent and cross-owned corporations that provide inputs for, or produce, subject merchandise and meet one of the four exceptions as provided in 19 CFR 351.525(b)(6)(ii) – (v). Therefore, our examination of the input suppliers, JDIL and IPP, and the attribution of subsidies they received to the input and downstream products produced by JDIL, IPP and Irving is within the scope of our practice and consistent with our past practice and our regulations.[586]

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[582] *See SC Paper Investigation IDM* at Comment 19.
[583] Id.
[584] *See* Coated Paper from Indonesia and accompanying Issues and Decision Memorandum at 10 ("…subject merchandise producers TK and PD"), 12 ("TK and PD, the SMG/APP CFS paper producers,…") and at 89.
[585] *See Preamble* 63 FR 65348 at 65402, ("Therefore, reliance upon the affiliated party definition would result in the Department expending unnecessary resources collecting information from corporations about subsidies which are not benefitting the production of the subject merchandise, or diluting subsidies more properly attributed to input producers allocating such subsidies over the production of remotely related and affected downstream producers.")
[586] *See*, *e.g.*, *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China*, 75 FR 59212 (September 27, 2010), and accompanying Issues and Decision Memorandum at "Attribution of Subsidies" and *Certain Uncoated Paper from Indonesia*, 81 FR 3104 (January 20, 2016) and accompanying Issues and Decision Memorandum at "Attribution of Subsidies."

VII. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish this final determination and the final subsidy rates in the *Federal Register* and will notify the U.S. International Trade Commission of our determination.

☒	☐
Agree	Disagree

4/17/2017

X Ronald K. Lorentzen

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance