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March 1, 2021

MEMORANDUM TO: Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Negative Determination of the Countervailing Duty Investigation of Common Alloy Aluminum Sheet from Brazil

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I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are not being provided to producers and exporters of common alloy aluminum sheet (aluminum sheet) from Brazil, as provided in section 705 of the Tariff Act of 1930, as amended (the Act). Below is the complete list of issues in this investigation for which we received comments from interested parties:

Comment 1:	Whether Commerce Applied Appropriate Negligibility and *De Minimis* Thresholds
Comment 2:	Whether Commerce Correctly Analyzed Benefit for the Integrated Drawback Program
Comment 3:	Whether the Integrated Drawback Program Provides Excessive Remission
Comment 4:	Whether Furnas' Sales of Electricity to Companhia Brasileiro de Aluminio (CBA) are a Countervailable Subsidy
Comment 5:	Whether the Ex-Tarifário Program Provides a Financial Contribution and is Specific
Comment 6:	Whether Commerce was Correct to Apply Adverse Facts Available (AFA) to Find the Lei do Bem Program *De Facto* Specific
Comment 7:	Whether the BNDES Finame Program is Specific
Comment 8:	Whether the Espirito Santo ICMS Reduction Program is Specific or Tied to Non-Subject Merchandise

II. BACKGROUND

A. Case History

On August 14, 2020, Commerce published its *Preliminary Determination*.[1] The selected mandatory respondents in this investigation are Novelis do Brasil Ltda. (Novelis Brasil) and CBA.[2]

During the course of this investigation, travel restrictions were imposed that prevented Commerce personnel from conducting on-site verification. However, Commerce took additional steps in lieu of on-site verification and, on December 2, 2020, issued questionnaires in lieu of verification to Novelis Brasil and CBA to verify the information relied upon in making this final determination, in accordance with section 782(i) of the Act.[3] On December 9 and 10, 2020, we received responses from Novelis Brasil and CBA, respectively.[4] On December 22, 2020, Commerce released its Post-Preliminary Determination.[5]

On January 7, 2021, Commerce issued a rejection notice requesting that the Government of Brazil (GBR) resubmit its case brief filed on January 4, 2021 without certain sections that contained new factual information (NFI).[6] On January 11, 2021, we received the GBR's revised case brief, as well as case briefs from Novelis Brasil, CBA, and the Aluminum Association Common Alloy Aluminum Sheet Trade Enforcement Working Group and its Individual Members, Aleris Rolled Products, Inc., Arconic, Inc., Constellium Rolled Products Ravenswood, LLC, JW Aluminum Company, Novelis Corporation, and Texarkana Aluminum, Inc. (collectively, the petitioners).[7] On January 19, 2021, we received rebuttal briefs from the

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[1] *See Common Alloy Aluminum Sheet from Brazil: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 85 FR 49634 (August 14, 2020) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] Commerce has found the following companies to be cross-owned with CBA: Votorantim S.A. and its holding company; Votorantim Comercializadora de Energia Ltda.; CBA Machadinho Geração de Energia Ltda.; and CBA Energia Participações S.A.

[3] *See* Commerce's Letters, "Questionnaire in Lieu of Verification for Novelis do Brasil Ltda.," dated December 2, 2020 (Novelis Brasil In-Lieu-of Verification Questionnaire); and "Questionnaire in Lieu of Verification for Companhia Brasileira de Alumino," dated December 2, 2020 (CBA In-Lieu-of Verification Questionnaire).

[4] *See* Novelis Brasil's's Letter, "Common Alloy Aluminum Sheet from Brazil: Novelis do Brasil Response to Questionnaire In Lieu of Verification," dated December 9, 2020 (Novelis Brasil In-Lieu-of Verification Response); *see also* CBA's Letter, "Common Alloy Aluminum Sheet from Brazil: Questionnaire in Lieu of Verification," dated December 10, 2020 (CBA In-Lieu-of Verification Response).

[5] *See* Memorandum, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from Brazil: Post-Preliminary Decision Memo," dated December 22, 2020 (Post-Preliminary Determination).

[6] *See* Commerce's Rejection Letter, dated January 7, 2021.

[7] *See* Petitioners' Letter, "Common Alloy Aluminum Sheet from Brazil: Petitioners' Case Brief," (Petitioners Case Brief); GBR's Letter, "Common Alloy Aluminum Sheets from Brazil; Case Brief on Preliminary Determination," dated January 11, 2021 (GBR Case Brief); CBA's Letter, "Common Alloy Aluminum Sheet from Brazil: Case Brief," dated January 11, 2021 (CBA Case Brief); and Novelis Brasil's Letter, "Common Alloy Aluminum Sheet from Brazil: Case Brief of Novelis do Brasil," dated January 11, 2021 (Novelis Brasil Case Brief).

petitioners, the GBR, Novelis Brasil, and CBA.[8] On January 21, 2021, the petitioners withdrew their September 14, 2020 hearing request.[9]

B. Period of Investigation (POI)

The POI is January 1, 2019, through December 31, 2019.

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is aluminum sheet from Brazil. For a complete description of the scope of this investigation, *see* the *Federal Register* notice accompanying this memorandum at Appendix I.

IV. APPLICATION OF AFA CONCERNING THE SPECIFICITY OF THE EX-TARIFÁRIO AND LEI DO BEM PROGRAMS

As discussed in the *Preliminary Determination*, Commerce is investigating the Ex-Tarifário and Lei do Bem programs.[10] For the *Preliminary Determination*, CBA and Novelis Brasil both reported benefiting from the Ex-Tarifário program for the POI and certain years during the 14-year average useful life (AUL) period.[11] Novelis Brasil reported that it benefited from the Lei do Bem program during the POI.[12]

In response to our requests for information concerning the specificity of the Ex-Tarifário program, the GBR provided estimated benefit amounts received by different sectors of Brazil's economy under the program; however, the GBR did not submit data we requested on the number of recipients in each year.[13] We requested information from the GBR regarding the total number of benefit recipients in each year in order to determine whether the benefits under the Ex-

[8] *See* Petitioners' Letter, "Common Alloy Aluminum Sheet from Brazil: Petitioners Rebuttal Brief," dated January 19, 2021 (Petitioners Rebuttal Brief); *see also* GBR's Letter, "Common Alloy Aluminum Sheets from Brazil; Rebuttal Brief," dated January 19, 2021 (GBR Rebuttal Brief); CBA's Letter, "Common Alloy Aluminum Sheet from Brazil: Rebuttal Brief," dated January 19, 2021 (CBA Rebuttal Brief); and Novelis Brasil's Letter, "Common Alloy Aluminum Sheet from Brasil: Rebuttal Brief of Novelis do Brasil Ltda.," dated January 19, 2021 (Novelis Brasil Rebuttal Brief).

[9] *See* Petitioner's Letters, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from Brazil – Petitioners Request for Hearing," dated September 14, 2020; and "Countervailing Duty Investigation of Common Alloy Aluminum Sheet from Brazil – Withdrawal of Hearing Request," dated January 21, 2021.

[10] *See Preliminary Determination* PDM at 13 and 15-16.

[11] *See* CBA's Letter, "Antidumping Duties on Imports of Common Alloy Aluminum Sheet from Brazil: CBA's Response to Section III of the Department's Questionnaire," dated June 18, 2020 (CBA IQR), at 12; *see also* Novelis Brasil's Letter, "Common Alloy Aluminum Sheet from Brazil: Response to Questions Regarding the Ex-Tarifario Program in Section III of the Countervailing Duty Questionnaire," dated June 11, 2020 (Novelis Brasil's Ex-Tarifario Response), at 1-6; and GBR's Letter, "Common Alloy Aluminum Sheets from Brazil; Response to the DoC's questionnaire for the GBR – Section II.," dated June 13, 2020, at 14.

[12] *See* Novelis Brasil's Letter, "Common Alloy Aluminum Sheet from Brazil: Response to Remainder of Section III of the Countervailing Duty Questionnaire," dated June 1, 2020 (Novelis Brasil's Section III IQR), at 39.

[13] *See Preliminary Determination* PDM at 13 (citing GBR's Letters, "Countervailing Duty (CVD) Investigation of Common Alloy Aluminum Sheet from Brazil: Response to Supplemental Questionnaire," dated July 26/27, 2020 (GBR SQR), at Exhibit A_2_A and "Common Alloy Aluminum Sheets from Brazil; Response to the DoC's questionnaire for the GBR – Section II.," dated June 13, 2020 (GBR IQR), at 20).

Tarifário program were limited, in fact, under section 771(5A)(D)(iii)(I) of the Act. As explained in the *Preliminary Determination*, the GBR did not provide the requested information on the total number of benefit recipients, citing tax secrecy laws.[14] As such, we find that the use of facts available is warranted, pursuant to sections 776(a)(1), and (a)(2)(A)-(B) of the Act. We continue to find that the tax secrecy laws to which the GBR cites include an exemption for the "aggregated data, which does not identify the taxpayer" and that the GBR has not justified its rationale for not providing aggregated usage data from tax secrecy requirements. Therefore, pursuant to section 776(b) of the Act, we determine that the GBR has not cooperated to the best of its ability, and as AFA, we find that the Ex-Tarifário program is *de facto* specific to a limited number of enterprises, as described under section 771(5A)(D)(iii)(I) of the Act.[15]

For the Lei do Bem program, GBR similarly provided estimated benefit amounts received by different sectors of Brazil's economy under the program, but did not submit the program usage data we requested on the number of benefit recipients in each year.[16] We requested this information from the GBR regarding the total number of benefit recipients in each year in order to determine whether the benefits of the Lei do Bem program were limited, in fact, under section 771(5A)(D)(iii)(I) of the Act. As explained in the *Preliminary Determination*, the GBR did not provide the requested information on the total number of benefit recipients, claiming that "the numbers are not available."[17]

We requested additional information from the GBR on the Lei do Bem program after the issuance of the *Preliminary Determination*. However, when asked why it could not provide data on the number of program recipients, the GBR merely cited "budget constraints," without any support or further explanation.[18] We do not find this sufficient justification or explanation for not providing the requested information, particularly given that the GBR was able to provide detailed data disaggregated by sector. Therefore, we find that the use of facts available is warranted, pursuant to sections 776(a)(1), and (a)(2)(A)-(B). Additionally, pursuant to section 776(b) of the Act, we continue to determine that the GBR has not cooperated to the best of its ability, and as AFA, that the Lei do Bem program is *de facto* specific to a limited number of enterprises, as described under section 771(5A)(D)(iii)(I) of the Act.

V. SUBSIDIES VALUATION

A. Allocation Period

Commerce made no changes to the allocation period, 14 years, and the allocation methodology used in the *Preliminary Determination*.[19] No issues were raised by interested parties in case briefs regarding the allocation period or the allocation methodology.

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[14] *See* GBR IQR at 20; and GBR SQR at 7-10.
[15] *See Preliminary Determination* PDM at 13 (citing GBR IQR at 19-20; *see also* GBR SQR at 7-13).
[16] *Id.* at 14 (citing GBR SQR 28-29 at Exhibit A_5_L_2 and GBR IQR at 20).
[17] *See* GBR SQR at 28.
[18] *See* GBR's Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet – Response to Third Supplementary CVD Questionnaire," dated September 3, 2020, at 14.
[19] *See Preliminary Determination* PDM at 7.

B. Attribution of Subsidies

Commerce made no changes to the methodologies used in the *Preliminary Determination* for attributing subsidies.[20]

C. Denominators

Commerce made no changes to the denominators used in the *Preliminary Determination* for calculating subsidy rates.[21]

D. Benchmarks and Interest Rates

Commerce made no changes to the loan benchmark and interest rates used in the *Preliminary Determination* and *Post-Preliminary Determination* for attributing subsidies.[22] Commerce stated in the *Preliminary Determination* that it would seek additional benchmark information on the Electricity for Less-Than Adequate Remuneration (LTAR) Program.[23] We received the additional benchmark information from CBA in a post-preliminary supplemental questionnaire response[24] and have updated our calculations for this program accordingly.[25]

VI. ANALYSIS OF PROGRAMS

A. Programs Determined to Be Countervailable

We made no changes to our *Preliminary Determination* and our *Post-Preliminary Determination* with respect to the methodology used to calculate the subsidy rates for the following programs, except where noted below. For descriptions, analyses, and calculation methodologies for these programs, *see* the *Preliminary Determination* and the Post-Preliminary Determination. Below in section "VII. Analysis of Comments," we address the issues raised in the parties' case briefs regarding these programs. The final program-specific subsidy rates are as follows:

1. *Provision of Electricity for LTAR*

As noted above, we modified the benchmark used to calculate benefit for this program.[26] The final subsidy rate for this program is 0.04 percent *ad valorem* for CBA.[27]

[20] *Id.* at 7-9.
[21] *Id.* at 7-9.
[22] *See Preliminary Determination* PDM at 10-11
[23] *Id.* at 11.
[24] *See* CBA's Letter, "Common Alloy Aluminum Sheet from Brazil: CBA's Response to the Department's Supplemental Questionnaire," dated August 28, 2020, at Exhibit 34.
[25] *See* Memorandum, "Final Determination Calculations for Companhia Brasileira De Aluminio," dated concurrently with this memorandum (CBA Final Calculations Memorandum), at 2 and Attachment at "ElectricityBM.BPI."
[26] *See Preliminary Determination* PDM at 18.
[27] *See* Memorandum, "Preliminary Determination Calculations for Novelis do Brasil Ltda," dated August 7,2020 (Novelis Brasil Prelim Calculations Memorandum), at 3 and Attachment II, unchanged for the final determination.

2. *Espirito Santo ICMS Reduction*

We made no changes to our methodology for calculating a subsidy rate under this program.[28] The final subsidy rate for this program is 0.61 percent *ad valorem* for Novelis Brasil.[29]

3. *Reintegra*

We made no changes to our methodology for calculating a subsidy rate under this program.[30] The final subsidy rates for this program are 0.07 percent *ad valorem* for CBA and 0.10 percent *ad valorem* for Novelis Brasil.[31]

4. *Lei do Bem*

We made no changes to our methodology for calculating a subsidy rate under this program.[32] The final subsidy rate for this program is 0.02 percent *ad valorem* for Novelis Brasil.[33]

5. *Ex-Tarifário*

We made no changes to our methodology for calculating a subsidy rate under this program.[34] The final subsidy rates for this program are 0.11 percent *ad valorem* for CBA and 0.03 percent *ad valorem* for Novelis Brasil.[35]

B. Programs Determined Not to Be Countervailable

1. Integrated Drawback Program

Based on arguments discussed in Comment 2, "Whether Commerce Correctly Analyzed Benefit for the Integrated Drawback Program," Commerce modified its evaluation of this program to include an analysis under a different section of the regulations than in the *Preliminary Determination*. As discussed in Comment 2, we now conclude that this program does not confer a benefit.

[28] *See Preliminary Determination* PDM at 21.
[29] *See* CBA Final Calculations Memorandum.
[30] *Id.* at 23.
[31] *See* CBA Final Calculations Memorandum at Attachment and Novelis Brasil Prelim Calculations Memorandum at 2-3 and Attachment II, unchanged for the final determination.
[32] *See Preliminary Determination* PDM at 24.
[33] *See* Novelis Brasil Prelim Calculations Memorandum at 2 and Attachment II, unchanged for the final determination.
[34] *Id.* at 25.
[35] *See* CBA Final Calculations Memorandum at Attachment and Novelis Brasil Prelim Calculations Memorandum at 2 and Attachment II, unchanged for the final determination.

C. Programs Determined Not to Confer a Measurable Benefit During the POI

1. *FINEP's Plano Estrategico de Inovação*

We made no changes to our methodology for calculating a subsidy rate under this program.[36] The final subsidy rate for this program is less than 0.005 percent *ad valorem* for CBA.[37]

D. Programs Determined to Be Not Used During the POI

Commerce made no changes to its *Preliminary Determination* with regard to programs determined to be not used by the respondents during the POI.[38]

1. *Amazon Region Development Authority and Northeast Region Development Authority Tax Incentives*
2. *Exemption of Payroll Taxes*
3. *Pernambuco Development Program*
4. *BNDES Giro/PROGEREN*
5. *BNDES ExIm Pre-and Post-Shipment Loans*
6. *BNDESPAR LOANS*
7. *Automatic BNDES*
8. *Research and Development Incentives INOVA Brasil Program*
9. *Export Financing from Banco do Brasil – PROEX*
10. *Export Promotion and Marketing Assistance*
11. *Export Guarantee Fund*
12. *Export Credit Insurance and Guarantees Through Seguradora Brasileira Credito a Exportacao (SCBE)*
13. *Special Regime for the Acquisition of Capital Goods for Export Companies (RECAP)*

VII. ANALYSIS OF COMMENTS

Comment 1: Whether Commerce Applied Appropriate Negligibility and *De Minimis* Thresholds

GBR Case Brief:[39]

- Commerce's preliminary subsidy margins are below two percent and, thus, fall within the *de minimis* threshold established by Article 27.10(a) of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM Agreement). Additionally, during the POI, Brazilian exports of aluminum sheet to the United States were 3.5 and 3.3 percent by volume and value, respectively, of total U.S. imports and, thus, the volume of Brazilian imports into the United States is negligible under Article 27.10(b) of the SCM Agreement.

[36] *See Preliminary Determination* PDM at 20.
[37] *See* CBA Final Calculation Memorandum at Attachment.
[38] *Id.* at 28.
[39] *See* GBR Case Brief at 5.

- The U.S. Trade Representative (USTR) considered Brazil a developing country until February 2020. Thus, during the POI, under U.S. law, Brazil was a developing country entitled to the *de minimis* and negligibility thresholds established by the SCM Agreement. Applying USTR's regulation retroactively is unfair, and Commerce should terminate the entire investigation.

CBA Case Brief:[40]
- All of the aluminum sheet imported during the POI was imported from Brazil prior to USTR changing Brazil's designation as a developing country. By the time USTR provided notice, neither the GBR nor CBA could change events that occurred in 2019 and serve as the basis for Commerce's subsidy calculations.
- The Court of Appeals for the Federal Circuit has explained that individuals have a right to rely on the law as it is written when they carry out their actions. The GBR and CBA relied on U.S. law as it was during the POI and that law should apply to this investigation.

Petitioners' Rebuttal Brief:[41]
- The GBR and CBA are wrong to claim that USTR's developing and least-developed country designation was applied retroactively in this investigation. The revised list was published on February 10, 2020, while the petition underlying the investigation was filed on March 9, 2020, and the investigation was initiated on March 30, 2020. The entirety of the proceeding has come after the change in the list and, thus, there is no issue of retroactivity.
- Even assuming, *arguendo*, that the changes in USTR's list were applied retroactively, this still does not support using the old *de minimis* threshold. There is no legal right to trade with foreign countries and similarly there is no right to import merchandise at a specific duty rate. Furthermore, the courts have found many times that in customs and trade law, reliance on prior expectations does not prevent retroactive application of duties.
- The GBR and CBA cannot claim a reasonable expectation that the USTR developing country list would remain in place for a specific period of time. USTR has been authorized by Congress to update the list "as necessary," meaning at any time.
- The GBR's additional arguments on negligibility are relevant for the U.S. International Trade Commission (ITC), not Commerce.

Commerce Position: On February 10, 2020, USTR published in the *Federal Register* its *Final Rule* on designations of developing and least-developed countries under the CVD law.[42] In the *Preliminary Determination*, published on August 14, 2020, we determined that Novelis Brasil's subsidy rate of 0.76 percent was *de minimis* because, at that time, Brazil was considered to be a developed country by USTR under its *Final Rule* on designations of developing and least-developed countries under the CVD law.[43] As indicated in the *Final Rule*, Brazil is ineligible for the two percent *de minimis* standard because it is no longer designated as a developing country.[44] Further, as noted, in the *Final Rule*, the country designations are applicable as of February 10,

[40] *See* CBA Case Brief at 10-11.
[41] *See* Petitioners Rebuttal Brief at 29-33.
[42] *See Designations of Developing and Least-Developed Countries Under the Countervailing Duty Law*, 85 FR 7613 (February 10, 2020) (*Final Rule*).
[43] *See Preliminary Determination*, 85 FR at 49635; *see also Final Rule*, 85 FR at 7615.
[44] *See Final Rule*, 85 FR at 7615.

2020.[45] There are no exceptions to the applicability of the country designations as of February 10, 2020.

Under section 771(36) of the Act, it is USTR's role to identify and publish in the *Federal Register* a list of countries determined to be least developed or developing countries and therefore subject to special thresholds. Pursuant to sections 703(b)(4)(A) and 705(a)(3) of the Act, a countervailable subsidy is *de minimis* if Commerce determines that the aggregate of the net countervailable subsidies is less than one percent *ad valorem* or the equivalent specific rate for the subject merchandise. As an exception, in accordance with section 703(b)(4)(B) of the Act, Commerce will apply a *de minimis* threshold of two percent to a country designated by USTR to be a developing country. The statute and the SAA clarify that this exception applies only when the USTR has issued a developing country designation for purposes of the CVD law.[46] Specifically, the SAA states:

> {S}ection 267 of the implementing bill provides guidance for designating both least developed and developing countries for purposes of the CVD law. It makes clear that this designation is solely for purposes of the CVD law and has no force or effect for any other purpose. In other words, designation for purposes of the CVD law has no particular weight in determining which countries are developing countries under other Uruguay Round agreements or under other provisions of U.S. law. Section 267 adds a new paragraph 771(36) to the Act, authorizing USTR to designate which countries are developing and least developed countries for purposes of the CVD law.[47]

Given that the *Final Rule* is applicable as of February 10, 2020, USTR's country designations apply to Commerce's final determination in this CVD investigation. Commerce does not have statutory authority to perform USTR's functions in this area. As stated above, in the *Final Rule*, USTR did not designate Brazil to be a developing country under the CVD law pursuant to section 771(36) of the Act and, therefore, the two percent *de minimis* threshold exception does not apply in this investigation. Consequently, for this final determination, consistent with sections 703(b)(4)(A) and 705(a)(3) of the Act, the *de minimis* threshold of one percent applies to Brazil. Based on the changes we have made in this final determination, we have calculated net subsidy rates for CBA and Novelis Brasil that are below the one percent *de minimis* threshold.

Lastly, we disagree with the GBR and CBA that multilateral agreements are relevant in this matter. It is the Act and Commerce's regulations, which are in compliance with our international obligations, that have direct legal effect under U.S. law, not treaties or multilateral agreements. As noted above, U.S. law makes clear that USTR has the responsibility to determine which

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[45] *Id.* at 7613.

[46] *See* section 703(b)(4)(B) of the Act; *see also* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol 1 (1994) (SAA) at 873 ("{The law} makes clear that this {developing country} designation is solely for purposes of the countervailing duty law and has no force or effect for any other purpose. In other words, designation for purposes of the CVD law has no particular weight in determining which countries are developing countries under other Uruguay Round agreements or under other provisions of U.S. law.").

[47] *See* SAA at 940.

countries are categorized as least developed or developing countries subject to special thresholds, and Commerce has the responsibility to apply the USTR's determination.

Comment 2: Whether Commerce Correctly Analyzed Benefit for the Integrated Drawback Program

CBA Case Brief:[48]

- Commerce incorrectly examined the benefit conferred by exemptions of domestic indirect taxes using 19 CFR 351.519(a)(1)(ii), "{r}emission or drawback of import charges upon export." Exemptions of domestic taxes on inputs used to manufacture goods for export are properly examined under 19 CFR 351.517(a), "{e}xemption or remission upon export of indirect taxes."
- Under 19 CFR 351.517(a), a benefit exists when the amount of tax exemptions exceeds the amount levied for the production and distribution of like products sold for domestic consumption. Here, CBA's IPI, PIS COFINS, and ICMS liability is ultimately zero for both the export and domestic markets, and thus, the exemption drawback did not confer a benefit.
- In *Silicon Metal from Brazil*, Commerce found that the Predominantly Exporting Companies (PEC) program, which allowed certain exporters to suspend payments of domestic value-added taxes (VAT) on input purchases, did not confer a benefit under 19 CFR 351.517(a).[49] Similarly, in this case, if the IPI, PIS, and COFINS had not been exempted for CBA's export production, CBA would have collected more VAT credits than VAT debits and would have been entitled to apply for credits or request a refund from the GBR. The program reduced the administrative burden of tax compliance, but not CBA's tax liability.
- Commerce countervailed this program in *HRS from Brazil* and relied on that finding in the *Preliminary Determination*, but none of the respondents in *HRS from Brazil* identified the correct section of the regulations under which this program should be analyzed.[50]

Petitioners' Rebuttal Brief:[51]

- As indicated by its name, this program provides a single integrated benefit that exempts the recipient from payment of import duties and several other taxes such as IPI and PIS/COFINS on inputs used to manufacture exported products. Nothing on the record suggests that the exemption attributable to import duties is treated differently from the portion attributable to the other taxes. CBA and the GBR both describe a single process, a single set of criteria, a single approval, and a single "petition" submitted to the Brazilian Integrated System of Foreign Trade (SISCOMEX), which administers the program. As such, because the program can include import duties and other taxes processed in a single drawback, Commerce correctly analyzed this program under 19 CFR 351.519 as a drawback.

[48] *See* CBA Case Brief at 1-10.
[49] *See Silicon Metal from Brazil: Final Affirmative Countervailing Duty Determination*, 83 FR 9838 (March 8, 2018) (*Silicon Metal from Brazil*), and accompanying Issues and Decision Memorandum (IDM) at 23-24.
[50] *See Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from Brazil: Final Affirmative Determination, and Final Determination of Critical Circumstances, in Part,* 81 FR 53416 (August 12, 2016) (*HRS from Brazil*), and accompanying IDM at Comment 10.
[51] *See* Petitioners Rebuttal Brief at 15-19.

- CBA's citation to *Silicon Metal from Brazil* is inapposite because the PEC program examined in that case only exempted domestic taxes and not import duties.[52] CBA is also incorrect to say that 19 CFR 351.519(a)(2) defines substitution drawbacks as "the remission, exemption, or drawback of import charges," when in fact nothing limits a substitution drawback to import charges alone. Nothing in the record suggests that this program operates differently than when it was examined in *HRS from Brazil*, and Commerce should, thus, continue to find it countervailable.

Commerce Position: In the *Preliminary Determination*, Commerce found that this program's exemption of import duties did not confer a benefit because the GBR has in place a reasonable and effective system to confirm which inputs are consumed in the production of the exported products and in what amounts, per 19 CFR 351.519(a)(4). No party has challenged this finding. However, in the *Preliminary Determination*, we found that the exemption of certain domestic taxes administered through this program did confer a benefit under 19 CFR 351.519(a)(2)(ii). CBA argues that because the domestic taxes at issue are indirect taxes, any potential benefit from these taxes should be examined under 19 CFR 351.517, *i.e.*, exemption or remission upon export of indirect taxes, not 19 CFR 351.519. After reviewing the record evidence and Commerce's past practice, we agree with CBA.

Section 351.519 of Commerce's regulations covers "import charges" and 19 CFR 351.102(b)(26) defines import charges as "a tariff, duty, or other fiscal charge that is levied on imports, other than an indirect tax." In other words, the definition of an "import charge," per the regulations, does not include indirect taxes levied on imports.[53] In turn, the regulations define an "indirect tax" as "sales, excise, turnover, value added, franchise, stamp, transfer, inventory, or equipment tax, a border tax, or any other tax other than a direct tax or an import charge." While the petitioner correctly states that the GBR "integrates" its remission of domestic and import duties into a single system that companies file for simultaneously, that does not change the framework in our regulations analyzing subsidies, nor does it change the fact that the individual taxes are clearly delineated and identifiable in the companies' reporting. Commerce has dealt previously with similar programs that can provide multiple types of benefits, which are properly analyzed under different regulations. For example, in *Rebar from Turkey* and *Pipe and Tubes from Turkey*, Commerce analyzed an analogous "Inward Processing" program administered by the Government of Turkey that contained both a duty drawback of import charges and remission of indirect taxes. In both cases, Commerce examined the exemption of indirect taxes under 19 CFR 351.517 and separately examined the exemption of import duties under 19 CFR 351.519.[54]

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[52] *Id*. at 17 (citing *Silicon Metal from Brazil* IDM at 22).

[53] Section 351.301(b)(28) of Commerce's regulations defines "indirect taxes" as including sales, excise, turnover, value added, franchise, stamp, transfer, inventory, or equipment tax, and a border tax.

[54] *See Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review; 2017*, 84 FR 48583 (September 16, 2019), and accompanying PDM at 18-20, unchanged in *Steel Concrete Reinforcing Bar From the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review; 2017*, 85 FR 42353 (July 14, 2020); *see also Circular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review and Partial Rescission; Calendar Year 2018*, 85 FR 18917 (April 3, 2020), and accompanying PDM at 17-19, unchanged in *Circular Welded Carbon Steel Pipes and Tubes From the Republic of Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2018*, 86 FR 6866 (January 25, 2021).

Therefore, we agree with CBA that the exemption of domestic indirect taxes under this program is more properly examined under 19 CFR 351.517.

In its case brief, CBA argued that if this program is analyzed under 19 CFR 351.517, it provides no benefit. This is because CBA's ultimate liability for the taxes exempted via the program is zero, even if it does not use the program, as these taxes are non-cumulative VATs that are passed on to the final customer.[55] The petitioners did not address the potential analysis of this program under 19 CFR 351.517 in their rebuttal brief. We agree with CBA that this program does not provide a benefit.

Commerce's general practice, established in cases such as *Hot-Rolled Steel from Thailand*, *Shrimp from Thailand*, and *DRAMS from Korea*, among others, is to not countervail exemptions of indirect taxes if those taxes function as normal VATs.[56] That is because:

> "{U}nder a normal VAT system, a producer pays input VAT on its purchases from suppliers and collects output VAT on its sales to customers. The producer merely conveys the tax forward and the ultimate tax burden is borne by the final (non-producing) consumer. This is achieved through a reconciliation mechanism in which the input VAT paid is offset against the output VAT collected. Any excess output VAT is remitted by the producer to the government. Any excess input VAT is refunded back to the producer by the government or credited to the producer to offset against future input VAT, as the case may be. Under this mechanism, the producer ultimately keeps no surplus output VAT and pays no excess input VAT. Thus, the net VAT incidence to the producer is ultimately zero, with the actual VAT burden conveyed forward to the final, non-producing consumer."[57]

Under 19 CFR 351.517, a benefit exists to the extent that the Secretary determines that the amount remitted or exempted exceeds the amount levied with respect to the production and distribution of like products when sold for domestic consumption. CBA argues that "the exemptions of domestic VATs CBA received under the Integrated Drawback Program do not result in a lower tax liability than the company would have realized with respect to the production of like products sold for domestic consumption. Rather, whether producing for export ***or*** the domestic market, CBA's liability for the IPI, PIS, COFINS, and ICMS is ultimately zero."[58]

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[55] *See* CBA Case Brief at 5-8.

[56] *See*, *e.g.*, *Final Affirmative Countervailing Duty Determination*: *Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 FR 50410 (October 3, 2001) (*Hot-Rolled Steel From Thailand*), and accompanying IDM at Comment 8; *see also Certain Frozen Warmwater Shrimp from Thailand: Final Negative Countervailing Duty Determination*, 78 FR 50379 (August 19, 2013) (*Shrimp from Thailand*), and accompanying IDM at Comment 9; and *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 IDM at Comment 34.

[57] *See Shrimp from Thailand* IDM at 54.

[58] *See* CBA Case Brief at 5-6 (emphasis in original).

Commerce has previously analyzed several of these VATs under the 19 CFR 351.517 standard. In *Silicon Metal from Brazil*, Commerce analyzed the PEC program and determined that the IPI and PIS/COFINS operated like standard VATs, and thus, exemptions of these taxes conferred no benefit under 19 CFR 351.517.[59] We also found in that case that exemptions of ICMS for raw material purchases operated like a standard VAT regime.[60] In the Post-Preliminary Determination, we found a standalone PIS/COFINS exemption program (specifically the Program of Social Integration (PIS) and Contribution for the Financing of COFINS Tax Exemptions for Sales of Aluminum Scrap) did not confer a benefit because PIS and COFINS operate as standard VATs.[61] Therefore, past practice and the instant investigation indicate that these domestic indirect taxes operate as standard VAT systems, and there is no evidence on the record that suggests otherwise. As these operate like standard VATs with a normal reconciliation mechanism, CBA's liability for these domestic indirect taxes are zero both with and without the program, whether for export or domestic consumption.

Commerce has allowed the possibility that under certain circumstances a time-value-of-money (TVM) benefit could arise from the difference between a refund and an exemption where "the amount of time…to reconcile…is inordinate."[62] Commerce has not defined what would be "inordinate," but has recognized that one year is within the bounds of a typical or normal VAT system.[63] As CBA must reconcile its VAT debits and credits every month,[64] Commerce finds that the exemptions do not provide a TVM benefit, and the record contains no other evidence suggesting otherwise. Therefore, consistent with these prior decisions and evidence in the instant investigation, we find that exemptions of the domestic taxes at issue under the Integrated Drawback program (specifically the IPI, PIS COFINS, and ICMS taxes) do not confer a benefit under 19 CFR 351.517.

Thus, as Commerce continues to find that this program's exemption of import duties did not confer a benefit, and we have now found that all four of the domestic indirect taxes exempted through the Integrated Drawback Program operate as standard VATs and, further, that the exemptions do not confer a TVM benefit, we find that the program does not confer a benefit to CBA.

Comment 3: Whether the Integrated Drawback Program Provides Excessive Remission

GBR Case Brief:[65]

- Exemptions or suspensions of domestic taxes on imported or domestically sourced imports that are exported are WTO consistent, provided that the tax reductions do not exceed the taxes levied. Brazil uses the SISCOMEX system to monitor inputs used under the drawback regime and confirm that export actually takes place. The GBR also notes that that the term "import

[59] *See Silicon Metal from Brazil* IDM at Comment 2.
[60] *Id.* at Comment 1.
[61] *See* Post-Preliminary Determination at 2-3.
[62] *See Hot-Rolled Steel from Thailand* IDM at Comment 8.
[63] *See Shrimp from Thailand* IDM at 56.
[64] *See* CBA's Letter, "Countervailing Duty (CVD) Investigation of Common Alloy Aluminum Sheet from Brazil: CBA's response to the New Subsidy Allegation (NSA) Supplemental Questionnaire," dated October 9, 2020, at Exhibits NSA-3 and NSA-4.
[65] *See* GBR Case Brief at 10-13.

charges" in the SCM Agreement refers to all charges paid at import, not limited to import duties.
- Commerce found that the GBR *does* have a reasonable system for identifying and rebating duties assessed on inputs consumed in the production of exports.
- Furthermore, the adoption of a drawback system means there is no revenue "otherwise due" and no obligation to pay the duties in the first place.

Petitioners' Rebuttal Brief:[66]
- The GBR argues that the SCM Agreement allows for the remission or exemption of duties and taxes that are not themselves import duties, as part of duty drawback schemes. This is based on an interpretation of the SCM Agreement as defining import charges as covering "all other fiscal charges paid at import." However, the panel report cited by the GBR states that authorities determine whether a drawback or remission is "excessive" by comparing the "import duties levied" to the "amount of the drawback." Even if other taxes are collected at import, these taxes are still not import duties, so the GBR is incorrect to argue that Commerce's finding is contrary to the WTO Panel report cited and does not explain how Commerce's application of 19 CFR 351.519 is inconsistent with the SCM Agreement.
- More importantly, proceedings before Commerce are held under U.S. law and are not bound by WTO Panel reports. Commerce must follow the Act and its regulations, which are consistent with the U.S.'s WTO obligations.

Commerce Position: As discussed above in Comment 2, we find that the exemption of domestic indirect taxes under this program does not confer a benefit when examined under 19 CFR 351.517(a) and, thus, the GBR's arguments that this program complies with the requirements of the SCM Agreement are moot.

Comment 4: Whether Furnas' Sales of Electricity to CBA are a Countervailable Subsidy

GBR Case Brief:[67]
- Commerce failed to establish in the *Preliminary Determination* how Furnas provided a financial contribution by selling electricity to CBA. Under the auctions established by Law No. 13,182, Furnas sells energy through competitive, ascending-price auctions. The government sets the minimum price, but there is no limit on how high the final price may be. Confirming this, the Canadian Border Services Agency (CBSA) found in its 2016 investigation of alleged subsidies for *Silicon Metal from Brazil* that auctions under Law No. 13,182 "established a market price for the electricity contact as the GBR controlled only the floor price, not the ceiling and there was ample competition in the process to establish a {fair market value}."[68]
- Commerce's finding in the *Preliminary Determination* that Law No. 13,182 was meant to provide favorable electricity rates to certain customers ignored the GBR's explanation that one of the objectives of the auctions was to raise funds for electricity generation projects in the Southeast and Midwest. It is against logic to consider a program meant to raise funds as conferring a financial contribution on auction participants.

[66] *See* Petitioners Rebuttal Brief at 5-6 and 19-20.
[67] *See* GBR Case Brief at 8-11.
[68] *Id*. at 8.

- Commerce did not calculate a negative benefit in months where CEMIG's unit electricity price exceeded Furnas' unit electricity price. Setting negative benefits to zero when addressing the adequacy of remuneration has been found by a WTO Panel to violate the SCM Agreement,[69] so Commerce should change its benefit calculation methodology to conform with the agreement in the event that it incorrectly finds this program to confer a financial contribution.
- If Commerce calculated the alleged benefit by multiplying the price difference by the quantity of electricity purchase in the months where CEMIG's unit price exceeded the unit price of Furnas, it means that there are other months where CEMIG's unit price does not exceed the unit price of Furnas. The fact that there are months where the price relationship is disadvantageous for the company in comparison to the benchmark and that this relationship cannot be determined beforehand, corroborates the GBR allegation that the program was not designed to provide any financial contribution to the companies. Logic does not allow Commerce to infer any benefit necessarily derived from the program, and the proper comparison between the current calculation could even demonstrate that the company was financially harmed.
- Commerce concluded this program was *de jure* specific, because only certain industries were explicitly listed as eligible for the auctions. However, Law No. 13,182 also allows companies outside those industries that have at least a certain level of voltage, load, and load factor to participate in the auctions.

Petitioners' Rebuttal Brief:[70]
- The GBR does not dispute that Furnas is a government authority. Thus, the provision of electricity by Furnas is a financial contribution, regardless of the mechanism by which Furnas sells the electricity. Commerce determines whether remuneration is adequate by comparing sales by a government authority to a benchmark price.
- Commerce has consistently upheld its methodology of not calculating "negative" benefits, and there is no reason to depart from it in this case, as Commerce considered and rejected similar arguments in *Wood Mouldings from China*.[71] Commerce should continue to calculate the benefit by comparing CBA's purchase prices from Furnas to the price Votorantim Comercializadora de Energia Ltda. (Votener) paid to Companhia Energética de Minas Gerais S.A. (CEMIG).
- Law No. 13,182 is regionally specific under the Act and also has narrow limitations on the users within the specified regions that can participate in the auctions; therefore, Commerce should continue to find it *de jure* specific.

Commerce Position: As an initial matter, section 771(5)(D) of the Act states that the government provision of a good is a financial contribution, and section 771(5)(E)(iv) of the Act provides that the provision of a good provides a benefit if that good is provided for less than adequate remuneration. Therefore, the statute explicitly provides that a government provision of a good can constitute the provision of a countervailable subsidy to a company.

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[69] *See United States—Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/5 (August 24, 2020).
[70] *See* Petitioners Rebuttal Brief at 10-15.
[71] *Id.* at 14, citing *Wood Mouldings and Millwork Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 85 FR 67 (January 4, 2021) (*Wood Mouldings from China*), and accompanying IDM at Comment 8.

As explained in the *Preliminary Determination*, record evidence indicates that Furnas is a subsidiary of Centrais Elétricas Brasileiras S.A., a state-owned company that is controlled by the federal administration under the ministerial supervision of the Ministry of Mines and Energy, and that the GBR holds a majority of the voting rights in Furnas.[72] Further, we explained that Furnas is authorized to participate in the Southeast and Central-West Energy Fund with the purpose of providing funds for the implementation of generation projects and transmission of electric energy and that Furnas is authorized to provide energy through auctions to consumers of the Southeast and Mideast regions of Brazil in the ferroalloy, metallic silicon, and magnesium sectors. As such, we determine that Furnas is a government authority under section 771(5)(B) of the Act and that it provides a financial contribution within the meaning of section 771(5)(D)(iii) of the Act by "providing goods or services, other than general infrastructure," specifically electricity.

It does not appear that the GBR disputes this finding, and we disagree with the GBR's contention that the electricity sold by Furnas via auction does not provide a financial contribution because Law No. 13,182 requires Furnas to set a minimum price, select the highest bid, and to set no limitations on the maximum selling.[73] The analysis of whether there is a financial contribution through the provision of a good for LTAR is independent of the analysis on how the good is sold and whether a benefit is conferred. In this proceeding, to determine whether a benefit was conferred under the auctions being examined for this program, we conducted the benefit analysis by comparing a tier-one benchmark based on the "market-determined price for the good or service resulting from actual transactions in the country in question" under 19 CFR 351.511, specifically electricity transactions between Votener, an electricity reseller affiliated with CBA, and unaffiliated parties, to the price at which CBA purchased electricity from a government authority. Further, any purported reasons for any pricing difference is not part of the benefit analysis under 19 CFR 351.511. Specifically, the *CVD Preamble* states:

> {I}f there is a financial contribution and a firm pays less for an input than it would otherwise pay in the absence of that financial contribution (or receives revenues beyond the amount it otherwise would earn), that is the end of the inquiry insofar as the benefit is concerned.[74]

We also disagree with the GBR's arguments regarding calculating a "negative benefit" for electricity transactions where the price CBA paid exceeded the benchmark price. The Act defines the "net countervailable subsidy" as the gross amount of the subsidy less three statutorily prescribed offsets: (1) the deduction of application fees, deposits or similar payments necessary 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.[75] Congress and the courts have confirmed that the statute permits only

[72] *See Preliminary Determination* PDM at 16-18.
[73] *See* GBR Case Brief at 7-8.
[74] *See Countervailing Duties; Final Rule*, 63 FR 65348 (November 25, 1998) (*CVD Preamble*) at 65361.
[75] *See* section 771(6) of the Act.

these specific offsets.[76] Offsetting the benefit calculated with a "negative" benefit is not among the enumerated permissible offsets. Further, the *CVD Preamble*[77] and Commerce's long-standing practice reflects this interpretation of the statute.[78]

Thus, if Commerce determines that a government authority has sold electricity for LTAR, a benefit exists, and the inquiry ends. Commerce will not "reduce" the amount of that benefit by offsetting for purported "negative" benefits. This is well established in Commerce practice and, accordingly, we have made no modifications to the final calculations for CBA regarding alleged "negative" benefits.

Finally, we continue to find that this program is *de jure* specific because Law No. 13,182 limits participation in these specific Furnas electricity auctions to users based on either: (1) industry sector (*i.e.*, producers of ferroalloys, metallic silicon, or magnesium, regardless of load factor); or (2) based on location and load factor (*i.e.*, industrial consumers located in the Southeast/Midwest submarket who require a voltage of 13.8 kV or higher and a load of 500 kW or higher, with a load factor of at least 0.8, regardless of their industry or sector).[79] The GBR acknowledges that Law No. 13,182 has established two categories of firms that are eligible for this program, one based on industry and the second based on geographic location and load factor, which we continue to determine to be *de jure* specific under sections 771(5A)(D)(i) and (iv) of the Act.

Comment 5: Whether the Ex-Tarifário Program Provides a Financial Contribution and is Specific

GBR Case Brief:[80]

- When an Ex-Tarifário is granted to a particular good, a new tariff rate is automatically created for that product. The new rate is not a reduction but rather a change in the rate and, as such, it does not confer a financial contribution.
- The WTO Appellate Body has recognized that WTO members are free to design their own tax policies and unilaterally reduce tariffs.
- Furthermore, this program is not specific because it consists of horizontal changes in tariff rates that apply to all imports of a specific good.

[76] *See* S. Rep. No. 96-249, at 86 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 472 ("{t}he list is narrowly drawn and is all inclusive."); *see also Kajaria Iron Castings v. United States*, 156 F. 3d 1163 (Federal Circuit 1998) at 11 ("we agree that 19 U.S.C. § 1677(6) provides the exclusive list of permissible offsets …."); and *Geneva Steel v. United States*, 914 F. Supp. 563 (CIT 1996) at 62 (explaining that section 771(6) of the Act contains "an exclusive list of offsets that may be deducted from the amount of a gross subsidy").

[77] *See CVD Preamble*, 63 FR at 65361 (stating that Commerce's LTAR benefit analysis ceases once it establishes the existence of a financial contribution and that the good in question was purchased for less than it otherwise would have been purchased in the absence of the financial contribution).

[78] *See, e.g.*, *Wood Mouldings from China* IDM at Comment 8; *see also Certain Softwood Lumber Products from Canada: Final Results of the Countervailing Duty Administrative Review, 2017-2018*, 85 FR 77163 (December 1, 2020), and accompanying IDM at Comment 11.

[79] *See Preliminary Determination* PDM at 17 (citing GBR IQR at 150).

[80] *See* GBR Case Brief at 6-7.

- Companies from 80 different sectors imported goods under this program during the AUL, and companies from the metallurgy sector made up only small percentages of the POI and AUL imports through the program.
- The CBSA found this program to be generally available based on the objective application criteria. Commerce similarly found the program not *de jure* specific, but erroneously applied AFA to the GBR for not providing the number of program users. The GBR provided extensive documentation on usage by sector that is more than sufficient for Commerce to conclude that this program is generally available.

Petitioners' Rebuttal Brief:[81]
- The GBR made essentially the same argument in *HRS from Brazil* that this program did not confer a financial contribution because it is a horizontal duty reduction, and Commerce rejected the argument there.
- The GBR refused to provide the program usage data Commerce requested, citing tax secrecy concerns; however, Commerce correctly identified record evidence showing that the GBR's tax secrecy claim was not a convincing explanation for not providing the usage data.

Commerce Position: For this final determination, we continue to find that the reduction of import duty rates from the baseline rate of 14 percent to as low as zero percent for certain goods under Ex-Tarifário constitutes a financial contribution in the form of revenue forgone under section 771(5)(D)(ii) of the Act. We disagree with the GBR's argument that a reduction in tariff rates that applies to all importers of a particular good does not constitute a financial contribution. That a reduction in tariffs for a particular product, on the basis of requests from importers of those products, is applied to all imports of that product does not negate the fact that the GBR is foregoing revenue, which provides a benefit. The GBR has provided no additional argument that warrants a departure from the *Preliminary Determination* or prior Commerce determinations concerning Brazil. Furthermore, the findings of another government's investigating authority (*i.e.*, the CBSA) are not relevant to our analysis of whether Brazilian producers of aluminum sheet are receiving countervailable subsidies.

With regard to whether the Ex-Tarifário program is specific, we note that we examined whether the program was *de jure* specific under section 771(5A)(D)(i) of the Act and determined that program eligibility was not limited by law because it does not appear to expressly limit access to the subsidy. We then examined whether the program was *de facto* specific under section 771(5A)(D)(iii) of the Act. A program may be *de facto* specific where the actual recipients of the subsidy are limited in number, where an enterprise or industry (or group of enterprises or industries), is a predominant user or receives a disproportionately large amount of the subsidy, or where the granting authority exercises discretion in the decision to grant the subsidy.

When considering whether the program is *de facto* specific, we have considered the distribution and receipt of the subsidy over the course of the AUL because benefits under Ex-Tarifário are linked to imports of certain goods and are non-recurring.[82] Pursuant to that analysis, we requested information on the number of companies that received benefits under this program and

[81] *See* Petitioners Rebuttal Brief at 6-10.
[82] *See Preliminary Determination* PDM at 16.

the benefit amounts received by industry or sector.[83] Although the GBR provided some information about the estimated benefits received by different sectors of Brazil's economy under the program, the GBR did not submit data that we had requested concerning the number of benefit recipients in each year of the AUL.[84] Instead, the GBR stated that privacy protections under Article 5 of Brazil's Constitution and restrictions on the disclosure of information obtained for tax purposes under Article 198 the Brazilian Tax Code and Article 2 of Brazilian Federal Revenue Ordinance No. 2,344 were the reasons for not providing information on the number of benefit recipients.[85]

We noted that Ordinance No. 2,344 lists four exceptions to tax secrecy, one of which is for "aggregated data, which does not identify the taxpayer," and we asked the GBR a second time to provide information on the number of benefit recipients and to explain its reasons for not reporting the number of companies benefiting from tax programs given the specific exemption of aggregated data in Ordinance No. 2,344.[86] The GBR did not provide this information and failed to explain why Ordinance No. 2,344 would not exempt aggregated usage data from tax secrecy requirements.[87] Therefore, in the *Preliminary Determination*, in the absence of the requested information that is necessary to complete our specificity analysis and the GBR's failure to cooperate to the best of its ability, we relied on the application of AFA to determine that the Ex-Tarifário program is *de facto* specific.[88]

The requested information would have enabled us to examine whether the recipients of the Ex-Tarifário program are limited in number and determine whether it is indicative of either *de facto* specificity or non-specificity. Thus, we do not have the information necessary to conduct a complete specificity analysis.[89] Accordingly, there is no basis to change our preliminary determination, on the basis of AFA, pursuant to sections 776(a) and (b) of the Act, that the Ex-Tarifário program is *de facto* specific.

Comment 6: Whether the BNDES Finame Program is Specific

Petitioners' Case Brief:[90]

- Commerce should reverse its preliminary finding that this program is not *de jure* specific, and analyze this program based on the record of this investigation, rather than simply citing *HRS from Brazil (2016)*. The record of each proceeding stands on its own, particularly for fact-intensive issues like whether a program is countervailable. Finame's governing regulation requires that the program's resources be earmarked to support domestically produced machinery and equipment, making the program a specific import substitution subsidy under section 771(5A)(C) of the Act.

[83] *See* Commerce's Letter, "Petition for the Imposition of Countervailing Duties on Imports of Common Alloy Aluminum Sheet from Brazil: Countervailing Duty Questionnaire," dated April 15, 2020, at Section II at 17.
[84] *See* GBR IQR at 14 and 19-20; *see also* GBR SQR at 7-10.
[85] *See* GBR SQR at 7-10.
[86] *See* Commerce's Letter, "Countervailing Duty (CVD) Investigation of Common Alloy Aluminum Sheet from Brazil: Request for Additional Information," dated July 9, 2020; *see also* Exhibit A_1_F.
[87] *See* GBR IQR at 14 and 19-20; *see also* GBR SQR at 7-10.
[88] *See Preliminary Determination* PDM at 13.
[89] *Id*. at 13 (citing GBR IQR at 19-20 and GBR SQR at 7-13).
[90] *See* Petitioners Case Brief at 2-10.

- CBA noted that the "rate of local content" in equipment purchased through the program must be reported to BNDES, and Novelis Brasil emphasized that BNDES administers the program "to finance the purchase of equipment and capital goods manufactured in Brazil that have a certain content of imported materials."[91]
- The GBR provided only limited information on the program, and nothing that contradicts the record evidence showing the program is limited to domestically produced goods. A public website submitted by the GBR indicates that Finame financing requires "nationally manufactured" goods.[92]
- Alternatively, this program is *de facto* specific under section 771(5A)(D)(iii) of the Act, because Novelis Brasil and CBA received a disproportionate amount of the metallurgy industry's support during certain AUL years.

CBA Rebuttal Brief:[93]
- The petitioners misconstrue or take out of context record evidence demonstrating that Finame supports domestic *investment* and does not promote import substitution since domestic investment can involve the manufacture of products using imported inputs. That Finame financing is contingent on imported machinery and equipment "contributing to the BNDES mission" of supporting "the GBR's medium and long-term credit policies in support of economic growth in Brazil" simply means that Finame recognizes that imported inputs can support economic growth.
- A citation to a website with information on the program does not overturn a *de jure* specificity finding based on examination of the relevant laws and regulations.

Novelis Brasil Rebuttal Brief:[94]
- An import substitution subsidy cannot be used to finance the purchase of imports. Companies can apply for Finame loans for any equipment, and Novelis Brasil's own responses show that foreign-origin goods can be acquired through this loan program. The petitioners cite regulatory language that Finame loans support the purchase of domestic goods but ignore the regulatory language immediately following that statement, which states that Finame loans may also be used to support the purchase of imported goods. The Finame program is not an import substitution program. The record of this investigation clearly demonstrates that Finame is not an import substitution program. No laws or regulations exist regarding the program and demonstrate that lending under the program is conditioned upon the use of domestic product over imported products. Therefore, the program is not *de jure* specific.
- With regard to the "more automatic application" for some domestic goods, this simply refers to the requirement that all machinery must be registered with BNDES for approval. In many cases, domestic goods may already be registered, meaning that the process is slightly more streamlined. However, the record is clear that the decision on whether to grant a Finame loan is not based on the origin of the equipment.
- Commerce correctly found this program to be not *de facto* specific and the petitioners' allegations that the program is *de facto* specific because Novelis Brasil received a disproportionate percentage of the metallurgy sector's loans is unsupported by law.

[91] *Id.* at 4, (citing Novelis Brasil IQR at 24).
[92] *Id.* at 7 (citing GBR IQR at Exhibit A_BNDES_A_2).
[93] *See* CBA Rebuttal Brief at 2-7.
[94] *See* Novelis Brasil Brief at 2-8

Commerce Position: We determine that the petitioners' claims that this program is specific are not adequately supported by the record of this investigation.

First, while the petitioners cite to language from the Finame regulations regarding how the program can be used to finance the purchases of nationally produced machinery to argue that the program is import-substituting, the immediately following section of the regulation states that financing under the Finame program can also be used for imported machinery.[95] Thus, we find that argument unpersuasive.

The petitioners also highlight various other aspects of the program that they claim makes it an import substitution subsidy. Novelis Brasil and CBA all provided evidence indicating that the program requires beneficiaries to report the rate of local content in machinery purchased using program loans.[96] Furthermore, the GBR explained that domestic machinery can receive "more automatic" financing than imported machinery.[97] A BNDES website, added to the record by the GBR, describes Finame as follows: "Financing, … for the production and acquisition of machinery, equipment and computer and automation goods…. The goods must be new, nationally manufactured and accredited by the BNDES."[98] While these aspects may be suggestive, we do not find them sufficient grounds to conclude that this program is an import substitution subsidy.

According to section 771(5A)(C) of the Act, "an import substitution subsidy is a subsidy that is contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions." Finame's governing regulations, however, explicitly make the program's funds available to purchases of imported machinery, and the GBR reported that Finame loans can be used for imported goods.[99] According to the GBR IQR, "the eligibility or receipt of loans is not affected by the use of domestic or imported goods."[100] In its response to the third supplemental questionnaire, the GBR answered "Yes" to the question of whether applicants can receive financing for the purchase of imported machinery and equipment in all circumstances.[101] In the fourth supplemental questionnaire response, the GBR reported that the existence of local production is not a criterion considered in the approval process for financing Finame projects.[102]

Thus, based on Finame's governing regulations, which allows for imported machinery to benefit from the program, and the GBR's responses which state that imported machinery is eligible for Finame loans, we determine that the program is not specific under section 771(5A)(A) and (C) of the Act. However, we note that Commerce remains concerned with the lack of clarity in the

[95] *See* Petitioners Case Brief at 4; *see also* CBA IQR at Attachment D, Exhibit BNDES 1.
[96] *See* CBA IQR at Attachment D; *see also* Novelis Brasil's Section III IQR at 24.
[97] *See* GBR IQR at 97.
[98] *Id.* at Exhibit A_BNDES_A_2.
[99] *See* CBA IQR at Attachment D, Exhibit BNDES 1; *see also* GBR IQR at 105 "the eligibility or receipt of loans is not affected by the use of domestic or imported goods;" and GBR SQR at 6, answering "Yes" to the question of whether applicants can receive financing for the purchase of imported machinery and equipment in all circumstances.
[100] *See* GBR IQR at 105.
[101] *See* GBR SQR3 at 6.
[102] *See* GBR SQR4 at PDF page 20.

GBR's responses on this program, as well as that the descriptions in the BNDES webpage cited by the petitioner and in CBA's initial questionnaire response are not entirely consistent with the GBR's responses to Commerce inquiries. Therefore, we stress that this determination is based on the specific facts gathered on this program in this investigation, and we will continue to examine this program and whether it may be specific as an import substitution program in future countervailing duty proceedings concerning Brazil, should this program be alleged or self-reported in a future case.

The petitioners also argue that this program is *de facto* specific. To be *de facto* specific, the distribution of benefits in a domestic subsidy must meet one or more of four enumerated factors: (I) the actual number of recipients are limited in number; (II) certain enterprises or industries are predominant users of the subsidy program or receive disproportionate benefits under the subsidy program; (III) the authority providing the subsidy uses discretion to favor certain enterprises or industries over other industries; and/or (IV) the manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.[103]

According to, the petitioners, "Novelis Brasil and CBA were predominant and/or disproportionate users of this program in the years of, and immediately prior to, the approval of its loans under this program within the meaning of {section} 771(5A)(D)(iii) of the Act."[104] However, this *de facto* specificity argument is based on the loans approved for Novelis Brasil and CBA as a percentage of loans received by the metallurgy sector.[105] This method of finding disproportionate use relative to a sector is contrary to Commerce's consistent practice in applying section 771(5A)(D)(iii) of the Act, whereby we compare the financial contribution received by the respondent to the amount received by all other recipients under the program.[106] As such, we see no grounds to deviate from our preliminary analysis of usage data provided by the GBR that showed this program to not be *de facto* specific.[107]

Comment 7: Whether Commerce was Correct to Find the Lei do Bem Program Specific Based on AFA

GBR Case Brief:[108]

- Commerce used AFA to find this program *de facto* specific, noting that the GBR did not cooperate by providing the needed information in the first questionnaire. However, the GBR acted to the best of its ability given that this program was only self-reported by a respondent,

[103] *See* section 771(5A)(D)(iii)(I-IV).
[104] *See* Petitioners Case Brief at 9-10.
[105] *Id.* at 10.
[106] *See*, *e.g.*, *Countervailing Duty Investigation of Certain Corrosion-Resistant Steel Products From Taiwan: Final Negative Countervailing Duty Determination*, 81 FR 35299 (June 2, 2016), and accompanying IDM at 15, "To analyze predominance and disproportionality under section 771(5A)(D)(iii)(II)-(III) of the Act, we utilized usage information from the TA to compare the income tax credits received by PT to the average tax credits that all other Taiwanese companies received under the program."
[107] We are unable to summarize the usage data provided by the GBR here because it is designated as business proprietary information. *See* Memorandum, "Preliminary FINAME Specificity Analysis," dated August 7, 2020.
[108] *See* GBR Case Brief at 15-16.

and it was difficult for the GBR to access the needed information due to remote work during the pandemic.
- Information from the most recent years on program usage is still not available and what was provided by the GBR is the best available information. The process of individual evaluation of companies is very labor intensive, and is, therefore, not realistic. Based on that information, Commerce should find the program not *de facto* specific.

Petitioners' Rebuttal Brief:[109]
- The GBR clearly failed to cooperate. First, the GBR failed to provide a response, claiming that relevant agencies were still gathering relevant information. Commerce, however, had stated that it had the necessary information but was looking for additional details. Second, the GBR provided only an incomplete response that withheld available usage data.

Commerce Position: We disagree with the GBR's claim that finding the Lei do Bem Program to be *de facto* specific based on AFA is improper. In the *Preliminary Determination*, Commerce found that, by not providing the number of enterprises that used this program, the GBR had not fully cooperated to the best of its ability. Commerce further found, based on AFA, that the Lei do Bem program was *de facto* specific to a limited number of enterprises. Commerce also stated that it would continue to examine the program's *de facto* specificity.[110]

On August 20, 2020, Commerce issued a post-preliminary supplemental questionnaire to the GBR.[111] Commerce asked the GBR to explain how the number of this program's users was "not available" to the GBR, given the information contained in Exhibit A_5_L_2, submitted by the GBR. That exhibit contained usage data broken into 99 sectors from 2006 to 2018.[112]

In its response to Commerce's post-preliminary supplemental questionnaire, the GBR simply stated that "due to fiscal constraints," the GBR could not provide the "declared values per company" and that it did not have usage information after 2014, because it had not completed auditing companies' submissions for those years.[113] Neither of these explanations addressed Commerce's preliminarily finding that the GBR had usage information on a company basis available and chose not to provide it. While the GBR may not have *finalized* its audits of benefits bestowed on companies through this program after 2014, Exhibit A_5_L_2 shows that it has access to significant information going up to 2018, a year in which it was able to provide usage data disaggregated by 99 industrial sectors.[114] Thus, while the GBR was able to provide program usage by industrial sector for the period 2006 through 2018, it did not provide usage information for the companies that, presumably, comprised each of those sectors, an outcome that remains unexplained. With regard to "fiscal constraints" purportedly preventing the GBR from providing the relevant information, Commerce was

[109] *See* Petitioners Rebuttal Brief at 20-24.
[110] *See Preliminary Determination* PDM at 14.
[111] *See* Commerce's Letter, "Countervailing Duty (CVD) Investigation of Common Alloy Aluminum Sheet from Brazil: Request for Additional Information," dated August 20, 2020, at 3.
[112] *See* GBR's Letter, "Countervailing Duty (CVD) Investigation of Common Alloy Aluminum Sheet from Brazil: Response to Supplemental Questionnaire," dated July 26, 2020 (GBR SQR1&2), at Exhibit A_5_L_2.
[113] *See* GBR's Letter, "Countervailing Duty Investigation of Common Alloy Aluminum Sheet – Response to Third Supplementary CVD Questionnaire," dated September 3, 2020 (GBR SQR3), at 14.
[114] *See* GBR SQR at Exhibit A_5_L_2.

requesting data on the total number of program users, and no information provided by the GBR suggests that such information would be more difficult to provide than what the GBR did submit. In other words, it would be reasonable to conclude that the GBR would have information regarding the number of program users in each industrial sector as it would need information from each of these users in order to determine program usage by sector.

As such, we continue to find that, pursuant to sections 776(a)(1) and (2)(C) of the Act, necessary information is missing from the record and that the GBR has impeded Commerce's examination of the specificity of the Lei do Bem program by not providing information within the deadlines established. Further, pursuant to section 776(b) of the Act, we determine that GBR has not fully cooperated to the best of its ability, and as AFA, that the Lei do Bem program is *de facto* specific to a limited number of enterprises, as described under section 771(5A)(D)(iii)(I) of the Act.[115]

Comment 8: Whether the Espirito Santo ICMS Reduction Program is Specific or Tied to Non-Subject Merchandise

Novelis Brasil Case Brief: [116]

- This program has no effect on Novelis Brasil's sales of aluminum sheet, as the facility that benefits from the program not does not handle any aluminum sheet. Additionally, ICMS does not apply to exports, so there is no way for this program to benefit aluminum sheet exported to the United States.
- The program is also not specific. Any company that establishes a wholesale distribution facility in Espirito Santo and applies can receive a benefit. The program is also not dependent on export performance, import substitution, a company's industry, or a company's location within Espirito Santo.

Petitioners' Rebuttal Brief:[117]

- Novelis Brasil has not demonstrated the authorities had any intent to tie the benefit from this program to a specific product, so its tying argument is invalid. Commerce's practice, following the *CVD Preamble*, is to examine "the purpose of the subsidy based on the information available at the time of bestowal." The burden of proof is on Novelis Brasil to demonstrate this.
- That a plant that did not produce subject merchandise received the benefit does not mean that the benefit was "tied" to non-subject merchandise. In order for this benefit to not be countervailable, Novelis Brasil would need to show that the Espirito Santo ICMS Program is affirmatively tied to a specific non-subject product. However, there is no record evidence that the program was tied to non-subject merchandise, and the program's eligibility criteria indicate that the only requirement to receive the benefit was increasing employment through the opening of a wholesale facility.
- Commerce's practice is to attribute subsidies received under state and regional programs to total sales, including subject and non-subject merchandise. That the plant was located in a state where Novelis Brasil does not produce subject merchandise is not relevant, as Commerce

[115] *See Preliminary Determination* PDM at 14 (citing GBR SQR at 28).
[116] *See* Novelis Brasil Case Brief at 1-2.
[117] *See* Petitioners Rebuttal Brief at 24-29.

does not trace how subsidies are used by companies. Additionally, Commerce has recognized that "money is fungible within a single integrated company and its use for one purpose may free up money to benefit another purpose."[118]
- Novelis Brasil did not directly address Commerce's specificity finding, supported by record evidence, that the program had restrictive eligibility criteria, so Commerce should continue to uphold this finding.

Commerce Position: We note at the outset that this program provides for a reduction of the ICMS owed for interstate sales from 12 percent to 1.1 percent, and Novelis Brasil stated that under this program for interstate sales, the debit and credit reconciliation mechanism "does not apply when a company is taking advantage of the Espirito Santo program. In that case, the ICMS owed is not assessed by reconciling debits and credits. The ICMS owed is simply 1.1 percent of the sales revenue."[119] The GBR similarly explained that under this program, "the ICMS owed is not assessed by reconciling debits and credits. The ICMS owed is 1.1 percent of the sales revenue (applicable only to sales within the domestic territory), and the company cannot use its ICMS credits on purchases."[120] Therefore, we continue to find that this program confers a benefit, consistent with the *Preliminary Determination* and prior Commerce decisions on ICMS interstate sales tax reductions.[121] We further disagree with both of Novelis Brasil's claims regarding this program and continue to find it a countervailable subsidy.

Regarding Novelis Brasil's tying arguments, it argues that Commerce should consider this program tied under 19 CFR 351.525(b)(5)(i) exclusively to sales of non-subject merchandise, because the facility that received the subsidy did not process subject merchandise. However, Commerce's practice when analyzing attribution under 19 CFR 351.525(b)(5)(i) is not to rely on how a recipient uses a subsidy, but rather on the stated purpose of the subsidy and terms of agreement under which the administering authority bestows a subsidy.[122] As the *CVD Preamble* explains, Commerce does not "trace the use of subsidies through a firm's books and records. Rather we analyze the purpose of the subsidy based on information available at the time of the bestowal."[123] This is consistent with the guidance provided in section 771(5)(C) of the Act, the SAA at 926, and 19 CFR 351.503(c), which all provide that the effect of a subsidy on a firm is not considered in determining whether there is a benefit to the firm.

In *Fine Denier PSF from India*, Commerce addressed as follows a respondent's claim that a subsidy program should be found tied to non-subject merchandise because the plant that benefited from the subsidy did not produce subject merchandise:

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[118] *Id.* at 28 (citing *Polyester Textured Yarn from India: Final Affirmative Countervailing Duty Determination*, 84 FR 63848 (November 19, 2019)), and accompanying IDM at 22.
[119] *See* Novelis Brasil's Letter, "Common Alloy Aluminum Sheet from Brazil: Novelis do Brasil Response to New Subsidy Allegation and Other Issue Supplemental Questionnaire," dated October 13, 2020, at 12-13.
[120] *See* GBR's Letter, "Countervailing Duty (CVD) Investigation of Common Alloy Aluminum Sheet from Brazil: Request for Additional Information," dated October 22, 2020 (GBR SQR4), at pdf page 32.
[121] *See Silicon Metal from Brazil* IDM at Comment 1.
[122] *See Countervailing Duties: Final Rule*, 63 FR 65348, 65402 (November 25, 1998) (*CVD Preamble*); *see e.g.*, *Biodiesel from the Republic of Indonesia: Final Affirmative Countervailing Duty Determination*, 82 FR 53471 (November 16, 2017), and accompanying IDM at Comment 3.
[123] *See CVD Preamble*, 63 FR at 65403.

> Commerce does not tie subsidies on a plant – or factory-specific basis, nor do the statute or the regulations provide for, or require, the attribution of a domestic subsidy to a specific entity within a firm (*i.e.*, a factory located within {a special economic zone} or specific state). Reliance is misguided in concluding that, because subsidies were provided to a plant that does not produce subject merchandise, the subsidies are tied to the production of non-subject merchandise, because the plant is a division of a subject merchandise producer (*i.e.*, Reliance).[124]

As Commerce noted in the *Preliminary Determination*, Espirito Santo's Law 10,568 establishing this program excludes certain goods from being eligible for the preferential 1.1 percent ICMS rate on interstate shipments out of Espirito Santo.[125] However, these limitations contain no prohibition on aluminum sheet being eligible for the reduced ICMS rate. Furthermore, the agreement signed between Novelis Brasil and Espirito Santo only requires the company to establish a new wholesale distribution center and create jobs in Espirito Santo.[126] The agreement has no additional limitations on the class or type of merchandise that may benefit from the program, or suggest that it is explicitly provided for the purpose of benefiting non-subject merchandise.

Novelis Brasil also argues that, because the ICMS tax is not levied on exports, this program, which reduces ICMS payable, is tied to sales within Brazil. Thus, Novelis Brasil claims that Commerce should attribute the benefit from this program only to sales within Brazil and not countervail it. However, Novelis Brasil's reference to the tax system does not change that the program agreement between the company and the government only requires the company to open a wholesale facility and increase employment. Novelis Brasil failed to meet its burden to produce evidence that benefits are tied to a particular product and not otherwise benefiting the overall operations of the company.

Novelis Brasil claims that this program is not specific because "to be eligible, a company must simply establish a wholesale distribution facility in Espirito Santo and submit an application form" and also that the program is not limited in various other ways.[127] However, these claims do not address Commerce's finding in the *Preliminary Determination* that this program is specific under section 771(5A)(D)(i) of the Act because:

> the program contains six separate exclusions listing types of wholesale operations that do not qualify for the program. The exclusions cover types of goods, for example, "{operations} with coffee, electricity, lubricants, liquids or gaseous fuels," as well as modes of distribution, for example, "{operations} that send goods to individual customers."[128]

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[124] *See Fine Denier Polyester Staple Fiber From India: Final Results of Countervailing Duty Administrative Review; 2017-2018*, 85 FR 86537 (December 30,2020), and accompanying IDM at 26.
[125] *See* Novelis Brasil's Letter, "Common Alloy Aluminum Sheet from Brazil: Novelis do Brasil Response to Questions General-4 and FINAME BNDES 1-3 in the First Supplemental Section III Questionnaire," dated July 6, 2020, at Exhibit ICMS/ES-1 at Exhibit Page 14.
[126] *Id.* at Exhibit ICMS/ES-2.
[127] *See* Novelis Brasil Case Brief at 3.
[128] *See Preliminary Determination* PDM at 26.

As neither Novelis Brasil nor any other interested party disputed the basis on which Commerce preliminarily found this program *de jure* specific, we find no basis to overturn our preliminary determination and, thus, continue to find this program specific under section 771(5A)(D)(i) of the Act.

VIII. RECOMMENDATION

We recommend approving all of the above positions. If these positions are accepted, we will publish the final determination in the *Federal Register* and will notify the ITC of our determination.

☒ ☐

Agree Disagree

3/1/2021

X

Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance