UNITED STATES-CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW
U.S.A.-92-1904-01

IN THE MATTER OF	**Before:**	**Richard G. Dearden (Chair)**
CERTAIN SOFTWOOD LUMBER		**Lawson A.W. Hunter, Q.C.**
PRODUCTS FROM CANADA		**Morton Pomeranz**
		J.RobertS. Prichard
		Michael Reisman

DECISION OF THE PANEL ON REMAND
(December 17, 1993)

Appearances:

M. Jean Anderson, Bruce H. Turnbull, Douglas A. Nave, David W. Oliver, and Deborah E. Siegel, on behalf of the Government of Canada.

Lawrence A. Schneider, Claire E. Reade, Michael T. Shor, and Matthew Frumin, on behalf of the Government of Alberta.

Homer E. Moyer, Grant D. Aldonas, Philip J. Ferneau, Susan Ginsburg, John E. Davis, Stuart E. Benson, James B. Altman, Daniel M. Flores, Peter B. Miller, and Angela Lykos, on behalf of the Government of British Columbia.

Mark S. McConnell, Lynn G. Kamarck, Deanna Tanner Okun, and Leslie A. Delagran (Economist), on behalf of the Government of Ontario.

Elliot J. Feldman, Michael A. Hertzberg, Matthew J. Clark, Jonathan C. Cahn, Patrick F.J. Macrory, Spencer S. Griffith, Margaret L.H. Peng, James E. Mendenhall and Shannon S.S. Herzfeld, on behalf of the Gouvernement du Québec.

Charlene Barshefsky, W. George Grandison, John R. Labovitz, Richard Diamond, and Jeffrey A. May, on behalf of the Canadian Forest Industries Council and Affiliated Companies.

John B. Rehm and Munford P. Hall, on behalf of MacMillan Bloedel Limited.

Randolph J. Stayin, Mark J. Andrews, and David Lubitz, on behalf of the Québec Lumber Manufacturers' Association.

John E. Corrett III, James A. Valeo, Thomas O. Gormand, and John R. Coogan, on behalf of Donohue, Inc.

Richard L. Cys, Edward B. Cohen, and David W. Tremaine, on behalf of J.D. Irving Limited.

Craig L. McKee, Gary N. Horlick, and Eleanor C. Shea, on behalf of Noranda Forest, Inc.

Alan W. Wolff, Michael H. Stein, Robert Griffen, and John Ragosta, on behalf of the Coalition for Fair Lumber Imports.

William D. Hunter, Craig Giesze, Joan MacKenzie, Marguerith Trossevin, and Jeffrey Lowe, on behalf of the Investigating Authority.

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I. INTRODUCTION

A. HISTORY OF THE PROCEEDINGS

This Panel is reviewing the third countervail ("cvd") investigation by the Department of Commerce of Canadian softwood lumber imports.

Commerce commenced its first cvd investigation of Canadian softwood lumber on October 27, 1982. Commerce issued a final negative determination on May 31, 1983 ("Lumber I"), concluding *inter alia* that stumpage rights were not provided to a "specific enterprise or industry, or group of enterprises or industries" within the meaning of the cvd statute nor under the agency's specificity test.[1] Commerce also concluded that stumpage was not provided at "preferential" rates within the meaning of the *Tariff Act of 1930*.

On May 19, 1986, Commerce received a second cvd petition from the Coalition for Fair Lumber Imports,[2] which claimed *inter alia* to have new evidence that government policies limited the use of stumpage programs, and alleged a change of law since Lumber I. Commerce commenced a second cvd investigation ("Lumber II"),[3] and later published an affirmative preliminary determination.[4] Commerce found that stumpage was both "specific" and "preferential" within the meaning of the cvd statute, conferring a benefit on

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[1] 48 Fed. Reg. 24,159 (1983).

[2] 51 Fed. Reg. 21,205 (1986).

[3] 51 Fed. Reg. 21,205 at 21,207.

[4] Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (1986).

Canadian softwood lumber products.[5] Commerce set the benefit conferred by the stumpage programs at 14.5% *ad valorem*.[6]

Prior to the issuance of a Final Determination in Lumber II, the United States and Canada entered into a Memorandum of Understanding ("*MOU*") concerning softwood lumber, pursuant to which the Government of Canada agreed to collect a 15% charge on softwood lumber exports to the United States, which charge could be reduced or eliminated for provinces that instituted replacement measures, *e.g.* increasing their stumpage fees. As a result, the Coalition's petition was withdrawn and Commerce's investigation terminated.[7]

In 1991, the Government of Canada and a number of the provincial governments undertook a joint study of four provincial stumpage programs, which study was said to have demonstrated that stumpage revenues in all four provinces exceeded the provinces' costs of administering the stumpage programs. On this basis, Canada concluded that the *MOU* had served its purpose and gave notice to the United States that it intended to exercise its right to terminate the *MOU* effective October 4, 1991.

Commerce self-initiated a third countervailing duty investigation into provincial stumpage programs on October 31, 1991 ("Lumber III"),[8] determining that Canada's unilateral termination of the *MOU* constituted the "special circumstances" necessary to

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[5] 51 Fed. Reg. 37,453 at 37,456.

[6] 51 Fed. Reg. 37,453 at 37,457. Note that the total subsidy rate was 15% *ad valorem* due to the other Canadian subsidy programs.

[7] Certain Softwood Lumber Products from Canada, 52 Fed. Reg. 315, amended, Certain Softwood Lumber Products from Canada, 52 Fed. Reg. 2,751 (1987).

[8] 56 Fed. Reg. 56,055 (1991).

self-initiate a cvd investigation.[9] At Commerce's invitation, the Coalition filed submissions in December, 1991, that argued that log export restrictions (hereinafter "LERs") in B.C., Alberta, Ontario and Québec constituted countervailable subsidies, and requested that Commerce include the export restrictions in its investigation.[10] Commerce complied.[11]

Commerce issued an affirmative preliminary countervailing duty determination ("*Preliminary Determination*") in Lumber III on March 5, 1992, which concluded that the stumpage programs in Alberta, B.C., Ontario and Québec conferred a weighted average subsidy of 6.25%, and that the LERs in B.C. conferred a weighted average subsidy of 8.23%. The combined weighted average rate of 14.48% was applied to softwood lumber exports from all provinces save the Atlantic provinces.[12] On May 28, 1992, Commerce published its *Final Determination*,[13] confirming that the stumpage programs of Alberta, B.C., Ontario and Québec conferred a weighted average subsidy of 2.91% on softwood lumber exports, and that B.C.'s LERs conferred a subsidy of 4.65% on softwood lumber producers in that province, yielding a weighted average subsidy of 3.60%. Commerce assessed a "country-wide" weighted average rate of 6.51% on softwood lumber exports from all provinces and territories under investigation, as a result.

This Panel was convened on July 29, 1992, pursuant to Article

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[9] As required by Article 2.1 of the *Agreement on Interpretation and Application of Articles VI, XVI, and XXIII on the General Agreement on Tariffs and Trade* (the *"GATT Subsidies Code"*). See 56 Fed. Reg. 56,055 (1991).

[10] Pub. Doc. Nos. 80 and 104.

[11] Pub. Doc. No. 121.

[12] Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 8,800 (1992).

[13] Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (1992).

1904 of the *United States - Canada Free Trade Agreement* ("*FTA*") to review Commerce's *Final Determination*. On May 6, 1993, the Panel unanimously issued the following remand instructions:

1. On stumpage specificity, the Panel unanimously found that: "[t]he evidence on the record shows that the number of users and the range of products produced by Canadian stumpage users are not so few as to render unreasonable a finding of non-specificity. Factors other than the number of users should therefore be taken into account. There was evidence on the record regarding factors such as the lack of dominant or disproportionate use of stumpage by the softwood lumber industry, as well as evidence both for and against the exercise of government discretion in these programs. This evidence could reasonably have informed Commerce's analysis and assisted it in making its determination. This evidence, although not necessarily controlling, is nonetheless legally relevant and we direct Commerce to consider this and all other relevant record evidence in reconsidering the specificity of Canadian stumpage programs on remand." On this basis, the Panel remanded "the Final Determination to Commerce for an express evaluation and weighing of all four factors enunciated in its Proposed Regulations, as well as any other factors relevant to *de facto* specificity."[14]

2. On stumpage preferentiality, the Panel unanimously "conclude[d] that, in this case, Commerce should have considered whether or not these provincial programs could and did have a distorting effect on the operation of normal competitive markets before concluding that these governmental policies involve the type of `preferential' pricing that constitutes a countervailable subsidy within the meaning of the *Tariff Act*." Accordingly, the Panel "remand[ed] this part of the stumpage decision back to Commerce for review of all the evidence regarding the natural resource market for standing timber in light of the legal principles formulated in th[e] decision."[15]

3. On LER specificity, the Panel unanimously found that it "was not persuaded that the record evidence met the requirement of *de jure* specificity and, therefore, the Panel remand[ed] the *Final Determination* to Commerce to review the record and establish

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[14] United States - Canada Free Trade Agreement Article 1904 Binational Panel Review, USA92-1904-01, Softwood Lumber Products from Canada (May 6, 1993), at 44 [hereinafter "Panel Decision"].

[15] *Ibid.*, at 59-60.

whether the log export restrictions are *de jure* specific or *de facto* specific."[16]

4. On LER preferentiality, the Panel stated that Commerce should "clarifi[y] ...whether the `direct and discernible' effects test requires the performance of a regression analysis ..." and "[s]hould Commerce determine upon remand that regression analysis is not required, it should then clarify what it meant by `direct and discernible effects.' Specifically, Commerce should clarify whether it meant to equate the phrase `proximate causal relationship or correlation (i.e., regression analysis)' with the phrase `direct and discernible effects.' If it did not, if the phrases represent two different standards, Commerce should clarify which standard governs and why. Commerce should then clarify whether the applicable standard is met by substantial evidence on the record." On the basis of these conclusions, the Panel unanimously remanded "the *Final Determination* to Commerce for clarification of the meaning of the applicable legal standard and demonstration that the standard was met by substantial evidence on the record."[17]

5. With respect to certain calculation issues arising out of the Panel's review of the LER issue, the Panel summarized its remand instructions as follows:

> "...the Panel remands:
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> 1) the determination to Commerce for express consideration of the Coalition's claim that Commerce erred in limiting its calculation of the benefit to certain areas of British Columbia;
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> 2) the determination to Commerce for recalculation of the domestic price of logs from the border interior using the log PPI;
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> 3) the determination so that Commerce may ascertain a species/grade adjustment supported by substantial evidence on the record for logs from the interior;
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> 4) the determination to Commerce for express

[16] *Ibid.*, at 76.

[17] *Ibid.*, at 118. Note that Panellists Weiler (subsequently replaced by Panellist Prichard) and Dearden joined in this remand on the assumption, *arguendo*, that LERs were countervailable under U.S. cvd law.

consideration of which of the Margolick-Uhler elasticities assumptions for supply and demand they adopted in calculating the equilibrium price factor;

5) the determination to Commerce for reconsideration of the economic adjustment made to export price; and

6) the determination to Commerce for either recalculation of the export cost adjustment to include the diminished value of the falldown sort or adoption of a within-grade adjustment."[18]

6. With respect to Commerce's refusal to exclude two Québec companies, the Panel found that Commerce should have considered these exclusion requests, and thus remanded the matter for Commerce's reconsideration.[19]

7. With respect to the participation of Dr. Lange in the Lumber III investigation, the Panel requested that "Commerce provide details to the Panel (including documentation) of Dr. Lange's specific role in this investigation at all stages and of any input Dr. Lange may have had in the formulation of the *Preliminary* and *Final Determinations*."[20]

Commerce issued its *Determination on Remand* on September 17, 1993,[21] in which it affirmed its previous affirmative determinations concerning both stumpage and LERs, and increased the applicable country wide rate from 6.51% to 11.54% *ad valorem*.

[18] *Ibid.*, at 125.

[19] *Ibid.*, at 132-33.

[20] *Ibid.*, at 150.

[21] Dept. of Commerce, International Trade Admin., Determination Pursuant to Binational Panel Remand (Sept. 17, 1993) [hereafter "*Determination on Remand*"]

SUMMARY OF THE MAJORITY'S CONCLUSIONS

The Panel's consideration of Commerce's *Determination on Remand*, in light of the Parties' submissions and the record evidence, has led to differing conclusions. Set out below are the Reasons of the Majority of the Panellists (Dearden, Hunter and Prichard). On the major remand issues arising out of the Panel Decision of May 6, 1993,[22] the Majority of the Panel has concluded as follows:

1. Commerce's *Determination on Remand* fails to provide a rational basis for its conclusion that provincial stumpage programs are specific, in accordance with the record evidence and existing U.S. law. The Majority remands this question back to Commerce for a determination that the provincial stumpage programs are not provided to a specific enterprise or industry, or group of enterprises or industries, within the meaning of 19 U.S.C. §1677(5).

2. Commerce's finding that provincial stumpage programs distort the normal competitive markets for softwood lumber is not supported by substantial evidence on the record. The Majority remands this question back to Commerce for a determination that provincial stumpage programs do not distort the normal competitive markets for softwood lumber and therefore are not countervailable.

3. Commerce's *Determination on Remand* failed to establish on

[22] United States - Canada Free Trade Agreement Article 1904 Binational Panel Review, USA92 - 1904-01, Softwood Lumber Products from Canada (May 6, 1993) [hereinafter "Panel Decision"].

the record evidence that B.C.'s LERs benefit a specific enterprise or industry or group of enterprises or industries in accordance with U.S. law, both in Commerce's misreliance on its stumpage specificity analysis and on its failure to analyze the range of industries which actually purchase logs. The Majority remands this matter back to Commerce for a finding of non-specificity with respect to log export restrictions.

4. Commerce's *Determination on Remand* satisfies the remand instructions set out in the Panel's decision of May 6, 1993 regarding the establishment of a direct and discernible effect between B.C.'s LERs and B.C. log prices. As a result, Panellists Hunter, Prichard, Pomeranz and Reisman[23] affirm the agency's determination that B.C. LERs confer a benefit which, if specific, would be countervailable.

The Panel as a group has pronounced upon two subsidiary issues, *arguendo*. We have considered Commerce's response for information concerning the participation of Dr. Lange in the Lumber III investigation, and have concluded that no violation of U.S. due process law has been established. The Panel would also, absent the Majority finding, have directed that Commerce exclude from its investigation two Québec companies, Les Industries Maibec and Matériaux Blanchet.

Set out below in Sections II - VI is the Majority's consideration of the *Determination on Remand*.

[23] Panellist Dearden dissenting, see *infra*.

II. STANDARD OF REVIEW

The Parties to this proceeding are in agreement that the Panel, in reviewing Commerce's *Determination on Remand*, is governed by the same standard of review that applied to its review of Commerce's *Final Determination*.[24] The Panel has conscientiously applied and followed that standard of review in considering of Commerce's *Determination on Remand*.

To quote from the Panel Decision (including the footnotes), that standard of review is as follows:

> "Article 1904(3) of the *FTA* requires this Panel to "apply the standard of review described in Article 1911 and the general legal principles that a court of the importing country otherwise would apply to a review of a determination of the competent investigating authority."[25] While the scope of this Panel's review is limited to the Administrative Record before the agency, the Panel may also consider, as provided under Article 1904(2):
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> > The relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing party would rely on such materials in reviewing a final determination of the competent investigating authority.
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> Since the United States is the importing country in this proceeding, Article 1911 of the *FTA* directs the Panel to apply the standard of review of 19 U.S.C. § 1516 A (b)(1)(B). Under that provision, the Panel must "hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record or otherwise not in accordance with law." This

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[24] Canadian Complainants' Joint Brief in Opposition to the *Determination on Remand*, at p. A-2 ("Canadian Complainants' Brief"); [Coalition's] Brief in Support of the Department of Commerce's Determination on Remand, at p. 2 ("Coalition Response Brief"). *Final Determination*, 57 Fed. Reg. 22,570 (May 28, 1992).

[25] Article 1911 defines "general legal principles" as "principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

standard has been applied and discussed in previous binational panel decisions.[26]

The standard of review requires that Commerce's decision: (1) be supported by substantial evidence on the record; and, (2) be otherwise in accordance with the applicable law.

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[27] Substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[28] However, "[a] reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view".[29] Substantial evidence has been held to mean "`such relevant evidence as a reasonable mind might accept as adequate to support a conclusion', taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence."[30]

Binational panels, as the reviewing body, may not engage in *de novo* review.[31] Panels must limit their

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[26] *e.g.* Live Swine from Canada, U.S.A. 91-1904-03 (May 19, 1992); Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, U.S.A. 90-1904-01 (May 24, 1991); New Steel Rails from Canada, U.S.A. 89-1904-08 (August 30, 1990); Fresh Chilled or Frozen Pork from Canada, U.S.A. 89-1904-11 (Aug. 24, 1990); and In re Red Raspberries from Canada, U.S.A. 89-1904-01 (Dec. 15, 1989).

[27] Matasushita Electric Industrial Co., Ltd v. United States, 750 F.2d 927,933 (Fed. Cir. 1984), citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). See also Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966 (CIT 1986); *aff'd per curium*, 810 F.2d 1137 (Fed. Cir. 1987).

[28] Consolo v. Federal Maritime Commission, 383 U.S. 607,619-20 (1966).

[29] Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488 (1951).

[30] Atlantic Sugar Ltd. v. United States, 744 F. 2d 1556, 1562, (Fed. Cir. 1984), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[31] American Lamb Co. v. U.S., 785 F.2d 994, 1001 (Fed. Cir. 1986) .

review to the evidence on the record.[32]

The decision of the U.S. Supreme Court in Chevron U.S.A. Inc. v. Natural Resource Defence Council is widely recognized as the *locus classicus* of judicial review of administrative action, particularly as regards an agency's interpretation of the law it is mandated to apply. Chevron stands for the proposition that in determining whether an agency's application and interpretation of a statute is in accordance with law, a court need not conclude that "the agency's interpretation [is] the only reasonable construction or the one this court would adopt had the question initially arisen in a judicial proceeding."[33] In Chevron, the Supreme Court articulated the standard as follows:

> When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
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> [...]
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> "... If [the agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that

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[32] PPG Industries, Inc. v. U.S., 928 F.2d 1568, 1572 (Fed. Cir. 1991).

[33] Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n. 11 (1984).

> the accommodation is not one that Congress would have sanctioned." United States v. Shimer, 367 U.S. 374, 382, 383 (1961)[34]

"The granting of discretionary authority to an agency implies that the exercise of discretion be predicated upon a judgment anchored in the language and spirit of the relevant statute and regulations."[35] A panel standing in the stead of a reviewing court may "not permit the agency under the guise of lawful discretion or interpretation, to contravene or ignore the intent of Congress."[36] Agency interpretations of statutes which they are charged with administering shall be sustained if permissible, unless Congress has directly spoken to the precise question at issue,[37] or unless the text of the statute and/or its legislative history indicates that the agency's interpretation is not one Congress would have sanctioned.[38] In K Mart Corp. v. Cartier, Inc.,[39] the Supreme Court described the inquiry as to whether Congress had made its intentions known as an inquiry into the statute's "plain meaning", by looking, in Justice Kennedy's words, "to the particular statutory language at issue, as well as the language and design of the statute as a whole".[40] In Immigration and Naturalization Service

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[34] *Ibid.* at 842-43, 844-45. A review of the Chevron doctrine, and the U.S. Supreme Court's practice following Chevron, has been written by T.W. Merrill in "Judicial Deference to Executive Precedent", 101 Yale L.J. 969 at pp.980-93.

[35] Freeport Minerals v. U.S., 776 F.2d 1029, 1032 (Fed. Cir. 1985).

[36] Cabot Corp. v. U.S., 694 F. Supp. 949, 953 (C.I.T. 1988).

[37] Rhone Poulenc, Inc. v. United States, 899 F.2d at 1185, 1190 n. 9 (Fed. Cir. 1990), citing Chevron, *supra*, at 842-45.

[38] P.P.G. Industries, Inc. v. U.S., 928 F.2d 1568, 1572 (Fed. Cir. 1991), citing U.S. v. Shimer, 387 U.S. 374, 382-83 (1961).

[39] 486 U.S. 281, 291 (1988).

[40] Kennedy's J.'s opinion on this issue was adopted by the Majority of the Court; his conclusions as to the validity of ss. 133.21(c)(1)-(3) of Regulations made pursuant to s. 526 of the *Tariff Act of 1930* were adopted in part and rejected in part by the Majority of the Court. See also Kennedy J.'s Majority opinion in Public Employees Retirement System of Ohio v. June M. Betts, 109 S. Ct. 2854, 2863 (1989): "No deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and long standing agency interpretations must fall to the extent they conflict with statutory construction."

> v. Cardozo-Fonesca,[41] Justice Stevens footnoted that "... an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is `entitled to considerably less deference' than a consistently held agency view."[42]
>
> A reviewing court's "duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute."[43] The task of the reviewing body is to ascertain whether the agency's action falls within a "range of permissible construction".[44]
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> Where there is an absence of clearly discernible legislative intent, binational panels must limit their inquiry to the question of whether Commerce's statutory interpretations are "sufficiently reasonable".[45] An agency's interpretation is "sufficiently" reasonable if it has a rational basis which comports with the object and purpose of the statute.[46] Reviewing courts have rejected Commerce's "exercise of administrative discretion if it contravenes statutory objectives".[47]

Before proceeding to address the substantive issues raised by the ***Determination on Remand***, we feel it beneficial to consider, as well, a recent decision of the Federal Circuit Appeals Court to which the Coalition, and Commerce to a more limited extent, have given particular emphasis in remand submissions concerning the

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41 480 U.S. 421, 446 n. 30 (1987).

42 citing in support Watt v. Alaska, 451 U.S. 251, 273 (1981).

43 Suramerica de Aleaciones Laminadas C.A. v. U.S., 966 F.2d 660, 665 (Fed. Cir. 1992).

44 *Ibid.*

45 American Lamb Co. v. U.S., 785 F.2d 944, 1001 (Fed. Cir. 1986), citing Chevron, U.S.A. Inc. v. National Res. Def. Council, 467 U.S. 837 (1984).

46 Georgetown Steel Corp. v. U.S., 801 F.2d 1308, 1314-18 (Fed. Cir. 1986) rev'g *sub nom* Continental Steel Corp. v. U.S., 615 F. Supp. 548 (C.I.T. 1985).

47 Ipsco, Inc. v. U.S., 899 F.2d 1192, 1195 (Fed. Cir. 1990).

standard of review and the preferentiality of the provincial stumpage programs: Daewoo Electronics Co. Ltd. et al. v. U.S.[48] Two questions of relevance to these proceedings were before the Court in Daewoo. First, the Court of Appeals was called upon to determine whether the trial court erred in overturning Commerce's "accounting methodology"[49] on the trial court's conclusion that 19 U.S.C. §1677a(d)(1)(C) (antidumping law) required that Commerce undertake an econometric analysis of tax incidence in foreign markets in calculating the applicable dumping margin.[50] This issue raised the question of whether Commerce's interpretation of the antidumping statute was in accordance with law. Second, the Court of Appeals was required to assess the trial court's reversal of Commerce's "use of the net delivered selling price to the first unrelated customer as the imputed commodity tax base under U.S.C. §1677a(d)(1)(C) for calculating the amount of tax adjustment,"[51] and the eventual dumping margin. This issue demanded that the Court apply the `substantial evidence' standard.

In considering the first question, the Daewoo Court undertook a detailed consideration of the standard applicable to the review of agency decisions. In reliance upon Chevron U.S.A. Inc.[52] and Suramerica de Aleaciones Laminadas, CA v. U.S.[53], the Court held that a question of statutory interpretation must be resolved with deference to the agency's interpretation, requiring that the Court

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[48] 1993 U.S. App. LEXIS 25042 (September 30, 1993)

[49] Described as a "longstanding agency practice": *Ibid.* at p. 5.

[50] Commerce did not interpret the statute to require such econometric analysis.

[51] *Ibid.* at p. 9.

[52] Chevron U.S.A., Inc. v. Natural Resources Defence Council, Inc., 467 U.S. 837, 844 (1984)

[53] 366 F.2d 660, 663 (Fed. Cir. 1992)

limit its consideration to the question of whether the agency's interpretation fell within the range of "permissible construction" or stated otherwise, whether it constituted a "reasonable interpretation" of the law. In reliance on Zenith Radio Corp. v. U.S.,[54] the Court noted that to sustain an agency's interpretation a court "need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings".[55]

In addressing the second question, the Daewoo Court held that "[s]ubstantial evidence consists of `such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'",[56] noting that "[t]he question is whether the record adequately supports the decision of the ITA, not whether some other inference could reasonably have been drawn."[57] As support for these propositions, the Daewoo Court relied upon the decisions in Matsushita, Consolidated Edison Co., and Consolo, referred to above.

As will be noted, the principles applied in Daewoo are those principles relied upon by the Majority herein. On the Majority's reading, the Federal Circuit in Daewoo did not understand itself to be breaking new legal ground but instead abiding by the standard of deference the Court "ha[d] long recognized...",[58] and

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[54] 437 U.S. 443, 450 (1978)

[55] Daewoo Elec. Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, No. 92-1558, 1993 U.S. App. LEXIS 25,042 (hereafter "Daewoo"), at p. 7. In Zenith Radio Corp., *ibid.* at 450, the Supreme Court held that "[t]he question is thus whether, in light of the normal aids to statutory construction, the Department's interpretation is "sufficiently reasonable" to be accepted by a reviewing court."

[56] Daewoo, *ibid*, at p. 10, citing Matsushita, *supra.*

[57] *Ibid.*

[58] *Ibid.*, at *15.

"ha[d]...indicated" in past decisions.[59] In our view, the Federal Circuit's comprehensive examination of the specific provision of the U.S. anti-dumping law at issue (U.S.C.§ 1677a(d)(1)(C), its legislative history, and previous judicial interpretation, does not evidence the application of a `new' or `expanded' standard of deference to the exercise of agency discretion. After careful review, the Daewoo Court concluded that Commerce's interpretation of U.S.C.§ 1677a(d)(1)(C), as not requiring an econometric analysis of tax incidence, could not be said to have "contravene[d] the statute.[60]

As a supplementary justification for this conclusion of law, the Federal Circuit noted the "onerous burden" imposed upon the agency by the trial court's direction to examine tax incidence through econometric analysis (as the only method available) and the probative value of such analysis. While the Federal Circuit's Reasons clearly considered the burden imposed on the agency by the economic analysis and the probative value of the result, we are unable to find any suggestion in the Court's Reasons that these factors, either alone or together, are dispositive of a reviewing tribunal's consideration of the agency's interpretation or application of the governing law.

Like the Federal Circuit, the Majority is "cognizant" of the overarching rule of deference to the agency's decision. At the same time, we note the important point made by the binational panel in Softwood Lumber (Injury) in the context of `substantial evidence':

"Although review under the substantial

[59] *Ibid.*, at *16.

[60] *Ibid.*, at *23.

> evidence standard is by definition limited, application of the standard does not result in the wholesale abdication of the Panel's authority to conduct a meaningful review of the Commission's determination. Indeed, a contrary conclusion would result in the evisceration of the purpose for reviewing agency determinations, rendering the appeal process superfluous. The deference to be afforded an agency's findings and conclusions is therefore not unbounded."[61]

In the end, a panel applying the substantial evidence standard must inevitably return to the basic question of whether the remand determination is based on "`such relevant evidence as a reasonable mind might accept as adequate to support a conclusion', taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence."[62] (our emphasis) Similar to the `substantial evidence' standard, the deference owed Commerce's construction of the law is not unbounded; Commerce's construction must be "permissible" and applied in a rational manner. A panel standing in the stead of a reviewing court may "not permit the agency under the guise of lawful discretion or interpretation, to contravene or ignore the intent of Congress."[63]

The Majority continues to be mindful of the pronouncements of the Extraordinary Challenge Committee in Live Swine from Canada[64] regarding the role of Article 1904 panels. Our review, both of the *Final Determination* and the *Determination on Remand*, has been in

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[61] USA-92-1904-02 (July 26, 1993) at p. 15. See also Armco, Inc. v. U.S., 733 F. Supp. 1514, 1519 (CIT, 1990) and Cabot Corp. v. U.S., 694 F. Supp. 949, 953 (CIT 1988)

[62] Atlantic Sugar Ltd. v. United States, 744 F. 2d 1556, 1562, (Fed. Cir. 1984), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[63] Cabot Corp. v. U.S., 694 F. Supp. 949, 953 (C.I.T. 1988).

[64] ECC-93-1904-01USA (April 8, 1993)

accordance with the principles articulated by the Extraordinary Challenge Committee.

III. STUMPAGE

A. SPECIFICITY

In the *Final Determination*, Commerce based a finding of stumpage specificity on the limited number of users of the program.[65] This finding was based upon Commerce's classification of the enterprises using stumpage into one group composed of two industries: solid wood products (including logs) and pulp and paper products.[66]

In the Panel Decision, this Panel remanded the *Final Determination* to Commerce for "an express evaluation and weighing of all four factors enunciated in its Proposed Regulations, as well as any other factors relevant to *de facto* specificity".[67] The Panel, having analyzed the relevant statutory provisions and the case law relating thereto, rejected Commerce's sequential

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[65] Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22, 570 at 22583 (hereinafter, "*Final Determination*").

[66] *Final Determination*, at 22581.

[67] Panel Decision, at 44. Paragraph 355.43(b)(2) of the Proposed Regulations (54 Fed. Reg. 23366, at 23379) provides as follows:

> In determining whether benefits are specific under paragraph (b)(1) of this section, the Secretary will consider, among other things, the following factors:
>
> (i) The extent to which a government acts to limit the availability of a program;
>
> (ii) The number of enterprises, industries, or groups thereof that actually use a program;
>
> (iii) Whether there are dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program;
>
> (iv) The extent to which a government exercises discretion in conferring benefits under a program.

application of the four factors from the Proposed Regulations, and directed Commerce to "consider all of the evidence, and provide a reasonable analysis of the weight it assigns to such evidence".[68] In its reasons leading to the remand, the Panel also noted that a finding in relation to the number of users could not be based upon a raw number alone; it must be compared to some sort of yardstick.[69] Moreover, the Panel recognized that the raw number of industries in question would depend upon the way in which an "industry" was defined.[70]

The Majority does not think that Daewoo requires the Panel to reconsider and adjust its holding that U.S. law requires Commerce to consider evidence relating to all four factors in the Proposed Regulations as well as any other factor relevant to *de facto* specificity. It is a well established principle of U.S. law that general expressions are to be taken in connection with the case in which the expressions are used.

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely

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[68] Panel Decision, at 38. The Majority agrees that "no one factor is necessarily dispositive" and "it is also not necessary to show all four" factors favour specificity in order to come to a determination that a program is specific (*Final Determination*, at 22582-3). Indeed, the Panel agreed unanimously in the Panel Decision that "this is not to say that Commerce could not, after having considered all the evidence, determine that a particular program is specific where there is more than a trivial number of users and/or industries, no dominant or disproportionate user, and no government discretion" (at 38, emphasis supplied).

[69] Panel Decision, at 38.

[70] Panel Decision, at 38.

investigated.[71]

Statements of the Court of Appeals in Daewoo relating to the deference which is due to Commerce's choice of analytical and empirical methods do not necessarily conflict with the specific pronouncements of the same court in PPG IV, for example, relating to the appropriate legal questions which Commerce must address when performing the specificity test mandated by the statute and its own Proposed Regulations. Daewoo is an important case, and the Majority has been guided by it when considering whether Commerce's analysis of the four factors rationally supports the conclusions reached by Commerce in this case. However, in the view of the Majority, the specific pronouncements of U.S. courts relied upon by the Majority in this Decision which have held that Commerce must consider all four factors in the Proposed Regulations, along with all other relevant considerations, are not overturned by Daewoo. In other words, the general statements in Daewoo do not have the effect of overruling the specific decisions of the U.S. courts relating to the actual issue in this case, namely, whether Commerce's application of its specificity test is reasonable and rationally supported.

Our object in this review of the *Determination on Remand* is to ensure that the Panel's instructions were carried out and that Commerce's finding of *de facto* specificity concerning the provincial stumpage programs is not "unsupported by substantial evidence on the record, or otherwise not in accordance with law".[72]

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[71] Cohens v. Virginia (1821) 6 Wheat. 264, 399 per Chief Justice Marshall (USSC), as cited in United States v. Wong Kim Ark (1898) 18 Supreme Court Reporter 456, at 468; see also: Donovan v. Red Star Marine Services, Inc., 739 F.2d 774, 782 (U.S.C.A. Second Cir. 1984); United States v. Alvarez-Porras, 643 F.2d 54, 61 (U.S.C.A. Second Cir. 1981); Communications Workers of America, AFL-CIO v. American T. & T. Co., L.L. Dept., 513 F2d 1024, 1028 (U.S.C.A. Second Cir. 1975); Rollins v. Peterson Builders, Inc., 761 F. Supp. 918, 923 (D.R.I. 1990)

[72] 19 U.S.C. §1516 a (b)(1)(B).

The Panel has reviewed the ***Determination on Remand***, keeping in mind that it is not to substitute its own opinion for that of Commerce, nor to choose between alternative reasonable interpretations of the statute, nor to weigh the evidence in place of Commerce. Nonetheless, we must ensure that there is substantial evidence in support of the conclusions reached. Substantial evidence must be rationally connected to the conclusions drawn therefrom,[73] and consideration must be given to evidence "which fairly detracts from the substantiality of the evidence".[74] Moreover we are limited to upholding the agency determination on the basis articulated by the agency itself. [75] The Panel also must review whether Commerce's analysis and conclusions are in accordance with U.S. law. In reviewing Commerce's specificity analysis of stumpage programs, we will examine each factor considered by Commerce in turn.

1. Number of Actual Users

(a) Number of Users

In its analysis of the number of users in the ***Determination on Remand***, Commerce found that stumpage users constituted one group of two or three industries and that this was too few to be non-specific.[76] Even accepting the Canadian complainants' evidence that stumpage users participate in twenty-seven industries based upon the end-products produced, Commerce found this number to be too

[73] Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 105; 103 S. Ct. 2246, 2256; 76 L. Ed. 2d 437 (1983), as cited in Chemical Mfrs. Ass'n v. USEPA, 870 F.2d 177 (5th Cir. 1989), 199.

[74] Atlantic Sugar Ltd. v. United States, 744 F. 2d 1556, 1562 (Fed. Cir. 1984), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[75] FPC v. Texaco, 417 U.S. 380, 397.

[76] *Determination on Remand*, at 25.

small and the users to comprise too small a portion of the Canadian economy to be non-specific.[77]

As the Panel noted in its Decision, the CIT recognized in Roses I that the factors in the Proposed Regulations cannot be applied mechanically:

> "The appropriateness of such a test is not directly before the court, and such a test may or may not answer the concerns raised here, depending on how it is applied. If the test is applied mechanically, it may fail to address the relevant issues. In deciding whether a countervailable domestic subsidy has been provided ITA must always focus on whether an advantage in international commerce has been bestowed on a discrete class of grantees despite nominal availability, program grouping, or the absolute number of grantee companies or "industries"."[78]

The concerns raised by the CIT in Roses I included not only the size of the recipient sector in relation to the Mexican economy, but also the diversity of enterprises involved, the exercise of discretion by the Mexican government, the effect of the FIRA program on international commerce, and possible artificiality of the program grouping.[79]

The Proposed Regulations themselves recognize that "...the specificity test cannot be reduced to a precise mathematical formula. Instead the Department must exercise judgment and balance the various factors in analysing the facts of a particular case".[80]

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[77] *Determination on Remand*, at 19.

[78] Roses, Inc. v. United States, 743 F. Supp. 870, 881 (CIT 1990).

[79] *Ibid.*, 879-81.

[80] 54 Fed. Reg. 23366, at 23368.

The Court of Appeals for the Federal Circuit held in PPG Industries, Inc. v. United States ("PPG IV") that: "...although the actual number of eligible firms must be considered, it is not controlling. Instead, the actual make-up of the eligible firms must be evaluated. This analysis determines whether those firms comprise a specific industry or group of industries."[81]

In Roses II, the CIT cautioned that "Commerce does not perform a proper *de facto* analysis if it merely looks at the number of companies that receive benefits under the program; the discretionary aspects of the program must be considered from the outset".[82]

When speaking of the application of the specificity test to a program whose users were limited by eligibility requirements, the CIT stated in PPG I that "the test necessarily involves subjective case by case decisions to determine when there is a discrete class of beneficiaries."[83]

Although these cases speak in terms of the application of the entire specificity test, their warning against applying the factors in a mechanical or mathematical fashion is particularly applicable to the analysis of the number of users. As noted by the Binational Panel in Swine V, "to determine that a program is *de facto* specific simply by applying some "mathematical formula" to the number of users of a program", would be to apply a test which has been

[81] 978 F. 2d 1232 (Fed. Cir. 1992), at 1240-41. Although the Court of Appeal was speaking of the analysis in relation to whether or not a foreign government acted to limit the availability of the program, which Commerce says includes an analysis of the number of eligible users, the logic is equally applicable to a consideration of the number of actual users.

[82] Roses, Inc. v. United States, 774 F. Supp. 1376, 1380 (CIT 1991).

[83] PPG Industries, Inc. v. United States, 662 F. Supp. 258, 266. (CIT 1987)

rejected by the U.S. courts.[84]

In analysing the number of actual users in the *Determination on Remand*, Commerce first examined the number of enterprises which actually use the provincial stumpage programs in question. Commerce accepted the record evidence that there were 3,600 enterprises using stumpage, and that, despite the fact that this group was only 0.41% of all enterprises in Canada, "this number does not appear to be so small as to dispositively indicate specificity".[85]

Commerce then went on to analyze the number of industries. Abstracting for the moment from the question of the manner in which Commerce defined the industries in question, at the heart of a consideration of the number of users must be a rational assessment of that number in light of the facts and circumstances of the case.[86] As noted above, Commerce must not apply a mathematical formula or apply the test mechanically. Indeed, Commerce's own counsel stated at the oral hearing that "no country in the world which administers the CVD law, including Canada, applies such fixed and numerical rules in applying the specificity test."[87] Only moments later, however, that same counsel admitted that Commerce's analysis of the number of users in this case "does come down to numbers because again intent is not dispositive."[88] Furthermore, Commerce contends that its finding that users comprise one group of two or three industries alone is sufficient to support a

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[84] Live Swine from Canada, USA-91-1904-04 (June 11, 1993) at 28.

[85] *Determination on Remand*, at 14.

[86] PPG Industries, Inc. v. United States, 662 F. Supp. 258, 266 (CIT 1987).

[87] Transcript (November 19, 1993), Pub. Doc. 331 at 104.

[88] *Ibid*., at 106.

determination of specificity.[89]

Although Commerce denied it was necessary to place the raw number of industries in context by explicitly measuring the group of users against any yardstick, it was mindful of the Panel's comments in this regard and undertook to do so. Commerce's findings are summarized in Table SP-1 and Graph SP-1 of the *Determination on Remand*.[90] Commerce found that users of stumpage in 1990 comprised 0.41% of all Canadian enterprises, between 2.63% and 3.95% of all industries at the 2-digit level of aggregation, 3.14% of all industries at a 4-digit level of aggregation, 3.25% of GDP, 9.18% of manufacturing GDP, and an estimated 9.02% of commodities produced in the Canadian economy.

Without further analysis, Commerce then concluded that these numbers fell "at the too few users end of the specificity spectrum"; they were "small" and therefore "too few" not to be considered specific.[91] In its Brief, Commerce stated that the spectrum ranged between a Cabot-type situation (involving one or two companies producing a single commodity) and the entire economy.[92]

The sum total of the reasoning which Commerce asks the Panel to endorse in this case amounts to the observation that the group of industries in question, the users of stumpage, was "small", or

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[89] "Despite the large absolute number of individual enterprises and individuals using stumpage programs, there is only one group of only two or three industries which use stumpage. As such, Commerce determines that the limited number of industries using stumpage is sufficient in and of itself to render the stumpage program specific on a de facto basis within the meaning of the statute." (*Determination on Remand*, at 25.)

[90] *Determination on Remand*, at 12 - 13.

[91] *Determination on Remand*, at 11 and 25.

[92] Commerce Response Brief, at 18.

"small" compared to the entire economy. Commerce maintains that this is consistent with the purpose of the specificity test, which it claims, following Carlisle,[93] is to avoid the absurd results which would flow from holding generally available benefits such as bridges, highways and capital expenditure tax credits to be countervailable.[94] While the Court in Carlisle held that to countervail generally available benefits would lead to absurd results and could not have been intended by Congress, it did not consider at what point such absurd results would entail, and in fact held to be non-countervailable a tax benefit which could only be used by a subset of the economy. Carlisle does not support the proposition, therefore, that all "small" groups of users are necessarily specific and countervailable. Moreover, while the statute itself provides little guidance on the intended definition of the word "specific", "countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents...",[95] and Carlisle is not the only judicial precedent relevant to this case.[96] Indeed, the Majority has considered all of the components of U.S. law cited in Article 1904:2 of the FTA and come to its conclusions on the basis of those legal authorities.

The view that programs with a limited group of users are not necessarily specific has been expressed by both the Court of International Trade and the Court of Appeals for the Federal Circuit. In Cabot I, the CIT distinguished between so-called

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[93] Carlisle Tire and Rubber Co. v. United States, 564 F.Supp. 834 (CIT 1983).

[94] Transcript (November 19, 1993), Pub. Doc. 331 at 106.

[95] Canada-United States Free Trade Agreement, Article 1904:2.

[96] See, *e.g.*, PPG Industries Inc. v. United States, 662 F. Supp. 258 (CIT 1987); Roses Inc. v. United States, 743 F. Supp. 870 (CIT 1990); and PPG Industries Inc. v. United States, 928 F.2d 1568 (USCA, Fed. Circ. 1991); PPG Industries, Inc. v. Unites States, 978 F.2d 1232 (USCA, Fed. Cir. 1992).

"general benefits" which following Carlisle are not countervailable, and "generally available" benefits which may, or may not, be countervailable depending upon the facts of the case.[97] The CIT reiterated that non-universal programs are not necessarily specific in PPG I ("...the mere fact that a program contains eligibility requirements for participation does not transform the program into one which has provided a countervailable benefit...There may, of course, be situations in which narrowly drawn eligibility requirements *de facto* render the benefit one which is provided to a specific enterprise or industry or group of enterprises or industries.").[98] This view was upheld by the Court of Appeals in PPG IV when it held up Commerce's finding that users of natural gas comprising approximately 3.5% of Mexican companies were not specific: "Because eligibility requirements always serve to limit participation in any given program and may do so indiscriminately, something more must be shown to prove that the program benefits only a specific industry or group of industries."[99]

It is clear, therefore, that the statute, as interpreted by U.S. courts requires more than a mere conclusion that a group of users is "small". Whether or not the Panel, if deciding the issue itself in place of Commerce, would find stumpage users to be specific is not the question before us. The question is whether Commerce has undertaken analysis which rationally supports its conclusion. To require rational analysis is not to impose a "methodology" on Commerce.

Commerce claims that some cases are simply so obvious that no

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[97] 620 F. Supp. 722 (CIT 1985), at 731.

[98] 662 F.Supp. 258, 265 (CIT 1987).

[99] PPG Industries, Inc. v. United States, 978 F.2d 1232, 1240.

reasoned explanation of a finding on the number of users is required.[100] As noted above, however, an agency's analysis and its eventual determination must have a reasoned basis,[101] and the degree of deference owed to Commerce precedents is necessarily dependent upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements."[102] Apart from the fact that acceptance of Commerce's proposition at face value would render any such "obvious" case unreviewable, the history of this case, with diametrically opposed conclusions as to whether stumpage users are too many or too few, indicates quite clearly that this is not one of those obvious cases.[103]

Indeed, while the Panel indicated in the Panel Decision that some scale must be used to place a raw number in context, and identified possible yardsticks which Commerce might consider, the Panel did not absolve Commerce of the need to support rationally the yardstick used in light of the facts in a given case, or to provide cogent analysis of the conclusions it draws from those comparisons. Indeed, Commerce's claim that it articulated various yardsticks in this case "in order for the Panel to better

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[100] *Determination on Remand*, at 10: "When Commerce finds a program to be specific because of too few users or, conversely, non-specific because of many users in a wide variety of industries, it has implicitly compared the number of users to some sort of appropriate standard or benchmark even though that standard or benchmark is not articulated because, based on the facts, the result is, in Commerce's view, incontestable. In Lumber III, where stumpage programs were found to be limited to a group of two or three industries, this benchmark was not articulated, as in many prior determinations, because Commerce found the results to be apparent on their face."

[101] American Lamb Co. v. U.S., 785 F. 2d 994, 1004 (Fed. Cir. 1986).

[102] Ceramica Regiomontana, S.A. v. U.S., 636 F. Supp. 961, 965 (CIT 1986), aff'd 810 F.2d 1137 (Fed. Cir. 1987), citing Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

[103] Cf. Lumber I, 48 Fed. Reg. 24159, at 24167: "Although nominal general availability of a program does not necessarily suffice to avoid its being considered a possible domestic subsidy, the Department further determines that stumpage is used within Canada by several groups of industries...in view of its general availability without governmental limitation and its use by wide-ranging and diverse industries, we determine that stumpage is not provided to a 'specific group of *** industries'." (emphasis added)

understand the reasoning behind [its] decision that the primary timber processing industries represent [too few users]"[104] implies that Commerce recognized that some case-specific reasoning was required.

As Commerce itself has accepted, it would be improper for Commerce to define a numerical "bright line" for use in all cases, whether it be in terms of the number of enterprises, a percentage of GDP, a number of commodities or end-products sold, *etc.*, and to determine a number to be "too big" or "too small" in that mechanical way.[105] As the courts have said repeatedly, Commerce must analyze the evidence on a case by case basis, and in doing so it must provide a basis for the conclusions it draws. Yet Commerce has merely concluded in this case that the users of stumpage are "small" either in absolute terms (two or three industries) or as compared to the entire economy.

The Panel notes, however, the fact that U.S. courts have stated that groups of users are not specific merely because they are limited.[106] Both Commerce and the Panel must accept this. The observation that a group of users is "small" is therefore not legally sufficient to support a finding of specificity. U.S. courts have said that even "small" groups can be non-specific, and they have also held that administrative agencies must rationally articulate their reasoning in coming to legal conclusions. Not only has Commerce engaged in conclusory analysis, but its conclusion is not legally sufficient to support the ultimate

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[104] *Determination on Remand*, at 11.

[105] Transcript (November 19, 1993), Pub. Doc. 331 at 104.

[106] *e.g.* PPG Industries v. United States, 928 F.2d 1568 (USCA, Fed. Cir. 1991); Roses, Inc. v United States, 743 F. Supp 870 (CIT 1990).

finding of specificity.

It is true that such explicit reasoning has not always been demanded in "obvious" cases, such as Cabot. However, Commerce itself has found in previous applications of the specificity test to the same group of users[107] that the group of users in question in this case is "too big" (the Majority notes that Commerce based its finding of non-specificity in 1983 not only on the nominal general availability of the program, but also on a further determination that "stumpage is used within Canada by several groups of industries").[108] In light of such inconsistent determinations on essentially the same facts, the Majority cannot defer to Commerce's latest conclusion when it is unsupported by articulated reasoning. That it is difficult to articulate why a group of users may be "too many" or "too few" in a non-obvious case such as this is recognized by the Panel. No doubt that is one of the reasons why Congress entrusted the question to an expert government agency. However, this difficulty does not absolve Commerce from carrying out such an analysis.

(b) Industry Grouping

The Canadian complainants have complained not only that Commerce's analysis of the number of users of stumpage was deficient, but that the manner in which it aggregated the enterprises using stumpage into "industries" was deficient as well.[109] Commerce did not accept that stumpage users were part of a broad range of twenty-seven different industries. It had

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[107] *Final Determination*, at 22585.

[108] *Certain Softwood Lumber Products from Canada*, 48 Fed. Reg. 24159, at 24167.

[109] Canadian Complainants' Brief, at B-55 to B-65.

attempted to verify the end-products survey upon which the Canadians had partially relied in coming to that number, and found that it could not verify that stumpage users in fact produced all products listed in the survey.[110] Furthermore, Commerce claimed that the survey methodology was different from the methodology used by Statistics Canada when assigning establishments to industries, and so could not be relied upon.[111] Commerce also argued that, even taken at face value, the end-products survey listed both intermediate and finished goods and so would tend to overcount the number of industries actually participating[112]. At a consistent level of aggregation, there would only be two or three industries. Commerce found further support for its own grouping in the "citations of authoritative sources Commerce placed on the record regarding the primary timber processing industries in the *Preliminary* and *Final Determinations*".[113]

It is not the place of this Panel to substitute its own opinion concerning the reliability of a survey for that of the Commerce officers who attempted to verify its findings. The Panel accepts, therefore, that fewer end-products were produced by some producers than was indicated on the survey. Since the industrial categories even at the 4-digit SIC level often include more than one end-product, however, it is not clear to what extent this deficiency affected the evidence that primary wood processors participate in twenty-seven industries when classified at that level. Furthermore, the end product surveys often indicated multiple producers of the products in question, so the impact of

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[110] *Determination on Remand*, at 16; *Final Determination*, at 22584.

[111] *Determination on Remand*, at 16-19.

[112] *Determination on Remand*, at 21-23.

[113] *Determination on Remand*, at 14.

inaccurate responses by some producers is unclear. Even if the SIC were not used as the appropriate industry definition, it is not clear that the diversity of end-products produced was significantly less than that claimed by the Canadians.

The fact that Statistics Canada assigns establishments to unique industrial categories for the purpose of avoiding double-counting when measuring production in the Canadian economy, does not mean that this is reasonable for counting industries in a specificity analysis. For an SIC classification to exist for a widget, at least one establishment must have produced widgets as its primary activity. It does not necessarily follow, however, that an enterprise (which is not necessarily the same thing as an establishment in any event) producing widgets other than as its primary activity is any less engaged in the widget industry. Provided the enterprise is in the business of selling widgets (not of producing them as inputs to its own production of some other good), one would logically include it as a participant in the industry that produces widgets. The discrepancy in the methodologies does not seem to this Panel to lead logically or necessarily to a problem of overcounting for the purposes of specificity.

Finally, Commerce criticizes the fact that the end-products surveys listed both intermediate products and finished goods, saying that this could result in double counting the same wood fibre as it passes through the manufacturing process. According to Commerce, industries are properly analyzed at a consistent level of aggregation and in this case the appropriate level of aggregation is the intermediate good stage which benefits from the stumpage program, ***i.e.***, primary timber processing industries.[114]

[114] *Determination on Remand*, at 23.

With respect, evidence that lumber producers also produce finished goods would appear to indicate that perhaps the classification of all sawmill operators as a single industry is misguided. If the primary business purpose of a sawmill operator is in fact the production of finished goods, then classifying the mill operator as a lumber producer is confusing a production process with the end result. The fact that some stumpage holders may in fact be in the business of selling lumber and pulp (intermediate goods), while others may be in the business of selling doorframes, boxes, pallets and paper products (finished goods which are made from lumber and pulp) is logically indicative not of double counting, but of industrial diversity among stumpage holders. An integrated producer may well sell some of its lumber commercially and use some of its lumber to produce its own finished goods. Including this producer in both the intermediate and the finished goods industries does not necessarily double count the wood fibre.

In the ***Preliminary Determination*** Commerce quoted excerpts from various Canadian studies as external support for its grouping, to which it again refers in the ***Determination on Remand***.[115] An examination of these quotes reveals that there is no consistency to the use of these words, and the group of firms linked by their use of forest resources is variously called a single industry composed of sectors, a sector composed of several industries, and a sector composed of sub-sectors, themselves composed of several industries.[116] Commerce also refers to a study discussed in the ***Final Determination*** as support for the use of its definition of the primary timber processing industries. The discussion in the ***Final***

[115] *Determination on Remand*, at 14.

[116] *Preliminary Determination*, at 8803.

Determination reveals, however, that the report in question dealt with primary manufacturing of forest products under six different headings. Moreover, it dealt with a program aimed at encouraging industrial diversity in the sector.[117]

All of which goes to show that the attribution of the label "industry" to any set of enterprises is not necessarily probative of whether or not that set of enterprises forms an industry for the purposes of the specificity test. The fact that forest management studies placed a label on the users of forestry resources does not indicate that those users are too few for non-specificity, any more than the use of the label "agricultural industries" in studies on the future of farming would indicate specificity in that case.

Indeed, Commerce itself has pointed out that the use of the words "primary timber processing industries" is merely a label which Commerce has applied for convenience to denote the group of users of stumpage.[118] As the federal Court of Appeals pointed out in PPG III, mere identification of the group of users of a program does not render that group "specific".[119] Thus, neither the label applied to program users by Commerce, nor descriptions used by Canadian government studies are determinative of the appropriate definition of an industry for the purposes of the specificity test.

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[117] Small Business Forest Enterprise Program, B.C. Verification Report, Exhibit S-11, Pub. Doc. 474 discussed at 22583 of the *Final Determination*.

[118] *Determination on Remand*, at 20. The Panel notes that Commerce resisted using such a use-based definition in PPG III when it rejected petitioner's suggestion that "energy-intensive" industries formed the operative definition: PPG Industries v. United States, 928 F.2d 1568 (USCA, Fed. Cir., 1991), at 1579: "...[I]t also appears quite clear from ITA's prior determinations that ITA does not recognize "energy-intensive" as a category of "specific" industries. In the ammonia and cement investigations, the subsidized resources are reported to have accounted for *eighty* percent and *fifty* percent of cost, respectively."

[119] PPG III, *supra*, at 1577.

(c) Commerce precedent

As noted above, one factor which mitigates in favour of increased deference toward an agency finding is its consistency with other agency pronouncements.[120] The specificity test has been part of U.S. CVD law for many years and it is instructive to look to other cases to see whether the number of users determined to be "too few" in this case, and the manner in which that number was determined, are unusual. It should be noted at this point that the *de facto* specificity test is, by definition, a fact based test, and each case will therefore be unique in that sense. This does not, however, render each unique fact situation a case of "first impression". Commerce has been called upon many times since 1988 to apply the very test which is before us in this case. While a lack of analogous precedent is obviously not in itself controlling as to whether specificity exists in this case, it is relevant in reviewing a determination which is unsupported by other cogent, rational explanations, as the Majority finds Commerce's analysis of this factor to be.

To this end, Commerce has pointed to five cases which show that "the level of aggregation typically examined by Commerce is closer to the primary timber processor level than the four-digit CSIC level".[121] The cases cited, however, do not appear to support this conclusion.

The group of users found to be specific in Certain Steel Products from Italy[122] was comprised of between two and five

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[120] Ceramica Regiomontana, S.A. v. U.S., 636 F. Supp 961, 965 (CIT 1986), aff'd 810 F.2d 1137 (Fed. Cir. 1987).

[121] *Determination on Remand*, at 21, footnote 34.

[122] 58 Fed. Reg. 37327.

companies (depending upon the corporate organization at the time of the program under review). The specificity determinations hinged upon the fact that debts had been forgiven, and equity provided on non-commercial terms, to these specific enterprises; the number of industries and the appropriate level of aggregation were not considered. Moreover, even if the relative specificity of the number of industries were considered, it appears that the companies in question manufactured products which would have fallen into two 3-digit SIC categories: primary steel, and steel pipe and tubes.[123] This case indicates that some rather important segments of industrial economies may be considered to be countervailable on the basis of the extremely small number of actual enterprises using the program, but does not support countervailing a large and diversified sector of the economy in which thousands of individual enterprises use the program. Neither do the other four cases cited by Commerce as illustrative of its typical practice assist its position in this case.

Both of the programs found to be countervailable in Antifriction Bearings from Singapore[124] were countervailable because they were export subsidies; the specificity test does not apply to export subsidies.[125] The countervailable programs in Industrial Phosphoric Acid from Israel[126] were either export subsidies or provided to a specific region of the country[127] or, in the case of

[123] The Panel has previously agreed that SIC codes need not be used to define industries, and their use for illustrative purposes in this Decision is not intended to imply that SIC classifications of industries are dispositive or necessary. The CSIC is used here only as illustrative scale against which to gauge industry definitions in various cases.

[124] 54 Fed. Reg. 19125.

[125] Proposed Regulations, paragraph 355.43(a).

[126] 52 Fed. Reg. 25,447.

[127] Proposed Regulations, paragraph 355.43(b)(3).

the provision of research and development grants to industry in general, were found to be countervailable without any specificity analysis at all. Similarly, the programs involved in Deformed Steel Concrete Reinforcing Bars from Peru[128] were either export subsidies, confined to specific regions, or - in the case of an equity infusion - provided to a single company. Finally, in Carbon Steel Wire Rod from Saudi Arabia[129], Commerce determined that a loan program which had benefited producers of what appears to be a huge variety of products over the years, had in fact only provided loans to three companies in the previous eight years. Commerce found that "despite the number of products which have received PIF financing, these loans are...provided to a specific group of enterprises".[130]

In sum, the findings in these cases either hinged on the programs being export subsidies, regional subsidies, or provided to a specific enterprise or specific group of enterprises. They tell us nothing about the level of industry aggregation typically examined by Commerce, nor when a group of industries will be "too few" in the absence of such extreme facts regarding the number of enterprises using the program. In fact, counsel for Commerce could refer the Panel to no other case in which Commerce has found a group of users spanning industries covering the equivalent of three 2-digit SIC codes to be "too few".[131] We are unable to find,

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[128] 50 Fed. Reg. 48819.

[129] 51 Fed. Reg 4206.

[130] *Ibid.*, at 4208.

[131] Transcript (November 19, 1993), Pub. Doc. 331 at 99-100. In its Response Brief (at 9), Commerce refers the Panel to the Swine V case (Live Swine from Canada, USA-91-1904-04 (July 11, 1993)), in which a panel ultimately affirmed the determination of specificity for about 50,000 producers of hogs. The Panel notes, however, that these enterprises were all engaged in the production of a single commodity. Furthermore, a different Panel found the record evidence concerning the same program for a different time period was not sufficient to support a determination of specificity. (Live Swine from Canada ("Swine IV"), USA-91-1904-03 (October 30, 1992)).

therefore, that Commerce precedent provides support for either its finding of "too few" or its industry grouping in this case.

(d) Number of Actual Users: Conclusion

In the Majority's view, Commerce's analysis of the record evidence regarding the number of industries using stumpage programs is not in accordance with law. Its analysis of the record evidence in deriving the number of industries represented by enterprises using stumpage is circular, depending upon the identification and labelling of the group of stumpage users rather than upon a reasoned analysis of the actual businesses in which those users were engaged. Dispositive for the Majority, however, is our conclusion that the lack of reasoned analysis of the number of industrial users in finding them to be "too few" reveals a mechanical and arbitrary exercise which is not supportable under U.S. law.

2. Dominant or Disproportionate Use

Commerce did not consider evidence relating to dominant or disproportionate use or the lack thereof in the *Preliminary Determination* or *Final Determination*, taking the view that such evidence was of "little, if any, guidance".[132] The Panel instructed Commerce to consider such evidence and we find that Commerce has done that.

Commerce did so in two different ways. The first way was to analyze whether the "primary timber processing industries", a label applied by Commerce to the users of stumpage, were the dominant

[132] *Preliminary Determination*, at 8804.

users of stumpage. The Panel was not surprised by the result: between 84.6% and 99.8% of timber harvested from provincial stumpage is used by the primary timber processing industries (*i.e.*, the users of stumpage). In fact, given the definition of the group of industries in question, the only surprise is that the group comprising all of the users of stumpage was not found to use 100% of the stumpage. The circularity of this analysis was initially clear to Commerce, who went on to look within the group of potential users to see if the producers of the product under investigation, softwood lumber, were dominant or disproportionate beneficiaries of the program.

During oral argument, however, counsel for the Coalition maintained that the relevant comparison is of the group of actual beneficiaries to the entire economy, and the fact that all of the benefits were used by those that could use them was indicative of specificity.[133] Commerce too in its *Determination on Remand* concluded that the fact that the users of stumpage were the users of almost 100% of the stumpage meant that the forest products industries received disproportionate benefits and was indicative of specificity.[134] Commerce had previously stated in the *Determination on Remand*, however, that "there is little to be learned from such an analysis because, as the universe of users is limited, the benefits cannot but flow to them in high percentages."[135] Further, cases cited by the Coalition in support of its comparison of the group of users to the entire economy, Certain Steel Products from Belgium,[136] Certain Steel Products from

[133] Transcript (November 19, 1993), Pub. Doc. 331 at 183.

[134] *Determination on Remand*, at 41.

[135] *Determination on Remand*, at 27.

[136] 58 Fed. Reg. 37273.

France,[137] and Certain Steel Products from Korea,[138] dealt with programs such as the provision of loans or access to direct foreign loans which potentially could have been used by any firm in the economy. Commerce explicitly justified its use of the entire economy in Certain Steel Products from Korea on the basis that this represented, in that case, the universe of potential users.[139] Similarly, in Certain Steel Products from Belgium, Commerce states: "In prior investigations, the Department has considered whether respondent companies received disproportionate benefits under a program in order to determine *de facto* specificity... In those investigations, we analyzed whether respondents received a disproportionate share of benefits by comparing their share of benefits to the share of benefits provided to all other users and recipients of the program in question."[140]

It is clear, therefore, that the cases detract from the Coalition's argument. Moreover, we find that Commerce's assessment of the futility of comparing an inherently limited group of stumpage users to the entire economy was reasonable.

Commerce went on to consider evidence of dominant or disproportionate user within the universe of stumpage users and examined evidence relating to whether or not sawmills were dominant or disproportionate beneficiaries. The Majority finds that Commerce has again defined the subset in relation to the process, rather than the actual business of the recipients and presented no

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[137] 58 Fed. Reg. 37304.

[138] 58 Fed. Reg. 37338.

[139] *Ibid*., at 37343: "...given the broad, nationwide nature of the program, share of GDP is an appropriate point of comparison."

[140] 58 Fed. Reg. 37273, 37280.

record evidence in support of this definition. The Majority also finds that the fact that 74% of all softwood timber harvested in B.C., Alberta, Ontario and Québec passed through a sawmill is not probative of dominant use of stumpage by lumber producers given the record evidence that sawmilling is a necessary first step in the production of many sawn wood products, not just softwood lumber, as well as the record evidence showing that much of the wood fibre which initially passes through a sawmill ends up in the pulp and paper sector.[141]

Commerce compared the total cubic meters of softwood lumber production with the total cubic meter harvest of softwood timber, and found that lumber production accounted for between 27% and 48% in the four provinces under consideration, and 37.22% overall.[142] According to Commerce, "as 37.61 (sic) percent greatly exceeds the "equivalent percentages", there is clear disproportionate and dominant use of softwood timber by the softwood industry".[143]

Commerce found fault with the manner in which wood fibre statistics were gathered by the Canadian government, but found that even accepting the statistics at face value, the fact that end products produced by sawmills accounted for about 28% of the wood fibre in the softwood harvest, compared to about 25% each for paper and pulp, was indicative of dominant use.[144]

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[141] The Majority wishes to make it clear that the lumber in question is, according to the record, often incorporated into other products produced by the log processor. The fact that the producer of boxes or pallets first sawed the logs does not mean that the producer of boxes or pallets is a producer of lumber. Such a proposition does not frustrate the operation of the statute by making any product which is incorporated into other products non-specific, since the facts in other cases might well establish dominant or disproportionate user, for example.

[142] *Determination on Remand*, at 29.

[143] *Determination on Remand*, at 30, footnote 47.

[144] *Determination on Remand*, at 37.

In our view, it is unreasonable for Commerce to ignore the fact that, while actual use by sawmills for the production of lumber is between 28% and 37%, actual use by the other "industry" in the group, pulp and paper producers, is in the range of 40% to 50%.[145] This fact indicates that sawmills, even if considered to be stand-alone beneficiaries, are neither the largest users of softwood stumpage, nor disproportionate users.

Furthermore, while Commerce refers to Certain Steel Products from Belgium[146] for the proposition that use in proportions smaller than 28% have been found to be disproportionate, it does not refer to the fact that hog growers receiving 52% of the benefits of a program in the Swine IV case were nonetheless non-specific.[147] As stated by Nies C.J. in PPG III: "when some members of Congress in 1984 sought to make natural resource subsidies countervailable *per se* where an industry was a disproportionate user, the legislation failed to be enacted."[148] As Michel J. also pointed out in the same case, there is a difference between *per se* rules and "fact-based discretionary rules".[149] In the Majority's view, Commerce's numerical analysis of dominant and disproportionate use, without more, comes close to equating disproportionate use and countervailability in the *per se* manner rejected by Congress in 1984, and the federal Court of Appeal in 1991.

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[145]Commerce notes that if the 37% figure for the softwood lumber share of wood fibre use is correct, then the shares for other uses must be correspondingly reduced. Even assuming the entire difference comes off the pulp and paper categories, these operations use about 40% of the harvest.

[146] 58 Fed. Reg. 37273.

[147] Live Swine from Canada, USA-91-1904-03 (October 30, 1992).

[148] PPG Industries, Inc. v. U.S., 928 F. 2d 1568, 1576 (USCA, Fed. Cir. 1991). See also *ibid.*, at 1579: "Disproportionate use is, under the ITA's specificity standard, a factor to be considered but is not in and of itself controlling".

[149] *Ibid.*, at 1584.

The Majority finds that while Commerce has looked at the record evidence on dominant and disproportionate use, it has not done so in a reasonable manner. Commerce has accepted that the users of stumpage are inherently limited, and has indeed found as an empirical fact that stumpage holders use virtually 100% of stumpage. To say that this supports a finding of specificity is to go full circle from the pre-Cabot stance that a natural limitation of program users, without more, rendered the program *per se* non-specific, to a stance that such a natural limitation actually supports a finding of specificity. This, it would seem, conflicts with Congress's rejection of a proposed amendment to render *per se* countervailable all natural resource subsidies with dominant users, regardless of specificity[150].

Looking within the universe of potential users to see if the subset including the products under investigation are dominant or disproportionate users of the program, the statistics cited by Commerce do not reasonably support the conclusion that softwood lumber producers are the dominant or disproportionate beneficiaries of the program. Moreover, Commerce has failed to provide any reasoned analysis, as required by U.S. courts, as to why the numbers it cited are relevant to a finding of specificity in this case, much less dispositive.[151]

3. Government Discretion

Commerce found in the *Determination on Remand* that there was no evidence that government discretion was exercised in favour of

[150] PPG III, 928 F.2d 1568 (USCA, Fec. Cir. 1991), at 1576.

[151] See also PPG Industries, Inc. v. U.S., 978 F.2d 1232 (Fed. Cir. 1992), at 1241.

one class of users over another.[152] Given the evidence on the record in this case, we find this conclusion reasonable.

There is no explicit mention of the weight assigned by Commerce to its finding that discretion does not influence the pattern of stumpage use. Rather, considering both government discretion and government action, Commerce found that they did not "independently yield sufficient credible evidence to conclude that stumpage is "specific", although the evidence on the record would tend to support rather than detract from a finding of specificity".[153]

Although it could be argued that a finding that there was no evidence of the exercise of government discretion is indicative, if anything, of a finding of non-specificity, it could also reasonably be argued that such a finding is simply neutral in its implications in this case in light of the evidence on government action (see discussion below). Insofar as we find that the evidence regarding government action can reasonably be said to be mildly supportive of specificity, and the evidence of a lack of government discretion can, at most, be said to be neutral as regards the specificity of the actual users of the program, Commerce's consideration of the evidence regarding these two factors is not unreasonable.

4. <u>Government Action</u>

Commerce considered the various statutory and regulatory provisions limiting the use of stumpage to the primary timber processing industries to be evidence of government limitation, but

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[152] *Determination on Remand*, at 42.

[153] *Determination on Remand*, at 48.

not dispositive of the issue of specificity.[154] The fact that government legislation restricted stumpage users to those who process logs and, in some cases, those who supply such processors, served "only to supplement and complement the stronger indicia of specificity resulting from analyses of the number of users and disproportionate use factors, and to weaken Canadian Complainants' claim that the inherent characteristics of stumpage are the sole determinant of the pattern of use".[155]

Commerce appears to agree that the inherent characteristics of stumpage limit the universe of stumpage users, but says that this fact is "undercut" by the government action embodied in the eligibility requirements for the various provincial stumpage programs.[156] The Majority finds that the legislative provisions cited by Commerce do indicate government action, to limit the availability of the program but do not indicate whether that action limited or in fact broadened the range of uses to which timber is put. Commerce says that "the combination of the types of legal limitation mentioned above may have resulted in the use of the vast majority of provincial stumpage by sawmills",[157] but beyond stating that the vast majority of the timber supplied to Québec sawmills comes from Crown lands, makes no finding as to whether or not such result actually occurred.[158] On the other hand, Canadian complainants have placed evidence on the record to show that the use pattern of timber in Canada is similar to that in other industrial countries, which might be taken to indicate that uses

[154] *Determination on Remand*, at 42 - 46.

[155] *Determination on Remand*, at 45-6.

[156] *Determination on Remand*, at 45.

[157] *Determination on Remand*, at 45 (emphasis added).

[158] *Determination on Remand*, at 45.

were not actually limited.[159]

It is not clear that the mere fact of government action limiting stumpage availability necessarily means that the range of uses is limited beyond the range which the inherent characteristics of the resource would permit. One can only do two things with a log: sell it or process it. The government action in question in Ontario permits both sellers of logs and those who process them to have access to the resource. According to Commerce' analysis, the legislation in Québec and Alberta contains processing requirements, but does not direct that any particular type of processing take place. Similarly, B.C. has processing requirements, although there is some indication that sawmills may be given preference over pulp mills in their access to stumpage. With the exception of B.C., therefore, the legislation cited would not appear to limit the pattern of timber use beyond the range which its inherent characteristics would permit. Indeed, to the extent that the government action concerned encourages wood processing rather than log exporting, the range of uses to which the timber is put might actually be expanded from that which might otherwise occur.

While the legislative provisions cited by Commerce are evidence of government action, it is not clear that this action acts to limit the range of uses to which stumpage is available in three of the four stumpage programs under investigation. Thus, while there is some evidence of government action which "acts to limit the availability of a program" in the sense that log sellers and/or exports are excluded, this fact alone does not mean that the range of uses to which stumpage is actually put is limited beyond the range permitted by its inherent characteristics.

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[159] Specificity Memorandum, Pub. Doc. 217, at 27 - 30. Panel Decision, at 41.

Nonetheless, the factor in the Proposed Regulations is the "extent to which government action acts to limit the availability of a program", and the Panel finds that the government action in question can reasonably be said to have limited the degree to which stumpage is available to log sellers and/or exporters, a conclusion which may be indicative of specificity. Commerce has found that this factor alone is not sufficient to support a finding of specificity, a conclusion which in the Majority's view is reasonable in the circumstances.

5. Inherent Characteristics

The Panel directed Commerce to consider all relevant factors in its specificity analysis of provincial stumpage programs; inherent characteristics was explicitly stated to be relevant to the analysis.[160] In the *Determination on Remand*, however, Commerce states that inherent characteristics speak only to the reason why a group of users might be limited and is not, therefore, relevant to the analysis.[161] Commerce therefore refused to accord inherent characteristics any weight or, in the alternative, accorded it very little weight in light of its finding that government action also limited the group of actual users of the stumpage programs. The reason why it carries such little weight is, according to Commerce, that the "underlying rationales, motives, or market forces which result in a limited group of users" is irrelevant to the question of whether it is specific. "A limited group is a limited group, whatever the reason...".[162]

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[160] Panel Decision, at 41.

[161] *Determination on Remand*, at 46.

[162] *Determination on Remand*, at 46 - 47.

Commerce does agree, however, that government action is a factor relevant to the specificity analysis, and that government action is the "flip-side" of inherent characteristics.[163] It therefore does not ring true for Commerce to claim that the reason why a group is limited is entirely irrelevant to the analysis. If the limitation of a group of actual users through express government action or government discretion can be indicative of specificity, then it logically follows that the limitation of a group of actual users through no fault of the government, *i.e.* due to the inherent characteristics of the program, might be indicative of non-specificity.

Although we feel that Commerce's treatment of inherent characteristics was not in keeping with the spirit of the instructions in the Panel Decision, in the end Commerce has concluded that the fact that the potential uses of stumpage are limited by its inherent characteristics indicates non-specificity, albeit with "very little weight". The Panel has already agreed with Commerce that this factor is not dispositive.[164] Furthermore, since it has been Commerce's practice to compare a sub-set of actual users to the universe of potential users in its analysis of dominant or disproportionate use, inherent characteristics has also essentially been considered as part of that analysis. In light of the Majority's conclusions on Commerce's application of the four factors in the Proposed Regulations to provincial stumpage programs, we will not disturb Commerce's treatment of inherent characteristics.

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[163] Commerce Response Brief, at 16, footnote 21: "Because inherent characteristics is merely the flip-side of government limitation, the two ought to be considered as a single factor...".

[164] Panel Decision, at 40.

6. Stumpage Specificity Conclusion

The Majority of the Panel has found that the analysis by Commerce of the evidence regarding specificity of provincial stumpage programs is legally flawed. The complete lack of reasoned analysis regarding whether or not the number of industries using stumpage is too few, and the mechanical, mathematical way in which Commerce decided that the users of stumpage are too few to be non-specific, is contrary to law and contrary to precedent. Similarly, the analysis of dominant or disproportionate use which compares all stumpage users to the entire economy, rather than comparing a subset including softwood lumber producers to the universe of potential users, is either irrelevant or perverse. The use of the statistics relating to whether sawmills account for a dominant or disproportionate share of stumpage use is similarly mechanistic, conclusory or, in some cases, misleading. Government action and discretion alone are not sufficient to support a finding of specificity. While the inherent characteristics factor has not really been analyzed by Commerce separately, to the extent that it has been considered, Commerce concedes that it weighs slightly in favour of non-specificity.

While we acknowledge that it is not the function of this Panel to reconsider the evidence on the record and come to a conclusion on specificity *de novo*, this is the second occasion on which Commerce has failed to provide a rational explanation of how the evidence before it leads logically to the conclusion that the provincial stumpage programs are specific under U.S. law. Its examination of the evidence on this occasion, while not according to law, has been detailed, and in the Majority's view there is little to gain from putting the parties to the time and expense of another remand. Since Commerce has been unable to provide a

rational legal basis for a finding that the provincial stumpage programs are specific and in light of the efficiency with which the Panel review is intended to resolve these disputes, we therefore remand this issue to Commerce for a determination that the provincial stumpage programs are not provided to a specific enterprise or industry, or group of enterprises or industries.

B. PREFERENTIALITY

The Panel, in its first Decision, found that Commerce had made a fundamental legal mistake in considering itself precluded from undertaking an analysis of whether Canadian provincial stumpage programs are market-distorting.[165] As we noted, the economic policy underlying countervailing duty law presumes that subsidies distort normal competitive markets.[166] There may of course be circumstances where this presumption of market distortion will not apply, either because there is no relevant competitive market against which a distortion can be measured (the case of non-market economies) or because of the special characteristic(s) of the market in question. In these exceptional cases, the economic theory that underlies countervailability is inoperable, and therefore, as a matter of U.S. law, no countervailable subsidy exists.

From the outset the Canadian Complainants have maintained that the provincial stumpage markets constitute one of these exceptional cases. They rely on classical Ricardian rent theory, which applies with respect to natural resources for which there is a basically fixed supply and strictly limited alternative uses. According to rent theory, there will be a range of prices for a resource (the "normal range") over which output will remain constant. Within the normal range, a reduction in price will not increase use of the resource.

There are two cases where this rule will not apply because prices fall outside the normal range. The first is where the government actually pays stumpage users to harvest timber that

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[165] Panel Decision, at 52.

[166] Carbon Steel Wire Rod from Poland 48 Fed. Reg. 19,374 (1984), upheld in Georgetown Steel Corp. v. U.S., 801 F. 2d 1308 (Fed. Cir. 1986).

would be otherwise uneconomical to harvest, *i.e.* where stumpage fees are negative. The second case is where the price for the resource falls into the "excessive range", *i.e.* is so high that it pushes the marginal cost of harvesting a tree above marginal revenue. In this latter case, the resource will be under utilized, and reducing the fee to within the normal range will result in some increase in output, which will move closer to the competitive norm where all profitable trees are harvested.

The Panel Decision noted that Commerce's *Final Determination* contained "no substantial analytical rebuttal" of the economic rent theory put forward by the Canadian Complainants.[167] In particular, Commerce had misunderstood the presentation of the theory by Dr. Nordhaus, the Canadian expert, both in his written studies and in testimony. For instance, contrary to Commerce's understanding, Dr. Nordhaus had not asserted that completely fixed supply was a crucial assumption of rent theory, nor that prices would never affect output. In fact, Dr. Nordhaus' explanation of the existence of prices in the excessive range illustrated that there would be some circumstances where these assumptions would not be fully applicable. The crucial fact, however, was that even in these circumstances output would not be increased beyond the competitive market norm--instead it would fall below that norm.

Finally, in the first Panel Decision, we noted that Commerce had not considered an empirical study undertaken by Drs. Nordhaus and Litan of the effects of increased stumpage charges on the output of timber in British Columbia. This study employed regression analysis to determine these effects, and found that, in fact these increases did not lead to reduced output.

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[167] Panel Decision at 58.

The *Determination on Remand* indicates that Commerce has now turned its mind to the threshold issue of market distortion, and has reviewed empirical evidence that it failed to consider previously. In the end, Commerce has determined that the Canadian provincial stumpage programs result in a distortion of normal competitive markets. Pursuant to the standard of review articulated above, and also in the Panel Decision, this Panel must limit its review to a consideration of whether Commerce's finding of market distortion is supported by "substantial evidence on the record." In performing this task, the Panel must not engage in a *de novo* review of the evidence itself or simply replace the economic theory chosen by Commerce with its own. We must display appropriate deference to the agency's expertise. But the Panel is nevertheless charged with ensuring that the agency's decision is not arbitrary, capricious, unprincipled, or results-driven. While deferential to the role of expertise in the gathering, analysis and weighing of economic evidence, it is the Majority's view that we are bound to ensure that the evidence does, indeed, provide a rational basis for Commerce's finding of market distortion. As the Panel noted in its first decision, this cannot but involve some examination of the evidence itself.[168]

An additional issue that must now be considered, however, is whether the recent Federal Circuit decision in Daewoo -- decided after the Panel's first Decision -- alters or develops the law in such a way as to affect our interpretation of the market distortion requirement established in Wire Rod from Poland and affirmed by the Federal Circuit in Georgetown Steel.

The Minority Opinion in this present judgment takes the position that, after Daewoo, the Panel must now defer to Commerce's

[168] Panel Decision, at 58.

reading of Wire Rod From Poland and Georgetown Steel as applicable only to non-market economies and therefore excuse Commerce from any requirement of showing market distortion as a pre-condition for a finding of countervailability with respect to Canadian provincial stumpage programs. In the words of the Minority, Daewoo "trumps"[169] the Panel's instruction on market distortion in the Panel Decision. Indeed, the differences between the Majority and Minority on market distortion largely boil down to whether Daewoo "trumps" the Panel's previous findings, for the Minority notes that -- but for Daewoo -- "we would concur in most of the Majority's reasoning on stumpage preferentiality in the present opinion."[170].

As noted in our discussion of the Standard of Review above, the primary legal issue in Daewoo was the interpretation of a particular section of the U.S. Anti-Dumping Law. The reasons given by the Federal Circuit in Daewoo focus almost entirely on whether the ITA's interpretation of 1677a(d)(1)(C) of the Anti-Dumping Law was "reasonable".

With respect to the degree of deference owed the agency in its interpretation of the statute, as we note above, the Federal Circuit did not appear to understand itself to be breaking new ground. Instead the Federal Circuit simply summarized or restated the appropriate standard of deference that "[We] have long recognized"[171] and that the Federal Circuit "has...indicated"[172] in past decisions. After this summary restatement of the existing standard of deference, the Daewoo Court went on to make a detailed

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[169] Minority Opinion, at 37.

[170] *Ibid.*

[171] Daewoo, at *15.

[172] Daewoo, at *16.

analysis of whether, in fact, the ITA's interpretation of 1677a(d)(1)(C) was reasonable.

The Federal Circuit examined in depth the exact wording of the provision at issue, its interpretation in previous cases, and its legislative history. Indeed, the level of rigour and detail involved in the Federal Circuit's review of the ITA's reading of 1677a(d)(1)(C) in itself reveals that the Federal Circuit was certainly not applying in this case some new, relaxed standard of almost total deference to agency discretion.

After thus engaging in a delicate and multi-facetted exercise of statutory interpretation, the Federal Circuit came to the conclusion that, given the legislative history and the case law with respect to 1677a(d)(1)(C), "we cannot say that ITA's interpretation of the statute contravenes the statute."[173]

After reaching this conclusion of law, the Federal Circuit remarked that in arriving at this result it was "also cognizant of the onerous burden entailed by the Court of International Trade's mandate."[174] If the statute were interpreted as requiring the ITA to examine tax pass-through, this would necessarily entail the employment of complex econometric analysis. Conducting such an analysis, the Federal Circuit noted, would impose a further considerable burden on the agency, and in any case event he best econometric analysis would not be highly probative with respect to tax incidence, given the inherent methodological limits of regression analysis with respect to tax incidence. The language of the Daewoo Court -- "we are also cognizant of the onerous burden"

[173] Daewoo, at *23.

[174] Daewoo, at *24 (emphasis added).

-- clearly indicates that the burden on the agency in undertaking complex economic analysis is an additional factor to be taken into account in examining whether the agency's interpretation of the statute is reasonable -- *i.e.* a consideration to be weighted along with the central elements of statutory interpretation, including construction of the language of the provision, consideration of precedents, and of legislative history. Nowhere does the Federal Circuit come close to suggesting that the avoidance of such a burden should in itself be a decisive or dispositive factor in interpreting or applying U.S. trade statutes.

Moreover, in considering the factor of burden on the agency, the Daewoo Court did not leave matters at a general, catch-all statement that economic analysis is burdensome. Instead, the Court considered the costs vs. the evidentiary benefits of requiring the Agency to undertake the particular type of economic analysis arguably pertinent to the statutory provision in question. The conclusion of the Federal Circuit with respect to the burden factor is, in fact, based on this cost-benefit analysis, not some general principle or rule that the burden of econometric analysis is always undue. The Federal Circuit ultimately found that "we cannot conclude that the burden is worth undertaking because of more soundly based results."[175] This is a clear indication of the Federal Circuit's view that the burden factor is to be applied through a case-by-case cost/benefit analysis.

If Daewoo is relevant at all to the issue of whether U.S. subsidies law requires as a legal pre-condition for countervailability the existence of market distortion, it is relevant only in as much as it suggests that the Panel should, in putting its mind to whether Commerce's interpretation of the

[175] Daewoo, at *25 (emphasis added).

subsidies law is reasonable, consider along with the normal factors in statutory interpretation, the burden it would place on the agency with respect to economic analysis by finding that the subsidies statute requires an investigation into the issue of market distortion.

The Panel's remand to Commerce to address the threshold requirement of market distortion, did not specify any particular economic methodology or technique, such as regression analysis, that Commerce must employ in its investigation of market distortion.[176] Unlike the provision of the anti-dumping law at issue in Daewoo, where only econometric analysis would yield some measurement of the tax incidence in question, this Panel has never viewed the market distortion requirement as entailing by its very nature the employment of a particular method or technique of economic analysis. This appears to have been well-understood by Commerce, which, in fact, has sought to base its finding of market distortion on a variety of sources, including general principles stated in economic textbooks, past empirical studies in markets other than the Canadian market, and its own reworking of the regressions in the Nordhaus-Litan study. Commerce clearly read the remand in the Panel Decision correctly as not placing it under the burden of conducting its own econometric analysis of the actual Canadian market. Therefore, the Majority simply does not consider that the factor of agency burden should alter the statutory interpretation on which the remand on market distortion is based. Simply put, our remand on market distortion did not, by the very nature of the issues, entail a burden on the agency of the kind considered in Daewoo. Moreover, crucial to its finding in Daewoo that an econometric analysis would impose a severe burden on the agency was the fact that, because of the nature of the provision of

[176] Panel Decision, at 59-60.

dumping law in question, such an analysis would have to be made "in virtually every investigation."[177] Not only does the interpretation of market distortion in our first Decision not impose on Commerce the burden of undertaking an econometric analysis (or indeed any other kind of complex economic study), but the number of investigations in which market distortion need be considered at all is very few. The vast bulk of investigations concern subsidy measures applied in normal competitive markets.

Finally, the Minority Opinion takes us to task for not restricting the ruling in Wire Rod to the case of non-market economies, and for citing no authority to support our (non-restrictive) reading of Wire Rod on the issue of market distortion.[178] However, such a non-restrictive reading was adopted by this entire Panel, including our fellow dissenting panellists, in the first Decision. In that Decision, we considered the legislative history of the statute and reviewed in detail the reasons on which Wire Rod and its affirmation in Georgetown Steel were based. We all agreed those decisions were not narrowly limited in applicability to non-market economies. As noted above, even if one reads most broadly and imaginatively those very few paragraphs of Daewoo that deal with anything other than an interpretation of specific rules in anti-dumping law, Daewoo simply does not support the need to re-consider *ab initio* the statutory interpretation made by this entire Panel in its first Decision. In effect, the Minority is asking us to accept that before Daewoo, the application of Wire Rod and Georgetown Steel was not limited to non-market economies. Wire Rod From Poland and particularly Georgetown Steel, are fundamental, landmark decisions in subsidies

[177] Daewoo, at *25.

[178] Minority Opinion, at 33-34.

law, and we simply cannot accept that the intent of the Federal Circuit in Daewoo was to bootstrap onto an interpretation of a sub-section of the anti-dumping law a basic rethinking of the scope of this fundamental jurisprudence on subsidies. Daewoo simply does not promulgate a new rule of law that "trumps" an otherwise correct interpretation of the subsidies jurisprudence.

1. Commerce's Theory of Market Distortion

With these considerations in mind, we turn to the issue of whether Commerce's finding of market distortion is supported by substantial evidence on the record.

In its *Determination on Remand*, Commerce advances a theory of the functioning of markets for natural resources (the "marginal cost" theory) that is presented as an alternative to the Ricardian economic rent theory propounded by the Canadian Complainants and their expert, Dr. Nordhaus. `Marginal cost theory', as articulated by Commerce, stands for the proposition that fewer trees will be harvested where an increase in stumpage fees results in a higher marginal cost for stumpage users. Commerce views this theory as more in conformity with the real world of stumpage markets than economic rent theory. According to Commerce, marginal cost theory sustains the conclusion that Canadian stumpage programs create a distortion in normal competitive markets, *i.e.* that these programs result in a greater output of timber and lower log prices than would exist in a normal competitive market.

An initial difficulty in ascertaining whether the marginal cost theory supports Commerce's finding of market distortion is that Commerce's presentation of this theory is intertwined, in the *Determination on Remand*, with a battery of criticisms of the

Canadian Complainants' Nordhaus study, including criticisms that this Panel, in its first decision, found to be based on a misinterpretation of Nordhaus. Thus, the Panel's first decision already noted that Nordhaus' theory is consistent with, and indeed incorporates, the possibility that a stumpage price may fall into the excessive range with respect to some trees on a stand but not others. An additional misunderstanding that seems operative in Commerce's criticism of Dr. Nordhaus in the ***Determination on Remand*** is that the Nordhaus theory assumes that stumpage is a fixed per-stand access fee, and does not include an assessment on every individual tree harvested. However, the basic insight that Nordhaus draws from classic Ricardian rent theory can as easily be stated in marginal cost terms: with respect to any individual tree, the stumpage fee falls within the normal range whenever the marginal cost of harvesting that tree plus the stumpage fee <u>for that tree</u> equals marginal revenue.

Significantly, the text by G. Robinson Gregory which Commerce cites as its primary doctrinal source for the marginal cost theory, recognizes that there is no tension between rent theory and marginal cost analysis with respect to resource pricing. According to Prof. Gregory: ". . . the rent theory approach is not opposed to the supply-demand model."[179] In Gregory's view, the major limitation of rent theory is that it views the issue of stumpage pricing exclusively from the perspective of the effects of this pricing on the manufacturer. By contrast, according to Gregory, there are other important economic questions related to forest management to which rent theory itself does not provide helpful answers. <u>But it is precisely on the question which we remanded to Commerce--*i.e.* the effects of stumpage pricing on output and prices of logs and ultimately of lumber--that Gregory deems rent theory to</u>

[179] Gregory, *Resource Economics for Foresters*, at 215.

be most useful.

It is no surprise, therefore, that the studies which Commerce cites as evidence of the superiority of marginal cost analysis to rent theory were not primarily concerned with estimating the effects of changes in stumpage prices on timber harvests. Instead these studies examined the interaction between the lumber and log markets, and the effects of these markets on the behaviour of stumpage owners or stumpage users.

Mindful of the deference it owes to Commerce's expert evaluation of the evidence, we are satisfied that the Gregory text and the empirical studies cited by Commerce are the work of reputable economists, and we must therefore defer to Commerce's choice of these sources of economic evidence. In the Majority's view, however, the problem is that, assuming (as we ought) the accuracy and rigour of these sources, they simply do not contradict the basic insight of rent theory on the question of the effects of stumpage pricing on the output and price of timber and lumber. To be sure, marginal cost theory does suggest that, at least for some trees on a stand, changes in stumpage charges may affect output. But it in no way puts in question the basic insight of rent theory that, with respect to natural resources, there will be a "normal range" where a change in the price of the resource will not affect output.

In the presence of competing economic theories we must, under U.S. administrative law, defer to Commerce's choice between these theories, provided that choice is reasonable, or at least, not arbitrary or capricious. We are not here, however, faced with two competing theories, because (to repeat Gregory's succinct formula) "the rent theory approach is not opposed to the supply-demand model." Instead, we are faced with two complementary and

interrelated approaches to resource markets, neither of which provide support for Commerce's conclusion that where lower stumpage prices exist in an administered system, output will be increased beyond the level that would otherwise prevail in a normal competitive market.

In the words of the Federal Circuit in a recent decision, "[o]f course we defer to any relevant scientific or technical expertise, but that does not authorize us to gloss over the critical steps of [the agency's] reasoning process."[180] Assuming that every empirical and analytical economic proposition referred to in the academic work cited by Commerce is indubitable, there is no logical train of reasoning that can lead from this evidence to Commerce's ultimate conclusion of market distortion. Even supposing that, for a substantial portion of timber, stumpage fees could hypothetically fall outside the normal range and in the excessive range, this would still not show a market distortion of the kind assumed by the legal meaning of a countervailable subsidy. For in the case of the fee falling in the excessive range, the effect would be the opposite of a subsidy, *i.e.* to reduce output below what would prevail where the fee was set within the normal range. A corollary to this is that, in an administered system, the government may reduce the stumpage fee so as to move it from the excessive to the normal range. On a marginal cost analysis, such a change in price will affect output. But the effect will be to move output towards the competitive norm, not above it. This simply illustrates the interaction, not opposition, between rent theory and marginal cost analysis.

[180] Gas Appliance Manufacturers Association, Inc., et al. v. Department of Energy, No. 91-5393 (July 27, 1993), at 9.

2. Commerce's Reworking of the Nordhaus-Litan Study

In addition to the sources discussed above, Commerce now cites its reworking of the Nordhaus-Litan empirical study as support for its conclusion that Canadian provincial stumpage programs distort normal competitive markets. Commerce claims that, in reviewing the Nordhaus-Litan study it found heteroscedasticity to be present. Heteroscedasticity is apparently a kind of distortion that is sometimes present in a regression analysis, for which there are standard techniques of correction. One of these techniques is to "weigh the observations".[181] The kind of weighting that Commerce chose to do in this case was by size of stand. In addition to weighting by stand, Commerce utilized data from later years, on which the Nordhaus-Litan study had not performed regressions. The result of rerunning the regressions with the weighting for volume, and of producing regressions for the later years, was that the coefficients became negative, *i.e.* suggesting that in fact the volume of timber harvested will increase where stumpage fees are reduced. The original Nordhaus-Litan result had suggested, by contrast, that there was almost no change in output accompanying changes in timber prices.

The Canadian Complainants argue that they were prejudiced by the lack of an opportunity to examine and comment upon Commerce's reworking of the Nordhaus-Litan study prior to the *Determination on Remand*. Thus, on due process grounds, they ask that this reworking be disregarded in determining whether Commerce's findings are based on substantial evidence on the record. Alternatively, they ask that the record be opened up in order to admit Dr. Nordhaus's comments and criticisms with respect to Commerce's reworking of his

[181] *Determination on Remand*, at 114.

study.

We are not persuaded that Commerce's reworking of the Nordhaus-Litan regressions constitutes fresh evidence, on which Commerce must, in accordance with the due process requirements of U.S. administrative law, provide an opportunity to comment and rebut. Commerce reviewed the data contained in the Nordhaus-Litan study, it did not use any new data. It applied agency expertise to the existing record.

The Canadian Complainants have had the opportunity to make submissions before this panel as to whether the manner in which Commerce reviewed the data in the Nordhaus-Litan study was reasonable. Normally, this would not require re-opening the record, since the Panel would simply be considering the soundness of the reasons that Commerce provides for its choice of method in reviewing and rearranging the data. Where, in our view, the Canadian Complainants have been prejudiced in this case is that Commerce has failed to state the reasons or assumptions behind its choice of weighting by volume as the preferred method of correcting for heteroscedasticity in the Nordhaus study, and its decision to run regressions for later years.

As the Federal Circuit noted in Sierra Club v. Costle,[182] economic modelling, despite its "aura of scientific validity", is inherently susceptible to manipulation. While this Panel has a responsibility to defer to the genuine expertise of Commerce, we are also required to ensure that Commerce's decision is not arbitrary or capricious. As the Federal Circuit has noted, "[b]ecause judicial review must be based on something more than trust or faith in the [agency's] experience, a court may not

[182] 657 F. 2d 298 at 332. (D.C. Cir. 1981).

respond to claims of technical expertise by 'rubber stamping' an agency decision as correct."[183] In order for review to be meaningful, it is crucial that Commerce fully explain its assumptions and methodology.

Without the benefit of such a reasoned explanation of what Commerce has done with the data, the reviewing body is faced with a choice between two unacceptable options--either to assume on faith that Commerce's findings are not arbitrary or capricious, or alternatively, to examine *de novo* the economic evidence itself. What is required has been clearly stated by the Federal Circuit in Sierra Club: "The agency must sufficiently explain the assumptions and methodology used in preparing the model; . . . There must be a rational connection between factual inputs, modelling assumptions, modelling results and conclusions drawn from these results."[184]

As we have noted, Dr. Nordhaus has submitted a number of criticisms of Commerce's choice to attempt to correct or perfect the Nordhaus-Litan study through weighting by volume, as well as its decision to produce regressions for different years. Even if, from an academic point of view, some of these criticisms hold water, we would have to defer to Commerce's choice, provided that choice is supported by reasons. The problem is that Commerce has completely failed to explain the reasons or assumptions behind its decision to weight by volume and to run regressions on data for additional years. Indeed, since the choice of years made in the original Nordhaus-Litan study was based on the fact that these years represented a period through which stumpage prices were substantially increased pursuant to the *Memorandum of*

[183] Chemical Manufacturers Association v. U.S. E.P.A., 870 F.2d. 177, at 189 (5th Cir. 1989), partly quoting Appalachian Power Co. v. Train, 545 F. 2d. 1451, at 1365 (4th Cir., 1976).

[184] *Ibid.*, at 333.

Understanding, this makes it even more important that Commerce's reasons for adding additional years (where similar price increases did not apparently occur) be stated explicitly.

Normally, under these circumstances, the Panel would have to make a further remand to Commerce that it outline the reasons or assumptions that are missing from the *Determination on Remand*. However, as the Coalition has noted in its Response Brief, considerable expense and delay has already occurred in this proceeding due to the complexity of the economic evidence. Before making such a remand, it thus behooves us to ask first, *arguendo*, if Commerce's assumptions in its reworking of Nordhaus-Litan are indeed reasonable, would the findings of the reworking, as a matter of logic, support its conclusion of market distortion?

Certainly, as the Panel noted in its first opinion, the original results of Nordhaus-Litan, *i.e.* close to zero elasticity, tend to support the hypothesis of economic rent theory that, in the normal range, changes in stumpage prices will not affect output. It does not necessarily follow from this, however, that the presence of some elasticity, as detected in Commerce's reworking of Nordhaus-Litan, undermines rent theory, or supports Commerce's conclusion that a market distortion exists.

In oral argument before this Panel, the Canadian Complainants maintained that the elasticities detected in Commerce's reworking of Nordhaus-Litan were such that it would take a 100% increase in price to produce a mere 8% increase in output.[185] This estimate is apparently uncontested by Commerce or the Coalition.

[185] In fact the standard definition of price inelasticity in microeconomics is an elasticity whose absolute value is between 0 and 1. With an elasticity of .08 according to the reworked Nordhaus-Litan study, stumpage would still be viewed as highly inelastic. Pub. Doc. 331

Thus understood, the result of the Nordhaus-Litan reworking seems entirely consistent with rent theory, which in the sophisticated version presented in the Nordhaus study, incorporates the possibility that a change in stumpage fees may push those fees either from the normal to the excessive range, or *vice versa*, and thereby affect output. The presence of some very limited elasticity cannot, without an unreasoned leap in logic, be stretched to support the finding that lower stumpage fees result in output being pushed beyond the competitive norm. The results of econometric analysis, if sound, can plausibly be employed to support an economic theory such as rent theory. However, Commerce simply has no economic theory that moves, step by step, from the assumption of elasticity to a standard or test for market distortion. In the absence of such a theory, the presence of elasticity--however supported by empirical work--is in itself not probative for purposes of answering the Panel's Remand. Furthermore, merely pointing to shortcomings or limitations in the Canadian Complainants' evidence cannot substitute for the requirement of a plausible economic theory or model, consistent with the available empirical evidence, that sustains the conclusion of market distortion.

3. Conclusion

Now that Commerce has put its mind to whether Canadian provincial stumpage programs create a market distortion and has determined that they do, we are required to decide whether the agency "considered the relevant factors and articulated a rational correlation between the facts found and the choice made."[186] With all due deference to Commerce's expertise as a fact-finder, we have searched in vain for a plausible or cogent "rational correlation"

[186] Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87 (1985), at 105.

between the evidence on which Commerce relies and its finding of market distortion. At most, the textbooks and studies cited by Commerce show the possibility that changes in stumpage fees may affect timber output. But, at least as presented in the *Determination on Remand*, none of the sources relied on by Commerce supports the conclusion that stumpage fees can be lowered to a point where output will exceed the competitive norm, and thereby create a market distortion. Even less do any of these sources provide a norm or standard for determining, either through axiomatic reasoning or empirical analysis, whether stumpage prices in the Canadian provinces distort normal competitive markets. Moreover, when one takes into account Dr. Nordhaus's distinction between the normal and excessive ranges of stumpage pricing, all of Commerce's sources are fully consistent with the Canadian Complainants' rent theory.

The Majority feels itself obligated, therefore, to conclude that Commerce's finding of market distortion is not supported by substantial evidence on the record. Since, as the Panel held in its first decision, market distortion is a fundamental assumption of countervailability under the statute, we must now remand to Commerce for a determination that provincial stumpage programs do not distort normal competitive markets for softwood lumber and therefore are not countervailable.

IV. LOG EXPORT RESTRICTIONS

A. SPECIFICITY

In the *Final Determination*, Commerce found British Columbia's log export restrictions to be *de jure* specific to the primary timber processing industries. This conclusion was not supported by reasoned consideration of the evidence; a review of the B.C. *Forest Act* and Regulations cited by Commerce revealed no identification of program recipients such as is necessary to support a finding of *de jure* specificity.[187] On remand, therefore, the Panel instructed Commerce to review the record and establish whether the log export restrictions are *de jure* specific or *de facto* specific.[188]

1. *Determination on Remand*

In the *Determination on Remand*, Commerce has found as follows:[189]

> "A finding of *de jure* specificity requires that eligible enterprises, and/or industries, for which a subsidy is intended be identified explicitly in the relevant legislation or regulations, and that the number of those eligible be sufficiently small so as to be deemed specific.[190] Accordingly, Commerce

[187] Panel Decision, at 71-5.

[188] Panel Decision, at 76.

[189] *Determination on Remand*, at 119.

[190] Commerce devotes approximately six pages of the *Determination on Remand* to a critique of the reasoning by which the Panel rejected the sequential approach to the four factors in the Proposed Regulations. Commerce claims that the Panel blurred the distinction between the *de jure* and *de facto* aspects of the specificity test (*Determination on Remand*, at 4), by saying that the number of actual users was part of a *de jure* analysis. The Panel may have understood certain of Commerce's statements to imply that even the number of eligible users would not enter into a *de jure* specificity analysis, and the passages

> agrees with the Panel's conclusion that the B.C. *Forest Act* does not, on its face, limit the beneficiaries of log export restrictions to specific enterprises or industries, or groups thereof. Therefore, pursuant to the Panel's instructions, Commerce will examine whether log export restrictions in B.C. are *de facto* specific."

Commerce then applied the analysis outlined in the Proposed Regulations to the beneficiaries of the log export restrictions. Saying that the Canadian complainants had agreed that the specificity analysis for stumpage and for log export restrictions were analogous, Commerce determined that:

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of Commerce's initial Panel Brief do indicate that a consideration of the number of eligible users is part of a *de jure* specificity analysis. However, the Panel quite clearly maintained a distinction between eligible and actual users and the *de jure* and *de facto* tests throughout the
passage to which Commerce takes exception (Commerce Response Brief, at 2-3, citing the Panel Decision at 36-37).

Moreover, in light of statements such as that in the *Determination on Remand* that "*de jure* analysis does not involve an analysis of the number of users (whether on an enterprise or industry basis)" (*Determination on Remand*, at 5), the Panel's initial understanding of Commerce's sequential approach is perhaps understandable. Commerce's difficulty with the Panel's analysis, and the Panel's difficulty with Commerce's analysis, may stem from the fact that the Panel uses the term "number of users" to denote either: a) the number of eligible users in the context of the *de jure* test, or b) the number of actual users in the context of the *de facto* test. Commerce on the other hand, seems to use both "number of actual users" and "number of users" for the *de facto* test alone. It is clear, however, that both the Panel and Commerce agree that a consideration of the number of eligible users is a necessary part of the *de jure* test, and a consideration of the number of actual users is a necessary part of the *de facto* test for specificity.

With respect to the Panel's remarks on the FIRE program in Lumber I, it is true that the second factor in the specificity analysis in the Proposed Regulations speaks of the number of "actual users", and that this factor is therefore not properly part of a *de jure* analysis, and the Panel stands corrected. The point is equally true that a consideration of the number of eligible users is a necessary part of a *de jure* analysis. Thus, more than a mere finding of "government action" is required for even a *de jure* analysis, and Commerce's assertion that "the satisfaction of a single factor can lead to a finding of specificity" (Commerce Brief, at C-27) is somewhat incomplete.

All of which was not ultimately determinative of the Panel's rejection of the sequential approach to the four factors in the Proposed Regulations. As Commerce recognizes, the Panel is bound by the precedent of the U.S. Court of Appeal, whose clear instruction to Commerce in PPG Industries v. United States (978 F.2d 1232 (USCA Fed. Cir. 1992), 1239-40) to consider government discretion, government action and the number of actual users on any *de facto* analysis must be respected. While this precedent may not have been followed by the Pure and Alloy Magnesium Panel (USA-92-1904-03, August 16, 1993), it was followed by the Panels in both Swine IV (USA-91-1904-03, October 30, 1992, at 22-27) and Swine V (USA-91-1904-04, June 11, 1993, at 13-14), and will continued to be followed by the Majority of this Panel.

> "...the facts and analysis pertaining to Commerce's stumpage *de facto* specificity analysis concerning the number of enterprises or industries, and inherent characteristics apply with respect to B.C. log export restrictions as well, except to the extent that the number of users is even smaller because logging, a component of the primary timber processing industries, does not benefit from the log export restrictions."[191]

Based upon evidence that over 75% of the B.C. timber harvest went through B.C. sawmills in 1989 and 1990, Commerce also found that the B.C. log export restrictions disproportionately benefited sawmills which produce softwood lumber.[192] Commerce found that the enumeration of the permitted forms of export for timber products contained in the B.C. *Forest Act* as well as the export tax structures and other restrictions on log exports were evidence of government limitation supporting specificity.[193] It found no evidence that government discretion in the administration of the restrictions was exercised in favour of one class of users over another.[194]

In weighing the factors, Commerce found that government limitation indicated the possibility of specificity, but that the small number of beneficiaries and dominant and disproportionate use, either individually or in combination, provided sufficient evidence to outweigh the fact that the universe of users was limited by the inherent characteristics of logs, and warranted a

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[191] *Determination on Remand*, at 120.

[192] *Determination on Remand*, at 121.

[193] *Determination on Remand*, at 121-23.

[194] *Determination on Remand*, at 123-24.

finding of *de facto* specificity.[195]

2. Canadian Complainants

The Canadian complainants deny that they ever agreed that the universe of users of stumpage was the same as the potential beneficiaries of lower-priced logs, and argue that in any event Commerce, as the investigating authority, is required to base a conclusion that the two programs benefit the same group of users on substantial record evidence.[196] Canadian Complainants argue that, as the log export restrictions operate indirectly to benefit the purchasers of logs, it is illogical to assume that only the first order purchasers benefit from the lower price for logs, and that Commerce must perform an investigation of the second and perhaps third order price effects in order to determine the economic incidence of the log export restrictions.[197] According to the Canadian Complainants, it is only if Commerce investigates this issue and finds that the lower price for logs was entirely absorbed by the initial log purchasers, and was not passed on to purchasers of processed wood products, that Commerce's analysis of stumpage users can apply to the users of log export restrictions.

As for Commerce's consideration of the record evidence in light of the four factors in the Proposed Regulations, even if only the initial purchasers of the logs are considered as the relevant group of actual users, Canadian Complainants argue that this group is not synonymous with the primary timber processing industries.

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[195] *Determination on Remand*, at 124-25.

[196] Canadian Complainants' Brief, at B-10 to B-11.

[197] Canadian Complainants' Brief, at B-6 to B-8, and B-12 to B-15, and B-19. In the following analysis, a "first order purchaser" is the actual purchaser of the log itself, while a "second order purchaser" is the purchaser of the output of the first order purchaser (*e.g.*, the purchaser of the lumber produced by the sawmill that purchased the log), *etc.*

The group of log purchasers includes log brokers (who do not process timber), and excludes not just loggers but also integrated timber processors who own their own stumpage and do not purchase logs. The number of actual users should therefore have been given separate consideration, even if second and third order price effects are ignored.[198]

According to the Canadian Complainants, the enumeration of the permitted forms of timber exports in the legislation does not favour one user of logs over another, and provides no evidence of government limitation.[199] As determined by Commerce, there is no evidence of the exercise of government discretion to favour one group of users over another.[200] Finally, the Canadian Complainants assert that sawmills, as such, are neither enterprises nor industries, and neither dominance nor disproportionality can be meaningfully discussed without knowing the full universe of actual beneficiaries.[201]

3. The Inclusion of Second Order Beneficiaries in the "Users" of the Program

Dealing first with the Canadian Complainants' argument that Commerce should have investigated the question of the pass through or economic incidence of lower log prices in order to determine whether secondary and further beneficiaries of the lower log prices should be included in the group of users for a specificity analysis, the Panel cannot find support for this argument in the

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[198] Canadian Complainants' Brief, at B-22.

[199] Canadian Complainants' Brief, at B-23.

[200] Canadian Complainants' Brief, at B-23.

[201] Canadian Complainants' Brief, at B-25.

legislation, much less conclude that either the statute or U.S. case law compels such an approach. All subsidies, not just border measures resulting in lower log prices, may or may not be passed through from the initial beneficiaries to their customers. Intuitively, if garden variety domestic subsidies such as grants were not passed on by their recipients in the form of either lower prices or higher output, there would be no policy reason to countervail domestic subsidies at all.[202]

The Canadian Complainants claim that border measures are different, and that because they operate indirectly, all of the indirect beneficiaries must be included in a specificity analysis. In our view, this argument confuses the manner in which a subsidy is bestowed with the identification of its recipients once it arrives. In this case, assuming that Commerce has found substantial evidence of a "direct and discernible effect" in the form of lower prices for logs, then the fact that the log prices were lowered indirectly through the impact of log export restrictions on a competitive market does not mean that the beneficiaries of the lower log prices are any different than would be the case if the government were to provide a direct subsidy in the form of a cash rebate to log purchasers for every log purchased. We therefore find that Commerce was not unreasonable in restricting its specificity analysis to the first order beneficiaries of the lower log prices.

[202] The United States Supreme Court endorsed this view in the context of export subsidies, saying that countervailing duty law was "intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their government": Zenith Radio Corp. v. United States, 437 U.S. 443, 455-6 (1978).

4. Commerce's Specificity Analysis as Applied to the First Order Beneficiaries

The question then arises, who are the first order beneficiaries of lower log prices? Commerce has assumed in the *Determination on Remand* that the beneficiaries must be the primary timber processing industries (excluding loggers), saying that the alleged Canadian Complainants' agreement with this proposition is sufficient support.[203] The Canadian Complainants deny that they ever agreed that all log users benefit from log export restrictions. Rather, they disagreed with the specificity analysis which Commerce had used for both programs. The fact that similar reasons may weigh against a determination of specificity in the case of both stumpage and log export restrictions in no way depends upon the groups of users being co-terminus. Further, the Canadian Complainants have pointed to statements in the same briefs which suggest that the universe of alleged beneficiaries of log export restrictions would not coincide with that of stumpage holders,[204] yet Commerce did not take such statements into account. Even if the acquiescence of a party were sufficient to support a determination in the absence of a reasoned analysis of record evidence, such acquiescence is not shown in this case.

Given the Majority's finding on the specificity of provincial stumpage programs, it is not necessary to make an explicit finding regarding the actual users of log export restrictions. Commerce has asserted that the same analysis applies to both groups. Since the Majority has directed a finding of non-specificity for the one program, then a finding of non-specificity for the other would

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[203] *Determination on Remand*, at 120.

[204] Canadian Complainants' Brief, at B-10 to B-11.

follow, and we so direct.

Looking at the record evidence presented by the parties, we find that Commerce was not legally justified in its assumption that the beneficiaries of the log export restrictions were the same as the users of stumpage. Commerce has clearly identified the benefit in question to be a lower price for logs in B.C.[205] This benefit flows, therefore, to the purchasers of those logs. Commerce itself points out that the group of stumpage users includes loggers, *i.e.* log sellers, who should be excluded from the beneficiaries of the lower log prices.[206] As pointed out by the Canadian Complainants, log brokers who buy for the export market should be included in the group of "users" of cheap logs.[207] The group of stumpage users may therefore be both under- and over-inclusive, but Commerce has not investigated the point.

Moreover, the Majority finds that the rationale put forward by Commerce for the inclusion of integrated stumpage holders in the universe of beneficiaries of lower log prices does not rationally support that conclusion. In fact, there is no rationale in the specificity analysis of the *Determination on Remand* for why stumpage holders are included in the group of actual users, and the conclusion that stumpage users benefit from the lower prices is simply restated in the specificity analysis in the Commerce Response Brief filed in defence of the *Determination on Remand.*

We have looked to the discussion of the calculation of the

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[205] Commerce Response Brief, at 31: "Both Commerce and the Panel have consistently identified lower log prices as the benefit at issue."

[206] *Determination on Remand*, at 120.

[207] Canadian Complainants' Brief, at B-22.

subsidy, however, and found there an explanation of the rationale.[208] Commerce found log export restrictions to be countervailable on the basis that they lead, indirectly, to a direct and discernible reduction in the price of logs in B.C.: "...the benefit is realized through a chain of events: (1) the government imposes the export restrictions; and, as a result, (2) the price of logs is lower, thereby reducing the cost of producing lumber...the `direct and discernible effects' test is the standard for establishing the necessary causal link between the government's action (log export restrictions) and the subsidy (lower log prices/production costs)."[209] Stumpage holders may not purchase logs, but Commerce seeks nonetheless to include them in the group of beneficiaries on the basis that the opportunity costs of producing lumber (*i.e.*, processing logs rather than selling them) have been reduced.[210]

In the Panel's view, Commerce has failed to provide a rational basis for its inclusion of integrated stumpage holders in the group of beneficiaries of the log export restrictions. Opportunity costs can be defined as the foregone value of the next best use to which resources might be put.[211] As such, they are notional costs which affect the use to which a resource will be put, not the costs of production once a particular use is chosen. To the extent that a stumpage holder's potential revenues from log sales decline, that stumpage holder is actually worse off than it would otherwise have been. It may chose to process more logs rather than to sell them, but its revenues from doing so are not increased by the lower log

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[208] *Determination on Remand*, at 128, footnote 239.

[209] *Determination on Remand*, at 128.

[210] *Determination on Remand*, at 128, footnote 239; and Commerce Response Brief, at 31.

[211] Canadian Complainants' Brief, at E-67, footnote 167.

market prices.

Moreover, to the extent that lower log prices induce a wood processor to purchase more logs and to cut less of its own stumpage, that processor will be counted among the beneficiaries of the program. A stumpage holder who still chooses to cut stumpage, and who does not buy logs, does not benefit in any accounting sense from the lower log prices. There is thus no rational connection between the log export restrictions and the reduction in production cost claimed by Commerce on the basis of reduced opportunity cost. Commerce could have investigated whether or not all stumpage holders purchase logs, and the record may well contain evidence in this regard, but Commerce declined to perform this analysis and the Panel cannot substitute its own review of the record for that of Commerce. Similarly, Commerce might have investigated whether the LER's lowered not only log prices but competitive stumpage prices in B.C. so as to lower stumpage holders' actual production costs, but it did not. The Panel cannot uphold an agency determination on the basis of speculation, and *post hoc* speculation at that.

Commerce also points to a completely different alleged benefit resulting from the log export restrictions, an ability to sell more lumber and other processed wood products as a result of the restrictions, and posits that all log processors will benefit from this, regardless of whether they purchase logs or cut standing timber themselves. In other words, because stumpage processors might benefit from an effect which Commerce has not investigated and upon which it has made no finding, stumpage holders are said to benefit from the lower log prices. The Majority cannot endorse such conclusory determinations.

Commerce argues that, if anything, the exclusion of loggers

(and, by implication, non-purchasing stumpage users if they are excluded) from the group of beneficiaries simply makes the group all the more specific.[212] Given the Majority's finding that Commerce's specificity analysis of stumpage users is fundamentally flawed, and its direction on that issue, however, it is not at all clear that even with the exclusion of integrated stumpage users and loggers, log purchasers would necessarily be found to be specific.[213] Furthermore, this conclusion would have to be arrived at after including log brokers in the analysis.

Finally, for the sake of completeness, we have considered Commerce's analysis of the other three factors from the Proposed Regulations and inherent characteristics. Even accepting that log purchasers are spread across the entire range of primary timber processing industries, the use of the statistics cited to support the claim that sawmills benefit disproportionately from the cheaper logs suffers from the same defects as the analysis used for the same purpose in connection with stumpage.[214] With respect to government action, the program under investigation is itself a set of regulations restricting log exportation. The benefits of that program are lower log prices. Since only log sellers are restricted by the program, and they would be worse off because of the program, there is no government limitation of the beneficiaries of the program. In fact, to the extent that the log export restrictions in encouraged a more diverse range of processing industries, the government action in question may indicate less,

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[212] Commerce Response Brief, at 34.

[213] The Majority notes at this point that in the absence of any evidence that LER's have a direct and discernible effect on stumpage prices (as distinct from log prices), to avoid double counting, any calculation of the subsidy conferred by the lower log prices would have to be based upon only the volume of timber which is actually sold on the open market, i.e., about 25% of the total harvest, rather than the 100% used by Commerce.

[214] See discussion regarding this factor in relation to stumpage programs, above.

rather than more, specificity of the enterprises and industries who purchase logs. Thus, the Majority finds that Commerce's analysis of the question of whether government action has limited the availability of the program benefits has not been applied in a logical manner to the facts as they relate to log export restrictions. Commerce's finding on the lack of evidence of the exercise of government discretion in favour of any particular subset of users is affirmed.

5. Remand

Commerce has once again failed to perform a *de facto* analysis of the beneficiaries of log export restrictions. Instead, Commerce has relied upon its analysis of the number of stumpage users rather than analysing the number and characteristics of actual purchasers of the cheaper logs. This, with limited further analysis of dominant or disproportionate use, government action, discretion and inherent characteristics, does not provide substantial evidence upon which a rational mind might conclude that the users of the benefit provided by the log export restrictions are specific enterprises or industries or groups of enterprises or industries. This is the second occasion upon which Commerce has failed to perform a separate specificity analysis of the log export restrictions, even after being directed to do so by the Panel. It would appear that Commerce is either unwilling or unable to perform such an analysis on the basis of the record before it. The Majority therefore remands this issue to Commerce to find that the beneficiaries of the program were non-specific.

B. EXISTENCE OF A SUBSIDY

1. Introduction

In the *Final Determination*, Commerce confirmed its preliminary finding that "export restrictions maintained by the Province of [British Columbia] constitute a countervailable domestic subsidy."[215] To reach this conclusion, Commerce undertook "a two-tier inquiry: (1) Whether these export restrictions provide a benefit to [B.C.] manufacturers [of softwood lumber]; and, if so, (2) whether the B.C. Government provides the benefit to a `specific' group of industries."[216] This section of the decision addresses the first part of the inquiry: the existence of a benefit or subsidy.

In its first Decision, the Majority of the Panel[217] affirmed Commerce's determination that export restrictions *may* constitute "subsidies" subject to countervailable duties under the *Tariff Act of 1930*, as amended.[218] The Majority held that despite Commerce's

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[215] 57 Fed. Reg. 22,570

[216] *Ibid.* at 22,607.

[217] Panellists Weiler and Dearden dissented on this point.

[218] Panel Decision, at 76-113.

In the *Preliminary Determination*, Commerce summarized how, according to economic theory, log export restrictions may benefit lumber manufacturers:

> [L]og export restrictions in BC result in an increase in the domestic supply of logs and a decrease in the domestic log price. Because logs are the primary input into lumber, the decrease in the domestic price caused by export restrictions artificially reduce the production costs of lumber producers.

Department of Commerce, International Trade Admin., Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 8,800 at 8,815 (Mar. 12, 1992) [hereinafter *Preliminary Determination*].

longstanding practice of finding that "border measures, such as export restrictions, generally did not constitute countervailable subsidies as a matter of law,"[219] Commerce's departure from this practice was reasonable and did not contravene the statute.[220] Accordingly, the Majority of the Panel affirmed Commerce's decision to include export restrictions within the universe of potentially countervailable subsidies.

In reaching its decision, the Majority of the Panel relied in part on three agency determinations that suggest a program would be countervailable if there is "evidence that the program lowered the domestic price" of a primary input.[221] Upon remand, the Panel[222] asked Commerce to demonstrate that this condition was met—that in fact, B.C. log export restrictions lowered the domestic price of logs. Such evidence would show that government action conferred a benefit to manufacturers, thereby creating a subsidy within the meaning of U.S. countervailing duty law.[223] Further, the Panel asked for a clear explanation of the "applicable legal standard" that Commerce applies in its assessment and a "demonstration that the standard was met by substantial evidence on the record."[224]

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[219] *Final Determination*, 57 Fed. Reg. 22,570 at 22,606, *quoted in* Panel Decision, at 78.

[220] The Majority of the Panel concluded: "Given that Congress granted Commerce authority to construe the term `subsidy' broadly, Commerce's decision to depart from previous determinations applying a tautological, *per se* rule is reasonable. As Commerce has clearly set forth this rationale in the *Final Determination*, remand to Commerce for further explanation of its departure from previous administrative rulings would not appear to be necessary." Panel Decision, at 89-90.

[221] Panel Decision, at 81, *citing* Anhydrous and Aqua Ammonia from Mexico, 46 Fed. Reg. 28,522, 28,525 (1963). *See also* Panel Decision, at 82-85 (discussing Non-Rubber Footwear from Argentina, 49 Fed. Reg. 9,922 (Mar. 16, 1984) and Leather from Argentina, 55 Fed. Reg. 40,212 (Oct. 2, 1990)).

[222] which Panellist Weiler and Dearden joined in *arguendo*.

[223] *See* Zenith Radio Corp. v. United States, 437 U.S. 443, 456 (1978).

[224] Panel Decision, at 118.

The Panel cautioned that to prove the subsidy existed, the parties *may not assume* "the government caused the [domestic] price of the input . . . to drop through the use of the export restrictions." Rather, Commerce must show that the export program reduced the actual input price, and "[a]ctual prices . . . depend upon a complicated interaction of domestic and international supply and demand elasticities."[225]

2. The Legal Standard: "Direct and Discernible Effects" Test

In the *Final Determination,* Commerce identified its task—to test for the existence of a benefit or subsidy[226] -— but failed to articulate how the agency would make this assessment. The Panel remanded "for clarification of the meaning of the applicable legal standard."[227]

The Panel Decision noted that Commerce appeared to offer two standards:

> "According to Commerce, it sought "to determine whether there is a proximate causal relationship or correlation (i.e., regression analysis) between the BC export restrictions and the domestic price of BC logs." Commerce then volunteered an alternative formulation: "In other words, we must ascertain whether these restrictions have a "direct and discernible effect" within the meaning of

[225] Panel Decision, at 83, *quoting* Non-Rubber Footwear from Argentina, 49 Fed. Reg. 9,922, 9,923 (March 16, 1984).

[226] Specifically, the objective of Commerce's analysis was "to establish whether B.C.'s log export restrictions conferred a benefit on B.C. producers of softwood products." Panel Decision, at 113, *citing Final Determination*, 57 Fed. Reg., at 22,609.

[227] Panel Decision, at 118.

> Leather upon the price of BC logs.'"[228]

This alternative formulation engendered confusion. The Panel questioned whether Commerce intended (1) to equate "proximate causal relationship" with "direct . . . effect"; (2) to require regression analysis to show "discernible effects"; and (3) to insist upon the fulfilment of both conditions (1) and (2), transforming *disjunctive* requirements into *conjunctive* requirements. Moreover, the Panel perceived problems in having a "direct effects" test measure "indirect benefits." The Panel inferred that "Commerce seems to indicate that the meaning of `direct effects' expands to mean `indirect effects' when the program being investigated provides indirect benefits," and concluded that "[t]his is not a legally satisfactory use of the language."[229]

After elaborating its problems with the alternative legal standard, the Panel provided the following instructions and guidance on remand:

> "Although the Panel may believe that Commerce did not mean to introduce a requirement that it demonstrate "discernible effects" through regression analysis before finding a subsidy to be countervailable, the role of the Panel is not to rewrite the determination replacing "correlation analysis" and "regression analysis" with "probability based economic theory" or some such phrase. Rather, the appropriate remedy should be remand for clarification as to whether the "direct and discernible" effects test requires the performance of a regression analysis.
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> Should Commerce determine upon remand that

[228] Panel Decision, at 113, *quoting Final Determination*, 57 Fed. Reg., at 22,609 (quoting Leather from Argentina, 55 Fed. Reg. 40,212 at 40,213).

[229] Panel Decision, at 114-15.

> regression analysis is not required, it should then clarify what is meant by "direct and discernible effects." Specifically, Commerce should clarify whether it meant to equate the phrase "proximate causal relationship or correlation (i.e., regression analysis)" with the phrase "direct and discernible effects." If it did not, if the phrases represent two different standards, Commerce should clarify whether the applicable standard is met by substantial evidence on the record. Given the confusing exposition of the "direct and discernible effects" standard, however, it is impossible for the Panel to determine whether the Margolick-Uhler Study and the Newport Study constitute substantial evidence supporting the existence of either a "proximate causal relationship" or "direct and discernible effects."[230]

In its *Determination on Remand*, Commerce confirmed the "direct and discernible effects" test as the legal standard for determining whether export restrictions constitute countervailable subsidies. Commerce explained that its reference to "a proximate causal relationship or correlation (*i.e.*, regression analysis)" did *not* state an "alternative standard." Rather, "this was simply a statement of the `direct and discernible' standard `[i]n other words.' `Proximate cause' and `direct effect' both refer to a causal relationship between two events":[231] "the government's action (log export restrictions) and the subsidy (lower log prices/production costs)."[232] In addition, the effect of the log export restriction—lower log prices or production costs—must be "discernible," which Commerce defined as "perceptible and

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[230] Panel Decision, at 117.

[231] *Determination on Remand*, at 126

[232] *Determination on Remand*, at 128.

`measurable.'"[233] The standard does not require regression analysis.[234]

As if anticipating the Panel's confusion, Commerce, in its *Preliminary Determination*, explained the seeming incongruity in applying a *direct* effect test to an *indirect* subsidy. Commerce wrote: "[T]he standard we articulated [in Leather from Argentina] was whether there is a direct effect on the input product, even though we recognize the effect on the processed product under investigation is indirect."[235] Whereas in Leather, this meant that Commerce examined whether Argentina's embargo directly affected hide prices which in turn indirectly benefitted leather tanners, in this determination Commerce investigated whether B.C. log export restrictions directly affected log prices which would benefit B.C. lumber manufacturers.[236]

To appreciate just what the "direct and discernible effects test" entails, it is important to consider its only previous application, viz. Leather from Argentina.[237] To satisfy the test in that determination, Commerce undertook a rudimentary "historical comparison of U.S. and Argentine hide price data."[238] Commerce simply looked at the data to see if there was a "cognizable and

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[233] *Ibid.* at 126-27.

[234] *Ibid.* at 129. Commerce argued the "Panel was mistaken in assuming" regression analysis was used in Leather from Argentina. See *infra* (discussing methodology used in Leather).

[235] *Preliminary Determination*, at 8,814.

[236] *Ibid.*

[237] 55 Fed. Reg. 40,212 (Oct. 2, 1990).

[238] *Ibid.* at 40,214.

discernible link";[239] apparently, the agency did not attempt to correlate the relationship using economic or statistical analysis. Although it considered other factors (*e.g.*, quality variations, inflation, and cattle slaughter) that might have contributed to the U.S.-Argentine hide price differential, Commerce did not attempt to aggregate these factors into a single economic model. Clearly, the methodology Commerce employed in Leather was primitive, certainly as compared to that undertaken in this determination. As Leather is the only application of the direct and discernible test, the Panel cannot expand upon or increase the evidentiary standard undertaken in Leather.[240]

All parties accept the "direct and discernible effects" test as the applicable standard.[241] Under this test, Commerce must show that B.C. log export restrictions cause domestic log prices to be lower than they would be absent the restrictions, and that this downward impact on price is perceptible and measurable.

3. Standard of Review

(a) Standard of Proof

Although all parties agree that the "direct and discernible effects" test is the applicable legal standard, the parties disagree on the level of proof required. The Panel requested on remand that Commerce provide "substantial evidence,"[242] but did not

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[239] *Ibid.*

[240] The law likewise requires that the Panel defer to the methodology Commerce chooses to demonstrate and measure the countervailable benefit, so long as it rationally supports the conclusions Commerce draws. *See* discussions of Ceramica Regiomontana and Daewoo, *infra.*

[241] Canadian Complainants' Brief at E-3 and Coalition Response Brief at IV-3.

[242] 19 U.S.C. § 1516(b)(1)(B).

define precisely what constitutes "substantial evidence" in the context of indirect subsidies. A sentence in Leather from Argentina suggests that to demonstrate export restrictions confer a subsidy, "an extremely high standard of proof" may be required;[243] the Canadian Complainants argue that this higher standard engenders a burden greater than that generally entailed by the "substantial evidence" standard.[244]

Commerce and the Coalition disagree with Canadian Complainants. Commerce asserts that the "direct and discernible effects" test itself is the "high standard of proof" mentioned in Leather. That is, requiring this test is an additional requirement, above-and-beyond the preferentiality analysis used for more commonplace countervailable subsidies. At the November, 1993 hearings, counsel for the investigating authority explained:

> "[T]hat high standard of proof does not mean something more than substantial evidence is required. The high standard of proof is a reference to the direct and discernible effects test which is unique to indirect subsidies. And that test need only be met by substantial evidence, not something more than substantial evidence . . . .
>
> What I'm saying is the higher standard of proof is simply a reference to the direct and discernible effects test. . . . You don't need a direct and discernible effects test and another subsidy in a direct subsidy case.
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> So it's an additional evidentiary standard for indirect subsidies. That's the only

[243] Panel Decision, at 85, *citing* Leather from Argentina, 55 Fed. Reg. 40,212 at 40,213 (Oct. 2, 1990).

[244] Canadian Complainants' Brief, at E-4. "Substantial evidence" was defined by the Supreme Court as "such evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

distinction."[245]

A plain reading of Leather supports Commerce's interpretation. Placing the quoted language in context, Commerce wrote:

> "When the petition in this investigation was filed, we held petitioners to an extremely high standard of proof, requiring them to substantiate their claim that the embargo had a direct and discernible effect on hide prices in Argentina."[246]

This sentence sustains Commerce's position that the "high standard of proof" *is* the "direct and discernible effects" test.

Moreover, surveying what Commerce actually did in Leather further supports this conclusion. The methodology Commerce employed is manifestly what Commerce considered the lawful standard. As discussed above, Commerce did not apply a rigorous standard in Leather.[247] Nothing indicates that it applied a heightened evidentiary standard.

With no indication that the agency has self-imposed a higher burden, it would be unlawful for this Panel to elevate the congressionally established standard of "substantial evidence." There is no statutory justification for establishing a "higher standard."

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[245] Transcript (Nov. 19, 1993) Pub. Doc. 331, at pp. 121-24 (M. Trossevin).

[246] 55 Fed. Reg., at 40,213.

[247] Commerce reported that it relied primarily on historical data comparing hide quality and price in Argentina, the United Kingdom, and the U.S. *See* 55 Fed. Reg., at 40,214-15.

(b) Deference to Commerce's Methodology

On remand, the Canadian Complainants fault several aspects of Commerce's "direct and discernible effect" evidence and its calculation of the subsidy benefit. By-and-large, these criticisms challenge the *methodology* Commerce used. As the Panel reviews this evidence, the calculations,[248] and the Canadian critiques, the Panel must bear in mind its standard of review under the law. While it is well established that a reviewing body must accord due weight to an agency's interpretation of a statute that it administers,

> "... deference granted or extended to the agency's interpretation of its statutory mandate *also applies to the methodology* that the agency employs in fulfilling its lawfully delegated mission. In order for the ITA effectively to administer the countervailing duty laws, it is necessary to permit some methodological flexibility. As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusion, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology."[249]

Both the Court of International Trade in Ceramica Regiomontana and the Federal Circuit in Daewoo[250] expressly recognize that Commerce may consider the burden to the agency and "limitations on the

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[248] *See* discussion *infra*, Minority Opinion. Due to the conclusions reached by the Majority on the specificity of LERs, it has not considered the calculation issues and makes no finding thereon.

[249] Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (emphasis added).

[250] *See* discussion, *infra*.

resources of the ITA" in selecting its methodology.[251] Under U.S. countervailing duty law, Commerce's "methodology need not be the most reasonable," to be upheld by this Panel, "nor need it be the methodology that this [Panel] would have selected had it been the decision maker."[252]

4. Satisfying the "Direct and Discernible Effects" Test

To satisfy the "direct and discernible effects" test, Commerce must demonstrate with substantial evidence that B.C log export restrictions depress domestic log prices. To meet its test, Commerce considered and weighed many pieces of evidence including:

- the predictions of "basic economic principles";
- the existence of a differential between B.C. export and domestic log prices that persists after adjusting to isolate the effects of log export restrictions from all other potential causes of the price gap;
- the conclusions of three economic studies that analyzed the economic impact of lifting B.C. log export restrictions; and,
- admissions by B.C. government officials and forestry experts concerning the intent and effectiveness of the export restrictions.

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[251] *Ibid.* at 968; Daewoo Elec. Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, *supra* at *25.

[252] British Steel Corporation v. United States, 632 F. Supp. 59, 68 (Ct. Int'l Trade 1986); Alhambra Foundry v. United States, 626 F. Supp. 402, 408 (Ct. Int'l Trade 1985); Asahi Chemical Industry Co. v. United States, 548 F. Supp. 1261, 1264 (Ct. Int'l Trade 1982).

On remand, Commerce concluded that "significant evidence" demonstrates "that B.C.'s log export restrictions have the effect of reducing the price of logs sold in the B.C. market."[253] For the reasons discussed below, the Panel finds the evidence on record "adequate to support [this] conclusion."[254]

(a) Economic Principles and Feedback Effects

To satisfy the "direct and discernible effects" test, Commerce starts from the "basic economic principle" that export restraints generally cause domestic prices to fall. According to Commerce, "[e]conomists agree that restricting the export of a product generally causes the price of that product to fall in the home market."[255]

The Canadian Parties respond that Commerce's economic theory is incomplete and inaccurate. They argue that a valid model must account for the supply and demand conditions in both the home and world markets for both raw materials and processed materials. The Canadian Complainants claim that these "feedback effects" are not considered in this basic theory nor accounted for in the three studies upon which Commerce relies.[256]

In essence, feedback-effect theory holds that if a country restricts the supply of a raw material (B.C. logs), world markets

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[253] *Determination on Remand*, at 133.

[254] Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), *quoted in* Atlantic Sugar Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (discussing appropriate standard of review).

[255] *Ibid.* at 133. Commerce supports this principle with excerpts from a general international economics text (Walters), a text on export restrictions (Keppler), and the Margolick-Uhler study. Further Commerce adds that its three studies, discussed *infra*, support this general principle and its application in the context of B.C. log export restrictions.

[256] Canadian Complainants' Brief, at E-22 - E-27.

will adjust to demand more of the finished product (lumber) from that country. Thus, if log export restraints were lifted, foreign demand for B.C. logs may increase, but foreign demand for lumber would decrease, thereby decreasing the domestic log prices.[257] A crucial issue is whether Commerce did or must account for these feedback effects in its economic theory and modelling.

Assuming *arguendo* that Commerce's analysis ignores the feedback effect, at least three factors indicate that such analysis is not necessary to satisfy the "direct and discernible effects" test. First, as the Coalition notes, accounting for world-wide supply and demand conditions affects "the *degree* rather than the *existence* of a price impact from export restrictions."[258] The feedback effect, which would decrease foreign demand for B.C. lumber thereby decreasing domestic log demand and prices, would not completely offset the increase in log demand caused by lifting the export restrictions. The decreased demand for lumber would be spread over many countries, not just B.C.; therefore, although demand for B.C. lumber may decrease, this decrease would be smaller than the increase in log exports.[259] The Canadian Complainants recognize "the feedback effect might not be complete."[260] The effects of the log export restrictions would still exist, although the magnitude of the price effect is smaller in the presence of feedback.

Second, as a matter of law, Commerce may not consider feedback effects to the extent they represent "secondary consequences" of

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[257] *See Determination on Remand*, at 137; Canadian Complainants' Brief, at E-23 - E-24.

[258] Coalition Response Brief, at IV-8.

[259] *See Determination on Remand*, at 137-38.

[260] Canadian Complainants' Brief, at e-26.

the subsidy program. Feedback effects may not be extracted from the subsidy benefit.[261] The Court of International Trade explained:

> "[C]ountervailing duty law . . . requires the amount of a duty imposed to be "equal to the amount of the net subsidy." 19 U.S. C. § 1671(a) (Supp. IV 1986). To determine to "net subsidy," Congress has directed Commerce to subtract from the gross subsidy the amount
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> (A) any application fee . . . paid in order to qualify for, or to receive, the benefit of the subsidy,
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> (B) any loss in the value of the subsidy resulting from its deferred receipt . . . , and
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> (C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.
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> 19 U.S.C. § 1677(6) (1982) . . . . *[T]he legislative history of this provision shows that Congress intended this list to be narrowly drawn and all inclusive*."[262] (emphasis added)

Since these three items do not expressly include feedback effects, Commerce may not account for that factor in determining the countervailable subsidy.

Finally, the Federal Circuit's recent decision in Daewoo[263] also teaches Commerce is not obligated to analyze feedback effects.

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[261] Coalition Response Brief, at IV-25 - IV-26, *citing* 54 Fed. Reg. 23,383 (1989) (to be codified at 19 C.F.R. § 355.46 (proposed May 31, 1989)); 19 U.S.C. § 1677(6); RSI (India) Pvt., Ltd. v. United States, 687 F. Supp. 605, 610 (Ct. Int'l Trade 1988).

[262] RSI (India) Pvt., Ltd. v. United States, 687 F. Supp. 605. 610 (Ct. Int'l Trade 1988) (emphasis added), *citing* S. Rep. No. 249, 96th Cong., 1st. Sess. 86 *reprinted in* 1979 U.S. Code Cong. & Admin. News 472.

[263] Daewoo Elec. Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, *supra*.

The Daewoo Court advised that when Commerce is deciding what level of economic analysis it shall undertake, Commerce may consider the "burden" that a highly sophisticated analysis shall impose on the agency. Commerce may rightfully consider that "[t]he delay and expense in making such an analysis in virtually every investigation would restrict the number of investigations which could be handled and interfere with the ITA's statutorily mandated duty to `complete the . . . determination within rigid time limits.'"[264] Daewoo recognized that a reviewing body should defer to the agency's choice of economic modelling so long as the governing statute does not require a certain level or form of analysis.[265] The governing statute, the *Tariff Act*, does not mandate a particular level or form of economic analysis; the law does not require that Commerce consider feedback effects (in fact, the language is to the contrary—that these secondary effects should not be considered -- as discussed above). Consequently, even if the studies had disregarded feedback effects, Commerce nevertheless may present the economic theory and models as evidence to show B.C. export restraints produce a direct and discernible downward effect on domestic log prices.

Although not necessary for its analysis, Commerce maintains that its studies do account for feedback effects to the extent that they exist.[266] The Margolick-Uhler study expressly noted that its model must account for the potential decrease in "the quantity of logs demanded by the processing sector," which principally includes the lumber market. In outlining the study's methodology, the

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[264] *Ibid* at *25.

[265] The Panel notes the general requirement, of course, that such economic modelling must also rationally support Commerce's conclusions.

[266] "[T]o the extent that such a feedback effect does occur, the Margolick-Uhler study is designed to capture this effect." *Determination on Remand*, at 137.

researchers wrote:

> "[I]t is first necessary to estimate *the impact of the removal of these restrictions on the quantity of logs demanded by the processing sector* and the quantity that the logging sector could supply at the new average price as a result of market integration. The determination of this price and the related quantities supplied and demanded by the *two sectors* is done using a standard market model."[267] (emphasis added)

Similarly, the Percy study also claims to account for "shifts in the pattern of trade in lumber and logs among Japan, Canada and the United States which would result from relaxing the *de facto* embargo."[268] Commerce's economic modelling, therefore, accounts for feedback effects to the degree feedback effects alter the derived demand for logs.

We conclude that to the extent that lifting log restraints directly depresses the lumber market and thereby affects domestic log demand, Commerce's studies reflect those shifts in derived demand curves. If, however, the feedback effects extend beyond those reflected in demand curves, Commerce is not obliged to account for these effects. Such an analysis would only influence the degree rather than the existence of the export restraints' price impact, would be a "secondary consequence" that Commerce should not consider as a matter of law, and would require of Commerce onerous economic modelling that this Panel may not compel

[267] Margolick-Uhler Study, at 3 (emphasis added).

[268] Percy Study, at 42.

under Daewoo and Ceramica Regiomontana.[269]

(b) Commerce's Three Economic Studies

Commerce presented three economic studies as evidence that B.C. log export restrictions depress domestic log prices.[270] The Canadian Parties challenge each study for failing to test for causation, not considering export restrictions in other countries, and not updating for significant changes in the tested markets.[271] For the reasons set forth below, the Panel finds these criticisms unpersuasive.

(i) Testing for Causation

The Canadian Parties claim that Commerce's studies cannot establish a causal connection between B.C. log restrictions and lower domestic log prices because "none of the models test whether

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[269] The Panel is likewise cognizant of an Extraordinary Challenge Committee's recent admonition: "[P]anels must be careful not to unnecessarily burden an investigating authority on remand." Live Swine from Canada, ECC-93-1904-01USA (Apr. 8, 1993).

[270] In summary, the three studies made the following findings:

> Margolick-Uhler concluded that absent B.C. log export restrictions, the export price would decrease "in the order of 20 to 25 percent" and "the price of logs in coastal British Columbia would be expected to rise by about 20 percent." Margolick-Uhler Study, Pub. Doc. at 16. Furthermore, these results were not significantly different when elasticity assumptions were varied. *Id.* at 12. Dr. Newport supported the methodology of the Margolick-Uhler study and "updated" its conclusions. Newport calculate the export price would decrease 18 percent if the log restraints were lifted. *Final Determination*, at 22,618.
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> The Percy Study, Pub. Doc. concluded that "a ten-fold increase in log exports . . . would result in domestic price increase of 22 percent on the coast and 17 percent in the interior."
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> The Haynes-Adams Study, Pub. Doc. used TAMM, a methodology developed by the U.S. forestry department, to conclude that by lifting Canadian log export restrictions prices in coastal B.C. would rise 13 percent and in the interior 32 percent.

[271] The Canadian Complainants posed these same criticisms prior to remand. The Panel's Remand Decision explained, but did not reach the merits, of these challenges. *See* Panel Decision, at 116. In addition, the Canadian Parties argue that the studies do not account for feedback effects. *See* discussion *supra*.

B.C.'s restraints *cause* a decline in domestic log prices. Each assumes it."[272] The Canadian Complainants are correct in that the studies do not isolate the export restraints as *the cause* of the depressed domestic prices.[273] Rather, each study demonstrates that if British Columbia removed its log export restraints, domestic prices would rise. The Panel finds this evidence—that lifting the restraints results in a rise in domestic log prices—*supports*, albeit not proving, the causal link Commerce aims to establish. This evidence, in conjunction with Commerce's other evidence in the record, combines to form the "substantial evidence" necessary to satisfy the "direct and discernible effects" test.

(ii) Accounting for Other Countries' Log Export Restrictions

The Canadian Complainants criticize the studies because they "fail to account for the effects of other countries' policies on export log prices."[274] In the *Final Determination* and Response Brief, Commerce correctly notes that the effects of other countries policies are irrelevant to this proceeding as a matter of law.[275] Commerce explained:

> "[T]he GATT Code, as embodied in the U.S. countervailing duty law, does not make exceptions for subsidy practices which

[272] Canadian Complainants' Brief, at E-16 (emphasis added).

[273] The Canadian Parties seek impossible precision. As noted in the *Final Determination*, no economic study, empirical evidence or data can conclusively prove that "but for" the B.C. export restraints, there would be no export/domestic price gap. "No social science study, including econometric studies, can conclusively prove that one factor or variable is the sole `cause' of another factor or variable." *Final Determination*, at 22,610, *citing* Lapin, Statistics for Modern Business Decisions 95-146, 311-96 (3d ed. 1982).

[274] Canadian Complainants' Brief, at E-27.

[275] *Final Determination*, at 22,614; Commerce Response Brief, at 92-93.

> counteract other trade-distorting policies . . . . In essence, the law uses as a benchmark not the market that would exist in a hypothetical, perfectly competitive market, but rather the market price that would exist in the imperfect, real world absent the trade-distorting program under investigation."[276]

Moreover, as a practical matter, Commerce cannot "net out" the impact of the policies of other countries because such an analysis would be endless.[277]

(iii) Accounting for Recent Changes in Market Structure

The Canadian Parties claim Commerce's studies are flawed because they do not account for recent changes in relevant markets.[278] Commerce responds that Dr. Newport's review did "update" the Margolick-Uhler study by concluding that no changes in the elasticity assumptions were necessary. There is no record evidence that recent structural changes have significantly altered the supply and demand curves.[279] Moreover, even if recent political changes have effected the market structure, thereby altering the elasticities assumed by the studies, such shifts would not significantly affect the studies' conclusions. Dr. Newport recognized that in the Margolick-Uhler study, even large variations in the elasticity assumptions do not significantly change the

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[276] Commerce Response Brief, at 92-93.

[277] *See* Coalition Response Brief, at IV-29 - IV-30.

[278] Canadian Complainants Brief, at E-29 - E-33. In particular, the Canadians cite additional U.S. log export restrictions, a U.S. - Japanese trade agreement on wood products, changes in B.C. restrictions and export volumes, and new markets through Siberia. *Id.*, at E-30.

[279] *Determination on Remand*, at 150-52; Commerce Response Brief, at 91-92.

results.[280]

(c) Testimony of B.C. Government Officials and Forestry Experts

As evidence to support the "direct and discernible effects" of log export restrictions, Commerce cites various B.C. officials, forestry experts, and members of Canadian lumber industry to demonstrate not only that the government ***intended*** the log export restrictions to benefit B.C. timber processors, but also that the government believed the log export restrictions had effective ***results***.[281] The Panel finds this testimony persuasive as corroborating evidence of the log export restraints' effects.

In its Remand Decision, the Panel noted the B.C. Select Standing Committee on Forests and Lands has stated "[t]he reduced overall demand for logs resulting from arbitrarily restricting log exports provides the domestic processing sector with a lower log price."[282] A committee formed by the B.C. government to study log exports concluded: "Without these restrictions, domestic log prices for most species and grades would certainly be higher than current levels, as domestic mills would be forced to compete for raw materials at higher prices in the world market."[283] Similarly, the First Royal Commission on Forest Resources stated: "The most obvious effect of restrictions on export sales is that demand for

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[280] *Ibid*, at 152-55.

[281] *Ibid.* at 142-45.

[282] Panel Decision, at 77, *quoting "Forest Act* - Part XII (Log Exports) and the Vancouver Log Market," Second Report of the British Columbia Select Committee on Forests and Lands. 4th Sess., 34th Parl., Legislative Assembly of British Columbia (1991).

[283] British Columbia Special Log Export Policy Committee, Legislation, Policies & Procedures of Log Exports from British Columbia 35 (1983).

logs is reduced, and this inevitably depresses domestic log prices."[284]

To the extent these statements only reflect an "intent" to benefit the softwood lumber industry, the comments may have "limited legal significance."[285] However, the reports of B.C. officials and forestry experts that testify to the *effect* of the export restraints provide significant evidentiary weight. Reflecting Canadian expert opinion, these statements, and others like them,[286] corroborate other affirmative evidence on the record.

(d) Canadian Complainants' Rebuttal Evidence

The Canadian Complainants placed two studies on the record which purport to show that B.C. log export restrictions do not have a direct and discernible effect on domestic log prices.[287] The Canadian Parties commissioned these reports from Professor Joseph P. Kalt[288] and Dr. William Finan [289]in preparation for this investigation.

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[284] Royal Commission on Forest Resources, P. Pearse, Commissioner, Timber Rights and Forest Policy in British Columbia 305 (1976).

[285] Panel Decision, at 77.

[286] For additional examples of such statements of intent and result, see *Determination on Remand*, at 143-45.

[287] Canadian Complainants' Brief, at E-36 - E-42.

[288] Joseph P. Kalt, "Economic Analysis of Canadian Log Export Policy," Pub. Doc. 251, Exhibit B (Feb. 21, 1992) [hereinafter "Kalt Study I"].

[289] William F. Finan, "Evaluation of the Relationship Between Log Exports and Prices in British Columbia," Pub. Doc. No. 501, Tab 4, Attachment A (Apr. 27, 1992) [hereinafter "Finan Study"].

(i) Kalt Analysis

In essence, Dr. Kalt hypothesized that if B.C. export restraints cause the export/domestic price differentials, then a change in the restrictions should cause a change in the differential. Applying regression analysis, Kalt examined whether increases in the "fee-in-lieu-of-manufacture" (*i.e.*, an export tax applied to some exported logs)[290] showed a corresponding expansion of the export/domestic price ratio. The study demonstrated no such effect.[291] Dr. Kalt concluded: "[T]he analysis fails to establish a causal link between the challenged . . . regulation and observed market performance."[292]

Commerce responds that the Kalt Study is flawed because the "fee" which Kalt examined is only a "relatively minor obstacle" to export.[293] The fee is imposed only after an exporter gains an exemption to the provincial regulation that requires all B.C. timber be used or manufactured in the province. As Commerce explained in the Remand *Determination*, gaining such an exemption "is a long and complex process" which only affects a fraction of the log harvest.[294] Commerce concludes that, although Kalt demonstrates that small changes in the volume of exports would not be enough to alter the domestic/export log price ratio, the study cannot predict what would happen if the log export restrictions

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[290] *Preliminary Determination*, at 8,611.

[291] Kalt Study I, at 27.

[292] *Ibid.* at 25.

[293] *Determination on Remand*, at 146.

[294] *Determination on Remand*, at 148. The B.C. *Forest Act* permits an exemption only if an exporter demonstrates the logs: (1) are surplus to domestic use; (2) could not be processed economically in the vicinity from which they were harvested; or (3) would otherwise be wasted. B.C. *Forest Act*, § 136, Pub. Doc. 101, App. II-30.

where eliminated entirely. Lifting the export restraints would increase the volume of exports dramatically, and domestic prices should change coordinately.[295]

(ii) Finan Analysis

In a similar analysis, Dr. Finan looked at changes in B.C.'s coastal log export volumes during the 1980s to see if there were corresponding changes in log prices. He found none.[296]

Commerce finds Finan's analysis unpersuasive for essentially the same reasons adduced with regard to Kalt. Finan's data represented "relatively small changes in the volume of log exports."[297] The study, therefore, "does not a address what might happen if the log export restrictions were lifted entirely, and log exports were to increase by a large amount."[298]

Expanding on Commerce's critique, the Coalition provides three additional arguments against the Kalt and Finan reports. First, Kalt and Finan fail to isolate the log export restrictions from other potential causes of price changes. In particular, the Coalition suggests, a rise in domestic log prices, attributable to the contemporaneous rise in stumpage fees, would have caused the researchers not to detect a decrease in prices as log export restrictions tightened. Second, because B.C. is a "price taker," the small changes which Kalt and Finan studied would not affect the Pacific Rim market price, thus the export price would remain

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[295] *Determination on Remand*, at 148.

[296] Canadian Complainants' Brief, at E-39.

[297] *Determination on Remand*, at 149.

[298] *Ibid.*, at 149.

constant. Finally, Kalt and Finan looked at the ratio of export-domestic prices rather than the real data differential which might have shown increases over the period.[299]

The Panel concludes that, given the limitations of the Canadian Complainants' studies, the reports do not refute the affirmative evidence on the record.

5. Conclusion

The Panel finds that Commerce has satisfied its remand instruction.[300] Commerce adequately articulated the "direct and discernible effects" test as the applicable legal standard. In this case, the standard required that Commerce establish that its view that B.C log export restrictions depressed domestic log prices and that this effect was perceptible and measurable was supported by substantial record evidence such that its conclusions therefrom were reasonable.

Commerce has met this standard by marshalling substantial evidence. Viewing the record in its entirety, the affirmative evidence was substantial; predictions of economic principles, the findings of three economic studies, and admissions by B.C.

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[299] Coalition Response Brief, at IV-36 - IV-38.

[300] Panellists Weiler (subsequently replaced by Panellist Prichard) and Dearden concurred in the remand on LERs in the Panel Decision on the assumption *arguendo* that the log export regulations were countervailable in order to ascertain whether Commerce could explain the applicable test for identifying a benefit and apply it, thereafter proffer the record evidence necessary to establish a causal relationship between the LERs and the benefit identified. As the Majority of the Panel is now satisfied that Commerce has met this burden, Panellist Dearden must revert to his dissenting views in the first Panel Decision on the countervailability of LERs.

As a result, Panellist Dearden has not considered the calculation issues raised in the Reasons of Panellists Reisman and Pomeranz, *infra*. Panellists Hunter and Prichard have not considered the calculation issues raised by the Reasons of Panellists Reisman and Pomeranz *infra*, as a result of the Majority's conclusions. Panellists Hunter's and Prichard's silence with respect to these calculation issues do not indicate concurrence with the Dissenting Reasons in this regard.

government officials and forestry experts collectively present sufficient evidence to meet the direct and discernible effects test. Applying the appropriate standard of deference,[301] as it must, the Panel finds the record presents "such relevant evidence as a reasonable mind might accept as adequate to support [Commerce's] conclusion."[302]

[301] In addition to the deferential standard articulated in U.S. Supreme Court, Federal Circuit, and Court of International Trade precedent, the Panel is mindful, as noted in Part I above, of the recent admonition of an Extraordinary Challenge Committee: "Panels are not appellate courts and must show deference to an investigating authority's determinations." Live Swine from Canada, ECC-93-1904-01USA (Apr. 8, 1993).

[302] Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

V. OTHER ISSUES

The Panel felt it fruitful to render a decision regarding the following two subsidiary issues:

A. the exclusion of Les Industries Maibec and Matériaux Blanchet; and,

B. the participation of Dr. Lange in Commerce's investigation.

A. THE EXCLUSION OF LES INDUSTRIES MAIBEC AND MATÉRIAUX BLANCHET

In rendering its *Final Determination*, Commerce refused to consider the applications of two QMLA companies, Les Industries Maibec and Matériaux Blanchet, for exclusion from the investigation because these companies filed their responses to Commerce's first questionnaire after the deadline of January 31, 1992. Exclusion was sought on the ground that these companies produced lumber almost exclusively from U.S. origin logs during the period of investigation and received only *de minimis* benefits. Commerce has never disputed the fact that, aside from the question of late filing, these two companies fulfilled Commerce's exclusion criteria.[303]

The Panel Decision stated: "that having fulfilled all of the criteria required for exclusion, Commerce should have excluded these companies. As a result, the Panel remands this matter to Commerce for consideration and pronouncement upon the exclusion requests of Les Industries Maibec and Matériaux Blanchet."[304]

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[303] See, for example, the *Determination on Remand*, at 179.

[304] Panel Decision, at 133.

In its Remand Determination, Commerce took the view that the Panel's remand required "it to enter into the record its consideration and decision regarding the exclusion requests of the two companies".[305] While Commerce entered into the record such consideration, it maintained its rejection of the companies' submissions and its refusal to exclude the two Québec companies, as a result.[306] Commerce did however note that:

> "... in the event that the Panel does not agree with Commerce's determination to reject the submissions, Commerce has conducted an analysis of the responses. The result of these calculations, which are contained in the "Company-Specific Exclusion Calculations" table, indicates that had the two companies responded in a timely manner, they would have in fact, fulfilled the requirements for exclusion. Accordingly, if so directed, Commerce will exclude these two companies from the order, subject to the Panel's approval."

For the reasons set out by the Panel in its decision of May 6, 1993, we find that Commerce acted contrary to U.S. law in failing to exclude Les Industries Maibec and Matériaux Blanchet from the *Final Determination* and the Order issued as a result. If necessary, the Panel would have unanimously instructed Commerce to exclude these two companies.

B. THE PARTICIPATION OF DR. LANGE IN THE LUMBER III INVESTIGATION

In rendering its first decision, the Panel considered carefully the question of the participation of Dr. William Lange, a former employee of the Coalition for Fair Lumber Imports, in Commerce's investigation in Lumber III. Taking note of the

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[305] *Determination on Remand*, at 177.

[306] *Ibid*, at 178-186.

existence in the Administrative Record of certain materials[307] which raised a possibility that Dr. Lange's involvement invited due process concerns under U.S. law, the Panel on remand directed that Commerce provide details (including documentation) of Dr. Lange's specific role in the investigation and of any input Dr. Lange may have had in the formulation of the *Preliminary Determination* or *Final Determination*,[308] to ascertain whether there was a basis for the Canadian Parties' allegation that bias sufficient to violate U.S. law was evident in these proceedings, and mandated the Panel's action.[309]

In its *Determination on Remand*, Commerce has complied with the Panel's request *inter alia* by providing the Declarations (affidavits) of a number of Department officials involved in the Lumber III investigation and its resultant *Preliminary* and *Final Determinations*.[310] Commerce stated that there was no evidence of bias on the part of Dr. Lange, apparent or actual, but, in any event, because Dr. Lange was not a "decision-maker", the Canadian Complainants were barred from claiming a due process violation

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[307] 1. letter from Robert C. Cassidy, Jr. to the Honourable Alan M. Dunn (March 3, 1992) - Pub. Doc. No. 332; 2. letter from Leonard M. Shambon to the Honourable Alan M. Dunn (March 12, 1992) - Pub. Doc. No. 382; and, 3. letter from Barbara Fredericks, Assistant General Counsel for Administration, Department of Commerce, to Robert C. Cassidy, Jr. (March 19, 1992) - Pub. Doc. No. 549.

[308] The Panel requested information which specifically addressed the extent of Dr. Lange's participation in the decision-making process and, actions by Dr. Lange during the investigation that may have prejudiced the Canadian Complainants. Finally, the Panel requested a copy of the letter Ms. Anderson attempted to introduce to the Panel regarding this issue during the oral argument.

[309] Commerce's argument that the Panel lacked jurisdiction to consider this issue because the Canadian Complainants did not cite in their complaints Dr. Lange's involvement as an error of law was rejected by the Panel; support for the Panel's finding was found in the panel decisions in New Steel Rail, except Light Rail, from Canada U.S.A. 89-1904-07 at 21 and in Certain Dumped Integral Horsepower Induction Motors, CDA-90-1904-01 at 8-9.

[310] Specifically, the affidavits of B. Tillman, B. Carreau, K. Parkhill, N. Gannon, and M. Price, describe the retention of Dr. Lange and the role he played in the investigatory and decision-making process.

having failed to establish actual bias on the part of Dr. Lange.[311] The Coalition echoed Commerce's views in this regard, providing the Panel with a convincing argument that without proof of actual bias on the part of Dr. Lange, U.S. due process law is not activated.[312]

The Canadian Parties challenge to this aspect of the *Determination on Remand* focused primarily on the adequacy of Commerce's response to the Panel's request for information. The Canadian Parties were unable, both in their written submissions and in oral argument on November 19, to provide the Panel with any caselaw in which an appearance of bias on the part of one member of the agency staff was alone sufficient to overturn an agency or commission decision. On review, the Panel concurs with both Commerce's and the Coalition's submissions that the caselaw relied upon by the Canadian Parties either involved the impugned bias of a decision-maker, or where the persons at issue more closely resembled Dr. Lange, applied an actual bias standard not an appearance of bias standard.

While the Panel continues to have serious concerns with the Department of Commerce's decision to retain the services of Dr. Lange in the Lumber III investigation, neither the record evidence nor the information provided by Commerce in response to the Panel's remand meets the evidentiary threshold required by existing U.S. law to overturn an agency decision on due process grounds. It is noteworthy that the affidavits filed by Commerce officials establish that Commerce did not treat this issue cavalierly but sought the advice of the Office of the General Counsel both on

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[311] *Determination on Remand*, at 187-89.

[312] Coalition's Response Brief at VII-2 *et seq*.

retaining Dr. Lange and on receiving the Canadian Parties' objection to his participation some months later. In oral argument on November 19, 1993, Commerce confirmed that Dr. Lange took no part in the decision-making process and that the declarants, in swearing their affidavits, informed themselves in this regard by speaking to Asst. Secretary Spetrini and to Dr. Lange himself. The Canadian Parties mounted no challenge to these declarations.[313] In such a circumstance, the Panel is bound under U.S. law to dismiss this issue raised by the Canadian Complainants but strongly urges the Department of Commerce in future cases to avoid hiring any person as part of its investigatory team who had prior involvement with a complainant such as Dr. Lange's prior involvement with the Coalition.

[313] Transcript (November 19, 1993), Pub. Doc. 331, at 214.

VI. **CONCLUSION**

For the reasons stated above, the *Determination on Remand* is affirmed in part and remanded in part. The results of this remand shall be provided by Commerce to the Panel within twenty (20) days of this decision.

ISSUED ON DECEMBER 17, 1993

SIGNED IN THE ORIGINAL BY:

Richard G. Dearden
Richard G. Dearden (Chair)
(dissenting in part)

Lawson A.W. Hunter
Lawson A.W. Hunter, Q.C.

Morton Pomeranz
Morton Pomeranz
(dissenting in part)

J. Robert S. Prichard
J. Robert S. Prichard

Michael Reisman
Michael Reisman
(dissenting in part)

Dissenting Table of Contents

Dissenting Opinion of Michael Reisman and Morton Pomeranz

We concur in the decision of the Majority of the Binational Panel with regard to Dr. Lange and the propriety of directing Commerce to exclude Les Industries Maibec and Materiaux Blanchet, and the Majority's conclusion that B.C. log export restrictions (LERs) do confer a subsidy to B.C. lumber manufacturers. In addition, we concur in particular sections of the Majority Opinion as addressed in the body of this dissent. We regret that we must dissent from the Majority's decision with regard to specificity and preferentiality in various Canadian stumpage programs and with regard to specificity in LERs. Our dissent obliges us to consider a number of calculation issues which the Majority does not reach.

I. History of Lumber III and Remand Instructions

The *Lumber III* proceedings began on October 31, 1991 when Commerce self-initiated a third countervailing duty investigation into softwood lumber from Canada.[314] The inquiry had two parts: (1) whether the Canadian federal and provincial governments subsidized

[314]For a history of *Lumber I* and *Lumber II* and a more detailed account of *Lumber III*, see United States-Canada Free Trade Agreement Article 1904 Binational Panel Review, U.S.A.-92-1904-01, Softwood Lumber Products from Canada, Decision of the Panel at 2-15 (May 6, 1993) [hereinafter Panel Decision (May 6, 1993)].

the production of certain softwood lumber products by providing "stumpage" to Canadian producers at rates said to be administratively set and artificially low; and (2) whether federal and provincial log export restrictions caused a downward effect on domestic log prices thereby benefitting Canadian lumber producers. On March 5, 1992, Commerce issued its *Preliminary Determination*;[315] Commerce found that the stumpage systems in Alberta, British Columbia (B.C.), Ontario, and Quebec conferred a weighted average subsidy of 6.25% and that B.C. log export restrictions conferred a weighted average subsidy of 8.23%. Following its *Preliminary Determination*, Commerce proceeded to verify submissions provided by the Canadian federal and provincial governments, and to conduct a public hearing on the issues. This resulted in a *Final Determination*,[316] issued May 28, 1992, which adjusted the applicable subsidy rates to a "country-wide," weighted-average rate of 6.51% on all softwood lumber exports from all provinces and territories under investigation. In the *Final Determination*, Commerce reached the following conclusions which are of particular significance to this dissent: (1) in determining specificity Congress precluded consideration of the input's "inherent characteristics;" (2) with

[315]Department of Commerce, International Trade Admin., Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 8800 (Mar. 12, 1992) [hereinafter *Preliminary Determination*].

[316]Department of Commerce, International Trade Admin., Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (May 28, 1992) [hereinafter *Final Determination*].

respect to the preferentiality of stumpage, "market distortion" need not be considered; and (3) B.C. log export restrictions do confer a benefit as supported by several economic studies.

Objecting to these conclusions, the Canadian federal government and certain provincial governments requested a Panel Review of the *Final Determination*. This Panel convened on July 29, 1992. After a series of procedural issues and public hearings, the Panel issued its first decision on May 6, 1993. The Panel affirmed certain aspects of Commerce's determination, but remanded several issues for further development and consideration. The remand instructions were as follows:

- In determining stumpage specificity, the Panel remanded the *Final Determination* to Commerce for an express evaluation and weighing of all four factors in its Proposed Regulations, as well as any other factors relevant to *de facto* specificity.[317]

- On Commerce's determination of stumpage preferentiality, the Panel concluded that "Commerce should have considered whether or not the provincial programs could and did have a distorting effect on the operation of normal competitive market before concluding that these governmental policies involve the type of `preferential' pricing that constitutes a countervailable subsidy within the meaning of the *Tariff Act*."[318] Accordingly, the Panel instructed Commerce to "review all the evidence regarding the natural resource market for standing timber in light of the legal principles formulated in [the Panel's] decision."[319]

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[317]*See* Panel Decision (May 6, 1993), at 27-44.

[318]*Id.* at 59-60.

[319]*Id.* at 60; *see generally id.* at 44-60.

- On specificity in log export restrictions, the Panel asked Commerce "to review the record and establish whether the log export restrictions are *de jure* specific or *de facto* specific."[320]

- On Commerce's finding that B.C. export restrictions constitute a subsidy, the Panel asked Commerce to clarify the applicable legal standard that the agency applies to test for the existence of an *indirect* subsidy. The Panel further requested that this standard be demonstrated by substantial evidence on the record.[321]

- In measuring the benefit of LERs, to establish the countervailing duty rate, the Panel questioned six aspects of the calculation. The Panel remanded the determination to Commerce: (1) "for express consideration of the Coalitions' claim that Commerce erred in limiting its calculation of the benefit to certain areas of British Columbia;" (2) "for recalculation of the domestic price of logs from the border interior using the log PPI;" (3) instructing Commerce to "ascertain a species/grade adjustment supported by substantial evidence on the record for logs from the interior;" (4) "for express consideration of which of the Margolick-Uhler elasticities assumptions for supply and demand they adopted in calculating the equilibrium price factor;" (5) "for reconsideration of the economic adjustment made to export price;" and (6) instructing Commerce to recalculate the export cost adjustment to include the diminished value of the falldown sort or adopt a within-grade adjustment.[322]

- On Commerce's refusal to exclude two Quebec companies, the Panel found Commerce should not have excluded these companies and remanded this matter to Commerce to reconsider the exclusion requests.[323]

- On the participation of Dr. Lange and his potential bias, the Panel requested that "Commerce provide details to the Panel (including documentation) of Dr. Lange's specific role in this investigation at all stages and of any input Dr. Lange may have had in the formulation of the *Preliminary* or *Final*

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[320] *Id.* at 76; *see generally id.* at 69-76.

[321] *Id.* at 113-18.

[322] *Id.* at 125; *see generally id.* at 118-25.

[323] *Id.* at 132-33.

Determinations."[324]

II. Standard of Review

We agree with much of the general formulation of the standard of review in the Majority Opinion. Specifically, we agree that the Panel is bound to uphold Commerce's Remand Determination so long as it is supported by "substantial evidence on the record," based on the record evidence "in its entirety."[325] Similarly, we agree that a Panel may not reweigh the record evidence, substituting its judgment for that of the agency.[326] We agree further that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[327] We agree that the substantial evidence standard means that the agency's decision is based on "`such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence."[328] We agree that the degree of deference owed the agency's decision depends on "the thoroughness

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[324]*Id.* at 150; *see generally id.* at 143-50.

[325]Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951). *See* Majority Opinion, at 10.

[326]*See* Majority Opinion, at 9-13.

[327]Consolo v. Federal Maritime Comm., 383 U.S. 607, 619-20 (1966).

[328]Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), *quoted in* Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984). *See* Majority Opinion, at 9.

evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements. . . ."[329] We agree, as well, that a significant failure on the part of the agency to meet these standards requires the reviewing authority to remand or set aside.[330] Similarly, we agree that a panel may "not permit the agency under the guise of lawful discretion of interpretation, to contravene or ignore the intent of Congress."[331] Indeed, it is this last postulate that compels us to dissent.

We believe that the Majority's formulation of the standard of review is incorrect in a number of critical points and that it leads the Majority into a misconceived exercise that clearly exceeds its jurisdiction. First, we would emphasize the fundamental authorization of Article 1904(3) of the Free Trade Agreement (FTA) which instructs the Panel to "apply the standard of review described in Article 1911 [of the FTA] and the general legal principles that a court of the importing country otherwise would apply to a review of a determination of a competent investigating authority."[332] Article 1904(3) has two prongs: the United States standard of review and the appropriate substantive law that a court

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[329]Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), *quoted in* Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 965 (Ct. Int'l Trade 1986).

[330]*See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 488, *cited in* Panel Decision (May 6, 1993), at 22 n.56.

[331]Cabot Corp v. United States, 694 F. Supp. 949, 953 (Ct. Int'l Trade 1988). *See* Majority Opinion, at 17.

[332]*See* Majority Opinion, at 9 (emphasis added).

applies to review a determination of an agency. In other words, it is not enough to properly identify the standard of review. It is equally important to identify the governing law, in this case the *Tariff Act* and the Proposed Regulations. For it is in the light of the statute and rules, that standard of review is applied.[333] As will be explained below, the Majority has failed to keep that second prong, viz. United States law governing this matter, in focus and as a result has conducted a defective review; the Majority has applied review standards not to U.S. law, but to what the Majority believes U.S. law should be. In our view, the governing legislation and rules in this case, the *Tariff Act* and the Proposed Regulations, are clear in their terms and their proper application to this case, but they have been materially misconstrued by the Majority of the Panel.

All agree that under United States law the Panel must accord "great deference"[334] to Commerce's interpretation and application of

[333]The governing statute is the backdrop against which the agency's construction is reviewed. As the Supreme Court recently instructed: "If the agency interpretation is not in conflict with the plain language of the statute, deference is due. In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole." National Railroad Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394 (1992) (citations omitted).

[334]Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978) (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)); Daewoo Elec. Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, No. 92-1558, 1993 U.S. App. LEXIS 25,042, at *16 (Fed. Cir. Sept. 30, 1993).

countervailing duty law.[335] "Whether we would have come to the same conclusion, were we to analyze the statute anew, is not the issue."[336] Rather, the Panel must ask whether Commerce's interpretation "is based on a permissible construction" of the *Tariff Act*.[337] If it is, Commerce's construction must be affirmed.[338]

The U.S. Supreme Court announced this deferential standard in *Chevron, U.S.A. v. Natural Resources Defense Council*, which, as the Panel noted, "is widely recognized as the *locus classicus* of judicial review of administrative action."[339] To appreciate this standard more fully, and its underlying justification, Justice Stevens' observation there merits lengthy quotation:

> Judges are not experts in the field, and are not part of either political branch of the Government. . . . While agencies are not directly accountable to the

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[335]*See* Majority Opinion, at 11; *see also* Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185 (Fed. Cir. 1993) (upholding ITA's "best information available" methodology and noting that where "Congress has `explicitly left a gap for the agency to fill,' . . . the ITA's construction of the construction of the statute must be accorded considerable deference.").

[336]Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992).

[337]*See* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984) (emphasis added); Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992).

[338]*Chevron*, at 845 (concluding agency's reasonable construction "should not be disturbe[d] unless it appears from the statute or its legislative history that the accommodation is not one the Congress would have sanctioned") (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)); *see also* Abbott v. Donovan, 570 F. Supp. 41, 49 (Ct. Int'l Trade 1983) ("The court will sustain the agency's interpretation of the statute where it has a rational basis in law, even though the court might have reached a different interpretation.").

[339]Panel Decision (May 6, 1993), at 22, *quoted in* Majority Opinion, at 11.

> people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.
>
> *When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.* In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. *The responsibilities for assessing the wisdom of such policy choices . . . are not judicial ones.*[340]

The circumstances in *Chevron* are directly analogous to the situation this Panel confronts: Congress had not articulated the meaning of a statutory provision, nor provided guidance on how it is to be applied, but left those decisions to an administrative agency. Just as the Supreme Court wrote, we could write:

> The arguments over policy that are advanced in the parties' briefs create the impression that respondents are now waging in a judicial forum a specific policy battle which they ultimately lost in the agency . . . , but one which was never waged in the Congress. Such policy arguments are more properly addressed to legislators or administrators, not to judges.[341]

As recognized time and time again, this means "a court may not

[340]*Chevron*, 467 U.S. at 865-66 (emphasis added).

[341]*Id.* at 864.

substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[342]

Examining what the Federal Circuit did in *American Lamb Co. v. United States*[343] illustrates what the standard of review means in practice. In that case, the International Trade Commission (ITC), in an antidumping and countervailing duty investigation,[344] found no reasonable indication of material injury to the domestic lamb industry. The petitioners sought review of this negative preliminary determination because ITC weighed conflicting evidence in its investigation, an administrative practice that was contrary to two Court of International Trade decisions. In those earlier

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[342]*Id.* at 844, *quoted in* Daewoo Elec. Co. v. International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, No. 92-1558, 1993 U.S. App. LEXIS 25,402 (Fed. Cir. Sept. 30, 1993). The Supreme Court added: "[A] court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." Chevron, 467 U.S. at 843.

Repeatedly, the Supreme Court has affirmed that a court must respect the broad scope of authority that Congress has granted to administrative agency decisionmaking. For example, in National Railroad Passenger Corp. v. Boston & Maine Corp., 112 S. Ct. 1394 (1992), the Court was asked whether the ICC's decision to condemn 48.8 miles of railroad property to be provided to Amtrack was a proper application of the Rail Passenger Service Act which permits condemnation if the railroad track is "required for intercity rail passenger service." The D.C. Circuit held below that "required" must mean that Amtrack needs the ownership, and not the mere use, of the property (i.e., that it is "indispensable or necessary"); therefore, the ICC's condemnation order was not proper. The Supreme Court reversed. Justice Kennedy explained that the ICC's position that the term "required" can also mean "useful or appropriate" must be accorded deference. Even though the ICC failed to explain its decision in detail, and admittedly the agency's interpretation of "required" runs contrary to its more natural meaning, the Court concluded that the agency's interpretation of the Act must be respected. Simply put, "[i]f the agency interpretation is not in conflict with the plain language of the statute, deference is due." *Id.* at 1401. *See also* Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524 (1991) (upholding agency's interim regulations).

[343]785 F.2d 994 (Fed. Cir. 1986).

[344]Although the lower court dismissed the countervailing duty investigation as moot, the Federal Circuit concluded that its holding "may be seen as applicable to preliminary determinations of injury under both sets of laws." *Id.* at 996 n.2.

decisions,[345] the Court of International Trade held that weighing conflicting evidence impermissibly construed the governing statute which required a positive determination if a "reasonable indication" of injury existed. Although Congress had not defined "reasonable indication," the lower court concluded that ITC must interpret that phrase to mean a "possibility" of injury, and as a result, that ITC's method of investigation may not include weighing conflicting evidence. The Federal Circuit disagreed; the lower court had wrongly imposed its construction of the statute for that of ITC. Despite the lower court's reasoned conclusion (it drew support from the legislative history, statutory language, and the perceived legislative purpose), the Federal Circuit found that under the appropriate standard of review, the lower court could not reject the agency's interpretation since "ITC's long-standing practice [was] permissible within the statutory framework."[346] That the agency's methodology made its findings virtually unreviewable is not a consideration: "Whether the court might find it more difficult to overturn a negative preliminary determination when ITC had weighed conflicting evidence cannot be a factor when evaluating the permissibility of ITC's method . . . ."[347]

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[345]Jeanette Sheet Glass Corp. v. United States, 607 F. Supp. 123 (Ct. Int'l Trade 1985); Republic Steel Corp. v. United States, 591 F. Supp. 640 (Ct. Int'l Trade 1984).

[346]785 F.2d at 1001.

[347]*Id.* at 1004.

The Federal Circuit recently revisited the applicable standard of review in *Daewoo Electronics Co. v. United States*,[348] a case of extraordinary importance for this Panel's task, yet one which, in our view, the Majority misconstrues and underestimates. In *Daewoo*, the court concluded that the general tenets of judicial review of administrative practice "extend to their limits when the ITA interprets" the "intricate framework" of U.S. trade law.[349] Specifically, the *Daewoo* court considered whether the antidumping law required that Commerce undertake econometric analysis to determine what portion of a tax levied on television sets in the Korean market were actually passed through to the Korean consumer; in theory, this determination would affect how Commerce adjusted the U.S. price when comparing it to the Korean price.

The essence of an antidumping investigation is this comparison of the U.S. price and the home market price for the subject good. To establish a fair basis of comparison, Commerce must factor out the effect of taxes levied on goods sold in the home market but not levied on goods sold abroad.[350] Commerce accomplishes this adjustment by increasing the U.S. price by the amount of the tax levied in the exporter's home market, but waived or rebated for

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[348]Daewoo Elec. Co. v. Int'l Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, No. 92-1558, 1993 U.S. App. LEXIS 25,042 (Fed. Cir. Sept. 30, 1993).

[349]*Id.* at *16-*17.

[350]*See* 19 U.S.C. § 1677a(d)(1)(C) (1980 & Supp. 1993).

exports.[351]

In *Daewoo*, Korea levied three different taxes on color television sets in the home market: an excise tax, a defense tax, and a value added tax. All three taxes were waived for exports.[352] In its initial investigation, Commerce adjusted the U.S. price of Daewoo's television sets by the full amount of the three taxes. Appellants objected, arguing that Commerce should have raised the U.S. price only to the extent that the Korean taxes were passed on to consumers in the Korean market. The Court of International Trade agreed with the appellants and instructed Commerce on remand "[to] undertake an econometric study of the Korean market to determine the tax incidence, or `pass through,' of the commodity taxes upon consumers."[353] Commerce came back to the court with a study that showed 100% pass through of all three taxes. The court was not satisfied that Commerce had met its burden and remanded a second time. In its redetermination, Commerce found tax pass through to be between 33% and 63%. This finding the court accepted.[354]

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[351]*See id.*

[352]*Daewoo*, 1993 U.S. App. LEXIS 25042 at *7-*8 (Fed. Cir. 1993).

[353]*Id.* at *8-*9 (citation omitted).

[354]*Id.* at *13.

The Court of International Trade concluded the antidumping law required that Commerce undertake such an econometric measurement; the court had reached the same conclusion in an earlier decision, *Zenith Electronics Corp. v. United States*.[355] In both cases, the Court of International Trade reasoned that the legislative history and the statutory language of the antidumping act led to the "inescapable conclusion . . . Congress intended the administering agency to perform tax absorption measurements. . . ."[356] The Federal Circuit disagreed; as it had in *American Lamb*, the Federal Circuit held that the lower court's construction cannot be imposed on the agency. Since Commerce's interpretation and methodology did not contravene the statute, they must be accepted on judicial review.[357]

While the Federal Circuit reached the same conclusion in *Daewoo* as it had in *American Lamb*, the *Daewoo* court went considerably further in explicating its reasoning and the scope of proper deference. Contrary to the Majority's view, *Daewoo* is not "a basic rethinking of the . . . fundamental jurisprudence on subsidies."[358] The Majority misconstrues our reading of *Daewoo* by

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[355]663 F. Supp. 1382 (Ct. Int'l Trade 1986), *appeal dismissed as moot*, 875 F.2d 291 (Fed. Cir. 1989).

[356]*Zenith*, 633 F. Supp. at 1398, *quoted in Daewoo*, 1993 U.S. App. LEXIS 25,042, at *14.

[357]*Daewoo*, 1993 U.S. App. LEXIS 25,042, at *23.

[358]Majority Opinion, at 56.

implying that we perceive the case as "breaking new legal ground" and "the application of a `new' or `expanded' standard of deference."[359] This is not our position. We believe, rather, that *Daewoo* restates the familiar standard of review and applies it to Commerce's interpretation and application of U.S. trade law. This part of *Daewoo's* holding applies directly to the present case.

Specifically, there are two struts in *Daewoo* that are relevant to this Panel's procedure. The first strut reinforces the posture of deference that United States administrative law accords to agency review. The second strut reinforces the posture of deference owed to *methodologies* developed by the agency to implement its statutory mandate when the statute itself does not indicate them. In making the tax measurement at issue in *Daewoo*, Commerce had used over a period of time a rather simple method of examining customary business records of exports to see if they showed that a tax was a separate "add on" to the domestic price. The defendants had argued for a more sophisticated and nuanced (and necessarily more complicated and time consuming) method. The Federal Circuit found that several factors counseled deference to Commerce's simpler analysis. These factors included: reasonable, consistent statutory interpretation by the agency; legislative history consistent with that interpretation; traditional deference

[359]Majority Opinion, at 15-16.

by reviewing courts to administrative expertise; the intricacy of the analysis required by the antidumping law even under Commerce's interpretation; and the "onerous burden entailed" by the lower court's remand instruction.[360] While earlier decisions, for example *Ceramica Regiomontana*, reaffirmed that the deference owed to an agency's interpretation of its statutory mandate applied equally to its methodology, and had even acknowledged that "to administer countervailing duty laws, it is necessary to permit some methodological flexibility,"[361] *Daewoo* explicitly affirms reasonable, simply executed methods as satisfactory for the fulfillment of U.S. law and explicitly rejects the need for complex econometric proof. The Majority implies that we find that the "the burden imposed on the agency by the economic analysis and the probative value of the result" are "dispositive."[362] With respect, this misstates our position. Again, in reviewing agency action for reasonableness, we consider statutory and regulatory language, legislative history, and consistent administrative practice. In addition, the factor of a "onerous burden" supplements and refines these authoritative sources and confirms that it is reasonable to

[360]*Daewoo*, at *14-*25.

[361]Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986).

[362]Majority Opinion, at 16.

defer to agency's simpler, surer, and more rapid methodology.[363] The point is not, as the Majority argues, that *Daewoo* alters the standard of review. Rather, *Daewoo* clarifies the standard of review and, in its light, it is clear that the Panel's May 6, 1993 decision was wrong. Accordingly, in our view, *Daewoo* requires us to revise key parts of that decision.

III. Stumpage

Stumpage in Canada is owned and sold by provincial governments under a variety of governmental programs. No one has suggested that the stumpage is being sold at above-market prices as a revenue-generating device. To the contrary, statements by government officials and Canadian economic actors in the private sector indicate that stumpage prices have been set to achieve a variety of other objectives. It is no matter for legal or economic surprise, then, that an independent GATT panel found no theoretical obstacle to a stumpage program, like that conducted in Canada, being a subsidy.[364]

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[363]The Federal Circuit explained that the burden which a methodology imposes on the agency, and the available of simpler alternatives, should be considered by a reviewing authority in evaluating the reasonableness of Commerce's interpretation. The *Daewoo* court wrote: "[In *Smith-Corona*,] we recognized that `the ready availability of cost data that can be employed without extensive complex econometric analysis supports the reasonableness of [the ITA's] decision to rely on cost. . . .' An economic analysis of tax incidence may reasonably be rejected for the same reason." *Daewoo*, at *24.

[364]*See* Panel Decision (May 6, 1993), at 14-15 (discussing Panel's admission of GATT panel report into record at Commerce's request).

The crucial questions, of course, are whether that program is "specific" within the meaning of United States law and whether it is "preferential." Specificity and preferentiality are the limitations which Congress established to preclude foreign governmental programs which are established and administered for general welfare from being treated as subsidies inconsistent with a free trade regime. With regard to specificity, the ***Tariff Act of 1930***, as amended in 1979[365] and 1988,[366] limits countervailable subsidies to those provided by the government "to a specific enterprise or industry, or group of enterprises or industries." This limitation is known as the "specificity" requirement and has been the subject of considerable litigation. Despite the term "specificity," the test for specificity is not itself "specific." The ***Tariff Act*** and the Proposed Regulations assign a broad, prudential competence to the implementing agency, as we will show below. As the Court of International Trade stated in ***PPG I***, "the test necessarily involves subjective case by case decisions to determine when there is a discrete class of beneficiaries."[367] Nor is the objective of the test arcane; it is to avoid unreasonable or absurd applications which would make benefits provided by the government to an entire economy, such as bridges or roads, a

[365]Trade Agreements Act, Pub. L. 96-39, 93 Stat. 144 (1980).

[366]Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 (Supp. 1993).

[367]PPG Indus. v. United States, 662 F. Supp. 258, 266 (Ct. Int'l Trade 1987).

subsidies or, conversely, fail to treat as a subsidy a benefit provided to a discrete part of the economy.

One of the most controversial parts of *Lumber III* is whether Commerce acted reasonably and met the substantial evidence requirement of U.S. administrative review in determining that stumpage programs are a countervailable subsidies because the programs meet the tests of specificity and preferentiality. We propose to review the way each of these limitations was treated.

A. *Commerce's Methodology for Determining Specificity*

In 1983, in its first Softwood Lumber determination, Commerce found that Canadian stumpage programs could not be specific because of the "inherent characteristics of this natural resource. . . ." Shortly afterwards, however, Commerce reconsidered and concluded that the "inherent characteristics" test it had been using "leads to an absurd result: An automatic finding of non-specificity for all natural resource subsidies." Commerce felt its revised judgment here was supported by Congress, which it believed, on the basis of its interpretation of the legislative history,[368] had repudiated the "inherent characteristics" test in the 1988 Act; in any case, Commerce knew it was entitled under U.S. law to revise an

[368]*Preliminary Determination*, at 8803.

earlier interpretation of a statute if circumstances warranted it.

In place of the discredited "inherent characteristics" test, Commerce promulgated, in 1989, Proposed Regulations which said

> In determining whether benefits are specific, the Secretary will consider, among other things, the following factors:
>
> (i) The extent to which a government acts to limit the availability of a program;
>
> (ii) The number of enterprises, industries, or groups thereof that actually use a program;
>
> (iii) Where there are dominant users of a program, or whether certain enterprises, industries or groups thereof received disproportionately large benefits under a program; and
>
> (iv) The extent to which a government exercises discretion in conferring benefits under a program.

The guidelines themselves do not use mandatory language such as "to apply" but instruct the Secretary to "consider" and, even then, the four criteria that are mentioned for consideration are not exclusive. They are to be considered "among other things;" those other things are not specified and are apparently to be determined by the Secretary.

In its *Preliminary Determination*, Commerce noted that Congress had not precisely defined, either in the 1979 Trade Agreements

Act[369] or the 1988 Act,[370] the words "specific enterprise or industry, or group of enterprises or industries."[371] Hence it concluded, as it is entitled under U.S. law, that "Congress had delegated to the administering authority, currently the Department, the authority to establish the parameters of the phrase."[372]

Stumpage programs, by their nature, are limited to primary timber processing industries. Commerce concluded, using definitions employed by the Canadian and U.S. governments, that this primary industry includes the solid wood products and pulp and paper products industries.[373] Commerce also noted that, though not essential to its determination, solid wood products and pulp and paper industries had "become increasingly interdependent," in many cases were integrated, and that provincial governments were encouraging integration by a system of differential pricing.[374] Commerce then proceeded to consider each of the four factors set out in its proposed regulations.

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[369]Trade Agreements Act of 1979, Pub. L. 96-39, 93 Stat. 144 (1980) (codified as amended as 19 U.S.C. § 1677 *et seq.*).

[370]Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 (Supp. 1993).

[371]*Preliminary Determination*, at 8803.

[372]*Id.*

[373]*Id.*

[374]*Id.* at 8804.

With respect to the first factor in the Proposed Rules, government limitation, the extent to which the government acts to limit the availability of a program is not instructive in this case because a government need not take any further action, through special rules, regulations, or eligibility criteria, to limit the availability or use of a program that is already in fact limited by the nature of the input provided.

With respect to the second factor, the number of enterprises, industries, or groups thereof that actually use a program, we have already noted that there is only one group of industries that uses stumpage: the primary timber processing industries, which is comprised of two major industries, the solid wood products industry and the pulp and paper products industry. While this may be due to the inherent characteristics of raw timber, as we have discussed, the fact that the inherent characteristics of stumpage limit the number of users is not an indication of nonspecificity.

The third factor, the extent to which dominant users or disproportionately large beneficiaries of a program exist, is not particularly helpful in this case. When the potential recipients of the benefits of a program span many industries, the breadth of the potential universe can make the examination of dominant use or disproportionately large benefits a useful tool in an analysis of specificity. However, when, as in this case, the universe of recipients is limited by the nature of the benefit, the factors of dominant use or disproportionality provide little, if any, guidance.

The last factor, government discretion, is also not instructive in this case because the inherent characteristics of the input limit its use to the primary timber processing industries. Although in our Notice of Self-Initiation we cited examples of government discretion as part of the evidence indicating that stumpage was specifically provided, we preliminarily determine that we do not need to reach the issue of whether the government exercises discretion in this case, because irrespective of whether discretion was exercised, it would not alter our conclusion.

Commerce summarized this part of its *Preliminary Determination*:

> We have considered both legislative history and case precedent in preliminarily determining that stumpage is provided to a specific group of industries. The guidance provided by Congress and the courts directs the Department to consider specificity on both a de jure and a de facto basis. A de facto analysis of provincial stumpage programs indicates that the programs are used by only one group of industries. While we recognize that the inherent characteristics of stumpage are, in and of themselves, limiting, we do not believe that it was Congress' intent to render such programs beyond the purview of the countervailing duty statutes because of this fact.[375]

The assumptions of Commerce's methodology were elaborated in the *Final Determination*, where Commerce characterized the four specificity criteria as "guidelines only" and noted that in its earlier decision in *Carbon Black*, it had not used all four criteria.

Commerce's interpretation of the Regulations, and the methodology they require, is that they are guidelines in making what is necessarily a judgment about factual constellations that may vary widely from case to case. Thus, "no one factor is necessarily dispositive" and "it is also not necessary to show all four." That interpretation seems not only reasonable, but inescapable, for in the variety of cases that might be brought to it, some of the factors - for example, the presence of a few dominant users - would simply not apply. If one of the four

[375] *Id.* at 8804-05.

criteria established specificity in a particular case, Commerce is not, in its view, obliged to make affirmative findings of specificity under the other three, but could proceed to examine the question of whether the preferentiality test was met.

On this basis, Commerce concluded in the *Final Determination*,

> . . . we have considered all of them [the criteria in the Proposed Regulations] and determine that one of them—the limited number of users—requires a finding of specificity.

In the decision of the Panel of May 6, 1993, the Panel found Commerce's methodology lacking. The Panel said

> We find that it is simply not reasonable for Commerce to posit, as it has in this case, that it is not required to consider evidence relating to all four of the factors listed in the Proposed Regulations, as well as any other relevant record evidence, before coming to a conclusion on specificity.[376]

Hence the Panel remanded to Commerce "for an express evaluation and weighing of all four factors enunciated in its Proposed Regulations, as well as any other factors relevant to *de facto* specificity."[377]

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[376]Panel Decision (May 6, 1993), at 39.

[377]*Id.* at 44.

In our view, *Daewoo* requires the Panel to reconsider and adjust its holding in its decision of May 6, 1993 so that it conforms with United States law. Under *Daewoo*, Commerce is entitled to establish its methodology, as long as it is consistent with the Statute. The procedures that Commerce had taken under the Proposed Rules meet the *Daewoo* standard. (Indeed, one may note that Commerce did, in fact, consider all four of the Rules, determining that only one was relevant.) Hence, this Panel should revise its decision of May 6, 1993 with regard to stumpage specificity so that it conforms to U.S. law as expressed in *Daewoo* and should confirm the finding by Commerce of stumpage specificity reached in its *Final Determination*.[378]

Even were one to ignore the implications of *Daewoo* for this aspect of specificity, Commerce, in our view, has complied with the remand instructions with regard to specificity in the decision of May 6, 1993. Hence the specificity requirement may be affirmed on this ground as well, for the reasons set out immediately below.

In responding to the Panel's instructions regarding specificity in its stumpage analysis, Commerce first preserved its objection to the Panel's requirement that it address all four

[378]*Final Determination*, at 22,580-86.

specificity factors.[379] Commerce continued to maintain that its consistent practice has been to address the four factors *seriatim* and to stop if one factor should support dispositively a finding of specificity. It also explained why it did not accept as law the statement in *PPG IV* that government action limiting the availability of a program is part of the *de facto* specificity analysis.[380] Because the *PPG IV* court's holding confirmed Commerce's result, Commerce could not appeal the court's legal reasoning, given constitutional standing doctrine. To bolster its argument, Commerce pointed the Panel to the recent opinion of a sister panel in Pure and Alloy Magnesium from Canada (CVD),[381] which upheld Commerce's sequential approach to specificity.[382] Understandably, Commerce has a long-term interest beyond this case in preserving the integrity of the countervailing duty law which Congress has directed it to apply. Therefore, Commerce's objection to this Panel's instruction should not, in our view, be taken as a sign of disrespect or, in any way, as inappropriate, but rather as a legitimate expression of how Commerce will continue to read the law after this case is put to rest.

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[379]Department of Commerce, International Trade Admin., Determination Pursuant to Binational Panel Remand at 6 (Sept. 17, 1993) [hereinafter Commerce Remand Determination].

[380]*Id.*

[381]USA-92-1904-03, Slip Op. (Aug. 16, 1993), at 35.

[382]Commerce Remand Determination, at 6-7.

Having reserved its legal position, Commerce proceeded to comply with the Panel's instruction on specificity. Commerce first identified the number of enterprises, industries, or groups of industries benefitting from administratively-set stumpage rates.[383] Commerce considered the universe of stumpage users at three different levels of aggregation (i.e., enterprises, 2-digit standard industrial classification (SIC) grouping, and 4-digit SIC grouping) and measured the size of that universe according to three alternative yardsticks (i.e., gross domestic product (GDP), manufacturing GDP, and number of commodities in the Canadian economy).[384] Commerce concluded that "by any yardstick, the users of stumpage are small in number."[385]

Commerce next considered whether there are dominant or disproportionate users of the stumpage programs.[386] Although noting that for natural resource subsidies, "as the universe of users is limited, the benefits cannot but flow to them in high percentages,"[387] Commerce proceeded to consider three benchmarks of dominant/disproportionate use. These benchmarks were:

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[383] *Id.* at 7-25.

[384] *Id.* at 12.

[385] *Id.* at 25.

[386] *Id.* at 25-42.

[387] *Id.* at 27.

> (1) the volume of softwood lumber produced as a percentage of the softwood timber harvest (37.22 percent); (2) the volume of softwood timber consumed by softwood lumber production as a percentage of the softwood timber harvest (74.09 percent); and (3) the volume of wood fiber used by "sawn timber products" as a percentage of Crown timber harvest 1988-89 (28.0 percent).[388]

Based on this analysis, Commerce concluded that the softwood lumber industry is a dominant and disproportionate user of stumpage.[389] The second factor, therefore, supported an affirmative finding of specificity.

The third specificity factor is government discretion. Commerce found no such discretion in provincial or federal administration of the stumpage programs.[390]

The fourth specificity factor is government limitation of a program. Commerce found that stumpage purchase at government-set rates is statutorily limited to primary timber processing industries.[391] This finding added further, though was not dispositive, evidence of specificity.

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[388] *Id.* at 27-28.

[389] *Id.* at 41-42.

[390] *Id.* at 42.

[391] *Id.* at 44.

Finally, following the Panel's instruction,[392] Commerce considered whether the inherent characteristics of stumpage mitigate its finding of specificity on other grounds.[393] Commerce concluded that while the inherent characteristics of stumpage surely explain the specificity of the universe of beneficiaries, that explanation does not preclude a finding of specificity.[394] Commerce concluded,

> Even if the Panel rejects Commerce's sequential approach to specificity, the totality of the evidence on the record regarding the factors to consider, examined either singly, in the case of a number of users and/or dominant-disproportionate use, or taken together, require a finding of specificity.[395]

The Majority of the Binational Panel found that Commerce's treatment of "number of users" was insufficient. Commerce did supply the benchmarks which the Panel had requested, and which had led it to conclude that the primary timber processing industries represent "too few users," as set out above. Despite the fact that Commerce's conception of the appropriate methodology is one of "subjective case by case decisions" as the court in ***PPG*** put it, it accommodated the Panel, as described above, by providing various numerical "yardsticks," indeed, consistent with its fact-finding

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[392]Panel Decision (May 6, 1993), at 40.

[393]Commerce Remand Determination, at 46-48.

[394]*Id.*

[395]*Id.* at 49.

role, finding that some were "not dispositive."[396] But other numbers fell "at the too few users end of the specificity spectrum." The Majority of the Panel finds this unsatisfactory, suggesting that Commerce's reasoning here might lead to the "absurd results" with which *Carlisle Tire* was concerned.[397] Whether or not one thinks Commerce's finding is reasonable, can anyone seriously contend that a finding of specificity based on 2.63-3.95% of groups of industries, or 3.14% of groups under a different SIC definition or 0.41% of the enterprises of the entire economy runs the danger of the absurdity that *Carlisle* was concerned with? Or characterizing as a subsidy a benefit available to the entire economy? Although this seems to us to be the central issue on a review of specificity, the Majority essentially ignores it and concludes that what Commerce has done, without a further explanation, is unacceptable. The reason is that Commerce does not provide criteria which would make decisions reviewable or supply prior precedents on which it could base its decision. We must comment on each of these criticisms.

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[396]For example, Commerce remarked, with regard to number of enterprises that "there are 3,600 enterprises that use stumpage. On its face, this number does not appear to be so small as to dispositively indicate specificity." Commerce Remand Determination, at 14. The Majority promptly endorsed this statement, *id.*, even though Commerce, in a footnote put the number in a context of 885, 000 enterprises in Canada. In our view, a percentage of 0.41, if not dispositive of specificity, is certainly very persuasive. At the very least, there is no danger here of characterizing a benefit generally available to everyone in the great industrial economy of Canada as a putative subsidy.

[397]Majority Opinion, at 25.

We take issue with the Majority's reading of *Carlisle* and the *PPG* Series.[398] The *leitmotif* of *Carlisle*, indeed of all the law of statutory construction, is to avoid absurdities in imposing countervailing duties. The *PPG* Court said:

> In Cabot, this Court further noted the absurdity of a rule that requires imposition of countervailing duties where producers or importers have received such a generalized public benefits, i.e., (infrastructure, education, national defense) as almost every imported good entering the stream of Commerce would be subject to countervailing duties. . . . On the other hand, the Cabot Court noted the absurdity of rule that transforms an obvious bounty into a non-countervailable benefit by making the program "generally available."
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> * * * *
>
> Although general availability may be a manifestation that a program has not conferred a benefit upon a specific recipient, general availability is not the statutory test. It is merely one of several relevant factors to be considered in determining whether or not a benefit or competitive advantage has been conferred upon a "specific enterprise or industry or group of enterprises or industries."[399]

We would draw the Majority's attention to the cited examples of "generalized public benefits." It is certainly unreasonable to characterize such generalized public benefits as subsidies to be countervailed. The point that is central to Commerce's determination of specificity, but that the Majority does not take

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[398]Majority Opinion, 26-27.

[399]PPG Indus. v. United States, 662 F.Supp. 258, 265 (Ct. Int'l Trade 1987).

up, is whether the stumpage programs are analogous to infrastructure, education, or national defense.

On remand Commerce sought to meet the Panel's demand for precedents, by scouring its jurisprudence. No cases were clearly on point and the Majority treats this as critical. A prior precedent is not necessarily an explanation, but in the context of this case, the presence or absence of a precedent begs the question. All acknowledge that ***Lumber III*** is a first-impression case and a difficult one. If there were applicable precedents from the past, it would not be a case of first impression. When there are first-impression cases, and they are not unusual in the law, the accepted methodology is to inquire of the statutory authorization to determine whether or not the decision in question is consistent with it. If one were obliged to find precedents for every new decision, there could never be a decision in a first-impression case.

The Majority of the Panel acknowledges that "explicit reasoning has not always been demanded in `obvious' cases,"[400] yet avers that this case is not obvious because Commerce has found the groups of users to be "too big" and "too small." But the Majority does not relate these variances to the fact that Commerce was not

[400]*Id.* at 29.

using *its* methodology here, but trying to comply with the remand instructions of the Panel itself.

The Majority insists upon articulated reasoning:

> That it is difficult to articulate why a group of users may be "too many" or "too few" in a non-obvious case such as this is recognized by the Panel. No doubt that is one of the reasons why Congress entrusted the question to an expert government agency. However, this difficulty does not absolve Commerce from carrying out such an analysis.[401]

We do not agree that this case is not obvious nor that Commerce failed in its legislated duty in the way it decided. But the gravamen of our dispute with the Majority here is its conception of United States law on review.

When Congress specifies a methodology in a statute, the agency implementing the statute must comply with that methodology, and it is incumbent on the court engaged in administrative review to assure itself that Congress' intentions were fulfilled and to check that the methodology was followed. When Congress does not specify a methodology, it is understood that it is instructing and empowering the implementing agency to devise and apply what it deems an appropriate methodology. A court engaged in adminis-

[401] *Id.*

trative review may not superimpose its own methodology, as we explained in our section on standards of review above. We believe that this is precisely what the Majority is doing. The appropriate question, of which the Majority has lost sight, is whether given the Statute, the Regulations and the evidence, the decision taken by Commerce was not unreasonable.

The relevant Statute is, of course, 19 U.S.C. § 1677(5). Section 5 defines "subsidy" and then in subsection (B) expresses a special rule. At the risk of belaboring the point, let us set it out again.

> Special rule. —In applying subparagraph (A), the administering authority, in each investigation, shall determine whether the bounty, grant, or subsidy in law or in fact is provided to a specific enterprise or industry or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, program, or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for determining that bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.

The provision does not prescribe a methodology, but gives a broad discretion to the agency implementing it. It does not provide grounds for review other than the assessment by the reviewing authority of whether the application of the special rule in sub-section 5 was reasonable in context.

As will be recalled, the proposed Regulations, issued by the Department in 1989, to implement the above provision provide, in relevant part,

> In determining whether benefits are specific (to an enterprise or industry, or group of enterprises or industries), the Secretary will consider, among other things, the following factors:
>
> * * * *
>
> (ii) The number of enterprises, industries or groups thereof that actually use a program;

Here again, in keeping with the statute which it implements, bright line and black letter have been eschewed. The agency is obliged to exercise discretion; the criterion for review is perforce reasonableness.

The Majority of the Panel, in rejecting Commerce's implementation of its remand instruction, is, in our view, criticizing the Statute and the Regulations and not Commerce's *Final Determination* and Remand Determination, which faithfully implements them. In effect, the Majority of the Panel is introducing requirements found in neither the Statute nor the Regulations. It might be desirable to revise United States and, indeed, Canadian law on this point so that it is closer to and meets some of the concerns of the Majority's view. Personally, we

are not unsympathetic to that view. But statutory and regulatory amendment is not the Panel's function. The Majority's real grievance is with the Regulations and the Statute. In our view, the Panel is acting *ultra vires*. The appropriate question here is whether the Department of Commerce fulfilled the terms of the remand instruction, as prescribed by the Statute and Regulations, and should be confirmed.

The Statute identifies as potential beneficiaries of a putative subsidy "a specific enterprise or industry, or group of enterprises or industries." There is no question that Commerce is authorized to take account of groups of enterprises or groups of industries. In its *Preliminary Determination*, Commerce explained at length why its grouping was of primary timber processing industries, with references to both Canadian and United States practice.[402] Indeed, one of its sources was a Canadian Forestry Service study prepared especially to examine the impact of the Free Trade Agreement. The Department of Commerce also relied upon the statistical usages of Statistics Canada. The Canadian Parties criticized Commerce's grouping, criticizing Commerce's reluctance to include producers of finished goods for which lumber is an input, in particular. To do so, of course, would have swelled the number of enterprises or groups of enterprises greatly. The

[402] *Preliminary Determination*, at 8804.

Majority of the Panel states:

> The fact that Statistics Canada assigns establishments to unique industrial categories for the purpose of avoiding double-counting when measuring production in the Canadian economy, does not mean that this is a reasonable methodology in counting industries for a specificity analysis.[403]

If one is to deal with categories within the Canadian political economy, one might argue that it would be impermissible to apply United States statistical techniques. But is it *prima facie* unreasonable to use the official Canadian categorization? Why? The Majority of the Panel claims that Canadian practice, as reflected in the documents examined by Commerce, shows a lack of consistency in the use of terms and groupings.[404] But the critical question is not whether the Canadian government is consistent. The question is whether the grouping made is reasonable, in terms of the Statute, and, insofar as there is case law available, in terms of prior decisions. There is ample evidence that both of these tests are met.

Yet, the Majority of the Panel concludes that

> Its [Commerce's] analysis of the record evidence in

[403]Majority Opinion, at 31.

[404]*Id.* at 33.

> deriving the number of industries represented by enterprises using stumpage is circular, depending upon the identification and labelling of the group of stumpage users rather than upon a reasoned analysis of the actual businesses in which those users were engaged. . . . [T]he lack of reasoned analysis of the number of industrial users in finding them to be "too few" reveals a mechanical and arbitrary exercise which is not supportable under U.S. law.[405]

With respect, we submit that the above statement is factually incorrect as an examination of the *Preliminary*, *Final*, and Remand Determinations will indicate. We think it quite reasonable for Commerce to apply statistical groupings used by the government of the country being examined, especially when they are created with regard to the Free Trade Agreement. Whether Commerce used the two-digit Canadian governmental standard industrial classification or the four-digit standard industrial classification, the group of industries was either 2.63 - 3.95% or 3.14% of all industries in Canada. Commerce's application of the statute did not produce a group that covered the entire economy or even a large part of it. It was a very small part of the economy. Given the fact that the group's boundaries had been described by the Canadian Government itself, and that the group's composition was supported by other substantial evidence on the record, we simply do not see how one can say that Commerce's conclusion was unreasonable, even if one would have reached a different decision. It is supportable under

[405]*Id.* at 37.

U.S. law.

In our view, Commerce has sustained its burden under the Statute and Regulations. But, for purposes of complete analysis, we will address several other issues concerning stumpage specificity that the Majority treated. The Majority's insistence on introducing secondary and tertiary users of the products of lumber as inputs leads the Panel also to reject Commerce's conclusion of dominant or disproportionate user. The Majority states:

> The Majority finds that the fact that 74% of all softwood timber harvested in B.C., Alberta, Ontario and Quebec passed through a sawmill is not probative of dominant use of stumpage by lumber producers given the record evidence that sawmilling is a necessary first step in the production of many sawn wood products. . . .[406]

This reasoning, if accepted, would effectively frustrate the operation of the Statute for any item which is then incorporated into other products. Relatively few products would ever qualify as subsidies, no matter how much governmental support they were accorded. Nor do we find that the interpretation of sub-section (iii) on dominant and disproportionate use applied by the Majority makes any sense. In subsection (iii) of the proposed regulations, the Secretary of Commerce looks to "[w]hether there are dominant

[406] *Id.* at 40.

users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program," after looking at government action and number of enterprises, industries or groups thereof. If specificity has plainly been established by, let us say, subsection (ii), the fact that some beneficiaries of the specific group benefit more than others is not relevant. Only if the group is not already specific under subsection (ii) does the Secretary inquire as to whether there is, in fact, a smaller group which is actually receiving the lion's share. If Commerce must, as the Majority suggests, "[l]ook[] within the universe of potential users to see if a subset including the products under investigation are dominant or disproportionate users of the program"[407] the Tariff Act will ultimately be frustrated, for Commerce will be obliged, in an infinite regress, to find dominance and disproportionality within ever smaller groups of a group that has already been found to be specific within the meaning of the statute.

The Majority of the Panel finds that Commerce's determination with regard to government discretion and government limitation is acceptable. In its Remand Determination, Commerce said:

> While it [the evidence] contains indications that the provinces maintained formal and informal, legal, and

[407]Majority Opinion, at 42.

> institutional restrictions on the provision of stumpage, these restrictions largely serve only to supplement and complement the stronger indicia of specificity resulting from analyses of the number of users and disproportionate use factors, and to weaken Canadian complainant's claim that the inherent characteristics of stumpage are the sole determinant of the pattern of use.[408]

The Majority concludes that "Commerce's consideration of the evidence regarding these two factors is not unreasonable."[409] We agree.

In its Remand Decision, the Panel instructed Commerce to take account of the inherent characteristics of the resource concerned. Commerce considered but assigned little if any weight to inherent characteristics, the very factor Canadian Complainants considered most important, if not dispositive.[410] The Panel has had to consider whether Commerce carried its burden to "evaluate" and to "weigh" the importance of inherent characteristics simply by raising the factor and then dismissing it with the conclusion that "a limited group is a limited group, whatever the reason."[411]

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[408]Commerce Remand Determination, at 45-46.

[409]Majority Opinion, at 43.

[410]*Compare* Commerce Remand Determination, at 47 ("inherent characteristics carry no weight") *with* Govt. of Canada et al., Canadian Complainants Joint Brief in Opposition to the Determination on Remand at B-41 (Oct. 12, 1993) [hereinafter Canadian Complainants' Brief] ("especially anomalous to exclude inherent characteristics from consideration in this case").

[411]Commerce Remand Determination, at 47.

The problem in determining whether Commerce carried its burden is that, in all fairness, it must be acknowledged that the Panel's instruction on this issue was not clear. On the one hand, the Panel agreed with Commerce that inherent characteristics should not be invoked to prove the "*per se* non-countervailability of natural resource subsidies."[412] The Panel noted further that use of a program by all eligible parties does not necessarily amount to non-specificity.[413] On the other hand, the Panel found that inherent characteristics "*could* still have some relevance."[414] But the Panel did not discuss how this factor could still be relevant, other than to suggest that it might explain why a small number of parties were using a program. If that is the relevance of inherent characteristics, however, it would seem to lead back to *per se* non-countervailability, the very rule that Congress rejected, as the Panel confirmed.

Part of the problem is that the nature of the inherent characteristics question with regard to natural resources appears to call for a "yes" or "no" answer. The inherent characteristics of a resource either do or do not limit the number of entities that might benefit from a subsidy specific to that resource. Thus, it

[412]Panel Decision (May 6, 1993), at 40.

[413]*Id*. at 41 n.111.

[414]*Id*. at 40.

appears that Commerce must either assign this factor no weight or all the weight (as Canadian Complainants would argue). The Majority, in effect, wants inherent characteristics always to weigh against specificity: "To say that this supports a finding of specificity is to go full circle from the pre-Cabot stance that a natural limitation of program users, without more, rendered the program *per se* non-specific, to a stance that such a natural limitation actually supports a finding of specificity."[415] In fact, Commerce never said that inherent characteristics factor supports a finding of specificity. Commerce merely found that inherent characteristics was a neutral factor. Inherent characteristics simply explain *why* a group of beneficiaries is specific.

We joined the Majority of the Panel in its decision of May 6, 1993, but it was certainly not our intention, in remanding then, to require Commerce to accord weight to a factor which, upon consideration, it found to be irrelevant. Our concern in this regard is all the greater, in that the factor on which Commerce is being faulted here is not one in the Regulations and was downplayed if not excluded by Congress itself. Consideration of this factor was imposed by the Panel itself and is of at least uncertain foundation in U.S. law. The Majority's conclusion now is all the more surprising as the Panel itself in its decision of May 6, 1993

[415]Majority Opinion, at 42.

said that inherent characteristics was not "dispositive."[416]

Given the dilemmas presented, Commerce weighed and considered the specificity factors and thus amply complied with the Panel's instructions. Wholly apart from its ample compliance with the remand instruction, we believe that *Daewoo* requires this Panel to revise its Decision of May 6, 1993 and to confirm Commerce's finding of stumpage specificity in its *Final Determination*.

B. *Preferentiality*

On the issue of stumpage preferentiality, the Panel's remand instructed Commerce to examine Canadian stumpage programs for market-distorting effects.[417] A simple finding that lower stumpage rates led to an increased harvest and/or lower log prices should not lead to an affirmative finding of preferentiality if these effects were not market distorting.[418]

In its Remand Determination, Commerce protested the market distortion requirement.[419] Commerce argued that the Panel had

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[416]*Id.*

[417]Panel Decision (May 6, 1993), at 59-60.

[418]*Id.* at 53.

[419]Department of Commerce, Response Brief of the Investigating Authority, at 43 (November 1, 1993) [hereinafter Commerce Response Brief]; *see also Final Determination*, at 50-52.

mistakenly relied on an underlying policy rationale for the countervailing duty law to derive a market distortion requirement not mandated by the language of the law.[420] That policy rationale came from *Carbon Steel Wire Rod from Poland*.[421] *Wire Rod* stands for the proposition that it is meaningless to speak of countervailable subsidies within the context of a non-market economy, such as Poland's was at the time. The whole concept of a subsidy assumes the presence of market forces that will respond to the benefit bestowed by the government.[422] In its *Final Determination,* Commerce had contended that the reasoning of *Wire Rod* should be restricted to non-market economies.[423]

Today the Majority expands the meaning of *Wire Rod*. The Majority argues that an exception to the presumption of market distortion applies *not only* to non-market economies, but also to a new category of circumstances. Without citing to *any* authority, the Majority "bootstraps" from the non-market economy exception in *Wire Rod* to carve out a *new* exception for markets with "special characteristics."[424] On the Majority's reading, *Wire Rod*

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[420]Commerce Response Brief, at 43.

[421]49 Fed. Reg. 19,374 (1984). *See* Panel Decision (May 6, 1993), at 50.

[422]*See* 49 Fed. Reg. 19,374, at 19,375-76.

[423]*Final Determination*, at 22587-88.

[424]Majority Opinion, at 49.

affirmatively establishes a market distortion requirement, rather than merely stating the irrelevance of subsidies in non-market economies.

Commerce has argued, and we would agree, that a market distortion requirement would read in to the countervailing duty law an effects test that is not currently there.[425] In contrast to the silence in section 771(5) of the *Tariff Act* (i.e., the domestic subsidies section), Commerce pointed to the explicit instruction in section 771A to calculate the effects of upstream subsidies on downstream products.[426] The instant case is governed by section 771(5).

Commerce's reluctance to undertake an investigation of market distortion finds further, and we believe dispositive, support in the Federal Circuit's recent opinion in *Daewoo*. As discussed *supra*, the *Daewoo* court cited several factors in favor of deference to Commerce's chosen methodology in an antidumping investigation: reasonable, consistent statutory interpretation by Commerce; legislative history consistent with that interpretation; traditional deference to administrative expertise; the intricacy of

[425]Commerce Remand Determination, at 53-54 (quoting Privatization section of the General Issues Appendix, Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria, 58 Fed. Reg. 37,217, 37,259-65 (July 9, 1993)).

[426]*Id.* at 55.

the analysis required by the antidumping law even under Commerce's chosen interpretation; and the "onerous burden entailed" by the lower court's instruction.[427]

These same factors prevail in the present case. Section 771(5) says nothing about market distortion, and Commerce has never read this factor in to its subsidy analysis. To the contrary, Commerce has consistently examined subsidies by comparing subsidized prices to market prices. Perhaps most important, as in ***Daewoo***, the Majority's requirement that Commerce find market distortion as a prerequisite to an affirmative determination may impose an "onerous burden."[428] As Commerce pointed out, and as the proceedings before this Panel have demonstrated, the instruction to make an explicit finding of market distortion "reduces the countervailing duty law to battling econometricians."[429] Like the antidumping law considered in ***Daewoo***, the countervailing duty law here considered involves a "number of factors . . . complicated by the difficulty in quantification of those factors and . . . foreign policy repercussions. . . ."[430] Indeed, regarding this last factor—foreign policy repercussions—if a dumping determination has

[427]*Daewoo*, at *14-*25.

[428]*Id.* at *24.

[429]Commerce Response Brief, at 47.

[430]*Daewoo*, at *17.

such repercussions, then *a fortiori* so does a subsidy determination. The latter is a response to government action, whereas the former is "merely" a response to private party action.

Regarding the "onerous burden" of employing econometric analysis in the countervailing duty context, the Majority criticizes us for exaggerating the significance of their market distortion requirement; they contend that "the number of investigations in which market distortion need be considered at all is very few."[431] Even if our colleagues are correct, the Majority is imposing a heavy burden not required by statute. Even a single case, as this one demonstrates, imposes the sort of onerous burden that concerned the Federal Circuit in the "single" case of *Daewoo*. Moreover, it is not at all clear that the number of investigations that require a finding of market distortion will prove, as the Majority suggests, to be "very few." The Majority's reasoning would apply to all natural resource subsidy investigations, and there is no reason to think that disputes over natural resource subsidies will not be a continued source of tension.

Moreover, the *Daewoo* court found support for its holding in the observation that "taxes can only be recouped in their entirety

[431]Majority Opinion, at 55 (emphasis in original).

from purchasers."[432] Analogously, in the present case, lower stumpage prices can only redound to the benefit of stumpage purchasers (i.e., lumber producers). Even if log output, and therefore lumber output, does not increase (that is, even accepting Canadian Complainants' argument that log supply is inelastic at competitive prices), lumber producers still benefit from lower-than-market prices. The higher profits they reap might, for example, be reinvested in capital stock to enhance their competitive advantage over time.

We believe that the Majority interprets *Daewoo* far too narrowly. The Majority holds *Daewoo* to mean that this Panel cannot dictate *how* Commerce must find market distortion, implying that *whether* Commerce must find market distortion is simply beyond question.[433] The Majority reduces the implication of *Daewoo* to the conclusion that the Panel cannot require Commerce to prefer one methodology over another in analyzing market distortion. The Majority asserts that "market distortion is a fundamental assumption of countervailability under the statute,"[434] thereby rendering it untouchable. This begs the question.

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[432]*Daewoo*, at *18.

[433]*See, e.g.*, Majority Opinion, at 51, 54-55.

[434]Majority Opinion, at 65.

Daewoo itself did not deal with *how* Commerce must analyze tax incidence but *whether* it must analyze tax incidence. The Federal Circuit held that the antidumping statute put Commerce under no such burden. It reached that holding notwithstanding language in the statute (on which the Court of International Trade had relied) instructing Commerce to raise the U.S. price of an investigated good by the amount of tax imposed exclusively in the home market "only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation."[435] That language formed the basis for a plausible argument that Commerce must disaggregate taxes imposed in the home market and adjust its calculations for taxes passed through to the consumer only. The Court of International Trade was persuaded by such an argument.

Unlike the Court of International Trade in *Daewoo*, the Majority in the instant case does not even have the leg of statutory language on which to stand. As discussed above, to derive a market distortion requirement, the Panel relied on Commerce's reasoning in *Wire Rod*, an inapposite case concerning subsidies in the context of a non-market economy.

For the above reasons, we dissent from the Majority's too

[435]19 U.S.C. § 1677a(d)(1)(C) (1980 & Supp. 1993); *see Daewoo*, at *6-*7.

narrow reading of *Daewoo* as that decision pertains to stumpage preferentiality. In light of *Daewoo*, the Panel should defer to the methodology employed by Commerce in its *Final Determination*. There, Commerce compared administratively set stumpage rates in each province to privately bid stumpage prices in the same province.[436] As Commerce's analysis was consistent with past practice and with the statutory language, its finding on stumpage preferentiality in its *Final Determination* should be upheld by this Panel.

Were we not strongly persuaded that *Daewoo* trumps our earlier instruction on market distortion, we would concur in most of the Majority's reasoning on stumpage preferentiality in the present opinion.[437] For the purposes of a complete analysis, but strictly as *obiter dictum*, we discuss below the Majority's review of Commerce's market distortion analysis. While we find the Majority's critique persuasive, assuming *arguendo* a market distortion requirement, unlike the Majority, we would have instructed Commerce on remand to provide explanations for the assumptions it makes in recalculating the Nordhaus Study's regression analysis, as discussed below.

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[436]*See, e.g.*, *Final Determination*, at 22,592-93 (British Columbia); *id.* at 22,597 (Quebec).

[437]Majority Opinion, at 56-63 (We would not concur in the Majority's remand instruction, at 63.).

Having registered its objection to the market distortion requirement, Commerce went on to argue in its Remand Determination that, nevertheless, stumpage rate reduction does lead to market distortion. Market distortion, according to Commerce, is the increased log (and, therefore, lumber) output associated with a fall in stumpage rates below the price that would obtain in a competitive market. Importantly, according to Commerce's theory, the price that would obtain in a competitive market is a "reservation price," higher than the highest price at which all presently standing timber would be cut by stumpage purchasers.[438]

In setting forth this argument, Commerce challenged the major piece of expert testimony on which Canadian Complainants relied—the Nordhaus Study.[439] Briefly, that study concluded that timber is a natural resource the supply of which behaves consistently with Ricardian economic rent theory. That is, log output is fixed. No matter how much the price of timber fluctuates between zero and some ceiling—i.e., the "normal range"—the quantity of timber cut will remain constant.[440]

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[438]Commerce Remand Determination, at 87 *et seq.*

[439]William D. Nordhaus, The Impact of Stumpage Charges on Prices and Trade Flows in Forest Products (Pub. Doc. No. 475) (Feb. 18, 1992) [hereinafter Nordhaus Study].

[440]Above the normal range ceiling, the quantity of timber cut will fall, as relatively high marginal costs will make it inefficient to cut certain stands or trees within stands. Prices above the normal range ceiling are in the excessive range, according to the Nordhaus Study.

Commerce attempted to rebut the Nordhaus thesis on three grounds. First, Commerce suggested that Nordhaus based his theory on a flat access fee for timber stands, as opposed to a volume-dependent fee.[441] That argument is plainly incorrect. Nordhaus' statements before Commerce confirm that his theory should apply even if stumpage fees are assessed according to volume cut.[442] Canadian Complainants correctly observed that Commerce had misinterpreted Nordhaus in this regard.[443]

Second, Commerce argued that the supply of timber is *not* perfectly inelastic over the relevant price range—i.e., between the market price and the government-established price—and that this fact undermines the applicability of economic rent theory to stumpage.[444] In light of that evidence, Commerce would apply marginal cost theory to stumpage. According to marginal cost theory, output will increase as the marginal cost of production decreases (as when stumpage fees fall).

Canadian Complainants correctly observed (as does the Majority

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[441]Commerce Remand Determination, at 59, 78, 82-83.

[442]Transcript of Proceedings Before U.S. Dept. of Commerce In the Matter of Softwood Lumber Products from Canada (Apr. 29, 1992) at 179 ln.12 to 181 ln.1. [hereinafter Nordhaus Transcript].

[443]Canadian Complainants' Brief, at C-4, C-18, C-28 to C-29.

[444]Commerce Remand Determination, at 77 *et seq*.

today[445]) that economic rent theory and marginal cost theory are not incompatible.[446] Both theories acknowledge the existence of a price range over which the timber harvest grows as stumpage rates fall. Marginal cost theory would clearly apply over that range. The crux of the stumpage preferentiality debate is whether that is the relevant price range. The answer depends on the strength of Commerce's third critique of the Nordhaus Study.

Commerce argued that there are multiple alternative uses for forests other than stumpage. These alternative uses explain the reservation price below which a competitive owner would not sell timber for stumpage but instead would hold the timber for its more valued use. Since these alternative potential uses are unable to compete for timber stands under the current regime (because only timber processors are allowed to buy government timber), prices for stumpage are kept artificially low.[447] When the government as owner lowers the stumpage rate below the reservation price that would prevail in a competitive market, it induces an increase in log output. This is market distorting, according to Commerce, because in a competitive market the timber that is cut as a result of the lower stumpage rate would have been held for the higher rent it

[445]Majority Opinion, at 58-59.

[446]Canadian Complainants' Brief, at C-15 to C-17.

[447]Commerce Remand Determination, at 78, 84-85.

might fetch in non-stumpage projects.[448]

If Commerce's alternative use/reservation price theory is correct, then the reservation price should be higher than the ceiling of what Nordhaus calls the normal range. For over the normal range log output is inelastic, whereas, at the reservation price, log output must still be somewhat elastic. The price difference reflects the quantity of timber that, in a competitive market, would be diverted from stumpage to other projects. However, Commerce offered no support for the thesis that a reservation price really would exist in a competitive market. Although the existence of alternative uses for timber is plausible, Commerce offered no evidence on point.

If Commerce's suggestion of alternative uses is incorrect, then all timber in a competitive market will be used for stumpage. In that event, there will be no reservation price, because any tree will fetch more rent as stumpage than if it were left standing. Therefore, the competitive price for timber will fall to the point where the maximum quantity will be harvested. This point is the normal range ceiling in the Nordhaus Study.

The market distortion issue then boils down to two questions:

[448]Commerce Remand Determination, at 77-78, 87-94.

(1) Are there alternative uses for timber that would be exploited in a competitive market? (2) Is there substantial evidence in the record of log output elasticity over the relevant price range?

We would gently quarrel with the Majority's view that Commerce's burden to show market distortion could be discharged by any method other than econometric analysis.[449] If the market distortion issue boils down to a debate over the elasticity of log outputs in competitive markets, then Commerce cannot rely on general economic theory or simple price comparisons. Rather, Commerce must undertake some type of econometric analysis. With respect, the fact is that Commerce cannot avoid precisely the sort of burden with which the Federal Circuit was concerned in *Daewoo*.

Simply to interpret the "evidence regarding the natural resource market,"[450] as the Panel instructed, Commerce had to assimilate the findings of the Nordhaus Study which the Panel found Commerce "thoroughly misunderstood."[451] Commerce could not possibly evaluate the Nordhaus Study unless the agency engaged in the type of analysis by which that study was produced. Therefore, Commerce

[449]*See* Majority Opinion, at 55 ("[T]his Panel has never viewed the market distortion requirement as entailing by its very nature the employment of a particular method or technique of economic analysis.")

[450]Panel Decision (May 6, 1993), at 60.

[451]Panel Decision (May 6, 1993), at 55.

could not possibly comply with the Panel's instruction without undertaking an econometric analysis.

In a footnote, Canadian Complainants question Commerce's assertion of alternative uses for timber.[452] They argue, first, that the existence of alternative uses for timber does not render economic rent theory inapposite in this case. Other quintessential "rent" goods, such as land, also have alternative uses.[453] This argument, however, misses the point that alternative uses are relevant, according to Commerce's thesis, over a price range in which standard marginal cost analysis, *not* economic rent analysis, applies. Therefore, the analogy to land, for which economic rent theory *always* applies, is irrelevant in this context. Canadian Complainants' second argument is that it is inappropriate to take alternative uses into account, because these alternative uses yield non-priced outputs which would be ignored in a competitive market.[454]

The strongest support Canadian Complainants offered to refute the existence of a reservation price in competitive markets was the

[452]Canadian Complainants' Brief, at C-33 n.31.

[453]*Id.*

[454]*Id.* at C-33 n.31. What Canadian Complainants mean by non-priced outputs is unclear. They could be referring to the suggestion that one alternative use for forests is tourism. While forest tourism might not yield much fiscal income, its contribution to general public welfare might implicitly be valued more highly than the highest price this timber would fetch as stumpage.

regression over a wide range of prices that is the focus of the Nordhaus Study. In support of his theory of economic rent, Nordhaus undertook a case study of B.C. and found that "[t]imber production shows virtually no response to stumpage charges. . . ." In some cases in that study although stumpage rates rose by 700% or more over the period of the test, there was no corresponding change in volume of logs harvested.[455]

Commerce challenged this study as being insufficiently rigorous, since it exhibited heteroskedasticity when Commerce tried to replicate its results.[456] Furthermore, after making corrections for heteroskedasticity, Commerce purported to show that log output is in fact elastic over the relevant price range. Canadian Complainants countered that Commerce misinterpreted the implications of heteroskedasticity. The possible statistical error, claimed Canadian Complainants, may represent a technical problem but does not detract from the conclusions of the Nordhaus Study.[457] Nordhaus himself pointed out, further, that Commerce's response to finding heteroskedasticity in the Nordhaus regression—the steps Commerce took to try to explain and correct

[455]William D. Nordhaus & Robert E. Litan, Empirical Analysis of the Effect of Stumpage on Timber Harvesting: A British Columbia Case Study (Mar. 5, 1992) *in* Canadian Complaints' Joint Case Brief Concerning Alleged Stumpage Subsidies and Preferentiality, vol. III-B, Attch. III-3 (Apr. 21, 1992) at 3, Charts 1-12; *see also* Nordhaus Transcript, at 188-89.

[456]Commerce Remand Determination, at 112-15.

[457]Canadian Complainants' Brief, at C-46 to C-48.

for the error—was contrary to "standard procedures."[458]

Thus, in an eery confirmation of *Daewoo's* warning, the debate over stumpage preferentiality seems to have been channeled into a debate over the arcane statistical concept of heteroskedasticity. Indeed, much, in this approach to the problem, may turn on the accuracy of the Nordhaus regression. If the heteroskedasticity exhibited in the regression is insignificant, then the evidence that log output is inelastic over a wide price range would seem to support Canadian Complainants. On the other hand, if the heteroskedasticity is significant and Commerce has correctly adjusted for it, then Commerce's finding of log output elasticity would seem to support its affirmative finding of market distortion.

The problem is, as the Majority has stated, "that Commerce has completely failed to explain the reasons or assumptions behind its [recalculations]."[459] We would therefore concur in the Majority's reasoning in its discussion of Commerce's reworking of the Nordhaus Study.[460] We agree that "it is crucial that Commerce fully explain its assumptions and methodology."[461] Complex econometric models,

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[458]William D. Nordhaus, Comments on Commerce's Analysis of Stumpage Elasticity, *in* Canadian Complainants' Brief, at App. A at 6.

[459]Majority Opinion, at 63.

[460]*Id.* at 60-64.

[461]*Id.* at 62.

such as those presented to this panel, are too manipulable to be meaningful without some justification for inputs and base assumptions.

However, unlike the Majority, we would remand to Commerce to give the agency an opportunity to explain its recalculation assumptions. The Majority avoids this result by arguing that even if one accepts the validity of Commerce's recalculations *arguendo*, the log output elasticity Commerce found (.08) is too small to reach an affirmative conclusion of preferentiality.[462] We do not believe that the Majority is entitled to go so far. How much log output elasticity is enough to support Commerce's reservation price theory is a question of fact for Commerce to find and for this panel to review for substantial evidence of the record. With all due respect to the Majority's concern for expense and delay,[463] it is *ultra vires* for this body to make an independent finding of fact. The proper response to Commerce's failure to explain its recalculation assumptions is a remand with instructions to provide the appropriate explanations.

For the above-stated reasons, we would have concurred (were it not for *Daewoo*) in the Majority's reasoning on Commerce's

[462]*Id.* at 63-64.

[463]*Id.* at 63.

recalculation of the Nordhaus regression, but we would dissent from the Majority's refusal to remand to Commerce for further explanation.

For the reasons elaborated above, however, we would confirm Commerce's finding of preferentiality in stumpage programs, without reference to the Nordhaus Study, on the basis of a methodology it has consistently used in market economies which does not require a demonstration of market distortion.

IV. Log Export Restrictions

A. *Specificity*

As we would uphold Commerce's finding of stumpage specificity, *a fortiori* we would uphold Commerce's finding of LER specificity. The universe of LER beneficiaries does not include logging enterprises and is, therefore, even smaller than the universe of stumpage beneficiaries.

We concur in the Majority's rejection of the argument proffered by the Canadian Complainants that LERs are non-specific because their benefits redound to secondary and tertiary

purchasers.[464] By that logic, any subsidy, no matter how small the group of direct beneficiaries, could be found to be non-specific. This would vitiate the purpose of the countervailing duty law.

The Majority rejects LER specificity principally because this result must follow from its rejection of stumpage specificity.[465] This result must follow because "Commerce has asserted that the same analysis applies to both groups."[466] The Majority then proceeds to challenge Commerce's inclusion of integrated log processors in the universe of LER beneficiaries on the ground that these enterprises do not purchase logs and cannot, therefore, benefit from LERs.

We write briefly to address the Majority's argument for excluding integrated log processors. We believe that Commerce properly included integrated log processors for three reasons.

First, although they own stumpage, integrated processors still participate in the log market. As British Columbia described the Vancouver log market in its questionnaire response: "The integrated companies use the log market to sell log sorts for which

[464] *Id.* at 70-71.

[465] *See id.* at 72.

[466] *Id.*

they have no suitable manufacturing facilities *and purchase log sorts that are suitable and required by their various processing facilities*."[467]

Second, integrated companies benefit to the extent that LERs reduce the price they pay for government stumpage. Even if one rejects Commerce's reservation price thesis in favor of Nordhaus's economic rent thesis, integrated companies that buy stumpage from the government must benefit from LERs. Dr. Nordhaus assumes that the price that timber would fetch in a competitive market is the ceiling of what he calls the normal range. Dr. Nordhaus would surely agree that the normal range ceiling—the highest stumpage rate at which all available timber will be cut—would be higher in a world without LERs than in a world with LERs. For, absent LERs, demand for timber would grow to reflect opportunities in the export market. Therefore, to the extent that LERs artificially depress the competitive stumpage rate, integrated companies benefit.

Finally, integrated producers benefit from reduced opportunity costs. The Canadian Complainants reject this third argument, citing Anhydrous and Aqua Ammonia from Mexico[468] for support.[469]

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[467]British Columbia Response, Countervailing Duty Questionnaire (Pub. Doc. 101) BC II-54 (Dec. 13, 1991) (emphasis supplied).

[468]48 Fed. Reg. 28,527.

[469]*See* Canadian Complainants' Brief, at E-67 n.167.

However, in Anhydrous and Aqua Ammonia, Commerce did not preclude itself from looking to opportunity costs to support a finding that an integrated company benefits from a subsidy. Anhydrous and Aqua Ammonia concerned, in relevant part, the opportunity costs to Petroleos Mexicanos (Pemex) for obtaining natural gas from which to produce ammonia. Pemex was an integrated producer which got its natural gas from internal sources. Petitioners had urged Commerce to look at Pemex's opportunity costs for natural gas as evidence that Pemex received preferential treatment when compared with ammonia producers that purchase their natural gas. Commerce did *not* find that opportunity costs could not be looked to. Rather, it found that Pemex's internal costs in fact "exceeded the price of natural gas for industrial users in Mexico at the time." Therefore, Anhydrous and Aqua Ammonia does not preclude Commerce from looking at opportunity costs in this case. Moreover, in his discussion of stumpage, Canadian Complainants' own expert describes the operations of integrated producers thus: "Under competitive conditions, a profit-maximizing firm would operate each division independently, valuing the other division's inputs or outputs at 'transfer prices' equal to market prices."[470] Therefore, an integrated timber processor that does not purchase logs still benefits from LERs to the extent that it operates each division independently.

[470]*See* Nordhaus Study, at 26.

For the above-stated reasons, we must dissent from the Majority's conclusion on LER specificity. We would uphold Commerce's affirmative finding.

B. *Existence of a Subsidy*

Although we concur in the Majority's conclusion that B.C. log export restrictions do provide a subsidy to domestic lumber manufacturers, we believe the Majority's opinion fails to deal with compelling evidence that led us to reach that conclusion: the persistence of an export/domestic price gap after proper adjustments. Because this was a basis for our conclusion, we believe it is necessary to explain our reasoning here.

At its core, the "direct and discernible effects" standard tests to see whether a gap exists between the export and domestic log prices that is only attributable to log export restrictions. Other factors which possibly cause the gap must be eliminated to isolate the export restraints' effects.[471]

All parties accept that the exported logs are of higher quality than those sold domestically. To the extent this quality differential is reflected in the export/domestic prices gap, it

[471]These factors may include differences in the species, grades, and quality of export and the additional costs of exports (e.g., transportation, additional towing, sorting).

must be adjusted out. According to Commerce, species and grade differences account for this quality differential. In the *Preliminary Determination*, Commerce explained:

> [B]ecause the species and the grade mix in the export and domestic markets are different, we adjusted this weighted average domestic log price for the different species-grade distributions between the two markets. This was done so that the domestic price would mirror the benchmark [export] price and a fair comparison could be made.[472]

Commerce also adjusted for certain costs incurred in the exportation process: dry land sorting, volume lost, and export transportation costs.[473] In the *Final Determination*, Commerce made these adjustments to reach an export/domestic price gap of Cdn$7.31. The Canadian Parties argue that an additional factor—a within-grade adjustment—is required. In fact, according to the Canadian Complainants, there is no export/domestic price gap if Commerce adjusts for a falldown sort costs or within-grade quality differences.

In its Remand Decision, the Panel accepted that such an additional adjustment was necessary. The Panel stated:

The Panel finds that neither Commerce's decision to

[472]*Preliminary Determination*, at 8816; *see also Final Determination*, at 22,616.

[473]*See Final Determination*, at 22,618-19.

> include the diminished value of the falldown sort as an export cost nor its decision not to adjust for within-grade difference is supported by substantial evidence on the record. The determination is therefore remanded to Commerce for either recalculation of the export cost adjustment to include the diminished value in the falldown sort or adoption of a within-grade adjustment.[474]

The Panel's decision here may have been based upon a confusion. Upon review, it appears that in the *Final Determination* Commerce did support its decision not to include either a falldown sort or within-grade adjustment, as we will explain below.

On remand, Commerce continues to maintain that "a) the diminished value of a falldown sort is not a cost of exporting, and b) a within-grade adjustment is not required."[475] We will address each of these *seriatim*.

a. Falldown Sort Adjustment

The "falldown sort" consists of "the logs left in the boom after the top quality logs have been removed for export."[476] Commerce recognizes that "the falldown sort that remains after

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[474]Panel Decision (May 6, 1993), at 124-25 ("The determination is . . . remanded to Commerce for either recalculation of the export cost adjustment to include the diminished value of the falldown sort or adoption of a within-grade adjustment.").

[475]Commerce Remand Determination, at 174.

[476]Panel Decision (May 6, 1993), at 124.

export logs have been removed from a domestic sort is worth less than an average domestic sort."[477] The price differential, which the Canadian Parties first valued at C$10.40,[478] represents species and grades differences, for which Commerce already adjusted.[479] Because the falldown sort is sold for its market value, it is not an additional cost of exporting. It would have been appropriate to view the falldown as a cost only if it were not marketable as a result of the removal of the export quality component and the exporter would have to pay someone, as it were, to remove the falldown. Introducing a falldown sort adjustment would double-count the species/grade adjustment.

b. Within-grade adjustment

Commerce also opposed making the within-grade adjustment. Commerce explained that there is "no evidence that only the high

[477] *Final Determination*, at 22,619-20.

[478] This value was for *one species* the Douglas Fir; therefore the value represents only a *grade* adjustment.

[479] In footnote 34 of the *Final Determination*, Commerce explained the relationship between the "falldown sort cost" and the species/grade adjustment. (The "camp-run sort" is the collection of total logs in the boom representing the entire harvest of a forest stand, prior to the removal of the "export sort.") Based on a hypothetical example BC provided Commerce during verification, Commerce compared the incremental gain of the export sort to the incremental loss of the falldown sort. The gain ($29,250) is the export price ($120/m3) less the camp-run price ($70/m3) times the export volume (585 m3), while the loss ($6,083) is the camp-run price ($70/m3) less the value of the falldown ($54.60/m3) times the falldown volume. This yields a difference of $23,167 or an incremental gain of $23.17/m3. "That this replaces the species and quality adjustment is evidence from the fact that all camp-run logs are all sorted into export or falldown sorts, and the dry land sort is a sort by grade and species." Moreover, the incremental gain of $23.17/m3 was similar to the species and quality adjustment used in this determination. *Final Determination*, at 22,620.

quality logs within a grade were exported."[480] Thus, Commerce argues, there is no basis to justify such an adjustment. In the *Final Determination*, Commerce reasoned:

> [W]e do not contest that a quality range can exist within statutory log grades. However, we were presented no evidence that only the high quality logs within a grade were exported. Because we have no evidence of a within-grade average difference between exported and domestic logs, we cannot accept that such an adjustment is in order, much less quantify the difference or make an adjustment to the export value. More important, we have no reason to believe that the species/grade adjustment we made does not account for within-grade differences.[481]

Arguably, this language sufficiently explains Commerce's decision not to include a within-grade adjustment. In finding otherwise, the Panel was in error.

Nevertheless, to comply with this Panel's remand, Commerce calculated a within-grade adjustment. As discussed above, the Canadian Parties urged this additional adjustment to account for the price differential between the average domestic sort and the falldown sort (Cdn$10.40). Commerce reasoned, that if a within-grade factor exists in this difference, it is only one part of the total differential attributable to all quality differences (Cdn$10.40 or 14.86%); species and grade differences also

[480]Commerce Remand Determination, at 175.

[481]*Final Determination*, at 22,620.

contribute to the Cdn$10.40 gap. To calculate the within-grade adjustment accordingly, Commerce took the total quality differential and subtracted the grade adjustment it already made (9.25%) to arrive at a within-grade difference of 5.61%.[482] The Panel concludes this within-grade calculation is reasonable and satisfies the Panel's remand instruction.

In its Response Brief, Commerce demonstrates that even if one applies the "within-grade adjustment" proposed by the Canadian Parties (i.e., the full Cdn$10.40), an export/domestic price gap persists. Commerce points out, and the Panel agrees, that the Canadian Complainants miscalculated the export/domestic price gap.[483] The Canadian Parties' "benchmark export price" was incorrect because it included the "price equalization adjustment."[484] The price equalization adjustment "accounts for the extent to which a rise in domestic prices following the lifting of the export ban might be accompanied by a fall in export prices."[485] Thus, it should not be included in a calculation to demonstrate the presence (or absence) of a price gap ***when the log export restrictions are in effect***. Commerce adds that even if the

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[482]Commerce Remand Determination, at 176; *see also* Coalition for Fair Lumber Imports, Brief in Support of the Department of Commerce's Determination on Remand IV-64 to IV-65 (Nov. 1, 1993) [hereinafter Coalition Brief].

[483]*See* Canadian Complainants' Brief, at E-12.

[484]Commerce Response Brief, at 98.

[485]Coalition Brief, at IV-12 to IV-13; *See also* Commerce Response Brief, at 98 n.102.

price equalization adjustment should be included, the Canadian Parties use the *incorrect* price equalization adjustment; with the correct price equalization adjustment, a Cdn$8.86 price gap still remains.[486]

c. Not Applying the Within-Grade Adjustment to Other Regions

Although Commerce applied this within-grade adjustment to the Coastal region, the agency refused to apply the same, or a similar, adjustment to Tidewater, Border, and North/Central Interior logs (collectively, the Interior).[487] According to the Coalition, the record shows that these regions have "a greater consistency of the product" which "indicates that there are few or no quality differences."[488] Commerce similarly asserted: "The record evidence confirms that there is no measurable quality differential between export logs and domestic logs among the logs harvested in the Interior."[489] Under such conditions, there is no need for a grade or within-grade adjustment. This determination is supported by the

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[486]Commerce Response Brief, at 99-100.

[487]Commerce Remand Determination, at 176.

[488]Coalition Brief, at IV-65.

[489]Commerce Response Brief, at 115; Commerce Remand Determination, at 171-72, 176, *citing* B.C. Verification Report (Apr. 15, 1992), at 7, 21-22 (recognizing that in the Interior, there is only one sawlog grade) and at 52 (quoting MOF officials: "export costs from this area [the interior] might be less because the greater consistency in the product would lead to easier sorting . . . .").

evidence in the record.

V. Calculation Issues

Since we conclude that LERs do confer a subsidy and, for the reasons explained in this dissent, we find that LERs benefit a specific universe of recipients, we must address the LER calculations which the Majority has declined to reach.

The Panel's remand included six instructions to Commerce on calculating the effect of log export restrictions. Commerce was to consider each of these calculations if it affirmed, as it has, its finding that LERs confer a direct and discernible benefit on lumber producers. In its Remand Determination, Commerce followed the Panel's instructions on each of the six calculations. As Commerce's responses to the Panel's instructions on calculations are supported by substantial evidence on the record, they should have been affirmed. We will consider Commerce's response to each of the calculation instructions in turn.

A. *Inclusion of North/Central Interior*

In evaluating British Columbia's LER program, Commerce divided the province into four regions: coast, tidewater interior, border

interior, and north/central interior. Commerce included all but the last region in its *Final Determination*. It justified exclusion of the north/central interior on the ground that logs would probably not be exported from that region even if LERs were lifted, and therefore, the region enjoys no benefit from LERs.[490]

The Panel asked Commerce to reconsider its exclusion of the north/central interior in light of the Coalition's argument that the effects of export restraints ripple throughout the province, even to regions from which exports are unlikely, due to exorbitant cost.[491]

In its Remand Determination, Commerce reversed its earlier determination on the north/central interior. It reasoned that logs need not be exported (or potentially exportable) from a particular region for the price effects of LERs to be felt in that region. This conclusion is based on three premises: 1) correlation of prices throughout the interior regions; 2) overlapping of individual markets within the province and competition among overlapping markets; and, 3) applicability of the "law of one price" within a market.[492] The correlation of prices is evidence

[490]*Final Determination*, at 22,615.

[491]Panel Decision (May 6, 1993), at 120.

[492]Commerce Remand Determination, at 158, 159, 164.

demonstrating the transmission of price effects from one part of the province to more distant regions. The mechanism for this transmission is the overlapping of individual markets, as Commerce illustrates with a diagram duplicated from the Coalition's brief.[493] Where markets overlap, they compete. Thus, if A and B are two overlapping markets for logs, such that only B is a potential exporter of logs, A will still feel the effects on B of the elimination of LERs. Moreover, according to the "law of one price," A will feel those effects not only where A overlaps with B, but throughout the entire area of A. And in turn those effects will set the terms on which A competes with overlapping market C, whether or not C is a potential exporter.[494] Thus, Commerce concludes, physical barriers impeding the export of logs from the north/central interior "[are] irrelevant to the analysis of price movements from the border Interior northward throughout the north/central Interior."[495]

The Canadian Complainants object to Commerce's decision to include the north/central interior on two grounds. First, the Canadian Parties claim that any ripple effect must dissipate as

[493] *Id.* at 161.

[494] *Id.* at 164-65.

[495] *Id.* at 167.

price transmission moves further into the interior.[496] Second, if the ripple effect is as robust as Commerce claims, then there should be no gap between export and domestic prices, because exports from certain parts of the tidewater interior, exempted from LERs by Orders in Council, would have an effect rippling deep into the interior.[497]

In response to the Canadian Complainants's first argument, Commerce refers to substantial record evidence pointing to a high correlation between log prices throughout the interior.[498] It appears that this evidence is primarily the Kalt Study and "price data covering 17 consecutive quarters ending with the first quarter of 1992."[499] Addressing the Canadian Complainants' second point, Commerce points out that the areas exempt from LERs hold this status precisely because the stands covered by the exemption "cannot be profitably harvested . . . . [and] would only be harvested for export, if it were profitable to do so."[500] Similarly, the Coalition observes that the price effect of the LER exemption applicable to certain parts of the tidewater interior

[496]Canadian Complainants' Brief, at E-58 to E-59.

[497]*Id.* at E-62.

[498]Commerce Response Brief, at 110.

[499]*Id.*

[500]*Id.* at 105.

(i.e., North Kalum) is not transmitted elsewhere in the province because "there is no demand for North Kalum logs and no demand for logs within the North Kalum area."[501]

Commerce has supported through substantial evidence on the record its inclusion of the north/central interior in calculating the benefit conferred by LERs. We would affirm this finding.

B. *Domestic Price: Log Purchase Price Index*

The Panel instructed Commerce to adjust its calculations for inflation using the log Purchase Price Index (PPI), rather than the more general PPI applicable to all goods.[502] Commerce complied with this instruction and came up with an adjusted domestic log price of $38.09 for the border and north/central interior.[503] Neither the Canadian Complainants nor the Coalition objected to this adjustment. We would affirm it.

The Canadian Complainants continue to challenge Commerce's construction of domestic prices for the interior regions. Specifically, the Canadian Complainants contest reliance on

[501]Coalition Brief, at IV-50.

[502]Panel Decision (May 6, 1993), at 121.

[503]Commerce Remand Determination, at 169.

Statistics Canada data, reliance on transfer prices reported by vertically integrated enterprises, and application of the export price-domestic price ratio observed on the coast to the interior.[504] Commerce responds by noting that, in constructing the domestic price for the interior regions, it relied on the best information available on the record. If the Canadian Complainants cast doubt on the reliability of data provided by its own statistics bureau without offering any alternative source of information,[505] Commerce may rely on the evidence in the record.

In its first opinion, the Panel took note of the factors Commerce used to construct the domestic price in the interior.[506] The Panel did not comment on or question these factors and did not instruct Commerce to reconsider those factors on remand. In our view, Commerce's construction of the interior price is a reasonable application of the evidence on the record and should be affirmed.

C. *Species/Grade Adjustment*

In its *Final Determination*, Commerce adjusted its measurement of domestic log prices so that, in comparing them to export prices,

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[504]*See* Canadian Complainants' Brief, at E-45 to E-50.

[505]Commerce Response Brief, at 105-06.

[506]Panel Decision, at 120.

the effect of LERs would not be distorted by other, irrelevant factors. Therefore, Commerce raised domestic prices to account for the superior species and higher grade logs typically sold for export. Commerce did not, however, vary these adjustments between the coast and the interior, although it acknowledged that logs from the interior are generally of "lower quality."[507]

The Panel instructed Commerce to make a separate species/grade adjustment for logs from the interior.[508]

Commerce recalculated species adjustments for the three interior regions and came up with a 3.25% adjustment for each region, compared with a 14.42% species adjustment for the coast.[509] Citing statements by B.C. Ministry of Forests officials that confirmed the consistency of grade in the interior, Commerce made no adjustment for grade, while maintaining a 24.58% grade adjustment for the coast.[510]

Neither the Canadian Complainants nor the Coalition objected to this redetermination. As it is supported by substantial

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[507]*Final Determination*, at 22,616.

[508]Panel Decision (May 6, 1993), at 122.

[509]Commerce Remand Determination, at 171.

[510]*Id.* at 171-72 & n.303.

evidence on the record, we believe that Commerce's species/grade adjustments should be affirmed.

D. *Elasticity Assumptions*

Commerce's conclusion that LERs confer a benefit on the B.C. lumber industry by reducing the domestic price of logs and increasing the export price of logs relied principally on a model developed by Michael Margolick and Russell Uhler, as updated in an April 1992 review by Carl A. Newport. The model as updated demonstrates that "after removal of the export restrictions, [the B.C. log market price] would be 27 percent higher, and the corresponding Pacific Rim market price 18 percent lower."[511] The Margolick-Uhler model is based on certain assumptions about the relative elasticities of supply and demand for logs in both the domestic and export markets. These elasticities, reflecting the sensitivity of supply and demand to changes in price, determine the size of the effect if LERs were removed.

The Panel found that the Newport update had relied on the elasticity assumptions posited six years earlier by Margolick and Uhler.[512] The Panel agreed with the Canadian Complainants that it

[511]*Final Determination*, at 22,618; *see also* Newport, Review and Update, at 10.

[512]Panel Decision (May 6, 1993), at 123.

is possible that system-wide changes in the log market since 1986 may warrant adjustment of the elasticity assumptions. Accordingly, the Panel remanded to Commerce "for express consideration of which of the Margolick-Uhler elasticities assumptions for supply and demand they adopt."[513]

In its Remand Determination, Commerce noted first that changes in the market cited by the Canadian Complainants, such as opening of the Russian log market and imposition of log export restrictions in the U.S. market, did not support changing the elasticity assumptions made in the 1986 study. Commerce found "no record evidence indicating that the net effect of these changes has significantly altered supply and demand in the Pacific Rim."[514]

Second, Commerce reiterated the observation made in the original Margolick-Uhler Study that the effects of lifting the LERs remain substantially similar over a range of elasticity assumptions.[515]

Therefore, absent substantial evidence suggesting that it

[513]*Id.* at 123.

[514]Commerce Remand Determination, at 152.

[515]*Id.* at 153 (citing Margolick-Uhler Study, at 12).

should do otherwise, Commerce maintained the base-case elasticities used by Margolick and Uhler.[516]

The Canadian Complainants respond to this conclusion by asserting that Commerce erred in its failure to factor out the effect of U.S. log export restrictions.[517] However, the Canadian Complainants point to no record evidence demonstrating that, in conjunction with other system-wide changes, log export restrictions in the U.S. warrant alteration of the base elasticity assumptions.

Commerce considered the record evidence and concluded that no changes should be made in the base elasticity assumptions. In expressly finding, based on the record evidence, that the base assumptions continue to obtain, Commerce complied with the Panel's instruction. Its finding should be affirmed.

E. *Economic Adjustment to Export Price*

The Panel's fifth calculation remand instructed Commerce to reconsider its adjustment of the export price that would prevail if LERs were lifted.[518] In its *Final Determination*, Commerce had

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[516]*Id.* (The base case elasticity assumptions are set out in the Margolick-Uhler Study, at 9.)

[517]Canadian Complainants' Brief, at E-69.

[518]Panel Decision (May 6, 1993), at 124.

applied the Newport Update of the Margolick-Uhler Study to calculate the expected decrease in export price.[519] Commerce took the percentage decrease in export price found by Newport and applied this percentage decrease to Commerce's data. On remand, Commerce acknowledged error in making this adjustment.[520] What it should have done was take the reduction of the gap between export and domestic prices found in Newport's update and calculated a new (post-LER) export price that would yield a proportionate reduction in the gap in Commerce's data. Commerce made the appropriate recalculation on remand by "adjust[ing] export prices downward to account for 48.89 percent of the price gap."[521]

The Canadian Complainants argue that notwithstanding this adjustment, Commerce has still neglected to account for two economic factors in recalculating export price which, if accounted for, would erode the supposed benefit attributable to LERs. First, the Canadian Complainants claim that Commerce has failed to include exports from the interior regions in calculating the post-LER export price. The Canadian Complainants maintain that inclusion of potential exports from these regions would reduce the post-LER

[519]*Final Determination*, at 22,617.

[520]Commerce Remand Determination, at 172.

[521]*Id.*

export price to the current domestic price.[522] Second, the Canadian Complainants claim that Commerce has failed to factor out the fee-in-lieu of manufacturing, thereby magnifying the price gap attributable to LERs.[523]

To the Canadian Complainants' first argument, Commerce responds (correctly) that the Canadian Complainants erred in comparing the post-LER export price to the current domestic price.[524] An accurate evaluation of the effect of LERs requires a comparison of the current export price with the current domestic price and a comparison of the post-LER export price with the post-LER domestic price. Moreover, if the Canadian Complainants' assertion is correct, then upon lifting LERs there should either be no gap between the domestic and the export price, or the domestic price should in fact be ***higher*** than the export price. Yet the Canadian Complainants point to no evidence on the record supporting its hypothesized elimination or reversal of the price gap.

Neither Commerce nor the Coalition appears to respond to the Canadian Complainants' contention that Commerce should have factored out the export levy in its adjustment of export price. It

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[522]Canadian Complainants' Brief, at E-73.

[523]*Id.*

[524]Commerce Response Brief, at 98.

may be that Commerce assumed (and it may not be unreasonable) that eliminating LERs would be accompanied by elimination of the fee-in-lieu of manufacturing. In any event, Commerce did find in its *Final Determination* that for regions currently exempt from LERs the maximum fee-in-lieu of manufacturing is 15 percent.[525] Perhaps Commerce assumed that absent LERs the export levy would remain at a similar level.

As Commerce has not explicitly addressed the export levy in its Remand Determination, the Panel should have instructed Commerce on remand to articulate the assumptions it makes regarding export levies in a no-LER world. If evidence on the record indicates that such fees would remain in place, then Commerce should adjust its calculation of export price consistently with that finding. We would have remanded on this matter.

F. *Falldown Sort/Within-Grade Adjustment*

As discussed above, when comparing domestic to export prices, Commerce isolates the effect of LERs by adjusting prices in a way that will hold other factors constant. While the parties agree that these other factors include the superior species and higher grades typically dedicated to export, they disagree over whether a

[525] *Final Determination*, at 22613.

further refinement should be made to account for variations of quality within a grade or, alternatively, to account for the cost of sorting the logs cut according to quality (i.e., "falldown sort"). On remand, the Panel instructed Commerce to recalculate export costs either by incorporating the costs of a falldown sort or by making a within-grade adjustment.[526]

As explained above in detail, we believe that Commerce was reasonable to calculate any within-grade adjustment by determining the difference between the Canadian Complainants' total falldown adjustment and Commerce's own grade adjustment. No evidence in the record suggests that this gap might represent something other than within-grade quality differences. Moreover, we agree with Commerce that there is no reason to apply the within-grade adjustment to the interior if the quality differences on the coast are virtually non-existent in the interior. We would confirm Commerce on these findings.

[526]Panel Decision (May 6, 1993), at 124-25.

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Lumber III is a difficult case both because of the first impression character of many of the questions it raises and also because of the enormous impacts a decision will have on the political economies of the two states that have established the Free Trade Agreement. It is a matter of public record that the two governments have agreed to negotiate a consensus approach to the problem of subsidies in the next two years. The political branches of governments may make new law in regard to this matter. A binational panel, charged as it is in this case with the application of United States law, may not.

ISSUED ON DECEMBER 17, 1993

SIGNED IN THE ORIGINAL BY:

Michael Reisman
Michael Reisman

Morton Pomeranz
Morton Pomeranz