




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

October 13, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Issues and Decision Memorandum for the Final Determination in
the Countervailing Duty Investigation of Supercalendered Paper
from Canada

I. SUMMARY

The Department of Commerce (Department) determines that countervailable subsidies are being provided to producers and exporters of supercalendered paper (SC paper) in Canada, as provided in section 705 of the the Act.

II. BACKGROUND

On August 3, 2015, the Department published its *Preliminary Determination* in the countervailing duty investigation of SC Paper from Canada.¹ Between August 3, 2015 and August 8, 2015, we conducted verification of the Government of Canada's (GOC), Government of Nova Scotia's (GNS), Government of Ontario's (GOO), Government of Quebec's (GOQ), Port Hawkesbury's, and Resolute's questionnaire responses. We released verification reports on August 27, 2015, and September 2, 2015, for the GOC, GNS, GOO, GOQ, Port Hawkesbury, and Resolute.²

The petitioner, the GOC³, Catalyst, Irving, Port Hawkesbury, and Resolute submitted case briefs concerning case-specific issues on September 11, 2015. On September 16, 2015, the Department rejected Irving's case brief and asked Irving to resubmit it without new factual information. Irving timely resubmitted its case brief on September 17, 2015.

¹ See *Preliminary Determination* and accompanying PDM.

² See GOC Verification Report, GNS Verification Report, GOO Verification Report, GOQ Verification Report, Port Hawkesbury Verification Report, and Resolute Verification Report.

³ Including the Government of British Columbia (GBC), the Government of New Brunswick (GNB), the GOO, the GOQ, and the GNS.



The petitioner, the GOC⁴, Irving, Port Hawkesbury, and Resolute submitted rebuttal briefs on September 18, 2015. At the request of the petitioner, the GOC⁵, Catalyst, Irving, Port Hawkesbury, and Resolute, the Department held a public hearing concerning these case-specific issues on September 24, 2015.

III. SCOPE OF THE INVESTIGATION

The merchandise covered by this investigation is supercalendered paper (SC paper). SC paper is uncoated paper that has undergone a calendering process in which the base sheet, made of pulp and filler (typically, but not limited to, clay, talc, or other mineral additive), is processed through a set of supercalenders, a supercalender, or a soft nip calender operation.⁶

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

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

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

IV. SUBSIDIES VALUATION

A. Period of Investigation

The period of investigation (POI) is January 1, 2014, through December 31, 2014.

B. Allocation Period

The Department normally allocates the benefits from non-recurring subsidies over the average useful life (AUL) of renewable physical assets used in the production of subject merchandise. The Department finds the AUL in this proceeding to be 13 years, pursuant to 19 CFR 351.524(d)(2) and the U.S. Internal Revenue Service's 1977 Class Life Asset Depreciation Range System.⁷ The Department notified the respondents of the 13-year AUL in the initial

⁴ Including the GBC, the GNB, the GOO, the GOQ, and the GNS.

⁵ Including the GBC, the GOO, the GOQ, and the GNS.

⁶ Supercalendering and soft nip calendering processing, in conjunction with the mineral filler contained in the base paper, are performed to enhance the surface characteristics of the paper by imparting a smooth and glossy printing surface. Supercalendering and soft nip calendering also increase the density of the base paper.

⁷ See U.S. Internal Revenue Service Publication 946 (2008), "How to Depreciate Property," at Table B-2: Table of Class Lives and Recovery Periods.

questionnaire and requested data accordingly. No party in this proceeding disputed this allocation period.

Furthermore, for non-recurring subsidies, we have applied the “0.5 percent test,” as described in 19 CFR 351.524(b)(2). Under this test, we divide the amount of subsidies approved under a given program in a particular year by the relevant sales value (*e.g.*, total sales or export sales) for the same year. If the amount of the subsidies is less than 0.5 percent of the relevant sales value, then the benefits are allocated to the year of receipt rather than across the AUL.

C. Attribution of Subsidies

Cross Ownership: In accordance with 19 CFR 351.525(b)(6)(i), the Department normally attributes a subsidy to the products produced by the company that received the subsidy. However, 19 CFR 351.525(b)(6)(ii)-(v) provides additional rules for the attribution of subsidies received by respondents with cross-owned affiliates. Subsidies to the following types of cross-owned affiliates are covered in these additional attribution rules: (ii) producers of the subject merchandise; (iii) holding companies or parent companies; (iv) producers of an input that is primarily dedicated to the production of the downstream product; or (v) an affiliate producing non-subject merchandise that otherwise transfers a subsidy to a respondent.

According to 19 CFR 351.525(b)(6)(vi), cross-ownership exists between two or more corporations where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets. This section of the Department’s regulations states that this standard will normally be met where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. The *CVD Preamble* to the Department’s regulations further clarifies the Department’s cross-ownership standard.⁸ According to the *CVD Preamble*, relationships captured by the cross-ownership definition include those where:

the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same way it can use its own assets (or subsidy benefits) . . . Cross-ownership does not require one corporation to own 100 percent of the other corporation. Normally, cross-ownership will exist where there is a majority voting ownership interest between two corporations or through common ownership of two (or more) corporations. In certain circumstances, a large minority voting interest (for example, 40 percent) or a “golden share” may also result in cross-ownership.⁹

Thus, the Department’s regulations make clear that the agency must look at the facts presented in each case in determining whether cross-ownership exists.

⁸ See *CVD Preamble*.

⁹ *Id.*, 63 FR at 65401.

The Court of International Trade has confirmed the Department's authority to attribute subsidies based on whether a company could use or direct the subsidy benefits of another company in essentially the same way it could use its own subsidy benefits.¹⁰

Port Hawkesbury

Port Hawkesbury identified the following companies and their roles, and responded to the Department's questionnaires on their behalf:¹¹

- 6879900 Canada Inc.
- Port Hawkesbury Investments
- Port Hawkesbury GP
- Port Hawkesbury Holdings
- Port Hawkesbury Inc.
- Port Hawkesbury
- PWCC

Port Hawkesbury reports the following roles for each of the companies:¹²

- 6879900 Canada Inc. – Holding company.
- Port Hawkesbury Investments – Holding company.
- Port Hawkesbury GP – Holding company, ownership interest in Port Hawkesbury LP.
- Port Hawkesbury Holdings – Holding company.
- Port Hawkesbury Inc. – Holding company, ownership interest in Port Hawkesbury LP.
- Port Hawkesbury – Producer of subject merchandise.
- PWCC – Involved in the purchase of NPPH through the CCAA procedure.

Port Hawkesbury's responses identify 6879900 Canada Inc., Port Hawkesbury Investments, Port Hawkesbury GP, Port Hawkesbury Holdings, and Port Hawkesbury Inc. as holding companies of Port Hawkesbury. Therefore, we find that these companies are cross-owned with Port Hawkesbury within the meaning of 19 CFR 351.525(b)(6)(vi). Because 6879900 Canada Inc., Port Hawkesbury Investments, Port Hawkesbury GP, Port Hawkesbury Holdings, and Port Hawkesbury Inc. are holding companies, we would normally attribute the benefit from subsidies received by any one of these holding companies to that holding company's consolidated sales (net of intercompany sales), in accordance with 19 CFR 351.525(b)(6)(iii). As discussed below under the "Programs Determined to Be Countervailable" section, however, we find no evidence that these holding companies received countervailable subsidies.

Regarding PWCC, Port Hawkesbury explained that on September 6, 2011, NPPH filed for protection from its creditors under the CCAA.¹³ Following normal CCAA procedures, pursuant

¹⁰ See *Fabrique* at 600-604.

¹¹ See generally PQR.

¹² *Id.* at 10; See, also, Port Hawkesbury Affiliation Response at 4 and 10.

¹³ See PQR at 6.

to the Supreme Court of Nova Scotia's (Court's) initial order, Ernst & Young, Inc. was appointed as the Court's Monitor (Monitor) of NPPH during the CCAA proceedings.¹⁴ NPPH and the Monitor, with the approval of the Court, hired U.S. based investment bankers Sanabe & Associates LLC (Sanabe) to assist in a sale of NPPH through a bidding/auction process.¹⁵ The Applicant, the Monitor, and Sanabe developed a list of 110 potential strategic and financial parties, including PWCC, and eventually designated 14 qualified bidders.¹⁶ Eight of the 14 qualified bidders submitted offers for NPPH's assets by October 24, 2011, of which four were invited on October 28, 2011, to submit formal and final offers by December 16, 2011.¹⁷ Of those four final offers, two were from parties wishing to continue the operations as a going concern (one of which was PWCC) and two were from parties intending to liquidate NPPH's assets.¹⁸

As part of its evaluation of the opportunity, PWCC conducted due diligence and developed a restructuring plan.¹⁹ NPPH and Sanabe evaluated the offers, and the Monitor reviewed the evaluation.²⁰ After that review, NPPH, Sanabe, and the Monitor recommended to NPPH's Board of Directors that the offer from PWCC should be pursued as the highest and best going concern proposal.²¹ On July 12, 2012, the Court approved the presentation of PWCC's offer, and on September 25, 2012, the Court issued a "Sanction Order" approving the sale.²² The sale was completed on September 28, 2012.²³

Port Hawkesbury stated that PWCC has no ownership interest in Port Hawkesbury and has never had any involvement in the operations of Port Hawkesbury.²⁴ Port Hawkesbury also stated that Port Hawkesbury and PWCC are affiliated only through common ownership by an ultimate owner.²⁵ Because Port Hawkesbury and PWCC have the same ultimate common ownership, we find that these companies are cross-owned within the meaning of 19 CFR 351.525(b)(6)(vi). Further, based on PWCC's involvement in the purchase of Port Hawkesbury, we are attributing to Port Hawkesbury's sales the benefit from any subsidies that PWCC received and transferred to Port Hawkesbury, in accordance with 19 CFR 351.525(b)(6)(v). *See* the "Analysis of Programs - Programs Determined To Be Countervailable" section below for a full discussion of the subsidy programs that PWCC originally received and transferred to Port Hawkesbury. We have also addressed comments on these programs in the "Analysis of Comments" section below at comments 5 and 6.

Port Hawkesbury is the producer of the subject merchandise. In accordance with 19 CFR 351.525(b)(6)(i), we are attributing subsidies received by Port Hawkesbury to its own sales.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 6-7.

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 7-8.

²³ *Id.* at 8. Additional information on the sale is business proprietary. *See* PQR at 6-10.

²⁴ *Id.* at 4.

²⁵ *See* Port Hawkesbury Second Affiliation Response at 1.

Resolute

Resolute responded to the Department's questionnaires on behalf of the following companies:²⁶

- Resolute
- Fibrek
- Mauricie
- Petit-Paris
- Opitciwan

Resolute reports the following for each of the companies:²⁷

- Resolute – Produces SC Paper, inputs used in making SC Paper, and a wide range of other products. It is also a holding company for Resolute's ownership in affiliates making other products in Canada.
- Fibrek – Wholly owned subsidiary of Resolute that operates a kraft pulp²⁸ mill.
- Mauricie – Resolute owns 93.2 percent of this company, which operates a sawmill.
- Opitciwan – Resolute owns 45 percent of this company, which operates a sawmill.
- Petit-Paris – Joint venture sawmill in which Resolute holds a 50 percent ownership stake.

Because Resolute is a parent company, we are attributing the benefit from subsidies that Resolute received to Resolute's consolidated sales (net of intercompany sales), in accordance with 19 CFR 351.525(b)(6)(iii).²⁹

As shown above, Resolute identified Fibrek as a wholly owned subsidiary of Resolute. Based on Resolute's full ownership of Fibrek, we determine that these companies are cross-owned within the meaning of 19 CFR 351.525(b)(6)(vi). During the POI, Fibrek supplied Resolute with kraft pulp to add tensile strength to paper that Resolute produced, including SC paper.³⁰ We determine that the kraft pulp that Fibrek supplied to Resolute is primarily dedicated to production of SC paper and other downstream paper products, pursuant to 19 CFR 351.525(b)(6)(iv). We have addressed comments from parties on this issues in the "Analysis of Comments" section below at comment 19.

Regarding Mauricie, Opitciwan, and Petit-Paris, regardless of whether cross-ownership under 19 CFR 351.525(b)(6)(vi) exists between Resolute and Mauricie, Opitciwan, and Petit-Paris, we

²⁶ See generally RQR.

²⁷ *Id.* at 4. Resolute designated the specific details of the relationships between Resolute and these companies as business proprietary information. See Resolute Supplemental Affiliation Response at 2-3; see, also, Department memorandum, "Countervailing Duty Investigation of Supercalendered Paper from Canada: Resolute Paper FP Canada Inc., Calculations for the Preliminary Determination," dated concurrently with this memorandum (Resolute Preliminary Calculation Memo).

²⁸ Kraft pulp is a reinforcing pulp that is added, as required for paper strength, to a paper machine. See RQR at 6.

²⁹ See, e.g., OCTG and accompanying IDM at Comment 39.

³⁰ *Id.* at 3. See, also, RQR at Exhibit 4, page 3 (identifying the types of "specialty papers" that Resolute produces, including SC paper).

find no evidence that Mauricie, Opitciwan, or Petit-Paris received assistance under any of the programs under investigation.

D. Denominators

In accordance with 19 CFR 351.525(b)(1)-(5), the Department considers the basis for the respondents' receipt of benefits under each program when attributing subsidies, *e.g.*, to the respondents' export or total sales. We have identified the denominator we used to calculate the countervailable subsidy rate for each program, as discussed below and in the calculation memoranda prepared for this determination.³¹

E. Loan Interest Rate Benchmarks and Discount Rates

The Department is examining loans provided to Port Hawkesbury and to Resolute that were outstanding during the POI. The loans are denominated in Canadian dollars (C\$). We are also investigating non-recurring, allocable subsidies that the respondents received.³² In the section below, we discuss the derivation of the benchmarks and discount rates for the POI and previous years.

Long-Term Loan Interest Rate Benchmark

Section 771(5)(E)(ii) of the Act explains that the benefit for loans is the “difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market,” indicating that a benchmark must be a market-based rate. Normally, the Department uses comparable commercial loans reported by the company for benchmarking purposes.³³ If the firm did not receive any comparable commercial loans during the relevant periods, the Department's regulations provide that we “may use a national average interest rate for comparable commercial loans.”³⁴ When loans are denominated in a foreign currency, 19 CFR 351.505(a)(2)(i) directs us to use a benchmark denominated in the same foreign currency as the loan.

Port Hawkesbury submitted interest rates, along with the underlying data, that it paid on other long-term commercial loans.³⁵ Resolute submitted an interest rate for “financial instruments with similar characteristics and maturities” as identified in the notes to its 2013 financial statements.³⁶

Based on Port Hawkesbury's response in the PQR, we find that the structure of Port Hawkesbury's other loans is similar to the government-provided loans.³⁷ Therefore, we find that

³¹ See Resolute Final Calculation Memo and Port Hawkesbury Final Calculation Memo.

³² See 19 CFR 351.524(b)(1).

³³ See 19 CFR 351.505(a)(3)(i).

³⁴ See 19 CFR 351.505(a)(3)(ii).

³⁵ See PQR at Exhibit 15-2.

³⁶ See RQR at Exhibit 3, page 89. The financial statements do not identify the source of the interest rate.

³⁷ See the Port Hawkesbury Final Calculation Memo and BPI Memo for more information.

these loans meet the definition of a “comparable commercial loan” under 19 CFR 351.505(a)(2) and used in them as our benchmark.³⁸

As noted above, the interest rate that Resolute submitted is for 2013; therefore, it is not contemporaneous with the government loans we are examining. Moreover, the record does not show any information on the structure of the loans that are the basis of this interest rate. Thus, consistent with 19 CFR 351.505(a)(2), we find that this is not an interest rate for a “comparable commercial loan.”

Where such benchmark rates for comparable commercial loans are unavailable, 19 CFR 351.505(a)(3)(ii) provides that we may use a national average interest rate as a benchmark. In this case, the GOC submitted the Bank of Canada’s prime business loan rates for 2003-2014.³⁹ We are using these rates as our national average interest rates under 19 CFR 351.505(a)(3)(ii) to measure the benefit from Resolute’s long-term loans.

See the “Analysis of Programs” section below for a description of the loan programs for which we required interest rate benchmarks.

Discount Rates

Consistent with 19 CFR 351.524(d)(3)(i)(A), we have used, as our discount rate, the long-term interest rate described above for the year in which the government approved non-recurring subsidies.

Uncreditworthy Allegation⁴⁰

The petitioner alleged that Port Hawkesbury was uncreditworthy in 2011 and 2012, and in accordance with 19 CFR 351.505(a)(4), the Department should use an uncreditworthy benchmark to determine the benefit from long-term loans and non-recurring subsidies allocated over time.⁴¹ Port Hawkesbury did not receive any of the alleged subsidies in 2011; therefore, we examined whether the company was uncreditworthy only in 2012.

Under 19 CFR 351.505(a)(4)(i), the Department will consider a firm to be uncreditworthy if, at the time the long-term loan or allocated subsidy was provided, the firm could not have obtained loan-term loans from conventional commercial sources. In the case of firms not owned by the government, under 19 CFR 351.505(a)(4)(ii), the receipt by a firm of comparable long-term commercial loans, unaccompanied by a government-provided guarantee, will normally constitute dispositive evidence that the firm is not uncreditworthy. During 2012, Port Hawkesbury was

³⁸ See Port Hawkesbury Final Calculation Memo.

³⁹ See GQR at Government of Quebec Response, Volume I, Exhibit QC-GEN-4, page 53; See, also, GSQR at Exhibit NS-SUPP1-1E.

⁴⁰ The petitioner has made additional arguments in its case brief at pages 17 - 21 regarding other information to find Port Hawkesbury uncreditworthy if we did not find the loan to be comparable and commercial or dispositive evidence of creditworthiness. As we found Port Hawkesbury to be creditworthy, the comments are moot and we have not addressed them.

⁴¹ See Petition, Volume II at 12.

able to obtain a comparable long-term loan from a commercial bank without a government guarantee.⁴² Therefore, we determine Port Hawkesbury to be creditworthy in 2012.⁴³

V. USE OF FACTS OTHERWISE AVAILABLE AND ADVERSE INFERENCES

Section 776(a) of the Act provides that, subject to section 782(d) of the Act, the Department shall apply “facts otherwise available” if: (1) necessary information is not on the record; or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party an opportunity to remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the deficiency within the applicable time limits, subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate.

On June 29, 2015, the President of the United States signed into law the Trade Preferences Extension Act of 2015 (TPEA), which made numerous amendments to the antidumping and CVD law, including amendments to section 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act.⁴⁴ The amendments to the Act are applicable to all determinations made on or after August 6, 2015, and, therefore, apply to this investigation.⁴⁵

Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information. In doing so, and under the TPEA, the Department is not required to determine, or make any adjustments to, a countervailable subsidy rate based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.⁴⁶ Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the countervailing duty investigation, a previous administrative review, or other information placed on the record.⁴⁷

⁴² See “Analysis of Comments” section at Comment 4 and BPI Memo.

⁴³ The petitioner filed comments on this issue and they are fully addressed below in the “Analysis of Comments” section at Comment 4.

⁴⁴ See TPEA, Pub. L. No. 114-27, 129 Stat. 362 (2015). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced applicability dates for each amendment to the Act, except for amendments contained to section 771(7) of the Act, which relate to determinations of material injury by the International Trade Commission. See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015) (*Applicability Notice*). The text of the TPEA may be found at <https://www.congress.gov/bill/114th-congress/house-bill/1295/text/pl>.

⁴⁵ See *Applicability Notice*, 80 FR at 46794-95.

⁴⁶ See section 776(b)(1)(B) of the Act; TPEA, section 502(1)(B).

⁴⁷ See, also, 19 CFR 351.308(c).

Section 776(c) of the Act provides that, in general, when the Department relies on secondary information rather than on information obtained in the course of a review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.⁴⁸ Secondary information is defined as information derived from the petition that gave rise to the investigation, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.⁴⁹ Further, and under the TPEA, the Department is not required to corroborate any countervailing duty applied in a separate segment of the same proceeding.⁵⁰

Finally, under the new section 776(d) of the Act, when applying an adverse inference, the Department may use a countervailable subsidy rate applied for the same or similar program in a CVD proceeding involving the same country, or if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that the Department considers reasonable to use.⁵¹ The TPEA also makes clear that, when selecting facts available with an adverse inference, the Department is not required to estimate what the countervailable subsidy rate would have been if the interested party failing to cooperate had cooperated or to demonstrate that the countervailable subsidy rate reflects an “alleged commercial reality” of the interested party.⁵²

As discussed below, due to the failure of Resolute to accurately respond to the Department’s questionnaires concerning other subsidies, the Department is relying on a subsidy rate calculated for a similar program in this proceeding. In light of the above, the Department corroborated the rates it selected to use as AFA to the extent practicable for this final determination. Because these rates reflect the actual behavior of the GOC with respect to similar subsidy programs, and because we lack questionnaire responses or adequate information from the GOC and the respondent companies demonstrating otherwise, the rates calculated for cooperative respondents provide a reasonable AFA rate in a manner consistent with the statute.

Subsidies Reported Prior to the Preliminary Determination

As described in the *Preliminary Determination*, on July 22, 2015, the GOC submitted a “revision” to its May 27, 2015, questionnaire response in which it indicated that in addition to assistance to Resolute that the GOC had previously reported under the Federal Pulp and Paper Green Transformation Program (FPPGTP), assistance had also been provided under this program to Fibrek S.E.N.C. (Fibrek), a company owned by Resolute. On the same date, Resolute submitted a “supplemental response” which it deemed necessary under the certification requirements provided in section 782(b) of the Act. This submission detailed previously unreported assistance received by Fibrek under the FPPGTP. The Department determined that it was appropriate to extend the deadline to accept this information under 19 CFR 351.302(b),

⁴⁸ See, also, 19 CFR 351.308(d).

⁴⁹ See SAA at 870 (1994).

⁵⁰ See section 776(c)(2) of the Act; TPEA, section 502(2).

⁵¹ See section 776(d)(1) of the Act; TPEA, section 502(3).

⁵² See section 776(d)(3) of the Act; TPEA, section 502(3).

which allows the Department to extend a deadline for good cause. However, the Department also noted that these submissions

represent a significant change to the information provided in the initial questionnaire responses in that they identify assistance to a cross-owned subsidiary of Resolute that the GOC and Resolute were expressly required to report in response to the questionnaire. Moreover, all of Resolute's questionnaire responses indicate that it "is including in its response" Fibrek, among other cross-owned companies for which the Department requested complete responses. Thus, as part of their initial questionnaire response, the GOC and Resolute understood their obligation to report assistance received by Resolute and any of the cross-owned companies under all programs under investigation, and the GOC and Resolute failed to satisfy this obligation.⁵³

In the *Preliminary Determination*, we applied adverse facts available to the FPPGTP program because the GOC and Resolute withheld necessary information, and the timing of the submission of information regarding Fibrek's receipt of assistance impeded the Department in its ability to analyze the information.⁵⁴ However, the Department was able to rely on the information timely submitted by the GOC in its initial questionnaire response for the purposes of analyzing the financial contribution and specificity of this program.⁵⁵

Additionally, in the *Preliminary Determination*, the Department stated that, based on the information submitted by the GOC and Resolute on July 22, 2015, "we preliminarily find that Resolute may have received additional benefits under other funding mechanisms. We intend to examine these additional potential benefits at verification and address them in the final determination."⁵⁶ These additional potential benefits were provided under the Ontario Forest Sector Prosperity Fund (FSPF) and Loan Guarantee Program (LGP).⁵⁷ At verification, the GOO provided all requested information regarding these programs, including the program mandate, related documentation, and disbursements of funds.⁵⁸ Additionally, the Department verified disbursements under these programs to Resolute during its verification of Resolute's questionnaire responses and was able to tie the submitted information to Resolute's financial records.⁵⁹

The Department was able to confirm, at verification, the information submitted by the GOC and Resolute in their July 22, 2015, submissions as well as the information requested by the Department and provided during verification regarding the FSPF and LGP programs. We explain above that section 776(a)(2)(D) of the Act provides that the Department shall apply

⁵³ See *Preliminary Determination* and accompanying Decision Memorandum, at page 12.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Memorandum to James Maeder, Senior Office Director, and Dana Mermelstein, Program Manager, Office I; from Katie Marksberry and David Neubacher, International Trade Analysts; Re: Verification Report, Government of Ontario, dated August 27, 2015 (GOO Verification Report).

⁵⁸ *Id.*

⁵⁹ See Resolute Verification Report.

“facts otherwise available” if an interested party or any other person provides information that cannot be verified as provided for by section 782(i) of the Act. Therefore, for this final determination, we find that it is no longer appropriate to apply AFA to the assistance received under these programs by Resolute and Fibrek. Arguments from interested parties on whether the use of AFA is appropriate in analyzing these subsidies and whether the Department properly investigated these subsidies are discussed below under Comment 12.

Subsidies Discovered During Verification of Resolute’s Questionnaire Responses

At the verification of Resolute’s questionnaire responses, the Department examined the company’s 10-K annual reports, general ledger accounts, financial statements, and other selected accounts from the chart of accounts to confirm that Resolute’s reported receipts of assistance were complete and accurate, and to ensure that there was no additional unreported assistance.⁶⁰ In examining these accounts, we noted entries in three accounts which showed reimbursements and/or funds received by Fibrek. Company officials provided descriptions of the funds in the accounts.⁶¹ Additionally, at verification of the GNS, the Department conducted a completeness test and reviewed all historic entries to the Nova Scotia Jobs Fund.⁶² This review led to the disclosure that after the GNS purchased the Resolute subsidiary Bowater Mersey Paper Company (Bowater), the GNS made a payment of C\$14,291,000 to Resolute to satisfy an outstanding Bowater liability to Resolute. The Department further noted in its report that the GNS conceded that this information had not been reported by either it or Resolute in their questionnaire responses.⁶³

As a matter of standard procedure, the Department’s initial CVD questionnaire asked Resolute to report “other subsidies.” Specifically, we asked: “{d}oes the GOC or entities directly owned, in whole or in part, by the GOC or any provincial or local government provide, directly or indirectly, provide any other forms of assistance to your company? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices.”⁶⁴ In its initial questionnaire response, Resolute responded to this request by stating that it had “examined its record diligently and is not aware of any other programs... that provided, directly or indirectly, any other forms of assistance to Resolute’s production and export of SC paper.”⁶⁵ However, the CVD questionnaire is clear that respondents are instructed to report “any other forms of assistance to {the} company,” not only assistance that the respondent considers to have been provided to subject merchandise. Therefore, given Resolute’s questionnaire response, and in light of the unreported information discovered at verification, the Department determines that the use of facts available pursuant to section 776(a)(2)(A) of the Act is warranted in determining the countervailability of these

⁶⁰ *Id.*

⁶¹ Record information related to these accounts is predominantly BPI. For a detailed discussion of the Department’s examination of Resolute’s accounting system, *see* Resolute Verification Report, at pages 8-9.

⁶² *See* GNS Verification Report at page 15.

⁶³ Record information related to this liability and related payment is predominantly BPI. For a detailed discussion of the Department’s findings at its verification of the GNS, *see* GNS Verification Report, at pages 13-14.

⁶⁴ *See* Department’s Initial CVD Questionnaire, at Section III: Questionnaire for Producers/Exporters of SC Paper from Canada (April 6, 2015).

⁶⁵ *See* RQR, dated May 28, 2015, at pages 32-33.

apparent subsidies that were discovered during verification. Moreover, because Resolute failed to respond to the best of its ability regarding our questions on other, non-reported subsidies provided by the GOC, including assistance discovered within Resolute's accounting system and apparent assistance discovered during verification of the GNS, we determine that an adverse inference is warranted with respect to these subsidies pursuant to section 776(b) of the Act. As a result, we are finding that, as AFA, these discovered forms of assistance provide a financial contribution and are specific within sections 771(5)(D) and 771(5A) of the Act, respectively. A benefit is conferred pursuant to section 771(5)(E). Interested parties commented on the appropriateness of applying AFA to these unreported subsidies, which we address at Comment 12.

VI. ANALYSIS OF PROGRAMS

Based upon our analysis of the record and the responses to our questionnaires, we determine the following.

A. Programs Determined To Be Countervailable

1. GNS Loan for Working Capital

In response to PWCC's request for financial assistance in connection with its acquisition of the Port Hawkesbury mill, the GNS established a credit facility for PWCC.⁶⁶ In August 2012, the GNS's Department of Economic and Rural Development and Tourism (ERDT), on behalf of the Minister of Nova Scotia, provided a letter of offer to PWCC for a credit facility of C\$40 million.⁶⁷ The Minister of Nova Scotia ultimately determined the amount of assistance, subject to approval by the Governor in Council.⁶⁸ The GNS provided the assistance pursuant to the Nova Scotia Jobs Fund Act.⁶⁹ The GNS offered and provided the assistance only to PWCC, which was not obligated to pay any interest on the loan during its term.⁷⁰

In September 2012, in contemplation of the completion of the CCAA process, the involved parties ultimately assigned the loan to Port Hawkesbury.⁷¹ The loan remained outstanding during the POI.⁷² The loan is eligible for forgiveness, but only if certain conditions are fulfilled each calendar year and confirmed by the GNS.⁷³ The GOC reported that as of the date of the GQR, the GNS had not forgiven any amount under the terms of the Letter of Offer, and the loan is still repayable in full as reflected in the financial accounts of the GNS.⁷⁴

We determine that this loan conferred a countervailable subsidy within the meaning of section

⁶⁶ See GQR at Government of Nova Scotia Questionnaire Response, Volume II, NS.II-2.

⁶⁷ *Id.* at NS.II-2 and Exhibit NS-CF-1.

⁶⁸ *Id.* at NS.II-10.

⁶⁹ *Id.* at NS.II-7 and Exhibit NS-CF-4.

⁷⁰ *Id.* at NS.II-12. See, also, GNS Pre-Preliminary Comments at 20.

⁷¹ See PQR at 38 and Exhibit 3-3.

⁷² See GQR at Government of Nova Scotia Questionnaire Response, Volume II, NS.II-6.

⁷³ *Id.* at NS.II-2, Exhibit NS-CF-1, and Exhibit NS-CF-2.

⁷⁴ *Id.* at NS.II-4 - NS.II-5.

771(5) of the Act and constitutes a financial contribution in the form of a direct transfer of funds from the GNS under section 771(5)(D)(i) of the Act. We also determine that a benefit exists under section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a)(1) equal to the difference between the amounts paid by the company for the loan during the POI and the amounts the company would have paid on a comparable commercial loan. Finally, we also determine that the program is specific in accordance with section 771(5A)(D)(i) of the Act because the GNS offered and provided the assistance only to PWCC.

To calculate the benefit under section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a)(1), we relied on the benchmarks described above under the “Loan Interest Rate Benchmarks and Discount Rates” section to determine the amount of interest that Port Hawkesbury would have paid on a comparable commercial loan during the POI. Because Port Hawkesbury received the loan in 2012, must fulfill certain conditions each calendar year (*i.e.*, more than one year after the receipt of the loan), and no forgiveness of any portion of the loan has been provided by the GNS, we are treating the loan as a contingent liability interest-free loan and using a long-term interest rate benchmark.⁷⁵

In accordance with 19 CFR 351.525(b)(6)(i), we calculated the countervailable subsidy rate by dividing this benefit amount by Port Hawkesbury’s total sales during the POI, as described above in the “Subsidies Valuation Information – Attribution of Subsidies” section. On this basis, we determine that the net countervailable subsidy rate for this program is 0.72 percent *ad valorem* for Port Hawkesbury.

2. GNS Loan to Improve Productivity and Efficiency

In response to PWCC’s request for financial assistance in connection with its acquisition of the Port Hawkesbury mill, the GNS’s ERDT also provided a Letter of Offer to PWCC for a loan of C\$24 million.⁷⁶ The GNS approved and provided the funds to PWCC in August 2012.⁷⁷ The Minister of Nova Scotia ultimately determined the amount of assistance, subject to approval by the Governor in Council.⁷⁸ The GNS provided the assistance pursuant to the Nova Scotia Jobs Fund Act.⁷⁹ The GNS offered and provided the loan, which has an interest rate of zero, only to PWCC.⁸⁰

PWCC assigned the loan to Port Hawkesbury after its receipt, and the loan remained outstanding during the POI.⁸¹ Under the terms of the Letter of Offer, the loan is eligible for forgiveness, but only if certain conditions are fulfilled each calendar year and confirmed by the GNS.⁸² The GOC reported that as of the date of the GQR, the GNS had not forgiven any amount under the

⁷⁵ See 19 CFR 351.505(d).

⁷⁶ See GQR at Government of Nova Scotia Questionnaire Response, Volume III, NS.III-2 and Exhibit NS-LN-1.

⁷⁷ *Id.* at NS.III-2 and NS.III-5.

⁷⁸ *Id.* at NS.III-9.

⁷⁹ *Id.* at NS.III-5 and Exhibit NS-LN-4.

⁸⁰ *Id.* at NS.III-11; *See, also*, GNS Pre-Preliminary Comments at 23.

⁸¹ See GQR at Government of Nova Scotia Questionnaire Response, Volume III, NS.III-5; *see, also*, PQR at 42.

⁸² See GQR at Government of Nova Scotia Questionnaire Response, Volume III, NS.III-2, Exhibit NS-LN-1, and Exhibit NS-LN-2.

terms of the Letter of Offer.⁸³

We determine that this loan conferred a countervailable subsidy within the meaning of section 771(5) of the Act and constitutes a financial contribution in the form of a direct transfer of funds from the GNS under section 771(5)(D)(i) of the Act. We also determine that a benefit exists under section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a)(1) equal to the difference between the amounts paid by the company for the loan during the POI and the amounts the company would have paid on a comparable commercial loan. Finally, we determine that the program is specific in accordance with section 771(5A)(D)(i) of the Act because the GNS only offered and provided the assistance to PWCC.

To calculate the benefit under section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a)(1), we relied on the benchmarks described above under the “Loan Interest Rate Benchmarks and Discount Rates” section to determine the amount of interest that Port Hawkesbury would have paid on a comparable commercial loan during the POI. Because Port Hawkesbury received the loan in 2012, must fulfill certain conditions each calendar year (*i.e.*, more than one year after the receipt of the loan), and no forgiveness of any portion of the loan has been provided by the GNS, we are treating the loan as a contingent liability interest-free loan and using a long-term interest rate benchmark.⁸⁴

In accordance with 19 CFR 351.525(b)(6)(i), we calculated the countervailable subsidy rate by dividing the benefit amount by Port Hawkesbury’s total sales during the POI, as described above in the “Subsidies Valuation Information – Attribution of Subsidies” section. On this basis, we determine that the net countervailable subsidy rate for this program is 0.43 percent *ad valorem* for Port Hawkesbury.

3. PWCC Indemnity Loan

Port Hawkesbury explained that during the course of the sales process for NPPH, PWCC incurred transaction costs and expenses for due diligence work and restructuring planning in connection with its acquisition of NPPH.⁸⁵ The GNS, as represented by the Minister of Natural Resources, agreed during the negotiation to reimburse PWCC for a portion of these costs and expenses, in recognition of the significant complexity, resources, and completion risk involved in pursuing, evaluating, negotiating, and implementing a possible transaction.⁸⁶ To memorialize this arrangement, PWCC and the GNS entered into an indemnity agreement, effective November 28, 2011, and amended on September 28, 2012 (Indemnity Agreement).⁸⁷ Under the Indemnity Agreement, if PWCC or any of its affiliates completed the acquisition of NPPH prior to October 31, 2012, PWCC (delegated to Port Hawkesbury) was obligated to repay the GNS all reimbursed amounts in three installments from 2013 – 2016.⁸⁸ Both the GNS and Port Hawkesbury reported

⁸³ *Id.* at NS.III-3.

⁸⁴ *See* 19 CFR 351.505(d).

⁸⁵ *Id.* at 94.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 95. *See, also*, GNS Pre-Preliminary Comments at 25.

the outstanding balances that Port Hawkesbury owed to the GNS during the POI under the Indemnity Loan, which has an interest rate of zero.⁸⁹

We did not initiate an investigation into this program in the *Initiation Notice*. However, section 775 of the Act provides that if the Department “discovers a practice which appears to be a countervailable subsidy, but was not included in the matters alleged in a countervailing duty petition ... then the administering authority (1) shall include the practice, subsidy, or subsidy program in the proceeding if the practice, subsidy, or subsidy program appears to be a countervailable subsidy with respect to the merchandise which is the subject of the proceeding...” *See, also* 19 CFR 351.311(b). Accordingly, based upon our discovery of a practice which appears to be a countervailable subsidy from Port Hawkesbury’s and the GNS’s questionnaire responses, the statute authorizes us to investigate this program.

We determine that the Indemnity Loan conferred a countervailable subsidy within the meaning of section 771(5) of the Act and constitutes a financial contribution in the form of a direct transfer of funds from the GNS under section 771(5)(D)(i) of the Act. We also determine that a benefit exists under section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a)(1) equal to the difference between the amounts paid by the company for the loan during the POI and the amounts the company would have paid on a comparable commercial loan. Finally, we determine that the program is specific in accordance with section 771(5A)(D)(i) of the Act because the GNS only provided assistance to PWCC for the due diligence work and restructuring planning in connection with the acquisition of NPPH.

To calculate the benefit under section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a)(1), we relied on the benchmarks described above under the “Loan Interest Rate Benchmarks and Discount Rates” section to determine the amount of interest that Port Hawkesbury would have paid on a comparable commercial loan during the POI. In accordance with 19 CFR 351.525(b)(6)(i), we calculated the countervailable subsidy rate by dividing this benefit amount by Port Hawkesbury’s total sales during the POI, as described above in the “Subsidies Valuation Information – Attribution of Subsidies” section. On this basis, we determine that the net countervailable subsidy rate for this program is 0.03 percent *ad valorem* for Port Hawkesbury.

4. Richmond County (Nova Scotia) Promissory Note for Property Taxes

On September 27, 2012, NPPH, Richmond County (Nova Scotia), and PWCC entered into an agreement that set the property taxes payable on Port Hawkesbury at C\$1,326,227 for the balance of the taxation year commencing September 28, 2012, and ending March 31, 2013.⁹⁰ The property taxes under the agreement were partly payable through a C\$450,000 interest-free loan granted in the form of a promissory note, repayable in four annual installments from 2013 to 2016, due by September 28 of each year.⁹¹ The payment of taxes in this manner was contingent on the GNS passing the Richmond Port Hawkesbury Paper Ltd. Taxation Act, which gave effect

⁸⁹ *Id.* at NS.I-17 – NS.I-18. *See, also*, PQR at Exhibit 15-2a. *See, also*, GNS Pre-Preliminary Comments at 26.

⁹⁰ *See* GQR at Government of Nova Scotia Questionnaire Response, Volume IV, NS.IV-2.

⁹¹ *Id.* at NS.IV-2, Exhibit NS-RL-1, and Exhibit NS-RL-2.

to the September 2012 agreement.⁹² The GNS reported that it offered this assistance only to Port Hawkesbury.⁹³ The Municipality of the County of Richmond is responsible for administering the loan.⁹⁴

Although PWCC was the party to the agreement, Port Hawkesbury records the loan in its accounts.⁹⁵ Port Hawkesbury's 2013 and 2014 audited financial statements include the loan in its Accounts Payable and Accrued Liabilities.⁹⁶

For this final determination, we find that this promissory note provides a financial contribution as a direct transfer of funds under section 771(5)(D)(i) of the Act. Because the granting of the promissory note and the payment of property taxes in this manner required the passage of specific legislation by the GNS, the Richmond Port Hawkesbury Paper Ltd. Taxation Act, we determine that it is specific to an enterprise under section 771(5A)(D)(i) of the Act. To calculate the benefit under section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a)(1), we relied on the benchmarks described above under the "Loan Interest Rate Benchmarks and Discount Rates" section to determine the amount of interest that Port Hawkesbury would have paid on a comparable commercial loan during the POI. In accordance with 19 CFR 351.525(b)(6)(i), we calculated the countervailable subsidy rate by dividing the benefit amount by Port Hawkesbury's total sales during the POI, as described above in the "Subsidies Valuation Information – Attribution of Subsidies" section.

In the *Preliminary Determination*, we found that the benefit to Port Hawkesbury under this program was less than 0.005 percent *ad valorem* during the POI, and therefore there was no benefit. For purposes of this final determination, however, we have revised the interest rate we are using as a benchmark to measure loan benefits and to allocate non-recurring benefits over time. As a result, we determine that Port Hawkesbury received a countervailable subsidy of 0.01 percent *ad valorem* under this loan program.

5. GNS Grants for Maintaining Hot Idle Status

The GNS reports that funds were provided by the GNS to maintain the Port Hawkesbury mill in "hot idle" status through to the completion of the sale of the mill to PWCC during the CCAA process. All payments by the GNS were made under the supervision of the court-appointed monitor in the context of the CCAA proceeding to maintain the NPPH assets in hot idle status pending the sale of the assets to potential buyers.⁹⁷ The reason for maintaining the mill in "hot idle" status is that machinery and equipment at mills like the Port Hawkesbury mill must be in constant operation in order to maintain their efficiency, and even operability. Any prolonged "cold" shutdown results in degradation of the machinery and equipment that can be very expensive, and sometimes impossible, to repair, thereby imperiling a successful restart.⁹⁸

⁹² *Id.* at NS.IV-4.

⁹³ *Id.* at NS.IV-9.

⁹⁴ *Id.* at NS.IV-3.

⁹⁵ See PQR at 48.

⁹⁶ *Id.*

⁹⁷ See GQR at Government of Nova Scotia Questionnaire Response, Volume VIII, NS.VIII-6.

⁹⁸ See PSQR at 12.

NPPH and NewPage Corporation (NewPage), NPPH's U.S. parent company, entered into a Settlement and Transition Agreement, under which NewPage committed approximately US\$22 million for a "hot-idle" fund under the oversight of a court-appointed monitor to maintain the hot idle status of the mill. However, by December 2011, these funds were nearly depleted.⁹⁹ Therefore, the Treasury Board of the GNS approved additional funding, to be provided by the Department of Natural Resources (DNR) to maintain the hot idle status of the mill. These approvals were granted in December 2011 and on March 26, 2012.¹⁰⁰ The amount of assistance was based on the actual costs of maintaining the hot idle status as reported by the court-appointed monitor under the CCAA proceeding,¹⁰¹ and funds were disbursed based on the monitor's approval of invoices for services rendered. Specifically, NPPH staff would receive invoices and periodically submit them to the monitor, who was responsible for vetting them to ensure they were for activities performed during the hot idle period, and upon approval would release funds for payment of the invoice.¹⁰² Additionally, any excess funds remaining at the conclusion of the CCAA proceedings were repaid to the GNS.¹⁰³

With respect to the sales process of the mill under the CCAA process, 21 letters of intent were received on September 28, 2011, from parties interested in purchasing the mill assets; 14 of these were designated as qualified buyers. On October 24, 2011, eight formal offers for the purchase of NPPH's assets were received by the monitor. On October 28, 2011, the monitor advised four of the eight bidders that they were being invited to continue as participants in the Sales Process, and they were advised to submit formal offers by December 16, 2011.¹⁰⁴ PWCC submitted its bid on December 16, 2011. The monitor announced, in a press release issued on January 4, 2012, that PWCC was chosen as the bidder to acquire NPPH.¹⁰⁵ Once the price set out in PWCC's letter of December 16, 2011, was accepted, it did not change throughout the duration of the process and the closing of its acquisition of the mill occurred based on that price.¹⁰⁶

In its questionnaire responses, Port Hawkesbury argues that it did not receive any of the funds during the hot idle period,¹⁰⁷ and the GNS argues that any benefit conferred under this program was provided to NPPH and was extinguished when the mill was sold to PWCC.¹⁰⁸ However, the Department's prior notice with respect to agency practice regarding privatization is instructive in evaluating the hot idle assistance.¹⁰⁹ This *Notice of Final Modification* addressed the treatment of prior subsidies with respect to change-in-ownership, including the treatment of concurrent

⁹⁹ See GQR at Government of Nova Scotia Questionnaire Response at Volume VIII, NS.VIII-5.

¹⁰⁰ See, e.g., GSQR at Exhibit NS-SUPP1-12, Appendix A.

¹⁰¹ See GQR at Government of Nova Scotia Questionnaire Response, Volume VIII, NS.VIII-9.

¹⁰² See PQR at 16-17.

¹⁰³ See GQR at Government of Nova Scotia Questionnaire Response, Volume VIII, NS.VIII-9 and Exhibit NS-HI-11.

¹⁰⁴ See GSQR at 10.

¹⁰⁵ See PSQR at 10.

¹⁰⁶ See PSQR at 11.

¹⁰⁷ See PQR at 17.

¹⁰⁸ See GQR at Government of Nova Scotia Questionnaire Response, Volume VIII, NS.VIII-6 - NS.VIII 7.

¹⁰⁹ See *Notice of Final Modification*.

subsidies provided to encourage or facilitate privatization.¹¹⁰ For the purposes of this methodology, the Department stated that it intends to scrutinize very carefully any instances of concurrent subsidies, and will normally determine that the value of concurrent subsidies is fully reflected in the fair market value price of an arm's length change in ownership/privatization and, therefore, is fully extinguished in any such transaction, if the following criteria are met:

1. The nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders;
2. The concurrent subsidies were bestowed prior to the sale; and
3. There is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the transaction price.¹¹¹

With respect to the hot idle funds provided by the GNS, the funds were bestowed prior to the conclusion of the sale of the former NPPH to its new owners and, thus the second criterion was met. However, we determine that the other two criteria were not satisfied. The solicitation for bids for the Port Hawkesbury mill and the selection of the four qualified bidders were completed by October 28, 2011, and the deadline for submitting bids was December 16, 2011. The decisions by the GNS to provide hot idle funds were made in December 2011 and on March 26, 2012, after the solicitation for bids and after the submission of all bids.¹¹² Thus, at the time the bids were submitted, the nature and the value of the hot idle funds provided by the GNS were not "fully transparent to all potential bidders," as articulated in the first criterion above. The potential bidders would not have been aware of the provision of hot idle funds from the GNS; therefore, the bids submitted could not have reflected the provision of the assistance by the GNS to maintain hot idle status.

Moreover, there is evidence on the record demonstrating that the hot idle funds were not fully reflected in the transaction price. Because the hot idle funds from the GNS were not in existence before the bid price was established and approved, the value of the GNS hot idle funds could not have been reflected in the transaction price. As Port Hawkesbury admits, the price set forth in the bid that was submitted and accepted on December 16, 2011, did not change throughout the duration of the sales process, and the closing of the acquisition of the mill ultimately occurred on the pricing terms submitted in the December 16, 2011, bid.¹¹³ Thus, even if that bid price initially reflected the fair market value of the Port Hawkesbury mill, and even though the hot idle funds were bestowed prior to the final sale, the value of the GNS hot idle funds could not have been reflected in the final transaction price, which was set before the hot idle funds were proposed and approved by the GNS. Therefore, even assuming an arm's length transaction for fair market value, because the actual transaction price could not have accounted for the amount of the subsidy, we determine that the subsidy could not have been extinguished.

¹¹⁰ The *Notice of Final Modification* explicitly addresses full privatization, but the Department later determined to apply this methodology to private-to-private sales. See, e.g., *Pasta from Italy* 70 FR at 17972.

¹¹¹ See *Notice of Final Modification*, 68 FR 37125, 37137.

¹¹² See, e.g., GSQR at Exhibit NS-SUPP1-12, Appendix A.

¹¹³ See PSQR at Exhibit 8, page 6.

We, therefore, determine that the grants provided by the GNS in order to maintain the Port Hawkesbury mill in “hot idle” status through to the completion of the sale of the mill to PWCC constitute a financial contribution in the form of a direct transfer of funds from the government bestowing a benefit in the amount of the grants within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act. We also determine that a benefit exists under 19 CFR 351.504(a), equal to the amount of the grant. Finally, we determine that the program is *de jure* specific, in accordance with section 771(5A)(D)(i) of the Act, because the GNS authorized the assistance only to Port Hawkesbury.

Because NPPH did not receive these benefits on an ongoing basis and the assistance was to be provided only during the pendency of the CCAA process, we are treating these subsidies as non-recurring grants.¹¹⁴ Additionally, because Port Hawkesbury reported the total amount of payments it received, and it was not able to identify the source of funds (GNS, New Page Corporation or NPPH) for the payments it received,¹¹⁵ we have used in our calculation the total amount of GNS funds disbursed under the court-appointed monitor’s approval, as reported by the GNS.¹¹⁶ Using this total, we conducted the “0.5 percent test” pursuant to 19 CFR 351.524(b)(2) and we found that the benefits were greater than 0.5 percent of Port Hawkesbury’s total sales in the year the grants were approved. Thus, we allocated the total benefit over the AUL using the discount rate discussed above in the section “Loan Interest Rate Benchmarks and Discount Rates,” to determine the amount attributable to the POI. We then divided the amount attributable to the POI by Port Hawkesbury’s total sales during the POI. On this basis, we determine that Port Hawkesbury received a net countervailable subsidy of 0.71 percent *ad valorem* under this program. For further discussion of the comments and arguments submitted with regard to this program in the case and rebuttal briefs, *see* Comment 5, below.

5. Forestry Infrastructure Fund

The GNS reports that the Forestry Infrastructure Fund (FIF) was created pursuant to an agreement between the GNS and NPPH dated September 16, 2011, which was put into effect by the Supreme Court of Nova Scotia on September 23, 2011, pursuant to its authority under the CCAA process. According to the GNS, the purpose of the FIF was to pass payments through NPPH to providers of certain services that the GNS deemed beneficial for the province.¹¹⁷ Specifically, the GNS determined that because NPPH intended to shut down its mill, ancillary forestry operations which are directly beneficial to the province and the provincial economy would cease immediately. Therefore, the GNS engaged with NPPH to continue the forestry infrastructure activities of third party contractors and subcontractors.¹¹⁸ These activities included silviculture (including ongoing silviculture activities that were only partially completed when NPPH sought creditor protection), road maintenance, forestry training program, and design,

¹¹⁴ A portion of this grant was returned to the GNS. *See* Port Hawkesbury Final Calculation Memo.

¹¹⁵ *See* PSQR at 14.

¹¹⁶ *See* GQR at Government of Nova Scotia Questionnaire Response, Volume VIII, NS.VIII-17.

¹¹⁷ *See* GQR at Government of Nova Scotia Questionnaire Response, Volume X, NS.X-2.

¹¹⁸ *Id.* at NS.X-3.

harvesting and transportation of timber.¹¹⁹ The GNS submitted internal documents which described the FIF as follows:

This \$14 million fund was established to support NewPage's supply chain while keeping the facility ready to be sold to a new owner. This fund helped to maintain woodlands operation. (Over a six month period, approximately 300 jobs were financed by the Fund.) Originally the fund was scheduled to end in December 2011; however, it was extended until March 31, 2012, to give more time to complete the sale. This initial expansion did not require additional funding.¹²⁰

Initial funding for the FIF was approved on September 16, 2011, in the amount of C\$14 million, to be provided by the ERDT.¹²¹ The order approving this original agreement was announced publicly on or before October 1, 2011.¹²² The FIF was amended three times subsequent to its establishment.¹²³ Notably, on March 7, 2012, the ERDT amended the agreement to extend it until September 30, 2012, and to provide an additional amount to the FIF of C\$12 million.¹²⁴

As discussed above under the "GNS Grants for Maintaining Hot Idle Status" section, PWCC submitted its bid to purchase the mill on December 16, 2011, and once the price set out in its bid was accepted, it did not change throughout the duration of the process and the closing of the acquisition of Port Hawkesbury occurred based on that price.¹²⁵

In its questionnaire response, Port Hawkesbury argues that it was not a party to the transactions under the FIF and received no benefits from it.¹²⁶ The GNS argues that the program was "cost and cash flow" neutral to NPPH, and the services provided under the program were designed to accrue to the benefit of the GNS.¹²⁷ However, the internal documentation submitted by the GNS demonstrates that the FIF was provided to support the ongoing operations of the mill during the bankruptcy process and to maintain the mill ready for sale as an ongoing concern,¹²⁸ which demonstrates that this program was established to support the mill through the CCAA and sale process, rather than only to support unrelated contractors. Additionally, the GNS argues that even if there was a benefit to NPPH, the benefit was extinguished when NPPH was sold to PWCC in a private-to-private transaction, made at arm's length, and at fair market value.¹²⁹ However, as discussed above, the Department looks for guidance in the *Notice of Final Modification*, which addresses the treatment of concurrent subsidies with respect to change-in-ownership.

¹¹⁹ *Id.*

¹²⁰ *See* GSQR at Exhibit 98B.

¹²¹ *See* GQR at Government of Nova Scotia Questionnaire Response, Volume X, NS.X-5.

¹²² *Id.* at Exhibit NS-FI-5.

¹²³ *Id.* at NS.X-6.

¹²⁴ *Id.* at Exhibit NS-FI-8.

¹²⁵ *See* PSQR at 11.

¹²⁶ *See* PQR at 18.

¹²⁷ *See* GQR at Government of Nova Scotia Questionnaire Response, Volume X, NS.X-3 – NS.X-4.

¹²⁸ *See* GSQR at Exhibit 98B.

¹²⁹ *See* GQR at Government of Nova Scotia Questionnaire Response, Volume X, NS.X-2.

The first step in our analysis is to determine whether the purchase of the mill from NPPH by PWCC was at arm's length for fair market value. In analyzing whether a sales transaction was for fair market value, the Department will normally examine whether the seller acted in a manner consistent with the normal sales practice of private commercial sellers in that country. Where an arm's-length sale occurs between private parties, we would normally expect the private seller to act in a manner consistent with the normal sales practices of private commercial sellers in that country.¹³⁰

The sale of the company was undertaken through the CCAA under the general supervision of the Supreme Court of Nova Scotia.¹³¹ The sale of the company occurred under the normal restructuring process of the CCAA, which is similar to the process undertaken under Chapter 11 of the U.S. Bankruptcy Code. The Court appointed an independent party, Ernst and Young, as the Monitor to oversee the day-to-day administration of the sale of the company. The notice of the potential sale was advertised in the Canadian and international press including an industry journal for the pulp and paper industry. Upon initiation of the sales process, 110 potential purchasers were contacted which resulted in the submission of 21 non-binding Letters of Intent (LOI). Fourteen of the parties that submitted LOIs were designated qualified bidders and eight of these qualified bidders submitted offers. Four of these bidders were then selected to submit formal and final offers. PWCC was then selected as the purchaser and the sale of the company by NPPH to PWCC was approved by the company's American bondholders and Canadian creditors. Based upon the manner in which the company was sold, we determine that this private-to-private party transaction between NPPH and PWCC was at arm's-length for fair market value.

After determining that the change-in-ownership was a private-to-private transaction at fair market value, we must then determine whether any subsidies were extinguished. The *Notice of Final Modification* establishes the criteria to be used in determining whether a subsidy is fully extinguished in a fair market value price of an arm's-length change in ownership/privatization. As noted above, these criteria are:

1. The nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders;
2. The concurrent subsidies were bestowed prior to the sale; and
3. There is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the transaction price.¹³²

With respect to the initial FIF approval amount of C\$14 million provided by the GNS, those funds were bestowed prior to the conclusion of the sale of the former NPPH to its new owners and, thus, the second criterion was met. Additionally, as noted above, the order approving this original agreement was announced publicly on or before October 1, 2011,¹³³ which is prior to the

¹³⁰ See, e.g., *Pasta From Italy*. 70 FR at 17972.

¹³¹ The information on the sales process of the company cited in this paragraph can be found in the PSQR at Exhibit 8.

¹³² See *Notice of Final Modification*, 68 FR 37125, 37137.

¹³³ See GQR at Government of Nova Scotia Questionnaire Response, Volume X, Exhibit NS-FI-5.

submission of formal offers for the purchase of the mill on October 24, 2011, and prior to the submission of PWCC's final bid on December 16, 2011.¹³⁴ Therefore, the first criterion was also met, as the nature and value of the initial FIF funds were fully transparent to all potential bidders. Additionally, there is no evidence otherwise on the record demonstrating that the amounts related to the first FIF approval were not fully reflected in the transaction price. Therefore, we determine that the subsidies related to the initial FIF approval were extinguished in the fair market price of an arm's-length sale of NPPH to PWCC.

With respect to the second FIF approval amount of C\$12 million, those funds were also bestowed prior to the conclusion of the sale of the former NPPH to its new owners and, thus, the second criterion was met. However, we determine that the other two criteria were not satisfied with respect to the second FIF approval amount. Specifically, as noted above, PWCC's final bid was submitted on December 16, 2011, whereas the second FIF amount was approved by the GNS and the ERDT after that date. Thus, at the time the bids were submitted, the nature and the value of the second FIF was not "fully transparent to all potential bidders," as articulated in the first criterion above. The potential bidders would not have been aware at the time they submitted their bids that the second FIF was forthcoming, and it is not possible that the bids submitted prior to this date could have reflected the provision of the assistance under the FIF.

Moreover, there is evidence otherwise on the record that demonstrates that the second FIF was not fully reflected in the transaction price. Because those funds were not disbursed before the bid price was established and approved, the value of the second FIF could not have been reflected in the transaction price. As Port Hawkesbury admits, the price set forth in PWCC's bid that was submitted and accepted on December 16, 2011, did not change throughout the duration of the sales process and the closing of the acquisition of the mill occurred on the pricing terms submitted in the December 16, 2011, bid.¹³⁵ Thus, even if that bid price initially reflected the fair market value of the Port Hawkesbury mill, and even though the concurrent subsidy was bestowed prior to the final sale, the value of the second FIF could not have been reflected in the final transaction price, which was set before the concurrent subsidies were proposed and approved by the GNS. Therefore, because the actual transaction price could not have accounted for the amount of the subsidy, we determine that the subsidy could not have been extinguished.

We determine that the grants provided by the GNS and the ERDT under the second FIF constitute a financial contribution in the form of a direct transfer of funds from the government bestowing a benefit in the amount of the grants within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act. We also determine that a benefit exists under 19 CFR 351.504(a), equal to the amount of the grant.¹³⁶ Finally, we determine that the program is *de jure* specific, in accordance with section 771(5A)(D)(i) of the Act, because the GNS authorized the assistance only to Port Hawkesbury.

¹³⁴ See GSQR at 10.

¹³⁵ See PSQR at Exhibit 8, page 6.

¹³⁶ As noted below in the "Analysis of Comments" section at comment 6, we are subtracting the total C\$14 million scheduled for FIF 1 from the total funding disbursed under the FIF program when calculating a benefit for FIF 2.

Because NPPH did not receive these benefits on an on-going basis and the assistance was to be provided only up until September 30, 2012,¹³⁷ we are treating these subsidies as non-recurring grants. As noted below, we are accounting for the full C\$14 million of the initial FIF disbursement by offsetting any amount in the second FIF tranche that was not spent in the prior phase. The remaining amount is the total amount of the grant. Therefore, we conducted the “0.5 percent test” pursuant to 19 CFR 351.524(b)(2) and we found that the benefits were greater than 0.5 percent of Port Hawkesbury’s total sales in the year the grant was approved. Thus, we allocated the total benefit over the AUL using the discount rate discussed above in the section “Loan Interest Rate Benchmarks and Discount Rates,” to determine the amount attributable to the POI. We then divided the amount attributable to the POI by Port Hawkesbury’s total sales during the POI. On this basis, we determine that Port Hawkesbury received a net countervailable subsidy of 0.54 percent *ad valorem* under this program. For further discussion of the comments and arguments submitted with regard to this program in the case and rebuttal briefs, *see* Comment 6, below.

6. GNS Grants for the Sustainable Forest Management and Outreach Program Agreement

Based on the petitioner’s allegation, the Department initiated an investigation of a program titled “GNS Grants for the Promotion of Forest Management and Sustainable Harvesting” under which the GNS agreed “to provide C\$3.8 million annually for 10 years in a forestry restructuring fund to support sustainable harvesting and forest land management.”¹³⁸ The GNS states that the petitioner misstated the nature, content, and name of this funding agreement, but it confirms that the “Sustainable Forest Management and Outreach Program Agreement” (Outreach Agreement) does provide funding of up to C\$3.8 million per year for up to ten years.¹³⁹ The GNS reported that the Outreach Agreement provides payment to Port Hawkesbury for providing certain services for the benefit of the province.¹⁴⁰ Port Hawkesbury explains that the funds are used for the following activities: road planning and maintenance, forestry planning and administration, resource inventory and data sharing, research, silviculture, operation of a silviculture program on private lands, forest planning, and forest certification.¹⁴¹ In order to receive the funds from the GNS and the DNR, Port Hawkesbury files quarterly reports outlining activities and expenses.¹⁴²

We determine that the grants under the Outreach Agreement that Port Hawkesbury received from the GNS constitute a financial contribution in the form of a direct transfer of funds from the government bestowing a benefit in the amount of the grants within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act. We also determine that a benefit exists under 19 CFR 351.504(a), equal to the amount of the grant. Finally, we determine that the program is specific in accordance with section 771(5A)(D)(i) of the Act because the GNS provided the assistance only to Port Hawkesbury.¹⁴³

¹³⁷ See GQR at Government of Nova Scotia Questionnaire Response, Volume X, Exhibit NS-FI-8.

¹³⁸ See *Initiation Notice* at 14.

¹³⁹ See GQR at Government of Nova Scotia Questionnaire Response, Volume XI.

¹⁴⁰ *Id.*

¹⁴¹ See PQR at 22-23.

¹⁴² *Id.*

¹⁴³ See GQR at Government of Nova Scotia Questionnaire Response, Volume XI, NS.XI-12.

In accordance with 19 CFR 351.524(c)(2), we find that the funds provided under this program constitute recurring benefits. Therefore, we calculated the countervailable subsidy rate by dividing the amount of the grants received during the POI under the Outreach Agreement by Port Hawkesbury's total sales during the POI, as described above in the "Subsidies Valuation Information – Attribution of Subsidies" section. On this basis, we determine that Port Hawkesbury received a net countervailable subsidy of 1.57 percent *ad valorem* under this program. For further discussion of the comments and arguments submitted with regard to this program in the case and rebuttal briefs, *see* Comment 7, below.

7. GNS Provision of Funds for Worker Training and Marketing

Port Hawkesbury reports that as part of PWCC's plan for restructuring NPHH, it sought a commitment by the GNS to provide funding going forward, in the event that PWCC was successful in purchasing NPPH. The GNS agreed to two grants: 1) a C\$1.5 million grant for workforce training at the Port Hawkesbury mill, and 2) C\$200,000 annually for five years (C\$1 million total) for the marketing of products produced at the Port Hawkesbury mill.¹⁴⁴ Although there was not a specific application process, PWCC's Letter of Offer, dated August 14, 2012, and the final amended offer, dated September 22, 2012, document the agreement with respect to these funds.¹⁴⁵

This grant is administered by the ERDT acting on behalf of the Minister.¹⁴⁶ In order to receive funds for workforce training under this program, Port Hawkesbury provided the ERDT with schedules of estimated training initiatives and related costs.¹⁴⁷ In order to receive the annual grant for marketing, Port Hawkesbury must provide the GNS with an annual marketing plan prior to the disbursement of funds, which it has done for 2013 and 2014.¹⁴⁸

We determine that the grants for workforce training and marketing that Port Hawkesbury received from the GNS and ERDT constitute a financial contribution in the form of a direct transfer of funds from the government bestowing a benefit in the amount of the grants within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act. We also determine that a benefit exists under 19 CFR 351.504(a), equal to the amount of the grant. Finally, we determine that the program is specific in accordance with section 771(5A)(D)(i) of the Act because the GNS and ERDT provided the assistance only to Port Hawkesbury.

Under 19 CFR 351.513(c), the Department treats worker training subsidies and promotion assistance subsidies, which would include marketing subsidies, as recurring benefits. Therefore, we calculated the countervailable subsidy rate by dividing the amount of the grants received for worker training and marketing during the POI under this program by Port Hawkesbury's total sales during the POI, as described above in the "Subsidies Valuation Information – Attribution of

¹⁴⁴ *See* PQR at 26-27.

¹⁴⁵ *Id.* at 26-27 and Exhibit 3-1 and 3-2.

¹⁴⁶ *See* GQR at Government of Nova Scotia Questionnaire Response, Volume XII, NS.XII-2.

¹⁴⁷ *See* PQR at 30 and Exhibit 3-4.

¹⁴⁸ *See* PQR at 30 and Exhibit 3-5.

Subsidies” section. On this basis, we determine that Port Hawkesbury received a net countervailable subsidy of 0.19 percent *ad valorem* under this program.

8. The Federal Pulp and Paper Green Transformation Program

The GOC reported that Resolute received grants during the POI under the FPPGTP.¹⁴⁹ The GOC also reported that Resolute’s cross-owned affiliate, Fibrek, received assistance under this program.¹⁵⁰ The purpose of the program was to improve the environmental performance of Canada’s pulp and paper industry. The program is authorized by the national government and administered by Natural Resources Canada. Under the program, participant companies which register and submit the required application materials receive a credit in the amount C\$0.16 per liter of black liquor used/burned during the period January 1, 2009 through December 31, 2009, up to a C\$1 billion cap for the total program.¹⁵¹ Following the credit application process, companies receive a confirmation of the value of the credits generated, and the total value of credits available for their use. Companies can then submit project proposals for funding consideration.¹⁵² Eligible projects must be capital investments in a Canadian pulp and paper mill and must be directly related to the mill’s industrial process and result in demonstrable improvements in environmental performance. Additionally, the project must be located at a pulp and paper mill in Canada.¹⁵³ This program ended on March 31, 2012; project expenses incurred by participating companies after that date would not be funded by the program.¹⁵⁴

We determine that grants from the GOC under the FPPGTP constitute a financial contribution in the form of a direct transfer of funds from the government, and bestow a benefit within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act and 19 CFR 351.504(a). We also determine that this program is specific under section 771(5A)(D)(i) of the Act because the grants provided under the program are limited to the pulp and paper industry.

The Department’s regulations at 19 CFR 351.525(b)(5)(i) state that generally, “(i)f a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product.” In making this determination, the Department analyzes the purpose of the subsidy based on information available at the time of bestowal.¹⁵⁵ A subsidy is tied only when the intended use is known to the subsidy giver (in this case, the GOC) and so acknowledged prior to or concurrent with the bestowal of the subsidy.¹⁵⁶ For example, in determining whether a loan is tied to a particular product, the Department examines the loan approval documents; to determine whether a grant is tied to a particular product, the Department examines the grant approval documents. In the case of the grant program at issue, the grant applicant’s guide clearly states that the intent of the program was to improve the environmental performance of Canada’s

¹⁴⁹ See GQR at Government of Canada Questionnaire Response, Volume V, GOC-4.

¹⁵⁰ See “Revised Response of the Government of Canada to the Department’s April 6 Questionnaire,” July 22, 2015.

¹⁵¹ *Id.* at 1 and 8.

¹⁵² *Id.* at 8.

¹⁵³ See GQR at Government of Canada Questionnaire Response, Volume V, GOC-12 – GOC-13 and Exhibit GOC-PPGTP-1.

¹⁵⁴ *Id.* at GOC-2.

¹⁵⁵ See *Countervailing Duties; Final Rule*, 63 FR 65348, 65403 (November 25, 1998).

¹⁵⁶ *Id.*

pulp and paper industry, and credits were only to be granted to Canadian pulp and paper companies. Additionally, in order to be eligible for the program, “projects must be capital investments at a Canadian pulp and paper mill that are directly related to the mill’s industrial process and result in demonstrable improvements in environmental performance”¹⁵⁷ and the project location must be at a pulp and paper mill in Canada.¹⁵⁸ Further, costs associated with other types of projects (specifically, costs associated with the production or export of softwood lumber products) are ineligible for the program.¹⁵⁹ Therefore, based on the record evidence, the purpose of this grant program was known and available prior to the bestowal of the benefit, and we determine that these grants are tied to the production of only pulp and paper products. Therefore, as required by 19 CFR 351.525(b)(5), we are attributing the benefits from these grants to the sales of the specific products that benefit from the grant (*i.e.*, pulp and paper products), rather than to Resolute’s total sales.¹⁶⁰

Because Resolute does not receive these benefits on an on-going basis, we are treating this subsidy as a non-recurring grant. Therefore, we conducted the “0.5 percent test” pursuant to 19 CFR 351.524(b)(2) on the amount of credit approved by the GOC based on Resolute’s black liquor usage in 2009. We found that the amount of approved credit was greater than 0.5 percent of Resolute’s sales of pulp and paper in the year of approval. Therefore, we allocated the total benefit over the AUL using the discount rate discussed above in the “Loan Interest Rate Benchmarks and Discount Rates,” to determine the amount attributable to the POI. We then divided the POI benefits by the appropriate pulp and paper sales during the POI. On this basis, we determine that Resolute received a net countervailable subsidy of 0.22 percent *ad valorem* under this program. For further discussion of the comments and arguments submitted with regard to this program in the case and rebuttal briefs, *see* Comments 19 and 20, below.

9. Ontario Northern Industrial Electricity Rate Program

The GOO and Resolute report that Resolute’s Thunder Bay, Fort Frances, and Iroquois Falls mills received grants during the POI under the Ontario Northern Industrial Electricity Rate (NIER) program, established on April 1, 2013.¹⁶¹ The purpose of the program is to assist Northern Ontario’s largest qualifying industrial electricity consumers which commit to developing and implementing an energy management plan to manage their energy usage and improve energy efficiency and sustainability. Specifically, participants receive a rebate of two cents per kilowatt hour, capped at 2011-12 consumption levels or C\$20 million, whichever is lower.¹⁶² The program is administered by the GOO Ministry of Northern Development & Mines. Companies eligible for assistance are industrial facilities located in Northern Ontario. The program has been extended indefinitely.¹⁶³ Companies which have been accepted into the program are not required to reapply and can expect to receive rebates in variable amounts based

¹⁵⁷ *See* GQR Volume I at Exhibit GOC-PPGTP-1, page 4.

¹⁵⁸ *Id.* at Exhibit GOC-PPGTP-1, page 9.

¹⁵⁹ *Id.* at Exhibit GOC-PPGTP-1, page 7.

¹⁶⁰ *See* RSQR2 at 1-2 and Exhibit S-8.

¹⁶¹ *See* GQR at Government of Ontario Questionnaire Response, Ontario-1 – Ontario-2; *see, also*, RQR at Appendix B.

¹⁶² *Id.*

¹⁶³ *Id.* at 2.

on the amount of eligible electricity consumed, not subject to the GOO Ministry of Northern Development & Mines' discretion.¹⁶⁴

We determine that the electricity rebates that Resolute received from the GOO constitute a financial contribution in the form of a direct transfer of funds from the government bestowing a benefit in the amount of the grants within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act. We also determine that this program is specific under section 771(5A)(D)(iv) of the Act because the rebates provided under the program are limited to companies located in a certain designated geographical region, *i.e.*, Northern Ontario, within the jurisdiction of the authority providing the subsidy. We also determine that a benefit exists under 19 CFR 351.504(a), equal to the amount of the grant.

In accordance with 19 CFR 351.524(c)(2), we find that the electricity rebates provided under the program constitute recurring benefits. Therefore, we calculated the countervailable subsidy rate by dividing the amount of rebates received under this program during the POI by Resolute's total sales during the POI, as described above in the "Subsidies Valuation Information – Attribution of Subsidies" section. On this basis, we determine that Resolute received a net countervailable subsidy of 0.45 percent *ad valorem* under this program. For further discussion of the comments and arguments submitted with regard to this program in the case and rebuttal briefs, *see* Comment 19, below.

10. Ontario Forest Sector Prosperity Fund (FSPF)

As noted above, in the *Preliminary Determination*, the Department stated that it would "examine these additional potential benefits at verification and address them in the final determination," referring, in part, to the FSPF. In the verification outline issued to the GOC, the Department instructed that the GOO should "{b}e prepared to discuss the information referenced in Paragraph 2.8, "Summary of Project Funding Sources and Contributors," and Table 3, "Total from Provincial/Territorial/Municipal Governments" of the FPPGTP Application Forms you submitted in Exhibit A-1 of Appendix A of your May 28, 2015 questionnaire response."¹⁶⁵ During verification, as requested, the GOO explained that the FSPF program was announced in 2005 and supported approved capital investment projects in value-added manufacturing, increased fiber use efficiencies, energy conservation/efficiency, and development of electricity co-generation. Eligible projects for the FSPF program were restricted to sites in northern or rural Ontario. The FSPF was a Ministry of Natural Resources capital grant program, and it stopped accepting applications in October 2008. These grants were available for up to 20 percent of eligible capital costs of approved projects (or up to 30 percent of costs for electricity generation projects). The maximum grant available was C\$25 million. Grant disbursements were made against incurred and paid eligible project costs. Under the FSPF, C\$71.5 million in grants were approved, and C\$61.7 million was disbursed.¹⁶⁶ Additionally, we reviewed this program during our verification of Resolute's questionnaire responses. We reviewed the full listing of disbursements of funds for each of the four projects for which Resolute received funds under the

¹⁶⁴ *Id.* at 25-26.

¹⁶⁵ *See* GOO Verification Report at 6.

¹⁶⁶ *Id.* at 4.

FSPF and tied all of the grant information to the company's financial accounts.¹⁶⁷

We determine that grants from the GOC under the FSPF constitute a financial contribution in the form of a direct transfer of funds from the government, and bestow a benefit within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act and 19 CFR 351.504(a). We also determine that this program is specific under section 771(5A)(D)(iv) of the Act because the grants provided under the program are limited to projects in northern or rural Ontario.

Because Resolute does not receive these benefits on an on-going basis, we are treating these subsidies as a non-recurring grant. Additionally, we conducted the "0.5 percent test" pursuant to 19 CFR 351.524(b)(2). We found that the amount of assistance was greater than 0.5 percent of Resolute's relevant sales in the year of approval. Therefore, for the grant related to the project at Resolute's Fort Frances mill, we allocated the total benefit over the AUL using the discount rate discussed above in the "Loan Interest Rate Benchmarks and Discount Rates," to determine the amount attributable to the POI. We then divided the POI benefits by Resolute's total sales during the POI. On this basis, we determine that Resolute received a net countervailable subsidy of 0.10 percent *ad valorem* under this program. For further discussion of the comments and arguments submitted with regard to this program in the case and rebuttal briefs, *see* Comment 20, below.

11. Subsidies Discovered During the Course of Verification

As discussed above, the Department determines, based on AFA, that subsidies from the GOC to Resolute and its cross-owned affiliates that were discovered during the course of verification are countervailable. For purposes of this final determination, we have identified three potential programs that Resolute benefitted from during the POI.

The first is the C\$14,291,000 that GNS paid to Resolute to satisfy an outstanding liability.¹⁶⁸ We further note that there was a post-closing amount of C\$3,773,000 owed by Resolute to the GNS.¹⁶⁹ As noted above, we are finding, as AFA, that the net amount conferred a benefit to Resolute, and we have treated the C\$10,518,000 (14,291,000 - 3,773,000) as a non-recurring grant. We conducted the "0.5 percent test" pursuant to 19 CFR 351.524(b)(2) and found the amount of assistance was less than 0.5 percent of Resolute's relevant sales in the year of approval. Thus, this amount expenses in the year received and does not have a measurable benefit during the POI. For the outstanding C\$3,773,000 owed by Resolute to the GNS, we have treated it as a contingent liability interest-free loan and used a long-term interest rate benchmark to calculate a benefit.¹⁷⁰ We divided the benefit by Resolute's total sales for the POI and note there is no measurable benefit.¹⁷¹

¹⁶⁷ *See* Resolute Verification Report, at 7.

¹⁶⁸ *See* GNS Verification Report, at 14.

¹⁶⁹ *See id.*

¹⁷⁰ *See* 19 CFR 351.505(d).

¹⁷¹ *See* Resolute Final Calculation Memo.

For the subsidies discovered at Resolute’s verification, we have identified the remaining two programs that we find, as AFA, to provide a financial contribution, to be specific, and to confer a benefit.¹⁷² Our identification relies on BPI information and is discussed in the *Resolute Final Calculation Memo*. With regard to our methodology for selecting an AFA rate, the Department applies the highest calculated rate for the identical program in the investigation if a responding company used the identical program, and the rate is not zero. If there is no identical program match within the investigation, or if the rate is zero, the Department uses the highest non-*de minimis* rate calculated for the identical program in another CVD proceeding involving the same country. If no such rate is available, the Department will use the highest non-*de minimis* rate for a similar program (based on treatment of the benefit) in another CVD proceeding involving the same country. Absent an above-*de minimis* subsidy rate calculated for a similar program, the Department applies the highest calculated subsidy rate for any program otherwise identified in a CVD case involving the same country that could conceivably be used by the non-cooperating companies.¹⁷³

In the instant proceeding, we were unable to find an identical program in the investigation or in another proceeding with a non-*de minimis* rate. Thus, we have used a program that is similar in terms of treatment of the subsidy (e.g., a grant). As such, we are relying on the rate of 8.55 percent calculated in the *1st Review of Pure and Alloy Magnesium* for “Article 7 Grants from the Quebec Industrial Development Corporation,” a program that provides assistance in the form of grants.¹⁷⁴ Consistent with the Department’s practice, this is the highest non-*de-minimis* rate for a similar program in a Canadian proceeding.¹⁷⁵ Therefore, we are applying a total combined rate of 17.10 (8.55 x 2) percent *ad valorem* to these two discovered programs. Interested parties have commented on the countervailability of these discovered subsidies, which we address at Comment 17.

12. GNS Preferential Electricity Rate for Port Hawkesbury

The petitioner alleged that Nova Scotia Power, Inc. (NSPI) provides electricity to Port Hawkesbury for less than adequate remuneration (LTAR).

The provision of electricity within Nova Scotia is governed by the following legislation and regulations: (1) *Public Utilities Act*; (2) *Utility and Review Board Act*; (3) *Electricity Act*; (4) *Maritime Link Act*; (5) *Renewable Electricity Regulations*; (6) *Renewable Electricity Retail Sale Regulations*; (6) *Wholesale Market Rules Regulations*; (7) *Board Regulatory Rules*; (8) *Utility and Review Board Regulations*; (9) *Public Utilities Rules*; and (10) *Maritime Link Cost Recovery Process Regulations*.¹⁷⁶ The Nova Scotia Department of Energy is responsible for setting the

¹⁷² See Resolute Verification Report at 8.

¹⁷³ See *id.*; see, also, *Thermal Paper from the PRC* and accompanying IDM at “Selection of the Adverse Facts Available Rate.”

¹⁷⁴ See *1st Review of Pure and Alloy Magnesium*, 62 FR 13857. The AFA rate relied upon by the Department for grant programs has changed since the *Preliminary Determination* because the Department has had additional time to review past CVD determinations involving Canada to identify a more appropriate rate under the Department’s methodology.

¹⁷⁵ See *Pipe from Turkey* and accompanying IDM at 5 – 7.

¹⁷⁶ See GSQR at NS.XIII-4.

policy and legislative framework for Nova Scotia's electricity system.¹⁷⁷ The Minister of Energy may establish and administer policies, programs, standards, codes of practices, directives, and approval processes pursuant to the *Electricity Act*.¹⁷⁸

The Nova Scotia Legislature has delegated regulatory oversight for the sale of electricity to the Nova Scotia Utility and Review Board (NSUARB) which was established pursuant to the *Utility and Review Board Act of 1992*.¹⁷⁹ The NSUARB is an independent agency of the Government of Nova Scotia.¹⁸⁰ The Minister of the Department of Economic and Rural Development and Tourism is responsible for the *Utility and Review Board Act*, which is the legislation that establishes the governance, structure and mandate of the NSUARB.¹⁸¹ The NSUARB reports to the Nova Scotia Legislature through the Minister of Economic and Rural Development and Tourism.¹⁸² Pursuant to the *Public Utilities Act*, the NSUARB exercises general supervision over all electric utilities operating as public utilities within the Province of Nova Scotia. This jurisdiction includes setting rates, tolls and charges; regulations for the provision of service; approval of capital expenditures in excess of C\$250,000; and any other matter the NSUARB feels is necessary to properly exercise its mandate.¹⁸³ In addition, the annual rate of return for public utilities is determined by the NSUARB.¹⁸⁴

The NSUARB's rules for regulation of the electricity market in Nova Scotia are provided in the *Board Regulatory Rules*, the *Public Utilities Rules*, and the *Utility and Review Board Regulations*.¹⁸⁵ Under section 5(1) of the *Utility and Review Board Act*, the Governor in Council of the Province of Nova Scotia appoints the members of the NSUARB. The Governor in Council is required under section 6(1) of the *Utility and Review Board Act* to designate the Chair and the Vice-Chair of the NSUARB.

Pursuant to the *Public Utilities Act*, NSPI, an investor-owned public utility, generates, transmits and distributes electricity throughout the Province of Nova Scotia.¹⁸⁶ NSPI is the successor to the Nova Scotia Power Corporation (NSPC), a crown corporation owned by the Province of

¹⁷⁷ See "Nova Scotia – US Comparator: Standard-Making and Enforcement Functions" Nova Scotia Utility and Review Board, October 9, 2014 at page 1 at Attachment 16 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

¹⁷⁸ See, e.g., Section 2B of the *Electricity Act* provided as GSQR at Exhibit NS-EL-3.

¹⁷⁹ See GSQR at NS.XIII-2.

¹⁸⁰ See GSQR at NS.XIII-2.

¹⁸¹ See "Nova Scotia – US Comparator: Standard-Making and Enforcement Functions" Nova Scotia Utility and Review Board, October 9, 2014 at page 1 at Attachment 16 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

¹⁸² *Id.*

¹⁸³ See, e.g., GSQR at NS.XIII-2; *Public Utilities Act* provided as Exhibit NS-EL-1; Nova Scotia Utility and Review Board "Electricity" at Attachment 17 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

¹⁸⁴ See GSQR at Exhibit NS-EL-1, section 45 of the *Public Utilities Act*.

¹⁸⁵ See GSQR at NS.XIII-3.

¹⁸⁶ See, e.g., Nova Scotia Utility and Review Board "Electricity" at Attachment 17 of the July 2, 2015, Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

Nova Scotia.¹⁸⁷ The powers, rights, privileges and obligations of public utilities such as NSPI are explicitly set forth by the GNS in law and regulation.

On September 6, 2011, NPPH sought protection under the CCAA and suspended operations at the Point Hawkesbury mill.¹⁸⁸ On September 28, 2012, PWCC restarted the SC paper production line.¹⁸⁹ Throughout the CCAA process, PWCC negotiated with NSPI to establish an electricity rate that would allow it to reopen the mill.¹⁹⁰ The result of these discussions was the development of a Load Retention Rate (LRR) that met PWCC's requirements and received approval from the NSUARB on September 27, 2012.¹⁹¹ During the POI, Port Hawkesbury was under the LRR.

Under section 771(5)(B) of the Act, a subsidy is described as a case in which an authority provides a financial contribution or entrust or directs a private entity to make a financial contribution. Under section 771(5)(B) of the Act, an "authority" is defined as a government of a country or any public entity within the territory of the country. Based on the information on the record, we determine that both the GNS and the NSUARB are "authorities" because they meet the definition of a "government" under section 771(5)(B) of the Act. For further information on this determination, please see Comment 10 of this memorandum.

Determining Financial Contribution

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

It is important to remember that financial contribution and benefit, as well as specificity, constitute separate and distinct types of analysis. In determining whether a financial contribution has been provided under section 771(5)(B)(iii) of the Act, we cannot comingle that determination with the analysis of whether that financial contribution has provided a benefit.

The SAA makes explicit reference and provides explicit directions as to when Commerce will find that a private party has made a financial contribution within the meaning of section 771(5)(B)(iii). The SAA states:

¹⁸⁷ *Id.*

¹⁸⁸ *See* PQR at 6.

¹⁸⁹ *See* PQR at 5. *See, also*, PSQR Exhibit 43-1, NSPI 2014 Load Forecast at 29 and PQR at 51 (At that time, PWCC also chose not to restart the newsprint production line, reducing the annual electricity demand of the facility by 35 percent).

¹⁹⁰ *See* PQR at 3.

¹⁹¹ *Id.*

In the past, the Department of Commerce (Commerce) has countervailed a variety of programs where the government has provided a benefit through private parties. (*See, e.g., Certain Softwood Lumber Products from Canada, Leather from Argentina, Lamb from New Zealand, Oil Country Tubular Goods from Korea, Carbon Steel Wire Rod from Spain, and Certain Steel Products from Korea*). The specific manner in which the government acted through the private party to provide the benefit varied widely in the above cases. Commerce has found a countervailable subsidy to exist *where the government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to the industry under investigation*.

In cases where the government acts through a private party, such as in *Certain Softwood Lumber Products from Canada* and *Leather from Argentina* (which involved export restraints that led directly to a discernible lowering of input costs), the Administration intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph.¹⁹²

Thus, there may be a number of ways in which an authority can act through a private party to provide a financial contribution. The SAA also establishes that the circumstances by which the government acts through a private party can vary widely, and that Commerce must examine these circumstances, and the relevant evidence, on a case-by-case basis. The SAA also states that the “entrusts or directs” standard must be interpreted broadly.¹⁹³

During the POI, the electricity consumed by Port Hawkesbury was provided by NSPI. Pursuant to the *Public Utilities Act*, NSPI is an investor-owned public utility that generates, transmits and distributes electricity throughout the Province of Nova Scotia.¹⁹⁴ As discussed in detail below, NSPI is providing this electricity at the entrustment or direction of the GNS. We find that this provision of electricity falls within the definition of a financial contribution under section 771(5)(D)(iii) of the Act because the provision of electricity is the provision of a good or service, other than general infrastructure.

While the provision of electricity is the provision of a good or service, the information on the record shows that NSPI is a private company. Because NSPI is a private company, in order for its provision of electricity to Port Hawkesbury to potentially give rise to a countervailable subsidy to Port Hawkesbury, the Department must consider two factors under section 771(5)(D)(iii) of the Act: whether an authority entrusted or directed NSPI to make a financial contribution to our respondent, Port Hawkesbury, and whether the provision of this financial contribution (provision of electricity) would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments. Again, the determination of whether a financial contribution has been provided (*i.e.*, the provision of electricity to Port Hawkesbury) is separate from the determination as to whether that financial contribution has conferred a benefit to Port Hawkesbury under section 771(5)(E) of the Act (*i.e.*,

¹⁹² See SAA accompanying H.R. 5110, H.R. Doc. No. 316, 103d Cong., 2d Sess. 911, 926 (1994) (emphasis added).

¹⁹³ *Id.*

¹⁹⁴ See Nova Scotia Utility and Review Board “Electricity” at Attachment 17 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

whether the price of electricity for Port Hawkesbury under the LRR is for less than adequate remuneration).

To analyze whether NSPI has been entrusted or directed to provide a financial contribution to Port Hawkesbury within the meaning of section 771(5)(D)(iii) of the Act, we first reviewed the laws and regulations that govern the provision of electricity within Nova Scotia.

NSPI is the successor to the Nova Scotia Power Corporation (NSPC), a Crown (*i.e.*, government-owned) corporation owned by the Province of Nova Scotia.¹⁹⁵ The provincial government of Nova Scotia, following the lead of several other Canadian provinces in establishing Crown electrical utilities, created its own Crown utility company in 1919 with the creation of the Nova Scotia Power Commission (Power Commission).¹⁹⁶ The Power Commission grew throughout the 1920s to the 1960s as private and municipally-owned electrical utilities in Nova Scotia went bankrupt and sold their assets to the Power Commission.¹⁹⁷ In 1972, the Power Commission and the utility company Nova Scotia Light and Power Company of Halifax were amalgamated to create the government-owned NSPC.¹⁹⁸

In the wake of the OPEC oil crisis in the 1970s, the GNS decided to switch from imported oil to Cape Breton coal as Nova Scotia's primary source of electricity generation. New coal power plants were built, mostly in Cape Breton to be close to the mines. With this transition from imported oil to provincial coal, the debt of the Crown corporation NSPC grew as it sought to limit the impact of the rising costs of generating and supplying electricity to its customers. By the early 1990s, NSPC's debt reached a level that the provincial government was no longer willing to bear.¹⁹⁹ On January 9, 1992, the GNS announced its intention to sell a controlling interest in NSPC and thereby privatize the Crown corporation. The *Nova Scotia Power Privatization Act* provided for the reorganization of NSPC and creation of NSPI, and for the transfer of the assets of NSPC, except the sinking fund assets in respect of the public debt of NSPC, to NSPI as a going concern. The privatization process was completed on August 12, 1992.²⁰⁰

In that same year, 1992, when the GNS privatized the Crown-owned utility company and NSPI was created, the GNS also amended the *Public Utilities Act* and the *Utility and Review Board Act* of 1992 created the NSUARB.

NSPI is defined as a "public utility" under both the *Public Utilities Act* and the *Electricity Act*.²⁰¹ Under the *Public Utilities Act*, the GNS has set forth by law numerous directions with respect to

¹⁹⁵ *Id.*

¹⁹⁶ See NSPI "Our History" at Attachment 18 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Nova Scotia Utility and Review Board "Electricity" at Attachment 17 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

²⁰¹ See section 2(e) of the *Public Utilities Act* and section 2(1)(ab) of the *Electricity Act*.

NSPI's service requirements, costs, tariff rates, and equity/ownership requirements. Among these statutorily-enforced government directives are:

- General supervision of all public utilities (section 18).
- An ordered independent savings review of NSPI (section 34A).
- Approval of any improvement over C\$250,000 (section 35).
- In an application by NSPI for approval of rates, tolls and charges or in ascertaining and determining what are proper and adequate annual rates of depreciation of NSPI's property, the NSUARB shall include in its determination of the company's rate base and revenue requirement the capital and operating costs of its generation and transmission plant or like facilities in accordance with generally accepted accounting principles (section 36(2)).
- The NSUARB may ascertain and determine the proper and adequate annual rates of depreciation (section 38(4)).
- In fixing rates, tolls and charges to be paid to NSPI for any service, the NSUARB shall include proper allowance for depreciation (section 41).
- The NSUARB will fix and determine a separate rate base for each type or kind of service furnished, rendered or supplied to the public by NSPI (section 42(1)).
- Where NSPI furnishes, renders or supplies more than one type or kind of service, the NSUARB will segregate such types or kinds of service into distinct classes or categories of service and require a rate base for each distinct class or category of service (section 43).
- The NSUARB will set NSPI's annual rate of return (section 45).
- The NSUARB has the power to compel NSPI to comply with the provisions of the *Public Utilities Act* (section 46).
- NSPI is required to furnish service and facilities reasonably safe and adequate in all respects just and reasonable (section 52).
- NSPI cannot abandon any part of its line or lines, or works without consent (section 53).
- NSPI cannot sell, assign or transfer the whole of its undertaking, or any part thereof to any person or corporation except with the approval of NSUARB (section 62).
- NSPI cannot charge, demand, collect or receive any compensation for any service performed without its schedule of rates, tolls and charges approved by NSUARB (section 64).
- NSPI cannot be granted a general rate increase to take effect sooner than twenty-four months following the effective date of the last preceding general rate increase (section 64A(2)).
- The recovery of executive remuneration of executive employees of NSPI is proscribed (section 64B).
- All tolls, rates and charges shall always, under substantially similar circumstances and conditions in respect of service of the same description, be charged equally to all persons at the same rate, and NSUARB may by regulation declare what shall constitute substantially similar circumstances and conditions (section 67(1)).
- NSPI cannot charge, demand, collect or receive a greater or less compensation for any service performed by it other than those proscribed by the scheduled rates approved by

NSUARB; and NSPI cannot demand, collect or receive any rates, tolls or charges not specified with that schedule (section 71).

- NSPI cannot issue any shares, stocks, bonds, debentures or any evidence of indebtedness payable in more than one year without approval of the NSUARB (section 74(1)).
- Where new shares are required to be offered to the shareholders, they will be offered at such price as determined by NSUARB (section 74(9)).
- NSPI will undertake cost-effective electricity efficiency and conservation activities that are reasonably available in an effort to reduce costs for its customers (section 79I(1)).

As is clear from the *Public Utilities Act*, the GNS controls and directs the methodology that NSPI has to use in rate proposals, and any rate that is charged by NSPI must be approved by the NSUARB. More importantly, with respect to the entrustment or direction of NSPI to provide a financial contribution under section 771(5)(B)(iii) of the Act, NSPI is required by law to provide electricity to customers who request it anywhere in Nova Scotia.²⁰² That is, NSPI is obligated under the laws of the Province of Nova Scotia to serve any resident or company within the Province and to provide electricity to that customer.²⁰³ This is a legal obligation that does not exist in some other markets. In deregulated or totally open markets, power companies can choose to provide service only when it makes economic sense to do so.²⁰⁴

In determining whether there is entrustment or direction of a private party to provide a financial contribution, section 771(5)(B)(iii) of the Act requires that the provision of the financial contribution would normally be vested in the government and that the practice does not differ in substance from practices normally followed by the government. The provision of a good or service is defined as a financial contribution under section 771(5)(D)(iii) of the Act. Therefore, the provision of a good or service such as the provision of electricity is a type of financial contribution provided by a government.²⁰⁵ As explained below, because of the nature of electricity and Nova Scotia's experience, we find that the provision of electricity, which satisfies the definition of financial contribution under section 771(5)(D)(iii) of the Act, would normally be vested in the government, and that the provision does not differ substantively from the normal practices of the government.

The GNS first provided electricity within the Province through a Crown corporation in 1919, and continued to provide electricity through a government-owned utility company until 1992, when the Crown Corporation, NSPC, was privatized and NSPI was created. Utility companies that

²⁰² See, e.g., section 52 of the *Public Utilities Act*; "Regulating Electric Utilities – Discussion Paper Phase One Governance Study- Liberalization and Performance –Based from the Province of Nova Scotia at 3 at Attachment 30 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

²⁰³ *Id.* at 6.

²⁰⁴ *Id.* at 3.

²⁰⁵ See, e.g., "Creating Competition & Mastering Markets: New Entrants, Monopolists and Regulators in Transforming Public Utilities Across the Atlantic;" "Imprudent Power Construction Projects: The Malaise of Traditional Public Utility Policies;" "Public Utilities;" and "Universal Service In Competitive Retail Electric Power Markets: Whither the Duty to Serve?" at Attachments 8, 13, 23, and 35 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

provide electricity are generally regarded as providing services which are public in nature because they comprise the foundation of economic development and furnish households with essential services.²⁰⁶ Furthermore, the public sees electricity as an essential service and a fundamental right.²⁰⁷ Quite often, public utilities such as electricity are not owned and operated by a government; however, even if the utility company is not owned by a government, it still is said to be “affected with a public interest” and subject to a degree of government regulation from which other businesses are exempt.²⁰⁸ In such situations, the utilities often operate as a monopoly in their markets under a license or franchise, and are required to render adequate services at reasonable prices to all who apply for service.²⁰⁹

The GNS directs NSPI by law to provide electricity to all companies in the Province including Port Hawkesbury. Therefore, the provision of electricity by NSPI to Port Hawkesbury satisfies the standard of entrustment or direction under section 771(5)(B)(iii) of the Act. As a result we determine that that Port Hawkesbury has received a financial contribution in the form of the provision of a good or service under section 771(5)(D)(iii) of the Act.

In addition to the statutory requirement through which the GNS entrusted or directed NSPI to provide a financial contribution in the form of a provision of a good or service to Port Hawkesbury, the record also demonstrates that the GNS played an essential role in the specific LRR that set the price for the electricity sold to Port Hawkesbury from NSPI. Again, we clarify that the provision of the financial contribution, the provision of electricity, is separate from whether the individual electricity rate provided to Port Hawkesbury provides a benefit. Thus, we are considering the extent to which the GNS entrusted or directed the creation of the LRR without regard to whether the resulting rate conferred a benefit.

As the Department stated in *DRAMs from Korea*, the Department interprets the “entrust or directs” language in 771(5)(B)(iii) to mean that, if a government affirmatively causes or gives responsibility to a private entity to carry out what might otherwise be a government subsidy function of the type listed in subparagraphs (i) to (iv) of section 771(5)(D), there would be a financial contribution.²¹⁰ Thus, when the government executes a particular policy by operating through a private body, or when a government affirmatively causes a private body to act, such that one or more of the type of functions referred to in subparagraphs (i) to (iv) is carried out, there is entrustment or direction. Moreover, in the case of an indirect subsidy, where the government is acting through a private party, it would make sense that the private party, and not the government itself, would fix the commercial terms.²¹¹ Accordingly, whether the terms are

²⁰⁶ See e.g., “Imprudent Power Construction Projects: The Malaise of Traditional Public Utility Policies” at 512 at Attachment 30 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

²⁰⁷ See e.g., “The Future is Electric Remarks for Nova Scotia Electricity Week: at 3 at Attachment 33 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities

²⁰⁸ See “What is Public Works” from the American Public Works Association at Attachment 37 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

²⁰⁹ *Id.*

²¹⁰ See *DRAMs from Korea* and accompanying IDM at 47-48.

²¹¹ See *id.*

sufficiently affected by government action so as to make the provision actionable is a factual element relevant to the measurement of “benefit,” not “financial contribution.”²¹²

When NPPH filed for creditor protection under the CCAA on September 6, 2011, and suspended operation of the Point Hawkesbury paper mill on September 16, 2011, the GNS immediately started to develop a plan to help ensure that the paper mill reopened as a going concern.²¹³ The Premier told the Nova Scotia Legislature that the GNS announced a seven-point plan designed to keep the paper mill in an operating condition so that a new buyer would be able to come in and bring the mill back on-line; this investment was made by the government to ensure that a new buyer had an asset that they were able to operate.²¹⁴ The Premier also informed the Nova Scotia Legislature on April 25, 2012, that the government had done everything it could to get the mill reopened and that, since September of 2011, the GNS had invested more than \$27 million to help ensure that the mill remained resale-ready for a new buyer.²¹⁵ The Premier stated that the government was not going to sit idly by and let the mill close permanently, and that the Province would continue to work with NSPI to find a solution.²¹⁶ While there were still a number of items to be worked out before the mill could be reopened, one of which was electricity rates, the Premier stated that he had spoken with the CEO of NSPI, and that he was confident that NSPI and PWCC were working together to build a plan that, once finalized, would go before the NSUARB for approval.²¹⁷ The Premier further stated that he had asked PWCC and NSPI to file the necessary paperwork with the NSUARB to ensure that once an agreement was found, a timely hearing could take place in order to expedite the reopening of the mill.²¹⁸

While the GNS was implementing its seven-point plan to keep the paper mill in operation and to maintain the mill in “hot idle” status for a new buyer, PWCC made it clear that it would not purchase and reopen the mill without a favorable rate for electricity.²¹⁹ Therefore, in order for the GNS to successfully implement its plan to find a new buyer to reopen the paper mill, there had to be an agreement on electricity under an LRR. The GNS stated that Port Hawkesbury would not exist if it had to pay any of the published electricity tariffs for industrial users.²²⁰ Thus, the LRR was the only means to get a new buyer to reopen the paper mill, the stated policy goal of the GNS.

²¹² *See id.*

²¹³ *See, e.g.*, April 27, 2012 Letter to Peter W. Gurnham, Chair of the Nova Scotia Utility and Review Board from the GNS Minister of Natural Resources Subject Application by PWCC for a Load Retention Rate provided at Exhibit NS-SUPP1-33H.

²¹⁴ *See, e.g.*, The Nova Legislature House of Assembly Debates and Proceedings Third Session Tuesday, November 1, 2011 at 27/56 provided in Exhibit NS-SUPP1-102.

²¹⁵ *See e.g.*, The Nova Legislature House of Assembly Debates and Proceedings Forth Session Wednesday, April 25, 2012 at 5/48 provided in Exhibit NS-SUPP1-102

²¹⁶ *See id.*

²¹⁷ *See id.*

²¹⁸ *See id.*

²¹⁹ *See, e.g.*, March 13 2012 Letter to Nova Scotia Utility & Review Board Re Application pursuant to Nova Scotia Power Inc.’s Load Retention Tariff from McInnes Cooper, counsel for PWCC

²²⁰ *See, e.g.*, July 7 2015 GOC Supplemental Questionnaire response 19 and 53.

To this end, the GNS worked closely with both NSPI and PWCC to address the issue of high electricity costs to the mill. As part of the GNS's involvement in negotiations relating to the re-opening of the mill, the Province hired and bore the cost of a C\$400 per hour consultant, Navigant Consulting, to help facilitate the discussions between PWCC and NSPI and to provide advice and technical support to both of these parties in designing and negotiating an LRR that could be delivered to the NSUARB for approval.²²¹ After the LRR was negotiated and submitted to the NSUARB for approval, Navigant Consulting provided evidence and testimony to the NSUARB on behalf of the GNS in support of the LRR.²²²

Even before its final approval of the LRR which set this specific electricity rate for Port Hawkesbury as required under the *Public Utilities Act*, the NSUARB played a critical role in the process leading up to PWCC and NSPI filing the request for approval of the LRR.²²³

On May 24, 2000, the NSUARB passed a decision that created a Load Retention Tariff (LRT) to retain companies on the electric system that sought alternative means of generation.²²⁴ The purpose of this provision was to offer companies a lower rate from the standard industrial tariff to induce them to remain being served by NSPI instead of moving towards co-generation facilities resulting in loss of load for NSPI. The NSUARB revised this decision in 2011 when the two paper companies, NPPH and Bowater, faced financial difficulties. On June 22, 2011, NPPH and Bowater filed an application with the NSUARB to change the pre-existing LRT to make it available to a company facing "impending business closure due to economic distress" and to allow for an LRR for a company in economic distress.²²⁵ Without this policy change by the NSUARB to allow for an LRR for business closure due to economic distress—a policy which was created to address the financial problems of the Provincial paper mills—our respondent, Port Hawkesbury, would not have qualified for an LRR under the laws and regulations governing the electricity market in Nova Scotia.

On March 13, 2012, PWCC informed the NSUARB that as part of its planned acquisition for the NPPH paper mill, it required an electricity rate for the mill that would allow it to be a viable long-term operation.²²⁶ PWCC reminded the NSUARB that the paper mill had ceased manufacturing paper for economic reasons and was in hot idle status awaiting potential resumption of production.²²⁷ The mill required an LRR in order for the proposed acquisition by PWCC to occur and for the mill to restart.²²⁸ Therefore, PWCC requested pursuant to Clauses 2 and 3 of Attachment A of the Load Retention Tariff, the NSUARB to direct NSPI to conduct a

²²¹ See Exhibit NS-SUPP1-33K and Exhibit NS-SUPP1-32B at Schedule B.

²²² See Exhibit NS-SUPP1-33L and Exhibit NS-SUPP1-33M.

²²³ As discussed above, we find that it was the GNS itself that entrusted or directed NSPI to provide electricity to Port Hawkesbury. However, because we also find that the NSUARB is an authority within the meaning of section 771(5)(B) of the Act, notwithstanding its relative independence from the rest of the GNS, we have considered the extent to which that authority also entrusted or directed NSPI to provide a financial contribution.

²²⁴ See PQR Exhibit 23-5.

²²⁵ See PQR Exhibit 23-6 at para.1. The LRT is a framework of rules that govern an LRR.

²²⁶ See March 13 2012 Letter to Nova Scotia Utility & Review Board Re Application pursuant to Nova Scotia Power Inc.'s Load Retention Tariff from McInnes Cooper, counsel for PWCC.

²²⁷ *Id.*

²²⁸ *Id.*

screening to determine whether an implementation of an LRR was warranted.²²⁹ On March 14, 2012, the NSUARB directed NSPI to conduct that screening.²³⁰ When the NSUARB approved an LRR for Port Hawkesbury, it concluded that that the LRR was needed in order for the mill to reopen and afford it the prospect of long-term viability.²³¹ The GNS also made a commitment to the NSUARB that if the mill load of Port Hawkesbury triggered an additional Renewable Electricity Standard (RES) obligation during the term of the proposed LRR mechanism, and if that resulted in additional incremental costs, then the GNS would guarantee that neither Port Hawkesbury nor any other ratepayers would be required to pay these costs.²³² With the final approval of the LRR for Port Hawkesbury, the sale of the paper mill was completed and the mill reopened, completing a one-year effort to finalize the policy goal of the GNS to find a new owner of the NPPH mill and to reopen the mill.²³³

According to independent analysis of the NSUARB published in *Energy Regulation Quarterly*, the NSUARB has taken its role as an agent of government policy very seriously, while insisting that the government express its policy in legislation; however, the NSUARB has been sensitive to the broader policy context that surrounds the issues that come before it, such as the impact of electricity costs on Nova Scotia's troubled pulp and paper industry and the importance of these pulp and paper mills, such as Port Hawkesbury, to the economy of the rural communities in Nova Scotia.²³⁴ With respect to the LRR rate specifically provide for Port Hawkesbury, independent analysis indicates that the NSUARB has had to strike a balance between "traditional ratemaking" and the economic, social and political realities that must be accommodated within regulation.²³⁵

Therefore, not only did the GNS entrust or direct NSPI to provide a financial contribution to Port Hawkesbury in the form of a provision of a good or service within the meaning of section 771(5)(D)(iii) of the Act, the GNS also worked to ensure that the provision of that good or service, the provision of electricity, would be at a specially-designed LRR rate for the respondent. The NSUARB also exercised its authority to provide LRRs to companies in economic distress. Next we address whether this LRR rate provided to Port Hawkesbury is specific.

²²⁹ *Id.*

²³⁰ See March 14 2012 Letter to NSPI from NSUARB Re Application pursuant to Nova Scotia Power Inc.'s Load Retention Tariff P-202/Mater No. MO4862.

²³¹ See, e.g., July 7 2015 GOC Supplemental Questionnaire response 52.

²³² See Exhibit NS-SUPP1-32A.

²³³ We also note that in addition to providing Port Hawkesbury with the LRR in order to ensure that the company receives electricity for LTAR, the GNS also provided a large package of subsidies that greatly exceeded the \$33 million paid by Port Hawkesbury for the NPPH paper mill.

²³⁴ See "The Contributions of Utilities Regulation to the Electricity Systems Transformation: the Case of Nova Scotia" *Energy Regulation Quarterly*, November 2014 – Volume 2, Fall 2014 at Attachment 32 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

²³⁵ *Id.*

Determining Specificity

When determining whether a program is countervailable, we must examine whether it is an export subsidy or whether it provides benefits to a specific enterprise, an industry, or group thereof, either in law (*de jure* specificity) or in fact (*de facto* specificity) pursuant to section 771(5A) of the Act. The provision of the LRR was approved for and expressly limited to one company, Port Hawkesbury. Therefore, we determine that this program is specific under section 771(5A)(D)(i) of the Act.

Determining the Appropriate Benchmark

Generally, pursuant to 19 CFR 351.511(a)(2), the Department determines whether a good or service is provided for LTAR by comparing, in order of preference: (i) the government price to a market-determined price for actual transactions within the country such as prices from private parties (a “Tier 1” benchmark); (ii) the government price to a world market price where it would be reasonable to conclude that such a world market price is available to consumers in the country in question (a “Tier 2” benchmark); or (iii), if no world market price is available, by assessing whether the government price is consistent with market principles (a “Tier 3” benchmark).

Tier 1 Benchmarks

With respect to a Tier 1 Benchmark for the provision of electricity, NSPI is the primary electric utility company in Nova Scotia providing electricity to most provincial consumers,²³⁶ with independent power producers generating a minimal amount of electricity by comparison and supplying that electricity over NSPI’s transmission and distribution network.²³⁷ Furthermore, the GNS regulates the rates that NSPI charges for electricity through the NSUARB. When the government provider constitutes a majority or a substantial portion of the market, the Department determines that prices within the country are distorted, that these prices do not satisfy the regulatory requirement for a market-determined price and, therefore, cannot be used as a benchmark for determining the adequacy of remuneration.²³⁸ We have determined that the GNS is providing electricity through NSPI to most consumers of electricity in Nova Scotia. Accordingly given that NSPI is entrusted or directed to provide electricity throughout Nova Scotia, electricity prices in Nova Scotia are not appropriate Tier 1 benchmarks.

²³⁶ See GSQR at NS.XIII.9 and Exhibit NS-EL-17 at DE-03/DE-04 Appendix H at 9 (NSPI provides 95 percent of the total electrical consumed in Nova Scotia.). See, also, GSQR at NS.XIII.7 (There are also six regulated municipal electric utilities which either source electricity from NSPI generation, Independent Power Producers or self-generate.).

²³⁷ See GSQR at Exhibit NS-EL-17 at DE-03/DE-04 Appendix L at 4.

²³⁸ See *CVD Preamble*, 63 FR at, 65377: “We normally do not intend to adjust such prices to account for government distortion of the market. While we recognize that government involvement in a market may have some impact on the price of the good or service in that market, such distortion will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market. Where it is reasonable to conclude that actual transaction prices are significantly distorted as a result of the government’s involvement in the market, we will resort to the next alternative in the hierarchy.”

The respondents argue that the record contains benchmark information from Alberta and that the Department should use these prices as the basis for a Tier 1 benchmark. However, 19 CFR 351.511(a)(2)(i) states that any Tier 1 price must be a price based on actual transactions, but the Alberta price does not stem from an actual transaction. Rather, it was constructed based on existing tariffs in Alberta as if Port Hawkesbury operated in that province.²³⁹ Furthermore, 19 CFR 351.511(a)(2)(iv) states that any Tier 1 benchmark must be a delivered price. Specifically, Alberta electricity is not available, marketable, or transportable to the mill in Nova Scotia, because Nova Scotia's only inter-provincial electricity transmission connection is with New Brunswick.²⁴⁰ Further, electricity transmitted over long distances suffers from line losses which greatly inflate the electricity's price,²⁴¹ and there is no record evidence of individual provincial tariffs in place across any potential inter-provincial transmission corridor to transport electricity from Alberta to the Nova Scotia border.²⁴² Finally, even if electricity from Alberta were available to Nova Scotia, the tariffs for this electricity would still be regulated by the NSUARB. For all of these reasons, the electricity from Alberta is not appropriate as a benchmark for the purposes of 19 CFR 351.511(a)(2)(i).²⁴³

Tier 2 Benchmarks

Pursuant to 19 CFR 351.511(a)(2)(ii), the Department will only use a Tier 2 benchmark based on world market prices where it is reasonable to conclude that the good or service is actually available to the purchaser in the country under investigation. The Department has specifically stated that electricity prices from other countries are normally not available to purchasers in the country under investigation, due to the unique nature of electricity.²⁴⁴ NSPI has stated that there is no international cross-border transmission or distribution of electricity into Nova Scotia.²⁴⁵ Therefore, we determine that we cannot rely on world market prices as a benchmark for determining whether electricity is provided for LTAR.

²³⁹ See Port Hawkesbury June 29, 2015, letter entitled "Supercalendered Paper from Canada – Benchmark Information and Pre-Preliminary Comments – Electricity" Exhibit 9a at 3.

²⁴⁰ See GSQR Exhibit NS-EL-17 at DE-03/DE-04 Appendix L at 8.

²⁴¹ See PQR Exhibit 23-12 at PQR 3717 (describing how line loss increases with distance).

²⁴² The Open Access Transmission Tariff does cover the transmission of electricity from the Nova Scotia border to the customer, but it does not cover transmission costs (including significant line loss over the intervening distance) for the required transit from Alberta to the Nova Scotia border that such a transaction would incur. For a description of the Open Access Transmission Tariff see GSQR Exhibit NS-EL-17 at DE-03/DE-04 at 133.

²⁴³ While there is inter-provincial transmission of electricity between Nova Scotia and New Brunswick, electricity from New Brunswick would not qualify as a Tier 1 benchmark because all tariffs for electricity in the Province are regulated by the NSUARB.

²⁴⁴ See *CVD Preamble*, 63 FR at 65377: "Paragraph (a)(2)(ii) provides that, if there are no useable market-determined prices stemming from *actual* transactions, we will turn to world market prices that *would be available* to the purchaser. We will consider whether the market conditions in the country are such that it is reasonable to conclude that the purchaser could obtain the good or service on the world market. For example, a European price for electricity normally would not be an acceptable comparison price for electricity provided by a Latin American government, because electricity from Europe in all likelihood would not be available to consumers in Latin America."

²⁴⁵ See GQR at Government of Nova Scotia Questionnaire Response, Volume XIII, NS.XIII-9 and GNS Verification Report at 20.

Tier 3 Benchmarks

Because there are no Tier 1 or Tier 2 prices that satisfy the regulatory requirements, we determine that it is appropriate to rely on the final alternative in the benchmark hierarchy set forth under 19 CFR 351.511(a)(2)(iii) *i.e.*, to determine whether the government price is consistent with market principles.²⁴⁶ We have done so in this case by assessing whether the prices charged under the LRR are established in accordance with market principles through an analysis of factors including price-setting philosophy, costs (including rates of return sufficient to ensure future operations), and possible price discrimination in the rate making.²⁴⁷

The NSUARB oversees most electricity ratemaking in Nova Scotia using standard rate of return regulation, which sets a reasonable return on common equity electricity generation, transmission, and distribution as determined by a cost-of-service methodology.²⁴⁸ The NSUARB evaluates proposed rates, holds an adversarial hearing, and adjusts proposed rates and tariffs to balance the needs of ratepayers and other stakeholders. When applying to the NSUARB for rate approval, NSPI submits complex analyses of its expected cost, revenue, and demand structure during the rate-setting process for each tariff, as well as current period financial statements to support its suggested price structure.²⁴⁹ Various parties are often involved in requesting tariff designs and take part in the application approval process for setting prices under the existing tariffs.²⁵⁰

²⁴⁶ See *CVD Preamble*, 63 FR at 65378.

²⁴⁷ *Id.* and *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 30946, 30954 (July 13, 1992) (*Magnesium from Canada*) (“As a general matter, the first step the Department takes in analyzing the potential preferential provision of electricity – assuming a finding of specificity – is to compare the price charged with the applicable rate on the power company’s non-specific rate schedule. If the amount of electricity purchased by a company is so great that the rate schedule is not applicable, we will examine whether the price charged is consistent with the power company’s standard pricing mechanism applicable to such companies. If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other industries which purchase comparable amounts of electricity, we would probably not find a countervailable subsidy.”).

²⁴⁸ See GSQR Exhibit NS-EL-1 at 14 (*Public Utilities Act* at section 45). See, also, GSQR Exhibit NS-EL-17 at DE-03/DE-04, Appendix H, at 5-7 for an explanation of the Fair Return Standard and supporting case precedent in Canada (A fair return gives a regulated utility the opportunity to 1) earn a return on investment commensurate with that of comparable risk enterprise; 2) maintain its financial integrity; and, 3) attract capital on reasonable terms and conditions).

²⁴⁹ See GSQR at Exhibit NS-EL-17 at DE-03/DE-04 at 110-111. See, also, GSQR at NS.XIII.4-6 (NSPI forecasts its costs, adds a reasonable rate of return and “proposes these rates to NSUARB” either through the General Rate Application (GRA) or the Fuel Adjustment Mechanism (FAM). The GRA application process is adversarial and often includes the Province as intervenor, the electric utility, and a customer advocate. The process begins with cross-party written questioning, continues through a rate hearing, and ends with an NSUARB written decision and order. FAM application procedures address over- or under-recovery of fuel costs, are adversarial, and consider an independent audit of actual versus forecast fuel costs.) Further, regulated common equity must be maintained at nearly 40 percent of capitalization (regulated common equity plus long-term debt plus retained earnings). See, also, GSQR Exhibit NS-EL-17 at DE-03/DE-04 at 117, and 126. Actual POI average common equity is 38.8 percent in NSPI’s 2014 financial statement. See GSQR Exhibit NS-SUPP1-36 at Attachment 1, p. 6.

²⁵⁰ See, GSQR at Exhibit NS-EL-8 for the *Board Regulatory Rules – Utility and Review Board Act* at section 4(e) (describes intervenor as a person who establishes an interest in an application). See, also, GSQR Exhibit NS-EL-23 at 11 (the fact that there intervenors involved in the application for the Port Hawkesbury LRR).

Most electricity rates in Nova Scotia are “above-the-line” rates set using the cost-of-service methodology in which costs associated with forecast demand are allocated to each tariff class.²⁵¹ For example, residential class customers pay for the distribution system that is not required to serve large industrial customers with transmission level connections. “Below-the-line” rates do not fully cover fixed costs nor contribute to the guaranteed return on regulated equity approved by the regulator.²⁵²

At the outset of the general rate setting process, a Load Forecast for the period at issue is calculated. The Load Forecast yields electricity loads for each rate class according to expected demand.²⁵³ The Load Forecast is the basis for a Cost-of-Service Study (COSS) which calculates a revenue requirement equal to the sum of system-wide fixed costs, variable costs incident to the supply of “above-the-line” rates at the expected loads from the forecast, and the expected return on equity (ROE) due the electric company.²⁵⁴ Highly variable fuel costs are covered at expected prices, and fluctuations in those prices are covered by or refunded to each rate’s customers in the future through rate adjustments stemming from the FAM.²⁵⁵

Next, expected revenues from “below-the-line” rate classes (which are usually negotiated separately or have been updated in the application and are not set according to the cost-of-service methodology) are subtracted from the revenue requirement. These “below-the-line” revenues are calculated at the current price of the rate, including any current period changes proposed in the application. Total expected system costs are then functionalized and allocated over the “above-the-line” rate classes considering the forecast load for each rate. Total costs for each rate are calculated and compared to expected revenues based on existing tariff prices for each rate. These outcomes yield revenue-to-cost ratios for each rate.

Next, a Revenue Analysis is conducted to determine the increase in revenue for each rate class to cover the revenue requirement (which at this point excludes the expected revenues of the “below-the-line” rates but includes ROE). During this step, revenue-to-cost ratios for each “above-the-line” rate are set within a band of 95 to 105 percent of their respective costs.²⁵⁶ From these calculations the total shortfall from the existing rates are calculated, and rates are increased to cover the revenue requirement.²⁵⁷ This process yields the final proposed rate increases.

The electricity rate setting process in Nova Scotia usually includes a single increase; however, NSPI applied for approval of different tariff prices for both 2013 and 2014 simultaneously in 2012 because of significant upward price pressures related to the loss of some of its largest customers and conversion from coal-based generation to the use of renewable energy sources.²⁵⁸

²⁵¹ See GSQR at Exhibit NS-EL-17 at DE-03/DE-04 at 139-145, and at SR-01 Cost of Service Study Attachment 1 at 3 and SR-02 Load Forecast.

²⁵² *Id.* at Exhibit NS-EL-17 at DE-03/DE-04 at 139, and SR-01 Attachment 1 at 3.

²⁵³ See GSQR at Exhibit NS-EL-17 SR-02 Load Forecast Attachment 1 at 4.

²⁵⁴ See GSQR at Exhibit NS-EL-17 SR-01 Cost of Service Study Attachment 1 at 3-12.

²⁵⁵ See GSQR at Exhibit NS-EL-17 at DE-03/DE-04 at 27.

²⁵⁶ *Id.* at Exhibit NS-EL-17 at DE-03/DE-04 at 139-145, and at SR-01 Attachment 1 at 3-12. These ratios are a normal part of cost-of-service rate-making in North America.

²⁵⁷ This process rebalances the revenue-to-cost ratios across the individual rate.

²⁵⁸ See GSQR Exhibit NS-EL-17 at DE-03/DE-04 at 8.

NSPI began addressing these price pressures in the prior general rate application for 2012 with a “Fixed Cost Recovery Mechanism,”²⁵⁹ which deferred system-wide unrecovered costs (*i.e.*, those from “below-the-line” rates for recovery from “above-the-line” rate classes). For the 2012 rate year, rates were set with Bowater and NPPH contributing load and revenue. Unrecovered fixed costs from those “below-the-line” rates were not allocated to “above-the-line” rate classes during the year, but were deferred to 2013-2014, when these costs would be spread over all “above-the-line” rate classes.²⁶⁰ This approach contrasted with the standard cost-of-service pricing mechanism in that it shifted costs from “below-the-line” rates to “above-the-line” rates, rather than shifting revenue pursuant to price setting in the COSS methodology or correcting for differences in expected versus actual fuel costs pursuant to a FAM.

That 2013/2014 General Rate Application (GRA), filed May 8, 2012, proposed rates for all customers by employing a Load Forecast that did not include the load for Port Hawkesbury’s mill, included an LRR for Bowater as an operational mill,²⁶¹ and spread system-wide fixed costs over all “above-the-line” rate payers (minus expected revenues from “below-the-line” rate classes included in the application).²⁶² The 2013/2014 GRA also introduced a “Rate Stabilization Plan” to continue deferring a portion of the uncovered fixed costs incident to supplying the economically distressed pulp and paper industry with electricity at LRR prices.

The Rate Stabilization Plan created an additional step for the normal rate proposal process by holding “above-the-line” increases at three percent rather than the 5.4 percent demanded by its increased cost structure. It did so by factoring in under-recovered cost deferrals to the “above-the-line” rate classes from a 2010 FAM, Balance Adjustment,²⁶³ which allowed NSPI to lower the “above-the-line” rates while keeping them at cost-to-revenue ratios of 95 to 105 percent in line with the cost-of-service methodology.²⁶⁴ That adjustment did not distort the cost-of-service methodology because under a FAM, specific under- or over-recovered fuel expenses are tracked and charged or credited to the applicable individual “above-the-line” rate classes.²⁶⁵ In this case, the shortfall in expected revenue was to be held as a regulatory asset by NSPI and spread over

²⁵⁹ *Id.* at DE-03/DE-04 at 15, 26. The Fixed Cost Recovery mechanism was approved in the NSUARB’s November 29, 2011, decision on the 2012 General Rate Agreement to defer lost fixed non-fuel cost contributions associated with the loss of load of NPPH and Bowater Mersey. By this method, “above-the-line” rates did not have to shoulder the fixed costs associated with those companies in 2012. At the time of the application, NSPI did not know if those facilities would operate. Accordingly, the unrecovered fixed costs were to be deferred and recouped in 2013 and 2014 based on actual figures.

²⁶⁰ *See* GSQR Exhibit NS-EL-17 at DE-03/DE-04 at 15.

²⁶¹ Bowater was operational at the time application was submitted.

²⁶² *See* GSQR at Exhibit NS-EL-17 for the 2013/2014 GRA. For specifics of the 2014 LRR rates *see* GSQR at Exhibit NS-EL-17 DE-03 – DE-04 at 143 (section 11.4.3.3 establishes the Variable Incremental Rate, Contribution to Fixed Costs, and Energy Charge for 2014); Appendix P at 21-29 (reiterates terms of the LRR based on NSUARB September 28, 2012, LRT Order).

²⁶³ *Id.* at Exhibit NS-EL-17 at DE-03/DE-04 at 8, 149-150; Exhibit NS-EL-17 at DE-03/DE-04, Appendix N at 11; and Exhibit NS-EL-17 at DE-03/DE-04 at 11. *See, also*, GSQR Exhibit NS-EL-17 at DE-03/DE-04 at 27.

²⁶⁴ *Id.* at Exhibit NS-EL-17 at SR-01, Attachment 1, at 130 (Exhibit 10 – Revenue and Expense Comparison for 2014).

²⁶⁵ *Id.* at Exhibit NS-EL-17 at DE-03/DE-04 at 27.

the 2015-2022 period;²⁶⁶ however, revenue was greater than expected and alleviated the need for a deferral.

The Rate Stabilization Plan also extended the 2012 Fixed Cost Recovery Mechanism, which, as discussed above, was not consistent with the typical cost-of-service methodology. In the 2013/2014 GRA, “above-the-line” rates covered their own costs and unrecovered system costs consisting of both the unrecovered fixed costs from “below-the-line” rates (*i.e.*, from Bowater’s LRR) but also stranded costs²⁶⁷ incident to the complete loss of load due to the closure of NPPH. NSPI curtailed output and idled some generation assets to generate variable cost savings and reduce total output, but the full system fixed costs still needed to be covered. Accordingly, this continued to represent a departure from the standard cost-of-service methodology because it shifted costs from a “below-the-line” rate to the “above-the-line” rate pool.

The 2013/2014 GRA did not account for the Port Hawkesbury LRR application process that had begun in April 2012, and the Load Forecast excluded the Port Hawkesbury mill’s load. Under the 2011 amendments to the Load Retention Tariff (LRT), an LRR need only fully cover incremental, *i.e.*, variable costs, and make a contribution to fixed costs.²⁶⁸ The LRR approved for Port Hawkesbury was priced in this manner. Accordingly, all system-wide fixed costs were covered regardless of the Port Hawkesbury LRR, even though those costs would include much of the fixed costs for Port Hawkesbury’s unanticipated load.

The NSUARB approved Port Hawkesbury’s LRR on September 27, 2012, issued a decision with respect to the 2013/2014 GRA on December 21, 2012, and issued an Order setting the rates for 2013 and 2014 on February 1, 2013.²⁶⁹ Because those rates were set without forecasting that revenue generated on Port Hawkesbury load would cover part of the revenue requirement, NSPI was in a position to over-recover fixed costs, even with the loss of Bowater’s load. However, it could not increase its profit margin beyond the permitted level of ROE and, instead, used the additional revenues to reverse planned deferrals and retire timely the 2012 balance of the Fixed Cost Recovery Mechanism, which set aside unrecovered fixed costs from 2012.²⁷⁰

With these cost principles and rate history in mind, we have considered whether any of the other rates established by NSPI are suitable for use as a Tier 3 benchmark.

²⁶⁶ *Id.* at Exhibit NS-EL-17 at DE-03/DE-04 at 8. (Some stranded costs are the result of previous capital expenditures to meet previously forecast demand growth which did not materialize due to the 2008 economic downturn, the slow subsequent recovery, and the unexpected shift to a much reduced level of demand from the paper industry in general.)

²⁶⁷ Stranded costs represent redundant existing investments in infrastructure which must still be paid for (either as idled or at reduced output), *e.g.*, generation facilities built to serve paper industry load which is now much smaller than forecast.

²⁶⁸ 2000 LRT modified by November 29, 2011, decision.

²⁶⁹ See GSQR at Exhibit NS-SUPP1-30 (Order M04972).

²⁷⁰ See, *e.g.*, GSQR NS-SUPP1- 36 at 3-4.

NSPI has tariffs for 12 “above-the-line” ratepayer classes in its 2014 schedule of rates.²⁷¹ NSPI also has several “below-the-line” rate classes, including the Bowater LRR, which were approved by the NSUARB.²⁷² Port Hawkesbury is connected to NSPI at the transmission level of the electrical grid with a 185,000 kV service.²⁷³ Port Hawkesbury owns its own transformers, receives its service on the high voltage side of the transformer, and does not have its own generation capacity.²⁷⁴ Under its previous owner, the paper mill used the Extra Large Industrial 2 Part Real Time Pricing (ELI2P-RTP) rate, which is an “above-the-line” rate.²⁷⁵ No ELI2P-RTP rate was set for the POI because no customers intended to use it.²⁷⁶ Among the other alternative pricing schedules available to large industrial customers, the GRLF did not apply to Port Hawkesbury,²⁷⁷ no rate was set for the One Part Real Time Price for 2014 and rates applicable to Bowater Mersey were not applicable to Port Hawkesbury because they were only available to Bowater Mersey.²⁷⁸ In addition, although there was a Large Industrial rate in effect during the POI, Port Hawkesbury reported that its electricity consumption was so large that the Large Industrial rate would not apply to its electricity purchases.²⁷⁹ Thus, in 2014, other than the Port Hawkesbury LRR, there were no electrical tariffs applicable to a customer with an extra-large connection size in the NSPI rate schedule.

As guided by the *CVD Preamble*, we continue to determine that under their normal rate setting philosophy, the NSUARB and NSPI set “above-the-line” rates in accordance with market principles for regulated monopolies when the cost-of-service method is employed (including the FAM). These rates fully incorporate the costs of fuel, generation, transmission, and distribution. Under this method of rate setting, there is a sufficient guaranteed rate of return to ensure future operations because all costs are covered, and, in order to ensure adequate investment, investors are guaranteed a rate of return on equity that is competitive with similarly risky investments available in the market.

In *Magnesium from Canada*, the Department stated that “if the amount of electricity purchased by a company is so great that the rate schedule is not applicable, we will examine whether the price charged is consistent with the power company’s standard pricing mechanism.”²⁸⁰ As

²⁷¹ See GSQR Exhibit NS-EL-17 at DE-03 – DE04 Appendix P, Attachment 4, at 40-76 (above-the-line tariffs 2014). See, also, GSQR at Exhibit NS-SUPP1-30 at Schedule D.

²⁷² See Order M04972 at Schedule D. See, also, GSQR Exhibit NS-EL-17 at DE-03 - DE-04 at 141 (stating that Mersey Basic, Mersey Additional Energy, Generation Replacement and Load Following (GRLF), and the LRT are “below-the-line” rates). See, also, GSQR Exhibit NS-EL-17 at SR-01, Attachment 1, at 110 (Revenue Analysis 2014 Exhibit 7, (showing “below-the-line” rates as direct revenue and including real time pricing (albeit with no revenue). This line item is for One Part Real Time Price but there was no planned usage during the POI).

²⁷³ See PSQR at 33.

²⁷⁴ *Id.*

²⁷⁵ See GSQR Exhibit NS-EL-17 at DE-03/DE-04 at 128.

²⁷⁶ *Id.* at Exhibit NS-EL-17 at DE-03/DE at 130 (Section 10.2.3 Suspension of ELI2P-RTP Rate Class).

²⁷⁷ See PSQR Exhibit 43-1 at 39 (GRLF is for customers who have their own generation capacity of no less than 2,000 kV).

²⁷⁸ See Order M04972 at Schedule D. The Mersey Basic and Mersey Additional Energy rates discussed in the General Rate Agreement were not used during the POI because the General Rate Agreement was submitted prior to the June 2012 closure of Bowater Mersey.

²⁷⁹ See PSQR at 32-33.

²⁸⁰ See *Magnesium from Canada*, 57 FR 30946, 30954.

explained in detail above, “above-the-line” electricity rates set in Nova Scotia include all costs plus a programmed amount for ROE. “Below-the-line” rates in general do not cover all costs attributable to the load they represent and do not provide an appropriate level of ROE based on their proportion of the load. The LRT requires only that an LRR cover all incremental costs and contribute to fixed costs, as was the case for Port Hawkesbury’s LRR. Accordingly, we determine that the “below-the-line” Port Hawkesbury LRR was not set by a market-determined method for a regulated monopoly and that, based on our analysis of costs, “below-the-line” rates do not include rates of return sufficient to ensure future operations by covering all costs and providing for profit. Therefore, consistent with 19 CFR 351.511(a)(2)(iii) and *Magnesium from Canada*, we determine that the Port Hawkesbury LRR was not set according to the standard pricing mechanism used by NSPI, *i.e.*, a cost-to-service methodology, and is not a market-determined price. Rather, the LRR is a “below-the-line” price that does not cover all fixed costs or profits.

Thus, in order to determine an appropriate Tier 3 benchmark, we have constructed a price that provides for complete coverage of fixed and variable costs, as well as a portion of ROE for profit using available information on the record. We started with the Port Hawkesbury LRR that covers all variable costs and makes a contribution to fixed costs. To estimate unrecovered fixed costs, we used an affirmative statement of the level of fixed costs covered by the 2012 ELI2P-RTP (C\$26/MWh), the last “above-the-line” rate used to service the mill, and subtracted from it the amount of fixed cost recovery in the Port Hawkesbury LRR (C\$2/MWh), leaving C\$24/MWh in unrecovered fixed costs under the Port Hawkesbury LRR.²⁸¹ We estimated 2014 ROE attributable to the Port Hawkesbury load by calculating the proportion of the system-wide ROE attributable to its load. To do this, we divided Port Hawkesbury’s actual load by the sum of Port Hawkesbury’s actual load and the 2014 Load Forecast total for the system load (calculated without Port Hawkesbury load). By adding together these three pricing factors, we constructed a Tier 3 benchmark that is consistent with market principles because it includes all fixed costs, all variable costs, and an amount for profit.

To calculate the benefit pursuant to section 771(5)(e)(iv) of the Act, we subtracted from the amount that Port Hawkesbury would have paid for the electricity it consumed during the POI according to the benchmark the actual amount paid by Port Hawkesbury during the POI under its LRR. The difference represents the benefit to Port Hawkesbury. We then divided the benefit by the total sales of Port Hawkesbury during the POI. Based upon this methodology, we calculated a countervailable subsidy rate of 14.24 percent *ad valorem* for Port Hawkesbury. Resolute did not use this program.

²⁸¹ See GSQR Exhibit NS-EL-17 DE-03/DE04 at 19.

13. GNS Provision of Stumpage and Biomass Material for Less Than Adequate Remuneration (LTAR)

The petitioner contends that the GNS offered Port Hawkesbury a 20-year “Forest Utilization License Agreement” (FULA), providing a company-specific plan for sourcing pulpwood and biomass fuel from Crown (*i.e.*, government) lands.²⁸² The petitioner claims that the FULA stipulates certain volumes of pulpwood and biomass material which Port Hawkesbury is required to purchase from private suppliers. As such, the petitioner argues that under the FULA, Port Hawkesbury is able to obtain approximately two-thirds of its pulpwood from Crown lands and is only obligated to obtain one-third of its pulpwood from private sources. The petitioner states this demonstrates that the FULA program for stumpage and biomass material from Crown lands constitutes a subsidy on the production of subject merchandise.

During 2014, the GNS’s stumpage prices recognized 17 product/species categories, including distinct categories for hardwood and softwood products, as well as distinct categories for pulpwood, biomass, and saw fiber products. The Province includes a regional distinction for two product categories – pulpwood and biomass. Port Hawkesbury is located in the Eastern Region and had no authority to harvest pulpwood or biomass from the Western Region during the POI.²⁸³ The authority of the Minister of Natural Resources to set stumpage rates is derived from the Nova Scotia *Crown Lands Act*.²⁸⁴

The DNR provides for three instruments for the use of Crown timber: (1) Short Term Permits under Section 28 of the *Crown Land Acts*; (2) License Agreements under Section 31 of the *Crown Land Acts*; and (3) Forest Utilization License Agreements (FULAs), which can be area-based or volume-based, provided for under Section 32 of the *Crown Land Act*.²⁸⁵

These agreements delineate various rights and obligations for DNR and the licensee. For example, DNR agrees to provide the licensee with the right to harvest a specified amount of Crown timber, and the licensee agrees to harvest the timber. The licensee must provide its own equipment and labor for harvesting and must provide an Operating Plan to the DNR for harvesting under the license, which DNR must approve before the harvesting can occur. The agreements include specific requirements for the building, maintenance and restoration of roads and infrastructure. The agreements also indicate whether any allowances will be applied for overhead or other obligations. Finally, the agreements prescribe how the harvested wood may be used, the silviculture fees to be imposed, and the stumpage rates to be charged.²⁸⁶

²⁸² The petitioner, in addition to making its allegation on Stumpage for LTAR to cover both pulpwood stumpage and biomass stumpage, also references the government provision of biomass under the allegation of “Provision of Steam for LTAR.” We are only addressing the allegation of biomass under this stumpage program because the provision of biomass is only provided to Port Hawkesbury by the GNS under the FULA.

²⁸³ See GQR at Government of Nova Scotia Questionnaire Response, Volume XXII, NS.XXII-5.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at NS-XXII-6

²⁸⁶ *Id.*

The FULA is the only agreement instrument applicable to Port Hawkesbury.²⁸⁷ The FULA with Port Hawkesbury reflects many of the general terms present in all agreements; however, some of the specifics of the Port Hawkesbury FULA differ from other agreements and are unique to the FULA for Port Hawkesbury.²⁸⁸ The primary difference is that the 2012 Port Hawkesbury agreement is a long-term (20 years), area-based agreement, whereas other agreements are shorter in length and/or based upon volume rather than area.²⁸⁹ Such distinctions result, for example, in differences in the administrative/overhead allowance amount, which can vary depending upon the type of the agreement and the attendant obligations borne by the Crown licensee. In addition, the methodology for determining pulpwood stumpage and biomass stumpage rates in the Port Hawkesbury FULA differs from that in other agreements across the province.²⁹⁰ The principal difference in the methodology for determining stumpage rates is that Port Hawkesbury's FULA departs from the standard FULA's reliance on particular market-related data for establishing the rates, and instead relies on completely different market-related information.²⁹¹ Under the FULA, Port Hawkesbury has the right to harvest stumpage and biomass and has obligations relating to road building and maintenance; site preparation and clean up; and silviculture.

We determine that the provision of stumpage from Crown land by the GNS to Port Hawkesbury under the FULA constitutes a financial contribution as a provision of a good or service within the meaning of 771(5)(D)(iii) of the Act. The GNS has stated that both the terms and the methodology for determining stumpage rates in the Port Hawkesbury FULA differs from those in other agreements within the Province of Nova Scotia; therefore, we determine the provision of stumpage under terms of the FULA is expressly limited to Port Hawkesbury and is *de jure* specific under section 771(5A)(D)(i) of the Act

The provision of stumpage provides a benefit within section 771(5)(D)(iv) of the Act, to the extent that the GNS received less than adequate remuneration when measured against an appropriate benchmark for stumpage. As explained above, the Department's regulations at 19 CFR 351.511(a)(2) set forth the basis for identifying benchmarks to determine whether a government good or service is provided for less than adequate remuneration.

In accordance with the first preference in the hierarchy, to determine the existence and extent of the benefit, we analyzed the stumpage market in Nova Scotia during the POI. Each year, the DNR issues a Registry of Buyers annual report indicating the total harvest in Nova Scotia from both Crown land and from private land.²⁹² According to the 2014 Registry of Buyers, stumpage

²⁸⁷ *Id.*

²⁸⁸ See Port Hawkesbury's QR at Exhibit 25-3 for the FULA.

²⁸⁹ See GQR at Government of Nova Scotia Questionnaire Response, Volume XXII, XXII-7.

²⁹⁰ *Id.*

²⁹¹ According to the GNS, the stumpage rates in Nova Scotia are based upon the fair market value of stumpage sold by private landowners to commercial harvesters, with adjustments made for Crown overhead/administrative costs and Crown silviculture fees. The fair market value is based upon surveys of private stumpage transactions in the Maritime Region (*id.* at Exhibit NS-ST-4), updated to reflect changes in market conditions over time. Stumpage rates were updated for the fiscal years April 2013 - March 2014 and April 2014 - March 2015, respectively. *Id.* at NS.XXII-4-5.

²⁹² See GQR at Government of Nova Scotia Questionnaire Response, Volume XXII, NS.XXII-3

harvest from Crown land accounted for 24 percent of the total harvest during 2014;²⁹³ the harvest from private land accounted for the remainder.

Because the participation of the Province in the stumpage market is small, and is well below a majority, we determine that it does not have a distortive impact on the private stumpage market or the stumpage prices therein. Thus, for this determination, it is appropriate to rely on observed market prices for stumpage as the Tier 1 benchmark. Moreover, Port Hawkesbury itself purchased a significant amount of pulpwood and biomass stumpage from private parties during the POI; we determine that these prices constitute observed market prices that satisfy the requirements of 19 CFR 351.511(a)(2)(i), and we are relying on them as the benchmark for determining the adequacy of remuneration.

During the POI, Port Hawkesbury purchased stumpage from private lands under both Lease Agreements and Purchase Agreements.²⁹⁴ Under Lease Agreements, Port Hawkesbury pays private woodlot owners for access to land and the right to build and maintain roads and harvest wood for both pulpwood and biomass. Port Hawkesbury also incurs regeneration obligations such as replanting under its Lease Agreements.²⁹⁵ These obligations are the same as the obligations that Port Hawkesbury incurs under the FULA. Under Purchase Agreements, Port Hawkesbury purchases the already-harvested wood. Because the Lease Agreements reflect the same rights and obligations that are set forth in the FULA, we are relying on purchases under Lease Agreements as the basis for our benchmark.

The FULA for Port Hawkesbury sets separate stumpage rates for (1) softwood pulpwood; (2) hardwood pulpwood; (3) hardwood fuelwood (biomass); (4) fuelwood greater than 75 percent hardwood; (5) softwood fuelwood (biomass); and (6) fuelwood greater than 75 percent softwood.²⁹⁶ For each of the separate stumpage rate categories set by the DNR within the FULA, we compared that rate to the stumpage rate for the identical pulpwood and fuelwood harvested by Port Hawkesbury under private Lease Agreements during the POI.

As such, for this final determination, we continue to compare the stumpage prices under the FULA to the stumpage prices for the identical pulpwood and fuelwood harvested by Port Hawkesbury from private lands under Lease Agreements during the POI. The Lease Agreements permit Port Hawkesbury to harvest standing timber on the same terms and with the same infrastructure obligations as the FULA. The information provided by Port Hawkesbury for its harvest under the FULA showed the stumpage rate paid to the GNS and separately reported all

²⁹³ See GNS July 29, 2015 supplemental response at 25.

²⁹⁴ See PQR at Exhibit 25-1 for purchases during the POI, Exhibit 25-2 for purchases of Biomass and Exhibit 25-3 for the FULA. For lease agreements that Port Hawkesbury had with private suppliers please see Exhibit 25-5 of the same submission.

²⁹⁵ Under the terms of the Forrest Management Agreement (FMA) the Port Hawkesbury mill will sustainably manage crown forest land for the benefit of multiple users, while receiving for itself a guaranteed annual supply of 400,000 gross metric tons per annum of logs. The FMA seeks to ensure sustainable regeneration of crown forests according to Forest Stewardship Council Principles. See PSQR at Exhibit 29-1 for more information on their obligations for forest regeneration of Crown Lands under the FMA.

²⁹⁶ See PSQR at 52 and Exhibit 67-1 and 67-2 for Stumpage Fees and PQR at Exhibit 25-3.

associated additional costs (e.g., silviculture, road building and maintenance).²⁹⁷ As well, the price information provided about the pulpwood harvest under private Lease Agreements was reported on the same basis, separately showing the stumpage price and each of the additional costs.²⁹⁸ For the biomass harvest under the FULA, the information provided by Port Hawkesbury shows the fully inclusive price of the stumpage fee and all other costs.²⁹⁹ Port Hawkesbury reported its purchases of fuel logs used for biomass under private Lease Agreements also on this fully cost-inclusive basis.³⁰⁰

Since the *Preliminary Determination*, however, we have learned that the stumpage rates under the FULA, for both pulpwood and biomass, are inclusive of an amount that the GNS collects as a silviculture fee.³⁰¹ Notwithstanding any other costs that Port Hawkesbury incurs for silviculture, this is one area in which the stumpage rates under the FULA differ, in terms of what Port Hawkesbury is paying for, from those under the Lease Agreements. In order to ensure that our benchmark reflects market-determined prices that represent actual transactions that are comparable to the Crown prices for which we are evaluating the adequacy of remuneration, we find it appropriate to add to the private Lease Agreement stumpage prices the amount that the stumpage prices under the FULA include as a silviculture fee.³⁰² This is consistent with 19 CFR 351.511(a)(2)(i), under which we consider factors affecting comparability.

To calculate the benefit received under this program, we compared the stumpage prices paid by Port Hawkesbury to the GNS under the FULA to the prices Port Hawkesbury paid under private Lease Agreements. For pulpwood, because the private leases had the same infrastructure obligations as the FULA, and the information provided by Port Hawkesbury for its harvest under the FULA showed the wood only price and separately reported all associated additional costs (e.g., silviculture, road building and maintenance). As well, the information provided about the pulpwood harvest from private lease holders was reported on the same basis, separately showing the stumpage price and each of the additional costs.³⁰³ Thus, for pulpwood, we have relied on the stumpage only price under private leases as our basis for comparison to the stumpage paid under the FULA. For the biomass harvest under the FULA, the information provided by Port Hawkesbury shows the fully inclusive price of the stumpage fee and all other costs. Port Hawkesbury reported its purchases of fuel logs used for biomass under private leases also on this fully cost-inclusive basis. However, because we learned at verification that the rates that Port Hawkesbury pays for stumpage on Crown lands include an amount, C\$3/m³, as a silviculture fee, we will add this C\$3m³ to the private prices, to ensure that the benchmark reflects the same

²⁹⁷ See Port Hawkesbury's SQR at 53 and Exhibits 2 -3 of its QR.

²⁹⁸ See PQR at Exhibit 25-1 for Crown Purchases. For purchases from private leaseholders, see PSQR at Exhibit 65.2.

²⁹⁹ See Port Hawkesbury's SQR at 50-51 and Exhibits 65-2 through 65-5.

³⁰⁰ See Exhibits 65-2 through 65-5 of Port Hawkesbury's SQR which document the various costs that Port Hawkesbury incurred on harvesting on private leased lands.

³⁰¹ See *Preliminary Results* Issues and Decision Memorandum at 40; Port Hawkesbury Verification Report at 7-11; and GNS Verification Report at 21-22.

³⁰² See Port Hawkesbury Final Calculation Memo.

³⁰³ See PQR at Exhibit 25-1 for Crown Purchases. For purchases from private leaseholders, see PSQR at Exhibit 65.2.

terms as the Crown stumpage rates.³⁰⁴ Therefore, we compared the fully cost-inclusive price of biomass stumpage obtained under the FULA to the fully cost-inclusive price of fuel logs, used for biomass material.³⁰⁵ We summed the total benefits for pulpwood and biomass material to derive a total for benefit for stumpage provided at LTAR. We then divided the stumpage benefit by the total sales of Port Hawkesbury to calculate a net countervailable subsidy rate of 1.74 percent *ad valorem* for this program.³⁰⁶ For further discussion of the comments and arguments submitted with regard to this program in the case and rebuttal briefs, *see* Comment 8, below.

B. Programs Determined To Be Not Used or To Not Confer a Benefit During the POI

1. The GOQ Support for the Forest Industry Program

Resolute reported that Fibrek and an additional cross-owned company had loans outstanding under the “Government of Quebec Support for the Forest Industry Program” (PSIF) during the POI.³⁰⁷ In response to our questions, the GOC explained that the PSIF sought to support the consolidation of, investment in, and modernization of businesses of the forestry sector, namely forest management companies (harvest and silviculture works), pulp and paper businesses, businesses of the first transformation of wood, and businesses which produced wood transformation and forestry exploitation machinery.³⁰⁸ The Quebec Council of Ministers approved the PSIF in 2006, and the program ended in 2010.³⁰⁹ The GOQ’s Investissement Québec, a government corporation owned by the GOQ, administered the program.³¹⁰

To calculate the benefit under section 771(5)(E)(ii) of the Act and 19 CFR 351.505(a)(1), we relied on the benchmarks described above under the “Loan Interest Rate Benchmarks and Discount Rates” section to determine the amount of interest that Resolute would have paid on a comparable commercial loan during the POI. We subtracted from that amount the actual interest paid on these loans during the POI. In accordance with 19 CFR 351.525(b)(6), we calculated the potential countervailable subsidy rate by dividing the benefit amount by the appropriate sales denominator. For loans to Fibrek, we attributed the benefit that Fibrek received under the program to the sales of Fibrek plus the unconsolidated sales of Resolute (net of inter-company sales), in accordance with 19 CFR 351.525(b)(6)(iv).³¹¹ Because Resolute designated the relationship between it and the other recipient of the loans as business proprietary information, we have described the appropriate sales denominator for measuring the benefit for this company in the Resolute Preliminary Calculation Memo and have not changed it for the final determination.

³⁰⁴ *See* Port Hawkesbury Verification Report at 7-11; and GNS Verification Report at 21-22.

³⁰⁵ *See* PSQR at Exhibit 65-5.

³⁰⁶ *See* Port Hawkesbury Preliminary Calculation Memo.

³⁰⁷ *See* RQR at 26-31. Resolute designated the names of the other companies as business proprietary information.

³⁰⁸ *See* GQR at Government of Quebec Questionnaire Response, Volume I, QC-8.

³⁰⁹ *Id.* at QC-8, Exhibit QC-PSIF-3, and Exhibit QC-PSIF-4.

³¹⁰ *Id.* at QC-9.

³¹¹ *See, e.g., Coated Paper from the PRC* and accompanying IDM at Comment 35.

We find that any potential benefit to Resolute under this program was less than 0.005 percent *ad valorem* during the POI. Thus, without determining whether this program provides a financial contribution or is specific, and consistent with our practice, we are not including the assistance that Resolute received under this program in the countervailing duty rate because there is no measurable benefit.³¹² For further discussion of the comments and arguments submitted with regard to this program in the case and rebuttal briefs, *see* Comment 18, below.

2. Richmond County (Nova Scotia) Property Tax Reduction

We initiated on an allegation that the Richmond County council agreed to reduce Port Hawkesbury's annual property taxes by half through 2016 from C\$2.6 million to C\$1.3 million.³¹³ The GNS reported that the reduction resulted from an agreement between Richmond County, NPPH, and PWCC on September 12, 2012, to amend a 2006 tax agreement between Richmond County and Stora Enso Port Hawkesbury Limited, a former owner of the Port Hawkesbury mill.³¹⁴ The amended tax agreement reduced the annual amount of property taxes to be paid to Richmond County by Port Hawkesbury from C\$2.5 million to C\$1.3 million.³¹⁵

Under section 771(5)(D)(ii) of the Act, the financial contribution from a tax program is the amount of foregone revenue that is otherwise due. Under the amended tax agreement, the amount of property tax that Port Hawkesbury paid to Richmond County during the POI was C\$1.3 million. In its initial questionnaire response, the GNS reported that during the POI, Richmond County assessed property tax at the rate of C\$2.07 per C\$100 of assessed value.³¹⁶ At this tax rate, according to the GNS, Port Hawkesbury would normally be assessed between C\$550,000 – C\$650,000 in property taxes during the POI.³¹⁷ Thus, the property tax that Port Hawkesbury paid during the POI under the amended tax agreement exceeds the property tax otherwise due. As a result, we find that there is no revenue foregone under section 771(5)(D)(ii) of the Act during the POI; without any foregone revenue, Port Hawkesbury did not receive a benefit during the POI under this program pursuant to 19 CFR 351.509(a). Because we find that there is no financial contribution or benefit, it is not necessary to address whether this program is specific. For further discussion of the comments and arguments submitted with regard to this program in the case and rebuttal briefs, *see* Comment 15, below.

3. Retention of Accumulated Tax Loss to Carry Forward

We initiated an investigation into whether PWCC obtained accrued tax losses by purchasing Port Hawkesbury.³¹⁸ Port Hawkesbury reported that under the *Income Tax Act (Canada) (CITA)*, Port Hawkesbury Inc. is entitled, within specified circumstances, to use the accumulated non-capital tax losses accrued prior to the purchase of NPPH through the CCAA process.³¹⁹ Port

³¹² *Id.* at 23.

³¹³ *See* Initiation Checklist at 10.

³¹⁴ *See* GQR at Government of Nova Scotia Questionnaire Response, Volume V, NS.V-3 - NS.V-4.

³¹⁵ *Id.* at NS.V-4; *see, also*, PQR at 50.

³¹⁶ *Id.*

³¹⁷ *Id.* at NS.V-11.

³¹⁸ *See* Initiation Checklist at 11-12.

³¹⁹ *See* PQR at 57.

Hawkesbury also explained that it does not have the ability to access the non-capital loss carry-forwards reported by Port Hawkesbury Inc. and, therefore, cannot derive any tax savings from Port Hawkesbury Inc.'s tax loss carry-forward.³²⁰ Further, Port Hawkesbury explains that, as a partnership under Canadian law, Port Hawkesbury is not subject to Canadian income taxes and, accordingly, also cannot derive any tax savings from Port Hawkesbury Inc.'s tax loss carry-forwards.³²¹ Finally, Port Hawkesbury stated that no other responding cross-owned affiliates can, under Canadian tax law, use these tax losses to derive any reductions in their tax obligations.³²²

Income tax deductions provide a financial contribution under section 771(5)(D)(ii) of the Act in the form of foregone revenue that is otherwise due to a government. The benefit is the extent to which the taxes paid by the firms as a result of the program are less than the tax the firms would otherwise pay in the absence of the program. *See* 19 CFR 351.509(a)(1). Citing the blank line for “Non-capital losses of previous tax years applied in the current tax year” in Port Hawkesbury Inc.'s 2013 tax year return (filed during the POI), Port Hawkesbury claims that Port Hawkesbury Inc. did not derive any tax savings from its accumulated tax losses during the POI.³²³ Based on this information and additional business proprietary information from Port Hawkesbury Inc.'s income tax return filed during the POI, we determine that Port Hawkesbury received no benefit under this program during the POI.³²⁴ Because we find that there is no benefit, we need not address whether this program provides a financial contribution or is specific.

4. GNS Purchase of Land for More than Adequate Remuneration (MTAR)

The Department initiated on an allegation that the GNS agreed to purchase land owned by Port Hawkesbury for almost C\$400 per acre, or C\$20 million total.³²⁵ Citing a separate June 2013 purchase of land by the GNS for a lower price, the petitioner alleged that the GNS overpaid for Port Hawkesbury's land. Specifically, in that separate transaction, the GNS paid C\$16,500,000, or C\$300 per acre, for 55,000 acres of forestry land from an unrelated private company, Northern Pulp.³²⁶

In its initial questionnaire response, the GNS reported that the DNR first approached NPPH about purchasing land in September 2011.³²⁷ After negotiating the price with Port Hawkesbury, the DNR purchased 50,858 acres of land from Port Hawkesbury for C\$20 million, or C\$393/acre, on September 28, 2012.³²⁸ Regarding the specificity of the program, the GNS stated, “The Government of Nova Scotia stipulates specificity, as the Department of Natural Resources purchased land from Port Hawkesbury.”³²⁹

³²⁰ *Id.* at 61.

³²¹ *Id.*

³²² *Id.* at 56.

³²³ *Id.* at 60.

³²⁴ *See* Port Hawkesbury Preliminary Calculation Memo for additional details on this analysis.

³²⁵ *See* Initiation Checklist at 12.

³²⁶ *See* Petition at Exhibit II-38.

³²⁷ *See* GQR at Government of Nova Scotia Questionnaire Response, Volume VII, NS.VII-2.

³²⁸ *Id.* at NS.VII-2; *see, also*, GNS Pre-Preliminary Comments at 29.

³²⁹ *See* GNS Pre-Preliminary Comments at 30.

We determine that this land purchase conferred a countervailable subsidy within the meaning of section 771(5) of the Act and constitutes a financial contribution in the form of the GNS purchase of a good from Port Hawkesbury under section 771(5)(D)(iv) of the Act. We also determine that the program is specific in accordance with section 771(5A)(D)(i) of the Act because the GNS provided the assistance only to Port Hawkesbury.

Regarding benefit, section 771(5)(D)(iv) of the Act states that in the case where goods are purchased by a government authority, a benefit shall normally be treated as conferred if such goods are purchased for more than adequate remuneration. This section of the Act also states the following:

For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.³³⁰

The Department has not developed regulations with respect to the purchase of goods.³³¹ While the Department has had relatively few proceedings involving allegations of the purchase of a good for MTAR, we have in the past relied on prices within the country to determine a benchmark to measure the benefit. The most recent proceeding in which the Department made a final determination involving the purchase of a good for MTAR, other than on an adverse facts available basis under section 776(b) of the Act, was *LEU from France*.³³² In *LEU from France*, we used prices within the country to determine whether the government purchase of LEU was for more than adequate remuneration.

Therefore, we must first determine whether there are market prices from actual sales transactions involving private buyers and sellers within the country under investigation that we can use to determine whether the GNS purchased Port Hawkesbury's land for MTAR. In the PSQR and GSQR, Port Hawkesbury and the GNS submitted the Property Valuation Services Corporation's (PVSC's) records of private party transactions for forest land parcels in Nova Scotia covering the period September 29, 2011, through September 27, 2013.³³³ We are relying on these transactions to measure the adequacy of remuneration from the GNS purchase of Port Hawkesbury's land because these represent market prices from actual sales transactions involving private buyers and sellers in Nova Scotia.

Section 771(5)(E)(iv) of the Act states that the adequacy of remuneration shall be determined in relation to the prevailing market conditions of the good being purchased. In a departure from the *Preliminary Determination*, we are now using private transactions of forest land occurring over the entire year of 2012. For a discussion of this, see comment 9 below. These transactions

³³⁰ See section 771(5)(D)(iv) of the Act.

³³¹ See 19 CFR 351.512.

³³² See *LEU from France* and accompanying Issues and Decision Memorandum.

³³³ See PSQR at Exhibit 91-1; see, also, GSQR at Exhibit NS-SUPP1-99. The lists of purchases in the PSQR and the GSQR are the same.

reflect the prevailing market conditions at the time the GNS purchased the land from Port Hawkesbury. The selection of a yearly benchmark is also consistent with the benchmarks used to measure the provision of a good or service for less than adequate remuneration. The PVSC database identifies 37 land transactions during 2012. To determine the benefit, we calculated a simple average price per acre of the private land transactions from 2012 from the PVSC database and compared that amount to the amount that the GNS paid Port Hawkesbury. On this basis, the calculation of the subsidy from this program results in a rate that is less than 0.005 percent, and, as such, does not have an impact on Port Hawkesbury's overall subsidy rate. Consistent with our past practice, we did not include this program in our net subsidy rate calculations for Port Hawkesbury.

5. Loan Guarantee Program (LGP)

As noted above, in the *Preliminary Determination*, the Department stated that it would “examine these additional potential benefits at verification and address them in the final determination,” referring, in part, to the LGP. In the verification outline issued to the GOC, the Department instructed that the GOO should “{b}e prepared to discuss the information referenced in Paragraph 2.8, “Summary of Project Funding Sources and Contributors,” and Table 3, “Total from Provincial/Territorial/Municipal Governments” of the FPPGTP Application Forms you submitted in Exhibit A-1 of Appendix A of your May 28, 2015 questionnaire response.”³³⁴ During verification, as requested, the GOO explained that the LGP was announced in 2005 and supported approved capital investment projects in value-added manufacturing, increased fiber use efficiencies, energy conservation/efficiency, and development of electricity co-generation. Specifically, the LGP provided government guarantees on commercial loans used for capital investment projects. The program stopped accepting applications in March 2011. The program limited the total amount of loan guarantees to C\$350 million in loan principal. The guarantees were available for up to 100 percent of loan amounts on term loans for financing eligible capital assets. The maximum term of the guarantee was generally five years and the maximum amount was C\$25 million.³³⁵

At verification, both the GOO and Resolute stated that Resolute did not receive any benefits under this program.³³⁶ At the GOO we reviewed summaries of all companies that received any benefits under this program and noted that none of the respondent companies received assistance under the LGP. Additionally, we reviewed a letter from Abitibi Bowater (the predecessor to Resolute) in which it withdrew its request for a loan guarantee.³³⁷ Based on this information and our verification of program information at the GOO, we determine that none of the respondent companies used this program during the POI. There is no need to address whether this program provides a financial contribution or is specific.

³³⁴ See GOO Verification Report at 6.

³³⁵ *Id.*

³³⁶ See Resolute Verification Report at 7; *see, also*, GOO Verification Report at 6.

³³⁷ *Id.*

6. **The Federal Atlantic Innovation Program**
7. **Government of New Brunswick (GNB) Funds for J.D. Irving**
8. **The Federal Transformative Technologies Pilot Scale Demonstrative Program**
9. **The British Columbia Ministry of Forests, Mines and Land Program**
10. **New Brunswick Climate Action Fund Grants**
11. **British Columbia Power Smart Program**
12. **BC Bioenergy Network Grants**
13. **New Brunswick Energy Rebate Fund**
14. **Loan from the Government of New Brunswick**
15. **The Powell River City Revitalization Tax Exemption Program**
16. **Efficiency New Brunswick Grant**
17. **Grants Under the Federal Forestry Industry Transformation Program**

C. Program Determined To Be Not Countervailable

Provision of Steam for LTAR

The petitioners alleged that a cogeneration facility located at the Port Hawkesbury mill provides electricity and steam to the mill for LTAR, and further that the GOC provides stumpage from Crown lands at LTAR to fuel the biomass boiler. NSPI operates the boiler, but Port Hawkesbury provides the fuel biomass.

During the POI, Port Hawkesbury purchased all of its electricity from NSPI under the LRR; therefore, it is not necessary to separately determine whether electricity from the cogeneration facility is provided for LTAR. All electricity purchases under the LRR are addressed in the *GNS Provision of Electricity for LTAR* section above.

Similarly, with respect to the provision of biomass fuel by the GNS to Port Hawkesbury, all stumpage that Port Hawkesbury obtains from Crown lands is governed by the FULA which we have separately addressed in the *GNS Provision of Stumpage for LTAR* section above.

In 2010, before NPPH entered the CCAA process, NSPI entered into a set of agreements with NPPH and began improving an electricity and steam “co-generation” facility at the paper mill.³³⁸ Among other investments, NSPI purchased a biomass-fired boiler and added a steam turbine generator to the facility to produce electricity (an arrangement that also allowed NSPI to partially meet its own legislated targets for renewable electricity generation).³³⁹ At that time NSPI and NPPH concluded several agreements considering the shifting of asset ownership between the parties, construction, operations and maintenance, and for the supply of steam. When the company was reconstituted out of the CCAA process as Port Hawkesbury in late 2012, the company signed a new agreement with NSPI covering its purchase of process steam from NSPI.³⁴⁰ The cogeneration facility came online in 2013 and served the mill during the POI.³⁴¹

³³⁸ See PQR at 51, 74.

³³⁹ *Id.* at 73 and GSQR at NS-SM-6 at 4. See, also, GSQR at NS-SM-6 at 6-7.

³⁴⁰ See PQR at 74.

The intention of the cogeneration facility is to provide steam to the mill and to generate electricity that can be dispatched either to the mill or to other NSPI customers via NSPI's transmission grid.³⁴² When Port Hawkesbury purchased the mill in 2012 it took over the contracts with NSPI and renegotiated the steam supply agreement.³⁴³ NSPI and Port Hawkesbury entered into a long-term agreement through which NSPI annually provides process and heating steam to the mill.³⁴⁴ The mill uses the steam for drying paper and heating the mill.³⁴⁵

Unlike the rates for electricity which must be approved by the NSUARB, the NSUARB has ruled that it has no jurisdiction with respect to the provision and pricing of steam between NSPI and Port Hawkesbury.³⁴⁶

Accordingly, because the GNS and the regulating agency, the NSUARB, are not involved in the provision of steam between NSPI and Port Hawkesbury, we determine that there is no financial contribution by an authority under section 771(5)(B) of the Act, nor is there the entrustment or direction of a private entity, NSPI, to make a financial contribution. Because we find that there is no financial contribution, we need not address whether this program is specific or confers a benefit.

VII. ANALYSIS OF COMMENTS

Comment 1: The Department's Selection of Mandatory and Voluntary Respondents

The GOC's Arguments:

- The Department should have investigated Irving and Catalyst as mandatory or voluntary respondents, in accordance with the general statutory requirements.
- The Department's obligation is to calculate countervailing duty rates as accurately as possible.³⁴⁷

The GBC's Arguments:

- The statute requires the Department to calculate a separate rate for each producer, unless there are a "large number" of producers. In this investigation, there are only four. As CIT rulings have confirmed, four producers cannot be deemed a "large number."³⁴⁸ The CIT also has rejected the Department's argument that it is too burdensome to select additional respondents because it is busy with other cases.³⁴⁹

³⁴¹ *Id.* at 71-72.

³⁴² *See* GSQR at Exhibit NS-SM-6 at 6. *See, also*, GSQR at XX-4 and Exhibit NS-SM-9 at 1.

³⁴³ *See* PQR at 74.

³⁴⁴ *Id.* *See, also*, PQR at Exhibit 24-4 at 6.

³⁴⁵ *Id.* at 71, 75.

³⁴⁶ *Id.* at Exhibit 24-3. *See, also*, GSQR at 62 (provision of industrial process steam is not a function of a regulated utility in Nova Scotia to or for the public).

³⁴⁷ *See Borusan* at 1336, citing *Rhone Poulenc* at 1191.

³⁴⁸ *See Carpenter* at 1344; *See, also*, *Zhejiang* at 1263.

³⁴⁹ *Id.*

At a minimum, the Department should have selected Catalyst as a voluntary respondent.

- The CIT has ruled that the “unduly burdensome” standard is higher for the Department’s selection of voluntary respondents than it is for its selection of mandatory respondents.³⁵⁰

Catalyst’s Arguments:

- According to section 777A(e)(1) and (2) of the Act, the Department shall calculate a countervailable subsidy rate for each known producer and/or exporter of subject merchandise and may only limit the number it investigates if the investigation involves a large number.
- There are only four possible Canadian exporters or producers of subject merchandise; the CIT has determined that four is not a large number.³⁵¹ The Department has failed to demonstrate that the number of companies at issue is large.
- Alternatively, if the Department does not select Catalyst as a mandatory respondent, then it must select Catalyst as a voluntary respondent pursuant to section 782(a) of the Act.
- The CIT has recently analyzed the “unduly burdensome” standard and determined that
- the Department cannot decline to individually examine a voluntary respondent by merel referring to “the same burdens that occur” in every proceeding.³⁵² The burden in this case does not exceed the burden presented in a typical CVD proceeding, and, unlike in *Husteel*, there are not multiple investigations related to SC paper.³⁵³
- Should the Department adhere to the statute and determine to individually investigate Catalyst, there is still time to conduct verification; the Act’s requirement to conduct verification should not prevent the Department from individually investigating Catalyst at this stage.

Irving’s Arguments/Rebuttal:

- Record evidence establishes that Irving was one of the two largest Canadian producers and exporters of SC paper during the POI. The Department acted contrary to law when it ignored the evidence that Irving submitted showing that the CBP import volume data were unreliable and unusable. In light of this showing, the Department should have used the actual import volume data that Irving submitted, issued quantity and value questionnaires, or requested import volume information that the four Canadian producers of SC paper had already submitted to the USITC.
- The Department’s conclusion that there were far more than four Canadian producers and exporters was wrong and contradicted by the CBP data itself, as was the Department’s claim that it had no evidentiary basis to claim that its customs broker erred when it classified Irving’s imports of SC paper under the wrong HTSUS subheading.

³⁵⁰ See *Ad Hoc Shrimp Trade*.

³⁵¹ See *Zhejiang* at 1263.

³⁵² See *Ad Hoc Shrimp*, at 1371 (quoting *Grobest & I-Mei Indus. (Vietnam) Co., Ltd. v. United States*, 853 F. Supp. 2d 1352, 1364-65 (CIT 2012) (*Grobest*)).

³⁵³ See *Husteel Co., Ltd. v. United States*, Slip Op. 15-100 (CIT Sept. 2, 2015) at 13.

- Similarly erroneous was the Department’s refusal to accept corrected import volume information provided in Irving’s March 27, 2015, submission, the same day that the Department accepted a submission from Resolute that also addressed respondent selection.
- As of June 2, 2015, the Department had received the exact export volumes of each of the four Canadian producers, which it ignored even though it had more than adequate time to select Irving as a mandatory respondent and complete its preliminary determination by the July 27, 2015 deadline.
- The Department’s refusal to select more than two mandatory respondents was arbitrary and unreasonable because it selected three mandatory respondents in other contemporaneous administrative reviews: *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China* (March 11, 2015); *Steel Wire Garment Hangers from the People’s Republic of China* (December 18, 2014); and *Frozen Warmwater Shrimp from Vietnam* (October 3, 2014). The fact that these reviews might have involved different offices is irrelevant, because personnel resources are fungible, and the rationale offered for selecting three respondents in those cases was “no different in substance” from the rationale provided for selecting two in this investigation.
- Regardless of record information on Irving’s export volume, the Department is obligated by the Act to conduct an individual investigation of every known exporter or producer when the total number of exporters or producers is not large. CIT precedent in *Zhejiang, Carpenter*, and *Asahi* compels the conclusion that the Department violated the Act when it declined to treat Irving as a mandatory respondent.³⁵⁴ The CIT has consistently held that four producers is not a “large” number, so the Department was obligated to select Irving as a mandatory respondent. Nothing on the record contradicts the fact that there are only four Canadian producers, despite the Department’s assertion to the contrary.
- The Department’s efforts to distinguish this investigation as presenting “unique and complex issues” are speculative, and the issues cited are also typical of administrative reviews. In addition, the Department is well acquainted with many relevant aspects of the paper industry in light of other investigations and reviews.³⁵⁵
- Regardless of the Department’s refusal to select Irving as a mandatory respondent, the Act requires the Department to select a producer as a voluntary respondent when the total number of producers seeking voluntary respondent status is “not so large that individual examination ... would be unduly burdensome or inhibit timely completion of the investigation.”³⁵⁶

³⁵⁴ See *Zhejiang* at 1260-1264: see, also, *Carpenter* at 1337-1343; see, also, *Asahi* at 1335-1341.

³⁵⁵ See *Uncoated Paper from Indonesia; Certain Lined Paper from India and the People’s Republic of China: Continuation of Antidumping and Countervailing Duty Orders*, 77 FR 53172 (Aug. 31, 2012); *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People’s Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Order*, 75 FR 70203 (Nov. 17, 2010); *Certain Crepe Paper Products from the People’s Republic of China: Continuation of Antidumping Duty Order*, 75 FR 26919 (May 13, 2010); *Lightweight Thermal Paper from the People’s Republic of China and Germany: Continuation of the Antidumping and Countervailing Duty Order on the People’s Republic of China, Revocation of the Antidumping Duty Order on Germany*, 80 FR 5083 (Jan. 30, 2015).

³⁵⁶ See section 782(a)(2) of the Act.

- The CIT has held that section 782(a)(2) of the Act sets a high threshold of agency burden before the requirement of individual review can be avoided.³⁵⁷ In this case, however, the Department’s efforts to establish an undue burden and to demonstrate that selection of Irving would inhibit timely completion of the investigation lack merit and are not supported by substantial evidence.
- In accordance with *Husteel*, the Department should have conducted a pre-investigation into the accuracy of the CBP entry data because Irving brought to the Department’s attention, in a timely manner, that the CBP entry data were incomplete.³⁵⁸ The *Husteel* court also urged the Department “to focus solely on the number of exporters or producers involved in the investigation or review” rather than its workload, and it implicitly endorsed the CIT’s prior decisions by holding that three or four respondents was not so “large” a number that the Department could decline to select all of them as mandatory respondents. The same approach is required here.
- The *Husteel* court’s dismissal of arguments concerning the reasonableness of selecting two mandatory respondents is not applicable here because the parties in that case failed to raise the issue before the Department. In contrast, Irving maintains that the selection of two respondents in this investigation was unreasonable given the circumstances of the investigation.
- Finally, pursuant to *Husteel*, the Department was obligated to ensure that its respondent selection was “representative.” Because the subsidies that Irving allegedly received are “distinctly different” from those allegedly provided by other Canadian provinces to other producers, the Department could and should have used its authority under section 777A(e)(2)(A) of the Act to select a sample of producers, in addition to using the option of selecting producers accounting for the largest volume from the exporting country. This would have resulted in the selection of the two largest respondents (Resolute and Irving) and the selection of Irving.
- In *Ad Hoc Shrimp*, the court rejected justifications that were similar to those offered by the Department in this investigation for refusing to select a voluntary respondent.
- Amendments to section 782(a) of the Act pursuant to section 506 of the Trade Preferences Extension Act of 2015 (TPEA) are irrelevant to the Department’s May 1, 2015 determination not to accept voluntary respondents. However, those amendments did not repeal the requirement that the Department individually examine all respondents where the total number is “not so large.”

The Petitioner’s Rebuttal:

- With respect to Irving’s assertion that its customs broker misclassified Irving’s entries of SC paper, Irving is a large and sophisticated importer with sufficient resources to hire competent assistance in the importation process. Any resulting problem with the import data was of Irving’s own making.
- Although Irving argued that the Department should have issued quantity and value questionnaires to the potential respondents, Irving does not cite a single instance where

³⁵⁷ See *Grobtest & I-Mei Indus. (Vietnam) Co., Ltd. v. United States*, 815 F. Supp. 2d 1342, 1363 (CIT 2012).

³⁵⁸ See *Husteel* at 13, n.8.

the Department has issued quantity and value questionnaires to aid mandatory respondent selection in countervailing duty investigations.

- The CIT’s ruling in *Zhejiang* involved an administrative review, not an investigation, which presents distinct challenges for the Department.
- *Husteel* supports the Department’s decision not to accept voluntary respondents in this investigation because the compressed timeline presents an even bigger burden than that at issue in *Husteel*, even though there are not multiple countries involved in this investigation. The Department’s reference to its workload here is not a reason to distinguish the case as suggested by Catalyst, particularly given the number of new steel investigations.
- Pursuant to section 506 of the TPEA, which amended section 782(a) of the Act, the Department may decline to review voluntary respondents for a variety of reasons that would make doing so unduly burdensome.
- Irving offers no explanation for how the Department could complete an individual investigation at this point in the proceeding given the statutory deadline.

Department’s Position:

For the final determination, and for the reasons discussed in the Respondent Selection Memorandum and our Voluntary Respondent Selection Memorandum, we continue to find that there was a large number of potential respondents involved in this investigation, and that it was appropriate to select as the two mandatory respondents, Port Hawkesbury and Resolute, the two largest producers and/or exporters of subject merchandise during the POI. Further, we determine that, in light of the Department’s available resources and the burdens presented by selecting additional respondents, the Department did not err in its decision to not select additional mandatory respondents or voluntary respondents as Catalyst and Irving have urged.

Section 777A(e)(2) of the Act permits the Department to limit its examination of all known exporters and producers of subject merchandise to a reasonable number of exporters or producers, if it is not practicable to determine individual countervailable subsidy rates because of the large number of exporters or producers involved. Under section 777A(e)(2)(A)(i) and (ii) of the Act, the Department may limit its examination to (1) a sample of exporters or producers that it determines is statistically valid based on the information available to it at the time of selection, or (2) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the Department determines can be reasonably examined. The SAA interprets these provisions to mean that the authority to select respondents, whether by using a “statistically valid” sample or by examining respondents accounting for the largest volume of subject merchandise, rests exclusively with the Department.³⁵⁹

As we stated in the Respondent Selection Memorandum, we found that “the number of producers and/or exporters shown in the Petition and CBP data constitutes a large number” and determined that it was not practicable to individually examine each of them.³⁶⁰ We arrived at that conclusion by evaluating the number of producers and/or exporters in relation to our anticipated workload

³⁵⁹ See SAA at 872.

³⁶⁰ See Respondent Selection Memorandum at 5.

and deadlines, and by considering the nature of this investigation.³⁶¹ Specifically, we determined that this particular investigation would require significant resources to analyze the requisite information for each company, any cross-owned companies, and the relevant provincial and federal governments, and that all information would need to be verified within the 75-day period between our preliminary and final determinations.³⁶² As a result, whether we considered data for HTS 4802.61.3035 or the combined data for HTS 4802.61.3010, 4802.61.3090, and 4802.61.3035, the relative number of potential respondents was too large to individually examine.³⁶³

Parties cite various CIT decisions³⁶⁴ to support their contention that the Department erred in its definition of “large,” but this reliance is misplaced for several reasons.

First, parties rely on the cited cases for the proposition that “four” potential respondents is not a large number. These assertions are beside the point because the proprietary CBP data are clear that there are more than four potential respondents.³⁶⁵ Irving contends that the CBP data reveal only names, not the actual number, of exporters and/or producers, and that *Husteel* confirmed the Department’s obligation to consider evidence that “the actual number of potential respondents is likely less than the number of companies separately listed.”³⁶⁶ The issue in *Husteel*, however, was whether the Department should have combined redundant company names when identifying the number of potential respondents, and the CIT ultimately determined that Commerce reasonably defined large even when those redundancies were eliminated.³⁶⁷ Irving made no suggestion as to how the Department should combine any alleged redundancies within the CBP data, and it is clear that the number of potential respondents remains larger than four even if certain similar company names were combined.³⁶⁸

Irving also contends that there is no evidence that companies other than itself, Catalyst, Port Hawkesbury, and Resolute, that were identified in the CBP data as having made entries of merchandise under HTS 4802.61.3035, were affiliated with the four “known” producers; as such, those additional exporters could not be Canadian producers of SC paper, and they were irrelevant to the Department’s consideration of the actual number of potential respondents. However, Irving offers no evidence that the companies were improperly identified as exporters in the CBP data and cites no authority for the proposition that the Department must make an *a priori* determination of affiliation with other companies before it even selects respondents. In fact, the Department’s standard practice is not to aggregate entry data based on a collapsing, cross-ownership or affiliation analysis.³⁶⁹ No party presented evidence to the Department at any point

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.* at 6.

³⁶⁴ See *Zhejiang, Carpenter, and Asahi*.

³⁶⁵ See Respondent Selection Memorandum at Attachment.

³⁶⁶ See *Husteel* at 13, n.8.

³⁶⁷ *Id.*

³⁶⁸ See Department Memorandum, “Release of U.S. Customs and Border Protection Data,” (March 19, 2015) at Attachments 2, 4, and 6.

³⁶⁹ See, e.g., *Sugar From Mexico: Final Affirmative Countervailing Duty Determination*, 80 FR 57337 (September 23, 2015), and accompanying Issues and Decision Memorandum at Issue 9.

in the respondent selection process to suggest that the other companies identified under that HTS category were not valid respondents, and Irving's unsupported statements are not a basis for disregarding those companies' exports.

Second, all of the cited cases involved challenges to the Department's final results of administrative reviews, not investigations. Although Irving disputes the unique and complex nature of investigations and discounts our initial assessment as "speculation," we disagree. As stated in the Respondent Selection Memorandum, investigations involve products, industries, and companies which may not have been previously analyzed by the Department and require significant additional research and analysis under more rigid statutory deadlines, all of which must factor in the Department's determination of what constitutes a "large" number of companies.³⁷⁰ The CIT recently agreed, stating, "the statutory deadlines for completing an investigation are shorter than the deadlines for completing a review, and Commerce is required to conduct a verification. As a general matter, 'Commerce has more work to do in less time' when conducting an investigation.'"³⁷¹ That was particularly the case in this investigation because we did not have a companion antidumping investigation with which to align the deadline for our final determination.³⁷² As a result, while administrative reviews offer up to 365 days for preliminary determinations and an additional 180 days for a final determination, we had only 130 days in which to issue our preliminary determination and 75 days for this final determination.

We also disagree with Irving's contention that our experience with past paper cases somehow lessened the burden in this case, because, whatever the Department's general familiarity with the paper production process, this investigation concerned alleged subsidies provided by the government of Canada at both the provincial and federal level to Canadian producers with which the Department had no prior experience. Prior antidumping and countervailing duty proceedings involving Indonesia, India, China, and Germany are completely unrelated to the issues presented by those allegations.

Accordingly, all of these cases are distinguishable on their facts. Here, the number of potential respondents was objectively large. The CBP data demonstrate that there were more than four potential respondents, unlike the circumstances in *Zhejiang*,³⁷³ and we did not implicitly define any number greater than two as large, unlike the CIT's findings in *Carpenter Tech.* and *Asahi*.³⁷⁴ We, therefore, continue to find that it was not practicable to examine all of the potential respondents, and that we appropriately limited our investigation pursuant to section 777A(e)(2) of the Act.

We also continue to find that it was appropriate to limit our examination to the two largest respondents by volume pursuant to section 777A(e)(2)(A)(ii) of the Act. As explained in the Respondent Selection Memorandum, we determined that we had the resources to individually examine two mandatory respondents based on the complexity of the investigation and our

³⁷⁰ See Respondent Selection Memorandum at 6.

³⁷¹ See *Husteel* at 15.

³⁷² See section 705(a)(1) of the Act and 19 CFR 351.210(b)(4).

³⁷³ 637 F. Supp. 2d at 1130.

³⁷⁴ *Carpenter* at 1727; *Asahi* at 1341.

resource constraints.³⁷⁵ This was in accordance with the statute, which requires only that we examine exporters accounting for the largest volume of exports of subject merchandise that “can be reasonably examined.” That determination was confirmed when we subsequently considered whether to accept additional respondents, as it had become clear that we could not reasonably do so based on our initial information about the selected companies and the relevant federal and provincial governments.³⁷⁶

We disagree with Irving’s contention that selecting two mandatory respondents was unreasonable in this case given our selection of three respondents in other proceedings, and where several provincial and company-specific programs were alleged. As an initial matter, the determination of what constitutes a “reasonable” number of respondents necessarily varies from case to case, depending on the complexity of the issues involved, the Department’s experience with the case and individual respondents, the time constraints involved, and the available resources. We are unable to comment on the particular circumstances of the cases cited by Irving because none of the referenced respondent selection determinations are on the record of this investigation; however, we note that all of them occurred prior to our respondent selection process in this case. In addition, we dispute Irving’s contention that “personnel resources are largely fungible” in this context because our resources remain finite. Our determinations to examine three respondents in earlier proceedings—all of which were administrative reviews, not investigations—were only relevant to the resources available for this investigation to the extent that those resources were already committed elsewhere.

We also dispute Irving’s assertion that limiting our examination to two respondents was unreasonable because it was “unrepresentative,” and its reliance on *Husteel* is misplaced in this context. In *Husteel*, the CIT held that the Department’s respondent selection failed to account for “an entirely distinct” type of subject merchandise when evidence showed “that its production process and price differ{ed} significantly from the {subject merchandise} produced by the other respondents.”³⁷⁷ In this case, on the other hand, there has been no demonstration that the subsidies alleged for Port Hawkesbury and Resolute are inherently unrepresentative of the subsidies (both federal and provincial) that were alleged for Irving. As the CIT recognized in *Husteel*, “mandatory respondents are unlikely to match non-examined producers in all respects. Some deviation is inherent when Commerce limits the number of individually examined respondents{.}”³⁷⁸ Accordingly, although we recognize that the particular subsidies bestowed upon Resolute and Port Hawkesbury may differ to some extent from those alleged for Irving, we have no basis for concluding that they are distortive and unrepresentative, and we do not find Irving’s complaint to be a sufficient reason to select additional mandatory respondents in this investigation.³⁷⁹

³⁷⁵ See Respondent Selection Memorandum at 8.

³⁷⁶ See Voluntary Respondent Selection Memorandum at 3.

³⁷⁷ *Husteel* at 23, n.12.

³⁷⁸ *Id.*

³⁷⁹ See, also, Comment 2 for a discussion of the reasonableness of the all-others rate assigned to Irving based on Resolute and Port Hawkesbury’s subsidy rates.

Finally, we reject Irving’s argument that the Department should have relied on sampling in addition to making its selections based on volume. At no time in the respondent selection process did any party suggest that the Department should select respondents by sampling pursuant to section 777A(e)(2)(A)(i) of the Act, and Irving offers no authority for doing so in conjunction with selection under section 777A(e)(2)(A)(ii). We do not agree that *Husteel* suggested such a methodology when the CIT commented on the potential value of “selecting a larger and/or more representative sample of exporters”; instead, we interpret the Court’s discussion to relate solely to the “potential pool of mandatory respondents,” regardless of whether selected under 777A(e)(2)(A)(i) or (ii).³⁸⁰

With respect to Irving’s arguments that the CBP data underlying our analyses were inaccurate and incomplete, we reiterate our finding from the Respondent Selection Memorandum that none of the parties provided information prior to our initial respondent selection indicating that the entry data were unreliable. In past cases, we have found CBP data to be unreliable for respondent selection purposes where they reflected inconsistent units of measure or were otherwise technically flawed.³⁸¹ There was no such showing here. As such, there was no reason for the Department to reject the CBP entry data in this investigation and to seek alternative import data for purposes of selecting respondents. We also agree with the Petitioner that no party cited Department precedent for issuing quantity and value questionnaires to aid mandatory respondent selection in investigations absent a showing that the CBP data are unreliable. Therefore, in accordance with our normal practice in investigations, we continue to find that the CBP entry data provide the most consistent and reliable basis for respondent selection.

With respect to Irving’s alleged misclassification of imports, we continue to find that Irving’s claims are unsupported and that we reviewed the appropriate HTS categories in selecting the mandatory respondents. As we explained in our Respondent Selection Memorandum, the information that Irving submitted on March 24, 2015, did not support its claim that entries from the POI had been misclassified and were underrepresented in our data queries.³⁸² To the extent that Irving argues that we should have relied on certified statements by a company official, those statements were not corroborated by CBP data or any other record information at the time we selected the mandatory respondents. In addition, although Irving contends that some of the data were “unusable” basket categories, we selected the two largest exporters of subject merchandise using HTS 4802.61.3035, which was a “clean” category limited to the subject merchandise.

We likewise disagree with Irving’s assertion that we improperly rejected its submission of new factual information on March 27, 2015. In our March 19, 2015 release of CBP entry data, we specified that parties could “provide comments on the attached CBP information for the Department’s consideration in respondent selection” within five days.³⁸³ Three parties filed additional submissions on March 27, 2015 (*i.e.*, three days after such comments were due):

³⁸⁰ See *Husteel* at 21 n.11.

³⁸¹ See, e.g., *Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of Review*, 74 FR 6372, 6373 (February 9, 2009), unchanged in *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 41374 (August 17, 2009).

³⁸² See Respondent Selection Memorandum at 8.

³⁸³ See Department Memorandum, “Release of U.S. Customs and Border Protection Data,” (March 19, 2015) at 2.

Irving, Resolute, and the GOC. We rejected the submissions by Irving and the GOC as untimely.³⁸⁴ However, we accepted the GOC's refiled comments following its explanation that they pertained to respondent selection as a whole, and were not comments on the CBP information subject to the March 24, 2015 deadline.

Irving suggests that our rejection of its March 27, 2015 submission was unreasonable because we did not likewise reject Resolute's submission, which discussed the CBP data.³⁸⁵ However, Resolute's comments were limited to rebuttal arguments in response to Irving and Catalyst's March 24, 2015 comments and did not contain new factual information.³⁸⁶ In contrast, Irving's submission addressed and contained new factual information directly relating to the original CBP data—information that it failed to provide within the established deadline for rebutting that data. It was therefore appropriate to reject that information as untimely.³⁸⁷

Finally, we disagree that we improperly ignored export volumes as summarized in Irving's June 2, 2015 submission.³⁸⁸ As explained above, the Department determined that we could reasonably examine two mandatory respondents given the circumstances of this investigation. We selected those respondents on the basis of the information available at the time, *i.e.*, CBP data. To the extent that later submissions suggested different export volumes and relative producer rankings,³⁸⁹ we were not in a position to examine those data for purposes of considering whether to select additional mandatory respondents at that point in the proceeding.³⁹⁰ The fact that the Department issued supplemental questionnaires to the mandatory respondents following Irving's submission does not mean that we could have done the same for Irving; to the contrary, the extra effort and analysis required for those supplemental questionnaires confirm our findings that, given our resource constraints and the complexities that became evident in the case, we could not practicably add mandatory respondents to our investigation.

Turning to comments regarding the acceptance of voluntary respondents, we continue to find that we were unable to examine either Irving or Catalyst as a voluntary respondent. We note that on June 29, 2015, the President of the United States signed into law the TPEA, which made numerous amendments to the AD and CVD law, including amendments to section 782(a) of the

³⁸⁴ See letter to Irving, "Countervailing Duty Investigation of Supercalendered Paper from Canada: *Untimely Filed Comments*," dated April 1, 2015; letter to the GOC, "Countervailing Duty Investigation of Supercalendered Paper from Canada: *Untimely Filed Comments*," dated March 27, 2015.

³⁸⁵ We note that Resolute filed its comments on March 26, 2015 under the Department's one-day lag rule, not March 27.

³⁸⁶ See letter from Resolute, "Supercalendered Paper from Canada: Respondent Selection," dated March 26, 2015.

³⁸⁷ See 19 CFR 351.302(c)(4).

³⁸⁸ See letter from Irving, "Supercalendered Paper from Canada: Request of Irving Paper Limited for Mandatory Respondent Status Based on Questionnaire Response Information," dated June 2, 2015.

³⁸⁹ We note that the export data for Catalyst and Irving referenced in Irving's submission were not subject to individual examination and were not verified pursuant to section 782(i) of the Act.

³⁹⁰ See Voluntary Respondent Selection Memorandum at 3.

Act.³⁹¹ Under the current language of that provision, when the Department limits the number of producers and/or exporters examined in an investigation, section 782(a) of the Act directs the Department to calculate individual countervailable subsidy rates for companies not initially selected for examination who voluntarily provide information if: 1) the information is submitted by the due date specified for producers and/or exporters initially selected for examination, and 2) the number of producers and/or exporters subject to the investigation is not so large that any additional individual examination of such companies would be unduly burdensome to the Department and inhibit the timely completion of the investigation. We disagree with arguments that the amendments do not apply to this investigation, because they apply to “determinations made on or after August 6, 2015” and, therefore apply to the disposition of this issue in the final determination of this investigation.³⁹²

Notwithstanding the effective date of the amendment, the amendment “*compliments* {sic} the Department’s voluntary respondent analysis and does not require parties...to submit additional information or argument.”³⁹³ Specifically, under section 782(a) of the Act as amended by the TPEA, in determining whether it would be unduly burdensome to examine a voluntary respondent under the revised section 782(a) of the Act, the Department may consider: (A) the complexity of the issues or information presented in the proceeding, including questionnaires and any responses thereto; (B) any prior experience of the administering authority in the same or similar proceedings; (C) the total number of investigations and reviews being conducted by the administering authority as of the date of the determination; and (D) other factors relating to the timely completion of each such investigation and review as the administering authority considers appropriate.

In this investigation, the Department faced unique complications and difficulties including: the “more compressed schedule”; the fact that this particular product, industry, and each individual company had not been previously investigated; the number of cross-owned affiliates identified for the mandatory respondents; and the number of governments responding to our questionnaires.³⁹⁴ Not only would investigating additional respondents individually likely require multiple rounds of supplemental questionnaires and extensive analysis,³⁹⁵ but the short history of this case has already presented us with extremely complex issues (*e.g.*, the provision of electricity for LTAR) and unexpected complications (*e.g.*, substantive filings concerning program use made shortly before the *Preliminary Determination*). All of these factors continue to lead us to conclude that accepting Catalyst and Irving as voluntary respondents would be

³⁹¹ See Pub. L. No. 114-27, 129 Stat. 362 (June 29, 2015). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments contained to section 771(7) of the Act, which relate to determinations of material injury by the ITC. See *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015).

³⁹² *Id.*, at 46794-95. The 2015 amendments may be found at <https://www.congress.gov/bill/114th-congress/house-bill/1295/text/pl>.

³⁹³ *Id.* (emphasis added).

³⁹⁴ See Voluntary Respondent Selection Memorandum at 4-5.

³⁹⁵ *Id.* at 5.

unduly burdensome and would inhibit the timely completion of the investigation.³⁹⁶ This comprehensive evaluation of our ability to complete the investigation in accordance with the statutory deadlines was consistent with the statutory standard.³⁹⁷

Parties cite *Ad Hoc Shrimp* and *Grobest* for the proposition that the “unduly burdensome” standard is higher than the standard for limiting our examination under section 777A(e)(2), and that the Department cannot decline to investigate voluntary respondents based on “the same burdens that occur” in every proceeding.³⁹⁸ We find, however, that the analysis described above satisfies the standard as interpreted by the CIT in those cases.³⁹⁹ Here, the statutory deadlines alone are distinct—and much more stringent—than those encountered in most other proceedings before the Department. That factor, in combination with the highly complex issues that became apparent with the submission of the mandatory respondents’ information (*e.g.*, electricity), necessarily limited our ability to devote additional resources to an individual examination of Catalyst and Irving such that we would not have been able to complete this investigation in a timely manner had we granted their requests.

We disagree with Catalyst’s contention that this case presents less of a burden than that at issue in *Husteel*, where the Department’s investigation of a product spanned multiple countries—although this investigation concerns only one country, our resource constraints, the unique issues of the case, and the shorter timeframe present their own burden that is, at a minimum, comparable to that identified in *Husteel*. We further disagree with Irving’s assertion that the lack of a companion antidumping case facilitated more resources for this investigation that would have been otherwise available, because the proceeding still required us to provide adequate time for parties to respond to our questionnaires, issue and receive supplemental questionnaires, analyze those responses, and conduct verification—all within a more compressed timeframe than usual.

Finally, we disagree with Catalyst and Irving that it would have been feasible to individually investigate and verify their responses in the time remaining in the proceeding. The statute afforded us only 75 days after our *Preliminary Determination* to complete verification, conduct an administrative hearing, and issue this final determination.⁴⁰⁰ In that time, we conducted verification of both mandatory respondents, their cross-owned affiliates, the federal Canadian government, and three provincial governments. We also allowed 46 days for case briefs, five additional days for rebuttal briefs, and conducted an administrative hearing on September 24, 2015. It was not possible, in that short time, to take on the additional burden of analyzing both

³⁹⁶ *Id.*

³⁹⁷ See *Husteel* at 28 (holding that “the concept of ‘undue burden’ contained in {section 782(a)} is predicated on Commerce’s ability to complete the investigation on time, which would seem to invite consideration of Commerce’s resources.”).

³⁹⁸ See *Ad Hoc Shrimp* at 1371, citing *Grobest*, 853 F. Supp. 2d at 1364-65.

³⁹⁹ The CIT’s discussion addressed the older standard under section 782(a), which stated that the Department shall accept voluntary respondents if “the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the investigation.” Our finding that we conform to the CIT’s rulings in those cases remains the same even under the new statutory standard.

⁴⁰⁰ See section 705(a)(1) of the Act.

companies' responses, issuing any necessary supplemental questionnaires, conducting verification, and fully analyzing the resulting information such that we could complete this investigation in a timely manner.

Accordingly, we didn't accept voluntary respondents in this investigation pursuant to the discretion granted by section 782(a) of the statute.

Comment 2: The Calculation of the All Other's Rate

Catalyst's Arguments:

- Should the Department continue to assign the all-others rate to Catalyst, it must calculate a rate that is supported by substantial evidence demonstrating that the rate reflects the economic reality of Catalyst.
- The Department must calculate subsidy rates as accurately as possible. To that end, the all-others rate calculated pursuant to the statute must reasonably reflect CVD rates for the companies that were not individually examined, and must be supported by "substantial evidence demonstrating that the rate reflects economic reality for {those} uninvestigated respondents."⁴⁰¹
- Using a simple average that includes company-specific and province-specific countervailable subsidies from which Catalyst could not possibly have benefited yields an all-others rate that does not reasonably reflect Catalyst's economic reality. Of the twelve programs that the Department determined to be countervailable, eleven were specific to provinces in which Catalyst has no presence, and ten were available exclusively to one of the two selected respondents, Port Hawkesbury. In *Xiamen*, the CIT found that "where the data used clearly indicates an unexplained anomaly, Commerce must articulate a reasonable basis for its use of the anomalous result."⁴⁰² This investigation presents such an anomaly because the company- and province-specific rates underlying the all-others rate are so unique that they cannot reflect Catalyst's actual subsidy rates.
- In *CWP from the PRC*, the Department excluded from its calculations countervailable subsidies that the respondent could not have received.⁴⁰³ In *MacLean-Fogg III*, the CIT criticized the Department for deciding "to apply every single subsidy program available throughout {the investigated country} to the {non-selected} respondents, regardless of their actual location."⁴⁰⁴ In this case, only six programs are potentially applicable to Catalyst, and those programs result in a *de minimis* overall subsidy rate.
- If the Department continues to apply an all-others rate to Catalyst based on the rates of the two mandatory respondents, then it must, pursuant to section 705(c)(5)(A) of the Act, calculate a weighted-average all others rate based on public information on the record.

⁴⁰¹ See *Navneet Publications (India) Ltd., v. United States*, 999 F. Supp. 2d 1354, 1358 (CIT 2014) (*Navneet*).

⁴⁰² See *Xiamen Int'l Trade and Industrial Co., Ltd. v. United States*, 953 F. Supp. 2d 1307, 1327 (CIT 2013) (*Xiamen*).

⁴⁰³ See *CWP from the PRC* and accompanying IDM at Comment 15.

⁴⁰⁴ See *MacLean-Fogg Co. v. United States*, 853 F. Supp. 2d 1336, 1343 (CIT 2012) (*MacLean-Fogg III*).

Irving's Arguments/Rebuttal:

- The Department has an obligation under section 705(c)(5) of the Act to adjust the subsidy rates used in the calculation of the all-others rate where necessary to prevent distortion and unfairness. The all-others rate of 11.19 percent from the preliminary determination, however, bears no reasonable relationship to the benefits that Irving may have received. Instead, the all-others rate reflects the benefits that Port Hawkesbury and Resolute received under subsidy programs that, as a matter of both law and fact, were unavailable to Irving. The benefits that Port Hawkesbury and Resolute received were under programs administered by provinces in which neither Irving nor any of its cross-owned companies were located. No evidence supports the assumption that Irving could have received benefits under these programs or under similar programs administered by Irving's home province of New Brunswick. As such, the Department's all-others rate violates the World Trade Organization Subsidies and Countervailing Measures Agreement and is unreasonable due to Irving's formal renunciation of benefits under any subsidy programs administered by provinces other than the Province of New Brunswick. The all-others rate violates the Department's overriding obligation to calculate subsidy rates, including an all-others rate, as accurately as possible.⁴⁰⁵
- The Department has discretion to adjust the all-others rate. The Department exercises this discretion when, for example, calculating the all-others rate using a simple average instead of a weight average, or when relying on ranged data, to avoid the disclosure of proprietary information. Given the Department's practice of adjusting AFA rates to account for unused programs, the Department must exercise its discretion to reasonably reflect the subsidy rates of cooperating respondents.
- The Department should calculate the all-others rate as the weighted average of the two individually calculated margins using the publicly ranged sales data that Port Hawkesbury and Resolute provided in their questionnaire responses. This would generate an all-others rate of 9.77%, in contrast to the preliminary 11.19% rate.
- If the Department agrees with Resolute that it did not receive any countervailable subsidies, then the Department would recalculate the all-others rate under the "General rule" in section 705(c)(5)(A)(i) to include only the final CVD rate that it calculates for Port Hawkesbury. If the Department does not reduce Port Hawkesbury's individual CVD rate below the Preliminary all-others rate of 11.19%, Irving will receive an all-others rate in the final determination that is even higher than the preliminary all-others rate. This result would be even more unreasonable than the current all-others rate.

The GOC's Arguments:

- The Department's obligation is to calculate CVD duty rates as accurately as possible; thus, the all-others rate must be reasonably reflective of potential CVD rates for non-investigated exporters or producers.

⁴⁰⁵ See *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 61 F. Supp. 3d 1306, 1336 (citing *Rhone Poulenc*, 899 F.2d at 1191); see, also, *MacLean-Fogg III*, 853 F. Supp. 2d at 1340-41.

- The CIT has recognized that the all-others rate must be based on reliable evidence on the record, relevant to the all-others respondents, and reflective of economic reality for the uninvestigated respondents.⁴⁰⁶ The Department's preliminary all-others rate failed to meet this standard.
- The Department has exercised its discretion in the past to adjust the all-others rate where necessary to prevent distortion.⁴⁰⁷

The GBC's Arguments:

- In the *Preliminary Determination*, the Department unlawfully failed to exclude from the calculation of the all-others rate the subsidy rates calculated for provincial programs in provinces where Irving and Catalyst do not operate. Thus, it would be distortive and grossly unfair to assign Catalyst an all-others rate based primarily on Nova Scotia's alleged subsidies provided to Port Hawkesbury.
- Section 705(c)(5) of the Act requires that the all-others rate must reasonably and accurately reflect subsidy rates for those companies that were not individually examined.
- The Department has repeatedly excluded subsidy rates for programs administered by provinces or other sub-national jurisdictions in which a given company did not operate when calculating AFA rates for that company. For example, in *CWP from the PRC*, when calculating the AFA rate for a specific respondent, the Department excluded rates pertaining to subsidies conferred by provinces in which that respondent did not operate.⁴⁰⁸

The Petitioner's Rebuttal:

- Irving or Catalyst did not cite any statutory support for their suggestion to receive a zero CVD rate and they provided no compelling reason for the Department to depart from its established practice of calculating an all-others rate based on an average of the CVD rates found for investigated respondents.
- Some of the subsidies alleged to have benefitted Irving and Catalyst are national and are not provincial.
- Irving and Catalyst are free to request an administrative review of their entries and recover any countervailing duty deposits (with interest) if it is established that they are not benefitting from illegal subsidies.

⁴⁰⁶ *MacLean-Fogg III*, 853 F. Supp. 2d at 1340-1341; *see, also, Navneet*, 999 F. Supp. 2d. at 1358.

⁴⁰⁷ *See Refrigerators from Korea*.

⁴⁰⁸ *See CWP from the PRC* and accompanying IDM at Comment 15. *See, also, Non-Oriented Electrical Steel from Taiwan*, 79 FR 61602 (October 14, 2014) (*NOES from Taiwan*); *Certain Tow-Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China*, 74 FR 29180 (June 19, 2009) (*Lawn Groomers from the PRC*); *Aluminum Extrusions from the People's Republic of China*, 76 FR 18521 (April 24, 2011) (*Aluminum Extrusions from the PRC*).

- The Department’s use of a simple average to protect confidential information is consistent with past practice.⁴⁰⁹

Department’s Position:

As stated in “Calculation of the All Others Rate Memo,” supra, sections 703(d) and 705(c)(5)(A) of the Act state that, for companies not investigated, the Department will determine an all-others rate by weight-averaging the individual countervailable subsidy rate of each of the companies investigated. The statute further explains that the all-others rate may not include zero and *de minimis* rates or any rates based solely on the facts available.⁴¹⁰

For the final determination, and consistent with the Department’s practice, we have calculated the all-others rate based on the weighted average of the mandatory respondents’ calculated subsidy rates.⁴¹¹ In certain situations, the Department will calculate the all-others rate as a simple average in order to avoid disclosing the business proprietary sales data normally used to weight the rates when calculating an average. As Irving and Catalyst argue, however, Resolute and Port Hawkesbury provided publicly-ranged data in this investigation, and the Department is able to use this data to calculate the all-others rate as a weighted-average for this final determination. As discussed in the Department’s proprietary memorandum,⁴¹² we compared the all-others rate calculated as a simple average and the all-others rate calculated as a weighted average using publicly-ranged sales data to the all-others rate calculated using a weighted average based on the mandatory respondent’s actual proprietary sales data. Based on this comparison, we determine that in this circumstance, calculating the all-others rate as a weighted average using the publicly ranged data yields a result closer to the weighted average rate calculated using the business proprietary sales data than calculating the all-others rate as a simple average. Therefore, the rate of 18.85 percent based on the publicly ranged data is a more accurate rate to use for this proceeding.

Additionally, we disagree with the argument put forth by Catalyst, Irving and the GBC that the Department must exclude from its calculation of the all-others rate the subsidy rates calculated for provincial programs in provinces where Irving and Catalyst do not operate. They claim that *MacLean-Fogg III* supports the supposition that the Department may not apply the rates from every subsidy program investigated to the non-selected respondents, regardless of location. However, in *MacLean-Fogg IV* the CIT agreed that the Department may calculate an all-others rate based on subsidies in locations where non-selected companies may not be located.⁴¹³ Whereas plaintiffs in *MacLean-Fogg IV* alleged that the Department must take into consideration

⁴⁰⁹ See, e.g., *Certain Kitchen Appliance Shelving and Racks From the People’s Republic of China: Final Results of the Countervailing Duty Administrative Review*, 77 FR 21744, (April 11, 2012).

⁴¹⁰ See Section 705(c)(5)(A)(i) of the Act.

⁴¹¹ See, e.g., *Countervailing Duty Investigation of Certain Passenger Vehicle and Light Truck Tires From the People’s Republic of China: Final Affirmative Determination, and Final Affirmative Critical Circumstances Determination, in Part*, 80 FR 34888 (June 18, 2015).

⁴¹² See Department Memorandum, “Calculation of the All Others Rate for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada,” dated concurrently with this Issues and Decision Memorandum.

⁴¹³ See *Maclean-Fogg Co. v. United States*, 885 F. Supp. 2d 1337, 1342 (CIT 2012) (*MacLean-Fogg IV*).

the “limited geographic footprint” of the non-selected companies, the Court found that the Department’s methodology was a reasonable one where there was “uncertainty” surrounding the location of the non-selected respondents.⁴¹⁴ Similarly, in this investigation, the Department cannot conclude without additional investigation that the non-selected companies, or any of their cross-owned companies, have no operations in a particular location. As we explained in our Voluntary Respondent Selection Memorandum, and again at Comment 1, we were unable to investigate additional mandatory or voluntary respondents in this investigation. Accordingly, we are not in a position to speculate as to the completeness and accuracy of the addresses listed in the Petition or the responses submitted by Catalyst and Irving.⁴¹⁵

Parties also misplace their reliance on cases in which we adjusted company-specific AFA subsidy rates.⁴¹⁶ In those cases, the Department addressed record evidence (or the lack thereof) that indicated a mandatory respondent did not operate within certain provinces of those countries and therefore could not have received a countervailable subsidy from certain programs. However, the exclusion of certain provincial programs was in the context of assigning a company-specific AFA rate, not an all-others rate, as is the issue here. Furthermore, there was record evidence making it clear that the respondent did not operate in certain provinces, and the Department’s determination to exclude the programs at issue reflected the Federal Circuit’s holding that the Department could not rely on rates that were “discredited by the agency’s own investigation.”⁴¹⁷ As explained above, we cannot come to the same conclusion with respect to the non-selected respondents in this case without additional investigation of those companies. Accordingly, we have calculated the all-others rate by weight-averaging the rates calculated for investigated respondents in accordance with the statute and find it to be a reasonable estimate of the countervailing duty rate applicable to the non-selected respondents.⁴¹⁸

We also disagree with parties’ reliance on *Navneet*, which can easily be distinguished. In that case, the Department calculated the all-others rate in an antidumping review based on a simple average of the zero rates of the two mandatory respondents and the AFA rates assigned to two uncooperative respondents. In doing so, the Department operated under the “Exception” to the general rule specified by section 735(c)(5)(B) of the Act to use “any reasonable method” to establish an all-others rate when the only rates established for individually investigated

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ See *CWP from the PRC*, 73 FR 31966 and accompanying IDM at Comment 15; *Aluminum Extrusions from the PRC*, 76 FR 18521 and accompanying IDM at 11-12 (declining to remove any sub-national programs from the subsidy rate absent evidence that the three non-cooperating companies had no facilities and/or cross-owned affiliates in those particular provinces); *NOES from Taiwan*, 79 FR 61602 and accompanying IDM at Comment 5 (removing certain provincial programs in the context of assigning a company-specific AFA rate); *Lawn Groomers from the PRC*, 74 FR 29180 and accompanying IDM at 5 (noting that the Department will only accept evidence from the government that can demonstrate through complete, verifiable, positive evidence that a company is not located in a specific province whose subsidies are being investigated when that company is a non-cooperating mandatory respondent).

⁴¹⁷ *Id.*, citing *F.lli De Cecco De Filippo Fara S. Martino S.p.A. v. United States*, 216 F.2d 1027, 1032 (Fed. Cir. 2000).

⁴¹⁸ See *MacLean Fogg IV* at 1342.

companies are zero, *de minimis*, or based entirely on AFA.⁴¹⁹ The CIT found that the all-others rate was untethered to the non-selected respondent's pricing behavior and economic reality. The CIT faulted the Department's reasoning in light of evidence supporting a lower all-others rate and where the chosen all-others rate represented a historic high in five proceedings under the order and appeared aberrational when examined in context.⁴²⁰ Contrastingly, in this investigation, we are operating under the "General rule" of section 705(c)(5)(A)(ii) of the Act, which prescribes a particular methodology to determine the all-others rate. Moreover, we have no evidentiary basis to conclude that the all-others rate is unreasonable, there is no prior historical context against which to evaluate the all-others rates, and the mandatory respondents do not have zero or *de minimis* rates. As discussed above, for this final determination, the Department has calculated the all-others rate using a weighted average of the mandatory respondent's calculated rates as required by the statute.

Although Catalyst cites *Xiamen* to suggest that the resulting all-others rate is an anomaly, nothing about the rates calculated for Resolute and Port Hawkesbury is inherently distortional.⁴²¹ Specifically, in that case, the CIT noted its concern that one of the calculated rates underlying the all-others rate was higher than the total AFA rate assigned to the PRC-wide entity.⁴²² Here, to the extent we have relied on partial AFA in calculating Resolute's rate, the total subsidy rate is still lower than the rate calculated for Port Hawkesbury. More importantly, the resulting rate is a reasonable, statutorily mandated estimate of the rate applicable to the non-selected respondents given the Department's inability to investigate all potential respondents. The all-others rate therefore reasonably reflects potential countervailable subsidy rates to all other companies.

Finally, we do not agree with parties that calculating the all-others rate based on "other information" in order to avoid the disclosure of proprietary information is analogous to parties' requests to adjust the all-others rate in this investigation by excluding certain programs.⁴²³ To the extent that we are departing from the language of section 705(c)(5)(A) of the Act in those circumstances, we do so in order to fulfill our statutory mandate under section 777(b) of the Act not to disclose proprietary information to unauthorized persons. We have no analogous basis for making the requested adjustments to the all-others rate. To the extent that parties' claim that we are obligated to do so in the interest of accuracy, we disagree that the all-others rate calculated in this final determination is distorted or otherwise unrepresentative of the non-selected respondents' actual subsidy rates for the reasons explained above.⁴²⁴

⁴¹⁹ The "Exception" language of section 705(c)(5)(A)(ii) of the Act, which is applicable in this CVD investigation, mirrors that of section 735(c)(5)(B) of the Act.

⁴²⁰ See *Navneet* at 1364.

⁴²¹ See *Xiamen* at 1327.

⁴²² *Id.* at 1326-27.

⁴²³ See, e.g., *Refrigerators from Korea*, 77 FR at 17412 (explaining that we did not calculate the all-others rate using a weight average of the mandatory respondents' rates "because doing so risk{ed} disclosure of proprietary information." And instead "calculated an average rate using other information on the record.").

⁴²⁴ The GOC relied on *Refrigerators from Korea* for the proposition that we have previously adjusted the all-others rate "to prevent distortion." However, there is no discussion of possible "distortions" in that decision. Instead, our only reason for relying on "other information" in that investigation was to avoid the disclosure of proprietary information. See 77 FR at 17412.

Irving's assertion that it has "renounced" all subsidy benefits for programs under investigation not administered by the Province of New Brunswick has no bearing on our findings. As an initial matter, Irving cites no provision in U.S. law to support the contention that the Department must somehow account for this renunciation in its calculation of an all-others rate.⁴²⁵ To the extent that the Department has addressed the renunciation of subsidies in other cases, it has only done so in the context of sunset reviews when considering the likelihood of the continuation or recurrence of countervailable subsidies,⁴²⁶ and in suspension agreements.⁴²⁷ Neither circumstance is relevant to this investigation. In addition, we cannot confirm Irving's claims without additional investigation and verification.⁴²⁸ We are unable to conduct such additional investigation beyond the two companies selected as mandatory respondents for the reasons explained in Comment 1, and, in any event, the statute does not require the Department to do so when calculating an all-others rate.

Finally, we note that Irving's renunciation of benefits is limited to those not administered by the Province of New Brunswick. Because we were unable to individually investigate Irving as noted above, we have not investigated potential subsidies granted by the Province of New Brunswick. Accordingly, even if we were to adjust the all-others rate by excluding "renounced" subsidies from the all-others rate, we would have no factual basis for concluding that the resulting rate was any more accurate or representative of Irving's actual rate of subsidization without conducting an individual examination of Irving's alleged subsidies. Moreover, the statute does not require us to engage in such a company-specific inquiry in the context of respondents not selected for individual examination.

Comment 3: Whether the Department Should Allow Irving to Post Bonds Until the Final Results of an Expedited Review

Irving's Arguments:

- The Department possesses discretion under the Act to allow Irving to post a bond, rather than a cash deposit, as security for all imports during the provisional measures period.
- Fundamental fairness requires that the Department exercise this discretion in light of the manner in which the Department has calculated the all-others rate.
- The Department should extend the bonding option throughout the entire period that it takes to complete an expedited review that Irving may request under 19 CFR 351.214(k). This regulation requires the Department to conduct an expedited review of an exporter that was not investigated during an investigation. Article 19.3 of the WTO SCM Agreement also mandates an expedited review.

⁴²⁵ See *JBF RAK LLC v. United States*, 790 F.3d 1358, 1368 (Fed. Cir. 2015) (declining to impose extra analytical requirements on the Department where the statute had no such requirement).

⁴²⁶ See SAA at 888 ("[A]s long as a subsidy program continues to exist, Commerce will not consider company- or industry-specific renunciations of countervailable subsidies, by themselves, as an indication that continuation or recurrence of countervailable subsidies is likely.").

⁴²⁷ See, e.g., *Roses and Other Cut Flowers From Colombia; Miniature Carnations From Colombia Final Results of Countervailing Duty Administrative Reviews of Suspended Investigations*, 61 FR 9429 (March 8, 1996).

⁴²⁸ *Id.* and accompanying IDM at Comment 2.

- Although 19 CFR 351.214(k)(3)(ii) provides that the Department “will not permit the posting of a bond or security under paragraph (e) of this section,” paragraph (e) refers to the posting of a bond “at the option of the importer.”

Department’s Position:

The Department modified 19 CFR 351.205 specifically to discontinue the option to post a bond during the provisional measures period (*i.e.*, the period between an affirmative preliminary antidumping or countervailing duty determination and the issuance of an antidumping or countervailing duty order) and, thereby, enhance enforcement by insuring that importers bear responsibility for any future duties they may owe.⁴²⁹ Although the *Modification*, by using the term “normally,” “provides the Department flexibility to address those rare and unusual circumstances that the Department may find warrant the acceptance of bonds,”⁴³⁰ the *Modification* also states that the Department views any departure from cash deposits as an exceptional determination to be made on a case-by-case basis.⁴³¹ We consider that Irving’s arguments about the all-others rate and respondent selection, as discussed in Comments 1 and 2 above, do not warrant an exceptional determination to depart from requiring cash deposits. The CIT has recognized that paying cash deposits “is an ordinary consequence of the statutory scheme,” and that cash deposits are needed to strengthen enforcement and “ensure that foreign exporters will not default in the satisfaction of their import obligations.”⁴³² Therefore, there is no basis to permit the option of posting a bond in lieu of cash deposits for Irving for the provisional measures period.

There is similarly no basis for permitting Irving to post bonds after the provisional measures period (*i.e.*, after a countervailing duty order is in place). The Department’s regulations unambiguously state that an antidumping or countervailing duty order will “instruct{ } the Customs Service to require a cash deposit of estimated antidumping or countervailing duties at the rates included in the Secretary’s final determination.”⁴³³

Moreover, contrary to Irving’s contention, the Department’s regulations do not permit the posting of a bond to satisfy the security requirement during the pendency of an expedited review. With regard to the treatment of a respondent’s entries during the pendency of an expedited review, 19 CFR 351.214(k)(3)(ii) is definitive in stating that the Department “will not permit the posting of a bond or security under paragraph (e) of this section.” Irving’s claim that the paragraph (e) reference to bonding “at the option of the importer,” permits the Department to allow bonding during an expedited review is misguided. First, paragraph (e) by its express language applies only to new shipper reviews, and 19 CFR 351.214(a) distinguishes between

⁴²⁹ See *Modification of Regulations Regarding the Practice of Accepting Bonds During the Provisional Measures Period in Antidumping and Countervailing Duty Investigations*, 76 FR 61042, 61043 (October 3, 2011). (*Modification*).

⁴³⁰ *Id.* at 61045.

⁴³¹ *Id.*

⁴³² See *Shandong Huarong General Group Corp. v. United States*, 122 F. Supp. 2d 143, 148 (CIT 2000) (denying plaintiff’s motion for a preliminary injunction to enjoin the collection of cash deposits, noting that plaintiff failed to prove it would suffer irreparable harm by being forced to pay).

⁴³³ 19 CFR 351.211(b)(2).

new shipper reviews and expedited reviews. Furthermore, the importer is always the party responsible for satisfying the security requirements for entering merchandise covered by an antidumping or countervailing duty action.⁴³⁴ In any situation in which the Department has permitted bonding in lieu of the requirement for a cash deposit, bonding is the exception to the requirement to post a deposit, in cash, of the estimated duties, and it is one way in which the importer, if it so chooses, can satisfy the security requirement.⁴³⁵ Accordingly, the “option of the importer” language in 19 CFR 351.214(e) does not translate into a requirement for the Department to permit bonding when the plain language of 19 CFR 351.214(k)(3)(ii) prohibits it.

Comment 4: Whether Port Hawkesbury is Creditworthy

The Petitioner’s Arguments:

- The Department needs to reconcile its preliminary finding that the BOA revolving line of credit was a comparable commercial loan for purposes of dispositive evidence of creditworthiness, but not for benchmark purposes.
- The BOA financing is not suitable as dispositive evidence of creditworthiness due to special conditions present in the loan agreement and the general conditions surrounding the restructuring of Port Hawkesbury.
- The Department has found that revolving lines of credit are not comparable to other types of loans.⁴³⁶ The GNS loans, in this instance, are not structured nor used as revolving lines of credit.
- The Department’s practice is to treat revolving lines of credit as short-term loans, even when the credit line is in place over a number of years.⁴³⁷ A review of Port Hawkesbury’s use of the BOA financing is consistent with the Department’s practice to treat lines of credit as short-term borrowing instruments.
- The Department may not view the loan as dispositive evidence where a company has taken out a single commercial bank loan for a relatively small amount, where a loan has unusual aspects, or where it considers a commercial loan to be covered by an implicit government guarantee.⁴³⁸
- The facts in this case are analogous to *DRAMS from Korea*, as the Citibank loan in that case was found to have an implicit government guarantee and unusual aspects in the lending agreement.⁴³⁹ In addition, the Department also looked to other characteristics

⁴³⁴ See section 709(b) of the Act.

⁴³⁵ See, e.g., *High Pressure Steel Cylinders From the People’s Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determinations*, 76 FR 64301 (October 18, 2011) (“In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing U.S. Customs and Border Protection to suspend liquidation of all entries of steel cylinders from the PRC that are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the Federal Register, and to require a cash deposit **or** bond for such entries of merchandise in the amounts indicated above.”) (emphasis added).

⁴³⁶ See *CFS from Korea* at Comment 21.

⁴³⁷ See *CFS from Korea* at Comment 20, *Butt-Weld Pipe Fittings from Taiwan* at Comment 8, and *Steel Flat Products and Plate from Canada* at Comment 5.

⁴³⁸ See *Preamble* at 65367 and *DRAMS from Korea* at “Creditworthiness” section.

⁴³⁹ *Id.*

such as collateral, size and other special circumstances.⁴⁴⁰ Collateral was not analyzed in *DRAMS from Korea*, but record evidence in this case demonstrates special circumstances in regard to collateral. With regard to size, Citibank's involvement in the restructuring was relatively small and the fact pattern in *DRAMS from Korea* parallels the instant proceeding.⁴⁴¹

- The Department must examine the additional special features in the BOA financing that provide further support a finding the loan is not comparable.

Port Hawkesbury's Rebuttal:

- The company had two competing commercial lenders offering financing and neither contained a government guarantee.
- The Department's analysis focuses on three basic characteristics: structure, maturity, and currency.⁴⁴²
- The GNS and BOA loans have the same structure and currency. The maturities are different, but all are long term.
- The Department has not found revolving lines of credit are not comparable to other loans, but found in specific instances these types of loans were not comparable to the government loans in the specific case or had maturity restrictions of one year.⁴⁴³
- *CFS from Korea* actually supports a creditworthy finding in the instant case as the Department found private long-term lending to be dispositive evidence, even though it was part of a workout plan and included a general payment guarantee as part of the syndicated loan.⁴⁴⁴
- The GNS was not involved in the negotiation of any commercial loans and there is no implicit or explicit guarantee with the BOA financing.

Department's Position:

Under 19 CFR 351.505(a)(4)(ii), the receipt of comparable commercial long-term loans, unaccompanied by a government guarantee, will normally constitute dispositive evidence that the firm is not uncreditworthy. When examining whether a loan is a comparable commercial loan, the Department will place primary focus on the structure (*e.g.*, fixed vs. variable interest rate), maturity (*e.g.*, short vs. long term), and currency.⁴⁴⁵ The petitioner argues the BOA and GNS loans are not comparable and notes the GNS loans are not structured, nor have they been used as revolving lines of credit. Moreover, the petitioner asserts that Department practice is to treat revolving lines of credit as short-term loans, even when the credit is in place for a number of years.

⁴⁴⁰ See *DRAMS from Korea* at "Creditworthiness Section" and *Preamble* at 65363 and 67.

⁴⁴¹ See *DRAMS from Korea* at "Creditworthiness" section and the petitioner's case brief at 13-14.

⁴⁴² See 19 CFR 351.505(a)(4)(i) and *Preamble* at 65363.

⁴⁴³ See *CFS from Korea* at Comment 20 and *Butt-Weld Pipe Fittings from Taiwan* at Comment 8.

⁴⁴⁴ See *CFS from Korea* at 21 and Comment 8.

⁴⁴⁵ See 19 CFR 351.505(a)(2).

We find the petitioner's reliance on *CFS from Korea*, *Butt-Weld Pipe Fittings from Taiwan*, and *Steel Flat Products and Plate from Canada* to be misplaced. Those proceedings involved comparing loans provided under a revolving line of credit to other types of loans, terms available under a revolving line of credit, and how a revolving line of credit was examined in an antidumping proceeding.⁴⁴⁶ In the instant proceeding, however, we are determining if the commercial loan provided is comparable to the GNS loan based on the above three factors. Based on our evaluation of the factors, we find the BOA and GNS loans are comparable commercial loans with regard to structure, maturity, and currency.⁴⁴⁷

In addition to 19 CFR 351.505(a)(4)(ii), the petitioner relies on the *Preamble* in arguing that the Department must also examine the size of the loan, special circumstances, and any explicit or implicit guarantees in finding the loan to be dispositive evidence of creditworthiness. Moreover, the petitioner argues that the current circumstances mirror *DRAMS from Korea*. We disagree with the petitioner and continue to find that the BOA financing is suitable for comparison purposes and dispositive evidence of creditworthiness.

In *DRAMS from Korea*, all loans were part of the restructuring effort of the Creditors Council. In that respect, the Citibank loan being examined was negotiated in conjunction with loans from government and private banks found to be entrusted or directed by the Government of Korea.⁴⁴⁸ Thus, the Department established specific links to the relative size of the Citibank loan and its distinct motivations from an average lender in terms of all lending under the restructuring effort. Thus, we found that it did not constitute dispositive evidence of creditworthiness.⁴⁴⁹ In the instant case, Port Hawkesbury was in a restructuring process, but there has been no alleged link or relationship found between the BOA financing and the GNS that is similar to Citibank in *DRAMS from Korea*. Indeed, Port Hawkesbury received two commercial financing offers and selected the BOA financing.⁴⁵⁰

The petitioner also tries to equate the relative size of the lending in *DRAMS from Korea* with that of Port Hawkesbury. However, in that case, we found Citibank's financing to be small in relation to all lending from creditors, while the petitioner is discussing the BOA financing in relation to GNS loans and the other subsidies examined in the proceeding.⁴⁵¹ Thus, reliance on any alleged similarities to *DRAMS from Korea* is misplaced.

Finally, the petitioner references special features of the BOA financing to support its assertion, noting that secured and/or guaranteed loans are a sign of a highly leveraged or otherwise uncreditworthy company and that the financial community would not have been willing to make a loan to Port Hawkesbury without these items.⁴⁵² The petitioner does not explain how these special features rise to "unusual aspects" as referenced in the *Preamble*, rather than being the normal practices of a financial business conducting its due diligence and providing lending based

⁴⁴⁶ See *CFS from Korea* at Comment 20 and *Butt-Weld Pipe Fittings from Taiwan* at Comment 8.

⁴⁴⁷ See BPI Memo for a full discussion.

⁴⁴⁸ See *DRAMS from Korea* at "Creditworthiness" section.

⁴⁴⁹ *Id.*

⁴⁵⁰ See PQR at 89.

⁴⁵¹ See *DRAMS from Korea* at "Creditworthiness" section and the petitioner's Case Brief at 10.

⁴⁵² See the petitioner's Case Brief at 16.

on its perceived risks.⁴⁵³ As such, the petitioner’s references to the BOA financing are not aspects we would normally consider unusual based on the circumstances of this proceeding, and we find the BOA financing to be dispositive evidence of creditworthiness.⁴⁵⁴

As noted in the “Uncreditworthy Allegation” section, we agree with the petitioner that the BOA financing loan is a comparable commercial loan and are using it as a benchmark and discount rate for loans and non-recurring grants provided or approved in 2012.

Comment 5: Whether the GNS’ Hot Idle Funding is Extinguished

The GOC’s Arguments:

- The Department did not properly follow its rule that “When a subsidy recipient is sold to an unrelated party in an arm’s-length transaction, subsidies received before the sale are presumed to be extinguished at the time of the sale.”
- Under the concurrent subsidies analysis, the Department wrongly found only one of the three criteria was met. Evidence on the record demonstrates that prospective bidders knew the mill was being sold in hot idle status, and the mill was required to remain in this status.⁴⁵⁵
- The fair market value of the mill did not change as a result of the additional hot idle funds. The Department is confusing the value of the company being purchased with the cost to the government of providing funds.⁴⁵⁶
- The three criteria for finding that concurrent subsidies have been extinguished have been met.

The GNS’ Arguments:

- The Department’s *Preliminary Determination* was legally flawed because it failed to follow its established presumption that an arm’s-length sale for fair market value extinguishes all pre-sale subsidies.
- The Department’s *Preliminary Determination* was also factually flawed because, from the beginning of the CCAA proceeding, bids were obtained for the mill to be sold as a “going concern.” A “going concern” bid requires the mill to be kept in a hot idle state; thus, any bids received after the mill was placed in hot idle status fully reflect the value of a hot idled mill, regardless of the hot idle funding source.
- The Department’s extinguishment criteria are satisfied and any benefit associated with the provision of hot idle funds was extinguished upon the completion of the CCAA process.

⁴⁵³ See *Preamble* at 65367 (“In general, we believe that if commercial banks are willing to provide loans to the firm, we should not substitute our judgment and find the firm to be uncreditworthy.”).

⁴⁵⁴ See BPI Memo for a full discussion.

⁴⁵⁵ See PQR at Exhibit G-12, page 7, Exhibit G-13, page 1, and Exhibit G-15.

⁴⁵⁶ See *Allegheny Ludlum* and *US – UK Lead and Steel*.

- In *Pasta from Italy*, the Department affirmed its extinguishment presumption, namely, that cases where there is a change in ownership, subsidies are extinguished through an arm's-length sale for fair market value.⁴⁵⁷ The Department failed to conduct this analysis in the *Preliminary Determination*.
- The change in ownership from NPPH to PWCC occurred at arm's length and for fair market value. The parties are not related; both parties sought to secure a deal within their best interests; the creditors and bondholders wanted to receive the largest return possible; and PWCC wanted to obtain the mill at the lowest price possible. The sale was at fair market value, as evidenced by Ernst & Young, which was appointed as Monitor and independently determined that the PWCC offer through the competitive bidding process provided the greatest potential recovery to the estate.
- The Department's privatization methodology establishes a rebuttable presumption that subsidies provided prior to a change in ownership are extinguished.⁴⁵⁸ There is no factual basis to overturn this presumption.
- Even though this sale did not have any government involvement, the Department can still examine the details and circumstances of the transaction to determine whether the subsidies were extinguished.⁴⁵⁹ The circumstances of the sale establish the arm's-length nature and fair market value of this transaction. The creditors and bondholders voted that the sale returned the maximum value; the Monitor concluded the price paid was the best value; the sale was advertised throughout North America and received numerous letters of intent.
- The Department erred in applying the three part test for extinguishment because "hot idle" was a necessary condition of a "going concern" sale from the beginning of the CCAA process. The bid price was for a sale of the mill to be delivered in hot idle status and, therefore, the nature and value of the hot idle funds were known to the bidder and reflected in the sales price.
- The CIT has held that "...a firm receives a subsidy if it gets something it did not pay for..."⁴⁶⁰ PWCC's offer to purchase the mill was an offer to purchase it as a going concern. Any hot idle funds used to preserve the going concern were reflected in the purchase price.
- There is no evidence on the record to conclude that the December 16, 2011, offers did not include an element for hot idle. All bidders knew prior to December 16, 2011, that continued hot idle funding would be necessary for a successful completion of the sale of the mill as a going concern.
- All hot idle funds were paid to NPPH; thus, Port Hawkesbury did not receive a financial contribution.

⁴⁵⁷ See *Pasta from Italy*, 70 FR at 17972 (citing SAA at 928).

⁴⁵⁸ See *Notice of Final Modification*, 68 FR at 37130.

⁴⁵⁹ See *Id.* at 37131.

⁴⁶⁰ See *Allegheny Ludlum Corp. v. United States*, 358 F. Supp. 2d 1334, 1339 (CIT 2005).

Port Hawkesbury's Arguments:

- The Department erroneously: (i) conflates the value of a subsidy with the amount of the financial contribution; (ii) applies a “cost-to-government” standard in determining the amount of the benefit, instead of a “benefit-to-recipient” standard; (iii) confuses the date of PWCC’s final bid with the determination of fair market value; and (iv) determines exactly who benefitted from the hot idle.
- NPPH had an obligation to maintain the mill in hot idle status. PWCC purchased the mill on this condition.
- Section 771(5)(E) of the Act states that “a benefit shall normally be treated as conferred where there is a benefit to the recipient.” Thus, the Department should consider whether a benefit was conferred on Port Hawkesbury, not on how much it cost the GNS to assist NPPH.
- The CIT has upheld that an arm’s-length transaction for fair market value eliminates any pass through of subsidies.⁴⁶¹
- The “benefit to recipient” standard is consistent with U.S. obligations under the WTO SCM Agreement. The WTO Appellate Body has stated that “the question whether a ‘financial contribution’ confers a ‘benefit’ depends, therefore, on whether the recipient has received a ‘financial contribution’ on terms more favorable than those available to the recipient in the market.”⁴⁶² Regardless of the cost to NPPH and the GNS to maintain the hot idle status, the value of the hot idle was reflected in the price paid and, therefore, Port Hawkesbury received no benefit.
- Fair market value was determined when PWCC submitted its bid on December 16, 2011, not when all parties approved the final transaction and closed the deal.
- The CAFC has stated: “the dictionary further defines ‘fair market value’ as ‘{t}he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s length transaction’ the point at which supply and demand intersect.”⁴⁶³ The parties continued to negotiate after December 16, 2011, and had a right to reject the plan if any felt they could get a higher price. Thus, it is the closing of the deal on September 28, 2012 that determines the fair market value of the mill.
- Maintaining the mill in hot idle status provided the highest possible return for NPPH. Thus, NPPH’s creditors, not Port Hawkesbury, were the beneficiaries of the hot idle.

The Petitioner's Rebuttal:

- There is a “baseline presumption” established in the *Notice of Final Modification* that non-recurring subsidies can benefit the recipient over a period of time normally corresponding to the average useful life of the recipient’s assets.⁴⁶⁴ Port Hawkesbury has failed to rebut this presumption and prove that the sale of the mill was at arm’s length and at fair market value.

⁴⁶¹ See *Id.*

⁴⁶² See *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (June 7, 2000) at page 25, para. 68.*

⁴⁶³ See *Allegheny Ludlum* (citing *Black’s Law Dictionary* 103 (7th ed. 1999)).

⁴⁶⁴ See *Notice of Final Modification*, 68 FR at 37127.

- Even if the Department were to conclude that the sale of the mill occurred at arm's length and for fair market value, which it should not, it does not automatically follow that the subsidies were extinguished. The Department may and should conclude that market distortions existed and, thus, the subsidies passed through to the new owner.
- The Department's change-in-ownership methodology provides that in situations where a government's actions may distort the market, the "market" price should be disregarded because the "transaction price was meaningfully different from what it would otherwise have been absent the distortive government action."⁴⁶⁵
- In *Pasta from Italy* the Department reiterated this practice, noting: "even if we find the sales price was at 'market value' parties can demonstrate that the broader market conditions were severely distorted by the government and that the transaction price was meaningfully different from what it would otherwise have been absent the distortive government action."⁴⁶⁶
- Port Hawkesbury's contention that it purchased the mill on the condition that it had been maintained in hot idle status does not negate the potential for a countervailable subsidy that benefitted the new owner.
- Port Hawkesbury's reliance on the CIT's decision in *Allegheny Ludlum* to support its contention that the Department erred in using a "cost-to-government" rather than a "benefit-to-the recipient" analysis is mistaken. That case supports a finding that the sale of the mill to PWCC was not at fair market value and that the hot idle subsidies did pass through to PWCC.
- The issue before the Department is not whether the amount of any subsidies provided to the mill's prior owner passed through to PWCC, but rather whether subsidies provided concurrent with and in facilitation of the mill's sale, benefitted PWCC. The Department's established methodology for examining concurrent subsidies was correctly applied in the *Preliminary Determination*.
- Port Hawkesbury argues that fair market value was established on the date all parties approved the transaction. The Department should continue to reject this argument and use the date that PWCC submitted its bid. The date the sale closed is irrelevant as the Department must consider whether the nature and value of the concurrent subsidies were fully transparent to all potential bidders.
- PWCC did not "buy" the mill; instead, the GNS paid PWCC to take the mill over. The purchase was, therefore, not at fair market value and, moreover, the GNS's actions distorted the price for Port Hawkesbury.
- Although Port Hawkesbury asserts that it was NPPH's creditors who were the beneficiaries of the hot idle payments and that maintaining the mill in hot idle status resulted in the highest possible return for NPPH, the record does not reflect that the creditors were better off with a going concern bid, nor does it demonstrate that maintaining the mill in hot idle status maximized return to the creditors rather than the desire of the GNS to maintain employment in the province.

⁴⁶⁵ *Id.*

⁴⁶⁶ *See Pasta from Italy*, 70 FR at 17973.

Department's Position:

The GNS argues that NPPH's sale of the Port Hawkesbury mill to PWCC was an arm's-length transaction between two unrelated parties, and as such, all subsidies provided to maintain the mill in hot idle status were extinguished by the sale. The GNS further claims that the Department must look to the SAA when examining extinguishment. The SAA defines an arm's-length transaction as one negotiated amongst unrelated parties, each of which is acting in its own interest, or between related parties where the terms of the transaction are those that would exist if the transaction had been negotiated by unrelated parties.⁴⁶⁷ However, the SAA also states that, "the sale of a firm at arm's length does not automatically, and in all cases, extinguish any prior subsidies conferred."⁴⁶⁸ The *Notice of Final Modification* states that, "the Department is not required to find extinguishment of previously bestowed subsidies on the sole basis that a change in ownership occurred, or that it occurred in an arm's-length transaction," and "a finding of both an arm's-length transaction and a transaction price reflective of fair market value {is} the basis for overriding the baseline presumption" of receiving a subsidy.⁴⁶⁹ Therefore, we dismiss the GNS's argument that an arm's-length transaction between two unrelated parties automatically results in extinguishment. As we explain above in the "Analysis of Programs – 5. GNS Grants for Maintaining Hot Idle Status," even assuming an arm's-length transaction for fair market value, the assistance authorized under hot idle funding could not have been extinguished by the sale to PWCC because the sale price had been established prior to the provision of the assistance, and, therefore, the bidders could not have incorporated the value of this assistance in their bids.

The GNS claims that in *Pasta from Italy*, the Department affirmed its extinguishment presumption—namely that, in cases where there is a change in ownership, subsidies are extinguished through an arm's-length sale for fair market value⁴⁷⁰—and that the Department's *Preliminary Determination* failed to follow that established presumption. The subsidies at issue in *Pasta from Italy*, however, occurred prior to the sale of the firm under discussion.⁴⁷¹ In contrast, the subsidies alleged here occurred concurrently with the sale to PWCC. Moreover, both the GNS and Port Hawkesbury misread the rebuttable presumption outlined in the *Notice of Final Modification*. The "baseline presumption" is that non-recurring subsidies can continue to benefit a company after a change in ownership.⁴⁷² The presumption *may* be rebutted by, among other things, a sale at arm's length and for fair market value.⁴⁷³ However, a sale at arm's length and for fair market value does not *automatically* extinguish subsidies provided prior to the sale (or the establishment of the price), and does not extinguish concurrent subsidies, except when the Department's established criteria have been satisfied.⁴⁷⁴ Those criteria are:

⁴⁶⁷ See *Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H.R. Doc. No. 316, 103d Cong., 2d Session, at 928 (1994).

⁴⁶⁸ *Id.* at 928.

⁴⁶⁹ See *Notice of Final Modification*, 68 FR 37128.

⁴⁷⁰ See *Pasta from Italy*, 70 FR at 17972.

⁴⁷¹ *Id.* at 17972-73.

⁴⁷² 68 FR 37127.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 37128.

1. The nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders;
2. The concurrent subsidies were bestowed prior to the sale; and
3. There is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the transaction price.⁴⁷⁵

After the funds that NPPH committed to maintain the plant in hot idle status were depleted in December 2011, the GNS authorized an amount of hot idle funds to keep the paper mill functioning until the completion of the mill's sale to its new owners. When the sale of the mill had not been completed and additional funding was necessary to continue the hot idle activities, the GNS's DNR provided additional hot idle funds in March 2012.⁴⁷⁶ Although PWCC offered its final bid and ultimately purchased the mill knowing that the mill had been kept in hot idle status, its final bid price could not reflect the value of the hot idle funds approved in December 2011 and March 2012, after its bid was submitted and the price established. The price established in PWCC's December 2011 bid did not change through the course of the CCAA process. The fact that Ernst & Young was appointed as Monitor and mediator of the bidding process, and that the creditors and bondholders voted for the sale's completion, is not relevant to the Department's evaluation of the concurrent subsidies criteria because the final bid could not have incorporated, and did not incorporate, the actual value of the final bestowal of hot idle funds. Accordingly, because the bid price for the mill was finalized in December 2011, criteria one and three were not satisfied with regard to the hot idle funding, and that assistance was not extinguished.

The GNS claims that the Department erred in applying the three-part test for extinguishment because "hot idle" was a necessary condition of a "going concern" sale from the beginning of the CCAA process. Yet the amount of funding from the GNS authorized in December 2011 and March 2012 was not known to PWCC and, therefore, was not included in PWCC's final bid amount. To the extent that "a firm receives a subsidy if it gets something it did not pay for,"⁴⁷⁷ as the CIT observed, PWCC's bid did not take into account the December 2011 or March 2012 hot idle funds and, therefore, did not pay for them.⁴⁷⁸ The question of whether the bid price was for a sale of the mill to be delivered in hot idle status, as the GNS contends, is inapposite. The issue is actually whether the bid and sale prices reflected and incorporated the hot idle funds approved in December 2011 and March 2012. We acknowledge that PWCC's bid was offered for the mill as a going concern with the understanding that the mill was being maintained in hot idle status. However, PWCC made that bid with the expectation that NPPH would maintain it as such and could not have anticipated that the GNS would assume responsibility for that

⁴⁷⁵ 68 FR at 37137.

⁴⁷⁶ See GQR at Government of Nova Scotia Questionnaire Response at Volume VIII, NS.VIII-5. See, also, e.g. GSQR at Exhibits NS-SUPP1-5A and NS-SUPP1-12, Appendix A.

⁴⁷⁷ See *Allegheny Ludlum*, 358 F. Supp. 2d at 1339.

⁴⁷⁸ See 68 FR 37137 ("All other things being equal, in a normally functioning and transparent market, we would expect that potential investors would be willing to increase the value of their offer prices to reflect the additional value that such concurrent subsidies are expected to contribute to the overall value of the company or its assets. Such additional value is therefore properly considered to be 'paid for' in the purchase prices, barring clear evidence to the contrary.").

maintenance.⁴⁷⁹ Thus, once NPPH could not fulfill its obligations, PWCC received a benefit in the form of additional, unanticipated financing from the GNS for the mill's continued hot idle status. Our measurement of that benefit is not a cost-to-government analysis, as parties have claimed, but a recognition that the full value of maintaining the mill in hot idle status was not accounted for in the original bid.⁴⁸⁰

Furthermore, PWCC/Port Hawkesbury has explicitly stated that the purchase of the mill was a transaction between two private parties. Therefore, it was purchasing the mill in hot idle status from a private party. PWCC was not purchasing a mill in hot idle status from the GNS. In an arm's-length transaction between two private parties, there should not be an expectation of government subsidization of that transaction if that transaction was at fair market value.

We disagree with the GNS's claim that Port Hawkesbury did not receive a financial contribution because all hot idle funds were paid to NPPH. The subsidies occurred concurrently with the sale to PWCC and we have appropriately considered whether those subsidies survived the change in ownership.⁴⁸¹ As explained above, because the final bid price that PWCC/Port Hawkesbury submitted did not account for hot idle funds approved after the submission of the bid, the subsidy was not extinguished. Similarly, we reject Port Hawkesbury's argument that the benefits of continued hot idle funding accrued to NPPH creditors because the funds maximized the creditors' return. This argument is simply a variation on Port Hawkesbury's contention that the subsidy was extinguished by a fair market transaction.⁴⁸² As explained above, however, it is not enough for a sale to occur at fair market value, and Port Hawkesbury has not adequately rebutted our "baseline presumption" that the hot idle funding benefitted PWCC once the sale was complete.

Comment 6: Whether the GNS' FIF Funding is Extinguished

The GOC's Arguments:

- Similar to the payments provided to maintain the Port Hawkesbury plant in hot idle status, the FIF payments are not countervailable.
- Using the concurrent subsidy analysis, the FIF payments were known to the bidders. The purpose of those payments was to keep the mill operational, and the additional payments were reflected in the final bid price.

The GNS' Arguments:

- The Department preliminarily analyzed the FIF as a grant that was not extinguished by reason of the arm's-length sale of the mill, rather than as a purchase of services. Because no money inured to NPPH or to Port Hawkesbury, rather, the funds went to third party

⁴⁷⁹ See GQR, Government of Nova Scotia Questionnaire Response, Volume VIII, at Exhibit NS-HI-4.

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.* at 37127.

⁴⁸² *Id.* (explaining that a "primary consideration" of whether a transaction was for fair market value was whether the seller "failed to maximize its return on what it sold.").

contractors and subcontractors, the Department must conduct an upstream subsidy analysis prior to finding any such payments countervailable. Port Hawkesbury did not receive these funds directly.

- By defining a financial contribution to include government purchases of goods but not government purchases of services, section 771(5)(D) of the Act precludes the Department from finding countervailable the province's purchase of services under the FIF.
- The CAFC upheld this view in *Eurodif S.A. v. United States*.⁴⁸³ In *Softwood Lumber IV*, the Department also declined to initiate an investigation of an allegation of excessive payments made under a service contract by a state-owned company, concluding that the government purchase of services does not constitute a financial contribution and cannot be countervailable.⁴⁸⁴
- The Department has always examined the "purpose of the subsidy...at the time of bestowal."⁴⁸⁵ Therefore, the Department's preliminary determination that a side effect of the FIF benefitted the purchaser of the mill does not indicate that the program is countervailable when the stated purpose of the program was the purchase of services and not a direct or indirect subsidy to NPPH or to the ultimate purchaser.
- Upon the sale of the mill at arm's length for fair market value, the payments under the FIF are presumptively extinguished; there are no facts to rebut this presumption and, therefore, no factual basis to find these payments countervailable.
- The Department committed a ministerial error by including extinguished FIF 1 funds in its calculation. Because the Department reasoned that all bidders knew that the province would provide C\$14 million in funding, the Department must adjust its *ad valorem* calculation to be in line with its own methodology. Accordingly, if the Department persists in its erroneous findings regarding the countervailability of FIF 2 funds, the *ad valorem* calculation must only rely upon the correct amount rather than the amount used in the *Preliminary Determination*.

Port Hawkesbury's Arguments:

- The Department's finding in the *Preliminary Determination* that payments under the FIF provided a countervailable subsidy to Port Hawkesbury is flawed because: (i) payments under the FIF went to third parties, and neither Port Hawkesbury nor the mill had any ownership rights in the output of such third parties; (ii) even if there were a benefit provided to Port Hawkesbury, it could only derive from its purchases from third parties of wood harvested pursuant to the FIF, and therefore, would be an upstream subsidy at most; and (iii) even if the mill benefitted directly during the CCAA process from the FIF, that benefit did not pass through to Port Hawkesbury.
- Unless the GNS is relieving a company of an obligation that it normally would incur, there is no subsidy to the company. In *Softwood Lumber*, the Department rejected an

⁴⁸³ See *Eurodif S.A. v. United States*, 411 F.3d 1355, 1364-5 (Fed. Cir. 2005).

⁴⁸⁴ See *Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Softwood Lumber Products from Canada*, 69 FR 75917 (December 20, 2004) (*Softwood Lumber IV*).

⁴⁸⁵ See *CVD Preamble*, 63 FR at 65403.

argument that the program in question provided a countervailable subsidy because it relieved the producers of obligations that they would otherwise incur.⁴⁸⁶

- Because there was no direct benefit to the mill, the only way the Department could have found a benefit to Port Hawkesbury from the FIF would be if it conducted an upstream subsidy analysis. The WTO panel reviewing the decision in *Softwood Lumber IV* held that the Department's "failure to conduct a pass-through analysis in respect of upstream transactions... was inconsistent with Article 10 of the Subsidies and Countervailing Measures Agreement..."⁴⁸⁷ Because the Department did not conduct this analysis it cannot find that any benefit to the third parties passed through to Port Hawkesbury.
- The bid price in December 2011 could have changed prior to the September 2012 deal and any of those parties could have altered the agreement if they felt the price did not reflect a fair market value.

The Petitioner's Rebuttal:

- Both Port Hawkesbury and the GNS argue that the FIF was implemented to further forestry policy goals and to pay for the infrastructure activities of third party contractors. However, the actual reason for the FIF program, as the Department found in its *Preliminary Determination*, was to "support the ongoing operations of the mill during the bankruptcy process and to maintain the mill ready for sale as a going concern."⁴⁸⁸
- Because the FIF payments are not bestowed on the production of an input, the upstream subsidy provision does not apply here.
- The term "obligation" should be interpreted broadly and not simply in the sense of a legal obligation.⁴⁸⁹
- The benefits from the FIF payments were not extinguished with the purchase of the mill, whether based on distortion or on the Department's concurrent subsidy analysis.

Department's Position:

In the *Preliminary Determination*, the Department found the extinguishment of subsidies that were provided under the first authorization of Forestry Infrastructure Funds (FIF 1) and were associated with the funding of ancillary forestry operations considered directly beneficial to the province and the provincial economy while the Port Hawkesbury paper mill was non-operational. The finding of extinguishment rested upon the knowledge of the bidders, prior to the submission of the bids, that the GNS had provided a specified amount of funding for purposes of continuing certain activities deemed beneficial to the provincial economy, such as silviculture (including ongoing silviculture activities that were only partially completed when NPPH sought creditor protection), road maintenance, forestry training program, and design,

⁴⁸⁶ See *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Softwood Lumber Products from Canada*, 67 FR 15545 (April 2, 2002) and accompanying Issues and Decision Memorandum, at section III.3 (*Softwood Lumber*).

⁴⁸⁷ See *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WT/DS257/R (August 29, 2003) at para. 8.1(c).

⁴⁸⁸ See *Preliminary Determination*, at 21.

⁴⁸⁹ See *CVD Preamble* at 65379 and *Pasta from Italy*.

harvesting and transportation of timber.⁴⁹⁰ However, the Department found that the second tranche of FIF funding (FIF 2), which was authorized by the GNS after the date of the PWCC bid, was not extinguished by PWCC's purchase of the mill, because the provision and the amount of the subsidy were not transparent to PWCC at the time of its bid.

Port Hawkesbury argues that because the payments under the FIF were made to third parties, no benefit was provided to it. However, the internal documentation submitted by the GNS demonstrates that FIF payments were provided to support the ongoing forestry operations of the mill during the bankruptcy process in order to avoid an interruption in the forestry work that would have a negative impact on the condition and the productive value of the forestry assets.⁴⁹¹ Under the Forestry Infrastructure Agreement (FIA), the province would pay the costs of, among other things, silviculture (on Crown lands and on private lands); harvesting, cutting and transportation, road maintenance on Crown lands, and "all work of the core NPPH staff in relation to the above." Although payments were made by Port Hawkesbury to third parties, the GNS reimbursed the company for the above activities that would otherwise be the company's responsibility. Thus, the amount reimbursed to Port Hawkesbury is the benefit, not the payment to the third parties, which is Port Hawkesbury's obligation. Port Hawkesbury's reliance on *Softwood Lumber* is misplaced, as discussed further below, because Port Hawkesbury was responsible for these activities pursuant to an agreement.⁴⁹²

Port Hawkesbury and the GNS also argue that even if there was a benefit provided to it under the FIF, the benefit could only be derived from its purchases from third parties of wood harvested pursuant to the FIF, and as a result, the FIF could provide only an upstream subsidy. However, because the FIF payments are not bestowed on an unaffiliated entity's production of an input, but instead to Port Hawkesbury, the upstream subsidy provision does not apply here.⁴⁹³ As such, Port Hawkesbury reliance on *Softwood Lumber IV* is inapposite because our examination of the benefit is not to the third parties, but to Port Hawkesbury itself. Therefore, a pass-through analysis in respect of an upstream subsidy transaction is not applicable.

The GNS argues that the Department committed a ministerial error by including extinguished FIF 1 funds in its calculation because the GNS did not disburse the full C\$14 million that it intended to provide under FIF 1. Therefore, because the Department reasoned that all bidders knew that the province would provide C\$14 million in funding, the Department must adjust its *ad valorem* calculation to extinguish the full C\$14 million that was included in FIF 1. Although the Department intentionally included the full amount of FIF 2 in its calculation for the *Preliminary Determination*, we agree with the GNS that the calculation should be adjusted for the final determination. Although we continue to find that the amount authorized for FIF 2 could not have been transparent to PWCC at the time of its bid, we also agree that the bid price fully accounted for the C\$14 million originally authorized under FIF 1. Therefore, we find it appropriate to subtract the full C\$14 million from the total funding disbursed under the FIF program when calculating a benefit under that program.

⁴⁹⁰ *Id.*

⁴⁹¹ See GSQR at Exhibit 98B; *GNS Verification Report* at 9.

⁴⁹² See PQR at 17.

⁴⁹³ See 19 CFR 351.523(a)(ii)(A).

We disagree with Port Hawkesbury’s contention that FIF payments constitute the government purchase of services and do not meet the definition of financial contribution in section 771(5)(D) of the Act. The information regarding the purpose of the FIF program (to maintain as ongoing the forestry operations which were otherwise interrupted by the closure of the NPPH mill), and the manner in which the payments were provided (as reimbursements for expenses incurred in the conduct of the proscribed forestry activities by “the core NPPH staff”) indicate that the payments were provided to alleviate the financial burden of continuing forestry activities for which NPPH itself would otherwise have been responsible.⁴⁹⁴ As such, the assistance provided by FIF 2 funds constitutes a grant, and not the purchase of services by the government.

Moreover, for the same reasons that we find the assistance provided for maintaining hot idle was not extinguished by PWCC’s purchase of NPPH, we find that the subsidies provided by FIF 2 are not extinguished by PWCC’s purchase. The final bid price submitted by PWCC was submitted in December 2011, and FIF 2 funding of C\$12 million was authorized by the GNS in March 2012.⁴⁹⁵

In the *Preliminary Determination*, the Department examined the FIF 2 funding as a concurrent subsidy in the context of the change in ownership analysis contemplated by the *Notice of Final Modification*. As with our hot idle analysis, we relied on three criteria to determine whether the concurrent subsidies were fully reflected in the arm’s-length, fair market value price of PWCC’s purchase of NPPH:

1. The nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders;
2. The concurrent subsidies were bestowed prior to the sale; and
3. There is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the transaction price.⁴⁹⁶

The *Notice of Final Modification*’s “baseline presumption” holds that non-recurring subsidies can benefit the recipient over a period normally corresponding to the average useful life of the recipient’s assets.⁴⁹⁷ Port Hawkesbury has failed to rebut this presumption by demonstrating that PWCC’s final bid price included an element for benefits from the FIF 2 funds, with the exception of those excluded, as discussed above.

As we explained with respect to the provision of hot idle funds, funds provided concurrently with the sale from NPPH to PWCC were not necessarily extinguished even assuming an arm’s-length fair market value transaction. Here, PWCC’s final bid was submitted on December 16, 2011, prior to the March 2012 approval of the FIF 2 funds, and it did not change to account for the value of those additional funds. Although parties make a similar argument to those concerning the GNS’s provision of hot idle funds—namely, that PWCC’s bid for a going concern and the

⁴⁹⁴ See PQR at 17.

⁴⁹⁵ See *GNS Verification Report* at 10.

⁴⁹⁶ See *Notice of Final Modification*, 68 FR 37125, 37137.

⁴⁹⁷ *Id.* at 37127.

FIF funds were part of maintaining it as such—we do not find them persuasive in this context for the same reason previously articulated. That is, although PWCC made its bid with knowledge that such forest maintenance had been funded under FIF 1, it received a benefit in the form of additional, unanticipated FIF 2 funds.

Comment 7: Whether Assistance Under the Outreach Agreement is Countervailable

The GNS' Arguments:

- Section 771(5)(D) of the Act prevents a finding of financial contribution for government purchases of services.
- If the Department finds the Outreach Agreement payments to constitute a grant, the Department must offset these payments against Port Hawkesbury's associated costs.

Port Hawkesbury's Arguments:

- Any funds provided by the GNS to Port Hawkesbury pursuant to the Outreach Agreement were for services received, not a grant, and therefore, not a financial contribution.
- Whereas section 771(5)(D) of the Act states that the government provision of goods and services or the government purchase of goods constitutes a financial contribution, it does not include the purchase of services by the government. This notable absence demonstrates Congress' intent that purchases of services by the government are not financial contributions. This is affirmed in the CVD Preamble which states “{w}e believe that if governmental purchases of services were intended to be treated similarly to the governmental purchase of goods, the statute and the WTO SCM Agreement would specifically mention services as they do with the provision of goods and services.”⁴⁹⁸
- The Department recognized such a distinction in practice as well by determining not to initiate in the *Softwood Lumber IV* investigation on certain allegations that involved the government purchase of services.⁴⁹⁹
- Even if the Department determines that payments made pursuant to the Outreach Agreement do not reflect the purchase of services, such payments are not countervailable because they reflect the reimbursement of expenses incurred solely at the request of the GNS for actions taken that are not required by statute or regulation

The Petitioner's Rebuttal:

- Funds provided pursuant to the Outreach Agreement are grants within the meaning of section 771(5)(D)(i) of the Act and not simply purchases of services as respondents argue.
- The Outreach Agreement was included in the negotiations for the sale of the mill in order to support Port Hawkesbury's production of subject merchandise. According to the Department's regulations, a subsidy will be attributed only to that product if it is tied to the

⁴⁹⁸ See *CVD Preamble*, 63 FR at 65379.

⁴⁹⁹ See *Softwood Lumber IV*, 69 FR 75917, and accompanying Issues and Decision Memorandum at Cmt. 50.

production or sale of that product.⁵⁰⁰ This is the case here, where the GNS provided funds to Port Hawkesbury so that it may renew and maintain forestry land.

- The Outreach Agreement had the ancillary effect of increasing employment in the province, similar to the FIF, and was an important policy goal of the GNS. The objective of the Monitor was to sell to a buyer who would restart the mill and put people to work.

Department's Position:

In the *Preliminary Determination*, the Department found that the funds provided to Port Hawkesbury by the GNS for Sustainable Forest Management and Outreach were a recurring benefit in accordance with 19 CFR 351.524(c)(2). We determined that the grants under the Outreach Agreement that Port Hawkesbury received from the GNS constituted a financial contribution in the form of a direct transfer of funds from the government bestowing a benefit in the amount of the grants, within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act.⁵⁰¹ We also determined that a benefit exists under 19 CFR 351.504(a), equal to the amount of the grant. Finally, we determined that the program is specific, in accordance with section 771(5A)(D)(i) of the Act, because the GNS provided the assistance only to Port Hawkesbury.⁵⁰²

Port Hawkesbury and the GOC argue that these payments were not benefits but a purchase of services by the GNS through Port Hawkesbury. In its case brief, Port Hawkesbury cites the *Preamble* and the Department's decision not to initiate on several service-related programs in *Softwood Lumber IV* as examples that a government purchase of services could be considered an income support and, therefore, is not a financial contribution.⁵⁰³ The GOC reiterates Port Hawkesbury's contention that the statute does not include the purchase of services in the definition of "financial contribution" and recognizes the distinction between the purchase of goods and the purchase of services, in practice, as well.⁵⁰⁴

The activities for which Port Hawkesbury receives reimbursement under the Outreach Agreement (road planning and maintenance; forestry planning and administration; resource inventory and data sharing, research, silviculture, including on private lands, forest planning and forest certification)⁵⁰⁵ are activities that involve the renewal and maintenance of forestry land, *i.e.*, the management of Port Hawkesbury's input and supply chain. These are activities that Port Hawkesbury would undertake even in the absence of the Outreach Agreement. As such, Port Hawkesbury's and the GNS's characterization of the Outreach Agreement as the government purchase of services misconstrues the nature of the assistance being provided. Because the Outreach Agreement provides reimbursements to Port Hawkesbury for costs it incurs in the course of managing its input and ensuring the efficient operation of its supply chain, *i.e.*, activities it was obligated to undertake as part of its operation, we continue to find that it

⁵⁰⁰ 19 CFR 351.525(b)(5).

⁵⁰¹ See *Preliminary Results* at 23.

⁵⁰² See GQR at Government of Nova Scotia Questionnaire Response, Volume XI, NS.XI-12.

⁵⁰³ See PHP Case Brief at 17.

⁵⁰⁴ See GOC Case Brief at "Joint Issues-14".

⁵⁰⁵ See PQR at 22-23.

provides a financial contribution in the form of a direct transfer of funds under section 771(5)(D)(i) of the Act.

With regard to the GNS's argument that the Department should offset the Outreach Agreement payments with Port Hawkesbury's associated costs, section 771(6) of the Act identifies the limited circumstances under which the Department will reduce the benefit amount. Qualifying offsetting amounts are:

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

There is no record evidence that Port Hawkesbury's associated costs meet the narrow definition provided in the statute. Accordingly, there is no basis for the Department to recognize them as an offset to the benefits provided under the Outreach Agreement.

Comment 8: Whether Port Hawkesbury's Private Stumpage Purchases Provide an Appropriate Benchmark for Port Hawkesbury's Crown Stumpage Purchases

Port Hawkesbury's Argument:

- The Department incorrectly applied a cost-to-government standard instead of a benefit-to-recipient standard when it compared Port Hawkesbury's purchase of Crown pulpwood to Port Hawkesbury's private purchase of wood. Section 771(5)(E) of the Act requires finding subsidies based on whether a company received a benefit, but the Department improperly used the cost-to-government analysis from *Softwood Lumber from Canada* to focus on the GNS's receipt of the Crown stumpage fees.⁵⁰⁶ There, the Department conducted an aggregate investigation based on information provided by the relevant governments that could be applied to all producers. The Department compared the aggregate stumpage fees paid to harvest Crown sawlogs to an aggregate private benchmark. In this investigation, this issue is narrower: whether Port Hawkesbury received a benefit from its purchase of pulpwood. Therefore, *Softwood Lumber from Canada* is inapplicable.
- The benefit-to-recipient analysis should consider whether Port Hawkesbury paid less to purchase Crown wood under the FULA than to purchase private wood. Because the Department limited its analysis only to the stumpage fees, the Department failed to consider the full cost Port Hawkesbury incurred under the FULA, private lease agreements, or roadside purchases.
- For its private purchases of pulpwood, Port Hawkesbury considered the delivery cost when determining whether to make a roadside purchase, harvest on leased land, or

⁵⁰⁶ See *Softwood Lumber from Canada*, 67 FR at 15545.

harvest on Crown land. Therefore, whether Port Hawkesbury received a benefit depends on whether the Crown pulpwood costs less on a per cubic meter basis at the point of delivery to the mill than does the pulpwood purchased from private sources.

- The Department has the fully inclusive cost of Crown pulpwood. It should compare the fully inclusive costs of Crown pulpwood with Port Hawkesbury's fully inclusive delivered costs for private purchases in the same region.
- Moreover, the unit prices under the private lease agreements are not comparable to the stumpage fees under the FULA and, therefore, are not an appropriate benchmark. The FULA and the private lease agreements are under different rights and obligations. For example, the FULA is for a 20-year term, renewable in 10-year increments. Private leases are for one- to five-year periods with no built-in renewal clauses. Land access and maintenance, record keeping, and administrative obligations are different for the FULA and private leases. Port Hawkesbury incurs more administrative costs on FULA lands than it does on private leases because of the stumpage fees to the Crown.
- Comparing the fully allocated delivered cost of Crown pulpwood to the fully allocated delivered cost of private pulpwood from the same counties in Nova Scotia would accurately demonstrate that, even including roadside purchases, the benefit is minimal.
- Even if the Department limits the comparison of Crown wood to the wood purchased pursuant to the private leases, the benefit is tiny.

The Petitioner's Argument:

- The Department should revise its benchmark to measure the benefit from stumpage from Crown lands to include prices paid to all private suppliers, including those with whom Port Hawkesbury had Lease Agreements and Purchase Agreements. Inclusion of only prices from sales made pursuant to Lease Agreements understates the benefit.
- Despite Port Hawkesbury's contention at verification that "roadside purchases are a third option for Port Hawkesbury that it uses only when it cannot obtain enough wood products from Crown and leased lands," these roadside purchases are actual purchases of wood products that it uses for its operation with the meaning of 19 CFR 351.511(a)(2)(i) and these purchases represent a significant portion of the market from which it obtains its inputs.
- In a recent case before the CIT, in upholding the Department's averaging of multiple data sources for use in assessing the adequacy of remuneration, the Court found that when there is more than one data source, "Commerce must average such prices to the extent practicable, making due allowance for factors affecting comparability. These factors ensure that the composite benchmark reflects prevailing market conditions in the home country."⁵⁰⁷
- Port Hawkesbury obtains a more beneficial price for roadside purchases than it does for its lease options.
- The Department should also adjust the benchmark upwards to include silviculture costs which are included in the prices for Crown stumpage but are not included in private stumpage prices.

⁵⁰⁷ *RZBC Group Shareholding Co.*, Slip Op. 15-83 (CIT 2015) at 25 (citing 19 C.F.R. 351.511(a)(2)(ii)).

The Petitioner's Rebuttal

- The Department did not use the cost-to-government approach. If the Department did so, it would have calculated no benefit from this program because the government incurs no cost to allow someone to cut down government-owned trees on government-owned land.
- For pulpwood stumpage, the Department's comparison of the price Port Hawkesbury paid the GNS for standing timber to the price Port Hawkesbury paid to private parties for standing timber is the correct comparison and is consistent with section 771(5)(E) of the Act, which defines the benefit to the recipient as, among others, where goods or services are provided for LTAR.
- Harvesting stumpage, *i.e.*, standing timber, substantially transforms stumpage into logs and log offcuts used as biomass and it adds significant value to the transformed products.
- In *CFS from Indonesia*,⁵⁰⁸ the Department found it inappropriate to use the delivered price of logs for purposes of calculating the benefit from a stumpage program.
- Port Hawkesbury cannot rely on *Softwood Lumber from Canada* to propose the use of log prices as a benchmark for stumpage. In *Softwood Lumber from Canada*, the Department recognized log prices as a reasonable starting point for a benchmark to stumpage, but only where there were no comparable private stumpage prices available, and the Department recognized that such prices need adjustments to reflect the value of the underlying stumpage.
- Likewise, the fuelwood stumpage (*i.e.*, biomass) benchmark should not be based on the delivered fuelwood log prices. The fuelwood stumpage price Port Hawkesbury paid to the GNS should be compared to the average of the fuelwood stumpage price Port Hawkesbury paid under its Lease and Purchase Agreements. Port Hawkesbury reported the all-inclusive prices for biomass purchases from private providers and the underlying details of those all-inclusive prices.

The GOC's Rebuttal:

- The Department has consistently recognized that stumpage and logs are distinct goods, and that only private stumpage prices can serve as a Tier 1 benchmark for Crown stumpage prices.
- The Department should continue its practice from the *Preliminary Determination* of rejecting the petitioner's attempts to mix Tier 1 and Tier 3 benchmark data.
- The petitioner's reliance upon *RZBC* is misplaced because it directs the Department to average prices to the extent practicable when they are within the same tier.
- The petitioner's assertion that the Department needs only to deduct harvesting costs to derive a residual value for stumpage is incorrect; in fact, to capture the residual value based on roadside/delivered log prices requires the deduction of all costs from the point of delivery "back to the stump."
- The petitioner is incorrect in claiming that the Department must adjust the benchmark upward by C\$3/m³ to account for private silviculture costs. Because the GNS has a tariff

⁵⁰⁸ *Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (October 25, 2007) (*CFS from Indonesia*).

establishing monetary credits for silviculture activities, the net per-cubic-meter cost for private silviculture for any given company can differ from the proscribed amount. The delivered/roadside private biomass prices used as a benchmark are already inclusive of any private silviculture costs incurred by the biomass stumpage buyer. To add an additional C\$3/m³ would result in double-counting.

Department's Position:

In the *Preliminary Determination*, the Department found that the provision of stumpage from Crown land by the GNS to Port Hawkesbury under the FULA constituted a financial contribution as a provision of a good or service within the meaning of section 771(5)(D)(iii) of the Act. Furthermore, the GNS stated that both the terms and the methodology for determining stumpage rates in the Port Hawkesbury FULA differed from those in other agreements within the Province of Nova Scotia; therefore, we determined the provision of stumpage under terms of the FULA is *de jure* specific under section 771(5A)(D)(i) of the Act because it was expressly limited to Port Hawkesbury.

As the petitioner noted correctly in its rebuttal brief, the program that the Department found countervailable in the *Preliminary Determination* was the provision of stumpage, *i.e.*, the right to harvest standing timber; it was not the provision of logs already harvested and delivered to Port Hawkesbury's mill. Thus, the Department is comparing the prices that Port Hawkesbury pays for the right to cut standing timber on Crown lands to the prices Port Hawkesbury paid to private parties for the right to harvest standing timber on private lands. Despite the GOC's and Port Hawkesbury's contentions, this is consistent with our practice from past cases involving stumpage.⁵⁰⁹ In instances where there are no prices for the right to harvest standing timber on private lands, we have used the available data to develop a benchmark that reflects such prices under Tier 2 benchmark methodology rather than under Tier 1 methodology, as we are able to do in this case. As such, in *CFS from Indonesia*, *Uncoated Paper from Indonesia* and *Softwood Lumber from Canada*, when the only prices that were available were prices of delivered logs, we adjusted such prices to remove all the costs incurred between the point of delivery and the point of harvest, *i.e.*, we took the prices back to the stump.

We disagree with Port Hawkesbury that this approach impermissibly reflects an analysis of the benefit on a "cost-to-government" basis, rather than on the statutorily required "benefit-to-recipient" basis. The GNS is providing stumpage; it is not providing logs already harvested and delivered to the mill. The benefit inures to Port Hawkesbury when the prices it pays for the harvest of standing timber on Crown lands are less than the prices it pays for the harvest of

⁵⁰⁹ See *CFS from Indonesia* and accompanying IDM at Comment 14 and *Uncoated Paper from Indonesia* and accompanying PDM at 22. In both cases the Department derived benchmark stumpage prices from standing timber. Also, as the petitioner noted in its rebuttal brief, in *CCP from Indonesia* and *Uncoated Paper from Indonesia*, when calculating the benefit from the log export ban program, the Department used the delivered prices of logs. See *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Affirmative Countervailing Duty Determination*, 75 Fed. Reg. 59209 (Sept. 27, 2010) and accompanying IDM at 11 (*CCP from Indonesia*) and *Uncoated Paper from Indonesia* and accompanying PDM at 22. This showed that we used distinct benchmarks for stumpage and logs. See *CCP from Indonesia* at Comment 12 and *Uncoated Paper from Indonesia* at section IX.A.2 (page 25).

standing timber on private lands. Because the Crown stumpage prices under the FULA represent the price of the right to harvest standing timber, under a Tier 1 benchmark analysis, we are seeking a market determined price for the same product. The prices Port Hawkesbury pays to harvest standing timber on Leased Lands represent purchases that are identical to Port Hawkesbury's purchases on Crown lands. Therefore, these private stumpage prices under Lease Agreements satisfy the requirements for a benchmark. However, as discussed above in the section "Provision of Stumpage for Less than Adequate Remuneration," the stumpage prices under the FULA include an amount that the GNS collects as a silviculture fee that is not represented in the private stumpage prices that Port Hawkesbury pays. As such, we have included this amount for silviculture fees in our benchmark prices, for both pulpwood and biomass.

The GOC argues that the inclusion of the C\$3/m³ silviculture fee in the benchmark would result in double-counting because the GNS has already established monetary credits for silviculture activities, and the delivered/roadside private biomass prices are already inclusive of any private silviculture costs incurred by the biomass stumpage buyer. This argument is unavailing. First, we are not using the delivered/roadside purchases in our benchmark, because we have actual stumpage prices from Lease Agreements that represent purchases more comparable to Crown stumpage prices, which are the prices Port Hawkesbury pays for the right to harvest standing timber. For the *Preliminary Determination*, and for the final determination, the Department used only Port Hawkesbury's leased purchases as a benchmark. Second, the Department learned at verification that the Crown stumpage prices paid by Port Hawkesbury include a silviculture fee collected by the GNS. Thus, when comparing the terms of the purchases on Crown lands to those on Leased Lands, we recognize that the Leased Lands prices do not include this silviculture fee. Therefore, as discussed above in the section "Programs Found Countervailable," it is appropriate, and consistent with 19 CFR 351.511(a)(2)(i), to include an amount for silviculture in the benchmark developed using Port Hawkesbury's private stumpage purchases on Leased Lands.

We disagree with the petitioner that the Department should include in the benchmark Port Hawkesbury's purchases of already harvested wood under Purchase Agreements. In the *Preliminary Determination*, the Department stated that it used the prices paid for stumpage harvested on leased lands for comparison to Crown stumpage purchases because "the Lease Agreements reflect the same rights and obligations that are set forth in the FULA."⁵¹⁰ The same cannot be said for Purchase Agreements, under which Port Hawkesbury purchases already-harvested wood; these purchases do not reflect the same rights and obligations.⁵¹¹ Furthermore, there is no information on the record with which the Department can derive a stumpage fee from the prices paid for wood products obtained under the Purchase Agreements, *e.g.*, information on the costs incurred in the harvest of the standing timber and its transportation, that would have to be subtracted to take the price back to the stump such that it would be appropriate for measuring the adequacy of remuneration of the Crown stumpage prices that Port Hawkesbury pays.

⁵¹⁰ See Preliminary Determination Decision Memorandum at 40; *see, also*, GQR at Government of Nova Scotia Questionnaire Response, Volume XXII, NS.

⁵¹¹ See Preliminary Determination at 40 and see Port Hawkesbury's SQR at 58 for the distinctions between Port Hawkesbury's lease obligations as compared to their purchase obligations.

Furthermore, even if complete information were on the record, the stumpage prices set forth in the Lease Agreements are more comparable to the FULA, and would still be the more appropriate benchmark.

Comment 9: Land for MTAR

The GNS' Arguments:

- The Department must measure the adequacy of remuneration in relation to prevailing market conditions, which normally include price, quality, availability, marketability, transportation or other conditions of the sale. For comparison purposes, the Department will seek information on market-determined prices for the good or service in question, stemming from actual transactions.
- With regard to land, comparability includes factors such as location, the size of the land parcels, the type of land parcels and contemporaneity.
- The Department recognized these comparability factors when it solicited information from the GNS for land transactions similar in size and location, for the period one year plus or minus the date that the GNS purchased the Port Hawkesbury land.
- In narrowing the sales identified for purposes of establishing a benchmark to the four sales that occurred in September 2012, the Department did not satisfy its standard for examining prevailing market conditions.
- In selecting only sales from September, the Department has not satisfied contemporaneity, especially because the negotiations for the sale of land to the GNS spanned a year, and the GNS approved the funds more than a month before the transaction closed.
- The Department also did not satisfy comparability on the basis of location; these four transactions occurred in only two of the nine counties in which the GNS purchased land from Port Hawkesbury and represented only 19 percent of the land purchased by the GNS from Port Hawkesbury.
- Using a benchmark that meets the Department's own standards for comparability shows that there was no benefit from the purchase by the GNS of land from Port Hawkesbury.

Port Hawkesbury Arguments:

- The Department found a benefit for the GNS purchase of land only by using an aberrational benchmark that did not reflect prevailing market conditions. The Department solicited information about private land sales in Nova Scotia consistent with its practice of creating a robust benchmark using as many data points as possible.⁵¹²
- By limiting the sales it used in its benchmark to the four sales that occurred in September 2012, the Department created an unrepresentative benchmark. This benchmark included too few transactions, in too few counties. The resulting monthly benchmark is based on

⁵¹² See, e.g., *Utility Scale Wind Towers from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 77 FR 75978 (Dec. 26, 2012) and accompanying IDM at Comment 15 (*Wind Towers from the PRC*).

the incorrect assumption that one month is sufficiently contemporaneous, and it excludes large quantities of relevant contemporaneous data.

- The use of a full year of data for benchmark purposes is common Department practice, and prior Department decisions indicate a preference by the Department to capture as much of the POI as possible when developing benchmarks.⁵¹³
- If the Department continues to find that a benchmark based on one month of data is appropriate, it should use data from private land sales in March 2012, the month in which the GNS and PWCC reached agreement on the land price. On this basis, March is more indicative of the relevant prevailing market conditions.

The Petitioner's Rebuttal Arguments:

- The Department should continue to calculate a benefit for the purchase of land for MTAR using the benchmark used in the *Preliminary Determination*, because the single most important factor in valuing land is the time period in which the land was purchased.
- The Department's longstanding practice is to use monthly prices for benchmarking purposes, and the Department has repeatedly rejected arguments to use annual benchmarks.⁵¹⁴
- Record evidence does not establish that the final price was agreed to in March 2012; indeed, the record indicates that the price was still a point of debate between the parties in March. Moreover, the breakdown in negotiations between the parties in September 2012 demonstrates that all elements of the deal remained fluid. Thus, the Department should reject the GNS' and Port Hawkesbury's arguments to use sales price data from March.
- The Department's benchmark is a reasonable estimation of private forestry land prices in Nova Scotia.

Department's Position

The Department has reexamined the benchmark for purposes of measuring whether the GNS purchased land for more than adequate remuneration. The GNS, Port Hawkesbury, and the petitioner have all identified cases in which the Department has variously expressed its preference for benchmarks based on annual or monthly data. Those cases involved the development of loan interest rate benchmarks, benchmarks for the sale of commodity products by the government for LTAR, and benchmarks for the provision of land for LTAR. The Department's preference in any particular situation is influenced by the particular good or service for which the Department is seeking a benchmark, as well as by the quality and quantity of benchmark information. The Department selects the appropriate benchmark based on the facts on the record in the particular investigation, and these facts will influence the decision as to whether to calculate a monthly or annual benchmark.

⁵¹³ See *Notice of Final Affirmative Countervailing Duty Determination: Low Enriched Uranium From France*, 66 FR 65901 (Dec. 21, 2001) and *Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 77 FR 13093 (Mar. 5, 2012).

⁵¹⁴ *CFS from Korea* and accompanying IDM at 51-52.

The Department has considerable discretion under the statute and regulations in developing benchmarks for various purposes, and it approaches this task on a case-by-case basis. For example, the petitioner cites *CFS from Korea*, in which the Department stated, “{b}ecause the price is determined on a monthly basis by market-driven forces for each company, the Department believes the most accurate calculation is on a monthly, not annual, basis.” That approach was appropriate in that case, which involved the government provision of chemical pulp that was sold under annual contracts at prices that varied by month. The government provision of chemical pulp occurred throughout the POI and in that case, the Department had information from which to choose the appropriate benchmark approach. In a case cited by Port Hawkesbury, *Wind Towers from the PRC*, the Department stated, “. . . .to derive the most robust HRS benchmark possible, we have sought to include as many data points as possible.” Again, the selection of a benchmark in each of these cases was based on the individual facts of each investigation.

For the *Preliminary Determination*, we developed a benchmark based on only the sales that occurred in the same month as the purchase of land by the GNS from Port Hawkesbury. The GNS argues that the benchmark should reflect prevailing market conditions for land, which include location, size of land parcel, contemporaneity, and land type, while the petitioner suggests that contemporaneity is important based upon finding a benchmark based on the date of sale. Based upon the comments from the interested parties, we have revised our benchmark. For this final determination, we calculated a benchmark using a simple average that includes all available land transactions during 2012, the calendar year in which the GNS made the land purchase.⁵¹⁵

We moved from a monthly average to an annual average land benchmark because the final negotiated price between Port Hawkesbury and GNS was not based solely on the prevailing market conditions in the month that the land was purchased, as can be shown by the fact that the offered price on the land changed throughout the year.⁵¹⁶ In addition, the date of the final sales contract for the land purchase between the GNS and Port Hawkesbury was not driven by the land purchase but by the date on which PWCC purchased the NPPH paper mill.⁵¹⁷ Therefore, based upon the facts on the record, the prevailing market conditions for forest land is better reflected in a benchmark calculated using all private forest land transactions in Nova Scotia during the year, instead of determining the benchmark only using the transitions that occurred in the month the sales contract was finally signed.

Comment 10 Whether the NSUARB is an Authority

The GOC’s Arguments:

- The NSUARB is an independent, quasi-judicial body established pursuant to the *Utility Review Board Act*. Its members have tenure, set procedures, and are not subject to

⁵¹⁵ See Port Hawkesbury Final Calculation Memo.

⁵¹⁶ See *e.g.*, GSQR at 79.

⁵¹⁷ See PQR at 86.

government control over decision making, and the record establishes that the NSUARB is legally, financially, and in-practice independent of the GNS.

The GNS' Arguments:

- In the *Preliminary Determination* the Department found that under the *Electricity Act*, the GNS Minister of Energy has responsibility for the general supervision and management of Nova Scotia's electricity system. This is an overstatement of the Minister of Energy's role.
- The *Electricity Act* deregulated the energy market in Nova Scotia and allows wholesale customers to purchase electricity from any competitive supplier, and suppliers must meet regulated minimums of renewable generation.⁵¹⁸ The *Public Utility Act* governs the oversight of the electricity market by the NSUARB and sets forth the legal requirements pertaining to public utilities like NSPI. This act does not address the role of the Minister of Energy on these points.
- Members of the NSUARB are not part of the GNS. In the *Preliminary Determination* the Department found that “{u}nder section 10(1) of the *Utility and Review Board Act*, each full-time member and each full-time employee of the NSUARB is deemed to be a person employed in the public service of Nova Scotia.”⁵¹⁹ This overly broad statement was contradicted through verification. The *Utility and Review Board Act* states that “{f}or all purposes of the *Public Service Superannuation Act*, each full-time member and each full-time employee of the Board is and is deemed to be a person employed in the public service of the Province and full-time service in employment of the Board is and is deemed to be public service.”⁵²⁰ The *Public Service Superannuation Act* establishes the Nova Scotia Pension Plan.⁵²¹ Therefore, section 10(1) of the *Utility and Review Board Act* merely permits NSUARB members and staff to participate in the pension plan. That, by itself, does not mean that the NSUARB is controlled by the Province. The NSUARB chair explained at verification that the “NSUARB takes no policy direction from the government,” that none of the cost associated with rate hearings are borne by the GNS, and that “Board Members are deemed civil servants only for the purposes of providing them with a pension.”⁵²²
- The Department failed to properly apply its five part test to determine that the NSUARB is an “authority” as the term is used in the statute. Under that test, the Department considers “1) the government's ownership; 2) the government's presence on the entity's board of directors; 3) the government's control over the entity's activities; 4) the entity's pursuit of governmental policies or interests; and 5) whether the entity is created by

⁵¹⁸ See GNSQR Exhibit NS-EL-3.

⁵¹⁹ See *PDM* at 30.

⁵²⁰ See GSQR Exhibit NS-EL-2 at section 10(1) {italics added}.

⁵²¹ See GSQR Exhibit NS-SUPP1-41A at section 46.

⁵²² See GNS Verification Report at 18.

statute.”⁵²³ The Department has stated that it analyzes these facts together, taking into account the facts and circumstances of the case.⁵²⁴

- The record demonstrates that the NSUARB satisfies only one of these criteria. The NSUARB is not owned by the government like the entity at issue in *Kitchen Racks China*.⁵²⁵ Further, there is no GNS presence on the NSUARB; rather, its members are appointed for life (except on bad behavior), on merit, through a complex committee review process following NSUARB objective criteria. This process mirrors that for appointments and retention for the Supreme Court Nova Scotia. In addition, GNS policymaking cannot control NSUARB activities; indeed, the NSUARB acts independently from GNS policies or interests, and the NSUARB has passed decisions that differ from GNS policy despite the GNS’s appearance before NSUARB hearings. The NSUARB’s mandate covers many other things. Its orders can be appealed to the Nova Scotia Court of Appeals, and it must act under applicable legal principles or risk reversal.
- Whether the entity is created by statute is the only factor satisfied here. In the past the Department has recognized that even if certain factors are satisfied, a negative determination may still be warranted. Here, the GNS cannot act through the NSUARB anymore than the Department can act through the CIT.
- NSPI and Port Hawkesbury agreed as private parties to set the electricity rate. It was the NSUARB’s role as arbiter in a contested hearing that established the proposed electricity rate. Under the LRT framework, the NSUARB must examine “whether, on a balance of probabilities, the other customers of NSPI would be better off by having {the extra-large industrial ratepayer} remain on the system (on the load retention rate) than those customers would be if {the extra-large industrial ratepayer} stopped taking service.”⁵²⁶ Even before receiving Port Hawkesbury’s application, the NSUARB announced that it would not and could not approve a rate where other customers were worse off.
- NSUARB’s role in this process is similar to that of the Supreme Court of Nova Scotia’s when it examined the plan of arrangement entered into between the creditors, NPPH and PWCC.

Port Hawkesbury’s Arguments:

- The Department ignored the evidence that the NSUARB was and is an independent, quasi-judicial regulatory body, does not perform a “government subsidy function” under U.S. countervailing duty law, and is not an “authority” within the meaning of the law. Therefore, it could not provide a financial contribution within the meaning of the Act.

⁵²³ See *Circular Welded Austenitic Stainless Pressure Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 4936 (Jan. 28, 2009) and accompanying Issues and Decision Memorandum at Comment V.A.1 (*Pressure Pipe China*).

⁵²⁴ See *CFS from Korea* and accompanying IDM at Comment 11.

⁵²⁵ See *Certain Kitchen Shelving and Racks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 37012 (July 27, 2009) and accompanying Issues and Decision Memorandum at Comment 4 (*Kitchen Racks China*).

⁵²⁶ See GQR Exhibit NS-EL-21 at para. 283.

- Under Canadian law, the principle of institutional independence consists of three core components: security of tenure, financial security, and administrative control.⁵²⁷ For administrative tribunals, such as the NSUARB, the degree of independence is determined by enabling statute and the degree of independence that the legislature intended.⁵²⁸ The Nova Scotia Court of Appeal has specifically confirmed that “The {NSUARB} is an independent quasi-judicial body which has both regulatory and adjudicative functions.”⁵²⁹ The United States has a similar principle.⁵³⁰
- Further, this contention was supported by the Department’s own factual information that it placed on record of the investigation.⁵³¹ NSUARB members have security of tenure, serving to the age of 70 on good behavior, this fact ensures NSUARB independence and the selection process is designed to prevent political influence (and is stronger than the short duration public utility commissionerships in certain jurisdictions in the United States). The NSUARB has financial security because it is funded by the public utilities. The NSUARB has administrative control because it has exclusive jurisdiction,⁵³² it has the powers, privileges, and immunities of a Nova Scotia Supreme Court Judge,⁵³³ its findings upon questions of facts within its jurisdiction are binding and conclusive,⁵³⁴ and appeals of its decision are restricted to questions of law and jurisdiction.⁵³⁵
- This structure exists to ensure that in Nova Scotia an independent economic regulator makes electricity pricing decision in the best interests of NSPI’s ratepayers based on fundamental economic principles and statute in the *Public Utilities Act*, including section 109(1) that prohibits public utilities from providing undue or unreasonable preference or advantage to individual firms and section 67(1) requiring the equality of tolls, rates and charges for like service to like customers.

⁵²⁷ See Pre-Preliminary Electricity Comments Appendix 3 (Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52 at para. 12).

⁵²⁸ *Id.* at para. 20.

⁵²⁹ See Pre-Preliminary Electricity Comments Appendix 4 (Antigonish (County) v. Antigonish (Town), 2006 NSCA 29 at para. 18); *see, also*, GNS Verification Report at p. 88. (“the NSUARB’s role as regulator is as an independent statutory tribunal which has the power to regulate directly, unlike other public utility boards in Canada that merely have the power to recommend decisions to the government.”)

⁵³⁰ See *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) (finding that the length and certainty of tenure was vital to Congress’ intention of creating a commission independent of the government).

⁵³¹ See, e.g., Memorandum to the File, entitled, “Placement of Documents on the Record Relating to Public Utilities,” (July 2, 2015) at Attachment 18: “.Nova Scotia – US Comparator: Standard-Making and Enforcement Functions from Nova Scotia Utility and Review Board,” dated October 9, 2014 at 1 (the NSUARB is “...an independent, quasi-judicial body which has both regulatory and adjudicative jurisdiction flowing from the Utility and Review Board Act.”) and at Attachment 8: “Creating Competition & Mastering Markets, New Entrants, Monopolists and Regulators in Transforming Public Utilities Across the Atlantic” at 1 (describing two different variations of public utility regulation, one of which is “public regulation,” the model in Nova Scotia. Concerning this model, that document describes “...administrative agencies that enjoy a considerable degree of independence from the industry and government in regulating a particular market” and states that “{t}he role of such a regulator is restricted to that of referee in charge of general oversight and legal enforcement, reflecting a more judicial relationship between the state and the private sector.”)

⁵³² UARB Act section 22(1).

⁵³³ UARB Act section 16.

⁵³⁴ UARB Act section 26.

⁵³⁵ UARB Act section 30(1).

- The GNS acts only as an intervenor before the NSUARB, and the NSUARB has sided against the GNS on rate setting issues (e.g., the NSUARB decided against two GNS positions on Fuel Adjustment Mechanism issues⁵³⁶).

The Petitioner's Case Brief:

- The Department reasonably found that the GNS, via the NSUARB, entrusted or directed NSPI to provide electricity for LTAR. The Department could also reasonably find that, as an authority, the NSUARB provides a financial contribution to PHP by making the subsidized rate available to Port Hawkesbury.

The GOC's Rebuttal:

- The NSAURB is independent of the GNS in both law and fact. The GNS does not exercise control over the NSAURB's activities and has no legal ability to instruct NSUARB with respect to its decisions.
- Neither NSPI nor the NSUARB are government authorities under the countervailing duty laws. Because there is no action by any "authority," there can be no finding that a financial contribution has been provided.
- NSPI's sale of electricity is dissimilar to the provision of stumpage in *Softwood Lumber Canada 2002*⁵³⁷ and *Free Sheet Paper Indonesia*.⁵³⁸ In those cases the Department explained that its definition of "providing" a good or service by "making it available" relies upon a factual record where a government acted to grant a right of access to harvest timber on government owned forest land through the issuance of licenses. The Department found that the pre-requisite to a government "making the good available" was government-ownership of the land. Here, as opposed to other Canadian provinces, there is no government ownership of the good, electricity, because NSPI owns the electrical system. Also, the NSUARB's action approving NSPI's proposed customer electricity rates does not grant a license for access to government owned property; rather, NSPI, a private entity, retains control and access to the electricity. Therefore the Department's precedent defining "providing" as "making available" is inapplicable in this case.

⁵³⁶ See GQR Exhibit NS-EL-15 and discussion in Pre-Preliminary Electricity Comments at 8-9. See, also, GSQR Exhibit NS-SUPPI-38A at paras. 30, 81-84.

⁵³⁷ See *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 15,545 (Apr. 2, 2002) and accompanying Issues and Decision Memorandum at I (Provincial Stumpage Programs Determined to Confer Subsidies) (*Softwood Lumber Canada 2002*).

⁵³⁸ See *Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (Oct. 25, 2007) and accompanying Issues and Decision Memorandum at Comment 9 (*Free Sheet Paper Indonesia*).

The GNS' Rebuttal:

- Neither NSPI nor the NSUARB are government authorities under the countervailing duty laws. Because there is no action by any “authority,” there can be no finding that a financial contribution has been provided.
- There is no government ownership of the NSUARB and its electricity rate making is funded by the electric utilities to cover the cost of regulation.
- The GNS is not represented on the NSUARB and GNS policy-making cannot and does not control NSUARB activities. The NSUARB acts independent from, and on occasion, contrary to GNS policies or interests.

Port Hawkesbury's Rebuttal:

- Petitioner is mistaken that an entrustment or direction determination is not required under *Softwood Lumber IV*. First, in *Softwood Lumber IV*, the Crown owned the trees; here, the GNS does not own the electricity. Second, there are no licensing fees for electricity in Nova Scotia. NSUARB action is much more akin to the Federal Trade Commission's approval of a merger between two private companies in the United States.

The Petitioner's Rebuttal:

- Respondents' contention that the NSUARB is not an authority is inaccurate. The agency possesses all the attributes of a public body as defined by the WTO Appellate Body. Specifically, the WTO has stated that a public body is “an entity that possesses, exercises or is vested with government authority,”⁵³⁹ and that a government “enjoys effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct through the exercise of lawful authority.”⁵⁴⁰
- The NSUARB is an authority under the Act. It was established by the *Utility and Review Board Act*⁵⁴¹ and has both regulatory and adjudicative functions,⁵⁴² and operates under the GNS Department of Economic and Rural Development and Tourism.⁵⁴³ The NSUARB has the power “to require and compel” a utility “to comply with the provisions of this Act and any municipal ordinance or regulation,”⁵⁴⁴ and is the regulator responsible for the “setting of prices.”⁵⁴⁵ The NSUARB has been described as “playing a catalytic

⁵³⁹ See Report of the Appellate Body, *United States- Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R (December 8, 2014), at para. 4.29.

⁵⁴⁰ See Reports of the Panels, *Canada- Certain Measures Affecting the Renewable Energy Generation Sector; Canada- Measures Relating to the Feed-In Tariff Program*, WT/DS412/R and WT/DS426/R (December 19, 2012) at para. 7.233

⁵⁴¹ See *PHP Electricity Pre-Preliminary Comments* at 5.

⁵⁴² *Id. Comments* at 11.

⁵⁴³ See *Petitioner's Pre-Preliminary Comments* Exhibit 13, entitled, “Nova Scotia- US Comparator: Standard-Making and Enforcement Functions,” *NSUARB* (October 9, 2014) at 1.

⁵⁴⁴ See PQR Exhibit 24-1 at 13.

⁵⁴⁵ See *PHP Electricity Pre-Preliminary Comments* at 7-8, quoting *Petroleum Products Pricing Act (Re)*, 2011NUSARB164 (Appendix 5).

role in prompting necessary policy development” and is a “super-regulator” with responsibility to regulate many things.⁵⁴⁶ The NSUARB also has broad statutory powers to regulate NSPI.⁵⁴⁷

- Port Hawkesbury’s reliance on *Humphrey’s Executor v. United States* and the U.S. Supreme Court’s consideration of the independence of the Federal Trade Commission are inapposite. Utility regulatory commissions may occupy a “special” place, but they are nevertheless part of the landscape of governmental agencies. The fact that different government agencies have different mandates and advocate before each other does not mean that they are not part of the government.⁵⁴⁸
- The NSUARB had a critical role and approved the LRR pricing “effective upon satisfying the conditions of the {NSUARB} decision.”⁵⁴⁹ The NSUARB actively executed its statutory role in establishing all aspects of the LRR. The NSUARB found NSPI’s neutral stance not acceptable and directed NSPI to actively participate in the rate setting proceedings decided November 29, 2011, concerning economic distress provisions for the LRT, an LRR for NPPH and Bowater, and the 2012 GRA.⁵⁵⁰ Although later mooted by changes to the LRR, the NSUARB required a remedy concerning the environmental mental conditions at the mill in its September 12, 2012, Order.⁵⁵¹

Department’s Position:

In our *Preliminary Determination*, we found that the GNS, through the NSUARB, entrusted or directed NSPI to provide a electricity to Port Hawkesbury at a reduced rate. In this final determination, we have modified our analysis to find that the GNS *directly* entrusted or directed NSPI to provide electricity pursuant to the *Public Utilities Act*. The provision of electricity falls within the definition of a financial contribution under section 771(5)(D)(iii) of the Act because the provision of electricity is the provision of a good or service, other than general infrastructure. To analyze whether NSPI has been entrusted or directed to provide a financial contribution to Port Hawkesbury within the meaning of section 771(5)(D)(iii) of the Act, we first review the laws and regulations that govern the provision of electricity within Nova Scotia. As is clear from the *Public Utilities Act*, the GNS, acting both through its laws and the NSUARB, controls and directs the methodology that NSPI must use in rate proposals, and any rate that is charged by NSPI must be approved by the NSUARB. More importantly, with respect to the entrustment or direction of NSPI to provide a financial contribution under section

⁵⁴⁶ See *Petitioner's Pre-Preliminary Comments* Exhibit 5 at 2-3.

⁵⁴⁷ See *NSQR* Exhibit SUPP1-38A, 2007 *NSUARB* 174 (December 10, 2007) at 27 (paras. 69 and 70)). 38A), provided as Exhibit 4 to, discussing key provisions of the Public Utilities Act.

⁵⁴⁸ See *Petitioner's Pre-Preliminary Comments* Exhibit 15 entitled, "Agency transformation and state utility commissions," *Utilities Policy* (Aug. 13, 2006) at 8 (They are imbued with "broad authority" and sometimes have been referred to as "the fourth branch of government" given their nominal independence in the exercise of their regulatory functions.)

⁵⁴⁹ See PQR PHP, Exhibit 20-7, NSUARB Order (Sept. 12, 2012), attached to Sixteenth Report of the Monitor (Sept.25, 2012) at Appendix B, at 2 (para. 1); see, also, *id.* at Appendix A to Appendix B at 1 (“The term of the arrangements contemplated by this Mechanism {i.e., the Port Hawkesbury LRR,} shall be from approval by the{NSUARB} to December 31, 2019”).

⁵⁵⁰ See PQR Exhibit 23-6 at 78 (para. 218).

⁵⁵¹ See PQR Exhibit 20-7 (para. 8).

771(5)(B)(iii) of the Act, NSPI is required by law to provide electricity to customers who request it anywhere in Nova Scotia.⁵⁵² That is, NSPI is obligated under the laws of the Province of Nova Scotia to serve any resident or company within the Province and to provide electricity to that customer.⁵⁵³ Therefore, the provision of electricity by NSPI to Port Hawkesbury satisfies the standard of entrustment or direction under section 771(5)(B)(iii) of the Act. As a result we have determined that Port Hawkesbury received a financial contribution in the form of the provision of a good or service under section 771(5)(D)(iii) of the Act. At no point in this investigation have respondents argued that the GNS, which enacted the laws governing the provision of electricity by NSPI, is not an “authority” under section 771(5)(B) of the Act. We now turn to respondents’ arguments regarding whether NSUARB is an “authority.” Under section 771(5)(B) of the Act, an “authority” means a government of a country or any public entity within the territory of the country. When Congress enacted the countervailing duty law it did not provide a definition of “government” within section 771(5)(B) of the Act. Thus, the discretion to define “government” lies with the Department.⁵⁵⁴ Black’s Law Dictionary has a number of definitions for the term “government,” including:

- The regulation, restraint, supervision, or control which is exercised upon the individual members of an organized jural society by those invested with the supreme political authority, for the good and welfare of the body politic; or the act of exercising supreme political power or control.
- The system of polity in a state; that form of fundamental rules and principles by which a nation or state is governed, or by which individual members of a body politic are to regulate their social actions.
- The sovereign or supreme power in a state or nation.
- The machinery by which the sovereign power in a state expresses its will and exercises its functions; or the framework of political institutions, departments, and offices, by means of which the executive, judicial, legislative, and administrative business of the state is carried on.⁵⁵⁵

“Government” can therefore be the “act” of exercising supreme control over citizens and resources, a “system” of governance in the form of rules and principles, the moniker for the source of authority in a nation, as well as the apparatus itself through which that authority is expressed.⁵⁵⁶

⁵⁵² See, e.g., section 52 of the *Public Utilities Act*; “Regulating Electric Utilities – Discussion Paper Phase One Governance Study- Liberalization and Performance –Based from the Province of Nova Scotia at 3 at Attachment 30 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.

⁵⁵³ *Id.* at 6.

⁵⁵⁴ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

⁵⁵⁵ Black’s Law Dictionary, 2nd Edition (1910).

⁵⁵⁶ Other definitions of “government” support this analysis. For example, the New Shorter Oxford English Dictionary defines government to include “the action of governing; continuous exercise of authority over subjects; authoritative direction or regulation; control; chiefly spec. the action of governing the affairs of a State; political rule and administration.” New Shorter Oxford English Dictionary, at 1123 (1993). This definition also comports with the statement of the WTO Appellate Body that “the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority.” *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*,

The NSUARB fulfills various definitions of the term “government.” It is a body established by law to perform a specific regulatory function of the state in the public interest. Regulation of a market or a monopoly is a government function and, indeed, governments create antitrust laws in order to place legal sanctions on private parties that attempt to manipulate the market or create a monopoly. As such, the NSUARB is an apparatus through which the authority of the GNS is expressed. Accordingly, the NSUARB falls under the definition of “government” pursuant to section 771(5)(B) of the Act.

Respondents themselves concede that the NSUARB is a “quasi-judicial regulatory” body and cite to a decision from the Nova Scotia Court of Appeals in which the Court confirmed that “{t}he {NSUARB} is an independent quasi-judicial body which has both regulatory and adjudicative functions.⁵⁵⁷” Regulatory and adjudicative functions are both activities and functions of a government. Respondents even acknowledge that the NSUARB’s role in reviewing and approving electricity tariffs, including the LRR approved for Port Hawkesbury, is similar to the role of the Supreme Court of Nova Scotia in overseeing the CCAA. They further state that NSUARB has the power, privileges and immunities of a Nova Scotia Supreme Court Judge and that its findings upon questions of fact within its jurisdiction are binding and conclusive. Thus, respondents appear to concede that the NSUARB is a governmental body. Respondents’ basic premise is that the NSUARB is not an authority because it is an independent body. There is no reason that governmental bodies cannot be independent, however; the legislative, executive, and particularly the judicial branches that exist in both the United States and Canada operate largely independent of each other but are still undoubtedly part of the government.⁵⁵⁸

The NSUARB was created by the legislative branch of the Nova Scotia government in 1992 with the *Utility and Review Board Act*, and its governmental regulatory authority over public utilities operating in Nova Scotia is also set forth by the legislative branch of the Nova Scotia government in the *Public Utilities Act*. We recognize that the NSUARB, as a “quasi-judicial body” and “administrative agency,” may make decisions that are at odds with the policies of elected government officials in both the legislative and executive branches of the Nova Scotia government; however, that independence is a common approach used by policymakers when delegating regulatory authority to government agencies. Thus, while we recognize the NSUARB’s relative independence from both the legislative and executive branches of the Nova Scotia government as outlined by the respondents, the independence conferred on it by law does not mean that the NSUARB is not a government body.

WT/DS379/AB/R, at para. 290.

⁵⁵⁷ See Pre-Preliminary Electricity Comments Appendix 4 (Antigonish (County) v. Antigonish (Town), 2006 NSCA 29 at para. 18); see, also, GNS Verification Report at p. 88. (“the NSUARB’s role as regulator is as an independent statutory tribunal which has the power to regulate directly, unlike other public utility boards in Canada that merely have the power to recommend decisions to the government.”).

⁵⁵⁸ See, e.g., *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935) (discussing the independence of the FTC as a quasi-legislative and quasi-judicial government body and stating, “The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question.”).

Respondents argue that the *Public Service Superannuation Act* establishes the Nova Scotia Pension Plan.⁵⁵⁹ Therefore, section 10(1) of the Utility and Review Board Act merely permits NSUARB members and staff to participate in the pension plan. That, by itself, does not mean that the NSUARB is controlled by the Province. We have already explained why, under the definition of “government,” the NSUARB is a government body. That determination does not rest upon the mere fact that members and employees of the NSUARB are deemed to eligible for a government pension or that individuals that receive a government pension are “controlled by the Province.”

Respondents also argue that the Department cannot find an entity to be an authority without conducting the “five-factor test” referenced in *Pressure Pipe China* and *CFS from Paper Korea*. Respondents’ argument with respect to this point represents a misunderstanding of the statute, the “five-factor test,” and case precedent. The “five-factor test” had its beginnings in *Dutch Flowers* where the Department was analyzing whether a natural gas company with partial government ownership was a public entity.⁵⁶⁰ The Department used the factors that became the “five-factor test” to determine that the provision of nature gas by that company was the provision of natural gas by the government. The Department used the “five-factor test” in subsequent cases, including *Pressure Pipe China*, to determine whether a state-owned enterprise was a public entity.

In this final determination, however, we have determined that the NSUARB is an “authority” because it is part of the government, not a public entity. The “five-factor test” is not used to determine whether an entity is a government body; therefore it is irrelevant in our determination that the NSUARB is an “authority” under the Act.

Finally, for purposes of this investigation, we have analyzed the provision of electricity to Port Hawkesbury as entrustment or direction. Therefore, for purpose of this final determination we have not applied the “five-factor test” or any other “public body test” to NSPI and have treated NSPI as a private entity.

Comment 11: Whether the Government Entrusted or Directed NSPI to Provide a Financial Contribution

The GOC’s Arguments:

- Based on the statute for financial contribution and the Department’s two part test for entrustment and direction, the Department cannot find entrustment or direction.⁵⁶¹

⁵⁵⁹ See GSQR Exhibit NS-SUPP1-41A at section 46.

⁵⁶⁰ See *Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers From the Netherlands*, 52 FR 3301, 3302-03 (February 3, 1987) (*Dutch Flowers*).

⁵⁶¹ See sections 771(5)(D) and 771(5)(B)(iii) of the Act, *DRAMS from Korea* and accompanying Issues and Decision Memorandum at comment 46-47, See *CFS from Korea; Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 75 FR 16428 (Apr. 1, 2010) and the accompanying issues and decision memorandum at comment 3. (*PRCBs Vietnam*); *DRAMS Korea*; and, *Certain Steel Nails from the Sultanate of Oman: Final Negative Countervailing Duty Determination*, 80 FR 28958 (May 20, 2015) and the accompanying issues and decision memorandum at comment 8 (*Nails Oman*).

- The WTO Appellate Body has made clear that entrustment or direction cannot be a by-product of government regulation.⁵⁶² The NSUARB’s involvement in the transactions between PWCC and NSPI was not even a by-product because it was limited exclusively to approving the rate structure negotiated between PWCC and NSPI.
- The Department’s practice in *Pipes and Tubes from Turkey* confirms that regulatory approval of a transaction by private parties is not government entrustment or direction because there must be substantial circumstantial evidence and more than mere government presence.⁵⁶³
- Similar to regulators of electricity in the United States, the NSUARB regulates “public utilities” in the province, pursuant to the *Public Utilities Act*. Therefore, countervailing the provision of electricity by NSPI on the basis that the NSUARB, a regulatory body, approved the rate structure would have dire consequences for all regulatory bodies in the United States and would go far beyond the scope of any previous finding by the Department.
- PWCC and NSPI are private entities that agreed to the LRR and petitioned the NSUARB for approval.
- NSUARB’s involvement in the deal was limited to approving the removal of a condition requested by the NSPI that PWCC seek an Advanced Tax Ruling from Revenue Canada and its approval on September 27, 2012 of a new price arrangement between NSPI and PWCC.⁵⁶⁴
- There is no record evidence that the GNS or the NSUARB interfered with NSPI’s negotiations with PWCC or that the GNS or NSUARB induced or coerced the NSPI to negotiate a rate with PWCC that did not reflect market realities.

The GNS’ Arguments:

- In the *Preliminary Determination*, the Department ignored three fundamental principles of the electricity market in Nova Scotia: 1) NSPI is a wholly owned publicly traded corporation that sets rates through long established procedures and settlement agreements with stakeholders; 2) the independent quasi-judicial NSUARB approves NSPI’s proposed rates through a contested argument process; and, 3) the GNS’s role before the NSUARB is limited to that of any interested party.
- The Department erred when it stated that the NSUARB negotiated with PWCC and NSPI to set the LRR.⁵⁶⁵
- NSPI submitted a letter that was reviewed by the Department verifiers, who were able to ask follow up questions regarding the contents of the NSPI letter when meeting with the

⁵⁶² Appellate Body Report, *US – DRAMS*, WT/DS353AB/R.

⁵⁶³ See *Pipes and Tubes from Turkey*

⁵⁶⁴ See GNS Verification Report at 16, 18, and NS Verification Exh. 28 at 20.

⁵⁶⁵ Port Hawkesbury has similar arguments about inconsistencies in the *Preliminary Determination* with respect to NSUARB involvement in negotiation the terms of the Port Hawkesbury LRR and confusion between the Port Hawkesbury LRR and the LRT; its arguments are included in this section in the interest of brevity. All of Port Hawkesbury’s specific points are identified directly.

NSUARB on this matter, contrary to the explanation provided by the verifiers in footnote 10 of the Verification Report. The Department did not request a meeting with NSPI.⁵⁶⁶

- Verification discussions cleared up any error: the verification report shows that the Department understands that “there are two separate LRRs”—one for Bowater Mersey in the 2013/2014 GRA, and one for Port Hawkesbury handled under a separate rate setting process before the NSUARB.⁵⁶⁷ Accordingly, no increases in prices for the Port Hawkesbury LRR are reflected in the 2013/2014 GRA.
- The LRT, the overarching legal framework under which a LRR may be approved, was established in 2000 and was designed to retain certain large customers who in the absence of the rate and the availability of other sources of energy supply would stop purchasing electricity from NSPI to the detriment of other rate payers.⁵⁶⁸ In 2011, an application approved by the NSUARB expanded the LRT to make it available to companies in economic distress (submitted by NPPH and Bowater on June 22 and approved by an NSUARB decision on November 29).⁵⁶⁹ The LRT was not affected by PWCC’s April 27, 2012 application for an LRR under the November 29, 2011, LRT framework.⁵⁷⁰
- The *Preliminary Determination* incorrectly stated that the NSUARB approved the NSPI/PWCC application for an LRR on April 27, 2012; on this date, the application was filed.
- The *Preliminary Determination* incorrectly stated that the NSUARB made the order conditional on a favorable Advance Tax Ruling (ATR) from Revenue Canada, implying that it was the NSUARB that imposed the condition; in fact, it was NSPI that included the condition in its April 27, 2012 LRR application.
- PWCC’s application for an LRR does not impact the existing Bowater load retention rate. The *Preliminary Determination* incorrectly stated that NSPI’s 2013/2014 GRA included increases to the LRR prices for 2013 and 2014. The verification report correctly stated that the 2013/2014 GRA could not refer to the Port Hawkesbury LRR at issue because NPPH had ceased operations at the time.⁵⁷¹ The 2013/2014 GRA explicitly excluded NPPH and, accordingly, it could not include price increases for the Port Hawkesbury LRR.⁵⁷²
- The Department properly concluded that NSPI is not a government or public entity – it is a private entity and, therefore, NSPI is not an “authority” and its provision of electricity to Port Hawkesbury is not countervailable.⁵⁷³ There is no record evidence that any

⁵⁶⁶ The contents of NSPI’s letter are business proprietary information.

⁵⁶⁷ See Government of Nova Scotia Verification Report at 15-16.

⁵⁶⁸ See GNSQR Exhibit NS-EL-20 for the NSUARB May 24, 2000 decision.

⁵⁶⁹ See GNSQR Exhibit NS-EL-21 for the NSUARB November 29, 2011 decision.

⁵⁷⁰ See GNSQR Exhibit NS-EL-17 at DE-03/DE-04 at 35.

⁵⁷¹ See Government of Nova Scotia Verification Report at 15-16.

⁵⁷² See GNSQR Exhibit NS-EL-17 at DE-03/DE-04 at 35 (“The main cause of the decline {in net energy demand} is our assumption, for the purpose of our load forecast, that the paper mill in Port Hawkesbury will not operate in {2013 and 2014}.”).

⁵⁷³ See *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 FR 50410 (Oct. 3, 2001) (*Flat Products from Thailand*), *Welded Line Pipe from the Republic of Korea: Preliminary Negative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination*, 80 FR 14907 (Mar. 20 2015) (*Line Pipe Korea*), *Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Trinidad and Tobago*, 62 FR 55003 (Oct. 22, 1997) (*Steel Wire Rod from*

“authority” entrusted or directed NSPI to provide electricity to Port Hawkesbury. NSPI entered into agreement with Port Hawkesbury as a self-interested, private entity. Under the LRR, Port Hawkesbury makes payments to NSPI to cover the incremental costs to supply the electricity and a contribution to the overall fixed costs of supplying electricity to all other ratepayers in Nova Scotia.

- In the *Preliminary Determination*, the Department found entrustment or direction by the GNS without first applying its two-part test. Reviewing this standard, first established in *DRAMS from Korea*, the CIT explained that “Commerce must consider counterevidence that the transactions making up that alleged program {were} formulated by an independent commercial actor (not a government) and motivated by commercial considerations.”⁵⁷⁴ The Department has applied this “totality of evidence” approach in recent proceedings as evidenced in *Retail Carrier Bags from Vietnam*⁵⁷⁵ and *Nails Oman*.⁵⁷⁶
- There is nothing on the record in this investigation that would satisfy the Department’s two-part test. With regard to step one, there is no evidence that the GNS compelled the NSPI to provide PWCC with electricity or the specific rate at which it was provided. Although the *Preliminary Determination* cited to evidence of the GNS policy goal of the completion of the CCAA with the mill being sold as a going concern, this does not satisfy step one. The Department conflates the GNS’ hot idle funding with an entirely different program, approval of a preferential electricity rate, that is unrelated to the CCAA proceeding.
- The Department cites to the Monitor’s report as evidence of influence, where the Monitor identified a bidder in PWCC that would purchase the mill as a going concern, but needed more time to complete the transaction. The GNS provided funds to maintain the *status quo* pending resolution of the CCAA. There is no evidence that hot idle funds were contingent on a successful agreement being reached between NSPI and PWCC, therefore there is nothing on the record to establish that any GNS policy influenced NSPI or the NSUARB.
- Step two would require the Department to establish a pattern of practice by the GNS with respect to NSPI’s decision-making. However, record evidence establishes that the GNS, rarely, if at all, interacted with the PWCC and NSPI in their negotiations. No pattern of practice existed.
- In *DRAMS from Korea* the Department found evidence of “(1) the Korean government’s propensity to subsidize companies like Hynix; (2) the Korean government’s proclivity for influencing or coercing the actions of financial institutions to achieve its policy goals; (3) the Korean government’s opportunity or capacity to specifically influence or coerce the financial institutions involved in Hynix’s restructuring; and (4) direct commands by the

Trinidad and Tobago), *Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Final Affirmative Countervailing Duty Determination*, 77 FR. 64473 (Oct. 22, 2012) (*Pipe from Oman*)

⁵⁷⁴ See *Hynix Semiconductor Inv. v. United States*, 391 F. Supp. 2d 1337, 1343 (CIT 2005) (*Hynix*).

⁵⁷⁵ See *Polyethylene Retail Carrier Bags from the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination*, 75 FR 16428 (April 1, 2010) and accompanying IDM at Comment 8. (*Retail Carrier Bags from Korea*).

⁵⁷⁶ See *Nails Oman*, 80 FR 28958 and accompanying IDM at Comment 3.

Korean government to some of these institutions.”⁵⁷⁷ The record in this investigation is to the contrary; it shows that the GNS had no ability to influence or coerce NSPI.

- Applying the Court’s determination in *Hynix* to examine counterevidence, it is also clear that the GNS did not entrust or direct NSPI to provide electricity to Port Hawkesbury.
- The fact that public utilities like NSPI are required to act within the law in Nova Scotia is not unusual. All private companies in the United States are similarly required to act lawfully. Regulation alone cannot form the basis for entrustment or direction. All record evidence establishes that NSPI acted as an independent and reasonable commercial actor. Having Port Hawkesbury purchase electricity from it and contribute to the overall fixed costs of a system that would have otherwise gone uncollected proves that NSPI was independently motivated by commercial concerns.

Port Hawkesbury’s Arguments:

- The fact that the NSUARB was not involved in the negotiation to establish the terms of the LRR is the evidence cited by the Department to support its assertion that the NSUARB was involved in setting the terms of the Port Hawkesbury LRR prior to the application submitted by NSPI and PWCC (on April 27, 2012), is incorrect and therefore the Department’s position (that the NSUARB was involved in the negotiation to set the terms of the Port Hawkesbury LRR) cannot be sustained in the final determination. The record demonstrates that the following negotiations occurred:
 - In Q1 2012, representatives of PWCC and NSPI met to negotiate the electricity price.⁵⁷⁸
 - On April 27, 2012, PWCC and NSPI applied for approval of the LRR for their partnership.
 - NSPI requested PWCC seek an ATR, and made it a condition of the deal.⁵⁷⁹
 - When the ATR was denied, NSPI withdrew.⁵⁸⁰
 - NSPI and PWCC engaged in several days of negotiations resulting in a new price arrangement that was approved by the NSUARB September 27, 2012.⁵⁸¹
 - Neither the GNS nor the NSUARB interfered with these negotiations to compel a desired outcome.⁵⁸² The verification report’s description is accurate: there is an adversarial hearing process and the GNS participates in the NSUARB process as one of many intervenors.
- LRTs are a common, well-established, market-based form of electricity tariff that have been widely used throughout North America by electricity suppliers, both public and private, for many decades.⁵⁸³ Nova Scotia has had an LRT since 2000; in its November 29, 2011, decision amending the LRT, the NSUARB specifically found that an LRT

⁵⁷⁷ See *Hynix*, 391 F. Supp. 2d at 1349.

⁵⁷⁸ See PHPSQR at Exhibit 42-1.

⁵⁷⁹ See PHPQR at Exhibit 23-7 at para. 6.

⁵⁸⁰ See PHPQR at Exhibit 23-9.

⁵⁸¹ See PHPQR at Exhibit 23-11.

⁵⁸² See PHP Pre-Preliminary Comments, “Benchmark Information and Pre-Preliminary Comments – Electricity,” (June 29, 2015) at 17.

⁵⁸³ See *id.* at 17 and Appendix 1.

based on economic distress is grounded on long established and well-accepted ratemaking principles applied in various jurisdictions, including Nova Scotia. Such rates are in the public interest and provide for rates that are reasonable and appropriate for all customers.⁵⁸⁴ In making the 2000 decision, the NSUARB cited examples in Texas and Indiana that supported giving LRT-type rates to large volume customers that could cogenerate.⁵⁸⁵ A witness in the hearing identified 11 utilities in North America that offered LRT-type rates related to customer's economic hardship.⁵⁸⁶ Port Hawkesbury was provided an LRR under the already approved LRT as a result of an arm's-length negotiation between PWCC and NSPI.

- The 2013/2014 GRA and the Port Hawkesbury LRR application were handled in separate NSUARB proceedings. The application for the Port Hawkesbury LRR was submitted 11 days before the 2013/2014 GRA. The latter stated that the Port Hawkesbury LRR application was based on the mill taking incremental energy so that no customer was at risk to pay any of the mill's load. The November 29, 2011, NSUARB decision stated that the new owner of the mill should apply for an LRR, which would have been appropriate for NPPH.⁵⁸⁷
- Port Hawkesbury's LRR requires the acceptance of the full risk of hourly incremental fuel costs unlike the November 29, 2011, decision for Bowater based on NSPI's year-by-year estimate of incremental avoided costs.
- There is no evidence to support the *Preliminary Determination* that the negotiation and approval of the LRR was one of the critical factors to ensure the purchase of NPPH by PWCC as a going concern, a policy goal of the GNS after NPPH entered CCAA protection. There is no evidence suggesting that the GNS directed NSPI to provide electricity to Port Hawkesbury at specific rates. The LRR was negotiated between two private corporations pursuant to the terms of a previously approved tariff without input or involvement from the NSUARB.

The Petitioner's Arguments:

- Port Hawkesbury received a countervailable subsidy through the provision of electricity at LTAR. Providing subsidized electricity was essential to the sale and re-opening of the Port Hawkesbury mill, as it was well known that "low cost electricity was a pre-condition for the sale"⁵⁸⁸ Record information shows that re-opening of the mill was contingent upon the providing of electricity at lower rates.
- The *Preliminary Determination* was correct in finding that the GNS entrusted or directed NSPI to provide electricity to Port Hawkesbury under the terms of and conditions of the LRR.

⁵⁸⁴ PHQR Exhibit 23-6, paras. 171-172.

⁵⁸⁵ *Id.* at 14 and *see* PHQR Exhibit 23-5 at para. 15 (citing *Re Northern Indiana Public Service Company*, (1988), 89 PUR 4th 385), respectively.

⁵⁸⁶ PHQR Exhibit 23-6 at para. 117.

⁵⁸⁷ *See* PHQR Exhibit 23-6 at para. 224.

⁵⁸⁸ *See* Petitioner's PHP Deficiency Comments at Exhibit 10 ("Nova Scotia court approves sales of paper mill for \$33 million, UARB approves discount power rate," *CBC News* (Sept. 27, 2012)).

- The NSUARB’s decisions are “purposeful, targeted compulsion by the government to the private entity at issue”⁵⁸⁹ and in turn, NSPI is entrusted to implement these decisions. The government in Canada has previously been found to exercise control over commercial utility companies.⁵⁹⁰
- The Department could also reasonably find that the NSUARB provides a financial contribution to Port Hawkesbury with respect to electricity for LTAR, because the NSUARB is an authority or agency within the GNS. In *Softwood Lumber Products from Canada*, the Department defined “provide” as “make available” and, thus, found that the right to harvest timber constitutes a provision of a good and, in-turn, the provision of a financial contribution.⁵⁹¹ Similarly, Port Hawkesbury has the right to access electricity at rates established by the NSUARB. *Softwood Lumber Products from Canada* was upheld by a WTO Panel, which found that “the right to harvest standing timber is not severable from the right over the standing timber and providing the right to harvest timber is therefore different from providing standing timber.”⁵⁹² The Panel was upheld by the WTO Appellate Body, which defined “provides” as “to put at the disposal of”.⁵⁹³
- In this instance, there is a “reasonably proximate relationship” between the action of the NSUARB and Port Hawkesbury’s electricity use, because the NSUARB “put at the disposal of” Port Hawkesbury electricity at reduced rates, thus providing a financial contribution to the company.

The GOC’s Rebuttal:

- The three statements provided by the petitioner to support its assertion are not supported by record evidence, are factually incorrect, and misstate the elements to find entrustment or direction.⁵⁹⁴
- In *US-DRAMS* the WTO Appellate Body stated that “{a} finding of entrustment or direction...requires that the government give responsibility to a private body – or exercise its authority over a private body – in order to effectuate a financial contribution.”
- The petitioner’s argument, that even if entrustment or direction did not occur, the NSUARB itself made a direct financial contribution to Port Hawkesbury, is baseless.

⁵⁸⁹ See PHP Electricity Pre-Preliminary Comments at 17.

⁵⁹⁰ See *Canada-Certain Measures Affecting the Renewable Energy Generation Sector I Canada -Measures Relating to the Feed-In Tariff Program*, Report of the Panels, WT/DS/412 and WT/DS426/R (December 19, 2012).

⁵⁹¹ See *Certain Softwood Lumber Products from Canada*) and accompanying IDM at I (Provincial Stumpage Programs Determined To Confer Subsidies).

⁵⁹² See *United States-Final Countervailing Duty Determination With Respect To Certain Softwood Lumber From Canada*, Report of the Panel, WT/DS257/R (Aug. 29, 2003) at para. 7.11.

⁵⁹³ See *United States-Final Countervailing Duty Determination With Respect To Certain Softwood Lumber From Canada*, Report of the Appellate Body, WT/DS257/AB/R (January 19, 2004) (“the concept of ‘making available’ or ‘putting at the disposal of’... requires there to be a reasonably proximate relationship between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other. Indeed, a government must have some control over the *availability* of a specific thing being ‘made available.’”) at paragraph 71.

⁵⁹⁴ See The Petitioner’s Case Brief, at 36.

- The Act states that a countervailable subsidy exists where an authority provides a financial contribution to a person, and a benefit is conferred. The Act defines “authority” as a “government of a country or any public entity within the territory of a country.” The NSUARB is not an authority within the meaning of the Act. When deciding whether an entity is an “authority,” the Department must consider whether the entity acts as an agent of the government in implementing policy or whether it operates independent of government control.
- The petitioner’s focus on the word “provide” is a red herring. Simple approval by the NSUARB of a rate negotiated between private parties does not qualify as a provision of a financial contribution by the NSUARB to PWCC.
- The petitioner’s reliance on two WTO cases: *Softwood Lumber from Canada*⁵⁹⁵ and *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* is misplaced.⁵⁹⁶ These cases are inapposite.
- In *Softwood Lumber* the WTO Appellate Body determined that for purposes of applying Article 1.1(a)(1)(iii) of the SCM Agreement, it does not matter if “provides” is interpreted as “supplies,” “makes available,” or “puts at the disposal of.” For determining the existence of a subsidy what matters is whether all the elements of the definition are fulfilled as a result of the transaction.⁵⁹⁷ The facts of this investigation can be distinguished. In that case, timber was harvested from government-owned land. Here there is no government ownership of the generation, transmission, or generation of electricity in Nova Scotia. The issue in *Softwood Lumber* was whether an access right provided by a government was equivalent to the provision of a good provided by the government. The issue in this investigation, however, is whether or not the GNS provided a good for less than adequate remuneration.
- In order to find a countervailable subsidy, the Department must find: (1) that the NSUARB is an “authority;” and (2) that simple approval by the NSUARB of a privately negotiated rate constitutes the provision of a good, and is, thereby, a financial contribution.
- Also distinguishable is the *Canada Feed-in Tariff* decision. In that case, the panel examined Ontario’s electricity system. The company at issue, Hydro One, was wholly owned by the Government of Ontario. As a result of regular meetings with the Minister of Energy to set the company’s strategic outlook and approval of Hydro One’s performance “expectations” by the Ministers of Energy and Finance, the panel concluded that the Government of Ontario exercised meaningful control over Hydro One’s activities. The panel also found that the Government of Ontario continued to play a critical role in all aspects of the system’s functioning, including regulation. NSPI is not owned or controlled by the GNS. The NSUARB is not subject to meaningful control by the policy-making offices of the GNS.

⁵⁹⁵ See *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber From Canada* WT/DS257/AB/R (January 19, 2004) (*Softwood Lumber*).

⁵⁹⁶ See *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* WT/DS412/R and *Canada – Measures Relating to the Feed-In Tariff Program* WT/DS426/R (December 19, 2012).

⁵⁹⁷ See *Softwood Lumber*, at para. 73.

The GNS' Rebuttal:

- NSPI's sale of electricity is dissimilar to the provision of stumpage in *Softwood Lumber Canada 2002*⁵⁹⁸ and *Coated Free Sheet Paper Indonesia*.⁵⁹⁹ In those cases, the Department explained that its definition of "providing" a good or service by "making it available" relies upon a factual record where a government acted to grant a right of access to harvest timber on government-owned forest land through the issuance of licenses. The Department found that the pre-requisite to a government "making the good available" was government ownership of the land. Here, unlike in other Canadian provinces, there is no government ownership of the good, electricity, because NSPI owns the electrical system. Also, NSUARB's action approving all NSPI-proposed electricity rates does not grant a license for access to government-owned property. Rather, NSPI, a private entity, retains control and access to the electricity. Therefore, the Department's precedent defining "providing" as "making available" is inapplicable in this case.
- Sections 771(5)(D) and (E) the Act specify that the Department must make separate findings of financial contribution and benefit. The electricity rate is examined under the benefit prong of the analysis of goods provided for LTAR. The Act does not permit the NSUARB approval of the rate to automatically transform the approving entity into the provider of the good; rather, in *Softwood Lumber Canada 2002* and *Coated Free Sheet Paper Indonesia*, the Department relied upon the government ownership of the good to find action by an authority.
- *Canada Feed-in Tariff* does not support the Department's finding of entrustment or direction because of differences between the electrical systems of Nova Scotia and Ontario. Unlike in Ontario, the GNS does not own the electrical system, and there is no meaningful control by the GNS over NSPI.
- The verification of the GNS established that the *Preliminary Determination* was incorrect in stating: 1) that PWCC and NSPI negotiated with the NSUAB throughout the CCAA process; and 2) that NSUARB full-time members and employees are deemed to be employees in the public service of the province of Nova Scotia under section 10(1) of the *Utility and Review Board Act*. The NSUARB did not engage in any off-the-record or pre-application discussions with NSPI and Port Hawkesbury. The NSUARB is not part of the GNS, and NSUARB members are deemed civil servants only for the purpose of providing them with pensions.
- The Department explained its two-part test to determine whether a private entity has been entrusted or directed to make a financial contribution in *DRAMS from Korea*.

⁵⁹⁸ See *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 15,545 (Apr. 2, 2002) and accompanying Issues and Decision Memorandum at I (Provincial Stumpage Programs Determined to Confer Subsidies) (*Softwood Lumber Canada 2002*).

⁵⁹⁹ See *Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (Oct. 25, 2007) and accompanying Issues and Decision Memorandum at Comment 9 (*Free Sheet Paper Indonesia*).

- In *DRAMS from Korea*, the Government of Korea (GOK) owned the banks, regulated them, and directly interfered in bank operations.⁶⁰⁰ In order to determine entrustment or direction, the Department looked beyond mere statements and considered specific acts. The Department also determined whether the GOK was in a position to coerce or induce private entities to provide a financial contribution.
- Unlike in *DRAMS from Korea*, the GNS does not own NSPI or Port Hawkesbury; NSPI is completely separate from its independent regulator, the NSUARB; and the GNS did not guarantee Port Hawkesbury's loan from Bank of America.
- In *CFS from Korea*, the Department found that while the GOK provided direct financial assistance by its participation in Shinho Paper's workout plan and syndicated loan, this assistance was insufficient to demonstrate entrustment or direction of Shinho Paper's other creditors to provide credit either through coercion or threats.⁶⁰¹
- In *PRCBs Vietnam*, discussed in *Nails Oman*, the Department determined that a private landlord in a government-run industrial zone was not a public authority and assessed whether entrustment or direction could be discerned from the relationship between the GOV and the private landlord and found that encouragement to pass along savings is a tenuous link.
- In *US-DRAMS*, the WTO Appellate Body stated that in most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement which could serve as evidence of entrustment or direction. Furthermore, the giving of responsibility to or the exercise of authority over a private body implies a more active role than mere encouragement.⁶⁰²
- In *US-Export Restraints*, the panel stated that "the ordinary meanings of the words 'entrusts' and 'directs' require an explicit and affirmative action of delegation or command."⁶⁰³
- In *Korea-Commercial Vessels*, the WTO panel "agree{d} that the delegation or command inferred by the terms 'entrustment' and 'direction' must take the form of an affirmative Act."⁶⁰⁴
- This case is consistent with *CFS from Korea*, *PRCBs Vietnam*, and *Nails Oman*, not *DRAMS from Korea*. There is no evidence of inducement or coercion by the GNS or the NSUARB. The NSUARB approves prices, and it evaluates them based on non-discrimination and the public interest using well-established economic principles.
- In *Cantour v. Detroit Edison*, the U.S. Supreme Court found that in analogous situations in the context of antitrust actions, the mere approval of rates by a utility regulator was insufficient to establish state action by the private utility provider.⁶⁰⁵ *Cantour* also stated that the exercise of sufficient freedom of choice bred independence.⁶⁰⁶ Here, NSPI

⁶⁰⁰ *Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors From the Republic of Korea*, 68 Fed. Reg. 16,766, 16,773 (Apr. 7, 2003).

⁶⁰¹ See *Free Sheet Paper Korea* at 22-23.

⁶⁰² See United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors *DRAMS from Korea*, WT/DS296/AB/R (2 June 2005) at paras. 108, 114.

⁶⁰³ United States – Measures Treating Export Restraints as Subsidies, WT/DS194/R (29 June 2001) at para. 8.44.

⁶⁰⁴ Korea – Measures Affecting Trade in Commercial Vessels, WT/DS301/R (7 March 2005) at para. 7.370.

⁶⁰⁵ See *Cantour v. Detroit Edison*, 428 U.S. at 582-583.

⁶⁰⁶ *Id.* at 593.

negotiated the rate with PWCC, and then brought the rate to the NSUARB, which approved it after conducting adversarial hearings.

- If the mere approval of an electricity rate by an independent regulatory body constitutes entrustment and direction, the Department has wrongly and dangerously expanded the definition of entrustment and direction to include a wide range of activities that it presumably did not intend, such as the review and approval of mergers by the U.S. Government.
- LRRs are market-based prices; when properly designed they can lead customers to make business decisions that are financially attractive and economically efficient, providing advantages to the affected customer and other customers on the system. To be effective, an LRR must be necessary to retain the load, the rate must be sufficient to retain the load, the rate must exceed the marginal cost of providing service, and must benefit all ratepayers. Port Hawkesbury's LRR does all of these.
- In the *Preliminary Determination* the Department assumed that an independent quasi-judicial body which reviews and approves arm's-length transactions between private parties, such as the NSUARB or U.S. courts (in the context of settlement agreements),⁶⁰⁷ performs a "government subsidy function" for purposes of U.S. countervailing duty law – a far-reaching precedent likely to be used against U.S. exporters. This assumption would also implicate the U.S. International Trade Commission, the Securities and Exchange Commission, FERC, the Federal Reserve Board, and the Federal Trade Commission, as well as the U.S. Departments of Justice, Transportation, Treasury, and Commerce, all of which review mergers directly or as part of a CFIUS review. Based on the evidence before it, this assumption cannot be sustained in the final determination.
- The Department's groundless determination that the NSUARB participated in the negotiation of a private contract between two private parties, either directly or through its review and approval of the proposed pricing mechanism also implicates private and publicly-owned U.S. electricity suppliers that negotiate individual rates with large customers.⁶⁰⁸
- Many U.S. states (*e.g.*, Pennsylvania, Minnesota, and Maine, the location of the petitioner's SC paper mills) have explicitly endorsed non-cost-of-service rates.
- The LRR that Port Hawkesbury negotiated with NSPI is fully consistent with NSPI's historical approach to electricity pricing for extra-large industrial customers. It is a form of market-based "below-the-line" rate that ensures the full recovery of incremental costs and a contribution to fixed costs and cannot be considered countervailable.

⁶⁰⁷ See, *e.g.*, *Moeller Commercial De Mexico, S. de R.L. de C.V. v. United States*, 44 F. Supp. 3d 1398 (CIT 2015); see, also, *Hynix*, 30 CIT at 308-309, 425 F. Supp. 2d at 1305-1306 (commending the Department's limited view of entrustment and direction, thus avoiding declaring court awards of punitive damages to be potentially countervailable).

⁶⁰⁸ See, *e.g.*, *Philadelphia Suburban Transportation Company v. Pennsylvania Public Utility Commission*, 3 Pa Commw. 184, 281 A.2d 179, 186 (Pa. Cmwlth. 1971).

Port Hawkesbury's Rebuttal:

- The petitioner conflates the Bowater LRR and the Port Hawkesbury LRR.
- The petitioner does not provide evidence of entrustment or direction; it only states that the record establishes that the sale of the mill was contingent upon an agreement for an electricity price lower than that paid by NPPH. Contrary to this opinion, the price was set by negotiation between two private parties, NSPI and PWCC, NSPI received significant commercial benefits, including the recovery of all incremental costs without subsidization from the other rate-payers, and the NSUARB approved the rate. NSPI is a private, for-profit company owned by a publicly traded company with fiduciary obligations to its shareholders to maximize profits. The NSUARB approval of electricity rates is not entrustment or direction because the NSUARB is a fully independent quasi-judicial body like a court of law; the U.S. Supreme Court found that mere approval of rates by a utility regulatory body is insufficient to turn the actions of an investor-owned electricity company into state action.⁶⁰⁹
- The petitioner's reliance on *Feed-in Tariffs* fails because Hydro One is wholly owned and controlled by the Government of Ontario and NSPI is privately held.
- The petitioner's argument that an entrustment or direction determination is not required by reliance on *Softwood Lumber IV* is unreasonable. First, in *Softwood Lumber IV*, the Crown owned the trees; here the GNS does not own the electricity. Second, there are no licensing fees for electricity in Nova Scotia. NSUARB action is much more like the Federal Trade Commission's approval of a merger between two private companies in the United States.

The Petitioner's Rebuttal:

- Port Hawkesbury's arguments that the GNS did not interfere with the process of setting electricity prices is contradicted by record evidence. Keeping the Port Hawkesbury mill open was a key objective of the GNS and having a lower electricity rate was an essential factor in re-opening the mill.
- Evidence on the record indicates that the GNS worked closely to address the issue of the mill's high electricity costs and that the agency was committed to re-opening the mill for the benefit of the Nova Scotian economy.⁶¹⁰ The government was heavily involved in the negotiations between PWCC and NSPI, via a consultant hired to facilitate negotiations.⁶¹¹ Further, the GNS was involved in ensuring that the LRR was approved. Thus, despite comments by Port Hawkesbury, record evidence shows that the GNS was essential to this process.
- The Department's finding of entrustment or direction is reasonable, consistent with the Act, and fully supported by the record, and even meets the threshold standard advocated by Port Hawkesbury in its comments prior to the *Preliminary Determination* that

⁶⁰⁹ See *Cantor v. Detroit Edison*, 428 U.S. 579, 96 S.Ct. 3110 (1976).

⁶¹⁰ See *Petitioner's Supplemental Pre-Preliminary Comments at Exhibit 5*. (Government of Nova Scotia Opening Statement, PWCC/NSPI Load Retention Tariff Application (NSUARB P-203) at 1 (NS-SUPP1-33K)).

⁶¹¹ See *Petitioner's Supplemental Pre-Preliminary Comments at Exhibit 12*. (Nova Scotia, Department of Natural Resources letter to the NSUARB (April 27, 2012) at 1 (NS-SUPP1-33H)).

entrustment or direction is “purposeful, targeted compulsion by the government to a private entity.”⁶¹²

- In *Feed-in Tariffs*, the government exercised meaningful control over the utility, notwithstanding that the utility is a commercial enterprise with an independent Board of Directors.⁶¹³ Similarly, NSPI must comply with the directives of the NSUARB.
- *DRAMS from Korea, US-DRAMS Korea, CFS from Korea, PRCBs Vietnam, and Nails Oman* are all consistent with the Department’s finding on entrustment and direction in the *Preliminary Determination*.
- In relying on litigation concerning *DRAMS from Korea*, Port Hawkesbury misconstrues the underlying facts because: 1) in *DRAMS from Korea* the government-owned bank took into account economic and social policy considerations in determining to participate in the respondent’s restructuring,⁶¹⁴ while here, the GNS and the NSUARB took into account social and policy considerations; 2) government ownership was not the dispositive issue in *DRAMS from Korea* because there the Department included public and private banks for restructuring finance, while here, the record indicates much more than government influence because NSPI could only sell electricity to Port Hawkesbury pursuant to, and under the conditions of, the LRR. The facts here are stronger than in the decisions upon which Port Hawkesbury relies.
- Port Hawkesbury’s reliance on *U.S. – Export Restraints* and *Korea-Commercial Vessels* is unavailing. There, the U.S. position was that “under the ordinary meaning of ‘direct,’ there would have to be the requisite causal connection between the government measure and the behavior of private actors in order for a financial contribution to exist.”⁶¹⁵ Here, that causal nexus exists.
- *Korea - Commercial Vessels* stated that “the ordinary meanings of the verbs ‘entrust’ and ‘direct’ comprise” the elements of something that is “necessarily delegated” to someone to do something.⁶¹⁶ Here, there was every expectation that NSPI would supply electricity to Port Hawkesbury under the LRR.
- In *US – DRAMS*, the panel indicated that the finding that the GOK “maintained a policy of supporting Hynix’s financial restructuring and thereby avoiding the firm’s collapse” supported an affirmative determination. Here, because the GNS maintained an announced policy to save the mill and, and together with the NSUARB, was willing to take extraordinary measures to save the mill does not diminish the rationale for an affirmative determination. This is similar to *Hynix*, where the government’s “willingness” to participate in past restructuring efforts for other firms supported a determination that such efforts were taken with respect to Hynix.

⁶¹² See *PHP Electricity Pre-Preliminary Comments* at 17.

⁶¹³ See *Canada Feed-in Tariffs* at paras. 7.235, 7.236, and 7.239.

⁶¹⁴ See *Hynix Semiconductor Inc. v. United States*, 425 F.Supp.2d 1287, 1304 (Ct. Int’l Trade 2006) (finding that the Department “did in fact adduce evidence supporting its conclusion that the {GOK} was able to influence or coerce multiple members of Hynix’s creditors council, both with and without government ownership.”

⁶¹⁵ See Report of the Panel, *United States -Measures Treating Export Restraints as Subsidies*, WT/DS194/R (June 29, 2001), at para. 8.39

⁶¹⁶ Report of the Panel, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R (March 7, 2005), at para. 7.367, quoting *US. -Export Restraints* at para. 8.29.

- In contrast to the facts of this investigation, “there was no record evidence” in *Nails Oman* indicating that the government had a policy of entrusting or directing private companies to provide a financial contribution;⁶¹⁷ the Department found no government actions to effectuate a “bail-out” policy in *CFS from Korea*;⁶¹⁸ and the Department found “no evidence” that the government interfered with land rent prices in *PRCBs Vietnam*.⁶¹⁹
- *Cantour* is not applicable. There, the court drew a “distinction between economic action taken by the State itself and private action taken pursuant to a state statute permitting or requiring individuals to engage in conduct prohibited by the Sherman Act.”⁶²⁰ The Court stated that the “approval of respondent’s decision to maintain such a program does not, therefore, implement any statewide policy relating to light bulbs.”⁶²¹ The Court stated “there can be no doubt that the option to have, or not to have, such a program is primarily respondent’s, not the Commission’s. Indeed, respondent initiated the program years before the regulatory agency was even created.”⁶²² The Court concluded that “even though there may be cases in which the State’s participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness.”⁶²³
- The CIT has stated that it is the Department’s obligation is to “show through the totality of its evidence that entrustment or direction has taken place.”⁶²⁴ Therefore the Department need not heed Port Hawkesbury’s argument that the Department should “be careful” to limit entrustment and direction findings to require that the private party action is “fulfilling a government subsidy function.”

Department’s Position:

The majority of the comments raised by the interested parties with respect to the issue of entrustment or direction have been addressed in the narrative section of this memorandum.⁶²⁵ Thus, we incorporate that position here and do not repeat our position on those comments here.

The respondents have argued that the Department failed to apply the “two-part test” used in *DRAMs from Korea* to find entrustment or direction. However, we did not use this “two-part test” in the instant investigation because that test is not applicable to the facts of this case. The SAA is clear that the analysis of an indirect subsidy through entrustment or direction is administered on a case-by-case basis because the specific manner in which a government may act through a private party is widely varied.⁶²⁶

⁶¹⁷ See *Nails Oman* 80 FR at 28959.

⁶¹⁸ See *CFS from Korea* and the accompanying Issues and Decision Memorandum at 23.

⁶¹⁹ See *PRCBs Vietnam* and the accompanying Issues and Decision Memorandum at 24.

⁶²⁰ *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 589 (1976).

⁶²¹ *Id.* at 584.

⁶²² *Id.* at 594.

⁶²³ *Id.* at 595.

⁶²⁴ See *Hynix Semiconductor Inc. v. United States* 425 F.Supp.2d at 1304.

⁶²⁵ See “GNS Preferential Electricity Rate for Port Hawkesbury” section above.

⁶²⁶ See Statement of Administrative Action (SAA) accompanying H.R. 5110, H.R. Doc. No. 316, 103d Cong., 2d Sess. 911, 926 (1994).

The “two-part test” used in *DRAMs from Korea* was appropriate to the specific manner in which the government acted to provide a financial contribution through a private party. In the instant investigation, the GNS entrusted or directed a private party, NSPI, to provide a financial contribution, the provision of electricity, directly through its laws. In *DRAMs from Korea*, the government used a manner other than direct legislation to entrust or direct private parties to provide a financial contribution to the respondent, Hynix. Therefore, the Department had to rely on circumstantial information to determine that there was entrustment or direction of a private party to provide a financial contribution. This is not the case here. If, similar to this instant investigation, the GOK had simply passed a law directing private financial institutions to provide a financial contribution to Hynix, the Department would not have used this two-part test because it would have been able to find entrustment or direction based solely on GOK law. Accordingly, it was not necessary to apply that test in this investigation.

The respondents also argue that there can be no entrustment or direction because the LRR rate was negotiated between two private parties. This argument has already been explicitly dismissed as irrelevant in *DRAMs from Korea*:

The Department interprets the “entrust or directs” language in 771(5)(B)(iii) to mean that, if a government affirmatively causes or gives responsibility to a private entity to carry out what might otherwise be a government subsidy function of the type listed in subparagraphs (i) to (iv) of section 771(5)(D), there would be a financial contribution. Thus, when the government executes a particular policy by operating through a private body, or when a government affirmatively causes a private body to act, such that one or more of the type of functions referred to in subparagraphs (i) to (iv) is carried out, there is entrustment or direction. Moreover, in the cases of an indirect subsidy, where the government is acting through a private party, it would make sense that the private party, and not the government itself, would fix the commercial terms. Whether the terms are sufficiently affected by government action so as to make the provision actionable is a factual element relevant to the measurement of “benefit,” not “financial contribution.”⁶²⁷

The respondents’ reliance on *Pipes and Tubes Turkey* to support their argument that government entrustment or direction is more than mere government presence, and their statement that entrustment or direction cannot be a by-product of government regulations, while correct, are misplaced with respect to the facts on the record of this investigation. Indeed, these statements provide further support for the Department’s finding of entrustment or direction.

Pipes and Tubes Turkey involved the sale of land between two private companies located in a Turkish industrial zone. The petitioner in that case argued that the Government of Turkey’s (GOT) approval of firms to locate in that zone constituted entrustment or direction on the sale of land between the two private parties. Based on the information on the record in that

⁶²⁷ See June 16 2003 *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea (DRAMs from Korea)* at 47-48.

investigation, we determined that there was no evidence that the GOT directed one private party to sell land to another private party. Similarly, in *PRCBs Vietnam* and *Nails Oman*, there was no evidence on the record that the government was entrusting or directing a private party to provide a financial contribution. In our investigation, the GNS, by law, directs the provision of a financial contribution by one private party to another.

We also agree that the entrustment or direction of a private party to provide a financial contribution cannot merely be a by-product of government regulation. Again, however, that is not the case in this investigation because the financial contribution, the provision of electricity, is not a by-product of regulation—it is the explicit subject of legislation. The provision of that financial contribution is the reason why the GNS enacted the *Public Utility Act* and why the GNS regulates not only the provision of the financial contribution but the provision of the benefit (to the extent that one exists) as well.

The respondents argue that finding a regulatory body such as the NSUARB to be an authority would have “dire consequences” for all regulatory bodies in the United States. They further argue that finding an independent quasi-judicial regulatory body an authority would implicate the U.S. International Trade Commission, FERC, the Securities and Exchange Commission, the Federal Reserve Board, the Federal Trade Commission, and numerous others, not to mention less-independent bodies like the Departments of Justice, Transportation, Treasury and Commerce. We find this argument unavailing. The mere fact that an entity is a government body does not make its activities subject to the countervailing duty law under our approach. Regardless of whether an entity is an authority under section 771(5)(B), a government action can only be found to be a countervailable subsidy if there is also a financial contribution as defined under section 771(5)(D) that provides a benefit as defined under 771(5)(E) which is specific as defined under section 771(5A) of the Act.

The respondents also argue that there are states such as Minnesota and Maine that have endorsed non-cost-of service rates; however, this fact is more germane to the existence of a benefit, and not to the issue of entrustment or direction. While we recognize that the respondents have acknowledged the potential use of a cross-border benchmark, for the reasons set forth elsewhere in this determination, we have used a tier 3 benchmark under 19 CFR 351.511(a)(2)(iii).

The respondents also argue that LRTs like that applicable to Port Hawkesbury are common throughout North America. Again, this is not relevant to this portion of our analysis because the prevalence of such tariffs speaks to the potential for a benefit, not the question of whether entrustment or direction of a financial contribution occurred. The information on the record of this investigation demonstrates that electricity provided pursuant to the LRR is a financial contribution that provides a benefit and is specific. That provision of electricity is, therefore, a countervailable subsidy under section 771 of the Act.

The respondents cite to *Cantor v. Detroit Edison*, which was a Supreme Court decision involving the federal antitrust laws, not the application of the countervailing duty law. Notwithstanding that distinction, *Cantor* recognized that state government regulation by a Public Service Commission of a private utility company engaged in a monopoly is an act of government, and the Supreme Court made no distinction between the Government of Michigan and the Michigan

Public Service Commission that the State of Michigan created by statute to regulate public utilities.⁶²⁸ Thus, *Cantour v. Detroit Edison* supports our determination that NSUARB is a government authority.

Finally, with regard to the GNS' contention that the Department's verifiers did not request a meeting with NSPI, the Department included the following information requests in the verification outline issued to the GOC:

- c. *Discuss and document how cost and revenue components of both "above-the-line" and "below-the-line" tariffs were determined for NSPI for the POI based on, where appropriate, the 2013-2014 GRA's Revenue Analysis, or other documents on the official record. Provide a detailed explanation of this process for the Large Industrial Tariff, the Extra Large Industrial Two Part Real Time Pricing, and the Load Retention Tariff. Additionally, provide a description of the load forecast for these tariffs.*
- d. *Explain outcomes of the Rate Stabilization Plan for NSPI during the POI with respect to the uncovered fixed costs inherent in providing the LRR to Port Hawkesbury. Discuss any differences between actual revenues during the POI and those that were forecast during the general rate application process. Discuss aspects of the NSPI's 2014 Financial Statement with respect to the balance of deferral accounts linked to the Rate Stabilization Plan and the Cost Recovery Mechanism from the 2012 rate year.*

The Department did not explicitly request to meet with NSPI. However, these agenda items were prepared in an effort to ensure that the Department would have the opportunity at verification to engage in a meaningful discussion with the appropriate individuals on the topics that the Department identified as germane to this investigation. As stated in the verification report:

{The GNS official} was able to explain the overall rate setting process but did not have access to information other than that which was on the record. He was able to discuss how rate setting is conducted, but he was not able to answer our questions about why certain rates were set at certain prices within the cost of service methodology or to provide additional information about the outcomes of deferrals which are discussed in the NSPI POI financial statement, e.g., the windup of the s.21 tax deferral and the planned, but not used, deferral under the Rate Stabilization Plan. {Citation omitted.} Counsel for the GNS explained that they had requested that NSPI participate in verification, or provide assistance to the GNS in preparing to respond to the verification agenda items c and d. In response to the GNS request, NSPI provided a letter⁶²⁹

⁶²⁸ See *Cantor*, 428 U.S. at 594-96.

⁶²⁹ See GNS Verification Report, at 19-20.

Thus, the Department did not have the opportunity to review the relevant record information or to discuss it at length at verification with NSPI. NSPI did provide a letter that the Department accepted as a verification exhibit, and the letter was marked as business proprietary information in its entirety. Separately, the Department did meet directly with the NSUARB to discuss various aspects of the electricity allegation at issue, as presented in the verification report.⁶³⁰ However, and contrary to the GNS' contention, because the letter provided by NSPI was marked as business proprietary information in its entirety, the Department's verifiers were expressly prohibited from discussing its contents or asking any follow-up questions with the NSUARB.

Comment 12: Whether to Use a Tier 1 Benchmark

The GOC's Arguments:

- The facts of the case do not support the Department's conclusion that a government provider of electricity constitutes a majority or a substantial portion of the market, that prices within the country are distorted, and that these prices do not satisfy the regulatory requirement for a market determined price under Tier 1.
- The Department ignored the Tier 1 benchmark data that was available on the record for Alberta and provided an inadequate basis to reject a Tier 1 benchmark. NSPI is a private company that is not entrusted or directed to supply electricity in Nova Scotia by the government, the GNS is not a supplier of any electricity in Nova Scotia and does not constitute a majority or a substantial portion of the electricity market, and regulation by the NSUARB is not sufficient involvement in a private transaction to find prices distorted by government involvement.
- Governmental regulatory approval of private electricity rates, a factor cited by the Department when rejecting the use of a Tier 1 benchmark, does not rise to the level of government involvement necessary to reject Tier 1 benchmarks. Even if the GNS did account for a substantial portion of the market, the Department must still determine whether actual transaction prices are significantly distorted as a result of the government's involvement in the market, and it has not done so.

The GNS' Arguments:

- The Department's benefit analysis is flawed because the Department impermissibly ignored its regulatory hierarchy and failed to use a Tier 1 benchmark for calculating the benefit.
- The Alberta benchmark reflects private party transactions in the country under investigation and, therefore, meets the requirements of 19 CFR 351.511(a)(2)(i). The *CVD Preamble*⁶³¹ explains that the Department must conclude that actual transaction prices are "significantly distorted as a result of the government's involvement in the market," before it will resort to the next alternative in the hierarchy. The Department wholly ignored this framework, and dispensed with the Alberta benchmark data by

⁶³⁰ See *Id.* at 20

⁶³¹ See *CVD Preamble* at 65,377 (Nov. 25, 1998).

focusing exclusively on the electrical system in Nova Scotia even though the country of investigation is Canada.

- There is no basis to depart from the regulations in the examination of electricity markets. In *Steel Wire Rod from Trinidad and Tobago*, the Department explained that a Tier 3 benchmark would be appropriate where “it is only the government that provides electricity within a country or where electricity cannot be sold across service jurisdictions within a country and there are divergent consumption and generation patterns within the service jurisdictions.”⁶³² However in *Softwood Lumber from Canada AR3 Prelim*, the Department abandoned this analysis in favor of Tier 1 in-country benchmarks that do not include any intra-country jurisdictional analysis.⁶³³

Port Hawkesbury’s Arguments:

- The Department ignored the use of a Tier 1 benchmark and didn’t establish that prices for electricity are distorted due to government involvement in doing so. Prices for electricity in Nova Scotia are based on sound economic and ratemaking practices as approved by an independent regulator.
- Alberta has a competitive wholesale and retail electricity market and its prices are not distorted by government involvement in the market. The Alberta electricity price information provided represented actual, market-determined prices in the country. In *Softwood Lumber from Canada AR1* and *AR2*, for stumpage, the Department determined that ‘country’ was not interchangeable with ‘province’ and that the analysis for whether to use a Tier 1 benchmark must be conducted at the country level, not at the province level. A comparison between the Alberta benchmark and the price paid by Port Hawkesbury yields no benefit.⁶³⁴

The Petitioner’s Arguments:

- The Act provides that availability is one of the elements which establish prevailing market conditions. The Alberta electricity price is based on a price set by a utility review board and is equivalent to the “permitted tariffs” disqualified by the Department in *Pipe from Oman*. Moreover, electricity from Alberta is not available in the Nova Scotia market; only prices in Nova Scotia were available to Port Hawkesbury.

⁶³² See CVD Preamble at, 65,377 (citing *Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Trinidad and Tobago*, 62 FR 55,003, 55,006-07 (Oct. 22, 1997) (*Steel Wire Rod from Trinidad and Tobago*)).

⁶³³ See, e.g., *Notice of Preliminary Results and Extension of Final Result of Countervailing Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 71 FR 33,932, 33,946 (Jun. 12, 2006) (*Softwood Lumber from Canada AR3 Prelim*) (Private Stumpage Prices in New Brunswick and Nova Scotia May Serve as a First-Tier Benchmarks in the Subject Provinces...we have used Maritimes’ private prices to measure the adequacy of remuneration of the stumpage programs administered by the GOA...”).

⁶³⁴ See *Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada*, 69 FR 75917 (Dec. 20, 2004) and accompanying Issues and Decision Memorandum at 34 (*Softwood Lumber AR1*); and *Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73448 (Dec. 12, 2005) and accompanying Issues and Decision Memorandum at 20-24 (*Softwood Lumber from Canada AR2*)).

Department's Position:

The Department's regulations at 19 CFR 351.511(a)(2)(i) provides that the preferred means of determining the adequacy of remuneration is a comparison with a market-determined price resulting from actual transactions for a comparable good or service in the country under investigation. Such a price can include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions.

When the government provider constitutes a majority or a substantial portion of the market, the Department determines that prices within the country are distorted and we will move to the next alternative in the hierarchy.⁶³⁵ As explained in "Program Found to be Countervailable" electricity prices in Nova Scotia are distorted by government involvement in the market because NSPI has been entrusted or directed to supply electricity therein and accounts for 95 percent of the province's generation, as well as most of the transmission and distribution. The respondents have argued that we should use electricity prices in Alberta as a Tier 1 benchmark. However, we have already addressed this argument in the narrative section of this memorandum. Accordingly, there is no available Tier 1 benchmark.

In *Steel Wire Rod from Trinidad and Tobago* the Department stated that "particular problems can arise when the government is the sole supplier of a good for LTRAR... {i}n this situation there may be no alternative prices available in the country." To remedy this situation we suggested alternatives that are now considered a Tier 3 Benchmark analysis.⁶³⁶ *Steel Wire Rod from Trinidad and Tobago* stated that such an approach is specifically warranted when "electricity cannot be sold across service jurisdictions within a country and there are divergent consumption and generation patterns within the service jurisdictions."⁶³⁷ As explained in "Program Found to be Countervailable" the Canadian electricity market is segmented because there are divergent consumption and generation patterns within the service jurisdictions.

The GNS contends that we abandoned the *Steel Wire Rod from Trinidad and Tobago* analysis when determining to use private stumpage prices in the Maritime Provinces to measure the adequacy of remuneration for Government of Alberta administered stumpage programs.⁶³⁸ Port Hawkesbury further contends that based on our decisions in *Softwood Lumber from Canada AR1* and *Softwood Lumber from Canada AR2*, we cannot exchange "country" for "province" in making a Tier 1 benchmark determination with respect to determining that prices are distorted by government involvement. We do not agree. First, the GNS's reliance on *Softwood Lumber from Canada AR3 Prelim* is mistaken. As an initial matter, there was no final determination corresponding to *Softwood Lumber from Canada AR3 Prelim* because that review was rescinded

⁶³⁵ See *CVD Preamble*, 63 FR at 65377.

⁶³⁶ See *Steel Wire Rod from Trinidad and Tobago*.

⁶³⁷ *Id.*

⁶³⁸ See *Softwood Lumber from Canada AR3 Prelim* (Private Stumpage Prices in New Brunswick and Nova Scotia May Serve as a First-Tier Benchmarks in the Subject Provinces...we have used Maritimes' private prices to measure the adequacy of remuneration of the stumpage programs administered by the GOA...").

and the order revoked before completion of the review.⁶³⁹ Thus, *Softwood Lumber from Canada AR3 Prelim* does not reflect a final position of the Department. In addition, the benchmark price under Tier 1 must be a delivered price to the respondent pursuant to 19 CFR 351.511(a)(2)(iv). Accordingly, we find that the discussion about market segmentation in *Steel Wire Rod from Trinidad and Tobago* is instructive for this investigation.

In addition, we have not determined that all electricity prices in Canada are distorted by government interference and that we cannot use any Canadian electricity prices. Rather, because the market for electricity in Canada is segmented, our finding that prices are distorted in Nova Scotia because of government involvement is limited to that market. Our decision not to use the Alberta price, on the other hand, is based on our consideration that our regulations require that a Tier 1 price reflect delivery charges and respondents have provided no information on the costs that would be incurred to transmit and deliver electricity from Albert to Nova Scotia. Moreover, the retail prices of electricity that is sold in Nova Scotia is regulated by the GNS. The cited *Softwood Lumber* decisions are therefore inapposite, because our decision to disregard the Alberta price is not based on a finding that a Tier 1 benchmark can only reflect prices in the province under investigation.

For these reasons we continue to find that there is no Tier 1 benchmark available to determine the adequacy of remuneration.

Comment 13: Whether the Port Hawkesbury LRR is based on Market Principles

The GOC's Arguments:

- The Department erred in its application of a Tier 3 benchmark based on “market principles” to the NSPI electricity rate provided to Port Hawkesbury.⁶⁴⁰ Instead of accepting that an electricity rate which was based on an actual market transaction between two private parties was in accordance with “market principles,” the Department constructed a complex benchmark to make this evaluation. In so doing, the Department failed to recognize that 1) LRRs are based on market principles in that they are a reasonable market-based approach to retain load from large power consumers; 2) Port Hawkesbury’s load is substantially greater than any other company in Nova Scotia and the rate applied to Port Hawkesbury is consistent with the normal rate-setting practices for large load consumers; and 3) recovery of all fixed costs is neither a requirement for such negotiated rates nor for rates that are “consistent with market principles.”

⁶³⁹ See *Notice of Rescission of Antidumping Duty Reviews and Revocation of Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 71 FR 61714 (October 19, 2006).

⁶⁴⁰ Under 19 CFR 351.511(a)(2) the Department determines whether a good or service is provided for LTAR by “assessing whether the government price is consistent with market principles.”

The GNS' Arguments:

- LRTs are a common, well-established, market-based form of electricity tariff that have been widely used throughout North America by electricity suppliers, both public and private, for many decades.⁶⁴¹ Nova Scotia has had an LRT since 2000, and in its November 29, 2011, decision amending the LRT, the NSUARB specifically found that extending the availability of a LRT to companies in economic distress is grounded in normal ratemaking principles applied in various jurisdictions, including Nova Scotia. Such rates are in the public interest and provide for rates that are reasonable and appropriate for all customers.⁶⁴² In implementing the LRT in 2000, the NSUARB cited examples in Texas and Indiana that supported giving LRT-type rates to large volume customers that could cogenerate.⁶⁴³ Port Hawkesbury was provided an LRR under the already-approved LRT as a result of an arm's-length negotiation between PWCC and NSPI.
- PWCC's application for an LRR did not impact the existing Bowater LRR. The Department's verification report correctly stated that the 2013/2014 GRA could not refer to the Port Hawkesbury LRR at issue because NPPH had ceased operations at the time.⁶⁴⁴ Indeed, the 2013/2014 GRA explicitly excluded Port Hawkesbury and, accordingly, it could not include price increases for the Port Hawkesbury LRR.⁶⁴⁵
- The *Preliminary Determination* incorrectly stated that the November 29, 2011 approval of an LRR for Bowater amended the general LRT framework to require the full recovery of variable incremental costs. In its November 29, 2011 decision, the NSUARB did not amend the general LRT framework to require full recovery of incremental costs; it stated that it would only approve the Bowater LRR if it was consistent with the general framework providing for full recovery of incremental costs.⁶⁴⁶
- The 2013/2014 GRA and the Port Hawkesbury LRR were handled in separate NSUARB proceedings. The application for the Port Hawkesbury LRR was submitted 11 days before the 2013/2014 GRA. The 2013/2014 GRA stated that the Port Hawkesbury LRR application is based on the mill taking incremental energy so that no customer is at risk of paying any of the costs of the mill's load.⁶⁴⁷ The November 29, 2011, NSUARB decision stated that the new owner of the mill should apply for an LRR and that it would have been appropriate for NPPH to have done so.⁶⁴⁸
- The LRR requires the acceptance of the full risk of hourly incremental fuel costs unlike the November 29, 2011, decision for Bowater that was based on NSPI's year-by-year estimate of incremental avoided costs.

⁶⁴¹ See PEC at 17 and Appendix 1.

⁶⁴² See PQR at Exhibit 23-6, paras. 171-172.

⁶⁴³ *Id.* at 14; and see PHQR Exhibit 23-5 at para. 15 (citing Re: Northern Indiana Public Service Company, (1988), 89 PUR 4th 385), respectively.

⁶⁴⁴ See Government of Nova Scotia Verification Report at 15-16.

⁶⁴⁵ See GQR at Government of Nova Scotia Questionnaire Response Exhibit NS-EL-17 at DE-03/DE-04 at 35 ("The main cause of the decline {in net energy demand} is our assumption, for the purpose of our load forecast, that the paper mill in Port Hawkesbury will not operate in {2013 and 2014}").

⁶⁴⁶ See GQR at Government of Nova Scotia Questionnaire Response Exhibit 23-6 at 95-96.

⁶⁴⁷ See GQR at Government of Nova Scotia Questionnaire Response Exhibit NS-EL-17 at DE-03/DE-04 at 143.

⁶⁴⁸ See PQR Exhibit 23-6 at para. 224.

- There is no evidence to support the Department’s contention that the negotiation and approval of the LRR was one of the critical factors that ensured the purchase of NPPH by PWCC as a going concern, a policy goal of the GNS after NPPH entered CCAA protection. There is no record evidence suggesting that the GNS directed NSPI to provide electricity to Port Hawkesbury at specific rates. The LRR was negotiated between two private corporations pursuant to the terms of a previously approved tariff without input or involvement from the NSUARB.
- The Department incorrectly determined that the Port Hawkesbury LRR is not set according to NSPI’s standard pricing mechanism, which is not a requirement of a Tier 3 benchmark analysis. Under 19 CFR 351.511(a)(2)(iii), the Department is required to analyze whether the price charged is “consistent with market principles,” not whether it is consistent with the “standard pricing mechanism.”
- The Department appears to follow the “consistent with market principles” framework when drawing the conclusion that such an electricity rate “fully incorporates the costs of fuel, generation, transmission, and distribution” with a sufficient rate of return incorporated. The Department’s standard defines Port Hawkesbury’s electricity rate perfectly for the following reasons: 1) the LRR includes all fuel and transmission incremental costs associated with Port Hawkesbury’s electricity usage; 2) there are no associated distribution costs because Port Hawkesbury is connected to the grid at the transmission level; and, 3) because Port Hawkesbury’s load was excluded from the load forecast and associated forecasts of cost, the 2013/2014 GRA covered all system fixed costs and the portion of Port Hawkesbury’s fixed costs contributed by the LRR is the sufficient rate of return for NSPI.
- The Department found in *Steel Wire Rod from Trinidad and Tobago* that when a utility returns a profit on the customer category under investigation, the rate is established “in accordance with market principles.”⁶⁴⁹
- The Department has found in *Melamine from Trinidad and Tobago* that where the industrial customer is treated less favorably than other customers, the electricity rate being charged is not a countervailable subsidy.⁶⁵⁰ Port Hawkesbury is comparatively disadvantaged because Port Hawkesbury 1) must pay on a week-ahead forecast basis, 2) incurs the full pass-through fuel cost and therefore doesn’t get the benefit of having its electricity rate remain constant when fuel costs vary (unlike Bowater’s LRR and ratepayers on the FAM), 3) is subject to supply interruption first before any other system user, and 4) is subject to penalty if NSPI generates or imports additional electricity on the system that Port Hawkesbury does not use.
- The Department concluded that “below-the-line” rates fail to take into account the cost-of-service methodology, rather than applying the required “market principles” analysis with regard to Port Hawkesbury’s LRR. As well, the Department analyzed “market principles” incorrectly, by assuming that the 2013/2014 GRA included the lost loads of

⁶⁴⁹ See *Final Negative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, 67 Fed. Reg. 55,810 (Aug. 30, 2002) (*Steel Wire Rod from Trinidad and Tobago*) and accompanying Issues and Decision Memorandum at Comment 7.

⁶⁵⁰ See *Melamine From Trinidad and Tobago: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Determination*, 80 FR. 21,708 (Apr. 20, 2015) (*Melamine from Trinidad and Tobago*) and the accompanying Issues and Decision Memorandum at IX.B.2.

NPPH and Bowater. Thus, the Department incorrectly presumed that NSPI incurred stranded costs with regard to NPPH's lost load. Port Hawkesbury's load was not included in the Load Forecast used for rate setting during this period; therefore, Port Hawkesbury did not contribute to system-wide fixed costs during the POI. System-wide fixed costs were covered by all other rate payers either during the rate year or through deferrals. Because the Port Hawkesbury load was not included in the Load Forecast, no associated fixed costs were under-recovered and there was no cross-subsidization by other ratepayer classes. Therefore, when Port Hawkesbury came back online at a rate that covered all incremental costs, this represented a net gain for NSPI through Port Hawkesbury's contribution to system-wide fixed costs.

- Under the Tier 3 methodology, the Department should not disqualify NSPI's "below-the-line" rates because the use of forecast costs applies equally to "above-the-line" and "below-the-line" ratepayer classes. Both types of rates are cost-based in different ways. The Department observed at verification that NSPI determines total costs across all customer categories and includes the total ROE. From that system-wide figure, revenue from "below-the-line" rates is subtracted first. The remaining amount is apportioned over the "above-the-line" classes based upon the established revenue-to-cost ratios. Therefore, the Department is incorrect to conclude that "below-the-line" rates are not based upon forecasted costs including the ROE. "Below-the-line" rates are determined pursuant to a rate-making methodology that accounts for forecasted costs.
- The Department's reliance on *Magnesium from Canada* to depart from its regulations is inapplicable in this case. In *Magnesium from Canada*, the Department compared the industrial rate determined through regular rate-making procedures with the rate charged under user-specific Rate and Profit Sharing agreements. In this investigation, however, the LRR is not comparable to the Rate and Profit Sharing agreements in *Magnesium from Canada*. This is because the agreements in *Magnesium from Canada* were a deviation from the normal rate schedule. Here, the Port Hawkesbury mill ceased operations, the overall rate schedule was updated without the Port Hawkesbury mill online, and therefore, Port Hawkesbury's LRR did not deviate from the customer category to which it was otherwise subject. This is why analyzing the rate under a standard pricing mechanism is not applicable.
- Contrary to the facts in *Magnesium from Canada*, the ELI2PT-RTP rate (NPPH's former rate) had not complied with a standard pricing mechanism. In 2008 for instance, the NSUARB recognized the need to exceed the revenue-to-cost ratio bands with the General Demand class increasing to 107.2% and the ELI2PT-RTP class reducing to 91%.
- LRRs are determined by the standard pricing mechanism. Specifically, the LRR must satisfy the criteria established in the published LRT which require the user to demonstrate economic hardship or the viability of using alternative sources of energy to qualify. This is no different than qualifying for a given rate based on the amount of electricity used. The LRR must be structured in a way to retain the customer on the system and not to have any cross-subsidization from other ratepayers. This is no different than a cost-of-service methodology of rate-setting where the costs associated with a specific user or user category are assigned directly to that user or user category. This is not a one-off, customer-specific discounted electricity tariff. Rather, the load retention rate was set through NSPI's standard pricing mechanism, which the NSUARB approved through an adversarial process.

Port Hawkesbury's Arguments:

- When there are no Tier 1 or 2 benchmarks, the regulations provide that the Department will normally measure the adequacy of remuneration by assessing whether the government price is consistent with market principles. Port Hawkesbury has outsize demand compared to all other NSPI customers; its LRR, a “below-the-line” rate, is in a class by itself. There are other “below-the-line” rates for 7 percent of the load forecast in effect in the province during the POI. “Below-the-line” rates are market-oriented because the NSUARB uses its discretion under provincial law to approve methods other than cost-based rates and has done so for decades. The Department provided no legal or evidentiary support in concluding that only cost-of-service based rates were consistent with market principles. In its November 29, 2011, decision the NSUARB stated that it has discretion under the law to vary from fully cost-based rates if it is in the public interest and if it does not subject other customer classes to undue discrimination. Such rates can be fair and equitable; therefore, they are consistent with market principles and are part of the standard pricing mechanism particularly for extra-large industrial customers.
- LRTs are market-based prices; when properly designed, they can lead customers to make business decisions that are financially attractive and economically efficient, providing advantages to the affected customer and other customers on the system. To be effective an LRR must be necessary to retain the load, it must be sufficient to retain the load, it must exceed the marginal cost of providing service, and it must benefit all rate payers. Port Hawkesbury’s LRR does all of these.
- Certain U.S. states,⁶⁵¹ have explicitly endorsed non cost-of-service rates.
- The LRR that PHP negotiated with NSPI is fully consistent with NSPI’s historical approach to electricity pricing for extra-large industrial customers. It is a form of a market-based “below-the-line” rate that ensures the full recovery of incremental costs and a contribution to fixed costs, and it cannot be considered countervailable.

Department’s Position:

We have already explained in detail the methodology required under 19 CFR 351.511 to determine whether the LRR provided to Port Hawkesbury provided a benefit under section 771(5)(E)(iv) of the Act.⁶⁵² The Department does not dispute that LRTs may be a common form of tariffs. The sole issue before the Department is whether the LRR provided to Port Hawkesbury provides a countervailable benefit under the countervailing duty law. In order to assess whether the LRR is consistent with market principles in accordance with 19 CFR 351.511(a)(2)(iii), we have resorted to the method described in *Magnesium from Canada* and compared the Port Hawkesbury LRR to a price set by the standard pricing mechanism.

⁶⁵¹ For a list of states with LRRs see PHQR Exhibit 23-4 and for discount rates see Pre-Preliminary Electricity Comments at Appendix 10.

⁶⁵² See “GNS Preferential Electricity Rate for Port Hawkesbury” under “Analysis of Programs” above.

Under a Tier 3 Benchmark analysis, the Department will assess whether the prices charged by NSPI are set in accordance with market principles through an analysis of such factors as NSPI's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination. We have not put these factors in any hierarchy, and we may rely on one or more of these factors in any particular case.⁶⁵³ For purposes of this investigation, under our Tier 3 Benchmark analysis, we assessed whether the prices charged under the LRR provided to Port Hawkesbury are set in accordance with market principles through an analysis of NSPI's standard pricing mechanism. If the rate charged under the LRR is consistent with the standard pricing mechanism and Port Hawkesbury is, in all other respects, essentially treated no differently than other companies and industries, then there is no benefit.⁶⁵⁴

Based on our analysis of the information on the record, we have determined that the LRR provided electricity to Port Hawkesbury for less than adequate remuneration during the POI.

The GNS argued that this situation is not comparable to that in *Magnesium from Canada* because the price under investigation in that case deviated from the rate schedule while the LRR at issue here did not deviate from NSPI's rate schedule. We disagree. We have applied the standard set forth in *Magnesium from Canada* in investigations where the respondent's rate did not deviate from the tariff rate.⁶⁵⁵

The GOC also argues that we should have accepted the LRR as an actual market transaction between two private parties. However, as we explain above, NSPI has been entrusted or directed to supply electricity to Port Hawkesbury and the rates of electricity in Nova Scotia are by law set and approved by the NSUARB.

Finally, the argument that the Port Hawkesbury LRR is not cross-subsidized because it covers all incremental costs overlooks the fact that it does not cover all fixed costs, an integral part of price-setting principles consistent with market principles.

Constructing a Tier 3 Benchmark

The GOC's Arguments:

- The Department's Tier 3 benchmark methodology is flawed, because it relied upon facts irrelevant to Port Hawkesbury and double counted ROE.
- The Bowater fixed cost calculation is irrelevant to Port Hawkesbury because the Bowater LRR was based on the 2012 Standard Energy Charge adjusted for the Base Cost of Fuel Component and the Fuel Adjustment Mechanism.⁶⁵⁶ Therefore, the rate charged (and reported in the 2012 GRA) was linked directly to Bowater's electricity usage under the

⁶⁵³ See *CVD Preamble*, at 65378.

⁶⁵⁴ See discussion of *Magnesium from Canada* at footnote 100.

⁶⁵⁵ See e.g. *Welded Line Pipe from the Republic of Korea: Final Negative Countervailing Duty Determination*, 80 FR 61365 (Oct. 13, 2015).

⁶⁵⁶ See GSQR Exhibit NS-SUPP1-38A at 6; see, also, Exhibit NS-SUPP1-38E at Appendix E for the calculation.

ELI2PT-RTP rate, and not to a standard allocation of fixed cost contribution under the ELI2PT-RTP.

- There is no information in the 2012 GRA regarding the fixed cost contribution that NPPH made prior to closing or a comparison between it and the new LRR. In any event, as discussed, the ELI2PT-RTP rate otherwise fails the Department's *Preliminary Determination* standard for a rate determined under normal rate-setting procedures because the rate was beyond the revenue-to-cost band at 91%. Therefore, not only is this "benchmark" inapplicable to Port Hawkesbury, it does not satisfy the Department's stated standard.
- The Department double counted return on equity by erroneously assuming that the Bowater rate did not include any ROE. However, ROE is always included across all rate-payer categories. Specifically, the Department verified that NSPI's revenue requirement "includes NSPI's return on equity for the entire system." From that established revenue requirement, "the "below-the-line" revenues are first deducted from the revenue requirement, and the remaining amount...is then allocated over all the "above-the-line" rate classes..." Thus, "below-the-line" revenues reduce the overall revenue requirement for the system. Accordingly, under the established rate-setting framework using the 2013/2014 GRA as a proxy for calculating benefit, the Bowater rate included an amount for ROE. Therefore, the Department should not have increased the LRR to include ROE.

*Port Hawkesbury's Arguments:*⁶⁵⁷

- The amount included in the Tier 3 Benchmark for uncovered fixed costs in the Department's benchmark does not consider the difference between incremental fuel costs already incorporated in the LRR and average system fuel costs incorporated in the 2012 ELI2P-RTP, the source of the amount of the uncovered fixed costs used by the Department in its benchmark. Other customers receive a reduction in fuel costs because Port Hawkesbury is paying actual incremental fuel costs off the top of the generation stack, *i.e.*, the most expensive generation. In order to be meaningful, the inclusion of an amount for fixed costs in the benchmark would need to be reduced by the additional fuel costs resulting from the disparity between the incremental fuel costs under the LRR and average system fuel costs used in the 2012 ELI2P-RTP and the non-fixed charges (including the "Variable Cost Adder," the "Environmental Adder," Line Loss Adjustment, and other minor adjustments) that PHP incurred under the LRR compared to those incurred under the ELI2P-RTP. Additionally, there would have to be a deduction to reflect the price of risk for the fact that the LRR is for service provided as priority interruptible.
- NSPI "above-the-line" rates cover ROE as part of the calculation of the revenue requirement. The uncovered fixed cost component the Department used in the construction of its benchmark was derived from an "above-the-line" rate, therefore, it already included a component of ROE.

⁶⁵⁷ Certain comments were summarized with the GNS brief *supra*.

The Petitioner's Rebuttal:

- Port Hawkesbury is incorrect when it argues that the LRR itself (with none of the Department's adjustments for uncovered fixed costs or ROE) represents the applicable Tier 3 benchmark because neither the GNS nor the NSUARB induced or coerced NSPI to negotiate a rate with PWCC to obtain a price which did not reflect market reality. PWCC was able to secure from the NSUARB an electricity price that was low enough for it to purchase and reopen the mill after it stated that an LRR was the only way it was able to do so.
- Port Hawkesbury's contention that the benchmark is irrational because it represents more than a 50 percent increase over what it paid is incorrect. Moreover, the benchmark favored by Port Hawkesbury uses an element from 2012 for uncovered fixed costs that was not increased by the 5.4 percent rate that was applied to all above-the line rates for 2014.
- The Department would have been justified in using the Large Industrial Rate as a benchmark.
- The Department's approach to calculating the benchmark was transparent and reasonable. Port Hawkesbury admits that its criticisms are unsupported by sufficient record evidence to fully analyze. There is no basis to find that incremental fuel costs are higher than average fuel costs.
- It is unclear to what extent, if any, the Department has double counted ROE. The Department was unable to explore this at verification because the Department did not meet with NSPI to discuss the comments in their letter or to have NSPI explain how fixed costs and ROE are actually calculated. Thus, the Department should not rely on the selective and incomplete submission of new factual information.

Department's Position:

As described in the previous comment, we resorted to the type of analysis used in *Magnesium from Canada* to select a benchmark to determine the adequacy of remuneration of Port Hawkesbury's LRR. For conducting this analysis, we would normally select as the benchmark a contemporaneous rate set by the standard pricing mechanism. However, despite the petitioner's contention, there were no "above-the-line" rates in effect during the POI for a customer with a load size similar to Port Hawkesbury's. We identified several rates from the standard pricing mechanism as possible benchmark selections, but we have rejected these actual "above-the-line" rates because they are not comparable. For example, before the LRR was established, the electricity tariff that applied to NPPH was the ELI2P-RTP; however, this rate was not in effect during the POI. Additionally, the Large Industrial Rate in the 2013/2014 GRA would not apply to Port Hawkesbury because of its large electricity consumption. No other existing "above-the-line" rates were applicable.

With no available "above-the-line" rates, we constructed a rate similar to an "above-the-line" rate determined using a cost-of service methodology based upon NSPI's standard pricing methodology. One approach to this task would have been to conduct a hypothetical COSS for 2014 and determine the price for the ELI2P-RTP because this is an established tariff, and a rate set by this tariff applied previously to the mill and to other extra-large industrial customers. We

were not able to conduct a hypothetical COSS for the POI because there is insufficient information to do so available on the record. Specifically, this would have required substantial accounting and operational information from NSPI sufficient to functionalize all costs and allocate them across the “above-the-line” rates. As an alternative, however, we were able to estimate the two missing elements that are not incorporated into the LRR: the uncovered fixed costs, and an amount for profit that would bring the rate in line with the standard pricing mechanism.

First, to the existing price of the LRR we added a measure of uncovered fixed costs from an “above-the-line” rate.⁶⁵⁸

The 2012 COSS is not on the record so we cannot identify the asset costs that were assigned to rates in that period. However, the 2012 ELI2P-RTP rate was designed based on the load of Bowater and Port Hawkesbury, and it is an “above-the-line” rate set by the standard pricing mechanism. We approximated the fixed costs that would be assigned to the Port Hawkesbury load by identifying the fixed cost rate per MWh that was assigned to the pooled loads of the two largest customers in 2012 (including the mill in question). This amount represents a cost-of-service defined amount of total fixed costs during the POI, and is the preferred comparison (*i.e.*, a contemporaneous price set by the standard pricing methodology) to the amount of fixed costs incurred by Port Hawkesbury during the POI under a rate set by the standard pricing mechanism. The C\$26/MWh total fixed costs attributed to the 2012 ELI2P-RTP in the 2013/2014 GRA is likely based on the 2012 COSS,⁶⁵⁹ because the constituents of this factor were necessarily calculated to set the 2012 ELI2P-RTP. Because the 2012 COSS is not on the record, however, we are relying on the affirmative statement in direct evidence before the NSUARB in the 2013/2014 GRA as an indicator of fixed cost coverage in the 2012 ELI2P-RTP and the fixed costs for the 2014 Port Hawkesbury load. This is discussed in further detail below.

Next we estimated the portion of ROE attributable to a hypothetical 2014 COSS-determined rate by dividing Port Hawkesbury’s 2014 load by the Port Hawkesbury load plus total-system-forecast load used in the 2013/2014 COSS which did not include Port Hawkesbury load. By this method we approximated the weighting of the ROE by the more complex cost-of service method, which assigns the cost of specific asset classes to rate-class loads and distributes revenue over the cost of rate-class load.

We disagree with the parties’ contention that we have double counted ROE in the benchmark. First, the statement we are quoting specifically calls it an amount of “fixed cost contribution.” It does not say that it is an element of the 2012 ELI-2P-RTP tariff, *i.e.*, energy charge, *etc.* We also disagree that the 2012 rate sheet, if it were on the record, would prove that the uncovered fixed cost amount contains ROE. A full description of the 2012 ELI-2P-RTP tariff is available on the

⁶⁵⁸ See GSQR Exhibit NS-EL-17 DE-03/DE04 at 19. (“Even if the Port Hawkesbury mill restarts, it is unlikely to contribute to fixed costs at historical levels. The system's second biggest customer {Bowater} is operating on a load retention tariff which produces the same result; a markedly lower contribution to fixed costs: \$4 per MWh instead of \$26 per MWh under the Extra Large Industrial Two Part Real Time Pricing rate.”).

⁶⁵⁹ When compared to how rates were calculated in the 2013/2014 GRA COSS. See GSQR Exhibit NS-EL-17 SR-01 Attachment 1 at 5-6.

record and does not specifically identify any fixed cost component.⁶⁶⁰ No other information on the record establishes the amount in question. The 2012 COSS is the apparent source of the information at step 6 where fixed costs for each “above-the-line” tariff are determined by functionalization and allocation.⁶⁶¹ Only in the next step of the COSS, when revenue analysis is conducted, is ROE included. Prices for individual rates are derived from this final outcome which determines the amount of revenue that must be covered for the rate class. Real time prices involve complex pricing methodologies and there is no way to identify fixed costs from the information in the 2012 ELI-2P-RTP tariff or on the record. Therefore our selection of an affirmative statement that captures an exact rate of uncovered fixed costs that was presented in the direct evidence of the 2013/2014 GRA is appropriate and does not include any ROE.

We disagree with Port Hawkesbury’s arguments that the benchmark should be adjusted for top of the fuel stack generation under the LRR, and that we should compare average system fuel costs to the incremental fuel costs for the top of the generation stack under the LRR. First, the LRR negotiations were concluded after the 2013/2014 GRA rates were approved, so the rest of the generation stack was accounted for. Second, average system fuel costs for “above-the-line” rate classes are corrected to account for actual fuel costs by the FAM, through which all rate classes eventually pay their own allocated actual fuel costs. Finally, no alternative calculation methodology has been proposed, and we do not have the information on the record to make that comparison.

Port Hawkesbury also argues that we should factor into the benchmark the risk of interruptability, but again, Port Hawkesbury has not proposed a methodology, and the record lacks sufficient information to do so. Moreover, there were no interruptible rates available to use as a benchmark.

Comment 14: Whether Steam for LTAR Provides a Countervailable Subsidy

The Petitioner’s Arguments:

- The NSUARB exercises jurisdiction over and approved the steam provision/co-generation agreement. The Department should find that the co-generation agreement was part of the LRR approved by the NSUARB for Port Hawkesbury and was merely another aspect of the agreement for subsidized electricity.
- The GNS’s statement that the NSUARB determined that a biomass facility and any agreements necessary for its operation are not subject to NSUARB approval is inaccurate and

⁶⁶⁰ See GSQR Exhibit NS-EL-17 SR-01 Attachment 1 .(Explanation of 2013/2014 COSS: Under the GRA application all “above-the-line” rates have been increased to cover the revenue requirement including the ROE. First, load was forecast for each class of rate payer. Second, expected revenue is determined with the existing tariffs. Third, costs are functionalized and then allocated to each rate class and the revenue requirement is determined including ROE. Next, total required revenues are compared to the expected revenue generated from the existing rate structure and increases to cover the revenue requirement are allocated to the “above-the-line” tariffs (below-the-line tariff increases are determined separately without the full cost covering requirement). The ROE used to determine the profits for NSPI is based on a percentage of capitalization so it not directly traceable to the allocation of costs to rate classes in step three.)

⁶⁶¹ See, e.g., GSQR Exhibit NS-EL-17 SR-01 Attachment 1 at 5-6.

seems to be the only record evidence cited in the *Preliminary Determination* to find that the NSUARB had no jurisdiction with respect to the provision and pricing of steam between NSPI and Port Hawkesbury.

- The Biomass Boiler agreement was an integral part of the LRR.
- Although the GNS presents the biomass project as an agreement between two private parties without any government involvement, the steam/electricity co-generation agreement was developed simultaneously with the electricity subsidy and thus, the GNS was “intimately” involved in the negotiations between NPSI and PWCC regarding the co-generation agreement.⁶⁶² Mr. Williams, of Navigant consulting, has stated that he “facilitated discussions regarding the Mill’s access to steam from the biomass boiler in the NSPI cogeneration facility.”⁶⁶³
- The GNS’s own exhibits make clear that the biomass plant and its operation were part of the LRR provisions negotiated and approved by the NSUARB.⁶⁶⁴ As provided for in documentation filed by NSPI with the NSUARB, the NSUARB approved NSPI’s C\$208.6 million capital work order application for the Port Hawkesbury bio-mass co-generating facility.⁶⁶⁵ Furthermore, NSPI asked that the NSUARB make any approval of the LRR “conditional upon the Government’s formal implementation of the assurance provided in the July 20th letter from Deputy Minister Collican,”⁶⁶⁶ regarding the bio-mass co-generation plant. Even after the advance tax ruling was denied by the Revenue Canada, the NSUARB’s “conditions relating to the operation and costs of the Biomass Plant” remained relevant.⁶⁶⁷
- The degree to which the mill would trigger additional Renewable Energy Standards (RES) costs over the LRR period was part of the NSUARB proceeding. PWCC assumed no responsibility for the costs of meeting RES requirements. In fact when PWCC disputed an estimate in additional annual costs, the Deputy Minister of Energy stepped in to prove the GNS’s commitment to covering any additional RES costs and to deem the biomass plant a “must run” facility.⁶⁶⁸
- Port Hawkesbury receives a benefit in the form of steam taken off the turbine generating electricity. It remains unclear if Port Hawkesbury pays anything for the process steam recovered from the electricity generating process. Port Hawkesbury is, at a minimum, receiving a benefit equal to the cost of the steam generation.
- The benefit from steam is specific. The biomass project was needed only if the mill continued to operate. The boiler equipment purchase and biomass supply agreements appear to have benefitted only Port Hawkesbury, and NSPI’s participation in the purchase and operation of the boiler subsidizes Port Hawkesbury’s steam use in the mill.

⁶⁶² See GSQR Exhibit NS-SUPPI-33M.

⁶⁶³ *Id.* at 13.

⁶⁶⁴ See *id.* at Exhibit NS-SUPPI-55A (2012 NSUARB 126 (August 20, 2012) at 5I (para. IS6) GSQR Exhibit NS-SUPPI-33K at 2. See, also, GSQR Exhibit NS-SUPPI-35Z at 1; GSQR Exhibit NS-SUPPI-35V at 14; GSQR Exhibit NS-SUPPI-55A at 14 (para. 9).

⁶⁶⁵ See *Id.* at Exhibit NS-SUPPI-36 at 11.

⁶⁶⁶ See *Id.* at Exhibit NS-SUPPI-35K at 3-4. See, also, Exhibit NS-SUPPI-35S at 1, 2.

⁶⁶⁷ See *Id.* at Exhibit NS-SUPPI-35P at I.

⁶⁶⁸ See *Id.* at Exhibit NS-SUPPI-55A at 58 (para. 178) and 59 (para. 179).

The GNS' Rebuttal:

- The Department should continue to find in the final determination that there is no factual basis to satisfy the requirements of the countervailing duty statute with regard to steam.
- The petitioner claims that the NSUARB had jurisdiction to review and approve the Shared Services and Steam Supply Agreement between Port Hawkesbury and NSPI because it was part of the LRR proceeding; this argument is flawed. The petitioner fails to establish any GNS involvement in the pricing of steam pursuant to the negotiated Shared Services and Steam Supply Agreement. Furthermore, the Department verified that the NSUARB did not exercise jurisdiction over the sale and purchase of steam from the biomass facility.
- The NSUARB is not an authority under the statute. Therefore, there is no action by a statutorily defined “authority” and, as a result, there can be no finding of a countervailable subsidy.
- The petitioner relies on the submission of evidence by a consultant during the LRR proceeding to demonstrate GNS involvement; however, the consultant’s involvement is unremarkable. The Department has verified that all parties involved in the NSUARBs proceedings hired experts to provide evidence. This consultant testified that he did not advocate for any specific party, nor could he, as he was limited contractually to his role as an expert. Additionally, the consultant’s evidence demonstrates that the Shared Services and Steam Supply Agreement was an external, unrelated, side agreement entered into by Port Hawkesbury and NSPI.
- The petitioner also points to discussions of the Shared Services and Steam Supply Agreement and the biomass facility during the LRR proceeding to support its claim that the NSUARB exercised jurisdiction over the biomass facility. However, the Department verified that the NSUARB did not have jurisdiction over the supply of steam for industrial use. In fact, the NSUARB found that it did not need to approve the agreement.
- Discussions about RES costs were not relevant to the Shared Services and Steam Supply Agreement as it relates to the purchase of steam. The LRT sets the framework for establishing qualification for the LRR and the criteria that the LRR must satisfy for approval. References to the biomass facility and the RES during the load retention proceeding address the benefits that exist to the electricity system as a whole across customer categories if the mill became operational and whether the biomass facility would incur costs that would need to be passed on to ratepayers. Such discussions would be expected in the NSUARB’s rigorous adversarial proceedings.
- In addition to having no jurisdiction over the biomass facility and steam agreement, the NSUARB is also not an “authority” that provided the good as required by the statute. There is no government ownership of the NSUARB, no GNS presence on the NSUARB, GNS policy-making cannot control the NSUARB’s activities, the NSUARB is an independent actor and, although the NSUARB is a creation of statute, the facts and circumstances establish that the NSUARB is completely independent from the GNS. Furthermore, the NSUARB does not own the biomass facility that produces the steam.

Port Hawkesbury Rebuttal:

- The Department’s finding that there was no entrustment or direction involved in NSPI’s sale of steam to Port Hawkesbury is supported by record evidence and was further substantiated at verification.
- The Department verified that the NSUARB does not regulate the provision of steam for industrial purposes, and the NSUARB itself has stated that it was not required to approve all agreements provided to them as part of the LRR approval process. As a result, it did not approve the steam-related agreements.
- The petitioner’s arguments regarding the expert also fall short of proving entrustment and direction. The consultant was not an advocate for any party in the negotiations, he was an independent contractor contracted for his expertise. Describing his limited role, he stated that he “did not advocate for any specific party or position, but occasionally offered suggestions and proposals to help resolve differences and keep the discussions moving forward.”⁶⁶⁹ The petitioner overstates the role played by the consultant.
- Department precedent supports the conclusion that technical advice from an industry expert is insufficient to demonstrate entrustment and direction. In the *DRAMS from Korea* litigation, the Department found that the role of Citibank/SSB as financial advisors to Hynix in developing the debt restructuring was insufficient to make that action a commercial transaction and the Department’s finding of entrustment and direction was upheld.⁶⁷⁰ On remand the Department found that such actions were “not those of an orchestrator or chief executive but rather those of a consultant who is assigned to implement a specific task with little or no influence on defining, or ensuring the execution of that task.”⁶⁷¹
- Similarly, the consultant was hired to implement a specific task and had no influence on defining or ensuring that PWCC and NSPI would enter into an agreement or on the specific terms of that agreement. His role was insufficient to indicate that the GNS has entrusted or directed NSPI to provide steam to Port Hawkesbury.
- The petitioner’s argument that the NSUARB is involved in approving the steam supply arrangement because the NSUARB had previously approved the capital work order for the biomass generation plant as an additional 60 MW source of NSPI electricity is unavailing. This approval by NSPI occurred before PWCC purchased the mill and is not related to the negotiations between PWCC and NSPI for steam supply from the biomass plant.
- The petitioner also incorrectly implies that NSPI’s operation of the biomass plant to provide renewable electricity to its ratepayers is tied to NSPI’s provision of steam to Port Hawkesbury. This is unsupported by record evidence. Rather, the RES is province-wide and similar to most mandates, if not all, in the United States. The GNS sought to ensure that the biomass plant would operate whether or not the mill re-opened. A renewable energy statutory requirement does not create a financial contribution by a government to NSPI or to Port Hawkesbury.
- The petitioner also contends incorrectly that PWCC assuming no responsibility for any additional costs of meeting RES requirements is an indication of entrustment or direction.

⁶⁶⁹ See GNSSQR Exhibit NS-SUPP1-33M at p.6.

⁶⁷⁰ See *Hynix Semiconductor Inc. v. United States*, 425 F. Supp. 2d 1287 (CIT 2006).

⁶⁷¹ See “*Final Results of Redetermination Pursuant to Remand, Hynix Semiconductor, Inc. v. United States*, Court No. 03-00651, Slip. Op. 05-106 (CIT August 26, 2005),” (November 23, 2005) at p.7.

There were no additional RES costs expected from the operation of the mill, thus, there was nothing to assume. As mentioned in the NSUARB decision, both NSPI and PWCC argued in the LRR proceeding that NSPI will have excess renewable energy through at least 2019, whether or not the mill operates. The GNS policy was that there was enough renewable supply coming online that Port Hawkesbury's load would not trigger any incremental RES cost over the term of the proposed mechanism. There were no changes to GNS policy as a result of the LRR application and it had no impact on the specific pricing terms and conditions for the steam supply negotiated privately between NSPI and Port Hawkesbury.

- The record demonstrates that Port Hawkesbury pays for all steam it receives. Port Hawkesbury pays a combined rate for the steam it purchases from NSPI, which includes the prices of the fuel used to produce the steam. Under Schedule 9 of the Shared Services and Steam Supply Agreement, Port Hawkesbury is fully responsible for all the fuel required to provide its entire steam usage and it otherwise pays a monthly charge in advance for NSPI's provision of steam to the mill. This information was verified by the Department.
- It is inaccurate for the petitioner to allege that the biomass project was necessary only if the mill continued to operate when the steam plant was approved by the NSUARB in 2010 and construction began long before PWCC decided to purchase the mill.
- The petitioner's contention that the Bowater LRR somehow led customers to cover higher costs associated with Port Hawkesbury's LRR is inaccurate. Port Hawkesbury's LRR was approved in a separate decision nearly a year later. Under its LRR, Port Hawkesbury pays the incremental fuel costs on the top of the generation stack and its costs fluctuate hourly.
- The petitioner also falsely contends that the boiler equipment purchase and biomass supply agreements benefit only Port Hawkesbury and that NSPI's participation in the purchase and operations of the boiler subsidize Port Hawkesbury's steam use in the mill. According to the petitioner, this would mean that NSPI, a private company, answerable to its publicly-traded parent, under no obligation to do so and contrary to its own interests, freely negotiated away the value of steam to Port Hawkesbury in exchange for less than adequate remuneration. This proposition is contradicted by NSPI's April 27, 2012 application to the NSUARB for approval of the electricity pricing mechanism it had negotiated with Port Hawkesbury. NSPI stated: "{t}he ability to run the biomass as a cogeneration facility results in improved economics over time for NS Power's customers when compared to having no mill in operation, as was fully canvassed during the work order for the biomass plant."⁶⁷² NSPI and its customers are clearly better off as a result of the steam supply agreements.
- Even if the Department found entrustment or direction there would still be no benefit. The petitioner's suggestion that the Department use imports of natural gas to compare to Port Hawkesbury's steam prices is unreasonable. Under 19 CFR 351.11(a)(2)(i), the Department is required to measure the adequacy of remuneration by "comparing the government price to a market-determined price for the good or service." The regulation does not permit the comparison of different products such as gas and steam. Even if the Department decided to compare the two, the appropriate benchmark would be the rates Port Hawkesbury pays for natural gas. That price is substantially below what Port Hawkesbury pays for steam, because it is only one of several components of the steam price.

⁶⁷² See PHQR Exhibit 23-7 at p. 5.

Department's Position:

The petitioner has argued that the involvement of the NSUARB in approving the NSPI purchase of the biomass facility is evidence that the NSUARB has exercised its governmental authority in a manner that demonstrates financial contribution. We disagree. The NSUARB had jurisdiction only to the extent that NSPI's purchase of the biomass facility represented a capital investment that required its approval. The record demonstrates that because NSPI's return on equity is determined against the value of capital of its regulated business, the NSUARB examines NSPI capital expenditures to ensure the accurate valuation of the capital of its regulated business. After granting approval for NSPI's purchase of the biomass facility and the concomitant capital expenditure, the NSUARB concluded that the generation of steam by NSPI was an area of NSPI activity that was not subject to regulation, and therefore it was beyond the NSUARB's jurisdiction. On this basis, we found in the *Preliminary Determination* that there was no financial contribution. Contrary to the petitioner's argument, the involvement of a contracted expert consultant does not demonstrate government involvement in the provision of steam sufficient to establish a financial contribution within the meaning of the section 771(5)(D)(iii) of the Act.⁶⁷³

There is no evidence to demonstrate that once the NSUARB made the determination that it had no jurisdiction over the provision or pricing of steam, there was any requirement that the NSUARB further consider the impact of the NSPI's unregulated business on NSPI's regulated business. Moreover, there is no evidence that the NSUARB did consider the impact. For example, there are no later rate-making proceedings that show that NSUARB gave any consideration to the impact on NSPI's regulated electricity generation and transmission business of the biomass facility's generation of steam and residual electricity. On this basis, we continue to find that the purchase by NSPI of the biomass facility provided no countervailable subsidy to Port Hawkesbury.

Comment 15: Whether the Property Tax Reduction in Richmond County Provides a Countervailable Subsidy

The Petitioner's Arguments:

- The GNS provided a countervailable subsidy in the form of reduced property taxes.
- Normally, property assessments are governed by the *Assessment Act*. Port Hawkesbury's former owner negotiated a special 10-year agreement in 2006 that was to remain in force unless the mill shut down. That 10-year agreement and resulting rate were subsequently authorized by legislation passed in 2006.
- In 2012, negotiations for the purchase of Port Hawkesbury included a discussion of reducing the property tax and a disclaimer was filed on the agreement under the CCAA. The disclaimer was eventually overruled by the court due to a finding it would cause an

⁶⁷³ We note that these findings are consistent with our finding regarding the entrustment or direction of the provision of electricity under the LRR. The lack of regulatory jurisdiction with respect to the provision of steam is dispositive evidence that such entrustment or direction could not have occurred, in light of petitioner's argument that entrustment or direction rests solely upon the NSUARB's regulatory jurisdiction over NSPI.

undue hardship to the county, but the municipality still concluded a new agreement that lowered the property tax to C\$1.3 million in 2012.

- The Department erroneously found no benefit for this program because Port Hawkesbury's tax assessment would have been lower had it paid under the normal assessment procedures. The proper analysis is the rate it otherwise would have paid, *e.g.*, C\$2.5 million under the 10-year agreement. Accordingly, the revenue foregone should have been measured as the difference between the C\$2.5 million under the 10-year agreement and the C\$1.4 million paid.
- The petitioner cites to a verification exhibit to comment on the Property Valuation Services Corporation (PVSC) assessment examined at verification.⁶⁷⁴ Estimates of the proper assessed value done by the PVSC, a government agency, is not reflective of the true value of the property.
- The program meets all the elements to find it a countervailable subsidy with a benefit of C\$1.2 million.

The GNS' Rebuttal:

- The 10-year agreement was properly disclaimed in the CCAA process and a new tax assessment agreement was established. The court held that the 10-year agreement could be disclaimed despite its promulgation through legislation. Moreover, the hardship finding by the court concerned a new provision of the CCAA, and a negotiated settlement agreement was preferable over litigating that untested provision.
- The petitioner's argument suggests that Port Hawkesbury should lose in litigation rather than settle to avoid any potential countervailable subsidies. Settlement is a normal outcome in government proceedings.
- The petitioner does not dispute that PVSC is an independent government agency and that Port Hawkesbury's assessed value is well below the amount paid in taxes.
- Record evidence does not support a finding that tax authorities were "forced" to forego revenue or that the PVSC tax assessment for 2015 or 2014 is "suspect."

Port Hawkesbury's Rebuttal:

- The proper analysis to determine a benefit for a tax program is the amount the company would have paid absent the program.⁶⁷⁵ In this instance, the Department was correct in comparing it to the assessed tax rate, as it would have been the applicable tax under the law.
- The petitioner's assertion that the verification exhibit is incomplete is not reflected in the cited exhibit and the petitioner asserts that Department officials have discretion in terms of what documents to take at verification.⁶⁷⁶

⁶⁷⁴ See The Petitioner's Case Brief at 42 (Contains BPI).

⁶⁷⁵ See *Lined Paper Products from India* at Comment 9.

⁶⁷⁶ See PH Rebuttal Brief at 20 (contains BPI) and *Floral Trade Council* at 399, *Ferrosilicon from the Russia* at Comment 2, *Pipe and Tube from India* at Comment 8.

- The PVSC is a government agency that assesses land for property taxes pursuant to the law, but is not an entity that is an authority. Nonetheless, its assessment is in line with an independent assessment of Port Hawkesbury’s land.
- The CIT has observed that for tax programs, “only another government-set rate...would be paid absent the countervailing exemption.”⁶⁷⁷ The only government-set rate would be the assessed rate, as the 10-year rate was outside the normal tax assessment procedure.

Department’s Position:

In September 2012, the GNS and Port Hawkesbury amended their 10-year agreement on tax assessment.⁶⁷⁸ The Legislature of Nova Scotia also promulgated legislation to enact the amended terms of the agreement.⁶⁷⁹ Thus, during the POI, the terms by which Port Hawkesbury owed property taxes were based on the amended tax agreement and the legislation promulgated by the Nova Scotia legislature. The petitioner argues that Port Hawkesbury is still legally bound to pay the tax specified in the original agreement, which should be the basis on which we measure whether there is a financial contribution or benefit. Moreover, the petitioner frames the process of the negotiated amended tax agreement to demonstrate that “the county ultimately agreed to lower the taxes, thus providing a subsidy to PHP.”⁶⁸⁰

Although the petitioner argues that the amended tax agreement resulted in a subsidy by virtue of the conditions surrounding the negotiations, it has not provided any statutory or regulatory support for the Department to consider in evaluating Port Hawkesbury’s tax valuations under the former tax provisions. In contrast, the amended legislation sets out the current tax assessment of Port Hawkesbury during the POI and contains a provision that a permanent closure of the mill or expiration of the agreement will revert the mill to the normal tax assessment process.⁶⁸¹ Therefore, we continue to examine whether a financial contribution or benefit was provided under the auspices of the amended law.

The petitioner also questions PVSC’s evaluation of Port Hawkesbury’s land assessment, citing an exhibit contained in the verification report.⁶⁸² As noted by Port Hawkesbury, however, the Department has discretion regarding its verification methods and which documents it will take as exhibits.⁶⁸³ Moreover, the narrative of the report which cites to the particular exhibit states:

PVSC’s valuation of the mill site was approximately 3.57 percent lower in the 2013 year-end valuation than the 2014 valuation. Based on these two valuations, however, Port Hawkesbury’s estimate of its property tax liability to Richmond County of between C\$550,000 and C\$650,000 in the absence of the agreement

⁶⁷⁷ See *Royal Thai* at 1365. See, also, *LWTP from China* at comment 8 and 19 CFR 351.511.

⁶⁷⁸ See GQR at GNSQR, Volume V at Exhibit NS-RT-6 and PQR at Exhibit 20-3.

⁶⁷⁹ See GQR at GNSQR, Volume V at Exhibit NS-RT-7.

⁶⁸⁰ See the petitioner’s Case Brief at 40.

⁶⁸¹ See GQR at GNSQR, Volume V at Exhibit NS-RT-7.

⁶⁸² See the petitioner’s Case Brief at 42.

⁶⁸³ See PH Rebuttal Brief at 20 (contains BPI) and *Floral Trade Council* at 399, *Ferrosilicon from the Russia* at Comment 2, *Pipe and Tube from India* at Comment 8.

was accurate. See VE-15 at 20-21. Thus, we found no discrepancies between the information in the PQR and the source documentation.⁶⁸⁴

Notwithstanding the petitioner's issue with the verification exhibit, the report concludes that the Port Hawkesbury's tax liability based on the valuations was accurate.⁶⁸⁵ The petitioner argues the Department should discount PVSC's assessment based on inconsistencies with prior evaluations and an independent assessment on the record. However, there is nothing on the record that supports the argument that one particular PVSC or independent assessment is more informative or reflective of market prices. As noted by the petitioner, PVSC is an independent agency of the GNS and is charged with assessing properties for tax valuations. In that regard, property taxes owed to the GNS are based on the PVSC's valuations. Thus, the petitioner's speculation on prior and independent assessments in relation to recent PVSC valuations does not explain how the Department should conclude that a countervailable subsidy was provided under section 771(5)(D)(ii) of the Act or 19 CFR 351.509(a) *without* relying on the PVSC assessments, because the verified PVSC assessments would still be the basis for the tax amount owed by Port Hawkesbury absent the amended agreement. Likewise, the petitioner has not explained what would be used to evaluate whether there is a financial contribution or benefit in place of PVSC's assessments. Accordingly, we have not changed our calculation of the benefit under this program, and we continue to find that Port Hawkesbury received no benefit.

Comment 16: Exclusion of the PWCC Indemnity Loan Program from Port Hawkesbury's Cash Deposit Rate

Port Hawkesbury's Arguments:

- The PWCC Indemnity Loan was paid off in full before the *Preliminary Determination*, as the Department verified. Therefore, the cash deposit rate should not include any subsidy rate that the Department calculates for this loan.⁶⁸⁶
- The WTO SCM Agreement at Article 19.4 requires that no countervailing duty be levied in excess of the amount of subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

Department's Position

Under 19 CFR 351.526, the Department may take into account a program-wide change in establishing the estimated CVD cash deposit rate. In an investigation, if the Department

⁶⁸⁴ See *Port Hawkesbury Verification Report* at 14.

⁶⁸⁵ *Id.*

⁶⁸⁶ See *CWP from Turkey*, 51 FR 1268 (excluding from the duty deposit rate short-term export financing loans that had principal outstanding during the review period, but were verified as paid off in full prior to the preliminary determination) (“{I}t is the Department’s policy to adjust the duty deposit rate to correspond as nearly as possible to the eventual duty liability in cases where changes have occurred after the period for which we are measuring subsidization and prior to our preliminary determination.”).

determines that a program-wide change has occurred subsequent to the POI and prior to the preliminary determination, and the Department is able to measure the change in the amount of countervailable subsidies provided under the program in question, the Department may remove from the cash deposit rate the countervailable subsidy rate for the program. A program-wide change is defined in 19 CFR 351.526(b) as (1) a change that is not limited to an individual firm or firms; and (2) is effectuated by an official act, such as the enactment of a statute, regulation, or decree, or contained in the schedule of an existing statute, regulation, or decree. We do not consider that the Port Hawkesbury's repayment of this loan meets the definition of a program-wide change because there was no government act that "effectuated" a change to this program. Thus, we do not agree that it is appropriate to adjust the cash deposit rate to exclude the countervailable subsidy rate calculated for the PWCC Indemnity Loan, and we have not done so.

Comment 17: Whether to Apply AFA to Resolute

The Petitioner's Arguments:

- The Department should continue to apply AFA for the FPPGTP which was reported three days prior to the *Preliminary Determination*. The Department should also apply AFA for FSPF and LGP and for certain programs from which Fibrek benefited (information about which is BPI), which the Department discussed in the Resolute Verification Report. Finally, the Department should continue to apply the highest rate calculated for a program that provides assistance in the form of grants.

Resolute's Arguments:

- Without the application of the AFA used in the *Preliminary Determination* for PPGTP, and with the finding that the IQ loans conferred no benefit, Resolute's overall countervailable subsidy rate is *de minimis*.

The GOC's Arguments:

- The Department no longer has a basis to AFA or adverse inferences the FPPGTP program.
- Both the Act and the WTO SCM Agreement establish that a minimum threshold must be met before the Department initiates a CVD investigation when determining which programs to include in that investigation. The alleged subsidies were not identified in the petition and, rather than initiating an investigation with respect to these alleged subsidies, the Department engaged in a "fishing expedition."
- Most of the subsidies at issue have been investigated by the Department in previous investigations and, therefore, the fact they were not included in the petition indicates that the petitioner recognized that these programs did not provide benefits to the production of the subject merchandise.
- The Department's practice is not to expand the scope of a CVD investigation to include additional programs without first making a formal determination that these basic initiation requirements have been met, as in a new subsidy allegation determination.

The GOQ's Arguments:

- Upon discovering new programs, the Act and the Department's regulations require the Department to either: (1) include the program if time permits; (2) defer analysis of the measure to a future review, if there is one; or (3) allow petitioner to withdraw and re-file its petition to include the new information.
- The petitioner's advocacy for the application of AFA for these programs requires that, if something is discovered—irrespective of whether it is relevant or material—adverse inferences must be applied, because it could have been discovered or reported earlier and was not.
- The GOQ, GOC, and Resolute responded to the Department's questionnaires and data requests completely and to the best of their ability. The petitioner's assertion that, because the Department did not collect information at verification, it must be that information was withheld, is in error. Thus, the Department is precluded from applying AFA.

The Petitioner's Rebuttal:

- The intent of section 776(b) of the Act is to prevent a non-cooperating respondent from receiving the same result as it would have received had it fully cooperated, and provides that the Department may use an adverse inference if a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information."⁶⁸⁷
- In *Steel Authority of India v. United States*, the court upheld the Department's application of AFA to the respondent SAIL based on its partial reporting of information in response to the Department's questionnaires.
- The Department should apply AFA to the FPPGTP program because the information was untimely, and to other programs discovered during the course of the investigation, by applying the highest rate calculated for a program that provides assistance in the form of grants.
- Section 775 of the Act and 19 CFR 351.311(b) provide the Department the authority to investigate subsidies discovered in the course of an investigation. Therefore, the Department should reject the respondents' arguments that, because the FSPF and LGP programs were not alleged, there is no legal basis for applying CVDs.
- The Department's practice demonstrates that when subsidies are discovered in an investigation, the subsidies are analyzed and countervailing duties are applied when the record demonstrates financial contribution, specificity, and benefit.

Resolute's Rebuttal:

- The Department accepted the July 22, 2015, submissions from the GOC and Resolute, and verified all of the submitted information. There is, therefore, no basis for the application AFA, because none of the circumstances under which AFA may be applied occurred here.
- Resolute has complied with every request for information and went well beyond any reasonable standard for a respondent to act to the best of its ability.

⁶⁸⁷ See SAA at 870.

- Under 19 CFR 351.311, if potentially countervailable subsidies are uncovered or discovered in the course of an investigation, they are subject to complete investigation, or if there is insufficient time to investigate them, they must be subject to an inquiry in a new review or through a new petition.
- The petitioner has the option, under the law, to withdraw its petition and submit a new one with additional allegations under 19 CFR 351.311(c)(1). The petitioner does not have the option to have the Department apply AFA under the law.
- The petitioner’s brief refers to a GNS transaction, which included paying off a liability of the Resolute property that the GNS was acquiring, and which netted the GNS a substantial profit. The transfer of money was the repayment of a loan owed by Bowater to Resolute at the time the GNS acquired Bowater. There was, thus, never a grant from Nova Scotia to Resolute.
- The Department did not discover the FSPF at verification; rather, it was referenced in a document supplied by Resolute to the Department. Further, although it could have nothing to do with the investigation, Resolute cooperated fully in providing all of the information requested by the Department, and the Department verified the information.
- Descriptions in Fibrek’s accounts indicated that it may have received reimbursement for portions of projects long before Resolute acquired Fibrek, thereby extinguishing any benefit to Resolute (had there been any). The record shows the reimbursements could have no value anywhere but Fibrek and could not involve a countervailable subsidy to the production of subject merchandise which was not manufactured, produced, or exported from there.
- The Department did not take the amounts of the funds in the accounts it examined or take any verification exhibits. The reason the Department did not do this is either that: 1) the Department did not find evidence that these were subsidies; 2) the amounts were so small as to be trivial; 3) the petitioner did not make any subsidy allegations pertaining to these reimbursements and there was no evidence they were related to subject merchandise; or 4) to the extent that these activities might be subsidies, the Department concluded that examination of them should be deferred to a subsequent administrative review.
- This case is distinguished from *Solar Cells* because there the Department said it discovered at verification potential countervailable subsidies and the record did not show that the apparent assistance did not benefit subject merchandise. Here, the record is clear that Fibrek does not produce supercalendered paper and its products are not primarily dedicated to the production of supercalendered paper, so there is no evidence that anything discovered here could be related to subject merchandise.

The GOC’s Rebuttal:

- The Department was put on notice, by the GOC, that the Department’s “other subsidy programs” question was overly broad and inconsistent with the Act, the Department’s regulations, and the WTO SCM Agreement. Further, the GOC interpreted the scope of this question narrowly and it was the Department’s responsibility under the Act to indicate to the GOC that its interpretation was not correct. Therefore, the Department has no basis to apply AFA for programs that did not meet the test set forth in the GOC’s interpretation of the “other programs” question.

Department's Position

There are two issues related to the Department's consideration of the application of partial AFA to Resolute for the final determination. First, as discussed above in the section, "Use of Facts Otherwise Available and Adverse Inferences," we no longer determine that it is appropriate to apply AFA to the grants received by Resolute under the FPPGTP program, and further, we do not find it appropriate to apply AFA to the grants received under the FSPF or LGP programs. Second, also discussed above, we determine, as AFA, that certain grants discovered during the verification of Resolute are countervailable.

The first issue relates to the grants that were reported by the GOC and Resolute in their "revised questionnaire responses" submitted shortly prior to the *Preliminary Determination*.⁶⁸⁸ In these submissions, the GOC and Resolute stated that during preparation for verification, they discovered that Resolute's cross-owned company, Fibrek, received benefits under the FPPGTP program. In the *Preliminary Determination*, the Department determined that it was appropriate to accept the information submitted in these two submissions. However, due to the timing of the submissions, the Department applied AFA to the FPPGTP program for the *Preliminary Determination*. Additionally, the Department determined that it would examine certain other "additional potential benefits," which were received under the FSPF and LGP, at verification and address them in the final determination, as discussed above in the "Use of Facts Otherwise Available and Adverse Inferences" section of this memorandum.

The petitioner argues that the Department should continue to apply AFA to the FPPGTP program, as well as the FSPF and LGP programs, because the respondents did not act to the best of their ability, and there is no question that Resolute and the GOC understood their reporting obligations. Resolute argues that because the Department accepted the information submitted by the GOC and Resolute, and was able to fully and accurately verify the information related to the FPPGTP, FSPF and LGP programs, there is no basis for applying AFA to these programs in the final determination. The Department agrees with Resolute with respect to the FPPGTP, FSPF, and LGP programs. As discussed above, sections 776(a)(1) and (2) of the Act provide that the Department shall, subject to section 782(d) of the Act, apply "facts otherwise available" if necessary information is not on the record or if an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Although for the *Preliminary Determination* the Department applied AFA to the FPPGTP program, the information and facts available on the record of this investigation are materially different at this stage in the proceeding. The Department accepted Resolute's and the GOC's information filed on July 22, 2015, under 19 CFR 351.302(b), which allows the Department to extend a deadline for good cause. Additionally, the Department was able to confirm at verification the entirety of the information necessary to fully examine and analyze the FPPGTP,

⁶⁸⁸ See Revised Response of the Government of Canada, dated July 22, 2015, at page 2; see, also, Resolute's Supplemental Response to Questionnaire, dated July 22, 2015, at page 2.

FSPF, and LGP programs. Therefore, the conditions that necessitated the reliance on adverse inferences for these programs in the *Preliminary Determination* are no longer present.

The second issue relates to the unreported grants that were discovered at the verification of Resolute's questionnaire responses. At the verification, the Commerce team noted entries for several unreported grants in the company's various accounts during the verification of non-use of subsidy programs.⁶⁸⁹ Despite the Department's questions concerning "Other Forms of Assistance" in the initial questionnaire, the GOC and Resolute did not report the existence of these grants in their initial or supplemental questionnaires. Resolute made no attempt to provide the information requested by the deadline for the submission of information, and gave no indication that it needed more time to provide the information requested, despite having done so in responding to questions on other topics, as noted elsewhere in this memorandum.

As explained above in the section "Use of Facts Otherwise Available and Adverse Inferences," we find that Resolute failed to provide information regarding this assistance discovered at verification, and thus, section 776(a)(2)(B) of the Act applies. We further find that by not divulging the receipt of this unreported assistance prior to the commencement of verification, Resolute failed to cooperate by not acting to the best of its ability and precluded this unreported assistance from being verifiable. Thus, pursuant to section 776(b) of the Act, we are determining, as AFA, that the unreported assistance in question is countervailable.

We disagree with Resolute as to why we did not take information regarding the amounts of the funds in these accounts. By its own actions, Resolute precluded the Department from fully investigating and verifying this information when it not only withheld the information until after the deadline for the submission of new factual information had passed, but never provided this information at all, leaving the Department to discover it during the verification process. The purpose of verification is "to verify the accuracy of information previously submitted to the record by the respondent," not to collect new information that had been previously requested but not reported.⁶⁹⁰ Second, the limited information obtained at verification was collected merely to record that Resolute received benefits from unreported government assistance programs. The Department did not "verify" this information. In the course of its long-standing verification procedures, the Department examined only certain accounts in order to determine non-use of programs and conduct its standard completeness methodology.⁶⁹¹ Additionally, the record evidence does not demonstrate that the information collected at the verification constitutes the entirety of the accounting information regarding unreported government grants. For example, the Department did not reconcile the amounts of these unreported government grants to Resolute's financial statements.⁶⁹² The fact that Resolute presented this information to Department officials during verification and not within the time limits for the submission of new factual information, or with its July Supplemental Response to Questionnaire, precluded the

⁶⁸⁹ See Resolute Verification Report at pages 8-9.

⁶⁹⁰ See, e.g., *Final Determination of Sales at Less Than Fair Value: Silica Bricks and Shapes From the People's Republic of China*, 78 FR 70918 (November 27, 2013), and accompanying Issues and Decision Memorandum at Comment 7; see, also, *Marsan Gida Sanayi Ve Ticaret A.S. v. United States*, 931 F. Supp. 2d 1258, 1280 (CIT 2013) (agreeing that "[t]he purpose of verification is not to collect new information").

⁶⁹¹ See Resolute Verification Report at 8-9.

⁶⁹² *Id.*

Department from verifying this information. Relying on this information now would not be consistent with the statute's mandate that the Department "shall verify all information relied upon in making . . . a final determination in an investigation."⁶⁹³ Instead, we must rely on the adverse inference that Resolute chose not to timely report this information and subject it to verification because doing so would have resulted in a less favorable result than allowing the Department to discover this information at verification.⁶⁹⁴

The GOC described that it took the following steps in determining what types of assistance to report: 1) identify cross-owned companies, 2) identify any forms of assistance not listed in the petition, 3) identify those programs that provided assistance to the production or export of SC paper, and 4) evaluate whether the other assistance was provided under a program generally available within Canada, and exclude such assistance from its reporting.⁶⁹⁵ However, the Department, not responding parties, makes the determination of whether assistance is reportable and ultimately countervailable. The GOC also argues that it "put the Department on notice" that our question regarding other subsidy programs was overly broad and inconsistent with the Department's statute and regulations. We note that the GOC's reply to our question stated:

In the absence of any allegations or evidence respecting other programs, consistent with Article 11.2 of the Agreement on Subsidies and Countervailing Measures, sections 701(b) and 775 of the Tariff Act of 1930, as amended and 19 C.F.R. 351.311, the GOC believes that no reply to this question is warranted or required.⁶⁹⁶

However, the GOC stated that it had attempted to "comply in good faith" and, in coordination with respondent and cross-owned companies, respond to the Department's question.⁶⁹⁷ Additionally, in its initial questionnaire response, Resolute stated that it had "examined its records diligently and is not aware of any other programs by the GOC or its entities, or any provincial or local government, that provided, directly or indirectly, any other forms of assistance to Resolute's production and export of SC Paper."⁶⁹⁸ Despite both Resolute's and the GOC's assertion that they had intended to comply fully with the Department's requests, both parties later amended their submission to include additional subsidies received by Resolute's affiliate Fibrek under the FPPGTP program that were not originally reported. It is reasonable that the GOC and Resolute may have discovered these additional benefits as a result of preparing for verification;⁶⁹⁹ however, these late-submitted "revised questionnaires" also clearly indicate that the GOC and Resolute were aware of their obligation to report assistance provided to cross-owned affiliates, including Fibrek, whether or not the assistance was provided prior to Fibrek's acquisition by Resolute. Therefore, an effort to comply in good faith with the Department's request to report other types of assistance would necessarily have included reporting other grants received by Fibrek.

⁶⁹³ See section 782(i) of the Act.

⁶⁹⁴ See SAA at 870.

⁶⁹⁵ See GOC's Initial Questionnaire Response, at Volume VIII, page 49

⁶⁹⁶ See GOC Rebuttal Brief at Joint Issues 5.

⁶⁹⁷ See GOC's Initial Questionnaire Response, at Volume VIII, page 49.

⁶⁹⁸ See Resolute's Initial Questionnaire Response, dated May 28, 2015, at 32-33.

⁶⁹⁹ See Revised Response of the Government of Canada, dated July 22, 2015, at page 2; *see, also*, Resolute's Supplemental Response to Questionnaire, dated July 22, 2015, at page 2.

Therefore, with respect to Resolute and the GOC's arguments, and consistent with *Shrimp from the PRC*,⁷⁰⁰ we find the failure of the GOC and Resolute to respond fully to our questions on "Other Forms of Assistance" demonstrates an unwillingness to respond to the Department's initial and supplemental questionnaires regarding this unreported assistance. Further, section 775 of the Act and 19 CFR 351.311(b) direct the Department to examine apparent subsidy practices discovered during the course of the proceeding and not alleged in the petition (if the Secretary "concludes that sufficient time remains"). The grants that we "discovered" at verification were clearly booked into Resolute's accounts.⁷⁰¹ Thus, the evidence examined at verification of Resolute's questionnaire responses indicated practices that appeared to provide countervailable subsidies, and the Department properly examined these programs under section 775 of the Act and 19 CFR 351.311(b).

We acknowledge that the Department's practice regarding assistance discovered during verification has varied in past cases. However, we find that the facts of this particular case merit the application of AFA. For example, in *Washers from Korea*, the respondent demonstrated that the grant in question was not tied to subject merchandise, and was not relevant to the investigation at hand; thus, the Department concluded that the grant in question was not tied to subject merchandise and was not countervailable.⁷⁰² In the instant investigation, we have no information on the record to demonstrate that the apparent assistance discovered at verification did not benefit the subject merchandise that would justify Resolute's failure to report. Although Resolute argues that these subsidies were received by Fibrek, and therefore, could not involve a subsidy to the production of subject merchandise, the Department has determined that Fibrek and Resolute are cross-owned, and therefore subsidies received by Fibrek may benefit subject merchandise. However, we are unable to make that determination based on the information on the record.

19 CFR 351.311(d) provides that the Department will notify the parties to the proceeding of any subsidy discovered during an ongoing proceeding, and whether it will be included in the ongoing proceeding. The parties were notified of the discovery of this assistance discovered at verification and their inclusion in this proceeding when the Department released Resolute's Verification Report. Such notice is evident in the fact that interested parties commented on the issues surrounding this assistance prior to the final determination.

Finally, for the assistance discovered at Resolute's verification, and consistent with our practice,⁷⁰³ we have applied our CVD AFA methodology to identify the CVD rate(s) to apply for the unreported assistance discovered at Resolute's verification, as discussed above in the section "Application of Facts Otherwise Available and Adverse Inferences."

⁷⁰⁰ *Shrimp from the PRC* and accompanying Issues and Decision Memorandum at 15

⁷⁰¹ Record information related to these accounts is predominantly BPI. For a detailed discussion of the Department's examination of Resolute's accounting system, see Resolute Verification Report, at pages 8-9.

⁷⁰² See *Washers from Korea* and accompanying Issues and Decision Memorandum at Comment 18.

⁷⁰³ See *Shrimp from the PRC* and accompanying Issues and Decision Memorandum at 15.

Comment 18: Whether the Support for the Forest Industry Program (Investissement Québec Loans) Provides Countervailable Subsidies to Resolute's SC Paper Production

The GOQ's Arguments:

- Two of Resolute's cross-owned or affiliated companies received loans under this program that were outstanding during the POI. Neither of these companies were producers of SC paper; and they only supplied minimal volumes of kraft pulp or wood chips to the Resolute mills in Québec that did produce SC paper.
- The Department has found no benefit for loans from IQ in prior CVD proceedings.⁷⁰⁴
- The Department's verification confirms its finding in the preliminary determination that PSIF loans from IQ conferred no benefit on Resolute or on the production of SC paper during the POI.

Resolute's Arguments:

- The Department preliminarily found the interest rates on the IQ loans to be higher than commercial rates, in one instance, and the benefit of the loan to be too small to measure, in another. The loans, therefore, have not contributed in any way to the manufacture, production or export of the subject merchandise and are not countervailable. The Department must come to the same conclusion in its final determination as in the *Preliminary Determination* that Resolute received zero benefit from the IQ loans.
- The Department has previously found IQ loans to be non-countervailable.⁷⁰⁵ Resolute also incorporates the GOQ case brief by reference in finding the IQ loans provided to Resolute's cross-owned or affiliated companies to be non-countervailable.
- In the alternative to a non-countervailable finding, the Department should find the IQ loans did not confer a benefit.

The Petitioner's Rebuttal:

- The precedents cited by the GOQ and Resolute only support finding the IQ loans did not confer a benefit.

Department's Position

In the *Preliminary Determination*, we found PSIF loans from IQ either did not confer a benefit or a measurable benefit.⁷⁰⁶ We have not changed our preliminary finding. However, the cases cited by the GOQ and Resolute do not confirm a finding that IQ loans are not countervailable, but rather that they have never been found to confer a measurable benefit. Therefore, as in our

⁷⁰⁴ See *Lumber from Canada Investigation*, *Lumber from Canada 1st AR*, *Lumber from Canada 2nd AR*, and *Lumber from Canada 3rd AR*.

⁷⁰⁵ See *Lumber from Canada 2nd AR* at 21.

⁷⁰⁶ See *Preliminary Results* and accompanying IDM at page 44.

past examinations of IQ loans, we are not determining whether this program provides a financial contribution or is specific, consistent with our practice.⁷⁰⁷

Comment 19: Whether Certain Programs Provides Countervailable Subsidies to Resolute's SC Paper Production

Resolute's Arguments:

- None of Resolute's SC paper facilities, all of which manufactured thermo-mechanical pulp, produce black liquor. Fibrek was eligible for and received FPPGTP credits for the black liquor production at its kraft pulp mill, but only a small amount of kraft pulp (for tensile strength) was provided for SC paper production.
- All four FPPGTP projects were for capital improvements to Fibrek's kraft pulp machinery. Thus, the funds were tied to projects at mills that produced only non-subject merchandise.⁷⁰⁸
- The only exception to the Department's tying rule arises when the subsidy is to an input product, in which case it is attributed to both the input and downstream products.⁷⁰⁹ However, Resolute and Fibrek are separate corporations, so this exception is not applicable. Moreover, Fibrek's kraft pulp is not primarily dedicated to Resolute's production of SC paper.
- The Department should treat the four projects under the FPPGTP program as separate grants. As such, each individual approval amount is less than 0.50 percent of the company's sales in the year of approval and would be expensed. If the Department collapses the four projects and amortizes the benefit over the AUL, it would need to attribute this value either to the small amount of kraft pulp that went into the manufacture of SC paper during the POI, or to the operations of the entire Resolute corporation.
- The record is unambiguous that certain alleged subsidies were tied to non-subject merchandise due to the approval and bestowal of the funds.
- The NIER program is available only in the Province of Ontario, and any subsidies can be attributed only to production within the Province of Ontario. The Department may not find a program to be regionally specific and also attribute its benefits to production outside of that region. Therefore, the credits received at Resolute's mills in northern Ontario may not be attributed to Resolute as a whole or to Resolute's production of SC paper in Québec.
- NIER credits granted to Resolute's mills in northern Ontario were tied to the actual electricity consumed in those mills during each billing cycle and were, therefore, tied at the time of bestowal to those particular mills.
- If the Department attributes NIER credits to anything other than the three mills in northern Ontario, it must attribute the benefits to Resolute's total net sales, not limited to those in Canada.
- The FSPF is a program specific to the Province of Ontario, and no inputs into SC paper came from any of Resolute's operations in Ontario. Therefore, the Department may not attribute any benefits from the FSPF to the manufacture, production or export of subject merchandise.

⁷⁰⁷ See, e.g., *Coated Paper from the PRC* and accompanying Issues and Decision Memorandum at page 23.

⁷⁰⁸ See 19 CFR 351.525(b)(5), *Certain Steel Products from Belgium, PET Film from India* at Comment 2, *Core from Korea* at 12, *Washers from Korea* at 14, *Steel Wheels from the PRC* at 30, and the *Preamble* at 65403.

⁷⁰⁹ See 19 CFR 351.525(b)(5)(ii).

- The Government of Ontario approved specific projects under the FSPF and entered into contracts that restricted the use of funding to the specific projects at the Fort Frances and Thunder Bay mills. Therefore, at the time of bestowal, the sole purpose of the funding was for projects related exclusively to the production in those mills.
- The three project grants are non-recurring: therefore, all of the FSPF grants to the Thunder Bay mill would be expensed in the year of receipt. The remaining project grant at Fort Frances should be allocated over of Resolute's total sales from all of its operations, not only those in Canada.

The GOC's Arguments:

- Subsidies to an input may only be countervailed in another company's production of subject merchandise when there is an upstream subsidy or a cross-owned supplier provides an input that is primarily dedicated to the downstream product.
- FPPGTP payments were made to two Resolute mills in Ontario that do not produce the subject merchandise; nor do they produce an input used by Resolute in the production of subject merchandise.
- FPPGTP benefits were applied for and approved for specific projects at these two mills.
- To the extent they were not extinguished in Resolute's arms-length acquisition of Fibrek, FPPGTP payments to Fibrek are not countervailable because Fibrek does not produce SC paper, and only a very small quantity of the kraft pulp produced by Fibrek was provided to Resolute for use in the latter's production of SC paper.
- Contributions under the FPPGTP to Fibrek were tied to capital improvements to equipment that was used to make kraft pulp. Thus, the benefits are tied to the Saint-Félicien mill.
- Subsidies to inputs can be countervailed only where: 1) there is an upstream subsidy analysis; or 2) there is cross-ownership between the input supplier and the producer of subject merchandise and the input product is "primarily dedicated."
- The upstream subsidy provisions were not invoked here, and Fibrek's production of kraft pulp is not primarily dedicated to Resolute's production of SC paper.
- The three Resolute mills that received NIER rebates were eligible based on their location in northern Ontario. Additionally, the three mills produce only non-subject merchandise and none provides inputs to Resolute's production of SC paper. Thus, Resolute's production of SC paper in Quebec could not have benefitted from the lower electricity costs.
- Payments under the FSPF program were for specific capital projects at two Resolute mills; they could only benefit the production of goods manufactured at those mills; and eligibility for the program was restricted to Ontario, where there was no SC paper production.

The GOO's Arguments:

- None of the benefits of the FSPF or the LGP can be attributed to SC paper production because: 1) the programs were restricted to Ontario, where no SC paper was produced during the POI; and 2) the programs were tied to particular projects that were unrelated to SC paper production.
- Therefore, benefits from the NIER program are not attributable to subject merchandise.

The GOQ's Arguments:

- Two of Resolute's cross-owned companies received loans under the IQ program that were outstanding during the POI. Neither of these companies were producers of SC paper and they only supplied minimal volumes of kraft pulp or wood chips to the Resolute mills in Québec that did produce SC paper.
- The Department's verification confirms its finding in the *Preliminary Determination* that IQ conferred no benefit on Resolute or on the production of SC paper during the POI.

The Petitioner's Rebuttal:

- The Department should continue to countervail the NIER program and, in calculating the rate, should divide the amount of rebates received under the program during the POI by Resolute's total sales amount, as revised at verification.

Resolute's Rebuttal:

- There is a reason that 19 CFR 351.525(b)(6)(iv) refers to the (specific) downstream product, not some unknown universe of downstream products. Countervailable subsidies must be tied to subject merchandise.
- In order to benefit Resolute, any countervailable subsidies found at Fibrek would have to pass through the thimble of input to the subject merchandise. The kraft pulp produced by Fibrek is not an input that is "primarily dedicated" to the production of the downstream product.

The Petitioner's Rebuttal:

- As a threshold matter, the Court of International Trade holds that "{t}here is nothing in the statute or case law to suggest that those specific items actually imported into the United States must have benefitted from the subsidies."⁷¹⁰ The respondents misstate the law and the Department's practice regarding the attribution of subsidies in an investigation. However, a review of the Department's practice and the correct legal provision demonstrate that each of the subsidies under consideration is properly attributable to Resolute.
- The respondents have taken the argument from *Softwood Lumber from Canada* that the Department should calculate mill-specific rates, and expanded it to cover Resolute's three mills in Quebec. The Department should reject this argument as it did in *Softwood Lumber from Canada*,⁷¹¹ where the Department declined to narrow its investigation to exclude other facilities making non-subject merchandise. For the final determination, the Department should follow its established practice and decline to limit its investigation.
- The Department's practice is not to trace subsidies through the production process.⁷¹² The Department's regulations state that "{i}f a subsidy is tied to production of an input product,

⁷¹⁰ See *Fabrique v. United States*.

⁷¹¹ See *Softwood Lumber from Canada* and accompanying IDM at Comment 8.

⁷¹² See *Coated Paper from the PRC* and accompanying IDM at Comment 18.

then the Secretary will attribute the subsidy to both the input and downstream products produced by a corporation."

- The respondents argue that the Department may only attribute subsidies to inputs used in the production of subject merchandise. However, the Department's attribution regulation, which is applicable to Resolute's factual circumstances in this investigation, does not require an input to be used in the production of subject merchandise.⁷¹³
- The Department should reject Resolute's argument that the NIER program was tied exclusively to production in Ontario and is beyond the scope of this investigation, because in determining whether a subsidy is tied, the Department only looks at "the stated purpose of the subsidy... at the time of bestowal."⁷¹⁴
- The respondents' theory is that a subsidy that is found to be specific because it is limited to a geographical region is not attributable to firms outside of that region. However, the Department found no evidence that the NIER subsidies were tied to a particular market or product within the meaning of 19 CFR 351.525(b)(4) or (5).

Department's Position

We disagree with Resolute and the GOC that it is not appropriate for the Department to countervail subsidies received by Resolute's mills or cross-owned companies that do not produce SC paper or that are located outside Québec. As an initial matter, we disagree with Resolute that we cannot attribute Fibrek's subsidies to Resolute pursuant to 19 CFR 351.525(b)(6)(iv) because kraft pulp manufactured by Fibrek is not primarily dedicated to the production of SC paper. It is our practice to include in our calculations subsidies provided to cross-owned companies on inputs that *could be* used in the production of a downstream product.⁷¹⁵ In this case, Resolute has reported the following with regard to Fibrek: 1) that it produced and supplied kraft pulp to Resolute; and 2) that kraft pulp is used in the production of paper products, including SC paper.⁷¹⁶ Further, Resolute has argued that that the inputs produced by Fibrek were not primarily dedicated to subject merchandise, because only a small amount of kraft pulp was used in the production of SC paper.

In *Coated Paper from the PRC*, the Department faced a similar issue of whether to trace subsidized inputs to merchandise sold to the United States and merchandise sold to other markets. The Department stated that it had "implemented tying regulations to attribute subsidies rather than tracing subsidies through the company. By analogy, we will not trace subsidized inputs through a company's production process."⁷¹⁷ Additionally, as the Department noted in *Coated Paper from the PRC*, the Department also did not trace subsidized inputs in *IPA from Israel*, in which the Department attributed input subsidies to all downstream products that the input could have been used to produce, regardless of whether the input was actually used to

⁷¹³ *Id.*

⁷¹⁴ *Citing MTZ Polyfilms.*

⁷¹⁵ *See e.g. Light-Walled Rectangular Pipe and Tube From People's Republic of China: Final Affirmative Countervailing Duty Investigation Determination*, 73 FR 16428 (June 24, 2008) and accompanying IDM at Comment 8.

⁷¹⁶ *See Preliminary Determination* and accompanying IDM at page 9; *see, also*, Resolute's Initial Questionnaire Response at 6.

⁷¹⁷ *See Coated Paper from the PRC* and accompanying IDM at Comment 18.

produce subject merchandise.⁷¹⁸ Furthermore, as the Department also noted in *Coated Paper from the PRC*, the CIT in *Fabrique* upheld the Department’s position that it is not appropriate to trace the benefit of a particular subsidy to specific items actually imported into the United States.⁷¹⁹

Accordingly, the question is whether the input *could have* been used to produce the subject merchandise exported to the United States, not whether the inputs were *actually* used for that purpose during the POI. Therefore, because Resolute has reported that some of Fibrek’s kraft pulp is, in fact, used in the production of subject merchandise (*i.e.* SC paper), and, thus, necessarily could be used to produce the downstream product (*i.e.* paper), the Department concludes that inputs produced by Fibrek are primarily dedicated, within the meaning of 19 CFR 351.525(b)(6)(iv).

Resolute and the GOC have also argued that the subsidies bestowed on the various mills are tied to projects that are specific to the location of the mill, that certain benefits were tied to non-subject merchandise, and that benefits received in Ontario cannot be attributed to merchandise produced in a different province. The issue of tying regional subsidies to the production in a particular region, essentially to a particular factory or mill of a respondent, has previously been raised before the Department. Our subsidy attribution regulations explicitly rejected the concept that benefits from regional subsidies are tied to the production in that particular region and to the particular factory located in that region.⁷²⁰ In addition, the statute and the regulations do not provide for, or require, the attribution of a domestic subsidy to a specific entity within a firm.⁷²¹ Therefore, we continue to find that it is appropriate to measure and attribute the benefits provided to Resolute’s cross-owned companies because we do not trace subsidized inputs through a company’s production process, and, as discussed above, neither Resolute nor the GOC has demonstrated that the subsidized inputs are not primarily dedicated to the production of a downstream product.

The CVD *Preamble* references the intent of the Department to attribute subsidies to the sales for which costs are reduced (or revenues increased).⁷²² Based on this statement, the Department provides examples of how this would apply to different types of subsidies (*e.g.*, export, *etc.*) and also describes the rationale behind its attribution under 19 CFR 351.525(b)(6)(iv).⁷²³ This rationale states that, for situations where there is an input producer whose production is dedicated almost exclusively to the production of higher value-added product, the Department’s believes that “the purpose of a subsidy provided to the input producer is to benefit the production

⁷¹⁸ See *Coated Paper from the PRC* at Comment 18, page 100, citing *Industrial Phosphoric Acid from Israel: Final Results of Countervailing Duty Administrative Review*, 63 FR 13626 (March 20, 1998) (“*IPA from Israel*”).

⁷¹⁹ See *Coated Paper from the PRC* at Comment 18, page 101, citing *Fabrique*, 166 F. Supp. 2d at 603. The CIT in *Fabrique* also cited the Federal Circuit’s decision that “[i]t would be burdensome and unproductive for the Department of Commerce to attempt to trace the use and effect of a subsidy demonstrated to have been provided to producers of the subject merchandise.” See *Saarstahl A.G. v. United States*, 78 F.3d 1539, 1543 (Fed. Cir. 1996).

⁷²⁰ See *Preamble* at 65404.

⁷²¹ See, *Coated Paper from the PRC* and accompanying IDM at Comment 18. See, also, *Final Results and Partial Rescission of Countervailing Duty Expedited Reviews: Softwood Lumber from Canada*, 67 FR 67638 (November 5, 2002) and accompanying IDM at Comment 8.

⁷²² See *CVD Preamble* at 65400.

⁷²³ *Id.* at 65401.

of both input and downstream products...” and “(b)(6)(iv) requires the Department to attribute the subsidies received by the input producer to the combined sales of the input and downstream products (excluding the sales between the corporations).”⁷²⁴ Thus, based on the above discussion regarding the Department’s established practice that it does not trace subsidized inputs through a company’s production process, the Department appropriately followed its practice with regard of the attribution of subsidies to subject merchandise.

We disagree with Resolute that the Department should treat the four projects under the FPPGTP program as separate grants for the purpose of establishing whether they are attributable to the POI under the “0.5 percent test,” conducted pursuant to 19 CFR 351.524(b)(2). As described by Resolute and the GOC in their questionnaire responses, the FPPGTP program was comprised of two steps: 1) apply for and receive confirmation of eligibility for credits under the program; and 2) submit project proposals for approval to use the previously awarded credits.⁷²⁵ Therefore, based on the elements and requirements of the program, we find that the approval date and the total amount of credits are established once per participant, immediately following the application for credits. Section 351.524(b)(2) of the Department’s regulations instructs us to determine whether “the total amount approved under the subsidy program is less than 0.5 percent of relevant sales... of the firm in question during the year in which the subsidy was approved.” Because the total amount approved under the subsidy was established prior to the submission of individual project proposals, the Department finds it appropriate to use the total amount approved, in accordance with our practice and the regulations, to determine whether the non-recurring benefits provided under the FPPGTP should be allocated to the POI.

Finally, Resolute argues that the Department should use its total corporate sales, including sales outside Canada, to calculate the *ad valorem* subsidy rate for this program. In the *Preliminary Determination*, the Department outlined its regulatory provisions for attributing subsidies to Resolute and its cross-owned companies. As contemplated in our regulations at 19 CFR 351.525(b)(6)(i), the intent is to attribute the subsidy to the products produced by the corporation that received the subsidy. Moreover, in the case of a multinational firm, the subsidy will be attributed to products produced by the firm within the country of the government that granted the subsidy, unless it is demonstrated that the subsidy was tied to more than domestic production.⁷²⁶ Resolute has not provided any support for finding that any of the countervailed subsidies were tied to more than domestic production, so we will not consider Resolute’s corporate sales outside of Canada for attribution purposes.

Comment 20: Whether Subsidies are Extinguished by Changes in Ownership

Resolute’s Arguments:

⁷²⁴ *Id.*

⁷²⁵ See e.g. GOC Original Questionnaire Response at Volume V, page 7.

⁷²⁶ See 19 CFR 351.525(b)(7). See, also, *Large Residential Washers from the Republic of Korea: Final Affirmative Countervailing Duty Determination*, 77 FR 75975 (December 26, 2012) and IDM at Comment 13, and *Final Affirmative Countervailing Duty Determination: Carbon and Certain Alloy Steel from Canada*, 67 FR 55813 (August 30, 2002) and IDM at Comment 9.

- Fibrek received contributions under the FPPGTP program for four projects, all prior to March 31, 2012, the date that the FPPGTP program was terminated by the federal government. Resolute acquired a controlling interest in Fibrek on May 2, 2012, and completed its acquisition on July 31, 2012, after all approved costs obligating reimbursement under the FPPGTP had been incurred and after the program was terminated.
- The Department verified that Resolute booked the full value of the payments under the PPGTP program, including payments to be made after the acquisition. Therefore, the full value of the project disbursements was an explicit part of the purchase of the company by Resolute at fair market value.
- The value of FPPGTP to Fibrek was fully paid for by Resolute in an arm's-length transaction for fair market value and must be presumed to be extinguished in its entirety and, therefore, not countervailable.⁷²⁷

The GOC's Arguments:

- The full amount of the project reimbursements to Fibrek from the GOC following the acquisition of Fibrek by Resolute was transparent and, therefore, was taken into account in reaching a fair market value for Fibrek. An arm's-length sale extinguishes prior subsidies.
- The Department's preliminary analysis does not address the fact that: (i) Resolute acquired Fibrek in a hostile takeover through share acquisitions that presumptively reflected the fair market value of the shares; and (ii) all four of the PPGTP grants to Resolute were approved and had been recorded in Fibrek's books, and three-quarters of the contributions had actually been paid out to Fibrek, long before the acquisition.
- The existence and value of grants to Fibrek were established when Resolute made its arm's-length acquisition, so the price paid for the shares reflected the full value of Fibrek, including the grants.⁷²⁸

The Petitioner's Rebuttal:

- In situations involving a change in ownership, the Department's baseline presumption is that nonrecurring subsidies benefit the recipient over a period of time normally corresponding to the average useful life of the recipient's assets. "{A}n interested party may rebut this baseline presumption by demonstrating that during the allocation period, a privatization occurred in which the government sold its ownership of all or substantially all of a company or its assets, and that the sale was an arm's length transaction for fair market value."⁷²⁹
- The evidence provided by respondents is insufficient for the Department to conduct its technical arm's-length and fair market value analysis given the complexity of the analysis.⁷³⁰
- The Department should reject the respondents' argument that subsidies to Fibrek were extinguished.

⁷²⁷ *Citing Pasta from Italy*, 17972.

⁷²⁸ *Id.*

⁷²⁹ *See Notice of Final Modification*, 68 FR 37125, 37217.

⁷³⁰ *See Stainless Steel Plate in Coils from Belgium: Preliminary Results of Countervailing Duty Administrative Review*, 74 FR 26844, (June 4, 2009). (*Steel Plate in Coils from Belgium*) and PQR at Exhibit 8.

Department's Position:

The Department disagrees with Resolute and the GOC that the Department should find that subsidies received by Fibrek were extinguished by Resolute's purchase of Fibrek. As discussed above in Comment 19, the Department's prior notice with respect to agency practice regarding privatization is instructive in evaluating whether benefits are extinguished by a change in ownership.⁷³¹ The *Notice of Final Modification* addressed the treatment of prior subsidies with respect to change in ownership, including the treatment of concurrent subsidies provided to encourage or facilitate privatization.⁷³² For the purposes of this methodology, the Department stated that it intended to scrutinize very carefully any instances of subsidies provided prior to, or concurrent with, a change in ownership, and would normally determine that the value of concurrent subsidies is fully reflected in the fair market value price of an arm's-length change in ownership/privatization and, therefore, is fully extinguished in any such transaction, if the following criteria were met:

1. The nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders;
2. The concurrent subsidies were bestowed prior to the sale; and
3. There is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the transaction price.⁷³³

The Department has applied this methodology to the sale of the former NPPH to its new owners, and determined that certain subsidies were extinguished by the change in ownership. However, Resolute has not provided the evidence necessary for the Department to apply the same analysis to Resolute's purchase of Fibrek. Specifically, the Department examined, in detail, the process through which Port Hawkesbury was put into bankruptcy, maintained during bankruptcy, and sold through the CCAA process, including the bidding process, the number of bids, the dates on which bids were placed and accepted, formal offers, and the acceptance of a bidder and the establishment of a purchase price. This information was examined within the context of the methodology set out in the *Notice of Final Modification* to establish whether the subsidies were extinguished by the sale.⁷³⁴

With respect to Resolute's purchase of Fibrek, the Department does not have any of the evidence or documentation that it would require to establish that the purchase of Fibrek was an arm's-length transaction for a fair market price, or any detailed information related to the timing, bidding or bid acceptance process and, thus, cannot determine whether any of the subsidies received before or during the purchase of Fibrek by Resolute were extinguished. The Department's original questionnaire stated:

⁷³¹ See *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act Section 123 Modification*, 68 FR 37125 (June 23, 2003) (*Notice of Final Modification*).

⁷³² The *Notice of Final Modification* explicitly addresses full privatization, but the Department later determined to apply this methodology to private-to-private sales. See e.g., *Certain Pasta From Italy: Preliminary Results and Partial Rescission of the Eighth Countervailing Duty Administrative Review (Pasta from Italy)*, 70 FR 17971; 17972 (April 8, 2005).

⁷³³ See *Notice of Final Modification*, 68 FR 37125, 37137.

⁷³⁴ See *Preliminary Determination* at pages 17-20.

Finally, if your company obtained all or substantially all the assets of another company during the AUL period, and that company still exists as an ongoing entity, we require a complete questionnaire response for such company. It is essential to include a discussion of all such “change in ownership” transactions within your responses to the questions below regarding your company’s history.⁷³⁵

While Resolute and the GOC responded on behalf of Fibrek, they did not supply any evidence or detailed information regarding the purchase of Fibrek by Resolute. Instead, throughout the investigation, Resolute and the GOC have submitted unsubstantiated assertions that the purchase of Fibrek was a “hostile takeover in 2012.”⁷³⁶ As a result, the Department has no evidentiary basis for determining whether the purchase, or hostile takeover, of Fibrek properly extinguishes the subsidies received by Fibrek (through a finding of both an arm’s-length transaction and a transaction price reflective of fair market value). Therefore, the Department maintains its baseline presumption that the subsidy benefits are not extinguished.⁷³⁷

Additionally, the GOC and Resolute argue that the Department should consider the fact that the benefits received by Fibrek prior to its purchase by Resolute were approved and booked in its accounting system prior to Resolute’s acquisition of Fibrek. Resolute contends that the Department also should consider how Resolute booked the full value of the remaining FPPGTP payments as anticipated revenue at the time it acquired Fibrek. As discussed above, the Department’s analysis in determining whether subsidies are extinguished, by a change in ownership takes into account three criteria. Here an examination of Fibrek’s and Resolute’s accounting records may be relevant to evaluating those criteria. However, an initial determination that a sale is made at an arm’s-length price and for fair market value must be made before the three additional criteria are examined. Therefore, because the Department does not have the evidence on the record to determine whether Resolute’s purchase of Fibrek was made at an arm’s-length price and for fair market value, the fact that Fibrek booked the subsidies prior to the sale or that Resolute did likewise at the time of the acquisition is not a determining factor in our extinguishment analysis. Additionally, the Department’s practice with regard to non-recurring subsidies is to allocate benefits received prior to the POI over the AUL to determine what amount is attributed to the POI. Therefore, as the Department has determined that these subsidies are not extinguished, the fact that these benefits were booked into Fibrek’s accounting prior to its purchase by Resolute does not preclude the Department from calculating an attributable benefit amount.

⁷³⁵ See The Department’s Initial CVD Questionnaire, dated April 6, 2015, at page 44.

⁷³⁶ See *e.g.* Resolute’s Initial Questionnaire Response at page 4; GOC Case Brief at Joint Issues page 7.

⁷³⁷ See *Notice of Final Modification*, 68 FR at 37130.

VIII. CONCLUSION

We recommend that you approve the findings described above.

✓
Agree

Disagree

Paul Piquado
Paul Piquado
Assistant Secretary
for Enforcement and Compliance

13 OCTOBER 2015
(Date)

APPENDIX

I. ACRONYM AND ABBREVIATION TABLE

| Acronym/Abbreviation | Complete Title |
|----------------------|--|
| Act | Tariff Act of 1930, as amended |
| AFA | Adverse Facts Available |
| ATR | Advanced Tax Ruling |
| AUL | Average Useful Life |
| C\$ | Canadian Dollars |
| CCAA | Companies Creditors Arrangement Act |
| CFR | Code of Federal Regulations |
| CIT | Court of International Trade |
| CITA | Income Tax Act (Canada) |
| CVD | Countervailing Duty |
| Department | Department of Commerce |
| DNR | The Government of Nova Scotia's Department of Natural Resources |
| ELI2P-RTP | Extra Large Industrial 2 Part Real Time Pricing |
| ERDT | The Government of Nova Scotia's Department of Economic and Rural Development and Tourism |
| FAM | Fuel Adjustment Mechanism |
| FibreK | FibreK General Partnership |
| FIF | Forestry Infrastructure Fund |
| FPPGTP | Federal Pulp and Paper Green Transformation Program |
| FULA | Forest Utilization License Agreement |
| GBC | Government of British Columbia |
| GNB | Government of New Brunswick |
| GNS | Government of Nova Scotia |
| GOC | Government of Canada |
| GOO | Government of Ontario |
| GOQ | Government of Québec |
| GRA | General Rate Application |
| GRLF | General Replacement and Load Following |
| HTSUS | Harmonized Tariff Schedule of the United States |
| IDM | Issues and Decision Memorandum |
| ISIC | International Standard Industrial Classification |

| Acronym/Abbreviation | Complete Title |
|-----------------------------|---|
| kV | Kilo-volt |
| LEU | Low Enriched Uranium |
| LLC | Limited Liability Company |
| LOI | Letter of Intent |
| LRR | Load Retention Rate |
| LTAR | Less Than Adequate Remuneration |
| Mauricie | Forest Products Mauricie LP |
| MWh | Megawatt-hour |
| MTAR | More Than Adequate Remuneration |
| NIER | Ontario's Northern Industrial Electricity Rate |
| NPPH | NewPage Port Hawkesbury |
| NSPC | Nova Scotia Power Corporation |
| NSPI | Nova Scotia Power, Inc. |
| NSUARB | Nova Scotia Utility and Review Board |
| Opitciwan | Société en Commandite Scierie Opitciwan |
| PDM | Preliminary Decision Memorandum |
| Petit-Paris | Produits Forestiers Petit-Paris Inc. |
| Petitioner | The Coalition for Fair Paper Imports, which is composed of Madison Paper Industries and Verso Corporation |
| POI | Period of Investigation |
| Port Hawkesbury | Port Hawkesbury Paper LP |
| Port Hawkesbury Inc. | Port Hawkesbury Paper Inc. |
| Port Hawkesbury Investments | Port Hawkesbury Investments Ltd. |
| Port Hawkesbury GP | Port Hawkesbury Paper GP |
| Port Hawkesbury Holdings | Port Hawkesbury Paper Holdings Ltd. |
| PVSC | Property Valuation Services Corporation |
| PSIF | Programme de Soutien à l'Industrie Forestière (Government of Québec's Program of Support for the Forest Industry) |
| PSQR | Port Hawkesbury Questionnaire Response |
| PWCC | Pacific West Commercial Corporation |
| Q&V Questionnaires | Quantity and Value Questionnaires |
| Resolute | Resolute FP Canada Inc. |
| ROE | Return on Equity |
| SC paper | Supercalendered paper |

| Acronym/Abbreviation | Complete Title |
|-----------------------------|---|
| U.S.C. | U.S. Code |
| USD | U.S. Dollars |
| USITC | United States International Trade Commission |
| WTO SCM Agreement | World Trade Organization Agreement on Subsidies and Countervailing Measures |

II. LITIGATION TABLE

| Short Citation | Complete Court Case Title |
|----------------------------|--|
| <i>Ad Hoc Shrimp</i> | <i>Ad Hoc Shrimp Trade Action Committee v. United States</i> , 925 F. Supp. 2d 1367 (CIT 2013) |
| <i>Allegheny Ludlum</i> | <i>Allegheny Ludlum Corp. v. United States</i> , 358 F. Supp. 2d 1334 (CIT 2005) |
| <i>Allegheny Ludlum II</i> | <i>Allegheny Ludlum Corp. v. United States</i> , 367 F. 3d 1339, 1349 (Fed. Cir. 2004) |
| <i>Asahi</i> | <i>Asahi Seiko Co., Ltd. v. United States</i> , 751 F. Supp. 2d 1335 (CIT 2010) |
| <i>Borusan</i> | <i>Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States</i> , 61 F. Supp. 3d 1306 (CIT 2015) |
| <i>Carpenter</i> | <i>Carpenter Technology Corp. v. United States</i> , 662 F. Supp. 2d 1337 (CIT 2009) |
| <i>Eurodif</i> | <i>Eurodif S.A. v. United States</i> , 411 F.3d 1355 (Fed. Cir. 2005) |
| <i>Fabrique</i> | <i>Fabrique de Fer de Charleroi, SA v. United States</i> , 166 F. Supp. 2d 593 (CIT 2001) |
| <i>GPX I</i> | <i>GPX Int'l Tire Corp. v. United States</i> , 893 F. Supp. 2d 1296 (CIT 2013) |
| <i>GPX II</i> | <i>GPX Int'l Tire Corp. v. United States</i> , 942 F. Supp. 2d 1343 (CIT 2013), <i>aff'd</i> , 780 F. 3d 1136 (Fed. Cir. 2015) |
| <i>Grobest</i> | <i>Grobest & I-Mei Indus. (Viet.) Co. v. United States</i> , 853 F. Supp. 2d 1342 (CIT 2012) |
| <i>Husteel</i> | <i>Husteel Co., Ltd. v. United States</i> , 2015 CIT LEXIS 100; Slip Op. 2015-100 (CIT 2015) |
| <i>MacLean-Fogg</i> | <i>MacLean-Fogg Co. v. United States</i> , 853 F. Supp. 2d 1336 (CIT 2012) |
| <i>Navneet</i> | <i>Navneet Publ'ns (India) Ltd. v. United States</i> , 999 F. Supp. 2d 1354 (CIT 2014) |

| Short Citation | Complete Court Case Title |
|-----------------------|--|
| <i>Rhone Poulenc</i> | <i>Rhone Poulenc, Inc. v. United States</i> , 899 F.2d 1185 (Fed. Cir. 1990) |
| <i>Xiamen</i> | <i>Xiamen Int'l Trade and Industrial Co. v. United States</i> , 953 F. Supp. 2d 1307 (CIT 2013) |
| <i>Zhejiang</i> | <i>Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States</i> , 637 F. Supp. 2d 1260 (CIT 2009) |

III. ADMINISTRATIVE DETERMINATIONS AND NOTICES TABLE

Note: if “certain” is in the title of the case, it has been excluded from the title listing.

| Short Citation | Administrative Case Determinations |
|--|--|
| <i>1st Review of Pure and Alloy Magnesium</i> | <i>See Pure and Alloy Magnesium From Canada: Final Results of the First (1992) Countervailing Duty Administrative Reviews</i> , 62 FR 13857 (March 24, 1997) |
| <i>CFS from Korea</i> | <i>Coated Free Sheet Paper from the Republic of Korea; Notice of Final Affirmative Countervailing Duty Determination</i> , 72 FR 60639 (Oct. 25, 2007) |
| <i>Coated Paper from the PRC</i> | <i>Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination</i> , 72 FR 60645 (October 25, 2007) |
| <i>Corrosion Resistant Steel from Korea</i> | <i>Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Final Results of Countervailing Duty Administrative Review</i> , 77 FR 13093 (March 5, 2012) |
| <i>CWP from the PRC</i> | <i>Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances</i> , 73 FR 31966 (June 5, 2008) |
| <i>CWP from Turkey</i> | <i>Certain Welded Carbon Steel Pipe and Tube Products from Turkey</i> , 51 FR 1268 (January 10, 1986) |
| <i>DRAMS from Korea</i> | <i>Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea</i> , 68 FR 37122 (June 23, 2003) |
| <i>LEU from France</i> | <i>Notice of Final Affirmative Countervailing Duty Determination: Low Enriched Uranium From France</i> , 66 FR 65901 (December 21, 2001) |
| <i>Magnesium from Canada</i> | <i>Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada</i> , 57 FR 30946, 30954 (July 13, 1992) |
| <i>Notice of Final Modification</i> | <i>Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act Section 123 Modification</i> , 68 FR 37125 (June 23, 2003) |

| Short Citation | Administrative Case Determinations |
|--------------------------------------|--|
| <i>OCTG from the PRC</i> | <i>Oil Country Tubular Goods From the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination, 74 FR 64045 (December 7, 2009)</i> |
| <i>Pasta from Italy</i> | <i>Pasta From Italy: Preliminary Results and Partial Rescission of the Eighth Countervailing Duty Administrative Review, 70 FR 17971 (April 8, 2005)</i> |
| <i>Refrigerators from Korea</i> | <i>Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Final Affirmative Countervailing Duty Determination, 77 FR 17410 (March 26, 2012)</i> |
| <i>Softwood Lumber from Canada</i> | <i>Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Softwood Lumber Products from Canada, 67 FR 15545 (April 2, 2002)</i> |
| <i>Softwood Lumber IV</i> | <i>Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Softwood Lumber Products from Canada, 69 FR 75917 (December 20, 2004)</i> |
| <i>Thermal Paper from the PRC</i> | <i>Lightweight Thermal Paper From the People's Republic of China: Final Affirmative Countervailing Duty Determination, 73 FR 57323 (October 2, 2008)</i> |
| <i>Pipe from Turkey</i> | <i>Welded Line Pipe From the Republic of Turkey: Final Affirmative Countervailing Duty Determination, 80 FR 61371 (October 13, 2015)</i> |
| <i>Uncoated Paper from Indonesia</i> | <i>Certain Uncoated Paper from Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 80 FR 51771 (Aug. 26, 2015)</i> |
| <i>Wind Towers from PRC</i> | <i>Utility and Scale Wind Towers From the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 77 Fed. Reg. 75,978 (Dec. 26, 2012)</i> |
| <i>Wire Rod from Venezuela</i> | <i>Final Affirmative Countervailing Duty Determination: Venezuelan Wire Rod, 62 FR 55014, 55021-22 (October 22, 1997)</i> |

IV. CASE-RELATED DOCUMENTS

| Short Citation | Complete Document Title |
|-----------------------|---|
| BPI Memo | Department Memorandum, “Business Proprietary Information Memorandum for the Final Determination,” (October 13, 2015). |

| Short Citation | Complete Document Title |
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| GNS Pre-Preliminary Comments | Letter from the GNS, “Supercalendered Paper from Canada: Pre-Preliminary Comments Submitted by the Government of Nova Scotia,” (July 13, 2015) |
| GNS Verification Report | Department Memorandum, “Verification Report: Government of Nova Scotia,” (September 2, 2015) |
| GOC Verification Report | Department Memorandum, “Verification Report: Government of Canada,” (August 27, 2015) |
| GOO Verification Report | Department Memorandum, “Verification Report: Government of Ontario,” (August 27, 2015) |
| GOQ Verification Report | Department Memorandum, “Verification Report: Government of Québec,” (August 27, 2015) |
| GQR | Letter from the GNS, “Response of the Government of Nova Scotia to the Department’s April 6, 2015 Questionnaire,” (May 28, 2015) |
| GQR | Letter from the GOQ, “Response of the Government of Québec to the Department’s April 6, 2015 Questionnaire,” (May 27, 2015) |
| Initiation Checklist | CVD Investigation Initiation Checklist: Supercalendered Paper from Canada (March 18, 2015) |
| <i>Initiation Notice</i> | <i>Supercalendered Paper From Canada: Initiation of Countervailing Duty Investigation</i> , 80 FR 15981 (March 26, 2015) |
| Port Hawkesbury Affiliation Response | Letter from Port Hawkesbury, “Supercalendered Paper from Canada – Affiliated Companies Response,” (April 20, 2015) |
| Port Hawkesbury Final Calculation Memo | Department memorandum, “Countervailing Duty Investigation of Supercalendered Paper from Canada: Port Hawkesbury Paper LP Calculations for the Final Determination,” (October 13, 2015) |
| Port Hawkesbury Preliminary Calculation Memo | Department memorandum, “Countervailing Duty Investigation of Supercalendered Paper from Canada: Port Hawkesbury Paper LP Calculations for the Preliminary Determination,” (July 27, 2015) |
| Port Hawkesbury Verification Report | Department memorandum, “Verification of the questionnaire responses submitted by Port Hawkesbury LP (Port Hawkesbury) and cross-owned affiliates 6879900 Canada Inc. (687), Port Hawkesbury Investments Ltd., Port Hawkesbury Paper GP, Port Hawkesbury Paper Holdings Ltd., Port Hawkesbury Paper Inc. (Port HawkesburyI), and Pacific West Commercial Corporation (PWCC),” (September 2, 2015) |
| PQR | Letter from Port Hawkesbury, “Supercalendered Paper from Canada – Initial Questionnaire Response,” (May 27, 2015) |
| Port Hawkesbury Second Affiliation Response | Letter from Port Hawkesbury, “Supercalendered Paper from Canada – Reply to Supplemental Affiliation Questionnaire,” (May 1, 2015) |
| PSQR | Letter from Port Hawkesbury, “Supercalendered Paper from Canada – Supplemental Questionnaire Response,” (July 6, 2015) |

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| <i>Preliminary Determination</i> | <i>Supercalendered Paper From Canada: Preliminary Affirmative Countervailing Duty Determination</i> , 80 FR 45951 (August 3, 2015), and accompanying Preliminary Decision Memorandum. |
| Resolute Final Calculation Memo | Department Memorandum, “Final Determination Calculations for Resolute FP Canada Inc. (Resolute),” (October 13, 2015) |
| Resolute Preliminary Calculation Memo | Department Memorandum, “Preliminary Determination Calculations for Resolute FP Canada Inc. (Resolute),” (July 27, 2015) |
| Resolute Supplemental Affiliation Response | Letter from Resolute, “Supercalendered Paper from Canada: Supplemental Affiliated Parties Questionnaire Response,” (May 1, 2015) |
| Resolute Verification Report | Department Memorandum, “Verification of the Questionnaire Responses of Resolute FP Canada Inc.,” (August 27, 2015) |
| RQR | Letter from Resolute, “Supercalendered Paper from Canada: Section III Questionnaire Response,” (May 28, 2015) |
| Respondent Selection Memo | Department Memorandum, “Countervailing Duty Investigation of Supercalendered Paper from Canada: Respondent Selection,” (April 13, 2015) |
| RSQR | Letter from Resolute, “Supercalendered Paper from Canada: First Supplemental Questionnaire,” (June 12, 2015) |
| RSQR2 | Letter from Resolute, “Supercalendered Paper from Canada: Resolute’s Supplemental Response to Questionnaire,” (July 22, 2015) |
| Revised Response of the Government of Canada | Letter from the GOC, “Supercalendered Paper from Canada: Revised Response of the Government of Canada to the Department’s April 6 Questionnaire,” (July 22, 2015) |

V. MISCELLANEOUS TABLE (REGULATORY, STATUTORY, ARTICLES, ETC.)

| Short Cite | Complete Title |
|-------------------------------|--|
| <i>Board Regulatory Rules</i> | <i>Board Regulatory Rules made under Section 12 of the Utility and Review Board Act; S.N.S. 1992, c. 11; N.S. Reg. 235/2005 (December 23, 2005) as amended up to N.S. Reg. 9/2013 (January 16, 2013)</i> |
| CCAA | <i>Companies Creditors Arrangement Act (R.S.C., 1985, C. C-36)</i> |
| CITA | <i>Income Tax Act (R.S.C., 1985, c. 1(5th Supp.))</i> |
| <i>CVD Preamble</i> | <i>Countervailing Duties; Final Rule</i> , 63 FR 65348 (November 25, 1998) |
| <i>Crown Land Act</i> | <i>Crown Lands Act; Chapter 114 of the Revised Statutes, 1989 amended 2012, c. 6 (March 14, 2013)</i> |
| <i>Electricity Act</i> | <i>Electricity Act: Chapter 25 of the Acts of 2004; as amended by 2010, c. 14; 2011, c. 15; 2013, c. 34 (March 18, 2014)</i> |

| Short Cite | Complete Title |
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| <i>How to Depreciate Property</i> | U.S. Internal Revenue Service Publication 946 (2008), “How to Depreciate Property,” at Table B-2 |
| <i>Hot-Rolled Lead</i> | <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R (June 7, 2000) |
| <i>Maritime Link Act</i> | <i>Maritime Link Act; Chapter 9 of the Acts of 2012; as amended by 2013, c. 40</i> (December 12, 2013) |
| <i>Notice of Final Modification</i> | <i>Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act Section 123 Modification</i> , 68 FR 37125, 37137 (June 23, 2003) |
| <i>Nova Scotia Jobs Fund Act</i> | <i>Nova Scotia Jobs Fund Act; Chapter 40 of the Acts of 2011; as amended by 2014, c. 9, s. 34</i> (May 1, 2014) |
| <i>Richmond Port Hawkesbury Paper Ltd. Taxation Act</i> | <i>Richmond Port Hawkesbury Paper GP Ltd. Taxation Act; Chapter 51 of the Acts of 2006 as amended by 2012, c. 49</i> (December 6, 2012) |
| <i>Public Utilities Act</i> | <i>Public Utilities Act; Chapter 380 of the Revised Statutes, 1989 as amended by 1992, c. 8, s. 35; 1992, c. 11, s. 43; 1992, c. 37, s. 3; 1997, c. 4, s. 43; 2001, c. 35, s. 30; 2005, c. 25, s. 1; 2006, c. 45; 2008, C. 31; 2010, cc. 24,71; 2012, c. 41; 2014, c. 5, s. 15</i> (May 1, 2014) |
| <i>Public Utilities Rules</i> | <i>Public Utilities Rules, made under Section 12 of the Utility and Review Board Act, S.N.S. 1992, c. 11, N.S. Reg. 290/92</i> (December 14, 1992) |
| <i>Renewable Electricity Regulations</i> | <i>Renewable Electricity Regulations made under Section 5 of the Electricity Act; S.N.S. 2004, c. 25; O.I.C. 2010-381 (October 12, 2010), N.S. Reg. 155/2010 as amended up to 01.C. 2014-26 (January 28, 2014), N.S. Reg. 14/2014</i> |
| <i>Renewable Electricity Retail Sale Regulations</i> | <i>Renewable Electricity Retail Sale Regulations made under Section 5 of the Electricity Act; S.N.S. 2004, c. 25, O.L.C. 2014-356 (August 25, 2014), N.S. Reg. 130/2014</i> |
| SAA | <i>Statement of Administrative Action accompanying the Uruguay Round Agreements Act</i> , H.R. Doc. No. 316, 103d Cong., 2d Session (1994) |
| SCM | <i>WTO Agreement on Subsidies and Countervailing Measures</i> |
| <i>Utility and Review Board Act</i> | <i>Utility and Review Board Act; Chapter 11 of the Acts of 1992, amended 1995, c. 7; 1998,c. 18, s. 582; 2007, c. 23; 2008, c. 68</i> (September 16, 2009) |
| <i>Utility and Review Board Regulations</i> | <i>Utility and Review Board Regulations made under Section 34 of the Utility and Review Board Act; S.N.S. 1992, c. 11; O.L.C. 92-1209 (December 10, 1992), N.S. Reg. 270/92</i> |
| <i>US – Civil Aircraft</i> | <i>United States – Measures Affecting Trade In Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R (Mar. 12, 2012) at 44, |

| Short Cite | Complete Title |
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| <i>US – Softwood Lumber</i> | <i>United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada, WT/DS257/R (August 29, 2003)</i> |
| <i>US – UK Lead and Steel</i> | <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (May 10, 2000) at page 25, para. 68.</i> |
| <i>Wholesale Market Rules Regulations</i> | <i>Wholesale Market Rules Regulations made under Section 5 of the Electricity Act; S.N.S. 2004, c. 25; O.I.C. 2007-43 (January 22, 2007, effective February 1, 2007), N.S. Reg. 36/2007</i> |