

**THE NORTH AMERICAN FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW**

In the Matter of:

**Supercalendered Paper from Canada:
Final Affirmative Countervailing Duty
Determination**

Secretariat File No.
USA-CDA-2015-1904-01

[PUBLIC VERSION]

Before: Lawrence J. Bogard, Panel Chair
Cynthia C. Lichtenstein
Joseph I. Liebman
David J. Mullan
Debra P. Steger

MEMORANDUM OPINION AND ORDER

April 13, 2017

Appearances:

Joanne E. Osendarp of Hughes, Hubbard & Reed LLP argued for the Government of Canada. With her on the brief were Matthew R. Nicely, Lynn G. Kamarck, Alan G. Kashdan, Scott M. Wise, and Daniel M. Witkowski.

Peggy A. Clarke of the Law Offices of Peggy A. Clarke and Gary N. Horlick of the Law Offices of Gary N. Horlick argued for Port Hawkesbury Paper LP.

Elliot J. Feldman of Baker & Hostetler LLP argued for Resolute FP Canada, Inc. and Resolute FP US, Inc. With him on the brief were John J. Burke, Michael S. Snarr, and Daniel R. Wilson.

Thomas M. Beline of Cassidy Levy Kent LLP argued for the Government of Nova Scotia. With him on the brief were Jack A. Levy, Christopher J. Kent, Christopher J. Cochlin, Andrew M. Lanouette, and Hugh Seong Seok Lee.

H. Deen Kaplan of Hogan Lovells US LLP argued for the Government of Ontario. With him on the brief were Mark S. McConnell, Jonathan T. Stoel, and Deborah M. Wei.

Frank J. Schweitzer of White & Case LLP argued for Irving Paper, Ltd. With him on the brief were Walter J. Spak, Gregory J. Spak, Jay C. Campbell, and Jessica E. Lynd.

Justin R. Becker of Sidley & Austin LLP argued for Catalyst Paper Corp., Catalyst Pulp and Paper Sales, Inc., and Catalyst Paper (USA), Inc. With him on the brief were Richard L.A. Weiner and Raj D. Pai.

Bernd G. Janzen of Akin Gump Strauss Hauer & Feld LLP argued for the Government of British Columbia. With him on the brief were Spencer S. Griffith and Shana A. Hofstetter.

Matthew J. Clark of Arent Fox LLP appeared for the Government of Quebec. With him on the brief was Julia L. Diaz.

Whitney M. Rolig and Amanda Lee of the Office of Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce argued for the Investigating Authority. With them on the brief were John D. McInerney and Michele D. Lynch.

Stephen A. Jones of King & Spaulding LLP argued for the Coalition for Fair Paper Imports. With him on the brief were Gilbert B. Kaplan and Jeffrey M. Telep.

OPINION AND ORDER OF THE PANEL

INTRODUCTION

This Binational Panel was appointed pursuant to Article 1904(2) of the North American Free Trade Agreement (“NAFTA”) and Section 516(A) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g), to review the Final Affirmative Countervailing Duty Determination¹ issued by the U.S. Department of Commerce (“Commerce” or “the Department”) in its countervailing duty (“CVD”) investigation of Supercalendared Paper (“SC paper”) from Canada.²

Port Hawkesbury Paper LP (“PHP”), Resolute FP Canada, Inc. and Resolute FP US, Inc. (collectively, “Resolute”), Irving Paper, Ltd. (“Irving”), and Catalyst Paper Corp. (“Catalyst”) challenge various elements of the *Final Determination*. They are supported by the Government of Canada (“GOC”) and the provincial governments of Nova Scotia (“GNS”), Ontario (“GOO”), Quebec (“GOQ”), and British Columbia (“GOBC”). Commerce, supported by the Petitioner, the Coalition for Fair Paper Imports (“Coalition” or “Petitioner”), opposes these challenges, with one exception: Commerce has requested a voluntary remand with respect to its calculation of the benchmark rate against which it measured whether electricity was provided to PHP for less than adequate remuneration (“LTAR”).

To summarize their claims: PHP challenges Commerce’s investigation into whether the GNS provided Crown stumpage rights (*i.e.*, the right to harvest timber from public lands) for

¹ Public Documents in the administrative record of Commerce’s investigation are designated as “P.R. Doc. ___” with the number assigned by the Department. Documents containing business proprietary information subject to protective order are designated as “C.R. Doc. ___.”

² *Supercalendared Paper From Canada: Final Affirmative Countervailing Duty Determination*, 80 Fed. Reg. 63535 (Dep’t Commerce Oct. 20, 2015), P.R. Doc. 540, (“*Final Determination*”) and accompanying Issues and Decision Memorandum (“*IDM*”), P.R. Doc. 526.

LTAR as being initiated without adequate evidentiary support. PHP also contends that Commerce unlawfully failed to recognize that any benefit resulting from the provision of funds by the GNS to maintain the New Page paper mill in “hot idle” status during the period leading up to the sale of the mill to PHP was extinguished by PHP’s purchase of the mill in a transaction made at arm’s length and for fair market value between private parties. PHP further contends that Commerce incorrectly found that the GNS had entrusted and directed Nova Scotia Power, Inc. (“NSPI”) to provide a financial contribution by providing electricity to PHP, and improperly calculated the benchmark against which the benefit of that financial contribution was measured. PHP contends, moreover, that Commerce erred in finding that payments made by the GNS to PHP through the Forestry Infrastructure Fund (“FIF”) and the Sustainable Forest Management and Outreach Program (“SFMO”) were countervailable grants when such payments were actually non-countervailable payments for the purchase of services. Finally, PHP argues that Commerce incorrectly failed to recognize that any benefit from the FIF program was extinguished when PHP purchased the paper mill in an arm’s length, fair market value transaction between private parties.

For its part, Resolute contends that Commerce failed to recognize that the benefits of any subsidies that its cross-owned company, Fibrek, may have received were extinguished when Resolute acquired that company through a “hostile takeover,” and that Commerce incorrectly concluded that the administrative record did not contain evidence establishing that Resolute purchased Fibrek in an arm’s length transaction at fair market value. Resolute further contends that Commerce improperly attributed any subsidies received by Fibrek pursuant to the Federal Pulp and Paper Green Transformation Program (“FPPGTP”) to Resolute, and that grants received by Resolute pursuant to Ontario’s Forest Sector Prosperity Fund (“FSPF”) and Northern

Industrial Electrical Rate (“NIER”) programs to support its paper mills in Ontario that did not produce SC paper were unlawfully attributed by Commerce to Resolute’s production of all pulp and paper products. Finally, Resolute challenges Commerce’s use of Adverse Facts Available (“AFA”) to establish a countervailing duty rate for “other assistance” provided to Fibrek that Resolute did not report to Commerce, but which Commerce identified at the verification stage of the investigation.

Irving and Catalyst challenge Commerce’s calculation of the “All Others” CVD rate assigned to the companies that were subject to the investigation but were not mandatory respondents.

For the reasons discussed herein, the Panel remands the *Final Determination* with respect to: (1) Commerce’s use of its “concurrent subsidies methodology” to conclude that the benefits from “hot idle” funds were not extinguished by PHP’s purchase of the New Page mill in an arm’s length, fair market value transaction between private parties; (2) Commerce’s use of its “concurrent subsidies methodology” to conclude that the benefits from certain FIF payments were not extinguished by PHP’s purchase of the New Page mill in an arm’s length, fair market value transaction between private parties; (3) Commerce’s conclusion that the GNS entrusted or directed NSPI to make a financial contribution by providing electricity to PHP; (4) Commerce’s conclusion that electricity prices in Nova Scotia could not serve as a “Tier 1” benchmark to determine whether NSPI provided electricity to PHP for LTAR; (5) Commerce’s conclusion that “market principles” for establishing a benchmark to determine whether NSPI provided electricity to PHP for LTAR are reasonably defined by reference to NSPI’s other customers rather than by practices in the electric utility industry as a whole; (6) Commerce’s motion for a voluntary remand to recalculate the benchmark for measuring whether NSPI provided electricity to PHP at

less than adequate remuneration; (7) Commerce's conclusion that there was no record evidence of a hostile takeover of Fibrek by Resolute that would demonstrate Resolute's purchase of Fibrek at arm's length and for fair market value; (8) Commerce's failure to examine whether the grants to Resolute under the NIER and FSPF programs were tied to the production of a particular product or to the production of an input product; and (9) Commerce's calculation of AFA for the other assistance to Fibrek that Commerce discovered at verification.

The Panel affirms the *Final Determination* in all other respects.

SUMMARY OF ADMINISTRATIVE PROCEEDINGS

This case originates from a petition filed by the Coalition on February 26, 2015, charging that SC paper from Canada benefited from countervailable subsidies.³ The GOC held consultations with Commerce on March 12, 2015, at which time it submitted a consultation paper stating its position that many of the Petitioner's subsidy allegations did not meet the statute's minimum standards for initiation.⁴ On March 18, 2015, the Department initiated its investigation of SC paper with respect to 28 of the 29 programs alleged in the Petition.⁵

The Coalition identified PHP, Resolute, Catalyst, and Irving as producers of SC paper from Canada. As part of the process of determining which of these producers to investigate as mandatory respondents, on March 19, 2016, Commerce released U.S. Customs ("Customs") import data for certain subheadings of the Harmonized Tariff Schedule of the United States ("HTSUS") that provided U.S. import volumes of SC paper from Canada attributable to each of

³ P.R. Doc. 1.

⁴ P.R. Doc. 62.

⁵ *Supercalendered Paper from Canada*, 80 Fed. Reg. 15981 (Dep't Commerce March 26, 2015), P.R. Doc. 84.

these producers.⁶ Commerce then invited and received comments from the parties on the Customs data and the selection of mandatory respondents. Irving and Catalyst submitted comments.⁷

On April 3, 2015, Commerce selected PHP and Resolute as mandatory respondents. Citing resource constraints and the complexity of the issues involved, the Department stated that it had selected PHP and Resolute because they were the two largest producers and/or exporters based on its analysis of the import data.⁸ With respect to voluntary respondents, Commerce stated that “{i}f voluntary responses are submitted in accordance with {the statute and regulations}, the Department intends to evaluate the circumstances at that time.”⁹

Commerce issued questionnaires to the GOC on April 6, 2015 and requested that the GOC forward the questionnaires to the relevant provincial governments and the two mandatory respondents.¹⁰ In addition to questions addressed to the expressly initiated programs, Commerce made the following request:

Does the GOC or entities directly owned, in whole or in part, by the GOC or any provincial or local government . . . , directly or indirectly, provide any other forms of assistance to producers or exporters of SC Paper? Please coordinate with the respondent companies to determine if they are reporting usages of any subsidy program(s). For each such program, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the Standard Questions

⁶ These were HTSUS subheadings 4802.61.3010, 4802.61.3035, and 4802.61.3090. P.R. Doc. 75.

⁷ P.R. Doc. 79; P.R. Doc. 81.

⁸ P.R. Doc. 100.

⁹ *Id.*

¹⁰ P.R. Doc. 103.

Appendix, as well as other appropriate appendices attached to this questionnaire.¹¹

In their respective questionnaire responses, the Governments of Canada, Ontario and Quebec objected to this “other assistance” request on the grounds that it was overbroad and inconsistent with the governing statute, Commerce’s regulations, and the Agreement on Subsidies and Countervailing Measures. After stating that they had attempted to comply with the question “in good faith,” the government respondents qualified their responses as follows: (1) PHP and Resolute were relied on to identify any “other assistance”; (2) the response was limited to assistance that was provided with respect to the production or export of SC paper; and (3) “generally available” assistance (e.g., infrastructure programs) was not reported.

On April 20, 2015, Catalyst and Irving submitted timely responses to Commerce’s questionnaire concerning their affiliated companies.¹² On May 1, 2015, Commerce issued a memorandum explaining that in the circumstances of the investigation, it would be unduly burdensome and inhibit timely completion of the investigation to accept submissions from voluntary respondents.¹³ On May 27, 2015, the GOC, the relevant provinces, PHP, and Resolute submitted timely responses to Commerce’s questionnaire, as did Catalyst and Irving.¹⁴

¹¹ P.R. Doc. 102 at 27.

¹² C.R. Doc. 68; C.R. Doc. 69.

¹³ P.R. Doc. 148.

¹⁴ P.R. Doc. 79; P.R. Doc. 169; P.R. Doc. 161; P.R. Doc. 198; P.R. Doc. 230.

Commerce published its *Preliminary Determination* on August 3, 2015.¹⁵ Commerce calculated preliminary *ad valorem* subsidy rates of 20.33 percent for PHP and 2.04 percent for Resolute and a rate for “All Other” exporters of SC Paper, including Catalyst and Irving, of 11.19 percent, which was a simple average of the rates calculated for PHP and Resolute.¹⁶

Commerce conducted verifications of the responses of the GOC, the provincial governments, and the mandatory respondents in August 2015. The respondent parties and the Coalition submitted Case Briefs and Rebuttal briefs on September 14 and 21, 2015, respectively.¹⁷ It held a public hearing at which the interested parties participated on September 24, 2015. Commerce published its *Final Determination* on October 20, 2015, in which it calculated revised *ad valorem* subsidy rates of 20.18 percent and 17.87 percent for PHP and Resolute, respectively. Commerce also calculated a revised All Others CVD rate of 18.85 percent, using a weighted-average of PHP’s and Resolute’s rates.¹⁸

The GOC, the GNS, the GOO, the GOBC, the GOQ, PHP, Resolute, Catalyst, and Irving each timely requested this Panel Review on November 18, 2015.

¹⁵ *Supercalendered Paper From Canada: Preliminary Affirmative Countervailing Duty Determination*, 80 Fed. Reg. 45951 (Dep’t Commerce Aug. 3, 2015), P.R. Doc. 472, and accompanying Preliminary Decision Memorandum (“PDM”), P.R. Doc. 442.

¹⁶ Although the statute requires Commerce to use a “weighted average” when calculating the all-others rate, 19 U.S.C. § 1671(c)(5)(A)(i), Commerce used a simple average because a weighted average “risk[ed] disclosure of proprietary information.”

¹⁷ C.R. Docs. 522-533.

¹⁸ P.R. Doc. 540; P.R. Doc. 526.

STANDARD OF REVIEW

This Panel's authority derives from NAFTA Chapter 19, Article 1904(1), which provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." In accordance with NAFTA Annex 1911, the Department's *Final Determination* concerning SC Paper from Canada is a "final determination" reviewable by a Binational Panel pursuant to Article 1904.

As provided under NAFTA Article 1904(2), this Panel must determine if the *Final Determination*:

was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

Further, pursuant to NAFTA Article 1904(3), this Panel is required to apply the standard of review and general legal principles that a United States Court would apply in a review of the *Final Determination*. NAFTA Article 1911 states that such general legal principles include "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies."

The applicable standard of review is set out in 19 U.S.C. § 1516a(b)(1)(B)(i), which requires the United States Court of International Trade ("CIT"), and therefore this Panel, to "hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Consolidated Edison Co. v.*

NLRB, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

NAFTA Article 1904(2) requires the Panel to conduct its review “based on the administrative record.” The Panel’s review of Commerce’s *Final Determination* is not *de novo* and must be made on the basis of the administrative record developed during the investigation. *See Cabot Corp. v. United States*, 694 F.Supp. 949, 952-53, (Ct. Int’l Trade 1988); *Ceramica Regiomontana, S.A. v. United States*, 636 F.Supp. 961, 966 (Ct. Int’l Trade 1986), *aff’d*, 810 F.2d 1137 (Fed. Cir. 1987). The Panel must, therefore, take into account any evidence on the administrative record that supports Commerce’s conclusions as well as any evidence that fairly detracts from the weight of the evidence relied on by the agency in reaching its conclusions. *Huvis Corp. v. United States*, 570 F.3d 1347, 1351 (Fed. Cir. 2009); *Consol. Edison* at 229. It is well settled that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Fed. Maritime Comm’n*, 383 U.S. 607, 619-620 (1966). The Panel therefore may not “displace {Commerce’s} choice between two fairly conflicting views, even though {it} would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488. In sum, the Panel must affirm Commerce’s *Final Determination* unless it concludes that the determination is not supported by substantial evidence on the administrative record of the underlying investigation.

Finally, in determining whether Commerce’s interpretation of the governing statute is “in accordance with law,” this Panel follows the Supreme Court’s decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* mandates that where the statute is clear and unambiguous on its face and Commerce interprets it accordingly, this

Panel must defer to Commerce's interpretation. However, where the statute is silent or ambiguous with respect to the specific issue before it, this Panel must then determine whether the agency reasonably construed the statute. *Chevron*, 467 U.S. at 842-843. Moreover, this Panel must defer to Commerce's reasonable interpretation of the statute even if the Panel would have preferred another, as the "agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding."

Chevron, at 842-843. See also *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir.1992); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994); *Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 813 (Ct. Int'l Trade 1998).

ANALYSIS AND DECISION

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. Complaining Parties Must Exhaust Their Administrative Remedies

Among the general legal principles that this Panel must apply to a review of a determination of the competent investigating authority is the doctrine of exhaustion of administrative remedies. By statute, parties to an administrative proceeding are required to exhaust their administrative remedies where appropriate, before obtaining judicial review. See 28 U.S.C. § 2637(d). Judicial decisions have established certain exceptions to the preclusive effects of the exhaustion doctrine. The doctrine holds generally that "A reviewing court usurps {the agency's} function when it sets aside an agency determination upon a ground not theretofore presented and deprives the {agency} of an opportunity to consider the matter, make its ruling, and state the reasons for its action."¹⁹ In short, before a party may appeal a Commerce determination to the CIT or a NAFTA Panel on particular grounds, it must have presented those

¹⁹ *Unemployment Compensation Comm'n v. Argon*, 329 U.S. 143, 155 (1946).

grounds to the Department at the administrative level. An important corollary requirement to this general exhaustion of administrative remedies doctrine is Commerce's regulation mandating that parties must raise in their administrative Case Briefs all arguments of concern to them.²⁰

The briefs of the parties before this Panel address the applicability of the exhaustion doctrine with respect to several findings that Commerce made in the *Final Determination*. The parties do not disagree as to the general applicability of the doctrine to CVD investigations or that there are established judicial exceptions to the requirement of exhaustion. Rather, the parties differ as to whether the particular factual circumstances pertaining to certain contested determinations demonstrate that a party sufficiently raised an issue in its administrative case brief so as to render the exhaustion doctrine an improper bar to the Panel's substantive consideration of the issue as to which the doctrine has been asserted. Consequently, at this point we review the underlying rationale for the doctrine and briefly discuss the exceptions that the courts have established.

The exhaustion doctrine serves two important purposes. First, it protects an administrative agency's authority. Second, it fosters judicial efficiency and preserves the resources of both the reviewing tribunal and the parties. "It allows the administrative agency to perform the functions within its area of special competence (to develop the factual record and to apply its expertise), and – at the same time – it promotes judicial efficiency and conserves judicial resources, by affording the agency the opportunity to rectify its own mistakes (and thus

²⁰ See 19 C.F.R. § 351.309(c)(2) (2010) ("The case brief must present all arguments that continue in the submitter's view to be relevant to the final determination.")

to moot controversy and obviate the need for judicial intervention).”²¹ These same tenets were articulated by the United States Court of Appeals for the Federal Circuit (“Federal Circuit”).²²

The courts have created limited exceptions to the exhaustion doctrine. Under the first of these, a pure question of law may excuse a failure to exhaust if the party raises “a new argument that is of a purely legal nature” that does not “require further agency involvement, additional fact finding, or opening up of the record” and does not “create undue delay nor cause expenditure of scarce party time and resources.”²³

Failure to exhaust may also be excused by a lack of access to the confidential record or by an intervening judicial decision “which if applied might have materially altered the result.”²⁴ Finally, parties need not exhaust their administrative remedies if doing so would have been futile. The futility exception is a narrow one and “{t}he mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust its administrative remedies.”²⁵

²¹ *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 342 F. Supp. 2d 1191, 1206 (Ct. Int’l Trade 2004). See also *Corus Staal BV v. United States*, 502 F.3d 1370, 1380-81 (Fed. Cir. 2007) (“*Corus Staal*”) (the trial court did not abuse its discretion in applying the exhaustion requirement when plaintiff failed to raise objections to the treatment of duty absorption issue).

²² *Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1988). See also *Essar Steel, Ltd. V. United States*, 753 F.3d 1368, 1374-75 (Fed. Cir. 2014) (“The doctrine of exhaustion of administrative remedies provides ‘that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.’”) (citations omitted).

²³ *Gerber Food (Yunnan) Co. v. United States*, 601 F. Supp. 2d 1370, at 1380 (internal citations omitted).

²⁴ *Id.* (internal citations omitted).

²⁵ *Corus Staal* at 1379 (internal citations omitted).

B. PHP Failed to Exhaust Its Administrative Remedies Concerning Initiation of the Investigation of Stumpage

PHP argues that Commerce initiated an investigation into whether its purchases of stumpage from the GNS were for LTAR without a sufficient basis.²⁶ PHP asserts that the Coalition did not allege, and Commerce did not otherwise identify, any evidence that PHP benefited from purchases of stumpage at LTAR. In the *Final Determination*, Commerce found that the provision of stumpage and biomass materials by the GNS constituted a countervailable subsidy and calculated an *ad valorem* countervailable subsidy rate of 1.74 percent.²⁷

Both Commerce and the Coalition assert in response that the Panel should affirm Commerce's determination with respect to the provision of stumpage because PHP did not raise this argument in its Case Brief to Commerce thereby failing to exhaust its administrative remedies and waiving any challenge to Commerce's determination concerning stumpage.²⁸

The GOC, joined by PHP, replies that the GOC objected to the initiation of the investigation of stumpage rights in its consultations with Commerce, and that the stumpage initiation issue had thereby been raised administratively before Commerce.²⁹ Specifically, the GOC argues that the pre-initiation consultations between the Department and the GOC put Commerce on notice that the GOC regarded the allegation of subsidized stumpage in Nova

²⁶ Case Brief ((Rule 57(1)) of Port Hawksbury Paper LP ("PHP R. 57.1 Br.") at 15-18.

²⁷ *IDM* at 53.

²⁸ See Rule 57(2) Brief of The United States Department of Commerce ("Commerce R. 57.2 Br.") at 44-47; Responsive Brief of The Coalition For Fair paper Imports ("Pet. R. 57.2 Br.") at 93. Petitioner provides additional reasons for rejecting the specificity argument (*Id.* at 93-9), but because our determination is based upon the Exhaustion Doctrine, we do not reach those arguments.

²⁹ See Canadian Government Parties' Joint Rule 57.3 Reply Brief ("GOC R. 57.3 Br.") at 33-34; Reply Brief (Rule 57.3) of Port Hawksbury Paper LP ("PHP R. 57.3 Br.") at 3-6.

Scotia with respect to PHP to be inadequate, and that such notice served to exhaust administrative remedies regardless of whether the GOC reiterated those objections in its Case Brief.³⁰

Both the GOC and PHP go on to assert that, in any event, it would have been futile to raise the issue in their Case Briefs and therefore, based upon the futility exception, the exhaustion doctrine should not be applied.

For the reasons explained below, we determine that the exhaustion of administrative remedies doctrine is applicable to the issue of Commerce's initiation of its investigation of stumpage provided to PHP, and that the parties have failed to exhaust their administrative remedies with respect to that issue.

No party has established that it met the clear requirement of 19 C.F.R. § 351.309(c)(2) (2010) that "The case brief must present all arguments that continue in the submitter's view to be relevant to the final determination." It is clear that neither the GOC nor PHP set forth any indication in their Case Briefs that initiation of investigation of stumpage was still an issue or that they objected to any aspect of the *Preliminary Determination* based upon those grounds, as required by the Commerce Regulation. No party has identified to us anything in any Case Briefs regarding such a position.³¹

³⁰ See Ex-Parte Memorandum—"Consultations with the Government of Canada ..." from Toby Vandall to the File (March 13, 2015), P.R. 64; Letter from Hughes Hubbard & Reed LLP to U.S. Department of Commerce, "Consultations Paper of the Government of Canada Connection with Countervailing Duty Petition on Supercalendered Paper (Mar. 13, 2015) P.R. 62.

³¹ It is worth noting this is not a case in which we might be faced with the question whether a somewhat vague administrative argument is sufficiently clear to put the agency on notice of an argument that is more fully in the briefs before the reviewing tribunal. This is also not a case that turns on the question of whether a party who is advancing an argument before the reviewing tribunal, but who did not raise such an argument in its administrative case brief, may rely upon the issue having been effectively and timely raised in the administrative case brief of another

The Futility Exception is Not Warranted

Both the GOC and PHP argue that this Panel should not apply the exhaustion of administrative remedies doctrine as a bar to their claims based upon the futility exception. They argue that it would have been futile for them to have raised the initiation argument, having raised it in pre-investigation consultations, because Commerce would under no circumstances after conducting its investigation and issuing a preliminary determination decide that it should reverse direction and agree that the investigation was improperly initiated in the first place. PHP goes on to assert that it would have been a needless waste of “time and money” to be expected to restate the arguments of improper initiation by raising that issue in the Case Briefs.³² Without analysis, PHP maintains that the decision in *Itochu Bldg. Products v. United States*, 733 F.3d 1140, 1146 (Fed. Cir. 2013) supports applying the futility exception here, while both PHP and the GOC rely upon the decision in *Corus Staal*³³ for the proposition that the Panel, like the courts, has discretion whether to require the exhaustion of administrative remedies.

The case here is readily distinguished from the situation in *Itochu*. There, in deciding to invoke the futility exception, the court stated:

Here, Commerce's position, which Commerce was defending in court at the time, was that it had no discretion in the matter because it was constrained by statute to reject Itochu's position. Moreover, Commerce has not identified any new factual or legal argument that Itochu could have made after Commerce issued its preliminary results that might have affected Commerce's position, aided judicial review, or given Itochu the relief it sought. In these circumstances, which are likely rare ones, the demanding abuse-of-

party before the reviewing tribunal. Therefore we do not address either of those two inapplicable circumstances.

³² PHP Rule 57.3 Brief at 5.

³³ *Supra*, note 21.

discretion standard for reversal of an exhaustion ruling under section 2637(d) is met. {Footnote omitted}

733 F. 3d at 1148.

In contrast, Commerce at no time has taken the position in this proceeding that (1) once its investigation began it did not have the authority to decline to make an affirmative CVD determination regarding stumpage because the investigation was improperly initiated; (2) it lacked the authority to reconsider its initiation determination; or (3) it would refuse to do so on any grounds had persuasive arguments to do so been presented in Case Briefs. Consequently, the circumstances that would warrant our exercising our discretion to apply the futility exception are not present in this case.

Based upon statutory and controlling legal precedent, we hold that PHP has failed to exhaust its administrative remedies with respect to its claim that the initiation of an investigation of stumpage was not in accordance with United States law. Therefore, PHP's claim regarding the improper initiation of stumpage for LTAR is denied. Commerce's determination to impose countervailing duties with respect to that program is upheld.

II. ISSUES RAISED BY PORT HAWKESBURY

A. Extinguishment/Pass Through of "Hot Idle" Funds

Background³⁴

In September 2011, New Page Port Hawksbury ("NPPH") applied for and obtained bankruptcy protection under the Companies Creditors Arrangements Act ("CCAA"). As part of these proceedings, a judge of the Nova Scotia Supreme Court ("NSSC") appointed a Monitor to

³⁴ The Background is distilled from the facts as recounted by Commerce in the *IDM* at 4-5, 17-20 and 82ff.

supervise the sale of NPPH through a bidding/auction process. In due course, NPPH, the Monitor, and a U.S. investment banking firm hired by the Monitor and NPPH, identified fourteen qualified bidders who were invited to submit preliminary offers to purchase NPPH's assets, including the mill at which PHP produced SC paper during the investigation period. Of those fourteen bidders, eight submitted offers and from those eight, four were invited to submit formal and final bids by December 16, 2011. They each did so.

Of those four, two intended to liquidate NPPH's assets while the other two planned to continue operations as a going concern. The latter two conditioned their bids on NPPH maintaining its SC paper mill in "hot idle" status until any sale was finalized. Following review by NPPH and the U.S. investment banking firm, and an evaluation of that review by the Monitor, NPPH's Board of Directors agreed that the offer from Pacific West Commercial Corporation ("PWCC") should be pursued as the higher and better of the two "going concern" proposals. On January 4, 2012, the Monitor announced that PWCC had been selected as the preferred bidder. In short, the transaction was one between two private entities.

On July 12, 2012, this decision was endorsed by the NSSC and, subsequently, on September 25, 2012, the court issued an order approving the sale. The sale was then finalized on September 28, 2012. During the negotiations that followed the decision to pursue PWCC's offer, the price to be paid for the assets of NPPH did not change from that in PWCC's final, formal bid.

Prior to the date by which the formal and final bids had to be submitted, December 16, 2011, NPPH's U.S. parent company had committed US\$22 million to a fund to maintain the SC paper mill in "hot idle" status, the disbursement of which was supervised by the Monitor. By the time that the formal and final bids were submitted, this fund was nearly exhausted. As a

consequence, the GNS Treasury Board approved additional funding to maintain the SC paper mill in “hot idle” status until any sale was finalized. The first tranche of this GNS “hot idle” funding was approved in December 2011 -- after the submission of the final bids. This was followed by a second tranche of funding on March 16, 2012. This money was also disbursed under the supervision of the Monitor. All funds that were approved but not disbursed were repaid to the GNS at the conclusion of the *CCCA* proceedings.

In its *Preliminary Determination*, Commerce concluded that the grants provided by the GNS for the purpose of maintaining the mill in “hot idle” status 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” 19 U.S.C. § 1677(5)(D)(i). Commerce then preliminarily determined that the grants conferred a benefit within the meaning of 19 C.F.R. § 351.504(a) equal to the amount of the “hot idle” grants. In its *Final Determination*, Commerce affirmed this conclusion.³⁵ In doing so, it rejected the contentions of the GOC, the GNS, and PHP that any benefit under the grants had been extinguished by the arm’s length for fair market value sale of NPPH to PWCC.

Application of Commerce’s “Concurrent Subsidies Methodology”

As a threshold matter, Commerce, supported by the Coalition, contends that the complaining parties failed to exhaust their administrative remedies with respect to their arguments that Commerce’s so-called “concurrent subsidies methodology” was unlawfully used in the *Final Determination* because: (a) Commerce applied a methodology that was developed in a privatization context to a sale between private parties, and (b) this methodology does not make

³⁵ *IDM* at 17-20.

economic sense in a private-to-private transaction.³⁶ The Panel concludes that the GNS raised the issue of the lawfulness of applying Commerce’s privatization methodology in private-to-private transactions with “reasonable clarity” in its administrative Case Brief to put Commerce on notice as to the issue. Accordingly, we do not find that the complaining parties failed to exhaust their administrative remedies.

The GNS argued in its Case Brief that Commerce “failed to apply its presumption that a private-to-private arm’s length sale transaction extinguishes pre-sale subsidies” and observed that when Commerce announced its privatization methodology, that methodology “applied specifically to the privatization of a government-owned company.”³⁷ The GNS further argued that in *Pasta from Italy*,³⁸ Commerce subsequently affirmed its presumption that subsidies are extinguished by arm’s length sales at fair market value that take place between private parties and that Commerce failed in the *Preliminary Determination* to engage in the fair market value analysis affirmed in *Pasta from Italy*. While the GNS’ argument could have been more explicitly stated, the Panel concludes that the GNS invoked, with “reasonable clarity” to alert Commerce that the issue being raised, the question whether the “concurrent subsidies methodology” could lawfully be employed in the context of a private-to-private transaction.³⁹

³⁶ Commerce R. 57.2 Br. at 51; see also the Coalition’s R. 57.2 Br. at 78-79.

³⁷ P.R. Doc. 498 at 57.

³⁸ *Certain Pasta from Italy*, 70 Fed. Reg. 17971 (Dep’t Commerce April 8, 2005).

³⁹ See *Ad Hoc Shrimp Trade Action Comm. v. United States*, 882 F. Supp. 2d 1366, 1373 (Ct. Int’l Trade 2012).

Moreover, because GNS raised the issue at the administrative level, the other complaining parties are entitled to raise it before the Panel.⁴⁰

Commerce takes the position that so-called concurrent subsidies, *i.e.*, subsidies that are provided in the course of the sale of a company's assets, require a different analysis than subsidies that are provided prior to the sale of those assets. In conducting its analysis of the "hot idle" funding from the GNS, Commerce applied the so-called concurrent subsidies methodology set out in its *Notice of Final Modification of Agency Practice*.⁴¹ Under part of that methodology, concurrent subsidies are treated as extinguished in an arm's length sale for fair market value when:

1. The nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore were 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.⁴²

Applying those three criteria to the GNS "hot idle" grants, Commerce ruled that the transaction did not fall within the requirements of the first and third elements.

The *Notice of Final Modification* and Commerce's "concurrent subsidies methodology" were explicitly adopted in the context of privatizations (*i.e.*, the sale of government owned production facilities to private interests) and not for the purposes of assessing sales by one

⁴⁰ See *Lifestyles Enter., Inc. v. United States*, 751 F. 3d 1371, 1377 (Fed. Cir. 2014).

⁴¹ *Id.* at 18-19 and 86-87, referring to *Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act*, 68 Fed. Reg. 37125 (Dep't Commerce June 23, 2003) ("*Notice of Final Modification*").

⁴² *Notice of Final Modification* at 37137.

private concern to another private entity. This is clear from the statement of action at the beginning of the *Notice*: “Modification of agency practice regarding privatizations.”⁴³ It is further underscored by subsequent language in the *Notice of Final Modification* in which Commerce observes that it was not then deciding whether the overall provisions of the *Notice* might also be applied in private-to-private transactions:

We are not making a decision at this time as to whether or how we will apply this new methodology to types of changes in ownership and factual scenarios (*e.g.* partial and gradual privatizations, **private-to-private sales**) other than the privatization of all or substantially all of a state-owned enterprise. Rather, we wish to provide the public with an additional opportunity for further comment on the applicability of the new methodology in those circumstances.⁴⁴

Later, in discussing the application of the specific methodology to be applied to concurrent subsidies, the *Notice* is even more specific: “We caution that our rationale for addressing concurrent subsidies should only be understood to apply to the circumstances of concurrent subsidies in the privatization context.”⁴⁵

However, in the *Final Determination*,⁴⁶ Commerce states that it had subsequently determined to apply this methodology to private-to-private sales, and cites as an example *Pasta from Italy*.⁴⁷ In contrast, as reflected in the *IDM*,⁴⁸ the GNS had argued that there was an

⁴³ *Id.* at 37125.

⁴⁴ *Id.* at 37136 (emphasis added).

⁴⁵ *Id.* at 37173.

⁴⁶ *IDM* at 18-19, n. 110.

⁴⁷ The parties identified no other determinations in which Commerce has applied its concurrent subsidies methodology to a private-to-private transaction.

⁴⁸ *IDM* at 82.

“established presumption that an arm’s-length sale for fair market value extinguishes all pre-sale subsidies”⁴⁹ and that the Department had affirmed this presumption in *Pasta from Italy*.⁵⁰ This produced the following retort from Commerce:

{B}oth 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. The presumption *may* be rebutted by, among other things, a sale at arm’s length for fair market value. However, a sale at arm’s length for fair market value does not *automatically* extinguish subsidies provided prior to sale (or the establishment of the price), and does not extinguish subsidies, except when the Department’s criteria are met.⁵¹

Obviously, this difference of opinion necessitates an examination of *Pasta from Italy*.

Pasta from Italy involved a private-to-private sale of a business. There, Commerce referred to the *Notice of Final Modification* under the heading “Changes in Ownership”, noting that it had adopted a new methodology for analyzing privatizations in the countervailing duty context. It then explained:

The Department’s new methodology is based on a rebuttable “baseline” presumption that non-recurring, allocable subsidies continue to benefit the subsidy recipient throughout the allocation period (which normally corresponds to the average useful life (“AUL”) of the recipient’s assets). However, an interested party may rebut this baseline presumption by demonstrating that, during the allocation period, a change in ownership occurred in which the former owner sold all or substantially all of a company or its assets, retaining no control of the company or its assets, and that the sale was an arm’s length transaction for fair market value.⁵²

⁴⁹ *Id.* at 83.

⁵⁰ *Id.* at 86.

⁵¹ *Id.*

⁵² *Pasta from Italy* at 17972.

Commerce then discussed the appropriate standards by which to assess whether there has been an arm's length transaction for fair market value. These standards vary as between privatizations and private-to-private sales. However, in either situation, if the test for rebutting the arm's length/fair market value presumption is satisfied, there then arises a secondary presumption to the effect that "any pre-sales subsidies will be presumed to be extinguished in their entirety."⁵³ In its turn, however, this secondary presumption is also rebuttable. If that presumption is un rebutted (not "obviated"), then "all non-recurring pre-sale subsidies {are} extinguished by the sale and, therefore, non-countervailable."⁵⁴

Nowhere in *Pasta from Italy* does Commerce make any reference to the three criteria that have to be met under the *Notice of Final Modification* for extinguishment in a privatization context even where there is a proven arm's length transaction for fair market value. Moreover, Commerce neither explicitly nor implicitly states that the *Notice of Final Modification* in all of its detail also applies to private-to-private sales. All Commerce did in *Pasta from Italy* was recognize in a private-to-private context certain presumptions that are set out in the *Notice of Final Modification*. Indeed, when it comes to the test to be applied in determining whether a party has obviated the secondary presumption of extinguishment that arises once it is established that there has been an arm's length transaction for fair market value, the criteria outlined bear no resemblance to the three part test for concurrent subsidies set out in the *Notice of Final Modification*. Rather, in *Pasta from Italy*, Commerce applies a different test: whether "broader market conditions were severely distorted by government action and that the transaction price was meaningfully different from what it would otherwise have been absent the distortive

⁵³ *Id.* at 17973.

⁵⁴ *Id.*

government action.”⁵⁵ Underscoring this is the fact that Commerce’s statement in the *Notice of Final Modification* cautioning against the application of the concurrent methodology in the context of private-to-private sales seems to be specifically addressed to the three prong methodology developed in the context of the secondary presumption.

Pasta from Italy does not, therefore, provide support for Commerce’s assertion that the three part test for determining whether a concurrent subsidy is extinguished where there has been an arm’s length sale for fair market value applies to private-to-private transactions. Absent additional support for its position, Commerce was not justified in failing to evaluate whether the contract of sale between NPPH and PWCC was made at arm’s length for fair market value and, if so, whether the facts met *Pasta from Italy*’s market distortion test, which we conclude a party may rely on when there is such an arm’s length for fair market value sale.

Application of the *Notice of Final Modification* Extinguishment Test to the Sale of NPPH

Even if Commerce were justified in applying the concurrent subsidies methodology from the *Notice of Final Modification*, the Department’s conclusion that the NPPH sale to PWCC did not meet the relevant criteria was not based on substantial evidence on the record or otherwise made in accordance with law.

As discussed above, of the four qualified bidders for the purchase of the mill, two planned to continue to operate it as a going concern while two planned to liquidate the corporate assets. Both of the bidders who planned to continue to operate the mill as a going concern conditioned their bids on the mill remaining in “hot idle” status until any sale was finalized. None of the facts surrounding the bid process suggests that these bidders were concerned with how this status was continued and, in particular, with who paid the costs of continuing the mill in

⁵⁵ *Id.*

“hot idle” status. As long as the “hot idle” status of the mill was preserved, the conditions of their bids were satisfied. As a consequence, the fact that the GNS funds for the preservation of “hot idle” status were not disbursed until after these bids were submitted does not reasonably appear to have had any impact on the price that either of these two bidders was prepared to pay for the mill.

Thus, even if we were to assume that the concurrent subsidies methodology set out in the *Notice of Final Modification* applies to private-to-private transactions, the GNS “hot idle” funds were bestowed prior to the finalization of the sale (as Commerce recognized in the *IDM*⁵⁶). Moreover, because the bidders conditioned their bids on the mill being in “hot idle” status regardless of whether the cost of doing so was paid by a private party or the GNS, the GNS’s funding was “fully transparent” to the bidders in that their bids assumed the costs of hot idle would be provided by some source, whether private or governmental. This assumption was reflected in the “final bid values of the potential bidders.” Whether by way of a subsidy or otherwise, the benefits of the mill remaining in “hot idle” status were bargained for and reflected in each of the two bids as a condition of the completion of any sale of the mill.

Finally, in terms of the third element in the relevant part of the concurrent subsidies methodology, there is “evidence otherwise on record” that the GNS “hot idle” funds were reflected in the purchase price. The purchase price paid by PWCC did not change between the time of the initial bid and the completion of the sale. By necessary implication, it reflected the worth to the purchaser of the obligation undertaken by the vendor to preserve the mill in “hot idle” status, fulfilment of which the GNS enabled by its grants.

⁵⁶ *IDM* at 23.

In short, even assuming the GNS assistance to NPPH in aid of keeping the mill in “hot idle” status was a subsidy, it was a subsidy to the vendor, not to the purchaser. Indeed, viewing this issue from the perspective of whether there was even in law a subsidy rather than in terms of the application of the concurrent subsidies methodology, it is difficult to see how there has been a “financial contribution” to the buyer of the mill. Rather, as argued by the Canadian parties, the GNS “hot idle” funds benefitted the seller since the cost of preserving the mill in “hot idle” condition was a cost that the seller would otherwise have had to bear as part of its contractual obligations assumed by NPPH in accepting PWCC’s bid.

We therefore remand this issue to Commerce for (1) a fuller explanation of why all components of the concurrent subsidy methodology apply to this private-to-private transaction, and, (2) failing that, an evaluation as to whether the sale of NPPH was at arm’s length for fair market value and, (3) if so, a determination as to whether there is any other factual basis for holding that the GNS “hot idle” grants were not extinguished by that sale.

B. Extinguishment/Pass Through of Forestry Infrastructure Fund

Commerce also deployed the concurrent subsidies methodology from the *Notice of Final Modification* in determining that the benefit of the second allocation of funds that the GNS provided to NPPH under the Forestry Infrastructure Fund was not extinguished by an arm’s length sale of the company’s assets (including the mill) for fair market value to PWCC.

The FIF was the result of a September 16, 2011 agreement between the GNS and NPPH that was put into effect a week later by the NSSC as part of the CCAA process. Under it, the GNS provided money for NPPH to use in the continuation of various forestry infrastructure activities carried on by third party contractors and subcontractors. In the *Final Determination*,⁵⁷

⁵⁷ *IDM* at 21.

Commerce characterized the FIF as a program “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,” or, in other words, “to support the mill through the CCAA and sale process.” In so doing, Commerce rejected contentions advanced by the GNS and PHP that the FIF was for the more general benefit of the Province of Nova Scotia and to “support unrelated contractors.”⁵⁸ Indeed, in their Joint Brief,⁵⁹ the complaining parties appeared to have accepted the essence of this characterization of the nature of the FIF. It was “established to support New Page’s supply chain while keeping the facility open to be sold to a new owner.”

Under the original agreement between the GNS and NPPH, NPPH was to receive C\$14 million and the fund was scheduled to terminate in December 2011. However, the agreement was amended to extend its operation until March 31, 2012. Thereafter, on March 7, 2012, the agreement’s life was extended again until September 30, 2012 and, at the same time, there was an infusion of a further C\$12 million into the FIF.

In its *Final Determination*, Commerce, in introducing the extinguishment issue, stated that it would look to the *Notice of Final Modification* for “guidance.”⁶⁰ However, it then treated the concurrent subsidies test from the *Notice of Final Modification* as definitive with respect to both tranches of FIF funding.⁶¹ In the case of the first tranche of funding, Commerce ruled that it

⁵⁸ Commerce also rejected the argument that the FIF funds did not amount to a countervailable subsidy because they were not a payment “that provides a financial contribution” but rather a purchase of services. We discuss and reject the challenge to this aspect of the *Final Determination* later in the decision (II.D). However, that does not moot the extinguishment argument dealt with in this section of our decision.

⁵⁹ P.R. Doc. 497 at 68.

⁶⁰ *IDM* at 21.

⁶¹ *IDM* at 22-23.

had been extinguished by reference to the concurrent subsidies criteria. The concurrent subsidies were not only bestowed prior to the sale, but they were also fully transparent to potential buyers. Moreover, there was an absence of evidence that the subsidies were not otherwise reflected in the purchase price. In contrast, as with the “hot idle” funds, Commerce determined that, while the second tranche of FIF funding met the second limb of the three part test (it had been bestowed prior to the sale), the extinguishment argument failed with respect to the first and third limbs. As opposed to the first tranche of funding, the nature and value of the second tranche was not fully transparent and therefore not reflected in the final bid values because it was approved after the date on which bids had closed. The Department found that the first criterion for extinguishment was not met. With respect to the third criterion, Commerce again relied on the fact that the price did not change at any point in the sales process, thus providing other evidence that the concurrent subsidies “were not fully reflected in the purchase price.” The price had been established before the second tranche of FIF funding was agreed upon and approved. Therefore, it could not have been reflected in the purchase price.

The same problems emerge from this analysis, albeit in a different setting, as were present in the case of the “hot idle” funds. Commerce deployed the three part methodology from the *Notice of Final Modification* without justifying why that three part methodology applied outside the realm of privatizations and, in particular, to private to private sales.⁶² Moreover, even assuming the relevance of the methodology to private to private sales, Commerce failed to consider whether the bestowal of the second tranche of the FIF funding was part of an obligation

⁶² Both Commerce and the Coalition contended that the complaining parties had failed to exhaust the argument that Commerce had erred in applying the concurrent subsidies methodology from the *Notice of Final Modification* in the context of a private-to-private sale. The Panel disagrees for the same reasons discussed above at pages 20-21 in the context of “hot idle” funding.

of PHP to maintain the mill as a “going concern” until the sale was finalized and approved as part of the CCAA process. As such, the second tranche of FIF funding was a subsidy to the vendor rather than the purchaser.

As a consequence, we therefore remand this issue to Commerce on the same terms as we remanded the issue of extinguishment as it arose in the context of the “hot idle” funds.

C. Commerce’s Conclusion that the GNS Entrusted or Directed NSPI to Provide Electricity

In the *Preliminary Determination*, Commerce found that the GNS, through the Nova Scotia Utility and Review Board (“NSUARB”), entrusted or directed NSPI to make a financial contribution by providing electricity. However, in the *IDM*, Commerce changed its decision to find that “the GNS *directly* entrusted or directed NSPI to provide electricity pursuant to the Public Utilities Act.”⁶³ As Commerce stated, 19 U.S.C. § 1677(5)(B)(iii) “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.”⁶⁴ Commerce also found that the provision of electricity is the provision of a good or a service pursuant to section 19 U.S.C. § 1677(5)(D)(iii).⁶⁵ This latter finding has not been appealed.

Commerce found that the GNS and the NSUARB were “authorities” within the meaning of 19 U.S.C. § 1677(5)(B) which defines “authority” as “a government of a country” or “a public entity.” No party contested that the GNS was a “government.” With respect to the NSUARB, Commerce declined to analyze it as a “public entity” and instead determined that this

⁶³ *IDM* at 108.

⁶⁴ *Id.* at 36.

⁶⁵ *Id.*

independent, quasi-judicial agency was a “government.”⁶⁶ This appears to be an inconsequential finding for the purposes of the entrustment or direction argument because ultimately, in the *Final Determination*, Commerce found that the GNS is the “government” that *directly* entrusted or directed NSPI to provide a financial contribution through the provision of electricity.⁶⁷

Commerce noted that the *Statement of Administrative Action* (“SAA”)⁶⁸ allows for a broad interpretation of the “entrust or direct” standard and stated that entrustment must be determined on a case-by-case basis.⁶⁹ The Department also stated that it must examine two factors under subsection (5)(B)(iii):⁷⁰ “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.”⁷¹

Commerce examined the laws and regulations that govern the provision of electricity in Nova Scotia and found that it is “clear from the Public Utilities Act” {(“PUA”) that} the GNS controls and directs” the rate proposal methodology that NSPI is required to use, and that NSUARB must approve rates charged by NSPI.⁷² Citing section 52 of the PUA, Commerce stated that “NSPI is required by law to provide electricity to customers who request it anywhere

⁶⁶ *Id.* at 32 and 109.

⁶⁷ This point is emphasized in the *IDM* at 33 and 108, as compared to the *Preliminary Determination* where Commerce found that the GNS, through the NSUARB, entrusted or directed NSPI to provide a financial contribution.

⁶⁸ H.R. Rpt. 103-316, Vol. I, 103rd Cong., 2nd Sess. (1994).

⁶⁹ *IDM* at 33.

⁷⁰ *Id.* Commerce actually cited section 19 U.S.C. § 1677(5)(D)(iii) of the Act, but clearly meant to refer to subsection (5)(B)(iii).

⁷¹ *Id.*

⁷² *IDM* at 36.

in Nova Scotia.”⁷³ Commerce distinguished what it termed “this legal obligation” from deregulated or open markets where a private company would be under no such obligation.

Essentially, Commerce provided three reasons to support its conclusion that the GNS entrusted or directed NPSI to provide electricity. The first appears to be based on history and a general view about the public purpose of electricity utilities. Commerce recounts that the GNS provided electricity through a Crown corporation in 1919 and continued to provide electricity through a government-owned utility until 1992.⁷⁴ Commerce also considered the provision of electricity is an “essential service and a fundamental right”⁷⁵ and maintained that “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.”⁷⁶ Commerce, however, also acknowledged that “the entrustment or direction of a private party to provide a financial contribution cannot merely be a by-product of government regulation.”⁷⁷

The Panel fails to see how a history of government ownership of a utility that ended twenty-five years ago constitutes substantial evidence supporting a conclusion that the provision of electricity would normally be vested in the government. Moreover, the fact that the provision of electricity is “affected with a public interest” may be evidence that the government would want to regulate it through the adoption of legislation and the creation of regulatory agencies to

⁷³ *Id.*

⁷⁴ *Id.* at 34, 36.

⁷⁵ *Id.* at 36-37.

⁷⁶ *Id.* at 37.

⁷⁷ *Id.* at 126.

establish rates for consumers, but it fails to demonstrate that the provision of electricity always will be carried out by governments or government practices.

A key element of Commerce's finding of entrustment was based on its assertion that NSPI is required by law to provide service to all customers in Nova Scotia who request it. In particular, Commerce emphasized, NSPI is obligated under the laws of the Province of Nova Scotia, including section 52 of the PUA, to provide any resident or company with electricity.⁷⁸ Commerce found that "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 19 U.S.C. § 1677(5)(B)(iii).⁷⁹ Further, Commerce asserted that it was not appropriate in this case to apply the two-part analysis described in *DRAMs from Korea*⁸⁰ because the GNS entrusted or directed NSPI, directly, through its laws to provide electricity to PHP.⁸¹ Thus, the legal obligation purportedly imposed by section 52 of the PUA was the most compelling reason for Commerce's finding that the GNS directly entrusted or directed NSPI to provide a financial contribution in the form of provision of electricity to PHP.⁸²

⁷⁸ *Id.* at 36.

⁷⁹ *Id.* at 37.

⁸⁰ *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 37122 (Dep't Commerce June 23, 2003).

⁸¹ *IDM* at 125. In *DRAMs from Korea*, Commerce stated, the government used other means to entrust or direct private parties to provide a financial contribution, and therefore circumstantial evidence had to be examined.

⁸² *Id.*

Section 52 of the PUA is entitled: *Duty to furnish safe and adequate service*, and provides as follows: “Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.” This is a general service duty that is common in some regulated utilities, requiring them to provide safe and adequate services to those customers who request it. It is no more than a general duty; it is not a specific direction from the GNS to NSPI to provide a financial contribution in the form of the sale of electricity at a discounted rate. Contrary to Commerce’s assertion, section 52 of the PUA does not require NSPI to provide electricity to any company that requests it.

A third potential reason raised by Commerce, although less clearly articulated in the *IDM*, is that the GNS “played an essential role” in setting rates for PHP, including the Load Retention Rate (“LRR”) that applied to PHP. Commerce makes different, inconsistent statements about the roles of the GNS and the NSUARB in setting rates, such as the LRR. In the *IDM*, Commerce clearly found that the GNS, not the NSUARB, was the government that directly entrusted or directed NSPI to provide electricity to PHP. In order to support that finding, as a matter of logic, the authority that should have been found to be controlling rate setting for electricity should have been the GNS, and not the NSUARB. Commerce did so in the *IDM*, stating that under the PUA, the GNS “controls and directs the methodology that NSPI has to use in its rate proposals.”⁸³ Beyond the fact that the PUA creates no obligation to provide electricity at any particular rate, this conclusion by Commerce ignores the fact NSPI must submit any rate proposals to the NSUARB, not the GNS, for approval.⁸⁴ Commerce therefore turned to circumstantial evidence to support its conclusion. Some of the actions Commerce cites as

⁸³ *IDM* at 36.

⁸⁴ *Id.*

evidence of the GNS entrusting or directing the provision of electricity to PHP included: (1) developing a 7-point plan to keep the PHP SC paper mill operational, including discussion of electricity rates with NSPI; and (2) hiring a consultant to help facilitate discussions and negotiations between PWCC⁸⁵ and NSPI to develop an LRR that could be submitted to the NSUARB for approval.⁸⁶

The Panel fails to understand how this evidence supports a finding of entrustment or direction for two reasons. First, Commerce explicitly stated that it was not relying upon the two-part test in *DRAMs from Korea* in this case, and therefore, it did not need to examine circumstantial evidence relating to the means that the GNS used to provide a financial contribution.⁸⁷ Second, developing a plan to keep the mill going and hiring a consultant to facilitate discussions between PWCC and NSPI, in our view, are not substantial evidence that the GNS was engaged in the provision of electricity or rate-setting.

For the reasons stated above, we find that Commerce has not identified substantial evidence on the record to support its conclusion that the GNS entrusted or directed NSPI to make a financial contribution by providing electricity. We therefore remand the findings related to this conclusion for examination consistent with our decision.

⁸⁵ Pacific West Commercial Corporation which is co-owned by the parent company of PHP. Commerce has determined that PHP and PWCC are cross-owned companies having the same ultimate common ownership. *IDM* at 5.

⁸⁶ *IDM* at 38-39.

⁸⁷ *Id.* at 125.

D. Commerce's Determination of Benefit: Benchmarks for Electricity Rates

PHP, the GOC, and the GNS have challenged the finding by Commerce that a benefit was conferred by the financial contribution made by the provision of electricity to PHP.⁸⁸ The parties who dispute that determination must show that it is not supported by substantial evidence and is not in accordance with the law.

The Department determines whether a benefit has been received by the recipient of a financial contribution by measuring the remuneration received from a government or a public body against an appropriate market benchmark, in accordance with the Department's regulation. *See* 19 C.F.R. § 351.511. The regulation offers a hierarchy of three benchmarks, usually identified as "Tier 1," "Tier 2," and "Tier 3." Tier 1 measure{s} "the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question."⁸⁹ In defining "Adequate Remuneration," 19 C.F.R. § 351.511 (2)(i) adds that "in choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability." 19 C.F.R. 351.511 (2)(iv) goes on to say, "(iv) *Use of delivered prices*. In measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii) of this section the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties."

The parties disagree strongly as to whether, in this case, there is a price that is appropriate to serve as a Tier 1 electricity benchmark in accordance with the regulation. Because Commerce

⁸⁸ 19 C.F.R. § 1677(5)(E).

⁸⁹ 19 C.F.R. § 351.511(a)(2).

placed on the record a document entitled “Overview of Electricity Regulation in Canada” stating that “Alberta has established a fully competitive wholesale and retail electricity market,”⁹⁰ PHP put into the record pricing data from the Province of Alberta for the POI including some “below-the-line” rates for large users.⁹¹ The Department determined that the Alberta rates were not comparable to Nova Scotia rates and could not be adjusted in order to be made comparable. We discuss first, the Department’s rejection of the Alberta pricing data as a Tier 1 benchmark and second the use of electricity prices in Nova Scotia as a Tier 1 benchmark.

Despite the regulation’s instruction that Commerce “will adjust” the comparison price, the *IDM*⁹² states that because the only inter-provincial delivery of electricity to Nova Scotia comes from New Brunswick, record evidence of electricity prices calculated from tariffs in effect in Alberta (that is, hypothesizing that PHP is based in Alberta) do not represent “actual transactions in the country in question.” With this interpretation of the term “market-determined price for the good or service resulting from actual transactions,” Commerce justified its rejection of the Alberta electricity tariffs as a benchmark. In support of its conclusion, the Department cited its practice in *Steel Wire Rod from Trinidad and Tobago*.⁹³

In short, based on the requirements for establishing a Tier 1 benchmark, Commerce concluded that prices from Alberta are not suitable as a Tier 1 benchmark because electricity from Alberta, in effect and reality, is not available in Nova Scotia. While this, certainly, is not

⁹⁰ PHP’s Case Brief, P.R. Doc. 523 at 43, n. 170, citing to *Utilities Articles* at Attachment 19.

⁹¹ PHP Pre-Preliminary Electricity Comments P.R. Doc. 303 at 18-22 and Appendices 8a, 8b, 9a, and 9b.

⁹² *IDM* at 42.

⁹³ *Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Trinidad and Tobago*, 62 Fed. Reg. 55,003, 55,006-07 (Dep’t Commerce October 22, 1997).

the only reasonable interpretation of the regulation, the Panel finds that Commerce's interpretation of its regulation is sufficiently within the zone of deference that we owe to the Department. We therefore uphold the Department's rejection of the Alberta pricing of electricity as a Tier 1 benchmark.

As for the use of Nova Scotia prices for a Tier 1 benchmark, the Department justified its rejection of the use of Nova Scotia prices as a Tier 1 benchmark on the following grounds:

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, with independent power producers generating a minimal amount of electricity by comparison and supplying that electricity over NSPI's transmission and distribution network. 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. 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.⁹⁴

This Panel has decided⁹⁵ that the Department has not identified substantial evidence on the record to support its conclusion that the GNS directly entrusted or directed NSPI to make a financial contribution by providing electricity. Given that finding, there was insufficient basis for concluding that "the GNS is providing electricity through NSPI to most consumers of electricity in Nova Scotia" or that "the government provider constitutes a majority or substantial

⁹⁴ *IDM* at 41.

⁹⁵ See the Panel's discussion of entrustment or direction, *supra*, at 31-36.

portion of the market”, and that consequently the prices in Nova Scotia for electricity are distorted. Moreover, Commerce has not identified on the record any evidence that electricity prices in Nova Scotia are distorted whereas the record is replete with evidence that the legal standards in Nova Scotia by which the private entity, NSPI, determines the rates it charges its customers are normal in this widely regulated industry. Thus, we do not find that the Department’s reason for rejecting the use of Nova Scotia electricity prices for Tier 1 comparison is reasonable. We therefore remand this issue to the Department for reconsideration of the use of Nova Scotia electricity pricing for a Tier 1 benchmark.

We now turn to Commerce’s selection and use of a Tier 3 benchmark.⁹⁶ As Commerce explained: “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.”⁹⁷ Commerce then referenced its practice, as developed in *Magnesium from Canada*⁹⁸ before the referenced regulation was adopted:

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

⁹⁶ Commerce argues that PHP failed to exhaust its administrative remedies with respect to the calculation of a Tier 3 benchmark because, “At no time . . . did PHP alert Commerce to its current argument that Commerce’s understanding of ‘system-wide fixed costs, variable costs, and the expected return on equity’ was fundamentally flawed.” Commerce R. 57.2 Brief at 95. This exhaustion argument is moot in light of Commerce’s request for a voluntary remand to revisit its calculation of the benchmark, including the return on equity element. The Panel therefore will not address it further.

⁹⁷ *IDM* at 43.

⁹⁸ *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, 57 Fed. Reg. 30946, 30954 (Dep’t Commerce July 13, 1992).

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.⁹⁹

However, Commerce concluded that the rate NSPI negotiated with PHP (by far the largest electricity customer in Nova Scotia¹⁰⁰), and approved by the NSUARB in accordance with the statutory standards was not consistent with market principles because the Department determined that it was not established by NSPI's "standard pricing mechanism," that is to say, rates based on cost-of-service as determined for so-called "above-the-line" customers.¹⁰¹ The Department did not explain why "below-the-line" rates were outside NSPI's standard pricing mechanism.

After rejecting the LRR that NSPI had negotiated with PHP because it was a so-called "below-the-line" rate, the Department calculated its own benchmark by adding up by what it believed to be NSPI's costs associated with PHP's use of electricity during the POI, including PHP's share of NSPI's fixed costs, incremental costs, and return on equity.¹⁰² Because this calculated benchmark resulted in a higher rate than the LRR that NSPI had negotiated with PHP,

⁹⁹ *IDM* at 43, n 247.

¹⁰⁰ See PHP's Case Brief, P.R. Doc. 523 at 45, stating, with citations to the record, "NSPI estimated PHP's load for the POI to be ... approximately 45% greater than the next 31 largest customers combined."

¹⁰¹ *IDM* at 48.

¹⁰² NSPI is a privately owned utility company with shareholders that expect the company to realize a return on equity.

Commerce determined that PHP paid LTAR for the electricity it purchased from NSPI. The difference between the benchmark rate and the LRR comprised a countervailable subsidy to PHP, according to the Department.

PHP's Case Brief to the Department challenged this conclusion, stating that it was "...without any legal or evidentiary support,...that only rates based on cost-of service {are} consistent with market place principles."¹⁰³ The Case Brief further observed that the *Preliminary Determination* had noted, "...below-the-line tariffs have predominantly and historically served NSPI's two largest customers."¹⁰⁴ PHP also quoted the NSUARB's statements from the 2011 decision that specifically allowed companies in economic difficulties to obtain below-the-line rates.¹⁰⁵ PHP's Case Brief continued:

Thus, the development of PHP's negotiated LRR is fully consistent with the market-based principles that have historically been followed in Nova Scotia for extra-large industrial customers, and below-the-line rates have not been, and are not, specific to PHP. Non-cost-of-service based rates (such as the load retention tariff) have been a staple of the Nova Scotia electricity landscape for decades, as is the case throughout North America, and incremental, below-the-line rate setting is a regular practice."¹⁰⁶

Responding to PHP's arguments, after going over the cost principles and rate history used in Nova Scotia in full detail,¹⁰⁷ the Department found:

In *Magnesium from Canada*, the Department stated that 'if

¹⁰³ PHP's Case Brief, P.R. Doc. 523 at 46.

¹⁰⁴ *Id.* at 46, n.180

¹⁰⁵ *Id.* at 46-47.

¹⁰⁶ *Id.* at 47.

¹⁰⁷ *IDM* at 43-46

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.' As 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."¹⁰⁸

The Panel finds that this paragraph fails to explain or provide authority for the Department's determination that a "below-the-line" rate that does not cover all costs attributable to the load they represent and does not provide an appropriate level of return on equity based on its proportion of the load is not a market-determined price or why such a "below-the-line" rate set by a price setting mechanism for extra-large customers (*i.e.*, one covering all incremental costs but only a portion of fixed costs) is not in accordance with market principles. Nor has the Department explained *why* covering all fixed costs is, in its view, "an integral part of price-setting principles consistent with market principles."¹⁰⁹ In short, the Department failed to explain why "market principles" for setting electricity rates should be identified in relation to rates for NSPI's non-PHP customers rather than on the practices of the electric industry

¹⁰⁸ *Id.* at 47-48.

¹⁰⁹ *IDM* at 136.

generally, when record evidence demonstrates that offering “below-the-line” rates is consistent with the commercial practices of the industry.

Commerce’s Motion for a Voluntary Remand

In addition, the Panel has before it Commerce’s Notice of Motion for Voluntary Remand, in part. The Motion explained that the Tier 3 benchmark that Commerce had constructed included a separate amount for return on equity, and the complainants have argued in their Rule 57.1 briefs and their Rule 57.3 reply briefs “that Commerce improperly double counted the return on equity cost component because return on equity is already reflected in the fixed cost component of the benchmark.” The Panel hereby grants Commerce’s motion for a voluntary remand to enable Commerce to reconsider whether the amount for fixed costs that it included in its Tier 3 benchmark calculation includes an amount for return on equity. The Panel also remands to Commerce for general reconsideration of its conclusions and findings relating to the Tier 3 benchmark in accordance with this decision.

E. Commerce’s Conclusion that Payments to PHP from the GNS Pursuant to the Forestry Infrastructure Fund and Sustainable Forest Management and Outreach Programs Were Financial Contributions

In the *Final Determination* Commerce addressed the question of whether two programs, the Forestry Infrastructure Fund (“FIF”) and the Sustainable Forest Management and Outreach Program (“SFMO”), under which PHP received payments from the GNS, were properly characterized as payments for the purchase of services provided to the GNS by PHP or were essentially grants that provided PHP with economic benefits for activities PHP was already responsible for performing as part of its existing operations supporting its production of SC paper. Commerce described these programs and stated its conclusion that both programs were countervailable subsidies as follows:

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

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-12¹¹⁰

Later in the *Final Determination*, Commerce stated:

Port Hawkesbury argues that because the payments under the FIF

¹¹⁰ *IDM* at 24 (footnotes in original).

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.

* * * * *

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.

* * * * *

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, activities it was obligated to undertake as part of its operation, we continue to find that it provides a financial contribution in the form of a direct transfer of funds under section 771(5)(D)(i) of the Act.

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)

⁴⁹⁴ See PQR at 17.

⁵⁰⁵ See PQR at 22-23.¹¹¹

PHP, GOC and GNS urge this Panel to overrule Commerce, contending that the payments received by PHP and the prior owner of the mill, NPPH, were compensation for the performance of services purchased from PHP and did not constitute grants providing financial benefits to PHP. Both Commerce and the Petitioner responded to these arguments, contending that the activities performed by PHP pursuant to the FIF and SMFO programs were such that PHP would have performed them in the course of supporting its SC paper production regardless of whether payments were received from the GNS. As such, they contend, the FIF and SMFO

¹¹¹ *IDM* at 91-94 (footnotes in original).

payments are grants to support PHP's SC paper production.

The Panel has carefully considered all of the parties' arguments and has examined the factual evidence obtained by Commerce during the course of its investigation, including the texts of the actual agreements under which the FIF and SMFO payments were made.¹¹²

19 U.S.C. § 1677(5)(B)(i) provides that a countervailable subsidy is a payment that "provides a financial contribution" while 19 U.S.C. 1677(5)(D)(i) provides that a financial contribution includes the direct transfer of funds such as 'grants.'" However, it is recognized that a financial contribution does not extend to a government authority's purchase of services. See *Eurodif S.A. v. United States*.¹¹³

For the reasons that follow, Commerce's determination that the payments under both the FIF and SMFO programs were grants, and not for the purchase of services, is reasonable and is supported by substantial evidence.¹¹⁴

As seen from the excerpts from the *IDM*, quoted above, and the evidence relied upon by Commerce in reaching its conclusions, PHP itself explained that the funding it received under FIF alleviated the financial burden of continuing forestry activities for which NPPH itself would otherwise have been responsible for performing. Indeed, as the evidence demonstrated, the payments were made directly to NPPH and not the individual contractors. Thus, there was substantial evidence to support Commerce's finding that the FIF payments were financial

¹¹² See the documents referenced by Commerce in the *IDM*, notes 139-143, quoted above.

¹¹³ 411 F.3d 1355, 1356 (Fed. Cir. 2005).

¹¹⁴ A panel should not reweigh the evidence or substitute its judgment for that of Commerce. See, e.g., *Metallverken Nederland B.V. v. United States*, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989). A panel should not substitute its judgment for that of Commerce, even if the panel would prefer a different conclusion if the agency's action is reasonable. See, e.g., *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

contributions to NPPH.

Similarly, there is substantial evidence to support Commerce's determination that the payments to PHP under the SMFO program constituted a financial contribution in the form of a direct transfer of funds. For these reasons and based upon the evidence cited by Commerce at page 94 of the *IDM*, the activities undertaken by PHP were those that it would have undertaken in the course of operating its business. It was therefore reasonable for Commerce to find that the SMFO program was a grant based upon the factual evidence that any benefits that the GNS would have received from PHP's activities were merely incidental or would have inured to the benefit of the GNS in any event in the course of PHP's operation of its business.

Additionally, we find that the complainants' reliance on *Softwood Lumber IV*¹¹⁵ is misplaced, as that decision involves programs that are different from the FIF and SMFO programs. Unlike the programs in *Softwood Lumber IV*, which were designed to improve forest resources over the long term, the FIF and SMFO programs, respectively, as found by Commerce, served to improve the position of NPPH during its bankruptcy proceedings and to assist PHP with the ongoing costs it would incur with the management of its input and supply chain.¹¹⁶

Finally, to the extent that any of the payments under these programs during the period of review were for activities performed after the purchase of the mill was completed, the Panel determines that PHP, the GNS and the GOC have not met their burden of demonstrating that Commerce erred in reaching its findings. Even though some of the reimbursable activities may

¹¹⁵ *Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,917 (Dep't Commerce May 20, 2015) ("*Softwood Lumber IV*").

¹¹⁶ *IDM* at 92 and 94, quoted above.

have been labeled in the terms of the agreements to cover activities that, if undertaken, were not necessarily activities that PHP would have otherwise been required to perform solely as part of its normal operations, PHP and the Canadian Government parties have failed to identify substantial evidence to support their position. As argued by Commerce and the Coalition, and as identified above, there is substantial evidence to support Commerce's reasoning and ultimate conclusion that the activities actually performed were for operations that PHP would otherwise have been required to perform because they were needed to support the production of the mill. Consequently, PHP as well as its government supporters have not met their burden of demonstrating, as they must do under 28 U.S. C. §2639, that the decision of the agency was erroneous.

Based upon the foregoing, we conclude that Commerce's determination that that the payments to PHP from the GNS under the FIF and SMFO programs were financial contributions was reasonable and supported by substantial evidence.

III. ISSUES RAISED BY RESOLUTE

A. Payments Made to Fibrek

Acquisition of Fibrek: Extinguishment/Pass through of FPPGTP Assistance to Resolute

In the *Preliminary Determination*, Commerce attributed to Resolute assistance that Fibrek, a wholly owned subsidiary of Resolute, had received from the GOC under the FPPGTP, a program that had ended on March 31, 2012. It did so in three stages. First, Commerce applied the cross-ownership provisions of the relevant regulations (19 C.F.R. § 351,525(b)(6)(iv) and (vi)) to capture for subsidy attribution purposes kraft pulp that Fibrek had supplied to Resolute during the investigation period. Kraft pulp was a product that could be used in the production of

the subject merchandise, SC paper, as well as other paper products.¹¹⁷ (We deal with the lawfulness of this attribution in section III.A.2, *infra*.)

Second, Commerce focused on Resolute's submission on July 22, 2015, only three business days before the due date for the *Preliminary Determination*, of information respecting Fibrek's receipt of assistance under the FPPGTP. This, stated Commerce in the Preliminary Determination, "impeded{the Department} in its ability to analyze this information, to determine if any clarifying information is needed, to request such additional information and incorporate it into the preliminary determination. At this stage of the proceeding, we lacked sufficient time to solicit additional necessary information before issuance of the preliminary determination."¹¹⁸ This conclusion led to a preliminary AFA determination against Resolute with respect to the assistance provided under the FPPGTP.

Third, Commerce preliminarily determined that the FPPGTP grants to both Resolute and Fibrek constituted a countervailable subsidy subject to a CVD rate based on the use of AFA.¹¹⁹

At no point in the *Preliminary Determination* did Commerce consider whether the benefits which Fibrek had received under the FPPGTP had been extinguished entirely on the completion of the sale of Fibrek to Resolute and, if so, whether that prevailed over the consequences of an AFA determination.

In their Case Briefs to Commerce, both Resolute and the GOC challenged the attribution of Fibrek's FPPGTP benefits to Resolute. Each asserted that Resolute had acquired control of

¹¹⁷ P.R. Doc. 442.

¹¹⁸ *Id.* at 13.

¹¹⁹ *Id.* at 25-26.

Fibrex as the result of an arm's length transaction for fair market value.¹²⁰ According to Resolute, citing *Certain Pasta from Italy*,¹²¹ in such circumstances, pre-sale subsidies "... will be presumed to be extinguished in their entirety and, therefore, non-countervailable."¹²² The Coalition's response relied on another presumption, this one described in the *Notice of Final Modification* and developed in the context of privatizations of government-owned production assets. Under that presumption, "non-recurring, allocable subsidies received prior to any changes in ownership continue to benefit the company throughout the allocation period."¹²³ But that presumption is itself rebuttable "... 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." Irrespective, however, of whether the concurrent subsidies methodology and these presumptions apply to private-to-private sales (such as Resolute's takeover of Fibrex),¹²⁴ the Coalition, the GOC, and Resolute all recognize, as a central issue, whether Resolute's takeover of Fibrex had been an arm's length transaction for fair market value.

With respect to this issue, the Coalition asserted that there was no substantial evidence on the record to support the GOC's and Resolute's contention that the sale of Fibrex to Resolute

¹²⁰ P.R. Doc. 497, Joint Issues at 7, GOC Issues at 2; P.R. Doc. 500 Resolute, at 2-6.

¹²¹ *Certain Pasta from Italy*, 70 Fed. Reg. 17971, 17972 (Dep't Commerce Apr. 8, 2005).

¹²² P.R. Doc. 500 at 6, n. 10.

¹²³ *See Stainless Steel Plate in Coils from Belgium: Preliminary Results of Countervailing Duty Administrative Review*, 74 Fed. Reg. 26844, 26845 (Dep't of Commerce June 4, 2009)

¹²⁴ See discussion, *supra*, at section II.A, "Application of Commerce's "Concurrent Subsidies Methodology" in the context of GNS's provision of "hot idle" funds during the completion of the sale of NPPH to PWCC.

was at arm's length for fair market value.¹²⁵ However, the GOC has cited the submission of information contained in the revised GOC and Resolute submissions of July 22, 2015, as well as translated material submitted by the GOC at verification.¹²⁶ The exact nature of that information was not detailed by the GOC, but Resolute has been more specific. It has pointed to its submission of information contained in Resolute's 2012 10-K report to the U.S. Securities and Exchange Commission and the judgment of the Quebec Court of Appeal in *AbitibiBowater inc. (Produits forestiers Résolu) v. Fibrek inc.*, 2012 QCCA 569.¹²⁷ Resolute asserted that this material was sufficient to establish that the sale of Fibrek was at arm's length for fair market value. The Coalition characterized this information as "paltry."¹²⁸ Moreover, it urged that the material contained in the July 22, 2015 submissions of both parties should be disregarded as new and untimely information. As for Resolute's 2012 10-K report, the Coalition argued that it was not sufficient to support a claim that any subsidy was extinguished, "especially in light of the complexity of information necessary for the Department's analysis."¹²⁹

In the *Final Determination*, Commerce stated that it was no longer relying on AFA with respect to Fibrek and its receipt of benefits under the FPPTGP and two other programs as a consequence of the information provided by the GOC and Resolute on July 22, 2015 and subsequently in response to questions asked during verification.¹³⁰ Rather, it treated the FPPGTP

¹²⁵ P.R. Doc. 499 at 70.

¹²⁶ P.R. Doc. 497, Joint Issues at 7; GOC Issues at 1.

¹²⁷ P.R. Doc. 500 at 5, n. 6 and 16, n. 48.

¹²⁸ P.R. Doc. 499 at 71.

¹²⁹ *Id.*

¹³⁰ *IDM* at 11-12.

grant to Fibrek as a non-recurring grant conferring an *ad valorem* benefit of 0.22%.¹³¹ As a consequence, the issue of whether the benefits provided by the FPPGTP were extinguished in the takeover of Fibrek by Resolute remained relevant. On that issue, without referring to the material on which the GOC and Resolute relied and, indeed, without dealing with the Coalition's contention that at least some of that material should be ignored as untimely, Commerce simply asserted that: (1) Resolute had not supplied "any evidence or detailed information regarding the purchase;"¹³² (2) throughout the proceedings, the GOC and Resolute had done no more than submit "unsubstantiated assertions" of the sale as being the result of a "hostile takeover;"¹³³ and (3) there was "no evidentiary basis for determining" whether the sale was at arm's length for fair market value.¹³⁴ As a result, Commerce, assuming the application of the baseline presumption and the concurrent subsidies methodology was lawful in private-to-private sales, held that the presumption of non-extinguishment had not been rebutted. Accordingly, Commerce stated there was no need to proceed further and evaluate whether the transaction passed any of the other concurrent subsidies methodology hurdles to an extinguishment finding.¹³⁵

The Panel's review of this element of the *Final Determination* depends on a double negative: whether there was an absence of substantial evidence to support Commerce's conclusion that there was "no evidentiary basis" to find an arm's length sale for fair market value. Stated another way, our decision turns on whether the record contains evidence that

¹³¹ *Id.* at 26-27.

¹³² *Id.* at 165.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

Resolute's takeover of Fibrek was at arm's length and for fair market value or, as Commerce concluded, the record contains no such evidence.

Albeit raised in the context of a Government of Quebec ("GOQ") loan to Fibrek and whether any benefit from it was extinguished by Resolute's takeover of Fibrek, the GOC provided a summary account of Resolute's takeover bid for Fibrek (including information as to the market value of shares in Fibrek, the price paid by Resolute, and the court proceedings arising out of Fibrek's resistance to the takeover) as early as the Consultation Report stage of the investigation.¹³⁶ That information was elaborated further in the same context in the GOQ's Questionnaire Response.¹³⁷ As recited in Resolute's Reply Brief, they were:

(1) A detailed timeline published by Reuters outlining "milestones" in Resolute's hostile takeover effort; (2) a copy of the Québec Court of Appeal decision striking down Fibrek's "poison pill" defense and providing exacting details about the transaction, competing offers from Mercer International Inc. and the ensuing litigation; (3) an S&P Capital IQ report detailing Resolute's purchase of Fibrek's shares on the open market; and (4) extracts from Resolute's Form 10-K annual report (dated March 1, 2013) filed with the U.S. Securities and Exchange Commission ("SEC")¹³⁸

In its Questionnaire Response submitted on the same day, Resolute also asserted that the takeover by reason of its hostile nature was a quintessential example of an arm's length transaction.¹³⁹

Subsequently, the GOC and Resolute transferred the focus of their arguments about the nature of the takeover of Fibrek from the GOQ loan¹⁴⁰ to the assistance provided to Fibrek under

¹³⁶ P.R. Doc. 62 at 18-19, as quoted in C.R. Doc. 98, Resolute Reply Brief, at 25-26.

¹³⁷ P.R. Doc. 266 at QC-12, as quoted in C.R. Doc. 98, Resolute Reply Brief, at 26-27.

¹³⁸ P.R. Doc. 265 at Exhibits RENFORT-3 through RENFORT-6.

¹³⁹ P.R. Doc. 213 at 4.

the FPPGTP. As already described, in their Rule 57.3 Reply Briefs, the GOC and Resolute asserted that the takeover of Fibrek was at arm's length and for fair market value. Moreover, Resolute in particular made reference in support of that contention to Resolute's 2012 10-K report and the Quebec Court of Appeal judgment.

Thus, it is clear that from a very early stage in the proceedings, the GOC, the GOQ, and Resolute were urging Commerce to treat Resolute's acquisition of Fibrek as an arm's length for fair market value sale. Moreover, following the *Preliminary Determination*, those arguments were specifically made in the context of the FPPGTP assistance to Fibrek.

Assertion is, of course, not evidence. However, it is also clear that Commerce had before it (albeit initially in another context) a detailed chronology and the relevant facts of the Fibrek takeover process. These facts originated from independent sources and spoke to matters relevant to the determination of whether the takeover had been an arm's length sale at fair market value: the obviously hostile nature of the takeover bid, the existence of competition for the control of Fibrek, and the price paid in relation to the market value of the shares in Fibrek. Much of this information was captured in the judgment of the Quebec Court of Appeal respecting the "poison pill" strategy of Fibrek in response to Resolute's takeover bid. In light of the presence of these facts on the administrative record, we find that Commerce's determination that there was "no evidence on the record" that the takeover was at arm's length for fair market value is itself not supported by substantial evidence.¹⁴¹

¹⁴⁰ In its *Preliminary Determination*, Commerce did not include the Quebec loan in the subsidy calculus on the basis that its benefits were *de minimis*; P.R. Doc. 442, at 44.

¹⁴¹ Commerce contends that "arguments concerning the relevance of the Annual Reports should be rejected for the parties' failure to exhaust their administrative remedies" because "at no time did any party suggest that the Annual Reports established both the arm's-length nature and fair market value of the acquisition." Commerce R. 57.2 Brief at 130. The Panel agrees. But even

Accordingly, we remand this issue to Commerce for explanation as to why it determined that there was no record evidence that the takeover of Fibrek by Resolute was at arm's length for fair market value. In the alternative, if Commerce concludes on the remand that, on the basis of evidence on the record, the takeover was at arm's length for fair market value, we direct Commerce to determine whether such an arm's length, for fair market value acquisition was sufficient to extinguish any subsidy that Fibrek received under the FPPGTP.

Payments Made to Fibrek for Mills that Did Not Produce SC Paper

For the purposes of calculating an *ad valorem* subsidy rate for Resolute's production of SC paper during the period of investigation, Commerce attributed assistance to Resolute that was received by Fibrek for the production of kraft pulp. The subsidies in question were not only the assistance Fibrek received under the FPPGTP but also two other categories of assistance discovered on verification.¹⁴²

Assuming that not all of these subsidies were extinguished by Resolute's takeover of Fibrek, both Resolute and the GOC contested this attribution of assistance in aid of Fibrek's production of kraft pulp in the calculation of an *ad valorem* subsidy rate for SC paper. They argued that this resulted from a misinterpretation of the relevant regulation, 19 C.F.R. § 351.525 (b)(6)(iv). That regulation provides:

(iv) *Input suppliers*. If there is cross-ownership between an input supplier and a downstream producer, and production of the input product is primarily dedicated to production of the downstream product, the Secretary will attribute subsidies received by the input producer to the combined sales of the input and downstream

discounting the Annual Reports, sufficient evidence exists on the record to establish that Commerce's determination that there was no record evidence that the takeover of Fibrek was at arm's length for fair market value was not supported by substantial evidence.

¹⁴² *IDM* at 3, 26-27, and 160-62.

products produced by both corporations (excluding the sales between the two corporations).

Resolute and the GOC did not contest that, in terms of this regulation, there was cross-ownership between Resolute and Fibrek. However, they argued, in essence, that very little of the “input product” (*i.e.*, kraft pulp) was used in Resolute’s production of “the downstream product” (*i.e.*, SC paper). As a consequence, the production of the input product was not “primarily dedicated” to production of the downstream product, rendering sub-clause 6(iv) inapposite.¹⁴³

Indeed, Commerce did not contest the factual premises behind this argument. They were:

1. Fibrek did not manufacture, produce or export SC paper;
2. Only a very small proportion of Fibrek’s kraft pulp sales were to Resolute;
3. The vast majority of Fibrek’s kraft pulp production was sold to unaffiliated customers;
4. Kraft pulp is a very small component in the manufacture of SC paper.

However, Commerce nevertheless relied on its practice to “... include in {its} calculations subsidies provided to cross-owned companies on inputs that *could be* used in the production of a downstream product.”¹⁴⁴ In linking this practice to the facts and the regulation, Commerce noted Resolute’s admission that some of Fibrek’s kraft pulp was used in the manufacture of SC paper and that it could be used to produce the downstream product, paper. Commerce concluded that this was sufficient to satisfy the “primarily dedicated” requirement of the regulation.¹⁴⁵

¹⁴³ *Id.* at 157-159.

¹⁴⁴ *Id.* at 160.

¹⁴⁵ *Id.* at 161.

In no sense is Commerce's reasoning a model of clarity. However, implicit in it is an interpretation of the term "downstream product" that is at odds with the meaning posited by Resolute and the GOC. For Commerce, "the downstream product" refers to paper products generally, not SC paper specifically or the subject merchandise exclusively. While Resolute and the GOC argue that "the downstream product" equates to the "subject merchandise", Commerce asserts that it does not; "downstream product" implicates all paper products manufactured by Resolute for which kraft pulp could be used. Provided the subject merchandise, SC paper, is one such product, the requirements of the regulation are met. This presumably also assumes that the kraft pulp provided to Resolute is "primarily dedicated" to the production of paper products generally.

Commerce elaborated on this argument at pages 120-28 of its Rule 57(2) reply brief to this Panel. In particular, but not exclusively, Commerce relied on its determination in *Certain Lined Paper Products from Indonesia*,¹⁴⁶ where Commerce justified the attribution of Fibrek's subsidies for the production of kraft pulp to Resolute and its production of SC paper. In particular, Commerce relied upon the following statement in *CLPP from Indonesia*:

By avoiding the use of the term "subject merchandise," {19 CFR 351.525} leaves open the possibility that the "products" benefiting from the subsidy may include subject and non-subject merchandise. Given that the terms "downstream products" or "products" are used in 19 C.F.R. § 351.525 several times in discussing the proper attribution of subsidies, and in those instances *there is no indication that {Commerce} intended to limit the attribution of the subsidy to only subject merchandise*, we find it reasonable that the use of the terms 'downstream product' in 19 C.F.R. § 351.525(b)(6)(iv) is consistent in meaning with that term as used in other subsections of 19 C.F.R. § 351.525.

¹⁴⁶ *Notice of Final Determination of Sales At Less Than Fair Value and Final Determination of Critical Circumstances: Certain Lined Paper Products from Indonesia*, 71 Fed. Reg. 47174 (Dep't Commerce Aug. 16, 2006). Commerce did not cite this determination in the *IDM*.

In justifying this interpretation of the term “the downstream product”, Commerce in its Rule 57(2) reply brief also took care to point out that this did not extend as far as authorizing attribution of subsidies in a cross-ownership situation where “the materials they produce are used in the production of many different products in different industries and {where the cross-owned company} is not their primary or sole customer.” Commerce also noted in its Rule 57(2) brief that the preamble to the CVD regulation states that “it would not be appropriate to attribute subsidies to a plastics company to the production of cross-owned corporations producing appliances and automobiles.”¹⁴⁷ However, Commerce argues, that situation is not the case here: the downstream products manufactured by Resolute are not “as disparate as automobiles and appliances and, in fact, paper products are exactly the type of product group that Commerce consistently has treated as a single ‘downstream product’ for the purposes of 19 C.F.R. § 351.525(b)(6)(iv).”

As we have observed earlier in this decision, this Panel must afford substantial deference to an agency’s interpretation of its own regulations. Nor is it for this Panel to decide which among several competing interpretations best serves the regulatory purpose. Commerce’s interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. As for the application of Commerce’s interpretation of the relevant provision to the facts of the particular case, the standard once again is whether that determination is supported by substantial evidence on the record.

In this instance, despite Resolute’s and the GOC’s arguments that the relevant regulation has a single plain meaning to the effect that the term “the downstream product” in subclause (6)(iv) equates to “the subject merchandise,” Commerce has provided a plausible account of the

¹⁴⁷ See *Countervailing Duties*, 63 Fed. Reg. 65348, 65401 (Dep’t Commerce Nov. 25, 1998).

subclause's structure and the meaning of "the downstream product" that is at odds with the proposed restrictive interpretation. While it would have been preferable had Commerce provided a policy-based justification for its interpretation (other than an appeal to its policy of not tracing "subsidized inputs through a company's production process"¹⁴⁸), this Panel must defer to Commerce's interpretation of the relevant regulation if, as here, it is not plainly erroneous or inconsistent.

As for the application of this interpretation to the situation before it, at least in its Rule 57(1) brief, Commerce has provided a reasoned justification for factually distinguishing the situation before it from those instances not within the scope of the terms of subclause 6(iv). This case does not present a situation where the input product was used in the production of many different products in different industries albeit in the context of a web of cross-owned companies.

We therefore sustain Commerce's determination attributing to Resolute's sales of paper products the assistance that Fibrek received from the GOC under the FPPGTP.

B. Payments Made Directly to Resolute for Mills that Did Not Produce SC Paper

In addition to the payments received by Fibrek, Resolute also received assistance directly from the GOC under the FPPGTP for pulp and paper mills in Ontario.¹⁴⁹ In the *IDM*, Commerce cited paragraph 351.525(b)(5)(i) of its regulations, which states, "(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." Commerce found that the purpose of the FPPGTP was to improve the environmental performance of the pulp and paper industry, that this purpose was known and acknowledged by

¹⁴⁸ *IDM* at 160-61.

¹⁴⁹ *IDM* at 26, referring to the GOC's Questionnaire Response, Volume V, Ex. GOC-4.

the GOC before the payments were made, and that the grants were tied to the production of only pulp and paper products.¹⁵⁰ For these reasons, Commerce determined, pursuant to subsection 351.525(b)(5), to attribute the benefits from the FPPGTP grants to Resolute to the sales of the specific products that benefited from the payments (*i.e.*, pulp and paper products), rather than to Resolute's total sales.¹⁵¹

Resolute has raised two claims of error relating to Commerce's findings on grants made to its two Northern Ontario mills under the FPPGTP. First, it argues that the funds provided to these mills by the GOC were tied to the production of non-subject merchandise, because the recipient mills did not produce SC paper. Second, Resolute maintains that none of its production of SC paper and no inputs into the production of SC paper were produced at the Ontario mills. The GOC also argues that the payments made to Resolute's Ontario mills (which make only non-subject merchandise) should only be attributed to products produced at those mills.¹⁵² The GOC maintains that the FPPGTP grants were tied only to products made at the recipient mills because the grants were provided for approved capital projects at those mills.¹⁵³ The GOC also argues that none of the products of those mills, which were located in Ontario, were used as inputs in the production of SC paper at Resolute's mills in Quebec and would not be because of the geographic distance between the Ontario and Quebec mills.¹⁵⁴

¹⁵⁰ *Id.* at 27.

¹⁵¹ *Id.*

¹⁵² GOC R.57.1 Brief at 119.

¹⁵³ *Id.* at 117.

¹⁵⁴ *Id.* at 118.

In response, Commerce argues that it correctly applied its tying rules because the Ontario mills produce a production input of SC paper, and argues further that it is not relevant whether those mills produced the subject merchandise or whether their output products are actually used to produce SC paper in Resolute's Quebec mills. What was relevant, Commerce maintains, is that the mills in Ontario received grants for the production of an input that **could** be used to produce SC paper.¹⁵⁵

The question before us, therefore, is whether Commerce's decision to attribute the benefits from FPPGTP grants to the production of pulp and paper products is supported by substantial evidence on the record and is otherwise in accordance with the law?

Commerce based its analysis on the general rule for "a subsidy tied to the production or sale of a particular product," 19 CFR 351(b)(5) (i), rather than on paragraph (ii) of that subsection, which is an exception for a subsidy tied to production of an input product. In the case of the former, the rule is to attribute the subsidy only to the sale of the product; in the latter case, the subsidy can be attributed to both the input and the downstream products. However, in the *Final Determination*, Commerce cited several of its administrative decisions as evidence that its practice has been to include in its subsidy calculations subsidies provided to inputs that could be used in the production process, even if they were not in fact used to produce the downstream subject merchandise.¹⁵⁶ In *Certain Softwood Lumber from Canada*¹⁵⁷, Commerce rejected the argument by an exporter that only one of its mills produced the subject merchandise and

¹⁵⁵ Commerce R. 57.2 brief at 108.

¹⁵⁶ *IDM* at 160.

¹⁵⁷ *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 67388 (Dep't Commerce November 5, 2002) and accompanying Issues and Decision Memorandum at 21.

therefore the inputs into its other mills that do not produce the subject merchandise should not be included in the calculations of the subsidy rate. In that case, Commerce stated that it was not required by its regulations to trace the inputs into the downstream output and to ascertain that the output is an in-scope product before determining whether the input carries a subsidy.¹⁵⁸ In *Softwood Lumber*, however, the inputs, *i.e.*, cedar and SPF logs, were within the scope of the order, were subsidized and were used by all of the mills. The issue was whether the sales of the downstream products produced by some of the mills which did not produce subject merchandise, but were produced from those inputs, could be attributed to the products. In *IPA from Israel*,¹⁵⁹ Commerce rejected the methodology it had used in prior reviews of apportioning subsidies bestowed on inputs (phosphate rock and green acid) to the output (IPA) according to the consumption of each input product in IPA production. Rather than tracing subsidized inputs through the production process into particular downstream products, Commerce attributed the input subsidies to all of the downstream products they could be used to produce, regardless of whether they were in fact used in producing the subject merchandise.¹⁶⁰ In *Coated Free Sheet Paper from the People's Republic of China*,¹⁶¹ Commerce also decided not to trace inputs. In that case, the issue was whether pulp that was not used to produce the subject merchandise exported to the US should be attributed to the benefits of the grants at issue in the investigation. Absent a showing that the subsidized pulp could not be used to produce the subject merchandise, the fact

¹⁵⁸ *Id.* at 22.

¹⁵⁹ *Industrial Phosphoric Acid from Israel: Final Results of Countervailing Duty Administrative Review*, 63 Fed. Reg. 13626 (Dep't Commerce March 20, 1998).

¹⁶⁰ *Id.* at 13630.

¹⁶¹ *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 Fed. Reg. 60645 (Dep't Commerce Oct. 25, 2007).

that it was not used as an input in the countries of exportation resulted from a business decision of the exporting company and did not prevent the subsidies on the inputs from being attributed to the subject merchandise.¹⁶²

In our view, the methodology employed by Commerce in this case to assess whether the subsidies to the production or sale of a particular product were tied to that product was consistent with the regulations and Commerce's interpretation thereof. Moreover, Commerce also conducted an examination of the grant applicant's guide and other documents to ascertain the purpose of the FPPGTP program and therefore, its conclusion is supported by substantial evidence on the record.¹⁶³ For these reasons, we uphold the determination of Commerce that the subsidies provided to Resolute's Ontario mills under the FPPGTP Program are tied to the production of pulp and paper products generally and, therefore, are to be included in the calculation of Resolute's *ad valorem* subsidy rate in this case.

Ontario Northern Industrial Electricity Rate and Forest Sector Prosperity Funds Programs

Resolute's pulp and paper mills located in Thunder Bay, Fort Frances and Iroquois Falls, Ontario received grants under the Ontario Northern Industrial Electricity Rate ("NIER") Program during the period of investigation.¹⁶⁴ The NIER program is designed by the GOO to enable large industrial facilities in Northern Ontario to establish energy management plans and to improve

¹⁶² *Id.* at 60648.

¹⁶³ *IDM* at 27.

¹⁶⁴ *Id.*

energy efficiency and sustainability. Qualifying participants receive rebates on their electricity bills based on the amount of electricity consumed.¹⁶⁵

Commerce found that such electricity rebates were a financial contribution in the form of a direct transfer of funds from the GOO that conferred a benefit to Resolute in the amount of the grants.¹⁶⁶ Moreover, Commerce also found the NIER program was specific because the rebates were limited to companies located within a particular geographical region, *i.e.*, Northern Ontario, within the jurisdiction of the GOO.¹⁶⁷

Resolute and the GOC maintain that payments under the NIER program were tied to the mills in Northern Ontario and thus to the non-subject merchandise produced at those mills.¹⁶⁸ Resolute argues that the benefits of the grants can only be attributed to products produced in Ontario and, therefore, these grants cannot be attributed to Resolute as a whole or to Resolute's production of SC paper.¹⁶⁹ Resolute also argues that it was inconsistent for Commerce to find that the NIER grants were regionally specific, while at the same time not attributing the benefits from those grants only to the mills in Ontario.¹⁷⁰

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 28.

¹⁶⁷ *Id.*

¹⁶⁸ Case Brief of Resolute FP Canada Inc. and Resolute FP US Inc. ("Resolute R. 57.1 Brief") at 78; GOC R. 57.1 Brief at 116.

¹⁶⁹ *IDM* at 161.

¹⁷⁰ Resolute R. 57.1 Brief at 78.

For its part, Commerce emphasizes that, in its view, “nothing about the NIER program” indicated that it was tied to the input products produced at the Ontario mills.¹⁷¹ The NIER program benefits, Commerce argues, were bestowed upon the mills “without regard to the products manufactured therein, and without limitations on which downstream products could benefit.”¹⁷² It also argues that Commerce’s findings with respect to regional specificity had nothing to do with the examination of benefit for subsidy valuation purposes.¹⁷³

The Forest Sector Prosperity Funds (“FSPF”) Program was a GOO capital grants program that was open to applications from capital investment projects in value-added manufacturing, increased fiber use efficiencies, energy conservation/efficiency, and development of electricity co-generation from 2005-2008. Under the FSPF program, four grants to Resolute’s mills in Northern Ontario were approved, totaling C\$71.5 million, of which C\$61.7 million had been disbursed.¹⁷⁴

Commerce determined that the grants provided under the FSPF program were countervailable subsidies because they provided a financial contribution in the form of a direct transfer of funds and conferred a benefit to Resolute. Moreover, Commerce found the grants were specific because they were provided to pulp and paper mills in Northern Ontario.¹⁷⁵

Similar to the NIER grants, Resolute argues that FSPF grants were tied to production in specific Ontario mills (*i.e.*, the Fort Frances and Thunder Bay mills) and therefore could not be

¹⁷¹ Commerce R. 57.2 Brief at 111.

¹⁷² *Id.* at 114.

¹⁷³ *Id.* at 115.

¹⁷⁴ *IDM* at 28.

¹⁷⁵ *IDM* at 29.

attributed to subject merchandise.¹⁷⁶ Resolute, the GOC and the GOO maintain that the FSPF program, by its purpose and bestowal, was tied to production of non-subject merchandise at mills in Ontario.¹⁷⁷ The GOC argues that Commerce did not even raise 19 C.F.R. § 351.525(b)(5) in its comingled discussion of the cross-owned Fibrek mills in Quebec and Resolute mills in Ontario.¹⁷⁸ The GOO maintains that Commerce simply failed to conduct an attribution analysis.¹⁷⁹ Commerce responds that the grants under the FSPF program were tied to the sales of inputs into the production of subject merchandise. It also maintains that nothing in the application or approval process for the grants that Resolute received for its Fort Frances mill stated that the products of that mill would be limited to non-subject merchandise.¹⁸⁰ Therefore, Commerce emphasizes, its determination relating to the FSPF grants to the Fort Frances mill is consistent with its tying methodology.¹⁸¹

It is difficult to find any reasoning in the *IDM* on the attribution of subsidies specifically concerning the grants under the NIER and FSPF programs. In sections 9 and 10 of the *IDM*,¹⁸² Commerce describes the NIER and FSPF programs, outlines their purposes, and makes determinations that they constitute countervailable subsidies. However, in contrast to its

¹⁷⁶ *Id.* at 157-158.

¹⁷⁷ Resolute R. 57.1 Brief at 81; GOC R. 57.1 Brief at 117; Rule 57.1 Brief of The Government of Ontario (“GOO R. 57.1 Brief”) at 12.

¹⁷⁸ GOC R. 57.1 Brief at 118.

¹⁷⁹ GOO R. 57.1 Brief at 11.

¹⁸⁰ Commerce R. 57.2 Brief at 117.

¹⁸¹ *Id.* at 118.

¹⁸² *Id.* at 27-29.

discussion of the FPPGTP program,¹⁸³ the *IDM* contains no discernable subsidy attribution analysis of the NIER and FSPF programs relating to Resolute's Ontario mills. There is a reference at the end of section 9 to Comment 19 and at the end of section 10 to Comment 20, to which we will turn. Almost all of the discussion on attribution in Comment 19, however, relates to the FPPGTP grants to Resolute's cross-owned Fibrek mills in Quebec. The remaining commentary appears to concern the FPPGTP assistance to Resolute's Ontario mills. The NIER and FSPF programs, which are GOO programs, not federal programs like the FPPGTP, are not specifically mentioned. The relevant regulation, 19 C.F.R. § 351.525(b)(5)(i) or (ii), is also not cited.

The issue before us, again, is whether the findings of Commerce on the attribution of the benefits of the NIER and FSPF grants to Resolute's sales were based on substantial evidence on the record and were otherwise made in accordance with the law.

Nowhere in the text of the *IDM* does Commerce refer to the attribution issue in relation to the NIER and FSPF programs, nor is there specific reference to, or analysis of, these two programs in Comments 19 and 20. Moreover, there is also no analysis or application of subparagraphs (i) or (ii) of section 351.525(b)(5) to these GOO programs.

The GOC and GOO maintain that Commerce has missed the point of their arguments which were that under section 351.525(b)(5)(i), the grants provided to the Ontario mills under the NIER and the FSPF Programs were not tied to the production of a particular product, *i.e.*, the subject merchandise. Commerce did not address that question; indeed, it did not analyze and make a determination on whether the grants under the NIER program or the FSPF program were

¹⁸³ *Id.* at 26-27.

tioned to any particular product, including an input product, as it did in the case of the FPPGTP Program.¹⁸⁴

Commerce addressed two other arguments raised by the parties relating to attribution of subsidies, but it is difficult to ascertain whether its reasoning was meant to apply to the Ontario mills benefitting from grants under the federal FPPGTP program or to GOO grants under the NIER or FSPF programs. In response to the arguments of Resolute and the GOC that subsidies granted to mills in Ontario are tied to projects in a specific region and to specific mills, Commerce responded that its regulations expressly exclude the idea that benefits from regional subsidies are tied to production in that region or to a specific producer or entity.¹⁸⁵ Because these comments are located rather awkwardly in the middle of two paragraphs where attribution of a subsidy to a cross-owned company, Fibrek, is addressed, the Panel can only assume that Commerce was alluding to grants under the federal FPPGTP program for which it had already conducted an attribution analysis. Once again, there is no specific reference to the NIER or FSPF programs in Comment 19 where this discussion appears. Each program must be analyzed separately in order for Commerce to lawfully find these grants to be countervailable subsidies, including the issue of attribution of subsidies, where relevant.

In this case, a specific analysis of the tying or attribution of subsidies under the NIER program and the FSPF program is lacking in the *Final Determination*. For these reasons, we remand this matter to Commerce to examine, pursuant to the Department's regulations, whether the grants to Resolute under the NIER and FSPF programs were tied to the production of a particular product or to the production of an input product.

¹⁸⁴ *Id.* at 26-27.

¹⁸⁵ *Id.* at 161, n. 720, citing *CVD Preamble* at 65404.

C. Commerce's Use of Adverse Facts Available to Value Assistance to Fibrek Discovered at Verification

Resolute and the GOC challenge, on various grounds, Commerce's use of AFA to establish a CVD rate for apparent subsidies, described below, that were received by Resolute's cross-owned affiliate, Fibrek. Resolute did not report these apparent subsidies to Commerce. Rather, the Department discovered them in the course of verifying Resolute's questionnaire responses. While Resolute offers many objections to Commerce's use of AFA for the Fibrek subsidies discovered at verification, the Panel finds all but one to be without merit. We affirm Commerce's conclusion, based on AFA, that the unreported assistance to Fibrek comprised two programs. We also affirm Commerce's conclusion, based on AFA, that these programs constitute countervailable subsidies. These unreported subsidies, however, appear to comprise both a non-recurring grant program and a separate, recurring grant program. Commerce nevertheless used as AFA for both programs the CVD rate that it calculated for a non-recurring grant program. We find this to be unreasonable when only one program appears to be a non-recurring grant. We therefore remand with instructions to Commerce either to reconsider and further explain its use of a non-recurring grant as AFA for a recurring grant or to identify and explain its use of a different source as AFA for Fibrek's recurring grant.

Commerce's Request for Information and Resolute's Failure to Respond

Resolute did not join the GOC and the Governments of Ontario and Quebec in objecting to Commerce's request for information concerning "any other forms of assistance to producers or exporters of SC paper." Instead, Resolute reported that it had "examined its records diligently and {was} 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.”¹⁸⁶ This first response to Commerce contained no reference to any government assistance to Fibrek that might have comprised countervailable subsidies.

Commerce’s initial CVD questionnaire was not Resolute’s only opportunity to report “other assistance” received by Fibrek. Commerce issued a supplemental questionnaire to Resolute on June 2, 2015.¹⁸⁷ Resolute responded to this questionnaire on June 12, 2015, explaining that “Fibrek is a wholly owned subsidiary of Resolute and is fully consolidated in Resolute’s accounting records.”¹⁸⁸ Even so, Resolute did not report any “other assistance” provided to Fibrek. Another opportunity arose when, five days before the statutory deadline for Commerce’s Preliminary Determination, Resolute *sua sponte* submitted a “supplemental” response to Commerce in which it explained that it had discovered documents demonstrating that the GOC had agreed to provide assistance to Fibrek pursuant to the FPPGTP prior to Resolute’s acquisition of Fibrek, and that funding under that program had been disbursed after the acquisition, which provided a benefit to Fibrek during the period of investigation.¹⁸⁹ Yet another opportunity existed at the outset of Commerce’s verification of Resolute’s CVD questionnaire response, when Resolute availed itself of the opportunity to present “minor corrections” to its response. None of its minor corrections identified “additional assistance” provided to Fibrek.

¹⁸⁶ P.R. Doc. 213 at 32-33.

¹⁸⁷ P.R. Doc. 270.

¹⁸⁸ P.R. Doc. 282 at 2.

¹⁸⁹ C.R. Doc. 458. Commerce accepted this submission but determined to apply AFA in the Preliminary Results because Resolute understood and failed to satisfy its obligation to report assistance received by Resolute and its cross-owned companies, including Fibrek, for all programs under investigation. Following verification of the “revised” and “supplemental” submissions, however, Commerce determined to rely on this information to calculate the *ad valorem* subsidy rate for the FPPGTP program in the *Final Determination*. *IDM* at 27.

In the course of this verification, the verifiers reviewed Fibrek's Chart of Accounts. Listed there were four accounts labeled in terms that appeared to describe subsidy programs that Resolute had not previously reported: (1) [], which concerned a reimbursement from []; (2) []; (3) [] an empty account, and (4) [] which concerned a reimbursement from [].

].¹⁹⁰ On its face, each of these accounts appeared to refer to subsidies.

In the *Final Determination*, Commerce treated the two accounts concerning apparent subsidies from [] as a single program ("Discovered Program 1") and funds from [] as a second program ("Discovered Program 2"). In light of Resolute's failure to report the assistance identified in these accounts and Commerce's discovery of them only at verification, the Department concluded that Resolute had failed to respond to the best of its ability to the Department's requests for information. *IDM* at 12-13, 154-155. Commerce then employed AFA to conclude that the discovered programs provided a financial contribution that was specific to Fibrek and conferred a benefit. After concluding that the discovered programs were grants, Commerce selected a CVD rate of 8.55 percent as AFA based on the rate Commerce had previously

¹⁹⁰ C.R. Doc. 511 at 8; C.R. Doc. 507, Ex. VE-5.

calculated for an “Article 7 grant from the Quebec Industrial Development Corporation”¹⁹¹ and applied it to each of the two programs.

Commerce’s Resort to AFA Was Reasonable

The GOC and Resolute first challenge Commerce’s resort to AFA because, they contend, the Department’s requirement that respondents report “other forms of assistance” beyond the programs identified in the Department’s notice of initiation was “vague and too broad to be enforced,” amounting to what Resolute characterizes as a fishing expedition.¹⁹² In addition, citing *Solar World Americas, Inc. v. United States*,¹⁹³ the GOC contends that the requirement to report “other assistance” reverses the statutory scheme by requiring respondents to add to the allegations of countervailable subsidies identified in Commerce’s notice of investigation.

The Panel does not agree that Commerce’s requirement that respondents report any “other assistance” in the CVD questionnaire response is unlawfully vague or over-broad. Substantively identical versions of the requirement have been an element of Commerce’s standard CVD questionnaire prior to the SC Paper investigation.¹⁹⁴ Moreover, the Court of

¹⁹¹ See *Pure and Alloy Magnesium From Canada*, 62 Fed. Reg. 13857 (Dep’t Commerce Mar. 24, 1997).

¹⁹² The decision on which the complaining parties rely most heavily, *Allegheny Ludlum Corp. v. United States*, 25 CIT 816 (2001), involved fundamentally different facts than those in the case before us. In *Allegheny Ludlum*, a petitioner challenged Commerce’s decision not to investigate a subsidy that was alleged after the preliminary determination. In holding that Commerce was not obliged to go on a “fishing expedition” searching for subsidies, the court observed that Commerce reasonably pursues potential subsidy practices only when there is “evidence on the record indicating the elements necessary for the imposition of countervailing duties are present.” Here, of course, that evidence was discovered in Fibrek’s Chart of Accounts at verification.

¹⁹³ 195 F.Supp.3d 1334 (Ct. Int’l Trade 2015).

¹⁹⁴ See, e.g., *Certain Frozen Warm Water Shrimp From the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 78 Fed. Reg. 50391 (Dep’t Commerce Aug. 19, 2013) and accompanying Issues and Decision Memorandum at cmt. 14.

International Trade (“CIT”) has concluded that Commerce is not precluded from asking about any other governmental assistance that may have been provided to a respondent because “it is Commerce, not the respondent, that determines what information is to be provided” despite any claim by respondent that the information request “cannot legally serve as the basis” for the Department’s review.¹⁹⁵ Simply put, Resolute had an obligation to provide information concerning any “other assistance” provided to Fibrek even if, in its own judgment, such assistance was not a countervailable subsidy or was not provided with respect to the production or sale of SC Paper. Resolute was, of course, free to argue about the legal significance of the facts once they had been provided, but it cannot defend its failure to provide relevant facts based on its own determination that Commerce’s requirement could embrace “assistance” that did not constitute countervailable subsidies. The determination whether “assistance” is a countervailable subsidy is Commerce’s to make after consideration of the relevant facts. It is not for Resolute to make that determination in the course of deciding what facts to provide to Commerce.

We note, as well, that Resolute did not object to Commerce’s requirement to report any other assistance as being too vague or overly broad until after Commerce discovered the unreported programs at verification. While the GOC responded to Commerce by endeavoring to redefine the scope of Commerce’s requirement, describing narrower parameters within which respondent companies would report assistance,¹⁹⁶ Resolute’s questionnaire responses neither

¹⁹⁵ *Ansaldo Componenti, S.p.A. v. United States*, 628 F. Supp. 198, 205 (Ct. Int’l Trade 1986); *Essar Steel, Ltd. v. United States*, 721 F. Supp. 2d 1285, 1298-99 (Ct. Int’l Trade 2010).

¹⁹⁶ P.R. Doc. 233.

objected to the question nor identified alternative criteria for reporting any additional assistance.¹⁹⁷

We are unpersuaded by the GOC's reliance on *Solar World*. In that decision the CIT upheld Commerce's refusal to initiate countervailing duty investigations of programs where the petition itself lacked sufficient supporting evidence. The court found that Commerce had no obligation to provide evidence to support a petition that the petitioner itself did not provide ("It is not for Commerce to seek out evidence supporting the . . . petition") prior to initiating an investigation. That is not the situation before us. Here Commerce found sufficient evidence to warrant initiating an investigation. *Solar World* does not limit the scope of Commerce's investigation once it has been initiated, nor does it grant a respondent the freedom to choose whether or not to respond to Commerce's questions concerning potentially countervailable assistance.

The case before us more closely resembles the facts in the CIT's recent decision in *Changzhou Trina Solar Energy Co., Ltd. v. United States*.¹⁹⁸ Like the complainants here, the Government of China and Trina Solar objected to Commerce's request for information identifying "any other forms of {governmental} assistance" that the plaintiff received during the

¹⁹⁷ C.R. Doc. 171 at 32-33. The GOC argues that Resolute similarly identified its objection to Commerce's requirement by providing a qualified response in which Resolute stated that it was "not aware of any other programs." Such a qualification is not in any sense an objection to Commerce's question. Moreover, Fibrek was fully consolidated into Resolute's financial statements and the programs discovered at verification were clearly identified in the Chart of Accounts. We do not address the question why Resolute was not aware of the programs.

¹⁹⁸ 195 F. Supp. 3d 1334 (Ct. Int'l Trade 2016).

investigation period, beyond the programs expressly discussed in the CVD petition.¹⁹⁹ The Court dismissed this objection, noting that “because Commerce’s inquiry concerning the full scope of governmental assistance . . . was within the agency’s independent investigative authority pursuant to 19 U.S.C. §§ 1671a(a) and 1677d, {Commerce’s} inquiry was not contrary to law.”²⁰⁰ Like the Fibrek assistance discovered at verification, Commerce discovered at Trina Solar’s verification entries for twenty-eight additional government grants that Trina Solar and the Government of China had not reported. Commerce then concluded that resort to AFA was warranted “in determining the countervailability of these apparent subsidies that were discovered during verification.” The CIT sustained this use of AFA in terms that we find instructive:

Because the record reasonably supports Commerce’s Determination that the {Government of China} failed to cooperate by not acting to the best of its ability to comply with the request for information regarding additional forms of governmental assistance, Commerce reasonably determined to use facts available with an inference adverse to the GOC, in deciding whether the elements necessary for the imposition of countervailing duties were met. Similarly, because the record reasonably supports Commerce’s determination that Trina Solar also failed to cooperate by not acting to the best of its ability to comply with this request for information, by failing to report additional grants and tax deduction found at verification, Commerce also reasonably resorted to AFA . . . to decide whether the elements necessary for the imposition of countervailing duties were met with regard to the additional grants and tax deduction found during verification.²⁰¹

The GOC and Resolute focus on Commerce’s “other assistance” question, arguing that “assistance” does not meet the statutory definition of countervailable subsidy in 19 U.S.C. §

¹⁹⁹ The plaintiff in that case offered much the same rationale for its objection that the GOC does here: in the absence of program-specific allegations and supporting evidence no reply is required, pursuant to Article 11.2 of the WTO Agreement on Subsidies and Countervailing Measures.

²⁰⁰ Op. Cit. at 1346.

²⁰¹ *Id.* at 1346-47.

1675(5). This focus is misdirected. The Department's use of AFA turns not on Commerce's "other assistance" question, but rather on the four accounts discovered at verification. On their face, these accounts did not describe mere "assistance." Each was identified in Fibrek's Chart of Accounts as a [] of one type or another. Whether or not Commerce might ultimately have concluded that the programs reflected in these accounts were countervailable, the fact that they were identified as [] in Fibrek's internal business records established them as "other assistance" to be reported to Commerce. By failing to report them, Resolute prevented Commerce from determining whether such assistance comprised countervailable subsidies.

Procedures for Subsidy Practices Discovered During a Proceeding

Resolute argues that Commerce's resort to AFA was unlawful because the assistance reflected in the accounts discovered at verification may only be addressed through the procedures set forth in the statute at 19 U.S.C. § 1677d and Sections 351.311(b) and (c) of Commerce's regulations, which describe procedures for investigating "Countervailable subsidy practices discovered during a proceeding." 19 C.F.R. § 351.311(b) provides that Commerce will investigate subsidy practices discovered in the course of a proceeding "if the Secretary concludes that sufficient time remains before the scheduled date for the final determination or final results of review." Alternatively, 19 C.F.R. § 351.311(c) provides that "If the Secretary concludes that insufficient time remains" then the Department may choose between two options during a CVD investigation: it may (1) allow the petitioner to withdraw the petition without prejudice and resubmit it with an allegation concerning the newly discovered practice, or (2) defer

consideration of the newly discovered practice until a subsequent administrative review, if any.²⁰²

These procedures do not explicitly address subsidies that are not discovered until verification because of a respondent's failure to disclose them any earlier in the proceeding. The Panel must therefore determine whether Commerce reasonably relied on its authority to resort to AFA rather than following the procedures described in the statute and regulations. We conclude that it did.

Had Resolute disclosed the existence of the four accounts discovered at verification, Commerce's resort to AFA would have been unnecessary. Resolute had multiple opportunities to do so. It could have disclosed the various accounts in its Chart of Accounts in its initial response to Commerce's CVD questionnaire, giving Commerce maximum time to examine the assistance reflected in those accounts and hear Resolute's arguments concerning their contents. Resolute could have availed itself of the opportunity to disclose the accounts in its June 2015 response to Commerce's supplemental questionnaire or in the supplemental submission that it made of its own accord. Resolute could even have attempted to identify the accounts as "minor corrections" at the start of its verification. It did none of these. The timing of Commerce's discovery of Fibrek's accounts was a direct result of Resolute's actions, or, stated otherwise, Resolute's failure to act by making a full disclosure of these accounts.

19 U.S.C. § 1677e(b) authorizes Commerce to employ AFA when an interested party: (1) withholds information requested by Commerce; (2) fails to provide information in a timely manner or in the form requested; (3) significantly impedes a proceeding; or (4) provides

²⁰² The option of withdrawing the petition is available only in CVD investigations, while the option of deferring consideration of a newly discovered program is available in both investigations and administrative review of existing CVD orders.

information that cannot be verified. The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) has explained that the “statutory mandate that a respondent act to ‘the best of its ability’ requires the respondent to do the maximum it is able to do.” *Nippon Steel Corp. v. United States*.²⁰³ “While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statute does not contain an intent element. ‘Inadequate inquiries’ may suffice.”²⁰⁴ Moreover, in determining whether a respondent has met this standard, Commerce should evaluate “whether {the} respondent has put forth its maximum effort to provide {the agency} with full and complete answers to all inquiries in an investigation.”²⁰⁵ In evaluating whether to apply AFA, Commerce considers whether the respondent:

...could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply. Commerce must find either a willful decision not to comply or behavior below the standard for a reasonable respondent.²⁰⁶

By failing to report the assistance reflected in the four accounts discovered at verification, Resolute withheld information from Commerce. The discovery of the accounts at verification manifested a failure to provide information in a timely manner. That failure significantly impeded Commerce’s investigation. Moreover, Resolute had reported that Fibrek had been consolidated into Resolute’s financial statements and the four accounts were labeled in a manner indicating that they referred to grants that might reasonably be determined to comprise countervailable subsidies. It was reasonable, therefore, for Commerce to find Resolute’s failure

²⁰³ 337 F.2d 1373, 1382 (Fed. Cir. 2003).

²⁰⁴ *Id.* at 1383.

²⁰⁵ *Id.* at 1382.

²⁰⁶ *Branco Peres Citrus S.A. v. United States*, 173 F. Supp. 2d 1363, 1372 (Ct. Int’l Trade 2001) (citing *Nippon Steel Corp. v. United States*, 118 F. Supp. 1366, 1378-79 (Ct. Int’l Trade 2000)).

to avail itself of multiple disclosure opportunities manifested a failure by Resolute to do the maximum it was able to do to respond to Commerce's requests for information.

Commerce reasonably resolved any conflict between the procedures governing subsidies discovered during an investigation and those governing its application of AFA. AFA embodies two basic precepts. First, AFA is intended to induce respondents to cooperate with Commerce's proceedings.²⁰⁷ Second, it is intended to ensure that a party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.²⁰⁸ Had Commerce adhered to the procedures set forth in 19 C.F.R. § 351.311(b) and (c), Resolute and similarly situated respondents would have no incentive to cooperate with Commerce. Moreover, Resolute might well have benefitted from its failure to report the accounts discovered at verification.

Verification takes place at a late stage of an investigation. By that time, the parties, Commerce, and the U.S. International Trade Commission ("ITC") have all expended significant resources. Withdrawal and refiling the petition pursuant to section 351.311(b) at such a late stage of the investigation would negate those expenditures and render much of the government's efforts redundant. Trade remedy proceedings, including CVD investigations, are notoriously costly to pursue. Restarting an entire investigation on the eve of briefing in order to address newly discovered subsidies is surely inefficient and may be prohibitively expensive, causing the petitioner to choose between foregoing relief on newly discovered programs or foregoing relief altogether. Either option allows Resolute to benefit from failing to report the Fibrek accounts.

The alternative, deferring consideration of the Fibrek accounts until a subsequent administrative review is carried out pursuant to section 351.311(c), would deny Petitioner any

²⁰⁷ See *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 24 CIT 841, 849 (2000).

²⁰⁸ See *Statement of Administrative Action* accompanying H.R.Rep. No. 103-826(I) at 870.

relief at all. As Resolute admits, its CVD rate would have been *de minimis* absent Commerce's resort to AFA for the discovered accounts. Consequently, absent AFA, Resolute would not have been subject to the *SC Paper* CVD Order and would not be subject to any subsequent administrative reviews. As a result, Resolute would be in the same position as it would be if Commerce had never discovered the Fibrek accounts – beyond the scope of the CVD order. In such circumstances, Commerce's resort to AFA rather than following any of the section 351.311 procedures was reasonable.

Resort to Adverse Facts Available Would Be Lawful Even If Subsidies to Fibrek Were Extinguished in an Arm's Length Fair Market Value Transaction

Resolute argues that certain of the subsidies listed in Fibrek's Chart of Accounts which Commerce discovered at verification are extinguished by Resolute's hostile takeover of Fibrek so that Commerce's resort to AFA was unlawful.²⁰⁹ Although the Panel is remanding the issue of Resolute's hostile takeover of Fibrek, we do not agree that a determination on remand would render resort to AFA unlawful. Just as any conflict between the procedures governing subsidies discovered during an investigation and those governing Commerce's application of AFA must be resolved in favor of AFA, so too, must any conflicts between AFA and extinguishment of subsidies by reason of an arm's length, fair market value transaction.

Had Resolute disclosed the Fibrek programs discovered at verification in its responses to Commerce's questionnaires (or supplemental questionnaires or minor corrections at verification) it would, of course, have been free to argue extinguishment by reason of an arm's length, fair market value transaction (or any other reason not to countervail those programs). Resolute's failure to disclose the programs prevented Commerce from making a substantive decision

²⁰⁹ Resolute R. 57.1 Brief at 59-62.

concerning them. If we were to accept Resolute's *post hoc* argument that extinguishment excuses its non-disclosure, we would be putting in the hands of a respondent a decision that is Commerce's to make. Pursuant to 19 U.S.C. § 1677e(b)(1)(B) as amended by the Trade Preferences Extension Act discussed below, Commerce has no obligation to modify the AFA subsidy rates based on the information (and presumably arguments about it) that Resolute would have provided had it given a complete response to Commerce's questionnaire. Commerce's conclusion that Resolute did not act to the best of its ability was reasonable. We decline to overturn that conclusion based on *post hoc* arguments about whether any benefits from the programs were extinguished by reason of an arm's length, fair market value transaction.

Trade Preferences Extension Act

On June 29, 2015, after Commerce initiated its SC Paper investigation but before the agency issued its Preliminary Determination, President Obama signed into law the Trade Preferences Extension Act of 2015 ("TPEA").²¹⁰ Section 502 of TPEA amended 19 U.S.C. § 1677e, the statutory provision governing the selection and corroboration of factual information that Commerce may use in applying AFA.²¹¹ In contrast to certain other provisions of TPEA, "section 502 . . . does not address explicitly its temporal reach."²¹² However, the Federal Circuit

²¹⁰ Pub. L. No. 114-27, 129 Stat. 362.

²¹¹ Section 502 clarified that in determining AFA Commerce is not required to determine or make adjustments to a CVD rate based on any assumptions about information that a respondent would have provided had it complied with Commerce's request for information.

²¹² *Ad Hoc Shrimp Trade Action Committee v. United States*, 802 F.3d 1339, 1349 (Fed. Cir. 2015).

concluded that “Congress intended section 502 of the Act to apply only to Commerce determinations made on or after the date of enactment.”²¹³

Because TPEA did not establish an explicit effective date for section 502, Commerce published a *Federal Register* Notice on August 6, 2015 establishing a date of application for section 502.²¹⁴ Commerce recognized that, while Congress intended section 502 to be effective immediately, immediate application was not practical. It therefore gave notice that it would apply section 502 to its determinations made on or after August 6, 2015, the earliest date on which the provision could be implemented.²¹⁵ Commerce published the *Final Determination* on October 20, 2015, several months after the date on which Commerce began to apply section 502 to its determinations.

Resolute contends that Commerce retroactively applied section 502 of TPEA “to apply exorbitant CVD margins to Resolute based on adverse factual inferences” with respect to the accounts discovered during verification. Resolute further contends that the *Effective Date Notice* was a promulgation of a substantive rule requiring notice and comment under the Administrative Procedures Act, 5 U.S.C. § 553(b) (“APA”) and that Commerce’s decision to apply TPEA in the SC Paper investigation thus violated the APA. The Panel does not agree with either contention.

With respect to the APA’s notice and comment requirements, the Federal Circuit has observed that section 502 took effect when it was signed into law on June 29, 2015.²¹⁶

²¹³ *Id.* at 1350.

²¹⁴ *Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made By the Trade Preferences Extension Act of 2015*, 80 Fed. Reg. 46793 (Dept. Commerce August 6, 2015) (“*Effective Date Notice*”).

²¹⁵ *Id.* at 46794.

²¹⁶ *Ad Hoc Shrimp* at 1339.

Commerce's *Effective Date Notice* merely established the date on which the Department could effectively apply it. As such, the *Effective Date Notice* was an interpretative rule exempt from the APA's notice and comment requirements.

The APA requires federal agencies to comply with various procedural requirements, including providing notice of a proposed rulemaking and an opportunity for interested parties to comment on new "substantive" or "legislative" rules. *See* 5 U.S.C. § 553. Agencies must publish notice and provide for a comment period when "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5)1(b). Substantive rules are "those that effect a change in existing law or policy or which affect individual rights and obligations."²¹⁷ The APA also provides an exception to these notice and comment requirements for when an agency issues an "interpretative rule." 5 U.S.C. § 553(b)(A). Interpretive rules "clarify or explain existing law or regulation."²¹⁸ "The critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."²¹⁹ "A rule that does no more than clarify the interpretation of a statute is necessarily interpretive in character, even if that interpretation has consequences for the rights of the parties."²²⁰

These decisions confirm that Commerce is not required to promulgate new regulations and engage in APA procedures when it is merely explaining or clarifying its interpretation of a statute. In announcing when it would begin to apply section 502, Commerce stated that it was

²¹⁷ *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998).

²¹⁸ *Id.*

²¹⁹ *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1204 (2015) (citing *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)).

²²⁰ *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1376 (Fed. Cir. 2001).

guided by Congress’s intention that TPEA be implemented as soon as practicably possible. *See* 80 Fed. Reg. 46794. We therefore find that the *Effective Date Notice* did no more than clarify the terms of TPEA by reducing or eliminating any ambiguity about the date on which Commerce would begin to apply section 502.

The enactment of the TPEA changed the governing law. The *Effective Date Notice* merely clarified the dates on which Commerce would apply the relevant TPEA amendments. The *Notice* itself did not change existing law or policy, nor did it affect individual rights or obligations.²²¹ Rather, because the TPEA was silent as to the relevant dates of application, Commerce merely clarified that ambiguity. We conclude, therefore, that the *Effective Date Notice* is not a substantive rule because it neither affected a change in existing law or policy nor affected individual rights or obligations.²²²

Whatever “new law, rights or duties” were created by the enactment of the TPEA took effect on June 29, 2015. Commerce did not change the meaning or the substance the TPEA in the *Effective Date Notice*. Nor did it create “new law, rights or duties” by establishing August 6, 2015 as the date on which it would begin to apply section 502. Commerce’s *Effective Date Notice* is an interpretative rule exempt from the APA’s rule-making procedures. The absence of an opportunity for notice and comment did not render the application of section 502 of TPEA to Resolute unlawful.

²²¹ *See Effective Date Notice*, 80 Fed. Reg. 46796 (“{Section 502} do{es} not impose any new requirements on the parties to such proceedings that would require them to submit additional information or argument”).

²²² *See Paralyzed Veterans of Am.*, 138 F.3d at 1436.

Resolute further contends that Commerce retroactively applied section 502 contrary to law because TPEA was enacted after the petition was filed and respondents had submitted responses to Commerce's CVD questionnaire. This argument, too, fails.

The Federal Circuit observed in *Ad Hoc Shrimp* that section 502 applies prospectively to Commerce's determination made after its enactment ("by omitting an effective date for section 502 of the Act, while explicitly providing for different effective dates for other provisions, Congress unambiguously intended section 502 to apply prospectively only – *i.e.*, to apply only to Commerce determinations made on or after the date of enactment"). The SC Paper *Final Determination* was issued more than three months after the effective date of TPEA. Commerce's application of the section 502 amendment was therefore consistent with Congress's intent that section 502 be applied in Commerce's determinations made after enactment.

Further, while TPEA is silent with respect to whether Congress intended it to be applied to pending investigations where evidence had already been submitted, the legislative history supports Commerce's application of section 502 as a reasonable interpretation of the statute. As the Court of Appeals observed in *Ad Hoc Shrimp*, Congress understood that it would have to decide when the TPEA amendments would take effect.²²³ Specifically, the Senate Finance Committee stated that a particular trade remedy amendment would apply to investigations and reviews initiated "(1) before the date of the enactment of this bill, if the investigation or review is pending a final determination as of such date of enactment, and (2) on or after such date of enactment."²²⁴ Commerce initiated this investigation before the TPEA was enacted. The

²²³ *Ad Hoc Shrimp*, 802 F.3d at 1351.

²²⁴ S. Rep. 114-45 (114 Cong., 1st Sess.) 2015 at 45 (discussing an amendment not enacted).

legislative history thus supports our conclusion that Commerce’s application of section 502 of the TPEA in the SC Paper investigation was reasonable and in accordance with the statute.

Commerce also contends that the application of section 502 of TPEA in SC Paper did not change its outcome. We agree. Both before and after the TPEA amendments 19 U.S.C. § 1677e provided that “Commerce shall, to the extent practicable, corroborate {secondary} information from independent sources that are reasonably at {its} disposal.”²²⁵ Section 502 amended this basic requirement by providing in 19 U.S.C. § 1677e(b)(1) that Commerce is not required to determine, or make any adjustments to an AFA CVD rate to account for the factual information that an uncooperative respondent might have provided had it cooperated. Section 502 also codified Commerce’s existing hierarchy for determining AFA in CVD proceedings by authorizing Commerce to rely on the highest prior CVD rate found for the same or similar program in the country under investigation, stating that Commerce need not either estimate what an uncooperative respondent’s rate would have been had it cooperated or consider an uncooperative respondent’s “commercial reality.” 19 U.S.C. § 1677e(d)(3)(B). As these amendments merely codified Commerce’s existing practice and Commerce followed that practice in SC Paper,²²⁶ Commerce’s application of the TPEA amendments did not affect Commerce’s selection of AFA or change the outcome of the investigation.

We agree with Commerce that the Federal Circuit decision in *NanYa Plastics Corp. v. United States*²²⁷ supports its resort to AFA for Resolute. In *NanYa*, the Federal Circuit clarified that the terms “accurate” and “commercial reality” are merely “reliable guideposts” for

²²⁵ 19 U.S.C. § 1677e.

²²⁶ *IDM* at 30 and 155.

²²⁷ 810 F.3d 1333 (Fed. Cir. 2016).

determining AFA. The court also stated that a Commerce determination is “accurate” if it is correct as a mathematical and factual matter (and thus is supported by substantial evidence) and reflects “commercial reality” if it is consistent with the method provided in the statute. Hence, “Commerce need not examine the economical or commercial reality of the parties specifically, or of the industry more generally, in some broader sense.”²²⁸

While *NanYa* thus confirmed Commerce’s flexibility in determining AFA, the court recognized that the selection of an AFA rate must nonetheless be supported by substantial evidence (“Our holding reflects what the statutory scheme already requires of Commerce to support its determination”).²²⁹ The requirement that Commerce’s selection of an AFA CVD rate must be supported by substantial evidence was explicitly addressed by the CIT in *Trina Solar*. There, the court concluded that Commerce had “improperly reached legal conclusions without the support of requisite factual findings” and remanded a CVD determination based on AFA. Noting that “the bar is low . . . it is not non-existent,”²³⁰ the court observed that

Commerce . . . found – entirely “as AFA” . . . and without relying on any record evidence or allegations – that each of the twenty-eight unreported grant programs and tax deduction found at verification provided a “financial contribution . . . , that each was specific . . . , and that each conferred a benefit”²³¹

The court concluded that Commerce could not merely invoke AFA as the sole basis establishing the elements of a countervailable subsidy, but must point to some facts on the record to support its conclusion. Commerce did so in *SC Paper*, observing that grants to Fibrek which had been

²²⁸ *Id.* at 1343.

²²⁹ *Trina Solar* at 1344.

²³⁰ *Id.* at 1349.

²³¹ *Id.* at 1347.

booked to Resolute appeared to provide countervailable subsidies.²³² This conclusion was fact-based and reasonable given that the accounts to which the grants were booked were identified []. Commerce thus relied on record evidence to establish the elements of a countervailable subsidy.

The statute provides that Commerce may rely on information from the petition, a final determination in the investigation, a previous administrative review, or on other information placed on the record as its sources for AFA.²³³ In the context of CVD investigations, Commerce may use as AFA, “. . . a countervailable subsidy rate applied for the same or similar program in a countervailing duty proceeding involving the same country, or (ii) if there is no same or similar program, use a countervailable subsidy rate for a subsidy program from a proceeding that {Commerce} considers reasonable to use.”²³⁴ Commerce is required to corroborate secondary information (*i.e.*, information other than that obtained in the course of an investigation or review) to the extent possible using independent sources that are reasonably at its disposal.²³⁵ In this statutory context, Commerce has developed the following three-tiered hierarchy for corroborating AFA in CVD proceedings: (1) the highest calculated rate for the identical program within the same proceeding, (2) the highest calculated rate for the identical program in another proceeding within the same country, and (3) the highest calculated rate for a similar or

²³² *IDM* at 155.

²³³ 19 U.S.C. § 1677e(b)(2).

²³⁴ 19 U.S.C. § 1677e(d)(1)(A).

²³⁵ 19 U.S.C. § 1677e(c)(1).

comparable program, as determined by the type of benefit conferred, in a previous segment of the proceeding or any previous proceeding involving the same country.²³⁶

Using this hierarchy, Commerce concluded that there was no information on the record of the SC Paper investigation concerning programs identical to the two Fibrek grants discovered at verification. It therefore turned to the third element of its hierarchy, the highest subsidy rate that it had calculated for a similar program in Canada. This proved to be a rate of 8.55 percent for “Article 7 Grants From the Quebec Industrial Development Corporation.”²³⁷ Commerce employed this rate separately as AFA for each of the two Fibrek grants discovered at verification. Resolute challenges Commerce’s use of the rate calculated for this Article 7 grant as AFA for either Fibrek subsidy.

With respect to the two accounts concerning subsidies [] that Commerce treated as a single program, Resolute argues that “reimbursements” are not grants. We find this argument to be merely semantic. A reimbursement can certainly be a grant in some cases. Commerce’s conclusion that this is such a case was reasonable. Moreover, the activities that these reimbursements support – [] – indicate that these are non-recurring grants. Commerce’s determination that the non-recurring Article 7 grant in *Magnesium from Canada* is similar to these grants is thus supported by substantial evidence. Accordingly, the Panel affirms Commerce’s selection of the Article 7 grant in *Magnesium from Canada* as AFA for this program.

²³⁶ See, e.g., *Essar Steel, Ltd. v. United States*, 753 F.3d 1368, 1373-74 (Fed. Cir. 2014).

²³⁷ *Pure and Alloy Magnesium From Canada*, *supra*, 62 Fed. Reg. 13857.

Resolute argues that [

] comprise a recurring grant, to which the non-recurring Article 7 grant in *Magnesium from Canada* cannot reasonably be found to be similar. The *Final Determination* does not explain how a non-recurring grant is similar to a recurring grant or, more specifically, how the Article 7 grant in *Magnesium from Canada* is similar to [] grants. In its brief to the Panel, Commerce responds only that Resolute “overstates the importance of the difference between recurring and non-recurring grants,” that “the law requires only that Commerce identify similar programs, not identical,” and that “the issue is moot in the context of {AFA}, where Commerce is not attempting to replicate experience *per se*, but is instead identifying a rate sufficiently high so as to induce cooperation.”²³⁸ We find that it is not sufficient to assert, as Commerce does, that the Article 7 grant is similar to the [

] grant merely because both are grants. Commerce’s regulations recognize substantive difference between recurring and non-recurring grants and treats them differently for purposes of calculating benefits. *See* 19 C.F.R. § 351.524. Commerce must address these differences in selecting a “similar” program as AFA. Moreover, to assert that the law only requires Commerce to identify similar programs begs the question why the programs are similar – a question that the *Final Results* do not answer. Finally, to declare the issue moot in the context of AFA contravenes the court’s decision in *Trina Solar* because it fails to support the determination that the programs are similar with substantial evidence.

The Panel therefore remands this element of the *Final Determination* with instructions for Commerce to identify and, as necessary, comment upon the substantial evidence on the

²³⁸ Commerce R. 57.2 Br. at 156.

record that supports its determination that the Article 7 grants are sufficiently similar to [] grants to reasonably be used as AFA for that program.

IV. CALCULATION OF THE ALL OTHERS CVD RATE

When Commerce initiated the SC Paper investigation it selected only PHP and Resolute as so-called “mandatory respondents.” P.R. Doc. 100. Because Catalyst and Irving were neither mandatory nor voluntary respondents,²³⁹ Commerce assigned to each of them an “All Others” CVD rate. Commerce calculated the All Others rate as the weighted average of the CVD rates determined for the two mandatory respondents, PHP and Resolute, using the publicly ranged values for each company’s exports to the United States. The result was an All Others CVD rate of 18.85 percent. Catalyst and Irving challenge Commerce’s calculation of the All Others CVD rate as grossly unfair, punitive, and unreasonable because PHP’s CVD rate largely comprised company- and province-specific subsidies that could not have benefited Catalyst or Irving, and Resolute’s CVD rate was largely based on AFA. Catalyst and Irving request a remand instructing Commerce to recalculate the All Others CVD rate excluding any element of PHP’s CVD rate that was based on company- or province-specific programs and the portion of Resolute’s that was based on AFA.²⁴⁰

The Panel denies the relief requested by Catalyst and Irving. Commerce calculated the All Others CVD rate according to the explicit and unambiguous mandate of the statute. That the

²³⁹ Catalyst and Irving requested that they be granted status as voluntary respondents and submitted responses to the Department’s CVD questionnaires. However, Commerce determined that it would “not select a voluntary respondent . . . because doing so would be unduly burdensome and would inhibit the timely completion” of the investigation. P.R. Doc. 148. Consequently, the Catalyst and Irving submissions were not critically evaluated by Commerce, nor were they subjected to verification as required by statute, 19 U.S.C. § 1677m(i).

²⁴⁰ Catalyst and Irving do not challenge Commerce’s decision not to name them as mandatory respondents or not to grant their requests for voluntary respondent status.

result may be a higher CVD rate than would have resulted had Catalyst and Irving been accepted as mandatory or voluntary respondents is of no consequence.

Commerce's calculation of an "All Others" CVD rate reflects a rare instance in which Congress directed the Department to employ a specific calculation methodology. 19 U.S.C. § 1671d(c)(1)(B)(i)(I) directs that Commerce "shall . . . determine an estimated individual countervailing duty rate for each exporter and producer individually investigated, and in accordance with paragraph (5), an estimated All-Others rate for all exporters and producers not individually investigated" Paragraph (5) of this subsection explicitly directs that: "the all-others rate shall be an amount equal to the weighted average countervailable subsidy rates established for exporters and producers individually investigated, excluding any zero and *de minimis* countervailable subsidy rates, and any rates determined entirely {on the basis of AFA}." 19 U.S.C. § 1671d(c)(5)(A)(i). Further, "If the countervailable subsidy rates established for all exporters and producers individually investigated are zero or *de minimis* rates, or are determined entirely {based on AFA}," 19 U.S.C. § 1671d(c)(5)(A)(ii) directs that Commerce "may use any reasonable method to establish an all-others rate . . . including averaging the weighted average countervailable subsidy rates determined for the exporters and producers individually investigated." *Id.*

The facts of this case do not afford Commerce the discretion in which it "may use" any reasonable method to establish the All Others CVD rate. Neither PHP nor Resolute was found to have a zero or *de minimis* CVD rate. None of PHP's CVD rate was based on AFA; while the bulk of Resolute's CVD rate was based on AFA, a small portion was not.²⁴¹ In such

²⁴¹ 17.10 percent of Resolute's 17.87 percent CVD rate was based on AFA. The remaining 0.77 percent was not.

circumstances, 19 U.S.C. § 1671d(c)(5)(A)(i) explicitly directs what the All Others rate “shall be.” Commerce has no discretion in this calculation: it must be the weighted average of the CVD rates for exporters and producers individually investigated. Nothing in the text of the statute authorizes Commerce to adjust the individual CVD rates for PHP and Resolute in calculating the All Others rate, as Catalyst and Irving request. Commerce thus “{gave} effect to the unambiguously expressed interest of Congress.”²⁴² As a result, the Panel finds that Commerce followed Congress’s express statutory mandate.

Catalyst and Irving urge that the All Others CVD rate must be calculated as “accurately as possible,” citing *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*²⁴³ and must “reflect economic reality for investigated respondents,” citing *Navneet Publications (India) Ltd. v. United States*.²⁴⁴ Catalyst and Irving contend that “accuracy” and “economic reality” taken primacy over the unambiguous mandate of the statute because “it is well settled that in reading regulatory and taxation statutes, form should be disregarded for substance and emphasis should be on economic reality,” citing *United States v. Eurodif*.²⁴⁵ The Panel concludes, however, that accuracy and economic reality must be evaluated within the context of the statute’s explicit mandate.²⁴⁶ In this case Commerce achieved accuracy when it correctly calculated the

²⁴² *Chevron*, 467 U.S. at 842-43.

²⁴³ 61 F. Supp. 3d 1306, 1336 (Ct. Int’l Trade 2015).

²⁴⁴ 999 F. Supp. 2d 1354, 1358 (Ct. Int’l Trade 2014).

²⁴⁵ 555 U.S. 305, 318 (2009).

²⁴⁶ Calculating the all others rate as accurately as possible “is properly understood as expressing a goal within the confines of the statutes, not in derogation of a statutory provision.” *Viraj Group, Ltd. v. United States*, 345 F. 3d 1371, 1377 (Fed. Cir. 2003). See also *Ad Hoc Comm. Of Ariz., -N.M., -Tex., -Fla. Prods. of Grey Portland Cement v. United States*, 13 F.3d 398, 402-03 (Fed. Cir. 1994).

weighted-average of PHP's and Resolute's CVD rates.²⁴⁷ Similarly, when Congress directs Commerce to execute its duties in a particular manner – as it did in directing what the All Others rate “shall be” – Commerce “need not examine the economic or commercial reality of the parties specifically, or the industry generally, in some broader sense.”²⁴⁸ Moreover, Commerce's calculation “reflects ‘commercial reality’ {because} it is consistent with the method provided in the statute.”²⁴⁹ Commerce's calculation of the All Others CVD rate in the *Final Determination* is entirely consistent with the methodology mandated in 19 U.S.C. § 1671d(c)(5)(A)(i). As such, it reflects commercial reality for producers and exporters of SC Paper not individually investigated.

Catalyst and Irving contend that their voluntary questionnaire responses, which Commerce did not accept, place this case on a different footing than the All Others CVD rate calculation contemplated by Congress. They contend that the voluntary responses detract from the evidence relied upon by Commerce in calculating the All Others rate, thus depriving that calculation of support by substantial evidence on the record as a whole. They further contend that the voluntary responses comprise affirmative evidence that Commerce's calculation is “absurd,” “unfair,” “penalizing,” and not reflecting commercial reality. These arguments presume that Commerce had discretion to weigh record evidence. As such, they are misplaced. Commerce had no discretion to decide how it must calculate the All Others CVD rate given the statute's language. The only relevant record evidence in this context is the fact that the CVD

²⁴⁷ See *Nan Ya* at 310 F.3d at 1344 (Commerce's calculation is “‘accurate’ if it is correct as a mathematical and factual matter”).

²⁴⁸ *Id.*

²⁴⁹ *Id.*

rates for PHP and Resolute are not zero, *de minimis*, or entirely based on AFA. Commerce's calculation of the All Others CVD rate correctly reflects this.

Moreover, the voluntary responses lack the probative value that Catalyst and Irving presume. They were not accepted by Commerce and therefore were not subjected to even rudimentary analysis, comment, clarification requests, or challenges. Most importantly, they were not verified by Commerce.²⁵⁰ The assertion that Catalyst and Irving would not have received subsidies that are specific to PHP does not preclude the possibility that they received their own company-specific subsidies. In the absence of a full vetting and verification, Commerce reasonably concluded that it was “not in a position to speculate as to the completeness and accuracy of . . . the responses submitted by Catalyst and Irving.” P.R. Doc. 526. Absent full analysis and verification, the completeness and accuracy of the Catalyst and Irving voluntary responses cannot be presumed by Commerce or the Panel.

Citing various dictionary definitions of “determine” and “determination,” Irving isolates the word “determining” from the heading for section 1671d(c)(5) (“Method for determining all-others rate and the country-wide subsidy rate”) and argues that the general rule for calculating an All Others rate imposes an obligation on Commerce “to ascertain, engage in a process of reasoning, exercise judgment, and make a decision after weighing the relevant facts in determining the all others rate.” The Panel is unpersuaded by Irving’s attempt to ascribe discretion to Commerce in following the statute. The statute itself spells out exactly what Congress has stated the All Others rate “shall be.” The process of calculating the All Others rate

²⁵⁰ 19 U.S.C. § 1677m(i) requires final determinations in investigations to be based on verified information.

according to the statute's direction does not entail the exercise in judgment that Irving ascribes to it.

Similarly unpersuasive is Irving's contention that the statute refers to rates for individual subsidy programs rather than the aggregate rates for respondents "individually investigated" when it directs Commerce to exclude zero, *de minimis*, or entirely AFA rates from the All Others calculation.²⁵¹ The Panel concludes that Commerce's reading of the statute as referring to the aggregate rate for individual respondents is reasonable given the structure of the CVD statute as a whole. 19 U.S.C. § 1677f-1(e)(1) describes CVD rates for mandatory respondents in unitary terms, stating that Commerce "shall determine *an* individual countervailable subsidy rate for each known exporter or producer of the subject merchandise" (emphasis added). Further, 19 U.S.C. § 1671b(b)(4)(A) defines a *de minimis* CVD rate in terms of the "aggregate of the net subsidies." Such statutory references to unitary and aggregate CVD rates confirm that Commerce's interpretation of the statute is reasonable.²⁵²

CONCLUSION AND ORDER

All of the arguments of the parties not expressly discussed above have been carefully considered. In accordance with the foregoing, it is hereby

ORDERED that Commerce's *Final Determination* is remanded for further consideration consistent with the Panel's decision with respect to (1) the use of Commerce's "concurrent

²⁵¹ Even if the Panel were to conclude that Irving's interpretation of the statute is reasonable, that conclusion would not render Commerce's reasonable interpretation of the statute unlawful. *Koyo Seiko, supra*, 36 F. 3d 1570.

²⁵² An identically worded provision governs the calculation of All Others antidumping duty margins; 19 U.S.C. § 1673d(c)(5)(A) merely substitutes "margins" for "countervailable subsidy rate." As dumping margins cannot be disaggregated in the manner that Irving urges for CVD rates, this use of identical language in the antidumping context further demonstrates the reasonableness of Commerce's statutory interpretation.

subsidies” methodology to analyze the provision of “hot idle” funding to PHP in a transaction between private parties; (2) Commerce’s conclusion that the Government of Nova Scotia entrusted and directed Nova Scotia Power, Inc. to make a financial contribution by providing electricity; (3) Commerce’s conclusion that Nova Scotia Power, Inc. provided electricity for less than adequate remuneration, addressing both its conclusion that a Tier 1 benchmark was not available and its calculation of a Tier 3 benchmark; (4) the use of Commerce’s “concurrent subsidies methodology” with respect to granting of Forestry Infrastructure monies to NPPH prior to its acquisition by PWCC; (5) Commerce’s statement that the administrative record contains no evidence of a hostile takeover of Fibrek by Resolute; (6) Commerce’s failure to examine whether the grants to Resolute under the Northern Industrial Electricity Rate and Forestry Sector Prosperity Funds programs were tied to the production of a particular product or to the production of an input product; and (7) Commerce’s use of the same non-recurring grant as the source for Adverse Facts Available for both recurring and non-recurring grants; and it is further

ORDERED that to the extent not rendered moot by Commerce’s explanation on remand as to why a Tier 1 benchmark for measuring the adequacy of remuneration of Port Hawkesbury’s electricity was not available, Commerce’s October 21, 2016 motion for a voluntary remand to consider whether Commerce should include a separate component for return on equity in its Tier 3 benchmark for measuring the adequacy of remuneration of Port Hawkesbury’s electricity purchased is **GRANTED**, and the calculation of the benchmark for such purchases is hereby remanded; and it is further

ORDERED that the *Final Determination* is in all other respects **SUSTAINED**; and it is further

ORDERED that Commerce should submit its redetermination on remand to the NAFTA Secretariat within 75 days of the date on which this decision is issued.

Signed in the Original.

<u>Lawrence J. Bogard</u>	<u>4/13/2017</u>
Lawrence J. Bogard, Panel Chair	Date
<u>Cynthia C. Lichtenstein</u>	<u>4/13/2017</u>
Cynthia C. Lichtenstein, Panelist	Date
<u>Joseph I. Liebman</u>	<u>4/13/2017</u>
Joseph I. Liebman, Panelist	Date
<u>David J. Mullan</u>	<u>4/13/2017</u>
David J. Mullan, Panelist	Date
<u>Debra P. Steger</u>	<u>4/13/2017</u>
Debra P. Steger, Panelist	Date