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REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS505/R.

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WORKING PROCEDURES OF THE PANEL

Adopted on 8 December 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

4. The Panel shall conduct its internal deliberations in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Canada requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Canada shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause, which may include where the issue concerning translation arises later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party become aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by Canada could be numbered CAN-1, CAN-2, etc. If the last exhibit in connection with the first submission was numbered CAN-5, the first exhibit of the next submission thus would be numbered CAN-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 12h00 (noon) the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Canada to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if available, preferably at the end of the meeting, and in any event no later than 17h00 on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions in accordance with the timetable adopted by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Canada presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the United States if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the United States to present its opening statement, followed by Canada. If the United States chooses not to avail itself of that right, the Panel shall invite Canada to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if available, preferably at the end of the meeting, and in any event no later than 17h00 of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions in accordance with the timetable adopted by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 12h00 (noon) the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 17h00 of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive section

18. The description of the arguments of the parties and third parties in the descriptive section of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first oral statements and responses to questions where possible, following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second oral statements and responses to questions where possible, following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. xxx).

b. Each party and third party shall file three paper copies of all documents it submits to the Panel. Exhibits may be filed in four copies on CD-ROM or DVD and two paper copies. The DS Registrar shall stamp the documents with the date and time of the filing.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic

copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry. The paper version of documents shall constitute the official version for the purposes of the record of the dispute.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 17h00 (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive section, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Revised on 20 January 2017

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the US Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the countervailing proceeding at issue in this dispute, entitled Supercalendered Paper from Canada (C-122-854). In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigation has agreed in writing to make the information publicly available.

3. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the investigation at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Canada and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorizing letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises.

5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information.

6. Third parties' access to BCI shall be subject to the terms of these procedures. A party objecting to a third party having access to BCI it is submitting shall inform the Panel of its objection and the reasons therefor prior to filing the document containing such BCI. The Panel may, if it finds the objection justified, request the objecting party to provide a non-confidential version of the BCI in question to the third party.

7. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business

Confidential Information" at the top of the page. Documents previously submitted to the United States Department of Commerce containing information designated as BCI for purposes of these proceedings pursuant to paragraph 2, and marked as "Contains Business Proprietary Information", shall be deemed to comply with this requirement. A party submitting BCI in the form of, or as part of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit CAN-1 (BCI)).

8. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

9. Where a party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 7. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are present or observing the session at that time. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party and, where BCI was submitted by a third party, that third party an opportunity to review the report to ensure that it does not contain any information that the party or third party has designated as BCI.

12. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Report of the Panel.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE PANEL: OPEN MEETINGS

Adopted on 27 January 2017

1. Subject to the availability of suitable WTO meeting rooms, the Panel will start its first and second substantive meetings with the parties**,** on 21-22 March 2017 and 13-14 June 2017, with a session open to the public at which no confidential information shall be referred to or disclosed ("non-confidential session").

2. At such sessions, each party will be asked to make opening and closing statements which shall not include confidential information. After both parties have made their opening statements, each party will be given the opportunity to pose questions or make comments on the other party's statement, as described in paragraphs 13 and 14 of the Working Procedures adopted by the Panel. The Panel may pose any questions or make any comments during such session. Such questions shall not include confidential information.

3. To the extent that the Panel or either of the parties considers it necessary, the Panel shall proceed to a closed session ("confidential session"), during which the parties will be allowed to make additional statements or comments and pose questions that involve confidential information. The Panel may also pose questions during the confidential session.

4. The Panel will start the third party session of its first substantive meeting with the parties by opening a portion of this session to the public ("non-confidential third party session"). At this portion of the third party session, no confidential information shall be referred to or disclosed. Each third party wishing to make its statement in the non-confidential third party session shall do so, but shall ensure that its statement does not include confidential information. After such third parties have made their statements, questions or comments from the parties or the Panel may be presented concerning these statements, as foreseen in paragraph 17 of the Working Procedures adopted by the Panel. Such questions or comments shall not include confidential information. To the extent that the Panel or any of the other third parties considers it necessary, the Panel shall then conclude this portion of the third party session and proceed to a third party closed session ("confidential third party session") during which other third parties shall make their statements.

5. During the confidential sessions referred to above, the following persons shall be admitted into the meeting room:

- Members of the Panel;
- Members of the delegations of the parties;
- Members of the delegations of the third parties throughout the third party session;
- WTO Secretariat staff assisting the Panel.

6. As set out below in paragraph 7, a live closed-circuit television broadcast of the Panel meeting to a separate viewing room in the WTO shall be used to allow other WTO Members, Observers, staff members, and registered members of the public to observe the non-confidential sessions.

7. The viewings will be open to officials of WTO Members, Observers and staff members of the WTO Secretariat upon presentation of their official badges. Accredited journalists and representatives of relevant non-governmental organizations (NGOs) may indicate to the Secretariat (Information and External Relations Division) their interest in attending the viewings. No later than four weeks before the substantive meetings, the WTO Secretariat will place a notice on the WTO website informing the public of the non-confidential sessions. The notice shall include a link through which members of the public can register directly with the WTO. The deadline for public registration shall be close of business on 10 March 2017 for the first substantive meeting, and 2 June 2017 for the second substantive meeting.

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

1.1. On 10 November 2017, the Panel submitted its Interim Report to the parties. On 24 November 2017, Canada and the United States each submitted written requests for the review of precise aspects of the Interim Report. On 1 December 2017, both parties submitted comments on each other's requests for review. Neither party requested an interim review meeting.

1.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. Due to changes as a result of our review, certain numbering of the footnotes in the Final Report has changed from the Interim Report. The text below refers to the footnote numbers in the Interim Report, with the footnote numbers in the Final Report in parentheses for ease of reference. The paragraph numbering did not change from the Interim Report to the Final Report.

1.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including those identified by the parties. The Panel is grateful for the assistance of the parties in this regard.

2 SPECIFIC REQUESTS FOR REVIEW

2.1 Canada's specific requests for review

2.1.1 Paragraph 7.8

2.1. Canada suggests that the Panel revise letter (b) of paragraph 7.8, in order to add the phrase "the interested parties".

2.2. The United States made no comment on this request.

2.3. We have decided to accommodate Canada's request after reviewing Canada's relevant claim.

2.1.2 Paragraph 7.12

2.4. Canada requests that the Panel revise the third sentence of paragraph 7.12, in order to remove the suggestion that all below-the-line rates are made possible through the LRT. Canada argues that, as it has observed in this proceeding, there are also several other types of below-the-line rates that were not adopted through the LRT.

2.5. The United States made no comment on this request.

2.6. We have decided to accommodate Canada's request after reviewing Canada's relevant arguments.

2.1.3 Paragraph 7.31

2.7. Canada suggests that the Panel revise the last sentence of paragraph 7.31, in order to reflect more clearly its argument that the benchmark was not appropriate because the cost elements of the benchmark were speculative and because it double-counted ROE.

2.8. The United States made no comment on this request.

2.9. We have decided to accommodate Canada's request after reviewing Canada's relevant arguments.

2.1.4 Paragraph 7.77

2.10. Canada suggests that the Panel revise footnote 153 (162 of the Final Report) of paragraph 7.77. Canada argues that the relevant references regarding this paragraph are found in paragraphs 153-159 of Canada's first written submission and paragraphs 49-54 of Canada's second written submission.

2.11. The United States made no comment on this request.

2.12. We have corrected the inaccuracy identified by Canada in footnote 153 (162 of the Final Report).

2.1.5 Paragraph 7.138

2.13. Canada suggests that the Panel revise the second sentence of paragraph 7.138, as well as footnote 235 (245 of the Final Report), in order to reflect the fact that Canada did not suggest that a price comparator would have been the only possible method of demonstrating sufficient evidence of benefit for the purposes of initiation in this case.

2.14. The United States made no comment on this request.

2.15. We have decided to accommodate Canada's request after reviewing Canada's relevant arguments.

2.1.6 Paragraph 7.173

2.16. Canada requests that the Panel revise footnote 285 (295 of the Final Report) of paragraph 7.173. Canada argues that a more accurate citation from the USDOC Issues and Decision Memorandum would be from pages 12-13, where the USDOC provides the legal basis for its conclusion by noting that Resolute "withheld information that has been requested".

2.17. The United States indicates that it has no objection if the citation to page 13 is expanded to include pages 12-13. The United States notes, however, that the existing reference to page 10 is correct, and should also be retained because it correctly cites to USDOC's determination that Resolute failed to accurately respond to the questionnaires concerning other subsidies.

2.18. We have decided to reject Canada's request. The citation in footnote 285 (295 of the Final Report) refers to specific language used by the USDOC throughout its Issues and Decisions Memorandum, and this specific language is not used in page 12 of that document.

2.1.7 Paragraph 7.235

2.19. Canada suggests that the Panel revise the third sentence of paragraph 7.235. Canada argues that, because the Panel is writing generally, the words "on SC Paper" should instead be "on the imported product."

2.20. The United States made no comment on this request.

2.21. We have corrected paragraph 7.235, in order to reflect the fact that the Panel is writing in a general sense on the third sentence.

2.1.8 Paragraph 7.278

2.22. Canada suggests that the Panel revise the fourth and sixth sentences of paragraph 7.278, in order to reflect that the USDOC recommended proceeding with an investigation into six of eight new subsidy allegations in the 18 April 2016 document and one of two amended new subsidy allegations in the 12 July 2016 document.

2.23. The United States made no comment on this request.

2.24. We have decided to accommodate Canada's request after reviewing the relevant evidence.

2.1.9 Paragraph 7.295

2.25. Canada suggests that the Panel add a reference at the end of paragraph 7.295 to the fact that Canada also introduced an additional US countervailing duty determination as evidence of the ongoing conduct at the second substantive meeting.

2.26. The United States made no comment on this request.

2.27. We have decided to accommodate Canada's request after reviewing the additional evidence submitted by Canada.

2.2 The United States' specific requests for review

2.2.1 Paragraph 7.22

2.28. The United States requests that the Panel modify the fourth sentence of paragraph 7.22, in order to add, to the description of the evidence set out by the USDOC with respect to the Government of Nova Scotia's alleged involvement in the process of negotiating PHP's LRR, as well as the NSUARB's role in creating and amending the LRT, the agreement between Nova Scotia and PWCC, whereby if the Port Hawkesbury's mill load resulted in increased incremental costs, Nova Scotia would guarantee that neither Port Hawkesbury nor other ratepayers would be required to pay the costs.

2.29. Canada is of the view that the request should be rejected as misleading and inaccurate. Canada argues that the USDOC did not find that the Government of Nova Scotia negotiated a commitment with PWCC in its final determination, but rather found that "[Nova Scotia] also made a commitment to the [NSUARB] that if the mill load of Port Hawkesbury triggered an additional Renewable Energy Standard (RES) obligation during the term of the proposed LRR mechanism", Nova Scotia would absorb these additional incremental costs.

2.30. We have decided to accommodate the request by the United States. However, in light of Canada's comment, we have included the specific language used by the USDOC in its Issues and Decisions Memorandum.

2.2.2 Paragraph 7.30

2.31. The United States requests that the Panel modify footnote 69 (69 of the Final Report) to paragraph 7.30, in order to reflect its position that Canada's argument described in this paragraph was not within the panel's terms of reference and was without merit.

2.32. Canada argues that the addition of these arguments is unnecessary, as they are already set out in Annex C, page C-24 at paragraphs 60-61. Canada adds, however, that if the Panel is inclined to reflect this argument by the United States, Canada suggests language which would reflect the positions of both parties.

2.33. We have decided to accommodate the request by the United States, as well as Canada's counter-request, after reviewing the relevant arguments of both parties.

2.2.3 Paragraph 7.32

2.34. The United States requests that the Panel modify paragraph 7.32, in order to reflect its argument that the USDOC's financial contribution determination relied upon evidence of specific actions taken by the Government of Nova Scotia to ensure that Port Hawkesbury would receive electricity.

2.35. Canada contends that the addition of these arguments is unnecessary, as they are already set out in Annex C, pages C-14-15 at paragraph 4. Canada adds, however, that if the Panel would like to reflect these arguments, Canada suggests that it modify footnote 75 to include reference to Annex C.

2.36. We have decided to accommodate the request by the United States after reviewing the relevant arguments. We have also decided to reject Canada's counter-request to include a reference to the executive summary of the United States because the Report already contains references to the actual submissions of the parties.

2.2.4 Paragraph 7.33

2.37. The United States requests that the Panel modify paragraph 7.33, in order to reflect its argument that the USDOC's benefit determination relied on a benchmark based on the prevailing market conditions for NSPI's extra-large industrial customers of electricity in Nova Scotia and the basis for the USDOC's determination that below-the-line rates are not consistent with the prevailing market conditions for electricity in Nova Scotia.

2.38. Canada requests that, if the Panel includes the United States' suggested revisions, it also revise the Interim Report to reflect Canada's submissions on these points.

2.39. We have decided to accommodate the request by the United States, as well as Canada's counter-request, after reviewing the relevant arguments of both parties.

2.2.5 Paragraph 7.58

2.40. The United States requests that the Panel modify the second sentence of paragraph 7.58. The United States argues that this sentence does not accurately reflect the United States' argument that the USDOC's analysis relied on the Public Utilities Act and the Government of Nova Scotia's involvement in the establishment of Port Hawkesbury's electricity rate. The United States requests the Panel to clarify that the paragraph reflects the Panel's interpretation of USDOC's determination, and not the United States' interpretation.

2.41. Canada made no comment on this request.

2.42. We have made adjustments to paragraph 7.58, in order to address the concern expressed by the United States. However, we continue to refer to arguments actually made by the United States in its first written submission concerning the specific issue of the USDOC's analysis of the Public Utilities Act.

2.2.6 Paragraph 7.100

2.43. The United States requests that the Panel modify paragraph 7.100, in order to reflect its argument that the level of the subsidy was also relevant to the issue of extinguishment.

2.44. Canada made no comment on this request.

2.45. We have decided to accommodate the request by the United States after reviewing the relevant arguments.

2.2.7 Paragraph 7.200

2.46. The United States requests that the Panel modify paragraph 7.200, in order to reflect the focus of its argument on the timing of Fibrek's disclosure.

2.47. Canada argues that this request is unnecessary, as the argument is already well reflected in the Panel's Interim Report, including at paragraphs 7.200 and 7.190.

2.48. We have decided to accommodate the request by the United States after reviewing the relevant arguments.

2.2.8 Paragraph 7.224

2.49. The United States requests that the Panel modify paragraph 7.224, in order to reflect the United States' interpretive arguments and to recognize the apparent agreement between the United States and Canada on the appropriate analysis.

2.50. Canada argues that the additional sentences suggested by the United States do not correctly reflect the United States' arguments and requests the Panel to reject the United States' request or, in the alternative, to make clear that there is a difference in the parties' views.

2.51. We have decided to accommodate the request by the United States after reviewing the relevant arguments. However, in light of Canada's comment, we have not included any suggestion that there is agreement between the parties on the appropriate analysis.

2.2.9 Paragraphs 7.298-7.300

2.52. The United States requests that the Panel modify paragraphs 7.298-7.300, in order to reflect the United States' arguments that Canada's claims are inconsistent with the actions of its own investigating authority.

2.53. Canada argues that the request should be rejected, as Canada's practice and actions are not before this Panel. Canada requests, however, that if the Panel chooses to include a reference to that argument, it also adds that Canada produced evidence demonstrating that the United States had mischaracterized Canada's practice in such circumstances.

2.54. We have decided to reject the request by the United States because Canada's actions and practices are irrelevant to our analysis in this dispute.

2.2.10 Paragraph 7.315

2.55. The United States suggests that the Panel reproduce paragraphs 133-141 of its second written submission in their entirety, which provides case-by-case responses to Canada's claims, in order to accurately reflect the entirety of the United States' arguments concerning Canada's ongoing conduct challenge. Additionally, the United States requests the Panel to include reference to the relevant paragraphs in footnote 565 (578 of the Final Report).

2.56. Canada made no comment on this request.

2.57. We have decided to reject the request by the United States because reproducing its arguments at such level of detail is not necessary for our analysis. Furthermore, the tables that have been included in this section reproduce the language used by the USDOC in the determinations identified by Canada.

2.2.11 Paragraph 7.323

2.58. The United States suggests that the Panel reproduce paragraphs 133-141 of its second written submission in their entirety, which provides case-by-case responses to Canada's claims, in order to accurately reflect the entirety of the United States' arguments concerning Canada's ongoing conduct challenge. Additionally, the United States requests the Panel to include reference to the relevant paragraphs in footnote 589 (602 of the Final Report).

2.59. Canada made no comment on this request.

2.60. We have decided to reject the request by the United States because reproducing its arguments at such level of detail is not necessary for our analysis. Furthermore, the tables that have been included in this section reproduce the language used by the USDOC in the determinations identified by Canada.

2.3 Typographical and other non-substantive errors

2.61. The Panel has corrected typographical and non-substantive errors in paragraphs 7.33, 7.63, 7.131, 7.170, 7.186, 7.227, 7.257, and 7.293 and footnotes 104 (111 of the Final Report), 106 (113 of the Final Report), 225 (235 of the Final Report), and 319 (329 of the Final Report).

2.4 BCI

The Panel has made adjustments concerning the designation of BCI in paragraphs 7.221 and 7.236, as indicated by Canada.

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ANNEX B

ARGUMENTS OF CANADA

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute concerns the U.S. Department of Commerce's (Commerce) final countervailing duty determination and subsequent expedited reviews against supercalendered paper (SC Paper) from Canada. It also concerns the Commerce's "Other Forms of Assistance–AFA" measure through which it applies Adverse Facts Available (AFA) to information discovered at verification that had not been disclosed in response to an overly broad question concerning "other forms of assistance".

2. The Coalition for Fair Paper Imports (Petitioner) alleged and Commerce subsequently initiated an investigation into the provision of alleged subsidies to SC Paper from Canada. Commerce identified four Canadian SC Paper producers: Port Hawkesbury Paper LP (PHP); Resolute FP Canada Inc. (Resolute); Catalyst Paper Corporation (Catalyst); and Irving Paper Ltd. (Irving). It then selected PHP and Resolute as company-specific respondents and refused Catalyst's and Irving's requests to be examined as voluntary respondents.

3. Commerce found that PHP received several countervailable subsidies, including: (1) the Government of Nova Scotia's (Nova Scotia) alleged direction of Nova Scotia Power Incorporated (NSPI) to provide electricity for less than adequate remuneration; (2) funds provided by Nova Scotia to NewPage Port Hawkesbury Corporation (NewPage PH), to maintain the mill in hot idle status pending its sale; and (3) Forestry Infrastructure Fund (FIF) contributions provided by Nova Scotia and held in trust by NewPage PH to pay third party contractors to conduct certain forestry activities for the province.

4. Commerce also found that Resolute received certain countervailable subsidies, including: (1) subsidies tied to the production of other products in Resolute's mills in Ontario that did not produce SC Paper during the period of investigation (POI); and (2) alleged subsidies discovered at the verification of Fibrek General Partnership (Fibrek), one of Resolute's affiliates. It also claimed that Resolute had failed to report certain assistance to Fibrek and applied AFA to conclude that this discovered information constituted a subsidy so that it could inflate its countervailing duty rate.

5. In the final determination, Commerce found a countervailing duty rate of 20.19 percent for PHP and a rate of 17.87 percent for Resolute. Commerce also calculated a weighted-average "all others" rate of 18.85 percent.

6. At the request of Catalyst and Irving, Commerce commenced an expedited review of these companies. In the context of this expedited review, it also initiated on several new subsidy allegations made by the Petitioner, which impermissibly expanded the scope of this review.

7. Commerce's approach to determining that PHP and Resolute received subsidies, and its ultimate finding to that effect, are inconsistent with the SCM Agreement. Moreover, Commerce's conduct violated the SCM Agreement through its application of an "all others" rate to Catalyst and Irving, and its improper initiation investigations into new subsidy allegations in the context of an expedited review. Finally, Commerce's "Other Forms of Assistance–AFA" measure, is also "ongoing conduct" or a "rule or norm" that is inconsistent with the SCM Agreement.

II. PORT HAWKESBURY PAPER

A. Commerce Erred in Finding that Nova Scotia Directed NSPI to Provide Electricity to PHP

8. Commerce erred when it found that Nova Scotia directed NSPI to provide electricity to PHP for less than adequate remuneration in accordance with Article 1.1(a)(1)(iv) of the SCM Agreement. It provided no analysis to support its finding of financial contribution. In particular, Commerce interpreted section 52 of the Nova Scotia *Public Utilities Act* to direct NSPI

to provide electricity to any customer in Nova Scotia, including to PHP. In doing so, it also ignored that entrustment or direction cannot be inadvertent or a mere by-product of governmental regulation.

9. Section 52 reflects NSPI's duty to serve—a high-level regulatory principle that is similar to general service obligations in other jurisdictions throughout North America. However, pursuant to the common law, while section 52 reflects the principle that NSPI and other public utilities are required to provide electrical service throughout their service area, it does not require NSPI to provide electricity in any circumstances, at any cost.

10. NSPI and Pacific West Commercial Corporation (PWCC) privately negotiated the specific Load Retention Rate (LRR) under which PWCC would pay for electricity, subject to a number of specific conditions. In *EC – Countervailing Measures on DRAM Chips,* the panel noted that when assessing whether a financial contribution provides a benefit or is specific for the purpose of establishing a subsidy, an investigating authority must refer to the specifically identified financial contribution. Despite this Commerce assessed whether the LRR itself – not the general service obligation – was specific and provided a benefit to PHP. It never establishes a causal link between the alleged direction to provide electricity through the duty to serve and the LRR.

11. In fact, the duty to serve does not direct NSPI to provide PHP with electricity through an LRR. Rather, the provisions of *Public Utilities Act* set out how NSPI establishes tariffs and rates for the provision of electricity to customers. The Load Retention Tariff is one such tariff. However, the Load Retention Tariff does not mandate that NSPI provide an LRR: it only requires NSPI to negotiate with its customer. These negotiations can fail. Where negotiations succeed, the specific rate is established by NSPI and the customer. The NSUARB may adjudicate NSPI's failure to provide an LRR at the request of one of the parties but it is not obligated to side with the customer.

12. NSPI chose to engage in LRR negotiations with PHP for its own business reasons. PHP was its largest customer, accounting for approximately 10 percent of its load. If the mill had shut down, NSPI would have lost a significant contribution to its fixed costs. NSPI's customers would bear this loss through dramatically increased rates. As such, NSPI privately negotiated an LRR with PHP. The terms of the LRR were such that PHP would receive a lower rate, and NSPI would retain its largest customer, and obtain benefits, such as the ability to interrupt PHP's service on short notice, advanced payments for electricity, a minimum contribution to fixed costs, and the ability to operate the mill during off-peak hours. The NSUARB approved the requested LRR on the basis that it would recover all incremental costs and would make a significant contribution to fixed costs.

13. Finally, Commerce acted inconsistently with Article 12.8 of the SCM Agreement when it failed to disclose essential facts under consideration prior to finding that Nova Scotia had directed NSPI to provide electricity to PHP through the duty to serve. In fact, the duty to serve was not raised by any of the Canadian parties or the Petitioner during the course of the investigation. Rather, Commerce made this finding in Final Determination on the basis of a passing reference to this principle, in a single paragraph, of a discussion paper. This discussion paper had been filed amongst 36 other documents, which were 1,148 pages in length, by Commerce. However, Commerce refused to explain the reason for this filing even after Canada and PHP requested such an explanation.

B. Commerce Erred in Finding that PHP Received a "Benefit"

1. Commerce Erred by Failing to Find that the LRR Represented a Market Price

14. Commerce also acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement when it improperly determined that the provision of electricity through the LRR conferred a benefit to PHP.

15. Commerce first failed to recognize that the LRR itself represented a market price and that, as such, NSPI's provision of electricity to PHP under the LRR was not for less than adequate remuneration. In such circumstances, there is no need to find a market-based benchmark to confirm that a market transaction is made for adequate remuneration. A benefit may only be

conferred where a recipient receives the financial contribution on more favourable terms than those available to the recipient in the market.

16. The LRR was the result of arm's-length negotiations between two private companies pursuing their own interests. NSPI obtained a significant contribution to its fixed costs through the LRR. It also obtained a customer that brought greater stability to the whole system through both its load and flexibility. The value that these flexibilities had for NSPI and Nova Scotia electricity ratepayers is reflected, in part, through the fact that, NSPI was able to recover certain deferred costs without further rate increases by November 2014. The NSUARB, an independent, quasi-judicial tribunal, approved the LRR applicable to PHP as being just and reasonable. The LRR was a negotiated price and a market outcome, which reflected the prevailing market conditions in Nova Scotia.

17. Commerce stated that whether the terms are sufficiently affected by government action so as to make the provision actionable is a factual element relevant to the measurement of benefit, not financial contribution. Yet, Commerce did not find that actions by Nova Scotia affected the establishment of the price agreed to by NSPI and PHP.

18. In *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Appellate Body noted that in understanding the relevant market in a case involving electricity there are a number of demand-side factors that need to be taken into account including: how rates are set for large customers; the size of customers; and the fact that different customers may be treated differently. By treating PHP, by far its largest customer, as indistinguishable from each of NSPI's other customers, Commerce failed to take these central factors into consideration.

2. Commerce Erred in Finding that Nova Scotia Electricity Prices Were Distorted

19. Commerce also improperly found the Nova Scotia's electricity market was "distorted" by applying a *per se* rule and not making a case specific determination. This erroneous finding was based solely on the fact that NSPI was the dominant supplier of electricity in that market.

20. First, privately-owned NSPI is not "government" and there is no "government" distortion in the Nova Scotia electricity market that could lead to the prices negotiated by NSPI being rejected.

21. Second, assuming that Commerce properly found that the "government" was the dominant supplier in Nova Scotia, Commerce improperly found distortion solely on this basis. The Appellate Body has repeatedly found that a *per se* finding of distortion is not permitted under the SCM Agreement. For example, in *US – Softwood Lumber IV*; *US – Anti-Dumping and Countervailing Duties (China)*; and *US – Countervailing Measures (China)*, the Appellate Body emphasized that the fact of a predominant government supplier does not, in and of itself, establish price distortion.

22. There needs to be a clear evidentiary link between a finding of government predominance and price distortion. An investigating authority must approach this issue on a case-by-case basis and can only reject in-country prices in very limited circumstances. Commerce failed to provide sufficient evidence that private prices do not reflect market prices.

3. Commerce's Constructed Benchmark Was Not an Appropriate Benchmark

23. Commerce then improperly constructed a benchmark to determine the benefit provided by the LRR in a manner that was inconsistent with Article 14(d) of the SCM Agreement.

24. Commerce first improperly dismissed below-the-line rates when constructing a benchmark. It then determined that as a "below-the-line" rate, PHP's LRR was not set by a market-determined method for a regulated monopoly. This ignored the fact that LRRs and other below-the-line rates are part of Nova Scotia's standard rate-making process and reflect prevailing market conditions in that province. The LRR fully recovers NSPI's marginal costs and provides a contribution to the utility's fixed costs, which includes a return on equity. The LRR was set by a different method than above-the-line rates but this does not make it any less market determined. It withstood the

scrutiny of the NSUARB, which found it to be non-discriminatory and "just and reasonable". It was also developed using a methodology that is common throughout North America.

25. Commerce made two fundamental errors in constructing a benchmark: (1) it combined the incremental costs of a below-the-line rate with a fixed cost contribution developed separately for a different customer in a different time period as part of an above-the-line rate; and (2) it double counted an amount for NSPI's return on equity. In doing so, Commerce constructed a hypothetical benchmark that no customer in Nova Scotia ever would have paid.

26. First, Commerce combined the LRR's variable costs from with fixed costs from the blended real-time pricing rate, an above-the-line rate. However, PHP's variable costs (the highest incremental hourly fuel charge) are not the same as the variable costs applied to above-the-line rates (which are the average fuel costs for the year). Despite this difference, Commerce made no adjustment to the fixed costs it used. In a market situation, a company subject to conditions such as paying the highest incremental fuel cost in a given hour would expect to contribute a reduced amount to fixed costs.

27. Second, Commerce's constructed benchmark double-counted the return on equity. NSPI's calculation of the fixed costs for the above-the-line rate which was used in to construct the benchmark already included an amount to provide a contribution to the return on equity. Despite this, Commerce added an additional amount for return on equity in constructing its benchmark. Commerce made this error despite being told by NSPI and Nova Scotia after the Preliminary Determination that it was double-counting. NSPI's General Rate Application clearly provides that under NSPI's Cost of Service Study, used to calculate above-the-line rates, allocated costs include the return on equity.

4. The Hot Idle Funds and FIF are not "Benefits" to PHP

28. Commerce also acted inconsistently with Articles 1.1(b), 10, 14, 19.1, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 when it erroneously found that PHP, rather than the previous owner, NewPage PH, was the recipient of certain financial contributions and that the benefit associated with these financial contributions was not extinguished by NewPage PH's arm's-length sale of the mill for fair market value.

29. NewPage PH was responsible for paying to keep the mill in "hot idle" while it was in creditor protection. Being placed in "hot idle" simply ensured that the mill would function in the future and added no further value to the mill. When NewPage PH ran out of "hot idle" funds, Nova Scotia provided additional funds to maintain the mill in hot idle. Commerce found that these funds were a subsidy to PHP. However, PHP was not the recipient of the hot idle funds.

30. PWCC's bid for the paper mill was also conditional on the mill being maintained in hot idle. The price PWCC paid was a market price for a mill in hot idle. The fact that Nova Scotia paid to maintain the paper mill hot idle is of no consequence as any benefit associated with the hot idle funds went to NewPage PH or its creditors, not to PWCC or PHP. In addition, if the payment by Nova Scotia had "benefited" PHP, one would have expected that that the Court appointed monitor would have sought new bids that would reflect any added value—the monitor expressly did not do so.

31. Similarly, neither PWCC nor PHP were the recipient of funds provided by Nova Scotia to the FIF. The recipient of a benefit must be a person, not a thing. When NewPage PH ceased operating the mill, it no longer had an obligation to conduct forestry activities that Nova Scotia viewed as economically and environmentally beneficial, such as silviculture and road maintenance on Crown lands or private lands. Nevertheless, NewPage PH was well positioned to act as a conduit, as it was located near the affected area and had a history of dealing with the contractors who could provide these services. NewPage PH subsequently agreed to hold the FIF in trust and to pay third party contractors to perform these activities on behalf of the province. Commerce found that the second FIF contribution, made after the December 16, 2011 deadline for final bids on the paper mill, constituted a subsidy to PHP. However, Commerce did not explain how the FIF funds increased the value of the mill between the time the bids were placed and PWCC's bid was accepted. It was the third party contractors, not PWCC or PHP, who received the FIF funds.

Finally, again, the monitor did not seek new bids after the FIF contribution but rather certified that PWCC's bid (which had not changed) reflected the best bid NewPage PH would receive.

32. With respect to the issue of whether subsidies could be extinguished by virtue of the arm's-length sale of a company that had received subsidies for fair market value, the Appellate Body's discussion of these issues in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* establishes that there is a rebuttable presumption that a benefit is extinguished if there is a complete transfer of ownership, at arm's-length and for fair market value. If NewPage PH received any benefit from the hot idle funding or the FIF, it was extinguished by the sale of the company in an arm's-length transaction at fair market value to PWCC. Commerce specifically found that "the private-to-private party transaction between NewPage PH and PWCC" to acquire the Port Hawkesbury paper mill was "at arm's-length for fair market value". PWCC purchased all of NewPage PH. The purchase for fair market value did not confer an advantage, as it reflected the value of any prior subsidies.

33. Nor did the hot idle funding and the FIF change the asset value of the mill. The hot idle funds maintained the status quo of the mill's assets at the time the mill was marketed for sale, but did not change to the asset value of the mill and did not contribute to any continuing revenue stream or future earnings. Similarly, the FIF was provided to third party contractors and also did not change the value of NewPage PH or its continuing revenue stream or future earnings.

5. Commerce Improperly Initiated Against Nova Scotia's Provision of Stumpage to PHP

34. Commerce acted inconsistently with Article 11 of the SCM Agreement when it improperly initiated into Nova Scotia's provision of stumpage and biomass without any evidence of a benefit. In particular, Commerce relied on three pieces of evidence to support its decision to initiate on Nova Scotia's provision of stumpage: (1) a version of the Forest Utilization License Agreement between Nova Scotia and PHP; (2) previous *Softwood Lumber from Canada* determinations; and (3) the *CFS Paper from Indonesia* determination. The Forest Utilization License Agreement provided no pricing information and Commerce did not cite any evidence of a comparison in the marketplace. Moreover, Commerce's previous *Softwood Lumber from Canada* decisions in fact indicate that stumpage in Nova Scotia is market-determined and not subsidized. Nor does the *CFS Paper from Indonesia* determination provide evidence that the pricing of stumpage conferred a subsidy in Nova Scotia.

III. RESOLUTE

A. Commerce Erroneously Applied AFA to Resolute in Relation to Information Discovered at Verification

35. Commerce acted inconsistently with Article 12.7 of the SCM Agreement by improperly finding that Canada and Resolute did not respond to questionnaires to the best of their ability and resorting to AFA when neither Canada nor Resolute had impeded the investigation. Moreover, the information Commerce claimed to have discovered was not "necessary information" that related to the alleged subsidies set out in the notice of initiation.

36. "Necessary information" is information specifically requested in detail, into which the investigating authority has initiated an investigation, and which relates to the production or export of the product under investigation. It cannot be the case that information is "necessary" simply by virtue of being requested.

37. Commerce's questionnaire asked companies to identify all other forms of "assistance" that they received, "to [their] company", from the government. Commerce claimed to discover new government assistance during its verification of Resolute's cross-owned affiliate, Fibrek. Commerce determined that the use of AFA was warranted simply because the information discovered allegedly fell within the scope of the broad and ambiguous "other forms of assistance" question and was not provided. No specific request was ever made by Commerce for further information, and nothing was ever refused or purposefully withheld by Canada or by Resolute.

38. Commerce's request for information on "other forms of assistance" was for information that was not necessary to the investigation. The term "assistance" is not defined and may require reporting measures that are not financial contributions or are generally available. The question asks for assistance "to your company", which requires respondents to report assistance that has nothing to do with the product under investigation. The question is also overly burdensome as it requires respondents to report the assistance over the entire Average Useful Life associated with assets used to produce the product under investigation—a period of 10 years in the SC Paper investigation.

39. The proper application of "facts available" must result in the calculation of an amount of subsidy that reasonably replaces the missing information (see e.g., Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468). Even if the discovered information was necessary to the investigation, the amounts received were available to Commerce during verification, and thus no information was missing from the investigation. Instead, Commerce applied a rate that amounted to 153 percent of Fibrek's sales during the POI.

B. Commerce Failed to Adhere to the Procedural Requirements of the SCM Agreement with Regards to Alleged Subsidies Discovered at Verification

40. Commerce also acted inconsistently with Articles 12.1 and 12.2 of the SCM Agreement when it failed to provide Canada and Resolute ample opportunity to present in writing and orally all evidence related to the information discovered during verification. In order to satisfy its procedural obligations under Articles 12.1 and 12.2, Commerce should have accepted additional information from Resolute concerning the "discovered" assistance during the course of verifications or shortly thereafter.

41. Further, Commerce acted inconsistently with Articles 12.1 and 12.8 of the SCM Agreement as it did not provide Resolute with notice of the information it required or of essential facts under consideration before applying AFA. Commerce failed to inform Resolute and Canada of a number of essential facts that were necessary for ensuring the ability of Resolute to defend its interests, contrary to Article 12.8, including that it did not accept the interpretation they provided of the "other forms of assistance" question or that the information provided regarding Fibrek's hostile takeover was considered insufficient to establish extinguishment of benefit.

C. Commerce Improperly Initiated an Investigation of Alleged Subsidies Discovered at Verification

42. Commerce's conduct was also inconsistent Article 11 of the SCM Agreement, which requires investigating authorities to review the accuracy and adequacy of the evidence of a subsidy before initiating investigation. Commerce failed to determine that the evidence that it put on the record constituted sufficient evidence of each element of a subsidy upon the discovery of certain information in the context of the verification of Resolute's cross-owned affiliate, Fibrek. Rather, it applied AFA without notice and improperly concluded that the alleged discovered information constituted countervailable subsidies without any evidence concerning the existence, amount and nature of the alleged subsidies in question.

43. The United States argues that the initiation standards should be understood with respect to an entire product under investigation. However, Article 11 refers to initiation with respect to an alleged "subsidy" not a "product". Moreover, financial contribution, benefit and specificity cannot be assessed with respect to a product in the abstract.

D. Commerce Erred in Failing to Find that Resolute's Hostile Takeover of Fibrek Extinguished Certain Contributions to Fibrek

44. Commerce acted contrary to Articles 1.1(b), 10, 14, 19.1, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 when it failed to recognize that alleged benefits provided to Fibrek prior to its arm's-length takeover by Resolute were extinguished. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body noted that private-to-private transactions are likely to be for "fair market value" and emphasized the importance of analyzing "to what extent a change in ownership and control would result from the private-to-private sales transactions".

45. Commerce found that Fibrek received subsidies from a federal program, the Pulp and Paper Green Transformation Program (PPGTP), and assistance discovered at verification that pre-dated Resolute's hostile takeover of Fibrek. Commerce concluded that there was no evidence indicating that Resolute's purchase of Fibrek was at arm's-length and for fair market value, and thus it found that the alleged assistance to Fibrek was not extinguished when Resolute took over Fibrek.

46. Commerce ignored clear evidence on the record that Resolute's hostile takeover of Fibrek was at arm's-length and for fair market value. This evidence included questionnaire responses and exhibits submitted by both Quebec and Resolute, including information detailing the terms of the hostile takeover, the amount paid, a description of the transaction, competing bids, a court proceeding resulting from Fibrek's "poison pill" defence to the takeover, liabilities assumed, and accounting treatment.

47. Commerce had a significant amount of evidence concerning the hostile takeover. It simply failed to analyse any of it.

E. Commerce Improperly Attributed Financial Contributions Tied to the Production of Other Products to SC Paper Production

48. Commerce acted inconsistently with Articles 10, 19.1, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 when it improperly attributed certain alleged subsidies to the production of SC Paper that were tied to the production of other products that were not under investigation.

49. The Appellate Body found in *US – Countervailing Measures on Certain EC Products*; *US – Anti-Dumping and Countervailing Duties (China);* and *US – Washing Machines*, that subsidies that are not attributable to the product under investigation may not be countervailed by an investigating authority. That is, a subsidy may either be untied, in which case the allocation of that subsidy is made across the sales value of all products, or it may be tied, in which case it may be countervailable only if it is tied to the product under investigation. Subsidies tied to the production of products other than those under investigation cannot be countervailed.

50. To that end, in *US – Softwood Lumber IV ,* the Appellate Body noted that the mere fact that a particular enterprise produces the product under investigation and receives a benefit does not allow countervailing duties to be imposed without a proper analysis of whether there is a benefit to the specific product under investigation. Furthermore, a subsidy on an input good can only be countervailed to the extent that it can be demonstrated that the benefit has passed through to the processed product and thus benefits it indirectly. Accordingly, if the product to which a subsidy was tied did not become part of the final processed product, and no benefit flowed through, those benefits cannot be countervailed.

51. Commerce improperly countervailed contributions to Resolute's Ontario production of other products under PPGTP, as well as Ontario's Forest Sector Prosperity Fund (FSPF) and Northern Industrial Electricity Rate (NIER) programs. These contributions were clearly tied to products other than SC Paper. Commerce ignored the record evidence and did not calculate the precise amount of benefit attributable to Resolute's production of SC Paper. In fact, none of the Ontario mills produced SC Paper or an input into SC Paper during the POI.

52. The benefit from the FSPF contributions was also tied to projects in Resolute's Thunder Bay and Fort Frances mills. At no time near the POI did either mill produce SC Paper. Nor did any of Resolute's Ontario mills produce an input good into SC Paper.

53. Similarly, with regard to the NIER program, these funds were tied to specific facilities in Northern Ontario. Commerce improperly attributed the funds to Resolute's total sales, despite the fact that no SC Paper was produced in Ontario and none of Resolute's Ontario mills produced an input good that was used in Resolute's SC Paper production during the POI.

54. Finally, Commerce failed to assess whether "Discovered Programs 1 and 2" that were identified during verification were tied to the production of products other than SC Paper or its inputs.

IV. CATALYST AND IRVING

A. Commerce Erroneously Constructed an "All Others" Rate Based Almost Entirely on Alleged Subsidies That Were Not Available to Irving or Catalyst

55. Commerce also acted contrary to its obligations under Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 in calculating its "all others" rate for Irving and Catalyst. The "all others" rate violates the United States' obligations to only apply countervailing duty rates in an amount that offsets a subsidy to the company in question. The "all others" rate was based on a rate composed almost entirely of AFA applied to Resolute and a rate composed exclusively of alleged subsidies that Commerce determined were only available to PHP. Commerce took no steps to ensure the representativeness of the companies it selected despite numerous representations by the parties that the "all others" rate would not be representative.

56. Article 19.4 of the SCM Agreement establishes the maximum amount of countervailing duty that may be levied. This objective was thwarted when Commerce calculated an "all others" rate using margins that are determined, in part, on the basis of the investigated parties' failure to supply certain information.

57. Commerce in conducting its countervailing duty investigation decided to import an anti-dumping methodology of selecting the largest exporters of the product under investigation. However, in doing so, it chose to not apply the associated rules, in particular, the Appellate Body decision in *US – Hot-Rolled Steel*, that "all others" rates may not include margins that were established even partially on the basis of "facts available". This approach, inappropriately, would lead to the anomalous result of having markedly different results in anti-dumping and countervailing duty investigations.

58. Similarly, Commerce determined that all of PHP's 20.18 percent rate related to alleged subsidies associated with the reopening of the paper mill should be included in the "all others" rate. These alleged subsidies were and are unavailable to Irving and Catalyst. The United States claims that it had insufficient information to determine that Irving and Catalyst did not have operations in the locations where the alleged subsidies to PHP were available. However, this assertion stands in stark contrast to Commerce's own findings that all alleged subsidies received by PHP were available only to PHP or PWCC.

B. Commerce Erroneously Initiated *De Novo* Investigation into New Subsidy Allegations in the Context of an Expedited Review

59. Article 19.3 of the SCM Agreement states that where an exporter has not been investigated, but its goods have nonetheless been made subject to a countervailing duty rate, it is entitled to an expedited review in order to "promptly" obtain a company-specific rate. There must be some limits to what is permitted in an expedited review. An expedited review occurs because an investigating authority has decided to estimate the countervailing duty rate through an "all others" rate. The purpose of an expedited review is to quickly assess an individual duty rate for a non-investigated exporter in a manner consistent with the SCM Agreement and Article VI of the GATT 1994.

60. Commerce's decision to investigate new subsidy allegations in the context of an expedited review frustrated the purpose the review by prolonging the process such that non-investigated exporters did not receive prompt relief. The investigation of new subsidy allegations upsets the delicate balance the SCM Agreement seeks to achieve between the right to impose duties to offset injurious subsidization and the obligations disciplining the use of countervailing measures. It is also contrary to the ordinary meaning of the word review.

61. Even if new subsidy allegations could be made in the expedited review, the Petitioner should not have been allowed to provide additional evidence at the time of the expedited review unless it could demonstrate that the information was not available to it at the time it filed the original petition, as it was required to provide the information that was reasonably available to it at the time of the petition, pursuant to Article 11.2.

C. Even if Commerce Could Investigate New Subsidy Allegations in Expedited Reviews, It Failed to Ensure That There was a Close Nexus Between these Allegations and the Programs on which it Initiated in the Original Investigation

62. Commerce failed to consider whether there was a sufficiently close nexus between programs it initiated on in the original investigation and the new subsidy allegations before deciding to initiate these new allegations. In *US – Carbon Steel (India)*, the Appellate Body affirmed the significance of this nexus with respect to administrative reviews.

63. Considering the need to conduct expedited reviews quickly, the requirement to initiate investigation into new subsidy allegations in the context of an expedited review should be at least as strict as the standard applied in administrative reviews. In fact, no such nexus exists. Commerce did not consider whether there was any link between the programs in the original investigation and the new subsidy allegations.

D. Even if New Subsidy Allegations are Permitted in Expedited Reviews, Commerce Failed to Ensure That There was Sufficient Evidence to Justify Initiation

64. Commerce acted inconsistently with Article 11 when it initiated into the new subsidy allegations. Pursuant to Article 11, an investigating authority may only initiate an investigation into allegations where there is sufficient evidence of each element of a subsidy.

65. Even if Commerce were permitted to initiate investigations into new subsidy allegations in the context of an expedited review, it had an obligation to ensure there was accurate and adequate evidence in the Petitioner's application to support each allegation before initiating into the allegations. Commerce failed to do so in this case.

V. COMMERCE'S OTHER FORMS OF ASSISTANCE-AFA MEASURE

A. Commerce's Other Forms of Assistance-AFA Measure Can be Considered Both Ongoing Conduct or a Rule or Norm of Prospective and General Application

66. Commerce maintains an "Other Forms of Assistance-AFA" measure. This measure can be characterized as ongoing conduct or as a rule or norm of prospective and general application. Under both analytical tools, the measure must be attributable to a Member and the precise content of the measure must be identified.

67. This measure is attributable to the United States as Commerce is an organ of the United States government.

68. The precise content of this measure can be described as follows: when Commerce issues questionnaires in an investigation or administrative review with an overbroad any "other forms of assistance" question. If Commerce discovers information during the course of its verifications that it considers to be evidence of "other forms of assistance", it applies AFA to that information to determine that there is a countervailable subsidy and to inflate the countervailing duty rate.

69. A measure challenged as a "rule or norm" must have "general and prospective application". As affirmed by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*; *US – Zeroing (EC);* and *US – Zeroing (Japan)*, the factors that may be considered in determining whether there the evidence establishes "general and prospective application" include whether the measure has "normative value", provides "administrative guidance", creates "expectations among the public and among private actors", is "intended" to apply generally and is "consistently" applied, or reflects a "deliberate policy".

70. A challenge against a measure as "ongoing conduct" must provide evidence of the measure's "repeated application" and that the conduct will likely continue into the future (see *e.g.*, Appellate Body Report, *Argentina – Import Measures*, para. 5.108).

71. Since 2012, Commerce has repeatedly applied its Other Forms of Assistance-AFA measure to countervail dozens of alleged subsidy programs. During the corresponding investigations and reviews, Commerce asked the "other forms of assistance" question, then "discovered" information at verification that it deemed responsive to this question. It then systematically applied AFA without making any factual determination of whether the elements of a countervailable subsidy had been met or assessing whether the information constituted "necessary information" related to the alleged subsidy programs it was investigating.

72. Commerce's Other Forms of Assistance-AFA measure is described by Commerce as a practice. It may not lightly deviate from such a practice, especially given that it has amended existing laws in a manner that will make this conduct more punitive. The Other Forms of Assistance-AFA measure amounts to more than simple repetition – it is a deliberate policy. Commerce has indicated that it intends to apply this practice in future investigations and reviews. It considers deviation from this policy to be an "error" and, pursuant to U.S. law, must provide a reasoned explanation for departing from the practice.

B. Commerce's Other Forms of Assistance-AFA Measure Fails to Ensure That There is Sufficient Evidence of a Countervailable Subsidy Before Improperly Applying AFA

73. Commerce's Other Forms of Assistance-AFA Measure is also inconsistent with Articles 11 and 12.7 of the SCM Agreement.

74. Articles 11.2 and 11.6 of the SCM Agreement provide that, before any program may be fully investigated, there must first be sufficient evidence of the elements of a countervailable subsidy. In applying its Other Forms of Assistance-AFA measure, Commerce fails to review the accuracy and adequacy of the evidence to attempt to determine whether the alleged assistance could have constituted a financial contribution, that a benefit could have been conferred, and that such assistance could be specific. Commerce's Other Forms of Assistance-AFA measure eliminates the requirement for evidence and effectively replaces it with the hurried impressions and assumptions of a Commerce verification team.

75. Article 12.7 of the SCM Agreement allows investigating authorities to rely on facts available only if an interested Member or party: (1) refuses access to necessary information within a reasonable period; (2) fails to provide necessary information within a reasonable period; or, (3) significantly impedes the investigation.

76. Article 12.7 requires evidence and a finding that the elements of a subsidy exist before Commerce self-initiates against a program, and before requests can be said to be for "necessary information". The panel in *US – Anti-Dumping and Countervailing Duties (China)* saw this as a finite list with no possibility to apply facts available in other situations. By asking the "other forms of assistance" question, Commerce attempts to create a new means to apply facts available outside the framework of Article 12.7.

C. Commerce's Other Forms of Assistance-AFA Measure Fails to Provide Respondents with Notice and Ample Opportunity to Present Evidence, and Does Not Disclose the Essential Facts Under Consideration

77. Commerce is required under Articles 12.1 and 12.8 of the SCM Agreement to provide respondents with notice and ample opportunity to present evidence, and to disclose to respondents the essential facts under consideration. At a minimum, Commerce's verifiers are required to request and collect any amount of documentation necessary to identify discrepancies and fully verify the discovered information. Under its Other Forms of Assistance-AFA measure, Commerce fails to offer respondents these procedural safeguards.

D. Resolute as an Example of What is Wrong with Commerce's Other Forms of Assistance-AFA Measure

78. Resolute fully cooperated with Commerce throughout the investigation and provided Commerce with full access to the electronic version of Fibrek's general ledger.

79. Commerce took only certain information on the "discovered" assistance onto its record and refused to accept other relevant information (for example, it refused to take down the amount of the discovered assistance). There was insufficient evidence and no factual basis for Commerce's conclusion that the "discovered" assistance met any of the elements of a countervailable subsidy.

80. If Commerce had allowed Resolute to provide further information, at most it would have calculated countervailing duty rates that were *de minimis*. This demonstrates that Commerce's practice leads to punitive and unreasonable results.

81. The Other Forms of Assistance-AFA measure permitted Commerce to ignore any and all evidence and exclude the actual amounts received from the record of the investigation.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. PORT HAWKESBURY PAPER

A. The United States' Attempt to Support Commerce's Flawed Financial Contribution Finding Must Fail

1. The United States Improperly Reads the Meaning of Entrustment or Direction under Article 1.1(a)(1)(iv) of the SCM Agreement

1. The United States has improperly conflated the meaning of "entrustment" and "direction" under Article 1.1(a)(1)(iv) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). "Direction" involves a government exercising its authority, including some degree of compulsion, over a private body. "Entrustment" involves a government giving responsibility for a task. In each case, the entrustment or direction must be linked to the "specific conduct" in that case.

2. The United States Cannot Demonstrate Direction through Alleged Circumstantial Evidence of an Entrustment Finding That It Did Not Make

2. The United States cannot claim that the U.S. Department of Commerce's (Commerce) finding of direction and its comments concerning entrustment can be considered cumulatively. Its determination that Nova Scotia directed Nova Scotia Power Inc. (NSPI) and its comments about entrustment relate to different financial contributions. Commerce found that Nova Scotia directed the general provision of electricity, or a good, to NSPI. It now claims, after the fact, that Nova Scotia entrusted NSPI to provide the particular load retention rate (LRR) negotiated with Pacific West Commercial Corporation (PWCC).

3. Commerce never found that Nova Scotia entrusted NSPI to provide an LRR. The United States refers to alleged circumstantial evidence of entrustment, but Commerce never made a finding based on this evidence. In fact, Commerce justified its failure to apply its test under U.S. law for assessing entrustment on the basis that it did not rely on this circumstantial information. Commerce's submissions in its NAFTA brief and before the NAFTA panel also demonstrate that it did not consider the LRR to be the financial contribution.

4. Moreover, the circumstantial evidence that Commerce discussed in its decision is taken out of context and systematically ignores evidence that runs contrary to its preferred conclusions.

3. The Duty to Serve Cannot be Understood through a Discussion Paper Summarizing Reports That Did Not Consider This Regulatory Principle

5. Commerce improperly found that Nova Scotia directed NSPI to provide Port Hawkesbury Paper LP (PHP) with an LRR through the duty to serve. Commerce understood the duty to serve through a passing reference to it in a discussion paper, which Commerce filed on its own initiative after the close of the evidentiary record. Commerce did not consider the context of this discussion paper, which summarized several reports that were prepared as part of Nova Scotia's general Electricity System Review. None of these reports concerned or analysed the duty to serve.

6. The United States has also mischaracterized Canada's position on the duty to serve in these proceedings. Canada has explained that the duty to serve is only enforceable through the investigation of complaints of customers who have not been provided with service under certain tariffs or rates. The Nova Scotia Utility and Review Board (NSUARB) may only approve rates that are "just" and "sufficient" for both customers and utilities, an approach that applies in many jurisdictions in Canada.

4. The United States Continues to Ignore Relevant Criteria in Article 1.1(a)(1)(iv) of the SCM Agreement

7. The provision of electricity by NSPI to PHP is not a function that "would normally be vested in the government" under Article 1.1(a)(1)(iv) of the SCM Agreement. Some functions set out in Article 1.1(a)(1) are inherently governmental and others are not. There is nothing inherently governmental about providing goods or services within the meaning of Article 1.1(a)(1)(iii).

8. Commerce failed to establish that the provision of electricity would normally be vested in the government of Nova Scotia. In accordance with the Nova Scotia legal regime, Nova Scotia does not provide electricity. Providing electricity is primarily the responsibility of NSPI. The regulation of the electricity market in Nova Scotia does not demonstrate that the provision of electricity would normally be carried out by the government. Nor does a history of government ownership of the utility responsible for providing electricity, which ended in 1992, constitute evidence that the provision of electricity would normally be vested in the government.

5. Commerce Failed to Disclose the Essential Facts under Consideration

9. The United States alleges that it disclosed the essential facts because it provided interested parties access to the record. In making this claim, the United States advances an incorrect interpretation of the disclosure obligation under Article 12.8 of the SCM Agreement.

10. Canada has explained that Commerce did not disclose essential facts concerning the duty to serve, and never gave the parties an opportunity to comment on the duty to serve or sought more information on it.

11. Essential facts in the context of a countervailing duty investigation are those that underlie the investigating authority's final findings and conclusions in respect of the elements of a subsidy, specifically financial contribution, benefit and specificity.

12. An investigating authority meets the requirement under Article 12.8 by disclosing essential facts in a manner that permits interested parties to defend their interests. In *Guatemala – Cement II*, the panel recognized that if interested parties cannot tell by looking at the record which documents will be relied on, the investigating authority has a positive obligation to identify the essential facts within the record.

13. The discussion paper underlies the final findings of subsidization including the investigating authority's analysis of financial contribution. It was placed on the voluminous record without any context or guidance as to its relevance. Its placement on the record does not satisfy the disclosure obligation under Article 12.8.

B. PHP Did Not Receive a "Benefit" under Article 1.1(b) of the SCM Agreement

1. The LRR Did Not Confer a "Benefit"

a) "Prevailing Market Conditions" Applied to the Nova Scotia Electricity Market and Commerce's Constructed Benchmark

14. Article 14(d) of the SCM Agreement provides that the provision of a good only confers a "benefit" if it is made for less than adequate remuneration. The adequacy of remuneration is determined in relation to prevailing market conditions for the good in question in the country of provision (including price, quality, availability, marketability, transportation and other conditions of purchase or sale). An analysis of "prevailing market conditions" is therefore based on a number of factors, which include but are not limited to "price". They concern "characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices".

15. The United States suggests that an assessment of "prevailing market conditions" is an assessment of the "predominant price" in a market. This suggestion is necessary for the United States because of the need under Commerce's constructed benchmark to characterize above-the-line rates as "predominant" in Nova Scotia. This argument fails for at least four reasons.

16. First, the United States fails to explain how its overall approach to benefit was consistent with the "prevailing market conditions" requirement in Article 14(d).

17. Second, below-the-line rates should be considered part of the "prevailing market conditions" under which the LRR was negotiated. Below-the-line rates are part of NSPI's standard pricing mechanism and are used in numerous jurisdictions. There was no basis for Commerce to ignore these prevailing market conditions.

18. Third, the United States fails to account for the nature of the electricity market, including factors such as how rates are set for large customers, the size of customers, and the fact that different customers may be treated differently.

19. Finally, the United States errs by suggesting that the phrase "in relation to" within Article 14(d) suggests "a more removed relationship" between the benchmark and the price at which the good is provided. In fact, the Appellate Body stated that the assessment of "prevailing market conditions" allows a benchmark to be a *more* exact proxy, allowing for a "meaningful [calculation] that does not overstate or understate" benefit.

20. A proper analysis of "prevailing market conditions" in Nova Scotia must reflect the guidance of the Appellate Body. This guidance directs one to the LRR, a rate which reflects a negotiated outcome between two private parties working within the standard pricing mechanism used in the province.

b) A Proper "Benefit" Analysis Examines Whether a Transaction is a Market Transaction

21. The United States argues that the Appellate Body has required that a benefit determination be based on a comparison and, with respect to Article 14(d), the United States adds that the phrase "in relation to" indicates that a benefit determination requires some form of comparative exercise. This is not always "required". The Panel may examine Commerce's benefit determination in the context of the specific circumstances of this case, which involves the provision of good under a private-to-private transaction that was beneficial to both parties.

22. The text of Article 14(d) does not preclude an investigating authority from considering whether a particular transaction between two private parties is a market transaction by its own terms. Article 14(d) provides for an assessment of whether the provision of goods was made for less than adequate remuneration. Unlike Articles 14(b) and 14(c), Article 14(d) does not expressly provide for the use of methodologies that contain a comparison and that direct that the "difference between" two amounts be found. The adequacy of remuneration is measured "in relation to" prevailing market conditions, including price, quality, availability, marketability, transportation and other conditions of purchase or sale. Price is only one of these factors.

23. The Appellate Body has stated that the assessment of "benefit" under Article 14 calls for an examination of the terms and conditions of the challenged transaction at the time it is made and compares them to the terms and conditions that would have been offered in the market at that time. In *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body examined whether a financial contribution was "consistent with what occurs in transactions between two market actors", and assessed whether a benefit was conferred without using a comparison price.

c) Commerce Failed to Consider Whether the LRR Represents a Market Price Resulting from Arm's Length Negotiations between Two Private Parties

24. The LRR is a market price which fully recovers NSPI's marginal costs and contributes to its fixed costs. There was no reasonable basis upon which Commerce could reject this rate and the United States ignores it as a market transaction.

25. The LRR was negotiated between two private parties acting at arm's length. This transaction was beneficial to both parties. PHP obtained electricity at an appropriate rate, which was important because electricity represented the largest expense of the mill. Maintaining PHP as a customer allowed NSPI to ensure a stable system and to address cost issues that would result from losing its

largest customer. PHP agreed to run the mill in a leaner manner and at off-peak hours, which offered value to NSPI. It also agreed to be "priority interruptible", so that NSPI could reduce a significant block of electricity demand from PHP at one time. PHP further agreed to pay for the most expensive incremental source of energy in the stack in any given hour that it used and purchased electricity. Finally, it agreed to pre-pay for its electricity, which eliminated the risk of non-payment for NSPI.

26. The United States cannot explain how it accounted for these factors in the benchmark that Commerce developed. Commerce did not seek out any information about the blended Real Time pricing rate, despite using that rate as a foundation for a calculation of a benchmark in the Final Determination. Commerce did not take into account that below-the-line rates had previously been made available to extra-large users in Nova Scotia and that such an approach was common in other jurisdictions. Commerce also did not take into account PHP's status as an extra-large customer and created a flawed benchmark that did not reflect a rate that any NSPI customer would pay.

27. The United States appears to imply that the NSUARB's decision to allow a Load Retention Tariff for companies in distress was made at the behest of PWCC. However, the evidence on the record of the investigation demonstrates that the LRR was approved under the framework of the existing LRT. The LRR arose out of negotiations between PWCC and NSPI, without the involvement of the NSUARB before its approval in a thorough and contested review process, which all electricity rates are subject to in Nova Scotia. The NSUARB found that approving the LRR was in the best interest of the whole customer base.

28. The United States also fails to acknowledge that Commerce improperly found in its Final Determination that the Nova Scotia electricity market was distorted solely on the basis that NSPI provides electricity to most customers of electricity in Nova Scotia.

d) Commerce Erred in Constructing a Benchmark

29. The United States asserts that Commerce's constructed benchmark "reflects a rate that an NSPI customer, like PHP, would have paid for electricity". This statement is not true. No NSPI customer would pay the rate calculated under the constructed benchmark.

30. The benchmark does not reflect prevailing market conditions in Nova Scotia, and Commerce made several methodological errors in constructing its benchmark. Commerce erred by substituting PHP's variable costs in the LRR, which included the highest incremental fuel costs per hour, for average variable costs. Commerce then added the higher fixed costs associated with the average variable rate to the highest incremental costs, paid in the LRR. Commerce also erred by adding an additional amount for return on equity, even though return on equity was already included in the fixed costs it used.

31. The United States incorrectly asserts that Commerce's methodology reflected NSPI's "standard rate making methodology". In fact, the United States acknowledges that it could not replicate NSPI's standard pricing mechanism using the information provided by the parties. Commerce never requested information from NSPI, which is a private entity and not part of the government of Nova Scotia.

2. The Hot Idle Funds and FIF Are Not "Benefits" to PHP

a) PHP Is Not the "Recipient" of the Hot Idle Funds

32. The United States fails to acknowledge that PWCC received no benefit from the hot idle funds. The "benefit" standard under Article 1.1(b) is not based on the "expectation" of who will pay but rather on the advantage the payment provides to its "recipient". The hot idle funds did not increase the value of what PWCC paid for. The United States argues that PWCC received "additional unanticipated financing", but PWCC did not receive this. If anyone did receive additional unanticipated financing, it was NewPage Port Hawkesbury Corporation (NewPage PH) and its creditors. The monitor confirmed that NewPage PH would receive more money from a sale as a going concern than it would under liquidation.

33. The United States' argument, that that the wording of footnote 36 to Article 10 of the SCM Agreement means that the "benefit" referred to in Article 1.1(b) of the SCM Agreement is a benefit to productive operations, has already been rejected by the Appellate Body. The recipient must receive the financial contribution on terms more favourable than what is available to it in the market.

b) PHP Is Not the "Recipient" of the FIF Funds

34. PHP was not the recipient of the Forestry Infrastructure Fund (FIF) funds. The FIF funds went to third party contractors. These funds were not a "grant" to NewPage PH, as the United States suggests. NewPage PH was simply a conduit for these funds, which were required to be cost and cash flow neutral to NewPage PH. These funds could not have provided any benefit to PWCC.

35. The United States' arguments regarding the FIF as a component of the "going concern" sale do not form part of Commerce's decision and are a *post hoc* rationalization. Rather than finding this, Commerce erroneously found that the payments Nova Scotia made to third party contractors were "reimbursements" that were equivalent to a grant because NewPage PH had a legal obligation to conduct the activities contemplated by the FIF. It then analyzed whether the grants paid to third parties were extinguished through the arm's length sale of the paper mill to PWCC.

36. The record does not support the United States' contention that NewPage PH was obliged to maintain its forestry activities once it entered the *Companies' Creditors Arrangement Act* process. The record is clear that the mill was sold as a "going concern", in a manner that the mill was ready to re-start operations as a "going concern" once the new owner was in place, but was not operational during the sales process. This is consistent with the fact that maintaining hot idle was a condition of the sale, but other operations of the mill were not.

c) Benefits Conferred on NewPage PH Were Extinguished in the Arm's Length Sale for Fair Market Value

37. The Appellate Body's decisions in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* established a rebuttable presumption that a benefit is extinguished if there is complete transfer of ownership (a full privatization) that is at arm's length and for fair market value. The United States argues that this presumption does not apply to private-to-private sales. However, if a private-to-private sale is at arm's length and for fair market value and the change in ownership is complete, then like a "full privatization" case, any prior subsidy should be considered to have been extinguished. These conditions are satisfied in the private-to-private transaction between NewPage PH and PWCC. In addition, PWCC did not obtain any assets on less than market terms, because hot idle and FIF did not change the asset value of the mill.

C. Commerce Initiated an Investigation into Stumpage and Biomass without Evidence That a Benefit May Have Been Conferred

38. The United States offers an after-the-fact rationalization of Commerce's decision to initiate into stumpage, claiming that Commerce had "information" supporting the existence of a "distorted" and "restricted" market for pulpwood and stumpage in Nova Scotia. These assertions are false. Commerce had no such information.

39. Commerce's initiation without reasonably available evidence relating to the amount of subsidy was inconsistent with Articles 11.2 and 11.3 of the SCM Agreement. Article 11.2 sets out the evidence that must be contained in an application, which includes any reasonably available evidence with regard to the existence, amount and nature of the subsidy in question. An investigating authority may only initiate pursuant to Article 11.3 if it has a sufficient amount of this evidence for each element of a subsidy. The provision of a proposed benchmark for comparison is reasonably available evidence that relates to the amount of a subsidy and was therefore required in the application.

40. Moreover, the provision of a proposed benchmark price is not the only method of demonstrating sufficient evidence of a benefit. Without any evidence of benefit, the Petitioner's allegations were mere assertion and "cannot be considered sufficient to meet the requirements" of Article 11.2.

II. RESOLUTE

A. Commerce's Application of AFA to Information "Discovered" during the Fibrek Verification is Inconsistent with the SCM Agreement

1. The United States' Claim that Initiation of an Investigation Concerns "Subsidization of a Product" Ignores the Requirement to Initiate Against Specific Subsidies

41. The United States concedes that it did not initiate an investigation into the "discovered" Fibrek General Partnership (Fibrek) programs. If an investigating authority has not initiated into a program, that program cannot lead to the imposition of countervailing duties and cannot be "necessary" to the investigation under Article 12.7 of the SCM Agreement.

42. Canada disagrees with the United States that an initiation of an investigation encompasses the entire investigation into the "subsidization of a product". Article 11.2 of the SCM Agreement requires that an application, which an investigating authority initiates upon, contain sufficient evidence of "a subsidy". It is also clear from Article 11.2(iii) that initiation requires "evidence with regard to the existence, amount and nature of the subsidy in question". The elements of a subsidy cannot be evidenced in the abstract; they must be shown in respect of each program that is initiated upon.

43. Article 11.3 adds that investigating authorities "shall review the accuracy and adequacy of the evidence" to justify initiation. Commerce failed to initiate or review the accuracy and adequacy of the very limited evidence that it did take concerning the discovered information.

2. Commerce Failed to Provide Canada and Resolute With Notice and Ample Opportunity to Present All Relevant Evidence in Relation to the Essential Facts under Consideration

44. Recourse to facts available pursuant to Article 12.7 is conditioned on an investigating authority notifying the interested party of the information required and providing ample opportunity to present relevant information. Without Commerce's disclosure of the essential facts underlying its decision to apply facts available, Canada and Resolute FP Canada Inc. (Resolute) were unaware of the factual basis for Commerce's determination and could not adequately defend their interests.

45. If Commerce was unable to provide the required procedural rights, then it should not have gathered additional information on uninitiated programs at verification. Doing so violated Articles 12.1, 12.2, 12.7, 12.8 and 12.11 of the SCM Agreement.

46. To avoid these violations, Commerce could have extended its timelines or conducted verifications earlier, allowing sufficient time to provide procedural rights. Commerce could also have completed the information gathering process in a subsequent review.

3. Only an Unambiguous Question, Specified in Detail, May Lead to Necessary Information

47. Commerce's "other forms of assistance" question cannot lead to the conclusion that discovered information was "necessary information" that "should have been disclosed" by Resolute, pursuant to Article 12.7. This is because the question is undefined, overly broad, ambiguous and not specified in detail. The question asks about assistance received by "producers and exporters" of supercalendered paper (SC Paper), rather than relating to the production and export of the product. The question also does not exclude generally available assistance.

48. Commerce's presumption that discovered information "should have been disclosed" ignores the requirement that information be "necessary" before applying "facts available". Commerce had no information before it that demonstrated that the discovered information constituted subsidies. The only information before Commerce was the names of the accounts that it discovered. This cannot constitute a legal basis upon which to impose countervailing duties. The manner in which bookkeepers use accounts to categorize entries bears no relation to the SCM Agreement and does not create a presumption that an entry is a financial contribution conferring a benefit that is specific.

4. Resolute Did Not "Fail to Disclose Subsidies"

49. The United States' statements that Resolute should have disclosed the discovered information overlook the fact that Resolute's answer, in which it communicated a sincere belief that it did not receive "assistance", has not been found to be untrue. Commerce's application of adverse facts available (AFA) based on the name of the three accounts, does not demonstrate that they should have been disclosed. Further, Commerce did not assess whether the amounts were provided as a result of fair market transactions, the amounts were related to generally available programs, the transactions were extinguished by virtue of the arm's length acquisition of Fibrek, or the amounts were properly attributable to the production of SC Paper.

50. It is also relevant that Canada submitted to Commerce a clear and detailed answer to the "other forms of assistance" question. Canada outlined how it interpreted the question and the manner by which Canada and the Canadian respondents were responding to it. The United States admits that Commerce did not question this response, despite having had multiple occasions to do so. Resolute and Canada cooperated fully with Commerce's investigation.

51. Even so, non-cooperation cannot be a sufficient basis for the imposition of adverse inferences. Adverse inferences cannot be used to punish non-cooperation and non-cooperation is not itself the basis for replacing "necessary information". Non-cooperation does not mitigate the obligation of investigating authorities to engage in a process of reasoning and evaluation.

52. Commerce found that Resolute "withheld information that has been requested". This standard is a subjective one, in clear contravention of Article 12.7 of the SCM Agreement. The Appellate Body has found that the use of facts available is permissible only in the context of information necessary to complete the investigation. This is an objective standard.

B. Resolute and Quebec Submitted Sufficient Evidence to Demonstrate That the Alleged Benefits to Fibrek Were Extinguished

53. The United States continues to defend Commerce's conclusion that it did not have any evidence that would allow it to establish that the purchase of Fibrek was at arm's length and for fair market value. This statement is not true. The record includes many descriptions of the transaction, including a judgment of the Quebec Court of Appeal regarding the "poison pill" strategy of Fibrek in response to Resolute's takeover bid and Canada's description of the takeover bid during consultations. The arm's length nature of the hostile takeover, including the value of that transaction, was brought to Commerce's attention as early as consultations prior to the initiation of the investigation.

54. The United States now claims that the information regarding the hostile takeover of Fibrek was disregarded by Commerce because it related to a different alleged subsidy program from the one originally initiated upon by Commerce. The United States argues that the extinguishment of the benefit relating to Fibrek was not known until the Pulp and Paper Green Transformation Program (PPGTP) was reported by Resolute prior to the Preliminary Determination. This disclosure of PPGTP funding to Fibrek does not somehow render the vast quantity of evidence submitted in respect of Fibrek moot or less reviewable by Commerce, simply because it was provided in the context of a different subsidy program. Put differently, Commerce had all the information it needed with respect to all subsidy programs that could be applicable to Fibrek; the information was not program-specific.

55. Moreover, Commerce had the discretion to issue supplemental questionnaires to collect additional information concerning the arm's length nature of this transaction after the Preliminary Determination. It failed to do so.

C. The Alleged Subsidies Tied to Products Other Than SC Paper Were Not Countervailable

56. The United States argues that the proper approach to attribution is one that considers whether a grant or a subsidy is "tied" to a product "on the basis of information available to the granting authority at the time the subsidy is granted". However, the United States ignores that the Appellate Body has expressly rejected this argument.

57. The appropriate inquiry into a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product. The focus is on the contributions themselves, rather than the program writ large.

58. However, even under the standard advocated by the United States, the subsidies were improperly attributed. They were tied to the production of products other than SC Paper and this was known at least as early as when the contributions were provided.

59. Furthermore, by applying an unrepresentative AFA rate, Commerce failed to consider any evidence regarding how any contribution to Fibrek could benefit SC Paper production. The evidence demonstrates that less than two percent of Fibrek's production was related to the production of SC Paper.

III. CATALYST AND IRVING

A. Commerce's Calculation of Catalyst's and Irving's Countervailing "All Others" Rate is Inconsistent with the SCM Agreement and the GATT 1994

60. The United States acted contrary to its obligations when it calculated the "all others" rate from a rate composed almost entirely of AFA and one composed entirely of alleged subsidies that Commerce found were specific to one company. This "all others" rate violates Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

61. The United States is incorrect when it asserts that no limitations exist for calculating an "all others" rate. The Appellate Body explained in *US – Carbon Steel* that the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end when it is determined that the text is silent on that requirement. That silence does not exclude the possibility that the requirement was intended to be included by implication.

62. Article 19.3 of the SCM Agreement should be read in the context of Article 6.10 and 9.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). These Articles establish that, as a rule, an investigating authority shall determine an individual margin of dumping for each exporter but provides rules to be followed where the number of producers is so large that this is impracticable. Article 19.3 of the SCM Agreement fulfills a similar function by establishing that where an investigating authority does not examine all exporters, it must conduct an expedited review.

63. Article 19.3 refers to the requirement that countervailing duties be levied in the "appropriate amounts" in each case. The Appellate Body has indicated that Article 19.4 informs what is an "appropriate amount" and that an "appropriate amount" cannot be more than the amount of the subsidy. Finally, the Appellate Body has found that the meaning of an "appropriate amount" in Article 19.3 must not be based on a refusal to take account of the context offered both by Article VI of the GATT 1994 and by the provisions of the Anti-Dumping Agreement.

64. Article 19.4 of the SCM Agreement should be read in context of Articles 6.10 and 9.4 of the Anti-Dumping Agreement, including the Appellate Body's decision in *US – Hot Rolled Steel*. This interpretation is consistent with the principle that disputes under the two agreements should not lead to markedly different results and with the Declaration on Dispute Settlement Pursuant to the Agreement on the Implementation of Part VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

65. Moreover, the United States has essentially imported methodology from the Anti-Dumping Agreement into its countervailing duty investigations. The application of that methodology should therefore be governed by similar rules as under the Anti-Dumping Agreement.

66. Commerce was obligated by Article 10 of the SCM Agreement to take all necessary steps to ensure that the countervailing duty rate did not exceed the amount of subsidization and, also, that it was appropriate. Commerce ignored these requirements in this investigation.

B. Commerce Improperly Initiated an Investigation into New Subsidy Allegations against Catalyst and Irving During the Expedited Review

1. New Subsidy Allegations are Contrary to the Purpose of Expedited Reviews and Violate Article 19.3

67. Part V of the SCM Agreement seeks to strike a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so. As part of this balance, when an investigating authority avails itself of the flexibility offered by Article 19.3 not to investigate all exporters, it cannot expand the scope of an expedited review by allowing the introduction of new subsidy allegations. This interpretation is consistent with the ordinary meaning of the term "review", and the requirement that such reviews must be "expedited" and "prompt".

2. New Subsidy Allegations in an Expedited Review Are Limited to Those with a Sufficiently Close Nexus to the Allegations in the Original Petition

68. Even if new subsidy allegations are permitted in an expedited review, only those with a sufficiently close nexus to the allegations made in the original petition may be reviewed, following the Appellate Body's guidance in the context of administrative reviews in *US – Carbon Steel (India)*. In both expedited and administrative reviews, it is important that the introduction of new subsidy allegations in the review not upset the balance between the interests of exporters and investigating authorities. Both forms of review are intended to review what occurred in the original investigation. They should therefore be subject to the same minimum limitation.

3. Commerce's Initiation into the New Subsidy Allegations Failed to Meet the Initiation Standards

69. In the alternative, if new subsidy allegations are permitted, Commerce acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement when it initiated into the new subsidy allegations. In particular, Commerce's initiation into the "British Columbia Ban on Exports of Logs and Wood Residue" illustrates Commerce's failure to evaluate whether there was sufficient evidence to justify initiation of an investigation. Evidence of a potential export restraint does not constitute sufficient evidence of a financial contribution and does not justify initiation.

IV. OTHER FORMS OF ASSISTANCE – AFA MEASURE

A. The Other Forms of Assistance – AFA Measure Violates the United States' WTO Obligations

70. The United States' Other Forms of Assistance – AFA measure can be evidenced as either "ongoing conduct" or as a "rule or norm of general and prospective application". These categories are analytical tools and do not govern the definition of a measure for the purposes of dispute settlement. Nevertheless, under the framework of either analytical tool, Commerce's conduct is a measure that is inconsistent with the United States' WTO obligations under the SCM Agreement.

71. First, the measure violates Articles 10 and 11, as Commerce assumes financial contribution, specificity, and benefit without any regard to the initiation standard. In fact, the United States has conceded that, in its interpretation, a petitioner need only allege one subsidy, regardless of what information might be available to it. Second, the measure violates Article 12.7, as Commerce applies adverse facts available to information that is not "necessary information". Finally, the measure violates Article 12.1, as Commerce denies respondents ample opportunity to provide evidence when applying the measure.

B. Ongoing Conduct

72. A party seeking to demonstrate a measure as "ongoing conduct" must establish that the measure is attributable to a Member, the precise content of the measure, the repeated application of the measure, and the likelihood that the measure will continue.

1. The Measure is Attributable to the United States

73. The United States Department of Commerce is an organ of the United States government. Its actions, including the Other Forms of Assistance – AFA measure are attributable to the United States.

2. The Precise Content of the Measure

74. Canada is challenging the entire Other Forms of Assistance – AFA measure. The measure consists of Commerce asking the "other forms of assistance" question, "discovering" information that it perceives to be responsive to this question, refusing to accept or consider information from the respondent related to the discovered information, and applying AFA to find a financial contribution, specificity and benefit with no supporting analysis. Commerce has stated that, in 2012, it determined that the proper course of action when it discovers a potential subsidy at verification is to use adverse inferences.

75. The fact that the application of this measure includes multiple stages and is applied in varied fact scenarios does not exclude it from being a measure for the purposes of WTO dispute settlement. The components of the measure are closely linked, and the fact that minor variations exist in the underlying facts when the measure is applied does not detract from the existence of the measure.

3. The Repeated Application of the Conduct

76. This conduct has been applied repeatedly by Commerce. Canada has provided nine examples of this conduct being applied. In each case, Commerce asks the "other forms of assistance" question, "discovers" information that it perceives to be responsive to this question, refuses to accept or consider information from the respondent related to the discovered information, and applies AFA to find a financial contribution, specificity and benefit with no supporting analysis.

4. The Likelihood That Such Conduct Will Continue

77. The statements made by Commerce in its determinations, as well as before the NAFTA Chapter 19 panel, demonstrate that Commerce will continue to apply the Other Forms of Assistance – AFA measure.

78. The United States asserts that the manner by which an authority chooses to characterise its practice in its determinations is not relevant to WTO dispute settlement. However, previous panels have found that Commerce's characterization of its actions in its determinations can be evidence of future conduct.

79. Additionally, each of Commerce's determinations applying the Other Forms of Assistance – AFA measure reference that the application of the measure is consistent with Commerce's practice in a previous case. This conduct is a practice under U.S. law, a characterization that has legal consequences.

80. The United States suggested in its responses to the Panel's questions that the Other Forms of Assistance – AFA measure does not constitute a "practice" for the purposes of U.S. law. Canada therefore requested that Mr. Grant Aldonas, former Under Secretary of Commerce for International Trade, prepare an expert report on whether the Other Forms of Assistance – AFA measure constitutes a practice under U.S. law.

81. Mr. Grant Aldonas explains in his report that the practice of applying AFA to programs "discovered" during verification that were not otherwise reported by cooperating respondents, in response to Commerce's "other assistance" question, clearly constitutes "agency practice" under U.S. law and "agency action" within the meaning of the U.S. *Administrative Procedure Act*. Mr. Aldonas explains that this practice has "the force of law" and that parties "have ample reason to rely on its continued application". Mr. Aldonas concluded that the Other Forms of Assistance – AFA measure represents a precedent on which parties in future countervailing duty investigations are entitled to rely and is a practice that Commerce has emphatically affirmed it will apply going forward.

C. Rule or Norm of General and Prospective Application

82. A party seeking to demonstrate a measure as a "rule or norm of general and prospective application" must establish that the measure is attributable to a Member, the precise content of the measure, and the general and prospective application of the measure.

83. The first two of these criteria are identical to and are supported by the same analysis as the first two criteria in the ongoing conduct analysis. The third criterion has two elements: general application and prospective application.

84. A measure is of general application if it is "not limited to a single import or importer" and "to the extent that it affects an unidentified number of economic actors". The Commerce determinations presented as evidence by Canada demonstrate that this measure is not limited to a single import or importer and is not addressed at specific economic actors.

85. A measure has prospective application to the extent that "it applies in the future" and is "intended to apply to future investigations". There is no requirement that a complaining Member demonstrate certainty. Factors that may demonstrate prospective application include: the existence of an underlying policy, systematic application of the rule or norm, the extent to which the rule or norm provides administrative guidance for future conduct, and the expectations it creates among economic operators.

86. In this case, there is ample evidence of these factors: in issues and decision memoranda, Commerce's statements, and the statements of petitioners before Commerce seeking to rely on the measure. For example, Commerce has publically acknowledged that in 2012 it made the decision that it would follow this course of action going forward. Mr. Aldonas confirms that the Other Forms of Assistance – AFA measure qualifies as an "agency practice" which, under U.S. law, creates a presumption that this practice "will continue". The measure guides Commerce's conduct and has created public expectations. As Mr. Aldonas explains in his report, the underlying policy objective of the concept of an agency practice is to allow parties to rely on an agency's past practice.

D. Resolute as an Example of the Measure

87. Canada has submitted as evidence screenshots of the information that Commerce refused to take at Fibrek's verification. The information on these documents was seen by Commerce verifiers.

88. The screenshot evidence was presented to the Panel in order to demonstrate the results of the WTO-inconsistent Other Forms of Assistance – AFA measure. The screenshots show that one of the discovered programs would not have added to Resolute's countervailing duty rate and the other discovered program could only have added 0.17 percent to the rate. Without the application of AFA, Resolute would have received a *de minimis* rate of 0.94 percent. The application of the Other Forms of Assistance – AFA measure brought Resolute's rate to 17.87 percent. As well, Commerce's decision to exclude this evidence from the record makes it far more difficult for a respondent to challenge this practice before a U.S. court or a NAFTA tribunal reviewing the determination.

89. The United States asserts in its submissions that it cannot verify the screenshots were seen by Commerce verifiers. The United States justifies its answer on the basis that Commerce accepted no information from the verification. This is circular reasoning: the decision not to accept the relevant information was Commerce's, and it now attempts to rely on that decision as a defense.

E. The Practice of Canada Border Services Agency

90. The United States attempts to justify its WTO-inconsistent behaviour by alleging that the Canada Border Services Agency (CBSA) engages in a practice similar to the U.S. Other Forms of Assistance – AFA measure. CBSA's practice and actions are not before this Panel. They are of no relevance in this case. However, in response to this allegation, Canada adduced evidence that the United States misrepresented CBSA's practice which is not similar to Commerce's. Here, it is only the United States' practice and measure that is inconsistent.

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ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX C-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

1. Canada has raised numerous claims, many involving complex issues under the SCM Agreement and the GATT 1994. Ultimately, however, this dispute is about a decision of the Canadian government to bail out and subsidize a bankrupt paper mill – a decision that resulted in subsidized exports and injury to a U.S. industry – as well as attempts by the respondents to shield from scrutiny evidence of subsidization. Canada's claims lack merit, and should be rejected.

II. CANADA'S CLAIMS WITH RESPECT TO PORT HAWKESBURY ARE WITHOUT MERIT

A. Commerce's Financial Contribution Determination for the Provision of Electricity to Port Hawkesbury Was Not Inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement

2. Commerce properly found that Nova Scotia entrusted or directed Nova Scotia Power to provide electricity to Port Hawkesbury based on evidence of the role of the government of Nova Scotia in the provision of electricity, specifically as it related to Port Hawkesbury. A financial contribution exists within the meaning of Article 1.1(a)(1) where the government "entrusts or directs" a private body to provide a good. Central to the analysis is the meaning of the terms "entrust or direct," which the Appellate Body has summarized in the following manner: "'entrustment' occurs where a government gives responsibility to a private body, and 'direction' refers to situations where the government exercises its authority over a private body." The delegation by the government may take a variety of forms, and a written measure with the force of law that is binding on a private body satisfies the standard of Article 1.1(a)(1)(iv). Commerce applied this WTO legal standard to the evidentiary record before it.

3. Commerce's determination was based on the plain terms of the *Public Utilities Act*. Nova Scotia Power is defined as a "public utility" under section 2(e) of the *Public Utilities Act*. That act unambiguously confers certain obligations on entities defined as "public utilities." Section 52 states the following:

> Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.

4. Commerce's determination noted that a publication commissioned by Nova Scotia, titled "Regulating Electric Utilities – Discussion Paper," explained Nova Scotia Power's obligations in the following manner:

> As a near monopoly, Nova Scotia Power has responsibilities imposed under law. One of them is an obligation to serve – the company must provide electricity to customers who request it, anywhere in Nova Scotia.

5. Commerce also found that the *Public Utilities Act* provides the NSUARB with the authority to approve all rates proposed by public utilities and to compel a public utility to comply with the provisions of that act. Based on its review of the *Public Utilities Act*, Commerce concluded that "{Nova Scotia} controls and directs the methodology that {Nova Scotia Power} has to use in rate proposals, and any rate that is charged by {Nova Scotia Power} must be approved by the NSUARB."

6. This factual determination, based on the plain language of section 52 and premised on the same understanding as Canada acknowledges in its first submission, led Commerce to conclude that Nova Scotia entrusted or directed – as the terms are defined within the meaning of

Article 1.1(a)(1)(iv) – Nova Scotia Power to provide electricity, which constitutes the provision of a good within the meaning of Article 1.1(a)(1)(iii). As noted, the Appellate Body has found entrustment or direction to occur where "the government gives responsibility to a private body 'to carry out' one of the types of functions listed in paragraphs (i) through (iii)," and that responsibility may be given through "formal or informal" means. Here, through a formal, legally binding measure, the government "gave responsibility to" or "exercised its authority over" Nova Scotia Power "to carry out" the provision of electricity. Canada has not demonstrated that Commerce's finding of entrustment or direction was inconsistent with Article 1.1(a)(1).

B. Commerce's Disclosure of the Essential Facts Was Not Inconsistent with Article 12.8 of the SCM Agreement

7. Canada's claim under Article 12.8 with respect to Commerce's financial contribution analysis is without merit. Article 12.8 does not prescribe a particular manner for disclosure, so long as the disclosure takes place "in sufficient time for the parties to defend their interests." The United States fully complied with these obligations, and Canada's argument is baseless: the essential facts under consideration that Commerce allegedly failed to disclose were a Nova Scotia law (the *Public Utilities Act) submitted by Nova Scotia* and a discussion paper commissioned by Nova Scotia on the provision of electricity in Nova Scotia. These two documents were served on all interested parties. These materials also were extensively addressed in the record of the proceeding, and interested parties had more than ample opportunity to defend their interests. Canada has failed to establish that Commerce did not disclose the *Public Utilities Act* and the discussion paper to all interested parties, and the Panel should reject Canada's claims under Article 12.8.

C. Commerce's Benefit Determinations for the Provision of Electricity to Port Hawkesbury Was Not Inconsistent with Article 1.1(b) of the SCM Agreement

8. Canada has not demonstrated that Commerce's benchmark was inconsistent with Articles 1.1(b) and 14(d) of the SCM agreement. Instead of presenting an argument based on the text of the agreement, Canada essentially asks the Panel to conduct a new benchmark analysis and to use an alternative benchmark that Canada would prefer.

9. Article 14(d) does not specify the benchmark to be used when determining the adequacy of remuneration, so long as, in the first instance, the benchmark is "connected with the prevailing market conditions in the country of provision." Indeed, the Appellate Body in *US – Carbon Steel (India)* recently found that there is no "hierarchy between different types of in-country prices that can be relied upon in arriving at a proper benchmark," observing that "whether a price may be relied upon . . . is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision." The Appellate Body in that case recognized that "it is permissible for an investigating authority in a benefit calculation to construct a price" to serve as the benchmark for the benefit analysis.

10. Article 14(d) does not prescribe the source of the benchmark, be it individual transaction prices or constructed prices, so long as the benchmark prices are consistent with "prevailing market conditions." The Appellate Body has observed "that the 'market conditions' are further modified by the term 'prevailing,' which means 'predominant,' or 'generally accepted.'" In developing a benchmark to determine adequate remuneration, the focus is thus on the norm, and identifying the prices that are "generally accepted" based on typical market conditions.

11. Commerce's benchmark complied with the obligations of Article 14(d). Commerce's benefit analysis compared the electricity rate paid by Port Hawkesbury to a benchmark price constructed using Nova Scotia Power's standard ratemaking methodology. That is, Commerce did not create an artificial benchmark; rather, it applied the methodology that Nova Scotia Power uses in developing rates for similarly situated entities.

12. To determine the appropriate methodology to calculate a benchmark, Commerce first considered the two types of rates offered by Nova Scotia Power. Those two rates are called above-the-line and below-the-line. The above-the-lines rates constituted the appropriate choice, as these are the normal rates based on the recovery of electricity generation and transmission costs. In contrast, the below-the-line rates are preferential, non-market rates that do not include the

recovery of costs. Commerce understandably determined that the above-the-line methodology best approximated the prevailing market conditions necessary to calculate a benchmark.

13. Commerce then considered whether any of the above-the-line rates in Nova Scotia Power's schedule of rates for the relevant period (2014) could be used as a benchmark. Prior to receiving the LRR, under Port Hawkesbury's previous owner, the mill received an above-the-line rate under the tariff class called "Extra Large Industrial 2 Part Real Time Pricing." During the relevant period, this tariff class was not listed in Nova Scotia Power's tariff because at that time, there was no above-the-line ratepayer with a sufficiently large usage requirement to qualify for that tariff class. With respect to the rate for the next smaller class of industrial consumer (called the "large industrial" rate), Port Hawkesbury confirmed that it would not be eligible for the rate because of its significantly larger electricity consumption. Accordingly, Commerce properly concluded that "there were no electrical tariffs applicable to a customer with an extra-large connection size in the {Nova Scotia Power} rate schedule."

14. In the absence of applicable tariffs in the Nova Scotia Power rate schedule, Commerce "constructed a price {benchmark} that provides for complete coverage of fixed and variable costs, as well as a portion of ROE {return on equity} for profit using available information on the record." Commerce's benchmark comprised the following:

> Benchmark = variable costs + fixed costs + profit

15. For variable costs, Commerce relied on the actual amount paid by Port Hawkesbury through the LRR. Commerce determined that the LRR "covers all variable costs and makes a contribution to fixed costs."

16. For fixed costs, Commerce started with the actual amount paid by Port Hawkesbury through the LRR (C$2/MWh). To estimate the amount of fixed costs not covered by the fixed cost contribution of the Port Hawkesbury LRR but that would have been covered by a rate representative of prevailing market conditions, Commerce identified the fixed cost rate per MWh that was most recently applied under the above-the-line rate for an extra-large industrial customer. The General Rate Application identified the standard fixed cost rate that would be applied to an extra-large industrial customer as C$26/MWh from the most current rate of this type available. The result is an unrecovered fixed cost of C$24/MWh. Commerce calculated the amount of total unrecovered fixed costs by multiplying Port Hawkesbury's actual electricity consumption (in MWh) by the per-unit amount of unrecovered fixed costs (C$24/MWh).

17. For profit, Commerce determined that the NSUARB approved for Nova Scotia Power a guaranteed profit rate of 9 percent. Commerce identified the portion of Nova Scotia Power's total profit that would be attributable to Port Hawkesbury. It did so by first isolating the percentage of Nova Scotia Power's electricity consumption that was accounted for by Port Hawkesbury. Commerce then multiplied that percentage by Nova Scotia Power's total profit to identify the exact amount of profit that would have been attributable to Port Hawkesbury.

18. Commerce then "added together the three portions of the benchmark payments calculated above {variable costs, fixed costs, and return on equity} to arrive at a total amount that Port Hawkesbury would have paid for its electricity…using the benchmark."

19. Commerce's benchmark was based on the prevailing market conditions for electricity in Nova Scotia and therefore consistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

D. Commerce's Determination that the Hot Idle and Forestry Infrastructure Subsidies Received by Port Hawkesbury Were Not Extinguished because of a Change of Ownership Is Consistent with the SCM Agreement and GATT 1994

20. Commerce properly determined that Port Hawkesbury was the recipient of "hot idle" funds and disbursements under the Forestry Infrastructure Fund (FIF) and that the benefit associated with these financial contributions was not extinguished by a change of ownership.

21. As part of the sale process, NPPH and NewPage Corporation (New Page), NPPH's U.S. parent company, entered into a Settlement and Transition Agreement, under which NewPage committed

approximately US$22 million to maintain the mill in hot idle status. It was necessary to maintain the mill in hot idle status because machinery and equipment at mills like the Port Hawkesbury mill had to be in constant operation in order to maintain their efficiency, and even operability. NPPH also negotiated an agreement with Nova Scotia to establish a forestry infrastructure fund to pay for ancillary forest operations that were previously undertaken by NPPH. The purpose of the forestry infrastructure fund was to ensure that certain forestry operations would continue because NPPH intended to shut down its mill and ancillary forestry operations. Nova Scotia, however, deemed these operations directly beneficial to the province and the provincial economy, and did not want them to cease immediately.

22. Benefit, as understood by the SCM Agreement, exists where the financial contribution makes the recipient better off than it would otherwise have been, absent that contribution. Here, absent Nova Scotia's payment of hot idle funds, the financial obligation to maintain the mill in hot idle status would have fallen on NPPH. Nova Scotia explicitly subsidized a necessary condition of the sale of the mill *as the sale was occurring*; thus, PWCC received a benefit.

23. The issue was "whether the bid and sale prices reflected and incorporated the hot idle funds approved in December 2011 and March 2012." Given that the funding was bestowed as a result of NPPH's inability to use its own financial reserves to fulfill the obligations to which it agreed, Commerce properly recognized that "the full value of maintaining the mill in hot idle status was not accounted for in the original bid." As Commerce explained, given that Nova Scotia did not approve the hot idle funding until after the December 16, 2011 deadline for all bids, "the potential bidders would not have been aware of the provision of hot idle funds from {Nova Scotia}; therefore, the bids submitted could not have reflected the provision of the assistance by the {Nova Scotia} to maintain hot idle status."

24. The bid value itself was the result of a market process that began in September 2011 and concluded on December 16, 2011, and Nova Scotia played an important role in the transaction after that price was established. Commerce appropriately recognized the nuances of those circumstances and reasonably determined that PWCC received a benefit that it did not pay for – Nova Scotia's financial support of that sale.

25. As an alternative argument, Canada claims that the facts support a conclusion that the purchase of Port Hawkesbury was a private transaction conducted at arm's-length and for fair market value, and that such a transaction must automatically extinguish a subsidy, regardless of how much a government subsidizes that transaction, because there can be no benefit to the purchaser under those conditions. To support its claim, Canada relies on the *US – Countervailing Measures on Certain EC Products* panel report. Canada's reliance, however, is misplaced. That report simply states the proposition that an arm's-length transaction for fair market value generally extinguishes prior subsidies. The report does not state that concurrent subsidies – that is, those reflected in the circumstances of the transaction – are always extinguished.

26. Commerce, per Articles 1 and 14 of the SCM Agreement, has the authority to apply a methodology to determine whether a benefit has been conferred. As such, Commerce took into account the precise nature and circumstances surrounding the transaction in examining whether the benefit from the subsidy was extinguished upon change in ownership. Commerce examined the transaction to determine whether the purchaser received an advantage or something that makes the recipient 'better off' than it would otherwise have been, absent that financial contribution. The facts here demonstrate that the hot idle and FIF funds provided by Nova Scotia allowed NPPH to fulfil an obligation – to sell the mill to Port Hawkesbury as a going concern – it otherwise would not have been able to meet. The record evidence demonstrates that due to the timing of the market transaction the hot idle grants and FIF were not reflected in the purchase price PWCC ultimately paid. And, accordingly PWCC's purchase of the mill did not extinguish the subsidy.

E. Commerce's Investigation of the Government of Nova Scotia's Provision of Stumpage to Port Hawkesbury Was Initiated in a Manner Consistent with Articles 11.2 and 11.3 of the SCM Agreement

27. Canada has failed to establish that Commerce's investigation into Nova Scotia's provision of stumpage and biomass to Port Hawkesbury is inconsistent with Articles 11.2 and 11.3 of the

SCM Agreement. The relevant inquiry is to determine whether an application contains "sufficient evidence" or "adequate facts or indications" *to justify initiation of an investigation*, not to sustain a preliminary or final determination. The amount of evidence that is "sufficient" for the initiation of an investigation must be considered in light of the qualification in Article 11.2 that an "application shall contain such information as is reasonably available to the applicant" on the existence, amount and nature of the subsidy in question. Thus, an application can comply with the standard set out in Article 11.2 "even if it does not include all the specified information if such information was simply not reasonably available to the applicant."

28. Commerce's decision to investigate Nova Scotia's provision of stumpage to Port Hawkesbury fully complied with this requirement because the application contained sufficient evidence with regard to the existence of a subsidy, and such evidence that was "reasonably available to the applicant." In particular, the application demonstrated that Port Hawkesbury did not procure pulpwood based on market principles. Furthermore, the application contained evidence that was "reasonably available" to the applicant to indicate the existence of a subsidy, consistent with Articles 11.2 and 11.3.

III. CANADA HAS FAILED TO ESTABLISH THAT COMMERCE'S COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO RESOLUTE WAS INCONSISTENT WITH THE SCM AGREEMENT OR GATT 1994

A. Canada's "As Applied" Claims Concerning Discovered Information Are Without Merit

29. Commerce initiated an investigation into SC Paper imports to determine whether manufacturers, producers, or exporters of SC Paper from Canada received countervailable subsidies. In other words, Commerce initiated an investigation into a *product* alleged to have been subsidized. Commerce's investigation into SC Paper imports included, but was not limited to, an examination of the programs listed by name in the petition.

30. As reflected in the record, the investigation was in relation to subsidies received by producers of a product, and not limited to particular programs. Commerce published a notice of initiation in the Federal Register explaining that Commerce accepted a petition and would examine further the information contained in that petition in the context of an examination of the subsidization of SC Paper.

31. An investigation into a product and the subsidies received by producers of that product is consistent with WTO requirements. The structure and content of Article 11 confirm that an initiation of an investigation under the SCM Agreement is not limited to an investigation of particular programs, but encompasses an investigation into the subsidization of a *product*. Articles 11.2 and 11.3 make clear that the petition (or application) must contain "sufficient information" on the existence of an alleged subsidy, together with injury and causal link. But the text does not limit the subsequent investigation initiated to the subsidy alleged in the petition. The chapeau of Article 11.2 of the SCM Agreement indicates that an investigating authority may initiate an investigation and examine programs not included in the written application. In particular, the chapeau of Article 11.2 requires only that there be "sufficient evidence" of the existence of "a subsidy" in an application to justify initiation of an investigation. The use of the indefinite article "a" preceding the noun "subsidy" in Article 11.2 is significant. The use of the phrase "a subsidy" as opposed to "the subsidy" indicates that the petition must contain "sufficient evidence" of subsidization to justify initiation of an investigation pursuant to Article 11.3, but not that an application need have covered all possible subsidies in order to justify an initiation into the subsidization of a product.

32. Article 11.3 provides additional interpretative guidance on the scope of an investigation. It is important to note that before initiating an investigation, Article 11.3 requires that an investigating authority determine if there is sufficient evidence of *injury* within the meaning of Article VI of GATT 1994. And, examples of evidence of alleged injury listed in Article 11.2 focus on import volume and price data related to a specific *product*. Accordingly, the injury analysis outlined in Article 11.2 to determine sufficient evidence for initiating an investigation relates to a *product*, not a specific subsidy program. Accordingly, Article 11.2(iv) supports the view that an investigating authority can initiate an investigation into a product.

33. Further support for the distinctions drawn in Article 11 between the petition (or application) and its contents, the evaluation of whether the petition (or application) contains "sufficient evidence" to justify initiation of an investigation, and the investigation into the *product* and the subsidies received by the producers of that product is provided by the notification provisions of Article 25 of the SCM Agreement. Article 25 of the SCM Agreement requires WTO Members to notify to Members in the SCM Committee any subsidy granted or maintained in their territory.

34. On June 30, 2015, Canada notified the SCM Committee of its industrial, cultural, agricultural, and fisheries programs at the federal and sub-federal government level, for fiscal years 2012-2014. However, Canada failed to disclose to Members any of the programs discovered during verification, depriving Members of the ability to understand the subsidies and evaluate their trade effects, if any.

35. Properly understood, the SCM Agreement permits Members to discover and countervail non-transparent subsidies as part of a properly initiated investigation. Where a country has failed to act in a transparent manner and properly notify its subsidy programs, it would be a perverse outcome to require an investigating authority to ignore information on non-notified or transparent subsidies and to require the authority not to counteract their contribution to injurious subsidization when calculating the final countervailing duty rate. To that end, Article 11 permits an investigating authority to initiate an investigation into the subsidization of a product, and examine subsidies not necessarily listed in the written application. Accordingly, Commerce's initiation of an investigation into SC Paper was conducted in accordance with Article 11 of the SCM Agreement.

1. Commerce's use of facts available regarding subsidies discovered during verification was not inconsistent with Article 12.7 of the SCM Agreement

36. Canada's argument that Commerce's decision to resort to facts available was inconsistent with obligations under the SCM Agreement suffers from three fundamental problems. First, Canada mischaracterizes the scope of the investigation, and thus Canada's argument on what information was or was not necessary is not based on the actual record in this dispute. Second, regardless of the scope of the investigation, the SCM Agreement does not prescribe the type of questions an investigating authority may ask an interested party, and Canada has not identified any provision that would foreclose Commerce from asking a question concerning "any other forms of assistance" that may be subsidizing the product in question. Third, Canada's arguments do not address the fundamental fact that Resolute impeded the investigation by failing to fully answer Commerce's question concerning "any other forms of assistance."

37. First, Canada mischaracterizes the scope of Commerce's investigation. Commerce properly initiated an investigation into a *product* alleged to have been subsidized. Commerce then, as part of the investigation, requested information on "any other forms of assistance" to determine whether Canada was, in fact, subsidizing the production of SC Paper. The "any other forms of assistance" question was asked in order to understand and collect information related to the alleged subsidization of the product under investigation – SC Paper.

38. Second, the SCM Agreement does not prescribe the type of questions an investigating authority may ask an interested party, and Canada has not identified any provision that would foreclose Commerce from asking the "any other forms of assistance" question. Canada argues that the information requested was not "necessary information." However, it is not for a respondent to determine subjectively what information is "necessary" to Commerce's investigation and analysis. The investigating authority determines what information to request and what is "necessary" on the basis of the investigation, including the responses by interested parties in the course of that investigation.

39. Third, Canada's argument fails to address the key factual underpinning for the use of facts available: namely, Resolute's decision not to provide a complete response to a question posed by Commerce in its questionnaire. In responding to the initial questionnaire, Resolute failed to report subsidies that were labeled in its own accounting system as "subsidies." This was not information that was "mitigating the absence of 'any' or 'unnecessary' information." Instead, Commerce discovered the information at verification when it was verifying the non-use of subsidy programs.

Consistent with Article 12.7, Commerce, then, resorted to facts available, and ultimately determined that the programs were countervailable subsidies.

40. By not divulging the receipt of the unreported assistance prior to the commencement of verification, Resolute precluded this unreported assistance from being "verifiable" and impeded the investigation by refusing to provide complete and verifiable answers. As a result of Resolute's failure to respond to Commerce's question, necessary information was missing from the record of the investigation which prevented Commerce from analyzing the relevant facts concerning the element of benefit. Accordingly, Commerce needed to rely on facts available to determine whether the discovered programs, found in accounts labeled as "subsidies" constituted countervailable subsidies.

41. Canada's objection to the applied duty rate in *Magnesium from Canada* is not based on any provision of the SCM Agreement. Article 12.2 provides that any decision of the investigating authority must be based "on the written record of this authority." In the countervailing duty investigation, Commerce complied with this obligation and used the limited record information that was available to it. The amount of the subsidy rates and the dates of receipt of the discovered subsidies were not "facts available" to Commerce because Resolute failed to divulge this information prior to verification and thus did not provide verifiable information. Consequently, Commerce selected a rate of 8.55 percent calculated in *Magnesium from Canada* for the "Article 7 Grants from Quebec Industrial Development Corporation," a program that provided assistance in the form of grants. Canada has not identified any breach of the SCM Agreement related to Commerce's calculation of the countervailing duty rate for Resolute. Accordingly, Commerce's facts available rate for Resolute was WTO-consistent.

2. Commerce adhered to all of the procedural requirements outlined in Articles 12.1, 12.2, 12.3, and 12.8 of the SCM Agreement

42. Canada errs in arguing that Commerce acted inconsistently with the procedural requirements outlined in Article 12 of the SCM Agreement. Canada does not contest the fact that Commerce provided all interested parties at least thirty days to reply to the initial questionnaire issued at the outset of the investigation. Resolute had numerous opportunities to ensure that its responses to Commerce's questions were correct, and, indeed, both Resolute and Canada filed amendments to their original submissions when they discovered that benefits to Fibrek under the Federal Pulp and Paper Green Transformation Program ("FPPGTP") were not properly reported. Moreover, the parties were notified that Commerce had discovered subsidies at verification and was including them in the investigation when Commerce released Resolute's verification report. In fact, interested parties submitted comments on this issue to Commerce prior to the issuance of the final determination.

43. Contrary to Canada's unsubstantiated Article 12.2 claim, Commerce provided Resolute with an opportunity to present information and arguments orally. During the September 24, 2015, public hearing, after the August 2015 verification, Resolute orally presented information and arguments related to the programs discovered during verification, specifically as to why Commerce should not apply facts available to the programs discovered during verification. These arguments were recorded by Commerce and reflected in the final determination.

44. Canada does not provide any evidence or adequate argumentation supporting its Article 12.3 claim. Furthermore, the record in the countervailing duty investigation shows that Commerce placed all relevant evidence on the record and thus made it available for interested parties and the public to view. There is no evidence presented by Canada that Commerce failed to provide interested parties with an opportunity to see all information relevant to the investigation.

45. In addition, Canada has failed to identify any facts, let alone essential facts contemplated under Article 12.8 of the SCM Agreement, that Commerce has failed to disclose. The disclosure obligation does not apply to the reasoning or conclusions of the investigating authority, but rather to the "essential facts" underlying the reasoning and conclusion.

B. Commerce's Determination that Certain Benefits Conferred to Fibrek Were Not Extinguished When Resolute Acquired Fibrek Is Consistent with the SCM Agreement

46. Commerce properly determined that the record did not contain sufficient evidence to support Resolute's claim that subsidy benefits received by Fibrek were extinguished by Resolute's purchase of its wholly-owned subsidiary, Fibrek. Despite Canada's arguments, Resolute simply characterized the Fibrek acquisition as a "hostile takeover" without any supporting evidence to that assertion. Commerce explicitly requested a discussion of all such "change in ownership" transactions within Resolute's responses to the questionnaire regarding Resolute's history, and, in turn, Resolute responded with brief, unsupported declarations. Resolute did not demonstrate that the price it paid for Fibrek reflected the subsidies Fibrek received. And, without that demonstration, Commerce was unable to reach a finding of extinguishment. As a result, Commerce properly determined that the benefits provided to Fibrek under the FPPGTP and the subsidies discovered at verification continued to benefit Resolute after Resolute's acquisition of Fibrek.

C. Commerce's Calculation of Resolute's Subsidy Rate for the FPPGTP, FSPF, and NIER Programs Was Not Inconsistent with the SCM Agreement and the GATT 1994

47. Commerce's attribution of the benefits received pursuant to the FPPGTP, the Ontario Forest Sector Prosperity Fund ("FSPF"), and the Ontario Northern Industrial Electricity Rate Program ("NIER") was consistent with the GATT 1994 and the SCM Agreement.

48. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not dictate precisely how an investigating authority should allocate the numerator and denominator when calculating countervailing duty ratios. In determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, a Member may examine a subsidy and determine that the benefits received from the countervailable subsidy are spread across the entire company, and cannot be linked to a particular product. Under such circumstances, it is appropriate to treat that subsidy by a company as essentially "untied," and to divide the benefit by the company's total sales for purpose of attributing the benefits to the company. This is precisely the exercise contemplated when the Appellate Body explains that the "correct calculation of a countervailing duty rate requires matching the elements taken into account in the numerator with the elements taken into account in the denominator." A subsidy that benefits all products would accordingly be attributed to all sales.

49. This matching exercise does not require the authority to trace subsidy benefits from receipt to the moment of actual use. Instead, as the Appellate Body has observed, "the appropriate inquiry into the existence of a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product." Although Canada seeks to cast blame on Commerce for failing to ascertain as precisely as possible the correct amount of the subsidy, in fact, Commerce undertook the very "matching" exercise described by the Appellate Body.

50. Commerce's attribution of the benefits received pursuant to the FPPGTP, FSPF, and NIER subsidy programs was consistent with the GATT 1994 and the SCM Agreement.

51. **FPPGTP**: Commerce properly attributed to Resolute's total sales of pulp and paper products the subsidy benefits received by Resolute under the FPPGTP program. The program's eligibility requirements explicitly targeted and limited benefits to Canada's pulp and paper industry. Commerce analyzed the design, structure, and operation of the program, explaining that the subsidy was limited to "capital investments at a Canadian pulp and paper mill," and that "costs associated with other types of projects…are ineligible for the program." Commerce appropriately determined that these grants were "tied to the production of only pulp and paper products."

52. **FSPF**: Commerce properly attributed the subsidy benefits received by Resolute under the FSPF to Resolute's total sales. In its consideration of the design, structure, and operation of the program, Commerce found that grants conferred under the program were not limited to the production of a particular product; rather, the grants were "issued to the forest industry to support

and leverage new capital investment projects." Commerce concluded that Resolute received a countervailable subsidy that benefited all of Resolute's production activities.

53. **NIER**: Commerce properly attributed the subsidy benefits received by Resolute under the NIER program to Resolute's total sales. In its consideration of the design, structure, and operation of the program, Commerce explained that the "purpose of the program is to assist Northern Ontario's largest qualifying industrial electricity consumers which commit to developing and implementing an energy management plan to manage their energy usage and improve energy efficiency and sustainability." Accordingly, in calculating the rate of subsidization, Commerce properly matched the elements taken into account in the numerator – a benefit to support all of Resolute's production – with the elements taken into account in the denominator – Resolute's total sales.

IV. COMMERCE'S CALCULATION OF CATALYST'S AND IRVING'S COUNTERVAILING DUTY RATES IS NOT INCONSISTENT WITH THE SCM AGREEMENT

A. Commerce's Calculation of the All Others Rate Was Consistent with the GATT 1994 and the SCM Agreement

54. Canada has failed to demonstrate that Commerce's determination was inconsistent with the obligations of Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994. The SCM Agreement does not prescribe a methodology for calculating a rate for non-investigated firms.

55. Under DSU Article 3.2 the Panel is to apply customary rules of interpretation, under which a provision is to be interpreted in accordance with the ordinary meaning of the terms in their context, and in light of its object and purpose. Conversely, the Appellate Body has recognized "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning.'" An agreement's silence on a particular issue cannot be filled by imputing the obligation of an entirely distinct agreement. Rather, a Member's obligations under the SCM Agreement are derived from the text of the SCM Agreement.

56. Canada's reliance on the Appellate Body report in *US – Hot-Rolled Steel* is misplaced. The Anti-Dumping Agreement and the SCM Agreement impose fundamentally different obligations to the calculation of an antidumping margin or a countervailing duty rate for a non-investigated entity. Article 9.4 of the Anti-Dumping Agreement identifies with particularity the antidumping margins that can and cannot be used in the calculation of a margin for non-investigated exporters. This level of prescription has no parallel in the SCM Agreement; Article 19.3 of the SCM Agreement establishes only that non-investigated exporters may be subject to countervailing duties and may request an expedited review.

57. Commerce adopted a reasonable approach for determining the rate for non-investigated companies – namely, to base that rate on the countervailing duty rates determined for the investigated producers. The weighted-average of Port Hawkesbury's and Resolute's countervailing duty rates provided the best approximation for the countervailable subsidies received by all other SC Paper producers during the relevant period of investigation. This was an eminently reasonable approach that resulted in a countervailing duty rate supported by evidence on the record.

B. Commerce Properly Initiated an Investigation into New Subsidy Allegations Against Catalyst and Irving During an Expedited Review

58. The United States disagrees with Canada's argument that the SCM Agreement contains some sort of unspecified limitation on the new subsidy allegations that may be included in an expedited review under Article 19.3.

59. The obligation outlined in Article 19.3 is clear: an investigating authority must provide an expedited review to an exporter who is subject to a countervailing duty investigation but was not individually investigated to establish an individual countervailing duty rate for that exporter. There is no limitation, express or implied. Canada agrees with this reading of Article 19.3. However, despite the clear obligation outlined in Article 19.3, Canada asks the Panel to expand

upon that obligation and place certain restrictions on a Member's conduct of an expedited review; restrictions that appear nowhere in the text of Article 19.3.

60. Moreover, Canada's reliance on the Appellate Body report in *US – Carbon Steel (India)* is misplaced. Canada is using the *US – Carbon Steel (India)* Appellate Body report to compare the *purpose* of an administrative review outlined in Article 21 to the conduct of an expedited review discussed in Article 19. This argument provides no basis to read into the text of Article 19.3 an obligation that is not there. For these reasons, Canada's claim under Article 19.3 fails and should be rejected.

C. Commerce's Initiation of the New Subsidy Allegations Was Consistent with Article 11 of the SCM Agreement

61. Commerce's decision to initiate an investigation into the new subsidy allegations was consistent with Article 11 of the SCM Agreement. Article 11.3 requires an authority to determine whether an application contains "sufficient evidence" or "adequate facts or indications" to justify initiation of an investigation, a lesser standard than is required to support a final finding by the investigating authority. In addition, the amount of evidence that is "sufficient" for the initiation of an investigation must be considered in light of the qualification in Article 11.2 that an "application shall contain such information as is reasonably available to the applicant" on the existence, amount and nature of the subsidy in question. For each new subsidy allegation, Commerce's decision to initiate was based on sufficient evidence and consistent with Article 11. We note that Canada has not notified to the WTO's SCM Committee any of the programs identified in the new subsidy allegations.

V. CANADA'S "AS SUCH" CLAIMS CONCERNING DISCOVERED INFORMATION ARE WITHOUT MERIT

62. As a fundamental matter, the so-called "ongoing conduct" cannot be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. Measures that are not yet in existence at the time of panel establishment cannot be within a panel's terms of reference under the DSU. The purported "ongoing conduct" does not exist apart from the instances of use of facts available in the context of a particular investigation. Unlike a measure that constitutes a rule or norm of general and prospective application, Canada's so-called ongoing conduct measure simply describes actions that Commerce has taken in small number of its countervailing duty determinations. Yet, for Canada's so-called measure to give rise to a breach of a WTO obligation, the measure would have to "constitute an instrument with a functional life of its own" and "do something concrete, independently of any other instruments."

63. Even aside from the fact that "ongoing conduct" is not a measure in existence as of the time of the Panel's establishment, and thus is not within its terms of reference, Canada's claims relating to such an alleged "measure" also fail because Canada has failed to establish that any such "ongoing conduct" exists or is likely to continue under the challenged order that is at issue in this dispute.

64. Canada's "as such" challenge related to discovered information fails because Canada has not identified the precise content of the alleged rule or norm or its general and prospective application. Canada seeks to characterize actions taken by Commerce in seven determinations as a "rule or norm of general and prospective application." Canada's effort fails. First, Canada seeks to define the precise content of the rule or norm by identifying a series of actions that theoretically could occur in any countervailing duty investigation. Canada merely reproduces a table listing a series of questions included in seven investigations that it collectively refers to as the "any other forms of assistance" question. The wording of the questions Canada has reproduced in Table 1 varies. In Table 2, Canada lists excerpts from the issues and decisions memoranda which correspond to the seven investigations. Similar to Table 1, the excerpts listed in the second table differ from each other. It is not clear what "application" Canada is challenging as a purported rule or norm. It is also unclear if Canada is challenging the application of a particular question, the application of facts available, a combination of both, or an application of something entirely different.

65. Canada's use of a series of varying, vague, and imprecise terms to identify the so-called "Other Forms of Assistance-AFA measure" is insufficient to meet the precise content requirement

previously outlined by the Appellate Body. Including selective excerpts from questionnaires and issue and decision memoranda does not identify with any precision the content of the measure Canada is challenging.

66. Second, in addition to insufficiently identifying the precise content of the so-called measure it is challenging, Canada has not demonstrated that the alleged measure is of general and prospective application. Canada presents little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be considered a norm or rule of general and prospective application. Indeed, these pieces of evidence support the opposite finding.

67. In all seven of the determinations Canada relies upon, Commerce made unique findings and reached different results. In two of the cases mentioned by Canada, Shrimp from China in 2013 and PET Resin from China in 2015, the "discovered" information was presented to Commerce by the companies, either as "minor corrections" at the outset of the verification or independently. In those two proceedings, Commerce accepted or rejected the corrections depending on the nature of the correction submitted.

68. In the instant case, during the verification of Resolute, Commerce discovered four potential previously unreported subsidy accounts. Three of the accounts showed reimbursements or funds received. For these three accounts, Commerce used facts available to determine that there were two countervailable programs. However, Commerce determined that it was not necessary to apply facts available to the other subsidy account discovered during verification.

69. With respect to Section 502 of the Trade Preferences Extension Act ("TPEA"), Canada simply cites to three determinations in which the Act was referenced. Canada does not explain how those citations to TPEA in any way support the existence of an alleged unwritten norm of general and prospective application. Furthermore, on its face, the TPEA provides Commerce with the discretion to use facts available in its determinations. The statute does not mandate any particular outcome, and thus even if a statute were somehow relevant to establishing the existence of an unwritten measure, this statue provides no support for Canada's position. As explained by Canada in its first written submission, the TPEA provides flexibility to Commerce, was recently enacted, and has only been referenced in a few administrative determinations. The sum total of the evidence Canada adduces to support its claim consists of a handful of determinations by Commerce and a broad reference to Section 502 of the TPEA. Such evidence is insufficient.

VI. CONCLUSION

70. For the foregoing reasons, the United States respectfully requests that the Panel reject all of Canada's claims.

EXECUTIVE SUMMARY OF THE U.S. STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

71. [A summary of the U.S. statement at the first substantive meeting is reflected in the above Executive Summary of the U.S. First Written Submission.]

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS

Summary of U.S. Response to Question 5

72. Commerce's conclusion of financial contribution was based on its consideration of two related factors: (1) section 52 of the *Public Utilities Act*, which requires a public utility to provide electricity to its customers, and (2) the unique role of Nova Scotia – including through the Nova Scotia Utility and Review Board ("NSUARB") – in the provision of electricity to Port Hawkesbury through the Load Retention Rate ("LRR"). With respect to the *Public Utilities Act,* Commerce found that Nova Scotia Power "is required by law to provide electricity to customers who request it anywhere in Nova Scotia."

73. With respect to the second factor identified above – the role of Nova Scotia in the negotiation of the LRR – Commerce's analysis took account of the unique circumstances surrounding the salvation from bankruptcy and dissolution of the Pork Hawkesbury mill. In this regard, Commerce noted that "{Nova Scotia} stated that Port Hawkesbury would not exist if it had

to pay any of the published electricity tariffs for industrial users." Indeed, the prospective new owner of the Port Hawkesbury mill made a lower price for electricity a precondition for the purchase of the mill. Because of Nova Scotia's keen interest in saving the mill as an ongoing concern, Nova Scotia ensured that Nova Scotia Power would offer to provide electricity at below market rates. Commerce's final determination identified record evidence on the role of Nova Scotia and the NSUARB in the negotiation of the LRR.

74. Commerce also relied on the fact that the government of Nova Scotia through the NSUARB changed the regulatory framework in order to make Port Hawkesbury eligible for a LRR. Under existing practice, an LRR had been available only to companies on the electric system that sought alternative means of generation. But in the Port Hawkesbury situation, Nova Scotia Power used the LRR to allow for the salvation of a bankrupt customer. In particular, Commerce found that, in June 2011, "{NewPage Port Hawkesbury} and Bowater filed an application with the NSUARB to change the pre-existing LRT to make it available to a company facing 'impending business closure due to economic distress' and to allow for an LRR for a company in economic distress." NewPage Port Hawkesbury required the LRR in order to operate the mill, and it was not eligible for this special rate under the existing Load Retention Tariff framework. Commerce considered the expansion of the Load Retention Tariff to be highly relevant to the government's entrustment or direction for the provision of electricity to Port Hawkesbury.

75. Accordingly, Commerce's financial contribution determination was based on section 52 of the *Public Utilities Act* and the government of Nova Scotia's conduct, including through the NSUARB, in ensuring the provision of electricity to Port Hawkesbury.

ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. CANADA HAS FAILED TO DEMONSTRATE THAT COMMERCE'S COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO PORT HAWKESBURY WAS INCONSISTENT WITH THE SCM AGREEMENT AND THE GATT 1994

A. Commerce's Financial Contribution Determination for the Provision of Electricity to Port Hawkesbury Was Consistent with Article 1.1(a)(1)(iv) of the SCM Agreement

1. In this submission, the United States responds to two arguments: first, Canada's repeated assertion that section 52 of the *Public Utilities Act* does not impose a duty to serve, despite Canada's own acknowledgment that the utility had a duty to serve; and second, that a general service obligation alone is not sufficient to find the existence of a financial contribution, even though Commerce's analysis was not limited to this single factor.

2. Canada has argued that the plain language of section 52 does not impose an obligation to serve. This argument is unavailing. First, Canada acknowledges that a legal obligation is derived from section 52 of the *Public Utilities Act*, but suggests that because "the duty to serve is not expressly set out in section 52," Commerce's record did not support the interpretation. But Canada's own statements make clear that Commerce properly interpreted the obligation of section 52. In its responses to the Panel's questions, Canada explains that "section 52…has been interpreted to include a duty to serve through the common law," and cites to a decision by the Nova Scotia Court of Appeal that found the predecessor provision to section 52 to "set out a 'service requirement' or a duty to serve."

3. Canada's second new argument – also contradicted by Canada's own statements – is that section 52 is "not directly enforceable by law" and that Nova Scotia Power "is not required by law to provide electricity to customers if it does not make economic sense to do so." Canada itself recognizes that "the {Nova Scotia Utility and Review Board ("NSUARB")} has the authority under section 46 to order public utilities to comply with the *Public Utilities Act*," and "sections 112 and 114 make it an offence to violate the *Public Utilities Act*." Of course, in both instances, this includes the duty to serve.

4. Canada's answers to the Panel's questions fault Commerce's financial contribution determination for not establishing a link between the government action and the specific conduct of Nova Scotia Power. But, without government involvement – through the financial contribution – Port Hawkesbury would not have received the provision of electricity for less than adequate remuneration. The United States has explained that ample evidence on the record of the countervailing duty investigation supported Commerce's conclusion:

- The NSUARB's decision to expand the Load Retention Tariff to allow for a Load Retention Rate ("LRR") for companies in economic distress, a decision made at the request of NewPage Port Hawkesbury. Without this government action, Port Hawkesbury would not have qualified for an LRR and would not have received the LRR.

- The government of Nova Scotia negotiated with Pacific West Commercial Corporation ("PWCC") the terms of a commitment whereby if Port Hawkesbury's mill load triggered certain obligations that resulted in increased incremental costs, Nova Scotia would guarantee that neither Port Hawkesbury nor other ratepayers would be required to pay.

- Nova Scotia's decision to hire a consultant "to help facilitate the discussions between PWCC and {Nova Scotia Power} and to provide advice and technical support to both of these parties in designing and negotiating an LRR that could be delivered to the NSUARB for approval."

- The unique role of the NSUARB in the negotiation and approval of the LRR.

5. Contrary to Canada's claims, Commerce's final determination identified a clear link between the government action and the granting of Port Hawkesbury's LRR.

B. Commerce's Disclosure of the Essential Facts Was Consistent with Article 12.8 of the SCM Agreement

6. As discussed in the U.S. first written submission, interested parties had ample opportunity – and availed themselves of that opportunity – to provide comments and arguments on the two facts that are the focus of Canada's claim: the *Public Utilities Act* and a discussion paper. Nova Scotia submitted to Commerce the *Public Utilities Act* on May 28, 2015 – 60 days before the *preliminary determination* – and Commerce's preliminary determination made clear that the *Public Utilities Act* and the obligations placed on Nova Scotia Power therein were central to Commerce's financial contribution analysis. As for the discussion paper, which Canada has not established to be an "essential fact," Commerce submitted to the record and distributed the paper to all interested parties 110 days before the final determination. Commerce explicitly provided interested parties the opportunity to "submit factual information to rebut, clarify, or correct the factual information." Canada does not dispute this timeline.

7. Canada's first interpretive argument – made without textual support – asserts that "the United States was obligated to request that interested parties address the relevance of section 52 and the duty to serve in written submissions, if it was contemplating relying on it to establish a financial contribution." Article 12.8 imposes no such obligation, and instead contains only a "disclosure obligation" that extends to the essential facts. The provision requires the authority to make the disclosure of the facts "in sufficient time for the parties to defend their interests." Given that some parties did in fact avail themselves of the full opportunity they were provided to "defend their interests" with respect to the *Public Utilities Act* and the submission containing the discussion paper, there is no basis for Canada's claim under Article 12.8.

C. Commerce's Benefit Determination for the Provision of Electricity to Port Hawkesbury Was Consistent with Articles 1.1(b) and 14(d) of the SCM Agreement

1. Article 14(d) requires the use of a market benchmark to determine the existence and extent of a benefit for the provision of a good or service

8. In its opening statement and in its responses to the Panel's questions, Canada continued to advance the extraordinary argument that "there was no need for Commerce to use a benchmark" because "the provision of electricity by {Nova Scotia Power} to {Port Hawkesbury} is itself a market transaction." Canada's argument assumes the conclusion. The very purpose of a benchmark is to determine if the transaction was made for less than adequate remuneration "in relation to the prevailing market conditions." The Appellate Body has recognized that a benefit determination requires a comparison between a market benchmark price and the price at which the good has been provided.

9. Furthermore, the underlying factual premise for Canada's argument – that the transaction for electricity concerns only two private entities, Nova Scotia Power and Port Hawkesbury, and is therefore necessarily a market transaction – is flawed. Commerce's final determination concluded that "{Nova Scotia} played an essential role in the specific LRR that set the price for the electricity sold to Port Hawkesbury from {Nova Scotia Power}."

2. Canada has failed to demonstrate that an above-the-line rate is not "in relation to the prevailing market conditions"

10. In its responses to the Panel's questions, Canada argues that below-the-line rates are part of "prevailing market conditions" in Nova Scotia. The question for the Panel is not whether a below-the-line rate could serve as a benchmark for electricity – that is, whether the Panel, were it to engage in *de novo* review of this issue, would consider a below-the-line rate *more appropriate* for use as a benchmark. Rather, the issue before the Panel is whether the benchmark *used by Commerce* – one based on above-the-line rates for extra-large industrial customers – is consistent with the legal obligations of Article 14(d) of the SCM Agreement.

11. Above-the-line rates for extra-large industrial users are in relation to the prevailing market conditions for an extra-large customer of electricity in Nova Scotia, consistent with Article 14(d) of the SCM Agreement. In considering the prices that were in relation to the prevailing market conditions for electricity in Nova Scotia, the record of the countervailing duty investigation made clear that above-the-line rates satisfied the legal standard. During the period of investigation, out of all of Nova Scotia Power's customers – regardless of size or customer class – *only Port Hawkesbury did not pay an above-the-line rate*.

12. Within the different categories of above-the-line rates, the extra-large industrial rate was the appropriate above-the-line rate under the circumstances of this investigation. This fact is clear based on Port Hawkesbury's own experience: prior to receiving the LRR, under Port Hawkesbury's previous owner, the mill received the above-the-line rate for extra-large industrial users. In other words, without government involvement, Port Hawkesbury would have paid an above-the-line rate for extra-large industrial users.

13. Canada has not established that an above-the-line rate for extra-large industrial users is not "in relation to the prevailing market conditions" for an entity that satisfies the requirements of an extra-large industrial user of electricity in Nova Scotia.

3. Canada's arguments regarding Commerce's construction of the benchmark are not supported by the record of the countervailing duty investigation

14. Commerce's constructed benchmark replicated the standard ratemaking methodology used by Nova Scotia Power to develop above-the-line rates for similarly situated entities. Indeed, like any above-the-line rate developed by Nova Scotia Power, Commerce's constructed benchmark was based on the sum of variable costs, the applicable contribution to fixed costs, and the standard profit ratio (*i.e.*, Benchmark = variable costs + fixed costs + profit).

15. Canada's first argument, which it does not support with citation to the record of the investigation, is that the constructed benchmark did not account for Port Hawkesbury's status as a priority interruptible customer. In the final determination, Commerce observed, "there were no interruptible rates available to use as a benchmark" during the period of investigation. Confronted with this reality, Commerce's constructed benchmark reflected a rate – the extra-large industrial rate – that *was priority interruptible*. As explained in the NSUARB order setting the framework for the Load Retention Tariff, the extra-large industrial rate requires that "customers served under this tariff must accept priority supply interruption."

16. Canada also argues that Commerce did not request accounting and operational information from Nova Scotia Power, or an explanation of the cost components of the extra-large industrial rate. Commerce requested the information necessary that would have been required to substantiate Canada's claims that additional adjustments should be made to the constructed benchmark, but neither Canada nor Nova Scotia Power provided the requested information. In addition to the requests for information in the questionnaires, Commerce specifically identified those issues as topics it intended to pursue as part of its on-site verification. Despite these specific requests, at verification, counsel for Nova Scotia informed Commerce that Nova Scotia Power was asked to participate and assist with the agenda items, but declined to do so.

17. Canada's challenge to Commerce's selected contribution to fixed costs – C$26 per MWh – for the constructed benchmark is also without merit. The 2012 rate for extra-large industrial customers was designed based on the load for Port Hawkesbury and Bowater Mersey pursuant to Nova Scotia Power's standard pricing mechanism, enabling Commerce to identify in a factual statement in the General Rate Application the fixed cost rate assigned to these companies in 2012. At no point in the countervailing duty investigation – or even (although it would be untimely) in this WTO proceeding – has Canada supported with evidence an alternative cost.

D. Commerce's Determination that the Hot Idle and Forestry Infrastructure Subsidies Received by Port Hawkesbury Were Not Extinguished because of a Change of Ownership Is Consistent with the SCM Agreement and GATT 1994

18. The United States will focus on the benefit PWCC received related to the forestry infrastructure subsidies (known as FIF). In its responses to the Panel's questions, Canada advances additional arguments against Commerce's determination pertaining to the forestry infrastructure subsidies. Canada acknowledges that PWCC's bid was conditioned on receiving the mill in hot idle status so that PWCC could sell the mill as a "going concern." Canada presents the new argument that one of the provincial subsidies – the FIF – was not designed to achieve the sale as a "going concern." First, the purpose of a subsidy is not a determining factor in a benefit analysis. Rather, the pertinent question is whether the subsidy was fully reflected in the final transaction price. Second, record evidence, in fact, demonstrates that the creation of the FIF aided in selling the mill to PWCC as a "going concern."

19. In a questionnaire response, Nova Scotia's statements are evidence that Nova Scotia created the FIF to maintain the supply chain of the mill during the sale process. Likewise, in an answer to a question regarding the extension of FIF and hot idle funding in March 2012, the government of Nova Scotia made explicit statements demonstrating that the FIF was created and maintained to ensure that the mill was sold as a "going concern." Without the FIF, the bankruptcy proceeding would have directly impacted NPPH's forestry operations. Moreover, as the Verification Report of the Government of Nova Scotia demonstrates, the FIF was implemented to enable the forestry operations to continue during the bankruptcy process and not interrupt supply chain operations at the mill. When it became clear that NPPH was ceasing production, Nova Scotia negotiated the Forestry Infrastructure Agreement, and was obliged to extend the agreement into 2012, well past PWCC's initial bid proposal, in order to maintain NPPH's ongoing forestry operations. All of these activities contributed to the sale of NPPH as a "going concern" to PWCC. Canada points to the fact that the marketing materials provided to prospective buyers of NPPH do not mention the FIF; this, however, does not undercut the record evidence demonstrating that the FIF contributed to the overall operations of the mill and allowed NPPH to continue its forestry operations during the bankruptcy process and sell the mill as a going concern.

20. Accordingly, despite Canada's arguments, the FIF was not merely a means of fulfilling NPPH's forestry obligations, but was created to sell the mill as a "going concern." Strikingly, as evident from Nova Scotia's questionnaire responses, Nova Scotia was directly involved in the ongoing efforts to sell the mill and agreed to inject subsidies that were intended to benefit the purchaser of the mill. The Province was committed to ensuring that the paper mill would be operational and globally competitive from the moment the paper mill was sold. In short, positive evidence on the record supports Commerce's finding that the FIF was a fund intentionally created by Nova Scotia to ensure that the mill was sold as a going concern in order to keep the mill in operation.

21. Turning to the extinguishment analysis, the pertinent question is whether there was a grant to NPPH, and whether the change in ownership resulted in an extinguishment of the subsidy, such that it no longer benefited the recipient.

22. As Japan correctly notes in its answers to the Panel's questions, "in addition to examining whether the sale was at arm's-length and for fair market value, a separate inquiry should be conducted to determine whether the sales price reflects the full value of any remaining benefits … {and} accordingly, if the company, asset, or equipment is purchased based on such going-concern value, the benefit could be considered to accrue to the target company/the purchaser." A subsidy extinguishment analysis entails a careful case-by-case analysis, and an important factor is the extent to which the benefit from the subsidy is fully reflected in the transaction price, *i.e.* whether the transaction price has incorporated, and thereby "extinguished," the subsidy.

23. Although not at issue under the facts of this dispute, the United States notes its disagreement with the European Union's blanket statement that a sale at arm's-length and for fair market value between private parties *a priori* extinguishes any benefit conferred prior to the sale. (Indeed, the European Union's third-party statement seems aimed at preserving its positions in a separate, ongoing dispute involving facts unlike those in the present dispute.) Though the issue is not raised here, the United States recalls that the Appellate Body in *EC – Large Civil Aircraft* distinguished between private-to-private sales and privatizations.

24. Thus, a determination of whether a sale was at arm's-length and for fair market value between private parties does not answer the question of whether benefits conferred prior to the sale have been extinguished. A fact-intensive inquiry must be conducted on a case-by-case basis to determine not only whether the sales price was at arm's-length and at fair market value, but also whether the benefit continues to be accounted for after a change of ownership and was reflected in the transaction price.

25. Commerce determined that PWCC received a benefit when Nova Scotia provided a grant to maintain the ongoing forestry operations of the mill during the bankruptcy process. Accordingly, Commerce concluded that because the C$12 million forestry infrastructure fund grant was provided after the PWCC bid was submitted, and the bid price did not change throughout the duration of the sales process, the value of the forestry infrastructure funds could not have been reflected in the final transaction price. Canada has not established that Commerce's determination related to the hot idle and forestry infrastructure subsidies is inconsistent with the SCM Agreement or the GATT 1994.

E. Commerce's Investigation of the Government of Nova Scotia's Provision of Stumpage and Biomass to Port Hawkesbury Was Initiated in a Manner Consistent with Articles 11.2 and 11.3 of the SCM Agreement

26. As previously explained, in Commerce's initiation checklist, Commerce stated that the evidence submitted in support of the allegation demonstrated the possible existence of a countervailable subsidy for the provision of stumpage and biomass material for less than adequate remuneration. In particular, the Forest Utilization License Agreement indicated a restricted market for stumpage and biomass fuel worthy of additional investigation, and Commerce specifically identified the Forest Utilization License Agreement as evidentiary support for its decision to initiate. Furthermore, Commerce explained that the petitioner provided information to determine benefit that was reasonably available to it.

27. Canada argues – without support in the text of the SCM Agreement – that "even if there was no evidence of benefit reasonably available to the Petitioner, Commerce was not justified in initiating an investigation with no evidence of benefit before it." Article 11.2 states that an application "shall contain such information as is reasonably available to the applicant on the" amount and nature of the subsidy in question. The provision recognizes that there may be circumstances where an applicant cannot ascertain evidence to demonstrate the nature and amount of a subsidy. Furthermore, Article 11 does not require pricing data to support an allegation of the provision of goods for less than adequate remuneration.

II. COMMERCE'S COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO RESOLUTE WAS CONSISTENT WITH THE SCM AGREEMENT AND THE GATT 1994

A. Canada's "As Applied" Claims Concerning Discovered Information Are Without Merit

28. First, in Canada's opening statement at the first panel meeting, Canada states that while the scope of the investigation is defined with respect to the product under investigation for the purposes of the any other forms of assistance question, Article 11 initiation standards should not be understood to refer to initiation with respect to a product. Canada's statements are inconsistent and not supported by any legal justification. The content and structure of Article 11 support that the investigating authority is able to satisfy the Article 11 initiation standards when it launches an investigation into an alleged subsidization of a particular product that need not be constrained to particular programs specified in the application. Particularly if – as appears to be the case – Canada accepts that the scope of Commerce's investigation was into the alleged subsidization of a

product, it is only logical that Article 11 likewise should be understood to apply with respect to the product under investigation.

29. To that end, Article 11 permits an investigating authority to initiate an investigation into the subsidization of a product, and examine subsidies not explicitly identified in the written application. The purpose of a CVD investigation is for an investigating authority to discover the extent of the subsidization of a product. Although an investigating authority may at the outset initiate its investigation into a product based on its evaluation of programs specifically identified in the written application, those programs focus, but do not limit, the inquiry of the investigating authority in determining the extent of the subsidization of a product. Accordingly, Commerce's initiation of an investigation into SC Paper was in accordance with Article 11 of the SCM Agreement.

30. Second, Canada argues that the "any other forms of assistance" question is problematic because the question is ambiguous, overly broad, and not specified in detail. Canada further argues that the "any other forms of assistance question" is applied in such a broad manner that it requires reporting measures that are not financial contributions and requires respondents to report all "assistance" received without defining the term "assistance." As an initial matter, Canada has conceded in its response to the Panel's questions that "a question cannot, in and of itself, violate the requirements of the SCM Agreement." Nonetheless, Canada argues that "poorly drafted, overly broad or ambiguous questions cannot request 'necessary information' and the failure to provide information in response to such a question cannot constitute an action that significantly impedes an investigation pursuant to Article 12.7."

31. Canada's arguments are not rooted in the SCM Agreement. Indeed, consistent with its approach throughout this dispute, Canada fails to cite to any relevant authority under the SCM Agreement. Furthermore, to the extent Canada argues that the "any other forms of assistance" question is unrelated to necessary information, Canada lacks any basis for its argument. The question can aid in discovering information related to the subsidies identified in the petition, in that the authority and the responding parties may have different views on the scope of the initially identified subsidies. In addition, whether there are any additional subsidy programs (other than those alleged in the petition) is relevant to determine the total level of subsidization to the product under investigation.

32. Canada also makes an unconvincing argument that the authority should ask more detailed questions about unknown subsidies. This argument makes no sense. At that stage, an investigating authority is unable to ask detailed questions about programs of which it is not yet aware.

33. With respect to Canada's argument that the term "assistance" was not defined in Commerce's questionnaire to Resolute, it is important to note that Resolute did not inform Commerce that it had difficulty defining "assistance." Had there been limitations to its answer, Resolute should have disclosed to Commerce what those limitations were from the outset. This would have provided Commerce with the maximum time to examine the additional assistance and consider arguments by the parties concerning the relevancy of their contents. However, Resolute provided a blanket assertion that there was no further information for it to provide. Thus, as a result of Resolute's representation to Commerce that it had provided all information requested, Commerce was unaware that in reality there was unreported assistance that may have warranted a more detailed inquiry.

34. Third, in its opening statement, Canada argues that Commerce issued supplemental questionnaires, but never followed-up on these responses to the "other forms of assistance" question. This argument does not match up with the record – as just explained, Resolute asserted that it received no other forms of assistance. Thus, on its face, Resolute's response to Commerce was complete, and Commerce had no basis to follow up on Resolute's response. In particular, Resolute represented that it had "examined its records diligently and {was} not aware of any other programs by {the government of Canada} . . . that provided, directly or indirectly, any other forms of assistance to Resolute's production and export of SC Paper." Nor did the government of Canada's questionnaire response indicate that Resolute had received "other forms of assistance." Thus, Commerce had no indication at that time that Resolute's response was deficient in any way.

35. It was not until the late stage of the proceeding, at Resolute's verification, that Commerce discovered that Resolute had failed to respond fully to Commerce's initial questionnaire with regard to other assistance received by Fibrek. The timing of Commerce's discovery of Fibrek's accounts was a direct result of Resolute's failure to cooperate with Commerce and fully disclose its accounts of assistance from the outset of the investigation. Moreover, per Article 25 of the SCM Agreement, Canada failed to notify to Members any of the programs discovered during verification, depriving Members of the ability to understand the subsidies and evaluate their trade effects, if any.

36. It is important to emphasize that Canada's interpretation of the relevant provisions of the SCM Agreement, if accepted, would create an incentive for exporters not to be forthcoming with an investigating authority seeking to determine the extent of a particular product's subsidization. Exporters that choose not to answer initial questions about other forms of assistance or possible subsidization – or choose to answer those questions untruthfully or incompletely – would benefit from the non-disclosure and possibly avoid a full investigation into the alleged subsidization should an investigating authority make such a discovery at verification or at a similarly late stage of an investigation. In that scenario, the distortive effects of injurious subsidization for which the SCM Agreement provides a remedy would go unaddressed. Canada's approach would privilege lack of transparency and undermine the subsidy disciplines of the WTO Agreements.

37. Finally, in its response to the Panel's question, Canada argues that Commerce had available the amounts received by Fibrek, and that the information was therefore not missing. Canada is incorrect. These amounts were not available to Commerce to place onto the record because they were not verifiable at that late stage of the proceeding. It was because of Resolute's failure to disclose the assistance from the outset that accounts which clearly indicated the existence of other forms of assistance were not discovered until the onsite verification. At that late juncture, Commerce officials were not able to verify the newly discovered subsidies, *i.e.*, whether the information discovered at verification was reliable and fully reflected the amount of assistance Resolute had received. Without the timely disclosure by Resolute of this assistance, Commerce was deprived of the opportunity to solicit information from the relevant government authority regarding the program or programs under which these funds were provided. Thus, Commerce properly relied on facts available to fill in the missing information.

B. Commerce's Determination that Certain Benefits Conferred to Fibrek Were Not Extinguished When Resolute Acquired Fibrek Is Consistent with the SCM Agreement

38. In its responses to the Panel's questions, Canada defines the term hostile takeover and argues that a hostile takeover is "always an arm's-length transaction." However, the term "hostile takeover" is not used in the SCM Agreement, nor is it contained in U.S. countervailing duty laws or regulations. Accordingly, one cannot conclude that Resolute's unsupported assertion that a "hostile takeover" occurred requires, or even supports, a finding that any such transaction extinguished subsidy benefits.

39. A proper analysis of extinguishment is not dependent upon an interested party's bare characterization of a private transaction. Rather, in order to make a finding of possible extinguishment, an authority should consider the circumstances of the transaction, including whether the final transaction price reflected the full value of any subsidies received. In the investigation at issue, Resolute's response to Commerce's request for information about changes in ownership characterized the transaction as a hostile takeover but offered no additional explanation. Of course, the fact that Canada now offers justification and explanations is irrelevant – those comments were not on the record in the investigation. Resolute also did not explain how – even if characterized as a hostile takeover – the price Resolute paid for Fibrek might reflect the value of any subsidy benefits received. Moreover, until Commerce's discovery at verification of other forms of assistance provided to Fibrek, Commerce had no reason to pursue additional information regarding the change in ownership.

C. Commerce's Calculation of Resolute's Subsidy Rate for the FPPGTP, FSPF, and NIER Programs Was Not Inconsistent with the SCM Agreement and the GATT 1994

40. As already addressed extensively and with specific reference to the text of the SCM Agreement, the United States has demonstrated that Commerce's calculation of Resolute's subsidy rate for the Federal Pulp and Paper Green Transformation Program ("FPPGTP"), Forest Sector Prosperity Fund ("FSPF"), and the Ontario Northern Industrial Electricity Rate ("NIER") programs was consistent with the applicable obligations under the covered agreements.

41. The appropriate inquiry, as explained by the Appellate Body, is on the subsidy at the time of bestowal. In *US – Washing Machines*, the Appellate Body explained that "we consider that a subsidy is 'tied' to a particular product if the bestowal of that subsidy is connected to, or conditioned upon, the production or sale of the production concerned." In conducting this assessment, "an investigating authority must examine the design, structure, and operation of the measure *granting* the subsidy at issue and take into account all the relevant facts surrounding the *granting* of that subsidy." Canada appears to agree with this interpretation. Commerce's determination was consistent with this approach. To review:

- **FPPGTP:** Commerce concluded that this program's eligibility requirements conditioned bestowal of the subsidy on the production of pulp or paper products. In its final determination, Commerce found that the program's application guide "states that the intent of the program was to improve the environmental performance of Canada's pulp and paper industry, and credits were only to be granted to Canadian pulp and paper producers." Furthermore, the application checklist requires that all proposals under the program demonstrate that "the project is a capital investment at a Canadian pulp and paper mill that is directly related to the mill's industrial process and will result in demonstrable improvements in environmental performance."

- **Forest Sector Prosperity Fund:** The FSPF program was a grant program supporting capital investment projects in northern or rural Ontario. The program eligibility criteria – which are listed on page 00207 of Exhibit CAN-50 – did not condition Resolute's receipt of the grant on the production of a given product. Resolute received a subsidy benefiting all of its production activities, not one "connected to, or conditioned on, the production or sale of a specific product."

- **Ontario Northern Industrial Electricity Rate:** The NIER program was intended "to assist Northern Ontario's largest qualifying industrial electricity consumers to reduce energy costs and use resources efficiently." Companies with "industrial facilities { } situated in Northern Ontario" received an energy rebate based on their energy consumption levels (subject to a cap) in exchange for "commit{ting} to developing and implementing an energy management plan { } to manage their energy usage and improve energy efficiency and sustainability." Thus, Resolute received a subsidy benefiting all of its production activities, not one "connected to, or conditioned on, the production or sale of a specific product."

III. COMMERCE'S CALCULATION OF CATALYST'S AND IRVING'S COUNTERVAILING DUTY RATES WAS CONSISTENT WITH THE SCM AGREEMENT

A. Commerce's Calculation of the All Others Rate Was Consistent with the GATT 1994 and the SCM Agreement

42. Canada has not established that Commerce's calculation of the all others rate was inconsistent with the covered agreements. In its past submissions, the United States has articulated the applicable obligations and explained that Commerce's calculation of the all others rate in this investigation is consistent with those obligations. In this submission, the United States will address Canada's arguments from its oral statement and responses to Panel questions with respect to the relevant legal obligations under the GATT 1994 and the SCM Agreement. Canada's arguments are without merit because neither the SCM Agreement nor the GATT 1994 prescribe a methodology for calculating a countervailing duty rate for non-investigated firms.

43. Canada admits that the SCM Agreement does not prescribe a particular method for calculating countervailing duty rates for non-investigated exporters. This acknowledgment should end the Panel's inquiry, as Canada cannot establish a breach.

44. Canada now attempts to create obligations by citing to multiple articles. In particular, Canada argues that Article VI:3 of the GATT 1994 and Articles 10 and 19.4 of the SCM Agreement impose several obligations that, in actuality, have no basis in the text of the covered agreements. Each provision, individually, does not support the finding of a breach; Canada's attempt to read these provisions together does not cure this defect.

45. Canada's first argument is that Articles 10 and 19.3, when read together, require an authority to ensure that the investigated exporters are representative of the industry as a whole in order to produce the most representative all others rate possible. Although Canada states that an authority is required to "take all necessary steps to ensure that the rate is accurate," that is not, in fact, the standard of Article 10. Rather, under Article 10, a Member is to take all necessary steps to ensure compliance with a separate provision of the GATT 1994 or the SCM Agreement.

46. As with Article 10, Canada has not identified a relevant obligation in Article 19.3. Article 19.3 entitles a non-investigated exporter to an expedited review in order to establish an individual countervailing duty rate; this provision has no bearing on the manner in which an authority is to calculate an all others rate. To that end, the United States agrees with the European Union view that it is because of this procedural safeguard that "investigating authorities are allowed to set duties at a level which is a reasonable proxy."

47. Canada's next argument – concerning Article 19.4 – lacks support in the record of the investigation. Canada argues that the calculated all others rate is inconsistent with Article 19.4 of the SCM Agreement because the "amounts of countervailing duties levied exceed the amount of subsidies found to exist." But, the record of the investigation demonstrates that the all others rate is based entirely on the "subsidies found to exist" with respect to SC Paper producers in Canada. Canada's third argument, again without support in the text of the covered agreements, faults the inclusion of Resolute's CVD rate in the all others calculation because Resolute's CVD rate was based in part on facts available. Canada refers to Article 12.7 of the SCM Agreement, but has not demonstrated the relevance of that provision to the calculated all others rate.

B. Commerce Properly Initiated an Investigation into New Subsidy Allegations Against Catalyst and Irving During an Expedited Review

48. Canada's argument that examining new subsidy allegations will "always" cause more delay in the context of an expedited review is misplaced. First, Canada offers conjecture, but no evidence in support of its sweeping generalization that a particular result would "always" occur. Canada fails to demonstrate how the examination of new subsidy allegations necessarily delays this process and offers no comparison point for the Panel to determine what, if anything, might constitute a "delay." Second, Canada fails to acknowledge the purpose of an expedited review. Similar to original investigations, an expedited review examines the potential subsidization of a particular product and determines the individual countervailing duty rate for the exporter under review. To that end, the investigation of new subsidy allegations in an expedited review is a permissible method of examining the potential subsidization of a particular product and the exporter under review. Moreover, an expedited review allows unexamined exporters to receive an individual countervailing duty rate sooner and on an expedited basis in the administrative process than would otherwise be the case. In fact, since our last submission in this dispute, Commerce has completed its expedited review of Catalyst and Irving.

49. Additionally, the United States disagrees with the Canada's reading of the Appellate Body report in *US – Carbon Steel (India)*. The SCM Agreement does not contain any type of unspecified limitation on the new subsidy allegations that may be included in an expedited review under Article 19.3. Canada presents no valid basis for this proposed interpretation of the SCM Agreement. Similarly, the close nexus language that the European Union cites in its answers to the Panel's questions is simply *dictum*. Neither the complaining party nor the responding party addressed this issue. Nor did the panel make any findings that could have been appealed. The United States has serious concerns under the DSU with an approach where the Appellate Body

issues *dictum* in one dispute, and then a party or adjudicator relies on that *dictum* as if it were treaty text in a subsequent dispute.

IV. CANADA'S "AS SUCH" CLAIMS CONCERNING DISCOVERED INFORMATION ARE WITHOUT MERIT

50. Canada's challenge to a purported rule or norm rests on Canada meeting a high threshold that such unwritten rule or norm does in fact exist. Canada has not clearly established – as it must – the precise content of an alleged rule or norm and the existence of general and prospective rules or norms that govern Commerce's action. Rather, Canada's additional arguments and evidence relate to past action, not what Commerce will do in the future.

51. The United States further notes that Canada has acknowledged in its response to the Panel's questions that "a question cannot, in and of itself, violate the requirements of the SCM Agreement." Therefore, Canada's acknowledgment suggests that Canada is not challenging the "any other forms of assistance question" itself, but rather the application of facts available to discovered information. If Canada is in fact only challenging Commerce's application of facts available to discovered information, then Canada has the burden of proving the 1) precise content of the alleged rule or norm; and 2) that the alleged rule or norm has general and prospective application.

52. In each of the nine determinations that Canada relies upon, Commerce made unique findings and reached different results. Canada argues incorrectly that the United States is "point{ing} to minor variations in language and try{ing} to say these are different actions." Rather, the substantial variations in language in each determination reflects the fact-specific nature of each of Commerce's determinations.

53. In addition, although Canada alleges that Commerce began the practice of applying facts available to discovered subsidies at verification in 2012, Canada fails to highlight *Large Residential Washers from the Republic of Korea*, a December 2012 decision, which Commerce cited to in its final determination as an example of a determination where Commerce did not countervail certain discovered grants at verification because they were deemed to not be tied to subject merchandise. The *Large Residential Washers* determination was issued after *Solar Cells from China 2012*, which Canada relies upon in support of its demonstration of the purported measure.

54. Thus, the nine cases cited by Canada, as well as *Large Residential Washers*, demonstrate that there is no rule or norm of general and prospective application when Commerce uses facts available for information discovered during verification. Instead, these cases show that the use of facts available is based on the particular circumstances of each case. While each case cited by Canada may concern information discovered during verification, the treatment of that information has varied in each determination.

55. Moreover, Canada fails to highlight the determinations where Commerce has asked a question involving the "any other forms of assistance" question, and where a respondent has cooperated and Commerce has verified the response (either a response of non-use of other forms of assistance, or a response of specifically identified programs). In those cases, Commerce would have no basis to apply facts available. As discussed above, the use of facts available is dependent on the circumstances of each case and is a fact-specific inquiry.

56. Canada's "as such" challenge, in addition to lacking legal merit, is remarkable in that it is inconsistent with the actions of its own administering authority. As described below, Canada Border Services Agency (CBSA) takes similar actions to those taken by Commerce in the SC Paper investigation with respect to other forms of assistance. CBSA both asks a similar question, and applies facts available if it later discovers that a party has failed to fully respond to the question.

57. First, in its requests for information, in addition to asking questions concerning the alleged subsidy programs, CBSA also asks questions concerning "any other programs not previously addressed." For instance, in *OCTG from India and Other Countries*, CBSA asked the Government of Turkey to identify "any other assistance programs . . . not previously addressed." Additionally, in *Copper Pipe from China*, CBSA asked the Government of China to identify "any other assistance programs . . . not previously addressed," and specifically requested disclosure of programs China

did not identify it its notification to the SCM Committee, per Article 25 of the SCM Agreement. Likewise, other investigating authorities also ask a similar question. For instance, the European Commission has asked questions concerning other types of subsidies received in its investigation of bioethanol originating in the United States. Similarly, Australia has asked a question concerning other forms of assistance in an investigation of steel shelving from China.

58. Second, not only does CBSA ask a similar question concerning other forms of assistance not otherwise alleged, but if CBSA discovers that a respondent failed to fully answer the question, CBSA has applied facts available. For instance, in *OCTG from India and Other Countries*, CBSA included additional programs after the initiation of the investigation concerning subsidization by the governments of India and Thailand. Specifically, for its investigation concerning Thailand, in its final determination, CBSA included program 8 and 9, which were not previously identified in the preliminary determination. In the final determination, CBSA then applied facts available to determine the countervailability for programs 8 and 9.

59. To the extent that Canada is challenging Commerce's "any other forms of assistance" question, the application of facts available, or a combination of both, the United States notes that CBSA takes similar action. Although the actions of CBSA may not be dispositive to the Panel's interpretive inquiry, they do reflect how another Member, with an active and sophisticated investigating authority, understands the obligations in the SCM Agreement.

EXECUTIVE SUMMARY OF THE U.S. STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

60. Canada's second written submission attempts to introduce a new claim: that Commerce "inadequately addressed" whether the provision of electricity would "normally be vested" in the government within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. Canada's new claim was not the subject of consultations and was not included in Canada's panel request. Article 6.2 of the DSU defines the scope of the dispute and requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Quite simply, with respect to this new claim, Canada's panel request did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

61. Canada's introduction of a new claim and supporting arguments also contravenes paragraph 5 of the Working Procedures of the Panel. Paragraph 5 of the Working Procedures requires that before the first meeting of the Panel, "each party shall submit a written submission in which it presents the facts of the case and its arguments." Canada's first written submission did not present facts or arguments that would support this new claim.

62. Canada's claim also fails on the merits. At the outset, we note that Commerce *did* address the issue raised in Canada's new claim, and *did* provide a well-reasoned, factual basis for its conclusion. Canada simply disagrees with Commerce's decision.

63. Canada's new claim refers to the second part of Article 1.1(a)(1)(iv). A financial contribution can exist where a government "entrusts or directs a private party to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." Canada argues that Commerce failed "to establish that the provision of electricity would normally be vested in the government of Nova Scotia."

64. Commerce's final determination properly considered if the provision of electricity is a function within the authority of the government of Nova Scotia. Commerce concluded that "because of the nature of electricity and Nova Scotia's experience, we find that the provision of electricity…would normally be vested in the government, and…does not differ substantively from the normal practices of the government." Commerce also found that, even where an electric utility is not "owned" by the 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." In the case of Nova Scotia, the provision of electricity remained within the regulatory control of the government: Commerce concluded that Nova Scotia Power was required "by law to provide electricity to all companies in the Province including Port Hawkesbury." Commerce made a fact-specific,

well-reasoned finding based on record evidence that the provision of a good – in this case, electricity – is a function that is normally within the authority of the government of Nova Scotia.

65. As we have shown, Canada's claim is outside of the Panel's terms of reference, is supported only by untimely arguments presented for the first time in a rebuttal submission, and in any event, fails on the merits.

66. Finally, in its second written submission, Canada suggests that Commerce must make a preliminary determination as to the countervailability of a subsidy before it initiates an investigation. Canada supports its argument with a so-called "Expert Report." A so-called "expert report" is nothing more than a section of Canada's submission. It obtains no particular probative value simply because Canada named the Canadian representative that supposedly prepared it, or because it is cut from the main submission and placed in a separate document.

EXECUTIVE SUMMARY OF U.S. COMMENTS ON CANADA'S RESPONSES TO PANEL QUESTIONS

Summary of U.S. Comment on Canada Response to Question 106(c)

67. Contrary to Canada's argument, Commerce did not act in the same manner in each of these cases. The change of language further demonstrates that Commerce makes its determinations on a case-by-case basis. Commerce's explanations vary because in reaching a determination, Commerce considers arguments presented by the parties and provides an explanation as to whether it agrees or disagrees with a party. While Canada points to *Truck and Bus Tires from China* as an example where Commerce allegedly had to explain why it was deviating from a purported practice, Commerce was merely ensuring that it was responsive to that specific respondent's arguments. In all of the determinations Canada relies upon, Commerce made unique findings and reached different results.

68. As the United States has explained, Canada's brief summaries fail to reflect the fact-specific nature of each of these determinations. For example, in some of these cases, such as in *Stainless Sheet and Strip from China* and *Shrimp from China*, respondents had the opportunity to report the discovered assistance in response to other questions from Commerce pertaining to named grants and subsidy programs. Therefore, the discovered assistance in those cases were not reported despite specific questions concerning certain grants and rewards.

69. Further, Canada's reference to a portion of its submission signed by an ex-U.S. official adds nothing to Canada's argument. The relevant inquiry for WTO dispute settlement is whether an alleged rule or norm is attributable to a Member, the complainant is able to identify the precise content of that alleged rule or norm, and there exists an alleged rule or norm that has prospective and general application. How an ex-government official in the employ of the Government of Canada characterizes certain past Commerce determinations has no import for this proceeding.

70. Finally, the United States would highlight that no U.S. court has ever determined under U.S. municipal law that Commerce has a practice of applying facts available to subsidies discovered at verification, and Canada has not shown otherwise.

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ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil is a third party in this dispute because of its systemic interest in the matters before the Panel. In its third party submission, oral statement and answers to the Panel´s questions, the following aspects were highlighted.

I. The use of facts available under Article 12.7 of the SCM Agreement

2. In cases where the necessary information is not provided, the Agreement allows, under Article 12.7, that the findings of an investigation be made on the basis of the "facts available". Article 12.7 ensures that the lack of information does not hinder the ability of investigation authorities to conduct the investigation, allowing them to fill in the gaps by using the relevant facts available in order to make a determination.[1]

3. However, this flexibility has limits. As the Panel in *EC – DRAM Chips*stated, "[...] we do not suggest that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available".[2] The authority therefore cannot "cherry-pick" facts which could lead to a biased determination, it should use the "best information available".

4. Therefore it is not any information that can be used to fill in the gaps. According to the Appellate Body in *Mexico-Rice*, the available information to be used should be "the most fitting or most appropriate information available in the case at hand." The SCM Agreement makes it clear that the application of Article 12.7 cannot entail a punishment for lack of information[3], as "[…] mere non-cooperation by itself does not suffice to justify a conclusion which is negative to the interested party that failed to cooperate with the investigating authority." [4]

5. The Appellate Body, referring to Article 6.8 of the AD Agreement, has also explained that the use of facts available is only permitted in a context of missing necessary information, that is, the use of facts available is not intended to mitigate the absence of any information, but rather to overcome the absence of information required to complete a determination.[5]

6. For Brazil, Article 12.7 strikes an adequate and necessary balance in the use of "facts available". On the one hand, Article 12.7 allows authorities to induce cooperation of interested parties, as it ensures that non-cooperating parties will not be in a better position than those who cooperate. On the other, it provides that the investigating authority's discretion is not unlimited with respect to use of this recourse and with respect to the facts it may use when faced with missing information. The treatment of information that does not follow these rules would lead to an improper basis for the determination.

II. Government participation does not in itself indicate price distortion

7. Brazil recalls that government participation or presence in a given market does not in itself indicate price distortion, allowing a deviation in the use of in-country private prices by the investigating authority[6].

8. This is even more relevant in sectors such as telecommunication, water supply and energy which are frequently regulated by governmental agencies. Because of its strategic nature, more often than not, governmental participation occurs in order to correct distortions related to market

[1] Appellate Body Report, *Mexico - Rice,* para. 291.
[2] Panel Report, *EC - Countervailing Measures on DRAM Chips*, para. 7.61.
[3] Panel Report, *Mexico - Rice*, para. 7.238.
[4] Panel Report, *EC - Countervailing Measures on DRAM Chips*, para. 7.60.
[5] Appellate Body Report, *Mexico – Rice*, para. 259.
[6] Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 442.

size, offer, demand, external factors affecting price, etc. Governmental presence, in these cases, may, in fact, be there to prevent market distortions such as the use of monopoly power. In these sectors, governmental presence is intrinsic to the prevailing market conditions, and should not per se authorize a determination that market conditions do not prevail.

9. In Brazil's view, the mere presence of a government in a given market does not entail per se the existence of price distortion. Price distortion cannot be inferred, and should be carefully established by investigating authorities.

III. Entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement

10. Regarding the proper characterization of "entrustment or direction" of a private body in regulated markets, Brazil contends that government legislation laying down general principles and establishing general rules in a given market cannot be understood *per se* as entrusting or directing a private body, as such legislation merely reflects a government's regulatory powers.

11. As the Panel in *Korea – Vessels* stated, paragraph (iv) of Article 1.1(a)(1) of the SCM Agreement is not concerned with "[…] a government's power, in the abstract, to order economic actors to perform certain tasks or functions", but rather with the concrete actions by a government in a particular case.[7]

12. According to Appellate Body, in *US – DRAMs,* paragraph (iv) must be viewed as striking a balance between addressing situations "[…]where a government uses a private body as a proxy to provide a financial contribution" and allowing for situations where "[…]a government is merely exercising its general regulatory powers.[8]" Brazil believes that striking an adequate balance between these two situations is particularly relevant in highly regulated markets such as the electricity market.

13. In this context, it is upon the investigating authority to establish that in each concrete case the concerned regulation has entrusted or directed a private body to provide a subsidy.

14. Furthermore, the Appellate Body has stated that Article 1.1(a)(1)(iv) is an anti-circumvention provision.[9] A finding of a financial contribution under said provision must only be made, on a case-by-case basis, in situations where the government is attempting to disguise a subsidy through a private entity. In this regard, to the extent that the government is regulating the market to provide general infrastructure, there would be no financial contribution, and hence no subsidy, in the sense of Article 1.1 of the SCM Agreement.

IV. The presumption that the benefit is extinguished in privatizations

15. Brazil recalls that the Appellate Body has recognized that there is a rebuttable presumption that the benefit is extinguished whenever there a sale at arms-length for fair-market-value in privatizations. The same reasoning should apply to sales between private parties.

V. The Scope of a CVD investigation

16. Brazil considers that the scope of a CVD investigation is defined by the evidence presented on the subsidy, the injury and the causal link, as per Article 11 of the SCM Agreement.

17. With regard to necessary information, Brazil agrees with Canada that information that falls outside the scope of the investigation cannot be considered as "necessary information" pursuant to Article 12.7 of the SCM Agreement. It must be acknowledged, however, that what is "necessary information" is not always easily determined.

[7] Panel Report, *Korea – Vessels*, para. 7.392.
[8] Appellate Body Report, *US – DRAMs,* para. 115.
[9] Appellate Body Report, *US – DRAMs,* para. 113; Appellate Body Report, *US – Softwood Lumber IV*, para. 52.

VI. Article 11 and expedited reviews

18. Brazil acknowledges that many obligations inscribed in Article 11 are not directly applicable for an expedited review under Article 19.3 without adaptations. However, this does not entail that the provisions of Article 11 cannot be relevant to the expedited review process in Article 19.3, especially where it guarantees certain rights to the exporter.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. This executive summary integrates the Third Party Written Submission, Oral Statement and Responses to the Panel's Questions by China.

2. First, on the issue of **the application of facts available by the USDOC under Article 12.7 of the SCM agreement**, it should be noted that the purpose of the use of "facts available" by the investigating authorities should be to "reasonably replace" the missing necessary information to arrive at an "accurate" determination. In this respect, Article 12.7 does not confer unfettered or unlimited discretion to the investigating authorities for selecting replacements when applies facts available. Otherwise, it would have jeopardised the purpose of the application of "facts available". More specifically, for arriving an accurate determination under this respect, it requires the investigating authority conducts a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case."[1].

3. Also in respect of ascertaining which "facts available" to use, Article 12.7 of the SCM Agreement requires a proper balance between the rights and obligations of a Member's investigating authority in its application of facts available. While the right to resort to facts available is necessary for the investigating authority to continue its investigation and make its determinations if necessary information is missing, the exercise of its rights is subject to strict disciplines. Specifically, the Appellate Body has found that "where there are several 'facts available' from which to choose, it would seem to follow naturally that the process of reasoning and evaluation would involve a degree of comparison."[2] If such a process were missing from the investigation proceeding, the investigating authorities should not be considered to have met its legal obligations.

4. Further, the application of facts available pursuant to Article 12.7 of the SCM Agreement does not presuppose that non-cooperation of a party in itself forms the basis for less favorable result for the interested parties. Rather, it just provides a situation in which a less favourable result becomes possible, and it does not mitigate the obligation of the investigating authorities for "reasoning and evaluation" where there are several "facts available" from which to choose.[3] In addition, "the use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7."[4]

5. Specifically, in the underlying investigation of this dispute, China's view is that the USDOC appears to have failed to engage in a proper process of "reasoning and evaluation", in the circumstance where there were *more than one* "fact available" from which to choose. By simply selecting *a* "fact available" with the highest rate, without sound reasoning and analysis, the USDOC appears not to have met its obligations. The USDOC could only be understood to have applied adverse inference for the alleged non-cooperation of the respondent as a punishment.

6. Secondly, on the issue of **the obligation for the disclosure of essential facts under Article 12.8 of the SCM Agreement**, China's view is that it is an important procedural obligation for the investigating authority "for ensuring the ability of the parties concerned to defend their interests."[5]

7. This obligation has multiple dimensions. The timing of the required disclosure is "before a final determination is made", and "in sufficient time for the parties to defend their interests." The contents of the required disclosure are those essential facts under the consideration by the investigating authority, which are about to form the basis for its determination of the investigation. Thus, the investigating authorities would not fulfil its obligation by simply providing access to

[1] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.435.
[2] Ibid.
[3] Ibid, paras. 4.425-4.426.
[4] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468.
[5] Appellate Body Report, *China – GOES*, para. 240.

document or documents to interested parties, without identifying the facts contained therein that are under their consideration and form the basis for the determination.[6]

8. Thirdly, on the **issue of the claim by Canada on "other forms of assistance-AFA measure",** China believes that the legal standard for proving the future application of a measure is not "certainty", whether the measure is written or unwritten, or whether the claim by the complainant is framed as ongoing conduct or rule or norm of prospective and general application.

9. China also observes that Members are allowed to challenge a measure with prospective effect serves important purposes, including preventing future disputes and protect the security and predictability needed to conduct future trade.

10. Finally, on **the issue of "entrustment or direction"**, China has a concern about whether a general provision that sets out certain basic regulatory principles is a sufficient link between the government and the specific conduct at issue for a finding of entrustment or direction under Article 1.1(a)(1)(iv). China also believes that the government legislation laying down general principles and establishing general rules in a given market cannot be understood *per se* as entrusting or directing a private body.

[6] Panel Report, *Guatemala – Cement II*, para. 8.230. The panel discussed the relationship between Article 6.9 and 6.4 of the Antidumping Agreement which is similar to Article 12.8 and 12.3 of the SCM Agreement.

ANNEX D-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. This executive summary integrates comments made by the European Union at the Third Party Hearing on 22 March and in its reply to the written questions by the Panel of 6 April 2017.

2. On the notion of **financial contribution through general service obligations**, an evaluation of the existence of a financial contribution involves consideration of the *nature of the transaction through which something of economic value is transferred by a government*. In addition to monetary contributions, a contribution having financial value can also be made *in kind* through a government providing goods or services or directing a private body to do so.

3. For there to be a financial contribution in the first place, a government (or a private body directed by a government) needs to *provide* the relevant good or service. However, Article 1.1(a)(1)(iii) requires there to be a *reasonably proximate relationship between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other. Very general governmental acts may be too remote from the concept of "making available" or "putting at the disposal of". A government must have some control over the availability of the specific thing being "made available"*.

4. What matters for purposes of determining whether a government "provides goods" in the sense of Article 1.1(a)(1)(iii), is the *consequence* of the transaction. This implies, however, that there must be a *transaction* in the first place. In this respect it has been considered that granting a right to certain goods suffices for there to be a transaction. However, the situations examined in the jurisprudence have concerned exclusive rights, not rights that are available to everyone.

5. Electricity is a good that has economic value. If a government provides electricity or directs a private body to provide electricity, there may be a financial contribution within the meaning of Article 1.1(a)(1)(iii). However, the basis on which a determination is made that electricity has indeed been provided by a government (or it has directed a private body to do so) must be clearly established. In the view of the European Union it cannot be lightly derived from very general provisions that may have more to do with setting out the general principles on the adequacy and safety of the relevant infrastructure and service. There must be a reasonably proximate relationship between the action of the government, and the use or enjoyment of the good or service by the recipient. It is difficult for the European Union to see a transaction in a general provision or principle that simply appears to set out certain basic regulatory principles and lays down the key qualities of the relevant services. If that principle amounts to no more than a statement that everyone must have access to basic amenities such as electricity, water etc. it does not as such involve the kind of action from the government that would amount to the necessary transaction for the purposes of Article 1.1(a)(1).

6. The way in which the European Union understands the concept of a general service obligation is that it does not interfere with the principles of supply and demand in a certain market. It rather underpins the relevant market by providing certain predictability to that market. The actual provision of the good or service in question requires the performance of contractual obligations between the supplier and recipient of the good or service. Non-performance of contractual obligations eventually leads to a breach of contract and the consequent possibility that the provision of the good or service is terminated or suspended until contractual obligations are complied with. The terms of the contract may also vary depending on the forces of supply and demand despite there being an underlying general service obligation.

7. The European Union would like to add that general service obligations are commonplace in sectors that often require significant public investment for the creation of the relevant general infrastructure. It is only natural that everyone will be entitled to basic access to the goods and services that are provided through such infrastructure even if the provision of the relevant goods and services is subsequently privatised and made subject to competition between private parties under strict public regulatory conditions. The European Union is concerned that if general service obligations as such and without more would fulfil the conditions of a financial contribution, be it as

such or as an alleged direction of a private body, investigating authorities would essentially be allowed to forego any serious analysis on the existence of a financial contribution in certain key sectors of the economy. However, this does not mean that a provision or a general principle regarding a general service obligation is irrelevant for considering whether a financial contribution exists. For instance, the situation could be different in the case of broad state intervention, which would have as its consequence a genuine transfer of something of economic value.

8. It is not clear to the European Union why the actual provision of electricity by NSPI to PHP, on the terms set forth in the LRR was not the focus of the investigating authority's financial contribution analysis. In the view of the European Union, the investigating authority's emphasis and focus on the general service obligation appears to be misplaced.

9. Secondly, on the so-called **"any other assistance question" and the subsequent application of facts available**: As a starting point, the European Union considers that investigating authorities should have some discretion in determining what information they need for their investigation, and thus, what is "necessary" information. This determination on whether the information requested is necessary must be assessed *ex ante* and not *ex post*, that is, at the moment when the request is made. It may very well be that at a certain stage of the investigation, investigating authorities legitimately consider some information is needed, which afterwards turns out not to have any impact on the final determination. This discretion, however, cannot be completely unfettered - information which is visibly irrelevant to the investigation, for instance because it is unmistakably related to issues outside the scope of the investigation, cannot be considered as "necessary information" pursuant to Article 12.7 SCM, even if the investigating authority requests it.

10. The application of facts available pursuant to Article 12.7 SCM does not only presuppose that necessary information is missing. It also presupposes that the investigating authority had clearly and precisely requested it from the interested party concerned. As Annex II.1 of the Anti-dumping Agreement (which is relevant context for the interpretation of Article 12.7 SCM[1]) confirms, such requests must be sufficiently clear and precise as to what information is needed – too broad, too vague or too general questions cannot entail the use of facts available[2].

11. This is particularly important in cases where the question (such as the "any other assistance question") also covers information that, following the above principles, the investigating authority might validly consider "necessary" at the beginning of the investigation, but which is objectively not relevant. While investigating authorities have a legitimate interest to find out (and ask) whether there are more countervailable subsidies relevant for the investigation at stake, failure to reply to such a general question should not automatically lead to the application of adverse facts available, denying interested parties any opportunity to comment on the new schemes discovered during the investigation, especially where it is doubtful in light of the circumstances of the case whether the failure to reply can indeed be considered as non-cooperation.

12. Information collected on new schemes discovered during the investigation should not be rejected on the sole grounds that those schemes were not disclosed in the initial reply as long as that information can be properly verified as to its accuracy and comprehensiveness. This ties in with the prohibition of a punitive use of facts available.

13. On the **calculation of so-called "all-others-rates"** in cases where rates for investigated exporters have been calculated using facts available, the European Union considers that Article 9.4 ADA is certainly relevant context that should inform how sampling in CVD investigations is done, but adapted where necessary to take into account the specificities of the CVD instrument. For instance, a straightforward application of the prohibition to use margins calculated on the basis of facts available in Article 9.4 might not be appropriate where investigating authorities resort to facts available because of non-cooperation of the subsidising Member. Information held by the subsidising Member, for instance on structure and ownership of upstream funding organisations, might be crucial for establishing the existence of countervailable subsidies, and for the calculation of margins. The information gap resulting from non-cooperation by the government of the subsidising Member is one that has repercussions on all potential exporters. The rationale from *US – Hot-Rolled Steel* that non-investigated exporters must not be prejudiced by shortcomings in

[1] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.423.
[2] Panel Report, *Argentina – Ceramic Tiles*, paras. 6.54-6.67, in particular 6.66.

the information supplied by the investigated exporters not imputable to the non-investigated exporters[3] does not seem to be pertinent in such a case.

14. On **expedited reviews pursuant to Article 19.3** of the SCM Agreement, the European Union considers that the possibility to include new subsidies in an expedited review should be the same as what the Appellate Body has found for administrative reviews, namely the sufficiently close nexus to the subsidies identified in the original investigation[4].

15. Finally, on the **standard of proof and characterisation of unwritten measures**, the European Union attaches great importance to the principle that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"[5], and that measures, including unwritten measures must not fit into certain "boxes" or categories in order to be susceptible to challenge in WTO dispute settlement[6]. The various types of unwritten measures that the Appellate Body has recognised over time in specific cases were certainly useful in capturing the phenomena at stake in each particular case. However, going forward, the European Union would caution against considering them as a typology that would be mechanistically applied to fact patterns which might not necessarily correspond to earlier cases. Complainants should be allowed to challenge whatever measure they can substantiate, without having to squeeze it into a particular box.

[3] Appellate Body Report, *US – Hot-Rolled Steel*, para. 123.

[4] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.541-4.543; see also the European Union's position on the criteria for a close nexus, referred to in footnote 1256 of the Appellate Body Report.

[5] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[6] Appellate Body Reports, *US – Continued Zeroing*, para. 179; *Argentina – Import Measures*, para. 5.102.

ANNEX D-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

1. The present dispute raises certain systemic issues regarding the interpretation of the SCM Agreement. The present dispute is one of the disputes that highlight the consistent undermining of the delicate balance crafted into the provisions of the SCM Agreement.

2. Whilst not taking a position on the specific facts of this case, except for the purpose of establishing the systemic issues involved, India would like to provide its views on certain legal claims advanced in the dispute.

3. Accordingly, India will focus on 3 issues in its statement:

(a) issues pertaining to sub-paragraph (iv) of Article 1.1(a)(1);

(b) improper use of the "facts available" standard; and

(c) examination of new subsidies during an expedited review under Article 19.3 of the SCM Agreement.

First Issue relating to Interpretation and application of Article 1.1(a)(1)(iv)

4. Sub-paragraph (iv) of Article 1.1(a)(1) of the SCM Agreement represents an exceptional case where actions of private bodies, pursuant to entrustment or direction by a government, are relevant for determining the existence of a subsidy. The provision requires an investigating authority to determine two aspects, i.e., (1) that the action or practice in question is 'normally' vested in the Government and (2) that the said action or practice does not, in the real sense, differ from practices normally followed by governments. Needless to mention that the determination regarding both these aspects shall be based on positive evidence.

5. We recall the findings of the Appellate Body in *US - AD and CVD (China)* (para. 297) that for a function or activity to be "normally" vested in the government, it should *ordinarily be considered part of governmental practice in the legal order of the relevant Member*. The Appellate Body also clarified that not all activities can simply be presumed to be 'governmental' in nature.

6. In the facts of this dispute, it is necessary to establish that provision of electricity is ordinarily viewed as a governmental practice in the legal order of the exporting country. It is not appropriate to determine a practice in question to be a governmental practice for the simple reason that it was carried out by the Government in the past or that only one entity is authorized to carry out that practice by the Government concerned.

7. Further, sub paragraph (iv), also mandates that the practice, *in no real sense, differs from practices normally followed by governments*. We recall the Appellate Body's observations in *US - AD and CVD (China)* that this refers to the classification and functions of entities within WTO Members. While arriving at a decision, an investigating authority is required to examine the practices prevailing in other Member countries before concluding that the practice in question, in no real sense, differs from the practices followed by other governments.

Issue No. 2 relating to Use of "Adverse Facts Available" standard

8. India would like to cover two aspects in this regard. Firstly, India would like to state that an investigating authority shall not resort to application 'facts available' standard in an indiscriminate manner. Due caution shall be exercised before resorting to application of facts available standard. With respect to the programs 'discovered' during verification, India considers that it is not appropriate to include them within the scope of the investigation without an evaluation of the essential elements such as financial contribution, benefit and specificity within the meaning of Articles 1 and 2 of SCM Agreement. To make such an evaluation, an investigating authority is required to seek all relevant information specific to the program/s in question in terms of

Article 12.1. of the SCM Agreement. Fact available standard under Article 12.7 of the SCM Agreement cannot be applied without following the due process so envisaged.

9. Secondly, India would like to state that the use of "facts available" standard is meant to enable Authorities to conclude the investigation and determine subsidization by 'reasonably' supplying or introducing the 'necessary' information that is 'missing'. While Article 12.7 of SCM Agreement ensures that an investigation may continue unhindered even in the event of failure of interested parties to supply necessary information, it is an established principle that Article 12.7 does not permit 'selection' of facts that lead to the *least favorable outcome*.

10. The Appellate Body in *US - Carbon Steel (India)* stated that *Article 12.7 requires an investigating authority to use "facts available" that reasonably replace the missing "necessary information", with a view to arriving at an accurate determination, which calls for a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case"*.

11. Accordingly, even while applying 'facts available' standard, an investigating authority cannot discard all the information that was 'discovered' during the investigation and adopt a CVD rate that was determined in the past. Further, India strongly believes that the "facts available" standard does not permit an investigating authority to automatically adopt "*the highest non-de minimis rate calculated*" for a program in another CVD investigation involving the same country. Such an approach is contrary to the standard articulated by the Appellate Body in *US – Carbon Steel (India)*.

Third issue relating to New Subsidy Allegations

12. Article 19.3 of the SCM Agreement mandates the investigating authorities to *establish an individual countervailing duty rate for an exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate*. The provision does not permit investigating authorities to determine the existence or degree of 'any' alleged subsidy. India is of the view that Article 19.3 is only meant to calculate individual duty rates on programs already determined to be subsidy in an original investigation. Therefore, introduction of new subsidies at the stage of expedited reviews, are implausible under Article 19.3 of the SCM Agreement.

13. In case the Panel deems inclusion of new subsidies in an expedited review as permissible, India believes that the standard articulated by the Appellate Body in *US - Carbon Steel (India)* for inclusion of new subsidies in an administrative review should be applicable to expedited reviews as well. In the context of administrative reviews the Appellate Body stated that such "new subsidies" must have a *sufficiently close link* to the subsidies that resulted in the imposition of the original countervailing duty. India believes that an unrestrained introduction of new subsidies into expedited reviews would upset the delicate balance of Part V of the SCM Agreement, which was the basis of the Appellate Body to reach its conclusion regarding new subsidies in *US - Carbon Steel (India)*.

ANNEX D-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. In this proceeding, Japan addresses the following issues: (1) the definition of "entrustment or direction" under Article 1.1(a)(1)(iv); (2) the standard for assessing market distortion under Article 14(d); (3) the punitive application of "facts available" under Article 12.7 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"); (4) the extinguishment of benefit through a private sale of a subsidized firm or asset at arm's-length and for fair market value; and (5) Canada's argument about unwritten measures that are "rules or norms of general and prospective application" or "ongoing conduct."

I. ENTRUSTMENT OR DIRECTION OF PRIVATE BODIES UNDER ARTICLE 1.1(A)(1)(IV)

2. Canada argues in its First Written Submission that the United States Department of Commerce ("USDOC") improperly found that the government of Nova Scotia directed Nova Scotia Power Inc. ("NSPI"), a private company, to provide a financial contribution, or that Nova Scotia entrusted NSPI or the Nova Scotia Utility and Review Board ("NSURB") to provide a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement. Japan considers that the test to determine whether a private body acted under the entrustment or direction of the government under Article 1.1(a)(1)(iv) requires a case-by-case analysis.

3. The Appellate Body has recognized that the demonstration of entrustment or direction will hinge on the particular facts of the case given the difficulty of precisely identifying, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. Moreover, the Appellate Body has found that, in order to demonstrate entrustment or direction under Article 1.1(a)(1)(iv), inferences may be reasonably drawn from the examination of the totality of evidence.

4. Japan considers that an obligation of a public utility to provide general services does not in itself establish entrustment or direction. Rather, in order to determine whether entrustment or direction exists under Article 1.1(a)(1)(iv), an investigating authority must conduct a fact-specific analysis. An obligation imposed on private bodies under relevant domestic laws and regulations, including a general service obligation, can be one element that an investigating authority may consider in this analysis. However, in order to give rise to entrustment or direction, it should be additionally shown, for example, that the regulation imposing such general obligation, through its design and structure, makes private bodies act against commercial considerations, such as continuing their activities despite a deficit.

5. Japan agrees with Brazil that government legislation laying down general principles and establishing general rules in a given market does not by itself establish entrustment or direction, unless, for example, such principles or rules, through their design and structure, make private bodies act against commercial considerations. As a result, Japan agrees that the existence of governmental general regulatory powers by itself does not satisfy the definition of financial contribution under Article 1.1(a)(1)(iv).

6. Japan notes, in this regard, the panel's finding in *Korea – Commercial Vessels* that the issue of entrustment or direction does not have to do with a government's power, in the abstract, to order economic actors to perform certain tasks or functions, but it has instead to do with whether the government in question has exercised such power in a given situation subject to a dispute. This finding is consistent with the understanding that the existence of governmental regulatory power over the producers *per se* does not establish entrustment or direction under Article 1.1(a)(1)(iv). Rather, it is when the exercise of such power causes private bodies to engage in a specific conduct (i.e., causes private bodies to act against commercial considerations) that the exercise of power constitutes an entrustment or direction.

7. The United States argues that Canada is conflating the analysis of "financial contribution" with a separate analysis of "benefit" based on Canada's argument that USDOC identified the

general service obligation as the basis of the financial contribution but assessed benefit with respect to the Load Retention Rate ("LRR"). Thus, the United States seems to imply that, even in a case of entrustment or direction, only the general obligation of the private body is to be assessed in determining financial contribution, and the specific conduct giving rise to the financial contribution must be assessed only under the analysis of "benefit."

8. However, Article 1.1(a)(1)(iv) recognizes that, unlike public bodies whose conduct will always constitute a financial contribution so long as the conduct falls under subparagraphs (i)-(iii), the conduct of private bodies is generally not directly linked with a government function. Therefore, as the Appellate Body has confirmed in *United States – Anti-Dumping and Countervailing Duties (China)*, a private body will be found to provide a financial contribution only if the entity's conduct falls under subparagraphs (i)-(iii), and in addition, the requisite link between the government and that conduct is established by a showing of entrustment or direction. Thus, according to the Appellate Body, the second clause of subparagraph (iv) requires an affirmative demonstration of the link between the government and the specific *conduct*, whereas all conduct of a governmental entity constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv). This confirms that in the instance of a private body, the relevant conduct should be evaluated under the "financial contribution" analysis.

II. STANDARD FOR MARKET DISTORTION UNDER ARTICLE 14(D)

9. In the original investigation, USDOC found that electricity was provided for less than adequate remuneration. USDOC's assessment was based on a constructed benchmark that it used once it had determined that it could not use NSPI's actual price, because it found that the Nova Scotia market for electricity was "distorted." According to Canada, this assessment was solely based on USDOC's determination that NSPI was a dominant supplier in the Nova Scotia electricity market. Canada challenges USDOC's determination on two grounds: that NSPI's prices could not reflect government distortion because NSPI is a private party, and that USDOC's finding of distortion based on the prominence of NSPI in the market was *per se* improper.

10. Canada points out that the analysis of whether a "benefit" was received is guided by Article 14(d), which permits a finding of benefit only when the provision of goods by a government "is made for less than adequate remuneration, or the purchase [of goods] is made for more than adequate remuneration." Whether the remuneration was "adequate" must be determined in relation to prevailing market conditions for the good or service in question in the country of the provision or purchase.

11. In this dispute, Japan presents its views on the assessment of such "market distortion" and the circumstances in which an investigating authority may disregard in-country prices. In order to find an appropriate benchmark for determining the adequacy of remuneration, the Appellate Body has stated that an authority must determine a comparator that reflects prevailing market conditions for the goods in question. Thus, the Appellate Body found that, based on the facts of the case, it must be demonstrated that the benchmark chosen relates to, or is connected with, the conditions prevailing in the country of provision.

12. The Appellate Body in *US – Lumber IV* has recognized that, while the prices of the same or similar goods sold by private suppliers in the country of provision are the primary benchmark, investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods. The determination of whether private prices are distorted due to the government's predominant role in the market must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation. The fact-specific nature of determining a proper benchmark is further confirmed in *US – Carbon Steel (India)*, where the Appellate Body has explained that what an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents.

13. Japan agrees with Canada that an investigating authority is not permitted to apply a "*per se*" rule in which it rejects in-country private prices *solely* on the basis of evidence that the government is the predominant supplier of the goods in question. Rather, if the authority has concerns that the predominance of the government likely distorts private prices in the market, it must examine whether the predominance actually caused a distortion of prices in the market by conducting a case-by-case analysis, based on all of the evidence. As to the specific elements to consider in assessing price distortion, the Appellate Body has found that this may involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers, and it could also require assessing the behavior of the entities operating in that market in order to determine whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices.

14. In this regard, Japan notes that the Appellate Body has found that the primary benchmark that the investigating authority must use is the price of similar goods sold by private suppliers in the country of provision. In other words, the primary benchmark price should be the price formed through arm's-length transactions by private suppliers in the country of provision, which is the price based solely on commercial considerations.

15. It should be noted that the Appellate Body in *US — Softwood Lumber IV* has upheld the panel's determination that the terms "market" or "market conditions" in Article 14(d) do not necessarily mean "pure" market, "fair market value" or a market "undistorted by government intervention." Thus, the mere fact that there is government involvement or intervention in the market does not necessarily mean that market prices are distorted, i.e., that the benchmark price is not formed through arm's-length transactions by private suppliers. As also upheld by the Appellate Body in the same case, the benchmark price must represent prices determined by *independent operators* following the principles of supply and demand, even if supply or demand are affected by the government's presence in the market.

III. PUNITIVE APPLICATION OF FACTS AVAILABLE UNDER ARTICLE 12.7

16. Canada argues that USDOC's application of an "all others rate" that incorporated an "adverse facts available" ("AFA") rate calculated for respondent company Resolute constituted a punitive action, and that the United States' recent amendments to its legislation make the application of the "Other Forms of Assistance-AFA" measure easier to apply in a more punitive manner. Japan presents its views on the standard for applying "facts available" under Article 12.7 of the SCM Agreement, and in particular, whether Members are permitted to apply Article 12.7 in a punitive manner.

17. As the Appellate Body noted in *Mexico – Anti-Dumping Measures on Rice*, Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. The Appellate Body has explained that the provision permits the use of facts on the record *solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination*. The Appellate Body has further cautioned against indiscriminate use of "facts available," noting that recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses.

18. Japan recognizes that the Appellate Body has found in *US – Carbon Steel (India)* that the grant of authorization to use adverse inferences under the SCM Agreement is not in itself "as such" inconsistent with Article 12.7, insofar as it could comport with the legal standard for Article 12.7. However, the Appellate Body's determination in that case was based on the fact that the text of the relevant U.S. statute was permissive, and did not *require* USDOC to use adverse inferences. The Appellate Body considered that the permissive language meant that the use of adverse inference is capable of being limited to those instances where it accords with the legal standard for Article 12.7 of the SCM Agreement.

19. Japan does not understand the Appellate Body's rulings as allowing Members to apply adverse inferences in a punitive manner, i.e., in a manner intended to punish a non-cooperating respondent. Nor is it Japan's view that the WTO agreements contemplate the use of adverse inferences as a means of deterring non-cooperation by imposing the threat of punishment in the

form of margins that go beyond the boundaries of what could reasonably be inferred based on the data that is on the administrative record, especially if there is evidence that the use of that adverse inference would result in an inaccurate result. In fact, the Appellate Body has made clear that such punitive use of adverse inferences would not comport with the requirements of Article 12.7.

20. Japan finds further support for this position in Article 6.8 of the Anti-Dumping Agreement and in Annex II of the Anti-Dumping Agreement, which contain seven specific requirements that must be satisfied in order for an authority to resort to facts available. Japan believes that Article 6.8 and Annex II of the Anti-Dumping Agreement provide interpretive guidance on a Member's obligations under Article 12.7 of the SCM Agreement. The Appellate Body has noted that it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.

21. The panel in *US – Hot-Rolled Steel* has stated that Article 6.8 and Annex II are meant to ensure that "even where the investigating authority is unable to obtain the "first-best" information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps "second-best" facts." Moreover, neither Article 12.7 of the SCM Agreement nor Article 6.8 (incorporating Annex II) of the Anti-Dumping Agreement refers to the use of "adverse facts available" or "adverse inferences." This is in contrast with paragraphs 7 and 8 of Annex V to the SCM Agreement, which explicitly permit the use of "adverse inferences" when developing information concerning serious prejudice. In particular, paragraph 7 of Annex II states that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation *could lead to a result which is less favourable* to the party than if the party did cooperate." While paragraph 7 recognizes that a non-cooperating respondent may be subject to determinations based on facts on the record that may be less favorable than the facts that the respondents would have submitted, it is Japan's view that this language does not grant permission for the investigating authority to bring about an outcome that is punitive and does not reasonably reflect an accurate margin calculation based on the available facts.

IV. EXTINGUISHMENT OF BENEFIT THROUGH A PRIVATE SALE OF A SUBSIDIZED FIRM OR ASSET AT ARM'S-LENGTH AND FOR FAIR MARKET VALUE

22. Japan also addresses the Panel's inquiry with regard to whether a sale at arm's-length and for fair market value between private parties extinguishes any benefit conferred prior to the sale. Japan does not consider that a sale at arm's-length and for fair market value between private parties *a priori* extinguishes any benefit conferred prior to the sale. Japan recalls that, with respect to partial privatization and private-to-private sales, the Appellate Body in *EC and certain member States — Large Civil Aircraft* has found it necessary to conduct a fact-intensive inquiry into the circumstances surrounding the changes in ownership to determine the extent to which there are sales at fair market value and at arm's-length and *whether a prior subsidy could be deemed to have come to an end*.

23. This finding suggests that a determination of whether a sale was at arm's-length and for fair market value between private parties does not by itself resolve the question of whether benefits conferred prior to the sale have been extinguished. Therefore, a fact-intensive inquiry must be conducted on a case-by-case basis to determine not only whether the sales price was at arm's-length and at fair market value, but also whether residual benefits of a subsidy still remain that are not reflected in the arm's-length price in question. Japan considers that this fact-intensive inquiry should include consideration of the design, the nature, and the structure of subsidy itself, in addition to the circumstances surrounding the sale. For example, when purchasing a target company, assets, or equipment, a purchaser would consider the ability to use remaining benefits in the future in assessing the going-concern value of the company, asset, or equipment. Accordingly, if the sales price is based on this going-concern value, the benefit could be considered to accrue to the purchaser.

V. CANADA'S ARGUMENT ON UNWRITTEN MEASURES

24. In its First Written Submission, Canada argues that USDOC's "Other Forms of Assistance-AFA" measure can be characterized as ongoing conduct or as a rule or norm of prospective and general application. Canada notes that regardless of how the measure is characterized, the analysis of attribution and the precise content of the measure is the same. It is only in relation to the prospective application of the measure that the relevant standards slightly differ. Japan agrees with Canada to the extent that the scope of measures that can be challenged in a WTO dispute settlement proceeding is broad.

25. In this respect, Japan notes that the Appellate Body in *Argentina — Import Measures* has confirmed that a broad range of measures can be challenged, finding that the distinction between "as such" and "as applied" claims neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures that are susceptible to challenge. Although the Appellate Body has not found it necessary for a complainant to categorize its challenge either "as such" or "as applied," it has implied that a distinction should be made with respect to different categories of challenged measures. The Appellate Body has further explained that unwritten measures susceptible to challenge in WTO dispute procedures include any act or omission that is attributable to a WTO Member, and the elements that a panel needs to review in ascertaining the existence of the measure will depend on the specific measure being challenged and how it is described or characterized by the complaining Member.

26. Japan is of the view that an unwritten measure can be challenged as long as a complaining Member clearly describes and characterizes what aspects of the measure it is challenging, as the characterization of the measure may determine the evidentiary requirements to establish the measure's existence.

ANNEX D-6

ANSWERS OF TURKEY TO QUESTIONS OF THE PANEL

QUESTIONS AND ANSWERS

1.8 In its opening statement, Canada submitted that requested information that falls outside the scope of the investigation cannot be considered as "necessary information" pursuant to Article 12.7 of the SCM Agreement, even if the investigating authority requests it. Would you agree with Canada? Please elaborate.

Turkey considers that whether the information requested by an investigating authority is necessary or not within the context of an investigation should be analysed in a case-by-case manner. In some cases, the investigating authority might need to request some information in order to decide whether this information is necessary for the determination of the related investigation.

On the other hand, the investigating authority should be as precise as possible in deciding on which information is to be requested from the interested parties.

That is, the investigating authority should be constrained in requesting information when it is apparent that this information is totally unrelated with the investigation.

2.10 In paragraph 6 of its oral statement, Japan refers to paragraph 284 of the Appellate Body Report in *US – Antidumping and Countervailing Duties (China)*. Please comment on its relevance to the present case.

Turkey understands that the relevance of this referral hinges on the discussion whether "direction" or "entrustment" by definition, necessitates a specific type of "conduct" of the government. In other words, in our understanding, the discussion focuses on the issue whether an affirmative and explicit action is needed to establish the "entrustment" or "direction" element in Article 1.1(a)(1)(iv)of the SCM Agreement.

We do not have a one-size-fits-all answer to this question. The point we may agree with Japan, however, is that the conduct of the government, irrespective of being affirmative or adverse, is imperative to satisfy the first stage of a three phase assessment which, in our understanding, includes whether the conduct amounts to "direction" or "entrustment" and whether it controls the private entity to provide benefit conferring financial contribution.

2.11 In paragraph 4 of its oral statement, Japan states that "an obligation of a public utility to provide such general service does not in itself establish entrustment and direction". Would you agree?

2.12 In paragraph 4 of its oral statement, Japan states that "[t]he mere obligation to provide electricity to all customers does not impede a private entity's ability to operate in accordance with the principles of supply and demand in a certain market." Would you agree?

3.13 The European Union asserts at paragraph 26 of its third party submission that: "[i]t is difficult for the European Union to see a transaction in a general provision or principle that simply appears to set out certain basic regulatory principles and lays down key qualities of the relevant services". Please comment.

4.14 In paragraph 5 of Brazil's oral statement, Brazil states that it "understands that government legislation laying down general principles and establishing general rules in a given market cannot be understood per se as entrusting or directing a private body." Please comment in light of the jurisprudence cited by Brazil in paragraphs 4 to 6.

Turkey understands that the last four questions concerns different aspects of the same issue, namely the "entrustment" or "direction" analysis as used in Article 1.1(a)(1)(iv)of the SCM Agreement. Therefore, for the sake of briefness Turkey would like to answer these four questions under one single section as follows.

> In relevant part, Article 1.1(a)(1)(iv) of the SCM Agreement reads as follows:
>
> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> ...
>
> (iv) a government [...] entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;...

In US-DRAMS, the Appellate Body states that paragraph (iv) covers situations where a private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii). Seen in this light, the terms "entrusts" and "directs" in paragraph (iv) identify the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the SCM Agreement[1]. According to the Appellate Body, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision. Thus a finding of entrustment or direction, requires that the government give responsibility to a private body—or exercise its authority over a private body—in order to effectuate a financial contribution. Thus Turkey agrees with the Appellate Body there must be a demonstrable link between the government and the conduct of the private body[2].

In order to establish such a link, evidence relating to the intent and involvement of the government has to be founded on reasonable and adequate explanation by the Investigating authority[3]. Furthermore in Turkey's understanding, the investigating authority should assess the totality of evidence to conclude whether an "entrustment" or "direction" is present or not[4].

Considering the facts of the dispute, Turkey shares the approach that a single factor or information cannot suffice to reach a conclusion concerning the presence or absence of government's "entrustment" or "direction" of a private entity.

Accordingly, Turkey considers that a "basic regulatory principle" alone is not adequate to be used as a yardstick to determine entrustment or direction in terms of Article 1.1(a)(1)(iv). In Turkey's view the "entrustment-direction" analysis necessitates an inclusive assessment bringing together evidence showing that this "basic regulatory principle" is in fact a reflection of a system of entrustment or direction. Thus, the focus of such an evaluation, is not whether this "general" or "regulatory" principle is merely stipulated in a legal text but whether an unbiased and objective investigating authority can present an explanation on how such a "principle" can be assessed as an instrument of "entrustment" or "direction" by using evidence establishing the link between the government and the private body.

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[1] Appellate Body Report, US-Countervailing Duty Investigation on Drams para. 108.
[2] Ibid, para. 112-113.
[3] Appellate Body Report, Japan – DRAMs (Korea), para. 131-134.
[4] Ibid.