UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

(DS505)

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

April 18, 2017

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.