Public Version

UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

(DS505)

RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

APRIL 6, 2017

TABLE OF EXHIBITS

EXHIBIT NUMBER	EXHIBIT
USA-12	Nova Scotia Power 2013 General Rate Application at SR-02, Attachment 1, pp. 27-34 (provided in Exhibit NS-EL-17 of the *Response of the Government of Nova Scotia to the Department's April 6, 2015 Questionnaire* dated May 28, 2015)
USA-13	Nova Scotia Power Response to Information Request at Load Retention Tariff Proceeding (provided as Exhibit 9 to *Petitioner's Supplemental Pre-Preliminary Determination Comments* dated July 14, 2015)
USA-14	*Verification Report: Government of Nova Scotia* (September 2, 2015) **(BCI)**
USA-15	*Qingdao Sea-Line Trading Co., Ltd. v. United States*, 2012 WL 990904 (Ct. Int'l Trade March 21, 2012)
USA-16	"Nova Scotia court approves sales of paper mill for $33 million, UARB approves discount power rate," CBC News (Sept. 27, 2012) (provided at Exhibit II-43 of the *Petition for the Imposition of Countervailing Duties* dated February 26, 2015)
USA-17	*Supercalendered Paper from Canada: Countervailing Duty (CVD) Questionnaire* (April 6, 2015), Section III, n. 1

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Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
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India – Patents (US) (AB)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998
Japan – DRAMs (Korea) (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
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US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R

US – Softwood Lumber V (AB)	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/264/AB/R, adopted 31 August 2004.
US – Washing Machines (AB)	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016

PORT HAWKESBURY

1.1 Provision of electricity

United States

5. What exactly was the basis for the USDOC's determination that the Government of Nova Scotia had entrusted or directed NSPI to provide electricity to PHP? Please identify the specific sections of the Final Determination that describe the basis for this determination of entrustment or direction. In doing so, please clarify whether any statements by the USDOC regarding the role of the Government of Nova Scotia in the negotiation of the LRR were relied on by the USDOC in this context.

1. Commerce's determination of entrustment or direction was based on the role of the government of Nova Scotia in the provision of electricity, specifically as it related to Port Hawkesbury. Commerce's reasoning is explained on pages 32 through 40 of the final determination,[1] and draws on various elements of record evidence. Commerce did not rest only on the general service obligation of section 52; as explained in the final determination, Commerce also "considered the extent to which the {government of Nova Scotia} entrusted or directed the creation of the LRR without regard to whether the resulting rate conferred a benefit."[2]

2. To recall, Commerce concluded that Nova Scotia entrusted or directed Nova Scotia Power to provide a financial contribution in the form of a provision of a good. This conclusion was based on Commerce's consideration of two related factors: (1) section 52 of the *Public Utilities Act*, which requires a public utility to provide electricity to its customers,[3] 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").[4] Commerce's consideration of this second factor is the subject referred to in the last sentence of the above question. To be absolutely clear, yes, Commerce's decision relied in part on the role of Nova Scotia in the negotiation of the LRR.

3. For the Panel's convenience, we will summarize salient aspects of Commerce's determination. With respect to the *Public Utilities Act,* Commerce noted that Nova Scotia Power "is required by law to provide electricity to customers who request it anywhere in Nova Scotia."[5] This legal obligation is derived from section 52 of the *Public Utilities Act*, which states the following:

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1 *See* SC Paper Final I&D Memo, pp. 32-40 (Exhibit CAN-37).
2 SC Paper Final I&D Memo, p. 37 (Exhibit CAN-37).
3 SC Paper Final I&D Memo, p. 36 (Exhibit CAN-37).
4 SC Paper Final I&D Memo, p. 37 (Exhibit CAN-37).
5 SC Paper Final I&D Memo, p. 36 (Exhibit CAN-37).

> Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.[6]

4. Commerce also placed on the record and cited in the final determination to a publication commissioned by the government of Nova Scotia, titled "Regulating Electric Utilities – Discussion Paper." That publication explained the obligation as follows:

> 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. This is a cost pressure that does not exist in some other markets. In deregulated or totally open markets, power companies can choose to provide service only when it makes economic sense to do so.[7]

5. 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."[8] Indeed, the prospective new owner of the Port Hawkesbury mill made a lower price for electricity a precondition for the purchase of the mill.[9] 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.

6. In this regard, the final determination stated the following:

> In addition to the statutory requirement through which the GNS entrusted or directed NSPI to provide a financial contribution in the form of a provision of a good or service to Port Hawkesbury, the record also demonstrates that the GNS played an essential role in the specific LRR that set the price for electricity sold to Port Hawkesbury from NSPI.[10]

7. In particular, Commerce's final determination identified record evidence on the role of Nova Scotia and the NSUARB in the negotiation of the LRR. Specifically, Commerce's final determination:[11]

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[6] Public Utilities Act, p. 16 of Exhibit NS-EL-1 (Exhibit CAN-21) (BCI), as cited on page 36 of the SC Paper Final I&D Memo (Exhibit CAN-37).

[7] *Placement of Documents on the Record Relating to Public Utilities* (July 2, 2015), Attachment 30 (Exhibit CAN-158). *See* SC Paper Final I&D Memo, p. 36 (Exhibit CAN-37).

[8] SC Paper Final I&D Memo, p. 38 (Exhibit CAN-37).

[9] SC Paper Final I&D Memo, p. 38 ("PWCC made it clear that it would not purchase and reopen the mill without a favorable rate for electricity.") (Exhibit CAN-37). *See* "Nova Scotia court approves sales of paper mill for $33 million, UARB approves discount power rate," CBC News (Sept. 27, 2012), provided at Petition for the Imposition of Countervailing Duties (February 26, 2015), Exhibit II-43 (emphasis added) (Exhibit USA-16).

[10] SC Paper Final I&D Memo, p. 37 (Exhibit CAN-37).

[11] SC Paper Final I&D Memo, pp. 38-40 (Exhibit CAN-37).

- Cited to statements made by the Premier of Nova Scotia as evidence of Nova Scotia's active involvement in the negotiation. The Premier explained that Nova Scotia "would continue to work with NSPI to find a solution," and that "he had spoken with the CEO of NSPI, and that he was confident that NSPI and PWCC were working together to build a plan that, once finalized, would go before the NSUARB for approval."[12]

- Explained that, to assist these efforts, Nova Scotia hired a consultant "to help facilitate the discussions between PWCC and NSPI and to provide advice and technical support to both of these parties in designing and negotiating an LRR that could be delivered to the NSUARB for approval."[13]

- Identified the unique role of the Nova Scotia Utility and Review Board (the NSUARB) in the negotiation and approval of the LRR. Citing to an independent analysis, Commerce's final determination explained that during the LRR negotiation "the NSUARB has had to strike a balance between 'traditional ratemaking' and the economic, social and political realities that must be accommodated within regulation."[14]

8. 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 Load Retention Rate. 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."[15] 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.

9. 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. Commerce concluded:

> Without this policy change by the NSUARB to allow for an LRR for business closure due to economic distress – a policy which was created to address the financial problems of the Provincial paper mills – our respondent, Port Hawkesbury, would not have qualified for an LRR under the laws and regulations governing the electricity market in Nova Scotia.

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[12] SC Paper Final I&D Memo, p. 38 (Exhibit CAN-37).
[13] SC Paper Final I&D Memo, p. 39 (Exhibit CAN-37).
[14] SC Paper Final I&D Memo, p. 40 (Exhibit CAN-37).
[15] SC Paper Final I&D Memo, p. 39 (Exhibit CAN-37).

10. In sum, Commerce concluded the following:

> Not only did the GNS entrust or direct NSPI to provide a financial contribution to Port Hawkesbury in the form of a provision of a good or service…the GNS also worked to ensure that the provision of that good or service, the provision of electricity, would be at a specially-designed LRR rate for the respondent.[16]

11. 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.

6. How relevant was the discussion of the role of the Government of Nova Scotia in the final determination?

12. As explained in the above U.S. response to question 5, the role of the government of Nova Scotia was a key consideration in Commerce's final determination.

7. Did the USDOC find that the Government of Nova Scotia entrusted or directed NSPI to provide: (i) electricity or (ii) an LRR? Please cite to the relevant evidence on the record.

13. As explained in the above U.S. response to question 5, the provision of electricity and the provision of an LRR were inextricably linked in the unique circumstances of the Port Hawkesbury mill. That is, the mill could not continue as an ongoing concern without the provision of electricity at below market rates. Thus, while the good in question is electricity, perhaps the best way to summarize is that Commerce determined that the government of Nova Scotia entrusted or directed Nova Scotia Power to provide to Port Hawkesbury electricity at a below market rate (LRR).

8. The United States asserts at paragraph 59 of its first written submission that the USDOC's preliminary determination cited to the Public Utilities Act to support its conclusion that Nova Scotia entrusted or directed NSPI to provide a financial contribution. Did the preliminary determination specifically reference Section 52 of the Public Utilities Act in this context? Please explain.

14. The U.S. first written submission explains that Commerce "cited to the *Public Utilities Act* to support its preliminary determination that Nova Scotia entrusted or directed Nova Scotia Power to provide a financial contribution." In particular, Commerce observed that:

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

[16] SC Paper Final I&D Memo, p. 40 (Exhibit CAN-37).

> privileges and obligations of public utilities such as NSPI are explicitly set forth by {Nova Scotia} in law and regulation.[17]

15. The preliminary determination does not explicitly cite to section 52, but "the powers, rights, privileges and obligations" considered by Commerce would include the obligations set out in section 52. In any event, Commerce's final determination contains a far more complete finding with respect to entrustment and direction. The final determination was based upon further consideration of information in the record, as informed by the additional explanation and discussion that occurred during verification.

Both parties

9. (ADVANCE QUESTION 2) 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.

16. The European Union's statement amounts to a theoretical point that is not tied to the facts of this dispute. As explained in response to question 5, Commerce's finding of entrustment or direction was not based only on the general service obligation that is derived from section 52 of the *Public Utilities Act*. Rather, Commerce also determined that Nova Scotia entrusted or directed Nova Scotia Power to provide electricity to Port Hawkesbury based on Nova Scotia's actions, including through the NSUARB, that led to the provision of electricity to Port Hawkesbury through the LRR.

17. Although the issue raised by the European Union is not before the Panel, the United States would note its disagreement with the European Union position. The European Union suggests that the entrustment or direction must be with respect to one or more particular "transactions." Contrary to the European Union's assertion, however, entrustment or direction can be with respect to particular transactions, with respect to a class of transactions, or with respect to all transactions of an entity.

18. There is no support for the European Union's interpretation in the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Article 1.1(a)(1)(iii) of the SCM Agreement provides that there is a financial contribution where "a government provides goods or services other than general infrastructure, or purchases goods." The Appellate Body has found that "provides" in this context means "supplies," "makes available" or "puts at the disposal of."[18] The term does not restrict the scope of "transactions" covered by Article 1.1(a)(1)(iii) in the manner proposed by the European Union.

19. The European Union's interpretation seems founded on an implicit concern that application of the plain text of the SCM Agreement means that many types of government actions might qualify as subsidies. As an initial matter, this type of consequential reasoning provides no basis for departing from the text. Furthermore, this type of policy argument fails to

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17 SC Paper Preliminary I&D Memo, p. 30 (Exhibit CAN-10) (internal citations omitted).

18 *US – Softwood Lumber IV (AB)*, para. 73.

take account of all three elements of a subsidy – that is, benefit and specificity, as well as contribution. The specificity element is particularly relevant here. A general service obligation, standing alone, may not amount to a measure that meets the specificity requirement.

10. 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?

20. As with the European Union position addressed in response to the prior question, Japan's position amounts to a theoretical point, not tied to the facts of this dispute. As explained in response to question 5, Commerce's finding of entrustment or direction was not based only on the general service obligation that is derived from section 52 of the *Public Utilities Act*.

21. Nonetheless, the United States notes the ordinary meaning of Article 1.1(a)(1)(iv), read in context, does not support the interpretation suggested by Japan. We refer the Panel to paragraphs 33 through 40 of the U.S. first written submission for discussion of the U.S. interpretation of Article 1.1(a)(1)(iv).

22. The United States, however, does agree with Japan's observation, in paragraph 4 of its oral statement, that "an obligation imposed on private entities under relevant domestic laws and regulations can be one element that an investigating authority may consider in conducting this fact-specific analysis in a particular case."[19] Indeed, in the investigation at issue in this dispute, Commerce conducted a fact-specific inquiry of the provision of electricity to Port Hawkesbury, one aspect of which was the general service obligation of section 52 of the *Public Utilities Act*.

1.2 The LRR

United States

17. Does the United States agree with Canada's assertion that "Commerce's own consideration of financial contribution found no government involvement in the negotiation of the LRR"? If not, please explain. Can the United States point to evidence on the USDOC record which reflects any such government involvement?

23. The United States disagrees with Canada's assertion. Rather, Commerce's final determination considered (1) the government's involvement in the change to the regulatory framework to allow Port Hawkesbury to receive an LRR,[20] and (2) the government's involvement in the negotiation between Nova Scotia Power and PWCC over Port Hawkesbury's specific LRR.[21]

24. Specifically, the following record evidence demonstrated the government of Nova Scotia's involvement in the expansion of the Load Retention Tariff to include companies in economic distress, a change to the regulatory framework that was made at the request of Port

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[19] Oral Statement of Japan, para. 4.

[20] SC Paper Final I&D Memo, p. 39 (Exhibit CAN-37).

[21] SC Paper Final I&D Memo, p. 37 (Exhibit CAN-37).

Hawkesbury's previous owner. Without this government action, Port Hawkesbury would not have been eligible for an LRR. This record evidence included:

- In 2011 and in response to an application filed by NewPage Port Hawkesbury and Bowater, the Nova Scotia Utility and Review Board (NSUARB) expanded the scope of the Load Retention Tariff to allow for an LRR for a company facing "impending business closure due to economic distress."[22] Without this amendment, Port Hawkesbury "would not have qualified for an LRR under the laws and regulations governing the electricity market in Nova Scotia."[23]

- Statements made by the Premier of Nova Scotia showing Nova Scotia's commitment to securing an electricity rate for Port Hawkesbury below the standard published rate. The Premier explained that Nova Scotia "would continue to work with NSPI to find a solution," and that "he had spoken with the CEO of NSPI, and that he was confident that NSPI and PWCC were working together to build a plan that, once finalized, would go before the NSUARB for approval."[24]

25. In addition, the record demonstrated government involvement in the negotiation between Nova Scotia Power and PWCC. Commerce observed that the electricity rate was vital to the success of the government of Nova Scotia's one-year effort to finalize its policy goal – to ensure that the paper mill reopened.[25] Commerce's record contained the following evidence of government involvement in the negotiation of the specific rate:

- The NSUARB order granting Port Hawkesbury's LRR explained that the LRR was the result of "vigorous negotiations carried out for more than six months between {PWCC} and Nova Scotia Power, with the participation of the government of Nova Scotia and the court-approved appointed monitor."[26]

- To assist the negotiations, Nova Scotia hired a consultant "to help facilitate the discussions between PWCC and NSPI and to provide advice and technical support to both of these parties in designing and negotiating an LRR that could be delivered to the NSUARB for approval."[27] After Nova Scotia Power and PWCC submitted the LRR to the NSUARB for approval, the consultant provided evidence and testimony on behalf of Nova Scotia in support of the proposal to the NSUARB.

26. Nova Scotia worked closely with Nova Scotia Power and PWCC to address the issue of high electricity costs. The evidentiary record reflected substantial government involvement at each stage of the process that led to the approval of Port Hawkesbury's LRR.

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22 SC Paper Final I&D Memo, p. 39 (Exhibit CAN-37).
23 SC Paper Final I&D Memo, p. 39 (Exhibit CAN-37).
24 SC Paper Final I&D Memo, p. 38 (Exhibit CAN-37).
25 SC Paper Final I&D Memo, p. 38 (Exhibit CAN-37).
26 NSUARB Order Approving Port Hawkesbury's Load Retention Rate, p. 16 of Exhibit NS-Supp1-55A (Exhibit CAN-35).
27 SC Paper Final I&D Memo, p. 39 (Exhibit CAN-37).

18. (ADVANCE QUESTION 3) Does the United States agree with Canada's assertion, in paragraph 43 of its first written submission, that the USDOC "abandoned its conclusion from its preliminary determination, where it erroneously found that the actions of the NSUARB had, by reason of its alleged involvement in the negotiations between NSPI and PWCC and its approval of the LRR, amounted indirectly to entrustment or direction by Nova Scotia"? Please elaborate.

27. The United States disagrees with Canada's assertion.

28. Rather, the record shows that the preliminary and final determinations are consistent. And, as one would expect, the reasoning in the final determination is more developed. We summarize below.

29. In its preliminary determination, Commerce preliminarily determined that Nova Scotia entrusted or directed Nova Scotia Power to provide electricity to Port Hawkesbury. Commerce cited the following factors:

- Pursuant to the *Public Utilities Act*, the NSUARB exercises general supervision over all electric utilities, which includes setting rates, tolls, and charges, and regulations for the provision of service.[28]

- Pursuant to the *Public Utilities Act*, the NSPI is a public utility that generates, transmits, and distributes electricity throughout Nova Scotia. The powers and obligations of public utilities are set forth by Nova Scotia in law and regulation.[29]

- The approval and provision of the LRR for Port Hawkesbury was made pursuant to Nova Scotia's laws and regulations. This includes the modification to the LRT to include customers such as Port Hawkesbury. Absent the approval of Nova Scotia, through the NSUARB, Nova Scotia Power could not have provided electricity to Port Hawkesbury under the terms of the LRR.[30]

30. The final determination took into account Commerce's findings at verification, and the additional time and opportunity to analyze evidence on the record of the investigation. Commerce cited the following factors:

- Pursuant to the *Public Utilities Act*, Nova Scotia controls and directs the methodology that Nova Scotia Power has to use in rate proposals, and any rate charged by Nova Scotia Power must be approved by the NSUARB.[31]

- Pursuant to the *Public Utilities Act*, Nova Scotia Power is required by law to provide electricity to customers who request it anywhere in Nova Scotia.[32]

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[28] SC Paper Preliminary I&D Memo, p. 29 (Exhibit CAN-10).
[29] SC Paper Preliminary I&D Memo, p. 30 (Exhibit CAN-10).
[30] SC Paper Preliminary I&D Memo, p. 30 (Exhibit CAN-10).
[31] SC Paper Final I&D Memo, p. 36 (Exhibit CAN-37).
[32] SC Paper Final I&D Memo, p. 36 (Exhibit CAN-37).

- The NSUARB played a critical role in the process leading up to PWCC and Nova Scotia Power filing the request for approval of the LRR.[33]

- The government of 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.[34]

31. The United States refers the panel to the more complete description of the final determination in the U.S. response to question 5.

19. In paragraphs 155-157 of its written submission, Canada refers to a number of factors flowing from changed arrangements in the operation of the mill that benefitted NSPI. These include Port Hawkesbury becoming priority interruptible, being able to run the mill at off-peak hours, paying the most expensive incremental source of energy in the stack and pre-paying its weekly account. Did the USDOC take into account these factors in its benefit analysis? If so, how? If not, why not?

32. Yes, Commerce investigated these and other factors that Canada argues could have an effect on the electricity rate charged to a particular customer.

33. First, Commerce's benchmark reflected a priority interruptible rate, as record evidence indicated that the extra-large industrial tariff was priority interruptible. In the NSUARB order setting the framework for the Load Retention Tariff, it was explained that the extra-large industrial rate places the following condition on customers seeking that rate:

> Customers served under this tariff must accept priority supply interruption.[35]

34. Nova Scotia Power went on to explain that the extra-large industrial tariff imposed the same interruptibility requirements as the LRR:[36]

> This tariff is interruptible for supply reasons. The customer will reduce its available interruptible system load by the amount requested by NSPI within ten (10) minutes of such request by the company.[37]

35. Nova Scotia Power's own statements suggested that the extra-large industrial rate that served as the basis for Commerce's benchmark did in fact account for Port Hawkesbury's position as a priority interruptible customer. This provision includes the same requirements as the LRR that the system load could be interrupted within 10 minutes of a request made by Nova Scotia Power.

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[33] SC Paper Final I&D Memo, p. 38 (Exhibit CAN-37).
[34] SC Paper Final I&D Memo, p. 37 (Exhibit CAN-37).
[35] NSUARB Order Setting Framework for Load Retention Tariff, p. 33 of Exhibit NS-Supp1-50A (Exhibit CAN-80).
[36] Canada First Written Submission, para. 38.
[37] NSUARB Order Setting Framework for Load Retention Tariff, p. 41 of Exhibit NS-Supp1-50A (Exhibit CAN-80).

36. Second, Commerce also investigated the quantitative effect that other factors – including being able to run the mill at off-peak hours, paying the most expensive incremental source of energy in the stack, and pre-paying its weekly account – could have on a customer's electricity rate. But, the record evidence did not support an adjustment of the type now sought by Canada.

37. In a supplemental questionnaire issued to Nova Scotia, Commerce requested information about the differences between the LRR and the rates charged under each rate class. *The government of Nova Scotia acknowledged that it did not have the information necessary to make the adjustments that Canada now seeks*:

> The differences between the published LRR and the published {above-the-line} rates can be described qualitatively by reference to the contribution to fixed costs accounted for in the rate, the real time pricing protocol, and credit risk assessment requiring demand forecasting, and pre-payment on that basis. *The Government of Nova Scotia does not possess any information that would permit it to provide an approximate value of the quantitative differences because NSPI's rate setting methodology relies upon NSPI proprietary information.*[38]

38. Commerce requested the information necessary to substantiate Canada's claims that additional adjustments should be made to the benchmark, but neither Canada nor Nova Scotia Power provided the information. As Canada did in its first written submission, Nova Scotia was able to qualitatively describe the differences between the rates. But, critically, Nova Scotia could not provide – and Nova Scotia Power was unwilling to provide – quantitative data that would allow for an adjustment. Canada asserted that such adjustments would be appropriate, but provided no evidence to support its assertions. Thus, there was no evidentiary basis for Commerce to make the adjustments.

39. Accordingly, Commerce's constructed benchmark was based on the information that was available to Commerce as provided by Nova Scotia. The available information reflected a priority interruptible tariff for extra-large industrial customers, which was the tariff applied to Port Hawkesbury's previous owner.

20. (ADVANCE QUESTION 4) What does the United States understand as "prevailing market conditions" under Article 14(d) of the SCM Agreement? Should "prevailing market conditions" always provide for full cost-recovery?

40. Article 14(d) of the SCM Agreement requires that the adequacy of remuneration be "determined in relation to the prevailing market conditions" in the country of provision. Below, we explain that several terms inform the proper interpretation of this provision.

41. The adequacy of remuneration must be determined "in relation to" the prevailing market conditions. In *Softwood Lumber IV*, the Appellate Body found that the phrase "in relation to" has a meaning similar to the phrases "as regards" and "with respect to."[39] This phrase indicates

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[38] *Response of the Government of Nova Scotia to the Department's First Supplemental Questionnaire* (July 8, 2015), p. 49 (Exhibit CAN-90).

[39] *US – Softwood Lumber IV (AB)*, para. 89.

that a benefit determination requires some form of comparative exercise; it would be improper – as Canada has suggested – to determine the level of benefit by comparing a price against itself.[40]

42. The provision recognizes that there may be limitations in identifying a benchmark, and that a benchmark may not in all cases represent an exact proxy. Rather, the phrase "in relation to" suggests a more removed relationship between the benchmark and the price at which the good has been provided. For instance, drafters could have used a phrase such as "shall reflect the prevailing market conditions." Instead, Article 14(d) requires only that the benchmark be determined with consideration of the prevailing market conditions. The Appellate Body summarized its interpretation in the following manner: "it must be demonstrated that, based on the facts of the case, the benchmark chosen relates or refers to, or is concerned with, the conditions prevailing in the market of the country of provision."[41]

43. The next term that informs a proper interpretation of Article 14(d) is "prevailing;" in determining a benchmark, the relevant market conditions are those that are "prevailing." The Appellate Body has found that "prevailing" market conditions are those that are "predominant" or "generally accepted."[42] The investigating authority is not to base its benchmark on an aberrational price "for the good in question." Instead, the obligation under Article 14(d) is to identify the predominant price for the particular good. For example, if a seller has a list price for a given product, but the company under investigation purchased the product for a different price, then the list price – which reflects the prevailing price – may serve as an appropriate benchmark to determine if the good was provided for less than adequate remuneration.

44. Read together, the terms "in relation to" and "prevailing" suggest that the benchmark is to have a connection with the price at which the good is normally provided.

45. The selection of a benchmark is a case-by-case determination, requiring a close evaluation of the particular facts of the market in question. Here, Commerce chose a benchmark based on a close evaluation of the market for electricity in Nova Scotia. Commerce found that above-the-line rates, which allow for full cost recovery, are in relation to the prevailing market conditions for electricity in Nova Scotia. During the period of investigation, all but one of Nova Scotia Power's customers – Port Hawkesbury – paid a rate that provided for full cost recovery.[43] To put this number in context, in 2011, Nova Scotia Power had nearly 500,000 customers.[44] Clearly, above-the-line rates reflected the "predominant" price for electricity in Nova Scotia.

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[40] *US – Softwood Lumber IV (AB)*, para. 89.

[41] *US – Softwood Lumber IV (AB)*, para. 89.

[42] *US – Carbon Steel (India)*, para. 4.150.

[43] *Verification Report: Government of Nova Scotia* (September 2, 2015), p. 19 ("During the {period of investigation}, Port Hawkesbury was the only NSPI rate payer on a below-the-line rate. Although Bowater Mersey was approved for an LRR, it ceased operations before the POI.") (Exhibit CAN-99).

[44] Nova Scotia Power 2013 General Rate Application at SR-02, Attachment 1, pp. 27-34, provided in Exhibit NS-EL-17 of the *Response of the Government of Nova Scotia to the Department's April 6, 2015 Questionnaire* (In 2011, Nova Scotia Power reported to the NSUARB that it had approximately 483,831 electricity customers. Of the total customers, in 2011, it appears that four paid a below-the-line rate, which amounts to less than one percent of Nova Scotia Power's customers.) (Exhibit USA-12).

46. The second part of the Panel's question – whether prevailing market conditions should always provide for full cost-recovery – is a theoretical one. That is, Commerce did not base its selection on the legal proposition that prevailing market conditions always allow for full cost recovery. Rather, here, Commerce found that under prevailing market conditions in Nova Scotia, the prevailing electricity rates were the tariffs normally provided by Nova Scotia Power, and that these tariffs *did* allow for full cost recovery.

47. Nonetheless, to be helpful, we will provide our views on this question. As noted, a selection of a benchmark is a case-by-case determination. Accordingly, the answer would depend on the relevant market. In a given market, it is perhaps theoretically possible that goods sold for a price that did not fully recover costs (at least in a short-term sense) might meet the standard of "in relation to the prevailing market conditions." However, in that circumstance, the question would be raised concerning how a true market price could not allow for a recovery of costs in the medium- or long-term; otherwise, how could the provider survive as an ongoing concern? Thus, a price that does not allow for the full recovery of costs may well be an indication of significant distortions in the market, such as through government subsidies to the provider. In any event, these types of theoretical questions are not raised in this dispute. As noted, Commerce based its determination on a fact-based analysis, and did not rely on any legal principle that any particular benchmark is *a priori* unusable.

21. Did the USDOC take into account the fact that the mill was NSPI's largest customer in its benefit analysis? If so, how?

48. Yes, Commerce's benchmark took into consideration the fact that Port Hawkesbury was Nova Scotia Power's largest customer. Nova Scotia Power had rate classes based on usage, and Commerce selected the rate class that corresponded to the very largest customers. Indeed, the precise reason that Commerce decided to construct a tariff for this rate class was that Nova Scotia Power did not have a user that fell in this highest rate class during the period of investigation. Accordingly, to select the most appropriate benchmark, Commerce constructed a tariff rate for "extra-large industrial" users during the period of investigation. Thus, the fact that Port Hawkesbury was the largest customer of Nova Scotia Power was an essential part of the benchmark analysis.

49. For the Panel's background, we provide the following additional details. Prior to receiving the preferential, below-market LRR, (that is, under Port Hawkesbury's previous owner), the mill received an above-the-line rate for "extra-large industrial customers."[45] During the period of investigation, Nova Scotia Power's published tariff schedule listed 12 above-the-line ratepayer tariff classes; however, the tariff class for extra-large industrial users was not among them because, when the rates in effect during the period of investigation were submitted to the NSUARB for approval, there was no active customer with a sufficiently large usage requirement to qualify for that tariff class. Thus, the rate applicable to the very largest customer – that is, Pork Hawkesbury – was not published by Nova Scotia Power.

[45] Formally, this rate was called the "Extra Large Industrial 2 Part Real Time Pricing" rate. *See* SC Paper Final I&D Memo, p. 47 (Exhibit CAN-37).

50. Commerce did not rely on the above-the-line rate for the next smaller class of industrial consumers – the "large industrial" rate – because, during the countervailing duty investigation, Port Hawkesbury confirmed that it would not be eligible for the rate because of its significantly larger electricity consumption. Accordingly, Commerce reasoned that "there were no electrical tariffs applicable to a customer with an extra-large connection size in the {Nova Scotia Power} rate schedule."[46]

51. In the absence of an applicable tariff in the Nova Scotia Power rate schedule applicable to the period of investigation, Commerce constructed a benchmark based on the fixed costs normally attributable to an above-the-line rate for extra-large industrial users. In Nova Scotia Power's 2013-2014 General Rate Application, Nova Scotia Power identified the contribution to fixed costs made under the extra-large industrial rate that applied to Port Hawkesbury's previous owner.[47] Accordingly, Commerce's benchmark appropriately reflected Port Hawkesbury's status as an extra-large industrial customer.

22. In rejecting the possible use of tier 1 benchmarks, the USDOC seems to have determined that all prices in Nova Scotia were distorted as a result of the dominant role of the government, through NSPI, in the market. If that is the case, how was it appropriate to use any aspects of the NSPI rates in constructing the USDOC's tier 3 benchmark?

52. Commerce's final determination noted that in Nova Scotia all electricity prices are regulated and approved by the government of Nova Scotia.[48] Thus, there were no prices in Nova Scotia available to consumers other than a government regulated and approved price. However, the fact that there is no non-government regulated price does not equate to a decision that costs for providing electricity or the methodology used to set electricity prices in that market are distorted. Therefore, Commerce undertook a separate analysis to assess whether the government regulated price was consistent with market principles, and found that this methodology and the associated above-the-line rates were based on market principles.[49]

53. In regard to above-the-line rates in particular, Commerce explained the following:

> The NSUARB and NSPI set "above-the-line" rates in accordance with market principles for regulated monopolies when the cost-of-service method is employed. These rates fully incorporate the costs of fuel, generation, transmission, and distribution. Under this method of rate setting, there is a sufficient guaranteed rate of return to ensure future operations because all costs are covered, and, in order to ensure adequate investment, investors are guaranteed a rate of return on equity that is competitive with similarly risky investments available in the market.[50]

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46 SC Paper Final I&D Memo, p. 47 (Exhibit CAN-37).
47 SC Paper Final I&D Memo, p. 48 (Exhibit CAN-37).
48 SC Paper Final I&D Memo, p. 41 (Exhibit CAN-37).
49 SC Paper Final I&D Memo, p. 47 (Exhibit CAN-37).
50 SC Paper Final I&D Memo, p. 47 (Exhibit CAN-37).

54. Consistent with this explanation that above-the-line rates were in accordance with market principles, Commerce considered the use of a published above-the-line rate, but concluded "there were no 'above-the-line' rates in effect during the {period of investigation} for a customer with a load size similar to Port Hawkesbury's. We have identified several rates from the standard pricing mechanism as possible benchmark selections, but we have rejected these actual 'above-the-line' rates because they are not comparable."[51] For this reason, Commerce constructed a benchmark based on the extra-large industrial above-the-line rate used by Port Hawkesbury's previous owner.

23. If an LRR had been available during the POI, which did not recover full fixed costs and an adequate ROE, would the USDOC have used it to calculate the amount of benefit?

55. Please see the U.S. response to question 20. The appropriate benchmark would depend on the "prevailing market conditions for the good."

Both parties

24. According to the transcript of the NAFTA hearing (Exhibit CAN-94, p. 147), NSPI may have indicated that it was "neutral on the deal", and that the LRR had "no direct benefit to it". Was there any evidence of such remarks by NSPI on the USDOC's record? If so, please provide the relevant extract from the record.

56. Yes, Commerce's evidentiary record contained evidence of these statements. In response to an information request during the Load Retention Tariff proceeding, Nova Scotia Power stated the following:

> There is no direct benefit to NS Power from the arrangement. NS Power has pursued the arrangement to provide its customers with an opportunity for some fixed cost recovery and to support the Strait region economy. NS Power will simply recover its direct incremental costs of serving the mill. Contributions toward fixed costs will be assigned to the direct benefit of NS Power's customers.

57. We provide the relevant extract from Commerce's record at Exhibit USA-13. Commerce's evidentiary record supported the finding that Nova Scotia entrusted or directed Nova Scotia Power to provide electricity through the LRR.

25. Was the decision by NSUARB to allow a LRT for companies in economic distress taken specifically to help the owner of the mill? Were there other considerations to which the NSUARB had regard? Can the parties cite to evidence on the record to support their answers?

58. Yes, the decision by the NSUARB to expand eligibility of the Load Retention Tariff to include companies in economic distress was in response to a request made by the previous owner of the Port Hawkesbury mill.

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[51] SC Paper Final I&D Memo, p. 138 (Exhibit CAN-37).

59. Relevant information can be found in the NSUARB decision dated November 29, 2011, found at Exhibit CAN-27. The introduction to the document explains that the NSUARB decision was made in response to "an application dated June 22, 2011, by NewPage Port Hawkesbury Corp. (NewPage) and Bowater Mersey Paper Company Limited…for amendments to the Load Retention Tariff ("LRT") and a Load Retention Rate "("LRR")."[52] The NSUARB described NewPage Port Hawkesbury's request in the following manner:

> The {NewPage} Application requested amendments to the terms and conditions of NSPI's existing LRT. These proposed revisions would extend the applicability of this LRT to instances where there is an impending business closure due to economic distress of NSPI's largest customers (i.e., NewPage and/or Bowater).[53]

60. As made clear by the NSUARB's summary of the proposed changes, the amended LRT would not be generally available; rather, the language of the amendments limited availability of the Load Retention Tariff to only NewPage Port Hawkesbury, Bowater, and their successors. NewPage Port Hawkesbury proposed, in relevant part, the following amendments:

a) the rate is to be granted in circumstances where it can be shown that the rate is required to respond to the competitive challenge of business closure due to economic distress

b) where the rate is required to respond to the competitive challenge of business closure due to economic distress, this rate shall be available only to Extra-Large Industrial customers.[54]

61. The proposal appears to limit application of the amended Load Retention Tariff to NewPage Port Hawkesbury and Bowater. NewPage Port Hawkesbury, in the application process, explained that it was suffering from economic distress and required the Load Retention Rate:

> Today there can be no doubt of the economic distress faced by the mill and its potential for permanent closure, and thus the need for a load retention rate.[55]

62. The evidence on the record of the countervailing duty investigation demonstrates that NewPage Port Hawkesbury submitted the application to expand the Load Retention Tariff to include companies in economic distress.

63. Furthermore, evidence on the record indicated that expansion of the Load Retention Tariff to companies in economic distress was a precondition for the sale. The prospective buyer, PWCC, indicated that it "would be nearly impossible to generate a profit at the Port Hawkesbury

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[52] NSUARB Decision to Expand LRT, p. 5 of Exhibit NS-EL-21 (Exhibit CAN-27).
[53] NSUARB Decision to Expand LRT, pp. 5-6 of Exhibit NS-EL-21 (Exhibit CAN-27).
[54] NSUARB Decision to Expand LRT, p. 37 of Exhibit NS-EL-21 (Exhibit CAN-27).
[55] NSUARB Decision to Expand LRT, p. 40 of Exhibit NS-EL-21 (Exhibit CAN-27).

mill."[56] Indeed, when the sale to PWCC was approved, the Canadian Broadcasting Corporation reported the following:

> After a year of legal wrangling, the $33-million sale of the former NewPage Port Hawkesbury paper mill to Vancouver-based Pacific West Commercial Corp. was officially sanctioned Thursday by the Nova Scotia Supreme Court. Then later that day, the discount power rate requested by the future owner of the mill was approved by the Utility and Review Board. *Low cost electricity was a pre-condition for the sale.*[57]

64. Likewise, a subsequent third-party analysis stated that the NSUARB's ultimate approval of the LRT for the mill reflected "simply the Board's acceptance . . . that the mill would not be purchased and re-opened without the proposed LRT."[58]

65. Accordingly, the NSUARB decision to expand the Load Retention Tariff to include companies in economic distress addressed the need to provide the mill owner with a lower cost of electricity.

26. Was it in NSPI's best interest to retain the mill as a client? Can both parties cite to evidence on the record to support their answers? How relevant is this fact for the benefit analysis?

66. The United States notes that the NewPage Port Hawkesbury and Bowater Load Retention Rate application proposed a contribution to fixed costs of $2.00 per MWH, which is the contribution to fixed cost under Port Hawkesbury's Load Retention Rate. At the time, the NSUARB stated that "{Nova Scotia Power} confirmed that it considered the adder of $2.00 to be too low."[59]

67. Although the evidence strongly supports the United States on this point, Nova Scotia Power's interest in retaining the mill as a client did not play a role in the selection of a benchmark. As noted, the SCM Agreement calls for a case-by-case analysis of prevailing market conditions. In the Nova Scotia electricity market, there was no evidence that "interest in retaining clients" determined the prices in the prevailing market conditions. Rather, the rates were set by rate class, and were approved by the NSUARB based on a principle of cost recovery.

27. In the context of the concept of "prevailing market conditions" under Article 14(d) of the SCM Agreement, do you agree with the following:

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[56] Petition for the Imposition of Countervailing Duties (February 26, 2015), Volume II, p. II-28 (Exhibit CAN-39).
[57] "Nova Scotia court approves sales of paper mill for $33 million, UARB approves discount power rate," CBC News (Sept. 27, 2012), provided at Petition for the Imposition of Countervailing Duties (February 26, 2015), Exhibit II-43 (emphasis added) (Exhibit USA-16).
[58] "The Contributions of Utilities Regulation to Electricity Systems Transformation: the Case of Nova Scotia," Energy Regulation Quarterly, (Nov. 2014), p. 8 provided at Memorandum to The File from Michael Romani, "Placement of Documents on the Record Relating to Public Utilities" (July 2, 2015) (Exhibit CAN-79); *see id.* at 7-8 (the "LRT was presented as necessary for the completion of the purchase and reopening of the mill").
[59] NSUARB Decision to Expand LRT, p.70 of Exhibit NS-EL-21 (Exhibit CAN-27).

a. That the relevant market is not one characterised by perfect competition, that is, a market in which individual participants have no influence over the market price;

68. Yes, we agree that the market for electricity in Nova Scotia is not characterized by perfect competition. To determine an appropriate benchmark in this market, in the final determination, Commerce considered the methodology used to determine above-the-line rates in Nova Scotia. Notwithstanding the role of the government in the electricity market, Commerce found that the methodology for above-the-line rates was based on market principles, and that above-the-line rates reflected the "prevailing market conditions" for electricity in Nova Scotia.

69. For a longer exposition on this phrase – prevailing market conditions – please see the U.S. response to question 20. In short, Article 14(d) of the SCM Agreement provides that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in the country of provision or purchase." Article 14(d) thus defines the relevant market as "the good or service in question in the country of provision." Accordingly, the determination of an appropriate benchmark requires fact-specific consideration of the "prevailing market conditions" for the provision of that good in the country of provision.

b. That the LRR was negotiated between two private entities, that is, a near monopoly (NSPI) and its largest customer by far (PHP);

70. The characterization in this question does not match the record in the investigation. As explained at length in response to Question 5, the government of Nova Scotia played a key role in the transaction. The entrustment and direction by the government of Nova Scotia included that Nova Scotia Power would provide a below market rate; otherwise, the sale would not have occurred and the mill would have closed.

c. That a key negotiating objective for NSPI was the need to keep the custom of PHP;

71. The record does not support this proposition. Rather, the record shows that the government of Nova Scotia heavily intervened to ensure that the sale would go through and that the mill would remain open.

72. Further, the United States recalls that this proceeding is not a *de novo* review of the analysis, but rather involves a review of whether Commerce provided a reasoned and adequate explanation for its selection of the benchmark.

d. That a rate that at least covers marginal costs of providing the service would reflect prevailing market conditions; and

73. The record does not support this proposition. The determination of whether a rate that covers marginal costs of providing service would be "in relation to prevailing market conditions" would depend on the "prevailing market conditions for the good or service in question in the country of provision."

74. In the underlying countervailing duty investigation, Commerce provided a reasoned and adequate explanation for its finding that above-the-line rates provide for complete cost

recovery,[60] and that above-the-line rates are the predominant rates applied to customers. Indeed, at verification, Commerce found that, during the period of investigation, Port Hawkesbury's Load Retention Rate was Nova Scotia Power's only below-the-line rate utilized by customers.[61] Furthermore, in 2011, the evidentiary record demonstrated that above-the-line rates accounted for greater than 99% of Nova Scotia Power's electricity rates.[62] Accordingly, the prevailing electricity rates in Nova Scotia provided for complete cost recovery.

e. That the discounted rate included a contribution to the fixed costs of NSPI as a benefit to all NSPI customers.

75. The discounted Load Retention Rate paid by Port Hawkesbury included a contribution to fixed costs of $2 per MWh. The record does not support the idea that Port Hawkesbury's contribution amounted to a "benefit" to Nova Scotia Power's customers. Moreover, if Port Hawkesbury wanted to benefit Nova Scotia Power's customers, it would have paid a tariff that covered full costs, *plus* some extra amount. Indeed, it is difficult to see how a rate that failed to cover all costs benefitted other customers. To the contrary, it would seem to be a detriment to other customers paying a rate that covered all costs.

76. The United States also notes that the focus of the benefit analysis under the SCM Agreement is on the *recipient*, and not the provider. The Appellate Body in *US – Carbon Steel (India)* explained that "the adequacy of the 'remuneration' paid in exchange for goods or services is, under Article 14(d), to be examined from the perspective of the recipient, rather than the government provider."[63] In this instance, the government has entrusted or directed Nova Scotia Power to provide electricity to Port Hawkesbury. Accordingly, consistent with the Appellate Body's statement, any speculative benefits received by Nova Scotia Power's customers are not relevant to the analysis of the benefit conferred to Port Hawkesbury.

77. The United States notes that the NewPage Port Hawkesbury and Bowater Load Retention Rate application proposed a contribution to fixed costs of $2.00 per MWh. At the time, the NSUARB stated that "NSPI confirmed that it considered the adder of $2.00 to be too low," and that "it would appear, based on the evidence of {} NewPage, that the adder was not based upon any cost analysis but based on NewPage's judgment as to what it could afford to pay."[64] Commerce did not, however, make any finding on the extent to which the contribution to fixed costs provided a benefit to NSPI's other customers.

28. 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

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60 SC Paper Final I&D Memo, p. 48 (Exhibit CAN-37).

61 *Verification Report: Government of Nova Scotia* (September 2, 2015), p. 19 ("During the {period of investigation}, Port Hawkesbury was the only NSPI rate payer on a below-the-line rate. Although Bowater Mersey was approved for an LRR, it ceased operations before the POI."). (Exhibit CAN-99).

62 Nova Scotia Power 2013 General Rate Application at SR-02, Attachment 1, pp. 27-34 (In 2011, Nova Scotia Power reported to the NSUARB that it had approximately 483,831 electricity customers. Of the total customers, in 2011, it appears that four paid a below-the-line rate, which amounts to less than one percent of Nova Scotia Power's customers) (Exhibit USA-12).

63 *US – Carbon Steel (India) (AB)*, para. 4.128.

64 NSUARB Decision to Expand LRT, p. 70 of Exhibit NS-EL-21 (Exhibit CAN-27).

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.

78. As is the case for the legal propositions espoused by the European Union and Japan, Brazil's legal points do not address the actual analysis conducted by Commerce. As explained in response to question 5, Commerce's finding of entrustment or direction was not based only on the general service obligation to provide electricity that is derived from section 52 of the *Public Utilities Act*. Rather, Commerce also determined that Nova Scotia entrusted or directed Nova Scotia Power to provide electricity to Port Hawkesbury based on Nova Scotia's actions, including through the NSUARB, that led to the provision of electricity to Port Hawkesbury through the Load Retention Rate.

79. Commerce's determination was consistent with the reports discussed in Brazil's oral statement. Commerce's finding of entrustment or direction was not focused on "a government's power, in the abstract,"[65] but rather considered the application of the general service obligation to the particular circumstances of Port Hawkesbury. Indeed, Commerce's analysis of entrustment or direction resembled the analysis contemplated by the panel in *Japan – DRAMS* that an authority is to scrutinize the evidence for "a message of some sort to third parties to the effect that they have the responsibility to take a particular course of action, or must behave in a particular way."[66] Commerce's determination analyzed the general service obligation and carefully considered the actions of Nova Scotia that led to the provision of electricity through the Load Retention Rate. We refer the Panel to the U.S. response to question 5 for a complete discussion of the evidence relied upon in this regard.

29. 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?

80. The accuracy of Japan's statement will depend on the application of a general service obligation in a particular situation.

81. The United States agrees with Japan's statement in paragraph 4 that "whether a private entity acted under the entrustment or direction of the government under Article 1.1(a)(1)(iv) requires a case-by-case analysis." A financial contribution determination must be based on the facts of the proceeding. As explained in response to question 5, Commerce's finding of entrustment or direction was not based only on the general service obligation to provide electricity that is derived from section 52 of the *Public Utilities Act*. Rather, Commerce also determined that Nova Scotia entrusted or directed Nova Scotia Power to provide electricity to Port Hawkesbury based on Nova Scotia's actions, including through the NSUARB, that led to the provision of electricity to Port Hawkesbury through the Load Retention Rate.

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[65] *Korea – Commercial Vessels*, para. 7.392, quoted at Oral Statement of Brazil, para. 5.

[66] *Japan – DRAMS (Korea) (Panel)*, para. 7.104, quoted at Oral Statement of Brazil, para. 6.

30. 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.

82. The Appellate Body's statement in *US – Antidumping and Countervailing Duties (China)* that Japan quoted in its oral statement is consistent with the legal views of the United States and with Commerce's approach in the investigation. The statement is also consistent with the panel's observation in *US – Export Restraints* that "the difference between subparagraphs (i)-(iii) on the one hand, and subparagraph (iv) on the other, has to do with the identity of the actor, and not with the nature of the action."[67] What these statements reinforce, as the United States has explained, is the fact-specific analysis required in a situation of entrustment and direction.

83. In the underlying countervailing duty investigation, the relevant "conduct" or "action" is the provision of electricity. Commerce determined that Nova Scotia entrusted or directed Nova Scotia Power to provide electricity to Port Hawkesbury. As explained in response to question 5, Commerce's finding of entrustment or direction was based in part on the general service obligation to provide electricity that is derived from section 52 of the *Public Utilities Act*. Commerce also determined that Nova Scotia's actions, including through the NSUARB, led to the provision of electricity to Port Hawkesbury through the Load Retention Rate. Commerce's final determination demonstrated a direct link between the government's actions and the provision of electricity.

1.3 Hot Idle Funding

United States

35. (ADVANCE QUESTION 7) At paragraph 125 of its first written submission, the United States asserts that, absent Nova Scotia's financial intervention, NPPH would have been responsible for the second tranche of "hot idle" funds, and that "thus, PWCC received a benefit". At paragraph 128, the United States further defines the benefit as "Nova Scotia's financial support of that sale". At paragraph 131, the United States asserts that the Hot Idle Funding provided by Nova Scotia allowed NPPH to fulfil its obligation to sell the mill to PWCC in "hot idle" status.

a. If NPPH would have been responsible for Hot Idle Funding costs absent Nova Scotia's financial intervention, how does this translate into a benefit for PWCC? In particular, how would NPPH having to pay those costs have impacted beneficially on PWCC?

84. PWCC's bid was offered for the mill as a going concern with the understanding that the current owner would attempt to maintain the mill in hot idle status. There is a major difference between having a bankrupt company try to maintain the hot idle status, and having the province – with essentially unlimited funds – inject additional funds into the transaction for the purpose of maintaining the hot idle status. A significant risk is entailed when a bankrupt company endeavors to maintain a facility in operating status; in contrast, the intervention of the government of Nova Scotia ensured that the mill could be maintained in hot idle status, and thus provided a major benefit to the buyer. And indeed, NPPH could not fulfil its obligations to

[67] *US – Export Restraints*, para. 8.53.

maintain the mill in operating status. Accordingly, PWCC received a benefit in the form of additional, unanticipated financing from Nova Scotia for the mill's continued hot idle status.[68]

85. NPPH could not continue to maintain the mill in hot idle status without additional funding from Nova Scotia. Without the additional funding, NPPH would not have been able to satisfy a necessary condition of the sale – maintaining the mill in hot idle status. And, PWCC would not have been able to purchase the mill in hot idle status but for Nova Scotia's financial contribution. In other words, but for Nova Scotia's intervention, the sale of NPPH as a going concern and in hot idle status would not have occurred.

b. Was the benefit not rather to NPPH and its creditors, since they were able to sell the mill in "hot idle" status, which they would not have been able to do absent Nova Scotia's financial intervention? Please elaborate.

86. The premise of this question perhaps assumes that benefit could accrue to the seller, or the buyer, but not both. There is, however, no basis legally or conceptually for this type of either/or framework. To the contrary, in the case of a non-recurring grant like the one provided by Nova Scotia, the subsidy benefit is allocated over the average useful life of the asset. Accordingly, the benefit normally would extend over time for several years. The question in a subsidy extinguishment analysis is whether that benefit continues to be accounted for after a change of ownership, or whether the change in ownership results in an extinguishment of the subsidy, such that it no longer benefits the recipients. 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.

87. As the United States has explained, in the present case, Nova Scotia injected the funds after the bid price was finalized, and thus the bid price did not reflect the additional government funding. Accordingly, there would be no basis to find that the subsidy was extinguished.

88. One can also consider this issue from a different angle, not in terms of a technical benefit analysis, but rather in terms of how the government subsidy assisted various parties and facilitated the transaction. PWCC was advantaged because the additional, unanticipated financing from Nova Scotia ensured that the mill could be maintained in hot idle status. The grant thus ensured the deal could move forward, and presumably Nova Scotia was thereby advantaged (or else it would not have wanted to enter into the deal in the first place). The record does not indicate whether the seller was advantaged – that is, whether the seller was better off with a going-concern bid versus a liquidation. But regardless, as noted above, there is no basis to view benefit as an either/or proposition. To the contrary, in cases of a non-recurring government grant, allocated over the average useful life of the asset, one might expect that that the initial recipient was benefitted, and that the benefit may carry over to the new owner (depending on whether the change in ownership results in the extinguishment of the remaining, unamortized part of the subsidy). And here, Nova Scotia's intervention to maintain the mill in hot idle status

[68] SC Paper Final I&D Memo, pp. 87-88 (Exhibit CAN-37).

explicitly subsidized the sale to PWCC. Accordingly, these subsidies, provided concurrent with and in facilitation of the mill's sale, benefitted PWCC.

36. (ADVANCE QUESTION 8) Canada asserts at paragraph 132 of its first written submission that the fact that the initial hot-idle funds set aside were insufficient "did not change the value of the business being purchased". Does the United States agree? If not, please explain exactly how the insufficiency of these funds affected the value of the business being purchased.

89. We do not agree. Insufficiency of funds could only be determined in hindsight and it could not have been predicted with complete certainty. At the time of the bid, there was uncertainty as to whether or not the mill could be maintained in hot idle status by the seller, which was bankrupt. This uncertainty would affect the amount the buyer was willing to offer. After the bid, the Province stepped in and provided additional funds, which ensured that the mill could be kept in hot idle status, and thus, made the asset more valuable to the purchaser.

90. The issue is whether the bid and sales prices reflected and incorporated the funds provided by Nova Scotia to maintain the mill in hot idle status. The final bid price that PWCC submitted could not have accounted for the hot idle funds because those funds were approved and provided after the submission of the bid. The bid and sale price for the purchase of the mill in hot idle status was C$33 million[69]; however, it actually cost [[ ]] to keep the mill ready for sale as a going concern. NPPH initially contributed C$22 million and, after PWCC's bid was accepted, the Province contributed [[ ]] of hot idle funds[70] and an additional C$12 million for the forestry infrastructure funds.[71]

91. Thus, the value of an operational mill was [[ ]] of which the government of Nova Scotia contributed a total of [[ ]] to NPPH – a dollar amount that [[ ]] PWCC's C$33 million bid and purchase price.

37. [[

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92. The United States is alleging that PWCC's $C33 million bid and sale price did not account for [[ ]] of hot idle funds and forestry infrastructure funding provided by Nova Scotia. Nova Scotia provided [[ ]][72] to keep the mill in hot idle status, and C$12 million to maintain NPPH's ongoing forestry operations and its supply chain during the bankruptcy process.[73]

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[69] SC Paper Final I&D Memo, pp. 18 and 40, n. 233 (Exhibit CAN-37).
[70] *Verification Report: Government of Nova Scotia* (September 2, 2015), p. 5 (Exhibit USA-14) (BCI).
[71] *Verification Report: Government of Nova Scotia* (September 2, 2015), p. 10 (Exhibit USA-14) (BCI).
[72] The [[ ]] hot idle funds were bestowed in two tranches: [[ ]] and [[ ]]. *Verification Report: Government of Nova Scotia* (September 2, 2015), p. 5 (Exhibit USA-14) (BCI).
[73] The forestry infrastructure grant totaled C$26 million and was bestowed in two tranches: C$14 million and C$12 million. Commerce determined that the first tranche of funding, $14 million, was reflected in PWCC's bid and sale price. However, Commerce determined that the C$12million tranche of funding was not reflected in the final transaction price. The C$12 million figure cited above does not include the C$14 million tranche of funding. *See* SC

1.4 Forestry Infrastructure Funding (FIF)

United States

41. The United States asserts at paragraph 118 of its first written submission that NPPH would have been responsible for FIF costs absent Nova Scotia's financial intervention.

a. Once it entered into the CCAA process, was NPPH required to undertake FIF activities pending the sale?

93. The question of whether or not NPPH was required to undertake forestry activities was not the focus of the investigation, nor should it have been. Rather, the issue was whether there was a grant to NPPH, and whether that benefit from that grant was extinguished by the sale.

94. Although whether or not the seller was required to undertake forestry operations is not pertinent to the subsidy analysis, the United States notes that the record supports the contention that it was necessary for NPPH to maintain forestry activities. PWCC's bid, which NPPH accepted, was for a mill maintained as a "going concern," and the ongoing forestry operations were a part of maintaining it as such.[74]

95. The FIF arose from a Forestry Infrastructure Agreement (FIA) established between NPPH and Nova Scotia to maintain the company's ongoing forestry operations and the supply chain of NPPH during the bankruptcy process.[75] As the Verification Report of Nova Scotia demonstrates, the FIF arose in the context of the NPPH mill closure, which would have interrupted NPPH's forestry operations on both Crown lands where it was licensed to harvest and on its private lands.[76] The FIF was implemented to enable the forestry operations to continue during the bankruptcy process and not interrupt the supply chain operations. The Nova Scotia officials characterized the FIF as follows during verification:

> [[
>
>]] This caused great concern among provincial government authorities about the best way to continue to use provincial forestry assets in a province that is three-quarters forested. Additionally, according to the DNR officials, there was a recognition both that the contractors and crews who work in the forests are the backbone of this activity and that an interruption in the forestry work would have a negative impact on the condition and the value of the forestry assets….because the CCAA process had begun at the time, the FIA required the approval of the Nova Scotia Supreme Court, and that as a requirement of the CCAA process, the FIA had to be cost neutral to NPPH.[77]

Paper Final I&D Memo, pp. 90-91 (Exhibit CAN-37); *Verification Report: Government of Nova Scotia* (September 2, 2015), pp. 9-10 (Exhibit USA-14) (BCI).

74 SC Paper Final I&D Memo, pp. 92-93 (Exhibit CAN-37).

75 SC Paper Final I&D Memo, pp. 21, 91 (Exhibit CAN-37).

76 *Verification Report: Government of Nova Scotia* (September 2, 2015), p. 9 (Exhibit USA-14) (BCI).

77 *Verification Report: Government of Nova Scotia* (September 2, 2015), p. 9 (Exhibit USA-14) (BCI).

b. If NPPH would otherwise have been responsible for FIF costs, how does this translate into a benefit for PWCC?

96. The record demonstrates that NPPH was unable to support its ongoing forestry operations at the mill and needed the intervention of Nova Scotia to do so. These forestry operations were in essence the supply chain for the mill. Accordingly, the continued conduct of forestry operations helped maintain the mill as a "going concern" for a potential buyer.

97. Turning to the extinguishment analysis, the second set of funding under the forestry grant was not reflected in the purchase price, and thus the benefit was not extinguished by the change of ownership of the mill. Because the value of the second tranche of funding under the FIF was bestowed after PWCC's bid was finalized, the government funding was not fully reflected in PWCC's transaction price. Accordingly, PWCC benefited by receiving the value of the second FIF grant ($C14 million) in its purchase of the mill.[78]

Both parties

42. (ADVANCE QUESTION 10) Did PWCC's bid contain any stipulations regarding the conduct of forestry activities eventually covered by the FIF? For example, was the conduct of these activities a condition for the acquisition of the Port Hawkesbury mill as a going concern?

98. As noted above, whether the forestry operations were required to be completed by NPPH is not pertinent to the subsidy analysis – a grant confers a subsidy, whether or not the activity supported by the grant involves a duty of the grant recipient. Accordingly, this issue was not a focus of the investigation.

99. Nonetheless, the record does not indicate that PWCC made forestry activities a specific condition of its bid. However, PWCC's bid did propose to maintain the mill as a "going concern," and the implementation of the FIF allowed the forestry operations to continue.[79] Evidence on the record indicates that without the FIF, NPPH would have been unable to continue its forestry operations, and that the bankruptcy proceeding directly impacted these activities. When it became clear that NPPH was ceasing production, Nova Scotia negotiated the FIA, 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.[80] All of these activities contributed to the sale of NPPH as a "going concern" to PWCC.

1.5 Stumpage and Biomass

United States

46. The United States asserts at paragraph 144 of its first written submission that the FULA "indicates the existence of a distorted market for pulpwood which is not based on market

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[78] SC Paper Final I&D Memo, p. 23 (Exhibit CAN-37).

[79] SC Paper Final I&D Memo, pp. 21, 91 (Exhibit CAN-37).

[80] *Verification Report: Government of Nova Scotia* (September 2, 2015), p. 9 (Exhibit USA-14) (BCI).

principles". The United States does not appear to provide any citation for this assertion. Was this the determination actually made by the USDOC? If so, where is that determination set forth?

100. Yes, Commerce determined that there was adequate information in the petition to support an investigation of the existence of a distorted market for pulpwood which is not based on market principles.

101. At the initiation stage, Commerce prepares a public notice announcing the investigation and an initiation checklist[81] that is placed on the record of the investigation. The initiation checklist is more detailed than the initial public notice. In that document, 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.[82]

102. Furthermore, Commerce explained that the petitioner provided information to determine benefit that was reasonably available to it. In its initiation, Commerce said that the petitioner "was unable to locate the stumpage prices actually paid by {Port Hawkesbury} for stumpage rights because {Nova Scotia} has redacted this information from public documents."[83] Commerce went on to explain that "while the petitioner states it was able to obtain the FULA between {Port Hawkesbury} and {Nova Scotia}, {Nova Scotia}, however, redacted from this document the details of the prices it charges for public resources."[84]

103. In light of the available evidence, Commerce stated that it would evaluate "the prevailing market conditions for stumpage and biomass purchased…in relation to the conditions otherwise available."[85] Accordingly, Commerce's initiation concluded that, based on the evidence reasonably available to the petitioner indicating a restricted market for stumpage and biomass, it would be necessary to analyze the existence of prevailing market conditions for the provision of stumpage and biomass.

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81 SC Paper Initiation Checklist (Exhibit CAN-40).
82 SC Paper Initiation Checklist, pp. 18-19 (Exhibit CAN-40).
83 SC Paper Initiation Checklist, p. 18 (Exhibit CAN-40).
84 SC Paper Initiation Checklist, p. 18 (Exhibit CAN-40).
85 SC Paper Initiation Checklist, p. 18 (Exhibit CAN-40).

2 RESOLUTE

2.1 "Other forms of Assistance" question/ Discovered Programmes

United States

52. (ADVANCE QUESTION 11) Did the USDOC self-initiate an investigation into the Discovered Programmes? If so, was there any formal instrument to this effect?

104. As explained in footnote 245 of the U.S. first written submission, Commerce did not self-initiate an investigation; the initiation of an investigation into the potential subsidization of SC Paper was based on a written application.[86]

53. At paragraph 11 of its first written submission, the United States submits that the USDOC "determined to investigate 28 of the 29 programs". This statement appears to reflect the USDOC's Notice of Initiation (Exhibit CAN-96), which refers to there being sufficient evidence in the petition to "initiate a CVD investigation of 28 of the 29 alleged programs".

a. Are these references to an investigation into 28 of the 29 programmes covered by the petition consistent with the United States' argument, at paragraph 148 of its first written submission, that the scope of the investigation was not limited to those programmes?

105. Yes. As explained in the U.S. first written submission, 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.[87] Moreover, Article 11 does not require that investigations examining subsidized imports that are causing injury be limited to programs included in the petition. Rather, the investigating authorities must determine whether the imported product is benefiting from subsidization causing injury. Reviewing potential subsidization of a product may entail a consideration of any and all programs that benefit the product, including programs not explicitly listed in the petition.[88]

106. The United States initiated an investigation into the potential subsidization of SC Paper, which included, but was not limited to the 28 programs identified in the petition. The purpose of a CVD investigation is to determine whether certain products are being impermissibly subsidized.[89] It is important to note that there is a distinction between having sufficient evidence to initiate an investigation into the potential subsidization of a product and having sufficient evidence to assess countervailing duties.

107. Thus, the purpose of an investigation is for an investigating authority to discover the extent of 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

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[86] U.S. First Written Submission, fn. 245.
[87] U.S. First Written Submission, paras. 159-163.
[88] U.S. First Written Submission, para. 165.
[89] U.S. First Written Submission, paras. 164-65.

in the written application, those programs focus, but do not limit, the inquiry of the investigating authority in determining the extent of subsidization to a product.

b. Is there any language in the Notice of Initiation indicating that the investigation may cover additional programmes? Please explain.

108. Yes, the Notice of Initiation stated that Commerce was "initiating a CVD investigation to determine whether manufacturers, producers, or exporters of SC Paper from Canada receive countervailable subsidies from the GOC and the certain Canadian provincial governments."[90] The Notice of Initiation thus was clear that Commerce was initiating an investigation to determine the extent of the subsidization to manufactures, producers, and/or exporters of SC Paper. Commerce began its investigation by examining 28 programs identified by the petitioners; however, nowhere in the Notice of Initiation did Commerce indicate that its investigation into the potential subsidization of SC Paper was solely limited to the 28 programs. The absence of limiting language in the notice of initiation further supports that the investigation covered the subsidization of the SC Paper industry.

109. In contrast, the Notice of Initiation did limit the type of product that was under investigation. The Notice of Initiation stated that the scope of the investigation was limited to SC Paper from Canada and specifically excluded imports of paper printed with final content of printed text or graphics.[91]

54. Did the USDOC inform, in any way, Canada and Resolute that their responses on the "other forms of assistance" question were not adequate or complete? Did the United States give any opportunity to Canada and Resolute to correct or complete their responses? Please elaborate.

110. On its face, Resolute's response – a flat denial of other forms of assistance – was complete. Thus, there was no basis for any follow up question during the main investigatory phase. It turned out, however, that the answer was not true. And, Canada does not dispute that the answer was untrue: other government assistance **was** provided, and was clearly marked as such in the records of the respondent.

111. More specifically, 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."[92] Therefore, at that point in time, there was no basis in the record for Commerce to question the completeness of Resolute's answer, and further, there was no indication, in the government of Canada's questionnaire response, 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.

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90 SC Paper Initiation Notice (Exhibit CAN-96).

91 SC Paper Initiation Notice, Appendix 1 (Exhibit CAN-96).

92 *Supercalendered Paper from Canada: Resolute's Section III Questionnaire Response* (May 27, 2015), pp. 32-33 (Exhibit CAN-41) (BCI).

112. Furthermore, Commerce did permit Canada and Resolute to correct their responses to the initial questionnaire. Five days prior to the issuance of the preliminary determination, Canada and Resolute submitted "revised" and "supplemental" responses, respectively, disclosing to Commerce that Resolute's subsidiary, Fibrek, had received assistance through FPPGTP. Despite the information being otherwise untimely under Commerce's regulations, Commerce determined that there was "good cause" to accept the corrected responses from both Canada and Resolute.[93]

113. 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. In verifying the completeness of Resolute's responses, which included reviewing company records to establish the accuracy of the company's reported non-use of subsidy programs, Commerce discovered that there were four subsidy accounts that Resolute had failed to disclose to Commerce. Commerce recorded the name of the accounts, and also accepted an explanation of the purpose of each account.[94]

55. The United States appears to accept that, in order for a programme to be explicitly covered by the Notice of Initiation, the investigating authority must establish that there is sufficient evidence of a specific subsidy to justify initiation of an investigation into that programme:

a. Is this a correct understanding of the United States' position? If not, please explain.

114. No, that is not the U.S. position. Rather, the United States understands that in order to initiate an investigation into the potential subsidization of a product, the investigating authority must establish that there is sufficient evidence of a subsidy. The purpose of an investigation is to determine the level of subsidization of a particular product. Before an investigating authority initiates an investigation, there must be some evidence that the product under investigation is being subsidized; however, the investigating authority is not required to include an exhaustive list of the subsidies it will examine. Neither does the list of programs provided in the initiation notice constitute a limitation on the investigation. As explained in our first written submission, this understanding is consistent with the text of Article 11 of the SCM Agreement, as well as the purpose of CVD investigations.

115. Programs identified in the notice of initiation serve as illustrative examples of the potential subsidization of the product under investigation. Once the investigation is initiated, the investigating authority will determine the extent of the subsidization by asking questions about both the programs listed in the notice of initiation and about other forms of assistance received that may constitute a countervailable subsidy. In order to determine the extent of the subsidization of a product, it is important for an investigating authority to be able to examine other forms of governmental assistance provided.

116. Of particular note is what Article 11 does not require. Article 11 does not require that investigations examining subsidized imports that are causing injury be limited to programs included in the petition. Rather, the text of the SCM Agreement is clear that the investigating

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93 SC Paper Final I&D Memo, p. 11 (Exhibit CAN-37).

94 *Verification of the Questionnaire Responses of Resolute FP Canada Inc.* (August 27, 2015), p. 8 (Exhibit CAN-47) (BCI).

authorities must determine whether the imported product is benefiting from subsidization causing injury. Reviewing potential subsidization of a product may entail a consideration of any and all programs that benefit the product, including programs not explicitly listed in the petition.

117. Furthermore, it is important to note that what is sufficient to justify initiating an investigation is different from what is sufficient to make a final determination. As the panel in *US – Softwood Lumber V* correctly stated, "the quantity and quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination."[95]

b. If so, what is the purpose of the disciplines set forth in Articles 11.2 and 11.3 of the SCM Agreement if an investigating authority could in any event include a broad range of potential programmes in the scope of its investigation through the use of a broadly worded request for information pertaining to other potential governmental assistance?

118. The purpose of the disciplines set forth in Articles 11.2 and 11.3 of the SCM Agreement is to ensure that the investigating authority has sufficient evidence to demonstrate that a particular product is being subsidized. During the course of the investigation, the investigating authority will then determine the extent of the subsidization. To ensure that the investigating authority has a complete understanding of the alleged subsidization, it is important to ask questions pertaining to other forms of governmental assistance.

119. Articles 11.2 and 11.3 of the SCM Agreement speak to the accuracy and adequacy of the evidence provided to justify the initiation of the investigation in light of the information reasonably available to the applicant. It requires investigating authorities to review the accuracy and adequacy of the evidence to determine whether it is "sufficient" to justify initiation. Nowhere in Articles 11.2 and 11.3 is there a requirement to articulate by name all programs it will examine during the course of the investigation. As explained in the answer to the preceding question, the text of Article 11 simply requires that the investigating authority have sufficient evidence of a subsidy before initiating an investigation into the potential subsidization of a product.

120. Provided that there is sufficient evidence of at least one subsidy related to the product under investigation an investigating authority may initiate an investigation pursuant to Article 11 of the SCM Agreement. It is important to keep in mind that what is sufficient to justify initiating an investigation is different from what is sufficient to make a final determination on the countervailablity of subsidies provided to the product.

c. In particular, why would a petitioner not simply provide sufficient evidence to justify the investigation of a single programme, with the investigating authority then asking exporters whether they also benefit from any other programs?

121. A petitioner has strong incentives to identify as many relevant subsidy programs as possible in order to increase the likelihood that the investigating authority captures the full extent

[95] *US – Softwood Lumber V (Panel)*, para. 7.84.

of the subsidization of the product. Without petitioners identifying specific subsidy programs, an investigating authority may not discover all assistance a particular manufacturer, producer, or exporter of a product receives.

56. If the petition had contained information concerning the Discovered Programmes, but the USDOC had determined that the information was not sufficient to justify initiation of an investigation, would the USDOC have been able to proceed in the manner that it did concerning those Discovered Programmes (in terms of using facts available to determine an amount of subsidization)?

122. This question involves a hypothetical situation, describing events that did not occur in the investigation. Furthermore, any use of facts available requires a close examination of the factual record, which necessarily is not available with respect to a hypothetical. Accordingly, the United States is not in a position to give a definitive response to what Commerce may or may not determine in the hypothetical situation presented by this question.

123. Nonetheless, the United States has some observations that may be of assistance. To recall, Article 12. 7 of the SCM Agreement permits an investigating authority to use facts available to fill in necessary information that a respondent has failed to provide. Where an investigating authority requests necessary information and a respondent fails to provide the necessary information, an investigating authority may use facts available to fill in the missing information.

124. In this type of hypothetical situation, it is possible that Commerce may not have used facts available for the discovered program provided the program was initially identified in the original petition and Commerce declined to initiate on that program. The purpose of the "any other forms of assistance question" is to obtain information on any additional subsidy programs, other than those alleged in the petition. Thus, had the "Discovered Programmes" been contained within the petition and Commerce determined not to initiate upon them, then Commerce would have already concluded that there was insufficient evidence of the existence of that particular subsidy.

125. In contrast, in the investigation at issue, Commerce determined to use facts available in this case after the respondent failed to answer a question pertaining to any other forms of assistance and Commerce discovered programs not previously disclosed as requested by the "any other forms of assistance" question. Simply failing to answer the question would not have been sufficient justification for Commerce's use of facts available. Rather, Commerce also in fact discovered subsidies during the course of the investigation that should have been disclosed.

57. Canada states in paragraph 282 of its first written submission that the USDOC asserted that there was no evidence indicating that the purchase of Fibrek was at arm's length and for fair market value, but that this assertion ignores the fact that, *inter alia*, Quebec and Resolute had reported this acquisition in their questionnaire responses and provided Securities and Exchange Commission reports, and a Quebec Court of Appeal decision that included details on the hostile takeover:

a. If the USDOC's decision was based on lack of information, what kind of additional information would have allowed the USDOC to make an affirmative decision?

126. As an initial matter, Commerce's determination was not based solely on a lack of information. Resolute's references to a "hostile takeover" in its questionnaire responses were nothing more than assertions, without additional explanation or references to record evidence.[96] Commerce made an affirmative finding that the evidence on the record did not support a finding of extinguishment. Resolute failed to explain how the negotiation of the purchase price for Fibrek might reflect the value of the subsidies. Similarly, Resolute's mere contentions in its administrative case brief [97] do not demonstrate that the purchase by Resolute of Fibrek extinguished prior subsidies to Fibrek based on an arm's length transaction at fair market value. Accordingly, Commerce concluded in its final determination that, although "an examination of Fibrek's and Resolute's accounting records may be relevant to evaluating" whether the subsidy benefits received by Fibrek were extinguished, such records were "not a determining factor" to the threshold question of whether "a sale is made at an arm's-length price and for fair market value."[98] Neither did the accounting records themselves address the questions regarding the transparency, to potential purchasers of Fibrek, of the subsidy benefits provided to Fibrek.

127. Although the specific information required for Commerce's extinguishment analysis varies from case to case and depends on the nature of the subsidy and the details of the transaction at issue, Commerce as a general matter would have needed information and a specific explanation from Resolute that the timing, transparency, and value of its bid for Fibrek extinguished any subsidy benefits. In addition to information concerning whether the purchase price was at fair market value and whether the purchase was at arm's length, other pertinent information would include when the subsidies were bestowed relative to the date of the bid and/or sale of the asset and whether the nature and value of the subsidies were fully transparent to potential purchasers and thereby reflected in the purchase price. Because it was not clear what subsidies were received by Fibrek until late in the investigation, and because the record did not demonstrate that Resolute's alleged "hostile takeover" of Fibrek reflected the value of the subsidy benefits Fibrek received, it was unable to accept Resolute's contention that the subsidy benefit was extinguished.

b. Did the USDOC try to obtain the additional information from Canada or Resolute?

128. Commerce was not in a position to request additional information about the acquisition of Fibrek because Resolute failed in its initial questionnaire response to provide **any information** on the subsidy that Fibrek had received. Rather, Resolute did not report this subsidy until just five days prior to the preliminary determination, when Resolute made a late, unsolicited submission of additional subsidies it had received.[99]

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[96] *Supercalendered Paper from Canada: Resolute's Section III Questionnaire Response* (May 27, 2015), p. 3 (Exhibit CAN-41) (BCI).

[97] *Supercalendered Paper from Canada: Resolute's Case Brief* (September 14, 2015), p. 65 (Exhibit USA-5).

[98] SC Paper Final I&D Memo, p. 165 (Exhibit CAN-37).

[99] *Supercalendered Paper from Canada: Resolute's Supplemental Response to Questionnaire (July 22, 2015)* (Exhibit CAN-45) (BCI).

129. Accordingly, at the time of the preliminary determination, Commerce had just learned of the subsidy to Fibrek, and the only record information regarding the acquisition was Resolute's conclusory assertion that it had acquired Fibrek in a "hostile takeover." In the initial questionnaire to Resolute, Commerce requested a complete "discussion" of all changes in ownership.[100] Resolute failed to provide a complete discussion of all changes in ownership.[101]

130. In sum, because the information was not known until such time that Resolute reported subsidies for Fibrek, Commerce did not initially request additional information on Resolute's acquisition of Fibrek.

Both parties

58. What is your understanding of the concept of "hostile takeover"? Would you agree that a hostile takeover involves acquisition of shares at prices above market prices?

131. The term "hostile takeover" is not used in the SCM Agreement, nor is it contained in U.S. countervailing duty laws or regulations. Furthermore, the record in the investigation does not provide a definition of "hostile takeover," and Resolute did not define this term in its questionnaire responses. Accordingly, one cannot conclude that Resolute's assertion that a "hostile takeover" occurred requires, or even supports, a finding that any such transaction extinguished subsidy benefits. Rather, as the United States has noted, the issue of extinguishment requires a close review of the complete factual record.

132. The pertinent question before Commerce was whether the final transaction price reflected the full value of any subsidies received. An investigating authority cannot assume that an acquisition price of a company via a hostile takeover or friendly takeover fully reflect any subsidies received. Resolute's response to Commerce's request for information about cross-ownership was a mere characterization of the transaction as a hostile takeover without additional explanation of how the price Resolute paid for Fibrek might reflect the value of any subsidy benefits received. Even if Commerce had accepted Resolute's characterization of the transaction as a "hostile" takeover, Resolute made no effort to demonstrate how a "hostile takeover" would affect the benefit analysis for certain subsidies.

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[100] *Supercalendered Paper from Canada: Countervailing Duty (CVD) Questionnaire (April 6, 2015)*, Section III, n. 1 (Exhibit USA-17).

[101] *Supercalendered Paper from Canada: Resolute's Section III Questionnaire Response* (May 27, 2015), p. 4 (Exhibit CAN-41).

59. Article 22.2(iii) of the SCM Agreement requires that the public notice of initiation shall include "a description of the subsidy practice or practices to be investigated Is this requirement to describe *ex ante* the subsidies to be investigated consistent with the notion that the scope of an original investigation is sufficiently broad to cover new subsidies discovered during verification? Please explain.

133. As an initial matter, the United States notes that Canada did not claim a breach of Article 22.2 of the SCM Agreement. Accordingly, any such claim is not within the Panel's terms of reference.[102]

134. Despite the fact that an alleged breach of Article 22.2 is not a claim made by Canada and is not within the Panel's terms of reference, the United States will nevertheless address the question in order to be of assistance to the Panel. Article 22.2(iii) of the SCM Agreement requires a description of the subsidy practice or practices to be investigated, not "programs." While the usage of the term "practice" in this context is not defined by the SCM Agreement, the United States notes that the text of Article 22.2(iii) does not use the term "programs." Given the absence of the term "programs," Article 22.2(iii) does not require a description of specific subsidy programs to be investigated, but rather a subsidy practice.

135. In this case, the subsidy practice to be investigated, as referenced in Article 22.2(iii), is the potential subsidization of SC Paper. This description is consistent with the fact that Commerce initiated an investigation into the potential subsidization of SC Paper. In other words, the subsidy practice at issue was the potential subsidization of SC Paper, and was not necessarily limited to individual subsidy programs.

2.2 FPPGTP, FSPS, NIER

Both Parties

60. Are investigating authorities required to trace specific benefits from receipt to the moment of actual use with respect to the subsidised good? Please elaborate with reference to specific provisions of the Covered Agreements.

136. No, the SCM Agreement does not require an investigating authority to trace specific benefits from receipt to the moment of actual use. In determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, the facts relating to the granting authority's *bestowal* of the subsidy are a key consideration.

137. Article VI:3 of the GATT 1994 and footnote 36 of the SCM Agreement specify that countervailing duties are intended to offset subsidies that have been "bestowed," directly or indirectly, on the manufacture, production, or export of a product. Thus, it would be appropriate

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[102] *India – Patents (US) (AB)*, paras. 89-90 (finding that where a panel request fails to specify a claim, such claim will not form part of the panel's terms of reference); *Chile – Price Band System (AB)*, para. 173 (finding that the Panel had exceeded its mandate and thus acted inconsistently with Article 11 of the DSU when it made a finding on a claim that was not made by Argentina).

for a Member to calculate and impose duties based on an analysis of the subsidy at the time of bestowal.

138. The Appellate Body has recognized that Article 3.1 of the SCM Agreement provides context that supports this interpretation.[103] Article 3.1 prohibits subsidies that are contingent, in law or fact, upon export performance. Footnote 4 explains, in turn, that a subsidy is contingent "in fact" on export performance when "the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings."

139. As the Appellate Body has observed, the phrase "granting of a subsidy" in footnote 4 focuses on "whether the *granting authority* imposed a condition based on export performance in providing the subsidy."[104] Likewise, the relevant meaning of the word "tie" is to "limit or restrict as to…conditions."[105] *De facto* export contingency thus requires the granting Member to impose a condition and must be assessed based on "an examination of the measure granting the subsidy and the facts surrounding the granting of the subsidy, including the design, structure, and modalities of operation of the measure."[106]

140. The Appellate Body has recognized on multiple occasions that the existence or absence of a "tie" is not based on the actual use of the subsidy:

> In setting out this test, we do not suggest that the issue as to whether the granting of a subsidy is in fact tied to anticipated exportation could be based on an assessment of the actual effects of that subsidy. Rather, we emphasize that *it must be assessed on the basis of the information available to the granting authority at the time the subsidy is granted.*[107]

141. These provisions provide context and lend additional support for an approach that considers that a grant of a subsidy is "tied" to a product "on the basis of information available to the granting authority at the time the subsidy is granted."[108]

142. Recently, the Appellate Body again recognized that the covered agreements do not require an investigating authority to trace benefits to the moment of actual use. In *US – Washing Machines*, the Appellate Body emphasized an investigating authority's need to assess the subsidy at the time of bestowal: "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 product concerned."[109] The Appellate Body went on to explain that "in conducting such an assessment, an investigating authority must examine the design, structure, and operation of the

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[103] *US – Washing Machines (AB)*, para. 5.270, fn. 603.
[104] *Canada – Aircraft (AB)*, para. 170 (emphasis in original).
[105] *Canada – Aircraft (AB)*, para. 171.
[106] *EC – Large Civil Aircraft (AB)*, para. 1056.
[107] *EC – Large Civil Aircraft (AB)*, para. 1049 (emphasis added).
[108] *EC – Large Civil Aircraft (AB)*, para. 1049.
[109] *US – Washing Machines (AB)*, para. 5.270.

measure *granting* the subsidy at issue and take into account all the relevant facts surrounding the *granting* of that subsidy."[110]

143. The Appellate Body's interpretation of Article VI:3 of the GATT 1994 is consistent with an understanding that an authority may appropriately consider the subsidy at the time of granting or bestowal, and that the SCM Agreement does not impose an obligation to trace the subsidy to the moment of actual use.

[110] *US – Washing Machines (AB)*, para. 5.270 (emphasis added).

3 CATALYST AND IRVING

3.1 "All others" rate

United States

64. (ADVANCE QUESTION 14) In *US – Hot Rolled Steel*, the Appellate Body, in the context of the Anti-dumping Agreement, found that a methodology for calculating "all others" rate that included margins established in part using facts available was inconsistent with Article 9.4 of that Agreement.[111] Would this jurisprudence also be relevant to the calculation of the "all others" rate in the context of the SCM Agreement? Please elaborate.

144. The Appellate Body's finding in *US – Hot-Rolled Steel* is not relevant to Canada's claim under the SCM Agreement.

145. Article 3.2 of the DSU requires the Panel to apply the customary rules of treaty interpretation, under which a treaty is to be interpreted in accordance with the ordinary meaning of the terms in their context and in light of its object and purpose. The Appellate Body's findings in *US – Hot-Rolled Steel* are based on the ordinary meaning of the terms in their context of *Article 9.4 of the Anti-Dumping Agreement*.

146. This fact is evident from a review of the Appellate Body's report. The Appellate Body's interpretation is based on the terms of Article 9.4, which make reference to Articles 6.8 and 6.10 of the Anti-Dumping Agreement. In its analysis, the Appellate Body defines a number of terms and phrases that appear in the text of Article 9.4, including "margins," "circumstances," and "established." These terms and others, in addition to the context provided by Articles 6.10 and 6.8 of the Anti-Dumping Agreement, formed the basis for the Appellate Body's interpretation of Article 9.4.

147. The SCM Agreement has no provision that is analogous to Article 9.4 of the Anti-Dumping Agreement. The panel in *China – Autos* recognized this difference between the two agreements, observing that "there is no equivalent to Articles 6.10 and 9.4 of the Anti-Dumping Agreement in the SCM Agreement."[112] The SCM Agreement does not contain a provision that disciplines the calculation of an all others rate in the manner prescribed by Article 9.4 of the Anti-Dumping Agreement.

148. Thus, the interpretive analysis undertaken by the Appellate Body in *US – Hot-Rolled Steel* has no bearing on the SCM Agreement. As the Appellate Body has found, "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning.'"[113]

65. Can the United States comment on paragraph 178 of Canada's opening statement and slides 59-60 of Canada's presentation?

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[111] *US – Hot Rolled Steel (AB)*, paras. 111-130.
[112] *China – Autos (US)*, para. 7.97.
[113] *US – Carbon Steel (AB)*, para. 65.

149. In paragraph 178 of Canada's opening statement and in slides 59-60 of Canada's presentation, Canada argues that Commerce's specificity finding for "each and every program PHP allegedly benefitted from"[114] necessarily precludes the possibility that Catalyst or Irving benefitted from these programs. Canada seems to suggest that where an authority has made a company-specific finding of specificity for a subsidy program, the subsidy rate for that program cannot be included in the calculation of a countervailing duty rate for non-investigated companies.

150. As an initial matter, Canada has not identified an obligation in the SCM Agreement that imposes the requirement asserted by Canada. The SCM Agreement does not contain provisions that impose limits on an investigating authority's methodology to calculate a countervailing duty rate for non-investigated companies. Rather, per Article 11 of the DSU, the Panel should "review whether {Commerce} provided a reasoned and adequate explanation as to (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination."[115]

151. Furthermore, Canada's argument confuses the purpose of an all others rate. Commerce limited its examination in this investigation to two companies, a decision not challenged by Canada. In calculating a rate for non-investigated companies, an authority is to rely on the calculated countervailing duty rates of the investigated companies. The experiences of the investigated companies are considered to be *representative* of producers of the subject merchandise in the country of production. In that sense, it is irrelevant to the calculation that a specificity determination may suggest that eligibility for a particular subsidy is limited to a particular company.

152. Canada's argument that the all others rate is not reflective of the experience of Catalyst and Irving assumes the conclusion, and has no support in the record of the investigation. To the extent that certain subsidies may be available only to investigated respondents, it is equally possible that other subsidy programs may similarly be limited only to non-investigated respondents.

153. An authority is required to make a determination based on the record evidence. In this investigation, the record demonstrated a particular level of subsidization for the two investigated companies. Based on the record, that level of subsidization is representative of the experience of producers of supercalendered paper in Canada. Accordingly, Commerce's decision to use 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 that was supported by evidence on the record and consistent with the SCM Agreement.

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[114] First Oral Statement of Canada, para. 178.

[115] *China – Broiler Products*, para. 7.4.

Both Parties

66. In paragraph 9 of its oral statement, India argues that "it is an established principle that Article 12.7 does not permit 'selection' of facts that lead to the *least favourable outcome*." In paragraph 4 of its oral statement, China contends that "[b]y simply selecting the highest rate among all so-called 'similar programs' the USDOC appears to have chosen the fact in the most adverse interest of the respondent." Please comment.

154. These statements by India and China concern Canada's claims regarding subsidies discovered at Resolute's verification. Furthermore, there is no evidence on the record of the countervailing duty investigation to support these statements. In theory, Commerce could have selected a higher rate that would be more adverse to the respondent; instead, Commerce selected a rate that was supported by record evidence.

155. With respect to the calculation of an all others rate, neither Canada nor any third parties have identified a provision of the SCM Agreement that would limit the use of facts available to determine an appropriate all others rate. The United States observes that this lack of prescription is to be contrasted with Article 9.4 of the Anti-Dumping Agreement, which specifically contemplates circumstances in which an authority relies on facts available to calculate an antidumping margin. Here, the SCM Agreement does not similarly prescribe an authority's calculation of an all others rate.[116]

3.2 Expedited Review

Both Parties

67. (ADVANCE QUESTION 15) What is the purpose of an expedited review?

156. Article 19.3 of the SCM Agreement expressly requires Members to grant an expedited review to those exporters that were not individually investigated who have requested such a review to establish an individual countervailing duty rate for that exporter. The purpose of an expedited review is to allow the manufacturers, producers, and exporters of the subject merchandise who were not selected as mandatory respondents to receive an individual CVD rate at an earlier point in the administrative process (*i.e.*, prior to the completion of the first administrative review after the issuance of a countervailing duty order). As the name implies, Commerce will make its decision regarding the individual rates sooner than it does in a normal review.

157. In this proceeding, Irving and Catalyst were able to request an expedited review of their imports shortly after the countervailing duty order was issued, and they will receive their individual CVD rates in April 2017, before the completion of the first administrative review of the countervailing duty order, which was initiated in February 2017.

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116 *US – Carbon Steel (AB)*, para. 65.

68. (ADVANCE QUESTION 16) Do you consider that the scope of an expedited review is circumscribed to subsidy programmes or to products whose production is allegedly benefiting from those programmes?

158. The scope of an expedited review is limited to the particular product under investigation. 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.

69. Is the scope of an expedited review circumscribed to the subsidy programmes identified in the original petition?

159. No. The scope of the expedited review is limited to an examination into the potential subsidization of the product identified in the original petition, not the programs. The expedited review can include, but is not limited to, an examination of programs included in the original petition. The text of Article 19.3 does not limit the scope of an expedited review to subsidy programs identified in the original petition. Article 19.3 provides:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a nondiscriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

160. The language used in Article 19.3 focuses on the amount of duties imposed on a particular product. In order to determine the extent of the subsidization of the product under investigation, an investigating authority must examine all subsides received by the previously uninvestigated company – those subsides included in the original petition as well as new subsidies alleged. Article 19.3 recognizes that an uninvestigated exporter may receive a subsidization rate not based on its actual subsidization during the period of investigation. Accordingly, it is only reasonable for an investigating authority to examine all subsidies received by the exporters subject to the expedited review, in order to determine the actual subsidization rate for the companies subject to the expedited review.

United States

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161. Commerce did not make this suggestion. In its initiation of the expedited review, Commerce made no specific determinations on the subsidies available to Catalyst or Irving. Furthermore, the United States notes that Article 19.3 does not call for such a determination;

rather, the provision only provides that uninvestigated exporters can request an expedited review. Commerce's determinations as to which subsidies were received by a particular company will be based upon record evidence in the proceeding.

73. In paragraphs 190 and 191 of its opening oral statement, Canada refers to the Appellate Body Report in *US – Carbon Steel (India)* where it found that allowing unfettered examination of new subsidy allegations in an administrative review upsets the delicate balance in Part V of the SCM Agreement. Canada considers that this means that "there must be some boundaries on an expedited review". Please comment.

162. 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. Canada presents no valid basis for this proposed interpretation of the SCM Agreement.

163. Canada does not even attempt to justify its suggestion under the customary rules of interpretation of public international law.[117] And indeed, the proposed interpretation cannot be reached under those rules. 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.[118] There is no limitation, express or implied.

164. Instead of applying the customary rules of interpretation, Canada apparently is asking the Panel to apply one sentence of Appellate Body *obiter dictum* – addressed to a different issue and different article of the SCM Agreement – as if it were an amendment to the text of the SCM Agreement. That approach, if adopted, would amount to an abuse of the dispute settlement system.

165. In particular, Canada has seized on one sentence in the Appellate Body report *US – Carbon Steel (India)* proceedings. That sentence, however, is pure *dictum.* The complaining party did not argue that the new subsidies in administrative reviews are somehow limited. Accordingly, neither the complaining party, the responding party, nor any third party addressed this concept. Rather, the statement upon which Canada now relies is found in an introductory legal discussion contained in the relevant section of the Appellate Body report; the statement is divorced from any matter of law raised in the appeal. In fact, for the Appellate Body to include this statement calls into question whether the report complies with Article 17.6 of the DSU, which states that an "appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."

166. The matters actually at issue in the relevant section of the *US – Carbon Steel (India)* report were whether certain SCM Agreement procedural requirements (under SCM Agreement articles 11, 13, and 22) apply to new subsidy allegations. (And to reiterate, there was no contention that those procedural requirements somehow imposed a substantive limit on the types

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117 *See* DSU art. 3.2.

118 Canada agrees with this reading of Article 19.3. *See* Canada First Written Submission, paras. 338-339.

of new subsidies that could be examined.) The Appellate found that the examination of new subsidy allegations is not subject to the procedural obligations set out in Articles 11.1 and 13.1 of the SCM Agreement,[119] and was subject to the procedural requirements of Article 22.1 and 22.2.[120] These are the actual findings on new subsidy allegations contained in *US – Carbon Steel (India)*.

167. The United States has grave concerns with an approach where the Appellate Body issues *dictum* in one dispute, and then relies on that *dictum* as if it were treaty text in a subsequent dispute. In this regard, the United States calls the Panel's attention to the statement of the United States in the Dispute Settlement Body regarding the possible reappointment of an Appellate Body member. As the United States explains in that statement, this sort of adjudicative approach undermines Members' confidence in the dispute settlement system.[121]

168. Turning to the contents of the *dictum* upon which Canada relies, the United States in this submission would make the following four points.

169. First, even on its own term, the *dictum* does not apply to expedited reviews. The Appellate Body was discussing continuation reviews under Article 22.2, not expedited reviews under Article 19.3. The Appellate Body's reasoning was based on the function of an Article 21.2 review as being a review of the "need for a continued imposition of the duty." And from this, the Appellate Body noted some sort of connection back to the original CVD investigation. To be clear, the United States fails to see how this statement supports any implicit, unwritten limitation on new subsidies in Article 22.2 reviews. But in any event, given that this was the basis for the Appellate Body statement, its reasoning simply does not apply to Article 19.3, which contains no similar language. Indeed, a limitation would be contrary to the purpose of Article 19.3, which is to determine a more accurate subsidy rate for the specific company requesting the review and calculation.

170. Second, even on its terms, the Appellate Body's *dictum* would not appear to have any consequence with respect to the matters at issue in this dispute. The Appellate Body stated that while it was not making definitive findings on which factors should be taken into consideration under its unwarranted *dictum*, it indicated that the following elements between the originally investigated subsides and new subsidies might be considered: (i) the same Member; (ii) the same responding companies (beneficiaries of the subsidies); and (iii) the same products.[122] Of course, the second factor could not apply here, since the entire point of an expedited review is to examine companies not originally examined. This again reinforces that the Appellate Body was not considering expedited reviews. And with respect to the other two factors (same exporting Member, same product), these factors would appear to apply to the new subsidy allegations in this dispute.

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119 *US – Carbon Steel (India) (AB)*, para. 4.548.
120 *US – Carbon Steel (India) (AB)*, para. 4.550.
121 *Minutes of 23 May 2016 DSB Meeting*, WT/DSB/M/379, paras. 6.2-6.7.
122 *US – Carbon Steel (India) (AB)*, n. 1256.

171. Third, the United States recalls that the issue in this dispute is not whether the United States is improperly applying CVDs based on new subsidies, but whether the very initiation of the investigation into those subsidies was somehow prohibited. Even if the SCM Agreement somehow could be interpreted to limit new subsidies in expedited reviews (and it cannot be so interpreted), the initiation phase would be the wrong time in the expedited review process to evaluate the issue. Even Canada appears to agree that not all new subsidies must be excused from examination, but only certain subsidies based on (unstated) relationships with originally examined subsidies. Whatever that relationship might be, it cannot be usefully examined at the initiation phase, at a time where the authority in fact has made no definitive findings on the existence or operation of any particular subsidy.

172. Fourth, and finally, the United States notes its serious concerns with the Appellate Body's statement that inclusion of certain new subsidies in Article 22.2 reviews could "upset[] the delicate balance in Part V of the SCM Agreement." This statement is severely problematic in several respects. It does not seem to have any basis in the customary rules of interpretation of public international law. It is completely conclusory – there is no explanation of what that delicate balance might be, and how new subsidies might upset that balance; rather, it is empty rhetoric. The statement likewise lacks any supporting discussion of what the Members might see as such balance, or how the Members might view the consequences of the Appellate Body's approach; this is a direct, necessary consequence of the fact that the issue was not before the Appellate Body, and thus was not briefed by any disputing party or third party. Finally, in terms of delicate balance, the Appellate Body's *dictum* – if actually adopted and applied in the manner Canada implies – could ***itself*** disrupt the operation of the SCM Agreement. It would appear to allow -- and even encourage – Members who are subsidizing products and causing injury to circumvent countervailing duties by changing the form of a subsidy, while maintaining the level of the subsidy.

3.3 "Other forms of assistance" - AFA Measure

United States

76. Please comment on Canada's assertion, at paragraph 428 of its first written submission, that the Other Forms of Assistance-AFA measure "essentially creates an incentive for petitioners and investigating authorities to abdicate their responsibilities at initiation".

173. As an initial matter, the United States strongly disagrees with Canada's assertion that the United States has adopted an "Other Forms of Assistance-AFA" measure.

174. Turning to the alleged measure at issue in this dispute, the United States disagrees with Canada's assertion that the other forms of assistance question created certain incentives for the petitioner and investigating authority. As explained previously, the initiation requirements in Article 11 of the SCM Agreement are intended to ensure that the investigating authority has sufficient evidence to demonstrate that a particular product is being subsidized. As long as there is sufficient evidence of the existence of subsidization of a product, the investigating authority may initiate an investigation into the potential subsidization of a particular product. The petitioner has a strong incentive to identify all known subsidies in the petition because this

increases the likelihood that the investigating authority has an understanding of the alleged subsidization of the product, and therefore will include all subsidies in the final results of the investigation. At the same time, once the investigation is initiated, an investigating authority may ask questions pertaining to other forms of assistance to determine the full extent of the potential subsidization of the product.

175. Furthermore, we would note that Canada's approach, if accepted, would create a significant incentive that would have serious negative implications for the operation of the SCM Agreement. If Canada's approach is accepted, Member's would have an incentive not to notify their programs fully because then (1) petitioners may not have sufficient information to allege a subsidy due to the failure to notify, and (2) under Canada's interpretation, the subsidy would not be countervailed if later discovered.

77. Are there any CVD investigations conducted by the US authorities since 2012 in which the "other forms of assistance" question has not been asked? Leaving aside the instances cited in paragraphs 357-359 of the US first written submission, has the USDOC always resorted to AFA in each case where that question has been asked?

176. First, the United States would note that this question highlights one of the fatal deficiencies in Canada's as such claim to a purported unwritten measure. As the United States explained in its first written submission at paragraph 350, it is not clear "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."

177. Turning to the first sentence of the question: The United States is not in a position to review every CVD questionnaire issued to every respondent in the last 5 years. If Canada makes an assertion regarding the content of every Commerce questionnaire, Canada has the burden to establish its factual contentions.

178. Turning to the second sentence of the question: In cases where Commerce has asked a question involving the any other forms of assistance question, and where a respondent has cooperated and Commerce verified the response (either a response of non-use of other forms of assistance, or a response of specifically identified programs), Commerce would have no basis to apply facts available. On the other hand, in instances where Commerce has discovered unreported assistance at verification), Commerce has in certain cases applied facts available. This is a case-by-case, fact-specific inquiry. As discussed in response to the subsequent question, and contrary to Canada's assertions, Commerce has not always resorted to facts available.

78. Does the United States automatically apply AFA in cases where it discovers subsidies at verification? If not, what analysis does it undertake to ensure that the information is "necessary" pursuant to Article 12.7 of the SCM Agreement. If the subsidies discovered bear no relation to the product under investigation, do they constitute "necessary information" to which facts available can be applied under Article 12.7?

179. No, Commerce has not automatically applied facts available in cases where it has discovered subsidies at verification. As exhibited in the seven determinations upon which Canada relies in its first written submission, Commerce did not apply facts available in each of those cases. For instance, in *Shrimp from China 2013* and *PET Resin from China 2015*, Commerce accepted new information concerning grants that were presented by the respondent companies at the outset of verification.[123] Likewise, in the investigation at issue in this dispute, Commerce discovered and accepted information concerning the Bowater Mersey program at the government of Nova Scotia's verification.[124] In each of these instances, Commerce did not apply facts available to new information presented at verification.

180. Another example is *Large Residential Washers from Korea*. In that investigation, Commerce did not countervail some of the grants that had been previously undisclosed because Commerce found that they had no relation to the subject merchandise.[125]

79. Could the United States comment on paragraphs 214 and 215 of Canada's oral statement? In particular, does the United States agree that including a question on "other forms of assistance" in the questionnaires and applying AFA if new information is discovered at verification is considered a "practice" for the USDOC under US Law?

181. The United States disagrees with Canada's statements in paragraphs 214 and 215 of its opening statement. Consistent with its approach throughout this dispute, Canada makes a bold assertion without citing to *any* relevant authority under the covered agreements. Specifically, Canada states in paragraph 214, "Although the U.S. uses the word 'practice' it is the equivalent of a U.S. 'policy' for the purpose of WTO jurisprudence."[126] Canada offers *zero* support for this proposition. Indeed, Canada has no basis for equating practice with policy. Moreover, the word "policy" is not something addressed – as Canada puts it -- in "WTO jurisprudence". Rather, the Appellate Body has found that a rule or norm of general and prospective application (which is something much more than a "policy") may be considered an unwritten measure that can be subject to dispute settlement.

182. The manner in which an investigating authority chooses in certain instances to characterize a particular action for purposes of its municipal law is not dispositive of whether that same action constitutes a rule or norm of general and prospective application that would be subject to an "as such" challenge before the DSB. Instead, the relevant standard, as discussed in the United States' first written submission, is whether the alleged rule or norm is attributable to a Member, the complainant is able to identify the precise content of the alleged rule or norm, and

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[123] *See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from China* (August 19, 2013) (Exhibit CAN-118); *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from China* (March 4, 2016) (Exhibit CAN-125).

[124] SC Paper Final I&D Memo, p. 57 (Exhibit CAN-37).

[125] U.S. First Written Submission, para. 356; SC Paper Final I&D Memo, p. 155 (Exhibit CAN-37).

[126] Canada Oral Statement at First Panel Meeting, para. 214.

there exists a rule or norm of prospective and general application.[127] Canada has yet to make any serious effort in this dispute to satisfy that burden.

183. Notwithstanding our fundamental disagreement with Canada's entire approach, the United States provides the following information to be of possible assistance to the Panel.

184. The seven cases cited by Canada in its first written submission illustrate that Commerce has engaged in fact-specific inquiries, and has made unique findings, and has reached different results. If Commerce had a "practice" under U.S. municipal law, as Canada claims, then all of these cases would have reached the same result.

185. For example, in *Shrimp from China 2013* and *PET Resin from China 2015,* Commerce accepted new information concerning grants that were presented to it by the respondent companies at the outset of verification. Likewise, in this investigation at issue in this dispute, Commerce accepted information concerning the Bowater Mersey program discovered at the government of Nova Scotia's verification.[128] In other cases, such as in *Solar Cells from China 2012, 2014, 2015*, Commerce did not accept new information discovered at the verifications.[129] Likewise, in *China Stainless Sheet and Strip 2017*, cited by Canada in its opening statement, Commerce accepted some new information presented to it at verification, and declined to accept other information discovered at verification.[130] Therefore, these cases demonstrate that Commerce's decision on whether to accept new information has varied depending on the relevant facts.

80. Could the United States comment on paragraphs 417 and 418 of Canada's first written submission? In the context of anti-dumping and CVD investigations in the United States, what constitutes a routine practice? What is its legal significance?

186. The question of what constitutes a routine practice under U.S. law is more complex than Canada has stated. A reviewing court might conclude that Commerce has a "practice" despite Commerce never having characterized its actions in that way. Likewise, a reviewing court might dispute Commerce's characterization of something as a practice. For instance, the United States Court of International Trade has previously held that despite Commerce's "reliance on its past

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[127] U.S. First Written Submission, paras. 341-347.

[128] *See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from China* (August 19, 2013) (Exhibit CAN-118); *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from China* (March 4, 2016) (Exhibit CAN-125).

[129] *See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovolataic Cells from China* (October 9, 2012) (Exhibit CAN-116); *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from China* (December 15, 2014) (Exhibit CAN-121); *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from China* (July 7, 2015) (Exhibit USA-08).

[130] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Stainless Steel Sheet and Strip from China* (February 1, 20172) (Exhibit CAN-164).

'routine practice,'" that statement alone, "does not adequately support its determination.[131] Indeed {Commerce} must do more than simply state that its conclusions are justified because they are in accord with actions in prior reviews; rather, it must cogently explain why it has exercised its discretion in a given manner."[132]

187. Regardless of the relevance of whether some course of action could be considered a practice under U.S. municipal law, 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 and alleged rule or norm that has prospective and general application. That inquiry is not dependent upon how an investigating authority chooses to characterize certain actions for purposes of its municipal law.

81. Can the United States confirm that the amounts indicated in Canada's opening statement at paragraphs 220 to 225 are found within USDOC's record? If not, why not? Were they observed by the verification team?

188. The amounts indicated in Canada's opening statement at paragraphs 220 to 225 and in its first written submission at paragraphs 440 to 444 are not in Commerce's record. Because of Resolute's failure to disclose the assistance, the accounts which clearly indicated the existence of other forms of assistance were not discovered until at 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.

189. The United States is unable to confirm whether the amounts indicated by Canada in its opening statement and its first written submission are the same amounts that were observed by Commerce officials at Resolute's verification. As Canada indicates at footnote 609 of its first written submission, its exhibit, titled "Fibrek Post-Verification Screenshot – GL Account," purports to replicate on-screen information observed by Commerce officials at verification. However, this screenshot was taken after verification, and there is no information in Commerce's record that would demonstrate that this is the same information Commerce officials observed at verification. Canada itself acknowledges that "{t}here were subsequent changes in the language Fibrek used to identify certain items as between verification and this new screenshot."[133] Thus, the United States is unable to confirm whether these are the actual amounts viewed by its officials that day at Resolute's verification.

190. Even if the United States were to consider the hypothetical question of whether Resolute actually received these amounts, neither the United States nor the Panel can be certain that these were the same amounts that were before Commerce officials at verification because these are not the same documents that were present that day. Moreover, without the timely disclosure by Resolute of this assistance, Commerce was deprived of the opportunity to solicit information

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131 *Qingdao Sea-Line Trading Co., Ltd. v. United States*, Slip Opinion 12-39, pp. 13-14 (Ct. Int'l Trade March 21, 2012) (Exhibit USA-15).

132 *Qingdao Sea-Line Trading Co., Ltd. v. United States*, Slip Opinion 12-39, pp. 13-14 (Ct. Int'l Trade March 21, 2012) (Exhibit USA-15).

133 *See* Canada First Written Submission, n. 609.

from the relevant government authority regarding the program or programs under which these funds were provided.

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