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UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

(DS505)

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I. INTRODUCTION

1. Throughout this dispute, Canada's arguments have failed to meaningfully address the specific rights and obligations provided in the covered agreements and ignored relevant facts. In this second submission, the United States will focus on the flaws in arguments Canada made in its oral statements at the first substantive panel meeting and in its answers to the Panel's questions following that meeting.

2. This submission is organized as follows: in section II, we address Canada's claims related to Port Hawkesbury Paper LP ("Port Hawkesbury"); in section III, we respond to Canada's claims related to Resolute FP Canada Inc. ("Resolute"); and in section IV, we address Canada's claims related to the non-investigated exporters. Finally, in section V, we respond to Canada's "as such" claims.

3. Section II.A addresses Canada's arguments regarding the financial contribution determination of the U.S. Department of Commerce ("Commerce") for the provision of electricity to Port Hawkesbury. In particular, we demonstrate that Commerce's determination was consistent with Article 1.1(a)(1)(iv) of the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement") because it was based on a full review of all of the record evidence, including evidence of a general service obligation imposed by the *Public Utilities Act* and evidence of the government's involvement in the provision of electricity to Port Hawkesbury through a special Load Retention Rate.

4. Section II.B addresses Commerce's disclosure of the essential facts under consideration for the financial contribution determination, highlighting the record evidence demonstrating that Commerce granted interested parties the opportunity to defend their interests by providing comments prior to the final determination on all essential facts.

5. In section II.C, we address Canada's arguments related to Commerce's constructed benchmark price that was used to determine the existence and extent of a benefit for the provision of electricity to Port Hawkesbury. We demonstrate that Canada has failed to establish that the constructed benchmark based on an above-the-line electricity rate for extra-large industrial customers to Nova Scotia was inconsistent with Article 14(d) of the SCM Agreement. Furthermore, we demonstrate that Commerce's constructed benchmark was based on record evidence, and was an appropriate choice for an unbiased and objective authority.

6. In section II.D, we address Canada's arguments related to Commerce's determination that grants bestowed upon pre-sale Port Hawkesbury in the course of its sale to Pacific West Commercial Corporation ("PWCC") continued to benefit Port Hawkesbury. We demonstrate that Commerce did not err when it determined that the hot idle and forestry infrastructure funds were countervailable subsidies received by Port Hawkesbury and were not extinguished because of a change in ownership. Section II.E then further demonstrates that Commerce's decision to investigate Nova Scotia's stumpage and biomass subsidies was based on evidence submitted in the petition, was sufficient in light of the information reasonably available to the petitioner, and thus was consistent with Articles 11.2 and 11.3 of the SCM Agreement.

7. In section III, we address Canada's claims made with respect to Resolute. Section III.A refutes Canada's claims regarding countervailable subsidies discovered during Commerce's verification of Resolute's questionnaire responses. We demonstrate that, upon discovering at verification that Resolute failed to report certain subsidies in response to a question posed by Commerce, Commerce's determination of a countervailing duty rate based on facts available was not inconsistent with Article 12.7 of the SCM Agreement.

8. Section III.B responds to Canada's argument that a respondent's characterization of a sale as a "hostile takeover" necessarily requires a finding of the extinguishment of a subsidy, and to the contrary, that the issue would entail a detailed, fact-based analysis of the change in ownership. Section III.C demonstrates that Commerce's calculation of certain countervailable subsidies conferred to Resolute appropriately took into account whether, at the time of bestowal of the subsidy, the bestowal was contingent on the production of a particular product. We also explain that Canada's arguments, which focus on Resolute's actual use of the countervailable subsidies, are not based on the applicable legal standard.

9. In section IV, we address Canada's claims regarding Catalyst Paper Corporation ("Catalyst") and Irving Paper Ltd. ("Irving"). In section IV.A we demonstrate that Canada has failed to establish a breach of the covered agreements for Commerce's calculation of the "all others" countervailing duty rate because Canada's arguments rely on obligations not applicable to a countervailing duty investigation. In section IV.B, we show that Commerce properly conducted an expedited review of the new subsidy allegations. We demonstrate that Canada has no basis for its argument that the examination of new subsidy allegations necessarily delays the expedited review process. We further demonstrate that Canada has failed to offer any comparison point for the Panel to determine what, if anything, might constitute a "delay," and has also failed to correctly characterize the purpose of an expedited review.

10. Finally, in section V, we respond to Canada's "as such" claims. In section V.A, we demonstrate that Canada has failed to identify the existence of any alleged rule or norm of general and prospective application. In section V.B, we demonstrate that Canada's "as such" claim is inconsistent with the actions of its own administering authority.

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

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

11. As already addressed extensively in prior submissions,[1] the United States has demonstrated that Commerce's financial contribution determination was consistent with Article 1.1(a)(1)(iv) of the SCM Agreement. In this submission, the United States will address Canada's further arguments on this issue, as set forth in Canada's opening statement and responses to the Panel's questions.

12. In particular, the United States responds to two arguments: first, Canada's repeated assertion that section 52 of the *Public Utilities Act* does not impose a duty to serve, despite Canada's own acknowledgment that the utility had a duty to serve; and second, that a general service obligation alone is not sufficient to find the existence of a financial contribution, even though Commerce's analysis was not limited to this single factor.[2]

13. As indicated above and discussed below, Canada's arguments lack merit.

1. Commerce appropriately concluded that Section 52 of the *Public Utilities Act* required Nova Scotia Power to provide electricity to Port Hawkesbury

14. Canada has argued that the plain language of section 52 does not impose an obligation to serve.[3] This argument is unavailing. The agency record plainly supports Commerce's finding that the utility had a duty to serve. Indeed, Canada's own statements in this proceeding acknowledge this. As explained in the U.S. first written submission, Commerce explained that Nova Scotia Power is "required by law to provide electricity to customers who request it anywhere in Nova Scotia."[4] This legal obligation is derived from section 52 of the *Public Utilities Act*, which states the following:

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[1] U.S. First Written Submission, paras. 19-49; U.S. Responses to the Panel's Questions, paras. 1-11.

[2] Canada Responses to the Panel's Questions, para. 22. *See also* European Union Responses to the Panel's Questions, para. 1; China Responses to the Panel's Questions, para. 5; Japan Responses to the Panel's Questions, para. 1.

[3] Canada Responses to the Panel's Questions, paras. 1-2.

[4] 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.[5]

15. Commerce also placed on the record and cited in the final determination to a publication commissioned by the government of Nova Scotia that confirmed that Nova Scotia Power "must provide electricity to customers who request it, anywhere in Nova Scotia."[6]

16. Canada's answers to the Panel's questions fail to undermine Commerce's determination.

17. First, Canada acknowledges that a legal obligation is derived from section 52 of the *Public Utilities Act*,[7] but suggests that because "the duty to serve is not expressly set out in section 52," Commerce's record did not support the interpretation.[8] But Canada's own statements make clear that Commerce properly interpreted the obligation of section 52. In its responses to the Panel's questions, Canada explains that "section 52…has been interpreted to include a duty to serve through the common law," and cites to a decision by the Nova Scotia Court of Appeal that found the predecessor provision to section 52 to "set out a 'service requirement' or a duty to serve."[9]

18. In seeking to determine whether there was a financial contribution, Commerce was seeking to understand the meaning of this provision within Canada and, similar to the Nova Scotia Court of Appeal,[10] Commerce concluded that the provision imposes a duty to serve. The court's decision in fact confirms Commerce's interpretation and undermines Canada's argument that section 52 of the *Public Utilities Act* did not require Nova Scotia Power to provide electricity to Port Hawkesbury. Commerce adequately explained its finding, which was supported by the text of the provision and additional evidence on the record.

19. Canada's second new argument – also contradicted by Canada's own statements – is that section 52 is "not directly enforceable by law"[11] and that Nova Scotia Power "is not required by law to provide electricity to customers if it does not make economic sense to do so."[12] Canada does not explain what this assertion means, or how it might be relevant to entrustment or direction. To the extent that Canada argues that entrustment or direction must involve "direct enforcement by law," the SCM Agreement provides no support for any such limitation on the

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[5] 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).

[6] *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).

[7] Canada First Written Submission, para. 110; Canada Responses to the Panel's Questions, para. 2.

[8] Canada Responses to the Panel's Questions, para. 1.

[9] Canada Responses to the Panel's Questions, para. 2.

[10] *Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al*, 18 NSR (2d) 692 (N.S.C.A.), p. 77 (Exhibit CAN-171).

[11] Canada Responses to the Panel's Questions, para. 5.

[12] Canada Responses to the Panel's Questions, para. 13.

"contribution" element of a subsidy analysis. In any event, Canada itself recognizes that "the {Nova Scotia Utility and Review Board} has the authority under section 46 to order public utilities to comply with the *Public Utilities Act*," and "sections 112 and 114 make it an offence to violate the *Public Utilities Act*."[13] Of course, in both instances, this includes the duty to serve. The provisions cited by Canada do not contain an exception from the duty to serve where doing so "does not make economic sense." Rather, the duty to serve as set forth in the *Public Utilities Act* is generally applicable and enforceable by the Nova Scotia Utility and Review Board ("NSUARB").

20. For these reasons, Canada's arguments do not undermine Commerce's finding that Nova Scotia Power was required by law to provide electricity to Port Hawkesbury.[14] Commerce's finding on the general service obligation in making its determination of entrustment or direction was based on positive evidence and one an unbiased and objective investigating authority could reach.

2. Commerce's financial contribution analysis considered the government of Nova Scotia's involvement in the establishment of Port Hawkesbury's LRR

21. Canada's answers to the Panel's questions fault Commerce's financial contribution determination for not establishing a link between the government action and the specific conduct of Nova Scotia Power.[15] The record does not support Canada's argument. To the contrary, Commerce's final determination took account of the unique role of Nova Scotia in Nova Scotia Power's LRR for Port Hawkesbury. As Commerce explained in the final determination:

> In addition to the statutory requirement through which {Nova Scotia} entrusted or directed {Nova Scotia Power} to provide a financial contribution in the form of a provision of a good or service to Port Hawkesbury, the record also demonstrates that {Nova Scotia} played an essential role in the specific LRR that set the price for electricity sold to Port Hawkesbury from {Nova Scotia Power}.[16]

22. Without government involvement – through the financial contribution – Port Hawkesbury would not have received the provision of electricity for less than adequate remuneration. The United States has explained that ample evidence on the record of the countervailing duty investigation supported Commerce's conclusion.[17] In particular, contrary to Canada's arguments, Commerce's final determination identified the following evidence of the government of Nova Scotia's involvement in the process that led to Port Hawkesbury's LRR:

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[13] Canada Responses to the Panel's Questions, para. 7.

[14] SC Paper Final I&D Memo, p. 36 (Exhibit CAN-37).

[15] Canada Responses to the Panel's Questions, para. 71.

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

[17] *See, e.g.*, U.S. First Written Submission, paras. 25-32; U.S. Responses to the Panel's Questions, paras. 1-11.

- The NSUARB's decision to expand the Load Retention Tariff to allow for an LRR for companies in economic distress, a decision made at the request of NewPage Port Hawkesbury. Without this government action, Port Hawkesbury would not have qualified for an LRR and would not have received the LRR from Nova Scotia Power.[18]

- The government of Nova Scotia negotiated with Pacific West Commercial Corporation ("PWCC") the terms of a commitment whereby if Port Hawkesbury's mill load triggered certain obligations that resulted in increased incremental costs, Nova Scotia would guarantee that neither Port Hawkesbury nor other ratepayers would be required to pay the costs.[19]

- Statements by the Premier of Nova Scotia expressing Nova Scotia's active involvement in the negotiation. The Premier explained that Nova Scotia "would continue to work with {Nova Scotia Power}to find a solution," and that "he had spoken with the CEO of {Nova Scotia Power}, and that he was confident that {Nova Scotia Power} and PWCC were working together to build a plan that, once finalized, would go before the NSUARB for approval."[20]

- Nova Scotia's decision to hire a consultant "to help facilitate the discussions between PWCC and {Nova Scotia Power} and to provide advice and technical support to both of these parties in designing and negotiating an LRR that could be delivered to the NSUARB for approval."[21] Commerce explained that "{Nova Scotia} worked closely with both {Nova Scotia Power} and PWCC to address the issue of high electricity costs to the mill."[22]

- The unique role of 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."[23]

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

[19] SC Paper Final I&D Memo, p. 40 (Exhibit CAN-37). *See Supplemental Questionnaire: Government of Nova Scotia* (July 7, 2015), Exhibit NS-Supp1-5A (Exhibit USA-18). This exhibit contains a document that Nova Scotia placed on the record of the countervailing duty investigation that depicts [[
]] This document includes reference to the [[ ]].

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

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

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

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

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

24. For the reasons set forth above, Commerce's conclusion that the government of Nova Scotia entrusted or directed Nova Scotia Power to provide electricity to Port Hawkesbury through the LRR was consistent with Article 1.1(a)(1) of the SCM Agreement. The final determination properly explained the link between Nova Scotia's actions, including the mandate of section 52 of the *Public Utilities Act*, and the provision of electricity to Port Hawkesbury.

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

25. Contrary to Canada's claims, Commerce properly disclosed the essential facts under consideration for the financial contribution determination, consistent with Article 12.8 of the SCM Agreement. Furthermore, the record demonstrates that Commerce also granted interested parties the opportunity to defend their interests by providing comments and arguments on all essential facts prior to the final determination.

26. As discussed in the U.S. first written submission, interested parties had ample opportunity – and availed themselves of that opportunity – to provide comments and arguments on the two facts that are the focus of Canada's claim: the *Public Utilities Act* and a discussion paper. Nova Scotia submitted to Commerce the *Public Utilities Act* on May 28, 2015 – 60 days before the *preliminary determination* – and Commerce's preliminary determination made clear that the *Public Utilities Act* and the obligations placed on Nova Scotia Power therein were central to Commerce's financial contribution analysis. As for the discussion paper, which Canada has not established to be an "essential fact,"[24] Commerce submitted to the record and distributed the paper to all interested parties 110 days before the final determination. Commerce explicitly provided interested parties the opportunity to "submit factual information to rebut, clarify, or correct the factual information."[25]

27. Canada does not dispute this timeline, but in its opening statement advances two arguments that have no support in the text of the SCM Agreement.

28. Canada's first interpretive argument – made without textual support – asserts that "the United States was obligated to request that interested parties address the relevance of section 52 and the duty to serve in written submissions, if it was contemplating relying on it to establish a

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[24] *See* U.S. First Written Submission, para. 62.

[25] *Placement of Documents on the Record Relating to Public Utilities* (July 2, 2015), Attachment 30 (Exhibit CAN-79).

financial contribution."[26] Article 12.8 imposes no such obligation, and instead contains only a "disclosure obligation" that extends to the essential facts.[27] To recall, Article 12.8 provides:

> The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

29. The provision does not require – as Canada suggests – that an authority affirmatively seek comments on particular, specific facts. Rather, the provision requires the authority to make the disclosure of the facts "in sufficient time for the parties to defend their interests."[28] In the SC Paper investigation, Nova Scotia itself submitted the *Public Utilities Act* and explained the operation and provisions of that law. With respect to the discussion paper, Commerce solicited comments from the interested parties when it placed the discussion paper – along with other documents – on the record of the investigation, and Canada acknowledges that an interested party in fact did avail itself of the opportunity to provide comments on Commerce's submission.[29] Given that some parties did in fact avail themselves of the full opportunity they were provided to "defend their interests" with respect to the *Public Utilities Act* and the submission containing the discussion paper, there is no basis for Canada's claim under Article 12.8.

30. Canada next argues – again without reference to the text of the agreement – that Commerce's disclosure was inadequate because the investigation involved a large factual record.[30] In making this argument, Canada seems to suggest that an authority must seek comments on a particular issue, but, as found by prior panels, Article 12.8 does not prescribe a particular manner for disclosure, and certainly does not require an authority to seek comments on specifically identified parts of the record. Rather, Article 12.8 ensures that the authority makes relevant information available to the interested parties, and allows them an opportunity to comment. Prior panels have recognized that "the requirement to inform all interested parties of the essential facts under consideration may be complied with in a number of ways," including

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[26] Oral Statement of Canada at the First Substantive Meeting of the Panel, para. 95.

[27] *China – GOES (Panel)*, para. 7.407 (emphasis in original) (citing *Argentina – Poultry Anti-Dumping Duties*, para. 7.228); *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5-Argentina) (Panel)*, para. 7.148 ("The text of Article 6.9 {of the Anti-Dumping Agreement} clarifies that this obligation applies with respect to facts, as opposed to the reasoning of the investigating authorities.").

[28] Article 12.8, SCM Agreement.

[29] *See, e.g.*, Oral Statement of Canada at the First Substantive Meeting of the Panel, para. 83. Canada was referring to a submission made by Port Hawkesbury. *See Port Hawkesbury's Comments to Rebut, Clarify, or Correct Documents Placed on the Record Relating to Public Utilities* (July 13, 2015).

[30] Oral Statement of Canada at the First Substantive Meeting of the Panel, para. 92.

"through the inclusion in the record of documents."[31] In this case, Commerce complied with this obligation and placed the documents on the record of the investigation with ample opportunity for the parties to provide comments.

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

31. In its first written submission and responses to the Panel's questions, the United States demonstrated that Commerce's benefit determination was consistent with Articles 1.1(b) and 14(d) of the SCM Agreement. As previously explained, during the period of investigation, Port Hawkesbury would not have been eligible for any of Nova Scotia Power's approved and published above-the-line rates; in the absence of such a rate, Commerce appropriately constructed a benchmark to reflect the rate that Port Hawkesbury would have been charged had there been no financial contribution. Commerce properly constructed the benchmark in a manner consistent with Article 14(d).

32. In its responses to the Panel's questions, Canada advances three arguments against Commerce's benchmark. We demonstrate below that each of Canada's arguments lacks merit, and Commerce's benefit determination was consistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

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

33. In its opening statement and in its responses to the Panel's questions, Canada continued to advance the extraordinary argument that "there was no need for Commerce to use a benchmark"[32] because "the provision of electricity by {Nova Scotia Power} to {Port Hawkesbury} is itself a market transaction."[33] Canada's argument assumes the conclusion. The very purpose of a benchmark is to determine if the transaction was made for less than adequate remuneration "in relation to the prevailing market conditions."

34. The Appellate Body has recognized that a benefit determination requires a comparison between a market benchmark price and the price at which the good has been provided. In *Softwood Lumber IV*, the Appellate Body found that the phrase "in relation to" has a meaning

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[31] *Argentina – Ceramic Tiles*, para. 6.125 (interpreting Article 6.9 of the Antidumping Agreement). Article 6.9 of the Antidumping Agreement and Article 12.8 of the SCM Agreement differ only in that the latter requires authorities to inform interested Members of the essential facts under consideration in addition to interested parties.

[32] Oral Statement of Canada at the First Substantive Meeting of the Panel, para. 131; Canada Responses to the Panel's Questions, para. 31.

[33] Oral Statement of Canada at the First Substantive Meeting of the Panel, para. 127.

similar to the phrases "as regards" and "with respect to." This phrase indicates that a benefit determination requires some form of comparative exercise.

35. Further support can be found for this proposition in the term "benefit," which the Appellate Body has stated "implies some kind of comparison."[34] In *Canada – Aircraft*, the Appellate Body explained the appropriateness of a comparison:

> This must be so, for there can be no "benefit" to the recipient unless the "financial contribution" makes the recipient "better off" than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a "benefit" has been "conferred", because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favorable than those available to the recipient in the market.[35]

36. Indeed, a benchmark confirms or refutes the conclusion advanced by Canada: whether, as a result of the government involvement in the transaction, the transaction price is "more favorable than those available to the recipient in the market."[36]

37. Furthermore, the underlying factual premise for Canada's argument – that the transaction for electricity concerns only two private entities, Nova Scotia Power and Port Hawkesbury, and is therefore necessarily a market transaction[37] – is flawed. Commerce's final determination concluded that "{Nova Scotia} played an essential role in the specific LRR that set the price for the electricity sold to Port Hawkesbury from {Nova Scotia Power}."[38] As explained above, the record of the countervailing duty investigation does not support Canada's contention that the transaction involved only two private entities; rather, Nova Scotia, including through the NSUARB, was an active participant in the events that led to the transaction. As explained by the NSUARB, 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."[39] In fact, it is only because of the pervasive government involvement in the transaction that a benefit determination is necessary.

38. In addition, the existence of a "private-to-private" transaction in this case is not unique. Where – as here – the investigating authority makes a finding of entrustment or direction pursuant to Article 1.1(a)(1)(iv), the transaction will be between two private parties. It cannot be

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[34] *Canada – Aircraft (AB)*, para. 157.

[35] *Canada – Aircraft (AB)*, para. 157.

[36] *Canada – Aircraft (AB)*, para. 157.

[37] Oral Statement of Canada at the First Substantive Meeting of the Panel, paras. 124-125.

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

[39] NSUARB Order Approving Port Hawkesbury's Load Retention Rate, p. 16 of Exhibit NS-Supp1-55A (Exhibit CAN-35).

the case that no benefit exists where an authority has made a finding of entrustment or direction, which would be the result if the transaction price is necessarily the benchmark, as Canada suggests. Such an interpretation would render subparagraph (iv) inutile and cannot be accepted.

39. In sum, Article 14(d) requires the use of a benchmark to determine the adequacy of remuneration for the provision of a good. Canada's arguments to the contrary are unavailing and not supported by either the text of the SCM Agreement or the record of the countervailing duty investigation.

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

40. In its responses to the Panel's questions, Canada argues that below-the-line rates are part of "prevailing market conditions" in Nova Scotia.[40] With this argument, Canada avoids the relevant issue that is before the Panel. The question for the Panel is not whether a below-the-line rate could serve as a benchmark for electricity – that is, whether the Panel, were it to engage in *de novo* review of this issue, would consider a below-the-line rate *more appropriate* for use as a benchmark.[41] Rather, the issue before the Panel is whether the benchmark *used by Commerce* – one based on above-the-line rates for extra-large industrial customers – is consistent with the legal obligations of Article 14(d) of the SCM Agreement.

41. As the United States demonstrated in previous submissions,[42] above-the-line rates for extra-large industrial users are in relation to the prevailing market conditions for an extra-large customer of electricity in Nova Scotia, consistent with Article 14(d) of the SCM Agreement. We will not repeat in full Commerce's basis for determining the constructed benchmark to be in relation to prevailing market conditions, but highlight the following points for the Panel in response to Canada's arguments regarding below-the-line rates.

42. Under Article 14(d) of the SCM Agreement, the "prevailing market conditions" are those that are "predominant" or "generally accepted."[43] The investigating authority is not to base its benchmark on an aberrational price "for the good in question." Instead, the benchmark is to reflect the price at which the good is normally provided. In other words, the benchmark is to reflect the price that would have been paid by the recipient in the absence of a financial contribution by the government.

43. In considering the prices that were in relation to the prevailing market conditions for electricity in Nova Scotia, the record of the countervailing duty investigation made clear that above-the-line rates satisfied the legal standard. During the period of investigation, out of all of Nova Scotia Power's customers – regardless of size or customer class – *only Port Hawkesbury*

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[40] Canada Responses to the Panel's Questions, para. 26.

[41] That said, the United States would note that it certainly does not agree that a below-the-line, concessionary rate would reflect prevailing market conditions for electricity in Nova Scotia.

[42] U.S. First Written Submission, paras. 85-98; U.S. Responses to the Panel's Questions, paras. 40-47.

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

did not pay an above-the-line rate.[44] The extraordinary nature of the below-the-line rates is not limited to the period of investigation. In 2011, Nova Scotia Power reported to the NSUARB that it had approximately 483,831 customers of electricity; of those customers, it appears that only four paid a below-the-line rate.[45] The record demonstrates that above-the-line rates were the predominant, generally accepted rates for electricity in Nova Scotia.

44. Within the different categories of above-the-line rates, the extra-large industrial rate was the appropriate above-the-line rate under the circumstances of this investigation. In the absence of a direct financial contribution from the government, Nova Scotia Power's largest industrial customers paid the above-the-line rate for extra-large industrial users. This fact is clear based on Port Hawkesbury's own experience: prior to receiving the LRR, under Port Hawkesbury's previous owner, the mill received the above-the-line rate for extra-large industrial users. In other words, without government involvement, Port Hawkesbury would have paid an above-the-line rate for extra-large industrial users. Commerce's decision to use this rate as the basis for constructing the benchmark was therefore based on positive evidence and one which an unbiased and objective authority could reach.

45. Canada has not established that an above-the-line rate for extra-large industrial users is not "in relation to the prevailing market conditions" for an entity that satisfies the requirements of an extra-large industrial user of electricity in Nova Scotia. Accordingly, Commerce's decision to construct a benchmark based on the above-the-line rate for extra-large industrial users is consistent with Article 14(d) of the SCM Agreement.

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

46. As previously explained,[46] Commerce's constructed benchmark replicated the standard ratemaking methodology used by Nova Scotia Power to develop above-the-line rates for similarly situated entities. Commerce did not create an artificial benchmark divorced from the market. Indeed, like any above-the-line rate developed by Nova Scotia Power, Commerce's constructed benchmark was based on the sum of variable costs, the applicable contribution to fixed costs, and the standard profit ratio (*i.e.*, Benchmark = variable costs + fixed costs + profit).[47] Therefore, although Commerce's constructed benchmark was, by definition, a rate that

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[44] *Verification Report: Government of Nova Scotia* (September 2, 2015), p. 19 ("During the {period of investigation}, Port Hawkesbury was the only {Nova Scotia Power} 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).

[45] 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* (Exhibit USA-12).

[46] U.S. First Written Submission, paras. 69-76.

[47] SC Paper Final I&D Memo, p. 47 (Exhibit CAN-37).

was not *available* to Nova Scotia Power's customers during the period of investigation,[48] it reflects a rate that a Nova Scotia Power customer, like Port Hawkesbury, would have paid for electricity in Nova Scotia.

47. Canada raises several arguments in its opening statement and responses to the Panel's questions regarding Commerce's methodology, but these arguments are not supported by evidence on the record of the countervailing duty investigation. Repeatedly, Canada identifies supposed errors with Commerce's methodology. As we address in detail below, Canada does not and cannot support its assertions with record evidence.

48. Canada's first argument, which it does not support with citation to the record of the investigation, is that the constructed benchmark did not account for Port Hawkesbury's status as a priority interruptible customer.[49] In the final determination, Commerce observed, "there were no interruptible rates available to use as a benchmark" during the period of investigation.[50] Confronted with this reality, Commerce's constructed benchmark reflected a rate – the extra-large industrial rate[51] – that *was priority interruptible*. As explained in the NSUARB order setting the framework for the Load Retention Tariff, the extra-large industrial rate requires that "customers served under this tariff must accept priority supply interruption."[52] Thus Commerce's constructed benchmark approximated, to the extent that evidence on the record of the investigation would allow, the cost elements of a priority-interruptible electricity rate formulated under Nova Scotia Power's standard pricing mechanism.

49. Canada also argues that Commerce did not request accounting and operational information from Nova Scotia Power, or an explanation of the cost components of the extra-large industrial rate.[53] Evidence on the record of the countervailing duty investigation directly contradicts Canada's argument. As explained in the U.S. responses to the Panel's questions, Commerce requested the information necessary that would have been required to substantiate Canada's claims that additional adjustments should be made to the constructed benchmark, but neither Canada nor Nova Scotia Power provided the requested information.[54]

50. In addition to the requests for information in the questionnaires, Commerce specifically identified those issues as topics it intended to pursue as part of its on-site verification. Commerce's verification outline, in which Commerce identifies the issues to be discussed at verification, stated as follows:

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[48] Oral Statement of Canada at the First Substantive Meeting of the Panel, paras. 148-149.

[49] Canada Responses to the Panel's Questions, para. 33.

[50] SC Paper Final I&D Memo, p. 140 (Exhibit CAN-37).

[51] The formal name of this rate is the "Extra Large Industrial Two Part Real Time Pricing" rate.

[52] NSUARB Order Setting Framework for Load Retention Tariff, p. 33 of Exhibit NS-Supp1-50A (Exhibit CAN-80).

[53] Canada Responses to the Panel's Questions, para. 35.

[54] *See* U.S. Responses to the Panel's Questions, paras. 36-38.

> c. Discuss and document how cost and revenue components of both "above-the line" and "below-the-line" tariffs were determined for {Nova Scotia Power} for the POI based on, where appropriate, the 2013-2014 GRA's Revenue Analysis, or other documents on the official record. Provide a detailed explanation of this process for the Large Industrial Tariff, the Extra Large Industrial Two Part Real Time Pricing, and the Load Retention Tariff. Additionally, provide a description of the load forecast for these tariffs.
>
> d. Explain outcomes of the Rate Stabilization Plan for {Nova Scotia Power} during the POI with respect to the uncovered fixed costs inherent in providing the LRR to Port Hawkesbury. Discuss any differences between actual revenues during the POI and those that were forecast during the general rate application process. Discuss aspects of {Nova Scotia Power's} 2014 Financial Statement with respect to the balance of deferral accounts linked to the Rate Stabilization Plan and the Cost Recovery Mechanism from the 2012 rate year.[55]

51. As Commerce explained in its final determination, "these agenda items were prepared in an effort to ensure that {Commerce} would have the opportunity at verification to engage in a meaningful discussion with the appropriate individuals on the topics that {Commerce} identified as germane to this investigation."[56]

52. Despite these specific requests, at verification, counsel for Nova Scotia informed Commerce that Nova Scotia Power was asked to participate and assist with the agenda items, but declined to do so.[57] Instead, Nova Scotia Power provided a cursory letter, the contents of which Commerce could not further discuss, inquire about, or even confirm with reference to source documents because of Nova Scotia Power's decision not to participate in the verification.[58] Thus, despite repeated attempts by Commerce to obtain evidence that would enable it to address Canada's unsubstantiated concerns with the benchmark methodology, Canada did not provide an evidentiary basis for its concerns.

53. Accordingly, Commerce's constructed benchmark was based on the information available to Commerce, including the general information on the electricity market that was provided by Nova Scotia. Commerce solicited detailed information on Nova Scotia Power's process for developing rates, and, notwithstanding Nova Scotia Power's decision not to

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[55] SC Paper Final I&D Memo, p. 127 (Exhibit CAN-37) (citing *Verification of Questionnaire Responses provided by the Government of Canada, and the Governments of the Provinces of Ontario, Nova Scotia, and Québec* (July 28, 2015) at pp. 8-9).

[56] SC Paper Final I&D Memo, p. 127 (Exhibit CAN-37).

[57] *Verification Report: Government of Nova Scotia* (September 2, 2015) at pp. 19-20 (Exhibit CAN-99).

[58] *Verification Report: Government of Nova Scotia* (September 2, 2015) at pp. 19-20 (Exhibit CAN-99).

participate in Commerce's investigation, constructed a benchmark that could be supported by evidence on the record of the investigation.

54. Canada's challenge to Commerce's selected contribution to fixed costs – C$26 per MWh – for the constructed benchmark is also without merit.[59] In its responses to questions, Canada argues that this figure was inappropriate because it relates to a rate that was calculated based on Nova Scotia Power's forecast costs for 2012, and in contemplation of the forecast load of two customers, neither of whom was taking service under the rate as of May 2012.[60] Canada's argument has no merit in that Commerce reviewed this issue, and explained how the utility's actual experience with those two customers affected the calculation. In particular, in the final determination, Commerce acknowledged that replicating Nova Scotia Power's standard pricing mechanism would have involved an update to the 2012 extra-large industrial rate, and then explained that this type of hypothetical analysis was not possible using the information provided by the parties.[61]

55. For that reason, Commerce selected an alternative approach that could be supported by evidence on the record of the investigation. The 2012 rate for extra-large industrial customers was designed based on the load for Port Hawkesbury and Bowater Mersey pursuant to Nova Scotia Power's standard pricing mechanism, enabling Commerce to identify in a factual statement in the General Rate Application the fixed cost rate assigned to these companies in 2012.[62] Commerce properly identified the fixed cost rate based on Nova Scotia Power's statement in the General Rate Application that the extra-large industrial rate contributed C$26 per MWh to fixed costs.[63] In Commerce's benchmark, that rate appropriately served as a proxy for what Port Hawkesbury would have paid under an above-the-line rate during the period of investigation, according to Nova Scotia Power's statement. At no point in the countervailing duty investigation – or even (although it would be untimely) in this WTO proceeding – has Canada supported with evidence an alternative fixed cost rate. In short, Commerce appropriately used a fixed cost rate based on the evidence provided by the parties to the investigation.

56. Canada's related argument regarding the fixed and variable costs chosen also lacks merit. Canada argues that Commerce's benchmark inappropriately combined the estimated fixed cost contribution from the 2012 rate with Port Hawkesbury being charged, in 2014, the highest variable fuel cost.[64] As stated above, Nova Scotia Power did not participate in the investigation,

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[59] Canada Responses to the Panel's Questions, para. 39.

[60] Canada Responses to the Panel's Questions, para. 39.

[61] SC Paper Final I&D Memo, p. 138-139 (Exhibit CAN-37).

[62] SC Paper Final I&D Memo, p. 138-139 (Exhibit CAN-37).

[63] SC Paper Final I&D Memo, p. 48 (Exhibit CAN-37) (citing *Response of the Government of Canada to the Department's April 6, 2015 Questionnaire, Volume XIII* (May 27, 2015) at DE-03-DE-04, p. 19 ("The system's second biggest customer is operating on a load retention tariff which produces the same result; a markedly lower contribution to fixed costs: $4 per MWh instead of $26 per MWh under the Extra Large Industrial Two Part Real Time Pricing rate.") (Exhibit CAN-21).

[64] Canada Responses to the Panel's Questions, para. 41.

a decision that required Commerce to construct the rate elements not incorporated into Port Hawkesbury's LRR. Commerce properly relied on actual rather than constructed prices where possible to account for the costs not reflected in Port Hawkesbury's rate, and used constructed prices for missing elements of the calculation. In doing so, Commerce arrived at a rate consistent with prevailing market conditions.

57. Canada's final argument – involving the return on equity ("ROE") component of the benchmark – is not supported by the record of the investigation.[65] Commerce's constructed benchmark included an amount for ROE to account for the fact that Port Hawkesbury's LRR did not contribute to Nova Scotia Power's guaranteed ROE.[66]

58. As Commerce properly observed, the ROE is part of Nova Scotia Power's revenue requirement that is allocated over the various rate classes.[67] Commerce further explained that the record demonstrated that there are three components to the revenue requirement: "system-wide fixed costs, variable costs incident to the supply of 'above-the-line' rates at {forecast loads}, and the expected return on equity { } due the electric company."[68] Accordingly, when considering arguments about the extent to which return on equity was already included in the "contribution to fixed costs,"[69] Commerce reviewed the record information about the cost components underlying the extra-large industrial rate.[70]

59. In reviewing the record information, Commerce concluded that although there was a "full description" of the 2012 extra-large industrial rate on the record, it did not "specifically identify any fixed cost component," and there was "no way to identify fixed costs from the information in the 2012 {extra-large industrial} tariff or on the record."[71] Accordingly, Commerce determined to rely on Nova Scotia Power's statement "that captures an exact rate of uncovered fixed costs" because it did not include any ROE.[72]

60. For the reasons set forth above, Canada's arguments are without merit. Consistent with Article 14(d) of the SCM Agreement, Commerce determined the adequacy of remuneration "in relation to prevailing market conditions" for electricity in Nova Scotia.

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[65] Canada Responses to the Panel's Questions, paras. 43-47.

[66] SC Paper Final I&D Memo, p. 48 (Exhibit CAN-37); *see also Port Hawkesbury Initial Questionnaire Response* (May 27, 2015) at Ex. 23-11, p. 2 (explaining that the amount to be paid included incremental costs and a contribution to fixed costs) (Exhibit CAN-31).

[67] SC Paper Final I&D Memo, p. 44 (Exhibit CAN-37).

[68] SC Paper Final I&D Memo, p. 44 (Exhibit CAN-37) (citing *Response of the Government of Canada to the Department's April 6, 2015 Questionnaire, Volume XV* (May 27, 2015) at SR-01, pp. 3-12) (Exhibit CAN-137).

[69] SC Paper Final I&D Memo, p. 44 (Exhibit CAN-37) (citing *Response of the Government of Canada to the Department's April 6, 2015 Questionnaire, Volume XIII* (May 27, 2015) at DE-03-DE-04, p. 19 (Exhibit CAN-21).

[70] SC Paper Final I&D Memo, pp. 139-140 (Exhibit CAN-37).

[71] SC Paper Final I&D Memo, pp. 139-140 (Exhibit CAN-37).

[72] SC Paper Final I&D Memo, pp. 139-140 (Exhibit CAN-37).

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

61. As addressed in prior submissions, the United States has demonstrated that Commerce's determination that PWCC benefited from the hot idle and forestry infrastructure subsidies was consistent with the SCM Agreement and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). In this submission, the United States will address Canada's further arguments on this issue, which are set forth in Canada's response to question 39 and in paragraph 162 of Canada's opening statement at the first panel meeting. In particular, the United States responds to two arguments: first, that the Forestry Infrastructure Fund ("FIF") was not designed to achieve the sale of the mill as a "going concern" – an argument not determinative to an extinguishment analysis and a position not supported by the record; and second, Canada's repeated assertion that the sale at issue was for fair market value – despite the fact that the government injected funds *after* the parties agreed to the sales price.

62. Canada's arguments lack merit. To recall, Commerce's determination was based on Commerce's consideration of two related factors: (1) PWCC benefited from the hot idle and FIF subsidies, and (2) the hot idle and FIF subsidies received by Port Hawkesbury were not extinguished when PWCC purchased the mill. Below, we respond to Canada's arguments with respect to each of these two factors.

1. PWCC Benefited from the Hot Idle and FIF Subsidies

63. In this submission, the United States will focus on the benefit PWCC received related to the forestry infrastructure subsidies (known as FIF). In its responses to the Panel's questions, Canada advances additional arguments against Commerce's determination pertaining to the forestry infrastructure subsidies. Canada acknowledges that PWCC's bid was conditioned on receiving the mill in hot idle status so that PWCC could sell the mill as a "going concern." Canada presents the new argument that one of the provincial subsidies – the FIF – was not designed to achieve the sale as a "going concern."[73] First, the purpose of a subsidy is not a determining factor in a benefit analysis. Rather, the pertinent question is whether the subsidy was fully reflected in the final transaction price. Second, record evidence, in fact, demonstrates that the creation of the FIF aided in selling the mill to PWCC as a "going concern."

64. In a questionnaire response, Nova Scotia indicated that the FIF was [[

]][74]

Nova Scotia further stated that [[

]][75] Thus, Nova Scotia's statement that [[

[73] Canada Responses to the Panel's Questions, para. 82.

[74] *Supplemental Questionnaire: Government of Nova Scotia* (July 7, 2015), Exhibit NS-Supp1-5A, questions and answers (Exhibit USA-18) (BCI).

[75] *Supplemental Questionnaire: Government of Nova Scotia* (July 7, 2015), Exhibit NS-Supp1-5A, questions and answers (Exhibit USA-18) (BCI).

]] is evidence that Nova Scotia created the FIF to maintain the supply chain of the mill during the sale process.

65. Likewise, in an answer to a question regarding the extension of FIF and hot idle funding in March 2012, the government of Nova Scotia stated that [[

]] and the

[[

]][76] In another response, Nova Scotia stated that [["

]][77]

66. These excerpts demonstrate that the FIF was created and maintained to ensure that the mill was sold as a "going concern." Without the FIF, the bankruptcy proceeding would have directly impacted NPPH's forestry operations. Moreover, as the Verification Report of the Government of Nova Scotia demonstrates, the FIF was implemented to enable the forestry operations to continue during the bankruptcy process and not interrupt supply chain operations at the mill. When it became clear that NPPH was ceasing production, Nova Scotia negotiated the Forestry Infrastructure Agreement, and was obliged to extend the agreement into 2012, well past PWCC's initial bid proposal, in order to maintain NPPH's ongoing forestry operations.[78] All of these activities contributed to the sale of NPPH as a "going concern" to PWCC.

67. Canada points to the fact that the marketing materials provided to prospective buyers of NPPH do not mention the FIF;[79] this, however, does not undercut the record evidence demonstrating that the FIF contributed to the overall operations of the mill and allowed NPPH to continue its forestry operations during the bankruptcy process and sell the mill as a going concern. Not only does the record demonstrate that the Agreement underlying the FIF created a [[ ]] to maintain forestry operations[80] and financed 300 jobs to continue forestry infrastructure activities,[81] there is evidence that Nova Scotia directly [[ ]] and contributed subsidies that would directly benefit PWCC.

68. Moreover, in Nova Scotia's supplemental responses, Nova Scotia provided a [[

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[76] *Supplemental Questionnaire: Government of Nova Scotia* (July 7, 2015), Exhibit NS-Supp1-5A, questions and answers (Exhibit USA-18) (BCI).

[77] *Supplemental Questionnaire: Government of Nova Scotia* (July 7, 2015), Exhibit NS-Supp1-5A, questions and answers (Exhibit USA-18) (BCI).

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

[79] Canada Responses to the Panel's Questions, para. 82.

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

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

]][82] [[

]][83]

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

2. PWCC's purchase of the mill did not extinguish the hot idle and FIF subsidies received by NPPH

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

71. As Japan correctly notes in its answers to the Panel's questions, "in addition to examining whether the sale was at arm's-length and for fair market value, a separate inquiry should be conducted to determine whether the sales price reflects the full value of any remaining benefits … {and} accordingly, if the company, asset, or equipment is purchased based on such going-concern value, the benefit could be considered to accrue to the target company/the purchaser."[84] As explained in the U.S. first written submission, 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.

72. Although not at issue under the facts of this dispute, the United States notes its disagreement with the European Union's blanket statement that a sale at arm's-length and for fair market value between private parties *a priori* extinguishes any benefit conferred prior to the sale.[85] (Indeed, the European Union's third-party statement seems aimed at preserving its positions in a separate, ongoing dispute involving facts unlike those in the present dispute.) Though the issue is not raised here, the United States recalls that the Appellate Body in *EC –*

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[82] *See Supplemental Questionnaire: Government of Nova Scotia* (July 7, 2015), Exhibit NS-Supp1-5A (Exhibit USA-18) (BCI).

[83] *See Supplemental Questionnaire: Government of Nova Scotia* (July 7, 2015), Exhibit NS-Supp1-5A (Exhibit USA-18) (BCI).

[84] Japan Response to the Panel's Questions, para. 4.

[85] European Union Response to the Panel's Questions, para. 2.

Large Civil Aircraft distinguished between private-to-private sales and privatizations. Specifically, the Appellate Body found that:

> In a partial privatization as well as in private-to-private sales, not all of the elements of a full privatization are present. Therefore, consistent with the Appellate Body's guidance, a fact-intensive inquiry into the circumstances surrounding the changes in ownership would be required in order to determine the extent to which there are sales at fair market value and at arm's length, accompanied by transfers of ownership and control, and whether a prior subsidy could be deemed to have come to an end.[86]

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

74. As explained in the United States' previous submissions, Commerce determined that PWCC received a benefit when Nova Scotia provided a grant to maintain the ongoing forestry operations of the mill during the bankruptcy process. Accordingly, Commerce concluded that because the C$12 million forestry infrastructure fund grant was provided after the PWCC bid was submitted, and the bid price did not change throughout the duration of the sales process, the value of the forestry infrastructure funds could not have been reflected in the final transaction price.[87] Canada has not established that Commerce's determination related to the hot idle and forestry infrastructure subsidies is inconsistent with the SCM Agreement or the GATT 1994.

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

75. The United States has demonstrated that Commerce's decision to investigate Nova Scotia's provision of stumpage and biomass was consistent with Articles 11.2 and 11.3 of the SCM Agreement.

76. As previously explained,[88] in Commerce's initiation checklist, Commerce stated that the evidence submitted in support of the allegation demonstrated the possible existence of a countervailable subsidy for the provision of stumpage and biomass material for less than adequate remuneration. In particular, the Forest Utilization License Agreement indicated a restricted market for stumpage and biomass fuel worthy of additional investigation, and Commerce specifically identified the Forest Utilization License Agreement as evidentiary

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[86] *EC – Large Civil Aircraft (AB)*, para. 725.

[87] U.S. First Written Submission, paras. 118- 120.

[88] U.S. First Written Submission, paras. 136-146; U.S. Responses to the Panel's Questions, paras. 100-103.

support for its decision to initiate.[89] Furthermore, Commerce explained that the petitioner provided information to determine benefit that was reasonably available to it.

77. In its responses to the Panel's questions, Canada argues – without support in the text of the SCM Agreement – that "even if there was no evidence of benefit reasonably available to the Petitioner, Commerce was not justified in initiating an investigation with no evidence of benefit before it."[90] Canada's proposed interpretation is undermined by the clear language of Article 11.2. As previously explained,[91] Article 11.2 states that an application "shall contain such information as is reasonably available to the applicant on the" amount and nature of the subsidy in question. The provision recognizes that there may be circumstances where an applicant cannot ascertain evidence to demonstrate the nature and amount of a subsidy. Article 11.2 does not preclude an investigating authority from initiating an investigation under such circumstances.

78. To support its interpretation, Canada refers to the panel report in *China – GOES*, but as Canada acknowledges,[92] the evidence that is "reasonably available" to an applicant will necessarily vary depending on the particular facts. In that case, the petition contained evidence of specificity, but the panel found that the evidence did not indicate the existence of specificity.[93] Thus, the evidence simply did not support initiation. In this case, evidence that might best be used to demonstrate a benefit – the pricing information – had been redacted from the agreement. Under these circumstances, it cannot be the case that a petitioner is required to provide pricing information to which it does not have access in order to initiate an investigation into the alleged program. Such an interpretation is contrary to the ordinary language of Article 11.2.

79. Furthermore, Article 11 does not require pricing data to support an allegation of the provision of goods for less than adequate remuneration. In this instance, Commerce determined that the Forest Utilization License Agreement itself was detailed, company-specific, and demonstrated the existence of a clearly restricted market for stumpage and biomass.[94] Commerce determined that the application, though it did not provide pricing data, provided evidence that was reasonably available to the applicant, and such evidence, in accordance with the initiation standard under the SCM Agreement, indicated the existence of a countervailable subsidy.[95]

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[89] *CVD Investigations Initiation Checklist: Supercalendered Paper from Canada* (March 18, 2015), pp. 18-19 ("SC Paper Initiation Checklist") (Exhibit CAN-40).

[90] Canada Responses to the Panel's Questions, para. 87.

[91] U.S. First Written Submission, paras. 139-143.

[92] Canada Responses to the Panel's Questions, para. 86.

[93] *China – GOES (Panel)*, para. 7.65.

[94] SC Paper Initiation Checklist, p. 18 (Exhibit CAN-40).

[95] SC Paper Initiation Checklist, p. 18 (Exhibit CAN-40).

80. Canada also now argues that the initiation was defective because the petition did not contain a benchmark against which to compare the prices for stumpage and biomass.[96] This is incorrect. The purpose of a benchmark is to undertake a comparison; if the petitioner does not have access to the pricing information underlying the agreement, then a provision of a proposed benchmark would have no purpose.

81. For these reasons, and as explained in the United States' previous submissions, Canada has failed to establish that Commerce's initiation of an investigation into the provision of stumpage and biomass to Port Hawkesbury was inconsistent with Articles 11.2 and 11.3 of the SCM Agreement.

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

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

82. The U.S. first written submission explains how Canada's "as applied" claims concerning discovered information lack merit. First, the United States has shown that Canada has mischaracterized the scope of the investigation, and thus Canada's argument on what information was necessary is not based on the actual record in this dispute. Second, regardless of the scope of the investigation, the United States has demonstrated that the SCM Agreement does not prescribe the type of questions an investigating authority may ask an interested party, and Canada has not identified any provision that would foreclose Commerce from asking a question concerning "any other forms of assistance" that may be subsidizing the product in question. Finally, the United States has explained how Canada's arguments do not address the fundamental fact that Resolute impeded the investigation by failing to answer fully Commerce's question concerning "any other forms of assistance."

83. In its statements at the first panel meeting and in its responses to the Panel's questions, Canada has done nothing to improve its deficient arguments. Instead, Canada has conceded certain points and repeated arguments advanced in its first written submission. Those arguments continue to lack merit. In the following section, we address statements Canada made during the first panel meeting and in response to the Panel's questions regarding "any other forms of assistance" question and the use of facts available.

84. First, in Canada's opening statement at the first panel meeting, Canada states that while the scope of the investigation is defined with respect to the product under investigation for the purposes of the any other forms of assistance question,[97] Article 11 initiation standards should not be understood to refer to initiation with respect to a product.[98] Canada's statements are

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[96] Canada Responses to the Panel's Questions, paras. 89, 93.

[97] Canada's Opening Statement at the First Substantive Meeting of the Panel, para. 31

[98] Canada's Opening Statement at the First Substantive Meeting of the Panel, para. 32.

inconsistent and not supported by any legal justification. As explained thoroughly in the U.S. first written submission, the content and structure of Article 11 support that the investigating authority is able to satisfy the Article 11 initiation standards when it launches an investigation into an alleged subsidization of a particular product that need not be constrained to particular programs specified in the application. Particularly if – as appears to be the case – Canada accepts that the scope of Commerce's investigation was into the alleged subsidization of a product, it is only logical that Article 11 likewise should be understood to apply with respect to the product under investigation.

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

86. Second, Canada argues that the "any other forms of assistance" question is problematic because the question is ambiguous, overly broad, and not specified in detail.[99] Canada further argues that the "any other forms of assistance question" is applied in such a broad manner that it requires reporting measures that are not financial contributions and requires respondents to report all "assistance" received without defining the term "assistance."[100] As an initial matter, Canada has conceded in its response to the Panel's questions that "a question cannot, in and of itself, violate the requirements of the SCM Agreement."[101] Nonetheless, Canada argues that "poorly drafted, overly broad or ambiguous questions cannot request 'necessary information' and the failure to provide information in response to such a question cannot constitute an action that significantly impedes an investigation pursuant to Article 12.7."[102]

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

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[99] Canada Response to the Panel Questions, para. 101; *see also* Canada's Opening Statement at the First Substantive Meeting of the Panel, paras. 13-14.

[100] Canada Opening Statement, paras. 13-14.

[101] Canada Response to Panel's Question, para. 164.

[102] Canada Response to Panel's Question, para. 164.

(other than those alleged in the petition) is relevant to determine the total level of subsidization to the product under investigation.

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

89. With respect to Canada's argument that the term "assistance" was not defined in Commerce's questionnaire to Resolute, it is important to note that Resolute did not inform Commerce that it had difficulty defining "assistance." Had there been limitations to its answer, Resolute should have disclosed to Commerce what those limitations were from the outset. This would have provided Commerce with the maximum time to examine the additional assistance and consider arguments by the parties concerning the relevancy of their contents. However, Resolute provided a blanket assertion that there was no further information for it to provide.[103] Thus, as a result of Resolute's representation to Commerce that it had provided all information requested, Commerce was unaware that in reality there was unreported assistance that may have warranted a more detailed inquiry.

90. Third, in its opening statement, Canada argues that Commerce issued supplemental questionnaires, but never followed-up on these responses to the "other forms of assistance" question.[104] This argument does not match up with the record – as just explained, Resolute asserted that it received no other forms of assistance. Thus, on its face, Resolute's response to Commerce was complete, and Commerce had no basis to follow up on Resolute's response. In particular, Resolute represented that it had "examined its records diligently and {was} not aware of any other programs by {the government of Canada} . . . that provided, directly or indirectly, any other forms of assistance to Resolute's production and export of SC Paper."[105] Nor did the government of Canada's questionnaire response indicate that Resolute had received "other forms of assistance." Thus, Commerce had no indication at that time that Resolute's response was deficient in any way.

91. 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.[106] 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

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

[104] Canada Opening Statement at the First Substantive Meeting of the Panel, para. 17.

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

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

subsidy accounts that Resolute had failed to disclose to Commerce. And, Canada does not dispute that Resolute's answer was untrue: other governmental assistance was provided, and was clearly marked as such in the records of the respondent. Moreover, per Article 25 of the SCM Agreement, Canada failed to notify to Members any of the programs discovered during verification, depriving Members of the ability to understand the subsidies and evaluate their trade effects, if any.

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

93. Finally, in its response to the Panel's question, Canada argues that Commerce had available the amounts received by Fibrek, and that the information was therefore not missing.[107] Canada is incorrect. These amounts were not available to Commerce to place onto the record because they were not verifiable at that late stage of the proceeding. As discussed above, it was because of Resolute's failure to disclose the assistance from the outset that accounts which clearly indicated the existence of other forms of assistance were not discovered until the onsite verification. At that late juncture, Commerce officials were not able to verify the newly discovered subsidies, *i.e.*, whether the information discovered at verification was reliable and fully reflected the amount of assistance Resolute had received. Without the timely disclosure by Resolute of this assistance, Commerce was deprived of the opportunity to solicit information from the relevant government authority regarding the program or programs under which these funds were provided. Thus, Commerce properly relied on facts available to fill in the missing information.

94. For the reasons stated above, and as explained in the United States' previous submissions, Canada's as applied claims concerning discovered information are without merit.

[107] Canada Responses to the Panel's Questions, para. 151.

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

95. In its responses to the Panel's questions, Canada defines the term hostile takeover and argues that a hostile takeover is "always an arm's-length transaction."[108] However, the term "hostile takeover" is not used in the SCM Agreement, nor is it contained in U.S. countervailing duty laws or regulations. Accordingly, one cannot conclude that Resolute's unsupported assertion that a "hostile takeover" occurred requires, or even supports, a finding that any such transaction extinguished subsidy benefits.

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

97. For the reasons stated above, and as explained in the United States' previous submissions, Commerce properly determined that certain benefits conferred to Fibrek were not extinguished when Resolute acquired Fibrek.

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

98. As already addressed extensively and with specific reference to the text of the SCM Agreement,[109] the United States has demonstrated that Commerce's calculation of Resolute's subsidy rate for the Federal Pulp and Paper Green Transformation Program ("FPPGTP"), Forest Sector Prosperity Fund ("FSPF"), and the Ontario Northern Industrial Electricity Rate ("NIER") programs was consistent with the applicable obligations under the covered agreements.

99. Canada and the United States agree on the applicable obligations: in Canada's responses to the Panel's questions, Canada acknowledged that an authority's inquiry into the existence of a product-specific tie should not focus on "the recipient's use of the proceeds of a subsidy."[110]

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[108] Canada Responses to the Panel's Questions, para. 90.

[109] U.S. First Written Submission, paras. 271-297; U.S. Responses to the Panel's Questions, paras. 136-143.

[110] Canada Responses to the Panel's Questions, para. 137.

Thus, Canada appears to agree with the United States that the covered agreements do not require an investigating authority to trace specific benefits from receipt to the moment of actual use.[111]

100. The appropriate inquiry, as explained by the Appellate Body, is on the subsidy at the time of bestowal. In *US – Washing Machines*, the Appellate Body explained that "we consider that a subsidy is 'tied' to a particular product if the bestowal of that subsidy is connected to, or conditioned upon, the production or sale of the production concerned." In conducting this assessment, "an investigating authority must examine the design, structure, and operation of the measure *granting* the subsidy at issue and take into account all the relevant facts surrounding the *granting* of that subsidy."[112] Canada appears to agree with this interpretation.[113]

101. Canada now argues that these subsidy programs are not tied to SC Paper because the facilities that received these countervailable subsidies did not produce SC Paper or SC Paper inputs.[114] As Canada has acknowledged, however, the actual use of the subsidy is not the relevant issue for analysis. Rather, the relevant issue is whether, at the time of bestowal of the subsidy, the bestowal was contingent on the production of a particular product. Commerce's determination was consistent with this approach. To review:

102. **FPPGTP:** Commerce concluded that this program's eligibility requirements conditioned bestowal of the subsidy on the production of pulp or paper products.[115] In its final determination, Commerce found that the program's application guide "states that the intent of the program was to improve the environmental performance of Canada's pulp and paper industry, and credits were only to be granted to Canadian pulp and paper producers."[116] Furthermore, the application checklist requires that all proposals under the program demonstrate that "the project is a capital investment at a Canadian pulp and paper mill that is directly related to the mill's industrial process and will result in demonstrable improvements in environmental performance."[117]

103. Finally, the only explicit limitation on eligible capital improvement projects was that they "[[

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[111] Canada Responses to the Panel's Questions, para. 137.

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

[113] Canada Responses to the Panel's Questions, para. 137.

[114] Oral Statement of Canada at the First Substantive Meeting of the Panel, paras. 54-59.

[115] SC Paper Final I&D Memo, pp. 26-27 (Exhibit CAN-37).

[116] SC Paper Final I&D Memo, pp. 26-27 (Exhibit CAN-37).

[117] *Response of the Government of Canada to the Department's April 6, 2015 Questionnaire, Volume V* (May 27, 2015) at Exhibit GOC-PPGTP-1, Appendix III (Exhibit CAN-44) (BCI).

[118] *Response of the Government of Canada to the Department's April 6, 2015 Questionnaire, Volume V* (May 27, 2015) at Exhibit GOC-PPGTP-2, p. 5 (Exhibit CAN-44) (BCI)).

104. Thus, the eligibility requirement made clear that, at the time of bestowal of the subsidy, receipt of the funds was conditioned on the production of pulp or other paper products. Commerce appropriately considered the "design, structure, and operation" of the measure granting the subsidy, and properly attributed the total benefits received by Resolute to the company's total sales of pulp and paper products.[119]

105. **Forest Sector Prosperity Fund:** The FSPF program was a grant program supporting capital investment projects in northern or rural Ontario.[120] The program eligibility criteria – which are listed on page 00207 of Exhibit CAN-50 – did not condition Resolute's receipt of the grant on the production of a given product. As Commerce observed, Resolute's application described a project that was not limited to the production of particular merchandise.[121] Resolute received a subsidy benefiting all of its production activities, not one "connected to, or conditioned on, the production or sale of a specific product."[122] Accordingly, Commerce properly attributed the total benefits received by Resolute to the company's total sales.

106. **Ontario Northern Industrial Electricity Rate:** The NIER program was intended "to assist Northern Ontario's largest qualifying industrial electricity consumers to reduce energy costs and use resources efficiently."[123] Under this program, companies with "industrial facilities { } situated in Northern Ontario" received an energy rebate based on their energy consumption levels (subject to a cap) in exchange for "commit{ting} to developing and implementing an energy management plan { } to manage their energy usage and improve energy efficiency and sustainability."[124]

107. According to Resolute, the NIER program did not condition the receipt of subsidy benefits on the production of particular merchandise.[125] Indeed, Resolute received benefits under this program simply because it was situated in Ontario.[126] Thus, Resolute received a subsidy benefiting all of its production activities, not one "connected to, or conditioned on, the production or sale of a specific product."[127]

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[119] SC Paper Final I&D Memo, p. 27 (Exhibit CAN-37).

[120] *Verification Report: Government of Ontario* (August 27, 2015), p. 4 (Exhibit CAN-142).

[121] *Supercalendered Paper from Canada: Government of Ontario Verification Exhibits* (August 12, 2015) at Exhibit 2 (Exhibit CAN-50) (BCI).

[122] *US – Washing Machines (AB)*, para. 5.273.

[123] *Response of the Government of Ontario to the Department's April 6, 2015 Questionnaire* (May 27, 2015), p. Ontario-2 (Exhibit CAN-103) (BCI).

[124] *Response of the Government of Ontario to the Department's April 6, 2015 Questionnaire* (May 27, 2015), pp. Ontario-2 and Ontario-19 (Exhibit CAN-103) (BCI).

[125] *Resolute Section III Questionnaire Response* (May 27, 2015) at App. B, p. 2 (Exhibit CAN-41) (BCI) ("Neither the application nor the approval specified any merchandise for which the credits were to be provided.").

[126] *Resolute Section III Questionnaire Response* (May 27, 2015), p. 25 (Exhibit CAN-41) (BCI).

[127] *US – Washing Machines (AB)*, para. 5.273.

108. For these reasons, Canada has not established that Commerce's calculation of a countervailing subsidy rate for these programs was inconsistent with the SCM Agreement or the GATT 1994.

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

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

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

110. Canada admits that the SCM Agreement does not prescribe a particular method for calculating countervailing duty rates for non-investigated exporters.[128] This acknowledgment should end the Panel's inquiry, as Canada cannot establish a breach.

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

112. Canada's first argument is that Articles 10 and 19.3, when read together, require an authority to ensure that the investigated exporters are representative of the industry as a whole in order to produce the most representative all others rate possible.[129] Canada relies on the same provisions for its assertion that an authority may in some cases be required to calculate a *regional* all others rate instead of a country-wide all others rate.[130] Neither of Canada's proposed interpretations have any basis in the provisions it cites.

113. Article 10 states:

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[128] Canada Responses to the Panel's Questions, para. 140.

[129] Canada Responses to the Panel's Questions, para. 141.

[130] Canada Responses to the Panel's Questions, para. 142.

> Members shall take all necessary steps *to ensure that the imposition* of a countervailing duty on any product of the territory of any Member imported into the territory of another Member *is in accordance with the provisions* of Article VI of GATT 1994 and the terms of this Agreement.[131]

114. Although Canada states that an authority is required to "take all necessary steps to ensure that the rate is accurate,"[132] that is not, in fact, the standard of Article 10. Rather, under Article 10, a Member is to take all necessary steps to ensure compliance with a separate provision of the GATT 1994 or the SCM Agreement. Canada has not explained how Article 10, alone, imposes an obligation relevant to Commerce's calculation of an all others rate.

115. Canada refers to Article 19.3 of the SCM Agreement, suggesting that the United States was in breach of Article 10 by failing to take all necessary steps to ensure that imposition of the duty was "in accordance with" Article 19.3. But Canada's reference does not support the proposed interpretation.

116. Article 19.3, in relevant part,[133] states:

> 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.

117. As with Article 10, Canada has not identified a relevant obligation in Article 19.3. Article 19.3 entitles a non-investigated exporter to an expedited review in order to establish an individual countervailing duty rate; this provision has no bearing on the manner in which an authority is to calculate an all others rate. To that end, the United States agrees with the European Union view that it is because of this procedural safeguard that "investigating authorities are allowed to set duties at a level which is a reasonable proxy."[134]

118. Canada's assertion that Articles 10 and 19.3, when read together, *require* an authority to ensure that selected exporters are representative of the industry as a whole is completely divorced from the text of the provisions. Canada's mere reference to these provisions fails to establish the existence of an obligation. Quite simply, there is no textual basis for Canada's interpretation, and Canada's efforts to establish a breach must fail.

119. Canada's next argument – concerning Article 19.4 – lacks support in the record of the investigation. Canada argues that the calculated all others rate is inconsistent with Article 19.4 of the SCM Agreement because the "amounts of countervailing duties levied exceed the amount

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[131] Emphasis added.

[132] Canada Responses to the Panel's Questions, para. 141.

[133] Canada has not itself identified the relevant part of Article 19.3. Accordingly, the United States presumes that Canada's interpretation relies on those aspects of the provision that concern non-investigated exporters.

[134] European Union Responses to the Panel's Questions, para. 6.

of subsidies found to exist."[135] But, the record of the investigation demonstrates that the all others rate is based entirely on the "subsidies found to exist" with respect to SC Paper producers in Canada. The all others rate reflected the weighted-average of Port Hawkesbury's and Resolute's countervailing duty rates, which provided the best approximation for the countervailable subsidies received by all other SC Paper producers during the relevant period of investigation. Because Commerce calculated the all others rate entirely on the basis of the "subsidies found to exist," Canada has failed to support the assertion that the all others rate exceeds the amount of subsidies found to exist.

120. Canada's third argument, again without support in the text of the covered agreements, faults the inclusion of Resolute's CVD rate in the all others calculation because Resolute's CVD rate was based in part on facts available.[136] Canada refers to Article 12.7 of the SCM Agreement, but has not demonstrated the relevance of that provision to Commerce's calculated all others rate. As explained above and in prior submissions by the United States, nothing in the text of Article 19.4 of the SCM Agreement prohibits the inclusion of a facts available rate in an all others rate calculation.

121. Finally, as discussed in prior submissions,[137] Canada's continued reliance on the Appellate Body report in *US – Hot-Rolled Steel* is misplaced. We will not repeat our arguments, but note that 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*. The SCM Agreement has no provision that is analogous to Article 9.4 of the Anti-Dumping Agreement, and, consistent with the customary rules of treaty interpretation, the treaty is to be interpreted in accordance with the ordinary meaning of the terms.

122. In short, Canada has not established the breach of a legal obligation in the covered agreements, and its proposed interpretations are not supported by the text of the GATT 1994 or the SCM Agreement, or Appellate Body reports.

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

123. Canada's argument that examining new subsidy allegations will "always" cause more delay in the context of an expedited review is misplaced. First, Canada offers conjecture, but no evidence in support of its sweeping generalization that a particular result would "always" occur. Canada fails to demonstrate how the examination of new subsidy allegations necessarily delays this process and offers no comparison point for the Panel to determine what, if anything, might constitute a "delay." Second, Canada fails to acknowledge the purpose of an expedited review.[138] Similar to original investigations, an expedited review examines the potential

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[135] Oral Statement of Canada at the First Substantive Meeting of the Panel, para. 176.

[136] Oral Statement of Canada at the First Substantive Meeting of the Panel, para. 178.

[137] *See* U.S. Responses to the Panel's Questions, paras. 144-148.

[138] Canada Responses to the Panel Questions, para. 156.

subsidization of a particular product and determines the individual countervailing duty rate for the exporter under review. To that end, the investigation of new subsidy allegations in an expedited review is a permissible method of examining the potential subsidization of a particular product and the exporter under review. Moreover, an expedited review allows unexamined exporters to receive an individual countervailing duty rate sooner and on an expedited basis in the administrative process than would otherwise be the case (i.e., prior to the completion of the first administrative review after the issuance of a countervailing duty order). In fact, since our last submission in this dispute, Commerce has completed its expedited review of Catalyst and Irving.[139] In contrast, Commerce only initiated its first administrative review of the SC paper countervailing duty order in February 2017, and that review is not expected to be completed until the end of 2017 at the earliest.

124. Additionally, the United States disagrees with the Canada's reading of the Appellate Body report in *US – Carbon Steel (India)*.[140] As explained in the U.S. answers to the Panel's questions, the SCM Agreement does not contain any type of unspecified limitation on the new subsidy allegations that may be included in an expedited review under Article 19.3. Canada presents no valid basis for this proposed interpretation of the SCM Agreement. Similarly, the close nexus language that the European Union cites in its answers to the Panel's questions is simply *dictum*. The complaining party in *Carbon Steel* did not argue that the new subsides that may be examined in administrative reviews is somehow limited. Accordingly, neither the complaining party nor the responding party addressed this issue. Nor did the panel make any findings that could have been appealed. Rather, the statement upon which the European Union relies is found in an introductory legal discussion in the relevant section of the Appellate Body report, divorced from the matter actually on appeal. The United States has serious concerns under the DSU with an approach where the Appellate Body issues *dictum* in one dispute, and then a party or adjudicator relies on that *dictum* as if it were treaty text in a subsequent dispute. With respect to the contents of the *dictum* upon which the European Union relies, the United States refers to paragraphs 168-172 of the U.S. answers to the Panel's questions.

125. For the reasons outlined above and included in prior U.S. submissions, the United States respectfully requests the Panel to reject Canada's initiation claims regarding expedited reviews.

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

126. In addition to its "as applied" claims concerning discovered information, Canada claims that the application of facts available in relation to subsidies discovered during the course of an investigation is inconsistent "as such" with various provisions of the SCM Agreement. As explained below and in our previous submissions, Canada's claims are without merit. Canada has failed to identify the precise content of an alleged rule or norm or its general and prospective

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[139] *Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review*, 82 Fed. Reg. 18896 (April 24, 2017) (Exhibit USA-26).

[140] Canada Opening Statement at First Substantive Meeting, paras. 190-191. The EU took a similarly incorrect view. *See* European Union Responses to the Panel's Questions, para. 10.

application. In addition, Canada "as such" claim is inconsistent with the actions of its own administering authority. For these reasons, and those explained in our prior submissions, Canada's claims fail.

A. Canada's "As Such" Claim Related to Discovered Information Fails Because Canada Has Not Identified the Precise Content of the Alleged Rule or Norm or Its General and Prospective Application

127. Canada's challenge to a purported rule or norm rests on Canada meeting a high threshold that such unwritten rule or norm does in fact exist. As the United States has shown in its prior written and oral submissions, Canada has not shown the existence of any rule or norm of general and prospective application.[141]

128. Canada's additional arguments at the first panel meeting and its responses to the Panel's questions following the panel meeting have not cured its failure. Specifically, once Canada's evidence is examined, it is clear that Canada has not carried its high burden. With respect to the alleged rule or norm, Canada has not clearly established – as it must – the precise content of an alleged rule or norm and the existence of general and prospective rules or norms that govern Commerce's action. Rather, Canada's additional arguments and evidence relate to past action, not what Commerce will do in the future.

129. As the United States explained in its first written submission at paragraph 350, it is not clear if Canada is challenging the inclusion of a particular question in a questionnaire, the application of facts available, a combination of both – or indeed perhaps something entirely different. As such, Canada has not met its burden of even attempting to define the supposed rule or norm.

130. Canada also does not show the existence of a rule or norm that constrains or otherwise affects Commerce's behavior generally and prospectively. Consequently, Canada's as such challenge to these alleged measures must fail, as Canada has not established the existence of the supposed rule or norm it seeks to challenge.

131. The United States further notes that Canada has acknowledged in its response to the Panel's questions that "a question cannot, in and of itself, violate the requirements of the SCM Agreement."[142] Therefore, Canada's acknowledgment suggests that Canada is not challenging the "any other forms of assistance question" itself, but rather the application of facts available to discovered information. If Canada is in fact only challenging Commerce's application of facts available to discovered information, then Canada has the burden of proving the 1) precise content of the alleged rule or norm; and 2) that the alleged rule or norm has general and prospective application.

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[141] *US – Export Restraints*, para. 8.126.

[142] Canada Response to the Panel's Question, para. 164.

132. As the United States explained in its first written submission, Canada's attempt to articulate the precise content of the alleged measure and general and prospective application fails. As discussed below, in each of the nine determinations that Canada relies upon, Commerce made unique findings and reached different results. Canada argues incorrectly that the United States is "point{ing} to minor variations in language and try{ing} to say these are different actions."[143] Rather, the substantial variations in language in each determination reflects the fact-specific nature of each of Commerce's determinations. In the subsequent paragraphs, we highlight the unique facts surrounding each of the nine determinations as evidence that Commerce's approach to discovered subsidies is not uniform and that no rule or norm of general and prospective application exists.

133. *Solar Cells from China 2012*: During verification, Commerce examined Trina Solar's special payables account to confirm that it had correctly reported all countervailable grants it received.[144] While examining the account, Commerce officials discovered an entry in Trina Solar's special payables account, "bonus for employees from government," which had not been reported previously despite Trina Solar representing in its second supplemental questionnaire response that it had identified all non-recurring subsides provided by the government of China.[145] Trina Solar was unable to demonstrate that the entry was tied to a reported grant or that the entry was not a countervailable grant.[146] As a result, Commerce relied on facts available to determine the amount countervailable.[147]

134. *Shrimp from China 2013*: On the first day of verification, Commerce asked Guolian if there were any minor corrections to be submitted, and Guolian provided five corrections.[148] Then on the third day of verification, Guolian officials further reported that three additional grants had not been included in its supplemental questionnaire response because those grants "had not been included in either non-operational income or special payables when Guolian was preparing its supplemental response."[149] According to Canada, Commerce refused to accept the additional information about these programs.[150] However, Commerce determined that Guolian had several opportunities to report the grants following the submission of its supplemental

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[143] Oral Statement of Canada at the First Substantive Meeting of the Panel, para. 213.

[144] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovolataic Cells from China* (October 9, 2012) ("Solar Cells from China 2012 I&D Memo"), pp. 9-10, 68-69 (Exhibit CAN-116).

[145] Solar Cells from China 2012 I&D Memo, pp. 9-10, 68-69 (Exhibit CAN-116).

[146] Solar Cells from China 2012 I&D Memo, p. 9 (Exhibit CAN-116).

[147] Solar Cells from China 2012 I&D Memo, p. 9 (Exhibit CAN-116).

[148] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from China* (August 19, 2013) ("Shrimp from China 2013 I&D Memo"), p. 76 (Exhibit CAN-118).

[149] Shrimp from China 2013 I&D Memo, p. 76 (Exhibit CAN-118).

[150] Canada First Written Submission, para. 411.

response, yet it did not seek additional time for provide this information.[151] Commerce, thus, used facts available to determine that the grants were countervailable.[152]

135. *Solar Cells from China 2014*: During verification, Commerce discovered several entries for grants which were previously unreported.[153] Commerce noted the "names, dates, and amounts received" for the discovered grants but did not accept additional information offered by Trina Solar's counsel.[154] Commerce relied on certain documents to determine the countervailability of the unreported grants.[155] Commerce determined that "the information in Trina Solar's 2012 annual report contains numerous references to government grants" and the discovered grants "were booked into accounts for recording subsidies under the PRC GAAP, such as government grants."[156] Commerce also discovered a previously unreported tax deduction in Trina Solar's income tax returns.[157] When questioned about the deduction, the company officials explained that the deduction was for employing persons with disabilities and provided a notice issued by the Ministry of Finance and the State Administration of Taxation, which Commerce accepted.[158] Thus, Commerce sought an explanation from the company officials with respect to the discovered tax deduction.

136. *Solar Cells from China 2015*: During verification, Commerce "discovered" 13 previously unreported grants.[159] Commerce collected information with respect to the discovered grants, and noted that "Lightway made no attempt to explain why {the discovered grants} might not be countervailable.[160] After examining "Lightway's audited financial statements and the exhibits collected at verification on this issue," Commerce determined that the 13 grants were in fact four unreported subsidy programs and one previously reported subsidy program.[161] Commerce did not apply facts available to the previously reported subsidy program.[162] Contrary to Canada's allegation, the record suggests that in this case, Commerce did in fact collect

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[151] Shrimp from China 2013 I&D Memo, p. 77 (Exhibit CAN-118).

[152] Shrimp from China 2013 I&D Memo, p. 77 (Exhibit CAN-118).

[153] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from China* (December 15, 2014) ("Solar Cells from China 2014 I&D Memo"), p. 86 (Exhibit CAN-121).

[154] Solar Cells from China 2014 I&D Memo, p. 86 (Exhibit CAN-121).

[155] Solar Cells from China 2014 I&D Memo, p. 87 (Exhibit CAN-121).

[156] Solar Cells from China 2014 I&D Memo, p. 87 (Exhibit CAN-121).

[157] Solar Cells from China 2014 I&D Memo, p. 87 (Exhibit CAN-121).

[158] Solar Cells from China 2014 I&D Memo, p. 86 (Exhibit CAN-121).

[159] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from China* (July 7, 2015 ("Solar Cells from China 2015 I&D Memo"), p. 59 (Exhibit USA-08).

[160] Solar Cells from China 2015 I&D Memo, p. 59 (Exhibit USA-08).

[161] Solar Cells from China 2015 I&D Memo, p. 59 (Exhibit USA-08).

[162] Solar Cells from China 2015 I&D Memo, p. 59 (Exhibit USA-08).

additional information regarding the discovered grant and there was no additional information offered by Lightway for Commerce to refuse.[163]

137. *PET Resin from China 2015*: On the first day of verification, Dragon Group and Xingyu both presented several previously unreported grants as "minor corrections."[164] Dragon Group and Xingyu explained that the grants had been omitted as a result of typographical errors.[165] Commerce accepted two of the three grants presented by Dragon Group and two of the six grants presented by Xingyu.[166] Commerce rejected the other grants because the grants were "recorded in accounts that should have been examined prior to verification and 'whether a program was used or not by a company is not 'minor' in the view of the Department."[167] Here, the "discovered" information was presented by the companies themselves to Commerce in the form of minor corrections. Commerce chose to accept certain corrections while rejecting others, based on what it determined to constitute a "minor" correction.[168] Additionally, while additional information from Dragon Group was not accepted,[169] Commerce stated that new factual information is accepted at verification "on case-by-case basis."[170]

138. *Welded Stainless Pressure Pipe from India 2016*: During verification, Commerce discovered that Steamline had failed to report an electricity duty rebate.[171] This rebate was not previously identified or reported to Commerce.[172] The information examined by Commerce at verification showed that the duty was paid, as well as that the rebate was received, during the period of investigation.[173] In the final determination, Commerce applied facts available in determining that the discovered rebate constituted a countervailable subsidy.[174] Because

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[163] Solar Cells from China 2015 I&D Memo, pp. 57-58 (Exhibit USA-08).

[164] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from China* (March 4, 2016) ("PET Resin from China 2015 I&D Memo"), p. 19 (Exhibit CAN-125).

[165] PET Resin from China 2015 I&D Memo, pp. 48-49 (Exhibit CAN-125).

[166] PET Resin from China 2015 I&D Memo, p. 19 (Exhibit CAN-125).

[167] PET Resin from China 2015 I&D Memo, p. 19 (Exhibit CAN-125).

[168] PET Resin from China 2015 I&D Memo, p. 19 (Exhibit CAN-125).

[169] PET Resin from China 2015 I&D Memo, p. 50 (Exhibit CAN-125).

[170] PET Resin from China 2015 I&D Memo, p. 52 (Exhibit CAN-125).

[171] *Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India* (September 22, 2016) ("Welded Stainless Pipe from India 2016 I&D Memo"), pp. 28-29 (Exhibit CAN-152).

[172] Welded Stainless Pipe from India 2016 I&D Memo, pp. 28-29 (Exhibit CAN-152).

[173] Welded Stainless Pipe from India 2016 I&D Memo, pp. 28-29 (Exhibit CAN-152).

[174] Welded Stainless Pipe from India 2016 I&D Memo, pp. 28-29 (Exhibit CAN-152).

Commerce verified information concerning the benefit amount at verification, Commerce had a verified benefit amount on the record to use in its calculations.[175]

139. *Supercalendered Paper from Canada 2015*: In the instant case, during the verification of Resolute, Commerce discovered four potential previously unreported subsidy accounts.[176] Three of the accounts showed reimbursements and/or funds received.[177] For these three accounts, Commerce used facts available to determine that there were two countervailable programs.[178] However, Commerce determined that it was not necessary to apply facts available to the other subsidy account discovered during verification. Moreover, at the government of Nova Scotia's verification, Commerce discovered and accepted information concerning the Bowater Mersey program, a previously unreported program.[179]

140. *Truck and Bus Tires from China 2017:* At its verification, Guizhou Tyre attempted at the outset of verification to provide more than 40 grants to Commerce officials that were previously unreported.[180] Commerce declined to accept the information because "the information that Guizhou Tyre presented at verification indicated that these received grants should have been reported to the Department previously."[181] Thus, Commerce applied facts available to these grants to determine them countervailable.[182]

141. *Stainless Sheet and Strip from China 2017*: During verification of Taigang, previously unreported grants were either offered as minor corrections at the outset of verification, or discovered during the course of verification.[183] Company officials at the verification "did not contest that they were government grants."[184] Moreover, more than a month prior to the start of verification, Commerce notified Taigang that it would verify reported usage of grants, as well as

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[175] *Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India: Final Calculation Memorandum for Steamline Industries Limited* (September 22, 2016), p.2 (Exhibit CAN-148).

[176] SC Paper Final I&D Memo, p. 29 (Exhibit CAN-37).

[177] SC Paper Final I&D Memo, p. 12 (Exhibit CAN-37).

[178] SC Paper Final I&D Memo, p. 30 (Exhibit CAN-37).

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

[180] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Truck and Bus Tires from the People's Republic of China; and Final Affirmative Determination of Critical Circumstances, in Part* (January 19, 2017) ("Truck and Bus Tires from China I&D Memo"), p. 65 (Exhibit CAN-163). The United States notes that although the issues and decision memorandum is dated "January 19, 2016," this was a typographical error. As indicated by the "filed by" date on the bottom of the document, the issues and decision memorandum was issued in January 2017.

[181] Truck and Bus Tires I&D Memo from China, p. 66 (Exhibit CAN-163).

[182] Truck and Bus Tires I&D Memo from China, p. 66 (Exhibit CAN-163).

[183] *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China* (February 1, 2017) ("Stainless Steel Sheet and Strip from China I&D Memo"), p. 20 (Exhibit CAN-164).

[184] Stainless Steel Sheet and Strip from China I&D Memo, p. 20 (Exhibit CAN-164).

"'evidence of subsidies provided by your government under any subsidy program, including programs not currently subject to investigation,' including subsidies recorded under 'special payables,' 'other payables,' and 'government subsidies' accounts."[185] At verification, Commerce discovered some of the unreported grants in the "special payables" account.[186] Thus, as a result of Taigang's failure to disclose these grants until verification, thereby hindering Commerce's efforts to examine the full scope of governmental assistance, Commerce applied facts available to the unreported grants.[187]

142. In addition, although Canada alleges that Commerce began the practice of applying facts available to discovered subsidies at verification in 2012, Canada fails to highlight *Large Residential Washers from the Republic of Korea*, a December 2012 decision, which Commerce cited to in its final determination as an example of a determination where Commerce did not countervail certain discovered grants at verification because they were deemed to not be tied to subject merchandise.[188] The *Large Residential Washers* determination was issued after *Solar Cells from China 2012*, which Canada relies upon in support of its demonstration of the purported measure.

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

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

B. Canada's "As Such" Claim Is Inconsistent with the Actions of Canada's Own Administering Authority

145. Canada's "as such" challenge, in addition to lacking legal merit, is remarkable in that it is inconsistent with the actions of its own administering authority. As described below, Canada Border Services Agency (CBSA) takes similar actions to those taken by Commerce in the SC

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[185] Stainless Steel Sheet and Strip from China I&D Memo, p. 20 (Exhibit CAN-164).

[186] Stainless Steel Sheet and Strip from China I&D Memo, p. 20 (Exhibit CAN-164).

[187] Stainless Steel Sheet and Strip from China I&D Memo, pp. 20-21 (Exhibit CAN-164).

[188] SC Paper I&D Memo, p. 155 (Exhibit CAN-37); *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea* (December 18, 2012), p. 22 (Exhibit USA-19).

Paper investigation with respect to other forms of assistance. CBSA both asks a similar question, and applies facts available if it later discovers that a party has failed to fully respond to the question.

146. First, in its requests for information, in addition to asking questions concerning the alleged subsidy programs, CBSA also asks questions concerning "any other programs not previously addressed."[189] For instance, in *OCTG from India and Other Countries*, CBSA asked the Government of Turkey to identify "any other assistance programs . . . not previously addressed."[190] Additionally, in *Copper Pipe from China*, CBSA asked the Government of China to identify "any other assistance programs . . . not previously addressed," and specifically requested disclosure of programs China did not identify it its notification to the SCM Committee, per Article 25 of the SCM Agreement.[191] Likewise, other investigating authorities also ask a similar question. For instance, the European Commission has asked questions concerning other types of subsidies received in its investigation of bioethanol originating in the United States.[192] Similarly, Australia has asked a question concerning other forms of assistance in an investigation of steel shelving from China.[193]

147. Second, not only does CBSA ask a similar question concerning other forms of assistance not otherwise alleged, but if CBSA discovers that a respondent failed to fully answer the question, CBSA has applied facts available. For instance, in *OCTG from India and Other Countries*, CBSA included additional programs after the initiation of the investigation concerning subsidization by the governments of India and Thailand.[194] Specifically, for its investigation concerning Thailand, in its final determination, CBSA included program 8 and 9, which were not previously identified in the preliminary determination.[195]

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[189] CBSA Exporter Request for Information – Subsidy, Certain OCTG From the Republic of India, the Republic of Indonesia, the Republic of Korea, the Kingdom of Thailand, the Republic of Turkey, Ukraine and the Socialist Republic of Vietnam, p. 31 (Exhibit USA-20).

[190] CBSA Exporter Request for Information – Subsidy, Certain OCTG From the Republic of India, the Republic of Indonesia, the Republic of Korea, the Kingdom of Thailand, the Republic of Turkey, Ukraine and the Socialist Republic of Vietnam, p. 31 (Exhibit USA-20).

[191] CBSA Exporter Request for Information – Subsidy, Certain Copper Pipe From the People's Republic of China, pp. 21-22, 27 (Exhibit USA-21).

[192] EC Anti-Subsidy Proceeding Questionnaire to the United States Concerning Imports of Bioethanol Originating in the United States of America (Exhibit USA-22).

[193] Australia Anti-Dumping Commission Questionnaire to the People's Republic of China Concerning Steel Shelving (Exhibit US-23).

[194] CBSA Statement of Reasons, Concerning the Final Determinations of Certain Oil Country Tubular Goods Originating In or Exported From the Republic of India, the Republic of Indonesia, the Republic of Korea, the Kingdom of Thailand, the Republic of Turkey, Ukraine and the Socialist Republic of Vietnam, (Mar. 18, 2015), paras. 237-238, 252-253 ("OCTG Final Statement of Reasons") (Exhibit USA-24).

[195] See OCTG Final Statement of Reasons, paras. 252-253; *compare* CBSA Final Statement of Reasons, Annex II, pp. 61-62 (Exhibit USA-24) *with* CBSA Statement of Reasons Concerning the Preliminary Determination (Dec. 18, 2014), p. 83 (Exhibit USA-25).

148. In the final determination, CBSA then applied facts available to determine the countervailability of subsidy programs because "the Government of Thailand did not submit sufficient information in response to the subsidy RFI and SRFIs . . . . Due to this lack of information, subsidy amounts for all exporters have been determined . . . based on the best information available to CBSA."[196] Therefore, for programs 8 and 9, CBSA used facts available to determine that the programs were countervailable.[197]

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

150. For the reasons stated above, and as explained in the U.S. prior submissions, the United States respectfully requests the Panel to reject Canada's as such claims. Canada has not met the high evidentiary burden it faces in these circumstances to establish the precise content of the alleged unwritten measure or its general and prospective application.

VI. CONCLUSION

151. For the foregoing reasons, and those set out in previous U.S. submissions, the United States respectfully requests that the Panel reject all of Canada's claims.

[196] OCTG Final Statement of Reasons, Annex II, p. 60 (Exhibit USA-24).

[197] OCTG Final Statement of Reasons, Annex II, pp. 61-62 (Exhibit USA-24).