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UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

REPORT OF THE PANEL

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Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Import Measures	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
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China – GOES	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
Egypt – Steel Rebar	Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
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Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
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US – Anti-Dumping Methodologies (China)	Appellate Body Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/AB/R and Add.1, adopted 22 May 2017
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, p. 6027
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015
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US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, p. 5
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357

Short title	Full case title and citation
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Stainless Steel (Mexico)	Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Washing Machines	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R and Add.1, adopted 26 September 2016
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AFA	Adverse facts available
Catalyst	Catalyst Paper Corporation
BCI	Business Confidential Information
CAD	Canadian dollar
CCAA	Companies' Creditors Arrangement Act
CVD	Countervailing duty
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FIA	Forestry Infrastructure Agreement
Fibrek	Fibrek General Partnership
FIF	Forestry Infrastructure Fund
FSPF	Ontario Forest Sector Prosperity Fund
FULA	Forest Utilization License Agreement
GATT 1994	General Agreement on Tariffs and Trade 1994
Irving	Irving Paper Ltd.
Kwh	Kilowatt hour
LRR	Load Retention Rate
LRT	Load Retention Tariff
NewPage PH	NewPage Port Hawkesbury Corporation
NIER	Ontario Northern Industrial Electricity Rate
NSPI	Nova Scotia Power Incorporated
NSUARB	Nova Scotia Utility and Review Board
PHP	Port Hawkesbury Paper LP
POI	Period of investigation
PPGTP	Federal Pulp and Paper Green Transformation Programme
PWCC	Pacific West Commercial Corporation
Resolute	Resolute FP Canada Inc.
ROE	Return on equity
Sanabe	Sanabe & Associates LLC
SC Paper	Supercalendered Paper
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TPEA	Trade Preferences Extension Act
USD	United States dollar
USDOC	United States Department of Commerce
WTO	World Trade Organization

1 INTRODUCTION

1.1 Complaint by Canada

1.1. On 30 March 2016, Canada requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) concerning certain countervailing measures with respect to Supercalendered Paper (SC Paper) from Canada as well as the United States' alleged ongoing conduct of applying adverse facts available (AFA) in respect of programmes discovered during the course of a countervailing duty (CVD) investigation.[1]

1.2. Consultations were held on 4 May 2016, but failed to resolve the dispute. On 9 June 2016, Canada requested the establishment of a panel.[2]

1.2 Panel establishment and composition

1.3. At its meeting on 21 July 2016, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Canada in document WT/DS505/2, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Canada in document WT/DS505/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 22 August 2016, Canada requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 31 August 2016, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Paul O'Connor
Members:	Mr David Evans Mr Colin McCarthy

1.6. Brazil, China, the European Union, India, Japan, Korea, Mexico, and Turkey notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] and timetable on 8 December 2016. The Panel revised its timetable on 1 February 2017 and on 1 September 2017.

1.8. The Panel held a first substantive meeting with the parties on 21 and 22 March 2017. A session with the third parties took place on 22 March 2017. The Panel held a second substantive meeting with the parties on 13 and 14 June 2017. At the request of the parties, the Panel's meetings with the parties were open to the public, except for those portions of the meetings where

[1] Request for consultations by Canada, WT/DS505/1 (Canada's consultations request).
[2] Request for the Establishment of a Panel by Canada, WT/DS505/2 (Canada's panel request).
[3] DSB, Minutes of the meeting held on 21 July 2016, WT/DSB/M/383.
[4] Constitution note of the Panel, WT/DS505/3.
[5] See the Panel's Working Procedures in Annex A-1.

Business Confidential Information (BCI) was discussed. A portion of the Panel's meeting with the third parties was also open to the public.

1.9. On 29 September 2017, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 10 November 2017. The Panel issued its Final Report to the parties on 15 December 2017.

1.3.2 Working Procedures on Business Confidential Information

1.10. After consultations with the parties, the Panel adopted, on 15 December 2016, Additional Working Procedures for the protection of Business Confidential Information.[6] The Panel revised these procedures on 20 January 2017.

1.3.3 Working Procedures for open meetings

1.11. After consultations with the parties, the Panel adopted, on 27 January 2017, Additional Working Procedures for open meetings.[7]

2 FACTUAL ASPECTS

2.1 The measures at issue

2.1. Canada has challenged the following measures concerning the imposition by the United States of countervailing duties on imports of SC Paper from Canada[8]:

a. Supercalendered Paper from Canada: Initiation of Countervailing Duty Investigation, 80 Fed. Reg. 15981 (26 March 2015);

b. Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination, 80 Fed. Reg. 63535 (20 October 2015);

c. Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada (13 October 2015);

d. Supercalendered Paper from Canada: Countervailing Duty Order, 80 Fed. Reg. 76668 (10 December 2015);

e. the initiation checklist, preliminary determination, questionnaires, verification reports, calculations memoranda, other determinations, memoranda, reports, and measures related to the investigation of Supercalendered Paper from Canada; and

f. determinations, memoranda, reports, and measures related to the expedited reviews initiated pursuant to Supercalendered Paper from Canada: Initiation of Expedited Review of the Countervailing Duty Order, 81 Fed. Reg. 6506 (8 February 2016), including:

   i. New Subsidy Analysis Memorandum (18 April 2016), in which the United States initiated an investigation into the new subsidy allegations filed by the petitioner on 16 February 2016; and

   ii. any further decisions to initiate an investigation into the amended new subsidy allegations filed by the petitioner on 25 April 2016.

2.2. Canada has also challenged what it characterizes as the United States' "ongoing conduct", or, in the alternative, "rule or norm of general and prospective application", of applying AFA in respect

[6] See Panel's Additional Working Procedures of the Panel Concerning Business Confidential Information in Annex A-2.
[7] See Panel's Additional Working Procedures on open panel meetings in Annex A-3.
[8] Canada's panel request.

of programmes discovered during the course of an investigation, and refusing to accept or consider evidence concerning these discovered programmes.[9]

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Canada requests that the Panel find that the United States' measures, as set above, are inconsistent with its obligations under Articles 1.1(a)(1), 1.1(b), 2, 10, 11.1, 11.2, 11.3, 11.6, 12.1, 12.2, 12.3, 12.7, 12.8, 14, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994. Canada further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that the United States bring its measures into conformity with the SCM Agreement and the GATT 1994.[10]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures (see Annexes B-1, B-2, C-1, and C-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Brazil, China, the European Union, India, Japan, and Turkey are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures (see Annexes D-1, D-2, D-3, D-4, D-5, and D-6). Mexico submitted written responses to the Panel's questions to third parties, and Korea did not submit written or oral arguments to the Panel.

6 INTERIM REVIEW

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

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-4.

7 FINDINGS

7.1 Introduction

7.1. This dispute concerns the imposition by the United States of certain countervailing measures with respect to SC Paper from Canada, as well as the United States' alleged ongoing conduct of applying AFA in respect of programmes discovered during the course of a CVD investigation. In Section 7.3, we address Canada's claims concerning the USDOC's determination with respect to Port Hawkesbury Paper LP (PHP), including the claims regarding the provision of electricity to PHP by Nova Scotia Power Incorporated (NSPI), the assistance under the hot idle funding and the Forestry Infrastructure Fund (FIF), and the provision of stumpage and biomass. In Section 7.4, we address Canada's claims concerning the USDOC's determination with respect to Resolute FP Canada Inc. (Resolute), including the claims regarding the application of AFA in relation to information discovered at verification, Resolute's purchase of Fibrek General Partnership (Fibrek), and the Federal Pulp and Paper Green Transformation Programme (PPGTP), the Ontario Forest Sector Prosperity Fund (FSPF) and the Ontario Northern Industrial Electricity Rate (NIER) programme. In Section 7.5, we address Canada's claims concerning the USDOC's determinations with respect to Irving Paper Ltd. (Irving) and Catalyst Paper Corporation (Catalyst), including the claims regarding the construction of the all-others rate, and the expedited reviews. In Section 7.6, we address Canada's claims concerning the United States' alleged "ongoing conduct" of applying AFA in respect of programmes discovered during the course of a CVD investigation, or "Other Forms of Assistance-AFA measure", including whether Canada has established the existence of such measure and the claims regarding such measure.

[9] Canada's panel request.
[10] Canada's first written submission, paras. 451-452.

7.2 General principles regarding treaty interpretation, the standard of review, and burden of proof

7.2.1 Treaty interpretation

7.2. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 17.6(ii) of the Anti-Dumping Agreement similarly requires panels to interpret that Agreement's provisions in accordance with the customary rules of interpretation of public international law.[11] It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

7.2.2 Standard of review

7.3. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

> [A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.4. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[12]

7.5. The Appellate Body has also clarified that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[13]

7.6. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[14] A panel's examination in that regard is not necessarily limited to the pieces of evidence *expressly* relied upon by an investigating authority in its establishment and evaluation of the facts in arriving at a particular conclusion.[15] Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in the final determination.[16] That notwithstanding, since a panel's review is not *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's conclusion.[17]

7.2.3 Burden of proof

7.7. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert

[11] Article 17.6(ii) of the Anti-Dumping Agreement also provides that if a panel finds that a provision of the Anti-Dumping Agreement admits of more than one permissible interpretation, it shall uphold a measure that rests upon one of those interpretations.
[12] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[13] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[14] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.
[15] Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.
[16] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.
[17] Appellate Body Report, *US – Lamb*, paras. 153-161. See also Appellate Body Reports, *US – Steel Safeguards*, para. 326; and *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and Panel Reports, *Argentina – Ceramic Tiles*, para. 6.27; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.48.

and prove its claim.[18] Therefore, as the complaining party in this proceeding, Canada bears the burden of demonstrating that certain aspects of the measures at issue are inconsistent with the SCM Agreement and the GATT 1994. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[19] Finally, it is generally required that each party asserting a fact provide proof thereof.[20]

7.3 Claims concerning the USDOC's CVD determination with respect to PHP

7.3.1 Claims concerning the provision of electricity to PHP by NSPI

7.3.1.1 Introduction

7.8. With respect to the provision of electricity by NSPI to PHP, Canada has brought the following claims:

a. Canada claims that the USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement, by improperly finding that the Government of Nova Scotia directed NSPI to provide a financial contribution to PHP.[21]

b. Canada also claims that the USDOC acted inconsistently with Article 12.8 of the SCM Agreement, by failing to inform the interested parties of the essential facts under consideration before finding that the Government of Nova Scotia directed NSPI to provide a financial contribution to PHP.[22]

c. Finally, Canada claims that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement, by erroneously determining that the Government of Nova Scotia, through the alleged entrustment or direction of NSPI, conferred a benefit to PHP through the provision of electricity for less than adequate remuneration.[23]

7.9. We first turn to Canada's claims concerning the United States' treatment of the provision of electricity to PHP as a financial contribution that confers a benefit. Specifically, we examine whether the United States acted inconsistently with: (a) Article 1.1(a)(1)(iv) of the SCM Agreement by improperly finding that the Government of Nova Scotia entrusted or directed NSPI to provide a *financial contribution* within the meaning of Article 1.1(a)(1)(iii); and (b) Articles 1.1(b) and 14(d) of the SCM Agreement by erroneously determining that the provision of electricity for less than adequate remuneration through the Government of Nova Scotia's alleged entrustment or direction of NSPI conferred a *benefit* to PHP. We then turn to Canada's claim that the USDOC failed to disclose essential facts under consideration which formed the basis for its decision to apply definitive countervailing duties with respect to the provision of electricity, contrary to Article 12.8.

7.3.1.2 Factual background

7.3.1.2.1 The relevant facts on the USDOC record

7.10. The government-owned power company Nova Scotia Power Corporation was privatized in 1992, followed in the same year by the creation of the Nova Scotia Utility and Review Board (NSUARB), a quasi-judicial tribunal and agency responsible for the regulatory oversight of the sale of electricity in the province. Pursuant to the Public Utilities Act[24], the NSUARB exercises general

[18] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 323, p. 337.
[19] Appellate Body Report, *EC – Hormones*, paras. 98 and 104.
[20] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323, p. 335.
[21] Canada's panel request, p. 2.
[22] Canada's panel request, p. 2.
[23] Canada's panel request, p. 2.
[24] Government of Nova Scotia, Questionnaire Response, Vol. XIII (28 May 2015), exhibits NS-EL-1 to NS-EL-17 (Nova Scotia Questionnaire Response, Vol. XIII), (Exhibit CAN-21 (BCI)), exhibit NS-EL-1: Public Utilities Act.

supervision over all electric utilities operating as public utilities within the province. This jurisdiction includes setting rates, tolls, and charges; regulations for provision of service; approval of capital expenditures in excess of USD 250,000; and any other matter the Board feels is necessary to exercise its mandate.

7.11. The rate base established by the NSUARB for electricity providers pursuant to the Public Utilities Act is determined in relation to the value of the physical assets "used and useful" in furnishing a particular service to the public. A utility is entitled to earn such annual return as the NSUARB deems just and reasonable, which "might roughly be equated to profit or net income in a nonregulated company". Generally speaking, the Board sets a rate of return equal to the return investors could expect to receive on an investment of comparable risk elsewhere in the economy. The last step in the Board's rate setting process is to ensure that the rates are reasonable as between the various classes of customers.[25]

7.12. The investor-owned, publicly-traded successor of the Nova Scotia Power Corporation, NSPI, supplies most of the electricity in the Province of Nova Scotia. NSPI's electricity rates are set using a cost-of-service methodology. It maintains two types of rates: (a) the "above-the-line" rates, calculated using a rate design methodology; and (b) the "below-the-line" rates that are set using a cost-based formula. The Load Retention Tariff (LRT) first approved by the NSUARB in 2000 and modified in 2011 enables NSPI to negotiate individual below-the-line rates with its largest customers in economic distress.[26] These below-the-line rates are known as Load Retention Rates (LRRs). An application for an LRR must demonstrate that making the LRR available to the customer is necessary and sufficient for retaining the load of the customer. In addition, the revenue from the LRR customer must exceed the incremental costs associated with serving that customer.

7.13. Where a customer applies for service under an LRR, NSPI conducts an initial screening to determine whether the implementation of these procedures is warranted[27], i.e. whether the customer could qualify for the rate.[28] If NSPI determines that an applicant meets the screening criteria, NSPI and the customer proceed to implement these procedures and negotiate an LRR, with appropriate terms and conditions.[29] The LRT stipulates that, "[t]he price, terms and conditions … shall be established jointly by NSPI and the customer" and that they "are determined on a customer by customer basis".[30] NSPI and the customer then submit the price, terms, and conditions offered under this rate to the NSUARB for approval.[31]

7.14. In the period between NewPage Port Hawkesbury Corporation's (Newpage PH) entry into the Companies' Creditors Arrangement Act (CCAA)[32] process and the conclusion of Newpage PH's sale to the Pacific West Commercial Corporation (PWCC), the latter approached NSPI to begin negotiations for an LRR. The Port Hawkesbury mill was NSPI's single largest customer, consuming

[25] USDOC Memorandum dated 2 July 2015 "Placement of Documents on the Record Relating to Public Utilities", (Exhibit CAN-79), pp. 638-639.

[26] Section 44 of the Public Utilities Act requires the Utilities Commission to authorize a set of tariffs, while Section 64(1) prohibits a public utility from charging for any service until tariffs or rates have been approved. (Canada's opening statement at the first meeting of the Panel, para. 102; Nova Scotia Questionnaire Response, Vol. XIII, (Exhibit CAN-21 (BCI)), exhibit NS-EL-1: Public Utilities Act).

[27] Government of Nova Scotia Questionnaire Response, Vol. XVII, exhibit NS-EL-17, attachment 1 "Load Retention Tariff" (Nova Scotia Questionnaire Response, exhibit NS-EL-17: Load Retention Tariff), (Exhibit CAN-143), p. 21.

[28] Port Hawkesbury, Questionnaire Response, exhibit 23-5 − 2000 NSUARB 72 (24 May 2000) (Port Hawkesbury Questionnaire Response, exhibit 23-5 − 2000 NSUARB 72), (Exhibit CAN-26), p. 4.

[29] Nova Scotia Questionnaire Response, exhibit NS-EL-17: Load Retention Tariff, (Exhibit CAN-143), p. 21.

[30] Nova Scotia Questionnaire Response, exhibit NS-EL-17: Load Retention Tariff, (Exhibit CAN-143), p. 20.

[31] Nova Scotia Questionnaire Response, exhibit NS-EL-17: Load Retention Tariff, (Exhibit CAN-143), p. 21.

[32] The CCAA is a federal law allowing insolvent corporations that owe their creditors more than CAD 5 million to restructure their business and financial affairs. The main purpose of the CCAA is to enable financially distressed companies to avoid bankruptcy, foreclosure, or the seizure of their assets while maximizing returns for their creditors and preserving both jobs and the company's value as a functioning business. CCAA proceedings are carried out under the supervision of a court. (Canada's first written submission, para. 14; Government of Nova Scotia, Questionnaire Response, Vol. VIII (28 May 2015), exhibits NS-HI-1 to NS-HI-7 (Nova Scotia Questionnaire Response, Vol. VIII), (Exhibit CAN-1 (BCI)), p. NS.VIII-2).

in excess of 10% of the electricity produced by NSPI.[33] On 28 September 2012, following court approval of PWCC's purchase of the mill, the NSUARB approved the LRR negotiated between NSPI and PWCC and applicable to PHP[34] until the end of 2019. The LRR states that its intent is:

> [T]o create a mechanism whereby the Partnership [PHP] pays the variable incremental costs of service, plus a significant positive contribution to fixed costs, such that other customers are better off by retaining the Partnership rather than having the Partnership depart the system and make no contribution to fixed cost recovery.[35]

7.15. The price of NSPI's provision of electricity to PHP under the LRR is calculated according to the following formula, determined on an hourly basis:

(hourly incremental cost/kWh + variable capital cost + contribution to fixed costs) * kWh actual load

7.16. The contribution to fixed costs is set at a minimum of CAD 0.20/kWh, with a minimum contribution of CAD 20 million by PHP by the end of 2017.[36] The LRR also stipulates a monthly administrative fee of CAD 20,700 for the LRR, to be made in advance weekly instalments. Under the heading "Special Conditions", the LRR states *inter alia* that NSPI can interrupt PHP's entire load at a ten-minute notice, with provision made for penalty payments in case of PHP's failure to comply. PHP also provides weekly electricity purchase payments in advance.[37]

7.3.1.2.2 The USDOC's determination

7.17. In its Decision Memorandum for the Preliminary Determination in July 2015, the USDOC preliminarily found that the Government of Nova Scotia, through the NSUARB, entrusted or directed NSPI to provide a financial contribution in the form of the LRR to PHP.[38] In its Issues and Decision Memorandum in October 2015, the USDOC modified its analysis and concluded that the Government of Nova Scotia directly entrusted or directed NSPI to provide electricity pursuant to the Public Utilities Act.[39] In reaching this conclusion, the USDOC discussed the regulatory

[33] Port Hawkesbury, Questionnaire Response, exhibit 47-1 – 2012 NSUARB 126 (20 August 2012) (Port Hawkesbury Questionnaire Response, exhibit 47-1 – 2012 NSUARB 126), (Exhibit CAN-28), para. 4.

[34] When Newpage PH was sold to PWCC, Newpage PH became PHP, wholly owned by PWCC.

[35] Port Hawkesbury, Questionnaire Response, exhibit 23-11 – NSUARB Order (27 September 2012) (Port Hawkesbury Questionnaire Response, exhibit 23-11 – NSUARB Order), (Exhibit CAN-31), appendix A, p. 1.

[36] More specifically, commencing for fiscal year 2013, PHP is under an obligation to pay 18% of its net earnings before tax, such that a maximum contribution to fixed costs would be CAD 0.40/kWh, for the first five full fiscal years. Any payment in excess of CAD 0.20/kWh is paid via an annual lump sum. (Port Hawkesbury Questionnaire Response, exhibit 23-11 – NSUARB Order, (Exhibit CAN-31), appendix A, p. 2).

[37] Port Hawkesbury Questionnaire Response, exhibit 23-11 – NSUARB Order, (Exhibit CAN-31), appendix A, pp. 1-6. Furthermore, the NSUARB's decision to approve the negotiated LRR indicates that "approval is based on the assumption that the LRR pricing will recover all the incremental costs without subsidization from the other ratepayers. In the event that there are significant adverse differences NSPI, under the terms of the LRR, can apply to the Board to alter the LRR on a prospective basis". (Ibid. p. 2).

[38] USDOC, Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada (27 July 2015) (Decision Memorandum for the Preliminary Determination), (Exhibit CAN-10), p. 30:

> The approval and provision of the LRR for [PHP] was made pursuant to the laws and regulations established by the [Government of Nova Scotia]. Indeed, the NSUARB on November 29, 2011, modified the reasons for applying the LRR to include extra-large industrial customers such as the Port Hawkesbury mill that are in economic distress. The negotiation and approval of the LRR was one of the critical factors to ensure the purchase of NPPH by PWCC as a going concern, a policy goal of the [Government of Nova Scotia] after NPPH applied to enter *CCAA* proceedings. Absent the approval of the [Government of Nova Scotia] through its established agency, the NSUARB, the public utility NSPI could not have provided electricity to [PHP] under the terms and conditions of the LRR. For these reasons, we preliminarily determine that under section 771(5)(B)(iii) of the Act, the [Government of Nova Scotia] entrusted or directed the public utility NSPI to provide a financial contribution in the form of the LRR to [PHP]. Therefore, we preliminarily determine that [PHP] received a financial contribution in the form of the provision of a good or service under section 771(5)(D)(iii) of the Act under this program.

(emphasis original; fn omitted)

[39] USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada (13 October 2015) (Issues and Decision Memorandum), (Exhibit CAN-37), p. 36; see also ibid. p. 108.

framework for the provision of electricity in Nova Scotia and the role of the NSUARB, and found that NSPI was obligated under the laws of Nova Scotia to provide electricity to any resident or company within the province.[40]

7.18. The structure of the Issues and Decision Memorandum is such that the analysis under the heading "Determining Financial Contribution" starts at page 32. The next heading at page 41 is entitled "Determining Specificity", followed on the same page by "Determining the Appropriate Benchmark". Under the heading "Determining Financial Contribution", the USDOC describes its task as follows at page 33:

> Because NSPI is a private company, in order for its provision of electricity to [PHP] to potentially give rise to a countervailable subsidy to [PHP], the [USDOC] must consider two factors under section 771(5)(D)(iii) of the Act: whether an authority entrusted or directed NSPI to make a financial contribution to our respondent, [PHP], and whether the provision of this financial contribution (provision of electricity) would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments.[41]

7.19. The USDOC then proceeds to review the laws and regulations that govern the provision of electricity within Nova Scotia. In this context, the USDOC lists at page 35 some of the numerous directions the Government of Nova Scotia has imposed on NSPI's service requirements, costs, tariff rates, and equity/ownership requirements under specific sections of the Public Utilities Act. Section 52 is mentioned once in this list, with respect to NSPI's requirement to "furnish service and facilities reasonably safe and adequate in all respects just and reasonable".[42] From this list, the USDOC then concludes that, "[a]s is clear from the *Public Utilities Act*, the [Government of Nova Scotia] controls and directs the methodology that NSPI has to use in rate proposals, and any rate that is charged by NSPI must be approved by the NSUARB."[43] Crucially, the USDOC further concludes the following:

> More importantly, *with respect to the entrustment or direction* of NSPI to provide a financial contribution under section 771(5)(B)(iii) of the Act, NSPI is required by law to provide electricity to customers who request it anywhere in Nova Scotia.[*] That is, NSPI is obligated under the laws of the Province of Nova Scotia to serve any resident or company within the Province and to provide electricity to that customer.[*] This is a legal obligation that does not exist in some other markets. In deregulated or totally open markets, power companies can chose to provide service only when it makes economic sense to do so.[*][44]

[*fn original][202] See, e.g., section 52 of the Public Utilities Act; "Regulating Electric Utilities – Discussion Paper Phase One Governance Study – Liberalization and Performance – Based from the Province of Nova Scotia at 3 at Attachment 30 of the July 2, 2015 Memorandum to the File regarding Placement of Documents on the Record Relating to Public Utilities.
[*fn original][203] *Id.* at 6.
[*fn original][204] *Id.* at 3.

7.20. As such, this paragraph provides a specific, if illustrative, reference to Section 52 only of the Public Utilities Act, in addition to referring to the Discussion Paper.

[40] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 30-37.
[41] Issues and Decision Memorandum, (Exhibit CAN-37), p. 33. We note that Canada challenges the second factor in its second written submission. (Canada's second written submission, paras. 28-33).
[42] Issues and Decision Memorandum, (Exhibit CAN-37), p. 35.
[43] Issues and Decision Memorandum, (Exhibit CAN-37), p. 36.
[44] Issues and Decision Memorandum, (Exhibit CAN-37), p. 36. (emphasis added)

7.21. The USDOC then considers the second factor quoted at paragraph 7.18 above, namely whether the provision of the financial contribution would normally be vested in the government and that the practice does not differ in substance from practices normally followed by the government.[45] Following a two-paragraph analysis of this second factor, the USDOC concludes the following:

> The [Government of Nova Scotia] directs NSPI by law to provide electricity to all companies in the Province including [PHP]. Therefore, the provision of electricity by NSPI to [PHP] satisfies the standard of entrustment or direction under section 771(5)(B)(iii) of the Act. As a result we determine that [PHP] has received a financial contribution in the form of the provision of a good or service under section 771(5)(D)(iii) of the Act.[46]

7.22. Having found the existence of a financial contribution in the form of entrustment or direction, the USDOC then turns to consider "the extent to which the [Government of Nova Scotia] entrusted or directed the creation of the LRR without regard to whether the resulting rate conferred a benefit".[47] Indeed, the Issues and Decision Memorandum states at this juncture that "[i]n addition to the statutory requirement through which the [Government of Nova Scotia] entrusted or directed NSPI to provide a financial contribution in the form of a provision of a good or service to [PHP], the record also demonstrates that the [Government of Nova Scotia] played an essential role in the specific LRR that set the price for the electricity sold to [PHP] from NSPI."[48] The USDOC then sets out evidence of the Government of Nova Scotia's alleged involvement in the process of negotiating PHP's LRR, as well as the NSUARB's role in creating and amending the LRT.[49] This evidence consists of: the Government of Nova Scotia's creation of a plan to keep the paper mill as a going concern; PWCC's assertion that it would not purchase and reopen the mill without a favourable rate for electricity[50]; the Government of Nova Scotia working closely with both NSPI and PWCC to address the issue of high electricity costs to the mill; the commitment of the Government of Nova Scotia to the NSUARB that if the mill load of Port Hawkesbury triggered an additional Renewable Electricity Standard obligation during the term of the proposed LRR mechanism, and if that resulted in additional incremental costs, then the Government of Nova Scotia would guarantee that neither Port Hawkesbury nor any other ratepayers would be required to pay these costs; and the NSUARB playing a critical role in the process leading up to the negotiation of the LRR, by passing a decision that allowed an LRT for companies in economic distress.[51]

7.23. The USDOC "clarif[ies] that the provision of the financial contribution, the provision of electricity, is separate from whether the individual electricity rate provided to [PHP] provides a benefit"[52], and then proceeds to carry out an analysis the conclusion of which is the following:

> Therefore, not only did the [Government of Nova Scotia] entrust or direct NSPI to provide a financial contribution to [PHP] in the form of a provision of a good or service within the meaning of section 771(5)(D)(iii) of the Act, the [Government of Nova Scotia] also worked to ensure that the provision of that good or service, the provision of electricity, would be at a specially-designed LRR rate for the respondent. The NSUARB also exercised its authority to provide LRRs to companies in economic distress. Next we address whether this LRR rate provided to [PHP] is specific.[53]

[45] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 36-37.
[46] Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.
[47] Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.
[48] Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.
[49] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 38-40.
[50] The United States points to the following evidence in this respect: Letter dated 13 March 2012 to Nova Scotia Utility and Review Board on the Application pursuant to Nova Scotia Power Inc.'s Load Retention Tariff from McInnes Cooper, counsel for PWCC. No exhibit was mentioned by the United States.
[51] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 37-40.
[52] Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.
[53] Issues and Decision Memorandum, (Exhibit CAN-37), p. 40.

7.24. After having found that "[t]he provision of the LRR" was specific[54], the USDOC then turned to consider the appropriate benchmark for determining whether the "government price", i.e. the LRR obtained by PHP, constituted less than adequate remuneration.[55] The USDOC first explained that NSPI, which provides electricity to most consumers in Nova Scotia, acts under the entrustment or direction of the Government of Nova Scotia. The USDOC also found that the Government of Nova Scotia regulated the rates that NSPI charges for electricity through the NSUARB. From this the USDOC concluded that the market of electricity in Nova Scotia was distorted and, therefore, electricity prices in Nova Scotia could not be used as a benchmark for determining the adequacy of remuneration.[56] After also rejecting the use of Alberta's prices ("Tier 1 benchmark") and world prices ("Tier 2 benchmark") as a basis for a benchmark based on a market-determined price, the USDOC considered that its final alternative was to determine whether PHP's LRR was consistent with market principles through an analysis of factors, including price-setting philosophy, costs (including rates of return sufficient to ensure future operations), and possible price discrimination in the rate making ("Tier 3 benchmark").[57]

7.25. The USDOC explained that the NSUARB oversees most electricity ratemaking in Nova Scotia, using standard rate-of-return regulation. Most electricity rates in Nova Scotia are "above-the-line" rates set using the cost-of-service methodology that includes a revenue requirement equal to the sum of system-wide fixed costs, variable costs incident to the supply of "above-the-line" rates at the expected loads from the forecast, and the expected return on equity (ROE) due to the electric company. In contrast, the USDOC explained, below-the-line rates are not set using the cost-of-service methodology and do not fully cover fixed costs nor contribute to the guaranteed ROE. The USDOC stated that LRRs are only required to cover all variable costs and contribute to fixed costs, but do not require rates of return sufficient to ensure future operations by covering all costs and providing for profit. Therefore, the USDOC concluded that PHP's LRR was not a market-determined price.[58]

7.26. To arrive at a Tier 3 benchmark, the USDOC constructed a price providing for coverage of fixed costs, variable costs, and portion of ROE for profit.[59] To estimate unrecovered fixed costs, the USDOC used an affirmative statement of the level of fixed costs covered by the last "above-the-line" rate used to service the mill when it was owned by Newpage PH (the 2012 ELI2PRTP (CAD 26/MWh)), and subtracted from it the amount of fixed cost recovery in PHP's LRR (CAD 2/MWh), leaving CAD 24/MWh in unrecovered fixed costs under PHP's LRR. The USDOC estimated the 2014 ROE attributable to the mill's load by calculating the proportion of the system-wide ROE attributable to its load. To do this, the USDOC divided the mill's actual load by the sum of PHP's actual load and the 2014 Load Forecast total for the system load (calculated without the mill's load).[60] The USDOC then subtracted from the amount that PHP would have paid for the electricity it consumed during the period of investigation (POI) according to the benchmark, the actual amount paid by PHP during the POI under its LRR. Based upon this methodology, the USDOC calculated a countervailable subsidy rate of 14.24% *ad valorem*.[61]

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[54] Issues and Decision Memorandum, (Exhibit CAN-37), p. 41.

[55] Issues and Decision Memorandum, (Exhibit CAN-37), p. 41. The United States' general approach to selecting a benchmark is explained in the Issues and Decision Memorandum as follows:

> Generally, pursuant to 19 CFR 351.511(a)(2), the [USDOC] determines whether a good or service is provided for [less than adequate remuneration] by comparing, in order of preference: (i) the government price to a market-determined price for actual transactions within the country such as prices from private parties (a "Tier 1" benchmark); (ii) the government price to a world market price where it would be reasonable to conclude that such a world market price is available to consumers in the country in question (a "Tier 2" benchmark); or (iii), if no world market price is available, by assessing whether the government price is consistent with market principles (a "Tier 3" benchmark).

(Ibid.)

[56] Issues and Decision Memorandum, (Exhibit CAN-37), p. 41.

[57] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 42-43. For an explanation of the tier benchmarks generally used by the USDOC, see fn 55 above.

[58] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 44-48.

[59] In its first written submission, the United States describes its calculation with the following formula: Benchmark = variable costs + fixed costs + profit. (United States' first written submission, para. 73).

[60] Issues and Decision Memorandum, (Exhibit CAN-37), p. 48.

[61] Issues and Decision Memorandum, (Exhibit CAN-37), p. 48.

7.3.1.3 Main arguments of the parties

7.27. Canada claims that the USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by improperly finding that the provision of electricity to PHP constituted a financial contribution. More specifically, Canada claims that the USDOC incorrectly considered that Nova Scotia had entrusted or directed NSPI to provide electricity services to all its customers through the general service obligation set out in the Public Utilities Act.

7.28. In this respect, Canada claims that the USDOC provided no analysis to support its determination, and that its reasoning relies on only two pieces of evidence: (a) Section 52 of the Public Utilities Act; and (b) a Discussion Paper[62] concerning potential modifications to the ownership and oversight of public utilities.[63] In Canada's view, the Government of Nova Scotia does not exercise authority over NSPI to provide electricity to customers through Section 52, which only sets out general requirements as to how electricity is provided.[64] It further submits that the Discussion Paper relied upon by the USDOC was not sufficient to understand this duty to serve.[65]

7.29. Canada rejects as "*post hoc* justifications" the United States' position that the USDOC's financial contribution determination relied in part on the role of the Government of Nova Scotia in negotiating the LRR. Canada argues that the most compelling reason for the USDOC's finding that the Government of Nova Scotia directed NSPI to provide electricity was the duty to serve, which does not constitute direction to provide a financial contribution through an LRR.[66] It further contends that the USDOC erroneously determined that the Government of Nova Scotia directed NSPI to provide a financial contribution through the general service obligation and then proceeded to consider the benefit and specificity associated with a different measure (the LRR).[67] For Canada, NSPI is not required to provide a customer with an LRR, and the NSUARB only requires NSPI to negotiate with its customers to determine whether it could provide such rate.[68]

7.30. Canada maintains that the USDOC also failed to properly address the criteria in Article 1.1(a)(1)(iv), namely whether the alleged provision of the good or service would "normally be vested" in the government, and "in no real sense, differs from practices normally followed by governments".[69]

7.31. With respect to benefit, Canada claims that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by improperly finding that the provision of electricity by NSPI conferred a benefit to PHP. In its view, the USDOC incorrectly considered that the electricity market in Nova Scotia was distorted because NSPI was the sole provider.[70] Canada disagrees with the United States' understanding of "prevailing market conditions", noting that

[62] The "Regulating Electric Utilities – Discussion Paper", a publication commissioned by Nova Scotia, explains that: "As a near monopoly, Nova Scotia Power has responsibilities imposed under law. One of them is an obligation to serve – the company must provide electricity to customers who request it, anywhere in Nova Scotia." (Placement of Documents on the Record Relating to Public Utilities, (2 July 2015), attachment 30: "Regulating Electric Utilities – Discussion Paper", Government of Nova Scotia (Discussion Paper), (Exhibit CAN-158), p. 3).

[63] Canada's first written submission, paras. 102, 108, and 111.

[64] Canada's first written submission, para. 108.

[65] Canada's second written submission, paras. 10 and 24-27.

[66] Canada's second written submission, paras. 2 and 16-23.

[67] Canada's first written submission, para. 116.

[68] Canada's first written submission, para. 115. In Canada's view, although the USDOC appears to analyse whether Nova Scotia entrusted NSPI to negotiate an LRR in the final determination, in a recent NAFTA Chapter 19 proceeding, the USDOC has clarified that it did not make such a finding. (Canada's first written submission, para. 107 (referring to USDOC, NAFTA Brief (5 July 2016) (USDOC's NAFTA Brief), (Exhibit CAN-76), p. 64)).

[69] Canada's second written submission, paras. 28-33; see also first written submission, para. 106. The Panel notes that the United States argued that Canada's claim was not within the Panel's terms of reference; that the presentation of these arguments in the second written submission violated the Panel''s working procedures; and that the claim failed on its merits. (United States opening statement at the second meeting of the Panel, paras. 13-27). Canada argued in response that this argument fell within its entrustment and direction claim and that it had raised this argument in its first written submission. (Canada's response to Panel question No. 86, paras. 18-21).

[70] Canada's first written submission, para. 144; second written submission, paras. 38-48.

prevailing market conditions concern "characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices", and not an assessment of the "predominant price", as the United States suggests.[71] Canada argues that the USDOC incorrectly considered that the LRR negotiated between two private parties, NSPI and PWCC, was not at market price, although below-the-line rates applied by NSPI are determined "in relation to prevailing market conditions". For Canada, they are part of NSPI's standard rate-setting methodology.[72] Canada also argues that the USDOC did not take into account demand-side factors relevant to electricity markets, such as how rates are set for large customers, the size of customers, and the fact that different customers may be treated differently (for example, because of the volume or load they take and the role of that load in creating stability in the system).[73] Canada submits that the benchmark constructed by the USDOC did not reflect "prevailing market conditions", and would not apply to any purchaser of electricity in Nova Scotia.[74] Canada further submits that the USDOC constructed an inappropriate benchmark[75], which included double-counting the ROE.[76]

7.32. The United States contends that the USDOC's financial contribution determination for the provision of electricity to PHP was not inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement. In its first written submission, the United States argues that the plain language of Section 52 of the Public Utilities Act demonstrates that NSPI is obligated to serve any resident or company within the province of Nova Scotia and to provide electricity to that customer, as confirmed in the Discussion Paper.[77] In its subsequent submissions, the United States emphasizes that the USDOC's financial contribution analysis was not only based on Section 52, but also considered the Government of Nova Scotia's involvement in the establishment of PHP's LRR.[78] In particular, the United States argues that the USDOC considered: (a) the NSUARB's decision to expand the LRT to allow for an LRR for companies in economic distress, a decision made at the request of NewPage Port Hawkesbury; (b) Nova Scotia's commitment to guarantee that neither Port Hawkesbury nor other ratepayers would be required to cover costs if Port Hawkesbury's mill load triggered obligations that resulted in increased incremental costs; (c) statements by the Premier of Nova Scotia confirming the government's active involvement in the negotiation of the LRR; and (d) the unique role of the NSUARB in the negotiation and approval of the LRR.[79] For the United States, Canada's argument that the USDOC erroneously determined that Nova Scotia directed NSPI to provide a financial contribution through the general service obligation and then proceeded to consider the benefit and specificity associated with a different measure (the LRR) is without merit because benefit and financial contribution are separate elements of a subsidy analysis.[80] Finally, it argues that the record plainly shows that the USDOC exhaustively analysed the issue, considered the arguments and reached a determination supported by evidence.[81]

7.33. With respect to benefit, the United States submits that the USDOC's benefit determination was consistent with Articles 1.1(b) and 14(d) of the SCM Agreement. The United States asserts that the issue before the Panel is whether the benchmark used by the USDOC − 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.[82] The United States argues that "prevailing market conditions" are those that are "predominant" or "generally accepted", and that the record of the countervailing duty investigation made clear that above-the-line rates satisfied the legal standard.[83] The United States adds that, during the POI, out of all of NSPI's customers − regardless of size or customer class − only PHP did not pay an above-the-line rate.[84]

[71] Canada's second written submission, para. 38.
[72] Canada's first written submission, paras. 143-144; second written submission, paras. 49-65; and response to Panel question No. 11, paras. 24-26.
[73] Canada's first written submission, paras. 160-165; second written submission, para. 42.
[74] Canada's second written submission, para. 41.
[75] Canada's first written submission, para. 165.
[76] Canada's first written submission, para. 174.
[77] United States' first written submission, para. 44; second written submission, paras. 14-20.
[78] United States' second written submission, paras. 21-24; response to Panel question No. 5, paras. 1-11.
[79] United States' second written submission, paras. 21-24; response to Panel question No. 5, paras. 1-11.
[80] United States' first written submission, para. 46.
[81] United States' first written submission, para. 48.
[82] United States' second written submission, para. 40.
[83] United States' second written submission, paras. 42-43.
[84] United States' second written submission, para. 43

The United States asserts that above-the-line rates are based on prevailing market conditions while below-the-line rates are preferential rates that do not permit the recovery of all costs, and represent an explicit exception to the standard pricing mechanism used by NSPI.[85] For the United States, the USDOC did not create an artificial benchmark, but rather applied the methodology NSPI uses in developing market rates for similarly situated entities, and therefore, its methodology, based on the sum of variable costs, the applicable contribution to fixed costs and the standard profit ratio, was consistent with market principles.[86] The United States rejects as circular Canada's argument that there was no need for the USDOC to use a benchmark because the provision of electricity by NSPI to PHP is itself a market transaction. In its view, a benefit determination requires some form of comparative exercise.[87]

7.34. The United States posits that the factual premise of Canada's argument, namely that the provision of electricity to PHP was purely a private-to-private transaction, is flawed, since the USDOC found that the Government of Nova Scotia played an essential role in the specific LRR applied to PHP.[88] For the United States, the existence of a private-to-private transaction in this case is not unique. It explains that, where an 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. The United States maintains that it cannot be 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, it contends, would render subparagraph (iv) inutile and cannot be accepted.[89]

7.3.1.4 Evaluation by the Panel

7.3.1.4.1 Whether the USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by finding that NSPI was entrusted or directed to provide electricity

7.35. Article 1.1(a)(1) of the SCM Agreement provides in relevant part as follows:

> *Article 1*
>
> *Definition of a Subsidy*
>
> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) ...
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments[.]

7.36. Among the possible forms that a financial contribution may take, Article 1.1(a)(1)(iv) of the SCM Agreement provides that there is a financial contribution when a government "entrusts or directs a private body" to carry out certain activities listed in Articles 1.1(a)(1)(i) to (iii), in our

[85] United States' first written submission, paras. 65 and 86-87; second written submission, paras. 40-45.
[86] United States' first written submission, para. 67; second written submission, paras. 46-60.
[87] United States' second written submission, paras. 33-36.
[88] United States' second written submission, para. 37.
[89] United States' second written submission, para. 38.

case, the provision of goods or services other than general infrastructure pursuant to Article 1.1(a)(1)(iii).

7.37. With respect to the concepts of "entrustment" or "direction" under Article 1.1(a)(1)(iv) of the SCM Agreement, the Appellate Body has opined that the terms "entrusts or directs" identify the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution.[90] More specifically, "entrustment" occurs where a government *gives responsibility* to a private body, and "direction" refers to situations where the government *exercises its authority* over a private body. In both instances, the government uses a private body as a *proxy* to bring into existence one of the types of financial contributions listed in paragraphs (i) through (iii).[91] Conversely, "situations involving exclusively private conduct – that is, conduct that is not in some way attributable to a government or public body – cannot constitute a 'financial contribution' for purposes of determining the existence of a subsidy under the *SCM Agreement*".[92] Both instances thus "require[] the participation of the government, albeit indirectly"[93], and there must be a "demonstrable link between the government and the conduct of the private body"[94] in order to bring into existence a financial contribution.[95]

7.38. However, not all government acts necessarily amount to entrustment or direction in terms of Article 1.1(a)(1)(iv) of the SCM Agreement. For instance, policy pronouncements by a government would not, by themselves, constitute entrustment or direction for purposes of Article 1.1(a)(1)(iv).[96] Additionally, entrustment and direction do not cover "the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market".[97] Thus, entrustment and direction "cannot be inadvertent or a mere by-product of governmental regulation".[98] It may be difficult to identify, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. Any particular label used to describe the governmental action is not necessarily dispositive.[99] In most cases, "one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction".[100]

7.39. Furthermore, with respect to the provision of goods or services within the meaning of Article 1.1(a)(1)(iii), the Appellate Body has stressed that there must be a reasonably proximate relationship between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other. Very general governmental acts may be too remote from the concept of "making available" or "putting at the disposal of". A government must have some control over the availability of the specific thing being "made available".[101]

7.40. We recall the standard of review that applies to a panel assessing the WTO-consistency of a CVD determination by a Member's investigating authority. In conducting such an assessment, a panel may not conduct a *de novo* review of the facts of the case "or substitute its judgement for that of the … authorit[y]".[102] Rather, the panel must examine "whether, in the light of the evidence

[90] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 108. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 52.
[91] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116. See also Panel Reports, *US – Export Restraints*, paras. 8.29-8.34; and *Korea – Commercial Vessels*, paras. 7.368-7.372.
[92] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 107.
[93] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 112. See also Panel Report, *EC – Countervailing Measures on DRAM Chips*, fn 65.
[94] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 112.
[95] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.
[96] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114.
[97] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114 (quoting Panel Report, *US – Export Restraints*, para. 8.31).
[98] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.95; and Panel Report, *China – GOES*, para. 7.93.
[99] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116.
[100] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116.
[101] Appellate Body Reports, *US – Carbon Steel*, paras. 4.68-4.69; *US – Softwood Lumber IV*, para. 71.
[102] Appellate Body Report, *US – Steel Safeguards*, para. 299 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 121). See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 379.

on the record, the conclusions reached by the investigating authority are *reasoned and adequate*".[103] What is "adequate" will inevitably depend on the facts and circumstances of the case and the particular claims made, but some relevant "lines of inquiry" can be identified.[104] First, a panel must ascertain whether the investigating authority has "evaluated all of the relevant evidence in an objective and unbiased manner", including by "tak[ing] sufficient account of conflicting evidence and respond[ing] to competing plausible explanations of that evidence".[105] Second, a panel must "test[] the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning".[106] Finally, the adequacy of an investigating authority's explanations "is also a function of the substantive provisions of the specific covered agreements that are at issue in the dispute".[107]

7.41. The main issue before the Panel is whether the USDOC, in light of the evidence before it, made a proper finding of entrustment or direction within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement.[108] In light of the parties' submissions in these proceedings, the Panel will first clarify the USDOC's financial contribution finding in connection with the provision of electricity by NSPI. Once this factual matter is clarified, the Panel will be in a position to determine whether the USDOC's determination was consistent with Article 1.1(a)(1)(iv).

7.3.1.4.1.1 What was the USDOC's financial contribution finding?

7.42. The position expressed by the United States in its first written submission was that the USDOC's finding of entrustment or direction was one of the Government of Nova Scotia entrusting or directing NSPI, through the general service obligation that the USDOC read from Section 52 of the Public Utilities Act, to provide electricity to all customers in the province. The United States explains in its first written submission that the USDOC's finding was a "straightforward" application of Article 1.1(a)(1)(iv) of the SCM Agreement since, as a matter of law, based on the plain language of Section 52, the Government of Nova Scotia has given to public utilities such as NSPI the duty to provide electricity.[109]

7.43. In its response to a question from the Panel as to whether the USDOC found that the Government of Nova Scotia entrusted or directed NSPI to provide: (a) electricity; or (b) an LRR, the United States responds that "perhaps the best way to summarize is that [the USDOC] determined that the Government of Nova Scotia entrusted or directed Nova Scotia Power to provide to [PHP] electricity *at a below market rate (LRR)*".[110] The United States posits that the USDOC also determined that the Government of Nova Scotia entrusted or directed NSPI to provide electricity to PHP based on the government's actions, including through the NSUARB, which led to the provision of electricity to PHP through the LRR.[111] In other words, the USDOC's finding of entrustment or direction was one not only based on the general service obligation that it read from Section 52, but also on the role of Nova Scotia in the negotiation of the LRR, more specifically "the unique role of Nova Scotia – including through the Nova Scotia Utility and Review Board … in the provision of electricity to [PHP] through the Load Retention Rate".[112] According to the United States, the USDOC's analysis thus "took account of the unique circumstances surrounding the salvation from bankruptcy and dissolution of the Port Hawkesbury mill".[113]

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[103] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93. (emphasis added)
[104] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[105] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 443.
[106] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.
[107] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 95 (referring to Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 184; *US – Cotton Yarn*, paras. 75-78; and *US – Lamb*, para. 105).
[108] It is not contested that the provision of electricity falls within the concept of a government provision of goods or services within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.
[109] United States' first written submission, paras. 29-30.
[110] United States' response to Panel question No. 7, para. 13. (emphasis added)
[111] United States' response to Panel question No. 9, para. 16, and No. 5, para. 1.
[112] United States' response to Panel question No. 5, paras. 1-2.
[113] United States' response to Panel question No. 5, para. 5. See also response to Panel question No. 5, paras. 6-7 and 9, and No. 17, paras. 23-24.

7.44. The Panel's analysis must be based on the "explanations given by the authority in its published report".[114] The only finding that we can see made by the USDOC pertaining to financial contribution was that the Government of Nova Scotia had entrusted or directed NSPI, through the existence of a general service obligation that the USDOC read from Section 52 of the Public Utilities Act, to provide electricity to all customers in the province. We recall the United States' assertion in the present proceedings that the role of the Government of Nova Scotia in negotiating the LRR to PHP served in part as a basis for the USDOC's finding of entrustment or direction.[115] However, while the USDOC *discussed* the Government of Nova Scotia's alleged role in the negotiation of PHP's LRR as well as the NSUARB's role in the creation and amendment of the LRT[116], on the face of the Issues and Decision Memorandum, the USDOC made no further findings on entrustment or direction.

7.45. The USDOC's finding on entrustment or direction at page 36 is that "NSPI is required by law to provide electricity *to customers who request it anywhere in Nova Scotia*. That is, NSPI is obligated under the laws of the Province of Nova Scotia to serve *any resident or company within the Province and to provide electricity to that customer*."[117] This conclusion is reiterated at page 37: "[t]he [Government of Nova Scotia] directs NSPI by law to provide electricity *to all companies in the Province* including [PHP]".[118]

7.46. In Comment 10 of the Analysis of Comments section of the Issues and Decision Memorandum, the USDOC clearly distinguishes between its preliminary finding that the Government of Nova Scotia, through the NSUARB, entrusted or directed NSPI to provide electricity to PHP at a reduced rate, i.e. through an LRR, and its much broader finding in the final determination that the Government of Nova Scotia, through the Public Utilities Act, directly entrusts or directs NSPI to provide electricity generally:

> In our *Preliminary Determination*, we found that the [Government of Nova Scotia], through the NSUARB, entrusted or directed NSPI to provide electricity to [PHP] at a reduced rate. In this final determination, we have modified our analysis to find that the [Government of Nova Scotia] *directly* entrusted or directed NSPI to provide electricity pursuant to the *Public Utilities Act*.[119]

7.47. The USDOC's subsequent discussion on "the extent to which the [Government of Nova Scotia] entrusted or directed the creation of the LRR without regard to whether the resulting rate conferred a benefit"[120] occurs *after* it has already reached the conclusion that there is entrustment or direction and a financial contribution at pages 36 and 37. The subsequent discussion does not culminate in any other finding of entrustment or direction. Instead, the USDOC states at page 40 that "the [Government of Nova Scotia] also worked to ensure that the provision of that good or service, the provision of electricity, would be at a specifically-designed LRR rate for the respondent. The NSUARB also exercised its authority to provide LRRs to companies in economic distress."[121]

7.48. This understanding of the USDOC's financial contribution determination is in fact aligned with the United States' assertion in its first written submission that "[t]hese legal obligations resulted in a straightforward application of the financial contribution standard: [the USDOC] determined that Nova Scotia entrusts or directs Nova Scotia Power to provide electricity to all customers".[122]

7.49. In light of the above, we do not consider that the United States' position that "perhaps the best way to summarize is that [the USDOC] determined that the government of Nova Scotia

[114] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; *US – Anti-Dumping and Countervailing Duties (China)*, para. 379.
[115] United States' response to Panel question No. 5, paras. 1-2.
[116] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 37-40.
[117] Issues and Decision Memorandum, (Exhibit CAN-37), p. 36. (emphasis added; fn omitted)
[118] Issues and Decision Memorandum, (Exhibit CAN-37), p. 37. (emphasis added)
[119] Issues and Decision Memorandum, (Exhibit CAN-37), Comment 10: "Whether the NSUARB is an Authority", p. 108. (emphasis original)
[120] Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.
[121] Issues and Decision Memorandum, (Exhibit CAN-37), p. 40.
[122] United States' first written submission, para. 29.

entrusted or directed Nova Scotia Power to provide to [PHP] electricity *at a below market rate (LRR)*"[123] is reflected in the Issues and Decision Memorandum. Stating that the Government of Nova Scotia "also worked to ensure that … the provision of electricity … would be at a specifically-designed LRR rate", and that the NSUARB "also exercised its authority to provide LRRs to companies in economic distress" does not equate to finding that the financial contribution at issue was PHP's LRR.

7.50. Further to the above, we observe that the USDOC's finding that the Government of Nova Scotia entrusted or directed NSPI to provide electricity to all customers in the province is based overwhelmingly on the general service obligation that the USDOC read from Section 52 of the Public Utilities Act. The USDOC's reference to "the statutory requirement through which the [Government of Nova Scotia] entrusted or directed NSPI to provide a financial contribution in the form of a provision of a good or service to [PHP] "[124] is highly informative: the statutory requirement, in the singular − that is the general service obligation − is the manner in which the USDOC considered Nova Scotia entrusted or directed NSPI to provide the financial contribution − that is the provision of electricity. This position is also reflected in the United States' following assertion in its first written submission: "Canada's claim is undermined by a Nova Scotia law that unambiguously requires public utilities to do just that − provide electricity to [PHP]. [The USDOC's] conclusion was a straightforward application of Article 1.1(a)(1)(iv) of the SCM Agreement."[125]

7.51. The following statement of the USDOC's position in Comment 11 of the Analysis of Comments-section is particularly instructive of the USDOC's reasoning on the issue of entrustment or direction:

> In the instant investigation, the [Government of Nova Scotia] entrusted or directed a private party, NSPI, to provide a financial contribution, the provision of electricity, *directly through its laws*. In *DRAMs from Korea*, the government used a manner other than direct legislation to entrust or direct private parties to provide a financial contribution to the respondent, Hynix. Therefore, the [USDOC] had to rely on circumstantial information to determine that there was entrustment or direction of a private party to provide a financial contribution. This is not the case here. If, similar to this instant investigation, the [Government of Korea] *had simply passed a law directing private financial institutions to provide a financial contribution to Hynix, the [USDOC] would not have used this two-part test because it would have been able to find entrustment or direction based solely on [Government of Korea] law.*[126]

7.52. This statement indicates the USDOC's view that it did not need to rely on any such circumstantial information to find entrustment or direction here, since such entrustment or direction was evident from law.[127]

7.53. The express terms used in the Issues and Decision Memorandum, as well as the sequence of the USDOC's analysis therein, thus indicate that the USDOC's finding of entrustment or direction was one of the Government of Nova Scotia entrusting or directing NSPI, through Section 52 of the Public Utilities Act, to provide electricity to all customers in the province. This finding was based overwhelmingly on the general service obligation that the USDOC read from Section 52, and found further support for in the Discussion Paper. It is the WTO-consistency of this financial contribution finding that the Panel is called to assess.

7.54. Our above understanding of the USDOC's analysis is in line with factual clarification provided by the United States itself in the NAFTA proceeding:

> [T]he [Government of Canada] is incorrect that [the USDOC] analyzed the LRR, rather than electricity, as the financial contribution for this subsidy. … [The USDOC] did analyze the LRR as a financial contribution in the *Preliminary Determination*; however, it clarified in the *Final Determination* that although the LRR was relevant to its benefit

[123] United States' response to Panel question No. 7, para. 13. (emphasis added)
[124] Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.
[125] United States' first written submission, para. 19.
[126] Issues and Decision Memorandum, (Exhibit CAN-37), p. 125. (emphasis added)
[127] See also Canada's second written submission, paras. 16-23.

> analysis, the LRR was not, in itself, the financial contribution. [Issues and Decision Memorandum] at 32-37 and 108. Accordingly, [the USDOC] based its *Final Determination* on the provision of electricity without regard to the rate mechanism involved. [Issues and Decision Memorandum] at 37 … [.][128]

7.55. In the NAFTA proceedings, the United States explained that the USDOC's financial contribution determination is not based on the discussion of Nova Scotia's possible entrustment of NSPI to create an LRR, which is instead additional analysis beyond what is required.[129]

7.56. After having clarified our understanding of the USDOC's financial contribution finding, the Panel turns to whether the USDOC's finding of entrustment or direction was inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement.[130]

7.3.1.4.1.2 Whether the USDOC's finding of entrustment or direction is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement

7.57. We recall Canada's position that the USDOC interpreted Section 52 of the Public Utilities Act as directing NSPI to provide electricity to any customer in Nova Scotia, while ignoring that entrustment or direction cannot be inadvertent or a mere by-product of governmental regulation. Canada argues that, while Section 52 reflects the principle that NSPI and other public utilities are required to provide electrical service throughout their service area, it does not require NSPI to provide electricity in any circumstances, at any cost. Indeed, Nova Scotia could not direct NSPI, through the duty to serve, because the LRT does not require NSPI to reach an agreement with any customer that requests an LRR.[131] Canada further posits that the United States has pointed to no other evidence that Nova Scotia directed NSPI by issuing authoritative instructions or otherwise exercising its authority to compel it to provide electricity through such a rate.[132]

7.58. The United States' position is that the USDOC's twelve-page financial contribution analysis was exhaustive, considered the arguments of the interested parties, and reached a determination supported by evidence.[133] We recall our finding that the USDOC's determination of entrustment or direction was based overwhelmingly on the general service obligation set forth in Section 52 of the Public Utilities Act. In this regard, the United States has argued that the USDOC's determination was based on the "plain terms"[134] of the *Public Utilities Act*, which imposes certain obligations on public utilities. According to the United States, these legal obligations resulted in a "straightforward application of the financial contribution standard".[135] The United States contends that, "as a matter of law", Nova Scotia has given public utilities, including NSPI, "the duty" to provide electricity.[136] Contrary to Canada's allegations, the United States argues that the USDOC's financial contribution determination did establish a link between the government action and the specific conduct of NSPI, by taking into account the unique role of Nova Scotia in NSPI's LRR to PHP.[137]

7.59. We fail to see an explanation by the USDOC of how NSPI was, through the general service obligation that the USDOC read from Section 52 of the Public Utilities Act, either "give[n] responsibility" to provide electricity either to any potential customer or to PHP specifically, or how

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[128] USDOC's NAFTA Brief, (Exhibit CAN-76), p. 64.
[129] Canada's first written submission, para. 107. See also USDOC's NAFTA Brief, (Exhibit CAN-76), p. 65:

> [H]aving determined that NSPI's provision of electricity satisfied the basic elements of the statute, [the USDOC] considered additional evidence concerning the extent to which the [Government of Nova Scotia] entrusted or directed this particular sale of electricity. Thus it did not negate [the USDOC's] earlier analysis, but instead demonstrated the extraordinary actions taken by the [Government of Nova Scotia] *beyond* its existing directive that NSPI must provide electricity to those who request it to shape how NSPI provided electricity to PHP.

(emphasis original)
[130] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[131] Canada's first written submission, paras. 108-115; second written submission, para. 7.
[132] Canada's second written submission, paras. 16-23.
[133] United States' first written submission, para. 48.
[134] United States' first written submission, para. 26.
[135] United States' first written submission, para. 29.
[136] United States' first written submission, paras. 25-30.
[137] United States' second written submission, paras. 21-23.

the Government of Nova Scotia "exercise[d] its authority" over NSPI to provide electricity either to any potential customer or to PHP specifically.

7.60. Section 52 of the Public Utilities Act, which the USDOC overwhelmingly relied on to make its finding of entrustment or direction, is entitled "Duty to furnish safe and adequate service", and by its very terms sets out general requirements as to the quality of the service and facilities provided: "Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable". This provision applies not only to NSPI, but also to every other public utility within the scope of the Public Utilities Act, which covers a wide range of goods and services beyond the provision of electricity.[138] While Canada does not contest the existence of a duty to serve, it has clarified in the context of these proceedings that Section 52 of the Public Utilities Act does not independently set out this high level regulatory principle. Rather, the provision has been interpreted to include a duty to serve through the common law in the Nova Scotia Court of Appeal ruling in *Board of Commissioners of Public Utilities v. Nova Scotia Corp. et al*.[139] Furthermore, this duty to serve is applied in practice through various other provisions of the Public Utilities Act.[140] The USDOC analysis relied only on Section 52 and the Discussion Paper.

7.61. Whether or not Section 52 of the Public Utilities Act in fact sets out the legal basis for the duty to serve, we do not see how the high-level general service obligation at issue here could be considered to entrust or direct NSPI − within the meaning of Article 1.1(a)(1)(iv) − to necessarily provide electricity to any customer, in any circumstances, under any conditions.[141] Rather, the USDOC appears to have done precisely what the Appellate Body has warned against when observing that "the interpretation of paragraph (iv) cannot be so broad as to allow Members to apply countervailing measures to products *whenever a government is merely exercising its general regulatory powers*"[142], and that entrustment and direction "cannot be inadvertent or *a mere by-product of governmental regulation*".[143]

7.62. The USDOC's determination appears to go counter to the Appellate Body's observation that entrustment and direction do not cover situations "in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market".[144] In the facts of the present dispute, it seems that the exercise of free choice is precisely reflected in the fact that Section 52 of the Public Utilities Act does not necessarily result in the provision of electricity to any customer, no matter the terms or conditions. As discussed below, notwithstanding Section 52 of the Public Utilities Act, NSPI only provides electricity to customers if the terms meet certain criteria. If those criteria are not met, no electricity is provided.

7.63. As explained by Canada in the present proceedings, the duty to serve "should not be understood to stand for the proposition that there is an entitlement to service in any given circumstance, at any given rate". Indeed, the Nova Scotia Court of Appeal ruling in *Board of Commissioners of Public Utilities v. Nova Scotia Corp. et al* confirmed that rates must be just and reasonable for the public, but also just and sufficient for the utility itself.[145] As such, Canada explains that NSPI is "not required by law to provide electricity if it does not make economic sense for it to do so, and the [NSUARB] is not entitled to approve rates that would be uneconomical for

[138] Nova Scotia Questionnaire Response, Vol. XIII, (Exhibit CAN-21 (BCI)), exhibit NS-EL-1: Public Utilities Act, Section 2, pp. 3-5, and Section 52, p. 16. See also European Union's third-party submission, para. 22.

[139] Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al., (1977), 18 NSR (2d) 692 (NSCA) (Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al.), (Exhibit CAN-171), p. 77.

[140] Canada's response to Panel question No. 1, paras. 1-7.

[141] The USDOC stated in the Issues and Decision Memorandum that NSPI "is required by law to provide electricity to customers who request it anywhere in Nova Scotia". (Issues and Decision Memorandum, (Exhibit CAN-37), p. 36; see also United States' response to Panel question No. 5, para. 3).

[142] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMs*, para. 115. (emphasis added)

[143] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMs*, para. 114 (emphasis added). See also Appellate Body Report, *US − Carbon Steel (India)*, para. 4.95; and Panel Report, *China − GOES*, para. 7.93.

[144] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMs*, para. 114 (quoting Panel Report, *US − Export Restraints*, para. 8.31).

[145] Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al., (Exhibit CAN-171), p. 77.

the utility".[146] Even under the LRT, evidence on the record of the investigation indicates that the right of any customer to an LRR is not automatic. It is subject to the criteria set by the NSUARB and ultimate approval by the NSUARB, but the terms and conditions are negotiated between the customer and NSPI. As Canada explains in these proceedings, the NSUARB approved the LRT that in turn enables NSPI to negotiate LRRs with customers. In particular, the LRT allows for the negotiation of LRRs for NSPI's largest customers in economic distress where certain criteria are met: (a) the LRR would be in the public interest; (b) the rate is necessary and sufficient to retain the load of the customer; and (c) the revenue from the rate exceeds the incremental costs associated with serving the customer. However, the LRT stipulates that "[t]he price, terms and conditions … shall be established jointly by NSPI and the customer" and that they are "determined on a customer by customer basis".[147] The terms agreed between NSPI and the customer are then put before the NSUARB for approval, followed by a thorough and contested review process.[148] The above appears to precisely be a situation "in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market".[149]

7.64. In addition, we observe that the USDOC's analysis of the entrustment/direction of NSPI to provide electricity also appears to be at odds with Article 1.1(a)(1)(iii) of the SCM Agreement. The ordinary meaning of the term "provides" in that provision is to "supply or furnish for use; make available".[150] The Appellate Body has opined that a government provision of goods and services requires for a government to have "some control over the *availability* of the specific thing being 'made available'"[151], and that general governmental acts may be too remote from the concept of "making available" or "putting at the disposal of", which requires there to be a reasonably proximate relationship between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other.[152] We see no evidence to suggest that Section 52 of the Public Utilities Act afforded the Government of Nova Scotia any "control over the availability of the specific thing being made available". Evidence on the USDOC record as to the freedom of choice of market actors contradicts the

[146] Canada's response to Panel question No. 2(c), paras. 13-15. See also response to Panel question No. 4, paras. 20-21.

[147] Nova Scotia Questionnaire Response, exhibit NS-EL-17: Load Retention Tariff, (Exhibit CAN-143), p. 20.

[148] Nova Scotia Questionnaire Response, Vol. XIII, (Exhibit CAN-21 (BCI)), response to question Nos. K, L, and M, pp. NS.XIII-23-NS.XIII-29; Port Hawkesbury Questionnaire Response, exhibit 23-5 – 2000 NSUARB 72, (Exhibit CAN-26), p. 4; Government of Nova Scotia, Questionnaire Response, Vol. XVII (28 May 2015), exhibits NS-EL-17 to NS-EL-23, (Exhibit CAN-27); Port Hawkesbury, Questionnaire Response, exhibit 23-6 – 2011 NSUARB 184 (29 November 2011), (Exhibit CAN-82); and Port Hawkesbury Questionnaire Response, exhibit 47-1 – 2012 NSUARB 126, (Exhibit CAN-28).

[149] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114 (quoting Panel Report, *US – Export Restraints*, para. 8.31). In this respect, we also note certain statements made by third parties to these proceedings: "It is difficult for the European Union to see a transaction in a general provision or principle that simply appears to set out certain basic regulatory principles and lays down the key qualities of the relevant services. Even if the provision is supplemented with other considerations creating thus the relevant general service obligation … the European Union is of the view that if that principle amounts to no more than a statement that everyone must have access to basic amenities as electricity, water etc. it does not as such involve the kind of action from the government that would amount to the necessary transaction for the purposes of Article 1.1(a)(1). … However, this does not mean that a provision or a general principle regarding a general service obligation is irrelevant for considering whether a financial contribution exists." (European Union's third-party statement, paras. 26 and 28); "Brazil understands that government legislation laying down general principles and establishing general rules in a given market cannot be understood *per se* as entrusting or directing a private body. Especially legislation regulating the provision of certain goods in a market, which is within the bounds of a Member's policy space. It is upon the investigating authority to establish that in each concrete case the concerned regulation has entrusted or directed a private body to provide a subsidy." (Brazil's third-party statement, para. 5.); and "[A]n obligation imposed on private entities under relevant domestic laws and regulations can be one element that an investigating authority may consider in conducting this fact-specific analysis in a particular case. However, Japan considers that an obligation of a public utility to provide such general services does not in itself establish entrustment and direction." (Japan's third-party statement, para. 4).

[150] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2383.

[151] Appellate Body Reports, *US – Carbon Steel (India)*, paras. 4.68-4.69 (emphasis original); *US – Softwood Lumber IV*, para. 71.

[152] Appellate Body Report, *US – Softwood Lumber IV*, para. 71.

existence of such control. This confirms our finding that the USDOC improperly established entrustment or direction to provide a good on the basis of Section 52 of the Public Utilities Act.

7.65. The present scenario also highlights the absence of any "transaction" in Section 52 of the Public Utilities Act. We recall the Appellate Body's statement in *US – Softwood Lumber IV* that "[a]n evaluation of the existence of a financial contribution involves consideration of *the nature of the transaction through which something of economic value is transferred by a government*".[153] We have difficulty identifying any transaction in either the language of Section 52 or a broader general service obligation that would amount to a transfer of economic value by a government.[154]

7.66. Similarly, we refer to the context provided by the requirement in the SCM Agreement that, to constitute a subsidy, the act of providing a good or service must "thereby" confer a benefit. Assuming arguendo that the general service obligation in this case constituted a "financial contribution", we fail to see how it could be argued that such a general service obligation "thereby" conferred a benefit to PHP. By the USDOC's own analysis, any benefit in this case derived from the LRR. However, the LRR was not part of the financial contribution that the USDOC determined to exist by virtue of Section 52 of the Public Utilities Act.

7.67. We note that, in addition to Section 52 of the Public Utilities Act, the USDOC cites to the Discussion Paper which states that NSPI "must provide electricity to customers who request it, anywhere in Nova Scotia. … In deregulated or totally open markets, power companies can choose to provide service only when it makes economic sense to do so."[155] The USDOC's reliance on this statement seems to be insufficient to explain how NSPI was, through Section 52, either "give[n] responsibility" to provide electricity to PHP, or how the Government of Nova Scotia "exercise[d] its authority" over NSPI to provide electricity to PHP. Besides, the interpretative value of the Discussion Paper is questionable. Its purpose is clearly limited to the following: "This document summarizes the findings of background reports relating to the governance study component of the review [of Nova Scotia's electricity system]. The intent of this document is to help shape the questions that the final governance study raises about how we should apply this knowledge in the Nova Scotia context."[156]

7.68. In light of the foregoing, we find that the USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by finding entrustment or direction with respect to the provision of electricity by NSPI.

7.3.1.4.2 Whether the USDOC's acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by finding that the provision of electricity by NSPI conferred a benefit to PHP

7.69. Article 1.1(b) of the SCM Agreement provides in relevant part as follows:

> *Article 1*
>
> *Definition of a Subsidy*
>
> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a) …
>
> (b) a benefit is thereby conferred.

[153] Appellate Body Report, *US – Softwood Lumber IV*, para. 52. (emphasis added)
[154] In this respect, see European Union's third-party submission, para. 26.
[155] Discussion Paper, (Exhibit CAN-158), p. 3.
[156] Discussion Paper, (Exhibit CAN-158), pp. 1-2. See also Canada's second written submission, paras. 24-27; and response to Panel question No. 2(a), paras. 8-11, and No. 2(b), para. 12.

7.70. Article 14(d) of the SCM Agreement reads:

> *Article 14*
>
> *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*
>
> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> ...
>
> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

7.71. Pursuant to Article 1.1(b) of the SCM Agreement, a subsidy exists for purposes of the SCM Agreement when a financial contribution by a government confers a benefit to a recipient. Where the financial contribution is in the form of a provision of goods or services, Article 14(d) provides that such provision "shall not be considered as conferring a benefit unless [it] is made for less than adequate remuneration" and that "[t]he adequacy of remuneration is to be determined in relation to prevailing market conditions for the good or service in question in the country of provision."[157]

7.72. As explained above, the USDOC's benefit analysis examined three separate tiers. Canada challenges the USDOC's analysis in respect of Tiers 1 and 3. Regarding Tier 1, Canada claims that the USDOC erred in finding that domestic electricity prices are distorted. Regarding Tier 3, Canada claims that the USDOC erred by not finding the LRR to represent a market price. In the alternative, Canada also argues that the Tier 3 benchmark constructed by the USDOC was not appropriate for the purposes of Article 14(d).

7.73. The USDOC begins its benefit analysis by assessing whether a Tier 1 benchmark, based on a market-determined price for actual transactions within the country, is appropriate. In rejecting prices in Nova Scotia, the USDOC finds that *prices* in the Nova Scotia electricity market are distorted due to government involvement:

> With respect to a Tier 1 Benchmark for the provision of electricity, NSPI is the primary electric utility company in Nova Scotia providing electricity to most provincial consumers, with independent power producers generating a minimal amount of electricity by comparison and supplying that electricity over NSPI's transmission and distribution network. Furthermore, the [Government of Nova Scotia] regulates the rates that NSPI charges for electricity through the NSUARB. When the government provider constitutes a majority or a substantial portion of the market, the [USDOC] determines that prices within the country are distorted, that these prices do not satisfy the regulatory requirement for a market-determined price and, therefore, cannot be used as a benchmark for determining the adequacy of remuneration. We have determined that the [Government of Nova Scotia] is providing electricity through NSPI to most consumers of electricity in Nova Scotia. Accordingly given that NSPI is

[157] Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.43 and 4.45. See also Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.178 and 7.209.

> entrusted or directed to provide electricity throughout Nova Scotia, electricity prices in Nova Scotia are not appropriate Tier 1 benchmarks.[158]

7.74. This extract shows that the USDOC's finding that electricity prices in Nova Scotia are distorted, and therefore not appropriate Tier 1 benchmarks, is based on its determination that the Government of Nova Scotia, through its entrustment or direction of NSPI, is providing a major or substantial portion of electricity. As a result of its determination of entrustment or direction, the USDOC has effectively treated NSPI as a government provider of electricity. This is why the USDOC refers to the situation of "[w]hen the government provider constitutes a majority or a substantial portion of the market". And it is because ("given that") NSPI is allegedly entrusted or directed to provide electricity that ("[a]ccordingly") the USDOC finds that prices in Nova Scotia are not appropriate Tier 1 benchmarks. Indeed, the USDOC itself confirms this in its response to comments by interested parties, where the USDOC states that "electricity prices in Nova Scotia are distorted by government involvement in the market because NSPI has been entrusted or directed to supply electricity therein and accounts for 95 percent of the province's generation".[159]

7.75. As already explained above, the USDOC's determination that the Government of Nova Scotia entrusted or directed NSPI to provide electricity is flawed. The USDOC therefore had no basis to treat NSPI as a government provider of electricity. Nor, therefore, did the USDOC have any basis for finding that electricity prices in Nova Scotia were distorted as a result of NSPI being a government provider. As a result, the USDOC improperly rejected electricity prices in Nova Scotia as Tier 1 benchmarks.

7.76. In respect of its Tier 3 benchmark analysis, the USDOC first examined "whether the government price is consistent with market principles". The USDOC found that the LRR was not consistent with market principles, because it constituted a below-the-line rate.[160] We agree with the basic approach adopted by the USDOC, in the sense that the issue of whether the provision of electricity to PHP conferred a benefit could reasonably be addressed by considering whether the terms on which that electricity was provided, i.e. the terms of the LRR, were consistent with market principles.[161]

7.77. However, in considering whether or not the terms of the LRR were based on market principles, the USDOC failed to consider record evidence suggesting that the LRR had indeed resulted from negotiations based on market considerations. In particular, as explained by Canada[162], the USDOC did not take account of the benefits to NSPI of the flexibilities agreed to by PWCC. For example, the USDOC's analysis of whether or not the LRR was based on market principles contains no reference to the importance to NSPI of maintaining the load from the Port Hawkesbury mill, its biggest customer, on its system. Nor does that analysis refer to PWCC agreeing: (a) to become "priority interruptible"; (b) to pay for its electricity in part on the basis of the most expensive incremental source of energy in the stack in any given hour that it purchased electricity; or (c) to pre-pay its bill on a weekly basis. Yet it seems entirely consistent with market principles for an electricity provider to seek to both manage its load and accommodate the needs of its largest customer, and for a company that consumes a large amount of electricity to make concessions and accept flexibilities that would result in a lower rate being payable. The United States itself observes that, according to the USDOC's record, the NSUARB had stated that the LRR resulted from "vigorous negotiations carried out for more than six months between [PWCC] and

[158] Issues and Decision Memorandum, (Exhibit CAN-37), p. 41. (fns omitted)
[159] Issues and Decision Memorandum, (Exhibit CAN-37), p. 130.
[160] Issues and Decision Memorandum, (Exhibit CAN-37), p. 48.
[161] This approach is consistent with the guidance in Article 14(d) of the SCM Agreement, whereby the adequacy of remuneration for the provision by the government of a good shall be determined in relation to "prevailing market conditions". We consider that consideration of whether or not a transaction was based on market principles will necessarily indicate whether or not that transaction is consistent with prevailing market conditions. The United States suggests at para. 39 of its second written submission that "Article 14(d) requires the use of a benchmark to determine the adequacy of remuneration for the provision of a good". The United States refers to the Report of the Appellate Body in *US – Softwood Lumber IV* to argue that the phrase "in relation to" prevailing market conditions indicates that a benefit determination requires "some form of comparative exercise". (Ibid. para. 34). We understand that the United States refers in this regard to para. 89 of that Appellate Body Report. However, we do not read the Appellate Body as requiring the use of a benchmark for the purpose of Article 14(d). The Appellate Body was simply addressing the type of benchmark (in or out-of-country) that could be used, without considering whether or not a benchmark had to be used.
[162] Canada's first written submission, paras. 153-159; second written submission, paras. 49-54.

Nova Scotia Power, with the participation of the government of Nova Scotia and the court-approved appointed monitor".[163] The USDOC seems to have focused unduly on the role of the Government of Nova Scotia (despite the absence of any finding of entrustment or direction in respect of the terms of the LRR), while disregarding the vigour of the negotiations that took place between NSPI and PWCC.

7.78. In light of the above we conclude that the USDOC's determination that the provision of electricity by NSPI conferred a benefit to PHP was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. In these circumstances, there is no need to examine Canada's alternative arguments regarding the Tier 3 benchmark constructed by the USDOC.

7.3.1.4.3 Whether the USDOC acted inconsistently with Article 12.8 of the SCM Agreement by failing to notify interested parties of "essential facts" regarding the provision of electricity

7.79. Finally, Canada claims that the USDOC provided no indication to interested parties that it was considering relying on Section 52 of the Public Utilities Act to find that Nova Scotia directed NSPI to provide a financial contribution.[164]

7.80. The United States contends that interested parties were aware of: (a) the contents of the Public Utilities Act; and (b) the significance of the Public Utilities Act to the financial contribution determination. The United States contends that interested parties had sufficient opportunity to advance arguments on the meaning and content of the Public Utilities Act.[165] The United States asserts that the USDOC's preliminary determination − in which the USDOC explained that "[p]ursuant to the *Public Utilities Act*, NSPI, an investor-owned public utility, generates, transmits and distributes electricity throughout the Province of Nova Scotia."[166] − made clear that the Public Utilities Act, and the obligations placed on Nova Scotia Power therein, were central to the USDOC's financial contribution analysis. The United States also asserts that the USDOC's verification report explains that rates in Nova Scotia are approved in accordance with the Public Utilities Act.[167]

7.81. Article 12.8 reads as follows:

> 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.

7.82. Article 12.8 provides for the disclosure of "essential facts" under consideration which form the basis for the decision to apply definitive measures. In addressing Canada's claim, it is important to identify the essential "fact" at issue. The word "fact" is defined *inter alia* as "[a] thing known for certain to have occurred or to be true".[168] The relevant essential fact is therefore not, as suggested by the United States, the Public Utilities Act. The Public Utilities Act is itself not a thing that is known to have occurred or to be true. Nor does the Public Utilities Act, taken as a whole and viewed in the abstract, comprise a fact forming the basis for the USDOC's determination. In our view, Canada's claim concerns the essential fact that, according to the USDOC, the public service obligation enshrined in Section 52 of the Public Utilities Act entrusted or directed the NSPI to provide electricity to PHP. It is this fact that the USDOC took to be true, and that forms the basis for the USDOC's financial contribution determination.

[163] United States' second written submission, para. 37 (referring to Government of Nova Scotia, Questionnaire Response, exhibit NS-SUPP1-55A − 2012 NSUARB 126: NSUARB Order Approving Port Hawkesbury's Load Retention Rate (20 August 2012), (Exhibit CAN-35), p. 16).
[164] Canada's first written submission, para. 130.
[165] United States' first written submission, para. 61.
[166] Decision Memorandum for the Preliminary Determination, (Exhibit CAN-10), p. 30.
[167] USDOC Memorandum dated 2 September 2015, "Verification Report: Government of Nova Scotia", (Exhibit CAN-99), p. 16.
[168] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 916. See also Panel Report, *Argentina − Poultry Anti-Dumping Duties*, para. 7.225.

7.83. There is no evidence to suggest that this essential fact was disclosed to interested parties, as required by Article 12.8 of the SCM Agreement. Nor does the United States argue that this particular essential fact was properly disclosed. Although the USDOC's preliminary determination and verification report referred to the Public Utilities Act, there is nothing in these documents to suggest to interested parties that the USDOC would ultimately rely on its factual understanding of the public service obligation set forth in Section 52 of the Public Utilities Act to find that the NSPI was entrusted or directed to provide electricity to PHP.

7.84. For these reasons, we uphold Canada's claim that the United States acted inconsistently with Article 12.8 of the SCM Agreement by failing to disclose to interested parties the essential fact that Section 52 of the Public Utilities Act entrusted or directed the NSPI to provide electricity to PHP.

7.3.2 Claims concerning the hot idle funding and the FIF

7.3.2.1 Introduction

7.85. With respect to the hot idle funding and the FIF, Canada has brought the following claims:

a. Canada claims that the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by erroneously finding that PHP was the recipient of the hot idle funding and that the benefit associated with these financial contributions was not extinguished by PWCC's arm's-length purchase of Newpage PH for fair market value.[169]

b. Canada equally claims that the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by erroneously finding that PHP was the recipient of the FIF and that the benefit associated with these financial contributions was not extinguished by PWCC's arm's-length purchase of Newpage PH for fair market value.[170]

7.3.2.2 Whether the USDOC properly found that a benefit resulting from the hot idle funding was conferred to PHP

7.3.2.2.1 Factual background

7.3.2.2.1.1 The relevant facts on the record

7.86. PHP's SC Paper mill in Port Hawkesbury, Nova Scotia, was previously owned by NewPage PH.[171] On 6 September 2011, Newpage PH filed for creditor protection under the CCAA.[172] In its CCAA application, Newpage PH declared that it was seeking to pursue a going concern sale.[173] To sell the mill as a going concern, the paper machines had to be maintained in a state that would enable a relatively quick return to production operations (i.e. hot idle status).[174] Newpage PH thus took the necessary steps to maintain the mill in hot idle status.[175]

[169] Canada's panel request, p. 2.
[170] Canada's panel request, p. 2.
[171] Canada's first written submission, paras. 12-13; Port Hawkesbury, Initial Questionnaire Response (27 May 2015) (Port Hawkesbury Initial Questionnaire Response), (Exhibit CAN-3 (BCI)), pp. 4-6.
[172] As explained before, the CCAA is a federal law allowing insolvent corporations that owe their creditors more than CAD 5 million to restructure their business and financial affairs. The main purpose of the CCAA is to enable financially distressed companies to avoid bankruptcy, foreclosure, or the seizure of their assets while maximizing returns for their creditors and preserving both jobs and the company's value as a functioning business. CCAA proceedings are carried out under the supervision of a court. (Canada's first written submission, para. 14; Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), p. NS.VIII-2).
[173] Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), exhibit NS-HI-1, p. 3; Canada's first written submission, paras. 14-16.
[174] Canada's first written submission, para. 15. In order to maintain a paper mill in hot idle, a skeleton maintenance crew, administration staff, utility services, and security staff were required to monitor mill systems and prevent damage or hazards in the mill and the surrounding property. (Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), p. NS.VIII-3).
[175] Canada's first written submission, para. 15; Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), p. NS.VIII-3.

7.87. Under the CCAA process, Newpage PH and its Monitor, Ernst & Young, hired Sanabe & Associates LLC (Sanabe) to assist with the sale of the mill. NewPage PH and Sanabe publicly advertised the mill, soliciting bids from interested parties. On 16 December 2011, there were four potential purchasers submitting formal offers, two of which were going concern offers and two of which were liquidation offers. One of the going concern offers was from PWCC, whose offer included the purchase of the company itself, and not only the assets. Sanabe recommended that PWCC's offer be accepted, as it would facilitate a going concern sale of the mill and timberlands.[176] Newpage PH then began taking steps to reach an acceptable agreement with PWCC.[177]

7.88. By December 2011, however, the funds to keep the mill in hot idle status were almost depleted, so the Government of Nova Scotia intervened to help maintain the hot idle status. On [[*****]], the Government of Nova Scotia approved the first amount of funding to maintain the hot idle status and, [[*****]], the Government of Nova Scotia approved an additional amount to continue the hot idle status. The amount of funding was based on the actual costs of maintaining the hot idle status as reported by the Monitor.[178]

7.89. On 6 July 2012, an initial Plan of Arrangement under the CCAA process was established, based on the sale of Newpage PH to PWCC.[179] [[*****]].[180] NewPage PH also continued negotiations with a back-up purchaser that would liquidate the mill's assets if final negotiations with PWCC broke down. The liquidation offer was lower than PWCC's offer.[181] The negotiations with PWCC succeeded and the change in ownership became effective on 28 September 2012. As of that date, Newpage PH became PHP, wholly owned by PWCC. The price paid by PWCC was the same as the original bid price submitted in December 2011.[182]

7.3.2.2.1.2 The USDOC's determination

7.90. To assess whether PHP had received a benefit from the hot idle funding, the USDOC applied its "concurrent subsidies methodology"[183], under which it "will normally determine that the value of concurrent subsidies is fully reflected in the fair market value price of an arm's length change in ownership/privatization and, therefore, is fully extinguished in such transaction"[184], if three criteria are met: "(1) The nature and value of the concurrent subsidies were fully transparent to all potential bidders and, therefore, reflected in the final bid values of the potential bidders; (2) The concurrent subsidies were bestowed prior to the sale; and (3) There is no evidence otherwise on the record demonstrating that the concurrent subsidies were not fully reflected in the transaction price."[185]

7.91. The USDOC explained that the hot idle funds were bestowed prior to the conclusion of the sale of Newpage PH and, thus, the second criterion was met. However, the USDOC determined that the other two criteria were not satisfied.[186]

7.92. With respect to the first criterion, the USDOC noted that the deadline for submitting bids was 16 December 2011 and the decisions by the Government of Nova Scotia to provide hot idle

[176] Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), p. NS.VIII-4.
[177] Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), p. NS.VIII-4; Port Hawkesbury Initial Questionnaire Response, (Exhibit CAN-3 (BCI)), p. 7.
[178] Canada's first written submission, paras. 18-20; Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), pp. NS.VIII-4-NS.VIII-5.
[179] Port Hawkesbury, Questionnaire Response, exhibit G-11 − Twelfth Report of the Monitor (8 August 2012) (Port Hawkesbury Questionnaire Response, exhibit G-11), (Exhibit CAN-12), p. 10.
[180] Port Hawkesbury, Questionnaire Response, exhibit G-15 − Plan Sponsorship Agreement, (Exhibit CAN-95 (BCI)), para. 7(1)(e).
[181] Port Hawkesbury Questionnaire Response, exhibit G-11, (Exhibit CAN-12), p. 33.
[182] Canada's first written submission, paras. 26-27; Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), p. NS.VIII-5; and Port Hawkesbury Initial Questionnaire Response, (Exhibit CAN-3 (BCI)), pp. 8-10.
[183] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 18-19.
[184] Notice of Final Modification of Agency Practice under Section 123 of the Uruguay Round Agreements Act, United States Federal Register, Vol. 68 No. 120 (23 June 2003) (Final Modification of Agency Practice), (Exhibit CAN-93); Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.
[185] Final Modification of Agency Practice, (Exhibit CAN-93); Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.
[186] Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.

funds were made after the solicitation for bids and after the submission of all bids. For that reason, the USDOC concluded that, at the time the bids were submitted, the nature and the value of the hot idle funds were not fully transparent to all potential bidders.[187]

7.93. With respect to the third criterion, the USDOC determined that there was evidence on the record demonstrating that the hot idle funds were not fully reflected in the transaction price. The USDOC explained that, because the hot idle funds were not in existence before the bid price was established and approved, the value of the hot idle funds could not have been reflected in the transaction price.[188]

7.94. For the USDOC, even if that bid price initially reflected the fair market value of the Port Hawkesbury mill, and even though the hot idle funds were bestowed prior to the final sale, the value of the hot idle funds could not have been reflected in the final transaction price, which was set before the hot idle funds were proposed and approved. Therefore, the USDOC concluded that, even assuming an arm's-length transaction for fair market value, the subsidy could not have been extinguished.[189] The USDOC thus found that the hot idle funds conferred a benefit to PWCC.[190]

7.3.2.2.2 Main arguments of the parties

7.95. Canada claims that the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, when it erroneously found that PWCC/PHP, rather than NewPage PH, was the recipient of the hot idle funds, and that the benefit associated with these financial contributions was not extinguished by NewPage PH's sale of the mill at arm's-length for fair market value.[191]

7.96. Canada argues that PWCC/PHP was not the recipient of the hot idle funds. Canada contends that the Government of Nova Scotia made the payments to the monitor, who gave them to NewPage PH to maintain the mill in hot idle status, so the funds did not go to PWCC as the winning bidder nor did payment of these funds increase the amount NewPage PH would receive. Canada submits that any benefit associated with the hot idle funds went to NewPage PH, or, more accurately, to NewPage PH's creditors.[192]

7.97. Canada also contends that, when applying its concurrent subsidy methodology, the USDOC failed to recognize that PWCC/PHP did not receive anything through payment of the hot idle funds. Canada asserts that PWCC's bid was for a mill as a going concern, so PWCC expected the mill to be maintained in hot idle during the CCAA sale process. Canada explains that the hot idle funding maintained the *status quo* and ensured that the mill could be sold as a going concern, because if the mill was not maintained in hot idle status, PWCC's offer would have been null. Canada adds that the USDOC was unable to articulate what value PHP received that was not included in the fair market price PWCC paid for the mill, since PHP received exactly what PWCC bid and paid for, a mill in hot idle. Canada also submits that PWCC's bid represented the best offer NewPage PH would receive, even if new bids had been solicited after the hot idle funds were paid. Canada argues that the USDOC should therefore have found that the payments were reflected in the bids and thus, that the "subsidies" were extinguished.[193]

[187] Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.
[188] Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.
[189] Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.
[190] Issues and Decision Memorandum, (Exhibit CAN-37), p. 20.
[191] Canada's first written submission, paras. 179-207; opening statement at the first meeting of the Panel, paras. 153-162; and second written submission, paras. 66-69.
[192] Canada's first written submission, paras. 184-189; opening statement at the first meeting of the Panel, paras. 155 and 157; second written submission, para. 67; and opening statement at the second meeting of the Panel, para. 177.
[193] Canada's first written submission, paras. 194-200; opening statement at the first meeting of the Panel, paras. 156-157 and 159; second written submission, paras. 68-69; and opening statement at the second meeting of the Panel, para. 176.

7.98. Canada argues, in the alternative, that any benefit related to the hot idle funding was extinguished by virtue of an arms-length sale for fair market value. For Canada, if a private-to-private sale is at arm's length and for fair market value, and the change in ownership is complete, any prior subsidy should be considered to have been extinguished. Canada contends that the USDOC specifically found that the private-to-private party transaction between NewPage PH and PWCC was at arm's-length for fair market value, so it acknowledged that PHP did not obtain any assets on less than market terms.[194]

7.99. The United States contends that a benefit exists when the financial contribution makes the recipient better off than it would otherwise have been. The United States argues that, absent the Government of Nova Scotia's payment of hot idle funds, the financial obligation to maintain the mill in hot idle status would have fallen on Newpage PH, so the Government of Nova Scotia explicitly subsidized a necessary condition of the sale of the mill as the sale was occurring and, thus, PWCC received a benefit.[195]

7.100. The United States adds that the issue was whether the bid and sale prices reflected and incorporated the hot idle funds. The United States argues that the final bid price that PWCC submitted could not have accounted for the hot idle funds because those funds were approved and provided after the submission of the bid. The United States contends that while the bid and sale price for the purchase of the mill in hot idle status was CAD 33 million, it actually cost [[*****]] to keep the mill ready for sale as a going concern. The United States adds that Newpage PH initially contributed CAD 22 million and, after PWCC's bid was accepted, the province contributed [[*****]] of hot idle funds and an additional CAD 12 million for the FIF. The United States argues that the value of an operational mill was [[*****]] of which the Government of Nova Scotia contributed a total of [[*****]] to Newpage PH – a dollar amount that [[*****]] PWCC's CAD 33 million bid and purchase price. Accordingly, for the United States, the hot idle funds, concurrent with and in facilitation of the mill's sale, benefited PWCC.[196] In addition, for the United States, the USDOC appropriately concluded that, given that the funding was bestowed as a result of Newpage PH's inability to use its own financial reserves to fulfil the obligations to which it agreed, the full value of maintaining the mill in hot idle status was not accounted for in the original bid. Also, given that the Government of Nova Scotia approved the hot idle funding after the deadline for all bids, the potential bidders would not have been aware of the provision of hot idle funds and the bids submitted could not have reflected the provision of the assistance to maintain hot idle status. The United States argues that the USDOC reasonably determined that PWCC received a benefit that it did not pay for, i.e. the Government of Nova Scotia's financial support of the sale.[197]

7.101. With respect to whether the benefit was extinguished through the sale at arm's length and for fair market value, the United States argues that 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. For the United States, 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. The United States argues that the USDOC examined the transaction to determine whether the purchaser received an advantage or something that made it better off than it would otherwise have been, absent that financial contribution. For the United States, the facts demonstrate that the hot idle funds allowed Newpage PH to fulfil an obligation it otherwise would not have been able to meet, i.e. sell the mill in hot idle status. The United States submits that record evidence demonstrates that, due to the timing of the market transaction, the hot idle funds were not reflected in the price PWCC ultimately paid, so the purchase did not extinguish the subsidy.[198]

[194] Canada's first written submission, paras. 201-207; opening statement at the first meeting of the Panel, para. 162; and opening statement at the second meeting of the Panel, paras. 182-189.
[195] United States' first written submission, para. 125.
[196] United States' response to Panel's question No. 36, paras. 90-91; closing statement at the second meeting of the Panel, para. 6.
[197] United States' first written submission, paras. 127-128.
[198] United States' first written submission, para. 131.

7.3.2.2.3 Evaluation by the panel

7.102. Pursuant to Article 1.1(b) of the SCM Agreement, for a subsidy to exist, a benefit must be conferred by a financial contribution. The term benefit is not defined in the SCM Agreement and no particular methodology to determine whether a benefit is conferred appears therein. The concept of benefit has instead been elucidated through panel and Appellate Body case law.[199]

7.103. The Appellate Body has explained that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage"[200] and "is concerned with 'benefit *to the recipient*' and not with the 'cost to government'".[201] A "'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient"[202], so a benefit can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something.[203] Also, the focus of any analysis should be on legal or natural persons instead of on productive operations.[204]

7.104. Concerning the methodology to establish whether a benefit exists, "the term 'benefit' implies some kind of comparison. … [Since] 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".[205] In undertaking this comparative analysis, the marketplace provides the appropriate basis for comparison, because the trade-distorting potential of a financial contribution can be identified only by determining whether the recipient has received that financial contribution on terms more favourable than those available in the market.[206]

7.105. The Panel agrees with the Appellate Body. In the case at issue, the USDOC was required to assess whether PWCC/PHP[207] was better off than it would otherwise have been, absent the hot idle funding.[208]

7.106. The Panel notes that, for the USDOC, the relevant question was whether the hot idle funding was fully reflected in the price paid by PWCC/PHP, and the fact that the bid offer preceded the proposal and approval of the hot idle funds was determinative to conclude that the price paid did not reflect the hot idle funds. However, the USDOC's methodology failed to address what in the Panel's view was the crucial question in the benefit analysis: whether PWCC/PHP was better off than it would otherwise have been, absent the hot idle funding. In our view, PWCC/PHP bid for and paid for a mill as a going concern and, thus, in hot idle status. This is what PWCC/PHP received. PWCC/PHP was not made any better off by the hot idle funding, since the hot idle funding did not result in PWCC/PHP receiving anything more than it paid for.

7.107. The Panel notes that in its section "Analysis of Comments", the USDOC addressed this issue as follows:

> The question of whether the bid price was for a sale of the mill to be delivered in hot idle status, as [the Government of Nova Scotia] contends, is inapposite. The issue is actually whether the bid and sale prices reflected and incorporated the hot idle funds approved in December 2011 and March 2012. We acknowledge that PWCC's bid was offered for the mill as a going concern with the understanding that the mill was being

[199] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 703.
[200] Appellate Body Report, *Canada – Aircraft*, para. 153. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.123.
[201] Appellate Body Report, *Canada – Aircraft*, para. 155 (emphasis original). See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.123.
[202] Appellate Body Report, *Canada – Aircraft*, para. 154.
[203] Appellate Body Report, *Canada – Aircraft*, para. 154. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 703.
[204] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 110.
[205] Appellate Body Report, *Canada – Aircraft*, para. 157. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.123.
[206] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.123. See also Appellate Body Reports, *US – Large Civil Aircraft (2nd complaint)*, para. 636; and *EC and certain member States – Large Civil Aircraft*, para. 705.
[207] As the Panel has explained, when Newpage PH was sold to PWCC, Newpage PH became PHP, wholly owned by PWCC. For ease of the analysis, the Panel will refer to PWCC/PHP.
[208] We note that the sale of the mill involved the full transfer of ownership from Newpage PH to PWCC.

> maintained in hot idle status. However, PWCC made that bid with the expectation that [Newpage PH] would maintain it as such and could not have anticipated that [the Government of Nova Scotia] would assume responsibility for that maintenance. Thus, once [Newpage PH] could not fulfill its obligations, PWCC received a benefit in the form of additional, unanticipated financing from [the Government of Nova Scotia] for the mill's continued hot idle status. Our measurement of that benefit is not a cost-to-government analysis, as parties have claimed, but a recognition that the full value of maintaining the mill in hot idle status was not accounted for in the original bid.[209]

7.108. The USDOC considered as "inapposite" the fact that PWCC/PHP paid for and received a mill in hot idle status. The USDOC instead concludes that, because the full value of maintaining the mill in hot idle status was not accounted for in the original bid, PWCC/PHP received a benefit in the form of additional, unanticipated financing from the Government of Nova Scotia. The USDOC seems to be suggesting that PWCC/PHP should have paid for the value of maintaining the mill in hot idle status during the sales process, despite the fact that its bid was for a mill in hot idle status. However, precisely because PWCC/PHP bid for a mill in hot idle, it was not PWCC/PHP, the buyer who had to bear the burden of maintaining the hot idle status of the mill during the sales process, but rather Newpage PH, the seller. If anything, therefore, it was Newpage PH that benefited from the hot idle funding, since it did not have to incur those costs in order to sell the mill in hot idle status.

7.109. Also, the USDOC contends that PWCC/PHP somehow received a benefit because it had made the bid with the expectation that Newpage PH would maintain the mill in hot idle status, and could not have anticipated that the Government of Nova Scotia would intervene. From the perspective of PWCC/PHP, though, we do not see the relevance of the source of the funds needed to maintain the mill in hot idle status. Again, PWCC/PHP received what it paid for, i.e. a mill in hot idle status. This remains true no matter where the funds to maintain the mill in hot idle status originated from.

7.110. The Panel notes that the United States has argued in these proceedings that PWCC/PHP received a benefit because the Government of Nova Scotia subsidized a necessary condition of the sale of the mill, and that, absent the Government of Nova Scotia's payment of hot idle funds, there would have been no transaction. Firstly, the United States has not identified any such finding by the USDOC, and we have not been able to identify any. Secondly, the United States seems to be suggesting that PWCC/PHP benefited from the hot idle funding because, but for that funding, it would have received nothing since the transaction would not have gone ahead. It is true that PWCC's offer was for a mill in hot idle, so if the mill had not been maintained in hot idle status there would have been no transaction. However, in such case PWCC/PHP would not have paid anything. From the perspective of the seller, though, the hot idle funding allowed Newpage PH to sell the mill as a going concern when it would otherwise not have been able to do so. Once again, therefore, the facts indicate that the benefit from the hot idle funding accrued to Newpage PH, and ultimately its creditors, rather than PWCC/PHP.

7.111. In light of the foregoing, the Panel concludes that the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding that the hot idle funding conferred a benefit on PWCC/PHP.

7.3.2.3 Whether the USDOC properly found that any benefit resulting from the FIF was conferred to PHP

7.3.2.3.1 Factual background

7.3.2.3.1.1 The relevant facts on the record

7.112. In its application under the CCAA, Newpage PH indicated that, given the limited period of full operation to be sustained following the CCAA filing, the amount of continued goods and services required by Newpage PH would be substantially reduced from its normal operation

[209] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 87-88. (fn omitted)

levels.[210] This included the ancillary forestry infrastructure activities.[211] The Government of Nova Scotia, however, wanted Newpage PH to keep contracting forestry infrastructure activities while the CCAA process was underway.[212] As a result, on 16 September 2011, the Government of Nova Scotia and Newpage PH concluded the Forestry Infrastructure Agreement (FIA), which was put into effect on 23 September 2011.

7.113. The FIA established the FIF to fund all eligible costs of the works approved in advance by the Government of Nova Scotia. Those works included: [[*****]].[213] The FIA was cost and cash flow neutral to Newpage PH[214] and [[*****]].[215] The first amount of the FIF was approved on 16 September 2011, and a second amount was approved on [[*****]].[216]

7.3.2.3.1.2 The USDOC's determination

7.114. The USDOC noted the Government of Nova Scotia's argument that the programme was cost and cash flow neutral to Newpage PH and that the services provided under the programme were designed to accrue to the benefit of Nova Scotia. The USDOC determined, however, that the internal documentation submitted by the Government of Nova Scotia demonstrated that the FIF was provided to support the ongoing operations of the mill during the bankruptcy process and to maintain the mill ready for sale as a going concern, which demonstrated that the programme was established to support the mill through the CCAA and sale process, rather than only to support unrelated contractors.[217]

7.115. The USDOC then determined that, based upon the manner in which the company was sold, the private-to-private party transaction between Newpage PH and PWCC was at arm's-length for fair market value.[218] The USDOC considered that it still had to determine whether any subsidies were extinguished. As in the case of the hot idle funding, the USDOC applied the three criteria set forth in the abovementioned concurrent subsidies methodology.[219]

7.116. With respect to the initial FIF approval amount, the USDOC determined that the three criteria were met because: (a) the order approving this original agreement was announced publicly prior to the submission of formal offers for the purchase of the mill and prior to the submission of PWCC's final bid, so the nature and value of the initial FIF funds were fully transparent to all potential bidders; (b) the funds were bestowed prior to the conclusion of the sale of Newpage PH to PWCC; and (c) there was no evidence on the record demonstrating that the amounts related to the first FIF approval were not fully reflected in the transaction price. Therefore, the USDOC concluded that the subsidies related to the initial FIF approval were extinguished in the fair market price of the arm's-length sale.[220]

7.117. With respect to the second FIF approval, the USDOC determined that the first criterion was not satisfied because the second FIF amount was approved after PWCC's final bid was submitted, so, at the time the bids were submitted, the nature and the value of the second FIF

[210] Government of Nova Scotia, Questionnaire Response, Vol. X – Forestry Infrastructure (28 May 2015), exhibits NS-FI-1 to NS-FI-12 (Nova Scotia Questionnaire Response, Vol. X), (Exhibit CAN-16 (BCI)), p. NS.X-3.
[211] Canada's first written submission, para. 21; Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), p. NS.X-3.
[212] Canada's first written submission, paras. 21-22; Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), p. NS.X-3; and Port Hawkesbury, Questionnaire Response, exhibit G-6 – Supreme Court of Nova Scotia, Initial Order (9 September 2011) (Port Hawkesbury Questionnaire Response, exhibit G-6), (Exhibit CAN-8), pp. 15-16.
[213] Canada's first written submission, para. 23; Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), p. NS.X-4.
[214] Canada's first written submission, paras. 21-22; Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), p. NS.X-3; and Port Hawkesbury Questionnaire Response, exhibit G-6, (Exhibit CAN-8), pp. 15-16.
[215] Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), pp. NS.X-4-NS.X-5.
[216] Canada's first written submission, para. 23; Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), pp. NS.X-5-NS.X-6.
[217] Issues and Decision Memorandum, (Exhibit CAN-37), p. 21.
[218] Issues and Decision Memorandum, (Exhibit CAN-37), p. 22.
[219] Issues and Decision Memorandum, (Exhibit CAN-37), p. 22.
[220] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 22-23.

was not fully transparent to all potential bidders and it was not possible that the bids could have reflected the provision of the assistance under the FIF.[221]

7.118. The USDOC also determined that the third criterion was not satisfied because there was evidence on the record demonstrating that the second FIF approval was not fully reflected in the transaction price. The USDOC explained that, because those funds were not disbursed before the bid price was established and approved, the value of the second FIF approval could not have been reflected in the transaction price.[222] The USDOC thus found that the second FIF approval conferred a benefit to PWCC.[223]

7.3.2.3.2 Main arguments of the parties

7.119. Canada argues that the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, when it erroneously found that PHP was the recipient of the FIF and that the benefit associated with the FIF was not extinguished by NewPage PH's sale of the mill at arm's-length for fair market value.[224]

7.120. Canada contends that the FIA was undertaken at the behest of the Government of Nova Scotia, and that the FIF merely facilitated this outcome by allowing for the passing of payments through NewPage PH to third-party providers of forestry services. Consequently, for Canada, these funds could not have provided any benefit to PWCC/PHP, and it was the third-party contractors who were the recipients of the FIF funds.[225]

7.121. Canada also contends that NewPage PH was not a recipient of any benefit that may be associated with these funds because it had no obligations related to forestry activities once it entered the CCAA process, and, even assuming *arguendo* that NewPage PH had received a subsidy under the FIF, that subsidy did not relate to PWCC/PHP because the Government of Nova Scotia ceased making any payments under the FIF upon sale of the mill to PWCC.[226]

7.122. Canada argues that PWCC's bid was for a mill as a going concern, so PWCC knew about the payments of the FIF funds and the bid reflected knowledge of the FIF funding. Canada argues that the USDOC should therefore have found that the payments were reflected in the bids and thus, that the subsidies were extinguished. For Canada, the USDOC failed to identify what the benefit was that PWCC/PHP is alleged to have received.[227] Canada states in this regard that the FIF funds neither increased the value of the assets acquired by PWCC, nor increased the future return on those assets.

7.123. Canada submits, in the alternative, that any benefit related to the FIF funds was extinguished by virtue of an arms-length sale for fair market value. For Canada, if a private-to-private sale is at arm's length and for fair market value and the change in ownership is complete, then any prior subsidy should be considered to have been extinguished and the USDOC specifically found that "the private-to-private party transaction between NewPage PH and PWCC was at arm's-length for fair market value". For Canada, the USDOC acknowledged that PHP did not obtain any assets on less than market terms.[228]

[221] Issues and Decision Memorandum, (Exhibit CAN-37), p. 23.
[222] Issues and Decision Memorandum, (Exhibit CAN-37), p. 23.
[223] Issues and Decision Memorandum, (Exhibit CAN-37), p. 23.
[224] Canada's first written submission, paras. 179-207; opening statement at the first meeting of the Panel, paras. 153-162; and second written submission, paras. 66-69.
[225] Canada's first written submission, para. 190-193; opening statement at the first meeting of the Panel, paras. 160-161; second written submission, paras. 70-72; and opening statement at the second meeting of the Panel, paras. 179-181.
[226] Canada's first written submission, para. 190-193; opening statement at the first meeting of the Panel, paras. 160-161; second written submission, paras. 70-72; and opening statement at the second meeting of the Panel, paras. 179-181.
[227] Canada's first written submission, paras. 194-200; opening statement at the first meeting of the Panel, paras. 156-157 and 159; and second written submission, paras. 68-69.
[228] Canada's first written submission, paras. 201-207; opening statement at the first meeting of the Panel, para. 162; and opening statement at the second meeting of the Panel, paras. 182-189.

7.124. The United States argues that positive evidence on the record supports the USDOC's finding that the FIF was a fund intentionally created by the Government of Nova Scotia to ensure that the mill was sold as a going concern in order to keep the mill in operation. The United States adds that the Verification Report of the Government of Nova Scotia demonstrates that the FIF was implemented to enable the forestry operations to continue during the bankruptcy process and not interrupt supply chain operations at the mill, and all of these activities contributed to the sale of Newpage PH as a going concern. The United States adds that the USDOC examined the transaction and determined, based on record evidence, that, without the Government of Nova Scotia's FIF grant, Newpage PH would not have been able to sell the mill as a going concern – a condition to which Newpage PH agreed. Thus, PWCC received a benefit when the Government of Nova Scotia provided a grant to maintain the ongoing forestry operations of the mill during the bankruptcy process.[229]

7.125. The United States maintains that the pertinent question on the extinguishment analysis is whether the change in ownership resulted in an extinguishment of the subsidy, such that it no longer benefited the recipient. The United States adds that 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. The United States adds that, accordingly, the USDOC concluded that because the second payment of the FIF 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 funds could not have been reflected in the final transaction price.[230]

7.3.2.3.3 Evaluation by the Panel

7.126. We recall that the term benefit encompasses some form of advantage to a recipient, and there can be no benefit to a recipient unless the financial contribution makes the recipient better off than it would otherwise have been, absent that contribution. Therefore, in the case at issue, the USDOC was required to assess whether PWCC/PHP was better off than it would otherwise have been, absent the FIF. For essentially the same reasons that we set out in respect of the hot idle funds, we consider that the USDOC failed to properly determine benefit in this manner.

7.127. The Panel notes that the USDOC first concluded that the FIF was established to maintain the mill as a going concern and that the sale of Newpage PH to PWCC/PHP was an arm's-length sale for fair market value. After concluding this, the relevant question for the USDOC was whether the FIF was fully reflected in the price paid by PWCC/PHP[231], and the fact that the bid offer preceded the approval of the second FIF amount was determinative to conclude that the price paid did not reflect the second FIF amount. However, as with the hot idle funding, the USDOC's methodology failed to address what in the Panel's view is the crucial question in the benefit analysis: whether PWCC/PHP was better off than it would otherwise have been, absent the FIF. As with the hot idle funding, there is no evidence that, as a result of the FIF, PWCC/PHP received anything more than it paid. There was in particular no determination by the USDOC that the value of the assets acquired by PWCC/PHP was increased as a result of the FIF, or that future returns on those assets were increased as a result thereof.[232]

7.128. In light of the foregoing, the Panel concludes that the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding that PWCC/PHP was the recipient of the benefits from the second FIF amount.

7.3.3 Claim concerning the provision of stumpage and biomass to PHP

7.3.3.1 Introduction

7.129. Canada claims that the USDOC acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement, by improperly initiating an investigation on the provision of stumpage and

[229] United States' first written submission, para. 132; second written submission, paras. 63-69.
[230] United States' first written submission, para. 132; second written submission, paras. 70-74.
[231] As the Panel has explained, when Newpage PH was sold to PWCC, Newpage PH became PHP, wholly owned by PWCC. For ease of the analysis, the Panel will refer to PWCC/PHP.
[232] [[*****]]

biomass by the Government of Nova Scotia to PHP, in the absence of any evidence that a benefit was conferred.[233]

7.3.3.2 Factual background

7.130. In its petition to initiate a CVD investigation on SC Paper, the petitioner alleged that, based on information reasonably available to it, PHP harvests a significant portion of the pulpwood and biomass from Nova Scotia Crown land and benefits from countervailable subsidies as a result.[234]

7.131. In support of this allegation, the petitioner submitted the publicly available version of a 20-year Forest Utilization License Agreement (FULA) between Nova Scotia and PHP[235], and explained that:

> This agreement specifies that PHP may harvest up to 400,000 green metric tons ("GMT") of spruce or fir pulpwood per year and another 175,000 MT of biomass fuel from Crown lands. The FULA also calls for PHP to purchase 200,000 GMT of pulpwood and 200,000 MT of biomass fuel from private suppliers. Thus, under the agreement, PHP is slated to obtain approximately two-thirds of its pulpwood from Crown land and one-third from private sources.[236]

7.132. Specifically with respect to benefit, the petitioner alleged that the Government of Nova Scotia provides a benefit "to the extent that PHP pays less than adequate remuneration for the stumpage and biomass".[237] The petitioner explained that "[d]espite significant effort", it was unable to locate the stumpage prices actually paid by PHP for stumpage rights because the Government of Nova Scotia had redacted the details on prices from the FULA. The petitioner then argued that the USDOC should determine the benefit to PHP by evaluating the prevailing market conditions for the stumpage and biomass purchased.[238]

7.133. The USDOC decided to initiate an investigation on the provision of stumpage and biomass to PHP. With respect to all the programmes on which the USDOC initiated an investigation, including the provision of stumpage and biomass to PHP, the USDOC explained as follows:

> We recommend investigating the programs listed under "Programs on Which the [USDOC] is Initiating an Investigation." For each program, the petitioner alleged the elements of a subsidy, i.e., financial contribution, benefit, and specificity. We find that the petitioner's allegations are supported by adequate and accurate information that was reasonably available to it.[239]

7.134. On the element of benefit with respect to the provision of stumpage and biomass, the USDOC described the petition as follows:

> The petitioner alleges that the [Government of Nova Scotia] provides a benefit through this program to the extent that PHP pays less than adequate remuneration for the stumpage and biomass, consistent with section 771(5)(E)(iv) of the Act. Despite significant effort, the petitioner states that it was unable to locate the stumpage prices actually paid by PHP for stumpage rights because the [Government of Nova Scotia] has redacted this information from public documents. While the petitioner states it was able to obtain the FULA between PHP and the [Government of Nova Scotia], the [Government of Nova Scotia], however, redacted from this document the details of

[233] Canada's panel request, p. 2.
[234] Petition for the Imposition of Countervailing Duties in the Matter of Supercalendered Paper from Canada, Vol. II: Canada Subsidy Allegations (26 February 2015) (Petition, Vol. II), (Exhibit CAN-39), p. II-46.
[235] Petition for the Imposition of Countervailing Duties in the Matter of Supercalendered Paper from Canada, Vol. II: Canada Subsidy Allegations (26 February 2015), exhibit II-66 – Forest Utilization License Agreement, (27 September 2012), (Exhibit CAN-138).
[236] Petition, Vol. II, (Exhibit CAN-39), pp. II-46-II-47. (fns omitted)
[237] Petition, Vol. II, (Exhibit CAN-39), p. II-48.
[238] Petition, Vol. II, (Exhibit CAN-39), p. II-48.
[239] USDOC, Enforcement and Compliance Office of Antidumping and Countervailing Duty (CVD) Operations, CVD Investigation Initiation Checklist (18 March 2015) (USDOC initiation checklist), (Exhibit CAN-40), p. 7.

> the prices it charges for public resources. Consistent with section 771(5)(E) of the Act, the petitioner requests that the [USDOC] investigate the benefit to PHP by evaluating the prevailing market conditions for stumpage and biomass purchased, including the "price, quality, availability, marketability, transportation, and other conditions" in relation to the conditions otherwise available.[240]

7.3.3.3 Main arguments of the parties

7.135. Canada claims that the USDOC initiation of an investigation into Nova Scotia's provision of stumpage and biomass did not meet the standard for sufficient evidence under Articles 11.2 and 11.3 of the SCM Agreement and thus the USDOC failed in its obligation to evaluate the accuracy and adequacy of the evidence in the application, in violation of Article 11.3 of the SCM Agreement.[241]

7.136. Canada argues that the petition provided no information with respect to benefit and simply alleged that the provision of stumpage and biomass for less than adequate remuneration was a countervailable subsidy, because PHP harvests a significant portion of the pulpwood and biomass from Nova Scotia Crown land. Canada contends that the petition did not include the stumpage rate paid by PHP or any pricing information about either government or private sales.[242]

7.137. Canada contends that none of the documents submitted by the petitioner constitute positive evidence of a benefit to PHP.[243] Canada asserts that the version of the FULA relied on by the petitioner only specified the quantity of pulpwood and biomass fuel PHP is permitted to harvest annually from Crown lands and did not provide a stumpage rate. For Canada, mere evidence of a purchase from the government is not an indication that a subsidy exists.[244]

7.138. Canada argues that, even if there was no evidence of a benefit reasonably available to the petitioner, the USDOC was not justified in initiating an investigation with no evidence of benefit before it. Canada adds that, even if the FULA had not been redacted, it would have only been a mere assertion of benefit because no comparator was provided.[245]

7.139. Canada also contends that the United States' argument that the USDOC had information supporting the existence of a distorted market for pulpwood is a *post hoc* rationalisation. Canada asserts that the petitioner had requested the USDOC to investigate the benefit to PHP by evaluating the prevailing market conditions for stumpage and biomass, but the USDOC did not make any finding that there was evidence that prevailing market conditions were distorted or that the market was restricted.[246]

7.140. The United States argues that the petition contained sufficient evidence with respect to the existence of a subsidy that was reasonably available to the applicant. The United States contends that the USDOC investigated the provision of stumpage, based on its determination that the petitioner provided adequate and accurate information that was reasonably available to it in support of the allegation. Concerning benefit, the United States contends that the USDOC explained that the specific stumpage rates had been redacted from the publicly available version of the FULA, and were not otherwise publicly available, so it concluded that the petitioner had presented adequate and accurate information that was reasonably available to it, and recommended investigation of the programme.[247]

7.141. The United States adds that, in particular, the application demonstrated that PHP did not procure pulpwood based on market principles and, rather, PHP entered into an agreement with Nova Scotia that sets restrictions on PHP's sourcing of pulpwood. The United States adds that the

[240] USDOC initiation checklist, (Exhibit CAN-40), p. 18.
[241] Canada's first written submission, paras. 208 and 217.
[242] Canada's first written submission, para. 212.
[243] Canada's first written submission, para. 213.
[244] Canada's first written submission, paras. 214-216.
[245] Canada's response to Panel question No. 43, para. 89.
[246] Canada's second written submission, paras. 73-75.
[247] United States' first written submission, paras. 134-137; second written submission, para. 76; and response to Panel question No. 46, paras. 101-103.

FULA stipulates certain volumes of pulpwood and biomass that PHP is required to purchase from private suppliers, so the agreement indicates the existence of a distorted market for pulpwood that is not based on market principles, and supports the potential existence of a countervailable subsidy by which a benefit has been conferred.[248]

7.142. For the United States, the absence of pricing data, which is often confidential and not available to an applicant, does not preclude initiation of an investigation.[249] The United States adds that the pricing information, which is evidence that might best be used to demonstrate a benefit, had been redacted from the agreement, so, under these circumstances, it cannot be the case that a petitioner is required to provide pricing information to which it does not have access. The United States adds that Article 11 does not require pricing data to support an allegation of the provision of goods for less than adequate remuneration and that, 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.[250]

7.3.3.4 Evaluation by the Panel

7.143. Articles 11.2 and 11.3 of the SCM Agreement read, in relevant parts, as follows:

> 11.2 An application under paragraph 1 shall include sufficient evidence of the existence of *(a)* a subsidy and, if possible, its amount[.] … Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:
>
> …
>
> (iii) evidence with regard to the existence, amount and nature of the subsidy in question;
>
> …
>
> 11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

7.144. Article 11 sets out a number of evidentiary requirements that must be satisfied in order to initiate a CVD investigation, including the requirement of sufficient evidence in an application. Article 11.2 provides that an application shall include sufficient evidence of the existence of a subsidy and Article 11.2(iii) specifies that the application shall contain such information as is reasonably available to the applicant on evidence with regard to the existence, amount, and nature of the subsidy in question. Article 11.3, in turn, states that the authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

7.145. The obligation upon Members in relation to the sufficiency of evidence in an application finds expression in Article 11.3 of the SCM Agreement, and must be read together with Article 11.2. This means that if an investigating authority initiates an investigation without sufficient evidence, it acts inconsistently with Article 11.3, and a panel does not need to make separate findings under Article 11.2.[251]

7.146. The term "evidence" is defined as "[f]acts or testimony in support of a conclusion, statement, or belief" and "[s]omething serving as proof". The term "sufficient" is defined,

[248] United States' first written submission, para. 144; response to Panel question No. 46, para. 100.
[249] United States' first written submission, para. 145; response to Panel question No. 46, paras. 102-103.
[250] United States' second written submission, paras. 77-80.
[251] Panel Reports, *China – GOES*, para. 7.50; *US – Countervailing Measures (China)*, para. 7.144.

relevantly, as "adequate".[252] The phrase "sufficient evidence" in Articles 11.2 and 11.3 of the SCM Agreement is used in the context of determining whether the initiation of a CVD investigation is justified.[253]

7.147. As other panels have explained, in making a determination of sufficiency of evidence, the investigating authority is balancing two competing interests, namely the interest of the domestic industry in securing the initiation of an investigation and the interest of respondents in ensuring that investigations are not initiated on the basis of frivolous or unfounded suits.[254] At the stage of initiating an investigation, an investigating authority is not required to reach definitive conclusions regarding the existence of a subsidy. However, while the amount and quality of the evidence required at the time of initiation is less than that required to reach a preliminary or a final determination, the requirement of sufficient evidence is a means by which investigating authorities filter those applications that are frivolous or unfounded.[255]

7.148. Article 11.2 requires "sufficient evidence of the *existence* of a subsidy"[256], namely the existence of a financial contribution, a benefit, and specificity. Therefore, although definitive proof of the existence and nature of a subsidy is not necessary at the stage of initiation, adequate evidence, tending to prove the existence of a subsidy, is required. Simple assertion, unsubstantiated by relevant evidence, is not sufficient to justify the initiation of an investigation.[257]

7.149. The Panel also notes that Article 11.2 explicitly refers to "such information as is reasonably available to the applicant", acknowledging that certain information may not be available. However, as the panel in *China – GOES* observed, an investigation cannot be justified where there is no evidence of the existence of a subsidy before an investigating authority, even if such evidence is not reasonably available to the applicant.[258]

7.150. In light of the above, the question before this Panel is whether an unbiased and objective investigating authority could have found that the information provided in the CVD application on SC Paper contained adequate evidence tending to prove that PHP received a benefit from the provision of stumpage and biomass by the Government of Canada. More precisely, whether an unbiased and objective investigating authority could have found that the FULA between PHP and the Government of Nova Scotia, stipulating that PHP must purchase a minimum volume of pulpwood and a maximum volume of biomass from private suppliers, provides sufficient evidence that PHP received a benefit. In its assessment, the Panel must take into account that the pricing information was redacted from the public version of the FULA and thus was not publicly available to the petitioner.

7.151. Firstly, the Panel notes a difference between what the USDOC did, as reflected in the Initiation Checklist, and what the United States argues that the USDOC did. While the Initiation Checklist notes that "the petitioner requests that the [USDOC] investigate the benefit to PHP by evaluating the prevailing market conditions for stumpage and biomass purchased"[259], it does not explicitly state any conclusion by the USDOC "that, based on the evidence reasonably available to the petitioner indicating a restricted market for stumpage and biomass, it would be necessary to analyse the existence of prevailing market conditions for the provision of stumpage and biomass", as argued by the United States.[260] Although the existence of a restricted market for stumpage and biomass might be relevant for a benefit analysis, the USDOC did not reach such a conclusion and, therefore, the Panel will not take into account this argument by the United States.

7.152. In the Panel's view, an agreement between a government and a private party, stipulating that the private party must purchase a certain volume from private suppliers, is not sufficient evidence of a benefit. More precisely, to say that PHP received a benefit from the Government of

[252] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 880, and Vol. 2, p. 3097.
[253] Panel Reports, *China – GOES*, para. 7.54; *US – Countervailing Measures (China)*, fn 184.
[254] Panel Reports, *China – GOES*, para. 7.54; *US – Countervailing Measures (China)*, fn 184.
[255] Panel Reports, *China – GOES*, para. 7.55; *US – Countervailing Measures (China)*, fn 184.
[256] Emphasis added.
[257] Panel Reports, *China – GOES*, para. 7.55; *US – Countervailing Measures (China)*, para. 7.151.
[258] Panel Report, *China – GOES*, para. 7.56.
[259] USDOC initiation checklist, (Exhibit CAN-40), p. 18.
[260] United States' response to Panel question No. 46, para. 103.

Nova Scotia because the FULA stipulates that PHP must purchase a minimum volume of pulpwood and a maximum volume of biomass from private suppliers constitutes a simple assertion, unsubstantiated by relevant evidence. The petitioner provided no evidentiary support to substantiate its statement that PHP pays less than adequate remuneration for the stumpage and biomass harvested from Crown land.

7.153. The Panel acknowledges that the information on pricing was redacted by the Government of Nova Scotia. However, even if the pricing information was not available to the applicant, the initiation could not be justified without sufficient evidence of the existence of a benefit.

7.154. For the reasons set out above, the Panel concludes that the USDOC acted inconsistently with Article 11.3 of the SCM Agreement, by failing in its obligation to evaluate the accuracy and adequacy of the evidence in the application with respect to the existence of a benefit in the provision of stumpage and biomass by the Government of Nova Scotia to PHP.

7.4 Claims concerning the USDOC's CVD determination with respect to Resolute

7.4.1 Claims concerning the application of AFA to Resolute in relation to information discovered at verification

7.4.1.1 Introduction

7.155. With respect to the application of AFA to Resolute in relation to information discovered at verification, Canada has brought the following claims:

a. Canada claims that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement, by improperly applying AFA to Resolute in relation to information discovered at verification.[261]

b. Canada also claims that the USDOC acted inconsistently with Articles 12.1, 12.2, 12.3, and 12.8 of the SCM Agreement, by failing to inform Canada and Resolute of relevant information and the essential facts under consideration prior to the final determination and to provide Resolute and Canada with ample opportunity to present relevant evidence in relation to the information it discovered during verification.[262]

c. Finally, Canada claims that the USDOC acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement, by improperly initiating an investigation of alleged subsidies discovered during Resolute's verification, without assessing whether information discovered during the course of the verification was accurate, adequate and provided sufficient evidence of the existence of a subsidy.[263]

7.4.1.2 Factual background

7.4.1.2.1 The relevant facts on the record

7.156. In April 2015, after initiating the original CVD investigation, the USDOC issued its initial questionnaires. Section 1 of the USDOC initial questionnaire entitled "General Instructions and Information", begins with the following language:

> The Department of Commerce (the [USDOC]) requests information about the *programs on which an investigation was initiated* in order to determine whether countervailable subsidies have been provided to Canadian producers/exporters of supercalendered paper (SC paper or subject merchandise). Section 775 of the Tariff Act of 1930, as amended (the Act), also requires the [USDOC] to investigate any *other potential countervailable subsidies* it discovers during the course of this

[261] Canada's panel request, p. 3.
[262] Canada's panel request, p. 3.
[263] Canada's panel request, p. 3.

> investigation *that pertain to the manufacture, production, or exportation of SC paper from Canada*.[264]

7.157. The initial questionnaire addressed to Resolute included the following question:

> Does [Canada] or entities directly owned, in whole or in part, by [Canada] or any provincial or local government provide, directly or indirectly, provide [*sic*] any other forms of assistance to your company? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices.[265]

7.158. Resolute responded that it had "examined its records diligently and [was] not aware of any other programs by [Canada] or its entities, or any provincial or local government, that provided, directly or indirectly, any other forms of assistance to Resolute's production and export of SC Paper".[266]

7.159. The initial questionnaire addressed to Canada and the relevant provincial governments also included the following similarly worded question:

> Does [Canada] or entities directly owned, in whole or in part, by [Canada] or any provincial or local government provide, directly or indirectly, any other forms of assistance to producers or exporters of SC Paper? Please coordinate with the respondent companies to determine if they are reporting usage of any subsidy program(s). For each such program, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the Standard Questions Appendix, as well as other appropriate appendices attached to this questionnaire.[267]

7.160. Canada and the provincial governments indicated in their responses to the "any other forms of assistance" question that the question was overly broad and inconsistent with the SCM Agreement, and that no reply was warranted or required. Nonetheless, they noted that they had attempted to comply in good faith with this question, and had limited their responses to respondent companies and assistance provided with respect to the production or export of SC Paper, and had omitted assistance that was generally available within Canada.[268]

7.161. The USDOC issued supplemental questionnaires to Resolute on various questions, but did not follow-up on the responses to the "other forms of assistance" question specifically, nor did it indicate disagreement with the response.[269]

7.162. In August 2015, the USDOC conducted verifications of Resolute and its subsidiaries. During the verification of Fibrek, Resolute's wholly owned subsidiary, as a result of running electronic searches for the French word "subvention"[270] (subsidy) in its general ledger, the USDOC found entries of interest in four accounts. One account was disregarded by the USDOC because it was

[264] USDOC Initial Questionnaire to Canada (6 April 2015), (Exhibit CAN-114), section I. (emphasis added)

[265] Canada's first written submission, para. 60. See also Resolute FP Canada Inc., Questionnaire Response, Section III (27 May 2015) (Resolute Questionnaire Response, Section III), (Exhibit CAN-41 (BCI)), p. 32.

[266] Canada's first written submission, para. 61; opening statement at the first meeting of the Panel, para. 16. See also Government of Canada, Questionnaire Response, Vol. VIII (27 May 2015) (GOC Questionnaire Response, Vol. VIII), (Exhibit CAN-42 (BCI)), pp. GOC-49-GOC-50.

[267] Canada's first written submission, paras. 59, 74, and 410, and table 1; GOC Questionnaire Response, Vol. VIII, (Exhibit CAN-42 (BCI)), p. GOC-49.

[268] Canada's first written submission, paras. 60 and 62-63. See also GOC Questionnaire Response, Vol. VIII, (Exhibit CAN-42 (BCI)), pp. GOC-49-GOC-50.

[269] Canada's first written submission, para. 64; opening statement at the first meeting of the Panel, para. 17.

[270] Canada's second written submission, paras. 102-103; response to Panel question No. 74, para. 162.

empty. The USDOC found that the other three accounts "showed reimbursements and/or funds received by Fibrek"[271] as follows:

a. an account labelled "Subsidy yet to be received", which included reimbursements for a portion of the infrastructure cost for the conversion of its facility from heavy oil to natural gas from Hydro Quebec that indicated it had been made in 2013 and 2014;

b. an account labelled "Subsidy from Hydro for Kiln" that contained transfers of funds from Hydro Quebec for the conversion of a heavy oil kiln to a biomass kiln that had been provided in 2010 and 2011; and

c. an account labelled "Other subsidies" relating to manpower training assistance, such funds being received from 2010 to 2014.[272]

7.163. The USDOC grouped the first two accounts together as a programme labelled "Discovered Program 1" and named the third account "Discovered Program 2". The USDOC examined the accounts but refused to accept onto its record any of the information contained in the accounts as to their nature or the amounts of reimbursement.[273]

7.4.1.2.2 The USDOC's determination

7.164. In its Issues and Decision Memorandum, the USDOC explained that, at the verification of Resolute's questionnaire responses, it noted entries in three accounts that showed reimbursements and/or funds received by Fibrek, and company officials provided descriptions of the funds in the accounts.[274] The USDOC indicated that "as a matter of standard procedure", its CVD questionnaire asked Resolute to report "other subsidies" through the "other forms of assistance" question. Resolute responded that it was not aware of "any other program[] that provided … any other forms of assistance to Resolute's production and export of SC paper".[275] However, in the USDOC's view, the CVD questionnaire clearly instructed respondents to report any other forms of assistance to the company, not only assistance that the respondent considers to have been provided to subject merchandise.[276]

7.165. The USDOC concluded that, given its questionnaire response, and in light of the unreported information discovered at verification, the use of facts available was warranted with respect to Resolute. The USDOC also determined that, because Resolute failed to respond to the best of its ability regarding the "other forms of assistance" question, an adverse inference was warranted with respect to the discovered subsidy programmes. The USDOC concluded that, as AFA, these discovered forms of assistance provided a financial contribution, were specific and a benefit was conferred.[277]

7.4.1.3 Main arguments of the parties

7.166. Canada claims that the USDOC applied AFA inconsistently with Article 12.7 of the SCM Agreement to the assistance discovered during Fibrek's verification. In particular, Canada argues that the USDOC improperly applied AFA as a result of an alleged failure to respond to the "other forms of assistance" question which could not have led to "necessary information" within the meaning of Article 12.7 of the SCM Agreement. First, the question did not relate to either the allegations made by the petitioner or to programmes upon which the USDOC self-initiated.[278] Second, the question was overly broad and was not specified in detail.[279] According to Canada, only an unambiguous question, specified in detail, can lead to necessary information, whereas the

[271] Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.
[272] Canada's first written submission, paras. 65-67.
[273] Canada's first written submission, paras. 68-69; response to Panel question No. 49, para. 103.
[274] Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.
[275] Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.
[276] Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.
[277] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 12-13.
[278] Canada's opening statement at the first meeting of the Panel, paras. 40 and 43.
[279] Canada's first written submission, paras. 235-249; second written submission, paras. 87-92; and response to Panel question No. 94, paras. 33-36.

"any other forms of assistance" question posed by the USDOC which led to the application of AFA is overly broad, ambiguous and not specified in detail.[280]

7.167. In Canada's view, an investigating authority may always require that an exporter participate in an information-gathering process, including verification. However, resort to "facts available" pursuant to Article 12.7 would be impermissible unless the request for information was precise and specified in detail.[281] If the authority seeks to gather additional information at the time of verification, and that information pertains to programmes on which the authority has not initiated, it would be required to seek the cooperation of the respondent parties to gather additional information and provide them with an opportunity to be presented with, and comment on, such information.[282]

7.168. In any event, even if the USDOC had determined that the discovered information was necessary to the investigation, Canada argues that the investigating authority had at its disposal all the information required to apply an amount of subsidy based on the discovered information and, instead, applied as facts available a duty rate far in excess of any potential realistic amount of subsidy.[283] Canada argues that, while the USDOC refused to accept any information about these accounts into evidence, and claimed that there was no evidence to evaluate that the amount of funds were readily available, they later described the fourth account they discovered as "empty", which seems to show that the accounts were apparent to the USDOC when they were examined.[284]

7.169. The United States argues that: (a) Canada mischaracterizes the scope of the investigation; (b) the SCM Agreement does not prescribe the type of questions an investigating authority may ask an interested party; and (c) Resolute impeded the investigation by failing to fully answer the "any forms of assistance" question.[285] According to the United States, the "other forms of assistance" question was posed by the USDOC in order to understand the extent of subsidization of the product under investigation, which corresponds to the scope of the investigation.[286] In the investigation at issue, the USDOC determined to use facts available after the respondent failed to answer a question pertaining to "other forms of assistance" and the USDOC discovered programmes not previously disclosed in response to this question. For the United States, the use of AFA was thus based on Resolute's lack of collaboration and Resolute's flat denial in response to the question did not call for a follow-up query by the USDOC.[287] The United States adds that, despite Canada's argument in these proceedings that the term "assistance" was not defined in the USDOC's questionnaire, Resolute did not inform the USDOC that it had difficulty defining "assistance".[288] The USDOC submits that, in any event, it is not for a respondent to determine what information is necessary; such a unilateral decision can disrupt the investigation.[289]

7.170. The United States further submits that it was only in the late stage of the proceeding, at Resolute's verification, that the USDOC discovered the new programmes, and therefore that Resolute had failed to respond to the "other forms of assistance" question. For the United States, the timing of the USDOC's discovery was therefore a direct result of Resolute's failure to cooperate and a course of action other than that adopted by the USDOC would create an incentive for

[280] Canada's second written submission, paras. 87-92.
[281] Canada's response to Panel question No. 51(a), paras. 110-111. Canada clarifies that the recourse to Article 12.7 would not normally be available, except when an exporter refused access to or did not provide necessary information or significantly impedes the investigation. The latter must be objectively assessed and cannot refer to the failure to respond adequately to an overly broad and ambiguous question. (Canada's response to Panel question No. 51(c), paras. 119-122).
[282] Canada's response to Panel question No. 51(b), paras. 115-116. See also second written submission, para. 98.
[283] Canada's first written submission, paras. 250-257; second written submission, paras. 100-112.
[284] Canada's opening statement at the first meeting of the Panel, paras. 21-22.
[285] United States' first written submission, para. 203; second written submission, para. 82.
[286] United States' first written submission, para. 204; opening statement at the first meeting of the Panel, para. 29.
[287] United States' response to Panel question No. 54, para. 110.
[288] United States' second written submission, para. 89.
[289] United States' first written submission, para. 206; opening statement at the first meeting of the Panel, paras. 27-28.

exporters not to be forthcoming with an investigating authority seeking to determine the extent of a particular product's subsidization.[290]

7.4.1.4 Evaluation by the Panel

7.171. Article 12.7 of the SCM Agreement provides as follows:

> In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

7.172. Broadly speaking, Article 12 of the SCM Agreement, and its counterpart Article 6 of the Anti-Dumping Agreement[291], have been interpreted in previous dispute settlement reports as serving the dual purpose of providing investigating authorities with as broad an evidentiary basis as possible while guaranteeing due process rights for interested parties.[292] In this context, the purpose of Article 12.7 is to ensure that a lack of information does not hinder the ability of an investigating authority to conduct its investigation, thus allowing the authorities to fill in the gaps by using the "facts available" they deem relevant in order to make a determination.[293]

7.173. We note at the outset that while the United States at times alludes in its submissions to Resolute *impeding* the USDOC's investigation[294], we consider that the disagreement between the parties concerns "refus[ing] access to, or otherwise … not provid[ing], necessary information within a reasonable period", rather than "significantly imped[ing] the investigation". Indeed, the USDOC's Issues and Decision Memorandum refers to "the failure of Resolute to accurately respond to the [USDOC's] questionnaires concerning other subsidies".[295]

7.174. Neither the SCM Agreement nor the Anti-Dumping Agreement defines the concept of "necessary" – the ordinary meaning of which is "[t]hat cannot be dispensed with or done without; requisite, essential, needful"[296] – information that must be requested by an investigating authority. Nonetheless, we concur with the Appellate Body's observation that "the use of the term 'necessary' to qualify the term 'information' carries significance. It is meant to ensure that Article 12.7 is not directed at mitigating the absence of 'any' or 'unnecessary' information, but is rather concerned with overcoming the absence of *information required to complete a determination*."[297] Similarly, when interpreting Article 6.8 of the Anti-Dumping Agreement in light of paragraph 1 of Annex II of that Agreement, the panel in *EC – Salmon (Norway)* opined that "'necessary information' refers to the specific information held by an interested party that is requested by an investigating authority

[290] United States' second written submission, paras. 91-93; response to Panel question No. 76, para. 175.

[291] Most relevantly, Article 6.8 of the Anti-Dumping Agreement provides the following: "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph."

[292] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292.

[293] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.

[294] United States' first written submission, para. 176: "Canada has failed to address the fact that Resolute impeded the investigation by not fully answering [the USDOC's] question concerning 'any other forms of assistance'"; ibid. heading (i) at p. 51: "[the USDOC] did not err when it determined to resort to facts available when Resolute impdeded the investigation by failing to provide necessary information". See also ibid. para. 203; and second written submission, para. 82.

[295] Issues and Decision Memorandum, (Exhibit CAN-37), p. 10. See also ibid. p. 13: "Resolute failed to respond to the best of its ability regarding our questions"; and United States' first written submission, para. 154: "[the USDOC], in its final determination, determined that Resolute failed to respond to the best of its ability to [the USDOC's] question related to additional assistance"; and para. 186: "[the USDOC] determined that … Resolute failed to respond to the initial questionnaire to the best of its ability".

[296] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1901.

[297] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (emphasis added). See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293: "[Article 12.7 of the SCM Agreement] permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination".

for the purpose of making determinations".[298] In this respect, we also agree with the distinction drawn by the panel in *Egypt – Steel Rebar* between information that is "necessary" on the one hand, and information that is merely "required" or "requested" on the other.[299] According to the terms of Article 12.7, only a request for the former may justify resorting to facts available.

7.175. The parties to these proceedings are in agreement that new programmes may be added to an investigation when they are discovered during that investigation.[300] As this point is not contested by the parties to these proceedings, it is not addressed by the Panel in this Report. Assuming that new programmes may be added to an investigation, it is logical to postulate that information pertaining to the existence of as-of-yet unidentified subsidy programmes benefiting the product under investigation is necessary information within the meaning of Article 12.7 of the SCM Agreement – that is information necessary to complete a determination on as-of-yet unidentified subsidization of the product under investigation. In order to justify recourse to facts available on the grounds that such necessary information was refused access to or was otherwise not provided, the USDOC first needed to establish that the information discovered was information necessary to complete a determination on subsidization of the product under investigation.

7.176. The USDOC failed to do so. Instead, having found entries referring to "reimbursements and/or funds"[301] in the company ledger at verification, the USDOC *inferred*[302] that these entries pertained to countervailable subsidization of SC paper, without taking any further steps to confirm that this was in fact the case and providing a reasoned and adequate explanation to that effect.[303] In the Resolute Final Calculation Memo, the USDOC acknowledges that "we do not know the nature of this assistance"[304], and expresses the following view in the Issues and Decision Memorandum: "In the instant investigation, we have no information on the record to demonstrate that the apparent assistance discovered at verification did not benefit the subject merchandise that would justify Resolute's failure to report."[305] More was required from the USDOC in these circumstances to establish that the information discovered was necessary information, i.e. information necessary to complete a determination on additional subsidization of the product under investigation. Resorting to the use of facts available in these circumstances was not consistent with Article 12.7.

7.177. While we acknowledge the United States' arguments on practical difficulties related to the timing of verifications and the closing of the record of the USDOC's investigation[306], we note the Appellate Body's consideration that, like Article 6 of the Anti-Dumping Agreement, Article 12 of the SCM Agreement as a whole "set[s] out evidentiary rules that apply *throughout* the course of the … investigation, and provide[s] also for due process rights that are enjoyed by 'interested

[298] Panel Report, *EC – Salmon (Norway)*, para. 7.343. (underlying omitted; italics added)
[299] Panel Report, *Egypt – Steel Rebar*, para. 7.151.
[300] This is the case notwithstanding the parties' disagreement on the procedural steps required to add such programmes to an investigation. Canada argues that for programmes not listed in the petition to be added to an investigation, they would need to meet the self-initiation threshold, consistent with Article 11.6 of the SCM Agreement. (Canada's response to Panel question No. 94, para. 34). The United States rejects Canada's position on the basis that the discovered programmes in this case were already included within the scope of the investigation which concerned *the subsidization* of SC Paper. (United States' comments on Canada's response to Panel question No. 94, paras. 22-29).
[301] Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.
[302] Issues and Decision Memorandum, (Exhibit CAN-37), p. 13.
[303] Issues and Decision Memorandum, (Exhibit CAN-37), p. 30: "For the subsidies discovered at Resolute's verification, we have identified the remaining two programs that we find, as AFA, to provide a financial contribution, to be specific, and to confer a benefit."; USDOC's Position on Comment 17: Whether to Apply AFA to Resolute, p. 153: "[W]e find that Resolute failed to provide information regarding this assistance discovered at verification, and thus, section 776(a)(2)(B) of the Act applies. We further find that … Resolute failed to cooperate[.] … Thus, pursuant to Section 776(b) of the Act, we are determining, as AFA, that the unreported assistance in question is countervailable."
[304] USDOC, Final Determination Calculations for Resolute FP Canada Inc. (13 October 2015), (Exhibit CAN-100 (BCI)), p. 4. After noting the entries in the company ledger discovered at verification, the USDOC states the following: "*Because we do not know the nature of this assistance*, we have determined that it is appropriate to treat … two entries … as one program (Discovered Program 1), and … funds … as a separate program (Discovered program 2)." (emphasis added)
[305] Issues and Decision Memorandum, (Exhibit CAN-37), USDOC's Position on Comment 17: Whether to Apply AFA to Resolute, p. 155.
[306] United States' second written submission, para. 93.

parties' *throughout* … an investigation".[307] In these circumstances, it is the right of respondents that the investigating authority may only resort to the facts available mechanism after properly determining that information necessary to complete a determination on additional subsidization of the product under investigation had been withheld. The fact that it would have been inconvenient or impractical for the USDOC to take further steps to confirm the basic nature of the discovered information cannot outweigh the due process rights enshrined in the WTO Agreements. This is all the more applicable where an investigating authority elects to add subsidy programmes to an ongoing investigation, rather than investigating only the subsidies identified in its notice of initiation.

7.178. We recall that the Appellate Body has indicated that Annex II of the Anti-Dumping Agreement provides guidance in the interpretation of Article 12.7 of the SCM Agreement.[308] Paragraph 1 of Annex II most relevantly states the following:

> As soon as possible after the initiation of the investigation, the investigating authorities should specify *in detail* the information required from any interested party, and the manner in which that information should be structured by the interested party in its response.[309]

7.179. We also recall the view of the panel in *Egypt – Steel Rebar* – expressed in the context of Article 6.8 of the Anti-Dumping Agreement – that while it is left to the discretion of an investigating authority to specify what information is "necessary", context provided by Annex II of that agreement suggests that such discretion is tempered by "a clear burden on the authority to be both prompt and *precise* in identifying the information that it needs from a given interested party".[310]

7.180. In this case, the USDOC requested information concerning other assistance through the following question:

> Does the [Government of Canada] or entities directly owned, in whole or in part, by the [Government of Canada] or any provincial or local government provide, directly or indirectly, provide [*sic*] any other forms of assistance to your company? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices.[311]

7.181. The parties to this dispute do not contest the USDOC's right to pose the question on "other forms of assistance". Canada itself concedes that "[t]he formulation of a question cannot, in and of itself, violate the requirements of the SCM Agreement".[312] However, the question posed by the USDOC is very broad. While such a broad question might pertain to necessary information regarding additional subsidization of the product under investigation, it may also pertain to a much

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[307] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 136 (emphasis added in *EC – Tube or Pipe Fittings*)). See also Appellate Body Report, M*exico – Anti-Dumping Measures on Rice*, para. 292.

[308] In the view of the Appellate Body, "it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations." (Appellate Body Report, M*exico – Anti-Dumping Measures on Rice*, para. 295). In *US – Anti-Dumping Methodologies (China)*, the Appellate Body explained that:

> Given the similarities between the text of Article 12.7 of the Agreement in Subsidies and Countervailing Measures (SCM Agreement) and Article 6.8 of the Anti-Dumping Agreement and that both provisions permit an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to dumping or subsidization and injury, we consider that the interpretation of Article 12.7 of the SCM Agreement developed by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* and *US – Carbon Steel (India)* is relevant to the understanding of the legal standard applied under Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.

(Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, fn 502)

[309] Emphasis added.

[310] Panel Report, *Egypt – Steel Rebar*, para. 7.155. (emphasis added)

[311] Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), p. 32.

[312] Canada's response to Panel question No. 75, para. 164.

broader range of "assistance".[313] In these circumstances, the investigating authority may not infer that a respondent's failure to respond fully to such a question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation; more is required of the investigating authority.

7.182. Furthermore, the manner in which the USDOC then proceeded to use facts available with respect to determining the amount of benefit is also problematic, since relevant and available information was ignored by the USDOC. In this respect, Canada argues that, even if the USDOC had correctly determined that the discovered information was necessary to the investigation, the proper application of facts available should have resulted in the calculation of an amount of subsidy in accordance with the actual amounts discovered at verification, rather than a 1997 administrative review on *Magnesium from Canada*.[314] According to Canada, had the USDOC properly selected facts from the best information on record, or not improperly closed its eyes to information before it, the USDOC would have been required to use the actual amounts received by Resolute.[315] In Canada's view, the use of the amounts discovered would have resulted in no missing information with respect to benefit.[316]

7.183. We are unconvinced by the United States' argument that actual amounts were not available to the USDOC to place onto the record of the investigation because they were not verifiable at that late stage of the investigation. According to the United States, at that point in time, the USDOC was unable 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. The USDOC was, according to the United States, deprived of the opportunity to solicit information from the relevant government authority regarding the programme or programmes under which these funds were provided.[317]

7.184. We recall that the purpose of Article 12.7 of the SCM Agreement is to ensure that lack of information does not hinder the ability of an investigating authority to conduct an investigation by allowing the authorities to fill in the gaps by using the "facts available" they deem relevant in order to make a determination.[318] However, it is well established that this allowance is not boundless. An investigating authority must use those "facts available" that "'*reasonably replace* the information that an interested party failed to provide', with a view to arriving at an accurate determination".[319] The facts available must be facts that are in the possession of the investigating authority and on its written record.[320] An investigating authority cannot resort to non-factual assumptions or speculation and must take into account all substantiated facts on the record.[321] Ascertaining the "reasonable replacements for the missing 'necessary information' involves a process of reasoning and evaluation" of all substantiated facts on the record on the part of the investigating authority.[322] In the event that the investigating authority must choose among several facts available, the process of reasoning and evaluation would involve a degree of comparison in

[313] The USDOC states in its Issues and Decision Memorandum (p. 12) that the questionnaire asked Resolute to report "other subsidies". This is not correct. The relevant question uses the term "assistance".
[314] Canada's first written submission, paras. 250-257.
[315] Canada's first written submission, para. 448.
[316] Canada's response to Panel question No. 48, paras. 98-99.
[317] United States' second written submission, paras. 92-93; response to Panel question No. 81, paras. 188-190. See also Issues and Decision Memorandum, (Exhibit CAN-37), pp. 153-154.
[318] Appellate Body Report. *Mexico – Anti-Dumping Measures on Rice*, para. 291.
[319] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416 (quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294 (emphasis added in *US – Carbon Steel (India)*). See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178.
[320] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417. See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178.
[321] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.417 and 4.419 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294). See also Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.178; and *US – Anti-Dumping Methodologies (China)*, para. 5.172.
[322] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.424. See also Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.179; and *US – Anti-Dumping Methodologies (China)*, para. 5.172.

order to arrive at an accurate determination.[323] In such a process, no substantiated facts on the record can be *a priori* excluded from consideration.[324]

7.185. As such, the Panel does not consider that the USDOC was justified in simply disregarding the actual amounts discovered during verification. The USDOC should have made a comparative evaluation of all available information before deciding which information constituted the best information available.[325] Especially in light of the fact that Article 12.7 should not be used as punishment[326], reliance on rates from an unrelated investigation over information found by the verification team in a respondent's own company ledger, without analysing that information, was not justified. This is especially the case since the USDOC had already relied on information in that ledger to infer the existence of a countervailable subsidy. While an investigating authority may encounter difficulty in establishing the factual foundation for a determination made on the basis of facts available in respect of additional subsidy programmes discovered at verification, this difficulty results from the authority's decision to expand the scope of the investigation beyond the subsidy programmes expressly identified in the notice of initiation. In light of the above we find that the USDOC's use of facts other than actual amounts present in the company ledger discovered at verification, without reasoned and adequate explanation, was inconsistent with Article 12.7.

7.186. Further to its claim under Article 12.7 of the SCM Agreement, Canada argues that the USDOC's treatment of the discovered programmes was inconsistent with Articles 11.2, 11.3, 12.1, 12.2, 12.3, and 12.8 of the SCM Agreement.[327] We understand that Canada's main concern in bringing these additional claims is to ensure that respondents enjoy certain "procedural safeguards" in respect of subsidy programmes discovered during the course of an investigation.[328] Canada refers in this regard to Article 12, arguing that the exporter shall be provided appropriate notice and ample opportunity to present all relevant evidence in respect of the essential facts under consideration. Canada also refers to Article 11, regarding the USDOC's alleged failure to review the accuracy and adequacy of evidence that the USDOC placed on the record concerning the discovered programmes. Generally, we consider that our interpretation and application of the facts available mechanism in the present case already reflects the type of procedural safeguards envisaged by Canada. We have explained above that the USDOC failed to establish that information necessary to its investigation was missing. In addition, the evidentiary rules of Article 12 apply throughout the investigation, requiring a degree of cooperation between the investigating authority and respondents in the development of the record. Accordingly, we see no need to separately consider Canada's claims under these additional provisions.[329]

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[323] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.431 and 4.435. See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.179.

[324] Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 294; *US – Carbon Steel (India)*, para. 4.419; and *US – Anti-Dumping Methodologies (China)*, para. 5.172.

[325] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

[326] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.419 and 4.422. See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.179; and *US – Anti-Dumping Methodologies (China)*, para. 5.172.

[327] Canada's first written submission, paras. 267, 272, and 280.

[328] See, for example, Canada's response to panel question No. 50, para. 108; and first written submission, paras. 258 and 277.

[329] That said, we are troubled by Canada's approach to the application of Article 11 in respect of the discovered programmes. Canada asserts that the USDOC should have self-initiated an investigation into the discovered programmes. Canada explains that, in order to meet the initiation standard set out in Articles 11.2 and 11.3, the USDOC was required to first review the adequacy of the evidence to attempt to determine whether the alleged assistance could have constituted a financial contribution, that a benefit could have been conferred, and that such assistance was specific. (Canada's first written submission, para. 280). At the same time, though, Canada does not interpret the relevant provisions of the SCM Agreement as requiring a formal issuance of a Notice of Initiation when "self-initiations take place during the course of an investigation already in process". (Canada's response to Panel question No. 50, para. 106). We note that footnote 37 of the SCM Agreement defines "initiated" as referring to a "procedural action by which a member formally commences an investigation". If – as suggested by Canada – an investigation is "already in process" in respect of a discovered programme, then the Article 11 initiation standard does not apply in respect of that programme. That standard only applies before the decision to initiate is made, i.e. before the "procedural action" referred to in footnote 37 is undertaken. In order to apply the Article 11 initiation standard in respect of a discovered programme, one would need to consider that the discovered programme is not yet covered by any investigation. This, though, is not the position that Canada is asking us to adopt.

7.4.2 Claim concerning Resolute's purchase of Fibrek

7.4.2.1 Introduction

7.187. Canada claims that the USDOC acted inconsistently with Articles 1.1(b), 10, 14, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, by failing to conclude that Fibrek, rather than Resolute, was the recipient of certain financial contributions, and that the benefit associated with these financial contributions was extinguished by Resolute's arm's-length purchase of Fibrek for fair market value.[330]

7.4.2.2 Factual background

7.188. In the context of the CVD investigation on SC Paper, Resolute provided information with respect to Fibrek, a wholly owned subsidiary, which produces kraft pulp in a mill located in Saint Felicien, Quebec.[331] In its questionnaire response of 28 May 2015, Resolute explained that it had acquired Fibrek in a "hostile takeover that [was] a poster child for an arm's-length transaction in which the benefit of any subsidy that might have existed would have been paid to the seller and no longer be of benefit to the acquired operations under a new owner".[332] Resolute submitted, as evidence of the terms in which it acquired Fibrek, its Form 10-K filings to the US Securities and Exchange Commission from 2012, 2013, and 2014.[333]

7.189. In its questionnaire response of 27 May 2015, the Government of Quebec also described Fibrek's acquisition.[334] It submitted, as evidence, a copy of the Quebec Court of Appeal decision regarding Fibrek's defense against Resolute's takeover effort[335]; a financial report [[*****]] detailing Fibrek's acquisition by Resolute[336]; and a timeline published by Reuters on the "Takeover battle for Canada's Fibrek".[337] The Government of Canada had also mentioned that Fibrek was acquired by Resolute through a hostile takeover in its consultation paper of 12 March 2015.[338]

7.190. On 22 July 2015, five days before the scheduled date for the issuance of the preliminary determination of the CVD investigation, the Government of Canada submitted a revision to its questionnaire response of 27 May 2015, indicating that it had provided assistance to Fibrek under the PPGTP.[339] On that same date, Resolute submitted a supplemental response detailing that PPGTP funds were provided for four specific projects in Fibrek's Saint-Felicien mill, and that, although the mill had not produced SC Paper, it had provided small amounts of kraft pulp to Resolute's SC Paper mills during the POI.[340]

7.191. The USDOC determined that the grants from the Government of Canada to Fibrek under the PPGTP constituted a financial contribution in the form of a direct transfer of funds from the government. Also, by maintaining its baseline presumption that non-recurring subsidies can benefit the recipient over a period of time, the USDOC concluded that the financial contributions to Fibrek had bestowed a benefit on Resolute.[341]

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[330] Canada's panel request, p. 2.
[331] Issues and Decision Memorandum, (Exhibit CAN-37), p. 6.
[332] Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), pp. 4 and 26.
[333] Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), exhibits 2, 3, and 4.
[334] Government of Quebec, Questionnaire Response, Vol. I (27 May 2015), (Exhibit CAN-49), p. QC-12.
[335] Government of Quebec, Questionnaire Response, Vol. III (27 May 2015) (GOQ Questionnaire Response, Vol. III), (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-4 − 2012 QCCA 569 (27 March 2012).
[336] GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-5 − [[*****]] (22 April 2015).
[337] GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-3 − Reuters Article (11 April 2012).
[338] Hughes Hubbard & Reed LLP, "Supercalendered Paper from Canada: Consultations Paper" (13 March 2015) (Consultations Paper), (Exhibit CAN-5), pp. 18-19.
[339] Government of Canada, Revised Questionnaire Response (22 July 2015), (Exhibit CAN-46), pp. GOC-2-GOC-3.
[340] Resolute FP Canada Inc., Supplemental Questionnaire Response (22 July 2015) (Resolute Supplemental Questionnaire Response), (Exhibit CAN-45 (BCI)), pp. 2-3 and appendix D.
[341] Issues and Decision Memorandum, (Exhibit CAN-37), p. 26.

7.192. In its Analysis of Comments section, the USDOC rejected an argument by Resolute and the Government of Canada that the subsidies received by Fibrek were extinguished when Resolute acquired Fibrek through a hostile takeover.[342]

7.193. The USDOC explained as follows:

> With respect to Resolute's purchase of Fibrek, the [USDOC] does not have any of the evidence or documentation that it would require to establish that the purchase of Fibrek was an arm's-length transaction for a fair market price, or any detailed information related to the timing, bidding or bid acceptance process and, thus, cannot determine whether any of the subsidies received before or during the purchase of Fibrek by Resolute were extinguished. The [USDOC's] original questionnaire stated:
>
> > Finally, if your company obtained all or substantially all the assets of another company during the AUL period, and that company still exists as an ongoing entity, we require a complete questionnaire response for such company. It is essential to include a discussion of all such "change in ownership" transactions within your responses to the questions below regarding your company's history.
>
> While Resolute and the [Government of Canada] responded on behalf of Fibrek, they did not supply any evidence or detailed information regarding the purchase of Fibrek by Resolute. Instead, throughout the investigation, Resolute and the [Government of Canada] have submitted unsubstantiated assertions that the purchase of Fibrek was a "hostile takeover in 2012." As a result, the [USDOC] has no evidentiary basis for determining whether the purchase, or hostile takeover, of Fibrek properly extinguishes the subsidies received by Fibrek (through a finding of both an arm's-length transaction and a transaction price reflective of fair market value). Therefore, the [USDOC] maintains its baseline presumption that the subsidy benefits are not extinguished.[343]

7.4.2.3 Main arguments of the parties

7.194. Canada claims that the USDOC acted inconsistently with Articles 1.1(b), 10, 14, 19.1, and 19.4 of the SCM Agreement, by improperly finding that the benefits conferred to Fibrek through the PPGTP were not extinguished when Resolute acquired Fibrek in a hostile takeover.[344]

7.195. Canada argues that the United States' assertion that there was no evidence indicating that the purchase of Fibrek was at arm's length for fair market value ignores the fact that both Quebec and Resolute reported its acquisition in their questionnaire responses, and provided extensive evidence, including Securities and Exchange Commission reports and a Quebec Court of Appeal decision, detailing the hostile takeover.[345] Canada also asserts that the USDOC had been aware that the takeover was hostile since consultations at the outset of the investigation.[346] Canada adds that, to the extent the USDOC required even more information, it failed in its responsibility to request it.[347]

7.196. Canada contends that the fact that Resolute reported the assistance under the PPGTP at a later stage, but prior to the Preliminary Determination, cannot render moot all evidence and arguments submitted in respect of Fibrek.[348]

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[342] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 163-164.
[343] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 164-165. (fn omitted)
[344] Canada's first written submission, para. 281.
[345] Canada's first written submission, paras. 282 and 287-291; opening statement at the first meeting of the Panel, paras. 46-49; and second written submission, para. 115.
[346] Canada's first written submission, para. 282; second written submission, para. 119.
[347] Canada's first written submission, para. 287; second written submission, para. 116.
[348] Canada's second written submission, paras. 117-120; opening statement at the second meeting of the Panel, paras. 89-92.

7.197. Canada asserts that the USDOC should have concluded that the full value of all PPGTP assistance to Fibrek was extinguished when Resolute acquired Fibrek in an arm's-length transaction for fair market value.[349]

7.198. The United States argues that none of the evidence on the record supports Canada's assertion that Fibrek's subsidies were fully reflected in Resolute's purchase price of the company and that, despite Canada's arguments, Resolute simply characterized Fibrek's acquisition as a hostile takeover without any supporting evidence to that assertion. The United States adds that, without adequate supporting evidence of the change in ownership transaction, the USDOC did not have sufficient evidence to determine that Fibrek was acquired through an arm's-length transaction.[350]

7.199. The United States asserts that a proper analysis of extinguishment is not dependent upon an interested party's characterization of a private transaction, but rather, an authority should consider the circumstances of the transaction, including whether the final transaction price reflected the full value of any subsidies received. The United States contends that Resolute's response characterized the transaction as a hostile takeover but offered no additional explanation.[351]

7.200. The United States also argues that, because Resolute failed in its initial questionnaire to provide any information on the subsidy that Fibrek had received, the USDOC was not in a position, five days before the preliminary determination, to request additional information about Fibrek's acquisition.[352]

7.4.2.4 Evaluation by the Panel

7.201. The Panel notes that the USDOC's determination that the benefit was not extinguished is based on the alleged failure by the Government of Canada and Resolute to provide evidence regarding the purchase of Fibrek by Resolute. The USDOC stated in particular that Resolute and the Government of Canada had not supplied "any evidence or detailed information regarding the purchase of Fibrek by Resolute"[353] and, instead, they had submitted "unsubstantiated assertions that the purchase of Fibrek was a 'hostile takeover in 2012'"[354]; and that it had "no evidentiary basis for determining whether the purchase, or hostile takeover, of Fibrek properly extinguishes the subsidies received by Fibrek (through a finding of both an arm's-length transaction and a transaction price reflective of fair market value)".[355]

7.202. The Panel recalls its task of examining "whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are *reasoned and adequate*".[356] For this purpose, the Panel must ascertain whether the USDOC "evaluated all of the relevant evidence in an objective and unbiased manner".[357] Therefore, the Panel will assess whether the USDOC's conclusion, in the sense that it had no evidentiary basis for determining whether the purchase of Fibrek extinguished the subsidies, was reasoned and adequate. For that, the Panel will go through the evidence submitted during the CVD investigation by the Government of Canada and Resolute.

7.203. Firstly, in the consultations paper of 12 March 2015, the Government of Canada explained the following:

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[349] Canada's first written submission, paras. 284 and 292; second written submission, para. 121.
[350] United States' first written submission, paras. 264-269.
[351] United States' first written submission, paras. 95-97; response to Panel question No. 58, para. 132.
[352] United States' response to Panel question No. 57(b), paras. 128-130; second written submission, para. 96.
[353] Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.
[354] Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.
[355] Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.
[356] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93. (emphasis added)
[357] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 443.

> [Resolute] launched a formal public offer to acquire at least 66.7% of the issued and outstanding shares of Fibrek. The purchase offer was estimated at C$130 million. Management resisted the hostile takeover, even to the point of pursuing litigation up to the Supreme Court of Canada. In response to the opposition [Resolute] increased its offer and the final transaction has been valued at C$218 million … [t]he purchase of Fibrek in a contested, public offering for its outstanding shares is an arms-length sale … [.][358]

7.204. Then, in its questionnaire response of 28 May 2015, Resolute explained that it had acquired Fibrek in 2012 "through a hostile takeover that is a poster child for an arm's-length transaction in which the benefit of any subsidy that might have existed would have been paid to the seller and no longer be of benefit to the acquired operations under a new owner".[359] Resolute submitted, as evidence, Resolute's Form 10-K filings to the US Securities and Exchange Commission from 2012, 2013, and 2014.

7.205. These Form 10-K filings, wherein Resolute had provided to the US Securities and Exchange Commission its financial statements of 2012, contained information on Fibrek's acquisition, presented in the following terms:

> Note 3. Acquisition of Fibrek Inc.
>
> *Overview*
>
> On December 15, 2011, we announced an offer to purchase all of the issued and outstanding shares of Fibrek Inc. ("Fibrek"), a producer and marketer of virgin and recycled kraft pulp, operating three mills. On May 2, 2012, we acquired a controlling interest in Fibrek and began consolidating the results of operations, financial position and cash flows of Fibrek in our consolidated financial statements.
>
> …
>
> Our acquisition of Fibrek was achieved in stages. In connection with the offer, between April 11, 2012 and April 25, 2012, we acquired approximately 48.8% of the then outstanding Fibrek shares. On May 2, 2012, we acquired additional shares of Fibrek, after which we owned a controlling interest in Fibrek (approximately 50.1% of the then outstanding Fibrek shares) and Fibrek became a consolidated subsidiary. After May 2, 2012, we acquired additional shares of Fibrek and, as of May 17, 2012, the offer expiry date, we owned approximately 74.6% of the then outstanding Fibrek shares. On July 31, 2012, we completed the second step transaction for the remaining 25.4% of the outstanding Fibrek shares.
>
> As aggregate consideration for all of the Fibrek shares we purchased, we distributed approximately 3.3 million shares of our common stock and Cdn$63 million ($63 million, based on the exchange rates in effect on each of the dates we acquired the shares of Fibrek) in cash. In connection with the Fibrek shareholder vote on the arrangement, certain former shareholders of Fibrek exercised (or purported to exercise) rights of dissent in respect of the transaction, asking for a judicial determination of the fair value of their claim under the Canada Business Corporations Act. No consideration has to date been paid to the former Fibrek shareholders who exercised (or purported to exercise) rights of dissent. Any such consideration will only be paid out upon settlement or judicial determination of the fair value of their claims and will be paid entirely in cash. Accordingly, we cannot presently determine the amount that ultimately will be paid to former holders of Fibrek shares in connection with the proceedings, but we have reserved approximately Cdn$14 million ($14 million, based on the exchange rate in effect on December 31, 2012) for the eventual payment of those claims, which was recorded in "Other long-term liabilities" in our Consolidated Balance Sheet as of December 31, 2012.

[358] Consultations Paper, (Exhibit CAN-5), p. 19.
[359] Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), p. 26.

...

Acquisition of controlling interest

The acquisition of a controlling interest in Fibrek on May 2, 2012 was accounted for as a business combination in accordance with the acquisition method of accounting pursuant to FASB ASC 805, which requires recording identifiable assets acquired and liabilities assumed at fair value (except for deferred income taxes and pension and OPEB plan obligations). Additionally, on the acquisition date, we remeasured our initial equity investment in Fibrek at the acquisition-date fair value. The acquisition-date fair value of our previously-held equity interest in Fibrek was $58 million, resulting in a loss of $1 million, which was recorded in "Other income (expense), net" in our Consolidated Statements of Operations for the year ended December 31, 2012.

In connection with the acquisition, we also assumed $121 million of Fibrek's outstanding indebtedness. For additional information, see Note 17, "Long term Debt."[360]

7.206. These 10K filings therefore contain information with respect to the timing of the acquisition of shares, from the announcement of the intention to take over Fibrek until the completion of the takeover, as well as with respect to the amounts paid by Resolute. This information contradicts the USDOC's assertion that Resolute had not supplied "any evidence or detailed information regarding the purchase of Fibrek by Resolute".[361]

7.207. The Government of Quebec, for its part, filed a copy of the Quebec Court of Appeal's decision regarding Fibrek's defense against Resolute's takeover. In its decision, the Quebec Court of Appeal provided a contextual description of Resolute's efforts to acquire Fibrek, presented in the following terms:

8 Fibrek, whose head office is in Quebec, is a business incorporated under the Canada Business Corporations Act, R.S.C. (1985), c. C-44. Its shares are listed on the Toronto Stock Exchange (TSX).

9 AbitibiBowater (Abitibi) is a company listed on both the New York Stock Exchange (NYSE) and the Toronto Stock Exchange, and has been doing business under the name Resolute Forest Products since its reorganization. On November 28, 2011, it announced its intention to launch a takeover bid to purchase all of Fibrek's issued and outstanding shares. Before officially launching its takeover bid on December 15, 2011, Abitibi made sure that it had the support of Fibrek's three most important shareholders: Fairfax, Pabrai, and Oakmont. Until April 13, 2012, it could count on the steadfast support of 59,502,822 shares, i.e., 46.5% of Fibrek's 130,075,556 outstanding shares.

10 Initially, its offer was conditional to the tender of at least two-thirds of Fibrek's shares, a percentage that was later reduced to 50.01% on March 20, 2012. A portion of the consideration was payable in money and another in Abitibi shares, representing a value of approximately $1 per share, based on Abitibi's share price in December of 2011.

11 Being of the view that this bid was low considering the potential or actual value of Fibrek, its board of directors decided to adopt various tactics to discourage this takeover bid, which it deemed hostile, and to gain more time to elicit one or several higher bids. It therefore amended the contracts of its executives, hired consultants to establish the value of the business and its shares, set up an independent committee, and hired lawyers and other advisors.

[360] Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), exhibit 2: FY 2012 Audited Financial Statement (Form 10-K), p. 85.
[361] Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.

12 On December 19, 2011, the board adopted a shareholders' rights scheme that would come into play in the event Abitibi purchased a single share and would neutralize Abitibi's offer (a defensive tactic commonly referred to by those in the [*sic*] as a poison pill). Following an application by Abitibi, this rights scheme was subjected to a prohibition order issued by the Bureau on February 9, 2012, effective February 13, 2012: [TRANSLATION] « WHEREAS it is now time, in the public interest, to allow the shareholders of Fibrek to decide of their own free will whether or not to tender their shares in answer to Resolute's bid (*AbitibiBowater inc. (Resolute Forest Products) v. Fibrek inc.*, 2012 QCBDR 8). In other words, this delaying tactic to give Fibrek time to find a white knight had been going on long enough and the time had come to let the shareholders respond to Abitibi's bid.

13 Meanwhile, Mercer International inc., a British Columbia corporation operating in the same industry as Fibrek and whose shares are registered on the TSX and NASDAQ, had shown interest. In early February, after having been given access to Fibrek's books, Mercer agreed to act as their white knight. After various dealings, which included a support agreement in which Fibrek's upper management undertook to support Mercer's bid and an $8.5M break fee if they chose to support a better offer, it launched a takeover bid for Fibrek. Its bid, in cash and shares, represented a value of approximately $1.30 per share, according to the share price at the time. It was conditional to the tender of 50.1% of the shares and to various approvals, including that of its shareholders regarding the issuance of the shares required to complete the takeover bid. These agreements were negotiated on February 9, the day on which the Bureau rendered its first ruling, and were made public the very next day.

14 In the course of negotiations with Fibrek, Mercer demanded the option of buying 32,320,000 warrants for the price of $1 each, convertible to as many shares of Fibrek. In the event of a conversion, Mercer would hold 32,320,000 common shares of Fibrek, representing 19.9% of Fibrek's issued capital, for the price of $1 per share − the price offered by Abitibi. Moreover, from the moment a single share is purchased, Mercer is entitled to require the nomination of two directors to Fibrek's board.

15 Mercer's takeover bid is not conditional upon the issuance of the warrants or their conversion, as was confirmed in clarifications sent to Fibrek's shareholders on March 19, 2012, following a request from the United States Securities and Exchange Commission (SEC): "The Offer is not conditional upon the issuance or conversion of the Special Warrants".

16 On February 13, 2012, being of the view that Mercer's takeover bid and ancillary agreements (break fee and warrants) were abusive toward the shareholders and financial markets, Abitibi applied to the Bureau for a prohibition order respecting Mercer's takeover bid and warrants pursuant to section 93 of the *Act respecting the Autorité des marches financiers*, R.S.Q. c. A-33.2 (*AAMF*) and section 265 of the *Securities Act*, R.S.Q. c. V-1.1 (*SA*).

17 On February 16, 2012, Steelhead Partners LLC (Steelhead), a Fibrek shareholder with 6,479,000 issued and outstanding Fibrek shares at the time, after reviewing Mercer's takeover bid, confirmed that it would tender its shares in favour of Abitibi. Steelhead is also a shareholder of Abitibi (13.3%).

18 As at February 16, 2012, Abitibi's bid appeared to have the support of 50.7% of Fibrek shareholders, thereby condemning Mercer's rival bid to failure if it had not had the warrants, its weapon to dilute the shareholders.

19 In its February 23, 2012 ruling, the Bureau found that the break fee, which was included in the Mercer takeover bid, was outside the norm and that the issuance of warrants constituted an unconscionable transaction on the markets. It prohibited the issuance of warrants and their conversion into shares, but it did not prohibit Mercer's takeover bid, even if it was tied to an overly generous break fee.

> 20 Being of the view that the Bureau's ruling was contrary to *Notice 62-202 relating to take-over bids – Defensive tactics* (NP 62-202) adopted by the Canadian securities administrators (CSA), which includes the AMF, Mercer and Fibrek resorted to the appeal under section 115.16 AAMF to the Court of Quebec, civil division, which does not suspend the Bureau's decision (section 115.21 AAMF). The case was heard on an urgent basis before the administrative and appellate division on March 5, 6, and 7, 2012. In a judgment rendered on March 9, 2012, completed on March 16 and corrected on March 19, the appeal was allowed and the Bureau's decision was set aside.
>
> 21 Unhappy with this outcome, Abitibi turned to this Court to seek leave to appeal pursuant to section 115.22 *AAMF*, which it was granted on March 16. The appeal was heard on an expedited basis on March 22, 2012.[362]

7.208. The Government of Quebec also filed a financial report [[*****]], detailing Fibrek's acquisition by Resolute, in the following terms:

> [[*****]][363]

7.209. The Government of Quebec submitted, in addition, a timeline published by Reuters outlining relevant events in the "takeover battle for Canada's Fibrek".[364] The article explains as follows:

> April 11 (Reuters) – Specialtv pulp maker Fibrek Inc has become the target of a takeover battle between AbitibiBowater Inc and Mercer International, signaling that the outlook for Canada's forest products industry is brightening.
>
> Mercer has raised its already higher cash-and-stock offer to C$182 million from C$170 million, but Fibrek's largest shareholders, including Prem Watsa's Fairfax Financial Holdings, continue to back AbitibiBowater's C$130 million bid.
>
> Following are the milestones in this battle:
>
> Nov 28 – AbitibiBowater commences bid for Fibrek, offers C$1 per share valuing the company at C$130 million.
>
> Nov 29 – Fibrek acknowledges unsolicited takeover bid from AbitibiBowater. Says AbitibiBowater's bid appears opportunistic.
>
> Dec 15 – AbitibiBowater starts formal takeover bid for Fibrek.
>
> Jan 3 – Fibrek rejects AbitibiBowater bid. Board recommends shareholders withdraw the tendered shares immediately.
>
> Jan 19 – Fibrek opposes AbitibiBowater's application to strike down its shareholder rights plan.
>
> Jan 20 – AbitibiBowater extends offer to February 13 from January 20.
>
> Feb 6 – Fibrek says receives proposals from third parties related to its strategic alternative process. Says a formal valuation of its common shares by Canaccord Genulty arrives at a fair value of between C$1.25 and C$1.45 per share.

[362] GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-4 – 2012 QCCA 569 (27 March 2012). (fns omitted)
[363] GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-5 – S&P Capital IQ Financial Report for Resolute Forest Products Inc. (22 April 2015).
[364] GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-3 – Reuters Article (11 April 2012).

> Feb 10 − Mercer says to buy Fibrek for about C$170 million, or C$1.30 a share, topping AbitibiBowater's hostile bid by 30 percent, Mercer's offer Includes C$70 million in cash, rest in stock. Abitibi's offer also has the same cash portion.
>
> Feb 13 − AbitibiBowater looks to block Mercer's offer, and extends its offer to Feb 23.
>
> Feb 16 − Fibrek opposes AbitibiBowater's application to cease trade the Mercer offer.
>
> Feb 23 − AbitibiBowater says Fibrek's special warrants to Mercer cease traded. These special warrants can be fully converted to Fibrek shares. Abitibi extends offer to March 9.
>
> March 9 − Court of Quebec reverses cease trade order against 21 private placement of special warrants by Fibrek to Mercer.
>
> March 15 − AbitibiBowater extends offer to March 19.
>
> March 19 − Mercer says offer will expire on April 6. AbitibiBowater extends its offer for Fibrek to March 29.
>
> March 20 − Toronto Stock Exchange approves private placement of special warrants by Fibrek to Mercer.
>
> March 21− AbitibiBowater says reduces minimum condition to acquire Fibrek to 50.01 percent from 66.67 percent earlier. Extends offer to April 2.
>
> March 27 − AbitibiBowater says court of appeal reinstates cease trade order on Fibrek's 32.3 million special warrants placement to Mercer.
>
> March 28 − Fibrek and Mercer say will move the Supreme Court against the Quebec court decision blocking a key term of their deal.
>
> April 1 − AbitibiBowater extends offer to April 11 and further reduces minimum condition to buy Fibrek to 45.7 per cent.
>
> April 5 − Mercer extends offer to April 16.
>
> April 11 − Mercer raises its offer by 8 percent to C$1.40 per share.[365]

7.210. The evidence presented by the Government of Quebec clearly contains information on the purchase of Fibrek by Resolute. It contains information on the timing of the acquisition of shares; on the nature of the takeover, including that Resolute's takeover efforts were deemed "hostile" by Fibrek's board of directors and that the board of directors opposed the takeover through various tactics, including a "poison pill" and an attempt to find a second bidder (or "white knight"); and on the relevant numbers regarding the value of the transaction. This contradicts the USDOC's assertions that Canada had not supplied "any evidence or detailed information regarding the purchase of Fibrek by Resolute"[366] and, instead, it had submitted "unsubstantiated assertions that the purchase of Fibrek was a 'hostile takeover in 2012'".[367]

7.211. The evidence provided by Resolute and Quebec demonstrates that the USDOC had on record detailed information related to the timing, bidding and bid acceptance process in respect of the acquisition of Fibrek by Resolute, including that this acquisition was opposed by Fibrek, and therefore "hostile". This information is relevant to the question of whether Fibrek's acquisition was an arms-length transaction for fair market value.

[365] GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-3 − Reuters Article (11 April 2012).
[366] Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.
[367] Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.

7.212. In these circumstances, the USDOC could not reasonably or adequately have concluded that it had no evidentiary basis for determining whether Fibrek's acquisition properly extinguished the subsidies received by Fibrek. At the very least, the above information provided sufficient basis for the USDOC to investigate this matter further.

7.213. Also, the Panel is not convinced by the United States' argument that, because Resolute failed in its initial questionnaire to provide any information on the subsidy that Fibrek had received, the USDOC was not in a position to request additional information about Fibrek's acquisition. As established above, the USDOC had a substantial amount of information concerning Resolute's acquisition of Fibrek from the outset of the investigation.

7.214. Based on the above, the Panel concludes that the USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding – on the basis of an alleged lack of relevant evidence – that the benefits conferred to Fibrek through the PPGTP were not extinguished when Fibrek was acquired by Resolute.[368]

7.4.3 Claims concerning the PPGTP, FSPF, and NIER programmes

7.4.3.1 Introduction

7.215. Canada claims that the USDOC acted inconsistently with Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, by failing to ascertain the precise amount of the subsidies attributable to the product under investigation and improperly attributing financial contributions under the PPGTP, the NIER programme and the FSPF, tied to the production of other products, to Resolute's SC Paper production.[369]

7.4.3.2 Factual background

7.216. These claims concern the manner in which the USDOC determined that subsidies provided to Resolute and Fibrek under the PPGTP, the NIER Programme and the FSPF benefitted Resolute's production and sales of SC Paper.

7.217. Regarding the PPGTP, the USDOC explained that the purpose of the programme was to improve the environmental performance of Canada's pulp and paper industry; credits were only to be granted to Canadian pulp and paper companies; projects had to be capital investments at a Canadian pulp and paper mill directly related to the mill's industrial process; and project location had to be at a pulp and paper mill in Canada.[370] The USDOC found that Resolute's mills received subsidies directly under this programme. The USDOC also found that Resolute benefited from subsides received under this programme by Fibrek. The USDOC explained that, during the POI, Fibrek had supplied Resolute with kraft pulp to add tensile strength to paper that Resolute produced, including SC Paper. The USDOC determined that the kraft pulp that Fibrek supplied to Resolute was primarily dedicated to the production of SC Paper and other downstream paper products.[371] The USDOC found that PPGTP subsidies were tied to the production of pulp and paper products, and therefore benefited Resolute's production of these products. The USDOC determined an *ad valorem* rate of subsidization under this programme by expressing the amount of subsidy received by Resolute and Fibrek as a percentage of Resolute's sales of pulp and paper during the POI.[372]

[368] The Panel notes that, with respect to this issue, Canada has also made claims of inconsistency with Articles 10, 14, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Given that the Panel has already found an inconsistency with the main substantive provision at issue, i.e. Article 1.1(b) of the SCM Agreement, and considering that Canada did not give any explanation with respect to these provisions, the Panel does not consider necessary to address these additional claims by Canada. The Panel also notes that Canada has also made these claims with respect to the discovered programmes. The Panel has already concluded that, in applying facts available to the discovered programmes, the USDOC acted inconsistently with Article 12.7 of the SCM Agreement. Consequently, it would be premature to reach any further conclusion with respect to the discovered programmes.

[369] Canada's panel request, p. 2.

[370] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 26-27.

[371] Issues and Decision Memorandum, (Exhibit CAN-37), p. 6.

[372] Issues and Decision Memorandum, (Exhibit CAN-37), p. 27.

7.218. Regarding the NIER Programme, the USDOC concluded that electricity rebates received under this programme by Resolute's Thunder Bay, Fort Frances, and Iroquois Falls mills in Ontario constituted countervailable subsidies. The USDOC explained that the purpose of the programme is to assist Northern Ontario's largest qualifying industrial electricity consumers which commit to developing and implementing an energy management plan; and companies eligible for assistance are industrial facilities located in Northern Ontario. The USDOC determined that these subsidies were not tied to any specific product, and that they therefore benefitted all of Resolute's production activities. The USDOC calculated an *ad valorem* rate of subsidization by expressing the amount of subsidy received as a percentage of Resolute's total sales during the POI.[373]

7.219. The USDOC adopted the same approach in respect of funding received by Resolute under the FPSF for specific projects at certain of its Ontario mills. The USDOC determined that the funding received by Resolute for the projects at these mills constituted countervailable subsidies. The USDOC explained that the FSPF Programme was to support capital investment projects in value-added manufacturing, increased fibre use efficiencies, energy conservation/efficiency and development of electricity co-generation; and eligible projects were restricted to sites in northern or rural Ontario. The USDOC found that FPSF subsidies were not tied to any product, and therefore allocated the amount of FPSF subsidies to Resolute's total sales during the POI.[374]

7.4.3.3 Main arguments of the parties

7.220. Canada claims that the USDOC acted inconsistently with Article VI:3 of the GATT 1994 and Articles 19.1, 19.3, and 19.4 of the SCM Agreement, by improperly countervailing contributions under the PPGTP, the FSPF, and the NIER Programmes that are not attributable to SC Paper. Canada argues that a proper assessment of the design, structure and operation of the PPGTP, the NIER Programme and the FSPF shows that subsidies provided under these programmes are tied to products other than SC Paper, and therefore cannot be attributed to SC Paper.[375]

7.221. Regarding the PPGTP funding for Resolute, Canada asserts that Resolute had informed the USDOC that although funding under this programme was available to the pulp and paper industry in general, the specific contributions were conditioned on the approved projects and, therefore, tied to the products impacted by those projects.[376] In particular, Resolute had reported that the relevant contributions were for specific projects at mills in Ontario. Resolute had further reported that, during the POI, none of its Ontario mills produced SC Paper [[*****]].[377]

7.222. Regarding the PPGTP funding for Fibrek, Canada does not deny that certain subsidized inputs produced by Fibrek at a mill in Quebec were used by Resolute in the production of SC Paper. However, Canada asserts that Resolute had reported to the USDOC that only small amounts of such inputs had been used by Resolute for the production of SC Paper.[378] Canada argues that there was therefore no basis for the USDOC to allocate the entirety of the PPGTP subsidies provided to Fibrek to Resolute's production of pulp and paper.[379]

7.223. Regarding subsidies provided under the NIER Programme and the FSPF, Canada asserts that these contributions were provided for specific projects at specific facilities in Ontario, and therefore tied to the products made in those facilities. Canada contends that, because no SC Paper

[373] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 27-28.
[374] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 28-29.
[375] Canada's first written submission, para. 302; opening statement at the first meeting of the Panel, paras. 54-59; second written submission, para. 128; and opening statement at the second meeting of the Panel, paras. 95-102.
[376] Canada's first written submission, paras. 303-308; opening statement at the first meeting of the Panel, para. 54; and confidential statement at the second meeting of the Panel, para. 3.
[377] Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), pp. 22-23.
[378] Resolute Supplemental Questionnaire Response, (Exhibit CAN-45 (BCI)), pp. 2-3 and appendix D.
[379] Canada's first written submission, paras. 309-311; opening statement at the first meeting of the Panel, para. 55; second written submission, para. 129; and opening statement at the second meeting of the Panel, para. 103. Canada argues that this argument is also applicable to the alleged assistance to Fibrek discovered during verification. The Panel has already concluded that the USDOC acted inconsistently with Article 12.7 of the SCM Agreement by applying AFA to the discovered programmes. Consequently, it would be premature to reach any further conclusion with respect to the information discovered at verification.

[[*****]] were produced at those Ontario facilities during the POI, these subsidies should not be allocated to Resolute's production of SC Paper.[380, 381]

7.224. The United States argues that Canada has failed to demonstrate that the USDOC's attribution of the countervailable subsidies received by Resolute was inconsistent with the GATT 1994 or the SCM Agreement. The United States contends that neither the GATT 1994 nor the SCM Agreement limit the imposition of countervailing duties only to subsidies tied to the product under investigation. The United States argues that an investigating authority is to examine the design, structure, and operation of the measure that is granting the subsidy.[382] The United States further argues that a subsidy is "tied" to a particular product if bestowal of the subsidy is "connected to, or conditioned upon, the production or sale of the subject merchandise".[383] The United States argues that the GATT 1994 and the SCM Agreement both contemplate the application of countervailing duties for subsidies that may benefit more than the product under investigation. The United States asserts that a Member may examine a subsidy and determine that the benefits received from that subsidy are spread across the entire company and cannot be linked to a particular product. For the United States, under such circumstances, it is appropriate to treat that subsidy as untied, and to divide the benefit by the company's total sales for purpose of attribution.[384]

7.225. The United States contends that the USDOC properly attributed the subsidy benefits received by Resolute under the PPGTP to Resolute's total sales of pulp and paper products. The United States argues that the USDOC appropriately determined, based on the evidence on the record, that these grants were tied to the production of only pulp and paper products, and that Resolute received a countervailable subsidy that benefited Resolute's pulp and paper production. For the United States, in calculating the rate of subsidization, the USDOC properly matched the elements taken into account in the numerator (a benefit to support Resolute's pulp and paper production during the POI) with the elements taken into account in the denominator (Resolute's sales of pulp and paper).[385]

7.226. With respect to the assistance to Fibrek under the PPGTP, the United States argues that the USDOC found that the PPGTP subsidized Fibrek's production of pulp, an input on SC Paper. The United States asserts that a Member may offset countervailable subsidies received by a producer of a processed product without having to undertake a pass-through analysis, if the producers of the input and processed product are affiliated.[386]

7.227. The United States asserts that the USDOC properly attributed the subsidy benefits received by Resolute under the NIER Programme and the FSPF to Resolute's total sales. The United States asserts that the programmes did not condition Resolute's receipt of the grant on the production of particular merchandise, so, based on the evidence on the record, the USDOC correctly concluded that Resolute received a countervailable subsidy that benefited all of Resolute's production activities. For the United States, the USDOC properly matched the elements taken into account in the numerator (a benefit to support all of Resolute's production) with the elements taken into account in the denominator (Resolute's total sales).[387]

7.4.3.4 Evaluation by the Panel

7.228. The main issue before this Panel is whether the USDOC properly attributed to the production of SC Paper the full amount of assistance provided to Resolute and Fibrek under the PPGTP, FSPF, and NIER Programmes.

[380] Canada's first written submission, paras. 317-321; opening statement at the first meeting of the Panel, para. 59; and confidential statement at the second meeting of the Panel, paras. 7-8.
[381] Canada's first written submission, paras. 312-316; opening statement at the first meeting of the Panel, para. 58; and confidential statement at the second meeting of the Panel, paras. 9-11.
[382] United States' first written submission, paras. 281-287; second written submission, paras. 99-100.
[383] United States' first written submission, para. 284 (quoting Appellate Body Report, *US – Washing Machines*, para. 5.273).
[384] United States' first written submission, paras. 271-288; second written submission, paras. 98-101; and response to Panel question No. 60, paras. 136-143.
[385] United States' first written submission, paras. 290-291; second written submission, paras. 102-104.
[386] United States' first written submission, paras. 287 and 291.
[387] United States' first written submission, paras. 292-296; second written submission, paras. 105-107.

7.229. Canada's claim is based on Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. Article VI:3 of the GATT 1994 reads as follows:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.[388]

7.230. Article 19.4 of the SCM Agreement, in turn, provides:

> No countervailing duty shall be levied[389] on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

7.231. Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement provide that countervailing duties shall not be levied in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.

7.232. The Appellate Body has explained that Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement "establish the rule that investigating authorities must, in principle, ascertain as accurately as possible the amount of subsidization bestowed on the investigated products. It is only with respect to those products that a countervailing duty may be imposed, and only within the limits of the amount of subsidization that those products received."[390] The Appellate Body has also found that the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, nor specify explicitly which elements should be taken into account in the numerator and the denominator. As a result, the investigating authority has discretion to choose the most appropriate methodology, "provided that such methodology allows for a sufficiently precise determination of the amount of subsidization bestowed on the investigated products".[391] The Appellate Body has also explained that an investigating authority is permitted to calculate the rate of subsidization on an aggregate basis, i.e. by dividing the total amount of the subsidy by the total sales value of the product to which the subsidy is attributable.[392] We agree with the approach adopted by the Appellate Body, and shall therefore be guided by it in resolving the matter before us.

7.233. The USDOC found that subsidies received by Resolute under the PPGTP, the NIER Programme and the FSPF were provided for specific projects at specific mills. While PPGTP funding was in principle available for relevant projects throughout Canada, the projects for which Resolute received PPGTP funding were situated at mills in Ontario. Funding under the NIER programme and the FSPF was only available for projects situated in Ontario.[393] Resolute had reported to the USDOC that it did not produce SC Paper [[*****]] at any of its facilities in Ontario. Resolute had reported that its production of SC Paper during the POI took place exclusively in Quebec.[394] The USDOC never contested that Resolute's SC Paper production took place exclusively in Quebec and that the funding under the PPGTP, the NIER Programme and FSPF was only provided to Resolute's facilities in Ontario.[395]

[388] Fn omitted.
[389] Fn omitted.
[390] Appelate Body Report, *US – Washing Machines*, para. 5.268. (fn omitted)
[391] Appelate Body Report, *US – Washing Machines*, para. 5.269.
[392] Appellate Body Report, *US – Washing Machines*, para. 5.267.
[393] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 26-29.
[394] Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), pp. 5-9 and 22-25.
[395] USDOC, Verification to the Questionnaire Responses of Resolute FP Canada Inc. (27 August 2015), (Exhibit CAN-47 (BCI)), pp. 6-7.

7.234. The Panel notes that the USDOC rejected Resolute's argument that it was not appropriate to countervail subsidies received by its mills in Ontario, that did not produce SC Paper. According to the USDOC, its "subsidy attribution regulations explicitly rejected the concept that benefits from regional subsidies are tied to the production in that particular region and to the particular factory located in that region"[396] and "the statute and the regulations do not provide for, or require, the attribution of a domestic subsidy to a specific entity within a firm".[397]

7.235. There may often be circumstances where it is reasonable for an investigating authority to attribute subsidies provided to one part of a corporate entity to products produced by other parts of that entity. The fact that the relevant entities are situated in different geographic areas of a Member is not necessarily determinative in this regard. However, there may also be circumstances where an investigating authority should not proceed in this manner, particularly when such an approach is at odds with the investigating authority's overarching obligation to ensure that it ascertains as accurately as possible the amount of subsidization bestowed specifically on the product under investigation. In the present case, record evidence indicated that certain subsidies provided to entities within Resolute's corporate structure could not reasonably be considered to benefit the sale or production of SC Paper. This is because the subsidies were provided for specific projects at mills that were not involved in the sale or production of that product. In such circumstances, the mere fact that subsidies were provided to entities within Resolute's corporate structure is not enough to justify the inclusion of such subsidies when calculating as accurately as possible the amount of subsidy bestowed on Resolute's production of SC Paper.[398] In order to countervail the relevant subsidies, the USDOC was required to show that such subsidies benefited Resolute's production of SC Paper, notwithstanding the fact that these subsidies were provided for specific projects at mills that were not involved in that production. The USDOC failed to do so. Its decision to countervail those subsidies is therefore inconsistent with Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

7.236. Regarding subsidies provided to Fibrek under the PPGTP, Resolute provided the USDOC with evidence showing that only a small amount of kraft pulp produced at a Fibrek mill benefitting from PPGTP funding was used for the production of SC Paper by Resolute.[399] In response, the USDOC explained that it does not trace subsidized inputs through a company's production process. For the USDOC, "the question is whether the input *could have* been used to produce the subject merchandise exported to the United States, not whether the inputs were *actually* used for that purpose during the POI."[400] The USDOC further determined that, because Resolute had reported that some of Fibrek's kraft pulp is, in fact, used in the production of SC Paper, such inputs produced by Fibrek are primarily dedicated to the production of SC Paper.

7.237. There may be circumstances where it is reasonable for an investigating authority to proceed as if the totality of subsidized inputs produced by an entity are used in the production of a finished product, without necessarily proving that this is the case. However, this will not be the case in circumstances where record evidence indicates that only a very small amount of the subsidized input produced by an entity is in fact used in the production of the finished product. In such circumstances, assuming that all inputs are used in the production of the finished product would be at odds with the requirement to ascertain as accurately as possible the amount of subsidization bestowed on the investigated product. In light of evidence provided by Resolute regarding the very limited amount of inputs from Fibrek actually used by Resolute for the production of SC Paper, the USDOC's assumption that all such inputs were used by Resolute for the production of SC Paper meant that its determination of the amount of subsidization of SC Paper in this regard failed to meet the degree of accuracy required by Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement.

[396] Issues and Decision Memorandum, (Exhibit CAN-37), p. 161.
[397] Issues and Decision Memorandum, (Exhibit CAN-37), p. 161.
[398] We recall that Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement link the amount of countervailing duty to the amount of subsidization of the exported product, not the amount of subsidization of the entities within the exporter's corporate structure.
[399] Resolute Supplemental Questionnaire Response, (Exhibit CAN-45 (BCI)), pp. 2-3 and appendix D.
[400] Issues and Decision Memorandum, (Exhibit CAN-37), p. 161. (emphasis original)

7.238. Canada has also presented claims under Articles 19.1 and 19.3 of the SCM Agreement. Article 19.1 of the SCM Agreement[401] provides that, after making a final determination of the existence and amount of the subsidy, a Member may impose a countervailing duty in accordance with the provisions of this Article.[402] Therefore, the imposition of countervailing duties in a manner inconsistent with Article 19.4 of the SCM Agreement is also inconsistent with Article 19.1.

7.239. Also, Article 19.3 of the SCM Agreement[403] contains the obligation to levy countervailing duties in the appropriate amounts. Amounts that have been calculated in a manner inconsistent with Article 19.4 of the SCM Agreement cannot be considered "appropriate" within the meaning of Article 19.3.[404]

7.240. Canada has also presented a claim under Article 10 of the SCM Agreement. Article 10[405] mandates Members to take all necessary steps to ensure that the imposition of a countervailing duty is in accordance with Article VI of the GATT 1994 and the SCM Agreement. The Appellate Body has treated claims under Article 10 as consequential in the sense that, when countervailing duties have been imposed in a manner inconsistent with Article VI of the GATT 1994 and/or any substantive provision of the SCM Agreement, the right to impose a countervailing duty has not been established, so the countervailing duties imposed are, as a consequence, inconsistent with Article 10 of the SCM Agreement.[406] The Panel has found that the USDOC's failed to meet the degree of accuracy required by Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. As a consequence, the USDOC acted inconsistently with Article 10 of the SCM Agreement.

7.241. Based on the above, the Panel concludes that, by attributing to the production of SC Paper subsidies provided to Resolute and Fibrek under the PPGTP, the NIER Programme and the FSPF, the USDOC acted inconsistently with Articles VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement.

7.5 Claims concerning the CVD determinations with respect to Irving and Catalyst

7.5.1 Claims concerning the calculation of the all-others rate

7.5.1.1 Introduction

7.242. Canada claims that the USDOC acted inconsistently with Articles 10, 12.7, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994, by improperly calculating an all-others rate for Irving and Catalyst that was derived from: (a) alleged company-specific subsidies that were only provided to PHP; and (b) Resolute's countervailing duty rate which was based, in part, on AFA.[407]

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[401] Article 19.1 of the SCM Agreement provides that "If, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn."

[402] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 80.

[403] Article 19.3 of the SCM Agreement provides, in relevant part, that "[w]hen a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case … on imports of such product from all sources found to be subsidized and causing injury".

[404] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 552-556.

[405] Article 10 of the SCM Agreement, concerning the Application of Article VI of GATT 1994, reads as follows:

> 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. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

(fns omitted)

[406] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.19-4.21; *US – Anti-Dumping and Countervailing Duties (China)*, para. 358; and *US – Softwood Lumber IV*, para. 143.

[407] Canada's panel request, p. 3.

7.5.1.2 Factual background

7.243. Catalyst and Irving are producers of SC Paper that were not selected as mandatory respondents and, therefore, did not receive an individual countervailing duty rate. Instead, they were subject to the all-others countervailing duty rate of 18.85.[408]

7.244. In the petition to initiate the CVD investigation, Catalyst and Irving were identified as producers of SC Paper.[409] Both companies provided comments on the initiation and requested to be included as mandatory respondents in the investigation.[410] However, the USDOC selected PHP and Resolute as the only mandatory respondents, explaining that it was within its discretion to limit the selection of producers and/or exporters for individual examination "[i]n light of the resource constraints and practical considerations".[411]

7.245. The USDOC constructed the all-others rate by weight-averaging PHP's 20.18% and Resolute's 17.87% rates to arrive at a rate of 18.85%.[412] The USDOC explained its decision as follows:

> [T]he resulting rate is a reasonable, statutorily mandated estimate of the rate applicable to the non-selected respondents given the [USDOC's] inability to investigate all potential respondents. The all-others rate therefore reasonably reflects potential countervailable subsidy rates to all other companies.[413]

7.246. While 17.10 of the 17.87% rate for Resolute was calculated using AFA[414], the 20.18% rate for PHP was based mainly on subsidies pertaining to the sale/acquisition of the Port Hawkesbury mill[415], which were available only to PHP.[416]

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[408] Supercalendered Paper from Canada: Countervailing Duty Order, United States Federal Register, Vol. 80, No. 237 (10 December 2015) (CVD Order), (Exhibit USA-2).
[409] Petition, Vol. II, (Exhibit CAN-39).
[410] USDOC Memorandum dated 3 April 2015 on Respondent Selection (Respondent Selection Decision), (Exhibit CAN-58).
[411] Respondent Selection Decision, (Exhibit CAN-58), p. 6.
[412] Issues and Decision Memorandum, (Exhibit CAN-37), p. 74.
[413] Issues and Decision Memorandum, (Exhibit CAN-37), p. 76.
[414] Issues and Decision Memorandum, (Exhibit CAN-37), p. 30.
[415] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 13-15, 17, 20, 25, and 38.
[416] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 13, 15-17, 20, 23-25, 41, and 50. With respect to the Government of Nova Scotia loan for working capital, the USDOC determined that "the program is specific in accordance with section 771(5A)(D)(i) of the Act because the [Government of Nova Scotia] offered and provided the assistance only to PWCC". (Ibid. p. 14). With respect to the Government of Nova Scotia loan to improve productivity and efficiency, the USDOC determined that "[t]he program is specific in accordance with section 771(5A)(D)(i) of the Act because the [Government of Nova Scotia] only offered and provided the assistance to PWCC". (Ibid. p. 15). With respect to the PWCC indemnity loan, the USDOC determined that "[t]he program is specific in accordance with section 771(5A)(D)(i) of the Act because the [Government of Nova Scotia] only provided assistance to PWCC for the due diligence work and restructuring planning in connection with the acquisition of NPPH." (Ibid. p. 16). With respect to the Richmond County (Nova Scotia) Promissory Note for Property Taxes, the USDOC determined that "[b]ecause the granting of the promissory note and the payment of property taxes in this manner required the passage of specific legislation by the [Government of Nova Scotia], the Richmond Port Hawkesbury Paper Ltd. Taxation Act, we determine that it is specific to an enterprise under section 771(5A)(D)(i) of the Act." (Ibid. p. 17). With respect to the hot idle funding, the USDOC determined that "the program is *de jure* specific, in accordance with section 771(5A)(D)(i) of the Act, because the [Government of Nova Scotia] authorized the assistance only to [PHP]." (Ibid. p. 20). With respect to the FIF, the USDOC determined "[t]hat the program is *de jure* specific, in accordance with section 771(5A)(D)(i) of the Act, because the [Government of Nova Scotia] authorized the assistance only to [PHP]." (Ibid. p. 23). With respect to Government of Nova Scotia Grants for the Sustainable Forest Management and Outreach Program Agreement, the USDOC determined that "the program is specific in accordance with section 771(5A)(D)(i) of the Act because the [Government of Nova Scotia] provided the assistance only to [PHP] ". (Ibid. p. 24). With respect to the Government of Nova Scotia Provision of Funds for Worker Training and Marketing, the USDOC determined that "[t]he program is specific in accordance with section 771(5A)(D)(i) of the Act because the [Government of Nova Scotia] and ERDT provided the assistance only to [PHP]". (Ibid. p. 25). With respect to the provision of electricity, the USDOC determined that "[t]he provision of the LRR was approved for and expressly limited to one company, [PHP]". (Ibid. p. 41). With respect to the provision of stumpage and biomass, the USDOC determined that [t]he provision of stumpage under terms of the FULA is expressly limited tor [*sic*] [PHP] ". (Ibid. p. 50).

7.5.1.3 Main arguments of the parties

7.247. Canada claims that, when it constructed the all-others rate, the USDOC acted contrary to its obligations under Articles 10, 12.7, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994 to establish the appropriate amount of the duty and not to levy countervailing duties in excess of the amount of subsidization.[417]

7.248. Canada contends that the all-others rate of 18.85% applied to Catalyst and Irving does not correspond to economic reality because the subsidies allegedly received by Resolute and PHP, upon which duties were levied, were not available to either Catalyst or Irving.[418]

7.249. With respect to the use of Resolute's rate of 17.87% to construct the all-others rate, Canada argues that the assistance allegedly received by Resolute was not available as a matter of law to other companies because 95% of that rate was an AFA rate related to Resolute's supposed failure to respond to the "other forms of assistance" question.[419]

7.250. Canada asserts that the Appellate Body in *US – Hot-Rolled Steel* found that it was inconsistent with Article 9.4 of the Anti-Dumping Agreement to include in the calculation of the all-others-rate margins established even partially on the basis of facts available.[420] Canada contends that this reasoning applies equally in countervailing duty proceedings, because the same considerations inform the purpose of the all-others rate provision in Article 19.4 of the SCM Agreement.[421] Canada adds that it would be unfair and inconsistent with Article 12.7 of the SCM Agreement to allow exporters who have not even been given the opportunity to cooperate, to face the consequences of the alleged non-cooperation of another exporter.[422]

7.251. With respect to the use of PHP's rate of 20.18% to construct the all-others rate, Canada contends that the entire rate calculated for PHP related to alleged subsidies provided in the context of the reopening of the Port Hawkesbury mill, so these subsidies were not available to Catalyst and Irving.[423] Canada asserts that the USDOC could easily have identified the programmes specific to PHP that could not have benefited any other companies because it had investigated those programmes thoroughly, and it had information on Catalyst and Irving from their voluntarily responses and from the information provided by all relevant provinces and Canada. Canada adds that the USDOC, indeed, found that these programmes were only available to PWCC or PHP.[424]

7.252. The United States argues that Canada makes its claim without explaining how any of the listed provisions of the SCM Agreement specifically supports Canada's position.[425] The United States asserts that, by citing to multiple articles, Canada attempts to create obligations that have no basis in the text of the covered agreements.[426]

7.253. The United States contends that, according to the language in Article 19.3, the SCM Agreement expressly contemplates that a Member may adopt a methodology that may subject individual exporters or producers to countervailing duties without individually investigating them.[427] The United States argues that neither the SCM Agreement nor the GATT 1994 prescribe a

[417] Canada's first written submission, paras. 322 and 328; second written submission, para. 130; and opening statement at the first meeting of the Panel, para. 182.
[418] Canada's first written submission, para. 329.
[419] Canada's first written submission, paras. 323 and 330.
[420] Canada's first written submission, paras. 326 and 331 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, paras. 111-130).
[421] Canada's opening statement at the first meeting of the Panel, paras. 172-173.
[422] Canada's opening statement at the first meeting of the Panel, para. 178; response to Panel question No. 61, para. 139, and No. 62, paras. 140-143.
[423] Canada's first written submission, paras. 324 and 332.
[424] Canada's first written submission, paras. 332-334; opening statement at the first meeting of the Panel, paras. 179-181.
[425] United States' first written submission, para. 298.
[426] United States' second written submission, paras. 111-118.
[427] United States' first written submission, para. 299.

methodology for calculating a countervailing duty rate for non-investigated firms, so the USDOC's chosen methodology is otherwise consistent with those agreements.[428]

7.254. With respect to the use of Resolute's rate of 17.87% to construct the all-others rate, the United States asserts that 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.[429] The United States adds that, by arguing that the SCM Agreement imposes certain obligations which derive from Article 9.4 of the Anti-Dumping Agreement, Canada is asking the Panel to disregard the customary rules of treaty interpretation.[430]

7.255. With respect to the use of PHP's rate of 20.18% to construct the all-others rate, the United States contends that Canada's position that the assigned all-others rate does not correspond to economic reality assumes the conclusion that certain countervailable subsidies received by PHP and Resolute may not have been available to the non-investigated companies, and has no support in the record of the investigation. The United States adds that, because the investigation did not cover Catalyst and Irving, Canada has no basis for asserting that their economic reality was different than the economic reality for PHP and Resolute.[431]

7.256. The United States contests Canada's argument that the amounts of countervailing duties levied exceed the amount of subsidies found to exist, because the all-others rate was based entirely on the subsidies found to exist with respect to producers of SC Paper in Canada. The United States argues that the USDOC adopted a reasonable approach, given that the weighted-average of PHP's and Resolute's countervailing duty rates provided the best approximation for the countervailable subsidies received by all other SC Paper producers during the relevant POI.[432]

7.5.1.4 Evaluation by the Panel

7.257. Canada's claims concern the manner in which the USDOC calculated the all-others rate applied on exports from exporters/producers that were not investigated during the underlying investigation.

7.258. Canada does not challenge *per se* the right of the United States to determine an all-others rate for non-investigated exporters. We note in this regard that the second sentence of Article 19.3 of the SCM Agreement provides that any exporter that was not actually investigated for reasons other than a refusal to cooperate shall be entitled to an expedited review. This provision therefore envisages the application of some form of countervailing duty rate to non-investigated exporters. However, there is no specific provision in the SCM Agreement prescribing the methodology that an investigating authority can use in order to determine the countervailing duty rate for non-investigated exporters or producers. The United States contends that the absence of any prescribed methodology for calculating countervailing duty rates for non-investigated exporters should lead the Panel to reject Canada's claims.[433] Canada, by contrast, contends that an investigating authority may use the methodology of its choice, so long as that methodology and the results it produces are consistent with the SCM Agreement and Article VI of the GATT 1994.[434]

7.259. The fact that there is no specific provision in the SCM Agreement prescribing the methodology for determining the countervailing duty rate for non-investigated exporters does not give investigating authorities an unfettered right to impose the non-individual countervailing duty rate that they prefer. Members can only impose countervailing duties − including to non-investigated exporters or producers − in accordance with the GATT 1994 and the SCM Agreement. This includes the obligations, under Article 19.3 of the SCM Agreement, to levy

[428] United States' first written submission, para. 298; second written submission, para. 109.
[429] United States' first written submission, para. 302; second written submission, paras. 120-121; and response to Panel question No. 64, paras. 145-148.
[430] United States' first written submission, paras. 300-301; response to Panel question No. 64, paras. 145-148.
[431] United States' first written submission, para. 303.
[432] United States' first written submission, para. 304; second written submission, para. 119.
[433] United States' second written submission, para. 110.
[434] Canada's response to Panel question No. 62, para. 140.

countervailing duties in the appropriate amounts in each case, and, under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, not to levy countervailing duties in excess of the amount of the subsidies found to exist. This is consistent with the object and purpose of the SCM Agreement of striking a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so.

7.260. In light of these considerations, we begin by addressing Canada's claim under Article 19.3 of the SCM Agreement, which provides:

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

7.261. Canada claims that it was not "appropriate" for the USDOC to determine the all-others rate for non-investigated exporters on the basis of: (a) subsidies provided to one of the investigated exporters, PHP, that were not available to non-investigated exporters; and (b) subsidy amounts determined for one of the investigated exporters, Resolute, using facts available.

7.262. With respect to the meaning of the phrase "appropriate amounts", we observe that the Appellate Body has stated:

> [T]hat relevant dictionary definitions of the term "appropriate" include "proper", "fitting" and "specially suitable (*for, to*)".[*] These definitions suggest that what is "appropriate" is not an autonomous or absolute standard, but rather something that must be assessed by reference or in relation to something else. They suggest some core norm − "proper", "fitting", "suitable" − and at the same time adaptation to particular circumstances. Within Article 19.3, the circumstance-specific quality of "the appropriate amounts" is further reinforced by the immediate context provided by the words "in each case". We also note that the term "amount" is defined as something quantitative, a number, "a quantity or sum viewed as the total reached".[*][435]

[*fn original][531] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 106.
[*fn original][532] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 71.

7.263. In our view, an all-others rate determined by reference to the countervailing duty rates established for investigated exporters will generally be "appropriate", in the sense of fitting or suitable, for non-investigated exporters, since the subsidization available to investigated exporters generally constitutes a reasonable proxy for the amount of subsidization that may have been available to non-investigated exporters. Even if record evidence suggests that non-investigated exporters may not have had access to all of the particular subsidies available to investigate exporters, the fact that investigated exporters benefited from a certain amount of subsidization suggests that non-investigated exporters in the same sector may also have had access to a similar amount of subsidization, albeit through different subsidy programmes.

7.264. The second sentence of Article 19.3 envisages the determination of a rate for exporters that were "not actually investigated". Since those exporters were "not actually investigated", we see no basis to conclude that an investigating authority should need to "investigate" which of the subsidies available to investigated exporters were also available to non-investigated exporters. While it may be that certain subsidies available to investigated exporters were not actually

[435] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 552. (emphasis original)

available to non-investigated exporters, the opposite could also be true. Non-investigated exporters or producers may benefit from subsidies that are not available to investigated exporters or producers, and which would not therefore be reflected in the all-others rate. Since those exporters have not been investigated, the determination of a fitting or suitable rate of subsidization for non-investigated exporters will necessarily not be precise. This lack of precision can be addressed in the expedited review envisaged in the second sentence of Article 19.3. For this reason, we reject Canada's claim that the USDOC acted inconsistently with Article 19.3 of the SCM Agreement by determining the all-others rate for non-investigated exporters on the basis of subsidies provided to investigated exporters that were not available to non-investigated exporters.

7.265. We emphasize that it is the rate of subsidization available to investigated exporters that provides an appropriate basis for determining the rate applicable to non-investigated exporters. This does not mean that it is always appropriate to base the all-others rate for non-investigated exporters on the countervailing duty rate determined for investigated exporters, particularly when that rate is determined, wholly or in part, using the Article 12.7 facts available mechanism.

7.266. The Article 12.7[436] mechanism is triggered when a producer or exporter refused access to, or otherwise did not provide, necessary information within a reasonable period or significantly impeded the investigation. If the investigating authority uses the rate calculated with facts available to construct the all-others rate, this would effectively mean that the non-investigated exporters or producers are similarly treated as being non-cooperative, even though there has been no finding of non-cooperation in their regard, and even though they may have been willing to participate fully in the investigation. This would not be fitting, or appropriate, since the use of facts available pursuant to non-cooperation may lead to an outcome that is less favourable for the non-cooperating party.[437]

7.267. Our interpretation of the term "appropriate" in this context finds support in the context provided by Article 9.4 of the Anti-Dumping Agreement[438], which directs investigating authorities to disregard, when constructing the all-others rate, margins of dumping established using facts available.[439] The Appellate Body has clarified that this includes margins of dumping constructed even partially on the basis of facts available.[440] As the Appellate Body considered that it would be anomalous if Article 12.7 of the SCM Agreement, concerning the use of facts available, were to permit the use of facts available in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations[441], the Panel considers that it would be anomalous if the SCM Agreement allowed for the construction of the all-others rate on the basis of rates calculated using facts available when the Anti-Dumping Agreement prohibits it.

7.268. The Panel's view also finds support in the WTO Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, in which Ministers recognized "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".

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[436] Article 12.7 of the SCM Agreement provides that: "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

[437] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.425-4.426.

[438] Article 9.4 of the Anti-Dumping Agreement provides, in relevant part:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers … provided that the authorities shall disregard for the purpose of this paragraph … margins established under the circumstances referred to in paragraph 8 of Article 6.

Article 6.8, in turn, provides that: "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

[439] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 449.

[440] Appellate Body Report, *US – Hot-Rolled Steel*, para. 122.

[441] Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 295; *US – Carbon Steel (India)*, para. 4.423.

7.269. For the above reasons, we conclude that, by constructing the all-others rate relying on Resolute's rate, which was mainly calculated using AFA, the USDOC acted contrary to its obligation under Article 19.3 of the SCM Agreement.[442]

7.270. The Panel will now address Canada's claims concerning Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement. In this respect, the Panel recalls that, under both Article VI:3 of the GATT 1994 and Article 19.4 of the SCM Agreement, Members must not levy countervailing duties in an amount greater than the amount of the subsidy found to exist and, thus, in order to determine the proper amount of a countervailing duty, an investigating authority must first ascertain the precise amount of the subsidy to be offset. The Appellate Body has characterized Articles 19.3 and 19.4 of the SCM Agreements as "closely related" provisions, because both paragraphs specifically address the quantitative limits on the imposition of countervailing duties, and as sharing an "interlinked nature", given that both provisions pertain to the final stage of countervailing duty proceedings.[443]

7.271. With regard to non-investigated exporters, an investigating authority will not have determined a precise amount of subsidization for the purpose of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. In this context, we consider that the appropriate amount of subsidization determined in respect of investigated exporters may serve as the ceiling for applying countervailing duties on non-investigated exporters. Accordingly, in the context of determining rates for non-investigated exporters, the failure to use an appropriate amount of subsidization under Article 19.3 also results in the levying of a countervailing duty in excess of the amount prescribed by Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

7.272. As explained before, it is uncontested that the all-others rate in the CVD investigation on SC Paper was constructed, in part, on the basis of Resolute's countervailing duty rate, and that 17.10 of the 17.87% of that rate was calculated using facts available. Because all-others rates constructed on the basis of countervailing duty rates calculated using facts available are inconsistent with the obligation under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 not to levy countervailing duties in excess of the amount of the subsidy found to exist, the Panel concludes that, by constructing the all-others rate relying on Resolute's rate, which was mainly calculated using AFA, the USDOC acted contrary to its obligation under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.[444]

7.273. Canada has also presented claims under Articles 10, 19.1 and 32.1 of the SCM Agreement. Article 10[445] mandates Members to take all necessary steps to ensure that the imposition of a countervailing duty is in accordance with Article VI of the GATT 1994 and the SCM Agreement and Article 32.1[446] mandates that actions against a subsidy of another Member may be taken only if it is in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement.[447] The Appellate Body has treated claims under Articles 10 and 32.1 as consequential claims in the sense that, when countervailing duties have been imposed in a manner inconsistent with Article VI of the GATT 1994 and/or any substantive provision of the SCM Agreement, the right to impose a

[442] This is regardless of whether the facts available were or were not used in a WTO-consistent manner.
[443] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.23.
[444] This is regardless of whether the facts available were or were not used in a WTO-consistent manner.
[445] Article 10 of the SCM Agreement, concerning the Application of Article VI of GATT 1994, reads as follows:

> 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. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

(fns omitted)
[446] Article 32.1 of the SCM Agreement provides that: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."
[447] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.19-4.20.

countervailing duty has not been established, so the countervailing duties imposed are, as a consequence, inconsistent with Articles 10 and 32.1 of the SCM Agreement.[448]

7.274. This means that, when Articles 10 and 32.1 of the SCM Agreement are invoked as consequential claims and the countervailing duties are found to be inconsistent with Article VI of the GATT 1994 or any substantive provision of the SCM Agreement, those countervailing duties will also be inconsistent with Articles 10 and 32.1, without the need for the complainant raising these claims to advance further arguments to establish the consequential violation.[449]

7.275. Similarly, the relevant part of Article 19.1 of the SCM Agreement[450] provides that, after making a final determination of the existence and amount of the subsidy, a Member may impose a countervailing duty in accordance with the provisions of this Article.[451] This means that a claim of violation of Article 19.1 of the SCM Agreement, concerning this relevant part, is consequential to a violation of the substantive obligations contained in Article 19.

7.276. The Panel has already concluded that, by constructing the all-others rate relying on Resolute's rate, which was mainly calculated using AFA, the USDOC acted contrary to its obligations under Articles 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. The Panel concludes that, as a consequence to this violation, the USDOC also acted inconsistently with Articles 10, 19.1, and 32.1 of the SCM Agreement.[452] The Panel rejects Canada's consequential claims in respect of the USDOC's failure to adjust the all-others rate in respect of subsidies that were not available to non-investigated exporters.

7.5.2 Claims concerning the expedited reviews

7.5.2.1 Introduction

7.277. With respect to the expedited reviews for Irving and Catalyst, Canada has brought the following claims:

a. Canada claims that the USDOC acted inconsistently with Article 19.3 of the SCM Agreement, by improperly initiating an investigation into new subsidy allegations in the context of the expedited reviews of Irving and Catalyst, which are intended to provide company-specific rates with respect to the subsidy allegations that were made in the original investigation.[453]

b. Canada also claims that the USDOC acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement, by improperly initiating an investigation into new subsidy allegations during the expedited reviews of Irving and Catalyst on the basis of an application that contains insufficient evidence concerning the existence, amount, and nature of the alleged subsidies.[454]

[448] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.19-4.21; *US – Anti-Dumping and Countervailing Duties (China)*, para. 358; and *US – Softwood Lumber IV*, para. 143.
[449] Appellate Body Reports, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.19-4.21; *US – Anti-Dumping and Countervailing Duties (China)*, para. 358; and *US – Softwood Lumber IV*, para. 143.
[450] Article 19.1 of the SCM Agreement provides that "[i]f, after reasonable efforts have been made to complete consultations, a Member makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this Article unless the subsidy or subsidies are withdrawn."
[451] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 80.
[452] Canada has also presented a claim under Article 12.7 of the SCM Agreement with respect to the construction of the all-others rate relying on Resolute's rate. Given that the Panel has already concluded that, in applying facts available to the discovered programmes, the USDOC acted inconsistently with Article 12.7 of the SCM Agreement, and considering that the Panel has already found a violation of Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT, the Panel does not consider necessary to address this claim.
[453] Canada's panel request, pp. 3-4.
[454] Canada's panel request, p. 4.

7.5.2.2 Factual background

7.278. Following the issuance of the countervailing duty order on SC paper from Canada on 10 December 2015[455], Catalyst and Irving requested the initiation of expedited reviews on 15 and 16 December 2015, respectively.[456] The USDOC initiated an expedited review relating to both companies on 8 February 2016 with respect to the eleven programmes identified in the context of the original investigation.[457] On 16 February 2016, the petitioner in the original investigation requested the USDOC to initiate an investigation, within the expedited review, into several new subsidy allegations.[458] Despite submissions by Canada, British Columbia, New Brunswick, Nova Scotia, Irving, and Catalyst contesting both the appropriateness of investigating new subsidy allegations in the context of expedited reviews and the lack of sufficient evidence[459], the USDOC issued an "Analysis of New Subsidy Allegations" on 18 April 2016 that recommended investigating six new subsidy allegations.[460] On 25 April 2016, the petitioner submitted two amended new subsidy allegations[461], which Catalyst, Irving, and the Canadian provinces argued were also insufficient.[462] The USDOC issued an "Analysis of Amended New Subsidy Allegations" that recommended investigating one amended new subsidy allegations on 12 July 2016.[463] The USDOC issued the preliminary results of the expedited reviews on 18 November 2016, imposing a *de minimis* countervailing duty rate of 0.79% on Catalyst and a countervailing duty rate of 7.99% on Irving. The USDOC also determined that both Catalyst and Irving should continue to pay cash deposits at the all-others rate of 18.85% until the issuance of the final results of the expedited reviews.[464] In the course of these proceedings, the United States has informed the Panel that the USDOC issued the final results of the expedited review on 24 April 2017, imposing a *de minimis* countervailing duty rate of 0.94% on Catalyst and a rate of 5.87% on Irving.[465]

7.5.2.3 Main arguments of the parties

7.279. Canada argues that the USDOC incorrectly initiated an investigation with respect to new subsidy allegations in the context of an expedited review. In particular, Canada argues that the inclusion of the new subsidy allegations within the context of an expedited review is contrary to

[455] CVD Order, (Exhibit USA-2).
[456] Catalyst Paper Corporation, Request for Expedited Review (15 December 2015), (Exhibit CAN-63); Irving Paper Ltd., Request for Expedited Review (16 December 2015), (Exhibit CAN-64).
[457] The original petition alleged that Catalyst had received the following subsidies: (a) a Canadian grant to Catalyst through the PPGTP, to improve the environmental performance of its Powell River, BC, facility, and an additional grant for its Port Alberni, BC, facility; (b) a cap on property taxes paid by Catalyst to the City of Powell River, BC, pursuant to an Agreement in Principle between Catalyst and the City of Powell River; (c) a grant from BC Hydro through British Columbia's Power Smart Program; and (d) grants from British Columbia and Canada for Catalyst's Crofton Pulp and Paper mill. The original petition also alleged that Irving had received the following subsidies: (a) three grants from Canada and New Brunswick for Irving's facility at Sussex Tree Nursery, to derisk investment in technology in the industry; (b) the Federal Atlantic Innovation Program; (c) New Brunswick Funds for J.D. Irving; (d) an PPGTP grant from Canada to Irving; (e) two grants from New Brunswick and Efficiency NB; (f) a grant from New Brunswick under its NB Climate Change Action Plan 2007-2012; and (g) a rebate of property taxes to offset electricity price increases from New Brunswick to Irving for mills running at the start of the programme at 85% of the prior year's production. (Petition, Vol. II, (Exhibit CAN-39)).
[458] New Subsidy Allegations Regarding Catalyst Paper and Irving Paper on the expedited review (16 February 2016), (Exhibit CAN-65).
[459] Canada, British Columbia, New Brunswick, and Nova Scotia, Response to Petitioner's New Subsidy Allegations (26 February 2016), (Exhibit CAN-66); Catalyst Paper Corporation, Response to Petitioner's New Subsidy Allegations and Request for Meeting (29 February 2016), (Exhibit CAN-67); Irving Paper Ltd. and Government of New Brunswick, Response to Petitioner's New Subsidy Allegations Concerning New Brunswick (26 February 2016), (Exhibit CAN-68); and Irving Paper Ltd., Response to Petitioner's New Subsidy Allegation Concerning the Provision of Stumpage in Nova Scotia (26 February 2016), (Exhibit CAN-69).
[460] USDOC, Analysis of New Subsidy Allegations (18 April 2016), (Exhibit CAN-70).
[461] Petitioner's Amended New Subsidy Allegations (25 April 2016), (Exhibit CAN-71).
[462] Catalyst Paper Corporation, Response to Petitioner's Amended New Subsidy Allegations (5 May 2016), (Exhibit CAN-72); Canada, British Columbia, New Brunswick and Irving Paper Ltd., Response to Petitioner's Amended New Subsidy Allegations (5 May 2016), (Exhibit CAN-73).
[463] USDOC, Analysis of Amended New Subsidy Allegations (12 July 2016), (Exhibit CAN-74).
[464] USDOC, Preliminary Results of Countervailing Duty Expedited Review, (18 November 2016), (Exhibit CAN-75), p. 3; Issues and Decision Memorandum, (Exhibit CAN-37), p. 74.
[465] Supercalendered Paper from Canada: Final Results of Countervailing Duty Expedited Review, United States Federal Register, Vol. 82, No. 77 (24 April 2017), (Exhibit USA-26), p. 18897; see also United States' second written submission, para. 123; and response to Panel question No. 67, para. 157.

the purpose of expedited reviews and violates Article 19.3 of the SCM Agreement. The purpose of an expedited review is to look back at the original investigation and see what the countervailing duty rate would have been for an exporter had they been investigated; it should not be an opportunity to delay the initiation of an investigation for non-selected exporters while simultaneously requiring them to pay provisional duties.[466] Based on its ordinary meaning, a "review" should be a "reconsideration of some subject or thing", i.e. look back at what was already considered in the initial investigation and consider those programmes. The concept of reconsidering would necessarily exclude the consideration of new allegations.[467] Furthermore, an expedited review must be "expedited" and "prompt". In the context of Article X:3 of the GATT 1994, the Appellate Body has interpreted the term "prompt" as performance "in a quick and effective manner and without delay", suggesting that an expedited review should similarly be done in a quick and effective manner and without delay caused by the introduction of new subsidy allegations.[468] Canada rejects the United States' position that a review is expedited so long as it is completed before the completion of the first administrative review, stating that such an approach renders Article 19.3 inutile.[469]

7.280. Canada further takes the view that the scope of an expedited review is limited to a review of the level of subsidization that non-investigated exporters received from alleged subsidies that the investigating authority either: (a) initiated on in response to a petition; or (b) self-initiated on in the context of the original investigation.[470] Examining new subsidy allegations will always cause more delay than reviewing those programmes that were considered in the original investigation, since an investigating authority will already have collected information on the latter.[471] In the alternative, even if new subsidy allegations are permitted in an expedited review, Canada submits that these are limited to those with a sufficiently close nexus to the allegations in the original petition and, in the expedited review at issue, the new subsidy allegations did not have a sufficiently close nexus to the allegations in the original petition.[472] Referring to the Appellate Body in *US − Carbon Steel (India)*, Canada argues that administrative and expedited reviews are both intended to review what occurred in the original investigation, and should therefore at least be subject to the same minimum limitation, i.e. that any new subsidy allegations have a sufficiently close nexus to the initial investigation.[473]

7.281. Finally, Canada argues that the USDOC's initiation into the new subsidy allegations violated Articles 11.2 and 11.3 of the SCM Agreement due to its failure to ensure that there was sufficient evidence of each element of a subsidy.[474]

7.282. The United States argues that Canada is asking the Panel to expand upon the clear obligation in Article 19.3 − namely that an investigating authority must provide an expedited review to an exporter who is subject to a countervailing duty investigation but was not individually investigated − and place certain restrictions on a Member's conduct of an expedited review that have no foundation in the text of Article 19.3.[475] The United States argues that, similar to original investigations, an expedited review examines the potential subsidization of a particular *product*, and the scope of an expedited review is thus limited to the product under investigation identified in the original petition, rather than to particular subsidy programmes.[476] The investigation of new subsidy allegations in an expedited review is therefore a permissible method of examining the potential subsidization of a particular product and the exporter under review.[477] Indeed, the text of

[466] Canada's opening statement at the first meeting of the Panel, para. 192; see also first written submission, paras. 336-348.
[467] Canada's second written submission, paras. 144-145 (quoting Definition of "reconsider" at *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.) (Oxford University Press, 2003) Vol. 2, p. 2492, (Exhibit CAN-195)).
[468] Canada's second written submission, para. 146 (quoting Appellate Body Report, *Thailand − Cigarettes (Philippines)*, para. 220).
[469] Canada's second written submission, para. 147.
[470] Canada's response to Panel question No. 68, para. 153.
[471] Canada's response to Panel question No. 70, paras. 156-160.
[472] Canada's first written submission, paras. 349-359.
[473] Canada's second written submission, paras. 148-153 (referring to Appellate Body Report, *US − Carbon Steel (India)*, para. 4.543).
[474] Canada's first written submission, paras. 364-391; second written submission, paras. 154-156.
[475] United States' first written submission, paras. 305-308.
[476] United States' response to Panel question No. 68, para. 158.
[477] United States' second written submission, para. 123.

Article 19.3 does not limit the scope of an expedited review to subsidy programmes identified in the original petition, but rather focuses on the amount of duties imposed on a particular product.[478]

7.283. The United States considers that an expedited review is expedited so long as it is completed before the completion of the first administrative review after the issuance of a countervailing duty order, which in the present case the United States does not expect to be completed before the end of 2017 at the earliest.[479] The United States also rejects Canada's reliance on a statement by the Appellate Body in *US – Carbon Steel (India)* that the scope of administrative reviews under Article 21.2 of the SCM Agreement is limited to subsidy programmes with a sufficiently close nexus to those initiated upon in the original investigation.[480] The United States expresses concern as to the relevance of what it characterizes as *dictum*[481], and further argues that the Appellate Body's statement does not apply to expedited reviews.[482]

7.284. Finally, the United States rejects Canada's argument that the USDOC's initiation into the new subsidy allegations violated Articles 11.2 and 11.3 of the SCM Agreement. With respect to one new subsidy allegation (New Brunswick's provision of stumpage to Irving for less than adequate remuneration), the United States argues that Canada's claim is not properly before the Panel because it was not included in Canada's panel request.[483] With respect to the other new subsidy allegations, the United States argues that the USDOC's decision to initiate in each instance was based on sufficient evidence and consistent with Article 11.[484]

7.5.2.4 Evaluation by the Panel

7.285. Article 19.3 of the SCM Agreement provides, in relevant part, that:

> 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.

7.286. The main issues raised by the parties' claims and arguments relate to the purpose and scope of expedited reviews under Article 19.3 of the SCM Agreement. Article 19.3 of the SCM Agreement does not explicitly limit the scope of an expedited review to either the product under investigation or the subsidy programmes identified in the original petition, nor does the provision set any timeline for the review. However, the provision requires that the review that a non-investigated, cooperating exporter is entitled to be "expedited" and that the investigating authority establish an individual countervailing duty rate "promptly".

7.287. The ordinary meaning of the term "expedite" is to "perform quickly"[485], while the meaning of "prompt" is "[q]uick to act" and "without delay".[486] As pointed out by Canada, the French version of "expedited review" is "réexamen accéléré", which can be translated as "accelerated re-examination" or "accelerated reconsideration". The French version of "promptly" is "moindres délais", which can be understood to mean "as soon" or "as quickly" as possible[487], or "with as little delay as possible". The Spanish version provides that a non-investigated, cooperating producer

[478] United States' response to Panel question No. 69, paras. 159-160.
[479] United States' response to Panel question No. 67, para. 156; second written submission, para. 123.
[480] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.543.
[481] United States' second written submission, para. 124; response to Panel question No. 73, paras. 164, 165, 167, and 172.
[482] United States' response to Panel question No. 73, paras. 168-172.
[483] United States' first written submission, para. 309.
[484] United States' first written submission, paras. 309-324.
[485] Definition of "expedite" at *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.) (Oxford University Press, 2003) Vol. 1, p. 893, (Exhibit CAN-104).
[486] Definition of "prompt" at *Shorter Oxford English Dictionary*, 5th edn, A. Stevenson (ed.) (Oxford University Press, 2003) Vol. 2, p. 2366, (Exhibit CAN-105).
[487] Canada's first written submission, para. 340.

"tendrá derecho *a que se efectúe rápidamente* un examen para que la autoridad investigadora fije *con prontitud* un tipo de derecho compensatorio individual para él".[488]

7.288. On the basis of the ordinary meaning of the language of Article 19.3, the Panel sees no basis for the United States' position that the purpose of an expedited review is "to allow the manufacturers, producers, and exporters of the subject merchandise who were not selected as mandatory respondents to receive an individual CVD rate *at an earlier point in the administrative process (i.e., prior to the completion of the first administrative review after the issuance of a countervailing duty order)*".[489]

7.289. Rather, on the basis of the language used in the last sentence of Article 19.3 of the SCM Agreement and the context provided by the first sentence of that provision, the purpose of the relevant part of Article 19.3 is, to the greatest extent possible, to put non-investigated, cooperating exporters in the same position they would have been in had they been investigated in the original proceeding, and thus levy countervailing duties "in the appropriate amounts in each case". The focus of the last sentence of Article 19.3 is on such exporters being "entitled" to an individual countervailing duty rate, in the same manner as investigated exporters ("aura droit", and "tendrá derecho" in the French and Spanish versions). Article 19.3 further states that this entitlement must be provided "promptly", through an "expedited" review. In this respect, the Panel notes Brazil's observation that, in the context of Article 19.3, the decision not to investigate a particular cooperating exporter was made by the investigating authority, independent of the exporter itself.[490] The relevant part of Article 19.3 thus reflects, on the one hand, the possibility for an investigating authority not to investigate each cooperating exporter in the original investigation, and on the other hand, the entitlement for such a non-investigated, cooperating producer to nonetheless get an individual countervailing duty rate, in a prompt manner through an expedited review. A similar balance is provided by Article 6.10 of the Anti-Dumping Agreement.

7.290. We thus agree with Canada's position that, based on the text of Article 19.3 of the SCM Agreement, the purpose of an expedited review is "to look back at the original investigation and see what the countervailing duty rate would have been for an exporter had they been investigated".[491] In other words, an expedited review should be aimed at putting, to the greatest extent possible, a non-investigated, cooperating exporter into the situation it would have been in, had it been investigated in the original investigation, on the basis of the measures covered by that investigation. Allowing the inclusion of any new subsidy allegations in the expedited review would frustrate the purpose of Article 19.3 as discussed above.

7.291. While the United States is correct to point out that the first sentence of Article 19.3 of the SCM Agreement refers to a countervailing duty imposed in respect of any "product"[492], the Panel does not consider this to imply that any and all new subsidy allegations relating to the product under investigation can be added to the scope of an expedited review. Rather, as explained above, the Panel considers that the purpose of an expedited review determines its scope: the purpose is to put non-investigated, cooperating exporters into the situation they would have been in, had they been investigated in the original investigation, and therefore the scope of the review should be limited to the measures covered by that investigation.

7.292. In light of the above, the Panel finds that the USDOC's inclusion of new subsidy allegations in the context of the expedited review into Catalyst and Irving was not consistent with Article 19.3 of the SCM Agreement. Since new subsidy allegations should not be included in an expedited review, Canada's other arguments on the initiation into the new subsidy allegations in an expedited review not being conform to Article 11 of the SCM Agreement are thereby rendered moot.

[488] Emphasis added.
[489] United States' response to Panel question No. 67, para. 156. (emphasis added)
[490] Brazil's third-party response to Panel question No. 6.
[491] Canada's opening statement at the first meeting of the Panel, para. 196.
[492] United States' response to Panel question No. 69, para. 160.

7.6 Claims concerning the "Other Forms of Assistance-AFA measure"

7.6.1.1 Introduction

7.293. In addition to its above claim related to specific instances of AFA being applied in the SC Paper investigation, Canada challenges what it refers to as the "Other Forms of Assistance-AFA measure". According to Canada, this unwritten measure consists of the USDOC applying AFA to subsidy programmes "discovered" during the course of a countervailing duty investigation that were not reported in response to its "other forms of assistance" question. Canada characterizes this unwritten measure as "ongoing conduct" or "rule or norm of prospective and general application". The United States disputes the mere existence of any such measure.

7.294. With respect to the "Other Forms of Assistance-AFA measure", Canada has brought the following claims:

a. Canada claims that the USDOC acts inconsistently with Articles 12.1, 12.7, and 12.8 of the SCM Agreement, by applying AFA to information discovered at verification, with no assessment of whether that information is "necessary" to the investigation.[493]

b. Canada also claims that the USDOC acts inconsistently with Articles 10, 11.1, 11.2, 11.3, and 11.6 of the SCM Agreement, by initiating investigations into transactions, financial transfers of funds, and any assistance whatsoever, without gathering sufficient evidence of financial contribution, benefit, and specificity.[494]

7.6.1.2 Main arguments of the parties

7.295. Canada challenges the "Other Forms of Assistance-AFA measure" as an unwritten measure that consists in the USDOC applying AFA to subsidy programmes "discovered" during the course of a CVD investigation that were not reported by respondent companies in response to the "other forms of assistance" question. Canada characterizes this unwritten measure as either "ongoing conduct" or "rule or norm of prospective and general application".[495] According to Canada, this measure is evidenced not only by a series of investigations since 2012, but through legislative changes and public statements of policy. In its view, the USDOC has made clear that its current and future response to what it perceives as an "unreported potential subsidy" being discovered at verification is to rely on adverse inferences in making all findings on that potential subsidy.[496] Canada provided determinations from seven USDOC investigations in its first written submission, each one of these determinations containing at least one application of the conduct.[497] At the first substantive meeting Canada provided two further determinations that also contained applications of this measure.[498] Canada also introduced an additional determination containing the application of this measure at the second substantive meeting.[499]

7.296. Canada raises three sets of claims of inconsistency with respect to the "Other Forms of Assistance-AFA measure": (a) Article 12.7 of the SCM Agreement because the "Other Forms of

[493] Canada's panel request, p. 5.
[494] Canada's panel request, p. 5.
[495] Canada's first written submission, paras. 392-393.
[496] Canada refers to USDOC's NAFTA Brief, (Exhibit CAN-76), p. 149. (Canada's first written submission, para. 393).
[497] Canada's first written submission, para. 411.
[498] Canada refers to USDOC, 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 (19 January 2016) (Truck and Bus Tires from China, Issues and Decision Memorandum (2016)), (Exhibit CAN-163); and USDOC, 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 (1 February 2017) (Stainless Steel Sheet and Strip from China, Issues and Decision Memorandum (2017)), (Exhibit CAN-164). (Canada's second written submission, para. 167).
[499] Canada refers to USDOC, Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Steel Concrete Reinforcing Bar from the Republic of Turkey (15 May 2017) (Exhibit CAN-211) (Canada's opening statement at the second meeting of the Panel, paras. 26 and 30).

Assistance-AFA measure" eliminates the requirement for evidence under this provision[500] and sets an exceedingly high standard of cooperation[501]; (b) Articles 10, 11.1, 11.2, 11.3, and 11.6 of the SCM Agreement because the USDOC failed to review the adequacy of the evidence regarding financial contribution, benefit, and specificity[502]; and (c) Articles 12.1, 12.7, and 12.8 of the SCM Agreement[503] because the USDOC failed to offer respondents the procedural safeguards in the SCM Agreement, including opportunities to present evidence, prior to applying AFA to determine the elements and amount of a subsidy.[504]

7.297. Canada states that it has laid out two paths for how to evidence the challenged measure. According to Canada, the Panel could see the conduct that is currently going on, and rely on statements made by the USDOC as evidence that it is likely to continue. Alternatively, the Panel could look at the evidence Canada has produced and determine that it is reflective of a deliberate policy that has general and prospective application.[505]

7.298. The United States contends that Canada has failed to identify the existence of any "Other Forms of Assistance-AFA measure", as it has established neither the existence of any "ongoing conduct" that is likely to continue, nor the precise content of the alleged rule or norm or its general and prospective application.[506] The United States posits that it is unclear whether Canada is challenging a particular question, the application of facts available, a combination of both, or the application of something entirely different.[507]

7.299. The United States argues that the "ongoing conduct" alleged by Canada cannot be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures, and measures that are not yet in existence at the time of panel establishment cannot be within a panel's terms of reference under the DSU.[508]

7.300. In any event, the United States argues that the facts of the current dispute are markedly different from the facts in *US – Continued Zeroing* and therefore, even under the Appellate Body's broad approach in that dispute, Canada's claim fails.[509] Canada has failed to establish that any "ongoing conduct" exists or is likely to continue.[510] Canada has also failed to identify the alleged future measures comprising the "ongoing conduct", and the conduct within such measures that is purportedly inconsistent with the SCM Agreement.[511] The United States also submits that Canada has failed to establish that the alleged measure is a rule or norm because it has not demonstrated its precise content and its prospective and general application. The United States maintains that Canada has presented little more than a string of cases, or repeat action.[512] For the United States, in all nine of the determinations that Canada relies upon, the USDOC made unique findings and reached different results.[513]

[500] Canada's first written submission, para. 426.
[501] Canada's first written submission, para. 432.
[502] Canada's first written submission, para. 423.
[503] In its submission, Canada adds references to Articles 11.1, 11.2, 11.3, and 11.6 of the SCM Agreement under this claim although there is no argumentation.
[504] Canada's first written submission, para. 435.
[505] Canada's opening statement at the first meeting of the Panel, para. 210.
[506] United States' first written submission, para. 325.
[507] United States' first written submission, para. 350; response to Panel question No. 77, para. 176.
[508] The United States refers to the Panel Reports, *US – Upland Cotton*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); and *Indonesia – Autos*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of a panel was not within the panel's terms of reference). It also refers to Appellate Body Report, *EC – Chicken Cuts*, para. 156: "[t]he term 'specific measures at issue' in Article 6.2 suggests that, as a general rule, the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel." (United States' first written submission, para. 327 and fn 445).
[509] United States' first written submission, para. 336.
[510] United States' first written submission, para. 335.
[511] United States' first written submission, para. 339.
[512] United States' first written submission, para. 346; second written submission, para. 132.
[513] United States' second written submission, para. 132. See also first written submission, paras. 341-362.

7.6.1.3 Evaluation by the Panel

7.6.1.3.1 Whether Canada has established the existence of the "Other Forms of Assistance-AFA measure"

7.301. The main issue before the Panel is whether Canada has demonstrated the existence of the "Other Forms of Assistance-AFA measure", either as "ongoing conduct" or as a "rule or norm of general and prospective application".

7.302. Most relevantly, Articles 3.3[514], 4.4[515], and 6.2[516] of the DSU refer to "measures" that can be challenged in WTO dispute settlement. The Appellate Body has explained that, "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"[517], and that "[t]he scope of measures that can be challenged in WTO dispute settlement is therefore broad".[518] Nonetheless, the Appellate Body has also sounded the following note of warning: "a panel must not lightly assume the existence of a 'rule or norm' constituting a measure of general and prospective application, especially when it is not expressed in the form of a written document".[519] Indeed, "[p]articular rigour is required on the part of a panel to support a conclusion as to the existence of a 'rule or norm' that is *not* expressed in the form of a written document", and "[a] panel must carefully examine the concrete instrumentalities that evidence the existence of the purported 'rule or norm' in order to conclude that such 'rule or norm' can be challenged, as such."[520] The Appellate Body has explained that its concerns are based on the following:

> When an "as such" challenge is brought against a "rule or norm" that is expressed in the form of a written document − such as a law or regulation − there would, in most cases, be no uncertainty as to the existence or content of the measure that has been challenged. The situation is different, however, when a challenge is brought against a "rule or norm" that is *not* expressed in the form of a written document. In such cases, the very existence of the challenged "rule or norm" may be uncertain.[521]

7.303. A complainant seeking to prove the existence of a measure, whether written or unwritten, will invariably be required to prove the attribution of that measure to a Member and its precise content. Depending on the specific measure challenged and how it is described or characterized by a complainant, however, other elements may need to be proven.[522]

7.304. We will first consider whether Canada has established the existence of the "Other Forms of Assistance-AFA measure" as unwritten "ongoing conduct". In *US − Continued Zeroing*, the Appellate Body considered the legal standard that must be met by a complainant when bringing a claim against an unwritten measure as "ongoing conduct". On that occasion, the measure

[514] "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members."
[515] "All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint."
[516] "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference."
[517] Appellate Body Report, *US − Corrosion-Resistant Steel Sunset Review*, para. 81. See also Appellate Body Reports, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 67; and *US − Anti-Dumping Methodologies (China)*, para. 5.122.
[518] Appellate Body Report, *EC and certain Member States − Large Civil Aircraft*, para. 794. See also Appellate Body Reports, *Guatemala − Cement I*, fn 47; *Argentina − Import Measures*, paras. 5.106 and 5.109; and *US − Anti-Dumping Methodologies (China)*, para. 5.122.
[519] Appellate Body Report, *US − Zeroing (EC)*, para. 196.
[520] Appellate Body Report, *US − Zeroing (EC)*, para. 198. (emphasis original)
[521] Appellate Body Report, *US − Zeroing (EC)*, para. 197. (emphasis original)
[522] Appellate Body Report, *Argentina − Import Measures*, para. 5.110.

consisted of the continued use of the zeroing methodology in successive proceedings by which duties in each of 18 cases were maintained.[523] The Appellate Body found that establishing the existence of the measure at issue required evidence of the use of the zeroing methodology, as ongoing conduct, with respect to duties resulting from each of the 18 anti-dumping duty orders at issue.[524] In sum, a complainant that is challenging a measure characterized as "ongoing conduct" would thus need to provide evidence that the measure is attributable to a Member, of its precise content, of its repeated application, and of the likelihood that such conduct will continue.[525]

7.305. In light of the above, we will thus consider whether Canada has established the existence of the "Other Forms of Assistance-AFA measure" as unwritten "ongoing conduct", that is whether Canada has established: (a) that the measure in question is attributable to the United States; (b) its precise content; (c) its repeated application; and (d) the likelihood that such conduct will continue.[526] While the United States contests the mere existence of the measure challenged by Canada, the attributability of the USDOC's conduct − that is the conduct of a US government authority − to the United States does not seem to be at question here.[527] We will address the third and fourth factors − namely repeated application and likelihood of continuation − together, since Canada relies to a great extent on the same evidence.

7.306. Before turning to the analysis below, we acknowledge the fundamental position expressed by the United States in these proceedings that "ongoing conduct" cannot be subject to WTO dispute settlement because it may be composed of an indeterminate number of potential future measures, as well as the United States' concerns about the rationale articulated by the Appellate Body in *US − Continued Zeroing*.[528] Despite the arguments put forth by the United States in these proceedings, and considering the need to ensure "security and predictability" in the dispute settlement system as contemplated in Article 3.2 of the DSU, we do not see any "cogent reasons" to depart from the Appellate Body's approach to "ongoing conduct" expressed in *US − Continued Zeroing*.[529]

7.6.1.3.1.1 The precise content of the "Other Forms of Assistance-AFA measure"

7.307. We first turn to consider whether Canada has demonstrated the precise content of the "Other Forms of Assistance-AFA measure", the existence of which is contested by the United States.

7.308. According to Canada, the "Other Forms of Assistance-AFA measure" consists in the USDOC asking the "other forms of assistance" question and, where the USDOC "discovers" information that it deems should have been provided in response to the above question, applying AFA with respect to the respondent to determine that the "discovered" information amounts to countervailable subsidies.[530]

7.309. As to the first step of this alleged measure − that is the USDOC asking the "other forms of assistance" question − Canada submits in the table below the various formulations of the "other forms of assistance" question in investigations starting in 2012[531]:

Table 1: Iterations of the "other forms of assistance" question

Investigation	USDOC's "other forms of assistance" question to respondent company
Solar Cells from China 2012[532]	Initial questionnaire to Trina Solar: "Did [China] (or entities owned directly, in whole or in part, by [China] or any provincial or local government) provide, directly or indirectly, any

[523] Appellate Body Report, *US − Continued Zeroing*, para. 181.
[524] Appellate Body Report, *US − Continued Zeroing*, para. 181. See also Appellate Body Report, *Argentina − Import Measures*, para. 5.105.
[525] Appellate Body Report, *US − Continued Zeroing*, para. 191. See also Appellate Body Report, *Argentina − Import Measures*, para. 5.108.
[526] Appellate Body Report, *US − Continued Zeroing*, para. 191. See also Appellate Body Report, *Argentina − Import Measures*, para. 5.108.
[527] Canada's first written submission, para. 407; second written submission, para. 160.
[528] United States' first written submission, paras. 327-336.
[529] Appellate Body Report, *US − Stainless Steel (Mexico)*, para. 160.
[530] Canada's second written submission, para. 161; first written submission, para. 392.
[531] The table is modelled on table 1 provided by Canada in its first written submission, para. 410.

Investigation	USDOC's "other forms of assistance" question to respondent company
	other forms of assistance to your company? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices".[533]
Shrimp from China 2013[534]	Initial Questionnaire to Guolian Companies: "Did [China] (or entities owned directly, in whole or in part, by [China] or any municipal, provincial or local government) provide, directly or indirectly, any other forms of assistance to your company (including cross-owned companies)? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in Standard Questions Appendix and other relevant appendices as appropriate".[535]
Solar Cells from China 2014[536]	Initial Questionnaire to Trina Solar: "Did [China] (or entities owned directly, in whole or in part, by [China] or any provincial or local government) provide, directly or indirectly, any other forms of assistance to your company between January 1, 2003, and the end of the POI? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices".[537]
Solar Cells from China 2015[538]	Initial Questionnaire to Lightway: "Did your government (or entities owned directly, in whole or in part, by your government or any provincial or local government) provide, directly or indirectly, any other forms of assistance to your company between January 1, 2003 and the end of the POR? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose, and terms, and answer all questions in the appropriate appendices".[539]
Supercalendered Paper from Canada 2015[540]	Initial Questionnaire to Resolute: "[d]oes [Canada] or entities directly owned, in whole or in part, by [Canada] or any provincial or local government provide, directly or indirectly, provide [*sic*] any other forms of assistance to your company? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices".[541]
PET Resin from China 2016[542]	Initial Questionnaire: "Did [China] (or entities owned directly, in whole or in part, by [China] or any provincial or local government) provide, directly or indirectly, any other forms of assistance to your company during the AUL through the end of the POI? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices."[543]

[532] Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination, United States Federal Register, Vol. 77, No. 201 (17 October 2012), (Exhibit CAN-115).

[533] USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China (9 October 2012) (Solar Cells from China, Issues and Decision Memorandum (2012)), (Exhibit CAN-116), p. 9.

[534] Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination, United States Federal Register, Vol. 78, No. 160 (19 August 2013), (Exhibit CAN-117).

[535] USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from the People's Republic of China (12 August 2013) (Shrimp from China, Issues and Decision Memorandum (2013)), (Exhibit CAN-118), pp. 75-76.

[536] Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Affirmative Countervailing Duty Determination, United States Federal Register, Vol. 79, No. 246 (23 December 2014), (Exhibit CAN-120).

[537] USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China (15 December 2014) (Solar Cells from China, Issues and Decision Memorandum (2014)), (Exhibit CAN-121), p. 17.

[538] Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013, United States Federal Register, Vol. 80, No. 134 (14 July 2015), (Exhibit CAN-122).

[539] Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from China (7 July 2015) (Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015)), (Exhibit USA-8), p. 19.

[540] Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination, United States Federal Register, Vol. 80, No. 202 (20 October 2015), (Exhibit CAN-36).

[541] Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.

[542] Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from the People's Republic of China: Final Affirmative Determination, United States Federal Register, Vol. 81 No. 49 (14 March 2016), (Exhibit CAN-124).

[543] USDOC, Investigation of Certain Polyethylene Terephthalate Resin from the People's Republic of China: Countervailing Duty Questionnaire (28 April 2015), (Exhibit CAN-126), p. 19.

Investigation	USDOC's "other forms of assistance" question to respondent company
Stainless Pressure Pipe from India[544]	First Supplemental Questionnaire to Steamline: "Did [India] (or entities owned directly, in whole or in part, by [India] or any provincial or local government, including the state of Gujarat) provide, directly or indirectly, any other forms of assistance to your company during the POI or during the 14 years prior to the POI? If so, please describe such assistance in detail, including the amounts, date of receipt, purpose and terms, and answer all questions in the appropriate appendices (from the initial questionnaire).[545]

7.310. Canada argues that the wording of this question has remained substantially the same for over a decade until the present, and submits that it and numerous other governments and exporters have recently been asked the "all other forms of assistance" question.[546]

7.311. Canada also points out that, when asked by the Panel whether there are "any CVD investigations conducted by the US authorities since 2012 in which the 'other forms of assistance' question has not been asked", the United States failed to provide any example of such an occurrence.[547] Canada points out the USDOC's statement in the Issues and Decision Memorandum in *Supercalendered Paper* that "[a]s a matter of standard procedure, [the USDOC's] initial CVD questionnaire asked Resolute to report 'other subsidies'".[548] In Canada's view, this demonstrates that it is the USDOC's standard procedure to include the "other forms of assistance" question in its questionnaires.[549]

7.312. As to the second step of this alleged measure − that is the USDOC's application of AFA where it finds information during verification that it deems should have been submitted in response to the "other forms of assistance" question − Canada argues that the USDOC has relied on this question to justify the use of AFA since 2012.[550] As such, the measure that Canada is challenging is the USDOC's post-2012 conduct.

7.313. Canada provides extracts from a number of USDOC determinations allegedly showing this repeated conduct, including in particular reliance on the "other forms of assistance" question.[551] Canada argues that a review of these determinations evidences the precise content of this measure.[552]

Table 2: Application of facts available by the USDOC

Investigation	Application of facts available by the USDOC
Solar Cells from China 2012	During verification, the USDOC examined the respondent company, Trina's, "special payables" account. The USDOC applied AFA to countervail one of the entries in the account, labelled "bonus for employees from government", as it held Trina was unable to tie this entry to a grant reported in its questionnaire response, or to demonstrate that it was not a countervailable subsidy.[553] "[The USDOC] determines that the use of facts available … is warranted in determining the countervailability of this apparent subsidy. Trina was unable to establish its claim that it had identified all non-recurring subsidies provided by [China]. In addition, [the USDOC] determines an adverse inference is warranted … [the USDOC] discovered numerous unreported subsidies during the course of this investigation. As such, in addition to requesting information concerning the discovered subsidies, we asked Trina to confirm that all additional non-recurring subsidies had been reported. Trina was unable to

[544] Countervailing Duty Investigation of Welded Stainless Pressure Pipe From India: Final Affirmative Determination, United States Federal Register, Vol. 81, No. 189 (29 September 2016), (Exhibit CAN-129).
[545] USDOC, Countervailing Duty Investigation on Welded Stainless Pressure Pipe from India: First Supplemental Questionnaire for Steamline Industries Limited, (2 February 2016), (Exhibit CAN-127), p. 7.
[546] Canada refers to USDOC, Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Countervailing Duty Questionnaire (19 January 2017), (Exhibit CAN-207). (Canada's second written submission, para. 164).
[547] United States' response to Panel question No. 77, paras. 176-178.
[548] Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.
[549] Canada's second written submission, para. 163.
[550] Canada's second written submission, para. 166.
[551] Canada's first written submission, para. 411.
[552] Canada's second written submission, para. 166.
[553] Solar Cells from China, Issues and Decision Memorandum (2012), (Exhibit CAN-116), pp. 9-10.

Investigation	Application of facts available by the USDOC
	establish at verification its reported statement that it had done so. Thus, it failed to cooperate to the best of its ability. As AFA, we determine that the amount entered under 'bonus for employees from government' in Trina's special payables account is a countervailable grant".[554]
Shrimp from China 2013	The USDOC countervailed, as AFA, three alleged grants that were discovered at verification of Guolian company. "Despite [the USDOC's] questions concerning 'Other Subsidy Programs' in the Initial QNR, [China] and the Guolian Companies did not report the existence of these three grants in their initial and supplemental questionnaires".[555] "We find the Guolian Companies failed to provide information regarding the three grant programs at issue by the deadlines established[.] ... We further determine that by not divulging the receipt of these three additional grants prior to the commencement of verification or during the 'Minor Corrections' phase of verification, the Guolian Companies failed to cooperate by not acting to the best of their ability and, thus ... we are applying AFA. The Guolian Companies' failure to divulge the receipt of these three grant programs precluded [the USDOC] from conducting an adequate examination *(e.g.*, [the USDOC] was unable to issue a supplemental questionnaire to [China] concerning the extent to which these programs constitute a financial contribution or are specific ...). Thus, as AFA, we are determining that each of the three grants meet the financial contribution and specificity criteria under these two provisions of the statute. Further, as AFA, we are determining that each of the three grant programs confers a benefit ...".[556]
Solar Cells from China 2014	The USDOC countervailed, as AFA: (a) twenty-eight unreported "grant programs;" and (b) an unreported tax deduction for "wages paid for placement of disabled persons". The "grants" and the tax deduction were "discovered" by the USDOC at Trina's verification.[557] "[The USDOC] determines that the use of facts available ... is warranted in determining the countervailability of these apparent subsidies that were discovered during verification. And because Trina Solar failed to respond to the best of its ability regarding our questions on other, non-reported subsidies provided by [China], we determine that an adverse inference is warranted with respect to these subsidies[.] ... With respect to the unreported tax deduction for disabled persons, we determine, as AFA, that this tax deduction is countervailable. As a result, we are finding that, as AFA, these discovered subsidies provide a financial contribution and are specific ... [and a] benefit is conferred".[558] "[The USDOC's] verifiers explained that while they would take the names, dates, and amounts received for these unreported grants as verification exhibits, we would consider any additional information on these grants to be new factual information, and thus declined to accept the additional information that was offered by counsel for Trina Solar with respect to these grants."[559] "With respect to Trina Solar's argument that [the USDOC] should use the information taken at verification, [the USDOC] disagrees. ... [The USDOC] is applying an adverse inference in determining the benefit of these unreported programs, not neutral facts available. By its own actions, Trina Solar precluded [the USDOC] from verifying this information when it withheld it until after the deadline for the submission of new factual information had passed."[560]

[554] Solar Cells from China, Issues and Decision Memorandum (2012), (Exhibit CAN-116), p. 10. (emphasis added)
[555] Shrimp from China, Issues and Decision Memorandum (2013), (Exhibit CAN-118), p. 77.
[556] Shrimp from China, Issues and Decision Memorandum (2013), (Exhibit CAN-118), p. 15. (emphasis added)
[557] Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), pp. 16-17.
[558] Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 17. (emphasis added)
[559] Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 86.
[560] Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 87. (emphasis added)

Investigation	Application of facts available by the USDOC
Solar Cells from China 2015	During the first administrative review, the USDOC countervailed unreported grants that were discovered during verification of the respondent Lightway. "[W]e determine that the use of facts available … is warranted in determining the countervailability of these apparent subsidies that were discovered during verification. Lightway and [China] withheld information that was requested of them by not providing information regarding other subsidies in response to the [other assistance question] above. Further, due to this withholding, we could not verify Lightway's usage of other subsidies. Because Lightway and [China] failed to respond to the best of their ability regarding our questions on other, non-reported subsidies provided by [China], we determine that an adverse inference is warranted with respect to these subsidies[.] … As a result, we are finding that, as AFA, these discovered subsidies provide a financial contribution and are specific[.] … As a result of Lightway's and [China's] non-cooperation, we can infer that Lightway benefitted from the programs at issue".[561] "Regarding Lightway's and Goal Zero's arguments that we should use the information taken at verification to calculate a subsidy rate, we disagree. First … we are relying on an adverse inference in determining the benefit of these unreported programs, and not neutral facts available. By their own actions, Lightway and [China] precluded [the USDOC] from verifying this information when they withheld such information until after the deadline for the submission of new factual information has passed."[562]
Supercalendered Paper from Canada 2015	The USDOC countervailed, on the basis of AFA, information discovered during verifications of respondent-company Resolute and Nova Scotia.[563] "In its initial questionnaire response, Resolute responded to [the 'other assistance'] request by stating that it had 'examined its record diligently and is not aware of any other programs … that provided, directly or indirectly, any other forms of assistance to Resolute's production and export of SC paper.' However, the CVD questionnaire is clear that respondents are instructed to report 'any other forms of assistance to [the] company,' not only assistance that the respondent considers to have been provided to subject merchandise. Therefore, given Resolute's questionnaire response, and in light of the unreported information discovered at verification, [the USDOC] determines that the use of facts available … is warranted in determining the countervailability of these apparent subsidies that were discovered during verification. Moreover, because Resolute failed to respond to the best of its ability regarding our questions on other, non-reported subsidies provided by [Canada], including assistance discovered within Resolute's accounting system and apparent assistance discovered during verification of the [Government of Nova Scotia], we determine that an adverse inference is warranted with respect to these subsidies[.] … As a result, we are finding that, as AFA, these discovered forms of assistance provide a financial contribution and are specific … [and a] benefit is conferred".[564] "We disagree with Resolute as to why we did not take information regarding the amounts of the funds in these accounts. By its own actions, Resolute precluded [the USDOC] from fully investigating and verifying this information when it not only withheld the information until after the deadline for the submission of new factual information had passed, but never provided this information at all, leaving [the USDOC] to discover it during the verification process. The purpose of verification is 'to verify the accuracy of information previously submitted to the record by the respondent,' not to collect new information that had been previously requested but not reported. … Additionally, the record evidence does not demonstrate that the information collected at the verification constitutes the entirety of the accounting information regarding unreported government grants. … Instead, we must rely on the adverse inference that Resolute chose not to timely report this information and subject it to verification because doing so would have resulted in a less favorable result than allowing [the USDOC] to discover this information at verification."[565]
PET Resin from China 2016	Two companies, Xingyu and Dragon Group, presented previously unreported grants as minor corrections on the first day of verification. The USDOC rejected four of the six grants presented by Xingyu as minor corrections, and countervailed the grants as AFA. Similarly, the USDOC rejected one of the three grants presented by Dragon Group as

[561] Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 20. (emphasis added)
[562] Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 57.
[563] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 12-13 and 29-30.
[564] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 12-13. (emphasis added; fn omitted)
[565] Issues and Decision Memorandum, (Exhibit CAN-37), pp. 153-154.

Investigation	Application of facts available by the USDOC
	minor corrections, and countervailed it as AFA. In total, the USDOC countervailed five grants because "whether a program was used or not by a company is not 'minor'".[566] "[The USDOC's] initial questionnaire asked respondents to report 'other subsidies.' The questionnaire is clear in instructing respondents to report 'any other forms of assistance to [the] company.' Therefore, we find that necessary information is not available on the record, and [the companies] withheld information requested by [the USDOC]. … [W]e determine that the use of AFA is warranted in calculating [the companies'] benefits from these programs. Moreover, because [the companies] failed to the best of their ability to answer our questions on 'other subsidies,' … we find that [the companies] failed to act to the best of their abilities in providing requested, necessary information that was in their possession, and that the application of AFA is warranted … in determining benefit."[567] "[W]e find that by not divulging the receipt of this unreported assistance prior to verification in their initial questionnaire response and subsequent 'other subsidies' response, [the companies] precluded [the USDOC] from an adequate examination of the grants (*e.g.*, [the USDOC] was unable to issue a supplemental questionnaire to [China] concerning the extent to which these programs constitute a financial contribution or are specific …)."[568] "Consistent with *Supercalendered Paper Canada* and *Shrimp from PRC*, as AFA, we find each of the unreported grants meet the financial contribution and specificity criteria under these two provisions of the statute. Further, as AFA, we find that each of the three grant programs confers a benefit …".[569]
Stainless Pressure Pipe from India 2016	At verification, the USDOC discovered that Steamline, the respondent company, received a rebate for electricity duty paid, which had not been previously reported. The USDOC applied AFA to find a countervailable subsidy.[570] While the USDOC considered new information discovered at verification in assessing benefit, in its Final Calculation Memo it notes that this was an inadvertent error, inconsistent with its practice of refusing to consider new information at verification.[571] "As discussed below, we find the application of partial adverse facts available ('AFA') is warranted with respect to Steamline's and [India's (*sic*)] responses for their failure to provide information related to the electricity duty exemption provided by the [state-owned enterprise]."[572] "As AFA for the electricity duty rebate discovered at verification, [the USDOC] is finding that the program is specific … and provides a financial contribution … as revenue forgone."[573] "Although this program was not alleged, in our first supplemental questionnaire, we requested that both [India] and Steamline report 'any other forms of assistance' provided 'directly or indirectly' by [India] or State Government of Gujarat ('SGOG') or state-owned enterprises. Neither Steamline nor [India] reported any additional assistance. … [I]f we find evidence of a possible subsidy in the course of a proceeding, we will pursue it by gathering information to understand the nature of the program. … The information examined by [the USDOC] at verification showed the duty paid, as well as that Steamline received a certificate of exemption in December 2014, and that it received a rebate of the electricity duty paid, which company officials booked into Steamline's accounts during the POI. There is no response on the record from [India] regarding eligibility criteria. The Bombay Electricity Duty Act, 1958, states that an application is required and that the

[566] USDOC, Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from the People's Republic of China: Issues and Decision Memorandum for the Final Determination (4 March 2016) (PET Resin from China, Issues and Decision Memorandum (2016)), (Exhibit CAN-125), pp. 18-19.
[567] PET Resin from China, Issues and Decision Memorandum (2016), (Exhibit CAN-125), p. 19. (emphasis added; fns omitted)
[568] PET Resin from China, Issues and Decision Memorandum (2016), (Exhibit CAN-125), pp. 52-53.
[569] PET Resin from China, Issues and Decision Memorandum (2016), (Exhibit CAN-125), p. 53. (emphasis added)
[570] USDOC, Issues and Decision Memorandum for the Final Affirmative Determination in the Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India (22 September 2016) (Stainless Pressure Pipe from India, Issues and Decision Memorandum (2016)), (Exhibit CAN-152), p. 28.
[571] USDOC, Countervailing Duty Investigation of Welded Stainless Pressure Pipe from India: Final Calculation Memorandum for Steamline Industries Limited (22 September 2016) (Stainless Pressure Pipe from India, Final Calculations Memorandum (2016)), (Exhibit CAN-148), fn 3.
[572] Stainless Pressure Pipe from India, Issues and Decision Memorandum (2016), (Exhibit CAN-152), p. 6.
[573] Stainless Pressure Pipe from India, Issues and Decision Memorandum (2016), (Exhibit CAN-152), p. 8. (emphasis added)

Investigation	Application of facts available by the USDOC
	government may prescribe 'terms and conditions' to be eligible for this program, none of which has been explained or provided by [India]. Moreover, [India] did not identify any record evidence in its case brief in support of its argument that the program is 'automatically available to all'. Additionally, there is no evidence of an application on the record from Steamline, and no explanation of the procedure for how Steamline obtained the exemption. Thus, we find the program specific ... based upon an adverse inference pursuant to sections 776(a) and (b) of the Act. Further, based on an adverse inference ... we find that the rebate of electricity duties to Steamline from the [state-owned enterprise] constitutes a financial contribution ... and that the rebated duty confers a benefit ...".[574] "As discussed in the Issues and Decision Memorandum ... we have included the amount for this program which was recorded in Steamline's accounting system during the period of investigation."[575] "Through an inadvertent error, and inconsistent with [the USDOC's] practice of not collecting new information at verification, [the USDOC] obtained information about the amount rebated to Steamline under the program. Thus, [the USDOC] is in the specific position of having a verified benefit amount on the record and, accordingly, is using that amount in its calculations."[576]

7.314. Canada argues that in each post-2012 investigation or review listed above, the USDOC "discovered" information at verification that it believed should have been disclosed in response to the "other form of assistance" question, and then refused to accept additional information from the respondents in question when such information was offered. Instead, the USDOC relied on AFA to determine all of the necessary components of a subsidy. In *Stainless Pressure Pipe from India*, Canada points out that the USDOC was forced to depart from its own practice because it had accidentally collected information at verification.

7.315. The United States argues that Canada has failed to provide sufficient evidence to clearly establish the precise content of the alleged measure. Instead, Canada has merely identified a series of actions that could theoretically occur in any countervailing duty investigation. The wording of the questions and excerpts from determinations listed by Canada in the above two tables vary. The United States submits that Canada's use of a series of varying, vague, and imprecise terms to identify the so-called "Other Forms of Assistance-AFA measure" is insufficient to meet the precise content requirement previously outlined by the Appellate Body.[577] The United States maintains that in all the determinations Canada relies upon, the USDOC made unique findings and reached different results, reflecting the fact-specific nature of each of the USDOC's determinations.[578]

7.316. Upon careful examination of the arguments of the parties and evidence before us, the Panel is of the view that Canada has provided sufficient evidence to establish the "precise content" of the "Other Forms of Assistance-AFA measure". The variations pointed out by the United States in the wording of the "other forms of assistance" question, as well as the relevant excerpts of USDOC determinations, do not in our view detract from the fact that substance of the questions and the USDOC's conduct is the same. Variations in the wording of the questions appear to mainly be due to the circumstances of any given investigation (interested parties, dates etc.) while the object of the question remains in essence the same. Similarly, the substance of the USDOC's reactions remains the same: the USDOC applies AFA with respect to the concerned respondent when it discovers, upon verification, information that it deems should have been reported in response to the "other forms of assistance" question to find countervailable subsidies. We thus consider that Canada has established the precise content of the "Other Forms of Assistance-AFA measure", which consists in the USDOC asking the "other forms of assistance" question, and where the USDOC "discovers" information that it deems should have been provided

[574] Stainless Pressure Pipe from India, Issues and Decision Memorandum (2016), (Exhibit CAN-152), pp. 28-29. (fns omitted)
[575] Stainless Pressure Pipe from India, Final Calculations Memorandum (2016), (Exhibit CAN-148), p. 2.
[576] Stainless Pressure Pipe from India, Final Calculations Memorandum (2016), (Exhibit CAN-148), fn 3.
[577] United States' first written submission, paras. 349-351.
[578] United States' second written submission, para. 132.

in response to that question, applying AFA to determine that the "discovered" information amounts to countervailable subsidies.[579]

7.317. We note that, as pointed out by Canada[580], the USDOC's description of this measure at the NAFTA Chapter 19 proceeding appears to be in line with Canada's description of the precise content of the challenged measure:

> [The USDOC's] finding that the complainants' failure to report these subsidies earlier in the proceeding warranted the use of adverse inferences was reasonable ... as was [the USDOC's] resulting adverse inference that each discovered subsidy provided a financial contribution, conferred a benefit, and was specific − the elements of a countervailable subsidy[.][581]
>
> ...
>
> It is true, as [the USDOC] acknowledged, that [the USDOC's] practice has "varied" over time. ... However, [the USDOC] determined, in 2012, that the proper course of action when an unreported potential subsidy is discovered at verification is to rely on adverse inferences in making findings on that potential subsidy.[582]

7.6.1.3.1.2 The repeated application of the "Other Forms of Assistance-AFA measure" and the likelihood of its continuation

7.318. We next turn to consider whether Canada has established the repeated application of the challenged "Other Forms of Assistance-AFA measure", as well as whether Canada has established that the challenged conduct is likely to continue. As Canada's arguments in this respect rely to a great extent on the same evidence, we will address these factors together.

7.319. Canada argues that the application of the "Other Forms of Assistance-AFA measure" by the USDOC is evidenced by a number of cases since 2012, as well as through legislative changes and public statements of policy. Canada argues that the USDOC has made clear that its current and future response to what it perceives as an "unreported potential subsidy" being discovered at verification is to rely on AFA in making all findings on that potential subsidy.[583]

7.320. Canada submits the following statements by the USDOC as evidence of the repeated application of the measure, as well as the likelihood of its continuation[584]:

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[579] In this respect, we note that the panel in *US − Anti-Dumping Methodologies (China)* considered the description by China of a measure as follows: "[W]henever [the] USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically makes an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it". (Panel Report, *US − Anti-Dumping Methodologies (China)*, para. 7.422 (quoting China's opening statement at the second meeting of the panel, para. 63 (emphasis original)). The panel found that the 73 anti-dumping determinations on the record demonstrated the precise content of the so-called "AFA Norm" as described by China. According to the panel, these determinations show that "whenever the USDOC made a finding that an NME-wide entity failed to cooperate to the best of its ability, it adopted adverse inferences and, in determining the duty rate for the NME-wide entity, selected facts from the record that were adverse to the interests of such entity, and the exporters included within it." (Panel Report, *US − Anti-Dumping Methodologies (China)*, para. 7.454).

[580] Canada's first written submission, para. 415.

[581] USDOC's NAFTA Brief, (Exhibit CAN-76), pp. 147-148.

[582] USDOC's NAFTA Brief, (Exhibit CAN-76), p. 149.

[583] Canada refers to USDOC's NAFTA Brief, (Exhibit CAN-76), p. 149. (Canada's first written submission, para. 393).

[584] We note that Canada also argues that this table demonstrates that the "Other Forms of Assistance-AFA measure" is of prospective and general application, as part of the test of demonstrating that a measure is a rule or norm of prospective and general application. (Canada's first written submission, para. 412).

Table 3: USDOC's statements regarding AFA

Investigation	USDOC's statements of practice regarding the "Other Forms of Assistance-AFA measure"
Shrimp from China 2013	"We acknowledge that [the USDOC's] practice regarding grant programs discovered at verification has varied in past cases. However, we find that the facts of this particular case merit the application of AFA. For example, in *Washers from Korea*, the respondent reported a previously unreported grant at verification. However, in doing so, the respondent demonstrated that the grant in question was not tied to subject merchandise, and thus was not relevant to the investigation at hand. Thus, [the USDOC] concluded that the grant in question was not tied to subject merchandise and was not countervailable. In the instant investigation, the Guolian Companies provided no demonstration that the apparent subsidies did not benefit the subject merchandise that would justify their failure to report."[585]
Solar Cells from China 2014	"We acknowledge that [the USDOC's] practice regarding assistance discovered during verification has varied in past cases. However, we find that the facts of this particular case merit the application of AFA. For example, in *Washers from Korea*, the respondent demonstrated that the grant in question was not tied to subject merchandise, and thus was not relevant to the investigation at hand; thus, [the USDOC] concluded that the grant in question was not tied to subject merchandise and was not countervailable. In the instant investigation, we have no information to demonstrate that the apparent assistance discovered at verification did not benefit the subject merchandise that would justify Trina Solar's failure to report."[586] "[F]or the assistance discovered at Trina Solar's verification, and **consistent with our practice** [citing *Shrimp from the PRC*], we will apply **our CVD AFA methodology** to determine the CVD rate(s) to apply for the unreported assistance discovered at Trina Solar's verification."[587]
Solar Cells from China 2015	"While [the USDOC's] practice regarding assistance discovered during verification has varied in past cases, we find that the facts of this particular proceeding merit the application of AFA. For example, in *Large Residential Washers from Korea*, the respondent demonstrated that the grant in question was not tied to subject merchandise, and thus, was not relevant to the investigation at hand. Therefore, [the USDOC] concluded that the grant in question was not tied to subject merchandise and was not countervailable. In the instant proceeding, we have no information to demonstrate that the apparent assistance discovered at Lightway's verification did not benefit subject merchandise or would otherwise not be countervailable. When these grants were discovered at verification, Lightway made no attempt to explain why they might not be countervailable."[588] "**[C]onsistent with our practice** [citing *Solar Panels from China*], we will apply **our CVD AFA methodology** to determine the CVD rate to apply for the unreported assistance discovered during Lightway's verification."[589] "[The USDOC] has countervailed subsidies discovered at verification in prior proceedings without a prior allegation. [The USDOC's] questionnaire clearly states that respondents must identify all government assistance."[590]
Supercalendered Paper from Canada 2015	"We acknowledge that [the USDOC's] practice regarding assistance discovered during verification has varied in past cases. However, we find that the facts of this particular case merit the application of AFA. For example, in *Washers from Korea*, the respondent demonstrated that the grant in question was not tied to subject merchandise, and was not relevant to the investigation at hand; thus, [the USDOC] concluded that the grant in question was not tied to subject merchandise and was not countervailable. In the instant investigation, we have no information on the record to demonstrate that the apparent assistance discovered at verification did not benefit the subject merchandise that would justify Resolute's failure to report."[591]

[585] Shrimp from China, Issues and Decision Memorandum (2013), (Exhibit CAN-118), p. 78. (fn omitted)
[586] Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 88. (fn omitted)
[587] Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 88. (emphasis added; fn omitted)
[588] Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 58. (fn omitted)
[589] Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 59. (emphasis added; fn omitted)
[590] Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 57. (fn omitted)
[591] Issues and Decision Memorandum, (Exhibit CAN-37), p. 155. (fn omitted)

Investigation	USDOC's statements of practice regarding the "Other Forms of Assistance-AFA measure"
	"[F]or the assistance discovered at Resolute's verification, and **consistent with our practice** [citing *Shrimp from PRC*], we have applied **our CVD AFA methodology** to identify the CVD rate(s) to apply for the unreported assistance discovered at Resolute's verification".[592] "[The USDOC] did not 'verify' this information. In the course of its long-standing verification procedures, [the USDOC] examined only certain accounts in order to determine non-use of programs and conduct its standard completeness methodology."[593]
PET Resin from China 2016	"Consistent with *Supercalendered Paper Canada* and *Shrimp from PRC*, as AFA, we find each of the unreported grants meet the financial contribution and specificity criteria under these two provisions of the statute. Further, as AFA, we find that each of the three grant programs confers a benefit".[594]
Stainless Pressure Pipe from India 2016	"Through an inadvertent error, and inconsistent with **[the USDOC's] practice of not collecting new information at verification**, [the USDOC] obtained information about the amount rebated to Steamline under the program."[595]

7.321. In addition to the above determinations, Canada, in its oral statement at the first substantive meeting, referred to two determinations subsequent to the ones listed as evidence in its first written submission[596], where, according to Canada, the USDOC applied the same practice.[597] The first determination is *Truck and Bus Tires from China 2016* where the USDOC appears to have used a similar language to that included in the above table for *PET Resin from China 2016*. In *Stainless Steel Sheet and Strip from China 2017*, the USDOC has further changed its language although, again, it treated discovered programmes in the same manner. The relevant language is as follows:

Table 4: USDOC's statements regarding AFA

Investigation	USDOC's statements of practice regarding the "Other Forms of Assistance-AFA measure"
Truck and Bus Tires from China 2016	"We find that Guizhou Tyre failed to provide complete information in response to our questions about other forms of assistance provided by the [Government of China]. … Therefore, consistent with prior determinations,[citing *Certain Polyethylene Terephthalate Resin from China 2016* and *SC Paper from Canada*] we find that the Guizhou Tyre has not cooperated to the best of its ability. … Pursuant to the [USDOC's] authority … we determine the application of AFA is warranted. We are finding that, as AFA, these discovered forms of assistance provide a financial contribution and are specific within the meaning of sections 771(5)(D) and 771(5A) of the Act, respectively. A benefit is conferred pursuant to section 771(5)(E) of the Act."[598]
Stainless Steel Sheet and Strip from China 2017	"On the first day of verification, the Taigang Companies presented previously unreported grants[.] … The [USDOC] rejected information concerning the specific amounts received by the Taigang Companies as untimely new information. … The [USDOC] also discovered several unreported grants[.] … [T]he [USDOC's] initial questionnaire asked respondents to report 'other subsidies.' The questionnaire is clear in instructing respondents to report 'any other forms of assistance to [the] company.' Therefore … [i]n accordance with sections 776(a)(2)(A) and 776(a)(2)(D) of the Act, we determine that the use of facts available is warranted in calculating Taigang's benefits from these programs."[599] "Consistent with U.S. law, the [USDOC] is not precluded from inquiring about other assistance to make determinations. … The [USDOC] may determine to use AFA in deciding whether the elements of a countervailable subsidy are met for both categories of subsidies (those alleged in a petition and those 'discovered' during an investigation) if the [USDOC]

[592] Issues and Decision Memorandum, (Exhibit CAN-37), p. 155. (emphasis added; fn omitted)
[593] Issues and Decision Memorandum, (Exhibit CAN-37), p. 153.
[594] PET Resin from China, Issues and Decision Memorandum (2016), (Exhibit CAN-125), p. 53.
[595] Stainless Pressure Pipe from India, Final Calculations Memorandum (2016), (Exhibit CAN-148), fn 3. (emphasis added)
[596] Truck and Bus Tires from China, Issues and Decision Memorandum (2016), (Exhibit CAN-163); Stainless Steel Sheet and Strip from China, Issues and Decision Memorandum (2017), (Exhibit CAN-164).
[597] Canada's opening statement at the first meeting of the Panel, para. 222.
[598] Truck and Bus Tires from China, Issues and Decision Memorandum (2016), (Exhibit CAN-163), pp. 15-16. (fn omitted)
[599] Stainless Steel Sheet and Strip from China, Issues and Decision Memorandum (2017), (Exhibit CAN-164), p. 9. (fns omitted)

Investigation	USDOC's statements of practice regarding the "Other Forms of Assistance-AFA measure"
	determines that the respondents are being uncooperative. … [Taigan's] failure to report the discovered assistance to the [USDOC] in a timely manner reflects a deliberate and unilateral decision that the discovered subsidies were not relevant to the [USDOC's] investigation. A deliberate decision not to cooperate warrants the application of adverse facts available."[600]

7.322. Canada considers the USDOC's determination in *Stainless Pressure Pipe from India* to be particularly notable, as the determination indicated that the practice of applying the "Other Forms of Assistance-AFA measure" has evolved to the point where the USDOC perceives itself as committing an "error" if it collects information on the alleged subsidies "discovered" at verification.[601]

7.323. The United States contests Canada's reading of the above determinations. The United States argues that, unlike in *US – Zeroing (EC)*, there are instances wherein the USDOC has not applied facts available to countervail information discovered during verification. The United States maintains that in all nine of the determinations Canada relies upon, the USDOC made unique findings and reached different results; there is no single approach taken by the USDOC.[602]

7.324. In spite of certain slight variations in the language used in the determinations, an examination of the above Issues and Decision Memoranda shows that the USDOC has acted substantially in the same manner when treating information discovered at verification that it considers should have been provided in response to the "other forms of assistance" question. We thus consider that Canada has shown that the USDOC has applied the "Other Forms of Assistance-AFA measure" in nine determinations since 2012, and thus adduced sufficient evidence of the repeated application of the challenged measure.

7.325. In reaching the above conclusion, we have carefully considered each instance where the United States alleges the USDOC did not apply the "Other Forms of Assistance-AFA measure". However, we have been unable to identify any instance where the "Other Forms of Assistance-AFA measure" was not applied, except in the case of "inadvertent error" on the part of the USDOC.[603]

7.326. In this respect, we first acknowledge the United States' argument that Canada's position fails to highlight *Washers from Korea 2012*, an example of a determination issued *after Solar Cells from China 2012* where the USDOC did not countervail certain grants discovered at verification because they were deemed to not be tied to subject merchandise.[604] This determination is further cited by the USDOC in the SC Paper Issues and Decision Memorandum.[605] Canada explains that *Washers from Korea 2012* was an investigation concurrent to *Solar Cells from China 2012*, with final determinations issued within two months of each other, where the USDOC's verification teams handled a similar situation in different ways, a fact Canada has never denied. Canada's claim relates instead to the USDOC's post-2012 practice.[606] As such, we do not consider that the United States has provided evidence of any instance *subsequent to 2012* where the USDOC did not apply AFA to a respondent on the basis of the "other forms of assistance" question. Furthermore, we note that while the USDOC refers to *Washers from Korea 2012* in the SC Paper determination in reference to its varied practice in the past, it goes on to conclude the following: "for the assistance discovered at Resolute's verification, and *consistent with our practice* [citing *Shrimp from PRC*], we have applied our CVD AFA methodology to identify the CVD rate(s) to apply for the unreported assistance discovered at Resolute's verification".[607] It seems to us that the reference to *Washers from Korea 2012* pertains to *past* practice, as opposed to the USDOC's practice at the

[600] Stainless Steel Sheet and Strip from China, Issues and Decision Memorandum (2017), (Exhibit CAN-164), pp. 20-21. (fns omitted)
[601] Canada's first written submission, para. 414.
[602] United States' second written submission, para. 132.
[603] Stainless Pressure Pipe from India, Final Calculations Memorandum (2016), (Exhibit CAN-148), fn 3.
[604] USDOC, Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Large Residential Washers from the Republic of Korea (18 December 2012), (Exhibit USA-19), p. 22.
[605] Issues and Decision Memorandum, (Exhibit CAN-37), p. 155.
[606] Canada's opening statement at the second meeting of the Panel, paras. 15-17.
[607] Issues and Decision Memorandum, (Exhibit CAN-37), p. 155. (emphasis added; fn omitted)

time of the SC Paper investigation. As such, we do not consider *Washers from Korea 2012* to undermine Canada's demonstration of the repeated application of the "Other Forms of Assistance-AFA measure".

7.327. Second, we acknowledge the United States' argument that the "Other Forms of Assistance-AFA measure" was not applied in two of the cases put forth by Canada − namely *Shrimp from China 2013* and *PET Resin from China 2016*[608] − where the USDOC accepted new information concerning grants that were presented by the respondent companies at the outset of verifications.[609] Nonetheless, we note that a situation where a respondent presents information to the USDOC at the outset of a verification is factually different from one where the USDOC itself discovers previously unreported information. The conduct challenged by Canada pertains specifically to situations where previously unreported information is discovered by the USDOC. Furthermore, in both instances, the USDOC went on to discover information during the verification and applied AFA because the companies did not report the programmes in response to the "other forms of assistance" question.

7.328. Further to the above, we consider that the evidence adduced by Canada sufficiently establishes that the challenged conduct is likely to continue. The consistent manner in which the USDOC refers to the measure, or to precedents where the measure was applied, in each of the above determinations suggests to us that the challenged conduct is likely to continue. The USDOC itself refers to the "Other Forms of Assistance-AFA measure" as described by Canada as its "practice" in the above-referenced determinations. For instance, in *Solar Cells from China 2014*, the USDOC indicates that "for the assistance discovered at Trina Solar's verification, and consistent with our practice [citing *Shrimp from the PRC*], we will apply our CVD AFA methodology to determine the CVD rate(s) to apply for the unreported assistance discovered at Trina Solar's verification."[610] In *Solar Cells from China 2015*, the USDOC indicates that "consistent with our practice [citing *Solar Panels from China*], we will apply our CVD AFA methodology to determine the CVD rate to apply for the unreported assistance discovered during Lightway's verification."[611] Similar language is used in the other determinations with either specific reference to the word "practice" or to precedents where the "Other Forms of Assistance-AFA measure" was applied. The fact that the USDOC itself has characterized a departure from this conduct as "inadvertent error" in *Stainless Pressure Pipe from India* strongly supports this conclusion.[612]

7.329. We observe that the disagreement between the parties in this respect focuses to a great extent on whether the challenged conduct by the USDOC amounts to a "practice" by the USDOC under US law.[613] However, we consider that whether the "Other Forms of Assistance-AFA

[608] Shrimp from China, Issues and Decision Memorandum (2013), (Exhibit CAN-118); PET Resin from China, Issues and Decision Memorandum (2016), (Exhibit CAN-125). We note that the United States refers to the latter investigation as PET Resin from China *2015*. (See, for example, United States' first written submission, para. 357). While the investigation was initiated in 2015, the Issues and Decision Memorandum was published on 4 March 2016, and has been submitted by Canada as Exhibit CAN-125, to which the United States also refers in its submissions.

[609] United States' first written submission, para. 357; response to Panel question No. 78, para. 179.

[610] Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 88. (fn omitted)

[611] Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 58. (fn omitted)

[612] Stainless Pressure Pipe from India, Final Calculations Memorandum (2016), (Exhibit CAN-148), fn 3.

[613] Canada relies to a great extent on the report of Mr. Grant Aldonas, former Under Secretary of Commerce for International Trade, which concludes the following: "[T]he [USDOC's] practice of applying AFA to programs 'discovered' during verification that were not reported by otherwise cooperating respondents in response to the [USDOC's] 'other assistance' question clearly constitutes 'agency practice' under U.S. law and 'agency action' within the meaning of the [Administrative Procedure Act]." Mr. Aldonas explains that this practice has "the force of law" and that parties "have ample reason to rely on its continuing application". He explains that the USDOC must continue to follow this practice or risk having its actions overturned on judicial review as being "arbitrary" or "capricious". In this view, this practice serves to limit the USDOC's discretion and obliges it to follow the precedent that it sets. (G. Aldonas, "Other Forms of Assistance-Adverse Facts Available", Expert Report, (Exhibit CAN-209), pp. 2, 9, and 11-12; Canada's second written submission, paras. 171-172). The United States rejects Canada's position that the "Other Forms of Assistance-AFA measure" constitutes a practice by the USDOC. The United States argues that the manner in which an investigating authority chooses in certain instances to characterize a particular action for purposes of its municipal law is not dispositive of whether that same action constitutes a rule or norm of general and prospective application that would be subject to an "as such" challenge before the DSB. If the USDOC had a

measure" constitutes a legally-binding practice or policy under US law is not determinative as to the likelihood of the continuation of the measure. As with the standard to determine the prospective application of a "rule or norm", we do not consider that Canada is required to prove the "certainty" of the future application of the "Other Forms of Assistance-AFA measure", but rather the likelihood that it will continue to apply. As such, we concur with the Appellate Body that "A complainant would not be able to show 'certainty' of future application, because any measure, including rules or norms, written or unwritten, may be modified or withdrawn in the future. The mere possibility that a rule or norm may be modified or withdrawn, however, does not remove the prospective nature of that measure."[614] Therefore, without pronouncing ourselves on whether or not the challenged conduct amounts to a "practice" under US law as argued by Canada, we consider that Canada has adduced sufficient evidence to establish the likelihood of continuation of that conduct.

7.330. Finally, we acknowledge Canada's reliance on the Trade Preferences Extension Act (TPEA), a legal instrument signed on 29 June 2015 as further evidence of the likelihood of continuation of the "Other Forms of Assistance-AFA measure". According to Canada, this instrument was adopted to facilitate the application of the "Other Forms of Assistance-AFA measure" and to make it more punitive. Canada argues that the TPEA has consistently been relied upon by the USDOC to support its refusal to accept information from respondents after it "discovers" information at verification.[615] Canada provides examples of CVD investigations that refer to the TPEA.[616] The United States argues that the TPEA does not mandate any particular outcome, and thus even if a statute were somehow relevant to establishing the existence of an unwritten measure, this statute provides no support for Canada's position.[617] The United States further argues that, as acknowledged by Canada itself[618], the TPEA provides flexibility to the USDOC, was recently enacted, and has only been referenced in a few administrative determinations.[619]

7.331. We do not consider that Canada has established that the TPEA allows the USDOC free hand with the use of AFA in cases of non-cooperation. We agree with the United States to the extent that the statute does not appear to mandate any particular outcome.[620] Crucially, the statute does not appear to link the use of AFA to the "other forms of assistance" question, which we consider to be an integral element in the measure challenged by Canada. The Panel is thus not convinced that this has an impact on the likelihood of the continuation of the "Other Forms of Assistance-AFA measure".

7.6.1.3.2 Conclusion

7.332. Having carefully considered the arguments of both parties and the evidence before us, the Panel is of the view that Canada has adduced sufficient evidence to establish that the challenged "Other Forms of Assistance-AFA measure" constitutes "ongoing conduct". As such, we do not consider it necessary to address Canada's argument that the challenged measure amounts to a "rule or norm of general and prospective application".[621]

7.333. In line with our findings in Section 7.4.1.4 above, we find that the unwritten measure challenged by Canada is inconsistent with Article 12.7 of the SCM Agreement. While a broad question such as "other forms of assistance" might pertain to necessary information regarding

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"practice" under US municipal law, as Canada claims, then all investigations should have reached the same result. Instead, in some cases the USDOC accepted new information at verification, while in others it declined to do so. (United States' response to Panel question No. 79, paras. 181-185).

[614] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

[615] Canada's first written submission, para. 419.

[616] See table 4 submitted by Canada in its first written submission, para. 419.

[617] Determinations on basis of facts available, United States Code, Title 19, Section 1677e, as amended by Section 502 of the Trade Preferences Extension Act of 2015, (Exhibit USA-10).

[618] Canada' first written submission, para. 419.

[619] United States' first written submission, para. 361.

[620] United States' first written submission, para. 361.

[621] We note that, explaining its approach, Canada has laid out "two paths … for the Panel on how to evidence this measure. The Panel could see the conduct that is currently going on, and rely on statements made by [the USDOC] as evidence that it is likely to continue. The Panel could look at the evidence Canada has produced and determine that it is reflective of a deliberate policy that has general and prospective application." (Canada's opening statement at the first meeting of the Panel, para. 210).

additional subsidization of the product under investigation, it may also pertain to a much broader range of "assistance". As we have said, in these circumstances, an investigating authority may not simply *infer* that a respondent's failure to respond fully to the "other forms of assistance" question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation.[622] In light of the due process rights enjoyed by interested parties throughout an investigation[623], it is the right of respondents that the investigating authority may only resort to the facts available mechanism after properly determining that information necessary to complete a determination on additional subsidization of the product under investigation had been withheld. This is all the more applicable where an investigating authority elects to add subsidy programmes to an ongoing investigation, rather than investigating only the subsidies identified in its notice of initiation.

7.334. Finally, we note that in addition to Article 12.7, Canada challenges the "Other Forms of Assistance-AFA measure" under Articles 10, 11.1, 11.2, 11.3, and 11.6 of the SCM Agreement because the USDOC failed to review the adequacy of the evidence regarding financial contribution, benefit and specificity[624], as well as Articles 12.1 and 12.8 of the SCM Agreement[625] because the USDOC failed to offer respondents the procedural safeguards in the SCM Agreement, including opportunities to present evidence, prior to applying AFA to determine the elements and amount of a subsidy.[626] We understand that Canada's main concern in bringing these additional claims is to ensure that respondents enjoy certain "procedural safeguards" in respect of subsidy programmes discovered during the course of an investigation.[627] As with our findings in Section 7.4.1.4 above, we consider that our interpretation and application of the facts available mechanism in the present case already reflects the type of procedural safeguards envisaged by Canada, and accordingly see no need to separately consider Canada's claims under these additional provisions.[628]

8 CONCLUSIONS AND RECOMMENDATION

8.1. On the claims concerning the USDOC's CVD determination with respect to PHP, for the reasons set forth in this Report, the Panel concludes as follows:

a. The USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement, by making a finding of entrustment or direction with respect to the provision of electricity by NSPI.

b. The USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement, when it determined that the provision of electricity by NSPI to PHP, through the LRR, conferred a benefit.

c. The USDOC acted inconsistently with Article 12.8 of the SCM Agreement, by failing to disclose to interested parties the essential fact that, in the view of the USDOC, Section 52 of the Public Utilities Act entrusted or directed NSPI to provide electricity to all customers, including PHP.

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[622] In this respect, we note in particular the following statements by the USDOC in the investigations at issue: "In the instant investigation, the Guolian Companies provided no demonstration that the apparent subsidies did not benefit the subject merchandise …" (Shrimp from China, Issues and Decision Memorandum (2013), (Exhibit CAN-118), p. 78); "In the instant investigation, we have no information to demonstrate that the apparent assistance discovered at verification did not benefit the subject merchandise …" (Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 88); "In the instant proceeding, we have no information to demonstrate that the apparent assistance discovered at Lightway's verification did not benefit subject merchandise or would otherwise not be countervailable" (Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 58); and "In the instant investigation, we have no information on the record to demonstrate that the apparent assistance discovered at verification did not benefit the subject merchandise …" (Issues and Decision Memorandum, (Exhibit CAN-37), p. 155).

[623] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 136).

[624] Canada's first written submission, para. 423.

[625] In its submission, Canada adds references to Articles 11.1, 11.2, 11.3, and 11.6 of the SCM Agreement under this claim although there is no argumentation.

[626] Canada's first written submission, para. 435. See also Canada's panel request, pp. 3-5.

[627] See, for example, Canada's first written submission, paras. 422-436.

[628] See, also, fn 329 above.

d. The USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding that the hot idle funding conferred a benefit on PWCC/PHP.

e. The USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding that the second FIF amount conferred a benefit on PWCC/PHP.

f. The USDOC acted inconsistently with Article 11.3 of the SCM Agreement, by failing in its obligation to evaluate the accuracy and adequacy of the evidence in the application with respect to the existence of a benefit in the provision of stumpage and biomass by the Government of Nova Scotia to PHP.

8.2. On the claims concerning the USDOC's CVD determination with respect to Resolute, for the reasons set forth in this Report, the Panel concludes as follows:

a. The USDOC acted inconsistently with Article 12.7 of the SCM Agreement, by applying facts available to the discovered programmes.

b. The Panel declines to rule on Canada's claims under Articles 11.2, 11.3, 12.1, 12.2, 12.3, and 12.8 of the SCM Agreement, regarding the discovered programmes.

c. The USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding, on the basis of an alleged lack of relevant evidence, that the benefit conferred on Fibrek through the PPGTP was not extinguished when Fibrek was acquired by Resolute.

d. The Panel declines to rule on Canada's claims under Articles 10, 14, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the USDOC's finding that the benefit conferred on Fibrek through the PPGTP was not extinguished when Fibrek was acquired by Resolute.

e. The Panel declines to rule on Canada's claims under Articles 1.1(b), 10, 14, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the USDOC's finding that the benefit conferred on Fibrek was not extinguished when Fibrek was acquired by Resolute, with respect to the alleged assistance discovered during the verification of Fibrek.

f. The Panel concludes that the USDOC acted inconsistently with Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, by attributing to the production of SC Paper subsidies provided to Resolute and Fibrek under the PPGTP, FSPF, and NIER Programmes.

g. The Panel declines to rule on Canada's claims under Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the attribution to the production of SC Paper of the alleged assistance discovered during the verification of Fibrek.

8.3. On the claims concerning the CVD determinations with respect to Irving and Catalyst, for the reasons set forth in this Report, the Panel concludes as follows:

a. The USDOC acted inconsistently with Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994, by constructing the all-others rate relying on Resolute's rate, which was mainly calculated using AFA.

b. The Panel declines to rule on Canada's claim under Article 12.7 of the SCM Agreement, regarding the construction of the all-others rate relying on Resolute's rate.

c. The Panel rejects Canada's claims under Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the USDOC's failure to adjust the all-others rate in respect of subsidies that were not available to non-investigated exporters.

d. The USDOC acted inconsistently with Article 19.3 of the SCM Agreement, by including new subsidy allegations in the context of the expedited reviews undertaken for Catalyst and Irving.

e. The Panel declines to rule on Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement, regarding the USDOC's alleged initiation of an investigation into new subsidy allegations during the expedited reviews of Catalyst and Irving.

8.4. On the claims concerning the "Other Forms of Assistance-AFA measure", for the reasons set forth in this Report, the Panel concludes as follows:

a. Canada has adduced sufficient evidence to establish that the challenged "Other Forms of Assistance-AFA measure" constitutes "ongoing conduct" and, therefore, the Panel does not consider it necessary to address Canada's argument that the challenged measure amounts to a "rule or norm of general and prospective application".

b. The unwritten measure challenged by Canada is inconsistent with Article 12.7 of the SCM Agreement.

c. The Panel declines to rule on Canada's claims under Articles 10, 11.1, 11.2, 11.3, 11.6, 12.1, and 12.8 of the SCM Agreement, with respect to the "Other Forms of Assistance-AFA measure".

8.5. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with certain provisions of the SCM Agreement and the GATT 1994, they have nullified or impaired benefits accruing to Canada under those agreements.

8.6. Pursuant to Article 19.1 of the DSU, the Panel recommends that the United States bring its measures into conformity with its obligations under those Agreements.

WORLD TRADE ORGANIZATION

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REPORT OF THE PANEL

Addendum

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

LIST OF ANNEXES

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PANEL DOCUMENTS

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 8 December 2016

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

General

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

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

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

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

Submissions

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

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

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

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

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

Questions

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

Substantive meetings

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

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

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

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

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

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

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

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

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

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

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

Third parties

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

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

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

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

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

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

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

Descriptive section

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

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

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

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

Interim review

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

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

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

Service of documents

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

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

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

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

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

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

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

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

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

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Revised on 20 January 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE PANEL: OPEN MEETINGS

Adopted on 27 January 2017

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

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

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

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

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

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

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

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

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

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

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

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

2 SPECIFIC REQUESTS FOR REVIEW

2.1 Canada's specific requests for review

2.1.1 Paragraph 7.8

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

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

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

2.1.2 Paragraph 7.12

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

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

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

2.1.3 Paragraph 7.31

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

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

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

2.1.4 Paragraph 7.77

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

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

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

2.1.5 Paragraph 7.138

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

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

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

2.1.6 Paragraph 7.173

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

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

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

2.1.7 Paragraph 7.235

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

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

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

2.1.8 Paragraph 7.278

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

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

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

2.1.9 Paragraph 7.295

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

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

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

2.2 The United States' specific requests for review

2.2.1 Paragraph 7.22

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

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

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

2.2.2 Paragraph 7.30

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

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

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

2.2.3 Paragraph 7.32

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

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

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

2.2.4 Paragraph 7.33

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

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

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

2.2.5 Paragraph 7.58

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

2.41. Canada made no comment on this request.

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

2.2.6 Paragraph 7.100

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

2.44. Canada made no comment on this request.

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

2.2.7 Paragraph 7.200

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

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

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

2.2.8 Paragraph 7.224

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

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

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

2.2.9 Paragraphs 7.298-7.300

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

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

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

2.2.10 Paragraph 7.315

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

2.56. Canada made no comment on this request.

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

2.2.11 Paragraph 7.323

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

2.59. Canada made no comment on this request.

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

2.3 Typographical and other non-substantive errors

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

2.4 BCI

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

ANNEX B

ARGUMENTS OF CANADA

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

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

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

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

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

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

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

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

II. PORT HAWKESBURY PAPER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. RESOLUTE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CATALYST AND IRVING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. PORT HAWKESBURY PAPER

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Commerce Failed to Disclose the Essential Facts under Consideration

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

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

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

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

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

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

1. The LRR Did Not Confer a "Benefit"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

d) Commerce Erred in Constructing a Benchmark

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. RESOLUTE

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

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

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

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

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

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

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

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

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

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

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

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

4. Resolute Did Not "Fail to Disclose Subsidies"

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CATALYST AND IRVING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. OTHER FORMS OF ASSISTANCE – AFA MEASURE

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

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

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

B. Ongoing Conduct

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

1. The Measure is Attributable to the United States

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

2. The Precise Content of the Measure

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

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

3. The Repeated Application of the Conduct

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

4. The Likelihood That Such Conduct Will Continue

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

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

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

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

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

C. Rule or Norm of General and Prospective Application

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

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

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

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

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

D. Resolute as an Example of the Measure

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

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

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

E. The Practice of Canada Border Services Agency

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

ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX C-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Benchmark = variable costs + fixed costs + profit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

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

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS

Summary of U.S. Response to Question 5

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

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

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

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

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

ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

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

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

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

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

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

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

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

II. Government participation does not in itself indicate price distortion

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

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

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

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

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

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

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

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

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

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

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

IV. The presumption that the benefit is extinguished in privatizations

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

V. The Scope of a CVD investigation

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

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

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

VI. Article 11 and expedited reviews

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

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX D-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX D-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Third issue relating to New Subsidy Allegations

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

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

ANNEX D-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. PUNITIVE APPLICATION OF FACTS AVAILABLE UNDER ARTICLE 12.7

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

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

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

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

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

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

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

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

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

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

V. CANADA'S ARGUMENT ON UNWRITTEN MEASURES

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

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

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

ANNEX D-6

ANSWERS OF TURKEY TO QUESTIONS OF THE PANEL

QUESTIONS AND ANSWERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WORLD TRADE ORGANIZATION

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UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

REPORT OF THE PANEL

Addendum

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

LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF CANADA

ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

PANEL DOCUMENTS

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 8 December 2016

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

General

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

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

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

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

Submissions

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

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

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

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

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

Questions

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

Substantive meetings

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

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

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

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

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

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

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

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

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

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

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

Third parties

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

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

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

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

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

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

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

Descriptive section

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

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

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

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

Interim review

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

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

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

Service of documents

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

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

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

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

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

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

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

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

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

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Revised on 20 January 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX A-3

ADDITIONAL WORKING PROCEDURES FOR THE PANEL: OPEN MEETINGS

Adopted on 27 January 2017

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

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

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

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

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

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

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

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

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

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

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

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

2 SPECIFIC REQUESTS FOR REVIEW

2.1 Canada's specific requests for review

2.1.1 Paragraph 7.8

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

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

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

2.1.2 Paragraph 7.12

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

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

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

2.1.3 Paragraph 7.31

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

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

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

2.1.4 Paragraph 7.77

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

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

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

2.1.5 Paragraph 7.138

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

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

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

2.1.6 Paragraph 7.173

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

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

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

2.1.7 Paragraph 7.235

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

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

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

2.1.8 Paragraph 7.278

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

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

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

2.1.9 Paragraph 7.295

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

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

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

2.2 The United States' specific requests for review

2.2.1 Paragraph 7.22

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

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

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

2.2.2 Paragraph 7.30

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

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

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

2.2.3 Paragraph 7.32

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

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

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

2.2.4 Paragraph 7.33

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

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

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

2.2.5 Paragraph 7.58

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

2.41. Canada made no comment on this request.

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

2.2.6 Paragraph 7.100

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

2.44. Canada made no comment on this request.

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

2.2.7 Paragraph 7.200

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

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

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

2.2.8 Paragraph 7.224

2.49. The United States requests that the Panel modify paragraph 7.224, in order to reflect the United States' interpretive arguments and to recognize the apparent agreement between the United States and Canada on the appropriate analysis.

2.50. Canada argues that the additional sentences suggested by the United States do not correctly reflect the United States' arguments and requests the Panel to reject the United States' request or, in the alternative, to make clear that there is a difference in the parties' views.

2.51. We have decided to accommodate the request by the United States after reviewing the relevant arguments. However, in light of Canada's comment, we have not included any suggestion that there is agreement between the parties on the appropriate analysis.

2.2.9 Paragraphs 7.298-7.300

2.52. The United States requests that the Panel modify paragraphs 7.298-7.300, in order to reflect the United States' arguments that Canada's claims are inconsistent with the actions of its own investigating authority.

2.53. Canada argues that the request should be rejected, as Canada's practice and actions are not before this Panel. Canada requests, however, that if the Panel chooses to include a reference to that argument, it also adds that Canada produced evidence demonstrating that the United States had mischaracterized Canada's practice in such circumstances.

2.54. We have decided to reject the request by the United States because Canada's actions and practices are irrelevant to our analysis in this dispute.

2.2.10 Paragraph 7.315

2.55. The United States suggests that the Panel reproduce paragraphs 133-141 of its second written submission in their entirety, which provides case-by-case responses to Canada's claims, in order to accurately reflect the entirety of the United States' arguments concerning Canada's ongoing conduct challenge. Additionally, the United States requests the Panel to include reference to the relevant paragraphs in footnote 565 (578 of the Final Report).

2.56. Canada made no comment on this request.

2.57. We have decided to reject the request by the United States because reproducing its arguments at such level of detail is not necessary for our analysis. Furthermore, the tables that have been included in this section reproduce the language used by the USDOC in the determinations identified by Canada.

2.2.11 Paragraph 7.323

2.58. The United States suggests that the Panel reproduce paragraphs 133-141 of its second written submission in their entirety, which provides case-by-case responses to Canada's claims, in order to accurately reflect the entirety of the United States' arguments concerning Canada's ongoing conduct challenge. Additionally, the United States requests the Panel to include reference to the relevant paragraphs in footnote 589 (602 of the Final Report).

2.59. Canada made no comment on this request.

2.60. We have decided to reject the request by the United States because reproducing its arguments at such level of detail is not necessary for our analysis. Furthermore, the tables that have been included in this section reproduce the language used by the USDOC in the determinations identified by Canada.

2.3 Typographical and other non-substantive errors

2.61. The Panel has corrected typographical and non-substantive errors in paragraphs 7.33, 7.63, 7.131, 7.170, 7.186, 7.227, 7.257, and 7.293 and footnotes 104 (111 of the Final Report), 106 (113 of the Final Report), 225 (235 of the Final Report), and 319 (329 of the Final Report).

2.4 BCI

The Panel has made adjustments concerning the designation of BCI in paragraphs 7.221 and 7.236, as indicated by Canada.

ANNEX B

ARGUMENTS OF CANADA

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. This dispute concerns the U.S. Department of Commerce's (Commerce) final countervailing duty determination and subsequent expedited reviews against supercalendered paper (SC Paper) from Canada. It also concerns the Commerce's "Other Forms of Assistance–AFA" measure through which it applies Adverse Facts Available (AFA) to information discovered at verification that had not been disclosed in response to an overly broad question concerning "other forms of assistance".

2. The Coalition for Fair Paper Imports (Petitioner) alleged and Commerce subsequently initiated an investigation into the provision of alleged subsidies to SC Paper from Canada. Commerce identified four Canadian SC Paper producers: Port Hawkesbury Paper LP (PHP); Resolute FP Canada Inc. (Resolute); Catalyst Paper Corporation (Catalyst); and Irving Paper Ltd. (Irving). It then selected PHP and Resolute as company-specific respondents and refused Catalyst's and Irving's requests to be examined as voluntary respondents.

3. Commerce found that PHP received several countervailable subsidies, including: (1) the Government of Nova Scotia's (Nova Scotia) alleged direction of Nova Scotia Power Incorporated (NSPI) to provide electricity for less than adequate remuneration; (2) funds provided by Nova Scotia to NewPage Port Hawkesbury Corporation (NewPage PH), to maintain the mill in hot idle status pending its sale; and (3) Forestry Infrastructure Fund (FIF) contributions provided by Nova Scotia and held in trust by NewPage PH to pay third party contractors to conduct certain forestry activities for the province.

4. Commerce also found that Resolute received certain countervailable subsidies, including: (1) subsidies tied to the production of other products in Resolute's mills in Ontario that did not produce SC Paper during the period of investigation (POI); and (2) alleged subsidies discovered at the verification of Fibrek General Partnership (Fibrek), one of Resolute's affiliates. It also claimed that Resolute had failed to report certain assistance to Fibrek and applied AFA to conclude that this discovered information constituted a subsidy so that it could inflate its countervailing duty rate.

5. In the final determination, Commerce found a countervailing duty rate of 20.19 percent for PHP and a rate of 17.87 percent for Resolute. Commerce also calculated a weighted-average "all others" rate of 18.85 percent.

6. At the request of Catalyst and Irving, Commerce commenced an expedited review of these companies. In the context of this expedited review, it also initiated on several new subsidy allegations made by the Petitioner, which impermissibly expanded the scope of this review.

7. Commerce's approach to determining that PHP and Resolute received subsidies, and its ultimate finding to that effect, are inconsistent with the SCM Agreement. Moreover, Commerce's conduct violated the SCM Agreement through its application of an "all others" rate to Catalyst and Irving, and its improper initiation investigations into new subsidy allegations in the context of an expedited review. Finally, Commerce's "Other Forms of Assistance–AFA" measure, is also "ongoing conduct" or a "rule or norm" that is inconsistent with the SCM Agreement.

II. PORT HAWKESBURY PAPER

A. Commerce Erred in Finding that Nova Scotia Directed NSPI to Provide Electricity to PHP

8. Commerce erred when it found that Nova Scotia directed NSPI to provide electricity to PHP for less than adequate remuneration in accordance with Article 1.1(a)(1)(iv) of the SCM Agreement. It provided no analysis to support its finding of financial contribution. In particular, Commerce interpreted section 52 of the Nova Scotia *Public Utilities Act* to direct NSPI

to provide electricity to any customer in Nova Scotia, including to PHP. In doing so, it also ignored that entrustment or direction cannot be inadvertent or a mere by-product of governmental regulation.

9. Section 52 reflects NSPI's duty to serve—a high-level regulatory principle that is similar to general service obligations in other jurisdictions throughout North America. However, pursuant to the common law, while section 52 reflects the principle that NSPI and other public utilities are required to provide electrical service throughout their service area, it does not require NSPI to provide electricity in any circumstances, at any cost.

10. NSPI and Pacific West Commercial Corporation (PWCC) privately negotiated the specific Load Retention Rate (LRR) under which PWCC would pay for electricity, subject to a number of specific conditions. In *EC – Countervailing Measures on DRAM Chips,* the panel noted that when assessing whether a financial contribution provides a benefit or is specific for the purpose of establishing a subsidy, an investigating authority must refer to the specifically identified financial contribution. Despite this Commerce assessed whether the LRR itself – not the general service obligation – was specific and provided a benefit to PHP. It never establishes a causal link between the alleged direction to provide electricity through the duty to serve and the LRR.

11. In fact, the duty to serve does not direct NSPI to provide PHP with electricity through an LRR. Rather, the provisions of *Public Utilities Act* set out how NSPI establishes tariffs and rates for the provision of electricity to customers. The Load Retention Tariff is one such tariff. However, the Load Retention Tariff does not mandate that NSPI provide an LRR: it only requires NSPI to negotiate with its customer. These negotiations can fail. Where negotiations succeed, the specific rate is established by NSPI and the customer. The NSUARB may adjudicate NSPI's failure to provide an LRR at the request of one of the parties but it is not obligated to side with the customer.

12. NSPI chose to engage in LRR negotiations with PHP for its own business reasons. PHP was its largest customer, accounting for approximately 10 percent of its load. If the mill had shut down, NSPI would have lost a significant contribution to its fixed costs. NSPI's customers would bear this loss through dramatically increased rates. As such, NSPI privately negotiated an LRR with PHP. The terms of the LRR were such that PHP would receive a lower rate, and NSPI would retain its largest customer, and obtain benefits, such as the ability to interrupt PHP's service on short notice, advanced payments for electricity, a minimum contribution to fixed costs, and the ability to operate the mill during off-peak hours. The NSUARB approved the requested LRR on the basis that it would recover all incremental costs and would make a significant contribution to fixed costs.

13. Finally, Commerce acted inconsistently with Article 12.8 of the SCM Agreement when it failed to disclose essential facts under consideration prior to finding that Nova Scotia had directed NSPI to provide electricity to PHP through the duty to serve. In fact, the duty to serve was not raised by any of the Canadian parties or the Petitioner during the course of the investigation. Rather, Commerce made this finding in Final Determination on the basis of a passing reference to this principle, in a single paragraph, of a discussion paper. This discussion paper had been filed amongst 36 other documents, which were 1,148 pages in length, by Commerce. However, Commerce refused to explain the reason for this filing even after Canada and PHP requested such an explanation.

B. Commerce Erred in Finding that PHP Received a "Benefit"

1. Commerce Erred by Failing to Find that the LRR Represented a Market Price

14. Commerce also acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement when it improperly determined that the provision of electricity through the LRR conferred a benefit to PHP.

15. Commerce first failed to recognize that the LRR itself represented a market price and that, as such, NSPI's provision of electricity to PHP under the LRR was not for less than adequate remuneration. In such circumstances, there is no need to find a market-based benchmark to confirm that a market transaction is made for adequate remuneration. A benefit may only be

conferred where a recipient receives the financial contribution on more favourable terms than those available to the recipient in the market.

16. The LRR was the result of arm's-length negotiations between two private companies pursuing their own interests. NSPI obtained a significant contribution to its fixed costs through the LRR. It also obtained a customer that brought greater stability to the whole system through both its load and flexibility. The value that these flexibilities had for NSPI and Nova Scotia electricity ratepayers is reflected, in part, through the fact that, NSPI was able to recover certain deferred costs without further rate increases by November 2014. The NSUARB, an independent, quasi-judicial tribunal, approved the LRR applicable to PHP as being just and reasonable. The LRR was a negotiated price and a market outcome, which reflected the prevailing market conditions in Nova Scotia.

17. Commerce stated that whether the terms are sufficiently affected by government action so as to make the provision actionable is a factual element relevant to the measurement of benefit, not financial contribution. Yet, Commerce did not find that actions by Nova Scotia affected the establishment of the price agreed to by NSPI and PHP.

18. In *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Appellate Body noted that in understanding the relevant market in a case involving electricity there are a number of demand-side factors that need to be taken into account including: how rates are set for large customers; the size of customers; and the fact that different customers may be treated differently. By treating PHP, by far its largest customer, as indistinguishable from each of NSPI's other customers, Commerce failed to take these central factors into consideration.

2. Commerce Erred in Finding that Nova Scotia Electricity Prices Were Distorted

19. Commerce also improperly found the Nova Scotia's electricity market was "distorted" by applying a *per se* rule and not making a case specific determination. This erroneous finding was based solely on the fact that NSPI was the dominant supplier of electricity in that market.

20. First, privately-owned NSPI is not "government" and there is no "government" distortion in the Nova Scotia electricity market that could lead to the prices negotiated by NSPI being rejected.

21. Second, assuming that Commerce properly found that the "government" was the dominant supplier in Nova Scotia, Commerce improperly found distortion solely on this basis. The Appellate Body has repeatedly found that a *per se* finding of distortion is not permitted under the SCM Agreement. For example, in *US – Softwood Lumber IV*; *US – Anti-Dumping and Countervailing Duties (China)*; and *US – Countervailing Measures (China)*, the Appellate Body emphasized that the fact of a predominant government supplier does not, in and of itself, establish price distortion.

22. There needs to be a clear evidentiary link between a finding of government predominance and price distortion. An investigating authority must approach this issue on a case-by-case basis and can only reject in-country prices in very limited circumstances. Commerce failed to provide sufficient evidence that private prices do not reflect market prices.

3. Commerce's Constructed Benchmark Was Not an Appropriate Benchmark

23. Commerce then improperly constructed a benchmark to determine the benefit provided by the LRR in a manner that was inconsistent with Article 14(d) of the SCM Agreement.

24. Commerce first improperly dismissed below-the-line rates when constructing a benchmark. It then determined that as a "below-the-line" rate, PHP's LRR was not set by a market-determined method for a regulated monopoly. This ignored the fact that LRRs and other below-the-line rates are part of Nova Scotia's standard rate-making process and reflect prevailing market conditions in that province. The LRR fully recovers NSPI's marginal costs and provides a contribution to the utility's fixed costs, which includes a return on equity. The LRR was set by a different method than above-the-line rates but this does not make it any less market determined. It withstood the

scrutiny of the NSUARB, which found it to be non-discriminatory and "just and reasonable". It was also developed using a methodology that is common throughout North America.

25. Commerce made two fundamental errors in constructing a benchmark: (1) it combined the incremental costs of a below-the-line rate with a fixed cost contribution developed separately for a different customer in a different time period as part of an above-the-line rate; and (2) it double counted an amount for NSPI's return on equity. In doing so, Commerce constructed a hypothetical benchmark that no customer in Nova Scotia ever would have paid.

26. First, Commerce combined the LRR's variable costs from with fixed costs from the blended real-time pricing rate, an above-the-line rate. However, PHP's variable costs (the highest incremental hourly fuel charge) are not the same as the variable costs applied to above-the-line rates (which are the average fuel costs for the year). Despite this difference, Commerce made no adjustment to the fixed costs it used. In a market situation, a company subject to conditions such as paying the highest incremental fuel cost in a given hour would expect to contribute a reduced amount to fixed costs.

27. Second, Commerce's constructed benchmark double-counted the return on equity. NSPI's calculation of the fixed costs for the above-the-line rate which was used in to construct the benchmark already included an amount to provide a contribution to the return on equity. Despite this, Commerce added an additional amount for return on equity in constructing its benchmark. Commerce made this error despite being told by NSPI and Nova Scotia after the Preliminary Determination that it was double-counting. NSPI's General Rate Application clearly provides that under NSPI's Cost of Service Study, used to calculate above-the-line rates, allocated costs include the return on equity.

4. The Hot Idle Funds and FIF are not "Benefits" to PHP

28. Commerce also acted inconsistently with Articles 1.1(b), 10, 14, 19.1, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 when it erroneously found that PHP, rather than the previous owner, NewPage PH, was the recipient of certain financial contributions and that the benefit associated with these financial contributions was not extinguished by NewPage PH's arm's-length sale of the mill for fair market value.

29. NewPage PH was responsible for paying to keep the mill in "hot idle" while it was in creditor protection. Being placed in "hot idle" simply ensured that the mill would function in the future and added no further value to the mill. When NewPage PH ran out of "hot idle" funds, Nova Scotia provided additional funds to maintain the mill in hot idle. Commerce found that these funds were a subsidy to PHP. However, PHP was not the recipient of the hot idle funds.

30. PWCC's bid for the paper mill was also conditional on the mill being maintained in hot idle. The price PWCC paid was a market price for a mill in hot idle. The fact that Nova Scotia paid to maintain the paper mill hot idle is of no consequence as any benefit associated with the hot idle funds went to NewPage PH or its creditors, not to PWCC or PHP. In addition, if the payment by Nova Scotia had "benefited" PHP, one would have expected that that the Court appointed monitor would have sought new bids that would reflect any added value—the monitor expressly did not do so.

31. Similarly, neither PWCC nor PHP were the recipient of funds provided by Nova Scotia to the FIF. The recipient of a benefit must be a person, not a thing. When NewPage PH ceased operating the mill, it no longer had an obligation to conduct forestry activities that Nova Scotia viewed as economically and environmentally beneficial, such as silviculture and road maintenance on Crown lands or private lands. Nevertheless, NewPage PH was well positioned to act as a conduit, as it was located near the affected area and had a history of dealing with the contractors who could provide these services. NewPage PH subsequently agreed to hold the FIF in trust and to pay third party contractors to perform these activities on behalf of the province. Commerce found that the second FIF contribution, made after the December 16, 2011 deadline for final bids on the paper mill, constituted a subsidy to PHP. However, Commerce did not explain how the FIF funds increased the value of the mill between the time the bids were placed and PWCC's bid was accepted. It was the third party contractors, not PWCC or PHP, who received the FIF funds.

Finally, again, the monitor did not seek new bids after the FIF contribution but rather certified that PWCC's bid (which had not changed) reflected the best bid NewPage PH would receive.

32. With respect to the issue of whether subsidies could be extinguished by virtue of the arm's-length sale of a company that had received subsidies for fair market value, the Appellate Body's discussion of these issues in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* establishes that there is a rebuttable presumption that a benefit is extinguished if there is a complete transfer of ownership, at arm's-length and for fair market value. If NewPage PH received any benefit from the hot idle funding or the FIF, it was extinguished by the sale of the company in an arm's-length transaction at fair market value to PWCC. Commerce specifically found that "the private-to-private party transaction between NewPage PH and PWCC" to acquire the Port Hawkesbury paper mill was "at arm's-length for fair market value". PWCC purchased all of NewPage PH. The purchase for fair market value did not confer an advantage, as it reflected the value of any prior subsidies.

33. Nor did the hot idle funding and the FIF change the asset value of the mill. The hot idle funds maintained the status quo of the mill's assets at the time the mill was marketed for sale, but did not change to the asset value of the mill and did not contribute to any continuing revenue stream or future earnings. Similarly, the FIF was provided to third party contractors and also did not change the value of NewPage PH or its continuing revenue stream or future earnings.

5. Commerce Improperly Initiated Against Nova Scotia's Provision of Stumpage to PHP

34. Commerce acted inconsistently with Article 11 of the SCM Agreement when it improperly initiated into Nova Scotia's provision of stumpage and biomass without any evidence of a benefit. In particular, Commerce relied on three pieces of evidence to support its decision to initiate on Nova Scotia's provision of stumpage: (1) a version of the Forest Utilization License Agreement between Nova Scotia and PHP; (2) previous *Softwood Lumber from Canada* determinations; and (3) the *CFS Paper from Indonesia* determination. The Forest Utilization License Agreement provided no pricing information and Commerce did not cite any evidence of a comparison in the marketplace. Moreover, Commerce's previous *Softwood Lumber from Canada* decisions in fact indicate that stumpage in Nova Scotia is market-determined and not subsidized. Nor does the *CFS Paper from Indonesia* determination provide evidence that the pricing of stumpage conferred a subsidy in Nova Scotia.

III. RESOLUTE

A. Commerce Erroneously Applied AFA to Resolute in Relation to Information Discovered at Verification

35. Commerce acted inconsistently with Article 12.7 of the SCM Agreement by improperly finding that Canada and Resolute did not respond to questionnaires to the best of their ability and resorting to AFA when neither Canada nor Resolute had impeded the investigation. Moreover, the information Commerce claimed to have discovered was not "necessary information" that related to the alleged subsidies set out in the notice of initiation.

36. "Necessary information" is information specifically requested in detail, into which the investigating authority has initiated an investigation, and which relates to the production or export of the product under investigation. It cannot be the case that information is "necessary" simply by virtue of being requested.

37. Commerce's questionnaire asked companies to identify all other forms of "assistance" that they received, "to [their] company", from the government. Commerce claimed to discover new government assistance during its verification of Resolute's cross-owned affiliate, Fibrek. Commerce determined that the use of AFA was warranted simply because the information discovered allegedly fell within the scope of the broad and ambiguous "other forms of assistance" question and was not provided. No specific request was ever made by Commerce for further information, and nothing was ever refused or purposefully withheld by Canada or by Resolute.

38. Commerce's request for information on "other forms of assistance" was for information that was not necessary to the investigation. The term "assistance" is not defined and may require reporting measures that are not financial contributions or are generally available. The question asks for assistance "to your company", which requires respondents to report assistance that has nothing to do with the product under investigation. The question is also overly burdensome as it requires respondents to report the assistance over the entire Average Useful Life associated with assets used to produce the product under investigation—a period of 10 years in the SC Paper investigation.

39. The proper application of "facts available" must result in the calculation of an amount of subsidy that reasonably replaces the missing information (see e.g., Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468). Even if the discovered information was necessary to the investigation, the amounts received were available to Commerce during verification, and thus no information was missing from the investigation. Instead, Commerce applied a rate that amounted to 153 percent of Fibrek's sales during the POI.

B. Commerce Failed to Adhere to the Procedural Requirements of the SCM Agreement with Regards to Alleged Subsidies Discovered at Verification

40. Commerce also acted inconsistently with Articles 12.1 and 12.2 of the SCM Agreement when it failed to provide Canada and Resolute ample opportunity to present in writing and orally all evidence related to the information discovered during verification. In order to satisfy its procedural obligations under Articles 12.1 and 12.2, Commerce should have accepted additional information from Resolute concerning the "discovered" assistance during the course of verifications or shortly thereafter.

41. Further, Commerce acted inconsistently with Articles 12.1 and 12.8 of the SCM Agreement as it did not provide Resolute with notice of the information it required or of essential facts under consideration before applying AFA. Commerce failed to inform Resolute and Canada of a number of essential facts that were necessary for ensuring the ability of Resolute to defend its interests, contrary to Article 12.8, including that it did not accept the interpretation they provided of the "other forms of assistance" question or that the information provided regarding Fibrek's hostile takeover was considered insufficient to establish extinguishment of benefit.

C. Commerce Improperly Initiated an Investigation of Alleged Subsidies Discovered at Verification

42. Commerce's conduct was also inconsistent Article 11 of the SCM Agreement, which requires investigating authorities to review the accuracy and adequacy of the evidence of a subsidy before initiating investigation. Commerce failed to determine that the evidence that it put on the record constituted sufficient evidence of each element of a subsidy upon the discovery of certain information in the context of the verification of Resolute's cross-owned affiliate, Fibrek. Rather, it applied AFA without notice and improperly concluded that the alleged discovered information constituted countervailable subsidies without any evidence concerning the existence, amount and nature of the alleged subsidies in question.

43. The United States argues that the initiation standards should be understood with respect to an entire product under investigation. However, Article 11 refers to initiation with respect to an alleged "subsidy" not a "product". Moreover, financial contribution, benefit and specificity cannot be assessed with respect to a product in the abstract.

D. Commerce Erred in Failing to Find that Resolute's Hostile Takeover of Fibrek Extinguished Certain Contributions to Fibrek

44. Commerce acted contrary to Articles 1.1(b), 10, 14, 19.1, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 when it failed to recognize that alleged benefits provided to Fibrek prior to its arm's-length takeover by Resolute were extinguished. In *US – Countervailing Measures on Certain EC Products*, the Appellate Body noted that private-to-private transactions are likely to be for "fair market value" and emphasized the importance of analyzing "to what extent a change in ownership and control would result from the private-to-private sales transactions".

45. Commerce found that Fibrek received subsidies from a federal program, the Pulp and Paper Green Transformation Program (PPGTP), and assistance discovered at verification that pre-dated Resolute's hostile takeover of Fibrek. Commerce concluded that there was no evidence indicating that Resolute's purchase of Fibrek was at arm's-length and for fair market value, and thus it found that the alleged assistance to Fibrek was not extinguished when Resolute took over Fibrek.

46. Commerce ignored clear evidence on the record that Resolute's hostile takeover of Fibrek was at arm's-length and for fair market value. This evidence included questionnaire responses and exhibits submitted by both Quebec and Resolute, including information detailing the terms of the hostile takeover, the amount paid, a description of the transaction, competing bids, a court proceeding resulting from Fibrek's "poison pill" defence to the takeover, liabilities assumed, and accounting treatment.

47. Commerce had a significant amount of evidence concerning the hostile takeover. It simply failed to analyse any of it.

E. Commerce Improperly Attributed Financial Contributions Tied to the Production of Other Products to SC Paper Production

48. Commerce acted inconsistently with Articles 10, 19.1, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 when it improperly attributed certain alleged subsidies to the production of SC Paper that were tied to the production of other products that were not under investigation.

49. The Appellate Body found in *US – Countervailing Measures on Certain EC Products*; *US – Anti-Dumping and Countervailing Duties (China);* and *US – Washing Machines*, that subsidies that are not attributable to the product under investigation may not be countervailed by an investigating authority. That is, a subsidy may either be untied, in which case the allocation of that subsidy is made across the sales value of all products, or it may be tied, in which case it may be countervailable only if it is tied to the product under investigation. Subsidies tied to the production of products other than those under investigation cannot be countervailed.

50. To that end, in *US – Softwood Lumber IV ,* the Appellate Body noted that the mere fact that a particular enterprise produces the product under investigation and receives a benefit does not allow countervailing duties to be imposed without a proper analysis of whether there is a benefit to the specific product under investigation. Furthermore, a subsidy on an input good can only be countervailed to the extent that it can be demonstrated that the benefit has passed through to the processed product and thus benefits it indirectly. Accordingly, if the product to which a subsidy was tied did not become part of the final processed product, and no benefit flowed through, those benefits cannot be countervailed.

51. Commerce improperly countervailed contributions to Resolute's Ontario production of other products under PPGTP, as well as Ontario's Forest Sector Prosperity Fund (FSPF) and Northern Industrial Electricity Rate (NIER) programs. These contributions were clearly tied to products other than SC Paper. Commerce ignored the record evidence and did not calculate the precise amount of benefit attributable to Resolute's production of SC Paper. In fact, none of the Ontario mills produced SC Paper or an input into SC Paper during the POI.

52. The benefit from the FSPF contributions was also tied to projects in Resolute's Thunder Bay and Fort Frances mills. At no time near the POI did either mill produce SC Paper. Nor did any of Resolute's Ontario mills produce an input good into SC Paper.

53. Similarly, with regard to the NIER program, these funds were tied to specific facilities in Northern Ontario. Commerce improperly attributed the funds to Resolute's total sales, despite the fact that no SC Paper was produced in Ontario and none of Resolute's Ontario mills produced an input good that was used in Resolute's SC Paper production during the POI.

54. Finally, Commerce failed to assess whether "Discovered Programs 1 and 2" that were identified during verification were tied to the production of products other than SC Paper or its inputs.

IV. CATALYST AND IRVING

A. Commerce Erroneously Constructed an "All Others" Rate Based Almost Entirely on Alleged Subsidies That Were Not Available to Irving or Catalyst

55. Commerce also acted contrary to its obligations under Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 in calculating its "all others" rate for Irving and Catalyst. The "all others" rate violates the United States' obligations to only apply countervailing duty rates in an amount that offsets a subsidy to the company in question. The "all others" rate was based on a rate composed almost entirely of AFA applied to Resolute and a rate composed exclusively of alleged subsidies that Commerce determined were only available to PHP. Commerce took no steps to ensure the representativeness of the companies it selected despite numerous representations by the parties that the "all others" rate would not be representative.

56. Article 19.4 of the SCM Agreement establishes the maximum amount of countervailing duty that may be levied. This objective was thwarted when Commerce calculated an "all others" rate using margins that are determined, in part, on the basis of the investigated parties' failure to supply certain information.

57. Commerce in conducting its countervailing duty investigation decided to import an anti-dumping methodology of selecting the largest exporters of the product under investigation. However, in doing so, it chose to not apply the associated rules, in particular, the Appellate Body decision in *US – Hot-Rolled Steel*, that "all others" rates may not include margins that were established even partially on the basis of "facts available". This approach, inappropriately, would lead to the anomalous result of having markedly different results in anti-dumping and countervailing duty investigations.

58. Similarly, Commerce determined that all of PHP's 20.18 percent rate related to alleged subsidies associated with the reopening of the paper mill should be included in the "all others" rate. These alleged subsidies were and are unavailable to Irving and Catalyst. The United States claims that it had insufficient information to determine that Irving and Catalyst did not have operations in the locations where the alleged subsidies to PHP were available. However, this assertion stands in stark contrast to Commerce's own findings that all alleged subsidies received by PHP were available only to PHP or PWCC.

B. Commerce Erroneously Initiated *De Novo* Investigation into New Subsidy Allegations in the Context of an Expedited Review

59. Article 19.3 of the SCM Agreement states that where an exporter has not been investigated, but its goods have nonetheless been made subject to a countervailing duty rate, it is entitled to an expedited review in order to "promptly" obtain a company-specific rate. There must be some limits to what is permitted in an expedited review. An expedited review occurs because an investigating authority has decided to estimate the countervailing duty rate through an "all others" rate. The purpose of an expedited review is to quickly assess an individual duty rate for a non-investigated exporter in a manner consistent with the SCM Agreement and Article VI of the GATT 1994.

60. Commerce's decision to investigate new subsidy allegations in the context of an expedited review frustrated the purpose the review by prolonging the process such that non-investigated exporters did not receive prompt relief. The investigation of new subsidy allegations upsets the delicate balance the SCM Agreement seeks to achieve between the right to impose duties to offset injurious subsidization and the obligations disciplining the use of countervailing measures. It is also contrary to the ordinary meaning of the word review.

61. Even if new subsidy allegations could be made in the expedited review, the Petitioner should not have been allowed to provide additional evidence at the time of the expedited review unless it could demonstrate that the information was not available to it at the time it filed the original petition, as it was required to provide the information that was reasonably available to it at the time of the petition, pursuant to Article 11.2.

C. Even if Commerce Could Investigate New Subsidy Allegations in Expedited Reviews, It Failed to Ensure That There was a Close Nexus Between these Allegations and the Programs on which it Initiated in the Original Investigation

62. Commerce failed to consider whether there was a sufficiently close nexus between programs it initiated on in the original investigation and the new subsidy allegations before deciding to initiate these new allegations. In *US – Carbon Steel (India)*, the Appellate Body affirmed the significance of this nexus with respect to administrative reviews.

63. Considering the need to conduct expedited reviews quickly, the requirement to initiate investigation into new subsidy allegations in the context of an expedited review should be at least as strict as the standard applied in administrative reviews. In fact, no such nexus exists. Commerce did not consider whether there was any link between the programs in the original investigation and the new subsidy allegations.

D. Even if New Subsidy Allegations are Permitted in Expedited Reviews, Commerce Failed to Ensure That There was Sufficient Evidence to Justify Initiation

64. Commerce acted inconsistently with Article 11 when it initiated into the new subsidy allegations. Pursuant to Article 11, an investigating authority may only initiate an investigation into allegations where there is sufficient evidence of each element of a subsidy.

65. Even if Commerce were permitted to initiate investigations into new subsidy allegations in the context of an expedited review, it had an obligation to ensure there was accurate and adequate evidence in the Petitioner's application to support each allegation before initiating into the allegations. Commerce failed to do so in this case.

V. COMMERCE'S OTHER FORMS OF ASSISTANCE-AFA MEASURE

A. Commerce's Other Forms of Assistance-AFA Measure Can be Considered Both Ongoing Conduct or a Rule or Norm of Prospective and General Application

66. Commerce maintains an "Other Forms of Assistance-AFA" measure. This measure can be characterized as ongoing conduct or as a rule or norm of prospective and general application. Under both analytical tools, the measure must be attributable to a Member and the precise content of the measure must be identified.

67. This measure is attributable to the United States as Commerce is an organ of the United States government.

68. The precise content of this measure can be described as follows: when Commerce issues questionnaires in an investigation or administrative review with an overbroad any "other forms of assistance" question. If Commerce discovers information during the course of its verifications that it considers to be evidence of "other forms of assistance", it applies AFA to that information to determine that there is a countervailable subsidy and to inflate the countervailing duty rate.

69. A measure challenged as a "rule or norm" must have "general and prospective application". As affirmed by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*; *US – Zeroing (EC);* and *US – Zeroing (Japan)*, the factors that may be considered in determining whether there the evidence establishes "general and prospective application" include whether the measure has "normative value", provides "administrative guidance", creates "expectations among the public and among private actors", is "intended" to apply generally and is "consistently" applied, or reflects a "deliberate policy".

70. A challenge against a measure as "ongoing conduct" must provide evidence of the measure's "repeated application" and that the conduct will likely continue into the future (see *e.g.*, Appellate Body Report, *Argentina – Import Measures*, para. 5.108).

71. Since 2012, Commerce has repeatedly applied its Other Forms of Assistance-AFA measure to countervail dozens of alleged subsidy programs. During the corresponding investigations and reviews, Commerce asked the "other forms of assistance" question, then "discovered" information at verification that it deemed responsive to this question. It then systematically applied AFA without making any factual determination of whether the elements of a countervailable subsidy had been met or assessing whether the information constituted "necessary information" related to the alleged subsidy programs it was investigating.

72. Commerce's Other Forms of Assistance-AFA measure is described by Commerce as a practice. It may not lightly deviate from such a practice, especially given that it has amended existing laws in a manner that will make this conduct more punitive. The Other Forms of Assistance-AFA measure amounts to more than simple repetition – it is a deliberate policy. Commerce has indicated that it intends to apply this practice in future investigations and reviews. It considers deviation from this policy to be an "error" and, pursuant to U.S. law, must provide a reasoned explanation for departing from the practice.

B. Commerce's Other Forms of Assistance-AFA Measure Fails to Ensure That There is Sufficient Evidence of a Countervailable Subsidy Before Improperly Applying AFA

73. Commerce's Other Forms of Assistance-AFA Measure is also inconsistent with Articles 11 and 12.7 of the SCM Agreement.

74. Articles 11.2 and 11.6 of the SCM Agreement provide that, before any program may be fully investigated, there must first be sufficient evidence of the elements of a countervailable subsidy. In applying its Other Forms of Assistance-AFA measure, Commerce fails to review the accuracy and adequacy of the evidence to attempt to determine whether the alleged assistance could have constituted a financial contribution, that a benefit could have been conferred, and that such assistance could be specific. Commerce's Other Forms of Assistance-AFA measure eliminates the requirement for evidence and effectively replaces it with the hurried impressions and assumptions of a Commerce verification team.

75. Article 12.7 of the SCM Agreement allows investigating authorities to rely on facts available only if an interested Member or party: (1) refuses access to necessary information within a reasonable period; (2) fails to provide necessary information within a reasonable period; or, (3) significantly impedes the investigation.

76. Article 12.7 requires evidence and a finding that the elements of a subsidy exist before Commerce self-initiates against a program, and before requests can be said to be for "necessary information". The panel in *US – Anti-Dumping and Countervailing Duties (China)* saw this as a finite list with no possibility to apply facts available in other situations. By asking the "other forms of assistance" question, Commerce attempts to create a new means to apply facts available outside the framework of Article 12.7.

C. Commerce's Other Forms of Assistance-AFA Measure Fails to Provide Respondents with Notice and Ample Opportunity to Present Evidence, and Does Not Disclose the Essential Facts Under Consideration

77. Commerce is required under Articles 12.1 and 12.8 of the SCM Agreement to provide respondents with notice and ample opportunity to present evidence, and to disclose to respondents the essential facts under consideration. At a minimum, Commerce's verifiers are required to request and collect any amount of documentation necessary to identify discrepancies and fully verify the discovered information. Under its Other Forms of Assistance-AFA measure, Commerce fails to offer respondents these procedural safeguards.

D. Resolute as an Example of What is Wrong with Commerce's Other Forms of Assistance-AFA Measure

78. Resolute fully cooperated with Commerce throughout the investigation and provided Commerce with full access to the electronic version of Fibrek's general ledger.

79. Commerce took only certain information on the "discovered" assistance onto its record and refused to accept other relevant information (for example, it refused to take down the amount of the discovered assistance). There was insufficient evidence and no factual basis for Commerce's conclusion that the "discovered" assistance met any of the elements of a countervailable subsidy.

80. If Commerce had allowed Resolute to provide further information, at most it would have calculated countervailing duty rates that were *de minimis*. This demonstrates that Commerce's practice leads to punitive and unreasonable results.

81. The Other Forms of Assistance-AFA measure permitted Commerce to ignore any and all evidence and exclude the actual amounts received from the record of the investigation.

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. PORT HAWKESBURY PAPER

A. The United States' Attempt to Support Commerce's Flawed Financial Contribution Finding Must Fail

1. The United States Improperly Reads the Meaning of Entrustment or Direction under Article 1.1(a)(1)(iv) of the SCM Agreement

1. The United States has improperly conflated the meaning of "entrustment" and "direction" under Article 1.1(a)(1)(iv) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). "Direction" involves a government exercising its authority, including some degree of compulsion, over a private body. "Entrustment" involves a government giving responsibility for a task. In each case, the entrustment or direction must be linked to the "specific conduct" in that case.

2. The United States Cannot Demonstrate Direction through Alleged Circumstantial Evidence of an Entrustment Finding That It Did Not Make

2. The United States cannot claim that the U.S. Department of Commerce's (Commerce) finding of direction and its comments concerning entrustment can be considered cumulatively. Its determination that Nova Scotia directed Nova Scotia Power Inc. (NSPI) and its comments about entrustment relate to different financial contributions. Commerce found that Nova Scotia directed the general provision of electricity, or a good, to NSPI. It now claims, after the fact, that Nova Scotia entrusted NSPI to provide the particular load retention rate (LRR) negotiated with Pacific West Commercial Corporation (PWCC).

3. Commerce never found that Nova Scotia entrusted NSPI to provide an LRR. The United States refers to alleged circumstantial evidence of entrustment, but Commerce never made a finding based on this evidence. In fact, Commerce justified its failure to apply its test under U.S. law for assessing entrustment on the basis that it did not rely on this circumstantial information. Commerce's submissions in its NAFTA brief and before the NAFTA panel also demonstrate that it did not consider the LRR to be the financial contribution.

4. Moreover, the circumstantial evidence that Commerce discussed in its decision is taken out of context and systematically ignores evidence that runs contrary to its preferred conclusions.

3. The Duty to Serve Cannot be Understood through a Discussion Paper Summarizing Reports That Did Not Consider This Regulatory Principle

5. Commerce improperly found that Nova Scotia directed NSPI to provide Port Hawkesbury Paper LP (PHP) with an LRR through the duty to serve. Commerce understood the duty to serve through a passing reference to it in a discussion paper, which Commerce filed on its own initiative after the close of the evidentiary record. Commerce did not consider the context of this discussion paper, which summarized several reports that were prepared as part of Nova Scotia's general Electricity System Review. None of these reports concerned or analysed the duty to serve.

6. The United States has also mischaracterized Canada's position on the duty to serve in these proceedings. Canada has explained that the duty to serve is only enforceable through the investigation of complaints of customers who have not been provided with service under certain tariffs or rates. The Nova Scotia Utility and Review Board (NSUARB) may only approve rates that are "just" and "sufficient" for both customers and utilities, an approach that applies in many jurisdictions in Canada.

4. The United States Continues to Ignore Relevant Criteria in Article 1.1(a)(1)(iv) of the SCM Agreement

7. The provision of electricity by NSPI to PHP is not a function that "would normally be vested in the government" under Article 1.1(a)(1)(iv) of the SCM Agreement. Some functions set out in Article 1.1(a)(1) are inherently governmental and others are not. There is nothing inherently governmental about providing goods or services within the meaning of Article 1.1(a)(1)(iii).

8. Commerce failed to establish that the provision of electricity would normally be vested in the government of Nova Scotia. In accordance with the Nova Scotia legal regime, Nova Scotia does not provide electricity. Providing electricity is primarily the responsibility of NSPI. The regulation of the electricity market in Nova Scotia does not demonstrate that the provision of electricity would normally be carried out by the government. Nor does a history of government ownership of the utility responsible for providing electricity, which ended in 1992, constitute evidence that the provision of electricity would normally be vested in the government.

5. Commerce Failed to Disclose the Essential Facts under Consideration

9. The United States alleges that it disclosed the essential facts because it provided interested parties access to the record. In making this claim, the United States advances an incorrect interpretation of the disclosure obligation under Article 12.8 of the SCM Agreement.

10. Canada has explained that Commerce did not disclose essential facts concerning the duty to serve, and never gave the parties an opportunity to comment on the duty to serve or sought more information on it.

11. Essential facts in the context of a countervailing duty investigation are those that underlie the investigating authority's final findings and conclusions in respect of the elements of a subsidy, specifically financial contribution, benefit and specificity.

12. An investigating authority meets the requirement under Article 12.8 by disclosing essential facts in a manner that permits interested parties to defend their interests. In *Guatemala – Cement II*, the panel recognized that if interested parties cannot tell by looking at the record which documents will be relied on, the investigating authority has a positive obligation to identify the essential facts within the record.

13. The discussion paper underlies the final findings of subsidization including the investigating authority's analysis of financial contribution. It was placed on the voluminous record without any context or guidance as to its relevance. Its placement on the record does not satisfy the disclosure obligation under Article 12.8.

B. PHP Did Not Receive a "Benefit" under Article 1.1(b) of the SCM Agreement

1. The LRR Did Not Confer a "Benefit"

a) "Prevailing Market Conditions" Applied to the Nova Scotia Electricity Market and Commerce's Constructed Benchmark

14. Article 14(d) of the SCM Agreement provides that the provision of a good only confers a "benefit" if it is made for less than adequate remuneration. The adequacy of remuneration is determined in relation to prevailing market conditions for the good in question in the country of provision (including price, quality, availability, marketability, transportation and other conditions of purchase or sale). An analysis of "prevailing market conditions" is therefore based on a number of factors, which include but are not limited to "price". They concern "characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices".

15. The United States suggests that an assessment of "prevailing market conditions" is an assessment of the "predominant price" in a market. This suggestion is necessary for the United States because of the need under Commerce's constructed benchmark to characterize above-the-line rates as "predominant" in Nova Scotia. This argument fails for at least four reasons.

16. First, the United States fails to explain how its overall approach to benefit was consistent with the "prevailing market conditions" requirement in Article 14(d).

17. Second, below-the-line rates should be considered part of the "prevailing market conditions" under which the LRR was negotiated. Below-the-line rates are part of NSPI's standard pricing mechanism and are used in numerous jurisdictions. There was no basis for Commerce to ignore these prevailing market conditions.

18. Third, the United States fails to account for the nature of the electricity market, including factors such as how rates are set for large customers, the size of customers, and the fact that different customers may be treated differently.

19. Finally, the United States errs by suggesting that the phrase "in relation to" within Article 14(d) suggests "a more removed relationship" between the benchmark and the price at which the good is provided. In fact, the Appellate Body stated that the assessment of "prevailing market conditions" allows a benchmark to be a *more* exact proxy, allowing for a "meaningful [calculation] that does not overstate or understate" benefit.

20. A proper analysis of "prevailing market conditions" in Nova Scotia must reflect the guidance of the Appellate Body. This guidance directs one to the LRR, a rate which reflects a negotiated outcome between two private parties working within the standard pricing mechanism used in the province.

b) A Proper "Benefit" Analysis Examines Whether a Transaction is a Market Transaction

21. The United States argues that the Appellate Body has required that a benefit determination be based on a comparison and, with respect to Article 14(d), the United States adds that the phrase "in relation to" indicates that a benefit determination requires some form of comparative exercise. This is not always "required". The Panel may examine Commerce's benefit determination in the context of the specific circumstances of this case, which involves the provision of good under a private-to-private transaction that was beneficial to both parties.

22. The text of Article 14(d) does not preclude an investigating authority from considering whether a particular transaction between two private parties is a market transaction by its own terms. Article 14(d) provides for an assessment of whether the provision of goods was made for less than adequate remuneration. Unlike Articles 14(b) and 14(c), Article 14(d) does not expressly provide for the use of methodologies that contain a comparison and that direct that the "difference between" two amounts be found. The adequacy of remuneration is measured "in relation to" prevailing market conditions, including price, quality, availability, marketability, transportation and other conditions of purchase or sale. Price is only one of these factors.

23. The Appellate Body has stated that the assessment of "benefit" under Article 14 calls for an examination of the terms and conditions of the challenged transaction at the time it is made and compares them to the terms and conditions that would have been offered in the market at that time. In *US – Large Civil Aircraft (2nd Complaint)*, the Appellate Body examined whether a financial contribution was "consistent with what occurs in transactions between two market actors", and assessed whether a benefit was conferred without using a comparison price.

c) Commerce Failed to Consider Whether the LRR Represents a Market Price Resulting from Arm's Length Negotiations between Two Private Parties

24. The LRR is a market price which fully recovers NSPI's marginal costs and contributes to its fixed costs. There was no reasonable basis upon which Commerce could reject this rate and the United States ignores it as a market transaction.

25. The LRR was negotiated between two private parties acting at arm's length. This transaction was beneficial to both parties. PHP obtained electricity at an appropriate rate, which was important because electricity represented the largest expense of the mill. Maintaining PHP as a customer allowed NSPI to ensure a stable system and to address cost issues that would result from losing its

largest customer. PHP agreed to run the mill in a leaner manner and at off-peak hours, which offered value to NSPI. It also agreed to be "priority interruptible", so that NSPI could reduce a significant block of electricity demand from PHP at one time. PHP further agreed to pay for the most expensive incremental source of energy in the stack in any given hour that it used and purchased electricity. Finally, it agreed to pre-pay for its electricity, which eliminated the risk of non-payment for NSPI.

26. The United States cannot explain how it accounted for these factors in the benchmark that Commerce developed. Commerce did not seek out any information about the blended Real Time pricing rate, despite using that rate as a foundation for a calculation of a benchmark in the Final Determination. Commerce did not take into account that below-the-line rates had previously been made available to extra-large users in Nova Scotia and that such an approach was common in other jurisdictions. Commerce also did not take into account PHP's status as an extra-large customer and created a flawed benchmark that did not reflect a rate that any NSPI customer would pay.

27. The United States appears to imply that the NSUARB's decision to allow a Load Retention Tariff for companies in distress was made at the behest of PWCC. However, the evidence on the record of the investigation demonstrates that the LRR was approved under the framework of the existing LRT. The LRR arose out of negotiations between PWCC and NSPI, without the involvement of the NSUARB before its approval in a thorough and contested review process, which all electricity rates are subject to in Nova Scotia. The NSUARB found that approving the LRR was in the best interest of the whole customer base.

28. The United States also fails to acknowledge that Commerce improperly found in its Final Determination that the Nova Scotia electricity market was distorted solely on the basis that NSPI provides electricity to most customers of electricity in Nova Scotia.

d) Commerce Erred in Constructing a Benchmark

29. The United States asserts that Commerce's constructed benchmark "reflects a rate that an NSPI customer, like PHP, would have paid for electricity". This statement is not true. No NSPI customer would pay the rate calculated under the constructed benchmark.

30. The benchmark does not reflect prevailing market conditions in Nova Scotia, and Commerce made several methodological errors in constructing its benchmark. Commerce erred by substituting PHP's variable costs in the LRR, which included the highest incremental fuel costs per hour, for average variable costs. Commerce then added the higher fixed costs associated with the average variable rate to the highest incremental costs, paid in the LRR. Commerce also erred by adding an additional amount for return on equity, even though return on equity was already included in the fixed costs it used.

31. The United States incorrectly asserts that Commerce's methodology reflected NSPI's "standard rate making methodology". In fact, the United States acknowledges that it could not replicate NSPI's standard pricing mechanism using the information provided by the parties. Commerce never requested information from NSPI, which is a private entity and not part of the government of Nova Scotia.

2. The Hot Idle Funds and FIF Are Not "Benefits" to PHP

a) PHP Is Not the "Recipient" of the Hot Idle Funds

32. The United States fails to acknowledge that PWCC received no benefit from the hot idle funds. The "benefit" standard under Article 1.1(b) is not based on the "expectation" of who will pay but rather on the advantage the payment provides to its "recipient". The hot idle funds did not increase the value of what PWCC paid for. The United States argues that PWCC received "additional unanticipated financing", but PWCC did not receive this. If anyone did receive additional unanticipated financing, it was NewPage Port Hawkesbury Corporation (NewPage PH) and its creditors. The monitor confirmed that NewPage PH would receive more money from a sale as a going concern than it would under liquidation.

33. The United States' argument, that that the wording of footnote 36 to Article 10 of the SCM Agreement means that the "benefit" referred to in Article 1.1(b) of the SCM Agreement is a benefit to productive operations, has already been rejected by the Appellate Body. The recipient must receive the financial contribution on terms more favourable than what is available to it in the market.

b) PHP Is Not the "Recipient" of the FIF Funds

34. PHP was not the recipient of the Forestry Infrastructure Fund (FIF) funds. The FIF funds went to third party contractors. These funds were not a "grant" to NewPage PH, as the United States suggests. NewPage PH was simply a conduit for these funds, which were required to be cost and cash flow neutral to NewPage PH. These funds could not have provided any benefit to PWCC.

35. The United States' arguments regarding the FIF as a component of the "going concern" sale do not form part of Commerce's decision and are a *post hoc* rationalization. Rather than finding this, Commerce erroneously found that the payments Nova Scotia made to third party contractors were "reimbursements" that were equivalent to a grant because NewPage PH had a legal obligation to conduct the activities contemplated by the FIF. It then analyzed whether the grants paid to third parties were extinguished through the arm's length sale of the paper mill to PWCC.

36. The record does not support the United States' contention that NewPage PH was obliged to maintain its forestry activities once it entered the *Companies' Creditors Arrangement Act* process. The record is clear that the mill was sold as a "going concern", in a manner that the mill was ready to re-start operations as a "going concern" once the new owner was in place, but was not operational during the sales process. This is consistent with the fact that maintaining hot idle was a condition of the sale, but other operations of the mill were not.

c) Benefits Conferred on NewPage PH Were Extinguished in the Arm's Length Sale for Fair Market Value

37. The Appellate Body's decisions in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* established a rebuttable presumption that a benefit is extinguished if there is complete transfer of ownership (a full privatization) that is at arm's length and for fair market value. The United States argues that this presumption does not apply to private-to-private sales. However, if a private-to-private sale is at arm's length and for fair market value and the change in ownership is complete, then like a "full privatization" case, any prior subsidy should be considered to have been extinguished. These conditions are satisfied in the private-to-private transaction between NewPage PH and PWCC. In addition, PWCC did not obtain any assets on less than market terms, because hot idle and FIF did not change the asset value of the mill.

C. Commerce Initiated an Investigation into Stumpage and Biomass without Evidence That a Benefit May Have Been Conferred

38. The United States offers an after-the-fact rationalization of Commerce's decision to initiate into stumpage, claiming that Commerce had "information" supporting the existence of a "distorted" and "restricted" market for pulpwood and stumpage in Nova Scotia. These assertions are false. Commerce had no such information.

39. Commerce's initiation without reasonably available evidence relating to the amount of subsidy was inconsistent with Articles 11.2 and 11.3 of the SCM Agreement. Article 11.2 sets out the evidence that must be contained in an application, which includes any reasonably available evidence with regard to the existence, amount and nature of the subsidy in question. An investigating authority may only initiate pursuant to Article 11.3 if it has a sufficient amount of this evidence for each element of a subsidy. The provision of a proposed benchmark for comparison is reasonably available evidence that relates to the amount of a subsidy and was therefore required in the application.

40. Moreover, the provision of a proposed benchmark price is not the only method of demonstrating sufficient evidence of a benefit. Without any evidence of benefit, the Petitioner's allegations were mere assertion and "cannot be considered sufficient to meet the requirements" of Article 11.2.

II. RESOLUTE

A. Commerce's Application of AFA to Information "Discovered" during the Fibrek Verification is Inconsistent with the SCM Agreement

1. The United States' Claim that Initiation of an Investigation Concerns "Subsidization of a Product" Ignores the Requirement to Initiate Against Specific Subsidies

41. The United States concedes that it did not initiate an investigation into the "discovered" Fibrek General Partnership (Fibrek) programs. If an investigating authority has not initiated into a program, that program cannot lead to the imposition of countervailing duties and cannot be "necessary" to the investigation under Article 12.7 of the SCM Agreement.

42. Canada disagrees with the United States that an initiation of an investigation encompasses the entire investigation into the "subsidization of a product". Article 11.2 of the SCM Agreement requires that an application, which an investigating authority initiates upon, contain sufficient evidence of "a subsidy". It is also clear from Article 11.2(iii) that initiation requires "evidence with regard to the existence, amount and nature of the subsidy in question". The elements of a subsidy cannot be evidenced in the abstract; they must be shown in respect of each program that is initiated upon.

43. Article 11.3 adds that investigating authorities "shall review the accuracy and adequacy of the evidence" to justify initiation. Commerce failed to initiate or review the accuracy and adequacy of the very limited evidence that it did take concerning the discovered information.

2. Commerce Failed to Provide Canada and Resolute With Notice and Ample Opportunity to Present All Relevant Evidence in Relation to the Essential Facts under Consideration

44. Recourse to facts available pursuant to Article 12.7 is conditioned on an investigating authority notifying the interested party of the information required and providing ample opportunity to present relevant information. Without Commerce's disclosure of the essential facts underlying its decision to apply facts available, Canada and Resolute FP Canada Inc. (Resolute) were unaware of the factual basis for Commerce's determination and could not adequately defend their interests.

45. If Commerce was unable to provide the required procedural rights, then it should not have gathered additional information on uninitiated programs at verification. Doing so violated Articles 12.1, 12.2, 12.7, 12.8 and 12.11 of the SCM Agreement.

46. To avoid these violations, Commerce could have extended its timelines or conducted verifications earlier, allowing sufficient time to provide procedural rights. Commerce could also have completed the information gathering process in a subsequent review.

3. Only an Unambiguous Question, Specified in Detail, May Lead to Necessary Information

47. Commerce's "other forms of assistance" question cannot lead to the conclusion that discovered information was "necessary information" that "should have been disclosed" by Resolute, pursuant to Article 12.7. This is because the question is undefined, overly broad, ambiguous and not specified in detail. The question asks about assistance received by "producers and exporters" of supercalendered paper (SC Paper), rather than relating to the production and export of the product. The question also does not exclude generally available assistance.

48. Commerce's presumption that discovered information "should have been disclosed" ignores the requirement that information be "necessary" before applying "facts available". Commerce had no information before it that demonstrated that the discovered information constituted subsidies. The only information before Commerce was the names of the accounts that it discovered. This cannot constitute a legal basis upon which to impose countervailing duties. The manner in which bookkeepers use accounts to categorize entries bears no relation to the SCM Agreement and does not create a presumption that an entry is a financial contribution conferring a benefit that is specific.

4. Resolute Did Not "Fail to Disclose Subsidies"

49. The United States' statements that Resolute should have disclosed the discovered information overlook the fact that Resolute's answer, in which it communicated a sincere belief that it did not receive "assistance", has not been found to be untrue. Commerce's application of adverse facts available (AFA) based on the name of the three accounts, does not demonstrate that they should have been disclosed. Further, Commerce did not assess whether the amounts were provided as a result of fair market transactions, the amounts were related to generally available programs, the transactions were extinguished by virtue of the arm's length acquisition of Fibrek, or the amounts were properly attributable to the production of SC Paper.

50. It is also relevant that Canada submitted to Commerce a clear and detailed answer to the "other forms of assistance" question. Canada outlined how it interpreted the question and the manner by which Canada and the Canadian respondents were responding to it. The United States admits that Commerce did not question this response, despite having had multiple occasions to do so. Resolute and Canada cooperated fully with Commerce's investigation.

51. Even so, non-cooperation cannot be a sufficient basis for the imposition of adverse inferences. Adverse inferences cannot be used to punish non-cooperation and non-cooperation is not itself the basis for replacing "necessary information". Non-cooperation does not mitigate the obligation of investigating authorities to engage in a process of reasoning and evaluation.

52. Commerce found that Resolute "withheld information that has been requested". This standard is a subjective one, in clear contravention of Article 12.7 of the SCM Agreement. The Appellate Body has found that the use of facts available is permissible only in the context of information necessary to complete the investigation. This is an objective standard.

B. Resolute and Quebec Submitted Sufficient Evidence to Demonstrate That the Alleged Benefits to Fibrek Were Extinguished

53. The United States continues to defend Commerce's conclusion that it did not have any evidence that would allow it to establish that the purchase of Fibrek was at arm's length and for fair market value. This statement is not true. The record includes many descriptions of the transaction, including a judgment of the Quebec Court of Appeal regarding the "poison pill" strategy of Fibrek in response to Resolute's takeover bid and Canada's description of the takeover bid during consultations. The arm's length nature of the hostile takeover, including the value of that transaction, was brought to Commerce's attention as early as consultations prior to the initiation of the investigation.

54. The United States now claims that the information regarding the hostile takeover of Fibrek was disregarded by Commerce because it related to a different alleged subsidy program from the one originally initiated upon by Commerce. The United States argues that the extinguishment of the benefit relating to Fibrek was not known until the Pulp and Paper Green Transformation Program (PPGTP) was reported by Resolute prior to the Preliminary Determination. This disclosure of PPGTP funding to Fibrek does not somehow render the vast quantity of evidence submitted in respect of Fibrek moot or less reviewable by Commerce, simply because it was provided in the context of a different subsidy program. Put differently, Commerce had all the information it needed with respect to all subsidy programs that could be applicable to Fibrek; the information was not program-specific.

55. Moreover, Commerce had the discretion to issue supplemental questionnaires to collect additional information concerning the arm's length nature of this transaction after the Preliminary Determination. It failed to do so.

C. The Alleged Subsidies Tied to Products Other Than SC Paper Were Not Countervailable

56. The United States argues that the proper approach to attribution is one that considers whether a grant or a subsidy is "tied" to a product "on the basis of information available to the granting authority at the time the subsidy is granted". However, the United States ignores that the Appellate Body has expressly rejected this argument.

57. The appropriate inquiry into a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product. The focus is on the contributions themselves, rather than the program writ large.

58. However, even under the standard advocated by the United States, the subsidies were improperly attributed. They were tied to the production of products other than SC Paper and this was known at least as early as when the contributions were provided.

59. Furthermore, by applying an unrepresentative AFA rate, Commerce failed to consider any evidence regarding how any contribution to Fibrek could benefit SC Paper production. The evidence demonstrates that less than two percent of Fibrek's production was related to the production of SC Paper.

III. CATALYST AND IRVING

A. Commerce's Calculation of Catalyst's and Irving's Countervailing "All Others" Rate is Inconsistent with the SCM Agreement and the GATT 1994

60. The United States acted contrary to its obligations when it calculated the "all others" rate from a rate composed almost entirely of AFA and one composed entirely of alleged subsidies that Commerce found were specific to one company. This "all others" rate violates Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

61. The United States is incorrect when it asserts that no limitations exist for calculating an "all others" rate. The Appellate Body explained in *US – Carbon Steel* that the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end when it is determined that the text is silent on that requirement. That silence does not exclude the possibility that the requirement was intended to be included by implication.

62. Article 19.3 of the SCM Agreement should be read in the context of Article 6.10 and 9.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). These Articles establish that, as a rule, an investigating authority shall determine an individual margin of dumping for each exporter but provides rules to be followed where the number of producers is so large that this is impracticable. Article 19.3 of the SCM Agreement fulfills a similar function by establishing that where an investigating authority does not examine all exporters, it must conduct an expedited review.

63. Article 19.3 refers to the requirement that countervailing duties be levied in the "appropriate amounts" in each case. The Appellate Body has indicated that Article 19.4 informs what is an "appropriate amount" and that an "appropriate amount" cannot be more than the amount of the subsidy. Finally, the Appellate Body has found that the meaning of an "appropriate amount" in Article 19.3 must not be based on a refusal to take account of the context offered both by Article VI of the GATT 1994 and by the provisions of the Anti-Dumping Agreement.

64. Article 19.4 of the SCM Agreement should be read in context of Articles 6.10 and 9.4 of the Anti-Dumping Agreement, including the Appellate Body's decision in *US – Hot Rolled Steel*. This interpretation is consistent with the principle that disputes under the two agreements should not lead to markedly different results and with the Declaration on Dispute Settlement Pursuant to the Agreement on the Implementation of Part VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures.

65. Moreover, the United States has essentially imported methodology from the Anti-Dumping Agreement into its countervailing duty investigations. The application of that methodology should therefore be governed by similar rules as under the Anti-Dumping Agreement.

66. Commerce was obligated by Article 10 of the SCM Agreement to take all necessary steps to ensure that the countervailing duty rate did not exceed the amount of subsidization and, also, that it was appropriate. Commerce ignored these requirements in this investigation.

B. Commerce Improperly Initiated an Investigation into New Subsidy Allegations against Catalyst and Irving During the Expedited Review

1. New Subsidy Allegations are Contrary to the Purpose of Expedited Reviews and Violate Article 19.3

67. Part V of the SCM Agreement seeks to strike a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so. As part of this balance, when an investigating authority avails itself of the flexibility offered by Article 19.3 not to investigate all exporters, it cannot expand the scope of an expedited review by allowing the introduction of new subsidy allegations. This interpretation is consistent with the ordinary meaning of the term "review", and the requirement that such reviews must be "expedited" and "prompt".

2. New Subsidy Allegations in an Expedited Review Are Limited to Those with a Sufficiently Close Nexus to the Allegations in the Original Petition

68. Even if new subsidy allegations are permitted in an expedited review, only those with a sufficiently close nexus to the allegations made in the original petition may be reviewed, following the Appellate Body's guidance in the context of administrative reviews in *US – Carbon Steel (India)*. In both expedited and administrative reviews, it is important that the introduction of new subsidy allegations in the review not upset the balance between the interests of exporters and investigating authorities. Both forms of review are intended to review what occurred in the original investigation. They should therefore be subject to the same minimum limitation.

3. Commerce's Initiation into the New Subsidy Allegations Failed to Meet the Initiation Standards

69. In the alternative, if new subsidy allegations are permitted, Commerce acted inconsistently with Articles 11.2 and 11.3 of the SCM Agreement when it initiated into the new subsidy allegations. In particular, Commerce's initiation into the "British Columbia Ban on Exports of Logs and Wood Residue" illustrates Commerce's failure to evaluate whether there was sufficient evidence to justify initiation of an investigation. Evidence of a potential export restraint does not constitute sufficient evidence of a financial contribution and does not justify initiation.

IV. OTHER FORMS OF ASSISTANCE – AFA MEASURE

A. The Other Forms of Assistance – AFA Measure Violates the United States' WTO Obligations

70. The United States' Other Forms of Assistance – AFA measure can be evidenced as either "ongoing conduct" or as a "rule or norm of general and prospective application". These categories are analytical tools and do not govern the definition of a measure for the purposes of dispute settlement. Nevertheless, under the framework of either analytical tool, Commerce's conduct is a measure that is inconsistent with the United States' WTO obligations under the SCM Agreement.

71. First, the measure violates Articles 10 and 11, as Commerce assumes financial contribution, specificity, and benefit without any regard to the initiation standard. In fact, the United States has conceded that, in its interpretation, a petitioner need only allege one subsidy, regardless of what information might be available to it. Second, the measure violates Article 12.7, as Commerce applies adverse facts available to information that is not "necessary information". Finally, the measure violates Article 12.1, as Commerce denies respondents ample opportunity to provide evidence when applying the measure.

B. Ongoing Conduct

72. A party seeking to demonstrate a measure as "ongoing conduct" must establish that the measure is attributable to a Member, the precise content of the measure, the repeated application of the measure, and the likelihood that the measure will continue.

1. The Measure is Attributable to the United States

73. The United States Department of Commerce is an organ of the United States government. Its actions, including the Other Forms of Assistance − AFA measure are attributable to the United States.

2. The Precise Content of the Measure

74. Canada is challenging the entire Other Forms of Assistance − AFA measure. The measure consists of Commerce asking the "other forms of assistance" question, "discovering" information that it perceives to be responsive to this question, refusing to accept or consider information from the respondent related to the discovered information, and applying AFA to find a financial contribution, specificity and benefit with no supporting analysis. Commerce has stated that, in 2012, it determined that the proper course of action when it discovers a potential subsidy at verification is to use adverse inferences.

75. The fact that the application of this measure includes multiple stages and is applied in varied fact scenarios does not exclude it from being a measure for the purposes of WTO dispute settlement. The components of the measure are closely linked, and the fact that minor variations exist in the underlying facts when the measure is applied does not detract from the existence of the measure.

3. The Repeated Application of the Conduct

76. This conduct has been applied repeatedly by Commerce. Canada has provided nine examples of this conduct being applied. In each case, Commerce asks the "other forms of assistance" question, "discovers" information that it perceives to be responsive to this question, refuses to accept or consider information from the respondent related to the discovered information, and applies AFA to find a financial contribution, specificity and benefit with no supporting analysis.

4. The Likelihood That Such Conduct Will Continue

77. The statements made by Commerce in its determinations, as well as before the NAFTA Chapter 19 panel, demonstrate that Commerce will continue to apply the Other Forms of Assistance − AFA measure.

78. The United States asserts that the manner by which an authority chooses to characterise its practice in its determinations is not relevant to WTO dispute settlement. However, previous panels have found that Commerce's characterization of its actions in its determinations can be evidence of future conduct.

79. Additionally, each of Commerce's determinations applying the Other Forms of Assistance − AFA measure reference that the application of the measure is consistent with Commerce's practice in a previous case. This conduct is a practice under U.S. law, a characterization that has legal consequences.

80. The United States suggested in its responses to the Panel's questions that the Other Forms of Assistance − AFA measure does not constitute a "practice" for the purposes of U.S. law. Canada therefore requested that Mr. Grant Aldonas, former Under Secretary of Commerce for International Trade, prepare an expert report on whether the Other Forms of Assistance − AFA measure constitutes a practice under U.S. law.

81. Mr. Grant Aldonas explains in his report that the practice of applying AFA to programs "discovered" during verification that were not otherwise reported by cooperating respondents, in response to Commerce's "other assistance" question, clearly constitutes "agency practice" under U.S. law and "agency action" within the meaning of the U.S. *Administrative Procedure Act*. Mr. Aldonas explains that this practice has "the force of law" and that parties "have ample reason to rely on its continued application". Mr. Aldonas concluded that the Other Forms of Assistance − AFA measure represents a precedent on which parties in future countervailing duty investigations are entitled to rely and is a practice that Commerce has emphatically affirmed it will apply going forward.

C. Rule or Norm of General and Prospective Application

82. A party seeking to demonstrate a measure as a "rule or norm of general and prospective application" must establish that the measure is attributable to a Member, the precise content of the measure, and the general and prospective application of the measure.

83. The first two of these criteria are identical to and are supported by the same analysis as the first two criteria in the ongoing conduct analysis. The third criterion has two elements: general application and prospective application.

84. A measure is of general application if it is "not limited to a single import or importer" and "to the extent that it affects an unidentified number of economic actors". The Commerce determinations presented as evidence by Canada demonstrate that this measure is not limited to a single import or importer and is not addressed at specific economic actors.

85. A measure has prospective application to the extent that "it applies in the future" and is "intended to apply to future investigations". There is no requirement that a complaining Member demonstrate certainty. Factors that may demonstrate prospective application include: the existence of an underlying policy, systematic application of the rule or norm, the extent to which the rule or norm provides administrative guidance for future conduct, and the expectations it creates among economic operators.

86. In this case, there is ample evidence of these factors: in issues and decision memoranda, Commerce's statements, and the statements of petitioners before Commerce seeking to rely on the measure. For example, Commerce has publically acknowledged that in 2012 it made the decision that it would follow this course of action going forward. Mr. Aldonas confirms that the Other Forms of Assistance − AFA measure qualifies as an "agency practice" which, under U.S. law, creates a presumption that this practice "will continue". The measure guides Commerce's conduct and has created public expectations. As Mr. Aldonas explains in his report, the underlying policy objective of the concept of an agency practice is to allow parties to rely on an agency's past practice.

D. Resolute as an Example of the Measure

87. Canada has submitted as evidence screenshots of the information that Commerce refused to take at Fibrek's verification. The information on these documents was seen by Commerce verifiers.

88. The screenshot evidence was presented to the Panel in order to demonstrate the results of the WTO-inconsistent Other Forms of Assistance − AFA measure. The screenshots show that one of the discovered programs would not have added to Resolute's countervailing duty rate and the other discovered program could only have added 0.17 percent to the rate. Without the application of AFA, Resolute would have received a *de minimis* rate of 0.94 percent. The application of the Other Forms of Assistance − AFA measure brought Resolute's rate to 17.87 percent. As well, Commerce's decision to exclude this evidence from the record makes it far more difficult for a respondent to challenge this practice before a U.S. court or a NAFTA tribunal reviewing the determination.

89. The United States asserts in its submissions that it cannot verify the screenshots were seen by Commerce verifiers. The United States justifies its answer on the basis that Commerce accepted no information from the verification. This is circular reasoning: the decision not to accept the relevant information was Commerce's, and it now attempts to rely on that decision as a defense.

E. The Practice of Canada Border Services Agency

90. The United States attempts to justify its WTO-inconsistent behaviour by alleging that the Canada Border Services Agency (CBSA) engages in a practice similar to the U.S. Other Forms of Assistance − AFA measure. CBSA's practice and actions are not before this Panel. They are of no relevance in this case. However, in response to this allegation, Canada adduced evidence that the United States misrepresented CBSA's practice which is not similar to Commerce's. Here, it is only the United States' practice and measure that is inconsistent.

ANNEX C

ARGUMENTS OF THE UNITED STATES

ANNEX C-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

I. INTRODUCTION

1. Canada has raised numerous claims, many involving complex issues under the SCM Agreement and the GATT 1994. Ultimately, however, this dispute is about a decision of the Canadian government to bail out and subsidize a bankrupt paper mill − a decision that resulted in subsidized exports and injury to a U.S. industry − as well as attempts by the respondents to shield from scrutiny evidence of subsidization. Canada's claims lack merit, and should be rejected.

II. CANADA'S CLAIMS WITH RESPECT TO PORT HAWKESBURY ARE WITHOUT MERIT

A. Commerce's Financial Contribution Determination for the Provision of Electricity to Port Hawkesbury Was Not Inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement

2. Commerce properly found that Nova Scotia entrusted or directed Nova Scotia Power to provide electricity to Port Hawkesbury based on evidence of the role of the government of Nova Scotia in the provision of electricity, specifically as it related to Port Hawkesbury. A financial contribution exists within the meaning of Article 1.1(a)(1) where the government "entrusts or directs" a private body to provide a good. Central to the analysis is the meaning of the terms "entrust or direct," which the Appellate Body has summarized in the following manner: "'entrustment' occurs where a government gives responsibility to a private body, and 'direction' refers to situations where the government exercises its authority over a private body." The delegation by the government may take a variety of forms, and a written measure with the force of law that is binding on a private body satisfies the standard of Article 1.1(a)(1)(iv). Commerce applied this WTO legal standard to the evidentiary record before it.

3. Commerce's determination was based on the plain terms of the *Public Utilities Act*. Nova Scotia Power is defined as a "public utility" under section 2(e) of the *Public Utilities Act*. That act unambiguously confers certain obligations on entities defined as "public utilities." Section 52 states the following:

> Every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable.

4. Commerce's determination noted that a publication commissioned by Nova Scotia, titled "Regulating Electric Utilities − Discussion Paper," explained Nova Scotia Power's obligations in the following manner:

> As a near monopoly, Nova Scotia Power has responsibilities imposed under law. One of them is an obligation to serve − the company must provide electricity to customers who request it, anywhere in Nova Scotia.

5. Commerce also found that the *Public Utilities Act* provides the NSUARB with the authority to approve all rates proposed by public utilities and to compel a public utility to comply with the provisions of that act. Based on its review of the *Public Utilities Act*, Commerce concluded that "{Nova Scotia} controls and directs the methodology that {Nova Scotia Power} has to use in rate proposals, and any rate that is charged by {Nova Scotia Power} must be approved by the NSUARB."

6. This factual determination, based on the plain language of section 52 and premised on the same understanding as Canada acknowledges in its first submission, led Commerce to conclude that Nova Scotia entrusted or directed − as the terms are defined within the meaning of

Article 1.1(a)(1)(iv) – Nova Scotia Power to provide electricity, which constitutes the provision of a good within the meaning of Article 1.1(a)(1)(iii). As noted, the Appellate Body has found entrustment or direction to occur where "the government gives responsibility to a private body 'to carry out' one of the types of functions listed in paragraphs (i) through (iii)," and that responsibility may be given through "formal or informal" means. Here, through a formal, legally binding measure, the government "gave responsibility to" or "exercised its authority over" Nova Scotia Power "to carry out" the provision of electricity. Canada has not demonstrated that Commerce's finding of entrustment or direction was inconsistent with Article 1.1(a)(1).

B. Commerce's Disclosure of the Essential Facts Was Not Inconsistent with Article 12.8 of the SCM Agreement

7. Canada's claim under Article 12.8 with respect to Commerce's financial contribution analysis is without merit. Article 12.8 does not prescribe a particular manner for disclosure, so long as the disclosure takes place "in sufficient time for the parties to defend their interests." The United States fully complied with these obligations, and Canada's argument is baseless: the essential facts under consideration that Commerce allegedly failed to disclose were a Nova Scotia law (the *Public Utilities Act) submitted by Nova Scotia* and a discussion paper commissioned by Nova Scotia on the provision of electricity in Nova Scotia. These two documents were served on all interested parties. These materials also were extensively addressed in the record of the proceeding, and interested parties had more than ample opportunity to defend their interests. Canada has failed to establish that Commerce did not disclose the *Public Utilities Act* and the discussion paper to all interested parties, and the Panel should reject Canada's claims under Article 12.8.

C. Commerce's Benefit Determinations for the Provision of Electricity to Port Hawkesbury Was Not Inconsistent with Article 1.1(b) of the SCM Agreement

8. Canada has not demonstrated that Commerce's benchmark was inconsistent with Articles 1.1(b) and 14(d) of the SCM agreement. Instead of presenting an argument based on the text of the agreement, Canada essentially asks the Panel to conduct a new benchmark analysis and to use an alternative benchmark that Canada would prefer.

9. Article 14(d) does not specify the benchmark to be used when determining the adequacy of remuneration, so long as, in the first instance, the benchmark is "connected with the prevailing market conditions in the country of provision." Indeed, the Appellate Body in *US – Carbon Steel (India)* recently found that there is no "hierarchy between different types of in-country prices that can be relied upon in arriving at a proper benchmark," observing that "whether a price may be relied upon . . . is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision." The Appellate Body in that case recognized that "it is permissible for an investigating authority in a benefit calculation to construct a price" to serve as the benchmark for the benefit analysis.

10. Article 14(d) does not prescribe the source of the benchmark, be it individual transaction prices or constructed prices, so long as the benchmark prices are consistent with "prevailing market conditions." The Appellate Body has observed "that the 'market conditions' are further modified by the term 'prevailing,' which means 'predominant,' or 'generally accepted.'" In developing a benchmark to determine adequate remuneration, the focus is thus on the norm, and identifying the prices that are "generally accepted" based on typical market conditions.

11. Commerce's benchmark complied with the obligations of Article 14(d). Commerce's benefit analysis compared the electricity rate paid by Port Hawkesbury to a benchmark price constructed using Nova Scotia Power's standard ratemaking methodology. That is, Commerce did not create an artificial benchmark; rather, it applied the methodology that Nova Scotia Power uses in developing rates for similarly situated entities.

12. To determine the appropriate methodology to calculate a benchmark, Commerce first considered the two types of rates offered by Nova Scotia Power. Those two rates are called above-the-line and below-the-line. The above-the-lines rates constituted the appropriate choice, as these are the normal rates based on the recovery of electricity generation and transmission costs. In contrast, the below-the-line rates are preferential, non-market rates that do not include the

recovery of costs. Commerce understandably determined that the above-the-line methodology best approximated the prevailing market conditions necessary to calculate a benchmark.

13. Commerce then considered whether any of the above-the-line rates in Nova Scotia Power's schedule of rates for the relevant period (2014) could be used as a benchmark. Prior to receiving the LRR, under Port Hawkesbury's previous owner, the mill received an above-the-line rate under the tariff class called "Extra Large Industrial 2 Part Real Time Pricing." During the relevant period, this tariff class was not listed in Nova Scotia Power's tariff because at that time, there was no above-the-line ratepayer with a sufficiently large usage requirement to qualify for that tariff class. With respect to the rate for the next smaller class of industrial consumer (called the "large industrial" rate), Port Hawkesbury confirmed that it would not be eligible for the rate because of its significantly larger electricity consumption. Accordingly, Commerce properly concluded that "there were no electrical tariffs applicable to a customer with an extra-large connection size in the {Nova Scotia Power} rate schedule."

14. In the absence of applicable tariffs in the Nova Scotia Power rate schedule, Commerce "constructed a price {benchmark} that provides for complete coverage of fixed and variable costs, as well as a portion of ROE {return on equity} for profit using available information on the record." Commerce's benchmark comprised the following:

> Benchmark = variable costs + fixed costs + profit

15. For variable costs, Commerce relied on the actual amount paid by Port Hawkesbury through the LRR. Commerce determined that the LRR "covers all variable costs and makes a contribution to fixed costs."

16. For fixed costs, Commerce started with the actual amount paid by Port Hawkesbury through the LRR (C$2/MWh). To estimate the amount of fixed costs not covered by the fixed cost contribution of the Port Hawkesbury LRR but that would have been covered by a rate representative of prevailing market conditions, Commerce identified the fixed cost rate per MWh that was most recently applied under the above-the-line rate for an extra-large industrial customer. The General Rate Application identified the standard fixed cost rate that would be applied to an extra-large industrial customer as C$26/MWh from the most current rate of this type available. The result is an unrecovered fixed cost of C$24/MWh. Commerce calculated the amount of total unrecovered fixed costs by multiplying Port Hawkesbury's actual electricity consumption (in MWh) by the per-unit amount of unrecovered fixed costs (C$24/MWh).

17. For profit, Commerce determined that the NSUARB approved for Nova Scotia Power a guaranteed profit rate of 9 percent. Commerce identified the portion of Nova Scotia Power's total profit that would be attributable to Port Hawkesbury. It did so by first isolating the percentage of Nova Scotia Power's electricity consumption that was accounted for by Port Hawkesbury. Commerce then multiplied that percentage by Nova Scotia Power's total profit to identify the exact amount of profit that would have been attributable to Port Hawkesbury.

18. Commerce then "added together the three portions of the benchmark payments calculated above {variable costs, fixed costs, and return on equity} to arrive at a total amount that Port Hawkesbury would have paid for its electricity…using the benchmark."

19. Commerce's benchmark was based on the prevailing market conditions for electricity in Nova Scotia and therefore consistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

D. Commerce's Determination that the Hot Idle and Forestry Infrastructure Subsidies Received by Port Hawkesbury Were Not Extinguished because of a Change of Ownership Is Consistent with the SCM Agreement and GATT 1994

20. Commerce properly determined that Port Hawkesbury was the recipient of "hot idle" funds and disbursements under the Forestry Infrastructure Fund (FIF) and that the benefit associated with these financial contributions was not extinguished by a change of ownership.

21. As part of the sale process, NPPH and NewPage Corporation (New Page), NPPH's U.S. parent company, entered into a Settlement and Transition Agreement, under which NewPage committed

approximately US$22 million to maintain the mill in hot idle status. It was necessary to maintain the mill in hot idle status because machinery and equipment at mills like the Port Hawkesbury mill had to be in constant operation in order to maintain their efficiency, and even operability. NPPH also negotiated an agreement with Nova Scotia to establish a forestry infrastructure fund to pay for ancillary forest operations that were previously undertaken by NPPH. The purpose of the forestry infrastructure fund was to ensure that certain forestry operations would continue because NPPH intended to shut down its mill and ancillary forestry operations. Nova Scotia, however, deemed these operations directly beneficial to the province and the provincial economy, and did not want them to cease immediately.

22. Benefit, as understood by the SCM Agreement, exists where the financial contribution makes the recipient better off than it would otherwise have been, absent that contribution. Here, absent Nova Scotia's payment of hot idle funds, the financial obligation to maintain the mill in hot idle status would have fallen on NPPH. Nova Scotia explicitly subsidized a necessary condition of the sale of the mill *as the sale was occurring*; thus, PWCC received a benefit.

23. The issue was "whether the bid and sale prices reflected and incorporated the hot idle funds approved in December 2011 and March 2012." Given that the funding was bestowed as a result of NPPH's inability to use its own financial reserves to fulfill the obligations to which it agreed, Commerce properly recognized that "the full value of maintaining the mill in hot idle status was not accounted for in the original bid." As Commerce explained, given that Nova Scotia did not approve the hot idle funding until after the December 16, 2011 deadline for all bids, "the potential bidders would not have been aware of the provision of hot idle funds from {Nova Scotia}; therefore, the bids submitted could not have reflected the provision of the assistance by the {Nova Scotia} to maintain hot idle status."

24. The bid value itself was the result of a market process that began in September 2011 and concluded on December 16, 2011, and Nova Scotia played an important role in the transaction after that price was established. Commerce appropriately recognized the nuances of those circumstances and reasonably determined that PWCC received a benefit that it did not pay for − Nova Scotia's financial support of that sale.

25. As an alternative argument, Canada claims that the facts support a conclusion that the purchase of Port Hawkesbury was a private transaction conducted at arm's-length and for fair market value, and that such a transaction must automatically extinguish a subsidy, regardless of how much a government subsidizes that transaction, because there can be no benefit to the purchaser under those conditions. To support its claim, Canada relies on the *US − Countervailing Measures on Certain EC Products* panel report. Canada's reliance, however, is misplaced. That report simply states the proposition that an arm's-length transaction for fair market value generally extinguishes prior subsidies. The report does not state that concurrent subsidies − that is, those reflected in the circumstances of the transaction − are always extinguished.

26. Commerce, per Articles 1 and 14 of the SCM Agreement, has the authority to apply a methodology to determine whether a benefit has been conferred. As such, Commerce took into account the precise nature and circumstances surrounding the transaction in examining whether the benefit from the subsidy was extinguished upon change in ownership. Commerce examined the transaction to determine whether the purchaser received an advantage or something that makes the recipient 'better off' than it would otherwise have been, absent that financial contribution. The facts here demonstrate that the hot idle and FIF funds provided by Nova Scotia allowed NPPH to fulfil an obligation − to sell the mill to Port Hawkesbury as a going concern − it otherwise would not have been able to meet. The record evidence demonstrates that due to the timing of the market transaction the hot idle grants and FIF were not reflected in the purchase price PWCC ultimately paid. And, accordingly PWCC's purchase of the mill did not extinguish the subsidy.

E. Commerce's Investigation of the Government of Nova Scotia's Provision of Stumpage to Port Hawkesbury Was Initiated in a Manner Consistent with Articles 11.2 and 11.3 of the SCM Agreement

27. Canada has failed to establish that Commerce's investigation into Nova Scotia's provision of stumpage and biomass to Port Hawkesbury is inconsistent with Articles 11.2 and 11.3 of the

SCM Agreement. The relevant inquiry is to determine whether an application contains "sufficient evidence" or "adequate facts or indications" *to justify initiation of an investigation*, not to sustain a preliminary or final determination. The amount of evidence that is "sufficient" for the initiation of an investigation must be considered in light of the qualification in Article 11.2 that an "application shall contain such information as is reasonably available to the applicant" on the existence, amount and nature of the subsidy in question. Thus, an application can comply with the standard set out in Article 11.2 "even if it does not include all the specified information if such information was simply not reasonably available to the applicant."

28. Commerce's decision to investigate Nova Scotia's provision of stumpage to Port Hawkesbury fully complied with this requirement because the application contained sufficient evidence with regard to the existence of a subsidy, and such evidence that was "reasonably available to the applicant." In particular, the application demonstrated that Port Hawkesbury did not procure pulpwood based on market principles. Furthermore, the application contained evidence that was "reasonably available" to the applicant to indicate the existence of a subsidy, consistent with Articles 11.2 and 11.3.

III. CANADA HAS FAILED TO ESTABLISH THAT COMMERCE'S COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO RESOLUTE WAS INCONSISTENT WITH THE SCM AGREEMENT OR GATT 1994

A. Canada's "As Applied" Claims Concerning Discovered Information Are Without Merit

29. Commerce initiated an investigation into SC Paper imports to determine whether manufacturers, producers, or exporters of SC Paper from Canada received countervailable subsidies. In other words, Commerce initiated an investigation into a *product* alleged to have been subsidized. Commerce's investigation into SC Paper imports included, but was not limited to, an examination of the programs listed by name in the petition.

30. As reflected in the record, the investigation was in relation to subsidies received by producers of a product, and not limited to particular programs. Commerce published a notice of initiation in the Federal Register explaining that Commerce accepted a petition and would examine further the information contained in that petition in the context of an examination of the subsidization of SC Paper.

31. An investigation into a product and the subsidies received by producers of that product is consistent with WTO requirements. The structure and content of Article 11 confirm that an initiation of an investigation under the SCM Agreement is not limited to an investigation of particular programs, but encompasses an investigation into the subsidization of a *product*. Articles 11.2 and 11.3 make clear that the petition (or application) must contain "sufficient information" on the existence of an alleged subsidy, together with injury and causal link. But the text does not limit the subsequent investigation initiated to the subsidy alleged in the petition. The chapeau of Article 11.2 of the SCM Agreement indicates that an investigating authority may initiate an investigation and examine programs not included in the written application. In particular, the chapeau of Article 11.2 requires only that there be "sufficient evidence" of the existence of "a subsidy" in an application to justify initiation of an investigation. The use of the indefinite article "a" preceding the noun "subsidy" in Article 11.2 is significant. The use of the phrase "a subsidy" as opposed to "the subsidy" indicates that the petition must contain "sufficient evidence" of subsidization to justify initiation of an investigation pursuant to Article 11.3, but not that an application need have covered all possible subsidies in order to justify an initiation into the subsidization of a product.

32. Article 11.3 provides additional interpretative guidance on the scope of an investigation. It is important to note that before initiating an investigation, Article 11.3 requires that an investigating authority determine if there is sufficient evidence of *injury* within the meaning of Article VI of GATT 1994. And, examples of evidence of alleged injury listed in Article 11.2 focus on import volume and price data related to a specific *product*. Accordingly, the injury analysis outlined in Article 11.2 to determine sufficient evidence for initiating an investigation relates to a *product*, not a specific subsidy program. Accordingly, Article 11.2(iv) supports the view that an investigating authority can initiate an investigation into a product.

33. Further support for the distinctions drawn in Article 11 between the petition (or application) and its contents, the evaluation of whether the petition (or application) contains "sufficient evidence" to justify initiation of an investigation, and the investigation into the *product* and the subsidies received by the producers of that product is provided by the notification provisions of Article 25 of the SCM Agreement. Article 25 of the SCM Agreement requires WTO Members to notify to Members in the SCM Committee any subsidy granted or maintained in their territory.

34. On June 30, 2015, Canada notified the SCM Committee of its industrial, cultural, agricultural, and fisheries programs at the federal and sub-federal government level, for fiscal years 2012-2014. However, Canada failed to disclose to Members any of the programs discovered during verification, depriving Members of the ability to understand the subsidies and evaluate their trade effects, if any.

35. Properly understood, the SCM Agreement permits Members to discover and countervail non-transparent subsidies as part of a properly initiated investigation. Where a country has failed to act in a transparent manner and properly notify its subsidy programs, it would be a perverse outcome to require an investigating authority to ignore information on non-notified or transparent subsidies and to require the authority not to counteract their contribution to injurious subsidization when calculating the final countervailing duty rate. To that end, Article 11 permits an investigating authority to initiate an investigation into the subsidization of a product, and examine subsidies not necessarily listed in the written application. Accordingly, Commerce's initiation of an investigation into SC Paper was conducted in accordance with Article 11 of the SCM Agreement.

1. Commerce's use of facts available regarding subsidies discovered during verification was not inconsistent with Article 12.7 of the SCM Agreement

36. Canada's argument that Commerce's decision to resort to facts available was inconsistent with obligations under the SCM Agreement suffers from three fundamental problems. First, Canada mischaracterizes the scope of the investigation, and thus Canada's argument on what information was or was not necessary is not based on the actual record in this dispute. Second, regardless of the scope of the investigation, the SCM Agreement does not prescribe the type of questions an investigating authority may ask an interested party, and Canada has not identified any provision that would foreclose Commerce from asking a question concerning "any other forms of assistance" that may be subsidizing the product in question. Third, Canada's arguments do not address the fundamental fact that Resolute impeded the investigation by failing to fully answer Commerce's question concerning "any other forms of assistance."

37. First, Canada mischaracterizes the scope of Commerce's investigation. Commerce properly initiated an investigation into a *product* alleged to have been subsidized. Commerce then, as part of the investigation, requested information on "any other forms of assistance" to determine whether Canada was, in fact, subsidizing the production of SC Paper. The "any other forms of assistance" question was asked in order to understand and collect information related to the alleged subsidization of the product under investigation – SC Paper.

38. Second, the SCM Agreement does not prescribe the type of questions an investigating authority may ask an interested party, and Canada has not identified any provision that would foreclose Commerce from asking the "any other forms of assistance" question. Canada argues that the information requested was not "necessary information." However, it is not for a respondent to determine subjectively what information is "necessary" to Commerce's investigation and analysis. The investigating authority determines what information to request and what is "necessary" on the basis of the investigation, including the responses by interested parties in the course of that investigation.

39. Third, Canada's argument fails to address the key factual underpinning for the use of facts available: namely, Resolute's decision not to provide a complete response to a question posed by Commerce in its questionnaire. In responding to the initial questionnaire, Resolute failed to report subsidies that were labeled in its own accounting system as "subsidies." This was not information that was "mitigating the absence of 'any' or 'unnecessary' information." Instead, Commerce discovered the information at verification when it was verifying the non-use of subsidy programs.

Consistent with Article 12.7, Commerce, then, resorted to facts available, and ultimately determined that the programs were countervailable subsidies.

40. By not divulging the receipt of the unreported assistance prior to the commencement of verification, Resolute precluded this unreported assistance from being "verifiable" and impeded the investigation by refusing to provide complete and verifiable answers. As a result of Resolute's failure to respond to Commerce's question, necessary information was missing from the record of the investigation which prevented Commerce from analyzing the relevant facts concerning the element of benefit. Accordingly, Commerce needed to rely on facts available to determine whether the discovered programs, found in accounts labeled as "subsidies" constituted countervailable subsidies.

41. Canada's objection to the applied duty rate in *Magnesium from Canada* is not based on any provision of the SCM Agreement. Article 12.2 provides that any decision of the investigating authority must be based "on the written record of this authority." In the countervailing duty investigation, Commerce complied with this obligation and used the limited record information that was available to it. The amount of the subsidy rates and the dates of receipt of the discovered subsidies were not "facts available" to Commerce because Resolute failed to divulge this information prior to verification and thus did not provide verifiable information. Consequently, Commerce selected a rate of 8.55 percent calculated in *Magnesium from Canada* for the "Article 7 Grants from Quebec Industrial Development Corporation," a program that provided assistance in the form of grants. Canada has not identified any breach of the SCM Agreement related to Commerce's calculation of the countervailing duty rate for Resolute. Accordingly, Commerce's facts available rate for Resolute was WTO-consistent.

2. Commerce adhered to all of the procedural requirements outlined in Articles 12.1, 12.2, 12.3, and 12.8 of the SCM Agreement

42. Canada errs in arguing that Commerce acted inconsistently with the procedural requirements outlined in Article 12 of the SCM Agreement. Canada does not contest the fact that Commerce provided all interested parties at least thirty days to reply to the initial questionnaire issued at the outset of the investigation. Resolute had numerous opportunities to ensure that its responses to Commerce's questions were correct, and, indeed, both Resolute and Canada filed amendments to their original submissions when they discovered that benefits to Fibrek under the Federal Pulp and Paper Green Transformation Program ("FPPGTP") were not properly reported. Moreover, the parties were notified that Commerce had discovered subsidies at verification and was including them in the investigation when Commerce released Resolute's verification report. In fact, interested parties submitted comments on this issue to Commerce prior to the issuance of the final determination.

43. Contrary to Canada's unsubstantiated Article 12.2 claim, Commerce provided Resolute with an opportunity to present information and arguments orally. During the September 24, 2015, public hearing, after the August 2015 verification, Resolute orally presented information and arguments related to the programs discovered during verification, specifically as to why Commerce should not apply facts available to the programs discovered during verification. These arguments were recorded by Commerce and reflected in the final determination.

44. Canada does not provide any evidence or adequate argumentation supporting its Article 12.3 claim. Furthermore, the record in the countervailing duty investigation shows that Commerce placed all relevant evidence on the record and thus made it available for interested parties and the public to view. There is no evidence presented by Canada that Commerce failed to provide interested parties with an opportunity to see all information relevant to the investigation.

45. In addition, Canada has failed to identify any facts, let alone essential facts contemplated under Article 12.8 of the SCM Agreement, that Commerce has failed to disclose. The disclosure obligation does not apply to the reasoning or conclusions of the investigating authority, but rather to the "essential facts" underlying the reasoning and conclusion.

B. Commerce's Determination that Certain Benefits Conferred to Fibrek Were Not Extinguished When Resolute Acquired Fibrek Is Consistent with the SCM Agreement

46. Commerce properly determined that the record did not contain sufficient evidence to support Resolute's claim that subsidy benefits received by Fibrek were extinguished by Resolute's purchase of its wholly-owned subsidiary, Fibrek. Despite Canada's arguments, Resolute simply characterized the Fibrek acquisition as a "hostile takeover" without any supporting evidence to that assertion. Commerce explicitly requested a discussion of all such "change in ownership" transactions within Resolute's responses to the questionnaire regarding Resolute's history, and, in turn, Resolute responded with brief, unsupported declarations. Resolute did not demonstrate that the price it paid for Fibrek reflected the subsidies Fibrek received. And, without that demonstration, Commerce was unable to reach a finding of extinguishment. As a result, Commerce properly determined that the benefits provided to Fibrek under the FPPGTP and the subsidies discovered at verification continued to benefit Resolute after Resolute's acquisition of Fibrek.

C. Commerce's Calculation of Resolute's Subsidy Rate for the FPPGTP, FSPF, and NIER Programs Was Not Inconsistent with the SCM Agreement and the GATT 1994

47. Commerce's attribution of the benefits received pursuant to the FPPGTP, the Ontario Forest Sector Prosperity Fund ("FSPF"), and the Ontario Northern Industrial Electricity Rate Program ("NIER") was consistent with the GATT 1994 and the SCM Agreement.

48. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 do not dictate precisely how an investigating authority should allocate the numerator and denominator when calculating countervailing duty ratios. In determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, a Member may examine a subsidy and determine that the benefits received from the countervailable subsidy are spread across the entire company, and cannot be linked to a particular product. Under such circumstances, it is appropriate to treat that subsidy by a company as essentially "untied," and to divide the benefit by the company's total sales for purpose of attributing the benefits to the company. This is precisely the exercise contemplated when the Appellate Body explains that the "correct calculation of a countervailing duty rate requires matching the elements taken into account in the numerator with the elements taken into account in the denominator." A subsidy that benefits all products would accordingly be attributed to all sales.

49. This matching exercise does not require the authority to trace subsidy benefits from receipt to the moment of actual use. Instead, as the Appellate Body has observed, "the appropriate inquiry into the existence of a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product." Although Canada seeks to cast blame on Commerce for failing to ascertain as precisely as possible the correct amount of the subsidy, in fact, Commerce undertook the very "matching" exercise described by the Appellate Body.

50. Commerce's attribution of the benefits received pursuant to the FPPGTP, FSPF, and NIER subsidy programs was consistent with the GATT 1994 and the SCM Agreement.

51. **FPPGTP**: Commerce properly attributed to Resolute's total sales of pulp and paper products the subsidy benefits received by Resolute under the FPPGTP program. The program's eligibility requirements explicitly targeted and limited benefits to Canada's pulp and paper industry. Commerce analyzed the design, structure, and operation of the program, explaining that the subsidy was limited to "capital investments at a Canadian pulp and paper mill," and that "costs associated with other types of projects…are ineligible for the program." Commerce appropriately determined that these grants were "tied to the production of only pulp and paper products."

52. **FSPF**: Commerce properly attributed the subsidy benefits received by Resolute under the FSPF to Resolute's total sales. In its consideration of the design, structure, and operation of the program, Commerce found that grants conferred under the program were not limited to the production of a particular product; rather, the grants were "issued to the forest industry to support

and leverage new capital investment projects." Commerce concluded that Resolute received a countervailable subsidy that benefited all of Resolute's production activities.

53. **NIER**: Commerce properly attributed the subsidy benefits received by Resolute under the NIER program to Resolute's total sales. In its consideration of the design, structure, and operation of the program, Commerce explained that the "purpose of the program is to assist Northern Ontario's largest qualifying industrial electricity consumers which commit to developing and implementing an energy management plan to manage their energy usage and improve energy efficiency and sustainability." Accordingly, in calculating the rate of subsidization, Commerce properly matched the elements taken into account in the numerator – a benefit to support all of Resolute's production – with the elements taken into account in the denominator – Resolute's total sales.

IV. COMMERCE'S CALCULATION OF CATALYST'S AND IRVING'S COUNTERVAILING DUTY RATES IS NOT INCONSISTENT WITH THE SCM AGREEMENT

A. Commerce's Calculation of the All Others Rate Was Consistent with the GATT 1994 and the SCM Agreement

54. Canada has failed to demonstrate that Commerce's determination was inconsistent with the obligations of Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994. The SCM Agreement does not prescribe a methodology for calculating a rate for non-investigated firms.

55. Under DSU Article 3.2 the Panel is to apply customary rules of interpretation, under which a provision is to be interpreted in accordance with the ordinary meaning of the terms in their context, and in light of its object and purpose. Conversely, the Appellate Body has recognized "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning.'" An agreement's silence on a particular issue cannot be filled by imputing the obligation of an entirely distinct agreement. Rather, a Member's obligations under the SCM Agreement are derived from the text of the SCM Agreement.

56. Canada's reliance on the Appellate Body report in *US – Hot-Rolled Steel* is misplaced. The Anti-Dumping Agreement and the SCM Agreement impose fundamentally different obligations to the calculation of an antidumping margin or a countervailing duty rate for a non-investigated entity. Article 9.4 of the Anti-Dumping Agreement identifies with particularity the antidumping margins that can and cannot be used in the calculation of a margin for non-investigated exporters. This level of prescription has no parallel in the SCM Agreement; Article 19.3 of the SCM Agreement establishes only that non-investigated exporters may be subject to countervailing duties and may request an expedited review.

57. Commerce adopted a reasonable approach for determining the rate for non-investigated companies – namely, to base that rate on the countervailing duty rates determined for the investigated producers. The weighted-average of Port Hawkesbury's and Resolute's countervailing duty rates provided the best approximation for the countervailable subsidies received by all other SC Paper producers during the relevant period of investigation. This was an eminently reasonable approach that resulted in a countervailing duty rate supported by evidence on the record.

B. Commerce Properly Initiated an Investigation into New Subsidy Allegations Against Catalyst and Irving During an Expedited Review

58. The United States disagrees with Canada's argument that the SCM Agreement contains some sort of unspecified limitation on the new subsidy allegations that may be included in an expedited review under Article 19.3.

59. The obligation outlined in Article 19.3 is clear: an investigating authority must provide an expedited review to an exporter who is subject to a countervailing duty investigation but was not individually investigated to establish an individual countervailing duty rate for that exporter. There is no limitation, express or implied. Canada agrees with this reading of Article 19.3. However, despite the clear obligation outlined in Article 19.3, Canada asks the Panel to expand

upon that obligation and place certain restrictions on a Member's conduct of an expedited review; restrictions that appear nowhere in the text of Article 19.3.

60. Moreover, Canada's reliance on the Appellate Body report in *US – Carbon Steel (India)* is misplaced. Canada is using the *US – Carbon Steel (India)* Appellate Body report to compare the *purpose* of an administrative review outlined in Article 21 to the conduct of an expedited review discussed in Article 19. This argument provides no basis to read into the text of Article 19.3 an obligation that is not there. For these reasons, Canada's claim under Article 19.3 fails and should be rejected.

C. Commerce's Initiation of the New Subsidy Allegations Was Consistent with Article 11 of the SCM Agreement

61. Commerce's decision to initiate an investigation into the new subsidy allegations was consistent with Article 11 of the SCM Agreement. Article 11.3 requires an authority to determine whether an application contains "sufficient evidence" or "adequate facts or indications" to justify initiation of an investigation, a lesser standard than is required to support a final finding by the investigating authority. In addition, the amount of evidence that is "sufficient" for the initiation of an investigation must be considered in light of the qualification in Article 11.2 that an "application shall contain such information as is reasonably available to the applicant" on the existence, amount and nature of the subsidy in question. For each new subsidy allegation, Commerce's decision to initiate was based on sufficient evidence and consistent with Article 11. We note that Canada has not notified to the WTO's SCM Committee any of the programs identified in the new subsidy allegations.

V. CANADA'S "AS SUCH" CLAIMS CONCERNING DISCOVERED INFORMATION ARE WITHOUT MERIT

62. As a fundamental matter, the so-called "ongoing conduct" cannot be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. Measures that are not yet in existence at the time of panel establishment cannot be within a panel's terms of reference under the DSU. The purported "ongoing conduct" does not exist apart from the instances of use of facts available in the context of a particular investigation. Unlike a measure that constitutes a rule or norm of general and prospective application, Canada's so-called ongoing conduct measure simply describes actions that Commerce has taken in small number of its countervailing duty determinations. Yet, for Canada's so-called measure to give rise to a breach of a WTO obligation, the measure would have to "constitute an instrument with a functional life of its own" and "do something concrete, independently of any other instruments."

63. Even aside from the fact that "ongoing conduct" is not a measure in existence as of the time of the Panel's establishment, and thus is not within its terms of reference, Canada's claims relating to such an alleged "measure" also fail because Canada has failed to establish that any such "ongoing conduct" exists or is likely to continue under the challenged order that is at issue in this dispute.

64. Canada's "as such" challenge related to discovered information fails because Canada has not identified the precise content of the alleged rule or norm or its general and prospective application. Canada seeks to characterize actions taken by Commerce in seven determinations as a "rule or norm of general and prospective application." Canada's effort fails. First, Canada seeks to define the precise content of the rule or norm by identifying a series of actions that theoretically could occur in any countervailing duty investigation. Canada merely reproduces a table listing a series of questions included in seven investigations that it collectively refers to as the "any other forms of assistance" question. The wording of the questions Canada has reproduced in Table 1 varies. In Table 2, Canada lists excerpts from the issues and decisions memoranda which correspond to the seven investigations. Similar to Table 1, the excerpts listed in the second table differ from each other. It is not clear what "application" Canada is challenging as a purported rule or norm. It is also unclear if Canada is challenging the application of a particular question, the application of facts available, a combination of both, or an application of something entirely different.

65. Canada's use of a series of varying, vague, and imprecise terms to identify the so-called "Other Forms of Assistance-AFA measure" is insufficient to meet the precise content requirement

previously outlined by the Appellate Body. Including selective excerpts from questionnaires and issue and decision memoranda does not identify with any precision the content of the measure Canada is challenging.

66. Second, in addition to insufficiently identifying the precise content of the so-called measure it is challenging, Canada has not demonstrated that the alleged measure is of general and prospective application. Canada presents little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be considered a norm or rule of general and prospective application. Indeed, these pieces of evidence support the opposite finding.

67. In all seven of the determinations Canada relies upon, Commerce made unique findings and reached different results. In two of the cases mentioned by Canada, Shrimp from China in 2013 and PET Resin from China in 2015, the "discovered" information was presented to Commerce by the companies, either as "minor corrections" at the outset of the verification or independently. In those two proceedings, Commerce accepted or rejected the corrections depending on the nature of the correction submitted.

68. In the instant case, during the verification of Resolute, Commerce discovered four potential previously unreported subsidy accounts. Three of the accounts showed reimbursements or funds received. For these three accounts, Commerce used facts available to determine that there were two countervailable programs. However, Commerce determined that it was not necessary to apply facts available to the other subsidy account discovered during verification.

69. With respect to Section 502 of the Trade Preferences Extension Act ("TPEA"), Canada simply cites to three determinations in which the Act was referenced. Canada does not explain how those citations to TPEA in any way support the existence of an alleged unwritten norm of general and prospective application. Furthermore, on its face, the TPEA provides Commerce with the discretion to use facts available in its determinations. The statute does not mandate any particular outcome, and thus even if a statute were somehow relevant to establishing the existence of an unwritten measure, this statue provides no support for Canada's position. As explained by Canada in its first written submission, the TPEA provides flexibility to Commerce, was recently enacted, and has only been referenced in a few administrative determinations. The sum total of the evidence Canada adduces to support its claim consists of a handful of determinations by Commerce and a broad reference to Section 502 of the TPEA. Such evidence is insufficient.

VI. CONCLUSION

70. For the foregoing reasons, the United States respectfully requests that the Panel reject all of Canada's claims.

EXECUTIVE SUMMARY OF THE U.S. STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

71. [A summary of the U.S. statement at the first substantive meeting is reflected in the above Executive Summary of the U.S. First Written Submission.]

EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS

Summary of U.S. Response to Question 5

72. Commerce's conclusion of financial contribution was based on its consideration of two related factors: (1) section 52 of the *Public Utilities Act*, which requires a public utility to provide electricity to its customers, and (2) the unique role of Nova Scotia − including through the Nova Scotia Utility and Review Board ("NSUARB") − in the provision of electricity to Port Hawkesbury through the Load Retention Rate ("LRR"). With respect to the *Public Utilities Act,* Commerce found that Nova Scotia Power "is required by law to provide electricity to customers who request it anywhere in Nova Scotia."

73. With respect to the second factor identified above − the role of Nova Scotia in the negotiation of the LRR − Commerce's analysis took account of the unique circumstances surrounding the salvation from bankruptcy and dissolution of the Pork Hawkesbury mill. In this regard, Commerce noted that "{Nova Scotia} stated that Port Hawkesbury would not exist if it had

to pay any of the published electricity tariffs for industrial users." Indeed, the prospective new owner of the Port Hawkesbury mill made a lower price for electricity a precondition for the purchase of the mill. Because of Nova Scotia's keen interest in saving the mill as an ongoing concern, Nova Scotia ensured that Nova Scotia Power would offer to provide electricity at below market rates. Commerce's final determination identified record evidence on the role of Nova Scotia and the NSUARB in the negotiation of the LRR.

74. Commerce also relied on the fact that the government of Nova Scotia through the NSUARB changed the regulatory framework in order to make Port Hawkesbury eligible for a LRR. Under existing practice, an LRR had been available only to companies on the electric system that sought alternative means of generation. But in the Port Hawkesbury situation, Nova Scotia Power used the LRR to allow for the salvation of a bankrupt customer. In particular, Commerce found that, in June 2011, "{NewPage Port Hawkesbury} and Bowater filed an application with the NSUARB to change the pre-existing LRT to make it available to a company facing 'impending business closure due to economic distress' and to allow for an LRR for a company in economic distress." NewPage Port Hawkesbury required the LRR in order to operate the mill, and it was not eligible for this special rate under the existing Load Retention Tariff framework. Commerce considered the expansion of the Load Retention Tariff to be highly relevant to the government's entrustment or direction for the provision of electricity to Port Hawkesbury.

75. Accordingly, Commerce's financial contribution determination was based on section 52 of the *Public Utilities Act* and the government of Nova Scotia's conduct, including through the NSUARB, in ensuring the provision of electricity to Port Hawkesbury.

ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. CANADA HAS FAILED TO DEMONSTRATE THAT COMMERCE'S COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO PORT HAWKESBURY WAS INCONSISTENT WITH THE SCM AGREEMENT AND THE GATT 1994

A. Commerce's Financial Contribution Determination for the Provision of Electricity to Port Hawkesbury Was Consistent with Article 1.1(a)(1)(iv) of the SCM Agreement

1. In this submission, the United States responds to two arguments: first, Canada's repeated assertion that section 52 of the *Public Utilities Act* does not impose a duty to serve, despite Canada's own acknowledgment that the utility had a duty to serve; and second, that a general service obligation alone is not sufficient to find the existence of a financial contribution, even though Commerce's analysis was not limited to this single factor.

2. Canada has argued that the plain language of section 52 does not impose an obligation to serve. This argument is unavailing. First, Canada acknowledges that a legal obligation is derived from section 52 of the *Public Utilities Act*, but suggests that because "the duty to serve is not expressly set out in section 52," Commerce's record did not support the interpretation. But Canada's own statements make clear that Commerce properly interpreted the obligation of section 52. In its responses to the Panel's questions, Canada explains that "section 52…has been interpreted to include a duty to serve through the common law," and cites to a decision by the Nova Scotia Court of Appeal that found the predecessor provision to section 52 to "set out a 'service requirement' or a duty to serve."

3. Canada's second new argument − also contradicted by Canada's own statements − is that section 52 is "not directly enforceable by law" and that Nova Scotia Power "is not required by law to provide electricity to customers if it does not make economic sense to do so." Canada itself recognizes that "the {Nova Scotia Utility and Review Board ("NSUARB")} has the authority under section 46 to order public utilities to comply with the *Public Utilities Act*," and "sections 112 and 114 make it an offence to violate the *Public Utilities Act*." Of course, in both instances, this includes the duty to serve.

4. Canada's answers to the Panel's questions fault Commerce's financial contribution determination for not establishing a link between the government action and the specific conduct of Nova Scotia Power. But, without government involvement − through the financial contribution − Port Hawkesbury would not have received the provision of electricity for less than adequate remuneration. The United States has explained that ample evidence on the record of the countervailing duty investigation supported Commerce's conclusion:

- The NSUARB's decision to expand the Load Retention Tariff to allow for a Load Retention Rate ("LRR") for companies in economic distress, a decision made at the request of NewPage Port Hawkesbury. Without this government action, Port Hawkesbury would not have qualified for an LRR and would not have received the LRR.

- The government of Nova Scotia negotiated with Pacific West Commercial Corporation ("PWCC") the terms of a commitment whereby if Port Hawkesbury's mill load triggered certain obligations that resulted in increased incremental costs, Nova Scotia would guarantee that neither Port Hawkesbury nor other ratepayers would be required to pay.

- Nova Scotia's decision to hire a consultant "to help facilitate the discussions between PWCC and {Nova Scotia Power} and to provide advice and technical support to both of these parties in designing and negotiating an LRR that could be delivered to the NSUARB for approval."

- The unique role of the NSUARB in the negotiation and approval of the LRR.

5. Contrary to Canada's claims, Commerce's final determination identified a clear link between the government action and the granting of Port Hawkesbury's LRR.

B. Commerce's Disclosure of the Essential Facts Was Consistent with Article 12.8 of the SCM Agreement

6. As discussed in the U.S. first written submission, interested parties had ample opportunity − and availed themselves of that opportunity − to provide comments and arguments on the two facts that are the focus of Canada's claim: the *Public Utilities Act* and a discussion paper. Nova Scotia submitted to Commerce the *Public Utilities Act* on May 28, 2015 − 60 days before the *preliminary determination* − and Commerce's preliminary determination made clear that the *Public Utilities Act* and the obligations placed on Nova Scotia Power therein were central to Commerce's financial contribution analysis. As for the discussion paper, which Canada has not established to be an "essential fact," Commerce submitted to the record and distributed the paper to all interested parties 110 days before the final determination. Commerce explicitly provided interested parties the opportunity to "submit factual information to rebut, clarify, or correct the factual information." Canada does not dispute this timeline.

7. Canada's first interpretive argument − made without textual support − asserts that "the United States was obligated to request that interested parties address the relevance of section 52 and the duty to serve in written submissions, if it was contemplating relying on it to establish a financial contribution." Article 12.8 imposes no such obligation, and instead contains only a "disclosure obligation" that extends to the essential facts. The provision requires the authority to make the disclosure of the facts "in sufficient time for the parties to defend their interests." Given that some parties did in fact avail themselves of the full opportunity they were provided to "defend their interests" with respect to the *Public Utilities Act* and the submission containing the discussion paper, there is no basis for Canada's claim under Article 12.8.

C. Commerce's Benefit Determination for the Provision of Electricity to Port Hawkesbury Was Consistent with Articles 1.1(b) and 14(d) of the SCM Agreement

1. Article 14(d) requires the use of a market benchmark to determine the existence and extent of a benefit for the provision of a good or service

8. In its opening statement and in its responses to the Panel's questions, Canada continued to advance the extraordinary argument that "there was no need for Commerce to use a benchmark" because "the provision of electricity by {Nova Scotia Power} to {Port Hawkesbury} is itself a market transaction." Canada's argument assumes the conclusion. The very purpose of a benchmark is to determine if the transaction was made for less than adequate remuneration "in relation to the prevailing market conditions." The Appellate Body has recognized that a benefit determination requires a comparison between a market benchmark price and the price at which the good has been provided.

9. Furthermore, the underlying factual premise for Canada's argument − that the transaction for electricity concerns only two private entities, Nova Scotia Power and Port Hawkesbury, and is therefore necessarily a market transaction − is flawed. Commerce's final determination concluded that "{Nova Scotia} played an essential role in the specific LRR that set the price for the electricity sold to Port Hawkesbury from {Nova Scotia Power}."

2. Canada has failed to demonstrate that an above-the-line rate is not "in relation to the prevailing market conditions"

10. In its responses to the Panel's questions, Canada argues that below-the-line rates are part of "prevailing market conditions" in Nova Scotia. The question for the Panel is not whether a below-the-line rate could serve as a benchmark for electricity − that is, whether the Panel, were it to engage in *de novo* review of this issue, would consider a below-the-line rate *more appropriate* for use as a benchmark. Rather, the issue before the Panel is whether the benchmark *used by Commerce* − one based on above-the-line rates for extra-large industrial customers − is consistent with the legal obligations of Article 14(d) of the SCM Agreement.

11. Above-the-line rates for extra-large industrial users are in relation to the prevailing market conditions for an extra-large customer of electricity in Nova Scotia, consistent with Article 14(d) of the SCM Agreement. In considering the prices that were in relation to the prevailing market conditions for electricity in Nova Scotia, the record of the countervailing duty investigation made clear that above-the-line rates satisfied the legal standard. During the period of investigation, out of all of Nova Scotia Power's customers − regardless of size or customer class − *only Port Hawkesbury did not pay an above-the-line rate*.

12. Within the different categories of above-the-line rates, the extra-large industrial rate was the appropriate above-the-line rate under the circumstances of this investigation. This fact is clear based on Port Hawkesbury's own experience: prior to receiving the LRR, under Port Hawkesbury's previous owner, the mill received the above-the-line rate for extra-large industrial users. In other words, without government involvement, Port Hawkesbury would have paid an above-the-line rate for extra-large industrial users.

13. Canada has not established that an above-the-line rate for extra-large industrial users is not "in relation to the prevailing market conditions" for an entity that satisfies the requirements of an extra-large industrial user of electricity in Nova Scotia.

3. Canada's arguments regarding Commerce's construction of the benchmark are not supported by the record of the countervailing duty investigation

14. Commerce's constructed benchmark replicated the standard ratemaking methodology used by Nova Scotia Power to develop above-the-line rates for similarly situated entities. Indeed, like any above-the-line rate developed by Nova Scotia Power, Commerce's constructed benchmark was based on the sum of variable costs, the applicable contribution to fixed costs, and the standard profit ratio (*i.e.*, Benchmark = variable costs + fixed costs + profit).

15. Canada's first argument, which it does not support with citation to the record of the investigation, is that the constructed benchmark did not account for Port Hawkesbury's status as a priority interruptible customer. In the final determination, Commerce observed, "there were no interruptible rates available to use as a benchmark" during the period of investigation. Confronted with this reality, Commerce's constructed benchmark reflected a rate − the extra-large industrial rate − that *was priority interruptible*. As explained in the NSUARB order setting the framework for the Load Retention Tariff, the extra-large industrial rate requires that "customers served under this tariff must accept priority supply interruption."

16. Canada also argues that Commerce did not request accounting and operational information from Nova Scotia Power, or an explanation of the cost components of the extra-large industrial rate. Commerce requested the information necessary that would have been required to substantiate Canada's claims that additional adjustments should be made to the constructed benchmark, but neither Canada nor Nova Scotia Power provided the requested information. In addition to the requests for information in the questionnaires, Commerce specifically identified those issues as topics it intended to pursue as part of its on-site verification. Despite these specific requests, at verification, counsel for Nova Scotia informed Commerce that Nova Scotia Power was asked to participate and assist with the agenda items, but declined to do so.

17. Canada's challenge to Commerce's selected contribution to fixed costs − C$26 per MWh − for the constructed benchmark is also without merit. The 2012 rate for extra-large industrial customers was designed based on the load for Port Hawkesbury and Bowater Mersey pursuant to Nova Scotia Power's standard pricing mechanism, enabling Commerce to identify in a factual statement in the General Rate Application the fixed cost rate assigned to these companies in 2012. At no point in the countervailing duty investigation − or even (although it would be untimely) in this WTO proceeding − has Canada supported with evidence an alternative cost.

D. Commerce's Determination that the Hot Idle and Forestry Infrastructure Subsidies Received by Port Hawkesbury Were Not Extinguished because of a Change of Ownership Is Consistent with the SCM Agreement and GATT 1994

18. The United States will focus on the benefit PWCC received related to the forestry infrastructure subsidies (known as FIF). In its responses to the Panel's questions, Canada advances additional arguments against Commerce's determination pertaining to the forestry infrastructure subsidies. Canada acknowledges that PWCC's bid was conditioned on receiving the mill in hot idle status so that PWCC could sell the mill as a "going concern." Canada presents the new argument that one of the provincial subsidies − the FIF − was not designed to achieve the sale as a "going concern." First, the purpose of a subsidy is not a determining factor in a benefit analysis. Rather, the pertinent question is whether the subsidy was fully reflected in the final transaction price. Second, record evidence, in fact, demonstrates that the creation of the FIF aided in selling the mill to PWCC as a "going concern."

19. In a questionnaire response, Nova Scotia's statements are evidence that Nova Scotia created the FIF to maintain the supply chain of the mill during the sale process. Likewise, in an answer to a question regarding the extension of FIF and hot idle funding in March 2012, the government of Nova Scotia made explicit statements demonstrating that the FIF was created and maintained to ensure that the mill was sold as a "going concern." Without the FIF, the bankruptcy proceeding would have directly impacted NPPH's forestry operations. Moreover, as the Verification Report of the Government of Nova Scotia demonstrates, the FIF was implemented to enable the forestry operations to continue during the bankruptcy process and not interrupt supply chain operations at the mill. When it became clear that NPPH was ceasing production, Nova Scotia negotiated the Forestry Infrastructure Agreement, and was obliged to extend the agreement into 2012, well past PWCC's initial bid proposal, in order to maintain NPPH's ongoing forestry operations. All of these activities contributed to the sale of NPPH as a "going concern" to PWCC. Canada points to the fact that the marketing materials provided to prospective buyers of NPPH do not mention the FIF; this, however, does not undercut the record evidence demonstrating that the FIF contributed to the overall operations of the mill and allowed NPPH to continue its forestry operations during the bankruptcy process and sell the mill as a going concern.

20. Accordingly, despite Canada's arguments, the FIF was not merely a means of fulfilling NPPH's forestry obligations, but was created to sell the mill as a "going concern." Strikingly, as evident from Nova Scotia's questionnaire responses, Nova Scotia was directly involved in the ongoing efforts to sell the mill and agreed to inject subsidies that were intended to benefit the purchaser of the mill. The Province was committed to ensuring that the paper mill would be operational and globally competitive from the moment the paper mill was sold. In short, positive evidence on the record supports Commerce's finding that the FIF was a fund intentionally created by Nova Scotia to ensure that the mill was sold as a going concern in order to keep the mill in operation.

21. Turning to the extinguishment analysis, the pertinent question is whether there was a grant to NPPH, and whether the change in ownership resulted in an extinguishment of the subsidy, such that it no longer benefited the recipient.

22. As Japan correctly notes in its answers to the Panel's questions, "in addition to examining whether the sale was at arm's-length and for fair market value, a separate inquiry should be conducted to determine whether the sales price reflects the full value of any remaining benefits … {and} accordingly, if the company, asset, or equipment is purchased based on such going-concern value, the benefit could be considered to accrue to the target company/the purchaser." A subsidy extinguishment analysis entails a careful case-by-case analysis, and an important factor is the extent to which the benefit from the subsidy is fully reflected in the transaction price, *i.e.* whether the transaction price has incorporated, and thereby "extinguished," the subsidy.

23. Although not at issue under the facts of this dispute, the United States notes its disagreement with the European Union's blanket statement that a sale at arm's-length and for fair market value between private parties *a priori* extinguishes any benefit conferred prior to the sale. (Indeed, the European Union's third-party statement seems aimed at preserving its positions in a separate, ongoing dispute involving facts unlike those in the present dispute.) Though the issue is not raised here, the United States recalls that the Appellate Body in *EC – Large Civil Aircraft* distinguished between private-to-private sales and privatizations.

24. Thus, a determination of whether a sale was at arm's-length and for fair market value between private parties does not answer the question of whether benefits conferred prior to the sale have been extinguished. A fact-intensive inquiry must be conducted on a case-by-case basis to determine not only whether the sales price was at arm's-length and at fair market value, but also whether the benefit continues to be accounted for after a change of ownership and was reflected in the transaction price.

25. Commerce determined that PWCC received a benefit when Nova Scotia provided a grant to maintain the ongoing forestry operations of the mill during the bankruptcy process. Accordingly, Commerce concluded that because the C$12 million forestry infrastructure fund grant was provided after the PWCC bid was submitted, and the bid price did not change throughout the duration of the sales process, the value of the forestry infrastructure funds could not have been reflected in the final transaction price. Canada has not established that Commerce's determination related to the hot idle and forestry infrastructure subsidies is inconsistent with the SCM Agreement or the GATT 1994.

E. Commerce's Investigation of the Government of Nova Scotia's Provision of Stumpage and Biomass to Port Hawkesbury Was Initiated in a Manner Consistent with Articles 11.2 and 11.3 of the SCM Agreement

26. As previously explained, in Commerce's initiation checklist, Commerce stated that the evidence submitted in support of the allegation demonstrated the possible existence of a countervailable subsidy for the provision of stumpage and biomass material for less than adequate remuneration. In particular, the Forest Utilization License Agreement indicated a restricted market for stumpage and biomass fuel worthy of additional investigation, and Commerce specifically identified the Forest Utilization License Agreement as evidentiary support for its decision to initiate. Furthermore, Commerce explained that the petitioner provided information to determine benefit that was reasonably available to it.

27. Canada argues – without support in the text of the SCM Agreement – that "even if there was no evidence of benefit reasonably available to the Petitioner, Commerce was not justified in initiating an investigation with no evidence of benefit before it." Article 11.2 states that an application "shall contain such information as is reasonably available to the applicant on the" amount and nature of the subsidy in question. The provision recognizes that there may be circumstances where an applicant cannot ascertain evidence to demonstrate the nature and amount of a subsidy. Furthermore, Article 11 does not require pricing data to support an allegation of the provision of goods for less than adequate remuneration.

II. COMMERCE'S COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO RESOLUTE WAS CONSISTENT WITH THE SCM AGREEMENT AND THE GATT 1994

A. Canada's "As Applied" Claims Concerning Discovered Information Are Without Merit

28. First, in Canada's opening statement at the first panel meeting, Canada states that while the scope of the investigation is defined with respect to the product under investigation for the purposes of the any other forms of assistance question, Article 11 initiation standards should not be understood to refer to initiation with respect to a product. Canada's statements are inconsistent and not supported by any legal justification. The content and structure of Article 11 support that the investigating authority is able to satisfy the Article 11 initiation standards when it launches an investigation into an alleged subsidization of a particular product that need not be constrained to particular programs specified in the application. Particularly if – as appears to be the case – Canada accepts that the scope of Commerce's investigation was into the alleged subsidization of a

product, it is only logical that Article 11 likewise should be understood to apply with respect to the product under investigation.

29. To that end, Article 11 permits an investigating authority to initiate an investigation into the subsidization of a product, and examine subsidies not explicitly identified in the written application. The purpose of a CVD investigation is for an investigating authority to discover the extent of the subsidization of a product. Although an investigating authority may at the outset initiate its investigation into a product based on its evaluation of programs specifically identified in the written application, those programs focus, but do not limit, the inquiry of the investigating authority in determining the extent of the subsidization of a product. Accordingly, Commerce's initiation of an investigation into SC Paper was in accordance with Article 11 of the SCM Agreement.

30. Second, Canada argues that the "any other forms of assistance" question is problematic because the question is ambiguous, overly broad, and not specified in detail. Canada further argues that the "any other forms of assistance question" is applied in such a broad manner that it requires reporting measures that are not financial contributions and requires respondents to report all "assistance" received without defining the term "assistance." As an initial matter, Canada has conceded in its response to the Panel's questions that "a question cannot, in and of itself, violate the requirements of the SCM Agreement." Nonetheless, Canada argues that "poorly drafted, overly broad or ambiguous questions cannot request 'necessary information' and the failure to provide information in response to such a question cannot constitute an action that significantly impedes an investigation pursuant to Article 12.7."

31. Canada's arguments are not rooted in the SCM Agreement. Indeed, consistent with its approach throughout this dispute, Canada fails to cite to any relevant authority under the SCM Agreement. Furthermore, to the extent Canada argues that the "any other forms of assistance" question is unrelated to necessary information, Canada lacks any basis for its argument. The question can aid in discovering information related to the subsidies identified in the petition, in that the authority and the responding parties may have different views on the scope of the initially identified subsidies. In addition, whether there are any additional subsidy programs (other than those alleged in the petition) is relevant to determine the total level of subsidization to the product under investigation.

32. Canada also makes an unconvincing argument that the authority should ask more detailed questions about unknown subsidies. This argument makes no sense. At that stage, an investigating authority is unable to ask detailed questions about programs of which it is not yet aware.

33. With respect to Canada's argument that the term "assistance" was not defined in Commerce's questionnaire to Resolute, it is important to note that Resolute did not inform Commerce that it had difficulty defining "assistance." Had there been limitations to its answer, Resolute should have disclosed to Commerce what those limitations were from the outset. This would have provided Commerce with the maximum time to examine the additional assistance and consider arguments by the parties concerning the relevancy of their contents. However, Resolute provided a blanket assertion that there was no further information for it to provide. Thus, as a result of Resolute's representation to Commerce that it had provided all information requested, Commerce was unaware that in reality there was unreported assistance that may have warranted a more detailed inquiry.

34. Third, in its opening statement, Canada argues that Commerce issued supplemental questionnaires, but never followed-up on these responses to the "other forms of assistance" question. This argument does not match up with the record − as just explained, Resolute asserted that it received no other forms of assistance. Thus, on its face, Resolute's response to Commerce was complete, and Commerce had no basis to follow up on Resolute's response. In particular, Resolute represented that it had "examined its records diligently and {was} not aware of any other programs by {the government of Canada} . . . that provided, directly or indirectly, any other forms of assistance to Resolute's production and export of SC Paper." Nor did the government of Canada's questionnaire response indicate that Resolute had received "other forms of assistance." Thus, Commerce had no indication at that time that Resolute's response was deficient in any way.

35. It was not until the late stage of the proceeding, at Resolute's verification, that Commerce discovered that Resolute had failed to respond fully to Commerce's initial questionnaire with regard to other assistance received by Fibrek. The timing of Commerce's discovery of Fibrek's accounts was a direct result of Resolute's failure to cooperate with Commerce and fully disclose its accounts of assistance from the outset of the investigation. Moreover, per Article 25 of the SCM Agreement, Canada failed to notify to Members any of the programs discovered during verification, depriving Members of the ability to understand the subsidies and evaluate their trade effects, if any.

36. It is important to emphasize that Canada's interpretation of the relevant provisions of the SCM Agreement, if accepted, would create an incentive for exporters not to be forthcoming with an investigating authority seeking to determine the extent of a particular product's subsidization. Exporters that choose not to answer initial questions about other forms of assistance or possible subsidization − or choose to answer those questions untruthfully or incompletely − would benefit from the non-disclosure and possibly avoid a full investigation into the alleged subsidization should an investigating authority make such a discovery at verification or at a similarly late stage of an investigation. In that scenario, the distortive effects of injurious subsidization for which the SCM Agreement provides a remedy would go unaddressed. Canada's approach would privilege lack of transparency and undermine the subsidy disciplines of the WTO Agreements.

37. Finally, in its response to the Panel's question, Canada argues that Commerce had available the amounts received by Fibrek, and that the information was therefore not missing. Canada is incorrect. These amounts were not available to Commerce to place onto the record because they were not verifiable at that late stage of the proceeding. It was because of Resolute's failure to disclose the assistance from the outset that accounts which clearly indicated the existence of other forms of assistance were not discovered until the onsite verification. At that late juncture, Commerce officials were not able to verify the newly discovered subsidies, *i.e.*, whether the information discovered at verification was reliable and fully reflected the amount of assistance Resolute had received. Without the timely disclosure by Resolute of this assistance, Commerce was deprived of the opportunity to solicit information from the relevant government authority regarding the program or programs under which these funds were provided. Thus, Commerce properly relied on facts available to fill in the missing information.

B. Commerce's Determination that Certain Benefits Conferred to Fibrek Were Not Extinguished When Resolute Acquired Fibrek Is Consistent with the SCM Agreement

38. In its responses to the Panel's questions, Canada defines the term hostile takeover and argues that a hostile takeover is "always an arm's-length transaction." However, the term "hostile takeover" is not used in the SCM Agreement, nor is it contained in U.S. countervailing duty laws or regulations. Accordingly, one cannot conclude that Resolute's unsupported assertion that a "hostile takeover" occurred requires, or even supports, a finding that any such transaction extinguished subsidy benefits.

39. A proper analysis of extinguishment is not dependent upon an interested party's bare characterization of a private transaction. Rather, in order to make a finding of possible extinguishment, an authority should consider the circumstances of the transaction, including whether the final transaction price reflected the full value of any subsidies received. In the investigation at issue, Resolute's response to Commerce's request for information about changes in ownership characterized the transaction as a hostile takeover but offered no additional explanation. Of course, the fact that Canada now offers justification and explanations is irrelevant − those comments were not on the record in the investigation. Resolute also did not explain how − even if characterized as a hostile takeover − the price Resolute paid for Fibrek might reflect the value of any subsidy benefits received. Moreover, until Commerce's discovery at verification of other forms of assistance provided to Fibrek, Commerce had no reason to pursue additional information regarding the change in ownership.

C. Commerce's Calculation of Resolute's Subsidy Rate for the FPPGTP, FSPF, and NIER Programs Was Not Inconsistent with the SCM Agreement and the GATT 1994

40. As already addressed extensively and with specific reference to the text of the SCM Agreement, the United States has demonstrated that Commerce's calculation of Resolute's subsidy rate for the Federal Pulp and Paper Green Transformation Program ("FPPGTP"), Forest Sector Prosperity Fund ("FSPF"), and the Ontario Northern Industrial Electricity Rate ("NIER") programs was consistent with the applicable obligations under the covered agreements.

41. The appropriate inquiry, as explained by the Appellate Body, is on the subsidy at the time of bestowal. In *US – Washing Machines*, the Appellate Body explained that "we consider that a subsidy is 'tied' to a particular product if the bestowal of that subsidy is connected to, or conditioned upon, the production or sale of the production concerned." In conducting this assessment, "an investigating authority must examine the design, structure, and operation of the measure *granting* the subsidy at issue and take into account all the relevant facts surrounding the *granting* of that subsidy." Canada appears to agree with this interpretation. Commerce's determination was consistent with this approach. To review:

- **FPPGTP:** Commerce concluded that this program's eligibility requirements conditioned bestowal of the subsidy on the production of pulp or paper products. In its final determination, Commerce found that the program's application guide "states that the intent of the program was to improve the environmental performance of Canada's pulp and paper industry, and credits were only to be granted to Canadian pulp and paper producers." Furthermore, the application checklist requires that all proposals under the program demonstrate that "the project is a capital investment at a Canadian pulp and paper mill that is directly related to the mill's industrial process and will result in demonstrable improvements in environmental performance."

- **Forest Sector Prosperity Fund:** The FSPF program was a grant program supporting capital investment projects in northern or rural Ontario. The program eligibility criteria – which are listed on page 00207 of Exhibit CAN-50 – did not condition Resolute's receipt of the grant on the production of a given product. Resolute received a subsidy benefiting all of its production activities, not one "connected to, or conditioned on, the production or sale of a specific product."

- **Ontario Northern Industrial Electricity Rate:** The NIER program was intended "to assist Northern Ontario's largest qualifying industrial electricity consumers to reduce energy costs and use resources efficiently." Companies with "industrial facilities { } situated in Northern Ontario" received an energy rebate based on their energy consumption levels (subject to a cap) in exchange for "commit{ting} to developing and implementing an energy management plan { } to manage their energy usage and improve energy efficiency and sustainability." Thus, Resolute received a subsidy benefiting all of its production activities, not one "connected to, or conditioned on, the production or sale of a specific product."

III. COMMERCE'S CALCULATION OF CATALYST'S AND IRVING'S COUNTERVAILING DUTY RATES WAS CONSISTENT WITH THE SCM AGREEMENT

A. Commerce's Calculation of the All Others Rate Was Consistent with the GATT 1994 and the SCM Agreement

42. Canada has not established that Commerce's calculation of the all others rate was inconsistent with the covered agreements. In its past submissions, the United States has articulated the applicable obligations and explained that Commerce's calculation of the all others rate in this investigation is consistent with those obligations. In this submission, the United States will address Canada's arguments from its oral statement and responses to Panel questions with respect to the relevant legal obligations under the GATT 1994 and the SCM Agreement. Canada's arguments are without merit because neither the SCM Agreement nor the GATT 1994 prescribe a methodology for calculating a countervailing duty rate for non-investigated firms.

43. Canada admits that the SCM Agreement does not prescribe a particular method for calculating countervailing duty rates for non-investigated exporters. This acknowledgment should end the Panel's inquiry, as Canada cannot establish a breach.

44. Canada now attempts to create obligations by citing to multiple articles. In particular, Canada argues that Article VI:3 of the GATT 1994 and Articles 10 and 19.4 of the SCM Agreement impose several obligations that, in actuality, have no basis in the text of the covered agreements. Each provision, individually, does not support the finding of a breach; Canada's attempt to read these provisions together does not cure this defect.

45. Canada's first argument is that Articles 10 and 19.3, when read together, require an authority to ensure that the investigated exporters are representative of the industry as a whole in order to produce the most representative all others rate possible. Although Canada states that an authority is required to "take all necessary steps to ensure that the rate is accurate," that is not, in fact, the standard of Article 10. Rather, under Article 10, a Member is to take all necessary steps to ensure compliance with a separate provision of the GATT 1994 or the SCM Agreement.

46. As with Article 10, Canada has not identified a relevant obligation in Article 19.3. Article 19.3 entitles a non-investigated exporter to an expedited review in order to establish an individual countervailing duty rate; this provision has no bearing on the manner in which an authority is to calculate an all others rate. To that end, the United States agrees with the European Union view that it is because of this procedural safeguard that "investigating authorities are allowed to set duties at a level which is a reasonable proxy."

47. Canada's next argument – concerning Article 19.4 – lacks support in the record of the investigation. Canada argues that the calculated all others rate is inconsistent with Article 19.4 of the SCM Agreement because the "amounts of countervailing duties levied exceed the amount of subsidies found to exist." But, the record of the investigation demonstrates that the all others rate is based entirely on the "subsidies found to exist" with respect to SC Paper producers in Canada. Canada's third argument, again without support in the text of the covered agreements, faults the inclusion of Resolute's CVD rate in the all others calculation because Resolute's CVD rate was based in part on facts available. Canada refers to Article 12.7 of the SCM Agreement, but has not demonstrated the relevance of that provision to the calculated all others rate.

B. Commerce Properly Initiated an Investigation into New Subsidy Allegations Against Catalyst and Irving During an Expedited Review

48. Canada's argument that examining new subsidy allegations will "always" cause more delay in the context of an expedited review is misplaced. First, Canada offers conjecture, but no evidence in support of its sweeping generalization that a particular result would "always" occur. Canada fails to demonstrate how the examination of new subsidy allegations necessarily delays this process and offers no comparison point for the Panel to determine what, if anything, might constitute a "delay." Second, Canada fails to acknowledge the purpose of an expedited review. Similar to original investigations, an expedited review examines the potential subsidization of a particular product and determines the individual countervailing duty rate for the exporter under review. To that end, the investigation of new subsidy allegations in an expedited review is a permissible method of examining the potential subsidization of a particular product and the exporter under review. Moreover, an expedited review allows unexamined exporters to receive an individual countervailing duty rate sooner and on an expedited basis in the administrative process than would otherwise be the case. In fact, since our last submission in this dispute, Commerce has completed its expedited review of Catalyst and Irving.

49. Additionally, the United States disagrees with the Canada's reading of the Appellate Body report in *US – Carbon Steel (India)*. The SCM Agreement does not contain any type of unspecified limitation on the new subsidy allegations that may be included in an expedited review under Article 19.3. Canada presents no valid basis for this proposed interpretation of the SCM Agreement. Similarly, the close nexus language that the European Union cites in its answers to the Panel's questions is simply *dictum*. Neither the complaining party nor the responding party addressed this issue. Nor did the panel make any findings that could have been appealed. The United States has serious concerns under the DSU with an approach where the Appellate Body

issues *dictum* in one dispute, and then a party or adjudicator relies on that *dictum* as if it were treaty text in a subsequent dispute.

IV. CANADA'S "AS SUCH" CLAIMS CONCERNING DISCOVERED INFORMATION ARE WITHOUT MERIT

50. Canada's challenge to a purported rule or norm rests on Canada meeting a high threshold that such unwritten rule or norm does in fact exist. Canada has not clearly established − as it must − the precise content of an alleged rule or norm and the existence of general and prospective rules or norms that govern Commerce's action. Rather, Canada's additional arguments and evidence relate to past action, not what Commerce will do in the future.

51. The United States further notes that Canada has acknowledged in its response to the Panel's questions that "a question cannot, in and of itself, violate the requirements of the SCM Agreement." Therefore, Canada's acknowledgment suggests that Canada is not challenging the "any other forms of assistance question" itself, but rather the application of facts available to discovered information. If Canada is in fact only challenging Commerce's application of facts available to discovered information, then Canada has the burden of proving the 1) precise content of the alleged rule or norm; and 2) that the alleged rule or norm has general and prospective application.

52. In each of the nine determinations that Canada relies upon, Commerce made unique findings and reached different results. Canada argues incorrectly that the United States is "point{ing} to minor variations in language and try{ing} to say these are different actions." Rather, the substantial variations in language in each determination reflects the fact-specific nature of each of Commerce's determinations.

53. In addition, although Canada alleges that Commerce began the practice of applying facts available to discovered subsidies at verification in 2012, Canada fails to highlight *Large Residential Washers from the Republic of Korea*, a December 2012 decision, which Commerce cited to in its final determination as an example of a determination where Commerce did not countervail certain discovered grants at verification because they were deemed to not be tied to subject merchandise. The *Large Residential Washers* determination was issued after *Solar Cells from China 2012*, which Canada relies upon in support of its demonstration of the purported measure.

54. Thus, the nine cases cited by Canada, as well as *Large Residential Washers*, demonstrate that there is no rule or norm of general and prospective application when Commerce uses facts available for information discovered during verification. Instead, these cases show that the use of facts available is based on the particular circumstances of each case. While each case cited by Canada may concern information discovered during verification, the treatment of that information has varied in each determination.

55. Moreover, Canada fails to highlight the determinations where Commerce has asked a question involving the "any other forms of assistance" question, and where a respondent has cooperated and Commerce has verified the response (either a response of non-use of other forms of assistance, or a response of specifically identified programs). In those cases, Commerce would have no basis to apply facts available. As discussed above, the use of facts available is dependent on the circumstances of each case and is a fact-specific inquiry.

56. Canada's "as such" challenge, in addition to lacking legal merit, is remarkable in that it is inconsistent with the actions of its own administering authority. As described below, Canada Border Services Agency (CBSA) takes similar actions to those taken by Commerce in the SC Paper investigation with respect to other forms of assistance. CBSA both asks a similar question, and applies facts available if it later discovers that a party has failed to fully respond to the question.

57. First, in its requests for information, in addition to asking questions concerning the alleged subsidy programs, CBSA also asks questions concerning "any other programs not previously addressed." For instance, in *OCTG from India and Other Countries*, CBSA asked the Government of Turkey to identify "any other assistance programs . . . not previously addressed." Additionally, in *Copper Pipe from China*, CBSA asked the Government of China to identify "any other assistance programs . . . not previously addressed," and specifically requested disclosure of programs China

did not identify it its notification to the SCM Committee, per Article 25 of the SCM Agreement. Likewise, other investigating authorities also ask a similar question. For instance, the European Commission has asked questions concerning other types of subsidies received in its investigation of bioethanol originating in the United States. Similarly, Australia has asked a question concerning other forms of assistance in an investigation of steel shelving from China.

58. Second, not only does CBSA ask a similar question concerning other forms of assistance not otherwise alleged, but if CBSA discovers that a respondent failed to fully answer the question, CBSA has applied facts available. For instance, in *OCTG from India and Other Countries*, CBSA included additional programs after the initiation of the investigation concerning subsidization by the governments of India and Thailand. Specifically, for its investigation concerning Thailand, in its final determination, CBSA included program 8 and 9, which were not previously identified in the preliminary determination. In the final determination, CBSA then applied facts available to determine the countervailability for programs 8 and 9.

59. To the extent that Canada is challenging Commerce's "any other forms of assistance" question, the application of facts available, or a combination of both, the United States notes that CBSA takes similar action. Although the actions of CBSA may not be dispositive to the Panel's interpretive inquiry, they do reflect how another Member, with an active and sophisticated investigating authority, understands the obligations in the SCM Agreement.

EXECUTIVE SUMMARY OF THE U.S. STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

60. Canada's second written submission attempts to introduce a new claim: that Commerce "inadequately addressed" whether the provision of electricity would "normally be vested" in the government within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement. Canada's new claim was not the subject of consultations and was not included in Canada's panel request. Article 6.2 of the DSU defines the scope of the dispute and requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Quite simply, with respect to this new claim, Canada's panel request did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

61. Canada's introduction of a new claim and supporting arguments also contravenes paragraph 5 of the Working Procedures of the Panel. Paragraph 5 of the Working Procedures requires that before the first meeting of the Panel, "each party shall submit a written submission in which it presents the facts of the case and its arguments." Canada's first written submission did not present facts or arguments that would support this new claim.

62. Canada's claim also fails on the merits. At the outset, we note that Commerce *did* address the issue raised in Canada's new claim, and *did* provide a well-reasoned, factual basis for its conclusion. Canada simply disagrees with Commerce's decision.

63. Canada's new claim refers to the second part of Article 1.1(a)(1)(iv). A financial contribution can exist where a government "entrusts or directs a private party to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." Canada argues that Commerce failed "to establish that the provision of electricity would normally be vested in the government of Nova Scotia."

64. Commerce's final determination properly considered if the provision of electricity is a function within the authority of the government of Nova Scotia. Commerce concluded that "because of the nature of electricity and Nova Scotia's experience, we find that the provision of electricity…would normally be vested in the government, and…does not differ substantively from the normal practices of the government." Commerce also found that, even where an electric utility is not "owned" by the government, "it still is said to be 'affected with a public interest' and subject to a degree of government regulation from which other businesses are exempt." In the case of Nova Scotia, the provision of electricity remained within the regulatory control of the government: Commerce concluded that Nova Scotia Power was required "by law to provide electricity to all companies in the Province including Port Hawkesbury." Commerce made a fact-specific,

well-reasoned finding based on record evidence that the provision of a good – in this case, electricity – is a function that is normally within the authority of the government of Nova Scotia.

65. As we have shown, Canada's claim is outside of the Panel's terms of reference, is supported only by untimely arguments presented for the first time in a rebuttal submission, and in any event, fails on the merits.

66. Finally, in its second written submission, Canada suggests that Commerce must make a preliminary determination as to the countervailability of a subsidy before it initiates an investigation. Canada supports its argument with a so-called "Expert Report." A so-called "expert report" is nothing more than a section of Canada's submission. It obtains no particular probative value simply because Canada named the Canadian representative that supposedly prepared it, or because it is cut from the main submission and placed in a separate document.

EXECUTIVE SUMMARY OF U.S. COMMENTS ON CANADA'S RESPONSES TO PANEL QUESTIONS

Summary of U.S. Comment on Canada Response to Question 106(c)

67. Contrary to Canada's argument, Commerce did not act in the same manner in each of these cases. The change of language further demonstrates that Commerce makes its determinations on a case-by-case basis. Commerce's explanations vary because in reaching a determination, Commerce considers arguments presented by the parties and provides an explanation as to whether it agrees or disagrees with a party. While Canada points to *Truck and Bus Tires from China* as an example where Commerce allegedly had to explain why it was deviating from a purported practice, Commerce was merely ensuring that it was responsive to that specific respondent's arguments. In all of the determinations Canada relies upon, Commerce made unique findings and reached different results.

68. As the United States has explained, Canada's brief summaries fail to reflect the fact-specific nature of each of these determinations. For example, in some of these cases, such as in *Stainless Sheet and Strip from China* and *Shrimp from China*, respondents had the opportunity to report the discovered assistance in response to other questions from Commerce pertaining to named grants and subsidy programs. Therefore, the discovered assistance in those cases were not reported despite specific questions concerning certain grants and rewards.

69. Further, Canada's reference to a portion of its submission signed by an ex-U.S. official adds nothing to Canada's argument. The relevant inquiry for WTO dispute settlement is whether an alleged rule or norm is attributable to a Member, the complainant is able to identify the precise content of that alleged rule or norm, and there exists an alleged rule or norm that has prospective and general application. How an ex-government official in the employ of the Government of Canada characterizes certain past Commerce determinations has no import for this proceeding.

70. Finally, the United States would highlight that no U.S. court has ever determined under U.S. municipal law that Commerce has a practice of applying facts available to subsidies discovered at verification, and Canada has not shown otherwise.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil is a third party in this dispute because of its systemic interest in the matters before the Panel. In its third party submission, oral statement and answers to the Panel´s questions, the following aspects were highlighted.

I. The use of facts available under Article 12.7 of the SCM Agreement

2. In cases where the necessary information is not provided, the Agreement allows, under Article 12.7, that the findings of an investigation be made on the basis of the "facts available". Article 12.7 ensures that the lack of information does not hinder the ability of investigation authorities to conduct the investigation, allowing them to fill in the gaps by using the relevant facts available in order to make a determination.[1]

3. However, this flexibility has limits. As the Panel in *EC – DRAM Chips*stated, "[...] we do not suggest that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available".[2] The authority therefore cannot "cherry-pick" facts which could lead to a biased determination, it should use the "best information available".

4. Therefore it is not any information that can be used to fill in the gaps. According to the Appellate Body in *Mexico-Rice*, the available information to be used should be "the most fitting or most appropriate information available in the case at hand." The SCM Agreement makes it clear that the application of Article 12.7 cannot entail a punishment for lack of information[3], as "[...] mere non-cooperation by itself does not suffice to justify a conclusion which is negative to the interested party that failed to cooperate with the investigating authority." [4]

5. The Appellate Body, referring to Article 6.8 of the AD Agreement, has also explained that the use of facts available is only permitted in a context of missing necessary information, that is, the use of facts available is not intended to mitigate the absence of any information, but rather to overcome the absence of information required to complete a determination.[5]

6. For Brazil, Article 12.7 strikes an adequate and necessary balance in the use of "facts available". On the one hand, Article 12.7 allows authorities to induce cooperation of interested parties, as it ensures that non-cooperating parties will not be in a better position than those who cooperate. On the other, it provides that the investigating authority's discretion is not unlimited with respect to use of this recourse and with respect to the facts it may use when faced with missing information. The treatment of information that does not follow these rules would lead to an improper basis for the determination.

II. Government participation does not in itself indicate price distortion

7. Brazil recalls that government participation or presence in a given market does not in itself indicate price distortion, allowing a deviation in the use of in-country private prices by the investigating authority[6].

8. This is even more relevant in sectors such as telecommunication, water supply and energy which are frequently regulated by governmental agencies. Because of its strategic nature, more often than not, governmental participation occurs in order to correct distortions related to market

[1] Appellate Body Report, *Mexico - Rice,* para. 291.
[2] Panel Report, *EC - Countervailing Measures on DRAM Chips*, para. 7.61.
[3] Panel Report, *Mexico - Rice*, para. 7.238.
[4] Panel Report, *EC - Countervailing Measures on DRAM Chips*, para. 7.60.
[5] Appellate Body Report, *Mexico – Rice*, para. 259.
[6] Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, para. 442.

size, offer, demand, external factors affecting price, etc. Governmental presence, in these cases, may, in fact, be there to prevent market distortions such as the use of monopoly power. In these sectors, governmental presence is intrinsic to the prevailing market conditions, and should not per se authorize a determination that market conditions do not prevail.

9. In Brazil's view, the mere presence of a government in a given market does not entail per se the existence of price distortion. Price distortion cannot be inferred, and should be carefully established by investigating authorities.

III. Entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement

10. Regarding the proper characterization of "entrustment or direction" of a private body in regulated markets, Brazil contends that government legislation laying down general principles and establishing general rules in a given market cannot be understood *per se* as entrusting or directing a private body, as such legislation merely reflects a government's regulatory powers.

11. As the Panel in *Korea – Vessels* stated, paragraph (iv) of Article 1.1(a)(1) of the SCM Agreement is not concerned with "[...] a government's power, in the abstract, to order economic actors to perform certain tasks or functions", but rather with the concrete actions by a government in a particular case.[7]

12. According to Appellate Body, in *US – DRAMs,* paragraph (iv) must be viewed as striking a balance between addressing situations "[...]where a government uses a private body as a proxy to provide a financial contribution" and allowing for situations where "[...]a government is merely exercising its general regulatory powers.[8]" Brazil believes that striking an adequate balance between these two situations is particularly relevant in highly regulated markets such as the electricity market.

13. In this context, it is upon the investigating authority to establish that in each concrete case the concerned regulation has entrusted or directed a private body to provide a subsidy.

14. Furthermore, the Appellate Body has stated that Article 1.1(a)(1)(iv) is an anti-circumvention provision.[9] A finding of a financial contribution under said provision must only be made, on a case-by-case basis, in situations where the government is attempting to disguise a subsidy through a private entity. In this regard, to the extent that the government is regulating the market to provide general infrastructure, there would be no financial contribution, and hence no subsidy, in the sense of Article 1.1 of the SCM Agreement.

IV. The presumption that the benefit is extinguished in privatizations

15. Brazil recalls that the Appellate Body has recognized that there is a rebuttable presumption that the benefit is extinguished whenever there a sale at arms-length for fair-market-value in privatizations. The same reasoning should apply to sales between private parties.

V. The Scope of a CVD investigation

16. Brazil considers that the scope of a CVD investigation is defined by the evidence presented on the subsidy, the injury and the causal link, as per Article 11 of the SCM Agreement.

17. With regard to necessary information, Brazil agrees with Canada that information that falls outside the scope of the investigation cannot be considered as "necessary information" pursuant to Article 12.7 of the SCM Agreement. It must be acknowledged, however, that what is "necessary information" is not always easily determined.

[7] Panel Report, *Korea – Vessels*, para. 7.392.
[8] Appellate Body Report, *US – DRAMs,* para. 115.
[9] Appellate Body Report, *US – DRAMs,* para. 113; Appellate Body Report, *US – Softwood Lumber IV*, para. 52.

VI. Article 11 and expedited reviews

18. Brazil acknowledges that many obligations inscribed in Article 11 are not directly applicable for an expedited review under Article 19.3 without adaptations. However, this does not entail that the provisions of Article 11 cannot be relevant to the expedited review process in Article 19.3, especially where it guarantees certain rights to the exporter.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

1. This executive summary integrates the Third Party Written Submission, Oral Statement and Responses to the Panel's Questions by China.

2. First, on the issue of **the application of facts available by the USDOC under Article 12.7 of the SCM agreement**, it should be noted that the purpose of the use of "facts available" by the investigating authorities should be to "reasonably replace" the missing necessary information to arrive at an "accurate" determination. In this respect, Article 12.7 does not confer unfettered or unlimited discretion to the investigating authorities for selecting replacements when applies facts available. Otherwise, it would have jeopardised the purpose of the application of "facts available". More specifically, for arriving an accurate determination under this respect, it requires the investigating authority conducts a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case."[1].

3. Also in respect of ascertaining which "facts available" to use, Article 12.7 of the SCM Agreement requires a proper balance between the rights and obligations of a Member's investigating authority in its application of facts available. While the right to resort to facts available is necessary for the investigating authority to continue its investigation and make its determinations if necessary information is missing, the exercise of its rights is subject to strict disciplines. Specifically, the Appellate Body has found that "where there are several 'facts available' from which to choose, it would seem to follow naturally that the process of reasoning and evaluation would involve a degree of comparison."[2] If such a process were missing from the investigation proceeding, the investigating authorities should not be considered to have met its legal obligations.

4. Further, the application of facts available pursuant to Article 12.7 of the SCM Agreement does not presuppose that non-cooperation of a party in itself forms the basis for less favorable result for the interested parties. Rather, it just provides a situation in which a less favourable result becomes possible, and it does not mitigate the obligation of the investigating authorities for "reasoning and evaluation" where there are several "facts available" from which to choose.[3] In addition, "the use of inferences in order to select adverse facts that punish non-cooperation would lead to an inaccurate determination and thus not accord with Article 12.7."[4]

5. Specifically, in the underlying investigation of this dispute, China's view is that the USDOC appears to have failed to engage in a proper process of "reasoning and evaluation", in the circumstance where there were *more than one* "fact available" from which to choose. By simply selecting *a* "fact available" with the highest rate, without sound reasoning and analysis, the USDOC appears not to have met its obligations. The USDOC could only be understood to have applied adverse inference for the alleged non-cooperation of the respondent as a punishment.

6. Secondly, on the issue of **the obligation for the disclosure of essential facts under Article 12.8 of the SCM Agreement**, China's view is that it is an important procedural obligation for the investigating authority "for ensuring the ability of the parties concerned to defend their interests."[5]

7. This obligation has multiple dimensions. The timing of the required disclosure is "before a final determination is made", and "in sufficient time for the parties to defend their interests." The contents of the required disclosure are those essential facts under the consideration by the investigating authority, which are about to form the basis for its determination of the investigation. Thus, the investigating authorities would not fulfil its obligation by simply providing access to

[1] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.435.
[2] Ibid.
[3] Ibid, paras. 4.425-4.426.
[4] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468.
[5] Appellate Body Report, *China – GOES*, para. 240.

document or documents to interested parties, without identifying the facts contained therein that are under their consideration and form the basis for the determination.[6]

8. Thirdly, on the **issue of the claim by Canada on "other forms of assistance-AFA measure",** China believes that the legal standard for proving the future application of a measure is not "certainty", whether the measure is written or unwritten, or whether the claim by the complainant is framed as ongoing conduct or rule or norm of prospective and general application.

9. China also observes that Members are allowed to challenge a measure with prospective effect serves important purposes, including preventing future disputes and protect the security and predictability needed to conduct future trade.

10. Finally, on **the issue of "entrustment or direction"**, China has a concern about whether a general provision that sets out certain basic regulatory principles is a sufficient link between the government and the specific conduct at issue for a finding of entrustment or direction under Article 1.1(a)(1)(iv). China also believes that the government legislation laying down general principles and establishing general rules in a given market cannot be understood *per se* as entrusting or directing a private body.

[6] Panel Report, *Guatemala – Cement II*, para. 8.230. The panel discussed the relationship between Article 6.9 and 6.4 of the Antidumping Agreement which is similar to Article 12.8 and 12.3 of the SCM Agreement.

ANNEX D-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1. This executive summary integrates comments made by the European Union at the Third Party Hearing on 22 March and in its reply to the written questions by the Panel of 6 April 2017.

2. On the notion of **financial contribution through general service obligations**, an evaluation of the existence of a financial contribution involves consideration of the *nature of the transaction through which something of economic value is transferred by a government*. In addition to monetary contributions, a contribution having financial value can also be made *in kind* through a government providing goods or services or directing a private body to do so.

3. For there to be a financial contribution in the first place, a government (or a private body directed by a government) needs to *provide* the relevant good or service. However, Article 1.1(a)(1)(iii) requires there to be a *reasonably proximate relationship between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other. Very general governmental acts may be too remote from the concept of "making available" or "putting at the disposal of". A government must have some control over the availability of the specific thing being "made available"*.

4. What matters for purposes of determining whether a government "provides goods" in the sense of Article 1.1(a)(1)(iii), is the *consequence* of the transaction. This implies, however, that there must be a *transaction* in the first place. In this respect it has been considered that granting a right to certain goods suffices for there to be a transaction. However, the situations examined in the jurisprudence have concerned exclusive rights, not rights that are available to everyone.

5. Electricity is a good that has economic value. If a government provides electricity or directs a private body to provide electricity, there may be a financial contribution within the meaning of Article 1.1(a)(1)(iii). However, the basis on which a determination is made that electricity has indeed been provided by a government (or it has directed a private body to do so) must be clearly established. In the view of the European Union it cannot be lightly derived from very general provisions that may have more to do with setting out the general principles on the adequacy and safety of the relevant infrastructure and service. There must be a reasonably proximate relationship between the action of the government, and the use or enjoyment of the good or service by the recipient. It is difficult for the European Union to see a transaction in a general provision or principle that simply appears to set out certain basic regulatory principles and lays down the key qualities of the relevant services. If that principle amounts to no more than a statement that everyone must have access to basic amenities such as electricity, water etc. it does not as such involve the kind of action from the government that would amount to the necessary transaction for the purposes of Article 1.1(a)(1).

6. The way in which the European Union understands the concept of a general service obligation is that it does not interfere with the principles of supply and demand in a certain market. It rather underpins the relevant market by providing certain predictability to that market. The actual provision of the good or service in question requires the performance of contractual obligations between the supplier and recipient of the good or service. Non-performance of contractual obligations eventually leads to a breach of contract and the consequent possibility that the provision of the good or service is terminated or suspended until contractual obligations are complied with. The terms of the contract may also vary depending on the forces of supply and demand despite there being an underlying general service obligation.

7. The European Union would like to add that general service obligations are commonplace in sectors that often require significant public investment for the creation of the relevant general infrastructure. It is only natural that everyone will be entitled to basic access to the goods and services that are provided through such infrastructure even if the provision of the relevant goods and services is subsequently privatised and made subject to competition between private parties under strict public regulatory conditions. The European Union is concerned that if general service obligations as such and without more would fulfil the conditions of a financial contribution, be it as

such or as an alleged direction of a private body, investigating authorities would essentially be allowed to forego any serious analysis on the existence of a financial contribution in certain key sectors of the economy. However, this does not mean that a provision or a general principle regarding a general service obligation is irrelevant for considering whether a financial contribution exists. For instance, the situation could be different in the case of broad state intervention, which would have as its consequence a genuine transfer of something of economic value.

8. It is not clear to the European Union why the actual provision of electricity by NSPI to PHP, on the terms set forth in the LRR was not the focus of the investigating authority's financial contribution analysis. In the view of the European Union, the investigating authority's emphasis and focus on the general service obligation appears to be misplaced.

9. Secondly, on the so-called **"any other assistance question" and the subsequent application of facts available**: As a starting point, the European Union considers that investigating authorities should have some discretion in determining what information they need for their investigation, and thus, what is "necessary" information. This determination on whether the information requested is necessary must be assessed *ex ante* and not *ex post*, that is, at the moment when the request is made. It may very well be that at a certain stage of the investigation, investigating authorities legitimately consider some information is needed, which afterwards turns out not to have any impact on the final determination. This discretion, however, cannot be completely unfettered - information which is visibly irrelevant to the investigation, for instance because it is unmistakably related to issues outside the scope of the investigation, cannot be considered as "necessary information" pursuant to Article 12.7 SCM, even if the investigating authority requests it.

10. The application of facts available pursuant to Article 12.7 SCM does not only presuppose that necessary information is missing. It also presupposes that the investigating authority had clearly and precisely requested it from the interested party concerned. As Annex II.1 of the Anti-dumping Agreement (which is relevant context for the interpretation of Article 12.7 SCM[1]) confirms, such requests must be sufficiently clear and precise as to what information is needed – too broad, too vague or too general questions cannot entail the use of facts available[2].

11. This is particularly important in cases where the question (such as the "any other assistance question") also covers information that, following the above principles, the investigating authority might validly consider "necessary" at the beginning of the investigation, but which is objectively not relevant. While investigating authorities have a legitimate interest to find out (and ask) whether there are more countervailable subsidies relevant for the investigation at stake, failure to reply to such a general question should not automatically lead to the application of adverse facts available, denying interested parties any opportunity to comment on the new schemes discovered during the investigation, especially where it is doubtful in light of the circumstances of the case whether the failure to reply can indeed be considered as non-cooperation.

12. Information collected on new schemes discovered during the investigation should not be rejected on the sole grounds that those schemes were not disclosed in the initial reply as long as that information can be properly verified as to its accuracy and comprehensiveness. This ties in with the prohibition of a punitive use of facts available.

13. On the **calculation of so-called "all-others-rates"** in cases where rates for investigated exporters have been calculated using facts available, the European Union considers that Article 9.4 ADA is certainly relevant context that should inform how sampling in CVD investigations is done, but adapted where necessary to take into account the specificities of the CVD instrument. For instance, a straightforward application of the prohibition to use margins calculated on the basis of facts available in Article 9.4 might not be appropriate where investigating authorities resort to facts available because of non-cooperation of the subsidising Member. Information held by the subsidising Member, for instance on structure and ownership of upstream funding organisations, might be crucial for establishing the existence of countervailable subsidies, and for the calculation of margins. The information gap resulting from non-cooperation by the government of the subsidising Member is one that has repercussions on all potential exporters. The rationale from *US – Hot-Rolled Steel* that non-investigated exporters must not be prejudiced by shortcomings in

[1] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.423.
[2] Panel Report, *Argentina – Ceramic Tiles*, paras. 6.54-6.67, in particular 6.66.

the information supplied by the investigated exporters not imputable to the non-investigated exporters[3] does not seem to be pertinent in such a case.

14. On **expedited reviews pursuant to Article 19.3** of the SCM Agreement, the European Union considers that the possibility to include new subsidies in an expedited review should be the same as what the Appellate Body has found for administrative reviews, namely the sufficiently close nexus to the subsidies identified in the original investigation[4].

15. Finally, on the **standard of proof and characterisation of unwritten measures**, the European Union attaches great importance to the principle that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings"[5], and that measures, including unwritten measures must not fit into certain "boxes" or categories in order to be susceptible to challenge in WTO dispute settlement[6]. The various types of unwritten measures that the Appellate Body has recognised over time in specific cases were certainly useful in capturing the phenomena at stake in each particular case. However, going forward, the European Union would caution against considering them as a typology that would be mechanistically applied to fact patterns which might not necessarily correspond to earlier cases. Complainants should be allowed to challenge whatever measure they can substantiate, without having to squeeze it into a particular box.

[3] Appellate Body Report, *US – Hot-Rolled Steel*, para. 123.

[4] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.541-4.543; see also the European Union's position on the criteria for a close nexus, referred to in footnote 1256 of the Appellate Body Report.

[5] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[6] Appellate Body Reports, *US – Continued Zeroing*, para. 179; *Argentina – Import Measures*, para. 5.102.

ANNEX D-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

1. The present dispute raises certain systemic issues regarding the interpretation of the SCM Agreement. The present dispute is one of the disputes that highlight the consistent undermining of the delicate balance crafted into the provisions of the SCM Agreement.

2. Whilst not taking a position on the specific facts of this case, except for the purpose of establishing the systemic issues involved, India would like to provide its views on certain legal claims advanced in the dispute.

3. Accordingly, India will focus on 3 issues in its statement:

(a) issues pertaining to sub-paragraph (iv) of Article 1.1(a)(1);

(b) improper use of the "facts available" standard; and

(c) examination of new subsidies during an expedited review under Article 19.3 of the SCM Agreement.

First Issue relating to Interpretation and application of Article 1.1(a)(1)(iv)

4. Sub-paragraph (iv) of Article 1.1(a)(1) of the SCM Agreement represents an exceptional case where actions of private bodies, pursuant to entrustment or direction by a government, are relevant for determining the existence of a subsidy. The provision requires an investigating authority to determine two aspects, i.e., (1) that the action or practice in question is 'normally' vested in the Government and (2) that the said action or practice does not, in the real sense, differ from practices normally followed by governments. Needless to mention that the determination regarding both these aspects shall be based on positive evidence.

5. We recall the findings of the Appellate Body in *US - AD and CVD (China)* (para. 297) that for a function or activity to be "normally" vested in the government, it should *ordinarily be considered part of governmental practice in the legal order of the relevant Member*. The Appellate Body also clarified that not all activities can simply be presumed to be 'governmental' in nature.

6. In the facts of this dispute, it is necessary to establish that provision of electricity is ordinarily viewed as a governmental practice in the legal order of the exporting country. It is not appropriate to determine a practice in question to be a governmental practice for the simple reason that it was carried out by the Government in the past or that only one entity is authorized to carry out that practice by the Government concerned.

7. Further, sub paragraph (iv), also mandates that the practice, *in no real sense, differs from practices normally followed by governments*. We recall the Appellate Body's observations in *US - AD and CVD (China)* that this refers to the classification and functions of entities within WTO Members. While arriving at a decision, an investigating authority is required to examine the practices prevailing in other Member countries before concluding that the practice in question, in no real sense, differs from the practices followed by other governments.

Issue No. 2 relating to Use of "Adverse Facts Available" standard

8. India would like to cover two aspects in this regard. Firstly, India would like to state that an investigating authority shall not resort to application 'facts available' standard in an indiscriminate manner. Due caution shall be exercised before resorting to application of facts available standard. With respect to the programs 'discovered' during verification, India considers that it is not appropriate to include them within the scope of the investigation without an evaluation of the essential elements such as financial contribution, benefit and specificity within the meaning of Articles 1 and 2 of SCM Agreement. To make such an evaluation, an investigating authority is required to seek all relevant information specific to the program/s in question in terms of

Article 12.1. of the SCM Agreement. Fact available standard under Article 12.7 of the SCM Agreement cannot be applied without following the due process so envisaged.

9. Secondly, India would like to state that the use of "facts available" standard is meant to enable Authorities to conclude the investigation and determine subsidization by 'reasonably' supplying or introducing the 'necessary' information that is 'missing'. While Article 12.7 of SCM Agreement ensures that an investigation may continue unhindered even in the event of failure of interested parties to supply necessary information, it is an established principle that Article 12.7 does not permit 'selection' of facts that lead to the *least favorable outcome*.

10. The Appellate Body in *US - Carbon Steel (India)* stated that *Article 12.7 requires an investigating authority to use "facts available" that reasonably replace the missing "necessary information", with a view to arriving at an accurate determination, which calls for a process of evaluation of available evidence, the extent and nature of which depends on the particular circumstances of a given case"*.

11. Accordingly, even while applying 'facts available' standard, an investigating authority cannot discard all the information that was 'discovered' during the investigation and adopt a CVD rate that was determined in the past. Further, India strongly believes that the "facts available" standard does not permit an investigating authority to automatically adopt "*the highest non-de minimis rate calculated*" for a program in another CVD investigation involving the same country. Such an approach is contrary to the standard articulated by the Appellate Body in *US – Carbon Steel (India)*.

Third issue relating to New Subsidy Allegations

12. Article 19.3 of the SCM Agreement mandates the investigating authorities to *establish an individual countervailing duty rate for an exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate*. The provision does not permit investigating authorities to determine the existence or degree of 'any' alleged subsidy. India is of the view that Article 19.3 is only meant to calculate individual duty rates on programs already determined to be subsidy in an original investigation. Therefore, introduction of new subsidies at the stage of expedited reviews, are implausible under Article 19.3 of the SCM Agreement.

13. In case the Panel deems inclusion of new subsidies in an expedited review as permissible, India believes that the standard articulated by the Appellate Body in *US - Carbon Steel (India)* for inclusion of new subsidies in an administrative review should be applicable to expedited reviews as well. In the context of administrative reviews the Appellate Body stated that such "new subsidies" must have a *sufficiently close link* to the subsidies that resulted in the imposition of the original countervailing duty. India believes that an unrestrained introduction of new subsidies into expedited reviews would upset the delicate balance of Part V of the SCM Agreement, which was the basis of the Appellate Body to reach its conclusion regarding new subsidies in *US - Carbon Steel (India).*

ANNEX D-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

1. In this proceeding, Japan addresses the following issues: (1) the definition of "entrustment or direction" under Article 1.1(a)(1)(iv); (2) the standard for assessing market distortion under Article 14(d); (3) the punitive application of "facts available" under Article 12.7 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"); (4) the extinguishment of benefit through a private sale of a subsidized firm or asset at arm's-length and for fair market value; and (5) Canada's argument about unwritten measures that are "rules or norms of general and prospective application" or "ongoing conduct."

I. ENTRUSTMENT OR DIRECTION OF PRIVATE BODIES UNDER ARTICLE 1.1(A)(1)(IV)

2. Canada argues in its First Written Submission that the United States Department of Commerce ("USDOC") improperly found that the government of Nova Scotia directed Nova Scotia Power Inc. ("NSPI"), a private company, to provide a financial contribution, or that Nova Scotia entrusted NSPI or the Nova Scotia Utility and Review Board ("NSURB") to provide a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement. Japan considers that the test to determine whether a private body acted under the entrustment or direction of the government under Article 1.1(a)(1)(iv) requires a case-by-case analysis.

3. The Appellate Body has recognized that the demonstration of entrustment or direction will hinge on the particular facts of the case given the difficulty of precisely identifying, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. Moreover, the Appellate Body has found that, in order to demonstrate entrustment or direction under Article 1.1(a)(1)(iv), inferences may be reasonably drawn from the examination of the totality of evidence.

4. Japan considers that an obligation of a public utility to provide general services does not in itself establish entrustment or direction. Rather, in order to determine whether entrustment or direction exists under Article 1.1(a)(1)(iv), an investigating authority must conduct a fact-specific analysis. An obligation imposed on private bodies under relevant domestic laws and regulations, including a general service obligation, can be one element that an investigating authority may consider in this analysis. However, in order to give rise to entrustment or direction, it should be additionally shown, for example, that the regulation imposing such general obligation, through its design and structure, makes private bodies act against commercial considerations, such as continuing their activities despite a deficit.

5. Japan agrees with Brazil that government legislation laying down general principles and establishing general rules in a given market does not by itself establish entrustment or direction, unless, for example, such principles or rules, through their design and structure, make private bodies act against commercial considerations. As a result, Japan agrees that the existence of governmental general regulatory powers by itself does not satisfy the definition of financial contribution under Article 1.1(a)(1)(iv).

6. Japan notes, in this regard, the panel's finding in *Korea – Commercial Vessels* that the issue of entrustment or direction does not have to do with a government's power, in the abstract, to order economic actors to perform certain tasks or functions, but it has instead to do with whether the government in question has exercised such power in a given situation subject to a dispute. This finding is consistent with the understanding that the existence of governmental regulatory power over the producers *per se* does not establish entrustment or direction under Article 1.1(a)(1)(iv). Rather, it is when the exercise of such power causes private bodies to engage in a specific conduct (i.e., causes private bodies to act against commercial considerations) that the exercise of power constitutes an entrustment or direction.

7. The United States argues that Canada is conflating the analysis of "financial contribution" with a separate analysis of "benefit" based on Canada's argument that USDOC identified the

general service obligation as the basis of the financial contribution but assessed benefit with respect to the Load Retention Rate ("LRR"). Thus, the United States seems to imply that, even in a case of entrustment or direction, only the general obligation of the private body is to be assessed in determining financial contribution, and the specific conduct giving rise to the financial contribution must be assessed only under the analysis of "benefit."

8. However, Article 1.1(a)(1)(iv) recognizes that, unlike public bodies whose conduct will always constitute a financial contribution so long as the conduct falls under subparagraphs (i)-(iii), the conduct of private bodies is generally not directly linked with a government function. Therefore, as the Appellate Body has confirmed in *United States – Anti-Dumping and Countervailing Duties (China)*, a private body will be found to provide a financial contribution only if the entity's conduct falls under subparagraphs (i)-(iii), and in addition, the requisite link between the government and that conduct is established by a showing of entrustment or direction. Thus, according to the Appellate Body, the second clause of subparagraph (iv) requires an affirmative demonstration of the link between the government and the specific *conduct*, whereas all conduct of a governmental entity constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv). This confirms that in the instance of a private body, the relevant conduct should be evaluated under the "financial contribution" analysis.

II. STANDARD FOR MARKET DISTORTION UNDER ARTICLE 14(D)

9. In the original investigation, USDOC found that electricity was provided for less than adequate remuneration. USDOC's assessment was based on a constructed benchmark that it used once it had determined that it could not use NSPI's actual price, because it found that the Nova Scotia market for electricity was "distorted." According to Canada, this assessment was solely based on USDOC's determination that NSPI was a dominant supplier in the Nova Scotia electricity market. Canada challenges USDOC's determination on two grounds: that NSPI's prices could not reflect government distortion because NSPI is a private party, and that USDOC's finding of distortion based on the prominence of NSPI in the market was *per se* improper.

10. Canada points out that the analysis of whether a "benefit" was received is guided by Article 14(d), which permits a finding of benefit only when the provision of goods by a government "is made for less than adequate remuneration, or the purchase [of goods] is made for more than adequate remuneration." Whether the remuneration was "adequate" must be determined in relation to prevailing market conditions for the good or service in question in the country of the provision or purchase.

11. In this dispute, Japan presents its views on the assessment of such "market distortion" and the circumstances in which an investigating authority may disregard in-country prices. In order to find an appropriate benchmark for determining the adequacy of remuneration, the Appellate Body has stated that an authority must determine a comparator that reflects prevailing market conditions for the goods in question. Thus, the Appellate Body found that, based on the facts of the case, it must be demonstrated that the benchmark chosen relates to, or is connected with, the conditions prevailing in the country of provision.

12. The Appellate Body in *US – Lumber IV* has recognized that, while the prices of the same or similar goods sold by private suppliers in the country of provision are the primary benchmark, investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods. The determination of whether private prices are distorted due to the government's predominant role in the market must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation. The fact-specific nature of determining a proper benchmark is further confirmed in *US – Carbon Steel (India)*, where the Appellate Body has explained that what an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents.

13. Japan agrees with Canada that an investigating authority is not permitted to apply a "*per se*" rule in which it rejects in-country private prices *solely* on the basis of evidence that the government is the predominant supplier of the goods in question. Rather, if the authority has concerns that the predominance of the government likely distorts private prices in the market, it must examine whether the predominance actually caused a distortion of prices in the market by conducting a case-by-case analysis, based on all of the evidence. As to the specific elements to consider in assessing price distortion, the Appellate Body has found that this may involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers, and it could also require assessing the behavior of the entities operating in that market in order to determine whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices.

14. In this regard, Japan notes that the Appellate Body has found that the primary benchmark that the investigating authority must use is the price of similar goods sold by private suppliers in the country of provision. In other words, the primary benchmark price should be the price formed through arm's-length transactions by private suppliers in the country of provision, which is the price based solely on commercial considerations.

15. It should be noted that the Appellate Body in *US — Softwood Lumber IV* has upheld the panel's determination that the terms "market" or "market conditions" in Article 14(d) do not necessarily mean "pure" market, "fair market value" or a market "undistorted by government intervention." Thus, the mere fact that there is government involvement or intervention in the market does not necessarily mean that market prices are distorted, i.e., that the benchmark price is not formed through arm's-length transactions by private suppliers. As also upheld by the Appellate Body in the same case, the benchmark price must represent prices determined by *independent operators* following the principles of supply and demand, even if supply or demand are affected by the government's presence in the market.

III. PUNITIVE APPLICATION OF FACTS AVAILABLE UNDER ARTICLE 12.7

16. Canada argues that USDOC's application of an "all others rate" that incorporated an "adverse facts available" ("AFA") rate calculated for respondent company Resolute constituted a punitive action, and that the United States' recent amendments to its legislation make the application of the "Other Forms of Assistance-AFA" measure easier to apply in a more punitive manner. Japan presents its views on the standard for applying "facts available" under Article 12.7 of the SCM Agreement, and in particular, whether Members are permitted to apply Article 12.7 in a punitive manner.

17. As the Appellate Body noted in *Mexico – Anti-Dumping Measures on Rice*, Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. The Appellate Body has explained that the provision permits the use of facts on the record *solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination*. The Appellate Body has further cautioned against indiscriminate use of "facts available," noting that recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses.

18. Japan recognizes that the Appellate Body has found in *US – Carbon Steel (India)* that the grant of authorization to use adverse inferences under the SCM Agreement is not in itself "as such" inconsistent with Article 12.7, insofar as it could comport with the legal standard for Article 12.7. However, the Appellate Body's determination in that case was based on the fact that the text of the relevant U.S. statute was permissive, and did not *require* USDOC to use adverse inferences. The Appellate Body considered that the permissive language meant that the use of adverse inference is capable of being limited to those instances where it accords with the legal standard for Article 12.7 of the SCM Agreement.

19. Japan does not understand the Appellate Body's rulings as allowing Members to apply adverse inferences in a punitive manner, i.e., in a manner intended to punish a non-cooperating respondent. Nor is it Japan's view that the WTO agreements contemplate the use of adverse inferences as a means of deterring non-cooperation by imposing the threat of punishment in the

form of margins that go beyond the boundaries of what could reasonably be inferred based on the data that is on the administrative record, especially if there is evidence that the use of that adverse inference would result in an inaccurate result. In fact, the Appellate Body has made clear that such punitive use of adverse inferences would not comport with the requirements of Article 12.7.

20. Japan finds further support for this position in Article 6.8 of the Anti-Dumping Agreement and in Annex II of the Anti-Dumping Agreement, which contain seven specific requirements that must be satisfied in order for an authority to resort to facts available. Japan believes that Article 6.8 and Annex II of the Anti-Dumping Agreement provide interpretive guidance on a Member's obligations under Article 12.7 of the SCM Agreement. The Appellate Body has noted that it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.

21. The panel in *US – Hot-Rolled Steel* has stated that Article 6.8 and Annex II are meant to ensure that "even where the investigating authority is unable to obtain the "first-best" information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps "second-best" facts." Moreover, neither Article 12.7 of the SCM Agreement nor Article 6.8 (incorporating Annex II) of the Anti-Dumping Agreement refers to the use of "adverse facts available" or "adverse inferences." This is in contrast with paragraphs 7 and 8 of Annex V to the SCM Agreement, which explicitly permit the use of "adverse inferences" when developing information concerning serious prejudice. In particular, paragraph 7 of Annex II states that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation *could lead to a result which is less favourable* to the party than if the party did cooperate." While paragraph 7 recognizes that a non-cooperating respondent may be subject to determinations based on facts on the record that may be less favorable than the facts that the respondents would have submitted, it is Japan's view that this language does not grant permission for the investigating authority to bring about an outcome that is punitive and does not reasonably reflect an accurate margin calculation based on the available facts.

IV. EXTINGUISHMENT OF BENEFIT THROUGH A PRIVATE SALE OF A SUBSIDIZED FIRM OR ASSET AT ARM'S-LENGTH AND FOR FAIR MARKET VALUE

22. Japan also addresses the Panel's inquiry with regard to whether a sale at arm's-length and for fair market value between private parties extinguishes any benefit conferred prior to the sale. Japan does not consider that a sale at arm's-length and for fair market value between private parties *a priori* extinguishes any benefit conferred prior to the sale. Japan recalls that, with respect to partial privatization and private-to-private sales, the Appellate Body in *EC and certain member States — Large Civil Aircraft* has found it necessary to conduct a fact-intensive inquiry into the circumstances surrounding the changes in ownership to determine the extent to which there are sales at fair market value and at arm's-length and *whether a prior subsidy could be deemed to have come to an end*.

23. This finding suggests that a determination of whether a sale was at arm's-length and for fair market value between private parties does not by itself resolve the question of whether benefits conferred prior to the sale have been extinguished. Therefore, a fact-intensive inquiry must be conducted on a case-by-case basis to determine not only whether the sales price was at arm's-length and at fair market value, but also whether residual benefits of a subsidy still remain that are not reflected in the arm's-length price in question. Japan considers that this fact-intensive inquiry should include consideration of the design, the nature, and the structure of subsidy itself, in addition to the circumstances surrounding the sale. For example, when purchasing a target company, assets, or equipment, a purchaser would consider the ability to use remaining benefits in the future in assessing the going-concern value of the company, asset, or equipment. Accordingly, if the sales price is based on this going-concern value, the benefit could be considered to accrue to the purchaser.

V. CANADA'S ARGUMENT ON UNWRITTEN MEASURES

24. In its First Written Submission, Canada argues that USDOC's "Other Forms of Assistance-AFA" measure can be characterized as ongoing conduct or as a rule or norm of prospective and general application. Canada notes that regardless of how the measure is characterized, the analysis of attribution and the precise content of the measure is the same. It is only in relation to the prospective application of the measure that the relevant standards slightly differ. Japan agrees with Canada to the extent that the scope of measures that can be challenged in a WTO dispute settlement proceeding is broad.

25. In this respect, Japan notes that the Appellate Body in *Argentina — Import Measures* has confirmed that a broad range of measures can be challenged, finding that the distinction between "as such" and "as applied" claims neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures that are susceptible to challenge. Although the Appellate Body has not found it necessary for a complainant to categorize its challenge either "as such" or "as applied," it has implied that a distinction should be made with respect to different categories of challenged measures. The Appellate Body has further explained that unwritten measures susceptible to challenge in WTO dispute procedures include any act or omission that is attributable to a WTO Member, and the elements that a panel needs to review in ascertaining the existence of the measure will depend on the specific measure being challenged and how it is described or characterized by the complaining Member.

26. Japan is of the view that an unwritten measure can be challenged as long as a complaining Member clearly describes and characterizes what aspects of the measure it is challenging, as the characterization of the measure may determine the evidentiary requirements to establish the measure's existence.

ANNEX D-6

ANSWERS OF TURKEY TO QUESTIONS OF THE PANEL

QUESTIONS AND ANSWERS

1.8 In its opening statement, Canada submitted that requested information that falls outside the scope of the investigation cannot be considered as "necessary information" pursuant to Article 12.7 of the SCM Agreement, even if the investigating authority requests it. Would you agree with Canada? Please elaborate.

Turkey considers that whether the information requested by an investigating authority is necessary or not within the context of an investigation should be analysed in a case-by-case manner. In some cases, the investigating authority might need to request some information in order to decide whether this information is necessary for the determination of the related investigation.

On the other hand, the investigating authority should be as precise as possible in deciding on which information is to be requested from the interested parties.

That is, the investigating authority should be constrained in requesting information when it is apparent that this information is totally unrelated with the investigation.

2.10 In paragraph 6 of its oral statement, Japan refers to paragraph 284 of the Appellate Body Report in *US – Antidumping and Countervailing Duties (China)*. Please comment on its relevance to the present case.

Turkey understands that the relevance of this referral hinges on the discussion whether "direction" or "entrustment" by definition, necessitates a specific type of "conduct" of the government. In other words, in our understanding, the discussion focuses on the issue whether an affirmative and explicit action is needed to establish the "entrustment" or "direction" element in Article 1.1(a)(1)(iv)of the SCM Agreement.

We do not have a one-size-fits-all answer to this question. The point we may agree with Japan, however, is that the conduct of the government, irrespective of being affirmative or adverse, is imperative to satisfy the first stage of a three phase assessment which, in our understanding, includes whether the conduct amounts to "direction" or "entrustment" and whether it controls the private entity to provide benefit conferring financial contribution.

2.11 In paragraph 4 of its oral statement, Japan states that "an obligation of a public utility to provide such general service does not in itself establish entrustment and direction". Would you agree?

2.12 In paragraph 4 of its oral statement, Japan states that "[t]he mere obligation to provide electricity to all customers does not impede a private entity's ability to operate in accordance with the principles of supply and demand in a certain market." Would you agree?

3.13 The European Union asserts at paragraph 26 of its third party submission that: "[i]t is difficult for the European Union to see a transaction in a general provision or principle that simply appears to set out certain basic regulatory principles and lays down key qualities of the relevant services". Please comment.

4.14 In paragraph 5 of Brazil's oral statement, Brazil states that it "understands that government legislation laying down general principles and establishing general rules in a given market cannot be understood per se as entrusting or directing a private body." Please comment in light of the jurisprudence cited by Brazil in paragraphs 4 to 6.

Turkey understands that the last four questions concerns different aspects of the same issue, namely the "entrustment" or "direction" analysis as used in Article 1.1(a)(1)(iv)of the SCM Agreement. Therefore, for the sake of briefness Turkey would like to answer these four questions under one single section as follows.

> In relevant part, Article 1.1(a)(1)(iv) of the SCM Agreement reads as follows:
>
> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> …
>
> (iv) a government […] entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;…

In US-DRAMS, the Appellate Body states that paragraph (iv) covers situations where a private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii). Seen in this light, the terms "entrusts" and "directs" in paragraph (iv) identify the instances where seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the SCM Agreement[1]. According to the Appellate Body, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision. Thus a finding of entrustment or direction, requires that the government give responsibility to a private body—or exercise its authority over a private body—in order to effectuate a financial contribution. Thus Turkey agrees with the Appellate Body there must be a demonstrable link between the government and the conduct of the private body[2].

In order to establish such a link, evidence relating to the intent and involvement of the government has to be founded on reasonable and adequate explanation by the Investigating authority[3]. Furthermore in Turkey's understanding, the investigating authority should assess the totality of evidence to conclude whether an "entrustment" or "direction" is present or not[4].

Considering the facts of the dispute, Turkey shares the approach that a single factor or information cannot suffice to reach a conclusion concerning the presence or absence of government's "entrustment" or "direction" of a private entity.

Accordingly, Turkey considers that a "basic regulatory principle" alone is not adequate to be used as a yardstick to determine entrustment or direction in terms of Article 1.1(a)(1)(iv). In Turkey's view the "entrustment-direction" analysis necessitates an inclusive assessment bringing together evidence showing that this "basic regulatory principle" is in fact a reflection of a system of entrustment or direction. Thus, the focus of such an evaluation, is not whether this "general" or "regulatory" principle is merely stipulated in a legal text but whether an unbiased and objective investigating authority can present an explanation on how such a "principle" can be assessed as an instrument of "entrustment" or "direction" by using evidence establishing the link between the government and the private body.

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[1] Appellate Body Report, US-Countervailing Duty Investigation on Drams para. 108.
[2] Ibid, para. 112-113.
[3] Appellate Body Report, Japan – DRAMs (Korea), para. 131-134.
[4] Ibid.