UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

(DS505)

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

July 26, 2017

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.