



**UNITED STATES – COUNTERVAILING MEASURES ON  
SUPERCALENDERED PAPER FROM CANADA**

REPORT OF THE PANEL

*BCI deleted, as indicated [[\*\*\*\*\*]]*

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Short title	Full case title and citation
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<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , <a href="#">WT/DS33/AB/R</a> , adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
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<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , <a href="#">WT/DS294/AB/RW</a> 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.<sup>1</sup>

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.<sup>2</sup>

### **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.<sup>3</sup>

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.<sup>4</sup>

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<sup>5</sup> 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

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<sup>1</sup> Request for consultations by Canada, WT/DS505/1 (Canada's consultations request).

<sup>2</sup> Request for the Establishment of a Panel by Canada, WT/DS505/2 (Canada's panel request).

<sup>3</sup> DSB, Minutes of the meeting held on 21 July 2016, WT/DSB/M/383.

<sup>4</sup> Constitution note of the Panel, WT/DS505/3.

<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

## **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<sup>8</sup>:

- 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

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<sup>6</sup> See Panel's Additional Working Procedures of the Panel Concerning Business Confidential Information in Annex A-2.

<sup>7</sup> See Panel's Additional Working Procedures on open panel meetings in Annex A-3.

<sup>8</sup> Canada's panel request.

of programmes discovered during the course of an investigation, and refusing to accept or consider evidence concerning these discovered programmes.<sup>9</sup>

### **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.<sup>10</sup>

### **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.

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<sup>9</sup> Canada's panel request.

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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".<sup>13</sup>

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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

### **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

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<sup>11</sup> 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.

<sup>12</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

<sup>13</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>14</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

<sup>15</sup> Appellate Body Report, *Thailand – H-Beams*, paras. 117-119.

<sup>16</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 164.

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> Finally, it is generally required that each party asserting a fact provide proof thereof.<sup>20</sup>

### **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.<sup>21</sup>
- 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.<sup>22</sup>
- 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.<sup>23</sup>

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<sup>24</sup>, the NSUARB exercises general

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<sup>18</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 323, p. 337.

<sup>19</sup> Appellate Body Report, *EC – Hormones*, paras. 98 and 104.

<sup>20</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 323, p. 335.

<sup>21</sup> Canada's panel request, p. 2.

<sup>22</sup> Canada's panel request, p. 2.

<sup>23</sup> Canada's panel request, p. 2.

<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup> 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<sup>27</sup>, i.e. whether the customer could qualify for the rate.<sup>28</sup> 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.<sup>29</sup> 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".<sup>30</sup> NSPI and the customer then submit the price, terms, and conditions offered under this rate to the NSUARB for approval.<sup>31</sup>

7.14. In the period between NewPage Port Hawkesbury Corporation's (Newpage PH) entry into the Companies' Creditors Arrangement Act (CCAA)<sup>32</sup> 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

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

<sup>26</sup> 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).

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> Nova Scotia Questionnaire Response, exhibit NS-EL-17: Load Retention Tariff, (Exhibit CAN-143), p. 21.

<sup>30</sup> Nova Scotia Questionnaire Response, exhibit NS-EL-17: Load Retention Tariff, (Exhibit CAN-143), p. 20.

<sup>31</sup> Nova Scotia Questionnaire Response, exhibit NS-EL-17: Load Retention Tariff, (Exhibit CAN-143), p. 21.

<sup>32</sup> 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.<sup>33</sup> 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<sup>34</sup> 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.<sup>35</sup>

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.<sup>36</sup> 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.<sup>37</sup>

#### 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.<sup>38</sup> 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.<sup>39</sup> In reaching this conclusion, the USDOC discussed the regulatory

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<sup>33</sup> 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.

<sup>34</sup> When Newpage PH was sold to PWCC, Newpage PH became PHP, wholly owned by PWCC.

<sup>35</sup> 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.

<sup>36</sup> 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).

<sup>37</sup> 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).

<sup>38</sup> 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)

<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup>

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".<sup>42</sup> 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."<sup>43</sup> 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 choose to provide service only when it makes economic sense to do so.[\*]<sup>44</sup>

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[\*fn original]<sup>202</sup> 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]<sup>203</sup> *Id.* at 6.

[\*fn original]<sup>204</sup> *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.

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<sup>40</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 30-37.

<sup>41</sup> 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).

<sup>42</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 35.

<sup>43</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 36.

<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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".<sup>47</sup> 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."<sup>48</sup> 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.<sup>49</sup> 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<sup>50</sup>; 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.<sup>51</sup>

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"<sup>52</sup>, 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.<sup>53</sup>

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<sup>45</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 36-37.

<sup>46</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.

<sup>47</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.

<sup>48</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.

<sup>49</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 38-40.

<sup>50</sup> 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.

<sup>51</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 37-40.

<sup>52</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.

<sup>53</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 40.

7.24. After having found that "[t]he provision of the LRR" was specific<sup>54</sup>, 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.<sup>55</sup> 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.<sup>56</sup> 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").<sup>57</sup>

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.<sup>58</sup>

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.<sup>59</sup> 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).<sup>60</sup> 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*.<sup>61</sup>

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<sup>54</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 41.

<sup>55</sup> 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.)

<sup>56</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 41.

<sup>57</sup> 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.

<sup>58</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 44-48.

<sup>59</sup> 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).

<sup>60</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 48.

<sup>61</sup> 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<sup>62</sup> concerning potential modifications to the ownership and oversight of public utilities.<sup>63</sup> 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.<sup>64</sup> It further submits that the Discussion Paper relied upon by the USDOC was not sufficient to understand this duty to serve.<sup>65</sup>

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.<sup>66</sup> 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).<sup>67</sup> For Canada, NSPI is not required to provide a customer with an LRR, and the NSUAR only requires NSPI to negotiate with its customers to determine whether it could provide such rate.<sup>68</sup>

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".<sup>69</sup>

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.<sup>70</sup> Canada disagrees with the United States' understanding of "prevailing market conditions", noting that

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<sup>62</sup> 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).

<sup>63</sup> Canada's first written submission, paras. 102, 108, and 111.

<sup>64</sup> Canada's first written submission, para. 108.

<sup>65</sup> Canada's second written submission, paras. 10 and 24-27.

<sup>66</sup> Canada's second written submission, paras. 2 and 16-23.

<sup>67</sup> Canada's first written submission, para. 116.

<sup>68</sup> 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)).

<sup>69</sup> 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).

<sup>70</sup> 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.<sup>71</sup> 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.<sup>72</sup> 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).<sup>73</sup> 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.<sup>74</sup> Canada further submits that the USDOC constructed an inappropriate benchmark<sup>75</sup>, which included double-counting the ROE.<sup>76</sup>

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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

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<sup>71</sup> Canada's second written submission, para. 38.

<sup>72</sup> Canada's first written submission, paras. 143-144; second written submission, paras. 49-65; and response to Panel question No. 11, paras. 24-26.

<sup>73</sup> Canada's first written submission, paras. 160-165; second written submission, para. 42.

<sup>74</sup> Canada's second written submission, para. 41.

<sup>75</sup> Canada's first written submission, para. 165.

<sup>76</sup> Canada's first written submission, para. 174.

<sup>77</sup> United States' first written submission, para. 44; second written submission, paras. 14-20.

<sup>78</sup> United States' second written submission, paras. 21-24; response to Panel question No. 5, paras. 1-11.

<sup>79</sup> United States' second written submission, paras. 21-24; response to Panel question No. 5, paras. 1-11.

<sup>80</sup> United States' first written submission, para. 46.

<sup>81</sup> United States' first written submission, para. 48.

<sup>82</sup> United States' second written submission, para. 40.

<sup>83</sup> United States' second written submission, paras. 42-43.

<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup> 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.<sup>89</sup>

#### **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

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<sup>85</sup> United States' first written submission, paras. 65 and 86-87; second written submission, paras. 40-45.

<sup>86</sup> United States' first written submission, para. 67; second written submission, paras. 46-60.

<sup>87</sup> United States' second written submission, paras. 33-36.

<sup>88</sup> United States' second written submission, para. 37.

<sup>89</sup> 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.<sup>90</sup> 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).<sup>91</sup> 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*".<sup>92</sup> Both instances thus "require[]" the participation of the government, albeit indirectly<sup>93</sup>, and there must be a "demonstrable link between the government and the conduct of the private body"<sup>94</sup> in order to bring into existence a financial contribution.<sup>95</sup>

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).<sup>96</sup> 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".<sup>97</sup> Thus, entrustment and direction "cannot be inadvertent or a mere by-product of governmental regulation".<sup>98</sup> 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.<sup>99</sup> 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".<sup>100</sup>

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".<sup>101</sup>

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]".<sup>102</sup> Rather, the panel must examine "whether, in the light of the evidence

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<sup>90</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 108. See also Appellate Body Report, *US – Softwood Lumber IV*, para. 52.

<sup>91</sup> 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.

<sup>92</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 107.

<sup>93</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 112. See also Panel Report, *EC – Countervailing Measures on DRAM Chips*, fn 65.

<sup>94</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 112.

<sup>95</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.

<sup>96</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114.

<sup>97</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114 (quoting Panel Report, *US – Export Restraints*, para. 8.31).

<sup>98</sup> 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.

<sup>99</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116.

<sup>100</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 116.

<sup>101</sup> Appellate Body Reports, *US – Carbon Steel*, paras. 4.68-4.69; *US – Softwood Lumber IV*, para. 71.

<sup>102</sup> 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*".<sup>103</sup> 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.<sup>104</sup> 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".<sup>105</sup> 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".<sup>106</sup> 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".<sup>107</sup>

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.<sup>108</sup> 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.<sup>109</sup>

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)*".<sup>110</sup> 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 NSUAR, which led to the provision of electricity to PHP through the LRR.<sup>111</sup> 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".<sup>112</sup> 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".<sup>113</sup>

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<sup>103</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93. (emphasis added)

<sup>104</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>105</sup> 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.

<sup>106</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

<sup>107</sup> 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).

<sup>108</sup> 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.

<sup>109</sup> United States' first written submission, paras. 29-30.

<sup>110</sup> United States' response to Panel question No. 7, para. 13. (emphasis added)

<sup>111</sup> United States' response to Panel question No. 9, para. 16, and No. 5, para. 1.

<sup>112</sup> United States' response to Panel question No. 5, paras. 1-2.

<sup>113</sup> 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".<sup>114</sup> 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.<sup>115</sup> 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<sup>116</sup>, 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."<sup>117</sup> 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]".<sup>118</sup>

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*.<sup>119</sup>

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"<sup>120</sup> 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."<sup>121</sup>

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".<sup>122</sup>

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

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<sup>114</sup> Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; *US – Anti-Dumping and Countervailing Duties (China)*, para. 379.

<sup>115</sup> United States' response to Panel question No. 5, paras. 1-2.

<sup>116</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 37-40.

<sup>117</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 36. (emphasis added; fn omitted)

<sup>118</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 37. (emphasis added)

<sup>119</sup> Issues and Decision Memorandum, (Exhibit CAN-37), Comment 10: "Whether the NSUARB is an Authority", p. 108. (emphasis original)

<sup>120</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.

<sup>121</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 40.

<sup>122</sup> United States' first written submission, para. 29.

entrusted or directed Nova Scotia Power to provide to [PHP] electricity *at a below market rate (LRR)*"<sup>123</sup> 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]"<sup>124</sup> 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."<sup>125</sup>

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*.<sup>126</sup>

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.<sup>127</sup>

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

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<sup>123</sup> United States' response to Panel question No. 7, para. 13. (emphasis added)

<sup>124</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 37.

<sup>125</sup> United States' first written submission, para. 19.

<sup>126</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 125. (emphasis added)

<sup>127</sup> 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 ... [.]<sup>128</sup>

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.<sup>129</sup>

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.<sup>130</sup>

#### **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.<sup>131</sup> 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.<sup>132</sup>

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.<sup>133</sup> 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"<sup>134</sup> 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".<sup>135</sup> The United States contends that, "as a matter of law", Nova Scotia has given public utilities, including NSPI, "the duty" to provide electricity.<sup>136</sup> 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.<sup>137</sup>

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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<sup>128</sup> USDOC's NAFTA Brief, (Exhibit CAN-76), p. 64.

<sup>129</sup> 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)

<sup>130</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>131</sup> Canada's first written submission, paras. 108-115; second written submission, para. 7.

<sup>132</sup> Canada's second written submission, paras. 16-23.

<sup>133</sup> United States' first written submission, para. 48.

<sup>134</sup> United States' first written submission, para. 26.

<sup>135</sup> United States' first written submission, para. 29.

<sup>136</sup> United States' first written submission, paras. 25-30.

<sup>137</sup> 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.<sup>138</sup> 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.*<sup>139</sup> Furthermore, this duty to serve is applied in practice through various other provisions of the Public Utilities Act.<sup>140</sup> 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.<sup>141</sup> 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*"<sup>142</sup>, and that entrustment and direction "cannot be inadvertent or a mere by-product of governmental regulation".<sup>143</sup>

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".<sup>144</sup> 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.<sup>145</sup> 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 [NSUAR] is not entitled to approve rates that would be uneconomical for

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<sup>138</sup> 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.

<sup>139</sup> 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.

<sup>140</sup> Canada's response to Panel question No. 1, paras. 1-7.

<sup>141</sup> 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).

<sup>142</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 115. (emphasis added)

<sup>143</sup> 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.

<sup>144</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114 (quoting Panel Report, *US – Export Restraints*, para. 8.31).

<sup>145</sup> Board of Commissioners of Public Utilities v. Nova Scotia Power Corp. et al., (Exhibit CAN-171), p. 77.

the utility".<sup>146</sup> 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".<sup>147</sup> The terms agreed between NSPI and the customer are then put before the NSUARB for approval, followed by a thorough and contested review process.<sup>148</sup> 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".<sup>149</sup>

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".<sup>150</sup> 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'"<sup>151</sup>, 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.<sup>152</sup> 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

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

<sup>147</sup> Nova Scotia Questionnaire Response, exhibit NS-EL-17: Load Retention Tariff, (Exhibit CAN-143), p. 20.

<sup>148</sup> 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).

<sup>149</sup> 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).

<sup>150</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2383.

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

<sup>152</sup> 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*".<sup>153</sup> 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.<sup>154</sup>

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."<sup>155</sup> 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."<sup>156</sup>

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.

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<sup>153</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 52. (emphasis added)

<sup>154</sup> In this respect, see European Union's third-party submission, para. 26.

<sup>155</sup> Discussion Paper, (Exhibit CAN-158), p. 3.

<sup>156</sup> 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."<sup>157</sup>

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

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<sup>157</sup> 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.<sup>158</sup>

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".<sup>159</sup>

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.<sup>160</sup> 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.<sup>161</sup>

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<sup>162</sup>, 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

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<sup>158</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 41. (fns omitted)

<sup>159</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 130.

<sup>160</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 48.

<sup>161</sup> 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.

<sup>162</sup> 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".<sup>163</sup> 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.<sup>164</sup>

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.<sup>165</sup> 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."<sup>166</sup> – 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.<sup>167</sup>

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".<sup>168</sup> 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.

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<sup>163</sup> 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).

<sup>164</sup> Canada's first written submission, para. 130.

<sup>165</sup> United States' first written submission, para. 61.

<sup>166</sup> Decision Memorandum for the Preliminary Determination, (Exhibit CAN-10), p. 30.

<sup>167</sup> USDOC Memorandum dated 2 September 2015, "Verification Report: Government of Nova Scotia", (Exhibit CAN-99), p. 16.

<sup>168</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> 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.<sup>169</sup>
- 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.<sup>170</sup>

#### **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.<sup>171</sup> On 6 September 2011, Newpage PH filed for creditor protection under the CCAA.<sup>172</sup> In its CCAA application, Newpage PH declared that it was seeking to pursue a going concern sale.<sup>173</sup> 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).<sup>174</sup> Newpage PH thus took the necessary steps to maintain the mill in hot idle status.<sup>175</sup>

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<sup>169</sup> Canada's panel request, p. 2.

<sup>170</sup> Canada's panel request, p. 2.

<sup>171</sup> 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.

<sup>172</sup> 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).

<sup>173</sup> Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), exhibit NS-HI-1, p. 3; Canada's first written submission, paras. 14-16.

<sup>174</sup> 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).

<sup>175</sup> 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.<sup>176</sup> Newpage PH then began taking steps to reach an acceptable agreement with PWCC.<sup>177</sup>

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.<sup>178</sup>

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.<sup>179</sup> [[\*\*\*\*\*]].<sup>180</sup> 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.<sup>181</sup> 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.<sup>182</sup>

#### **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"<sup>183</sup>, 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"<sup>184</sup>, 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."<sup>185</sup>

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.<sup>186</sup>

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

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<sup>176</sup> Nova Scotia Questionnaire Response, Vol. VIII, (Exhibit CAN-1 (BCI)), p. NS.VIII-4.

<sup>177</sup> 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.

<sup>178</sup> 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.

<sup>179</sup> 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.

<sup>180</sup> Port Hawkesbury, Questionnaire Response, exhibit G-15 – Plan Sponsorship Agreement, (Exhibit CAN-95 (BCI)), para. 7(1)(e).

<sup>181</sup> Port Hawkesbury Questionnaire Response, exhibit G-11, (Exhibit CAN-12), p. 33.

<sup>182</sup> 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.

<sup>183</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 18-19.

<sup>184</sup> 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.

<sup>185</sup> Final Modification of Agency Practice, (Exhibit CAN-93); Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.

<sup>186</sup> 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.<sup>187</sup>

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.<sup>188</sup>

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.<sup>189</sup> The USDOC thus found that the hot idle funds conferred a benefit to PWCC.<sup>190</sup>

#### **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.<sup>191</sup>

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.<sup>192</sup>

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.<sup>193</sup>

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<sup>187</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.

<sup>188</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.

<sup>189</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 19.

<sup>190</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 20.

<sup>191</sup> 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.

<sup>192</sup> 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.

<sup>193</sup> 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.<sup>194</sup>

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.<sup>195</sup>

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.<sup>196</sup> 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.<sup>197</sup>

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.<sup>198</sup>

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<sup>194</sup> 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.

<sup>195</sup> United States' first written submission, para. 125.

<sup>196</sup> United States' response to Panel's question No. 36, paras. 90-91; closing statement at the second meeting of the Panel, para. 6.

<sup>197</sup> United States' first written submission, paras. 127-128.

<sup>198</sup> 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.<sup>199</sup>

7.103. The Appellate Body has explained that "the ordinary meaning of 'benefit' clearly encompasses some form of advantage"<sup>200</sup> and "is concerned with 'benefit to the recipient' and not with the 'cost to government'".<sup>201</sup> A "'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient"<sup>202</sup>, 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.<sup>203</sup> Also, the focus of any analysis should be on legal or natural persons instead of on productive operations.<sup>204</sup>

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".<sup>205</sup> 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.<sup>206</sup>

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

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

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<sup>199</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 703.

<sup>200</sup> Appellate Body Report, *Canada – Aircraft*, para. 153. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.123.

<sup>201</sup> Appellate Body Report, *Canada – Aircraft*, para. 155 (emphasis original). See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.123.

<sup>202</sup> Appellate Body Report, *Canada – Aircraft*, para. 154.

<sup>203</sup> Appellate Body Report, *Canada – Aircraft*, para. 154. See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 703.

<sup>204</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 110.

<sup>205</sup> Appellate Body Report, *Canada – Aircraft*, para. 157. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.123.

<sup>206</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.123. See also Appellate Body Reports, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 636; and *EC and certain member States – Large Civil Aircraft*, para. 705.

<sup>207</sup> 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.

<sup>208</sup> 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.<sup>209</sup>

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

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<sup>209</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 87-88. (fn omitted)

levels.<sup>210</sup> This included the ancillary forestry infrastructure activities.<sup>211</sup> The Government of Nova Scotia, however, wanted Newpage PH to keep contracting forestry infrastructure activities while the CCAA process was underway.<sup>212</sup> 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: [[\*\*\*\*\*]].<sup>213</sup> The FIA was cost and cash flow neutral to Newpage PH<sup>214</sup> and [[\*\*\*\*\*]].<sup>215</sup> The first amount of the FIF was approved on 16 September 2011, and a second amount was approved on [[\*\*\*\*\*]].<sup>216</sup>

#### **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.<sup>217</sup>

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.<sup>218</sup> 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.<sup>219</sup>

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.<sup>220</sup>

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

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<sup>210</sup> 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.

<sup>211</sup> Canada's first written submission, para. 21; Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), p. NS.X-3.

<sup>212</sup> 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.

<sup>213</sup> Canada's first written submission, para. 23; Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), p. NS.X-4.

<sup>214</sup> 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.

<sup>215</sup> Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), pp. NS.X-4-NS.X-5.

<sup>216</sup> Canada's first written submission, para. 23; Nova Scotia Questionnaire Response, Vol. X, (Exhibit CAN-16 (BCI)), pp. NS.X-5-NS.X-6.

<sup>217</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 21.

<sup>218</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 22.

<sup>219</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 22.

<sup>220</sup> 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.<sup>221</sup>

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.<sup>222</sup> The USDOC thus found that the second FIF approval conferred a benefit to PWCC.<sup>223</sup>

#### **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.<sup>224</sup>

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.<sup>225</sup>

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.<sup>226</sup>

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.<sup>227</sup> 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.<sup>228</sup>

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<sup>221</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 23.

<sup>222</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 23.

<sup>223</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 23.

<sup>224</sup> 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.

<sup>225</sup> 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.

<sup>226</sup> 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.

<sup>227</sup> 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.

<sup>228</sup> 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.<sup>229</sup>

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.<sup>230</sup>

#### **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<sup>231</sup>, 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.<sup>232</sup>

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

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<sup>229</sup> United States' first written submission, para. 132; second written submission, paras. 63-69.

<sup>230</sup> United States' first written submission, para. 132; second written submission, paras. 70-74.

<sup>231</sup> 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.

<sup>232</sup> [[\*\*\*\*\*]]

biomass by the Government of Nova Scotia to PHP, in the absence of any evidence that a benefit was conferred.<sup>233</sup>

### 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.<sup>234</sup>

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<sup>235</sup>, 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.<sup>236</sup>

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".<sup>237</sup> 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.<sup>238</sup>

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.<sup>239</sup>

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

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<sup>233</sup> Canada's panel request, p. 2.

<sup>234</sup> 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.

<sup>235</sup> 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).

<sup>236</sup> Petition, Vol. II, (Exhibit CAN-39), pp. II-46-II-47. (fns omitted)

<sup>237</sup> Petition, Vol. II, (Exhibit CAN-39), p. II-48.

<sup>238</sup> Petition, Vol. II, (Exhibit CAN-39), p. II-48.

<sup>239</sup> 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.<sup>240</sup>

### 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.<sup>241</sup>

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.<sup>242</sup>

7.137. Canada contends that none of the documents submitted by the petitioner constitute positive evidence of a benefit to PHP.<sup>243</sup> 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.<sup>244</sup>

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.<sup>245</sup>

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.<sup>246</sup>

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.<sup>247</sup>

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

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<sup>240</sup> USDOC initiation checklist, (Exhibit CAN-40), p. 18.

<sup>241</sup> Canada's first written submission, paras. 208 and 217.

<sup>242</sup> Canada's first written submission, para. 212.

<sup>243</sup> Canada's first written submission, para. 213.

<sup>244</sup> Canada's first written submission, paras. 214-216.

<sup>245</sup> Canada's response to Panel question No. 43, para. 89.

<sup>246</sup> Canada's second written submission, paras. 73-75.

<sup>247</sup> 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.<sup>248</sup>

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.<sup>249</sup> 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.<sup>250</sup>

### **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.<sup>251</sup>

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,

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<sup>248</sup> United States' first written submission, para. 144; response to Panel question No. 46, para. 100.

<sup>249</sup> United States' first written submission, para. 145; response to Panel question No. 46, paras. 102-103.

<sup>250</sup> United States' second written submission, paras. 77-80.

<sup>251</sup> Panel Reports, *China – GOES*, para. 7.50; *US – Countervailing Measures (China)*, para. 7.144.

relevantly, as "adequate".<sup>252</sup> 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.<sup>253</sup>

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.<sup>254</sup> 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.<sup>255</sup>

7.148. Article 11.2 requires "sufficient evidence of the *existence* of a subsidy"<sup>256</sup>, 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.<sup>257</sup>

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.<sup>258</sup>

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"<sup>259</sup>, 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.<sup>260</sup> 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

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<sup>252</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 880, and Vol. 2, p. 3097.

<sup>253</sup> Panel Reports, *China – GOES*, para. 7.54; *US – Countervailing Measures (China)*, fn 184.

<sup>254</sup> Panel Reports, *China – GOES*, para. 7.54; *US – Countervailing Measures (China)*, fn 184.

<sup>255</sup> Panel Reports, *China – GOES*, para. 7.55; *US – Countervailing Measures (China)*, fn 184.

<sup>256</sup> Emphasis added.

<sup>257</sup> Panel Reports, *China – GOES*, para. 7.55; *US – Countervailing Measures (China)*, para. 7.151.

<sup>258</sup> Panel Report, *China – GOES*, para. 7.56.

<sup>259</sup> USDOC initiation checklist, (Exhibit CAN-40), p. 18.

<sup>260</sup> 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.<sup>261</sup>
- 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.<sup>262</sup>
- 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.<sup>263</sup>

###### **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

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<sup>261</sup> Canada's panel request, p. 3.

<sup>262</sup> Canada's panel request, p. 3.

<sup>263</sup> Canada's panel request, p. 3.

investigation *that pertain to the manufacture, production, or exportation of SC paper from Canada*.<sup>264</sup>

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.<sup>265</sup>

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".<sup>266</sup>

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.<sup>267</sup>

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.<sup>268</sup>

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.<sup>269</sup>

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"<sup>270</sup> (subsidy) in its general ledger, the USDOC found entries of interest in four accounts. One account was disregarded by the USDOC because it was

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<sup>264</sup> USDOC Initial Questionnaire to Canada (6 April 2015), (Exhibit CAN-114), section I. (emphasis added)

<sup>265</sup> 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.

<sup>266</sup> 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.

<sup>267</sup> 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.

<sup>268</sup> 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.

<sup>269</sup> Canada's first written submission, para. 64; opening statement at the first meeting of the Panel, para. 17.

<sup>270</sup> 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"<sup>271</sup> 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.<sup>272</sup>

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.<sup>273</sup>

#### **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.<sup>274</sup> 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".<sup>275</sup> 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.<sup>276</sup>

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.<sup>277</sup>

#### **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.<sup>278</sup> Second, the question was overly broad and was not specified in detail.<sup>279</sup> According to Canada, only an unambiguous question, specified in detail, can lead to necessary information, whereas the

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<sup>271</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.

<sup>272</sup> Canada's first written submission, paras. 65-67.

<sup>273</sup> Canada's first written submission, paras. 68-69; response to Panel question No. 49, para. 103.

<sup>274</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.

<sup>275</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.

<sup>276</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.

<sup>277</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 12-13.

<sup>278</sup> Canada's opening statement at the first meeting of the Panel, paras. 40 and 43.

<sup>279</sup> 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.<sup>280</sup>

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.<sup>281</sup> 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.<sup>282</sup>

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.<sup>283</sup> 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.<sup>284</sup>

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.<sup>285</sup> 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.<sup>286</sup> 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.<sup>287</sup> 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".<sup>288</sup> 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.<sup>289</sup>

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

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<sup>280</sup> Canada's second written submission, paras. 87-92.

<sup>281</sup> 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).

<sup>282</sup> Canada's response to Panel question No. 51(b), paras. 115-116. See also second written submission, para. 98.

<sup>283</sup> Canada's first written submission, paras. 250-257; second written submission, paras. 100-112.

<sup>284</sup> Canada's opening statement at the first meeting of the Panel, paras. 21-22.

<sup>285</sup> United States' first written submission, para. 203; second written submission, para. 82.

<sup>286</sup> United States' first written submission, para. 204; opening statement at the first meeting of the Panel, para. 29.

<sup>287</sup> United States' response to Panel question No. 54, para. 110.

<sup>288</sup> United States' second written submission, para. 89.

<sup>289</sup> 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.<sup>290</sup>

#### 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<sup>291</sup>, 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.<sup>292</sup> 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.<sup>293</sup>

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<sup>294</sup>, 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".<sup>295</sup>

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"<sup>296</sup> – 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*."<sup>297</sup> 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

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<sup>290</sup> United States' second written submission, paras. 91-93; response to Panel question No. 76, para. 175.

<sup>291</sup> 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."

<sup>292</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 292.

<sup>293</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.

<sup>294</sup> 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 impeded the investigation by failing to provide necessary information". See also *ibid.* para. 203; and second written submission, para. 82.

<sup>295</sup> 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".

<sup>296</sup> *Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 1901.

<sup>297</sup> 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".<sup>298</sup> 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.<sup>299</sup> 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.<sup>300</sup> 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"<sup>301</sup> in the company ledger at verification, the USDOC *inferred*<sup>302</sup> 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.<sup>303</sup> In the Resolute Final Calculation Memo, the USDOC acknowledges that "we do not know the nature of this assistance"<sup>304</sup>, 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."<sup>305</sup> 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<sup>306</sup>, 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

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<sup>298</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.343. (underlying omitted; italics added)

<sup>299</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.151.

<sup>300</sup> 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).

<sup>301</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.

<sup>302</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 13.

<sup>303</sup> 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."

<sup>304</sup> 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)

<sup>305</sup> Issues and Decision Memorandum, (Exhibit CAN-37), USDOC's Position on Comment 17: Whether to Apply AFA to Resolute, p. 155.

<sup>306</sup> United States' second written submission, para. 93.

parties' *throughout* ... an investigation".<sup>307</sup> 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.<sup>308</sup> 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.<sup>309</sup>

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".<sup>310</sup>

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.<sup>311</sup>

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".<sup>312</sup> 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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<sup>307</sup> 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, *Mexico – Anti-Dumping Measures on Rice*, para. 292.

<sup>308</sup> 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, *Mexico – 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)

<sup>309</sup> Emphasis added.

<sup>310</sup> Panel Report, *Egypt – Steel Rebar*, para. 7.155. (emphasis added)

<sup>311</sup> Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), p. 32.

<sup>312</sup> Canada's response to Panel question No. 75, para. 164.

broader range of "assistance".<sup>313</sup> 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*.<sup>314</sup> 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.<sup>315</sup> In Canada's view, the use of the amounts discovered would have resulted in no missing information with respect to benefit.<sup>316</sup>

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.<sup>317</sup>

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.<sup>318</sup> 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".<sup>319</sup> The facts available must be facts that are in the possession of the investigating authority and on its written record.<sup>320</sup> An investigating authority cannot resort to non-factual assumptions or speculation and must take into account all substantiated facts on the record.<sup>321</sup> 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.<sup>322</sup> 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

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<sup>313</sup> 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".

<sup>314</sup> Canada's first written submission, paras. 250-257.

<sup>315</sup> Canada's first written submission, para. 448.

<sup>316</sup> Canada's response to Panel question No. 48, paras. 98-99.

<sup>317</sup> 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.

<sup>318</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291.

<sup>319</sup> 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.

<sup>320</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417. See also Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.178.

<sup>321</sup> 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.

<sup>322</sup> 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.<sup>323</sup> In such a process, no substantiated facts on the record can be *a priori* excluded from consideration.<sup>324</sup>

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.<sup>325</sup> Especially in light of the fact that Article 12.7 should not be used as punishment<sup>326</sup>, 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.<sup>327</sup> 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.<sup>328</sup> 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.<sup>329</sup>

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<sup>323</sup> 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.

<sup>324</sup> 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.

<sup>325</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

<sup>326</sup> 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.

<sup>327</sup> Canada's first written submission, paras. 267, 272, and 280.

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

<sup>329</sup> 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.<sup>330</sup>

### 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.<sup>331</sup> 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".<sup>332</sup> 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.<sup>333</sup>

7.189. In its questionnaire response of 27 May 2015, the Government of Quebec also described Fibrek's acquisition.<sup>334</sup> It submitted, as evidence, a copy of the Quebec Court of Appeal decision regarding Fibrek's defense against Resolute's takeover effort<sup>335</sup>; a financial report [[\*\*\*\*\*]] detailing Fibrek's acquisition by Resolute<sup>336</sup>; and a timeline published by Reuters on the "Takeover battle for Canada's Fibrek".<sup>337</sup> 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.<sup>338</sup>

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.<sup>339</sup> 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.<sup>340</sup>

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.<sup>341</sup>

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<sup>330</sup> Canada's panel request, p. 2.

<sup>331</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 6.

<sup>332</sup> Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), pp. 4 and 26.

<sup>333</sup> Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), exhibits 2, 3, and 4.

<sup>334</sup> Government of Quebec, Questionnaire Response, Vol. I (27 May 2015), (Exhibit CAN-49), p. QC-12.

<sup>335</sup> 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).

<sup>336</sup> GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-5 – [[\*\*\*\*\*]] (22 April 2015).

<sup>337</sup> GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-3 – Reuters Article (11 April 2012).

<sup>338</sup> Hughes Hubbard & Reed LLP, "Supercalendered Paper from Canada: Consultations Paper" (13 March 2015) (Consultations Paper), (Exhibit CAN-5), pp. 18-19.

<sup>339</sup> Government of Canada, Revised Questionnaire Response (22 July 2015), (Exhibit CAN-46), pp. GOC-2-GOC-3.

<sup>340</sup> Resolute FP Canada Inc., Supplemental Questionnaire Response (22 July 2015) (Resolute Supplemental Questionnaire Response), (Exhibit CAN-45 (BCI)), pp. 2-3 and appendix D.

<sup>341</sup> 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.<sup>342</sup>

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.<sup>343</sup>

#### **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.<sup>344</sup>

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.<sup>345</sup> Canada also asserts that the USDOC had been aware that the takeover was hostile since consultations at the outset of the investigation.<sup>346</sup> Canada adds that, to the extent the USDOC required even more information, it failed in its responsibility to request it.<sup>347</sup>

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.<sup>348</sup>

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<sup>342</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 163-164.

<sup>343</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 164-165. (fn omitted)

<sup>344</sup> Canada's first written submission, para. 281.

<sup>345</sup> 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.

<sup>346</sup> Canada's first written submission, para. 282; second written submission, para. 119.

<sup>347</sup> Canada's first written submission, para. 287; second written submission, para. 116.

<sup>348</sup> 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.<sup>349</sup>

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.<sup>350</sup>

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.<sup>351</sup>

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.<sup>352</sup>

#### 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"<sup>353</sup> and, instead, they had submitted "unsubstantiated assertions that the purchase of Fibrek was a 'hostile takeover in 2012'"<sup>354</sup>; 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)".<sup>355</sup>

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*".<sup>356</sup> For this purpose, the Panel must ascertain whether the USDOC "evaluated all of the relevant evidence in an objective and unbiased manner".<sup>357</sup> 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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<sup>349</sup> Canada's first written submission, paras. 284 and 292; second written submission, para. 121.

<sup>350</sup> United States' first written submission, paras. 264-269.

<sup>351</sup> United States' first written submission, paras. 95-97; response to Panel question No. 58, para. 132.

<sup>352</sup> United States' response to Panel question No. 57(b), paras. 128-130; second written submission, para. 96.

<sup>353</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.

<sup>354</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.

<sup>355</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.

<sup>356</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93. (emphasis added)

<sup>357</sup> 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 ... [.]<sup>358</sup>

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".<sup>359</sup> 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.

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<sup>358</sup> Consultations Paper, (Exhibit CAN-5), p. 19.

<sup>359</sup> 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."<sup>360</sup>

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".<sup>361</sup>

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.

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<sup>360</sup> Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), exhibit 2: FY 2012 Audited Financial Statement (Form 10-K), p. 85.

<sup>361</sup> 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 marchés 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.<sup>362</sup>

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

[[\*\*\*\*\*]]<sup>363</sup>

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".<sup>364</sup> 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 Genuity arrives at a fair value of between C\$1.25 and C\$1.45 per share.

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<sup>362</sup> GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-4 – 2012 QCCA 569 (27 March 2012). (fns omitted)

<sup>363</sup> 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).

<sup>364</sup> 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.<sup>365</sup>

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"<sup>366</sup> and, instead, it had submitted "unsubstantiated assertions that the purchase of Fibrek was a 'hostile takeover in 2012'".<sup>367</sup>

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.

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<sup>365</sup> GOQ Questionnaire Response, Vol. III, (Exhibit CAN-48 (BCI)), exhibit QC-RENFORT-3 – Reuters Article (11 April 2012).

<sup>366</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 165.

<sup>367</sup> 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.<sup>368</sup>

### **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.<sup>369</sup>

#### **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.<sup>370</sup> The USDOC found that Resolute's mills received subsidies directly under this programme. The USDOC also found that Resolute benefited from subsidies 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.<sup>371</sup> The USDOC found that PPGTP subsidies were tied to the production of pulp and paper products, and therefore benefitted 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.<sup>372</sup>

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<sup>368</sup> 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.

<sup>369</sup> Canada's panel request, p. 2.

<sup>370</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 26-27.

<sup>371</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 6.

<sup>372</sup> 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.<sup>373</sup>

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 FPSF 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.<sup>374</sup>

#### 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 FPSF, 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 FPSF shows that subsidies provided under these programmes are tied to products other than SC Paper, and therefore cannot be attributed to SC Paper.<sup>375</sup>

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.<sup>376</sup> 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 [[\*\*\*\*\*]].<sup>377</sup>

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.<sup>378</sup> 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.<sup>379</sup>

7.223. Regarding subsidies provided under the NIER Programme and the FPSF, 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

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<sup>373</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 27-28.

<sup>374</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 28-29.

<sup>375</sup> 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.

<sup>376</sup> 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.

<sup>377</sup> Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), pp. 22-23.

<sup>378</sup> Resolute Supplemental Questionnaire Response, (Exhibit CAN-45 (BCI)), pp. 2-3 and appendix D.

<sup>379</sup> 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.<sup>380, 381</sup>

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.<sup>382</sup> 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".<sup>383</sup> 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.<sup>384</sup>

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).<sup>385</sup>

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.<sup>386</sup>

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).<sup>387</sup>

#### **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.

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<sup>380</sup> 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.

<sup>381</sup> 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.

<sup>382</sup> United States' first written submission, paras. 281-287; second written submission, paras. 99-100.

<sup>383</sup> United States' first written submission, para. 284 (quoting Appellate Body Report, *US – Washing Machines*, para. 5.273).

<sup>384</sup> United States' first written submission, paras. 271-288; second written submission, paras. 98-101; and response to Panel question No. 60, paras. 136-143.

<sup>385</sup> United States' first written submission, paras. 290-291; second written submission, paras. 102-104.

<sup>386</sup> United States' first written submission, paras. 287 and 291.

<sup>387</sup> 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.<sup>388</sup>

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

No countervailing duty shall be levied<sup>389</sup> 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."<sup>390</sup> 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".<sup>391</sup> 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.<sup>392</sup> 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.<sup>393</sup> 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.<sup>394</sup> 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.<sup>395</sup>

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<sup>388</sup> Fn omitted.

<sup>389</sup> Fn omitted.

<sup>390</sup> Appellate Body Report, *US – Washing Machines*, para. 5.268. (fn omitted)

<sup>391</sup> Appellate Body Report, *US – Washing Machines*, para. 5.269.

<sup>392</sup> Appellate Body Report, *US – Washing Machines*, para. 5.267.

<sup>393</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 26-29.

<sup>394</sup> Resolute Questionnaire Response, Section III, (Exhibit CAN-41 (BCI)), pp. 5-9 and 22-25.

<sup>395</sup> 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"<sup>396</sup> 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".<sup>397</sup>

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.<sup>398</sup> 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.<sup>399</sup> 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."<sup>400</sup> 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.

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<sup>396</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 161.

<sup>397</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 161.

<sup>398</sup> 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.

<sup>399</sup> Resolute Supplemental Questionnaire Response, (Exhibit CAN-45 (BCI)), pp. 2-3 and appendix D.

<sup>400</sup> 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<sup>401</sup> 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.<sup>402</sup> 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<sup>403</sup> 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.<sup>404</sup>

7.240. Canada has also presented a claim under Article 10 of the SCM Agreement. Article 10<sup>405</sup> 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.<sup>406</sup> 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.<sup>407</sup>

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<sup>401</sup> 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."

<sup>402</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 80.

<sup>403</sup> 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".

<sup>404</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 552-556.

<sup>405</sup> 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)

<sup>406</sup> 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.

<sup>407</sup> 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%.<sup>408</sup>

7.244. In the petition to initiate the CVD investigation, Catalyst and Irving were identified as producers of SC Paper.<sup>409</sup> Both companies provided comments on the initiation and requested to be included as mandatory respondents in the investigation.<sup>410</sup> 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".<sup>411</sup>

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%.<sup>412</sup> 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.<sup>413</sup>

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

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<sup>408</sup> Supercalendered Paper from Canada: Countervailing Duty Order, United States Federal Register, Vol. 80, No. 237 (10 December 2015) (CVD Order), (Exhibit USA-2).

<sup>409</sup> Petition, Vol. II, (Exhibit CAN-39).

<sup>410</sup> USDOC Memorandum dated 3 April 2015 on Respondent Selection (Respondent Selection Decision), (Exhibit CAN-58).

<sup>411</sup> Respondent Selection Decision, (Exhibit CAN-58), p. 6.

<sup>412</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 74.

<sup>413</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 76.

<sup>414</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 30.

<sup>415</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 13-15, 17, 20, 25, and 38.

<sup>416</sup> 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 to [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.<sup>417</sup>

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.<sup>418</sup>

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.<sup>419</sup>

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.<sup>420</sup> 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.<sup>421</sup> 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.<sup>422</sup>

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.<sup>423</sup> 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.<sup>424</sup>

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.<sup>425</sup> 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.<sup>426</sup>

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.<sup>427</sup> The United States argues that neither the SCM Agreement nor the GATT 1994 prescribe a

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<sup>417</sup> 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.

<sup>418</sup> Canada's first written submission, para. 329.

<sup>419</sup> Canada's first written submission, paras. 323 and 330.

<sup>420</sup> Canada's first written submission, paras. 326 and 331 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, paras. 111-130).

<sup>421</sup> Canada's opening statement at the first meeting of the Panel, paras. 172-173.

<sup>422</sup> 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.

<sup>423</sup> Canada's first written submission, paras. 324 and 332.

<sup>424</sup> Canada's first written submission, paras. 332-334; opening statement at the first meeting of the Panel, paras. 179-181.

<sup>425</sup> United States' first written submission, para. 298.

<sup>426</sup> United States' second written submission, paras. 111-118.

<sup>427</sup> 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.<sup>428</sup>

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.<sup>429</sup> 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.<sup>430</sup>

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.<sup>431</sup>

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.<sup>432</sup>

#### **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.<sup>433</sup> 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.<sup>434</sup>

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

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<sup>428</sup> United States' first written submission, para. 298; second written submission, para. 109.

<sup>429</sup> United States' first written submission, para. 302; second written submission, paras. 120-121; and response to Panel question No. 64, paras. 145-148.

<sup>430</sup> United States' first written submission, paras. 300-301; response to Panel question No. 64, paras. 145-148.

<sup>431</sup> United States' first written submission, para. 303.

<sup>432</sup> United States' first written submission, para. 304; second written submission, para. 119.

<sup>433</sup> United States' second written submission, para. 110.

<sup>434</sup> 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".[\*]<sup>435</sup>

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[\*fn original]<sup>531</sup> *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 106.

[\*fn original]<sup>532</sup> *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

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<sup>435</sup> 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<sup>436</sup> 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.<sup>437</sup>

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<sup>438</sup>, which directs investigating authorities to disregard, when constructing the all-others rate, margins of dumping established using facts available.<sup>439</sup> The Appellate Body has clarified that this includes margins of dumping constructed even partially on the basis of facts available.<sup>440</sup> 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<sup>441</sup>, 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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<sup>436</sup> 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."

<sup>437</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.425-4.426.

<sup>438</sup> 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."

<sup>439</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 449.

<sup>440</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 122.

<sup>441</sup> 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.<sup>442</sup>

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.<sup>443</sup>

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.<sup>444</sup>

7.273. Canada has also presented claims under Articles 10, 19.1 and 32.1 of the SCM Agreement. Article 10<sup>445</sup> 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<sup>446</sup> 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.<sup>447</sup> 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

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<sup>442</sup> This is regardless of whether the facts available were or were not used in a WTO-consistent manner.

<sup>443</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.23.

<sup>444</sup> This is regardless of whether the facts available were or were not used in a WTO-consistent manner.

<sup>445</sup> 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)

<sup>446</sup> 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."

<sup>447</sup> 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.<sup>448</sup>

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.<sup>449</sup>

7.275. Similarly, the relevant part of Article 19.1 of the SCM Agreement<sup>450</sup> 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.<sup>451</sup> 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.<sup>452</sup> 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.<sup>453</sup>
- 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.<sup>454</sup>

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<sup>448</sup> 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.

<sup>449</sup> 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.

<sup>450</sup> 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."

<sup>451</sup> Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 80.

<sup>452</sup> 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.

<sup>453</sup> Canada's panel request, pp. 3-4.

<sup>454</sup> 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<sup>455</sup>, Catalyst and Irving requested the initiation of expedited reviews on 15 and 16 December 2015, respectively.<sup>456</sup> 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.<sup>457</sup> 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.<sup>458</sup> 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<sup>459</sup>, the USDOC issued an "Analysis of New Subsidy Allegations" on 18 April 2016 that recommended investigating six new subsidy allegations.<sup>460</sup> On 25 April 2016, the petitioner submitted two amended new subsidy allegations<sup>461</sup>, which Catalyst, Irving, and the Canadian provinces argued were also insufficient.<sup>462</sup> The USDOC issued an "Analysis of Amended New Subsidy Allegations" that recommended investigating one amended new subsidy allegations on 12 July 2016.<sup>463</sup> 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.<sup>464</sup> 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.<sup>465</sup>

### 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

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<sup>455</sup> CVD Order, (Exhibit USA-2).

<sup>456</sup> 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).

<sup>457</sup> 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)).

<sup>458</sup> New Subsidy Allegations Regarding Catalyst Paper and Irving Paper on the expedited review (16 February 2016), (Exhibit CAN-65).

<sup>459</sup> 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 Allegations Concerning the Provision of Stumpage in Nova Scotia (26 February 2016), (Exhibit CAN-69).

<sup>460</sup> USDOC, Analysis of New Subsidy Allegations (18 April 2016), (Exhibit CAN-70).

<sup>461</sup> Petitioner's Amended New Subsidy Allegations (25 April 2016), (Exhibit CAN-71).

<sup>462</sup> 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).

<sup>463</sup> USDOC, Analysis of Amended New Subsidy Allegations (12 July 2016), (Exhibit CAN-74).

<sup>464</sup> 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.

<sup>465</sup> 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.<sup>466</sup> 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.<sup>467</sup> 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.<sup>468</sup> 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.<sup>469</sup>

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.<sup>470</sup> 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.<sup>471</sup> 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.<sup>472</sup> 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.<sup>473</sup>

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.<sup>474</sup>

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.<sup>475</sup> 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.<sup>476</sup> 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.<sup>477</sup> Indeed, the text of

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<sup>466</sup> Canada's opening statement at the first meeting of the Panel, para. 192; see also first written submission, paras. 336-348.

<sup>467</sup> Canada's second written submission, paras. 144-145 (quoting Definition of "reconsider" at *Shorter Oxford English Dictionary*, 5<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2003) Vol. 2, p. 2492, (Exhibit CAN-195)).

<sup>468</sup> Canada's second written submission, para. 146 (quoting Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 220).

<sup>469</sup> Canada's second written submission, para. 147.

<sup>470</sup> Canada's response to Panel question No. 68, para. 153.

<sup>471</sup> Canada's response to Panel question No. 70, paras. 156-160.

<sup>472</sup> Canada's first written submission, paras. 349-359.

<sup>473</sup> Canada's second written submission, paras. 148-153 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.543).

<sup>474</sup> Canada's first written submission, paras. 364-391; second written submission, paras. 154-156.

<sup>475</sup> United States' first written submission, paras. 305-308.

<sup>476</sup> United States' response to Panel question No. 68, para. 158.

<sup>477</sup> 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.<sup>478</sup>

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.<sup>479</sup> 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.<sup>480</sup> The United States expresses concern as to the relevance of what it characterizes as *dictum*<sup>481</sup>, and further argues that the Appellate Body's statement does not apply to expedited reviews.<sup>482</sup>

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.<sup>483</sup> 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.<sup>484</sup>

#### 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"<sup>485</sup>, while the meaning of "prompt" is "[q]uick to act" and "without delay".<sup>486</sup> 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<sup>487</sup>, or "with as little delay as possible". The Spanish version provides that a non-investigated, cooperating producer

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<sup>478</sup> United States' response to Panel question No. 69, paras. 159-160.

<sup>479</sup> United States' response to Panel question No. 67, para. 156; second written submission, para. 123.

<sup>480</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.543.

<sup>481</sup> United States' second written submission, para. 124; response to Panel question No. 73, paras. 164, 165, 167, and 172.

<sup>482</sup> United States' response to Panel question No. 73, paras. 168-172.

<sup>483</sup> United States' first written submission, para. 309.

<sup>484</sup> United States' first written submission, paras. 309-324.

<sup>485</sup> Definition of "expedite" at *Shorter Oxford English Dictionary*, 5<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2003) Vol. 1, p. 893, (Exhibit CAN-104).

<sup>486</sup> Definition of "prompt" at *Shorter Oxford English Dictionary*, 5<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2003) Vol. 2, p. 2366, (Exhibit CAN-105).

<sup>487</sup> 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".<sup>488</sup>

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)".<sup>489</sup>

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.<sup>490</sup> 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".<sup>491</sup> 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"<sup>492</sup>, 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.

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<sup>488</sup> Emphasis added.

<sup>489</sup> United States' response to Panel question No. 67, para. 156. (emphasis added)

<sup>490</sup> Brazil's third-party response to Panel question No. 6.

<sup>491</sup> Canada's opening statement at the first meeting of the Panel, para. 196.

<sup>492</sup> 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.<sup>493</sup>
- 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.<sup>494</sup>

### 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".<sup>495</sup> 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.<sup>496</sup> 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.<sup>497</sup> At the first substantive meeting Canada provided two further determinations that also contained applications of this measure.<sup>498</sup> Canada also introduced an additional determination containing the application of this measure at the second substantive meeting.<sup>499</sup>

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

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<sup>493</sup> Canada's panel request, p. 5.

<sup>494</sup> Canada's panel request, p. 5.

<sup>495</sup> Canada's first written submission, paras. 392-393.

<sup>496</sup> Canada refers to USDOC's NAFTA Brief, (Exhibit CAN-76), p. 149. (Canada's first written submission, para. 393).

<sup>497</sup> Canada's first written submission, para. 411.

<sup>498</sup> 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).

<sup>499</sup> 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<sup>500</sup> and sets an exceedingly high standard of cooperation<sup>501</sup>; (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<sup>502</sup>; and (c) Articles 12.1, 12.7, and 12.8 of the SCM Agreement<sup>503</sup> 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.<sup>504</sup>

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.<sup>505</sup>

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.<sup>506</sup> 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.<sup>507</sup>

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.<sup>508</sup>

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.<sup>509</sup> Canada has failed to establish that any "ongoing conduct" exists or is likely to continue.<sup>510</sup> 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.<sup>511</sup> 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.<sup>512</sup> For the United States, in all nine of the determinations that Canada relies upon, the USDOC made unique findings and reached different results.<sup>513</sup>

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<sup>500</sup> Canada's first written submission, para. 426.

<sup>501</sup> Canada's first written submission, para. 432.

<sup>502</sup> Canada's first written submission, para. 423.

<sup>503</sup> 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.

<sup>504</sup> Canada's first written submission, para. 435.

<sup>505</sup> Canada's opening statement at the first meeting of the Panel, para. 210.

<sup>506</sup> United States' first written submission, para. 325.

<sup>507</sup> United States' first written submission, para. 350; response to Panel question No. 77, para. 176.

<sup>508</sup> 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).

<sup>509</sup> United States' first written submission, para. 336.

<sup>510</sup> United States' first written submission, para. 335.

<sup>511</sup> United States' first written submission, para. 339.

<sup>512</sup> United States' first written submission, para. 346; second written submission, para. 132.

<sup>513</sup> 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<sup>514</sup>, 4.4<sup>515</sup>, and 6.2<sup>516</sup> 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"<sup>517</sup>, and that "[t]he scope of measures that can be challenged in WTO dispute settlement is therefore broad".<sup>518</sup> 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".<sup>519</sup> 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."<sup>520</sup> 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.<sup>521</sup>

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.<sup>522</sup>

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

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<sup>514</sup> "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."

<sup>515</sup> "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."

<sup>516</sup> "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."

<sup>517</sup> 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.

<sup>518</sup> 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.

<sup>519</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 196.

<sup>520</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 198. (emphasis original)

<sup>521</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 197. (emphasis original)

<sup>522</sup> 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.<sup>523</sup> 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.<sup>524</sup> 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.<sup>525</sup>

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.<sup>526</sup> 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.<sup>527</sup> 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*.<sup>528</sup> 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*.<sup>529</sup>

#### **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.<sup>530</sup>

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<sup>531</sup>:

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

Investigation	USDOC's "other forms of assistance" question to respondent company
<i>Solar Cells from China 2012</i> <sup>532</sup>	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

<sup>523</sup> Appellate Body Report, *US – Continued Zeroing*, para. 181.

<sup>524</sup> Appellate Body Report, *US – Continued Zeroing*, para. 181. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.105.

<sup>525</sup> Appellate Body Report, *US – Continued Zeroing*, para. 191. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.108.

<sup>526</sup> Appellate Body Report, *US – Continued Zeroing*, para. 191. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.108.

<sup>527</sup> Canada's first written submission, para. 407; second written submission, para. 160.

<sup>528</sup> United States' first written submission, paras. 327-336.

<sup>529</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

<sup>530</sup> Canada's second written submission, para. 161; first written submission, para. 392.

<sup>531</sup> 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". <sup>533</sup>
<i>Shrimp from China 2013</i> <sup>534</sup>	<u>Initial Questionnaire to Guolian Companies</u> : "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". <sup>535</sup>
<i>Solar Cells from China 2014</i> <sup>536</sup>	<u>Initial Questionnaire to Trina Solar</u> : "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". <sup>537</sup>
<i>Solar Cells from China 2015</i> <sup>538</sup>	<u>Initial Questionnaire to Lightway</u> : "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". <sup>539</sup>
<i>Supercalendered Paper from Canada 2015</i> <sup>540</sup>	<u>Initial Questionnaire to Resolute</u> : "[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". <sup>541</sup>
<i>PET Resin from China 2016</i> <sup>542</sup>	<u>Initial Questionnaire</u> : "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". <sup>543</sup>

<sup>532</sup> 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).

<sup>533</sup> 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.

<sup>534</sup> 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).

<sup>535</sup> 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.

<sup>536</sup> 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).

<sup>537</sup> 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.

<sup>538</sup> 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).

<sup>539</sup> 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.

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

<sup>541</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.

<sup>542</sup> 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).

<sup>543</sup> 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
<i>Stainless Pressure Pipe from India</i> <sup>544</sup>	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)." <sup>545</sup>

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.<sup>546</sup>

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.<sup>547</sup> 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'".<sup>548</sup> 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.<sup>549</sup>

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.<sup>550</sup> 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.<sup>551</sup> Canada argues that a review of these determinations evidences the precise content of this measure.<sup>552</sup>

**Table 2: Application of facts available by the USDOC**

Investigation	Application of facts available by the USDOC
<i>Solar Cells from China 2012</i>	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. <sup>553</sup>  "[The USDOC] determines that the <u>use of facts available ... is warranted in determining the countervailability of this apparent subsidy</u> . 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

<sup>544</sup> 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).

<sup>545</sup> 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.

<sup>546</sup> 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).

<sup>547</sup> United States' response to Panel question No. 77, paras. 176-178.

<sup>548</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 12.

<sup>549</sup> Canada's second written submission, para. 163.

<sup>550</sup> Canada's second written submission, para. 166.

<sup>551</sup> Canada's first written submission, para. 411.

<sup>552</sup> Canada's second written submission, para. 166.

<sup>553</sup> 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". <sup>554</sup>
<i>Shrimp from China 2013</i>	<p>The USDOC countervailed, as AFA, three alleged grants that were discovered at verification of Guolian company.</p> <p>"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".<sup>555</sup></p> <p>"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 ...). <u>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 ...</u>".<sup>556</sup></p>
<i>Solar Cells from China 2014</i>	<p>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.<sup>557</sup></p> <p>"[The USDOC] determines that the use of facts available ... is warranted in <u>determining the countervailability of these apparent subsidies that were discovered during verification.</u> 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[.] ... <u>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</u>".<sup>558</sup></p> <p>"[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."<sup>559</sup></p> <p>"With respect to Trina Solar's argument that [the USDOC] should use the information taken at verification, [the USDOC] disagrees. ... [The USDOC] <u>is applying an adverse inference in determining the benefit of these unreported programs, not neutral facts available.</u> 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."<sup>560</sup></p>

<sup>554</sup> Solar Cells from China, Issues and Decision Memorandum (2012), (Exhibit CAN-116), p. 10. (emphasis added)

<sup>555</sup> Shrimp from China, Issues and Decision Memorandum (2013), (Exhibit CAN-118), p. 77.

<sup>556</sup> Shrimp from China, Issues and Decision Memorandum (2013), (Exhibit CAN-118), p. 15. (emphasis added)

<sup>557</sup> Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), pp. 16-17.

<sup>558</sup> Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 17. (emphasis added)

<sup>559</sup> Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 86.

<sup>560</sup> Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 87. (emphasis added)

Investigation	Application of facts available by the USDOC
<i>Solar Cells from China 2015</i>	<p>During the first administrative review, the USDOC countervailed unreported grants that were discovered during verification of the respondent Lightway.</p> <p>"[W]e determine that the use of facts available ... <u>is warranted in determining the countervailability of these apparent subsidies that were discovered during verification.</u> 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[.] ... <u>As a result of Lightway's and [China's] non-cooperation, we can infer that Lightway benefitted from the programs at issue</u>".<sup>561</sup></p> <p>"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."<sup>562</sup></p>
<i>Supercalendered Paper from Canada 2015</i>	<p>The USDOC countervailed, on the basis of AFA, information discovered during verifications of respondent-company Resolute and Nova Scotia.<sup>563</sup></p> <p>"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 <u>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</u>".<sup>564</sup></p> <p>"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."<sup>565</sup></p>
<i>PET Resin from China 2016</i>	<p>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</p>

<sup>561</sup> Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 20. (emphasis added)

<sup>562</sup> Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 57.

<sup>563</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 12-13 and 29-30.

<sup>564</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 12-13. (emphasis added; fn omitted)

<sup>565</sup> Issues and Decision Memorandum, (Exhibit CAN-37), pp. 153-154.



Investigation	Application of facts available by the USDOC
	<p>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'".<sup>566</sup></p> <p>"[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, <u>and that the application of AFA is warranted ... in determining benefit.</u>"<sup>567</sup></p> <p>"[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 ...)." <sup>568</sup></p> <p><u>"Consistent with <i>Supercalendered Paper Canada</i> and <i>Shrimp from PRC</i>, 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 ..."</u> <sup>569</sup></p>
<i>Stainless Pressure Pipe from India 2016</i>	<p>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.<sup>570</sup> 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.<sup>571</sup></p> <p>"As discussed below, we find the application of partial adverse facts available ('AFA') is warranted with respect to Steamline's and [India's (<i>sic</i>)] responses for their failure to provide information related to the electricity duty exemption provided by the [state-owned enterprise]." <sup>572</sup></p> <p><u>"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."</u> <sup>573</sup></p> <p>"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</p>

<sup>566</sup> 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.

<sup>567</sup> PET Resin from China, Issues and Decision Memorandum (2016), (Exhibit CAN-125), p. 19. (emphasis added; fns omitted)

<sup>568</sup> PET Resin from China, Issues and Decision Memorandum (2016), (Exhibit CAN-125), pp. 52-53.

<sup>569</sup> PET Resin from China, Issues and Decision Memorandum (2016), (Exhibit CAN-125), p. 53. (emphasis added)

<sup>570</sup> 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.

<sup>571</sup> 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.

<sup>572</sup> Stainless Pressure Pipe from India, Issues and Decision Memorandum (2016), (Exhibit CAN-152), p. 6.

<sup>573</sup> 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
	<p>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 ...".<sup>574</sup></p> <p>"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."<sup>575</sup></p> <p>"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."<sup>576</sup></p>

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.<sup>577</sup> 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.<sup>578</sup>

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

<sup>574</sup> *Stainless Pressure Pipe from India*, Issues and Decision Memorandum (2016), (Exhibit CAN-152), pp. 28-29. (fns omitted)

<sup>575</sup> *Stainless Pressure Pipe from India*, Final Calculations Memorandum (2016), (Exhibit CAN-148), p. 2.

<sup>576</sup> *Stainless Pressure Pipe from India*, Final Calculations Memorandum (2016), (Exhibit CAN-148), fn 3.

<sup>577</sup> United States' first written submission, paras. 349-351.

<sup>578</sup> United States' second written submission, para. 132.

in response to that question, applying AFA to determine that the "discovered" information amounts to countervailable subsidies.<sup>579</sup>

7.317. We note that, as pointed out by Canada<sup>580</sup>, 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[.]<sup>581</sup>

...

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.<sup>582</sup>

#### **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.<sup>583</sup>

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<sup>584</sup>:

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<sup>579</sup> 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]henver [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).

<sup>580</sup> Canada's first written submission, para. 415.

<sup>581</sup> USDOC's NAFTA Brief, (Exhibit CAN-76), pp. 147-148.

<sup>582</sup> USDOC's NAFTA Brief, (Exhibit CAN-76), p. 149.

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

<sup>584</sup> 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"
<i>Shrimp from China 2013</i>	"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 <i>Washers from Korea</i> , 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." <sup>585</sup>
<i>Solar Cells from China 2014</i>	<p>"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 <i>Washers from Korea</i>, 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."<sup>586</sup></p> <p>"[F]or the assistance discovered at Trina Solar's verification, and <b>consistent with our practice</b> [citing <i>Shrimp from the PRC</i>], we will apply <b>our CVD AFA methodology</b> to determine the CVD rate(s) to apply for the unreported assistance discovered at Trina Solar's verification."<sup>587</sup></p>
<i>Solar Cells from China 2015</i>	<p>"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 <i>Large Residential Washers from Korea</i>, 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."<sup>588</sup></p> <p>"[C]onsistent with our practice [citing <i>Solar Panels from China</i>], we will apply <b>our CVD AFA methodology</b> to determine the CVD rate to apply for the unreported assistance discovered during Lightway's verification."<sup>589</sup></p> <p>"[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."<sup>590</sup></p>
<i>Supercalendered Paper from Canada 2015</i>	"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 <i>Washers from Korea</i> , 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." <sup>591</sup>

<sup>585</sup> Shrimp from China, Issues and Decision Memorandum (2013), (Exhibit CAN-118), p. 78. (fn omitted)

<sup>586</sup> Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 88. (fn omitted)

<sup>587</sup> Solar Cells from China, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 88. (emphasis added; fn omitted)

<sup>588</sup> Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 58. (fn omitted)

<sup>589</sup> 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)

<sup>590</sup> Solar Cells from China, Issues and Decision Memorandum on the Final Anti-Dumping Administrative Review (2015), (Exhibit USA-8), p. 57. (fn omitted)

<sup>591</sup> 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 <b>consistent with our practice</b> [citing <i>Shrimp from PRC</i> ], we have applied <b>our CVD AFA methodology</b> to identify the CVD rate(s) to apply for the unreported assistance discovered at Resolute's verification". <sup>592</sup>
	"[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." <sup>593</sup>
<i>PET Resin from China 2016</i>	"Consistent with <i>Supercalendered Paper Canada</i> and <i>Shrimp from PRC</i> , 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". <sup>594</sup>
<i>Stainless Pressure Pipe from India 2016</i>	"Through an inadvertent error, and inconsistent with <b>[the USDOC's] practice of not collecting new information at verification</b> , [the USDOC] obtained information about the amount rebated to Steamline under the program." <sup>595</sup>

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<sup>596</sup>, where, according to Canada, the USDOC applied the same practice.<sup>597</sup> 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"
<i>Truck and Bus Tires from China 2016</i>	"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 <i>Certain Polyethylene Terephthalate Resin from China 2016</i> and <i>SC Paper from Canada</i> ] 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." <sup>598</sup>
<i>Stainless Steel Sheet and Strip from China 2017</i>	"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." <sup>599</sup>
	"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]

<sup>592</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 155. (emphasis added; fn omitted)

<sup>593</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 153.

<sup>594</sup> PET Resin from China, Issues and Decision Memorandum (2016), (Exhibit CAN-125), p. 53.

<sup>595</sup> Stainless Pressure Pipe from India, Final Calculations Memorandum (2016), (Exhibit CAN-148), fn 3. (emphasis added)

<sup>596</sup> 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).

<sup>597</sup> Canada's opening statement at the first meeting of the Panel, para. 222.

<sup>598</sup> Truck and Bus Tires from China, Issues and Decision Memorandum (2016), (Exhibit CAN-163), pp. 15-16. (fn omitted)

<sup>599</sup> 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." <sup>600</sup>

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.<sup>601</sup>

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.<sup>602</sup>

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.<sup>603</sup>

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.<sup>604</sup> This determination is further cited by the USDOC in the SC Paper Issues and Decision Memorandum.<sup>605</sup> 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.<sup>606</sup> 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".<sup>607</sup> 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

<sup>600</sup> Stainless Steel Sheet and Strip from China, Issues and Decision Memorandum (2017), (Exhibit CAN-164), pp. 20-21. (fns omitted)

<sup>601</sup> Canada's first written submission, para. 414.

<sup>602</sup> United States' second written submission, para. 132.

<sup>603</sup> Stainless Pressure Pipe from India, Final Calculations Memorandum (2016), (Exhibit CAN-148), fn 3.

<sup>604</sup> 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.

<sup>605</sup> Issues and Decision Memorandum, (Exhibit CAN-37), p. 155.

<sup>606</sup> Canada's opening statement at the second meeting of the Panel, paras. 15-17.

<sup>607</sup> 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*<sup>608</sup> – where the USDOC accepted new information concerning grants that were presented by the respondent companies at the outset of verifications.<sup>609</sup> 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."<sup>610</sup> 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."<sup>611</sup> 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.<sup>612</sup>

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.<sup>613</sup> However, we consider that whether the "Other Forms of Assistance-AFA

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<sup>608</sup> *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.

<sup>609</sup> United States' first written submission, para. 357; response to Panel question No. 78, para. 179.

<sup>610</sup> *Solar Cells from China*, Issues and Decision Memorandum (2014), (Exhibit CAN-121), p. 88. (fn omitted)

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

<sup>612</sup> *Stainless Pressure Pipe from India*, Final Calculations Memorandum (2016), (Exhibit CAN-148), fn 3.

<sup>613</sup> 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."<sup>614</sup> 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.<sup>615</sup> Canada provides examples of CVD investigations that refer to the TPEA.<sup>616</sup> 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.<sup>617</sup> The United States further argues that, as acknowledged by Canada itself<sup>618</sup>, the TPEA provides flexibility to the USDOC, was recently enacted, and has only been referenced in a few administrative determinations.<sup>619</sup>

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.<sup>620</sup> 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".<sup>621</sup>

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).

<sup>614</sup> Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.

<sup>615</sup> Canada's first written submission, para. 419.

<sup>616</sup> See table 4 submitted by Canada in its first written submission, para. 419.

<sup>617</sup> 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).

<sup>618</sup> Canada's first written submission, para. 419.

<sup>619</sup> United States' first written submission, para. 361.

<sup>620</sup> United States' first written submission, para. 361.

<sup>621</sup> 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.<sup>622</sup> In light of the due process rights enjoyed by interested parties throughout an investigation<sup>623</sup>, 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<sup>624</sup>, as well as Articles 12.1 and 12.8 of the SCM Agreement<sup>625</sup> 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.<sup>626</sup> 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.<sup>627</sup> 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.<sup>628</sup>

## 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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<sup>622</sup> 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).

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

<sup>624</sup> Canada's first written submission, para. 423.

<sup>625</sup> 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.

<sup>626</sup> Canada's first written submission, para. 435. See also Canada's panel request, pp. 3-5.

<sup>627</sup> See, for example, Canada's first written submission, paras. 422-436.

<sup>628</sup> 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.

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