UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

(DS505)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

June 13, 2017

TABLE OF EXHIBITS

Exhibit No.	Description
USA-27	*Resolute Forest Products, Inc. v. Government of Canada*, Notice of Arbitration and Statement of Claim
USA-28	Dictionary definition

Mr. Chairman, members of the Panel:

1. As we explained at the first meeting of the Panel, the genesis of this dispute lies in Canada's decision to provide substantial subsidies to save a major paper mill from bankruptcy, and then to allow that mill to injure the U.S. paper industry by sending its output to the U.S. market at subsidized prices. The United States is not alone in having serious concerns with the economic distortions caused by Canada's decision to bail out the Port Hawkesbury mill. Resolute, one of the respondents in the investigation at issue here, is currently arguing before an arbitral panel that Canada's intervention into the SC Paper market caused economic harm to other paper producers.[1]

2. Members agreed to the countervailing duty provisions in the GATT 1994 and the SCM Agreement precisely for the purpose of allowing an importing Member to remedy this type of unfair trade. And as the record shows, the U.S. Department of Commerce conducted a rigorous investigation, taking full account of all information on the record, and properly calculated countervailing duty margins for the Canadian respondents.

3. Canada has no valid basis for its contentions that Commerce's determination is somehow inconsistent with WTO rules. At bottom, Canada presents two types of arguments. First, Canada relies on supposed obligations and rights found nowhere in the covered agreements. Second, Canada seeks to reargue the factual record, and asks the Panel to assume the improper role of undertaking a *de novo* review. Neither of those approaches supports a valid finding

[1] *Resolute Forest Products, Inc. v. Government of Canada*, Notice of Arbitration and Statement of Claim, pp. 25 – 45 (Exhibit USA-27).

against the U.S. response to Canada's subsidization of its bankrupt mill and the SC Paper industry more generally.

4. The United States has addressed Canada's arguments at length in prior submissions. In this statement, we will address several issues relating to Canada's arguments in its second written submission and responses to Panel questions.

5. As an initial matter, we note that Canada's second written submission devoted considerable attention to an unrelated and ongoing proceeding before a NAFTA arbitral panel. That proceeding involves different legal standards and different parties, and is thus not relevant to the issues in this dispute.

I. Commerce's Financial Contribution Determination Established a Link between the Government of Nova Scotia and the Provision of Electricity to Port Hawkesbury

6. We begin with Commerce's finding of financial contribution with respect to the provision of subsidized electricity to Port Hawkesbury. In its second submission, Canada repeats its argument that the determination is flawed because Commerce did not link the entrustment or direction to the specific exercise of regulatory power.[2] This argument has no support in the record. To the contrary, the record shows that Commerce undertook this very analysis. That is, Commerce considered both the legal obligation of the utility to provide electricity in Nova Scotia, as well as the government's specific involvement in the provision of subsidized electricity to Port Hawkesbury.

[2] Canada Second Written Submission, para. 14.

7. Canada makes the unsupported claim that the United States has engaged in post hoc justification.[3] To highlight the baseless nature of Canada's argument, we will summarize Commerce's reasoning and conclusions as contained in the record of this dispute. Commerce first concluded that the *Public Utilities Act* requires Nova Scotia Power "to provide electricity to customers who request it anywhere in Nova Scotia."[4] Commerce explained its interpretation and that interpretation was supported by evidence on the record.[5] Remarkably, Canada now does not even argue that Commerce's interpretation was factually incorrect,[6] and Canada has acknowledged that the Nova Scotia Court of Appeal also interpreted the language of the provision "to include a duty to serve."[7]

8. Commerce then established the existence of a link between this legal obligation and the provision of electricity to Port Hawkesbury. The evidentiary record is clear – based on Nova Scotia's actions and words[8] – that Nova Scotia entrusted and directed Nova Scotia Power to provide electricity to Port Hawkesbury. Commerce stated that in addition to the legal obligation "the record also demonstrates that {Nova Scotia} played an essential role in the specific LRR that set the price for the electricity sold to Port Hawkesbury from {Nova Scotia Power}."[9]

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[3] Canada Second Written Submission, para. 8.

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

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

[6] Canada Answers to Questions, para. 2.

[7] Canada Answers to Questions, para. 2.

[8] *See* U.S. Second Written Submission, paras. 21-22.

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

9. We have demonstrated that Commerce supported this conclusion with extensive evidence.[10] What Canada dismissively refers to in its second submission as "circumstantial evidence"[11] is in fact demonstrable actions taken by Nova Scotia to ensure that Port Hawkesbury would receive electricity.

10. The evidence upon which Commerce relied included the following:

- The prospective new owner of the Port Hawkesbury mill made a lower price for electricity a precondition for the purchase of the mill;[12]
- The Nova Scotia Utility and Review Board made a decision at the request of NewPage Port Hawkesbury to expand the Load Retention Tariff to make NewPage Port Hawkesbury eligible;[13]
- Actions taken by Nova Scotia to facilitate an agreement between Nova Scotia Power and Pacific West Commercial Corporation ("PWCC"), including the hiring of a consultant to participate in the negotiations;[14] and
- An agreement between Nova Scotia and PWCC, whereby if Port Hawkesbury's mill load resulted in increased incremental costs, Nova Scotia would guarantee that neither Port Hawkesbury nor other ratepayers would be required to pay the costs.[15]

[10] U.S. Second Written Submission, para. 22; U.S. Responses to the Panel's Questions, paras. 7-9.

[11] Canada Second Written Submission, para. 8.

[12] SC Paper Final I&D Memo, p. 38 (Exhibit CAN-37). *See* "Nova Scotia court approves sales of paper mill for $33 million, UARB approves discount power rate," CBC News (Sept. 27, 2012), provided at Petition for the Imposition of Countervailing Duties (February 26, 2015), Exhibit II-43 (Exhibit USA-16).

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

[14] SC Paper Final I&D Memo, pp. 38-39 (Exhibit CAN-37).

[15] SC Paper Final I&D Memo, p. 40 (Exhibit CAN-37). *See Supplemental Questionnaire: Government of Nova Scotia* (July 7, 2015), Exhibit NS-Supp1-5A (Exhibit USA-18).

11. These actions are not "circumstantial evidence." Rather, these actions are direct evidence – which formed the basis for Commerce's final determination – of a link between the actions of Nova Scotia and the provision of electricity to Port Hawkesbury.

12. We again recall that it is not the role of a panel to conduct a *de novo* review of the evidence;[16] rather, a panel is to consider whether an authority has provided a reasoned and adequate explanation as to how the evidence supports the determination.[17] Commerce has done so here,[18] and the Panel should reject Canada's claims.

II. Canada's Second Written Submission Presents a New Claim that Is Not Properly Before the Panel and Is Otherwise Without Merit

13. Canada's second written submission attempts to introduce a new claim: that Commerce "inadequately addressed" whether the provision of electricity would "normally be vested" in the government within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement.[19] Our remarks today on Canada's new claim will focus on three issues: that the claim is not within the Panel's terms of reference; that Canada's presentation of its arguments in the second written submission violates the Panel's working procedures; and that Canada's claim fails on the merits. For all of these reasons, the Panel should reject the claim.

14. Canada's new claim was not the subject of consultations and was not included in Canada's panel request. Article 6.2 of the DSU defines the scope of the dispute and requires that a panel request "identify the specific measures at issue and provide a brief summary of the legal

[16] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (emphasis in original).

[17] *China – Broiler Products*, para. 7.4 (*citing US – Countervailing Duty Investigation on DRAMS (AB)*, para. 186 and *US – Lamb (AB)*, para. 103.).

[18] U.S. First Written Submission, paras. 41-48; U.S. Responses to the Panel's Questions, paras. 1-11; U.S. Second Written Submission, paras. 11-24.

[19] Canada Second Written Submission, paras. 28-33.

basis of the complaint sufficient to present the problem clearly." The provision serves the important procedural fairness objective of notifying the defending party and potential third parties of the nature of the dispute.[20] The provision ensures that the responding Member can "know what case it has to answer, and…begin preparing its defence."[21] Quite simply, with respect to this new claim, Canada's panel request did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

15. Canada's claim regarding Commerce's financial contribution determination can be found on page 2 of the panel request. There, Canada claims that the challenged measure is inconsistent with Article 1.1(a)(1)(iv) of the SCM Agreement because:

> the United States improperly found that the Government of Nova Scotia and the Nova Scotia Utility and Review Board {} entrusted or directed Nova Scotia Power Inc. ("NSPI") to provide a financial contribution within the meaning of Article 1.1(a)(1)(iii) by allegedly:
>
> a. obligating NSPI to "serve any resident or company" within the province, and
>
> b. requiring that NSPI enter into commercial negotiations with Pacific West Commercial Corporation to reach an agreement on a Load Retention Rate.[22]

16. The panel request is clear: Canada's financial contribution claim concerns the issue of whether the government of Nova Scotia "entrusts or directs" Nova Scotia Power to provide electricity. Subparagraphs (a) and (b) demonstrate this scope. These subparagraphs, which further limit Canada's claim, refer to elements of Commerce's finding of entrustment or

[20] *Argentina – Import Measures (AB)*, para. 5.39.

[21] *US – Countervailing and Anti-Dumping Measures (AB)*, para. 4.8 (internal citations omitted).

[22] Panel Request, p. 2.

direction. These facts have no relevance to the claim raised in Canada's second submission on whether the provision of electricity would "normally be vested" in the government.

17. Accordingly, with respect to the new claim, Canada's panel request failed entirely to "provide a brief summary of the legal basis of the complaint sufficient to present the problem" as required by Article 6.2 of the DSU. The Panel should reject Canada's attempt to expand the dispute at this late stage of the proceeding.

18. Canada's introduction of a new claim and supporting arguments also contravenes paragraph 5 of the Working Procedures of the Panel. Paragraph 5 of the Working Procedures requires that before the first meeting of the Panel, "each party shall submit a written submission in which it presents the facts of the case and its arguments."

19. Canada's first written submission did not present facts or arguments that would support this new claim. In the first written submission, Canada was required to identify the obligation of the SCM Agreement it claims to have been breached, and present arguments on how Commerce's determination breached the identified obligation. Canada did neither. Canada provided no discussion or argument – anywhere in the first written submission – on the meaning or interpretation of the relevant phrase of Article 1.1(a)(1)(iv). Canada neither identified the applicable obligation nor presented facts or argument to support a claim that Commerce's determination breached an obligation.

20. The Working Procedures of the Panel limit the contents of a second written submission to "rebuttal." Canada's second written submission, however, presents for the first time Canada's interpretation of the applicable obligations and supporting facts relating to this new claim. Canada's actions run contrary to the clear instructions in paragraph 5 of the Panel's Working Procedures, and the Panel should reject these new arguments as untimely.

21. Canada's claim also fails on the merits. At the outset, we note that Commerce *did* address the issue raised in Canada's new claim, and *did* provide a well-reasoned, factual basis for its conclusion.[23] Canada simply disagrees with Commerce's decision.

22. Canada's new claim refers to the second part of Article 1.1(a)(1)(iv). A financial contribution can exist where a government "entrusts or directs a private party to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." Canada argues that Commerce failed "to establish that the provision of electricity would normally be vested in the government of Nova Scotia."[24]

23. The relevant language for Canada's new claim is "the type of functions illustrated in (i) to (iii) above which would normally be vested in the government." The "type of functions" for the authority to consider are in subparagraphs (i) to (iii), which include the direct transfer of funds, revenue due foregone by the government, and, as relevant here, the provision of goods. The phrase "type of functions" is not limited, as Canada suggests,[25] to the specific action entrusted or directed to the private body, such as the conferral of "Grant A" or the provision of electricity to "Company B." Rather, the "functions" may be understood to be broader, as defined by the text in paragraphs (i) to (iii). In this case, the "function" under consideration may be the provision of goods broadly or, more specifically, the provision of electricity.

24. Article 1.1(a)(1)(iv) then indicates that a government may entrust or direct a function "which would normally be vested in the government." The Appellate Body has said that "the

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

[24] Canada Second Written Submission, para. 31; *see* para. 28, fn. 40.

[25] Canada Second Written Submission, para. 31.

reference to 'normally' in this phrase incorporates the notion of what would ordinarily be considered part of governmental practice in the legal order of the relevant Member."[26] And the term "vested" is defined as "bestow or confer (property, authority, power, etc.) on a person or persons."[27] Taken together, these terms indicate a focus on the granting government's legal authority, and consideration of whether the "function" is within the control of the granting government in the legal sense. In other words, does the granting government have the legal authority to undertake the entrustment or direction of the private body.

25. Commerce's final determination properly considered if the provision of electricity is a function within the authority of the government of Nova Scotia. Commerce concluded that "because of the nature of electricity and Nova Scotia's experience, we find that the provision of electricity…would normally be vested in the government, and…does not differ substantively from the normal practices of the government."[28] Commerce explained the long history in Nova Scotia of electricity being directly within the control of the government, as the government provided electricity throughout the province from 1919 until 1992.

26. Commerce also found that, even where an electric utility is not "owned" by the government, "it still is said to be 'affected with a public interest' and subject to a degree of government regulation from which other businesses are exempt."[29] In the case of Nova Scotia, the provision of electricity remained within the regulatory control of the government: Commerce concluded that Nova Scotia Power was required "by law to provide electricity to all companies

[26] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297 (emphasis added).

[27] *New Shorter Oxford English Dictionary*, Volume 2, p. 3570 (Exhibit USA-28).

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

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

in the Province including Port Hawkesbury."[30] Commerce made a fact-specific, well-reasoned finding based on record evidence that the provision of a good – in this case, electricity – is a function that is normally within the authority of the government of Nova Scotia.

27. As we have shown, Canada's claim is outside of the Panel's terms of reference, is supported only by untimely arguments presented for the first time in a rebuttal submission, and in any event, fails on the merits.

III. Canada Has Failed to Demonstrate that Commerce's Benefit Determination Was Inconsistent with the SCM Agreement

28. We turn now to Commerce's benefit determination. Canada's arguments in its second written submission broadly fall into two categories: that Port Hawkesbury's Load Retention Rate somehow reflected "prevailing market conditions"[31] and that Commerce's constructed benchmark contained alleged methodological flaws. Neither type of argument has merit.

A. Commerce's Use of a Benchmark to Determine the Adequacy of Remuneration for Electricity Is Consistent with the SCM Agreement and Appellate Body Findings

29. To determine the adequacy of remuneration, Commerce appropriately compared the transaction price to a market-based benchmark. Canada however, continues to make the completely unsupportable argument that "there was no need for Commerce to use a benchmark"[32] because the provision of electricity is a "market transaction."[33] This argument is

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

[31] Canada Second Written Submission, paras. 41, 51.

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

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

completely circular – unless a "relation" involving market conditions is examined, Canada has no legal basis for asserting that the level of benefit was zero.

30. Under the guideline set out in Article 14(d), a benefit exists if the provision of a good has been "made for less than adequate remuneration" (LTAR). Article 14(d) provides that "the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question." Under the plain text of this provision, an LTAR determination involves an analysis of the "relation" between the transaction price and some other price. Accordingly, the Appellate Body has explained that "a determination of whether remuneration is 'less than adequate' within the meaning of Article 14(d) involves the selection of a comparator – i.e. a benchmark price – with which to compare the government price for the good in question."[34] The benchmark, in turn, must be "in relation to prevailing market conditions."

31. Canada's argument – that there can be no benefit because there is a "market transaction" – assumes the conclusion. Notwithstanding Commerce's finding that Port Hawkebury's Load Retention Rate was not set according to Nova Scotia Power's standard pricing mechanism,[35] Canada has unilaterally asserted the existence of a "market transaction." But, an authority must rely on evidence, and it is the benchmark that confirms or refutes the conclusion advanced by Canada: whether, because of the government's involvement in the transaction, the transaction price is "more favorable than those available to the recipient in the market."[36] Furthermore, the underlying factual premise for Canada's argument – that the transaction for electricity concerns only two private entities – is flawed. The record of the countervailing duty investigation does

[34] *US – Carbon Steel (India) (AB)*, para. 4.148. *See* U.S. Second Written Submission, paras. 34-38.

[35] SC Paper Final I&D Memo, p. 47-48 (Exhibit CAN-37).

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

not support Canada's contention that the transaction involved only two private entities. As explained by the NSUARB, the LRR was the result of "vigorous negotiations carried out for more than six months between PWCC and Nova Scotia Power, with the participation of the government of Nova Scotia and the court-approved appointed monitor."[37]

32. A benchmark plays the critical evidentiary role of demonstrating if, as a matter of fact, the remuneration was adequate. An investigating authority cannot assume the *existence* of a benefit simply because one party is a government authority; similarly, the investigating authority cannot – as Canada proposes – assume the *absence* of a benefit where there is a transaction between two private entities.

33. Under Canada's logic, there would never be a finding of benefit where an authority has made a finding of entrustment or direction for the provision of a good. Under such circumstances, both parties will always, by definition, be private parties. The involvement of two private parties in a transaction does not necessarily result in the provision of a good for adequate remuneration. Such an interpretation would render subparagraph (iv) meaningless and cannot be accepted. Rather, as recognized by the Appellate Body, a benefit determination requires a comparison between a market benchmark price and the price at which the good has been provided.[38]

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

[38] *See* U.S. Second Written Submission, paras. 34-38.

B. Canada Has Failed to Support with Evidence its Claims of Methodological Errors with Commerce's Constructed Benchmark for Electricity

34. Throughout its submissions, Canada has relied on mere assertion to support its argument that Commerce made certain methodological errors in constructing the benchmark for electricity. Similar claims were made during the countervailing duty investigation: Canada did not provide evidence to support such statements, despite Commerce's repeated requests to do so. Today, we address two examples of Canada's unsupported criticism.

35. The first concerns Commerce's selected contribution to fixed costs – C$26 per MWh. Commerce did not create this figure. Rather, Commerce took this figure directly from Nova Scotia Power's General Rate Application, which explicitly stated that customers paying under the extra-large industrial rate contributed C$26 per MWh to fixed costs.[39] Commerce's decision was supported by evidence on the record.

36. Repeatedly, Canada has criticized use of this figure, but has failed to point to any record evidence undermining Commerce's finding.

37. To the extent that Canada disagreed with Commerce's understanding of that ratemaking process, Canada had the opportunity during the investigation to present further information and evidence. Canada declined to do so. Contrary to Canada's claim that "Commerce never asked for any relevant information about the blended Real Time Pricing rate,"[40] Commerce specifically identified these issues as topics to discuss at the on-site verification. In its verification outline, Commerce requested the following:

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[39] SC Paper Final I&D Memo, p. 48 (Exhibit CAN-37) (citing *Response of the Government of Canada to the Department's April 6, 2015 Questionnaire, Volume XIII* (May 27, 2015) at DE-03-DE-04, p. 19 (Exhibit CAN-21).

[40] Canada Second Written Submission, para. 54.

> c. . . . Provide a detailed explanation of this process for the Large Industrial Tariff, the Extra Large Industrial Two Part Real Time Pricing, and the Load Retention Tariff. Additionally, provide a description of the load forecast for these tariffs.[41]

38. If Canada had additional information on the design and operation of the extra-large industrial rate, or a different figure for the contribution to fixed costs, Canada could have presented that information during the proceeding. But, as previously explained, Nova Scotia was not able to do so.[42]

39. As a result, the record before Commerce contained a statement by Nova Scotia Power that identified the contribution to fixed costs for customers under the extra-large industrial rate. And the record did not contain any evidence – evidence, not mere assertion – to contest Nova Scotia Power's own statement. Under these circumstances, Commerce's use of the figure was appropriate.

40. The second example of Canada's unsubstantiated criticism concerns other factors that Canada claims should be accounted for in the benchmark.[43] As an initial matter, we have explained that Commerce's benchmark reflected a priority interruptible rate.[44]

41. With respect to the other factors listed by Canada, including the factors discussed in the FIT case, Commerce requested evidence from Nova Scotia to support the asserted need for certain adjustments. Nova Scotia acknowledged that it did not have the evidence that would support any such adjustments, stating that

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

[42] U.S. Second Written Submission, paras. 51-53.

[43] *See, e.g.*, Canada Second Written Submission, para. 42.

[44] U.S. Second Written Submission, paras. 33-35.

> the Government of Nova Scotia does not possess any information that would permit it to provide an approximate value of the quantitative differences because NSPI's rate setting methodology relies upon NSPI proprietary information.[45]

42. Nova Scotia could not provide – and Nova Scotia Power was unwilling to provide – quantitative data that would support an adjustment. Canada asserted that such adjustments would be appropriate, but provided no evidence to support its assertions. Commerce properly made a determination based on the evidence that did exist on the record of the investigation.

IV. Canada Has Failed to Identify a Breach in Commerce's Calculation of the All Others Rate

43. Canada has failed to establish that Commerce's calculation of the all others rate was inconsistent with the covered agreements. As explained at length in the U.S. second written submission,[46] Canada has yet to identify the *specific obligation* that it claims Commerce to have breached in determining the all others rate. In other words, Canada has not identified what precisely Commerce was required to do – pursuant to a covered agreement – in calculating the all others rate. To the contrary, Canada even admits that Article 19.3 of the SCM Agreement does not prescribe a particular method for calculating countervailing duty rates for non-investigated exporters.[47] For this reason, Canada's claim must fail.

44. In its second written submission, Canada quotes from various provisions of the Anti-Dumping Agreement and U.S. municipal law.[48] These references are not relevant here. As previously explained, the SCM Agreement has no provision that is analogous to Article 9.4 of

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

[46] U.S. Second Written Submission, paras. 110-121.

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

[48] Canada Second Written Submission, paras. 136-140.

the Anti-Dumping Agreement,[49] and the obligations of the Anti-Dumping Agreement are not to be imputed to the SCM Agreement.[50] Furthermore, a Member's legal obligations under the covered agreements do not flow from that Member's municipal law. Rather, Article 11 of the DSU directs the panel to make an objective assessment of the facts "and the applicability of and conformity with the relevant covered agreements," and not conformity with municipal law. A Member's municipal law does not alter the substance of the obligations in the covered agreements. Today, in paragraph 190, Canada indicated that its "concern is focused on the phrase 'appropriate amounts.'" Based on a quick review of Canada's submissions, this is the first time that Canada has even mentioned this phrase during this proceeding, and is further evidence of Canada's strained effort through the course of this proceeding to identify an applicable obligation.

V. Canada Has Failed to Demonstrate that Commerce Improperly Initiated an Investigation into the Subsidization of SC Paper

45. Canada asserts that Article 11 of the SCM Agreement prevents an investigating authority from examining subsidies not listed by name in the written application.[51] As the United States has explained, Canada's proposed interpretation is not founded on the SCM Agreement, and is thus incorrect. Indeed, if Canada itself believed this interpretation was correct, presumably Canada would ensure that its own investigating authority complied with it. But as we have noted, Canada's own authority does not exclude subsidies not named in the written application.

[49] U.S. First Written Submission, para. 302; U.S. Responses to the Panel's Questions, paras. 146-147; U.S. Second Written Submission, para. 121.

[50] U.S. First Written Submission, paras. 300-302; U.S. Responses to the Panel's Questions, paras. 145-147; U.S. Second Written Submission, para. 121.

[51] Canada Second Written Submission, paras. 80-86.

Canada's second written submission advances two interpretive issues that we will address today: the scope of a decision to initiate an investigation and the evidentiary standard that must be satisfied in order to initiate an investigation.

46. To recall, Article 11.1 provides that "an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry."[52] Article 11.2 indicates the evidentiary requirements applicable to the initiation of a countervailing duty investigation, stating that there must be "sufficient evidence of the existence of (a) a subsidy and, if possible, its amount."[53] Article 11.3 further explains that, "{t}he 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."[54]

47. As the United States explained in its prior submissions, the content and structure of Article 11 of the SCM Agreement does not preclude an investigating authority from initiating an investigation into the subsidization of a product, and examine subsidies not explicitly identified in the written application. While an investigating authority may at the outset initiate its investigation into a product based on its evaluation of programs specifically identified in the written application, those programs focus, but do not limit, the inquiry of the investigating authority in determining the extent of the subsidization of a product.

[52] SCM Agreement, Article 11.1.

[53] SCM Agreement, Article 11.2.

[54] SCM Agreement, Article 11.3.

48. Canada's reliance on the singular form of the word "subsidy" in Article 11 is misplaced.[55] The relevant issue is not whether the drafters used the plural or singular form of the term "subsidy," but rather what word precedes the term "subsidy."

49. As discussed in the U.S. first written submission, the use of the indefinite article "a" preceding the noun "subsidy" in Article 11.2 is an important factor in understanding the scope of the initiation. The Shorter Oxford English Dictionary defines the word "a" as an "indefinite article."[56] An "indefinite article" is defined as "a thing of indefinite nature or meaning, or which cannot be classified, specified, or defined."[57] An indefinite article indicates that its noun is not specific or identifiable to the reader or listener, whereas a definite article is used to indicate something specific. The use of the phrase "a subsidy" as opposed to "the subsidy" indicates that the petition must contain "sufficient evidence" of subsidization to justify initiation of an investigation pursuant to Article 11.3, but not that an application need have covered all possible subsidies in order to justify an initiation into the subsidization of a product.

50. In addition, accepting Canada's argument would read the qualification to the evidentiary standard for initiation out of Article 11. Article 11.2 states, in relevant part, "{t}he application shall contain such information as is reasonably available to the applicant."[58] Article 11.2 recognizes that all subsidies may not be reasonably available or known to the applicant. Thus, an application can comply with the standard set out in Article 11.2 "even if it does not include all

[55] Canada Second Written Submission, para. 77.

[56] *New Shorter Oxford English Dictionary*, Volume 1, p. 1 (Exhibit USA-03).

[57] *New Shorter Oxford English Dictionary*, Volume 1, p. 1 (Exhibit USA-03).

[58] SCM Agreement, Article 11.2.

the specified information if such information was simply not reasonably available to the applicant."[59]

51. The second interpretative question at issue is determining the evidentiary standard for initiating an investigation. In its second written submission, Canada suggests that Commerce must make a preliminary determination as to the countervailability of a subsidy before it initiates an investigation.[60] Canada supports its argument with a so-called "Expert Report." Canada's argument fails for two fundamental reasons. First, a so-called "expert report" is nothing more than a section of Canada's submission. It obtains no particular probative value simply because Canada named the Canadian representative that supposedly prepared it, or because it is cut from the main submission and placed in a separate document.

52. Second, Canada's argument incorrectly interprets the evidentiary standard for initiation outlined in Article 11 of the SCM Agreement. As explained in the U.S. answers to panel questions, there is a distinction between initiating an investigation into the potential subsidization of a product, and actually imposing countervailing duties. What is sufficient to justify initiating an investigation under the SCM Agreement is different from what is sufficient to make a preliminary or final affirmative determination as to the countervailing duty rate. Rather, Article 11 requires that a written application contain sufficient evidence of a subsidy, and if possible its amount, injury, and causal link. Panels have observed in the context of the SCM Agreement that

[59] *US – Softwood Lumber V (Panel)*, para. 7.55 (discussing Article 5.2 of the AD Agreement).

[60] Canada Second Written Submission, para. 85.

the evidentiary standard to initiate an investigation is necessarily lower than is required to support a final finding by the investigating authority.[61]

53. The relevant question at the initiation stage is not whether the information in the written application fully satisfies the requirements in the relevant substantive provisions of the SCM Agreement, but rather whether it is "sufficient to justify the initiation of an investigation."[62] By asserting that an investigating authority must apply a particular legal standard, and then find evidence sufficient to support a finding in relation to each element of that standard, Canada appears to seek to convert the initiation decision into a preliminary or final determination. But this is incorrect. Determining the countervailability of any apparent subsidy is a separate inquiry determined over the course of an investigation.

54. Finally, the United States would like to correct a misstatement made by Canada. In its second written submission, Canada has incorrectly stated that "in responses to the Panel question the United States concedes that it did not initiate an investigation into the discovered programs at the verification of Fibrek."[63] This is incorrect. The Panel asked the United States if it self-initiated an investigation into the discovered programs. The United States explained that it did not self-initiate an investigation pursuant to Article 11.6, but rather, the initiation of an investigation into the potential subsidization of SC Paper was based upon a written application. Since the United States did not self-initiate an investigation, Canada's claims under Article 11.6 of the SCM Agreement are not relevant to the facts of this case.

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[61] *See China – GOES (Panel)*, para. 7.54, quoting *US – Softwood Lumber V (Panel)*, para. 7.84; *Argentina – Poultry Anti-Dumping Duties*, para. 7.62; *Guatemala – Cement II*, para. 8.35.

[62] SCM Agreement, Art. 11.3.

[63] Canada Second Written Submission, para. 76.

VI. Canada Has Failed to Demonstrate that Commerce's Use of Facts Available Was Inconsistent with the SCM Agreement

55. The United States has presented in its previous oral and written submissions a comprehensive discussion of Commerce's use of facts available as well as the relevant legal obligations of the SCM Agreement. In this statement, we would like to focus the Panel's attention to the consequence of accepting Canada's approach to the SCM Agreement and the knowing contradiction embedded in Canada's argument.

56. Canada argues that Commerce's "any other forms of assistance question" did not request information necessary to the investigation. Canada has no basis in the text of the SCM Agreement, or otherwise, for this position. As explained in our first written submission, the SCM Agreement does not prescribe the type of questions an investigating authority may ask an interested party, and Canada has not identified any provision that would foreclose Commerce from asking the "any other forms of assistance" question. Moreover, Canada has conceded in its response to the Panel's questions that "a question cannot, in and of itself, violate the requirements of the SCM Agreement."[64] The "any other forms of assistance" question was asked in order to understand and collect information related to the alleged subsidization of the product under investigation – SC Paper. Without asking respondents whether they received any other forms of assistance, it would not have been possible to ascertain the extent of the subsidization benefitting the product in question. Thus, the any other forms of assistance question was entirely appropriate for Commerce to include in its questionnaire.

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

57. Additionally, it is not for a respondent to determine subjectively what information is "necessary" to Commerce's investigation and analysis. Canada's suggestion that Resolute should be allowed to decide on its own what information might be "necessary," and be permitted to withhold certain requested information on that basis, is not appropriate action for a respondent and could result in serious disruption to investigations. The investigating authority determines what information to request and what is "necessary" on the basis of the investigation, including the responses by interested parties in the course of that investigation.

58. Finally, Canada's view is inconsistent with Canada's own practice and that of other WTO members. In the U.S. second written submission, the United States offered evidence of other countries, including Canada, asking respondents to identify other forms of assistance received.[65] Specifically, Canada has asked respondents to identify "any other assistance programs . . . not previously addressed."[66] Based on the actions of Canada and other countries, there seems to be a recognition within the WTO membership that the WTO covered agreements permit an investigating authority to ask respondents to identify assistance not previously listed in the petition. It seems odd now that Canada is objecting to Commerce's use of the any other forms of assistance question when Canada's own investigating authority asks a similar question when conducting its investigations.

59. Moreover, not only does Canada ask a similar question concerning other forms of assistance, but if the Canadian investigating authority discovers that a respondent failed to fully answer the question, Canada applies facts available. For example, Canada has applied facts

[65] US Second Written Submission, para. 145.

[66] US Second Written Submission, paras. 145-146.

available to information discovered during verification in its investigation concerning Certain Oil Country Tubular Goods involving Thailand.[67]

VII. Canada Has Failed to Demonstrate that Commerce Has a "Practice" Challengeable As Such Under the WTO Covered Agreements

60. In Canada's second written submission, Canada relies on a so-called "expert report" prepared by a representative of Canada. This document, however, is simply an extension of Canada's brief and carries no special weight. Further, the arguments presented in this document are the same arguments made throughout Canada's oral and written submissions. As explained in the U.S. answers to Panel questions, 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 WTO.[68]

61. As discussed in detail in our second written submission, Canada's attempt to articulate the precise content of the alleged measure and general and prospective application fails. In each of the determinations that Canada has relied upon, Commerce made unique findings and reached different results, which demonstrate that there is no rule or norm of general and prospective application when Commerce uses facts available for information discovered during verification.[69] While each case cited by Canada may have concerned information discovered during verification, the treatment of that information has varied in each determination. Thus, Canada's own evidence confirms that Commerce's use of facts available is dependent on the

[67] US Second Written Submission, paras. 147-149.

[68] US Answers to Panel Questions, para. 182.

[69] US Second Written Submission, paras. 132-144.

circumstances of each case and is a fact-specific inquiry. For these reasons and those previously articulated, the Panel should reject Canada's claims.

VIII. CONCLUSION

62. For the reasons provided today and in our prior submissions, the United States respectfully requests that the Panel reject each of Canada's claims.

63. Mr. Chairman, members of the Panel, this concludes our opening statement. On behalf of the U.S. delegation, I would like to thank the Panel and the Secretariat for your service in this dispute. We look forward to responding to any questions you may have.