

additional subsidization of the product under investigation, it may also pertain to a much broader range of "assistance". As we have said, in these circumstances, an investigating authority may not simply *infer* that a respondent's failure to respond fully to the "other forms of assistance" question resulted in a failure to provide information necessary to establish the existence of additional subsidization of the product under investigation.⁶²² In light of the due process rights enjoyed by interested parties throughout an investigation⁶²³, 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 specificity⁶²⁴, as well as Articles 12.1 and 12.8 of the SCM Agreement⁶²⁵ because the USDOC failed to offer respondents the procedural safeguards in the SCM Agreement, including opportunities to present evidence, prior to applying AFA to determine the elements and amount of a subsidy.⁶²⁶ We understand that Canada's main concern in bringing these additional claims is to ensure that respondents enjoy certain "procedural safeguards" in respect of subsidy programmes discovered during the course of an investigation.⁶²⁷ As with our findings in Section 7.4.1.4 above, we consider that our interpretation and application of the facts available mechanism in the present case already reflects the type of procedural safeguards envisaged by Canada, and accordingly see no need to separately consider Canada's claims under these additional provisions.⁶²⁸

8 CONCLUSIONS AND RECOMMENDATION

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

- a. The USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement, by making a finding of entrustment or direction with respect to the provision of electricity by NSPI.
- b. The USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement, when it determined that the provision of electricity by NSPI to PHP, through the LRR, conferred a benefit.
- c. The USDOC acted inconsistently with Article 12.8 of the SCM Agreement, by failing to disclose to interested parties the essential fact that, in the view of the USDOC, Section 52 of the Public Utilities Act entrusted or directed NSPI to provide electricity to all customers, including PHP.

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

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

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

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

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

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

⁶²⁸ See, also, fn 329 above.

- d. The USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding that the hot idle funding conferred a benefit on PWCC/PHP.
- e. The USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding that the second FIF amount conferred a benefit on PWCC/PHP.
- f. The USDOC acted inconsistently with Article 11.3 of the SCM Agreement, by failing in its obligation to evaluate the accuracy and adequacy of the evidence in the application with respect to the existence of a benefit in the provision of stumpage and biomass by the Government of Nova Scotia to PHP.

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

- a. The USDOC acted inconsistently with Article 12.7 of the SCM Agreement, by applying facts available to the discovered programmes.
- b. The Panel declines to rule on Canada's claims under Articles 11.2, 11.3, 12.1, 12.2, 12.3, and 12.8 of the SCM Agreement, regarding the discovered programmes.
- c. The USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement, by finding, on the basis of an alleged lack of relevant evidence, that the benefit conferred on Fibrek through the PPGTP was not extinguished when Fibrek was acquired by Resolute.
- d. The Panel declines to rule on Canada's claims under Articles 10, 14, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the USDOC's finding that the benefit conferred on Fibrek through the PPGTP was not extinguished when Fibrek was acquired by Resolute.
- e. The Panel declines to rule on Canada's claims under Articles 1.1(b), 10, 14, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the USDOC's finding that the benefit conferred on Fibrek was not extinguished when Fibrek was acquired by Resolute, with respect to the alleged assistance discovered during the verification of Fibrek.
- f. The Panel concludes that the USDOC acted inconsistently with Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, by attributing to the production of SC Paper subsidies provided to Resolute and Fibrek under the PPGTP, FSPF, and NIER Programmes.
- g. The Panel declines to rule on Canada's claims under Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the attribution to the production of SC Paper of the alleged assistance discovered during the verification of Fibrek.

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

- a. The USDOC acted inconsistently with Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994, by constructing the all-others rate relying on Resolute's rate, which was mainly calculated using AFA.
- b. The Panel declines to rule on Canada's claim under Article 12.7 of the SCM Agreement, regarding the construction of the all-others rate relying on Resolute's rate.
- c. The Panel rejects Canada's claims under Articles 10, 19.1, 19.3, 19.4, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994, regarding the USDOC's failure to adjust the all-others rate in respect of subsidies that were not available to non-investigated exporters.

- d. The USDOC acted inconsistently with Article 19.3 of the SCM Agreement, by including new subsidy allegations in the context of the expedited reviews undertaken for Catalyst and Irving.
- e. The Panel declines to rule on Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement, regarding the USDOC's alleged initiation of an investigation into new subsidy allegations during the expedited reviews of Catalyst and Irving.

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

- a. Canada has adduced sufficient evidence to establish that the challenged "Other Forms of Assistance-AFA measure" constitutes "ongoing conduct" and, therefore, the Panel does not consider it necessary to address Canada's argument that the challenged measure amounts to a "rule or norm of general and prospective application".
- b. The unwritten measure challenged by Canada is inconsistent with Article 12.7 of the SCM Agreement.
- c. The Panel declines to rule on Canada's claims under Articles 10, 11.1, 11.2, 11.3, 11.6, 12.1, and 12.8 of the SCM Agreement, with respect to the "Other Forms of Assistance-AFA measure".

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

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