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UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CANADA

The following communication, dated 9 June 2016, from the delegation of Canada to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

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On 30 March 2016, the Government of Canada ("Canada") requested consultations with the Government of the United States of America (the "United States" or "US") 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 from Canada* as well as the United States' ongoing conduct of applying adverse facts available to information discovered during the course of a countervailing duty investigation.

Canada held consultations with the United States on May 4, 2016. These consultations failed to settle the dispute.

I. Supercalendered Paper from Canada

The US countervailing measures at issue with respect to *Supercalendered Paper from Canada*, *inter alia*, include:

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

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

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

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

5. 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

6. 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 (February 8, 2016), including:

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

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

Canada considers these US countervailing measures to be inconsistent with provisions of the SCM Agreement and the GATT 1994, including:

1. Articles 11.2 and 11.3 of the SCM Agreement as the United States improperly initiated an investigation into the provision of Crown stumpage by the Government of Nova Scotia to Port Hawkesbury Paper LP ("PHP") on the basis of an application that did not contain sufficient evidence concerning the existence, amount, and nature of the alleged subsidy,

2. Article 1.1(a)(1)(iv) of the SCM Agreement as the United States improperly found that the Government of Nova Scotia and the Nova Scotia Utility and Review Board ("NSUARB") entrusted or directed Nova Scotia Power Inc. ("NSPI") to provide a financial contribution within the meaning of Article 1.1(a)(1)(iii) to PHP 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,

3. Article 12.8 of the SCM Agreement as the United States failed to inform the interested parties of the essential facts under consideration before it found 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) to PHP by obligating NSPI to "serve any resident or company" within the province,

4. Articles 1.1(b) and 14(d) of the SCM Agreement as the United States erroneously determined that the Government of Nova Scotia and NSUARB through their alleged entrustment and direction of NSPI conferred a benefit to PHP through the provision of electricity for less than adequate remuneration,

5. 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 as the United States erroneously found that PHP, rather than the previous owner, was the recipient of certain financial contributions and that the benefit associated with these financial contributions was not extinguished by Pacific West Commercial Corporation's arm's-length purchase of NewPage Port Hawkesbury for fair market value,

6. Articles 12.1 and 12.8 of the SCM Agreement as the United States did not provide Resolute FP Canada Inc. ("Resolute") with notice of the information it required or the essential facts under consideration before finding that Resolute provided insufficient evidence to establish that its acquisition of its subsidiary, Fibrek, occurred through an arm's-length transaction for fair market value,

7. 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 as the United States improperly failed to find 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,

8. Articles 10, 19.1, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 as the United States failed to ascertain the precise amount of subsidies attributable to the product under investigation and improperly attributed certain alleged subsidies to the production of supercalendered paper that were provided to the production of other products that were not under investigation,

9. Articles 11.1, 11.2. 11.3 and 11.6 of the SCM Agreement as the United States failed to assess whether information discovered during the course of the verification of Resolute was accurate, adequate and provided sufficient evidence of the existence of a subsidy,

10. Articles1.1(a)(1), 1.1(b), 2 and 14 of the SCM Agreement as the United States failed to make a reasoned determination as to whether the discovered information reflected the provision of a financial contribution that conferred a benefit to Resolute or whether this discovered information could have been specific,

11. Article 12.7 of the SCM Agreement as the United States improperly resorted to adverse facts available as the information it discovered was not "necessary information" that related to the alleged subsidies set out in the notice of initiation,

12. Article 12.7 of the SCM Agreement as the United States improperly found that Canada and Resolute did not respond to questionnaires to the best of their ability and resorted to adverse facts available when neither Canada nor Resolute had impeded the investigation,

13. Articles 1.1(a)(1), 1.1(b), 2, 11.1, 11.2, 11.3, 11.6, 12.7 and 14 of the SCM Agreement as the United States improperly relied on adverse facts available with respect to the discovered information to determine the existence of a countervailable subsidy as well as the amount of subsidy for Resolute,

14. Article 12.1 of the SCM Agreement as the United States failed to provide Canada and Resolute ample opportunity to present in writing all relevant evidence in relation to the information it discovered during verification,

15. Article 12.2 of the SCM Agreement as the United States failed to accord Resolute the right to present evidence orally in relation to the information the United States discovered during verification,

16. Articles 12.3 and 12.8 of the SCM Agreement as the United States failed to inform Canada and Resolute of relevant information and the essential facts under consideration prior to the final determination so as to provide them with an opportunity to defend their interests,

17. Articles 10, 12.7, 19.1, 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 as the United States improperly calculated an "all others" rate for Irving Paper Limited ("Irving") and Catalyst Paper that was derived from: (1) alleged company-specific subsidies that were only provided to PHP, and (2) Resolute's countervailing duty rate which was based, in part, on adverse facts available,

18. Articles 11.2 and 11.3 of the SCM Agreement as the United States improperly initiated an investigation into six of the petitioner's new subsidy allegations during its 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. These new subsidy allegations relate to:

    a. New Brunswick Provision of Silviculture Grants,

    b. New Brunswick Provision of Research and Development Subsidies,

    c. New Brunswick Large Industrial Renewable Energy Purchase Program

    d. British Columbia Provision of Stumpage to Catalyst for Less Than Adequate Remuneration

    e. British Columbia Provision of Wood Products to Catalyst for Less Than Adequate Remuneration,

    f. British Columbia Ban on Exports of Logs and Wood Residue.

19. Articles 19.1, 19.3 and 19.4 of the SCM Agreement as the United States improperly initiated an investigation into six of the petitioner's new subsidy allegations referred to in paragraph 11 during its 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,

20. Articles 11.2 and 11.3 of the SCM Agreement should the United States improperly further initiate an investigation into the petitioner's amended new subsidy allegations during its 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, and

21. Articles 19.1, 19.3 and 19.4 of the SCM Agreement should the United States improperly further initiate an investigation into the petitioner's amended new subsidy allegations during its 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.

These US countervailing measures have also, to the extent not already specified above, resulted in the imposition or levying of countervailing duties in a manner that is inconsistent with Articles 10, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994. In addition, these US measures fail to set out in sufficient detail the findings and conclusions reached and all relevant information on issues of fact and law in contravention of Articles 22.3 and 22.5 of the SCM Agreement.

II. The United States' Ongoing Conduct of Improperly Applying Adverse Facts Available to Discovered Information

The United States improperly applies adverse facts available in order to countervail information that it "discovers" during the course of an investigation. The United States claims that the application of adverse facts available to countervail information that it discovers during the course of an investigation is permissible as interested Members and interested parties should have disclosed this information in response to a question concerning "any other forms of assistance." It also refuses to accept or consider evidence concerning this discovered information.

Canada considers that this ongoing conduct, or, in the alternative, a rule or norm of general and prospective application, is a measure that is inconsistent with the SCM Agreement. This US measure is evidenced, *inter alia*, by the following:

1. *Countervailing Duty Investigation of Certain Polyethylene Terephthalate Resin from the People's Republic of China: Final Affirmative Determination*, 81 Fed. Reg. 13,337 (March 14, 2016), and Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of *Certain Polyethylene Terephthalate Resin from the People's Republic of China* (March 4, 2016),

2. *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 Fed. Reg. 63,535 (October 20, 2015), and Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of *Supercalendered Paper from Canada* (October 13, 2015),

3. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules,* ("*Solar Cells*") *from the People's Republic of China: Final Results of the Countervailing Duty Administrative Review*, 80 Fed. Reg. 41,003 (July 14, 2015), and Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, ("Solar Cells") from the People's Republic of China (July 7, 2015),

4. *Certain Crystalline Silicon Photovoltaic Products* ("*Solar Panels*") *from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 79 Fed. Reg. 76,962, and Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Products ("Solar Panels") from the People's Republic of China (December 15, 2014),

5. *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 78 Fed. Reg. 50,391 (August 19, 2013), and Issues

and Decisions Memorandum for the Final Determination of Certain Warmwater Shrimp from the People's Republic of China (August 12, 2013),

6. *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, ("Solar Cells") from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 Fed. Reg. 63,788 (Oct. 17, 2012), and 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 (October 9, 2012),

7. final determinations, issues and decision memoranda and similar determinations issued in other US investigations or reviews, which reflect this ongoing US conduct, and
8. Section 502 of the *Trade Preferences Extension Act* which amended section 776 of the *Tariff Act of 1930* to confirm and broaden the discretion of the United States to apply adverse facts available.

Canada considers this ongoing US conduct or, in the alternative, rule or norm of general and prospective application, to be inconsistent with Articles 10, 11.1, 11.2, 11.3, and 11.6 of the SCM Agreement. In particular, the United States fails to assess whether discovered information provides sufficient evidence of the existence of a subsidy as required by Articles 11.1, 11.2 and 11.6 which results in the imposition of countervailing duties in a manner inconsistent with Article 10 of the SCM Agreement. The United States also does not review the accuracy and adequacy of the discovered information to determine whether it provides sufficient evidence as required by Article 11.3 of the SCM Agreement.

This US measure also improperly applies adverse facts available to discovered information that is not "necessary information" in a manner that is inconsistent with Article 12.7 of the SCM Agreement. The discovered information is not "necessary" as it is not related to alleged subsidies set out in the public notice of initiation which are the proper subject matter of the investigation. It follows that the fact that this discovered information was not disclosed cannot be considered a failure to provide "necessary information" or an effort to significantly impede the investigation.

Canada separately considers the ongoing US conduct or, in the alternative, rule or norm of general and prospective application, of applying adverse facts available in relation to information discovered during the course of the investigation to be inconsistent with Articles 12.1, 12.7 and 12.8 of the SCM Agreement. In particular, it results in the United States:

1. failing to provide interested Members and interested parties with ample opportunity to present in writing all evidence they consider relevant to the information discovered during the course of the investigation in a manner that is inconsistent with Article 12.1 of the SCM Agreement,

2. failing to disclose the essential facts under consideration within sufficient time for interested Members or interested parties to defend their interests in accordance with Article 12.8 of the SCM Agreement, and

3. improperly applying adverse facts available in a manner that is inconsistent with Article 12.7 of the SCM Agreement as the interested Members and interested parties did not refuse or fail to provide necessary information or otherwise impede the investigation.

As a consequence of the breaches described above, this ongoing US conduct or, in the alternative, rule or norm of general and prospective application is also inconsistent with Articles 1.1(a)(1), 1.1(b), 14, 19.1, 19.3, 19.4 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

The US countervailing measures in *Supercalendered Paper from Canada,* and the ongoing US conduct or, in the alternative, rule or norm of general and prospective application of applying adverse facts available to information discovered during the course of an investigation, nullifies or impairs benefits accruing to Canada, directly or indirectly, under the cited agreements.

Therefore, Canada respectfully requests, pursuant to Article 6 of the DSU and Article 30 of the SCM Agreement, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

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