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UNITED STATES – COUNTERVAILING MEASURES ON SOFTWOOD LUMBER FROM CANADA

REQUEST FOR CONSULTATIONS BY CANADA

The following communication, dated 28 November 2017, from the delegation of Canada to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes,* 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 softwood lumber products from Canada.

I. CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA

The US countervailing measures concerning softwood lumber products from Canada include:

1. *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 Fed. Reg. 51,814 (November 8, 2017);

2. Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination (November 1, 2017); and

3. The Notice of Initiation, Initiation Checklist, Questionnaires, Verification Reports, Preliminary Determination, Decision Memorandum for the Preliminary Determination, Calculations Memoranda, Market Memoranda, other determinations, memoranda, reports and measures related to the countervailing duty investigation of *Certain Softwood Lumber Products from Canada*.[1]

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

A. Stumpage

1. Articles 1.1(b) and 14(d) of the SCM Agreement as the United States improperly rejected in-jurisdiction benchmarks for stumpage (i.e., standing timber) that reflected prevailing market conditions in each of Alberta, British Columbia (B.C.), Ontario, New Brunswick, and Québec as the basis for evaluating adequacy of remuneration and, as a result, incorrectly determined the existence and amount of any benefit;

2. In the alternative, Articles 1.1(b) and 14(d) of the SCM Agreement as the United States failed to make necessary adjustments to stumpage benchmarks to reflect

[1] Canada also intends to include as a measure the U.S. Countervailing Duty Order which is expected to follow the issuance of any final affirmative injury or threat of injury determination concerning *Softwood Lumber Products from Canada*.

prevailing market conditions in assessing adequacy of remuneration when it compared:

a. Alberta, Ontario, New Brunswick, and Québec stumpage to a Nova Scotia stumpage benchmark, and

b. B.C. stumpage to a benchmark based on US Pacific Northwest log prices,

and therefore incorrectly determined the existence and amount of any benefit;

3. In the alternative, Articles 1.1(b) and 14(d) of the SCM Agreement as the United States relied on a Nova Scotia stumpage benchmark that

a. was based on data that were unreliable and not fully disclosed,

b. suffered from methodological flaws, and

c. was otherwise unreliable,

and therefore incorrectly determined the existence and amount of any benefit;

4. In the alternative, Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 as the United States, in assessing adequacy of remuneration for stumpage, improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage, and therefore incorrectly determined the existence and amount of any benefit;

B. Log Export Permitting Processes

5. Articles 11.2 and 11.3 of the SCM Agreement as the United States improperly initiated an investigation into federal and provincial log export permitting processes for B.C. logs without sufficient evidence of a financial contribution within the meaning of Articles 1.1(a)(1)(iii) and (iv) of the SCM Agreement;

6. Articles 1.1(a)(1)(iii) and (iv), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 as the United States improperly determined that federal and provincial log export permitting processes for B.C. logs constitute a financial contribution by finding that:

a. the federal and provincial governments entrusted or directed private entities to provide B.C. logs to softwood lumber producers, and

b. the provision of B.C. logs is normally vested in the federal and provincial governments and does not differ from the practices normally followed by these governments,

and therefore incorrectly determined the existence of a subsidy;

C. Non-Stumpage Programs

7. 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 improperly attributed to the production of softwood lumber products certain alleged subsidies that were bestowed on the production of products that were not under investigation, including:

a. B.C. Hydro – Electricity Purchase Agreements,

b. Hydro-Québec – Purchase of Electricity under PAE 2011-01, and

c. New Brunswick Power – Large Industrial Renewable Energy Purchase Program,

and therefore failed to ascertain the precise amount of subsidies attributable to the product under investigation;

8. Articles 1.1(b) and 14(d) of the SCM Agreement as the United States erroneously rejected benchmarks that reflected prevailing market conditions and instead relied on inappropriate benchmarks that did not reflect prevailing market conditions for

the sale of the relevant type of electricity when it assessed adequacy of remuneration concerning:

a. B.C. Hydro – Electricity Purchase Agreements; and

b. Hydro-Québec – Purchase of Electricity under PAE 2011-01,

and, as a result, incorrectly determined the existence and amount of any benefit;

9. Articles 1.1(a)(1)(i) and (iii), 1.1(b), and 14(d) of the SCM Agreement as the United States improperly treated as a grant the purchase of electricity by New Brunswick Power under the Large Industrial Renewable Energy Purchase Program and, as a result, incorrectly determined the existence and amount of any benefit;

10. Articles 1.1(a)(1)(i) and (iii), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 as the United States erroneously determined that reimbursements Québec provided to Resolute for services related to partial cut silviculture prescriptions on provincial Crown land constituted a financial contribution;

11. In the alternative, Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 as the United States improperly determined that reimbursements Québec provided to Resolute for services related to partial cut silviculture prescriptions conferred a benefit resulting in the imposition of countervailing duties in excess of the amount of any alleged subsidy;

12. Articles 1.1(a)(1)(i) and (iii), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 as the United States erroneously determined that reimbursements New Brunswick provided to J.D. Irving for services related to the company's performance of silviculture and forest management services on provincial Crown land constituted a financial contribution;

13. In the alternative, Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 as the United States improperly determined that the reimbursements New Brunswick provided to J.D. Irving for services related to silviculture and licence management conferred a benefit resulting in the imposition of countervailing duties in excess of the amount of any alleged subsidy; and

14. Articles 2.1(a) and 2.1(b) of the SCM Agreement as the United States improperly found that the Federal Accelerated Capital Cost Allowance for Class 29 Assets was limited to certain enterprices and was *de jure* specific, when in fact it is generally available to all enterprises that engage in certain activities and is based on objective criteria and conditions.

The measures of the United States set out above 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, 21.1, 21.2, 32.1, and 32.5 of the SCM Agreement and Article VI:3 of the GATT 1994.

II. THE UNITED STATES' IMPROPER DETERMINATION OF IN-COUNTRY BENCHMARKS

1. Canada has distinct provincial markets for stumpage that reflect important differences in the provincial forests, the availability, accessibility, and quality of standing timber, transportation costs, distance to market, and other prevailing market conditions. These distinct provincial stumpage markets mean that a comparison to prevailing market conditions in the country of provision under Article 14(d) of the SCM Agreement must be made in relation to prevailing market conditions for each province's distinct stumpage market.

2. The United States, in a series of previous administrative reviews, and in recent preliminary and final countervailing duty determinations, has improperly treated stumpage in certain Atlantic provinces (i.e., Nova Scotia as well as, in the previous administrative reviews, New Brunswick) as if this stumpage were an in-country benchmark that reflected prevailing

market conditions for standing timber sold in provincial markets in Alberta, Ontario, and Québec.

3. This US measure is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement as Nova Scotia and New Brunswick cannot be considered to be in-country benchmarks for Alberta, Ontario or Québec as stumpage markets in these provinces have completely different prevailing market conditions from those in Nova Scotia and New Brunswick.

4. This US measure is evidenced, *inter alia*, by the following:

   a. *Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products From Canada*, 69 Fed. Reg. 75,917 (December 20, 2004) as amended by 70 Fed. Reg. 9,046 (February 24, 2005);

   b. *Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 73,448 (December 12, 2005);

   c. *Notice of Preliminary Results and Extension of Final Result of Countervailing Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 71 Fed. Reg. 33,931 (June 12, 2006);

   d. *Certain Softwood Lumber Products From Canada: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination With Final Antidumping Duty Determination*, 82 Fed. Reg. 19,657 (April 28, 2017);

   e. Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada (April 24, 2017);

   f. *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 Fed. Reg. 51,814 (November 8, 2017);

   g. Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination (November 1, 2017); and

   h. The questionnaires, verification reports, calculations memoranda, issues and decision memoranda, other determinations, memoranda, reports and measures related to the above administrative reviews and investigations concerning softwood lumber products from Canada.

5. This measure is attributable to the United States, consists of the content identified and described above, and is presently occurring and likely to be continued in the future. In the alternative, it constitutes ongoing conduct or a rule or norm of general and prospective application that is inconsistent with the United States' WTO obligations.

The US measure set out above has 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, 21.1, 21.2, 32.1, and 32.5 of the SCM Agreement and Article VI:3 of the GATT 1994.

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The United States' measures described above nullify or impair the benefits accruing to Canada directly or indirectly under the cited agreements.

Canada reserves the right to address additional measures and claims in the course of consultations.

Canada looks forward to receiving the United States' reply to this request and to determining a mutually convenient date and place for consultations.