UNITED STATES – COUNTERVAILING MEASURES ON SUPERCALENDERED PAPER FROM CANADA

(DS505)

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

March 21, 2017

Mr. Chairman, members of the Panel:

1. On behalf of the U.S. delegation, I would like to thank you, as well as the Secretariat assisting you, for your work on this dispute.

2. Canada has raised numerous claims, many involving complex issues under the SCM Agreement[1] and the GATT 1994.[2] Ultimately, however, this dispute is about a decision of the Canadian government to bail out and subsidize a bankrupt paper mill – a decision that resulted in subsidized exports and injury to a U.S. industry – as well as attempts by the respondents to shield from scrutiny evidence of Canadian subsidization.

3. The U.S. first written submission responds in detail to Canada's claims and arguments. Today, we focus our statement on a subset of the claims made with respect to Port Hawkesbury[3] and Resolute.[4]

4. Before turning to the legal issues, the United States would highlight the basic facts that led to the imposition of countervailing duties on supercalendared (SC) paper from Canada.

5. With respect to Port Hawkesbury, the closure of that mill resulted in a series of extraordinary measures by the province of Nova Scotia. The provincial government was highly motivated to ensure that the mill would be sold to a new operator, and would become operational in the near term. Canada's first written submission identifies the great lengths that the government of Nova Scotia went to in order to make the purchase of the mill commercially viable.[5] This included the grant of a substantial sum of money to ensure the mill could be sold as a going concern;[6] the establishment of a Forest Infrastructure Fund – financed by Nova Scotia –

[1] *Agreement on Subsidies and Countervailing Measures*.
[2] *General Agreement on Tariffs and Trade 1994*.
[3] Port Hawkesbury Paper LP.
[4] Resolute FP Canada Inc.
[5] *See* Canada First Written Submission, paras. 19-25.
[6] Canada First Written Submission, para. 20; U.S. First Written Submission, paras. 107-110.

to maintain forestry activity during the shutdown;[7] and the negotiation of a special electricity rate specifically designed for companies in economic distress.[8] These facts are not in dispute.

6. With respect to Resolute, Canada's first written submission acknowledges that the United States Department of Commerce ("Commerce") specifically requested Resolute to disclose all government assistance.[9] Canada also concedes that Resolute did not disclose in its questionnaire response the subsidy programs discovered at verification, and that Resolute's non-disclosure led to Commerce's decision to resort to facts available with respect to these subsidy programs.[10]

I. Commerce's Financial Contribution Determination on the Provision of Electricity to Port Hawkesbury Was a Straightforward Application of Article 1.1(a)(1)(iv) of the SCM Agreement

7. The U.S. first written submission presents a thorough discussion of Commerce's financial contribution determination and the applicable legal obligations of Article 1.1(a)(1) of the SCM Agreement.[11] Today, we provide a summary of the factual record before Commerce and demonstrate that Canada's claims are without merit.

8. As a matter of law, Nova Scotia has given to public utilities – such as Nova Scotia Power – the legal obligation to provide electricity. Section 52 of the *Public Utilities Act* provides that "every public utility is required to furnish service and facilities reasonably safe and adequate and in all respects just and reasonable."[12] The text is unambiguous, and its meaning was confirmed in a paper commissioned by Nova Scotia that explained this obligation.[13] This interpretation has again been confirmed by Canada's first written submission, which acknowledges that section 52

[7] Canada First Written Submission, paras. 21-25; U.S. First Written Submission, paras. 112-114.
[8] Canada First Written Submission, para. 34; U.S. First Written Submission, para. 24.
[9] Canada First Written Submission, paras. 235-236.
[10] Canada First Written Submission, paras. 235-236.
[11] *See* U.S. First Written Submission, paras. 25-49.
[12] *Public Utilities Act*, p. 16 of Exhibit NS-EL-1 (Exhibit CAN-21) (BCI).
[13] *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).

is "understood to reflect the principle that NSPI and other utilities are required to provide electrical service to all of their customers."[14] This directive provided a sufficient basis for Commerce's affirmative finding that Nova Scotia Power is required to provide electricity to its customers, including Port Hawkesbury.[15]

9. Commerce's findings in relation to the provision of electricity in Nova Scotia were not limited to section 52 of the *Public Utilities Act*. Commerce also found that, under the law, Nova Scotia "controls and directs the methodology" used in electricity rate proposals, and that the Nova Scotia Utility and Review Board ("Review Board") must approve or deny all rate proposals.[16] With respect to Port Hawkesbury in particular, Commerce determined that the Review Board expanded the extraordinary Load Retention Tariff framework to include companies facing "impending business closure due to economic distress."[17] In doing so, Port Hawkesbury became eligible for a Load Retention Rate from Nova Scotia Power, a rate that, by its terms, does not allow for the full recovery of costs.[18]

10. I will now turn to the entrustment or direction standard under the SCM Agreement. A financial contribution exists within the meaning of Article 1.1(a)(1) where the government "entrusts or directs" a private body to provide a good. Central to the analysis is the meaning of the terms "entrust or direct," which the Appellate Body has summarized in the following manner: "'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."[19] The delegation by the government may take a variety of forms, and a written measure

[14] Canada First Written Submission, para. 110.
[15] *See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Supercalendered Paper from Canada* (October 13, 2015) ("SC Paper Final I&D Memo"), p. 37 (Exhibit CAN-37).
[16] SC Paper Final I&D Memo, p. 36.
[17] *See* SC Paper Final I&D Memo, p. 39.
[18] SC Paper Final I&D Memo, p. 48.
[19] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

with the force of law that is binding on a private body satisfies the standard of Article 1.1(a)(1)(iv).

11. Commerce applied this WTO legal standard to the evidentiary record before it. Through its actions, Nova Scotia "gave responsibility" or "exercised its authority over" Nova Scotia Power to "carry out" the provision of electricity. Furthermore, in this instance, the *Public Utilities Act* closely tracks the standard of entrustment or direction. Accordingly, Commerce appropriately applied the ordinary meaning of the entrustment or direction standard to the plain meaning of section 52 of the *Public Utilities Act*.[20]

II. Commerce's Constructed Benchmark for the Provision of Electricity to Port Hawkesbury Was Based on Prevailing Market Conditions within the Meaning of Article 14(d) of the SCM Agreement

12. Canada's claims regarding Commerce's determination of benefit are similarly without merit. Canada's first written submission offers an alternative benchmark that it believes should have been used,[21] but Canada has not demonstrated that the benchmark employed by Commerce – which took into consideration the recovery of fixed and variable costs – is not "in relation to prevailing market conditions" in Canada within the meaning of Article 14(d) of the SCM Agreement. We refer the Panel to the U.S. first written submission for a detailed discussion on the elements of Commerce's calculated benchmark.[22] Here, we summarize the facts before Commerce and demonstrate the benchmark's consistency with Article 14(d).

13. The establishment of Nova Scotia Power's electricity rates involves an approval process run by the Review Board.[23] In particular, Nova Scotia Power submits a General Rate Application to the Review Board for approval of above-the-line and below-the-line electricity

[20] *See* SC Paper Final I&D Memo, p. 37 (Exhibit CAN-37).
[21] *See* Canada First Written Submission, para. 144.
[22] U.S. First Written Submission, paras. 65-98.
[23] Canada First Written Submission, para. 30.

rates for each class of customer.[24] Above-the-line rates are the predominant rates in Nova Scotia: they recover all costs and include Nova Scotia Power's regulated amount for profit.[25] Accordingly, application of above-the-line rates is the norm. For example, during the period of investigation, Port Hawkesbury's Load Retention Rate was the only below-the-line rate in effect.[26] The General Rate Application refers to the elements that, taken together, equal the above-the-line electricity rate for each customer class; in particular, variable costs, a contribution to fixed costs, and a contribution to Nova Scotia Power's return on equity.

14. During the period of investigation, Port Hawkesbury was not eligible for any above-the-line rates in effect. Thus, Commerce was required to construct a benchmark in order to determine benefit. With its constructed benchmark, Commerce replicated the above-the-line rate for "extra-large industrial" users, the customer class under which the Port Hawkesbury mill was previously billed.

15. For variable costs, Commerce used Port Hawkesbury's actual variable costs during the period of investigation.[27]

16. For fixed costs, Commerce relied on Nova Scotia Power's own statement on the appropriate contribution to fixed costs for an extra-large industrial user.[28] The General Rate Application does not itemize the contribution to fixed costs allocated to each customer class. The 2012 General Rate Application did, however, identify the contribution to fixed costs previously made by customers in the extra-large industrial rate class: $26 per MWh.[29]

[24] SC Paper Final I&D Memo, p. 36 (Exhibit CAN-37).
[25] SC Paper Final I&D Memo, p. 47 (Exhibit CAN-37).
[26] *Verification Report: Government of Nova Scotia* (September 2, 2015) p. 19 (Exhibit CAN-99).
[27] SC Paper Final I&D Memo, p. 48 (Exhibit CAN-37).
[28] SC Paper Final I&D Memo, p. 48 (Exhibit CAN-37).
[29] Nova Scotia Power *2013 General Rate Application* at DE-03-DE-04, p. 19, provided as Exhibit NS-EL-17 (Exhibit CAN-21) (BCI).

Accordingly, contrary to Canada's assertion, Commerce did not speculate on the fixed cost contribution; Nova Scotia Power's statement to the Review Board provided concrete evidence.

17. Finally, Commerce included an amount for profit. Commerce used Nova Scotia Power's total profit during the period of investigation to determine the amount of profit that would have been derived from Port Hawkesbury's electricity purchases under the "extra-large industrial" rate. The record evidence did not demonstrate that Nova Scotia Power's return on equity was captured in either the fixed or variable costs.[30]

18. Together, these three variables produced a benchmark that reflected the prevailing electricity rate for extra-large industrial users in Nova Scotia.

19. I will now turn to the relevant provisions of the SCM Agreement. The Appellate Body in *US – Carbon Steel (India)* recently found that Article 14(d) of the SCM Agreement does not specify the benchmark to be used when determining the adequacy of remuneration so long as the benchmark is "connected with the prevailing market conditions in the country of provision."[31] The Appellate Body went on to observe that there is no "hierarchy between different types of in-country prices that can be relied upon in arriving at a proper benchmark," finding that "whether a price may be relied upon…is not a function of its source but, rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision."[32] The Appellate Body further recognized that "it is permissible for an investigating authority in a benefit calculation to construct the price" to serve as the benchmark.

20. Canada has not demonstrated, and cannot demonstrate, that Commerce's constructed benchmark is not "in relation to the prevailing market conditions" in Canada. First, "prevailing"

[30] SC Paper Final I&D Memo, p. 48 (Exhibit CAN-37).
[31] *US – Carbon Steel (India) (AB)*, para. 4.159.
[32] *US – Carbon Steel (India) (AB)*, para. 4.154.

market conditions are those that are "predominant" or "generally accepted."[33] With the exception of Port Hawkesbury's extraordinary rate, every Nova Scotia Power customer paid an above-the-line rate during the period of investigation.[34] The rates are necessarily based on market conditions in Canada, taking into consideration costs and a return on equity.

21. Second, contrary to Canada's argument, Commerce was not required under the SCM Agreement to consider whether the electricity market in Canada was distorted. The Appellate Body has observed that the authority must demonstrate the existence of price distortion in the market before departing from the use of a benchmark *from the country of provision*.[35] Commerce did not use an out-of-country benchmark; rather, the above-the-line rate is consistent with "prevailing market conditions" in Canada.

22. Third, Commerce's constructed benchmark, intended to replicate an above-the-line rate, is "*in relation to* the prevailing market conditions." The phrase "in relation to," which the Appellate Body has found to mean "in connection with,"[36] allows that a benchmark is to be determined with consideration of the relevant market conditions.

23. Commerce did so here. Commerce constructed the benchmark using figures related to Port Hawkesbury's own experience as an above-the-line ratepayer in Canada. In particular, Commerce used Port Hawkesbury's own variable costs and a contribution to fixed costs that Nova Scotia Power identified as the standard contribution for the extra-large industrial user class.[37] The benchmark was an accurate approximation – and "in relation to" – the prevailing rate that Port Hawkesbury would have paid under the extra-large industrial class above-the-line

[33] *US – Carbon Steel (India) (AB)*, para. 4.150.
[34] *Verification Report: Government of Nova Scotia* (September 2, 2015) p. 19 (Exhibit CAN-99).
[35] *See US – Softwood Lumber IV (AB)*, para. 101.
[36] *US – Carbon Steel (India) (AB)*, para. 4.151.
[37] SC Paper Final I&D Memo, p. 48 (Exhibit CAN-37).

rate in Canada. In sum, Canada has not demonstrated that Commerce's benchmark was inconsistent with Article 14(d).

III. Commerce's determination that Resolute failed to provide necessary information was not inconsistent with Article 12.7 of the SCM Agreement

24. Canada's claims regarding Commerce's application of facts available with respect to Resolute are also without merit. The U.S. first written submission presents a thorough discussion of Commerce's use of facts available and the applicable legal obligations of Article 12.7 of the SCM Agreement. Today, we would like to draw the Panel's attention to the systemic implications of Canada's proposed interpretation of Article 12.7 of the SCM Agreement.

25. The claims brought by Canada regarding discovered information seek to impose unsupported restrictions on a Member's ability to counter the injurious effects of subsidies. In essence, Canada seeks to convert the procedural requirements of the SCM Agreement into a means to hide a Member's subsidization from the scrutiny of an investigating authority.

26. Canada's interpretation is untenable. Part V of the SCM Agreement permits Members to levy countervailing duties on imported products to offset the benefits of subsidies bestowed on the manufacture, production or export of those goods.[38] In order to offset subsidization of a product causing injury, it is only logical for an investigating authority to ask questions in an investigation related to the potential subsidization of that product.

27. Canada claims that Commerce's "any other forms of assistance question" did not request information necessary to the investigation.[39] Canada's argument, however, mistakenly suggests that the respondent determines what is necessary to the investigation. This reflects a fundamental misunderstanding of the meaning of Article 12.7.

[38] *US – Carbon Steel (AB)*, para. 74.
[39] Canada First Written Submission, para. 238.

28. It is clear from the text of Article 12.7 that it is not for a respondent to determine what information is "necessary" to the investigation. Rather, Article 12.7 "permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization . . . and injury."[40] Thus, the investigating authority appropriately determines what information to request and what is "necessary" to the investigation into the potential subsidization of the product.

29. As explained in the U.S. first written submission, Commerce, as part of its investigation into the potential subsidization of SC Paper, requested information on "any other forms of assistance" to determine the extent to which Canada could be subsidizing the production of SC Paper.[41] 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. Thus, information about other forms of assistance was necessary for Commerce to arrive at a conclusion as to the extent of subsidization afforded to SC Paper imports.

30. Canada's reading of Article 12.7 would make it more difficult, if not impossible, to ensure that an investigating authority has what it needs to investigate potential injurious subsidization of certain imports. As explained in our first written submission, Article 25 of the SCM Agreement requires WTO Members to notify to Members in the SCM Committee any subsidy granted or maintained in their territory. The Article 25 notification requirement is intended to ensure that Members act in a transparent manner and disclose all subsidies in order to enable Members to "evaluate the trade effects and to understand the operation of the notified subsidy programs." If Canada had complied with its notification obligations, then the petitioner would have had information to examine and allege the receipt of this subsidy by Canadian

[40] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 291.
[4141] U.S. First Written Submission, para. 204.

respondent companies. Canada's failure to notify the programs discovered at verification, as required by Article 25, highlights why it is important for an investigating authority to be able to ask the "any other forms of assistance" question.

31. If a respondent is allowed not to provide information it subjectively deems unnecessary, respondents would be able to hide subsidies simply by asserting that the information requested was unnecessary. This would result in an incomplete investigation into the potential subsidization of certain imports and limit the investigating authority's ability to counter injurious subsidies. For these reasons and those discussed in our first written submission, Canada's reading of Article 12.7 should be rejected.

IV. Canada's "as such" claims concerning discovered information are without merit

32. We now turn to the issue of Canada's "as such" challenge concerning discovered information. Canada claims that the alleged "repeated application" of facts available to undisclosed subsidies in other investigations is a separate measure, which it calls both "ongoing conduct" and a norm of general and prospective application, and that these alleged measures are inconsistent "as such" with the SCM Agreement. As explained in our first written submission, these claims are without merit for three reasons. First, Canada has failed to identify the existence of a norm of general and prospective application. Second, to the extent that "ongoing conduct" could ever be a measure that may be subject to dispute settlement, Canada has failed to establish the existence of any such measure in this dispute. Third, Canada has not shown that either type of unwritten measure, even if Canada could prove existence, would be in breach of any WTO obligation.[42]

[42] U.S. First Written Submission, para. 323.

33. In the remainder of our opening statement – without repeating in full our arguments – we simply would like to highlight Canada's failure to make its case, both as a matter of evidence and as a matter of law. Canada's efforts to describe the application of facts available to undisclosed subsidies in other investigations as a "measure" that breaches WTO obligations "as such" have fallen short of the requirements in the DSU and findings articulated in past WTO reports. In its first written submission, Canada ignores the fact that challenged actions must have independent operational status in the sense of doing something or requiring some particular action.[43] The so-called "ongoing conduct" Canada seeks to challenge does not do something or require some particular action. Instead, Canada simply identifies seven determinations in which Commerce applied facts available. And, as I will discuss momentarily in the context of the alleged unwritten "norm," those instances were not identical, but rather varied according to the specific factual circumstances. Such evidence is insufficient to demonstrate the existence of an unwritten "ongoing conduct" measure.

34. Similarly, Canada's efforts to characterize actions taken by Commerce in these seven determinations as a "rule or norm of general and prospective application" is unconvincing. Canada has not established either the precise content of any alleged measure, or that its evidence shows some norm of general and prospective application.[44] Instead, the sum total of the evidence Canada adduces to support its claim consists of a handful of determinations by Commerce and a broad reference to Section 502 of the Trade Preferences Extension Act (TPEA).

35. With respect to the specific determinations, Canada merely reproduces two tables, one listing a series of questions included in seven investigations, and one listing excerpts from the issues and decisions memoranda in those investigations. The evidence Canada relies upon is

[43] *US – Export Restraints*, para. 8.85.
[44] *US – Zeroing (EC) (AB)*, paras. 196-198.

insufficient to identify the precise content of the alleged measure. The wording of the questions Canada has reproduced in Table 1 varies, and the excerpts listed in the second table all differ from each other. Canada's use of a series of varying 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.

36. In addition to insufficiently identifying the precise content of the so-called measure it is challenging, Canada has not demonstrated that the alleged measure is a norm of general and prospective application. Canada presents little more than a "string of cases, or repeat action" in support of its claim that a measure exists that can be considered a norm or rule of general and prospective application. The fact that Commerce may have applied facts available in some prior determinations based upon the particular circumstances of those proceedings does not transform Commerce's actions into a measure. As the panel stated in *US – Steel Plate*, "[t]hat a particular response to a particular set of circumstances has been repeated … does not, in our view transform it into a measure."[45]

37. And indeed, in all seven of the determinations Canada relies upon, Commerce made unique findings and reached *different* results. In fact, in the final determination for SC Paper, Commerce recognized that its approach to "assistance discovered during verification has varied in past cases" and provided *Large Residential Washers From the Republic of Korea* as an example of an investigation where Commerce did not countervail some of the grants that had been previously undisclosed and were not discovered until verification.[46]

38. With respect to Section 502 of the TPEA, Canada simply cites to three determinations in which the Act was referenced. Canada does not explain how those citations to the TPEA support

[45] *US – Steel Plate (Panel)*, para. 7.23
[46] SC Paper Final I&D Memo, p. 155 (Exhibit CAN-37).

the existence of an alleged unwritten norm of general and prospective application. Furthermore, on its face, the TPEA provides Commerce with the discretion to use facts available in its determination, and does not mandate any particular outcome. As acknowledged by Canada in its first written submission, the TPEA provides flexibility to Commerce, was recently enacted, and has only been referenced in a few administrative determinations.[47] The TPEA also does not support the existence of an alleged unwritten norm of general and prospective application.

39. In sum, Canada's efforts to construct a so-called "measure" based on Commerce's use of facts available and results reached in a handful of distinct determinations do not demonstrate the existence of a rule or norm of general and prospective application. Commerce's use of facts available is the result of fact-specific decisions made throughout an investigation. For these reasons and those explained in our first submission, Canada's "as such" claims must fail.

V. CONCLUSION

40. As we have demonstrated in the U.S. first written submission and again this morning, Canada's claims are without merit, and the United States respectfully requests that the Panel reject them.

41. Mr. Chairman, members of the Panel, this concludes the U.S. opening statement. We would be pleased to respond to your questions.

[47] Canada First Written Submission, para. 419.