

***UNITED STATES – COUNTERVAILING MEASURES ON
SUPERCALENDERED PAPER FROM CANADA***

(DS505)

**CLOSING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL**

June 14, 2017

Mr. Chairman, members of the Panel:

1. You have sat through long presentations and heard extensive arguments from both parties in our written submissions. It is evident from the questions you have asked that you have focused on those arguments and carefully reviewed our submissions. Given that, our closing statement will provide some additional points on three issues discussed during yesterday’s meeting: the hot idle funds, the forestry infrastructure fund, and programs discovered during verification.

2. With respect to the hot idle funds, I will focus on why the subsidy resulting from Nova Scotia’s provision of hot idle funds was not extinguished by the sale of the mill to Pacific West Commercial Corporation (“PWCC”). In this respect, we have concerns that our discussion yesterday somewhat departed from the legal framework set out in the SCM Agreement. To recall, the SCM Agreement states that a countervailing duty “is levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise.”¹ We do not think it is disputed that but for the sale of the mill, there would be no question that Nova Scotia’s provision of hot idle funds was a subsidy bestowed directly on the manufacture of SC paper, and that a countervailing duty was warranted. We further recall that for a grant of this type, Commerce allocates the amount of the grant over time. Thus, but for the sale of the mill, there would be no question that this grant would have been offset with a countervailing duty applied over the number of years that the grant was amortized.

3. The SCM Agreement does not specifically state that a subsidy is extinguished upon the transfer of ownership of the facility that produces the merchandise. Indeed, if the ownership was

¹ SCM Agreement, fn. 36.

transferred without a sale, such as in a corporate reorganization, then no one would argue that the subsidy is extinguished. Rather, the idea of extinguishment via an arms length sale is that the amount of the subsidy is reflected in the arms length sale price. Conceptually, the purchaser in essence disgorges the subsidy by paying more than it would have absent the subsidy. In appropriate circumstances, the subsidy may be considered to have been extinguished.

4. In the case of a subsidy, such as the one here, paid during the sales process, a key question is whether that subsidy was fully known at the time the sales price was established. If it was not, the subsidy could not have been reflected in the sale price. And if the subsidy was not reflected in the sales price, there simply is no basis for finding that the subsidy was somehow extinguished by the sale.

5. With this in mind, the United States would emphasize that the question of whether the buyer benefitted from the subsidy is arguably a departure from the SCM Agreement. First, the “benefit” in terms of a legal sense under the SCM Agreement is clear. In the case of a grant, the level of benefit is the amount of the grant. Second, the SCM Agreement does not ask whether a particular owner of an enterprise received a subsidy, or a benefit. Rather, the question, as noted, is whether the subsidy was “bestowed directly or indirectly upon the manufacture” of the merchandise.

6. That said, the question of whether the buyer “received a benefit” from the subsidy probably gets to the same place as a more technical discussion under the SCM Agreement. In any event, in the circumstances of this dispute, the buyer definitely benefitted from the hot idle funds. As explained in our prior submissions, PWCC submitted a bid for the mill as a “going

concern” in hot idle status for \$33 million, and ultimately purchased the mill for that same price.² After entering bankruptcy proceedings in September 2011, NewPage Port Hawkesbury (“NPPH”) set aside \$22 million in order to maintain the mill in hot idle status for PWCC during the bankruptcy proceedings; however, that amount was insufficient.³ After the submission of PWCC’s initial bid, the Government of Nova Scotia intervened to cover the additional costs of maintaining the mill in hot idle status – costs that NPPH could not cover and costs not reflected in PWCC’s \$33 million purchase price. If the Government of Nova Scotia did not intervene, PWCC would have had to pay an additional amount to keep the mill in hot idle status or the transaction would not have resulted in the transfer of an operational mill. Thus, absent the Government of Nova Scotia’s payment of hot idle funds, PWCC would not have been able to purchase the mill in “hot idle” status from NPPH without injecting its own funds to keep the mill in operational status. Furthermore, the level of Nova Scotia’s intervention could not have been reflected in the sales price, because neither the fact nor level of the government intervention was known at the time the sales price was established.

7. With respect to the Forestry Infrastructure Fund, PWCC agreed to purchase the mill as a “going concern.” As the Panel correctly noted during yesterday’s meeting, similar to the hot idle funds, the Forestry Infrastructure Fund was implemented to enable the forestry operations to continue during the bankruptcy process in order not to interrupt the supply chain operations at the mill. This enabled the mill to be operational on the first day after the sale. Without the Forestry Infrastructure Fund, the bankruptcy proceeding would have directly impacted NPPH’s forestry operations.

² SC Paper Final I&D Memo, p. 38 (Exhibit CAN-37).

³ SC Paper Final I&D Memo, p. 18 (Exhibit CAN-37).

8. As evident from Exhibit USA-18, Nova Scotia had strong incentives for wanting the mill to be operational and globally competitive from the moment the paper mill was sold.⁴ Positive evidence on the record supports Commerce’s finding that the Forestry Infrastructure Fund was a fund intentionally used by Nova Scotia to ensure that the mill was sold as a “going concern” in order to keep the mill in operation to the benefit of PWCC.

9. Now turning briefly to the programs discovered during verification. With respect to this issue, it is important to clarify that there are two distinct questions before the Panel. The first question concerns the initiation standard for investigating programs discovered during verification. The second question is whether an investigating authority can use facts available on the record to determine if a discovered program is countervailable.

10. With regard to the first question, as explained during yesterday’s session and throughout our written submissions, Article 11 of the SCM Agreement allows an investigating authority to investigate programs not mentioned by name in the written application provided the investigating authority satisfied the initiation standards as it relates to program or programs included in the written application. Here, Commerce made a threshold finding that there was sufficient evidence concerning countervailability with respect to 28 programs in its notice of initiation. However, that list is not exhaustive. This is because, as the United States has demonstrated, Commerce initiated an investigation into the alleged subsidization of SC Paper, and was not limited to seeking only information concerning the alleged programs that were initiated upon, pursuant to Article 11, by the written application. Programs discovered during the course of the investigation that relate to the alleged subsidization of the product under investigation are

⁴ *Supplemental Questionnaire: Government of Nova Scotia* (July 7, 2015), Exhibit NS-Supp1-5A, questions and answers (Exhibit USA-18) (BCI).

considered to be initiated upon due to the fact that the scope of the investigation from its outset was into the alleged subsidization of the product.

11. We have explained that the text, structure, and content of Article 11 of the SCM Agreement support this conclusion. Moreover, this is consistent with how other WTO members approach programs discovered during the course of the investigation.

12. It is important to emphasize that the initiation question is a separate inquiry from determining how an investigating authority treats programs discovered during verification. Article 12.7 allows an investigating authority to use facts available to determine whether a discovered program is in fact countervailable.

13. Interpreting Article 12.7 of the SCM Agreement in a manner that would prevent an investigating authority from using facts available on programs discovered during the course of the investigation would create perverse incentives for exporters. It would create an incentive for exporters not to be forthcoming with an investigating authority seeking to determine the extent of a particular product's subsidization. And, it would allow an exporter to possibly avoid a full investigation into the alleged subsidization should an investigating authority make such a discovery at verification or at a similarly late stage of an investigation. In that scenario, exporters are benefiting from hiding subsidies and the investigating authority is hindered from addressing any distortive effects of the undisclosed subsidies.

14. The U.S. written submissions explain in great detail the scope and meaning of Article 12.7 and we will not repeat those arguments today. We simply want to highlight for the Panel the two distinct questions at issue related to discovered programs and the consequence of interpreting Article 12.7 in a manner that prevents an investigating authority from using facts available on programs discovered during the course of the investigation.

15. The United States looks forward to responding in writing to the Panel’s questions and to commenting on responses provided by Canada.

16. The United States thanks the Panel, and the Secretariat staff assisting the Panel, for the careful attention you are giving to this matter. And with that, we conclude our closing statement.

17. Thank you.