UNITED STATES – CERTAIN SYSTEMIC TRADE REMEDIES MEASURES

REQUEST FOR CONSULTATIONS BY CANADA

The following communication, dated 20 December 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 ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 17 of the Agreement on the Implementation of Article VI of the GATT 1994 ("Anti-Dumping Agreement") and Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") concerning certain laws, regulations and other measures maintained by the United States with respect to U.S. anti-dumping and countervailing duty proceedings.

Canada considers that the United States maintains the following measures relating to anti-dumping or countervailing duty investigations, reviews or other proceedings, which are inconsistent with its WTO obligations:

A. The Liquidation of Final Anti-Dumping and Countervailing Duties in Excess of WTO-Consistent Rates and Failure to Refund Cash Deposits Collected in Excess of WTO-Consistent Rates

1. The United States purports to implement adverse WTO recommendations and rulings concerning US anti-dumping and countervailing measures, but does so in a manner that is not compliant with its WTO obligations.

2. If a US final determination, administrative review or other anti-dumping or countervailing duty measure is found to be WTO-inconsistent, the United States normally issues a determination under section 129 of the Uruguay Round Agreements Act ("section 129 determination") in an attempt to bring the measure into conformity with its WTO obligations. However, by the time it has issued a section 129 determination, the United States has ordinarily collected cash deposits at WTO-inconsistent anti-dumping or countervailing duty rates. The United States also normally "suspending liquidation" for these cash deposits until final assessment of the anti-dumping or countervailing duties occurs in an administrative review, or, if no administrative review is requested, at the rates established in the final anti-dumping or countervailing duty determination, or after the completion of judicial review by US courts or review by a NAFTA Chapter 19 panel.

3. If a section 129 determination reduces the relevant anti-dumping or countervailing duty rate, the United States does not apply the lower rate to entries of product under investigation that occurred prior to the date on which the section 129 determination is implemented and for which it has only collected cash deposits ("prior unliquidated entries"). In particular, the United States does not reduce
these anti-dumping or countervailing duty rates for prior unliquidated entries in the section 129 determination itself, in subsequent administrative reviews or other determinations that may pertain to prior unliquidated entries. These prior unliquidated entries are then subject to final assessment and liquidation at the higher WTO-inconsistent rates after the expiry of the reasonable period of time.

4. The United States also does not immediately issue instructions to refund the difference between the cash deposits paid at the previous WTO-inconsistent rate and the lower, revised rate resulting from the section 129 determination. Instead, it retains the excess cash deposits until final assessment is complete and liquidation is required under US law as a result of an administrative review or at the conclusion of US court or NAFTA Chapter 19 proceedings.

5. The United States maintains two WTO-inconsistent measures that arise out of its implementation of adverse WTO recommendations and rulings in the manner described above in paragraphs 2-4.

6. The first measure consists of the US policy or practice of not applying reduced anti-dumping or countervailing duty rates that result from a Section 129 determination to prior unliquidated entries. This measure is attributable to the United States as it relates to section 129 determinations, administrative reviews and other measures that the United States Trade Representative or the US Department of Commerce issue concerning US anti-dumping and countervailing duties. The precise content of this measure is described above in paragraphs 2-3. This measure has been applied repeatedly and it is likely that it will continue to be applied in the future. In the alternative, this measure constitutes ongoing conduct or a rule or norm of general and prospective application.

7. Canada submits that this measure is inconsistent with:

a. Article 9.2 of the Anti-Dumping Agreement and Article 19.3 of the SCM Agreement, because the measure results in the collection of duties in respect of prior unliquidated entries that are not in the "appropriate amounts";

b. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because the measure results in the assessment of anti-dumping duties in respect of prior unliquidated entries that are in excess of the margin of dumping;

c. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because the measure results in the assessment of countervailing duties in respect of prior unliquidated entries that are in excess of the amount of the subsidy found to exist;

d. Article 11.1 of the Anti-Dumping Agreement and Article 21.1 of the SCM Agreement, because the measure results in the collection of anti-dumping and countervailing duties in amounts that are greater than "the extent necessary" to counteract dumping or subsidization that is causing injury;

e. Article 21.1 of the DSU, because the measure prevents the United States from complying with the recommendations and rulings of the DSB or materially constrains its ability to do so; and

f. Article 21.3 of the DSU, because the measure prevents the United States from complying with the recommendations and rulings of the DSB within the reasonable period of time or materially constrains its ability to do so.

8. This measure relates to and is evidenced, in part, by the section 129 determinations set out in Annex I.

9. The second measure consists of the US Department Commerce's policy or practice of not issuing instructions to US customs authorities to refund excess cash deposits immediately following the implementation of a section 129 determination that results in a reduced anti-dumping or countervailing duty rate, regardless of its reasons for doing so. This measure is attributable to the
United States as it relates to section 129 determinations, administrative reviews and other measures that the United States Trade Representative or the US Department of Commerce issue concerning US anti-dumping and countervailing duties. The precise content of this measure is described above in paragraph 4. This measure has been applied repeatedly and it is likely that it will continue to be applied in the future. In the alternative, this measure constitutes ongoing conduct or a rule or norm of general and prospective application.

10. Canada submits that this measure is inconsistent with:

a. Article 9.2 of the Anti-Dumping Agreement and Article 19.3 of the SCM Agreement, because the measure results in the United States continuing to hold cash deposits for prior unliquidated entries that were not collected in the "appropriate amounts" after the expiry of the reasonable period of time;

b. Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, because the measure results in the United States continuing to hold cash deposits for prior unliquidated entries that are in excess of the margin of dumping after the expiry of the reasonable period of time;

c. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because the measure results in the United States continuing to hold cash deposits for prior unliquidated entries that are in excess of the amount of the subsidy found to exist after the expiry of the reasonable period of time;

d. Article 11.1 of the Anti-Dumping Agreement and Article 21.1 of the SCM Agreement, because the measure results in the United States continuing to hold cash deposits of anti-dumping and countervailing duties in amounts that are greater than "the extent necessary" to counteract dumping or subsidization which is causing injury after the expiry of the reasonable period of time;

e. Article 21.1 of the DSU, because the measure prevents the United States from complying with the recommendations and rulings of the DSB or materially constrains its ability to do so;

f. Article 21.3 of the DSU, because the measure prevents the United States from complying with the recommendations and rulings of the DSB within the reasonable period of time or materially constrains its ability to do so; and

g. The first supplementary note to Articles VI:2 and VI:3 of the GATT 1994, because the measure results in the United States continuing to hold cash deposits in an amount that exceeds "reasonable security" for the payment of anti-dumping and countervailing duties pending a final determination of duty liability after the expiry of a reasonable period of time.

11. This measure relates to and is evidenced, in part, by the section 129 determinations set out in Annex I.

B. Retroactive Provisional Anti-Dumping and Countervailing Duties Following Preliminary Affirmative Critical Circumstances Determinations

12. The United States frequently issues preliminary affirmative critical circumstances determinations, which then result in instructions to US customs authorities to retroactively suspend liquidation of entries and collect provisional anti-dumping and countervailing duties in the form of cash deposits or bonds for the 90 days period prior to the preliminary anti-dumping or countervailing duty determination. The US customs authorities then retroactively suspend liquidation of entries and may take other enforcement actions following the preliminary anti-dumping or countervailing duty determination.
13. The measure at issue is the US policy or practice of issuing preliminary affirmative critical circumstances determinations and instructions which direct US customs authorities to retroactively suspend liquidation of entries and collect provisional duties in the form of cash deposits or bonds for the 90-day period prior to the preliminary anti-dumping or countervailing duty determination. This measure is attributable to the United States as it concerns the US Department of Commerce’s preliminary affirmative critical circumstances determinations and its resulting instructions to US customs authorities. The precise content of this measure is described above in paragraph 12. This measure has been applied repeatedly and it is likely that it will continue to be applied in the future. In the alternative, this measure constitutes ongoing conduct or a rule or norm of general and prospective application.

14. Canada submits that this measure is inconsistent with Articles 10.1 and 10.6 of the Anti-Dumping Agreement and Articles 20.1 and 20.6 of the SCM Agreement as the issuance of preliminary affirmative critical circumstances determinations, which result in instructions to US customs authorities to suspend liquidation of entries and to collect provisional duties, is inconsistent with these provisions which only permit the retroactive imposition of definitive duties during the 90 days prior to the preliminary determination.

15. This measure is also inconsistent with Article 17.3 of the SCM Agreement as it results in the application of provisional duties in the 60 day period after the date of initiation of an investigation. It also violates Articles 7.4 of the Anti-Dumping Agreement and 17.4 of the SCM Agreement as it results in the application of provisional duties for a period that is longer than the prescribed time limit set out in these provisions.

16. This measure relates to and is evidenced, in part, by the US Department of Commerce’s preliminary affirmative critical circumstances determinations and instructions set out in Annex II.

17. Finally, in the alternative, if after it issues a preliminary affirmative critical circumstances determination the United States is required pursuant to §§ 703(d)-(e), 705(c)(3)-(4), 733(d)-(e) and 735(c)(3)-(4) of the Tariff Act of 1930 and 19 CFR § 351.206, to issue instructions to US customs authorities following the preliminary determination to retroactively suspend liquidation of entries and collect provisional duties, or if these provisions require the retroactive collection of provisional duties, these measures are “as such” inconsistent with Articles 10.1 and 10.6 of the Anti-Dumping Agreement and Articles 20.1 and 20.6 of the SCM Agreement. These provisions of the Tariff Act of 1930 and the U.S. Code of Federal Regulations in these circumstances would also be “as such” inconsistent with the prohibition on the application of provisional duties sooner than 60 days from the date of initiation, as set out in Article 7.3 of the SCM Agreement and with the prohibition on the application of provisional duties for a period longer than the time limits for the application such duties, as set out in Article 7.4 of the Anti-Dumping Agreement and Article 17.4 of the SCM Agreement.

C. The US Treatment of Export Controls in Countervailing Duty Proceedings

18. The United States treats export permitting processes, export levies, export quotas, export restraints, export bans, and other similar export controls (“Export Controls”) on input products that are used or incorporated into a product under investigation as financial contributions. As a result, the United States initiates investigations into and/or imposes countervailing duties with respect to these Export Controls.

19. The measure at issue is the US policy or practice of treating Export Controls as financial contributions and improperly initiating investigations into and/or imposing countervailing duties with respect to Export Controls that apply to input products that are used or incorporated into products under investigation. This measure is attributable to the United States as it concerns the US Department of Commerce’s findings concerning Export Controls in US countervailing duty investigations or reviews. The precise content of this measure is described above in paragraph 18. This measure has been applied repeatedly and it is likely that it will continue to be applied in the future. In the alternative, this measure constitutes ongoing conduct or a rule or norm of general and prospective application.
20. Canada considers this measure to be inconsistent with:

a. Article 1.1(a)(1) of the SCM Agreement, because the United States improperly determines that an Export Controls constitutes a financial contribution;

b. Articles 11.2, 11.3 and 11.6 of the SCM Agreement, because the United States initiates investigations into Export Controls where there is insufficient evidence of a financial contribution to support such an initiation; and

c. Articles 19.1, 19.3, 19.4, 21.1 and 21.2 of the SCM Agreement and Article VI:3 of the GATT 1994, because the United States improperly imposes countervailing duties with respect to Export Controls which cannot provide a financial contribution and therefore cannot constitute subsidies.

21. This measure has arisen in US countervailing duty proceedings referred to in Annex III.

D. The Improper Calculation of Benefit in Countervailing Duty Proceedings involving the Provision of Goods for Less than Adequate Remuneration

22. In countervailing duty proceedings, the United States determines whether a government has provided goods for less than adequate remuneration and calculates the alleged benefit by comparing the price of goods provided by a government to a benchmark price. The United States benefit calculation partially disregards comparisons where the government price is higher than the benchmark price by assigning a zero value to these comparisons.

23. The United States also claims that including comparisons that result in an above-benchmark price in the benefit calculation constitutes an "offset" not provided for in 19 U.S.C. 1677(6) and 19 C.F.R. §351.503(b).

25. The measure at issue is the US policy or practice of partially disregarding comparisons that result in negative values in calculating the alleged benefit associated with the provision of the government goods that are under investigation. This measure is attributable to the United States as it relates to the US Department of Commerce's benefit calculations in countervailing duty proceedings. The precise content of this measure is described above in paragraph 22. This measure has been applied repeatedly and it is likely that it will continue to be applied in the future. In the alternative, this measure constitutes ongoing conduct or a rule or norm of general and prospective application.

26. Canada considers this measure to be inconsistent with:

a. Articles 1.1(b) and 14(d) of the SCM Agreement, because this measure results in the calculation of benefit associated with the provision of goods by setting the results of comparisons that did not show a benefit to zero and, as a consequence, improperly determines the existence and amount of benefit associated with the provision of these goods; and

b. Articles 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because by setting the results of comparisons that did not show a benefit to zero before calculating the overall benefit, the measure results in the assessment of countervailing duties in inappropriate amounts that are in excess of the amount of any countervailable subsidy.

27. This measure relates to and is evidenced, in part, by the US countervailing duty determinations and reviews set out in Annex IV.

28. In the alternative, to the extent that the United States claims that 19 U.S.C. § 1677(6) and 19 C.F.R. § 351.503(b) require it to partially disregard comparisons where the government price is higher than the benchmark price in calculating the existence and amount of benefit, these provisions are "as such" inconsistent with:
a. Articles 1.1(b) and 14(d) of the SCM Agreement, because 19 U.S.C. § 1677(6) and 19 C.F.R. § 351.503(b) result in the calculation of benefit associated with the provision of goods by setting the results of comparisons that do not show a benefit to zero, and, as a consequence, improperly determine the existence and amount of benefit associated with the provision of these goods; and

b. Articles 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because by setting the results of comparisons that did not show a benefit to zero before calculating the overall benefit, 19 U.S.C. § 1677(6) and 19 C.F.R. § 351.503(b) result in the assessment of countervailing duties in inappropriate amounts that are in excess of the amount of any countervailable subsidy.

29. This measure relates to and is evidenced, in part, by the US countervailing duty determinations and reviews set out in Annex IV.

E. The United States’ Effective Closure of the Evidentiary Record before the Preliminary Determination

30. The United States restricts interested parties from submitting factual information or other evidence which would allow them to fully defend their interests in anti-dumping and countervailing duty investigations by effectively closing the evidentiary record before the preliminary determination. The United States purports to retain discretion to accept additional factual information after these deadlines have passed in “extraordinary circumstances.” However, it does not exercise, or almost never exercises, this discretion.

31. The United States restricts interested parties from submitting factual information or other evidence through a composite measure that consists of:

a. 19 CFR § 351.301(c)(3) and § 351.301(c)(5), which require interested parties to file "factual information" that was not previously requested or that concerns value factors or adequacy of remuneration, a minimum of 30 days prior to the preliminary determination;

b. 19 CFR § 351.301(a) and § 351.302(c), which prohibit the United States from exercising its discretion to accept factual information after the deadlines referred to in subparagraph (a) unless there are "extraordinary circumstances"; and

c. The US policy or practice of not exercising, or almost never exercising, its discretion to accept additional factual information in the circumstances described in subparagraph (b).

32. These US regulations and the US policy or practice function as a composite measure that is attributable to the United States as it relates to US regulations as well as the US Department of Commerce's policy or practice of not exercising, or almost never exercising, its discretion to accept additional factual information. The precise content of this composite measure is set out above in paragraphs 30-31. This measure has been applied repeatedly and it is likely that it will continue to be applied in the future.

33. This composite measure is inconsistent Articles 6.1, 6.2 and 6.9 of the Anti-Dumping Agreement and Articles 12.1 and 12.8 of the SCM Agreement as it establishes deadlines that do not provide interested parties "ample opportunity" to present all of the factual information necessary to fully defend their interests after the disclosure of the essential facts under consideration in the US Department of Commerce's preliminary anti-dumping or countervailing duty determinations.

34. This composite measure has arisen in the US anti-dumping and countervailing duty investigations in which it has refused to exercise its discretion to accept additional factual information including those set out in Annex V.
F. The US International Trade Commission Tie Vote Provision

35. The US International Trade Commission ("ITC") determines whether the US industry is injured or threatened with material injury in the United States. The ITC is normally composed of six Commissioners.

36. Section 771(11) of the Tariff Act of 1930 provides that where the Commissioners are evenly divided as to whether a determination of the ITC should be affirmative or negative, the ITC is deemed to have made an affirmative determination of:

   a. material injury to the industry of the United States;
   b. threat of material injury to such industry; or
   c. material retardation of the establishment of an industry in the United States,

as the case may be, by reason of imports of the product under investigation.

37. Section 771(11) prevents the United States from making an objective examination of injury, threat of injury or material retardation in its determinations as it creates an institutional bias in favour of affirmative results that is "as such" inconsistent with Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement.

38. Finally, section 771(11) results in the United States administering its laws, regulations, and decisions in a manner that is not uniform, impartial, and reasonable because of the institutional bias it creates in favour of affirmative results in injury, threat of injury, or material retardation decisions which is "as such" inconsistent with Article X:3(a) of the GATT 1994.

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 anti-dumping and countervailing duty measures in a manner that is inconsistent with Articles 1, 7.5, 9.3, 9.3.1, 9.4, 11.1, 11.2, 18.1, and 18.4 of the Anti-Dumping Agreement, Articles 10, 17.5, 19.1, 19.3, 19.4, 21.1, 21.2, 32.1 and 32.5 of the SCM Agreement and Articles VI:2 and VI:3 of the GATT 1994.

All of the US 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.
## Annex I

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