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### VIA E-MAIL (WEBMASTER\_SUPPORT@TRADE.GOV)

The Honorable Penny Pritzker  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Avenue, N.W.  
Washington, D.C. 20230

*Re: Comments Regarding Subsidy Programs Provided By Countries Exporting Softwood Lumber And Softwood Lumber Products To The United States (81 Fed. Reg. 74765)*

Dear Secretary Pritzker:

We submit these comments on behalf of the Conseil de l'industrie forestière du Québec ("CFIQ") in response to the request by the Department of Commerce ("Commerce" or "the Department") for comments on Subsidy Programs Provided By Countries Exporting Softwood Lumber And Softwood Lumber Products To The United States. 81 Fed. Reg. 74765 (Dep't of Commerce, October 27, 2016).

The Department has prepared its Softwood Lumber Subsidies Reports to Congress in connection with its obligations under the Softwood Lumber Act of 2008 to ensure compliance with the Softwood Lumber Agreement of 2006 between Canada and the United States ("SLA

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2006”) and to monitor, verify and report on export charges collected under that agreement.<sup>1</sup>

The purpose for the Department’s Softwood Lumber Subsidies Reports expired on October 12, 2015 with the expiration of SLA 2006.

I. **New Restrictions On Softwood Lumber Trade Would Be To The Detriment Of Downstream Industries And Consumers**

Canada has always been the primary and indispensable foreign supplier of softwood lumber to the United States. When President Obama and Canada’s Prime Minister Justin Trudeau met in Washington D.C. on March 10, 2016, they discussed, among other things, softwood lumber trade relations. They instructed their respective government officials to work toward the negotiation of a new softwood lumber agreement, instructions they renewed when they met again on June 29, 2016.<sup>2</sup> The two governments stated on October 12, 2016 that they “are committed to continuing negotiations in an effort to achieve a durable and equitable solution for North American softwood lumber producers, downstream industries, and consumers.”<sup>3</sup>

The U.S. lumber industry, seeking to increase the cost of essential materials for the U.S. housing market, has insisted that any new agreement contain more trade restrictions than SLA 2006. Hence, progress toward a mutually acceptable agreement that would be equitable for producers on both sides of the border, and U.S. downstream industries and U.S. consumers has been elusive. Instead, the U.S. lumber industry filed petitions on Black Friday, November

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<sup>1</sup> See *Softwood Lumber Act of 2008* at <http://enforcement.trade.gov/sla2008/sla-index.html>; see also *Softwood Lumber Act of 2008: Customs and Border Protection Established Required Procedures, but Agencies Report Little Benefit from New Requirements*, U.S. Government Accountability Office, GAO-10-220 (December 2009) (“GAO Report”).

<sup>2</sup> <https://www.whitehouse.gov/the-press-office/2016/06/30/joint-statement-prime-minister-canada-and-president>.

<sup>3</sup> <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/october/statement-canada-and-united-states>.

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25, 2016, seeking to renew litigation over softwood lumber trade and burden economic recovery.

The U.S. industry's petition relies heavily on Department of Commerce and International Trade Commission investigation determinations, the most recent now fifteen years old, that Canadian softwood lumber was subsidized and threatening injury to the U.S. industry. The petition conveniently does not mention that these determinations were reversed by NAFTA binational panels, WTO panels and the Appellate Body, Extraordinary Challenge Committees, U.S. courts, and the agencies themselves in administrative reviews and remand determinations. The resulting remand and administrative review determinations, which are effectively the final determinations of record, were negative: no subsidies, no injury, no threat of injury caused by imports of softwood lumber from Canada.

The National Association of Home Builders recently formed a consumer alliance with the National Retail Federation and the National Lumber & Building Materials Dealers Association, committed to providing American consumers access to a stable, dependable and affordable supply of lumber and building materials. This American Alliance of Lumber Consumers ("AALC") supports free trade in lumber and building materials because access to lumber and other readily available building materials enables home builders to provide safe, decent and affordable housing at prices competitive with other, typically more expensive products.

The AALC recognizes that both the threat of new trade litigation and the possibility of a trade-distorting agreement are detrimental to the housing market and the continuing economic recovery of the United States from the crippling recession that suddenly followed SLA 2006. The AALC has stated that it "believes restrictive trade agreements that impose quotas, tariffs

and other border tax measures have the potential to create large and unpredictable swings in the cost and supply of lumber and other key building materials, which hurts housing affordability.” It added that “any new agreement must be mindful of the U.S. housing market and ensure American consumers of lumber have access to a stable, dependable and affordable supply.”<sup>4</sup>

U.S. lumber manufacturers have never been able to provide all of the lumber demanded by U.S. homebuilders. The construction of trade barriers to restrict Canadian softwood lumber supply serves only to raise prices on new homes and home renovations for Americans. The Department of Commerce should not lose sight of the important domestic interests of U.S. downstream industries and the consuming public as it evaluates the Black Friday petitions, the conduct of any resulting investigations, and as the United States continues negotiations for a new softwood lumber agreement with Canada.

## **II. Subsidy Allegations And Market Distortions**

### **A. Subsidies And Countervailability**

The Department’s Reports to Congress contain the disclaimer that the reference to a program as a subsidy “does not constitute a finding regarding the countervailability ... under U.S. law or the WTO SCM Agreement.”<sup>5</sup> Subsidies that are not countervailable presumably do not distort markets.

There are four critical considerations in determining whether a government program distorts trade and may be offset by a countervailing duty. First, there must be a financial contribution by a government to the production or export of a foreign good. Second, the

<sup>4</sup> <http://nahbnow.com/2016/03/nahb-forms-coalition-dedicated-to-free-lumber-trade/>

<sup>5</sup> See e.g., U.S. Department of Commerce, “Softwood Lumber Subsidies Report To The Congress,” June 2016 (“June 2016 Report”), at 15.

financial contribution must confer a benefit on the subject merchandise. Third, the beneficial financial contribution must be specific to an enterprise or industry or group of enterprises or industries. Fourth, the specific, beneficial financial contribution must cause a domestic industry to experience injury or be threatened imminently with injury. This last condition—injury or threat of injury—is determined by the United States International Trade Commission, not Commerce.

The main alleged Canadian softwood lumber subsidy, for the last three decades, has been “stumpage,” the sale of timber cutting rights by provincial governments that, by virtue of the Canadian Constitution, own most of Canada’s natural resources, including the forests. According to the allegation, the provincial governments sell the cutting rights for “less than adequate remuneration,” meaning that the governments supposedly do not recover from the private forestry sector the full and fair value of the cutting rights, with the difference between what they collect and what they should collect (what ought to be a market price) representing a financial contribution.

**B. No Subsidies In Québec**

Canadian softwood lumber exports to the United States have been the subject of protracted legal disputes four different times, beginning in 1982, but ultimately never have been found to be unfairly subsidized, nor to injure or threaten injury, to any U.S. industry. A new investigation would be even less likely now to result in definitive subsidy and injury findings, at least as far as Québec is concerned. Québec revised radically its stumpage system in 2011 to make it even more market-determined than the system in the previous investigation, finishing in 2006, when no countervailable subsidy margin ultimately was found for Canada, including Québec.

The purpose of Québec's Sustainable Forest Development Act is to sell standing timber at market prices: Chapter A-18.1, 1, 1, 1. "This Act establishes a forest regime designed to . . . (5) govern the sale of timber and other forest products on the open market at a price reflecting their market value . . ."

Previously, prices in Québec's private forest, representing 20 to 23 percent of the harvest, were used to establish prices in the public forest. Now, responding to specific U.S. demands and experience in British Columbia (whose new auction-based stumpage system had been recognized and accepted by the United States upon entry into force of the SLA in October 2006), public forest stumpage fees are derived from public auctions. The province reserves 25% of the annual allowable cut of Crown timber for sale in auctions, in addition to the private forest harvest and timber purchased by Québec border mills from New England and New York. Nearly half Québec's stumpage thus is set by public auctions, private forest sales, and purchases of U.S. logs. The *Bureau de mise en Marché de bois* then sets the price for the remaining Crown timber based on the prices obtained at auctions of timber from the public forests.

The 75% of the public forest that is not auctioned in Québec (approximately half of the remaining harvest) is made available to former Timber Supply and Forest Management Agreement (CAAF) holders (those who have invested in mills and rely on the availability of standing timber) in return for the payment of 18% of the previous year's stumpage. That amount must be paid in an advance lump sum prior to the harvesting period, regardless of whether the whole or any volume is harvested. Québec industry also must pay auction prices and annual dues for established mills.

**C. The Department Cavalierly Claims Subsidies Where There Are None**

The Department, although careful to disclaim countervailability, has not been careful about what its Reports have characterized as subsidies to softwood lumber. The programs that allegedly subsidize softwood lumber, highlighted in the June 2016 Report, have little or nothing to do with subsidies or softwood lumber. As the Department's most recent example, the June 2016 Report includes the "Ontario Northern Industrial Electricity Rate Program" ("NIER") as a purported subsidy on the manufacture of softwood lumber, referencing the countervailing duty investigation of *Supercalendered Paper from Canada* as its reason for including it in the report.<sup>6</sup> However, the Department failed to acknowledge what it knows, from the *Supercalendered Paper* investigation itself, that NIER's eligibility requirements expressly state that, "facilities that are designated as Sawmills and Wood Preservation," e.g., lumber manufacturers, "would not be eligible for the NIER program."<sup>7</sup>

The Department has referenced a Pulp and Paper Green Transformation Program, a Transformative Technology Program, and a Forest Innovation Program, all programs of the Government of Canada, among its alleged softwood lumber subsidies. The first program terminated in March of 2012 and pertains to the production of pulp and paper, not softwood lumber, a fact the Department also knows from the *Supercalendered Paper* investigation.<sup>8</sup> The latter two similarly are listed as programs not for the support of softwood lumber, but rather for research and development into emerging forest biomass, biochemical and nanotechnology

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<sup>6</sup> June 2016 Report at 10.

<sup>7</sup> See *Northern Industrial Electricity Rate Program (NIER Program) Program Rules*, Ontario Ministry of Northern Development and Mines at 6, available at [http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/019-0297E~2/\\$File/0297E\\_Guide.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/019-0297E~2/$File/0297E_Guide.pdf).

<sup>8</sup> Issues and Decision Memorandum, *Supercalendered Paper from Canada*, 80 Fed. Reg. 63535 (Oct. 20, 2015).

programs. The Department has inquired into some of these programs in another investigation and knows the facts about them.<sup>9</sup>

The Department mentions softwood marketing program subsidies, but some of these programs no longer exist (“the VWP expired in March 2011,” June 2016 Report at 11), or are so old, with so little value, they serve only to give an exaggerated impression of government assistance. The Department examined Canada’s Investments in Forest Industry Transformation Program in the *Supercalendered Paper from Canada* investigation, but found no use of the program and therefore no countervailable subsidies.<sup>10</sup>

The Report contains additional examples of casual, exaggerated characterizations of subsidies. The Department makes a subsidy allegation that “Canada imposes export controls on logs, pulpwood and red cedar products to promote further processing in Canada.”<sup>11</sup> The Department should note that the WTO panel in *United States—Measures Treating Export Restraints as Subsidies*, WT/DSR194/R, Panel Report 29 June 2001 found that export restrictions did not constitute a financial contribution under Article 1.1 of the WTO’s Subsidies and Countervailing Measures Agreement because they did not constitute a government-entrusted or government-directed provision of goods. Moreover, the Department should recognize that the United States Department of Interior, Bureau of Land Management, imposes and enforces restrictions on the export of unprocessed timber from federal lands in the United States<sup>12</sup> and the Department’s Bureau of Industry and Security controls the export of

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> June 2016 Report at 11.

<sup>12</sup> See e.g., 43 C.F.R. 5400.0-3(c) and (e).



unprocessed western red cedar, even to Canada, for short supply reasons.<sup>13</sup> The Department should consider the international trade implications for U.S. exporters of lumber that would arise from a policy equating log export restrictions with countervailable subsidies.

The Department has been questioning and investigating tiny programs in Québec's private forest for more than three decades. These programs have always been found irrelevant or *de minimis*. They also provide far less support to private forest owners than the United States and state and local governments provide for private forest owners.

Commerce has "identified" repeatedly for Congress "subsidies identified in connection with the SLA which have been reviewed by an arbitration panel" and "Additional Subsidies Identified in Connection with the SLA."<sup>14</sup> The SLA 2006 and its dispute settlement mechanisms in fact neither identified nor defined countervailable subsidies. It had no provision for identifying and offsetting countervailable subsidies.

What Commerce seems to mean in its identifications is any grant or other benefit that had been determined to reduce or offset the taxes or quotas imposed by the SLA that was not covered by an exception.<sup>15</sup> SLA arbitration panels reviewed allegations that such grants or benefits circumvent the tax or quota Export Measures, but their findings and conclusions were not determinations that a program was a countervailable subsidy. Moreover, the SLA "subsidies" referenced had no connection to the manufacture or production of Canadian softwood lumber today:

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<sup>13</sup> See 15 C.F.R. 754.4.

<sup>14</sup> June 2016 Report at 12-14.

<sup>15</sup> See SLA 2006 Article XVII.

- Québec Forest Industry Support Program. A loan guarantee program terminated in 2011.
- Québec 15% Capital Tax Credit. A capital tax gradually phased out, beginning in 2007, until it finally was abolished in 2011. The capital tax credit similarly expired with the capital tax in 2011.
- Québec Road Tax Credit. Program expired on April 1, 2013.
- Québec Reductions in Operational and Silvicultural Costs. The Programme d'investissement sylvicole (PIS), terminated on March 31, 2014.
- Canada's Forest Industry Long-Term Competitiveness Initiative. Programs developed to promote innovation and investment in the forest sector, expand market opportunities, and develop a national forest pest strategy. They provide no support for the production or export of softwood lumber and consequently could not be identified as softwood lumber "subsidies." The initiative sponsors innovation and market opening and development, primarily through associations and non-profit organizations, to promote the use of wood as an environmentally friendly building material.

### **III. Subsidy Findings Require Substantiated Allegations And Thorough Investigation**

The Department appears to be changing its practices to ready itself for recognition of China as a market economy in a climate in which it views China as inherently cheating and deserving of punishment regardless of the facts or the Department's legal obligations. The Department appears to be carrying over that distrust into how it is treating traditional market economies like Canada. The Department has taken to finding "subsidies" that are not alleged

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and countervailing them without investigation.<sup>16</sup> These actions, if continued, could render these reports to Congress pointless.

The law has not changed: it remains necessary for petitioners to allege a subsidy and to substantiate the allegation.<sup>17</sup> We are answering the known allegations against softwood lumber from Canada, at least as to Central Canada. As discussed in Section II.B *supra*, Québec radically revised how it manages crown stumpage based on a new auction system designed to satisfy the United States. Similarly, a NAFTA Binational Panel and the Department on remand found in Lumber IV that the residual value system in Ontario did not confer a countervailable subsidy.<sup>18</sup>

We cannot answer the unknown. Congress ought to discourage the Department from treating trustworthy allies and trade partners as dishonest, and the Department should not abandon statutory procedures in favor of suspicion and prosecution.

Respectfully submitted,



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<sup>16</sup> See Section II.C *supra*.

<sup>17</sup> 19 U.S.C. § 1671a(b)(1).

<sup>18</sup> See *In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination*, Secretariat File No. USA-CDA-2002-1904-03 NAFTA Binational Panel Review, FOURTH REMAND DETERMINATION (July 7, 2005) available at: <http://enforcement.trade.gov/remands/USA-CDA-2002-1904-03-cvd4.pdf>.