

SOFTWOOD LUMBER SUBSIDIES REPORT TO THE CONGRESS

U.S. Department of Commerce

December 2014

TABLE OF CONTENTS

| | |
|---|----------|
| Background and Reporting Methodology..... | 3 |
| Identification of Subsidies..... | 3 |
| Subsidies Provided..... | 5 |
| Conclusion..... | 13 |
| Public Comments..... | Appendix |

I. Background and Reporting Methodology

As an initial matter, given the large number of countries that export softwood lumber and softwood lumber products to the United States, we concluded that it was untenable to find subsidy information for every country that exports softwood lumber or softwood lumber products to the United States.¹ Instead, in order to provide a report that reflects subsidies which have a significant impact on the U.S. softwood lumber industry, we analyzed U.S. imports of softwood lumber and softwood lumber products to determine which countries were the largest exporters of such products to the United States. As a result, based on data published by the United States International Trade Commission Tariff and Trade DataWeb, we include in this report subsidies provided by Canada, the only country with exports accounting for at least one percent of total U.S. imports of softwood lumber by quantity, as classified under Harmonized Tariff Schedule code 4407.1001,² during the period January 1, 2014 through June 30, 2014. In particular, Canada accounts for 96.72 percent of total U.S. imports.

As in past reports, for this, the Thirteenth Softwood Lumber Subsidies Report to Congress (Thirteenth Report), we are relying on a six-month period to identify the countries subject to review. We will rely on U.S. imports of softwood lumber and softwood lumber products during the period July 1, 2014 through December 31, 2014, to select the countries subject to the next report.

Under U.S. countervailing duty (CVD) law, a subsidy will be found if a government authority: (i) provides a financial contribution, (ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or (iii) makes a payment to a funding mechanism to provide a financial contribution to a person, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, and a benefit is thereby conferred. *See* section 771(5)(B) of the Tariff Act of 1930, as amended (the Act).

II. Identification of Subsidies

The U.S. Government investigates and monitors the provision of subsidies by other countries through various means, including the enforcement of U.S. trade laws, participation at the World Trade Organization (WTO), the implementation of bilateral trade agreements, as well as public comment. Therefore, we examined subsidies identified in those areas, specifically: A) CVD investigations and reviews; B) WTO reporting by member countries and WTO monitoring; C) subsidies identified in the course of enforcing bilateral agreements regarding softwood lumber and softwood lumber products; and D) comments from the public.

¹ For the period January 1, 2014 through June 30, 2014, thirty-nine countries had exports of softwood lumber to the United States.

² Imports classified under Harmonized Tariff Schedule code 4407.1001 account for the vast majority of imports of softwood lumber and softwood lumber products.

A. Countervailing Duty Proceedings

To identify subsidies on softwood lumber or softwood lumber products provided by Canada, we analyzed the most recently completed CVD proceedings involving exports to the United States of softwood lumber or softwood lumber products from Canada and have included in this report any subsidies identified in relevant proceedings.

In 2006, the United States and Canada signed the Softwood Lumber Agreement (SLA), a bilateral accord between the United States and Canada, which resulted in the U.S. government terminating the most recent CVD order on imports of Canadian softwood lumber.³ The CVD order had been established in 2002, pursuant to U.S. government determinations that federal and provincial governments in Canada were unfairly subsidizing Canadian producers, and that imports of the subsidized Canadian lumber threatened to injure the U.S. industry. We included in our first twelve reports subsidies identified in the last administrative review of the CVD order on softwood lumber from Canada, which was completed prior to the termination of the order pursuant to the SLA. That administrative review covered the period April 2003 through March 2004. We continue to report these identified subsidies.

B. WTO Notifications and Monitoring

We identified two sources of information from the WTO – Subsidies Notifications and Trade Policy Reviews (TPRs). The Subsidies Notification is the primary source of information under the WTO framework for each member country's subsidy programs. WTO member countries are required to notify the WTO of specific subsidies, in accordance with Article 25 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). This portion of the SCM Agreement requires that members notify all specific subsidies, at all levels of government and covering all goods sectors, to the SCM Committee. New and full notifications are due every two years; members may also submit updated notifications at any time, but those particular notifications have been de-emphasized by the SCM Committee. These documents are available from the WTO Secretariat and may be accessed through the WTO's website.⁴

Pursuant to the WTO's Trade Policy Review (TPR) Mechanism, each WTO member country's national trade policies are subject to periodic review by the WTO Secretariat, which then publishes a report. Information on subsidy programs is also found in the TPR report of each member country. The frequency of each country's TPR varies according to its share of world trade. Canada is subject to review every four years. The TPR reports for each country are available from the WTO Secretariat and may be accessed through the WTO's website.⁵

³ In January of 2012, the United States and Canada signed a two-year extension of the SLA, which extended the SLA from October 12, 2013 to October 12, 2015.

⁴ http://www.wto.org/english/tratop_e/scm_e/scm_e.htm.

⁵ http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#bycountry.

C. Monitoring and Enforcement Related to Bilateral Trade Agreements

We have also included in this report subsidies identified in the course of administering and enforcing the SLA.⁶ As noted above, on September 12, 2006, the United States and Canada signed the 2006 SLA to settle outstanding disputes regarding the importation of softwood lumber from Canada into the United States. Pursuant to the SLA, the United States terminated the antidumping and countervailing duty orders on softwood lumber from Canada, refunded cash deposits, and agreed not to impose other trade remedies. In exchange, Canada agreed to impose certain export measures and not to take any action having the effect of reducing or offsetting the export measures.

D. Public Comment

On October 27, 2014, the Department published a notice in the *Federal Register* soliciting public comment on subsidies provided by Canada on softwood lumber or softwood lumber products for inclusion in this report.⁷ The comments received are attached as Appendix I. To the extent these comments contain information regarding any potentially new subsidy programs we will review that information, going forward, as appropriate.

III. Subsidies Provided

In the First Report, we listed all known subsidies, identified using the methodology described above, provided by Brazil, Canada, Chile, and Germany on softwood lumber or softwood lumber products exported to the United States. In the Second Report, we listed all known subsidies, identified using the methodology described above, provided by Canada, Chile, and Germany. In the Third Report, we listed all known subsidies, identified using the methodology described above, provided by Brazil, Canada, Chile, Germany, and Sweden. In the Fourth, Fifth, Sixth, Seventh, and Twelfth Reports, we listed all known subsidies, identified using the methodology described above, provided by Canada and Chile. In the Eighth, Ninth, Tenth, and Eleventh Reports, we listed all known subsidies, identified using the methodology described above, provided by Canada.⁸

For the period January 1, 2014 through June 30, 2014, in this Thirteenth Report we have applied the methodology described above with regard to Canada. No new subsidies were identified for Canada in comparison with the Twelfth Report. The subsidies identified for Canada are as follows.

Canada

⁶ The SLA is particular to Canada. The United States does not have a similar agreement involving softwood lumber or softwood lumber products from any other country.

⁷ See *Subsidy Programs Provided by Countries Exporting Softwood Lumber and Softwood Lumber Products to the United States; Request for Comment*, 79 FR 63895 (October 27, 2014).

⁸ Our previous reports are posted on our website at www.trade.gov/Enforcement under the “Trade Agreements” link. See <http://enforcement.trade.gov/sla2008/sla-index.html>.

We previously identified subsidies provided by Canada on softwood lumber and softwood lumber products through examinations of the most recently completed CVD administrative review, WTO notifications, and the implementation and enforcement of the SLA. There have been no new TPRs or Subsidies Notifications for Canada since the last Report; thus, the following are unchanged from the prior Report.

Subsidies Identified in CVD Proceedings

The Department determined that the following programs benefited Canadian softwood lumber producers in the second administrative review of imports under the CVD order, which was the last administrative review completed before the order was terminated. The second administrative review investigated Canadian subsidy programs in effect between April 2003 and March 2004.⁹

- A. Provincial Stumpage Programs (provision of lumber for less than adequate remuneration)
 - 1. Alberta
 - 2. British Columbia
 - 3. Manitoba
 - 4. Ontario
 - 5. Quebec
 - 6. Saskatchewan

In Canada, the vast majority of standing timber used by softwood lumber producers originates from lands owned by the Crown. Each of the Canadian provinces reviewed in the last administrative review completed under the most recent CVD order, *i.e.*, Alberta, British Columbia, Manitoba, Ontario, Quebec, and Saskatchewan, has established programs through which it charges certain license holders “stumpage” fees for standing timber harvested from Crown lands. In the underlying investigation of the most recent CVD order and in subsequent administrative reviews, the Department found that the provincial governments provided a countervailable subsidy to softwood lumber producers by selling the key input for softwood lumber production, timber, to the Canadian producers in each of the provinces listed above for less than adequate remuneration.

⁹ During the conduct of the investigation and three subsequent administrative reviews, the Department investigated a large number of programs, not all of which were in use, or evaluated, during the second administrative review. Because the second administrative review was the most recently completed administrative review with a final determination, we have used it as the most current and accurate measure of our findings.

B. Non-Stumpage Programs Determined To Confer Subsidies

Programs Administered by the Government of Canada

1. Western Economic Diversification Program (WDP): Grants and Conditionally Repayable Contributions

Introduced in 1987, the Western Economic Diversification Program (WDP) is administered by the Government of Canada's (GOC's) Department of Western Economic Diversification headquartered in Edmonton, Alberta, whose jurisdiction encompasses the four western provinces of Alberta, British Columbia, Manitoba, and Saskatchewan. The program supports commercial and non-commercial projects that promote economic development and diversification in the region.

During the 2003-2004 period covered by the most recently completed administrative review of the CVD order, the WDP provided grants to softwood lumber producers or associations with two "sub-programs," *i.e.*, the International Trade Personnel Program (ITPP) and "Other WDP Projects." Under the ITPP and "Other WDP Projects," companies were reimbursed for certain salary expenses in Alberta, British Columbia, Manitoba, and Saskatchewan.

2. Natural Resources Canada (NRCan) Softwood Marketing Subsidies

In 2002, the GOC approved a total of C\$75 million in grants to target new and existing export markets for wood products and to provide increased research and development to supplement innovation in the forest products sector. This total was allocated to three sub-programs: Canada Wood Export Program (Canada Wood), Value to Wood Program (VWP), and the National Research Institutes Initiative (NRII). The programs were placed under the administration of NRCan, a part of the Canadian Forest Service.

The VWP is a five-year research and technology transfer initiative supporting the value-added wood sector through partnerships with academic and private non-profit entities. In particular, during the 2003-2004 period of review, NRCan entered into research contribution agreements with Forintek Canada Corp. (Forintek) to do research on efficient resource use, manufacturing process improvements, product development, and product access improvement. The VWP is still available. See below under "Subsidies Identified from Canada's WTO Notification" for additional information.

The NRII is a two-year program that provides salary support to three national research institutes: the Forest Engineering Research Institute of Canada (FERIC), Forintek, and the Pulp & Paper Research Institute of Canada. In the 2003-2004 administrative review, the Department found that research undertaken by FERIC constitutes a government financial contribution to commercial users of Canada's forests. Further, the Department found that FERIC's research covers harvesting, processing, and transportation of forest products, silviculture operations, and small-scale operations and,

thus, the Department determined that government-funded R&D by FERIC benefits, *inter alia*, producers of softwood lumber. Similarly, the Department found that Forintek's operations, done in collaboration with the GOC under NRII, which pertain to resource utilization, tree and wood quality, and wood physics,¹⁰ also constitute a government financial contribution. The Department also reconfirmed its earlier determination that because grants offered under the NRII are limited to Forintek and FERIC, institutions that conducted research related to the forestry and logging industry, the wood products manufacturing industry, and the paper manufacturing industry, the program is specific to that industry. The NRII is periodically reinstituted and is currently in effect.

Programs Administered by the Government of British Columbia

1. Forestry Innovation Investment Program (FIIP)

The Forestry Innovation Investment Program came into effect on April 1, 2002. On March 31, 2003, FIIP was incorporated as Forestry Innovation Investment Ltd. (FII). FII funds are used to support the activities of universities, research and educational organizations, and industry associations producing a wide range of wood products. FII's strategic objectives are implemented through three sub-programs addressing: research, product development and international marketing.

The Department reconfirmed its earlier finding that the FII grants are provided to support product development and international marketing for Canadian softwood lumber producers.

2. British Columbia Private Forest Property Tax Program

British Columbia's property tax system has two classes of private forest land -- Class 3, "unmanaged forest land," and Class 7, "managed forest land" -- that incurred different tax rates from the 1990s through the 2003-2004 period of review. In the second administrative review, the Department reaffirmed its earlier finding that property tax rates for Class 7 were generally lower than for Class 3 land at all levels of tax authority for most, though not all, taxes. The Department further reaffirmed its finding that the various municipal and district (a.k.a. regional) level authorities imposed generally lower rates for Class 7 than for Class 3 land. The tax program is codified in several laws, of which the most salient is the 1996 Assessment Act (and subsequent amendments). Section 24(1) of the Assessment Act contains forest land classification language expressly requiring that, *inter alia*, Class 7 land be "used for the production and harvesting of timber." Additionally, Section 24(3) or 24(4) of the Assessment Act, depending on the edition of the statute, requires the assessor to declassify all or part of Class 7 land if "the assessor is not satisfied. . . that the land meets all requirements" for managed forest land classification. Amendments to the provision, enacted from 1996 through 2003, retained the same language stating these two conditions. Thus, the law as published during the 2003-2004 period of review required that for private forest land to

¹⁰ The area of wood science is concerned with the physical and mechanical properties of wood and the factors which affect them.

be classified, and remain classified, as managed forest land, it had to be “used for the production and harvesting of timber.”

The Department also found that because the British Columbia tax authorities impose two different tax rates on private forest land, the governments are foregoing revenue when they collect taxes at the lower rate, and the program thus provides a government financial contribution to the British Columbia lumber industry. Further, the Department determined that because the Assessment Act expressly requires that Class 7 land be “used for the production and harvesting of timber,” and additionally requires the assessor to declassify any Class 7 land not meeting all of the Class 7 conditions (of which timber use was one), the British Columbia private forest land tax program is specific to the industry as a matter of law. The Department considered the sum of the tax savings enjoyed by Class 7 sawmill landowners at the provincial, regional, and sub-provincial (or local) levels of tax authority in British Columbia to represent the value of this subsidy.

Programs Administered by the Government of Quebec

1. Private Forest Development Program

The Private Forest Development Program (PFDP) involves the provision of certain grants to private forest landowners. These grants provide incentives to private land owners to grow more trees, which increases the supply of wood available to softwood lumber producers. In addition, some of the sawmill operators also own private land and receive these incentives. The system is set up so that every holder of a wood processing plant operating permit in Quebec must pay the Government of Quebec a fee of C\$1.20 for every cubic meter of timber acquired from a private forest. These fees fund, in part, the PFDP.

Canada reported in recent WTO notifications that the PFDP program was created in 1995 to protect and enhance registered forest land and that it remains an ongoing program.¹¹ Canada reported that the assistance is limited to 80 percent of the costs of eligible initiatives, but the aggregate value of assistance and identity of beneficiaries are not provided in the notification. *See Canada N220* at page 44 and *Canada N253* at page 48.

¹¹ *See New & Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures*, G/SCM/N/220/CAN (7/14/11) (*Canada N220*), at 44; and *New & Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures*, G/SCM/N/253/CAN (7/19/13) (*Canada N253*), at 48.

Additional Subsidies Information from Canada's WTO Notifications

The following programs were reported in *Canada N220* and/or *Canada N253*.

1. Pulp and Paper Green Transformation Program¹²

On June 17, 2009, Canada announced a \$1 billion Pulp and Paper Green Transformation Program (PAPGTP) to support its pulp and paper producers. The stated purpose of this program was to improve energy efficiency and renewable energy production technologies. Canada reported in its WTO Notification that the program provided contribution funding, capped at CAD \$1 billion, to pulp and paper companies for environmental upgrades to Canadian facilities, based on a credits system. As of March 31, 2012, when the program ended, 38 pulp and paper mills across Canada, representing 24 companies, generated credits under the PAPGTP based on their 2009 production levels of black liquor.¹³ The GOC confirmed on its website that the program ended on this date. See <http://cfs.nrcan.gc.ca/pages/231>.

2. Value to Wood (VWP)

As explained above in the “Subsidies Identified in CVD Proceedings” section, the VWP was one of three softwood marketing subsidy programs administered by NRCan. Canada reported in its WTO Notification that the VWP funded pre-competitive research and technology transfer activities in support of secondary wood products manufacturers. Canada reported that the VWP expired in March 2011. See *Canada N220* at page 27 and *Canada N253* at page 27.

3. Investments in Forest Industry Transformation Program (IFIT)

Launched in August 2010, the IFIT provides targeted investments for projects that implement new technologies leading to non-traditional high-value forest products and renewable energies. Eligible recipients are companies that produce forest products and own at least one existing forest product manufacturing facility located in Canada. Projects were selected for funding through a competitive process. The program is funded under the *Department of Natural Resources Act* and the *Energy Efficiency Act*. See *Canada N253* at page 25.

4. Transformative Technology Program (TTP)

The TTP provides funding under the *Department of Natural Resources Act* and the *Forestry Act* in the form of contributions for pre-competitive, non-proprietary R&D for development and adaptation of emerging technologies such as forest biomass, forest biotechnology and nanotechnology. The program was created in April 2007. Funded research focuses on the development of breakthrough technologies related to forest

¹² This program was listed in the Sixth Report under the heading “Additional Subsidies Identified in Connection with the SLA.”

¹³ Source: <http://www.nrcan-rncan.gc.ca/media/newcom/2009/200961a-eng.php>.

biomass utilization, nanotechnology, and next-generation forest products, as well as addressing on-going productivity challenges facing the industry. The program is funded under Canada's Forest Innovation Program. *See Canada N253* at page 26.

5. Quebec Forestry Financing Program

Ongoing since 2004, under the Québec Ministère des Ressources Naturelles et de la Faune, the program supports certified forest producers in acquiring forest plots, with assistance provided in the form of loan guarantees for loans of up to \$750,000. *See Canada N253* at page 48.

6. Ontario Tax Credit for Manufacturing and Processing

Canada reported in its WTO Notification that this program provides a tax credit under the Ontario Taxation Act 2007 against Ontario taxable income for eligible Canadian profits from manufacturing and processing, farming, fishing, logging, mining, the generation of electrical energy for sale, or the production of steam for sale. Canada did not report the amount or rate of the credit. *See Canada N220* at page 41.

7. Quebec Private Forest Property Tax Refund

Canada reported in its WTO Notification that this program provides refunds of up to 85 percent of property taxes for certified forest producers that log in privately-owned forests. The program was created in 1998 to encourage producers to undertake projects to increase the value of their privately owned forests and remains an ongoing program. *See Canada N220* at page 44 and *Canada N253* at page 49.

Subsidies Identified in Connection with the SLA which have been Reviewed by an Arbitration Panel¹⁴

On September 30, 2013, the United States and Canada agreed to jointly initiate arbitration under the SLA to resolve a disagreement over the implementation of a prior SLA arbitration award (LCIA No. 81010B). The 81010B award required Canada to apply additional export charges on shipments of softwood lumber from Quebec and Ontario to remedy breaches of the SLA concerning certain forestry programs in those provinces. On April 2, 2014, the LCIA Tribunal found that Canada's collection obligations pursuant to the 81010B award ended on October 12, 2013.

1. Ontario Forest Sector Loan Guarantee Program

This program was announced in 2005 to make available C\$350 million in loan guarantees over five years to stimulate and leverage investment in the forest industry.

¹⁴ The first five of these programs was listed in each of the first five reports under the heading "Subsidies in Connection with the SLA upon which Arbitration has been Requested." The sixth program was listed in the sixth, seventh, and eighth reports under the heading "Subsidies in Connection with the SLA upon which Arbitration has been Requested."

These loan guarantees could be for a term of two to five years and generally range from C\$500,000 to a maximum of C\$25 million.

2. Ontario Forest Sector Prosperity Fund

This grant program was announced in 2005 to provide grants to the forest sector that would support and leverage new capital investment programs.

3. Forest Industry Support Program

This program was announced in 2006 to make available C\$425 million in financing to foster investment and modernization projects to improve the productivity and competitiveness of Quebec's forest products industry.

4. 15% Capital Tax Credit

This program was announced in 2006 to provide a 15% tax credit to Quebec's forest products industry on investments in manufacturing and processing equipment through 2009.

5. Quebec's Road Tax Credit¹⁵

This program was announced in 2006 and allowed the Government of Quebec to incur costs previously borne by the forest products industry. The program includes C\$100 million for a refundable tax credit of 40% for the construction of and major repairs to access roads and bridges.

6. British Columbia Sales of Grade 4 Timber

Since 2007, British Columbia has sold increasing amounts of publicly-owned timber in its interior for salvage rates, providing a benefit to softwood lumber producers. While the mountain pine beetle infestation has caused extensive damage to forests in British Columbia, the majority of the damaged timber is usable for softwood lumber products.

On July, 18, 2012, a LCIA Tribunal acknowledged the dramatic increase in the amount of timber priced as grade 4 in British Columbia, and reviewed a number of actions by British Columbia that the United States had explained helped account for that increase (LCIA No. 111790). However, the tribunal did not find that Canada had circumvented the LCIA.

¹⁵ In each of the first five reports, this funding was included in the program description "Forest Management Measures," which was listed under the heading "Subsidies in Connection with the SLA upon which Arbitration has been Requested."

Additional Subsidies Identified in Connection with the SLA¹⁶

1. Wood Promotion Program

The Government of Ontario provides C\$1 million per year in funding to the forest products industry to enhance value-added manufacturing.

2. North Ontario Grow Bonds Program

The Government of Ontario provided approximately C\$13 million in bonds to new and growing businesses in the North. For example, in September 2006, a C\$250,000 loan to the Manitou Forest Products Limited for expansion of its sawmill was among the projects funded.

3. Forest Industry Long-Term Competitiveness Initiative

This program provides government funding for research and development that benefits the forest products industry.

4. Ontario Forest Access Road Construction and Maintenance Program¹⁷

This program was announced in 2006 to make available C\$75 million to reimburse forest companies for costs incurred for constructing and maintaining primary and secondary forest access roads.

5. Reductions in Operational and Silvicultural Costs¹⁸

This program was announced in 2006 and allowed the Government of Quebec to incur costs previously borne by the forest products industry. The program includes C\$210 million in measures to reduce the cost of operations and silvicultural investments.

¹⁶ These programs were listed in the Twelfth Report.

¹⁷ This program was listed in each of the first five reports under the heading “Subsidies in Connection with the SLA upon which Arbitration has been Requested.”

¹⁸ In each of the first five reports, this funding was included in the program description “Forest Management Measures,” which was listed under the heading “Subsidies in Connection with the SLA upon which Arbitration has been Requested.”

IV. Conclusion

We note that this report covers all subsidies identified following the reporting methodology described above and does not constitute a finding regarding the countervailability of the listed subsidies under U.S. law, or their status under the SLA or the WTO SCM Agreement. We also note that this report only includes subsidies identified pursuant to the described reporting methodology. A subsidy's presence in or absence from this report is not an indication of whether the subsidy is countervailable under U.S. law, is in accordance with the relevant WTO agreements, or is actionable under any other international agreement.

Appendix

PICARD KENTZ & ROWE

Picard Kentz & Rowe LLP
1750 K Street, NW
Washington, DC 20006

tel +1 202 331 5042
fax +1 202 331 4011
dyocis@pkrlp.com

November 26, 2014

BY ELECTRONIC MAIL to webmaster_support@trade.gov

The Honorable Penny Pritzker
Secretary of Commerce
U.S. Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Softwood Lumber Subsidies Semi-Annual Report

Dear Secretary Pritzker:

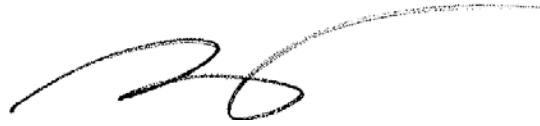
On behalf of the U.S. Lumber Coalition (the “Coalition”),¹ we hereby submit these comments in response to the request by the Department of Commerce (the “Department”) for comments on subsidies provided by certain countries exporting softwood lumber to the United States in the period from January 1, 2014 through June 30, 2014.²

¹ The Coalition is an association of domestic entities interested in promoting fair trade in softwood lumber products. Members of the Coalition have been petitioners in several antidumping and countervailing duty proceedings involving softwood lumber products from Canada.

² *Subsidy Programs Provided by Countries Exporting Softwood Lumber and Softwood Lumber Products to the United States; Request for Comment*, 79 Fed. Reg. 63,985 (Dep’t Commerce Oct. 27, 2014).

Please do not hesitate to contact any of the undersigned should you have any questions concerning this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'AK', with a long horizontal flourish extending to the right.

Andrew W. Kentz
David A. Yocis
Nathaniel Maandig Rickard
Jordan C. Kahn
Roop K. Bhatti*

PICARD KENTZ & ROWE LLP
1750 K Street, N.W.
Washington, D.C. 20006

Counsel to the U.S. Lumber Coalition

* – Admitted in Illinois, admission pending in the District of Columbia.

SUBSIDIES TO SOFTWOOD LUMBER PRODUCTION

Comments of the U.S. Lumber Coalition

Submitted Pursuant to Section 805 of the Softwood Lumber Act of 2008

Andrew W. Kentz
David A. Yocis
Nathaniel Maandig Rickard
Jordan C. Kahn
Roop K. Bhatti*
PICARD KENTZ & ROWE LLP
1750 K Street, N.W.
Washington, D.C. 20006
(202) 331-4040

Counsel to the U.S. Lumber Coalition

November 26, 2014

SUBSIDIES TO SOFTWOOD LUMBER PRODUCTION

Submission of the U.S. Lumber Coalition to the Department of Commerce

Pursuant to Section 805 of the Softwood Lumber Act of 2008

November 26, 2014

The following comments are provided in response to the request by the Department of Commerce (“Department”) to identify subsidies provided by Canada to the production or export of softwood lumber products to the United States during the period January 1, 2014 through July 31, 2014.

1. CANADA

A. Provision of Standing Timber for Less Than Adequate Remuneration

The large majority of timber used in the production of softwood lumber in Canada is harvested from “Crown lands” owned and managed by the several Canadian provincial governments. This timber is provided by the provincial governments to lumber producers (or, less often, to logging contractors who in turn sell the harvested logs to lumber producers) under a variety of contractual arrangements. While the details vary from one province to another, these provincial systems share some common features, including:

- an administered price for most, if not all, Crown timber that is set at a level demonstrably well below market prices;
- low minimum or “reservation” prices, ensuring that higher volumes of timber are harvested in poor markets when a profit-maximizing landowner would otherwise withhold timber from the market until prices improve; and
- domestic processing requirements, to ensure that the benefit of this below-market timber is provided exclusively to softwood lumber producers in Canada.

Further, the provincial systems generally account for such a large share of the timber available to lumber producers that the government’s administered price for Crown timber suppresses market pricing mechanisms for private timber (and any small share of Crown timber that may be sold competitively in some provinces).

As the Department has previously established, the provision of Crown timber by provincial governments constitutes the government provision of goods and therefore a financial contribution within the meaning of Section 771(5)(D) of the Tariff Act of 1930, as amended (19 U.S.C. § 1677(5)(D) (2006)) (the “Act”). Further, the Department has repeatedly found that because the number of industries making use of Crown timber is limited, the provision of timber is specific within the meaning of Section 771(5A)(D)(iii) of the Act. Therefore, the provision of Crown timber to softwood lumber producers is a countervailable subsidy if it confers a benefit – that is, if the provision is made for “less than adequate remuneration” as set forth in Section 771(5)(E)(iv) of the Act and the Department’s implementing regulations.

Under these laws and regulations, the Department would determine whether timber is being sold for less than adequate remuneration by reference, where possible, to a market-determined benchmark price.¹ Because Crown timber sales account for the vast majority of timber sold in most Canadian provinces, internal Canadian timber prices will generally not be viable benchmarks for this purpose.² Under any reasonable application of these established principles, Canadian provinces plainly provide a benefit with respect to most of the softwood lumber produced in Canada from Crown timber. A brief survey of the most important lumber-producing provinces shows this to be the case.

British Columbia (BC). The BC government provides Crown timber under a wide variety of arrangements. The province sells a small portion of this timber in auctions.³ However, bidders must agree to process the timber in BC, so the potential highest bid is therefore excluded from the auction if the highest possible value of the timber is for an export market. The province also limits the number of open contracts any individual bidder may have at any one time. Under these constraints, the majority of auction participants are logging contractors that harvest auctioned timber and sell the logs to BC producing mills; these same contractors generally also are employed by those same mills to harvest Crown timber sold directly by the government to the BC producing mills at prices set by regulation. Thus, the ultimate price that bidders are willing to pay is limited, at the margin, by the availability of Crown timber to BC lumber mills at administered prices.

Most of the Crown timber is sold through long-term contracts directly to producers at prices set on the basis of a complex statistical modeling exercise deemed to produce the “estimated winning bid” for a given timber stand, had the stand been sold under this deeply flawed auction system.⁴ But if the auction prices do not actually reflect market value, neither

¹ The Court of Appeals for the Federal Circuit has upheld the Department’s application of its standard regulatory framework for selecting benchmark prices, including the use of prices outside the subsidizing country when appropriate, for purposes of the less-than-adequate-remuneration inquiry. Essar Steel, Ltd. v. United States, 678 F.3d 1268, 1273-74 (Fed. Cir. 2012).

² The World Trade Organization (WTO) Appellate Body has confirmed that, consistent with the WTO agreements, the Department may rely on the size of the government’s market share as potentially conclusive evidence that internal prices cannot be used as a reliable market benchmark. Report of the Appellate Body, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/AB/R, adopted Mar. 25, 2011, paras. 446, 458.

³ In the period identified in the Department’s request – January through June 2014 – about 12 percent of harvested timber on the BC Coast (1,184,584 m³ out of 9,802,294 m³) was harvested from auction stands, and less than 15 percent of harvested timber in the BC Interior (3,396,414 m³ out of 22,793,526 m³) was harvested from auction stands, according to data accessed through the BC Harvest Billing System, <https://www15.for.gov.bc.ca/hbs/>.

⁴ The most recent modeling exercises are set forth in the Information Papers of the BC Ministry of Forests, Lands, and Natural Resources Operations Timber Pricing Branch. See “Coast Market Pricing System Update – 2014,” Jan. 1, 2014; “Interior Market Pricing System

would the prices resulting even from a statistically valid translation of the auction prices to these long-term “tenure” sales. And, as the Coalition has demonstrated at length in prior submissions to the Department, the translation procedures used by BC are far from statistically valid.

That the BC “market pricing system” fails to systematically price BC Crown timber at market levels is clear by comparing the results of the system to actual observed market prices for similar timber sold in the United States. For example, the weighted-average price for BC Douglas fir logs sold domestically on the BC Coast during the January-June 2014 period was C\$83.34/m³,⁵ or 21 percent less than in July-December 2013. Prices for U.S. domestic sawlog grades of Douglas fir during the same period averaged C\$136.45/m³,⁶ or 12 percent more than in July-December 2013. As a result, while U.S. prices for comparable logs were 16 percent higher than BC Coast prices in July-December 2013, U.S. prices were 64 percent higher in January-June 2014.

With respect to the BC Interior, BC sawmills paid an average of C\$59.18/m³ for spruce-pine-fir (SPF) logs purchased from third parties in January-June 2014.⁷ This figure is 4 percent higher than that reported for July-December 2013. During the same period, U.S. sawmills paid an equivalent of C\$86.23/m³ for logs of the same species, or more than 10 percent more than in July-December 2013.⁸ Thus, while the market price in the United States for these logs was more than 37 percent higher than the log price reported for the BC Interior in July-December 2013, it was 46 percent higher in January-June 2014.

In sum, prices for wood fiber provided by the BC government have failed to keep up with the increasing market price for fiber that U.S. sawmills must pay. As a result, the subsidy benefit being provided to BC sawmills is increasing.

While traded logs in BC may not be fully representative of the full provincial Crown harvest, these comparisons illustrate the significant price differential between prices generated by the BC “market pricing system” and actual market prices for similar logs, harvested from similar

Update – 2014,” July 1, 2014; <http://www.for.gov.bc.ca/hva/infopaper.htm>. The application of these models to Crown timber pricing is detailed in the “Coast Appraisal Manual,” last revised Aug. 15, 2014, <http://www.for.gov.bc.ca/hva/manuals/coast.htm>, and the “Interior Appraisal Manual,” last revised Nov. 1, 2014, <http://www.for.gov.bc.ca/hva/manuals/interior.htm>.

⁵ BC Log Market Reports for the three-month periods ending March 31, 2014 and June 30, 2014, available at http://www.for.gov.bc.ca/hva/logreports_coast.htm?2014.

⁶ RISI *Log Lines*, issues dated Feb. 2014 through July 2014, simple average of monthly #2, #3, and #4 sawlog prices in Regions 1, 2, and 3, converted using monthly Federal Reserve exchange rates and a conversion factor of 5.66 m³/MBF.

⁷ BC Log Market Reports for the three-month periods ending March 31, 2014 and June 30, 2014, available at http://www.for.gov.bc.ca/hva/logreports_interior.htm?2014.

⁸ RISI *Log Lines*, issues dated Feb. 2014 through Aug. 2014, simple average of quarterly lodgepole pine and Engelmann spruce prices in Region 4, converted using monthly Federal Reserve exchange rates and a conversion factor of 4.81 m³/MBF.

forests, by U.S. and Canadian producers making a commodity product to be sold into the same markets. Although these large (and growing) differentials are not sufficient to calculate a subsidy benefit with precision, they nonetheless indicate that the timber provided to BC lumber producers by the BC government is sold for considerably less than adequate remuneration.

Quebec. Pursuant to the Sustainable Forest Development Act, enacted in 2010, Quebec significantly modified its Crown timber sales program as of April 1, 2013. Prior to that date, Quebec sawmills accessed Crown timber under “Timber Supply and Forest Management Agreements,” which allowed mills to harvest Crown timber exclusively for use in the processing mill designated in the license. As of April 2013, these licenses were withdrawn and replaced with “Timber Supply Guarantees.” A new “Bureau de mise en marché des bois” (Timber Sales Office) began to sell timber at auction in 2011, and these Crown timber auction prices now serve as the starting point of the methodology for calculating the timber price for each zone. Thus, in effect, the new Quebec pricing system closely resembles the BC “market pricing system.” And it has many of the same flaws, including a prohibition on access to Quebec Crown timber by processing facilities outside the province (even within Canada).

According to the Timber Sales Office web site:

Pursuant to the Sustainable Forest Development Act, the Timber Sales Office has the function of evaluating the Market Value *{sic}* of Standing Timber (MVST) that beneficiaries of a Supply Agreement must pay for each cubic meter of harvested wood. This value is established by the parity technique, which is applied to the market value of standing timber sold on the free market *{sic}* for Crown timber.

The MVST is determined with reference to the characteristics of the timber in each of 187 pricing zones that make up the public forest. It is then indexed quarterly to take account of the evolution of the market prices for finished products (lumber, panels, pulp and paper, etc.) over the course of the year.⁹

⁹ Quebec Timber Sales Office (*Bureau de mise en marché des bois*), <https://bmmb.gouv.qc.ca/publications-et-reglements/tarification-forestiere/> (last visited May 29, 2014), original French text as follows:

En vertu de la Loi sur l'aménagement durable du territoire forestier, le Bureau de mise en marché des bois a pour fonction d'évaluer la valeur marchande des bois sur pied (VMBSP) que doivent acquitter les bénéficiaires d'une garantie d'approvisionnement pour chaque mètre cube de bois récolté. Cette valeur est établie par la technique de parité, laquelle s'appuie sur la valeur marchande des bois sur pied vendus sur le marché libre des forêts de l'État.

La VMBSP est établie en fonction des caractéristiques des bois pour chacune des 187 zones de tarification que compte la forêt publique. Elle est, par la suite, indexée à chaque trimestre pour tenir compte de l'évolution des prix en cours d'année sur les marchés des produits finis (bois d'oeuvre, panneaux, pâtes et papiers, etc.).

Thus, on April 1, 2014, the first new annual standing timber prices derived from a full year of Crown auctions under the new system should have gone into effect. However, no price guide was published until May. A “draft” timber price schedule for the period April 1, 2014 through March 31, 2015, dated May 7, 2014, was posted to the Timber Sales Office web site, along with the following notice:

Consultation on the standard rates for the market value of standing timber in Crown forests for the year 2014-2015.

The new reference rate chart for the market value of standing timber for the year 2014-2015 is currently subject to a consultation period. Anyone having comments on the draft chart is requested to make them known to Mr. Jean-Pierre Adam, director general of the Timber Sales Office, by e-mail to the following address: serviceclientele@bmmb.gouv.qc.ca, or by mail to 5700, 4e Avenue Ouest, local A-204, Québec (Québec) G1H 6R1. The consultation period ends May 27, 2014.¹⁰

Ultimately, the final timber prices for the April-June 2014 period were not posted until June, and the actual prices were generally lower – in some cases, significantly lower – than in the “draft” schedule. Accordingly, it is safe to assume that the new Quebec timber pricing system is, at the very least, still a work in progress.

In any event, it appears that timber prices in Quebec remain well below market levels, notwithstanding the introduction of the new pricing system. The most recently published data for the province as a whole states that the average price of spruce, pine, fir, and larch (SPF-L) timber of sawlog grade (grade B) was C\$11.97/m³ in the year from April 2012 to March 2013.¹¹ The simple average of the four quarterly grade B SPF-L price for the 187 pricing zones during that same period was C\$10.29/m³, or 86 percent of the actual reported average price. During the period of interest to the Department – January through June 2014 – the simple average of the two

¹⁰ Id., original French text as follows:

Consultation sur les taux unitaires de la valeur marchande des bois sur pied des forêts du domaine de l'État pour l'année 2014-2015

La nouvelle grille de taux de référence de la valeur marchande des bois sur pied pour l'année 2014-2015 fait présentement l'objet d'une période de consultation. Toute personne ayant des commentaires à formuler sur le projet de grille est priée de les faire parvenir à M. Jean-Pierre Adam, directeur général du Bureau de mise en marché des bois, par courriel à l'adresse suivante : serviceclientele@bmmb.gouv.qc.ca ou par la poste au 5700, 4e Avenue Ouest, local A-204, Québec (Québec) G1H 6R1. La période de consultation se termine le 27 mai 2014.

¹¹ Quebec Ministry of Natural Resources, *Ressources et industries forestières: Portrait statistique édition 2013*, at 38, <http://www.mffp.gouv.qc.ca/forets/connaissances/connaissances-statistiques.jsp>.

quarterly grade B SPF-L prices for the 187 pricing zones was C\$16.67/m³, so if the same relationships held as in the 2012-13 period, this would translate to an average Crown timber SPF-L price of C\$15.90/m³ during the January-June 2014 period.

Press reports in 2013 attributed to Quebec forest executives the claim that Quebec wood fiber costs have increased 25 percent since 2011, which would be roughly consistent with this calculation.¹² Of course, the prices received for lumber produced by Quebec mills has increased by considerably more than that. According to *Random Lengths*, Eastern SPF 2x4 lumber (delivered to Boston) was \$297/MBF in the week to May 13, 2011, but had increased to \$503/MBF in the week ending April 12, 2013. One would expect that, in such a pricing environment, the market value of timber to have increased by at least 25 percent.

These Quebec stumpage rates include the value of silviculture. In addition, as the Government of Canada confirmed in an LCIA dispute settlement proceeding, several of the in-kind payments made by Quebec lumber producers for which the Department made adjustments in prior countervailing duty reviews (such as the Forestry Fund, fire protection, and insect protection) are now also included in the Quebec stumpage rate.¹³ As a result, only C\$3.43/m³ of the upward adjustment that the Department made to Quebec stumpage rates in its most recent countervailing duty review of Quebec stumpage pricing would still be applicable today. Accordingly, under any reasonable calculation, Quebec stumpage rates are far below those for comparable timber in Maine, where the most recent available data (for 2013) found that SPF sawtimber prices averaged C\$24.35/m³.¹⁴

Even still, the Quebec industry is urgently demanding that the Quebec government provide relief from these increases. According to a recent press report:

“How can an industry survive and thrive in this environment?” asks a simmering James (Jim) Lopez, president and CEO of Tembec Inc.

The complaint has been heard so often it sounds like a broken record. And yet the industry has found a new way to approach the government for aid

. . . . But while the industry is courting the government once more, it is also threatening to invest elsewhere. Case in point: Tembec, which has to decide how it is going to allocate \$80-million in investments between its Ontario and Quebec sawmills.

¹² “Forestry’s Elusive Quest for Innovation,” *Globe and Mail* (Nov. 20, 2013).

¹³ Award of the Tribunal, *United States of America v. Canada*, LCIA No. 81010 (Jan. 20, 2011), para. 228 (fire and insect prevention); para. 233 (Forestry Fund).

¹⁴ Maine Forest Service, “2013 Stumpage Prices by Maine County,” at <http://www.maine.gov/dacf/mfs/publications/index.html>, converted using Federal Reserve exchange rates and a conversion factor of 4.81 m³/MBF.

“It is an unfortunate truth that if you are faced as an investor with the decision on where to put your money first, it will not be in Quebec – not with this business environment, not with this business environment, not with this fibre supply, not with the rapid rise in the cost of wood,” says Mr. Lopez.¹⁵

Perhaps as a result of these entreaties, or threats, the Quebec government announced a substantial aid package to the forest industry on November 21, 2013.¹⁶ In addition, the government announced a new task force dedicated to “improvements in the implementation of the [new] forest system” (*les améliorations à apporter à la mise en oeuvre du régime forestier*).¹⁷ Whether, as in BC, this task force develops ways to use the province’s discretion in carrying out the pricing system to respond to industry complaints remains to be seen.

Alberta, Saskatchewan, Manitoba, Ontario. In these provinces, virtually all Crown timber is provided to softwood lumber producers at fixed rates.

In Alberta, all “timber that is used or will be used to make lumber, pulp, or roundwood timber products” is charged an identical rate that is adjusted monthly to reflect lumber prices. Regardless of the rate, the mere fact that Alberta charges the same price for logs that can be used to make lumber as it does for logs only fit to be chipped for pulp is sufficient to demonstrate that its sawlog prices are below those that would prevail in a market. During the period of interest to the Department, the standard monthly rate varied from C\$2.15/m³ to C\$3.15/m³ for first 107,296 m³ purchased by a licensee, and from C\$3.64/m³ to C\$4.76/m³ for higher volumes.¹⁸ These rates are considerably lower even than those charged in the BC Interior for a similar mix of species.

In Ontario, all SPF timber harvested by sawmills from January-March 2014 period was charged a fixed rate of C\$4.80/m³, increasing to C\$4.87/m³ in April-June 2014.¹⁹ Theoretically, this rate can (like Alberta’s) increase during periods of high lumber prices, but Ontario timber fees have not actually been higher than the minimum rate in any month since April 2005.

¹⁵ Id.

¹⁶ “Quebec Pledges \$430 Million to Struggling Forestry Sector,” *CTV News* (Nov. 22, 2013), <http://montreal.ctvnews.ca/quebec-pledges-430-million-to-struggling-forestry-sector-1.1554958>.

¹⁷ Press Release, Ministère des Ressources Naturelles, “Rendez-vous de la forêt québécoise – ‘Une vision d’avenir commune pour la filière bois’ – Martine Ouellet,” Nov. 22, 2013, <http://www.mrn.gouv.qc.ca/presse/communiqués-detail.jsp?id=10456>.

¹⁸ Monthly Alberta timber dues letters, available at <http://srd.alberta.ca/LandsForests/ForestManagement/TimberDuesCrownFees/MonthlyTimberDuesLetters.aspx>.

¹⁹ Monthly Ontario stumpage rate charts are available at http://www.lrcsde.lrc.gov.on.ca/itrees/stumpage/stumpage_rates.html.

The forest industry succeeded in amending the Ontario Forest Tenure Modernization Act, which was enacted on June 1, 2011,²⁰ to ensure that sawmills will continue to have guaranteed access to Crown timber (at administered price levels) for at least the next five years. As industry representatives explained in testimony on this legislation, guaranteed timber access plays an essential role in the lumber industry's access to investment. For example, EACOM Timber Corp. stated that it recently invested in six Ontario lumber mills "based in large measure on secure, predictable, and affordable supplies of committed crown timber. That was the basis of the offer and the transaction."²¹ The legislation allows the creation of local forest management corporations, which will manage a region's Crown forests and provide sawmills with access to Crown timber. These corporations hold forest licenses and are responsible for providing "predictable" access to Crown timber.²² For the first five years, there will be only two such corporations established.

New Brunswick. Crown timber plays a much smaller role in New Brunswick than in the six Canadian provinces mentioned above, historically accounting for just over half of the harvest; the other half of the timber harvest is divided roughly equally between industrial freehold land owned by major lumber producers and private woodlots owned by thousands of small holders. Crown prices are derived from periodic surveys of timber prices obtained by small woodlot owners. However, many in New Brunswick – including the woodlot owners themselves – believe that the terms of access to Crown timber by lumber producers actually forces private timber prices to conform to the administered price of Crown timber, rather than the reverse.²³ A report by the provincial Auditor General concluded: "The fact that the [lumber] mills directly or indirectly control so much of the source of timber supply in New Brunswick means that the [timber] market is not truly an open market. In such a situation it is not possible to be confident that the prices paid in the market are in fact fair market value."²⁴

In 2014, New Brunswick increased the amount of Crown timber available for harvest by about 10 percent, making the additional fiber available to producers that promised to invest in

²⁰ An Act to enact the Ontario Forest Tenure Modernization Act, 2011 and to amend the Crown Forest Sustainability Act, 1994, *available at* http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2454&detailPage=bills_detail_the_bill&Intranet= [hereinafter 2011 Ontario Tenure Act]. .

²¹ Official Report of Debates (Hansard), Standing Committee on General Government, at G-303, Apr. 13, 2011, at (testimony of Brian Nicks, director of forestry for Ontario, EACOM Timber Corp.).

²² 2011 Ontario Tenure Act at §5(4).

²³ See Donald W. Floyd, Robert Ritchie & Tony Rotherham, *New Approaches for Private Woodlots – Reframing the Forest Policy Debate* (Jan. 2012), *available at* <http://www2.gnb.ca/content/dam/gnb/Departments/nr-rn/pdf/en/CrownLandsForests/NewApproachesForPrivateWoodlots.pdf>.

²⁴ Province of New Brunswick, "Report of the Auditor General 2008," para. 5.36.

increased production capacity in the province.²⁵ With the increase, the softwood Crown harvest will reach 3.9 million cubic meters a year, presumably bringing the share of the total softwood harvest derived from Crown lands clearly over its historic level of 50 percent. It remains to be seen whether the increase in the Crown harvest will have a negative impact on private timber pricing in the province.

Accordingly, it is possible that the provision of Crown timber in New Brunswick is also made for less than adequate remuneration. However, recent price levels for private timber sales in New Brunswick and Nova Scotia are relatively close to those prevailing for similar timber in Maine, and these combined private timber rates are used to set Crown prices in New Brunswick. The most recently available average private SPF sawtimber price in New Brunswick and Nova Scotia, for the period November 1, 2011 through October 31, 2012, was C\$22.69/m³.²⁶ This was slightly below contemporaneous Maine SPF sawtimber prices, which (as noted above) averaged C\$24.10/m³ in 2012.

Nova Scotia. Most timberland in Nova Scotia, unlike other provinces, is privately held, and most timber purchases are therefore market transactions between private parties. However, the provincial government recently purchased more than 500,000 acres of formerly commercial timberland, which has become Crown land on which companies could obtain harvesting rights.²⁷ Some temporary licenses for this land were granted to sawmills in 2014.²⁸

B. Federal and Provincial Log Export Restrictions

All Canadian provinces prohibit the export of unprocessed logs harvested from Crown timber. These prohibitions may take the form of direct restrictions on log exports or a domestic processing requirement imposed as a condition on harvesters of Crown timber. In either case, exceptions are granted rarely, usually as a result of exceptional conditions such as a large amount of timber damaged by fire or disease. The Canadian federal government also restricts exports of logs harvested from most private land in BC, although the provincial government manages the procedures for seeking exemptions from these federal restrictions.

Section 127 of the BC Forest Act requires that timber harvested from the following sources must be either used or manufactured in BC: (1) Crown land; (2) private land granted by

²⁵ See Government of New Brunswick, *Putting Our Resources to Work: A Strategy for Crown Lands Forest Management*, Mar. 12, 2014, <http://www2.gnb.ca/content/dam/gnb/Departments/nr-rn/pdf/en/ForestsCrownLands/AStrategyForCrownLandsForestManagement.pdf>.

²⁶ “Survey Results and Prices for Standing Timber Sales from Maritime Private Woodlots,” summary report at 7, <https://novascotia.ca/pfpmb/StumpageReport11.pdf>.

²⁷ Chris Lambie, “Nova Scotia Chases Bowater Assets,” *The Chronicle Herald* (Halifax), Nov. 13, 2012, available at thechronicleherald.ca/novascotia/171174-nova-scotia-chases-bowater-assets.

²⁸ Department of Natural Resources (Nova Scotia), *Western Crown Land Planning Process* web page, <http://novascotia.ca/natr/land/western-land/> (last visited Nov. 25, 2014).

the province after March 12, 1906; or (3) private land in a tree farm license area, regardless of the date granted. Section 128(3) of that Act provides that exemptions from this requirement may only be given if the province is satisfied that (a) the timber is surplus to the requirements of BC mills; (b) the timber cannot be processed economically in the vicinity of the harvest or elsewhere in BC; or (c) the exemption would prevent waste of or improve the utilization of Crown timber.

The BC Government relies on the Timber Export Advisory Committee's (TEAC) recommendations to determine whether a permit to export logs should be granted. This determination is largely based on whether any BC mills tender an offer equal to the BC domestic price, which is calculated by TEAC. As a practical matter, persons wishing to export logs in BC must first advertise the logs or the standing timber. Any BC processor wishing to bid for the logs may do so. If no bid is received, an export permit may be issued – but if a bid is received that the province deems to be an acceptable price (even if it is well below the export price that is otherwise available), the export permit will be denied. The timber or log owner then has the option of selling domestically or not harvesting the timber at all. On January 17, 2013, BC issued a series of “clarifications” of allegedly previously existing policy on how TEAC assesses and evaluates export-blocking offers.²⁹

Logs exported from land under BC's jurisdiction, whether Crown land or private land, must pay a “fee in lieu of domestic manufacture.” On January 17, 2013, BC issued a new schedule of fees in lieu that applies to timber whose export permit applications are received on or after March 1, 2013.³⁰ This new schedule increases these fees over their previously established level, based on the average price gap between domestic prices and export prices during the prior 3-month period. The increase was 20 percent from March through June of 2013 and 30 percent since July 2013. For the period of interest to the Department, therefore, the “fee in lieu” was expressed as a percentage of the domestic log price as follows:

- Douglas Fir, 19.5%;
- Saw-grade logs of other species, 13%; and
- Low-grade logs of other species, 6.5%.

Professor David Haley of the University of British Columbia describes the BC log export regime as amounting to “a transfer of wealth from timber owners, both the Crown and private sector, to forest products manufacturing companies. In other words, manufacturers receive a subsidy at the expense of timber growers.”³¹ The result, he explains, is that:

²⁹ “Conditions for Surplus Test Exemptions,” Jan. 17, 2013, http://www.for.gov.bc.ca/ftp/HET/external!/publish/Web/exports/Conditions_for_Exemption_Jan_2013_signed.pdf.

³⁰ “Fee in Lieu of Manufacturing Rates, as of March 1, 2013,” Jan. 17, 2013, http://www.for.gov.bc.ca/ftp/het/external!/publish/web/exports/Fee_in_Lieu_as_of_Mar_1_2013.pdf.

³¹ David Haley, “Are Log Export Restrictions on Private Forestland Good Public Policy? An Analysis of the Situation in British Columbia” (2002), at 10. In response to a subsequent media inquiry about the applicability of his 2002 paper to the present situation of log exports

By lowering domestic log prices, restrictions on log exports reduce the revenue flowing to British Columbians from stumpage sales on public forestland and also the returns to those who harvest timber on public land and sell their logs in domestic markets. . . . The benefits of log export restrictions on private land are reaped by the timber products processing sector, which enjoys lower raw material costs than it would experience in the absence of such restrictions.³²

Other provincial government policies amount to at least a *de facto* restriction on the export of logs in other provinces as well. For example, there is a substantial amount of private forestland in Quebec along the U.S. border, and domestic log prices in Quebec are significantly lower than just across the border in Maine, New Hampshire, Vermont, and New York. This price differential would lead one to expect that, absent government restrictions, Quebec would export logs from private lands into the United States – but such exports rarely occur. The sale of private logs in Quebec is governed by a number of regional marketing boards or “syndicates,” which develop marketing plans that must be approved by a Quebec governmental agency. These marketing boards also facilitate the registration of private landowners in Quebec as “forestry producers” (*producteurs forestiers*), which gives private landowners access to four governmental subsidy programs: (1) the Private Forest Development Assistance Program (*Le programme d’aide à la mise en valeur des forêts privées*); (2) the Virginia Deer Damage Management Assistance Program (*Le programme d’aide à l’aménagement des ravages de cerfs de Virginie*); (3) the Property Tax Rebate Program (*Le programme de remboursement de taxes foncières*); and (4) the Forestry Finance Program (*Le programme de financement forestier*).³³ Indeed, in its November 2013 of increased aid to the forest industry, Quebec announced additional funding to increase the subsidies offered through the property tax rebate program.³⁴ Thus, the marketing boards have the power to prevent, or at least to discourage, the export of logs from Quebec private lands.

These export restrictions and prohibitions are countervailable subsidies to Canadian softwood lumber producers, as the Department has found in prior lumber CVD investigations as well as in other CVD determinations.³⁵ Through these policies, the provincial and federal

from BC Crown land, Professor Haley stated: “The arguments used in 2002 are equally applicable today and while this paper focuses on private land most of the arguments are equally applicable to public lands.” Ian MacNeill, “Log Export,” *Truck Logger BC*, Fall 2010, at 16, 19.

³² Haley, *supra* note 23, at 15.

³³ Syndicat des Producteurs de Bois de l’Estrie, “Frequently Asked Questions,” at <http://www.spbestrie.qc.ca/fr/faq/> (last visited May 29, 2014).

³⁴ “Quebec Pledges \$430 Million to Struggling Forestry Sector,” *CTV News* (Nov. 22, 2013), <http://montreal.ctvnews.ca/quebec-pledges-430-million-to-struggling-forestry-sector-1.1554958>.

³⁵ *E.g.*, *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia*, 75 Fed. Reg. 59,209 (Dep’t Commerce Sept. 27, 2010) (final affirmative CVD determ.), Issues & Decision Memorandum at 12-14.

governments either directly provide timber, or entrust or direct harvesting companies to provide timber, to domestic producers, thus providing a financial contribution. Because this timber is provided to domestic processors at below-market prices, a benefit is conferred. And because this timber is provided only to domestic processing industries, the log export restrictions are *de jure* specific.³⁶

C. Other Subsidy Programs

Additional subsidy programs also provide benefits to softwood lumber producers in Canada.

1. Energy Subsidies

Sawmills produce both lumber and co-products, and revenue from co-products is an important part of the economics of lumber production. Declining demand for paper – a key industry that purchases sawmill coproducts – has therefore adversely impacted many sawmills in both Canada and the United States. The Canadian federal and provincial governments have encouraged the development of energy from biomass, including wood chips, as a potential new market for lumber coproducts. In addition to providing an additional market for lumber coproducts, these programs benefit lumber producers in two other ways that may constitute countervailable subsidies. First, government support – through the federal Pulp and Paper Green Transformation Program and other support programs – may fund some or all of the capital costs in creating biomass facilities. Second, agreements between government-owned power companies such as BC Hydro and Hydro Quebec and lumber companies to purchase excess power generated from biomass facilities may constitute the government purchase of goods for more than adequate remuneration.

Describing two power generation projects undertaken by the company that were expected to come online in the second and third quarter of 2014 to potential investors, West Fraser emphasized that it had reached “[l]ong-term contracts to sell power to B.C. Hydro” and that the initiative was “[p]rojected to reduce costs and contribute to sawmill earnings when completed.”³⁷ In describing a project intended to result in “the installation of a new electrical turbine that will increase the Temiscaming facility’s electricity production capacity from its current 10 megawatts to 60 megawatts,” Tembec observes that “The Company has entered into a 25-year power purchase contract with Hydro-Quebec that will allow the Company to sell to Hydro-Quebec up to 50 megawatts of the incremental electricity generated by the new turbine at green energy rates of \$106 per MW/hour, indexed annually to the consumer price index.”³⁸ In its message to shareholders, Tembec highlighted the agreement with Hydro-Quebec: “The critical element of

³⁶ *Id.*, Issues & Decision Memorandum at 12.

³⁷ West Fraser, *CIBC Institutional Investor Conference: Investor Presentation*, Jan. 22-24, 2014, <http://www.westfraser.com/sites/default/files/presentations/pdfs/CIBC-Whistler-Institutional-Investor-Conference-January-24-2013.pdf>.

³⁸ Tembec Inc., 2013 Financial Report, at 84, <http://tembec.com/sites/tembec.com/files/pdf/tembec-financial-report-2013-en.pdf>.

the Temiscaming energy investment is a purchase power agreement with Hydro-Quebec that was signed in 2012.”³⁹

In addition to the agreement with Tembec, Hydro-Quebec reports eleven other contracts for energy production through biomass (residual forest supply) entered into between March 2012 and May 2014.⁴⁰ BC Hydro reports that 11 of its 92 current Electricity Purchase Agreements (EPAs) are for energy production through biomass, with another EPA for Western Forest Products’ hydroelectric generating plant in Squamish.⁴¹ Of the 32 EPAs reached by BC Hydro for projects in development, 6 are for energy production through biomass.⁴²

Agreements to purchase energy at guaranteed prices are not the only incentive for the development of biomass energy capacity. British Columbia also administers a “Load Displacement” incentive program through its Power Smart program wherein BC Hydro may provide “financial incentives to displace all or part of the customer’s site electrical load.”⁴³ Per BC Hydro, “[t]hese incentives will be modelled after our Project Incentives: Transmission or Project Incentives: Distribution (the \$500,000 max distribution incentive cap has been removed), depending on the customer’s rate class.”⁴⁴ Through the program, “BC Hydro

³⁹ *Id.* at 1.

⁴⁰ See <http://www.hydroquebec.com/distribution/fr/marchequbecois/pae-201101/index.html> (last visited Nov. 17, 2014).

⁴¹ See BC Hydro, “Independent Power Producers (IPPs) currently supplying power to BC Hydro,” <https://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/independent-power-producers-calls-for-power/independent-power-producers/independent-power-producers-currently-supplying-power-to-bc-hydro.pdf> (last visited Nov. 17, 2014).

⁴² See BC Hydro, “Independent Power Producers (IPPs) with projects currently in development,” <http://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/independent-power-producers-calls-for-power/independent-power-producers/independent-power-producers-with-projects-currently-in-development.pdf> (last visited Nov. 17, 2014).

⁴³ See BC Hydro, “Customer-Based Generation,” https://www.bchydro.com/energy-in-bc/customer-based_generation.html (last visited Nov. 17, 2014).

⁴⁴ *Id.* More information regarding BC Hydro’s Power Smart Project Incentives: Transmission program is available here: <https://www.bchydro.com/powersmart/business/programs/project-incentives/transmission.html> (last visited Nov. 17, 2014) and more information regarding BC Hydro’s Power Smart Project Incentives: Distribution program is available here: <https://www.bchydro.com/powersmart/business/programs/project-incentives/distribution.html> (last visited Nov. 17, 2014).

provides funding for the development and installation of clean or renewable on-site generation that displaces electricity otherwise supplied by BC Hydro.”⁴⁵

One company participating in the Load Displacement program is Conifex Timber Inc. – one of the current 32 EPAs reached by BC Hydro for projects in development. In its 2013 Financial Statement, Conifex described substantial benefits under the program:

During 2013, the Company drew down \$3,312,500 of the Load Displacement Agreement (‘LDA’) incentive funds available under the BC Hydro LDA contract (2012 – \$3,312,500). The incentive funding will be recognized in profit or loss on a systematic basis over the 20 year term of the LDA upon commencement of delivery of electrical energy.⁴⁶

Another company participating in BC’s Load Displacement program is Canfor. In September, Canfor announced plans to produce two pellet plants in the province, “tied to a long term agreement with a power utility customer.” Canfor reported that “[t]he total investment of \$58 million will include electrical self-generation capacity of 3 megawatts supported through BC Hydro’s Power Smart Load Displacement Program.”⁴⁷

2. Preferential Tax Schemes

In past softwood lumber CVD proceedings, the Department found that the British Columbia Private Forest Property Tax Program provided countervailable subsidies. BC currently refers to this program as the Managed Forest Program. Under this program, BC imposes lower tax rates on land classified as Class 7, “managed forest land.” To qualify for the lower Class 7 rates, land must be “used for the production and harvesting of timber.”

In addition, a new Quebec Capital Tax Credit Program provides tax credits of 15 percent of eligible expenses related to the acquisition of capital equipment used in the processing of forest products and acquired before January 1, 2013. The Quebec provincial government estimated that the program would reduce the taxes paid by Quebec forest products producers by C\$120 million over four years. A recent report by the Quebec Auditor General found that another Quebec tax subsidy, the Quebec Road Tax Credit Program, was poorly administered and

⁴⁵ BC Hydro, *Energy-efficiency Investments to Reduce Costs for Pulp and Paper Producers*, July 24, 2014, http://www2.news.gov.bc.ca/news_releases_2013-2017/2014MEM0018-001057.htm.

⁴⁶ See Conifex Timber Inc., Consolidated Financial Statements: December 31, 2013 and 2012, at 25, <http://www.conifex.com/investor-relations/>.

⁴⁷ Canfor Corp., *Canfor to Construct Pellet Plants in Chetwynd, Fort St. John*, Sept. 24, 2014, http://www.canfor.com/docs/default-source/news-2014/nr20140924_media_advisory_chet_fsj_pellet.pdf?sfvrsn=2.

that funds were disbursed even to companies that had failed to prove eligibility.⁴⁸ This program was also found to be a subsidy in breach of the SLA by an LCIA tribunal in January 2011.

Other tax programs that appear to provide subsidies have been identified in prior Coalition submissions to the Department, incorporated herein by reference.

3. Unearned Compensation for Tenure Rights

The principal form of Crown timber harvesting rights in most Canadian provinces involves some type of long-term arrangement. Guaranteed long-term access to timber assists lumber producers in obtaining financing for capital investments to improve efficiencies, as industry observers have long recognized.⁴⁹ In recent years when provinces have withdrawn these rights prior to the expiration of the tenure arrangement, significant compensation has been paid to the tenure holder. Such payments provide substantial benefits to the former tenure holders, who paid little or nothing to obtain the long-term harvesting rights in the first place. The payments also demonstrate the high value of the tenure rights that continue to be enjoyed by the vast majority of tenure holders whose rights have not been taken back by the governments.

In BC, the Department has previously found countervailable compensation paid for tenure takebacks under the Protected Areas Forest Compensation Act and the Forest Revitalization Act. Both pieces of legislation remain in effect and compensation continues to be paid under the Protected Areas Forest Compensation Act, although details are usually not made public.

In Newfoundland and Labrador, the provincial expropriation of a pulp and paper mill, together with its associated tenure rights, was the subject of a claim under Chapter 11 of the North American Free Trade Agreement. In August 2010, the federal Canadian government agreed to settle these claims for C\$130 million, one of the largest payments ever made in a Chapter 11 dispute.

In Alberta, holders of major tenures (Forest Management Agreement or FMA) are routinely compensated when timber on land associated with the tenure is removed as a result of activities by energy and mining companies. This is because FMA holders receive property rights against third parties (but not the Crown) in standing timber on their tenures – property rights that they do not pay for, but nonetheless receive as part of their tenure. This amounts to ongoing compensation for lost harvesting rights on a continuous basis – essentially, compensation for tenure takebacks in another form.

⁴⁸ Rapport du Vérificateur général du Québec à l'Assemblée nationale pour l'année 2010-2011, tome II, ch. 5 (2011), *available at* http://www.vgq.gouv.qc.ca/fr/fr_publications/fr_rapport-annuel/fr_2010-2011-T2/fr_Rapport2010-2011-T2-Chap05.pdf.

⁴⁹ E.g., Halifax Global, Inc., “Newfoundland Forest Sector Strategy,” Nov. 2008, at 13 n.2 (report commissioned by the Newfoundland & Labrador Department of Natural Resources).

To the extent that tenure reform being implemented in Quebec and under consideration in Ontario leads to modifications of existing long-term tenure arrangements in those provinces, any compensation paid by those provinces could constitute further tenure compensation subsidies to their softwood lumber producers.

4. Grants, Loans, and Loan Guarantees

Prior submissions by the Coalition address a number of programs by which the federal and provincial Canadian governments provide grants, loans, loan guarantees, and other support, directly and indirectly, to Canadian softwood lumber producers. These submissions are incorporated herein by reference.

As detailed in those submissions, the Department has found a number of these programs to be countervailable in prior softwood lumber proceedings. Further, the Ontario Forest Sector Prosperity Fund, the Ontario Forest Sector Loan Guarantee Program, and the Quebec Forest Industry Support Program provided benefits that were the subject of arbitration between the United States and Canada under the SLA.

With respect to new programs, it is not always clear from publicly available information whether programs that provide benefits to the “forest industry” or the “forest products industry” necessarily provide benefits to softwood lumber producers. The prohibitions in the SLA on new subsidy programs benefitting softwood lumber producers appear to have restrained somewhat, but certainly not eliminated, the provision of benefits to softwood lumber producers under these programs. In addition to those previously identified programs, the Coalition notes the following additional information regarding programs that may be providing benefits to softwood lumber producers.

Export Development Canada (EDC). Despite the name, EDC is not limited to financing export transactions, but since 2009 has also provided direct support to Canadian enterprises. EDC reports that it did C\$11,803,000,000 of business with Canada’s forestry sector in the year ending September 30, 2013.⁵⁰ This business includes “financing (including guarantees), political risk insurance to lenders, and equity transactions.”⁵¹ One of the largest benefits EDC provides Canadian enterprises is financing at a below market rate or when financing is otherwise unavailable. As the owner of an Ontario-based fencing company concisely stated to a Canadian industry newsletter: “I don’t borrow money. Export Development Canada guarantees my payments.”⁵²

⁵⁰ Canadian Industry Sub-Sector, Export Development Canada for the year ending September 30, 2013, available at <http://www.edc.ca/EN/About-Us/Disclosure/Reporting-on-Transactions/Pages/industry-sub-sector-2013.aspx>

⁵¹ D.2 Individual Transaction Reporting, available at www19.edc.ca/English/disclosure_9237.htm.

⁵² Madison’s Timber Preview, June 15, 2012 at 1.

Investments in Forest Industry Transformation Program. This program originally provided C\$100 million in federal grants between 2010 and 2014 to forest products companies to develop new products and technologies. The program was renewed in 2014 for an additional four years with C\$90 million in additional funding.⁵³ Although project funding was not allowed for products falling within the scope of the SLA, many lumber producers are reported to have received funding under the program, including Millar Western, Tolko, and West Fraser.⁵⁴

Pulp and Paper Green Transformation Program. Nearly C\$1 billion in grants were been made available under this program for capital investments in pulp and paper mills to promote energy efficiency.⁵⁵ Many of these mills are affiliated with, or co-located with, softwood lumber producers. Several of these companies, including West Fraser and Canfor, have publicly announced major capital investment programs aimed almost completely at softwood lumber production, since the large grants received to fund pulp and paper investment under this program have freed up funds otherwise unavailable.

⁵³ Natural Resources Canada, *Investments in Forest Industry Transformation*, web page at <http://www.nrcan.gc.ca/forests/federal-programs/13139> (last visited Nov. 25, 2014).

⁵⁴ *Id.*

⁵⁵ Natural Resources Canada, *Pulp and Paper Green Transformation Program: Mission Accomplished*, web page at <http://www.nrcan.gc.ca/forests/federal-programs/13141> (last visited Nov. 25, 2014).

BakerHostetler

Baker & Hostetler LLP

Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5304

T 202.861.1500
F 202.861.1783
www.bakerlaw.com

Elliot J. Feldman
direct dial: 202.861.1679
EFeldman@bakerlaw.com

November 25, 2014

VIA E-MAIL (WEBMASTER_SUPPORT@TRADE.GOV)

The Honorable Penny Pritzker
Secretary of Commerce
U.S. Department of Commerce
14th Street and 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 (79 Fed. Reg. 63895)

Dear Secretary Pritzker:

We submit these comments on behalf of the Conseil de l'industrie forestière du Québec and the Ontario Forest Industries Association 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. 79 Fed. Reg. 63895 (Dep't of Commerce, Oct. 27, 2014).

I. CANADIAN SOFTWOOD LUMBER IS INTEGRAL TO THE U.S. HOUSING INDUSTRY AND THE U.S. ECONOMY

It is important for Congress to understand the implications for average Americans and for the American economy of raising the price of softwood lumber. Housing is the engine of the American economy. American residential homes are built with softwood lumber. Canada supplies around twenty-five percent of the softwood lumber needed in the United States. Canada used to supply about a third, until managed trade imposed quotas. With the quotas,

Atlanta Chicago Cincinnati Cleveland Columbus Costa Mesa Denver
Houston Los Angeles New York Orlando Philadelphia Seattle Washington, DC

beginning in October 2006, the U.S. softwood lumber industry raised prices and slowed down economic recovery from the worst recession since the 1930s.

The National Association of Home Builders reported last June that its economists have calculated a 10% increase in the price of framing lumber per 1,000 board feet, adding approximately \$660 to the price of an average new home. In 2012, 232,447 households were priced out of homes they wanted to buy because of \$1,000 increments in cost, and a 10% increase in the average wholesale price of framing lumber shut out approximately 160,000 families from qualifying for mortgages.¹

II. SETTING THE RECORD STRAIGHT ON SOFTWOOD LUMBER

No one disagrees that trade should be fair. There should be no disagreement, either, that reports aimed at raising the price of softwood lumber should be accurate and true. Countervailing duties on softwood lumber from Canada raise the costs of home ownership for Americans. Congress, and the American public, are entitled to know whether trade barrier costs have been imposed fairly and legally under U.S. law and international agreements. Congress intended to protect U.S. manufacturers from unfair trade, but never intended for the United States to impose countervailing duties absent legally sustainable determinations that the imported goods were unfairly subsidized and caused or threatened to cause material injury to domestic manufacturers.

Congress has the right to be informed accurately and fully regarding the history of the legal disputes over softwood lumber from Canada. References to the history of litigation over softwood lumber subsidies in the Department's semi-annual reports should not be selective or self-serving. The Department stated in its June 2014 report to Congress that it identifies

¹ See Letter from James W. Tobin III, National Association of Home Builders, to Secretary of Commerce Penny Pritzker, dated May 29, 2014.

softwood lumber subsidies, in part, by analyzing “the most recently completed {countervailing duty or “CVD”} proceedings involving exports to the United States of softwood lumber or softwood lumber products from Canada...” Report at 4. The Department then referred to the 2002 “U.S. government determinations that federal and provincial governments in Canada were unfairly subsidizing Canadian producers, and that imports of the subsidized Canadian lumber threatened to injure the U.S. industry.” *Id.*

The 2002 determinations were not “the most recently completed proceedings.” The Department omitted from its Report that, from 2003 to 2006, independent NAFTA arbitration tribunals (authorized and empowered by Congress) repeatedly held the 2002 determinations of both Commerce, with respect to unfair subsidies, and the U.S. International Trade Commission (“Commission”), with respect to injury (which the Commission never found) and threat of injury, to be unsupported by substantial evidence and otherwise not in accordance with law.² Ultimately, the Department and Commission both issued remand determinations in compliance with the decisions from the NAFTA panels finding that Canadian softwood lumber was not unfairly subsidized, and did not threaten material injury to any U.S. industry.³ Among these tribunal decisions and agency remand determinations, Commerce determined that Ontario’s stumpage system, in particular, was not subsidized, and a NAFTA Panel exempted Ontario producers from the countervailing duty order before judging the CVD determination invalid for all Canadian provinces soon thereafter. Those remand determinations are the standing law, not

² See, e.g., *Second Remand Decision of the Panel, Softwood Lumber from Canada (Injury)*, USA-CDA-2002-1904-07, Aug. 31, 2004; *Decision of the NAFTA Panel on the Fifth Remand Determination, In the Matter of Certain Softwood Lumber Products from Canada: Final Countervailing Duty Determination* USA-CDA-2002-1904-03, Mar. 17, 2006 at 3, 8.

³ See *Fifth Remand Determination In the Matter of Certain Softwood Lumber from Canada*, Final Countervailing Duty Determination (Dep’t of Commerce Nov. 22, 2005); *Antidumping and Countervailing Duty Investigations of Certain Softwood Lumber Products from Canada: NAFTA Panel Decision* 69 Fed. Reg. 69584 (Dep’t of Commerce Nov. 30, 2004) (Notice of NAFTA Panel decision).

the initial determinations in 2002, yet Commerce made no mention of them in its last Report To The Congress.

In addition, an arbitration panel of the World Trade Organization found, on March 22, 2004, that:

... in its final threat of injury determination, the US International Trade Commission (USITC) failed to comply with the requirements of Articles 3.5 and 3.7 the Anti-Dumping Agreement and Article 15.5 and 15.7 of the SCM Agreement in finding a likely imminent substantial increase in imports and a causal link between imports and threat of injury to the domestic industry in the US producing softwood lumber. The panel found that the USITC's finding of likelihood of substantially increased imports was not consistent with the requirements of the Agreements, and that the causation conclusion rested on this inconsistent finding. The panel therefore found that the anti-dumping and countervailing measures imposed by the United States on imports of softwood lumber from Canada are inconsistent with the United States' obligations under those provisions, and recommended that those measures be brought into conformity with the United States' obligations.⁴

The Commission, purporting to implement and comply with the "no threat of injury" findings of the WTO panel, issued a new affirmative threat of injury determination under Section 129 of the Uruguay Round Agreements Act.⁵ The U.S. Trade Representative, Commerce, and the Commission sought to use the new Section 129 threat of injury determination to resurrect the Commission's threat of injury determination that had not survived NAFTA Panel, and WTO Panel, review. A three-judge panel of the U.S. Court of International Trade invalidated the Section 129 action and confirmed that "Section 129 cannot be read to imply authority for the USTR to order the implementation of a section 129(a) determination that does not result in at

⁴ See the WTO's description of *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada* (DS 277) at http://wto.org/english/tratop_e/dispu_e/cases_e/ds277_e.htm

⁵ See *Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,917 (Dec. 20, 2004).

least partial revocation of an AD, CVD or safeguards order.” *Tembec Inc. v. U.S.*, 441 F.Supp. 2d 1302, 1327 (Ct. Int’l Trade 2006).⁶

The 2006 results of these judicial processes, in what is called “*Lumber IV*” (the fourth set of investigations and administrative reviews of allegations that Canadian softwood lumber exports to the United States were unfairly subsidized, which began in 1982), emerged like those of the previous rounds of the softwood lumber dispute. Neither Commerce nor the Commission, through four investigations over a period of nearly twenty-five years, has ever had a final determination upheld finding countervailable subsidies on softwood lumber from Canada. Thus, Commerce addresses the programs it has “identified” in investigations without mentioning that, repeatedly for nearly a quarter century, Commerce’s findings have been overturned by judicial review, and Commerce itself, on remands, has stated that the programs it initially had found to be countervailable subsidies either have not been subsidies at all, or have not been specific to an industry or group of industries such that they would be countervailable.

Since 2007, Commerce has never presented to Congress the real facts about its judicial setbacks and remand determinations. Instead, Commerce has tried to convey the impression to Congress that Canadian softwood lumber producers continue to enjoy significant subsidies that are offset by the Softwood Lumber Agreement of 2006.

III. THE DEFINITION OF A COUNTERVAILABLE SUBSIDY

There are three 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

⁶ The judgment was vacated due to the 2006 Softwood Lumber Agreement between the United States and Canada, but the decision of the court was not withdrawn. *Tembec, Inc. v. U.S.*, 475 F.Supp.2d 1393, (Ct. Int’l Trade 2007).

financial contribution must be specific to the good in question. Third, the specific 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 Commission, not Commerce.

The main alleged softwood lumber subsidy is “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 Commerce, 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 representing a financial contribution.

Commerce’s initial findings in CVD investigations concerning softwood lumber from Canada have never been upheld upon judicial review. Commerce has tried many different methodologies to determine what adequate remuneration ought to be, then contrasting that value with amounts actually paid. In every instance, through four protracted rounds of litigation, judicial review has held the methodologies and calculations finding inadequate remuneration to be unlawful. In every instance, when Commerce has complied with judicial instructions correcting the flaws and errors in the methodologies finding inadequate remuneration, Commerce has found, on remand, that remuneration was adequate. Consequently, in the end, Commerce has never “identified” stumpage as a subsidy because its initial views have never been upheld.

Nor have alleged subsidies ever been found to be countervailable. Notwithstanding the Commission’s investigative conclusions that unfair trade has threatened injury to the domestic

producers of softwood lumber (the Commission never found the industry actually injured), not once in a quarter-century did the legal process conclude with a finding that a domestic U.S. industry was injured or threatened with injury by reason of unfairly traded imports of softwood lumber from Canada.

Notwithstanding these truths – that the most important “identified” subsidies have been found repeatedly not to be subsidies at all, and that even had they been subsidies they would not have been countervailable – Commerce, with the advice and guidance of the U.S. softwood lumber industry, has reported to Congress on subsidies justifying managed trade and higher prices for American consumers.

IV. NO COUNTERVAILABLE SUBSIDIES HAVE BEEN IDENTIFIED UNDER THE SOFTWOOD LUMBER AGREEMENT

Commerce has “identified” repeatedly for Congress, since the signing of the 2006 Softwood Lumber Agreement (“SLA”), alleged subsidies to the production and export of softwood lumber from Canada. In its most recent Report, Commerce referred to “subsidies identified in connection with the SLA which have been reviewed by an arbitration panel.”

The alleged existence of these subsidies purportedly justifies the continuation of trade restrictions raising the price of softwood lumber. However, the SLA and its dispute settlement mechanisms neither identify nor define countervailable subsidies. Commerce has not been involved in considering subsidy allegations concerning softwood lumber from Canada since its final negative remand determinations in 2006.

The SLA has no provision for identifying and offsetting countervailable subsidies. What Commerce seems to mean, in referring to “subsidies identified in the course of administering and enforcing the SLA,” Report at 5, is any grant or other benefit that has been determined to

reduce or offset the taxes or quotas imposed by the SLA and is not covered by an exception. See SLA Article XVII. SLA arbitration panels have reviewed allegations that such grants or benefits circumvent the tax or quota Export Measures, but their findings and conclusions are not determinations that a program is a countervailable subsidy.

The criteria for determining countervailable subsidies are not the same as the SLA circumvention criteria applied by the SLA tribunals. A countervailable subsidy under both U.S. and WTO trade law requires findings of a financial contribution, benefit, specificity and injury or threat of injury to domestic producers of like goods. The SLA tribunals have neither the authority nor responsibility for determining whether the government has received adequate remuneration for any grants or benefits provided to Canadian softwood lumber producers. Nor do the tribunals have the authority or responsibility for determining whether U.S. softwood lumber producers have been injured or threatened with injury.

SLA tribunals applying the anti-circumvention criteria in SLA Article XVII consider whether grants or benefits were provided to producers or exporters of Canadian softwood lumber products that offset the SLA Export Measures. Grants or benefits provided under stumpage programs as they existed on July 1, 2006 and programs undertaken for environmental conservation are not considered circumventions of the SLA, let alone countervailable subsidies.

The remedy for SLA circumvention also is different from the remedy for countervailable subsidies. The SLA provides quotas for shipments of softwood lumber to the United States from Québec, Ontario, Manitoba and Saskatchewan and for a further reduction of the permitted export volumes in the event of circumvention. U.S. trade law, however, does not allow any quotas as a remedy to offset countervailable subsidies (nor does the WTO). The SLA requires

producers and exporters of Canadian softwood lumber to pay export charges to the Government of Canada at pre-determined rates, depending solely on the price for lumber in a given period, which rates may be increased in the event of a finding of circumvention. U.S. trade law permits the imposition of countervailable duties calculated in reference to the benefit received from the provincial government. Thus, countervailing duties under U.S. law are intended to level the playing field by offsetting unfair subsidy practices, whereas SLA export taxes are set at fixed rates depending on the current price of lumber.

An SLA tribunal found in 2011 that certain Ontario and Québec programs were circumventions of the SLA, but virtually all of those programs have been eliminated, and their financial impact on the rate of the applicable Export Charges (0.1% for Ontario, 2.6% for Québec) was nominal.

Ontario Programs:

- Ontario Forest Sector Loan Guarantee Program. Applications for this program, which provided nothing more than loan guarantees, were no longer accepted after March 31, 2011, and the last drawdown under the program was in May 2013.
- Ontario Forest Sector Prosperity Fund. Applications for this program were no longer accepted after October 10, 2008. The last check was written from the fund in March 2014.
- Wood Promotion Program. Applications for this program ended February 28, 2014.
- North Ontario Grow Bonds Program. The Northern Ontario Grow Bonds Corporation was dissolved on May 1, 2012. The assets and liabilities of the Corporation were transferred to the Province of Ontario, including the bonds that had not been surrendered by bond holders.
- Ontario Public Access Road Construction and Maintenance Program. What the U.S. Coalition refers to as “forest access roads” are, in fact, public access roads, built by

forest companies not just for harvesting, but also for the use of miners and prospectors, energy companies, summer cottage vacationers, naturalists and blueberry harvesters, among others. This program pre-dated the July 2006 SLA negotiations and was grandfathered in the agreement.

Québec Programs:

- Québec Forest Industry Support Program. This loan guarantee program was terminated in 2011.
- Québec 15% Capital Tax Credit. The capital tax gradually was 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. This program expired on April 1, 2013.
- Reductions in Operational and Silvicultural Costs. The Programme d'investissement sylvicole (PIS) was terminated on March 31, 2014.

Government of Canada Programs:

- Forest Industry Long-Term Competitiveness Initiative. Programs under this initiative were developed to promote innovation and investment in the forest sector, expand market opportunities, and develop a national forest pest strategy. The programs under this initiative, developed by the Government of Canada, provide no support for the production or export of softwood lumber and consequently could not be identified as "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.

V. THE QUÉBEC AND ONTARIO STUMPAGE PROGRAMS ARE MARKET-BASED

A. Québec Revised Its Stumpage Program In 2011 With Due Consideration Of U.S. Government And Industry Complaints

The problems in this story are felt acutely in Québec because, in 2011, Québec radically reformed its stumpage program in ways that should please the United States, notwithstanding

that the system for selling stumpage had not been found in the previous two investigations to confer a subsidy. Québec substantially reformed its stumpage system to make it even more market-determined. 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 Quebec'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 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. 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 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 volume is harvested. Québec industry also must pay for roads, fire and insect protection, in addition to paying auction prices and annual dues for established mills.

B. Ontario's Stumpage Program Is Market-Based

Ontario's timber harvesting fees are based on the value derived from fair market value sales of forest products downstream. Commerce has recognized the "basic market principle"

that “the market value of timber is derivative of the value of the downstream products,” and that the method of “deriving stumpage prices from log prices,” as Ontario’s residual value stumpage system does, allows Commerce “to determine whether provincial stumpage prices are consistent with market principles.”⁷ Ontario’s residual value system had been recognized by Commerce and an independent NAFTA arbitration panel in *Lumber IV*, after years of thorough investigation, as providing no countervailable subsidy.⁸ The Ontario industry also incurs the costs of obligations from operating on Crown lands, such as the preparation of long-term forest management plans, that typically are not incurred by participants in U.S. Forest Service auctions.

VI. CONCLUSION

The 2006 Softwood Lumber Agreement between Canada and the United States was a political compromise to end litigation and introduce predictability and stability to North American lumber markets. It was not a reversal of judicial findings and agency admissions that Canadian softwood lumber exports to the United States were not subsidized and were not injuring, nor threatening injury, to any U.S. industry. The semi-annual reports to Congress mandated by the SLA are not invitations to revise the history of this dispute. At the end of each of four rounds of protracted legal disputes, Canadian softwood lumber exports to the United States have never been found to be unfairly subsidized or to injure or threaten injury to any U.S. industry.

Nothing has occurred since 2006 to alter these facts. Allegations of circumvention of the SLA cannot be translated into findings, or “identification,” of countervailable subsidies. What has occurred, most prominently and conspicuously, is that Québec has reformed its stumpage

⁷ See *Remand Determination In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Countervailing Duty Determination* (Dep’t of Commerce Jan 12, 2004) at 11.

⁸ See *Decision of the NAFTA Panel on Third Remand, In the Matter of Certain Softwood Lumber Products from Canada: Final Countervailing Duty Determination* USA-CDA-2002-1904-03, May 23, 2005 at 21-22.

system – not because the old system conferred a subsidy (Commerce admitted in its final remand determination that it did not), but because an auction-based system is what the United States has demanded. Between the conclusions in 2006 that Ontario's residual value system is market-determined, and the 2011 revisions to Québec law conforming to U.S. demands, there remains no basis at all for Commerce's historical revisionism that is transparently designed to raise prices on new homes for Americans.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "E. Feldman", with a stylized flourish at the end.

Elliot J. Feldman
Michael S. Snarr

Counsel to Conseil de l'industrie forestière du Québec
and the Ontario Forest Industries Association