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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,

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

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[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

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[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

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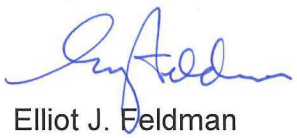
[7] *See Remand Determination In the Matter of Certain Softwood Lumber from Canada*: *Final Affirmative Countervailing Duty Determination* (Dep't of Commerce Jan 12, 2004) at 11.
[8] *See Decision of the NAFTA Panel on Third Remand, In the Matter of Certain Softwood Lumber Products from Canada: Final 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,



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