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Acting Secretary of Commerce
Attn: Enforcement and Compliance
APO/Dockets Unit, Room 18022
U.S. Department of Commerce
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

Re: **Countervailing Duty and Antidumping Duty Investigations of Certain Softwood Lumber Products from Canada: Comments on Allegations of Critical Circumstances**

Dear Acting Secretary:

On behalf of the Government of Canada ("GOC"), and with the support of the Provinces of Alberta, British Columbia, Ontario, Québec, New Brunswick, Manitoba, and Saskatchewan (collectively, the "Governmental Parties"), the four mandatory respondents in these investigations (Canfor, Resolute, Tolko, and West Fraser), J.D. Irving, and industry associations British Columbia Lumber Trade Council, Conseil de l'industrie forestière du Québec, New Brunswick Lumber Producers, and Ontario Forest Industries Association, we submit the

following comments on critical circumstances for the Department's consideration in advance of the preliminary determinations in the above-referenced investigations of certain softwood lumber products from Canada. We file these comments at this stage of the proceedings in light of the recent submission of mandatory respondents' monthly shipment data and Petitioner's proposal that the Department issue an early critical circumstances decision, in advance of the preliminary determinations.[1] We may also file comments on this topic later in the investigations as additional facts and arguments are presented or become available.

When considering allegations of critical circumstances at the preliminary phases of countervailing duty ("CVD") and antidumping duty ("AD") investigations, the Department must apply separate two-pronged tests that share a common element. The first prong of the CVD test requires the Department to evaluate whether "the alleged countervailable subsidy is inconsistent with the Subsidies Agreement."[2] Under the first prong of the AD test, the Department must determine whether "there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise" or "the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales."[3] The second and final prongs of both tests are identical: the Department must determine whether "there have been massive imports of the subject merchandise over a relatively short period."[4] As explained below, none of the foregoing statutory prongs is met in either the CVD or AD investigation, and the Department should

[1] *See* Committee Overseeing Action for Lumber International Trade Investigations or Negotiations, Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Softwood Lumber Products from Canada (Nov. 25, 2016) ("Petition"), Vol. I at 67-68.
[2] 19 U.S.C. § 1671b(e)(1)(A).
[3] *Id.* § 1673b(e)(1)(A).
[4] *Id.* §§ 1671b(e)(1)(B), 1673b(e)(1)(B).

therefore issue negative preliminary determinations on critical circumstances in both investigations.

I. The Alleged Subsidy Does Not Support a Finding of Critical Circumstances

When applying the first prong of the CVD test, the Department "limits its findings to those subsidies contingent on export performance or the use of domestic over imported goods (*i.e.*, those prohibited under Article 3 of the Subsidies Agreement)."[5] Here, Petitioner contends that the "Export Guarantee Program" ("EGP") administered by Export Development Canada is a subsidy contingent upon export performance, in violation of the Subsidies Agreement.[6] Neither the Petition nor the Department's Initiation Checklist identifies any other alleged subsidies that Petitioner claims are contingent upon export performance.

The EGP does not support an affirmative preliminary determination of critical circumstances for any of the mandatory respondents. As those entities have reported separately, none of them or their cross-owned companies used the EGP during the POI. With respect to the mandatory respondents, therefore, Petitioner's critical circumstances allegations must fail at the first prong.

Nor does the EGP support an affirmative preliminary finding for all other producers of softwood lumber products from Canada. In recent preliminary determinations on critical circumstances where the Department has considered usage or non-usage of an alleged prohibited subsidy by all other (non-mandatory) respondents, the Department has relied predominantly on the experience of the investigated companies. For example, in its CVD investigation of certain cold-rolled steel flat products from Russia, the Department initiated on two programs that the

[5] *Decision Memorandum for the Preliminary Negative Countervailing Duty Determination in the Countervailing Duty Investigation of Monosodium Glutamate from Indonesia; and Preliminary Negative Determination of Critical Circumstances in the Countervailing Duty Investigation* 6 (Mar. 4, 2014) (C-560-827) (citation omitted).
[6] Petition, Vol. I at 77-78.

petitioner alleged were contingent upon export performance.[7] In its subsequent preliminary decision memorandum, however, the Department found that the mandatory respondents had not used the programs and thus explained:

> We preliminarily determine that the {mandatory respondents} did not use, or receive benefits from, a prohibited subsidy (*e.g.*, a program subsidy program {sic} that was contingent upon export sales as described under section 771(5A)(B) of the Act). Therefore, we preliminarily determine that critical circumstances do not exist for the {mandatory respondents}, *and all other producers/exporters*.[8]

In other words, the Department found non-usage by the mandatory respondents and relied on that non-usage in determining non-usage by all other producers.[9] In this case, the Department should not deviate from its practice of relying on the experience of the mandatory respondents to assess, for the purposes of a preliminary determination on critical circumstances, whether all other producers received a benefit from an alleged subsidy that Petitioner claims is inconsistent with the Subsidies Agreement. Because no mandatory respondents used the EGP during the POI, the Department should issue a negative determination on critical circumstances for all respondents in the CVD investigation.

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[7] *See Certain Cold-Rolled Steel Flat Products From Brazil, India, the People's Republic of China, the Republic of Korea, and the Russian Federation: Initiation of Countervailing Duty Investigations*, 80 Fed. Reg. 51,206, 51,209 (Aug. 24, 2015) (referring to Russia CVD Initiation Checklist); *Countervailing Duty Investigation Initiation Checklist, Certain Cold-Rolled Steel Flat Products from the Russian Federation* 9 (Aug. 17, 2015) (C-821-823) (recommending initiation on grants for "Export Credit Interest for 'Highly Processed' Industrial Goods"); *id.* at 16 (recommending initiation on "Eximbank Financing").

[8] *Decision Memorandum for the Preliminary Affirmative Determination, Preliminary Negative Critical Circumstances Determination, and Alignment of Final Determination With Final Antidumping Duty Determination: Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation* 8 (Dec. 15, 2015) (C-821-823) (emphasis added).

[9] *See also Decision Memorandum for Preliminary Determination of Countervailing Duty Investigation: Non-Oriented Electrical Steel from the People's Republic of China* 4 (Mar. 18, 2014) (C-570-997) ("To determine whether all other PRC producers/exporters of the subject merchandise under investigation benefitted from countervailable subsidies that are inconsistent with the SCM Agreement, we are basing our finding on the decision applied to {the mandatory respondent}.").

II. There Is No History or Knowledge of Dumping and Material Injury by Reason of Subject Imports

In support of its allegations of critical circumstances in the AD investigation, Petitioner claims that "{t}here can be no doubt that there is a history of dumping and material injury by reason of dumped subject imports in the United States."[10] But the Petition's two-paragraph characterization of prior proceedings in the softwood lumber dispute falls far short of providing a basis on which the Department could conclude that there is a history or knowledge of dumping and injury.

a. There Is No History of Injurious Dumping

To evaluate "whether a history of dumping and material injury exists, the Department generally considers current and previous AD orders on subject merchandise from the country in question in the United States and current orders in any other country on imports of subject merchandise."[11] Petitioner's observation that "{t}here have been four separate prior CVD proceedings"[12] has nothing to do with whether there is a history of *dumping*. From the early 1980s to the early 2000s—a nearly twenty-year period that captures the *Lumber I*, *Lumber II*, and *Lumber III* investigations—dumping of softwood lumber from Canada was never alleged, let alone investigated. There has been only one previous antidumping order (the "*Lumber IV* AD order") since the genesis of the softwood lumber dispute almost thirty-five years ago but, as explained below, the antidumping order was not based on a proper finding of injury by the International Trade Commission ("ITC").

In its May 16, 2002 final determination in *Lumber IV*, the ITC found that the domestic

[10] *See* Petition, Vol. I at 75-77.
[11] *Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Dioctyl Terephthalate from the Republic of Korea* 6-7 (Jan. 26, 2017) (A-580-889) (concluding critical circumstances did not exist because there was no history or knowledge of injurious dumping).
[12] *See* Petition, Vol. I at 76.

softwood lumber industry was not materially injured by reason of subject dumped and subsidized imports from Canada, but concluded that the industry was threatened with material injury from such imports,[13] thus leading to imposition of AD and CVD orders on May 22, 2002.[14] However, Canadian parties successfully challenged the ITC's threat determination. In its 2006 decision reviewing improper action taken by the U.S. Trade Representative, the Court of International Trade ("CIT") catalogued the extensive procedural history during which multiple NAFTA and WTO Panels repeatedly ruled that the ITC's May 16, 2002 threat-of-injury determination contravened U.S. law and the WTO Antidumping Agreement.[15] As a result, the CIT concluded that the Department's "May 22, 2002 {AD and CVD} Orders {were} not supported by an affirmative finding of injury."[16] Placed in the proper context, then, the *Lumber IV* AD order cannot support a finding that there is a history of injurious dumping.[17]

b. There Is No Knowledge of Dumping and Material Injury

To evaluate whether there is *knowledge* of dumping and material injury, "the Department normally considers dumping margins of 25 percent or more, for export price sales, or 15 percent or more, for constructed export price sales, sufficient to impute knowledge of the exporter selling

[13] *Softwood Lumber from Canada*, Inv. Nos. 701-TA-414, 731-TA-928 (Final), USITC Pub. 3509 at 35 (May 2002).
[14] *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,068 (May 22, 2002).
[15] *See Tembec, Inc. v. United States*, 30 C.I.T. 958, 960-65 (2006) ("*Tembec I*"). The court initially reserved its decision on remedy, and later imposed judgment in *Tembec, Inc. v. United States*, 30 C.I.T. 1519 (2006). That judgment was vacated in *Tembec v. United States*, 31 C.I.T. 241 (2007), but the court declined to withdraw the underlying decision because of "the substantial public interest in the establishment of judicial precedent." *Id.* at 251.
[16] *Tembec I*, 30 C.I.T. at 1002.
[17] Meanwhile, the dumping margins calculated by the Department in the *Lumber IV* investigation and administrative reviews never exceeded 15% for any company, and declined to an average of only 2.11% in the second (and last fully completed) administrative review. *See Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,068 (May 22, 2002) (amended final AD order); *Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products From Canada*, 69 Fed. Reg. 75,921 (Dec. 20, 2004) (AR1 final); *Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 73,437 (Dec. 12, 2005) (AR 2 final).

the subject merchandise at less than its fair value."[18]

The only information about the margin of dumping on the record at this stage of the investigation is the petition. Petition rates are known to be inherently unreliable.[19] It is therefore premature at this stage to rule on whether there is dumping exceeding the thresholds discussed above.

However, even if the preliminary margins are above the relevant thresholds, it remains the case that the importers of subject merchandise would have no reason to know that the dumping was injurious. As discussed above, *Lumber IV* resulted in a negative current injury determination, and ultimately after appeal a negative threat determination as well. Furthermore, the Department should not rely on the ITC's preliminary determination in the pending investigations to impute knowledge of dumping and injury. In cases where an ITC preliminary determination has preceded the Department's preliminary determination on critical circumstances, the Department has sometimes looked to the ITC's decision "{t}o determine whether importers knew, or should have known, that there was likely to be material injury by reason of dumped imports."[20] We respectfully submit that relying on an ITC preliminary determination to impute knowledge of injurious dumping is at best a dubious practice, given that the ITC need only find a "reasonable indication" of injury in that phase of its investigation. The

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[18] *Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Dioctyl Terephthalate from the Republic of Korea* 7 (Jan. 26, 2017) (A-580-889) (citation omitted).

[19] *See, e.g.*, *id.* at 5-7 (finding that margins did "not meet the quantitative thresholds utilized by the Department" despite allegations in petition that margins "exceeded the threshold . . . to impute knowledge"); *Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Phosphor Copper from the Republic of Korea* 6-8 (Oct. 5, 2016) (A-580-885) (declining to impute knowledge despite allegation in petition that margins "could be as high as 66.54 percent"); *Decision Memorandum for the Preliminary Affirmative Determination in the Antidumping Duty Investigation of Certain Oil Country Tubular Goods from the Republic of the Turkey* 13 (Feb. 14, 2014) (A-489-816) (noting that Department calculated preliminary dumping margins of "0.00 percent" and "4.87" for two mandatory respondents, notwithstanding petitioner's allegations of margins as high as 47%).

[20] *See Welded Stainless Pressure Pipe from Malaysia: Critical Circumstances* 4 (Dec. 30, 2013) (A-557-815) (relying on ITC preliminary determination "to impute knowledge of material injury to the importers").

practice is even less warranted where there are simultaneous countervailing and antidumping duty investigations, such as here. In such instances, there is no articulable basis in the ITC's decision for discerning whether the injury determination is premised on potentially subsidized imports alone, potentially dumped imports alone, or both, as the ITC makes no determination on the underlying CVD and AD claims. A preliminary determination by the ITC in a joint CVD/AD investigation says nothing definitive about whether injury may be caused by dumped imports. The Department should therefore avoid relying on such a determination to impute knowledge that there was likely to be injurious dumping.

Relying on the ITC's January 2017 preliminary determination to impute knowledge would be even more problematic if the Department adopted the Petitioner's proposed pre-Petition "knowledge" date for purposes of determining whether there are "massive imports." In the Department's 1997 *Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, one of the earliest instances we have identified where the Department relied on an ITC preliminary determination to impute knowledge of injurious dumping, the Department made clear that it relied on the ITC decision in that case "because the general public, including importers, is deemed to have *notice* of that {ITC} finding as published in the Federal Register."[21] The "notice" rationale for imputing knowledge of injury disappears, however, if the Department considers comparison periods far in advance of an ITC decision.

Petitioner has failed to establish either history or knowledge of injurious dumping. The Department should thus issue a negative preliminary determination on critical circumstances in the antidumping duty investigation.

[21] 62 Fed. Reg. 61,964, 61,967 (Nov. 20, 1997) (emphasis added).

III. The Department Should Reject Petitioner's Proposed Comparison Periods for Determining Whether There are Massive Imports

Petitioner's allegations on critical circumstances do not satisfy the first prong of either the CVD or AD test, and it is therefore unnecessary for the Department to examine now or at a later date whether there have been "massive imports of the subject merchandise over a relatively short period."[22] If the Department does consider the issue of "massive imports," however, we urge the Department to wait until more data are available, as the Department's traditional comparison periods require at least three months of data before and after the filing of a petition. The Department should not adopt the alleged pre-Petition knowledge date requested by the Petitioner, as selecting that date is not supported by the evidence and would be inconsistent with the Department's practice.

The Department generally will not consider an increase of less than 15 percent sufficient to meet the massive imports standard. Specifically, the Department's regulations state: "In general, unless the imports during the 'relatively short period' . . . have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive."[23]

Regarding the appropriate "relatively short period," the Department's typical practice is to compare data for periods of at least three months before and after "the date the proceeding begins," i.e., "the date a petition is filed."[24] In special circumstances, the Department may compare earlier data if it "finds that importers, or exporters or producers, had reason to believe,

[22] *See* 19 U.S.C. §§ 1671b(e), 1673b(e).
[23] 19 C.F.R. § 351.206(h).
[24] *Decision Memorandum for the Preliminary Determination in the Less Than Fair Value Investigation and Negative Determination of Critical Circumstances of Emulsion Styrene-Butadiene Rubber from Brazil* 12 (Feb. 16, 2017) (A-351-849) (citing 19 C.F.R. § 351.206(i)).

at some time prior to the beginning of the proceeding, that a proceeding was likely."[25] Under either approach, "it is the Department's practice to base its critical circumstances analysis on all available data."[26]

At the time the Petition was filed in this case, Petitioner relied on aggregate data through August 2016 and asked the Department to compare the ten-month periods before and after mid-October 2015 (i.e., January 2015 through October 2015 and November 2015 through August 2016).[27] Petitioner's approach suffers from at least two flaws. First, adopting an October 2015 "knowledge" date is not supported by sufficient evidence of knowledge that a "proceeding was likely" before the Petition was filed. Petitioner contends that, "{w}hen the {SLA 2006} expired on October 12, 2015, Canadian producers and subject importers were aware of a *near exact date* when AD or CVD proceedings were likely (*i.e.*, shortly after the standstill period)."[28] But Petitioner conveniently ignores the significant negotiating history that took place after the SLA 2006 expired and continued into late 2016. For example, nine days after the standstill period expired on October 12, 2016, and the domestic industry was no longer barred from filing a trade action, the U.S. Lumber Coalition[29] issued a press release that, in part, commended a group of U.S. Senators for urging the Canadian and United States Governments to "bring the negotiations

[25] 19 C.F.R. § 351.206(i).
[26] *E.g.*, *Decision Memorandum for the Negative Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination in the Less-Than-Fair-Value Investigation of Certain Oil Country Tubular Goods from the Republic of Korea* 15 n.105 (Feb. 14, 2014) (A-580-870) ("The Department's long-standing practice in critical circumstances determinations is to examine the longest period for which information is available up to the date of the preliminary determination.") (citation omitted); *Decision Memorandum for the Preliminary Affirmative Determination in the Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the People's Republic of China* 18-19 (Dec. 15, 2016) (C-570-030) (finding pre-petition knowledge date and considering data "up until the most recent month for which data are available").
[27] *See* Petition, Vol. I at 73.
[28] *Id.* at 70 (emphasis added).
[29] The U.S. Lumber Coalition is the first entity identified in Petitioner's roster of members. *See* Petition, Vol I. at 2.

process to successful conclusion with a new, stable, and sustainable agreement."[30] In fact, Petitioner did not file its Petition until over forty days after the standstill period had expired. Petitioner cannot have it both ways. Claiming that importers knew in October 2015 of a "near exact date" when a proceeding was likely—when Petitioner expressed optimism about a new agreement publicly as late as October 2016—is far too thin a reed to support such a departure from the Department's well-established practice of comparing periods before and after the filing of the petition.

Second, the periods Petitioner proposes to compare are both too long and too old to meet the standard set forth in the statute. In addition to being well beyond the "relatively short period" contemplated by the statute,[31] comparing ten-month periods that collectively end in August 2016—three months before the filing of the petition—does not make use of "all available data" that the Department has a practice of using. Any extension of the periods to make use of such available data would make a mockery of the "relatively short period" standard.

In short, Petitioner has presented inadequate support for its proposed comparison periods. If the Department reaches the issue of "massive imports," it should wait until data are available for at least three months after the filing of the Petition. In the meantime, there is no basis in the record for the Department to conclude that there have been "massive imports" of softwood lumber from Canada "over a relatively short period" by either the mandatory respondents or all others.

* * *

[30] *See* U.S. Lumber Coalition Press Release (Oct. 21, 2016), http://www.uslumbercoalition.org/doc/USLC%20Press%20Release%20re%20Senate%20to%20President%20Obama%20re%20Negotiations%20for%20a%20New%20SLA%2010212016.pdf (accessed Feb. 23, 2017).

[31] Although the Department has considered ten-month periods on at least one occasion in the past, we respectfully submit that comparison of such long periods is not consistent with the statutory directive to consider imports "over a relatively short period."

None of the statutory requirements are met for an affirmative determination of critical circumstances in either the CVD or AD investigations of certain softwood lumber products from Canada. Accordingly, the Government of Canada, with the support of the above-referenced accompanying parties, requests that the Department issue negative critical circumstance determinations in both investigations—or, at the very least, postpone making a decision on this topic until the preliminary determinations in both investigations are issued.

Respectfully submitted,

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COUNSEL CERTIFICATION

I, Matthew R. Nicely, with Hughes Hubbard & Reed LLP, counsel to the Government of Canada, certify that I have read the attached submission of Comments on Allegations of Critical Circumstances filed on February 24, 2017, pursuant to the antidumping and countervailing duty investigations regarding Softwood Lumber from Canada (A-122-857/C-122-858). In my capacity as counsel to the Government of Canada, I certify that the information contained in this submission is accurate and complete to the best of my knowledge. I am aware that U.S. law (including, but not limited to, 18 U.S.C. § 1001) imposes criminal sanctions on individuals who knowingly and willfully make material false statements to the U.S. Government. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD/CVD proceeding, the U.S. Department of Commerce may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that a copy of this signed certification will be filed with this submission to the U.S. Department of Commerce.

Signature: 

Date: 2/24/17

GOVERNMENT CERTIFICATION

I, Michael Owen, Senior Counsel, Trade Law Bureau, currently employed by the Government of Canada, certify that I prepared or otherwise supervised the preparation of the attached submission of Comments on Allegations of Critical Circumstances filed on February 24, 2017 pursuant to the antidumping and countervailing duty investigations regarding Softwood Lumber from Canada (A-122-857/C-122-858). I certify that the public information and any business proprietary information of the government of Canada contained in this submission is accurate and complete to the best of my knowledge. I am aware that the information contained in this submission may be subject to verification or corroboration (as appropriate) by the U.S. Department of Commerce. In addition, I am aware that, even if this submission may be withdrawn from the record of the AD/CVD proceeding, the Department may preserve this submission, including a business proprietary submission, for purposes of determining the accuracy of this certification. I certify that copy of this signed certification will be filed with this submission to the U.S. Department of Commerce.

Signature: 

Date: February 24, 2017

PUBLIC CERTIFICATE OF SERVICE

I, Matthew R. Nicely, hereby certify that a copy of the foregoing public submission has been served this day via email per prior agreement, upon the following persons:

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Dated: February 24, 2017