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FOR ELECTRONIC SUBMISSION

Donald W. Eiss
Chairman, Trade Policy Staff Committee
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: Negotiating Objectives with Respect to Canada's Participation in the Proposed Trans-Pacific Partnership Trade Agreement (Docket No. USTR-2012-0015)

Dear Mr. Eiss:

These comments are submitted on behalf of the U.S. Lumber Coalition[1] (the "Coalition") in response to the "Request for Comments on Negotiating Objectives with Respect to Canada's Participation in the Proposed Trans-Pacific Partnership Trade Agreement" published by your office on July 23, 2012.[2] They are submitted within the deadline set forth in the notice and contain no business confidential information. With the submission of these written comments, the Coalition believes it unnecessary to request to participate in the September 24 hearing on this matter.

[1] The U.S. Lumber Coalition, formerly known as the Coalition for Fair Lumber Imports, is an association of domestic entities interested in promoting fair trade in softwood lumber products. Members of the Coalition were petitioners in the antidumping and countervailing duty proceedings that were settled in the 2006 Softwood Lumber Agreement.

[2] 77 Fed. Reg. 43,131 (USTR July 23, 2012).

The United States and Canada entered into their first modern free-trade arrangement almost a quarter century ago. Under the U.S.-Canada Free Trade Agreement (FTA), and then the North American Free Trade Agreement (NAFTA), the economic relationship between our two countries has deepened substantially. However, important structural differences remain, and trade disputes between the United States and Canada continue to occur where these differences create imbalances due to the economics of particular industries. Perhaps no such dispute has been as legally complex, politically acrimonious, or directly impactful on jobs and investment on both sides of the border as the dispute over trade in softwood lumber.

Canada's participation in the potential Trans-Pacific Partnership trade agreement ("TPP") provides a number of opportunities to address softwood lumber trade in a constructive way. As explained in detail below, neither the FTA nor NAFTA addressed the fundamental structural differences between U.S. and Canadian timber markets that are at the root of the softwood lumber dispute, and in at least one instance they created a mechanism that has actually exacerbated the problem. To the extent that the negotiation of a "high-standard, 21st century" trade agreement that includes Canada can improve this situation, the Coalition would support and encourage such an agreement.

In these comments, we will briefly outline these outstanding issues that, in the Coalition's view, are at the root of the ongoing trade dispute over softwood lumber. We will then address specific areas of the negotiation where we believe useful progress could be made.

1. Differences Between U.S. and Canadian Timber Markets Are the Fundamental Cause of the Softwood Lumber Dispute

Softwood lumber products are solid wood products made from coniferous (evergreen) species of trees, such as spruce, pine, fir, and cedar. When trees are harvested, they produce

"roundwood" or logs which are generally transported to lumber mills (sawmills) where they are manufactured into lumber. A variety of co-products, such as wood chips, sawdust, and bark are also produced, which can be used to produce a wide variety of products, including pulp and paper products and, increasingly, bioenergy. While softwood lumber has many uses, the principal drivers of softwood lumber demand in the United States are the home construction and remodeling industries. For U.S. producers, the cost of logs – the raw material for lumber – is approximately 70 percent of the cost of production.

In the United States, most of the timberlands from which the softwood lumber industry draws its logs are privately owned. State and federal lands are an important but relatively small, supplemental source of timber for producers in the western United States, while producers in the U.S. South and Northeast rely almost exclusively on logs harvested from private lands. Thus, the prices U.S. lumber producers pay for their wood fiber supply is set by market forces of supply and demand.

In Canada, the situation is quite different. Provincial governments own approximately 90 percent of the commercial timberlands in most Canadian lumber-producing provinces. Most timber is harvested pursuant to long-term contracts (20 or 25 years, renewable indefinitely) that require lumber producers to manage a portion of the Crown forest in return for the right to harvest timber at a price (known as "stumpage") determined by the provincial government. In some provinces, this price is simply set administratively by government regulation. Other provinces have attempted to establish pricing formulas to tie the administered stumpage rate on long-term tenures to observed prices in auctions for limited amounts of Crown timber or the small volume of private timber sales in a province. However, the dominance of long-term tenures over these auction or private timber markets, combined with the considerable discretion

the provinces retain in designing and implementing the pricing formulas, give little confidence that these formulas generate true market prices.

In any case, the timber prices paid by Canadian softwood lumber producers are almost always lower, sometimes very substantially lower, than the market prices paid by U.S. lumber producers for their timber supply, even where the U.S.-Canadian border is simply a line drawn through a forest that is identical on both sides of the border. This subsidy – government sales of timber for below-market prices – provides a significant advantage to Canadian producers in the U.S. market. And Canada mainly produces for the U.S. market; before the 2006 Softwood Lumber Agreement (SLA) and the post-2007 U.S. housing market collapse, some 60 percent of Canadian production was exported to the United States, while Canadian imports made up more than 35 percent of U.S. consumption.

The lumber market is highly cyclical, and lumber producers – both in Canada and in the United States – tend to be located in relatively isolated areas where few other economic opportunities exist. Particularly when lumber markets are poor, Canadian provincial governments come under considerable political pressure to use their ownership of the forest resource to enable local lumber producers to survive the downturn and preserve local jobs and economic activity. But doing this does not eliminate the economic pain of the downturn; it simply exports it to competing lumber-producing regions. If one Canadian province starts down this road, other Canadian provinces can use their ownership of the forest resources to respond in kind, but U.S. producers do not have this option. Either they can avail themselves of the U.S. trade laws, as they have on several occasions since 1981, or they can simply absorb Canada's share of the industry's adjustment to the down cycles.

It is unlikely that the United States will abandon private ownership of commercial timberlands, or that Canada will privatize its Crown forests, at any time in the foreseeable future. Accordingly, the goal of any trade agreement in this area must be to manage the differences between the two systems as they impact trade in softwood lumber products. Trade agreements provide two avenues for dealing with these differences – they can impose disciplines that improve the degree to which Canadian timber pricing and forest management systems reflect market forces, and they can improve the available border mechanisms to ensure that trade in lumber products can occur as freely and fairly as possible given the nonmarket aspects of Canadian timber policy that may continue to exist. The TPP negotiations offer both sets of opportunities, and the United States should actively pursue both of them with Canada.

2. A TPP Agreement Can Improve Disciplines on Nonmarket Aspects of Canadian Timber Policies

Trade agreements like the TPP must respect the national sovereignty of all the parties, and this extends to Canada's sovereign right to provide for any system of ownership rights for commercial timberland that it chooses. Where Canada's choice of mainly public ownership of its forests affects its trading partners, and therefore becomes relevant to the TPP negotiations, is in the potential distortions of public forest ownership on the markets for the forest products that are made from the trees harvested from these forests. A TPP agreement can address these distortions either directly (through disciplines on the public ownership of the forests itself) or, perhaps more promisingly, indirectly (through disciplines on trade in the logs harvested from the public forests). We deal with each of these in turn below.

(a) Disciplines on Timber Pricing and Forest Management Practices in Public Forests

Forests are important resources for many reasons that have nothing to do with trade concerns. Forest ecosystems are highly diverse and support wildlife, absorb and store carbon dioxide, and provide important recreational, environmental, and other benefits. Whether forests are publicly or privately owned, forest management must take into account all of these concerns. However, forests also provide a commercial resource – timber that is harvested for production of lumber and its coproducts. Thus, when governments own commercial forests, they are acting within markets – both the markets for timber harvesting rights (which are inherently local) and the downstream markets for forest products (many of which are tradable internationally). Trade agreements can ensure that, when governments act as market participants, they do so in accordance with market forces and do not abuse their status as governments to provide greater advantages to its domestic industry over its foreign competitors than they could have in markets.

Historically, trade agreements have addressed the potential government provision of goods for less than adequate remuneration as a subsidy that can be regulated through trade agreement subsidy disciplines. Articles 1 and 14(d) of the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures (SCM) are an example of this type of agreement. However, the TPP will contain additional disciplines on "state-owned enterprises" (SOEs) that may also be relevant to Canadian timber pricing and forest management practices.

The Coalition understands that the TPP discussions of SOE disciplines are focused precisely on the distortions of trade that can occur when governments act as market participants, including with respect to natural resources, in ways that favor their domestic industries and give

them unfair advantages in international trade. Secretary of State Clinton expressed this view clearly in a public statement last year:

> To make the most of open markets, however, we have to make sure that all companies play by the same rules, whether their owners sit in corporate boardrooms or government ministries. Now, let's just be very clear here, too often, national favorites enjoy preferential access to government resources and special protection from competition in their markets. That gives these companies, whether they are wholly owned or partially owned by a government, an unfair advantage and harms foreign competitors and local entrepreneurs alike. We are working to include a chapter on state-owned enterprises in the Trans-Pacific Partnership and to finalize new OECD guidelines. Our premise is simple; the rules must apply equally to all companies. We call this commonsense principle competitive neutrality, and we promote it all over the world.
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> … Governments are entering markets directly through their cash reserves, natural resources, and businesses they own and control. And they are shaping these markets not just for profit, but to build and exercise power on behalf of the state.
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> …
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> The way states deploy their cash, companies, and natural resources, especially in global markets, is of critical concern to us, and I hope it will be also to you. We need, therefore, to develop international rules and norms that set the boundaries, police bad behavior, and require transparency so that state-owned entities are clear about their intentions and their actions.

Speech of Secretary Hillary Rodham Clinton at the Economic Club of New York, Oct. 14, 2011, at 16-18.

To be clear, in this case the "SOEs" are the provincial governments who act, in part, as commercial providers of a commercial product – standing timber – in competition with private actors that also sell standing timber to lumber and other forest product producers. This competition is both direct – i.e., with other potential timber suppliers to Canadian lumber mills that harvest from Crown land, whether on private land in Canada, the United States, or elsewhere – and indirect, through competition in the downstream markets such as lumber. Provincial governments or agencies that sell Crown timber manipulate timber prices in favor of politically

powerful domestic industries; when they do, competing timber sellers must lower their prices in order to compete with the government's pricing policy.

Perhaps even more significantly, Canadian governments distort timber markets by setting unreasonable minimum timber prices. Unlike many perishable agricultural commodities, timber that is not harvested continues to grow and is available for harvest at a future time, when prices and other market conditions may be more favorable. Timber sellers that are motivated primarily by maximizing their own revenue therefore set a "reservation price," below which it is preferable to delay harvesting until prices improve. Minimum timber prices in Canada, however, tend to be much lower than market-based reservation prices; in British Columbia (BC), the minimum price is C$0.25/$m^3$, or about US$10 per truckload of logs – far below any reasonable reservation price. Thus, Canadian provincial governments, unwilling to withhold timber from domestic lumber producers in market downturns for political reasons, continue to sell timber below market-based reservation prices in poor economic conditions. This artificially increases supply precisely when demand is low, exacerbating the effects of poor lumber markets on competing timber sellers and on lumber producers (such as those in the United States) who do not have access to timber at affordable prices when lumber prices are low.

The Coalition believes it would be appropriate to address these issues of market distortions caused by the government acting as the seller of a commercial product in the SOE component of the TPP negotiations. These are precisely the types of government actions that have caused the concerns that Secretary Clinton and other U.S. Government officials have described. However, the Coalition recognizes that the SOE negotiations are still at an early stage and that the SOE disciplines that emerge from the TPP process may not be as comprehensive as one would hope. In that case, these market-distorting Canadian government practices will have

to be addressed under the rubric of subsidy disciplines, which we discuss in section 3 of these comments below. But realism about the likelihood of what the TPP SOE negotiations are likely to achieve does not diminish in any way the pernicious effects of Canada's nonmarket practices in this area or the desirability of bringing the participation of Canadian governments in timber markets under stronger market-based disciplines.

(b) Disciplines on Trade in Logs

Canadian governments manipulate timber markets through their direct participation in these markets as sellers of standing timber on Crown land. However, standing timber can be manufactured into lumber only when it is harvested and the resulting logs are transported to a lumber mill. While standing timber is literally rooted in a particular place, logs can be transported and therefore can be – and are – traded internationally. Therefore, in order to ensure that their nonmarket timber sales practices benefit only domestic lumber producers, Canadian governments must – and do – prevent lumber mills outside their jurisdiction from harvesting timber and exporting logs. Meaningful disciplines on log export restrictions, therefore, could indirectly affect the trade-distorting Canadian timber pricing practices.

Canadian log export restrictions take a variety of forms. We discuss these in detail in the Appendix to this submission. Here we summarize the main types of log export restrictions.

Timber harvested on public land. With respect to Crown timber – which accounts for around 90 percent of the timber used in lumber production in Canada – most provinces have a legal requirement that all timber harvested be manufactured into lumber (or another forest product) in the province of harvest, or (in the case of Ontario) within Canada. Waivers of this restriction are rarely granted, and when they are it is usually only for the least desirable species and qualities of timber. For example, in 2006 BC issued a "Mountain Pine Bark Beetle Timber

Export Order" (OIC 885, Dec. 1, 2006) authorizing the export of a limited quantity of lodgepole pine logs from trees killed by the mountain pine beetle, but only from the Northern Interior Forest Region (i.e., the area farthest from the U.S. border where transportation costs are the highest; logs harvested near the U.S. border were not eligible) and only upon the payment of a C$1.00/$m^3$ "fee in lieu of manufacture in the province." That few, if any, logs were exported pursuant to this order does not imply that there is no significant export demand for Canadian logs generally.

Most of the logs that are exported from Canada are in fact exported from BC, which authorizes the export of logs that are surplus to domestic production needs. In order to receive export authorization, a seller of Crown logs must advertise the sale and make it available to domestic mills. If a domestic mill makes an offer for the logs at the prevailing *domestic* price for logs (which is driven by the administered price for standing Crown timber, not the market price), export authorization will not be granted even if the export price is higher than the price the domestic mill is willing to pay. Further, a "fee in lieu of manufacture in the province" must be paid even when export is authorized. In practice, entities that wish to export logs negotiate with domestic BC mills to provide them with a supply of logs at a lower, domestic price, in order to forestall objections from domestic mills that would block the exports they are able to make at the higher world market price (less the "fee in lieu" payment to the government).

Timber harvested from private land (BC). While provincial governments require domestic processing of logs harvested from Crown lands (and thereby implicitly restrict their export), Canadian federal law requires an export permit for logs harvested from private land. In BC, where a significant amount of commercial timber on the BC Coast is on private land, "Notice 102" essentially empowers the BC provincial government to apply the same log export

blocking system that it uses to implement its own restrictions on logs harvested from BC provincial lands to logs from private lands as well. For land privatized after 1906, the "fee in lieu" requirement also applies even to log exports from private land. In recent years, this "fee in lieu" has been higher than the average Crown stumpage price – meaning that some BC private landowners pay more to the government to export logs from their own land than BC lumber mills pay to harvest Crown timber that they process domestically.

Timber harvested from private land (Quebec). As noted above, only 10 percent of the commercial timber harvest in Canada is derived from private lands; in addition to the significant concentration of private forest on the BC Coast, there is a substantial amount of private forest land in southern Quebec. Much of this land is within commercial transportation range of the U.S. border and logs could be exported from this area, depending on prices. In fact, U.S. mills in this area routinely pay as much, if not more, for logs as their Canadian counterparts, as can be evidenced by advertised log prices in industry trade publications from the region. Yet few, if any, Quebec logs are exported to the United States, regardless of price. While the "blocking" system for log exports from private land in BC does not exist in Quebec, most private landowners in Quebec sell their timber or logs through local "syndicates" or marketing boards. These syndicates operate according to marketing plans that require approval from the Régie, an agency of the Quebec government. While the Coalition is unaware of any formal directive preventing the Régie from approving marketing plans that include log exports, it is nonetheless telling that no such marketing plans have been approved, even when log exports would be advantageous to the private landowners. And even though individual private landowners are nominally free to sell timber and logs outside the marketing boards, numerous Quebec government subsidy programs for private landowners are administered through the marketing

boards, which provides a disincentive for them to act independently. And, in any event, federal Canadian law still requires an permit for any export of logs.

These log export restrictions are an essential component of the Canadian nonmarket timber supply system. Canada's exports of logs to the United States and elsewhere would undoubtedly increase somewhat if log export restrictions were removed. But while these exports might be significant for some U.S. and Canadian mills near the border, it is unlikely that the overall volume of log exports would be large enough to have a major direct impact on timber or lumber markets generally. Much more significant is the fact that log export restrictions insulate Canadian domestic lumber mills from world market prices. For example, when China began to import increasingly large volumes of softwood logs in 2010, lumber mills in the United States, New Zealand, and many other countries faced a significant cost-price squeeze, as their log costs increased because they had to compete for logs with Chinese importers, while their prices for finished lumber products did not increase. Canadian producers, by contrast, did not have to compete with China for logs at the world market price, and so were insulated from this log cost increase. Unsurprisingly, the United States and New Zealand export a much larger volume of softwood logs to China than softwood lumber – but Canada exports much more lumber than logs to China. Eliminating or minimizing Canadian log export restrictions, therefore, is not mainly about increasing Canada's log exports. Rather it is a key means of ensuring that Canadian lumber producers are not shielded from world market prices for their inputs by the Canadian provincial timber supply system.

How would log export restrictions be affected by the TPP negotiations? Presumably the TPP, like other U.S. free trade agreements, would impose general disciplines on the use of export restrictions by TPP members. Unless Canada negotiates a specific exemption from these general

disciplines, it is likely that these disciplines would require the reform, if not the complete elimination, of Canada's log export restrictions.

For example, the U.S.-Dominican Republic-Central America Free Trade Agreement (DR-CAFTA) imposes two types of disciplines on export restrictions, both of which would be relevant to Canada's log export restrictions if mirrored in the final TPP agreement. First, Article 3.8 of DR-CAFTA incorporates the prohibition on export bans and quantitative restrictions established in Article XI of the General Agreement on Tariffs and Trade 1994 (GATT). Canada's log export restrictions clearly qualify as export bans and therefore would be subject to these provisions. Although GATT Article XX recognizes exceptions to the Article XI prohibition on export restrictions, for example to conserve exhaustible natural resources, it is doubtful that Canada's export restrictions – unlike the export restrictions the United States maintains on some exports of logs from public lands – can be justified under these provisions. Exceptions for the corresponding DR-CAFTA provisions (as with the FTA and NAFTA), however, have been handled through a blanket exemption for all log export restrictions, regardless of their form, economic impact, or potential justification. Any such exemption that may be negotiated for a parallel TPP obligation, however, should be limited to restrictions that are genuinely aimed at conserving natural resources. It is difficult to understand how the "blocking" mechanism as employed by BC, for example, could be justified as a conservation measure. It should be possible to devise a TPP exemption for log export restrictions that have the primary effect of promoting conservation, while offering no protection for log export restrictions that have the primary effect of promoting domestic manufacturing at the expense of other TPP parties.

Second, Article 3.11 of the DR-CAFTA prohibits parties from maintaining any duties, taxes, or other charges on exports to another DR-CAFTA party, unless they are also applied to exports to all other DR-CAFTA parties and to domestic producers.[3] On its face, a similar provision in the TPP would appear to prohibit BC's "fee in lieu of manufacture in the province," at least as applied to exports to other TPP members. A robust discipline on export taxes on logs would also prevent the introduction of new export taxes to circumvent any prohibitions on outright export restrictions that might be negotiated in the TPP.

If the TPP contains general disciplines on export restrictions comparable to those in other recent U.S. trade agreements, Canada would need to seek explicit exemptions in order to maintain its current system. While the United States would understandably seek to protect its own right to restrict log exports for conservation purposes, it should be made clear that these restrictions do not aid U.S. lumber producers, who pay full market prices for all of their logs – including those harvested from public lands subject to export restrictions – in the way, or in anything remotely approaching the degree, to which Canadian export restrictions benefit Canadian lumber producers. Further, eliminating export restrictions on logs originating on private land in Canada, while maintaining all of Canada's existing export restrictions on logs from public lands, would not be equivalent to exempting existing U.S. export restrictions on logs from public lands, given the vastly different nature and economic effects between them.

In sum, a "high-standard, 21st century" trade agreement cannot simply protect all of Canada's existing restrictions on the export of logs. Even if conservation concerns preclude

[3] However, it would be useful for the TPP to clarify that the use of export taxes in a bilateral U.S.-Canadian agreement on softwood lumber, such as in the current SLA, would be permissible as a negotiated alternative to the use of trade remedies.

complete and totally unrestricted free trade in logs for all TPP parties, any exceptions to export restraint disciplines for logs should be narrowly drawn so that the trade-distorting, protectionist aspects of the Canadian export restraint system are subject to TPP disciplines.

3. A TPP Agreement Should Provide for Trade Remedies Applied to Imports from All TPP Member Countries on an Equal Footing

Trade remedies – the antidumping duty law to offset international price discrimination and other unfair pricing practices, and the countervailing duty law to offset injurious subsidization – are an essential element of the "free trade" consensus in U.S. trade policy. The benefits of free trade and the efficiencies generated from differences in comparative advantage among countries are undeniable, but these benefits are achievable only when import-sensitive industries have confidence in mechanisms that can remedy instances where differences in national policy can be used to generate artificial and injurious advantages.

Members of the Coalition have, on several occasions in recent decades, been forced to invoke the U.S. trade remedy laws with respect to softwood lumber imports from Canada. They have done so, not to punish Canada or seek protection from an allegedly more competitive Canadian industry, but to seek the restoration of the competitive balance between imports and U.S. producers that is distorted by the Canadian timber pricing and forest management systems. In 1986, 1996, and again in 2006, trade remedy cases have been resolved by bilateral agreements between the United States and Canada specifically to address trade in softwood lumber. These agreements have brought a degree of stability to the market and temporary relief from the worst effects of the Canadian system, but if effective U.S. trade remedy laws were not available to the U.S. industry as an alternative, these agreements would never have existed.

Unfortunately, the effectiveness of these laws has been undermined as they apply to Canada through Chapter 18 of the FTA, maintained in Chapter 19 of NAFTA, providing for binational panel review of whether domestic trade remedy actions comply with domestic law, in place of ordinary judicial review of these actions. The TPP negotiations provide an opportunity to end the failed experiment of Chapter 19, replacing it with a general TPP norm that all TPP members should provide judicial review of trade remedy determinations – as required by the WTO agreements – to all other TPP members on the same basis.[4]

Several reasons independently support the desirability of a TPP rule that would have the effect of eliminating Chapter 19 review. First, Chapter 19 as applied to U.S. trade remedy actions is unconstitutional, and is bad public policy even if it were constitutional. Second, Chapter 19 has proven particularly unhelpful in resolving disputes over softwood lumber, and in some ways has actually exacerbated the dispute. Third, Chapter 19 was designed 25 years ago to address Canadian concerns that have been overtaken by subsequent events; eliminating the now obsolete Chapter 19 system may therefore be the easiest concrete step to address the softwood lumber issue in the TPP. Finally, it is appropriate to address the Chapter 19 issue in the context of the TPP, rather than bilaterally (or trilaterally) in the context of NAFTA. We discuss each of these briefly below.

Chapter 19 is unconstitutional. As the U.S. Department of Justice recognized even at the time the FTA was being approved, there are significant constitutional problems raised by empowering international dispute settlement panels to direct the actions of U.S. government

[4] Such a norm would not preclude agreements between TPP countries not to apply trade remedies to each other at all, such as the longstanding agreement between Australia and New Zealand. As these countries take no trade remedy actions against one another at all, the question of a special, more favorable regime of judicial review of trade remedy actions does not arise.

agencies, by direct operation of U.S. law. Chapter 19 panels and committees review and have unreviewable authority to direct the actions of the Secretary of Commerce and the members of the International Trade Commission, all of whom are officers appointed by the President and confirmed by the Senate, yet the members of the panels and committees are appointed, in part, by foreign governments not subject to constitutional oversight or democratic accountability.

Further, even U.S. members of panels and committees, once appointed, cannot be removed, even for cause, by the President or any other U.S. constitutional officer, without the consent of the foreign government. The U.S. Supreme Court recently concluded that a statute limiting Presidential removal authority (in a much less substantive fashion) over persons exercising Executive Branch authority was unconstitutional, reasoning that "{t}he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010) (quoting U.S. Const., Art. II). Chapter 19 also deprives parties of impartial judicial review of agency action by Article III courts, especially domestic petitioners for whom Chapter 19 panels – *all* of whose members are appointed by parties who would oppose claims made on review by petitioners – are hardly impartial.

The Coalition has twice challenged the constitutionality of the FTA and NAFTA binational panel review system in the U.S. Court of Appeals for the D.C. Circuit. On both occasions, these challenges were dismissed as a result of the agreement reached between the U.S. and Canadian governments. Should that agreement not be renewed after it expires, it is very likely that the Coalition would again exercise its rights under the trade laws and, ultimately, renew its constitutional challenge. However, another industry might well bring a constitutional

challenge before then. Better that Chapter 19 be removed by negotiation now than it be overturned unilaterally by court action later.

Chapter 19 would be bad policy, even if it were constitutional. The Chapter 19 system has produced many poor decisions that have failed to apply the proper standard of review and that make other severe legal errors, while providing no meaningful check on such improper decisions. The former chief judge of the Court of Appeals for the D.C. Circuit stated that an early Chapter 19 decision "may violate more principles of appellate review of agency action than any opinion by a reviewing body which I have ever read." In re Certain Softwood Lumber Products from Canada, ECC-94-1904-01USA, Aug. 3, 1994, dissenting op. of Wilkey, J., at 41. More recently, at least two Chapter 19 panels have expressly refused to follow binding Federal Circuit precedent in the past few years. In re Stainless Steel Sheet and Strip in Coils from Mexico, No. USA-MEX-2007-1904-01, Apr. 14, tic, at 20-24; In re Carbon and Certain Alloy Steel Wire Rod from Canada, No. USA-CDA-2006-1904-04, Nov. 28, 2007, at 12-30.

Chapter 19 exacerbates the difficulties of addressing softwood lumber issues with Canada. The softwood lumber trade issue is far more politically sensitive in Canada's domestic politics than in our own. While many in the United States are concerned about the harm that Canadian practices impose on U.S. industry, workers, and communities, people outside those communities are generally unaware that there even is a softwood lumber dispute. This is not the case in Canada, where certain Canadian interests have unfortunately portrayed the issue as one of Canada's sovereignty vis-à-vis the United States and attempted to make the issue one of domestic Canadian politics. In this context, the complex rulings on the multiple arcane issues that inevitably arise in antidumping and countervailing duty proceedings become intensely political issues in which U.S. trade agencies are falsely imagined as wildly unprincipled agencies

who, in this instance, require Canadian citizens to instruct them to follow U.S. law. Binational panels, usually operating without experienced staff and often without significant expertise in the particular legal matters or basic principles of U.S. administrative law at issue, are singularly ill equipped to adjudicate these intensely political disputes. And, because – rightly or wrongly – it is perceived that NAFTA panels in this matter will not, in fact, apply U.S. law correctly as a U.S. court would, parties on both sides of the border become more willing to risk litigation because it is difficult to predict exactly how U.S. law will ultimately be applied. That is not to say that U.S. courts will uniformly uphold U.S. agencies on matters involving lumber; respondents often prevail in their legal challenges to aspects of the application of the trade remedy laws in U.S. courts. But they do so professionally and in a way that leaves all sides feeling that the outcome is legitimate as a matter of U.S. law – something that is rarely the case, even for the winners, in binational NAFTA panel proceedings. With a clearer understanding of, and confidence in, the likely outcome of trade remedy proceedings, it becomes easier for all stakeholders to reach a negotiated outcome without first exhausting one another, and their governments, in unnecessarily contentious and lengthy legal disputes.

The concerns that led Canada to desire Chapter 19 are now obsolete. At the time of the FTA negotiations in the late 1980s, there was no WTO and no binding international dispute settlement with regard to trade remedies. Moreover, the Tokyo Round Subsidies Code did not contain an agreed definition of what a "subsidy" was, or how one ought to measure a subsidy benefit for the purpose of countervailing duty law. Further, in contrast to today, there were numerous countervailing duty proceedings involving goods from Canada then ongoing in the United States. In this context, Canada was unwilling to enter into an FTA with the United States that offered no recourse for Canada in the event that the United States unilaterally deemed some

Canadian practice a "subsidy" over Canada's objection. Chapter 19 was envisioned as a temporary stopgap to assuage this concern pending the negotiation of more detailed substantive subsidy disciplines.

With the entry into force of the WTO agreements in 1995, these Canadian concerns no longer have any validity. The WTO SCM Agreement contains detailed definitions of a "subsidy" and the WTO provides a binding international dispute settlement mechanism to resolve any dispute over whether the United States has complied with its WTO obligations in taking countervailing measures against imported goods that benefit from an alleged Canadian "subsidy." There is no need for a second international dispute resolution process to resolve the same matters. And there is nothing wrong with U.S. judicial review that requires supervision by binational panels to ensure that U.S. agencies properly apply U.S. law – and if there were, Chapter 19 panels have not demonstrated that they do a better job. To the contrary.

Therefore, while Chapter 19 was very important for Canada at the time of the FTA – it is widely believed that Canada would not have signed the FTA without it – its importance today has diminished considerably, if not disappeared entirely. Moreover, as outlined in the prior section of this submission, Canada will need to seek significant exemptions from TPP disciplines, especially on export restraints, or else make significant changes to its provincial timber sales and log management systems. It may be easier for Canada to accept the retirement of the Chapter 19 system than to make difficult reforms to these systems.[5] And from the perspective of U.S. industry, while the true establishment of actual market pricing for Canadian

[5] This is especially the case because Chapter 19 affects trade matters that are the responsibility of the Canadian federal government, while meaningful reforms to Canadian timber pricing and forest management systems would involve detailed negotiations with the provinces.

Crown timber is the preferred resolution to the dispute, a clear reestablishment of the U.S. right to fully apply its own trade remedy laws to Canada (subject, of course, to U.S. WTO commitments and WTO dispute settlement) may be a more satisfactory outcome of the TPP negotiations than partial reforms to Canada's log export restraints with uncertain market effects and ill-defined implementation processes at the level of each relevant Canadian province.

Addressing Chapter 19 is an appropriate matter for the TPP negotiations. Although resolving the problems caused by Chapter 19 could be resolved on a bilateral (or trilateral) basis within the NAFTA framework, the TPP provides an appropriate, and more realistic, framework for achieving this result. This is true for several reasons.

First, it is generally accepted that the TPP will permit members to continue to use their trade remedy laws with respect to their imports from one another. While nothing should require TPP members to use their trade remedy laws, it is entirely appropriate that they retain the option of making use of them in the appropriate circumstances. In doing so, they are of course bound by their WTO obligations with regard to these instruments, including the requirements to provide an independent review proceeding for trade remedy actions. It is entirely appropriate for the TPP members to provide that no TPP member may provide special or more favorable procedural treatment to one TPP member than another when it applies the same trade remedy laws to both TPP members. And in doing so, TPP members may appropriately address instances, such as NAFTA Chapter 19, where they may have made prior commitments that would be inconsistent with this provision.

Second, although many potential TPP members have a wide variety of preexisting bilateral trade agreements with other TPP members that, in general, the TPP members wish to continue in force to the fullest extent possible, it is inevitable that in particular circumstances it

will be advisable to suspend one or another provision of an existing trade agreement while the TPP is in force. This is normal practice when one trade agreement largely supersedes another, as NAFTA did with the FTA. Even though the FTA remains in existence alongside NAFTA, it is effectively suspended while NAFTA is in force – commissions and committees established under the FTA, for example, do not continue to meet – and would snap back to life if for some reason NAFTA were to cease to exist. As a matter of domestic law, certain aspects of the U.S. FTA implementing legislation are suspended – not repealed – by the NAFTA Implementation Act. See Pub. L. 103-182, § 501(c)(3) (1993). Accordingly, it would be reasonable and expected that one or another provision of NAFTA might be suspended, by agreement of the parties, while the TPP is in force among them.

Finally, the issue of trade in softwood lumber products will necessarily be an issue for the TPP negotiations, if only because Canada will need to make significant revisions to its current practices or seek exemptions from generally applicable TPP rules, certainly with respect to export restraints, and perhaps with regard to SOEs or other provisions as well. Any exemptions should not be lightly granted, especially given that softwood lumber remains an issue that has remained problematic between our two countries even under NAFTA. In this context, all options should be kept on the table and made part of the negotiating process. A dogmatic position that the suspension of a NAFTA provision cannot, under any circumstances, be part of the resolution of a specific issue in the TPP negotiations would unnecessarily limit U.S. negotiating flexibility and could produce a less-than-optimal final result.

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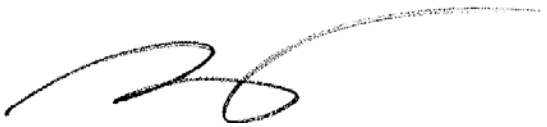
Please do not hesitate to contact any of the undersigned if you have any questions about this submission, or if you would like further information on any topic discussed herein.

Respectfully,



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APPENDIX – CANADIAN LOG EXPORT RESTRAINT MEASURES

1. Provincial Laws Prohibiting Export of Crown Logs

The major lumber producing provinces all have legal requirements that prevent the export of logs from Crown lands and, in some cases, private lands as well, from the province (or, in the case of Ontario, from Canada).

British Columbia – Forest Act § 127 – Timber harvested from Crown land and certain private land "must be (a) used in British Columbia, or (b) manufactured in British Columbia into wood products to the extent of manufacture specified by regulation."

Forest Act § 128(3) – No exception to the requirement in section 127 may be made unless the Minister "is satisfied that (a) the timber or wood residue will be surplus to requirements of timber processing facilities in British Columbia, (b) the timber or wood residue cannot be processed economically in the vicinity of the land from which it is cut or produced, and cannot be transported economically to a processing facility located elsewhere in British Columbia, or (c) the exemption would prevent the waste of or improve the utilization of timber cut from Crown land."

Alberta – Forests Act § 33 – "(1) No person shall transport or cause to be transported logs, trees or wood chips, except dry pulpwood or Christmas trees, to any destination outside Alberta from any forest land.

"(2) Notwithstanding subsection (1), the director may: (a) authorize any person to transport logs, trees or wood chips to be used for research or experimental purposes to any destination outside Alberta from any forest land, or (b) exempt any logs, trees or wood chips from any specified forest land from the application of this subsection for a period not to exceed one year."

Ontario – Crown Forest Sustainability Act § 30 – "(1) A forest resource licence that authorizes the harvesting of trees is subject to the condition that all trees harvested shall be manufactured in Canada into lumber, pulp or other products.

"(2) Subsection (1) does not apply to trees that are used in Canada in an unmanufactured state for fuel, building or other purposes.

"(3) The Minister may grant exemptions from subsection (1)."

Quebec – Forest Act § 159 – "All timber harvested in the domain of the State, whatever the nature or object of the management permit authorizing the harvesting, must be completely processed in Québec."

Forest Act § 160 – "Timber is completely processed when it has undergone all the treatments and processes of manufacture and has passed through all the phases of processing necessary to render it suitable for its intended final use."

Forest Act § 161 – "The Government may, on the conditions it determines, authorize the shipment outside Québec of incompletely processed timber from the domain of the State if it appears to be contrary to the public interest to do otherwise."

Forest Act § 162 – "The Minister shall grant the authorization referred to in section 162 if he considers that timber supply sources are sufficient and forest production is respected. The authorization shall be valid for a maximum period of one year."

Sustainable Forest Development Act (to replace the Forest Act effective Apr. 1, 2013) § 117 – "All timber harvested in the forests in the domain of the State must be completely processed in Québec. Timber is completely processed when it has undergone all the manufacturing treatments and processes and has passed through all the necessary phases to render it suitable for its intended final use."

New Brunswick – Crown Lands and Forests Act § 68 – "(1) It is a condition of every license, sub-license, permit and Crown timber sale issued under this Act that timber harvested from Crown Lands shall not be manufactured into forest products outside New Brunswick or exported from New Brunswick for any other use.

"(2) Notwithstanding subsection (1), the Minister, with the approval of the Lieutenant-Governor in Council, may for a specified lot of timber exempt any licensee, sub-licensee, permittee or purchaser under a Crown timber sale from the condition imposed under subsection (1)."

2. Federal Laws and Regulations Prohibiting Export of Logs from Private Land in British Columbia

Notice 102 – Department of Foreign Affairs and International Trade, Notice to Exporters, "Export of Logs from British Columbia," Serial No. 102 (Apr. 1, 1998).
Available at http://www.international.gc.ca/controls-controles/systems-systemes/excol-ceed/notices-avis/102.aspx?lang=eng&view=d

3. Quebec Provincial Laws on Marketing Boards Affecting Export of Logs from Private Land

Act Respecting the Marketing of Agricultural, Food and Fish Products (2012):
§ 52 – The Régie receives proposed marketing plans from marketing boards and "may grant the application, reject it or make such amendments or restrictions as it sees fit to the draft plan. In making its decision, the Régie shall consider, among other factors, existing cooperative marketing structures for the product concerned, existing and potential markets, economic conditions and the interests of producers, buyers, other intervenors and consumers."
§ 58 – "Any person or partnership engaged in the production or marketing of the product marketed under a plan is bound by the obligations provided for in this Act from the coming into force of the plan."