

August 8, 2003

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The Honorable Grant D. Aldonas  
Under Secretary for International Trade  
U.S. Department of Commerce  
Central Records Unit, Rm. 1870  
Pennsylvania Ave. and 14th Street, N.W.  
Washington, D.C. 20230

Attn: Mr. James Terpstra

Re: Proposed Policies Regarding the Conduct of Changed Circumstances Reviews of the Countervailing Duty Order on Softwood Lumber from Canada - Request for Comments (C-122-839)

Dear Under Secretary Aldonas:

This is submitted on behalf of the Gouvernement du Québec in response to the Department of Commerce's solicitation of comments on its proposed *Policy Bulletin* ("*Bulletin*") regarding trade in softwood lumber from Canada.<sup>1</sup> As the caption to the Department's published notice confirms, the proposed *Bulletin* is intended to guide the conduct of future administrative proceedings, specifically changed circumstances reviews arising under the countervailing duty order in *Certain Softwood Lumber Products from Canada*.<sup>2</sup> But the *Bulletin* also professes a second objective -- to encourage reform of forestry practices in Canada in a manner consistent with the descriptions and examples of market-based forestry described in the *Bulletin*. Implicit in this discussion, and indeed the entire premise of the *Bulletin*, is that

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<sup>1</sup> *Proposed Policies Regarding the Conduct of Changed Circumstances Reviews of the Countervailing Duty Order on Softwood Lumber from Canada*, 68 Fed. Reg. 37,456 (Dept. Comm., June 24, 2003) ("*Bulletin*").

<sup>2</sup> *Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 37,775 (Dept. Comm., May 30, 2002).

existing forestry systems in Canada are not market-based and do not result in adequate remuneration to provincial governments for standing timber. Québec does not agree with these propositions. The stumpage regime in effect in Québec since 1987 under the *Forest Act* is specifically oriented to the private market for standing timber in Québec, a market that operates within the larger market for standing timber and logs in North America. Because it is specifically oriented to private markets, the stumpage system in Québec possesses the aspects of the market performance to which the *Bulletin* pledges fealty, and softwood lumber producers in Québec are free to (and do) react to market forces.

Notwithstanding its disagreement with the premises that underlie the Department's view of standing timber markets in Canada, Québec welcomes the Department's initiative to develop the *Bulletin* and to clarify certain aspects of the analysis the Department will apply to future requests for changed circumstances reviews. The *Bulletin* is an important step towards the shared goal of a durable solution to end the cycle of litigation that has for too long marked trade in softwood lumber products between Canada and the United States.

Because the *Bulletin* is intended to encourage reform and provide guidance both as to those reform efforts and the manner in which they will be evaluated in a changed circumstances review, clarity is an essential requirement of the *Bulletin*. If the *Bulletin* and its conclusions are unclear, open to question, or subject to serious contest after reforms have been adopted in good faith, then the incentive for reform will be undercut. In these comments therefore Québec poses a number of questions, the answers to which will help the parties to understand the operation of the broad policy guidance provided in the *Bulletin* and make more clear how those policy expectations correlate to the governing legal standard and the prior proceedings affecting

softwood lumber. In other words, answers to Québec's questions will allow readers to assess the extent to which the *Bulletin* truly holds the promise of a durable solution. Québec's comments avoid issues that are specifically related to pending litigation on the assumption that any final *Bulletin* and its application will conform to the results of that litigation and that it is therefore unnecessary to reiterate old arguments. The absence of specific comment therefore should not be mistaken for assent on any issue.

The following comments are formatted in compliance with the directions provided in the Department's June 24, 2003 *Federal Register* notice.<sup>3</sup> An electronic copy of these comments is also being provided, as requested in the Department's notice.

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<sup>3</sup> The paragraph reference in the heading of Québec's comments (e.g., Comment 2 (¶ I.A.1)) refers to the paragraph numbering of the proposed policy being addressed, as used in the *Bulletin*.

### Comment 3 (¶ I.B.2.b)

#### Summary of the Comment

Numerous factors influence the value of standing timber. Those factors must be considered when comparing prices in a reference market to stumpage charges for standing timber on provincial land. Québec, and other parties, have identified various factors that the Department should include as adjustments when applying reference prices to stumpage prices on public lands. In this regard, the Department should explain how provinces are to demonstrate that adjustments are “economically justified and what it means to keep adjustments “to the minimum necessary.”<sup>16</sup>

#### Discussion

The value of standing timber is influenced by numerous factors. In comparing reference prices with stumpage prices for standing timber on public lands, price adjustments must be made to reflect any differences in quality of the timber resource and other factors, such as differences in harvesting and operating costs on provincial public lands and in the reference market. The Department correctly acknowledges that these differences can result in variations in stumpage prices. In this regard, the *Bulletin* states the following:

The Department must be satisfied that all relevant characteristics of the administered portion of the harvest are adequately accounted for in the reference market. These factors could include, among others, the biophysical characteristic of the different plots of trees subject to stumpage transactions; different harvesting conditions, and different industry characteristics . . . .

Various jurisdictions, including Québec, already take these and other factors into account when determining the value of standing timber, and the Department should do the same.

To determine the market value of standing timber on public land, Québec uses a comparative value assessment, *i.e.*, the “parity technique.” This methodology sets the value of public stumpage at the price of private stumpage, adjusted for actual differences in the relative

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<sup>16</sup> *Bulletin*, 68 Fed. Reg. at 37,460.

operating costs on private and public land. In all, the Québec parity technique employs 17 specific and commonly recognized variables that affect timber values.<sup>17</sup> Several New England states also recognize that a variety of factors influence the value of timber. These factors are summarized in the following table and substantially mimic Québec’s adjustment variables<sup>18</sup>:

	<u>ME</u>	<u>NY</u>	<u>NH and VT</u>	<u>CT</u>
Per Acre Harvest Volume	✓	✓	✓	
Total Volume			✓	✓
Average Tree Size	✓	✓	✓	
Species Mix	✓		✓	
% of Timber Species	✓	✓		
Timber Quality	✓	✓	✓	✓
Logging Terrain	✓	✓		
Distance to Public Roads	✓	✓	✓	✓
Type of Logging	✓	✓		
Time of Year	✓	✓		✓
Landowner Requirements	✓	✓		✓
Market Demand	✓	✓	✓	✓
Logging Costs/Equipment	✓	✓		✓
Distance to Market	✓	✓	✓	✓
Accessibility to Area			✓	✓
Market/Price Knowledge	✓	✓	✓	

<sup>17</sup> The variables include road construction and maintenance, harvesting, forest camps, administration and supervision, transportation to plant, transportation to market, fire protection, insect and disease protection, production of seedlings, seedling transportation, and forestry research. Biophysical conditions (e.g., slope, density, tree size, species concentration) and quality differences are also taken into account by the parity technique between the different public forest tariffing zones and the private forest in Québec.

<sup>18</sup> See *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 43,186, Disclosure Documents at D (“Data Used for Québec”).

As the above table makes apparent, similar factors are used in Québec’s parity technique and in the day-to-day valuation of timber in the states contiguous to Québec. In the *Bulletin*, the Department states that adjustments should be kept to “the minimum necessary, and must be fully and economically justified . . . .”<sup>19</sup> The Department should not artificially or arbitrarily limit the number of adjustments because of the acknowledged importance of ensuring the accurate transmission of prices from the reference market. In this regard, the Department should explain how provinces will be expected to demonstrate that adjustments are “economically justified.” Does the fact that jurisdictions throughout the northeastern United States recognize specific factors demonstrate that these adjustments are “economically justified”?

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<sup>19</sup> *Bulletin*, 68 Fed. Reg. at 37,460.

## Comment 2 (¶ I.A.1)

### Summary of the Comment

The *Bulletin* suggests that appurtenancy requirements operate solely as a structural impediment to the operation of market forces. This characterization not only lacks empirical support, but also is inaccurate insofar as the appurtenancy requirement in Québec serves to support the operation of market forces in Québec's private forest.

### Discussion

To achieve a market-based timber sales system that meets the requirements set out in the Department's *Bulletin*, provinces must, among other things, remove practices and policies that "inhibit the ability of lumber producers to respond to changes in the market."<sup>11</sup> Among the practices and policies that inhibit market responses, the *Bulletin* identifies appurtenancy requirements. Appurtenancy requirements generally mandate that tenure holders must themselves process the timber harvested on their tenures. Based on this general purpose, the *Bulletin* concludes that appurtenancy requirements act as an impediment to the operation of market forces and the ability of market participants to respond freely to changes in the marketplace.<sup>12</sup> The factual support for this conclusion is not stated in the *Bulletin* and is not evidenced in the record of the prior proceedings. The conclusion is also inaccurate because in Québec the appurtenancy requirement enhances market competition.

Québec's appurtenancy requirement prevents timber harvested on public lands from being sold on the open market. Sawmills without public tenures must therefore compete for timber from private sources in Québec and elsewhere. By separating Québec's public and

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<sup>11</sup> *Bulletin*, 68 Fed. Reg., at 37, 457.

<sup>12</sup> *Id.* at 37,458 (The *Bulletin* states that appurtenancy provisions inhibit the ability of tenure holders to "rationalize their harvesting operations, log purchase and sales operations, and lumber production in response to changing market conditions").

### Comment 3 (¶ I.B.2.b)

#### Summary of the Comment

Numerous factors influence the value of standing timber. Those factors must be considered when comparing prices in a reference market to stumpage charges for standing timber on provincial land. Québec, and other parties, have identified various factors that the Department should include as adjustments when applying reference prices to stumpage prices on public lands. In this regard, the Department should explain how provinces are to demonstrate that adjustments are “economically justified and what it means to keep adjustments “to the minimum necessary.”<sup>16</sup>

#### Discussion

The value of standing timber is influenced by numerous factors. In comparing reference prices with stumpage prices for standing timber on public lands, price adjustments must be made to reflect any differences in quality of the timber resource and other factors, such as differences in harvesting and operating costs on provincial public lands and in the reference market. The Department correctly acknowledges that these differences can result in variations in stumpage prices. In this regard, the *Bulletin* states the following:

The Department must be satisfied that all relevant characteristics of the administered portion of the harvest are adequately accounted for in the reference market. These factors could include, among others, the biophysical characteristic of the different plots of trees subject to stumpage transactions; different harvesting conditions, and different industry characteristics . . . .

Various jurisdictions, including Québec, already take these and other factors into account when determining the value of standing timber, and the Department should do the same.

To determine the market value of standing timber on public land, Québec uses a comparative value assessment, *i.e.*, the “parity technique.” This methodology sets the value of public stumpage at the price of private stumpage, adjusted for actual differences in the relative

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<sup>16</sup> *Bulletin*, 68 Fed. Reg. at 37,460.



operating costs on private and public land. In all, the Québec parity technique employs 17 specific and commonly recognized variables that affect timber values.<sup>17</sup> Several New England states also recognize that a variety of factors influence the value of timber. These factors are summarized in the following table and substantially mimic Québec’s adjustment variables<sup>18</sup>:

	<u>ME</u>	<u>NY</u>	<u>NH and VT</u>	<u>CT</u>
Per Acre Harvest Volume	✓	✓	✓	
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Distance to Public Roads	✓	✓	✓	✓
Type of Logging	✓	✓		
Time of Year	✓	✓		✓
Landowner Requirements	✓	✓		✓
Market Demand	✓	✓	✓	✓
Logging Costs/Equipment	✓	✓		✓
Distance to Market	✓	✓	✓	✓
Accessibility to Area			✓	✓
Market/Price Knowledge	✓	✓	✓	

<sup>17</sup> The variables include road construction and maintenance, harvesting, forest camps, administration and supervision, transportation to plant, transportation to market, fire protection, insect and disease protection, production of seedlings, seedling transportation, and forestry research. Biophysical conditions (e.g., slope, density, tree size, species concentration) and quality differences are also taken into account by the parity technique between the different public forest tariffing zones and the private forest in Québec.

<sup>18</sup> See *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 43,186, Disclosure Documents at D (“Data Used for Québec”).

As the above table makes apparent, similar factors are used in Québec’s parity technique and in the day-to-day valuation of timber in the states contiguous to Québec. In the *Bulletin*, the Department states that adjustments should be kept to “the minimum necessary, and must be fully and economically justified . . . .”<sup>19</sup> The Department should not artificially or arbitrarily limit the number of adjustments because of the acknowledged importance of ensuring the accurate transmission of prices from the reference market. In this regard, the Department should explain how provinces will be expected to demonstrate that adjustments are “economically justified.” Does the fact that jurisdictions throughout the northeastern United States recognize specific factors demonstrate that these adjustments are “economically justified”?

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<sup>19</sup> *Bulletin*, 68 Fed. Reg. at 37,460.

private timber markets, the appurtenancy requirement intensifies competition in Québec's private market.

The effect of Québec's appurtenancy requirement must also be viewed in the context of the lack of any minimum cut requirement. Because Québec has no minimum cut requirement, public tenure holders are not required to harvest minimum levels of timber, which must then be processed in their mills. The absence of minimum cut requirements in Québec allows lumber producers fully to respond to market signals, whatever the Department may mean by that phrase. The Department's contention that appurtenancy provisions limit the ability of tenure holders to "rationalize their harvesting operations, log purchases and sale operations, and lumber production in response to market changes" is therefore invalid with regard to Québec. Consequently, the *Bulletin* should modify its discussion of appurtenancy requirements to reflect the positive effects of this requirement in Québec.

The "Examples of Market-Based Timber Sales" that appear in Part II of the *Bulletin* are noteworthy in that they do not include an example that is built on private market transactions within a Province. Instead, the examples consist of government run auctions (replacing one type of government sale with another), transactions across borders, and a category for other approaches that achieve "equivalent economic effects."<sup>13</sup> The *Bulletin* should contain an example built upon the statute's instruction to assess adequate remuneration based on the prevailing market conditions in the country of investigation and the Department's own regulations, specifically, "market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual

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<sup>13</sup> *Id.* at 37460 - 37462.

transactions between private parties . . . .”<sup>14</sup> Québec therefore respectfully requests that the Department’s *Bulletin* include an example based on private transactions. In the absence of such an example the *Bulletin* is incapable of being a complete expression of policy since it will deliberately omit the single most relevant form of economic activity prevailing in both Canada and the United States, transactions between private parties.

In building an additional example based on private market transactions, the Department must be mindful of the issues that Québec has raised in these comments. For example, Québec’s experience shows that such policies can in fact foster and intensify the competition in private party transactions in ways that compliment the goal of enabling market forces. Notwithstanding the questions raised above and elsewhere in these comments by Québec, the following is an example of the type of language that would be appropriate for inclusion in an example based on private market transactions to illustrate the proposition that aspects of tenure themselves are not preclusive of market prices and can, in practice, reinforce the operation of markets:

With respect to appurtenancy and the transferability of tenure, Province C<sup>15</sup> reinforces those aspects of appurtenancy that reduce access to public timber for failure to acquire, where available, a sufficient portion of a mill’s furnish from private sources of supply. To promote competition for public timber, Province C authorizes the free transfer of tenure consistent with Province C’s appurtenancy requirements (i.e., Province C will permit the transfer of tenure and the mills to which they apply, rather than requiring that tenure revert to Province C in the event of the sale of a mill). In addition, Province C authorizes the transfer of a portion of a tenure holder’s annual allocation on public land to other mills.

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<sup>14</sup> 19 C.F.R. § 351.511(a)(2).

<sup>15</sup> The moniker “Province C” is used here for consistency with the Province A and Province B references in the *Bulletin*’s examples.

## Comment 1 (Relevant Legal Standard)

### Summary of the Comment

Adequate remuneration refers to the price or value received by a government in exchange for a good or service provided by the government. Section I of the *Bulletin* describes policies, practices, and characteristics that relate to forest management and tenure operation, but that have no specific relationship to the price of standing timber and were not examined as elements of any countervailable benefit in the underlying investigation. The *Bulletin* should explain the relationship of these tenure policies to the “adequate remuneration” standard and how they constitute relevant “changed circumstances.”

### Discussion

The *Bulletin*'s first paragraph states that a government may confer a countervailable benefit by virtue of the provision of goods or services for “less than adequate remuneration.”<sup>4</sup>

Adequate remuneration is a value (*i.e.*, price) test. It asks whether the total return to a government provider of goods or services constitutes “adequate remuneration” for the good or service.

Section I of the *Bulletin*, entitled “Standard for a Market-Based Timber Sales System,” discusses a number of characteristics that are present in varying degrees in the stumpage programs of the different provinces.<sup>5</sup> None of these characteristics has an obvious or clear relationship to the adequacy of the remuneration received by provincial governments for the timber standing on crown land. To the contrary, the introductory portion of Section I refers to these tenure policies as allegedly inhibiting the ability of softwood lumber producers to fully

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<sup>4</sup> See *Bulletin*, 68 Fed. Reg. at 37,457.

<sup>5</sup> For example, while Québec does have appurtenancy requirements in its principal tenure form (the Timber Supply and Forestry Management Agreement (‘TSFMA’)), it does not have minimum cut requirements or mill closure restrictions.

react to changes in the market place and states that the Department will require the elimination or substantial reform of such practices as reinforcing the operation of market forces.<sup>6</sup>

Therefore, the Department should explain further its view of the relationship of these tenure characteristics to the adequate remuneration standard. Is it the Department's view that adequate remuneration is not possible in provinces where any of the listed practices are present? If so why? Is it the Department's view that reform or removal of these characteristics provides a guarantee of adequate remuneration? Since none of the listed practices were examined in the underlying investigation, how do changes in these tenure policies qualify as or contribute to "changed circumstances" under 19 U.S.C. § 1675(b) in comparison with the relevant conditions that were examined in the investigation and that were found to be the root of the alleged subsidies found there?

These questions are especially important in view of the WTO Panel's decision in *United States - Measures Treating Exports Restraints as Subsidies*.<sup>7</sup> In that decision, the WTO rejected an argument that the effects of a policy or practice could be the basis for deeming it a financial contribution. The Panel summarized the U.S. argument as follows:

[T]he United States focuses primarily on the effects or the results of a government action, rather than on the nature of the action, in order to determine whether that action constitutes a financial contribution. Thus according to the US approach, the existence of a financial contribution in the case of an export restraint depends entirely on the reaction thereto of the producers of the restrained good, and specifically on the extent to which they increase their domestic sales of the restrained product because of the restraint. Under the US approach, the existence of a financial contribution in

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<sup>6</sup> That changes in these characteristics are a requirement for a changed circumstances review under the terms of the *Bulletin* is also made clear in Section III.A.1., which states that a changed circumstances review will be initiated upon receipt of an application containing evidence "demonstrating elimination of any policies and practices that inhibit market response, as defined in section A.1, above." *Bulletin*, 68 Fed. Reg. at 37,462.

<sup>7</sup> *United States - Measures Treating Exports Restraints as Subsidies*, WT/DS194/R (June 29, 2001).

the case of an export restraint therefore actually cannot be determined from the nature of the action (the export restraint) as such.<sup>8</sup>

The Panel disagreed, stating that “it cannot be the case that the nature of a Member government’s measure under the SCM Agreement is to be determined solely on the basis of the reaction to that measure by those it affects.”<sup>9</sup> Instead, the Panel found that “a financial contribution by a *government* must be proven by reference to the action of the *government*.”<sup>10</sup> In light of the WTO’s decision in *Exports Restraints*, the Department should explain why policies and practices that relate to the conduct of others, but that are not part of the adequacy of remuneration, nor a financial contribution, can nevertheless be critical elements of a changed circumstances review and changed circumstances in themselves.

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<sup>8</sup> *Id.* at ¶ 8.33.

<sup>9</sup> *Id.* at ¶ 8.34.

<sup>10</sup> *Id.* (emphasis in original).

## Comment 4 (¶ III.A. and E.)

### Summary of the Comment

The Department needs to confirm that the changed circumstances reviews will be conducted on a province-by-province basis. The Department also need to explain whether a province will receive its own adjusted rate if, during a changed circumstances review, it is determined that some but not all of the reforms have been implemented successfully.

### Discussion

The *Bulletin* appears to envision a series of changed circumstances reviews that will be conducted on a province-by-province basis.<sup>20</sup> If it is determined that the reforms to the province’s system of timber sales meet the requisite standards, the Department “will determine that the provincial system does not provide a countervailable subsidy and will revoke the countervailing duty order. . . .”<sup>21</sup> Such revocation will not be for all of Canada, but rather for the province that undertakes the requisite changes, submits its own request for review, and successfully undergoes the changed circumstances review. As stated in the *Bulletin*, “if the Department determines, as a result of review, that revocation of the order *with respect to a province* is warranted, the Department will normally order revocation of the countervailing duty order with respect to all unliquidated entries of the subject merchandise produced *in the province* from timber harvested *in the province* that is entered, or withdrawn from warehouse, on or after the application date.”<sup>22</sup>

The Gouvernement du Québec agrees that the province-specific approach adopted in the *Bulletin* for the changed circumstances reviews is permitted under the statute. Pursuant to 19 U.S.C. §1677(3), each province is a “political subdivision” and therefore a “country” for purpose

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<sup>20</sup> *Id.* at 37,462 (permitting each province to submit a request for review at any time).

<sup>21</sup> *Id.* at 37,457.

<sup>22</sup> *Id.* at 37,463 (emphasis added).



## Comment 6 (¶ I.A.5)

### Summary of Comment

The *Bulletin* asserts that holders of long-term tenures are insulated from market forces because the tenures, *inter alia*, provide them guaranteed supplies of wood fiber. The *Bulletin*'s assertion is not coupled with any evidence or reasoning to support its claim, and it overlooks the fact that long term tenure holders cannot negotiate the price they pay for public stumpage and cannot know the price for more than a three-month, fixed time span. The Department must substantiate and clarify the claim that long-term tenures provide a valuable “security of supply” and it must explain why companies who source wood fiber from private sources do not have greater “security of supply,” given their ability to negotiate long term, fixed price contracts, and in many cases given their ability to harvest timber from their own private woodlots.

### Discussion

The Department claims that a “security of supply ... inhibits the responsiveness of tenure holders to changes in the market.”<sup>26</sup> But, this assertion ignores the fact that stumpage prices on all long-term, non-transferable tenures in Québec vary quarterly, rather than being fixed. Because of this, tenure holders cannot predict the price for stumpage beyond at most a fixed three-month time span. This is in direct contrast with wood fiber supplied from private sources, where stumpage prices can be contractually set between buyers and sellers over long periods of time, thus placing companies sourcing their wood fiber from private sources at a distinct advantage over those companies holding public tenures. The Department must explain how tenure holders, who are unable to contractually secure long-term price guarantees, somehow operate with a competitive advantage vis-à-vis non-tenure holders who *can* secure long-term price guarantees through contract.

The *Bulletin* does not address how or why the alleged “security of supply” decreases tenure holders’ responsiveness to the market any more than it private landowners’ responsiveness to “changes in the market” are “inhibit[ed].” In the United States major lumber

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<sup>26</sup> *Bulletin*, at 68 Fed. Reg. 37, 458.

producing companies own hundreds of thousands of hectares of forest land from which they regularly source fiber. The Department should explain how the “security of supply” enjoyed by these companies through fee simple ownership of their supply source “inhibits” their “responsiveness ... to changes in the market.” That explanation should contrast, if there is a contrast, the situation of tenure holders, who cannot be certain what price they will pay for stumpage for more than a fixed three-month span of time and who are precluded from enjoying contractually negotiated and guaranteed prices.

## Comment 5 (¶ I.A.5.)

### Summary of the Comment

If tenures offer any measure of security, that security is not diminished by the option to alienate. Transferability increases the value of an asset to its owner by providing the opportunity to retain or sell the asset at any given moment depending on market conditions. Therefore, it is incorrect to suggest that an adjustment for alleged tenure security is appropriate for non-transferable tenures as opposed to those that are transferable.

In addition, the non-transferability of tenures in Québec furthers the province's law regarding the public forest's "residuality." Non-transferability increases competition in the private forest and therefore necessarily increases the price of public stumpage.

### Discussion

The *Bulletin* states that "[a]djustments to the observed prices may be required to take into account the differences in the attributes of sales in the independently functioning market and long-term, non-transferable arrangements on provincial lands, including the security of supply associated with a [sic] long-term, non-transferable tenures on the administered portion of the province's harvest."<sup>24</sup> This statement implies that transferable tenures are less valuable than those that are not transferable. That is, according to this section of the *Bulletin*, an adjustment might be necessary for non-transferable tenures, but not for those that are transferable simply because the latter can be transferred by the holder. Is this the Department's intention? Does the Department consider the non-transferable tenure to be secure if as a matter of law the tenure does not constitute a property right for the holder and if the tenure can be taken without compensation for any opportunity losses?

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<sup>24</sup> *Bulletin*, 68 *Fed. Reg.* at 37,458.

Law and logic suggest that assets are more valuable to their owners when they are capable of being transferred than when they are not.<sup>25</sup> The owner of a transferable asset has the ability to retain or sell the asset for a myriad of reasons, including changes in market conditions, changes in its business structure, and better opportunities in other production activities. As such, there does not appear to be an economic reason for assuming transferable tenures are inherently less valuable than non-transferable tenures.

The non-transferability of tenures in Québec furthers the province's requirement that purchasers look to the private forest for supply before they are allowed to purchase public stumpage (*i.e.*, the Québec law on residuality of the public forest). In Québec, timber supply and forest management agreements (TSFMAs) are not transferable. They are not property of the mills, but a contract between a buyer and a seller (the Gouvernement du Québec). When an allocated volume is reduced, for whatever reason, the tenure holder is not entitled to compensation. The non-transferability of tenures is an essential requirement to ensure the residuality of the public forest in order to prevent public timber from entering into competition with timber from the private forest. Because the private timber price sets the crown stumpage rate, the non-transferability of public tenures in Québec increases rather than decreases the price charged for public stumpage going forward.

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<sup>25</sup> See *Shackleford v. United States*, 262 F.3d 1028, 1032 (9th Cir. 2001) (“The right to transfer is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’ It is axiomatic that if an asset’s marketability is restricted, it is less valuable than an identical marketable asset. We have long recognized that restrictions on alienability reduce value.”) (citations omitted).

of all reviews under 19 U.S.C. § 1675.<sup>23</sup> Nonetheless, so that there is no room for confusion, the Department should confirm that it intends on performing the changed circumstances reviews on a province-specific basis. Further, U.S. administrative law requires an agency to explain changes in established policy or practice. Therefore, to the degree that a province-specific approach to the changed circumstances reviews constitutes such a change, the Department should explain its basis for that change.

The Department also should explain whether there will be individual rates for provinces that go through changed circumstances reviews but are not excluded. As drafted, it is unclear what the possible results of a changed circumstances review will be besides complete exclusion from the order. If a province undertakes significant reforms but during a changed circumstances review the Department decides that the province has not done so adequately or completely, will the Department publish a reduced province-specific rate? If not, why not?

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<sup>23</sup> See *In the Matter of Certain Softwood Lumber Products from Canada*, Panel No. U.S.A.-92-1904-02, United States-Canada Free Trade Agreement Binational Panel Review, 1993 FTAPD LEXIS 3, \*226 (May 6, 1993) (“Commerce is *clearly able to investigate provincial programs and apply a province-specific subsidy rate if desired*. The Panel agrees that it is arguable that the application of a Canada-wide rate to vastly different programs administered by distinct political subdivisions in Canada *may not accord with a ‘purposive’ interpretation* of the U.S. CVD law and the GATT Subsidies Code.”) (emphasis added).

## Comment 7 (¶ I.B.2.a)

### Summary of Comment

The *Bulletin* should recognize that the right to contract allows parties to maintain the confidentiality of their agreements. The *Bulletin* should also recognize that, both as a legal and factual matter, provincial governments cannot gather and supply all information from market participants.

### Discussion

The *Bulletin* asks provinces to demonstrate that “full and transparent” information is available to “all participants” in any market used as a reference for setting administered stumpage prices.<sup>27</sup> The Department also suggests that “market information” be made available to private owners of standing timber in the form of “internet pages, trade publications, or other similar sources of public information.”<sup>28</sup>

The Gouvernement du Québec agrees that the dissemination of information in the market place is important. Nevertheless, the *Bulletin* must acknowledge that there are both legal and real world limitations on the ability of a provincial government to collect data from private parties. Does the Department intend that provincial governments should force market participants who have privately negotiated contracts to publicly disclose the terms of their contracts? Currently, the Gouvernement du Québec gathers data regarding private sales of standing timber in order to determine the stumpage prices on public tenures, but this data is confidential. Forcing companies to publicly disclose their terms of sale abrogates the right to contract and may not be possible in Québec as a legal matter. The Department must clarify

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<sup>27</sup> *Id.* at 37,459.

<sup>28</sup> *Id.*

## Comment 8 (¶ I.B.2.a)

### Summary of Comment

The *Bulletin* implies that prices resulting from a market consisting mostly of freely negotiated bilateral contracts are not “market-based prices” unless further evidence is given showing that the market participants possessed “full and transparent” information. The Department, however, overlooks that it used “bilaterally negotiated” pricing data from the United States in its cross border analysis in the underlying investigation. The Department must explain why bilaterally negotiated sales prices in the United States, without any supporting evidence that those market participants possessed “full and transparent” pricing information, are considered “market-based prices,” while identically generated prices in Canada require supporting evidence that the market participants possessed “full and transparent” pricing information before those prices can be considered “market-based” prices.

### Discussion

The Department states that relying on a market that is comprised mostly of “bilaterally negotiated” contracts requires special care in order to insure that information in the market is “full and transparent” and available to “all participants in the reference market . . .,” essentially asserting that the market mechanism of bilateral negotiation might not produce market prices that would be valid enough to constitute “market-based pricing.”<sup>29</sup> The Department expands on this in paragraph I.B.2.a of the *Bulletin*:

Most private transactions for timber in Canada are conducted through a series of bilateral negotiations between buyers and sellers. While there is a good deal of information available on the going rates that certain market participants might offer or pay in the market, there is generally no systematic reporting of such transactions, through an active public exchange for example, that would ensure both a stronger market and a more reliable reference point for setting stumpage rates . . . .<sup>30</sup>

But this should not be a source of concern because, as the Department is aware, timber markets in the United States are dominated by bilaterally negotiated contracts for timber supply, and in

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<sup>29</sup> *Id.* at 37,459.

<sup>30</sup> *Id.*

fact rely very little on auctions as market-pricing mechanisms. By way of example, during the countervailing duty investigation underlying the *Bulletin*, the Department determined that unverified surveys of private, bilaterally negotiated stumpage prices in the State of Maine were an expression of market-based timber prices that could be used to assess public stumpage charges in Québec. If bilaterally negotiated contracts between private parties in the United States, for example, in the State of Maine, generate acceptable market-based prices, than contracts similarly negotiated between private parties in Canada must also be viewed as producing acceptable market-based prices. The Department also needs to explain the extent to which it found the private market in Maine to be superior to that in Québec as regards information being “full and transparent” and available to “all participants in the reference market.”

Québec’s *Comment 2* above notes the obvious inconsistency of the statute and regulations to an asserted “policy bulletin” that has no example of a private market-based method for determining the adequacy of remuneration. This omission is all the more glaring in light of the *Bulletin*’s general allusions to surveys of private transactions in reference markets. The omission should be corrected and a private transaction based example included in the bulletin. The following is an example of the type of description that might be used in such an illustration:

With regard to pricing, Province C establishes the market price of standing timber through surveys of standing timber transactions in the province, including transactions by mills in Province C for standing timber in other jurisdictions. Entities that hold public land tenures in Province C will continue to be specifically excluded from the pool of respondents in all standing timber transaction surveys. Province C then applies those prices to sales of standing timber on public land, taking into account only those adjustments that are economically justified. Province C ensures that there are no barriers to entry or exit in the market for privately-owned standing timber within its jurisdiction.



This language provides one illustration of the basic approach of surveying standing timber transactions in private markets, but adds to it an affirmative requirement to eliminate transactions in which tenure holders participate, precisely the type of care in survey design referred to earlier in the *Bulletin*.<sup>31</sup> Though unnecessary as a matter of law, this illustration goes further than a simple internal survey by also referring to any actual transactions for standing timber in another jurisdiction by a province's mills.

The *Bulletin's* general comment about private transaction surveys to establish reference markets mentions timeliness as a concern. In provinces like Québec that do or would survey transactions annually, this concern is allayed. In fact Québec goes further and imposes quarterly indexation of public stumpage charges tied to the movement of final product prices. Establishing this level of price sensitivity ensures that prices are timely in relation to relevant product markets, indeed price changes as rapid as those implicated by quarterly adjustments are more responsive than Québec understands to be typical of private standing timber transactions, including those in the United States, where prices are typically fixed for the duration of multi-year agreements. To the extent an illustration of a private transaction based approach is added to the *Bulletin* as an example (and Québec considers such to be essential to the credibility of the *Bulletin* as a complete statement of policy), the Department could build on Québec's example or go in a different direction. For example the illustration could look less far downstream from the stump and focus instead in transactions involving a traded intermediate product -- logs. Such an illustration might read as follows:

To ensure that the prices for timber on provincial lands reflect changes in market conditions on an ongoing basis, Province C adjusts the prices quarterly based on observed changes in

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<sup>31</sup> *Id.* at 37,460 (“ . . . great care must be exercised in survey design.”).

published log prices in the province, which includes logs harvested on private lands within the province and those harvested on private and public lands in adjacent jurisdictions.

This example contains a reference to other jurisdictions by way of illustrating the point made elsewhere in the *Bulletin*, but not incorporated into any of the examples, that log markets can be a relevant reference. Because logs, unlike standing timber, are traded and shipped, it is a market reality (at least in Québec) that the log market consists of active participants from many areas and jurisdictions. As the Department is aware, roughly 10% of Québec's softwood fiber is imported in log form from private lands outside Québec, primarily the United States. The presence of a contested market populated with numerous well informed buyers and sellers should be embraced as an example in the *Bulletin*, not avoided.

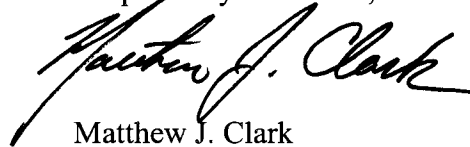
whether they are advocating that provinces should force market participants to publicly disclose the terms of sale of privately negotiated contracts.

Furthermore, legal issues involving the right to confidentiality in private contracts notwithstanding, does the Department intend that provincial governments gather and disseminate private market pricing information to market participants? If so, the Department must explain why provincial governments should undertake that action when the thousands of market participants in the private forest sector have not found it necessary or profitable to gather and sell such information.

## Conclusion

The Gouvernement du Québec welcomes the initiative underlying the Department's development of a *Policy Bulletin* to guide future consideration of changed circumstances reviews of the countervailing duty order in *Certain Softwood Lumber Products from Canada*. In these comments Québec has posed a number of questions in the expectation that answers to them will make the *Bulletin* more clear and thereby more likely to achieve its intended purpose. Critical in that regard is a request by Québec that the Department add to the *Bulletin* an additional example to illustrate the *Bulletin's* future operation. This example should build from a base of private transactions in the relevant province. Private transactions are a reference market described generally in the *Bulletin*, they are the test of adequate remuneration articulated in the Department's own regulations,<sup>35</sup> and the one standard specifically endorsed by a WTO dispute resolution panel as the basis for measuring the adequacy of remuneration under the Agreement on Subsidies and Countervailing Measures. To complete the *Bulletin*, it is important that the Department provide an example to illustrate the private market model described elsewhere in the *Bulletin*.

Respectfully submitted,



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<sup>35</sup> 19 C.F.R § 351.511(a)(2).

## Comment 9 (“Effects Tests”)

### Summary of Comment

In various places, the *Bulletin* refers to expected results or requests result-based information. These references imply the presence of an effects test, or at least an expectation of certain results. Effects tests and result standards are inconsistent with the notion of a “policy” bulletin and of “policy” based reforms and should be specifically disclaimed in the *Bulletin*.

### Discussion

The various reforms discussed in the *Bulletin* and in its illustrative examples are described as measures whose full implementation will result in market-determined prices that ensure adequate remuneration. The *Bulletin* does not prescribe what such prices should be, how they should compare to current prices (*i.e.*, be higher, lower, or the same), or even how the resulting price might be analyzed to assess whether it is in fact “market determined.” Instead the *Bulletin* describes systems and practices whose faithful implementation will result in market-determined prices and *a fortiori* adequate remuneration.

Despite the *Bulletin*’s policy orientation, it expresses an expectation that “timber valuations would equilibrate” as a result of the reforms discussed. Part III.B. of the *Bulletin* captioned “Content of Request” specifically requires that applications for changed circumstances review include evidence showing that provincial charges are “consistent with the range of prices observed in other open and competitive markets.”<sup>32</sup> That same section also requires that applications for changed circumstances review provide “[e]vidence regarding stumpage charges

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<sup>32</sup> *Id.* at 37,462 (*see* Part III.B.3.). The reference to “other open and competitive markets” presumably refers to markets other than the reference market used to set stumpage in the first place or the reference is a tautology. The *Bulletin* provides no guidance as to how such comparisons are to be made. Nor does it explain why there is any need to test market-determined prices against one another as a “policy” matter.

on the administered portion of the harvest before and after the provincial reforms are implemented.”<sup>33</sup>

The Department should explain the reason for these requirements and for the expectation regarding equilibration and must make clear whether they establish an effects test, including whether evidence of specific results will be a factor in the Department’s analysis in a future changed circumstances review. If positive evidence of specific results or effects is required, the *Bulletin* must explain how those evidentiary requirements are to be met and what they will mean to the Department’s analysis. For example, stumpage prices before and after the proposed reforms are implemented could easily be the same either because the pre-reform prices were consistent with market prices or because the nature of the reforms is such that specific effects may not manifest themselves immediately. Does the requirement to report pre-reform and post-reform stumpage charges pre-suppose a difference in the two? What will be the impact on a changed circumstances review if the prices are unchanged or even decline?<sup>34</sup> Must applicants wait until reforms manifest a change in stumpage pricing before application can be made? These points, and the implied expectation they create, must be addressed.

The *Bulletin*’s stated expectation that timber valuations will equilibrate between the United States and Canada, coupled with the requirement that applications for changed circumstances review include evidence of price consistency with “the range of prices observed in other open and competitive markets” could be interpreted as a soft cross-border comparison between U.S. and provincial stumpage prices. The Department needs to make clear its

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<sup>33</sup> *Id.*

<sup>34</sup> For example, if prices in an adjacent jurisdiction being used under Example B of the *Bulletin* fall, for whatever reason, stumpage rates on the administered harvest in the relevant province could decline in comparison with pre-reform prices as function of the reforms prompted by the *Bulletin*.

expectations and requirements and state whether such considerations will influence future changed circumstances reviews. If evidence of consistency with other open and competitive markets is required, what markets does the Department view as being open and competitive? What does consistency mean; how close is consistent? What is the implication of inconsistency? If a province has adopted and fully implemented the reforms required in the *Bulletin* but another market assumed to be open and competitive exhibits different pricing, will the reaction be that the province's reforms are insufficient or that the allegedly open and competitive market is not as open and competitive as previously believed?

The *Bulletin* should be shorn of actual and implied effects tests and should specifically disclaim all such standards. The *Bulletin* is a statement of policy, not of specific results. Under the terms of the *Bulletin* reform of provincial practices as specified in the *Bulletin* will produce an incontestable legal result -- adequate remuneration and revocation of the existing order. A back-end test of results or effects is inconsistent with the *Bulletin's* otherwise up-front structure and stated objectives.

It is possible that the above-referenced language in the *Bulletin* is not intended to reflect the imposition of any type of effects test or standard, but is instead expressing an aspiration for external corroboration or validation that the various changes illustrated in the examples in fact yield adequate remuneration. There is no legal requirement for such a belts and suspenders approach. Therefore to the extent the Department's analysis of a changed circumstances review application imposes a double burden that analysis will be flawed. But the Department could recognize that where systems and programs go beyond the minimum specified in the *Bulletin* that those extra efforts will be recognized as positive factors in a future changed circumstances review.

For example, a private transaction based system that accurately collects and applies private prices to public stumpage provides adequate remuneration. Such an approach is literally what the regulations specify (“market-determined price . . . from actual transactions in the country”). Although the Department cannot require more, it can recognize positively when more is done.

In these comments Québec has requested that the Department add to the *Bulletin* an additional example to illustrate how the dominant form of private standing timber sales in both the United States and Canada -- bilateral sales freely negotiated between willing buyer and willing sellers -- fit within the framework of the *Bulletin* well as do government run sales (auctions). In addition to providing an illustration of a private market reference system, that example could invite or recognize high demands and assurances that provinces may self-impose. The following text provides one example of such redundancy or corroboration as it might apply to a private market that features extensive log trade as well as private standing timber transactions. Québec’s position is that as a matter of law the accurate use of the private standing timber market is sufficient, but Québec can understand the attractiveness of additional, purely optional, measures.

Province C annually assesses the weighted-average stumpage charge applied to the administered portion of the harvest by comparing delivered log costs for timber harvested from private lands (including private lands in other jurisdictions) and from public lands. To enable this comparison, Province C conducts a statistically valid survey of log consumption by randomly selected sawmills producing lumber in the province to obtain information on delivered log costs, omitting only logs from private timberlands owned by integrated mills. The survey collects information on both delivered log costs and the quality aspects (i.e., species and size) of the mills’ log furnish by origin (i.e., from provincial land, on the one hand, or alternate sources of supply on the other). The delivered log costs by source (public and competitive) are then compared using common standard board foot scaling rules. The comparison is made



by first translating the delivered log costs per cubic meter into thousand board foot equivalents using the International ¼ in. log scaling rule and the solid cubic meter log scaling rule applicable to public land in Province C. To ensure accuracy in the determination and application of the conversion factors, dual scalings will be performed.

Using a composite profile of the surveyed log supply from public and competitive sources, log stacks are assembled representing the actual public and competitive log supply to Province C's saw mills. The stacks are then scaled using the International ¼ in. rule and the solid cubic meter scaling rule applied on Province C's public lands. The existing International ¼ in. rule will be applied to logs having a top end diameter of 6 inches or more for purposes of the province's dual scaling exercise. But because that rule is recognized to be less accurate with respect to logs of 4 inch and 5 inch diameters, the existing International ¼ in. scaling rule for those logs will be restated so as to make them consistent with the International ¼ in. rule for logs with top end diameters of 6 inches or more. This calibration will be accomplished using a series of actual sawmill production runs to permit actual yield ratios to be obtained by comparing the 4 and 5 inch log production results to the 6 inch log production results. Those ratios will then be applied to the International ¼ in. rule for logs with a top end diameter of 6 inches to arrive at the new scaling rule for logs with top end diameters of 4 and 5 inches. The province will apply the new scaling rule to logs with top end diameters of 4 and 5 inches in its dual scaling exercise.

The dual scaling exercises are performed by teams of professional scalers skilled in the application of the relevant scaling rules and the scaling exercises are open to observation and verification. In the second step the conversion factors obtained from the dual scaling exercises are weight averaged by source (if there is more than one source). The resulting weighted average conversion factor is then multiplied by the per cubic meter log cost to express the delivered log cost on a thousand board foot basis for public source logs and for competitive source logs. In the final step the difference in the board foot costs of logs from the two sources is restated on a cubic meter basis by application of the actual scaled conversion factor for logs from public land in order to adjust the public stumpage rate using this difference in delivered log cost. The operation of the annual log cost adjustment is fully transparent and verifiable.

This very detailed description of a stand-by or supplemental mechanism to validate the results obtained in a direct observation market-based system encourages practices that are consistent with other aspects of the *Bulletin*, including transparency, objectivity, and the prevalence and potential role for log markets. Although not expressed as such in the *Bulletin*, this process of validation, or one like it, brings to the analysis for the example province a mechanism that mimics the tool used by private sector actors to determine the value of standing timber -- delivered log costs.